SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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REBECCA MARCUS,

Plaintiff,

- v -

THE CITY OF NEW YORK, LIEUTENANT DONALD STEWART, DEPUTY INSPECTOR LOURON HALL, DR. RUSSELL MILLER, DR. MARYIRENE FLYNN

Defendants.

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INDEX NO. 152651/2022

MOTION DATE 02/28/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion for DISMISSAL.

Upon the foregoing documents, plaintiff's cross-motion to amend her complaint is granted and defendants' motion to dismiss this action is granted, in part, to the extent set forth below.

FACTUAL BACKGROUND

Plaintiff's complaint, taken as true for purposes of this motion, alleges as follows:

Plaintiff joined the New York City Police Department ("NYPD") on July 11, 2005 (NYSCEF Doc. No. 12 [Amended Complaint at ¶42]). In 2019, she became the Domestic Violence Sergeant in the 100th Precinct (Id. at ¶44). At the 100th Precinct, Special Operations Lieutenant Donald Stewart would regularly speak to plaintiff about his "his romantic and sex life" in a way that made plaintiff uncomfortable, as plaintiff understood these conversations as an effort to determine if she was interested in Stewart romantically (Id. at ¶¶46-51). Stewart would also sit in her office and stare at her, making her uncomfortable (Id. at ¶¶52-53). Beginning in June 2019, Stewart called plaintiff during non-work hours—including at 3:00 a.m.—while intoxicated to

complain about work and his life, including his love life (Id. at ¶¶55-59, 65). Stewart complained to plaintiff's commanding officer, defendant Deputy Inspector Louron Hall, that plaintiff had failed to answer his phone calls (Id. at ¶66).

On August 28, 2019, plaintiff suffered arm and neck injuries while trying to restrain a twelve-year-old child who was "high on K2" (Id. at ¶67). Plaintiff went to the hospital as a result where she was diagnosed with a torn rotator cuff (Id. at ¶¶68, 72). Plaintiff returned to limited duty on September 16, 2019 (Id. at ¶74). On September 17, 2019, plaintiff received the result of an MRI, which showed that her C4-C5 vertebrae had "completely shifted and [were] resting on her spinal cord" (Id. at ¶¶73, 75). This condition made it difficult for plaintiff to breathe (Id. at ¶76). In addition, she was informed that any "jostling" of her discs could leave her paralyzed (Id.). Plaintiff alleges that, prior to this injury, she expected to be assigned to the detective bureau and was also "on the Lieutenants list for promotion" but, as a result of her disability—presumably her spinal injury, though this is not specified—she was not assigned to the detective bureau or promoted to Lieutenant (Id. at ¶¶169-174). Plaintiff asserts that with a proper accommodation she could have done either job (Id. at ¶¶176-178). Despite her spinal cord injury, the NYPD Medical Division attempted to place her back to full duty (Id. at ¶¶77-79).

On October 31, 2019 and other occasions, Hall told plaintiff that if she went "restricted" he would replace her (Id. at ¶¶80, 83-84). On that same date, Hall also chastised plaintiff for not answering phone calls from Stewart (Id. at ¶85). Plaintiff responded that Stewart was "causing her emotional distress and sexually harassing her" and that she did not answer the phone because he would "regularly call her late at night while intoxicated" (Id. at ¶86). Plaintiff asserts that NYPD policy required her supervisors to file a complaint of discrimination with the Office of Equal

Employment after receiving this information but failed to do so (Id. at ¶87). Rather, "immediately" after this meeting, plaintiff was "stripped of her role as Domestic Violence Sergeant" (Id. at ¶88).

Plaintiff "went restricted" the following day and was transferred to PSA 9 (Id. at ¶89). She worked there until March 12, 2020, where she was transferred to the Medical Division (Id. at ¶90). Plaintiff then "went sick" on March 26, 2020, based on what she believed were COVID-19 symptoms (Id. at ¶92). Plaintiff requested a reasonable accommodation to work from home due to COVID-19, which was denied (Id. at ¶94). Plaintiff was "forced" to return to work on April 9, 2020 (Id. at ¶93). Plaintiff went out sick again on April 18, 2020, and into the hospital on April 23, 2020 (Id. at ¶¶95-96). After her release from the hospital, plaintiff was transferred to the 100th Precinct on May 8, 2020 (Id. at ¶97). Plaintiff asserts that since she went "restricted" she has been put in positions in which she cannot earn any overtime, as part of a NYPD policy that disabled officers are "forbidden" from earning overtime (Id. at ¶¶103-106)

On November 18, 2020, plaintiff saw defendant Dr. Russell Miller, an NYPD Orthopedic Surgeon, who directed that she return to work in two weeks, against her spinal surgeon's advice (Id. at ¶109). In response, plaintiff filed a Department of Health complaint against Miller (Id. at ¶112). Afterward, at subsequent appoints with the Medical Division, plaintiff waited for hours to see the doctor despite being the "first to sign in for her appointment" (Id. at ¶¶114-116).

In December 2020 plaintiff was transferred to the Queens Warrants Squad (Id. at ¶118). In an unspecified period (though presumably after December 2020), plaintiff was repeatedly threatened with being surveyed off the job by unidentified individuals (Id. at ¶119). On January 26, 2021, plaintiff applied for disability retirement (Id. at ¶120).

On February 23, 2021, plaintiff began seeing Dr. Maryirene Flynn, another Orthopedic District Surgeon, who denied plaintiff's requested for an EMG test and to see a neurologist and

declined to authorize further physical therapy for plaintiff, contrary to the recommendation of plaintiff's treating doctor (Id. at ¶¶125, 133-135).

On August 17, 2021, the NYPD Medical Board recommended plaintiff for 3/4 Accident Disability retirement (Id. at ¶136). Plaintiff asserts that "even though plaintiff was approved for 3/4 disability, her retirement could and should have been avoided had she been properly accommodated by defendants" (Id. at ¶137).

On August 27, 2021, plaintiff's throat spasmed so severely that Plaintiff began choking at work while trying to eat a grape, then began choking on her own saliva (Id. at ¶140). Plaintiff was taken by ambulance to Presbyterian Hospital in Queens (Id. at ¶142).

Based on the foregoing, plaintiff now asserts claims for medical malpractice, negligence, and gross negligence against Flynn and Miller, alleging that they: forced her to return to work prematurely, which led to her hospitalization; provided medical advice which stunted her recovery and will lead to future surgeries; and forced her to retire. She also asserts a claim for negligent hiring, training and retention against the City and Dr. Miller and a claim against the City on a theory of respondeat superior for the negligent acts of Miller and Flynn. Finally, she asserts various claims under Administrative Code §8-107 (the "New York City Human Rights Law" or "NYCHRL"), including: discrimination based on both disability and sex/gender; hostile work environment based on both sex/gender and disability; failure to provide reasonable accommodation; retaliation; and strict liability under Administrative Code §8-107(13)(b).

The City now moves to dismiss the complaint. Plaintiff opposes and cross-moves to amend the complaint to, principally, add further factual allegations in connection with her medical malpractice claim.

DISCUSSION

The Court first addresses plaintiff's cross-motion to amend her complaint. Generally, "[l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay" (Murray v City of New York, 51 AD3d 502, 503 [1st Dept 2008] [internal quotations and citations omitted]). "[P]laintiff need not establish the merit of [her] proposed new allegations but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit..." (MBIA Ins. Corp. v Greystone & Co. Inc., 74 AD3d 499, 500 [1st Dept 2010] [internal citations omitted]). The Court discerns no prejudice to defendants here, as their motion to dismiss addresses the amended complaint insofar as it diverges from original complaint. Accordingly, the Court addresses the City's motion to dismiss as directed to the amended complaint.

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

Plaintiff's Tort Claims

Defendants' motion to dismiss is granted as to plaintiff's tort claims, i.e., her claims for medical malpractice, gross negligence, negligence, and negligent hiring, training and supervision. As an initial matter, plaintiff's notice of claim filed on September 24, 2020 does not include any claim for medical malpractice, barring the assertion of such a claim here (Scott v City of New York, 40 AD3d 408, 409 [1st Dept 2007]) as well as any claims that arise from events which

occurred after her notice of claim was filed (See Varsity Tr., Inc. v Bd. of Educ. of City of New York, 5 NY3d 532, 537 [2005]; see also Agostinello v Great Neck Union Free School Dist., 102 AD3d 638, 639 [2d Dept 2013]). Plaintiff's argument that no notice of claim is necessary because her claims against these doctors are asserted against them in their individual capacity is unavailing because these allegations clearly arise from their roles as NYPD doctors (Aykac v City of New York, 198 NYS3d 350 [1st Dept 2023] citing Parpounas v Ohagan, 216 AD3d 985 [2d Dept 2023]).

In any event, the complaint's allegations do not support any of plaintiff's tort claims. No gross negligence claim lies "[w]here, as here, a plaintiff fails to allege any facts whatsoever describing any type of behavior beyond ordinary negligence, the plaintiff cannot be said to have fulfilled the pleading requirements applicable to claims of gross negligence" (Aykac v City of New York, 2022 NY Slip Op 33639[U], 14 [Sup Ct, NY County 2022] affd as mod Aykac v City of New York, 198 NYS3d 350 [1st Dept 2023]). Plaintiff's negligence claim fails because allegations that a physician, in the course of meeting and examining a person, has injured that examinee, is "not properly prosecuted as a garden-variety common-law negligence action, but sounds in medical malpractice" (Aykac v City of New York, 2022 NY Slip Op 33639[U], 13 [Sup Ct, NY County 2022] affd as mod 198 NYS3d 350 [1st Dept 2023]). However, plaintiff's claim for medical malpractice fails because, as discussed above, she does not allege that she sought Dr. Miller or Dr. Flynn's professional services for the purposes of medical or surgical treatment and, in fact, specifically states that both doctors were, at all times, acting within the scope of their employment with the City (See Aykac v City of New York, 198 NYS3d 350 [1st Dept 2023]). This fact also bars plaintiff's claims for negligent training, supervision, and discipline of these

doctors (Id.). Finally, in light of the dismissal of the tort claims against Doctors Miller and Flynn, plaintiff's respondeat superior claim must also be dismissed.

New York City Human Rights Law

Claims arising under the NYCHRL must be reviewed with "an independent liberal construction analysis in all circumstances ... targeted to understanding and fulfilling ... the City HRL's uniquely broad and remedial purposes" (Williams v New York City Housing Authority, 61 AD3d 62, 66 [1st Dept 2009] [internal citations and quotations omitted]) and should be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (Albunio v City of New York, 16 NY3d 472, 477-478 [2011]).

Employment discrimination claims under the NYCHRL, in particular, are reviewed under a notice pleading standard, in which "a plaintiff alleging employment discrimination need not plead specific facts establishing a prima facie case of discrimination but need only give fair notice of the nature of the claim and its grounds" (Vig v New York Hairspray Co., L.P., 67 AD3d 140 [1st Dept 2009] [internal citations and quotations omitted]).

Gender Discrimination

Defendants' motion to dismiss plaintiff's claim for gender discrimination is denied. To state a claim of gender discrimination under the NYCHRL, plaintiff must allege that: (1) she is a member of a protected class, (2) she was qualified for her position, (3) she was adversely or differently treated based on her gender in a way that disadvantaged her and (4) this action occurred under circumstances giving rise to an inference of discrimination (See e.g., Hosking v Mem. Sloan-Kettering Cancer Ctr., 186 AD3d 58, 62 [1st Dept 2020]; see also Harrington v City of New York, 157 AD3d 582 [1st Dept 2018]). Plaintiff has done so here.

There is no dispute as to the first or second elements of this claim. As to the third element, that she was treated "less well" than others, based on her gender, the Court, mindful that "sexual advances are not always explicit" (Franco v Hyatt Corp., 189 AD3d 569, 570-71 [1st Dept 2020] [internal citations omitted]), concludes that the complaint's allegations that plaintiff was regularly forced to discuss Lieutenant Stewart's sex life, against her wishes, are sufficient, under the generous notice pleading standard, to qualify as sexual harassment which, under the NYCHRL, is "viewed as one species of sex- or gender-based discrimination" (Crookendale v New York City Health and Hosps. Corp., 175 AD3d 1132 [1st Dept 2019] [internal citations and quotations omitted]). Discovery as to the specifics of these conversations and the context in which they were held will be probative as to whether they were ultimately innocuous, constituted trivial slights or petty inconveniences, or constituted sexual harassment.

Disability Discrimination

That branch of defendants' motion to dismiss plaintiff's disability discrimination claim is also denied. To state a claim of disability discrimination under the NYCHRL, plaintiff must allege that: (1) she is a member of a protected class, (2) she was qualified for her position, (3) she was adversely or differently treated based on her disability in a way that disadvantaged her, and (4) this action occurred under circumstances giving rise to an inference of discrimination (See e.g., Hosking v Mem. Sloan-Kettering Cancer Ctr., 186 AD3d 58, 62 [1st Dept 2020]; see also Harrington v City of New York, 157 AD3d 582 [1st Dept 2018])

While the complaint's allegations that NYPD doctors concluded that plaintiff is medically capable of returning to work and recommended that she do so does not establish any disadvantageous treatment (See Aykac v City of New York, 2022 NY Slip Op 33639[U], 20 [Sup Ct, NY County 2022] ["The NYPD's medical determinations, whether 'correct' or not, cannot

constitute a basis for the plaintiff's claim that he was discriminated against on the basis of disability"] affd as mod 198 NYS3d 350 [1st Dept 2023]), the complaint's allegations that, after learning of her disabling spinal injury in September 2019, plaintiff was denied promotion and transferred to a different precinct, hindering her ability to earn overtime, are sufficient, at this juncture, to state that she was treated in a way that disadvantaged her (See Santiago-Mendez v City of New York, 136 AD3d 428 [1st Dept 2016] [denial of promotion to Detective 2nd Grade "adequately alleges an adverse employment action"]). Moreover, plaintiff's allegations that she faced threats to "survey" her out of the NYPD—i.e. "forced to retire from the NYPD due to a disability" (Ayende v The City of New York, 2023 NY Slip Op 32970[U], 3 [Sup Ct, NY County 2023]) along with allegations that she was placed on 3/4 disability retirement rather than be accommodated, are sufficient to support an inference of discrimination based on disability (See Id.).

Hostile Work Environment – Gender

Defendants' motion to dismiss plaintiff's hostile work environment claim based upon her gender is denied. To state a hostile work environment claim under the NYCHRL, plaintiff need only allege facts showing that "she has been treated less well than other employees because of her protected status or that discrimination was one of the motivating factors for the defendant's conduct" (Chin v. New York City Hous. Auth., 106 AD3d 443, 445 [1st Dept 2013] citing Williams v NYCHA, 61 AD3d at 75-78 [2013]). She has done so here, through her allegations of sexual harassment by Lieutenant Stewart (See Domingo v Avis Budget Group, Inc., 219 AD3d 964, 966 [2d Dept 2023] ["plaintiff's allegations of sexual harassment and improper touching could constitute 'more than petty slights and trivial inconveniences'" sufficient for hostile work environment claim under NYCHRL]). While the defendants note that this claim overlaps with her

gender discrimination claim, the NYCHRL "does not distinguish between sexual harassment and hostile work environment" and "contains no prohibition on conflating claims" (Suri v Grey Glob. Group, Inc., 164 AD3d 108, 115 [1st Dept 2018]; but see Hernandez v City of New York, 2016 NY Slip Op 30641[U], 19 [Sup Ct, Kings County 2016] ["the hostile work environment claims here must be dismissed as duplicative of the discrimination claims given that liability under the hostile work environment claims is premised on the same factual allegations and theory of liability as the discrimination claims"]).

Hostile Work Environment - Disability

Defendants' motion is also denied as to plaintiff's hostile work environment claim based on her disability. Plaintiff has stated a claim here through allegations that she was disabled and faced threats to survey her off of the NYPD (See Ayende v The City of New York, 2023 NY Slip Op 32970[U], 11 [Sup Ct, NY County 2023]; see also Pesantez v The City of New York, 2023 NY Slip Op 32249[U], 7 [Sup Ct, NY County 2023]).

Failure to Accommodate

Defendants' motion to dismiss plaintiff's failure to accommodate claim is denied. The elements of a claim for failure to accommodate under the NYCHRL are that: (1) plaintiff has a disability under the relevant statute; (2) the employer had notice of plaintiff's disability; (3) with reasonable accommodations, plaintiff could have performed the essential functions of his job; and (4) the employer refused to make such accommodations (See Miloscia v B.R. Guest Holdings LLC, 33 Misc3d 466 [Sup Ct, NY County 2011]; Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881, 885 [2013]). The complaint's allegations that defendants were aware of plaintiff's spinal cord damage but failed to engage her in a good-faith interactive process to assess her needs, coupled with her allegation that she would have continued working if her request for reasonable

accommodation was granted, are sufficient to state a cognizable claim for failure to accommodate her disability under the City Human Rights Law (See Aykac v City of New York. 198 NYS3d 350 [1st Dept 2023] [internal citations omitted]).

In opposition, the City argues that this claim should be dismissed because plaintiff fails to specify the accommodation that she requested. This ignores the generous notice pleading standard applicable here. The City further argues that the complaint's own allegations undercut this claim insofar as it states the City accommodated plaintiff by approving extended paid sick leave and assigning her to limited or restricted duty and, further, acknowledges that plaintiff was granted 3/4 accident disability retirement (which, the City asserts, required her to certify that she was physically incapable of performing the essential functions of a police officer). However, these arguments, which seek to undercut or rebut plaintiff's prima facie case, are not properly made on a motion to dismiss (See Petit v Dept. of Educ. of City of New York, 177 AD3d 402, 404 [1st Dept 2019]).

Retaliation

Defendants' motion to dismiss plaintiff's retaliation claims under the NYCHRL is denied. To make out a prima facie claim of retaliation under the NYCHRL, plaintiff must allege that: (1) she engaged in a protected activity, (2) her employer was aware of this protected activity, (3) employer took an action that disadvantaged her as a result of the protected activity, such that she was discouraged from further protected activity, and (4) a causal connection exists between the protected activity and the employer's disadvantageous action (Reichman v City of New York, 179 AD3d 1115, 1119 [2d Dept 2020] [internal citations and quotations omitted]). In this context, "protected activity" refers to "actions taken to protest or oppose statutorily prohibited

discrimination" (Thomas v Mintz, 60 Misc 3d 1218(A) [Sup Ct, NY County 2018] [internal citations omitted], affd as mod, 182 AD3d 490 [1st Dept 2020]).

While plaintiff's complaint to the Department of Health about Miller is not a protected activity (See Lent v City of New York, 209 AD3d 494 [1st Dept 2022]) and her long wait to see NYPD doctors cannot be said to have disadvantaged her (See Fletcher v Dakota, Inc., 99 AD3d 43, 51-52 [1st Dept 2012]), plaintiff has sufficiently stated a retaliation claim through her allegations that she engaged in a protected activity in complaining about sexual harassment to Deputy Inspector Hall, her commanding officer, in August 2019, and suffered a disadvantageous act insofar as she was removed as Domestic Violence Sergeant and placed on restricted duty. A causal nexus between these events is satisfied by her allegation that her placement on restricted duty "immediately" thereafter (See Jones v The City of New York, 2019 NY Slip Op 30399[U], 8 [Sup Ct, NY County 2019] ["a 'strong temporal correlation' alone is sufficient to raise an issue of fact as to retaliatory motive when the protected activity is followed within a few days or weeks by termination"]).

The City argues in opposition that plaintiff cannot assert that her placement on restricted duty was adverse to her, because she alleges elsewhere in the complaint that plaintiff was seeking to be on restricted duty. However, discrepancies and contradictions in the complaint are viewed at this juncture in light most favorable to plaintiff (See Brannigan v Door, 149 AD3d 892, 893 [2d Dept 2017] ["plaintiff's proposed amendment contradicted an allegation in the original complaint, but that inconsistency simply raises an issue of credibility that may be addressed later in the action; it does not, contrary to the third-party defendants' contention, render the proposed amendment patently without merit"]) and are issues to investigate in discovery rather than grounds for dismissal.

Administrative Code §8-107(13)(b)

Defendants' motion to dismiss plaintiff's claim under NYCHRL §8-107(13)(b) is denied. That statute provides for an employer's vicarious liability for unlawful discriminatory conduct of an employee or agent where: (1) that employee or agent "exercised managerial or supervisory authority" over the plaintiff, and (2) the employer either knew of such conduct and either acquiesced in or failed to take immediate and appropriate corrective action, or (3) should have known of the discriminatory conduct but "failed to exercise reasonable diligence" to prevent it (Hunter v Barnes & Noble, Inc., 2023 NY Slip Op 30638[U] [Sup Ct, NY County 2023]). Here, allegation that Deputy Inspector Hall, plaintiff's commanding officer, was informed of sexual harassment and failed take required corrective action satisfies this claim.

In light of the foregoing, it is

ORDERED that plaintiff's motion to amend her complaint is granted; and it is further

ORDERED that the proposed Amended Complaint in the form submitted with plaintiff's motion (NYSCEF Doc. No. 12) is deemed filed and served; and it is further

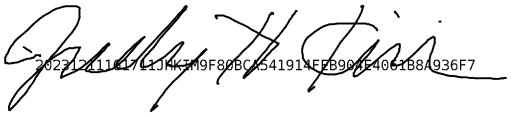
ORDERED that defendants' motion to dismiss is granted in part, to the extent that plaintiff's claims for medical malpractice, negligence, gross negligence, and negligent supervision, training, and discipline, (i.e., counts, six seven, eight, nine, and ten) are hereby dismissed; and it is further

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

ORDERED that, within twenty days from the date of this decision and order, counsel for the City of New York shall serve a copy of this decision and order with notice of entry on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "EFiling" page on this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



12/11/2023
DATE

HON. JUDY H. KIM, J.S.C.

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