UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSEPHINE ROBINSON,

Plaintiff,

Docket No: 11-CV-3742
(JPO)

-against-

GUCCI AMERICA, STAN SHERWOOD, MATTEO MASCAZZINI and CHRISTY LELECK,

Defendants.

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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT MASCAZZINI'S MOTION TO DISMISS

LEEDS MORELLI & BROWN, P.C.
Attorneys For Plaintiff
One Old Country Road, Suite 347
Carle Place, New York 11514
(516) 873-9550

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PRELIMINARY STATEMENT

Plaintiff, Josephine Robinson ("Plaintiff" or "Robinson") commenced this action on June 1, 2011 based on Defendant, Gucci America's ("Gucci") violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the Americans with Disability Act, and Defendants Gucci, Stan Sherwood ("Sherwood"), Matteo Mascazzini ("Mascazzini"), and Christy Leleck's ("Leleck"), violations of the New York State Human Rights Law, Sections 290 *et seq.* ("NYSHRL") and the New York City Human Rights Law ("NYCHRL"). Defendant Mascazzini has moved to dismiss the complaint as against him pursuant to FED. R. CIV. P. 12(b)(6). The Complaint states a claim for relief that is plausible and Mascazzini's motion should be denied. Plaintiff submits this Memorandum in Opposition to Mascazzini's motion.

STATEMENT OF FACTS

Robinson is a dark-skinned, Latin, female, of West Indian national origin. (Compl. ¶ 10). In March 2008, Robinson was hired by Gucci as a tax attorney. (Compl. ¶ 10). As Associate President of Gucci, Mascazzini was Robinson's supervisor. (Compl. ¶ 9). Almost immediately, Robinson realized she entered a workplace permeated with discriminatory animus. (See generally Compl.).[1] On May 27, 2010, Robinson made her first complaint of discrimination and harassment to Hilarie Nenner, Human Resources Manager. (Compl. ¶ 26). With no cessation to the harassment, Robinson complained again to Human Resources in June 2010. (Compl. ¶¶ 27-28, 32). In retaliation for these complaints, Robinson was placed on administrative leave from July 26, 2010 to September 14, 2010. (Compl. ¶ 39).

[1] A full recitation of the extent of the harassment and discrimination should not be necessary for resolution of the issues presented in Defendant Mascazzini's motion; however, Plaintiff has plead numerous specific instances of unlawful treatment in her Complaint.

On September 14, 2010, Robinson returned to work. (Compl. ¶ 42). Mascazzini, along with Leleck, the Director of Human Resources, ordered Robinson to report to the company's New Jersey office, despite the fact that the previous day, Robinson was given the option of returning to either the New York or New Jersey office. (Compl. ¶¶ 41-42). Robinson objected to Mascazzini and Leleck's directive because the commute was burdensome and she was not licensed to practice law in New Jersey. (Compl. ¶ 42). Mascazzini and Leleck again ordered Robinson to New Jersey. (Compl. ¶ 42). Robinson complained that such treatment was retaliation, yet she was still ordered to New Jersey. (Compl. ¶ 43). When she reported to the New Jersey office the next day, she was assigned to a hot, dirty office, with no computer and no work assignments. (Compl. ¶ 44).

On November 2, 2010, less than two months after her complaint to Mascazzini, Robinson's employment was terminated. (Compl. ¶ 58).

STANDARD OF REVIEW

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. As the Second Circuit has explained:

> we apply a "plausibility standard," which is guided by "[t]wo working principles," First, although "a court must accept as true all of the allegations contained in a complaint," that "tenet" "is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss," and "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-

> specific task that requires the reviewing court to draw on its judicial experience and common sense."

Harris v. Mills, 572 F.3d 66, 71-72 (2d Cir. 2009) (citations omitted).

The test, in short, is whether the specific factual allegations in the complaint are sufficient "to raise a right to relief above a speculative level." Twombly, 550 U.S. at 555. The traditional requirements that the Court "draw all reasonable inferences in the plaintiff's favor and accepts as true the facts alleged in the complaint" remain, even in the wake of Twombly and Iqbal. Arar v. Ashcroft, 585 F.3d 559, 567 (2d Cir. 2009); James v. Bauet, 09 Civ. 609, 2009 WL 3817458, *3 (S.D.N.Y. Nov. 11, 2009). Notably, even under this standard, "Rule 12(b)(6) does not countenance dismissals based on a court's disbelief of a complaint's factual allegations." Twombly, 550 U.S. at 566; see also 2004 Stuart Moldaw Trust v. XE LIFE, LLC, 642 F. Supp. 2d 226, 240 (S.D.N.Y. 2009); Brown v. Castleton College, 09-CV-1, 2009 WL 3248106, *2 (D. Vt. Oct. 10, 2009). "The test is whether the plaintiff is entitled to offer evidence to support his claim, not whether he is ultimately likely to prevail." G.I. Home Dev. Corp. v. Weis, 07-CV-4115, 2009 U.S. Dist. LEXIS 29345, at *7 (E.D.N.Y. Mar. 31, 2009) (quoting Chance v. Armstrong, 143 F.3d 698, 701 (2d Cir. 1998)). Plaintiff's complaint cannot be dismissed even where not every element of plaintiff's case is supported with "detailed facts," as long as there is "more than naked assertion" to support a claim. Brown, 2009 WL 3248106 at *2 (quoting Ashcroft, 129 S. Ct. at 1949; Twombly, 550 U.S. at 557). Accordingly, as set forth below, Plaintiff's claims against Mascazzini should not be dismissed because the Complaint alleges sufficient facts from which the Court can infer that he is liable for his misconduct and that Plaintiff is entitled to relief.

ARGUMENT

I. THE COMPLAINT STATES A CLAIM AGAINST MASCAZZINI

The Second Circuit has made clear that a supervisor who "actually participates in the conduct giving rise to a discrimination claim may be held personally liable under the HRL." Tomka v. Seiler Corp., 66 F.3d 1295, 1317 (2d Cir. 1995). Individuals may also be liable under the NYCHRL using the same standards. Feingold v. New York, 366 F.3d 138, 158 (2d. Cir. 2004) (allowing claims to proceed against individuals based on, *inter alia*, the individuals' actual participation in the discrimination, and for taking no remedial action against others' discriminatory conduct).

Here, Defendant Mascazzini argues that "Plaintiff has failed to plead a critical element of a discrimination claim" – discriminatory intent and that Plaintiff failed to plead that Mascazzini was aware of Plaintiff's protected activity. As discussed below, Defendant Mascazzini's arguments are unavailing so his motion should be denied.

A. Plausibly, Defendant Mascazzini Actually Participated in the Discrimination

Preliminarily, Plaintiff notes that she need not plead each element of her claim with specificity to withstand a motion to dismiss. The Supreme Court has made clear that notice pleading remains the rule and a plaintiff's complaint need only state sufficient facts to make the claim plausible. Twombly, 550 U.S. at 563. Accordingly, Defendant Mascazzini's argument that Plaintiff "failed to plead a critical element" is entirely without merit.

Notwithstanding, the Complaint sets forth facts from which the Court could find Mascazzini liable. "Actions taken by an employer that disadvantage an employee for no logical reason constitute strong evidence of an intent to discriminate." Stratton v. Dep't of Aging, 132 F.3d 869, 880 n.6 (2d Cir. 1997).

Here, the Complaint alleges that on September 13, 2010, Plaintiff was provided the option of working at either the New York or New Jersey office upon return from administrative leave, which is also alleged to be an adverse action. (Compl. ¶ 41). Plaintiff chose the New York office. (Compl. ¶ 41). When Plaintiff returned to work on September 14, 2010, Mascazzini disregarded Plaintiff's decision and ordered her to report to the New Jersey office.[2] (Compl. ¶ 42). Plaintiff objected to that directive indicating that the commute was too burdensome and she is not authorized to practice law in New Jersey. (Compl. ¶ 42). Nonetheless, Mascazzini continued to order her to New Jersey. (Compl. ¶ 42). When Plaintiff arrived in the New Jersey office, she found deplorable conditions – the office was hot and dirty and she had no computer and no work assignments. (Compl. ¶ 44). Accordingly, with no work to be done in the New Jersey office and with Plaintiff not even permitted to practice law in New Jersey, there is no logical reason to have assigned her to New Jersey over her pleas to work in New York. Thus, Plaintiff has met the minimal threshold requirement to establish the inference of discrimination prong of the McDonnell-Douglas test and her discrimination claim against Mascazzini should not be dismissed. See Flaherty v. Massapequa Pub. Sch., 752 F. Supp. 2d 286, 297 (E.D.N.Y. 2010) (holding that just the one statement, "You hired gays?" sufficient to satisfy inference of discrimination element) (citing Schnabel v. Abramson, 232 F.3d 83, 87 (2d Cir. 2000) (satisfying a prima facie case is a minimal burden)).

[2] Defendants allude to an argument that the New Jersey transfer may not be an adverse action. However, the Supreme Court has held that, "employment decisions that affect work assignment are tangible employment actions." Faragher v. City of Boca Raton, 524 U.S. 775, 790 (1998). Since Plaintiff had no work assignments in New Jersey, the transfer fits squarely within the meaning of an adverse action. This allegation is sufficient on a motion to dismiss and discovery will reveal facts which create issues of facts.

B. The Complaint Clearly Alleges Plaintiff Complained to Mascazzini and that Plaintiff was Terminated Less Than Two Months After Her Complaint

A plaintiff may illustrate a causal connection "indirectly, by showing that the protected activity was followed closely by discriminatory treatment." Borrero v. Collins Bldg. Services, Inc., No. 01 Civ. 6885, 2002 WL 31415511, at *15 (S.D.N.Y Oct. 25, 2002) (citations and internal quotation marks omitted). "A period of only two months between a protected activity and an adverse action may permit a reasonable jury to find the acts to be temporally proximate and causally related." Id.; see also Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769-70 (2d Cir. 1998) ("strong temporal correlation" between complaint and adverse action coupled with issues of fact about pretext sufficient to survive judgment, particularly where harasser generated the employer's proffered business reason); Ashok v. Barnhart, 289 F. Supp. 2d 305, 315 (E.D.N.Y. 2003) (denying summary judgment where Plaintiff's only evidence of retaliatory animus was temporal proximity).

Here, on September 14, 2010, Plaintiff complained in good faith directly to her supervisor, Mascazzini that he was retaliating against her. (Compl. ¶ 9, 43). On November 1, 2010, less than two months after her complaint, Plaintiff was terminated. (Compl. ¶ 58). This strong temporal proximity raises an inference of retaliatory animus. Although the letter advising Plaintiff of her termination was signed by Leleck, it is entirely plausible that Mascazzini, as Plaintiff's supervisor, made the termination decision (or at least had input into the decision) and Leleck, as a human resources manager, merely drafted and signed the letter. As such facts are known only to Defendants at this time, discovery will show the extent of Mascazzini's

involvement in the decision and Plaintiff should not be precluded from seeking such discovery and holding Mascazzini responsible for his unlawful conduct.[3]

Additionally, the Complaint alleges that Plaintiff complained to Human Resources about discrimination no less than two times. Thus, it is plausible that Leleck, as Director of Human Resources, was aware of Plaintiff's complaints particularly in light of the illogical demand that Plaintiff work in New Jersey.[4] Therefore, it is also plausible that Mascazzini, as Associate President of Gucci and as Plaintiff's supervisor, was aware of her complaints since Mascazzini was present with Leleck and joined in the illogical demand that she work in New Jersey.

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[3] Plaintiff pleads other claims and other facts between the time of her complaint to Mascazzini and the time of her termination. Without the benefit of discovery, it is impossible to determine which unlawful reason or reasons motivated the adverse employment actions, but employment discrimination plaintiffs are not precluded from pleading alternative theories of discrimination and retaliation. Fagan v. U.S. Carpet Installation, Inc., 770 F. Supp. 2d 490, 495 (E.D.N.Y. 2011) ("complex inquiries into the parties' intent may sometimes justify raising multiple, inconsistent claims") (citing FED. R. CIV. P. 8(d)(3); Henry v. Daytop Village, Inc. 42 F.3d 89, 95 (2d Cir. 1994)).

[4] As discussed above, Defendants insinuate that the New Jersey transfer may not be an adverse action. Since transferring an attorney to a hot dirty office with no computer and no work assignments would dissuade a reasonable employee from complaining about discrimination, it is an adverse employment action. See Burlington Northern v. White, 548 U.S. 53, 57 (2006). If there is any doubt that the transfer is an adverse action under federal and state law, it is most certainly an adverse action under city law since the New York City Human Rights Law prohibits an employer from retaliating in any manner and is, thus, broader than the Burlington Northern standard. Williams v. N.Y.C. Housing Auth., 61 A.D.3d 62, 70 (N.Y. App. Div. 2009) (holding that the City council made clear that the human rights law differs from the Second Circuit's retaliation standard). To analyze a CHL retaliation claim, Courts determine whether the adverse action is "reasonably likely to deter a person from engaging in protected activity." Id. (citing Restoration Act § 8-107(7)).

CONCLUSION

For the reasons discussed herein, Defendant's motion should be denied in its entirety.

Dated: Carle Place, New York
October 21, 2011

Respectfully submitted,

LEEDS, MORELLI & BROWN, P.C.
Attorneys for Plaintiff
One Old Country Road, Suite 347
Carle Place, N.Y. 11514
(516) 873-9550

By: /s/
RICK OSTROVE