Bailey v Brooklyn Hosp. Ctr.
2017 NY Slip Op 30013(U)
January 4, 2017
Supreme Court, New York County
Docket Number: 160752/2013
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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KEISHA BAILEY,

Plaintiff,

-against-

THE BROOKLYN HOSPITAL CENTER, PROMED PERSONNEL SERVICES OF NY INC., INFINITE PERSONNEL SERVICES, INC. AND DOE CORPORATIONS 1-5,

Defendants.

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Index No. 160752/2013

DECISION & ORDER

Motion Sequence 002

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this gender discrimination action under the New York City Human Rights Law ("NYCHRL"), Plaintiff Keisha Bailey ("Plaintiff") alleges that Defendant The Brooklyn Hospital Center (the "Hospital") was responsible for a male-coworker creating a hostile, discriminatory work environment, and for retaliation when Plaintiff complained about the co-worker's conduct. The Hospital now moves for summary judgment dismissing Plaintiff's Complaint. For the reasons set forth below, the Hospital's motion is granted.

BACKGROUND FACTS[1]

I. Plaintiff's Employment

The Hospital is a non-profit, acute care community and teaching hospital and a signatory to a Collective Bargaining Agreement ("CBA") with 1199 SEUI/United Healthcare Workers East (the "Union") (*Mathurin Aff* ¶ 5)[2]. The CBA requires adherence to a specific procedure when

[1] Unless otherwise noted, the essential facts are undisputed and, pursuant to the standards of summary judgment, viewed in the light most favorable to the non-movant (Plaintiff).

[2] Refers to the affidavit of Venra Mathurin ("Mathurin"), the Hospital's Director of Labor and Employee Relations.

filling certain employment vacancies (*Mathurin Aff* ¶¶ 7-12).

Plaintiff was first assigned as a mailroom clerk at the Hospital on July 31, 2012, to fill in for a Union employee on leave (*Mathurin Aff* ¶¶ 20, 23; *Pl Tr* 23:4-8; 82:20-85:15). In October of 2012, at approximately the same time that Plaintiff's first assignment concluded when the permanent employee returned to work, a medical assistant position became available (*Mathurin Aff* ¶¶ 20, 23). Pursuant to the CBA, the Hospital posted the position internally on October 26, 2012 (*Exh 12*; *Mathurin Aff* ¶ 24). The Hospital did not want to leave the position vacant for weeks during the recruitment and hiring process, and decided to use a temporary person from ProMed Personnel Services, Inc. ("ProMed") to fill the position (*Mathurin Aff* ¶ 25).

In November 2012, ProMed referred Plaintiff to the medical assistant position, who began work as a medical assistant on November 19, 2012 (*Mathurin Aff* ¶¶ 25-26; Exhibit 5). Plaintiff reported to Carla Moseley ("Moseley"), the Charge Nurse and supervisor (*Pl Aff* ¶¶ 5-6; *Pl Tr* 14).[3] Moseley informed Plaintiff that Jamie Lopez ("Lopez"), a "Senior Medical Assistant," would train Plaintiff as a medical assistant (*Pl Aff* ¶ 8).

II. Harassment

Several days after beginning as a medical assistant, Lopez, under the guise of demonstrating his masseur training, fondled her and masturbated in front of her (*Pl Aff* ¶¶ 10-12). On November 24, 2012, several days after the first incident and after Lopez learned that Plaintiff's apartment had been flooded during Hurricane Sandy, Lopez appeared at Plaintiff's house with his wife and daughter to deliver a box of cleaning supplies-according to Plaintiff, to

[3] Though her name also appears as "Mosley" and "Mosely" in the papers, emails attached by the parties identify the correct spelling as "Moseley" (*see e.g. Pl Exh O*).

(*Def Exhs 6, 7*).

On December 17, Moseley and DiDilectis, and Mathurin met separately with Plaintiff and Duncan to gather additional facts (*Def Exh 9*). Plaintiff confirmed the three incidents, that they had occurred when she was alone with Lopez, and that she had not previously reported the incidents until December 13 (*Mathurin Aff* ¶¶ 41, 43; *Def Exh 9*). The Hospital terminated Lopez on December 19, six days after Plaintiff's initial complaint (*Mathurin Aff* ¶ 50).

IV. Alleged Retaliation

Though Plaintiff believed that the complaints would remain confidential, comments by other employees (who are unidentified) indicated displeasure with Lopez's termination, and Plaintiff's role in it (*Pl Aff* ¶ 27-29, *Pl Tr* 180-181). A Union delegate also told Plaintiff (and Duncan) that she could "block [her] from joining the [U]nion" (*Pl Aff* ¶ 30; *Pl Tr* 185). A message was also relayed to Plaintiff that a union representative had told a co-worker not to speak to her (*Pl Aff* ¶ 28; *Pl Tr* 182-183).

Plaintiff complained about this treatment in a note to Vaswani on January 10, 2013, who did not respond and "would not even say hello" to Plaintiff (*Pl Aff* ¶ 31; *Pl Exh J*). When, on January 18, DeDilectis told Plaintiff that her position was ending and Plaintiff responded by asking why she was not retained despite a lack of staffing, DeDilectis blamed Plaintiff's failure to join the Union (*Pl Aff* ¶ 32).[5] Thereafter, another co-worker said, "why are [Plaintiff and Duncan] still working here after what happened to [Lopez]?" and "we were able to get one terminated."[6] Shortly before Plaintiff's last day at the Hospital, she wrote another letter to

[5] Plaintiff contends that she did on several occasions, but did not receive any response.

[6] It is unclear whether this was said in the presence of Plaintiff.

Vaswani addressing mistreatment and discrimination based on her earlier complaints (*Pl Aff* ¶ 37, *Pl Exh M*). Finally, a text to Vaswani on Plaintiff's last day was met with, according to Plaintiff, a flippant response (*Pl Exh N*).

Plaintiff subsequently filed her Complaint, alleging unlawful discrimination and retaliation by the Hospital under the NYCHRL.[7] The Hospital now moves to dismiss, arguing: first, that Plaintiff's gender discrimination claim should be dismissed because Lopez did not have supervisory authority and because the Hospital did not know, and could not have known, of Lopez's conduct before Plaintiff's report, or acquiesce to it after Plaintiff's report; second, that Plaintiff's retaliation claim should be dismissed because the co-worker's slights were trivial and therefore not sufficiently "material" to support retaliation; and third, that Plaintiff's retaliation claim also fails because the Hospital articulates a legitimate, non-retaliatory, and non-pretextual reason for the end of plaintiff's employment: that her position was temporary and the process of filling it permanently had begun before Plaintiff began there.

In opposition, Plaintiff argues that, interpreting the NYCHRL more broadly than its state and federal counterparts: first, that she establishes a claim for gender discrimination against the Hospital under 8-107(13(b) because Lopez was given managerial or supervisory authority by virtue of his seniority, and that the Hospital knew or should have known of Lopez's conduct because of its pervasiveness and because at least one complaint had been made prior to Lopez's conduct with Plaintiff; and second, that she establishes a claim for retaliation because she suffered multiple instances of adverse conduct stemming from her complaints, and that the Hospital's explanation for the end of her employment is pretextual.

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[7] The Court previously entered default judgment against the remaining defendants (*NYSCEF* 14).

In reply, the Hospital argues that Plaintiff's affidavit manufactures facts by utilizing inadmissible hearsay which contradicts Plaintiff's deposition testimony. The Hospital also reiterates that the discrimination claim fails because Lopez was not a supervisor, and because the Hospital did not know, and could not have known, about Lopez's conduct before Plaintiff reported it. Finally, the Hospital also reiterates that the retaliation claim should be dismissed because it did not take adverse action against Plaintiff or, alternatively, that Plaintiff cannot demonstrate any link between the adverse action and Plaintiff's complaints.

DISCUSSION

I. Summary Judgment/NYCHRL Generally

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] and *Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212

[b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose" (*Kosovsky v. Park South Tenants Corp.*, 45 Misc3d 1216(A), 2014 WL 5859387 [Sup Ct, NY County 2014] *citing Zuckerman*, 49 NY2d at 562 [1980]). The opponent "must assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] *lv denied*, 24 NY3d 917 [2015] *citing Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]).

The New York City Council's Local Civil Rights Restoration Act of 2005 clarified that the NYCHRL's provisions were meant to be construed independently, and more liberally, than their state and federal counterparts (*Williams v N.Y.C. Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]). The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the NYCHRL's "uniquely broad and remedial" purposes (*id.*; *see also Ya-Chen Chen v City Univ. of N.Y.*, 805 F3d 59, 75 [2d Cir 2015]). In other words, under the NYCHRL, summary judgment is appropriate if "the record establishes as a matter of law that discrimination or retaliation played no role in the defendant's actions" (*Ya-Chen Chen*, 805 F3d at 76).

II. Unlawful Discrimination

Neither party disputes the discriminatory nature of Lopez's alleged acts. The parties dispute, however, the Hospital's liability, as Lopez's employer, for those acts.

The NYCHRL provides that an employer is liable for the unlawful discriminatory conduct of its employees or agents 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 supervisory responsibility; or
> (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 (NYC Admin Code § 8-107 [13]).

The unambiguous language of NYC Administrative Code § 8-107(13) indicates the existence of strict liability in the employment context for acts of managers and supervisors, and for acts of co-workers where the employer knew of the act and failed to take prompt and effective remedial action, or should have known and had not exercised reasonable diligence to prevent it (*Zakrzewska*, 14 NY3d at 480 [2010], *citing* 1991 N.Y. City Legis. Ann., at 187; *see also Suarez v City of N.Y.*, 126 Fair Empl Prac Cas (BNA) 1207 [EDNY 2015] [where an agent acting as an employer is sued based on the discriminatory acts of a non-supervisory employee, the agent can only be held liable if a reasonable fact-finder could conclude that it knew or should have known of the offending employee's unlawful discriminatory conduct and acquiesced in it or failed to exercise reasonable diligence to prevent it], *citing Zakrzewska*, 14 NY3d at 479).

A. Lopez's Managerial or Supervisory Responsibility

As to whether Lopez was Plaintiff's "manager or supervisor" such that strict liability for his actions can be imposed under section (1), supervision is defined as "the series of acts involved in managing, directing, or overseeing persons or projects" and "management" is defined as "the act or system of controlling and making decisions for a business, department, etc."

(*Black's Law Dictionary* [10th ed. 2014]). Under the NYCHRL, "supervisory capacity" requires the "power to do more than simply carry out personnel decisions made by others"; that is, the employee has the capacity to "act with or on behalf of the employer in hiring, firing, paying, or in administering the terms, conditions or privileges of employment" (*Priore v New York Yankees*, 307 AD2d 67, 74 [1st Dept 2003] [extending the holding of *Murphy v ERA United Realty*, 251 AD2d 469, 469 [2d Dept 1998], to the NYCHRL to find that agents and supervisory employees may be sued as individual defendants]; *see also Miloscia v B.R. Guest Holdings LLC*, 33 Misc 3d 466, 478 [Sup Ct 2011], *mod on other grounds*, 94 AD3d 563 [1st Dept 2012] [an individual employee may be liable as an "employer," only when she has an "ownership interest *or any power to do more than carry out personnel decisions made by others*" (emphasis added)]; *Henry-Offor v City Univ. of New York*, 11 CIV. 4695 NRB, 2012 WL 2317540, at *6 [SDNY June 15, 2012] [summary judgment in favor of defendant denied where defendant's employee maintained the authority to alter the terms and conditions of their employment, including the decision not to renew plaintiffs' contracts]).

To the extent that the parties agree that Lopez's authority extended only to Plaintiff's initial training, no evidence is offered to suggest that Lopez had any broader authority, or that Lopez's role in training Plaintiff constituted "managerial or supervisory responsibility" within the meaning of the NYCHRL. The record supports the Hospital's contention that Lopez "did not have the authority to hire, fire, promote, demote, discipline or transfer another employee" (*Mathurin Aff* ¶ 34). Indeed, Plaintiff herself testified that Lopez was a medical assistant, in the same position as she (*Pl Tr* 39:2-4).

The cases that Plaintiff cites are distinguishable because they discuss the NYCHRL's

general standards of liberal construction in a different context, taking as a given that the employees at issue were supervisors. In *Albunio v City of N.Y.* (16 NY3d 472, 475 [2011]), the Court of Appeals simply acknowledged, without further analysis, that one of the parties alleged to have discriminated against the plaintiff was the plaintiff's "immediate supervisor." Similarly, in *Aulicino v N.Y.C. Dept. of Homeless Services* (580 F3d 73, 84 [2009]), the Second Circuit discussed the appropriate manner in which to analyze the frequency of harassment such that anti-discrimination statutes are not diluted.

Accordingly, the Hospital has demonstrated, that Lopez did not, as a matter of law, exercise managerial or supervisory responsibility. Therefore, the branch of the Hospital's motion to dismiss the first cause of action for gender discrimination claim on the ground that it is not liable under section (1) is granted.

B. Whether the Hospital "Knew or Should Have Known" About Lopez's Conduct Prior to Plaintiff's Report

The Hospital contends that it was not aware of Lopez's conduct toward Plaintiff or toward Duncan until on and after Plaintiff's and Duncan's report to management on December 13, 2012 (*Mathurin Aff* ¶ 33). Until that point, Lopez "was a good worker with a clean record" (*id.* at ¶¶ 35-36). There were no eyewitnesses to Lopez's conduct toward Plaintiff, and the Hospital immediately investigated Plaintiff's complaints, and suspended Lopez immediately, followed shortly thereafter by his termination (*Pl Tr* 80:14-82:14; 100:2-6; 114:3-9; 126:10-11; 128:23-25; 162:2-7; 165:14-25; 177:20-178:9).

In opposition, Plaintiff contends that the Hospital should have known about, and taken steps to end, Lopez's conduct as early as a few weeks before December 13, 2012, when Duncan

allegedly reported Lopez's similar conduct (*Pl Aff* ¶¶ 19-20). Plaintiff relies on Mathurin's hand-written notes of a December 17, 2012 meeting, which purportedly confirm that Duncan complained a "few weeks ago," of Lopez's conduct (*Pl Memo of Law* at 9, *citing Pl Exh D*).[8] Plaintiff also cites to Lopez's sexual harassment of another employee, Marie Dorcely, who complained of Lopez on December 17, 2012.

In response, Mathurin attests[9] explains that the "few weeks ago" passage refers to "Ms. Duncan's *incident*," and not Ms. Duncan's *report* of the incident (*Supp Mathurin Aff* ¶ 7). Mathurin points out that the notes of her interview with Duncan on December 17, 2012 indicate that Duncan did not report any instances of Lopez's conduct until after Plaintiff had made her own complaints on December 13, 2012 (*id.* at ¶ 8, *citing Pl Exh D* ["She did not mention this incident to anyone. *** When [Plaintiff came to [Duncan] and told her that [Lopez] was saying that she wasn't doing anything ... she then reported the incidents to [Moseley] and subsequently [Vaswani] and [DeDilectis]"]).

The Hospital demonstrated that it did not know or should have known of Lopez's sexually harassing conduct prior to Plaintiff's incidents with Lopez. Plaintiff's incidents with Lopez occurred on November 20, November 21, sometime about a "week later" (arguably,

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[8] Plaintiff cites Exhibit D, which are the handwritten notes of Duncan's interview. Such notes do not reference any complaint by Duncan made a "few weeks ago." Instead, the reference to Duncan's purported complaint "a few weeks ago," appears in Exhibit E, which was a meeting among Director Mathurin, Supervisor Moseley and Manager DeDilectis.

[9] Courts may consider submissions on reply which, like the Hospital's submission, are offered to clarify or refute opposition to the initial motion (*Matapos Tech. Ltd. v Cia. Andina de Comercio Ltda*, 68 AD3d 672, 672 [1st Dept 2009] [lower court properly considered supplemental affidavit, inadvertently omitted on initial moving papers, because non-movant made an issue of the omission in opposition to the motion]; *Piraeus Jewelry, Inc. v Interested Underwriters at Lloyd's*, 246 AD2d 386, 387 [1st Dept 1998] [lower court should have considered the evidence offered in its reply papers to refute the claims raised in affidavit in opposition]). The Court considers Mathurin's supplemental affidavit as an attempt to clarify and/or refute Plaintiff's opposition.

between November 26 through November 30th per Plaintiff's timecard), and finally on December 12 (regarding Lopez pulling her belt) ("the day before I reported him; That was the last incident before I reported him) (See Plaintiff's meeting handwritten notes; EBT, p. 136).

It is uncontested that Plaintiff reported Lopez on December 13, 2012. Vaswani and DeDilectis testified at their depositions that they did not know about Lopez's sexually harassing conduct toward Ms. Duncan until *after* Plaintiff had complained on December 13th (Vaswani EBT, 51 (Duncan came forward "like a day after or whatever, as we were investigating all of a sudden Marlene's name came up"; 59-60; DeDilectis EBT, 30-31, 77). And, it is noted that the handwritten notes from Duncan's interview also state: "[w]hen asked why she reported the instances *now and not sooner*, she stated that she felt really stupid for allowing him to touch her like that and was embarrassed to report it." And, Dorcely's complaint of Lopez's sexually harassing conduct occurred only during the investigation into Plaintiff's complaint. Yet, the record also arguably indicates that the Hospital became aware of Lopez's sexually harassing conduct, at the earliest, on December 12, 2012. According to Plaintiff's meeting, on "*December 12th*," Lopez told her "that he had sent [Duncan] to the labs because she wasn't doing anything." (See Exhibit G). According to Duncan's meeting, "When [Plaintiff] come to her and told her that [Lopez] was saying that she wasn't doing anything, and that he had to send her to the labs, *she [Duncan] then reported the incidents* to Ms. Moseley and subsequently . . . Vaswani and . . . Dedelictis." (Emphasis added). Thus, while Lopez allegedly sexually harassed Duncan on November 12, November 13, and "The following week," the Hospital arguably first received notice of Duncan's objectionable conduct, at the earliest, on or after December 12, 2012 when Duncan "reported the incidents" or on or after December 13, 2012, when Plaintiff first

complained of Lopez. Plaintiff's deposition supports this conclusion. When asked whether any of the other staff tell her that they had ever reported Lopez for inappropriate behavior, Plaintiff responded, "Yes. Just Marlene and Marie Darcy." When asked "That's all around the same time as you." Plaintiff replied, "Yes." (Plaintiff EBT, pp. 100, 148-149). Therefore, even viewing the evidence in the light most favorable to the Plaintiff, the Hospital did not have notice of Lopez's sexually harassing conduct until December 12, the same date of his last incident with the Plaintiff on December 12th. In other words, the Hospital established that it did not have notice of any sexually harassing complaints of Lopez at the various times he sexually harassed the Plaintiff.

Plaintiff failed to raise an issue of fact in this regard. Plaintiff's reliance on the handwritten notation of December 17th, that "A few weeks ago, Marlene [Duncan] reported that he tried to massage her . . ." is insufficient to raise an issue of fact as to whether the Hospital was aware of Lopez's alleged sexual conduct prior to the incidents involving the Plaintiff. The December 17th handwritten notation is of Mathurin's interview of Moseley, who told her that "Duncan had first reported an issue with . . . Lopez on December 13, 2012." (Supplemental affidavit¶7). Notably, neither Duncan nor Plaintiff was present during Mathurin's interview of Moseley. Mathurin further attests that her subsequent interview of Duncan revealed that Duncan did not report her incidents with Lopez until December 13th because "she felt 'stupid' and 'embarrassed.'" (Mathurin Supplemental affidavit, ¶8). Consistent with Duncan's interview notes, Mathurin, who was present during Duncan's interview (Affidavit, ¶¶39, 44), previously attested that Duncan did not report her incidents with Lopez until December 13, 2012.

Further, plaintiff's claim that the Hospital should have known of Lopez's harassment

based on the "sheer number of women who Lopez accosted" (*i.e.*, Dorcely, Duncan and Plaintiff) is insufficient, in light of the absence of any evidence indicating that the Hospital was aware of Lopez's objectionable conduct prior to the incidents involving the Plaintiff.

Thus, the branch of the Hospital's motion for summary judgment seeking dismissal of the first cause of action for gender discrimination on the ground that it is not liable under sections (2) and (3), is also granted.

III. Retaliation

Plaintiff's second cause of action alleges that the Hospital took various adverse actions against her, up to and including termination, in response to the complaints she made about Lopez. The Hospital also argues that the allegations amount to "petty slights" by employees and "trivial slights" by managers that cannot support a retaliation claim, and that Plaintiff's employment was a temporary work assignment, the end of which was set in motion well before Plaintiff made her complaints.

As relevant here, NYC Administrative Code § 8-107(7) provides that

> It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter...

To make out a retaliation claim under NYCHRL, a plaintiff must show that "(1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Calhoun v County of Herkimer*, 114 AD3d 1304, 1306 [4th Dept 2014], *citing Forrest v Jewish Guild for the Blind*, 3

NY3d 295, 313 [2004], *superseded on other grounds by statute as discussed in Williams*, 61 AD3d at 84, n 33). Here, the parties dispute the third and fourth factors.

In order to establish entitlement to summary judgment in a retaliation case, a defendant may "demonstrate that the plaintiff cannot make out a *prima facie* claim of retaliation" or, alternatively, a defendant may "offer[ ] legitimate, nonretaliatory reasons for the challenged actions," and show that there are "no triable issue[s] of fact . . . whether the . . . [reasons are] pretextual" (*Calhoun*, 114 AD3d at 1306, *citing Brightman,* 108 AD3d at 740). If the defendant meets this burden, the ultimate burden rests with plaintiff, who must prove a causal connection between the adverse action and her protected activity, and that the reasons put forth by the defendant were merely a pretext for unlawful discrimination (*Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740 [2d Dept 2013]).

Like other provisions of the NYCHRL, the Restoration Act requires that courts "construe [the NYCHRL] ... broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51–52 [1st Dept 2012]). "[I]t is important that the assessment [of a retaliation claim] be made with a keen sense of [the] realities [of the circumstances surrounding the plaintiff], of the fact that the "chilling effect" of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities" (*id.*, *citing Williams v N.Y.C. Hous. Auth.*, 61 AD3d 62, 71, 872 NYS2d 27 [2009], *lv den* 13 NY3d 702 [2009]).

A. End of Plaintiff's Employment

Plaintiff alleges several instances of adverse employment action taken against her by the Hospital, culminating in the end of her employment despite the availability of two permanent

medical assistant positions (including the one vacated by Lopez upon his termination).

In support of dismissal, the Hospital first contends that Plaintiff was never an employee, and therefore could not have been terminated. However, as discussed above, a violation of the NYCHRL does not require termination, only a material change in the circumstances of Plaintiff's employment. Additionally, the NYCHRL does not distinguish between employees and independent contractors for purposes of prohibiting discriminatory actions (*see Sellers v Royal Bank of Can.*, 2014 WL 104682, at *10 [SDNY Jan. 8, 2014], *affd*, 592 Fed Appx 45 [2d Cir 2015], *quoting O'Neill v Atlantic Sec. Guards, Inc.*, 250 AD2d 493, 493 [1st Dept 1998] [unlike its state and federal counterparts, the NYCHRL protects independent contractors "if they are 'natural persons' who '*carry out work in furtherance of an employer's business enterprise*'"] *see also* NYC Admin Code § 8-102[5] ["For purposes of this subdivision, natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer"]).

The Hospital next contends that the process of hiring a permanent employee for Plaintiff's position had been set into motion several months before Plaintiff's complaint due to a CBA provision requiring the hiring of 1199 Union members.

Mathurin's affidavit and supplemental affidavit, which are supported by numerous documents, confirm the hiring procedure and timeline that evidence a non-discriminatory reason for the end of Plaintiff's employment at the Hospital.

The CBA requires the Hospital to follow certain procedures to fill vacant positions, including the medical assistant position occupied by Plaintiff (*Mathurin Aff* ¶¶ 8-9, 18). First, a

vacant position must be posted internally for at least three business days (*Mathurin Aff* ¶ 8; CBA Art. IX, Section 8(a)). If the position remains vacant, the Hospital must then submit the vacancy to the Union's Joint Employment Service, which shall be the sole source of referrals for seven days (*Mathurin Aff* ¶¶6, 9; CBA Art. VI). The Hospital then interviews referred Union members, who receive first preference (*Mathurin Aff* ¶ 10; *Exh 4*).

Once an offer is extended and before a candidate can begin employment, the candidate must successfully complete numerous pre-employment requirements, such as a background check, drug screening, and employment and education verifications (*Mathurin Aff* ¶ 11). Because the process can often take weeks or months to complete, the Hospital often employs temporary workers who, per the CBA, may not be given priority over Union members (*Mathurin Aff* ¶ 12). If the referral service provides qualified candidates, however, those candidates must be given preference (*Mathurin Aff* ¶ 10, *citing Def Exh 4*).

Consistent with its procedures, the Hospital posted the first vacant position internally on October 26, 2012, *before* Plaintiff began work as a medical assistant (*Mathurin Aff* ¶ 55, *citing Def Exh 12*). After the posting ended on October 31, 2012, the Hospital submitted the position to the Union's Employment Service, which in turn submitted several candidates who were interviewed by DeDilectis beginning in December of 2012 *(Mathurin Aff* ¶¶ 56-58). After none of the candidates were chosen, the Union's Employment Service referred two more members, one of whom was interviewed on January 14, 2013 and offered the position on January 18, 2013 (*Mathurin Aff* ¶¶ 58-59, *citing Def Exhs 13, 14*). On January 18, 2013, (albeit after Plaintiff's complaint) the Hospital notified ProMed that Plaintiff's temporary assignment would soon end, which it did after the Union candidate completed her application process (*Mathurin Aff* ¶¶ 62-65,

citing Def Exh 14).

"An employer's continuation of a course of conduct that had begun before the employee complained does not constitute retaliation because, in that situation, there is no causal connection between the employee's protected activity and the employer's challenged conduct" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 129 [1st Dept 2012]; *cf. Williams v N.Y.C. Hous. Auth.*, 61 AD3d 62, 71 [1st Dept 2009] [a jury could conclude that assignment to duties outside or beneath one's normal work could be retaliation]; *Calhoun v County of Herkimer*, 114 AD3d 1304, 1308 [4th Dept 2014] ["Even if the loss of federal funding were one of the reasons for the decision not to renew plaintiff's contract ... the timing and circumstances of the nonrenewal suggest [impermissible retaliation]).

This sequence of events, as supported by documentary evidence including evidence submitted by Plaintiff herself (*Pl Exh K*), demonstrate an absence of a causal link between Plaintiff's complaints about Lopez and the end of her employment. By Plaintiff's own admission, her complaints were not made until December 13, 2012, well after the search for a replacement medical assistant had already begun. Even crediting Plaintiff's argument that Duncan had complained about Lopez's conduct "a few weeks" earlier (in November), the search had already begun even before that time period, and there is no indication that the Hospital knew about (and or was motivated to retaliate for) Plaintiff's complaints regarding Lopez.

In opposition, Plaintiff confirms that she began work as a medical assistant on November 19, 2012 (*Pl Aff* ¶ *5, citing Pl Tr* 13). She testifies that, from her previous experience as a mailroom clerk at the Hospital, she would have the opportunity to "join the union and gain preference for permanent positions" after three months of employment f(*Pl Aff* ¶ 7). After

Plaintiff reported Lopez's actions and allegedly experienced poor treatment from co-workers and supervisors, she learned that permanent medical assistant positions had become available (*id.* at ¶ 29).

When Plaintiff approached a Union delegate about joining the Union, she was "...told by the delegate that she could block me from joining the union, which [she] believed was being done because [she] complained about Lopez" (*id.* at ¶ 30). However, any causal link between Plaintiff's complaints about Lopez and her union membership, is undermined by Plaintiff's deposition testimony that the Union delegate made that comment to her in the presence of *Duncan*-the latter of whom had also complained about Lopez and nevertheless been accepted to the Union and offered a permanent position after referral from the Union (*Pl Tr* 184-186; *Mathurin Supp Aff* ¶¶ 25-29).

On January 18, 2013, DeDilectis informed Plaintiff that her position was ending (*Pl Aff*, at ¶ 32). When Plaintiff asked why she was not being kept on staff, despite the multiple vacancies, she was told that it was because she had not applied to join the Union (*id.*, ¶¶ 32-34). According to Plaintiff, this was untrue.[10]

Plaintiff's last day was February 22, 2013, allegedly due to the complaints she made about Lopez, as well as her subsequent reports of staff mistreatment that stemmed from her complaints about Lopez.

Plaintiff attaches and cites to a portion of the CBA that provides that temporary employees (such as Plaintiff) shall, after three months, "become a member of the Union" and "shall be treated as a regular employee for the purpose of filling vacant or available permanent

[10] Beyond her own affidavit, Plaintiff provides no other evidentiary support for this contention.

positions for which the Employee is immediately qualified" (*Pl Exh L* at VIII [1]; [6]). In turn, a "vacant position" is defined as "a position for which the Employer is actively recruiting for which no Employee at the institution has exercised [Seniority rights] and after the position has been submitted to the Job Security Fund layoff pool operated by the Joint Employment Service."

The Hospital disputes the applicability of that portion of the CBA to ProMed employees (*Mathurin Supp Aff* ¶¶ 30-32). Regardless of its applicability, which is unclear from its face because only selected portions have been submitted, Plaintiff's argument is nevertheless unavailing. Plaintiff's argument revolves around her efforts – allegedly ignored or rebuffed – to join the Union, but does not mention any efforts to actually apply for the position because none was actually available at that time. That is, Plaintiff's argument ignores that there is no evidence that the Lopez position was, in fact "vacant" or "available," and presumes, without support, that the Hospital had any obligation to immediately begin efforts to replace Lopez. As of August 18, 2016, Lopez's position had not been posted or filled (*Mathurin Supp Aff* ¶¶ 16-18). There was no other available position because, as discussed above, the Hospital had already undertaken efforts to fill the previous vacancy.

Plaintiff's final argument contends that the Hospital sought to develop a non-Union pretext for the end of her employment. Specifically, Plaintiff points to internal Hospital emails referencing an error made by Plaintiff (*Pl Exhs O, P, Q*). The import of these emails is unclear, as the Hospital does not make any argument here regarding such errors. Accordingly, the Court does not rely on or discuss them further.

B. Treatment by Co-Workers and Supervisors

While adverse employment actions need not be material in order to be held violative of

the NYCHRL, a plaintiff must show that he or she "was treated differently from others in a way that was more than trivial, insubstantial, or petty" (*Williams v Regus Mgt. Group, LLC*, 836 F Supp 2d 159, 172–73 [SDNY 2011]; *Williams v N.Y.C. Hous. Auth.*, 61 AD3d at 79 ["... a focus on unequal treatment based on gender regardless of whether the conduct is 'tangible' (like hiring or firing) or not—is in fact the approach that is most faithful to the uniquely broad and remedial purposes of the local statute]; *Kerman-Mastour v Fin. Indus. Regulatory Auth., Inc.*, 814 F Supp 2d 355, 366 [SDNY 2011]). Even considering the broad interpretation to be afforded to Plaintiff under the NYCHRL, "courts must be mindful that the NYCHRL is not a general civility code" (*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 110 [2d Cir 2013], *citing Williams*, 61 AD3d at 79; *accord Nelson v HSBC Bank USA*, 87 AD3d 995, 999 [2d Dept 2011]). To avoid liability, the burden rests with defendants to demonstrate that the conduct complained of "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" (*Williams*, 61 AD3d at 79). In such "truly insubstantial cases, where the defense is clear as a matter of law," summary judgment may be appropriate (*Williams*, 61 AD3d at 79).

A precise definition of a "truly insubstantial case" is elusive because each case is fact-specific, but a spectrum of work environments has emerged. At one end, militating against dismissal are multiple instances of odious or objectively offensive utterances, significant or punitive changes in duties, or conduct which is "sufficiently continuous or pervasive" *(compare Albunio v City of N.Y.*, 67 AD3d 407, 408 [1st Dept 2009], *affd*, 16 NY3d 472 [2011] [repeated denials of change of assignment requests, isolation from fellow officers, repeated denials of annual leave requests, unjustified change of duty status to restricted duty and removal of his

firearm, harassment from a fellow officer and forced retirement made the working environment "objectively so intolerable that a reasonable person in their respective positions would have felt compelled to leave"]; *Graciani v Patients Med., P.C.*, 2015 Fair Empl Prac Cas [BNA] 284097 [EDNY 2015] [summary judgment denied where plaintiff demonstrated that upon announcing her pregnancy, defendants immediately changed the way they acted toward her, including telling Plaintiff to dress differently on multiple occasions and rushing her out of the bathroom]).

At the other end of the spectrum, in favor of dismissal are actions which are outwardly offensive but infrequent, or inconveniences or slights – even many – that are characterized more fairly as an unpleasant or not discriminatory *(see Dowrich-Weeks v Cooper Sq. Realty, Inc.*, 535 Fed Appx 9, 11–12 [2d Cir 2013] [negative remarks to a client, forced relocation from office to cubicle, denial of permission to work periodically from home, and demotion from one supervisory role to another with less responsibility are not materially adverse employment actions under the NYCHRL, and not supported by inference of discriminatory animus]; *Rogers v Bank of New York Mellon*, 2016 Fair Empl Prac Cas [BNA] 263535 [SDNY 2016] [single, racially-charged derogatory remark is not "sufficiently continuous or pervasive to sustain a hostile work environment claim and does not constitute anything more than a petty slight"]; *Mullins v Consol. Edison Co. of N.Y, Inc.*, 2015 WL 4503648, at *5 [SDNY July 22, 2015] [granting summary dismissal of NYCHRL claim where plaintiff relied solely on "occasional jokes" with racial tint, and on comment that he "speaks well"]; *Sosa v Medstaff, Inc.*, 2014 WL 4377754, at *7 [SDNY Sept. 4, 2014], *affd sub nom Sosa v Local Staff, LLC*, 618 Fed Appx 19 [2d Cir 2015] [single instance of inappropriate "you're so street" comment, avoiding eye contact, use of intermediaries to communicate, and micromanagement of plaintiff's work do not support an inference that

plaintiff had a reasonable good faith belief that he was subject to discrimination]).

While the precise point which separates a discriminatory work environment from an unpleasant one is difficult to discern, a helpful guidepost is whether the employer's conduct dissuaded the plaintiff from engaging in protected activity (Rogers, 2016 Fair Empl Prac Cas (BNA) 263535 ["...the allegedly faulty investigations and the denial of 'promotional increases' — also fail under the more liberal NYCHRL standard because, even assuming that plaintiff suffered any adverse action, plaintiff has not even asserted (much less presented evidence) *that defendants' conduct dissuaded her from engaging in protected activity*" (emphasis added)]).

Applying those principles here, the circumstances alleged by Plaintiff do not rise above triviality. For example, Plaintiff alleges that she was targeted by hostile remarks by co-workers for her actions and, when she complained to her supervisors in writing on several occasions, her concerns were either ignored or dismissed (*Pl Aff* ¶¶ 26-28, 31, 35). However, the incidents are, as established by the Hospital, mischaracterized or inflated by Plaintiff, or trivial; indeed, according to Plaintiff's own testimony, the remarks also ceased soon after Plaintiff's first written report to Vaswani of her co-workers' conduct (*Pl Tr* 192:4-19).

For example, Plaintiff attests that another female medical assistant said that Lopez was a "nice person" who would "not do that sort of thing" and told Plaintiff "what kind of person would cause a man to lose his job when she just started here?"(*Pl Aff* ¶ 27 [emphasis added]; *Pl Tr* 180:20). But Plaintiff's own testimony subsequently notes that this was an isolated incident that was not repeated after her complaint (*Pl Tr* at 180-81), and did not dissuade her from making further complaints (*see e.g., Pl Exh M*).

Additionally, as discussed above, Plaintiff also alleges that an unnamed union delegate

told her that "she *could* block me from joining the union" (emphasis added). To the extent that Plaintiff alleges that the statement *itself* was retaliation, it cannot be characterized as more than an inconvenience. To the extent that Plaintiff alleges that Union membership was actually denied based on her complaints, she provides no evidence of actual efforts to join the Union or the Hospital's role in denying membership. Moreover, her argument is undermined by the fact that Duncan, who also complained about Lopez's conduct and but was nevertheless admitted into the Union and offered a position at the Hospital (*Mathurin Aff* ¶¶ 74-79; *see Hart v New York Univ. Hosps. Ctr.*, 09 CIV. 5159, 2011 WL 4755368, at *9 [SDNY Oct. 7, 2011], *affd sub nom.*, 510 Fed Appx 22 [2d Cir 2013] [plaintiff failed to state a retaliation claim where, *inter alia,* the employer established that other employees who filed discrimination complaints continued to be employed by the hospital]).

Plaintiff also alleges that Vaswani continued to be dismissive of her concerns and complaints, up to and including Plaintiff's final day at the Hospital (*Pl Aff* ¶ 37, *citing Exh N*). But the same exhibit (*Pl Exh N*) refutes Plaintiff's characterization of Vaswani's communication as "careless"; that is, Vaswani did not limit her comments to "what sort of help would you like?", but, earlier in the day, acknowledged receipt of Plaintiff's second letter, directed her to a direct supervisor and indicated that Vaswani was available by phone to talk to Plaintiff.

Finally, even assuming that Vaswani became less friendly and that co-workers' alienated Plaintiff by making "looks and whispers" after her complaints about Lopez (*Pl Aff* ¶ 27), and that a union representative told another co-worker not to speak with her, such actions fail to give rise to retaliatory treatment. "Silent treatment" or ostracism are not considered a "materially adverse change in the terms and conditions of employment" unless accompanied by "many other

allegedly adverse activities (such as derogatory remarks, denial of compensatory time, and increasing duties while decreasing staff)" (*Carpenter v City of Torrington*, 100 Fed Appx 858, 860 [2d Cir 2004]; *Miksic v TD Ameritrade Holding Corp.*, 2013 WL 1803956, at *4 [SDNY Mar. 7, 2013], *citing Linares v City of White Plains*, 773 F Supp 559, 561–62 [SDNY 1991] [in addition to isolation and ostracism, complaint alleged refusal to fill vacancies and provide office equipment, refusal to permit discipline of unsatisfactory employees, stricter accounting for time and attendance for plaintiff than others, blocked funding, denial of compensatory time, and other adverse actions]).

Based on the record, the Court finds that the Hospital demonstrated a valid, non-pretextual reason for terminating Plaintiff's employment, and that Plaintiff's treatment by co-workers was not materially adverse to her employment. Accordingly, dismissal of Plaintiff's second cause of action for retaliation is appropriate.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the Defendant The Brooklyn Hospital Center's motion for summary judgment dismissing plaintiff's complaint against it is granted; and it is further

ORDERED that the Clerk is directed to sever the complaint against Defendant The Brooklyn Hospital Center and may enter judgment accordingly; and it is further

ORDERED that Defendant The Brooklyn Hospital Center shall, within 20 days of entry, serve a copy of this Order with notice of entry upon all parties and the Clerk of Court.

This constitutes the decision and order of the Court.

Dated: January 4, 2017

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.