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

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MARGOT LOTH

Plaintiff,

- v -

CITY OF NEW YORK,

Defendant.

INDEX NO. 160925/2021

MOTION DATE 08/16/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. NICHOLAS W. MOYNE:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22
were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In this action, plaintiff Margo Loth ("Plaintiff"), an Emergency Medical Technician ("EMT") at the New York City Fire Department ("FDNY"), alleges she was discriminated against due to her gender and retaliated against for her complaints of discrimination. Plaintiff alleges claims under the New York State Human Rights Law ("SHRL") and the New York City Human Rights Law ("CHRL"). The City of New York ("Defendant") moves to dismiss the complaint.

FACTUAL BACKGROUND

Plaintiff began working for Defendant as a FDNY Haz-Tac Emergency Medical Technician on February 14, 2011. In July 2018, Plaintiff was featured in the FDNY's 2019 Calendar of Heroes. Thereafter, on multiple occasions, Captain Donna Lynn Hannon Tiberi ("Tiberi") allegedly referred to Complainant as a "calendar girl" to other FDNY members in a disparaging manner. In November 2018, Plaintiff agreed to participate as a witness in connection with a gender discrimination complaint filed with the FDNY's Equal Employment Opportunity ("EEO") office by female Paramedic Carin Rosado ("Rosado") against Tiberi. Both Plaintiff and Rosado claimed that they regularly observed Tiberi subjecting

female employees to disparate treatment as compared to similarly situated male employees.

After the EEO complaint was filed, the plaintiff alleges that Tiberi began retaliating against her by, among other things, vandalizing her personal belongings and denying her time and leave requests, as well as denying her overtime that she was entitled to per FDNY policy. The plaintiff, as well as four other women, subsequently participated in a EEO proceedings as witnesses for Rosado. Subsequently, Tiberi allegedly engaged in further acts of retaliation against the plaintiff by denying her time off and annual leave requests, overtime opportunities, providing negative statements about plaintiff in connection with her performance evaluation, denying her promotional opportunities and/or salary raises, filing disciplinary charges against plaintiff based upon false accusations, and hindering her ability to enroll in medic classes or transfer within the department.

On August 30, 2019, Ms. Loth engaged in further protected activity by filing an internal EEO complaint against Tiberi. The plaintiff alleges that Tiberi increased retaliatory actions against her by, among other things, docking her pay for alleged lateness, refusing to provide her 2018 evaluation, interfering with her s ability to apply for an available Hazardous Materials Instructor position for which she was qualified, assigning her to overtime shifts for which she never confirmed her availability, and refusing to provide the plaintiff with an evaluation and recommendation that was required for her medic school program. Tiberi also allegedly subjected female employees, including the plaintiff, to disparate treatment as compared to similarly situated male employees.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiffs 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 [1994]). The inquiry is whether the proponent has a cause of action, not whether she has stated one (*Id.* quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Whether a plaintiff can ultimately establish her allegations is not part of the calculus in determining a motion to dismiss (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). However, the court is not required to accept factual allegations that are plainly contradicted by documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

At this early stage of the litigation, dismissal would be inappropriate as the plaintiff has sufficiently pled claims for gender discrimination pursuant to the SHRL and CHRL. Pursuant to the SHRL and CHRL, a plaintiff alleging gender discrimination must allege that: "(1) she is a member of a protected class; (2) she was qualified for the position; (3) that she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination." (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]). Under the CHRL, discrimination claims should be construed broadly in favor of the plaintiff, to the extent such a construction is reasonably possible. (*See Arnold Melman, MD v Montefiore Med. Ctr.*, 98 AD3d 107, 112 [1st Dept 2012]). Here, the plaintiff has plausibly alleged that she was suffered to adverse employment actions when Defendant denied her promotional opportunities and/or salary raises and hindered her ability to enroll in medical classes. Furthermore, Plaintiff alleged that defendant also: (1) interfered with her ability to apply for an available Hazardous Materials Instructor position for which she was qualified; (2) increased her workload by assigning her to work overtime shifts for which she never confirmed her availability; and (3) refused to provide her with evaluations and recommendations required for her medic school program, which in turn delayed her enrollment in that program.

These allegations are more than sufficient to plead that the plaintiff suffered adverse employment actions within the framework of both the SHRL and the CHRL. Under the SHRL, an adverse employment action requires a showing of a "materially adverse change in terms and conditions of employment." (*Bilitch v New York City Health and Hospitals Corp.*, 194 AD3d 999, 1001 [2d Dept 2021]). Under the more plaintiff-favorable CHRL, a plaintiff need only allege that she was subjected to an unfavorable change or treated less well than other employees based upon her gender (*see Local 621 v New York City Department of Transportation*, 178 AD3d 78, 81 [1st Dept 2019]; *Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]). The complaint easily satisfies both standards.

Additionally, the plaintiff has sufficiently pled claims from which reasonable inferences can be drawn to sustain gender discrimination claims under the SHRL and CHRL. See id. Specifically, Plaintiff has pled that: (1) Tiberi referred to Plaintiff as a "calendar girl" to other FDNY members in a disparaging manner; (2) harassed other female employees; and (3) subjected female employees, including Plaintiff, to disparate treatment in the terms and conditions of their employment as compared to similarly situated male employees. Clearly, a reasonable finder of fact could infer that Tiberi discriminated against Plaintiff

based upon her gender and therefore, Plaintiff has sufficiently stated a claim for gender discrimination under the SHRL and CHRL.

Finally, the complaint adequately alleges claims for unlawful retaliation under the SHRL and CHRL Under the SHRL, to plead a claim for retaliation, a plaintiff must allege that: (1) she engaged in protected activity by opposing prohibited conduct; (2) defendant's knowledge of the protected activity; (3) she suffered an adverse employment action as a result of her engagement in protected activity; and (4) a causal connection exists between the protected activity and the adverse action. (*Bilitch*, 194 A.D.3d at 1004 [internal citations omitted]). "In the context of a case of unlawful retaliation, an adverse employment action is one which might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (*Id.*) (*quoting Keceli v Yonkers Racing Corp.*, 155 AD3d 1014, 1016 [2d Dept. 2017]). Under the CHRL, like discrimination victims, retaliation victims are provided with broader protection than their SHRL counterpart (*see Bilitch*, 194 AD3d at 1004) (*citing Reichman v City of New York*, 179 AD3d 1115 [2d Dept. 2020]). To plead a plausible retaliation, claim under NYCHRL, a plaintiff must show that: (1) she engaged in a protected activity; (2) her employer was aware of such activity; (3) her employer "engaged in conduct which was reasonably likely to deter a person from engaging in that protected activity;" and (4) a causal connection between the protected activity and alleged retaliatory conduct (*Id.*).

Here, the plaintiff has stated a plausible claim of retaliation under NYSHRL by alleging that she engaged in protected activity by agreeing to participate as a witness in her colleague's EEO complaint against Tiberi and that she suffered an adverse employment action as a result of her engagement in protected activity when Defendant and/or Tiberi vandalized Plaintiff's personal items, denied her overtime and promotional opportunities, filed disciplinary charges against her based upon false accusations, hindered her ability to enroll in medic classes and/or transfer within the department, docked her pay for alleged lateness, refused to provide her an evaluation, and increased her workload by assigning her to overtime shifts for which she never confirmed her availability. For the same reasons, plaintiff has sufficiently pled a plausible claim of retaliation under the more lenient NYCHRL standard. A reasonable person would likely be deterred from participating as a witness in an EEO interview and/or filing an internal EEO complaint if they were then subjected to vandalism of their personal items, denials of overtime and promotional opportunities, baseless disciplinary accusations, docked pay for false accusations of lateness, inability to enroll in necessary

courses, and an increased workload as a result of said engagement. Accordingly, the claim for retaliation should stand.

The defendant's motion to dismiss is hereby denied. The defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry. Counsel are directed to appear for a preliminary conference in Room 103, 80 Centre Street, New York, New York, on July 19, 2023, at 2:00 PM.

The forgoing constitutes the decision and order of this court.

5/15/2023
DATE

NICHOLAS W. MOYNE, J.S.C.

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