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

PRESENT: HON. LYNN R. KOTLER, J.S.C. PART 8

Katelyn Newman

INDEX NO. 150459/2023

MOT. DATE

- v -

International Institute for the Brain (iBRAIN), et al

MOT. SEQ. NO. 001

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).____

Replying Affidavits NYSCEF DOC No(s).____

In this action, Plaintiff, a former employee of defendant International Institute for the Brain (iBRAIN) (the "School"), is suing her former employer for sexual harassment based on gender, hostile work environment, retaliation, defamation and intentional infliction of emotional distress. Defendants the School, Patrick B. Donohue, Suzanne Wallach, Arthur Mielnik, and Dr. Victor Pedro now move to dismiss plaintiff's amended complaint pursuant to CPLR § 3211[a][1] and [7] and/or to strike certain allegations therein pursuant to CPLR § 3024(b). Plaintiff opposes the motion. The court's decision follows.

In her amended complaint, plaintiff alleges a number of extraneous facts regarding the working conditions at the School, how the School operates and general complaints that do not support any cause of action. The relevant allegations plaintiff asserts are as follows: plaintiff worked at the School for less than four months: from August 24, 2022 to December 15, 2022, "primarily doing marketing and public relations work". The school provides education to children with brain injury and brain-based disorders with a main campus on the Upper East Side of Manhattan.

Defendant Dr. Victor Pedro, the Chief Innovations Officer at the School, allegedly invited plaintiff for coffee at a nearby deli shortly after plaintiff started working at the School. Plaintiff does not articulate beyond vague generalizations that "the experience .... was 'creepy' .... since Dr. Pedro acted as if he wanted to ask her personal questions and that he wanted something more from her, but did not clearly say what that was." Thereafter, plaintiff claims that she "tried to avoid Dr. Pedro as much as possible, even though he persisted in his inappropriate and harassing conduct, which continued to make her feel extremely uncomfortable around him."

Plaintiff next alleges that defendant Patrick Donohue, founder and chairman of the School, "seemed to take a special interest in 'mentoring' plaintiff and making her 'feel at home'" at the School. However, "[a]s time went on ... and as Plaintiff began asking more and more questions of defendant Donohue and other members of the [School] management, she was met with increased hostility." Plaintiff explains that on October 11, 2022, Donohue and defendant Arthur Mielnik, Deputy Director of

Dated: 8/16/23

HON. LYNN R. KOTLER, J.S.C.

**1. Check one:** ☐ **CASE DISPOSED** ☑ **NON-FINAL DISPOSITION**

**2. Check as appropriate: Motion is** ☐ **GRANTED** ☐ **DENIED** ☑ **GRANTED IN PART** ☐ **OTHER**

**3. Check if appropriate:** ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

Strategic Planning at the School, asked plaintiff to come into Donohue's office and then closed the door. The following allegedly ensued:

> Plaintiff expected that she had been called in to discuss one or more of the tasks she was working on and to answer any questions. However, Donohue startled her by immediately saying, "shut up Katie," "let me speak let me speak," and "Katie quiet, I didn't ask you to speak." Plaintiff responded by saying, "okay," but this only seemed to enrage Donohue further, shouting at her: "Why did you say okay? I did not ask you to say okay to me, I asked you to shut up." Donohue just kept going on and on until Plaintiff fell completely silent. Arthur Mielnik just sat there chuckling, taking notes, and smirking at Plaintiff.

Plaintiff next generally alleges that she "quickly noticed that it was on herself and the other younger women" at the School "who were subject to the hostile, abusive and toxic treatment by Donohue and other male members of the administration, while the male staff members were treated with much greater respect. It was as if all the men on staff were part of a 'good old boy' fraternity and that harassment and mistreatment of the women staff members was just another acceptable part of the 'toxic office culture'" at the School. Plaintiff alleges that she "was constantly being subjected to short-term deadlines that she was told she had to meet" whereas "most of the men in the office were permitted, without any adverse consequences, to sleep while at the office, with apparently little to do and no discernible deadlines." Plaintiff further complains that Donohue "often took male hires out for long lunches, leaving the women employees to do most of the work at the office."

Plaintiff otherwise alleges that she was "constantly degraded and disrespected", her job title and responsibilities "chang[ed] on a monthly basis", Donohue said to her "I already told you" or "you should know; its not rocket science' and "How are you not getting this, it's so fucking simple." Donohue also allegedly screamed at her when plaintiff could not read his handwriting. Claiming that "[t]his was both frightening and embarrassing, since the door was wide open, and everyone could hear him screaming."

Regarding defendant Suzanne Wallach, plaintiff claims that she "added significantly to the hostile work environment to which Plaintiff was subjected to" because "Wallach called and texted her on a near constant basis, both during work hour (sic) and long after working hours, well into the night." Plaintiff further alleges:

> [Wallach] bombarded Plaintiff with questions, complaints, accusations and insinuations, some of which had to do with her PR and marketing work, but much having to do with subjects far outside Plaintiff's areas of responsibility. At other times, Wallach went into a "radio silence" mode and could not be reached for days at a time, even though there were important deadlines that had to be met. As a result of this continued round-the-clock pressure from Wallach and the other defendant members of [the School] management team, Plaintiff suffered from lack of sleep and insomnia, leaving her depressed, stressed and exhausted often during normal working hours. Finally, the mental, emotional and verbal abuse and harassment became so intense that Plaintiff felt compelled to seek professional therapeutic assistance.

In early November 2022, plaintiff and Donohue met with the School's "external PR team" where "Donohue embarrassed and humiliated [plaintiff] by treating her like a child, telling her, for example, 'you know what I look like, so you don't need to look back at me.'" That evening, a nonparty member of the external PR team, Michael Olivia, allegedly texted plaintiff from a bar, drunk, and said unspecified "inappropriate things about Donohue and [the School], which [plaintiff] found to be extremely disconcerting".

Plaintiff attempted to resign on November 8, 2022, but defendant Mielnik insisted she give two weeks of notice. A few days later, plaintiff met with Donohue and Mielnik he "urged" her to continue at

the School "with an increase in salary and a possible promotion to a management-level position by February 2023. They also promised to improve her work environment, telling her that she would report directly to Donohue... that [Donohue] would go easier on her... [Plaintiff] decided to give it another try."

According to plaintiff, things did not change. On or about December 7, 2022, plaintiff "again found herself overloaded with various tasks at the last minute by upper management staff..." Plaintiff claims that Olivia emailed plaintiff asking her to convert a Microsoft document to PDF for him. Plaintiff admits that she responded "with direction on how to accomplish this simple task, copying in Donohue and other management personnel." Plaintiff further alleges that

> Donohue responded by running over to Plaintiff and screaming at the top of his lungs. His face turned bright red as he slammed his fist down on her desk, calling her names and demanding "why the fuck would you write that to me." He further commented: "You're so unprofessional, pathetic, and incompetent." Meanwhile, Plaintiff pointed out to him that she had to get a press release done by 6 p.m. that same day and that if he wanted to scream at her, he should have asked her to come to his office instead of doing it in front of the whole staff. After he stormed off, she completed the press release and left to go home since she did not want the rest of the staff to see her crying. She texted Donohue's assistant, saying she would work the rest of the day from home.

Defendant finally resigned on December 13, 2022 after she felt that Donohue "did not want to talk or see her" and told plaintiff "to take a separate car" to an event." According to plaintiff, "[s]he decided at that point that she could not take any more of the stress and psychological abuse she was being submitted to..."

To support her claim for defamation, plaintiff alleges that she received a "Cease and Desist" letter dated December 19, 2022 because plaintiff "was receiving communications via social media, text message and phone calls from present and former employees" for the purpose of "bring[ing] awareness to [the School's] inferior services to obtain improved services for the benefit of the students." Specifically, plaintiff alleges that the defamatory statement in the 12/19/22 Letter read as follows:

> "Your actions violate federal law, including but not limited to The Family Educational Rights and Privacy Act (FERPA) and The Health Insurance Portability and Accountability Act of 1996 (HIPAA), as well as New York State privacy laws prohibiting the publication and/or dissemination of confidential and private images and other private health information of minor." (footnote omitted)

Plaintiff claims that photographs she posted "were the same that the defendants encouraged her to post during her employment."

Plaintiff further alleges that one day after this action was commenced, defendants filed a retaliatory copyright infringement and defamation case against Plaintiff in federal court on January 25, 2023 entitled iBRAIN v. Newman, U.S.D.C., S.D.N.Y., Case 1:23-cv-00638-JPO. Plaintiff states:

> Upon information and belief, iBRAIN's federal complaint against Newman for $2.9 million was intended to frighten her into silence regarding (i) the exercise of her First Amendment rights to speak out about the fraud and abuse, as well as dangerous facilities, substandard educational services, and questionable financial practices at iBRAIN that she had become aware of at iBRAIN and from her communications with parents and other current and former employees, and in direct retaliation for her efforts to blow the whistle on these practices and to inform that public and relevant governmental officials of these practices, and (ii) her right to petition this public forum to enforce her rights.

Plaintiff has asserted five causes of action against the defendants: [1] sexual harassment and gender discrimination in violation of the New York State Human Rights Law, Exec. Law § 290 *et seq.* ("NYCSHRL"), and the New York City Human Rights Law, Admin Code § 8-101 *et seq.* ("NYCHRL").; [2] hostie work environment in violation of the NYSHRL and NYCHRL; [3] wrongful retaliation; [4] libel and defamation *per se*; and [5] intentional infliction of emotional distress.

Parties' arguments

Defendants argue that plaintiff has failed to state a prima facie cause of action, that the action should be dismissed against defendant Mielnik and scandalous and unnecessary allegations in plaintiff's amended complaint should be stricken.

In opposition to the motion, plaintiff has provided sworn affidavits from three former coworkers and a paraprofessional who was fired from the School in 2021. Two of the former coworkers, Victoria Kelly, a musical therapist, and Dahlia Afeef, a videographer, claimed that women were treated differently at the School. Kelly states in pertinent part:

> Dr. Pedro shouted at and demeaned me and the rest of the music therapy team, which were all women. He also forced us to participate in his unethical research. He fired any woman employee who stood up to him or said anything he did not agree with. Two of my direct supervisors (both women) were fired for absolutely no reason while I was working there. Dr. Pedro was especially demeaning to me and the other women who worked there.

Meanwhile, Afeef states:

> I and other women employees at [the School] were definitely treated differently than the male employees there, in that Patrick Donohue and others in upper management spoke to us and treated us in a short, disrespectful manner, which sharply worded orders to 'do this or do that' with little or no explanation or discussion. It was definitely a hostile work environment. The male employees were treated much better, as if they were real human beings and not work-slaves to be ordered around. Donohue and the other managers also refused to listen to or consider my ideas or that of the other women employees, and would often just shout us down or dismiss us as if we could not possible come up with any good ideas. It was as if the only good ideas could come from the male employees. And if the women employees hesitated or questioned an order, they would likely be summarily fired. It was 'my way or the highway' when it came to the women employees at [the School].

**Discussion**

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). 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 (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

Under CPLR § 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez, supra* at 88).

At the outset, plaintiff's claims against Mielnik are severed and dismissed. In order to save these claims, plaintiff's counsel asserts that "Mielnik compounded this abuse, and aided and abetted [] humiliating treatment, by chuckling, taking notes, and smirking at Plaintiff", refused to accept her resignation

in November 2022, and acted as a go-between with Donohue by relaying Donohue's order that plaintiff come to the office first on December 13, 2022 and take a separate car to the event. In order to state a claim for aiding and abetting discrimination, plaintiff must allege that Mielnik "actually participated" in the alleged discriminatory acts (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 328-329 [2004]. Here, the court agrees with defendants that plaintiff's claims are insufficient to demonstrate a prima facie cause of action against Mielnik. Accordingly, plaintiff's claims against Mielnik are severed and dismissed.

First cause of action

Plaintiff alleges gender-based discrimination in violation of the NYCHRL and NYSHRL. A *prima facie* case of discrimination requires a showing by the plaintiff that: [1] she is a member of a protected class; [2] she was qualified to hold the position; [3] she was terminated from employment or suffered another adverse employment action; and [4] the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Only if these elements are satisfied will there be a rebuttable presumption of discrimination which the employer can then rebut by proving a legitimate, independent, non-discriminatory reason for the adverse employment action (*id.* citing *Ferrante v. American Lung Association*, 90 NY2d 623 [1997]; see also *McDonnell Douglas Corp. v. Green*, 411 US 792 [1973]). If the employer is successful, the burden then shifts back to plaintiff who must prove that the reason being offered is a pretext, and therefore false.

Reading the complaint in the most favorable light, plaintiff has failed to allege that she suffered an adverse employment action or circumstances giving rise to the inference of discrimination. On the contrary, plaintiff's claims amount to mere personality conflicts, complaints about being subject to deadlines, being given responsibilities and other hyperbolic rhetoric. For example, while plaintiff claims that Dr. Pedro was "creepy" and engaged in "inappropriate and harassing conduct", these statements are too vague and conclusory to establish that plaintiff was discriminated against on the basis of gender. Plaintiff also complains that male coworkers had less or no work to do and were able to sleep at work. These allegations do not demonstrate an adverse employment action suffered by plaintiff.

Similarly, the affidavits submitted by plaintiff in opposition to defendants' motion fail to bolster plaintiff's claims with anything more than general statements about disparities in treatment between women and men at the School. Plaintiff has already amended her complaint once and still, even in opposition to the motion, plaintiff has failed to substantiate a claim for gender-based discrimination. Accordingly, plaintiff's first cause of action is severed and dismissed.

Second cause of action

Under the NYSHRL, a hostile work environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Forest, supra* at 310 quoting *Harris v. Forklift Sys., Inc.,* 510 US 17 [1993]). The NYCHRL standard is more liberal that the NYSHLR standard for a hostile work environment claim, and plaintiff need only show that she has been treated less well than other employees because of her gender (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 [1st Dept 2009]; *see also Abe v. New York University*, 159 AD3d 445 [1st Dept 2019]).

Reading the allegations in the most favorable light, the court finds that plaintiff has alleged sufficient facts to survive defendants' motion to dismiss her second cause of action. When coupled with the affidavits of Kelly and Afeef, plaintiff has stated a claim under the NYCHRL that she was treated less well than male employees at the School. As for the NYSHRL-based claim, the court finds that given the relatively short period of time that plaintiff worked at the School, plaintiff has alleged sufficient facts to establish severe and pervasive discriminatory conduct which altered the terms of plaintiff's employment. Accordingly, defendants' motion to dismiss the second cause of action is denied.

Third cause of action

Defendants' motion to dismiss plaintiff's retaliation claims is granted. To state a claim of retaliation, plaintiff must allege that she engaged in a protected activity, his employer was aware of his participation in such activity, plaintiff suffered an adverse employment action based upon the activity, and there is a causal connection between the protected activity and the adverse action (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]). Absent from plaintiff's complaint are any facts which would support ever element of a claim for retaliation. Instead, as defense counsel correctly points out, "the facts fail to show any causal relationship between the protected activity Plaintiff claims to have engaged in and any so-called 'retaliatory' acts by Defendants." Accordingly, the third cause of action is also severed and dismissed.

Fourth cause of action

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 him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Stepanov v. Dow Jones & Co., Inc.*, 120 AD3d 28 [1st Dept 2014] citing *Foster v. Churchill*, 87 NY2d 744, [1996]). Whether the statements constitute fact or opinion is a question of law for the court to decide (*Silsdorf v. Levine*, 59 NY2d 8 [1983] *cert denied* 464 US 831).

The elements of a defamation claim are: [1] a false statement; [2] publication of the statement without privilege or authorization to a third party; [3] constituting fault as judged by, at a minimum, a negligence standard; and [4] the statement must either cause special harm or constitute defamation *per se* (*Dillon v. City of New York*, 261 AD2d 34 [1st Dept 1999] citing Restatement of Torts, Second § 558). A defamation claim must be pled with particularity, so that a plaintiff must allege the particular words complained of as well as the time, place and manner of the statement and to whom the statement was made (CPLR 3016[a]; *Dillon*, *supra* at 38).

In evaluating the viability of a defamation claim, the words must be construed in the context of the entire statement before an ordinary audience, and if the statement is not reasonably susceptible to a defamatory meaning, the claim is not actionable (*Silsdorf v. Levine*, 59 NY2d 8 [1983] *cert denied* 464 US 831). "Courts will not strain to find defamation where none exists" (*Dillon, supra* at 38 [internal quotation omitted]).

Meanwhile, defamation *per se* does not require a showing of special damages. A statement charing a plaintiff with a serious crime is considered defamation *per se* (*see Liberman v. Gelstein*, 80 NY2d 429 [1992]). On this point, the court agrees with plaintiff that the 12/19/22 Letter charged plaintiff with violating the law, which if plaintiff can prove was false, would constitute slander *per se*. Therefore, to the extent that plaintiff has alleged a cause of action for libel *per se*, defendants' motion to dismiss the fourth cause of action is denied.

Fifth cause of action

A cause of action for intentional infliction of emotional distress has four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Chanko v. American Broadcasting Companies Inc.*, 27 NY3d 46 [2016] quoting *Howell v. New York Post Co.*, 81 NY2d 115 [1993]). This cause of action is subject to a one-year statute of limitations (CPLR § 215[3]; see *Bellissimo v. Mitchell*, 122 AD3d 560 [2d Dept 2014]).

A plaintiff bears a heavy burden of alleging a claim for intentional infliction of emotional distress (*Howell v. New York Post Co., Inc.*, 81 NY2d 115 [1993]). Plaintiff must assert conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency ... and

[is] utterly intolerable in a civilized community" (*Kickertz v. New York University*, 110 AD3d 268, 277-278 [1st Dept 2013] citing *Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 N.Y.3d 15 [2008]).

Here, the court agrees with defendants that plaintiff has not alleged sufficient facts to support the necessary elements of a cause of action for intentional infliction of emotional distress. Yelling at plaintiff, telling her to close the door, and other vague and conclusory allegations are insufficient to state such a claim. Accordingly, defendants' motion to dismiss the fifth cause of action is granted.

Strike scandalous matter

Defendants move to strike paragraph 7-18, 20-25, 39-41, 45 and 47-50 from the amended complaint pursuant to CPLR 3024[b]. Under this Rule, a party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading. "In reviewing a motion pursuant to CPLR 3024(b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action" (*Soumayah v. Minnelli*, 41 AD3d 390 [1st Dept 2007]).

Since the challenged allegations contained in paragraphs 7-18, 20-25, and 39-40 and 47-50 of the amended complaint are wholly irrelevant to plaintiff's viable cause of actions, the motion is granted and these portions of plaintiff's complaint are stricken (see i.e. *New York City Health and Hospitals Corp. v. St. Barnabas Community Health Plan*, 22 AD3d 391 [1st Dept 2005]). The court notes that by striking these allegations, plaintiff is not precluded from introducing such claims at trial in the event they should become relevant (*Soumayah*, *supra*). However, at this stage of the litigation, these allegations are unnecessarily inserted into plaintiff's amended complaint and must be stricken (*Schachter v. Massachusetts Protective Assn.*, 30 AD2d 540 [2d Dept 1968]). The motion is, however, denied as to the remainder of the challenged portions of plaintiff's complaint. Paragraphs 41 and 45 provide context for plaintiff's defamation claim and is therefore not unnecessary (*New York City Health and Hospitals Corp., supra*).

**CONCLUSION**

Accordingly, it is hereby

**ORDERED** that defendants' motion is granted to the following extent:

[1] plaintiff's claims against Mielnik are severed and dismissed; and

[2] plaintiff's first, third and fifth causes of action are severed and dismissed; and

[3] paragraphs 7-18, 20-25, and 39-40 and 47-50 of the amended complaint are stricken.

And it is further **ORDERED** that defendants shall answer the complaint within 30 days from entry of this decision/order; and it is further

**ORDERED** that remaining parties in the above captioned matter are hereby directed to submit a proposed Preliminary Conference order on consent on or before September 29, 2023.

Pursuant to the Uniform Civil Rules for the Supreme Court and the County Court § 202.11:

> Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery, including discovery of electronically stored information, and any other issues to be discussed at the conference, (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case.

Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.

All sides are directed to meet and confer before the above date and present a proposed preliminary conference order on consent, completing page 1 (and if necessary, the additional directives) of the preliminary conference order form available on the nycourts.gov website at:

https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-Genl.pdf

Proposed preliminary conference orders must be filed on NYSCEF. If all sides do not consent to completing the preliminary conference order outside of court, the parties SHALL submit a joint letter on or before the above date advising as to the status of the meet and confer and what issues, if any, have arisen which prevent the parties from completing a proposed preliminary conference order on consent.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 8/16/23
New York, New York

So Ordered:

**Hon. Lynn R. Kotler, J.S.C.**