SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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ESTHER ORTIZ,

Plaintiff,

- v -

EQUINOX HOLDINGS, INC., JOHN LARSON

Defendants.

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INDEX NO. 161353/2018

MOTION DATE 05/31/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

Plaintiff commenced this action alleging she was the subject of discriminatory, and sexually derogative comments made by her Equinox co-worker, John Larson (Larson). Defendant Equinox moves for summary judgment and dismissal of the action as against it. For the reasons stated below, the motion is granted to the extent set forth below.

ALLEGED FACTS

In the Summer of 2016, Equinox opened a new fitness club facility located in the Dumbo neighborhood of Brooklyn, New York (the "Dumbo Club"). Around that same time, Equinox hired plaintiff as a Tier 1 Personal Trainer at the Dumbo Club.

Between June 2016 and February 2018, plaintiff reported to the Dumbo Club's Fitness Manager, Kenneth Arroyo ("Arroyo"). Arroyo reported to Personal Training Manager, Joseph Tirado ("Tirado") until Tirado's transfer to a different club in December 2016. After Tirado's

transfer, Arroyo began reporting to the Dumbo Club's new Personal Training Manager, Theodor Gjone ("Gjone").

Larson was also a personal trainer at the Dumbo Club and performed the same responsibilities and had the same supervisors as plaintiff. Plaintiff alleges Larson had a history of sexually harassing female employees at Equinox.

Personal trainers at the Dumbo Club are divided into three "Tiers" – Tier 1, Tier 2 and Tier 3 – based on the amount of business generated by the personal trainers and their level of education/experience. All personal trainers, regardless of tier level, are scheduled for two types of shifts: (1) "Floor Shifts," in which they tend to the gym floor and assist members with any questions they may have regarding the gym equipment and personal fitness; and (2) "Personal Training Sessions," in which they work one-on-one with a member. Personal trainers earn a standard hourly rate for Floor Shifts and can earn a higher hourly rate for Personal Training Sessions.

Personal trainers generate Personal Training Session leads from existing members by advertising the sessions during their Floor Shifts; setting up a marketing table about their services; and calling members during phone drives to gauge their interest in signing up for Personal Training Sessions. Personal trainers can also generate leads by providing complimentary fitness assessments to new members and then signing them up for subsequent paid Personal Training Sessions.

At the Dumbo Club, these complimentary services were typically assigned by Arroyo and Gjone, who matched new members to personal trainers based on several different criteria, including the personal trainers' availability, the member's personal fitness goals and any injuries or medical history that might require special attention or expertise.

Plaintiff, along with personal trainers Amanda Cole ("Cole") and Shannon Rubin ("Rubin"), consistently received the highest number of new membership leads in the months following the opening of the Dumbo Club.

On December 13, 2016, Larson, approached plaintiff in the breakroom. Larson, referencing a picture plaintiff took with rapper 50 Cent, asked plaintiff if she performed oral sex on 50 Cent in exchange for him taking a picture with her. Larson then publicly suggested that plaintiff was performing sexual favors in exchange for favorable treatment at Equinox. A few minutes later, plaintiff walked to Arroyo's office and complained that Larson said something horrible about her and that he disrespected her in the breakroom. Plaintiff did not provide any details about the nature of Larson's comment at that time.

Shortly thereafter, plaintiff walked back to the breakroom, followed by Arroyo, and told Larson that he had to respect her and that he could not speak to her in that way. After the verbal exchange with Larson, plaintiff told Arroyo that she was too upset to offer any specific details about what was said by Larson and left the facility. Since plaintiff was scheduled to commence a two-week vacation the following day, she informed Arroyo that she would call him during her vacation to provide him additional details about the incident.

Arroyo reported the altercation to General Manager, Alex Daniels ("Daniels"), and subsequently informed Gjone.

Equinox maintains a sexual harassment policy, which directs employees who experience any type of harassment, discrimination or retaliation, to report it to a manager. The policy further states that, after receiving a complaint, Equinox will promptly investigate the claim by interviewing the complainant and the accused, as well as others if applicable.

Gjone investigated plaintiff's claims by speaking with plaintiff, Larson and four (4) other employees who were present in the breakroom during the December 13, 2016, incident. On or about January 7, 2017, Gjone concluded his investigation and submitted a summary of the witness interviews to Daniels and Regional Personal Training Manager, Herbie Schmale ("Schmale"). The summary revealed that the witnesses corroborated plaintiff's allegations against Larson.

On or about January 17, 2017, Daniels reviewed the investigation findings with Regional Human Resources Generalist, Stephanie Herrmann and discussed next steps with her. On January 18, 2017, Daniels met with plaintiff to relay the investigation findings. During that conversation, plaintiff thanked Daniels for addressing the situation and stated that she was ready to move on. That same day, Gjone and Daniels issued Larson a written disciplinary warning, stating that any future inappropriate conduct or derogatory language would result in further disciplinary action up to and including termination of employment.

Approximately one month after receiving the disciplinary warning, in or around February 2017, Larson voluntarily resigned from his employment with Equinox.

After Larson's resignation in February 2017, plaintiff continued working at the Dumbo Club. Plaintiff testified that in Spring 2017, for a variety of reasons, several of her clients stopped scheduling Personal Training Sessions. For instance, some members relocated to different gyms, while others could no longer afford plaintiff's services or felt that they outgrew her training program. At that time, plaintiff complained to Arroyo and Gjone that she believed she was not receiving enough new membership leads to grow and maintain her business.

Defendants allege that the Dumbo Club experienced its greatest growth in the number of new members during its first six months of operation. Since there was an influx of new member

sign-ups when the club initially opened, there was a corresponding greater number of new membership leads to assign to personal trainers at that time. In January 2017, after the Dumbo Club had been open for six months, it experienced a significant decrease in the number of new members. Consequently, Equinox asserts there were fewer new membership leads to assign to the personal trainers at the facility.

As a result, beginning in or around January 2017, plaintiff, along with other personal trainers, began receiving fewer new membership leads. Between July 2016 and December 2016, plaintiff received 35 new membership leads. Between January 2017 and June 2017, plaintiff received 32 new membership leads. Several of Plaintiff's coworkers experienced a significantly greater decrease in the number of new membership leads received. Plaintiff asserts that the leads she received were more significantly reduced then the figures reported by Equinox and that the leads were of a lesser quality because the customers she contacted were not interested in paid training sessions.

Arroyo and Gjone continued to assign plaintiff new membership leads and encouraged her to generate additional leads from existing customers by scheduling more Floor Shifts and setting up marketing tables. Since Plaintiff preferred to generate existing customer leads through phone drives, Arroyo assigned her 20 such leads per week and scheduled plaintiff for one hour a week to call the leads and gauge their interest in signing up for Personal Training Sessions. Equinox asserts that beginning in 2016 and into 2017, plaintiff received more phone drive leads than any other personal trainer at the facility.

On or about February 7, 2018, plaintiff contacted People Services Area Manager, Kristina Buzzo ("Buzzo"), asking to schedule a meeting to discuss her career at Equinox. The following week, plaintiff met with Buzzo and told her about the December 13, 2016, incident.

Plaintiff stated that she believed Arroyo was retaliating against her for her complaints about Larson in December 2016. Specifically, plaintiff complained that Arroyo gave her fewer new membership leads and had falsely stated that the reason one of plaintiff's former clients asked to switch trainers was because plaintiff was on her phone and was not attentive during her Personal Training Sessions.

Plaintiff requested that she be permitted to take a mental health leave of absence and be transferred to another location upon her return. Buzzo referred plaintiff to Equinox's third party-leave and disability administrator, Matrix Absence Management ("Matrix"), to request her leave of absence and accommodation, and stated that she would investigate plaintiff's claims against Larson and Arroyo. Matrix approved plaintiff's leave of absence through April 30, 2018. Plaintiff's leave was then further extended on at least four (4) occasions: from May 1, 2018 through July 31, 2018; from August 1, 2018 through October 15, 2018; from October 16, 2018 through January 3, 2019; and from January 4, 2019 through July 9, 2019.

Buzzo investigated plaintiff's claims of harassment and retaliation and found that (1) Arroyo was not directly involved in the December 13, 2016, incident; and (2) although Arroyo may have misunderstood the member's reasons for switching personal trainers, there was no evidence that his actions were retaliatory in any way.

Effective March 22, 2018, Equinox granted plaintiff's request to transfer to another club and planned to transfer her when she returned from leave. Plaintiff never returned to Equinox after her leave of absence and instead voluntarily resigned on February 11, 2019.

DISCUSSION

"A defendant moving for summary judgment has the initial burden of coming forward with admissible evidence, such as affidavits by persons having knowledge of the facts, reciting

the material facts and showing that the cause of action has no merit" (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once this showing has been made, the burden shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Equinox Is Entitled to Summary Judgment On Plaintiff's Discrimination Claims Under State Law

Plaintiff asserts four causes of action. Under the NYCHRL plaintiff asserts a cause of action for disparate and discriminatory treatment and a cause of action for retaliatory conduct. Under the NYSHRL, plaintiff asserts a cause of action for discrimination on the basis of gender by sexual harassment and creation of a hostile work environment, and retaliation.

Hostile Work Environment Claim Under NYSHRL

To show that she was subjected to sex discrimination by virtue of a hostile work environment, plaintiff must show that there was "conduct (1) that is objectively severe or pervasive—that is, conduct that creates an environment that a reasonable person would find hostile or abusive ..., (2) that the plaintiff subjectively perceives as hostile or abusive ..., and (3) that creates such an environment because of plaintiff's sex ...." *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001). Where, as here, the alleged hostile work environment is the result of conduct by plaintiff's co-worker, rather than a supervisor, plaintiff must also show that the employer "is responsible for the continued hostility of the work environment." *Id.*

In assessing a hostile work environment claim, "courts should examine the totality of the circumstances, including: the frequency of the discriminatory conduct; its severity; whether it is

physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the victim's job performance." *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 20 (2d Cir. 2014). "In order to establish a hostile work environment claim under Title VII, a plaintiff must produce enough evidence to show that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.*

Although "even one incident of sufficient severity can create a hostile work environment," generally "isolated remarks or occasional episodes of harassment do not constitute a hostile environment within the meaning of Title VII." *Rizzo-Puccio v. Coll. Auxiliary Servs., Inc.*, 216 F.3d 1073, 2000 WL 777955, at *3 (2d Cir. 2000). Evidence that "colleagues discuss[ed] topics that were inappropriate and sexual in nature," or otherwise engaged in unprofessional behavior, is insufficient to sustain a hostile work environment claim. *Byrne v. Telesector Res. Grp., Inc.*, 339 F. App'x 13, 18 (2d Cir. 2009). "Hostile work environment and retaliation claims under the NYSHRL are generally governed by the same standards as federal claims under Title VII." *Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 609 (2d Cir. 2006).

Plaintiff has identified two instances in December 2016, where Larson, her co-worker made inappropriate comments. In addition to the incident in the break room, Arroyo acknowledged that at a Christmas party earlier that week, Larson had made a comment insinuating plaintiff was sleeping with her supervisor to get ahead at work. While these remarks were inappropriate and disturbing, they merely constituted "isolated remarks or occasional episodes of harassment" rather than the severe and pervasive conduct that would lead to a hostile work environment. *Chauca v. AdvantageCare Physicians, P.C.*, No. 18-CV-2516 (BMC), 2019 WL 4247495, at *8 (E.D.N.Y. Sept. 6, 2019). Courts have rejected hostile work environment

claims under circumstances more severe than those presented in the case at bar. See, e.g., Vito v. Bausch & Lomb Inc., 403 F. App'x 593, 596 (2d Cir. 2010) (holding that multiple colleagues' repeated sexual banter, gestures, and inappropriate physical contact were insufficient for a hostile work environment claim); Carter v. State of New York, 151 F. App'x 40, 41 (2d Cir. 2005) ("Three kisses on the cheek in a two-year period, in the absence of any other discriminatory or offensive treatment, do not meet the threshold this Court has established for hostile work environment claims.").

Under NYSHRL, an employer can be held liable for an employee's discriminatory conduct where the employer has become a party to said conduct by encouraging, condoning, or approving it." *Bianco v. Flushing Hospital Medical Center*, 54 A.D.3d 304 (2nd Dept. 2008). *See also Matter of Totem Taxi v. New York State Human Rights Appeal Board*, 65 N.Y.2d 300 (1985). "An employer's calculated inaction in response to discriminatory conduct may, as readily as affirmative conduct, indicate condonation." *Matter of State Division of Human Rights v. St. Elizabeth's Hospital*, 66 N.Y.2d 684 (1985).

Here, Equinox maintained and followed an anti-discrimination and anti-antiharassment policy. Equinox took immediate action by investigating plaintiff's December 2016 complaint and subsequently issuing Larson a written disciplinary action regarding his conduct. This disciplinary action specifically warned Larson that any future conduct would result in further discipline, including possible termination of employment. Moreover, while plaintiff asserts that Equinox was aware that Larson had sexually harassed other female-employees, she produces no admissible evidence on this issue and both Arroyo and Gjone specifically testified that they had never received any prior complaints against him.

Based on the foregoing, defendant is entitled to summary judgment dismissing plaintiff's third cause of action.

Retaliation Under NYSHRL

There are four elements to a *prima facie* case of retaliation under the NYSHRL: (1) that plaintiff engaged in protected activity; (2) that the employer was aware of this activity; (3) that the employer took adverse action against the plaintiff; and (4) that a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the adverse employment action. *Chauca v. AdvantageCare Physicians, P.C.*, No. 18-CV-2516 (BMC), 2019 WL 4247495, at *5 (E.D.N.Y. Sept. 6, 2019); *see also Kessler v. Westchester Cnty. Dep't of Soc. Servs.*, 461 F.3d 199, 205-06 (2d Cir. 2006).

"The burden then shifts to defendants to provide a legitimate, non-retaliatory reason for the adverse employment action." *Green v. Rochdale Vill. Soc. Servs., Inc.*, 15-cv-5824, 2016 WL 4148322, at *7 (E.D.N.Y. Aug. 4, 2016). After which plaintiff must identify an issue of material fact that would enable the jury to find that the reason given by defendant is pretext for retaliatory animus based upon the protected activity. *Id.*

Plaintiff's retaliation claims fail as a matter of law. Plaintiff cannot illustrate a causal connection between her December 2016 complaint against Larson and the decline in new membership leads. The Dumbo Club received an influx of new client leads to assign to personal trainers during its first six months of operation, however, after the excitement surrounding the Club quieted, so too did the number of new members signing up for Personal Training Sessions. Plaintiff and most of her coworkers, experienced a corresponding decline in the new membership leads at that time.

Additionally, the timing between plaintiff's December 2016 complaint and Arroyo's claim that one of her clients switched trainers due to plaintiff's phone use entirely rebuts any causal connection between the two. Specifically, plaintiff testified that Arroyo made this statement about her sometime in late 2017 or early 2018. The timing between plaintiff's complaint and this alleged statement, therefore, is far too attenuated to permit an inference that they were causally connected in any way. *See, e.g., Matter of Parris v. New York City Dept. of Educ.*, 111 A.D.3d 528, 529 (1st Dept. 2013); *Valentin v. Fox Bus. Network*, 2016 NY Slip Op 30372(U); *Tarascio v NBC Universal* 2016 NY Slip Op 30200(U).

The Motion Is Denied as To the First Cause of Action Under NYCHRL

The legislative history of NYCHRL contemplates that the law be liberally and independently construed with the aim of making it the most progressive in the nation. *Jordan v. Banks Advertising Inc.*, 11 Misc. 3d 764 (2006). Accordingly, Courts must construe the provisions of the NYCHRL "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Albunio v. City of New York*, 16 N.Y.3d 472 (2011); *See also Bennett v. Health Management Systems, Inc.* 92 A.D.3d 29 (1st Dept. 2011).

To state a hostile work environment claim under the NYCHRL, a plaintiff must simply allege facts tending to show they were subject to "unwanted gender-based conduct." *Williams v. NYCHA*, 61 A.D.3d 62, 62 (1st Dept 2009). "Significantly, the NYCHRL imposes liability for harassing conduct even if that conduct does not qualify as severe or pervasive, and questions of 'severity' and 'pervasiveness' go only to the question of damages, not liability." *Tulino v. City of N.Y.*, No. 15-CV-7106 (JMF), 2016 U.S. Dist. LEXIS 66012, at *12-13 (S.D.N.Y. May 19, 2016).

Equinox's main contention to dismiss plaintiff's claims of a hostile work environment and discrimination in violation of the New York City Human Rights Law (NYC Administrative Code §8-107 et seq., "NYCHRL") is its claim that Larson's comments constitute petty slights and trivial inconveniences.

To prevail on dismissal of the claims under the NYCHRL Equinox has the burden of showing based on the evidence and drawing all reasonable inferences in plaintiff's favor that no reasonable jury could find defendant liable for gender-based discrimination.

A single isolated comment can be actionable under the NYCHRL. Id. at 43. See also *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 80 n.30 (1st Dept. 2009) ("One can easily imagine a single comment that objectifies women being made in circumstances where that comment would, for example, signal views about the role of women in the workplace and be actionable"); *Hernandez v. Kaisman*, 103 A.D.3d 106, 115 (1st Dept. 2012) ("comments . . . objectifying women's bodies and exposing them to sexual ridicule, even if considered 'isolated,' clearly signaled that [the speaker] considered it appropriate to foster an office environment that degraded women").

In this case, the court finds that a reasonable jury could conclude that Larson's comments were more then just a trivial inconvenience.

A reasonable jury could also conclude that Equinox did not go far enough in addressing the acknowledged comments by just giving a warning, or even that a zero-tolerance policy for such conduct should be in place.

The NYCHRL imposes vicarious liability on an employer where the employer knew of the offending employee's unlawful discriminatory conduct and acquiesced in it or failed to take appropriate corrective action. *Heron v. Medrite Testing, LLC*, 2022 U.S. Dist. LEXIS 75087, at

*22 (S.D.N.Y. Apr. 25, 2022) (*quoting Baez v. Anne Fontaine USA, Inc.*, 2017 U.S. Dist. LEXIS 1630, at *5-6 (S.D.N.Y. Jan. 5, 2017)); *see also* N.Y.C. Admin. Code § 8-107(13).

As noted above whether the action taken by Equinox in response to Larson's comments was appropriate is a question of fact for the jury under the NYCHRL.

Based on the foregoing, the motion to dismiss the first cause of action under the NYCHRL is denied.

The Second Cause of Action for Retaliation Under NYCHRL Is Dismissed

On her second cause of action plaintiff must be able to show that once she complained of the conduct by Larson, Equinox engaged in conduct that was reasonably likely to deter her from making any further complaints. Simply put there is just nothing in the record on which a reasonable juror could find that Equinox retaliated against plaintiff for making the complaints, even under the more liberal standard applicable under the NYCHRL.

Based on the foregoing, plaintiff's second cause of action is dismissed.

WHEREFORE it is hereby:

ORDERED that Equinox's motion seeking summary judgment is granted to the extent of dismissing the second, third and fourth causes of action as against Equinox, and denied as to the first cause of action; and it is further

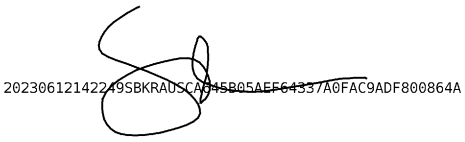
ORDERED that, within 20 days from entry of this order, Equinox shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that the parties appear before the Court for a virtual pre-trial conference on June 29, 2023, at 2:30 pm for a pre-trial conference at which time a trial date will be set; and it is further

ORDERED that this constitutes the decision and order of this court.



6/12/2023
DATE

SABRINA KRAUS, 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