Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS Justice — IA Part 2

ERICA DIGGS,
Plaintiff,

-against-

OSCAR DE LA RENTA, LLC AND JBCSTYLE NY, LLC AND CINDY CHEECK, an individual AND NORA ELEZAY, an individual and ANGIE SANTOS, an individual,
Defendants.

Index Number 16175/2012

Motion Date June 30, 2014

Motion Seq. No. 2

The following papers numbered 1 to 10 read on this motion by defendants Oscar de la Renta (ODLR), LLC, Cindy Cheek (Cheek), Nora Elezay (Elezay), and Angie Santos (Santos) to dismiss plaintiff Erica Diggs' complaint pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-7
Reply Affidavits.....	8-10

Upon the foregoing papers it is ordered that this motion is determined as follows:

In this employment discrimination action under the New York State Human Rights Law, Executive Law § 290 *et seq.* (NYSHRL) and New York City Human Rights Law, Administrative Code of City of NY § 8-107 *et seq.* (NYCHRL), plaintiff is an African-American female who was placed by staffing agency JBCStyleNY (JBC) on a temporary assignment at ODLR's warehouse distribution center near JFK Airport for a total of eight days beginning on Monday, April 16, 2012.[1] JBC had informed her that ODLR needed a temporary employee for several weeks to conclude sometime in May. Following a conference with chambers in connection with an order to show cause, defendant's motion seeking summary judgment on the remaining

[1] The action against JBC was discontinued in December 2012.

hostile work environment and retaliation claims was adjourned to October 10, 2014.

According to plaintiff, twice on second day of work, she heard Elezay, a Caucasian and her only co-worker in the children's wear division, utter the epithet "n-----" to Ramon Cabral (Cabral), a Hispanic employee at ODLR. Both times, the word was used as a jocular greeting to get his attention, and Elezay and Cabral laughed at her use of the word afterward. Elezay used the word a few times on Wednesday and once again on Thursday. She also heard Santos, the supervisor at the distribution center, call the sole Asian employee at ODLR "wonton" or "wongtong" everyday in a friendly manner. Elezay was not at the distribution center on plaintiff's first day of work.

On Thursday, April 19, plaintiff told Elezay she did not think she should be using "the 'n' word" in the workplace. Elezay responded, "Don't tell me you're offended" and "I wasn't using it towards you and you're the only black person here. So why are you offended?" Later that day, Santos approached plaintiff, informed her that Elezay had told her about the incident, and apologized. Santos further stated, "I know you're new here, but we joke like that here . . . . I'm a woman of color also, so I understand . . . how you could be offended, but I just want you to know don't take it that way." Plaintiff testified that Santos "kept going on and on about how . . . they joke like that here and it's a fun environment." Santos allegedly stated that "since [plaintiff is] the only one that's offended here, I'll make sure that we don't use that word when [plaintiff is] around." Also that day, plaintiff called Jackie Fisher (Fisher) from JBC to tell her about the incident and Santos' response. Fisher apologized and said she would speak to ODLR about it.

By the time she returned home from work on Thursday, Cheek, the Director of Account Services and Logistics at ODLR (and Elezay's sister), had left a voicemail on plaintiff's cellphone stating that she had spoken to Elezay about the incident and asking plaintiff to call her. According to Cheek's affidavit, she told Elezay that her comment to Cabral violated ODLR's zero tolerance policy and that any repetition of such conduct would result in disciplinary action.

On Friday, Cheek gave Elezay a formal written warning. She also called plaintiff either on Friday or Monday to apologize again and informed her that she had addressed the issue and to her know if anything further happened. Additionally, Santos apologized to plaintiff and told plaintiff she had spoken with Cheek about the incident.

Plaintiff testified that after her complaint and subsequent conversations with supervisors, usage of the "n" word ceased, but she continued to hear "wonton." Although her work remained the same, other employees would not speak to her and the environment became "quiet" and "awkward." Santos also stated that she noticed that plaintiff became "reluctant to talk to people" and "quieter," and "kept more to herself."

On Wednesday, April 25 Cheek visited the OCLR distribution center to assess the volume of work in the children's wear division. Upon consultation with Santos, she concluded that the workload was insufficient to warrant plaintiff's continued employment. Cheek called Fisher to notify her. Plaintiff was terminated from temporary employment at ODLR that same day.

On April 26, ODLR hired Marko Kusturic for a permanent position in the children's wear division, responsible for the same work that plaintiff had previously performed.

On a motion for summary judgment, the moving party has the burden of demonstrating "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]). Once the movant has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Under the NYSHRL, which mimics the federal employment discrimination law (*see Nelson v HSBC Bank USA*, 87 AD3d 995, 999 [2011]), a hostile work environment claim exists "[w]hen 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" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004], *quoting Harris v Forklift Sys., Inc.*, 510 US 17, 21 [1993]; *Morse v Cowtan & Tout, Inc.*, 41 AD3d 563, 564 [2007]). In determining whether an environment is hostile, the Court must consider all the circumstances, including the frequency of discriminating conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with the employee's work performance (*see Forrest*, 3 NY3d at 310-311). Such severe and pervasive conduct may be subjectively perceived as hostile or abusive by the plaintiff, such that it creates an objectively hostile or abusive environment that a reasonable person finds to be hostile or intimidating (*see*

Hernandez v Kaisman, 103 AD3d 106, 111 [2012]; *Hughes v United Parcel Serv., Inc.*, 4 Misc 3d 1023[A], *6 [2004]). Additionally, to recover against an employer for the discriminatory acts of an employee, the plaintiff must demonstrate that the employer became a party to such conduct by encouraging, condoning, or approving it (*see Forrest*, 3 NY3d at 311; *Beharry v Guzman*, 33 AD3d 742 [2006]).

The "wonton" comments uttered by Santos are not actionable insofar as plaintiff testified that she never complained about them to her employer (*see O'Neil v Roman Catholic Diocese of Brooklyn*, 98 AD3d 485, 487 [2012]). With respect to the language used by Elezay, many a court has agreed that "far more than a mere offensive utterance, [the racial slur "n-----"] is pure anathema to African-Americans. Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as ['n-----']" (*Benedith v Malverne Union Free School Dist.*, ── F Supp 2d ──, 2014 WL 4056554, *20 [EDNY 2014] [internal citations and quotation marks omitted], *citing White v BFI Waste Services, LLC*, 375 F3d 288, 298 [4th Cir 2004]; *Rodgers v Western-Southern Life Ins. Co.*, 12 F3d 668, 675 [7th Cir 1993]; *McKay v Principi*, 2004 WL 2480455, *6 [SDNY Nov. 4, 2004, No. 03 Civ. 1605(SAS)]). Particularly given the history carried in that single word, Elezay's act of uttering "n-----" in the presence of plaintiff, even if not directed toward her, may still contribute to the creation of a hostile work environment (*see Patane v Clark*, 508 F 3d 106, 114 [2d Cir 2007]). A reasonable factfinder could conclude that plaintiff's repeated subjection to hearing the word would make that work environment objectively hostile (*see Johnson v County of Nassau*, 2014 WL 4700025, *12 [EDNY Sept. 22, 2014, No. 10-CV-06061 [JFB][GRB]), *citing Hrobowski v Worthington Steel Co.*, 358 F3d 473, 477 [7th Cir 2004]; *Benedith*, ── F Supp 2d ──, 2014 WL 4056554, *20).

Despite the severity of the epithet uttered by Elezay the evidence does not support a finding that its usage was "pervasive," as required under the NYSHRL (*see Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18, 26 [2014]; *Thompson v Lamprecht Transport*, 39 AD3d 846, 847 [2007]). However, a jury could find that the complained-of conduct amounted to more than "petty slights and trivial inconveniences" under the more liberal NYCHRL (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 79-80 [2009]). Moreover, triable issues of fact remain whether ODLR, as her employer, took reasonable steps to promptly remedy the harassing conduct (*see Turley v ISG Lackawanna, Inc.*, 803 F Supp 2d 217, 250 [WDNY 2011]). Such corrective action "must be real and not a sham" (*see Manzo v Sovereign Motor Cars, Ltd.*, 2009 WL 3151094, *12 [EDNY

Sept. 29, 2009, No. 08-CV-1229], *quoting Trotta v Mobil Oil Corp.*, 788 F Supp 1336, 1351 [SDNY 1992]). Here, Cheek issued a written warning to Elezay that merely described her misconduct as "using inappropriate slang in corporate environment" without further remedial steps. Similarly, Santos allegedly responded to plaintiff's complaint by stating that her colleagues would continue such conduct when plaintiff was not present in any event. A jury could find that ODLR's response to plaintiff's complaint was not reasonable or sufficient (*see Manzo*, 2009 WL 3151094, *13; *see also Dortz v City of New York*, 904 F Supp 127, 153-155 [1995] [triable issues remained under the NYHRL and federal law]). Therefore, summary judgment on the cause of action alleging hostile work environment is warranted under NYSHRL, but not under the NYCHRL.

Turning to plaintiff's retaliation cause of action, a plaintiff must show that: (1) he or she participated in a protected activity, (2) the employer was aware of his or her participation in that activity, (3) the employer took an adverse employment action, and (4) there was a causal connection between the protected activity and the adverse employment action (*see Ruane-Wilkens v Board of Educ. of City of New York*, 56 AD3d 648, 649 [2008]). Under the NYCHRL, need only show that the employer retaliated "in any manner" (*see Schanfield v Sojitz Corp. of Am.*, 663 F Supp 2d 305, 343 [2009]) or took an employment action that disadvantaged him or her (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [2012]).

It is undisputed that plaintiff was engaged in a protected activity when she complained to the employer about the alleged comments, and that she was subsequently terminated from her temporary assignment at ODLR. In arguing that there was no causal connection between plaintiff's protected activity of complaining about Elezay's language and ODLR's action of terminating her employment, defendant relies primarily Cheek's affidavit and deposition testimony stating that plaintiff was on a temporary assignment to the new children's wear division, pending the hiring of a permanent employee; a new employee was in fact hired; and the workload did not justify continuing to employ plaintiff. As courts will not second-guess the business decisions of employers (*see Greene v Brentwood Union Free School Dist.*, 966 F Supp 2d 131, 156 [2013]), defendant has successfully asserted a legitimate, independent, non-discriminatory explanation for plaintiff's termination (*see Delrio v City of New York*, 91 AD3d 900, 901-902 [2012]).

In opposition, however, plaintiff raises a triable issue of fact based partly on the short time period between her protected activity and her termination six days later (*see Zann Kwan v Andalex Group LLC*, 737 F3d 834, 847 [2d Cir 2013]). While temporal proximity alone cannot defeat a motion for summary judgment, it may

be coupled with other evidence to raise a triable issue of fact (*see id.*). In this regard, plaintiff's testimony reflects that when she interviewed with ODLR on April 12, Cheek told her that ODLR was very busy and they would need her for a few weeks or possibly longer due to the full calendar of upcoming trunk shows. Moreover, plaintiff testified that Cheek said ODLR was in the process of interviewing candidates for a permanent position in the children's wear division and that the new hire would help alleviate the busy workflow in the children's wear division currently handled by plaintiff and Elezay alone. Although plaintiff recalls that sometime after her complaint Cheek asked if she would be interested in becoming a permanent employee (Cheek's testimony differs), thus perhaps negating an inference that ODLR intended to terminate her for reporting the offensive conduct, her testimony nevertheless calls into question defendant's proffered non-discriminatory explanation of reduced work volume, particularly in light of the fact that ODLR hired a permanent employee the day after it discharged plaintiff. Given the inexplicable speed with which the workload at ODLR's children's wear division suddenly plummeted, the court finds that triable issues of fact as remain which preclude summary judgment under the NYSHRL and NYCHRL (*see Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Browne v Board of Educ.*, — AD3d —-, 2014 NY Slip Op 07465 [2014]; *Nelson v HSBC Bank USA*, 41 AD3d 445, 446 [2007]).

Accordingly, defendant's motion for summary judgment is granted to the extent of dismissing plaintiff's hostile work environment cause of action under the NYSHRL, but denied with respect to the hostile work environment claim under the NYCHRL and the retaliation claims under the NYSHRL and NYCHRL.

Dated: December 9, 2014

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J.S.C.