SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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DEVON SMITH,

Plaintiff,

- v -

GLOBAL CONTACT HOLDING COMPANY, ET AL.,

Defendants.

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INDEX NO. 156087/2019

MOTION DATE

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11-40, 43-51, 55-57; (Motion 002) 41-42, 46-48, 52-53 _

were read on this motion to/for DISMISS/DISQUALIFY.

This is an action, inter alia, to recover damages for employment discrimination on the basis of gender and gender identity, and unlawful retaliation in violation of the New York State Human Rights Law (Executive Law art 15; hereinafter, the State HRL) and the New York City Human Rights Law (Administrative Code of City of NY § 8-101 et seq.; hereinafter, the City HRL).

In motion sequence number 001, defendants move pursuant to CPLR 3211 (a) (1) and (a)(7) to dismiss the complaint. Plaintiff opposes the motion.

In motion sequence number 002, defendants move to disqualify plaintiff's counsel from representing him in this action. Plaintiff opposes the motion and cross-moves for sanctions pursuant to 22 NYCRR 130-1.1.

Motion sequence numbers 001 and 002 are consolidated for disposition.

BACKGROUND

The following facts are drawn from plaintiff's verified complaint (Verified Complaint, NYSCEF Doc. No. 1). Plaintiff is a transgender man who is in the process of a medical and

social gender transition (*id.* at ¶ 11). As part of his social transition, he identifies as a man and uses the name "Devon" and masculine pronouns to correspond with his gender identity (*id.* at ¶ 12).

Defendants Global Contact Holding Company, Inc. and Global Contact Services LLC (hereinafter together, GC) provide call center services for New York City's Access-a-Ride program (*id.* at ¶¶ 4-5). In or about April 2018, GC hired plaintiff as a customer service agent (*id.* at ¶ 13). At the start of training, GC's training staff honored plaintiff's request to identify him as a man, use the name "Devon" and masculine pronouns when speaking with or about him, and that the name "Devon" be printed on his identification badge (*id.* at ¶¶ 14-15).

In or about May 2018, plaintiff successfully completed training for the position and began working on the floor of the call center (*id.* at ¶ 17). Plaintiff alleges that thereafter, and for the entire period of his employment with GC, he was subjected to discrimination, harassment, and retaliation because of his gender identity (*id.* at ¶ 18).

Allegations Regarding Defendant Nadia Darson, Director of Human Resources

According to the complaint, in June 2018, plaintiff met with a quality assurance supervisor for a routine review of his performance. During this meeting, the supervisor inquired about plaintiff's use of the name "Devon" on recorded calls (*id.* at ¶ 20). Plaintiff explained that he is a transgender individual in the process of transitioning to a man, and that as part his transition, he identifies himself as "Devon" and uses male pronouns (*id.* at ¶ 21). The supervisor told plaintiff to contact GC's Human Resources (HR) Department (*id.* at ¶ 22).

Later that day, plaintiff notified the HR Department of his gender identity, that he was in the process of transitioning, and of his preferred name and pronouns (*id.*). He also requested that his first name be changed to "Devon" in GC's computer system and that GC employees refer to

him using masculine pronouns (*id.* at ¶¶ 22-23). An HR associate gave plaintiff a "request form" to complete and implemented the name change (*id.* at ¶ 24).

For a brief period of time, GC identified plaintiff as "Devon Smith" for the purposes of "ADP payroll, the ADEPT vehicle dispatch system, PIPKINS workforce management scheduling system, and the AVAYA telephone system" (*id.* at ¶ 25). Some members of the management team and some of plaintiff's coworkers began, or continued, to refer to him as "Devon" and used masculine pronouns (*id.*). In addition, plaintiff's July 20, 2018 paycheck was made payable to "Devon Smith" (*id.* at ¶ 26). However, GC's Director of HR, defendant Nadia Darson, called to notify plaintiff that GC reversed his name change and replaced his name in the system to a feminine name that did not correspond with his gender identity (*id.* at ¶ 27). When plaintiff objected, Darson informed plaintiff that it was GC's policy that the name in its systems must be the same name used on an employee's government-issued identification (*id.* at ¶ 28). Thereafter, Darson made a point of refering to plaintiff by a feminine name and used feminine pronouns on documents and when speaking to or about plaintiff (*id.* at ¶ 31).

Allegations Regarding Defendant Damaris Merritt, Director of Travel Services

When plaintiff started working on the floor, he also met with defendant Damaris Merritt, GC's Director of Travel Services. Plaintiff informed Merritt that he is a transgender man and requested that GC employees use the name "Devon" and male pronouns when referring to him (*id.* at ¶ 46). Merritt refused (*id.* at ¶ 47).

In or about late May or early June 2018, Merritt met with plaintiff and another associate in Merritt's office. Merritt referred to the pair as "ladies." Plaintiff reminded Merritt that he identifies as a man, and again requested that Merritt use his masculine name and pronouns (*id.* at

¶ 48). Merritt again refused, stating something to the effect of "I'm not going to call you Devon or he, everyone can see you are a woman" (*id.* at ¶ 49).

On another occasion, when plaintiff told Merritt that he was undergoing a medical and social gender transition, Merritt indicated that she disapproved and said, "Why would you want to do that?" (*id.* at ¶ 50). Merritt also gestured to plaintiff's chest and stated, "you've got some big things up there, you're no guy" (*id.* at ¶ 51). Merritt continued to address plaintiff as a woman during all interactions. Each time plaintiff reminded Merritt that he identifies as a man, and asked that she use the name and pronouns corresponding with his identity, Merritt refused (*id.* at ¶ 52).

Allegations Regarding Defendant Danielle Chisolm, Plaintiff's Supervisor/Team Leader

During an initial supervisory meeting with his supervisor/team leader, defendant Danielle Chisolm, Chisolm referred to plaintiff by a feminine name. Plaintiff informed Chisolm that he is a transgender male and requested that she use the name and pronouns corresponding with his gender identity (*id.* at ¶ 55). Chisolm refused, informing plaintiff that she would not use "nicknames" and would only use the name appearing on plaintiff's "paper." When plaintiff reiterated that he is transgender and was going through a transition, Chisolm persisted in her refusal, expressly stating: "I'm not calling you Devon, I'm referring to you as the name on our paperwork" (id. at ¶ 56). Plaintiff showed Chisolm his temporary badge identifying him as "Devon," but his attempts to convince Chisolm to use the name and pronouns corresponding with his gender identity failed (*id.* at ¶¶ 57-58).

Shortly thereafter, on or about August 22, 2018, Merritt and Chisolm subjected plaintiff to written discipline for a purported failure to inform them that he would not report for his scheduled shift, even after plaintiff provided proof that discipline was unwarranted (*id.* at ¶¶ 59-

60). When plaintiff requested assistance from Chisolm as his supervisor, Chisolm regularly told plaintiff that she was no longer his team leader and refused to assist him (*id.* at ¶ 62). Chisolm also stopped using any name or pronouns when speaking to plaintiff, and eventually stopped speaking to plaintiff altogether even though she was plaintiff's direct supervisor (*id.* at ¶ 63-64).

Allegations Regarding Defendant Annitte Brown, Supervisor/Team Leader

Plaintiff also addressed his gender identity with defendant Annitte Brown, a supervisor/team leader who managed customer service associates working in plaintiff's vicinity (*id.* at ¶ 65). In or about May or June 2018, Brown conducted a meeting with several associates on the floor and referred to plaintiff as "my girl." Plaintiff corrected Brown, stating, "you mean him, Annitte" (*id.* at ¶¶ 66-67). Plaintiff told Brown that he identifies as a man, and asked Brown to call him by the name and pronouns corresponding with his gender identity. Several coworkers from plaintiff's training class who were present informed Brown that plaintiff was openly transgender and identified himself as a man to management and others from the day he was hired (*id.* at ¶ 68). Brown nevertheless refused and continued to refer to plaintiff as a woman, and by a feminine name and pronouns for the duration of his employment (*id.* at ¶ 69). Brown also subjected plaintiff to offensive and hostile comments, including referring to him as a "fat bitch" when discussing him with another supervisor (*id.* at ¶ 70).

Allegations Regarding Plaintiff's Medical Leave and Termination

In addition, to being subject to inaccurate disciplinary warnings, plaintiff was refused medical leave of a duration advised by his doctor, threatened repeatedly with termination, and terminated twice while working at GC (*id.* at ¶¶ 72-73). In this regard, the complaint includes the following allegations. On or about September 20, 2018, plaintiff took a leave of absence from his employment for medically necessary surgery on his knee. His physician advised that he

remain on leave until December 2018 (*id.* at ¶¶ 74-75). When plaintiff requested a medical leave of absence, defendant Merritt threatened to fire him if he took a leave (*id.* at ¶ 76).

Although plaintiff was eventually granted a medical leave, Darson and Merritt refused to grant him a leave sufficient for his recovery. Instead, they granted him a 30-day medical leave (until October 2018), which was extended for an additional 30 days (until November 2018).As a result, plaintiff's knee did not properly heal and he now requires at least one additional surgery (*id.* at ¶¶ 77-78).

As required by GC's policies, plaintiff remained in contact with GC during his medical leave, specifically updating Merritt about his recovery and return (*id.* at ¶ 79). Plaintiff asked Merritt five or six times to extend his leave past the end of November. However, Merritt refused and told plaintiff with increasing frequency that she would fire him if he did not return to work against his doctor's recommendation (*id.* at ¶ 80). Plaintiff was so distraught by Merritt's threats that he returned to work on November 1, 2018, against the advice of his doctor (*id.* at ¶ 82). When plaintiff returned to work, Merritt refused to allow plaintiff to enter her office for any purpose (*id.* at ¶ 84).

On or about November 29, 2018, plaintiff was absent from work due to complications from his surgery (*id.* at ¶ 85). He notified GC that he would be absent and not available to work his shift on November 29 and 30, 2018 (*id.* at ¶ 86). Plaintiff is a certified client of the Access-a-Ride program and schedules his trips through GC's services (*id.* at ¶ 87). When he attempted to return to work on December 1, 2018, his scheduled trip had been cancelled in the Access-a-Ride system (*id.* at ¶ 88). Plaintiff contacted GC per the appropriate policies to report that he would not be present at the start on his shift, and also directly contacted Merritt, explaining that his trip

had been cancelled and requested assistance (*id.* at ¶ 89). Defendants did not assist him and did not follow up, and plaintiff was not able to get to work until December 2, 2018 (*id.* at ¶ 90).

When plaintiff returned for his shift on December 2, 2018, he provided medical documentation for his absence (*id.* at ¶ 9). On or about December 5, 2018, GC terminated him for disciplinary infractions, many of which were false (*id.* at ¶ 92). For example, plaintiff's regular schedule was Tuesday through Saturday. The Notice of Termination presented to plaintiff when he was fired indicated that he was terminated because he was absent without cause or permission on November 26, 2018, a Monday, when he was not even scheduled to work (*id.* at ¶ 93). The Notice of Termination also indicated that plaintiff failed to report that he would be absent on December 1, 2018, when in fact, plaintiff followed policy and contacted GC as early as about 5:30 a.m. (*id.* at ¶ 94).

Through a negotiation process with his union, plaintiff returned to work on or about February 18, 2019 on a Sunday through Thursday schedule (*id.* at ¶ 95). When plaintiff returned to work, Merritt refused to speak to him, refused to assist him in obtaining his identification badge, and refused to grant him access to his locker which contained, among other things, equipment he needed for work (*id.* at ¶ 97).

When plaintiff finally received his identification badge, it identified him with a feminine name, even though he was identified as "Devon" on his temporary identification badge and made many requests that defendants use his masculine name and pronouns (*id.* at ¶ 98). On all other documents, defendants identified plaintiff with a feminine name and pronouns that did not correspond with his gender identity (*id.* at ¶ 99).

On or about February 20, 2019, plaintiff approached Merritt again to request assistance. Merritt responded, "I'm not dealing with you," or words to that effect, and shooed plaintiff away

(*id.* at ¶ 100). Chisolm was present and witnessed the interaction. Speaking about plaintiff, Chisolm stated "I don't know why they let that fat bitch back" or words to that effect (*id.* at ¶ 101). Merritt, Brown, and Chisolm also continued to use a name and gender pronouns that did not correspond with plaintiff's gender identity (*id.* at ¶ 102).

On or about March 2, 2019, plaintiff notified Frank Camp, the Head of Operations for GC, that he did not have childcare for his children on March 3 or 4, 2019. Plaintiff asked to be taken off the schedule for Sunday and to be allowed to work on Friday that week instead of Monday to accommodate his childcare needs (*id.* at ¶ 104). Despite his notice to GC that he was not available to work March 3 or 4 because he lacked childcare, GC refused to accommodate him (*id.* at ¶ 106).

On or about March 6, 2019, GC again terminated plaintiff (*id.* at ¶ 107). Plaintiff requested that he be permitted to pick up his final paycheck on March 15, 2019, the next regularly scheduled pay date (*id.* at ¶ 109). GC refused and in contravention Labor Laws § 191, informed plaintiff that it would mail his final paycheck (*id.* at ¶ 110). On March 15, 2019, plaintiff's union representative was present at GC's offices and with plaintiff's authority asked for the paycheck (*id.* at ¶ 111). GC refused, and falsely claimed to have mailed it earlier that morning (*id.* at ¶ 112).

Plaintiff did not receive his final paycheck until March 25, 2019, 10 days after his regularly scheduled pay date (*id.* at ¶ 113). The envelope containing the check was postmarked March 21, 2019, almost a week after GC claimed it was mailed (*id.* at ¶ 114). Also, Antoinette Currie, GC's General Counsel and Senior Vice President of HR, responded to inquiries from plaintiff's union regarding the status of his check by stating "We don't have an employee by the name of Devon Smith," and insisted that plaintiff was identified by GC with a feminine name

and pronouns (*id.* at ¶ 115). Currie commented that if plaintiff asked GC to use the name "Devon" and masculine pronouns, it would "make note of the preference" (*id.* at ¶ 116).

The Instant Action

Based on the foregoing allegations, plaintiff commenced this action against defendants seeking damages for violations of the State and City HRLs, and for declaratory and injunctive relief. In the first cause of action, plaintiff claims that defendants violated the State HRL by discriminating against, harassing and subjecting him to a hostile work environment on the basis of his gender and gender identity (*id.* at ¶¶ 121-128). In the second cause of action, plaintiff claims that defendants violated the State HRL by retaliating against him for reporting their discriminatory practices and hostile work environment (*id.* at ¶¶ 129-132). In the third cause of action, plaintiff claims that defendants violated the City HRL by discriminating and retaliating against him and for complaining about the discrimination and retaliation (*id.* at ¶¶ 133-139). Plaintiff also seeks a judgment declaring that the acts and practices complained of violated the State and City HRLs, enjoining and permanently restraining such violations, and directing defendants to take such affirmative actions as are necessary to ensure that the effects of these practices are eliminated and do not continue to affect plaintiff and other employees (*id.* at pages 18-19).

In motion sequence number 001, defendants now move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint on the grounds of documentary evidence and failure to state a cause of action. In motion sequence number 002, defendants move to disqualify plaintiff's counsel from representing him in this action and plaintiff cross-moves for sanctions pursuant to 22 NYCRR 130-1.1. For the following reasons, the motions and cross motion are denied.

DISCUSSION

Defendants' Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211 (a) (1), "[d]ismissal is warranted only if the documentary evidence establishes a defense to the asserted claims as a matter of law. Thus, defendant bears the burden of demonstrating that the proffered [evidence] conclusively refutes plaintiff's factual allegations" (*Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 105-106 [2018] [internal quotation marks and citations omitted]). On a motion to dismiss pursuant to CPLR 3211 (a) (7), "the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference. Whether the plaintiff can ultimately establish [his] allegations is not part of the calculus in determining a motion to dismiss" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [internal quotation marks and citation omitted]).

The Employment Discrimination Claims

The State HRL prohibits discrimination in employment and employment-related matters on the basis of "gender identity or expression" (Executive Law § 296 [1]). The statute defines "gender identity or expression" as follows: "a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender" (Executive Law § 292 [35]). The City HRL also prohibits employment discrimination on the basis of "gender," which includes "actual or perceived sex, gender identity and gender expression, including a person's actual or perceived gender-related self-image, appearance, behavior, expression or other gender-related characteristic, regardless of the sex assigned to person at birth"

(Administrative Code of City of NY §§ 8-102, 8-107[1]).

Both the State and City HRLs require that their provisions be "construed liberally" to accomplish the remedial purposes of prohibiting discrimination (*see* Executive Law § 300; Administrative Code of City of NY § 8-130; *see Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]); *Matter of Binghamton GHS Empls. Fed. Credit Union v State Div. of Human Rights*, 77 NY2d 12, 18, [1990]; *Sanders v Winship*, 57 NY2d 391, 395 [1982]). In 2005, the New York City Council (hereinafter, the Council) enacted the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 [2005] of City of NY, hereinafter, the Restoration Act), amending the City HRL (Administrative Code of City of NY § 8-101 et seq.). The Restoration Act "explicitly requires an independent liberal construction analysis [of its provisions] . . . targeted to understanding and fulfilling . . . the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart state or federal civil rights law" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]; *see* Administrative Code of City of NY § 8-130; *Albunio*, 16 NY3d at 477-478 (2011); *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 112 [1st Dept 2012]). "The Council sought to 'underscore' that the provisions of the City's [HRL] are to be construed independently of similar provisions of state and federal [HRLs] and declared that interpretations of similarly worded provisions are to be viewed 'as a floor below which the City's [HRL] cannot fall'" (*Nelson v HSBC Bank USA*, 87 AD3d 995, 996 [2d Dept 2011], quoting Local Law No. 85 [2005] of City of NY § 1).

"[E]mployment discrimination cases are . . . generally reviewed under notice pleading standards" (*O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83, 91 [1st Dept 2017], quoting *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]). As such, a liberal pleading standard is applied for determining whether a plaintiff has stated a cause of action for

violations of both the State and City HRLs (*see Walzer v Metropolitan Transp. Auth.*, 117 AD3d 525, 525-526 [1st Dept 2014]; *Vig v New York Hairspray Co.*, L.P., 67 AD3d at 145).

> A plaintiff states a claim of invidious discrimination under the State and City HRLs by alleging (1) that he/she is a member of a protected class, (2) that he/she was qualified for the position, (3) that he/she was subjected to an adverse employment action (under State HRL) or he/she was treated differently or worse than other employees (under City HRL), and (4) that the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination.

(*Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]; *see* Executive Law § 296; Administrative Code of City of NY § 8-107).

Here, plaintiff has alleged that he is part of a protected class due to his gender identity and that he was qualified for his position, having successfully completed the required training. Plaintiff also sufficiently pleaded that he was treated adversely in that defendants refused to grant him a medical leave sufficient for his recovery, that he was subject to unwarranted discipline, and terminated twice under circumstances giving rise to an inference of discrimination. In this regard, the complaint alleges that despite having been informed that plaintiff identifies as a male and would like to be referred to using the name "Devon" and male pronouns, defendants persisted in repeatedly using a female name and pronouns when referring to him, which did not correspond to his gender identity. Additionally, plaintiff was subject to remarks such as "I'm not going to call you Devon or he, everyone can see you are a woman" and "you've got some big things up there, you're no guy." He was also referred to as "my girl" and "fat bitch." These allegations, viewed in the light most favorable to plaintiff, are indicative of discriminatory animus.

While "[s]tray remarks" "do not, without more, constitute evidence of discrimination" (*Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 494 [1st Dept 2014] [internal quotation marks and citation omitted]; *see Melman v Montefiore Med. Ctr.*, 98 AD3d at 125 ; *Mete v New York State*

Off. of Mental Retardation & Dev. Disabilities, 21 AD3d 288, 294 [1st Dept 2005]), "[v]erbal comments can serve as evidence of discriminatory motivation when a plaintiff shows a nexus between the discriminatory remarks and the employment action at issue" (*Chiara v Town of New Castle*, 126 AD3d 111, 124 [2d Dept 2015]; *see Schreiber v Worldco*, LLC, 324 F Supp 2d 512, 518 [SD NY 2004]; *Cherry v New York City Hous. Auth.*, 2017 US Dist LEXIS 161830, 2017 WL 4357344, at *19 [ED NY, Sept. 29, 2017, No. 15-Civ.-6949 (MKB)]).

> In determining whether a comment is a probative statement that evidences an intent to discriminate or whether it is a non-probative 'stray remark,' a court should consider the following factors: (1) who made the remark, i.e., a decisionmaker, a supervisor, or a low-level co-worker; (2) when the remark was made in relation to the employment decision at issue; (3) the content of the remark, i.e., whether a reasonable juror could view the remark as discriminatory; and (4) the context in which the remark was made, i.e., whether it was related to the decision making process.

(*Schreiber v Worldco, LLC*, 324 F Supp 2d at 519). No one factor is dispositive (*see Chiara v Town of New Castle*, 126 AD3d at 125; *Henry v Wyeth Pharmaceuticals, Inc.*, 616 F3d 134, 149 [2d Cir 2010]).

Here, the complaint alleges that at all relevant times, the individual defendants possessed management and supervisory authority over plaintiff, including the authority to cause his termination and to affect the terms and conditions of his employment. Considering (1) that the remarks regarding plaintiff's gender identity were made by decisionmakers and supervisors after plaintiff made it clear that he is a transgender man and uses a male name and pronouns, (2) the close temporal proximity of the remarks to the employment decisions at issue, and (3) that a reasonable juror could view the remarks as discriminatory, plaintiff's allegations demonstrate a connection between defendants' comments and the employment decisions at issue sufficient to give rise to an inference of discrimination (*see also* NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local

Law No. 3 [2002] Administrative Code of City of NY § 8-102 [23] [2016] [available at https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderID_InterpretiveGuide_2015.pdf] ["refusal to use a transgender employee's preferred name, pronoun, or title may constitute unlawful gender-based harassment"]; ["The NYCHRL requires employers . . . to use an individual's preferred name, pronoun and title (e.g., Ms./Mrs.) regardless of the individual's sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the individual's identification"]; ["All people, including employees . . . have the right to use their preferred name regardless of whether they have identification in that name or have obtained a court-ordered name change, except in very limited circumstances where certain federal, state, or local laws require otherwise (e.g., for purposes of employment eligibility verification with the federal government)"]).

In support of their motion, defendants assert that the discrimination claims should be dismissed because plaintiff was terminated for legitimate reasons related to his attendance. However, the documents submitted by defendants in this regard (NYSCEF Doc. Nos. 21, 23, 24, 25) do not conclusively refute plaintiff's allegations or resolve all of the factual issues at hand.

Defendants also argue that plaintiff should be equitably estopped from arguing that he was discriminated against based upon his gender identity inasmuch as he self-identified as "Devonia" and as a female on all of his employment-related documentation, including (but not limited to) the official documents that he submitted to GC and to government agencies on his IRS Form W-4, New York State Employee's Withholding Allowance Certificate, Direct Deposit Form, application for disability benefits, and applications for unemployment insurance to the New York State Department of Labor (NYSCEF Doc. Nos. 18, 19, 20, 31, 33). Defendants assert that aside from one reference to "Devon Smith" on plaintiff's July 30, 2018 paycheck,

none of the records that plaintiff submitted to GC indicate that he asked to be referred to as a "Devon Smith" or by male pronouns. Defendants also point out that in paragraph 105 of the verified complaint, plaintiff refers to himself using the female pronoun "her" (NYSCEF Doc. No. 001, ¶ 104). In addition, they submit medical documents on which plaintiff's providers refer to him as "Devonia" (NYSCEF Doc. No. 32), as well as correspondence wherein his attorney refers to him as "Devonia" (NYSCEF Doc. No. 28).

Defendants contend that these "admissions," made before and after his employment with GC, estop plaintiff from asserting facts to the contrary. They aver that "[in] the end, Plaintiff purports to maintain claims . . . against Defendants for calling him by the feminine name 'Devonia' and by female pronouns – the very same conduct that he, his medical providers, and his counsel have done" (NYSCEF Doc. No. 39, at 3). Defendants argue that they were "entitled to rely upon Plaintiff's self-identification as 'Devonia' and as female, and it would be a clear breach of equitable estoppel doctrine for Plaintiff to be permitted to continue his case asserting the contrary" (*id.*).

Defendants' reliance on the doctrine of equitable estoppel is misplaced. "[I]n the absence of evidence that a party was misled by another's conduct or that the party significantly and justifiably relied on that conduct to its disadvantage, an essential element of estoppel [i]s lacking" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., LP.*, 7 NY3d 96, 106-107 [2006][internal quotation marks and citations omitted]). In this case, defendants take the position that they were misled by documents and e-mails on which plaintiff identified himself as "Devonia" or as a female. However, plaintiff specifically alleges in his complaint that he informed all of the individual defendants, including Darson (GC's director of HR), that he is a transgender male and requested that he be referred to as "Devon" and by the use of male

pronouns. None of the documents submitted by defendants in support of their motion utterly refutes these allegations. Therefore, accepting these allegations as true and according plaintiff the benefit of every possible favorable inference, the doctrine of equitable estoppel is inapplicable.

Lastly, defendants argue that even if plaintiff is able to establish liability as to GC, his claims against Darson, Merritt, Brown, and Chisolm (together, the individual defendants) should be dismissed because the complaint does not allege that the individual defendants actually participated in the conduct giving rise to the discrimination claim. They also assert that plaintiff has not alleged facts sufficient to establish individual liability under the State or City HRLs. These contentions are without merit.

"An individual will not be subject to liability under the [State HRL] unless he or she is shown to have an ownership interest or any power to do more than carry out personnel decisions made by others" (*Matter of New York State Div. of Human Rights v ABS Elecs., Inc.*, 102 AD3d 967, 969 [2d Dept 2013]; *see Patrowich v Chemical Bank*, 63 NY2d 541 [1984]; *Kaiser v Raoul's Rest. Corp.*, 72 AD3d 539, 540 [1st Dept 2010]; *Pepler v Coyne*, 33 AD3d 434 [1st Dept 2006]). The City HRL extends liability to "an employee," and "includes fellow employees under the tent of liability, but only where they act with or on behalf of the employer in hiring, firing, paying, or in administering the 'terms, conditions or privileges of employment'--in other words, in some agency or supervisory capacity" (*Priore v New York Yankees*, 307 AD2d 67, 74 [1st Dept 2003]).

Here, the complaint alleges that at all relevant times, each of the individual defendants "had management and supervisory authority over Plaintiff, including the authority to cause Plaintiff's termination and to affect the terms and conditions of Plaintiff's employment"

(Complaint, NYSCEF Doc. No. 001, at ¶¶ 10, 123, 135). Accepting these allegations as true, and according plaintiff the benefit of every possible favorable inference, the individual defendants may be subject to liability under the State and City HRLs. Furthermore, the complaint sufficiently alleges that they actually participated in the conduct giving rise to the discrimination claim.

Accordingly, defendants are not entitled to dismissal of plaintiff's discrimination claims.

The Hostile Work Environment Claim

Initially, it is noted that the complaint seeks damages for hostile work environment under the State HRL only. Under the State HRL, a plaintiff claiming a hostile work environment

> "must show that 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. To determine whether a hostile work environment exists, a court must consider all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interfered with an employee's work performance"

(*Reichman v City of New York*, 179 AD3d 1115, 1118 [2d Dept 2020][internal citations omitted]).

Plaintiff alleges that he was subject to a hostile work environment, by, among other things, the persistent and repeated use of a female name and pronouns when referring to him, and being subject to remarks such as "I'm not going to call you Devon or he, everyone can see you are a woman" and "you've got some big things up there, you're no guy." He was also referred to as "my girl" and "fat bitch." The complaint indicates that such incidents were pervasive and

occurred repeatedly throughout plaintiff's employment. Viewed in the light most favorable to plaintiff, the circumstances set forth in the complaint sufficiently allege that plaintiff was subject to a hostile work environment based on his gender identity under the State HRL.

Accordingly, defendants are not entitled to dismissal of plaintiff's hostile work environment claim.

The Retaliation Claims

Under both the State and City HRLs, it is unlawful to retaliate against any person because he or she has opposed discriminatory practices (*see* Executive Law § 296[7]; Administrative Code of City of NY § 8-107 [7]).

> To make out a prima facie claim of retaliation under the State HRL, a plaintiff must show that (1) he/she has engaged in a protected activity, (2) his/her employer was aware of such activity, (3) he/she suffered an adverse employment action based upon the activity, and (4) a causal connection exists between the protected activity and the adverse action. Under the City HRL, the test is similar, though rather than an adverse action, the plaintiff must show only that the defendant took an action that disadvantaged him or her.

(*Harrington v City of New York*, 157 AD3d at 585 [internal quotation marks and citations omitted]).

Here, plaintiff alleges that he engaged in protected activity by making repeated complaints about the aforementioned conduct. He alleges that defendants were aware of the protected activity because he made complaints to the Director of Travel Planning for GC, the Director of HR, and to his supervisor. He alleges that defendants retaliated against him for making the complaints by repeatedly addressing him as a woman, refusing to grant him a medical leave sufficient for his recovery from medically necessary surgery, subjecting him to inaccurate disciplinary warnings, threatening to fire him if he took medical leave, and terminating his employment twice. Viewed in the light most favorable to plaintiff, these allegations state a claim for retaliation under the State HRL.

"A fortiori, they state a claim under the [City HRL] (Administrative Code of City of NY § 8-107), which is more liberal than either its state or federal counterpart (*see* Administrative Code of City of NY § 8-130; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 65-67 [2009])" (*Brightman v Prison Health Servs., Inc.*, 62 AD3d 472, 472 [1st Dept 2009]). The retaliatory acts alleged in the complaint are "materially adverse" inasmuch as they "well might have dissuaded a reasonable worker from making . . . a charge of discrimination" and also "satisfy the requirement of the [City HRL] that they must be reasonably likely to deter a person from engaging in protected activity" (*id.* [internal quotation marks and citations omitted]).

Accordingly, defendants are not entitled to dismissal of plaintiff's retaliation claims.

Defendants' Motion to Disqualify Plaintiff's Counsel

Defendants move to disqualify plaintiff's counsel -- Laine A. Armstrong, Esq., Richard Soto, Esq. and their firm Advocates for Justice -- from representing him in this action pursuant to Rule 3.7 (a) of the Rules of Professional Conduct (22 NYCRR §1200.0). They argue that Armstrong and Soto should be disqualified because they will be key factual witnesses and have personal knowledge regarding contested, material issues relevant to their defense.

"The right to counsel is a valued right and any restrictions must be carefully scrutinized" (*Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 469-470 [1st Dept 2013][internal quotation marks and citation omitted]). This right "should not be abridged absent a clear showing that disqualification is warranted" (*Lombardi v Lombardi*, 164 AD3d 665, 667 [2d Dept 2018] [internal quotation marks and citations omitted]). "[W]here the rules relating to professional conduct are invoked not at a disciplinary proceeding but in the context of an ongoing lawsuit, disqualification . . . can [create a] strategic advantage of one party over another. Thus, the movant must meet a heavy burden of showing that disqualification is warranted"

(*Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d at 470 [internal quotation marks and citation omitted]; *see Kassis v Teacher's Ins. & Annuity Assn.*, 93 NY2d 611, 617 [1999]["because disqualification of a law firm during litigation may have significant adverse consequences to the client and others, it is particularly important that the [Rules of Professional Conduct] not be mechanically applied when disqualification is raised in litigation"] [internal quotation marks and citation omitted]).

> Rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.0) provides that, unless certain exceptions apply, '[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact' (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7 [a]). In order to disqualify counsel on the ground that he or she may be called as a witness, a party moving for disqualification must demonstrate that (1) the testimony of the opposing party's counsel is necessary to his or her case, and (2) such testimony would be prejudicial to the opposing party.

(*Lombardi v Lombardi*, 164 AD3d at 667). Furthermore, "[w]hen considering a motion to disqualify counsel, a trial court must consider the totality of the circumstances and carefully balance the right of a party to be represented by counsel of his or her choosing against the other party's right to be free from possible prejudice due to the questioned representation" (*Ferolito v Vultaggio*, 99 AD3d 19, 27 [1st Dept 2012] [internal quotation marks and citation omitted]).

Here, defendants assert that they intend to call Armstrong and Soto as key factual witnesses in this action because Armstrong and Soto continued to refer to plaintiff as "Devonia" and with female pronouns throughout plaintiff's tenure at GC and throughout plaintiff's grievance arbitration hearing in February 2019, as evidenced by various e-mails and correspondence (NYSCEF Doc. Nos 26-28). Defendants also point out that following the arbitration, although Armstrong took the opportunity to request certain revisions to the Consent Award [not defined], she did not request that the Consent Award be modified to refer to plaintiff by his preferred name of "Devon" and male pronouns (NYSCEF Doc. Nos. 29-30). Defendants

assert that the first time Armstrong requested that her client be referred to as "Devon" was in correspondence dated March 2019 (NYSCEF Doc. No. 37). They also highlight that one paragraph of the complaint in the instant action refers to plaintiff using the female pronoun "her" (NYSCEF Doc. No. 001, ¶ 104).

Defendants maintain that "[g]iven that the uncontroverted documentary evidence shows that Plaintiff's counsel Ms. Armstrong and Mr. Soto engaged in the very same conduct – referring to Plaintiff as 'Devonia' and with female pronouns – that forms the basis of his allegation of gender and gender identity discrimination and hostile work environment against Defendants, there is no doubt that his counsel will be critical witnesses in this case" (Defendants' Mem of Law, at 8-9, NYSCEF Doc. No. 42). They contend that Armstrong and Soto will be asked about their personal knowledge as to when plaintiff commenced his transition, and began identifying as "Devon," because they each continued to refer to him as "Devonia" well after April 2018. Moreover, defendants intend to call Armstrong as a witness to explain why she continued to refer to plaintiff as "Devonia" until March 2019, and what prompted Armstrong to suddenly start referring to Plaintiff as "Devon." Therefore, based on the foregoing, defendants contend that Armstrong and Soto's continued representation of plaintiff in this action will present a conflict of interest.

Defendants are, in essence, arguing that Armstrong's and Soto's testimony may be relevant to the veracity of plaintiff's claim that in April 2018, he informed defendants that he was a transgender man in the process of a medical and social gender transition, that he identifies as a man, and uses the name "Devon" and masculine pronouns to correspond with his gender identity. However, whether their testimony will prejudice plaintiff is speculative (*see*

Goldberger v Eisner, 21 AD3d 401, 401 [2d Dept 2005]). Therefore, defendants have failed to make a clear showing that disqualification of plaintiff's counsel is warranted.

Accordingly, defendants' motion to disqualify plaintiff's counsel must be denied.

Plaintiff's Cross Motion to Sanctions

Plaintiff cross-moves for sanctions pursuant to 22 NYCRR 130-1.1 on the ground that defendants' motion to disqualify his counsel is meritless and certain statements made in support of the motion are false. While the motion lacks merit, it cannot be said that it reaches to a level of frivolousness or harassment so as to warrant the imposition of monetary sanctions and the award of costs pursuant to 22 NYCRR 130-1.1.

Accordingly, plaintiff's cross motion for sanctions must be denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3211 (a) (1) and (a) (7) to dismiss the complaint is denied (motion sequence number 001); and it is further

ORDERED that defendants' motion to disqualify plaintiff's counsel from representing him in this action is denied (motion sequence number 002); and it is further

ORDERED that plaintiff's cross motion for sanctions pursuant to 22 NYCRR 130-1.1 is denied (motion sequence number 002).

6-26-20
DATE

PAUL A. GOETZ, J.S.C.

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