SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ELLEN M. COIN J.S.C. PART 63
Justice

Veronica Cajamarca

-v-

Regal Entertainment Group and Otis Gadsden

INDEX NO. 103027/2012
MOTION DATE 6/12/2013
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH THE ANNEXED DECISION
AND ORDER.

This constitutes the decision and order of the Court

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/17/13

ELLEN M. COIN, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY -- PART 63

VERONICA CAJAMARCA,

Plaintiff,

- against -

REGAL ENTERTAINMENT GROUP and
OTIS GADSDEN, Individually,

Defendants.

Index No.: 103027/12

DECISION/ORDER

COIN, ELLEN, J.:

In this action, plaintiff Veronica Cajamarca (Cajamarca) sues her former employer, defendant Regal Entertainment Group (Regal), to recover damages for alleged sexual harassment by a former co-worker, defendant Otis Gadsden (Gadsden). The complaint alleges five causes of action, for employment discrimination, aiding and abetting discrimination, and interference with protected rights, in violation of the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-107 *et seq.*) (NYCHRL); and for assault and battery. Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Background

The facts of this case have been set out in some detail in the decision in a prior related federal action (*see Cajamarca v Regal Entertainment Group*, 863 F Supp 2d 237 [ED NY 2012] [the federal decision]), with which the court presumes the parties are familiar. *See also Cajamarca v Regal Entertainment Group*, 2012

WL 2782437, 2012 US Dist LEXIS 124485 (ED NY 2012). The following background information, as relevant to this motion, is drawn from that decision, as well as the parties' submissions on this motion, which include papers submitted in the federal action.

Defendant Regal owns and operates movie theaters throughout the country, including several in New York City. *See* Plaintiff's Response to Defendants' Statement of Material Facts (Statement of Facts), Ex. 2 to Affirmation of Jesse Rose in Opposition to Defendants' Motion (Rose Aff.), ¶ 1. Plaintiff Cajamarca started working for Regal in October 2008, as a "Floor Staff" employee at the Kaufman Astoria theater. *Id.*, ¶ 7. Floor Staff employees work in positions related to the operation of Regal's theaters, such as box office cashiers, ticket takers, ushers, and concession stand staff. *See* Affidavit of Jennifer Jones (Jones Aff.), ¶ 7. In or around March 2009, plaintiff transferred to Regal's Midway theater as a member of the Floor Staff, working primarily as a box office cashier, and occasionally at the concession stand. *Id.*, ¶ 13; Cajamarca Dep., Ex. 5 to Affirmation of Maurice Ross in Support of Defendants' Motion (Ross Aff.), at 134. Defendant Gadsden was hired by Regal in or around late March 2009, as a Floor Staff employee at the Atlas Park theater. Statement of Facts, ¶¶ 25, 27. In early 2010, he became a "Shift Lead," and retained that position when he

transferred to the Midway theater in or around March 2010. *Id.*, ¶¶ 27, 29. In July 2010, Regal eliminated the "Shift Lead" position and replaced it with the "Senior Cast Member" position, and Gadsden then became a "Senior Cast Member." *Id.*, ¶¶ 29, 30; Jones Aff., ¶ 8; Affidavit of Otis Gadsden (Gadsden Aff.), ¶ 10. The "Senior Cast Member" position, like the Shift Lead position, is described by Regal as a "non-supervisory, non-management" position given to experienced, high performing employees. *See* Senior Cast Member Role Rehearsal, Ex. 8 to Ross Aff.; Memo from Bruce Wren, dated July 16, 2010, Ex. 11 to Ross Aff. Employees holding the position were expected to be a mentor and role model to peers, and to assist management with employee training, checking all operations for preparedness, closing and conducting inventory of the concession stand, monitoring stock, and more. *See id.* Defendants contend that Gadsden, as a "Shift Lead" or "Senior Cast Member," had no supervisory responsibilities. Statement of Facts, ¶¶ 34, 37-39. Plaintiff claims that he was her supervisor. Amended Complaint, Ex. 55 to Ross Aff., ¶ 7.

Plaintiff and Gadsden first met shortly after Gadsden transferred to the Midway theater in or around March 2010. *Id.*, ¶ 40. Plaintiff alleges that Gadsden immediately began commenting on her looks and body and asking her to go out with him, and later began to harass her with overtly sexual comments and gestures. *See* Amended Complaint, Ex. 55 to Ross Aff., ¶¶ 14-

20, 23-25, 29-35. She claims that the harassment increased from May to September 2010, and culminated in an incident which occurred in the employee break room at the Midway theater. Plaintiff testified that, on the day of the incident, she was on her lunch break, sometime between 6:00 pm and 9:00 pm (*id.* at 182), when Gadsden came in and sat down next to her, and kissed her. *Id.* at 199-201. He then, according to plaintiff, got up, walked four or five feet away and, standing against the wall, pulled down his pants, exposed his penis and started stroking his penis and making salacious comments to her. *Id.* at 165-166, 167-168.

Defendant Gadsden denies that he harassed plaintiff, and claims that he and plaintiff were friendly co-workers who occasionally socialized together. Gadsden Dep., Ex. 5 to Rose Aff., at 85, 87; Gadsden Aff., ¶ 19. Gadsden admits that he kissed plaintiff in the break room, but asserts that the incident occurred in May 2010, that nothing more than a kiss occurred, and that, subsequently, their friendly relationship continued. Gadsden Dep., Ex. 5 to Rose Aff., at 86; Gadsden Dep., Ex. 6 to Ross Aff., at 33-34; Gadsden Aff., ¶¶ 20-24; Statement of Facts, ¶ 52. It is not disputed that, in or around May or June 2010, plaintiff and Gadsden went to Starbucks together on a break, and Gadsden gave plaintiff a ride home from work; in early summer 2010, they planned to go with their respective children to

Hershey Park, Pennsylvania, although they did not make the trip; and, in August 2010, they watched a movie together with their children at the Midway theater. Statement of Facts, ¶¶ 42-45.

On September 23, 2010, plaintiff lent Gadsden $600, to start a business, and they signed a written agreement that he would repay her with $300 interest by October 20, 2010. *Id.*, ¶ 46. A few days after she made the loan, however, in early October 2010, plaintiff asked Gadsden to immediately repay a portion of the loan, which he did not do. *Id.*, ¶¶ 47-48; Cajamarca Dep., Ex. 3 to Rose Aff., at 142-145. According to plaintiff, it was sometime after she made the $600 loan to Gadsden that the break room incident occurred. Cajamarca Dep., Ex. 5 to Ross Aff., at 150.

On or about October 10, 2010, plaintiff spoke to Jane Cinsov, a manager, about Gadsden and told her what had happened in the break room. Cajamarca Dep., Ex. 5 to Ross Aff., at 186-188, 197; Cinsov Dep., Ex. 16 to Ross Aff., at 19-20. Cinsov advised plaintiff to report the incident to General Manager Nick Green (Green), and told plaintiff that she would have to report the incident if plaintiff did not. *Id.* at 22; Statement of Facts, ¶ 50. Plaintiff spoke to Green a couple days later, and filed a written complaint on October 11, 2010. Cajamarca Dep., Ex. 5 to Ross Aff., at 197-200; *see* Statement Form, Ex. 15 to Ross Aff. Green reported plaintiff's complaint to Jones, who

began an investigation, which started with a survey of other female employees who worked with Gadsden, about their knowledge of any inappropriate or harassing conduct in the workplace. None of the women surveyed knew of any sexual misconduct in the workplace, except an associate manager who noted that plaintiff told her, after she filed a complaint, that Gadsden had harassed her. Statement of Facts, ¶¶ 51 (d), 53, 57, 59; *see* Generic Inquiry Forms, Ex. 19 to Ross. Aff. After receiving plaintiff's complaint, Green put plaintiff and Gadsden on different schedules to keep them apart. Statement of Facts, ¶ 51 (d); Green Dep., Ex. 4 to Rose Aff., at 17, 19. Statements about what happened between them were submitted by plaintiff and Gadsden, who denied plaintiff's allegations. Statement of Facts, ¶¶ 54-55, 56, 60. After plaintiff complained to Jones that Gadsden had threatened her, and that there had been other incidents of harassment by Gadsden, Gadsden was suspended pending the investigation. Statement of Facts, ¶¶ 54-55; Green Dep., Ex. 4 to Rose Aff., at 17.

After the investigation was completed, Jones concluded that evidence did not corroborate plaintiff's accusations against Gadsden, but, because Gadsden admitted he had kissed plaintiff in the break room, which was inappropriate conduct whether plaintiff had objected to it or not, Gadsden was given a final disciplinary warning. Jones Declaration, Ex. 1 to Jones Aff., ¶¶ 17-18; *see*

Statement of Facts, ¶¶ 61-64. Gadsden was permitted to return to work, but Green was advised that plaintiff and Gadsden must remain on different schedules. *Id.*, ¶ 18. After Gadsden returned to work, plaintiff complained that she was being retaliated against by other employees; her complaint was investigated and Regal found no evidence that other employees were retaliating against her. Jones Declaration, Ex. 1 to Jones Aff., ¶¶ 21-26. Plaintiff then requested a transfer to another theater, which was granted in or around late December 2010. Cajamarca Dep., Ex. 5 to Ross Aff., at 243-244. She worked there for about a month, and then, feeling "overwhelmed" by everything that had happened, requested a leave of absence. *Id.* at 245. She was granted a 30-day leave, and subsequently was granted two extensions through April 30, 2011. *Id.* at 245-246; *see* Letters, Ex. 31-33 to Ross Aff. In May 2011, when plaintiff still was incapable of returning to work, Regal terminated her employment, and advised her that she could re-apply when she was able to work. Cajamarca Dep., Ex. 5 to Ross Aff., at 246-248; *see* Letter dated May 10, 2011, Ex. 34 to Ross Aff.

In June 2011, plaintiff commenced an action in the United States District Court, Eastern District of New York, alleging unlawful employment discrimination and retaliation, in violation of Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*) (Title VII) and the NYCHRL; and assault and battery. By

decision and order dated May 31, 2012, the court granted defendants' motion for summary judgment to the extent of dismissing plaintiff's claims under Title VII, with prejudice, and, declining to exercise jurisdiction over her state law claims, dismissing the state law claims without prejudice. Plaintiff then commenced the instant action, alleging discrimination and retaliation in violation of the NYCHRL, and assault and battery; she subsequently served an amended complaint, withdrawing the retaliation claim. *See* Amended Complaint, Ex. 55 to Ross Aff.

Discussion

It is well settled that to obtain summary judgment, the moving party must establish the cause of action or defense, by tender of proof in admissible form, "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212 (b); *Zuckerman v City of New York,* 49 NY2d 557, 562 (1980); *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such showing has been made, to defeat summary judgment, the opposing party must show, also by producing evidentiary proof in admissible form, that genuine material issues of fact exist which require a trial of the action. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman,* 49 NY2d at 562. The evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]),

and the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957).

The issue, however, "must be shown to be real, not feigned" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772, 773 [1st Dept 1983], *affd* 62 NY2d 686 [1984]), and "when there is no genuine issue to be resolved at trial, the case should be summarily decided . . . ." *Andre v Pomeroy*, 35 NY2d 361, 364 (1974); *see Brown v Muniz*, 61 AD3d 526, 527-528 (1st Dept 2009); *Gervasio v Di Napoli*, 134 AD2d 235, 236 (2nd Dept 1987); *Assing v United Rubber Supply Co.*, 126 AD2d 590, 590-591 (2nd Dept 1987). Further, while it is not the function of the court on a motion for summary judgment to assess credibility (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]), "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact. *Zuckerman*, 49 NY2d at 562; *see Colarossi v University of Rochester*, 2 NY3d 773, 774 (2004); *William Iselin & Co. v Mann Judd Landau*, 71 NY2d 420, 425-426 (1988).

In this case, plaintiff alleges that she was sexually harassed by Gadsden over a period of about five months, and that Regal is liable for Gadsden's conduct under the NYCHRL

(Administrative Code §§ 8-107 [1] and [13]). She also alleges that Gadsden aided and abetted discrimination and interfered with her protected rights, in violation of Administrative Code §§ 8-107 (6) and (19), and committed assault and battery.

Sexual Harassment

Under the NYCHRL, it is unlawful for an employer to fire or refuse to hire or employ, or otherwise to discriminate in the terms, conditions and privileges of employment, because of, as relevant here, an individual's sex or gender. Administrative Code § 8-107 (1) (a). As under Title VII, sexual harassment which results in a hostile or abusive work environment is a form of gender discrimination prohibited by the NYCHRL. *See Williams v New York City Hous. Auth.*, 61 AD3d 62, 75 (1st Dept 2009); *Meritor Sav. Bank, FSB v Vinson*, 477 US 57, 64-65 (1986). The NYCHRL was intended to be more protective than its state and federal counterparts and its provisions accordingly must be liberally construed to accomplish "the uniquely broad and remedial purposes" of the law. Administrative Code § 8-130; *see Williams*, 61 AD3d at 66. In contrast to the standards applied in Title VII cases, to establish sexual harassment under the NYCHRL, a plaintiff need not establish that the conduct was severe or pervasive, only that "she has been treated less well than other employees because of her gender" and that the conduct consisted of something more than "petty slights or trivial inconveniences."

Williams, 61 AD3d at 78, 80.

For purposes of this motion, although defendants contend that plaintiff is not credible, they do not dispute that, as found by the federal court, Gadsden's conduct, if proven, could be considered sexual harassment. At issue is whether Regal can be found liable for Gadsden's conduct.

Pursuant to Administrative Code § 8-107 (13), an employer may be liable for the unlawful discriminatory conduct of an employee in three instances: "(1) where the offending employee 'exercised managerial or supervisory responsibility' . . . ; (2) where the employer knew of the offending employee's unlawful discriminatory conduct and acquiesced in it or failed to take 'immediate and appropriate corrective action'; and (3) where the employer 'should have known' of the offending employee's unlawful discriminatory conduct yet 'failed to exercise reasonable diligence to prevent [it].'" *Zakrzewska v New School*, 14 NY3d 469, 479 (2010), quoting Administrative Code § 8-107 (13) (b) (1)-(3).[1] The NYCHRL, in effect, "imposes strict liability on

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[1]Administrative Code § 8-107 (13) (b) provides in full: "An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision one or two of this section only where:
(1) the employee or agent exercised managerial or supervisory responsibility; or
(2) the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or superivsory responsibility; or

employers for the acts of managers and supervisors." *McRedmond v Sutton Pl. Rest. & Bar, Inc.*, 95 AD3d 671, 673 (1st Dept 2012); *see Zakrewska*, 14 NY3d at 480; *O'Neil v Roman Catholic Diocese of Brooklyn*, 31 Misc 3d 1219(A) (Sup Ct, NY County 2011), *affd* 98 AD3d 485 (2nd Dept 2012). Thus, under the NYCHRL, as under Title VII, "an employer's liability for . . . [workplace] harassment may depend on the status of the harasser." *Vance v Ball State Univ.*, __ US __, 133 S Ct 2434, 2439 (June 24, 2013).

Accordingly, critical to determining whether Regal can be held strictly liable for Gadsden's conduct is whether Gadsden "exercised managerial or supervisory responsibility." At the outset, plaintiff contends that this issue was already decided by the federal court, when it found that there was a triable issue of fact as to whether Gadsden was plaintiff's supervisor. Plaintiff argues that, based on the doctrine of collateral estoppel, this court is bound by that finding, and defendants' motion must be denied.

In the federal action, the court found that plaintiff's testimony, that "if [Gadsden] told me to go on a break, I was . . . mandated to go on break . . . [a]nd if he told me to clean, I cleaned" (*Cajamarca*, 863 F Supp 2d at 248; Gadsden Dep., Ex. 5 to Ross Aff., at 145), "[r]ead liberally . . . could support a

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(3) the employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct."

conclusion that Gadsden had 'authority to direct the employee's daily work activities.'" *Cajamarca*, 863 F Supp 2d at 248. Noting that plaintiff's testimony was "quite thin" and "perilously close to the kind of conclusory assertions that generally do not raise an issue of fact sufficient to defeat a motion for summary judgment" (*id.*), the court nonetheless found that "[i]n the absence of evidence sufficient to conclusively demonstrate the nature of the work relationship between plaintiff and Gadsden," the court could not "hold as a matter of law that Gadsden was not plaintiff's supervisor as that term has been broadly defined by the Second Circuit." *Id.* The court suggested, however, that had defendants better addressed the issue, by further questioning plaintiff at her deposition or submitting an affidavit from Gadsden responding to plaintiff's testimony, the outcome might have been different. *Id.*

Defendants now have responded to that suggestion, by submitting additional evidence in support of their argument that Gadsden had no supervisory or managerial responsibilities, including affidavits from Gadsden, describing his daily activities and his work relationship with plaintiff, and from Jennifer Jones, Regal's Human Resources Manager, explaining Regal's practices and procedures for the assignment and supervision of the Floor Staff. According to Gadsden, he worked as a Shift Lead, and later as a Senior Cast Member, non-

management, hourly wage positions for senior members of the Floor Staff, and he performed the work of regular Floor Staff members and helped theater managers as directed. Gadsden Aff., ¶¶ 4, 6. He also attests that he wore the same uniform as Floor Staff employees, that no employee reported to him, and that he had no authority to hire, fire, or schedule any employee, or discipline or otherwise instruct an employee except at the direct request of a manager. *Id.*, ¶ 8. He further attests that, because he primarily worked as an usher, and plaintiff primarily worked as a box office cashier, he had few work-related interactions with her, although he socialized with her on occasion. *Id.*, ¶¶ 13, 18, 19. "On rare occasions under instructions from a manager," he would ask plaintiff to help with a particular task, but this was "abnormal," because they usually worked in geographically different locations in the theater and their job functions and activities did not overlap. *Id.*, ¶¶ 15, 17.

Jones, in her affidavit, explains that members of the Floor Staff are never considered part of management, and employees in Shift Lead or Senior Cast Member positions have no supervisory authority or responsibilities. Jones Aff., ¶7. She attests, based on a review of time sheets of both plaintiff and Gadsden, that plaintiff worked most of her time as a box office cashier, where she would have been closely supervised by theater managers and not by any Floor Staff, including Shift Leads or Senior Cast

Members. She also attests that Gadsden worked primarily as an usher, had no authority to hire, fire, schedule, discipline, suspend, layoff, recall or assign other employees, did not work with plaintiff on more than half the days of the time period from March through December 2010, and could not have supervised plaintiff during the time that she worked in the box office. *Id.*, ¶¶ 9-10, 13-14, 16.

Contrary to plaintiff's contention, defendants are not precluded on this motion from addressing the issue of Gadsden's employment status or from submitting additional evidence. Collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party. . . ." *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 (1984); *see Buechel v Bain*, 97 NY2d 295, 303-304 (2001), *cert denied* 535 US 1096 (2002); *BDO Seidman LLP v Strategic Resources Corp.*, 70 AD3d 556, 560 (1st Dept 2012). "[W]hether to apply collateral estoppel in a particular case depends upon 'general notions of fairness involving a practical inquiry into the realities of the litigation'" *(Jeffreys v Griffin*, 1 NY3d 34, 41 [2003] [citation omitted]), and "should never be rigidly or mechanically applied." *Matter of Halyalkar v Board of Regents of State of New York*, 72 NY2d 261, 268-269 (1988); *see Buechel*, 97 NY2d at 303-304; *People v Roselle*, 84 NY2d 350, 357 (1994); *Kaufman v Eli Lilly & Co.*, 65

NY2d 449, 455 (1985); *White v Frize*, 35 AD3d 983, 984 (3rd Dept 2006).

The issue of whether Gadsden was plaintiff's supervisor was not finally decided against any party in the federal action, the issue was not essential to the federal court's determination, and the federal court did not base its grant of defendants' motion on this ground. *See City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128 (2007); *Dietrich v E.I. du Pont de Nemours & Co.*, 38 AD3d 1335, 1336 (4th Dept 2007); *Peterkin v Episcopal Social Servs. of N.Y.*, 24 AD3d 306, 307 (1st Dept 2005). Rather, the federal court concluded that "[e]ven if Gadsden was plaintiff's supervisor," Regal was entitled to dismissal of the Title VII claims based on the Faragher/Ellerth defense, which is not applicable in this case, and, as articulated in the United States Supreme Court's decisions in *Faragher v City of Boca Raton* (524 US 775, 807 [1998]) and *Burlington Industries Inc. v Ellerth* (524 US 742, 756 [1998]), provides that an employer is not liable for a supervisor's sexual harassment under Title VII if the employer can establish that no tangible employment action was taken as part of the alleged harassment, the employer used reasonable care to prevent and correct any sexually harassing behavior, and the plaintiff unreasonably failed to take advantage of the employer's preventive or corrective measures. *See Cajamarca*, 863 F Supp 2d

at 248-249, 252; *Zakrzewska*, 14 NY3d at 476 (2010).[2]

The NYCHRL does not define "supervisor" or "managerial or supervisory responsibility," and the standard for determining, under the NYCHRL, who should be considered a supervisor is not well settled. For purposes of an employer's vicarious liability for harassing conduct by an employee, it is widely accepted that employees who have the power to hire, fire, demote, promote, transfer, or discipline another employee are supervisors. *See O'Neil*, 31 Misc 3d 1219(A), at *9; *Mack v Otis Elev. Co.*, 326 F3d 116, 126 (2d Cir 2003), *cert denied* 540 US 1016 (2003). New York federal courts have, however, at least until very recently, adopted a broader definition, one derived in part from the Equal Employment Opportunity Commission (EEOC) enforcement guidelines, which include an employee who "'has authority to direct the employee's daily work activities.'" *Mack*, 326 F3d at 127 (2003) (citation omitted); *see Heskin v InSite Adver., Inc.*, 2005 WL 407646, *18, 2005 US Dist LEXIS 2546, *64 (SD NY 2005). This broader definition "is more compatible with the City law's formulation 'managerial or supervisory responsibility.'" *O'Neil*, 31 Misc 3d 1219(A), at *9.

As defendants correctly note, shortly after the submission of the instant motion, the United States Supreme Court issued a

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[2]The Faragher/Ellerth defense does not apply to claims under the NYCHRL, and is not at issue in this action. *See Zakrzewska*, 14 NY3d at 479; *Cajamarca*, 853 F Supp 2d at 256 n 11.

decision narrowing the definition of "supervisor," under Title VII, to include only employees empowered "to take tangible employment actions against the victim, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Vance*, 133 S Ct at 2443, quoting *Ellerth*, 524 US at 761. This federal precedent, however, "is not binding in light of the remedial purposes of the City statute," and the court finds no basis for applying it. *Fornuto v Nisi*, 84 AD3d 617, 617 (1st Dept 2011); *see Williams*, 61 AD3d at 66-67 (interpretations of similar federal provisions should be viewed "'as a floor below which the [NYCHRL] cannot fall, rather than a ceiling above which the local law cannot rise'" [citation omitted]).[3]

Even under the broader definition of "supervisor," however, defendants' submissions on this motion, which plainly respond to deficiencies noted by the federal court, make a prima facie showing that Gadsden was not plaintiff's supervisor.
In opposition, plaintiff offers no evidence, not even an affidavit from plaintiff, to contest defendants' evidence. Thus,

[3]Similarly, the recent Court of Appeals decision in *Barenboim v Starbucks Corp.* (21 NY3d 460 [June 26, 2013]) is not particularly instructive, as it distinguished employees with limited supervisory responsibilities from employees with "meaningful authority or control over subordinates," solely for purposes of determining an employee's eligibility for tip sharing under NY's Labor Law.

the sole evidence supporting plaintiff's argument that Gadsden was her supervisor is the same "thin" deposition testimony, that she would take a break or clean if Gadsden told her to, which, in light of the additional, undisputed evidence, is insufficient to raise a material triable issue of fact. *See Scoppettone v Mamma Lombardi's Pizzico, Inc.*, 2013 WL 1223857, 2013 US App LEXIS 6062 (2d Cir 2013) (although plaintiff believed co-worker had authority to assign tasks, no evidence showed he had supervisory power sufficient to subject employer to liability).

Plaintiff does not otherwise argue that Regal knew of Gadsden's alleged harassment and acquiesced in it or failed to take appropriate corrective action, or that Regal should have known of alleged harassment and failed to act reasonably to prevent it. Moreover, as the federal court found, Regal had a reasonable anti-harassment policy in place, of which plaintiff was aware, and it responded appropriately and immediately after plaintiff made a complaint. Therefore, the first and fourth causes of action are dismissed.

Aiding and Abetting / Interference with Protected Rights

The second and third causes of action allege respectively, as against Gadsden only, that he aided and abetted discrimination, in violation of Administrative Code § 8-107 (6), and that he interfered with plaintiff's rights under the NYCHRL, in violation of Administrative Code § 8-107 (19).

Administrative Code § 8-107 (6) makes it unlawful for "any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so." "An aiding and abetting claim against an individual employee depends on employer liability, however, and, '[w]here no violation of the Human Rights Law by another party has been established, . . . individuals cannot be held liable . . . for aiding and abetting their own violations of the Human Rights Law.'" *Miloscia v B.R. Guest Holdings LLC*, 33 Misc 3d 466, 479 (Sup Ct, NY County 2011) (internal citations omitted), *affd in part & modified in part* 94 AD3d 563 (1st Dept 2012); *see Matter of Medical Express Ambulance Corp. v Kirkland*, 79 AD3d 886, 888 (2nd Dept 2010); *Strauss v New York State Dept. of Educ.*, 26 AD3d 67, 73 (3rd Dept 2005). Because plaintiff's underlying discrimination claims against Regal have been dismissed, plaintiff's claim against Gadsden as an aider and abettor of such alleged discriminatory conduct fails as a matter of law.

Administrative Code § 8-107 (19) provides that "[i]t shall be an unlawful discriminatory practice for any person to coerce, intimidate, threaten or interfere with, or attempt to coerce, intimidate, threaten or interfere with, any person in the exercise or enjoyment of . . . any right granted or protected pursuant to this section." "A claim of interference requires the plaintiff to allege that individuals on behalf of the entity took

action to prevent the claimant from obtaining a protected right." *Gilberti v Silverstein Props., Inc.*, 2012 WL 2003710, 2012 NY Misc LEXIS 2566, *3 (Sup Ct, NY County 2012), citing *Montanez v New York City Hous. Auth.*, 5 AD3d 314 (1st Dept 2004).

Plaintiff alleges that Gadsden threatened her, during a telephone call, by telling her that he had been in the Army and she "had no idea what [he] could do to her." Amended Complaint, ¶ 53. In an unsworn statement submitted during Regal's investigation of her complaint against Gadsden, plaintiff claims that she called him on October 20, 2010, despite having been told by Green, the theater manager, not to speak to him, and asked him to repay her outstanding loan to him, and during that conversation, he made the above threat. *See* Cajamarca Statement, Ex. 24 to Ross Aff., at 7. Plaintiff, however, submits no testimony, or other admissible evidence, to support this claim. At her deposition, plaintiff testified that he threatened her on the phone, but she did not recall when, and did not say how, and then she explained that it was his demeanor that was threatening, that is, "the way he would approach [her] . . . demand stuff from [her] or the way [she] saw him with other employees and being aggressive." Cajamarca Dep., Ex. 61 to Ross Aff., at 191-192. Further, even if Gadsden made a threat to plaintiff during the October telephone call, it appears that this conversation chiefly concerned plaintiff's demand for the return of the outstanding

loan, and did not constitute an interference with a protected right under the NYCHRL. Nor, in fact, did it prevent her from exercising her right to make complaints about Gadsden and other employees at the theater. The fourth cause of action, therefore, also is dismissed.

Assault and Battery

Plaintiff is not pursuing claims for assault and battery against Regal, and does not appear to be pursuing her claim against Gadsden for battery. Rather, plaintiff argues only that the claim against Gadsden for assault should not be dismissed. *See* Plaintiff's Memo of Law in Opp., at 8-9. The admitted kiss, in any event, is insufficient to sustain a claim for battery, which requires a showing that a person "'intentionally touches another person, without that person's consent, and causes an offensive bodily contact.'" *Jeffreys*, 1 NY3d at 41 n 2, quoting PJI2d 3:2 (2003); *see Sola v Swan*, 18 AD3d 363 (1st Dept 2005). By her own testimony, the kiss between plaintiff and Gadsden was "mutual" and "friendly." Cajamarca Dep., Ex. 5 to Ross Aff., at 200-201.

To recover on a claim of assault, "the plaintiff must show that another person made 'an intentional attempt, displayed by violence or threatening gesture, to do injury to, or commit a battery upon,' his or her person." *Williams v Port Auth. of New York and New Jersey*, 880 F Supp 980, 994 (ED NY 1995), quoting 6

NY Jur 2d: Assault--Civil Aspects §§ 1, 3 at 194, 196 (1980). "While '[a]n action for an assault need not involve physical injury, but only a grievous affront or threat to the person of the plaintiff'" (*Gould v Rempel*, 99 AD3d 759, 760 [2nd Dept 2012] [citations omitted]), an assault claim requires proof that there was conduct that placed plaintiff in imminent apprehension of harmful or offensive contact. *See id.*; *Cotter v Summit Sec. Servs., Inc.*, 14 AD3d 475, 475 (2nd Dept 2005); *Holtz v Wildenstein & Co., Inc.*, 261 AD2d 336, 336 (1st Dept 1999); *Charkhy v Altman*, 252 AD2d 413, 414 (1st Dept 1998).

Here, plaintiff claims that Gadsden, during the break room incident, after sitting next to plaintiff and kissing her, got up, walked a few feet away from her, pulled his pants down, exposed his penis, started masturbating, and then quickly pulled his pants up and left the room. Cajamarca Dep., Ex. 5 to Ross Aff., at 165, 169, 171, 177. She testified that she was upset and humiliated and turned away (*id.* at 169), and sat in the break room crying for a couple minutes before she went back to work. *Id.* at 177-178. Gadsden disputes plaintiff's version of what happened in the break room, and denies that he did anything more than kiss her. Gadsden Dep., Ex. 6 to Ross Aff., at 34. Even assuming that there are issues of fact as to whether Gadsden engaged in the conduct alleged by plaintiff, plaintiff does not allege or prove that she was put in imminent apprehension of

harmful contact. As she testified, the incident happened fast and Gadsden left the room immediately after he put his pants on. Moreover, as was recently held, in a comparable factual setting, "conclusory allegations that defendant's employee 'intentionally placed [plaintiff] in apprehension of imminent offensive contact by masturbating next to her,' are insufficient" to state a cause of action for assault. *Herskowitz v Equinox Holdings, Inc.*, 2013 WL 2642956, *7, 2013 NY Misc LEXIS 2371, *16 (Sup Ct, NY County 2013). As the court in *Herskowitz* also noted, "the court's research has found no cases in this or other departments, and plaintiff does not cite to any, imposing liability for an assault solely based on the act of masturbation performed in front of another person." *Id.* Thus, the cause of action for assault must be dismissed.

Accordingly, it is

ORDERED that defendants' motion is granted and the complaint is dismissed with prejudice; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly, with costs and disbursements as taxed by the Clerk.

Dated: October 17, 2013

ENTER:

HON. ELLEN COIN, J.S.C.