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United States District Court,
S.D. New York.

Marie CASALINO, Plaintiff,
v.
NEW YORK STATE CATHOLIC HEALTH PLAN, INC., d/b/a Fidelis Care New York, Defendant.

No. 09 Civ. 2583(LAP).
|
March 30, 2012.

Opinion

Opinion & Order

LORETTA A. PRESKA, Chief Judge.

***1** Plaintiff Marie Casalino ("Casalino" or "Plaintiff") brings this action against her former employer New York State Catholic Health Plan, Inc. ("Fidelis" or "Defendant") alleging unlawful gender discrimination in the forms of hostile work environment harassment, retaliation, and disparate treatment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* ("Title VII") and the New York City Human Rights Law, N.Y.C. Admin. Code § 8–101 *et seq.* ("NYCHRL" or "HRL"). Fidelis moves for summary judgment and dismissal of these claims under Federal Rule of Civil Procedure 56. For the reasons below, Defendant's motion is GRANTED in part with prejudice and DENIED in part.

I. *BACKGROUND*

The Court presumes the parties' familiarity with the facts of this case, which are quite lengthy and have been set out in detail in the parties' 56.1 Statements and Counter–Statements [dkt. nos. 40–42, 48.] Nevertheless, the Court undertakes to include a brief summary of the facts for the purposes of this opinion, citing variously to Defendant's Rule 56.1 Statement ("D.56.1"), Plaintiff's Rule 56.1 Statement ("P.56.1"), and Defendant's Response to Plaintiff's Statement of Facts ("Def. Reply 56.1"). To the extent there appears to be a material dispute as to any fact referenced in this fact summary or opinion based on admissible evidence, the Court has endeavored to so indicate.

Casalino is a board-certified pediatrician with a subspecialty in Neonatal–Perinatal medicine. She holds a Master's Degree in public health. In 1998 Plaintiff moved from clinical and academic medicine into public health administration. In 2003 she entered the field of managed health care. In February 2005 she was hired by Mark Lane ("Lane"), Chief Executive Officer of Fidelis, as a medical director. Plaintiff reported directly to Dr. Marco Michelson ("Michelson"), Fidelis' Chief Medical Officer, and she worked out of Fidelis' headquarters in Rego Park, Queens. In autumn 2005 a second medical director, Dr. Nancy Klotz ("Klotz"), joined Fidelis and also began reporting to Michelson. (P. 56.1 ¶¶ 312–15, 324.)

In October 2005 Fidelis acquired Center Care, another health plan located in Manhattan. After having received a generally positive 90–day written performance evaluation in June 2005, Fidelis appointed Plaintiff medical director of its new Center Care branch in addition to her other duties. She maintained offices at Center Care and at Fidelis. In March 2006, Michelson gave her a written performance evaluation with an overall score of "successful" which resulted in a raise. (P. 56.1 ¶¶ 322–23.) At all times, Fidelis had a Code of Conduct and an Employee Handbook, both of which prohibited employee discrimination and harassment. The Handbook states that any allegations of harassment or discrimination will be "promptly and thoroughly investigated." It states that harassment can occur "over email, phone mail or other electronic media." The Handbook also sets forth a formal corrective action procedure, under which employees with performance problems are to be given two written warnings on a specific "corrective action form." (P. 56.1 ¶¶ 331–41.)

***2** In March 2006, Susan Davis ("Davis"), a supervisor for clinical services who worked in the Buffalo office, asked to speak with Diane Tucker ("Tucker"), Fidelis' Vice President of Human Resources, about what she called a "sensitive issue." Davis told Tucker that Michelson had been "loud," "unreasonable," and "unprofessional" in a telephone call with her. Davis also told Tucker that Liya Davidov ("Davidov"), in Fidelis' pharmacy department, had also had a similar interaction with Michelson. Davis had complained to Tucker in Human Resources about Michelson, and Tucker had told

her that she would look into the matter and get back to her. According to Davis, Tucker never did so. (P. 56.1 ¶¶ 348–60.)

On May 15, 2006, Vicki Landes ("Landes"), Director of Clinical Services and Davis's immediate supervisor, received a phone call from Michelson in which he became very angry and vocal, accusing her of not doing job and then slamming his phone down. Landes became very upset at the interaction and spent 10–15 minutes in a co-worker's office trying to compose herself. Landes then called Robert Fazzolari ("Fazzolari"), Assistant Vice President for Corporate Compliance. Fazzolari called her back with Regina Trainor ("Trainor"), Chief Legal Officer and Head of Compliance at Fidelis. Landes explained the incident to them, and they informed her that Tucker would be following up with her. (P. 56.1 ¶¶ 361–75.) Landes also called Plaintiff, who was her direct supervisor, who was at home on medical leave at the time. Landes was very upset, and Plaintiff tried to help her regain her composure. Plaintiff told Landes that she was going to come back to work and help her with this incident. In the meantime, Plaintiff and Landes agreed that Landes should stay clear of Michelson. (P. 56.1 ¶¶ 376–80.)

Human Resources did not contact Landes. On May 17 and 19, 2006, Landes e-mailed Tucker and Fazzolari requesting a follow-up on the Michelson situation. Tucker did not reply to either e-mail. (P. 56 .1 ¶¶ 382–85.) On May 17, 2006, Plaintiff returned to work, and Tucker came to visit her about the Landes–Michelson incident. Plaintiff reported to Tucker that she found it upsetting that Landes had been so frightened by the call and said she would do whatever she could to help smooth things over. (P. 56.1 ¶¶ 386–89.) Tucker then spoke to Michelson and requested that he reprimand individuals, if at all, one-on-one and not with others around. (P. 56.1 ¶ 391.)

Thereafter, Landes attempted to stay clear of Michelson, but Plaintiff shortly found herself mediating an additional dispute between them. Michelson had sent Landes an e-mail accusing her of not doing certain work on Fidelis' website. Landes explained to Plaintiff that she had never been assigned the work. When Plaintiff attempted to explain this to Michelson, he reacted sharply, harshly criticizing Landes. Plaintiff told Landes they would try and address the website issue together and Landes could go through Plaintiff in her dealings with Michelson. (P. 56.1 ¶¶ 393–400, 403–05.) Following this mediation, however, Plaintiff noticed that Michelson became more difficult for her to deal with. He attempted to marginalize Plaintiff in her meetings with Lane and Fidelis Chief Operating Officer Father Patrick Frawley ("Frawley"). He prevented Plaintiff from including her matters on the meeting agendas, interrupted her when she attempted to speak, and criticized her comments after she had spoken. Plaintiff eventually began taking notes and making comments in private conversations with participants after meetings ended. She told Michelson that she was being quiet due to his interruptions and criticisms whenever she spoke. Michelson then began criticizing Plaintiff's written submissions. He eventually became difficult to deal with on administrative matters like approvals for days off or time for medical appointments. (P. 56.1 ¶¶ 417–24.)

***3** In the autumn of 2006, Plaintiff was responsible for completing a project entitled Best Clinical Administrative Practices ("BCAP"), which required the completion and submission of a report and presentation to New York State in order to meet certain regulatory requirements for both Fidelis and Center Care. Michelson had assigned Plaintiff the task when she became Medical Director for Center Care in September 2005. Plaintiff and Michelson had difficulty coordinating his edits to the presentation leading up to its due date on September 8, 2006, particularly in light of Lane and Frawley's significant issues with an earlier draft that Plaintiff had submitted. On September 7, 2006, the night before the project was due and Plaintiff and Michelson were to present it once again to Lane and Frawley, having not received Michelson's edits by 5 p.m., Plaintiff left for the day. She assigned an administrative assistant the task of waiting for and then making any final changes Michelson might have. (*See* Def. 56.1 ¶¶ 139–52; P. 56.1 139–52.)

On September 8, 2006, while waiting to make the final presentation to Lane and Frawley, Michelson began berating Plaintiff in the anteroom outside Fidelis' executive office. Specifically, Michelson said he was frustrated that Plaintiff had not taken ownership for her projects and assignments, had not gotten her work done, and had left assignments for others. Klotz and two additional staff were present in the room during this interaction. After Plaintiff gathered herself, the meeting on the submission to the New York State Department of Health took place. After the meeting, Michelson called Plaintiff to his office and started yelling and waiving his hands. Plaintiff asked Michelson not to speak to her that

way but "he just kept screaming and screaming." Plaintiff left Michelson's office, returned to her own, and broke down. She called Tucker who came to Plaintiff's office. Plaintiff informed Tucker that Michelson had treated her the way she had heard that he treated other women. Plaintiff remained in her office with the door closed for the rest of the day. (P. 56.1 ¶ ¶ 454–58; Def. 56.1 ¶¶ 154–58.)

On September 13, 2006, Plaintiff met with Trainor and Fazzolari regarding the incident. She told them she had been frightened and reduced to tears and sobbing and that there were women who were afraid to be in an office with Michelson. Plaintiff told Trainor, "you have a problem employee who behaves inappropriately towards women and you are now on notice from me that you have to do something about him." Plaintiff felt that Trainor was unsympathetic. Trainor told Plaintiff that she felt this was an issue with Michelson's management style and that Michelson was trying to manage her. (P. 56.1 ¶¶ 464–67.) Tucker did not conduct any further investigation into Plaintiff's complaint. Tucker did speak with Michelson, advising him to "adjust how he was interacting and figure out a way to work with Marie." (P. 56.1 ¶¶ 478–81.)

***4** In October, Fidelis announced that Michelson was taking a leave of absence from the company effective November 1, 2006, and that Klotz would take over as acting Chief Medical Officer. (Pl. 56.1 ¶ 488.) At her prior performance evaluation in March 2006, Plaintiff had requested that Michelson provide her with an interim performance evaluation in six months time. That review took place just before he left, on or about October 31, 2006. (Def. 56.1 ¶ 184.) In this review, Plaintiff received six "needs improvement" scores in various areas, and Michelson reported that Plaintiff needed to improve her level of ownership over projects, be more willing to discuss her own shortcomings, be more involved in the clinical service departments, and better improve the credentialing process over which she was in charge. The overall score for the review was "Needs Improvement," which was the second lowest score possible to achieve. (Def. 56.1 ¶¶ 187–91.) On or about December 15, 2006, Plaintiff filed an extensive written response to this review with Fidelis in which she defended herself on substance and made no mention of retaliation or discrimination. She claimed that the review was unfair and that Fidelis' fiscal challenges may have compromised her performance. (Def. 56.1 ¶¶ 199–201.)

While working under Klotz during Michelson's leave of absence, Klotz informed Plaintiff that Lane and Frawley had a negative opinion of her work. Plaintiff told Klotz that she felt that Michelson had made an effort to diminish her in their eyes. Plaintiff worked closely with Klotz during this period, dividing up Michelson's responsibilities, and Klotz ultimately felt that she could not have done the work of acting Chief Medical Officer without Plaintiff's help. On December 7, 2006, after a series of presentations to a committee of the Fidelis Board of Directors, Klotz told Plaintiff that she felt that "we had turned a corner" in restoring Plaintiff's credibility. Plaintiff told Klotz she felt it was owing to Michelson's absence. (P. 56.1 ¶¶ 493–505.) In mid-December, word spread that Michelson would be returning in January 2007. Plaintiff was very worried and spoke to both Klotz and Tucker about her concerns. Both assured her that things would be better upon his return. (P. 56.1 ¶¶ 513–36.)

Klotz left for a vacation in Israel from December 21, 2006 through January 2, 2007. As of December 21, her October performance review notwithstanding, Plaintiff had never received a warning notice under the Fidelis corrective action policy as described in the Employee Handbook and had never been advised that she was in danger of termination. Her feedback from Klotz had been positive. (P. 56.1 ¶¶ 517, 600.) Beginning December 22, 2006, however, four incidents came to a head almost simultaneously which, according to Fidelis, were "significant performance deficienc[ies]" and largely formed the basis for Plaintiff's ultimate termination. (*See, e.g.,* Def. 56.1 ¶¶ 216, 253.) They were: (1) Plaintiff's failure to revoke the credentials of a Dr. Cheng as a Fidelis provider consistent with Fidelis' policy regarding medical license revocations and the like; (2) Plaintiff's failure timely to revoke the credentials of a Dr. Florio for substantially the same reasons; (3) Trainor's realization that Plaintiff had "never given or ensured that Behavioral Health staff had proper access to Fidelis computer system when they were on-call at night and over the weekend;" and (4) the "Family K" incident in which authorization of provider services was granted without having a required negotiated rate in place for those services. Each of these incidents or issues arose on or after December 22, 2006, within a 10–day period. [1]

1 The facts surrounding these incidents are subject to substantial dispute between the parties and go to the heart of Fidelis' proffered reasons for Plaintiff's

termination, as well as Plaintiff's claim of pretext in this suit. These disputed facts are laid out at length in the parties' 56.1 Statements. (*See* Def. 56.1 ¶¶ 216–73, 279–89; P. 56.1 ¶¶ 216–73, 279–89, 518–81; Def. Reply 56.1 ¶¶ 518–81.)

***5** Exactly what happened next at Fidelis is heavily disputed by the parties, as is Michelson's role, if any, in Plaintiff's ultimate termination. Michelson returned to Fidelis on January 2, 2007. That same day, Lane sent out an e-mail welcoming Michelson back and announcing that Klotz would be taking over the role of head of Center Care, which had been Plaintiff's position until that day. Plaintiff was not advised of this decision until the e-mail was sent out. (Def. 56.1 ¶¶ 274–75.) Fidelis states that this decision was made prior to Klotz's return to the office on January 3, 2007, and that "it did not mean that Plaintiff could not continue her employment at Fidelis." (Def. 56.1 ¶ 277.) Earlier that same day, however, with Michelson now back in the office, Lane had sent Michelson a draft of the same e-mail for his review and comment. Michelson replied, "Looks good. Is the unspoken message too obvious?" (P. 56.1 ¶¶ 583–89.)

Simultaneously, and as a result of the incidents in late December 2006, Frawley had prepared a memo to Klotz for her review upon her return and copied it to Trainor, Lane, and Plaintiff on the morning of January 3, 2007 when Klotz returned. The memo describes what Frawley felt were Plaintiff's "numerous performance deficiencies" and "serious concerns" about Plaintiff's work. Frawley describes "grave concerns relative to Dr. Casalino's judgment, ownership, and overall ability to perform appropriate oversight of a critical process that has significant regulatory and quality implications for the Plan and its members." Trainor responded to the memo via e-mail, largely concurring in his judgment. Though Klotz testified that she began the day with no intention of terminating Plaintiff, (P. 56.1 ¶ 591), after reviewing Frawley's memo, Trainor's e-mail, and additional materials on Plaintiff's performance, she resolved to terminate her. (Def. 56.1 ¶¶ 290.) Though Michelson had returned to Fidelis as Chief Medical Officer the day before, Fidelis represents that "Dr. Klotz had the authority to do so ... because she was Plaintiff's supervisor during the December mishaps and Dr. Michelson was not yet fully integrated back into his role." (Def. 56.1 ¶ 290.)

Fidelis notes that Klotz was the sole decision maker in Plaintiff's termination and had no knowledge of Plaintiff's prior complaints about Michelson. (Def. 56.1 ¶ 215.) Similarly, Fidelis states that Michelson played no role in the decision. (Def. 56.1 ¶¶ 293–94.) Plaintiff, however, points to testimony from Trainor that a January 3, 2007 meeting was called in which Trainor, Lane, Frawley, Klotz, and possibly even Michelson attended and "a conclusion was reached at the meeting to terminate Casalino. It was discussed who would terminate her, and it was decided that Klotz would." (*See* P. 56.1 ¶¶ 290, 596–98.) Moreover, Klotz spoke with Michelson on January 3, 2007, prior to making her decision to terminate Plaintiff. (Pl. 56.1 ¶ 290.) Later that day, Plaintiff was called into a meeting with Klotz and Tucker and was informed she was terminated. (Def. 56.1 ¶ 299; P. 56.1 ¶ 602.) Klotz later composed a memorandum laying out the performance failures resulting in Plaintiff's termination. (Def. 56.1 ¶¶ 300–02.)

II. *DISCUSSION*

A. *Summary Judgment Standard of Review*

***6** The standard for summary judgment is uncontroversial. In considering a motion for summary judgment, the Court resolves all ambiguities and draws all reasonable inferences against the moving party. *Lindsay v. Ass'n of Prof'l Flight Attendants,* 581 F.3d 47, 50 (2d Cir.2009). "Summary judgment is appropriate only 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Kwan v. Schlein,* 634 F.3d 224, 228 (2d Cir.2011) (quoting Fed.R.Civ.P. 56(a)); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A fact is material if it might affect the outcome of the suit under the governing law." *Lindsay,* 581 F.3d at 50. "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Liberty Lobby,* 477 U.S. at 250.

Rule 56 mandates summary judgment "against a party who fails to make a showing sufficient to establish the

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Liberty Lobby,* 477 U.S. at 249–50 (internal citations omitted). In the face of insufficient evidence, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex,* 477 U.S. at 322–23.

"It is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases." *Abdu–Brisson v. Delta Air Lines, Inc.,* 239 F.3d 456, 466 (2d Cir.2001), *cert. denied,* 534 U.S. 993, 122 S.Ct. 460, 151 L.Ed.2d 378 (2001); *see also Weinstock v. Columbia Univ.,* 224 F.3d 33, 40 (2d Cir.2000) (instructing that "trial courts should not 'treat discrimination differently from other ultimate questions of fact' ") (quoting *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). Accordingly, a plaintiff alleging Title VII discrimination claims "cannot escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts ... or defeat the motion through mere speculation or conjecture." *Jones v. Hirschfeld,* 348 F.Supp.2d 50, 59 (S.D.N.Y.2004).

B. *Analysis*

Plaintiff alleges unlawful gender discrimination in the forms of hostile work environment harassment, retaliation, and disparate treatment in violation of Title VII and NYCHRL. The Court addresses each claim in turn. Separate analysis of the Title VII and NYCHRL claims are provided where necessary but are otherwise discussed together.

1. *Gender–Based Harassment: Hostile Work Environment*

***7** To prevail on her claim that she experienced gender-based harassment under Title VII, Plaintiff must show that: (1) she is a member of a protected class; (2) she suffered unwelcome harassment; (3) she was harassed because of her membership in a protected class; and (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment. *See Gregory v. Daly,* 243 F.3d 687, 691–92 (2d Cir.2001); *Monterroso v. Sullivan & Cromwell, LLP,* 591 F.Supp.2d 567, 584 (S.D.N.Y.2008). For the purposes of this motion, the Court focuses on elements three and four above. It is axiomatic that a successful allegation of harassment must demonstrate that the conduct of which Plaintiff complains occurred *because* of her gender. *See Brennan v. Metropolitan Opera Assoc., Inc.,* 192 F.3d 310, 318 (2d Cir.1999). Moreover, "incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." *Alfano v. Costello,* 294 F.3d 365, 374 (2d Cir.2002). Plaintiff must show that "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.' " *Howley v. Town of Stratford,* 217 F.3d 141, 153 (2d Cir.2000) (quoting *Harris v. Forklift Sys. Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)); *see also* Brennan, 192 F.3d at 318 ("Isolated, minor acts or occasional episodes do not warrant relief.").

Here, Plaintiff has simply failed to adduce sufficient evidence to support even a *prima facie* claim of gender-based workplace harassment. For the reasons below, Plaintiff cannot point to facts sufficient for a reasonable jury to find that (a) the conduct she experienced was based upon her gender, or (b) rose to a level that was sufficiently severe or pervasive. For these reasons, Defendant's motion for summary judgment as to the hostile work environment claim must be granted, whether categorized as a Title VII or NYCHRL claim.

To be actionable, the conduct of which Plaintiff complains must have occurred because of her gender. *Brennan,* 192 F.3d at 318; *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). Incidents, however abusive, that are not gender-related are not relevant to establish a claim against Fidelis that can survive its motion for summary judgment. *See Norris v. N.Y.C. Hous. Auth.,* No. 02 Civ. 6933, 2004 WL 1087600, at *12 (S.D.N.Y. May 14, 2004) ("[R]udeness without any evidence of discriminatory intent does not constitute discrimination.").

Plaintiff's harassment allegations in this case reduce to essentially one verbal encounter with Michelson, which

was itself in no way characterized by any gender-specific animus. (Def. R. 56.1 ¶¶ 139–143.) Plaintiff does not allege that Michelson ever made, for example, derogatory comments about women or engaged in any sexually inappropriate behavior. (*See generally* P. 56.1.) Plaintiff's testimony in this regard does not raise even a direct inference of conduct occurring *because* of her gender. In fact, Plaintiff concedes that this incident occurred after she left the "BCAP" project in the hands of an executive assistant just before its deadline. (Def. R. 56.1 ¶¶ 151–52.) Apart from this one central interaction, Plaintiff elsewhere suggests that she was "marginalized" and "ignored" by Michelson during meetings and the like. (Def. R. 56.1 ¶ 307.) Plaintiff places particular emphasis on her own reactions, noting that Michelson "berated her and frightened her, reduced her to tears to the point where she could not leave her office." (*See* Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment ("Opp.") at 21.) Plaintiff's own reactions, however, even if credited by the jury as true, cannot themselves demonstrate Michelson's gender animus.

***8** Nor can Plaintiff sustain a *prima facie* case of gender harassment here by pointing to the experiences of other women at Fidelis. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment *to which members of the other sex are not exposed." Oncale,* 523 U.S. at 80 (citing *Harris,* 510 U.S. at 25) (emphasis added). While it is certainly true that hostile work environment claims turn on a totality of the circumstances which may include consideration of conduct directed at other employees, *see Cruz v. Coach Stores, Inc.,* 202 F.3d 560, 572 (2d Cir.2000), Plaintiff's invocation of co-workers Landes and Davis is actually self-defeating as their own testimony supports the notion that Michelson was in fact an "equal opportunity" offender. (*See* Reply Memorandum of Law in Further Support of Defendant's Motion for Summary Judgment ("Def. Reply Mem.") at 5–6.) Nowhere does Plaintiff actually allege that Landes or Davis were yelled at *because* they were female. Both Landes and Davis themselves testified that their encounters with Michaelson were gender-neutral and that Michelson also treated male employees harshly. (Def. R. 56 .1 ¶¶ 100, 110–12, 115.) Landes testified that Michelson spoke harshly to male employees Boardman and Weinberg to such extent that Boardman felt the situation needed to be addressed with Human Resources. (*Id.* ¶ 111.) Davis herself testified that she personally observed Michelson yelling at Weinberg during a management meeting. (*Id.* ¶ 112.) Moreover, Plaintiff herself testified that she felt Michelson respected her, at least through May 2006, (*id.* ¶ 56), and also testified that female co-workers Klotz, Trainor, and Tucker had positive interactions with Michelson and she never witnessed those individuals treated in a hostile manner. (*Id.* ¶ 183.)

It is not controversial that Casalino may offer "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace" as an "evidentiary route" to raising an inference of discriminatory intent. *See Oncale,* 523 U.S. at 80–81. Moreover, a jury is certainly permitted to find gender motivation on the basis of disparate treatment itself, derogatory verbal comments alone, or a combination of both. *See Pucino v. Verizon Wireless Commc'ns, Inc.,* 618 F.3d 112, 117–19 (2d Cir.2010). The problem in this case is that Plaintiff has offered insufficient evidence of either to permit a reasonable jury to find that Michelson's conduct occurred because of her gender.

Even if Plaintiff could establish that Michelson's conduct occurred because of her gender, Plaintiff cannot establish to the extent she must that the conduct was sufficiently "severe or pervasive" within the meaning of Title VII. Among the factors courts look to in assessing the severity of any alleged harassment are "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." *Harris,* 510 U.S. at 23. The Court of Appeals has said that one incident is generally insufficient to support a harassment claim unless it constitutes "an intolerable alteration of the plaintiff's working conditions ... so as to substantially interfere with or impair his ability to do his job." *Mathirampuzha v. Potter,* 548 F.3d 70, 79 (2d Cir.2008). For the reasons described above, Plaintiff's allegations essentially reduce to the single September 2006 incident in which Michelson engaged in a verbal altercation with her. (Def. R. 56.1 ¶¶ 139–183.) But Plaintiff continued to work with Michelson through his leave of absence in November 2006 and Plaintiff offers no evidence at all that any further exchange of that sort took place between them. (Def. R. 56.1 ¶¶ 182, 204–08 .) The Court finds that a reasonable jury could not conclude, on the evidence Plaintiff has

brought forward on this motion, that this incident resulted in an "intolerable alteration of the plaintiff's working conditions." *See Mathiramphuzha,* 548 F.3d at 79.

***9** As to additional instances of harassment to which Plaintiff refers, "the objective severity of [the] harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all of the circumstances.' " *Oncale,* 523 U.S. at 81 (citing *Harris,* 510 U.S. at 23). Plaintiff alleges that Michelson "marginalized" her during meetings, did not let her discuss certain meeting agenda items, and generally made her job more difficult. (Def. R. 56.1 ¶ 307.) The evidence put forward in response to this motion, however, is unspecific as to when the marginalization occurred, which agenda items were not discussed, or how exactly her job was made more difficult. (*See* Memorandum of Law in Support of Defendant's Motion for Summary Judgment ("Def.Mem.") at 7–8.) While specific details as to every single incident alleged may not be necessary to find harassment severe or pervasive, *see Pucino,* 618 F.3d at 119–20, the evidentiary record here is broadly deficient of such details. The Court agrees with Defendant that, unlike *Pucino,* Plaintiff does not offer evidence of harassment which when reviewed in its totality could have affected "most of the major aspects of [Plaintiff's] employment." (*See* Def. Reply Mem. at 4–5 (citing *Pucino,* 618 F.3d at 119).)

Moreover, the Court notes that it cannot wholly divorce the question of whether harassment is severe or pervasive from the question of whether the harassment itself is based on gender. As noted above, abusive incidents that are not gender-related are irrelevant to establish a claim against Fidelis that can survive its motion for summary judgment. *See* Norris, 2004 WL 1087600, at *12. Such incidents are equally irrelevant in assessing the severity or pervasiveness of any harassment for Title VII purposes. Based on the current record, the Court concludes that no reasonable jury could find that Michelson subjected Plaintiff to gender-based harassment that was severe or pervasive. [2]

2 Because the Court finds that Plaintiff's *prima facie* case of harassment does not survive summary judgment, the Court need not address whether Michelson's behavior, had it violated Title VII, could be inputed to Fidelis under *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) and *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

Finally, the Court's grant of summary judgment on Plaintiff's harassment claim for Title VII purposes merits a similar grant on Plaintiff's NYCHRL claim. A NYCHRL hostile work environment claim requires that Plaintiff prove "by a preponderance of the evidence that she has been treated less well than other employees *because* of her gender." *Williams v. N.Y.C. Hous. Auth.,* 61 A.D.3d 62, 872 N.Y.S.2d 27, 39 (1st Dep't 2009) (emphasis added). While it is true that the NYCHRL moves the consideration of severity and pervasiveness from the liability to the damages phase of trial, *see id.* at 39–40, it remains a requirement of the claim that any harassment be "because of" Plaintiff's gender. *Id.* at 39. The New York Appellate Division, First Department also recently made clear that summary judgment remains available if a plaintiff's claim of severity is not borderline. *See id.* at 41 ("[W]e assure employers that summary judgment will still be available where they can prove that the alleged discriminatory conduct in question does not represent a 'borderline' situation but one that could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences."); *see also Short v. Deutsche Bank,* 79 A.D.3d 503, 913 N.Y.S.2d 64, 66 (1st Dep't 2010) ("The various complaints about [harasser's] conduct in the workplace were nothing more than non-actionable petty slights and minor inconveniences which in any event may be viewed by a reasonable employee as a function of [harasser's] management style, unrelated to gender discrimination," citing *Williams,* 872 N.Y.S.2d at 41). Because the Court has already determined that Plaintiff cannot establish that Michelson's conduct occurred because of gender, the Court also concludes that Plaintiff fails the NYCHRL summary judgment standard on this harassment claim. Accordingly, Defendant's motion for summary judgment on the NYCHRL harassment claim is also granted.

2. *Retaliation Claim*

***10** Plaintiff alleges that Fidelis illegally retaliated against her following her complaint about Michelson. Specifically, she points to her October 2006 performance review, her "marginalization" at work, and her January 3, 2007 termination. Retaliation claims are analyzed under the standard set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802–04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In order to survive summary

judgment on a Title VII retaliation claim, Plaintiff must offer sufficient evidence to permit a reasonable jury to find that (1) she engaged in a protected activity known to Fidelis; (2) Fidelis took an adverse employment action against her; and (3) that "a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the adverse employment action." *Kessler v. Westchester Cnty. Dep't of Soc. Servs.,* 461 F.3d 199, 205–06 (2d Cir.2006) (citation omitted). If a *prima facie* case is established, the burden shifts to the employer to present a legitimate, non-discriminatory reason for any adverse employment action. *See Gallagher v. Delaney,* 139 F.3d 338, 349 (2d Cir.1998), *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). Once an employer satisfies this burden of production, all presumptions drop out, and the plaintiff bears the burden of persuasion in showing that the employer's proffered reason for the adverse employment action is merely a pretext for retaliation. *Id.* Plaintiff's NYCHRL claim is analyzed using a substantially similar, though more liberalized framework. *See, e.g., DeMarco v. CooperVision, Inc.,* 369 Fed. Appx. 254, 255 (2d Cir.2010); *Williams,* 872 N.Y.S.2d at 33–34.

a. Protected Activity

Here, Plaintiff argues that she engaged in protected activity within the meaning of Title VII when she had a September 13, 2006 meeting with Chief Legal Officer and Corporate Compliance Officer Regina Trainor and Associate Director of Corporate Compliance Robert Fazzolari in which she reported the September 8, 2006 altercation with Michelson. (P. 56.1 ¶ 464.) Plaintiff alleges specifically that she informed Trainor and Fazzolari that "there were women that were afraid to be in the office with Michelson" and said "you have a problem employee who behaves inappropriately towards women and you are now on notice from me that you have to do something about him." (*Id.* ¶¶ 464–67.) Fidelis does not seriously dispute these facts, except to clarify that Plaintiff's testimony was that she informed Tucker in Human Resources that "there were women that were afraid to be in the office with Michelson," rather than Trainor or Fazzolari in the September 13 meeting. (*See* Def. Reply 56.1 ¶ 464.) Fidelis also points out that while Trainor later testified that she remembered Plaintiff "putting her on notice, she understood her to mean that she was putting her on notice that Michelson would raise his voice, not that she was raising claims of unlawful harassment." (*Id.* ¶ 466, 872 N.Y.S.2d 27.) Plaintiff does separately allege that on September 8, 2006 she said to Tucker, "he can't treat people like this, he can't treat women like this. This is what he did to Vicki. I know he did this to Sue. He has done it to other women." (P. 56.1 ¶ 457.) Fidelis does not dispute this testimony.

***11** To a lesser extent, Plaintiff alleges that she engaged in protected activity when she separately discussed with Tucker the issues her colleague Vicki Landes had dealing with Michelson. Specifically, Plaintiff alleges that Tucker came to her office in May 2006 after an incident involving Landes and Michelson and said she wanted to discuss the situation. (Pl. 56.1 ¶ 387.) Plaintiff told Tucker "she had spoken with Landes and found it upsetting that Landes was so frightened about the incident." (*Id.*) Plaintiff told Tucker she would do whatever she could to help. (*Id.* ¶ 388, 872 N.Y.S.2d 27.) Fidelis does not dispute this testimony.

In the context of a Title VII retaliation claim, " '[p]rotected activity' includes opposition to a discriminatory employment practice or participation in any investigation, proceeding, or hearing under Title VII." *Hubbard v. Total Commc'ns, Inc.,* 347 Fed. Appx. 679, 680–81 (2d Cir.2009). It is clearly established that "informal complaints to supervisors constitute protected activity under Title VII." *Sclafani v. PC Richard & Son,* 668 F.Supp.2d 423, 427 (E.D.N.Y.2009); *see also Amin v. Akzo Nobel Chemicals, Inc.,* 282 Fed. Appx. 958, 961 (2d Cir.2008); *Cruz,* 202 F.3d at 566; *Sumner v. U.S. Postal Serv.,* 899 F.2d 203, 209 (2d Cir.1990). Here, Plaintiff complained about what she perceived, rightly or wrongly, to be Michelson's gender animus to the head of Human Resources, the Chief Legal Officer, and the Associate Director of Corporate Compliance. (*See* P. 56.1 ¶¶ 387–88, 464–67.) These complaints, even if informal, fall within the accepted definition of protected activity for Title VII purposes.

To establish that an employee engaged in protected activity sufficient to establish a retaliation claim, however, the employee must also demonstrate:

> that she had a good faith, reasonable, belief that the underlying challenged actions of the employer violated the law ... In this regard, the reasonableness of plaintiff's belief is assessed in light of the totality of the circumstances ... The employee's belief that [s]he was

> opposing an employment practice made unlawful by Title VII must also be objectively reasonable, in the sense that the asserted opposition must be grounded on sufficient evidence that the employee was the subject of discrimination and harassment at the time the protest to the offending conduct is registered.

Spadola v. N.Y.C. Transit Auth., 242 F.Supp.2d 284, 291 (S.D.N.Y.2003); *see also Sullivan–Weaver v. N.Y. Power Auth.,* 114 F.Supp.2d 240, 243 (S.D.N.Y.2000) ("Mere subjective good faith belief is insufficient, the belief must be reasonable and characterized by objective good faith."). Whether Plaintiff's belief was objectively reasonable for this purpose is a decision for the trier-of-fact based on the record in the case. *See Thomas v. Westchester Cnty. Health Care Corp.,* 232 F.Supp.2d 273, 279 (S.D.N.Y.2002). Thus, although the Court has already determined, *supra,* that Michelson's conduct did not constitute a violation of Title VII, the question on the retaliation claim is whether Plaintiff possessed a good faith, reasonable belief that it did. *See Martin v. State Univ. of N.Y.,* 704 F.Supp.2d 202, 228 (E.D.N.Y.2010).

***12** The language Plaintiff used in speaking with Tucker, Trainor, and Fazzolari, *supra,* clearly identified her belief that Michelson's behavior was differentiated on the basis of gender, even if she did not make a formal complaint. Plaintiff testified that over her almost two years working with Michelson, she became aware that fellow female employees Susan Davis, Vicki Landes, Liya Davidov, and Nancy Kolodjeski each had experienced what they felt was improper treatment by Michelson. (*See* P. 56.1 ¶¶ 348–407.) Plaintiff also avers that, with respect to Michelson's treatment of male employees, she "saw him interact in a variety of settings with Dave Thomas, John Olearczyk, Adrian Gardner, Michael Martelacci, Alan Boardman, Rich Weinberg, Robert Osgood, and Jiong Huang" and "never observed Michelson raise his voice with a male employee in a manner remotely like he did with her." (P. 56.1 ¶¶ 410–11.) A reasonable jury could find, therefore, that it was not objectively unreasonable for Plaintiff to have concluded at the time she made her complaints that Michelson behaved differently with women than he did with men. Nor is the Court persuaded that Defendant's several arguments in its papers, (*see, e.g.,* Def. Mem. at 15), completely eliminate any possibility that Plaintiff's subjective view was reasonable. The fact that Michelson never mentioned gender in pejorative terms and often had positive interactions with Klotz, Trainor, and Tucker, (Def. 56.1 ¶¶ 183), while ultimately probative on the merits, does not itself make Plaintiff's belief unreasonable. Nor is Plaintiff's conversation with Tucker about Landes not actionable merely because Landes herself never lodged a formal complaint. (*See* Def. Mem. at 16.) A jury could certainly believe that Plaintiff, armed with the knowledge available to her at the time of her complaints, proceeded under the belief that Michelson was impermissibly differentiating his conduct at Fidelis on the basis of gender.

Finally, the Court notes that to the extent Plaintiff engaged in protected activity under Title VII, Fidelis possessed both constructive and actual knowledge of it. Plaintiff's language, *supra,* was more than sufficient to alert Human Resources and the Chief Compliance Officer that Plaintiff was making a complaint sounding in gender discrimination. Because Plaintiff complained to the individuals tasked with investigating such complaints, (*see* Def. 56.1 ¶¶ 34–45), Fidelis' knowledge may be imputed. *See Triola v. Snow,* 289 Fed. Appx. 414, 417 (2d Cir.2008). Particularly in light of her choice of language in the September 13, 2006 meeting with Trainor and Fazzolari, there can be no serious dispute that "plaintiff's opposition was directed at conduct prohibited by Title VII" and by the NYCHRL. *See, e.g., Galdeiri–Ambrosis v. Nat'l Realty & Dev. Corp.,* 136 F.3d 276, 292 (2d Cir.1998).

b. Adverse Employment Action

In order to be considered actionable in the retaliation context, an employer's action following Plaintiff's protected activity must be "materially adverse" enough to "dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 57, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). This standard is intended to "separate significant from trivial harms" because Title VII "does not set forth 'a general civility code for the American workplace.' " *Id.* at 68 (quoting *Oncale,* 523 U.S. at 80). Even the NYCHRL, which contains no material adversity requirement, nonetheless insists that any such employer action "reasonably deter a person from engaging in protected activity." *See Williams,* 872 N.Y.S.2d at 34. Here, Plaintiff points to her "marginalization" at work, her October 2006 performance review, and her January 3, 2007 termination. The Court addresses each in turn.

***13** First, the Court must dispose of any attempt by Plaintiff to characterize her "marginalization" by Michelson in this case as an adverse employment action within the meaning of Title VII or the NYCHRL. For the reasons described above, *supra,* Plaintiff has simply failed to adduce evidence of sufficient weight and specificity to support a claim of retaliation on that basis. Moreover, the Court is mindful that any such marginalization, at least under the evidence produced in this case to date, is likely characterized as a "trivial harm." *Burlington,* 548 U.S. at 68; *see also Mabry v. Neighborhood Defender Serv.,* 769 F.Supp.2d 381, 399 (S.D.N.Y.2011) ("Plaintiff's allegation that he was excluded from management meetings, when considered in context, does not constitute an adverse employment action."); *Short,* 913 N.Y.S.2d at 66.

More compelling is Plaintiff's allegation that her October 2006 performance review and her January 3, 2007 termination were adverse employment actions within the meaning of Title VII and the NYCHRL. It is certainly true that a poor review which results in no further adverse action cannot be deemed sufficient to dissuade a reasonable person from complaining of discriminatory treatment. *See Ragin v. East Ramapo Cent. Sch. Dist.,* No. 05 Civ. 6496, 2010 WL 1326779, at *17, *aff'd,* 417 Fed. Appx. 81 (2d Cir.2011); *Martinez–Santiago v. Zurich N. Am. Ins. Co.,* No. 07 Civ. 8676, 2010 WL 184450, at *11 ("A reasonable employee would not be dissuaded from filing a discrimination complaint merely because her supervisor gave her constructive employment-based criticism."). Here, however, Plaintiff specifically alleges that her October 2006 performance review was expressly the precursor for her January 2007 termination and differs markedly from her generally positive March 2006 review. (*See* P. 56.1 ¶¶ 188, 195; Opp. at 31.) Under Plaintiff's theory of the case, both the October 2006 performance review and the January 2007 termination are therefore related and "materially adverse" employment actions within the meaning of Title VII and NYCHRL. *See Burlington,* 548 U.S. at 57. The arguments Defendant makes regarding whether the termination in particular was in any way related to the performance review, (*see, e.g.,* Def. Reply Mem. at 12), are more appropriately left for the discussion of pretext and causation.

c. Causation and Pretext

Finally, in order to establish a *prima facie* case of retaliation under Title VII, Plaintiff must demonstrate "a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the adverse employment action." *Kessler,* 461 F.3d at 205–06 (citation omitted). For convenience, the Court analyzes the causation requirement on Plaintiff's *prima facie* case together with her ultimate burden of persuasion in rebutting Fidelis' non-discriminatory reasons for her negative review and subsequent termination. [3]

3 For the purposes of this motion, the Court assumes that Fidelis has satisfied its burden of production in offering a legitimate, nondiscriminatory reason for Plaintiff's negative review in October 2006 and termination in January 2007. *See McDonnell Douglas,* 411 U.S. at 800. The Court of Appeals has made clear that Fidelis' burden of production is relatively light. *See Greenway v. Buffalo Hilton Hotel,* 143 F.3d 47, 52 (2d Cir.1998) ("The employer need not *persuade* the court that it was motivated by the reason it provides; rather, it must simply articulate an explanation that, if true, would connote lawful behavior.").

***14** A plaintiff alleging a causal connection between a protected activity and an adverse employment action must demonstrate evidence of "retaliatory animus by the decision-makers who engaged in the adverse employment actions." *Ragin,* 2010 WL 1326779, at *24. Michelson took a personal leave of absence beginning November 1, 2006, at which point Klotz became the Acting Chief Medical Officer. (*Def.* 56.1 ¶¶ 204, 211.) Fidelis submits that Klotz testified that after becoming Acting Chief Medical Officer, she became concerned that Plaintiff had "significant problems with systems, multitasking and managing people in her department." (Def. 56.1 ¶ 288.) She also testified that she found that Plaintiff "consistently blamed others for problems while refusing to take responsibility for her role in them or for failing to oversee processes and individuals." (Def. 56.1 ¶ 289.) Based on her observations and the input of Frawley, Klotz concluded that she needed to terminate Plaintiff immediately and was the sole decision maker in doing so. (Def. 56.1 ¶¶ 290–91, 298.) For example, Klotz testified that she viewed Frawley's memo as "informational only, and not as a directive as to how to handle Plaintiff's employment." (Def. 56.1 ¶ 287.) Critically, Klotz testified that at "no time during [her] employment with Fidelis was she aware that Plaintiff had made an internal complaint about Dr. Michelson's behavior with regard to the BCAP project or at all for that matter." (Def. 56.1 ¶ 215.)

These facts might ordinarily be fatal to Plaintiff's claim because in most cases where a decision maker cannot be shown to have been aware of the protected activity, any adverse employment action she undertakes is not causally related to that protected activity. *See Ragin,* 2010 WL 1326779, at *24. Plaintiff, however, disputes material facts as set out by Defendant in its 56.1 Statement. In particular, Plaintiff argues that Fidelis had resolved to terminate Casalino upon Michelson's return from his leave of absence and then went about the process of establishing a pretextual record to support that action. (*See, e.g.,* P. 56.1 ¶ 285.) In addition to pointing out the extent to which Defendant shapes certain of Klotz's testimony in its 56.1 Statement, Plaintiff specifically points to several additional disputed facts: (1) In response to Frawley's e-mail, Trainor sent an e-mail to Klotz, copying Michelson, Lane, Frawley, and Casalino that did not mention any concern over Plaintiff's "ability to act as a supervisor", (P. 56.1 ¶ 286); (2) by the time Klotz returned to work from a vacation on January 3, 2007, it was Lane who had already replaced Plaintiff as medical director at Center Care, (P. 56.1 ¶ 287); (3) Klotz actually testified that prior to arriving to work on January 3, 2007, she had "no plans" to terminate Casalino, that she in fact viewed the Frawley memo and Trainor e-mail as "the final straw" in her decision to terminate Plaintiff, and that she could not remember what else, if anything, she reviewed that day, (Pl. 56.1 ¶ 287–88); (4) Klotz spoke with Michelson in the office the day Plaintiff was terminated, (P. 56.1 ¶ 290); (5) Trainor testified that a meeting was convened on January 3, 2007 which included Trainor, Lane, Frawley, and perhaps even included Michelson, in which "a decision was reached at the meeting to terminate Casalino, and that Klotz would do it," (P. 56.1 ¶¶ 190–92); and (6) Michelson participated in Lane's decision to remove Plaintiff as medical director of Center Care when Lane asked Michelson to "review and comment" on his memo of January 2, 2007 announcing the Center Care change, to which Michelson replied, "Looks good. Is the 'unspoken' message too obvious?" (P. 56.1 ¶ 293). In light of these apparently disputed facts, the Court cannot agree with Defendant that Plaintiff "does not cite a *single* admissible fact in support" of her theory that "the facts support an inference that either Klotz was not the decision-maker or that she was strongly influenced by Lane, Frawley, Trainor and Michelson, and by the input of Michelson reflected in the October review." (*See* Def. Reply Mem. at 13; Opp. at 33–34.) Because the Court has already determined that Fidelis was on constructive notice of Plaintiff's protected activity, *supra,* Plaintiff's theory is sufficiently compelling. Moreover, the Court of Appeals has elsewhere instructed that under the *McDonnell Douglas* framework, "[t]o make out a *prima facie* case is not a demanding burden." *Greenway,* 143 F.3d at 52.

***15** There is no doubt that certain of Plaintiff's proffered evidence is circumstantial, but circumstantial evidence on the issue of causation and in rebutting Fidelis' non-discriminatory motive for Plaintiff's termination is permissible. *See, e.g., Henry v. Wyeth Pharmaceuticals, Inc.,* 616 F.3d 134, 148 (2d Cir.2010), *cert. denied,* —— U.S. ——, 131 S.Ct. 1602, 179 L.Ed.2d 516 (2011) ("A causal connection is sufficiently demonstrated if the agent who decides to impose the adverse action but is ignorant of the plaintiff's protected activity acts pursuant to encouragement by a superior (who has knowledge) to disfavor the plaintiff."); *Gordon v. N.Y.C. Bd. Of Educ.,* 232 F.3d 111, 117 (2d Cir.2000) ("A jury, however, can find retaliation even if the agent denies direct knowledge of a plaintiff's protected activities, for example, so long as the jury finds that the circumstances evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or *implicit* [sic] upon the orders of a superior who has the requisite knowledge.") (emphasis added). This is true whether in establishing a *prima facie* case or in satisfying her ultimate burden of persuasion in the case. *Gordon,* 232 F.3d at 117. In fact, the Court of Appeals in *Gordon* rejected the exact rule Defendant advocates here: that Klotz's lack of personal knowledge is itself fatal to Plaintiff's claim. *See id.* Defendant is quick to characterize Plaintiff's theory of retaliation as a "conspiracy," (*see* Def. Reply Mem. at 14), apparently losing sight of the fact that a successful fabrication of a pretext for discrimination is often precisely that.

Moreover, Plaintiff is permitted to make her case for causation at least in part on the temporal proximity between engaging in the protected activities and suffering an adverse employment action. *See Clark Cnty. Sch. Dist. v. Breeden,* 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001); *Hubbard,* 347 Fed. Appx. at 681 (finding that four months between protected activity and adverse employment action did not exceed the "outer limit" of when causation may be inferred from temporal proximity); *Green Tree Credit Corp.,* 159 F.3d 759, 769 (2d Cir.1998) (reversing summary judgment where an

adverse employment action occurred within two months of plaintiff's complaint to management). Here, Plaintiff seeks to demonstrate that over a two-year engagement at Fidelis, her protected activity, negative review, and termination all took place in what was effectively a four-month period. Moreover, her negative evaluation came less than a month after her complaint regarding Michelson and differs not insubstantially from her generally positive March 2006 performance review. Finally, when the time Michelson spent out of the office on personal leave is excluded, Plaintiff's January 3, 2007 termination follows a mere two months after her September 2006 complaint and October 2006 negative performance evaluation. It is important to note too that Plaintiff is not building her entire case-in-chief or rebuttal of pretext on temporal proximity alone.

***16** Plaintiff may also demonstrate retaliatory intent and an inference of causation with evidence of disparate treatment of other employees engaging in the same or similar conduct for which an adverse employment action is purported to have occurred. *See, e.g ., Raniola v. Bratton,* 243 F.3d 610, 625 (2d Cir.2001); *Gordon,* 232 F.3d at 117. Here, Plaintiff points as an example to two of the incidents in December 2006 that Fidelis claims demonstrated her inability to perform her position's functions, arguing that her termination ultimately involved mistakes by lower level employees far removed from Casalino through intermediate supervisors. (*See, e.g.,* Opp. at 34.) Plaintiff notes that no other Fidelis employee besides her was disciplined. (P. 56.1 ¶¶ 538, 564.) In *Hubbard,* the Court of Appeals recently rejected a defendant's argument on appeal that Hubbard had not presented sufficient evidence to support a jury's conclusion that the defendant's reasons for firing her were pretextual. *See Hubbard,* 347 Fed. Appx. At 681. The defendant had proposed that Hubbard had been terminated for "excessive personal Internet use," and Hubbard had established that other employees "used the Internet as much, or more, than she did, and that only she and two other women were monitored." *Id.* The Court of Appeals concluded that this showing was sufficient to reach the jury. *See id.* ("The jury was entitled to find that explanation to be pretextual."). Here too, Fidelis naturally offers an explanation for the disparity to which Plaintiff points. (*See, e.g.,* Def. Reply 56.1 ¶ 564 (arguing that the incidents reflected "a pattern of problems with Plaintiff's job performance").) As in *Hubbard,* however, that explanation can be weighed by a reasonable jury.

Finally, the Court observes that Plaintiff may rely on circumstantial evidence of pretext. "[R]etaliatory intent may also be shown in conjunction with the plaintiff's *prima facie* case, by sufficient proof to rebut the employer's proffered reason for the termination." *Parrish v. Sollecito,* 258 F.Supp.2d 264, 268 (S.D.N.Y.2003) (citing *Reeves,* 530 U.S. at 143–49). The Court of Appeals has noted that to survive summary judgment, a Title VII plaintiff "has no obligation to prove that the employer's innocent explanation is dishonest, in the sense of intentionally furnishing a justification known to be false." *Henry,* 616 F.3d at 156. Instead, the plaintiff need only show that the defendant "was in fact motivated at least *in part* by the prohibited discriminatory animus." *Id.* (citing *Gordon,* 232 F.3d at 117) (emphasis added). It is well settled that a plaintiff may do so "by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nondiscriminatory reason for its action." *Ramos v. Marriott Intern., Inc.,* 134 F.Supp.2d 328, 343 (S.D.N.Y.2001) (citations and alterations omitted); *see also EEOC v. Ethan Allen, Inc.,* 44 F.3d 116, 120 (2d Cir.1994); *Chambers v. TRM Copy Ctrs. Corp.,* 43 F.3d 29, 39 (2d Cir.1994).

***17** Beyond the disciplinary inconsistency discussed above, *supra,* Plaintiff provides a list of no fewer than sixteen such inconsistencies that she argues are supported by the record. Among the most salient are:

- The evaluation given to Plaintiff by Michelson in October 2006 differed markedly from the evaluation also given by Michelson in March 2006; Plaintiff's protected activity occurred in September 2006 just before the second evaluation. *See, e.g., Ibok v. Sec. Indus. Automation Corp.,* 369 Fed. Appx. 210, 213 (2d Cir.2010) (pretext may be demonstrated where "evaluations of plaintiff post-dating the protected activity contradict earlier evaluations").

- All of the alleged grounds for termination, as detailed by Fidelis, occurred during a ten-day period at the end of December 2006. (P. 56.1 ¶¶ 518–81.)

- Plaintiff was terminated immediately upon Michelson's return from his leave of absence.

- Klotz, Plaintiff's supervisor, had complimented Plaintiff's work in December 2006 prior to leaving for vacation, (P. 56.1 ¶¶ 500–07), and testified that she returned to Fidelis on January 3, 2007 with no

intention of terminating Casalino, (P. 56.1 ¶¶ 590–91).

- Though Fidelis represents that Klotz herself made the decision to terminate Plaintiff for cause on January 3, 2007, Lane had already decided to appoint Klotz to replace Plaintiff as medical director of Center Care on January 2, 2007. (P. 56.1 ¶ 605.)

- Though Fidelis represents that Klotz herself made the decision to terminate Plaintiff for cause on January 3, 2007, both Frawley and Trainor circulated critical memos and Trainor testified that a meeting was convened on January 3, 2007 which included Trainor, Lane, Frawley, and may have included Michelson, in which "a decision was reached at the meeting to terminate Casalino, and that Klotz would do it." (P. 56.1 ¶¶ 190–92, 594–98.)

- Lane solicited Michelson's response to a draft of the January 2, 2007 announcement e-mail, indicating that they had already discussed Plaintiff's place in the department, to which Michelson replied, "Looks good. But is the 'unspoken' message too obvious?" (P. 56.1 ¶¶ 583–89.)

- Despite Fidelis' announcement on January 2, 2007 that Klotz would be talking over as medical director of Center Care, Klotz later testified that she never actually held that position, but served only until Plaintiff's replacement, Dr. Jonathan Kaplan, was selected. (P. 56.1 ¶¶ 603–06.)

- Fidelis ignored its own "corrective action" policy set forth in detail in its Employee Handbook; Plaintiff was terminated without any written warnings issued under the policy. (P. 56.1 ¶¶ 331–36, 600.)

(*See* Opp. at 35–37.) Plaintiff's position is that taken together, the record includes sufficient material, comprised of permissible temporal proximity evidence, circumstantial evidence of disparate treatment of employees, and circumstantial evidence of pretext to establish that retaliation was, at least "in part," a reason for her termination in January 2007. *See Henry,* 616 F.3d at 156. The same evidence goes to pretext. *See Gordon,* 232 F.3d at 117. Given the Court of Appeals' recent holding in *Hubbard,* 347 Fed. Appx. at 681, this Court is constrained to find that true questions of fact exist as to whether, among other issues, Klotz was the actual decision maker in Plaintiff's termination, said termination was actually the result, at least in part, of Plaintiff's protected activity under Title VII, and whether Fidelis' stated legitimate nondiscriminatory reasons are merely pretextual.

***18** On a motion for summary judgment on a Title VII claim, the Court of Appeals has made perfectly clear that Plaintiff need not, as Fidelis appears to suggest, (*see* Def. Mem. at 24–25 (citing *Weinstock,* 224 F.3d at 42; *James v. N.Y. Racing Ass'n,* 233 F.3d 149, 156 (2d Cir.2000)), actually demonstrate that Fidelis' proffered reasons for her termination were themselves purely false. *See Henry,* 616 F.3d at 156. Rather, the question is whether, based on the evidentiary showing to date, Plaintiff may "invite the jury to ignore the defendant's proffered legitimate explanation and conclude that discrimination was a motivating factor, whether or not the employer's proffered explanation was also in the employer's mind ." *See Field v. N.Y.S. Office of Mental Retardation & Developmental Disabilities,* 115 F.3d 116, 121 (2d Cir.1997). Resolving all ambiguities and drawing all reasonable inferences against Fidelis, as this Court must, *Lindsay,* 581 F.3d at 50, the Court cannot conclude "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed.R.Civ.P. 56(a).

d. NYCHRL Retaliation Claim

Retaliation claims under the NYCHRL are to be liberally construed, do not require an "ultimate action" with respect to employment or a "materially adverse change in the terms or conditions of employment," and are not restricted to the "standard currently applied by the Second Circuit in [Title VII] retaliation claims." *Williams,* 872 N.Y.S.2d at 33–34 (citations omitted). Accordingly, because the Court has found Plaintiff's Title VII retaliation claim survives Fidelis' motion for summary judgment, so too does Plaintiff's NYCHRL retaliation claim.

3. *Gender–Based Discrimination: Disparate Treatment*

To state a *prima facie* case for gender-based disparate treatment discrimination, Plaintiff must demonstrate: (1) membership in a protected class; (2) that she was qualified for her position; (3) that she experienced an adverse employment action; and (4) circumstances surrounding the adverse employment decision that give rise to an inference of discrimination. *See Gregory,* 243 F.3d at 689. As with the retaliation claim above, Plaintiff's disparate treatment claim is analyzed using the framework laid out

in *McDonnell Douglas.* If Plaintiff establishes a *prima facie* case, Fidelis may proffer a legitimate, non-discriminatory reason for the alleged adverse employment action. *See Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 252–56, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). If Fidelis meets this burden, Plaintiff must then establish, by a preponderance of the evidence, that Fidelis' stated reasons are merely pretext for discrimination. *See id.*

In order to establish her *prima facie* case of disparate treatment discrimination, it is critical that Plaintiff demonstrate that any adverse actions taken against her were done under circumstances "giving rise to an inference of discrimination" based on her gender. *See Leibowitz v. Cornell Univ.,* 584 F.3d 487, 498 (2d Cir.2009). This element is critical in analyzing the NYCHRL claim as well. *See Williams,* 872 N.Y.S.2d at 41 ("[T]he primary issue for a trier of fact ... is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees *because of her gender."*) (emphasis added). Such inferences may be drawn from direct evidence, statistical evidence, or circumstantial evidence. *See generally Sogg v. American Airlines,* 193 A.D.2d 153, 603 N.Y.S.2d 21 (1st Dep't 1993). They must, however, be more than inferences that Plaintiff's termination was erroneous or unsupported by the facts alleged—they must be inferences that gender discrimination itself was a reason for the termination. *See, e.g., Babcock v. N.Y.S. Office of Mental Health,* No. 04 Civ. 2261, 2009 WL 1598796, at *15 ("The fact that [employer] may have relied on incorrect information is immaterial to [Plaintiff's] gender discrimination claim."). For the reasons the Court has already identified in discussing her gender harassment allegations under Title VII and NYCHRL, *supra,* Plaintiff has simply failed to adduce sufficient factual material to allow a reasonable jury to conclude that any adverse action was taken against her specifically on the basis of her gender, outside the specific context of retaliation for protected activities.

***19** This Court rejects Plaintiff's proposed reading of *Meiri v. Dacon,* 759 F.2d 989 (2d Cir.1985), *cert. denied,* 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985), which Plaintiff suggests permits her to "establish the inference of discrimination (element four) by showing merely that the employer sought a replacement for her position." (*See* Opp. at 38.) That is not the Court of Appeals' holding. Instead, the Court of Appeals held that Plaintiff need not establish that she was replaced by someone outside her own protected class as a condition of surviving summary judgment. *See Meiri,* 759 F.2d at 996 ("Assuming arguendo that Meiri did in fact offer evidence sufficient to defeat summary judgment at the *prima facie* stage, we must now address whether the INS satisfied its burden of rebuttal .") (footnote omitted). Similarly, *Chertkova v. Conn. Gen. Life Ins. Co.,* 92 F.3d 81 (2d Cir.1996), merely clarified that Meiri does not support a rule requiring Plaintiff to demonstrate on summary judgment that her position remained open and that Fidelis continued to seek other applicants. *See id.* at 91. In any event, neither holding eliminates the requirement that Plaintiff adduce sufficient evidence to permit a reasonable jury to conclude that she was terminated *because of* her gender.

Absent other direct, circumstantial, or statistical evidence, Plaintiff has failed to produce sufficient evidence that any adverse employment action Fidelis undertook had an impermissible basis in gender as required by Title VII and the NYCHRL to establish a *prima facie* disparate treatment claim. *See Leibowitz,* 584 F.3d at 498; *Williams,* 872 N.Y.S.2d at 41. Accordingly, Fidelis' motion for summary judgment on these claims is granted.

CONCLUSION

For the reasons stated above, Defendant's Rule 56 motion for summary judgment [dkt. no. 37] is GRANTED in part with prejudice and DENIED in part. The parties shall confer and inform the Court by letter no later than April 6, 2012 how they propose to proceed.

SO ORDERED.

All Citations

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United States District Court,
S.D. New York.

Barbara B. KASTLE and Matthew L. Kastle, individually and as Joint Administrators of the Estate of Michael W. Kastle, Deceased, Plaintiffs,
v.
The TOWN OF KENT, NEW YORK, et al., Defendants.

No. 13 CV 2256(VB).
|
Signed March 21, 2014.

Opinion

MEMORANDUM DECISION

BRICCETTI, District Judge.

***1** Plaintiffs Barbara B. Kastle and Matthew L. Kastle bring this Section 1983 action against defendants the Town of Kent, the Town of Kent Police Department, Police Chiefs Donald L. Smith and Alex DiVernieri, Police Sergeant Jerry Raneri, Police Officers Vincent E. Bade, Chris Tompkins, Darren M. Cea, and Alex VanderWoude, and "John Doe" police officers (collectively, the "Kent Defendants"); the County of Putnam, Sheriff Donald B. Smith, Deputy Sheriffs J.P. Kerwick and Daniel Hunsberger, and "Michael Doe" deputy sheriffs (collectively, the "Putnam Defendants"); and the Town of East Fishkill, the Town of East Fishkill Police Department, Police Chief Brian C. Nichols, Police Captain Dwayne P. Doughty, Police Officers Kyle P. Doughty, Daniel P. Didato, and Ryan J. Angioletti, and "Mark Doe" police officers (collectively the "East Fishkill Defendants"), arising out of a car accident involving plaintiffs' deceased son, Michael W. Kastle ("Michael"), and defendant Bade.

Plaintiffs assert constitutional claims for Fourth Amendment violations, procedural and substantive due process violations, conspiracy, abuse of process, and for municipal liability as against the Town of Kent, the Town of East Fishkill, and Putnam County.

Plaintiffs also assert a state law wrongful death claim.

Now pending are the Kent Defendants' motion to dismiss under Rules 12(b)(1) and 12(b)(6) (Doc. # 22), the Putnam Defendants' motion to dismiss under Rule 12(b)(6) (Doc. # 26), and the East Fishkill Defendants' motion to dismiss under Rule 12(b)(6) (Doc. # 31).

For the following reasons, each motion is GRANTED in part and DENIED in part.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

BACKGROUND

For purposes of deciding the pending motions, the Court accepts all well-pleaded factual allegations in the amended complaint as true and draws all reasonable inferences in favor of plaintiffs.

Plaintiffs are Barbara and Matthew Kastle, the parents of Michael Kastle, who died on April 8, 2012, at the age of eighteen, after an apparent interaction of prescription Xanax and a contraindicated narcotic painkiller.

I. *The Car Accident and Related Proceedings*

On April 27, 2011, Michael's car collided with Kent Police Officer Vincent E. Bade's car in East Fishkill, New York. Plaintiffs allege Bade was intoxicated and crossed into Michael's lane of traffic, and Bade's alcohol consumption was a significant factor in the accident. Defendants the Town of Kent, and Kent Police Chiefs Donald L. Smith and Alex DiVernieri were allegedly notified of the accident and of the fact that Bade was driving while intoxicated within a few minutes. "[T]o preserve the reputation" of the Kent Police Department and Bade, plaintiffs allege Donald L. Smith and DiVernieri directed Bade be removed from the scene and spared interviews and blood-alcohol tests, and dispatched an unnamed Kent police officer to the scene to coordinate with the East Fishkill Defendants investigating the accident. (Am.Compl.¶¶ 30–32).

***2** The unidentified Kent police officer arrived and, at the request of Bade, Donald L. Smith and DiVernieri, allegedly removed evidence from Bade's vehicle, including

a briefcase and beer and/or liquor bottles. Plaintiffs further allege the East Fishkill Defendants concealed Bade's intoxication at the time of the accident "upon the request" of the Kent Defendants. (*Id.* ¶ 38).

Plaintiffs allege that, between two and eight hours after the accident, Bade was administered a breathalyzer test revealing a blood alcohol content of 0.04%, which plaintiffs contend implies Bade was legally intoxicated at the time of the accident. Unspecified actors from East Fishkill also allegedly advised Putnam County Sheriff Donald B. Smith that Bade was impaired, but the Putnam Defendants declined to investigate further. [1]

1 Plaintiffs allege Bade was formerly employed by the Putnam County Sheriff's Office and thus personally knew the individual Putnam County Defendants.

During the investigation, Michael was allegedly confined in a police vehicle and, later, isolated and interrogated at the East Fishkill Police Station. He was charged with various traffic offenses, allegedly on the basis on false factual and expert statements submitted by Bade and the East Fishkill Defendants, including "three separate, inconsistent versions of the information affidavits and depositions ... all of which knowingly and falsely claimed that the accident was exclusively [Michael's] fault" submitted by the East Fishkill Defendants. (*Id.* ¶¶ 56, 58(a), (c)).

Plaintiffs allege the East Fishkill Defendants also pressured Michael to admit to causing the accident. Throughout the investigation and subsequent court proceedings, Michael and his minor passenger "consistently maintained" Bade's vehicle had crossed into Michael's lane, causing the accident. (*Id.* ¶ 48).

On November 16, 2011, Michael was tried for and convicted of traffic violations relating to the accident. Plaintiffs allege the conviction was based on incomplete testimony from East Fishkill police officers, "who did not disclose their finding that Bade was impaired at the time of the accident," or release written reports, even though they were repeatedly asked to do so. (*Id.* ¶ 87). Plaintiffs further allege the Town of East Fishkill denied the existence of accident investigation records until after Michael was convicted of charges relating to the accident and the deadline for appealing the conviction had passed.

II. *The Alleged Campaign To Harass Michael*

Immediately after the accident, defendants allegedly "began a coordinated campaign to target, intimidate and harass" Michael that persisted until Michael's death on April 8, 2012, which arose out of their "collective and collaborative desire to protect" Bade and to suppress evidence of Bade's intoxication at the time of the accident. (*Id.* ¶ 58).

The amended complaint includes the following allegations in support of these claims:

- Over the eleven month period between the accident and Michael's death, defendants "follow[ed] Michael routinely, whenever he was driving alone" (*Id.* ¶ 58(d)) and, between April 27 and June 23, 2011, made "physical and verbal" threats that if anything happened to Bade, "Michael would be arrested and charged with murder, or otherwise harmed." (*Id.* ¶ 68).

***3** • Kent police officers frequently parked outside Michael's house in patrol cars to observe and "intimidate" him. (*Id.* ¶ 58(q)-(r)).

- Between April 27 and May 17, 2011, Michael's car was impounded and searched without probable cause by the Town of East Fishkill and, subsequently, by Putnam County in June 2011.

- On July 9, 2011, defendant Kent Police Officer Chris Tompkins "attempted to run Michael off the road," detained him, and filed incorrect statements and false traffic charges against him. (*Id.* ¶ 58(f)). DiVernieri knew about these false statements but failed to investigate them or to discipline Tompkins.

- In July 2011, after Michael's lawyer moved to dismiss the charges arising out of the accident on the basis of the inconsistent affidavits, a new ticket for crossing a pavement marking, "backdated" to April 27, 2011, was delivered to plaintiffs. (*Id*. ¶¶ 58(h), 72).

- During a court proceeding on July 30, 2011, the East Fishkill Police Department refused to disclose exculpatory evidence gathered during the accident investigation.

- On August 23, 2011, Michael was detained and falsely ticketed for "imprudent speed" without probable

cause when his car approached an accident scene at which Tompkins was present. At the time, Tompkins "was being investigated for his false statement in connection with the July 9 stop," and that investigation, not traffic offenses, "was the reason" Tompkins issued the ticket to Michael that day. (*Id.* ¶ 75).

- On September 15, 2011, Putnam County police officers, including defendant Deputy Sheriff Daniel Hunsberger, followed Michael from his school to a Home Depot in Southeast. Hunsberger arrested Michael in the store and charged him with misdemeanor offenses, including petit larceny, disorderly conduct, and resisting arrest. During the arrest, Hunsberger "slammed Michael's face into a wall," injuring him. (*Id.* ¶ 83). Hunsberger also falsely claimed in court documents that Michael had apologized to Hunsberger for his conduct relating to the accident.

- On October 27, 2011, six months after the accident, Michael received a notice of a speeding ticket arising out of the accident, issued without probable cause and based on an affidavit of defendant East Fishkill Police Officer Daniel P. Didato.

- In the fall of 2011, Kent police officers, including Tompkins, Darren M. Cea, and Alex VanderWoude, frequently followed Michael to and from school.

- In the fall of 2011 and winter of 2011–2012, Kent police officers drove by Michael's house at night, "shining strong lights into the windows" of his bedroom. (*Id.* ¶¶ 58(p), 100–01).

- At some time during the winter of 2011–2012, unspecified Kent police officers stopped Michael and conducted an unlawful search of Michael and his car, during which they observed a container of Michael's prescription Xanax.

- In March 2012, Michael was driving with his father, Matthew Kastle. Matthew Kastle observed an unidentified Kent police officer speed up and indicate Michael should pull over. When the officer saw Matthew Kastle was in the car, he sped away.

***4** • On March 11, 2012, defendant Putnam County Deputy J.P. Kerwick stopped Michael and ticketed him on the basis of a false affidavit for failing to signal.

- On March 30, 2012, Cea followed Michael to Michael's friend's house, where Cea watched him as he "burned tires ... with the consent of the homeowner." As Michael was leaving, Cea pulled him over and issued a ticket for an "unsafe start," failure to wear a seatbelt, and driving with an obstructed view. (*Id.* ¶ 58(u)). At that time, Cea learned Michael had retained a civil rights lawyer.

- The same day, Michael received a call from an individual who encouraged Michael to "swap" some of his prescription Xanax pills for a narcotic painkiller. [2]

2 Plaintiffs allege this individual was a confidential informant, and that it was this particular painkiller that interacted with Michael's prescription Xanax, causing his death.

- Defendant Kent Police Sergeant Jerry Raneri advised Barbara Kastle to stop filing FOIA requests seeking public records relating to the arrests and tickets, allegedly "implying Michael would continue to be harmed" if she did not. (*Id.* ¶ 58(k).

III. *Michael's Mental Health Treatment*

On May 3, 2011, Michael experienced a panic attack and was admitted to the hospital, after which he was treated by mental health professionals. He began the course of prescription Xanax treatment in June 2011.

After his driver's license was suspended on October 25, 2011, Michael "became profoundly depressed" (*Id.* ¶ 85) and underwent psychotherapy. Michael was admitted to the hospital for another panic attack on November 17, 2011.

Plaintiffs allege that in March 2012, Michael's psychological condition worsened and he had difficulty sleeping, eating, and taking care of himself and "became markedly fearful, withdrawn and uncommunicative." (*Id.* ¶ 105).

Michael experienced another panic attack on April 5, 2012, after receiving a notice to appear in court for the March 11, 2012, traffic offense. Plaintiffs allege this panic

attack was brought on by the notice and, more generally, by the alleged pattern of harassment.

IV. *Michael's Death*

Tragically, Michael died after being found unresponsive at a friend's home on the morning of April 8, 2012. Plaintiffs allege the Putnam County Sheriff's Office informed them Michael's death was caused by an interaction of Xanax with a contraindicated narcotic painkiller.

DISCUSSION

I. *Legal Standard*

The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Ryder Energy Distrib. v. Merrill Lynch Commodities, Inc.,* 748 F.2d 774, 779 (2d Cir.1984) (internal quotation marks omitted). In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court evaluates the sufficiency of the complaint under the "two-pronged approach" outlined by the Supreme Court in *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009). First, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the assumption of truth and are thus not sufficient to withstand a motion to dismiss. *Id.* at 678; *Hayden v. Paterson,* 594 F.3d 150, 161 (2d Cir.2010). Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal,* 556 U.S. at 679.

***5** To survive a Rule 12(b)(6) motion, the allegations in the complaint must meet a standard of "plausibility." *Ashcroft v. Iqbal,* 556 U.S. at 678; *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 564 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

II. *Constitutional Claims*

Plaintiffs assert constitutional claims for Fourth Amendment violations, procedural and substantive due process violations, conspiracy, abuse of process, and *Monell* claims as to the municipal defendants.

A. *Fourth Amendment Claims*

The Fourth Amendment, which applies to the states through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' " U.S. Const. amend. IV. "[T]he first step in any Fourth Amendment claim (or, as in this case, any section 1983 claim predicated on the Fourth Amendment) is to determine whether there has been a constitutionally cognizable seizure." *Medeiros v. O'Connell,* 150 F.3d 164, 167 (2d Cir.1998).

1. *False Arrests*

"Indisputably, an arrest is a seizure." *Bryant v. City of New York,* 404 F.3d 128, 136 (2d Cir.2005). "To establish a claim for false arrest under [Section] 1983, a plaintiff must show that 'the defendant intentionally confined him without his consent and without justification.' " *Escalera v. Lunn,* 361 F.3d 737, 743 (2d Cir.2004) (quoting *Weyant v. Okst,* 101 F.3d 845, 852 (2d Cir.1996)). Probable cause to arrest "is a complete defense to an action for false arrest." *Bernard v. United States,* 25 F.3d 98, 102 (2d Cir.1994). Probable cause exists when an officer has "knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." *Panetta v. Crowley,* 460 F.3d 388, 395 (2d Cir.2006) (internal quotation marks omitted). In determining whether an officer had probable cause, a court examines the information available to the officer "at the time of the arrest and immediately before it." *Lowth v. Town of Cheektowaga,* 82 F.3d 563, 569 (2d Cir.1996).

Plaintiffs allege Michael was detained and questioned without probable cause in connection with the investigation of the Bade accident on April 27, 2011. Plaintiffs concede, however, that Michael was eventually convicted of the traffic violations arising out of that arrest. This conviction bars plaintiffs' false arrest claim with respect to the arrest on April 27, 2011. *See Cameron v. Fogarty,* 806 F.2d 380, 388–89 (2d Cir.1986) (When "law enforcement officers have made an arrest, the resulting conviction is a defense to a § 1983 action asserting that the arrest was made without probable cause.").

***6** Plaintiffs also allege Michael was falsely arrested by Putnam County Deputy Sheriff Daniel Hunsberger at a Home Depot in Southeast on September 15, 2011, and that the arrest was without probable cause. [3] However, as the Putnam Defendants argue, plaintiffs have not pleaded any facts whatsoever concerning the circumstances of the arrest or otherwise supporting an inference that Michael was confined "without justification." *Escalera v. Lunn,* 361 F.3d at 743. Plaintiffs merely allege Hunsberger arrested Michael knowing the violations he was charging Michael with were "false." Such conclusory allegations are not entitled to the assumption of truth. See *Ashcroft v. Iqbal,* 556 U.S. at 679. Plaintiffs therefore have not plausibly pleaded a false arrest claim against the Putnam Defendants in connection with the arrest on September 15.

3 As the Putnam Defendants correctly observe, plaintiffs' opposition brief indicates Michael pleaded guilty to disorderly conduct, but "not the higher fabricated charges" arising out of this arrest. The Putnam Defendants argue such a plea precludes plaintiffs' false arrest claim relating to the Home Depot arrest. The amended complaint does not contain information about a plea and instead alleges the charges relating to the arrest were ultimately dismissed. However, because the Court dismisses plaintiffs' false arrest claim relating to this arrest on the basis of pleading deficiencies, it is unnecessary to address this inconsistency.

Accordingly, plaintiffs' false arrest claims are dismissed.

2. *Unreasonable Searches and Seizures*

A Fourth Amendment "seizure" occurs when police detain an individual under circumstances in which a reasonable person would believe he or she is not at liberty to leave. *United States v. Mendenhall,* 446 U.S. 544, 554 (1980). "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.*

"A police officer's order to stop constitutes a seizure if a reasonable person would have believed that he was not free to leave, and the person complies with the officer's order to stop." *United States v. Simmons,* 560 F.3d 98, 105–06 (2d Cir.2009) (internal citation and quotation marks omitted).

Here, plaintiffs allege Michael was stopped without probable cause on July 9, 2011, when Kent Officer Tompkins "attempted to run [him] off the road" through "vehicular intimidation" and then detained him. (Am.Compl.¶¶ 58(f), 70). On August 23, 2011, plaintiffs allege Tompkins detained Michael again without probable cause and issued a ticket for "imprudent speed," and that Tompkins did so because Tompkins was being investigated in connection with the stop on July 9, not because there was any traffic violation. Plaintiffs further allege Michael was stopped without probable cause and unlawfully frisked by Kent officers while he was driving with friends during the winter of 2011–2012. Plaintiffs also allege Michael was stopped in traffic without cause on two more occasions in March 2012, by Putnam Deputy Kerwick and Kent Officer Cea, respectively. There are no allegations Michael resisted any of these stops or attempted to flee.

These encounters constitute seizures within the meaning of the Fourth Amendment. *See, e.g., Terry v. Ohio,* 392 U.S. 1, 19 (1968); *Arizona v. Johnson,* 555 U.S. 327, 327 (2009) ("For the duration of a traffic stop ... a police officer effectively seizes everyone in the vehicle, the driver and all passengers." (internal quotation marks omitted)).

***7** Investigatory stops (temporary detention) and frisks (pat downs) may be conducted without violating the Fourth Amendment's ban on unreasonable searches and seizures if two conditions are met. *Arizona v. Johnson,* 555 U.S. at 326 (citing *Terry v. Ohio,* 392 U.S. at 19). "[I]n a traffic-stop setting, the first *Terry* condition-a lawful investigatory stop-is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation." *Id.* at 327; see also *Whren v. United States,* 517 U.S. 806, 810 (1996) ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred ."). The police need not have cause to believe an occupant is involved in criminal activity. *Arizona v. Johnson,* 555 U.S. at 327. "To justify a patdown of the driver or a passenger during a traffic stop, however, ... the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Id.*

As discussed above, plaintiffs allege Michael was stopped in traffic without probable cause on five occasions, and that the tickets issued for traffic violations during certain of those stops were all based on false affidavits. Plaintiffs further allege Michael was frisked without probable cause-and thus, necessarily, without reasonable suspicion-during the winter 2011–12 stop. *See United States v. Sokolow,* 490 U.S. 1, 7 (1989) (observing reasonable suspicion "is obviously less demanding" than level of suspicion required for probable cause).

These allegations are sufficient to state unlawful search and seizure claims, because plaintiffs allege Michael was stopped without cause, and all traffic violations issued in connection with certain of those stops were based on false affidavits, which supports a plausible inference that there was no objective probable cause for the stops.

Plaintiffs also allege Michael's car was searched without probable cause by Kent officers during the traffic stop in the winter of 2011–2012. This allegation states a claim for an unlawful search. *See McCardle v. Haddad,* 131 F.3d 43, 48–49 (2d Cir.1997) ("Nothing in *Terry* can be understood to allow a generalized cursory search ... [and] to validate a protective area search incident to a *Terry* stop, the officer must have an articulable suspicion that the suspect is potentially dangerous" (internal citations and quotation marks omitted)).

Accordingly, defendants' motions to dismiss plaintiffs' unlawful search and seizure claims are denied.

3. *Excessive Force Claim Against the Putnam Defendants*

"The Fourth Amendment prohibits the use of unreasonable and therefore excessive force by a police officer." *Tracy v. Freshwater,* 623 F.3d 90, 96 (2d Cir.2010) (citing *Graham v. Connor,* 490 U.S. 386, 395 (1989)). "The Fourth Amendment test of reasonableness 'is one of objective reasonableness.' " *Bryant v. City of New York,* 404 F.3d 128, 136 (2d Cir.2005) (quoting *Graham v. Connor,* 490 U.S. at 399). "[T]he subjective motivations of the individual officers ... ha[ve] no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment." *Id.* Therefore, "the inquiry is necessarily case and fact specific and requires balancing the nature and quality of the intrusion on the plaintiff's Fourth Amendment interests against the countervailing governmental interests at stake." *Tracy v. Freshwater,* 623 F.3d at 96.

***8** Because police officers must often use some degree of force when arresting or otherwise lawfully "seizing" an individual, the Supreme Court has recognized that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Graham v. Connor,* 490 U.S. at 396 (internal citation and quotation marks omitted). Thus, a plaintiff generally must prove he sustained some injury to succeed on an excessive force claim. *McAllister v. N.Y.C. Police Dep't,* 49 F.Supp.2d 688, 699 (S.D.N.Y.1999); see also *Landy v. Irizarry,* 884 F.Supp. 788, 798 n. 14 (S.D.N.Y.1995) ("An arrestee must prove some injury, even if insignificant, to prevail in an excessive force claim.").

As the Putnam Defendants assert, when the injury resulting from alleged excessive force is de *minimis,* the excessive force claim is typically dismissed. See, e.g., *Smith v. City of New York,* 2010 WL 3397683, at *10 (S.D.N.Y. Aug. 27, 2010).

"On the other hand, courts have allowed plaintiffs to recover, even though the injury caused was not permanent or severe, where the force used was excessive." *Lemmo v. McKoy,* 2011 WL 843974, at *6 (E.D.N.Y. Mar. 8, 2011); *accord Robison v. Via,* 821 F.2d 913, 924 (2d Cir.1987) ("While [plaintiff] did not seek medical treatment for her injuries, and this fact may ultimately weigh against her in the minds of the jury in assessing whether the force used was excessive, this failure is not fatal to her claim. If the force used was unreasonable and excessive, the plaintiff may recover even if the injuries inflicted were not permanent or severe."); see also *Maxwell v. City of New York,* 380 F.3d 106, 108 (2d Cir.2004) ("[W]e have permitted a plaintiff's claim to survive summary judgment on allegations that, during the course of an arrest, a police officer twisted her arm, 'yanked' her, and threw her up against a car, causing only bruising.").

Here, plaintiffs allege Hunsberger "slammed Michael's face into a wall" in the course of arresting him at Home Depot on September 15, 2011, causing visible injury later observed by plaintiffs. (Am.Compl.¶ 83).

The Court cannot conclude the conduct alleged was not excessive under the circumstances presented, or that the

injuries caused by the conduct alleged were plainly de *minimis* so as to bar plaintiffs' excessive force claim as a matter of law.

Accordingly, the Putnam Defendants' motion to dismiss plaintiffs' excessive force claim is denied.

B. *Procedural Due Process*

To prevail on this claim, plaintiffs must show they possessed a protected liberty or property interest and were deprived of that interest without due process. *McMenemy v. City of Rochester,* 241 F.3d 279, 285–86 (2d Cir.2001). Whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause is a question of federal law. *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 9 (1978).

***9** The Due Process Clause prohibits government officers acting in an investigative capacity from fabricating evidence when the fabrication results in a deprivation of liberty, and the Second Circuit has established that the harm caused by such conduct is redressable through a Section 1983 action for damages. *See Zahrey v. Coffey,* 221 F.3d 342, 348–49 (2d Cir.2000). [4]

4 Although the Supreme Court has held a similar cause of action (involving fabrication of evidence) fell under the Fourth Amendment, *see Albright v. Oliver,* 510 U.S. 266, 274–75 (1994), the Second Circuit has characterized this right as a procedural due process violation. As the Supreme Court noted, the *Albright* plaintiff did not assert a claim for procedural due process. *Id.* at 271. "Because evidence fabrication serves to both improperly charge and/or arrest a plaintiff as well as unfairly try him, the *Coffey* violation, in its essence, involves aspects of both the Fourth Amendment and procedural due process." *Zahrey v. City of New York,* 2009 WL 1024261, at *8 n. 14 (S.D.N.Y. Apr. 15, 2009).

Here, plaintiffs allege the initial charges filed against Michael relating to the April 27, 2011, car accident were based on falsified factual and expert statements from Bade and the East Fishkill Defendants, including inconsistent affidavits and testimony submitted by the East Fishkill Defendants. Plaintiffs further allege Michael's liberty was restricted when he was confined in a police vehicle at the scene and subsequently detained and interrogated at the police station.

Plaintiffs have also pleaded allegations of a number of incidents during which Michael was stopped, arrested, and/or ticketed on the basis of a false affidavit, including one such allegation against Putnam Defendant Hunsberger.

Accordingly, defendants' motions to dismiss plaintiffs' procedural due process claim are denied.

C. *Substantive Due Process*

"[T]he substantive component of the Fourteenth Amendment's Due Process Clause forbids the government from burdening, in a constitutionally arbitrary way, an individual's property [or liberty] rights." *O'Connor v. Pierson,* 426 F.3d 187, 204 (2d Cir.2005). "Substantive due process is an outer limit on the legitimacy of governmental action," *Natale v. Town of Ridgefield,* 170 F.3d 258, 263 (2d Cir.1999), which "protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against a government action that is incorrect or ill-advised." *Kaluczky v. City of White Plains,* 57 F.3d 202, 211 (2d Cir.1995) (internal quotation marks omitted).

Plaintiffs argue the conduct alleged states a substantive due process "pattern of harassment" claim, citing *Chalfy v. Turoff,* 804 F.2d 20 (2d Cir.1986), and its progeny. In *Chalfy,* the Second Circuit observed "a true pattern of harassment by government officials may make out a section 1983 claim for violation of due process of law." *Id.* at 22.

Defendants contend the conduct alleged does not shock the conscience.

Although the Court is inclined to find the conduct was, as alleged, conscience-shocking, such a determination would not alter the well-established rule that "[s]ubstantive due process analysis is ... inappropriate ... [where a] claim is 'covered by' the Fourth Amendment." *Bryant v. City of New York,* 404 F.3d 128, 136 (2d Cir.2005) (quoting *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 843 (1988)).

Moreover, the *Chalfy* line of cases relied on by plaintiffs is distinguishable, because "[i]ntentional government harassment with the objective of *driving plaintiffs out of business* is the essence of a *Chalfy* claim." *Bertuglia v. City of New York,* 839 F.Supp.2d 703, 719 (S.D.N.Y.2012)

(emphasis added) (internal quotation marks omitted). In contrast, plaintiffs' claims are largely premised on alleged conduct proscribed by the Fourth Amendment. The Court concludes plaintiffs' claims are therefore substantially "covered" by the Fourth Amendment (and by procedural due process protections with respect to the alleged evidence fabrication) and declines to expand the concept of substantive due process to encompass such conduct. *See Benzman v. Whitman,* 523 F.3d 119, 127 (2d Cir.2008) ("[W]e must heed the Supreme Court's cautionary words that 'the Court has always been reluctant to expand the concept of substantive due process.' " (quoting *Collins v. City of Harker Heights,* 503 U.S. 115, 125 (1992)).

***10** Accordingly, plaintiffs' substantive due process claim is dismissed.

D. *Conspiracy*

Plaintiffs assert a Section 1983 claim for conspiracy to violate Michael's constitutional rights. [5] To survive a motion to dismiss on a Section 1983 conspiracy claim, plaintiffs must allege: "(1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Pangburn v. Culbertson,* 200 F.3d 65, 72 (2d Cir.1999). Although "conclusory allegations of a § 1983 conspiracy are insufficient, ... such conspiracies are by their very nature secretive operations, and may have to be proven by circumstantial, rather than direct, evidence." *Id.* (internal citations and quotation marks omitted). A plaintiff is not required to list the place and date of defendants' meetings and the summary of their conversations when pleading conspiracy, but the pleadings must present facts tending to show agreement and concerted action. See e.g., *Concepcion v. City of New York,* 2008 WL 2020363, at *4 (S.D.N.Y. May 7, 2008).

5 The amended complaint also contains passing references to 42 U.S.C. § 1985. To the extent plaintiffs seek to assert a Section 1985 conspiracy claim, it is dismissed for failure to allege any racial or class-based discriminatory animus. *See Gagliardi v. Vill. of Pawling,* 18 F.3d 188, 194 (2d Cir.1994) ("To recover under section 1985(3), a plaintiff must allege some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." (internal quotation marks omitted)); *Herrmann v. Moore,* 576 F.2d 453, 458–59 (2d Cir.1978) (plaintiff asserting a Section 1985(2) claim bears burden of proving classbased or other invidiously discriminatory animus).

Here, plaintiffs allege defendants were part of a conspiracy to intimidate and harass Michael and to suppress evidence of Bade's intoxication following the accident, arising out of their "collective and collaborative desire to protect" Bade. (Am.Compl.¶ 58). Specifically, plaintiffs allege the East Fishkill and Kent Defendants conspired to suppress accident reports and "to remove evidence from the vehicle owned and operated by Officer Bade" (*Id.* ¶ 35), and the East Fishkill and Putnam Defendants acted in concert to impound Michael's vehicle without probable cause on two occasions. [6]

6 Plaintiffs further assert in their opposition brief that the East Fishkill and Putnam defendants "acted in concert" with private actors, "the tow company owner and auto mechanic" that had Michael's vehicle. Because plaintiffs improperly raise this allegation for the first time in opposition to the instant motions, the Court declines to consider it. *See, e.g., Greenidge v. Allstate Ins. Co.,* 446 F.3d 356, 361 (2d Cir.2006).

These allegations, together with allegations that officers from all three municipalities followed and surveilled Michael regularly over the months following the accident, support a plausible inference of general agreement among actors in the three municipalities to engage in harassment and intimidation on Bade's behalf, in violation of Michael's due process and Fourth Amendment rights, as well as an inference of concerted action towards that end.

Therefore, defendants' motions to dismiss plaintiffs' conspiracy claim are denied.

E. *Abuse of Process*

The Kent and East Fishkill Defendants move to dismiss plaintiffs' abuse of process claim on the grounds that the claim was not included in plaintiffs' Amended Notice of Claim. [7]

7 The Kent and East Fishkill Defendants contend plaintiffs' failure to raise an abuse of process claim in their Amended Notice of Claim deprives the Court of subject matter jurisdiction. (The Putnam Defendants instead move to dismiss pursuant to Rule 12(b) (6), arguing plaintiffs have not pleaded the "collateral objective" element of such a claim.)

> The Kent and East Fishkill Defendants have not provided the Court with any authority suggesting plaintiffs' failure to raise an abuse of process claim in their Amended Notice has jurisdictional implications under the circumstances presented here. Therefore, the Court addresses defendants' motions to dismiss this claim as motions to dismiss for failure to state a claim. *See Hardy v. N.Y.C. Health & Hosp. Corp .,* 164 F.3d 789, 794 (2d Cir.1999) ("Failure to comply with [notice of claim] requirements ordinarily requires a dismissal for failure to state a cause of action.").

Plaintiffs appear to contend that their *original* Notice of Claim contained a detailed account of the abuse of process claim, the original Notice was "appended" to the Amended Notice, and abuse of process allegations were contained in both Notices.

In reply, the Kent and East Fishkill Defendants argue the Amended Notice of Claim is the operative notice of claim, and by amending their original Notice of Claim to remove the abuse of process claim, plaintiffs expressed their intention not to pursue it. The Kent Defendants also correctly observe plaintiffs have not filed their original Notice of Claim with this Court.

***11** The Court agrees. Because the Amended Notice of Claim is the operative notice, the question is whether plaintiffs asserted an abuse of process claim in the Amended Notice.

"[I]n a federal court, state notice-of-claim statutes apply to state-law claims." *Hardy v. N.Y.C. Health & Hosp. Corp.,* 164 F .3d 789, 793 (2d Cir.1999). "Notice of claim requirements are construed strictly by New York state courts." *Id.* (internal citations omitted). Under New York law, filing a notice of claim that "states the nature of the claim and describes the time when, the place where, and the manner in which the claim arose, is a condition precedent to asserting a tort claim against a municipality ." *Crew v. Town of Beekman,* 105 A.D.3d 799, 800, 962 N.Y.S.2d 677, 678 (2d Dep't 2013) (citing N.Y. Gen. Mun. Law § 50–e(1)(a)). Although "a claimant need not state a precise cause of action in *haec verba* in a notice of claim, a party may not add a new theory of liability ... not included in the notice of claim." *Id.,* 105 A.D.3d at 800–01, 962 N.Y.S.2d at 678 (internal quotation marks and citations omitted). "[U]nder New York law, if § 50–e has not been satisfied (and the defendant has not waived its right to a notice of claim), no damages are available." *Hardy v. New York City Health & Hosp. Corp.,* 164 F.3d at 794. "Failure to comply with [notice of claim] requirements ordinarily requires a dismissal for failure to state a cause of action." *Id.*

Having carefully reviewed plaintiffs' Amended Notice of Claim, [8] the Court concludes plaintiffs did not satisfy the condition precedent by stating the nature of an abuse of process claim and describing how such a claim arose. [9]

8 Plaintiffs' Amended Notice of Claim is incorporated by reference in the amended complaint. *See Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir.2002).

9 Because the Court dismisses the abuse of process claim on this basis, it is unnecessary to address the Putnam Defendants' arguments regarding the lack of a "collateral objective."

Accordingly, plaintiffs' abuse of process claim is dismissed.

F. *Monell Claims*

Defendants argue plaintiffs have failed to state *Monell* claims against the three municipalities: the Town of Kent, the Town of East Fishkill, and Putnam County. [10] *See Monell v. Dep't of Soc. Servs.,* 436 U.S. 658 (1978). The Court agrees.

10 In addition to the Town of Kent, the Town of East Fishkill, and Putnam County, plaintiffs assert their *Monell* claim against the Town of Kent Police Department, the Town of East Fishkill Police Department, and the Putnam County Sheriff's Office. Under New York law, a municipal police department has no separate legal identity apart from the municipality that created it. Therefore, it cannot be sued. *See Hall v. City of White Plains,* 185 F.Supp.2d 293, 303 (S.D.N.Y.2002); *Baker v. Willett,* 42 F.Supp.2d 192, 198 (N .D.N.Y.1999) ("A police department cannot sue or be sued because it does not exist separate and apart from the municipality and does not have its own legal identity."). Accordingly, plaintiffs' claims against the Town of Kent Police Department, the Town of East Fishkill Police Department, and the Putnam County Sheriff's Office are dismissed.

Under *Monell,* a municipality may be liable for deprivation of constitutional rights "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly

be said to represent official policy, inflicts the injury." *Id.* at 694. A municipality may also be liable for inadequate training, supervision, or hiring when the failure to train, hire, or supervise amounts to deliberate indifference to the rights of those with whom municipal employees will come into contact. *City of Canton v. Harris,* 489 U.S. 378, 388 (1989).

Plaintiffs principally argue the three municipalities maintained a custom or practice of selectively profiling, stopping, ticketing, and harassing teenagers in their communities. Absent from the amended complaint, however, are any factual allegations supporting this conclusory assertion. In fact, the amended complaint does not contain any allegations of misconduct directed at any teenager other than Michael Kastle.

***12** Plaintiffs also argue there is an established policy of asset-sharing among the municipalities, as well as a custom or practice of transferring officers among the neighboring jurisdictions to excuse official misconduct, which, together, support a culture of officers "covering" for one another. In support, plaintiffs point to allegations that an unidentified Kent police officer was dispatched to remove evidence from the accident scene in neighboring East Fishkill on April 27, 2011, and the Town of Kent did not withdraw charges against Michael arising out of the traffic stop on July 9, 2011, even after the Town allegedly became aware the charges were based on a false affidavit.

The Court is not persuaded these two allegations support a plausible inference of a widespread practice of police officers in all three municipalities covering for one another's misconduct. Moreover, neither a policy of asset-sharing, nor a custom or practice of transferring officers among neighboring jurisdictions after misconduct, is actionable by plaintiffs because there is no affirmative causal link establishing such practices are closely related to Michael's death, or that such practices caused the alleged deprivations of Michael's Fourth Amendment and due process rights. See *Vippolis v. Vill. of Haverstraw,* 768 F.2d 40, 44 (2d Cir.1985) ("[T]he plaintiff must establish a casual connection-an 'affirmative link'-between the policy and deprivation of his constitutional rights."); *Rodriguez v. City of New York,* 649 F.Supp.2d 301, 308 (S.D.N.Y.2009) ("One of the requirements for establishing municipal liability is that the plaintiff establish that [t]he deficiency is closely related to the ultimate injury, such that it actually caused the constitutional deprivation." (internal quotation marks omitted)).

Furthermore, "conclusory allegations that a municipality failed to train and supervise its employees" are insufficient to state a *Monell* claim. *Davis v. City of New York,* 2008 WL 2511734, at *6 (S.D.N.Y. June 19, 2008). Plaintiffs' deliberate indifference allegations are conclusory and unsupported by any specific factual allegations.

Accordingly, plaintiffs' *Monell* claims against the Town of Kent, the Town of East Fishkill, and Putnam County are dismissed.

Plaintiffs' claims against the individual defendants in their official capacities are dismissed for the same reasons. *See Kentucky v. Graham,* 473 U.S. 159, 165 (1985) ("Official—capacity suits ... generally represent only another way of pleading an action against an entity of which an officer is an agent." (internal quotation marks omitted)).

III. *Personal Involvement / Supervisory Liability*

The Kent Defendants argue plaintiffs have not sufficiently alleged the personal involvement of Officers Bade and VanderWoude, Sergeant Raneri, Police Chief DiVernieri, and Police Chief Donald L. Smith. The Putnam Defendants similarly argue plaintiffs' personal involvement allegations are insufficient as to Sheriff Donald B. Smith.

***13** "It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995) (internal quotation marks omitted). "[T]he doctrine of respondeat superior standing alone does not suffice to impose liability for damages under section 1983 on a defendant acting in a supervisory capacity. Evidence of a supervisory official's 'personal involvement' in the challenged conduct is required." *Hayut v. State Univ. of N.Y.,* 352 F.3d 733, 753 (2d Cir.2003) (internal citation omitted).

With respect to supervisory liability, personal involvement need not be shown by "direct participation by the supervisor in the challenged conduct," but may be demonstrated by "an official's (1) failure to take corrective action after learning of a subordinate's unlawful conduct, (2) creation of a policy or custom fostering the unlawful

conduct, (3) gross negligence in supervising subordinates who commit unlawful acts, or (4) deliberate indifference to the rights of others by failing to act on information regarding the unlawful conduct of subordinates." *Id.*

A. *Kent Defendants*

Plaintiffs allege Donald L. Smith and DiVernieri were notified Bade was driving while intoxicated on April 27, 2011, directed Bade be removed from the scene, and directed an unidentified Kent officer to the scene to coordinate with the East Fishkill officers investigating the accident and remove evidence from Bade's vehicle. Plaintiffs further allege DiVernieri was aware of the alleged false statements made by Officer Tompkins in connection with the traffic stop on July 9, 2011, and failed to investigate the charges or to discipline Tompkins.

These allegations give rise to a plausible inference Donald L. Smith and DiVernieri were deliberately indifferent to violations of Michael's rights by failing to act on this information.

Plaintiffs plead Raneri advised Barbara Kastle she should stop filing FOIA requests seeking public records, allegedly "implying Michael would continue to be harmed" if she did not. (Am.Compl.¶ 58(j)-(l)). Thus, not only do plaintiffs allege Raneri's direct participation in the alleged conduct, but this allegation also supports a plausible inference Raneri was deliberately indifferent to violations of junior officers.

Therefore, plaintiffs have pleaded supervisory liability claims against Donald L. Smith, DiVernieri, and Raneri.

Plaintiffs have also sufficiently pleaded the personal involvement of defendants Bade and VanderWoude in the alleged course of conduct. Plaintiffs plead Bade was directly involved in the initial accident-out of which all of the other alleged conduct arose-and plaintiffs further allege Bade submitted false factual statements forming the basis of the charges filed against Michael relating to the accident, and was also aware of the Town of East Fishkill's alleged efforts to suppress potentially exculpatory evidence. Regarding VanderWoude, plaintiffs allege Michael was frequently followed to and from school by a number of Kent police officers, including VanderWoude, in the fall of 2011.

***14** Accordingly, the Kent Defendants' motion to dismiss for lack of personal involvement is denied.

B. *Sheriff Donald B. Smith*

Plaintiffs plead Putnam County Sheriff Donald B. Smith was a former colleague of Bade, was advised by unidentified East Fishkill actors that Bade was impaired at the time of the accident, and took no action in response to that information.

As the Putnam Defendants correctly observe, it is unclear what kind of action the County Sheriff could have taken in response to allegations of misconduct by a Town of Kent police officer. Plaintiffs' allegations are insufficient to plead plausibly Sheriff Smith's personal involvement in the alleged conduct on the basis of any of the grounds set forth above.

Therefore, plaintiffs' claims against Sheriff Donald B. Smith are dismissed.

IV. *Plaintiffs' State Law Wrongful Death Claim*

"Under New York law, as a general matter, the elements of a wrongful-death action are '(1) the death of a human being born alive; (2) a wrongful act, neglect or default of the defendant by which the decedent's death was caused, provided the defendant would have been liable to the deceased had death not ensued; (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent; and (4) the appointment of a personal representative of the decedent." *In re September 11 Litig.,* 811 F.Supp.2d 883, 886 (S.D.N.Y.2011) (quoting *Chong v. N.Y.C. Transit Auth.,* 83 A.D.2d 546, 441 N.Y.S.2d 24, 25–26 (2d Dep't 1981)).

Defendants argue plaintiffs' wrongful death claim should be dismissed because Michael's death, the result of an apparent interaction of contraindicated drugs, was not a foreseeable consequence of defendants' alleged interactions with Michael.

The Court disagrees.

Plaintiffs have pleaded allegations giving rise to the inference that Michael's physical and mental well-being were harmed by a persistent course of harassment and intimidation by various defendants over the course of the months preceding his death.

The Court cannot determine a decline in Michael's mental health was not a foreseeable consequence of the conduct alleged, or that it was not foreseeable that a dramatic decline in a teenager's mental health could result in physical harm or death, as a matter of law. *See Harris v. Key Bank Nat. Ass'n,* 89 F.Supp.2d 408, 418 (W.D .N.Y.2000); see also *Lizzio v. Cnty. of Onondaga,* 170 A.D.2d 1000, 1000, 566 N.Y.S.2d 900, 900 (4th Dep't 1991) ("[P]roximate cause is almost always a triable issue of fact."); *Rotz v. City of New York,* 143 A.D.2d 301, 304, 532 N.Y.S.2d 245, 248 (1st Dep't 1988) ("Issues of ... foreseeability and proximate cause involve the kinds of judgmental variables which have traditionally, and soundly, been left to the finders of fact to resolve even where the facts are essentially undisputed.").

Accordingly, defendants' motions to dismiss plaintiffs' wrongful death claim are denied.

CONCLUSION

***15** The Kent Defendants' motion to dismiss the complaint, the East Fishkill Defendants' motion to dismiss the complaint, and the Putnam Defendants' motion to dismiss the complaint are GRANTED in part and DENIED in part.

Plaintiffs' claims against the Town of Kent, the Town of East Fishkill, Putnam County, and Donald B. Smith are dismissed.

The Clerk is directed to terminate the following defendants: the Town of Kent Police Department, the Town of East Fishkill Police Department, the Putnam County Sheriff's Office, the Town of Kent, the Town of East Fishkill, Putnam County, and Putnam County Sheriff Donald B. Smith.

The Clerk is further directed to terminate the pending motions. (Docs. # # 22, 26, and 31).

SO ORDERED:

All Citations

Not Reported in F.Supp.3d, 2014 WL 1508703