Mejia v T.N. 888 Eighth Ave. LLC CO
2016 NY Slip Op 32578(U)
December 21, 2016
Supreme Court, New York County
Docket Number: 150228/2014
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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JUDITH MEJIA,

Plaintiff,

Index No.:
150228/2014

-against-

T.N. 888 EIGHTH AVENUE LLC CO d/b/a COSMIC DINER, ELIAS "LOUIE" TSANIAS, JOHN DIMOS, ABC CORPORATIONS #1-10, And JOHN DOES #1-10, Jointly and Severally,

Defendants.

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ROBERT KALISH, J.:

Upon the foregoing submitted papers, Defendants' motion for summary judgment pursuant to CPLR §3212 dismissing Plaintiff's action in its entirety is hereby granted as follows:

This action arises out of plaintiff Judith Mejia's claims that she was subject to discrimination, retaliation, hostile work environment and retaliatory constructive discharge in violation of the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL). Defendants T.N. 888 Eighth Avenue LLC CO d/b/a Cosmic Diner (Cosmic Diner), Elias "Louie" Tsanias (Tsanias),[1] John Dimos (Dimos), ABC Corporations #1-10, and John Does #1-10, jointly and severally, move, pursuant to CPLR §3212, for summary judgment dismissing the complaint.

[1] Plaintiff concedes that Tsanias was not properly served and is not a party in this action.

Plaintiff's Causes of Action

Plaintiff's complaint sets forth eight causes of action:

- Plaintiff's first cause of action alleges that she was discriminated against based upon her gender in violation of both the NYSHRL and NYCHRL including that she was subjected to a hostile work environment based upon her gender. Plaintiff claims that the employees repeatedly touched and spoke to her in a sexual manner and that it affected the condition of her employment. Plaintiff claims that she reported this harassment to management, who failed to act and also participated in the harassment.

- Plaintiff's second cause of action mirrors the first one, and further alleges that plaintiff was subject to gender-based discrimination in that the terms and condition of her employment were disparate to those of male employees.

- Plaintiff's third cause of action alleges that she was discriminated against based on of her race and/or national origin in violation of both the NYSHRL and NYCHRL including that she was subjected to a hostile work environment based upon her race and/or national origin. Plaintiff alleges that she was subject to a hostile work environment because employees ridiculed plaintiff based on her protected characteristics and that the conduct was severe and pervasive. Plaintiff further alleges that management knew or should have known about the discrimination but did not take remedial actions.

- Plaintiff's fourth cause of action alleges that she was discriminated against based upon her age in violation of both the NYSHRL and NYCHRL including that she was subjected to a hostile work environment based upon her age.

- Plaintiff's fifth cause of action alleges that the defendants retaliated against her when she complained about the incidents of sexual harassment and other instances of hostile work environment. Plaintiff further contends that she was retaliated against for engaging in a federal wage and hour lawsuit against defendants. She further alleges that the retaliation culminated in a lawsuit against her and a false report

to a news outlet.

- Plaintiff's sixth cause of action alleges malicious prosecution, and was voluntarily withdrawn by the plaintiff at oral argument on November 3, 2016.

- Plaintiff's seventh cause of action alleges abuse of process, and was voluntarily withdrawn by the plaintiff at oral argument on November 3, 2016.

- Plaintiff's eight cause of action alleges defamation in that plaintiff alleges that the defendants published a false statement about plaintiff and that she was harmed by this statement.

Parties' general contentions on the instant motion

Defendants argue in support of their motion for summary judgment, in sum and substance, that there are no factual issues which should preclude summary judgment. Specifically, the Defendants argues the plaintiff has failed to establish a sufficient basis to maintain any of her causes of action under the NYSHRL and/or NYCHRL, including the plaintiff's hostile work environment claims under the NYSHRL and NYCHRL. The defendants further argue that there is no basis for the plaintiff's eighth cause of action for defamation.

In opposition to the defendants' motion, the plaintiff argues that she has sufficiently made out her prima facie cases on all of her causes of action under the NYSHRL and NYCHRL and her defamation claim. She further argues that there are numerous issues of fact as to all of her claims under the NYSHRL and NYCHRL and her defamation claim to warrant denying defendants' motion for summary judgment.

The Court will address the Defendants' argument for summary judgment and the Plaintiff's arguments in opposition within the context of the Plaintiff's factual allegations in the underlying action, and the Parties' submitted papers including the depositions.

Discussion

Prior to quitting in August 2013, plaintiff was employed by the Cosmic Diner as a waitress. Plaintiff, who is a woman of Colombian descent and is over 40 years of age, had been employed by the Cosmic Diner since 2006. During the course of her employment, plaintiff requested and received the 7a.m.- 3p.m. shift during most days. During the course of her employment, plaintiff reported to Tsanias and Dimos.

According to plaintiff, defendants subjected her to discrimination, a hostile work environment and retaliation, as a result of her gender/national origin/age, and because she engaged in protected activity. Plaintiff claims that she was treated differently than her male and Greek co-workers, and that the supervisors who participated in and acquiesced to the discriminatory conduct were all male.

Plaintiff argues that defendants favored employees of Greek and Polish national origin. She provides examples, as set forth below, of defendants' alleged unlawful discriminatory practices with respect to her national origin:

- Plaintiff claims, without providing specific dates, that defendants and the other employees "taunted plaintiff because she was Colombian and accused her of being a criminal and a drug dealer, like all other Colombians [internal quotation marks omitted]." Complaint, ¶ 21. She continues that she was regularly ridiculed about her accent and place of birth by defendants and the male employees. Although plaintiff complained about this harassment based on national origin, defendants failed to act.
- On one unspecified date in 2009, plaintiff claims that Dimos screamed at her, "Get out, you "f...ing" bitch. What are you thinking? This is my place and I do whatever I want. You don't belong here, you "f...ing" Colombian. Go back to Colombia." *Id.*, ¶ 23.

Plaintiff claims that she was subject to gender discrimination for the following reasons, in pertinent part:

- Defendants allegedly paid male servers a higher wage, allowed them to earn more tips and provided them with more vacation time than female, non-Greek servers.
- Female servers were held to a different standard than male servers for making mistakes on checks and for missing or arriving late for shifts.
- According to plaintiff, extra shifts were offered to male servers first.
- Dimos allegedly stated to plaintiff and other female employees that all women are "bitches" except for his mother.

Plaintiff further claims that she was subject to a hostile work environment, based on her gender. Among other things, she alleges the following:

- On an unspecified occasion, plaintiff states that she spoke to Tsanias about a male employee who was harassing plaintiff.
- Plaintiff claims that she was regularly exposed to sexual jokes and leering. When plaintiff would complain about this unspecified behavior to defendants, they would tell her to leave the male staff alone and get back to work.
- According to plaintiff, Dimos "regularly pressured female employees to go out on dates with him." Complaint, ¶ 45.
- Plaintiff reported that a kitchen employee, Carlos, had been sexually harassing her since 2006. She states that Carlos would make vulgar comments to plaintiff and when she did not respond, he began retaliating against her by not making her orders. Plaintiff was purportedly advised by Tsanias, that if she called the police she would be fired and that she was the one who caused the employee to harass her.
- In 2009, plaintiff complained about Carlos's behavior to one of her customers, who was a police officer (the 2009 incident). The police officer went into the kitchen and confronted Carlos about the behavior. Plaintiff continues that Carlos was upset by the confrontation and threatened to quit. However, defendants "begged" him to stay and "screamed" at plaintiff for causing trouble." *Id.*, ¶ 40. Plaintiff testified that Carlos allegedly touched plaintiff "in the back. He put his hand on my chest." Plaintiff's tr at 157.

Plaintiff contends that she was subject to discrimination based on her age because defendants "constantly made insulting and humiliating comments to plaintiff about her age and advised her that she was too old [internal quotations omitted]." Complaint, ¶ 46.

Wage and Hour Lawsuit:

Plaintiff states that, in or about October 2012, she joined in as a plaintiff in a class action suit against defendants to collect unpaid wages. Helena Ruzic was the only named plaintiff in the amended class action complaint that was filed in June 2012. The complaint had alleged that the plaintiffs were entitled to unpaid wages from defendants for overtime work for which they did not receive overtime pay and for unpaid minimum wages.

Plaintiff claims that, after the commencement of the wage and hour suit, the discrimination against her worsened and she believed that defendants were trying to make her quit. Although the lawsuit eventually settled, plaintiff alleges that, as a result of joining the lawsuit, the defendants engaged in the following retaliatory behavior:

- Among other allegations, plaintiff claims that defendants purportedly instructed employees to harass and intimidate plaintiff. According to plaintiff, defendants would falsely advise her that customers were complaining about her. Plaintiff was told to leave her shifts early and that she could not share tips from the tables. Plaintiff states that she was given more work than other employees, despite earning less money.
- Plaintiff believes that, as a result of the suit, defendants commenced their own suit against plaintiff, accusing her of undercharging customers so that she could get a bigger tip. Plaintiff concedes that there were mistakes on her checks but that she made mistakes because she is a "human being," not because she was engaged in a scheme. Tr at 60.

Lawsuit Against Plaintiff:

On July 19, 2013, defendants commenced an action against plaintiff, alleging that plaintiff had fraudulently reduced customers' checks, and then, in return, requested a bigger tip. The complaint alleged that, as a result of the bribes and kickbacks, plaintiff improperly took a minimum of $75,000 from defendants. The complaint further alleged that plaintiff fraudulently added a service charge before presenting the check to customers. Defendants relied on four checks in their complaint.

Defendants claim that, in mid-July 2013, a customer reported to Melanie Melous (Melous), the cashier, that plaintiff had offered him a "private arrangement to reduce prices on menu [sic] and in return obtain a larger tip for herself." Melous aff, ¶ 6. Melous continues that the customer, who was a New Jersey restaurant owner, told her to report the incident to management. Melous states that the customer was angry about plaintiff's alleged dishonest proposal and would not take part in it. The customer's check had been altered in the amount of $10 and plaintiff did not dispute this with Melous.

Dimos states the following with respect to this alleged check altering incident: "To be clear, it was the Customer who informed Management of [plaintiff's] dishonest conversation and alteration of check 00120, first to the cashier [Melous] and then

me when I came over that [plaintiff] had first conversed with such customer to join in a dishonest arrangement to cheat the Diner . . . ." Dimos aff, ¶ 45. Dimos continues that it was not a math mistake, but intentional dishonesty. He states that, although plaintiff was not fired after this incident, her checks were monitored.

Plaintiff does not deny making mistakes on checks. However, plaintiff claims that the "mistakes happened when defendants retaliated against Plaintiff by seating as many customers as possible in her section." Complaint, ¶ 60. She further states that the cashiers "purposefully looked for and then failed to correct" plaintiff's mistakes as a way to commence a "bogus lawsuit against [plaintiff] in an attempt to make her quit her employment." *Id.*, ¶ 61. In addition, plaintiff argues that the "alleged scheme is even more preposterous because servers at Defendant Cosmic Diner are required to pool all of their tips." *Id.*, ¶ 62.

Dimos states, "[h]ad [plaintiff] not been caught by a restaurant owner from New Jersey, who came to the City to see 'Jersey Boys' next door, and was seated at her table the scam she perpetrated would not have been discovered." Dimos aff, ¶ 57.

During her testimony, plaintiff was further questioned about adding a service charge to certain checks. Plaintiff testified that, when the customers were foreign, she was told by Tsanias that it was acceptable to add a service charge to the check. However, she could not produce any written policy from the Cosmic Diner which allowed her to include a service charge unless the party was six people or more.

Defendants voluntarily withdrew the complaint against plaintiff in September 2013, as plaintiff "voluntarily left her position as server . . . ." Plaintiff's exhibit G at 1.

New York Post Article:

Shortly after defendants commenced their lawsuit against plaintiff, a reporter from the New York Post wrote an article about the lawsuit defendants had commenced. Evidently, the reporter sat in the diner and interviewed plaintiff and plaintiff had her picture taken for the article. Plaintiff claims that she was "horrified when she realized that the infamy generated from the article would make it incredibly difficult for her to get a job in a different restaurant." Complaint, ¶ 68. Plaintiff does not state that the reporter interviewed defendants but contends that Dimos sat the reporter at plaintiff's table and "smiled menacingly at plaintiff." *Id.*, ¶ 65.

The New York Post article is entitled, "Waitress $erved bribes with breakfast: lawsuit." Plaintiff's exhibit H. The article continues with the following, in pertinent part:

> "The owners of the Cosmic Diner in Midtown say a longtime waitress, Judith Mejia, reduced customers' tabs in exchange for cash. Mejia's self-serving cost them at least $75,000 over the years, says a lawsuit the owners filed in Manhattan Supreme Court last week . . . Mejia . . . denied the allegations . . . Mejia claims the suit is retaliation for discrimination complaints that she and two other workers have made against their employer."

Id.

Defendants claim that they did not arrange the story or the photo, and that the reporter learned of the lawsuit by reviewing the docket of recently filed complaints.[2] Dimos testified that he did not call the newspaper and that he did not know how the newspaper found out about the lawsuit.

Plaintiff quits Cosmic Diner:

Plaintiff claims that, as a result of the lawsuit commenced against her and the news article, she experienced chest pains and other health ailments and went to the hospital prior to the start of her shift on August 3, 2013. Plaintiff was then "advised that due to the extreme stress and hostility at Defendants, she could not return to work due to medical reasons." Complaint, ¶ 75.

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[2] Defendants attached a proposed stipulation from the New York Post stipulating, among other things, that its reporter learned of the lawsuit in the course of her ordinary duties as a reporter and that she was not solicited by defendants. As this is not signed by any party, the court will not consider it.

Plaintiff then communicated to defendants that she would not be returning to work.

Plaintiff filed for, and received, unemployment benefits commencing in August 2013. She testified that, during the period she applied for unemployment benefits, she was healthy, ready, willing and able to work. Plaintiff's tr at 115. Defendants allege that, to continue to receive unemployment benefits, plaintiff had to "certify weekly to NYS Unemployment Office she was healthy and able bodied and looking for employment." Dimos aff, ¶ 59.

In support of the motion for summary judgment, defendants provide the affidavit of Dimos. Dimos does not believe that plaintiff was discriminated against while employed at the Cosmic Diner. Dimos contends that, to his knowledge, no one criticized plaintiff's birthplace, and states, "[w]ith so many of the wait and the entire kitchen staff being Hispanic, that she was born in Colombia was of no importance. Doing her job during her shift was the important issue. The wait and kitchen staff spoke Spanish to her and one another in a friendly work environment." Dimos aff, ¶ 6. Dimos continues that the entire kitchen staff was Hispanic and that plaintiff never complained to him about being discriminated against on the basis of national origin.

Dimos refutes plaintiff's contentions and denies making any of the alleged statements. Dimos states that, during the almost eight years of employment, plaintiff never complained about gender discrimination. He maintains that all of the waiters "count out their own tips at the end of the shift, not the management. They keep the money they count out. Do not turn it over to Management. The credit card tips are calculated and paid." *Id.*, ¶ 9. Dimos reiterates that all of the servers are paid the same and that the male servers do not make higher tips. "[T]he tips are pooled exclusively by the male and female employees counting together at the end of each shift, divided among those males and females on the shift evenly, with 20% allocated by both to the bus boy." *Id.*, ¶ 10.

Dimos alleges that it is undocumented and false that males are assigned to extra shifts or that males or Greek employees receive more vacation time than others. Dimos continues that all of the workplace policies were the same for every employee. Dimos states that there is an employee manual that specifies an established procedure to report sexual harassment or other forms of discrimination and that plaintiff had never complained to him either orally or written about any discrimination except for the 2009 incident.

Dimos maintains that Cosmic Diner cooperated and allowed the customer (referring to the 2009 incident involving a customer who was a police officer) to enter the kitchen and interrogate Carlos. Dimos claims that it is impossible for plaintiff to come into contact with the cook because the cooks are separated from the wait staff by a table and kitchen equipment. Dimos continues that, after the police officer investigated plaintiff's allegations of sexual harassment, there was no probable cause for an arrest or issuance of a criminal complaint.

According to defendants, plaintiff did not formally join as a plaintiff in the wage and hour lawsuit until February 2014, which was already after plaintiff had left the Cosmic Diner. As a result, defendants claim plaintiff's allegations that, once she joined the complaint in 2012 the discrimination worsened, are misleading, as plaintiff was not formally joined until a second amended complaint was filed in February 2014. According to Dimos, plaintiff left "on her own rapidly after the issues with the customer complaint of dishonesty came to light . . . ." Dimos aff, ¶ 55. Defendants state that plaintiff suffered no adverse employment actions, as she reported on her tax returns that, after her first year of employment, she earned the same amount of money in each additional year.

Plaintiff describes an instance where a Polish waitress was favored by management in that she was off on weekends and that "if she had to leave early, she had no problems. Nobody tells her anything because she is a prodigy." Plaintiff's tr at 136. Plaintiff testified that there were a large contingent of Latin Americans employed by Cosmic Diner. Plaintiff testified that the Cosmic Diner favored Greek waiters and gave them better shifts. She said "they paid them more . . . I have no evidence, but I know they paid them more and they were allowed to their tips. When they came to work, they didn't pool their tips with ours. They kept their tips." *Id.* at 162-163.

Analysis

I. Summary Judgment Standard

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 (1st Dept 2012); *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact [internal quotation marks and citation omitted]." *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008);

Giuffrida v Citibank Corp., 100 NY2d 72, 81 (NY 2003).

In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." *Id.* at 544; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility [internal quotation marks and citation omitted]." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010); Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (NY1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 (1st Dept 2002).

II. NYSHRL and NYCHRL standards

Pursuant to NYSHRL, as set forth in Executive Law § 296 (1) (a), it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to fire or to discriminate against, an individual in the terms, conditions or privileges of employment because of the individual's gender, age, race or national origin.

Pursuant to the NYCHRL, as stated in Administrative Code § 8-107 (1) (a), it is an unlawful discriminatory practice for an employer to refuse to hire or employ or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's age, race, national origin and gender.

In evaluating causes of action under both the NYSHRL and the NYCHRL, the Court applies the burden shifting analysis developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), where Plaintiff has the initial burden to establish a prima facie case of discrimination (*See Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 305 (2004)).

Under the *McDonnell Douglas* framework, a plaintiff meets his the initial prima facie burden "by showing that [h]e is a member of a protected class, [h]e was qualified to hold the position, and that [h]e suffered adverse employment action under circumstances giving rise to an inference of discrimination. If the plaintiff makes such a showing, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the employment decision. If the employer succeeds in doing so, the burden then shifts back to the plaintiff to prove that the reason proffered by the employer was merely a pretext for discrimination [internal quotation marks and citations omitted]." (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 (1st Dept 2016); *See also Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009)).

In evaluating claims under the NYCHRL, the Court must also evaluate said claims with regard for the NYCHRL's "*uniquely broad and remedial purposes.*" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 (1st Dept 2009) (emphasis in original)). "For HRL liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that [he] has been treated less well than other employees because of [his protected status]." (*Id.* at 78; *See also e.g. Serdans v New York & Presbyt. Hosp.*, 112 AD3d 449, 450 (1st Dept 2013)(Court held that plaintiff's testimony regarding disability based discrimination raised issues of fact as to whether she was treated differently under the NYCHRL or suffered an adverse employment action under the NYSHRL)).

In addition, "[a] motion for summary judgment dismissing a City Human Rights Law claim can be granted 'only if the defendant demonstrates that it is entitled to summary judgment under both [the McDonnell Douglas burden-shifting framework and the mixed-motive' framework]'" (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 (1st Dept 2016) *citing Melman v Montefiore Med. Ctr.*, 98 AD3d 107 (1st Dept 2012)). The Appellate Division, First Department, has reaffirmed the applicability of both the *McDonnell Douglas* framework and the mixed motive analysis to claims brought under the NYCHRL. (*Id., See also Melman v*

Montefiore Med. Ctr., 98 AD3d 107, 113 (1st Dept 2012) ("an action brought under the NYCHRL must, on a motion for summary judgment, be analyzed under both the *McDonnell Douglas* framework and the somewhat different 'mixed-motive' framework recognized in certain federal cases")).

"Under the mixed-motive framework, the question on summary judgment is whether there exist triable issues of fact that discrimination was one of the motivating factors for the defendant's conduct. Thus, under this analysis the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination [internal quotation marks and citations omitted]." (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d at 514-515).

The Court will now address Defendants' motion for summary judgment as to her claims made pursuant to to the NYSHRL and the NYCHRL.

III. The Defendants are entitled to Summary Judgment dismissing the Plaintiff's first, second, third and fourth causes of action alleging hostile work environment brought under the NYSHRL:

The Plaintiff's first, second, third and fourth causes of action allege that the Defendant created a hostile work environment for the Plaintiff on the basis of her gender, race/national origin and age respectively and in violation of the NYSHRL. Under Title VII of the Civil Rights Act of 1964, 42 USC § 2000 *et seq.* (Title VII), sexual harassment that results in a "hostile or abusive work environment" is prohibited as a form of employment discrimination. *Meritor Savings Bank, FSB v Vinson*, 477 US 57, 66 (1986).

A hostile work environment is present 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 [interior quotation marks and citation omitted]." *Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 310 (2004); *Hernandez v Kaisman*, 103 A.D.3d 106 (1st Dept 2012). The standard for proof for discrimination and retaliation claims brought pursuant to NYSHRL is the same for claims brought under Title VII. *Maher v Alliance Mortgage Banking Corp.*, 650 F Supp 2d 249, 259 (ED NY 2009).

"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) *lv denied* 89 NY2d 809 (NY 1997). These circumstances include "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 [internal quotation marks and citation omitted]." *Forrest v Jewish Guild for the Blind*, 3 NY3d at 310-311. Generally, 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 Center v New York State Division of Human Rights*, 221 AD2d at 51.

Based on the incidents as set forth in the factual allegations, plaintiff claims that she was subjected to sexual harassment and gender/race/age/national origin discrimination by reason of a hostile work environment and that she was treated differently based on those characteristics. In order to support her cause of action for hostile work environment based on gender, plaintiff refers to the 2009 incident and claims that, from the

commencement of her employment until she left in 2013, she was subject to overt sexual advances from Carlos. Plaintiff testified that she would have to run out of the kitchen when Carlos would make obscene gestures.

Actions to recover damages for alleged discrimination under the NYSHRL and the NYCHRL are subject to a three-year statute of limitations. *See* CPLR 214 (2); Administrative Code of the City of New York § 8-502 (d). The record indicates that these alleged interactions occurred from when the plaintiff commenced work in 2006 until 2009, when plaintiff asked a police officer to speak to Carlos. It is undisputed that defendants cooperated with the police officer, that the police officer spoke to Carlos and that no charges were filed. While plaintiff alleges that the rude and harassing behavior occurred on a regular basis, there is no indication that this particularly complained-of sexually harassing behavior, by Carlos, or others, continued past 2009. As counsel for defendants noted during oral argument, although plaintiff's counsel avers that this behavior "continued" past 2009, plaintiff simply makes a "general statement that, I was there for six years and certain things happened." Tr of oral argument at 16. Accordingly, any claims related to the 2009 incident are time-barred as occurring outside the statute of

limitations.[3]

Plaintiff alleges that she was subject to a hostile work environment based on her age because unspecified male employees advised her that she was too old to work at Cosmic Diner. She further claims that she was subject to a hostile work environment based on national origin because, on unspecified occasions, defendants' employees accused her of, among other things, being a drug dealer. With respect to gender, in addition to the 2009 incident with Carlos, plaintiff alleges that Dimos subjected her to a hostile work environment. Plaintiff contends that Dimos called all women "bitches" except his mother and leered at female customers and employees.

As set forth below, the additional allegations do not rise to an actionable level of a hostile work environment under the NYSHRL as they were not severe or pervasive. "[I]n order to be actionable, the incidents of harassment must occur in concert or with a regularity that can reasonably be termed pervasive [internal quotation marks and citation omitted]." *Hamilton v Bally of Switzerland*, 2005 WL 1162450, *8, 2005 US Dist LEXIS 9319, *27 (SD NY 2005). Plaintiff worked for defendants for over

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[3] Plaintiff does not argue that the continuing violations doctrine should apply to her hostile work environment claims. Regardless, the doctrine would not apply, as plaintiff has failed to plausibly allege that the 2009 incident amounted to a continuous practice or policy of discrimination.

seven years. As a result, no rational fact finder could conclude that these allegations, considering the time period in which they occurred and the totality of the circumstances, could alter the conditions of the plaintiff's employment so as to create a hostile work environment. While plaintiff may have been exposed to a "mere offensive utterance," a reasonable person cannot find that plaintiff was subject to a hostile work environment due to her national origin or age. *Brennan v Metropolitan Opera Assn.*, 284 AD2d 66, 68, 72 (1st Dept 2001).[4]

Although even a single incident of harassment can create a hostile work environment if the alleged conduct is "extraordinarily severe," the sporadic alleged statements by Dimos do not rise to the level of being extraordinarily severe. *San Juan v Leach*, 278 AD2d 299, 300 (2d Dept 2000). Moreover, the Appellate Division, First Department, has held that "a decision maker's stray remark, without more, does not constitute evidence of discrimination." *Mete v New York State Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 294 (1st Dept 2005). As a result, Dimos's alleged comments do not rise to the level of an actionable hostile work environment.

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[4] In addition, plaintiff testified that the alleged comment from Dimos screaming at plaintiff to go back to Colombia occurred in 2009. This too, is outside the statute of limitations.

In addition, although plaintiff may have been uncomfortable with Dimos's alleged leering at female servers and waitresses, this does not raise a triable issue of fact with respect to a hostile work environment. It is well settled that, "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code' . . . . [C]onduct must be extreme to amount to a change in the terms and conditions of employment . . . [internal quotation marks and citations omitted]." *Faragher v City of Boca Raton*, 524 US 775, 788 (1998).

In order to sustain a claim for sex-based hostile work environment, plaintiff must demonstrate that defendants' conduct exposed members of one sex to "disadvantageous terms or conditions of employment to which members of the other sex are not exposed [internal quotation marks and citation omitted]." *Oncale v Sundowner Offshore Servs., Inc.*, 523 US 75, 80 (1998). Plaintiff claims that she was treated less well due to her protected characteristics. She claims that, among other things, she was disciplined more harshly than male employees and that male, and some Greek and Polish employees received more lucrative employment opportunities than plaintiff. Specifically, plaintiff alleges that male employees did not have to share tips, that they were not reprimanded when they made simple addition mistakes on their checks, and that a Polish employee was given more vacation

time.

Defendants maintain that all servers are paid the same and that all tips are pooled together by the employees, not the management. The record further indicates that plaintiff's income was stable and consistent in that she received the same average income for the years 2007 through 2013.

In opposition, plaintiff fails to raise a triable issue of fact as she provides no support for her allegations that male servers were allowed to receive higher tips or that they were not subject to the same employment standards. Plaintiff's testimony contradicts the alleged favoritism towards male servers by claiming that female servers, who are Polish, are entitled to more vacation time and other benefits. Even during oral argument, counsel addressed plaintiff's additional contradictory testimony that some women servers were also placed in the "non-sharing" tip section. Tr of oral argument at 25.

Furthermore, despite alleging that defendants' conduct affected her work performance, plaintiff did not miss work over the seven-year time period she worked for defendants, nor was her salary impacted. Moreover, shortly after quitting the Cosmic Diner, plaintiff certified every week for the next six months that she was healthy, willing and ready to go back to work.

Accordingly, considering the totality of the circumstances, even in the light most favorable to plaintiff, plaintiff fails to raise a triable issue of fact with respect to her NYSHRL hostile work environment claims and defendants are granted summary judgment dismissing these claims.

IV. The Defendants are entitled to Summary Judgment dismissing the Plaintiff's first, second, third and fourth causes of action alleging hostile work environment hostile work environment claims brought under the NYCHRL:

The Plaintiff's first, second, third and fourth causes of action also allege that the Defendant created a hostile work environment for the Plaintiff on the basis of her gender, race,/national origin and age respectively and in violation of the NYCHRL. "Under the NYCHRL, there are not separate standards for 'discrimination' and 'harassment' claims [internal quotation marks and citation omitted]." *Johnson v Strive East Harlem Empl. Group*, 990 F Supp 2d 435, 445 (SD NY 2014). To establish a discrimination claim under the NYCHRL, plaintiff has to prove by a "preponderance of the evidence that she has been treated less well than other employees because of [her protected status]." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 (1st Dept 2009).

Despite the broader application of the NYCHRL, *Williams* also recognized that the law does not "operate as a general civility code [internal quotation marks and citation omitted]." *Id.* at 79. Defendants can still avoid liability if they can demonstrate that "the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'" *Id.* at 80. Under the NYCHRL, "the conduct's severity and pervasiveness are relevant only to the issue of damages." *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 110 (2d Cir 2013).

Applying the standard set forth in *Williams* to the present case, plaintiff's allegations with respect to the gender/age/national origin-based conduct cannot sustain a hostile work environment claim. The actions complained of, as set forth in the facts, are no more, than "petty slights and trivial inconveniences". *Williams v New York City Hous. Auth.*, 61 AD3d at 80. Moreover, although Dimos's conduct may have been offensive to plaintiff, a reasonable juror would find that it did not rise to an actionable level. *See e.g. Magnoni v Smith & Laquercia, LLP,* 701 F Supp 2d 497, 506 (SD NY 2010), *affd* 483 Fed Appx 613 (2d Cir 2012) (Court held no viable claim under the NYCHRL for hostile work environment when plaintiff's boss told her a "crude anecdote from his sex life with another woman, and occasionally [referred] to [plaintiff] as voluptuous and knocking

her knee . . . .").

Plaintiff does not deny making mistakes on the checks submitted in the record and speculates about the motive of the news reporter. Even viewing facts in the light most favorable to plaintiff, plaintiff has not established that any additional allegations regarding harassment, including the lawsuit against plaintiff or the news article, were the result of a discriminatory animus or that she was treated less well due to any protected characteristics. *See e.g. Massaro v Department of Educ. of the City of N.Y.*, 121 AD3d 569, 570 (1st Dept 2014) ("Plaintiff failed to adequately plead discriminatory animus, which is fatal to both her age discrimination and hostile work environment claims under the State and City Human Rights Laws (HRL). Indeed, her allegations that she was 51 years old and was treated less well than younger teachers are insufficient to support her claims [internal citations omitted]").

In addition, mere conclusory allegations that plaintiff was treated differently than other employees fail to demonstrate that defendants' actions were motivated by a discriminatory animus. "Conclusory allegations of discrimination are insufficient to defeat a motion for summary judgment." *Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326, 329 (1st Dept 2005). The court finds that plaintiff's claims that she was treated less well due to her gender are conclusory and cannot defeat summary judgment.

Accordingly, defendants are granted summary judgment dismissing plaintiff's causes of action grounded in discrimination and hostile environment in violation of the NYCHRL.

V. The Defendants are entitled to Summary Judgment dismissing the Plaintiff's fifth causes of action alleging constructive discharge and retaliation under the NYSHRL and NYCHRL:

Constructive Discharge:

Plaintiff claims that she was intentionally subjected to adverse actions while other employees were not, and that these actions created an intolerable work atmosphere, forcing her to quit. A constructive discharge "occurs when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily. Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign [internal quotation marks and citations omitted]." *Chertkova v Connecticut Gen. Life Ins. Co.*, 92 F3d 81, 89 (2d Cir 1996).

For the reasons already discussed, this court held that a reasonable jury would not find that plaintiff was subject to a hostile work environment. Moreover, "in presenting a *prima facie* case of discriminatory discharge the plaintiff must present proof that her discharge occurred in circumstances giving rise to an inference of discrimination on the basis of her membership in that class." *Id.* at 91. As plaintiff fails to link the purported adverse employment actions to any gender/age/national origin-based discriminatory motive, she cannot raise a triable issue of fact with respect to her constructive discharge claim.

Retaliation:

Under both the NYSHRL and the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Executive Law § 296 (7); Administrative Code § 8-107 (7). Under the broader interpretation of the NYCHRL, "[t]he retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7).

For a plaintiff to successfully plead a claim for retaliation under the NYSHRL or NYCHRL, she must demonstrate that: "(1) she has engaged in protected activity, (2) her employer was aware that [he] 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 v Jewish Guild for the Blind*, 3 NY3d at 313; *see also Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012).

"Protected activity" refers to "actions taken to protest or oppose statutorily prohibited discrimination." *Aspilaire v Wyeth Pharms., Inc.*, 612 F Supp 2d 289, 308 (SD NY 2009); *see also Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dept 2010) (referring to protected activity under the NYCHRL as "'opposing or complaining about unlawful discrimination' [internal citation omitted]").

An adverse action is described as the following, in pertinent part:

> "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 . . . . A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation [internal quotation marks and citations omitted]."

Messinger v Girl Scouts of U.S.A., 16 AD3d 314, 314-315 (1st Dept 2005).

In the present case, plaintiff's joinder in a wage and hour lawsuit regarding overtime pay does not constitute protected activity. *See e.g. Pezhman v City of New York*, 47 AD3d 493, 494 (1st Dept 2008) (filing a grievance about conduct other than unlawful discrimination is not a protected activity).

Besides the 2009 incident, plaintiff claims that she repeatedly complained to her supervisors about alleged discriminatory conduct but does not provide any specific instances, dates or times for these complaints. Defendants deny any additional reports made by plaintiff. Even assuming, arguendo, that plaintiff engaged in protected activity, she cannot demonstrate an adverse employment action. For instance, plaintiff's allegations that defendants began seating plaintiff's section to capacity at all times, is not an adverse employment action.

Defendants were aware of harassing conduct in 2009 when they cooperated with the police officer who interrogated Carlos. Even if this incident was not outside the statute of limitations, plaintiff fails to show a causal connection between this activity and her alleged constructive discharge, which occurred approximately four years later. *See e.g. Clark County School Dist. v Breeden*, 532 US 268, 273 (2001) ("The cases that accept

mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close' . . . . [internal quotation marks and citations omitted]").

Accordingly, defendants are granted summary judgment dismissing plaintiff's claims for retaliation under the NYSHRL and NYCHRL.[5]

VI. The Defendants are entitled to Summary Judgment dismissing the Plaintiff's eighth cause of action alleging Defamation:

Defamation is defined as "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society [internal quotation marks and citations omitted]." *Foster v Churchill*, 87 NY2d 744, 751 (1996). CPLR 3016 (a) provides that "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint . . . ." In addition, "[t]he complaint also must allege the time, place and manner of the false statement and

[5] In a footnote, plaintiff has argued that liability should extend to Dimos as plaintiff's supervisor. However, as plaintiff has failed to raise a triable issue of fact with respect to her discrimination and retaliation claims under the NYSHRL or NYCHRL, she cannot sustain these claims against any of the individual defendants as employers/supervisors.

specify to whom it was made." *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999).

Plaintiff relies on a news article to allege that defendants falsely reported to news outlets that plaintiff reduced customers' bills in exchange for cash. However, the news article refers to the lawsuit and does not reference any actual statements made by defendants, let alone whether or not defendants even spoke to the reporter. As a result, plaintiff's complaint does not satisfy the pleading requirements of CPLR 3016 (a), as it does not state the particular slanderous words that defendants allegedly said to the reporter, nor does it set forth the "time, place and manner of the false statement[s]." *Dillon v City of New York*, 261 AD2d at 38. Accordingly, defendants are granted summary judgment dismissing the cause of action for defamation.

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendants T.N. 888 Eighth Avenue LLC CO d/b/a Cosmic Diner, Elias "Louie" Tsanias and John Dimos for summary judgment dismissing the complaint herein is granted, and the complaint is dismissed in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: Dec. 21, 2016

ENTER:

HON. ROBERT D. KALISH
J.S.C.

J.S.C.