SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO S. HAGLER** **PART** **17**

Justice

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SYDNEY PUPPO,

Plaintiff,

- v -

BLUEMERCURY, INC., MARLA BECK, MARK MORTA, NATALIA NORMAN

Defendant.

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INDEX NO. 152105/2021

MOTION DATE 01/31/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 45

were read on this motion to/for DISMISSAL.

In motion sequence number 003, defendants MARK MORTA (hereinafter "Morta") and NATALIA NORMAN (hereinafter "Norman") move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing plaintiff SYDNEY PUPPO (hereinafter "plaintiff") verified complaint as against them.

BACKGROUND

Plaintiff filed an amended summons and verified complaint against defendants Morta and Norman on May 13, 2021. (*See* NYSCEF DOC. NO. 11). Plaintiff alleges that she began working as a sales associate at BlueMercury in July 2019.[1] (*id.* at ¶ 8). Plaintiff further alleges that in November 2019, she was working at the Sutton Place store with Morta as her store manager. (*id.* at ¶ 10). In November 2019, plaintiff states she inadvertently sent Morta an intimate image of herself that "depicted her partially exposed buttocks covered only by an

[1] In an order dated April 11, 2022, following oral argument, this Court granted defendant Marla Beck's motion to dismiss the complaint (mot. sequence number 001). (*id.*). Additionally, this Court granted the portion of defendant's motion seeking dismissal of the cause of action for quid pro quo sexual harassment as to defendant Bluemercury, as moot "in light of plaintiff's withdrawal of said cause of action." (*See* NYSCEF DOC. NO. 43).

undergarment." (*id.* at ¶ 11). Plaintiff then immediately advised Morta that the photo was sent accidentally, and it was not intended for him. (*id.* at ¶ 12).

Plaintiff alleges that Morta, without her permission or consent, "distributed the [i]ntimate [i]mage in February 2020, with the intent to cause substantial emotional harm to [p]laintiff, to at least one other employee, [defendant] Norman" who had become plaintiff's store manager at the time. (*id.* at ¶ 13). Plaintiff alleges that following the unauthorized disclosure of the intimate image, plaintiff was "ridiculed in front of other colleagues by Norman on multiple occasions even though [plaintiff] advised Norman that she should not discuss it and it made her uncomfortable." (*id.* at ¶ 16).

Plaintiff further alleges that defendant Norman "began a campaign of gender discrimination, sexual harassment and retaliation." (*id.* at ¶ 17). In support of this claim, plaintiff alleges that defendant Norman texted plaintiff to ask if her boyfriend was "deep inside" her and, on another occasion, texted plaintiff expressing hope that her boyfriend was "very deep inside" her. (*id.* at ¶ 17). Defendant Norman allegedly also texted plaintiff to suggest that plaintiff purchase her a birthday gift. (*id.*).

Plaintiff alleges that upon her refusal to engage with defendant Norman, defendant Norman retaliated by writing plaintiff up. (*id.* at ¶ 18). Plaintiff adds that she "was forced to resign because the company condoned [defendant] Norman's retaliation." (*id.* at ¶ 20).

DISCUSSION

"'[A] motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law.'" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 125 [2d Dept 2009],

affd 16 NY3d 775 [2011], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

Moreover, in considering a motion to dismiss for failing to state a cause of action pursuant to CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction (*see* CPLR § 3026), and the court should "accept the facts as alleged in the complaint as true, accord plaintiffs 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 African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013]).

Although "evidentiary material may be considered in determining the viability of a complaint . . . the complaint should not be dismissed unless the defendant has established that a material fact alleged by the plaintiff is not a fact at all and that no significant dispute exists regarding it." (*Stewart v New York City Tr. Auth.*, 50 AD3d 1013, 1014 [2d Dept 2008][internal quotation marks and citation omitted]; *see also Nunez v Mohamed*, 104 AD3d 921, 922 [2d Dept 2013]).

Moreover, NYC Admin. Code § 10-180(b)(1) provides:

> "It is unlawful for a covered recipient to disclose an intimate image, without the depicted individual's consent, with the intent to cause economic, physical or substantial emotional harm to such depicted individual, where such depicted individual is or would be identifiable to another individual either from the intimate image or from the circumstances under which such image is disclosed."

INTIMATE IMAGE

Here, defendant Morta first argues that plaintiff's sixth cause of action must be dismissed as to defendant Morta because the image does not depict any "intimate body parts" and plaintiff is not identifiable in the photograph. (*See* NYSCEF DOC. NO. 36, pgs. 14-15).

Specifically, Morta alleges that "the image that [plaintiff] sent to [defendant] Morta depicts the buttocks of a headless, naked body." (*id.* at pg. 14). Morta argues that pursuant to NYC Admin. Code § 10-180(a), "intimate body parts" is specifically defined as "the genitals, pubic area or anus of any person, or of the female nipple or areola of a person who is 11 years old or older." (*id.*). According to Morta, the photograph does not depict "a pubic area or anus" and, thus, does not purport to show any "intimate body parts." (*id*).

Additionally, Morta argues that even if the photograph depicted an intimate body part, plaintiff's claim should still be denied on the ground that "there is simply no identifying evidence that the buttock depicted in the relevant photo actually belongs to [plaintiff]." (*id.* at pg. 15). Defendant contends that the cause of action must fail and be dismissed, given that plaintiff's head or face cannot be seen.

Lastly, defendant asserts that plaintiff has failed to establish that Morta disclosed the image of plaintiff with the "intent to cause economic, physical, or substantial emotional harm," as outlined in NYC Admin. Code § 10-180(b)(1). (*id.*).

In opposition to defendant's motion, plaintiff argues "New York criminal courts have consistently held the buttocks to be an intimate part within the meaning of sexual offense statutes." (*See* NYSCEF DOC. NO. 40 at pg. 9). Moreover, plaintiff maintains that she is identifiable from the image given that Norman, the recipient of the intimate image from Morta, ridiculed her for the photograph in front of her colleagues. (*id.* at pg. 10). Plaintiff adds that assuming, *arguendo*, that even if questions of fact exist as to whether plaintiff is identifiable, defendants are not entitled to dismissal "'[b]ecause questions which cannot be resolved on a motion to dismiss are present and because a full record has not been developed.'" (*id.*).

At the outset, it is undisputed that Morta disclosed the image to Norman, without the permission or consent of plaintiff. (*See* NYSCEF DOC. NO. 11 at ¶ 13).

The plain meaning of NYC Admin. Code § 10-180 prohibits the disclosure of any intimate image without consent. Here, plaintiff has sufficiently pled facts to support a claim for the unlawful disclosure of an intimate image. Morta's argument that NYC Admin. Code § 10-180(b) specifically enumerates that an "anus" and not "buttocks" constitute intimate body parts that would render the photograph an "intimate image" is a question appropriate for a jury as a finder of fact.

Moreover, defendant's second argument that there is no identifying evidence "that the buttock depicted in the relevant photo" belongs to plaintiff must also be denied. While there is indeed no face or head in the photograph, NYC Admin. Code § 10-180(b)(1) provides that an intimate image cannot be disclosed where the depicted individual can be identified "from the circumstances under which such image is disclosed."

Here, plaintiff has sufficiently pled that she inadvertently sent the image to Morta via text message. Plaintiff's pleadings also establish that Morta had knowledge that the sender of the photograph was plaintiff, after which he forwarded the image to Norman without plaintiff's consent. Therefore, plaintiff has sufficiently pled facts that make plaintiff identifiable "from the circumstances under which such image is disclosed." (NYC Admin. Code § 10-180(b)(1)).

Accordingly, defendant Morta's motion seeking dismissal, on the grounds that plaintiff's image was not an intimate image in accordance with NYC Admin. Code § 10-180(b), is denied. Further, the branch of Morta's motion seeking dismissal on the grounds that plaintiff is not identifiable in the image and that the requisite intent was not pled, is also denied. Lastly, Morta's contention that the plaintiff has failed to establish that Morta disseminated the image

with the "intent to cause economic, physical, or substantial emotional harm" is also denied. Indeed, plaintiff has sufficiently pled that Morta, who was her work supervisor at the time she inadvertently disclosed the image, forwarded the same image to Norman, at a time when Norman was plaintiff's new work supervisor. Plaintiff has sufficiently pled that she experienced significant distress at her place of employment, as a result of the dissemination of the image.

Accordingly, defendant Morta's motion to dismiss plaintiff's claim related to the disclosure of the intimate image is denied.

SEXUAL HARSSMENT- CONSTRUCTIVE DISCHARGE AND HOSTILE WORK ENVIRONMENT

Defendants next argue that plaintiff's cause of action, alleging a constructive discharge from her employer, should be dismissed as "the [c]omplaint is devoid of any facts linking the alleged viewing of the image by [defendant] Norman to the conduct [plaintiff] claims to have experienced." (*See* NYSCEF DOC. NO. 36 pg. 18). Defendants further move to dismiss plaintiff's claim of a hostile work environment, arguing that plaintiff has not established a claim pursuant to the New York State Human Rights Law ("NYSHRL"). (*id.* at pg. 19).

In support of their argument, defendants seek to compare the facts of this case with those in the matter of *Poolt v Brooks*, 38 Misc 3d 1216(A), 2013 NY Slip Op 50116(U) [Sup Ct, NY County 2013]. Defendants argue that in *Poolt*, a plaintiff who quit her job because of "'large pictures of various naked women'" did not amount to constructive discharge. (*See* NYSCEF DOC. NO. 36 at pg. 17). Defendants add that alleged harassment of plaintiff in *Poolt* included "'off-color comments in a work context'" as well as a "'major incident of sexual harassment involving inappropriate intimate questions, improper comments and suggestive gestures." (*id.*). Defendants conclude that any claims for constructive discharge should be denied because "similar to the plaintiff in *Poolt*, the "'off-color comments'" in a work environment and passing

instances of "'intimate"' questions are not enough to support a claim for constructive discharge." (*id.* at pgs. 18-19).

It is noteworthy that *Poolt* was decided as part of a summary judgment motion, pursuant to CPLR 3212. However here, defendants have moved to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1) and 3211(a)(7). As such, plaintiff's pleadings are to be afforded a liberal construction and thus a court should "accept the facts as alleged in the complaint as true, accord plaintiffs 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 [1995]; *see also African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013]).

In order to establish a claim for constructive discharge, the plaintiff must demonstrate "deliberate and intentional" acts of the employer created an "intolerable workplace condition" which would compel a "reasonable person to leave" their employment. (*See Morris v Schroder Capital Mgmt. Intl.*, 7 NY3d 616, 622 [2006]; *see also Polidori v Societe Generale Groupe*, 39 AD3d 404, 405 [1st Dept 2007]). Furthermore, a hostile work environment exists when "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." (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004][internal quotation marks and citation omitted]).

Additionally, "whether a workplace may be viewed as hostile or abusive–from both a reasonable person's standpoint as well as from the victim's subjective perspective–can be determined only by considering the totality of the circumstances." (*Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 51 [4th Dept 1996]). A

totality of the circumstances includes the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." (*Forrest* , 3 NY3d at 310-11). Additionally, under the NYSHRL, "isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment; in order to be actionable, the offensive conduct must be pervasive." (*Matter of Father Belle Community Ctr.*, 221 AD2d at 51).

Here, plaintiff alleges that following the unauthorized disclosure of the intimate image, she was "ridiculed in front of other colleagues" by Norman "on multiple occasions even though [plaintiff] advised Norman that she should not discuss it and it made her uncomfortable." (*See* NYSCEF DOC. NO. 11 at ¶ 13). Plaintiff further maintains that Norman texted plaintiff on several occasions, including to ask if her boyfriend was "deep inside" her and again to express hope that plaintiff's boyfriend was "very deep inside" her. (*id.* at ¶ 17). Defendant Norman allegedly also texted plaintiff to suggest that plaintiff purchase her a birthday gift. (*id.*).

When accepted as true and viewed most favorably, Norman's alleged conduct is sufficient to establish a claim for hostile work environment and constructive discharge. Plaintiff's allegations that Norman ridiculed her in front of her colleague about an intimate image "on multiple occasions," despite plaintiff stating she was uncomfortable, demonstrates facts to support a claim that the workplace was permeated with "insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." (*Forrest* 3 NY3d at 310). Plaintiff asserts that defendant Norman's ridicule was the result of an improperly disseminated image depicting an intimate image of plaintiff's body, which is pervasive on its face. Additionally, the allegations that plaintiff received text messages

from her supervisor, Norman, asking if plaintiff's boyfriend was "deep inside" her, is offensive conduct that is pervasive under the NYSHRL. (*See* NYSCEF DOC. NO. 11 at ¶ 13).

In assessing the totality of the circumstances, the ridicule plaintiff allegedly endured related to the intimate image, coupled with the pervasive and sexual text messages, sufficiently state a cause of action for a hostile workplace. Plaintiff claims that defendant Norman's conduct caused plaintiff to suffer adverse employment consequences and, as a result, plaintiff was forced to resign from her employment. (*id.* at ¶¶ 20-21).

With respect to Morta, plaintiff has not sufficiently pled a claim for hostile work environment or constructive discharge. At the time that Norman allegedly ridiculed plaintiff and sent her sexual text messages, Morta was no longer plaintiff's supervisor. Additionally, Morta's act of distributing the image to Norman, does not on its face demonstrate facts to show that a workplace was permeated with "insult that is sufficiently severe or pervasive to alter the conditions" of Puppo's employment. (*Forrest*, 3 NY3d at 310). Aside from sharing the intimate image of plaintiff with Norman, the facts do not bear out a claim for hostile work environment or constructive discharge as to Morta.

Accordingly, defendants' motion to dismiss plaintiff's claim for constructive discharge and hostile workplace, is denied as to defendant Norman, and granted as to defendant Morta.

GENDER DISCRIMINATION

Defendants also argue that plaintiff's cause of action under the NYSHRL and the New York City Human Rights Law ("NYCHRL"), alleging gender discrimination, should be dismissed as plaintiff "has failed to plead facts demonstrating that she suffered an adverse employment action under circumstances giving rise to an inference of discrimination." (*See* NYSCEF DOC. NO. 36 at pg. 23). In opposition, plaintiff argues that defendants' main

argument is that "[plaintiff] cannot prove that she was subjected to an adverse employment action by [d]efendants" and thus, cannot sustain a claim for gender discrimination. (*See* NYSCEF DOC. NO. 40 at pg. 15).

To establish a prima facie claim for gender discrimination, a plaintiff must demonstrate "(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,* 3 NY3d at 305). In considering claims of sex discrimination under the NYSHRL and the NYCHRL, the crucial inquiry is "whether the plaintiff…has been treated less well than other employees because of her gender." (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 [1st Dept 2009]). Courts have also noted that "the prohibitions against sex discrimination address themselves not to discrimination on account of one's sexual relationships, but rather to discrimination based on one's gender in and of itself." (*Mastrototaro v Consolidated Edison Co. of New York, Inc.*, 1990 WL 47709 [SDNY 1990]).

Additionally, "an adverse employment action requires a materially adverse change in the terms and conditions of employment. To be materially adverse, a change in working conditions must be "'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" (*Forrest,* 3 NY3d at 306 [internal citation omitted]).

Here, plaintiff's complaint fails to sufficiently plead gender discrimination. In her complaint, plaintiff alleges that Norman "began a campaign of gender discrimination, sexual harassment and retaliation." (*See* NYSCEF DOC. NO. 11 at ¶ 17). Plaintiff maintains that defendant Norman's conduct included texting plaintiff to ask if her boyfriend was "deep inside" her and, on another occasion, texted plaintiff expressing hope that her boyfriend was "very deep

inside" her. (*id.* at ¶ 17). Defendant Norman allegedly also texted plaintiff to suggest that plaintiff purchase her a birthday gift. (*id.*).

These allegations alone fail to establish an inference of gender discrimination. The summons and complaint does not provide any indication that plaintiff was "treated less well than other employees because of her gender." (*See Williams,* 61 AD3d at 78).

Additionally, plaintiff's complaint is completely devoid of any facts to demonstrate how Morta discriminated against plaintiff based on her gender. At the time of Norman's alleged discriminatory campaign, Morta was no longer supervising plaintiff. Accordingly, defendants' motion to dismiss plaintiff's claim for gender discrimination is granted as to both defendants Morta and Norman.

RETALIATION

Defendants next argue that plaintiff's cause of action, alleging retaliation by defendant Norman, should be dismissed because plaintiff "cannot demonstrate that she suffered an adverse employment action under State law, or that she was subjected to conduct that was reasonably likely to deter a person from engaging in that activity." (*See* NYSCEF DOC. NO. 36 at pg. 24).

"Under both State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices." (*Forrest,* 3 NY3d at 312). In order to establish a prima facie claim for retaliation, a plaintiff must demonstrate 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." (*id.* at 313). "The same analysis employed for retaliation claims under Title VII and NYSHRL applies to retaliation

claims under the NYCHRL." (*Acosta v City of NY*, US Dist Ct SD NY, 11 Civ. 856, 2012 WL 1506954, at *7 (SDNY 2012).

Here, plaintiff's complaint fails to sufficiently establish a claim for retaliation. Plaintiff alleges that "when [plaintiff] refused to engage with [defendant] Norman," defendant Norman retaliated by writing plaintiff up. (*See* NYSCEF DOC. NO. 11 at ¶ 19). Indeed, courts have held that "[d]isciplinary notices, threats of disciplinary action and excessive scrutiny do not constitute adverse employment actions in the absence of other negative results such as a decrease in pay or being placed on probation." (*Lewis v Snow*, 2003 WL 22077457, *82003 US Dist LEXIS 15700, *24 [SDNY 2003] *quoting Lumhoo v Home Depot USA, Inc.*, 229 F Supp 2d 121, 150 [EDNY 2002]).

Here, a mere allegation that plaintiff was written up after refusing to interact with defendant Norman is, on its face, insufficient to sustain a claim of retaliation predicated upon an adverse employment action. Additionally, plaintiff's complaint is completely devoid of any facts to demonstrate how Morta retaliated against plaintiff, when Norman was plaintiff's supervisor.

Accordingly, defendants' motion to dismiss plaintiff's claim for retaliation is granted as to both defendants Morta and Norman.

AIDING AND ABETTING

Finally, defendants argue that plaintiff's cause of action, alleging aiding and abetting by both Morta and Norman, should be dismissed. Specifically, defendants assert that the "sole factual assertion against Morta is that he received a picture from [plaintiff] and forwarded that image along to another Bluemercury supervisor." (*See* NYSCEF DOC. NO. 36 at 27). Additionally, defendants argue that "to the extent any claims in this case survive, dismissal of the aiding and abetting claim against Norman is still appropriate because there are no allegations

against [defendant Morta], and an individual cannot be held liable for aiding and abetting his or her own conduct." (*id.* at pg. 27).

An individual employee may be held liable, under both the NYSHRL and the NYCHRL for aiding and abetting discriminatory conduct. However, "an individual cannot aid and abet his or her own [alleged discriminatory conduct]." (*Hardwick v Auriemma*, 116 AD3d 465, 468 [1st Dept 2014]). Moreover, an aiding and abetting claim against an employee requires plaintiff to show that the employee "'actually participated' in the conduct giving rise to [the discrimination] claim." (*Feingold v New York*, 366 F3d 138, 158 [2d Cir 2004]).

As a preliminary matter, as plaintiff has failed to state a claim for gender discrimination and retaliation, her claims that defendants aided and abetted each other in discrimination or retaliation cannot survive and must be dismissed. (*See* Executive Law § 296[6]; Administrative Code of City of N.Y. § 8-107[6]).

With respect to aiding and abetting discriminatory acts of hostile work environment and constructive discharge, plaintiff's claims must also be dismissed. Plaintiff has not sufficiently established a claim against defendant Morta for either a hostile work environment or discharge. At the time that plaintiff was ridiculed and sent pervasive messages from Norman, Morta was no longer plaintiff's supervisor. Moreover, plaintiff has not alleged any facts to support a claim that defendant Morta actually participated in the conduct giving rise to the discrimination claim. Accordingly, defendants' motion to dismiss the claims of aiding and abetting discrimination is granted.

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant MARK MORTA to dismiss the complaint herein is denied as to the claims of disclosure of an intimate image; and it is further

ORDERED that the motion of defendant MARK MORTA to dismiss the complaint herein is granted as to the claims of constructive discharge, hostile work environment, gender discrimination and retaliation; and it is further

ORDERED that the motion of defendant NATALIA NORMAN to dismiss the complaint herein is denied as to the claims of constructive discharge and hostile work environment; and it is further

ORDERED that the motion of defendant NATALIA NORMAN to dismiss the complaint herein is granted as to the claims of gender discrimination and retaliation.

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; 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 "E-Filing" page on the court's website)].

ORDERED that the balance of this action is severed and continued.

10/13/2023
DATE

SHLOMO S. HAGLER, 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