SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LORI S. SATTLER** **PART** **02TR**

Justice

----------X

MARIE ETIENNE

Plaintiff,

- v -

MTA NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

----------X

INDEX NO. 155727/2022

MOTION DATE 09/12/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16

were read on this motion to/for DISMISS.

Plaintiff Marie Etienne ("Plaintiff") commenced this action against Defendant MTA New York City Transit Authority ("Defendant") alleging discrimination based on race, religion, and national origin; hostile work environment; and retaliation in violation of the New York City Human Rights Law, New York Administrative Code § 8-107 ("City HRL"). Defendants move to dismiss the Complaint. Plaintiff opposes the motion.

As set forth in the Complaint (NYSCEF Doc. No. 15), Plaintiff, who states she is Black, Christian, and from Haiti, has been employed by Defendant since 1998. In 2009, she began working in Defendant's Capital Management Program, Outside Projects Unit, first as an Associate Staff Analyst/Project Coordinator, and then as an Associate Project Manager I. In 2017, she was promoted to Associate Project Manager II, a title she still holds. Plaintiff alleges she is primarily responsible for reviewing engineering plans of outside contractors working at or near Defendant's facilities to determine their effect on those facilities and to ensure the safety of those using the facilities. She contends she was qualified for all positions she has held in the

unit, as she has a master's degree in Civil Engineering from the City University of New York and has always performed her job well.

The Complaint alleges that during the relevant period Plaintiff's immediate supervisors were Mohamed Adam, Rajen Udeshi, and David Chang. It states: "Upon information and belief, Mr. Adam is Sudanese, Mr. Udeshi is Indian, and Mr. Chang is Asian. None are Christian" (Complaint ¶ 19). Plaintiff alleges that her supervisors failed to promote her until 2017, and that they falsely criticized her work. She specifically points to one instance where Mr. Adam told Mr. Udeshi that a determination Plaintiff made was not correct when "[i]n fact, it was correct" (*id.* ¶ 28). She alleges that she was not permitted to work overtime, although she concedes that she was permitted to work overtime from 2011 to 2014. She further alleges that she was not permitted to work through her lunch hour. She contends she was regularly talked down to, yelled at, given unrealistic deadlines, and told she was not completing her work in a timely fashion. The Complaint describes incidents where she and her supervisors disagreed about the substance of her work product. Plaintiff contends that workers who are not Black, Christian, or Haitian were not falsely criticized, were permitted work overtime, were not yelled at, were not pressured to finish projects quickly, and that their work was not routinely reviewed.

The Complaint refers to another employee in Plaintiff's department, Joelle Lichtman, who Plaintiff alleges is white, Jewish, and not Haitian. Plaintiff concedes that Ms. Lichtman is not an engineer (*id.* ¶ 25-26). She contends that Ms. Lichtman received two promotions during the period in which Plaintiff only received one. The Complaint does not indicate what positions Ms. Lichtman has held or what her qualifications are. Plaintiff further claims that Mr. Udeshi "repeatedly told Plaintiff that she does not know anything; while claiming that Ms. Lichtman knows 'everything'" and that her supervisors did not give Plaintiff credit for the work she did,

while "Mr. Adam did Ms. Lichtman's work" (*id.* ¶ 35-36). Plaintiff details several days in 2017 when Ms. Lichtman allegedly took long breaks and "played games in the newspaper" but was not reprimanded, whereas "it is a problem if plaintiff returned from lunch a few minutes late" (*id.* ¶ 46).

Plaintiff served Defendant with a Notice of Claim on August 28, 2018 and filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission ("EEOC") on August 30, 2018. The EEOC issued a Notice of Right to Sue on November 19, 2018. The Complaint alleges that the criticism of her work and claims related to her ability to work overtime continued after Plaintiff took these actions, which she contends constitutes retaliation. In 2018, one of her supervisors placed a notation on her timesheet stating that she was required to swipe out and in for lunch every day but did not do so for another employee who held the same job title as Plaintiff held. She further contends that Ms. Lichtman "was chosen to speak for the Engineers at a conference; although she is not an Engineer. Plaintiff was not chosen" (*id.* ¶ 70).

Plaintiff commenced an action against Defendant in the United States District Court for the Eastern District of New York on February 15, 2019, asserting claims under Title VII of the United States Civil Rights Act, the New York State Human Rights Law ("State HRL"), and City HRL. After discovery was completed, Defendant moved for summary judgment dismissing those claims. On March 25, 2022, the District Court dismissed the Title VII and State HRL claims on their merits (*Etienne v MTA New York City Transit*, US Dist Ct, ED NY, 19 CV 920, Dearie, J., 2022, NYSCEF Doc. No. 8). That Court found that Plaintiff failed to raise a triable issue of fact as to whether she was subject to adverse employment actions and, even assuming she was, as to whether those actions occurred in circumstances giving rise to an inference of

discrimination. The Court declined to exercise supplemental jurisdiction over the City HRL claims and dismissed those without prejudice. Plaintiff then commenced this action.

Defendant now moves to dismiss the City HRL claims. It argues Plaintiff's claims are barred by collateral estoppel because the District Court found that Plaintiff failed to plead facts on which an inference of discrimination could be based and therefore Plaintiff is collaterally estopped from bringing the instant claims, since this is also an element of the City HRL. Defendant further argues that any claims alleged in the Complaint that purportedly occurred prior to November 25, 2015 are time-barred. Finally, it argues if addressed on the merits the Complaint fails to state a cause of action because Plaintiff does not plead differential, hostile, or retaliatory treatment sufficient to constitute City HRL violations and, even if she did, the Complaint's allegations that such treatment was under circumstances giving rise to an inference of discrimination are conclusory. In opposition, Plaintiff argues collateral estoppel cannot be found because the City HRL is more permissive than Title VII and the State HRL. She further argues that under the continuing violation doctrine, all of her claims are timely. Finally, she maintains that her Complaint pleads facts sufficient to survive a pre-discovery motion to dismiss.

Collateral estoppel precludes a party from "relitigating in a subsequent action an issue clearly raised and decided against that party in a prior action" (*Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18, 23 [1st Dept 2014]; *see also Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). It is well established that claims brought under the City HRL must be analyzed separately and independently from Title VII and State HRL claims in order to understand and fulfill the City HRL's "uniquely broad and remedial purposes, which go beyond those of counterpart State or federal civil rights laws" (*Russell v New York Univ.*, 204 AD3d 577, 578 [1st Dept 2022], quoting *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66

[1st Dept 2009]). "Federal and City Human Rights Law discrimination issues are not necessarily identical for collateral estoppel purposes, because the purposes of the City Human Rights Law go beyond those of counterpart federal civil rights laws" (*Russell*, 204 AD3d at 579). Although Plaintiff asserts facts identical to those in the prior federal action as the basis for her City HRL claims, the Court finds that her claims must still be examined because of the more liberal pleading standards that apply to City HRL claims (*Russell*, 204 AD3d at 579). Accordingly, Plaintiff's causes of action cannot be dismissed on the theory of collateral estoppel.

When considering a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), "the court is required to accept as true the facts as alleged in the complaint, accord the plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009], citing *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). However, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 374 [2009], citing *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]).

First Cause of Action - Discrimination

A plaintiff states a claim for employment discrimination under the City HRL by pleading facts sufficient to support a prima facie case that the plaintiff (1) is a member of a protected class, (2) was qualified for the position held, (3) was treated differently than other employees, and (4) that the employer's differential treatment occurred in circumstances giving rise to an inference of discrimination (*Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]).

It is undisputed that Plaintiff is a member of a protected class and is qualified to hold her position. However, even construing the complaint liberally, presuming its factual allegations to be true, and giving the benefit of every possible favorable inference, Plaintiff fails to adequately plead facts to support a claim that Defendant treated Plaintiff differently than employees of other races, religions, and national origins under similar circumstances (*see Kwong v City of New York*, 204 AD3d 442, 444 [1st Dept 2022]). Plaintiff's allegations that she was held to different standards than Ms. Lichtman do not satisfy this element because Plaintiff concedes that Ms. Lichtman is not engineer and served in a different role than Plaintiff did. Plaintiff's other specific allegation, that a co-worker with the same title as Plaintiff did not have a note placed on her timesheet requiring her to clock out at lunch, is also insufficient. Plaintiff concedes that she and her supervisors disagreed about whether she should be permitted to work through lunch, and the Complaint states that note was placed on her timesheet after this ongoing disagreement began. The Complaint does not allege that Plaintiff's co-worker was engaged in a similar dispute. Plaintiff's other claims that she was treated differently are conclusory and devoid of any specifics (*see, e.g.*, Complaint ¶ 41 ["Mr. Adam and Mr. Udeshi did not yell at non-Black, non-Christian or non-Haitian employees."]).

Even were the Court to find that the Complaint did allege that Plaintiff was treated differently, it fails to adequately plead facts supporting circumstances giving rise to an inference of discrimination or discriminatory motive. Although Plaintiff asserts that Defendant's actions were motivated by bias based on her race, religion, and national origin, she does not set forth factual allegations in support of that claim other than that she is Black, Christian, and Haitian, and was treated differently (*see Whitfield-Ortiz v Department of Educ. of the City of New York*, 116 AD3d 580 [1st Dept 2014]; *Askin v Department of Educ. of the City of New York*, 110 AD3d

621, 622 [1st Dept 2013]). The Complaint's sole factual allegation that addresses her Plaintiff's protected status is that Mr. Chang told Plaintiff in January 2017 that Mr. Udeshi was discriminating against her because she is Black (Complaint ¶ 45). This claim alone, without any assertions of differential treatment or discriminatory motive, is insufficient to fulfill the fourth element of a City HRL discrimination cause of action (*see Wecker v City of New York*, 134 AD3d 474, 475 [1st Dept 2015]["stray derogatory remarks, without more, do not constitute evidence of discrimination"]).

Second Cause of Action – Hostile Work Environment

A plaintiff asserting a hostile work environment claim pursuant to the City HRL must show that they were "treated less well than similarly situated persons who were not members" of the plaintiff's protected class (*Russell*, 204 AD3d at 593; *see also Thomas v Mintz*, 182 AD3d 490 [1st Dept 2020]). They will not succeed, however, if the conduct complained of consists of nothing more than "petty slights and trivial inconveniences" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 80 [1st Dept 2009]). Furthermore, a lack of discriminatory animus is fatal to a cause of action for hostile work environment (*Pelepelin v City of New York*, 189 AD3d 450, 451-452 [1st Dept 2020]; *Llanos v City of New York*, 129 AD3d 620 [1st Dept 2015]).

For the same reasons that Plaintiff has not pled a cause of action for discrimination, Plaintiff has failed to adequately plead any discriminatory animus or that she was treated less well than other similarly situated employees not in her protected class in the context of a hostile work environment claim. Additionally, her allegations, even when read in the light most favorable to Plaintiff, amount to "petty slights and trivial inconveniences." Taking all facts alleged in the Complaint as true, Plaintiff was given more work than could reasonably be completed during regular working hours, was criticized for not being able to timely complete

that work, was not permitted to work overtime to complete that work and was reprimanded for trying to do so. Despite what Plaintiff contends was a contentious work environment, during the period covered by the Complaint Plaintiff was promoted and was at times permitted to work overtime. Accordingly, her hostile work environment claim must be denied.

Having found that Plaintiff has failed to adequately plead an ongoing practice of discrimination or continuing hostile work environment, the Court finds that the continuing violation doctrine cannot be applied to the Complaint's claims occurring prior to the three-year statute of limitations on City HRL claims (Administrative Code of City of NY § 8-502[d]) and those claims are therefore time-barred (*see Mira v Harder*, 177 AD3d 426 [1st Dept 2019]). In any event, were the earlier claims addressed on the merits, they would also fail for the same reasons as the later claims do.

Third Cause of Action - Retaliation

Plaintiff's final cause of action for retaliation is premised on the allegations that the purported discriminatory treatment and hostile work environment continued after Plaintiff served Defendant with a Notice of Claim and filed a Charge of Discrimination with the EEOC. A plaintiff makes a prima facie case for retaliation by showing that (1) the plaintiff engaged in a protected activity, (2) the employer was aware of the protected activity, (3) the employer took an action that disadvantaged the plaintiff, and (4) there was a causal connection between the protected activity and the disadvantageous action (*Harrington*, 157 AD3d at 585). Under the City HRL's liberal pleading standard, an action that disadvantages a plaintiff "must be reasonably likely to deter a person from engaging in protected activity" even if such action does not result in a materially adverse change in employment conditions (Administrative Code of City

of NY § 8-107[7]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 [1st Dept 2012]; *see also Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]; *Harrington*, 157 AD3d at 584).

The Complaint's allegation that Plaintiff's supervisors were aware of the protected activity, i.e., filing the Charge of Discrimination and Notice of Claim, consists only of the assertion that "Defendant and the named supervisors received due notice of the said Charge of Discrimination and Notice of Claim" (Complaint ¶ 64). However, even accepting that allegation as true, the Complaint does not plead facts indicating that Plaintiff was disadvantaged or that any action was causally connected to her protected activity. The Complaint merely alleges that the actions of Plaintiff's supervisors objected to in the Charge of Discrimination and Notice of Claim continued. It cannot be said that this treatment, which the Court has found does not give rise to an inference of discrimination or amount to a hostile work environment, is not reasonably likely to deter a person from engaging in protected activity. Accordingly, Plaintiff's retaliation cause of action must be dismissed.

For the reasons set forth herein it is hereby:

ORDERED that Defendant's motion is granted and the Complaint is dismissed.

4/10/2023
DATE

LORI S. SATTLER, J.S.C.

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