SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO S. HAGLER** **PART 17**
Justice

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MEREDITH PITTMAN, M.D.,

Plaintiff,

- v -

RHONDA YANTISS, M.D., JOAN & SANFORD I. WEILL MEDICAL COLLEGE OF CORNELL UNIVERSITY, and NEW YORK-PRESBYTERIAN HOSPITAL,

Defendants.

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INDEX NO. 151274/2020

MOTION DATE 06/02/2021, 06/02/2021

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 62, 63, 64, 65, 72, 74, 80, 81, 82, 88, 89

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 66, 67, 68, 69, 70, 71, 73, 75, 76, 77, 78, 79, 84, 85, 86, 87, 90

were read on this motion to/for DISMISS.

Motion sequence nos. 004 and 005 are consolidated for disposition herein.

Plaintiff Meredith Pittman, M.D. brings this action for, inter alia, unlawful employment discrimination against a former co-worker, defendant Rhonda Yantiss, M.D. (Dr. Yantiss), and her former employer, defendants Joan & Sanford I. Weill Medical College of Cornell University (WCM) (together, the WCM Defendants) and New York and Presbyterian Hospital (NYP) (together with WCM, WCM/NYP).

In motion sequence no. 004, the WCM Defendants move, pursuant to CPLR 3211 (a) (7), to dismiss the second amended complaint (the SAC).

In motion sequence no. 005, defendant New York-Presbyterian Hospital (NYP) moves, pursuant to CPLR 3211 (a) (7), to dismiss the SAC.

Background

The following facts are drawn primarily from the SAC and are assumed to be true for purposes of these motions. Plaintiff is a board-certified anatomic pathologist (NY St Cts Elec Filing [NYSCEF] Doc No. 60, SAC ¶ 1). Dr. Yantiss is a Professor of Pathology and Laboratory Medicine at WCM and the Chief of Gastrointestinal Pathology/Associate Attending Pathologist at NYP who had managerial and/or supervisory control over plaintiff (*id.*, ¶ 7). WCM is a biomedical research unit and medical school of Cornell University (*id.*, ¶ 8). NYP is a non-profit academic medical center affiliated with WCM (*id.*, ¶ 9).

By letter dated September 21, 2015, Dr. Daniel M. Knowles (Dr. Knowles), Professor and Chair of the Department of Pathology and Laboratory Medicine at WCM and Pathologist-in-Chief at NYP, extended an offer of employment to plaintiff (*id.*, ¶¶ 20-21). The letterhead bears the logos for "Weill Cornell Medical College" and "New York-Presbyterian Hospital Weill Cornell Medical Center" (*id.*, ¶ 21). The appointment as an Assistant Professor of Pathology and Laboratory Medicine on the Pathway Recognizing Academic Achievement and Scholarship (Clinical Expertise and Innovation) in the Division of Gastrointestinal Pathology (the Division) at WCM and Assistant Attending Pathologist at NYP was for a one-year term beginning January 1, 2016, with renewals to be determined annually (*id.*, ¶¶ 1 and 22-23). Plaintiff would be notified in accordance with WCM policy if the Contract was not renewed (*id.*, ¶ 23). Plaintiff signed the offer letter on September 22, 2015 (the Contract) (NYSCEF Doc No. 69, John H. Pope affirmation, Ex 2 at 4). The Contract was renewed every year until 2020 (*id.*, ¶ 23).

Plaintiff alleges that after she announced her pregnancy in March 2016, Dr. Yantiss began harassing her based on her pregnancy and gender (*id.*, ¶¶ 31 and 37). Dr. Yantiss often stated that plaintiff's clothing was inappropriate for a pregnant woman (*id.*, ¶ 33). At a July 2016

conference, Dr. Yantiss commented that plaintiff "'looked so much bigger than [her] dates'" (*id.*). At a September 2017 meeting, Dr. Yantiss asked plaintiff if she was pregnant because "her dress emphasized her 'mommy tummy'" (*id.*, ¶ 34). In November 2017, Dr. Yantiss called two pathologists, who had commented about sexual harassment in academic pathology on social media, "'stupid little brats'" (*id.*, ¶ 35).

From October 2016, when plaintiff returned from maternity leave, to Spring 2019, Dr. Yantiss allegedly harassed plaintiff based on her familial or caregiver status (*id.*, ¶ 36). Dr. Yantiss frequently told plaintiff "'it was perceived' that she was not doing her job due to her family responsibilities' … [and] that she 'should have her nanny work more hours'" (*id.*, ¶¶ 36-37). In March 2017, Dr. Yantiss yelled at plaintiff for choosing to care for her child instead of attending an optional United States and Canadian Academy of Pathology (USCAP) dinner, and "told her, in words or effect, that 'it was perceived' that she 'was not doing her job'" (*id.*, ¶ 38).

Plaintiff alleges that Dr. Yantiss has ridiculed her in front of others. Dr. Yantiss allegedly told faculty at a June 2017 awards dinner that plaintiff had won the Resident Teaching Award "'because she is nice'" and mocked plaintiff's position as Director of Education in a September 2017 meeting with senior Division pathologists (*id.*, ¶¶ 39-40).

Dr. Yantiss also began excluding plaintiff from participating in research projects and papers because she was "'too junior'" and lacked experience to serve as a last author, or senior researcher, even though male Assistant Professors under Dr. Yantiss's mentorship, who did not have family or caregiver responsibilities, served as last authors (*id.*, ¶¶ 43-45). At an August or September 2017 meeting, Dr. Yantiss stated plaintiff should not work on a review article because she was not "'an expert in anything'" (*id.*, ¶ 41). And at an August 1, 2018 meeting, Dr. Yantiss told residents and fellows that plaintiff "'should not be working with residents'" (*id.*, ¶ 45).

Plaintiff made 10 complaints to WCM/NYP faculty and administration officials about Dr. Yantiss's conduct. In October 2017, plaintiff complained to her direct supervisor, Dr. Alain Borczuk (Dr. Borczuk), Vice Chair for Anatomic Pathology at WCM and an Assistant Attending Pathologist at NYP, who replied that plaintiff was "'too sensitive'" and that it would be difficult to find a new Chief of Pathology (*id.*, ¶ 47). Plaintiff complained about Dr. Yantiss's behavior twice more to Dr. Borczuk on June 29 and August 6, 2018 (*id.*, ¶ 48). On August 27, 2018, plaintiff complained to her assigned WCM mentor, Dr. Susana Morales, an Associate Professor of Internal Medicine at WCM and an Associate Attending Physician at NYP, who referred plaintiff to WCM's Associate Deans of Diversity (*id.*, ¶ 49). On September 18, 2019, plaintiff met with Associate Deans of Diversity Dr. Linnie Maria Golightly and Dr. Rache M. Simmons, who promised to put her in contact with WCM's Human Resources (HR) Department, but failed to do so (*id.*, ¶ 50). On October 8, 2018, plaintiff met with Dr. Knowles, who agreed Dr. Yantiss's behavior was "in words or effect, 'not good'" (*id.*, ¶ 51). On October 31, 2018, plaintiff met with Dr. Philip Wilner, Senior Vice President-Chief Operating Officer at NYP and WCM Faculty Ombudsman, who referred her to Dr. Peter Schlegel (Dr. Schlegel), Senior Associate Dean for Clinical Affairs and Chair of the Urology Department at WCM and an Attending Physician at NYP, to request an investigation (*id.*, ¶ 52). By email on October 31, 2018, plaintiff reported Dr. Yantiss's actions to Dr. Schlegel, who responded that his assistant would schedule a meeting with Tanisha Raiford (Raiford), the Chief Privacy Officer in WCM's HR Department (*id.*, ¶ 53). On November 19, 2018, plaintiff met with Raiford and another representative and provided them with the names of eight witnesses (*id.*, ¶ 54). Raiford responded that HR would conduct a prompt investigation, and would keep the complaint confidential (*id.*, ¶ 55). On May 6, 2019, Dr. Yantiss told an unnamed Division faculty member

that she had learned of plaintiff's HR complaint from an unnamed Department administrator (*id.*, ¶ 57). Dr. Jose Jessurun (Dr. Jessurun), a Senior Division Pathologist, confirmed to plaintiff that there had been a "'breach of confidentiality'" regarding her HR complaint (*id.*, ¶ 58).

Beginning in April 2019, Dr. Yantiss has purportedly retaliated against plaintiff. She has refused to meet with plaintiff in person or outside the presence of a third party; excluded plaintiff from Division meetings at which research and career development opportunities are discussed; pressured Dr. Jessurun to exclude plaintiff from a project in June 2019; reduced her teaching hours; and, in November 2019, excluded plaintiff from participating in follow-up studies associated with a paper that she and Dr. Yantiss had co-written (*id.*, ¶¶ 56 and 60-65). Dr. Yantiss has twice denied plaintiff's requests for more teaching hours (*id.*, ¶¶ 62 and 64).

Dr. Yantiss has allegedly defamed plaintiff by repeatedly circulating a rumor that she had "'stole[n] intellectual property' from Dr. Jessurun and claimed 'ownership' over his ideas by incorporating his suggestions into a research paper," despite Dr. Jessurun's statement to plaintiff and other Division faculty that she had not plagiarized his work (*id.*, ¶ 67). In Fall 2018, Dr. Yantiss told an unnamed Division faculty member that plaintiff had "'stolen research ideas'" (*id.*, ¶ 68). In February or March 2019, Dr. Yantiss met Dr. David Pisapia (Dr. Pisapia), an Associate Professor in the WCM Department of Pathology and Laboratory Medicine and an Assistant Attending Pathologist at NYP, at a birthday party for a mutual friend's child and told him that plaintiff "'had taken an idea' that wasn't hers and 'claimed ownership' of it as if it had been hers"[1] (*id.*, ¶ 69). At a March 1, 2020 social event for the 2020 Annual USCAP Meeting at

[1] Plaintiff learned of Dr. Yantiss's comments to Dr. Pisapia in August 2019 from an unnamed faculty member in the Department of Pathology and Laboratory Medicine, and Dr. Pisapia later confirmed to plaintiff that Dr. Yantiss told him plaintiff had "'taken an idea'" (*id.*, ¶ 69).

the hotel bar at the J.W. Marriott in Los Angeles, Dr. Yantiss told an unnamed WCM/NYP faculty member that plaintiff had "'stolen ideas' from other Division pathologists" (*id.*, ¶ 73).

Dr. Yantiss also disparaged plaintiff to others. In Spring 2019, Dr. Yantiss called two of plaintiff's mentors at Johns Hopkins University, told them plaintiff had filed a formal complaint against her, and repeated the claim that plaintiff had stolen intellectual property (*id.*, ¶ 70). In Spring and Summer 2019, Dr. Yantiss called unnamed pathologists at the Cleveland Clinic, the University of Michigan and Montefiore Medical Center to make false statements about plaintiff's character and work performance (*id.*, ¶ 71).

On May 21, 2019, plaintiff met Dr. Schlegel and Raiford to discuss Dr. Yantiss's allegedly retaliatory acts (*id.*, ¶ 75). Plaintiff claims Raiford told her that she was perceived as adversarial and uncollaborative; repeated the allegation that plaintiff had stolen intellectual property; and dismissed Dr. Yantiss's "years of harassment … by stating that doctors sometimes say things they shouldn't when they are in a 'family' environment," even though Raiford had spoken to only two witnesses (*id.*, ¶¶ 75-77 and 80). Raiford referred plaintiff to the Employee Assistance Program Consortium for counseling and told her that she was required to attend weekly meetings with Dr. Borczuk (*id.*, ¶¶ 78-79). Plaintiff perceived this as "punishment" for complaining about harassment and discrimination (*id.*, ¶ 79).

On June 4 and December 6, 2019, plaintiff met with Dr. Massimo Loda (Dr. Loda), Chair of the Department of Pathology and Laboratory Medicine at WCM/NYP, about the HR investigation (*id.*, ¶ 81). Dr. Loda allegedly stated that he agreed with the results and concluded that Dr. Yantiss had not engaged in any wrongdoing (*id.*). In the latter meeting, also attended by Dr. David Hajjar, Executive Vice Chair of the Department of Pathology and Laboratory Medicine, Dr. Loda dismissed the defamation claim as "'academic people talk'" (*id.*).

Plaintiff also complains of retaliatory conduct by WCM/NYP. Plaintiff commenced this action on February 4, 2020 and served defendants with process two days later (*id.*, ¶ 82). In response, WCM/NYP barred plaintiff from coming to work. Specifically, by email dated February 9, 2020, Dr. Loda advised plaintiff that she should not report to work without his further instruction (*id.*, ¶ 83). On February 20, 2020, plaintiff filed a complaint with the New York State Public Health and Health Planning Council (the PHHPC) alleging that WCM/NYP had barred her from work in retaliation for commencing this action and had violated Public Health Law § 2801-b[2] (*id.*, ¶ 85). Three weeks later on March 12, 2020, WCM/NYP terminated plaintiff's access to her work email and ordered her to return her staff badge and keys (*id.*, ¶ 86). Then, on April 23, 2020, plaintiff received a letter dated April 20, 2020 stating that her Contract had not been renewed and would end on April 19, 2021 (*id.*, ¶ 90). Gina Imperator, WCM's Chief Administrative Officer, advised plaintiff by email on May 4, 2020 that she should not perform work for or engage in activities, including research, on behalf of WCM unless Dr. Loda instructed her to do so (*id.*, ¶ 92). Dr. Loda also refused to provide plaintiff with a verification of her research assignment at WCM/NYP to the National Institutes of Health Loan Repayment Program because "'there is no reason … for you to be conducting research, or doing any other work, on behalf of Weill Cornell'" (*id.*, ¶¶ 93-94). Plaintiff's name and physician profile were removed from WCM/NYP's website later that year (*id.*, ¶ 88).

Procedural History

Plaintiff commenced this action by filing a summons and complaint (NYSCEF Doc No. 1), and this court granted plaintiff leave to file the SAC (NYSCEF Doc No. 58). The SAC dated

[2] The PHHPC dismissed the complaint against WCM because the medical school was not considered a hospital under Public Health Law § 2801 (1), credited the complaint against NYP and directed NYP to review its actions (NYSCEF Doc No. 64, Benjamin E. Stockman affirmation, Ex A).

November 5, 2020 asserts five causes of action for: (1) a violation of New York State Human Rights Law (Executive Law § 290 *et seq.*) (State HRL) for discrimination, hostile work environment, retaliation and blacklisting against defendants; (2) a violation of New York City Human Rights Law (Administrative Code of City of NY § 8-101 *et seq.*) (City HRL) for discrimination, hostile work environment, retaliation and blacklisting against defendants; (3) intentional infliction of emotional distress against Dr. Yantiss; (4) defamation against Dr. Yantiss; and (5) breach of contract against WCM/NYP. In lieu of answering the SAC, the WCM Defendants and NYP move separately for dismissal. This court has dismissed the third cause of action in an interim decision and order dated February 24, 2021 (NYSCEF Doc Nos. 89-90).

Positions of the Parties

The WCM Defendants argue the SAC fails to state a claim for gender discrimination or for a hostile work environment because plaintiff has not suffered an adverse employment action. She received her full salary and benefits and has secured a position at Maimonedes Medical Center. They contend that the comments identified in the SAC amount to nothing more than petty slights, which are not actionable. They assert that the allegation male colleagues were treated more favorably than plaintiff is conclusory. On the retaliation claim, they posit that plaintiff cannot show she was treated less well than others. The WCM Defendants also contend that the cause of action for defamation has not been pled with particularity and that of the several statements are time-barred. Alternatively, the WCM Defendants contend that the common interest privilege shields Dr. Yantiss from liability, and plaintiff has not pled that the statements were made with spite, ill will, or a reckless disregard for the truth. The WCM Defendants have not addressed plaintiff's claims for blacklisting or aiding and abetting discrimination pled in the first two causes of action or the fifth cause of action for breach of contract.

In response, plaintiff argues that the SAC gives the WCM Defendants fair notice of her discrimination claims. She maintains that the SAC identifies two instances of defamation per se involving Dr. Pisapia and the faculty pathologist, whose identity was disclosed in discovery, and specifies when and where the statements were made. Plaintiff also contends that it is inappropriate to grant pre-answer dismissal of a defamation claim based on the common interest privilege. In any event, she submits this qualified privilege is inapplicable because Dr. Yantiss had no interest or duty to make the statements to physicians outside the Division or WCM/NYP.

NYP's liability for unlawful discrimination is predicated upon its status as plaintiff's joint employer, but NYP contends that she was employed by WCM. NYP, an academic medical center, states that it collaborates with WCM, a medical school. WCM employs the doctors appointed to NYP, and NYP extends privileges to them to practice medicine on its premises. NYP maintains that WCM hired plaintiff, the actions complained of were perpetrated by WCM employees, and plaintiff sought assistance from WCM, not NYP, personnel. NYP also argues that the breach of contract claim fails because it was not a signatory to the Contract.

Plaintiff counters that NYP employed her as an Assistant Pathologist and at WCM as an Assistant Professor (NYSCEF Doc No. 78, Robert B. Stulberg [Stulberg] affirmation, Ex A, ¶ 2), as indicated in the Contract (NYSCEF No. 69 at 1). She proffers her affidavit in which she explains her role at the hospital. As to the breach of contract cause of action, plaintiff alleges the Contract, which outlines her clinical responsibilities, shows that NYP is a signatory and a party.

Standard of Review

On a motion brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v*

Martinez, 84 NY2d 83, 87-88 [1994]). The court need not extend such consideration to bare legal conclusions or claims that are contradicted by documentary evidence (*Myers v Schneiderman*, 30 NY3d 1, 11 [2017], *rearg denied* 30 NY3d 1009 [2017]). Dismissal is warranted where "the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

Discussion

I. The First and Second Causes of Action

The first and second causes of action assert claims for violations of the State and City HRLs, respectively, and are predicated upon the same facts. Defendants allegedly engaged in unlawful discrimination on the basis of gender/sex, pregnancy and familial/caregiver status, subjected plaintiff to a hostile work environment and retaliated against her for complaining about such conduct (NYSCEF Doc No. 60, ¶¶ 100, 102-103, 111 and 113-114). WCM/NYP allegedly aided and abetted Dr. Yantiss by failing to prevent her conduct (*id.*, ¶¶ 101 and 112).

Executive Law 296 § (1) (a) makes it unlawful for an employer to discriminate against an individual in compensation or in the terms, conditions or privileges of employment because of that individual's sex or familial status. Under Administrative Code § 8-107 (1) (a) (3), it is unlawful for an employer to discriminate against a person in compensation or in the terms, conditions or privileges of employment based on that person's gender or caregiver status. In cases involving the State and City HRLs, all that is required to survive a motion to dismiss at the pre-answer, pre-discovery pleading stage is "'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] [citation omitted]). Thus, to state a cause of action for employment discrimination under the State and

City HRLs, the plaintiff must plead that he or she (1) is a member of a protected class; (2) is qualified for the position; (3) was adversely affected or treated differently; and (4) suffered an adverse action that occurred under circumstances giving rise to an inference of discrimination[3] (*Santiago-Mendez v City of New York*, 136 AD3d 428, 428-429 [1st Dept 2016]). Claims brought under the State or City HRL are subject to a three-year statute of limitations (*id.*).

A. The WCM Defendants

1. Gender/Sex and Familial/Caregiver Status Discrimination

Executive Law § 292 (26) (a) defines "familial status," in part, as "a person who is pregnant or has a child." Administrative Code § 8-102 defines a "caregiver" as "any person who provides direct and ongoing care for a minor child." While neither the State nor City HRL expressly refer to pregnancy, "[d]iscrimination on the basis of pregnancy is a form of gender discrimination" (*Chauca v Abraham*, 30 NY3d 325, 330 n 1 [2017]).

The SAC satisfies the first two elements for pleading an employment discrimination claim. Plaintiff is a member of a protected class (*see Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989] [protected class consisting of women]; *Singhal v Doughnut Plant, Inc.*, 2022 WL 976885, *4, 2022 US Dist LEXIS 60674, *9 [SD NY, Mar. 31, 2022, No. 20-cv-3295 (ALC)] [protected class consisting of pregnant women]). Plaintiff also alleges that she was

[3] The standard for a State HRL discrimination claim accruing before October 2019 differs from the standard for a City HRL discrimination claim (*see Kwong v City of New York*, 204 AD3d 442, 444 n 1 [1st Dept 2022]). However, Executive Law § 300, as amended in 2019 (*see* L 2019, ch 160, § 6), now reads, in part, that "[t]he provisions of this article shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed." As a result, claims brought under the State and City HRLs accruing after October 2019 must be construed liberally to accomplish their remedial purposes of eliminating or preventing discrimination (Executive Law §§ 290 and 300; Administrative Code §§ 8-101 and 8-130). Many of the allegedly discriminatory acts described in the SAC occurred before October 2019.

qualified for the position. Although the WCM Defendants do not challenge these two elements, they maintain that plaintiff cannot satisfy the third and fourth elements.

To constitute adverse action under the State HRL, there must be a material change to the terms and conditions of the plaintiff's employment (*Kwong*, 204 AD3d at 443). The change must be "more disruptive than a mere inconvenience or an alteration of job responsibilities" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306 [2004] [internal quotation marks and citation omitted]). Examples include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices … unique to a particular situation" *(id.* [internal quotation marks and citation omitted]). Because the City HRL must be construed broadly in the plaintiff's favor (*Albunio v City of New York*, 16 NY3d 472, 477 [2011]), the plaintiff need not show that he or she suffered an adverse employment action. Rather, the plaintiff must show only that he or she suffered differential treatment, i.e. that he or she was "treated less well," than other employees because of a protected characteristic (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]). Indeed, "a focus on unequal treatment based on gender – 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 [City HRL]" (*id.* at 79).

On review of the SAC, plaintiff does not plead that she was demoted or that her salary and benefits were reduced or eliminated. She complains that in August 2018, Dr. Yantiss stated she should not be working with residents (NYSCEF Doc No. 60, ¶ 45), but the SAC fails to plead that plaintiff, in fact, ceased working with residents after that meeting. The SAC, though, also alleges that after plaintiff returned from maternity leave, Dr. Yantiss stated that it was

perceived plaintiff was not performing her job. Dr. Yantiss significantly curtailed plaintiff's research and writing opportunities by telling her that she was too junior to engage in research or work as a last author even though male faculty without family or caregiver responsibilities served as last authors (*id.*, ¶¶ 43-44). While "a decrease in workload, without any formal demotion or reduction in pay, does not constitute an actionable adverse employment action" (*Bennett v Watson Wyatt & Co.*, 136 F Supp 2d 236, 248 [SD NY 2001], *reconsideration denied* 156 F Supp 2d 270 [SD NY 2001], *affd* 51 Fed Appx 55 [2d Cir 2002]), plaintiff claims that the research aspect of her job required her to collaborate with residents, fellows and faculty to research, write and publish papers in medical journals (NYSCEF Doc No. 60, ¶ 18). The Contract also provides that plaintiff's duties included a mix of clinical and research work (*id.*, ¶ 26). Affording plaintiff the benefit of every favorable inference, these allegations are sufficient to plausibly allege that plaintiff experienced a significant, material change to the terms of her employment or a diminution of her responsibilities and that she was treated less well than other female caregiver employees (*see Lefort v Kingsbrook Jewish Med. Ctr.*, 203 AD3d 708, 710 [2d Dept 2022] [stating a triable issue of fact existed whether plaintiff suffered an adverse employment action where her position offered the same salary but did not involve any of the management responsibilities from her prior position]; *see also Patane v Clark*, 508 F3d 106, 116 [2d Cir 2007] [reasoning that removing nearly all the secretarial responsibilities from the plaintiff, an executive secretary, constituted adverse action]).

The WCM Defendants contend that plaintiff received her full salary and benefits through April 2021, but this factual assertion is made in a memorandum of law.[4] An unsworn

[4] Plaintiff, in opposition, submits a letter dated November 17, 2020 informing counsel for the WCM Defendants that she had accepted a position at Maimonedes Medical Center and was "entitled, by contract, to receive her full salary and benefits through at least [April 19, 2021]" (NYSCEF Doc No. 82, Stulberg affirmation, Ex A at 2).

memorandum of law from an attorney without personal knowledge has no probative value (*see Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 432 [1st Dept 2010] [statements in memorandum of law have no evidentiary value]; *Rogers v Krauss*, 2012 NY Slip Op 33553[U], *8 [Sup Ct, NY County 2012] ["The facts stated in the memoranda of law … are merely unsworn statements not based on personal knowledge, and are not part of the record. They have no evidentiary value any more than facts stated in an attorney's affidavit"]; *Eden Rock Fin. Fund, L.P. v Gerova Fin. Group Ltd.*, 34 Misc 3d 1205[A], 2011 NY Slip Op 52431[U], *5 [Sup Ct, NY County 2011] [denying a CPLR 3211 motion to dismiss, in part, where "[t]he numerous factual assertions made by counsel for [defendant] in its memoranda of law, upon which its arguments are based, would lack any evidentiary value even on a summary judgment motion, and have no bearing on these motions addressed to the sufficiency of the complaint"]). Furthermore, even if plaintiff had received her full salary, she has pled facts alleging that her research responsibilities were significantly reduced and that she was treated less well than her male colleagues.

As to the fourth element, a "'[d]iscriminatory motivation may be inferred from, among other things, 'invidious comments about others in the employee's protected group[,] or the more favorable treatment of employees not in the protected group'" (*Mazzeo v Mnuchin*, 751 Fed Appx 13, 14 [2d Cir 2018] [citation omitted]; *see also Whitfield-Ortiz v Department of Educ. of City of N.Y.*, 116 AD3d 580, 581 [1st Dept 2014] [finding that the plaintiff failed to plead discriminatory animus because the complaint did not contain allegations of comments or references to race or gender or allege facts that others who did not share the plaintiff's protected characteristics were treated more favorably]). Construing the SAC in the light most favorable to plaintiff, the SAC pleads facts sufficient to infer that plaintiff suffered an adverse action or disadvantage treatment because of her gender and familial/caregiver status. The SAC alleges

that Dr. Yantiss remarked on plaintiff's inability to perform her job once she became a mother and that she was treated less well than male faculty members who were not caregivers.

The WCM Defendants argue that Dr. Yantiss's comments constitute non-actionable, petty slights. While the State and City HRLs are not "general civility code[s]" (*Williams*, 61 AD3d at 79 [internal quotation marks and citation omitted]), whether conduct constitutes a petty slight or trivial inconvenience is an affirmative defense that must be raised in the defendant's answer (*Kaplan v New York City Dept. of Health & Mental Hygiene*, 142 AD3d 1050, 1051 [2d Dept 2016]). Thus, it is more appropriate to address that issue on a motion for summary judgment and not on a pre-answer, pre-discovery motion to dismiss (*id.*). Accordingly, that part of the WCM Defendants' motion seeking to dismiss so much of the first and second causes of action predicated on gender and familial/caregiver status discrimination is denied.

2. Hostile Work Environment

A hostile work environment is one "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create and abusive working environment" (*Forrest*, 3 NY3d at 310 [internal quotation marks and citation omitted]). A plaintiff alleging a cause of action for a hostile work environment under the State HRL "must plead facts that would tend to show that the complained of conduct: (1) is objectively severe or pervasive – that is, creates an environment that a reasonable person would find hostile or abusive; (2) creates an environment that the plaintiff subjectively perceives as hostile or abusive; and (3) creates such an environment because of the plaintiff's [protected class]" (*Godino v Premier Salons, Ltd.*, 140 AD3d 1118, 1120 [2d Dept 2016] [internal quotation marks and citation omitted]). It is not necessary for the plaintiff to plead the severe and pervasive standard to state a claim under the City HRL, as the plaintiff need

only plead facts sufficient to infer that he or she was treated less well because of discrimination (*Campbell v New York City Dept. of Educ.*, 200 AD3d 488, 489 [1st Dept 2021]).

The WCM Defendants repeat the argument that Dr. Yantiss's comments constitute non-actionable petty slights, but as explained earlier, this defense "should be raised in the defendants' answer, and does not lend itself to a pre-answer motion to dismiss" (*Kaplan*, 142 AD3d at 1051). Accordingly, the WCM Defendants' motion to dismiss so much of the first and second causes of action predicated upon a hostile work environment is denied as premature.

3. Retaliation

The WCM Defendants do not address plaintiff's claims of retaliation except to express that they could not have retaliated against plaintiff for filing the PHHPC complaint because she had been told the Contract would not be renewed before she filed that complaint (NYSCEF Doc No. 65, WCM Defendants' mem of law at 4 n 3). Thus, the court will limit its discussion to the PHHPC complaint.

To state a cause of action for retaliation under the State HRL, the plaintiff must allege that "(1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest*, 3 NY3d at 313). The City HRL imposes slightly different requirements for a retaliation claim and requires the plaintiff to show that "(1) [she] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [her]; and (3) a causal connection exists between the protected activity and the adverse action" (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]).

Filing a complaint about discrimination constitutes a protected activity (*Alshami v City Univ. of N.Y.*, 203 AD3d 592 [1st Dept 2022]), and here, the SAC alleges that after plaintiff filed the PHHPC complaint, the WCM Defendants retaliated by terminating her work email access, requesting that she surrender her staff badge and office keys and barring her from working without further instruction. Furthermore, counter to the WCM Defendants' contention, the SAC alleges that plaintiff filed the PHHPC complaint two months before she was told the Contract would not be renewed. These actions, which took place in close temporal proximity to the protected activity, disadvantaged plaintiff (*see Noho Star Inc. v New York State Div. of Human Rights*, 72 AD3d 448, 449 [1st Dept 2010] [stating that a causal connection may be inferred when the protected activity plaintiff had engaged in is followed closely by discriminatory treatment]). As such, the allegations adequately plead a plausible claim for retaliation in violation of the State and City HRLs based on the filing of the PHHPC complaint. Therefore, to the extent the moving papers can be construed to seek dismissal of so much of the first and second causes of action for retaliation based on the filing of the PHHPC complaint, the motion is denied.

B. NYP

As explained above, violations of the State and City HRLs subject an aggrieved party's employer to liability. That said, a non-employer may also be liable. Under the joint employer doctrine, "two employers handle certain aspects of their employer-employee relationship jointly" (*Griffin v Sirva Inc.*, 835 F3d 283, 292 [2d Cir 2016] [internal quotation marks and citations omitted]). Thus, even though a plaintiff is formally employed by one entity, another entity found to have constructively employed the plaintiff may be liable for employment law violations (*id.* at 292-293). Critical to this determination is the joint employer's control over the plaintiff (*Griffin*

v Sirva, Inc., 29 NY3d 174, 186 [2017]). Courts apply the "immediate control" test, which looks at whether the joint employer had "immediate control over the other company's employees" and had control "in setting the terms and conditions of the employee's work" (*Brankov v Hazzard*, 142 AD3d 445, 446 [1st Dept 2016] [internal quotation marks omitted]). Factors to consider include "the commonality of hiring, firing, discipline, pay, insurance, records, and supervision" with the most important factor being "the employer's right to control the means and manner of the worker's performance" (*id.* [internal quotation marks omitted]). Whether an entity is the plaintiff's joint employer usually involves a fact-intensive inquiry that cannot be resolved on motion to dismiss (*see Yousef v Al Jazeera Media Network*, 2018 WL 6332904, *2, 2018 US Dist LEXIS 188198, *5 [SD NY, Oct. 31, 2018, No. 16-cv-6416 (CM)]).

The allegations in the SAC, bolstered by plaintiff's affidavit, adequately plead that plaintiff was jointly employed by WCM and NYP (*see Popat v Levy*, 328 F Supp 3d 106, 120 [WD NY 2018] [denying dismissal of a Title VII claim where the complaint pled facts showing that one of the defendants, a professor at the university and a physician at a not-for-profit corporation associated with that university, hired the plaintiff for a faculty position where he was expected to train university medical students while he performed surgery alongside and as directed by the not-for-profit corporation's doctors]). Although the Contract states that plaintiff's attending privileges at NYP were contingent upon her continued full-time employment at WCM, the Contract also states that her appointment as an Attending Pathologist was subject to review by an internal committee at NYP (NYSCEF Doc No 69 at 1). Plaintiff avers that she spent 60% of her time performing clinical care services for NYP patients, which required her to work in NYP facilities, use NYP equipment and work with NYP staff, none of whom held positions or were formally affiliated with WCM (NYSCEF Doc No. 78, ¶¶ 3-6). Plaintiff further

avers that her clinical schedule was determined, in part, by senior NYP supervisory staff such as Dr. Borczuk, Dr. Yantiss, and Brian Robinson, M.D., an Associate Attending Pathologist at NYP (*id.*, ¶ 8). In affording plaintiff every possible favorable inference, these allegations are sufficient to plausibly allege that NYP is a joint employer.

NYP maintains that WCM is plaintiff's exclusive employer based upon the "affiliation model" (NYSCEF Doc No. 71, NYP mem of law at 6), but the factual assertions describing the interplay between NYP and WCM are contained within counsel's unsworn memorandum of law, which lacks probative value (*Eden Rock Fin. Fund, L.P.*, 2011 NY Slip Op 52431[U], *5). Moreover, the court must assume that the allegations pled in the SAC are true (*see Leon*, 84 NY2d at 87), and plaintiff has alleged NYP is her joint employer (*see United States ex rel. Sarafoglou v Weill Med. College of Cornell Univ.*, 451 F Supp 2d 613, 625 [SD NY 2006] [denying dismissal of a retaliation claim under the federal False Claims Act brought against NYP because the court must take plaintiff's allegation that she was an NYP employee as true]).

Furthermore, Executive Law § 296 (6) and Administrative Code 8-107 (6) prohibit any person from aiding and abetting unlawful discrimination (*see National Org. for Women v State Div. of Human Rights*, 34 NY2d 416, 421 [1974] [finding that a corporate publisher aided and abetted discrimination by publishing "held wanted" columns based on gender]; *Schindler v Plaza Constr. LLC*, 154 AD3d 495, 496 [1st Dept 2017] [reasoning that even if the defendant was not the plaintiff's joint employer, it could be liable on an aiding and abetting theory under the City HRL]). Here, the SAC alleges that plaintiff made numerous complaints to employees at WCM/NYP, but they failed to take any meaningful action to address them. Thus, the part of NYP's motion to dismiss the first and second causes of action against it is denied.

II. The Fourth Cause of Action

The cause of action for defamation against Dr. Yantiss is predicated on allegedly false statements published to third parties that plaintiff had stolen intellectual property from Dr. Jessurun (NYSCEF Doc No. 60, ¶ 124). The SAC alleges these statements are defamatory per se (*id.*, ¶ 130).

"Defamation is 'the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society'" (*Stepanov v Dow Jones & Co, Inc.*, 120 AD3d 28, 34 [1st Dept 2014] [citation omitted]). Only statements alleging objective facts capable of being proven false, as opposed to opinion or rhetorical hyperbole, are actionable (*Davis v Boeheim*, 24 NY3d 262, 271-272 [2014]). Slander, which is "defamatory matter addressed to the ear" (*Ava v NYP Holdings, Inc.*, 64 AD3d 407, 411 [1st Dept 2009], *lv denied* 14 NY3d 702 [2010]), is not actionable unless the plaintiff suffered special damages, or "the loss of something having economic or pecuniary value" (*Liberman v Gelstein*, 80 NY2d 429, 435-436 [1992] [internal citation and quotation marks omitted]). If a statement is defamatory per se, though, damages are presumed and need not be pled or proven (*id.* at 435). A statement is defamatory per se if it: (1) charges the plaintiff with a serious crime; (2) tends to injure plaintiff's business or profession; (3) imputes that the plaintiff has a loathsome disease; or (4) imputes unchastity to a woman (*id.*). Thus, to state a cause action for defamation, the plaintiff must plead "(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm" (*Stepanov*, 120 AD3d at 34).

The plaintiff must also plead the particular defamatory words in the complaint (*see* CPLR 3016 [a]), along with "who said them and who heard them, when the speaker said them, and where the words were spoken" (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 48 [1st Dept 2009]), *lv dismissed in part, denied in part* 14 NY3d 736 [2010]). Paraphrasing of the allegedly defamatory statements is impermissible (*Mañas v VMS Assoc., LLC*, 53 AD3d 451, 454-455 [1st Dept 2008]). The use of "words 'to the effect', 'substantially', or words of similar import generally renders the complaint defective" (*Geddes v Princess Props. Intl.*, 88 AD2d 835, 835 [1st Dept 1982] [internal quotation marks and citation omitted]). Whether a statement is defamatory is a legal question for the court to resolve (*Savitt v Candor*, 189 AD3d 468, 469 [1st Dept 2020]).

A cause of action for defamation is subject to a one-year state of limitations (*see* CPLR 215 [3]), and plaintiff commenced this action on February 4, 2020. Therefore, any statements made before February 4, 2019 (NYSCEF Doc No. 60, ¶¶ 67-68) are time-barred (*see Petrisko v Animal Med. Ctr*, 187 AD3d 553, 554 [1st Dept 2020] [dismissing a defamation claim for statements made more than a year before the action was commenced]). The allegation that Dr. Yantiss told plaintiff's unnamed mentors in Spring 2019 that she had stolen intellectual property is not sufficiently specific, and fails to meet the exacting pleading standard set forth in CPLR 3016 (a) (*see Offor v Mercy Med. Ctr.*, 171 AD3d 502, 503 [1st Dept 2019] [dismissing a defamation claim where the plaintiff failed to plead the exact defamatory words and the time, place, and manner the statement was made]). Likewise, the statement to Dr. Pisapia "in February or March 2019" is not sufficiently specific. Although plaintiff contends that the exact date may be ascertained during discovery, nothing prohibited plaintiff from obtaining the specific date from Dr. Pisapia for purposes of pleading it in the SAC.

However, the statement Dr. Yantiss made to the pathologist at the 2020 USCAP conference is sufficiently specific as the SAC identifies the particular words spoken, who spoke them, who heard them, and when and where the statement was made (*see Amaranth LLC*, 71 AD3d at 48 [denying dismissal where the complaint satisfied CPLR 3016 [a]; *Epifani v Johnson*, 65 AD3d 224, 234 [2d Dept 2009] [denying dismissal where the complaint identified set forth the statement and to whom, when, and where the statement was made]). Contrary to the WCM Defendants' assertion that the statement plaintiff had "'stolen ideas' from other Division pathologists" (NYSCEF Doc No. 60, ¶ 73) does not constitute rhetorical hyperbole. The statement is reasonably susceptible of a defamatory connotation as it purports to convey a fact that is capable of being proven false (*see Amaranth LLC*, 71 AD3d 48; *Gross v New York Times Co.*, 82 NY2d 146, 153 [1993] [stating that only facts can be proven false]). In addition, the statement is arguably defamatory per se because it tends to injure plaintiff in her profession (*see Keeling v Salvo*, 188 AD3d 463, 464 [1st Dept 2020] [reasoning that a statement that insinuates the plaintiff, who is in the property management business, was dismissed from a condominium board because of alleged misconduct, was defamatory per se]). According to the SAC, part of plaintiff's work involved authoring papers for publication in medical journals (NYSCEF Doc No. 160, ¶ 18). An allegation that plaintiff had claimed the ideas of a colleague as her own could be damaging (*see Paladino v Cojocaru*, 2021 NY Slip Op 32669[U], *18-19 [Sup Ct, NY County 2021] [concluding that statements accusing the plaintiff of plagiarism defamed her "status as college professor and denigrates her academic skills"]).

Nonetheless, the WCM Defendants maintain that the common interest privilege applies. Under the common interest privilege, "[a] good-faith communication upon any subject matter in which the speaker has an interest, or in reference to which he [or she] has a duty, is qualifiedly

privileged if made to a person having a corresponding interest or duty" (*Present v Avon Prods.*, 253 AD2d 183, 187 [1st Dept 1999], *lv dismissed* 93 NY2d 1032 [1999]). The plaintiff may overcome this qualified privilege by showing the speaker spoke with malice, which is defined as either spite, ill will, or knowledge that the statement was false or was made with reckless disregard of the truth (*Liberman*, 80 NY2d at 438). A qualified privilege, like the common interest privilege, is an affirmative defense that must be raised in the defendant's answer (*see Garcia v Puccio*, 17 AD3d 199, 201 [1st Dept 2005]). The "recognized procedure is to plead the privilege as an affirmative defense and thereafter move for summary judgment on that defense" (*Demas v Levitsky*, 291 AD2d 653, 661 [3d Dept 2002], *lv dismissed* 98 NY2d 728 [2002] [denying a motion to dismiss as premature because truth, like a qualified privilege, is an affirmative defense that must be raised in an answer]). Furthermore, in opposing a motion to dismiss, the plaintiff is not obligated to plead evidentiary facts supporting an allegation of malice (*Arts4All, Ltd. v Hancock*, 5 AD3d 106, 109 [1st Dept 2004]), nor must the plaintiff rebut this defense (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). As applied here, the part of the WCM Defendants' seeking dismissal based on the common interest privilege is denied as premature as the WCM Defendants have yet to serve an answer to the SAC.

III. The Fifth Cause of Action

The fifth cause of action asserts a claim for breach of contract against WCM/NYP. NYP argues it bears no liability as a non-signatory to the Contract. The WCM Defendants did not address this cause of action on their motion.

To state a cause of action for breach of contract, the plaintiff must plead the existence of a valid contract, the plaintiff's performance, the defendant's breach and damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). A breach of contract cause of

action cannot be maintained against a non-signatory to the agreement (*Array BioPharma, Inc. v AstraZeneca AB*, 184 AD3d 463, 464 [1st Dept 2020], citing *Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 463 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]. A review of the Contract shows that it was signed by Dr. Knowles as a Professor and Chairman of the Department of Pathology and Laboratory Medicine at WCM (NYSCEF Doc No. 69 at 4). The Contract states that plaintiff's attending privileges at NYP were contingent upon her continued full-time appointment at WCM (*id.* at 1), sets out the terms and conditions of her employment at WCM, and sets out WCM's obligations to plaintiff all without mentioning NYP's obligations to plaintiff. The Contract merely "recommends" her appointment as an attending physician an NYP. Plaintiff, in opposition, has "failed to present the court with any authority finding that a claim for breach of contract can be stated against a non-signatory, non-party to an employment contract under a joint employer theory" (*Naderi v North Shore-Long Is. Jewish Health Sys.*, 2014 NY Slip Op 30485(U), *7 [Sup Ct, NY County 2014], *affd* 135 AD3d 619 [1st Dept 2016]). The fifth cause of action is dismissed as against NYP.

Accordingly, it is

ORDERED that the motion of defendants Rhonda Yantiss, M.D. and Joan & Sanford I. Weill Medical College of Cornell University to dismiss the second amended complaint (motion sequence no. 004) is denied; and it is further

ORDERED that the motion of defendant New York-Presbyterian Hospital to dismiss the second amended complaint (motion sequence no. 005) is granted to the extent of dismissing the fifth cause of action against it, and the fifth cause of action is dismissed against said defendant; and it is further

ORDERED that within 30 days after service of this order with written notice of entry, defendants Rhonda Yantiss, M.D., Joan & Sanford I. Weill Medical College of Cornell University and New York-Presbyterian Hospital are directed to serve an answer to the second amended complaint.

6/15/2022
DATE

SHLOMO HAGLER, J.S.C.

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