SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **05M**

Justice

----------X

EBONY HUNTLEY,

Plaintiff,

- v -

CITY OF NEW YORK, SALVATOR MARCHESE

Defendant.

----------X

INDEX NO. 151697/2023

MOTION DATE 06/05/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, 23, 24, 26

were read on this motion to DISMISS.

With the instant motion, Defendants City of New York and Captain Salvator Marchese ("Captain Marchese")(collectively, the "City") move, pursuant to CPLR § 3211(a)(7), to dismiss Plaintiff Ebony Huntley's ("Plaintiff") complaint for failure to state a cause of action. Plaintiff opposes the motion, and cross moves to amend her complaint. For the reasons stated herein, the City's motion is denied, and Plaintiff's cross motion is granted.

BACKGROUND AND ARGUMENTS

Plaintiff, having joined the New York Police Department ("NYPD") in July 2002, was promoted to the rank of Lieutenant in June 2022 and subsequently assigned to Transit District 3. Following her promotion, Captain Marchese assumed the role of Commanding Officer of Transit District 3. It is alleged that Captain Marchese made disparaging remarks about Police Officer Elizabeth Munoz, who was returning from maternity leave and on restricted duty. Plaintiff asserts that Captain Marchese instructed her to assign Officer Munoz to unfavorable shifts, such as weekends, which Plaintiff believed to be discriminatory. Furthermore, Plaintiff contends that Captain Marchese subjected her to verbal abuse, refused to communicate directly with her, and instead relayed messages through male colleagues. Additionally, Plaintiff states that her midnight shift was altered to a 4 PM to 12 AM schedule, which she was unable to accommodate due to her caregiving responsibilities. Upon Marchese's refusal to revert her shift, and in light of the purportedly hostile work environment, Plaintiff states that she tendered her resignation. Post-resignation, Plaintiff sought to work as much overtime as possible; however, she claims that Captain Marchese allegedly thwarted these efforts.

The City moves to dismiss the complaint on several grounds. First, the City argues that Plaintiff's complaint does not raise an inference of gender discrimination. It is contended that the complaint itself contradicts the assertion that Plaintiff was treated less favorably than similarly situated male colleagues. The City points out that Plaintiff's allegations suggest issues of

insubordination and performance deficiencies, which justified Captain Marchese's corrective measures. Furthermore, the City argues that Plaintiff does not specify that she was treated less favorably than her male counterparts, and the alleged comments and actions do not, according to the City, substantiate claims of discrimination.

Second, the City maintains that Plaintiff's constructive discharge claim is unsubstantiated as she fails to demonstrate that the Defendants deliberately created intolerable working conditions compelling her resignation. The reassignment to a day shift, the City argues, does not constitute the severity required to establish constructive discharge.

Third, the City argues that Plaintiff's retaliation claim is deficient as she did not engage in any protected activity under the law. Furthermore, the City submits that allegations that male officers were also subjected to difficult working conditions undermine Plaintiff's claim that she was singled out for adverse treatment.

In response, Plaintiff cross-moves to file an amended complaint, contending that the original complaint sufficiently states causes of action for discrimination, retaliation, failure to accommodate, and constructive discharge under the New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL). Plaintiff argues that her amended complaint addresses the retaliation issue by asserting that requesting an accommodation is a protected activity.

DISCUSSION

City's Motion to Dismiss

When considering a pre-answer motion to dismiss the complaint for failure to state a cause of action, a court must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference (*Chanko v Am. Broadcasting Companies Inc.*, 27 NY3d 46, 52 [2016]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002], *quoting, Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]). The procedural posture of a pre-answer motion to dismiss requires that the court limit its inquiry to the legal sufficiency of a plaintiff's claim and, "merely examine the adequacy of the pleadings and not assess the sufficiency of the parties' evidence" (*Davis v. Boeheim*, 24 NY3d 262 [2014]). Employment discrimination cases are generally reviewed under a particularly relaxed notice pleading standard (*Vig v. N.Y. Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]). 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 (*Swierkiewicz v. Sorema N.A.*, 534 U.S. 506,514-15 [2002]). In considering a motion to dismiss for failure to state a cause of action, 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 (*Sokoloff v. Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action

cognizable at law a motion for dismissal will fail" (*Guggenheimer v. Ginzburg*, 43 NY2d 268,275 (1977).

To state a claim under the NYSHRL, a plaintiff must state a prima facie cause of action for employment discrimination by pleading that (l) they arc members of a protected class; 2) they are qualified to hold the position; 3) they suffered an adverse employment action; and 4) the adverse action occurred under circumstances giving rise to an inference of discrimination (*Stephenson v. Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CJO*, 6 NY3d 265 [2006]). To state a discrimination claim under the NYCHRL, a plaintiff must allege "(l) that he/she is a member of a protected class, (2) that he/she was qualified for the position, (3) that he/she was treated differently or worse than other employees, and (4) that the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination" (*Harrington v. City of New York*, 157 A.D.3d 582 [1st Dept 2018]). While the "burden of establishing a prima facie case of discrimination is 'not onerous,'" (*Bennett v. Health Mgt. Sys. Inc.*, 92 AD3d 29, 35 [1st Dept 2011] *quoting Tex. Dept. of Cmty. Affairs v. Burdine*, 450 US 248 [1981]), failing to plead discriminatory animus of the defendant is fatal to a discrimination claim under the NYCHRL (*Toth v. N.Y. City Dept. of Citywide Admin. Servs.*, 119 AD3d 431, 431 [1st Dept 2014]). The plaintiff must, at a minimum, demonstrate that the circumstances surrounding the adverse employment action give rise to an inference of discrimination (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Under the NYCHRL, the plaintiff must show that "he was treated differently from others in a way that was more than trivial, insubstantial, or petty" (Armstrong v. Metro. Trans. Auth., 2014 U.S. Dist. LEXIS 121159 [S.D.N.Y. Aug.28, 2014]). Under the NYSRL and NYCHRL, plaintiff can adduce facts sufficient to plead discriminatory animus by showing that similarly situated comparators were treated differently (*Whitfield-Ortiz v. Department of Educ. of City of New York*, 116 A.D3d 580 [1st Dept 2014]). As of August 12, 2019, for conduct that occurred as of the amendment, claims under the NYSHRL and the NYCHRL are to be analyzed under the same standard. In terms of an adverse employment action, plaintiff must plead events that were more than petty slights and trivial inconveniences (*Alshami v. City of University of New York*, 162 NYS3d 720 [1st Dept 2022]).

Here, Plaintiff pleads that she is a woman (a protected class) and she performed her job in a satisfactory or above satisfactory manner. Plaintiff further pleads with particularity that men were given favorable treatment over women which included, but is not limited to, lucrative specialized assignments, overtime, desired assignments, and tours. Plaintiff's complaint pleads numerous comparators to Plaintiff who are fellow lieutenants who have the same job duties and responsibilities as Plaintiff. These officers include, but are no way limited to, Lieutenant Charles, Lieutenant Amill, and Lieutenant Bowman. Plaintiff pleads that these male sergeants were not yelled or cursed at, received greater employment opportunities such as more overtime, and received *de facto* promotions they were less qualified for than Plaintiff. Plaintiff is similarly situated in every way to these male officers except for her gender despite the allegations by the City. Plaintiff further contends that she was even more qualified than these officers on multiple occasions. As a result, Plaintiff asserts that she earns significantly less income than her male peers, which equates to as much as $7,500 less a month because of disparate transfers and minimal overtime. Further, Plaintiff purports to have lost over $4,000 a year in night differential pay due to her discriminatory transfer by the City. Plaintiff states unequivocally that these same adverse actions are not taken against her male colleagues who are similarly situated to Plaintiff in every

way. Each of these, alone, are more than a petty slight and trivial inconvenience. As such, Plaintiff easily meets her burden for her gender discrimination claims having identified similarly situated comparators who received greater benefits. In applying the liberal pleading standard, plaintiff has sufficiently pleaded her discrimination and hostile workplace claims.

The court further finds that Plaintiff has sufficiently pleaded a claim for constructive discharge. A constructive discharge claim is when an employee alleges that the employer, rather than directly discharging the individual, has intentionally created an intolerable work atmosphere that forces the employee to quit involuntarily (*Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 73 [2d Cir. 2000]). Recently, in *Bond v. New York City Health & Hosps. Corp.*, 215 AD3d 469 (1st Dept 2023), the Appellate Division, First Department, found that allegations of a hostile work environment and reduced work assignments raised an issue of fact as to whether defendant "deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign" (*quoting Polidori v. Societe Generale Groupe*, 39 AD3d 404 [1st Dept. 2007]). Here, as set forth above, considering the liberal pleading standards afforded these claims and viewing Plaintiff's pleadings in the light most favorable to Plaintiff, Plaintiff has sufficiently pleaded that her working conditions were beyond the reasonable person standard set forth above. Plaintiff states that she has been forced to work in an environment which labeled females as lesser than male counterparts directly by the Commanding Officer. She alleges that she was ostracized and humiliated which is sufficient to allege constructive discharge at the pleading stage (*see Pugliese v. Actin Biomed LLC*, 106 AD3d 591 [1st Dept 2013]). Plaintiff's constructive discharge is further evidenced in her pleadings by her alleged denial of positions which would have advanced her career, denial of overtime and other benefits of employment which cost Plaintiff as much as $7,500 per month compared to her male peers, denied transfer requests, and retirement before she would have otherwise. Lastly, Plaintiff alleges that the City denied Plaintiff's accommodation request which forced her to choose between retiring and caring for her children and her sickly father. This denial of accommodation in and of itself is sufficient to constitute a constructive discharge. As such, Plaintiff has adequately pleaded constructive discharge.

Likewise, Plaintiff has adequately pleaded retaliation insofar as she has stated, with particularity, that Plaintiff requested an accommodation and engaged in protected activity, the City harassed Plaintiff and denied her a transfer request for her caretaker status. Immediately following the complaint, Plaintiff further states that she was retaliated against in that she was denied accommodation, overtime, yelled at, and ultimately forced to retire as a result of the retaliatory treatment. At this early pleading stage, viewing Plaintiff's allegations in a light most favorable, Plaintiff easily meets her burden. Indeed, Plaintiff has sufficiently given the City "fair notice" of the nature of her claims and their grounds, as "fair notice is all that is required to survive at the pleadings stage" (*Petit v. Department of Educ. of the City of New York*, 177 AD3d 402 [1st Dept 2019]).

While Plaintiff's complaint does not contain explicit gender-motivated statements by Captain Marchese, the alleged treatment of pregnant officers and the overall conduct towards Plaintiff raise a sufficient inference of gender animus to survive a motion to dismiss. Under the NYCHRL, discrimination need only be one factor, among others, for a claim to proceed. It is plausible that Marchese perceived Plaintiff's actions as insubordinate because of her gender.

Similarly, although caregivers are not entitled to accommodations under the NYSHRL and NYCHRL, there is a duty under the NYCHRL not to discriminate against caregivers. At this early stage in litigation, Plaintiff's allegations satisfy the requirements to proceed with her claims.

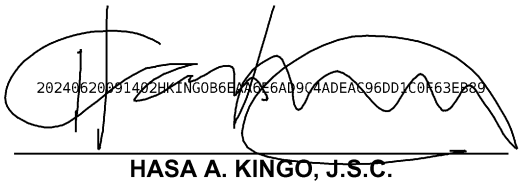
Cross-Motion to Amend the Complaint

Plaintiff seeks leave of the court to amend her complaint to add additional facts that plead with greater detail her discrimination claims, which the court grants. The City argues the amendments are futile. The court notes that permitting Plaintiff to amend her complaint does not prejudice the City. A party may amend his pleading at any time by leave of Court and leave shall be freely given upon terms as may be just (CPLR § 3025[b]).

Based on the foregoing, it is hereby

ORDERED that the City's motion is denied and Plaintiff's cross-motion to amend her pleadings is granted. Plaintiff is permitted to file and serve the proposed amended complaint annexed as Ex. A to her cross motion within 30 days of this order. Plaintiff shall serve a copy of this order with notice of entry upon the City within 30 days of its filing on NYSCEF.

This constitutes the decision and order of the court.



6/20/2024
DATE

HASA A. KINGO, J.S.C.

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