NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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Dr. Suzan Russell,

Plaintiff,

- against -

New York University, Joseph M. Thometz, Eve Meltzer, Fredric Schwarzbach, and Robert Squillance,

Defendants.

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Index №. 29210/2017E

Hon. **Howard H. Sherman**, Justice Supreme Court

The following papers numbered ____ to ___were read on these motions **(Seq. Nos. 6, 7)** for dismissal noticed on _____and duly submitted as **Nos.** __ on the Motion Calendar of _____

Sequence No. 6	Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	62-75
Cross Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits, Memorandum of Law	98-99
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Upon the foregoing papers, the two separate motions listed above are decided in accordance with the annexed decision and order.

Dated: _June 12 2020_____ **Hon._____**
HOWARD H. SHERMAN, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

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DECISION and ORDER
Index No. 29210/2017E

Howard H. Sherman, J.

Upon the foregoing papers, the separate motions of the defendants for dismissal pursuant to CPLR 3211 are decided as follows:

Plaintiff Suzan M. Russell is a former adjunct faculty member in New York University's ("NYU" or the "University") Liberal Studies Program. She alleges that the defendants based on the basis of her gender, sexual orientation, religion, and age subjected her to discrimination and harassment, and that she suffered retaliation for engaging in activity protected by New York State and City discrimination laws. The gravamen of the current dispute is whether any of the claims pending in this action survive the earlier dismissal of a related federal action. This Court previously stayed this action pending determination of the appeal in the related federal action. (Order, Sherman, J., April 18, 2018).

Facts and Procedural History

Plaintiff became embroiled in a petty dispute with defendants Joseph M. Thometz ("Thometz") and Eve Meltzer ("Meltzer") in December 2012, over comments made on an NYU listserv. Thometz sent a disparaging email to other faculty members in which he accused plaintiff of engaging in "disorganized rants," stated that she was "clearly in crisis," and characterized her as

"'a mean-spirited person." Thometz erroneously copied plaintiff on the email, which prompted a human resources complaint by plaintiff. The complaint was resolved amicably.

In 2013, Thometz and/or Meltzer, another professor, allegedly began a secret campaign to harass plaintiff. In June 2013, plaintiff began to receive unsolicited mail and email, some of which was pornographic. In addition, Thometz and/or Meltzer began to post comments on the Internet impersonating the plaintiff. This bizarre conduct allegedly ended on or about July 2013. The harassment was extensively investigated by NYU and the Manhattan District Attorney's office.

In March 2015, plaintiff commenced an action in the Southern District of New York, in which plaintiff asserted claims against NYU, Thometz and Meltzer under Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination in Employment Act, the New York State Human Rights Law, and the New York City Human Rights Law. She also sought damages for intentional infliction of emotional distress. (Russell v. New York Univ., 2017 U.S. Dist. LEXIS 111209, *aff'd* 739 Fed. Appx. 28, 2018 U.S. App. LEXIS 17138 [2d Cir. 2018]). Although Thometz initially denied that he was the source of the harassment, during a deposition conducted on April 15, 2016, Thometz admitted that he had in fact "signed [plaintiff] up for random 'free stuff'" and engaged in at least some on-line impersonation of the plaintiff. He explained that he did this in response to, or for the purpose of "mirroring" her behavior towards him (and other faculty) on the faculty listserv, in the hope of getting her to stop "spamming" the faculty listserv and/or prompting NYU's adoption of certain policies regulating the use of the listserv.

During the pendency of the federal action, on October 9, 2015, plaintiff's employment was terminated. The stated basis for the termination was that despite warnings, plaintiff repeatedly contacted a witness in the federal action (another faculty member) in violation of an order of the federal court.

The defendants in the federal action moved for summary judgment. The motion court first considered plaintiff's claims with respect to a hostile work environment in violation of Title VII and the ADEA. The court found that these claims failed because "on the undisputed factual record presented to the Court, no reasonable jury could find a sufficient basis to impute the alleged conduct to NYU." (Id at *76-77.) NYU provided a reasonable avenue for complaint, three NYU departments were involved in the ensuing investigation, and the online impersonation and other conduct was committed using a personal computer from locations outside of NYU. NYU offered to "filter" the offensive emails, and NYU had no solid basis (other than plaintiff's speculation) to connect Thometz or Meltzer to the complained-of conduct until at least December 17, 2013, when the DA's office interviewed Thometz. By the time Thometz admitted his involvement in April 2016, he was no longer employed by the Liberal Studies Program, and he discontinued all activities at NYU the next month. The court also found that NYU did not treat plaintiff differently with respect to her termination because of her membership in protected classes, as she failed to present evidence that her termination occurred under circumstances giving rise to an inference of discrimination.[1] The motion court similarly rejected claims for retaliation in violation of Title VII, and claims for discrimination and retaliation pursuant to Title IX.

The Court found that no exceptional circumstances existed warranting the exercise of supplemental jurisdiction over plaintiff's NYSHRL and NYCHRL claims against the NYU defendants as well as Thometz and Meltzer, and accordingly dismissed those claims without prejudice.

On September 29, 2017, during the pendency of plaintiff's appeal, plaintiff commenced this action. On appeal to the Second Circuit, plaintiff challenged the district court's dismissal of her hostile work environment claim against the NYU Defendants pursuant to Title VII and the ADEA,

[1] An arbitrator found that the penalty of termination was too severe, but did not find that termination of plaintiff's employment was motivated by any discriminatory or improper animus.

and the district court's dismissal of her Title VII retaliation claim against the NYU Defendants. The Second Circuit affirmed the motion court's findings.

Argument

Defendants Thometz and Meltzer

Defendants Thometz and Meltzer now move to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7) on the grounds of collateral estoppel, res judicata, and the statute of limitations. Defendants maintain that although the federal court did not consider the plaintiff's claims under the NYSHRL and NYCHRL, the underlying findings of fact may still preclude the state claims. (*Williams v New York City Tr. Auth.*, 171 A.D.3d 990, 992 [2d Dept. 2019] [where a federal court declines to exercise jurisdiction over a plaintiff's state law claims, collateral estoppel may still bar those claims provided that the federal court decided issues identical to those raised by the plaintiff's state claims].) The defendants argue that because all of plaintiff's claims asserted in this action are barred by the prior federal determination, plaintiff's complaint as against Thometz and Meltzer must be dismissed with prejudiced in its entirety.

Defendants further argue that the present complaint is barred by the statute of limitations. They argue that any discriminatory or retaliatory acts that occurred before September 29, 2014, three years before the filing of the complaint herein, are barred by the applicable statute of limitations period under the NYSHRL and NYCHRL. Likewise, they argue that the intentional infliction of emotional distress claim is barred by the applicable one-year statute of limitations period. Because Thometz, according to his own statement, allegedly ceased all activity with respect to plaintiff in July 2013, defendants argue that the NYSHRL and NYCHRL discrimination and retaliation claims based on race and disability, as well as her intentional infliction of emotional distress claim, are time-barred in their entirety. For the foregoing reasons, defendants argue that

plaintiff's second and fifth causes of action for discrimination based on race and disability, second and sixth causes of action for retaliation, and tenth cause of action for intentional infliction of emotional distress must be dismissed pursuant to CPLR § 3211(a)(5).

In addition, defendants argue that under both the NYSHRL and NYCHRL, individuals cannot be liable for discrimination absent some showing that: (1) the individual was an employer; or (2) the individual aided and abetted a violation of the law committed by the employer. See Exec. Law § 296(1), (6); NYC Admin. Code § 8-107(6). Defendants argue that plaintiff's bare and unsupported legal conclusion in the complaint that Thometz and Meltzer were plaintiff's "employers" is contrary to the findings of the federal court in the related action. Those assertions, or the additional assertions that these individual defendants aided and abetted NYU, defendants contend, are insufficient and require dismissal of the first, second, third, fifth, sixth, seventh, eighth and ninth causes of actions of the complaint as against Thometz and Meltzer.

Defendants further argue that plaintiff failed to plead facts showing discriminatory intent. They argue that plaintiff fails to plead any facts demonstrating that the defendants' conduct occurred as a consequence of plaintiff's alleged protected status, let alone that Thometz and Meltzer had knowledge of Plaintiff's age, race, religion, gender, sexual orientation.

Additionally, defendants argue that their conduct amounted to no more than petty slights or trivial inconveniences. They argue that each of plaintiff's factual underpinnings are insufficient, i.e.:

- In support of her claim for age discrimination, plaintiff relies on her receipt of mailings from AARP, arthritis materials, incontinence pads, and vaginal lubricants;
- With respect to her claim for employment discrimination based on her Jewish religion/race, plaintiff relies on a certain internet posting, her alleged receipt of a Qur'an, and certain mailings from various Christian organizations;

- As to anti-gay animus, plaintiff asserts that Thometz "outed her" by posting a statement that plaintiff "fancies" [another female] J.M., and by causing plaintiff to receive gay pornography.

Defendants maintain that these acts do not evince discrimination based on disability or gender. Similar to Plaintiff's discrimination claims, defendants argue that plaintiff's retaliation claims (plaintiff's second and sixth causes of actions against Thometz and Meltzer) must be dismissed pursuant to CPLR § 3211(a)(7), as neither one of those individuals participated in the adverse employment action, i.e., plaintiff's termination.

Plaintiff's eighth cause of action alleges that Thometz and Meltzer interfered with protected rights. NYC Admin. Code § 8-107(19). Defendants argue that plaintiff has failed to allege a specific protected right under the NYCHRL that Thometz and Meltzer allegedly interfered with, or that Thometz and Meltzer allegedly took action on behalf of NYU.

Lastly, defendant's contend that the intentional infliction of emotional distress cause of action must be dismissed for failure to state a claim under CPLR § 3211(a)(7), as the alleged conduct did not constitute "extreme and outrageous conduct" sufficient to support the cause of action.

Defendants NYU, Fredric Schwarzbach and Robert Squillace (collectively "NYU Defendants")

The NYU defendants similarly move to dismiss pursuant to CPLR 3211(a)(5) and (7). They argue that the claims are barred by collateral estoppel, and that the addition of Schwarzbach as an individual defendant, or attempts to re-label her causes action or include an additional protected category, cannot sustain cognizable claims against any of the NYU Defendants. Dismissal of Russell's NYSHRL and NYCHRL claims is warranted as plaintiff fails to allege any new facts that could support a claim that the NYU Defendants mistreated her as a result of her gender, race,

disability, sexual orientation, or membership in another protected class, or took any actions based on a discriminatory or retaliatory animus.

To the extent that plaintiff attempts to impose individual liability on Schwarzbach or Squillace as her purported "employer," the NYU defendants argue that the complaint lacks any factual allegations that these individuals fall within the definition of "employer" under the NYSHRL or the NYCHRL, or that they encouraged, condoned or approved Thometz's or Meltzer's purported discriminatory conduct. (*See, e.g., Doe v. Bloomberg, L.P.*, 178 A.D.3d. 44, 48 [1st Dept. 2019]). Further, there is no allegation that either Schwarzbach's or Squillace's engaged in harassing conduct, or created a hostile work environment.

Plaintiff's arguments

Plaintiff notes that the federal court explicitly dismissed the plaintiff's NYSHRL and NYCHRL claims without prejudice, and did not engage in an analysis of any of plaintiff's state law claims. Because the federal court did not make any independent determination regarding the merits of plaintiff's state law discrimination claims, plaintiff argue, these claims, which contain stronger safeguards against discriminatory conduct, should not be barred by collateral estoppel.

Plaintiff maintains that she has properly alleged discrimination, hostile work environment, and retaliation claims against defendants, based on having received pornographic and other materials to her mailbox -- things targeting her protected categories such as a Quran and various Christian material even though she is Jewish; receiving pornographic material directed toward her sexual orientation; and finally, being sent incontinence materials and products because of her age. As to the NYU defendants, plaintiff argues that they failed to properly investigate the harassment, and terminated her based on improper motives.

With respect to the statute of limitations, plaintiff argues that 28 U.S.C. § 1367 specifically allows for a 30-day grace period following dismissal of federal claims for a plaintiff to file state law claims in state court (*Artis v. District of Columbia*, 138 S. Ct. 594 [2018]), and that the federal action tolls any other applicable statutes of limitations during the time that the case is pending in federal court.

Plaintiff asserts that she has now specifically alleged in the complaint (contrary to the allegations in the federal court) that defendant Thometz and Meltzer had supervisory power and was able to make personnel decisions within defendants organization, and therefore can be held fully liable as employers under both the NYSHRL and NYCHRL. But even assuming that Thometz and Meltzer had no supervisory power, plaintiff argues that co-workers as individual can be held personally liable for their own harassing conduct on an aiding and abetting theory. Plaintiff contends that the NYCHRL creates direct liability for employment discrimination not only against the employer, but also "an employee or agent thereof." N.Y.C. Admin. Code §8-107(l)(a). Thus, plaintiff argues, the NYCHRL provides for individual liability of an employee regardless of ownership or decision-making power. (*Malena v. Victoria's Secret Direct, LLC*, 886 F.Supp.2d 349, 366 [S.D.N. Y. 2012]). Plaintiff argues that this result obtains as well under the NYSHRL, and that under both statutes, the plaintiff must show that the individual defendant engaged in discriminatory or retaliatory acts. (*Stallings v. U.S. Elec. Inc.*, 270 A.D.2d 188, 707 N.Y.S.2d 9, 10 [1st Dept. 2000]). In other words, the status of the wrongdoer - whether he is a coworker, supervisor, owner, or other employee - is irrelevant when determining individual liability under the NYCHRL. (*See, e.g., Harrison v. Banque Indosuez*, 6 F.Supp.2d 224 at 233-234 (1998) ("defendant who actually participates in the conduct that gives rise to a discrimination claim may be held personally liable under the HRL, regardless of the defendant's status in the corporation"); *Williams v. City of New York*, 2006 WL 2668211, at *25-26 (E.D.N.Y 2006) (defendant liable "even though coworker

lacked the authority to either hire or fire the plaintiff."). Similarly, the liability of the employer is irrelevant under the NYCHRL. (*See, e.g., Falbaum v. Pomerantz*, 891 F.Supp. 986, 993 [S.D.N.Y. 1995] [allowing individual liability although no claims against employer asserted); *Maloff v. City Commission*, 46 N.Y.2d 902, 904 [1979] [finding harasser individually liable for damages]; N.Y.C. Local Law No. 85 of 2005, § 1 (Oct. 3, 2005) (Restoration Act); Gurian, A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law, 33 Fordham Urb. L.J. 255, 274 & 297 [Jan. 2006] [stating that, after 2005 Restoration Act, there should be no doubt as to whether NYCHRL provides for individual employee liability]).

Plaintiff also argues that she has stated a claim for interference with a protected right, a plaintiff must show coercion, intimidation, threats, or interference in her exercise or enjoyment of a right. (*Nieblas-Love v. New York City Housing Authority*, 165 F. Supp. 3d 51, 78 [S.D.N.Y. Feb. 26, 2016] [citing N.Y.C. Admin. Code § 8-107[9]). Additionally, where a court has found that plaintiff "plausibly alleged discrimination or retaliation claims, a claim for unlawful interference under the NYCHRL, 'as a further extension of these claims, ... should not be dismissed outright without the benefit of further judicial proceedings." (*Parker v. Workmen's Circle Center of the Bronx, Inc.*, 2015 WL 5710511, at * 7 (S.D.N.Y. Sept. 29, 2015) (denying the defendants' motion to dismiss plaintiffs' NYCHRL claims).

Plaintiff further argues that the individual defendants created a hostile work environment and engaged in discrimination. With respect to defendant Meltzer, the complaint alleges that she had personal knowledge of what was being sent to plaintiff, and was a participant in this conduct. Further, the complaint expressly alleges that the mail that plaintiff was receiving was originally generated from defendant Meltzer's computer, thereby properly alleging that defendant Meltzer was an active participant in the discriminatory and harassing conduct that plaintiff was subjected to and therefore she should not be dismissed from the case.

Lastly, plaintiff argues that defendant Thometz and Meltzer clearly engaged in outrageous and extreme conduct, so as to go beyond all possible bounds of decency, thereby alleging intentional infliction of emotional distress.

Discussion

NYU Defendants

The NYU defendants correctly demonstrate that the factual determinations underlying the federal court's findings collaterally estopp the plaintiff from asserting new factual theories which conflict with the prior determinations. "Where a federal court declines to exercise jurisdiction over a plaintiff's state law claims, collateral estoppel may still bar those claims provided that the federal court decided issues identical to those raised by the plaintiff's state claims" (*Milione v City Univ. of N.Y.*, 153 AD3d 807, 808-809, 59 NYS3d 796 [2017].) This reasoning has been applied in the context of employment discrimination actions, even where the plaintiff seeks redress under the more liberal standards of the NYCHRL. For example, in *Williams v New York City Tr. Auth.* (171 A.D.3d 990, 993, 97 N.Y.S.3d 692, 696 [2d Dept. 2019]), the Second Department concluded:

> "Here, the [federal] District Court determined that the defendants had legitimate, nondiscriminatory reasons for their employment actions; that the defendants were not motivated by retaliatory animus; that the reasons for the defendants' employment actions were not a pretext for discrimination; and that the plaintiff was not treated differently from other employees. Thus, even under the broader standard of the NYCHRL, those determinations nonetheless require dismissal of the plaintiff's causes of action."

In the present case, as in *Williams v New York City Tr. Auth.*, the factual findings of the federal district court preclude any claim against the NYU defendants. The federal district court concluded factually that the NYU defendants exhaustively investigated the harassment by the individual defendants, that the NYU defendants were not were not aware of and did not participate in the harassment, that they took reasonable action to address the claims. Further, the decision to

terminate was devoid of any discriminatory motivation, as supported by the arbitrator's finding that plaintiff engaged in serious misconduct, albeit the arbitrator found that the penalty was excessive.

The NYCHRL imposes strict liability on an "employer" for the discriminatory acts of the managers and supervisors. (*See* Administrative Code of the City of New York § 8-107[13][b][1]; *Zakrzewska v New School*, 14 NY3d 469, 480-481, 928 N.E.2d 1035, 902 N.Y.S.2d 838 [2010]). The federal District Court in the related federal action, in its affirmed findings, specifically found that neither Thometz nor Meltzer performed any supervisory role over the plaintiff, and that they were solely co-workers. This crucial factual finding may not now be overturned by plaintiff's conclusory assertions that defendant Thometz and Meltzer had supervisory power over her, and were able to make personnel decisions within the NYU organization. Plaintiff is collaterally estopped from making these factual arguments which conflict with the federal court's resolution of factual issues identical to those raised here. (*Milione v City Univ. of New York*, 153 AD3d 807, 59 N.Y.S.3d 796 [2d Dept. 2017], *lv denied* 30 NY3d 907, 70 N.Y.S.3d 447, 93 N.E.3d 1212, cert denied 138 S. Ct. 2027, 201 L. Ed. 2d 278 [2018]). The factual findings made by the federal court as to any of the elements of the NYSHRL and NYCHRL claims asserted here have a preclusive effect. (*See Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 31 N.Y.S.3d 3 [1st Dept. 2016], *lv denied* 28 NY3d 902, 40 N.Y.S.3d 350, 63 N.E.3d 70 [plaintiffs precluded by federal court opinion from relitigating discrete factual issues decided against them in federal action; federal court found no evidence that male employees treated differently than female plaintiffs, or that males were provided better mentoring and opportunities]).

In *Milione v City Univ. of New York* (*supra*) the plaintiff's discrimination claims under the NYCHRL were held to have been properly dismissed as the federal court in the federal discrimination action before it had determined that the defendants had legitimate, nondiscriminatory reasons for their employment actions, they were not motivated by racial animus, their reasons were

not a pretext for discrimination, and the plaintiff was treated no differently than other employees. The federal decision was thus dispositive of the plaintiff's state and city Human Rights Law claims even under the "broader standard" of the NYCHRL, and the plaintiff was thus collaterally estopped from relitigating those claims. (Supra, 153 AD3d 807 at 809.)

Under the NYCHRL, a plaintiff need not show that instances of conduct resulting in a hostile work environment were severe and pervasive, but only that she experienced disparate or unequal treatment on account of a protected characteristic. (*Hernandez v Kaisman*, 103 AD3d 106, 957 N.Y.S.2d 53 [1st Dept. 2012].) The conduct or instances of such animus must, moreover, result in more than a "petty slight or trivial inconvenience." (Id at 115.)

This Court is required under its collateral estoppel analysis to apply the factual findings of the federal court in evaluating plaintiff's claims of discrimination and disparate treatment under the more liberal analysis of the City Human Rights Law (Administrative Code of City of NY § 8-107). As stated in *Johnson v IAC/InterActiveCorp* (118 N.Y.S.3d 561, 563, 2020 N.Y. App. Div. LEXIS 518, *1-2 [1st Dept. 2020]):

> "The motion court correctly held that collateral estoppel applied to issues of fact in this state action that are identical to issues of fact necessarily resolved by the United States District Court for the Southern District of New York in granting summary judgment dismissing plaintiff's federal employment discrimination claims (see Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP, 116 AD3d 134, 140, 981 N.Y.S.2d 89 [1st Dept 2014]; Sanders v Grenadier Realty, Inc., 102 AD3d 460, 461, 958 N.Y.S.2d 120 [1st Dept 2013]). In applying collateral estoppel to such purely factual issues, the motion court properly evaluated plaintiff's claims of discrimination and disparate treatment under the more liberal analysis of the City Human Rights Law (Administrative Code of City of NY § 8-107) and did not conflate it with the federal analysis (Williams v New York City Hous. Auth., 61 AD3d 62, 872 N.Y.S.2d 27 [1st Dept 2009], lv denied 13 NY3d 702 [2009]; see Administrative Code § 8-130). The court cited the applicable "mixed motive standard" under the City HRL (Hudson v Merrill Lynch & Co., Inc., 138 AD3d 511, 514, 31 N.Y.S.3d 3 [1st Dept 2016], lv denied 28 NY3d 902 [2016]; Williams, 61 AD3d at 78, n 27), and correctly concluded that plaintiff failed to raise a triable issue of discrimination based on the termination of her employment or any disparate treatment."

In an action brought under the NYCHRL, on a motion for summary judgment, the inquiry must be analyzed both under the framework set forth in *McDonnell Douglas Corp. v. Green* (411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 [1973]), as well as the "mixed-motive" framework recognized in certain federal cases. (*Melman v Montefiore Med. Ctr.*, 98 A.D.3d 107, 113, 946 N.Y.S.2d 27, 30 [1st Dept. 2012].) The federal court has already applied the McDonnell Douglas analysis in dismissing plaintiff's claims. Under a "mixed-motive" analysis, plaintiff should prevail in an action under the NYCHRL if he or she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision (*see Williams v New York City Hous. Auth., supra*, 61 AD3d 62, 78; *Melman v Montefiore Med. Ctr., supra*, 98 A.D.3d 107, 127 [1st Dept. 2012].)

Reviewing the case under a "mixed-motive" framework, no basis exists for a finding that unlawful discrimination was the basis for an adverse employment decision. "Under both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices." *(Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 310 [2004]). To establish unlawful retaliation, plaintiff must show that she engaged in protected activity, her employer was aware that she participated in such activity, she suffered an adverse employment action based upon his protected activity, and the existence of a causal connection between the protected activity and the adverse employment action.

When a defendant moves for summary judgment dismissing a cause of action alleging retaliation[2] under either the NYSHRL or the NYCHRL, " '[the] defendant must demonstrate that the

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[2] Pursuant to the NYCHRL, a plaintiff need not establish that the alleged retaliation or discrimination resulted in an ultimate action with respect to employment or in a materially adverse change in the terms and conditions of employment so long as the retaliatory or discriminatory act was reasonably likely to deter a person from engaging in protected activity. (*Ananiadis v Mediterranean Gyros Prods., Inc.*, 151 A.D.3d 915, 918-919, 54 N.Y.S.3d 155, 159-160 [1st Dept.

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 the defendant's explanations were pretextual' " (*Delrio v City of New York*, 91 AD3d 900, 901, 938 NYS2d 149 [2012].)

The factual findings of the federal courts make clear that no pretext or retaliatory animus existed for the termination of plaintiff's employment. The plaintiff cannot now alter these factual findings by naming additional NYU employees, or by asserting contrary factual theories.

For the reasons stated above and based on the arguments of he NYU defendants, the complaint as to these defendants is dismissed.

Defendant Thometz and Meltzer

Plaintiff seeks to hold the individual defendants Thometz and Meltzer liable under various theories. With respect to "aiding and abetting" discrimination under the NYCHRL, however, as the claims against the NYU defendants are dismissed, any claim against these defendants as an aider and abettor of the employer's allegedly discriminatory conduct fails as a matter of law. (*See, e.g., Abe v Cohen*, 115 AD3d 491, 492, 981 N.Y.S.2d 692 (1st Dept. 2014) ["[Defendant] cannot be held liable for aiding and abetting an act which itself is not actionable"]). Nor can Thometz and Meltzer cannot be held liable for aiding and abetting their own alleged discriminatory conduct. (*See Hardwick v Auriemma*, 116 AD3d 465, 983 N.Y.S.2d 509 [1st Dept. 2014]).

Plaintiff postulates that the person committing the harassment is responsible for the unlawful conduct. While it would be logical to hold a fellow employee responsible for acts of harassment, "[t]here is no indication in the local ordinance, explicit or implicit, that it was intended to afford a separate right of action against any and all fellow employees based on their independent and unsanctioned contribution to a hostile environment. The inclusion of the word "employee" in the

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2017].)

local ordinance does not automatically open the door of liability to an entirely new category of defendants; the term must be read in context." (*Priore v. N.Y. Yankees*, 307 A.D.2d 67, 74, 761 N.Y.S.2d 608, 614 [1st Dept. 2003]; *see Matter of Medical Express Ambulance Corp. v Kirkland*, 79 A.D.3d 886, 888, 913 N.Y.S.2d 296, 299 [2010].)

It is well settled that an employee who did not participate in the primary violation itself, but who aided and abetted that conduct, may be individually liable based on those actions under both the NYSHRL and the NYCHRL. (*See* Executive Law § 296 [6]; Administrative Code § 8-107 [6]). Bothe the NYSHRL and the NYCHRL provide that it is "an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden [thereunder], or to attempt to do so." (Executive Law § 296 [6]; Administrative Code § 8-107 [6]). A defendant who provides assistance to the individual or individuals participating in the primary violation may be found liable for aiding and abetting discriminatory conduct (*see Jews for Jesus v Jewish Community Relations Council of N.Y.*, 79 NY2d 227, 233, 590 NE2d 228, 581 NYS2d 643 [1992]). These theories of liability, however, have been directed at supervisors who fail to take adequate remedial measures in view of discrimination. Thus, supervisors who fail to conduct a proper and thorough investigation, or to take remedial measures upon a plaintiff's complaint of discriminatory conduct, are subject to liability on an aiding and abetting theory (*Ananiadis v Mediterranean Gyros Prods., Inc.,* 151 A.D.3d 915, 917-918, 54 N.Y.S.3d 155, 158-159 [1st Dept. 2017].)

Contrary to plaintiff's arguments, however, co-workers who engage in discriminatory conduct who have no role in supervision or terms of employment are not liable under the NYCHRL or the NYSHRL. (*Priore v. N.Y. Yankees, supra*, 307 A.D.2d 67, 74, 761 N.Y.S.2d 608, 614 [1st Dept. 2003]; *see also, Montgomery v ELRAC, Enter. Holdings, Inc.,* 2019 N.Y. Misc. LEXIS 5282, 2019 NY Slip Op 32896(U) [Sup Ct. Bronx County [Franco, J.] [liability of fellow employee under NYCHRA requires some supervisory role]; *Palmer v Cook*, 2019 N.Y. Misc. LEXIS 4301, *9, 2019

NY Slip Op 51228(U) [Sup Ct. Queens Co.] [plaintiff cannot sustain a cause of action against co-employee without supervisory authority].) To the extent that *Malena v. Victoria's Secret Direct, LLC* (886 F.Supp.2d 349, 366 [S.D.N. Y. 2012]) suggests that a co-worker may be directly liable for discrimination, that holding is contrary to *Priore v. N.Y. Yankees* (*supra.*). There is, accordingly, no basis to hold these defendants liable under either State or City discrimination laws.

The alleged conduct does not constitute conduct so outrageous that it constitutes intentional infliction of emotional distress. (*Conklin v Laxen*, 118 N.Y.S.3d 893, 897-898, 2020 N.Y. App. Div. LEXIS 979, *7 [2d Dept. 2020] [alleged conduct of could not be deemed "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community," citing *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 56, 29 N.Y.S.3d 879, 49 N.E.3d 1171 [2016].)

Accordingly, it is hereby,

ORDERED that the respective motions are granted, and the complaint is dismissed.

This is the Decision and Order of the Court.

Dated: _June 12 2020_____

Howard H. Sherman, J.S.C.