| **Howell v United Fedn. of Teachers Welfare Fund** |
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| 2020 NY Slip Op 31713(U) |
| June 3, 2020 |
| Supreme Court, New York County |
| Docket Number: 153234/2017 |
| Judge: Kathryn E. Freed |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

***Justice***

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**INDEX NO.** 153234/2017

STEPHANIE HOWELL,

Plaintiff,

**MOTION SEQ. NO.** 001

- v -

UNITED FEDERATION OF TEACHERS WELFARE FUND and ARTHUR PEPPER,

**DECISION + ORDER ON MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this action by plaintiff Stephanie D. Howell seeking damages against defendants United Federation of Teachers Welfare Fund ("the Fund") and Arthur Pepper ("Pepper") for discrimination based on her gender, race and sexual orientation, as well as for retaliation and hostile work environment based on violations of the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL"), defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After oral argument, as well as a review of the motion papers and the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

The Fund provides supplemental dental, prescription, and other medical benefits for employees who are predominantly employed by the New York City Department of Education. Doc. 25 at par. 2. In 1995, Pepper became the Executive Director of the Fund and, in that capacity, was its administrator until his retirement in 2017. Doc. 25 at par. 1.

Plaintiff, an African American homosexual female, began working for the Fund as an Office Manager-Coordinator in 1997. Doc. 1 at pars. 3, 46, 56; Doc. 31 at 6, 20. In that role, she served as a secretarial assistant to Lorna Baptiste, James Botta, and Geoff Sorkin, Assistant Directors of the Fund. Doc. 30; Doc. 31 at 6-7, 28. According to Pepper, plaintiff also worked for him at that time and sat in a workstation located outside of the offices of those for whom she worked. Doc. 25 at par. 5. In addition, plaintiff generated letters related to HIPAA compliance and to beneficiaries of deceased members regarding their benefits. Doc. 31 at 8-9, 30. Plaintiff estimated that HIPAA compliance constituted about 10%-25% of her job and that assisting Baptiste and Sorkin comprised approximately 33% and 20-25% of her workload, respectively. Doc. 31 at 89-91. She further estimated that assisting Botta constituted about 30% of her workload. Doc. 30. During her employment at the Fund, plaintiff was disciplined only once, for lateness. Doc. 31 at 36.

According to Pepper, plaintiff worked primarily for Baptiste, for whom she answered calls, sorted mail, directed issues to appropriate staff members, and performed other secretarial and clerical duties. Doc. 25 at par. 6. As the Executive Department changed, plaintiff was assigned other duties, such as writing eligibility letters and logging personal representative and power of attorney forms. Doc. 25 at par. 7.

In or about 1998, plaintiff was promoted to Office Coordinator and she got an 8% raise. Doc. 25 at par. 5. The position was created for her and was not posted. Doc. 25 at par. 5.

In 2005, plaintiff graduated from John Jay College with a Bachelor's Degree in Public Administration. Doc. 31 at 10-11. In 2016, she obtained an MBA which, she claimed, enhanced her ability to do her job at the Fund, since it provided her with skills relating to human resources, management, accounting, and ethics. Doc. 31 at 14-15. The same year, plaintiff attended a discrimination training class and received defendants' harassment/discrimination policy. Doc. 31 at 69. According to the Fund's policy, any complaints of discrimination were to be given to Pepper. Doc. 31 at 132.

According to plaintiff, from 2010 until 2017, Pepper consistently referred to three Caucasian employees of the Fund, Catherine Creegan, Tim De-Quatro, and

Seth Golstein, as the "the future of the Fund". Doc. 1 at par. 36; Doc. 30 at par. 14; Doc. 31 at 52, 56-57.

In September 2015, during the course of the U.S. Open tennis tournament, plaintiff and her co-worker Anesa Soleyin were standing in front of Soleyin's desk outside Pepper's office talking about how fit professional tennis players Venus and Serena Williams were. Doc. 31 at 120-121. Pepper exited his office, heard the conversation, and commented that Serena Williams' "arm is bigger than his waist" and that she should not "wear the things that she was wearing." Doc. 31 at 122. He further stated that Serena Williams should not wear such outfits "because of her body frame", that even his wife thought that she should not have worn a particular outfit, and that he would be "afraid of [Serena Williams] because of her arm size." Doc. 31 at 123. Plaintiff deemed these comments to be derogatory because certain news articles about Serena Williams, especially items about European tournaments, likened the shape of her body to an "ape" or "monkey". Doc. 31 at 123. Plaintiff advised Pepper that his comments were derogatory because they were similar to the racist remarks she had seen in the press. Doc. 31 at 124. She was also offended by Pepper's remarks because they inferred that a woman with a muscular build was "not as feminine as some people want females to be." Doc. 31 at 125.

In response, Pepper allegedly told plaintiff that "things like this get out hand" and referred to plaintiff as "too emotional." Doc. 31 at 134. Pepper asked plaintiff

to apologize for calling him out on his remarks in front of other members of the staff and she refused. Doc. 31 at 126, 128. Plaintiff printed a copy of the article referring to Serena Williams as a "monkey" and, the following day, September 8, 2015, gave it to Pepper's secretary along with a memo complaining that, as a "black, non-feminine (to some) female", she found his comments "offensive and discriminatory". Doc. 1 at par. 56; Doc. 20; Doc. 31 at 129-130. Pepper did not deny making the comments about Serena Williams and, in fact, submitted a letter of apology to plaintiff on September 10, 2015. Doc. 21; Doc. 31 at 130. Except for this incident, plaintiff could not recall "any other comment that Mr. Pepper or management made about race, gender or sexual orientation." Doc. 31 at 19-22.

In October 2015, Pepper allegedly "stripped" plaintiff of her duties and transferred them to his non-African-American assistants. Doc. 30 at par. 21. Specifically, Pepper "stripped [plaintiff] of the HIPAA policy that [she] was actually working on, as well as assisting the [D]eputy [A]ssistant [D]irector [Botta], which [Pepper] transferred" to his Administrative Assistants Soleyin (Trinidadian Indian), Christina Tufano (Caucasian), and Theresa Perrone (Caucasian). Doc. 23; Doc. 30 at par. 21; Doc. 31 at 27. Pepper also relieved plaintiff of her duty of maintaining the attendance sheet and transferred it to Tufano. Doc. 31 at 86. Plaintiff's duty of assisting Sorkin was transferred to Soleyin, Tufano and Perrone; payroll duties were transferred to Tufano; and plaintiff's job duties were relegated to picking up

"overflow" calls which, she believed, was a demotion and she complained to Pepper regarding the same. Doc. 31 at 94. Previously, plaintiff did not have to cover these phone calls because she was part of the executive staff (Doc. 31 at 96) and the only phone calls plaintiff had been required to cover were for Sorkin, Baptiste and, if Soleyin was at lunch, for Pepper. Doc. 31 at 96. Additionally, plaintiff's workstation was moved from outside of the offices of Pepper, Sorkin and Baptiste to a cubicle with the Administrative Assistants, which she referred to as a "rubber room." Doc. 1 at par. 68(e); Doc. 31 at 99.

Baptiste retired in January 2016. Doc. 25 at par. 8; Doc. 30 at par. 22. Plaintiff had learned that Baptiste planned to retire about 1 ½ years before that date. Doc. 31 at 74. Just prior to her retirement, Baptiste, another Assistant Director, and Pepper were supported by a pool of three secretaries and plaintiff. Doc. 25. At par. 8. In October 2016, plaintiff was allegedly advised that she was no longer to process staff benefits.[1] Doc. 31 at 74-75. Although Pepper claimed that this was part of a "reorganization" of the Fund, plaintiff insisted that such term was used for the first time only after Baptiste retired. Doc. 30 at par. 22; Doc. 31 at 74-76.

The Fund determined that, when Baptiste retired, they would not hire another Assistant Director to fill her position, but rather would reassign the duties she had

[1] This is likely an error, and plaintiff appears to have meant 2015, since plaintiff and Pepper both state that Baptiste retired in January 2016.

performed. Doc. 26 at 11. Thus, Baptiste's retirement left three secretaries and plaintiff supporting only one assistant director and Pepper in the Executive Department. Doc. 25 at par. 9. In anticipation of Baptiste's retirement, Pepper met with each of the secretaries and plaintiff in the fall of 2015 and in early 2016 and asked them to give him a list of their duties. Doc. 25 at par. 9. In February 2016, he met with each of them to let them know that their duties would change. Doc. 25 at par. 9. As a result of this process, plaintiff was assigned to be a full-time Supervisor in the Scholarship Fund and was to continue as Office Coordinator. Doc. 25 at par. 10. Her workstation was therefore moved from outside Baptiste's office to the Scholarship Fund area. Doc. 25 at par. 10. She then worked on eligibility letters, but no longer on logging personal representative and power of attorney forms. Doc. 25 at par. 10. She continued to be employed by the Fund and her salary remained the same. Doc. 25 at par. 10.

Plaintiff claims that, during her tenure at the Fund, Pepper did not make her aware of any newly created positions which became available. Doc. 31 at 32. Plaintiff testified that non-union positions were never posted. Doc. 31 at 35. According to plaintiff, the Fund created positions and gave them to non-African American individuals without posting them first. Doc. 31 at 37. Only after plaintiff complained about discrimination were African-American employees, such as Hernoune Nicholas, promoted by the Fund. Doc. 31 at 38. Plaintiff and other black

employees, such as Shirley Jordan, Beverly Sobers (who had an Associate's degree), and Mercedes Walker (who had an MBA), were all qualified for the positions created by Pepper. Doc. 31 at 39. Nevertheless, Pepper hired Tim De-Quatro, a Caucasian who took only a few classes in community college, Seth Goldstein, a Caucasian who was not familiar with health benefits, and Catherine Creegan, an undergraduate student with no social work experience. Doc. 31 at 43, 45, 46, 48. Plaintiff maintained that, had defendants sought qualified African-American employees who were clearly more experienced, these Caucasian employees would not have been hired. Plaintiff claims that she, too, was more qualified than these Caucasian employees because she had more years of experience, better skills and a Bachelor's Degree. Doc. 31 at 48.

According to Pepper, non-union and management positions were posted only as needed. Doc. 25 at par. 14. Typically, those employees who sought an open position, or were interested in a position if and when it opened in the future, would let Pepper know. Doc. 25 at par. 14. However, plaintiff never expressed such interest to Pepper. Doc. 25 at par. 14. Nor did Baptiste ever tell Pepper that plaintiff was interested in a position. Doc. 25 at par. 14.

Plaintiff further testified that she did not receive a raise after earning her MBA but that Hendelman, a Caucasian, received a raise of approximately $30,000 after receiving his MBA. Doc. 31 at 61. Creegan also received a salary increase after

receiving her Master's degree in social work. Doc. 31 at 63. George Reis and Hoi Yan received raises after becoming CPAs. Doc. 31 at 63-65. As of December 2015, plaintiff was the only African-American executive assistant who did not receive a cash bonus from Pepper. Doc. 31 at 70-71. Unlike plaintiff, non-African-American employees Soleyin (Indian Trinidadian), Perrone (Italian), and Tufano (Italian) received cash bonuses. Doc. 31 at 72-74. Plaintiff had allegedly received a cash bonus every Christmas prior to 2015. Doc. 31 at 73.

Additionally, plaintiff testified that, when Creegan left work early in the day so that she could take college classes, she was placed on a leave of absence for the hours she did not work but did not need to make a written request for such leave (Doc. 31 at 103), whereas plaintiff had to provide numerous written requests to take disability leave under the Family Medical Leave Act ("FMLA"). Doc. 31 at 105. She conceded, however, that leave under the FMLA required the submission of a written form. Doc. 31 at 105.

In 2016, plaintiff submitted a complaint of retaliation and discrimination to Michael Mulgrew, President of the Fund. Doc. 30 at par. 25; Doc. 31 at 132. On March 29, 2016, Karen Randle of the Fund's Human Resources Department informed plaintiff that PEAR HR Solutions ("PEAR") would be conducting an impartial investigation into plaintiff's discrimination complaints. Doc. 1 at par. 81. On March 30, 2016, plaintiff urged Randle to interview certain witnesses (Mercedes

Walker and Akilah Osorio), but was told that "only key people" would be interviewed. Doc. 1 at par. 82. On June 27, 2016, Mulgrew and Adam Ross, the Fund's attorney, advised plaintiff that the investigation into her complaints revealed no evidence of discrimination. Doc. 1 at par. 84. Although PEAR's investigation noted that Pepper demonstrated "poor communication and leadership style", it determined that it was "unable to substantiate a claim for racial discrimination or workplace harassment." Doc. 23 at 8. On June 29, 2016, plaintiff objected to the findings of the investigation which objection, she claimed, was ignored by defendants. Doc. 1 at par. 89. Plaintiff's workstation, which was close to Pepper's office, was not moved until the investigation was completed, despite her claim that there was ample room to move her. Doc. 31 at 152.

Following plaintiff's complaints of discrimination, Baptiste told her that Pepper did not like her because she spoke up for herself and that he was going to try to take away her duties. Doc. 31 at 86-88. Pepper allegedly said that he could not keep someone he could not trust on his staff. Doc. 31 at 85. Pepper's alleged retaliation commenced following plaintiff's written complaint of discrimination against him after their disagreement regarding his comments about Serena Williams. Doc. 31 at 108.

Pepper allegedly told Tufano to stay away from plaintiff because she was "trouble". Doc. 31 at 136. She also claims that Pepper instructed other employees,

including Rhonda Nettles and Glendalis Madrigal, to go through her desk to search for evidence of poor work performance (Doc. 1 at pars. 62-63) and reprimanded plaintiff for reading a book, despite the fact that it was a work-related manual. Doc. 1 at par. 64.

On February 16, 2016, plaintiff submitted a written complaint about discrimination to Mulgrew and, when she received no response, she contacted his assistants to request a meeting. Doc. 1 at pars. 73-74. On March 11, 2016, during a meeting with Mulgrew and Ross, plaintiff continued to complain about the discrimination she endured. Doc. 1 at par. 75. On March 15, 2016, plaintiff complained to Mulgrew that Pepper was not allowing her to see certain unspecified documents to which she previously had access. Doc. 1 at par. 76.

On March 16, 2016, plaintiff complained to Pepper about "dismantling her work functions". Doc. 1 at par. 76. She also claimed that, on March 21, 2016, she complained to Ellie Engle (Staff Director), Dave Hickey (Chief Financial Officer) and Ross about discrimination at the Fund, but that no action was taken. Doc. 1 at par. 78.

On March 22, 2016, plaintiff met with Pepper, Sorkin and Botta, at which time she was advised that her phones would be monitored. Doc. 1 at par. 80. On April 5, 2016, Pepper allegedly passed by plaintiff's desk 4 times every 30 minutes. Doc. 1 at par. 83. Although Pepper threatened to write up plaintiff for

insubordination in August 2016, she conceded that this was not based on her race, gender or sexual preference. Doc. 31 at 163. This allegedly raised plaintiff's blood pressure and she had to go to urgent care for treatment. Doc. 31 at 165.

Plaintiff maintained that, as a result of Pepper's acts of retaliation, she lost the opportunity to earn a higher salary and has suffered from emotional distress, had to take a leave of absence, was prescribed medication, and went to therapy. Doc. 31 at 110, 113. She took Zoloft for anxiety and increased the amount of medication she took for attention deficit disorder. Doc. 31 at 115. Plaintiff also alleged that she sustained out-of-pocket expenses, including co-payments of $25 for each therapy visit. Doc. 31 at 116.

Plaintiff commenced the captioned action by filing a summons and complaint on April 6, 2017. Doc. 1. As a first cause of action, she claimed that defendants violated the NYSHRL by demoting her and discriminating against her based on her race, gender, and sexual orientation. Doc. 1. As a second cause of action, she alleged that defendants violated the NYSHRL by maintaining a hostile work environment by harassing her because of her race, gender and sexual orientation. Doc. 1. As a third cause of action, she alleged that defendants retaliated against her by maintaining a hostile work environment. Doc. 1. As a fourth cause of action, she alleged that defendants violated the NYCHRL by suspending her and discriminating against her based on her race, gender and sexual orientation. Doc. 1. As her fifth

cause of action, plaintiff claimed that defendants violated the NYCHRL by treating her less favorably than others based on her race, gender, and sexual orientation, thereby creating a hostile work environment. Doc. 1. As her sixth and final cause of action, she claimed that defendants violated the NYCHRL by retaliating against her. Doc. 1.

Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the ground that they did not violate any of plaintiff's rights pursuant to the NYSHRL or NYCHRL. In support of the motion, defendants submit, inter alia, an attorney affirmation, a memorandum of law, the pleadings, portions of plaintiff's deposition transcript, and the report of the independent investigation conducted regarding Pepper's allegedly discriminatory behavior. Docs. 15-26. Defendants further submit an affidavit by Pepper in which he attests, inter alia, that he hired and promoted persons of all backgrounds based on their qualifications; that plaintiff never told him that she earned an MBA; that there was no policy of automatically awarding an individual a raise for completing an advanced degree; that plaintiff never requested a promotion; and that, of the two positions to which plaintiff could have been promoted, one was filled by an African-American woman and the other by a Caucasian male. Doc. 25.

In opposition to the motion, plaintiff argues that issues of fact exist regarding whether she was qualified for the new positions at the Fund, whether she was given

an opportunity to apply for them, and whether she was passed over for promotion because of her race. She further claims that issues of fact exist concerning whether the non-discriminatory reason for her demotion and/or being passed over for promotion was pretextual. Additionally, plaintiff claims that defendants failed to establish as a matter of law that they did not subject her to a hostile work environment. Plaintiff also claims that issues of fact exist regarding whether defendants engaged in retaliatory conduct against her for complaining about Pepper.

In reply, defendants assert, inter alia, that plaintiff's claim of discrimination is defeated by the fact that she did not apply for the promotions she complains she did not receive. Doc. 37. They further assert that, although plaintiff claims that the Fund had a policy of giving raises to those who earned advanced degrees, she has failed to adduce proof of such a policy. Doc. 37. Additionally, defendants maintain that the changes in plaintiff's job duties and the location of her workstation were attributable to Baptiste's retirement and not to discrimination. Doc. 37. Defendants also assert that they did not retaliate against plaintiff for complaining of alleged discrimination and that she was not subjected to a hostile work environment. Doc. 37.

## LEGAL CONCLUSIONS:

### Discrimination Pursuant to NYSHRL

Employment discrimination claims brought pursuant to the NYSHRL and NYCHRL, including disability claims, are analyzed pursuant to the three-part burden-shifting framework [**6] established in *McDonnell Douglas Corp. v Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (*see Stephenson v Hotel Emples. & Rest. Emples. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270-271, 844 N.E.2d 1155, 811 N.Y.S.2d 633 [2006]; *Reichman v City of New York*, 179 AD3d 1115, 1117, 117 N.Y.S.3d 280 [2d Dept 2020]). First, the plaintiff must meet his or her *prima facie* burden to establish a discrimination claim and, "[i]f the plaintiff makes such a showing, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the employment decision. [*8] If the employer succeeds in doing so, the burden then shifts back to the plaintiff to prove that the reason proffered by the employer was merely a pretext for discrimination" (*Hudson v Merrill Lynch & Co., Inc.*, 138 A.D.3d 511, 514-515, 31 N.Y.S.3d 3 [1st Dept 2016] [internal quotation marks and citations omitted]; *see Stephenson v Hotel Emples. & Rest. Emples. Union Local 100 of AFL-CIO*, 6 NY3d at 270-271; *Johnson v IAC/Interactive Corp.*, 2018 NY Slip Op 31720[U], 2018 Misc LEXIS 3184, *2-3 [Sup Ct, NY County 2018]).

To make out a *prima facie* case of employment discrimination under either statute, a plaintiff "must show that he [or she] is a member of a protected class qualified to hold his or [her] position who was fired or suffered an adverse employment action which occurred under circumstances giving rise to an inference of discrimination" (*Haber v J. Press, Inc.*, 2013 NY Slip Op 31201[U], 2013 NY Misc LEXIS 2376, *6-7 [Sup Ct, NY County 2013] [internal quotation marks and citation omitted]; *see Melman v Montefiore Medical Center*, 98 AD3d 107, 113-114, 946 N.Y.S.2d 27 [1st Dept 2012]; *Mete v New York State Office of Mental Retardation & Developmental Disabilities*, 21 AD3d 288, 290, 800 N.Y.S.2d 161 [1st Dept 2005]; *Engelman v Girl Scouts-Indian Hills Council, Inc.*, 16 AD3d 961, 962, 791 N.Y.S.2d 735 [3rd Dept 2005]).

> Moreover, "[t]o prevail on a motion for summary judgment seeking dismissal of an employment discrimination claim under the NYSHRL, 'defendants must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered [**7] legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual'" (*Fusco v HSBC Bank United States N.A.*, 2018 NYLJ LEXIS 2673, *14-15 [Sup Ct, NY County 2018], *quoting Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305, 819 N.E.2d 998, 786 N.Y.S.2d 382 [2004]).

*Gordon v Consol. Edison, Inc.*, 2020 NY Slip Op 30979(U), *5-7 (Sup Ct, NY County 2020).

Defendants are entitled to summary judgment dismissing plaintiff's claim of discrimination pursuant to the NYSHRL.

Initially, Pepper's comments regarding Serena Williams, although insensitive and made in poor taste, were not directed at plaintiff. Even if they had been, such "[s]tray remarks", "even by a decision maker, do not, without more, constitute evidence of discrimination." *Serdans v New York & Presbyt. Hosp.*, 112 AD3d 449, 450 (1st Dept 2013). Further, plaintiff conceded that, other than the Serena Williams comments, neither Pepper nor the Fund made any comments offensive to her race, gender or sexual preference.

Similarly, Pepper's references to three young white employees as the "future of the Fund" do not evince a racial motivation.

Plaintiff further asserts that she has raised an issue of fact regarding whether she was qualified for a promotion and whether defendants' failure to promote her was based on her race. However, Pepper establishes in his affidavit that, of the 16 staff promotions between April 2014 and April 2017, 9 were of African-American employees. Doc. 25. Additionally, 7 of the 12 individuals hired by the Fund during that same period were African-American. Doc. 25. Additionally, maintains Pepper, the only two positions to which plaintiff could have been promoted – Deputy Assistant Director and Deputy Assistant Comptroller – were filled by an African-American woman and a Caucasian man. Doc. 25. Thus, plaintiff has not demonstrated an issue of fact regarding whether the Fund's hiring and/or promotion practices discriminated against African-Americans.

Although plaintiff also claims that the Fund discriminated by failing to post opportunities for promotion before such jobs were filled, she admitted that non-union jobs were not posted. Additionally, she did not dispute Pepper's representation that she never approached him to inquire about a promotion.[2]

Additionally, plaintiff claims that defendants discriminated against her by failing to pay her a bonus after she earned an MBA. However, Pepper establishes, and plaintiff does not dispute, that plaintiff never directly advised Pepper that she

[2] This Court notes that, when plaintiff was promoted to Office Coordinator in 1998, the position was created for her and was not posted.

earned the degree, and that the Fund has no set policy of paying a bonus to an employee who earns an advanced degree.

**Hostile Work Environment Pursuant to NYSHRL**

Under the NYSHRL, a hostile work environment 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." *La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918, 919 (2d Dept 2015) (internal quotation marks and citations omitted). Isolated remarks or occasional episodes of harassment generally will not support a finding of a hostile or abusive work environment since, in order to be actionable, the offensive conduct must be pervasive. *Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 51 (4th Dept 1996).

Plaintiff fails to provide any factual allegations to demonstrate that defendants subjected her to an environment "permeated with discriminatory intimidation, ridicule, and insult" in violation of the NYSHRL. *La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d at 919 (internal quotation marks and citation omitted). Although she claims that "[s]eeing new and less experienced Caucasian employees taking the positions" to which she could have been promoted "created a hostile work

environment", she tellingly fails to specify the positions to which she refers. Doc. 28 at 28. Thus, she fails to contradict Pepper's representation that there were only two positions to which she could have been promoted, and that one was filled by an African-American woman.

Plaintiff's conclusory hostile work environment claims also fail because Pepper's comments about Serena Williams and his reference to three young Caucasian employees as the "future of the Fund" amount to "no more than petty slights or trivial inconveniences." *Massaro v Dept. of Educ. of the City of N.Y.*, 121 AD3d 569, 570 (1st Dept 2014) quoting *Williams v New York City Hous. Auth.*, 61 AD3d 62, 79-80 (1st Dept 2009).

**Retaliation Pursuant to NYSHRL**

To make out a retaliation claim under NYSHRL, a plaintiff must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action. *See Forrest*, 3 NY3d 295 at 313.

Plaintiff's claim of retaliation is, in essence, that she was demoted because she made a complaint about Pepper in September 2015. She maintains that she was "stripped" of her duties in October 2015 as a result of complaining about Pepper and that the temporal proximity of her complaint and her alleged demotion reveals, at the very least, a question of fact regarding whether the change of her duties constituted retaliation. However, in making this argument, plaintiff completely disregards her own testimony that she was aware that Baptiste would be retiring approximately 1 ½ years before the latter left the Fund in January 2016. Doc. 31 at 74. Therefore, it is hardly surprising that the Fund would begin reorganizing in October 2015 to meet its imminent staffing needs.

Although plaintiff also claims that the Fund retaliated against her by changing her workstation, there was no reason for her to remain at a desk outside of Baptiste's office after the latter retired.[3] In any event, changing a seat assignment is not an adverse action and, even if it could be considered such, plaintiff fails to raise an issue of fact as to whether it occurred under circumstances giving rise to an inference of discrimination. *See Leader v City of N.Y.*, 2020 NY Slip Op 30807(U), *24 (Sup Ct, NY County 2020).

[3] Curiously, plaintiff also asserts that it took *too long* for the Fund to change her workstation, specifically that it waited until after the independent investigation to be completed to do. Doc. 31 at 152.

Additionally, although plaintiff claims that the changing of her duties, while still being paid the same salary, constituted retaliation, she fails to show how any of defendants' actions, *i.e.*, maintaining her position as Office Coordinator while also appointing her as Supervisor of the Scholarship Fund, materially changed the terms and conditions of her employment. *See e.g. Silvis v City of New York*, 95 AD3d 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").

**Discrimination Pursuant to NYCHRL**

> "A motion for summary judgment dismissing a [NYCHRL] [*9] 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" (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d at 514 [internal brackets and citation omitted]; *see Watson v Emblem Health Services*, 158 AD3d 179, 183, 69 N.Y.S.3d 595 [1st Dept 2018]; *Bennet v Health Management Systems, Inc.*, 92 AD3d 29, 41, 936 N.Y.S.2d 112 [1st Dept 2011]). "Under the 'mixed-motive' framework, the question on summary judgment is whether there exist triable issues of fact that discrimination was one of the motivating factors for the defendant's conduct. Thus, under this 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 [adverse employment] action was motivated at least in part by . . .

> discrimination" (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d at 514 [internal quotation marks and citations omitted]).

*Gordon v Consol. Edison, Inc.*, at *7.

Initially, plaintiff fails to raise an issue of fact regarding whether Pepper's comments regarding Serena Williams were motivated at least in part by discrimination. Although Pepper commented on the size of the tennis player and about her clothing, he never said anything about the fact that she was African-American. Nor did he direct any racist comments at plaintiff. Although plaintiff believed that Pepper's comments were racist because some European writers had compared Williams to an ape or a monkey, this language was not used by Pepper, and her attempt to attribute a racist motive to Pepper based on her perception, with no other factual basis, cannot defeat defendants' entitlement to summary judgment. Further, plaintiff conceded that, other than the Serena Williams comments, neither Pepper nor the Fund made any comments offensive to her race, gender or sexual preference.

As noted above, defendants made a prima facie showing that they did not discriminate in hiring or promotions. Plaintiff has failed to raise an issue of fact regarding whether there was a pretext for defendants' practices. Additionally, as noted previously, plaintiff conceded that non-union positions were not posted and that she did not seek a promotion. Even if she had done so, the only two positions

to which plaintiff could have been promoted – Deputy Assistant Director and Deputy Assistant Comptroller – were filled by an African-American woman and a Caucasian man. Doc. 25. Thus, plaintiff has not demonstrated an issue of fact regarding whether the Fund's hiring practices hinged on racial animus.

Although plaintiff also claims that the Fund discriminated by failing to post opportunities for promotion before such jobs were filled, she admitted that non-union jobs were not posted. Additionally, she did not dispute Pepper's representation that she never approached him to inquire about a promotion.[4]

Additionally, plaintiff claims that defendants discriminated against her by failing to pay her a bonus after she earned an MBA. However, Pepper establishes, and plaintiff does not dispute, that plaintiff never advised Pepper that she earned the degree, and that the Fund has no set policy of paying a bonus to an employee who earns an advanced degree.

Although plaintiff maintains that she did not approach Pepper about a promotion because "there were no specific positions [she] could approach Pepper about" (Doc. 30 at par. 13), this statement is utterly conclusory and fails to raise an issue of fact regarding whether plaintiff was not promoted due to her gender, race, or sexual preference. *See Suri v Grey Global Group, Inc.*, 164 AD3d 108 (1st Dept 2018). Indeed, plaintiff fails to adduce any evidence that Pepper was required to

[4] Indeed, as noted previously, her *own* promotion in 1998 was to position created for her and which was not posted.

post any position in which she was interested or explain the absence of any effort on her part to even communicate with Pepper about a possible promotion.

**Hostile Work Environment Pursuant to NYCHRL**

The NYCHRL is less stringent in its requirements, requiring only that a plaintiff demonstrate that she was treated "less well" than other employees, but that she experienced more than "petty slights and grievances". *Williams v. New York City Hous. Auth.*, 61 AD3d at 79. Under the NYCHRL, it is the employer that carries the burden of proving the conduct's triviality. *See Mihalki v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 111 (2nd Cir. 2013). Defendants' have established prima facie that they did not treat plaintiff "less well" than other employees. Although plaintiff claims that a hostile work environment arose from Pepper's comments regarding Serena Williams, comments about three white employees he referred to as "the future of the Fund", and walking past her desk multiple times in one day, these amount to nothing more than petty slights of trivial inconveniences. *See Buchwald v Silverman Shin & Byrne PLLC*, 149 AD3d 560 (1st Dept 2017). Although plaintiff also claims that Pepper warned that he would monitor her telephone calls, she does not represent whether this happened to others as well and, thus, this Court cannot discern whether this resulted in plaintiff being treated "less well" than others.

**Retaliation Pursuant to NYCHRL**

> Under the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Administrative Code § 8-107 (7). 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 [**27] 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, 948 N.Y.S.2d 263 (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, 893 N.Y.S.2d 37 (1st Dept 2010) (internal quotation marks and citations omitted).

*Leader v City of N.Y.*, 2020 NY Slip Op 30807(U), *26-27 (Sup Ct, NY County 2020).

> "To establish its entitlement to summary judgment in a retaliation case, a defendant must demonstrate that the plaintiff cannot make out a prima facie claim of retaliation or, having offered legitimate, nonretaliatory reasons for the challenged actions, that there exists no triable issue of fact as to whether [*28] the defendant's explanations were pretextual.'" *Brightman v Prison Health Serv., Inc.*, 108 AD3d at 740-741, quoting *Delrio v. City of New York*, 91 AD3d 900, 901 (2d Dept 2012); *see Lambert v. Macy's E., Inc.*, 84 AD3d 744, 745 (1st Dept 2011). As with other NYCHRL discrimination claims, it is not necessary in NYCHRL cases based on retaliation to show that retaliation was the sole motive for the adverse employment action. *See Melman*, 98 AD3d at 127.

*Walsh v. A.R. Walker & Co.*, 2018 NYLJ LEXIS 4238, *27-28 (Sup Ct New York County 2018).

If the defendant meets this burden, then the ultimate burden shifts to plaintiff, who must prove a causal connection between the adverse action and her protected activity, and that the reasons put forth by the defendant were merely a pretext for unlawful discrimination. *Brightman*, 108 AD3d 739, 740 (2d Dept 2013).

This Court is to "construe [the NYCHRL] ... broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Fletcher*, 99 AD3d at 51-52 (1st Dept 2012). Even if the alleged retaliation does not result in an ultimate action or materially adverse change in the terms and conditions of employment, "retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in a protected activity." NYC Admin Code § 8-107.

Here, even viewing the evidence in the light most favorable to plaintiff, this Court finds that plaintiff has failed to meet the foregoing standard, and that she fails to raise an issue of fact regarding whether defendants retaliated against her. Initially, plaintiff has not shown that she was fired or demoted, or that her workstation was changed, as a result of complaining about Pepper. Plaintiff knew about Baptiste's planned January 2016 retirement approximately 1 ½ years prior to that date. Since the Fund decided not to replace Baptiste, but rather to reassign her work to others, there was no reason for plaintiff to remain at the workstation outside of Baptiste's

office after the latter retired. Additionally, as noted above, although plaintiff's duties were changed at or about the time of Baptiste's retirement, this was because the retirement required a reorganization of the labor needed to support the Executive Department. Thus, this change in plaintiff's duties was not an adverse employment action. *See Silvis v City of New York*, 95 AD3d at 665; *cf. Williams v N.Y.C. Hous. Auth.*, 61 AD3d at 71.

Additionally, the change of plaintiff's workstation was not an adverse employment action and, even if it could be deemed as such, there is no evidence that the location of her desk was changed because of her race, gender or sexual preference. *Leader v City of N.Y., supra.* For a change in working conditions to be considered materially adverse, they 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, 792 N.Y.S.2d 56 (1st Dept 2005) (internal quotation marks and citations omitted). Moreover, plaintiff does not deny that her salary remained the same after the reorganization. Doc. 30 at par. 23.

Plaintiff further maintains that, after she complained to Pepper about his comments regarding Serena Williams, he no longer gave her a cash bonus at Christmas, as he had every year prior. Doc. 31 at 70-74. When asked how she knew that the other members of the administrative staff received bonuses, plaintiff

responded that she "saw them receive an envelope and [she] saw when they opened them." Doc. 31 at 72. Although she said that she knew the envelopes were from Pepper she did not specifically state that she saw him hand them out. Thus, her testimony that the envelopes contained bonuses is speculative and conclusory, and this Court notes that she never called any of the witnesses who received these alleged bonuses to appear for a deposition to confirm whether Pepper gave the envelopes to her co-workers or why. *See Bunn v City of New York*, 180 AD3d 550 (1st Dept 2020). Also speculative is and conclusory is plaintiff's claim that she was assigned less prestigious duties "in hopes that [she] would resign." Doc. 30 at par. 23.

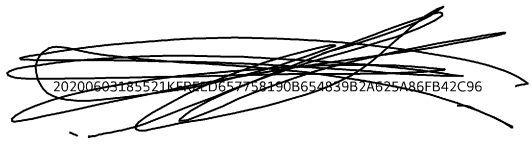
This Court has considered the parties' remaining arguments and finds them to be without merit or unnecessary to address given its conclusions.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.




6/3/2020
DATE

KATHRYN E. FREED, J.S.C.

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