SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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LAURA HIGGINS,

Plaintiff,

- v -

GLADSTONE GALLERY LLC, BARBARA GLADSTONE, and MAX FALKENSTEIN, individually,

Defendants.

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INDEX NO. 150934/2022

MOTION DATE 04/08/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISSAL.

Plaintiff, Laura Higgins (plaintiff), commenced this action seeking damages stemming from her employment and termination of employment with defendant Gladstone Gallery, LLC (the Gallery). Defendants, the Gallery, Barbara Gladstone, the owner and president of the Gallery, and Max Falkenstein, the Gallery's senior partner, now move pursuant to CPLR 3211(a)(7) to dismiss the complaint. Plaintiff opposes the motion, and cross-moves to amend the complaint. For the following reasons, both motions are granted in-part.

According to the complaint, plaintiff commenced her employment with the Gallery September 2016 as the manager. "As Gallery Manager, Plaintiff reported directly to Gladstone and Falkenstein. Plaintiff maintained their calendars, attended meetings, and oversaw art exhibitions" (NYSCEF Doc. No. 11 [Complaint], ¶ 10). Plaintiff claims that at some point during her employment at the Gallery, plaintiff complained about irregularities in the payroll system, Stacey Tunis, the Gallery's financial director, admitted to plaintiff that the Gallery had committed some of the violations. Tunis and Gladstone ignored plaintiff's repeated complaints to address these problems.

Plaintiff also alleges that defendants created a hostile work environment by, inter alia, paying male employees more than female employees even when the males worked in lower-level positions. The complaint also alleges that defendants did not hire a Caucasian person for a job because, particularly in the aftermath of George Floyd's murder, they were eager to diversify the staff and hire a person of color. Defendants also ignored plaintiff when she informed them that a lesbian worker accused defendants of discrimination based on the worker's sexual orientation; they concluded that because the worker's supervisor was also a lesbian, there could be no discrimination.

Plaintiff alleges that after she made the above complaints and requests, "Gladstone began her retaliatory campaign to ruin Plaintiff" (*id.*, ¶ 25). Specifically, "Gladstone harassed and bullied Plaintiff by creating a toxic environment riddled with argumentative comments toward Plaintiff" (*id.*, ¶ 40). Around October 20, 2020, Gladstone allegedly threw a Gallery book at her head (*id.*, ¶ 75).

Around July 7, 2021, Falkenstein held a meeting with plaintiff, during which he stated that her interactions with Gladstone had become contentious and that their conflicts had put him in the middle of their disputes. When plaintiff attempted to explain that Gladstone's behavior was in retaliation against her for complaining about payroll violations and discrimination, Falkenstein accused her of "pulling the victim card" (*id.*, ¶ 26). The next day, plaintiff tendered her resignation to Falkenstein, but she was "brushed aside" (*id.*, ¶ 27). Following these events, around July 9, 2021, plaintiff told Falkenstein that she had been ambushed at the July 7 meeting. In response, he "repeated the patently false claim that Plaintiff's performance was sub-par" (*id.*, ¶ 28). Plaintiff then left her job; the complaint refers to her departure as a "constructive discharge" (*id.*, ¶ 29).

Shortly thereafter, plaintiff interviewed for a job at the George Condo Studio (the Studio). Around July 16, 2021, the Studio offered her the position. Plaintiff was to start work on August 2, 2021. However, the Studio rescinded the offer around July 28, 2021, the day after her "onboarding meeting" there (*see id.*, ¶¶ 31-32). The complaint states, "[u]pon information and belief," that Gladstone defamed plaintiff to George Condo, the Studio's owner, and this was the reason the Studio withdrew the offer (*id.*, ¶ 33).

The complaint asserts seven causes of action. The first and second causes of action are for retaliation under the New York City Administrative Code (Admin. Code) § 8-107 (1) (e) and the New York Executive Law (Executive Law) §§ 290 *et seq*, respectively. The complaint bases these claims on plaintiff's complaints of discrimination around June 7, 2021, July 8, 2021, and on another date that is not specified but which was prior to July 9, 2021, when plaintiff left the Gallery. The complaint also refers to Gladstone's supposed comments to Condo as retaliatory. The complaint alleges monetary injury along with "severe, mental anguish and emotional distress, including but not limited to depression, humiliation, embarrassment, stress and anxiety, loss of self-esteem and self-confidence, and emotional pain and suffering for which she is entitled to an award of monetary damages" (NYSCEF Doc. No. 11, ¶¶ 46, 62). The complaint further states that plaintiff should be awarded attorney's fees as punitive damages because of the extreme nature of defendants' mistreatment of her. The seventh cause of action asserts that the allegedly retaliatory conduct also violated Labor Law § 215.

The third cause of action alleges that co-defendant Gladstone intentionally inflicted emotion distress upon plaintiff. It specifies that Gladstone "engaged in extreme and outrageous conduct that consisted of bullying, harassment, and culminated in a physical assault of and throwing a Gallery handbook at Plaintiff by Gladstone when Gladstone threw a Gallery handbook at her" (*id.*, ¶ 65). Gladstone allegedly threw the handbook at plaintiff around October 20, 2020. This is also the basis of the fifth cause of action, for assault. As an alternative to the third and fifth causes of action, the complaint contains a sixth cause of action against Gladstone for prima facie tort.

Finally, the fourth cause of action is against Gladstone is for defamation. The complaint asserts the claim on information and belief. Specifically, it refers to the contention that Gladstone defamed plaintiff to Condo, calling her a poor employee. The complaint alleges that Gladstone's defamatory statements resulted in Condo's withdrawal of the job offer.

CPLR 3211(a)(5)

On a motion to dismiss pursuant to CPLR 3211(a)(5) on the ground that the action is barred by the statute of limitations, the defendant must establish that the time to sue expired (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]). Under CPLR § 215 (3), assault and intentional infliction of emotional distress (IIED) claims must be asserted within one year of the alleged occurrence. As the complaint alleges that Gladstone assaulted plaintiff around October 20, 2020, and as plaintiff did not file the complaint until January 31, 2022, defendants argue that plaintiff's claims for assault and IIED must be dismissed.

Defendants point to *Gallagher v Directors Guild of Am.* (144 AD2d 261, 261-262 [1st Dept 1988]), which applies CPLR § 215 (3) to claims for IIED, in support of their position that plaintiff's third cause of action is untimely (*see Winslow v New York-Presbyt./Weill-Cornell Med. Ctr.*, 203 AD3d 533, 533 [1st Dept 2022]). The pertinent part of the cause of action alleges that the infliction of distress "culminated" in October 20, 2020, when Gladstone purportedly threw the book at her.

In opposition and in support of her cross motion to amend, plaintiff argues that the claims are timely due to Executive Order 202.8 and its subsequent extensions. As is relevant here, the March 20, 2020, Order states:

> "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 . . . as prescribed by the procedural laws of the state . . . is hereby tolled from the date of this executive order until April 19, 2020."

Subsequent orders extended the toll through November 3, 2020. Accordingly, plaintiff asserts that the limitations periods for her assault and intentional infliction of emotional distress claims were extended for 228 days beyond the expiration of the statute of limitations and, as such, are timely.

The Court rejects plaintiff's argument. "A toll suspends the running of the statute of limitations for a finite time period" (*Murphy v Harris*, 210 AD3d 410, 411 [1st Dept 2022]). Thus, as defendants argue in reply, the Executive Orders did not add 228 days to the statute of limitations periods for all claims that would have expired between March 20, 2020, and November 3, 2020. Instead, the Executive Orders tolled the limitations period from the date that the cause of action arose until November 3, 2020. Thus, in *Murphy*, the First Department determined that a wrongful death claim that had six months and ten days left in the statutory limitations period on March 20, 2020, still had six months and ten days left in the limitations

period when the toll ended on November 3, 2020 (*id.* at 411-412). Notably, it did not add the entire tolled period to the claim.[1]

Here, the causes of action based on the alleged assault were tolled from October 20, 2020, the date of the incident, to November 3, 2020. Plaintiff had the full limitations period of one year from November 3, 2020, or until November 3, 2021, to file these claims. Plaintiff did not file the complaint until well over two months after the deadline. Accordingly, the third and fifth causes of action are untimely and must be dismissed.

CPLR 3211(a)(7)

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83. 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, " 'factual allegations ... that consist of bare legal conclusions, or that are inherently incredible .... are not entitled to such consideration" ' (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836, [2007], *cert denied* 552 US 1257 [2008]).

Defamation

Defendants next assert that plaintiff's fourth cause of action for defamation should be dismissed as legally insufficient. Defendants argue that under CPLR § 3016 (a), "the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." Defendants argue that the complaint's pertinent allegations are made on information and belief, and thus they are speculative (citing *Smulyan v New York Liquidation Bur.*, 158 AD3d 456, 457 [1st Dept 2018] [speculation that the defendant defamed the plaintiff when contacted for a job reference was "wholly speculative"]). Further, they contend that the alleged defamatory statement – "that Plaintiff was not a good employee" (NYSCEF Doc. No. 11, ¶ 70) – is threadbare and therefore insufficient.

In response, plaintiff alleges that the complaint adequately alleges defamation. Plaintiff states that the approximate date of the defamation was July 27, 2021, after her "onboarding meeting" and before Condo rescinded his job offer. More specific details about the defamatory statements are not in her possession. Plaintiff argues that discovery must be held, including of Gladstone's texts, emails, and phone records, and of depositions of Gladstone and Condo, before she can amplify her pleadings accordingly. Plaintiff points to *Beschel v Countrywide Home Loans, Inc.* (21 Misc 3d 1136 [A], 2008 NY Slip Op 52397 [U] [Sup Ct, Nassau County 2008])

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[1] As defendants point out, the issue of whether the Executive Orders suspended or tolled the statutes of limitations is unresolved on a State-wide level. However, the recent First Department cases of *Murphy v Harris* and of *Gabin v Greenwich House, Inc.* (210 AD3d 497 [1st Dept 2022]), both of which bind this court, hold that the limitations periods were tolled rather than suspended.

and *Browne v The Bd. of Educ.* (2012 NY Slip Op 30417 [U] [Sup Ct, Nassau County 2012]), in which the Nassau County Supreme Court denied CPLR § 3211 motions pending discovery where, as here, the defendants possessed more particularized knowledge of the defamation.

Defendants reply that this argument has no merit because the cited principle only applies where the claim itself is not speculative or lacking in merit. Indeed, they argue that plaintiff "may not use discovery— either pre-action or pretrial—to remedy the defects in his pleading" (*Weinstein v City of New York*, 103 AD3d 517, 517-518 [1st Dept 2013] [dicta]). They state that where the complaint only alleges "nonspecific defamatory rumors" which do not "allege the particular defamatory words or statements," the plaintiff cannot use discovery to remedy these fundamental defects (*Naderi v North Shore-Long Is. Jewish Health Sys.*, 135 AD3d 619, 620 [1st Dept 2016]). They distinguish *Beschel* and *Browne*, arguing that in those cases there was more specific evidence and detail concerning the alleged defamations. Moreover, they argue that the complaint merely speculates that Gladstone called plaintiff a bad employee, and this is a statement of opinion and is not actionable (citing *Davis*, 24 NY3d at 269; *see Kerns v Ishida*, 208 AD3d 1102, 1103 [1st Dept 2022]).

"Defamation is the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of plaintiff in the minds of right-thinking persons, and to deprive plaintiff of their friendly intercourse in society" (*3P-733, LLC v Davis*, 187 AD3d 626, 627-628 [1st Dept 2020] [internal quotation marks and citation omitted]). To assert defamation, a complaint must state that the defendant made a false statement to a third party without privilege or authority, and it also must state that the statement caused harm or is defamatory per se (*id.* at 628).

On a motion to dismiss a cause of action for defamation, "the motion to dismiss must be denied if the communication at issue, taking the words in their ordinary meaning and in context, is also susceptible to a defamatory connotation" (*Davis*, 24 NY3d at 272 [internal quotation marks and citation omitted]). However, under CPLR § 3016 (a), the complaint must set forth "the particular words complained of." The actual words used are important, as the alleged defamation must consist of "provably false factual statements" (*Schmitt v Artforum Intl. Mag., Inc.*, 178 AD3d 578, 588 [1st Dept 2019]). In contrast, "[s]ubjective statements of opinion . . . are not actionable as [defamation]" (*id.*).

The complaint at issue here fails in that it does not include the particular words at issue (*see Gardner v Virtuoso Ltd.*, 204 AD3d 514, 514-515 [1st Dept 2022]). Instead, it merely suggests that Gladstone probably said bad things about plaintiff to her prospective employer. The complaint asserts that Gladstone likely informed Condo that she had a negative opinion of plaintiff, and not that she told demonstrable lies about her. The proposed amended complaint does not remedy these defects.

The complaint also does not use the allegedly defamatory words or set forth the context with sufficient clarity to indicate that the defamation occurred. For this reason, in *Smulyan,* (158 AD3d at 457), the First Department affirmed the dismissal of the plaintiff's defamation claim because the plaintiff "contend[ed], based on nothing but conjecture, that the reason he did not receive a job offer from a third party that was considering him for employment is that the third

party contacted [defendant] for a reference, and [defendant] defamed him." The result is not different here because the complaint alleges that an existing job offer was withdrawn. Further, the proposed addition to the complaint – Falkenstein's alleged statement that defendants were now unwilling to give plaintiff a good reference – does not show that defendants intended to lie about her (NYSCEF Doc. No. 16 [Proposed Amended Complt.], ¶ 90).

Plaintiff's request for discovery concerning this claim also must fail. Courts do not generally grant such requests, only doing so when, in their discretion, they determine that the circumstances warrant it. The cases upon which plaintiff relies involve more compelling circumstances. In *Beschel*, the complaint asserted that the defendants published to clients that the plaintiffs were shady, that they were involved in fraudulent loans, and that it would be bad business to work with them. The court found that these allegations were enough to indicate that defamatory statements were made (*see Beschel*, 21 Misc 3d 1136 [A], 2008 NY Slip Op 52397 [U]). In *Browne*, despite the absence of the particular words, the complaint alleged that the defendants accused her of improprieties, including falsifying student's grades. The allegations in *Browne* also clearly suggested that defamatory statements were made (*see Browne*, 2012 NY Slip Op 30417 [U]). Due to plaintiff's failure to suggest that – if Gladstone spoke to Condo at all – she made specific defamatory accusations, as opposed to negative statements, discovery is unwarranted.

Prima facie tort

Plaintiff's sixth cause of action for prima facie tort is based on the alleged discussion between Gladstone and Condo around July 27, 2021, which allegedly resulted in the rescission of plaintiff's job offer. According to defendants, plaintiff does not set forth a viable claim. Defendants cite *AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.* (115 AD3d 402, 403 [1st Dept 2014]), which states that "[t]he requisite elements for a cause of action sounding in prima facie tort are (1) the intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal" and that "disinterested malevolence" must be the defendant's only motivation. Defendants argue that the complaint does not show that the alleged conversation was motivated only by a disinterested malevolence (citing *Wiggins & Kopko, LLP v Masson*, 116 AD3d 1130, 1131-1132 [3d Dept 2014]). Instead, defendants state that there could have been multiple possible reasons, or mixed reasons, for the alleged conversation with Condo.

In opposition, plaintiff suggests that her cause of action for prima facie tort is bolstered by the facts that Gladstone engaged in a continuous course of tortious conduct as soon as plaintiff began pointing out defendants' wage violations and discriminatory conduct, that Gladstone threw a gallery book at her, and that defendants constructively discharged her. This history, she implies, shows that Gladstone "maliciously intended to harm Plaintiff" when she allegedly contacted Condo (NYSCEF Doc. No. 11, ¶ 86). Plaintiff also contends that, although the complaint does not use the phrase "disinterested malevolence," this omission is not fatal because this context makes it clear that the motive was solely malice, and because the complaint repeatedly refers to Gladstone's ill will, malice, and intent to harm her (citing, inter alia, *DiMicco Bros., Inc. v Consolidated Edison Co. of N.Y., Inc.*, 8 AD3d 99, 100 [1st Dept 2004]). Defendants' reply reiterates that the complaint does not allege disinterested malevolence. They

distinguish *DeMicco*, which plaintiff cites to show that disinterested malevolence can be inferred, because in that case the defendant failed to perform a legal duty.

For the first time in their reply, defendants argue that plaintiff does not allege special damages with sufficient particularity. They also allege for the first time that the sixth cause of action is duplicative of plaintiff's other claims. The Court cannot consider these arguments as they are made for the first time in reply (*see Manouel v Dembin*, 202 AD3d 441, 441 [1st Dept 2022]; *Domaszowec v Residential Mgt. Group LLC*, 135 AD3d 572, 574 [1st Dept 2016]). Thus, the only issue before the Court on this claim is whether the complaint sufficiently plead that disinterested malevolence was the sole motivation for the alleged conduct.

"Disinterested malevolence . . . [means] that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983] [internal quotation marks and citations omitted]). To withstand a motion to dismiss, the plaintiff must "set forth sufficient facts to establish that defendants' sole motive . . . was 'disinterested malevolence'" (*Silberman v Sulner*, 229 AD2d 827, 828-829 [3d Dept 1996] [citation omitted]). With respect to the defamation claim, which rests on the same alleged conversation with Condo, plaintiff asserts that "Gladstone contacted Condo with malicious intent and/or in reckless disregard for the truth with the sole desire to ruin plaintiff's employment prospects" (NYSCEF Doc. No. 11, ¶ 72).

In connection with the prima facie tort claim itself, the complaint states that "[a]s a result of Gladstone's malice and desire to harm plaintiff, upon information and belief, Gladstone contacted Condo to ruin plaintiff's employment with Condo's studio" (*id.*, ¶ 87). Thus, the complaint alleges "that there was malice, and that disinterested malevolence was the only reason" for the communication to Condo (*Diorio v Ossining Union Free School Dist.*, 96 AD3d 710, 712 [2d Dept 2012]). Further, for the purposes of this CPLR § 3211 motion, the alleged conversation, together with the complaint's allegations that defendants created a hostile work environment, and that Gladstone displayed a personal animosity toward her, "are sufficient to show that [Gladstone] acted solely with disinterested malevolence" (*Starishevsky v Parker*, 225 AD2d 480, 480 [1st Dept 1996]). A proposed amendment to the complaint adds that "Falkenstein told Plaintiff "well, we were willing to give you a good reference but not now" (NYSCEF Doc. No. 16, ¶¶ 49, 90) and strengthens the inference that defendants' actions were malicious. Defendants are correct that other motives, or mixed motives, are possible. However, "[d]efendant['s] . . . potential rebuttal argument to a prima facie case . . . is misplaced at this early procedural juncture" (*Petit v Department of Educ. of the City of N.Y.*, 177 AD3d 402, 404 [1st Dept 2019]). Accordingly, the Court denies the branch of defendants' motion to dismiss plaintiff's cause of action sounding in prima facie tort.

New York City and State Human Rights Law

Defendants next turn to plaintiff's second cause of action, which alleges that defendants violated Executive Law § 296 (7). That provision states:

> It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article . . . . Retaliation may include, but is not limited to, disclosing an employee's personnel files because he or she has opposed any practices forbidden under this article. . . .

As is relevant here, the activities to which the section refers include discrimination based on race, color, and sexual orientation (Executive Law § 296 [1]). "In order to make out the claim, 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, 312-313 [2004]).

Among other things, plaintiff contends that she was constructively discharged from her job. A claim for constructive discharge "must allege facts showing that defendant deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign" (*Polidori v Societe Generale Groupe*, 39 AD3d 404, 405 [1st Dept 2007] [internal quotation marks and citation omitted]). Further, a plaintiff must show that there is a causal connection between the alleged protected conduct and the defendant's adverse treatment (*Collins v Indart-Etienne*, 59 Misc 3d 1026, 1051 (Sup Ct, Kings County 2018]). An allegation that the defendants made isolated remarks or occasionally engaged in episodes of harassment is not enough to show that a hostile or abusive environment exists. The pleading requirement under the State and City human rights laws are lenient (*Lively v WAFRA Inv. Advisory Group, Inc.*, -- AD3d --, --, 2022 NY Slip Op 06887, *1 [1st Dept 2022]).

The Court has described plaintiff's initial allegations above, including the contention that Gladstone's treatment of plaintiff got worse after she notified defendants that they were violating anti-discrimination and labor laws (NYSCEF Doc. No. 11, ¶ 12). The Court also considers plaintiff's allegations in the proposed amended complaint. She alleges that, because of their anger at her for complaining about their violations, "Gladstone and Falkenstein began creating scenarios to make it seem like Plaintiff was not performing her job" (NYSCEF Doc. No. 16, ¶ 24). More specifically, she states that after she complained to them, Gladstone and Falkenstein 1) refused to hold staff meetings with her, 2) rejected her requests to participate on a group phone call that addressed the Gallery's plans for reopening, to include her on calls relating to the Gallery's merger with another gallery, and to include her in other discussions relevant to her work with the Gallery employees, 3) excluded her from daily meetings, and 4) ignored her requests for updates about the new schedule (*id.*, ¶¶ 25-29). Plaintiff alleges that in August 2020, Gladstone screamed at her and blamed her for problems at the Gallery (*id.*, ¶ 31). She states that Gladstone rolled her eyes at her whenever she asked any questions, rejected her plans even after they had been approved, accused her of misconduct for following Gladstone's directions, repeatedly criticized and shunned her, responded to plaintiff's suggestions, if at all, with hostility, and verbally abused her (*id.*, ¶¶ 33-37, 43-45). In addition, plaintiff alleges that "Gladstone then ostracized Plaintiff, intentionally ignored Plaintiff in front of others or offer[ed] to buy lunch for other employees while not asking plaintiff" because Gladstone wanted the

employees to see that she "was no longer to be trusted or spoken to" (*id.*, ¶ 38; *see* ¶ 41). Plaintiff alleges that Gladstone relocated her desk so that she was isolated from the rest of the staff (*id.*, ¶ 40).

Defendants argue that dismissal is appropriate because plaintiff did not plead that she suffered an adverse employment action within the meaning of the statute. Although constructive discharge is an adverse impact, defendants claim that the facts alleged in the complaint do not support plaintiff's argument. In support, they cite *Polidori* (39 AD3d at 405-406), in which a claim was dismissed "[b]ecause defendant investigated plaintiff's complaint, albeit allegedly imperfectly, and [after terminating the employee primarily responsible for the harassment] offered plaintiff reasonable options for returning to work." Here, defendants contend that plaintiff's constructive discharge rests on the allegations that she was yelled at, disparaged, and given an unfair negative performance review. According to defendants, these allegations are insufficient (citing *Nichols v Memorial Sloan-Kettering Cancer Ctr.*, 36 AD3d 426 [1st Dept 2007] [negative performance memo was insufficient]; *Murphy v Department of Educ. of City of New York*, 155 AD3d 637 [2d Dept 2017] [allegation of continual harassment, without more, was too vague and conclusory to support a claim]).

Other than the alleged constructive discharge, none of plaintiff's contentions amount to retaliatory conduct within the meaning of the statute (comparing to *Ponterio v Kaye* (25 AD3d 865, 869 [3d Dept 2006]; *Artis v Random House, Inc.*, 34 Misc 3d 858, 866-867 [Sup Ct, NY County 2011]). Defendants note that "[r]eprimands and excessive scrutiny do not constitute adverse employment action in the absence of other negative results" (NYSCEF Doc. No. 12, *11 [quoting *Mejia v Roosevelt Is. Med. Assoc.*, 95 AD3d 570, 572 [1st Dept 2012] [affirming summary judgment where plaintiff was transferred to another unit in the hospital, his vacation was delayed, he was assigned difficult patients at inconvenient times, and he received negative evaluations in some categories after the deaths of two or more of his patients, but his pay remained the same and he was not placed on probation]). Defendants also point out that in her complaint, plaintiff alleges that throughout her tenure at the Gallery, Gladstone verbally abused her "for no legitimate reason" (NYSCEF Doc. No. 11, ¶ 11) and that Gladstone's toxic behavior "progressively got worse" after plaintiff reported the allegedly discriminatory behavior of defendants (*id.*, ¶ 12). Thus, they contend that because the complaint merely alleges the "continuation of a course of conduct that had begun before the employee complained . . . there is no causal connection between the employee's protected activity and the employer's challenged conduct" (quoting *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 129 [1st Dept 2012]; also citing *Sims v Trustees of Columbia Univ. in the City of N.Y.*, 168 AD3d 622 [1st Dept 2019]). Defendants add that plaintiff's claim that Gladstone talked to Condo about her is without factual support.

In response, plaintiff argues that her allegations state a valid claim for retaliation. She quotes *Jeudy v City of New York* (142 AD3d 821, 824 [1st Dept 2016]), which found that "the complaint establish[ed] that defendant's concerted campaign of excessive scrutiny following plaintiff's . . . complaints about continual rejection was calculated to, and did, lead directly to plaintiff's suspension and termination." She also notes that in *Vega v Hempstead Union Free Sch. Dist.* (801 F3d 72, 85 [2d Cir 2015] [internal quotation marks and citation omitted]), the Second Circuit noted that discrimination under 42 USC § 200e-2 (a) (1) includes materially

adverse changes in the plaintiff's job, such as "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation."

Plaintiff contends that the complaint alleges, with sufficient detail, that Gladstone's conduct was markedly worse after plaintiff complained to her about discrimination and other violations, and that the proposed amended complaint further supports her contentions of retaliatory conduct. She points to her statement that Gladstone made her feel unwelcome and, on specific occasions, criticized her in front of other employees. She states that Falkenstein's critical review of her job performance also was retaliatory. According to plaintiff, these allegations are sufficient to state a claim even if there was no constructive discharge.

Plaintiff notes that in their reliance on caselaw, defendants regularly apply the wrong standard of review. More specifically, the courts in *Nicols* and *Stetson v NYNEX Serv. Co.* (995 F2d 355 [2d Cir 1993]), which defendants cite in their discussion, considered summary judgment motions rather than motions to dismiss for failure to state a claim. Plaintiff also distinguishes *Murphy* because the plaintiff there alleged the constructive discharge was the result of discrimination and a hostile work environment rather than retaliation.

Further, plaintiff states that regardless of whether this Court accepts her constructive discharge theory, she alleges retaliation based on several other adverse actions, including her performance review and Gladstone's alleged conversation with Condo. Plaintiff points out that defendants rely on another summary judgment case, *Mejia*, in support of their argument regarding the sufficiency of the alleged adverse actions. Plaintiff additionally argues that defendants' subsequent alleged action – that is, the defamation – was an adverse action.

Defendants' reply reiterates that plaintiff has not asserted a claim based on her purported constructive discharge, and therefore her NYSHRL retaliation claim fails. They compare her allegations to those alleged in *Pugliese v Actin Biomed LLC* (106 AD3d 591 [1st Dept 2013]). In *Pugliese*, the First Department found that the complaint stated a cause of action for constructive discharge and retaliation by alleging that the defendants "humiliated, ostracized, and sexually harassed plaintiff, and told her that they would make her life miserable until she quit, in response to her objections to the violations of the regulations by defendants" (*id.* at 592 [internal quotation marks omitted]). By comparison, they contend, plaintiff's complaint merely alleges "petty slights and criticisms" (NYSCEF Doc. No. 21, *11).

Defendants also rely on *Mascola v City Univ. of N.Y.* (14 AD3d 409 [1st Dept 2005]), which affirmed the dismissal of a claim for constructive discharge. The complaint before the trial court in *Mascola* had alleged that the defendants discriminated against the plaintiff based on his gender in that, unlike his female coworkers, (1) plaintiff was denied the opportunity to advance to a higher position, (2) he did not receive discretionary merit salary increases, and (3) his "supervisors . . . subjected him to a hostile work environment" (*Mascola v City Univ. of N.Y.*, 2003 WL 25780785, Index No. 106800/2002, Oct. 15, 2003, DeGrasse, J., *affd* 14 AD3d 409 [1st Dept 2005]). Defendants argue that plaintiff's allegations are similarly insufficient. They also rely on *Young v City of New York* (2016 NY Slip Op 33127 [U] [Sup Ct, Bronx County

2016]), in which the court found that counsel's statement that the retaliation was in direct response to plaintiff's complaint was insufficient where the complaint itself did not allege this.

After careful consideration, the Court denies the motion as it relates to this claim. First, the Court notes that plaintiff has not alleged constructive discharge as a separate cause of action. Instead, she states that it is one of the numerous adverse impacts of defendants' alleged retaliation. In their arguments, defendants consider plaintiff's complaints separately rather than in their entirety to determine whether she has stated a claim. Collectively, plaintiff has described a course of conduct that, if true, may be considered retaliatory. For example, the Second Department in *Mitchell v TAM Equities, Inc.* (27 AD3d 703 [2d Dept 2006]), found that the plaintiff asserted valid claims for retaliation and for constructive discharge by asserting that:

> "after she protested the offensive conduct to her supervisors, certain of those supervisors retaliated against her by, among other things, arbitrarily reprimanding her, personally berating her in front of her subordinates, refusing to permit her normal lunch and personal breaks during long work[-]days, and compelling her to return to work against medical advice after an injury, all of which further compelled her to leave her employment."

(*id.* at 706).

Here, too, plaintiff alleges that she was reprimanded without reason and berated in front of her subordinates. She also states that Gladstone physically assaulted her and that defendants excluded her from meetings that were related to her job at the Gallery. She describes this as part of a continuous course of conduct. Whether the conduct rises to the degree necessary for the claim to survive summary judgment or a trial, of course, raises a separate issue not appropriate for review under CPLR § 3211 (7). Similarly, the fact that plaintiff contends that Gladstone treated her poorly before the retaliation occurred is not enough to defeat the claim at this point in the litigation. Instead, it may raise issues of fact.

The NYCHRL, is broader in scope than the State Law (*Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 [1st Dept 2016]). As the cause of action under the State's law survives dismissal, "[a] fortiori, [the allegations] state a claim under the New York City Human Rights Law" (*Brightman v Prison Health Servs., Inc.*, 62 AD3d 472, 472 [1st Dept 2009]). In addition, allegations that are dismissed as insufficient under the State laws often survive dismissal motions as they relate to the Administrative Code (*see, e.g., Pelepelin v City of New York*, 189 AD3d 450, 452 [1st Dept 2020] [claim sustained where the complaint adequately asserted "a disadvantageous action"). Therefore, defendants' application to dismiss the first cause of action is also denied. The Court notes that defendants' reliance on *Brightman* to support this prong of the motion is misplaced. Even if, as defendants allege, the allegations in *Brightman* are more extreme than those at hand here, *Brightman* does not provide the minimum set of facts required to state a claim for retaliation. Defendants' reliance on *Williams v New York City Hous. Auth.* (61 AD3d 62, 78-79 [1st Dept 2009]) is also misplaced, as that case involved a summary judgment motion and considered the claim under a different legal standard, and the defendants' argument was in support of its affirmative defense "that the conduct complained of consist[ed] of nothing more than . . . petty slights and trivial inconveniences" (*id.* at 80 [internal quotation marks and

citation omitted]). At this juncture, plaintiff does not have to defeat defendants' potential affirmative defense. Moreover, she would not bear the burden of proof (*see Kaplan v New York City Dept. of Health & Mental Hygiene*, 142 AD3d 1050, 1051-1052 [2d Dept 2016]).

Defendants' arguments regarding the deterrent impact of the alleged retaliatory conduct, which rely on *Brightman* and *Melman*, are not persuasive. The requirement is that the conduct "must be reasonably likely to deter a person from engaging in protected activity," not that the person in question was deterred (*Brightman*, 62 AD3d at 472 [internal quotations and citation omitted]). It is sufficient, therefore, that the actions "well might have dissuaded a reasonable worker" from his or her conduct (*id.* [internal quotation marks and citation omitted]). *Melman* is also distinguishable because it involves a motion for summary judgment. Plaintiff's proposed amendments provide more specific dates and general time frames for the alleged retaliatory conduct, thus addressing another of defendants' arguments.

Labor Law § 215

Finally, defendants argue that plaintiff's seventh cause of action for violations of the Labor Law, must fail because plaintiff's complaint does not assert that, pursuant to Labor Law § 215 (2) (b), she served notice on the Attorney General before she commenced this action. Plaintiff's proposed amended complaint attempts to remedy this problem by stating that plaintiff provided this notice around March 18, 2022 (NYSCEF Doc. No. 16, ¶ 115). Although this date is after January 31, 2022, when plaintiff commenced this lawsuit, the deficiency is not fatal. As plaintiff notes, despite the language in the statute, New York courts have not considered this to be a condition precedent (*see Kubersky v Cameron Indus., Inc.*, 173 AD3d 541, 542 [1st Dept 2019]). Accordingly, the branch of defendants' motion to dismiss plaintiff's cause of action pursuant to Labor Law § 215 is denied.

Cross motion to amend the complaint

The Court partially grants the cross motion to amend the complaint. "Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks and citations omitted]). As shown above, the additions supplement several of the allegations in the original complaint and are not palpably improper. Defendants are incorrect when they state that the new pleading does not specify when plaintiff allegedly made her complaints about discrimination (*see* NYSCEF Doc. No. 16, ¶ 58). However, in this order, the Court dismisses the third through fifth causes of action. Accordingly, plaintiff must file and serve a new amended complaint that does not include those causes of action.

Accordingly, it is hereby

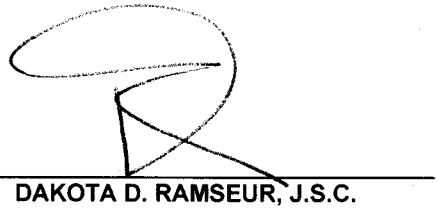
ORDERED that the motion to dismiss is granted to the extent that it seeks dismissal of the third, fourth, and fifth causes of action; and it is further

ORDERED that the cross-motion to amend is granted to the extent that it pertains to the first, second, sixth, and seventh causes of action, and plaintiff shall serve and file an amended complaint in accordance with the terms of this order within thirty (30) days; and it is further

ORDERED that defendants shall serve and file their answer to the amended complaint within thirty days after service; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendants, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



2/10/2023
DATE

DAKOTA D. RAMSEUR, 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