SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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TARA GUGLIUCCIELLO,

Plaintiff,

- v -

CITY OF NEW YORK, DEPUTY INSPECTOR ANDREW ARIAS,

Defendants.

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INDEX NO. 156669/2022

MOTION DATE 01/31/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to DISMISS.

Upon the foregoing documents, defendants' motion to dismiss plaintiff's complaint is granted in part.

Plaintiff's complaint alleges, in pertinent part, as follows:

Plaintiff joined the New York City Police Department ("NYPD") as a police officer in July 2001, and was promoted to Detective in 2008. In 2017, plaintiff became pregnant and gave birth to her son on December 26, 2017. Thereafter she remained home to care for her son until June 2018, using her pregnancy leave and, when it ran out, her accrued vacation time.

Upon returning to work at the 13th Precinct, plaintiff "had issues" with the timekeeper as to whether certain of the days she was out on maternity leave should have been accounted for as sick leave or vacation time. In her efforts to resolve this issue, plaintiff "ran afoul" of the timekeeper, Gladys Dendy. Plaintiff complained about Dendy's treatment of her to the

Commanding Officer, Inspector McAndrews, and the Executive Officer, Deputy Inspector Andrew Arias. Arias declined to take any action on plaintiff's behalf.

Towards the end of 2018, the fish in the 13th Precinct's fish tank died. Arias blamed plaintiff for their death and "stated that she should be arrested for a felony." Arias subsequently transferred to Manhattan South in order to run the Detectives Squad. In January 2019 plaintiff was, against her wishes, also transferred to Manhattan South Night Watch and, as a result, continued to work out of the same building and under the same command as Arias. Prior to her transfer, plaintiff was "on the detective's list to make 2nd Grade detective."

Plaintiff was the only woman in Manhattan South Night Watch. Unlike the men in the command, she was not given a locker or an office. In addition, the men in the unit would regularly "go out on jobs" for which they received overtime while plaintiff was "forced to stay back in the command." This discrepancy in overtime allowed these male officers to make $5,000.00 to $10,000.00 more per month than plaintiff. Plaintiff asserts that, except for their gender, these male colleagues—including Dave Rodriguez, Charlie Zucconi, Marcelino Alverez, Matt Murphy, Will Smiley and Michael MacDougall—were similarly situated to her in every way, including their ranks, supervisors, and job duties. Plaintiff regularly asked for overtime which was necessary to pay for the care of her son but Arias would intercede to ensure that plaintiff did not get overtime.

After plaintiff's transfer to Manhattan South Night Watch, Arias audited plaintiff's records from the 13th Precinct, resulting in a "bogus" command discipline that forced plaintiff to "lose five days" as punishment. Plaintiff asserts that, as a result of this command discipline, she was also taken off of the list of candidates for promotion to Detective Grade Two.

Plaintiff's new desk in Manhattan South was diagonally opposite Arias's office and, as a result, plaintiff was "forced to listen" to Arias regularly use misogynistic language and berate her to other supervisors from his office, including referring to plaintiff as a "cunt" and as "fat" and "sloppy." Plaintiff asserts that she regularly complained about the "disparate treatment"—presumably, Arias's misogynist language—"only for the treatment to worsen."

Plaintiff contracted COVID-19 in December 2020 but was denied line of duty injury status, forcing her to "go personal sick" as a result, while males in the command who contracted COVID-19 were granted line of duty injury status.

In February 2021, plaintiff was again audited, at Arias's instigation, and accused of being two hours late to work on an unidentified date. Following this audit, plaintiff was administratively transferred to the 1st Precinct, which plaintiff asserts was a form of "highway therapy" as punishment for her complaints of gender discrimination. Other officers of plaintiff's team, including similarly-situated males Matt Murphy and Michael MacDougall, were also found to be late but were not disciplined or transferred.

Plaintiff filed her retirement papers in January 2022.

Plaintiff commenced this action on August 9, 2022, asserting claims under New York State Executive Law §296 et seq (also known as the New York State Human Rights Law or "NYSHRL") and New York City Administrative Code §8-107 (also known as the New York City Human Rights Law or "NYCHRL") for employment discrimination (based on gender), hostile work environment, and retaliation.

Defendants now move, pursuant to CPLR §§3211(a)(1) and (7), to dismiss the complaint. Defendants argue, as a threshold matter, that all claims that accrued prior to December 24, 2018 are time-barred. They further argue that plaintiff's employment discrimination claims fail because

she does not adequately allege that Arias had any involvement with her alleged mistreatment and, moreover, documents referenced in the Complaint—i.e., command discipline and time theft audit reports—directly contradict her allegation that Arias was responsible for any adverse employment actions against her, as they were signed by other NYPD officials. Defendants argue that plaintiff's retaliation claims fail because plaintiff does not allege when, how, or to whom these complaints were made, let alone that Arias was aware of any complaint of discrimination by plaintiff. Finally, the defendants argue that plaintiff's hostile work environment claim fails because plaintiff has failed to plead specific facts which, if true, would rise above the level of the occasional offensive remark by Arias.

Plaintiff opposes defendants' motion, arguing that, under the notice pleading standard governing this motion, her pleadings are sufficient. She adds that the documents submitted by defendant are not properly considered in connection with this motion to dismiss and, in any event, do not definitively rebut plaintiff's allegations. Plaintiff asserts, that to the extent any claims accrued prior to December 24, 2018, they are nevertheless timely under the continuing violation doctrine.

DISCUSSION

"When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference. The ultimate question is whether, accepting the allegations and affording these inferences, plaintiff can succeed upon any reasonable view of the facts stated" (Doe v Bloomberg, L.P., 36 NY3d 450, 454 [2021] [internal citations and quotations omitted]). Claims arising under the NYCHRL, in particular, must be reviewed with "an independent liberal construction analysis in all circumstances … targeted to understanding and

fulfilling … the [NYCHRL's] uniquely broad and remedial purposes" (Williams v New York City Hous. Auth., 61 AD3d 62, 66 [1st Dept 2009] [internal citations and quotations omitted]) and must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (Albunio v City of New York, 16 NY3d 472, 477-478 [2011]). Employment discrimination claims under the NYCHRL, in particular, are reviewed under a notice pleading standard, in which "a plaintiff alleging employment discrimination need not plead specific facts establishing a prima facie case of discrimination but need only give fair notice of the nature of the claim and its grounds" (Vig v New York Hairspray Co., L.P., 67 AD3d 140 [1st Dept 2009] [internal citations and quotations omitted]).

Employment Discrimination

In light of the foregoing, defendants' motion to dismiss plaintiff's claims for employment discrimination is denied. To state a claim for employment dissemination under the NYSHRL, plaintiff must allege that: (2) she is a member of a protected class; (2) she was qualified to hold the position; (3) she suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination (Ayers v Bloomberg, LP., 203 AD3d 872, 874 [2d Dept 2022]). "An adverse employment action requires a materially adverse change in the terms and conditions of employment" and "must be more disruptive than a mere inconvenience or an alteration of job responsibilities" (Forrest v Jewish Guild for the Blind, 3 NY3d 295, 306]d [internal citations and quotations omitted]). The elements of a discrimination claim under the NYCHRL largely mirror the foregoing, except that a plaintiff need not plead that she suffered an "adverse employment action," but only that she was "treated differently" because of her gender (Askin v Dept. of Educ. of the City of New York, 110 AD3d 621, 622 [1st Dept 2013]).

In this case, it is undisputed that plaintiff is a member of a protected class and was qualified for her position. To the extent that the parties dispute the final two elements of this cause of action, the Court agrees with plaintiff that she has sufficiently stated that she was adversely or differently treated through the restriction of overtime and denial of promotion (See Santiago-Mendez v City of New York, 136 AD3d 428, 428-29 [1st Dept 2016]). Her allegations that preferential treatment, including more overtime, was afforded to similarly situated comparators as well as allegations of Arias's regular misogynistic comments directed at her are sufficient to show that such adverse acts occurred under circumstances giving rise to an inference of discrimination based on (See Alshami v City Univ. of New York, 203 AD3d 592 [1st Dept 2022]; see also Demir v Sandoz Inc., 155 AD3d 464, 466 [1st Dept 2017] [allegations that plaintiff was passed over for a promotion for no legitimate reason, that she was demoted in title … and that she and other women, including other Muslim women, had been subjected to abusive and derogatory remarks about accent and religious practices alleged sufficient facts to show adverse employment actions under circumstances giving rise to an inference of discrimination]). As plaintiff's complaint states an employment discrimination claim under the NYSHRL, it also states such a claim under the NYCHRL (See Williams v New York City Hous. Auth., 61 AD3d 62, 66 [1st Dept 2009] [NYSHRL represents "a floor below which the City's Human Rights law cannot fall"]).

In opposition, defendants argue that the complaint fails to provide sufficient detail to establish that the male colleagues she identifies are in fact similarly situated to her in all relevant respects. However, at this juncture, affording plaintiff all reasonable inferences and mindful of the generous notice pleading standard to be applied, plaintiff's identification of a specific comparators, by name, is sufficient to carry her burden (See e.g., Pelepelin v City of New York, 189 AD3d 450, 452 [1st Dept 2020] [plaintiff "amply met" pleading burden on failure to promote claim by

"naming as a comparator a specific individual whose details can be particularly verified during discovery"]).

In addition, the Time Audits and "Supervisor's Complaint Report/Command Discipline Election Report" submitted by defendant are beyond the scope of their CPLR § 3211(a)(1) motion. On such a motion, only documentary evidence which "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" is permissible (Goshen v Mut. Life Ins. Co. of New York, 98 NY2d 314, 326 [2002] citing Leon v Martinez, 84 NY2d 83, 88 [1994]). The material submitted by the City here is not documentary evidence, as it is not "unambiguous, authentic, and undeniable" (Cf. Acquafredda Enterprises LLC v Sterling Natl. Bank, 202 AD3d 501, 502 [1st Dept 2022], lv to appeal denied, 38 NY3d 910 [2022]) and, in any event, does not "utterly refute" the complaint's factual allegations that Arias was the driving force behind the investigations of plaintiff and the punishments resulting from these investigations.

Hostile Work Environment

Defendants' motion to dismiss plaintiff's hostile work environment claims is also denied. 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" (Hunter v Barnes & Noble, Inc., 2023 NY Slip Op 30638[U], 8-9 [Sup Ct, NY County 2023] [internal citations and quotations omitted]). To state a hostile work environment claim under the NYCHRL, however, plaintiff need only allege facts showing that "she has been treated less well than other employees because of her protected status or that discrimination was one of the motivating factors for the defendant's conduct" (Chin v. New York City Hous. Auth., 106 AD3d 443, 445 [1st Dept 2013] citing Williams v NYCHA, 61 AD3d at 75-78 [2013]).

Plaintiff has satisfied both standards through her allegations that disparaging and misogynistic comments were regularly directed toward her—sometimes in the presence of NYPD supervisors—along with allegedly unfounded discipline, unfavorable assignments, and the denial of promotional opportunities (See Alshami v City Univ. of New York, 203 AD3d 592 [1st Dept 2022]; see also Demir v Sandoz Inc., 155 AD3d 464, 466 [1st Dept 2017]; Anderson v Edmiston & Co., Inc., 131 AD3d 416, 417 [1st Dept 2015] ["Plaintiff has also adequately alleged a claim for hostile work environment by alleging that her supervisor routinely made deprecatory, vulgar, and offensive remarks about women"]).

Retaliation

Finally, defendants' motion to dismiss plaintiff's retaliation claims under the NYSHRL and NYCHRL is granted. To make out a prima facie claim of retaliation under the NYSHRL, plaintiff must allege that (1) she engaged in a protected activity, (2) her employer was aware of this protected activity, (3) she suffered an adverse employment action as a result of the protected activity, and (4) a causal connection exists between the protected activity and the adverse action (Harrington v City of New York, 157 AD3d 582, 585 [1st Dept 2018]) [internal citations and quotations omitted]). In this context, "protected activity" refers to "actions taken to protest or oppose statutorily prohibited discrimination" (Thomas v Mintz, 60 Misc 3d 1218(A) [Sup Ct, NY County 2018] [internal citations omitted], aff'd as mod, 182 AD3d 490 [1st Dept 2020]) while an adverse employment action is one which might have "dissuaded a reasonable worker from making or supporting a charge of discrimination" (Reichman v City of New York, 179 AD3d 1115, 1119 [2d Dept 2020] [internal citations and quotations omitted]). Under the NYCHRL, the test is similar, though rather than an adverse action, the plaintiff must allege only that the defendant took an action that disadvantaged him (Id.).

Here, plaintiff's complaint fails to allege that she engaged in any protected activity, she does not identify the person or people to whom she complained or when she made these complaints. These omissions mandate the dismissal of her retaliation claims (See e.g., Whitfield-Ortiz v Dept. of Educ. of City of New York, 116 AD3d 580, 581 [1st Dept 2014] [retaliation claims properly dismissed where plaintiff "did not state the substance of her alleged complaints, to whom she allegedly complained, or when such complaints were made" and "failed to plead any facts regarding when the alleged retaliatory incidents occurred or how those incidents were causally connected to any protected activity"]).

In light of the foregoing, it is

ORDERED that defendants' motion is granted to the limited extent that plaintiff's claims for retaliation under the New York State Human Rights Law and New York City Human Rights Law are hereby dismissed; and it is further

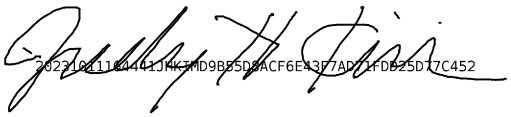
ORDERED that defendants' motion is otherwise denied; and it is further

ORDERED that within fifteen days of the date of this decision and order counsel for the City of New York shall serve a copy of this decision and order, with notice of entry, upon defendant as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and 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 Cases (accessible at the

"EFiling" page on this Court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



10/11/2023
DATE

HON. JUDY H. KIM, 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