SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 18

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ELIZABETH HENRY,

Plaintiff,

- v -

RISING GROUND, ISAAC FREITES, a/k/a ISAAC ASCENSION FREITES, ATLANTIC TOMORROW, DAVID SMITH, LINDSAY BRIENZA, MEREDITH BARBER

Defendant.

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INDEX NO. 153458/2021

MOTION DATE 05/17/2021

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, 15, 16, 17, 18

were read on this motion to/for DISMISS.

Plaintiff Elizabeth Henry is a former employee of defendant Rising Ground (RG), a not-for-profit human services organization operating in New York City and Westchester County. Two and a half years after her resignation, plaintiff commenced an action against RG and Lindsay Brienza (Brienza) and Meredith Barber (Barber), two other former RG employees, as well as Atlantic Tomorrow (Atlantic), a vendor used by RG, and Isaac Freites, a/k/a Isaac Ascension Freites (Freites), and David Smith (Smith), two third-party individuals, in connection with her employment at RG. This action, which seeks monetary damages for violations of the New York City Human Rights Law (NYCHRL) and the New York State Human Rights Law (NYSHRL), arises out of two separate instances of alleged sexual harassment, a year apart, by two different men (Freites and Smith), neither of whom work for RG, at fundraisers that took place outside the office. RG is a defendant in 14 causes of action.

RG now moves, pursuant to CPLR 3211, for an order dismissing the complaint as against it. Plaintiff cross-moves, pursuant to NYCRR §§ 130-1.1 and 130-1.2, for sanctions, costs and attorneys' fees against RG, for its allegedly frivolous conduct in filing the motion to dismiss.

FACTS

Background

RG is a not-for-profit human services organization, servicing the greater New York City area (complaint [NYSCEF Doc No. 2], ¶ 2). RG hired plaintiff on July 5, 2018 as a Development Assistant (*id.*, ¶ 8), and as such, she was responsible for providing vital support to all fundraising, public relations, marketing, volunteerism and other activities of the Institutional Advancement Department.

Defendant Atlantic is an office technology and IT solutions company offering imaging, IT and document management (*id.*, ¶ 3). Defendant Smith was a guest, invitee or a guest of invitee, Christa Puccio (Puccio), an employee of Atlantic, who was present at a donor event on April 28, 2019 that was sponsored by RG (*id.*, ¶ 5).

Defendant Freites is an associate board member of RG, and was present at a donor golf event on July 26, 2018 that was sponsored by RG (*id.*, ¶ 4).

Defendant Brienza was an RG employee, and the director of Donor Engagement (*id.*, ¶ 6). Defendant Barber was RG's vice-president of Institutional Giving during the time of plaintiff's employment at RG (*id.*, ¶ 7).

The July 26, 2018 Incident

Plaintiff alleges that Freites, an associate board member of RG, was an attendee during the donor event on July 26, 2018, during which he committed acts against plaintiff that imposes liability against him and RG, as well as against Brienza, who was plaintiff's supervisor at RG.

Plaintiff alleges that, on July 5, 2018, at the time of her hiring as a development assistant, Barber, plaintiff's direct supervisor, cautioned her to "dress like your grandmother" (*id.*, ¶ 9). On July 26, 2018, 21 days after commencement of her employment, plaintiff was required to attend a donor event at O'Lunney's Restaurant in New York City at which Freites was present (*id.*, ¶11). Plaintiff alleges that, during this event, Freites subjected her to unwelcomed sexual advances,

requests for sexual favors, sexual harassment, overt sexual comments, sexual solicitation and sexual intrusions (*id.*, ¶ 12). According to plaintiff, Freites engaged her in an extended conversation; stood very close to her, almost touching her, and looking intimately at her; commented how interesting and intriguing she was; stated that she should find a boyfriend who could take her around the world; and told her to come to more events so that he could see her (*id.*, ¶¶ 15-19).

Plaintiff alleges that the July 26, 2018 Freites incident was witnessed by Brienza, who approached her upon seeing how uncomfortable she was with Freites, and asked her if she was okay (*id.*, ¶¶ 20-21). Plaintiff told Brienza that Freites was clearly interjecting himself in a very intimate manner toward her and that he made her very anxious, frightened and concerned, especially since she had just started her job three weeks ago, and it might be in jeopardy (*id.*, ¶¶ 21-22). According to plaintiff, Brienza responded, "that is how Hispanic men are" (*id.*, ¶ 23).

Plaintiff alleges that, at the time of the Freites incident, she was a single mother of a 17-month-old infant, so that she was in no position to file an immediate complaint (*id.*, ¶ 25). As a result, she did not complain about the Freites incident to her employer until July 15, 2019, after her resignation, when her attorneys sent a letter to RG (*id.*, ¶ 28).

Plaintiff alleges that Brienza did not make any report of the incident to RG's Human Resources Department, and that RG's staff and Human Resources Department did not conduct any interviews or investigation of the Freites incident (*id.*, ¶¶ 26-27).

The April 29, 2019 Incident

On April 29, 2019, plaintiff was required to work at RG's Tee For Tots Golf Outing donor event at the Westchester Country Club in Westchester County, NY (*id.*, ¶ 33). It was plaintiff's understanding that defendant Smith was a guest, invitee or a guest of invitee Puccio, an employee of Atlantic, which, in turn, was a donor and retail contractor for RG (*id.*, ¶ 5).

Plaintiff alleges that she first encountered Smith at the 16th hole where she was selling competition tickets, and that Smith immediately commented to Sharon Pyle (Pyle), an employee of RG, how nice it was to see beautiful women (*id.*, ¶ 34). Plaintiff further alleges that, at the cocktail party after the golfing, Smith observed that plaintiff had changed into a shirt and said, "Do I know you? I saw you before. Oh yes, you clean up very nice" (*id.*, ¶ 36). According to plaintiff, this encounter was witnessed by Nancy Hruska (Hruska), an RG employee (*id.*, ¶ 37). Plaintiff alleges that she walked away from Smith as he and a group of other men at the cocktail party leered at her in a sexually intimate fashion, and that this leering terrified and humiliated her, causing her great anxiety and emotional trauma (*id.*, ¶¶ 38-39).

After the cocktails, there was a dinner in the evening during which there was a silent auction. Plaintiff alleges that she was standing by the table with the auction items when Smith approached her and said to her: "Would you like to come on this auction trip to Bermuda with me? I will buy you lots of bathing suits to wear" (*id.*, ¶¶ 40-41). Plaintiff alleges that she was disgusted, emotionally distressed and felt violated (*id.*, ¶ 41).

According to plaintiff, the following RG employees witnessed this conduct: Barber, plaintiff's direct supervisor, co-employees Hruska and Patrick Larkin, and Pyle, an RG supervisor (*id.*, ¶ 43). Plaintiff alleges that, subsequently, Barber visually examined plaintiff's appearance up and down to determine if her attire was "appropriate" (*id.*, ¶ 44).

Plaintiff alleges that, at the end of the dinner, Smith again approached plaintiff and requested directions to the Pro Shop, so she began to direct him (*id.*, ¶ 45). Defendant Smith then said, "I know how to get there, I just wanted to speak with you again" (*id.*, ¶ 46).

Plaintiff alleges that Joelle Johnson, her predecessor in her job, was also frequently sexually harassed by RG's board members, including Nick Preddice and Matthew Del Paricio (*id.*, ¶ 47). On those occasions, Jack Toone, another RG employee, noticed and commented: "Can you blame them?" (*id.*, ¶ 48).

According to plaintiff, RG tolerated and fostered an atmosphere and pattern of sexual innuendo, overt suggestive comments and actions, stalking, touching, menacing, and threatening conduct by male employees, officers, directors, guests and invitees against female employees, and that RG's executive authority was utilized as a vehicle to sexually harass its female employees, including plaintiff (*id.*, ¶¶ 49-50).

Plaintiff's Reporting of the Incidents and RG's Response

On May 8, 2019, plaintiff met with RG's Angela Harris (Harris), the associate director of Human Resources, and lodged a complaint relating to the April 19, 2019 conduct by Smith (*id.*, ¶¶ 51, 53-54). Plaintiff alleges that she was required to attend the April 19th golf event as a member of RG's Institutional Advancement program (*id.*, ¶ 52). Plaintiff further alleges that Atlantic provided printers and copiers to RG (*id.*, ¶ 55).

In or about May-July, 2019, RG conducted an investigation of plaintiff's May 8, 2019 allegations against Smith, including interviews of witnesses (*id.*, ¶ 56). Plaintiff alleges that RG did not interview Smith (*id.*, ¶ 57). Plaintiff further alleges that RG spoke with Puccio, who indicated that she was "appalled" by Smith's behavior (*id.*, ¶ 58).

On June 21, 2019, plaintiff informed RG by email of requests that: the contents of her interview on that day with RG's Roanica Paisley (Paisley), the senior vice-president of Human Resources, be made part of her personnel file as she had requested; that another meeting would not be productive in view of RG's attitude; and that she preferred communications by email (*id.*, ¶ 68). By email dated July 3, 2019, RG admitted that it had received plaintiff's June 21, 2019 email (*id.*).

Plaintiff alleges that, in the July 3, 2019 email, RG confirmed that plaintiff had met with Harris and Paisley about the April 29, 2019 incident (*id.*, ¶¶ 59-60). RG also emphasized again that it had conducted an investigation, including speaking to Puccio (*id.*, ¶¶ 61-62).

Plaintiff alleges that Barber admitted to witnessing the Smith incident and apologized for it, but took no further steps (*id.*, ¶ 65). Plaintiff alleges that in the July 3, 2019 email, RG acknowledged that it was informed by plaintiff that Barber was a witness to the April 19, 2019 incident, but did not include her in the investigation (*id.*, ¶ 67).

Plaintiff alleges that these meetings between plaintiff and RG were conducted as pro forma requirements, but in fact were used to delay, derail and intimidate plaintiff with the objective that plaintiff would become discouraged and abandon her claims (*id.*, ¶ 69).

Plaintiff alleges that, on July 10, 2019, after she reported the Smith incident, Brienza threatened her with disciplinary sanctions for her refusal to sign a disciplinary document for alleged dereliction of duties, also in retaliation for filing a claim of sexual harassment (*id.*, ¶ 83). According to plaintiff, Brienza altered a written document entitled "Life Cycle of a Donation" to create a false basis for accusing plaintiff of breaching the procedure for the processing of checks, "which supposedly caused dire consequences when in fact there were no damages" (*id.*, ¶ 84).

On July 12, 2019, plaintiff submitted a letter of resignation to RG and RG acknowledged receipt of the letter the same day (*id.*, ¶¶ 70-71). Plaintiff alleges that she informed RG that her resignation was a direct result of: sexual misconduct, the procedural mismanagement of her sexual harassment claim, and the subsequent retaliation on or about July 10, 2019 in the form of an unfair and erroneous disciplinary action against her (*id.*, ¶ 72).

After her resignation, plaintiff informed her attorneys that there was another sexual harassment incident against her on July 26, 2018 during her employment by RG (*id.*, ¶ 75). In a letter dated July 15, 2019, plaintiff's attorneys informed RG of the Freites incident (*id.*, ¶ 76). In letters dated July 15, 2019 and August 15, 2019 to all defendants, plaintiff's attorneys requested the email, residential and employment addresses of Smith and Freites, which, she alleges, were not provided (*id.*, ¶¶ 77, 88).

DISCUSSION

"'When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference'" (*Cortlandt St. Recovery Corp. v. Bonderman*, 31 NY3d 30, 38 [2018] [citation omitted]). In addition, employment discrimination pleadings are generally reviewed under a notice pleading standard (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]). However, "[t]he ultimate question is whether, accepting the allegations and affording these inferences, 'plaintiff can succeed upon any reasonable view of the facts stated'" (*Doe v Bloomberg, L.P.*, 36 NY3d 450, 454 [2021] [citation omitted])

Construing the claims in the generous matter to which they are entitled, this court nevertheless concludes that defendant's motion to dismiss must be granted.

First, Third and Fifth Causes of Action (The Penal Law Causes of Action)

In the first, third and fifth causes of action, plaintiff alleges that RG committed Stalking in the Fourth Degree (Penal Law §§ 120.45 [s] [2] and [3]), Stalking in the Third Degree (Penal Law § 120), and Harassment (Penal Law §§ 240.26 [2] and [3]), respectively. However, these statutes make clear that the offenses of Stalking and Harassment apply to a "person" who is an individual, and not to a company, such as RG.

Penal Law § 120.45 states that:

> "A person is guilty of stalking in the fourth degree when he or she intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person, and knows or reasonably should know that such conduct: . . .
>
> 2. causes material harm to the mental or emotional health of such person, where such conduct consists of following, telephoning or initiating communication or contact with such person, a member of such person's immediate family or a third party with whom such person is acquainted, and the actor was previously clearly informed to cease that conduct; or
>
> 3. is likely to cause such person to reasonably fear that his or her employment, business or career is threatened, where such conduct consists of appearing, telephoning or initiating communication or contact at such person's place of

> employment or business, and the actor was previously clearly informed to cease that conduct"

(Penal Law §§ 120.45 [2], (3); *see also* Stalking in the Third Degree, Penal Law § 120.5 [1]-[4] [subsuming Stalking in the Fourth Degree, and adding the requirement of either predicate convictions, multiple victims, or intent to do greater harm]).

Similarly, Penal Law § 240.26, Harassment in the Second Degree, states:

> "A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person:
>
> 1. He or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; or
>
> 2. He or she follows a person in or about a public place or places; or
>
> 3. He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose"

(Penal Law § 240.26 [1]-[3]).

Under Penal Law §10.7, Definitions, "'person' means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality."

These causes of action must be dismissed as against RG, a corporate entity, as under New York law, the Stalking and Harassment laws clearly apply to only the kinds of "persons" who can be "he" or "she," and who can engage in certain behaviors unique to human individuals, such as following someone around, having an intent to annoy or harm, kick or strike, or any of the other acts described (*see Cablevision Sys. Corp. v Communications Workers of Am. Dist. 1*, 41 Misc 3d 763, 768 [Sup Ct, Nassau County 2013] [finding that it was "not appropriate to define a 'person' as a corporation within the context of (the harassment and stalking) statutes"]).

Moreover, these causes of action must be dismissed for the additional reason that, even if they applied to RG, they are barred by the statute of limitations. With respect to the first and third causes of action, Stalking in the Fourth Degree is a Class B misdemeanor (Penal Law § 120.45),

and Stalking in the Third Degree is a Class A misdemeanor (Penal Law § 120.50). The statute of limitations for Class A and B misdemeanors is two years (NY Rules of Criminal Procedure § 30.10 [2] [b]). Here, both causes of action are explicitly predicated upon an event that took place on July 26, 2018, so the statute of limitations would have run on July 26, 2020.

However, because of the COVID-19 pandemic, on March 20, 2020, former Governor Andrew Cuomo issued Executive Order 202.8, entitled "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," which tolled a number of statutory deadlines, including the statute of limitations:

> "I hereby temporarily suspend or modify, for the period from the date of this Executive Order through April 19, 2020 the following:
>
> - In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, ***any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding***, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020"

(Executive Order 202.8 [emphasis added]).

Through a series of later executive orders, the toll was extended until November 3, 2020, for a total of 228 days (*see* Executive Order 202.72). Under New York law, a toll stops the clock on a deadline when it becomes effective, and a litigant is then entitled to whatever time that was left on the deadline when the tolling lifts (*see e.g. Bayne v City of New York*, 137 AD3d 428, 429 [1st Dept 2016]; *see also Brash v Richards*, 195 AD3d 582, 582 [2d Dept 2021] ["A toll suspends the running of the applicable period of limitation for a finite time period, and '(t)he period of the toll is excluded from the calculation of the (relevant time period)'"] [citation omitted]).

Thus, because the executive orders tolled the statute of limitations between March 20, 2020 and November 3, 2020, plaintiff still had over four months before the statute of limitations on the

stalking causes of action ran on March 11, 2021. However, this complaint was not filed until April 9, 2021. Therefore, the first and third causes of action for stalking are untimely. With respect to the fifth cause of action, Harassment in the Second Degree is classified under New York law as a violation (Penal Law § 240.26). Violations carry a one-year statute of limitations (NY Rules of Criminal Procedure § 30.10 [2] [c]). Accordingly, the fifth cause of action is also untimely.

The Court rejects plaintiff's argument in opposition that the Penal Law causes of action should not be dismissed because they are only asserted as "necessary preconditions" or "prefatory prohibited acts" for application of the NYCHRL and NYSHRL (*see* plaintiff's memorandum of law [NYSCEF Doc No. 17], at 15-17). To the contrary, the complaint clearly asserts the Penal Law claims as independent causes of action. Moreover, neither the NYSHRL nor the NYCHRL require a person to be a victim of a criminal sex offense in order have a cause of action for discrimination or retaliation against her employer.

Accordingly, the first, third and fifth causes of action are dismissed.

Seventh, Ninth, Eleventh, Thirteenth and Sixteenth Causes of Action

The seventh, ninth, eleventh, thirteenth and sixteenth causes do not state cognizable causes of action and must be dismissed.

In the seventh cause of action, plaintiff alleges that the New York City Administrative Code (Administrative Code), Chapter 1, §8-102, title Civil Rights, Definitions, provides that the "victim of sex offenses or "stalking" means a victim of acts that would constitute violations of sections 120.45 of the Penal Law, Stalking in the Fourth Degree (complaint, ¶ 104). Plaintiff further alleges that RG violated section 120.45 (3) of the Penal Law and that, therefore, plaintiff is the victim of stalking under the Administrative Code, Chapter 1, §8-102, Definitions, in violation of her civil rights (*id.*, ¶ 105).

Similarly, in the ninth cause of action, plaintiff alleges that Administrative Code, Chapter 1, §8-102, title Civil Rights, Definitions, provides that the "victim of sex offenses" or "stalking"

means a victim of acts that would constitute violations of sections 120.50 (3) of the Penal Law, Stalking in the Third Degree (*id.*, ¶ 110). Plaintiff further alleges that that RG violated section 120.50 (3) of the Penal Law and that, therefore, plaintiff is the victim of stalking under the Administrative Code, Chapter 1, §8-102, Definitions, in violation of her civil rights (*id.*, ¶ 111).

Likewise, in the thirteenth cause of action, plaintiff alleges that the Administrative Code, Chapter 1, §8-102, Title Civil Rights, Definitions, provides that the victim of sex offenses in stalking means a "victim of acts that would constitute violations of article 130 of the Penal Law; sex offenses; lack of consent" (*id.*, ¶ 120). Plaintiff further alleges that RG violated section 130.05 (c) of the Penal Law: sex offenses; lack of consent and that, therefore, plaintiff is the victim of sex offenses, and lack of consent by defendants RG under Administrative Code, Title Civil Rights, Chapter 1, § 8-102 Definitions, in violation of her civil rights (*id.*, ¶ 121).

In the sixteenth cause of action, plaintiff cites to the policy statement of the NYCHRL, Administrative Code, Title 8: Civil Rights, Chapter 1, Policy, §801, and alleges that RG was "prejudicial and discriminatory against plaintiff because of her status as a victim of sex offenses or stalking and because of gender-based harassment that threatened the terms, conditions and privileges of employment" (complaint, ¶ 135).

Thus, in the seventh, ninth and thirteen causes, plaintiff bases her causes of action on the Definitions section of the NYCHRL, and in the sixteenth cause of Action, she bases her claim on the Policy statement of the NYCHRL. However, the Definitions section and the Policy statement of the NYCHRL are not substantive provisions of the law, and as such, none of those causes of action state a cognizable claim (*see e.g. Ste Ame Isorait v Atlantic Mut. Companies*, 1993 WL 37330, * 4, 1993 US Dist LEXIS 1388, * 13 [ED NY 1993] ["In order to state a civil cause of action under [the RICO] statute, however, a plaintiff first must allege a violation of its substantive provision" and not "the statute's definitions and remedies provisions"]; *Rosenberg v Comprehensive Comm. Dev. Corp.*, 1998 WL 809522, * 2, 1998 US Dist LEXIS 18314, * 7 [SD

NY 1998] ["remedies provided by [the New York Labor Law] are available only with respect to violations of the substantive provisions"]; *Jara v Strong Steel Doors, Inc.*, 16 Misc 3d 1139[A], 2007 NY Slip Op 51755[U], * 11 [Sup Ct, Kings County 2007] ["Defendants correctly contend that Labor Law § 190 is not a substantive provision pursuant to which a claim may be made, but rather provides definitions of terms used throughout Article 6 of the Labor Law"]; *affd sub nom Jara v Strong Steel Door, Inc.*, 58 AD3d 600 [2d Dept 2009]).

Likewise, in the eleventh cause of action, plaintiff cites to Penal Law § 130.05 (2) (c), which merely specifies that lack of consent is an element of all sex crimes under the Penal Law. It defines lack of consent as force, failure to acquiesce, as well as physical, mental or statutory incapacity like or being in the care of the government or related entity (*id.*). There is no conduct prohibited by this statute; it merely clarifies an element of other statutory provisions. As such, it also is not a cognizable cause of action.

The Court rejects plaintiff's argument that these claims, all of which are for violations of definitions and policy provisions, are viable causes of action because they are "statutory provisions of law" (plaintiff's memorandum of law at 18). Clearly, the definitions and policy sections cited are provisions of the NYCHRL. Nevertheless, it is axiomatic that definitions and policy sections are not the provisions of law that give rise to actionable, independent causes of action.

Accordingly, the seventh, ninth, eleventh, thirteenth and sixteenth causes of action are dismissed for failure to state a cause of action.

Fifteenth Cause of Action (Aiding and Abetting)

The fifteenth cause of action is entitled "Aiding and Abetting," and is brought against all of the defendants, except Freites and Smith. The wording of this cause of action is unclear, but it appears that plaintiff is alleging that defendants aided and abetted Freites and Smith in stalking and harassing her, pursuant to the Penal Code provisions (*see e.g.* complaint, ¶ 126 [defendants "knew or should have known that" Freites and Smith "were sexual predators who sought out

female employees of defendant (RG) to sexually harass, stalk, alarm and annoy during the course of their employment at donor events"]). However, as the Penal Code Provisions do not apply to this case, there can be no aiding and abetting of them (*see e.g. United States v Delgado*, 972 F3d 63, 75 [2d Cir 2020] ["liability under the federal aiding-and-abetting statute requires proof that a defendant performed some act that 'directly facilitated or encouraged' the commission of (the) substantive crime"] [citation omitted]; *see also IKB Intern. S.A. v Bank of America Corp.*, 584 F Appx 26, 29 [2d Cir 2014] [holding that plaintiff's claim for aiding and abetting fraud "fails in the absence of underlying fraud"]; *Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010] [same]).

Accordingly, because plaintiff cannot demonstrate the existence of the underlying Penal Code violations, she cannot state a cause of action for aiding and abetting Penal Code violations (*see id.*). Thus, the fifteenth cause of action for aiding and abetting must be dismissed.

Seventeenth Cause of Action (Unlawful Discriminatory Practices Under the NYCHRL)

In the seventeenth cause of action, plaintiff asserts a claim against all defendants under section 8-107 (1) (a) of the NYCHRL, which provides that it is an unlawful discriminatory practice for an "employer" to discriminate against "any person ... in compensation or in terms, conditions or privileges of employment" (NYCHRL §8-107 [1] [a]). "An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or an agent which is in violation of" the NYCHRL's substantive employment provisions (NYCHRL § 8-107 [13] [b]). Plaintiff alleges that "[d]efendants were prejudicial and discriminatory against plaintiff because of her actual or perceived gender in the terms, conditions and privileges of employment" (complaint, ¶ 137).

However, the seventeenth cause of action does not state a claim for discrimination against RG. RG is not liable for the conduct of Freites because Freites is not "an employee or agent" of RG. In fact, Freites was alleged to be an employee of another company, KPMG, and only an associate board member -- not an employee -- of RG (*see* complaint, ¶ 4). The complaint fails to

contain any allegations to suggest that Freites could be considered as an employee (*compare White v Pacifica Foundation*, 973 F Supp 2d 363, 376-377 [SD NY 2013] [explaining why board member was not an "employee" of defendant employer]).

Nor does the complaint contain any allegations suggesting Freites was RG's agent. As the NYCHRL does not define "agent," common law principles apply. Under New York law, "[t]he 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 N.Y. Abstract, LLC*, 106 AD3d 47, 58 [2d Dept 2013] [internal quotation marks and citation omitted]). "'It is well settled that a principal-agency relationship exists where one retains a degree of direction and control over the other'" (*Pekelnaya v Allyn*, 25 AD3d 111, 120 [1st Dept 2005] [citation omitted]; *accord White*, 973 F Supp2d at 377 ["Under New York law, 'an agency relationship exists . . . when there is agreement between the principal and the agent that the agent will act for the principal and the principal retains a degree of control over the agent'"] [citation omitted]). "The element of control often is deemed the essential characteristic of the principal-agent relationship," as well as the authority to bind the principal (*White*, 973 F Supp2d at 377).

Here, there is no allegation that Freites, as an associate board member, had any agreement with RG to act on its behalf, retained any control over RG, had the authority to bind RG, or any other indicia of the agency relationship.

Moreover, there is no presumption that RG is vicariously liable for Freites simply by virtue of his membership title (*see Escudero v Long Beach Med. Ctr.*, 1 Misc 3d 902, 2003 NY Slip Op 51480[U],* 3 [Sup Ct NY County 2003] ["It is clear that, to establish a prima facie case of vicarious liability for the actions of independent entities or contractors, there must be more than simply a connection between the parties"]).

It is also clear that Smith is not an employee or agent of RG. Smith is alleged to be an invitee of an employee of Atlantic Tomorrow (complaint, ¶ 5). It is further alleged that "his

company provided [RG's] printers/copiers" (*id.*, ¶ 55). As a guest of an employee of a vendor of RG, there is no doubt that Smith is not an employee or agent of RG, so that RG has no employer liability for his actions.

Accordingly, as neither Freites nor Smith is agent or employee of RG, plaintiff cannot state a claim for discrimination under the NYCHRL on the basis of either the July 26, 2018 incident or the April 29, 2019 incident, and the seventeenth cause of action is dismissed.

Eighteenth Cause of Action (Aiding and Abetting Under the NYCHRL)

In the eighteenth cause of action, plaintiff alleges that "[d]efendants, individually and as a group, engaged in the unlawful discriminatory practice of aiding, abetting, inciting, compelling and coercing the violations of the aforementioned penal laws prohibited by NYCAC § 107.6" (complaint, ¶ 139).

The NYCHRL, like the NYSHRL, forbids any person to aid, abet, incite, compel or coerce discrimination or retaliation (NYCHRL § 8-107 [6]; NYSHRL § 296 [6]). Under the statutes, "'[i]t is the employer's participation in the discriminatory practice which serves as the predicate for the imposition of liability on others for aiding and abetting'" (*Black v ESPN, Inc.*, 70 Misc 3d 1217[A], 2021 NY Slip Op 50118[U], * 4 [Sup Ct, NY County 2021] [citation omitted] [NYSHRL]; *see also Miloscia v B.R. Guest Holdings LLC*, 33 Misc 3d 466, 479 [Sup Ct, NY County 2011], *affd in part, modified in part on other grounds* 94 AD3d 563 [1st Dept 2012] [under the NYCHRL, "an aiding and abetting claim against an individual employee depends on employer liability"]; *Xiang v Eagle Enterprises, LLC*, 2020 WL 248941, * 7, 2020 US Dist LEXIS 7909, * 19-20 [SD NY 2020] ["like the NYSHRL, liability must be found as to the employer before an individual employee can be liable for aiding and abetting discriminatory conduct under the NYCHRL"]). "'Moreover, in order for aider-and-abettor liability to be established, the defendant must be found to have actually participated in the conduct giving rise to the claim of

discrimination'" (*Black*, 70 Misc 3d 1217[A], 2021 NY Slip Op 50118[U], at * 4 [citation omitted]).

This court finds that there can be no aider and abettor liability against RG for the July 28, 2018 Freites incident, as aiding and abetting is inherently a derivative claim, and there is no principal-employer violation to aid and abet (*see Malena v Victoria's Secret Direct, LLC*, 886 F Supp 2d 349, 367 [SD NY 2012] ["(a)n individual may not be held liable ... merely for aiding and abetting his own discriminatory conduct but only for assisting another party in violating that law"]; *Miloscia v B.R. Guest Holdings LLC*, 33 Misc 3d at 479 ["'(w)here no violation of the Human Rights Law by another party has been established . . . individuals cannot be held liable . . . for aiding and abetting their own violations of the Human Rights Law'"] [citation omitted]).

Here, the claim against Freites is "derivative of the claim" against RG, and as such, RG cannot be liable for aiding its own conduct, nor for purportedly aiding Freites to aid RG's own conduct (*see Malena*, 886 F Supp2d at 368 [finding no aiding and abetting liability against corporate defendants]). In the July 28, 2018 incident, there is no allegation that anyone who imputes liability to RG "actually participated in the conduct giving rise to the claim of participation." Moreover, even if true, the allegation that Brienza told plaintiff "that's just how Hispanic men are" does not amount to actual participation in Freites' alleged sexual harassment.

In addition, even assuming that the complaint properly alleged discrimination by Smith/Atlantic at the golf outing, to support aider and abettor liability against RG, plaintiff would have to allege "direct, purposeful participation" by RG in the principal conduct (*Fried v LVI Servs., Inc.*, 2011 WL 2119748, * 7, 2011 US Dist LEXIS 57639, * 22 [SD NY 2011] ["'to find that a defendant actually participated in the discriminatory conduct requires a showing of direct, purposeful participation'"] [citation omitted]). However, plaintiff only alleges that Barber, Pyle Hruska and Larkin, employees of RG, witnessed the alleged discrimination of Smith, a guest of an employee of Atlantic (*see* complaint, ¶¶ 34, 37, 43). Witnessing discrimination does not constitute

direct, purposeful participation therein. Further, it is not alleged that these RG employees shared the intent or purpose of the principal actor, and "there can be no partnership in an act where there is no community of purpose" (*Dodd v City University of New York*, 489 F Supp 3d 219, 268 [SD NY 2020] [internal quotation marks and citation omitted]).

The only other allegations that could be construed as alleging aiding and are that, after plaintiff was allegedly harassed by Smith, Barber "visually examined plaintiff's appearance up and down to determine if her attire was 'appropriate'" (complaint, ¶ 44), and after the April 29, 2019 incident, a male co-employee of RG "stated to plaintiff that 'you know you liked it' and 'you were showing some leg'" (*id.*, ¶ 79). However, even if these allegations are true, it is unclear how these statements could constitute aiding and abetting against RG. Plaintiff does not allege that Barber or the unidentified male employee were intending to help Smith/Atlantic engage in an inappropriate sexual relationship with her, or otherwise had a common purpose with Smith in sexually harassing her.

Finally, plaintiff claims that RG aided and abetted in retaliating against plaintiff for having reported the two incidents of harassment (*id.*, ¶¶ 87-88). However, as previously discussed, by definition, this is impossible since RG cannot aid and abet its own conduct.

Accordingly, the eighteenth cause of action is dismissed.

Twentieth Cause of Action (Employer Liability Under the NYCHRL)

In the twentieth cause of action for employer liability under the NYCHRL, plaintiff alleges that RG is "liable, as employer[] of [Freites and Smith] based on their aforesaid acts, for their discriminatory conduct" (complaint, ¶ 147). However, "the NYCHRL's employer liability provision is not a substantive cause of action that creates a distinct form of liability for employers, but instead describes the circumstances in which '[a]n employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or an agent which is in violation' of the NYCHRL's substantive employment provisions" (*Rossbach v Montefiore Medical Center*,

2021 WL 930710, * 9, 2021 US Dist LEXIS 46012, * 25 [SD NY 2021] [citation omitted]; NYCHRL § 8-107 [13] [b]). Moreover, as discussed with respect to the seventeenth cause of action, neither Smith nor Freites is an employee of RG.

Accordingly, the twentieth cause of action for employer liability must be dismissed for failure to state a cause of action.

Twenty-First Cause of Action (Aiding and Abetting, Employer Liability and Discrimination under the NYSHRL)

The twenty-first cause of action alleges violations of NYSHRL §§ 290, 292 and 296. However, sections 290 and 292 are the purposes, policy and definitions sections of the NYSHRL, which are not substantive provisions of the law (*see supra*). As such, there is no cause of action under these provisions.

Although NYSHRL § 296 encompasses every substantive provision of the statute, plaintiff does not specify which provisions she is asserting. Nevertheless, assuming that plaintiff intended to assert the same causes of action under the NYSHRL as she did under the NYCHRL, those causes of action would be for discrimination, retaliation, aiding and abetting, and employer liability. Plaintiff's claims for aiding and abetting and employer liability under the NYSHRL are analyzed identically with the NYCHRL, and as such, are insufficient for the same reasons that those claims under the NYCHRL are insufficient.

However, discrimination and retaliation (discussed *infra*) are analyzed under a different standard. While the NYSHRL was recently amended to be construed like the NYCHRL, the "amendments to the NYSHRL only apply to conduct after the amendment's effective date of August 12, 2019" (*Doran v Erin Ives*, 2021 WL 1614368, * 6, n 4, 2021 US Dist LEXIS 79559, * 17, n 4 [SD NY 2021]; *McHenry v Fox News, Inc.*, 510 F3d 51, 69 [SD NY 2020] ["the 2019 NYSHRL amendments are not retroactive"]). Here, plaintiff resigned on July 12, 2019, and,

accordingly, all of the relevant conduct in this complaint is governed by the pre-amendment NYSHRL standard.

With respect to discrimination, under the pre-amendment standard, sexual harassment claims brought under a hostile work environment theory under the NYSHRL are judged by the same standard as their federal counterparts in Title VII of the Civil Rights Act of 1964 (*Summa v Hofstra Univ.*, 708 F3d 115, 123–24 [2d Cir 2013]). "A plaintiff claiming a hostile work environment animated by discrimination in violation of the NYSHRL must establish that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the condition of the plaintiff's employment and create an abusive work environment" (*Reichman v City of New York*, 179 AD3d 1115, 1118 [2d Dept 2020]; *accord Wright v Compass Group USA*, 72 Misc 3d 1202[A], 2021 NY Slip Op 50583[U], * 2 [Sup Ct, Kings County 2021]). "To determine whether a hostile work environment exists, a court must consider all 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 interfered with an employee's work performance" (*Reichman*, 179 AD3d at 1118; *see also Terry v Ashcroft*, 336 F3d 128, 148 [2d Cir 2003] ["Incidents must be more than 'episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive'"] [citation omitted]).

The hostile work environment test has both objective and subjective elements (*see Raspardo v Carlone*, 770 F3d 97, 114 [2d Cir 2014] ["the conduct complained of must be severe or pervasive enough that a reasonable person would find it hostile or abusive, and the victim must subjectively perceive the work environment to be abusive"]; *see also Terry*, 336 F3d at 148 ["a plaintiff must allege facts showing that she was faced with harassment "'of such quality or quantity that a reasonable employee would find the conditions of her employment *altered for the worse*'"] [citation omitted; italics in original]). "[T]he claim will not succeed if the offending actions are

no more than petty slights or trivial inconveniences" (*Franco v Hyatt Corp.*, 189 AD3d 569, 570 [1st Dept 2020]). As such, the pleadings must give rise to an inference of at least partial discriminatory or retaliatory motives (*Sutter v Dibello*, 2019 WL 4195303 at * 23, 2019 US Dist LEXIS 136665 [ED NY 2019]).

Plaintiff describes two isolated incidents that occurred outside the office at work events, where she was allegedly harassed by two different men, neither of whom supervised her, or were even themselves employees of RG. Moreover, plaintiff never saw either man again, as the isolated incidents did not occur at the office, or in the context of her everyday employment. As such, even if plaintiff subjectively perceived this conduct to be unpleasant, it could not have objectively altered the conditions of her working environment. Thus, these allegations are insufficient to constitute actionable conduct under the NYSHRL at the time it occurred.

Nineteenth and Twenty-First Causes of Action (Retaliation under the NYCHRL and NYSHRL)

In the nineteenth cause of action for retaliation under the NYCHRL, plaintiff alleges that "[d]efendants, individually and as a group, engaged in the unlawful practices of retaliation and discrimination against plaintiff because of her opposition to defendants['] practices and because of her filing a complaint," and that the "acts of retaliation and discrimination by defendants resulted in the ultimate coercive termination of plaintiff's employment" (complaint, ¶¶ 141-142).

As part of the twenty-first cause of action under the NYSHRL, plaintiff also presumably brings a claim for retaliation.

Under both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices (see Executive Law § 296 [7]; Administrative Code of City of NY § 8-107 [7]). To establish a claim for retaliation under the NYCHRL, a complainant must show that (1) she engaged in a protected activity, (2) the employer was aware that she participated in such activity, (3) the employer engaged in conduct which was reasonably

likely to deter a person from engaging in that protected activity, and (4) there is a causal connection between the protected activity and the alleged retaliatory conduct (*see Sanderson–Burgess v City of New York*, 173 AD3d 1233, 1235–1236 [2d Dept 2019]).

To establish a claim for retaliation under the NYSHRL, a plaintiff "must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312–13 [2004]; *see also Littlejohn v City of New York*, 795 F 3d 297, 316 [2d Cir 2015] [for a NYSHRL retaliation claim to survive a motion to dismiss, a plaintiff must "plausibly allege() a causal connection between the protected activities and the adverse employment action"]).

An employee engages in a "protected activity" by "opposing or complaining about unlawful discrimination" (*Forrest*, 3 NY3d at 313; *see also Davis-Bell v Columbia Univ*, 851 F Supp 2d 650, 682 [SDNY 2012]). Termination from employment constitutes "adverse employment action" (*Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 552 [1st Dept 2003], *affd* 3 NY3d 295 [2004]).

With respect to the July 26, 2018 Freites incident, plaintiff admits she did not tell anyone about this incident until after her resignation on July 12, 2019 (complaint, ¶ 75). As such, she could not have engaged in protected activity regarding this incident, and/or RG was not aware that she participated in such activity. Accordingly, plaintiff could not have been retaliated against with respect to this incident.

The remainder of plaintiff's claim for retaliation alleges that RG retaliated against her for making a single complaint about Smith's actions at the golf outing a few months prior to her resignation. The only retaliatory action alleged by plaintiff that occurred after her complaint is

that, on July 10, 2019, Brienza threatened plaintiff with disciplinary sanctions for her "refusal to sign a disciplinary document for alleged derelictions of duties" (*see* complaint, ¶ 83).

No adverse action took place. Assuming, arguendo, that the *threat* of disciplinary action could be construed as reasonably likely to deter a person from engaging in a protected activity under the NYCHRL, there is no allegation that Brienza knew of the protected activity that would infer a connection. For the same reason, the other alleged retaliatory act by Brienza, in falsely accusing plaintiff of breaching a procedure, would also fail to state a claim (see, e.g., Akinde v New York City Health and Hosps. Corp., 169 AD3d 611, 612 [1st Dept 2019]; Sanderson-Burgess v City of New York, 173 AD3d 1233, 1235-36 [2d Dept 2019]).

The complaint does not allege any other consequences levelled against plaintiff for her complaint of sexual harassment, or even for her refusal to sign the document. Contrary to her claim in the complaint of "coercive termination," plaintiff was not fired by RG. Rather, on July 12, 2019, plaintiff resigned (complaint, ¶¶ 70-71). Moreover, nowhere in the complaint is it alleged that plaintiff's resignation amounted to a constructive termination, and no facts suggest that RG was planning to or threatening to terminate her (*see Crookendale v New York City Health & Hosps. Corp.*, 175 AD3d 1132, 1132 [1st Dept 2019] [dismissing claim for constructive termination where defendant had not made a decision to terminate plaintiff when she voluntarily resigned]). "Moreover, when an employee resigns rather than respond to disciplinary charges, the resignation cannot later be construed as a constructive discharge" (*Bailey v New York City Bd. of Educ.*, 536 F Supp 2d 259, 266 [ED NY 2007]).

Nor does plaintiff allege that RG "'deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign'" (*Short v Deutsche Bank Sec., Inc.*, 79 AD3d 503, 504 [1st Dept 2010] [citation omitted]). Rather, a constructive termination occurs where an employee is actually forced out or presented with no true choice (*see McCalla v SUNY Downstate Med. Ctr.*, 2006 WL 1662635, * 5, 2006 US Dist LEXIS

38175 [ED NY 2006] [plaintiff successfully pled an adverse employment action where defendants presented plaintiff with a resignation letter and told him if he did not sign it, he would be fired and his career would be ruined]; *Rupert v City of Rochester, Dept. of Envtl. Servs.*, 701 F Supp 2d 430, 440 [WD NY 2010] [constructive discharge may be demonstrated "by proof that an employee was presented with the decision to resign or be fired"]).

Here, the allegations do not support an inference that plaintiff's working environment was hostile at all, let alone, so objectively hostile that she had no choice but to resign. As such, plaintiff does not state a cause of action for retaliation or retaliatory discharge under the NYCHRL or the NYSHRL.

Cross-Motion for Sanctions

Plaintiff cross-moves for the imposition of sanctions, for defendant's allegedly frivolous conduct in filing the motion to dismiss. Plaintiff's cross motion for sanctions is denied. Sanctions are only available for "frivolous conduct," narrowly defined as conduct that is "completely without merit in law and [that] cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law" (22 NYCRR 130-1.1). The imposition of sanctions is not appropriate here, as, given the fact that plaintiff's complaint is being dismissed for failure to state a cause of action, by definition, defendant's conduct in bringing the motion to dismiss cannot be frivolous and without merit (*see Benishai v Benishai*, 83 AD3d 420, 420 [1st Dept 2011]; *Matter of L&M Bus Corp. v New York City Dept. of Educ.*, 83 AD3d 432, 433 [1st Dept 2011]).

Accordingly, it is ORDERED that the motion of defendant Rising Ground to dismiss the complaint herein is granted, and the complaint is dismissed in its entirety against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption is amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

This constitutes the decision and order of the Court.

6/10/2022
DATE

ALEXANDER TISCH, J.S.C.

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