Acosta v CKR Law LLP
2021 NY Slip Op 30380(U)
February 9, 2021
Supreme Court, New York County
Docket Number: 156323/2019
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

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CATHERINE ACOSTA,

Plaintiff,

- v -

CKR LAW LLP, JEFFREY RINDE, JOHN DOES 1-10, and ABC CORP. 1-10,

Defendants.

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INDEX NO. 156323/2019

MOTION DATE 11/17/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 31

were read on this motion to/for DISMISS.

Defendants bring this pre-answer motion, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint alleging hostile work environment based on sexual orientation and a failure to accommodate plaintiff's disability, in violation of the New York City Human Rights Law (NYCHRL). Plaintiff opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

The Complaint

The following facts are alleged in the verified complaint and, for purposes of this motion to dismiss, are accepted as true. Plaintiff, a New Jersey resident, was hired on or about December 12, 2017 as a Marketing Director for defendant CKR Law LLP (CKR), with its principal office in New York, New York. Throughout her employment, she was repeatedly subjected to a sexually hostile work environment. As examples, the complaint details a number of incidents that occurred in June, July and August of 2018, including the dates, the names of the five CKR attorneys involved, and the substance and circumstances of the comments or conduct; certain of

the allegations as against a particular attorney contain a number of incidents. The majority of the specified incidents occurred after plaintiff's July 18, 2018 same-sex marriage. After each instance, she complained to defendant Jeffrey A. Rinde (Rinde), CKR's New York City managing partner and her immediate supervisor.

In or about October 2018, plaintiff, "who suffers from anxiety, advised Defendant Rinde that the sexually hostile work environment, along with the daily commute from New Jersey to New York, were exacerbating her disabling medical condition" [NYSCEF Doc No. [NYSCEF] ¶ 1, verified complaint [complaint] ¶ 10). She "provided documentation from her medical provider requesting the reasonable accommodation that she be permitted to work from home" (*id.* ¶ 11). Rinde authorized her requested accommodation and "further stated that she would probably be more productive in light of no commuting time and no interruptions" (*id.* ¶ 12). She provided CKR with weekly updates, including that she worked 12 hour days several days a week to meet deadlines. In or about October 2018, Rinde began treating her with hostility, ignoring her emails and refusing to provide requested approvals, thereby delaying her deadlines and projects.

On or about November 30, 2018, she travelled to New York City for a meeting with Rinde, who told her that "she would need to work more hours in the office" (*id.* ¶ 18). He did not tell plaintiff that her working from home had become an undue hardship for CKR or that her work was suffering as a result of her not being in the office. She "reluctantly agreed to increase her time in the office based on Rinde agreeing to provide her with an office sufficiently removed from the attorneys who had previously created the hostile working environment" (*id.* ¶ 19).

When plaintiff appeared in the office on December 1, 2018 she learned that Kally Savvas (Savvas), whom the complaint identifies as CKR's Human Resources Manager, was "openly discussing" plaintiff's "disabling medical condition" (*id.* ¶ 20), and she immediately complained

to Rinde that her privacy rights were violated. She told him that she "could not work in the office, even on a part-time basis, knowing that her medical condition had been discussed throughout the office and the prospect of the sexually hostile working environment having never been remediated" (*id.* ¶ 22). Rinde "never responded to [her] complaint and, upon information and belief, never investigated the breach of her privacy rights" (*id.* ¶ 23).

Plaintiff did not receive her scheduled performance review or the bonus "that was distributed to everyone but" her (*id.* ¶ 24). She outlined in her January 2, 2019 email to Rinde "all of her positive accomplishments during her year-long tenure" with CKR, "which was acknowledged throughout the year" by her CKR colleagues. Her employment was terminated on January 18, 2019, "allegedly due to her inability to work in the New York City office" (*id.* ¶ 26). Following plaintiff's termination, defendants named her assistant Director of Marketing and "shortly thereafter, permitted [her former assistant] to work from home" (*id.* ¶ 27).

The first and second causes of action allege hostile work environment in violation of the NYCHRL; the first cause of action is against defendant CKR and the second cause of action is against Rinde in his corporate capacity and individually. Plaintiff alleges that she "was subjected to comments of a sexual nature from Defendant CKR employees because of her sexual orientation" (*id.* ¶ 29; see also ¶ 38), and that the "sexual comments were severe and pervasive enough to make a reasonable woman believe the working conditions were altered and that the working environment was intimidating and harassing" (*id.* ¶ ¶30, 39). Plaintiff alleges that: despite the complaints she made to Rinde defendants never investigated or remedied the hostile work environment; defendants "intentionally and negligently failed to implement and enforce anti-harassment and discrimination policies and procedures" (*id.* ¶¶ 32, 41); and defendants

"failed to properly train upper managers on its anti-harassment and complaint procedures, as well as its policies of confidentiality" (*id.* ¶ 33).

As her third cause of action, plaintiff alleges that defendants violated the NYCHRL by failing to provide her with a reasonable accommodation for her disability. She "notified Defendants that she suffered from disabling anxiety and requested the reasonable accommodation to work from home in order to avoid the hostile work environment and the daily commute, all of which exacerbated her disabling medical condition" (*id.* ¶ 46). "Defendants then withdrew the reasonable accommodation" and required her "to come to the New York City office from [her] home in New Jersey" (*id.* ¶ 47). Defendants did not provide her with an explanation for withdrawing her reasonable accommodations, or reference "an undue hardship for Defendants or Plaintiff Acosta's work suffering while she worked from home" (*id.* ¶ 48). After learning that her privacy rights were violated, plaintiff renewed her request to work from home. Her "employment was terminated due to Defendants rejecting her renewed request for the reasonable accommodation of working from home" (*id.* ¶ 50). "Yet, shortly thereafter, Defendants assigned the position of Marketing Director to [her assistant], who was then permitted to work from home" (*id.* ¶ 52).

The Parties' Contentions

Defendants contend that the complaint should be dismissed pursuant to CPLR 3211 (a) (1) and (a) (7). They assert that the complaint fails to state a cause of action for a hostile work environment under the NYCHRL since, taken alone or together, the 5 alleged incidents or comments over a three-month period do not reach the requisite level of severe or pervasive. Additionally, the complaint does not allege disparate treatment on the basis of plaintiff's sexual orientation or another protected characteristic. Additionally, Defendants assert that the alleged

statements/incidents were not homophobic or derogatory and could not reasonably be interpreted as such, and also note that three of the comments were not directed at plaintiff's sexual orientation.

Defendants further contend that plaintiff's claim relating to CKR's alleged failure to provide her with a reasonable accommodation fails for four reasons. First, plaintiff acknowledges that defendants reasonably and temporarily accommodated her, and defendants assert that, by law, there is no requirement to make that accommodation permanent. Second, plaintiff does not and cannot allege that she could perform the essential job functions were the accommodation made permanent. Third, she does not allege that her employment was terminated because of her anxiety. Fourth, she fails to allege the exact statutorily defined disability and did not provide defendants with any medical documentation.

In addition to their supporting memorandum of law (NYSCEF 23) and their counsel's affirmation with accompanying exhibits (NYSCEF 22), defendants submit five affirmations/affidavits. Three affidavits are from individuals identified in the complaint as allegedly making the comments to plaintiff (NYSCEF 19, 20, 21). Defendant Rinde submits an affidavit with exhibits (NYSCEF 17, Affidavit of Jeffrey A. Rinde [Rinde aff]), including copies of his exchange of emails with the plaintiff and the January 18, 2019 letter of employment termination. The fifth affidavit, accompanied by an exhibit consisting of a copy of plaintiff's letter of hire, is from Savvas, CKR's Global Operations Manager, to whom plaintiff reported. Savvas was responsible for many human resources duties, including hiring, reviews, and addressing employee concerns or complaints.

The affidavits or affirmations deny the allegations concerning harassment and discrimination. Among other matters, defendants deny: 1) that plaintiff ever complained about a

sexually hostile work environment; 2) that plaintiff provided medical documentation or a letter or request from her doctor concerning any medical condition or her working conditions; 3) any alleged basis for plaintiff's long term absence from the office and the reason for her failure to adequately perform her essential job duties; and 4) that her assistant was hired or promoted to replace her (she was not) and then given permission to work at home. Defendants also deny that they violated plaintiff's privacy by openly discussing her medical condition. Rather, Savvas states that, as required, she consulted with CKR's management and executive committees about plaintiff's decision to stop working from CKR's office and what actions could and should be taken; she posits that it might be that a staff member overheard a private, closed door conversation with a member of the executive committee.

Additionally, the affidavits/affirmations deny the occurrence of some of the alleged incidents and as to others, contest plaintiff's recitation and characterizations of the alleged comments and incidents. These affidavits set forth non - discriminatory and business - related or innocent explanations and motivation. Defendants also point to what they characterize as plaintiff's admissions and contradictory statements, and inconsistencies in the allegations and in the positions plaintiff took as part of a telephone hearing held before an Administrative Law Judge (ALJ) of the Unemployment Insurance Appeal Board, relying on the ALJ's June 25, 2019 decision attached as an exhibit (June 2019 Unemployment Decision).

Further, defendants assert that: generally [pre-Coronavirus] CKG did not permit staff to work remotely; plaintiff knew she was expected to work in CKR's New York office and the nature of her job so required; and in or around August 2018, plaintiff began regularly not coming into the office and gave various explanations for not appearing for work or for wanting time off. Her last day at the office was September 19, 2019. Plaintiff did not tell Rinde or Savvas that she

was being harassed or ridiculed, did not make a complaint, and did not ask to temporarily or permanently work from home. The first time plaintiff told Savvas that she was not coming into work because of an anxiety attack was October 9, 2018, and the following week plaintiff claimed to be seeing a new doctor and acknowledged she was still not coming into work. Plaintiff was repeatedly asked to but did not return to the office.

Rinde additionally attests that: he heard from many attorneys during the summer and fall of 2018 that plaintiff "was not adequately performing her duties as marketing director" and that he "also experienced [his] own frustrations with Ms. Acosta's work product and responsiveness" (Rinde Affidavit, ¶ 15). From September through November he "continued to receive multiple complaints from attorneys about Ms. Accosta's poor and inadequate performance" (*id.* ¶ 20), but did not then terminate her employment, as he "did not want to disrupt the Firm if there was any chance to work with Ms. Acosta to improve her performance and have her return to the office" (*id.* ¶ 21), and then, due to the holiday season, waited until after December to terminate her employment.

Rinde attests that he was not aware that plaintiff began to work remotely until early October 2018 when she emailed him that she "'had a severe panic attack' and was 'working from home today,'" and stated that she "'know[s] this is not a full-time remote job'" (*id.* ¶ 10). Plaintiff, in a series of October 2018 emails to him, "complained of panic or anxiety attacks, her long commute, stress, workload, family issues with her ex-husband and children, and other medical issues that, according to her, contributed to her inability to come into the office," and he learned from her that "she was taking medication and seeing one or more doctors" (*id.* ¶ 11). "Given the medical conditions that Ms. Acosta professed to be dealing with, [he] agreed that she could temporarily work from home," intending that this be for "a short time period, maybe one

week, while Ms. Acosta sorted out her medications with a doctor" (*id.* ¶ 12). Plaintiff "never mentioned any kind of harassment or ridicule by CKR lawyers or staff as a reason that she could not come into the office" (*id.* ¶ 13). He denies the complaint's allegations and attests that he "never treated Ms. Acosta with hostility or interfered with her performance", and, as set forth in the emails he attaches to his affidavit, she "regularly thanked him" for his and Savvas's understanding and their being "more than accommodating with all that [she] has been going through the past few months" (*id.* ¶¶ 32, 33).

In his affidavit, Rinde further states that plaintiff did not come into the office in October or November of 2018, and kept delaying, until November 28, 2018, his requests that she return to meet in person to discuss her situation. At the meeting, Rinde told plaintiff "that it was imperative that she return to work in the office" and "explained that numerous attorneys found [her] inaccessible and not responsive over the past few months, which was harming the Firm's marketing efforts" and "creating discord with other Firm employees" (*id.* ¶ 23). At that meeting, plaintiff "never mentioned any harassment by or conflict with anybody at the office" and did not provide any medical documentation (*id.* ¶ 24). During the meeting, he offered plaintiff an internal office, to be shared with her assistant, although internal offices generally were not available to staff members, to "address her concerns about being distracted while in the office and be an incentive for her to return" (*id.* ¶ 25). At the end of the meeting, plaintiff agreed to return that Monday but never returned, and did not respond to his request that they meet again. Her employment was terminated by letter dated January 18, 2019 "based on her under performance, her chronic absenteeism, and her refusal to come into work at the CKR Law office" (*id.* ¶ 30).

In her opposing memorandum of law, plaintiff argues that defendants' motion should be denied. She urges that, contrary to defendant's contention, her complaint sufficiently pleads both a claim for hostile work environment and a claim for disability discrimination and failure to accommodate. While the complaint asserts claims only under the NYCHRL and not under the New York State Human Rights Law (NYSHRL), plaintiff asserts that her NYSHRL claims also are sufficiently pleaded. In their reply memorandum of law, defendants similarly note that the complaint does not assert causes of action pursuant to the NYSHRL. Accordingly, this Court does not address plaintiff's arguments concerning the sufficiency of unpleaded causes of action under NYSHRL.

Plaintiff contends that the complaint "sets forth specific instances of actions by her co-workers in Paragraphs 8 and 9 of the Complaint," which occurred over a few months, and "amount to more than petty slights or trivial inconveniences" (NYSCEF 23, Mem. Law in Opp. at 8). Further, under the NYCHRL, the conduct's severity and pervasiveness are not issues to be determined on a motion to dismiss.

Plaintiff argues that defendants' use of affidavits to counter the complaint's factual allegations is inappropriate, since the purpose of this motion to dismiss is not to determine the facts and is brought prior to discovery. Moreover, asserts plaintiff, the "one-sided and biased affidavits" address only some of her allegations (Mem. Law in Opp. at 12). She further asserts that, contrary to defendants' contention, she has sufficiently pleaded facts that she was treated less well than her assistant, whom the complaint alleges was given plaintiff's job and was permitted to work from home.

Additionally, plaintiff is a member of more than one protected class, and defendants were aware that she entered into a same sex marriage in July, 2018, were aware of plaintiff's sexual

orientation, and were aware of her disability and need for a reasonable accommodation. The complaint alleges that plaintiff's employment was terminated and she suffered adverse employment action as a direct result of her sexual orientation and disability. Defendants also do not and cannot argue that they made any attempts to engage in the requisite good faith interactive process. Defendants also do not and cannot argue that plaintiff's working remotely would cause CKR an undue hardship, especially since, after plaintiff's termination, her assistant was offered plaintiff's position and was allowed to work remotely. Plaintiff contends that questions of whether an accommodation would have been reasonable under the circumstances or would have imposed an undue hardship on defendants are not issues to be determined on a motion to dismiss.

Plaintiff additionally argues that, contrary to defendants' contentions, her complaint is not inconsistent with her position or statements before the ALJ. Moreover, the June 2019 Unemployment Decision found in plaintiff's favor and granted her unemployment benefits, and defendants fail to mention that the Unemployment Insurance Appeal Board in its September 20, 2019 decision (September 2019 Unemployment Decision) denied CKR's appeal of the June 2019 Unemployment Decision (NYSCEF 24, ex. B to the affidavit of plaintiff's counsel).

In reply, defendants assert that plaintiff's opposition papers cannot save from dismissal her claims for hostile work environment and failure to accommodate under the NYCHRL. Defendants contend that "in an attempt to fill the holes identified in Defendants' motion to dismiss," plaintiff uses her counsel's unsworn statements (NYSCEF 26, Defendants' Reply Mem. of Law at 2). These statements are not alleged in the complaint, which was verified by her counsel, and are not based on counsel's personal knowledge. Defendants argue that even with those new facts, plaintiff fails to rebut defendants' arguments "that the alleged statements/incidents are not homophobic or in any way derogatory, and do not amount to sexual

orientation discrimination under the NYCHRL" (*id.* at 3). Defendants assert that plaintiff fails to address the cases and points made by defendants, "essentially conceding" that the allegations are insufficient (*id.*). In a footnote, defendants note that plaintiff "protests that Defendants offered affidavits on the motion to dismiss," and assert that they "offered those affidavits to place in context the illogical hostile work environment claims" (*id.* fn 3).

Defendants further contend that, in her opposing memorandum of law, plaintiff agrees to defendants' recitation of the elements of a prima facie case of failure to accommodate, and plaintiff's own allegations demonstrate that she cannot make the requisite showing. First, the complaint alleges that defendants "did in fact provide reasonable accommodation" and, second, plaintiff "failed to allege that she could perform the essential functions of her job" (*id.* at 4). Additionally, defendants argue that, in her complaint, plaintiff makes only one claim for discrimination for failure to accommodate (referencing ¶¶ 45-53 of the complaint), and the claim is described as "a 'withdrawal' of previously provided reasonable accommodation" (referencing ¶¶ 47-48 of the complaint). Since plaintiff did not allege that she was denied reasonable accommodation because of her sexual orientation, her counsel's "discussion" that she was part of more than one protected class "is irrelevant and should be disregarded" (Reply Mem. of Law at 5). Additionally, plaintiff cannot remedy the deficiencies in her complaint by her counsel's assertions in the opposing memorandum of law that she was performing the essential functions of her job and that she was qualified for the position. Defendants further argue that plaintiff "muddles the failure to accommodate claim by invoking the 'good faith interactive process'" (*id.* at 6), and assert that the documentary evidence attached to the Rinde affidavit reflect that defendants "discussed by email the desire to come to a 'workable solution' with Plaintiff" (*id.* at 7).

Discussion

CPLR 3211 (a) (1)

Defendants move to dismiss under CPLR (a) (1) and (a) (7). Pursuant to CPLR 3211 (a) (1), a party "may move for judgment dismissing one or more causes of action against him on the ground that . . . a defense is founded upon documentary evidence. It is defendant's burden to show that "the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Serv., LLC v Fimat Futures USA,* 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted]). "A paper will qualify as 'documentary evidence' only if it satisfies the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity;' and (3) its contents are 'essentially undeniable'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86, 87 (2d Dept 2010]). The motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002], citing *Leon v Martinez*, 84 NY2 83, 88 [1994]).

Defendants have failed to meet their burden pursuant to CPLR 3211 (a) (1). Defendants have not shown that the various exhibits they attach qualify as documentary evidence. Moreover, the documentation they rely upon does not resolve all factual issues as a matter of law. The various exhibits and affidavits (to the extent they are properly considered on this motion) do not utterly refute plaintiff's factual allegations and do not conclusively establish defendants' defense(s) as a matter of law.

CPLR 3211 (a) (7)

This Court now turns to defendants' pre-answer motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7). In determining such a motion, a court must liberally construe the complaint, accept the alleged facts as true, and accord plaintiff "the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2 at 87). The motion "must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal quotation marks and citations omitted]). Affidavits submitted by a defendant "will almost never warrant dismissal under CPLR 3211, *unless* they establish conclusively that [defendant] has no [claim or] cause of action" (*Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008], citing *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). "Whether a plaintiff can ultimately establish [her] allegations is not part of the calculus in determining a motion to dismiss" (*EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005).

"In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]). A plaintiff alleging employment discrimination "need not plead [specific facts establishing] a prima facie case of discrimination but need only give fair notice of the claim and its grounds" (*id.* [internal quotation marks and citation omitted]). "Fair notice is all that is required to survive at the pleading stage" (*Petit v Department of Educ. of the City of N. Y.*, 177 AD3d 402, 403[1st Dept 2019]).

In determining the instant motion, this Court first notes that several of the supporting or opposing arguments blur or conflate the definitional sections, the pleading requirements, and the

burden of proof for employment discrimination claims under the NYCHRL (NYC Admin Code, Section 8-101 *et seq*.) with those under the NYSHRL. Critically, the NYCHRL "explicitly requires an independent liberal construction analysis in all circumstances, even where State and federal civil rights laws have comparable language" (*Williams v New York City Hous. Auth*., 61 AD3d 62, 66 [1st Dept 2009]. "The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as [NYCHRL's] uniquely broad and remedial purposes, which go beyond those of counterpart state or federal civil rights law" (*id.* internal quotation marks omitted]. Therefore, this Court will address some of the differences between the NYCHRL and the NYSHRL as they relate to the determination of the instant dismissal motion.

Hostile Work Environment

A central argument in defendants' papers is the assertion that the complaint fails to state a cause of action for hostile work environment because the alleged incidents or comments, viewed alone or together, do not reach the requisite level of severe or pervasive. Contrary to defendants' contention, however, under the NYCHRL it is not plaintiff's burden to so plead (*see Kaplan v New York City Dept. of Health & Mental Hygiene*, 142 AD3d 1050, 1051 (2nd Dept 2016]).

The NYCHRL prohibits discrimination based on actual or perceived sexual orientation and uses the same standard for discrimination and hostile work environment: a plaintiff must show that she was treated less favorably because of her sexual orientation (N.Y.C. Admin. Code Section 8-107 [1] [a]; *Hernandez v Kaisman*, 103 AD3d 106, 114 [1st Dept 2012]); *Williams*, 61 AD3d at 78-79) For liability under the NYCHL, "the primary issue for a trier of fact in harassment cases, as in other terms - and - conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of [her sexual orientation]" (*Williams*, 61 AD3d at 78).

"Experience has shown that there is a wide spectrum of harassment cases falling between 'severe and pervasive' on the one hand and a 'merely' offensive utterance on the other" (*Williams*, 61 AD3d at 76, footnote omitted). While NYCHRL's broader purposes "do not connote an intention that the law operates as a general civility code" (*Williams,* 61 AD3d at 79, internal quotation marks omitted), the "way to avoid this result is not by establishing [an] overly restrictive 'severe or pervasive' bar, but by recognizing an affirmative defense whereby defendants can still avoid liability if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences'" (*Williams*, 61 AD3d at 79-80). A contention that the behavior or statement was "a petty slight or trivial inconvenience constitutes an affirmative defense, which should be raised in the defendants' answer, and does not lend itself to a pre-answer motion to dismiss" (*Kaplan,* 142 AD3d 1050 at 1051 [internal citations omitted]). Keeping in mind the "broad remedial purpose" of the NYCHRL, "questions of 'severity' and 'pervasiveness' are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability" (*Williams,* 61 AD3d at 76, internal citation omitted)

Moreover, at this early procedural juncture, defendants' apparent reliance on their affidavits addressing the substantive merits of the complaint is misplaced. Depending on the particular allegation, defendants, in their five affidavits/affirmations, either deny that the statement or conduct occurred or assert that there were business, legitimate and non-discriminatory reasons for such actions. For the purposes of determining this motion, however, this Court accepts as true the complaint's allegations and draws all reasonable inferences therefrom. Accordingly, defendants' affidavits raise and address issues that are not now before the court.

In addition to defendants' contentions that are specifically addressed, the court has considered all of defendants' arguments in favor of dismissal of the hostile work environment claims and denies the motion. Determining this motion under the standards for a CPLR 3211 (a) (7) motion generally and the lenient notice pleading standard for discrimination cases in particular, this Court finds that the complaint adequately pleads that plaintiff was subject to a hostile work environment under the NYCHRL. The allegations taken from the four corners of the complaint and the inferences therefrom, when viewed under the totality of the circumstances, sufficiently plead that several incidents occurred within an approximate three - month period, and that plaintiff was treated less well than other employees, because of her sexual orientation. Whether plaintiff will ultimately prevail is not relevant on this pre-answer motion to dismiss.

Accommodation

A disability claim under the provisions of the NYCHRL requires a distinct analysis from that under the NYSHRL, as they are not equivalent (*Vig*, 67 AD3d at 147). In the context of a CPLR 3211 motion, the examination of the NYCHRL's reasonable accommodation provision "begin[s] with the recognition of the New York City Council's mandate that courts should be sensitive to the distinctive language, purposes and liberal construction analysis required by the" NYCHRL (*Phillips v City of New York,* 66 AD3d 170, 172 [1st Dept 2009]). A complaint states a prima facie case of disability-based employment discrimination under both the NYCHRL and the NYSHRL "'if the employee suffers from a statutorily defined disability and the disability caused the behavior for which the employee' suffered an adverse employment action" (*Hosking v Memorial Sloan-Kettering Cancer Ctr.*, 186 AD3d 58, 61 (1st Dept 2020), quoting *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 834 [2014]). Under the NYCHRL, however, "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 582, 585 [1st Dept 2018], quoting *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]). The complaint sufficiently alleges such a claim for the purposes of determining this motion.

Unlike the NYSHR, the NYCHRL's "definition of 'disability' does not include 'reasonable accommodation' or the ability to perform a job in a reasonable manner,' but rather 'defines disability solely in terms of impairments'" (*Jacobsen*, 22 NY3d at 834-835, quoting *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY2d 881,885 [2013], Admin. Code of the City of N.Y. Section 8-102 [16]). The NYCHRL defines disability as "any physical, medical, mental or psychological impairment, or a history or record of such impairment" (Admin. Code Section 8-102 [16] [a]). Contrary to defendants' argument, the complaint sufficiently pleads, for purposes of this dismissal motion, that plaintiff's anxiety constituted a disability under the NYCHRL. The complaint also alleges that plaintiff advised defendants of her disability and her need for an accommodation. Whether she did or, as asserted by defendants in their affidavits, did not, and whether as alleged in her complaint she did provide medical documentation or did not, as asserted by the defendants, are not issues to be determined on this motion.

The NYCHRL "forbids employment discrimination against physically and mentally impaired individuals, and employers may raise the inability of disabled employees to 'with reasonable accommodation, satisfy the essential requisites of their job' only as an affirmative defense to a [NYCHRL] claim" (*Jacobsen,* 22 NY3d at 835, quoting Admin. Code of the City of N.Y. Section 8-107 [15] [b]). The NYCHRL "places the burden on the employer to show the unavailability of any safe and reasonable accommodation and to show any proposed accommodation would place an undue hardship on its business" (*Jacobsen*, 22 NY3d at 835 [internal citations omitted]). Therefore, even assuming that, as argued by defendants, the

complaint fails to explicitly or by inference allege that plaintiff was, upon reasonable accommodation, able to fulfill the essential requirements of her job, this omission does not result in dismissal of her complaint. Rather, it is an affirmative defense to be asserted by defendants in their answer.

Additionally, this motion to dismiss also is not the proper mechanism by which to establish whether the NYCHRL's requisite good faith interactive process was undertaken. First, this issue is generally a factual one and not amenable to disposition by CPLR 3211 (a) (7). Second, NYCHRL's analysis differs from that of the NYSHRL. Pursuant to both the NYCHRL and the NYSHRL, "the first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested. The interactive process continues until, if possible, an accommodation reasonable to the employee and employer is reached'" (*Hosking*, 186 AD3d at 62-63, quoting *Phillips v City of New York*, 66 AD3d 170, 176 [1st Dept 2009]). While under NYSHRL the "employer must engage[ ] in interactions with the employee revealing at least some deliberation upon the viability of" an accommodation" (*Hosking*, 186 AD3d at 63, quoting *Jacobsen*, 22 NY3d at 837], the NYCHRL "clearly requires a more rigorous process" (*Hosking*, 186 AD3d at 63 [internal citation omitted]).

Finally, defendants' arguments "that there were legitimate, nondiscriminatory reasons for actions taken against plaintiff is unavailing. Defendant[s] present[ ] a potential rebuttal argument to a prima facie case of employment discrimination, which is misplaced at this early procedural juncture" (*Petit,* 177 AD3d at 404). Similarly misplaced is defendants' reliance on the factual assertions set forth in their affidavits. Furthermore, this Court has not considered any factual assertion made by plaintiff's counsel in the opposing memorandum of law which is not based

upon the allegations or their reasonable inferences set forth in the verified complaint, documentary evidence, or an affidavit from plaintiff. In addition to defendants' contentions that are specifically addressed, the court has considered all of defendants' arguments in favor of dismissal of the failure to accommodate claim and denies the motion.

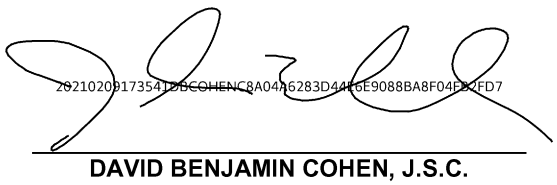
This Court does not opine on whether, and to what extent, part or all of plaintiff's causes of action are, following discovery, amenable to disposition by summary judgment. Nor does this Court opine as to whether, if the case is not resolved between the parties or by way of motion, plaintiff or defendants will prove successful at trial.

Accordingly, it is hereby:

ORDERED that defendant's pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1) and (a) (7) is denied; and it is further

ORDERED that defendants shall serve and file an answer to the complaint within twenty days; and it is further

ORDERED that the parties are to appear for a preliminary conference on March 22, 2021 at 2:30 p.m. unless they first complete a bar coded preliminary conference form (to be provided by the Part 58 Clerk), which form must be completed and emailed to chambers (at jjudd@nycourts.gov) prior to the scheduled conference date.



2/9/2021
DATE

DAVID BENJAMIN COHEN, 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