Girard v VNU Inc.
2006 NY Slip Op 30846(U)
March 13, 2006
Supreme Court, New York County
Docket Number: 109305/2004
Judge: Karen S. Smith

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

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KEITH GIRARD and SAMANTHA CHANG,

Plaintiffs,

-against-

VNU INC., VNU BUSINESS MEDIA INC., JOHN KILCULLEN, and KEN SCHLAGER

Defendants.

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Index no.: 109305/2004
Motion seq.: 004 & 005
Motion date: January 9, 2006

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

Motion Sequences 004 and 005 are consolidated for the purposes of disposition by this decision and order. Defendants VNU Inc's, VNU Business Media's, John J. Kilcullen's and Ken Schlager's motion for summary judgment dismissing plaintiffs' first through fifth causes of action, and alternatively for summary judgment on defendant's claim of after acquired evidence, is granted in part and denied in part as more fully set forth below. Defendants Kilcullen's and Schlager's motion for summary judgment dismissing the complaint as against them individually is granted in part and denied in part as more fully set forth below.

In this action, plaintiffs Keith Girard and Samantha Chang seek damages for harassing and discriminatory behavior arising from their employment with defendant VNU.

The material facts are contained in the parties' moving papers and are not in dispute unless otherwise noted. Defendant VNU Business Media, Inc., (hereinafter "BMI"), a Delaware corporation, publishes *Billboard* magazine, a weekly publication covering the music industry. Defendant VNU, Inc., a New York Corporation, owns BMI. In March of 2003, BMI hired defendant John Kilcullen, a Caucasian male, as President of BMI's Music and Literary Group and president and publisher of *Billboard*. In June of 2003, defendant Ken Schlager, a Caucasian male, became Executive Editor of Billboard, and held that position until September of 2004, when he became Co-Executive Editor of the magazine.

In April of 2003, BMI hired plaintiff Keith Girard, a Caucasian male, as Editor in Chief of

Billboard. Prior to his hire at Billboard, Girard worked at Crain Communications, Inc., as editor for a publication entitled *InvestmentNews*. Plaintiff Samantha Chang, an Asian American female, worked at InvestmentNews from October 2002 until September 2003, first as a News Editor and later as an Assistant Managing Editor.

Following an interview with Kilcullen, Chang was hired by BMI as a Senior Editor. She began work on September 15, 2003, reporting directly to Girard. Shortly after her arrival, rumors began to spread among the Billboard staff concerning an intimate relationship between Girard and Chang. The rumors were apparently started by Billboard staff members who had seen Girard and Chang together at Central Bar, a bar frequented by BMI employees. The rumors prompted Judy Bellamy, the Director of Human Resources for BMI's Music and Literary group to interview employees who had seen Girard and Chang at Central Bar. On October 15, Chang and Girard met separately with Kilcullen, and Sharon Sheer, BMI's Senior Vice President of Human Resources. Kilcullen asked them if they were having a sexual relationship. Both denied any improper relationship between them. Following the interview Chang was reassigned to report to Ken Schlager. Defendants allege that the reassignment was done solely to mitigate the concerns of other employees. The rumors persisted, and Girard circulated a memo to members of the Billboard senior editors, stating that gossip would not be tolerated. On November 16, 2003, Chang sent Bellamy an e-mail complaining about the manner in which the rumors concerning her and Girard were handled, and her reassignment to Schlager. On November 17, 2003, Chang and Bellamy met to discuss Chang's concerns. Defendants took no further steps to stop the rumors.

In February of 2004, Girard received a Performance Review from Kilcullen. Girard received ratings of "met some/not all expectations" for two of nine separate rating categories. On May 6, 2004, Kilcullen and Bellamy had a follow-up meeting with Girard concerning his performance evaluation. In a written "Final Warning" prepared the next day, Kilcullen outlined certain issues that Girard needed to correct, including his failure to complete the Billboard overhaul plan in a timely fashion and the perception among the staff that Girard gave preferential treatment to Chang and Carla Hay, an African American Billboard staff member who had complained to Girard that other

staff members had harassed her.

On May 20, 2004, Chang arrived at work at 10:00 a.m. Upon her arrival, she was confronted by Schiffman who was upset allegedly becuase of Chang's failure to check with him before leaving work the prior evening. In a deposition, Schlager testified that he had informed Chang that she was required to check with Schiffman before leaving work that night. Chang and Schiffman went to Girard's office. Schiffman then left Girard's office and headed for the exit. On his way out, he kicked a wastebasket at the entrance to Carla Hay's cubicle and uttered a strong epithet. That same day, Chang sent e-mails to Kilcullen and Lisa Garris from BMI's Human Resources Department, complaining about the incident.

The next day, Kilcullen met with Sheer and Michael Marchesano, BMI's Chief Executive Officer. At the meeting, it was determined that Girard's and Chang's employment at BMI be terminated. On Monday, May 24, Kilcullen and Sheer met with Girard and informed of their decision. That same day, Schlager and Bellamy met with Chang and informed her likewise.

Plaintiffs commenced this action on June 23, 2004. The original complaint contained twelve causes of action. By this court's order dated November 19, 2004, the sixth through twelfth causes of action were dismissed. On September 19, 2005, plaintiffs served an amended complaint, omitting the dismissed causes of action. The five remaining causes of action are all asserted under New York State Executive Law § 296 and § 8-107 of the New York City Administrative Code ("NYCAC"). Chang's first cause of action alleges that defendants discriminated against and discharged Chang on account of her gender. Chang's second cause of against all defendants, alleges that defendants discriminated against and discharged Chang on account of her race and national origin,. Chang's third cause of action alleges that defendants, by their behavior, created a hostile work environment. Chang's fourth cause of action alleges that defendants persecuted, intimidated, and discharged Chang in retaliation for her opposition to their unlawful discriminatory conduct towards her. The fifth cause of action, by Girard against all defendants, alleges that defendants persecuted, intimidated, and discharged Girard in retaliation for his opposition to their unlawful discriminatory conduct towards Hay and Chang.

All defendants now move for summary judgment dismissing all the causes of action. Alternatively, the defendants seek judgment limiting Chang's entitlement to economic damages. Defendants Kilcullen and Schlager move separately for judgment dismissing the complaint as against them. The court will consider defendants' motion for summary judgment as to all defendants first, taking each cause of action in turn.

1. Chang's causes of action for discrimination based upon race and sex.

Defendants contend that there is insufficient evidence in the record to support Chang's claim for discrimination based upon either sex or race. Specifically, they contend that, apart from Chang's termination, there is no evidence in the record concerning an adverse employment action. They argue that Chang's reassignment from Girard to Schlager was not an adverse employment action. They further argue that there is no evidence to support an inference that Chang was reassigned or terminated because of either her race or her sex. Instead, defendants argue that Chang was terminated because of her disruptive and insubordinate behavior.

Plaintiffs respond that there is adequate evidence in the record to support their claim that Chang was discharged because of her race. Principally, they cite e-mails Lisa Garris, a Human Resources Manager for the Music and Literary Group, sent to Judy Bellamy in October of 2003 concerning Chang and Hay. In the e-mails, Garris noted that Chang and Hay, both minorities, spent time together and that most of the newsroom staff were Caucasian males. In the e-mails, Garris states "Samantha and Carla's budding friendship might not turn into anything that would result in a lawsuit, but I feel it's good to be aware of it and to just keep an eye on it." Plaintiffs also cite affidavits provided by Girard and Chang, in which they allege that staff members referred to Chang as a "bitch" and that Schlager made frequent comments concerning Chang's ethnicity at weekly meetings. They also submit the text of an instant-message communication between Schiffman and Joellen Sommer, Vice President of Business Affairs, in which Sommer referred to rumored relationship between Chang and Girard as "the King and I." Plaintiffs also contend that Chang's

reassignment to Schlager constitutes an adverse employment action, but do not set forth proof that the reassignment was motivated because of Chang's race or sex.

Plaintiffs further contend that defendants purported rationale for firing Chang, that she was disruptive and insubordinate, is pretextual. To support this claim, they point to Garris's e-mails and the minimal proof in the record concerning Chang's disruptive and insubordinate behavior.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Guiffrida v. Citibank* 100 NY2d 72, 81 [2003]). Once the movant has made such a showing the burden shifts to the party opposing the motion to produce evidence in an admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Id*).

On this cause of action, defendants have failed to demonstrate the absence of any material issues of fact. Accordingly, summary judgment is not appropriate on this cause of action.

A plaintiff asserting a claim of discrimination under Executive Law§ 296 or § 8-107 of the New York City Administrative Code has the initial burden to establish a *prima facie* case. (*Forrest v. Jewish Guild for the Blind* 3 NY3d 295, 305 [2004].) Plaintiff must show 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 occurred under circumstances that would give rise to an inference of discrimination. (*Id.*) Plaintiff need only make a *de minimis* showing to establish her *prima facie* case. (*Schwaller v. Squire Sanders & Dempsey*, 249 AD2d 195, 196 [1st Dept 1998].) The burden then shifts to the defendant to rebut the presumption of discrimination by establishing non-discriminatory reasons for its employment action. (*Forrest*, 3 NY3d at 305.) Then, the burden shifts back to plaintiff to show that the reasons defendant has given are pretextual and the real reason is discriminatory. (*Id.*)

There is a material question of fact concerning Chang's claim for discrimination. Plaintiffs have established a *prima facie* case that Chang was discharged for discriminatory reasons. There is no dispute that Chang was a member of two protected classes (namely, she was a female and an

Asian American), that Chang was qualified for her position, and that defendants fired Chang. The e-mails sent by Garris to Bellamy, both human resources employees, give rise to an inference that Chang was terminated because of her race and gender. The burden now shifts to defendants to submit evidence of a legitimate, non-discriminatory motive for Chang's discharge.

Defendants contend that Chang was fired because she was an insubordinate and disruptive employee. To support this claim, defendant cite complaints filed by Wes Orshoski, another Billboard staff member, who claimed that Chang had asked why people felt she and Girard were having an affair. They also cite instances two other complaints concerning Chang's behavior filed by Melinda Newman and Mary Ann Kim, both Billboard staff members. They further allege that, following the incident that gave rise to Kim's complaint, Chang complained about Kim's behavior directly to Kim's supervisor, violating company protocol. Defendants allege that Chang should have complained to her own supervisor, not Kim's. Defendants further allege that, in a meeting with Schlager, Chang stated that she felt it was ridiculous that she reported to him and not Girard. Defendants also offer an e-mail Schiffman sent Kilcullen on May 21, 2004, in which Schiffman alleges that Chang frequently missed editorial deadlines. Defendants finally point out that Schlager had allegedly instructed Chang to check with Schiffman before she left for the night on May 19, 2004, but that Chang had failed to do so. Thus, the burden now shifts back plaintiffs to raise a material issue of fact as to whether defendants' proffered reasons are pretextual.

A material issue of fact exists as to whether defendants' purported reasons for Chang's termination are pretextual. To support their claim that Chang was a disruptive employee, defendants cite three complaints, two of which apparently arose from arguments Chang had with other Billboard staff members. The third was filed because Chang confronted a fellow employee about a rumor about her personal life that defendants felt was so widespread and problematic that it would be necessary to reassign Chang to deal with it. To support their claim that she was insubordinate, defendants point to one complaint that Chang missed deadlines, one instance where she failed to check in with someone before leaving work for the evening, one instance where she complained about someone's conduct to the wrong supervisor, and one instance where she expressed

dissatisfaction with a condition of her employment to her supervisor. Combining this frankly limited record of disruptive and insubordinate behavior with the direct evidence that the human resources department felt she posed a lawsuit threat and should be monitored because she was a minority female, a factfinder could reasonably conclude that defendants fired Chang either because she was a woman or because she was Asian American. Accordingly, dismissal of plaintiffs first and second causes of action is not appropriate at this point of time.

2. Chang's cause of action for hostile work environment

"A hostile work environment exists when, as judged by a reasonable person, it is permeated by discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the circumstances of plaintiff's employment." (*McIntyre v. Manhattan Ford, Lincoln-Mercury*, 175 Misc2d 795, 802 [Sup. Ct., N. Y. County, 1997][*citing Harris v. Forklift Sys.* 510 US 17, 21 [1993]]). To establish a *prima facie* case for a hostile work environment, plaintiff must show that (1) she is a member of a protected class, (2) the conduct or words upon which her claim is predicated were unwelcome, (3) the conduct or words were prompted solely because of her protected status, (4) the conduct or words created a hostile work environment which affected a term or condition of her employment, and (5) that the defendant is liable for the conduct. (Id. *[citing Trotta v. Mobil Oil Corp*, 788 F Supp 2d 1336 [SDNY 1992] *and Danna v. New York Telephone Co.* 752 F Supp 2d 594 [SDNY 1990].) The conduct complaint of must be both objectively and subjectively offensive; that is, a reasonable person must find it offensive and the plaintiff perceive it as such. (*San Juan v. Leach*, 278 AD2d 299, 301 [2nd Dept 2000].) "Generally, isolated remarks or occasional episodes of harassment will not support a finding of a hostile work environment; in order to be actionable, the offensive conduct must be pervasive." (*Father Belle Community Centre v. New York State Division on Human Rights*,, 221 AD2d 44, 51 [4th Dept., 1996] *appeal denied* 89 NY2d 809 [1997]). Under a hostile work environment claim brought pursuant to Executive Law § 296, an employer will be liable for the conduct of its employee only where the employer acquiesced in or condoned the

conduct, or where the employee whose conduct is in question is the highest ranking member of management to whom the plaintiff could complaint. (*Id.* at 54.) However, when a claim is brought under NYCAC § 8-107 (1), the employer will be liable if the employee whose conduct in question is plaintiff's supervisor. (NYCAC § 8-107 [13][b].)

There are two major components to conduct that plaintiffs set forth to support Chang's hostile work environment claim. First are the rumors about an affair between Chang and Girard. Secondly, plaintiffs allege that Schlager, as Chang's supervisor, engaged in sexually inappropriate behavior. The court will address the rumors first.

In a case dealing with a similar allegation, the Second Circuit Court of Appeals held that, when a man and a woman are both subjected to similar treatment, there is an inference that the woman's treatment is not based upon sex. (*Brown v. Henderson*, 257 F3d 246, 254 [2nd Circ 2001].) In that case, defendant sought to demonstrate that the conduct a female plaintiff set forth could not support a hostile work environment claim because a male employee had been subject to the same treatment. The Court held that recovery was not precluded simply because both individuals received the same treatment, which included allegations that they were engaged in an affair. (*Id.* at 252.) However, the Court went on to hold that, in the absence of evidence suggesting that the plaintiff's treatment was based upon her sex, the common treatment gives rise to an inference that the offensive conduct was based on something other than the plaintiff's sex. (*Id.* at 254.)

While the rumors alleged that Chang and Girard were having an affair, there is no showing that the rumors were targeted at Chang because of her sex. Plaintiffs contend that one could reasonably conclude that Chang would not have been the subject of the rumors if she had not been a woman or of Asian descent. However, this argument ignores the fact that Girard, a white male, was a subject of the rumors as well. Accordingly, plaintiffs cannot cite the rumors to support Chang's hostile work environment claim.

The cases cited by plaintiff, in which rumors of a female plaintiff's sexual relationship with a male sustained a hostile work environment claim, are readily distinguishable from the present case. (*See Spain v. Galegos*, 26 F 3d 439 [3rd Cir 1994]; *Gillen v. Borough of Mahattan Community*

College, 1999 US Dist LEXIS 4862 [SDNY 1999]; *Jew v. University of Iowa*, 749 F Supp 946 [SD Iowa 1990].) In each of those cases, the essence of the rumors was that the female employee's advancement at work was not due to her merit but to an affair with her male supervisor. Here, while the record shows that there was a perception that Girard treated Chang favorably, plaintiffs cite no evidence that the rumors contained allegations that Chang obtained her position at Billboard because she was having an affair with Girard.

Chang has also alleged that, after he became her supervisor, Schlager sexually harassed Chang. In her affidavit in opposition to defendants' motion, Chang alleges that Schlager would rub up against her when he was in her cubicle and frequently made sexually charged comments concerning Chang's appearance, once remarking that Chang's legs appeared very smooth and soft. Chang also alleges that, on three separate occasions, she saw a green vibrator sitting on Schlager's desk. On one such occasion, Chang alleges that Schlager alluded to marital difficulties and stressed that Chang need to make her working relationship with Schlager work. On another occasion, Chang alleges that Schlager showed him the vibrator and turned it on. Chang also alleges that, at editorial meetins, Schlager would sometimes joke that Chang should be assigned Asia-related news stories because she was Asian. Chang claims that Schlager's behavior humiliated her and made her feel uncomfortable.

Schlager's conduct, as alleged, especially in light of the fact that a finder of fact could reasonably conclude that Chang was subject to offensive conduct, based upon her sex and race, that was sufficiently pervasive so as to alter the terms of her employment, in light of the fact that Schlager was Chang's direct supervisor. Defendants argue that BMI and VNU had no knowledge of Schlager's conduct and, as such, cannot be liable for it. Plaintiffs acknowledge that Chang never complained about it. However, they point out that Marchesano knew Schlager kept a vibrator on display in his office. This at least raises an issue of fact as to whether VNU and BMI acquiesced in his conduct. Moreover, as Schlager was Chang's direct supervisor, his conduct will support a claim under NYCAL § 8-107.

Defendants argue that Chang's failure to complain about it precludes plaintiffs from raising

it now to support their claim. An employer may avoid vicarious liability to an employee subjected to a hostile work environment by the conduct of a supervisor if the employer can establish: (1) that it took reasonable care to promptly correct any sexually harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer. *(Vitale v. Rosina Food Products, Inc.*, 283 AD2d 141, 145 [4th Dept 2001].) Once an employer establishes that the plaintiff failed to avail herself of its complaint procedure, the burden shifts to the plaintiff to show that her failure to take advantage of the procedure was in fact reasonable. (*Leopold v. Baccarat, Inc.* 239 F3d 243, 246 [2nd Cir 2001].) To satisfy her burden, the plaintiff must show that she had a credible fear that her complaint would not be taken seriously or that she would suffer an adverse employment action as a result. (*Id.*) A credible fear cannot be based upon the employee's subjective belief, but rather evidence that the employer has ignored or resisted similar complaints or has taken adverse employment actions when similar complaints have been filed. (*Id.*)

Here, plaintiffs have acknowledged that defendants had such a plan in place and that Chang failed to take advantage of it. Plaintiffs contend that Chang did not avail herself of it because BMI had failed to take effective action when Chang had previously complained about the persistence of the rumors concerning her and Girard. However, the record indicates that BMI had taken steps to address the issue. Specifically, Girard had sent out a memo, approved by Kilcullen, stating that rumors and gossip were not to be tolerated in the work place. That Chang was unhappy with the manner in which BMI dealt with the rumors is not sufficient to meet her burden of showing that her failure to complain was based on a credible fear that her complaint would not be taken seriously. Moreover, the record indicates that Chang did complain on a subsequent occasion about the menacing behavior of Chuck Taylor, a Billboard staff member who had been reassigned by Girard, and that, as a result of the complaint, Taylor's desk was moved away from Chang's. Since plaintiffs cannot demonstrate that Chang acted reasonably in not complaining about Schlager's conduct, defendants cannot now be held liable for his conduct.

The remaining conduct that plaintiffs allege to support their cause of action, Schiffman's

aggressive conduct on May 20, 2004, and Taylor's menacing behavior, were not pervasive enough to support a hostile work environment claim. As there is insufficient evidence in the record to support Chang's hostile work environment cause of action, that cause of action is dismissed.

3 Chang's cause of action for retaliatory discharge.

Defendants contend that the facts alleged by plaintiffs do not establish a claim for retaliatory discharge, as Chang did not engage in any protected activity and she was discharged for lawful, non-retaliatory reasons. Specifically, they contend that Chang never complained about actions or practices forbidden under New York State Human Rights Law or New York City Human Rights Law. They further contend that Chang was discharged because she was an insubordinate and disruptive employee.

Plaintiffs contend that Chang made numerous complaints to VNU human resources employees that clearly conveyed her belief that she was being subjected to discriminatory treatment based upon her race and her sex. Plaintiffs also contend that there is ample evidence to support their claim that Chang was discharged as a result of these complaints and that defendants purported reasons for firing Chang were pretextual.

New York State and New York City Human Rights Laws forbid retaliation or discrimination against a person because she has opposed any practices forbidden under those laws. (Executive Law § 296 [1] [e]; NYCAC §8-107[7].) To maintain a claim for retaliatory discharge an employee must demonstrate that (1) she engaged in a 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. (*Forrest*, 3 NY3d at 312-313.) As in a claim for discrimination, when plaintiff has established her *prima facie* case for retaliatory discharge, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the discharge. (*Grafe v. Iona College*, 281 AD2d 347, 348 [1st Dept 2001].) The burden then shifts back to plaintiff to demonstrate that defendant's articulated reasons

were pretexts for discrimination. (*Id.*)

Here, plaintiffs have set forth a *prima facie* case for retaliatory discharge. Following her confrontation with Marc Schiffman on May 20, 2004, Chang sent John Kilcullen an e-mail in which she complained of Schiffman's "abusive, mysoginistic [sic]" behavior. To her e-mail she annexed a portion of VNU's anti-harassment policy. Plaintiffs also point out that Kilcullen, Sheer, and Marchesano made the decision to discharge Chang the day after she sent the e-mail. A reasonable finder of fact could conclude that Chang was fired because of her complaint.

Defendants contend that Chang was discharged for legitimate, non-discriminatory reasons. However, as noted above, plaintiffs have raised an issue of fact as to whether those reasons are pretextual. The e-mail that Garris sent Bellamy, noting that it was worth keeping tabs on Chang because she was a female minority and alluding to the threat of a lawsuit, further bolsters plaintiffs claim that defendants fired Chang because of her complaints about her workplace.

Since Chang has raised an issue of fact concerning defendant's purported reasons for her discharge, summary judgment on the fourth cause of action is inappropriate at this time.

4. Girard's claim for retaliatory discharge.

Defendants contend that Girard's claim for retaliatory discharge must also be dismissed, as Girard did not engage in any protected activity and there is no causal connection between Girard's alleged protected activity and his discharge. Rather, defendants contend, Girard was discharged for legitimate, non-retaliatory reasons. Plaintiffs contend that there was a causal connection between Girard's actions and his discharge, and that the reasons defendants have set forth for his discharge are pretextual.

There is sufficient evidence in the record to support plaintiffs' claim that Girard was discharged because he objected to discriminatory treatment of Chang and Carla Hay, a female African-American Billboard employee. Girard alleges that, on numerous occasions, he told Kilcullen that Chang and Hay had complained to him that they were being treated in an unfair and

hostile manner by white male staff members, and that they believed the treatment was based upon their race and sex. Girard alleges that Kilcullen refused to acknowledge the problem and in fact order Girard never to put anything in writing concerning racial or sexual harassment or discrimination, and to instead use the euphemism "cultural issues" to address the problem. Moreover, Kilcullen, Marchesano, and Sheer made the determination to fire Girard at the same time they elected to fire Chang. From the fact that there are issues of fact as to whether Chang was fired for discriminatory or retaliatory reasons, that Chang and Girard were fired simultaneously, and that Girard has alleged that Kilcullen was reluctant to deal with Chang's and Hay's complaints, a reasonable trier of fact could conclude that Girard's termination was motivated by his complaints to Kilcullen.

Defendants allege that Girard was discharged for legitimate, non-discriminatory reasons. Specifically, they point to the meeting Girard had with Kilcullen on May 6, and the May 7 "Final Warning" memo, which outlined numerous shortcomings, including the failure to finish a complete overhaul plan for Billboard on time and perceptions among the staff that Girard treated Chang and Hay preferentially. Defendants further allege that, following the May 6 meeting, Kilcullen and Judy Bellamy spoke to various employees who made further complaints, particularly about his relationship with Chang.

However, plaintiffs have raised an issue of fact concerning whether defendants' stated reasons for his termination are pretextual. They point out that, three months prior to the "Final Warning" memo, Kilcullen awarded him a substantial bonus. With regards to Girard's failure to timely complete the overhaul plan for Billboard, Girard alleges that the task Kilcullen had assigned him had started out relatively small in scope, and that Kilcullen had continued to expand its scope until it was impossible for Girard to complete on his own in a timely fashion. Plaintiffs contend that Kilcullen turned the overhaul plan into a "Sisyphean task", one that Girard could never possibly complete within the time Kilcullen had given him. From these allegations, a trier of fact could reasonably assume that Girard was not fired for the reasons set forth by defendants. As such, and in light of the fact that Girard was fired on the same day as Chang, an issue of fact exists concerning

whether defendants proffered reasons for discharging Girard are a pretext to cover up retaliatory motives. Accordingly, it is premature to grant summary judgment dismissing the fifth cause of action.

5. Defendants' motion for summary judgment limiting Chang's right to economic damages

Defendants have moved in the alternative for summary judgment limiting Chang's potential right to economic damages to the period of time immediately following her termination to January 17, 2005. Defendants contend that, assuming a jury concludes that she was wrongfully discharged, Chang cannot recover for pay she would have earned after that date because, on that date, defendants discovered that Chang made material misrepresentations on her employment application.

An employer can limit its liability to a wrongfully discharged employee by showing that the employee would have been fired for legitimate non-discriminatory means based upon evidence the employer acquired after the employee was terminated. (*McKennon v. Nashville Banner Publishing Co.*, 513 US 352, 362-363 [1995]; *see also Bell v. Helmsley*, 2003 NY Misc LEXIS 192 [Sup Ct NY 2003].) The burden rests upon the employer to establish that the employee would have been fired for the discovered reason. (*McKennon*, 513 US at 362-363.)

Defendants have set forth evidence that Chang had misrepresented the amount of previous salaries on her employment application and that she was fired from one job and quit another job just prior to being placed on final performance warning, while stating on her application that she had never been fired, suspended, or asked to resign. Defendants have also submitted the application she signed, which states that false statements and misrepresentations would be ground for immediate discharge, and deposition testimony from Sharon Sheer to the effect that Chang would have been discharged had BMI learned of her misrepresentations sooner. However, plaintiffs have pointed out, and defendants have conceded, that BMI has never discharged an employee on these grounds before. Accordingly, there is an issue of fact as to whether BMI would have discharged Chang for her misrepresentations, and summary judgment on this issue is inappropriate at this time.

6. Kilcullen's and Schlager's motion to for summary judgment dismissing the claims as against them personally

Kilcullen and Schlager move separately to dismiss all causes of action against them. Kilcullen and Schlager contend that there are insufficient facts in the record to support the causes of action against them, and that, as a matter of law, neither can be liable under either Executive Law § 296 or NYCAC § 8-107.

Executive Law § 296 (1) (a) states that it is unlawful for an employer to engage in discriminatory acts. On a Executive § 296 (1) (a) claim, an individual can be liable if only he has an ownership interest in the employer or has the power to do more than simply carry out personnel decisions made by others. (*Murphy v. ERA United Realty*, 251 AD2d 469, 471 [2nd Dept 1998][*citing Patrowich v. Chemical Bank*, 63 NY2d 541 [1984]].) § 296 (6) provides that "[i]t shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so." However, there is some confusion in the courts as to whether co-employees who had no ownership decision and no decision making authority concerning personnel could be liable for aiding and abetting a violation of § 296 (1). (Compare *Trovato v. Air Express International*, 238 AD2d 333, 334 [2nd Dept 1997] [holding that only employers, employee-owners, or those with specified authority are subject to liability under § 296 (6)] with *Murphy*, 251 AD2d at 471-473] [holding that co-employees who had no ownership interest or decision making power could be liable under § 296 (6)].) However, the Court resolved the conflict in its decision in *Murphy*, the more recent of the two. In *Murphy*, two co-employee defendants were alleged to have engaged in a course of conduct to harass the plaintiff in concert with their employer, who was an owner employee. (251 AD2d at 470.) In allowing the aiding and abetting claim to stand against them, the Court distinguished the case from *Trovato* by noting that, while the co-employees in *Travato* had engaged in a course of discriminatory conduct against the plaintiff, there was no evidence in the record that they did so in concert with the employer as part of a broader scheme. (Id at 472-473.) Thus, under *Murphy*, to be liable as an aider and abetter under § 296 (6), the individual in question must have participated in a scheme of discrimination or

harassment in concert with his employer.

Under NYCAC § 8-107 (1) (a) expressly prohibits an employer *or an employee* from engaging in discriminatory employment acts. However, this provision extends to employees "only where they act with or on behalf of the employer in hiring, firing, paying, or in administering the 'terms, conditions or privileges of employment.'" (*Priore v. New York Yankees*, 307 AD2d 67, 74 [1st Dept 2003].) NYCAC § 8-107 (6) provides for separate liability for persons aiding or abetting discriminatory acts. While that section of the statute was not before the Court in *Priore*, the Court held that "[t]here is no indication in the local ordinance, explicit or implicit, that it was intended to afford a separate right of action against any and all fellow employees based upon their independent and unsanctioned contribution to a hostile environment." (307 AD2d at 74.) Accordingly, the court concludes that, to be liable under NYCAC § 8-107 (6), as with Executive Law § 296 (6), an employee must have participated in some scheme of discrimination or harassment in concert with his employer.

Schlager cannot be liable under either NYCAC § 8-107 or Executive Law § 296. Plaintiffs do not contest that he had no ownership interest in either BMI or VNU or that he had the power to do more than simply carry out personnel decisions made by others. While plaintiffs have attributed sexually and racially offensive conduct to him, there is no evidence in the record that would support a finding that he engaged in this conduct in concert with BMI or VNU, or that he acted at their behest. Accordingly, summary judgment is appropriate dismissing the claims against him individually.

There is a question of fact as to whether Kilcullen can be liable. Defendants contend that Kilcullen had no authority to fire Chang or Girard, and those actions could only be taken with Marchesano's approval. While Kilcullen testified that he lacked the authority to even reassign Chang to Schlager, Marchesano testified that he would involve other people in the decision to terminate an employee and that no one had carte blanche as to such a decision. As the decision to fire both Chang and Girard was reached at a meeting with Kilcullen, Marchesano, and Sheer, it is clear that Kilcullen had some control over whether they would be terminated. Accordingly, there

is an issue of fact as to whether Kilcullen had the authority to do more than simply carry out the personnel decisions of others. Accordingly, summary judgment dismissing the complaint against him is premature at this time

It is hereby,

ORDERED that Motion Sequence 004 is granted to the extent that the third cause of action is dismissed, and is denied as to the remaining claims , and it is further

ORDERED that Motion Sequence 005 is granted to the extent that all the causes of action are dismissed as against defendant Ken Schlager, and is denied as to the remainding claims.

This constitutes the decision and order of the court.

The parties are remanded of their scheduled conference in Mediation Part 2 on April 3, 2006, at 9:30 a.m.

Dated: March 13, 2006
New York, New York

ENTER:

J.S.C.