SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

CHARISSE SAMUEL,

Plaintiff,

-against-

DEVACHAN HAIR AND SPA, INC., DEVA CONCEPTS LLC, SANDRA GIAMETTA, JANICE HIRST, and COLIN WALSH,

Defendants.

----------X

Index No.: 150598/2020

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

This action arises out of plaintiff Charisse Samuel's claims that defendants Devachan Hair and Spa, Inc., Deva Concepts LLC, Sandra Giametta (Giametta), Janice Hirst (Hirst) and Colin Walsh (Walsh) (collectively, defendants) wrongfully terminated her and subjected her to discrimination, a hostile work environment and retaliation on account of her race, gender, sex, status as pregnant woman, familial status and status as a caregiver, in violation of the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL). Plaintiff also alleges defendants deprived her of overtime pay and failed to comply with record keeping requirements, in violation of the New York Labor Law (NYLL). Defendants move, pursuant to CPLR 3211 (a) (5) and (7), for an order partially dismissing the amended complaint. Specifically, defendants are seeking to dismiss the NYSHRL and NYCHRL pregnancy and caregiver status discrimination claims as time barred and seek to dismiss the gender discrimination claims as insufficiently pled. For the reasons set forth below, defendants' motion is granted in part and denied in part.

BACKGROUND AND FACTUAL ALLEGATIONS

Defendants "created a hair salon and hair products for women with curly hair." NYSCEF Doc. No. 23, Amended Complaint (AC), ¶ 1. Plaintiff commenced her employment with defendants in March 2015 as a Salon Manager. For the relevant time period, plaintiff worked at the flagship location located on Broome Street. Plaintiff's job responsibilities included overseeing "the front desk manager, inventory, staffing of apprentices, scheduling, and client issues," [and] "[p]laintiff managed more than 50 employees, including 30 stylists, 18 apprentices, and 6 receptionists." *Id.*, ¶ ¶ 43, 44.

Hirst, the Director of Operations, is "a White woman with no children," and was one of plaintiff's supervisors. *Id.*, ¶ 29. Giametta, "a White woman," was promoted in June 2015 to assist Hirst and subsequently also supervised plaintiff. *Id.*, ¶ 38. Walsh, a "White male," hired plaintiff, and is defendants' Chief Executive Officer. *Id.*, ¶ 26.

Plaintiff alleges that, while working for defendants, she was subjected to ongoing discrimination due to her race, gender, pregnancy, and familial/caregiver status and that when she complained about the discrimination that she and others endured, defendants retaliated against her and ultimately unlawfully terminated her.[1] A timeline of plaintiff's allegations is as follows:

August 2015-Pregnancy Discrimination

In August 2015, plaintiff announced her pregnancy. According to plaintiff, Hirst "disparage[d] her in front of her colleagues because she was pregnant up until the end of her

[1] Under the NYSHRL, discrimination due to being a parent is referred to as familial status, while under the NYCHRL, the term is caretaker status. When addressing claims that plaintiff was discriminated against on the basis that she was providing direct and ongoing care for a child, the court will use the term caregiver status interchangeably with familial status.

pregnancy and subsequent to it." *Id.*, ¶ 84. For instance, Hirst purportedly "ridiculed" plaintiff for choosing to become pregnant and, on at least seven occasions, "stated disparagingly and with an annoyed or angry voice, 'since Reesey decided to get pregnant,' when discussing responsibility." *Id.*, ¶ 81. Furthermore, Hirst treated plaintiff differently than other colleagues who were pregnant. For example, defendants allegedly "went out of their way to support [a] White colorist during her pregnancy, but meanwhile treated plaintiff as if her pregnancy was career ending." *Id.*, ¶ 84. Hirst allegedly harbored "outward hostility" towards plaintiff that "was not only steeped in gender bias minimizing her as a woman because of her pregnancy but also racial bias minimizing her as a Black pregnant woman . . . ." *Id.*, ¶ 86.

In February 2016, plaintiff was allegedly "blindsided . . . with an undeserved written warning." *Id.*, ¶ 88. Also in February 2016, plaintiff requested a reasonable accommodation so that she could leave work two hours early on certain days to received prenatal care. Hirst initially responded that plaintiff must schedule appointments so that they do not conflict with management meetings. Plaintiff reported this response to "HR Director Portolese," who advised Hirst that defendants "were required to provide Plaintiff with this accommodation." *Id.*, ¶ 93. Hirst allegedly accommodated "a White woman who was pregnant around the same time as Plaintiff without issue." *Id.*, ¶ 94.

According to plaintiff, Hirst was "angry that she was forced to allow Plaintiff to adjust her schedule to receive her prenatal medical care, and she was cold and hostile to Plaintiff, and did not talk to her." *Id.*, ¶ 96. Days later, Hirst "moved Plaintiff's desk from the area where all other managers sat, on the lower level, to inside a dirty, dusty broom closet located inside of the staff locker room where everyone went to the bathroom." *Id.*, ¶ 97. Hirst purportedly "moved Plaintiff's desk in retaliation for her request for the reasonable accommodation of leaving early

to receive prenatal medical care, and Defendants subjected her to continuous discrimination and retaliation by keeping her office in the broom closet until approximately January 2018 - a few months before Devachan Defendants' terminated Plaintiff." *Id.*, ¶ 102.

After seeing her doctor, plaintiff also requested a reasonable accommodation to be able to have a work free lunch and to receive a fifteen-minute break to sit every one to two hours. Although Portolese granted the accommodation, Hirst, in theory, "denied Plaintiff the accommodation daily because, upon information and belief, she did not believe Plaintiff, as a Black pregnant woman, was worthy of an accommodation of any sort." *Id.*, ¶ 103.

Plaintiff filed a written complaint with Walsh, reporting Hirst's allegedly discriminatory treatment towards plaintiff on the basis of her pregnancy. In sum, Walsh allegedly advised plaintiff that Hirst was just being strict, and that plaintiff was just being sensitive. Walsh did not address or ameliorate the issue of plaintiff's desk being placed in the broom closet. In retaliation for plaintiff's complaint, Hirst, among other things, "changed their weekly meetings and refused to meet with her." *Id.*, ¶ 113.

July 2016-Plaintiff Returns from Maternity Leave/Caregiver Status Discrimination

Plaintiff claims that she continued to be discriminated and retaliated against due to her pregnancy and caregiver status when she returned from maternity leave. The AC states the following, in relevant part: Hirst did not reinstate weekly one-on-one meetings with plaintiff, routinely reprimanded her in front of colleagues and customers, gave her tasks outside of her job description and unfairly blamed plaintiff for issues that were not within plaintiff's control. Upon her return from maternity leave, plaintiff was not given her former work schedule. "Defendants took her morning shift away from her and gave it to a less qualified White woman with no

children because of Plaintiff's pregnancy, maternity leave, and caregiver status, and in retaliation for her complaint to Defendant Walsh." *Id.*, ¶ 121.

Plaintiff was required to take the "less desirable evening time shifts," and work four, ten-hour days instead of five eight-hour days. *Id.*, ¶ 119. Even after the person working the morning shifts was terminated, defendants refused to return plaintiff to this schedule. Plaintiff alleges that, although she routinely worked longer hours than her shifts, defendants failed to adequately compensate her for her overtime. A "White woman," was able to "change her shift schedule to accommodate her childcare needs," while plaintiff was held to different standards. *Id.*, ¶ 132. Similarly, although both plaintiff and a "White woman with no children" attended a work event outside of normal working hours, the other employee was allowed to leave work early the following day, while plaintiff was not.

Actions occurring after January 2017

Plaintiff received a written warning for not bringing a colleague's Facebook post to Hirst's attention. Plaintiff did not believe that it was "fair that she was getting written up for a post," because the employee who wrote it was in another supervisor's department. *Id.*, ¶ 165. According to plaintiff, another manager who was a "White woman," was "not given a warning for not bringing the social medial post to Defendant Hirst's attention." *Id.*, ¶ 166. Plaintiff complained to Walsh that Hirst was "treating her differently than other managers," and that "Hirst consistently blamed her for things that were not her fault, and that the warning should not go in her file because it was unfair." *Id.*, ¶ 70.

In February 2017, Hirst forced plaintiff, and no other manager, to inform the colorists that they would not be receiving a significant compensation increase. During a subsequent managers' meeting, "Hirst audaciously claimed that Plaintiff failed to communicate the

information about the increase correctly to the colorists." *Id.*, ¶ 183. The AC states that "Hirst did not demean White employees or males in front of colleagues the way Plaintiff was treated." *Id.*, ¶ 186. Plaintiff broadly alleges that Hirst assigned her more work than others and constantly yelled, abused, and blamed her for things that were not her fault," after plaintiff returned from maternity leave. *Id.*, ¶ 187.

Plaintiff alleges that while White women and male caregivers had flexibility and freedom to shift their schedules to accommodate their childcare needs, plaintiff was not afforded the same flexibility. For instance, "on numerous occasions in 2017 and 2018, as Plaintiff said goodnight to colleagues at the end of her shift, an unexpected customer situation would arise." *Id.*, ¶ 199. Plaintiff was expected "to stay and handle the situation even though it impacted her childcare arrangements. Whereas Plaintiff's male and White female colleagues with children, were able to simply leave the salon at the end of their shifts even if an unexpected work-related issue arose at the end of their shifts." *Id.*, ¶ 199. She also claims that "Defendants afforded much more flexibility to three male stylists with young children to switch their schedules at a moment's notice to deal with their childcare needs. *Id.*, ¶ 196.

On November 13, 2017, Rebecca Matthews (Matthews) was hired as the new Director of Operations. Hirst no longer worked at the salon but was still employed by defendants. Plaintiff advised Matthews that Hirst had moved her desk to the broom closet right after plaintiff requested a reasonable accommodation while pregnant. Matthews purportedly advised plaintiff that she and Giametta would be moved into a new office space. However, in January 2018, Matthews informed plaintiff and Giametta that the move would not take place. Hirst allegedly had "demanded that [Hirst] move into the new office space with her new team, and Defendant Walsh agreed with her." *Id.*, ¶ 212. "True to form, even though Plaintiff had been told she

would be moved, Defendant Hirst, Defendant Walsh, and Devachan Defendants yet again took action against Plaintiff steeped in discriminatory bias and hostility towards her as a Black woman who had become pregnant and was now a mother." *Id.*, ¶ 213. Plaintiff continues that Hirsh and Walsh "sought to keep Plaintiff in the broom closet to 'keep her in her place.'" *Id.*, ¶ 213.

Plaintiff complained to Matthews that "she was being treated unfairly because of who she was and that it was not acceptable." 215. *Id.*, ¶ The AC sets forth that "[s]hortly thereafter, Director Matthews surprisingly told Plaintiff that the original plan was back in place, and that Plaintiff would now be moving into the new office space." *Id.*, ¶ 216.

Race-based Discrimination and Plaintiff's termination

In the summer of 2017, Hirst allegedly belittled plaintiff in front of customers when plaintiff attempted to give hair advice, but "never belittled White employees about their opinion in front of customers or others." *Id.*, ¶ 193. In January 2018, Stylist Fagley "began screaming and yelling at Plaintiff regarding an apprentice's schedule, and told her that he did not have to listen to anything she said on the salon floor." *Id.*, ¶ 224. Plaintiff responded and tried to "deescalate the situation . . . ." *Id.*, ¶ 225. Fagley allegedly then "called her a 'bitch' and screamed that she 'lived in the ghetto.'" *Id.*, ¶ 227. Fagley also "said that [plaintiff's] Instagram post was racist and that she was a racist, and repeatedly accused her of calling someone a 'house n**ga', which she had never done." *Id.* Plaintiff filed a written complaint about the incident. Fagley was terminated and plaintiff was "suspended for a week for 'having an altercation.'" *Id.*, ¶ 231. Plaintiff claims that she was "astounded that she was being suspended when she was clearly being racially attacked, and when she had done so much to try and prevent and diffuse the situation." *Id.*, ¶ 231.

In April 2018, plaintiff was asked to spend 90% of her time on the salon floor, while still completing her administrative responsibilities. Plaintiff claims defendants insisted on this requirement so they could set her up to fail. Plaintiff believes that defendants knew as of March 2018, that they were planning on terminating her.

Furthermore in the Spring of 2018, a Black female apprentice told plaintiff that she felt uncomfortable working with "Senior Stylist Mahoney," whom she perceived as racist. Giametta shared an office with plaintiff and heard the conversation. The AC states that the next day, Giametta "handed the Black female apprentice a gift card with the value of about $15 on it [because] Giametta actually thought giving the Black apprentice a low value gift card would be sufficient to 'buy off' the Black apprentice for the concerns she raised about Stylist Mahoney." *Id.*, ¶ 244. The apprentice told plaintiff that she thought Giametta's actions were insulting and degrading. Plaintiff then informed Giametta and Matthews that the apprentice quit for this reason. Nonetheless, defendants did not address any of the racially discriminatory actions that resulted in the apprentice quitting.

In July 2018, Stylist Mahoney offended a Black customer. Although plaintiff sent Giametta and Mathews an email about the incident, he was never disciplined. According to plaintiff, "just a few weeks following Plaintiff's report of Senior Stylist Mahoney's racial harassment of a Black customer, Director Matthews called Plaintiff into her office and told her that she was being terminated based on her failure to spend 90% of her time on the salon floor." *Id.*, ¶ 252. Plaintiff alleges that she was disciplined under false pretenses and then terminated in retaliation for her continued and repeated reports of discrimination. According to plaintiff "[n]o other manager was required to be on the floor for 90% of their time." *Id.*

Instant Action and Defendants' Motion

The AC sets forth 11 causes of action. In the first and second causes of action, plaintiff alleges that defendants discriminated against her by subjecting her to a hostile work environment on the basis of race, gender, pregnancy, and/or familial/caregiver status, in violation of the NYSHRL and the NYCHRL.

In the third and fourth causes of action, plaintiff alleges that defendants discriminated against her by subjecting her to both disparate impact and disparate treatment on account of her race, in violation of the NYSHRL and the NYCHRL.

The fifth and sixth causes of action allege that defendants discriminated against plaintiff by subjecting her to different treatment on the basis of her gender, status as a pregnant woman and familial/caregiver status, in violation of the NYSHRL and the NYCHRL. Further, [p]laintiff has suffered both disparate impact and disparate treatment." *Id.*, ¶ 288. The AC sets forth that "[d]efendants have discriminated against Plaintiff by treating her differently from and less preferably than similarly-situated male employees, non-pregnant employees, employees who are not mothers, White pregnant female employees, and White employees who were mothers, and by subjecting her to discriminatory pay, discriminatory denial of promotions, disparate terms and conditions of employment . . . ." *Id.*, ¶ 289.

The seventh and eighth causes of action allege that defendants retaliated against plaintiff, in violation of the NYSHRL and the NYCHRL. In the ninth cause of action, plaintiff alleges that Hirst, Walsh and Giametta aided and abetted defendants' discriminatory and retaliatory actions against plaintiff, in violation of the NYSHRL and the NYCHRL. In the tenth cause of action, plaintiff clams that defendants failed to pay her overtime in violation of the NYLL. The

eleventh cause of action sets forth that defendants failed to provide plaintiff with wage statements or explanation, in violation of the NYLL.

As set forth below, defendants argue that plaintiff's claims for hostile work environment and discrimination based on her pregnancy and caregiver/familial status are untimely and must be dismissed. Plaintiff informed defendants of her pregnancy in August 2015 and returned from maternity leave on July 5, 2016. Prior to having her child, plaintiff alleged that she was subjected to hostile remarks by Hirst and targeted with an undeserved warning, that she was denied a reasonable accommodation, and that her office was moved to a broom closet, among other claims. Although plaintiff requested to resume working in the same shift that she had been assigned to prior going out on maternity leave, defendants denied this request and plaintiff was required to work the evening shifts upon her return.

Plaintiff filed her complaint on January 16, 2020. Defendants argue that, even assuming plaintiff's allegations to be true for purposes of this motion to dismiss, as the pregnancy and caregiver status discrimination claims occurred prior to January 17, 2107, they are time-barred.

Defendants argue that plaintiff fails to sufficiently plead a claim for gender-based discrimination or hostile-work environment under the NYSHRL or the NYCHRL. According to defendants, the AC contains no allegations that plaintiff suffered from an adverse action, or that she was treated less well, due to her gender. They continue that plaintiff fails to allege any gender-based allegations separate from her pregnancy and caregiver status claims, which are time-barred.

In opposition, plaintiff argues that, as at least one of the claims occurred within the statutory period, her claims for pregnancy and caregiver status discrimination and harassment are timely pursuant to the continuing violations doctrine. Plaintiff states, "[a]s is clear, this steady

stream of discriminatory and harassing actions based on her status as a woman, pregnant woman, pregnant Black woman, mother, and caretaker continued unabated and affected all aspects of her employment, including its very conditions, throughout of her employment with Defendants." NYSCEF Doc. No. 26, Plaintiff's memorandum of law in opposition at 16. Plaintiff argues that from the moment she became pregnant up until her termination, she was subjected to a hostile work environment up until her termination. The discrimination started when plaintiff announced her pregnancy and Hirst was hostile towards her and gave her an undeserved written warning. The hostility subsequently continued when plaintiff requested a reasonable accommodation and was then forced to move a broom closet. When plaintiff returned from maternity leave, she was not given the same flexibility as other colleagues. Further, due to her complaints, plaintiff was allegedly given an undeserved written warning.

Plaintiff continues that the incidents above, which "occurred prior to the January 16, 2017 statute of limitations are directly related to the discrimination and hostile work environment she faced afterwards." *Id.* at 15. Defendants purportedly continued to blame plaintiff for things that were not her fault. Defendants allegedly also assigned her more work than others, yelled at her, refused to accommodate her schedule and refused to move her office from the broom closet until January 2018. Further, in March 2018, plaintiff was suspended for one week "under false pretenses, also setting her up for termination for an alleged "altercation" in which a White stylist attacked her verbally, called her racial slurs including "House n*gger," and intimidated her physically." *Id.* at 16. Plaintiff argues that "the discrimination and hostile work environment culminated" when plaintiff was assigned "an impossible work requirement above her already taxing tasks and responsibilities, to which no other manager was subject," and then defendants terminated her for "allegedly failing to meet those work requirements." *Id.*

According to plaintiff, based on her status as a pregnant woman, she has successfully pled a claim for gender discrimination and hostile work environment in violation of the NYSHRL. "Thus, when Plaintiff alleges that she was discriminated against on the basis of her status as a pregnant women [sic], she is also alleging gender and/or sex discrimination." *Id.* at 19. Plaintiff reiterates that she has alleged several instances of pregnancy and caretaker discrimination, and this is discrimination based on sex/gender. For example, three male stylists with young children were provided with more flexibility than plaintiff to switch their schedules at a moment's notice to deal with their childcare needs.

Listing the same allegations as under her pregnancy/care giver status claim, plaintiff argues that she "suffered an even worse hostile work environment because of her status not just as a pregnant and childcare-taking woman, but more specifically as a Black pregnant and childcare-taking woman." *Id.* at 22.

With respect to the NYCHRL, as with her NYSHRL claim, plaintiff claims that when she was "discriminated against on the basis of her status as a pregnant women under the NYCHRL, she is also alleging gender and/or sex discrimination." *Id.* at 23. Plaintiff argues that, as she has sufficiently pled a claim under the NYSHRL, she is also able to establish one under the more lenient standards of the NYCHRL. For example, under the NYCHRL, a plaintiff does not need to sustain a materially adverse employment action to have a viable claim.

Oral Argument Held January 12, 2021

The parties conducted an oral argument on January 12, 2021. Defendants argued that the pregnancy, caregiver and familial status claims are time barred and that plaintiff fails to state a gender discrimination claim. Ultimately, this court noted that it "could only discern one allegation within the statute of limitations, namely after January 2017." NYSCEF Doc. No. 29,

tr of oral argument at 23. The parties were asked to address the issue of timeliness with respect to plaintiff's claim that her desk was moved to a broom closet in March 2016, when she was pregnant, and remained there until January 2018. Plaintiff's counsel was directed to "submit a letter pointing to the allegations in the complaint wherein there are allegations that would come within ambit of the permitted period, after January 2017, for the discrimination and/or hostile work environment claims to survive .. . ," and defendants' counsel was permitted to reply. *Id.* at 23-24.

DISCUSSION

I. Dismissal

On a motion to dismiss pursuant to CPLR 3211 (a) (7), "the facts as alleged in the complaint [are] accepted as true, the plaintiff is [given] the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." *Mendelovitz v Cohen,* 37 AD3d 670, 671 (2d Dept 2007). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted). "In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards . . . . [I]t has been held that 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 nature of the claim and its grounds." *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (1st Dept 2009) (internal citation omitted).

II. NYSHRL/Pregnancy/Familial Status

Pursuant to the NYSHRL, as set forth in Executive Law § 296 (1) (a), it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's sex or familial status. Although pregnancy is not explicitly listed in the statute, "discrimination on the basis of a woman's pregnancy . . . constitutes discrimination on the basis of sex [under the NYSHRL]." *Wilcox v Cornell Univ.*, 986 F Supp 2d 281, 285 (SD NY 2013) (internal quotation marks and citation omitted). The NYSHRL provides the "same sort of protection" for pregnancy as Title VII. *Quaratino v Tiffany & Co.*, 71 F3d 58, 63 (2d Cir 1995).

Under the NYSHRL, familial status is defined as "any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years." Executive Law §292 (26) (a).

"On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on the ground that the complaint is barred by the applicable statute of limitations, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 (2d Dept 2016). Actions to recover damages for alleged discrimination under the NYSHRL and the NYCHRL are subject to a three-year statute of limitations. *See* CPLR 214 (2); Administrative Code of the City of New York § 8-502 (d).

At the outset, defendants state that claims alleging discrimination on the basis of pregnancy and familial status/caregiver must be dismissed as time-barred because the only allegations proffering in support of these claims relate to conduct occurring more than three years prior to when plaintiff originally filed the complaint. However, plaintiff argues that a "continuing violation exception" should apply to the claims pre-dating January 16, 2017, as they

are all part of a "snowball effect" of harassment and discrimination that began when she announced her pregnancy.

In brief, plaintiff's untimely pregnancy claims are as follows: In August 2015, after plaintiff announced she was pregnant, Hirst spoke to her disparagingly and with an annoyed voice, gave plaintiff an undeserved written warning, canceled the one-on-one meetings they used to have and ignored the reasonable accommodations that defendants had provided plaintiff. Hirst moved plaintiff's desk to a broom closet in retaliation for requesting a reasonable accommodation.

Plaintiff's untimely caregiver status discrimination claims are as follows: In July 2016, when plaintiff returned from maternity leave, despite her request, plaintiff was not provided with the same work schedule that she had been given prior to her pregnancy, and, similarly, despite her request, she was not provided with the same scheduling flexibility as White female/pregnant/caregiver or male/caregiver colleagues. In November 2016, plaintiff was also given an undeserved written warning. Plaintiff's desk remained in the broom closet, and she was still not provided with one-on-one meetings.

In pertinent part, incidents occurring after January 16, 2017 are as follows: Despite her request, plaintiff was not placed back on the morning shift and was not given the same scheduling flexibility as male coworkers with young children. Plaintiff received an undeserved written warning. Hirst still assigned plaintiff more work than others, blamed her for things, demeaned her in front of a customer and yelled at her during a meeting. Despite her complaints, plaintiff's desk was not moved from the broom closet until January 2018. Defendants then set up plaintiff to fail by requiring her to be on the salon floor 90% of the time, something no other manager was asked to do.

Continuing Violations-NYSHRL

The standard for applying the continuing-violation doctrine to claims under Title VII and NYSHRL is governed by *National R.R. Passenger Corp. v Morgan*, 536 US 101, 117 (2002). *Sotomayor v City of New York*, 862 F Supp 2d 226, 250 (ED NY 2012), *affd* 713 F3d 163 (2d Cir 2013). The Court in *National R.R. Passenger Corp. v Morgan* limited the application of the continuous violation doctrine and held that it did not apply to discrete time-barred acts. It held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act." *National R.R. Passenger Corp. v Morgan*, 536 US at 113.

"Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *National R.R. Passenger Corp. v Morgan*, 536 US at 114. In addition, courts have held that a rejection of a proposed accommodation is also a discrete act that "does not give rise to a continuing violation." *Elmenayer v ABF Freight Sys., Inc.*, 318 F3d 130, 134-135 (2d Cir 2003). Similarly, allegedly unfair disciplinary actions, in addition to a purported change of duties, are discrete acts that do not trigger the continuing violations policy exception. *See e.g. Henry-Offor v City Univ. of N.Y.*, 2012 WL 2317540, *3, 2012 US Dist LEXIS 84817, *10 (SD NY 2012) ("demotion in job title, reductions in responsibility, unwarranted criticism, and failure to provide attribution for specific work performed - are paradigmatic examples of discrete acts"). Accordingly, here, plaintiff's untimely allegations are considered discrete discriminatory acts that cannot form the basis of an invidious employment discrimination claim under the NYSHRL. *See National R.R. Passenger*

Corp. v Morgan, 536 US at 115 ("All prior discrete discriminatory acts are untimely filed and no longer actionable").

Plaintiff argues that her request to be moved from the broom closet, her lack of one-on-one meetings and the inability to return to the morning shifts, which demonstrated the differential treatment she received due to her pregnancy and caregiver status, continued through her employment. Plaintiff describes that in November 2017, she explained to a supervisor "how humiliating it was that she was relegated to the broom closet for speaking up for herself – a Black woman who was eight months pregnant- and that Defendants continued to treat her unfairly by keeping her desk in the broom closet." Plaintiff's memorandum of law at 8. However, as noted, the acts of moving plaintiff's desk to a broom closet and taking away a manager meeting, allegedly occurring as a result of her pregnancy status, in addition to the inability to return to a certain schedule, are discrete acts that "occurred" on the day they "happened." *National R.R. Passenger Corp. v Morgan*, 536 US at 110 (internal quotation marks omitted). *See e.g. Kassner v 2nd Ave. Delicatessen, Inc.*, 496 F3d 229, 239 (2d Cir 2007) ("This allegation of a permanent assignment to an undesirable work station is time-barred under the ADEA, the NYSHRL, and the NYCHRL").

Accordingly, the claims alleging disparate treatment on the basis of pregnancy, caregiver/status in violation of the NYSHRL that accrued before January 17, 2017, are dismissed as time barred. *See e.g. Gaffney v Village of Mamaroneck Police Dept.*, 2016 WL 4547499, *4-5, 2016 US Dist LEXIS 117533, *13-14 (SD NY 2016) (internal quotation marks and citation omitted) ("Plaintiff's demotions and reductions in responsibility, which are untimely, are not revived simply because Chief Leahy later referred to their result. . . . Nor are Plaintiff's claims that he continues to be denied overtime and a bulletproof vest timely"). Nonetheless, courts have

held that, "even under the [NYSHRL], [a plaintiff] is not precluded from using the prior acts as background evidence in support of a timely claim." *Jeudy v City of New York*, 142 AD3d 821, 823 (1st Dept 2016) (internal quotation marks and citations omitted).

III. NYSHRL Discrimination

"A plaintiff alleging discrimination in violation of the NYSHRL must establish that (1) he or she is a member of a protected class, (2) he or she was qualified to hold the position, (3) he or she suffered an adverse employment action, and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination." *Bilitch v New York City Health & Hosps. Corp.*, 194 AD3d 999, 1001 (2d Dept 2021).

Pregnancy

Plaintiff's pregnancy discrimination claim alleged under the NYSHRL is dismissed as time barred, as the continuing violations doctrine does not save her untimely claims.

Caregiver Status

Here, plaintiff appears to be alleging caretaker status discrimination claims on the basis of race-plus-gender-plus caregiver status. *See e.g. Back v Hastings on Hudson Union Free Sch. Dist.*, 365 F3d 107, 118 n 7 (2d Cir 2004) (internal quotation marks and citation omitted) ("In such cases the employer does not discriminate against the class of men of women as a whole but rather treats differently a subclass of men or women"). Plaintiff asserts that, as a Black female caretaker, she was treated less well than male caretakers, White woman caretakers and White women without children. *Manzolillo v Cooke*, 438 F Supp 2d 311, 313 (SD NY 2006) ("Such complaints are actionable under the rubric of 'sex-plus' discrimination: discrimination against some but not all women based on their gender 'plus' an additional characteristic such as appearance, pregnancy, marital status, or age"). According to plaintiff, the "White non-pregnant

and childless women, White pregnant women, and caretaking men" were similarly situated in all respects.

Plaintiff alleges that the "disparate treatment by Defendants in comparison with White pregnant and non-pregnant and childless employees and male employees was an adverse action." Plaintiff's memorandum of law at 19. However, "[a] showing of disparate treatment -- that is, a showing that the employer treated plaintiff less favorably than a similarly situated employee outside his protected group -- is a recognized method of raising an inference of discrimination for purposes of making out a prima facie case." *Mandell v County of Suffolk*, 316 F3d 368, 379 (2d Cir 2003) (internal quotation marks and citation omitted). Even under the notice pleading standard, plaintiff must still allege that she was subjected to an adverse action under the NYSHRL.

To be actionable under the NYSHRL, the adverse employment action must be "a materially adverse change in the terms and conditions of employment." *Golston-Green v City of New York*, 184 AD3d 24, 37 (2d Dept 2020) (internal quotation marks and citation omitted). "Such change must be more disruptive than a mere inconvenience or an alteration of job responsibilities, such as a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished material responsibilities." *Id.* (internal quotation marks and citation omitted). Accordingly, plaintiff fails to sufficiently plead a claim for caregiver discrimination based on an unfavorable schedule because this is not a materially adverse employment action under the NYSHRL. *See e.g. Katz v Beth Israel Med. Ctr.*, 2001 WL 11064, *14, 2001 US Dist LEXIS 29, *44 (SD NY

2011) ("[b]eing yelled at, receiving unfair criticism, receiving unfavorable schedules or work assignments do not rise to the level of adverse employment actions").[2]

IV. NYSHRL Hostile Work Environment

To establish a claim for hostile work environment under the NYSHRL, a plaintiff 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." *La Marca-Pagano v Dr. Steven Phillips, P.C.,* 129 AD3d 918, 919 (2d Dept 2015) (internal quotation marks and citations omitted). "Generally, isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment; in order to be actionable, the offensive conduct must be pervasive." *Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 51 (4th Dept 1996).[3]

The Court in *National R.R. Passenger Corp. v Morgan* held that the continuing violations doctrine was available to hostile work environment claims. In contrast to discrete acts, hostile work environment claims, by their nature, "involve[] repeated conduct. . .. The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years. . . ." *National R.R. Passenger Corp. v Morgan*, 536 US at 115.

---

[2] Defendants moved to dismiss the caregiver status claims as being untimely. Nevertheless, as plaintiff addresses the sufficiency of the pleadings in her memorandum of law, and defendants moved to dismiss the gender claims for failure to state a claim, the court will address the sufficiency of this particular gender/caretaker status claim.

[3] "In August 2019, the NYSHRL was amended to direct courts to construe the NYSHRL, like the NYCHRL [New York City Human Rights Law], 'liberally for the accomplishment of the remedial purposes thereof . . . .'"). *McHenry v Fox News Network, LLC*, 510 F Supp 3d 51, 68 (SD NY 2020). However, this, and the other amendments to the NYSHRL, are not applicable as they do not apply retroactively.

Therefore, a claim for hostile work environment will not be time-barred if all the acts complained of are part of the same unlawful practice, and at least one discriminatory act falls within the statute of limitations. *See Matter of Lozada v Elmont Hook & Ladder Co. No. 1*, 151 AD3d 860, 862 (2d Dept 2017) (internal quotation marks and citation omitted) ("[T]he statute of limitations requires that only one sexually harassing act demonstrating the challenged work environment occur within [the statutory period] and that once that is shown, a court . . . may consider the entire time period of the hostile environment in determining liability").

Pregnancy

Here, in support of her hostile work environment claim, plaintiff alleges that Hirst ridiculed her for becoming pregnant, took away meetings and reacted with hostility when plaintiff asked for accommodations. In retaliation for her complaints, Hirst moved her desk to the broom closet.

"While pregnant women, women who very recently gave birth, and women on maternity leave are unquestionably within the protected class of pregnant persons, at some point in time such women are no longer affected by pregnancy, childbirth, or related medical conditions and, thus, are not protected. . . . [Courts have] establish[ed] a loose line at approximately four months from the date of birth." *Albin v Lvmh Moet Louis Vuitton, Inc.*, 2014 WL 3585492, *3-4, 2014 US Dist LEXIS 92627, *9 (SD NY 2014) (internal quotation marks and citation omitted). Plaintiff gave birth in February 2016 and returned from maternity leave in July 2016. By January 2017, when the statute of limitations started to accrue, plaintiff was not "affected by pregnancy, childbirth or related medical conditions." As plaintiff was no longer under the protected status of pregnancy after the statute of limitations started to accrue, the continuing violations doctrine is inapplicable as there is no possibility for at least one timely act.

In any event, plaintiff fails to link the time barred acts, such as moving her office and canceling her weekly meetings, with any actionable conduct within the limitations period. It is well settled that "absent any details of new discrete acts, rather than the effects of past acts, . . . [a] plaintiff's allegations are insufficient to establish a continuing violations claim." *Donas v City of New York*, 62 AD3d 504, 505 (1st Dept 2009).

Caregiver Status

Pre-limitations conduct may be considered to support the hostile work environment claim "only if the incidents are sufficiently related" to incidents that occurred during the limitations period. *McGullam v Cedar Graphics, Inc.*, 609 F3d 70, 77 (2d Cir 2010). As noted, prior to the limitations period, plaintiff alleged that she was denied the ability to return to her former schedule and that she was routinely required to work longer than her shift without compensation or flexibility. Plaintiff also claims that Hirst dismissed her in meetings, wrongly blamed her for things and yelled at her in front of colleagues and customers.

In support of her caregiver status claim, for the post-limitations period, plaintiff claims that defendants accommodated the scheduling needs of White women and men caretakers, but not hers. It appears that the bulk of plaintiff's hostile work environment claims stem from when plaintiff was pregnant. Plaintiff then alleges that "[a]fter she returned from maternity leave, Defendant Hirst assigned her more work than others and constantly yelled, abused, and blamed her for things that were not her fault." *Id.*, ¶ 187. Plaintiff's supplemental submission does little to clarify what specific timely allegations support the claim that plaintiff was subjected to a

hostile work environment due to her protected status as a caregiver.[4] Nonetheless, the part of defendants' motion seeking to dismiss this hostile work environment claim as untimely, is denied. It is well settled that "[f]air 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). "Crediting plaintiff's allegations for the purpose of this pre-answer, pre-discovery motion to dismiss the complaint . . . . we cannot say, as a matter of law, that these acts, if proven, were not part of a single continuing pattern of unlawful conduct extending into the . . . period immediately preceding the filing of the complaint." *Id.* at 403-404 (internal quotation marks and citations omitted).

V. NYCHRL/Pregnancy/Caregiver Status

Pursuant to the NYCHRL, it is an unlawful discriminatory practice for an employer to refuse to hire, employ, fire, or discriminate against an individual in the terms, conditions, or privileges of employment because of the individual's gender or caregiver status. *See* Administrative Code § 8-107 (1) (a). Although pregnancy is not explicitly listed in the statute, "pregnancy discrimination is a form of gender discrimination under the NYCHRL." *Chauca v Abraham*, 841 F3d 86, 90 n 2 (2d Cir 2016). In relevant part, caregiver is defined as "a person who provides direct and ongoing care for a minor child." Administrative Code § 8-102.

To sufficiently plead an invidious discrimination claim under the NYCHRL, a plaintiff must allege, "(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 treated differently or worse than other employees . . . , and

[4] Hirst had also asked plaintiff to deliver bad news to the colorists and then yelled at her in front of colleagues about the way she handled it. It is unclear how this treatment is related to her status as a caregiver.

(4) that the . . . 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). The provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts. *Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 (1st Dept 2016). "[L]iability for a harassment/hostile work environment claim is proven where a plaintiff proves that he or she was treated less well than other employees because of the relevant characteristic. *Nelson v HSBC Bank USA*, 87 AD3d 995, 999 (2d Dept 2011).

Pregnancy Timeliness

"New York state courts have since held that the more generous, continuing violations doctrine continues to apply to claims [brought under the NYCHRL]." *Sotomayor v City of New York* (862 F Supp 2d at 250). For purposes of determining a continuing violation under the NYCHRL, "[o]therwise time-barred discrete acts can be considered timely where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." *Id.* (internal quotation marks and citations omitted); *see also Center for Independence of the Disabled v Metropolitan Transp. Auth.*, 184 AD3d 197, 200-201 (1st Dept 2020) ("Under the NYCHRL, however, it has long been recognized that continuing acts of discrimination within the statutory period will toll the running of the statute of limitations until such time as the discrimination ends").

As discussed, as plaintiff fails to plead a timely allegation that she was discriminated against on the basis of pregnancy, the continuing violations doctrine cannot save her untimely claims made under the NYCHRL. Accordingly, these claims are dismissed as time barred.

Caregiver Status Timeliness

Plaintiff provides specific examples of why she believed that defendants discriminated against her on the basis of caregiver status when they denied her proposed work schedule requests. These denials commenced after she returned from maternity leave, which would be pre-limitations conduct, and occurred throughout the remainder of her employment. Applying the standard for continuing violations under the NYCHRL, the court will consider all of plaintiff's allegations proffered in support of the NYCHRL caregiver status claims, including ones that may have been untimely as discrete acts under the NYSHRL. Accordingly, the part of defendants' motion seeking to dismiss these claims as untimely, is denied.

Discrimination

While receiving an unfavorable work schedule is not considered a materially adverse employment action under the NYSHRL, under the NYCHRL, a plaintiff can plead a successful claim without alleging that she was subjected to a materially adverse employment action. *See O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83, 91 (1st Dept 2017) ("the City HRL does not require that a plaintiff suffer a materially adverse employment action in order to succeed in an anti-discrimination action under the City HRL"). Instead, "a focus on unequal treatment based on [a protected characteristic] -- regardless of whether the conduct is 'tangible' (like hiring or firing) or not -- is in fact the approach that is most faithful to the uniquely broad and remedial purposes of the local statute." *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 114 (2d Cir 2013) (internal quotation marks and citation omitted).

Defendants maintain that plaintiff was not similarly situated to the other employees, as the male caretakers were stylists, and she was not. Nonetheless, plaintiff has alleged that she was similarly situated to them, and the AC also sets forth allegations that plaintiff has been

treated less well than other employees, in addition to the male caretakers. On this pre-answer motion to dismiss, given the liberal pleading standards, as relevant for this motion, plaintiff has sufficiently alleged that she was treated less well than other employees because of her caregiver status and gender. *See e.g. Brathwaite v Frankel*, 98 AD3d 444, 445 (1st Dept 2012) ("The inference of discrimination arises from the complaint's allegations that plaintiffs, who performed clerical work, were laid off as a result of the elimination of their job title, under which all the employees were disabled, while other job titles involving clerical work were not eliminated").

Hostile Work Environment

Under the NYCHRL, "the conduct's severity and pervasiveness are relevant only to the issue of damages. To prevail on liability, the plaintiff need only show differential treatment – that [he/she] is treated 'less well' -- because of a discriminatory intent." *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.* (715 F3d at 110) (internal citation omitted). As noted, to support her hostile work environment claim, plaintiff states that Hirst yelled at her, demeaned her and assigned her additional duties, based on plaintiff's status as a Black woman and mother. Accordingly, plaintiff has sufficiently stated a hostile work environment claim under the NYCHRL.

Defendants argue, among other things, that this treatment constituted nothing more than petty slights and trivial inconveniences. However, "a contention that the behavior 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 v New York City Dept. of Health & Mental Hygiene,* 142 AD3d 1050, 1051 (2d Dept 2016) (internal citation omitted).

VI. NYSHRL/NYCHRL Gender Discrimination Claims

Plaintiff maintains that her "disparate treatment by Defendants in comparison with White pregnant and non-pregnant and childless employees and male employees was an adverse action." Plaintiff's memorandum of law at 19. Pregnancy discrimination is a form of gender discrimination. Nonetheless, any claims that plaintiff was discriminated due to her pregnancy status in conjunction with her gender, are time barred.

Defendants move to dismiss the gender discrimination claims as insufficiently pled. Plaintiff does not appear to have a separate claim that she was treated differently based on gender alone. Nevertheless, at this time, the court declines to dismiss the gender-based discrimination and hostile work environment claims. As set forth above, plaintiff has sufficiently alleged under the NYCHRL that she was treated less well on the basis of her caretaker-plus status, which included gender. Courts have "recognized that a plaintiff's discrimination claims may not be defeated on a motion for summary judgment based merely on the fact that certain members of a protected class are not subject to discrimination, while another subset is discriminated against based on a protected characteristic shared by both subsets." *Gorzynski v Jetblue Airways Corp.*, 596 F3d 93, 109 (2d Cir 2010).

Furthermore, plaintiff has proffered several actions to support her claims that she was subject to unequal treatment and a hostile work environment based on her status a Black female. Plaintiff argues that "black females have been recognized as a protected class under discrimination laws" and that she "has successfully pleaded that the two grounds of her discrimination, based on race and gender, compounded the disparate treatment she received at the hands of Defendant." Plaintiff's memorandum of law at 20. As defendants have not moved at this time to dismiss the race-based claims, it is premature to dismiss the race-plus-gender

claims. It is well settled that, "whether the pleading will later survive a motion for summary judgment, or whether the party will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss." *Kaplan v New York City Dept. Of Health & Mental Hygiene,* 142 AD3d at 1051 (internal quotation marks and citations omitted).

CONCLUSION

Accordingly, it is

ORDERED that defendants' partial motion to dismiss is granted to the extent that the claims alleging pregnancy discrimination and hostile work environment in violation of the NYSHRL and NYCHRL are dismissed as untimely, and the claim alleging disparate treatment on the basis of familial status in violation of the NYSHRL, as predicated on events occurring prior to January 17, 2017, is dismissed as untimely, with the remainder of this claim dismissed for failure to state a claim; and it is further

ORDERED that defendants' motion is otherwise denied; and it is

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that defendants serve and file their answer to the amended complaint within 20 days after service of a copy of this order with notice of entry.

Dated: January 5, 2022

ENTER: _____
HON. SHLOMO S. HAGLER, J.S.C.