SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. Kalish
Justice

PART 29

Jolene Spellman

- v -

Gucci America Inc., and Greg Nakama, individually and on behalf of Gucci America Inc.

INDEX NO. 160266/2014

MOTION SEQ. 002

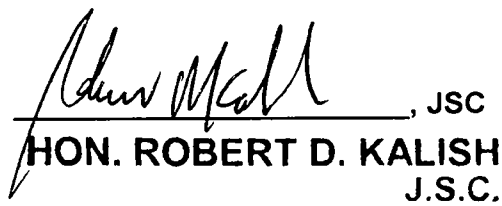
MOTION DATE: Oral Argument held on August 11, 2015.

The following papers, numbered 1-3, were read on the Defendant Gucci America Inc.'s motion to dismiss the Plaintiff's first cause of action pursuant to CPLR §3211

Defendant's motion to dismiss pursuant to CPLR §3211 — Memorandum of Law — Affidavits — Affirmations — Exhibits	No(s). 1
Plaintiff's Memorandum of Law in Opposition — Affidavits — Affirmations — Exhibits	No(s). 2
Plaintiff's Memorandum of Law in Reply	No(s). 3

Upon the forgoing papers, the Defendant Gucci America Inc.'s motion to dismiss the Plaintiff's first cause of action pursuant to CPLR §3211 for failure to state a cause of action is decided in accordance with the attached memorandum decision.

Dated: September 9, 2015



HON. ROBERT D. KALISH, JSC
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 as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 29

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Jolene Spellman

Petitioner

DECISION AND ORDER

-against-

INDEX NO.: 160266/2014

Gucci America Inc., and Greg Nakama, individually and on behalf of Gucci America Inc.

Respondent

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Robert D. Kalish, J.:

Upon the foregoing papers, the Defendant, Gucci America Inc.'s ("Gucci") motion to dismiss the Plaintiff's first cause of action, which is the only remaining cause of action against Gucci in the underlying case, for failure to state a cause of action pursuant to CPLR §3211 is hereby granted and the underlying action is dismissed as against Gucci in its entirety as follows:

Background and Procedural History

In the underlying action, the Plaintiff originally alleged five causes of action against the Defendants. By prior stipulation dated March 18, 2015, the Plaintiff consented to the dismissal of the second and fifth causes of action in their entirety and the third and fourth causes of action against the moving Defendant Gucci. On March 20, 2015, the Honorable Anil C. Singh signed an order to this effect. Therefore, the only cause of action remaining against Gucci in the underlying action is the first cause of action for hostile work environment pursuant to New York City Administrative Code §8-502 (the "NYCHRL").

The Plaintiff alleges in her first cause of action in sum and substance that the Defendant Gucci subjected her to a hostile work environment in violation of the NYCHRL. The Plaintiff alleges that she commenced her employment at Gucci as a sales representative at the Fifth Avenue store in New York City on or about May 1, 2012. Plaintiff further alleges that the Defendant Greg Nakama was employed by Gucci as the leather goods manager at said store and was Plaintiff's supervisor. Plaintiff alleges that on or about February 5, 2014, Mr. Nakama stated that he would kill Plaintiff and fire her. Said comment was made in front of other employees including the Plaintiff. Plaintiff claims in her complaint that said physical threat was due in part to Plaintiff's gender. Plaintiff further claims that she sent an anonymous email to Human Resources regarding threats of workplace violence, but that said email was ignored and Mr. Nakama was promoted. Said email was dated February 5, 2007 at 2:27 pm, and indicated that Mr. Nakama stated to three employees, including the plaintiff and a male employee, that if they didn't follow his rules he will kill them or fire them. The email further indicates that Mr. Nakama made said comment to the three employees in front other people (Affidavit of Lori Strober-Lewin Exhibit A). Plaintiff further alleges that on or about March 29, 2014, Mr. Nakama stated that "he would kill us and knock us on the upside of the head" referring to a group of employees including the Plaintiff. Plaintiff argues that said statements caused the Plaintiff to reasonably believe or be aware that she would immediately suffer a battery and that Mr. Nakama possessed the apparent present ability to carry out the battery without Plaintiff's consent. Plaintiff further alleges in the complaint that she complained to Human Resources, but no action was taken. Plaintiff also alleges that she had gone to a training in Italy, was compelled to pay the hotel bill and that Mr. Nakama required her to take a personal day off when it should have been a vacation day. Plaintiff argues that said actions caused her constructive termination. The Plaintiff further argues that said action created a hostile work environment in violation of the NYCHRL and resulting in

psychological injuries to the Plaintiff.

Parties Contentions:

In the instant motion Gucci argues in sum and substance that the Plaintiff has failed to set forth a claim for hostile work environment or constructive termination pursuant to the NYCHRL. Specifically, Gucci argues that the complaint fails to allege facts supporting Plaintiff's assertion that the conduct in question was motivated by Plaintiff's gender. Further Gucci argues that even assuming that the Plaintiff's allegations are true, said allegations fail to demonstrate anything more than a petty inconvenience and are similarly insufficient to establish that the Plaintiff was constructively terminated.

Specifically, Gucci refers to the anonymous e-mail that the Plaintiff sent to Human Resources on February 8, 2015. Said email indicated that Mr. Nakama's comments were directed at Plaintiff and two other employees, one of whom is a man named Douglas DeSilva. Gucci further argues that the Plaintiff did not state in the anonymous email that Mr. Nakama's comment had anything to do with her gender, that she feared for her personal safety in the presence of Nakama, or that she took Nakama's hyperbole to be a literal threat. Rather, Gucci argues that the Plaintiff only stated that she did "not want to work in a job where I feel that managers can harass employees". Gucci argues that the Plaintiff has failed to establish that any of Mr. Nakama's alleged conduct towards the Plaintiff was based upon her gender.

Gucci further argues that even assuming that the allegations in the complaint as to Mr. Nakama's conduct were true, said conduct does not rise to the level of creating a hostile work environment pursuant to the NYCHRL. Specifically, the allegations that Mr. Nakama made two isolated hyperbolic comments over a two-month period is insufficient to support the Plaintiff's claim that she was subjected to an objectively hostile work environment.

[*.5]

Similarly, Gucci argues that the Plaintiff has failed to establish a claim for constructive discharge, as the standard for establishing constructive discharge is higher than that for hostile work environment. Gucci argues that just as two isolated hyperbolic comments are insufficient to establish a claim for hostile work environment, they are equally insufficient to establish a claim for constructive discharge.

In opposition to the motion, the Plaintiff argues in sum and substance that although Mr. Nakama made the two alleged comments/threats in front of other employees including men, Mr. Nakama directed the comments at the Plaintiff as a female, not at the males in the room. Plaintiff further reiterates the factual allegations included in her complaint. Plaintiff further argues that, Mr. Nakama's actions and Gucci's failure to address the situation were sufficient to satisfy the Plaintiff's prima facie burden to establish claims for hostile work environment and constructive discharge under the NYCHRL.

In their reply papers, Gucci reiterates its arguments for dismissal. Gucci further emphasizes that the Plaintiff has failed to make out her first cause of action since all of Plaintiff's allegations in support of her first cause if action are conclusory and speculative.

Analysis

Dismissal for failure to state a cause of action

On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction, the facts alleged in the complaint are to be accepted as true, plaintiff is to be accorded the benefit of every possible favorable inference, and the court must determine only "whether the facts as alleged fit within any cognizable legal theory" (See Faison v. Lewis, 25 NY3d 220, 224 (NY 2015); Samuelsen v New York City Tr. Auth., 101 AD3d 537, 540 (NY App Div 1st Dept 2012) citing (Leon v. Martinez, 84 N.Y.2d 83 (NY 1994) see also Vig v New York Hairspray Co., L.P., 885 NYS2d 74 (NY App Div 1st Dept 2009)).

"In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards . . . [I]t has been held that a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds" (Vig v New York Hairspray Co., L.P., 885 NYS2d 74 (NY App Div 1st Dept 2009) citing Swierkiewicz v. Sorema N.A., 534 U.S. 506 (US 2002)). Further, under CPLR §3211 (a) (7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'" (Leon v Martinez, 84 NY2d 83, 88 (NY 1994) citing Rovello v. Orofino Realty Co., 40 NY2d 633 (NY 1976); Guggenheimer v. Ginzburg, 43 NY2d 268 (NY 1977). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" Matter of Gottlieb v City of New York, 10 NYS3d 542 (NY App Div 2d Dept 2015) citing Riback v. Margulis, 842 NYS2d 54 (NY App Div 2d Dept 2007)).

The NYCHRL

Pursuant to the NYCHRL, as stated in Administrative Code of the City of New York § 8-107 (1) (a), it is an unlawful discriminatory practice for an employer to refuse to hire or employ or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's gender, age, race or national origin. Further the NYCHRL offers broader protections than the New York State Human Rights Law (Romanello v Intesa Sanpaolo, S.P.A., 22 NY3d 881, 884 (NY 2013). "The protections afforded employees under the New York City Human Rights Law (NYCHRL) are more expansive than those provided under analogous provisions of Title VII of the Civil Rights Act of 1964" (Matter of Phillips v Manhattan & Bronx Surface Tr. Operating Auth. 2015 NY Slip Op 06564 (NY App Div. 1st Dept 2015) [internal citations omitted]). Further the "severe or pervasive" standard, which is used under federal and state law to determine whether actionable harassment has occurred, does not apply to claims brought under the NYCHRL. "Rather, the new and lower standard to be applied 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'" (Matter of Phillips v Manhattan & Bronx Surface Tr. Operating Auth. 2015 NY Slip Op 06564 (NY App Div. 1st Dept 2015) citing Williams v. New York City Hous. Auth., 61 AD3d 62, 75 (NY App Div 1st Dept 2009) lv denied 13 NY3d 702 (NY 2010)

"The NYCHRL, as amended by the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 of City of New York [2005]) (Restoration Act), also 'explicitly requires an independent liberal construction analysis . . . targeted to understanding and fulfilling . . . the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart state or federal civil rights laws.'" (Bennett v Time Warner Cable, Inc., 2014 NY Slip Op 33007(U)(NY Sup Ct NY Cnty Nov. 25, 2014) citing Williams v. New York City Hous. Auth., 61 A.D.3d 62 (NY App Div 1st Dept 2009) lv denied 13 NY3d

702 (NY 2010); New York City Administrative Code §8-130; Romanello v Intesa Sanpaolo, S.P.A., 22 NY3d 881 (NY 2013); Bennett v Health Mgt. Sys., Inc., 92 AD3d 29 (NY App Di. 1st Dept 2011) lv denied 18 N.Y.3d 811 (NY 2012)). The provisions of the NYCHRL must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (Albunio v City of New York, 16 N.Y.3d 472, 477 (NY 2011). The court must evaluate claims with regard for the NYCHRL's "'uniquely broad and remedial' purposes." (Williams v New York City Hous. Auth. 872 NYS2d 27 (NY App Div 1st Dept 2009) lv denied 13 NY3d 702 (NY 2010)).

However, a plaintiff alleging employment discrimination in violation of the NYCHRL still has the initial burden to establish a prima facie case of discrimination. To meet this burden, Plaintiff must show that (1) [she] is a member of a protected class; (2) [she] was qualified to hold the position; (3) [she] was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. (Melman v Montefiore Med. Ctr., 946 NYS2d 27, 31 (NY App Div 1st Dept 2012); see also Baldwin v Cablevision Sys. Corp., 888 NYS2d 1 (NY App Div 1st Dept 2009) lv denied 14 N.Y.3d 701 (NY 2010)).

The Plaintiff has failed to state a cause of action under the NYCHRL for hostile work environment

A hostile or abusive work environment resulting from sexual harassment constitutes a violation of the human rights laws (Williams v. New York City Hous. Auth., 61 AD3d 62, 75 (NY App. Div. 1st Dept 2009) lv denied 13 NY3d 702 (NY 2010)). "For HRL liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, 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." (Williams v. New York City Hous. Auth., 61 AD3d 62, 78 (NY App Div 1st Dept 2009) lv denied 13 NY3d 702 (NY 2010)). Under Williams, the test for dismissing a NYCHRL hostile work environment claim is whether the alleged discriminatory conduct represents a "borderline" situation, or one that could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences." (Williams v. New York City Hous. Auth., 61 AD3d 62, 80 (NY App Div 1st Dept 2009) lv denied 13 NY3d 702 (NY 2010)). However, despite the broader application of the NYCHRL, Williams also recognized that the law does not "operate as a general civility code" (Williams v. New York City Hous. Auth., 61 AD3d 62, 79 (NY App Div 1st Dept 2009) lv denied 13 NY3d 702 (NY 2010)).

"Whether a workplace may be viewed as hostile or abusive — from both a reasonable person's standpoint as well as from the victim's subjective perspective — can be determined only by considering the totality of the circumstances" (Matter of Fattier Belle Community Center v New York State Division of Human Rights, 642 NYS2d 739, 745 (NY App Div 4th Dept 1996) lv denied 89 N.Y.2d 809 (NY 1997)). These circumstances include "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" (Forrest v Jewish Guild for the Blind, 3 NY3d at

310-311). "Generally, isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment; in order to be actionable, the offensive conduct must be pervasive" (Matter of Father Belle Community Center v New York State Division of Human Rights,221 AD2d 44, 51 (NY App Div 4th Dept 1996)).

Upon review of the Plaintiff's pleadings and the submitted papers, the Court finds that the Plaintiff's allegations as alleged in her pleadings do not give rise to a cognizable theory under the NYCHRL against Gucci. Specifically, the factual allegations, if true, are insufficient to make out a claim that Mr. Nakama's alleged comments towards the Plaintiff were based upon her gender. The Plaintiff alleges that on two specific instances (February 5, 2014 and March 29, 2014 respectively) Mr. Nakama stated that he would kill Plaintiff and fire her; and that "he would kill us and knock us on the upside of the head". However, the Plaintiff stated in an anonymous email to human resources that Mr. Nakama directed his February 5, 2014 comments towards the Plaintiff and two other employees, one of whom was male. The Plaintiff confirms in her affidavit that Mr. Nakama made the February 5, 2014 statement to the Plaintiff while other employees were present, including a male employee. The Plaintiff further confirms in her affidavit that Mr. Nakama directed the March 29, 2014 statement at the Plaintiff and her co-workers. There is nothing from the Plaintiff's description of Mr. Nakama's March 29, 2014 statement or the substance of the statement itself to suggest that it was aimed towards the Plaintiff based upon her gender. Further, although the Plaintiff states in her affirmation that she "felt" that Mr. Nakama specifically directed said comments at the Plaintiff based upon her gender, there is nothing in the Plaintiff's allegations to support her subjective opinion that said comments were directly aimed at her based upon her gender. The Plaintiff merely states in conclusory terms that she subjectively believed that the remarks made by Mr. Nakama were directed to her because she was a female. However there is

no reasonable basis for such a belief as alleged. Similarly, there is nothing in the Plaintiff's allegations to suggest that she was "compelled" to pay the hotel bill for her training in Italy and/or that Mr. Nakama required her to take a personal day off (when it should have been a vacation day) based upon her gender.

As stated, the NYCHRL, does not "operate as a general civility code" (Williams v. New York City Hous. Auth., 61 AD3d 62, 79 (NY App Div 1st Dept 2009) lv denied 13 NY3d 702 (NY 2010)). Although the Court recognizes that Mr. Nakama's two comments may have been less than civil, the Plaintiff's allegations as to these two comments are insufficient to set forth a claim pursuant to the NYCHRL. Specifically, the Plaintiff's allegations, if true, are insufficient to show that Mr. Nakama's comments were specifically aimed towards the Plaintiff and/or based upon Plaintiff's gender.

Even assuming arguendo that the Plaintiff's allegations, if true, were sufficient to establish that Mr. Nakama's two comments were aimed at the Plaintiff and based upon her gender, said isolated incidents are insufficient to set forth a claim of hostile work environment under the NYCHRL. "Generally, isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment; in order to be actionable, the offensive conduct must be pervasive" (Matter of Father Belle Community Center v New York State Division of Human Rights,221 AD2d 44, 51 (NY App Div 4th Dept 1996)). "Although a 'mild, isolated incident does not make a work environment hostile, the test is whether 'the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse.'" Anderson v Edmiston & Co., Inc., 2013 NY Slip Op 33291U (NY Sup Ct Ny Cnty Dec. 16, 2013) [addressing a hostile environment claim under the NYCHRL] citing Feingold v. New York, 366 F3d 138 (2d Cir NY 2004)).

Even assuming the truth of the Plaintiff's allegations, this Court finds that said allegations are insufficient to rise to the level that a reasonable employee would find that the conditions of her employment were altered for the worse." The Plaintiff alleges in sum and substance that Mr. Nakama made two hyperbolic statements to two different groups of employees (both groups including the Plaintiff). Said comments were almost two months apart, and further there is nothing within the substance of said comments (respectively that he would kill Plaintiff and fire her; and that "he would kill us and knock us on the upside of the head") that would cause a reasonable employee to believe that the conditions of her employment altered for the worse. Even taken together with the Plaintiff's allegation that she was "compelled" to pay the hotel bill fore her training in Italy and that Mr. Nakama required her to take a personal day off (when it should have been a vacation day), said allegations are insufficient to make out a claim of hostile work environment pursuant to the NYCHRL.

Finally, the Court finds that taken with their context (i.e. that Mr. Nakama allegedly made the comments almost two months apart and to groups of employees), Mr Nakama's alleged comments were insufficient to cause a reasonable employee to reasonably believe or be aware that she/he would immediately suffer a battery and that Mr. Nakama possessed the apparent present ability to carry our the battery without said employee's consent.

The plaintiff has failed to state a cause of action under the NYCHRL for constructive discharge

In order to set forth a cause of action for constructive discharge under the NYCHRL, the Plaintiff is required to allege facts sufficiently to support an inference that defendants deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign. (See Morris v. Schroder Capital Mgmt. Int'l, 7 NY3d 616(NY 2006); Attea v Helmsley Enters., Inc., 2014 NY Slip Op 31107U (NY Sup Ct NY Cnty Apr. 25, 2014) citing Mascola v. City Univ. of N.Y., 14 AD3d 409 (NY App Div 1st Dept 2005); Davis v Phoenix Ancient Art, S.A., 2013 NY Slip Op 50613U (NY Sup Ct NY Cnty 2013); Zherka v. Tower Group Cos., Inc., 2011 NY Slip Op 33985U (N.Y. Sup. Ct. Apr. 29, 2011 NY Cnty) citing Short v Deutsche Bank Sec., Inc., 913 NYS2d 64 (NY App Div 1st Dept 2010); Hernandez v. Central Parking Sys. of N.Y., Inc., 879 NYS2d 461 (NY App. Div. 1st Dept 2009)).

Just as the Plaintiff's allegations are insufficient to set forth a claim for hostile work environment, under th NYCHRL this Court finds that said allegations are also insufficient to set forth a claim for constructive discharge. In sum and substance, two isolated hyperbolic remarks made by a supervisor almost two months apart are insufficient to rise to the level of constructive dismissal. Even taken together with the Plaintiff's allegation that she was "compelled" to pay the hotel bill fore her training in Italy and that Mr. Nakama required her to take a personal day off (when it should have been a vacation day), said allegations are insufficient to make out a claim of constructive dismissal pursuant to the NYCHRL.

Conclusion

Accordingly and for the reasons so stated in the instant decision, the Court finds that the Plaintiff has failed to state a cause of action against Gucci under the NYCHRL. Further, the Court has been informed by the Plaintiff's attorney that the Defendant Mr. Nakama was not served with the summons and complaint. As such, it is hereby

ORDERED that Gucci's motion to dismiss the Plaintiff's first cause of action as against Gucci is granted and as the Plaintiff's first cause of action was the only remaining cause of action against Gucci it is further

ORDERED that the underlying action is dismissed in its entirety

The foregoing constitutes the Order and Decision of the Court.

Dated:

Sept 11, 2015

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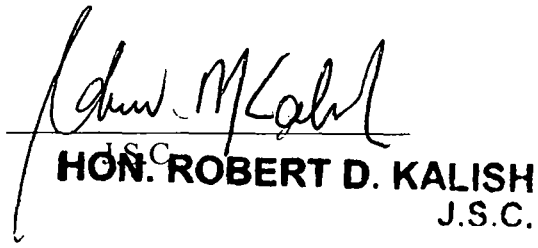

HON. ROBERT D. KALISH
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