Southerland v Phoenix Constructors JV
2017 NY Slip Op 32027(U)
September 26, 2017
Supreme Court, New York County
Docket Number: 156005/15
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

NICKOL SOUTHERLAND

INDEX NO. 156005/15

MOT. DATE

- v -

MOT. SEQ. NO. 003

PHOENIX CONSTRUCTORS JV et al.

The following papers were read on this motion to/for summary judgment and strike jury demand

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 85-105

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 107-126

Replying Affidavits NYSCEF DOC No(s). 149-155

In this employment action for hostile work environment, disability discrimination and retaliation, defendants Phoenix Constructors JV (Phoenix), Fluor Enterprises, Inc. (Fluor), Slattery Skanska, Inc., Skanska USA Civil Northeast, Inc. (Skanska defendants), Bovis Lend Lease LMB, Inc. (Bovis), Granite Construction Northeast Inc. (Granite Construction), Kenneth Primiano, Joe DeRosa and Dudley Eisser (collectively defendants), move for an order, pursuant to CPLR 3212, for summary judgment dismissal of the complaint in its entirety, and for an order pursuant to CPLR 4101 for an order striking the jury demand by plaintiff, Nickol Southerland.

Plaintiff opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

Facts

Many material facts are not in dispute. Plaintiff was employed in the New York City construction industry for 15 years as a laborer at the time she began working for defendants (Southerland tr at 49), and has been a member of the Laborers Local Union 731 since in or around 1997 (id.).

In 2006, plaintiff began working as a laborer for Skanska defendants, Fluor, Bovis and Granite Construction, who formed the construction company joint-venture known as Phoenix. Phoenix was hired by the Port Authority of New York and New Jersey (Port Authority) to execute the World Trade

Dated: 9/26/17

HON. LYNN R. KOTLER, 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

Center (WTC) reconstruction effort in the wake of the tragedy of September 11, 2001.

Plaintiff was assigned to work at "Gate 3" at the site. Her duties included staging, escorting and directing vehicles into and out of the WTC worksite, directing pedestrian traffic in and around the WTC site, accepting deliveries and keeping her area clean, among other tasks (Southerland tr at 156-158). Plaintiff was employed in this position for two and a half years without incident. Plaintiff's regular work schedule during that time was Monday through Friday from 7:00 a.m. to 3:30 p.m. (complaint, ¶ 20), but while working at Gate 3, plaintiff was regularly provided with opportunities to work overtime, as she was regularly needed to start at 5:30 a.m. (plaintiff tr at 211-212; Kenneth Primiano tr at 34).

Plaintiff claims that throughout her tenure working at Gate 3, for two and one-half years, she was subject to "a relentless tirade of gender-specific epithets" from her coworker, Giovanni Santillo and was often times referred to as a "bitch" (complaint, ¶ 19; plaintiff tr at 156-158; Elisia Spivey tr at 93-95).

Plaintiff testified that on one occasion on April 21st, Santillo was "in a funk" (plaintiff tr at 201-202). It was very busy. Plaintiff asked Santillo, over the two-way radio, how many trucks there were or to asked to send over some trucks (id. at 202). Santillo told plaintiff "to stop calling his fucking name over the radio" (id.). Plaintiff called him again around 2:00 p.m., asking if he was back from lunch (id.). Santillo again yelled at her to stop fucking calling him over the radio. Plaintiff told him "if you are finished, I need to go to lunch." Santillo replied "I'm tired of you fucking calling me you stupid bitch" (id.). A coworker, Charles Davis, confirms that he overheard Santillo call plaintiff a "dumb bitch over the radio and told her to shut the fuck up" (Davis tr at 43).

Further, plaintiff maintains that in 2007, when defendant Kenneth Primiano became plaintiff's foreman and immediate supervisor, Primiano would regularly criticize plaintiff in person and over the two-way radio about the way she was performing her job (complaint, ¶¶ 25-26). Primiano also allegedly called plaintiff a "bitch" over the radio on occasion (plaintiff tr at 206). Plaintiff testified that after Santillo made the comment over the radio Primiano got on the radio and said "I'm tired of this fucking shit. Somebody's going to get fired" (plaintiff tr at 203).

Plaintiff testified that Primiano also expected the women in their group, including plaintiff, to flirt with him. Plaintiff refused and was treated with hostility, however, a coworker, Melissa, used to flirt with Primiano; the two would go to lunch together, and Melissa would get the overtime she wanted (id. at 376-377; Charles Davis tr at 62-67). It was rumored that Melissa and Primiano were having a sexual relationship (plaintiff tr at 378-379; Spivey tr at 116).

Elisia Spivey, a former coworker of plaintiff, testified that Primiano questioned Spivey about her sexual orientation on one or two occasions (Spivey tr at 85-86). Spivey also testified that she overheard Santillo call plaintiff a bitch a couple of times, stating things like "She's such a bitch. Why is she such a bitch?" (Spivey tr at 94). Spivey told the two men that they needed to stop calling plaintiff that word (id.). Spivey testified that plaintiff had a way about her, where she came off as authoritative, and would talk to her coworkers like they were children (id. at 95). Plaintiff would direct Santillo in such a way like she was giving orders (id.).

EEO Policies

Under the Skanska Anti-Harassment policy, "[i]t is the responsibility of all management to immediately report any activities, which constitute harassment in any form" and "the Company will promptly and thoroughly investigate any complaint as it arises" (plaintiff exhibit H at PS 309).

The Phoenix Constructor's Sexual Harassment Policy provides "Phoenix Constructor foremen, superintendents and all other supervisory personnel are responsible for maintaining" "a working environment free of harassment, intimidation and coercion at all sites and in all facilities" "with specific attention to minority or female individuals working at these sites or facilities" (plaintiff exhibit I at PS 336, 337). Under Phoenix's policy, managerial employees are to report any alleged violations of the policy to enable Phoenix's human resources director/EEO director to "promptly conduct an investigation and examine all the facts fairly and impartially" (id. at PS 337).

Complaints to Defendants regarding Primiano's and Santillo's Conduct & Alleged Retaliation

Plaintiff complained about Santillo's conduct to Dudley Eisser, the superintendent of laborers at WTC during the relevant time period. Plaintiff also complained about Primiano's comments and attitude towards her (plaintiff tr at 18-19; plaintiff tr at 203, 206). Eisser promised to address the situation. Eisser and Primiano met to discuss the issue. Primiano testified that they had to do something because Santillo and plaintiff were constantly fighting (Santillo tr at 65; see also Spivey tr at 93). Primiano and Eisser decided to transfer plaintiff to another position at the WTC site, rather than Santillo (plaintiff tr at 201-203; Primiano tr at 66-67). Eisser testified that they decided to transfer plaintiff to "eliminate friction" and avoid "provok[ing] any more outbursts" and to give plaintiff an "opportunity to take it a little easier" as the position was "less stressful" (Eisser tr at 116). Santillo was spoken to about proper radio etiquette and FCC law, and was reminded not to use foul language on the job (id. at 112-113).

Eisser recalls reprimanding Primiano for his use of the word "bitch" over the radio, however, he did not recall if it was plaintiff who made the complaint (Eisser tr at 129-130). Rather than report the misconduct to human resources as he was required to per defendants' equal employment opportunity (EEO) policies, Eisser had a "stern conversation" with Primiano, which was his "way of dealing with things" in order to "curtain that activity on one offense" (id.; see also Skanska USA Civil Anti-Harassment Policy dated September 2008, plaintiff exhibit H; Phoenix Employee Procedures Manual, plaintiff exhibit I [collectively EEO policies]).

Plaintiff complained when she was told about the transfer, because the schedule was inflexible and she would lose overtime hours as a result (Eisser tr at 117). Specifically, plaintiff was transferred to the West Broadway Staging area, where the required hours were from 7:00 a.m. to 7:00 p.m. Plaintiff complained to her shop steward that the hours would interfere with her ability to care for her disabled child (complaint, ¶ 51; plaintiff tr at 257-258; Pogelscheck tr at 44). She was then transferred to Gate 2 (id., ¶ 51). When plaintiff complained to Primiano, he replied "You're lucky to still have a job" (complaint, ¶ 50). Plaintiff also felt that she was being retaliated against because the radio was taken away from her, and she felt she needed it to properly perform her job (Eisser tr at 120). Eisser disagreed (id.).

At Gate 2, plaintiff worked the ramp with Tommy Major and Sara Rodriguez. Both Major and Rodiguez worked from 6:00 a.m. to 3:30 p.m. every day, allowing them five hours of overtime each week. Plaintiff, who was charged with the same job responsibilities, was assigned by Primiano to begin work at either 6:30 a.m. or 7:00 a.m., depriving her of the ability to earn the same amount of overtime as her colleagues (plaintiff tr at 274).

In or around September 2008, plaintiff alleges that Joe DeRosa, plaintiff's supervisory at Gate 2, falsely accused plaintiff of using profanity on the job site in front of a supervisor, Greg Shore. De Rosa threatened that if plaintiff engaged in such misconduct again, she would be terminated (complaint, ¶¶ 61-64; plaintiff tr at 284-287).

Plaintiff's Workplace Injury & Discharge from Employment

On December 9, 2008, plaintiff was injured while at work when a truck backed into her from behind and hit her with such force that she was thrown into the air, crashing down on her shoulder, arms and head (complaint, ¶¶ 65-66). Plaintiff went to the hospital for treatment and was diagnosed with "soft tissue contusion" (defendant exhibit 8). She was released to return to work that same day (id.). She remained home from work on December 11, 2008 because of intense pain, but resolved to go to work the following day after her shop steward, Karl Pogelschek called her and urged her to return to work as soon as possible (plaintiff tr at 129 -130).

On December 12, 2008, plaintiff returned to work. That afternoon, her pain increased and plaintiff went to see Sharon Quinn about receiving an accommodation due to her injuries. At the time, she had a doctor's note stating that plaintiff should be excused from work until December 15, 2008 (plaintiff tr at 330; see also defendant exhibit 9). Plaintiff went to see Quinn, after asking Pogelscheck, how to get more time off, light duty and/or accommodation upon her return to work (plaintiff tr at 522-524). While speaking with Quinn, Eisser knocked on the office door, interrupted their conversation and fired plaintiff (plaintiff tr at 330-331; Eisser tr at 134-135; Quinn tr at 14-16).

Eisser testified that he set up the meeting with plaintiff and Quinn for the purposes of terminating plaintiff (Eisser tr at 134-135). Quinn testified, however, that she never had an opportunity to discuss anything about plaintiff with Eisser (Quinn tr at 14). Rather, on the day, plaintiff was "let go", Quinn was in her office, plaintiff knocked on the door introduced herself and told Quinn about her workplace injury; how at first it did not hurt but the next day it was hurting (id. at 14-15). Eisser then knocked on the door and "handed [plaintiff] a piece of paper and explained to [plaintiff] that it was her last day and she seemed to be upset and she said why, why am I being let go. I have seniority. And he said we have no work and many people are being let go" (id. at 15). The two proceeded to continue talking and left Quinn's office (id.). Plaintiff claimed she had seniority. Plaintiff and Quinn had no further conversations (id. at 16).

Eisser's Decision to Terminate Plaintiff

Eisser testified that the reason her terminated plaintiff was "based on the fact that the Port Authority had told us that we were no longer required to staff certain locations, which meant that I had too many people, and so I was in a position to lay off some people" (Eisser tr at 135). However, defendants took the position in the interrogatory responses that the Port Authority was responsible for making the decision to eliminate certain positions, including the flagger position at Gate 2. Defendants claimed in their interrogatory responses that Eisser merely "advised plaintiff that her position had been eliminated" (defendant exhibit 23), which coincidentally, occurred when plaintiff was discussing her workplace injury with Sharon Quinn.

Majur was the other individual who was discharged as a result of the same reduction in force, however, within days, he returned to work at the WTC site, working at the site for an additional two years (DeRosa tr at 112; Eisser tr at 138-139).

Plaintiff's Ability to Work

Plaintiff testified that in 2009, she applied for disability benefits, but never claimed that she could not work without an accommodation of her disabilities at any time during the proceeding before the U.S. Social Security Administration (SSA) (plaintiff tr at 562-565). She also testified that she believed she

could have continued to work for defendants at the WTC site with accommodation, such as the opportunity to sit down in between tasks (id. at 562). The SSA recently determined that plaintiff is only 80 percent disabled, and she is obligated to look for work to make up the income no longer covered under her disability benefits (id. at 64-65).

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of NewYork*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Plaintiff has asserted the following causes of action in her complaint: [1] hostile work environment in violation of the NYSHRL against all corporate defendants; [2] aiding and abetting hostile work environment in violation of NYSHRL against defendants Primiano and Eisser; [3] hostile work environrment in violation of the NYCHRL against all defendants; [4] aiding and abetting hostile work environment against defendants Primiano and Eisser; [5] retaliation in violation of the NYSHRL against all defendants; [6] retaliation in violation of the NYCHRL against all defendants; [7] disability discrimination in violation of NYSHRL against all corporate defendants; [8] failure to accommodate in violation of the NYSHRL against all corporate defendants; [9] disability discrimination in violation of NYCHRL against all corporate defendants; [10] failure to accommodate in violation of the NYCHRL against all corporate defendants; and [11] negligent hiring, retention and supervision against all corporate defendants.

At the outset, the court notes that defendants have not moved with respect to the eleventh cause of action. Therefore, it is not addressed herein.

Hostile Work Environment

A hostile work environment under the NYSHRL (Executive Law § 296) exists where 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]). To state a hostile work environment claim under the NYCHRL, however, plaintiff must demonstrate that she has been treated less well than other employees because of her gender (*Williams v New York City Hous. Auth.*, 61 AD3d 62 [1st Dept 2009]). At the summary judgment stage, judgment should normally be denied to a defendant if there exist triable issues of fact as to whether such conduct occurred" (*id.* at 78).

In determining whether a plaintiff was subject to a hostile work environment under the NYSHRL, the court must look at the totality of the circumstances and may consider "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utter-

ance; and whether it unreasonably interferes with an employee's work performance" (*Forrest*, *supra* at 326).

Here, contrary to defendants' argument, plaintiff has set forth with sufficient particularity that she was subject to an objectively hostile or abusive work environment within the meaning of the NYSHRL. Indeed, while plaintiff testified in depth as to the exchange/encounter on April 21, 2008, she testified that her coworker, Santillo, referred to her as a bitch on multiple occasions. Plaintiff's supervisor also called her a bitch. Further, plaintiff's testimony is supported by Spivey's deposition testimony, to wit:

Q. Now, you heard Mr. Santillo call Ms. Southerland a bitch, right?

A. Yeah. A couple of times.

Q. A couple of times?
A. Yeah, because he said she's such a bitch. Why is she such a bitch? And she would be talking to –

Q. Who did he say that to?

A. Sometimes he would be talking to Kenny [Primiano], and Kenny would be like, yeah, yeah, yeah. I know, I know, I know.

On this record, the court rejects defendants' characterization of the complained-of conduct as just occasional isolated acts. Nor is it of any moment that Santillo called plaintiff a bitch on April 21, 2008 because he was in a "funk". It is for a fact-finder to determine such matters of credibility to the extent that Santillo disputes plaintiff's factual claims regarding the extent and severity of the underlying conduct.

A reasonable fact-finder could conclude based upon this record that plaintiff's coworkers' conduct was severe and pervasive enough to have altered plaintiff's work environment. Defendant's motion must also be denied with respect to the City Human Rights Law hostile work environment claim because a reasonable fact-finder could find the complained-of conduct more than just "petty slights and trivial inconveniences (*Williams*, *supra*). Accordingly, the motion for summary judgment dismissing the hostile work environment claims is denied.

Retaliation

Under both the NYSHRL and NYCHRL, it is unlawful to retaliate against an employee for opposing discriminatory practices (see Executive Law § 296 [7]; Administrative Code § 8–107 [7]). To establish a *prima facie* case of retaliation under the NYSHRL or NYCHRL, plaintiff has the burden of showing 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" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]; *Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 206 [1st Dept 2015]). A causal connection may be established indirectly by showing that the protected activity was closely followed in time by the adverse action (*Feingold v New York*, 366 F3d 138, 156–157 [2d Cir 2004]).

"If the plaintiff meets this burden and the defendant then points to evidence of a legitimate, nonretaliatory reason for the challenged employment decision, the plaintiff must point to evidence that would be sufficient to permit a rational fact finder to conclude that the employer's explanation is merely a pretext for impermissible retaliation" (*Cifra v G.E. Co.*, 252 F3d 205, 216 [2d Cir 2001]).

Here, there is no dispute plaintiff complained to her foreman, Primiano, and Eisser, about the derogatory comments made by her coworker Santillo. Eisser himself testified that after complaining, it was plaintiff, not Santillo, who was moved to another location at the work site. Defendant argues that there was no adverse employment action. Plaintiff contends, however, that the first transfer location had an onerous and less flexible schedule, which interfered with her ability to care for her son, and the second transfer to Gate 2 resulted in a loss of overtime to plaintiff.

Defendants submit evidence in reply which supports plaintiff's claim that she earned less overtime after she was transferred (see defendants' exhibit 21, plaintiff's 2008 payroll history). Specifically, the 2008 payroll record indicates that from the week ending January 6, 2008 through the week ending April 27, 2008 (a period of 17 weeks), there were six pay periods where plaintiff earned overtime of 20 hours or more (id.). After she was transferred, for the remaining 33 weeks that year, there was only one pay period where plaintiff earned 20 or more hours of overtime (id.). Further, 12 out of the first 17 weeks, plaintiff earned 10 or more hours of overtime, approximately 70% of the time (id.). However, during the remaining 33 weeks, plaintiff worked 10 or more hours of overtime for 13 pay periods, which is approximately 39% of the time (id.).

"'[A] decrease in wage or salary' constitutes a 'materially adverse change in the terms and conditions of employment'" (*Santiago-Mendez v City of New York*, 136 AD3d 428, 429 [1st Dept 2016] [holding plaintiff's reduction of overtime by "at least 6 hours" constitutes an adverse employment action]; quoting *Forrest*, 3 NY3d at 306; see also *Brightman v Prison Health Servs.*, Inc., 62 AD3d 472 [1st Dept 2009] [denial of opportunity to work overtime and transfer to another location among other actions found retaliatory under both NYSHRL and NYCHRL]. Such retaliatory acts are "reasonably likely to deter a person from engaging in a protected activity" (*Brightman*, 62 AD3d at 472]).

Further, the temporal proximity mere days between the time of plaintiff's complaint and her transfer to the other location establishes a causal connection between the two events (see *Cifra*, 252 F3d at 217 [causal connection needed to prove retaliation claim "can be established indirectly by showing that the protected activity was closely followed in time by the adverse action"] [internal quotation marks and citation omitted]; *Quinn v Green Tree Credit Corp.*, 159 F3d 759, 769 [2d Cir 1998] [holding that it was error to grant summary judgment dismissing the plaintiff's retaliation claim for lack of evidence of a causal connection where her "discharge came less than two months after she filed a complaint with (defendant's) management and just ten days after she filed a complaint with the (state division of human rights)"]).

Defendants' proffered reason for transferring plaintiff as opposed to Santillo to avoid friction and to give plaintiff an "opportunity to take it a little easier" after first transferring her to an inflexible position requiring a 12-hour workday appears disingenuous and pretextual. However, this is not for the court but rather for the fact finder to determine.

The court, therefore, denies the branch of the motion for summary judgment on the retaliation claims.

Disability Discrimination

Under both the NYSHRL and the NYCHRL it is unlawful for an employer to discriminate on the basis of an employee's statutorily defined disability (*Jacobsen v. New York City Health and Hospitals Corp.*, 22 N.Y.3d 824 [2014]). In order to state a *prima facie* case of disability discrimination, the employee must show both that he or she suffers from a statutorily defined disability and that the disability caused the behavior for which the employee was terminated. (*Id.*)

Plaintiff has not worked in any capacity since December 2008. Shortly after the accident, plaintiff's neurologist diagnosed her as having a 100% total impairment (defendant exhibit 14). Since then plaintiff's treating physicians have consistently documented plaintiff medically as having "100%" temporary impairment or "totally disabled from employment" and "unable to return to work" for varying reasons (id.). Plaintiff has been receiving workers' compensation benefits and social security benefits based on her and her physician's consistent and repeated representations that she was and still is unable to work (defendant exhibits 4, 14).

"Plaintiff cannot contend that she was entitled to workers' compensation benefits on the ground that she was totally disabled and, at the same time, contend that her 'disability' was within the protection of [the NYSHRL]" (*Sherman v Kang*, 275 AD2d 1016, 1017 [4th Dept 2000]; *Kwarren v American Airlines*, 303 AD2d 722 [2d Dept 2003]). As a matter of law, plaintiff is judicially estopped from arguing that she could perform the essential functions of her job from the date of her application for disability benefits since it is undisputed on this record that plaintiff was unable to return to work in any capacity after her accident. Further, to the extent that plaintiff's counsel argues that plaintiff should have been afforded a reasonable accommodation such as a desk job at a computer, that argument is rejected in light of plaintiff's own testimony that she was not ready, willing and able to work from the date of accident (plaintiff tr at 77-85). The issues of whether plaintiff is now totally disabled or whether she could presently work in any capacity is of no moment and is otherwise not before the court. Accordingly, defendants' motion for summary judgment dismissing the seventh through tenth causes of action is granted.

Individual Liability of Defendants De Rosa, Primiano and Eisser

Plaintiff asserts the following claims against the individual defendants: aiding and abetting a hostile work environment in violation of the NYSHRL and the NYCHRL as against Primiano and Eiser (second and fourth causes of action); hostile work environment in violation of the NYCHRL as against all defendants, including Primiano, DeRosa and Eisser (third cause of action); and, retaliation in violation of the NYSHRL and NYCHRL as against all defendants (fifth and sixth causes of action).

Under the NYSHRL, an individual employee may be liable as an "employer," only when he or she has an "ownership interest or any power to do more than carry out personnel decisions made by others" (*Patrowich v Chemical Bank*, 63 NY2d 541, 543–544 [1984]; Kaiser v Raoul's Rest. Corp., 72 AD3d 539 [1st Dept 2010]). The NYCHRL, which expressly extends liability to "an employee," similarly has been interpreted to "include fellow employees under the tent of liability . . . only where they 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]).

Alternatively, under both the NYSHRL and NYCHRL, an individual employee may be held liable for aiding and abetting discriminatory conduct (Executive Law § 296 [6]; Administrative Code § 8–107 [6]). "Where a defendant provided, or attempted to provide, assistance to the individual or individuals partic-

ipating in the primary violation, he or she may be found liable for aiding and abetting discriminatory conduct" (*Ananiadis v Mediterranean Gyros Prods., Inc.*, 151 AD3d 915, 917 [2d Dept 2017]).

Defendants assert that individual liability cannot stand where the underlying claims have been dismissed (*Mascola v City Univ. of New York*, 14 AD3d 409, 410 [1st Dept 2015]; Briestein v Michael C. Fina Co., 2016 NY Slip Op 31858[U], *47-48 [Sup Ct, NY County 2016]). To the extent that the hostile work environment and retaliation claims have not been dismissed, the court will address the potential individual liability of those claims.

Plaintiff has come forward with evidence that Eisser was involved in the decision to transfer plaintiff after she complained about her coworker's use of the word bitch sufficient to raise a triable issue of fact as to whether Eisser participated in retaliatory conduct (see *Krause v Lance & Loader Group, LLC*, 40 Misc 3d 385, 398 [Sup Ct, NY County 2013]). Therefore, he could potentially be held individually liable as an employer under the NYSHRL, and as an employee under the NYCHRL. Likewise, there are triable issues of fact as to whether and to what extent, Primiano, plaintiff's supervisor, was involved in the decision to transfer plaintiff after her complaints concerning Santillo's conduct, and whether it was retaliatory in nature (see *Sanchez v Brown, Harris, Stevens, Inc.*, 234 AD2d 170 [1st Dept 1996]). Plaintiff also claims that Primiano called her a bitch and according to Spivey, Primiano condoned Santillo's discriminatory conduct.

Further, "an employee who did not participate in the primary violation itself, but who aided and abetted that conduct, may be individually liable based on those actions under both the NYSHRL and the NYCHRL" (*Ananiadis v Mediterranean Gyros Products, Inc.*, 151 AD3d 915, 915 [2d Dept 2017], citing Executive Law § 296 [6]; Administrative Code § 8–107 [6]). Issues of fact preclude summary judgment dismissing the aiding and abetting claims. Therefore, the motion for summary judgment dismissing the individual liability claims as against Eisser and Primiano is denied.

The court finds, however, that the allegations as raised against Joe DeRosa, i.e., that he falsely accused plaintiff of using profanity in front of a supervisor, do not standing alone constitute retaliation or hostile work environment. While DeRosa was plaintiff's supervisor after she was transferred to Gate 2, there is no evidence that he partook in the decision to transfer plaintiff or was involved in the decision to terminate her. Moreover, plaintiff's claims against DeRosa are indeed too attenuated to ascribe him to the underlying discrimination claims. Therefore, the motion to dismiss the individual claims as against DeRosa is granted, and those claims are hereby dismissed. As there are no remaining claims as against DeRosa, the action is hereby severed and dismissed as against him.

Back pay

Defendants argue that plaintiff provides no legal basis for a back pay claims as a matter of law because she suffered a work related injury at or around the same time of her termination and has been receiving workers' compensation and social security benefits since that time. "The purpose of back pay is to make a person whole and redress the economic injury that has resulted from unlawful employment discrimination" (*Matter of New York State Off. of Mental Health v New York State Div. of Human Rights*, 53 AD3d 887, 890 [3d Dept 2008]).

Plaintiff counters that the collateral source rule applies here, which "requires the tortfeasor to bear the full cost of the injury caused regardless of any benefit the victim has received from an independent or 'collateral' source" (*Applehead Pictures LLC v Perelman*, 80 AD3d 181, 191 [1st Dept 2010]). As dis-

cussed *supra*, there is no dispute that plaintiff was unable to work during the period in question. Accordingly, defendants are entitled to summary judgment on plaintiff's claim for back pay.

Jury Trial

Defendants contend that the court should strike plaintiff's demand for a jury trial as plaintiff joins claims for legal and equitable relief arising out of her employment with defendants. CPLR 4101 states:

> In the following actions, issues of fact shall be tried by a jury unless a jury trial is waived . . ., except that equitable defenses and equitable counterclaims shall be tried by the court:
>
> 1. An action in which a party demands and sets forth facts which would permit a judgment for a sum of money only . . .."

Plaintiff counters that a party's entitlement to demand a jury trial is dependent up on the facts pleaded, not the demand for relief (*Kaplan v Long Island Univ.*, 116 AD2d 508, 509 [1st Dept 1986]). However, the fundamental rule is "that where a plaintiff seeks legal and equitable relief in respect of the same wrong, his [or her] right to a trial by jury is lost" (*Loftman v Columbia Univ.*, 2006 WL 6349155 [Sup Ct, NY County June 2006, No. 121601/02]).

In the prayer for relief of the complaint, plaintiff requests that the court grant "her injunctive relief to prevent Defendants [from] violating her civil rights, judgment sufficient to compensate her for economic, emotional and psychic injuries, humiliation, suffering and to punish all named Defendants for their violation of law and deter similar violations of law in the future . . .." This case, unlike *Loftman* and *Kaplan*, is more akin to *Vega v Metroplitan Life Ins. Co.*, 146 AD2d 495 [1st Dept 1989]), wherein the court found a jury trial was warranted where the employment discrimination/harassment complaint sought backpay and compensatory damages, despite a prayer for equitable relief. The court took note of the fact that plaintiff did not seek reinstatement, as is the case presented here (*id.*; see also *Hebranko v Bioline Laboratories, Inc.*, 149 AD2d 567, 568 [2d Dept 1989] ["(w)here a plaintiff alleges facts upon which monetary damages alone will afford full relief, inclusion of a demand for equitable relief in the complaint's prayer for relief will not constitute a waiver of the right to a jury trial"]).

The court, therefore, denies defendants' request to strike the jury demand.

CONCLUSION

Accordingly, it is

ORDERED that the motion for summary judgment by defendants Phoenix Constructors JV, Fluor Enterprises, Inc., Slattery Skanska, Inc., Skanska USA Civil Northeast Inc., Bovis Lend Lease LMB, Inc., Granite Construction Northeast Inc., Kenneth Primiano, Joe DeRosa and Dudley Eisser is granted to the extent that the seventh, eighth, ninth and tenth causes of action are severed and dismissed; and it is further

ORDERED that plaintiff's claim for back pay is severed and dismissed; and it is further

ORDERED that the fifth and sixth causes of action are dismissed as against defendant Joe DeRosa, and the complaint is dismissed in its entirety as against said defendant, with costs and disburse-

ments to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that defendants' motion for an order striking plaintiff's jury demand is denied; it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 9/26/17
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.