Bond v New York City Health & Hosps. Corp.
2020 NY Slip Op 30617(U)
February 25, 2020
Supreme Court, New York County
Docket Number: 160658/2013
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE **PART 62**
Justice

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LORI BOND

Plaintiff,

- v -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

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INDEX NO. 160658/2013

MOTION DATE 11/21/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to/for SUMMARY JUDGMENT .

Upon the foregoing documents, the motion is decided as follows:

This action arises out of plaintiff Lori Bond's claims that she was subject to a hostile work environment based on sexual harassment in violation of the New York City Human Rights Law (NYCHRL) while working for defendant New York City Health and Hospitals Corporation (HHC). Plaintiff further alleges that she was retaliated against after complaining about this gender discrimination and that, as a result of HHC's conduct, she was compelled to resign. HHC moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND AND FACTUAL ALLEGATIONS

Prior to her alleged unlawful constructive discharge on October 30, 2013, plaintiff was employed by HHC as the Director of Pharmacy Systems and Analytics. Plaintiff had commenced

her employment with HHC in October 2011 and her job responsibilities included among other things, "managing numerous pharmaceutical projects [and] analyzing pharmaceutical software . . . ." NYSCEF Doc. No. 40, Complaint, ¶ 5.

South Carolina incident

According to plaintiff, she was given many responsibilities when she first started working and she quickly implemented successful strategies. For instance, plaintiff claims to have "successfully converted the outpatient pharmacies to a new version of pharmacy software," and "earned praise from pharmacy directors for improving wait times and patient satisfaction." NYSCEF Doc. No. 63, plaintiff's aff, ¶ 11. Further, during the first year of her work she consistently received praise for her work performance from her supervisors and HHC's clients. For example, on June 12, 2012 Enrik Ramlakhan (Ramlakhan) emailed plaintiff "This is excellent work!" NYSCEF Doc. No. 70 at 1. On March 2, 2012 the Director of pharmacy at Elmhurst Hospital Center emailed "You are so efficient! It is so refreshing to see how fast you are addressing the issues." NYSCEF Doc. No. 71 at 1.

In October 2012, plaintiff and Matthew Binder (Binder) who was her direct supervisor and a senior director at HHC, attended a business conference together. Binder showed up at Bond's hotel room and started to kiss Bond. The complaint states that "Bond, who had consumed more alcohol during the cocktail party than she was used to, engaged in some sexual activity with Binder, which Bond ultimately stopped. Binder was clearly frustrated by Bond's refusal to continue to engage in sexual activity, and he left Bond's room." Complaint, ¶ ¶ 14, 15.

After refusing to continue in sexual activity with Binder, plaintiff alleges that Binder treated plaintiff less well due to her gender and subjected her to "constant unwarranted hostility and criticism." *Id.*, ¶ 17. Some examples include the following:

Criticizing plaintiff's decisions on her assigned projects, when, prior to the incident, she was advised that she was doing a great job.

- Accusing plaintiff of unsatisfactory work, despite no difference in the quality of her work.
- Taking responsibilities away from plaintiff, for no legitimate business purpose. This includes dismantling plaintiff's "team and removing all of [plaintiff's] direct reports for no legitimate business reason."
- Avoiding contact with plaintiff by going to her subordinates for information.
- "Calling [plaintiff] a 'liar' with regard to her commuting difficulties following Hurricane Sandy." *Id.*, ¶ 18.
- After one year of working, accusing plaintiff of incorrectly filling out her time sheets.

The complaint summarizes that "Binder made his discriminatory bias toward [plaintiff] explicitly clear through his criticism of her work and unwillingness to accept [plaintiff's] circumstances during a natural disaster, a pattern of discriminatory behavior that manifested itself only after Binder's personal encounter with [plaintiff] at the conference in South Carolina." *Id.*, ¶ 19.

Retaliation

Plaintiff states that Binder continued to punish her for rejecting him in South Carolina by micromanaging and criticizing her. For instance, on November 6, 2012, Binder emailed plaintiff, "Why wouldn't you have the call tomorrow? The files are still your responsibility. I don't understand you. Did you ever report to someone before you got to HHC? I think we need to talk right away." NYSCEF Doc. No. 83 at 1.

On November 14, 2012, Binder emailed plaintiff that he would be having two of her team members report directly to him. The email stated the following:

> "and since you tolerate calling in sick like this, I will have the two of them report to me directly. They both replied back to me last night that they would be at Lincoln this morning. By the way, you opened the email at 9:23 last night, which would have given you ample time to reply back to me."

NYSCEF Doc. No. 85 at 1.

That same day, plaintiff complained to Ramlakhan, who was Binder's supervisor, about being subjected to a hostile work environment. She stated, in relevant part, that Binder's behavior towards her the past several weeks had been unprofessional, offensive and uncalled for. The email states, in pertinent part: "See I am writing you because the way that I am being treated by Matt for the last several weeks is unprofessional, offensive, uncalled for and, quite honestly, make me very uncomfortable. Even worse, I know that I haven't done anything to deserve it." NYSCEF Doc. No. 50 at 1.

In response to plaintiff's complaint, Ramlakhan temporarily became plaintiff's direct supervisor. However, plaintiff alleges that Ramlakhan ratified and condoned Binder's unwarranted hostile treatment by continuing to marginalize and micromanage plaintiff. Plaintiff states that she "felt the hostility from Ramlakhan the moment I made my complaint about Binder. I had complained about serious issues from Ramlakhan's right hand person and Ramlakhan was not happy about it." Plaintiff's aff, ¶ 35. Binder was eventually re-assigned as plaintiff's supervisor.

March 6, 2013 email to Ramlakhan

After Ramlakhan allegedly berated plaintiff for no legitimate reason, plaintiff emailed him on March 6, 2013 and rebutted his criticism of her work performance and attendance. She also advised him, among other things, that she was dissatisfied with not being allowed to work off site. After her rebuttal, she told Ramlakhan that she believes that she is being targeted for rejecting Binder's sexual advance. Plaintiff emailed Ramlakhan and Bert Robles (Robles), who is Ramlakhan's supervisor, the following, in relevant part:

> "After being moved to 40 Wall St. and prohibited from going off-site without any explanation why, I had finally had enough and approached you to ask why. In response, you made mention of my absence and tardiness, about which you have not mentioned before except to tell me I had to apply for disability because I was out for a week with a

> sinus infection, two ear infections and dehydration. To begin with, I have medical excuse documentation for a majority of those absences involving illness . . . . For those instances that did not involve my own personal illness, I have very good reason for not attending work.
>
> ***
>
> "As for the off-site meetings I have had during the course of my work weeks, I find your accusations that I was trying to evade being at work or doing something other than work incredibly offensive since I give this department 110% every day.
>
> ***
>
> "Even if I did deserve some sort of response to my performance, it should be in the form of a formal discussion, with clearly stated problems and expected resolutions. Instead, you and Matt have decided to retaliate by attacking me professionally and making slanderous statements to my peers and colleagues. Additionally, the two of you have intentionally and effectively impeded my ability to perform my duties and conspired with my adversaries within HHC toward these efforts.
> "Given the absurdity of the way I'm being targeted and treated by you and Matt, the only logical explanation that I can think of is that this is a result of Matt's actions in South Carolina, including showing up at my room in the middle of the night attempting to have sex with me, about which I will be meeting with Lena Mullings. There is nothing that I've done that would warrant this kind of behavior and this attitude toward me all really began upon our return.
>
> ***
>
> "I have a right to privacy and request that this e-mail remains confidential."

NYSCEF Doc. No. 89 at 3-4.

Although plaintiff requested that Ramlakhan keep the email confidential, he forwarded it to several other people, including Binder. Plaintiff alleges that Ramlakhan called plaintiff into a meeting with Binder and Janet Karageozian (Karageozian), another Director. Plaintiff states that she has never interacted with Karageozian. Plaintiff's aff, ¶ 41. At the meeting, Ramlakhan allegedly engaged in an aggressive tirade, and accused plaintiff of not doing her work and stated that "any hostility I was experiencing was because of my poor performance." *Id.*

March 7, 2013 EEO complaint

On March 7, 2013, "as a result of the retaliation [plaintiff] was suffering following her complaints to Ramlakhan," plaintiff filed a formal complaint against Binder and Ramlakhan with HHC's Office of Affirmative Action and Equal Employment Opportunity (EEO), alleging

discrimination and retaliation. Complaint, ¶ 31. Maxine Katz (Katz) and Vincent Giambanco (Giambanco) were included as other employees who discriminated against plaintiff. Plaintiff met with Tania Pierre, (Pierre) an internal EEO officer. According to plaintiff, although she sent Pierre several documents evidencing plaintiff's experiences, Pierre did not respond to the emails. Despite Pierre's assurance to plaintiff that she would investigate plaintiff's complaint, plaintiff believes that HHC neither investigated nor took any action to remedy the hostile work environment. For example, on March 28, 2013 plaintiff emailed Pierre the following:

> "I don't understand why I haven't heard back from you at all. I am still experiencing the same treatment and am not being allowed to continue with or at this point even participate in my work. Please see Matt's e-mail to Victor Kim below showing him trying to circumvent me and my involvement in this project, which I have been working on for almost a year."

NYSCEF Doc. No. 103 at 1.

Plaintiff alleges that she was subject to a hostile work environment and retaliated against for filing her complaint. For example, plaintiff states that, after she made her EEO complaint, work assignments were taken away and she was removed from the 340B project, "a project that I had successfully led from the start of my employment." Plaintiff's aff, ¶ 46. Plaintiff would call in for conference calls but the other participants would not answer. Shortly after filing her complaint, despite requesting to be moved away from Binder, plaintiff was advised that time sheets would now be located in front of Binder's office and that she would have go there twice a day to sign them. NYSCEF Doc. No. 107.

When the alleged hostile work environment was allowed to continue, plaintiff retained counsel to address "certain discriminatory conduct that has arisen" related to plaintiff's employment. NYSCEF Doc. No. 106 at 1. Pursuant to a letter dated April 2, 2013, plaintiff's

counsel wrote to HHC and requested to meet with a legal representative to discuss an "amicable resolution of the issues that exist." *Id.*

In April 2013, plaintiff again contacted Pierre and advised her that working conditions were getting much worse. In one email dated April 5, 2013, plaintiff indicated that she was being replaced on most projects, everything she was working on was being taken over by other people, and that no one is responding to her emails or showing up to meetings. Plaintiff concluded by stating, "[c]an't you have me reassigned to the "EPIC" project or something else?" NYSCEF Doc. No. 108 at 1. Plaintiff emailed Pierre twice on April 8, 2013, stating the following:

> "Tania,
> I am not coming to work today because the thought of having to work in the same space as him has me very upset. I keep breaking down in tears and I'm physically sick with nausea. He and Rick are effectively trying to force me out. I don't understand why this is being allowed to happen. I am beside myself such that I've broken down crying during at least 3 meetings.
> Can you please at least get my workstation moved from 160 Water St. until you can get me reassigned?
>
> ***
>
> "Tania,
> Were you able to find someplace for me to work other than 160 Water? This is so stressful and frustrating. I guess I didn't realize that between the time someone files a complaint and the time the investigation is over, anything goes.
> Please get back to me. . . ."

NYSCEF Doc. No. 109 at 1.

Plaintiff again followed up with Pierre on April 9, 2013. In relevant part, she informed Pierre that there were workstations located in two other offices close to her current office. She requested to be transferred to one of those stations so she would not have to be in the same office as Binder. In the alternative, plaintiff stated, "If you can't find an alternative workspace or department for me, can I work opposite hours than what [Binder] works?" NYSCEF Doc. No. 110 at 1. Plaintiff again requested to be placed on the EPIC project or to be assigned to groups

involved in 340B, pharmacy billing and revenue. Plaintiff indicated that she has "proven [her] abilities in those areas" and knows that she could be an asset there. *Id.*

On April 10, 2013, Pierre advised plaintiff that, in response to plaintiff's request, she was being "moved out of [her] group pending the investigation of [the] complaint." NYSCEF Doc. No. 111 at 1. Pierre continued that this was not a transfer but just a temporary assignment and that plaintiff would be reassigned to work under Dr. Louis J. Capponi (Capponi). Plaintiff responded the following: "Ok. Since, this is only temporary and eventually I will be getting back to these projects, can you ask that I continue to receive e-mails, meeting invitations and all other correspondence so that I don't lose track of my projects . . . ." *Id.*

After being reassigned, plaintiff received an email from CaptureRX, an HHC client, that they were advised not to speak to her because she had been reassigned. "Just wanted to let you all know that I just got off the phone with Vincent Giambanco and he told me to no longer communicate with Lori Bond and indicated that she has been 'reassigned.'" NYSCEF Doc. No. 113 at 1. Plaintiff reached out to Pierre and questioned how Giambanco, who is not her supervisor, was allowed to discuss plaintiff's status. Plaintiff stated the following, "Vincent Giambanco has no business telling anyone my status. He is not my supervisor. . . ." *Id.* at 3.

Plaintiff further argued that she should not have to give up her position on the 340B Committee just because she is not currently working under Ramlakhan. Plaintiff advised Pierre that other members on the committee also have full time jobs performing other duties. Plaintiff asked, "Why should the fact that I am not currently working under [Ramlakhan] mean that I can't perform my duties on the committee?" *Id.* at 2.

In sum, Pierre advised plaintiff that many of the issues are not EEO related and that plaintiff should contact Corporate Compliance for assistance. On April 16, 2013, plaintiff again emailed

Pierre that she had never wanted to be reassigned, but that it was her only option. "The projects that I was working on are important to me because I care about and enjoy what I do. I never wanted to be reassigned. As I stated, I felt as though my only two options were to continue to endure this worsening and hostile environment or be reassigned." NYSCEF Doc. No. 113 at 1.

Plaintiff's transfer

As noted, plaintiff was temporarily transferred to work with Capponi. The complaint states that "HHC transferred Bond to a different position where was not given any duties and further humiliated and marginalized her by giving her busy work, all of which amounted to a demotion." Complaint, ¶ 37. Plaintiff states that she had to wait four months to meet with Capponi. In the interim, plaintiff sat in a cubicle "with nothing to do." She would read a book or take enrichment classes on HHC's system. She continues that the "humiliation of coming in every day with nothing to do was unbearable." Plaintiff's aff, ¶ 63. Capponi finally met with plaintiff in August 2013 and asked plaintiff to do something which she had no background in. After she did the work and gave her presentation, an employee advised her that they were already HIPAA-compliant and that plaintiff's work had already been done. Plaintiff realized that "the work I had done was just busy work . . . ." *Id.*, ¶ 68.

On October 30, 2013 plaintiff summarized her situation and advised HHC that she was forced to resign as a result of being effectively and completely removed from her position. "After one year of enduring this and eight months of waiting for HHC to take some action to make it stop, it is clear that this situation is not going to improve and I will not be getting my job and responsibilities back. More importantly, [Ramlakhan] and [Binder] remain in their positions at HHC." NYSCEF Doc. No. 116 at 3.

Instant Action

The first cause of action alleges that plaintiff was discriminated against based on gender in violation of the NYCHRL. As set forth in the complaint, plaintiff claims that her supervisors subjected her to a hostile work environment whereby she was treated less well due to her gender. Despite plaintiff's complaints to HHC, it failed to remediate the situation.[1] Plaintiff states that the events leading up the constructive discharge are part of both her discrimination and retaliation claims. As a result of HHC's actions, plaintiff alleges that her career and emotional well-being have suffered. In addition to punitive damages, plaintiff is seeking compensatory damages in the amount of five million dollars, plus attorney's fees and pre-judgment interest.

Hostile work environment

HHC summarizes plaintiff's hostile work environment claim, including plaintiff's claims that she was unfairly criticized about her work product, timesheets, usage of leave and working from remote locations, her claims involving the removal of responsibilities and also her claim that supervisors avoided speaking or communicating with her. HHC then argues that plaintiff's allegations are not actionable under the NYCHRL as they do not rise above the level of petty slights and trivial inconveniences.

In opposition, plaintiff maintains that she has satisfied the threshold for a gender discrimination claim under the NYCHRL as she is not required to demonstrate that discrimination was the only reason for HHC's conduct. Furthermore, HHC cannot meet its high burden to demonstrate that this conduct consisted of no more than petty slights or trivial inconveniences.

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[1] "HHC is liable to Bond for the sexually hostile and abusive treatment she suffered in her workplace, because the unlawful conduct was engaged in by HHC management and supervisory personnel, who allowed and condoned a workplace permeated with discriminatory intimidation and sexual harassment that altered the terms, conditions and privileges of Bond's employment and created an abusive, threatening and hostile work environment where Bond was treated less well because of her gender." Complaint, ¶ 46. HHC does not dispute that Binder "exercised managerial or supervisory responsibility." *See* Administrative Code § 8-107 (13) (b) (1).

Constructive Discharge/Gender Discrimination

According to HHC, plaintiff fails to create a triable issue of fact that the transfer to Capponi and the length of time taken to investigate the EEO complaint would make plaintiff's work conditions so intolerable that a reasonable person would have no choice but to resign. With respect to working for Capponi, according to HHC, as plaintiff retained the same salary, plaintiff's subjective dissatisfaction with her alleged reduction in workload does not meet the standard for a constructive discharge.

In terms of the EEO complaint, HHC argues that, while plaintiff believes that Pierre's investigation was insufficient, by the time plaintiff resigned, plaintiff had been removed from the work environment she had complained about. In addition, Pierre had "taken steps to conduct interviews and to evaluate the evidence provided by Plaintiff . . . ." NYSCEF Doc. No. 61, HHC's memorandum of law at 9.

HHC also argues that plaintiff's constructive discharge claims are "undercut" by the four months she delayed in filing an EEO complaint against Binder after the South Carolina incident and the fact that she did not resign for almost one year after the incident. "Plaintiff provides no explanation for why, if her work environment after the South Carolina trip was so intolerable as to constitute a constructive discharge, she waited over four months to file an EEO complaint, and over one year to resign from [HHC]." *Id.* at 10.

In reply, plaintiff asserts that it is "outrageous" for HHC to claim that Pierre's investigation was ongoing, as HHC has produced no investigation records or interview notes. Also, plaintiff did not complain that the investigation was ineffective but that HHC's action "was so gross that it can only be interpreted as deliberate indifference to her well-being." Plaintiff's memorandum of

law at 28. For instance Pierre emailed questions to Ramlakhan on November 1, 2013, which was already after plaintiff had resigned.

Furthermore, plaintiff argues that her claim is not about dissatisfaction with job responsibilities, but about not having a job at all. "I do not believe that any reasonable person with my level of education and experience would welcome being at a job with nothing to do." Plaintiff's aff, ¶ 83. Furthermore, plaintiff argues that a jury could find that plaintiff remained at the job because she hoped Pierre's investigation would lead to a resolution.

Retaliation

In the second cause of action, plaintiff alleges that she was retaliated against, in violation of the NYCHRL, when she complained of being subjected to discriminatory conduct.

HHC argues that, as plaintiff did not engage in protected activity prior to her EEO complaint on March 6, 2013, the court should not consider any retaliation claims for actions that occurred prior to that date. According to HHC, the November 14, 2012 email plaintiff sent to Ramlakhan does not constitute protected activity because, while plaintiff complains that Binder is acting unprofessionally towards her, it does not state that Binder was subjecting her to a hostile work environment due to her gender.

HHC also argues that plaintiff has failed to establish that, after her March 2013 complaint, HHC engaged in conduct reasonably likely to deter a person from engaging in protected activity. For example, although plaintiff argues that, in response to her complaint she was transferred to a different position, it was plaintiff herself who requested to be transferred to a different supervisor and to a different location. According to HHC, plaintiff's subjective belief that her transfer was a demotion does not create an issue of fact. In addition, although plaintiff believes she was retaliated

against by being forced to do busy work, HHC argues that plaintiff's change in job responsibilities does not constitute an adverse employment action because her salary and title did not change.

HHC further claims that its criticism of plaintiff's attendance and remote work does not constitute retaliation because this criticism is a course of conduct that began prior to plaintiff's EEO complaint. For instance, HHC notes that, in May 2012, Binder and Ramlakhan expressed concern over plaintiff's time and leave. For example, on May 7, 2012, plaintiff emailed Binder that her son had been hospitalized and that she would be out of the office. Binder forwarded the email to Ramlakhan who stated that is starting to get out of control. NYSCEF Doc. No. 47 at 1. When plaintiff emailed Binder that she would be out of the office on May 29, 2012 he emailed, "You will not be reprimanded but to be honest with you we have concerns with all the time you've taken off recently. Although you've had a lot of things happen to your family, we want to make sure you're still committed to the job. It has a direct impact on the users you support and your staff." NYSCEF Doc. No. 48 at 1. HHC points to Pierre's notes taken after plaintiff resigned where Capponi allegedly mentioned to Pierre that he was unable to provide plaintiff with an assignment due to her inconsistent attendance.

According to HHC, the court should disregard plaintiff's alternative "conspiracy theories" for how she was retaliated against. For example, plaintiff stated in her EEO complaint that, in addition to Binder and Ramlakhan, Katz and Giambanco discriminated against her.

Plaintiff argues that a jury could find that HHC's actions occurring after the March 6, 2013 complaint would be reasonably likely to deter an employee from engaging in protected activity. For instance, as set forth above, after plaintiff emailed Ramlakhan advising him that she was going to file a formal complaint, despite requesting that he keep the email confidential, Ramlakhan forwarded the email to Binder and others. Plaintiff states that Ramlakhan then called a meeting

with Binder and another director with whom plaintiff had never interacted with. She states, "Ramlakhan berated me in front of both of them, accusing me of not doing my job, evading work, going rogue and event stating that any hostility I was experiencing was because of my poor performance." Plaintiff's aff, ¶ 41.

According to plaintiff, in May 2012, she had several personal and family medical emergencies. However, other than the May 2012 email and a conversation with Binder, no one at HHC ever reprimanded her or mentioned an issue with attendance until after the South Carolina incident. Plaintiff continues that it is "disingenuous for HHC to raise my attendance as an issue in response to my complaint." Plaintiff's aff, ¶ 86. She points out that HHC compares plaintiff's sick and personal time used for the period of April 2012 - April 2013 to the prior year, despite the fact that plaintiff was not an employee until October 2011. Plaintiff states that her absences while working for Capponi were "directly connected to the humiliating and degrading position HHC placed me in . . . . Adding up the days I was out . . . and using it to blame me is sickening. No one could have tried harder than me to get Pierre to act as confirmed by all of the emails I sent her, many of which went unanswered." Plaintiff's aff, ¶ 64. For instance, on June 3, 2013 plaintiff emailed Pierre, "I will not be in today because sitting there in that cubicle with absolutely nothing to do in spite of my knowledge, experience and work ethic is making me have panic attacks." NYSCEF Doc. No. 114 at 1.

As set forth above, plaintiff maintains that, in retaliation for filing the complaints, her responsibilities were taken away and she was taken off of projects. Further, among other things, plaintiff was transferred to an assignment where, for four months, she had nothing to do. According to plaintiff, a jury could find that an employee with plaintiff's work and educational experience could be dissuaded from complaining about discrimination if it resulted in placing her

in a "dead-end assignment." Plaintiff states that she listed Katz and Giambanco as "perpetrators" because they seemed to support everything Binder and Ramlakhan did to me. It was for that reason, I set forth their names and not because I was engaging in conspiracy theories . . . ." Plaintiff's aff, ¶ 43 n 5.

DISCUSSION

Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

Gender Discrimination

Pursuant to the NYCHRL, as set forth in Administrative Code § 8-107 (1) (a), it is an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's gender. The provisions of the

NYCHRL are to be construed more liberally than its state or federal counterparts. *Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 (1st Dept 2016).

On a motion for summary judgment dismissing a claim for discrimination under the NYCHRL, courts have reaffirmed the applicability of the burden-shifting analysis as developed in *McDonnell Douglas Corp. v Green*, shifting analysis to discrimination cases as developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) in addition to the mixed-motive analysis. *See Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 (1st Dept 2016) (internal quotation marks and citation omitted) ("A motion for summary judgment dismissing a City Human Rights Law claim can be granted only if the defendant demonstrates that it is entitled to summary judgment under both the *McDonnell Douglas* burden-shifting framework and the mixed-motive framework").

In the burden-shifting analysis, the plaintiff must set forth that he or she "is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009).

If the plaintiff is able to set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating nondiscriminatory reasons for its employment actions. *Baldwin v Cablevision Sys. Corp.*, 65 AD3d at 965. If the employer meets this burden, the plaintiff must "prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination." *Id.* (internal quotation marks and citation omitted).

Under the mixed-motive analysis, "the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to

whether the action was motivated at least in part by . . . discrimination." *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 (1st Dept 2012) (internal quotation marks and citations omitted).

Courts have recently reiterated that sexual harassment is not a separate claim but must "be viewed as one species of sex- or gender-based discrimination." *Crookendale v New York City Health & Hosps. Corp.*, 175 AD3d 1132, 1132 (1st Dept 2019) (internal quotation marks and citation omitted). "The [NYCHRL] speaks to unequal treatment and does not distinguish between sexual harassment and hostile work environment." *Suri v Grey Global Group, Inc.*, 164 AD3d 108, 115 (1st Dept 2018). To establish a discrimination claim under the NYCHRL, plaintiff has to prove 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 Housing Auth.*, 61 AD3d 62, 78 (1st Dept 2009). Despite the broader application of the NYCHRL, conduct that consists of "petty slights or trivial inconveniences . . . do[es] not suffice to support a hostile work environment claim." *Buchwald v Silverman Shin & Byrne PLLC*, 149 AD3d 560, 560 (1st Dept 2017) (internal quotation marks and citation omitted).

Courts have not "automatically appl[ied] the [] burden-shifting framework to every aspect of a plaintiff's [NYCHRL] claim." *Suri v Grey Global Group, Inc.*, 164 AD3d at 119. For example, in *Suri v Grey Global Group, Inc.*, the plaintiff alleged that, after rejecting her supervisor's sexual advance, the supervisor subjected her to a hostile work environment. Specifically, after this incident, the supervisor's behavior towards the plaintiff changed and he, among other things, allegedly "dismissed her work; talked over her; put his hand in her face when she was talking; criticized, belittled and mocked her in front of other employees; cut her out of meetings; withheld resources; and delayed one of her projects." *Id.* at 111-112.

The Court did not apply the burden shifting analysis to the plaintiff's gender discrimination claim based on sexual harassment/hostile work environment although it applied it to the termination and failure to promote claims. It noted that requiring plaintiff to rebut defendant's nondiscriminatory explanations for the treatment "does not serve the broad remedial purpose of the [NYCHRL]." *Id.* at 114. It recognized that "differential treatment may be actionable even where the treatment does not result in an employee's discharge." *Id.* at 120. Accordingly, even if plaintiff could not prove that her discharge was discriminatory, she may still be able to recover for differential treatment based on gender.

The Court provided examples where the framework was not applied to claims alleging sexual advances and subsequent demeaning conduct. It found that, "[i]t is the jury's function to determine what happened between Cirullo and Suri, and whether it amounted to gender discrimination." *Id.* at 116. Further, if plaintiff's testimony is credited that "her treatment at the workplace deteriorated in the wake of these incidents, then a jury could find that such behavior did not constitute petty slights or trivial inconveniences." *Id.* at 117 (internal quotation marks and citations omitted). The Court ultimately found that issues of fact remained as to whether the plaintiff was treated less well due to her gender in violation of the NYCHRL.

Here, one portion of plaintiff's gender discrimination claim includes the claim that Binder subjected her to a hostile work environment after she rejected his sexual advances. In the other portion, plaintiff "relies on HHC stripping away her duties, which culminated in her constructive discharge . . . as part of . . . her gender discrimination claim." Plaintiff's memorandum of law at 15. Accordingly, similar to the analysis in *Suri v Grey Global Group, Inc., supra,* this court will separate these claims and will not apply the burden shifting framework to Binder's alleged sexual advance and his subsequent demeaning conduct towards plaintiff.

Plaintiff testified about the incident where Binder showed up at her hotel room. She provided examples of how, prior to the South Carolina incident, Binder praised and supported her work and she was able to work independently. However, after she rejected Binder's sexual advances, she noticed a change in his attitude towards her and felt that he was punishing her for rejecting him. Binder allegedly began to micromanage her, criticize the same work that he once praised and question her capabilities. Binder ultimately directed two of plaintiff's team members to report to him directly, thereby allegedly undermining plaintiff's position.

In the present case, viewed in the light most favorable to plaintiff, she has raised a triable issue of fact that, after the South Carolina incident, Binder treated her less well than other employees due to her gender. As in *Suri v Grey Global Group, Inc.*, if plaintiff's testimony is credited that "her treatment at the workplace deteriorated in the wake of [the South Carolina incident], then a jury could find that such behavior did not constitute petty slights or trivial inconveniences." *Id.* at 117.

HHC argues that Binder's conduct directed at plaintiff was part of a continuation of conduct taken for legitimate non-discriminatory business reasons that started before the South Carolina incident. As discussed, the court will refrain from having plaintiff address HHC's nondiscriminatory reasons for Binder's behavior. Regardless, even if plaintiff's attendance had been a problem, HHC does not address Binder's other allegedly hostile behavior towards plaintiff. Also, as noted by plaintiff, HHC was disingenuous when presenting the issue of plaintiff's time and leave, as it compared two different time periods. Moreover, it is also unclear why HHC repeatedly presents purported problems with plaintiff's time and leave to support the argument that all of plaintiff's difficulties at work stem from attendance issues. For example, HHC states, "[t]here is no basis to infer a discriminatory or retaliatory motive behind Defendant's attempts to

manage Plaintiff's excessive absences and authorized remote work, which began well before Plaintiff's sexual encounter with Binder." HHC's reply memorandum of law at 6. As plaintiff correctly states, "this case is not about my dissatisfaction with my job duties or about legitimate actions that HHC took in response to my excessive use of sick time." Plaintiff's aff,¶ 7. On the other hand, the majority of plaintiff's claims, such as the claim that Binder created a hostile work environment after plaintiff rejected his sexual advance, the claim that her assignments were taken away or that she was undermined, the issues related to plaintiff's transfer and plaintiff's allegation that HHC failed to conduct a proper investigation, are completely unrelated to any alleged attempt by HHC to manage plaintiff's excessive absences and remote work.

Accordingly, HHC's request for summary judgment on the part of plaintiff's gender discrimination claim alleging that her supervisor subjected her to a hostile work environment after she rejected his sexual advances, is denied.

Constructive Discharge

To state a claim for constructive discharge, a plaintiff must "submit evidence that defendant deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign." *Crookendale v New York City Health & Hosps. Corp.*, 175 AD3d 1132, 1132 (1st Dept 2019) (internal quotation marks and citation omitted). As set forth in the facts, plaintiff argues HHC constructively discharged her by placing her in a "dead-end" position and not effectively responding to her complaints. Plaintiff claims that, despite providing other viable suggestions such as being placed on the EPIC project, she was placed in a position where she could not continue her work.

However, the record indicates that Pierre attempted to honor plaintiff's request to be relocated and her request to be reassigned to a different supervisor. Pierre advised plaintiff that

some of her suggestions were not viable. For example, on April 9, 2013, in response to plaintiff's suggestion to work on the EPIC project, Pierre emailed the following:

> "I did explore the EPIC idea but was told that those positions would have to be applied for via the normal channels of HHC job application. This is not a department in which you could be transferred into. I don't know if there are positions available, but I encourage you to look into that if that is an area of interest for you."

NYSCEF Doc. No. 110 at 1.

Shortly thereafter, plaintiff was ultimately placed with Capponi, where she retained the same salary. Plaintiff's dissatisfaction with this placement fails to raise a question of fact as to whether HHC "deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign." *Crookendale v New York City Health & Hosps. Corp.*, 175 AD3d at 1132 (internal quotation marks and citation omitted). "Deliberate is more than a lack of concern; something beyond mere negligence or ineffectiveness." *Polidori v Societe Generale Groupe*, 39 AD3d 404, 405 (1st Dept 2007) (internal quotation marks and citation omitted).

Plaintiff argues that. when she was removed from the CaptureRX project she complained to Pierre, who did not understand the seriousness of this action and referred the complaint to corporate compliance. However, it is undisputed that Pierre did meet with plaintiff and attempt to remedy the situation. For example, on April 5, 2013, Pierre emailed plaintiff the following: "Based on the several times we have spoken, you articulated to me that you did not feel uncomfortable working with Matt Binder (that is, being in meetings with him, seeing him and communicating with him in the work environment, etc.). . . . Are you now uncomfortable with Matt and interacting with him in person?" NYSCEF Doc. No. 108 at 1.

As a result, HHC's investigation, even if it was ineffective, does not meet the high standard for a constructive discharge claim. "Because defendant investigated plaintiff's complaint, albeit

allegedly imperfectly, and offered plaintiff reasonable options for returning to work, the alleged ineffectiveness of its corrective action in eliminating the hostile environment does not give rise to a potential liability for constructive discharge." *Polidori v Societe Generale Groupe*, 39 AD3d at 406. Accordingly, HHC is granted summary judgment dismissing plaintiff's constructive discharge claim.

Other Adverse Employment Actions

According to plaintiff she suffered an adverse action when she was transferred to Capponi because she was taken off of her prior projects, waited for four months to be assigned work and then was ultimately assigned busy work. To be considered materially adverse, a change in working conditions must be more disruptive than a "mere inconvenience or an alteration of job responsibilities." *Messinger v Girl Scouts of U.S.A*, 16 AD3d 314, 315 (1st Dept 2005) (internal quotation marks and citations omitted). Plaintiff's transfer is not an adverse employment action, because it did not "amount to a materially adverse change in the terms and conditions of [plaintiff's] employment." *Humphries v City Univ. of N.Y.*, 146 AD3d 427, 427 (1st Dept 2017). Although plaintiff was not satisfied with her work assignments, there was no change to her salary or title. *See e.g. Silvis v City of New York,* 95 AD3d 665, 665 (1st Dept 2012) (internal quotation marks and citation omitted) ("Plaintiff's transfer from the position of literacy coach to a classroom teacher was merely an alteration of her responsibilities, and not an adverse employment action. Apart from a change in the nature of her duties, plaintiff retained the terms and conditions of her employment, and her salary remained the same").

Even assuming, arguendo, that being transferred to a different office could be construed as an adverse employment action, plaintiff fails to set forth any facts that this transfer "occurred under circumstances giving rise to an inference of discrimination." The record indicates that plaintiff

was the one who emailed Pierre several times requesting to be transferred to a different location and a different supervisor.

In addition to ultimately being forced to resign, plaintiff alleges that she was subject to a series of adverse actions after the South Carolina incident and then was ultimately constructively discharged. For example, plaintiff claims that Ramlakhan criticized her work, that she would try to make conference calls and no other employees would answer and that work was taken away. First, courts have found that being subject to excessive scrutiny and being left out of meetings are not adverse actions. *See e.g. Silvis v City of New York*, 95 AD3d 665, 665 (1st Dept 2012) (internal quotation marks and citation omitted) (Plaintiff's allegation that "she was subjected to a relentless stream of reprimands is not sufficient to establish a prima facie case of discrimination" as plaintiff still received a satisfactory end of year rating and reprimands did not result in a reduction of pay or privileges).

Nonetheless, even if any of the above actions were adverse, plaintiff fails to demonstrate how gender discrimination was a motivating factor in HHC's treatment of her. For example, plaintiff claims that Ramlakhan continued to marginalize plaintiff after she complained to him about Binder on November 14, 2012. However, at that time, Ramlakhan, nor anyone else at HHC, knew about the South Carolina incident. Further, while plaintiff alleges that she was transferred and her responsibilities were taken away, among other things, even viewing the evidence in a light most favorable to plaintiff, plaintiff fails to produce any evidence that she was treated differently from anyone else under the circumstances, due to her gender. "Stated otherwise, on this record, no triable issue exists as to whether the employer, in taking the challenged action, was motivated at least in part by [gender] discrimination." *Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 81 (1st Dept 2017) (internal quotation marks and citation omitted); *see also Chin v New York*

City Hous. Auth., 106 AD3d 443, 445 (1st Dept 2013) (Plaintiff has failed to demonstrate how "discrimination was one of the motivating factors for the defendant's conduct").

NYCHRL Retaliation

Under the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Under the broader interpretation of the NYCHRL, "[t]he retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7). For plaintiff to successfully plead a claim for retaliation under the NYCHRL, she must demonstrate that: "(1) [she] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [her]; and (3) a causal connection exists between the protected activity and the adverse action." *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012). Protected activity under the NYCHRL refers to "opposing or complaining about unlawful discrimination." *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dept 2010) (internal quotation marks and citations omitted).

On November 14, 2012 plaintiff complained to Ramlakhan that Binder's behavior had been unprofessional, offensive and that she did not do anything to deserve this treatment. She alleges that, after sending this email, she immediately felt Ramlakhan's hostility towards her. For instance, plaintiff alleges that, on March 5, 2013, Ramlakhan berated her for no reason. Plaintiff further claims that Ramlakhan subsequently continued Binder's effort to marginalize and micromanage her. On March 6, 2013, plaintiff complained to Ramlakhan about the hostile work environment and advised Ramlakhan that she believed the hostile work environment was linked to Binder's actions in South Carolina and that she was planning to meet with an EEO

representative. On March 7, 2013, plaintiff met with an EEO representative and filled out a complaint.

Here, however, plaintiff cannot establish the first element in a prima facie case of retaliation under the NYCHRL with respect to any retaliation claims made for conduct occurring between November 14, 2012 and March 6, 2013 because she did not engage in protected activity. *Breitstein v Michael C. Fina, Co.*, 156 AD3d 536, 537 (1st Dept 2017) ("In support of his retaliation claim, plaintiff failed to demonstrate that he engaged in a protected activity"). Her November 14, 2012 complaint to Ramlakhan did not indicate what discriminatory conduct she was protesting when she complained about Binder's behavior. Accordingly, this complaint did not "constitute protected activity," as plaintiff never asserted to anyone that she suffered from this mistreatment, as a result of a protected characteristic. *Fruchtman v City of New York*, 129 AD3d 500, 501 (1st Dept 2015).

Plaintiff argues that Ramlakhan and other employees' conduct towards her after she complained on March 6, 2013 would be reasonably likely to deter an employee from engaging in protected activity. Nonetheless, as set forth below, in response to HHC's motion, plaintiff fails to raise a triable issue of fact that she was subjected to retaliatory acts that reasonably would have deterred her from engaging in protected activity. "The plaintiff offered nothing but speculation that any of the defendants' challenged actions were motivated, even in part, by unlawful discrimination or retaliation, and such speculation is insufficient to defeat summary judgment." *Ellison v Chartis Claims, Inc.*, 178 AD3d 665, 669 (2d Dept 2019). Moreover, the record indicates that many of the incidents are taken out of context and involve several different unrelated HHC employees.

For example, she alleges that, after sending an email to Ramlakhan advising him that she was meeting with an EEO officer regarding the South Carolina incident, Ramlakhan called a

meeting with her, Binder and others and forwarded her email, despite her request to keep the email confidential. However, there are discrepancies in plaintiff's timeline. The record indicates that, prior to sending the March 6, 2013 email, plaintiff met with Ramlakhan to discuss her concerns with his recent criticisms. She then followed up with the email as set forth above, which she sent not only to Ramlakhan but also to Robles, who is Ramlakhan's supervisor. In the interim, Ramlakhan met with plaintiff, Binder and Janet Karageozian. He then forwarded the following email to Gloria Velez in Human Resources, and sent a copy to Robles, Binder and Karageozian:

> "Hello Gloria,
> We need to sit and talk to you about this email received from Lori Bond. Yesterday Lori came into my office to discuss not being able to go to the various sites as she wanted to and she did not want to report to Matthew Binder. Lori was extremely loud and disrespectful - witnessed by Michael Keil and Janet Karageozian. I told her that her tone was inappropriate and we should schedule a meeting to review her concerns - she agreed but slammed the door when she left.
> I scheduled a meeting today with Lori, Matt and Janet to review her concerns - shortly before the meeting she sent this email to Bert and me. I did not have a chance to review before the meeting but at the meeting she was again highly agitated and confrontational. We asked her to let us know how we can resolve the issues - she did not provide anything other than she wants to be able to do her job the way she deems is appropriate - which is making business decisions and going off-site she feels is necessary. We need your guidance here. I am having her report to Janet until we plan out our next steps.
> Additionally, I have to admit, I am feeling a bit uncomfortable with her tone, demeanor and glaring looks."

NYSCEF Doc. No. 90 at 1.

As another example, plaintiff states that she was retaliated against when HHC moved the timesheets in front of Binder's office. However, the record indicates that, on April 5, 2013, another HHC employee advised plaintiff and others that "Time Sheets will be in front of Matt Binder's office." NYSCEF Doc. No. 107 at 1. There is no indication that this employee's actions were causally connected to plaintiff's complaints. Further, plaintiff claims that Biambanco notified CaptureRX that plaintiff would no longer be working with them. By that point, as plaintiff had been transferred and was working on a different assignment, this would be a legitimate response

to CaptureRX. Plaintiff also contends that other people, including Katz, took over plaintiff's assignments. According to the record, in response to a question that Capponi emailed to plaintiff, Katz and others, Katz responded, "I got this one and will deal with it." NYSCEF Doc. No. 96 at 1. Plaintiff fails to produce any evidence other than self-serving allegations that Katz's actions were motivated by a discriminatory animus.

Plaintiff further claims that HHC's actions with respect to transferring her to Capponi and ultimately leading up to her constructive discharge would reasonably deter an employee from engaging in protected activity. Nonetheless, here, HHC established prima facie that plaintiff's transfer to Capponi was not made in retaliation for her discrimination complaints "because it did not constitute . . . an action that disadvantaged [her]." *Cubelo v City of New York*, 168 AD3d 637, 638 (1st Dept 2019) (internal quotation marks and citations omitted). As discussed, the transfer was made at plaintiff's request and her salary and benefits were not affected by the transfer. "Plaintiff's perception that the transfer was a demotion fails to raise a triable issue of fact." *Id.* at 638. Accordingly, as plaintiff fails to raise a triable issue of fact that HHC retaliated against her, HHC is granted summary judgment dismissing this claim.

CONCLUSION

Accordingly, it is

ORDERED that defendant New York City Health and Hospitals Corporation's motion for summary judgment is denied with respect to plaintiff Lori Bond's gender discrimination claim under NYCHRL alleging that plaintiff rejected her supervisor's sexual advance and as a result, he subjected her to a hostile work environment in violation of the NYCHRL; and it is further

ORDERED that defendant New York City Health and Hospitals Corporation's motion for summary judgment and is granted with respect to dismissing the remainder of plaintiff's complaint.

2/25/2020
DATE

HON. LAURENCE L. LOVE, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE