SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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ALEXANDRIA FITZGERALD,

Plaintiff,

- v -

WE WORK MANAGEMENT, LLC,DAVID STILES

Defendant.

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INDEX NO. 153618/2022

MOTION DATE 06/03/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27

were read on this motion to/for DISMISS.

Upon the foregoing documents, and after oral argument, which took place on February 28, 2023, where Valdi Licul, Esq. appeared for Plaintiff Alexandria Fitzgerald ("Plaintiff") and David W. Garland, Esq. appeared for Defendants We Work Management ("WeWork") and David Stiles ("Stiles") (collectively "Defendants"), the Defendants' partial motion to dismiss pursuant to CPLR §§ 3211(a)(5) and (a)(7) is granted.

I. Background

Plaintiff brings this action alleging gender- and disability-based discrimination and retaliation under the New York State Human Rights Law ("NYSHRL") and New York City Human Rights Law ("NYCHRL"), along with accompanying aiding and abetting claims. Plaintiff claims that she worked in WeWork's "Enterprise Services Group" which is responsible for building office space for WeWork's clients (NYSCEF Doc. 1 at ¶ 13).

Plaintiff was assigned to shadow Stiles, who brought her to construction sites, directed her day-to-day activities, and assigned her work on his projects (*id.* at ¶¶ 18-20). In May of 2019, Plaintiff and Stiles went on an overnight business trip to Kansas City, Missouri (*id.* at ¶ 23).

Allegedly, Stiles questioned Plaintiff about whether she had a boyfriend, complimented her appearance, boasted that other women at WeWork had a crush on him, and allegedly advised Plaintiff to "have a bunch of one-night stands." (*Id.* at ¶¶ 23-29). Stiles also allegedly wiped barbecue sauce from Plaintiff's face without asking her, and later that night, allegedly sent multiple texts to Plaintiff asking her to cuddle (*id.* at ¶¶ 30-33). Allegedly, these interactions caused Plaintiff to experience anxiety (*id.* at ¶ 35).

Plaintiff reported this interaction to WeWork's human resources department, who conducted an investigation (*id.* at ¶ 36). WeWork allegedly found that Stiles violated WeWork's antiharassment and antidiscrimination policies and issued him a warning (*id.* at ¶ 38). Allegedly, WeWork forced Plaintiff to continue working with Stiles despite her objections (*id.* at ¶ 47). Plaintiff alleges that as a result she began to go to therapy in June of 2019 (*id.* at ¶ 50). In March or April of 2020, Plaintiff allegedly requested that Stiles be removed from her team (*id.* at ¶ 53). In April of 2020, WeWork terminated her (*id.* at ¶ 54).

Plaintiff originally brought her claims in this action, as well as claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), and the Family & Medical Leave Act ("FMLA") on July 9, 2020, in the Southern District of New York ("SDNY") (*see Fitzgerald v The We Company d/b/a WeWork, et. al.*, Civ. Action No.: 1-20-cv-05260[AT]) (the "SDNY Action").

In a Decision and Order dated March 30, 2022, United States District Judge Analisa Torres granted summary judgment dismissing all of Plaintiff's claims except for the NYSHRL and NYCHRL claims. Judge Torres refused to exercise supplemental jurisdiction over the NYSHRL and NYCHRL claims, and the case was dismissed (*see Fitzgerald v The We Company, et. al.*, 2022 WL 952963 [SDNY 2022]). This action was commenced on April 27, 2022 (NYSCEF Doc. 1).

On May 31, 2022, Defendants moved to dismiss based on collateral estoppel and failure to state a claim (NYSCEF Doc. 4). Specifically, Defendants argue that Judge Torres' decision, which granted summary judgment, made several factual findings based on a developed evidentiary record which bars Plaintiff's claims in the instant action (NYSCEF Doc. 5). Defendants argue that these factual findings include:

- After an investigation into Stiles' conduct towards Plaintiff, WeWork issued a final written warning stating that any further violation "would result in [his] immediate separation from work."
- For the remainder of Plaintiff's employment, Stiles remained in a different "pod" and reported to a different supervisor.
- When Plaintiff began attending therapy sessions, she was never prevented from going, nor were disparaging comments made towards her about going to therapy.
- After a failed IPO attempt, WeWork reorganized and reduced its workforce. As part of the reorganization, Plaintiff's group was combined with another group, which resulted in changed job titles. Her compensation remained the same and she was provided with additional responsibilities.
- In November 2019, WeWork laid off approximately 20% of its workforce (2,400 employees), including employees in Plaintiff's role.
- In early 2020, there were additional layoffs. Three-Hundred (300) employees, including those with Plaintiff's title, were laid off. Plaintiff's role was eliminated.

Based on these findings of fact, Judge Torres held that no reasonable fact finder could conclude, under federal law, that Plaintiff was discriminated against or harassed based on her gender of purported disability, nor was she retaliated against. Judge Torres held that Defendants demonstrated legitimate, non-discriminatory business reasons for her termination. Plaintiff, along with other "junior level role" employees, were terminated as part of workforce reductions. Judge Torres held that Plaintiff offered no evidence of pretext to rebut this finding.

Regarding harassment, Defendants argue that Judge Torres found Plaintiff failed to establish a *prima facie* case of harassment under federal law, since Stiles' inappropriate, but

limited, conduct towards her were isolated and discrete rather than severe and pervasive. Moreover, Plaintiff failed to establish a *prima facie* claim of retaliation, because there was no proof of a causal connection between her complaints about Stiles and her termination. Because her termination was due to the April 2020 reduction in workforce, Plaintiff could not establish that her complaints about Stiles were the "but-for" cause of her termination. Moreover, Judge Torres found that Plaintiff had not established that her anxiety is a "disability" within the meaning of the ADA and therefore could not seek redress under that statute. The FMLA claims were dismissed because Plaintiff was never denied the opportunity to attend therapy sessions.

Defendants argue collateral estoppel applies to bar the NYSHRL and NYCHRL claims because the prior factual determinations are determinative of the NYSHRL and NYCHRL claims. Specifically, Defendants argue that there where there is a factual finding that regarding a legitimate, nondiscriminatory reason for adverse employment actions, discrimination claims are barred from being re-litigated in State Court. Defendants argue this finding is buttressed by Plaintiff's failure in the SDNY action to submit any evidence of pretext to rebut Defendants' non-discriminatory rationale, despite there being a developed evidentiary record. Defendants argue that Plaintiff is precluded from arguing she is disabled because Judge Torres already found there was no evidence to support Plaintiff's claim she suffered from anxiety disorder, and in any event, she is estopped from asserting an adverse employment action as a result of her disability since Judge Torres further found that there was no inference of discrimination arising from her termination as part of the April 2020 layoffs. Defendants argue even if collateral estoppel does not apply, Plaintiff still fails to state a claim pursuant to CPLR § 3211(a)(7).

Plaintiff submitted her opposition on August 11, 2022 (NYSCEF Doc. 20). Plaintiff argues that collateral estoppel should not apply, since Judge Torres made no determination of the

NYSHRL and NYCHRL claims and merely refused to exercise her supplemental jurisdiction. Plaintiff argues that under federal law, plaintiff must prove that her sex was a motivating factor in terminating her employment, while under State and City law, her sex need not be the only, or even a significant factor, in the adverse employment action. Plaintiff asserts that a legitimate, non-discriminatory reason for Plaintiff's termination under the federal standard does not preclude Plaintiff from showing in this action that sex played some role in Defendants' decision to terminate her employment.

Defendants submitted their reply on September 28, 2022 (NYSCEF Doc. 26). Defendants argue that Plaintiff's arguments are contradicted by binding precedent. Defendants also argue that Plaintiff ignores and fails to address the findings of fact which were made in Judge Torres' decision, which are fatal to her claims no matter what the legal theory and however forgiving the standard. Defendants reiterate that Judge Torres repeatedly found no evidence of any discriminatory pretext which are fatal to Plaintiff's discrimination and retaliation claims. Defendants also argue that Plaintiff has abandoned her disability harassment claims by failing to address Defendants' failure to state a claim argument.

II. Discussion

A. 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 1 [2015] [internal quotation marks and citation omitted], *rearg denied* 25 NY3d 1193 [2015]). 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]).

Although claims under the NYCHRL are analyzed separately and independently from claims under equivalent federal legislation and the NYSHRL, this does not mean that collateral estoppel will never apply to bar identical claims made under the NYCHRL which were previously dismissed under federal legislation (*see Russell v New York University*, 204 AD3d 577 [1st Dept 2022]; *see also Emmons v Broome County*, 180 AD3d 1213 [3d Dept 2020]; *Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP*, 116 AD3d 134 [1st Dept 2014]). This is especially true where a federal district court previously dismisses discrimination claims on the merits, and a plaintiff's complaint in a federal action and the current action are essentially the same claims (*Russell* at 578).

As held by the First Department "it would be illogical to accept as true in the state action a factual allegation rejected by the federal court where the plaintiff had a full and fair opportunity to litigate it in the federal action, as long as the same conclusion would result if the allegation were viewed under the more liberal City Human Rights Law standard" (*id.* at 579). On the other hand, where federal discrimination claims are dismissed at the pleading stage, collateral estoppel may not apply to preclude NYSHRL and NYCHRL discrimination claims (*see Lively v Wafra Investment Advisory Group, Inc.*, 211 AD3d 432 [1st Dept 2022]; *see also Pustilnik v Battery Park City Authority*, 71 Misc.3d 1058 [Sup. Ct. NY Co. 2021]).

This Court, being bound to the First Department's decision in *Russell*, finds that collateral estoppel applies (204 AD3d 577, 578 [1st Dept 2022] ["in light of the particular express facts that the federal courts found were conclusively demonstrated by the record on the summary judgment

motions before the district court....and the relevant collateral estoppel case law....we conclude that...plaintiff's claims under both the State and City Human Rights Laws were properly dismissed under the doctrine of collateral estoppel"]; *see also Karimian v Time Equities, Inc.*, 164 AD3d 486 [2d Dept 2018]).

i. Plaintiff's NYSHRL and NYCHRL Claims of Gender and Disability Based Discrimination

The essential elements of a claim for discrimination in violation of the NYSHRL and NYCHRL, Plaintiff must allege that she (1) is a member of a protected class; (2) was qualified for her position; (3) was subject to an adverse employment action; and (4) that she was terminated under circumstances giving rise to an inference of discrimination (*Askin v Department of Educ. of City of N.Y.*, 110 AD3d 621 [1st Dept 2013]). 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 58, 64 n.1 [1st Dept 2020]; *Golston-Green v City of New York*, 184 AD3d 24, 35 [2d Dept 2020]).

It has been held that a reduction in force ("RIF") undertaken for economic reasons is a nondiscriminatory basis for employment terminations under the NYSHRL and NYCHRL (*Hudson, supra* at 516). Here, even under the more liberal NYSHRL and NYCHRL standards, the evidence presented and factual findings made in Judge Torres' decision collaterally estops Plaintiff from re-litigating her NYSHRL and NYCHRL claims. Specifically, Plaintiff cannot meet the essential element of showing that "she was terminated under circumstances giving rise to an inference of discrimination." Judge Torres found that "the April 2020 RIF eliminated *all* U.S.-

based employees in Fitzgerald's role and department" (*Fitzgerald v We Company*, 2022 WL 952963 at * 6 [SDNY 2022]). Judge Torres also found that the alleged male comparators who survived the RIF were not comparators since they were in more senior management roles who were not subject to the same criteria as Plaintiff (*id.*).

Judge Torres also found that "Fitzgerald offers **no evidence** of pretext to rebut Defendants' non-discriminatory rationale for her termination." (*id.*) (emphasis added). The dearth of evidence presented on a motion for summary judgment despite having the benefit of over a year of discovery collaterally estops Plaintiff from relitigating the issue of whether she was "terminated under circumstances giving rise to an inference of discrimination" (*see Russell v New York Univ.*, 204 AD3d 577 [1st Dept 2022]; *Johnson v IAC/InterActiveCorp.*, 179 AD3d 551 [1st Dept 2020], *lv denied* 35 NY3d 912 [2020]; *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 515 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]). Even analyzing the claim under the "play no-role" standard, the termination due to an RIF of all employees in Plaintiff's role, and Plaintiff's failure to provide *any* evidence showing a discriminatory pretext in the SDNY action prohibits this Court from allowing the claims to go forward. This finding precludes both the gender-based and disability-based discrimination claims, as under both, Plaintiff would have to show that her gender and/or disability played some role in her termination.[1]

ii. NYSHRL Gender and Disability - Based Hostile Work Environment Claim

"A plaintiff claiming a hostile work environment animated by discrimination in violation of the NYSHRL must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of plaintiff's employment and create an abusive working environment." (*Bilitch v New York City Health &*

[1] If the Court were to undertake a CPLR 3211(a)(7) analysis, the Court would note that nowhere in the Complaint is it alleged that the Defendants knew about or perceived Plaintiff's alleged disability based on anxiety.

Hosps. Corp., 194 AD3d 999, 1003 [2d Dept 2021] citing *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004]; *see also Mejia v T.N. 888 Eighth Avenue LLC Co.*, 169 AD3d 613 [1st Dept 2019] [stray remarks about age or nationality are insufficient to constitute hostile work environment]; *Witchard v Montefiore Medical Center*, 103 AD3d 596 [1st Dept 2013]). "To determine whether a hostile work environment exists, a court must consider all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interfered with the plaintiff's work performance (*id.* citing *La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918 [2d Dept 2015]).

In issuing her summary judgment decision, Judge Torres held that Stiles' comments were an isolated instance which did not rise to the level of a hostile work environment. She found that Plaintiff did not show admissible evidence that Stiles' behavior following the trip was sufficiently continuous to alter the conditions of her working environment. Indeed, Plaintiff conceded in her deposition that after Stiles was reprimanded, he did not direct any further inappropriate behavior towards her. These facts led Judge Torres to dismiss Plaintiff's gender-based hostile work environment claims. These facts, which are identical to the facts alleged in this case, and which Plaintiff had a full and fair opportunity to litigate through discovery and a summary judgment motion, collaterally estop Plaintiff from bringing a hostile work environment claim under the NYSHRL (*see Lum v Consolidated Edison Company of New York, Inc.*, 209 AD3d 434, 435 [1st Dept 2022] [differentiating hostile work environment based on sex discrimination claims under NYSHRL and NYCHRL]; *Johnson v IAC/InterActiveCorp.*, 179 AD3d 551 [1st Dept 2020]; *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511 [1st Dept 2016]).

Indeed, even under the NYSHRL and NYCHRL, allegations regarding a handful of insensitive comments made by an employee's superior do not rise to the level of actionable hostile work environment (*Thomas v Mintz*, 182 AD3d 490 [1st Dept 2020]).

Regarding Plaintiff's alleged disability-based hostile work environment claims, as Judge Torres stated "there is no evidence suggesting that Fitzgerald's supervisors ever discouraged or prevented her from attending therapy….[i]ndeed, Fitzgerald attended all her scheduled therapy appointments." Plaintiff likewise makes no allegations regarding any comments or actions made towards her about her purported disability based on anxiety. Based on the facts introduced on the prior motion for summary judgment, and Judge Torres' finding that Plaintiff was allowed to make her own accommodation regarding her alleged disability, she is collaterally estopped from relitigating a disability-based hostile work environment claim in this Court.

iii. Retaliation Claims

The Court also finds that collateral estoppel bars the retaliation claims. To state a claim for retaliation under the NYSHRL and NYCHRL, a plaintiff must show that she (1) engaged in a protected activity; (2) the employer was aware of such activity; (3) she suffered an adverse employment action based upon the activity; and (4) a causal connection exists between the protected activity and the adverse action (*Harrington v City of New York, 157 AD3d* 582 [1st Dept 2018]). As previously stated, Judge Torres' found that Plaintiff's termination was not related to her complaints about Stiles, but based on a RIF of all individuals with Plaintiff's role in the United States. This bars a finding of a causal connection between Plaintiff's complaints about Stiles and her termination.

Although the standards upon which liability may be imposed differs between federal statutes, the NYSHRL and NYCHRL, the prior findings of undisputed facts preclude liability for

the NYSHRL and NYCHRL claims challenged on this motion by negating essential elements Plaintiff must prove under the NYSHRL and NYCHRL (*Russell v New York University*, 204 AD3d 577 [1st Dept 2022]. Therefore, Defendants' partial motion to dismiss Plaintiff's Complaint is granted. The only claims now remaining are Plaintiff's fourth and sixth causes of action related specifically to her NYCHRL hostile work environment/sexual harassment claims.

Accordingly, it is hereby,

ORDERED that Defendants' partial motion to dismiss is granted; and it is further

ORDERED that Plaintiff's fourth and sixth causes of action as they relate specifically to her NYCHRL hostile work environment/sexual harassment claims are severed and survive the instant motion to dismiss; and it is further

ORDERED that Defendants are directed to serve an Answer to the remaining claims within twenty days of entry of this Decision and Order; and it is further

ORDERED that within ten days of entry, Defendants shall serve a copy of this Decision and Order, with notice of entry, on Plaintiff; and it is further

ORDERED that on June 21, 2023, the parties appear for an in-person preliminary conference in Room 442, 60 Centre Street, at 9:30 a.m. The parties may submit a proposed preliminary conference order prior to the conference via e-mail to SFC-Part33-Clerk@nycourts.gov; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

5/15/2023
DATE

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

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

153618/2022 FITZGERALD, ALEXANDRIA vs. WE WORK MANAGEMENT, LLC ET AL
Motion No. 001