SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM **PART** 05RCP

Justice

----------X

IRMA PEREZ,

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

----------X

INDEX NO. 111768/2011

MOTION DATE 10/13/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, the City of New York's motion for summary judgment dismissing this action is granted in part, for the reasons set forth below.

FACTUAL BACKGROUND

The following factual recitation reflects plaintiff's testimony at her May 23, 2019 examination before trial ("EBT") and her affidavit submitted in opposition to defendant's motion.

Plaintiff began working as a New York City Police Department ("NYPD") police officer on September 29, 2000 (NYSCEF Doc. 34 [Perez Aff. in Opp. at ¶2). In 2011, she was assigned to the 26th Precinct's Traffic Control Division (Id. at ¶3). On July 25, 2011, while plaintiff was processing an arrest, Sergeant Julio Cabreja berated her for taking too long (Id. at ¶¶5-6). After plaintiff explained that the delay was due to printer issues, Cabreja responded, "Well my guys don't take this long. My guys don't take this long. My F'ing guys don't take this long. Why are you taking this long? Why are you females?" (Id. at ¶¶6-7). Cabreja then told plaintiff that he

would issue her a command discipline and would not approve her overtime hours for that day (Id. at ¶8). However, no command discipline was issued and plaintiff's overtime hours were ultimately approved by another supervisor (NYSCEF Doc. No. 29 [Perez EBT at pp. 29, 33-34]).Thereafter, Cabreja repeatedly threatened to write plaintiff up for the July 25, 2011 overtime hours and issue her a command discipline (NYSCEF Doc. No. 34 [Perez Aff. in Opp. at ¶9). During this period, plaintiff routinely heard Cabreja refer to male police officers as "my guys," while referring to female police officers as "you females" (Id. at ¶12). On October 3, 2011, plaintiff was reassigned to the midnight shift—which is, per plaintiff, a less desirable assignment—without the customary advance notice (Id. at ¶14).

In response, plaintiff commenced this action on October 17, 2011, asserting claims for gender discrimination under Executive Law §296 (the New York State Human Rights Law, or "NYSHRL") and Administrative Code §8-107 (the New York City Human Rights Law, or "NYCHRL"), alleging that Sergeant Cabreja had issued her a command discipline for misappropriation of overtime and that her reassignment to the graveyard shift was due to her gender (See NYSCEF Doc. No. 23 [Summons and Complaint]).

After commencing this action, plaintiff was faced with "microscopic scrutiny" and was reprimanded for minor infractions including standing at certain locations on patrol and for removing her cap (NYSCEF Doc. 34 [Perez Aff. in Opp. at ¶¶15, 18]). In addition, at daily roll call, supervisors would repeatedly cross out plaintiff's name and reassign her to "less desirable" posts—including solo posts, foot posts, hospital posts, and telephone switchboard desks—with no partner, making her the only officer assigned to patrol alone (Id. at ¶19; NYSCEF Doc. No. 29 [Perez EBT at pp. 99-101). These reassignments resulted in extended shifts with no breaks or meals, which prevented plaintiff from taking her prescribed medication (NYSCEF Doc. No. 29

[Perez EBT at pp. 77-82]). Plaintiff was informed by Sergeant Coker that these regular roll call reassignments were carried out at the direction of Lieutenant Fremont (NYSCEF Doc. 34 [Perez Aff. in Opp. at ¶20]). Plaintiff's frequent reassignments prevented her from issuing enough summonses and, as a result, she was reprimanded for "not producing enough activity" and given a negative evaluation in December 2011 (Id. at ¶¶24-25).

During one shift, plaintiff overheard Lieutenant Fremont remark, "F her, F her, F her, I'm changing her post, F her, she's not getting relieved … You know, she got this going on with the lawsuit. Screw her. She's not getting meals. She's not getting relief. Screw her. F her" (Id. at ¶¶20-22; NYSCEF Doc. No. 29 [Perez EBT at pp. 101-102, 104-105]). Over the remainder of her career in the NYPD, she overheard supervisors discussing her lawsuit, remarking "[s]he's gone," and "[t]hey're gunning for her" (Id. at ¶17). When plaintiff complained to her union delegate about her frequent reassignments, he responded that these reassignments were because of her lawsuit and asked her when she would drop the lawsuit (NYSCEF Doc. No. 34 [Perez Aff. in Opp. at ¶23]).

In December 2011 plaintiff received a command discipline for failing to submit her book of summons which command discipline was substantiated a year later, on December 10, 2012, resulting in a loss of three vacation days (Id. at ¶26). A male officer at the 26th Precinct, Officer Durrell, told plaintiff that he had previously not turned in his book of summons and was never disciplined (Id. at ¶27). Plaintiff was also subjected to a command discipline based on allegations that she failed to appear for mandatory overtime, which resulted in another loss of vacation days (Id. at ¶28). Plaintiff was uncertain when this command discipline was issued, testifying that it was sometime between July 2011 and October 2012 (NYSCEF Doc. No. 29 [Perez EBT at pp. 78-79]). Another male colleague, Officer Frino, told plaintiff that he had failed to appear for mandated overtime but had not been disciplined (Id.).

Plaintiff subsequently filed an Amended Complaint dated February 29, 2012, adding claims for retaliation under the NYSHRL and NYCHRL based on allegations that the disciplines she received for failing to appear for mandated overtime, appearing late to work, and failing to hand in a book of summons were in retaliation for her commencement of this action (NYSCEF Doc. No. 26 [Am. Compl. at ¶¶16-19]). Thereafter, on November 26, 2013, plaintiff was transferred to Queens Viper, where she was reprimanded for parking in a handicapped spot (as she was permitted to do) and then transferred to Queens Warrants on December 2, 2013 (NYSCEF Doc. No. 34 [Perez Aff. in Opp. at ¶¶29-30). She was then diagnosed with autoimmune issues, lupus, rheumatoid arthritis, arthritis, osteoarthritis, fibromyalgia, and femoral acetabular impingement, which forced her to take sick leave and, ultimately, retire form the NYPD in November 2014 (Id. at ¶¶32-34)

The City now moves, pursuant to CPLR §3212, for an order granting it summary judgment dismissing this action. The City argues that plaintiff cannot establish a prima facie case of discrimination because plaintiff did not suffer any adverse or disadvantageous employment action and that, even assuming she had, she has failed to establish that it occurred under circumstances permitting an inference of discrimination. The City further argues that plaintiff's retaliation claims must be dismissed because plaintiff never suffered any adverse or disadvantageous employment action and, in any event, has not established any causal connection between the alleged retaliatory acts and her protected activity, i.e., her commencement of this action.

Plaintiff opposes this motion, asserting that she has established a prima facie claim for gender discrimination through her testimony as to Cabreja's treatment of her and her subsequent transfer to the midnight shift. She also maintains that she has established a prima facie claim for

retaliation through her testimony that after the commencement of this action she was frequently reprimanded for minor lapses and reassigned to less desirable assignments.

In reply, the City argues that, to the extent plaintiff relies on factual allegations from her EBT and affidavit that were not included in her Amended Complaint, such facts may not be considered in determining whether she has made a prima facie case for gender discrimination or retaliation.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

In assessing a defendant's motion for summary judgment dismissing NYSHRL and NYCHRL claims, courts apply the burden shifting analysis developed in McDonnell Douglas Corp. v Green, 411 US 792 (1973), in which the plaintiff has the initial burden to establish a prima facie[1] case of discrimination after which "the burden shifts to the defendants to rebut the presumption by demonstrating nondiscriminatory reasons for its employment actions" (Ciulla v Xerox Corp., 70 Misc 3d 1205(A) [Sup Ct, NY County 2021] internal citations omitted]). If the

[1] In this context, "prima facie" denotes plaintiff's de minimis burden to establish facts sufficient to create a "legally mandatory, rebuttable presumption," rather than the "more traditional meaning of describing plaintiff's burden of setting forth sufficient evidence to go before the trier of fact" (Melman v Montefiore Med. Ctr., 98 AD3d 107, 122-23 [1st Dept 2012] quoting Sogg v American Airlines, 193 AD2d 153, 162 [1st Dept 1993]).

employer meets this burden, the plaintiff must then, under the NYSHRL, "prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination" or, under the less onerous standard set under the NYCHRL, raise "an issue as to whether the action was motivated at least in part by ... discrimination" (Id. quoting Melman v. Montefiore Med. Ctr., 98 AD3d 107, 127 [1st Dept 2012]).

Gender Discrimination

In light of the foregoing, the City bears the burden on this motion to "demonstrate either the plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for the challenged actions, the absence of a triable issue of fact as to whether the explanations were pretextual" (McDonald v The City of New York, 2020 NY Slip Op 34384[U], 8-9 [Sup Ct, Kings County 2020] [internal citations omitted]). Here, the City argues that plaintiff has failed to establish every element of discrimination under the NYSHRL or NYCHRL.

To establish a prima facie claim for gender discrimination under the NYSHRL, plaintiff must prove that she is a member of a protected class, that she was qualified to hold the position, that she suffered an adverse employment action, and that this adverse employment action occurred under circumstances giving rise to an inference of discrimination (See Reichman v City of New York, 179 AD3d 1115, 1116-17 [2d Dept 2020] [internal citations omitted]). "To be 'materially adverse' a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities" such as "a 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" (Messinger v Girl Scouts of the U.S.A., 16 AD3d 314, 315 [1st Dept 2005] quoting Galabya v New York City Bd. of Educ., 202 F.3d 636, 640 [2d Cir. 2000]).

Here, there is no dispute that plaintiff has satisfied the first two elements of her prima facie case—i.e., that she is a member of a protected class and was qualified to hold the position of police officer. Rather, the City argues that these alleged harms were not adverse employment actions.

The City is correct that Cabreja's threats to issue a command discipline, which he never acted upon, do not constitute an adverse or disadvantageous employment action under either the NYSHRL or NYCHRL (See Sims v Trustees of Columbia Univ. in the City of New York, 168 AD3d 622, 623 [1st Dept 2019] [threats of discipline do not constitute adverse or disadvantageous employment actions under either NYSHRL or NYCHRL]) and that plaintiff's reassignment to the midnight shift does not constitute an adverse employment action under the NYSHRL as it did not alter the essential terms and conditions of her employment (See Mejia v Roosevelt Is. Med. Assoc., 95 AD3d 570, 571 [1st Dept 2012]). However, a command discipline resulting in lost vacation days can constitute an adverse act for purposes of a discrimination claim (See Bayley v City of New York, 2010 NY Slip Op 30472[U] [Sup Ct, New York County 2010] [motion for partial summary judgment denied as to claim for discrimination based on 2005 Charges and Specification]).

Despite this, the City's motion for summary judgment on this cause of action is granted, as there is no evidence that these command disciplines were issued under circumstances permitting an inference of discriminatory intent based on plaintiff's gender. "Discriminatory 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"

(Trinidad v Mary Manning Walsh Nursing Home Co., Inc., 2019 NY Slip Op 31706[U], 15 [Sup Ct, NY County 2019] quoting Mazzeo v Mnuchin, 751 Fed Appx 13, 14 [2d Cir 2018]). Here, Cabreja's general references to "my guys" and "females," constitute "stray remarks" that do not give rise to an inference of gender-biased discrimination (See Basso v EarthLink, Inc., 157 AD3d 428, 430 [1st Dept 2018] ["One derogatory reference to plaintiff and her male colleagues as girls when they lagged behind on the way to a restaurant, on an unspecified date" was, at most, a "stray remark" that, did not "without more, constitute evidence of discrimination"]; Tihan v Apollo Mgt. Holdings, L.P., 201 AD3d 557, 558 [1st Dept 2022] ["Stray remarks about [plaintiff] being a 'loud Turk' do not support an inference of discrimination under the circumstances"]; Breitstein v Michael C. Fina Co., 2016 NY Slip Op 31858[U] [Sup Ct, NY County 2016] ["alleged comments about beanies, that all Jews drive Mercedes and that Plaintiff is a highly compensated old Jew, may have been offensive, [but] a reasonable juror would find that these sporadic comments are too petty and trivial to rise to an actionable level"] affd 156 AD3d 536 [1st Dept 2017]). In addition, plaintiff's hearsay testimony that male colleagues were not punished for the same behavior for which she was disciplined is insufficient to permit such an inference where, as here, it is the only evidence offered (See Tarascio v NBC Universal, 2016 NY Slip Op 30200[U] [Sup Ct, New York County 2016]). Accordingly, defendant's motion to dismiss plaintiff's discrimination claim under the NYSHRL is granted.

That branch of defendant's motion to dismiss plaintiff's NYCHRL discrimination claim is also granted. The elements of a discrimination claim under the NYCHRL are identical to that of a discrimination claim NYSHRL except that plaintiff need not establish an adverse action but only show that defendant took an action that disadvantaged her (See Reichman v City of New York, 179 AD3d 1115, 1119 [2d Dept 2020]). While plaintiff's testimony about being micromanaged

does not establish a disadvantageous act under the NYCHRL (See Sims v Trustees of Columbia Univ. in the City of New York, 168 AD3d 622, 623 [1st Dept 2019]), her assignment to the midnight shift and command disciplines are sufficient to establish disadvantageous employment actions under the more generous NYCHRL standard (See Golston-Green v City of New York, 184 AD3d 24, 38-39 [2d Dept 2020] [a "less favorable work schedule" constitutes "actionable unfavorable treatment under the [NYCHRL]). Dismissal is nevertheless warranted however, as there remains no evidence that these disadvantageous acts were taken with discriminatory intent on the part of defendant. In light of the foregoing, that branch of defendant's motion to dismiss plaintiff's discrimination claims under the NYSHRL and NYCHRL is granted and they are hereby dismissed.

Retaliation

To establish its entitlement to summary judgment dismissing plaintiff's NYSHRL and NYCHRL retaliation claims, the City must "demonstrate that the plaintiff cannot make out a prima facie claim of retaliation or, having offered legitimate, nonretaliatory reasons for the challenged actions, that there exists no triable issue of fact as to whether the defendant's explanations were pretextual" (McDonald v The City of New York, 2020 NY Slip Op 34384[U], 14 [Sup Ct, Kings County 2020] [internal citations and quotations omitted]).

To establish a prima facie claim for retaliation under the NYSHRL, plaintiff must prove that: (i) she has engaged in protected activity (i.e., "opposing or complaining about unlawful discrimination"); (ii) her employer was aware that she participated in such activity; (iii) she suffered an adverse employment action based upon her activity; and (iv) there is a causal connection between the protected activity and the adverse action (Forrest v Jewish Guild for the Blind, 3 NY3d 295, 313 [2004]).

There is no dispute that plaintiff engaged in protected activity by commencing this action on October 17, 2011. Rather, the City argues that plaintiff has failed to meet her prima facie burden insofar as there is no evidence that there was any adverse action against her after she commenced this lawsuit. The Court disagrees. While plaintiff's testimony that she was yelled at and subjected to excessive and unwarranted scrutiny does not establish an adverse employment action under the NYSHRL (See Chin v New York City Hous. Auth., 106 AD3d 443, 444 [1st Dept 2013]), her testimony as to the two command disciplines she received and her resulting loss of vacation days, is sufficient to establish an adverse act[2] (See Bayley v City of New York, 2010 NY Slip Op 30472[U] [Sup Ct, New York County 2010]).

The City fails to establish that there was no causal connection between her protected activity and these command disciplines. Although the three months between plaintiff's commencement of this action and the command discipline in December 2011 is too attenuated to establish a causal connection in and of itself, "[t]he absence of temporal proximity will not defeat the claim, where, as here, there are other facts supporting causation" (Harrington v City of New York, 157 AD3d 582, 586 [1st Dept 2018]). Specifically, plaintiff's testimony as to Lieutenant Fremont's statements "F her, F her, F her, I'm changing her post, F her, she's not getting relieved … You know, she got this going on with the lawsuit. Screw her. She's not getting meals. She's not getting relief," considered in conjunction with the command disciplines, raises an issue of fact as to whether they were motivated by retaliatory animus (See Collins v Indart-Etienne, 59 Misc 3d

[2] To the extent that plaintiff's affidavit in opposition and EBT testimony sets out facts that could have been included in her Amended Complaint but were not—i.e., her frequent reassignments at roll call—or which occurred after plaintiff filed her Amended Complaint—i.e., her transfers on November 26, 2013 and December 2, 2013 and forced medical retirement in 2014—they cannot be considered in addressing the instant motion because they were first raised in plaintiff's 2019 testimony, well beyond the statute of limitations for NYSHRL and NYCHRL claims (See O'Connor v Bank of New York, 2008 NY Slip Op. 30614(U) [Sup Ct, NY County 2008] [internal citations omitted]; see also Demetriades v Royal Abstract Deferred, LLC, 159 AD3d 501, 503 [1st Dept 2018]).

1026, 1054 [Sup Ct, Kings County 2018] [schoolteacher plaintiff's allegations that school principal publicly stated that she wanted plaintiff "out" and four months later placed plaintiff in absent teacher reserve sufficiently stated claim for retaliation]).

To the extent the City also argues that the 2012 command discipline submitted by plaintiff in opposition to the instant motion establishes that a legitimate, nonretaliatory reasons for the challenged actions, plaintiff's testimony as to Fremont's express statement of retaliatory animus raises an issue of fact as to whether this discipline was pretextual. Finally, the City's assertion that plaintiff admitted, at her deposition, to the conduct that formed the basis for the command disciplines is not supported by a review of the transcript. Accordingly, that branch of defendant's motion to dismiss plaintiff's retaliation claim under the NYSHRL must be denied. As the NYSHRL represents "a floor below which the City's Human Rights law cannot fall" (Williams v New York City Hous. Auth., 61 AD3d 62, 66 [1st Dept 2009]) the City's motion is also denied as to plaintiff's NYCHRL claim.

In light of the foregoing, it is

ORDERED that the City of New York's motion for summary judgment dismissing plaintiff's complaint is granted, in part, to the extent that plaintiff's first cause of action (for gender discrimination in violation of Executive Law §296 and Administrative Code §8-107) is hereby dismissed, and is otherwise denied; and it is further

ORDERED that counsel for plaintiff is directed to serve a copy of this decision and order, with notice of entry, on defendants within ten days from the date of this decision and order

ORDERED that, within ten days from the date of this decision and order, counsel for plaintiff is directed to serve a copy of this decision and order, with notice of entry, on the Clerk of

the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119); and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office 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).

This constitutes the decision and order of the Court.

20231120151928JHKIMF8DAB454EFC343A5918A288DFAC58B4E

11/20/2023
DATE

HON. JUDY H. KIM, J.S.C.

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