# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. JUDY H. KIM** **PART** **05RCP**

***Justice***

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ALTHEA THOMAS,

Plaintiff,

- v -

THE CITY OF NEW YORK, SEAN FAGAN, MATEUSZ TKACZUK

Defendants.

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**INDEX NO.** 150877/2021

**MOTION DATE** 12/14/2021

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 35, 36, 38, 39, 40, 41, 42

were read on this motion to DISMISS.

On January 26, 2021, plaintiff Althea Thomas ("Thomas"), a police officer with the NYC Police Department ("NYPD"), commenced this action against defendants the City of New York ("City"), Sergeant Sean Fagan ("Fagan"), and Lieutenant Mateusz Tkaczuk ("Tkaczuk") (collectively, the "Defendants"), asserting claims for race and gender-based discrimination, hostile work environment, and retaliation under Administrative Code §8-107, also known as the New York City Human Rights Law ("NYCHRL"). Her complaint alleged the following:

Plaintiff, a Black woman, has been employed as an NYPD police officer since January of 2006 (NYSCEF Doc. No. 21 [Complaint at ¶15]). In April of 2018, Thomas was assigned to NYPD Transit 20—a police command located within Briarwood Subway Station in Jamaica, New York—as a Neighborhood Coordination Officer ("NCO") (Id. at ¶¶7, 23, 35-36). NCOs serve as liaisons between the police and the community (Id. at ¶25). Within Transit 20, plaintiff and her NCO

partner, a Black male, were assigned to Sector Charlie (Id. at ¶¶63-64). Defendants Fagan and Tkaczuk supervised the NCO team (Id. at ¶¶8-9, 39-41).

In January 2019, a comment anonymously posted on the NYPD's Transit Twitter account claimed that Sector Charlie officers did not go out on patrol but slept in the office and left early to beat rush hour (Id. at ¶¶61-62). Plaintiff alleged that a "white male individual" within the NCO team posted the comment to "publicly disparage" her, relying on negative stereotypes held by Fagan and the other white NCO officers that Black officers were lazy, untrustworthy, and less qualified than their white fellow officers (Id. at ¶¶65-70). Plaintiff "publicly complained" about the post and spoke to a union delegate who, in response, subsequently spoke to the NCO officers and instructed them to "act with respect towards one another" (Id. at ¶72).

In October of 2019, plaintiff found footprints on her chair at work and complained to Fagan who responded in a mocking and dismissive manner (Id. at ¶¶76-78). Plaintiff then placed signs on her chair and desk stating, "please do not put feet on chair" (Id. at ¶¶81-82). The following day, Thomas found footprints on these signs (Id. at ¶83).

On January 31, 2020, Fagan selected plaintiff for overtime, against her wishes and, according to plaintiff, in contravention of the NYPD practice of assigning overtime based on seniority (Id. at ¶¶86-96). The overtime selection required Thomas to scramble to secure childcare (Id. at ¶97). On February 3, 2020, Fagan again selected plaintiff for overtime for the following day, again forcing her to quickly make childcare arrangements (Id. at ¶¶98-104). Plaintiff alleges that white male NCOs were afforded flexibility in their schedules and tours compatible with their childcare needs that she was not given (Id. at ¶¶107-112). On September 9, 2020, Fagan changed plaintiff's schedule indefinitely to evening hours, knowing that her husband, an officer in another precinct, worked the same hours (Id. at ¶¶113-114). Two other less-senior male NCOs did not

have similar schedule changes (Id. at ¶117). On September 14, 2020, plaintiff complained to Tkaczuk that the schedule change would cause her family hardship but he did not alter her schedule (Id. at ¶¶119-12). On October 12, 2020, at the direction of Tkaczuk, plaintiff was assigned to patrol duty instead of her scheduled administrative duties (Id. ¶¶128-132). Despite her seniority, Thomas was the only NCO required to report to patrol duties that day (Id. at ¶¶136-137).

On November 19, 2020, Fagan and Tkaczuk met with plaintiff's NCO partner and advised him that he and plaintiff were being transferred out of the NCO team (Id. at ¶¶153-155). On November 25, 2021, plaintiff received written notification of her transfer back to transit patrol (Id. at ¶¶168-169). Plaintiff viewed the transfer as a "de facto demotion" because transit patrol officers do not have steady schedules unlike NOCs who have weekends off (Id. at ¶¶171-175).

On April 16, 2021, defendants moved, pursuant to CPLR §3211(a)(7), to dismiss the complaint's claims for retaliation, discrimination, and hostile work environment. By decision and order dated August 13, 2021, the Court (Hon. Dakota D. Ramseur) granted defendants' motion in part, dismissing plaintiff's retaliation claim and otherwise denying the motion (NYSCEF Doc. No. 17 [August 13, 2021 Decision and Order]). Justice Ramseur held, in relevant part, that:

> [P]laintiff's complaint fails to allege that she engaged in a protected activity. The complaint is bare as to the nature of her complaint concerning the Twitter post and whether she complained about that the Twitter post was discriminatory on the basis of gender or race…Further, other than alleging that she "publicly complained" about the Twitter post, plaintiff fails to allege facts suggesting that her employer or supervisors had knowledge of her complaint.

(Id.)

On August 27, 2021, plaintiff filed an Amended Complaint asserting retaliation claims under the NYCHRL against the Defendants and alleging additional facts in support of these claims.

To wit, the Amended Complaint specifies that the January 2019 anonymous Twitter comment stated:

> u must be kidding…finally we get to see our ncos, since we don't get to see them at work especially charlie ncos who come in to sleep and leave work at 1320 to beat the rush hour traffic…the other ncos at least go out here and there but charlie ncos just sleep in the office.

(NYSCEF Doc. No. 21 [Am. Compl. at ¶209]). The Amended Complaint clarifies that Sector Charlie consisted only of plaintiff and one other officer, a Black man (Id. at ¶207]). It also specifies that plaintiff's January 24, 2019 "public complaint" regarding the Twitter post was made to Captain Mullaney, Transit 20's commanding officer, and that plaintiff asked Captain Mullaney to conduct an investigation (Id. at ¶¶217-219). Finally, it alleges that Captain Mullaney subsequently discussed the Twitter post with Fagan but that no investigation was conducted (Id. at ¶¶220-227]).

Defendants now move, pursuant to CPLR §3211(a)(7), to dismiss these retaliation claims, contending that plaintiff's Amended Complaint fails to allege that she engaged in a protected activity. Alternatively, defendants argue that even if plaintiff engaged in a protected activity, her amended complaint does not allege either that the Defendants were aware of this activity or that there is a causal connection between the protected activity and the alleged adverse employment actions. Plaintiff opposes the motion.

**DISCUSSION**

Defendants' motion to dismiss plaintiff's retaliation claims is granted. On a motion to dismiss under CPLR §3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (See Leon v Martinez, 84 NY2d 83 [1994]). This is particularly the case where a claim under the NYCHRL is at issue, as the Court must "construe Administrative Code § 8-10 (7), like

other provisions of the City's Human Rights Law, broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (Fletcher v Dakota, Inc., 99 AD3d 43, 51 [1st Dept 2012] [internal citations and quotations omitted]).

"[T]o make out a retaliation claim under the [NYCHRL], the complaint must allege that: (1) [plaintiff] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [her]; and (3) a causal connection exists between the protected activity and the adverse action" (Fletcher v Dakota, Inc., 99 AD3d 43, 51-52 [1st Dept 2012] [internal citations omitted]). Plaintiff has satisfied two of these three requirements.

As a threshold matter, plaintiff's Amended Complaint has cured the deficiencies outlined in Judge Ramseur's prior decision. Specifically, its allegations that plaintiff complained to Captain Mullaney and her union delegate about the Twitter post invoking racist stereotypes in its description of the members of Sector Charlie—both of whom were Black—are sufficient to allege that plaintiff engaged in protected activity (See La Porta v Alacra, Inc., 142 AD3d 851, 853 [1st Dept 2016] [plaintiff's complaint about offensive Facebook message constituted protected activity]; see also Fletcher v Dakota, Inc., 99 AD3d 43, 52 [1st Dept 2012] [plaintiff's objection to cooperative board member's anti-Semitic statements constituted protected activity]).

In addition, the Amended Complaint's allegations that Captain Mullaney subsequently met with Fagan and that plaintiff's union delegate addressed the NCO team regarding the tweet alleges facts that could, if proven, establish that defendants were aware of this protected activity (See Anonymous v Anonymous, 165 AD3d 19, 31 [1st Dept 2018] [plaintiff sufficiently alleged that defendants had knowledge of his protected activity based upon repeated complaints about noncompliance with the tax laws to tax department as well as to various superiors]).

Plaintiff has also sufficiently alleged that defendants engaged in conduct that disadvantaged her, i.e., engaged in behavior that was "reasonably likely to deter a person from engaging in protected activity" (Williams v New York City Hous. Auth., 61 AD3d 62, 71 [1st Dept 2009]) through her allegations that: (i) she was suddenly assigned overtime on January 31, 2020 and February 3, 2020, despite her seniority, requiring her to scramble for childcare; (ii) her shift was changed to evening hours in September 2020, against her wishes; (iii) she was assigned to patrol duty in lieu of her normal administrative duties in October 2020; and (iv) she was reassigned from the NCO unit in November 2020 (See e.g., Pelepelin v City of New York, 189 AD3d 450, 452 [1st Dept 2020] [allegations of plaintiff's reassignment to guard duty sufficiently allege retaliatory act under NYCHRL]).

Ultimately, however, plaintiff's retaliation claims must be dismissed based on her failure to allege a causal connection between her protected activity and the retaliatory acts in question. "A causal connection may be established either indirectly, by showing that the adverse closely followed in time the protected activity, or directly, through evidence of retaliatory animus, such as verbal or written remarks" (Thomas v Mintz, 60 Misc 3d 1218(A) [Sup Ct, NY County 2018], affd as mod, 182 AD3d 490 [1st Dept 2020]; see also Albunio v City of New York, 67 AD3d 407, 408 [1st Dept 2009], affd, 16 NY3d 472 [2011]). Here, the first alleged actions that allegedly disadvantaged plaintiff occurred approximately one year after plaintiff's January 2019 complaint about the tweet. These events are not sufficiently close in time to establish a causal nexus based solely on temporal proximity (See Baldwin v Cablevision Sys. Corp., 65 AD3d 961, 967 [1st Dept 2009] [four-month gap between protected activity and retaliatory act too distant to establish causal connection]; Bantamoi v St. Barnabas Hosp., 146 AD3d 420, 420 [1st Dept 2017] [five-month gap too distant to establish causal connection]). Plaintiff has not alleged any other facts indicating

retaliatory animus, as in the case relied upon by plaintiff (See Harrington v City of New York, 157 AD3d 582 [1st Dept 2018] [although plaintiff's job application to NYPD was denied many years after conclusion of plaintiff's 2007 lawsuit against NYPD, retaliatory nature of NYPD's denial was clear where 2007 lawsuit was express grounds given for denial of application]). Accordingly, plaintiff's retaliation claims must be dismissed (See Brown v City of New York, 185 AD3d 410, 410-11 [1st Dept 2020]).

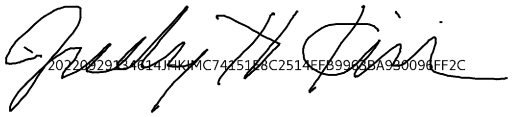
In light of the foregoing, it is

**ORDERED** that defendants' motion to dismiss the second, fourth, and sixth causes of action in plaintiff's Amended Complaint, asserting retaliation claims against each defendant, is granted and are hereby dismissed; and it is further

**ORDERED** that defendant the City of New York is directed to serve a copy of this order with notice of entry on plaintiff as well as on the Clerk of the Court (60 Centre St., Room 141B) and the Trial Support Office (60 Centre St., Rm. 119) within ten days from entry; and it is further

**ORDERED** that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Case*s (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



9/29/2022
DATE

HON. JUDY H. KIM, J.S.C.

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| 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 |