

<b>Walker v Triborough Bridge &amp; Tunnel Auth.</b>
2022 NY Slip Op 32695(U)
August 9, 2022
Supreme Court, New York County
Docket Number: Index No. 160839/2021
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33

-----X  
KELLIE WALKER,

Plaintiff,

- v -

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,  
D/B/A METROPOLITAN TRANSPORTATION  
AUTHORITY BRIDGES AND TUNNELS, VICTOR  
MUALLEM, SHARON GALLO-KOTCHER

Defendant.  
-----X

INDEX NO. 160839/2021

MOTION DATE July 28, 2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISSAL

Oral argument took place on July 28, 2022 with Jeanne M. Christensen appearing for Plaintiff Kellie Walker (“Plaintiff”) and Helene Hechtkopf appearing on behalf of all Defendants.

Upon the foregoing documents, it is decided and ordered as follows below.

**I. Procedural Background**

On January 19, 2021, Plaintiff filed a Complaint in the Southern District of New York (the “SDNY case”) (NYSCEF Doc. 17). Defendants in that case moved to dismiss the Complaint on June 1, 2021 pursuant to FRCP 12(b). In a decision dated November 18, 2021, SDNY dismissed Plaintiff’s Title VII, Section 1981 and Section 1983 claims and did not analyze Plaintiff’s State law claims but rather refused to exercise supplemental jurisdiction over Plaintiff’s State law claims (*id.*).

Plaintiff then filed a Complaint in Supreme Court, First Department on December 2, 2021. Defendants made this pre-Answer motion to dismiss on January 18, 2022. Defendants filed their

motion to dismiss arguing that (1) Plaintiff is collaterally estopped from asserting discrimination, hostile work environment and retaliation claims; (2) Plaintiff has failed to state a claim for race or gender discrimination, retaliation, and under the gender motivated violence act (“GMV”); (3) Plaintiff has failed to state a claim against individual defendants; and (4) Plaintiff’s tort claims should be dismissed because they are barred by the Workers’ Compensation Law and failed to comply with the statutory notice of claim requirement (NYSCEF Doc. 7).

Plaintiff in opposition argues that (1) she is not collaterally estopped from asserting her claims; (2) she has adequately pleaded all of her claims, and (3) Plaintiff’s tort claims are not barred by the Workers’ Compensation Law and do comply with the statutory notice of claim requirement.

## II. Factual Background

Plaintiff Kellie Walker (“Plaintiff”) is a 50-year-old Black woman who is a practicing attorney and has been employed by Defendant Triborough Bridge and Tunnel Authority (“MTA”) since 2018 (NYSCEF Doc. 1 at ¶ 1). Plaintiff’s supervisor was Defendant Victor Muallem (“Muallem”) a 60-year-old white man who is a director of labor relations at the MTA (*id.* at ¶ 37). Plaintiff’s colleagues who also worked under Muallem were Alexandria Jean-Pierre (“Jean-Pierre”) who is a 40-year-old Black woman, and Eduardo Miyashiro (“Miyashiro”) (*id.* at ¶ 36). Defendant Sharon Gallo-Kotcher (“Gallo-Kotcher”) is a 61-year-old white female who is the vice president of labor relations at the MTA and has the authority to direct Plaintiff’s work activities, assign her job responsibilities, and monitor her performance (*id.* at ¶ 37).

Plaintiff alleges that in the Spring of 2019, Muallem began to direct severe animosity towards Plaintiff and Jean-Pierre, the two Black females on his team, while grooming Miyashiro for promotion (*id.* at ¶¶ 44-47). In April of 2019, Plaintiff alleges Muallem’s animosity resulted in

emails with “unwarranted and gratuitous criticisms about Ms. Walker’s work product, copying Gallo-Kotcher” while he would similarly “make belittling comments to [plaintiff]” (*id.* at ¶ 49). In November of 2019, Plaintiff alleges that Muallem went into Plaintiff’s office, and with the door open for everyone to hear, started screaming at the top of his lungs criticizing Plaintiff’s work product (*id.* at ¶ 51).

Plaintiff further alleges that during an arbitration hearing on January 8, 2020, Muallem, in front of the MTA’s clients, opposing counsel, and Arbitrator John Sands, verbally abused Plaintiff by interjecting and shouting at her while she tried to give an opening statement (*id.* at ¶¶ 54-56). Allegedly, Muallem was shouting so ferociously that spit flew out of mouth and Arbitrator Sands had to call Plaintiff, Muallem, and opposing counsel out of the room to discuss Muallem’s behavior (*id.* at ¶¶ 58-61). Plaintiff alleges that Muallem never treated any male employees in a similar manner and alleges that Muallem subjected Plaintiff to this behavior because Plaintiff is a Black woman (*id.*). Plaintiff claims that a month later, on February 3, 2020, Muallem struck Plaintiff with the back of his hand in the presence of opposing counsel, Arbitrator Dan Brent, a court reporter, and a superintendent of the MTA, because he was unhappy with Plaintiff’s cross-examination of a witness (*id.* at ¶¶ 65-68). Plaintiff again alleges that Muallem would have never physically assaulted her had she been a man and that she was subjected to this alleged act of violence because she is a Black woman (*id.* at ¶¶ 69-72).

On February 4, 2020, Plaintiff submitted a workplace violence incident form to Gallo-Kotcher, and on February 5th, Plaintiff filed an incident report with the New York City Police Department (*id.* at ¶¶ 80-81). On February 6th, Plaintiff obtained a medical note to take a temporary leave of absence from her employment (*id.* at ¶82).

Plaintiff retained counsel around the end of February and sent a letter of representation to the MTA, after which Plaintiff alleges that the MTA, and specifically Gallo-Kotcher, began a campaign of retaliation (*id.* at ¶87). Plaintiff alleges that acts of retaliation included comments by Gallo-Kotcher on the time she would clock in and out of work, requesting a report on the status of all of her cases within an hour, and making plaintiff go into the office to conduct virtual litigation as Covid-19 cases were rising in November of 2020 even though Plaintiff allegedly suffers from underlying health conditions (*id.* at ¶¶ 87-88, 94). It is alleged Gallo-Kotcher's justification for making Plaintiff go into the office was for "ease of collaboration", but Plaintiff alleges that this was just a pre-text for Gallo-Kotcher's retaliation especially because all "collaboration" with other counsel occurred virtually and not in-person (*id.* at ¶ 95). Plaintiff also alleges that after she sent her letter of representation, Gallo-Kotcher would repeatedly make reference to Muallem while speaking with Plaintiff to provoke her intentionally, causing Plaintiff to feel anxious and shake (*id.* at ¶ 99).

Plaintiff states that her workplace violence complaint caused the MTA to investigate the incident; however, they found "insufficient evidence to substantiate Ms. Walker's allegations" without providing any justification or information as to how the investigation was conducted" (*id.* at ¶ 112). On November 23, 2020, Plaintiff filed a charge of discrimination and retaliation with the Equal Employment Opportunity Commission ("EEOC") (*id.* at ¶ 116).

Plaintiff alleges the retaliation continued after filing the EEOC claim, alleging that when she had to come back into the office 50% of the time starting September 20, 2021, she was forced to come in on the same days as Muallem even though she requested the ability to stagger her workdays with Muallem so she would not have to be in his presence (*id.* at ¶ 117). On November 17, 2021, Plaintiff was allegedly informed by Gallo-Kotcher that she had to relocate to an office

extremely close to Muallem and when Plaintiff requested she remain in her current office to avoid being close to Muallem, she allegedly received no response and was forced to move extremely close to her alleged abuser (*id.* at ¶ 118-122).

### III. Discussion

#### A. Motion to Dismiss Standard

As recently reiterated by the Court of Appeals, when reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determines only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]).

Employment discrimination cases are generally reviewed under a liberal notice pleading standard, meaning that a Plaintiff need not plead specific facts establishing a prima facie case of discrimination, but must only give fair notice of the nature of the claim and its grounds (*Petit v Department of Education of City of New York*, 177 AD3d 402 [1st Dept 2019]; *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]; *Gershenson v Local 52*, 2022 NY Slip Op 32546[U] [Sup Ct, New York County 2022]).

#### B. Collateral Estoppel

Collateral estoppel applies when “(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits” (*Conason v Megan Holding, LLC*, 25 NY3d

[2015] [internal quotation marks and citation omitted], *rearg denied* 25 NY3d 1193 [2015]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1985])

Collateral estoppel is an equitable doctrine, grounded in the facts and realities of a particular litigation, and is not to be applied rigidly. *Buechel v Bain*, 97 NY2d 295, 303 [2001]; *Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 684 [1st Dept 2007]; *Pustilnik v Battery Park City Authority*, 71 Misc.3d 1058, 1069 [Sup Ct, New York County 2021]). “The fundamental inquiry is whether re-litigation should be permitted in a particular case in light of fairness to the parties, conservation of the resources of the courts and the litigants, and the societal interests in consistent and accurate results.” *Buechel* at 304. The litigant seeking the benefit of collateral estoppel must show that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party, while the party to be precluded bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination (*id.*).

Defendant argues that “where a federal court has dismissed federal discrimination claims, state and city discrimination claims that are based upon the same theories are precluded by the doctrine of collateral estoppel and must be dismissed.” However, the case upon which Defendant relies to assert such a rule does not mandate state and city discrimination claims be precluded by collateral estoppel (*Emmons v Broome County*, 180 AD3d 1213, 1216 [3d Dept 2020] [“where...a federal court dismisses federal claims but declines to exercise supplemental jurisdiction over analogous state law claims, the federal determination may be dispositive of the state claims based upon principles of collateral estoppel”] (emphasis added)).

While Defendant also relies on *Wiltz v New York City* (191 AD3d 452 [1st Dept 2021]) in support of its assertion that collateral estoppel should preclude Plaintiff’s state law claims, the Court finds that case to be distinguishable and inapplicable. In *Wiltz*, the *pro se* Plaintiff’s

Complaint containing, amongst other causes of action, claims under the New York State and City Human Rights Laws for alleged disability discrimination, was dismissed for his failure to appear at a status conference. The First Department, applying the standard to vacate dismissal rather than the motion to dismiss standard, found there was no meritorious reason to vacate since the Plaintiff had a full and fair opportunity to litigate his state law claims in his prior federal action (*id.*). Here, while Title VII claims were addressed under the Federal Rules of Civil Procedure's motion to dismiss standard, the Plaintiff's state law claims were not addressed at all and no discovery took place since the district court refused to exercise its supplemental jurisdiction and the case was dismissed on the pleadings. Therefore, due to the different procedural posture between this case and *Wiltz*, the Court finds *Wiltz* to be unpersuasive and inapplicable to the facts here.

Furthermore, the New York City Human Rights Law's ("NYCHRL") pleading standard is significantly more liberal than the plausibility standard of the Federal Rules of Civil Procedure or even the CPLR's notice-pleading standard for claims under the New York State Human Rights Law ("NYSHRL") (*Harris v Structuretech New York, Inc.*, 191 AD3d 470 [1st Dept 2021]; *O'Rourke v National Foreign Trade Council, Inc.*, 176 AD3d 517, 518 [1st Dept 2019]; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 65-69 [1st Dept 2009]; *Pustilnik* at 1069; *Gershenson v Local 52*, 2022 NY Slip Op 32546[U] at \*11 [Sup Ct, New York County 2022]).

Moreover, New York Local Law 35 § 1 expressly instructs courts to interpret NYCHRL liberally and independently of state and federal anti-discrimination laws in order to create an independent body of jurisprudence for the NYCHRL that is maximally protective of civil rights in all circumstances. Therefore, "allegations that would be insufficient to state a federal claim might well be enough to state a cause of action under the NYCHRL" or under NYSHRL's notice-pleading standard. Because the pleading standards under Title VII compared to NYCHRL and



NYSHRL are materially different, Defendants' collateral estoppel argument is inapplicable (*Pustilnik v Battery Park City Authority* at 1069-1070).

### C. Sufficiency of Plaintiff's Race or Gender Discrimination Claims

Defendants asserts that even if Plaintiff's claims are not collaterally estopped, Plaintiff's claims should be dismissed because they fail to state a claim. Defendants argue that Plaintiff's claims fail because she has not alleged that the adverse or different treatment she suffered occurred under circumstances giving rise to an inference of discrimination. However, accepting all of Plaintiff's allegations as true and granting Plaintiff all favorable inferences which may be drawn from the Complaint as this Court must, the Court finds Defendants' argument is without merit, as Plaintiff repeatedly alleged she was subject to more intense scrutiny, passed over for certain positions or involvement in meetings, and even was subjected to physical violence because of her status as a Black women while similarly situated men were never subjected to such treatment in the workplace.

Moreover, the standard for determining liability for discrimination-based claims under the NYCHRL is to ensure that discrimination plays no role in the disparate treatment of similarly situated individuals in the workplace (*Williams v New York City Housing Authority*, 61 AD3d 62, 76 [1st Dept 2009]). The NYSHRL, which was amended in 2019, mirrors the "play no-role" standard under the NYCHRL (*Hosking v Mem'l Sloan-Kettering Cancer Ctr.*, 186 AD3d 68, 64 n.1 [1st Dept 2020] ["this amendment is remarkably similar to the City HRL's Restoration Act"]; *Golston-Green v City of New York*, 184 AD3d 24, 35 [2d Dept 2020]). Plaintiff's allegations of physical and verbal abuse directed towards her, as a Black woman, that were not directed towards any similarly situated men in her office, give rise to the inference that discrimination played a role

in Muallem's treatment of Plaintiff thereby satisfying her pleading standard under NYCHRL and NYSHRL.

Plaintiff has also sufficiently pled retaliation. Plaintiff has demonstrated she engaged in protected activity by submitting a work place violence form and an incident report to NYPD after she was allegedly physically abused by Muallem, and was then retaliated against by allegedly being relocated to an office in extremely close proximity to the individual she alleged physically abused her, and was forced to come into the office during a surge of Covid-19 to conduct virtual litigation despite her underlying health condition while other similarly situated individuals were allowed to work remotely (*O'Rourke v National Foreign Trade Council, Inc.*, 176 AD3d 517 [1st Dept 2019]; *Harrington v City of New York*, 157 AD3d 582, 585-586 [1st Dept 2018]; *Albunio v City of New York*, 67 AD3d 407, 408 [1st Dept 2009]). Under the standard upon which pleadings are reviewed in a pre-Answer motion to dismiss, the Court finds that Plaintiff has sufficiently demonstrated that these alleged retaliations would reasonably deter a person from reporting their superior for alleged physical abuse.

#### **D. Aiding and Abetting Claims**

Defendants argues that Plaintiff's "aiding and abetting" claims against Muallem and Gallo-Kotcher must fail because (1) no discrimination took place and (2) an individual cannot aid and abet themselves. The Court finds Defendants' first argument unpersuasive for the reasons set forth in section II(B). As to Defendants' second argument, since it is alleged that Muallem's own actions gave rise to the discrimination claim, he cannot also be held liable for aiding and abetting, therefore, Plaintiff's "aiding and abetting" claim against Muallem must be dismissed (*Hardwick v Auriemma*, 116 AD3d 465, 468 [1st Dept 2014]). However, the Court finds Plaintiff's allegations

against Gallo-Kotcher sufficiently state a claim for aiding and abetting in violation of the NYSHRL (*Griffin v Sirva, Inc.*, 29 NY3d 174, 188 [2017]).

#### E. Gender Motivated Violence Act

Plaintiff has similarly stated a claim under the Gender Motivated Violence Act. The GMV allows a civil cause of action for an “injur[y] by an individual who commit[ted] a crime of violence motivated by gender.” (N.Y.C. Admin. Code §10-1104). A crime of violence is defined as “an act...that would constitute a misdemeanor or felony...if the conduct presents a serious risk of physical injury to another, whether or not those acts actually resulted in criminal charges.” A crime of violence motivated by gender is one “committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.” (N.Y.C. Admin. Code §10-1103). Because the Court must accept Plaintiff’s allegations as true on a motion to dismiss, and it is alleged Muallem physically struck the Plaintiff and had never struck a similarly situated male employee, the Court, giving the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings, finds that Plaintiff sufficiently states a claim under the GMVA. (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236 [2021]; *Eckhart v Fox News Network, LLC*, 2021 WL 4124616 at \*25 [SDNY 2021]).

#### F. Plaintiff’s Tort Claims

Defendants next assert that Plaintiff’s tort claims must be dismissed for its failure to comply with the statutory notice of claim requirement. An authority’s knowledge of an incident is insufficient to constitute notice of a plaintiff’s intent to file a civil suit based on a negligence claim (*Rosenbaum v City of New York*, 8 NY3d 1 [2006]; *Keeney v New York City Housing Authority*, 168 AD3d 581, 581-582 [1st Dept 2019]; *Silicato v Skanska USA Civil Northeast Inc.*, 112 AD3d

464 [1st Dept 2013]). Because filing a timely Notice of Claim is a condition precedent to bringing a suit against Defendant MTA and its employees, and compliance with the written notice of claim requirement is mandatory and strict, Plaintiff's claims for assault, battery, and negligent supervision are dismissed without prejudice (*Vyrkin v Triboro Bridge & Tunnel Auth.*, 2021 WL 797654 at \*6 (SDNY 2021); *Guillan v Triborough Bridge and Tunnel Auth.*, 202 AD2d 472, 473-474 [2d Dept 1994]). Based on the above, the Court finds no reason to analyze Defendants' argument that these claims would be barred by the Workers' Compensation Law.

Accordingly, it is hereby,

ORDERED that Defendants' motion to dismiss Plaintiff's First, Second, Fourth, Fifth, and Seventh causes of action is denied; and it is further

ORDERED that Defendants' motion to dismiss Plaintiff's Third and Sixth causes of action is granted only to the extent those causes of action are dismissed as to Defendant Muallem; and it is further

ORDERED that Plaintiff's Eighth, Ninth, and Tenth causes of action are dismissed, without prejudice.

This constitutes the Decision and Order of this Court.

8/9/2022  
DATE

*Mary V Rosado*  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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