The New State Sexual Harassment Laws

Theodore Roosevelt Inn of Court

Nassau County Bar Association

Monday, December 17, 2018

5:30 p.m.

Hon. Gale D. Berg

Stanley A. Camhi, Esq.

Frank S. Rosenfield, Esq.

Elizabeth E. Schlissel, Esq.

Hon. Claire I. Weinberg

Hon. Gale D. Berg, has been a practicing attorney for 40 years. She has been the Director of Pro Bono Attorney Activities of the Nassau County Bar Association, for the past six years, where she oversees the Mortgage Foreclosure Project, providing twice-monthly free consultation clinics to homeowners facing the loss of their homes, as well as recruiting and educating volunteer attorneys to represent homeowners for the day, at mandatory court conferences. As Director of the program, she is responsible for all aspects, including advertising the program to homeowners as well as administering and filing for grants to support the Program. In addition, she is a sitting Magistrate in the Village of Baxter Estates, and is an Adjunct Professor at C.W. Post College. She sits on the Advisory Board of Nassau Suffolk Law Services, the Nassau Academy of Law and the Board of the Theodore Roosevelt Inns of Court and is a past President of Yashar (Lawyers and Judges of Hadassah).

Her experience spans both private and government practice of law. Her career has included the posts of Chief Prosecutor, Nassau County Traffic and Parking, Assistant Attorney at the New York State Racing and Wagering Board, New York State Assistant Attorney General, and an attorney in private practice specializing in real estate, including changing the laws regarding rezoning warehouses located in lower Manhattan to become residential.

JASPAN SCHLESINGER
ATTORNEYS AT LAW

Stanley A. Camhi

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PRACTICE AREAS:

Appellate
Labor and Employment Law
Litigation

Stanley A. Camhi is co-chair of the Firm's Litigation Practice Group and its Appellate Practice Group, where he practices in the area of general civil litigation with an emphasis on employment related matters and insurance defense work. His practice includes the defense of employment discrimination claims in both the public and private sector, including claims brought under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the State Human Rights Law, and the Civil Rights Acts. Rated AV, the highest Martindale-Hubbell peer rating for lawyers, Mr. Camhi has also lectured on the topic of wrongful discharge and privacy in the workplace.

From 1980 until 1986, when he joined Jaspan Schlesinger LLP, Mr. Camhi was an Assistant Attorney General for the State of New York. In 1983, the Attorney General appointed him to serve as Chief of a Litigation Section where he supervised a staff of ten attorneys primarily responsible for defending Title VII and other discrimination claims brought against the State. As an Assistant Attorney General, Mr. Camhi defended the State of New York and its agencies against lawsuits brought in both federal and state court. His responsibilities included all phases of pre-trial discovery and motion practice as well as trial and appellate work.

Prior to becoming an Assistant Attorney General, Mr. Camhi practiced law for five years with a Capitol Hill law firm in Washington, D.C. where he was primarily responsible for handling the firm's litigation in both the federal and local courts of the District of Columbia.

Mr. Camhi was a recipient of the Long Island Business News Leadership in Law Award in 2012 and named to the New York Metro area Super Lawyers list for litigation. The Super Lawyers list is issued by Thomson Reuters. A description of the selection methodology can be found at http://www.superlawyers.com/about/selection_process.html.

Mr. Camhi previously served on the Board of the Long Island Chapter of the American Foundation for Suicide Prevention and is a member of the Board of the Sephardic Temple of Cedarhurst, New York.

Mr. Camhi received his Juris Doctor degree from the Emory University School of Law where he graduated with distinction and was awarded the Order of the Coif based upon his academic achievements. Upon graduation he was admitted to practice law in Georgia.

In 1976, Mr. Camhi was admitted to practice law in both the District of Columbia and Virginia. In 1980, he was also admitted to practice in New York. In addition, Mr. Camhi is admitted to practice law in several federal district courts where he has tried numerous cases. He has argued numerous appeals in the United States Court of Appeals for the Second Circuit and the New York appellate courts including the Court of Appeals, the State's highest court. He is also admitted to practice before the United States Supreme Court. In addition, he is a member of New York State Bar Association, the Nassau County Bar Association and the Theodore Roosevelt Inn of Court of the American Inns of Court.

EDUCATION

- B.A., George Washington University - 1972
- J.D., Emory University School of Law, with honors - 1975

BAR ADMISSIONS

- District of Columbia
- Georgia
- New York
- Virginia

Frank S. Rosenfield graduated, summa cum laude, from the State University of New York at Binghamton in 2011 and received a Juris Doctorate Degree from Benjamin N. Cardozo School of Law in 2014. He was admitted to practice before the Courts of the State of New York in 2015.

While in law school, Mr. Rosenfield interned for the Honorable Norman Janowitz of the Supreme Court, Nassau County. Prior to Joining CG&P, Mr. Rosenfield worked as a law clerk at firms specializing in personal injury, medical malpractice, and employment law, and gained experience mediating divorces for programs run by the Office of Court Administration.

Mr. Rosenfield has been an Associate with Catalano Gallardo & Petropoulos since 2014, where his practice covers cases including legal malpractice defense, medical malpractice defense, nursing home defense, products liability, and general liability litigation.

Mr. Rosenfield is a member of the Nassau County Bar Association and The Theodore Roosevelt American Inn of Court.

Tannenbaum Helpern Syracuse & Hirschtritt LLP

Elizabeth E. Schlissel

Associate
[illegible]
Phone: 212-[illegible]
Download V-card

Bio

Elizabeth Schlissel is an associate in the Tannenbaum Helpern's Employment Law practice representing clients in employment litigation and other aspects of employment law.

Employment Litigation

[illegible] retaliation, hostile work environment, breach of employment contracts and restrictive covenants, [illegible] and [illegible] to accommodate [illegible] [illegible] U.S. and New York State Department of Labor.

Employment Counseling

[illegible] and HR [illegible] and [illegible] sexual harassment complaints. In addition, Elizabeth [illegible] employee [illegible]

Publications

- [illegible] Liability: Keep Your Employees On The [illegible] List (Employment Alert) | December 2018

Events

- Complying with New York State Sexual Harassment [illegible] Theodore Roosevelt American Inn of Court, Nassau County Bar Association, December 12, 2018 [illegible]
- [illegible] Trends in Employment Law, Theodore Roosevelt American Inn of Court, Nassau County Bar Association, [illegible] 2017

Practice Areas:

- Employment Law

Areas of Focus:

- Employment Law

Education:

College

- [illegible] University

Law School

- [illegible] University School of Law

Prior Affiliations:

- Elizabeth previously served as an Assistant District Attorney for the Nassau County District Attorney's Office, serving under District Attorney Kathleen Rice, prosecuting misdemeanors and felonies.

Memberships:

Professional

- Theodore Roosevelt American Inn of Court Executive Committee Member
- Long Island Association Young Professionals Committee
- Nassau County Bar Association [illegible] Employment Committee

Bar Admissions:

- New York State
- U.S. District Court for the Eastern District of New York
- U.S. District Court for the Southern District of New York

HON. CLAIRE I. WEINBERG

PROFESSIONAL EXPERIENCE

Judicial Hearing Officer	2006 - Present
Nassau County Supreme Court – Arbitrator, Fee Disputes	2007 – Present
Acting Justice, Nassau County Supreme Court & Founding Judge of the Domestic Violence Court	2002 - 2005
Judge, Nassau County Court	2001 - 2005
Judge, District Court, Nassau County	1991 - 2000
Attorney in Private Practice Practice concentrated in criminal defense & Family Court	1983 - 1990
Assistant District Attorney, Nassau County	1976 - 1983
Legal Research Assistant to Judge Jacob Fuchsberg, New York State Court of Appeals	1975 – 1976
Lectured extensively, primarily on Domestic Violence, within the legal community and the community at large	

PROFESSIONAL STATUS

Admitted to the United States Supreme Court	1999
Admitted to practice in all New York State Courts	1976
Admitted to practice in Federal District Courts, Eastern & Southern Districts	1976

EDUCATION

Hofstra University School of Law – Juris Doctor	1975
Queens College – BA	1972
National College of District Attorneys	1978 - Summer

COMMUNITY ACTIVITIES

Nassau County Bar Association – Member; Former member of the Board of Directors Formerly Chair of Community Relations and Public Education Committee, Vice Chair of Judicial Section; presently a member of several committees
Nassau County Women's Bar Association – Member, former member of Board of Directors
Yashar, the Attorneys & Judges Chapter of Hadassah – Founding President and active member of the Board of Directors
Theodore Roosevelt Inn of Court – Member, Past President
Jewish Lawyers Association of Nassau County – Member, Past President
Temple Emanuel – Member, Former Trustee
Great Neck Lawyers Association – Member, Former member of Board of Directors
Former Assistant District Attorneys Association – Past President
Nassau County Judicial Committee on Women in the Courts – Past Chair
Nassau County Family Violence Task Force – Former member
New York State County Court Judges Association – Retired

HONORS

Nassau County Women's Bar Association – Rona Seider Award	2014
Yashar, the Attorneys & Judges Chapter of Hadassah – Leadership Award	2011
League of Women Voters – Notable Contributions to Society	2004
Soroptimists International of Nassau County – Woman of Distinction	2002
Great Neck Lawyers Association – Community Service Award	2000
Jewish Lawyers Association of Nassau County – Distinguished Service Award	1999
Town of North Hempstead – Women's Honor Roll	1996
Yashar, the Attorneys & Judges Chapter of Hadassah – Honoree	1996

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Program Outline

Introduction	10 minutes
Scene 1	3 minutes
Talk	5 minutes
Scene 2	3 minutes
Talk	5 minutes
Scene 3	3 minutes
Talk	5 minutes
Scene 4	3 minutes
Talk	5 minutes
Scene 5	5 minutes
Talk	10 minutes
State Harassment Laws	15 minutes
Quiz	5 minutes
Conclusion	20 minutes
Q& A	10 minutes

Total

CLE Credits: 2.0 hours of Ethics and Professional

The New State Sexual Harassment Laws

CLE Requirement, General Information

The New State Sexual Harassment Laws

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Sexual Harassment Definitions

Sexual Harassment

- Sexual Harassment occurs whenever unwelcome or unwanted conduct, words, deeds, or behaviors on the basis of gender affects a person's job and makes the employee feel uncomfortable. It includes but not limited to unwanted suggestive comments on a person's appearance, unwanted touching or other physical contact, unwanted sexual jokes or comments, unwanted sexual advances and unwanted exposure to pornographic material. The victim as well as the harasser may be male or female. It does not have to be the opposite sex. The victim need not be the person harassed but could be anyone affected by the offensive conduct.

Quid Pro Quo Sexual Harassment

- Quid pro Quo is defined by the EEOC as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:
  - Submission to the conduct is made either explicitly or implicitly a term or condition of an individual's employment or
  - Submission to or rejection of the conduct by an individual is used as a basis for employment decisions affecting such individual, or
  - The conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

Hostile Work Environment

- Hostile work environment exists when harassment creates an offensive and unpleasant working environment which affects an individual's ability to do their job. It is subtle and can be one incident or several. The intent of the harasser is irrelevant. The perception or impact of harassed person is what matters. It can be created through physical acts. verbal behavior or non- verbal.
- To create a sexually hostile environment, unwelcome conduct based on gender must be:
- Subjectively abusive to the person affected and objectively severe or pervasive enough to create a work environment that a reasonable person would find abusive.

Psychological Harassment

- Psychological harassment is humiliating, or abusive behavior intended to lower a person's self-esteem or cause them torment. It can be actions, gestures or words.
- It includes abusive words or phrases, slurs or negative stereotyping. Threatening, intimidating or hostile acts, put down jokes, or written or graphic material that shows hostility or aversion to an individual.
- It affects the individual through low self- esteem, feelings of insecurity and dread, decreased self confidence, feelings of powerlessness, embarrassment and questions their own judgment.
- They harass due to fear, jealously, past experiences.
- Cost is decreased morale, productivity, increased turnover in personnel, loss of trust and potential lawsuits.

New State Sexual Harassment Laws

What Happened this year in the Media?

10/5/17 — Actress Ashley Judd accuses media mogul **Harvey Weinstein** in a breaking story by *The NYT*

11/29/17 — *Today* show opens with a stunning revelation that co-host **Matt Lauer** had been fired after NBC received allegations about his sexual misconduct

12/07/17 — At the urging of his party, U.S. **Sen. Al Franken** says he'll resign from Senate amid sexual misconduct allegations

01/01/18 — Over 300 women of Hollywood form an anti-harassment coalition called **Times Up**

04/26/18 — **Bill Cosby** is convicted of drugging and molesting a woman following his re-trial

05/07/18 — Four women accuse New York Attorney General **Eric Schneiderman** of sexual and physical assault. Schneiderman resigns immediately

05/24/18 — Several women accuse Actor **Morgan Freeman** of harassment and inappropriate behavior

05/25/18 — **Harvey Weinstein** turns himself in after the Manhattan DA brings criminal charges against him, including rape

07/30/18 — FEMA personnel chief, **Corey Coleman**, harassed women, hired some as possible sexual partners for male employees, agency's leader says

08/20/18 — **Asia Argento,** one of the first to accuse **Harvey Weinstein** of sexual assault, allegedly paid off her own sexual assault accuser.

9/10/18 — CBS CEO and Chairman **Les Moonves** steps down after *The New Yorker* publishes a second story detailing claims of sexual assault, harassment and retaliation.

9/19/18 — GOP pushes Supreme Court nominee, **Brett Kavanaugh** accuser to testify about sexual assault allegation, but risks a #MeToo backlash.

[1]Source: Christen A. Johnson and KT Hawbaker, *#MeToo: A Timeline of Events,* CHICAGO TRIBUNE, April 27, 2018

New State Anti-Sexual Harassment Laws

- Anti-Sexual harassment **policy**
- Annual anti-sexual harassment **training**
- Sexual harassment against certain **non-employees** is prohibited
- **Confidentiality** provisions in settlement agreements involving sexual harassment claims are limited
- **Mandatory arbitration** of sexual harassment claims are largely prohibited

NYS Policy Requirements

- The anti-sexual harassment policy must:
  - **Prohibit** sexual harassment;
  - Provide **examples** of prohibited conduct;
  - Include information concerning the federal and state **statutory provisions** concerning sexual harassment and **remedies** available to victims of sexual harassment and a statement that there may be applicable local laws;
  - Include a standard **complaint form**;
  - Include a procedure for the timely and confidential **investigation** of complaints and ensure due process for all parties;
  - Inform employees of their **rights of redress** and all available forums for adjudicating sexual harassment complaints administratively and judicially;
  - Clearly state that sexual harassment is considered a form of employee **misconduct** and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and
  - Clearly state that **retaliation** against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.

NYS Training Requirements

- All NY employers must provide sexual harassment prevention training to all employees “on an **annual** basis”
- The DOL/DHR published **training** materials
- Employers may use the DOL/DHR model training or use their own, so long as they satisfy the criteria set forth in the law

NYS Training Requirements

- The training materials must:
  - Be “interactive”;
  - Explain sexual harassment consistent with guidance issued by the DOL/DHS;
  - Include examples of conduct that would constitute unlawful sexual harassment;
  - Include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;
  - Include information concerning employees’ rights of redress and all available forums for adjudicating complaints; and
  - Address conduct by supervisors and any additional responsibilities for such supervisors.

NYS Training Requirements

- Definition of “Interactive”
  - Interactive training **requires some form of employee participation**, meaning the training may:
    - Be web-based with questions asked of employees as part of the program;
    - Accommodate questions asked by employees;
    - Include a live trainer made available during the session to answer questions; and/or
    - Require feedback from employees about the training and the materials presented.
- Other Guidance:
  - Employers must provide **all employees** with interactive training, even if employees are absent or don’t show up, but employers may discipline no-show employees
  - Training should be **modified** to reflect the work of the organization by including, for example, industry-specific scenarios
  - Employers should provide employees with training in the language that is spoken by their employees

NYS Law – Expansion to Non-Employees

- NY employers may not permit sexual harassment of certain "**non-employees**"
- Definition of non-employees include:
  - contractor, subcontractor, vendor, consultant, other person providing services pursuant to a contract in the workplace, other person who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a "contract in the workplace"
- Limitations—this only applies where:
  - The employer, its agents or supervisors **knew or should have known** that such non-employee was subjected to sexual harassment in the employer's work-place, **and**
  - The employer failed to take immediate and appropriate **corrective action**
- In reviewing non-employee cases, the extent of the employer's **control** and any other **legal responsibility** that the employer may have with respect to the conduct of the harasser shall be considered

NYS Non-Disclosure Limitations

- Provisions in settlement agreements that would prevent the employee from disclosing the underlying **facts and circumstances** to the claim or action are now prohibited
  - Exception: the employee **prefers** that such a provision be in place
- What are the underlying "facts and circumstances"?
  - These rules only apply to confidentiality provisions aimed at the "underlying facts and circumstances to the claim"
  - This does not appear to apply to the existence, amount or other terms of the settlement
- An employee who prefers to keep the circumstances of their claim confidential may do so by following this procedure:
  - Employee must have **21 days to consider** such a confidentiality provision
  - Parties must **sign an agreement** memorializing the employee's preference to keep the underlying facts and circumstances of the claim confidential
  - Employee must have **seven days** after signing the agreement to **revoke** the agreement

Harassment Quiz

1. If no one complaints, then it’s not sexual harassment.

2. If my intensions were good – for example, I meant to compliment someone on how great they looked there is no way my conduct could violate the harassment policy.

3. It cannot be sexual harassment if both parties are the same gender.

4. Quid Pro Quo harassment occurs when a female boss tells dirty jokes to the other women in the office.

5. If someone is offended by my behavior in the break room, then they should take their break somewhere else, or at another time, since I am not “working” while I’m on my break and I have a right to freedom of speech.

6. If most people find a comment amusing and inoffensive, then the one person who is offended does not have a right to complain about harassment.

7. Harassment based on sex can include making stereotypical remarks about someone’s gender.

8. Harassment or discrimination based on sex, race, color religion, national origin, age, disability, ancestry, or any other characteristic protected by federal state or local law is unlawful and also violates my employer’s policy.

9. Sexual harassment involves offering job benefits in exchange for sexual favors, or alternatively threatening a person's job if they don't agree to the offer.

10. It is unlawful, and a violation of the company's policy, to retaliate against someone who resists unwelcome behavior, files a complaint about sexual harassment or perceived harassment, or participates in an investigation.

11. Employees are subject to disciplinary action, up to and including termination for engaging in unlawful harassment or discrimination.

12. Swearing and foul language can be harassment if they offend anyone at work.

13. It is unlawful for a man to sexually harass another man because of his gender.

14. Pretending to be gay to make co-worker’s laugh is just for fun and would not be considered harassment.

15. If an employee does not immediately complain about offensive behavior, the behavior is probably welcome and not harassment.

16. Making comments about a co-worker's age such as "We only hire young employees because the old guys just do not understand our technology" is not something an employee should get upset about.

17. An employee who leaves a voicemail message to a Middle Eastern co-worker saying “Hey towel head” is not considered harassing behavior.

18. If a victim of harassment asks a manager or supervisor not to tell anyone about the sexual harassment incident, the supervisor should not take further action.

19. If a supervisor sees that an employee has posted sexually explicit posters in his work area, but nobody has complained about it, no further action is required.

20. A supervisor who touches an employee in a sexual manner only one time may be guilty of sexual harassment.

Harassment Quiz

1.	If no one complaints, then it's not sexual harassment.	True	False
2.	If my intensions were good – for example, I meant to compliment someone on how great they looked there is no way my conduct could violate the harassment policy.	True	False
3.	It cannot be sexual harassment if both parties are the same gender.	True	False
4.	Quid Pro Quo harassment occurs when a female boss tells dirty jokes to the other women in the office.	True	False
5.	If someone is offended by my behavior in the break room, then they should take their break somewhere else, or at another time, since I am not "working" while I'm on my break and I have a right to freedom of speech.	True	False
6.	If most people find a comment amusing and inoffensive, then the one person who is offended does not have a right to complain about harassment.	True	False
7.	Harassment based on sex can include making stereotypical remarks about someone's gender.	True	False
8.	Harassment or discrimination based on sex, race, color religion, national origin, age, disability, ancestry, or any other characteristic protected by federal state or local law is unlawful and also violates my employer's policy.	True	False
9.	Sexual harassment involves offering job benefits in exchange for sexual favors, or alternatively threatening a person's job if they don't agree to the offer.	True	False
10.	It is unlawful, and a violation of the company's policy, to retaliate against someone who resists unwelcome behavior, files a complaint about sexual harassment or perceived harassment, or participates in an investigation.	True	False
11.	Employees are subject to disciplinary action, up to and including termination for engaging in unlawful harassment or discrimination.	True	False
12.	Swearing and foul language can be harassment if they offend anyone at work.	True	False

13. It is unlawful for a man to sexually harass another man because of his gender. True False

14. Pretending to be gay to make co-worker's laugh is just for fun and would not be considered harassment. True False

15. If an employee does not immediately complain about offensive behavior, the behavior is probably welcome and not harassment. True False

16. Making comments about a co-worker's age such as "We only hire young employees because the old guys just do not understand our technology" is not something an employee should get upset about. True False

17. An employee who leaves a voicemail message to a Middle Eastern co-worker saying "Hey towel head" is not considered harassing behavior. True False

18. If a victim of harassment asks a manager or supervisor not to tell anyone about the sexual harassment incident, the supervisor should not take further action. True False

19. If a supervisor sees that an employee has posted sexually explicit posters in his work area, but nobody has complained about it, no further action is required. True False

20. A supervisor who touches an employee in a sexual manner only one time may be guilty of sexual harassment. True False

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Labor Law (Refs & Annos)
Chapter 31. Of the Consolidated Laws (Refs & Annos)
Article 7. General Provisions

McKinney's Labor Law § 201-g
§ 201-g. Prevention of **sexual harassment**
Effective: October 9, 2018

Currentness

1. The department shall consult with the division of human rights to create and publish a model **sexual harassment** prevention guidance document and **sexual harassment** prevention policy that employers may utilize in their adoption of a **sexual harassment** prevention policy required by this section.

a. Such model **sexual harassment** prevention policy shall: (i) prohibit **sexual harassment** consistent with guidance issued by the department in consultation with the division of human rights and provide examples of prohibited conduct that would constitute unlawful **sexual harassment**; (ii) include but not be limited to information concerning the federal and state statutory provisions concerning **sexual harassment** and remedies available to victims of **sexual harassment** and a statement that there may be applicable local laws; (iii) include a standard complaint form; (iv) include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties; (v) inform employees of their rights of redress and all available forums for adjudicating **sexual harassment** complaints administratively and judicially; (vi) clearly state that **sexual harassment** is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in **sexual harassment** and against supervisory and managerial personnel who knowingly allow such behavior to continue; and (vii) clearly state that retaliation against individuals who complain of **sexual harassment** or who testify or assist in any proceeding under the law is unlawful.

b. Every employer shall adopt the model **sexual harassment** prevention policy promulgated pursuant to this subdivision or establish a **sexual harassment** prevention policy to prevent **sexual harassment** that equals or exceeds the minimum standards provided by such model **sexual harassment** prevention policy. Such **sexual harassment** prevention policy shall be provided to all employees in writing. Such model **sexual harassment** prevention policy shall be publicly available and posted on the websites of both the department and the division of human rights.

2. The department shall consult with the division of human rights and produce a model **sexual harassment** prevention training program to prevent **sexual harassment** in the workplace.

a. Such model **sexual harassment** prevention training program shall be interactive and include: (i) an explanation of **sexual harassment** consistent with guidance issued by the department in consultation with the division of human rights; (ii)

examples of conduct that would constitute unlawful **sexual harassment**; (iii) information concerning the federal and state statutory provisions concerning **sexual harassment** and remedies available to victims of **sexual harassment**; and (iv) information concerning employees' rights of redress and all available forums for adjudicating complaints.

b. The department shall include information in such model **sexual harassment** prevention training program addressing conduct by supervisors and any additional responsibilities for such supervisors.

c. Every employer shall utilize the model **sexual harassment** prevention training program pursuant to this subdivision or establish a training program for employees to prevent **sexual harassment** that equals or exceeds the minimum standards provided by such model training. Such **sexual harassment** prevention training shall be provided to all employees on an annual basis.

3. The commissioner may promulgate regulations as he or she deems necessary for the purposes of carrying out the provisions of this section.

Credits

(Added L.2018, c. 57, pt. KK, subpt. E, § 1, eff. Oct. 9, 2018.)

McKinney's Labor Law § 201-g, NY LABOR § 201-g
Current through L.2018, chapters 1 to 356.

End of Document

Compilation of Codes, Rules and Regulations of the State of New York Currentness
Title 9. Executive Department
Subtitle A. Governor's Office
Chapter I. Executive Orders
Part 4. Executive Orders (Mario M. Cuomo) [FN1] (Refs & Annos)

9 NYCRR 4.19

Section 4.19. Executive Order No. 19: New York State Policy Statement on **Sexual Harassment** in the Workplace

WHEREAS, **sexual harassment** in the workplace is not merely offensive but is a form of discrimination in violation of Federal and State law; and

WHEREAS, every State employee is entitled to a working environment free from **sexual harassment** and its deleterious economic, psychological and physical effects; and

WHEREAS, the cost to the State is considerable in both human and financial terms including the replacement of personnel who leave their jobs, increased use of health benefit plans due to emotional and physical stress, absenteeism, and decline in individual and workgroup productivity;

NOW, THEREFORE, I, Mario M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and Laws of the State of New York, do hereby establish a New York State Policy Statement on **Sexual Harassment** in the Workplace.

I. The head of each department, agency, board, commission or other entity under the jurisdiction of the Executive Branch shall:

a. Issue a strong management policy statement defining and prohibiting **sexual harassment** in the workplace. The policy statement should inform employees of their rights of redress, and the availability of complaint resolution channels and assistance with incidents of **sexual harassment**. The policy statement should make clear that **sexual harassment** is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in **sexual harassment** and against supervisory and managerial personnel who knowingly allow such behavior to continue.

b. Widely distribute the policy statement by providing it to all employees, including it in new employee orientation, and publicizing it in internal employee publications.

c. Conduct appropriate training to instruct and sensitize all employees.

d. Develop guidelines to ensure the swift and thorough investigation of allegations and complaints of **sexual harassment** and enforcement of appropriate sanctions including disciplinary actions. The affirmative action officer shall have responsibility for processing complaints. Because of the sensitivity of the issue, particular efforts should be made to conduct investigations with due regard for confidentiality to ensure protection of the complainant and the accused. Although the intent is to address and resolve these matters at the workplace, victims should be informed of the various administrative and legal remedies available.

The complaint procedure should provide for subsequent review to determine if the **sexual harassment** has been effectively stopped.

e. Provide the Governor's Office of Employee Relations with a copy of the policy statement and a brief description of the actions taken and planned in regard to preventing and combating **sexual harassment** in the State workplace, and report all complaints and their resolution to the Governor's Office of Employee Relations.

As used in this Order, unwelcome **sexual** advances, requests for **sexual** favors, or other verbal or physical conduct of a **sexual** nature will constitute **sexual harassment** when:

(1) Submission to the conduct is either explicitly or implicitly a term or condition of an individual's employment; or

(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) The conduct has the purpose or effect of unreasonably interfering with an affected person's work performance, or creating an intimidating, hostile, or offensive work environment.

II. The Governor's Office of Employee Relations shall provide information to the entities covered by this Executive Order to assist in the implementation and the operation of the policy established by this Executive Order.

Nothing in this Order shall be construed to enlarge upon nor limit or abridge the rights of any person under the United States or State Constitutions of the Statutes of the United States or the State of New York.

Signed: Mario M. Cuomo

Dated: May 31, 1983

Credits

Order dated May 31, 1983, filed June 13, 1983.

[FN1]

Executive Orders bearing numbers like 55.43, etc, denoting amendments to Governor Rockefeller's orders numbered 55 through 59, are the so-called "New York City superseders" and are appended to the Executive Orders in Part 1 of this Title.

Current with amendments included in the New York State Register, Volume XXL, Issue 49 dated December 5, 2018. Court rules under Title 22 may be more current.

9 NYCRR 4.19, 9 NY ADC 4.19

End of Document

Minimum Standards for Sexual Harassment Prevention Policies

Combating Sexual Harassment

Every employer in the State of New York is required to adopt a sexual harassment prevention policy pursuant to Section 201-g of the Labor Law. An employer that does not adopt the model policy must ensure that the policy that they adopt meets or exceeds the following minimum standards. The policy must:

i) prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;

ii) provide examples of prohibited conduct that would constitute unlawful sexual harassment;

iii) include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws;

iv) include a complaint form;

v) include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;

vi) inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;

vii) clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and

viii) clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.

Employers must provide each employee with a copy of its policy in writing. Employers should provide employees with the policy in the language spoken by their employees.

* * *

The adoption of a policy does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

Sexual Harassment Policy for All Employers in New York State

Combating Sexual Harassment

Introduction

[*Employer Name*] is committed to maintaining a workplace free from sexual harassment. Sexual harassment is a form of workplace discrimination. All employees are required to work in a manner that prevents sexual harassment in the workplace. This Policy is one component of [*Employer Name's*] commitment to a discrimination-free work environment. Sexual harassment is against the law[1] and all employees have a legal right to a workplace free from sexual harassment and employees are urged to report sexual harassment by filing a complaint internally with [*Employer Name*]. Employees can also file a complaint with a government agency or in court under federal, state or local antidiscrimination laws.

Policy:

1. [*Employer Name's*] policy applies to all employees, applicants for employment, interns, whether paid or unpaid, contractors and persons conducting business, regardless of immigration status, with [*Employer Name*]. In the remainder of this document, the term "employees" refers to this collective group.

2. Sexual harassment will not be tolerated. Any employee or individual covered by this policy who engages in sexual harassment or retaliation will be subject to remedial and/or disciplinary action (e.g., counseling, suspension, termination).

3. Retaliation Prohibition: No person covered by this Policy shall be subject to adverse action because the employee reports an incident of sexual harassment, provides information, or otherwise assists in any investigation of a sexual harassment complaint. [*Employer Name*] will not tolerate such retaliation against anyone who, in good faith, reports or provides information about suspected sexual harassment. Any employee of [*Employer Name*] who retaliates against anyone involved in a sexual harassment investigation will be subjected to disciplinary action, up to and including termination. All employees, paid or unpaid interns, or non-employees[2] working in the workplace who believe they have been subject to such retaliation should inform a supervisor, manager, or [*name of appropriate person*]. All employees, paid or unpaid interns or non-employees who believe they have been a target of such retaliation may also seek relief in other available forums, as explained below in the section on Legal Protections.

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[1] While this policy specifically addresses sexual harassment, harassment because of and discrimination against persons of all protected classes is prohibited. In New York State, such classes includeage, race, creed, color, national origin, sexual orientation, military status, sex, disability, marital status, domestic violence victim status, gender identity and criminal history.

[2] A non-employee is someone who is (or is employed by) a contractor, subcontractor, vendor, consultant, or anyone providing services in the workplace. Protected non-employees include persons commonly referred to as independent contractors, "gig" workers and temporary workers. Also included are persons providing equipment repair, cleaning services or any other services provided pursuant to a contract with the employer.

Adoption of this policy does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

4. Sexual harassment is offensive, is a violation of our policies, is unlawful, and may subject [*Employer Name*] to liability for harm to targets of sexual harassment. Harassers may also be individually subject to liability. Employees of every level who engage in sexual harassment, including managers and supervisors who engage in sexual harassment or who allow such behavior to continue, will be penalized for such misconduct.

5. [*Employer Name*] will conduct a prompt and thorough investigation that ensures due process for all parties, whenever management receives a complaint about sexual harassment, or otherwise knows of possible sexual harassment occurring. [*Employer Name*] will keep the investigation confidential to the extent possible. Effective corrective action will be taken whenever sexual harassment is found to have occurred. All employees, including managers and supervisors, are required to cooperate with any internal investigation of sexual harassment.

6. All employees are encouraged to report any harassment or behaviors that violate this policy. [*Employer Name*] will provide all employees a complaint form for employees to report harassment and file complaints.

7. Managers and supervisors are **required** to report any complaint that they receive, or any harassment that they observe or become aware of, to [*person or office designated*].

8. This policy applies to all employees, paid or unpaid interns, and non-employees and all must follow and uphold this policy. This policy must be provided to all employees and should be posted prominently in all work locations to the extent practicable (for example, in a main office, not an offsite work location) and be provided to employees upon hiring.

What Is "Sexual Harassment"?

Sexual harassment is a form of sex discrimination and is unlawful under federal, state, and (where applicable) local law. Sexual harassment includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender.

Sexual harassment includes unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual's sex when:

- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, even if the reporting individual is not the intended target of the sexual harassment;

- Such conduct is made either explicitly or implicitly a term or condition of employment; or

- Submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual's employment.

A sexually harassing hostile work environment includes, but is not limited to, words, signs, jokes, pranks, intimidation or physical violence which are of a sexual nature, or which are directed at an

individual because of that individual's sex. Sexual harassment also consists of any unwanted verbal or physical advances, sexually explicit derogatory statements or sexually discriminatory remarks made by someone which are offensive or objectionable to the recipient, which cause the recipient discomfort or humiliation, which interfere with the recipient's job performance.

Sexual harassment also occurs when a person in authority tries to trade job benefits for sexual favors. This can include hiring, promotion, continued employment or any other terms, conditions or privileges of employment. This is also called "quid pro quo" harassment.

Any employee who feels harassed should report so that any violation of this policy can be corrected promptly. Any harassing conduct, even a single incident, can be addressed under this policy.

Examples of sexual harassment

The following describes some of the types of acts that may be unlawful sexual harassment and that are strictly prohibited:

- Physical acts of a sexual nature, such as:
  - Touching, pinching, patting, kissing, hugging, grabbing, brushing against another employee's body or poking another employee's body;
  - Rape, sexual battery, molestation or attempts to commit these assaults.

- Unwanted sexual advances or propositions, such as:
  - Requests for sexual favors accompanied by implied or overt threats concerning the target's job performance evaluation, a promotion or other job benefits or detriments;
  - Subtle or obvious pressure for unwelcome sexual activities.

- Sexually oriented gestures, noises, remarks or jokes, or comments about a person's sexuality or sexual experience, which create a hostile work environment.

- Sex stereotyping occurs when conduct or personality traits are considered inappropriate simply because they may not conform to other people's ideas or perceptions about how individuals of a particular sex should act or look.

- Sexual or discriminatory displays or publications anywhere in the workplace, such as:
  - Displaying pictures, posters, calendars, graffiti, objects, promotional material, reading materials or other materials that are sexually demeaning or pornographic. This includes such sexual displays on workplace computers or cell phones and sharing such displays while in the workplace.

- Hostile actions taken against an individual because of that individual's sex, sexual orientation, gender identity and the status of being transgender, such as:
  - Interfering with, destroying or damaging a person's workstation, tools or equipment, or otherwise interfering with the individual's ability to perform the job;
  - Sabotaging an individual's work;
  - Bullying, yelling, name-calling.

Who can be a target of sexual harassment?

Sexual harassment can occur between any individuals, regardless of their sex or gender. New York Law protects employees, paid or unpaid interns, and non-employees, including independent contractors, and those employed by companies contracting to provide services in the workplace. Harassers can be a superior, a subordinate, a coworker or anyone in the workplace including an independent contractor, contract worker, vendor, client, customer or visitor.

Where can sexual harassment occur?

Unlawful sexual harassment is not limited to the physical workplace itself. It can occur while employees are traveling for business or at employer sponsored events or parties. Calls, texts, emails, and social media usage by employees can constitute unlawful workplace harassment, even if they occur away from the workplace premises, on personal devices or during non-work hours.

Retaliation

Unlawful retaliation can be any action that could discourage a worker from coming forward to make or support a sexual harassment claim. Adverse action need not be job-related or occur in the workplace to constitute unlawful retaliation (e.g., threats of physical violence outside of work hours).

Such retaliation is unlawful under federal, state, and (where applicable) local law. The New York State Human Rights Law protects any individual who has engaged in "protected activity." Protected activity occurs when a person has:

- made a complaint of sexual harassment, either internally or with any anti-discrimination agency;
- testified or assisted in a proceeding involving sexual harassment under the Human Rights Law or other anti-discrimination law;
- opposed sexual harassment by making a verbal or informal complaint to management, or by simply informing a supervisor or manager of harassment;
- reported that another employee has been sexually harassed; or
- encouraged a fellow employee to report harassment.

Even if the alleged harassment does not turn out to rise to the level of a violation of law, the individual is protected from retaliation if the person had a good faith belief that the practices were unlawful. However, the retaliation provision is not intended to protect persons making intentionally false charges of harassment.

Reporting Sexual Harassment

Preventing sexual harassment is everyone's responsibility. [*Employer Name*] cannot prevent or remedy sexual harassment unless it knows about it. Any employee, paid or unpaid intern or non-employee who has been subjected to behavior that may constitute sexual harassment is encouraged to report such behavior to a supervisor, manager or [*person or office designated*]. Anyone who witnesses or becomes aware of potential instances of sexual harassment should report such behavior to a supervisor, manager or [*person or office designated*].

Reports of sexual harassment may be made verbally or in writing. A form for submission of a written complaint is attached to this Policy, and all employees are encouraged to use this complaint form. Employees who are reporting sexual harassment on behalf of other employees should use the complaint form and note that it is on another employee's behalf.

Employees, paid or unpaid interns or non-employees who believe they have been a target of sexual harassment may also seek assistance in other available forums, as explained below in the section on Legal Protections.

Supervisory Responsibilities

All supervisors and managers who receive a complaint or information about suspected sexual harassment, observe what may be sexually harassing behavior or for any reason suspect that sexual harassment is occurring, **are required** to report such suspected sexual harassment to [*person or office designated*].

In addition to being subject to discipline if they engaged in sexually harassing conduct themselves, supervisors and managers will be subject to discipline for failing to report suspected sexual harassment or otherwise knowingly allowing sexual harassment to continue.

Supervisors and managers will also be subject to discipline for engaging in any retaliation.

Complaint and Investigation of Sexual Harassment

All complaints or information about sexual harassment will be investigated, whether that information was reported in verbal or written form. Investigations will be conducted in a timely manner, and will be confidential to the extent possible.

An investigation of any complaint, information or knowledge of suspected sexual harassment will be prompt and thorough, commenced immediately and completed as soon as possible. The investigation will be kept confidential to the extent possible. All persons involved, including complainants, witnesses and alleged harassers will be accorded due process, as outlined below, to protect their rights to a fair and impartial investigation.

Any employee may be required to cooperate as needed in an investigation of suspected sexual harassment. [*Employer Name*] will not tolerate retaliation against employees who file complaints, support another's complaint or participate in an investigation regarding a violation of this policy.

While the process may vary from case to case, investigations should be done in accordance with the following steps:

- Upon receipt of complaint, [*person or office designated*] will conduct an immediate review of the allegations, and take any interim actions (e.g., instructing the respondent to refrain from communications with the complainant), as appropriate. If complaint is verbal, encourage the individual to complete the "Complaint Form" in writing. If he or she refuses, prepare a Complaint Form based on the verbal reporting.

- If documents, emails or phone records are relevant to the investigation, take steps to obtain and preserve them.

- Request and review all relevant documents, including all electronic communications.

- Interview all parties involved, including any relevant witnesses;

- Create a written documentation of the investigation (such as a letter, memo or email), which contains the following:
    - A list of all documents reviewed, along with a detailed summary of relevant documents;
    - A list of names of those interviewed, along with a detailed summary of their statements;
    - A timeline of events;
    - A summary of prior relevant incidents, reported or unreported; and
    - The basis for the decision and final resolution of the complaint, together with any corrective action(s).

- Keep the written documentation and associated documents in a secure and confidential location.

- Promptly notify the individual who reported and the individual(s) about whom the complaint was made of the final determination and implement any corrective actions identified in the written document.

- Inform the individual who reported of the right to file a complaint or charge externally as outlined in the next section.

Legal Protections And External Remedies

Sexual harassment is not only prohibited by [*Employer Name*] but is also prohibited by state, federal, and, where applicable, local law.

Aside from the internal process at [*Employer Name*], employees may also choose to pursue legal remedies with the following governmental entities. While a private attorney is not required to file a complaint with a governmental agency, you may seek the legal advice of an attorney.

In addition to those outlined below, employees in certain industries may have additional legal protections.

State Human Rights Law (HRL)

The Human Rights Law (HRL), codified as N.Y. Executive Law, art. 15, § 290 et seq., applies to all employers in New York State with regard to sexual harassment, and protects employees, paid or unpaid interns and non-employees, regardless of immigration status. A complaint alleging violation of the Human Rights Law may be filed either with the Division of Human Rights (DHR) or in New York State Supreme Court.

Complaints with DHR may be filed any time **within one year** of the harassment. If an individual did not file at DHR, they can sue directly in state court under the HRL, **within three years** of the alleged sexual harassment. An individual may not file with DHR if they have already filed a HRL complaint in state court.

Complaining internally to [*Employer Name*] does not extend your time to file with DHR or in court. The one year or three years is counted from date of the most recent incident of harassment.

You do not need an attorney to file a complaint with DHR, and there is no cost to file with DHR.

DHR will investigate your complaint and determine whether there is probable cause to believe that sexual harassment has occurred. Probable cause cases are forwarded to a public hearing before an administrative law judge. If sexual harassment is found after a hearing, DHR has the power to award relief, which varies but may include requiring your employer to take action to stop the harassment, or redress the damage caused, including paying of monetary damages, attorney's fees and civil fines.

DHR's main office contact information is: NYS Division of Human Rights, One Fordham Plaza, Fourth Floor, Bronx, New York 10458. You may call (718) 741-8400 or visit: www.dhr.ny.gov.

Contact DHR at (888) 392-3644 or visit dhr.ny.gov/complaint for more information about filing a complaint. The website has a complaint form that can be downloaded, filled out, notarized and mailed to DHR. The website also contains contact information for DHR's regional offices across New York State.

Civil Rights Act of 1964

The United States Equal Employment Opportunity Commission (EEOC) enforces federal anti-discrimination laws, including Title VII of the 1964 federal Civil Rights Act (codified as 42 U.S.C. § 2000e et seq.). An individual can file a complaint with the EEOC anytime within 300 days from the harassment. There is no cost to file a complaint with the EEOC. The EEOC will investigate the complaint, and determine whether there is reasonable cause to believe that discrimination has occurred, at which point the EEOC will issue a Right to Sue letter permitting the individual to file a complaint in federal court.

The EEOC does not hold hearings or award relief, but may take other action including pursuing cases in federal court on behalf of complaining parties. Federal courts may award remedies if discrimination is found to have occurred. In general, private employers must have at least 15 employees to come within the jurisdiction of the EEOC.

An employee alleging discrimination at work can file a "Charge of Discrimination." The EEOC has district, area, and field offices where complaints can be filed. Contact the EEOC by calling 1-800-669-4000 (TTY: 1-800-669-6820), visiting their website at www.eeoc.gov or via email at info@eeoc.gov.

If an individual filed an administrative complaint with DHR, DHR will file the complaint with the EEOC to preserve the right to proceed in federal court.

Local Protections

Many localities enforce laws protecting individuals from sexual harassment and discrimination. An individual should contact the county, city or town in which they live to find out if such a law exists. For example, employees who work in New York City may file complaints of sexual harassment with the New York City Commission on Human Rights. Contact their main office at Law Enforcement Bureau of the NYC Commission on Human Rights, 40 Rector Street, 10th Floor, New York, New York; call 311 or (212) 306-7450; or visit www.nyc.gov/html/cchr/html/home/home.shtml.

Contact the Local Police Department

If the harassment involves unwanted physical touching, coerced physical confinement or coerced sex acts, the conduct may constitute a crime. Contact the local police department.

Sexual Harassment Prevention EMPLOYEE TOOLKIT

Combating Sexual Harassment

Introduction

New York State is a national leader in the fight against sexual harassment and is partnering with employers across the state to further our commitment to ending sexual harassment in the workplace.

This toolkit will provide you provide you an overview of the changes and direct you to resources available through New York State and the relevant state agencies.

These resources are all available on the state's Combating Sexual Harassment in the Workplace website: **www.ny.gov/programs/combating-sexual-harassment-workplace**.

What are the New Requirements?

The 2019 New York State Budget includes the nation's strongest and most comprehensive sexual harassment package, including new resources and requirements for employers.

The new law establishes minimum standards for sexual harassment prevention policies and training. All New York State employers are required to either adopt and use the State's model policy and training as-is, or to use the models as a basis to establish their own policy and training.

Your employer is required to distribute their policy, in writing, to you and every other employee in your organization. They are also required to provide you with an interactive training about sexual harassment prevention.

If you believe that you have been subjected to sexual harassment, you are encouraged to complete your employer's Complaint Form and submit it to the person or office designated by your employer. If you are more comfortable reporting verbally or in another manner, your employer should still complete the complaint form, provide you with a copy and follow its sexual harassment prevention policy by investigating the claims.

Legal Protections and External Remedies

Sexual harassment is prohibited by your employer and by state, federal, and, where applicable, local law.

Aside from your employer's internal process, you may also choose to pursue legal remedies with the governmental entities listed on the following pages. While a private attorney is not required to file a complaint with a governmental agency, you may seek the legal advice of an attorney.

In addition to those outlined in the following pages, employees in certain industries may have additional legal protections.

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Complaining internally to your employer does not extend your time to file with DHR or in court. The one year or three years is counted from date of the most recent incident of harassment. You do not need an attorney to file a complaint with DHR, and there is no cost to file with DHR.

DHR will investigate your complaint and determine whether there is probable cause to believe that sexual harassment has occurred. Probable cause cases are forwarded to a public hearing before an administrative law judge. If sexual harassment is found after a hearing, DHR has the power to award relief, which varies but may include requiring your employer to take action to stop the harassment, or redress the damage caused, including paying of monetary damages, attorney's fees and civil fines.

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Contact the Local Police Department
If the harassment involves unwanted physical touching, coerced physical confinement or coerced sex acts, the conduct may constitute a crime. Contact your local police department.

Where to Find Support

The following organizations provide resources and services related to sexual harassment and discrimination. This list is not a comprehensive list of New York organizations who provide resources and services related to sexual harassment and discrimination:

NOW NYC Helpline offers referrals for callers needing help with employment discrimination, divorce and custody, financial empowerment, intimate partner violence, and sexual assault. Contact them at http://nownyc.org/service-fund/get-help/ or (212) 627-9895

A Better Balance's free, legal helpline offers confidential information about workplace rights, including sexual harassment, pregnancy discrimination, breastfeeding, and work-family issues. Contact them at (212) 430-5982 or info@abetterbalance.org.

New York State Bar Association Lawyer Referral and Information Service at www.nysba.org or (800) 342-3661

www.LawHelpNY.org: Legal information for New Yorkers who cannot afford an attorney.

Legal Momentum Equality Works Program: Litigation against employers who have maintained or practiced discrimination. Contact at www.legalmomentum.org or (212) 925-6635

City Bar Justice Center: http://www.citybarjusticecenter.org or (212) 626-7373 or 7383

Lambda Legal: www.lambdalegal.org or (866) 542-8336

Time's Up Legal Defense Fund, https://nwlc.org/legal-assistance/

Model Complaint Form for Reporting Sexual Harassment

Combating Sexual Harassment

[Name of employer]

New York State Labor Law requires all employers to adopt a sexual harassment prevention policy that includes a complaint form to report alleged incidents of sexual harassment.

If you believe that you have been subjected to sexual harassment, you are encouraged to complete this form and submit it to [*person or office designated; contact information for designee or office; how the form can be submitted].* You will not be retaliated against for filing a complaint.

If you are more comfortable reporting verbally or in another manner, your employer should complete this form, provide you with a copy and follow its sexual harassment prevention policy by investigating the claims as outlined at the end of this form.

For additional resources, visit: ny.gov/programs/combating-sexual-harassment-workplace

COMPLAINANT INFORMATION

Name:

Work Address: Work Phone:

Job Title: Email:

Select Preferred Communication Method: ☐Email ☐Phone ☐In person

SUPERVISORY INFORMATION

Immediate Supervisor's Name:

Title:

Work Phone: Work Address:

Adoption of this form does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

COMPLAINT INFORMATION

1. Your complaint of Sexual Harassment is made about:

   Name: Title:

   Work Address: Work Phone:

   Relationship to you: ☐Supervisor ☐Subordinate ☐Co-Worker ☐Other

2. Please describe what happened and how it is affecting you and your work. Please use additional sheets of paper if necessary and attach any relevant documents or evidence.

3. Date(s) sexual harassment occurred:

   Is the sexual harassment continuing? ☐Yes ☐No

4. Please list the name and contact information of any witnesses or individuals who may have information related to your complaint:

The last question is optional, but may help the investigation.

5. Have you previously complained or provided information (verbal or written) about related incidents? If yes, when and to whom did you complain or provide information?

If you have retained legal counsel and would like us to work with them, please provide their contact information.

Signature: _____ *Date:* _____

Instructions for Employers

If you receive a complaint about alleged sexual harassment, follow your sexual harassment prevention policy.

An investigation involves:

- Speaking with the employee
- Speaking with the alleged harasser
- Interviewing witnesses
- Collecting and reviewing any related documents

While the process may vary from case to case, all allegations should be investigated promptly and resolved as quickly as possible. The investigation should be kept confidential to the extent possible.

Document the findings of the investigation and basis for your decision along with any corrective actions taken and notify the employee and the individual(s) against whom the complaint was made. This may be done via email.

Sexual Harassment Prevention EMPLOYER TOOLKIT

Combating Sexual Harassment

Introduction

New York State is a national leader in the fight against sexual harassment and is partnering with employers across the state to further our commitment to ending sexual harassment in the workplace.

This toolkit will provide you step-by-step guidance to implementing the required training and sexual harassment policy, directing you to resources available through New York State and the relevant state agencies.

These resources are all available on the State's Combating Sexual Harassment in the Workplace website: **www.ny.gov/programs/combating-sexual-harassment-workplace**.

What are the New Requirements?

The 2019 New York State Budget includes the nation's strongest and most comprehensive sexual harassment package, including new resources and requirements for employers. There are two key components under this law:

Policy (see pages 2-4)
Under the new law, every employer in New York State is **required to establish a sexual harassment prevention policy**. The Department of Labor in consultation with the Division of Human Rights has established a model sexual harassment prevention policy for employers to adopt, available at www.ny.gov/programs/combating-sexual-harassment-workplace. Or, employers may adopt a similar policy that meets or exceeds the minimum standards of the model policy (www.ny.gov/combating-sexual-harassment-workplace/employers#model-sexual-harassment-policy).

Training (see pages 5-6)
In addition, every employer in New York State is **required to provide employees with sexual harassment prevention training**. The Department of Labor in consultation with the Division of Human Rights has established this model training for employers to use. Or, employers may use a training program that meets or exceeds the minimum standards of the model training (www.ny.gov/combating-sexual-harassment-workplace/employers#training-requirements).

Policy: Implementation

All employers must adopt and provide a sexual harassment prevention policy to all employees by **October 9, 2018**.

If you want to adopt the State Model Policy:

- The State Model Policy contains fields for you to list your business name and the name/contact information for the individual(s) you have designated to receive sexual harassment complaints. Fill in those fields and apply whatever branding (e.g., logos, etc.) you like. You may choose to modify the policy to reflect the work of your organization and industry specific scenarios or best practices.

- Distribute the policy to all employees in writing or electronically. Employers are also encouraged to have employees acknowledge receipt of the policy, and to post a copy of the policy where employees can easily access it.

If you already have a policy and do NOT want to adopt the State Model Policy:

- Use the checklist on the next page to ensure your policy meets or exceeds the required minimum standards.

- If it already meets those standards, ensure it already has been or will be distributed to employees by October 9, 2018. All future new employees should receive the policy before commencing work.

- Ensure your complaint form and process are up to date and that employees are made aware of it as part of the policy.

- If you do not have a complaint form, a model is available online: www.ny.gov/combating-sexual-harassment-workplace/employers#model-complaint-form

- Review the online FAQs, which outline numerous common questions that may arise: www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions

- Distribute a copy of your finalized policy to all employees in writing. This may be done electronically, for example, by email. Employers are also encouraged to have employees acknowledge receipt of the policy, and to post a copy of the policy where employees can easily access it.

- You are also encouraged to provide the policy and training to anyone providing services in the workplace.

If you do NOT yet have a policy:

- Download the model policy, available online: www.ny.gov/combating-sexual-harassment-workplace/employers#model-sexual-harassment-policy
- Customize the document by filling in the employer name, person or office designated to receive complaints and appropriate contact information, as highlighted throughout.
- You may choose to modify the policy to reflect the work of your organization and industry specific scenarios or best practices.
- Review the online FAQs, which outline numerous common questions that may arise: www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions
- Distribute a copy of your finalized policy to all employees in writing. This may be done electronically, for example, by email. Employers are also encouraged to have employees acknowledge receipt of the policy, and to post a copy of the policy where employees can easily access it.
- You are also encouraged to provide the policy and training to anyone providing services in the workplace.

Policy: Minimum Standards Checklist

An employer that does not use the State model policy -- developed by the State Department of Labor and State Division of Human Rights -- must ensure their policy meets or exceeds the following minimum standards.

The policy **must**:

- ☐ Prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- ☐ Provide examples of prohibited conduct;
- ☐ Include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws;
- ☐ Include a complaint form;
- ☐ Include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;
- ☐ Inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- ☐ Clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and
- ☐ Clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.

Training: Instructions for Employers

All employers are required to train current employees by October 9, 2019. New employees should be trained as quickly as possible. In addition, all employees must complete sexual harassment prevention training at least once per year. This may be based on calendar year, anniversary of each employee's start date or any other date the employer chooses.

If you already have a training:

- Use the checklist on the next page to ensure your training meets or exceeds the required minimum standards.
- If your existing training does not, it should be updated to include all the listed elements. You may also provide supplemental training to employers who have already completed the training to ensure they have received training that meets or exceeds the minimum standards.
- Review the online FAQs, which outline numerous common questions that may arise: www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions

If you do NOT yet have a training:

- Download the model training, available online: www.ny.gov/combating-sexual-harassment-workplace/employers#training-requirements.
    - You may execute this training in a variety of ways, including live in person, via webinar or on an individual basis, with feedback as outlined in the training guidance document.
    - Depending on how you choose to present your training, you may utilize different available resources. For example, if you do a live presentation, you should download the PowerPoint and read the script that appears in the "Notes" of each slide.
    - If you choose to train employees with the video, you may direct them to watch it online or download it and show to a group, after which you would provide them a mechanism for feedback, as outlined in the training guidance document.
- Customize the training document(s) and modify them to reflect the work of your organization, including industry specific scenarios or best practices.
- The training should detail any internal process employees are encouraged to use to complain and include the contact information for the specific name(s) and office(s) with which employees alleging harassment should file their complaints.
- You may wish to include additional interactive activities as part of the training, including an opening activity, role playing or group discussion(s).
- Review the online FAQs, which outline numerous common questions that may arise: www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions

Training: Minimum Standards Checklist

An employer that does not use this model training -- developed by the State Department of Labor and State Division of Human Rights -- must ensure their training meets or exceeds the following minimum standards.

The training **must**:

- ☐ Be interactive (*see the model training guidance document for specific recommendations*);
- ☐ Include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- ☐ Include examples of unlawful sexual harassment;
- ☐ Include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to targets of sexual harassment;
- ☐ Include information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- ☐ Include information addressing conduct by supervisors and additional responsibilities for supervisors.

Minimum Standards for Sexual Harassment Prevention Training

Combating Sexual Harassment

Every employer in the State of New York is required to provide employees with sexual harassment prevention training pursuant to Section 201-g of the Labor Law. An employer that does not use the model training developed by the State Department of Labor and Division of Human Rights must ensure that the training that they use meets or exceeds the following minimum standards. The training must:

(i) be interactive;

(ii) include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;

(iii) include examples of conduct that would constitute unlawful sexual harassment;

(iv) include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;

(v) include information concerning employees' rights of redress and all available forums for adjudicating complaints; and

(vi) include information addressing conduct by supervisors and any additional responsibilities for such supervisors.

As of Oct. 9, 2018, each employee must receive training on an annual basis. Employers should provide employees with training in the language spoken by their employees.

* * *

Providing employees with training does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

Model Sexual Harassment Prevention Training

OCTOBER 2018 EDITION

Combating Sexual Harassment

Purpose of this Model Training

New York State is a national leader in the fight against sexual harassment in the workplace and the 2019 Budget includes legislation to further combat it.

Under the new law, every employer in New York State is **now required to establish a sexual harassment prevention policy** pursuant to Section 201-g of the Labor Law. The Department of Labor in consultation with the Division of Human Rights has established a model sexual harassment prevention policy for employers to adopt, available at www.ny.gov/programs/combating-sexual-harassment-workplace. Or, employers may adopt a similar policy that meets or exceeds the minimum standards of the model policy.

In addition, every employer in New York State is **now required to provide employees with sexual harassment prevention training** pursuant to Section 201-g of the Labor Law. The Department of Labor in consultation with the Division of Human Rights has established this model training for employers to use. Or, employers may use a training program that meets or exceeds the minimum standards of the model training.

An employer's sexual harassment prevention training **must be interactive**, meaning it requires some level of feedback by those being trained.

The training, which may be presented to employees individually or in groups; in person, via phone or online; via webinar or recorded presentation, should include as many of the following elements as possible:

- Ask questions of employees as part of the program;
- Accommodate questions asked by employees, with answers provided in a timely manner;
- Require feedback from employees about the training and the materials presented.

How to Use This Training

This model training is presented in a variety of formats, giving employers maximum flexibility to deliver the training across a variety of worksite settings, while still maintaining a core curriculum.

Available training elements include:

1. **Script** for in-person group training, available in PDF and editable Word formats
2. **PowerPoint** to accompany the script, available online and for download, also in PDF
3. **Video** presentation, viewable online and for download
4. **FAQs**, available online to accompany the training, answering additional questions that arise

Instructions for Employers

- This training is meant to be a model that can be used as is, or adapted to meet the specific needs of each organization.
- Training may include additional interactive activities, including an opening activity, role playing or group discussion.
- If specific employer policies or practices differ from the content in this training, the training should be modified to reflect those nuances, while still including all of the minimum elements required by New York State law (shown on Page 4).
- The training should detail any internal process employees are encouraged to use to complain and include the contact information for the specific name(s) and office(s) with which employees alleging harassment should file their complaints.
- It should also be modified to reflect the work of the organization by including, for example, industry specific scenarios.
- To every extent possible, this training should be given consistently (using the same delivery method) across each organization's workforce to ensure understanding at every level and at every location.
- It is every employer's responsibility to ensure all employees are trained to employer's standards and familiar with the organization's practices.
- All employees must complete initial sexual harassment prevention training before Oct. 9, 2019.
- All employees must complete an additional training at least once per year. This may be based on calendar year, anniversary of each employee's start date or any other date the employer chooses.
- All new employees should complete sexual harassment prevention training as quickly as possible.
- Employers should provide employees with training in the language spoken by their employees. When an employee identifies as a primary language one for which a template training is not available from the State, the employer may provide that employee an English-language version. However, as employers may be held liable for the conduct of all of their employees, employers are strongly encouraged to provide a the policy and training in the language spoken by the employee.
- On occasion, a participant may share a personal or confidential experience during the training. If this happens, the trainer should interrupt and recommend the story be discussed privately and with the appropriate office contact. After the training, follow up with this individual to ensure they are aware of the proper reporting steps. Managers and supervisors must report all incidents of harassment.

Minimum Training Standards Checklist

An employer that does not use this model training -- developed by the State Department of Labor and State Division of Human Rights -- must ensure their training meets or exceeds the following minimum standards.

The training **must**:

- ☐ Be interactive;
- ☐ Include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- ☐ Include examples of unlawful sexual harassment;
- ☐ Include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to targets of sexual harassment;
- ☐ Include information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- ☐ Include information addressing conduct by supervisors and additional responsibilities for supervisors.

NEW YORK STATE

Sexual Harassment Prevention Training

ELEMENT 1: TRAINING SCRIPT

OCTOBER 2018 EDITION

NEW YORK STATE | Combating Sexual Harassment

Table of Contents

Trainer Introduction

- Welcome to our annual training on sexual harassment prevention.
- My name is _____[*name*]_____ and I am the _____[*title*]____ at _____[*organization*]_____.
- In recent years, the topic of sexual harassment in the workplace has been brought into the national spotlight, bringing with it renewed awareness about the serious and unacceptable nature of these actions and the severe consequences that follow.
- The term "sexual harassment" may mean different things to different people, depending on your life experience.
- Certain conduct may seem acceptable or have seemed acceptable in the past. That does not mean it is acceptable to the people we work with.
- The purpose of this training is to set forth a common understanding about what is and what is not acceptable in our workplace.

Sexual Harassment in the Workplace

- New York State has long been committed to ensuring that all individuals have an equal opportunity to enjoy a fair, safe and productive work environment.
- Laws and policies help ensure that diversity is respected and that everyone can enjoy the privileges of working in New York State.
- Preventing sexual harassment is critical to our continued success. Sexual harassment will not be tolerated.
- This means any harassing behavior will be investigated and the perpetrator or perpetrators will be told to stop.
- It also means that disciplinary action may be taken, if appropriate. If the behavior is sufficiently serious, disciplinary action may include termination.
- Repeated behavior, especially after an employee has been told to stop, is particularly serious and will be dealt with accordingly.
- This interactive training will help you better understand what is considered sexual harassment.
- It will also show you how to report sexual harassment in our workplace, as well as your options for reporting workplace sexual harassment to external state and federal agencies that enforce anti-discrimination laws.
- These reports will be taken seriously and promptly investigated, with effective remedial action taken where appropriate.

What is Sexual Harassment?

- Sexual harassment is a form of sex discrimination and is unlawful under federal, state, and (where applicable) local law.

- Sexual harassment includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender.

- Sexual harassment includes unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual's sex when:

    1. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, even if the reporting individual is not the intended target of the sexual harassment;

    2. Such conduct is made either explicitly or implicitly a term or condition of employment; or

    3. Submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual's employment.

- There are two main types of sexual harassment.

Hostile Environment

- A hostile environment on the basis of sex may be created by any action previously described, in addition to unwanted words, signs, jokes, pranks, intimidation, physical actions or violence, either of a sexual nature or not of a sexual nature, directed at an individual because of that individual's sex.

- Hostile environment sexual harassment includes:

    - Sexual or discriminatory displays or publications anywhere in the workplace, such as displaying pictures, posters, calendars, graffiti, objects, promotional material, reading materials or other materials that are sexually demeaning or pornographic.

        - This includes such sexual displays on workplace computers or cell phones and sharing such displays while in the workplace.

        - This also includes sexually oriented gestures, noises, remarks, jokes or comments about a person's sexuality or sexual experience.

    - Hostile actions taken against an individual because of that individual's sex, such as:

        - Rape, sexual battery, molestation or attempts to commit these assaults.

        - Physical acts of a sexual nature (including, but not limited to, touching, pinching, patting, grabbing, kissing, hugging, brushing against another employee's body or poking another employee's body)

- Interfering with, destroying or damaging a person's workstation, tools or equipment, or otherwise interfering with the individual's ability to perform the job;
- Sabotaging an individual's work;
- Bullying, yelling, name-calling.

Quid Pro Quo Sexual Harassment

- Quid pro quo sexual harassment occurs when a person in authority trades, or tries to trade, job benefits for sexual favors.
- Quid pro quo is a legal term meaning a trade.
- This type of harassment occurs between an employee and someone with authority, like a supervisor, who has the ability to grant or withhold job benefits.
- Quid pro quo sexual harassment includes:
    - Offering or granting better working conditions or opportunities in exchange for a sexual relationship
    - Threatening adverse working conditions (like demotions, shift alterations or work location changes) or denial of opportunities if a sexual relationship is refused
    - Using pressure, threats or physical acts to force a sexual relationship
    - Retaliating for refusing to engage in a sexual relationship

Who can be the Target of Sexual Harassment?

- Sexual harassment can occur between any individuals, regardless of their sex or gender.
- New York Law protects employees, paid or unpaid interns, and non-employees, including independent contractors, and those employed by companies contracting to provide services in the workplace.

Who can be the Perpetrator of Sexual Harassment?

- The perpetrator of sexual harassment can be anyone in the workplace:
- The harasser can be a **coworker** of the recipient
- The harasser can be a **supervisor** or **manager**
- The harasser can be any third-party, including: a **non-employee**, **intern**, **vendor**, **building security**, **client**, **customer** or **visitor**.

Where Can Workplace Sexual Harassment Occur?

- Harassment can occur **whenever and wherever** employees are fulfilling their work responsibilities, including in the field, at any employer-sponsored event, trainings, conferences open to the public and office parties.
- Employee interactions during non-work hours, such as at a hotel while traveling or at events after work can have an impact in the workplace.
- Locations off site and off-hour activities can be considered extensions of the work environment.
- Employees can be the target of sexual harassment through calls, texts, email and social media.
- Harassing behavior that in any way affects the work environment is rightly the concern of management.

Sex Stereotyping

- Sex stereotyping occurs when conduct or personality traits are considered inappropriate simply because they may not conform to other people's ideas or perceptions about how individuals of either sex should act or look.
- Harassing a person because that person does not conform to gender stereotypes as to "appropriate" looks, speech, personality, or lifestyle is sexual harassment.
- Harassment because someone is performing a job that is usually performed, or was performed in the past, mostly by persons of a different sex, is sex discrimination.

Retaliation

- Any employee who has engaged in "protected activity" is protected by law from being retaliated against because of that "protected activity."

- "Protected activities" with regard to harassment include:

    - Making a complaint to a supervisor, manager or another person designated by your employer to receive complaints about harassment

    - Making a report of suspected harassment, even if you are not the target of the harassment

    - Filing a formal complaint about harassment

    - Opposing discrimination

    - Assisting another employee who is complaining of harassment

    - Providing information during a workplace investigation of harassment, or testifying in connection with a complaint of harassment filed with a government agency or in court

What is Retaliation?

- Retaliation is any action taken to alter an employee's terms and conditions of employment (such as a demotion or harmful work schedule or location change) because that individual engaged in any of the above protected activities. Such individuals should expect to be free from any negative actions by supervisors, managers or the employer motivated by these protected activities.

- Retaliation can be any such adverse action taken by the employer against the employee, that could have the effect of discouraging a reasonable worker from making a complaint about harassment or discrimination.

- The negative action need not be job-related or occur in the workplace, and may occur after the end of employment, such as an unwarranted negative reference.

What is Not Retaliation

- A negative employment action is not retaliatory merely because it occurs after the employee engages in protected activity.

- Employees continue to be subject to all job requirements and disciplinary rules after having engaged in such activity.

The Supervisor's Responsibility

- Supervisors and managers are held to a high standard of behavior. This is because:
    - They are placed in a position of authority by the employer and must not abuse that authority.
    - Their actions can create liability for the employer without the employer having any opportunity to correct the harassment.
    - They are required to report any harassment that is reported to them or which they observe.
    - They are responsible for any harassment or discrimination that they should have known of with reasonable care and attention to the workplace for which they are responsible.
    - They are expected to model appropriate workplace behavior.

Mandatory Reporting

- Supervisors **must report any harassment** that they observe or know of, even if no one is objecting to the harassment.
- If a supervisor or manager receives a report of harassment, or is otherwise aware of harassment, it must be promptly reported to the employer, without exception,
    - Even if the supervisor or manager thinks the conduct is trivial
    - Even if the harassed individual asks that it not be reported
- Supervisors and managers will be subject to discipline for failing to report suspected sexual harassment or otherwise knowingly allowing sexual harassment to continue.
- Supervisors and managers will also be subject to discipline for engaging in any retaliation.

What Should I Do If I Am Harassed?

- We cannot stop harassment in the workplace unless management knows about the harassment. It is everyone's responsibility.
- You are encouraged to report harassment to a supervisor, manager or other another person designated by your employer to receive complaints (as outlined in the sexual harassment prevention policy) so the employer can take action.
- Behavior does not need to be a violation of law in order to be in violation of the policy.

- We will provide you with a complaint form to report harassment and file complaints, but if you are more comfortable reporting verbally or in another manner, we are still required to follow the sexual harassment prevention policy by investigating the claims.

- If you believe that you have been subjected to sexual harassment, you are encouraged to complete the Complaint Form and submit it to:

    - [*Person or office designated*]

    - [*Contact information for designee or office*]

    - [*How the Complaint Form can be submitted*]

- You may also make reports verbally.

- Once you submit this form or otherwise report harassment, our organization must follow its sexual harassment prevention policy and investigate any claims.

- You should report any behavior you experience or know about that is inappropriate, as described in this training, without worrying about whether or not if it is unlawful harassment.

- Individuals who report or experience harassment should cooperate with management so a full and fair investigation can be conducted and any necessary corrective action can be taken.

- If you report harassment to a manager or supervisor and receive an inappropriate response, such as being told to "just ignore it," you may take your complaint to the next level as outlined in our policy under "Legal Protections And External Remedies."

- Finally, if you are not sure you want to pursue a complaint at the time of potential harassment, document the incident to ensure it stays fresh in your mind.

What Should I Do If I Witness Sexual Harassment?

- Anyone who witnesses or becomes aware of potential instances of sexual harassment should report it to a supervisor, manager or designee.

- It can be uncomfortable and scary, but it is important to tell coworkers "that's not okay" when you are uncomfortable about harassment happening in front of you.

- It is unlawful for an employer to retaliate against you for reporting suspected sexual harassment or assisting in any investigation.

Investigation and Corrective Action

- Anyone who engages in sexual harassment or retaliation will be subject to remedial and/or disciplinary action, up to and including termination.
- [*Name of Company*] will investigate all reports of harassment, whether information was reported in verbal or written form.
- An investigation of any complaint should be commenced immediately and completed as soon as possible.
- The investigation will be kept confidential to the extent possible.
- Any employee may be required to cooperate as needed in an investigation of suspected sexual harassment.
    - It is illegal for employees who participate in any investigation to be retaliated against.

Investigation Process

- Our organization also has a duty to take appropriate steps to ensure that harassment will not occur in the future. Here is how we will investigate claims.
- [*Person or office designated*] will conduct an immediate review of the allegations, and take any interim actions, as appropriate
- Relevant documents, emails or phone records will be requested, preserved and obtained.
- Interviews will be conducted with parties involved and witnesses
- Investigation is documented as outlined in the sexual harassment policy
- The individual who complained and the individual(s) accused of sexual harassment are notified of final determination and that appropriate administrative action has been taken.

Additional Protections and Remedies

- In addition to what we've already outlined, employees may also choose to pursue outside legal remedies as suggested below.

New York State Division of Human Rights (DHR)

- A complaint alleging violation of the Human Rights Law may be filed either with DHR or in New York State Supreme Court.
- Complaints may be filed with DHR any time **within one year** of the alleged sexual harassment. You do not need to have an attorney to file.
- If an individual did not file at DHR, they can sue directly in state court under the Human Rights Law, **within three years** of the alleged sexual harassment.
- An individual may not file with DHR if they have already filed a Human Rights Law complaint in state court.
- For more information, visit: **www.dhr.ny.gov**.

United States Equal Employment Opportunity Commission (EEOC)

- An individual can file a complaint with the EEOC anytime **within 300 days** from the alleged sexual harassment. You do not need to have an attorney to file.
- A complaint must be filed with the EEOC before you can file in federal court.
- For more information, visit: **www.eeoc.gov**.
- *NOTE: If an individual files an administrative complaint with DHR, DHR will automatically file the complaint with the EEOC to preserve the right to proceed in federal court.*

Local Protections

- Many localities enforce laws protecting individuals from sexual harassment and discrimination.
- You should contact the county, city or town in which you live to find out if such a law exists.
- Harassment may constitute a crime if it involves things like physical touching, coerced physical confinement or coerced sex acts. **You should also contact the local police department**.

Other Types of Workplace Harassment

- Workplace harassment can be based on other things and is not just about gender or inappropriate sexual behavior in the workplace.

- Any harassment or discrimination based on a protected characteristic is prohibited in the workplace and may lead to disciplinary action against the perpetrator.

    - Protected characteristics include age, race, creed, color, national origin, sexual orientation, military status, sex, disability, marital status, domestic violence victim status, gender identity and criminal history.

- Much of the information presented in this training applies to all types of workplace harassment.

Summary

- After this training, all employees are should understand what we have discussed, including:

    - How to recognize harassment as inappropriate workplace behavior

    - The nature of sexual harassment

    - That harassment because of any protected characteristic is prohibited

    - The reasons why workplace harassment is employment discrimination

    - That all harassment should be reported

    - That supervisors and managers have a special responsibility to report harassment.

- With this knowledge, all employees can achieve appropriate workplace behavior, avoid disciplinary action, know their rights and feel secure that they are entitled to and can work in an atmosphere of respect for all people.

- Find the Complaint Form [*insert information here*].

- For additional information, visit: **ny.gov/programs/combating-sexual-harassment-workplace**

Sexual Harassment Case Studies

- Let's take a look at a few scenarios that help explain the kind of behaviors that can constitute sexual harassment.

- These examples describe inappropriate behavior in the workplace that will be dealt with by corrective action, including disciplinary action.

- Remember, it is up to **all employees** to report inappropriate behavior in the workplace.

Example 1: Not Taking "No" for an Answer

Li Yan's coworker Ralph has just been through a divorce. He drops comments on a few occasions that he is lonely and needs to find a new girlfriend. Li Yan and Ralph have been friendly in the past and have had lunch together in local restaurants on many occasions. Ralph asks Li Yan to go on a date with him—dinner and a movie. Li Yan likes Ralph and agrees to go out with him. She enjoys her date with Ralph but decides that a relationship is not a good idea. She thanks Ralph for a nice time, but explains that she does not want to have a relationship with him. Ralph waits two weeks and then starts pressuring Li Yan for more dates. She refuses, but Ralph does not stop. He keeps asking her to go out with him.

Question 1. When Ralph first asked Li Yan for a date, this was sexual harassment. True or False?

FALSE: Ralph's initial comments about looking for a girlfriend and asking Li Yan, a coworker, for a date are not sexual harassment. Even if Li Yan had turned Ralph down for the first date, Ralph had done nothing wrong by asking for a date and by making occasional comments that are not sexually explicit about his personal life.

Question 2. Li Yan cannot complain of sexual harassment because she went on a date with Ralph. True or False?

FALSE: Being friendly, going on a date, or even having a prior relationship with a coworker does not mean that a coworker has a right to behave as Ralph did toward Li Yan. She has to continue working with Ralph, and he must respect her wishes and not engage in behavior that has now become inappropriate for the workplace.

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Li Yan complains to her supervisor, and the supervisor (as required) reports her complaint to the person designated by her employer to receive complaints. Ralph is questioned about his behavior and he apologizes. He is instructed by the designated person to stop. Ralph stops for a while but then starts leaving little gifts for Li Yan on her desk with accompanying love notes. The love notes are not overtly offensive, but Ralph's behavior is starting to make Li Yan nervous, as she is afraid he may start stalking her.

Question 3. Ralph's subsequent behavior with gifts and love notes is not sexual harassment because he has stopped asking Li Yan for dates as instructed. He is just being nice to Li Yan because he likes her. True or False?

FALSE: Li Yan should report Ralph's behavior. She was entitled to have effective assistance in getting Ralph to stop his inappropriate workplace behavior. Because Ralph has returned to pestering Li Yan after being told to stop, he could be subject to serious disciplinary action for his behavior.

Example 2: The Boss with a Bad Attitude

Sharon transfers to a new location with her employer. Her new supervisor, Paul, is friendly and helps her get familiar with her new job duties. After a few days, when no one else is around, Paul comes over to Sharon's work area to chat. Paul talks about what he did last night, which was to go to a strip club. Sharon is shocked that Paul would bring up such a topic in the workplace and says nothing in response. Paul continues talking and says that all the women in the office are so unattractive that he needs to get out and "see some hot chicks" once in a while. He tells Sharon he is glad she joined the staff because, unlike the others, she is "easy on the eyes." Sharon feels very offended and demeaned that she and the other women in her workplace are being evaluated on their looks by their supervisor.

Question 1. Because Paul did not tell Sharon that she is unattractive, he has not harassed her. True or False?

FALSE: Paul has made sexually explicit statements to Sharon, which are derogatory and demeaning to Sharon and her female coworkers. It does not matter that Paul supposedly paid Sharon a "compliment." The discussion is still highly offensive to Sharon, as it would be to most reasonable persons in her situation.

Question 2. By bringing up his visit to the strip club, Paul is engaging in inappropriate workplace behavior. True or False?

TRUE: Simply bringing up the visit to the strip club is inappropriate in the workplace, especially by a supervisor, and it would be appropriate for Sharon to report this conduct. A one-time comment about going to a strip club is behavior that Paul would be told to stop, even though it probably would not rise to the level of unlawful harassment, unless it was repeated on multiple occasions.

Question 3. Paul should be instructed to stop making these types of comments, but this is not a serious matter. True or False?

FALSE: Paul's comments about the female employees are a serious matter and show his contempt for women in the workplace. Paul is required to model appropriate behavior, and must not exhibit contempt for employees on the basis of sex or any protected characteristic. Sharon should not have to continue to work for someone she knows harbors such contempt for women, nor should the other employees have to work for such a supervisor. Management should be aware of this, even if the other employees are not, and Paul should be disciplined and, most likely, removed from his current position.

Example 3: No Job for a Woman?

Carla works as a licensed heavy equipment operator. Some of her male coworkers think it is fun to tease her. Carla often hears comments like "Watch out, here she comes–that crazy woman driver!" in a joking manner. Also, someone keeps putting a handmade sign on the only port-a-potty at the worksite that says, "Men only."

Question 1. Women in traditionally male jobs should expect teasing and should not take the joking comments too seriously. True or False?

FALSE: Whether Carla is being harassed depends in part on Carla's opinion of the situation; that is, whether she finds the behavior offensive. However, if at any point Carla does feel harassed, she is entitled to complain of the behavior and have it stopped, regardless of whether and for how long she has endured the behavior without complaint. Carla can always say when enough is enough.

Question 2. Carla cannot complain, because the site supervisor sometimes joins in with the joking behavior, so she has nowhere to go. True or False?

FALSE: Carla can still complain to the supervisor who is then on notice that the behavior bothers Carla and must be stopped. The supervisor's failure to take Carla's complaint seriously, constitutes serious misconduct on his or her part. Carla can also complain directly to the person designated by her employer to receive complaints, either instead of going to the supervisor, or after doing so. The employer is responsible for assuring that all employees are aware of its anti-harassment policies and procedures.

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Some of Carla's other coworkers are strongly opposed to her presence in the traditionally all-male profession. These coworkers have sometimes said things to her like, "You're taking a job away from a man who deserves it," "You should be home with your kids," and "What kind of a mother are you?" Also, someone scratched the word "bitch" on Carla's toolbox.

Question 3. These behaviors, while rude, are not sexual harassment because they are not sexual in nature. True or False?

FALSE: The behaviors are directed at her because she is a woman and appear to be intended to intimidate her and cause her to quit her job. While not sexual in nature, this harassment is because of her sex and will create a hostile work environment if it is sufficiently severe or frequent.

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Carla complains about the jokes and other behaviors, and an investigation is conducted. It cannot be determined who defaced Carla's toolbox. Her coworkers are told to stop their behavior or face disciplinary charges. The supervisor speaks with Carla and tells her to come to him immediately if she has any further problems. Carla then finds that someone has urinated in her toolbox.

Question 4. There is nothing Carla can do because she can't prove who vandalized her toolbox. True or False?

FALSE: Carla should speak to her supervisor immediately, or contact any other person designated by her employer to receive complaints directly. Although the situation has become very difficult, it is the employer's responsibility to support Carla and seek a solution. An appropriate investigation must be promptly undertaken and appropriate remedial action must follow.

Example 4: Too Close for Comfort

Keisha has noticed that her new boss, Sarah, leans extremely close to her when they are going over the reports that she prepares. She touches her hand or shoulder frequently as they discuss work. Keisha tries to move away from her in these situations, but she doesn't seem to get the message.

Question 1. Keisha should just ignore Sarah's behavior. True or False?

FALSE: If Keisha is uncomfortable with Sarah's behavior, she has options. If she feels comfortable doing so, she should tell Sarah to please back off because her closeness and touching make her uncomfortable. Another option is to complain directly to a person designated by her employer to receive complaints, who will speak with Sarah. Although this may not be sufficiently severe or pervasive to create an unlawful harassment situation (unless it was repeated by Sarah after she was told to stop), there is no reason for Keisha to be uncomfortable in the workplace. There is no valid reason for Sarah to engage in this behavior.

--

Before Keisha gets around to complaining, Sarah brushes up against her back in the conference room before a meeting. She is now getting really annoyed but still puts off doing anything about it. Later Sarah "traps" Keisha in her office after they finish discussing work by standing between her and the door of the small office. Keisha doesn't know what to do, so she moves past her to get out. As she does so, Sarah runs her hand over Keisha's breast.

Question 2. Sarah's brushing up against Keisha in the conference room could just be inadvertent and does not give Keisha any additional grounds to complain about Sarah. True or False?

FALSE: Sarah is now engaging in a pattern of escalating behavior. Given the pattern of her "too close" and "touching" behavior, it is unlikely that this was inadvertent. Even before being "trapped" in Sarah's office, Keisha should have reported all of the behaviors she had experienced that had made her uncomfortable.

Question 3. Sarah touching Keisha's breast is inappropriate but is probably not unlawful harassment because it only happened once. True or False?

FALSE: Any type of sexual touching is very serious and does not need to be repeated to constitute sexual harassment. Keisha should immediately report it without waiting for it to be repeated. Sarah can expect to receive formal discipline, including possible firing.

Example 5: A Distasteful Trade

The following scenario will explain many aspects of quid pro quo sexual harassment.

Tatiana is hoping for a promotion to a position that she knows will become vacant soon. She knows that her boss, David, will be involved in deciding who will be promoted. She tells David that she will be applying for the position, and that she is very interested in receiving the promotion. David says, "We'll see. There will be a lot of others interested in the position."

A week later, Tatiana and David travel together on state business, including an overnight hotel stay. Over dinner, David tells Tatiana that he hopes he will be able to promote her, because he has always really enjoyed working with her. He tells her that some other candidates "look better on paper" but that she is the one he wants. He tells her that he can "pull some strings" to get her into the job and Tatiana thanks David. Later David suggests that they go to his hotel room for "drinks and some relaxation." Tatiana declines his "offer."

Question 1. David's behavior could be harassment of Tatiana. True or False?

TRUE: David's behavior as Tatiana's boss is inappropriate, and Tatiana should feel free to report the behavior if it made her uncomfortable. It is irrelevant that this behavior occurs away from the workplace. Their relationship is that of supervisor and supervisee, and all their interactions will tend to impact the workplace.

David's behavior, at this point, may or may not constitute quid pro quo harassment; David has made no threat that if Tatiana refuses his advance he will handle her promotion any differently. However, his offer to "pull some strings" followed by a request that they go to his hotel room for drinks and relaxation might be considered potentially coercive. Certainly, if David persists in his advances—even if he never makes or carries out any threat or promise about job benefits—then this could create a hostile environment for Tatiana, for which the employer could be strictly liable because David is a management employee.

--

After they return from the trip, Tatiana asks David if he knows when the job will be posted so that she can apply. He says that he is not sure, but there is still time for her to "make it worth his while" to pull strings for her. He then asks, "How about going out to dinner this Friday and then coming over to my place?"

Question 2. David engaged in sexual harassment. True or False?

TRUE: It is now evident that David has offered to help Tatiana with her promotion in exchange for sexual favors.

--

Tatiana, who really wants the position, decides to go out with David. Almost every Friday they go out at David's insistence and engage in sexual activity. Tatiana does not want to be in a relationship with David and is only going out with him because she believes that he will otherwise block her promotion.

Question 3. Tatiana cannot complain of harassment because she voluntarily engaged in sexual activity with David. True or False?

FALSE: Because the sexual activity is unwelcome to Tatiana, she is a target of sexual harassment. Equally, if she had refused David's advances, she would still be a target of sexual harassment. The offer to Tatiana to trade job benefits for sexual favors by someone with authority over her in the workplace is quid pro quo sexual harassment, and the employer is exposed to liability because of its supervisor's actions.

--

Tatiana receives the promotion.

Question 4. Tatiana cannot complain of harassment because she got the job, so there is no discrimination against her. True or False?

FALSE: Tatiana can be the recipient of sexual harassment whether or not she receives the benefit that was used as an inducement.

--

Tatiana breaks off the sexual activities with David. He then gives her a bad evaluation, and she is removed from her new position at the end of the probationary period and returns to her old job.

Question 5. It is now "too late" for Tatiana to complain. Losing a place of favor due to the break up of the voluntary relationship does not create a claim for sexual harassment. True or False?

FALSE: It is true that the breakup of a relationship, if truly consensual and welcomed at the time, usually does not create a claim for sexual harassment. However, the "relationship" in this case was never welcomed by Tatiana. David's behavior has at all times been inappropriate and a serious violation of the employer's policy. As the person who abused the power and authority of a management position, David has engaged in sexual harassment.

Example 6: An Issue about Appearances

Leonard works as a clerk typist for a large employer. He likes to wear jewelry, and his attire frequently includes earrings and necklaces. His boss, Margaret, thinks it's "weird" that, as a man, Leonard wears jewelry and wants to be a clerical worker. She frequently makes sarcastic comments to him about his appearance and refers to him "jokingly" as her office boy. Leonard, who hopes to develop his career in the area of customer relations, applies for an open promotional position that would involve working in a "front desk" area, where he would interact with the public. Margaret tells Leonard that if he wants that job, he had better look "more normal" or else wait for a promotion to mailroom supervisor.

Question 1. Leonard's boss is correct to tell him wearing jewelry is inappropriate for customer service positions. True or False?

FALSE: Leonard's jewelry is only an issue because Margaret considers it unusual for a man to wear such jewelry. Therefore, her comments to Leonard constitute sex stereotyping.

--

Margaret also is "suspicious" that Leonard is gay, which she says she "doesn't mind," but she thinks Leonard is "secretive." She starts asking him questions about his private life, such as "Are you married?" "Do you have a partner?" "Do you have kids?" Leonard tries to respond politely "No" to all her questions but is becoming annoyed. Margaret starts gossiping with Leonard's coworkers about his supposed sexual orientation.

Question 2. Leonard is the recipient of harassment on the basis of sex and sexual orientation. True or False?

TRUE: Leonard is harassed on the basis of sex because he is being harassed for failure to adhere to Margaret's sex stereotypes.

Leonard is also harassed on the basis of his perceived sexual orientation. It does not matter whether or not Leonard is a gay man in order for him to have a claim for sexual orientation harassment.

Leonard might also be considered a target of harassment on the basis of gender identity, which is a form of sex and/or disability discrimination prohibited by the Human Rights Law. Leonard should report Margaret's conduct, which is clearly a violation of the sexual harassment policy, to a person designated by his employer to receive complaints (i.e. his employer's "designee").

--

Leonard decides that he is not going to get a fair chance at the promotion under these circumstances, and he complains to the employer's designee about Margaret's behavior. The designee does an investigation and tells Margaret that Leonard's jewelry is not in violation of any workplace rule, that she is to consider him for the position without regard for his gender, and that she must stop making harassing comments, asking Leonard intrusive questions, and gossiping about his personal life. Margaret stops her comments, questions, and gossiping, but she then recommends a woman be promoted to the open position. The woman promoted has much less experience than Leonard and lacks his two-year degree in customer relations from a community college.

Question 3. Leonard has likely been the target of discrimination on the basis of sex, sexual orientation and/or retaliation. True or False?

TRUE: We don't know Margaret's reason for not recommending Leonard for the promotion, but it is not looking good for Margaret. It appears that she is either biased against Leonard for the same reasons she harassed him, or she is retaliating because he complained, or both.

Leonard should speak further with the employer's designee, and the circumstances of the promotion should be investigated. If it is found that Margaret had abused her supervisory authority by failing to fairly consider Leonard for the promotion, she should be subject to disciplinary action. This scenario shows that sometimes more severe action is needed in response to harassment complaints, in order to prevent discrimination in the future.

PRESS RELEASE

New York State
Unified Court System

Hon. Lawrence K. Marks
Chief Administrative Judge

Contact:
Lucian Chalfen, Public Information Director
Arlene Hackel, Deputy Director
(212) 428-2500

www.nycourts.gov/press

Date: November 13, 2018

NYS Judicial Committee on Women in the Courts to Survey Attorneys, Including Judges and Nonjudicial Employees, Eliciting Their Insights on Gender Fairness in the New York State Courts

New York – Some 32 years since the New York Task Force on Women in the Courts released its groundbreaking report on gender bias in the courts–based in part on the results of a survey soliciting attorneys' experiences–the New York State Judicial Committee on Women in the Courts, an outgrowth of the Task Force, is conducting a new poll of lawyers, judges and court personnel to examine the progress made and work ahead in eliminating gender disparities in the courts.

The new poll builds on the original survey and other research conducted by the Task Force, which was established by the then Chief Judge of the New York State court system in 1984 in response to respected academic studies that questioned whether women were being fairly and justly treated in our nation's court systems. The Task Force study focused primarily on three areas: the status and treatment of women litigants in various contexts including domestic violence and rape; the status and treatment of female attorneys; and the status and treatment of female court employees.

Following its comprehensive 22-month investigation, the Task Force reported "the pervasiveness of gender bias in our court system with grave consequences that denied women

equal justice, equal treatment and equal opportunity," proposing specific recommendations for corrective action. The Committee was created to implement and monitor these reforms.

Led by the Hon. Betty Weinberg Ellerin (Alston & Bird LLP) and comprising a distinguished group that includes judges and attorneys from around the state, the Committee has worked vigorously to secure equal justice, treatment and opportunity in the courts: serving to establish a broad spectrum of educational programs for judges and court employees on gender and bias issues; promoting the recruitment of qualified women for senior management and other court positions that had traditionally been filled by males; and acting as a catalyst for the creation of specialized courts to help ensure equal justice in matrimonial matters and domestic violence cases, among other measures.

The group has also expanded upon the Task Force's recommendations to address practical realities affecting women in the court setting, such as pay parity, sexual harassment, private lactation areas, and the intersection of prostitution with sex trafficking, with the latter spurring the establishment of a statewide network of human trafficking intervention courts.

More recently, the Committee members found themselves frequently engaged in discussion on the extent of the actual progress made in eradicating bias against women in the courts since the 1986 release of the Task Force report. These conversations led to a unanimous vote to conduct another survey to examine issues surrounding gender fairness in the courts, including further remedial steps to be taken.

The Committee has been working with experts to develop and distribute the survey, which will be emailed to a large, random sample of attorneys who have been admitted to practice law in New York State. Those attorneys selected will be able to complete the survey online. Their responses will be confidential and aggregated with others who respond. The Committee is also working with the State's various bar associations to raise awareness about the survey and encourage attorneys, if selected, to participate.

The survey will address the experiences of attorneys and other court users. Some survey sections cover a broad range of experiences that may be encountered in the court system regardless of the survey participant's practice area. Other sections ask about specific areas of practice and substantive law, such as family law, matrimonial law and criminal law.

Among the more general questions, the survey will query participants on whether and how gender affects courtroom interactions, the courthouse environment (sexual harassment) and

fee-generating appointments and assignments. The survey also contains questions regarding the availability and impact of courthouse children's centers–where litigants and other court users can safely leave their children while they attend to court matters–baby-changing tables in public restrooms and lactation facilities.

Survey participants will be instructed to select the responses that best reflect their opinions based upon their own recent experiences or direct knowledge while handling matters in the New York State courts. At the end of each section, respondents will be given the opportunity to offer comments and suggestions.

"While we have come a long way in eliminating gender bias in the courts since the release of the Task Force's seminal report, our work is not yet finished. We must continue, through study, education and reform, to open the doors of opportunity and tear down barriers to justice. This survey, combined with the many other efforts of the Committee, will help us identify and address the range of ongoing and emerging court-related concerns faced by women of diverse needs," said Chief Judge Janet DiFiore.

"The New York State Judicial Committee on Women in the Courts has made tremendous strides over the past several decades to broaden opportunities for women in the courts and improve how women–whether court employees, attorneys, litigants, witnesses or other court users–are treated throughout the court system. I am grateful to Justice Ellerin and the Committee members for their ongoing efforts in the pursuit of justice for all and look forward to the survey findings and the reforms they will help spawn," said Chief Administrative Judge Lawrence K. Marks.

"I believe the time is ripe for another survey, as the Committee looks to a new generation of attorneys for their insights–based on firsthand experiences and knowledge–to gauge the current state of gender fairness in the courts. The information to be gleaned from the survey will prove invaluable in guiding the Committee forward on the path to equal justice. In that regard, I want to especially thank the subcommittee that spearheaded this project, co-chaired by Court of Claims Judge Renee Minarik and retired Family Court Judge Marilyn O'Connor, both of Rochester, who worked tirelessly on the project, along with the other subcommittee members, including Judge Juanita Bing Newton, Dean of the New York Judicial Institute, Fern Schair, Vice Chair of the Committee, Westchester County Supreme Court Justice Terry Ruderman and attorneys Caroline Levy and Cheryl Zimmer, both of Suffolk County. Special thanks go to

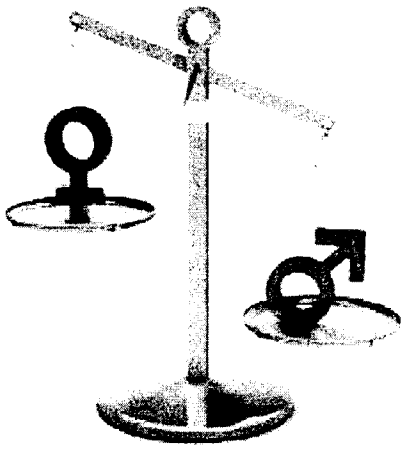
Charlotte Watson, Executive Director of the Committee, who has been of invaluable assistance to all of us," said Justice Ellerin.

The survey will be administered online over a four to six-week period starting this month. It will take approximately 20 minutes to complete, depending on the attorney's area of specialty. The Committee will begin to review the survey responses in the first quarter of 2019, followed by a preliminary report of findings and recommendations.

# # #

Court System to Survey Attorneys About Sexual Harassment, Gender Bias in Courts

By **Andrew Denney** (/author/profile/Andrew-Denney/) | November 15, 2018 at 05:18 PM



Gender discrimination

More than 30 years since the release of a **landmark report (http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/ny-task-force-on-women-in-the-courts-summary.pdf)** detailing pervasive discrimination against women in New York courts, an Office of Court Administration committee of judges and attorneys tapped to address bias issues is conducting a new survey to get a comprehensive look at gender fairness in the courts.

Starting this month, the New York State Judicial Committee on Women in the Courts will **administer an online survey (http://ww2.nycourts.gov/sites/default/files/document/files/2018-11/PR18_18.pdf)** to a random sample of attorneys to see what progress has been made in eliminating gender bias in the courts and if there is more work to be done, according to a release from the OCA.

When conducting its survey on bias in the courts more than three decades ago, the task force that eventually gave rise to the women's committee focused its energies on assessing the treatment of women litigants, attorneys and court employees.

This time, the committee will focus on facility issues that affect female attorneys, such as making accommodations for lactation; and sexual harassment, said committee chairwoman Betty Weinberg Ellerin, a retired state Supreme Court justice who served on the Appellate Division, First Department and who is now senior counsel at Alston & Bird.

Over the past year, since the #MeToo movement has led to the ouster of powerful people in a wide array of institutions, sexual harassment and abuse has become a top priority in many workplaces.

New York's court system has not seen the kind of high-profile exits that have shaken up Hollywood and Washington, D.C., though as the Law Journal reported earlier this month, the court system, with more than 16,000 employees, has not gone without its own allegations of sexual misconduct.

Since the task force conducted its work in the mid-1980s, society has reframed its views of what is considered inappropriate behavior in the workplace.

"The fact is that in many instances the same kind of conduct maybe existed in the 80s," Ellerin said.

The women's committee is building off of work started by a task force created in 1984 at the behest of Sol Wachtler, then the chief judge of the state Court of Appeals, to study how women are treated in the courts—as employees, judges, attorneys and litigants—and launched a 22-month investigation into the matter.

When the task force handed over its report in 1986, the picture it painted for what women endured in the court system was a dark one: bias against women was rampant, the report states, and women disproportionately faced a "climate of condescension, indifference and hostility."

At the time, physical abuse was cited as the reason for divorces granted in almost 40 percent of cases, the report states. Yet some Family Court judges on the bench back then seemed underinformed about domestic violence. It was not uncommon for victims to be blamed for provoking attacks against them, and not to be believed that they were being abused unless their injuries were visible.

As for female attorneys, while their numbers were growing in the mid-1980s, with some reporting significant improvements in the way they're treated, there was a "widespread perception" that judges, male attorneys and court employees did not treat female attorneys with the same dignity as their male counterparts.

The most commonly cited examples of inappropriate conduct toward female attorneys were being subjected to being addressed in familiar terms, comments about their appearance or sexual advances, according to the task force report.

"While we have come a long way in eliminating gender bias in the courts since the release of the task force's seminal report, our work is not yet finished," said Chief Judge Janet DiFiore in the news release. "We must continue, through study,

education and reform, to open the doors of opportunity and tear down barriers to justice."

Read more:

NY Court System's Handling of Sexual Harassment Complaints Criticized (https://www.law.com/newyorklawjournal/2018/11/07/ny-court-systems-handling-of-sexual-harassment-complaints-criticized/)

In #MeToo Era, New York Courts' New Sexual Misconduct Policy Was Done Too Quietly, Critics Charge (https://www.law.com/newyorklawjournal/2018/11/06/in-metoo-era-new-york-courts-new-sexual-misconduct-policy-was-done-too-quietly-critics-charge/)

Witnesses Say Judiciary Needs More Transparency & Reporting Options on Sexual Misconduct (https://www.law.com/newyorklawjournal/2018/10/30/witnesses-say-judiciary-needs-more-transparency-reporting-options-on-sexual-misconduct/)

Andrew Denney

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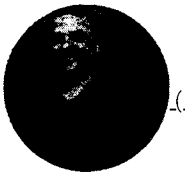

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New York State Judicial Committee on Women in the Courts

Credibility and Court Interaction

In the courtroom, being recognized as credible is one of the most important elements affecting a litigant, witness, expert, or attorney. The credibility afforded to the attorneys, litigants, or witnesses is reflected by the seriousness and respect accorded them by the judge. We seek your perceptions of whether and how gender affects credibility in the courts.

1. Credibility and Court Interaction

	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree	Don't Know/No Opinion
a. Male judges appear to give more credibility to the statements/arguments of male attorneys than to those of female attorneys.	○	○	○	○	○	○
b. Male judges appear to give more credibility to the testimony of male witnesses than to that of female witnesses.	○	○	○	○	○	○
c. Female judges appear to give more credibility to the statements/arguments of male attorneys than to those of female attorneys.	○	○	○	○	○	○
d. Female judges appear to give more credibility to the testimony of male witnesses than to that of female witnesses.	○	○	○	○	○	○
e. Male judges appear to give less credibility to female **expert** witnesses than to male expert witnesses.	○	○	○	○	○	○
f. Female judges appear to give less credibility to female **expert** witnesses than to male expert witnesses.	○	○	○	○	○	○
g. Male judges appear to impose a greater burden of proof on female litigants than on male litigants.	○	○	○	○	○	○
h. Female judges appear to impose a greater burden of proof on female litigants than on male litigants.	○	○	○	○	○	○

2. Judges intervene to correct any negative conduct toward women.

Never	Rarely	Sometimes	Often	Very Often	Don't Know/No Opinion
○	○	○	○	○	○

3. Attorneys intervene to correct any negative conduct toward women.

Never	Rarely	Sometimes	Often	Very Often	Don't Know/No Opinion
○	○	○	○	○	○

4. Any comments or suggestions for improving Credibility and Court Interaction:

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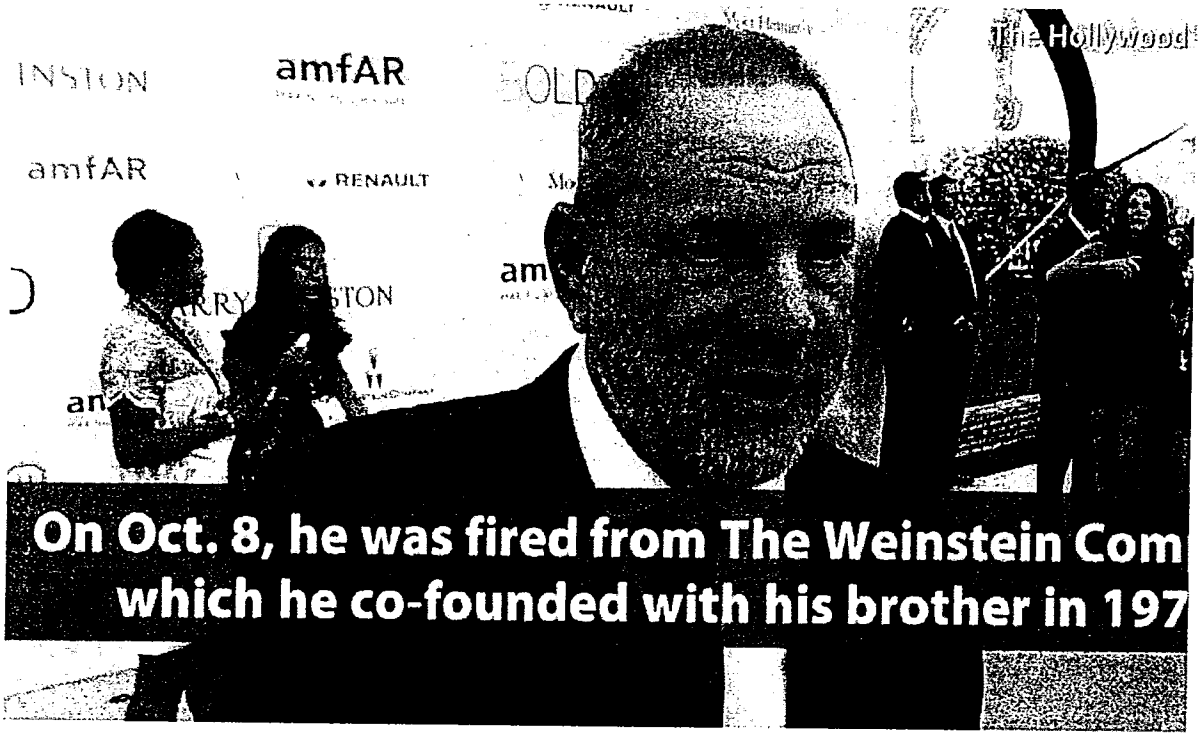

Caption

One year after Weinstein: A timeline of powerful men accused of sexual misconduct

Oct 05, 2018
By Fiza Pirani, The Atlanta Journal-Constitution

Friday, Oct. 5 marks exactly one year since the New York Times published the groundbreaking exposés from multiple women alleging Hollywood mogul Harvey Weinstein had raped or sexually harassed them. Some 80 women, including prominent actresses, have come forward since.

» RELATED: How to watch procedural vote on Kavanaugh nomination

Also on Friday: the procedural vote on Judge Brett Kavanaugh's U.S. Supreme Court nomination, which may lead to a confirmation vote later this weekend. Kavanaugh is accused of molesting California professor and research psychologist Christine Blasey Ford in a locked room at a 1982 high school gathering.

Last week, Ford detailed her sexual assault allegation against the nominee in a televised Senate Judiciary Committee hearing that drew millions of viewers. Kavanaugh has unequivocally denied the allegations, but the hearing resulted in an FBI investigation.

» RELATED: #MeToo: Women share harrowing accounts of sexual assault, harassment

Weinstein and Kavanaugh are just two of the many high-profile men in media, politics and beyond to have faced allegations ranging from inappropriate behavior to forced sexual misconduct to rape.

Some — but not all — have been ousted from their companies, arrested or resigned from their positions amid the allegations.

» RELATED: A look at #MeToo and its mostly hidden impact at the Georgia Capitol

A timeline of publicly reported sexual misconduct scandals against high-profile men since Harvey Weinstein:

Note: This list will be updated periodically. Included is the accusation, response and aftermath for each individual named. This is not an exhaustive list of accusations.

Sept. 16

Brett Kavanaugh — Judge, U.S. Supreme Court nominee

- Accusation: During the summer of 2018, professor and psychologist Christine Blasey Ford wrote a confidential letter to a senior Democratic lawmaker alleging that Kavanaugh had sexually assaulted her when they were high school students in Maryland. Ford said that he and a friend, both of whom were visibly drunk, locked her in a bedroom. While his friend watched, she said, Kavanaugh pinned her to the bed and put his hand over her mouth when she tried to scream. Her first public account

assault or misconduct.

- Response: Judge Kavanaugh has denied the claims. Last Thursday, he testified before the Senate Judiciary Committee about the allegations.

- Aftermath: The accusations led to a televised hearing, followed by an extended FBI investigation requested by Republican Senator Jeff Flake of Arizona, which delayed the confirmation timetable. Flake, who is retiring from the Senate, initially said he would vote to confirm Kavanaugh — until he was cornered by two women in an elevator, one of whom tearfully and angrily detailed her own account of sexual assault. "You're telling all women that they don't matter," she said. The White House on Thursday said the FBI had completed the investigation and an initial Senate vote will occur on Friday, followed by the final vote this weekend, according to the New York Times.

More Kavanaugh news:

- Who was questioned by the FBI in the Kavanaugh probe?
- Georgia's senators will vote to confirm Brett Kavanaugh
- Kavanaugh appeals directly to public opinion in WSJ editorial
- How to watch procedural vote on Kavanaugh nomination
- Metro Atlanta teacher interviewed by FBI in Kavanaugh probe
- Kavanaugh hearings reinforce need for parent-child dialogue on consent
- What Kavanaugh drama says about due process and the Central Park 5

Aug. 27

Gerard Depardieu — French actor

- Accusation: An unnamed 22-year-old French actress accused Depardieu of raping her at his Paris mansion on two different occasions in August. The actress, who was studying at a school where Depardieu was teaching, formally reported the claims to police, Variety reported.
- Response: According to Depardieu's lawyer, Hervé Temime, he was "shaken" by the allegations. "I am absolutely convinced his innocence will be established," Temime told France Info radio.
- Aftermath: A preliminary investigation was launched at the end of August. No significant updates since, though he was recently spotted in North Korea ahead of the regime's 70th anniversary in September.

June 14

Chris Hardwick — Actor, comedian, TV host

an allegedly abusive relationship with an unnamed boyfriend, who many interpreted as Hardwick. She said she dealt with "long-term" abuse and sexual assault.

- Response: In a statement to Deadline, Hardwick said he was "blindsided" by the essay and denied the allegations. "I was heartbroken to read Chloe's post," he said. "Our three year relationship was not perfect—we were ultimately not a good match and argued—even shouted at each other—but I loved her, and did my best to uplift and support her as a partner and companion in any way and at no time did I sexually assault her."
- Aftermath: About one month after AMC's investigation into the allegations, the company announced that Hardwick would return as host of AMC's "Talking Dead." "We take these matters very seriously and given the information available to us after a very careful review, including interviews with numerous individuals, we believe returning Chris to work is the appropriate step," AMC said in a statement. He will also be returning to NBC to be a guest judge on "America's Got Talent" and was reinstated to his website Nerdist, which had wiped him from the site amid the allegations.

May 23

Morgan Freeman — Actor

- Accusation: CNN reported in May that eight women came forward with allegations of harassment against Freeman. Two said he "subjected them to unwanted touching." Another woman who worked as a production assistant for the 2015 film "Going in Style" said he tried to life her skirt up multiple times, asking whether she was wearing underwear.

- Response: "Anyone who knows me or has worked with me knows I am not someone who would willingly offend or knowingly make anyone feel uneasy," Freeman said in the statement. "I apologize to anyone who felt uncomfortable or disrespected -- that was never my intent."

- Aftermath: Freeman's NatGeo docuseries "The Story of God" will resume production on its third season after the network put the show on hold amid investigations into the allegations. Statement from NatGeo to Entertainment Weekly: "When we learned of recent allegations surrounding Mr. Freeman completely unrelated to our work with him, as a precaution we paused production on our new season in order to complete a thorough investigation led by our parent company Fox, executed through an independent investigator. The results of this investigation revealed no incidents of concern during any of our work with Mr. Freeman."

May 7

Eric Schneiderman — New York Attorney General

- Accusation: Four women accused Schneiderman of sexual misconduct and physical abuse. The report was published in the New Yorker.

- Response: In a statement, Schneiderman said, "In the privacy of intimate relationships, I

- Aftermath: Three hours after the publication of the story, Schneiderman resigned from his position. "While these allegations are unrelated to my professional conduct or the operations of the office, they will effectively prevent me from leading the office's work at this critical time," he said in a statement. "I therefore resign my office, effective at the close of business on May 8, 2018."

May 4

Junot Diaz — Author, MIT creative writing professor

- Accusation: Writer Zinzi Clemmons accounted a forced kiss with Diaz on Twitter when she was a 26-year-old graduate student at MIT. Other women have spoken out about misogynistic and verbally abusive behavior, according to Vox. A month before writer Clemmons' tweet, Diaz published an acclaimed essay in the New Yorker that detailed the childhood abuse that shaped him.

- Response: "I take responsibility for my past. That is the reason I made the decision to tell the truth of my rape and its damaging aftermath," Diaz said in a statement through his agent to the New York Times. "This conversation is important and must continue. I am listening to and learning from women's stories in this essential and overdue cultural movement. We must continue to teach all men about consent and boundaries."

- Aftermath: Diaz resigned as chair of the Pulitzer Prize Board, the Cambridge Public Library canceled its annual Summer Reading Kick-Off featuring Diaz and MIT, where he teachers, launched an investigation. In June, MIT concluded that they found no evidence of misconduct, according to the New York Times. "To date, M.I.T. has not found or received information that would lead us to take any action to restrict Professor Díaz in his role as an M.I.T. faculty member, and we expect him to teach next academic year," the university said in a statement.

April 4

Nicholas Nixon — Former photographer, professor at Massachusetts College of Art and Design

- Accusation: According to the Boston Globe, more than a dozen former students reported inappropriate conduct, emails and said Nixon asked them to pose nude.

- Response: "I encourage students to accept and use their sexuality [as] part of their putting the best they have into their work," Nixon said in an e-mail to a former Boston Globe reporter in late February. "I have never hit on, touched or done anything personal." In a later statement to the Globe, Nixon said, "I realize that I should have censored myself more. To those students, I offer my profound apology."

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March 22.

» RELATED: Sexual harassment in the workplace: What is it, how to report it and more you should know

March 29

John Kricfalusi — Creator of "The Ren & Stimpy Show"

- Accusation: According to a report from BuzzFeed News and subsequent interviews with The New York Times, two women have accused Kricfalusi of sexual misconduct with teenagers in the 1990s. One of the women, Robyn Byrd, said he first wrote to her when she was 14 and then touched her genitals through her pajamas at age 16. Kricfalusi is about 15 years older than Byrd.

- Response: He admitted to having a 16-year-old girlfriend in the 1990s. A statement from Kricfalusi's lawyer Daniel Perlman to BuzzFeed News: "The 1990s were a time of mental and emotional fragility for Mr. Kricfalusi, especially after losing 'Ren & Stimpy,' his most prized creation. For a brief time, 25 years ago, he had a 16-year-old girlfriend. Over the years John struggled with what were eventually diagnosed mental illnesses in 2008. To that point, for nearly three decades he had relied primarily on alcohol to self-medicate. Since that time he has worked feverishly on his mental health issues, and has been successful in stabilizing his life over the last decade. This achievement has allowed John the opportunity to grow and mature in ways he'd never had a chance at before." Kricfalusi also penned this controversial 11-page letter posted on his Facebook page.

- Aftermath: Both Cartoon Network and Adult Swim said they would not work with Kricfalusi in the future. Nickelodeon also removed Kricfalusi's portrait from the studio.

March 5

Sherman Alexie — Native American author

- Accusation: Ten women spoke to NPR about inappropriate comments to unwanted sexual advances and consensual sexual relations. One writer, Erika Wurth, said Alexie tried to kiss her and told her to come to his room, which she did. She told him she was inexperienced and a virgin, but she believes that he only stopped touching her when he realized he'd have to rape her to continue.

- Response: Alexie issued a public apology, but denied the accusations made by writer Litsa Dremousis, whose tweets prompted the women to come forward. "Over the years, I have done things that have harmed other people, including those I love most deeply. To those whom I have hurt, I genuinely apologize." Read the full statement here.

of its Sherman Alexie Scholarship to the M.F.A. Alumni Scholarship.

» RELATED: Why sex scandals are finally leading to consequences

Feb. 28

Jeff Franklin — Former "Fuller House" showrunner

- Accusation: According to Variety, multiple staffers on the set of "Fuller House" accused Franklin of being verbally abusive and making sexually charged comments. A source also said he also had a habit of giving women he dated parts in the series.

- Response: No public response to the allegations. But Franklin did speak out about being "heartbroken to be leaving" the show.

- Aftermath: Franklin was out as showrunner of Netflix's "Fuller House" and Warner Bros. TV declined to renew its overall deal.

Feb. 22

Philip Berk — Former president of Hollywood Foreign Press Association

- Accusation: In 2003, actor Brendan Fraser alleged Berk sexually assaulted him. "His left hand reaches around, grabs my ass cheek, and one of his fingers touches me in the taint. And he starts moving it around," he said about an incident following a Hollywood Foreign Press Association luncheon. The actor recalled feeling afraid, like a little kid and that he was on the verge of tears. He believes the HFPA blacklisted him in retaliation. Fraser detailed the account in his memoir and in a candid interview for GQ.

- Response: "Mr. Fraser's version is a total fabrication," Berk said in an e-mail to GQ. He denies HFPA retaliation. "My apology admitted no wrongdoing, the usual 'If I've done anything that upset Mr. Fraser, it was it was not intended and I apologize.'"

- Aftermath: The HFPA launched an investigation and found "the exchange was not an intended sexual advance," but a joke. They added that "the HFPA understands today—as it did 15 years ago—that what Mr. Fraser experienced was inappropriate," Deadline reported.

Feb. 21

Daniel Handler — Author known as Lemony Snicket

- Accusation: Handler has been accused by a number of women working in children's literature of inappropriate sexual comments, according to the Pacific Standard. The accusations came under the spotlight after Handler signed a pledge launched by author Gwenda Bond stating that authors that don't adopt and enforce harassment

inappropriate accounts with Handler.

- Response: "It has never been my wish to insult any of my professional colleagues," he wrote in response to the accusations on the pledge."My whole life my sense of humor has not been for everyone, and my books continue to be regarded, by a segment of the population, as inappropriate ... I take seriously the responsibilities of my visibility, and have always thought that treating all of my colleagues the same was the best way to dispel the unease that can come from a competitive or self-conscious environment ... I am listening and willing to listen; I am learning and willing to learn."

- Aftermath: In March, Wesleyan University, where he was scheduled to give a commencement speech, announced he had stepped down from the position amid student protests. Anita Hill replaced him.

» RELATED: Charlie Rose fired from CBS amid sexual harassment allegations; PBS cuts ties with newsman

Feb. 16

Patrick Demarchelier — Photographer

- Accusation: The Boston Globe published a report featuring several staffers accusing photographers of sexual exploitation and abuse, including Demarchelier. At least 25 photographers, agents, stylists, casting directors and other industry professionals came forward about Demarchelier. Several women reported unwanted sexual advances, including groping breasts, thrusting hands onto models' genitals and other vulgar propositions. According to the Globe, one teenage model said Demarchelier allegedly asked her if he could lick her genitals.

- Response: "People lie and they tell stories," Demarchelier said in a statement to the Globe. "It's ridiculous." He added that he has "never, never, never" touched a model inappropriately and called the accusations "pure lying" by models who "get frustrated if they don't work."

- Aftermath: Conde Nast, a media conglomerate that includes Vogue, Glamour, and GQ, stopped working for now with Demarchelier.

Greg Kadel — Photographer

- Accusation: The Boston Globe published a report featuring several models accusing photographers of sexual exploitation and abuse, including Kadel. One of the five models the Globe spoke to about Kadel was still in high school when she recalled the first incident. She was at a fashion party her agent took her to where adults gave her cocaine and alcohol. Kadel was asked to take her home, but allegedly took her to a hotel room, pushed her against the wall and had sex with her. The model told her

ending her career with the company. Kadel also took topless photographs of her as a minor.

- Response: "Greg has never done that. He's dated some girls and that's happened. It's all consensual between adults. He's never used his power in any way that is unbecoming," Ernesto Qualizza, an agent for Kadel, said. Kadel believes the encounters reported by the Globe were consensual or misinterpreted.

- Aftermath: Conde Nast, a media conglomerate that includes Vogue, Glamour, and GQ, stopped working for now with Kadel. Following an investigation, Victoria's Secret said it suspended its relationship with him.

» RELATED: Louis C.K. loses FX, Netflix gigs after remorseful acknowledgment of sexual misconduct

Andre Passos — Photographer

- Accusation: The Boston Globe published a report featuring several models accusing photographers of sexual exploitation and abuse, including Passos. Former model Dasha Alexander said that when she was 15, Passos inserted his fingers into her vagina while taking her photo 20 years ago. He told her it would give the photos "more emotion."

- Response: He denied any allegations and said he went to court for this and was not guilty. The Globe could not locate any court records. Passos texted the statement to the Globe from Brazil. "I have already suffered enough consequences out of this absurd story. ... I was a victim as well as the model was a victim of her parents and agency to send her out in the world in such a tender age in the hands of an evil industry," he said. "An industry that never knew how [to] educate [these] girls, that only looked at profit and fame no matter what."

- Aftermath: Nothing of note as of Oct. 5.

Seth Sabal — Photographer

- Accusation: The Boston Globe published a report featuring several models accusing photographers of sexual exploitation and abuse, including Sabal. Three models accused Sabal of sexual harassment. One of the women said at age 16, she was given alcohol and asked to take off her underwear as Sabal allegedly took photos up her skirt.

- Response: "He can unequivocally say that he never has taken any nude photos of an underage model, he never sexually harassed anyone and never forced anyone to do something they weren't comfortable with. If anyone who felt uncomfortable with any requests that have been made, he does apologize. He never coerced, forced or in any

- Aftermath: Sabal, who is semi-retired, hasn't lost any jobs as a result of the Boston Globe report, according to his attorney.

» RELATED: What we know about ex-Atlanta woman accused of fake Roy Moore story

David Bellemere — Photographer

- Accusation: The Boston Globe published a report featuring several models accusing photographers of sexual exploitation and abuse, including Bellemere. Women said the renowned photographer forcibly stuck his tongue down their mouths

- Response: "I've never been taking advantage [of models]," he said in a statement to the Boston Globe. "This is not true. I've never done anything like this in my life."

- Aftermath: Multiple companies, including Victoria's Secret and Lord & Taylor, haven't hired Bellemere in recent years as models came out with complaints.

Feb. 2

Vincent Cirrincione — Talent manager

- Accusation: The Hollywood talent manager who helped Halle Berry and Taraji Henson rise to fame was accused by nine minority women of sexual harassment. One stage actress, Tamika Lamison, told the Washington Post that in June 1996, Cirrincione said he would take her on as a client if he could have sex with her whenever he wanted.

- Response: Cirrincione denied allegations of trading sexual favors for representation but said he did pursue sexual relationships with the actresses. "I have had affairs while in committed relationships, ones I am now ashamed to say are coming to light and shading my past and my reputation. I can say without a doubt that I have never used favors, sexual or otherwise, as a reason for managing anyone. I want to make it clear that not one of those relationships were anything but consensual," he said.

- Aftermath: Cirrincione shut down his company, Vincent Cirrincione Associates, following the Washington Post report. "It is with incredibly great sadness that at this time, I believe it's in the best interests of all my actors and actresses that I represent to close my management company," Cirrincione said a statement to Deadline. "This business is hard enough and I don't want to distract in any way from their careers or opportunities in the entertainment field. I wish all the people I represent the very best in all their future endeavors."

Feb. 1

Paul Marciano — GUESS co-founder

emotionally harassing women. According to Business of Fashion, Marciano has previously been accused of sexual misconduct by two other women.

- Response: Marciano denied all the allegations.
- Aftermath: The Guess, Inc. board of directors has not been able to determine that the accusations have merit following an investigation, according to a company statement.

Jan. 27

Scott Baio — Actor

- Accusation: In an interview with Megyn Kelly, actress Nicole Eggert accused her former co-star Scott Baio of molesting her when she was a minor on the set of "Charles in Charge." She was 14 years old when the sexual abuse started, she said. Eggert said the two first had sexual intercourse when she was 17. Baio is more than 11 years older than her.
- Response: Baio has denied the allegations and defended himself on Facebook Live shortly after. He said the allegations were "lies" and says Eggert "seduced" him. "If you have a real claim, you go to the real people, not social media, where people like me get beat up," Baio said in his Facebook Live video.
- Aftermath: Other castmates, Alexander Polinsky and Adam Carl, recalled Baio's inappropriate behavior on set and came to Eggert's defense. She and her attorney said they are exploring all legal options.

» RELATED: Kevin Spacey apologizes after allegation of decades-old attack, says he is gay

Jan. 26

Steve Wynn — Casino mogul

- Accusation: The graphic accusations against Wynn were first reported by the Wall Street Journal and detailed sexual misconduct such as harassment, coercion, indecent exposure and an alleged sexual assault. Allegations were made by salon and spa employees at Wynn's luxury resort in Las Vegas. Additional allegations by women in Las Vegas and Chicago were published in February by the Las Vegas Review-Journal.
- Response: Wynn denied the allegations, and called the idea that he ever assaulted any woman "preposterous." More: "We find ourselves in a world where people can make allegations, regardless of the truth, and a person is left with the choice of weathering insulting publicity or engaging in multi-year lawsuits. It is deplorable for anyone to find themselves in this situation."
- Aftermath: On Jan. 27, Wynn resigned as finance chair of the Republican National Committee and a few days later, the Nevada Gaming Control Board and Gaming Commission launched investigations into his conduct. Wynn eventually left his role as CEO of Wynn Resorts and is no longer allowed to use the salon and spa.

Jan. 25

- Accusation: According to The Wrap, model Brittney Lewis said that whens he was 17 years old, Copperfield drugged and assaulted her in 1988 after a modeling contest he judged.

- Response: Copperfield denied the allegations and said his life has been turned "upside down" by false allegations of assault in the past. "While I weather another storm, I want the [#MeToo] movement to continue to flourish. Always listen, and consider everything carefully, but please for everyone's sake don't rush to judgment," he said in a statement.

- Aftermath: Lewis said she has no plans to pursue a criminal or civil suit against Copperfield, but even if she wanted to the statute of limitations would prevent her, according to The Wrap.

Jan. 18

Michael Douglas — Actor

- Accusation: Journalist and author Susan Braudy told the Hollywood Reporter that in the late '80s, while she ran the New York office of Stonebridge Productions, Douglas masturbated in her presence during a one-on-one script meeting in his apartment. He is also accused of sexually charged dialogue.

- Response: "That was completely untrue," Douglas told Deadline and Hollywood Reporter about Braudy's claims that he masturbated in front of her before firing her in retaliation. "I'd confess to anything I thought I was responsible for," he says. "And it was most certainly not masturbating in front of this woman. This reeks." He did, however, acknowledge inappropriate discussions. "Maybe she is disgruntled her career didn't go the way she hoped and she is holding this grudge," he said.

- Aftermath: Nothing of note as of Oct. 5.

Jan. 16

Seal — Singer

- Accusation: Actress Tracey Birdsall accused Seal of sexual battery and groping shortly after the singer encouraged women to come forward about their stories of sexual misconduct. According to TMZ, Birdsall said in November 2016, Seal lunged at her and tried to kiss her while the two were in his kitchen. She said he then belittled her for the tank top she was wearing and began groping her breasts.

- Response: A representative from Seal's team said, "Seal vehemently denies the recent allegations made against him by a former neighbor for alleged misconduct more than a

- Aftermath: The Los Angeles County Sheriff's Department confirmed that it launched an investigation into sexual battery allegations against Seal, but the investigation was dropped in February. According to USA Today, the L.A. County district attorney's office decided not to file criminal charges.

Jan. 13

Aziz Ansari — Actor, comedian

- Accusation: An anonymous woman tells her account of a sexual encounter with Ansari to Babe.net, accusing him of sexual misconduct.

- Response: Ansari released a statement on January 14 in which he said they "engag[ed] in sexual activity, which by all indications was completely consensual," but when he "heard that it was not the case for her, I was surprised and concerned."

- Aftermath: Nothing of note as of Oct. 5, though the account led to multiple conversations about affirmative consent and the controversy around it.

Mario Testino — Photographer

- Accusation: In the same publication as the accusations against Weber, the New York Times reported 13 assistants and models accused Testino of unwanted advances and coercion during photo shoots and other private sessions.

- Response: Lawyers representing Testino challenged the character and credibility of people who complained of harassment. His attorney told the Associated Press, "We are not providing any further comment at this time."

- Aftermath: According to Hollywood Reporter, Conde Nast, which publishes "Vogue" and other top magazines, said it would stop working with Weber and Testino for now.

» RELATED: Putin crony sides with Harvey Weinstein, says America is too uptight

Bruce Weber — Photographer

- Accusation: Fifteen current and former male models told the New York Times their experiences with Weber reflected a pattern of "unnecessary nudity and coercive sexual behavior, often during photo shoots." "I remember him putting his fingers in my mouth, and him grabbing my privates," model Robyn Sinclair told the Times. "We never had sex or anything, but a lot of things happened. A lot of touching. A lot of molestation."

- Response: "I'm completely shocked and saddened by the outrageous claims being made against me, which I absolutely deny," Weber said in a statement from his lawyer.

AJC

Jan. 11

James Franco — Actor

- Accusation: Accused by five women of inappropriate or sexually exploitative behavior. The Los Angeles Times reported four of the women were his students at a school he founded, Studio 4. The fifth said he was her mentor. One of the former students, Sarah Tither-Kaplan, told The Times that during a nude orgy scene she filmed with Franco and other women, he removed protective plastic guards covering the actresses' vaginas while performing oral sex on them.

- Response: In an interview with Stephen Colbert, Franco said: "Look, in my life I pride myself on taking responsibility for things that I have done. I have to do that to maintain my well being. The things that I heard that were on Twitter are not accurate. But I completely support people coming out and being able to have a voice because they didn't have a voice for so long. So I don't want to shut them down in any way. If I have done something wrong, I will fix it — I have to."

- Aftermath: After the women came forward, Franco was snubbed for an Oscar nomination and removed from the "Vanity Fair" Hollywood issue cover.

Jan. 9

Stan Lee — Former editor-in-chief, publisher, chairman of Marvel Comics

- Accusation: Several allegations of sexual assault and harassment by nurses caring for him at his home in Hollywood Hills. According to the Daily Mail, 95-year-old Lee allegedly groped and harassed the nurses and is said to have asked for oral sex in the shower. Months later, in April, a Chicago massage therapist said Lee fondled himself and inappropriately grabbed her during arranged massages in 2017.

- Response: Lee denied all allegations. His lawyer told DailyMail.com that Lee fully intends to clear his "stellar good name." In response to the April Chicago masseuse allegations, Jonathan Freund, an attorney for Lee told the Chicago Tribune, "He is a high-profile public figure and I think it's a shakedown. The guy is 95, I don't think he would do that."

- Aftermath: The nursing company employing the nurses is in a legal dispute with Lee. As for the lawsuit from the masseuse, Lee's attorney said he was not aware of a criminal investigation and said the allegations might be part of "a shakedown."

Jan. 5

Paul Haggis — Oscar-winning director and screenwriter

more women to come forward with sexual misconduct accusations, including another forced sex act. The accounts were reported by the Associated Press.

- Response: Haggis has vehemently denied the accusations and said the original accuser and her lawyer had demanded a $9 million payment to avoid legal action, which he characterized as extortion. Haggis' lawyer Christine Lepera added that her client is also questioning whether the accusations are driven by Scientologists that Haggis claims have attacked him for years with false accusations. The AP noted that each of the women interviewed denied any connection to the organization.

- Aftermath: Nothing of note as of Oct. 5.

» RELATED: Harvey Weinstein scandal: 'No way all these people could have been victims and men didn't know...'

Ben Vereen — Tony Award-winning actor

- Accusation: According to a report from the New York Daily News, Vereen is accused of sexual misconduct by two actresses during his production of "Hair." Women said he invited female cast members to his home and provoked them into performing sex acts. The actor is also accused of inappropriate conduct and talk during rehearsals in which cast members stripped naked.

- Response: "I would like to apologize directly to the female cast members of the musical 'Hair' for my inappropriate conduct when I directed the production in 2015," Vereen said in a statement. "While it was my intention to create an environment that replicated the themes of that musical during the rehearsal process, I have since come to understand that it is my conduct, not my intentions, which are relevant here. So I am not going to make any excuses because the only thing that matters here is acknowledging and apologizing for the effects of my conduct on the lives of these women. Going forward, my having come to terms with my past conduct will inform all my future interactions not only with women, but with all individuals. I hope these women will find it in their hearts to accept my sincere apology and forgive me."

- Aftermath: Venice Theatre leadership addressed the allegations in a separate statement. "We have learned recently that during our 2015 production of 'Hair,' more than one female cast member was asked to join Mr. Vereen at his residence. Some of those visits resulted in compromising situations for at least two of the actresses." The theater said it was also working to strength its policies and procedures regarding sexual harassment. According to the New York Times, touring production group Broadway San Diego cut ties to Vereen, whose name was on an awards program rewarding outstanding local high school performers, shortly after the report was publicized.

Jan. 2

- Accusation: Former "Community" writer Megan Ganz accused Harmon of sexually harassing her during her time working on the series.

- Response: Following a Twitter dialogue between him and Ganz, Harmon issued a detailed apology on an episode of his podcast, "Harmontown." He said: "I lied to myself the entire time about it. And I lost my job. I ruined my show. I betrayed the audience. I destroyed everything and I damaged her internal compass, he said. "And I moved on. I've never done it before and I will never do it again, but I certainly wouldn't have been able to do it if I had any respect for women. On a fundamental level, I was thinking about them as different creatures. I was thinking about the ones that I liked as having some special role in my life and I did it all by not thinking about it." Read the full apology at Time.com.

- Aftermath: After reading Harmon's lengthy apology, Ganz said responded on Twitter. "Dan Harmon, I forgive you," she wrote.

2017

Dec. 18

Alex Kozinski — California federal court judge

- Accusation: Accused of sexual harassment by 15 women, some of whom said he subjected them to unwanted sexual comments or physical contact, including kissing, hugging and groping, the Washington Post reported. The women included his own colleagues and others who met him at events. One woman, a clerk for a different judge at the time of the comment, said Kozinski suggested to colleagues that she exercise naked.

- Response: Kozinski partially apologized but also framed some of the accusations as a misunderstanding. In a statement released by his attorney, Kozinski said: "I've always had a broad sense of humor and a candid way of speaking to both male and female law clerks alike. In doing so, I may not have been mindful enough of the special challenges and pressures that women face in the workplace. It grieves me to learn that I caused any of my clerks to feel uncomfortable; this was never my intent. For that, I sincerely apologize."

- Aftermath: Following the accusations reported by the Post, the current chief judge began a misconduct inquiry into Kozinski. Kozinski abruptly retired following the inquiry. "I cannot be an effective judge and simultaneously fight this battle," he said in the statement. "Nor would such a battle be good for my beloved federal judiciary. And so I am making the decision to retire, effective immediately."

Dec. 15

- Accusation: Accused of "unwanted, unwarranted sexual advances," sexual battery, gender violence, battery and assault toward a radio and television broadcaster during a Nov. 1 interview at San Manuel Casino in Highland, California. The allegations were filed in a lawsuit.

- Response: Simmons denied all allegations on social media. "Friends, I intend to defend myself against any alleged charges you may have been reading about in the media," he wrote. "For the record, I did not assault the person making these accusations in the manner alleged in the complaint or harm her in any way. I am conferring with my lawyers with the aim of vigorously countering the allegations. And I look forward to my day in court where the evidence will prove my innocence."

- Aftermath: Simmons settled the sexual battery lawsuit in July, according to court filings.

Dec. 13

Morgan Spurlock — Hollywood director

- Accusation: Spurlock started the national conversation around his name by sharing a blog post on Dec. 13 in which he admitted to a history of sexual misconduct. He wrote about a rape accusation in college, a sexual harassment suit that was settled and how he cheated on all his romantic partners, including both of his wives.

- Response: "I am part of the problem," he wrote. "As I sit around watching hero after hero, man after man, fall at the realization of their past indiscretions, I don't sit by and wonder 'who will be next?' I wonder, 'when will they come for me?'"

- Aftermath: YouTube Red, the company's subscription service, canceled the release of Spurlock's "Super Size Me 2." He had stepped down from the production company behind the film, Warrior Poets. The company has also removed the film from the Sundance film festival and Spurlock has been cut from Stephanie Soechtig's documentary, "The Devil We Know," TechCrunch reported.

Dec. 11

Ryan Lizza — The New Yorker Magazine's Washington correspondent

- Accusation: Accused of engaging in what the New Yorker Magazine called "improper sexual conduct." Here's what a spokeswomen for the magazine said in a statement, according to the New York Times: "The New Yorker recently learned that Ryan Lizza engaged in what we believe was improper sexual conduct. We have reviewed the matter and, as a result, have severed ties with Lizza. Due to a request for privacy, we are not commenting further."

inappropriate," he told the New York Times via email. "The New Yorker was unable to cite any company policy that was violated."

- Aftermath: Fired from the New Yorker. Lizza also worked as an on air political commentator for CNN, but CNN said in a statement that Lizza "will not appear on CNN while we look into this matter."

President Donald Trump

- Accusation: At least 13 women have accused Trump of sexual harassment and assault. Many of the accusations against him surfaced during the 2016 campaign after the release of a vulgar 2005 "Access Hollywood" video in which Trump talked about groping women. Following the wave of sexual harassment accusations in recent months, including allegations against Alabama Senate candidate Roy Moore, the president is back in the spotlight. In a news conference on "Megyn Kelly Today" on Dec. 11, three women shared accounts of being forcibly kissed, groped and fondled by Trump.

- Response: Trump has denied all accusations. In a statement to NBC News on Dec. 11, the White House called the claims "false" and that "the American people voiced their judgment by delivering a decisive victory" to Trump last year.

- Aftermath: No notable fallouts as of Oct. 5.

» RELATED: Trump accusers speak out on Megyn Kelly Today: 'Where do we draw the line?'

Mario Batali — TV star, renowned chef

- Accusation: Multiple women anonymously alleged in a Eater New York story that Batali sexually harassed them. The publication said it spoke to dozens of people who worked with Batali. One woman said he "grabbed both of my breasts" and others said he asked about their sex lives and underwear.

- Response: "I apologize to the people I have mistreated and hurt. Although the identities of most of the individuals mentioned in these stories have not been revealed to me, much of the behavior described does, in fact, match up with ways I have acted," Batali said in a statement. "That behavior was wrong and there are no excuses. I take full responsibility and am deeply sorry for any pain, humiliation or discomfort I have caused to my peers, employees, customers, friends and family."

- Aftermath: Batali said he is stepping down from his company, Batali & Bastianich Hospitality Group, and from his daytime TV job on "The Chew" for an indefinite period. The Food Network has also suspended plans to revive Batali's famed show, "Molto Mario."

AJC

Dec. 6

Warren Moon — NFL Hall of Fame quarterback, co-founder and president of Sports 1 Marketing

- Accusation: An assistant for his sports marketing firm, Wendy Haskell, accused him of making "unwanted and unsolicited" sexual advances as part of her role, according to a civil lawsuit. She alleged she was forced to sleep in the same bed with Moon on business trips while wearing lingerie and when she complained, Moon said "this was the way it was." Haskell also claimed she was also drugged at one point and when she made complaints, she was demoted. (Associated Press)

- Response: "Warren Moon has yet to be served with the lawsuit filed by Wendy Haskell, but he is aware of the claims contained in it," Moon's attorney, Daniel Fears, said in a statement Thursday, Dec. 7. "Mr. Moon denies the claims by Ms. Haskell. Mr. Moon contends these claims are meritless, and he has every intention to vigorously defend himself in court."

- Aftermath: Moon said he was taking a leave of absence from his current job as a member of the Seattle Seahawks' game-day broadcasting team, according to NBC Sports. The case was settled out of court.

Dec. 1

Ruben Kihuen — U.S. House of Representatives (D-Nev.)

- Accusation: Sexual harassment of a staffer during his campaign between December 2015 and April 2016. She said he propositioned her for dates and sex despite her repeated rejections. On two occasions, she said he touched her thighs without consent, BuzzFeed News reported.

- Response: Kihuen's congressional office released a statement to BuzzFeed News, which included an apology for the staffer, who he called "a valued member of my team." Later, however, the office reached out and said he wanted to "make it clear that I don't recall any of the circumstances."

- Aftermath: Despite pressure from Democrats and other officials, Kihuen refused to resign. He told ABC News on Dec. 5 that the Democratic Congressional Campaign Committee's investigation found nothing. On Dec. 16, he announced he would not seek re-election in 2018, but may change his mind, according to the Washington Post.

Blake Farenthold — U.S. House of Representatives (R-Texas)

- Accusation: Details emerged showing Farenthold used $84,000 in taxpayer funds to secretly settle a confidential sexual harassment case. The 2014 allegations came from

lewd comments and illegally firing her after she complained about the mistreatment. The uncovered settlement is part of an investigation of sexual harassment and discrimination in Congress.

- Response: Farenthold denied the accusations in the lawsuit, which included a "strict confidentiality" agreement between the parties. In 2015, when it was settled and dismissed, he said he was "glad to put this behind me and move forward." He issued a statement: "While I 100% support more transparency with respect to claims against members of Congress, I can neither confirm nor deny that settlement involved my office as the Congressional Accountability Act prohibits me from answering that question."

- Aftermath: Farenthold announced he would retire and not seek re-election in 2018. On April 6, he unexpectedly resigned from office and Texas Governor Greg Abbott ordered that he pay the cost of the special election that took place following his leave.

Nov. 30

Russell Simmons — Entrepreneur, co-founder of Def Jam Recordings

- Accusation: Simmons is accused of rape by three women; the accounts were published in the New York Times on Dec. 13. In a guest column for Hollywood Reporter in November, Jenny Lumet, daughter of director and screenwriter Sidney Lumet, accused Simmons of forced sex and harassment in 1991.

- Response: Simmons, 60, said in a statement to the New York Times about the three rape accusations: "I vehemently deny all these allegations. These horrific accusations have shocked me to my core and all of my relations have been consensual." In response to Lumet's column, Simmons said: "I have been informed with great anguish of Jenny Lumet's recollection about our night together in 1991. I know Jenny and her family and have seen her several times over the years since the evening she described. While her memory of that evening is very different from mine, it is now clear to me that her feelings of fear and intimidation are real. While I have never been violent, I have been thoughtless and insensitive in some of my relationships over many decades and I sincerely and humbly apologize." Read the full statement.

- Aftermath: Simmons has stepped down from his companies, including music label Def Jam Recordings, Rush Communications and his multiple fashion lines.

» RELATED: Russell Simmons stepping down from companies after sexual assault allegation

Nov. 29

Garrison Keillor — Creator and former host of "A Prairie Home Companion"

- Accusation: Inappropriate behavior with a woman who worked with him during the

outside law firm for an independent investigation of the allegations.

- Response: In a statement to the Associated Press, Keillor said he was fired over "a story that I think is more interesting and more complicated than the version MPR heard."

- Aftermath: MPR terminated its contracts with Keillor. An Oct. 14 Vermont book festival also cancelled Keillor's appearance amid public outcry. A thorough investigation found troubling behavior.

» RELATED: Garrison Keillor accused of inappropriate behavior, fired by Minnesota Public Radio

Matt Lauer — NBC "Today" show morning host

- Accusation: NBC News specified few details, but noted a complaint from a colleague about Lauer's inappropriate sexual behavior in the workplace. Variety.com reported later that day that multiple women accused Lauer of harassment, including exposing himself, giving a colleague an explicit sex toy and making inappropriate comments.

- Response: Lauer issued a statement the following day, which former colleague Savannah Guthrie read aloud on the "Today" show. "There are no words to express my sorrow and regret for the pain I have caused others by words and actions. To the people I have hurt, I am truly sorry. As I am writing this I realize the depth of the damage and disappointment I have left behind at home and at NBC." Read the full statement.

- Aftermath: In its memo about Lauer's misconduct, NBC News announced it had terminated his employment.

More Lauer news:

- Matt Lauer: What he's said about wife Annette Roque

- Here's how 'TODAY' addressed the news of Matt Lauer's firing from the show

- 5 things to know about Matt Lauer

- Matt Lauer fired: A timeline of his career

- Matt Lauer firing has people wondering what Tamron Hall, Ann Curry are up to

Nov. 22

Nick Carter — Backstreet Boys member

- Accusation: Accused of rape approximately 15 years ago by Melissa Schuman, former

- Response: Allegations denied. "I am shocked and saddened by Ms. Schuman's accusations. Melissa never expressed to me while we were together or at any time since that anything we did was not consensual."

- Aftermath: The case is reportedly under review at the Santa Monica Police Department, according to the Daily Beast.

Nov. 21

John Lasseter — Pixar and Disney Animation chief

- Accusation: Accused by several women of unwanted touching.

- Response: Acknowledged some "missteps" with employees and apologized for any behavior that made workers uncomfortable. "No matter how benign my intent, everyone has the right to set their own boundaries and have them respected."

- Aftermath: Lasseter said he was taking a six-month leave of absence to take better care of himself, recharge and "ultimately return with the insight and perspective I need to be the leader you deserve." But in June, Disney announced Lasseter would be leaving the company at the end of 2018, and will be taking on a consulting role in the meantime.

» RELATED: Survey shows 1 in 3 men don't think catcalling is sexual harassment

Nov. 20

Charlie Rose — PBS and CBS host

- Accusation: Accused by several women of unwanted sexual advances, groping and grabbing women, walking naked in front of them or making lewd phone calls.

- Response: He has apologized for his behavior but has questioned the accuracy of some of the accounts. "It is essential that these women know I hear them and that I deeply apologize for my inappropriate behavior. I am greatly embarrassed. I have behaved insensitively at times. I accept responsibility for that, though I do not believe that all of these allegations are accurate."

- Aftermath: Fired from CBS, PBS cut ties and multiple universities rescinded his accolades.

» RELATED: Charlie Rose fired from CBS amid sexual harassment allegations; PBS cuts ties with newsman

Glenn Thrush — New York Times White House reporter

- Response: He disputes some of the accusations but has said he had had a drinking problem and apologized for "any situation where I behaved inappropriately."

- Aftermath: Suspended from the New York Times. "We intend to fully investigate and while we do, Glenn will be suspended," Times officials said.

» RELATED: New York Times suspends reporter Glenn Thrush amid sexual misconduct claims

John Conyers — U.S. Senator (D-Mich.)

- Accusation: BuzzFeed reported on a 2015 harassment settlement for $27,000 between the senator and a former staffer. More staffers have spoken out since. The Washington Post later unveiled a case of harassment involving a D.C. ethics lawyer.

- Response: Conyers has denied the allegations and in his statement, he said "the mere making of an allegation does not mean it is true." "I have long been and continue to be a fierce advocate for equality in the workplace and I fully support the rights of employees who believe they have been harassed or discriminated against to assert claims against their employers, he said.

- Aftermath: Rep. John Conyers, the longest-serving member of Congress, submitted his resignation Tuesday, Dec. 5. Earlier that day, he announced plans to retire amid the allegations and amid concerns for his health. Conyers endorsed his son, John Conyers III, to replace him.

» RELATED: The Latest: Political consultant says Conyers in hospital

Nov. 16

Al Franken — U.S. Senator (D-Minn.)

- Accusation: Los Angeles news anchor Leeann Tweeden accused Franken of kissing her forcibly and groping her as she slept during a USO tour in 2006. Franken was photographed with his hands over her breasts as she slept. He also has been accused by several other women since the initial allegation was made public.

- Response: "I don't know what was in my head when I took that picture, and it doesn't matter," Franken said in a statement. "There's no excuse. I look at it now and I feel disgusted with myself. It isn't funny. It's completely inappropriate. It's obvious how Leeann would feel violated by that picture."

- Aftermath: Franken announced his resignation Thursday, Dec. 7 and said he would leave the Senate in coming weeks. "I may be resigning my seat, but I'm not giving up my voice," he said. Earlier, Senate Majority Leader Mitch McConnell called for an Ethics

promised to cooperate with the ethics investigation. He also canceled an Atlanta book tour and was cut from a PBS special.

» RELATED: President Trump comments on Senator Franken's groping photo

Nov. 10

Gary Goddard — CEO of The Goddard Group, behind the creation of theme park attractions including the Georgia Aquarium and the Monster Plantation ride at Six Flags Over Georgia

- Accusation: Sexual assault of minors, including "ER" actor Anthony Edwards. Edwards alleged that at age 15, Goddard molested him and raped his best friend.
- Response: He has denied the allegations.
- Aftermath: Taking leave from his company.

Eddie Berganza — Editor of DC Comics

- Accusation: Sexual harassment, including groping and forcibly kissing women at least two women.
- Response: Berganza has not issued a response as of Nov. 29.
- Aftermath: Fired by Warner Bros. Television Group and DC Entertainment.

Andrew Kreisberg — Executive producer of "Arrow," "Supergirl," "The Flash"

- Accusation: Accused by 19 women of sexual harassment and inappropriate touching.
- Response: He denied the allegations and told Variety he has made comments on women's appearances and clothes "but they were not sexualized." "Like many people, I have given someone a nonsexual hug or kiss on the cheek," he said.
- Aftermath: Suspended by Warner Bros. Television Group.

Nov. 9

Louis C.K. — Comedian

- Accusation: Accused by five women of sexual misconduct
- Response: "These stories are true. At the time, I said to myself that what I did was okay because I never showed a woman my (expletive) without asking first, which is also true. But what I learned later in life, too late, is that when you have power over another person, asking them to look at your (expletive) isn't a question. It's a predicament for

- Aftermath: Planned release of film "I Love You, Daddy" halted. Netflix special canceled. Ties with FX and HBO cut off. Nine months later, the comedian returned to the stage.

» RELATED: Louis C.K. loses FX, Netflix gigs after remorseful acknowledgment of sexual misconduct

Roy Moore — Alabama judge and politician, U.S. previous Senate candidate (R.-Ala.)

- Accusation: Accused of sexually assaulting two women decades ago when they were teenagers; about a half-dozen other women have accused Moore of inappropriate conduct.

- Response: Allegations denied. "This is an effort by Mitch McConnell and his cronies to steal this election from the people of Alabama and they will not stand for it!"

- Aftermath: He rebuffed pressure from national Republican leaders to step aside. The state GOP stood by him. The Republican National Committee withdrew financing. Moore eventually lost the Senate special election campaign to Democratic nominee Doug Jones.

» RELATED: What we know about ex-Atlanta woman accused of fake Roy Moore story

Matthew Weiner — "Mad Men" creator

- Accusation: Accused by former "Mad Men" writer Kater Gordon of sexual harassment. Gordon said Weiner told her she "owed it to him to let him see her naked," and that she was fired from "Mad Men" a year later.

- Response: Allegations denied. Weiner's representative said in a sttement that he "does not remember saying this comment nor does it reflect a comment he would say to any colleague."

- Aftermath: Weiner canceled two appearances following the allegations.

Nov. 8

Jeffrey Tambor — Actor

- Accusation: Two women — an actress on his show "Transparent" and his assistant — allege sexual misconduct.

- Response: He denies the allegation, saying in a statement that he has "never been a predator — ever." Tambor also said his assistant was disgruntled. "I've already made clear my deep regret if any action of mine was ever misinterpreted by anyone as being

- Aftermath: Tambor left the Amazon series "Transparent." The cast and team of "Arrested Development" defended Tambor and affirmed his scenes would remain in the show's fifth season.

» RELATED: Tambor doesn't see how he can return to 'Transparent'

Nov. 7

Ed Westwick — Actor known for "Gossip Girl"

- Accusation: Accused by two women of sexual assault, including actress Kristina Cohen and former actress Aurelie Wynn.

- Response: He denies the allegations. "I have never forced myself in any manner, on any women. I certainly have never committed rape." Westwick said he is cooperating with the authorities to have his name cleared as soon as possible.

- Aftermath: The BBC pulled an Agatha Christie adaptation from its television schedule and halted production on a second sitcom starring the former "Gossip Girl' actor. A Los Angeles investigation found that Westwick would not be prosecuted for alleged offenses as there was not sufficient information to prove the incidents beyond a reasonable doubt.

Nov. 3

David Guillod — Primary Wave Entertainment co-CEO

- Accusation: Three women, including actress Jessica Barth accused Guillod of drugging and sexually assaulting them. Another said he raped her.

- Response: Guillod denied all accusations. "Mr. Guillod is saddened by these false and malicious claims," a publicist for Guillod told TheWrap.

- Aftermath: Guillod took a leave of absence from Primary Wave Entertainment.

Nov. 1

Dustin Hoffman — Actor

- Accusation: Accused by writer Anna Graham Hunter of sexual harassment when she was 17. She was working as an intern on a production set of one of his films. Also accused by a second woman, Wendy Riss Gatsiounis, of misconduct when she was a struggling playwright in her 20s. A total of seven women came forward.

- Response: Hoffman has only responded to Hunter's allegation. "I have the utmost

I am."

- Aftermath: The actor presented an award at the Hollywood Film Awards in Beverly Hills, California, on Nov. 6. There was no acknowledgment of the allegations.

Jeff Hoover — Kentucky House Speaker

- Accusation: Accused of sexual harassment by a GOP caucus staffer and settled the claims in October.

- Response: Hoover denied the harassment allegation but said he sent consensual yet inappropriate text messages. "I engaged in banter that was consensual but make no mistake it was wrong on my part to do that. And for that, I am truly sorry. ... I want to reiterate that at no time, at no time did I engage in unwelcome or unwanted conduct of any kind."

- Aftermath: Settled a sexual harassment claim from the GOP caucus staffer. Stepped down as speaker. Remains in the legislature.

» RELATED: Former Kentucky speaker hospitalized following resignation

Brett Ratner — Filmmaker

- Accusation: Accused by at least six women of sexual harassment, including actresses Natasha Henstridge and Olivia Munn.

- Response: He denies the allegations and is suing his rape accuser for libel. A statement from an attorney of Ratner: "We are confident that his name will be cleared once the current media frenzy dies down and people can objectively evaluate the nature of these claims."

- Aftermath: Playboy shelved projects with Ratner and Ratner stepped away from Warner Bros.-related activities.

Oct. 31

Andy Dick — Comedian

- Accusation: There are at least four accusations of sexual harassment and misconduct against Dick from production members on set of independent feature film "Raising Buchanan," according to Hollywood Reporter. Dick is known for his "outlandish antics" over the years, including exposing himself in public. "My middle name is 'misconduct,'" he joked.

- Response: "I didn't grope anybody. I might have kissed somebody on the cheek to say

- Aftermath: Fired from film.

Michael Oreskes — NPR chief editor

- Accusation: Accused of inappropriate behavior or sexual harassment by at least four women while at the New York Times, NPR and the Associated Press.

- Response: "I am deeply sorry to the people I hurt. My behavior was wrong and inexcusable, and I accept full responsibility," he said in a statement.

- Aftermath: Resigned from NPR.

Oct. 30

Hamilton Fish — New Republic president and publisher

- Accusation: Multiple sexual harassment allegations by female employees.

- Response: "Women have longstanding and profound concerns with respect to their treatment in the workplace. Many men have a lot to learn in this regard. I know I do, and I hope for and encourage that new direction," Fish wrote in an email to magazine owner Win McCormack.

- Aftermath: He resigned from the magazine.

Jeremy Piven — Actor

- Accusation: Accused by three women of sexual misconduct. Former Playboy model and reality star Ariane Bellamar penned a series of tweets describing the harassment.

- Response: He denies all allegations. "Let me begin by saying that the accusations against me are absolutely false and completely fabricated," Piven said in a statement. "I would never force myself on a woman. Period. I have offered to take a polygraph to support my innocence. I keep asking myself, 'How does one prove something didn't happen?'"

- Aftermath: A representative said he's looking at legal options. According to TVLine, CBS ended its drama "Wisdom of the Crowd," in which Piven is the lead actor.

» RELATED: Kevin Spacey apologizes after allegation of decades-old attack, says he is gay

Oct. 29

Kevin Spacey — Actor

- Response: Spacey apologized for "what would have been deeply inappropriate drunken behavior" if Rapp's acconts are indeed accurate. In his controversial statement, Spacey also said after having relationships with both men and women over the years, he's decided to "choose now to live as a gay man."

- Aftermath: Fired from hit Netflix series "House of Cards" and replaced in Ridley Scott's completed film "All the Money in the World." He appeared in "Billionaire Boys Club." Massachusetts prosecutors are investigating one allegation. His former publicist has said he is seeking unspecified treatment.

» RELATED: Kevin Spacey's career going down like a house of...

Oct. 26

Ken Baker — E! News correspondent

- Accusation: Sexual harassment of two women, including unwanted kissing and inappropriate comments.

- Response: Denied allegations. "I am very disturbed by these anonymous allegations, which make my heart ache. I take them very seriously," Baker said in a statement to TheWrap. "I care deeply for people's feelings and sincerely live in a way that treats people with dignity and respect."

- Aftermath: After he was pulled from air, Baker left the network and moved to Chicago, according to Page Six.

Mark Halperin — MSNBC political analyst, co-author of "Game Change"

- Accusation: Accused of harassing about 12 women while at ABC News.

- Response: He has denied some of the allegations. "I am profoundly sorry for the pain and anguish I have caused by my past actions. I apologize sincerely to the women I mistreated." Full statement on Twitter.

- Aftermath: Dismissed from MSNBC and NBC News and book contract terminated. His upcoming book's HBO adaptation was canceled as well.

Oct. 25

Knight Landesman — Artforum publisher

- Accusation: Accused by at least nine women of sexual harassment, including groping and sued by one woman.

hard to correct," he told ArtNet News in an email.

- Aftermath: He has resigned from the magazine.

Oct. 24

Leon Wieseltier — New Republic editor

- Accusation: Accused of sexually harassing numerous women.
- Response: "For my offenses against some of my colleagues in the past I offer a shaken apology and ask for their forgiveness," he wrote in an emailed statement to the New York Times.
- Aftermath: Removed from the masthead of The Atlantic magazine, fired from Emerson Collective.

Oct. 23

Terry Richardson — Fashion photographer

- Accusation: Inappropriate sexual behavior with multiple models at photoshoots for almost two decades.
- Response: Richardson has denied the allegations. "I collaborated with consenting adult women who were fully aware of the nature of the work and, as is typical with any project, everyone signed releases," he said in a previous statement. "I have never used an offer of work or a threat of rebuke to coerce someone into something that they did not want to do."
- Aftermath: Banned from working with Vogue, other Condé Nast publications.

» RELATED: Putin crony sides with Harvey Weinstein, says America is too uptight

Oct. 22

James Toback — Writer-director

- Accusation: Accused by hundreds of women of sexual harassment, including actresses
- Response: He has denied the allegations to the Los Angeles Times and said he had never met the women or, if he did, it "was for five minutes and have no recollection." Toback also repeatedly claimed that for the last 22 years, it had been "biologically impossible" for him to engage in the behavior described by his accusers, the LA Times reported.

former ICM chief Jeff Berg, terminated his relationship with him.

Oct. 21

John Besh — Celebrity chef, chief executive of Besh Restaurant Group

- Accusation: Accused by 25 women of sexual harassment
- Response: "I alone am entirely responsible for my moral failings. This is not the way the head of a company like ours should have acted, let alone a husband and father."
- Aftermath: He has stepped down from the Besh Restaurant Group.

Oct. 19

Lockhart Steele — Editorial director, Vox Media

- Accusation: Accused of sexually harassment of at least one person, including unwanted kissing.
- Response: In a message to its employees, Vox Media's chief executive said Lock admitted to "engaging in conduct that is inconsistent with our core values and will not be tolerated."
- Aftermath: Fired immediately.

Oct. 17

Chris Savino — Nickelodeon producer

- Accusation: Accused of harassing up to 12 women.
- Response: Savino apologized in a Facebook statement that has now been taken down. "I am deeply sorry and I am ashamed. Although it was never my intention, I now understand that the impact of my actions and communications created an unacceptable environment."
- Aftermath: Fired from Nickelodeon. His show "The Loud House" is in its second season and will continue to air and proceed with production.

Oct. 12

Roy Price — Amazon executive

- Accusation: Accused by Isa Hackett, an executive producer of the Amazon series "The Man in the High Castle," of sexual harassment.

- Aftermath: Resigned from Amazon days after being suspended.

Oct. 10

Ben Affleck — Actor

- Accusation: Multiple women have come forward with accounts of harassment from Affleck. Actress Hilarie Burton revived a past sexual assault claim, accusing him of groping her breast during a visit to MTV's "TRL" in 2003. Actress Rose McGowan, one of the many women who've spoken out against Weinstein, also claimed Affleck was well aware of Weinstein's sexual misconduct.

- Response: Affleck apologized to Burton via Twitter and wrote, "I acted inappropriately toward Ms. Burton and I sincerely apologize." Speaking with the Associated Press, Affleck said he's "looking at my own behavior and addressing that and making sure I'm part of the solution."

- Aftermath: Affleck said in an interview with Fox 5 that he's donating future residuals from any Weinstein or Miramax projects to groups benefitting independent film and victims of sexual assault.

» RELATED: Harvey Weinstein scandal: 'No way all these people could have been victims and men didn't know...'

Oct. 5

Harvey Weinstein — Hollywood producer and co-founder of the Weinstein Company

- Accusation: Weinstein is accused of raping three women. and is accused of sexual assault and harassment of dozens of others dating back to the 1980s, including actresses Gwyneth Paltrow, Ashley Judd, Rose McGowan, Lupita, Nyong'o, Angelina Jolie, Lena Headey and Lisa Rose. In November, Weinstein was accused of sex trafficking by aspiring actress Kadian Noble, who is suing him. In an op-ed published Wednesday, Dec. 13 by the New York Times, actress Salma Hayek detailed some of the most vivid accounts yet of alleged abuse and harassment, including his demand for a sex scene with full frontal nudity in "Frida." According to Hayek, Weinstein even threated to kill her.

- Response: The film producer denies charges that he raped one woman and forced another to perform oral sex. In response to Hayek's accusation, Weinstein released a statement to USA Today via spokeswoman Holly Baird and said "all of the sexual allegations as portrayed by Salma are not accurate and others who witnessed the events have a different account of what transpired." In October, Weinstein's spokeswoman Sallie Hofmeister said, "Any allegations of non-consensual sex are unequivocally denied by Mr Weinstein."

AJC

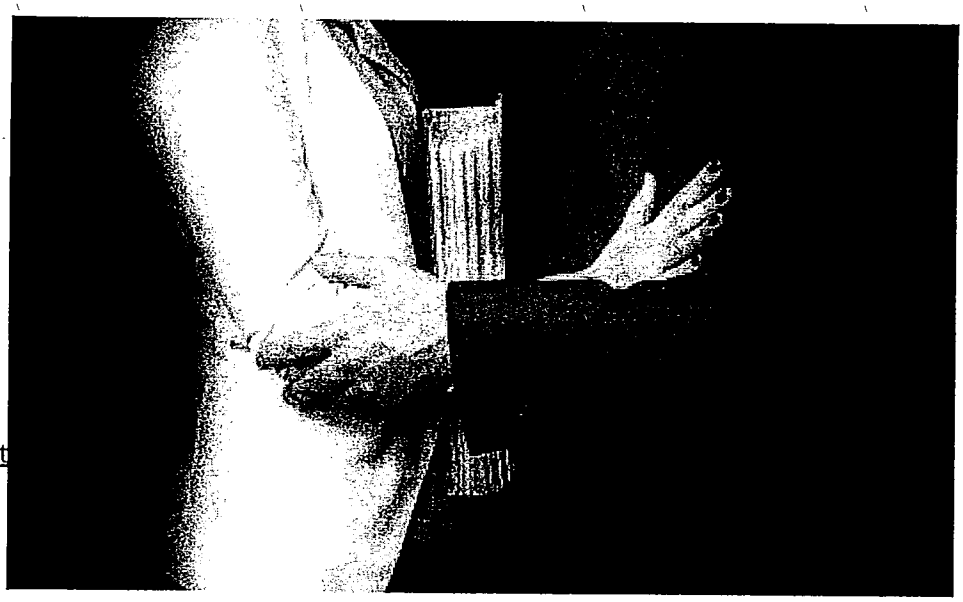
- Aftermath: Harvey Weinstein will face criminal sex act and rape charges in a New York court, a law enforcement official said on Friday, May 25. The film producer will be charged with committing a criminal sex act in a 2004 encounter with an aspiring actress who told a magazine he forced her to perform oral sex. Weinstein will plead not guilty to charges of rape, criminal sex act, sex abuse and sexual misconduct, his attorney, Benjamin Braffman, said. Previously: Fired from the Weinstein Company and expelled from the Academy of Motion Pictures Arts and Sciences. Weinstein hired two defense lawyers after police found actress Paz de la Huerta's case against him credible. Police say he raped her twice in 2010.

» RELATED: What Hollywood's men are saying about Harvey Weinstein amid sexual harassment allegations

The Associated Press contributed to this report.

NY Employers Grapple With New Sexual Harassment Law Now in Effect

By Kristen Rasmussen (/author/profile/Kristen Rasmussen/) | October 10, 2018 at 11:08 AM



Sexual harassment/Credit: andriano.cz/Shutterstock.com

Today marks a big deadline for employers in New York, although not quite as big as some initially feared.

Under New York state's **new sweeping Sexual Harassment Prevention Policy (https://www.law.com/newyorklawjournal/2018/08/16/five-things-employers-must-know-about-nys-new-anti-sexual-harassment-laws/)**, all employers must have adopted and distributed, either via paper or electronic means, a sexual harassment prevention policy by today, the effective date of the law. However, employers have another full year, until Oct. 9, 2019, to implement arguably the most onerous requirement of the new law: sexual harassment training for all employees who work a portion of their time in New York. (An earlier version required the training to occur by year's end.)

"The requirement to actually have a policy and distribute it is new, and a lot of employers really did not have this robust policy that is now required," said Tammy Riddle, a member in the business law and employment practices groups at Hurwitz & Fine.

In addition to mandating the implementation of a sexual harassment policy and training, the law also requires that employers establish training for new hires "as soon as possible" from their start date and perform the training on an annual basis.

(New York City also recently adopted its own regulation, requiring all employers, as of last month, to display in a conspicuous place anti-sexual harassment posters and provide the corresponding information to employees.)

Employers don't have to start from scratch, however. The state provides **model policies (https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionM** and **training programs (https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionM** but Riddle said companies should be careful with those given that the model training guides, for example, include requirements that are not contained in the law.

"Every client is in a different industry, and the model training and policy guides may not be a one-size-fits-all solution," she said. "Employers should take a look at their own policies and modify those to fit their mission and their administration."

But it's not just the models that require more. The law itself mandates items that aren't typically included in employers' training modules, said Allan Bloom, an employment and labor law partner at **Proskauer Rose (https://www.law.com/law-firm-profile/?id=247&name=Proskauer)**. These include, he added, information about the federal and state statutes governing sexual harassment, the remedies available to victims of sexual harassment, the available forums for adjudicating sexual harassment complaints, both administratively and judicially, a procedure for the timely and confidential investigation of complaints and **a complaint form (https://www.ny.gov/sites/ny.gov/files/atoms/files/CombatHarassmentComplaint%20Form.pdf)**.

"Most employers are not necessarily looking to educate their employees on what the law is and what their remedies are," Bloom said.

To Robert Brody, founder and managing member of Brody and Associates, a management-side labor, employment and benefits firm, the new law is just another onerous burden for employers.

These new regulations "are not going to break the bank, but it's just one more reason that it's a pain in the neck to do business in New York state sometimes," he said.

Brody said that because the state's model policy and training program require more than the law itself, many employers, who would rather just adopt what is free rather than pay to have a tailor-made policy drafted, will be engaging in onerous, unnecessary tasks. In addition, training new employees "as soon as possible" could mean training as often as every month if employers opt to train new hires within 30 days of their start date, as an earlier version required, he added.

"All of a sudden you have to train people, everyone in your organization; that's a pretty big nut to crack," Brody said. All the requirements are "just difficult, and I think we want to be smart about not creating such a difficult environment that we start saying, "Other states look a lot better than New York.'"

Riddle predicted that the requirement for sexual harassment prevention training to be "interactive" may present the largest challenge for employers. Although the state has made clear that a live trainer is not required, "it did state that if you're just

playing a video or handing out a document that does not provide for questions to be answered or some sort of back-and-forth, that's not going to qualify as interactive," she said.

Bloom said that many employers will likely start rolling out their training sometime this fall or late this year. But Riddle said some employers will apply the policy-distribution deadline to the training and begin doing so today.

"It's a relief that they've got additional time with the training, but employers shouldn't take a sit-back-and-breathe position with it because being proactive may be very helpful in preventing" alleged incidents of workplace sexual harassment, she said.

Kristen Rasmussen

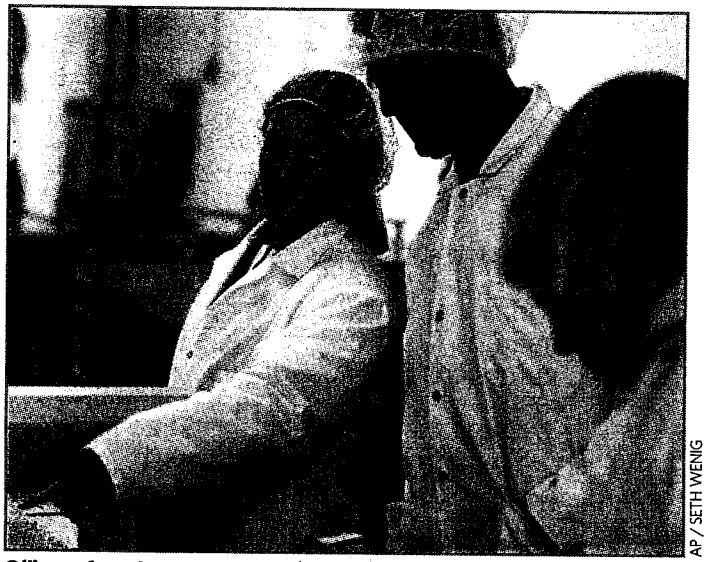
Kristen Rasmussen is an Atlanta-based reporter who covers corporate legal departments and in-house attorneys, Georgia government and health care.

(/author/profile/Kristen Rasmussen/)

How women execs handle gender bias

Subtle or overt, it's still an issue for many in business

The Associated Press



AP / SETH WENIG

Ollie co-founders Gabby Slome and Alex Douzet — often assumed to be married — check their dog food production in Woodbridge, N.J.

It can be subtle, like failing to make eye contact with a woman business owner but engaging in animated conversation with her male co-owner. Or more blatant, like asking an owner seeking investor money if she plans to have children.

Many women business owners say they've encountered gender discrimination from potential investors, customers and employees who don't grasp the reality that a woman can be a CEO, trial attorney or own a technology company. Many women are taken aback at first and don't know how to respond to comments or behavior they find insulting, intrusive and demeaning. But over time, they find strategies.

When Amanda Bradford speaks at technology forums about coding and algorithms, some men tell her afterward of their surprise. They assume because she's a woman, she's the marketer, not the inventor of The League, a dating app.

When she sought funding for her San Francisco company, she says, "I often felt like I didn't get the credit for having the technical experience."

Higher visibility now

Women business owners are not immune from the gender discrimination in the news — even as it's more and more likely a customer or potential investor will find themselves speaking to a woman if they want to see the boss. The number of U.S. women-owned businesses has grown to 10 million from 5.4 million in 1997.

Susan Duffy, executive director of women's entrepreneurial leadership at Babson College, says that even though women owners are more visible and accepted than decades ago, "someone still assumes that if you're the CEO, you're the white guy in the suit."

Potential customers or investors often assume Gabby Slome and Alex Douzet, two of the co-founders of dog food manufacturer Ollie, are married. Outsiders can't seem to get their minds around the fact that Slome, who's married to someone else, could be running a business without her husband, or his bankroll.

"They don't understand that I'm doing this independently of him," says Slome, whose company is based in Manhattan.

Taking an opportunity

Slome has learned to turn an uncomfortable moment into a pitch about Douzet and herself: "I tell them, we met because of shared business interests, and our joint abilities and skill sets make us good business partners.

Duffy says about dealing with gender bias: "Have your antenna up so you know it when you see it and have two or three ready-to-go behaviors in your back pocket to manage it in the moment for the best outcome."

Humor has its place

Noushin Ketabi has noticed that when she and her husband and business partner Rob Terenzi meet with male executives, they speak to him and don't make eye contact with her. They seem to see him as the decision-maker in their California coffee company, Vega. Ketabi responds by speaking knowledgeably and authoritatively — and sometimes with humor to ease awkwardness.

Taking on the issue

Julia Fowler confronted the investor who asked if she planned to have children.

"The question itself was extremely inappropriate and personal that had nothing to do with the company," says Fowler, co-founder of Edited, a retail tech firm in New York, San Francisco and London.

At first Fowler was taken aback. Then, at a second meeting she raised the issue. "I said to the partner who had asked, 'I want to understand why this is important to you.' He didn't have an explanation," Fowler says. Edited got the money.

Showing the bottom line

Michelle Kennedy has found potential investors don't trust that she knows her product and the market for it. She did market research before seeking investor funding for Peanut, an app that helps mothers connect with one another. But even as recently as 2016, potential investors would say, "I don't know. I need to speak to my wife or my secretary, my sister, my daughter who will know better" than she does, Kennedy says. Kennedy encounters less bias lately because she can show revenue and earnings numbers that prove her ability to run a company.

Recently Enacted New York State and New York City Sexual Harassment Laws Impose New Requirements on Private Employers

Loeb & Loeb LLP

USA | September 18 2018

New York State launched a website in August called "Combating Sexual Harassment in the Workplace." The website contains various materials (including a model policy, model training materials, a model complaint form and FAQs) in connection with recently enacted New York State laws designed to further prevent, and protect victims of, sexual harassment. New York City has also recently enacted new laws designed to further prevent, and protect victims of, sexual harassment. The materials on New York State's website were subject to comment through Sept. 12, 2018. A note on the website states that "[t]he comments are being reviewed and necessary revisions being considered, with finalized documents expected to be released in the near future." We will issue a new alert with any material changes to the finalized documents.

The state and city laws, which take effect in 2018 and 2019, affect private employers by, among other things:

- Requiring them to update their sexual harassment policies and implement annual sexual harassment prevention training that meet or exceed the standards set by the new laws.
- Prohibiting nondisclosure provisions regarding the underlying facts and circumstances of sexual harassment claims, except where the provision is the complainant's preference.
- Prohibiting mandatory predispute arbitration provisions for sexual harassment claims.
- Expanding liability for sexual harassment claims to independent contractors and certain other nonemployees.
- Requiring employers to post anti-sexual harassment rights and responsibilities notices in both English and Spanish, and to distribute a similar notice to employees at their time of hire.

As a result of these new laws, employers must implement or update, as the case may be, their sexual harassment policies and sexual harassment prevention training programs; make sure any arbitration provisions and settlement agreements conform to new requirements; and make the required postings and distributions.

Statewide Measures

The 2018-2019 state budget, signed into law by Gov. Andrew Cuomo on April 12, requires New York employers and agencies to take a range of substantive actions to prevent sexual harassment and protect victims of harassment. The new measures include:

Development of a model policy and training program. The New York State Department of Labor (NYSDOL) and the Division of Human Rights (NYSDHR) are charged with developing a model sexual harassment prevention policy and a model sexual harassment prevention training program. All New York state employers — regardless of size — must adopt the model programs or establish their own policies and programs that meet or exceed the models' standards. Such policies must be adopted by Oct. 9, 2018. According to the draft FAQ on the state's website, all employees must receive this training by Jan. 1, 2019, and each calendar year thereafter, and all new employees after Jan. 1, 2019, must receive training within their first 30 days of employment. Below are the specific requirements of this training and policies.

Model policy. The model sexual harassment prevention policy must:

- Prohibit sexual harassment consistent with guidance issued by the NYSDOL and NYSDHR.
- Provide examples of prohibited conduct that would constitute unlawful sexual harassment.
- Provide information on state and federal laws concerning sexual harassment and remedies available to victims, and state that there may be applicable local laws.
- Include a standard complaint form (*see* the state's draft model form).
- Include a procedure for the timely and confidential investigation of complaints that ensures due process for everyone involved.
- Inform employees of their rights of redress and all available forums for handling complaints administratively and judicially.
- State that sexual harassment is considered a form of employee misconduct, and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow this behavior to continue.
- State that retaliation against individuals who complain of sexual harassment or those who testify or assist in any proceeding under the law is unlawful.

New York State has issued a draft model policy, which implements the above requirements of the new law. Notably, although the law does not state what would constitute a timely and confidential investigation of complaints that ensures due process for everyone involved, the draft policy states that an investigation of any complaint "should" be completed within 30 days, and outlines the steps for conducting investigations of sexual harassment, including:

- Conduct an "immediate" review of the allegations.
- Encourage the complaining employee to complete a written complaint form or, if s/he refuses, prepare a complaint form based on the oral reporting.
- Take steps to preserve relevant documents, emails or phone records.
- Request and review all relevant documents, including all electronic communications.
- Interview all parties involved, including any relevant witnesses.
- Create written documentation of the investigation that includes, among other things, (i) a list of all documents reviewed, along with a detailed summary of relevant documents; (ii) a list of names of those interviewed, along with a detailed summary of their statements; (iii) a timeline of events; (iv) a summary of prior relevant incidents, reported or unreported; and (v) the final resolution of the complaint, together with any corrective

actions action(s).

- Inform the complainant of his or her right to file an external complaint or charge.

If the above steps and procedures for an investigation make it into the final model policy, they will, while not necessarily required by law, likely be the standard for what constitutes a timely and confidential investigation of complaints that ensures due process for everyone involved

Model training program. The model sexual harassment prevention training program must:

- Be provided to all employees on an annual basis.
- Be interactive (see the below-described FAQ guidance)
- Include an explanation of sexual harassment consistent with guidance issued by the NYSDOL in consultation with the NYSDHR
- Include examples of unlawful sexual harassment,
- Include information on federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment.
- Include information about employees' rights and all available forums for adjudicating complaints.
- Include information addressing conduct by supervisors and any additional responsibilities for these supervisors

Notably, the law does not specify the length of the required training, or the format (e.g., in person or online).

The draft FAQs explain the requirement that the training be "interactive." "It requires some form of employee participation, meaning the training may:

- Be web-based with questions asked of employees as part of the program;
- Accommodate questions asked by employees;
- Include a live trainer made available during the session to answer questions; and/or
- Require feedback from employees about the training and the materials presented."

The draft FAQs also state that employees who must receive the required training include temporary and transient employees, even "if someone just works for one day for the employer, or works for just one day in NY."

New York State has issued draft training materials. While these materials are for in-person training, the state has indicated that it will make available a PowerPoint and video presentations.

Employers that choose not to use the model policy and training program must provide a sexual harassment prevention policy and training program to all employees that meets or exceeds the model prevention policy and training programs developed by the NYSDOL and NYSDHR

Prohibition of nondisclosure clauses in sexual harassment settlements. Effective July 11, 2018, employers have no authority to include nondisclosure clauses in any settlement agreement or other resolution of a sexual harassment claim that would prevent the disclosure of the underlying facts and circumstances to the claim or action, unless the condition of confidentiality is the complainant's preference. Under newly enacted New York Civil Practice Law and Rules (CPLR) Section 5003-b, any such term or condition must be provided to all parties to the agreement and, similar to settlement agreements under the Age Discrimination in Employment Act (ADEA), the complainant must be provided at least 21 days to consider this term or condition, and the complainant will have seven days following execution of the agreement to revoke his or her acceptance of the agreement.

The draft FAQs state that two agreements would be required to establish a complainant's agreement not to disclose facts underlying a claim of harassment — one agreement (with the 21-day consideration period and seven-day revocation period) memorializing the complainant's preference to maintain the allegations as confidential, and a second agreement containing the nondisclosure language and any other terms of the parties' agreement resolving the dispute. Perhaps, the final FAQs will allow the same document to establish the employee's preference and contain the substantive terms, as requiring two documents seems unnecessary and is contrary to current practice in the analogous ADEA context. Notably, the FAQs state that "the employer initiate the process by suggesting a term or condition of confidentiality [a]s long as the statutory process and timeline summarized above is followed[.]"

Notably, this law does not bar provisions requiring that the settling individual maintain the confidentiality of the terms of the agreement.

Prohibition of mandatory arbitration of sexual harassment claims. Effective July 11, 2018, Section 7515 was added to the New York CPLR. Under CPLR 7515, New York employers with four or more employees are barred from requiring, in any contract entered into after the July 11, 2018 effective date, the mandatory binding arbitration of sexual harassment claims. Section 7515 also declares that, if a contract nevertheless contains such a prohibited provision (presumably including ones entered into prior to July 11, 2018), the provision will be rendered null and void without affecting the enforceability of the remaining provisions of the contract.

Employers may continue to use mandatory predispute arbitration provisions for claims other than those for sexual harassment. Also, because Section 7515 applies only to predispute arbitration provisions, it does not prohibit parties from agreeing to arbitration for sexual harassment claims after a dispute arises. Also, as an exception to the new law, collective bargaining agreements may provide for mandatory predispute arbitration of sexual harassment claims

While the issue has not yet been decided by any court, employers will likely argue that Section 7515 is pre-empted by the Federal Arbitration Act, which establishes Congress' preference for arbitration as a means of dispute resolution and pre-empts any state rule discriminating on its face against arbitration.

Requirement for competitive bidders for certain state or public contracts to confirm they have sexual harassment prevention policies and training in place. Effective Jan. 1, 2019, competitive bidders for state or public contracts must sign a statement confirming that their policies and training meet minimum state standards. Every bid must contain the following statement: "By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid, each party thereto certifies as to its own organization, under penalty of perjury, that the bidder has and has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment prevention training to all its employees. Such policy shall, at minimum, meet the requirements of section two hundred one-g of the labor law."

State departments and agencies may elect to require this confirmation even when the competitive bidding process is not used.

Reimbursement of funds paid by state agencies and entities for sexual harassment claims. Any employee who is subject to a final judgement of personal liability for intentional wrongdoing related to a sexual harassment claim must reimburse any state agency or entity that makes a payment to a plaintiff for an adjudicated award based on a sexual harassment claim for his or her proportionate share of that judgment, notwithstanding any law to the contrary. The employee must personally reimburse the state agency or entity within 90 days of the state agency or entity's payment of the award

Prohibition of sexual harassment of nonemployees. Employers are barred from allowing the sexual harassment of nonemployees in their workplaces. An employer may be held liable to a nonemployee contractor, subcontractor, vendor, consultant or other person providing a contracted service in the workplace for sexual harassment, when the employer or supervisors knew or should have known that the nonemployee was subjected to sexual harassment in the employer's workplace and failed to take immediate appropriate and corrective action. This provision took effect April 12, 2018

Importantly, the extent of the employer's control and any other legal responsibility that the employer may have regarding the harasser's conduct will be considered, though the legislation does not specify how and in what forum the harasser's conduct would be reviewed.

New York City: The Stop Sexual Harassment in NYC Act

New York City Mayor Bill de Blasio signed the Stop Sexual Harassment in NYC Act on May 9, 2018. The act comprises 11 bills targeting sexual harassment in the workplace. The bills that apply to private employers mandate:

Broader scope of coverage. The new legislation expands the city law prohibiting sexual harassment to all employers in New York City (not just those with four or more employees, as was the case previously). The amendment took effect upon enactment of the law on May 9, 2018

Annual sexual harassment prevention training. All city agencies and the offices of the mayor, borough presidents, comptroller and public advocate must conduct annual sexual harassment prevention training for all employees (Bill 612-A). Private employers with 15 or more employees must conduct annual sexual harassment prevention training for all employees (Bill 632-A). Training is required for full- and part-time employees, including interns, who work more than 80 hours in a calendar year, and must be provided 90 days after their initial hiring. However, new employees who have received anti-sexual harassment training at a prior employer within the required training cycle are not required to receive additional training at another employer until the next annual training cycle. The training mandate will take effect on April 1, 2019.

Training must be "interactive," which is defined by the legislation as "participatory teaching whereby the trainee is engaged in a trainer-trainee interaction, use of audio-visuals, computer or online training program or other participatory forms of training as determined by the commission. However, such 'interactive training' is not required to be live or facilitated by an in-person instructor in order to satisfy the provisions of this subdivision."

At the very least, the training must:

- Inform employees that sexual harassment is illegal under federal, state and city discrimination laws.
- Provide examples of sexual harassment.
- Explain the employer's internal complaint process, as well as the process available through the City Commission on Human Rights, the State Division of Human Rights and the Equal Employment Opportunity Commission
- Emphasize the prohibition of retaliation, and give examples of what constitutes retaliation
- Provide information about bystander intervention.
- Outline supervisors' and managers' responsibilities in preventing sexual harassment and retaliation.

In addition, the City Commission on Human Rights will develop an online interactive training module, which may be used to satisfy the training component, as long as employers also inform employees of their internal reporting procedures. The module will be free to the public and must include an electronic provision of certification.

The legislation also provides that an employee needs to receive sexual harassment prevention training only once per required cycle. Although it does not define the length of a "cycle," a cycle is believed to mean a calendar year. Further, multijurisdictional employers may use a single training program for all employees, so long as the training program meets all the requirements of the New York City law

Employers must keep a record of all trainings, including a signed employee acknowledgment, which may be electronic.Employers shall maintain these records for at least three years and make records available for inspection by the Commission upon request.

Prominently posted information. Effective Sept. 6, 2018, all employers in New York City, regardless of the number of their employees, must conspicuously display, in their employee break rooms or other common areas, anti-sexual harassment rights and responsibilities notices in both English and Spanish, and distribute a fact sheet to individual employees at the time of hire, which may be included in an employee handbook

Expanded protections under the New York City Human Rights Law. Amendments to this law apply gender-based discrimination provisions to all employers, regardless of the number of employees (Bill 657-A); give the New York City Commission on Human Rights the power to eliminate and prevent sexual harassment as a form of discrimination (Bill 660-A); and increase the statute of limitations for filing an administrative charge of gender-based harassment from one year to three years from the time that the alleged harassment occurred (Bill 663-A). The statute of limitations for filing a lawsuit for sexual harassment — which was already three years — remains unchanged. These provisions took effect upon the law's enactment on May 9, 2018.

Reporting requirements. Contractors and subcontractors that apply for city contracts must include their employment practices, policies and procedures on addressing sexual harassment in the employment report required of proposed contractors and subcontractors (Bill 693).

What Employers Should Do Now

New York employers should take, at a minimum, the following steps to comply with the new state and city laws:

- Review the state's model anti-sexual harassment policy and, by Oct. 9, 2018, revise, as necessary, their own anti-sexual harassment policies to comply with the new requirements, including, without limitation, coverage to contractors, vendors and other nonemployees
- Review the state's model anti-sexual harassment training programs and, by Jan. 1, 2019, provide training to all New York employees. Thereafter, provide training to all new employees within 90 days after their hiring and, again, to all employees each calendar year. Training for New York City employees should also meet the new city law requirements.
- Review arbitration programs and provisions in form contracts to determine whether changes are required on a going-forward basis with respect to arbitration of sexual harassment claims
- Revise form separation and settlement agreements to comply with the new laws prohibiting confidentiality requirements for facts and circumstances of sexual harassment claims, unless these requirements are the complainant's preference. With respect to any agreements with these confidentiality requirements, provide for the required 21-day review and seven-day revocation periods.
- Train human resources professionals and in-house counsel on the new state and city requirements.
- Display the anti-sexual harassment rights and responsibilities poster designed by the New York City Commission on Human Rights in any New York City office locations, and include the Commission's fact sheet in their employee handbooks (or otherwise distribute the fact sheet to all new employees).

42 Misc.3d 502
Supreme Court, New York County, New York.

Jane DOE, Plaintiff,
v.
The CITY OF NEW YORK, et al., Defendants.

Dec. 2, 2013.

Synopsis
Background: Transgender female who was client of New York City Human Resources Administration's (HRA) HIV/AIDS Services Administration (HASA) sued city, claiming gender and disability discrimination under New York State Human Rights Law and New York City Human Rights Law. City moved to dismiss for failure to state cause of action.

Holdings: The Supreme Court, New York County, Margaret A. Chan, J., held that:

[1] disparate impact claim was sufficiently alleged, and

[2] disparate treatment claim was sufficiently alleged.

Motion denied.

West Headnotes (2)

[1] **Civil Rights**
Public Services, Programs, and Benefits

Transgender female's complaint sufficiently alleged that New York City Human Resources Administration's (HRA) HIV/AIDS Services Administration (HASA) policy of requiring birth certificate identifying person's gender in order to change gender marker on HASA benefits card had disparate impact on transgender community, as required to state claim for discrimination based on sexual orientation, under New York City Human Rights Law; complaint alleged that HASA policy prevented transgender person born in Puerto Rico from obtaining benefits card due to Puerto Rican law that did not permit changes to gender markers on birth certificates, despite legal name change and documentation from physician stating that medical convertive surgery was completed, and that transgender female was subjected to accusations of fraud and denial of benefits because she did not present as man, contrary to marker on benefits card. New York City Administrative Code, § 8–107(17)(a)(1, 2).

1 Cases that cite this headnote

[2] **Civil Rights**
Public Services, Programs, and Benefits

Transgender female's complaint sufficiently alleged that New York City Human Resources Administration's (HRA) HIV/AIDS Services Administration (HASA) subjected her to disparate treatment due to her gender while she attempted to change her gender marker on her HASA benefits card after her convertive surgery, as required to state claim for discrimination based on sexual orientation, under New York State Human Rights Law and New York City Human Rights Law; complaint alleged that HASA employees subjected transgender female to demeaning purposeful use of masculine pronouns in addressing her, even though she presented as female, that employees insisted that she sign document with her birth name despite court-issued name change order, and that employees knew of her convertive surgery yet did not treat her accordingly or appropriately. McKinney's Executive Law § 296; New York City Administrative Code, § 8–107(17)(a)(1, 2).

1 Cases that cite this headnote

Attorneys and Law Firms

**361 Manhattan Legal Services, Inc., New York, Attorneys for Plaintiff.

Daniel Pepitone, of counsel, Michael A. Cardozo, by Andrew J. Rauchberg, New York, for Defendants.

Opinion

MARGARET A. CHAN, J.

***503** Plaintiff is a transgender female who is a client of the New York City Human Resources Administration's (HRA) HIV/AIDS Services Administration (HASA). She was diagnosed with Gender Identity Disorder, and has completed convertive surgery. On August 31, 2011, plaintiff requested that HASA update its records to reflect her legal name change and change of gender information, and to obtain a benefits card to reflect the same. Plaintiff alleged that HASA denied her request to change the gender marker on her benefits card and that HASA employees demeaned her by continuing to address her by her former male name and using male pronouns. Plaintiff brings four causes of action against the defendants. The first two are related to gender and disability discrimination under the New York State Human Rights Law (State HRL) pursuant to Executive Law § 290 *et seq.*, and the third and fourth causes of action cite gender and disability discrimination under the New York City Human Rights Law (City HRL) pursuant to New York Administrative Code § 8–107(4) and (6). The City made the instant motion to dismiss the complaint for failure to state a cause of action. The decision and order is as follows:

The crux of plaintiff's claims is that she was denied access to benefits which included immediate processing of her request to update HASA's records with her legal name and correct gender marker. HASA refused to update its records until plaintiff submitted a request to change name form with an amended birth certificate. When plaintiff requested a written explanation of HASA's actions, she had to sign a release using her birth name, rather than her legally changed name; plaintiff complied, reluctantly. Plaintiff also claimed that HASA employees further demeaned her by continuing to address her by her former male name and using male pronouns. Plaintiff argued that the interaction with ****362** HASA violated her right to privacy because the HASA employees were speaking loudly so that others in the office were privy to plaintiff's request and knowledge of her change of gender.

Defendants respond that plaintiff does not have a claim as HASA never ceased provision of any service or benefits to plaintiff. The only impediment was that it was not able to amend ***504** its records until it processed plaintiff's name change request. Defendants added that at no time was plaintiff discriminated against nor harassed. At oral argument, defendants clarified that if plaintiff was harassed or demeaned by HASA employees, it did not rise to the level of discrimination.

DISCUSSION

In considering a motion to dismiss the court must construe the complaint liberally and accept the pleaded facts as true to determine whether the facts fit into any cognizable legal theory (*see Leon v. Martinez,* 84 N.Y.2d 83, 87–8, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]; *PT Bank Central Asia v. ABN AMRO Bank N.V.,* 301 A.D.2d 373, 375, 754 N.Y.S.2d 245 [1st Dept. 2003]). The court must accept not only the material allegations of the complaint, but also whatever can be reasonably inferred therefrom in favor of the pleader (*see PT Bank Central Asia,* 301 A.D.2d at 375, 754 N.Y.S.2d 245).

As plaintiff's claim arose from her request to change her records and benefits card to reflect her female name and gender, it is important to note the following facts: plaintiff, who was identified male at birth, had a female gender identity since early childhood, and by age twelve, had started taking hormones and testosterone suppressants. Subsequently, she had undergone medical and surgical procedures to transition from male to female. On March 8, 2011, she petitioned and received a court-ordered name change from her birth name to her chosen name. On August 8, 2011, plaintiff requested defendants to change her HASA records and benefits card to reflect her female gender and name. Plaintiff explained that every time she used the benefits card, she was subjected to embarrassment, humiliation, discrimination, accusations, and denial of services because the card indicated the holder to be male while plaintiff presented as female with a female name.

To effectuate the change in the benefits card and record, plaintiff and her patient navigator presented documents such as a court-issued name change order, and a letter from her treating physician stating that she had completed all the procedures to transition from male to female to plaintiff's HASA case manager, Mr. Diawouh. However, Mr. Diawouh stated that he could only submit the request for a name change to the HRA Case Manager, but could not guarantee that the request would be granted. He summarily denied the gender marker change as plaintiff did not have a birth certificate that reflected her gender as female as required by HASA's administrative policy. Plaintiff explained that she could not get an amended

birth certificate to ***505** accommodate HASA's administrative policy because she was born in Puerto Rico where gender markers may not be amended on official documents such as birth certificates. A supervisor, Mr. Carthen, and the Center Manager, Mr. Jean Louis, were called into the case; they also denied the amendment of the gender marker absent a birth certificate with a female gender identification. Eventually, HASA updated plaintiff's records pursuant to her legal name change without the amended birth certificate.

Under these facts, the question is whether plaintiff has stated a cause of action under the State and/or City HRL for unlawful discrimination based on sexual ****363** orientation or disability when she was denied accommodations, including a change to her benefits card, and being subjected to the mistreatment she alleged. Plaintiff argues that benefits include the accommodations, not just the tangible benefits, as defendants would have it. Defendants argue that the benefits card is not a benefit, but a means for clients to obtain tangible benefits such as food, housing, financial assistance, and healthcare.

Both the City HRL and State HRL protect certain groups from policies or practices that discriminate against them in areas such as employment, public accommodations and housing (*see,* Executive Law § 296; Administrative Code of City of N.Y. § 8–107). The City's HRL is more expansive than that of the State's. It was amended in 2005 to broaden its protection against discrimination (*see Albunio v. City of New York,* 16 N.Y.3d 472, 477, 922 N.Y.S.2d 244, 947 N.E.2d 135 [2011]). As amended, Administrative Code § 8–130 reads as follows:

> "The provisions of this title [i.e., the New York City Human Rights Law] shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed."

The Court of Appeals has stated that "[t]he City's Human Rights Law goes the additional step of prohibiting policies or practices which, though neutral on their face and neutral in intent, have an unjustified disparate impact upon one or more of the covered groups." (*Levin v. Yeshiva University,* 96 N.Y.2d 484, 489, 730 N.Y.S.2d 15, 754 N.E.2d 1099 [2001]).

Plaintiff's grievances here are (1) the impracticability of effectuating a change in her benefits card and (2) the treatment ***506** to which she was subjected in the process. Addressing first HASA's administrative policy of requiring a birth certificate identifying a person's gender to change its gender marker. The policy is facially neutral. However, as can be seen through plaintiff's efforts, the policy does not appear to accommodate a certain group. "A claim of discrimination based on sexual orientation can be stated where a facially neutral policy or practice has a disparate impact on a protected group" (Administrative Code § 8–107[17][a][1]–[2]). For the transgender community, while there are procedures on obtaining a change to one's birth certificate after convertive surgery—at least in New York City—it does not hold true everywhere. Plaintiff claims that Puerto Rico does not permit changes to gender markers in official documents such as birth certificates, and cites *Ex Parte Alexis Delgado Hernandez,* 165 D.P.R. 170, 2005 WL 1593435 [2005] to support her claim. Alas, the case is in Spanish without English translation, hence, the support it purports to give to plaintiff is unknown. Nevertheless, support is found in a case, written in English, from California, *Diaz v. Oakland Tribune, Inc.,* 139 Cal.App.3d 118, 123, 188 Cal.Rptr. 762 [1983], where the plaintiff in *Diaz*, after her convertive surgery, successfully changed all her records and official documents to reflect her gender change, except for her Puerto Rican birth certificate. Puerto Rico did not permit changes to gender markers in birth certificates (*id.*).

[1] Under the present HASA policy, a transgender person, such as plaintiff, cannot obtain a change to his/her birth certificate will not be able to obtain a benefits card to indicate a change in his/her gender despite legal name change and documentation from a doctor stating that the medical convertive surgery was complete. While ****364** plaintiff is still eligible for HASA benefits, the unchanged benefits card denies or hampers access to those benefits. As plaintiff had experienced, she was subjected to accusations of fraud, and denial of tangible benefits because she did not present as a man, contrary to the benefits card indication. Therefore, while plaintiff is eligible for HASA benefits, she risks loss of such benefits due to her hampered of access to them. Thus, while HASA's policy appears to be equal across the board, its practical impact for the transgender community is not.

[2] As for the treatment to which plaintiff was subjected, accepting the allegations as true for the purposes of this motion to dismiss, the purposeful use of masculine pronouns in addressing ***507** plaintiff, who presented as female, and the insistence that she sign a document with

her birth name despite the court-issued name change order, is not a light matter, but one which is laden with discriminatory intent. HASA employees knew of her convertive surgery, and yet did not treat her accordingly or appropriately. Their acts are against the tenets of HASA which is to assist its clients with housing, medical and financial needs. It cannot be said that plaintiff felt demeaned for any reason other than abject discriminatory reasons (*see generally, Birney v. New York City Dept. of Health and Mental Hygiene,* 34 Misc.3d 1243 (A), 2012 WL 975082 [Sup. Ct., N.Y. Cty. 2012] discussion of transgender people obtaining gender change marker in birth certificates). Thus, based on the foregoing, plaintiff has sufficiently stated a cause of action. Defendants' motion to dismiss is denied.

This constitutes the decision and order of the court.

All Citations

42 Misc.3d 502, 976 N.Y.S.2d 360, 2013 N.Y. Slip Op. 23403

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KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Perks v. Town of Huntington, E.D.N.Y., March 12, 2003

221 A.D.2d 44
Supreme Court, Appellate Division, Fourth Department, New York.

Matter of FATHER BELLE COMMUNITY CENTER and Board of Directors, Respondents,
v.
NEW YORK STATE DIVISION OF HUMAN RIGHTS ON the COMPLAINT OF Deborah A. KING, Deborah Horvatits and Elizabeth A. Hurd, Petitioners.

April 19, 1996.

Synopsis
State Department of Human Rights brought Article 78 proceeding seeking order of enforcement of its determination that corporate employer was liable for **sexual harassment** of employees based on conduct of employer's executive director and actions of employer's board of directors in its handling of complaints and in its constructive termination or retaliatory discharge of employees. The Supreme Court, Erie County, Doyle, J., transferred proceeding. The Supreme Court, Appellate Division, Denman, P.J., held that: (1) employer could be held directly liable for its executive director's **sexual harassment** of employees; (2) employer could be held liable for board's acts of condonation and retaliatory discharge; and (3) award of $60,000 in compensatory damages to each employee was neither without foundation nor excessive.

Petition for enforcement granted.

West Headnotes (23)

[1] **Civil Rights**
⚖Practices Prohibited or Required in General; Elements

When supervisor **sexually harasses** subordinate because of subordinate's sex, that supervisor discriminates on basis of sex in violation of Human Rights Law. McKinney's Executive Law § 296, subd. 1.

4 Cases that cite this headnote

[2] **Civil Rights**
⚖Quid Pro Quo
Civil Rights
⚖Hostile Environment; Severity, Pervasiveness, and Frequency

Complaint seeking relief for **sexual harassment** may proceed under either quid pro quo or hostile work environment theory.

2 Cases that cite this headnote

[3] **Civil Rights**
⚖Quid Pro Quo

"Quid pro quo **sexual harassment**" occurs when unwelcome **sexual** conduct, whether **sexual** advances, requests for **sexual** favors, or other verbal or physical conduct of **sexual** nature, is used either explicitly or implicitly as basis for employment decisions affecting compensation, terms, conditions, or privileges of complainant's employment.

8 Cases that cite this headnote

[4] **Civil Rights**
⚖Quid Pro Quo

Issue in quid pro quo **sexual harassment** case is whether supervisor has expressly or tacitly linked tangible job benefits to acceptance or rejection of **sexual** advances; quid pro quo claim is made out whether employee rejects advances and suffers consequences or submits to advances in order to avoid consequences.

8 Cases that cite this headnote

[5] **Civil Rights**
⚖Quid Pro Quo

Because focus in quid pro quo **sexual harassment** case is on prohibited conduct, the unwelcome **sexual** overtures, and not victim's reaction to it, there is no requirement that victim suffer actual economic loss.

5 Cases that cite this headnote

[6] **Civil Rights**
⚖Hostile Environment; Severity, Pervasiveness, and Frequency

"Hostile work environment **sexual harassment**" occurs when employer's conduct has purpose or effect of unreasonably interfering with individual's work performance or creating intimidating, hostile or offensive working environment.

3 Cases that cite this headnote

[7] **Civil Rights**
⚖Hostile Environment; Severity, Pervasiveness, and Frequency

Hostile work environment **sexual harassment** exists when workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter conditions of victim's employment.

13 Cases that cite this headnote

[8] **Civil Rights**
⚖Hostile Environment; Severity, Pervasiveness, and Frequency

Unlike quid pro quo **sexual harassment** claim, hostile work environment **sexual harassment** claim may be made out in absence of proof of linkage between offensive conduct in decisions affecting employment.

6 Cases that cite this headnote

[9] **Civil Rights**
⚖Hostile Environment; Severity, Pervasiveness, and Frequency

Hostile work environment **sexual harassment** claim does not require proof of economic loss.

1 Cases that cite this headnote

[10] **Civil Rights**
⚖Hostile Environment; Severity, Pervasiveness, and Frequency

Whether workplace may be viewed as hostile or abusive from both reasonable person's standpoint as well as from victim's subjective perspective, for purposes of claim of hostile work environment **sexual harassment**, can be determined only by considering totality of circumstances.

7 Cases that cite this headnote

[11] **Civil Rights**
⚖Hostile Environment; Severity, Pervasiveness, and Frequency

Generally, isolated remarks or occasional episodes of **harassment** will not support finding of hostile or abusive work environment **sexual harassment**; in order to be actionable, offensive conduct must be pervasive.

10 Cases that cite this headnote

[12] **Civil Rights**
⁘Vicarious Liability; Respondeat Superior
Civil Rights
⁘Employment Practices

Both state and federal cases require, as predicate to imposing liability for quid pro quo and hostile work environment **sexual harassment** upon employer, that there be some basis for imputing employee's conduct to employer; neither imposes liability on employer based solely on employment relationship.

4 Cases that cite this headnote

[13] **Civil Rights**
⁘Employment Practices

In New York, doctrine of respondeat superior, or vicarious liability based on agency relationship, is not available in cases involving discrimination, including sex-based discrimination and its **sexual harassment** component.

9 Cases that cite this headnote

[14] **Civil Rights**
⁘Knowledge or Notice; Preventive or Remedial Measures

Under New York law, in order to recover against employer for quid pro quo or hostile work environment **sexual harassment**, employee must demonstrate that employer acquiesced in discriminatory conduct or subsequently condoned it. McKinney's Executive Law § 296, subd. 1(a).

14 Cases that cite this headnote

[15] **Civil Rights**
⁘Practices Prohibited or Required in General; Elements
Civil Rights
⁘Employment Practices

"Condonation," which may sufficiently implicate employer in discriminatory acts of its employee to constitute basis for employer liability under Human Rights Law, contemplates knowing, after-the-fact forgiveness or acceptance of an offense. McKinney's Executive Law § 290 et seq.

6 Cases that cite this headnote

[16] **Civil Rights**
⁘Practices Prohibited or Required in General; Elements
Civil Rights
⁘Employment Practices

Employer's calculated inaction in response to employee's discriminatory conduct may, as readily as affirmative conduct, indicate "condonation" which may sufficiently implicate employer in discriminatory act of employee to constitute basis for employer liability under Human Rights Law. McKinney's Executive Law § 290 et seq.

15 Cases that cite this headnote

[17] **Civil Rights**
⁘Practices Prohibited or Required in General; Elements
Civil Rights
⁘Employment Practices

Condonation, which may sufficiently implicate employer in discriminatory act of employee to constitute basis for employer liability under Human Rights Law, may be disproved by showing that employer reasonably investigated complaint of discriminatory conduct and took corrective action. McKinney's Executive Law §

290 et seq.

12 Cases that cite this headnote

[18] **Civil Rights**
Knowledge or Notice; Preventive or Remedial Measures

Corporate employer could be held directly liable for its executive director's **sexual harassment** of employees; there was no opportunity to make complaint to upper-level management when executive director was highest ranking supervisor and requiring employees to notify corporate directors would be unfair and impractical. McKinney's Executive Law § 296, subd. 1(a).

4 Cases that cite this headnote

[19] **Civil Rights**
Knowledge or Notice; Preventive or Remedial Measures
Civil Rights
Discharge or Layoff

Corporate employer could be held liable for acts of condonation and retaliatory discharge committed by its board of directors following complaints of **sexual harassment**; although detailed complaints about executive director's conduct were related to board, board undertook no serious investigation or meaningful action on behalf of employees and failed to establish any policy concerning **sexual harassment** or mechanisms to allow employees to pursue **harassment** grievances in confidence, enabling fellow employees to learn about complaints and commit retaliatory acts of **harassment** and intimidation. McKinney's Executive Law § 296, subd. 1(a).

2 Cases that cite this headnote

[20] **Civil Rights**
Evidence
Civil Rights
Hearing, Determination, and Relief; Costs and Fees

State Division of Human Rights (SDHR) may award compensatory damages for mental anguish suffered by employee based on violation of Human Rights Law and such award is not dependent upon psychiatric or other medical evidence; instead, mental injury may be proved by employee's own testimony, corroborated by reference to circumstances of alleged misconduct. McKinney's Executive Law § 290 et seq.

3 Cases that cite this headnote

[21] **Civil Rights**
Judicial Review and Enforcement of Administrative Decisions

Deference should be paid to assessments of State Department of Human Rights (SDHR) in view of important objectives of Human Rights Law, the discretion vested in agency to achieve those objectives, and its four decades of special experience in weighing merit and value of claims. McKinney's Executive Law § 290 et seq.

Cases that cite this headnote

[22] **Civil Rights**
Judicial Review and Enforcement of Administrative Decisions

In reviewing award for mental anguish and humiliation for violation of Human Rights Law, court should determine whether relief was reasonably related to wrongdoing, whether award was supported by evidence before Commissioner of State Division of Human Rights (SDHR), and how it compared with other awards for similar injuries, giving due consideration to evidence concerning

employee's condition, its severity or consequences, and any physical manifestations and any medical treatment. McKinney's Executive Law § 290 et seq.

6 Cases that cite this headnote

[23] **Civil Rights**
Hearing, Determination, and Relief; Costs and Fees

Considering duration, severity, consequences, and physical manifestations of mental anguish, award of $60,000 in compensatory damages to employees who suffered **sexual harassment** was neither without foundation nor excessive. McKinney's Executive Law § 296, subd. 1(a).

1 Cases that cite this headnote

Attorneys and Law Firms

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Lawrence Kunin, General Counsel, State Division of Human Rights by Michael Swirsky, New York City, for respondent—State Division of Human Rights.

Before DENMAN, P.J., and LAWTON, WESLEY, BALIO and DAVIS, JJ.

Opinion

DENMAN, Presiding Justice:

In this CPLR article 78 proceeding, we are asked to consider, among other issues, whether New York's rule against imposing vicarious liability in discrimination cases precludes imposition of liability on a corporate employer for acts of **sexual harassment** perpetrated by its highest managerial employee. We conclude that it does not.

This proceeding arises out of five human rights complaints that culminated in a determination by the Commissioner of the New York State Division of Human Rights (SDHR) finding ***46** the Father Belle Community Center (Center) liable for **sexual harassment** of the three complainants based on the conduct of the Center's Executive Director, Vito Caruso, and based on the actions of the Center's Board of Directors in its handling of the complaints and in its constructive termination or retaliatory discharge of the three complainants. SDHR awarded each of the complainants $60,000 in damages for mental anguish and humiliation, and awarded two of the complainants back pay in the amounts of $504 and $665.60, respectively.

SDHR filed a petition pursuant to Executive Law § 298 seeking an order of enforcement of its determination. SDHR's petition brings up for review the merits of the Commissioner's ****742** determination (*see,* Executive Law § 298; *Matter of State Div. of Human Rights v. Bystricky,* 30 N.Y.2d 322, 326, 333 N.Y.S.2d 398, 284 N.E.2d 560), thus requiring us to decide whether the Center may be held directly liable for its Executive Director's **sexual harassment** of the complainants or for the Board's acts of condonation and retaliatory discharge. We must further decide whether the three awards for mental anguish and humiliation are excessive under the circumstances.

I

The Center is a not-for-profit corporation that provides social, educational, and recreational opportunities at its facilities in Buffalo. It receives nearly all of its funding from Federal, State, and local government, much of it through block grants administered by the City of Buffalo. The Center does not now dispute that Vito Caruso, its Executive Director, subjected the three complainants to constant **sexual harassment** throughout their employment. Deborah King was employed at the Center briefly in 1982 and from December 1984 until she was fired in October 1987. Elizabeth Hurd worked at the Center from July 1983 until she resigned under duress in September 1987. Deborah Horvatits worked at the Center from June 1986 until her termination in October 1987. All three women worked under the direct supervision of Caruso, the Center's highest ranking employee, who

exercised considerable authority in hiring and firing and plenary authority in determining pay, assignments, and other working conditions, subject only to oversight by the Board of Directors. All three women gave testimony, much of it corroborated by one another and by other witnesses, that Caruso subjected them to a similar pattern of inappropriate and demeaning communication, unwelcome **sexual** overtures, unwanted physical contact, *47 and express and implied threats to fire them or make their jobs more difficult or unpleasant if they did not submit to his advances. Caruso repeatedly begged each of the complainants to be his "girlfriend" or "mistress", and to marry or "sleep" with him. Caruso consistently demanded that the women attend nonwork-related lunches and go on boat rides with him during business hours. On such occasions, Caruso typically would become intoxicated and would become more persistent in his romantic pursuits, frequently hugging and kissing the women and making **sexually** suggestive remarks. If the complainants refused his invitations to have lunch or to go on his boat, Caruso would become angry, refuse to approve their work, and threaten to fire or demote them. On several occasions, Caruso asked a complainant to share a hotel room with him on a business trip.

Each of the complainants periodically received verbal and written notices of termination, and complainant Horvatits' pay and benefits were cut. The firings typically were rescinded by Caruso when the complainants acted contrite and promised to "cooperate" with him. Additionally, Caruso left each of the complainants suggestive or threatening notes, including, on one occasion, a copy of Caruso's pistol permit reproduced under the heading, "You Asked For It." With respect to complainant Hurd, Caruso threatened to "kill" her if she were lying when she denied reporting the **harassment**. That threat prompted Hurd to resign her position the next day, September 8, 1987. At about the same time, Caruso's conduct became so intolerable to King and Horvatits that they complained to City officials and the Board of Directors. Complainants first disclosed the **harassment** to Mary Rizzo, a Board member, but initially refrained from taking the matter before the entire Board because it was composed mainly of Caruso's cronies.

Nonetheless, members of the Board of Directors became aware of the allegations of **sexual harassment** no later than September 14, 1987. The personnel committee of the Board met with the complainants between September 14 and 18 and, between then and late October 1987, the personnel committee and the full Board convened several times to discuss the matter. Several of those meetings included Caruso and City officials who oversaw funding of the Center. The initial response of Caruso to the allegations was to assert that he had done nothing wrong because his treatment of the complainants was no different from his treatment of the rest of the staff. On September 15, in the interim, **743 complainant Horvatits received *48 a termination notice. She contacted a City official, who interceded with the Board, which restored Horvatits to her job. Thereafter, King and Horvatits were **harassed** and intimidated by other employees of the Center, including relatives of Caruso. Eventually, retaliatory complaints of poor performance and insubordination were filed against King and Horvatits.

On October 2, 1987, the Board took up the complaints, but soon terminated its investigation and opted to refer the matter to an arbitrator. The Board placed Caruso on paid leave of absence, but allowed him to report daily for work at the Center. Over the next several weeks, King and Horvatits continued to be **harassed** and intimidated by other employees. Moreover, they were repeatedly asked to resign. On October 13, 1987, King and Horvatits filed complaints with SDHR, and Hurd filed her complaint one week later. The next day, complainants attended a meeting at the Center at which they were advised that Caruso would be reinstated to his position. The Chairman of the Board asked King and Horvatits why they did not take a leave of absence or quit if they could not get along with Caruso, and informed them that, if it were up to him, they would be fired. On October 23, 1987, King received a letter threatening immediate termination, and Horvatits received a similar letter on October 26. On October 28, through intervention of City officials, King was transferred from the Center's payroll to the City's payroll, but was still employed at the Center. King was terminated by the Board on October 30, 1987 for insubordination and poor performance. That same day, Horvatits was informed by the Board that she was being terminated in an ouster of all City-affiliated workers. Like King, Horvatits was told that she had an hour to leave the premises. Many of the City-affiliated workers were later rehired by the Center, but Horvatits was not among those rehired. King and Horvatits each filed a second complaint alleging retaliatory discharge.

The complaints against the Center and Board were the subject of SDHR hearings that culminated in an order of the Commissioner dated March 12, 1993. The Commissioner found that Caruso had created a hostile work environment and that his conduct constituted *quid pro quo* **harassment** both on and off the work premises under circumstances in which Caruso was exercising his authority as chief executive officer for the Center, including his authority to supervise, direct, and oversee the employees and to make decisions with respect to

hiring, firing, and conditions of employment. Further, the Commissioner found that the Center was responsible for the actions *49 of Caruso because they had been undertaken within the scope of his authority.

Additionally, the Commissioner found the Center responsible for condonation and retaliation based on the actions or omissions of the Board and supervisory employees in failing to establish policies concerning **sexual harassment** or mechanisms to pursue **sexual harassment** grievances in confidence; failing vigorously to investigate the complaints; pressuring the complainants to resign or take leaves of absence; threatening the complainants with termination; failing to protect the complainants from acts of **harassment** by other employees; failing to reinstate Hurd following her constructive discharge; and ultimately terminating King and Horvatits.

Based on the testimony of the complainants concerning their feelings of stress, powerlessness, fear, anger, nervousness, humiliation, and lack of self worth, together with their testimony concerning the adverse physical effects of such mental distress, the Commissioner awarded $60,000 to each complainant for emotional distress and humiliation. Further, the Commissioner made minimal awards of back pay to Hurd and Horvatits. Thereafter, SDHR filed a petition seeking enforcement of the Commissioner's order.

II

The Center contends that it cannot be held liable for acts of **sexual harassment** committed by its Executive Director without the concurrent knowledge of the Board of Directors because New York law bars imposition of vicarious liability for discrimination. In our view, the Commissioner's order, which does not mention "vicarious liability" or "respondeat **744 superior", permissibly imposes direct liability upon the Center for acts of **harassment** committed by its chief executive officer.

[1] [2] The Human Rights Law (Executive Law § 290 *et seq.*) declares that it "shall be an unlawful discriminatory practice * * * (f)or an employer * * * because of the * * * sex * * * of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment" (Executive Law § 296[1][a]). Through developments in case law, the concept of sex-based discrimination in employment has come to include **sexual harassment** of employees (*see, Matter of Salvatore v. New York State Div. of Human Rights,* 118 A.D.2d 715, 500 N.Y.S.2d 47; *50 *Rudow v. New York City Commn. on Human Rights,* 123 Misc.2d 709, 714–720, 474 N.Y.S.2d 1005, *affd.* 109 A.D.2d 1111, 487 N.Y.S.2d 453, *lv. denied* 66 N.Y.2d 605, 499 N.Y.S.2d 1025, 489 N.E.2d 1302; *see generally, Harris v. Forklift Sys.,* 510 U.S. 17, 22, 114 S.Ct. 367, 371, 126 L.Ed.2d 295; *Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 64–65, 106 S.Ct. 2399, 2404–2405, 91 L.Ed.2d 49; *Karibian v. Columbia Univ.,* 14 F.3d 773, 777, *cert. denied* 512 U.S. 1213, 114 S.Ct. 2693, 129 L.Ed.2d 824). "[W]hen a supervisor **sexually harasses** a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex" (*Meritor Sav. Bank v. Vinson, supra,* at 64, 106 S.Ct. at 2404). A complainant seeking relief for **sexual harassment** may proceed under two theories: 1) *quid pro quo;* and 2) hostile work environment (*see, Meritor Sav. Bank v. Vinson, supra,* at 64–65, 106 S.Ct. at 2404–2405; *Rudow v. New York City Commn. on Human Rights, supra,* at 715–718, 474 N.Y.S.2d 1005).

[3] [4] [5] *Quid pro quo* **harassment** occurs when unwelcome **sexual** conduct—whether **sexual** advances, requests for **sexual** favors, or other verbal or physical conduct of a **sexual** nature—is used, either explicitly or implicitly, as the basis for employment decisions affecting compensation, terms, conditions, or privileges of the complainant's employment (*Thoreson v. Penthouse Intl.,* 149 Misc.2d 150, 156, 563 N.Y.S.2d 968, *mod. on other grounds* 179 A.D.2d 29, 583 N.Y.S.2d 213, *affd.* 80 N.Y.2d 490, 591 N.Y.S.2d 978, 606 N.E.2d 1369, *rearg. denied* 81 N.Y.2d 835, 595 N.Y.S.2d 397, 611 N.E.2d 298). The issue in a *quid pro quo* case is whether the supervisor has expressly or tacitly linked tangible job benefits to the acceptance or rejection of **sexual** advances; a *quid pro quo* claim is made out whether the employee rejects the advances and suffers the consequences or submits to the advances in order to avoid those consequences (*see, Karibian v. Columbia Univ., supra,* at 778). Because the focus is on the prohibited conduct—the unwelcome **sexual** overtures—and not on the victim's reaction to it, there is no requirement that the victim suffer actual economic loss (*see, Karibian v. Columbia Univ., supra,* at 778; *Rudow v. New York City Commn. on Human Rights, supra,* at 718–720, 474 N.Y.S.2d 1005).

[6] [7] [8] [9] [10] [11] Hostile work environment **harassment** occurs when the employer's conduct " 'has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment' " (*Meritor Sav. Bank v.*

Vinson, supra, at 65, 106 S.Ct. at 2404–2405). A hostile work environment exists "[w]hen 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' " (*Harris v. Forklift Sys., supra,* at 21, 114 S.Ct. at 370; *see, Rudow v. New York City Commn. on Human Rights, supra,* at 716–719, 474 N.Y.S.2d 1005). Unlike a *quid pro quo* claim, a hostile work environment claim may be made out in the absence of proof of linkage between the offensive ***51** conduct and decisions affecting employment. As with a *quid pro quo* claim, a hostile work environment claim does not require proof of economic loss. Whether a workplace may be viewed as hostile or abusive—from both a reasonable person's standpoint as well as from the victim's subjective perspective—can be determined only by considering the totality of the circumstances (*Harris v. Forklift Sys., supra,* at 23, 114 S.Ct. at 371; ****745** *Tomka v. Seiler Corp.,* 66 F.3d 1295, 1305). Generally, isolated remarks or occasional episodes of **harassment** will not support a finding of a hostile or abusive work environment; in order to be actionable, the offensive conduct must be pervasive (*Harris v. Forklift Sys., supra,* at 20, 114 S.Ct. at 370; *Meritor Sav. Bank v. Vinson, supra,* at 67, 106 S.Ct. at 2405–2406; *Tomka v. Seiler Corp., supra,* at 1305, n. 5).

Here, the complaints were properly sustained by SDHR on overlapping theories of *quid pro quo* and hostile work environment **harassment**. Caruso subjected the complainants to constant unwanted **sexual** overtures of a verbal and physical nature. He expressly and impliedly promised the complainants various job benefits if they would agree to submit to his advances, and both threatened and inflicted economic injury if they refused. Moreover, that conduct on Caruso's part required the complainants to run a gauntlet of degrading, offensive, intimidating, and ultimately physically threatening conduct that created a hostile work environment and unreasonably interfered with the performance of their jobs.

[12] The issue, however, is not Caruso's liability, but the Center's. Both State and Federal cases require, as a predicate to imposing liability upon the employer, that there be some basis for imputing the employee's conduct to the employer; neither imposes liability on the employer based solely on the employment relationship (*compare, Matter of State Div. of Human Rights [Greene] v. St. Elizabeth's Hosp.,* 66 N.Y.2d 684, 687, 496 N.Y.S.2d 411, 487 N.E.2d 268, *and Matter of State Univ. of N.Y. at Albany v. State Human Rights Appeal Bd.,* 81 A.D.2d 688, 438 N.Y.S.2d 643, *affd.* 55 N.Y.2d 896, 449 N.Y.S.2d 29, 433 N.E.2d 1277, *with Meritor Sav. Bank v. Vinson, supra, and Karibian v. Columbia Univ., supra,* at 779). Beyond that principle, State and Federal law differ markedly, notwithstanding pronouncements from some courts that they are virtually identical (*see, Tomka v. Seiler Corp., supra,* at 1304, n. 4, 1306–1307; *Song v. Ives Labs.,* 957 F.2d 1041, 1048; *see also, Sogg v. American Airlines,* 193 A.D.2d 153, 155, 603 N.Y.S.2d 21, *lv. dismissed* 83 N.Y.2d 846, 612 N.Y.S.2d 106, 634 N.E.2d 602, *lv. denied* 83 N.Y.2d 754, 612 N.Y.S.2d 109, 634 N.E.2d 605, *rearg. denied* 83 N.Y.2d 954, 615 N.Y.S.2d 878, 639 N.E.2d 419 ["standards" of proof held the same under Human Rights Law and Title VII of the Civil Rights Act of 1964, 42 USC § 2000e *et* ***52** *seq.*]). Federal courts have relied on common-law principles of agency to determine whether an employee's **sexual harassment** should form the basis for the imposition of vicarious liability on the employer (*see, Meritor Sav. Bank v. Vinson, supra; Karibian v. Columbia Univ., supra,* at 777, 779). In the Federal cases, the issue is the extent of the **harasser's** authority, not necessarily whether the employer knows of the **harassment** or condones it. That agency analysis may lead to divergent results depending on whether the claim is for *quid pro quo* **harassment** or hostile work environment **harassment**. In the former case, because the **harasser**, by definition, wields the employer's authority to alter the terms and conditions of employment—either actually or apparently—the law imposes strict liability on the employer (*see, Meritor Sav. Bank v. Vinson, supra,* at 70–71, 106 S.Ct. at 2407–2408; *Karibian v. Columbia Univ., supra,* at 777; *Carrero v. New York City Hous. Auth.,* 890 F.2d 569, 579 ["(T)he **harassing** employee acts as and for the company, holding out the employer's benefits as an inducement to the employee for **sexual** favors"]; *Steele v. Offshore Shipbuilding,* 867 F.2d 1311, 1316, *reh. denied sub nom. McCullough v. Offshore Shipbuilding,* 874 F.2d 821 ["When a supervisor requires **sexual** favors as *quid pro quo* for job benefits, the supervisor, by definition, acts as the company"]).

In contrast, employer liability under a hostile work environment **harassment** theory involves a more intricate analysis under Federal law. Whereas liability for *quid pro quo* **harassment** is always imputed to the employer, employers are not automatically liable for a hostile work environment created by their employees (*Meritor Sav. Bank v. Vinson, supra,* at 70–72, 106 S.Ct. at 2407–2408; *Tomka v. Seiler Corp., supra,* at 1305; *Karibian v. Columbia Univ., supra,* at 779). The liability of the employer may hinge on whether the **harasser** is the complainant's supervisor or merely a co-worker. If the **harasser** is a supervisor, the employer will be liable where the supervisor used his actual or apparent ****746** authority to engage in the **harassment** or where the

supervisor otherwise was aided in creating a hostile work environment by the agency relationship (*see, Tomka v. Seiler Corp., supra,* at 1305; *Karibian v. Columbia Univ., supra,* at 780). The complainant need only establish a nexus between the **harasser's** supervisory authority and the acts of **harassment** (*see, Tomka v. Seiler Corp., supra,* at 1306–1307). In contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the **harassment**, or where a co-worker who lacks supervisory authority is the **harasser**, an employer ***53** generally will not be liable unless the employer either provided no reasonable avenue of complaint or, after learning of the **harassment**, did nothing about it (*see, Tomka v. Seiler Corp., supra,* at 1305; *Karibian v. Columbia Univ., supra,* at 780). Under that analysis, there is a continuum of supervisory authority: " '[a]t some point * * * the actions of a supervisor at a sufficiently high level in the hierarchy would necessarily be imputed to the [employer]' " (*Karibian v. Columbia Univ., supra,* at 780, quoting *Kotcher v. Rosa & Sullivan Appliance Ctr.,* 957 F.2d 59, 64).

[13] [14] [15] [16] [17] In New York, the relevant analysis is not based on common-law rules of agency and, indeed, almost wholly disregards those rules. Thus, the doctrine of respondeat superior, or vicarious liability based on the agency relationship, is not available in cases involving discrimination, including sex-based discrimination and its **sexual harassment** component (*see, Spoon v. American Agriculturalist,* 120 A.D.2d 857, 858, 502 N.Y.S.2d 296; *Matter of New York State Dept. of Correctional Servs. v. McCall,* 109 A.D.2d 953, 954, 486 N.Y.S.2d 443; *Hart v. Sullivan,* 84 A.D.2d 865, 866, 445 N.Y.S.2d 40, *affd.* 55 N.Y.2d 1011, 449 N.Y.S.2d 481, 434 N.E.2d 717; *Matter of State Univ. of N.Y. at Albany v. State Human Rights Appeal Bd., supra,* at 689, 438 N.Y.S.2d 643; *Kersul v. Skulls Angels,* 130 Misc.2d 345, 348, 495 N.Y.S.2d 886; *see generally, Matter of State Div. of Human Rights [Greene] v. St. Elizabeth's Hosp., supra,* at 687, 496 N.Y.S.2d 411, 487 N.E.2d 268; *Matter of Totem Taxi v. New York State Human Rights Appeal Bd.,* 65 N.Y.2d 300, 305, 491 N.Y.S.2d 293, 480 N.E.2d 1075, *rearg. denied* 65 N.Y.2d 1054, 494 N.Y.S.2d 1034, 484 N.E.2d 1056). Under New York law, in order to recover against an employer, the complainant must demonstrate that the employer acquiesced in the discriminatory conduct or subsequently condoned it (*see, Matter of State Div. of Human Rights [Greene] v. St. Elizabeth's Hosp., supra,* at 687, 496 N.Y.S.2d 411, 487 N.E.2d 268; *Matter of Totem Taxi v. New York State Human Rights Appeal Bd., supra,* at 305, 491 N.Y.S.2d 293, 480 N.E.2d 1075; *Goering v. NYNEX Information Resources Co.,* 209 A.D.2d 834, 619 N.Y.S.2d 167; *Spoon v. American Agriculturalist, supra,* at 858, 502 N.Y.S.2d 296; *Hart v. Sullivan, supra,* at 866, 445 N.Y.S.2d 40). "Condonation, which may sufficiently implicate an employer in the discriminatory acts of its employee to constitute a basis for employer liability under the Human Rights Law, contemplates a knowing, after-the-fact forgiveness or acceptance of an offense. An employer's calculated inaction in response to discriminatory conduct may, as readily as affirmative conduct, indicate condonation" (*Matter of State Div. of Human Rights [Greene] v. St. Elizabeth's Hosp., supra,* at 687, 496 N.Y.S.2d 411, 487 N.E.2d 268; *see also, Goering v. NYNEX Information Resources Co., supra; Matter of New York State Dept. of Correctional Servs. v. McCall, supra,* at 954, 486 N.Y.S.2d 443). Condonation may be disproved by a showing that the employer reasonably investigated a complaint of discriminatory conduct ***54** and took corrective action (*see, Matter of State Div. of Human Rights [Greene] v. St. Elizabeth's Hosp., supra,* at 687, 496 N.Y.S.2d 411, 487 N.E.2d 268; *Matter of State Univ. of N.Y. at Albany v. State Human Rights Appeal Bd., supra,* at 689, 438 N.Y.S.2d 643; *Matter of New York State Dept. of Correctional Servs. v. McCall, supra,* at 954, 486 N.Y.S.2d 443).

III

[18] We must decide whether New York's rule against vicarious liability in discrimination cases bars recovery against an employer where, as here, the **harasser** is its highest ranking employee. In our view, it does not. We take care to point out that we are not relying on the vicarious liability rule employed in the Federal cases; rather, we ****747** hold that the corporate employer may be held directly liable for acts of discrimination perpetrated by a high-level managerial employee. In reaching our determination, we have considered the purposes of the acquiescence or condonation requirement and the manner in which notice of the **harassment** would be given to the corporate employer in the usual case. Under New York law, where the complainant is **harassed** by a low-level supervisor or a coemployee, the complainant is required to establish only that upper-level supervisors had knowledge of the conduct and ignored it; if so, the **harassment** will be imputed to the corporate employer and will result in imposition of direct liability. However, there is no opportunity to make a complaint to upper-level management where the **harasser** is the highest ranking supervisor. Moreover, requiring the complainant in that instance to notify the corporate directors is unfair and impractical. Corporate directors typically are not present at the workplace and necessarily delegate their

responsibilities to upper-level managerial employees. Thus, it would be unrealistic to require the complainant to "go over the head" of an abusive chief executive. Further, if an upper-level supervisor's knowledge of **harassing** conduct can be imputed to the corporate employer for the purpose of establishing acquiescence or condonation as a basis for imposing direct liability (*see, e.g., Goering v. NYNEX Information Resources Co., supra,* at 834–835, 619 N.Y.S.2d 167; *Spoon v. American Agriculturalist, supra,* at 859, 502 N.Y.S.2d 296; *cf., O'Reilly v. Executone of Albany,* 121 A.D.2d 772, 773, 503 N.Y.S.2d 185), there is no logical reason why the **harassing** conduct of a top manager cannot be imputed to the employer as well (*cf., Kersul v. Skulls Angels, supra,* at 349, 495 N.Y.S.2d 886).

The analogy is not precise, but an instructive comparison can be made to those cases in which a court assesses punitive ***55** damages against a corporate employer for the malicious acts of its employee. Such damages may be assessed where "management has authorized, participated in, consented to or ratified the conduct" (*Loughry v. Lincoln First Bank,* 67 N.Y.2d 369, 378, 502 N.Y.S.2d 965, 494 N.E.2d 70). Participation by a "superior officer" in the course of his employment constitutes participation by the employer itself (*Loughry v. Lincoln First Bank, supra,* at 378–380, 502 N.Y.S.2d 965, 494 N.E.2d 70). "The term 'superior officer' obviously connotes more than an agent, or 'ordinary' officer, or employee vested with some supervisory or decision-making responsibility * * * [Rather, it] contemplate[s] a high level of general managerial authority in relation to the nature and operation of the employer's business" (*Loughry v. Lincoln First Bank, supra,* at 380, 502 N.Y.S.2d 965, 494 N.E.2d 70 [citations omitted]). The level of responsibility of the officer within the entity need only "be sufficiently high that his participation in the wrongdoing renders the employer blameworthy, and arouses the 'institutional conscience' for corrective action" (*Loughry v. Lincoln First Bank, supra,* at 380–381, 502 N.Y.S.2d 965, 494 N.E.2d 70 [citations omitted]). Here, there can be no question that Caruso, the highest ranking executive of the Center, was a "superior officer" within the meaning of *Loughry,* thus rendering the Center liable as a "participant" in the offending conduct.

Although no New York case expressly imposes direct liability on an employer for acts of **harassment** perpetrated by a top manager, the case of *Thoreson v. Penthouse Intl.,* 149 Misc.2d 150, 563 N.Y.S.2d 968, *mod. on other grounds* 179 A.D.2d 29, 583 N.Y.S.2d 213, *affd.* 80 N.Y.2d 490, 591 N.Y.S.2d 978, 606 N.E.2d 1369, *rearg. denied* 81 N.Y.2d 835, 595 N.Y.S.2d 397, 611 N.E.2d 298, *supra* supports the determination that the Center is liable. In *Thoreson,* the complainant alleged **sexual harassment** against her former employer, Penthouse International, Ltd., and its Chairman and principal shareholder, Robert Guccione. The complainant prevailed against both the corporation and the individual, based on the court's finding that "defendant Guccione utilized his employment relationship with plaintiff to coerce her to participate in **sexual** activity" (*Thoreson v. Penthouse Intl.,* 149 Misc.2d 150, 157, 563 N.Y.S.2d 968, *supra*). It is significant that none of the three published decisions in that case mentions acquiescence, condonation, or knowledge on the part of anyone else in the corporate hierarchy besides Guccione ***748** (*see, Thoreson v. Penthouse Intl.,* 149 Misc.2d 150, 563 N.Y.S.2d 968, *mod. on other grounds* 179 A.D.2d 29, 583 N.Y.S.2d 213, *affd.* 80 N.Y.2d 490, 591 N.Y.S.2d 978, 606 N.E.2d 1369, *rearg. denied* 81 N.Y.2d 835, 595 N.Y.S.2d 397, 611 N.E.2d 298, *supra*). In our view, the *Thoreson* case must be read as supporting imposition of strict liability against a corporate employer for its chief executive's discriminatory conduct (*see also, Kersul v. Skulls Angels, supra,* at 349, 495 N.Y.S.2d 886; *cf., Collins v. Willcox, Inc.,* 158 Misc.2d 54, 55–56, 600 N.Y.S.2d 884).

***56** IV

[19] In any event, the Center may be held liable for acts of condonation and retaliatory discharge committed by its Board of Directors. Condonation may be established by knowledge acquired after the fact, combined with insufficient investigation and corrective action (*see, Matter of State Div. of Human Rights [Greene] v. St. Elizabeth's Hosp., supra,* at 687, 496 N.Y.S.2d 411, 487 N.E.2d 268; *Matter of State Univ. of N.Y. at Albany v. State Human Rights Appeal Bd., supra,* at 689, 438 N.Y.S.2d 643; *Matter of New York State Dept. of Correctional Servs. v. McCall, supra,* at 954, 486 N.Y.S.2d 443). Here, although detailed complaints about Caruso's conduct were related to the Board of Directors, the Board as a whole undertook no serious investigation or meaningful action on behalf of the complainants. Instead, it took a series of actions that exacerbated complainants' injuries. The Board had failed to establish any policy concerning **sexual harassment** or mechanisms to allow the complainants to pursue **harassment** grievances in confidence. That enabled fellow employees to learn about the complaints and commit retaliatory acts of **harassment** and intimidation. The Board failed to protect the complainants from those acts, and indeed

allowed other employees to pursue retaliatory complaints of poor performance and insubordination against the complainants. The Chairman of the Board urged the complainants to resign and informed them that, if it were up to him, they would be fired. The Board endorsed a series of termination notices served upon the complainants. Although the Board placed Caruso on leave on October 2, 1987, he was allowed to continue to report to work daily at the Center, was restored to active status on October 20, 1987, and subsequently was fully reinstated to his duties as Executive Director. Moreover, although the Board resolved on October 2, 1987 to pursue an arbitration process, it abandoned that process as soon as complaints were filed with SDHR. Ultimately, the Board terminated King and Horvatits. The Board also failed to remedy the wrong inflicted upon Hurd, whose earlier resignation the Center now concedes was a constructive termination (*see, Matter of Imperial Diner v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 78–79, 436 N.Y.S.2d 231, 417 N.E.2d 525; *Brown v. State of New York*, 125 A.D.2d 750, 751, 509 N.Y.S.2d 169, *lv. dismissed* 70 N.Y.2d 747, 519 N.Y.S.2d 1034, 514 N.E.2d 392). As a consequence of its willful inaction, the Center was properly held liable for condoning Caruso's discriminatory conduct. Similarly, the Commissioner properly held the Center liable for discharging complainants King and Horvatits in retaliation for their having filed complaints with SDHR, in violation of Executive Law § 296(7) (*see, Gleason v. Callanan Indus.*, 203 A.D.2d 750, 610 N.Y.S.2d 671).

***57** V

[20] [21] [22] Substantial evidence supports the award of $60,000 to each complainant for mental anguish and humiliation. It is well established that SDHR may award compensatory damages for mental anguish suffered by a complainant (*Matter of New York City Tr. Auth. v. State Div. of Human Rights [Nash]*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 577 N.E.2d 40; *Matter of Horgan v. New York State Div. of Human Rights [O'Connor]*, 194 A.D.2d 674, 675, 599 N.Y.S.2d 99) and that such award is not dependent upon psychiatric or other medical evidence (*Matter of New York City Tr. Auth. v. State Div. of Human Rights [Nash], supra,* at 216, 573 N.Y.S.2d 49, 577 N.E.2d 40; *Thoreson v. Penthouse Intl.*, 179 A.D.2d 29, 31, 583 N.Y.S.2d 213, *affd.* 80 N.Y.2d 490, 591 N.Y.S.2d 978, 606 N.E.2d 1369, *rearg. denied* 81 N.Y.2d 835, 595 N.Y.S.2d 397, 611 N.E.2d 298, *supra*). Instead, "[m]ental injury may be proved by the complainant's own testimony, ****749** corroborated by reference to the circumstances of the alleged misconduct" (*Matter of New York City Tr. Auth. v. State Div. of Human Rights [Nash], supra,* at 216, 573 N.Y.S.2d 49, 577 N.E.2d 40; *see, Gleason v. Callanan Indus., supra,* at 752, 610 N.Y.S.2d 671). Deference should be paid to the assessments of SDHR in view of the "important objectives of the Human Rights Law, the discretion vested in the agency to achieve those objectives, and its four decades of special experience in weighing the merit and value of such claims" (*Matter of New York City Tr. Auth. v. State Div. of Human Rights [Nash], supra,* at 215–216, 573 N.Y.S.2d 49, 577 N.E.2d 40). "[D]ue to the strong anti-discrimination policy spelled out by the Legislature of this State, an aggrieved individual need not produce the quantum and quality of evidence to prove compensatory damages [under the Executive Law that] he would have to produce under an analogous provision" (*Batavia Lodge No. 196, Loyal Order of Moose v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 316 N.E.2d 318). In reviewing an award for mental anguish and humiliation, the court should "determine whether the relief was reasonably related to the wrongdoing, whether the award was supported by evidence before the Commissioner, and how it compared with other awards for similar injuries" (*Matter of New York City Tr. Auth. v. State Div. of Human Rights [Nash], supra,* at 219, 573 N.Y.S.2d 49, 577 N.E.2d 40). The court should give due consideration to the evidence concerning the "complainant's condition, its severity or consequences, any physical manifestations, and any medical treatment" (*Matter of New York City Tr. Auth. v. State Div. of Human Rights [Nash], supra,* at 218, 573 N.Y.S.2d 49, 577 N.E.2d 40).

[23] On this record, considering the "duration, severity, consequences and physical manifestations of the mental anguish" (*Gleason v. Callanan Indus., supra,* at 752, 610 N.Y.S.2d 671), we conclude that the award of $60,000 in compensatory damages to each of the three complainants was not "without foundation" (*Thoreson v.* ***58** *Penthouse Intl., supra,* at 31, 583 N.Y.S.2d 213). Nor are the awards excessive in comparison to analogous cases (*cf., Gleason v. Callanan Indus., supra,* at 751–752, 610 N.Y.S.2d 671 [$54,000 award for mental anguish for **harassment** and retaliation]; *Thoreson v. Penthouse Intl., supra,* at 31, 583 N.Y.S.2d 213 [$60,000 award for mental anguish]; *SUNY Coll. of Envtl. Science & Forestry v. State Div. of Human Rights,* 144 A.D.2d 962, 963, 534 N.Y.S.2d 270 [$100,000 award for mental anguish]).

Accordingly, the petition for enforcement should be granted.

Petition unanimously granted without costs.

LAWTON, WESLEY, BALIO and DAVIS, JJ., concur.

All Citations

221 A.D.2d 44, 642 N.Y.S.2d 739

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164 A.D.3d 108
Supreme Court, Appellate Division, First Department, New York.

Rachana SURI, Plaintiff-Appellant,
v.
GREY GLOBAL GROUP, INC., et al.,
Defendants-Respondents,

5201
|
Index 100846/11
|
ENTERED: AUGUST 2, 2018

Synopsis

Background: Employee brought action against employer for, inter alia, gender discrimination under the New York City Human Rights Law, alleging that she was discriminated against because she rebuffed her immediate supervisor's sexual advance, and that afterwards her supervisor's behavior toward her turned from affable to malignant and her workplace became a hostile environment. Employer moved for summary judgment, and the Supreme Court, New York County, Donna M. Mills, J., 2016 WL 11455957, granted motion. Employee appealed.

Holdings: The Supreme Court, Appellate Division, Peter H. Moulton, J., held that:

[1] genuine issues of material fact existed as to whether supervisor made sexual overture, whether supervisor created hostile work environment because employee rebuffed that overture, and whether employee was treated less well than other employees because of her gender, precluding summary judgment, and

[2] *Bennett* burden-shifting analysis, 92 A.D.3d 29, did not apply to employee's claim.

Affirmed as modified.

Marcy L. Kahn, J., filed opinion concurring in part and dissenting in part, in which David Friedman, J.P., joined.

West Headnotes (10)

[1] **Civil Rights**
Disparate treatment
Civil Rights
Employment practices

To establish a gender discrimination claim under the New York City Human Rights Law, a plaintiff need only demonstrate by a preponderance of the evidence that she has been treated less well than other employees because of her gender. New York City Administrative Code, § 8-101 et seq.

Cases that cite this headnote

[2] **Civil Rights**
Quid pro quo

"Quid pro quo harassment," for purposes of claims under the New York State and City Human Rights Laws, occurs when unwelcome sexual conduct, whether sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, is used explicitly or implicitly, as the basis for employment decisions affecting compensation, terms, conditions, or privileges of employment. N.Y. Executive Law § 290 et seq.; New York City Administrative Code, § 8-101 et seq.

Cases that cite this headnote

[3] **Civil Rights**
Quid pro quo

In analyzing a claim of quid pro quo harassment under the New York State and City Human Rights Laws, the focus is on whether the supervisor has expressly or tacitly linked tangible job benefits to the acceptance or rejection of sexual advances, and a claim is stated whether the employee rejects the advance and suffers the consequences or submits to the advance. N.Y. Executive Law § 290 et seq.;

New York City Administrative Code, § 8-101 et seq.

Cases that cite this headnote

[4] **Civil Rights**
Sexual Harassment; Work Environment

The New York City Human Rights Law speaks to unequal treatment and does not distinguish between sexual harassment and hostile work environment, and it contains no prohibition on conflating claims; rather the overall context in which the challenged conduct occurs cannot be ignored. New York City Administrative Code, § 8-101 et seq.

Cases that cite this headnote

[5] **Judgment**
Employees, cases involving

Genuine issues of material fact existed as to whether employee's immediate supervisor made sexual overture, whether supervisor created hostile work environment because employee rebuffed that overture, and whether employee was treated less well than other employees because of her gender, precluding summary judgment for employer on employee's gender-discrimination claim under the New York City Human Rights Law. New York City Administrative Code, § 8-107(1)(a).

Cases that cite this headnote

[6] **Civil Rights**
Practices prohibited or required in general; elements
Civil Rights
Quid pro quo

The absence of evidence of a supervisor's direct pressure for sexual favors as a condition of employment does not negate indirect pressure or doom a gender discrimination claim under the New York City Human Rights Law. New York City Administrative Code, § 8-107(1)(a).

Cases that cite this headnote

[7] **Judgment**
Presumptions and burden of proof

It is not the province of the court itself to decide what inferences should be drawn, and if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper.

Cases that cite this headnote

[8] **Civil Rights**
Employment practices

Bennett burden-shifting analysis, 92 A.D.3d 29, did not apply to employee's gender discrimination claim under the New York City Human Rights law, in which employee alleged that her immediate supervisor tacitly sought sexual favors from her and then treated her as a pariah after she rebuffed him. New York City Administrative Code, § 8-107(1)(a).

Cases that cite this headnote

[9] **Civil Rights**
Evidence

The mixed-motive test, which applies to claims under the New York City Human Rights Law, employs the same burden-shifting as the *McDonnell Douglas* test. New York City Administrative Code, § 8-101 et seq.

Cases that cite this headnote

[10] **Civil Rights**
Discrimination in General
Civil Rights
Motive or intent; pretext

The mixed-motive test, which applies to claims under the New York City Human Rights Law, recognizes that it is not uncommon for there to be multiple or mixed motives for discrimination; the City Human Rights Law proscribes such partial discrimination and requires only that a plaintiff prove that discrimination was a motivating factor for an adverse employment action. New York City Administrative Code, § 8-101 et seq.

Cases that cite this headnote

**11 Plaintiffs appeals from the order of the Supreme Court, New York County (Donna M. Mills, J.), entered May 19, 2016, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the claims for employment discrimination, sexual harassment, and hostile work environment under the New York State and City Human Rights Laws.

Attorneys and Law Firms

Michael G. O'Neill, New York, for appellant.

Davis & Gilbert LLP, New York (Jessica Golden Cortes and Nirupama S. Hegde of counsel), for respondents.

David Friedman, J.P., Marcy L. Kahn, Cynthia S. Kern, Jeffrey K. Oing, Peter H. Moulton, JJ.

MOULTON, J.

*110 Plaintiff Rachana Suri brings this appeal after Supreme Court granted defendants' motion for summary judgment and dismissed her complaint in its entirety. Supreme Court correctly dismissed most of Suri's claims. However, it erred in dismissing Suri's claim that she was discriminated against because she rebuffed the sexual advance of Pasquale Cirullo, her immediate supervisor. Suri offers evidence that after this alleged incident Cirullo's behavior toward her turned from affable to malignant, and her workplace became a hostile environment. As discussed below, this evidence is sufficient to create a triable issue of fact concerning her gender discrimination claim under the City Human Rights Law.

We first summarize the claims that Supreme Court correctly found could not survive defendants' motion for summary judgment. We agree that Supreme Court properly dismissed Suri's claims that she was terminated from her employment on account of her gender or ethnicity in violation of the State and City Human Rights Laws. In response to defendants' assertion that Suri's position was eliminated and that she was terminated as part of a corporate reorganization and reduction in force, Suri pointed to no evidence showing that her termination was motivated by discrimination (*see Cadet–Legros v. New York Univ. Hosp. Ctr.*, 135 A.D.3d 196, 200 n. 1, 202, 21 N.Y.S.3d 221 [1st Dept. 2015]; *Bennett v. Health Mgt. Sys., Inc.*, 92 A.D.3d 29, 41, 936 N.Y.S.2d 112 [1st Dept. 2011], *lv denied* **12 18 N.Y.3d 811, 2012 WL 1432090 [2012]). Suri's employer's decision to terminate her was not made by Cirullo, nor was it made in consultation with him. Suri's contention that she was replaced by two white men does not support her claim that her termination was discriminatory. The individuals that she *111 identified performed duties that mostly did not overlap with hers.[1]

Supreme Court correctly rejected Suri's discrimination claim based on an alleged failure to promote her. While Cirullo was hired for a supervisory position to which Suri had also applied, she makes no showing that the decision was gender-based and all the record evidence is to the contrary.

In addition, we agree with Supreme Court that Suri did not point to any evidence that her employer discriminated against her because she was Indian. Cirullo's single, isolated comment that she had "dark" skin under the circumstances alleged was a "stray remark[ ]" that does not support an inference of discrimination (*Hudson,* 138 A.D.3d at 517, 31 N.Y.S.3d 3; *Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 125, 946 N.Y.S.2d 27 [1st Dept. 2012]).

However, while Supreme Court properly dismissed Suri's gender discrimination claim under the State Human Rights Law, Supreme Court erred in dismissing Suri's claim under the more broadly protective City Human Rights Law (*see Hernandez v. Kaisman,* 103 A.D.3d 106, 114, 957 N.Y.S.2d 53 [1st Dept. 2012]). Suri offers evidence that Cirullo used his position to implicitly demand sexual favors, and, when she rebuffed him, to

explicitly make her life miserable for the next 18 months. By this evidence Suri demonstrated that there are triable issues of fact concerning her claim under Administrative Code of City of N.Y. § 8–107(1)(a).

Suri states that she began reporting to Cirullo in October 2008. She asserts that on Cirullo's first day as Senior Vice President, he walked into her office and told her she had beautiful hair. The next day he told her that she had really nice boots. Suri claims that about one week later, when she sat next to Cirullo at a meeting, he put his hand on her thigh, close to her knee, and squeezed lightly for a few seconds. Suri explains that she immediately moved away. She understood Cirullo's behavior as a sexual overture.

After this meeting, Suri claims that Cirullo's behavior towards her changed. According to Suri he dismissed her work; ***112** talked over her; put his hand in her face when she was talking; criticized, belittled and mocked her in front of other employees; cut her out of meetings; withheld resources; and delayed one of her projects. For the last six months of her employment, Cirullo stopped talking to her, even though he sat next to her. She also maintains that because Cirullo mistreated her, other employees followed along believing that it was permissible to disrespect her.

Suri explains that she only complained about the overture to her friends. However, she complained to the Executive Vice President in March 2009 that Cirullo cut her out of meetings. According to Suri, after the Executive Vice President intervened, ****13** Cirullo briefly relented and invited her to a few meetings. However, Cirullo soon resumed cutting her out of meetings and emails. Suri maintains that after she objected, Cirullo gave her the task of setting up the very same meetings to which she was not invited. In May or June 2009, Suri states that she complained to the human resources manager that Cirullo pulled her on and off projects and left her with no resources on one project. According to Suri, the human resources manager responded "that that's how men are and we have to tiptoe around their egos and this is a male-dominated world and we already know we work twice as hard as they do with less pay." As a result of this complaint, Suri explains that the manager requested that Cirullo create a new job description for her. Cirullo did so, but three days after the complaint, he removed her from a project.

Suri claims that as a result of the treatment inflicted by Cirullo and his followers, she developed gastrointestinal problems, lost significant weight, and required mental health counseling.

Cirullo denies complimenting Suri's appearance and squeezing her leg. He also contends that he treated all of his direct reports the same way and that, at worst, the behavior alleged by Suri just paints a portrait of a bad manager. Cirullo also maintains that even if Suri's allegations are true, the incidents amount to nothing more than petty slights or trivial inconveniences. Cirullo also takes issue with Suri's characterization of his hostility towards her, pointing to emails as evidence that they had a cordial relationship. He also maintains that she was too sensitive to her colleagues' tone, and attributed that sensitivity to her family issues.

The City Human Rights Law

The City Human Rights Law is codified in title 8 of the Administrative Code (§ 8–101 *et seq.*). As is relevant to this action, ***113** Administrative Code § 8–107(1)(a) prohibits "[u]nlawful discriminatory practices" and provides that it is unlawful:

> "(a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual orientation, uniformed service or alienage or citizenship status of any person:
>
> "(1) To represent that any employment or position is not available when in fact it is available;
>
> "(2) To refuse to hire or employ or to bar or to discharge from employment such person; or
>
> "(3) To discriminate against such person in compensation or in terms, conditions or privileges of employment" (Administrative Code § 8–107 { 1} [a][1], [2], [3]).

In 2005, the City Council passed the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 [2005] of City of N.Y. § 1), finding that the provisions of the City Human Rights Law had been "construed too narrowly to ensure protection of the civil rights of all persons covered by the law." The Restoration Act revised the City Human Rights Law (Administrative Code § 8–130[a]) to state:

> "The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions worded

> comparably to provisions of this title, have been so construed."

In *Williams v. New York City Hous. Auth.*, in an opinion by Justice Acosta, we found that "the text and legislative history [of the Restoration Act] represent a desire ****14** that the City HRL meld the broadest vision of social justice with the strongest law enforcement deterrent" (61 A.D.3d 62, 68, 872 N.Y.S.2d 27 [1st Dept. 2009] [internal quotation marks omitted], *lv denied* 13 N.Y.3d 702, 2009 WL 2622097 [2009]). The Court of Appeals has also emphasized that all provisions of the City Human Rights Law should be construed "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, 477–478, 922 N.Y.S.2d 244, 947 N.E.2d 135 [2011]).

***114** In *Williams* we also dispensed with the need for much of the nomenclature that has accreted over the years in gender discrimination jurisprudence, such as "sexual harassment" and "quid pro quo," and instead focused on "the existence of differential treatment" in connection with "unwanted gender-based conduct" (*Williams,* 61 A.D.3d at 75, 76, 872 N.Y.S.2d 27). We explained:

> "Despite the popular notion that 'sex discrimination' and 'sexual harassment' are two distinct things, it is, of course, the case that the latter is one species of sex- or gender-based discrimination. There is no 'sexual harassment provision' of the law to interpret; there is only the provision of the law that proscribes imposing different terms, conditions and privileges of employment based, inter alia, on gender" (*id.* at 75, 872 N.Y.S.2d 27).

[1] [2] [3]Thus, to establish a gender discrimination claim under the City Human Rights Law, a plaintiff need only demonstrate "by a preponderance of the evidence that she has been treated less well than other employees because of her gender" (*id.* at 78, 872 N.Y.S.2d 27).[2] We also found that the federal and state law, limiting actionable sexual harassment to "severe or pervasive" conduct, was not appropriate for the broader and more remedial City Human Rights Law (*id.* at 75–81, 872 N.Y.S.2d 27). Instead, we recognized an affirmative defense whereby defendants can avoid liability if the conduct amounted to nothing more than what a reasonable victim of discrimination would consider "petty slights and trivial inconveniences" (*id.* at 80, 872 N.Y.S.2d 27).[3]

In our view, the dissent's approach does not serve the broad remedial purpose of the City Human Rights Law. The dissent ***115** errs in parsing Suri's third cause of action into two claims: hostile work environment and sexual harassment, and then separately analyzing each claim as if they were unrelated. The dissent concludes that Cirullo's and Suri's coworkers' alleged mistreatment of her over an 18–month period far exceeded "petty slights." Nevertheless, ****15** the hostile work environment claim fails, the dissent concludes, because there is no evidence that the mistreatment was sexually motivated. In doing so, the dissent disregards Cirullo's alleged sexual overture (which is analyzed separately) and the temporal proximity between the alleged overture and the alleged 18–month period of mistreatment.

The dissent separately analyzes Cirullo's alleged overture as a sexual harassment claim, rejecting Suri's argument that it should be considered in connection with the 18–month period of mistreatment that followed. The dissent concludes that unlike the behavior over the 18–month period, the two compliments and the thigh squeeze amounted to nothing more than "petty slights." This conclusion is built upon the dissent's finding that Suri did not produce "some evidence" sufficient to raise an issue of fact as to whether Cirullo suggested a sexual relationship. In doing so, however, the dissent discounts Suri's own testimony.

[4]The dissent erroneously rejects Suri's argument that her claim should be viewed holistically, finding that to do so improperly conflates or resurrects Suri's claims. The City Human Rights Law speaks to unequal treatment and does not distinguish between sexual harassment and hostile work environment. It contains no prohibition on conflating claims.[4] Rather the "overall context in which [the challenged conduct occurs] cannot be ignored" (*Hernandez,* 103 A.D.3d at 115, 957 N.Y.S.2d 53).

[5] [6]Viewing the claim holistically, as we must, defendants are not entitled to summary judgment under the City Human Rights Law. The jury must decide whether Cirullo made a sexual overture, and whether Cirullo created a hostile work ***116** environment because Suri rebuffed that overture.[5] ****16** Sexual advances are not always made explicitly. The absence of evidence of a supervisor's direct pressure for sexual favors as a condition of employment does not negate indirect pressure or doom the claim (see *Gallagher v. Delaney,* 139 F.3d 338, 346 [2d Cir.1998] [jury must decide whether the plaintiff experienced a hostile work environment in violation of federal and state law where the plaintiff's supervisor never directly asked her to engage in sexual relations and never specifically conditioned her employment on accepting his gifts, offers, and signs of affection]).

[7]Admittedly, that Cirullo did not expressly demand sex

or engage in sexually charged conversations makes the facts of this case more equivocal than those of some of our precedents. However, "[i]t is not the province of the court itself to decide what inferences should be drawn ...; if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper" (*Vivenzio v. City of Syracuse,* 611 F.3d 98, 106 [2d Cir.2010] [internal quotation marks omitted]).

It is a jury's function to determine what happened between Cirullo and Suri, and whether it amounted to gender discrimination. If it credits plaintiff's account of two "compliments" followed ***117** within approximately one week by her supervisor's palm on her thigh, and her description of how her treatment at the workplace deteriorated in the wake of these incidents, then a jury could find that such behavior did not constitute "petty slights or trivial inconveniences" (*Williams* at 80, 872 N.Y.S.2d 27; *compare Ji Sun Jennifer Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP,* 120 A.D.3d 18, 25, 987 N.Y.S.2d 338 [1st Dept. 2014]).

Thus, in our view, Suri sufficiently raises an issue of fact as to whether she was "treated less well than other employees because of her gender" (*Williams,* 61 A.D.3d at 78, 872 N.Y.S.2d 27) in violation of Administrative Code § 8–107(1)(a).

The Bennett Burden–Shifting Framework

[8]While we agree with the dissent's application of this framework to the wrongful termination and failure to promote aspects of Suri's claim under the City Human Rights Law (*see Bennett,* 92 A.D.3d at 29, 936 N.Y.S.2d 112; *see also Watson v. Emblem Health Servs.,* 158 A.D.3d 179, 69 N.Y.S.3d 595 [1st Dept. 2018]; *Hudson v. Merrill Lynch & Co.,* 138 A.D.3d at 511, 31 N.Y.S.3d 3), burden-shifting analysis does not apply to Suri's claim that Cirullo tacitly sought sexual favors from her, and treated her as a pariah for the next 18 months after she rebuffed him.[6]

The dissent cites to three of our prior decisions in order to buttress the position that the *Bennett* burden-shifting test applies to this claim (*see Arifi v. Central Moving & Stor. Co., Inc.,* 147 A.D.3d 551, 46 N.Y.S.3d 784 [1st Dept. 2017]; *Kim,* 120 A.D.3d at 18, 987 N.Y.S.2d 338; *Chin v. New York City Hous. Auth.,* 106 A.D.3d 443, 965 N.Y.S.2d 42 [1st Dept. 2013], *lv denied* ****17** 22 N.Y.3d 861, 2014 WL 591245 [2014]). The dissent's reliance on these three cases is misplaced.

In both *Arifi* and *Kim,* we did not apply the *Bennett* burden-shifting analysis to the plaintiffs' hostile work environment claims under the City Human Rights Law, although we applied the test to the plaintiffs' termination claims (*Arifi,* 147 A.D.3d at 551, 46 N.Y.S.3d 784; *Kim,* 120 A.D.3d at 26, 987 N.Y.S.2d 338). Our disagreement with the dissent, however, is not with the application of the *Bennett* burden-shifting test to Suri's termination or failure to promote claims. Rather, it is with respect to the application of the *Bennett* test to Suri's claim that she suffered a hostile work environment as the result of rejecting Cirullo's alleged sexual advance.

***118** In *Arifi,* the plaintiff's hostile work environment claim failed because the plaintiff did not demonstrate that age discrimination was one of the motivating factors for the employer's hostile conduct (*Arifi,* 147 A.D.3d at 551, 46 N.Y.S.3d 784). In *Kim,* the plaintiff's hostile work environment claim failed because the conduct at issue amounted to nothing more than "petty slights and trivial inconveniences" (*Kim,* 120 A.D.3d at 26, 987 N.Y.S.2d 338 [internal quotation marks omitted]). Similarly, in *Chin,* the plaintiff's hostile work environment claim failed for reasons unrelated to the *Bennett* burden-shifting test—a test that was not applied to that claim. Although we applied the *Bennett* burden-shifting test in *Chin* to the plaintiff's failure to promote claim, the plaintiff's hostile work environment claim failed because the plaintiff did not demonstrate that she was treated less well than other employees because of her protected status or that discrimination was one of the motivating factors for the defendant's conduct (*Chin,* 106 A.D.3d at 444–445, 965 N.Y.S.2d 42).

[9] [10]In our view, the dissent mistakenly applies the *Bennett* burden-shifting test to Suri's claim that Cirullo tacitly sought sexual favors from her, and mistreated her after she rebuffed him. In *Bennett* we weighed the applicability of the three-step burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) to a summary judgment motion under the City Human Rights Law, where a plaintiff alleged wrongful termination.[7] We concluded that:

> "[o]n a motion for summary judgment, defendant bears the burden of showing that, based on the evidence before the court and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under any of the evidentiary routes: under the *McDonnell Douglas* test, or as one of a number of mixed motives, by direct or circumstantial evidence" (*Bennett,* 92 A.D.3d at 41, 936 N.Y.S.2d 112).[8]

Although we noted that a central purpose of the City Human Rights Law "was to resist efforts to ratchet down or devalue ***119 **18** the means by which those intended to be protected by the City [Human Rights Law] could be most strongly protected" and "[t]hese concerns warrant the strongest possible safeguards against depriving an alleged victim of discrimination of a full and fair hearing before a jury of her peers by means of summary judgment," we nevertheless found that the defendants were properly granted summary judgment (*id.* at 44, 936 N.Y.S.2d 112). We found that the employer justified its "adverse action" of termination because the plaintiff put forth no evidence that the defendants' explanations for terminating him were pretextual, or any evidence of a mixed motive.[9]

Notably, however, *Bennett* did not involve a claim for differential treatment resulting in a hostile environment. Our post-*Williams* cases demonstrate that courts should not automatically apply the *Bennett* burden-shifting framework to every aspect of a plaintiff's City Human Rights Law claim (*see e.g. Kim,* 120 A.D.3d at 18, 987 N.Y.S.2d 338). In *Kim,* we applied the *Bennett* framework to a plaintiff's claim that she was terminated in retaliation for engaging in a protected activity, and we found triable issues of fact as to whether the employer's workforce reduction was a pretext for that termination (*see id.* at 25, 987 N.Y.S.2d 338). However, in *Kim* we did not apply burden-shifting to that aspect of the plaintiff's claim arising out of a hostile workplace (*id.* at 26, 987 N.Y.S.2d 338). Instead, we focused on whether a reasonable person would consider the conduct nothing more than petty slights and trivial inconveniences (*id.* at 26, 987 N.Y.S.2d 338). We found that the claim, arising from one inappropriate gender-based comment and a reprimand for reading a book, should be dismissed because a reasonable person would consider the conduct nothing more than petty slights and trivial inconveniences (*id.*). Similarly, in *Hernandez*, 103 A.D.3d at 106, 957 N.Y.S.2d 53, where the issue of termination was not before us, we did not apply the *Bennett* test in concluding that summary judgment should be denied under the City Human Rights Law based on comments and emails which ***120** objectified women's bodies. Instead, we considered the totality of the circumstances, and, using a reasonable person standard, determined whether the behavior fell within the broad range of conduct between severe and pervasive on the one hand and petty slight or trivial inconvenience on the other (see *Hernandez,* 103 A.D.3d at 114–115, 957 N.Y.S.2d 53 [internal quotation marks omitted]).[10]

In addition to the fact that cases such as *Kim and Hernandez* have not applied the ****19** *Bennett* burden-shifting framework to every aspect of a gender discrimination claim, we find the reasoning in *Mihalik v. Credit Agricole Cheuvreux N.A., Inc.*, 715 F.3d 102 (2d Cir.2013) persuasive. In that case, the Second Circuit analyzed a plaintiff's claim of gender discrimination and retaliation under the City Human Rights Law (*id.* at 107). The plaintiff alleged that she was subjected to suggestive comments and was propositioned for sex. After she refused her CEO's advances, she claimed that the CEO retaliated by excluding her from meetings, berating her in front of other employees, criticizing her work, and ultimately firing her (*id.* at 106–108).

In reversing the District Court's grant of summary judgment to the defendants, the Second Circuit criticized the District Court for considering the plaintiff's gender discrimination claim under a quid pro quo analysis and hostile work environment analysis (*id.* at 114). Under the City Human Rights Law, the Second Circuit observed, differential treatment may be actionable even where the treatment does not result in an employee's discharge. *Williams* made clear that the City Human Rights Law focuses on unequal treatment regardless of whether the conduct is "tangible" like hiring or firing (*id.*). Thus, even assuming that a plaintiff could not prove that she was dismissed for a discriminatory reason, she could still recover for other differential treatment based on her gender (*id.*). Notably, the Second Circuit observed that "[e]ven a poorly-performing employee is entitled to an environment free from sexual harassment" and that poor performance would not excuse alleged sexual advances and demeaning behavior (*id.*).

***121** Therefore, while the Second Circuit applied the *Bennett* burden-shifting test to that part of the claim alleging wrongful termination, it declined to apply the framework to the alleged sexual advances and subsequent demeaning conduct (*id.*). Instead, drawing all reasonable inferences in the plaintiff's favor, the Second Circuit found that it could not conclude, as a matter of law, that there was no causal connection between the rejections of sexual advances and the supervisor's subsequent demeaning conduct.

Similarly, viewing the evidence in a light most favorable to Suri, we cannot conclude as a matter of law that Cirullo did not tacitly condition the terms, conditions or privileges of Suri's employment on submission to his alleged sexual overture and thereafter create a hostile work environment after she rejected him. That behavior would not be petty or trivial. Issues of fact exist for the jury as to whether Suri was treated less well because of her gender, in violation of Administrative Code § 8–107(1)(a).

Accordingly, the order of the Supreme Court, New York County (Donna M. Mills, J.), entered May 19, 2016, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the claims for employment discrimination, sexual harassment, and hostile work environment under the New York State and City Human Rights Laws, should be modified, on the law, to deny the motion as to plaintiff's claim under the City Human Rights Law in connection with her assertion that she rejected her supervisor's sexual overture and as a result he subjected her to a hostile work environment, and otherwise affirmed, without costs.

All concur except Friedman, JP. and Kahn J. who dissent in part in an opinion by Kahn, J.

Opinion

KAHN, J. (dissenting in part)

I would affirm the order of the Supreme Court in all respects. In my view, plaintiff ****20** has failed to proffer evidence sufficient to raise an issue of fact as to whether those actions allegedly taken by defendants that form the basis of plaintiff's claims of hostile work environment and disparate treatment under the New York City Human Rights Law (Administrative Code of City of N.Y. § 8–107[1][a]) (City HRL) were motivated by gender, race or ethnicity discrimination. With regard to plaintiff's conclusory allegations of two incidents of defendant Cirullo's complimenting her on her appearance and one incident of touching, while I believe that the behavior described in these alleged incidents is certainly inappropriate, I also believe that these incidents do not raise any ***122** issue of fact sufficient to defeat defendants' motion for summary judgment as to plaintiff's City HRL sexual harassment claim. Furthermore, I do not agree with the majority that three of plaintiff's retaliation claims (claims four, seven and eight), which she abandoned before the motion court and does not raise before us, also allege separable claims of hostile work environment and disparate treatment and, to that extent, should survive defendants' summary judgment motion. I do agree with the majority, however, that the remainder of plaintiff's claims were properly dismissed. I therefore respectfully dissent in part, as detailed below.

I. *Statement of Facts*

Except where indicated otherwise, the following facts are uncontested. Defendant Grey Global Group, Inc. is a global advertising and marketing agency. Plaintiff Rachana Suri, who identifies herself as a "brown skinned woman of Indian descent," was employed by Grey from June 2004 until her termination on April 27, 2010. Defendant Pasquale Cirullo was employed by Grey beginning in March 2008 and, in September 2008, became plaintiff's supervisor.

Plaintiff began working for Grey in June 2004 as a business analyst in its Financial Services Department at an annual salary of $70,000. She subsequently received several promotions and salary increases. In September 2005, she was promoted to Financial Manager at an annual salary of $85,000. In November 2006, her annual salary increased to $89,000. In January 2007, she was moved into Grey's Information Technology (IT) Department and promoted to Director.

In March 2008, plaintiff was invited to interview and apply for the position of Project Manager of the Donovan Data Systems (DDS) financial data management system which was to be implemented by Grey. Plaintiff was interviewed by John Grudzina, who was then Grey's Executive Vice President, General Counsel and Chief of Staff. He did not offer her the position, however, but instead offered it to Cirullo. According to Grudzina, his reasons for hiring Cirullo were that he was "very knowledgeable about the DDS system," "came very highly recommended" and "was directly involved in the negotiation of the DDS system."

One month later, in April 2008, plaintiff was again promoted, this time to the position of Vice President, which office she held until her termination, and her annual salary again increased, ***123** this time to $105,000. In July 2008, her annual salary was raised to $115,000 and remained at that amount until her termination in April 2010.

On September 1, 2008, Cirullo was promoted to Senior Vice President and Director of Business Systems and thereafter became plaintiff's supervisor. According to plaintiff, on Cirullo's first day as Senior Vice President and as her supervisor, he entered her office and, after a 5–to 10–minute work discussion, Cirullo told plaintiff ****21** that she had beautiful hair. The following day, Cirullo came into her office again and told her that she had nice boots.

According to plaintiff, in November 2008,[1] she and Cirullo attended a meeting with about six representatives of DDS. At the beginning of the meeting, while plaintiff was seated at a conference table with Cirullo seated directly to her right, Cirullo touched plaintiff's thigh, near her knee. He lightly squeezed her thigh for "[m]aybe a second or two." He did not caress her leg or otherwise move his hand on her leg, and he did not look at her or say anything. She immediately moved her chair away from him and made no eye contact with him throughout the two-hour meeting. Plaintiff interpreted Cirullo's touching her as a sexual overture, especially in light of his previous comments about her hair and boots.

Plaintiff has testified that the evening after the touching incident, she spoke about the incident with a friend who did not work at Grey, in the presence of her friend's boyfriend. That friend, in turn, introduced plaintiff to a person who worked in human resources at the United Nations, with whom plaintiff also discussed the incident. She has further stated that she also spoke about the incident with another close friend and confidant who is now deceased. Plaintiff has also stated that she eventually spoke to her parents about what had occurred that day. None of these individuals provided confirmation of such reports on the record before us, however. Plaintiff neither discussed the incident with Cirullo at any time nor reported it to anyone else at Grey. As plaintiff acknowledges, ***124** Cirullo never touched her again, and never made any sexual comments to her. In his own testimony, Cirullo denied that he touched plaintiff at any meeting, and did not recall giving her any compliments about her appearance, although he conceded that he may have done so.

According to plaintiff, over the course of the next 18 months, from November 2008 to April 2010, "Cirullo made my life at Grey miserable" in the following respects. Cirullo had been "very nice and outgoing" before the touching incident, but became distant and less communicative afterward. He also subjected her to a barrage of demeaning and negative treatment. Cirullo dismissed her work and her ideas. He talked over her, scoffed at her comments at meetings, publicly criticized her ideas, excluded her from meetings that she had arranged for him and invaded her privacy by snooping on her computer. Because Cirullo "set the tone" in her department, its other employees, who had previously respected her, felt at liberty to disrespect her. She experienced disrespectful treatment not only from her fellow Vice Presidents at Grey, but also from Grey employees who held a lower-level position than her own. In addition, Cirullo stole many of her ideas and presented them as his own, took her on and off projects at will and threatened to harm her career if she did not comply with his directives. Cirullo eventually removed her from important projects and stopped talking to her altogether.

****22** According to Michael Yarcheski, a colleague of plaintiff's at Grey, however, he had attended "[q]uite a few" meetings with plaintiff and Cirullo and observed that Cirullo was "cordial to her." According to plaintiff, she complained to Mandy Preville Wellington, a former Grey employee who then worked in Grey's human resources department, "maybe ten times" in 2009 about the mistreatment she was receiving from Cirullo at Grey. Plaintiff has stated that she spoke to Wellington as a personal friend and not in her capacity as a Grey human resources employee, and does not believe that any formal report of her complaints was made by Grey's human resources department as a result of her conversations with Wellington. Wellington testified, however, that she does not recall plaintiff ever speaking to her about being mistreated or treated differently by Cirullo or any other Grey employees, however. Moreover, a series of email messages between Cirullo and plaintiff indicates a cordial relationship between the two of them, although plaintiff discounts the email messages as not representative of their relationship.

***125** Cirullo further testified that plaintiff was not the only Grey employee reporting to him that he put on and took off projects, and that he also did this with other employees, male and female, when they had completed one aspect of a given project and when he thought that they would make a valuable contribution to a given aspect of another project. He also stated that he reassigned plaintiff at times when plaintiff's knowledge was redundant of that of other employees who were also working on the same project and that he thought that her time would be better spent on other projects.

According to plaintiff, Doug Livingston, who at the time was head of the special projects group and who worked on a project with plaintiff but was not her supervisor, also belittled her, and talked over and disagreed with her at meetings.

Plaintiff maintains that in March 2009 she complained to Grudzina about Cirullo. Although plaintiff has not specified the nature of her March 2009 complaint, she has testified that, on an unspecified date, she went to Grudzina and told him that Cirullo wasn't inviting her to meetings, to which Grudzina responded that he would talk to Cirullo. According to plaintiff, after she complained to Grudzina, Cirullo invited her to two or three meetings but then excluded her from meetings once again.

In May 2009, plaintiff made a formal complaint to a female manager of Grey's human resources department, who was neither plaintiff's manager nor her supervisor, about being mistreated and disrespected by Cirullo and Livingston. She accused Cirullo of asking her to perform such tasks as sending out electronic meeting notices on his behalf, denying her the resources she needed to do her work and giving her no idea of what was expected of her. According to plaintiff, the human resources department manager's responses to her complaints were that "that's how men are," "this is a male-dominated world" and that women "work twice as hard as [men] do with less pay." Three days after her complaint to the human resources department manager, Cirullo removed her from a work project to which she had been assigned six weeks earlier. She then complained to Grudzina and the human resources department manager about being removed from the project and was told that her removal was Cirullo's decision to make.

Cirullo testified that, to the extent that plaintiff's complaint about lack of resources referred to her assigned task of training Grey's clients to use a computerized ****23** document repository ***126** system, with the exception of one other Grey employee with whom plaintiff was working at the time, she was the sole resource, as she and her coworker were the only ones trained to use the system and the only ones who could train others to use it.

After plaintiff's May 2009 meeting with the human resources department manager, Cirullo met with the same manager, who told him about plaintiff's complaint about not knowing what was expected of her. The manager suggested that Cirullo prepare a job description for plaintiff. Cirullo did so, and met with plaintiff to review the job description with her and to give her an outline of her responsibilities. According to Cirullo, plaintiff raised no objections or questions with regard to designated responsibilities and did not tell Cirullo that she needed any further resources to complete her designated tasks.

According to plaintiff, in October 2009, during a "terrorist alert day," she was pulled off the subway and searched, causing her to be late for a meeting at work. When she arrived at work, Cirullo commented that she should expect to be searched because she was "dark." Cirullo denied making any such comment.

In January 2010, Robert Walsh was hired as Grey's Chief Information Officer while the offices of other subsidiaries of WPP Group PLC, Grey's parent company, were being consolidated with Grey. Walsh was given the responsibility of determining how to consolidate the IT teams of the various WPP companies into one shared service, thereby eliminating overlap and duplication of resources and staff. The Grey IT Department consisted of several teams, including the Business Systems group, of which Cirullo was the Project Director and plaintiff the Project Manager. At the time, 10 to 15 employees worked in the Business Systems group. Pursuant to the consolidation effort, 13 Grey IT Department employees, including plaintiff, were dismissed as the result of reductions in force in February, April and May 2010. All of the terminated IT Department employees other than plaintiff were men, and included Caucasians, Asians and Latinos. Plaintiff was the only woman in the Business Systems group and was the only person in that group who was selected for termination in the course of the reductions in force.

Walsh testified that he decided to terminate plaintiff's employment without consulting Cirullo because he realized that she was working only on a single project and that the ***127** company needed to cut costs. He further testified that he did not know much about the quality of her job performance, but thought that, although she was capable of handling more work, she was not working at full capacity. He further observed that she was not asking to take on more work and did not seem like a "go-getter." Walsh included plaintiff in his list of employees to be terminated in the first round of layoffs in February 2010, but Cirullo urged him to defer her termination until April 2010 to allow her more time to finish her assigned tasks and to attempt to complete the one project on which she was working at the time. On the day of her termination, she was working on one aspect of one project but could not complete it that day. According to Cirullo, plaintiff was not replaced and no one took over her assignment after her dismissal.

After plaintiff's departure, Walsh hired two Caucasian men. According to Walsh, one of those two men, who had worked at a WPP subsidiary other than Grey, had been transferred to Grey by Walsh to perform work comparable to that performed by Cirullo. That man was placed in charge of oversight of Business Systems, a responsibility which plaintiff had not had ****24** while employed at Grey. The other of the two men, who had worked at yet another WPP subsidiary, was transferred to Grey by Walsh in May 2010 to "fix" the DDS system. That man replaced Cirullo as DDS Project Manager after Walsh's termination of Cirullo, which occurred in December 2010.

In January 2011, plaintiff commenced the instant action, alleging employment discrimination based on her gender, race and/or ethnicity in violation of the State and City HRLs, including claims for wrongful termination (claims

nine and ten), failure to promote (claims one and two) and disparate treatment (claims five and six). Plaintiff also advanced a claim of creating a sexually, racially and/or ethnically hostile work environment and sexual harassment in violation of the City HRL (claim three). Defendants subsequently moved successfully for summary judgment dismissing all of plaintiff's claims.

II. *Legal Standards*

A. *City HRL*

The Court of Appeals has instructed that the City HRL must be "construe[d] ... 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, 477–478, 922 N.Y.S.2d 244, 947 N.E.2d 135 [2011]; *see* Administrative Code § 8–130[a] ["The [City HRL] ***128** shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws ... have been so construed"]; Administrative Code § 8–130[c] ["Cases that have correctly understood and analyzed the liberal construction requirement of subdivision a of this section and that have developed legal doctrines accordingly that reflect the broad and remedial purposes of [the City HRL] include [*Albunio*] ..., [*Bennett v. Health Mgt. Sys., Inc.,* 92 A.D.3d 29, 936 N.Y.S.2d 112 (1st Dept. 2011), *lv denied* 18 N.Y.3d 811, 2012 WL 1432090 (2012)] ... and the majority opinion in [*Williams v. New York City Hous. Auth.,* 61 A.D.3d 62, 872 N.Y.S.2d 27 (1st Dept. 2009), *lv denied* 13 N.Y.3d 702, 2009 WL 2622097 (2009)]"]).

In order to succeed on a motion for summary judgment dismissing City HRL employment discrimination claims of wrongful termination, failure to promote and disparate treatment, the moving defendant must establish that the evidence, viewed in the light most favorable to the plaintiff, shows that no reasonable jury could find the defendant liable "under any of the evidentiary routes," including the *McDonnell Douglas* framework (*see McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 [1973]) and the "mixed motive" framework (*see Williams,* 61 A.D.3d at 78 n. 27, 872 N.Y.S.2d 27), "by direct or circumstantial evidence" (*Bennett,* 92 A.D.3d at 41, 936 N.Y.S.2d 112).

With respect to City HRL employment discrimination claims, as our Court has explained:

> "Under the McDonnell Douglas framework, a plaintiff asserting a claim of employment discrimination bears the initial burden of establishing a prima facie case, by showing that she is a member of a protected class, she was qualified to hold the position, and that she suffered adverse employment action under circumstances giving rise to an inference of discrimination. If the plaintiff makes such a showing, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the employment decision. If the employer succeeds in doing so, the burden then shifts back to the plaintiff to prove that ****25** the reason proffered by the employer was merely a pretext for discrimination" (*Hudson v. Merrill Lynch & Co., Inc.,* 138 A.D.3d 511, 514, 31 N.Y.S.3d 3 [1st Dept. 2016], *lv denied* 28 N.Y.3d 902, 2016 WL 4742476 [2016] [internal citations omitted]).

With respect to a claim of violation of the City HRL, we have cautioned:

> ***129** "[The defendant's] explanatory second set of facts... should not be relied on to negate the plaintiff's prima facie case in the first instance, but rather, seen as either: (a) the defendant's articulation through competent evidence of nondiscriminatory reasons for its action (stage two in the *McDonnell Douglas* framework); or (b) part of the defendant's ultimate effort to undercut the weight assigned to the plaintiff's evidence and thus disprove the plaintiff's claim that it was more likely than not that discrimination played a role in defendant's actions" (*Bennett,* 92 A.D.3d at 37, 936 N.Y.S.2d 112).

Under the "mixed motive" framework, the first two stages of the three-stage burden-shifting framework are the same as those of *McDonnell Douglas,* but the plaintiff's burden of proof in the third stage is lessened. In a "mixed motive" analysis, "[t]he question on summary judgment is whether there exist triable issues of fact that discrimination was one of the motivating factors for the defendant's conduct" (*Williams,* 61 A.D.3d at 78 n. 27, 872 N.Y.S.2d 27). Under this framework, "the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the [adverse employment] action was motivated at least in part by discrimination" (*Melman v. Montefiore Med. Ctr.,* 98 A.D.3d 107, 127, 946 N.Y.S.2d 27 [1st Dept. 2012][internal quotation marks omitted]).

Under both the *McDonnell Douglas* and "mixed motive" frameworks, however, on a claim of employment discrimination under the City HRL, once the defendant has proffered nondiscriminatory reasons for the

challenged action, "the plaintiff may not stand silent" (*Bennett,* 92 A.D.3d at 39, 936 N.Y.S.2d 112). Rather, "[t]he plaintiff must either counter the defendant's evidence by producing pretext evidence (or otherwise), or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination" (*id.*). That burden may be satisfied by the plaintiff's offering of "some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete" (*Cadet–Legros v. New York Univ. Hosp. Ctr.,* 135 A.D.3d 196, 200, 21 N.Y.S.3d 221 [1st Dept. 2015] [internal quotation marks omitted]). Only under "rare and unusual" circumstances should the defendant's production of evidence of a nondiscriminatory motive prompt the court to return to the question of whether the plaintiff made ***130** out a prima facie case for discrimination in the first instance (*Bennett,* 92 A.D.3d at 40, 936 N.Y.S.2d 112).

On a claim of sexually hostile work environment in violation of the City HRL, a plaintiff must establish that she was " 'treated less well than other employees because of her gender' " (*Short v. Deutsche Bank Sec., Inc.,* 79 A.D.3d 503, 505–506, 913 N.Y.S.2d 64 [1st Dept. 2010], quoting *Williams,* 61 A.D.3d at 78, 872 N.Y.S.2d 27). Such a claim may be dismissed only if the claim amounts to the "truly insubstantial case" in which the "defendant's behavior cannot be said to fall within the 'broad range of conduct that falls between "severe and pervasive" on the one hand and a "petty slight or trivial inconvenience" on the other' " (****26** *Hernandez v. Kaisman,* 103 A.D.3d 106, 114–115, 957 N.Y.S.2d 53 [1st Dept. 2012], quoting *Williams,* 61 A.D.3d at 80, 872 N.Y.S.2d 27).

Although claims of hostile work environment in violation of the City HRL are to be liberally construed in the plaintiff's favor, the City HRL is not a "general civility code" (*Williams,* 61 A.D.3d at 79, 872 N.Y.S.2d 27 [internal quotation marks omitted]). Accordingly, in order for such a claim to survive a summary judgment motion, the plaintiff must proffer "some evidence" that the defendant's adverse conduct toward the plaintiff had a discriminatory motive (*see Cadet–Legros* at 200, 21 N.Y.S.3d 221; *Bennett* at 45, 936 N.Y.S.2d 112).

Claims of sexual harassment under the City HRL are based upon allegations of "unwelcome sexual conduct—whether sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature" (*Matter of Father Belle Community Ctr. v. New York State Div. of Human Rights,* 221 A.D.2d 44, 50, 642 N.Y.S.2d 739 [4th Dept. 1996], *lv denied* 89 N.Y.2d 809, 655 N.Y.S.2d 889, 678 N.E.2d 502 [1997] [addressing State HRL claims]). The City HRL does not differentiate sexual harassment from other forms of gender discrimination, however. Indeed, as we have explained in *Williams,* the City HRL has no express provision for sexual harassment claims at all (*see Williams* at 75, 872 N.Y.S.2d 27 ["There is no 'sexual harassment provision' of the law to interpret; there is only the provision of the law that proscribes imposing different terms, conditions and privileges of employment based, inter alia, on gender"]). Rather, in City HRL analysis, "sexual harassment" is viewed as "one species of sex- or gender-based discrimination" (*id.*). However, our jurisprudence offers no basis for any departure from the *Father Belle* definition in identifying sexually harassing behavior. In short, sexual harassment under the City HRL involves unwelcome verbal or physical conduct of a sexual nature.

***131** Thus, as we have stated in *Williams,* "the primary issue ... in harassment cases, as in other terms and conditions cases, is whether the plaintiff ... has been treated less well than other employees because of her gender" (*Williams,* 61 A.D.3d at 78, 872 N.Y.S.2d 27). We have further observed that "[a]t the summary judgment stage, judgment should normally be denied to a defendant if there exist triable issues of fact as to whether such conduct occurred" (*id.*). While a plaintiff need not demonstrate that the incidents of an employer's unwelcome sexual conduct were "severe and pervasive" in order to establish an actionable claim of sexual harassment under the City HRL, summary dismissal of a City HRL sexual harassment claim is available to employers in "truly insubstantial cases" where "the alleged discriminatory conduct in question ... could only be reasonably interpreted ... as representing no more than petty slights or trivial inconveniences" (*id.* at 80, 872 N.Y.S.2d 27).

With regard to the circumstances under which a corporate employer may be held vicariously liable for the discriminatory acts of its employees, the "City HRL imposes strict liability on employers for the acts of managers and supervisors ... where ... 'the offending employee exercised managerial or supervisory responsibility' " (*McRedmond v. Sutton Place Rest. & Bar, Inc.,* 95 A.D.3d 671, 673, 945 N.Y.S.2d 35 [1st Dept. 2012], quoting *Zakrzewska v. New School,* 14 N.Y.3d 469, 479, 902 N.Y.S.2d 838, 928 N.E.2d 1035 [2010], quoting Administrative Code § 8–107[13][b][1]).

B. *State HRL*

This Court's summary judgment review of State HRL

employment discrimination **27 claims is limited to *McDonnell Douglas* analysis under binding Court of Appeals precedent (*see Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 819 N.E.2d 998 [2004] [setting forth *McDonnell Douglas* framework only]; *Fletcher v. Dakota, Inc.,* 99 A.D.3d 43, 52 n. 2, 948 N.Y.S.2d 263 [1st Dept. 2012] ["While we rely upon Forrest in addressing plaintiff's State HRL claim (because that case continues to be binding upon us in the context of State HRL claims), we do not rely upon Forrest with respect to plaintiff's City HRL claim"]).

III. *Discussion*

Plaintiff has delineated her claims of gender and race/ethnicity employment discrimination as wrongful termination (claims nine and ten), failure to promote (claims one and two) and disparate treatment (claims five and six) in violation of both the City and State HRLs. In addition, she advances a claim of creation *132 of a sexually, racially and/or ethnically hostile work environment in violation of the City HRL and an apparent claim of sexual harassment in violation of the City HRL (claim three). Hence, I will address plaintiff's claims as so delineated.

At the outset, in order to determine whether plaintiff's claims were properly dismissed, a review of these claims under a combined *McDonnell Douglas* and "mixed motive" evidentiary framework analysis is consistent with our precedent (*see e.g. Hudson,* 138 A.D.3d at 514–517, 31 N.Y.S.3d 3). Beginning with the first stage of the inquiry, here, it is undisputed that plaintiff, who describes herself as a "woman of Indian descent," is a member of a protected class; that she was qualified for the position she held at Grey; that she suffered the adverse employment action of being terminated from her position; and that she alleges that she was denied a promotion, subjected to a hostile work environment, was sexually harassed and received disparate treatment from that accorded to Caucasian male employees, under circumstances that give rise to an inference of gender or racial/ethnic discrimination on defendants' part. Thus, I would find that plaintiff has met her burden of establishing a prima facie case for all of her claims of employment discrimination. I now turn to the next stage of the analysis, which is to ascertain whether defendants have provided any nondiscriminatory explanation for their actions as to each of plaintiff's claims, and if so, whether plaintiff has sufficiently responded with some evidence to counter defendants' explanation.

A. *Wrongful Termination Claims (Claims Nine and Ten)*

1. City HRL

With respect to whether defendants have proffered any nondiscriminatory explanation for plaintiff's termination, Walsh testified that, without consulting Cirullo, he determined that plaintiff should be among the employees terminated in the reduction in force because she was working only on a single project at that time and because Grey needed to cut costs. "There is no question that a reduction in force undertaken for economic reasons is a nondiscriminatory basis for employment terminations" (*Hudson,* 138 A.D.3d at 515, 31 N.Y.S.3d 3). In addition, unsatisfactory work performance is also a nondiscriminatory basis for termination (*id.,* citing *Bennett* at 45–46, 936 N.Y.S.2d 112). Thus, defendants have met their burden of providing nondiscriminatory explanations for plaintiff's termination.

Having determined that defendants have satisfied their burden under the second stage of both evidentiary frameworks, *133 I now turn to the last stage of the inquiry, **28 which is to determine whether, under the *McDonnell Douglas* framework, plaintiff has proven that the reasons proffered by defendants for her termination were merely a pretext for discrimination against her, or whether, under the lesser burden of the "mixed motive" framework, plaintiff has raised an issue as to whether her termination was motivated, at least in part, by discrimination. As our Court has stated, in the face of nondiscriminatory explanations for defendants' actions, "plaintiff may not stand silent" (*Bennett,* 92 A.D.3d at 39, 936 N.Y.S.2d 112).

Here, in support of her argument that Walsh's explanations for her termination were a pretext for defendants' discriminatory motivation, plaintiff asserts that she was replaced by two Caucasian men hired by Walsh after her departure. However, Cirullo has testified that plaintiff was not replaced and that no one took over her assignments. Indeed, on the day that plaintiff was terminated, she was working only on one aspect of a single project. Moreover, the defense offered testimony that one of the men to whom plaintiff refers had been transferred from another WPP subsidiary to perform work comparable to Cirullo's, not plaintiff's, including oversight of Business Systems, a responsibility plaintiff did not have while working at Grey. The other man to

whom plaintiff refers had worked on DDS at another WPP subsidiary and was hired by Walsh in May 2010 to "fix" the DDS system. That man eventually replaced Cirullo, not plaintiff, as DDS Project Manager. Plaintiff has not addressed any of this evidence.

Furthermore, plaintiff has not controverted Walsh's testimony that he did not consult Cirullo in making the decision to terminate plaintiff. There is no evidence that Cirullo's actions in pulling plaintiff off projects or any of the mistreatment plaintiff allegedly suffered at the hands of Cirullo was designed to create a pretext for plaintiff's termination. Collaboration between Cirullo and Walsh for the purpose of creating a pretext for plaintiff's termination is not supported by the record, not only in light of Walsh's uncontroverted testimony that he did not consult Cirullo prior to deciding to terminate plaintiff, but also in view of Cirullo's uncontroverted testimony that, upon learning that Walsh had placed plaintiff on the list of employees to be terminated, he prevailed upon Walsh to keep plaintiff on the job to allow her more time to attempt to finish her assigned tasks. Moreover, Walsh terminated Cirullo just a matter of months after he terminated plaintiff. No evidence has been ***134** presented casting doubt on Walsh's testimony that, at the time he was implementing the reduction in force, as far as he knew, plaintiff was working only on a single project rather than at full capacity. In any event, plaintiff has presented no evidence suggesting that even a single reason given by defendants for her termination is pretextual, i.e., "false, misleading or incomplete" (*Cadet–Legros,* 135 A.D.3d at 200, 21 N.Y.S.3d 221 [internal quotation marks omitted]).

Additionally, plaintiff does not dispute that 12 other people, all men, were terminated from Grey's IT department following consolidation.

Although Grey could be found vicariously liable for any discriminatory actions taken by Walsh and Cirullo with respect to her termination, as both of them exercised managerial or supervisory authority over plaintiff at all relevant times (*see Zakrzewska,* 14 N.Y.3d at 479–480, 902 N.Y.S.2d 838, 928 N.E.2d 1035; *McRedmond,* 95 A.D.3d at 673, 945 N.Y.S.2d 35), plaintiff has failed to rebut the nondiscriminatory reasons given for Walsh's actions and Walsh's assertion that Cirullo was not involved in plaintiff's termination. Accordingly, ****29** I concur with the majority that this claim, brought against Grey on a vicarious liability theory, does not survive defendants' summary judgment motion.

2. State HRL

Because plaintiff's City HRL claim, notwithstanding the more liberal analysis afforded to claims advanced under that law, does not survive defendants' summary judgment motion, a fortiori, its State HRL counterpart also fails on summary judgment review. Accordingly, I concur with the majority that this claim was properly dismissed.

B. *Failure to Promote Claims (Claims One and Two)*

1. City HRL

With regard to whether defendants have proffered any nondiscriminatory explanation for the failure to promote plaintiff, Grudzina has stated that he hired Cirullo because he was very knowledgeable about the DDS system, came highly recommended and was directly involved in the negotiation of that system. Plaintiff has made no showing that any of these nondiscriminatory reasons for hiring Cirullo was pretextual. Moreover, plaintiff has admitted that she has made no factual allegations of discrimination against Grudzina.

Plaintiff claims that Grey's discriminatory motive in failing to promote her is demonstrated by Cirullo's alleged statements ***135** to her about his experience and his own later dismissal by Walsh for poor managerial performance, both of which, she claims, show that he was not as qualified for the position as she was, and by his referral by a Caucasian man at WPP to Grudzina, another Caucasian man. She contends that all of these considerations give rise to an inference of gender, racial and/or ethnic discrimination. Her statement that Cirullo told her that he was not qualified for the position constitutes hearsay, and, in any case, does not establish discrimination on Grey's part, especially since Cirullo was already working in the DDS system at the time. Moreover, in April 2008, one month after plaintiff was passed over for promotion to the DDS manager position, plaintiff herself was promoted to the position of Vice President. Plaintiff's argument that Cirullo's referral by a Caucasian male to another Caucasian male demonstrates a discriminatory motive is speculative and conclusory. Thus, in response to defendants' motion, plaintiff has failed to raise a triable issue of fact as to whether Grey's denying plaintiff a promotion was attributable, in whole or in part, to gender, race and/or ethnic discrimination.

Moreover, plaintiff's argument that the failure to promote her is indicative of discrimination against her on Grey's

part is undermined by the fact that in April 2008, one month after she was passed over for the DDS project manager position, upon her promotion to Vice President, her annual salary was increased to $105,000, followed by an increase to $115,000 in July 2008.

Therefore, plaintiff's claim of failure to promote in violation of the City HRL fails under both the *McDonnell Douglas* and "mixed motive" evidentiary frameworks. Accordingly, I believe that the motion court correctly granted summary dismissal of that claim.

2. State HRL

Because plaintiff's City HRL claim fails to survive the summary judgment motion under a *McDonnell Douglas* framework analysis, a fortiori, its State HRL counterpart also fails to survive the motion under the same evidentiary framework. Therefore, ****30** I concur with the majority that this claim, too, was correctly dismissed.

C. *Hostile Work Environment Claim (Claim Three)*

Plaintiff alleges that defendants created a sexually, racially and/or ethnically hostile work environment in violation of the ***136** City HRL. Specifically, plaintiff asserts that the series of incidents of alleged mistreatment she received from Cirullo and other Grey employees for the 18–month period following the alleged touching incident, i.e., from November 2008 to April 2010, during which Cirullo "made [her] life at Grey miserable," subjected her to a hostile work environment because of her gender, race and/or ethnicity.

1. Sexually hostile work environment

On a claim of creation of a sexually hostile work environment in violation of the City HRL, a plaintiff must establish that she was "treated less well than other employees because of her gender" (*see Williams,* 61 A.D.3d at 78, 872 N.Y.S.2d 27; *see also Short v. Deutsche Bank Sec., Inc.,* 79 A.D.3d at 505–506, 913 N.Y.S.2d 64).

We addressed the subject of sexually hostile work environment in *Hernandez v. Kaisman*, 103 A.D.3d 106, 957 N.Y.S.2d 53 (1st Dept. 2012). In *Hernandez,* the defendant, a physician, sent a series of sexually offensive email messages and repeatedly made sexually offensive comments to his employees. In modifying the motion court's order granting summary dismissal of the plaintiffs' claims to the extent of reinstating their claim of sexual discrimination/sexually hostile work environment under the City HRL, we found that the defendant's comments and email messages objectifying women's bodies, including comments about the size of one of his employee's breasts and the size of another employee's buttocks, and exposing them to sexual ridicule clearly showed that the defendant was creating a sexually hostile work environment (*id.* at 115, 957 N.Y.S.2d 53). Thus, in *Hernandez,* the facts presented demonstrated that that case was not the "truly insubstantial case" in which a defendant's behavior amounts to no more than "petty slights and trivial inconveniences" (*id.* at 115, 957 N.Y.S.2d 53). Significantly for present purposes, the facts also clearly showed that the defendant's conduct was sexually and gender motivated and, as such, supported the plaintiffs' sexually hostile work environment claim. Therefore, in *Hernandez,* denial of the defendant's summary judgment motion was required.

This case presents no such situation, however. To be sure, the recurring mistreatment plaintiff allegedly received from Cirullo and other employees at Grey over the 18–month period in question was disrespectful and demeaning, far exceeding the "petty slights and trivial inconveniences" found in truly insubstantial cases. There is no evidence, however, that in any of the series of incidents of harsh mistreatment of plaintiff that ***137** allegedly occurred during that time, "she was treated less well than other employees *because of her* [*gender*]" (*see Chin v. New York City Hous. Auth.,* 106 A.D.3d 443, 445, 965 N.Y.S.2d 42 [1st Dept. 2013], *lv denied* 22 N.Y.3d 861, 2014 WL 591245 [2014] [emphasis added]; *Short,* 79 A.D.3d at 505–506, 913 N.Y.S.2d 64; *Williams,* 61 A.D.3d at 78, 872 N.Y.S.2d 27), or that defendants' conduct was, even in part, sexually motivated (*see Chin* at 445, 965 N.Y.S.2d 42). In contrast to *Hernandez,* where each of the email messages and comments in question had a sexually offensive component to it that signaled the defendant's intention to foster a sexually demeaning work environment for women, the record in this case is bereft of ****31** any evidence that any of the degrading incidents described by plaintiff signaled a sexual or gender-based motivation on the part of Cirullo or any other Grey employee.

However badly plaintiff was treated, in order for plaintiff's claim of sexually hostile work environment in violation of the City HRL, which is not a "general civility

code" (*Williams,* 61 A.D.3d at 79, 872 N.Y.S.2d 27 [internal quotation marks omitted]), to survive a summary judgment motion, plaintiff must proffer "some evidence" that defendants' adverse conduct was motivated by gender or sexual discrimination (*see Cadet–Legros* at 200, 21 N.Y.S.3d 221; *Bennett* at 45, 936 N.Y.S.2d 112). Here, plaintiff proffers no such evidence.

Furthermore, Cirullo provided nondiscriminatory explanations for his actions, none of which are rebutted by plaintiff. With respect to plaintiff's allegations that Cirullo put her on and took her off projects, Cirullo explained that he also did this with other employees, male and female, when they had completed one aspect of a given project and when he thought that they would make a valuable contribution to a given aspect of another project. He further explained that he would reassign plaintiff because at times plaintiff's knowledge was redundant of that of other employees who were also working on the same project and that he thought that her time would be better spent on other projects. He also stated that he did not provide her with additional resources to aid her in training clients to use the computerized document system because only plaintiff and one other employee working with her were trained in the use of that system and were the only ones who could train others to use it. With regard to plaintiff's complaint that she had to arrange meetings, she has acknowledged that other people, including Cirullo, also set up meetings and invited her to attend them.

***138** Thus, plaintiff has proffered no evidence rebutting Cirullo's nondiscriminatory explanations for the conduct of which she complains.

Notably, the uncontroverted record reveals that none of plaintiff's complaints to Grudzina or the human resources department manager mentioned gender-based or sexually discriminatory conduct, including her March 2009 complaint to Grudzina about Cirullo which apparently concerned Cirullo's failure to invite her to meetings; her May 2009 complaint to the human resources department manager about Cirullo's giving her the task of sending out electronic meeting notices, not giving her the resources she needed to do her job and not giving her any indication of what was expected of her; and her subsequent complaint to both Grudzina and the manager about Cirullo's taking her off a project three days after she made her prior May 2009 complaint to the manager.

Moreover, Cirullo has stated that after plaintiff met with the manager of Grey's human resources department and complained about, among other things, not knowing what was expected of her, Cirullo met with that same manager, who advised him to prepare a job description for plaintiff. He did so and reviewed it with plaintiff, giving her an outline of her responsibilities. According to Cirullo, plaintiff voiced no objections or questions with regard to her designated responsibilities and did not tell Cirullo that she needed any further resources to complete her designated tasks. Plaintiff does not dispute Cirullo's statement.

Furthermore, throughout the 18–month period in question, plaintiff's position as Vice President and her annual salary of $115,000 remained unchanged, and there is no evidence that Cirullo or anyone else at ****32** Grey took any steps to remove her from that position or to decrease her salary. Indeed, it is uncontroverted that when Walsh determined that plaintiff should be terminated in February 2010, Cirullo intervened and successfully persuaded him to postpone her termination to April 2010. Cirullo's intervention to forestall plaintiff's termination is inconsistent with plaintiff's claim that Cirullo actions were motivated by discrimination against her.

Thus, there is insufficient evidence to show that gender discrimination played any part in Cirullo's decisions or actions over the course of the 18–month period in question.

***139** 2. Racially and/or ethnically hostile work environment

With respect to that aspect of plaintiff's claim alleging that defendants created a racially and/or ethnically hostile work environment, the sole evidentiary basis of that claim is plaintiff's statement that Cirullo once referred to her as "dark." That comment could just as reasonably be interpreted as Cirullo's commiserating with plaintiff, however, by commenting on improper racial profiling by the police to explain to plaintiff why she was pulled off the subway, and not reflective of any racial or ethnic bias on his part.

Moreover, plaintiff proffers no evidence of any nexus between Cirullo's remark about her and the course of mistreatment she allegedly endured. At most, Cirullo's comment was a stray remark which does not constitute evidence of discrimination (*see Godbolt v. Verizon, N.Y. Inc.,* 115 A.D.3d 493, 494, 981 N.Y.S.2d 694 [1st Dept. 2014], *lv denied* 24 N.Y.3d 901, 2014 WL 4356693 [2014]; *Melman v. Montefiore Med. Ctr.,* 98 A.D.3d at 125, 946 N.Y.S.2d 27).

Furthermore, Grey cannot be held liable for any discriminatory actions taken against plaintiff during the 18–month period in question by any Grey employees other than Cirullo because, with the exception of Walsh, who played no role in the course of mistreatment plaintiff allegedly endured, no other Grey employee, including Doug Livingston, had any managerial or supervisory authority over plaintiff (*see Zakrzewska,* 14 N.Y.3d at 479–480, 902 N.Y.S.2d 838, 928 N.E.2d 1035; *McRedmond,* 95 A.D.3d at 673, 945 N.Y.S.2d 35).

Therefore, in my view, the motion court properly dismissed plaintiff's claim of creation of a sexually, racially and/or ethnically hostile work environment in violation of the City HRL.

D. *Sexual Harassment Claim (Claim Three)*

To the extent that plaintiff alleges a sexual harassment claim in connection with her hostile work environment claim, the only unwelcome sexual conduct she alleges are the three alleged incidents from the fall of 2008: Cirullo's complimenting her hair on his first day of work as Senior Vice President; his complimenting her on her boots the following day; and his touching of her thigh shortly thereafter, apparently during the November 2008 meeting. As noted, Cirullo has denied the touching incident.

Here, although plaintiff "may not stand silent" (*Bennett,* 92 A.D.3d at 39, 936 N.Y.S.2d 112), she proffers no evidence that the alleged incidents in question, the two compliments and the one touching incident, amount to anything more than "petty slights" (*see* ***140** *Williams,* at 80, 872 N.Y.S.2d 27). Moreover, plaintiff does not support her contention that these incidents amount to an overture by Cirullo that plaintiff have a sexual relationship with him with "some evidence" sufficient to raise a triable issue of fact (*see* ****33** *Cadet–Legros* at 200, 21 N.Y.S.3d 221; *Bennett* at 45, 936 N.Y.S.2d 112). Finally, there is no evidence that any unwelcome sexual conduct was visited upon plaintiff from November 2008 to her departure in April 2010.

Although both plaintiff and the majority urge that we not consider the three incidents in question in isolation, but in connection with the incidents of mistreatment that occurred in the 18–month period that followed, to do so in the context of plaintiff's third claim for relief would improperly conflate her sexual harassment and hostile work environment claims. Further, in advancing this argument, plaintiff is attempting to resurrect her retaliation claims (claims four, seven, eight, eleven and twelve), which, as previously noted, were dismissed by the motion court without opposition from plaintiff, and have not been raised on the present appeal (see discussion in § III.F, *infra*).

Therefore, to the extent that, in claim three, plaintiff alleges a City HRL sexual harassment claim, I believe that the motion court properly dismissed it.

E. *Disparate Treatment Claims (Claims Five and Six)*

I now turn to plaintiff's claims of disparate treatment motivated by gender and racial and/or ethnic discrimination on defendants' part.

1. City HRL (Claim Six)

At the outset, plaintiff proffers no evidence that Caucasian men or any other Grey employees whose race or ethnicity differed from her own and who were similarly situated to her were better treated by defendants than she was.

To the extent that the factual underpinnings of plaintiff's claim of disparate treatment in violation of the City HRL have not already been addressed in our preceding discussion of plaintiff's wrongful termination and hostile work environment claims, applying the *Bennett* burden-shifting analysis, which remains applicable to plaintiff's claims of City HRL discrimination other than wrongful termination and has continuing vitality in our Court's jurisprudence (*see Arifi v. Central Moving & Stor. Co., Inc.,* 147 A.D.3d 551, 551, 46 N.Y.S.3d 784 [1st Dept. 2017] [applying *Bennett* analysis to City HRL hostile work environment claim]; *Ji Sun Jennifer Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP,* 120 A.D.3d 18, 25–26, 987 N.Y.S.2d 338 [1st Dept. 2014] [City HRL retaliatory ***141** discharge and gender/pregnancy discrimination claims]; *Chin v. New York City Hous. Auth.,* 106 A.D.3d at 444–445, 965 N.Y.S.2d 42 [City HRL retaliation and hostile work environment claims], where, as here, no evidence is presented to rebut any of defendants' proffered nondiscriminatory reasons for their actions, plaintiff's discrimination claims must fail (*see Arifi,* 147 A.D.3d at 551, 46 N.Y.S.3d 784 [the plaintiff's failure to present any evidence of discriminatory animus in response to the defendant corporation's proffered nondiscriminatory reason for its actions was "fatal" to the plaintiff's hostile work environment claim, citing

Cadet–Legros at 202, 21 N.Y.S.3d 221; *Bennett* at 39–40, 936 N.Y.S.2d 112]; *see also Chin,* 106 A.D.3d at 444–445, 965 N.Y.S.2d 42 [upholding dismissal of City HRL retaliation claim where the plaintiff employee failed to raise an issue of fact as to whether nondiscriminatory reasons proffered by the defendant authority for failing to promote her were pretextual]). Neither does plaintiff proffer any evidence that any negative treatment she allegedly experienced in the course of her employment at Grey due to Cirullo's or Walsh's actions was "because of her gender" (*see Short,* 79 A.D.3d at 505–506, 913 N.Y.S.2d 64; ****34** *Williams,* 61 A.D.3d at 78, 872 N.Y.S.2d 27) or was motivated by race and/or ethnicity discrimination.

Moreover, plaintiff's claim of disparate treatment is undermined by the fact that she received promotions and salary increases while at Grey, rising from the position of business analyst in its Financial Services Department at an annual salary of $70,000 to the position of Vice President at an annual salary of $115,000.

Therefore, in my view, this claim is not actionable under either the *McDonnell Douglas* or the "mixed motive" evidentiary framework and was properly dismissed by the motion court.

2. State HRL (Claim Five)

Because plaintiff's City HRL claim fails to survive under the *McDonnell Douglas* framework analysis, a fortiori, its State HRL counterpart also fails to survive defendant's summary judgment motion under the same evidentiary framework.

Therefore, I concur with the majority that this claim was properly dismissed.

F. *Retaliation Claims (Claims Four, Seven, Eight, Eleven and Twelve)*

None of plaintiff's retaliation claims (claims four, seven, eight, eleven and twelve) are properly raised on this appeal. Plaintiff failed to respond to defendants' motion as to those claims before the motion court and did not move for reargument upon that court's dismissal of them. Accordingly, any challenge to the dismissal of those claims is unpreserved on the record before us.

***142** Plaintiff's mention in her appellate brief that defendants "discriminated against [her] by subjecting her to disparate treatment after she turned down Cirullo's advance" also fails to revive these claims here, as she neither mentions retaliation, nor makes any causal link between this general and vague claim and any specific actions of disparate treatment taken against her by defendants. Plaintiff never develops or discusses this argument further, either in her brief, nor by way of oral argument. In sum, plaintiff has failed to raise her retaliation claims on this appeal.

The majority opines that claims four is a properly presented City HRL claim for a discriminatory hostile work environment, and that claims seven and eight are properly presented as State and City HRL claims for discriminatory disparate treatment. In doing so, the majority conflates these claims, which allege sexually hostile work environment and disparate treatment, respectively, as a result of plaintiff's rejection of Cirullo's alleged advance, and which are clearly for retaliation, with the City HRL discriminatory hostile work environment claim, which is separately presented in claim three, and with the State and City HRL disparate treatment claims, which are separately presented in claims five and six, and I would so treat them. Accordingly, I believe that Supreme Court properly dismissed claims four, seven and eight in their entirety.

The majority's reliance upon *Ji Sun Jennifer Kim v. Goldberg, Weprin, Finkel, Goldstein LLP,* 120 A.D.3d 18, 987 N.Y.S.2d 338 (1st Dept. 2014) in arguing that the temporal proximity of Cirullo's alleged sexual overture and his subsequent change in behavior toward her is sufficient to demonstrate a causal connection between these two alleged events is misplaced. In *Kim,* we upheld the plaintiff's claims of retaliatory discharge on summary judgment review, based in part upon our conclusion that the temporal proximity of the second of the plaintiff's two complaints of discriminatory treatment in the workplace and her termination two months later could be sufficient for a jury to find a ****35** causal connection between them (*id.* at 25, 987 N.Y.S.2d 338). Here, plaintiff makes no claim of retaliation based on complaints of discrimination. And even under the majority's view, the three incidents she cites in support of her allegation that Cirullo's conduct amounted to a sexual overture were temporally removed from the noxious treatment she experienced and were unsupported by any evidentiary nexus with Cirullo's subsequent behavior towards her.

***143** The view of the majority is that plaintiff's mere conclusory reassertion of being treated less well than other employees because of her gender in response to

defendants' proffer of evidence of nondiscriminatory explanations for their actions is sufficient to defeat defendants' motion for summary judgment. As our jurisprudence following *Bennett* has consistently established, however, where a defendant meets its burden on the motion by showing that upon considering the evidence presented and "drawing all reasonable inferences in plaintiff's favor, no jury could find the defendant liable under any of the evidentiary routes [applicable to discrimination cases], ... a plaintiff may defeat summary judgment by offering 'some evidence that at least one of the reasons proffered by defendant is false, misleading or incomplete' " (*Watson v. Emblem Health Servs.*, 158 A.D.3d 179, 183, 69 N.Y.S.3d 595, 69 N.Y.S.3d 595 [1st Dept. 2018], quoting *Bennett*, 92 A.D.3d at 45, 936 N.Y.S.2d 112; *see Cadet–Legros*, 135 A.D.3d at 200, 21 N.Y.S.3d 221).

By advancing its differing view in this case, the majority is, in effect, virtually eliminating this established standard for review of summary judgment motions in City HRL cases, rendering it indistinguishable from that on review of CPLR 3211(a)(7) motions to dismiss in such cases. Furthermore, the majority is eliminating the relaxed requirement of *Bennett* and its progeny that a minimal evidentiary showing must be made by the plaintiff to refute the defendant's nondiscriminatory explanations.

Adhering to our precedent, I would apply the *Bennett* standard and find that here, plaintiff failed to proffer any evidence of discriminatory conduct or motive in response to defendants' nondiscriminatory explanations for their treatment of her. The record as presented fails to raise a material issue of fact as to whether defendants' treatment of her was the product of unlawful discrimination (*cf. Watson*, 158 A.D.3d at 183–185, 69 N.Y.S.3d 595 [evidence of employer's failure to reasonably accommodate employee's disability, refusal to acknowledge medical documentation of her condition, and numerous emails containing derogatory comments about her medical condition sufficed to raise triable fact question of possible pretextual motive]).

Accordingly, I would affirm the motion court in all respects.

***144** Order of the Supreme Court, New York County (Donna M. Mills, J.), entered May 19, 2016, modified, on the law, and otherwise affirmed, without costs.

Opinion by Moulton, J. All concur except Friedman, J.P. and Kahn, J. who dissent in part in an Opinion by Kahn, J.

Friedman, J.P., Kahn, Kern, Oing, Moulton, JJ.

All Citations

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Footnotes

1 Suri's effort to carve the small Business Systems unit, of which she was a part, out of the overall reduction in force, in order to show that she was the only woman impacted by the reduction in force within the smaller group, also fails. The sample sizes are too small to support a statistical inference of discrimination (*see Hudson v. Merrill Lynch & Co., Inc.*, 138 A.D.3d 511, 517, 31 N.Y.S.3d 3 [1st Dept. 2016], *lv denied* 28 N.Y.3d 902, 2016 WL 4742476 [2016]; *Armstrong v. Sensormatic/ADT*, 100 A.D.3d 492, 954 N.Y.S.2d 53 [1st Dept. 2012]).

2 Prior to *Williams*, our cases held that the New York State and City Human Rights Laws applied the same federal standards for quid pro quo and hostile environment sexual harassment claims, differing only in that the City Human Rights Law allows punitive damages (*see Walsh v. Covenant House*, 244 A.D.2d 214, 215, 664 N.Y.S.2d 282 [1st Dept. 1997]). Quid pro quo harassment occurs when unwelcome sexual conduct (whether sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature) is used explicitly or implicitly, as the basis for employment decisions affecting compensation, terms, conditions, or privileges of employment (*see Matter of Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739 [4th Dept 1996], *lv denied* 89 N.Y.2d 809, 655 N.Y.S.2d 889, 678 N.E.2d 502 [1997]). The focus is on whether the supervisor has expressly or tacitly linked tangible job benefits to the acceptance or rejection of sexual advances and a claim is stated whether the employee rejects the advance and suffers the consequences or submits to the advance (*id.*).

3 However, questions of severity and pervasiveness apply to the scope of damages (*Williams* at 76, 872 N.Y.S.2d 27).

4 Prior to 1998 federal cases separately analyzed, under federal law, quid quo pro and hostile work environment claims; hostile work environment claims spoke to an environment permeated with sexually harassing comments, materials or conduct (*see*

Sharon P. Stiller, Employment Law in New York § 3:23 at 206 [2d ed 2012]). However, federal law moved away from those distinctions to focus on whether there was a tangible job detriment that altered the terms of employment (*see Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 [1998]; *Burlington Indus. Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 [1998]).

5 Suri's claim that Cirullo created a hostile work environment after she rebuffed his alleged sexual overture is before us on this appeal. We disagree with the dissent to the extent that the dissent characterizes this claim as one for retaliation under Administrative Code § 8–107(7), and then, as a result of this characterization, concludes that the claim sounding in hostile work environment is not before us. The dissent rejects our position that the three incidents in question must be viewed holistically in connection with the 18–month period of mistreatment that ensued. To view these incidents holistically, the dissent contends, would improperly resurrect Suri's retaliation claims (denominated in Suri's complaint as Claim Four, Claims Seven and Eight, and Claims Eleven and Twelve). However, Claim Four and Claims Seven and Eight of the complaint speak not only to retaliation, but to a hostile work environment which ensued as the result of Suri's rejection of Cirullo's alleged advance. Claim Four provides that "[f]rom October, 2008 through April, 2010, Cirullo subjected plaintiff to a hostile work environment in retaliation for her rejection of his November, 2008 sexual advance, in violation of Chapter Eight of the New York City Administrative Code" and concludes that "Grey is liable to plaintiff for the hostile work environment created by Cirullo." Claims Seven and Eight provide that "[f]rom October, 2008 through April, 2010, defendants subjected plaintiff to disparate terms and conditions of employment in retaliation for her rejection of Cirullo's November, 2008 sexual advance, in violation of ... Chapter Eight of the New York City Administrative Code." Thus, Suri's claim is properly before us as a claim alleging gender-based discrimination in violation of Administrative Code § 8–107(1)(a).

6 The dissent applies the *Bennett* framework and concludes that Suri's hostile work environment claim fails because Suri did not rebut Cirullo's nondiscriminatory explanations for the way she was treated during the 18–month period. The dissent also cites the *Bennett* framework in concluding that Suri did not support with "some evidence" her claim that Cirullo made a sexual overture sufficient to raise an issue of fact.

7 The *McDonnell Douglas* framework was created to apply to an "adverse employment action" as defined by federal law. As noted above the City Human Rights Law is broader, and differential treatment may be actionable even where that treatment does not result in an employee's discharge or an "adverse employment action" as defined by federal law.

8 The mixed-motive test employs the same burden-shifting as the *McDonnell Douglas* test (*see Hudson,* 138 A.D.3d at 511, 31 N.Y.S.3d 3). It recognizes that it is not uncommon for there to be multiple or mixed motives for discrimination; the City Human Rights Law proscribes such partial discrimination and requires only that a plaintiff prove that discrimination was a motivating factor for an adverse employment action (*see Bennett,* 92 A.D.3d at 40, 936 N.Y.S.2d 112).

9 The defendants were entitled to summary judgment in light of the employer's credible evidence of reports of the plaintiff's unsatisfactory work performance, undisputed evidence that the plaintiff frequently slept and drank on the job, and left early without explanation (*Bennett* at 46, 936 N.Y.S.2d 112). The plaintiff's claim of age discrimination was undermined by the fact that he was replaced by an older worker, and his claim of race discrimination was unsupported by evidence that a similarly situated, poor performing, black coworker was treated more leniently (*id.*).

10 The Second Circuit and some sister circuits have similarly not applied the *McDonnell Douglas* burden-shifting framework to hostile work environment claims under federal law (*see Reynolds v. Barrett,* 685 F.3d 193, 202 [2d Cir.2012]; *Moody v. Atlantic City Bd. of Educ.,* 870 F.3d 206, 213 n. 11 [3d Cir.2017] ["Some of our sister circuits have concluded that the *McDonnell Douglas* framework does not apply in hostile work environment sexual harassment cases ... We agree that the burden-shifting framework is inapplicable here because ... there can be no legitimate justification for a hostile work environment"]).

1 The record is somewhat unclear as to the timing of these three incidents. The personnel records and plaintiff's deposition testimony indicate that Cirullo's two comments allegedly occurred in early September 2008, immediately upon his promotion, while the meeting incident took place two months later. Plaintiff also testified and stated in her sworn affidavit that the two comments occurred in October 2008, about a week before the November 2008 meeting. In any case, it is undisputed that none of the three incidents occurred after November 2008.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Chauca v. Abraham, 2nd Cir.(N.Y.), November 1, 2016

61 A.D.3d 62
Supreme Court, Appellate Division, First Department, New York.

Gina WILLIAMS, Plaintiff–Appellant,
v.
The NEW YORK CITY HOUSING AUTHORITY, et al., Defendants–Respondents.

Jan. 27, 2009.

Synopsis
Background: Employee brought action against city housing authority and others alleging hostile work environment, disparate treatment on basis of sex, and retaliation. The Supreme Court, New York County, Faviola A. Soto, J., granted defendants' motion to compel document production and denied employee's cross motion to compel document production. Employee appealed. The Supreme Court, Appellate Division, 22 A.D.3d 315, 802 N.Y.S.2d 55,affirmed as modified in part and remitted. On remission, the Supreme Court, New York County, Michael D. Stallman, J., entered summary judgment in city's favor, and employee appealed.

Holdings: The Supreme Court, Appellate Division, Acosta, J., held that:

[1] employee's assignment to strip and wax boiler room floor did not constitute retaliation, and

[2] comments made in employees's presence were insufficient to support **sexual harassment** claim.

Affirmed.

Andrias, J., concurred in result only and filed opinion.

West Headnotes (10)

[1] **Civil Rights**
⊂=State and Local Remedies
Courts
⊂=Decisions of United States Courts as Authority in State Courts

Interpretations of state or federal provisions worded similarly to New York City Human Rights Law provisions may be used as aids in interpretation only to extent that counterpart provisions are viewed as floor below which city's human rights law cannot fall, rather than ceiling above which the local law cannot rise, and only to extent that those state or federal law decisions may provide guidance as to uniquely broad and remedial provisions of local law. New York City Administrative Code, § 8–130.

84 Cases that cite this headnote

[2] **Civil Rights**
⊂=State and Local Remedies
Courts
⊂=Construction of federal Constitution, statutes, and treaties

New York City's Civil Rights Restoration Act notified courts that (a) they had to be aware that some provisions of New York City Human Rights Law (HRL) were textually distinct from its State and federal counterparts, (b) all provisions of City's HRL required independent construction to accomplish the law's uniquely broad purposes and (c) cases that had failed to respect these differences were being legislatively overruled. New York City Administrative Code, § 8–130.

130 Cases that cite this headnote

[3] **Civil Rights**
⊂=Adverse actions in general
Civil Rights
⊂=Employment practices

In assessing retaliation claims under New York City's Human Rights Law (HRL) that involve

neither ultimate actions nor materially adverse changes in terms and conditions of employment, it is important that assessment be made with keen sense of workplace realities, of fact that "chilling effect" of particular conduct is context-dependent, and of fact that jury is generally best suited to evaluate impact of retaliatory conduct in light of those realities. New York City Administrative Code, § 8–107(a)(7).

60 Cases that cite this headnote

[4] **Civil Rights**
Public Employment
Municipal Corporations
Grounds
Public Employment
Assignment of work or duties in general

City housing authority employee's assignment to strip and wax boiler room floor did not constitute retaliation, in violation of New York City Human Rights Law, even if work was not normally part of employee's job, where same allegedly "out of title" work was given to non-complaining employees for whom work was not normally part of job.

Cases that cite this headnote

[5] **Limitation of Actions**
Liabilities Created by Statute

New York City's Civil Rights Restoration Act's uniquely remedial provisions are consistent with rule that neither penalizes workers who hesitate to bring action at first sign of what they suspect could be discriminatory trouble, nor rewards covered entities that discriminate by insulating them from challenges to their unlawful conduct that continues into the limitations period. New York City Administrative Code, § 8–130.

11 Cases that cite this headnote

[6] **Civil Rights**
Hostile environment; severity, pervasiveness, and frequency
Civil Rights
Employment practices

In examining alleged **sexual harassment** violation under New York City law, questions of "severity" and "pervasiveness" are applicable to consideration of scope of permissible damages, but not to question of underlying liability. New York City Administrative Code, § 8–107(1)(a).

23 Cases that cite this headnote

[7] **Civil Rights**
Practices prohibited or required in general; elements
Civil Rights
Employment practices

In order to establish **sexual harassment** claim under New York City Human Rights Law, plaintiff must prove by preponderance of evidence that she has been treated less well than other employees because of her gender. New York City Administrative Code, § 8–107(1)(a).

166 Cases that cite this headnote

[8] **Civil Rights**
Motive or intent; pretext
Judgment
Employees, cases involving

On motion for summary judgment in "mixed motive" employment discrimination claim under New York City Human Rights Law (HRL), question is whether there exist triable issues of fact that discrimination was one of the motivating factors for defendant's conduct. New York City Administrative Code, § 8–107.

66 Cases that cite this headnote

[9] **Civil Rights**
Hostile environment; severity, pervasiveness, and frequency

Defendant alleged to have engaged in **sexual harassment** in workplace can avoid liability under New York City Human Rights Law by proving that conduct complained of consists of nothing more than what reasonable victim of discrimination would consider petty slights and trivial inconveniences. New York City Administrative Code, § 8–107(1)(a).

75 Cases that cite this headnote

[10] **Civil Rights**
Hostile environment; severity, pervasiveness, and frequency

Comments made in female employee's presence on one occasion that were not directed at her, and were perceived by her as being in part complimentary to co-worker were, in view of employee's own experience and interpretation, nothing more than petty slights or trivial inconveniences, and thus were insufficient to support **sexual harassment** claim under New York City Human Rights Act. New York City Administrative Code, § 8–107(1)(a).

51 Cases that cite this headnote

Attorneys and Law Firms

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RICHARD T. ANDRIAS, J.P., DAVID B. SAXE, LUIS A. GONZALEZ, JAMES M. CATTERSON, ROLANDO T. ACOSTA, JJ.

ACOSTA, J.

*63 *Introduction*
This appeal presents us with the opportunity to construe for the first time the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 of City of New York [2005]).

Defendants' summary judgment motion—addressed to an amended complaint alleging a hostile work environment, disparate treatment on the basis of sex, and retaliation in violation of applicable provisions of the Executive Law and the New York City Administrative Code—was granted in its entirety. While we agree with the motion court that the claims arising under both *64 State and City human rights laws must be dismissed, we take a different approach and consider the City claims under the commands of the Restoration Act, as a distinct analysis is required to fully appreciate and understand the distinctive and unique contours of the local law in this area.

Background
Plaintiff was, at all times relevant to the action, an employee of defendant Housing Authority. From November 1995 to June 2004, she worked as a heating plant technician assigned to the Authority's South Jamaica Houses development. As such, she was responsible for maintaining the development's heating system.

The pro se plaintiff commenced this action in August 2001. After converting defendants' dismissal motion to one for summary judgment, Justice Louise Gruner Gans dismissed the claims asserted under Title VII of the federal Civil Rights Act of 1964 (as amended), and otherwise granted plaintiff's motion for leave to amend the complaint. In the 2003 amended complaint, plaintiff alleged that defendants engaged in, or permitted, a hostile work environment, disparate treatment on the basis of sex, and retaliation, all in violation of Executive Law 296(a)(1), (6) and (7), and Administrative Code § 8–107(a)(1), (6) and (7).

30 Plaintiff alleged she was **sexually harassed in January 1997, when her supervisor allegedly told her,

after she had requested facilities to take a shower, "You can take a shower at my house." Plaintiff alleged a second incident on October 21, 1998, where sex-based remarks were made in her presence, although not directed at her. Plaintiff interpreted some of those remarks as being complimentary to a co-worker, and a disparaging reference to the supervisor's own wife.

For her disparate treatment claim, plaintiff alleged that her supervisor denied her tools that she needed for her work, preferred (higher paying) shifts, and some training, all during her probationary year (i.e., no later than 1996). Plaintiff acknowledges that she was ultimately permitted to work the preferred shifts when they were vacated by employees of longer standing. She also alleged that she was denied two training opportunities in 1999. The record reflects that plaintiff did participate in other substantial training throughout her tenure.

Plaintiff asserted that she was retaliated against after making complaints about discriminatory treatment. She alleges that in ***65** August 1999 she had to do work outside of her regular duties; specifically, she was required to strip and wax the boiler room office floor, a task that she completed in two regular workdays. Plaintiff also asserted that in August 2001, she was required to perform work in the field and to respond to tenant complaints, work she claimed was customarily given to utility staff. She alleged that a 2002 incident of retaliation consisted of her supervisor's refusal to permit her to take "excused time" to resolve a parking ticket she had received.

Plaintiff was promoted in June 2004 to become an assistant superintendent.

In August 2007, the court (Michael D. Stallman, J.) granted defendants' motion for summary judgment dismissing the amended complaint in its entirety. The **sexual harassment** claim was dismissed on the basis that the conduct complained of was not "severe or pervasive."

On the disparate treatment claim, the court found the allegations from plaintiff's probationary year were time-barred because they were not part of a continuing pattern of discriminatory conduct. He also found that plaintiff had attended at least nine one- or two-day training courses, and did not allege that she suffered any injury as a result of not attending more. Finally, he found that plaintiff accepted a promotion offered in May 2004, and had not claimed that she would have been promoted earlier had she taken more classes. The court characterized the disparate treatment claim as missing the necessary element of an "adverse employment action."

Evaluating the retaliation claim, the court found that a one-time assignment to perform a task arguably within plaintiff's duties did not constitute retaliation, and that the other claims did not involve being treated differently from workers who had not complained.

We agree with the court's analysis as it pertains to plaintiff's State claims under the Executive Law. The decision dismissing the action failed, however, to properly construe plaintiff's claims under the local Restoration Act,[1] which mandates that courts be sensitive to the distinctive language, purposes, and method of analysis required by the City HRL, requiring an analysis more stringent than that called for under either Title VII or the State ****31** HRL. In ***66** light of this explicit legislative policy choice by the City Council, we separately analyze plaintiff's HRL claims.

I. Requirements and Purposes of the Restoration Act

While the Restoration Act amended the City HRL in a variety of respects,[2] the core of the measure was its revision of Administrative Code § 8–130, the construction provision of the City HRL (Local Law 85, § 7, deleted language, new language italicized):

> The provisions of this [chapter] *title* shall be construed liberally for the accomplishment of the *uniquely broad and remedial* purposes thereof, *regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed.*

As a result of this revision, the City HRL now explicitly requires an independent liberal construction analysis in all circumstances, even where State and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's "uniquely broad and remedial" purposes, which go beyond those of counterpart State or federal civil rights laws.

[11] Section 1 of the Restoration Act amplifies this message. It states that the measure was needed because the provisions of the City HRL had been "construed too narrowly to ensure protection of the civil rights of all persons covered by the law." It goes on to mandate that provisions of the City HRL be interpreted "independently from similar or identical provisions of New York state or

federal statutes." Taking sections 1 and 7 of the Restoration Act together, it is clear that interpretations of State or federal provisions worded similarly to City HRL provisions may be used as aids in interpretation only to the extent that the counterpart provisions are viewed "as a floor below which the City's Human Rights law cannot fall, rather ***67** than a ceiling above which the local law cannot rise" (§ 1), and only to the extent that those State- or federal-law decisions may provide guidance as to the "uniquely broad and remedial" provisions of the local law.

The Committee Report accompanying the legislation likewise states that the intent of the Restoration Act was to "ensure construction of the City's human rights law in line with the purposes of the fundamental amendments to the law enacted in 1991," and to reverse the pattern of judicial decisions that had improvidently "narrowed the scope of the law's protections" (Report of Committee on General Welfare, 2005 N.Y. City Legis. Ann., at 536).

The City Council's debate on the legislation made plain the Restoration Act's intent and consequences:

> Insisting that our local law be interpreted broadly and independently will safeguard New Yorkers at a time when federal and state civil rights protections are in jeopardy. There are many illustrations of cases, like *Levin* on marital status, *Priore* [,] *McGrath* and *Forrest* that have either failed to interpret the City Human Rights Law to fulfill its uniquely broad purposes, ignore [*sic*] ****32** the text of specific provisions of the law, or both. With [the Restoration Act], these cases and others like them will no longer hinder the vindication of our civil rights.[3]

[12] In other words, the Restoration Act notified courts that (a) they had to be aware that some provisions of the City HRL were textually distinct from its State and federal counterparts, (b) *all* provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes[4] ***68** and (c) cases that had failed to respect these differences were being legislatively overruled.

There is significant guidance in understanding the meaning of the term "uniquely broad and remedial." For example, in telling us that the City HRL is to be interpreted "in line with the purposes of the fundamental amendments to the law enacted in 1991," the Council's committee was referring to amendments[5] that were "consistent in tone and approach: every change either expanded coverage, limited an exemption, increased responsibility, or broadened remedies. In case after case, the balance struck by the Amendments favored victims and the interests of enforcement over the claimed needs of covered entities in ways materially different from those incorporated into state and federal law."[6]

The Council directs courts to the key principles that should guide the analysis of claims brought under the City HRL: "discrimination should not play a role in decisions made by employers, landlords and providers of public accommodations; traditional methods and principles of law enforcement ought to be applied in the civil rights context; and victims of discrimination suffer serious injuries, for which they ought to receive full compensation" (Committee Report, 2005 N.Y. City Legis. Ann., at 537).

In short, the text and legislative history represent a desire that the City HRL "meld the broadest vision of social justice with the strongest law enforcement deterrent."[7] Whether or not ***69** that desire is wise ****33** as a matter of legislative policy, our judicial function is to give force to legislative decisions.[8]

As New York's federal and State trial courts are recognizing the need to take account of the Restoration Act, the application of the City HRL as amended by the Restoration Act must become the rule and not the exception.[9]

II. Retaliation

In 1991, the anti-retaliation provision of the City HRL (Administrative Code § 8–107[7])—which had been identical to ***70** the State HRL provision—was amended in pertinent part to proscribe retaliation "*in any manner* " (Local Law 39 [1991], § 1). If courts were to construe this language to make actionable only conduct that has caused a materially adverse impact on terms and conditions of employment, it would constitute a significant narrowing of the Council's proscription on retaliation "in any manner." However, courts have consistently engaged in this construction. Therefore, the City Council was determined, via the Restoration Act of 2005 to "make clear that the standard to be applied to retaliation claims under the City's human rights law differs from the standard currently applied by the Second Circuit in [Title VII] retaliation claims ... [and] is in line with the standard

set out in the guidelines of the Equal Employment Opportunity Commission" (Committee Report, 2005 Legis. Ann., at 536). In **34 § 8(d)(3) of its compliance manual (1998), dealing with the subject of retaliation, EEOC indicates that the

> broad coverage accords with the primary purpose of the anti-retaliation provisions, which is to "[m]aintain[ ] unfettered access to statutory remedial mechanisms." Regardless of the degree or quality of harm to the particular complainant, retaliation harms the public interest by deterring others from filing a charge. An interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the anti-retaliation provisions [citations omitted].[10]

To accomplish the purpose of giving force to the earlier proscription on retaliation "in any manner," the Restoration Act amended § 8–107(7) to emphasize that

> [t]he retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse *71 change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.

[3] In assessing retaliation claims that involve neither ultimate actions nor materially adverse changes in terms and conditions of employment, it is important that the assessment be made with a keen sense of workplace realities, of the fact that the "chilling effect" of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities.[11] Accordingly, the language of the City HRL does not permit any type of challenged conduct to be categorically rejected as nonactionable. On the contrary, no challenged conduct may be deemed nonretaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was, in the words of the statute, "reasonably likely to deter a person from engaging in protected activity".[12]

[4] Turning to the retaliation claims, it is clear that even under this broader construction, plaintiff's claim that her assignment to strip and wax the boiler room floor did not constitute retaliation. It is certainly possible for a jury to conclude that someone would be deterred from making a complaint if knowing that doing so might result in being assigned to duties outside or beneath one's normal work **35 tasks. However, an examination of this record shows conclusively that plaintiff cannot link her complained-of assignment to a retaliatory motivation. The same allegedly "out of title" work was given to non-complaining employees for whom the work was not normally part of the job.

*72 Although not raised expressly on appeal by the pro se plaintiff, her other retaliation claims are similarly unavailing. Her assignment to do field work and respond to tenant complaints did not represent a difference in treatment attributable to retaliation, since the record shows that other workers (who did not complain of discrimination) were given similar assignments. The failure to grant plaintiff "excused time" to deal with a parking ticket also did not represent a difference in treatment from workers who did not complain of discrimination.[13] Accordingly, plaintiff's retaliation claim must fail.

III. Continuing violations

In *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 [2002], the Supreme Court established that for federal law purposes, the "continuing violation" doctrine only applied to **harassment** claims as opposed to claims alleging "discrete" discriminatory acts. At the time the comprehensive 1991 amendments to the City HRL were enacted, however, federal law in the Second Circuit did not so limit continuing violation claims (*see e.g. Acha v. Beame,* 570 F.2d 57, 65 [2d Cir.1978], holding that a continuing violation would exist if there had been a continuing policy that "limited opportunities for female participation" in the work force, including policies related to "hiring, assignment, transfer, promotion and discharge"; *Cornwell v. Robinson,* 23 F.3d 694, 704 [2d Cir.1994], reaffirming the vitality of a 1981 decision finding a continuing violation where there had been a consistent pattern of discriminatory hiring practices). There is no reason to believe that the Supreme Court's more restrictive rule of 2002 was anticipated when the City HRL was amended in 1991, or even three years after that ruling, when the Restoration Act was passed in 2005.[14]

[5] On the contrary, the Restoration Act's uniquely remedial provisions ***73** are consistent with a rule that neither penalizes workers who hesitate to bring an action at the first sign of what they suspect could be discriminatory trouble, nor rewards covered entities that discriminate by insulating them from challenges to their unlawful conduct that continues into the limitations period.

****36** The continuing violation doctrine is discussed in the specific context of plaintiff's **sexual harassment** and disparate treatment claims, *infra,* at Parts IV and V, respectively.

*IV. **Sexual Harassment***

In 1986 the Supreme Court ruled, for federal law purposes, that **sexual harassment** must be "severe or pervasive" before it could be actionable (*Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49).[15] The "severe or pervasive" rule has resulted in courts "assigning a significantly lower importance to the right to work in an atmosphere free from discrimination" than other terms and conditions of work.[16] The rule (and its misapplication) has routinely barred the courthouse door to women who have, in fact, been treated less well than men because of gender.[17]

Before the Restoration Act, independent development of the City HRL was limited by the assumption that decisions interpreting federal law could safely be imported into local human rights law because, it was said, any broad anti-discrimination policies embodied in State or local law are "*identical* to those underlying the federal statutes" (*McGrath,* 3 N.Y.3d at 433, 788 N.Y.S.2d 281, 821 N.E.2d 519 [emphasis added]). If the City Council had wanted to depart from a federal doctrine, *McGrath* stated, it should have ***74** amended the law to rebut that doctrine specifically (*id.* at 433–434, 788 N.Y.S.2d 281, 821 N.E.2d 519). The City Council followed this *McGrath* admonition, legislatively overruling it by amending the construction provision of Administrative Code § 8–130, and putting to an end this view of the City HRL as simply mimicking its federal and State counterparts.[18] By making a specific textual amendment to the construction provision (something not done in 1991), the Council formally and unequivocally rejected the assumption that the City HRL's purposes were identical to that of counterpart civil rights statutes. In its place, the Council instructed the courts—reflected in text and legislative history—that it wanted the City HRL's provisions to be construed *more broadly than federal civil rights laws and the State* HRL, and wanted the local ****37** law's provisions to be construed as *more remedial than federal civil rights laws and the State* HRL (Administrative Code § 8–130, as amended by the Restoration Act in 2005).

The Council saw the change to § 8–130 as the means for obviating the need for wholesale textual revision of the myriad specific substantive provisions of the law. While the specific *topical* provisions changed by the Restoration Act give unmistakable *illustrations* of the Council's focus on broadening coverage, § 8–130's specific *construction* provision required a "process of reflection and reconsideration" that was intended to allow independent development of the local law "in all its dimensions" (*Return to Eyes on the Prize,* 33 Fordham Urb LJ at 280).[19]

Accordingly, we first identify the provision of the City HRL we are interpreting and then ask, as required by the City ***75** Council: What interpretation "would fulfill the broad and remedial purposes of the City's Human Rights Law"?[20] Despite the popular notion that "sex discrimination" and "**sexual harassment**" are two distinct things, it is, of course, the case that the latter is one species of sex- or gender-based discrimination. There is no "**sexual harassment** provision" of the law to interpret; there is only the provision of the law that proscribes imposing different terms, conditions and privileges of employment based, inter alia, on gender (Administrative Code § 8–107[1][a]).[21]

As applied in the context of **sexual harassment**, therefore, the relevant question is what constitutes inferior terms and conditions based on gender. One approach would be to import the "severe or pervasive" test, a rule that the Supreme Court has characterized as "a middle path" between making actionable any conduct that is merely "offensive and requiring the conduct to cause a tangible psychological injury" ****38** (*Harris v. Forklift Sys.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 [1993]). This "middle path," however, says bluntly that a worker whose terms and conditions of employment include being on the receiving end of all unwanted gender-based conduct (except what is severe or pervasive) is experiencing essentially the same terms and conditions ***76** of employment as the worker whose employer has created a workplace free of unwanted gender-based conduct.

[6] Twenty-two years after *Meritor,* 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49, it is apparent that the two workers described above do not have the same terms and conditions of employment. Experience has shown that

there is a wide spectrum of **harassment** cases falling between "severe or pervasive" on the one hand and a "merely" offensive utterance on the other.[22] The City HRL is now explicitly designed to be broader and more remedial than the Supreme Court's "middle ground," a test that had sanctioned a significant spectrum of conduct demeaning to women. With this broad remedial purpose in mind, we conclude that questions of "severity" and "pervasiveness" are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability (*Farrugia,* 13 Misc.3d at 748–749, 820 N.Y.S.2d 718).

In doing so, we note that the "severe or pervasive" test reduces the incentive for employers to create workplaces that have zero tolerance for conduct demeaning to a worker because of protected class status. In contrast, a rule by which liability is normally determined simply by the existence of differential treatment (i.e., unwanted gender-based conduct) maximizes the law's deterrent effect. It is the latter approach—maximizing deterrence—that incorporates "traditional methods and principles of law enforcement," one of the principles by which our analysis must be guided (Committee Report, 2005 N.Y. City Legis. Ann., at 537). Permitting a wide range of conduct to be found beneath the "severe or pervasive" bar would mean that discrimination is allowed to play *some significant role* in the workplace. Both Administrative Code § 8–101 and the Committee Report accompanying the Restoration Act say the analysis of the City HRL must be guided by the need to make sure that discrimination plays *no* role (2005 N.Y. City Legis. Ann., at 537), a principle again much more consistent with a rule by which liability is normally determined simply by the existence of unwanted gender-based conduct. Finally, the "severe or pervasive" doctrine, by effectively treating as actionable only a small subset of workplace actions that demean women or members of other protected classes, is contradicted by the Restoration *77 Act principle that the discrimination violations are *per se* "serious injuries" (*id.*).[23] Here again, a focus on differential treatment better serves the purposes of the statute.

Further evidence in the legislative history precludes making the standard for **sexual harassment** violations a carbon copy of the federal and State standard. The City HRL's enhanced liberal construction requirement was passed partly in recognition of multiple complaints that a change to § 8–130 was necessary to prevent women from being hurt by the unduly restrictive "severe or pervasive" standard. The Council had been told that the "severe or **39 pervasive" standard "continuously hurts women" and "means that many victims of **sexual harassment** may never step forward."[24] Likewise, the Council was told that "without any consideration of what standard would best further *78 the purposes of the City Law, women who have been **sexually harassed** are routinely thrown out of court without getting a chance to have a jury hear their claims because a judge uses the federal standard that they have not been **harassed** enough,"[25] and that "[w]e have long had the problem of judges insisting that **harassment** [has] to be 'severe or pervasive' before it is actionable, even though such a requirement unduly narrows the reach of the law."[26]

[7] [8] For HRL liability, therefore, the primary issue for a trier of fact in **harassment** cases, as in other terms-and-conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender. At the summary judgment stage, judgment should normally be denied to a defendant if there exist triable issues of fact as to whether such conduct occurred (Administrative Code § 8–107(1)(a); *see Farrugia,* 13 Misc.3d at 748–749, 820 N.Y.S.2d 718 ["Under the City's law, liability should be determined by the existence of unequal treatment, and questions of severity and frequency reserved for consideration of damages"], cited by the Southern District Court in **40 *Selmanovic,* 2007 U.S. Dist. LEXIS 94963, *11, 2007 WL 4563431, *4).[27]

Farrugia was recently criticized in *Gallo* for its focus on "unequal treatment," the Southern District insisting that the "severe or pervasive" restriction be applied to City HRL claims just as the restriction is applied to Title VII and State HRL claims. We conclude that the criticism simply does not recognize the City HRL's broader remedial purpose. The *Gallo* decision states:

> A single instance of "unequal" treatment (between, say, a man and woman or a homosexual and heterosexual) can constitute "discrimination," but may not qualify as "**harassment**" of the sort needed to create *79 a hostile work environment. If inequality of treatment were all that the hostile work environment law required, hostile work environment and discrimination claims would merge.

(585 F.Supp.2d at 537–38). In other words, the *Gallo* court begins with the premise that it is necessary to maintain the distinction that current federal law makes between non-**harassment** sex discrimination claims on the one hand (where a permissive standard is applied),

and sex discrimination claims based on **harassment** (where "hostile work environment" is the term of art describing the application of a restrictive standard).

Contrary to the assumption embedded in *Gallo,*[28] the task under the City HRL, as amended by the Restoration Act, is not to ask, "Would a proposed interpretation differ from federal law?", but rather, "How differently, if at all, should **harassment** and non-**harassment** sex discrimination cases be evaluated to achieve the City HRL's uniquely broad and remedial purposes?"[29]

As discussed above, we conclude that a focus on unequal treatment based on gender—regardless of whether the conduct is "tangible" (like hiring or firing) or not—is in fact the approach that is most faithful to the uniquely broad and remedial purposes of the local statute. To do otherwise is to permit far too much unwanted gender-based conduct to continue befouling the workplace.

[9] Our task, however, is not yet completed because, while the City HRL has been structured to emphasize the vindication of civil rights over shortcuts that reduce litigation volume, we recognize that the broader purposes of the City HRL do not connote an intention that the law operate as a "general civility code" ****41** (*Oncale v. Sundowner Offshore Servs.,* 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 [1998], discussing Title VII). The way to avoid this result is ***80** not by establishing an overly restrictive "severe or pervasive" bar, but by recognizing an affirmative defense whereby defendants can still avoid liability if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider "petty slights and trivial inconveniences."

In doing so, we narrowly target concerns about truly insubstantial cases, while at the same time avoiding improperly giving license to the broad range of conduct that falls between "severe or pervasive" on the one hand and a "petty slight or trivial inconvenience" on the other. By using the device of an affirmative defense, we recognize that, in general, "a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as **sexual harassment** and retaliation" (*Gallagher v. Delaney,* 139 F.3d 338, 342 [2d Cir.1998]). At the same time, we assure employers that summary judgment will still be available where they can prove that the alleged discriminatory conduct in question does not represent a "borderline" situation but one that could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences.

[10] In the instant case, the complaint was filed in August 2001. As such, actions that occurred prior to August 1998 would normally be barred except if the continuing violation doctrine applies. During the limitations period, the only **harassment** allegation supported by evidence that could be credited by a jury consists of comments made in plaintiff's presence on one occasion in October 1998 that were not directed at her, and were perceived by her as being in part complimentary to a co-worker. These comments were, in view of plaintiff's own experience and interpretation, nothing more than petty slights or trivial inconveniences, and thus are not actionable.[30]

Prior to the limitations period, the record does reflect the inappropriate comment about taking a shower, made in January 1997 (i.e., 19 months before the start of the limitations period). Since this pre-limitation-period comment was not joined to actionable ***81** conduct within the limitation period,[31] the continuing violation doctrine does not render the complaint about the January 1997 comment timely. Accordingly, plaintiff's **sexual harassment** claims must fail.

V. Other Disparate Treatment Claims

Plaintiff's allegations regarding not initially being provided with necessary tools and not being assigned to more desirable work-shift assignments refer to conduct in 1995 and 1996. The absence of any problem for at least 20 months prior to the start of the limitations period does not evidence a "consistent pattern," and in any event, there is no connection to actionable conduct during the limitations period. Plaintiff does not show differences in treatment with male workers in the limitations period; like other workers, she received ****42** substantial training.[32] It is thus unnecessary to reach the issue of the "materiality" of these non-**harassment** claims.[33]

Accordingly, the order of Supreme Court, New York County (Michael D. Stallman, J.), entered August 14, 2007, which granted defendants summary judgment dismissing the amended complaint, should be affirmed, without costs.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered August 14, 2007, affirmed, without costs.

All concur except ANDRIAS, J.P. who concurs in the result only in a separate Opinion:

ANDRIAS, J. (concurring in the result only).

Because my learned colleagues insist on addressing and deciding an issue that was raised neither below nor on appeal, I would affirm for the reasons stated by the motion court which, in pertinent part, properly dismissed plaintiff's claim for retaliation upon a finding that a one-time assignment to strip and wax the boiler room floor—a task that was, at least arguably, a part of her duties—did not constitute retaliation.

***82** Relying upon the Supreme Court's decision in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67–68, 126 S.Ct. 2405, 165 L.Ed.2d 345 [2006] for its holding that "actionable retaliation" is that which "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" (internal quotations and citations omitted), plaintiff succinctly argues on appeal that a reassignment of duties can constitute retaliatory discrimination even where both the former and present duties fall within the same job description, that a jury could reasonably conclude the reassignment would have been "materially adverse to a reasonable employee," and that the motion court inappropriately assessed the credibility of the witnesses' statements regarding that assignment.

My colleagues find no merit to plaintiff's arguments and agree with the motion court's analysis as pertinent to plaintiff's State Human Rights Law claim, but take issue with its decision because it failed to construe her claim according to the standard set forth in the Local Civil Rights Restoration Act of 2005. However, neither at nisi prius nor on appeal has plaintiff enunciated a specific claim under the New York City Human Rights Law. Moreover, even if it could be argued that, by amending her verified complaint to add in its introduction that "This is an action pursuant to the New York Executive Law § 296(a)(1),(6), (7) and New York City Administrative Code § 8–107(a)(1), (6), (7), of a hostile work environment and retaliation to vindicate the civil rights of plaintiff," she had actually raised the issue, she clearly has not pursued it on appeal.

****43** The question of whether we should be deciding appeals on the basis of arguments not raised by the parties on appeal has recently become a recurring issue in this Court. It is, however, a fundamental principle of appellate jurisprudence that arguments raised below but not pursued on appeal are generally deemed abandoned, and such arguments, which are therefore not properly before us, should not be considered (*see McHale v. Anthony,* 41 A.D.3d 265, 266–267, 839 N.Y.S.2d 33 [2007]). The rationale for such principle, as expressed by this Court, is that deciding issues not even raised or addressed in the parties' briefs would be so unfair to the parties as to implicate due process concerns (*id.* at 267, 839 N.Y.S.2d 33). "By any standard it would be unusual behavior for an appellate court to reach and determine an issue never presented in a litigation, and to do so without providing an opportunity for the adversely affected parties to be heard on a question which they had no ***83** reason to believe was part of the litigation" (*Grant v. Cuomo,* 130 A.D.2d 154, 176, 518 N.Y.S.2d 105 [1987], *affd.* 73 N.Y.2d 820, 537 N.Y.S.2d 115, 534 N.E.2d 32 [1988]).

> "These principles are not mere technicalities, nor are they only concerned with fairness to litigants, important as that goal is. They are at the core of the distinction between the Legislature, which may spontaneously change the law whenever it perceives a public need, and the courts which can only announce the law when necessary to resolve a particular dispute between identified parties. It is always tempting for a court to ignore this restriction and to reach out and settle or change the law to the court's satisfaction, particularly when the issue reached is important and might excite public interest. However, it is precisely in those cases that the need for judicial patience and adherence to the common-law adversarial process may be—or is often greatest" (*Lichtman v. Grossbard,* 73 N.Y.2d 792, 794–795, 537 N.Y.S.2d 19, 533 N.E.2d 1048 [1988]).

For my colleagues to adopt a new and supposedly more liberal standard for determining liability under the City's Human Rights Law and to abandon the present, supposedly unduly restrictive, "severe or pervasive" standard in favor of one that "is most faithful to the uniquely broad and remedial purposes of the local statute," without any input from the parties concerned, flies in the face of these well settled principles.

In *A Return to Eyes on the Prize: Litigating under the Restored New York City Human Rights Law* (33 Fordham Urb LJ 255 [2006]), which my colleagues repeatedly cite with approval, the author, who is described as "the principal drafter of the Local Civil Rights Restoration Act" of 2005, complains that the failure of such reforms to achieve their potential is due in significant part to the supposed "unwillingness of judges to engage in an independent analysis of what interpretation of the City Human Rights Law would best effectuate the purposes of that law" (*id.* at 255–256). However, in the next breath, he states: "In fairness, advocates for victims of discrimination must also take responsibility for the stunted state of City Human Rights Law. On far too many

occasions, courts have not been asked to engage in this independent analysis" (*id.* at 256 n. 5). That is exactly the case here, and my colleagues' departure from the normal rules governing appellate courts is singularly unwarranted (see *Grant*, 130 A.D.2d at 176, 518 N.Y.S.2d 105).

All Citations

61 A.D.3d 62, 872 N.Y.S.2d 27, 105 Fair Empl.Prac.Cas. (BNA) 1059, 2009 N.Y. Slip Op. 00440

Footnotes

1 *See* 2005 N.Y. City Legis. Ann., at 528–535.

2 These include re-emphasizing the breadth of the anti-retaliation requirement, discussed *infra,* Part II. Other provisions include creating protection for domestic partners, increasing civil penalties for claims brought administratively, restoring attorney's fees for "catalyst" cases, and requiring thoroughness in administrative investigations conducted by the New York City Human Rights Commission.

3 Statement of Annabel Palma at the meeting of the N.Y. City Council (Sept. 15, 2005, transcript at 41). Council Member Palma was a member of the Committee on General Welfare that had brought the bill to the floor of the Council. Committee Chairman Bill de Blasio emphasized that "localities have to stand up for their own visions" of "how we protect the rights of the individual," regardless of federal and State restrictiveness (transcript at 47). Council Member Gale Brewer, the chief sponsor of the Restoration Act, reiterated the comments of Palma and de Blasio, and the importance of making sure that civil rights protections "are stronger here than [under] the State or federal law" (transcript at 48–49). (Transcript on file with N.Y. City Clerk's Office and the N.Y. Legislative Service.)

4 The City Council in amending Administrative Code § 8–130 could have mandated that "some" provisions of the law be "construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof," or that "new" provisions of the law be so construed. The Council instead made the "shall construe" language applicable to "the provisions of this title," without limitation.

5 Local Law No. 39 (1991) of City of N.Y.

6 Prof. Craig Gurian, *A Return to Eyes on the Prize: Litigating under the Restored New York City Human Rights Law,* 33 Fordham Urb LJ 255, 288 (2006). The article—described elsewhere as "an extensive analysis of the purposes of the Local Civil Rights Restoration Act, written by one of the Act's principal authors" (*Ochei v. Coler/Goldwater Mem. Hosp.*, 450 F.Supp.2d 275, 283 n. 1 [S.D.N.Y.2006])—summarizes some of the dramatic changes of the 1991 Amendments (*see* Gurian, at 283–88).

7 *Gurian, Return to Eyes on the Prize,* 33 Fordham Urb LJ at 262. This is consistent with statements and testimony of the Association of the Bar of the City of N.Y. (letter dated Aug. 1, 2005), the Brennan Center for Justice (Jul. 8, 2005), and the Anti–Discrimination Center (Apr. 14, 2005), all on file with the Committee on General Welfare and the N.Y. Legislative Service, each confirming that the Council sought to have courts maximize civil rights protections. For example, the Bar Association, at p. 4 of its letter, referred to "the Council's clear intent to provide the greatest possible protection for civil rights." At the Council's debate prior to passage, Council Member Palma described the Bar Association and Brennan Center statements as important to the Committee, and characterized the Anti–Discrimination Center's testimony as "an excellent guide to the intent and consequences of [the] legislation we pass today."

8 We note in this context two cardinal rules of statutory construction: that legislative amendments are "deemed to have intended a material change in the law" (McKinney's N.Y. Statutes § 193[a]), and that "courts in construing a statute should consider the mischief sought to be remedied by the new legislation, and they should construe the act in question so as to suppress the evil and advance the remedy" (*id.* § 95). As such, we are not free to give force to one section of the law that has specifically been amended (e.g. Administrative Code § 8–107[7]), and decline to give force to another (e.g. § 8–130). We must give force to all amendments, and not relegate any of them to window dressing.

9 *See e.g. Selmanovic v. NYSE Group,* 2007 U.S. Dist. LEXIS 94963, *9–20, 2007 WL 4563431, *4–6 [S.D.N.Y.], recognizing the Restoration Act's enhanced liberal construction requirement, and its impact on **sexual harassment** and retaliation claims under the local law; *Pugliese v. Long Is. R.R. Co.*, 2006 U.S. Dist. LEXIS 66936, *38–40, 2006 WL 2689600, *12–13 [E.D.N.Y.], identifying Administrative Code § 8–107(13)(b)(1) as the City law's explicit statutory basis for imposing vicarious liability on those exercising

managerial or supervisory authority, and noting that "the breadth and scope of CHRL will often yield results different from Title VII"; *Okayama v. Kintetsu World Express (U.S.A.)*, 2008 WL 2556257 [Sup. Ct., N.Y. County], holding that the explicit statutory structure of Administrative Code § 8–107[13][b] precludes the availability of the federal *Faragher* affirmative defense where the conduct of those exercising managerial or supervisory authority is at issue; *Farrugia v. North Shore Univ. Hosp.*, 13 Misc.3d 740, 820 N.Y.S.2d 718 [2006], noting that "The New York City Human Rights Law was intended to be more protective than the state and federal counterparts"; *Bumpus v. New York City Tr. Auth,* 18 Misc.3d 1131(A), 2008 N.Y. Misc. LEXIS 4628, *7, 2008 WL 399147, *3, noting that "The legislative history contemplates that the Law be independently construed with the aim of making it the most progressive in the nation".

10 The Committee Report cited, inter alia, *Ray v. Henderson*, 217 F.3d 1234, 1241–1243 [9th Cir.2000] to help illustrate the broad sweep of the re-emphasized City anti-retaliation provision.

11 *See* discussion in *Return to Eyes on the Prize,* 33 Fordham Urb LJ at 321–322.

12 Subsequent to passage of the Restoration Act, the U.S. Supreme Court modified the Title VII anti-retaliation standard (*Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 [2006]). In doing so, however, *Burlington* still spoke in terms of "material adversity," i.e., conduct that might have dissuaded a reasonable worker from making or supporting a charge of discrimination (*id.* at 68, 126 S.Ct. 2405). While this was a standard similar to that set forth in § 8–107(7), it cannot be assumed that cases citing *Burlington* adequately convey the full import of the City HRL standard, especially because the confusing use of the term "materially adverse" might lead some courts to screen out some types of conduct *prior* to conducting "reasonably likely to deter" analysis. In fact, to reiterate, § 8–107(7) specifically rejects a materiality requirement.

13 There is no evidence in the record to suggest that in the circumstances presented, the failure to grant such time off was an act reasonably likely to deter a person from engaging in protected activity.

14 *See, e.g.,* the statement of then-Mayor Dinkins in connection with the signing of the 1991 Amendments, endorsed in the 2005 Committee Report, that "there is no time in the modern civil rights era when vigorous local enforcement of anti-discrimination laws has been more important. Since 1980, the federal government has been marching backward on civil rights issues" (Committee Report, 2005 N.Y. City Legis. Ann., at 536). Indeed, one motivation expressed by the Committee for passing the Restoration Act was that construction of numerous provisions of the City HRL "narrowed the scope of the law's protections." This enhanced liberal construction was directly confronted in *McGrath v. Toys "R" Us, Inc.*, 3 N.Y.3d 421, 788 N.Y.S.2d 281, 821 N.E.2d 519 [2004], a case in which a narrow, post–1991 interpretation of federal law was transplanted into the local law without Council action (Committee Report, at 537). *McGrath* was also identified on the floor of the Council as a case inconsistent with the requirements of the Restoration Act (*see* Council Member Palma's statement at footnote 3, *supra*).

15 Although the assumption has been that such a rule applies to the City HRL (*see, e.g.,* the recent case of *Gallo v. Alitalia–Linee Aeree Italiane–Societa per Azioni,* 585 F.Supp.2d 520, 536–38 [S.D.N.Y.]), the fact is that "severe or pervasive" was not the accepted City HRL rule at the time of the 1991 Amendments (*see* discussion in *Return to Eyes on the Prize,* 33 Fordham Urb LJ at 300–301). Moreover, there is no evidence that "severe or pervasive" has ever been subjected to liberal construction analysis, let alone the enhanced analysis required by the Restoration Act.

16 Judith J. Johnson, *License to* ***Harass*** *Women: Requiring Hostile Environment* ***Sexual Harassment*** *to be "Severe or Pervasive" Discriminates among "Terms and Conditions" of Employment* (62 M.d. L. Rev. 85, 87 [2003]).

17 *Id.* at 111–134, describing a variety of techniques by which claims have been turned away using "severe or pervasive" as a shield for discriminators.

18 See Committee Report, 2005 N.Y. City Legis. Ann., at 537. Importantly, the way that the Council responded to *McGrath* was not by dealing with the specific topic of the case (the availability of attorney's fees in circumstances where only nominal damages are awarded), but by changing the method of analysis applicable to *all* provisions of the law. *McGrath,* of course, was also explicitly mentioned on the floor of the City Council as one of the cases that, with the passage of the Restoration Act, would—in Council member Palma's words—"no longer hinder the vindication of our civil rights" (*see* text at footnote 3, *supra*). In light of the foregoing, it is puzzling that *Gallo* would make the identical Council "could have done so" argument already specifically rejected by the Restoration Act (see 585 F.Supp.2d at 537–38).

19 *See also* page 4 of the Bar Association letter (*supra* at footnote 7), reciting the expectation that the undoing of narrow

construction of the law by legislative amendment "should no longer be necessary" if there is judicial appreciation for the Restoration Act's intention that the law provide "the greatest possible protection for civil rights"; and page 5 of the Brennan Center Statement (same footnote), noting the suggestion that "a better approach would be for the Council to limit itself to specifically overruling individual interpretations that it views as unduly restrictive. However, this approach has proven ineffective in the past, as the courts have tended to construe narrowly specific Council amendments. Without an explicit instruction that the City Human Rights Law should be construed independently, courts will continue to weaken New York City's Law with restrictive federal and state doctrines."

20 *See* Committee Report, 2005 N.Y. City Legis. Ann., at 538 n. 8; *see also* page 4 of the Bar Association letter (*supra* at footnote 7) that construction must flow from "the Council's clear intent to provide the greatest possible protection for civil rights"; Anti–Discrimination Center testimony (same footnote) that "In the end, regardless of federal interpretations, the primary task of [a] judge hearing a City Human Rights Law claim is to find the interpretation for the City Law that most robustly further[s] the purposes of the City statute."

21 The fact that Title VII has language similar to that of the City HRL does not even begin our inquiry, let alone end it. The Restoration Act made clear, with specific statutory language, that the obligation to determine what interpretation best fulfills the City law's purposes is in no way limited by the existence of cases that have interpreted analogous federal civil rights provisions (Administrative Code § 8–130); *cf. Gallo,* where the courts apparently believed there was something called "the hostile work environment law" (585 F.Supp.2d at 537–38), but never asked what interpretation of § 8–107(1)(a)'s "terms and conditions" language would best fulfill the uniquely broad and remedial purposes of the City HRL.

22 It would be difficult to find a worker who viewed a job where she knew she would have to cope with unwanted gender-based conduct (except what is severe or pervasive) as equivalent to one free of unwanted gender-based conduct.

23 As already noted, the fact that conduct is actionable does not control the amount of damages to be awarded.

24 Kathryn Lake Mazierski, President, New York State Chapter of the National Organization for Women, Testimony at Hearing of the City Council's Committee on General Welfare, at 49–50 (Sept. 22, 2004) (NOW testimony, transcript on file with N.Y. City Clerk's Office). Note that *Gallo* asserts that organizations sought to have the "severe and pervasive" test "removed" from the City HRL; that the Council "ignored" that suggestion and "amended only those specific portions of the CHRL that the City thought needed to be addressed," and that Prof. Gurian's article supports that account (585 F.Supp.2d at 537–38). In so stating, *Gallo* ignores the legislative history and mischaracterizes the article. In fact, as discussed, *supra,* the most important specific textual changes made by the Council were the changes to § 8–130—changes designed to control the construction of every other provision of the HRL, and so important that they were doubly emphasized in Section 1 of the Restoration Act. Contrary to *Gallo,* neither the New York Chapter of NOW nor any of the other organizations that spoke to this issue had argued that the City Council should revise the text of § 8–107(1)(a)'s terms-and-conditions provision to proscribe the "no severe or pervasive" limitation, and the Council made no decision to "adopt" the "severe or pervasive" rule. Instead, the organizations all raised the issue as part of their (successful) advocacy to have the language of § 8–130 changed. For example, Ms. Mazierski, after describing the "problem of hitching the local law to a federal standard" (NOW testimony, at 47) argued for an enhanced liberal construction provision: "If judges are forced to look at a proper standard for **sexual harassment** claims under the City's Human Rights Law, independent [of] the federal standard, *we will be able to have an argument on the merits and not be stuck on the standard that continuously hurts women* " (at 50, emphasis added). As for Prof. Gurian's article, it set forth the decision that the City Council actually made, describing the enhanced liberal construction provision as the Restoration Act's "declaration of independence," and noting that areas of law that have been settled by virtue of interpretations of federal or State law "will now be reopened for argument and analysis.... As such, advocates will be able to argue afresh (or for the first time) a wide range of issues under the City's Human Rights Law, including the parameters of actionable **sexual harassment**" (*Return to Eyes on the Prize,* 33 Fordham Urb LJ at 258).

25 Brennan Center statement (*supra at* footnote 7), at p. 5.

26 Anti–Discrimination Center testimony (*supra at* footnote 7), at p. 2.

27 In the "mixed motive" context, of course, the question on summary judgment is whether there exist triable issues of fact that discrimination was one of the motivating factors for the defendant's conduct. Under Administrative Code § 8–101, discrimination shall play no role in decisions relating to employment, housing or public accommodations.

28 Throughout this decision, we have referenced *Gallo* to illustrate types of analyses that have now been rejected by the Restoration Act, but it is important to note that the Restoration Act will require many courts to approach the City HRL with new eyes. It is not that frequent that legislation is enacted "to remind, empower, and require judges to fulfill their essential role as active and zealous agents for the vindication of the purposes of the law" (*Return to Eyes on the Prize,* 33 Fordham Urb LJ at 290). Nor are judges often urged by the legislative body to exercise judicial restraint against substituting their own more conservative social policy judgments for the policy judgments made by the Council or treating a local law as merely in parallel with its federal or state counterpart (*id.*).

29 *Cf.* Committee Report, 2005 N.Y. City Legis. Ann., at 538 n. 8: The Restoration Act "underscores the need for thoughtful, independent consideration of whether the proposed interpretation would fulfill the uniquely broad and remedial purposes of the City's human rights law."

30 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. No such circumstances were present here.

31 The lack of actionable gender-based discrimination in this case (to which a pre-limitation period **harassing** comment could otherwise be linked) is discussed, *infra,* in Part V.

32 The record shows that plaintiff was, in fact, absent on two occasions, but complained about being denied training.

33 In view of the Restoration Act's rejection of *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 786 N.Y.S.2d 382, 819 N.E.2d 998 [2004] and *Galabya v. New York City Bd. of Educ.,* 202 F.3d 636 [2d Cir.2000] two of the cases cited by the court below, that issue would need to be decided afresh with due regard for the commands of the enactment (*see e.g.* Council Member Palma's statement, at footnote 3, *supra,* that cases like these "will no longer hinder the vindication of our civil rights"; *see also* Committee Report, 2005 N.Y. City Legis. Ann., at 537, demanding that "discrimination ... not play a role," and at 538 n. 4, contrasting *Galabya* with the Council's preferred approach to materiality). However, given the factual circumstances of the instant case, such a determination is not necessary.

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KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in Fletcher v. Dakota, Inc., N.Y.A.D. 1 Dept., July 3, 2012

3 N.Y.3d 295
Court of Appeals of New York.

Paula FORREST, Appellant,
v.
JEWISH GUILD FOR THE BLIND et al.,
Respondents.

Oct. 26, 2004.

Synopsis
Background: Terminated African-American employee initiated action, alleging former employer discriminated against her on basis of race and color and retaliated against her for complaining about such discrimination. The Supreme Court, New York County, Walter Tolub, J., denied employer's motion for summary judgment. Employer appealed. The Supreme Court, Appellate Division, 309 A.D.2d 546, 765 N.Y.S.2d 326, reversed. Employee appealed.

Holdings: The Court of Appeals, Kaye, C.J., held that:

[1] employee failed to establish prima facie case of racial discrimination;

[2] employee failed to establish hostile work environment; and

[3] employee failed to state claim of retaliation.

Affirmed.

G.B. Smith, J., concurred and filed opinion.

West Headnotes (19)

[1] **Civil Rights**
⁂Practices Prohibited or Required in General; Elements
Civil Rights
⁂Discharge or Layoff

To establish prima facie case of racial discrimination in employment under State Human Rights Law and New York City Administrative Code, plaintiff must show that (1) she is member of protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) discharge or other adverse action occurred under circumstances giving rise to inference of discrimination. McKinney's Executive Law § 296; New York City Administrative Code, § 8–107.

139 Cases that cite this headnote

[2] **Civil Rights**
⁂Employment Practices

After plaintiff establishes prima facie case of racial discrimination in employment in violation of the New York State Human Rights Law and New York City Administrative Code, burden then shifts to employer to rebut presumption of discrimination by clearly setting forth, through introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision. McKinney's Executive Law § 296; New York City Administrative Code, § 8–107.

50 Cases that cite this headnote

[3] **Civil Rights**
⁂Motive or Intent; Pretext
Civil Rights
⁂Employment Practices

In order to succeed on claim of race discrimination in employment, in violation of the State Human Rights Law and New York City Administrative Code, once employer has set forth legitimate, independent, and nondiscriminatory reasons to support its

employment decision, plaintiff must prove that employer's legitimate reasons were merely pretext for discrimination by demonstrating both that stated reasons were false and that discrimination was real reason. McKinney's Executive Law § 296; New York City Administrative Code, § 8–107.

29 Cases that cite this headnote

[4] **Judgment**
⇒Labor and Employment

To prevail on its summary judgment motion in action by terminated employee alleging discrimination in employment in violation of the New York State Human Rights Law and New York City Administrative Code, employer was required to demonstrate either employee's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for employer's challenged actions, absence of material issue of fact as to whether employer's explanations were pretextual. McKinney's Executive Law § 296; New York City Administrative Code, § 8–107.

67 Cases that cite this headnote

[5] **Civil Rights**
⇒Promotion, Demotion, and Transfer

African-American employee's change in job title did not constitute demotion, as required to establish prima facie case of racial discrimination in violation of State Human Rights Law and New York City Administrative Code; rather, undisputed proof was that her new title was adopted as part of restructuring by employer, which provided services to disabled persons, in effort to be consistent with terminology used by its state regulatory agency, and was applied to all similarly situated employees, and salary and benefits were unaffected by these changes. McKinney's Executive Law § 296; New York City Administrative Code, § 8–107.

10 Cases that cite this headnote

[6] **Civil Rights**
⇒Particular Cases

Alleged mistreatment suffered by African-American employee at hands of her supervisors, consisting of snatching of pad from her hands, patting of a seat in allegedly humiliating way, shouting at her in meeting, circling of her name on time sheet erroneously indicating she was late, and rolling of eyes when she spoke, did not constitute materially adverse change in terms and conditions of employment, as required to establish prima facie case of race discrimination in violation of State Human Rights Law and New York City Administrative Code. McKinney's Executive Law § 296; New York City Administrative Code, § 8–107.

10 Cases that cite this headnote

[7] **Civil Rights**
⇒Motive or Intent; Pretext

Even assuming that African-American employee established that she was terminated from her employment, and thus suffered adverse employment action, as required to establish prima facie showing as of racial discrimination in violation of State Human Rights Law and New York City Administrative Code, she failed to offer evidence that employer's legitimate explanations, including employee's failure to submit documentation in favor of family medical leave act she had taken, and her traveling to Hawaii leaving her without notifying employer, were pretext for unlawful discrimination, as required to defeat employer's motion for summary judgment. McKinney's Executive Law § 296; New York City Administrative Code, § 8–107.

39 Cases that cite this headnote

[8] **Civil Rights**
Hostile Environment; Severity, Pervasiveness, and Frequency

African-American employee's assertion that supervisors used three racial slurs, in one instance asserted for first time nearly six years after comment was purportedly made, in absence of affidavit from anyone who heard alleged epithets, or of written report filed by employee or anyone else alleging remarks were made, as matter of law could not establish hostile work environment in violation of State Human Rights Law and New York City Administrative Code; use of three epithets had occurred over nine-year employment history, and employee did not allege that the egregious remarks interfered in any way with her job performance. McKinney's Executive Law § 296; New York City Administrative Code, § 8–107.

8 Cases that cite this headnote

[9] **Civil Rights**
Hostile Environment; Severity, Pervasiveness, and Frequency

Racially hostile work environment in violation of State Human Rights Law and New York City Administrative Code exists when workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter conditions of victim's employment and create abusive working environment. McKinney's Executive Law § 296; New York City Administrative Code, § 8–107.

69 Cases that cite this headnote

[10] **Civil Rights**
Hostile Environment; Severity, Pervasiveness, and Frequency

Whether environment is racially hostile or abusive can be determined only by looking at all circumstances, including frequency of discriminatory conduct, its severity, whether it is physically threatening or humiliating, or mere offensive utterance, and whether it unreasonably interferes with employee's work performance; conduct must both have altered conditions of victim's employment by being subjectively perceived as abusive by victim, and have created objectively hostile or abusive environment, one that reasonable person would find to be so. McKinney's Executive Law § 296; New York City Administrative Code, § 8–107.

32 Cases that cite this headnote

[11] **Civil Rights**
Hostile Environment; Severity, Pervasiveness, and Frequency

Racially hostile work environment requires more than few isolated incidents of racial enmity; instead of sporadic racial slurs, there must be steady barrage of opprobrious racial comments. McKinney's Executive Law § 296; New York City Administrative Code, § 8–107.

5 Cases that cite this headnote

[12] **Civil Rights**
Knowledge or Notice; Preventive or Remedial Measures

Use of racial slurs and insults by supervisor without knowledge or acquiescence of employer does not constitute unlawful discriminatory practice actionable under State Human Rights Law. McKinney's Executive Law § 296.

4 Cases that cite this headnote

[13] **Civil Rights**
Employment Practices

Employer cannot be held liable under State Human Rights Law for employee's discriminatory act unless employer became party to it by encouraging, condoning, or approving it. McKinney's Executive Law § 296.

15 Cases that cite this headnote

[14] **Civil Rights**
Knowledge or Notice; Preventive or Remedial Measures

Employer did not know of, let alone condone or acquiesce in, racial epithets which African-American employee alleged supervisors made, as required to constitute unlawful discriminatory practice actionable under State Human Rights Law; employee did not report any of alleged remarks or indeed any other allegations of racial **harassment** to employer, or bring complaint utilizing procedures established pursuant to employer's antidiscrimination policy. McKinney's Executive Law § 296.

11 Cases that cite this headnote

[15] **Civil Rights**
Employment Practices
Judgment
Labor and Employment

Mere fact that employee may disagree with her employer's actions or think that her behavior was justified does not raise inference of pretext with respect to employer's proffered legitimate, non-discriminatory reason for employee's termination, as required to defeat employer's motion for summary judgment in employment discrimination action. McKinney's Executive Law § 296; New York City Administrative Code, § 8–107.

6 Cases that cite this headnote

[16] **Civil Rights**
Practices Prohibited or Required in General; Elements

In order to make out retaliation claim under both State and City Human Rights Laws, plaintiff must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered adverse employment action based upon her activity, and (4) there is causal connection between protected activity and adverse action. McKinney's Executive Law § 296; New York City Administrative Code, § 8–107.

129 Cases that cite this headnote

[17] **Civil Rights**
Activities Protected

African-American employee did not engage in protected activity under State Human Rights Law and New York City Administrative Code, as required to state claim that employer retaliated against employee for allegedly complaining about racial discrimination; although employee filed numerous grievances claiming generalized "**harassment**," she never alleged that she was discriminated against because of race, or invoked article of Collective Bargaining Agreement prohibiting such practices.

32 Cases that cite this headnote

[18] **Judgment**
Labor and Employment

As matter of law, mere fact that discriminatory incidents of which employee complains occurred after grievances were filed does not create issue of fact as to causality, as required to support claim of retaliation on employer's

motion for summary judgment.

2 Cases that cite this headnote

[19] **Civil Rights**
—Employment Practices

Because African-American employee failed to raise triable issue of material fact that she was either retaliated against or discriminated against because of her race, her claims that employer and individual defendants aided and abetted each other in any discrimination or retaliation could not survive employer's motion for summary judgment. McKinney's Executive Law § 296, subd. 6.

31 Cases that cite this headnote

Attorneys and Law Firms

***385 *296 **1001** Tuckner, Sipser, Weinstock & Sipser, New York City (William J. Sipser and Jack Tuckner of counsel), for appellant.

***297** Torys LLP, New York City (Lauren Reiter Brody and Frances Kulka Browne of counsel), for respondents.

***298 OPINION OF THE COURT**

KAYE, Chief Judge.

Racial discrimination has no place in society. Antidiscrimination laws must therefore be strictly enforced to root out this scourge whenever it occurs. But it is simply not the law that every dispute that arises between people of different races constitutes employment discrimination, or that every wrongful act perpetrated in the course of such a dispute is committed because of race. Simply put, animosity on the job is not actionable; unequal treatment based on racial animus is. Because plaintiff has failed to raise a triable issue ***386 **1002** of fact that she was unlawfully discriminated against on the basis of her race, we affirm the Appellate Division's award of summary judgment to defendants dismissing the complaint.

I. Facts and Procedural History[1]

Founded in 1914, defendant Jewish Guild for the Blind is a not-for-profit, nonsectarian agency that provides educational, health care and social services to blind, visually impaired and multidisabled persons. Its stated mission is to help those with visual disabilities lead productive, independent, satisfying lives.

Plaintiff is an African–American woman who was hired by the Guild in 1985 as a music therapist in its Continuing Treatment ***299** Program (CTP). In 1990, plaintiff began an educational leave of absence from the Guild, which lasted for more than a year. By the time she returned, in August 1991, the Guild and the CTP had undergone a substantial reorganization as mandated by the State of New York. In order to continue to receive state funding, the Guild was thus required to implement certain procedures and policies of the State Office of Mental Health. As a result, the CTP was moved from the Guild's Educational Services Department to its Mental Health Services Department (directed by defendant Goldie Dersh), and was renamed the Continuing Day Treatment Program (CDTP).

Upon her return to the Guild, plaintiff was assigned to the CDTP, which was coordinated by defendant Eugenia Adlivankina. In order to reflect the terminology used by the State Office of Mental Health, the job titles of all art therapists, dance therapists and music therapists—including plaintiff—were changed to creative arts therapists.

As an employee of the CTP, plaintiff's responsibilities had been limited to providing music therapy—that is, using music to facilitate the development of goals, such as memory, sequencing or motor coordination. With programmatic restructuring, however, came changes in approach. In the CDTP, all professionals—both creative arts therapists and social workers—were viewed as members of an interdisciplinary team, charged with providing holistic services to program clients. As a result, all professional employees—no longer just social workers—were assigned cases and required to participate

in developing treatment plans and maintaining accurate therapy records and documentation so as to comply with Office of Mental Health mandates. With the management of a caseload came such tasks as communicating with clients' family members, scheduling appointments, arranging transportation and attending meetings with other team members. Ultimately, in January 1992, to reflect the shared mission of both creative arts therapists and social workers—all of whom also continued to provide therapeutic services consistent with their own specialized training and qualifications—the job titles for all such professional employees were changed to case manager. Plaintiff's salary and benefits, however, did not change. At around the same time, the desks of all CDTP professionals were relocated into one large office so as to facilitate the shared exchange of client information.

From the start, plaintiff complained about having to share an office and resisted her additional case management responsibilities, ***300** preferring to limit her *****387 **1003** efforts to the conduct of music therapy sessions. Conflict quickly arose. As early as November 1991, plaintiff wrote a memorandum to her union delegate complaining about her case management duties, while stating that she "was not adamantly refusing to cooperate." Moreover, because social workers had always carried caseloads and performed attendant administrative tasks, plaintiff—who neither was trained for nor provided social work services—took the position that she had been forced to undertake the "dual" job of creative arts therapist and social worker, and therefore filed a grievance with her union in which she sought increased pay. In February 1992, plaintiff complained in a memorandum to Adlivankina that her current responsibilities did not allow enough time for her to complete her recordkeeping duties, suggested that she be "free[d] up" to focus on paperwork, and warned, "I see this as being a potential problem we'll have to work out."

In July 1992, after the State promulgated new policies and procedures mandating the use of standardized medical record forms, all staff members, including plaintiff, were provided special training in the completion of the new forms. Plaintiff, however, appears to have had difficulty in complying with her responsibility to maintain these state-mandated patient records. Explaining that the forms were constantly changing, plaintiff fell behind in keeping her patient notes current. Throughout the fall of 1992, plaintiff received oral and written warnings from her supervisors, Dersh and Adlivankina, setting forth instances in which plaintiff had allegedly failed to write progress notes when required, not completed her notes in a timely manner, misdated notes, and written them in an incorrect sequence. Patients who had been absent from therapy sessions were sometimes marked present on medical charts, which plaintiff's supervisors had explained to her were legal documents. The supervisors further advised plaintiff that her notes were frequently unstructured and unrelated to client treatment plans and services provided. In some instances, notes were smudged or illegible.

By November 1992, plaintiff's supervisors were expressing concern that the inaccuracies and omissions in her notes—including with respect to client attendance—threatened to place the Guild out of compliance with state-mandated recordkeeping guidelines for the provision of health services, and with documentation requirements for Medicaid reimbursement. Tellingplaintiff ***301** they were worried that the Guild's licensing status and funding might be jeopardized at an upcoming audit by the State Office of Mental Health, plaintiff's supervisors relieved her of the bulk of her other responsibilities so that she could devote the majority of her time to her client charts. She was warned in writing about "what appears to be a lack of responsiveness on your part to previous guidance and instruction in these matters and what seems to be either an unwillingness or inability to properly perform charting tasks." Plaintiff filed grievances with her union concerning the warnings about her recordkeeping, alleging that she was being "**harass**[ed]."

In December 1992, plaintiff received a written warning for leaving her blind patients unattended. As undisputed by plaintiff, a holiday lunch was being offered to CDTP clients during plaintiff's scheduled lunch hour. Plaintiff nevertheless chose to help serve lunch to the patients. After leaving to take her own lunch 20 minutes into the hour, plaintiff did not return for an hour and 15 minutes—20 minutes after her therapy session was scheduled to begin. Plaintiff then dismissed her group 15 minutes later, in violation *****388 **1004** of state standards requiring that no group session may be shorter than 45 minutes.

The record reflects other conflicts as well. In June 1992, plaintiff took extended vacation to be with her ailing mother. Because she had failed to provide specific information on when she would return, the Guild eventually reached out to her in Florida in an effort to arrange for patient coverage. Plaintiff thereafter sent a telegram to the Guild, updating her supervisors on her mother's condition. On her return to work, she filed two grievances alleging "**harassment**" and seeking reimbursement for the cost of the telegram. In October 1992, plaintiff was disciplined for violating the policy that confidential patient records are never to be removed from

the CDTP without supervisory permission, and for then refusing to discuss the issue with Adlivankina the morning after the incident on the ground that working hours had not yet begun.

Plaintiff filed complaints with the union and with defendant Carol Handfus, Director of Personnel at the Guild, because she did not like her assigned lunch hour, because a circle had been placed next to her name on a posted time sheet when she was (mistakenly, it turned out) thought to be late, and because Dersh had removed a pad from plaintiff's hand at a meeting. Other complaints were not formally filed because, according to plaintiff, the union "[f]ail[ed] to represent and pursue all of my ***302** claims" and stated, "You are so self-centered and self-involved, all you ever think about are your grievances." Plaintiff eventually filed a complaint against her union with the New York State Division of Human Rights. In January 1993, plaintiff requested transfer to the Guild's Day Treatment Program (DTP), which was coordinated by her friend, defendant Patricia Finocchiaro, and which provides ongoing treatment for visually impaired adults with psychiatric diagnoses, and deaf and blind persons who are cognitively impaired. The DTP is separate from the CDTP and is operated under the auspices of the State Office of Mental Retardation and Developmental Disabilities.

Plaintiff's problems with recordkeeping continued. In March 1994, Finocchiaro wrote a memorandum to plaintiff reflecting Finocchiaro's discovery that, for more than five months, plaintiff had failed to make any progress notes in the records of several clients, though monthly patient progress notes were required. At the end of July 1994, plaintiff requested a three-month leave of absence to begin in August, pursuant to the Family and Medical Leave Act of 1993 (29 USC § 2601 *et seq.*) (FMLA), to care for her seriously ill father in Florida (*see* 29 USC § 2612[a][1][C]). The Guild approved the request, subject to the submission by plaintiff of specified documentation of her father's serious health condition (*see* 29 USC § 2613). Plaintiff was given the requisite form to complete and undertook to return it, with the necessary certification by her father's physician, by August 22.

Between August and October 1994, the Guild sent several letters to plaintiff at the Florida address, by certified mail and Federal Express, requesting the required documentation and providing additional copies of the necessary form. The first certified letter was returned by the post office as unclaimed. The next informed plaintiff that, if she did not submit the mandated certification, she would be considered on unauthorized leave of absence and subject to termination. On October 6, 1994, plaintiff called the Guild and promised to provide the documentation by the following week.

In the meantime, plaintiff had applied for and received unemployment insurance *****389 **1005** benefits from the New York State Department of Labor on the ground that she was "available and seeking employment in the State of Florida." On October 18, the Guild received a copy of a form requested by the Department of Labor's Unemployment Insurance Division on September 6, and completed by a physician on October 7, diagnosing plaintiff's father with " [h]ypertension, aging and prostate," ***303** recommending medication as treatment, and—in response to the question, "What home care, if any, is needed?"—stating, "Needs family member."

Because the certification contemplated by the FMLA requires more specific information than was contained on the unemployment insurance form,[2] the Guild sent two more letters by express mail, informing plaintiff of the inadequacy of her submission and setting a new compliance deadline of October 31. Three days before the deadline, the Guild was notified by Federal Express that its last letter had been refused and that the courier had been advised by plaintiff's father that plaintiff was not at that address. Handfus then called plaintiff's father, who informed her that plaintiff had left his home three weeks earlier and gone to Hawaii, and that he had been living without any help at home since that time. Finally, on November 2, 1994, Handfus sent a letter to plaintiff detailing the events surrounding her leave, and advising her that her employment had been terminated on the ground of job abandonment.

Two days later, a resignation letter dated October 22, 1994, and "effective immediately," arrived from plaintiff:

> "I want to express my gratitude for the opportunity to serve, utilize my talents, and grow both professionally and personally. It was most rewarding for me to see the value of my contributions in helping others.
>
> "Extenuating circumstances, the most paramount one being the care of my father, has brought me to this juncture in my life. That care is now required beyond the limitations of my leave of absence which the Guild has already granted."

By November, plaintiff had begun a new job as a school teacher in Florida.

***304** Meanwhile, in September 1994, after having started her FMLA leave, plaintiff filed a complaint with the New York City Commission on Human Rights and the Equal

Employment Opportunity Commission (EEOC), alleging that defendants had discriminated against her on the basis of race and color and in retaliation. In her complaint, plaintiff alleged that in October 1992, she was told that Dersh had referred to her as an "uppity nigger." In June 1997, plaintiff filed an amended complaint with the City Commission, alleging additional acts—including that Adlivankina had encouraged plaintiff's coworkers to refer to her as "our Black American Princess"—that were purported to have occurred prior ***390 **1006** to the filing of the original complaint but omitted from that pleading.

Dissatisfied with the investigation conducted by Commission attorneys, plaintiff wrote letters regarding a supervisor's "unwarranted attitude," and accusing the Commission of racial discrimination and failure to render "unbiased assistance to all people": "[M]y complaint against the employer with whom I encountered conflict has already been recorded. It is not an encouraging experience to have it occur within the Commission as well." Because plaintiff failed, despite the Commission's request, to rescind the right-to-sue letter she had received from the EEOC, as required in order for the Commission to continue its investigation, the Commission administratively closed her case. Within weeks, plaintiff filed suit against defendants in the United States District Court for the Southern District of New York, alleging violations of federal, state and city antidiscrimination laws. Three months later, she voluntarily dismissed that action.

In February 1998, more than three years after her employment with the Guild had ended, plaintiff commenced the instant lawsuit seeking several million dollars in damages, alleging that defendants discriminated against her on the basis of race and color and retaliated against her for complaining about such discrimination, in violation of the New York State Human Rights Law (*see* Executive Law § 296[1][a]; [7]) and the New York City Administrative Code (*see* Administrative Code of City of N.Y. § 8–107[1][a]; [7]). In her complaint, plaintiff pleaded an additional racial slur made by Dersh, not previously alleged, said to have been uttered in 1992: "Why do we always have to stroke Blacks to get them to work?"

After plaintiff and three of the individual defendants were deposed, defendants moved for summary judgment dismissing *305 the complaint. Supreme Court denied defendants' motion, and the Appellate Division reversed. We now affirm.

II. Racial Discrimination

A. Discriminatory Employment Action

[1] [2] [3] A plaintiff alleging racial discrimination in employment has the initial burden to establish a prima facie case of discrimination.[3] To meet this burden, plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination (*see Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 687 N.E.2d 1308 [1997]). The burden then shifts to the employer "to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support ***391 **1007** its employment decision" (*id.* [citations omitted]). In order to nevertheless succeed on her claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason (*see id.* at 629–630, 665 N.Y.S.2d 25, 687 N.E.2d 1308).

[4] To prevail on their summary judgment motion, defendants must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual. In that event, summary judgment would constitute "a highly useful device for expediting the just disposition of a legal dispute for all parties and conserving already overburdened judicial resources" *306 (*Matter of Suffolk County Dept. of Social Servs. [Michael V.] v. James M.*, 83 N.Y.2d 178, 182, 608 N.Y.S.2d 940, 630 N.E.2d 636 [1994]), inasmuch as no valid purpose is served by submitting to a jury a cause of action that cannot survive as a matter of law. Defendants have satisfied their burden.

The first two elements necessary to establish a claim of discrimination are not in dispute. Plaintiff is an African–American woman, qualified for the job she held at the Guild. She has, however, failed to raise a triable of issue of material fact as to whether any adverse

employment action she alleges she suffered occurred under circumstances giving rise to an inference of discriminatory motive. Preliminarily, plaintiff's proof of adverse action is in large measure wanting. She asserts three such actions: her "demotion" from music therapist to creative arts therapist and then to case manager; a series of interpersonal conflicts with her supervisors; and her ultimate termination.

An adverse employment action requires a materially adverse change in the terms and conditions of employment. To be materially adverse, a change in working conditions must be "more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by 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" (*Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 [2d Cir.2000] [citations and internal quotation marks omitted]).

[5] Plaintiff has offered no evidence that her change in job title constituted a demotion. Rather, the undisputed proof is that the title of creative arts therapist was adopted as part of the Guild's 1991 restructuring in an effort to be consistent with the terminology used by its state regulatory agency, and was applied to all similarly situated employees. Later, all professionals in the CDTP were restyled case managers to reflect the holistic approach valued by the program. Plaintiff's salary and benefits were unaffected by these changes.[4]

*****392 **1008** [6] ***307** Nor does the alleged mistreatment suffered at the hands of her supervisors rise to the level of adverse action as defined by law. The snatching of a pad from her hands, the patting of a seat in an allegedly humiliating way, the shouting at her in a meeting, the circling of her name on a time sheet, the rolling of eyes when she spoke—none of these constitutes a materially adverse change in the terms and conditions of plaintiff's employment (*see e.g. Fridia v. Henderson*, 2000 WL 1772779, *7, 2000 U.S. Dist LEXIS 17295, *22 [S.D.N.Y., Nov. 30, 2000] [excessive work, denials of requests for leave with pay and a supervisor's general negative treatment of the plaintiff are not materially adverse changes in the terms, conditions or privileges of employment]; *Katz v. Beth Israel Med. Ctr.*, 2001 WL 11064, *14, 2001 U.S. Dist LEXIS 29, *44 [S.D.N.Y., Jan. 4, 2001] ["Being yelled at, receiving unfair criticism, receiving unfavorable schedules or work assignments ... do not rise to the level of adverse employment actions"]).

[7] Plaintiff has, however, raised a triable issue of fact as to whether she was terminated from her employment. Clearly, termination constitutes an adverse action. Plaintiff concedes that she intended to resign from the Guild on October 22, 1994, effective immediately. But she asserts that she was nevertheless terminated because the Guild sent her a letter of discharge prior to its receipt of her resignation. Whether in these circumstances the Guild's action preempted and rendered ineffective her resignation presents a question of fact that a jury might resolve in her favor. But plaintiff still cannot avoid summary judgment for defendants because, even assuming that she has made a prima facie showing as to the fourth element, she has failed to rebut defendants' proof that the purported termination did not arise under circumstances giving rise to an inference of discrimination—that is, that she was not terminated "because of [her] race" (Executive Law § 296[1][a]; Administrative Code of City of N.Y. § 8–107 [1][a]).

Rather, the undisputed facts establish that plaintiff repeatedly failed to comply with her obligation to submit documentation in support of her family medical leave substantiating the nature of her father's serious illness. Plaintiff's lack of cooperation and failure to adhere to her commitments by themselves establish legitimate, nondiscriminatory reasons for ending her employment. And plaintiff's actions in traveling to Hawaii and leaving her father, without notifying the Guild of this substantial change, placed her in violation of statutory standards for entitlement ***308** to family medical leave and provided further justification for the Guild's decision.[5]

In response to this showing by defendants that their actions were justified by plaintiff's conduct, plaintiff has offered no evidence that defendants' legitimate explanations were a pretext for unlawful discrimination—that is, that they were false and that racially motivated discrimination was the real reason.[6] Indeed, plaintiff *****393 **1009** fails to demonstrate any causal relationship between the racial epithets allegedly uttered in 1992 by Dersh and Adlivankina, and her purported termination from Finocchiaro's department in 1994, that could conceivably demonstrate that the termination occurred under circumstances giving rise to an inference of discrimination (*see Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S.Ct. 1775, 104 L.Ed.2d 268 [1989] [O'Connor, J., concurring in judgment] ["statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself," are insufficient to establish discriminatory intent]).

Simply put, plaintiff has failed to raise an issue of fact as to whether she was discriminated against on the basis of

her race. To be sure, the record establishes that there was no love lost between plaintiff and her supervisors. Indeed, as a cycle unfolded of supervisory dissatisfaction with plaintiff's work; the giving of warnings; complaints about the warnings; a perceived lack of improvement; and more warnings followed by more complaints, any number of fair inferences could be drawn from the record as to the motives underlying such events.

Racial animus, however, is not among them. Plaintiff herself was hard pressed at her deposition to articulate any basis for her claim that defendants' alleged unfair treatment and **harassment** was race-based, other than a repeated assertion—or assumptionS ***309** that she was the only one so treated:[7] only she was told that she was jeopardizing the department (but only she had such difficulties with her charts); only she and another African–American employee had the spaces next to their names circled on a time sheet (but only they had not yet signed in and so were thought to be late); only she had to sign out for breaks (but when cross-examined, she admitted that others actually signed out as well); only she was refused overtime compensation (but although her overtime request arose from having stayed late to complete her reports, plaintiff did not dispute defendants' evidence that overtime is simply not available to employees of the Guild and that compensatory time is available only for direct patient care, not paperwork).

Indeed, prior to having taken her final leave from the Guild, plaintiff did not complain of racial discrimination in any forum. Although her grievances made clear that she felt "**harass**[ed]," she never alleged that the **harassment** was racially motivated. Rather, her union grievances for **harassment** alleged violations of articles IV, VII and XVII of the Collective Bargaining Agreement—pertaining to management rights over employees' job responsibilities, procedures for disciplining employees and vacation rights—not article V, which specifically prohibits discrimination, including racial discrimination. Nor did her resignation letter—thanking the Guild for "the opportunity to serve, utilize my talents, and grow both professionally and personally"—give any hint that she had ever been, or believed she had been, subjected to discrimination based on her race.

*****394 **1010** To be sure, discrimination, when it occurs, is a serious evil to be dealt with seriously. But mere personality conflicts must not be mistaken for unlawful discrimination, lest the antidiscrimination laws "become a general civility code" (*Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 [1998] [citation and internal quotation marks omitted]; *see also Gorley v. Metro–North Commuter R.R.*, 2000 WL 1876909, *7, 2000 U.S. Dist LEXIS 18427, *25–26 [S.D.N.Y., Dec. 22, 2000] ["Even if (plaintiff's supervisor) did harbor personal animosity against plaintiff ... Title VII ***310** provides relief only for racial discrimination, not fickleness"], *affd.* 29 Fed.Appx. 764 [2d Cir.2002]; *Gibson v. Brown*, 1999 WL 1129052, *12, 1999 U.S. Dist LEXIS 18555, *34 [E.D.N.Y., Oct. 19, 1999] ["Personal animosity is not the equivalent of ... discrimination and is not proscribed by Title VII. The plaintiff cannot turn a personal feud into a ... discrimination case by accusation" (citations omitted)], *affd.* 242 F.3d 365 [table; text at 2000 WL 1843914, 2000 U.S. App LEXIS 33119 (2d Cir.2000)]; *Padob v. Entex Info. Serv.*, 960 F.Supp. 806, 813 [S.D.N.Y.1997] ["It might be just as likely that Plaintiff was excluded because of her acknowledged personality conflict with (her supervisor)—but such behavior is not prohibited by (antidiscrimination laws)"]).[8]

B. Hostile Work Environment[9]

[8] Even one racial epithet is inexcusable. Employers are therefore both free and well advised to adopt zero tolerance policies in the workplace. But in the absence of a single affidavit from anyone who heard the alleged epithets, or of any written report filed by plaintiff or anyone else, at any time, alleging the remarks, plaintiff's assertion that defendants used three racial slurs—in one instance asserted for the first time nearly six years after the comment was purportedly made—as a matter of law cannot establish a hostile work environment.

[9] A racially hostile work environment exists "[w]hen 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" (*Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 [1993] [citations and internal quotation marks omitted]). While deplorable, the use of three epithets over a nine-year employment history does not satisfy this test.

[10] Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; ***311** and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the

environment abusive" (*id.* at 23, 114 S.Ct. 367). ***395 **1011** Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment—one that a reasonable person would find to be so (*see id.* at 21, 114 S.Ct. 367).

[11] Of course, even a "mere[ly] offensive" (*id.* at 23, 114 S.Ct. 367) racial slur is reprehensible. But it is not actionable. Here, the epithets complained of did not pervade plaintiff's work environment, having allegedly occurred on three occasions over nine years. A hostile work environment requires "more than a few isolated incidents of racial enmity" (*Snell v. Suffolk County,* 782 F.2d 1094, 1103 [2d Cir.1986]). "[I]nstead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments" (*Schwapp v. Town of Avon,* 118 F.3d 106, 110 [2d Cir.1997] [citation omitted]; *see also Harris,* 510 U.S. at 21, 114 S.Ct. 367 ["mere utterance of an ... epithet which engenders offensive feelings in an employee ... does not sufficiently affect the conditions of employment" (citation and internal quotation marks omitted)]; *Brown v. Coach Stores, Inc.,* 163 F.3d 706, 713 [2d Cir.1998] [no hostile work environment where supervisor made, on occasion, racist remarks, including one directed at the plaintiff]). Nor has plaintiff shown, or even alleged, that the egregious remarks interfered in any way with her job performance.

[12] [13] [14] Moreover, the use of racial slurs and insults by a supervisor without the knowledge or acquiescence of the employer does not constitute an unlawful discriminatory practice actionable under the State Human Rights Law (*see Matter of General Motors Corp., Fisher Body Div. v. State Human Rights Appeal Bd.,* 54 N.Y.2d 905, 445 N.Y.S.2d 150, 429 N.E.2d 829 [1981], *affg.* 78 A.D.2d 1006, 433 N.Y.S.2d 904 [4th Dept.1980]; *see also Hart v. Sullivan,* 55 N.Y.2d 1011, 449 N.Y.S.2d 481, 434 N.E.2d 717 [1982], *affg.* 84 A.D.2d 865, 445 N.Y.S.2d 40 [3d Dept.1981]). For an "employer cannot be held liable [under state law] for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it" (*Matter of State Div. of Human Rights v. St. Elizabeth's Hosp.,* 66 N.Y.2d 684, 687, 496 N.Y.S.2d 411, 487 N.E.2d 268 [1985], quoting *Matter of Totem Taxi, Inc. v. New York State Human Rights Appeal Bd.,* 65 N.Y.2d 300, 305, 491 N.Y.S.2d 293, 480 N.E.2d 1075 [1985]). Plaintiff has failed to offer any evidence that the Guild knew of, let alone condoned or acquiesced in, the epithets. The record is devoid of proof that plaintiff ever *312 reported any of the alleged remarks or indeed any other allegations of *racial* **harassment** to anyone at the Guild, or brought a complaint utilizing the procedures established pursuant to the Guild's antidiscrimination policy, which is contained in the record.[10]

[15] Plaintiff's arguments reflect a fundamental misapprehension of the law of summary judgment. To be sure, plaintiff ***396 **1012** has identified disputed issues of fact. But factual disputes are not enough; they must relate to *material* issues. Whether Dersh snatched a pad from plaintiff's hand out of sheer rudeness or because she was struck by the quality of plaintiff's notetaking is irrelevant when, as a matter of law, in neither event would a claim of racial discrimination be established. Nor do we find material whether defendants' contemporaneous assessment of plaintiff's recordkeeping skills was justified. "The mere fact that [plaintiff] may disagree with [her] employer's actions or think that [her] behavior was justified does not raise an inference of pretext" (*Estrada v. Lehman Bros., Inc.,* 2001 WL 43605, *5, 2001 U.S. Dist LEXIS 288, *15 [S.D.N.Y., Jan. 18, 2001] [citations omitted]; *see also Jimoh v. Ernst & Young,* 908 F.Supp. 220, 226 [S.D.N.Y.1995] ["As a matter of law, an employee's disagreement with an employer's business decision is insufficient to prove discriminatory conduct"]).

Similarly, a resolution of whether or not plaintiff's supervisors used racial epithets—an allegation denied by defendants—could not alter the conclusion that, even were they uttered, on this record they are insufficient to make out a hostile work environment.

III. Retaliation

[16] Under both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices (*see* Executive Law § 296[7]; Administrative Code of City of N.Y. § 8–107 [7]). In order to make out the claim, *313 plaintiff must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action.

[17] Plaintiff's showing fails on every prong. No triable issue of fact exists that plaintiff engaged in a protected activity—that is, opposing or complaining about unlawful discrimination[11]—or, a fortiori, that the Guild was aware of any such complaint. Although plaintiff filed numerous

grievances claiming generalized "**harassment**," she never alleged that she was discriminated against because of race, or invoked the article of the Collective Bargaining Agreement prohibiting such practices.[12] Moreover, plaintiff has "failed to submit sufficient evidence from which a jury could reasonably conclude a causal connection between any protected activity [s]he engaged in and any adverse employment action" (*Francis v. Chemical Banking Corp.*, 213 F.3d 626 [table; text at 2000 WL 687715, *1, 2000 U.S. App LEXIS 11896, *3 (2d Cir.2000)], *cert denied* 532 U.S. 949, 121 S.Ct. 1419, 149 L.Ed.2d 359 [2001]), or, as with her discrimination claim, to ***397 **1013** rebut defendant's evidence that any adverse action taken against her was justified by the legitimate, nondiscriminatory reasons already described.

[18] Nor can plaintiff avoid summary judgment "by merely pointing to the inference of causality resulting from the sequence in time of the events" (*Chojar v. Levitt,* 773 F.Supp. 645, 655 [S.D.N.Y.1991]; *see also Feliciano v. Alpha Sector, Inc.*, 2002 WL 1492139, *12, 2002 U.S. Dist LEXIS 12631, *35 [S.D.N.Y., July 12, 2002] ["As a matter of law, (t)he mere fact that the incidents of which (a plaintiff) complains occurred after ... grievances ***314** were filed does not create an issue of fact as to causality" (citations and internal quotation marks omitted)]).[13]

[19] Further, because plaintiff has failed to raise a triable issue of material fact that she was either retaliated against or discriminated against because of her race, her claims that defendants aided and abetted each other in any discrimination or retaliation cannot survive (*see* Executive Law § 296 [6]; Administrative Code of City of N.Y. § 8–107[6]).

In short, we agree with the Appellate Division that, on this record, it does no favor to the litigants, or to the law, or to the rigorous enforcement of genuine discrimination claims, to deny summary judgment and allow this case to proceed to trial.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

G.B. SMITH, J. (concurring).

The question on this appeal is whether appellant has raised a factual issue that precludes summary judgment. While appellant has sufficiently raised triable issues of fact on her claims of disparate treatment, hostile work environment and retaliation in the first instance, respondents have met their burden of giving nonracial reasons for her treatment and appellant has not demonstrated that those reasons are pretextual. I, therefore, concur in affirming the order of the Appellate Division.

Appellant began working for defendant as a music therapist in September 1985. From 1990 to 1991, she took a leave of absence to study for a Master's degree in urban education.

I

Two separate but related analyses are relevant on this appeal, the standard governing summary judgment and the standard governing the allegations of racial discrimination alleged by plaintiff.

"To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented" (*Glick & Dolleck v. Tri–Pac Export Corp.*, 22 N.Y.2d 439, 441, 293 N.Y.S.2d 93, 239 N.E.2d 725 [1968]; *see also Zuckerman* ***315** *v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]). Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable (*Glick & Dolleck v. Tri–Pac,* 22 N.Y.2d at 441, 293 N.Y.S.2d 93, 239 N.E.2d 725). On a summary judgment motion, the moving party must set forth evidence that there is no factual issue ***398 **1014** and that it is entitled to summary judgment (*Zuckerman v. City of New York,* 49 N.Y.2d at 560–562, 427 N.Y.S.2d 595, 404 N.E.2d 718). If the moving party establishes a basis for a grant of summary judgment, the opposing party must present evidence that there is a triable issue (*id.*).

"It is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 631, 665 N.Y.S.2d 25, 687 N.E.2d 1308 [1997]). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] is ruling on a motion for summary judgment or for a directed verdict" (*see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 [1986]).

Moreover, the facts must be viewed in the light most favorable to the nonmoving party (*see Matsushita Elec.*

Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 [1986]). For the purposes of appealing a summary judgment motion, appellant's allegations of fact must be taken as true (*see Rajcoomar v. TJX Cos., Inc.*, 319 F.Supp.2d 430, 433 n. 4 [S.D.N.Y.2004] ["The Defendant concedes that for the purposes of this motion it takes Rajcoomar's allegation of termination as true because all evidence must be viewed in a light most favorable to a plaintiff on a motion for summary judgment"]; *Catanzaro v. Weiden*, 140 F.3d 91, 93–94 [2d Cir.1998] ["All evidence presented by the nonmoving party must be taken as true, and all inferences must be construed in a light most favorable to the nonmoving party"]). Of course, the standard for determining the outcome of the motion is whether or not there are any genuine issues of material fact in dispute (*see Glick & Dolleck v. Tri–Pac Export Corp.*, at 441, 293 N.Y.S.2d 93, 239 N.E.2d 725). Moreover, for the purposes of review, the facts as stated by the nonmovant must be taken as true.

The second analysis relates to the showing appellant must make to support her claim of racial discrimination and to defeat summary judgment.

***316** Forrest sues under Executive Law § 296(1)(a)[1] and Administrative Code of the City of New York § 8–107(1)(a)[2] proscribing racial discrimination in employment in New York State and New York City. The first cause of action is for race and color discrimination in violation of Executive Law § 296. The second cause of action is for race and color discrimination in violation of Administrative Code § 8–107. The third cause of action is for retaliation in violation of Executive Law § 296(1)(e) and (7). The fourth cause of *****399 **1015** action is for retaliation in violation of Administrative Code § 8–107(7). The fifth cause of action is for aiding and abetting in violation of Executive Law § 296(6). The sixth cause of action is for aiding and abetting in violation of Administrative Code § 8–107(6). The seventh cause of action is for constructive discharge pursuant to Executive Law § 296. The eighth cause of action is for constructive discharge in violation of Administrative Code § 8–107.

These New York State and New York City laws are in accord with the federal standards under title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*; *Matter of Aurecchione v. New York State Div. of Human Rights*, 98 N.Y.2d 21, 25–26, 744 N.Y.S.2d 349, 771 N.E.2d 231 [2002]; *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 687 N.E.2d 1308 [1997]; *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 [2d Cir.1998]).[3] The three-step framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 [1973] for cases alleging violations of title VII of the Civil Rights Act of ***317** 1964 is relevant here. First, the appellant employee must make a prima facie showing of racial discrimination. Second, once the appellant has satisfied her burden, defendant must articulate a clear nondiscriminatory reason for the termination or other action. Third, appellant must show that the proffered reasons are pretextual.

II

Appellant claims that she has met her burden of showing that there was racial discrimination and that there are factual issues concerning whether the proffered reason for her termination was pretextual.

Appellant, Forrest, worked as a music therapist and case manager for the Jewish Guild for the Blind. On November 2, 1994, appellant was terminated, allegedly due to failure to provide documentation of her father's medical condition. Forrest was on a three-month approved leave of absence, without pay, in order to take care of her ailing father in Florida. The Guild requested that she provide proof of her father's condition. Part of that proof was a form, provided by the Guild, to be completed by a physician indicating her father's diagnosis, prognosis and a doctor's recommendation that appellant's father required an in-home caregiver. Appellant argues that she sent the required information on a form different from the one required by respondent.

Appellant alleges that during her employment with the Guild, she was subjected to several racially motivated statements and conduct directed at her by her supervisors. Specifically, appellant alleges that on or about October 19, 1992, Eugenia Adlivankina, appellant's immediate supervisor, told her that Goldie Dersh, who was the program director in the Continuing Day Treatment Program, called appellant "an uppity nigger." The assertion that Dersh made this statement was allegedly repeated to her by another employee, Dr. Dov Rappaport. Appellant alleges further that on or about October 26, 1992, at a staff meeting, Dersh stated, "Why is it necessary to stroke Blacks to get them to work?" The third comment, reportedly made to White staff members by Adlivankina "on at least four occasions" on the same day was that staff members should refer to Forrest as "our Black American *****400 **1016** Princess." Appellant claims that she filed grievances on two of these incidents,

although on the advice of her union representative, the grievances were filed in general terms.

*318 Appellant further asserts that she was required to perform the duties of two separate titles and was not compensated for overtime while White staff did receive such compensation. She also claims that her salary was reduced, that for over a year, she was required to sign in and out to go to the bathroom and for coffee breaks while White employees did not have to do the same. Her name, along with that of another African–American, was circled and highlighted on a sign-in sheet. Appellant reports that Adlivankina later came and apologized to her for circling her name. She alleges that she requested a description of her job duties and title, things that she was entitled to under the union agreement, but was denied them by her immediate supervisor. She claims that she filed grievances with her employer, but that these grievances were met with retaliation by means of threats, disciplinary actions that were not justified and by the assignment of additional duties. She claims that the conduct of her supervisors led to psychological problems for which she underwent treatment and incurred expenses. Finally, she claims that she was forced to resign because of defendants' actions.

Appellant filed five grievances with her union, Local 1199. The first, dated July 9, 1992, was filed to grieve "**harassment** of Paula Forrest in violation of contract and article IV, Section 1 and [article] XVII" of the Collective Bargaining Agreement (CBA).[4] The complaint was denied. On July 22, 1992, appellant filed a second complaint for **harassment** in violation of article IV, section 1 and article XVII of the CBA. This complaint was never heard. On October 8, 1992, appellant filed a grievance for violations of the Collective Bargaining Agreement including article XXI, section 13 and article IV, section 1.[5] On November 11, 1992, Carol Handfus denied the grievance of October 8, 1992 with a lengthy explanation concerning job classifications and job duties.[6] This complaint was sent to arbitration on December 9, 1992.

*319 The fourth complaint was filed on November 19, 1992, grieving the "verbal warning of 11/3/92 and the written warning of 11/13/92 concerning job perform[ance]" and "in violation of the CBA including Article IV Section 2."[7] This grievance was ***401 **1017 sent to the personnel director. The final grievance was filed on December 4, 1992 for **harassment** and "abus[e of] power and authority in a capricious manner without just cause." The grievance alleges violations of article IV, section 1 and article VII, section 1.[8] The grievance was denied.

On November 4, 1992, appellant sent a letter to a supervisor, Handfus, concerning "Bias Treatment in CDTP/Soc[ial] Serv[ices]/**Harassment**." This letter dealt specifically with choice of lunch time, and whether or not appellant was being treated differently based upon job title. Appellant transferred from the Continuing Day Treatment Program to the Day Treatment Program on January 8, 1993. Effective January 18, 1993, appellant assumed the job title of teaching specialist.

A settlement agreement, dated February 22, 1994, purportedly resolved "all allegedly outstanding grievances and the pending arbitration case arising out of or in connection with the Employee's former employment in CDTP." The settlement agreement addressed an increase in job classification, increase in pay, disciplinary written warnings, appellant's new job title of teacher/human services professional in the Day Treatment Program, and withdrawal by the union of a pending arbitration case.

Respondents offer evidence rebutting appellant's claims, including that the racially offensive statements were never made. Further, respondents allege that Forrest was terminated as a result of her failure to provide the necessary documentation for her extended leave of absence. Respondents also assert *320 that appellant's work was inadequate and that she failed to comply with recordkeeping requirements. In addition, respondents argue that Forrest resigned before she was terminated. Respondents also state that appellant was not in Florida at the time she stated she was but she had traveled to Hawaii to visit her brother. Finally, respondents argue that the Guild has a nondiscrimination policy with respect to race and other matters.

III

Appellant commenced an action against respondents in 1998 in Supreme Court, New York County. In August 2002, Supreme Court denied defendants' motion for summary judgment. After referring to the factual allegations made by appellant, that court stated:

> "Plaintiff has raised a prima facie case of discrimination. The allegations raised by plaintiff, when analyzed in a light most favorable to plaintiff, may permit a trier of fact to conclude that plaintiff was forced to work in a hostile work environment as a result

of her race. In addition to claims of egregiously inappropriate statements made by the individual defendants and humiliation suffered during staff meetings, she alleges that she was transferred to other positions and given additional duties and responsibilities not assigned to other employees who are not African–American.

"The court cannot conclude that, when all the circumstances and individual acts are considered, the allegations do not constitute racial discrimination as a matter of law. Whether or not the explanations offered by defendants for transferring plaintiff to different departments and changing her responsibilities are pretextual also cannot be determined as a matter of law, especially when considered in conjunction with plaintiff's claims of persistent humiliation and hostility toward her. Upon this record, a trier of fact may conclude that the defendants' ***402 **1018 explanations for some of their actions are unpersuasive and that discrimination has occurred."

In October 2003, the Appellate Division reversed and granted defendants' summary judgment motion, finding that appellant had not shown that defendants' conduct toward her was racially *321 biased, or that the nondiscriminatory reasons for terminating appellant were pretextual. The Appellate Division decision stated the following:

"Certainly, the allegations of the complaint describe egregious conduct. However, on such a summary judgment motion, once the defendants have made a showing establishing a right to dismissal, the plaintiff's burden in opposing the motion requires more than allegations that, if proven, establish conduct of which we disapprove. The plaintiff must offer evidentiary support not only to establish a prima facie case, but also evidence creating a material dispute of fact as to the showing made by the defendants....

"Here, the submitted documentation satisfies defendants' burden on a summary judgment motion of establishing their entitlement to dismissal of the complaint. They have established a legitimate and nondiscriminatory basis for almost all of the conduct of which plaintiff complains, leaving a remainder of claims that cannot alone serve as the basis for a claim of employment discrimination.

"Specifically, when we cull through plaintiff's claims in light of the evidentiary submissions, it becomes apparent that, as defendants point out, many of plaintiff's allegations are unsupported by, or actually disproved by, evidentiary materials, and that the conduct alleged to constitute discriminatory disparate treatment of plaintiff was based upon legitimate and nondiscriminatory reasons, unrelated to any racial animus. In response, plaintiff offers nothing tending to show that the proffered nondiscriminatory explanations are pretextual. All that then remains of plaintiff's claims are the hotly disputed allegations of racial epithets, which are simply insufficient by themselves to support her claim of race discrimination. Ultimately, plaintiff has failed to provide sufficient support to create a question of fact as to whether her termination, or any adverse treatment of her during her employment, 'occurred under circumstances giving rise to an inference of ... discrimination' " (309 A.D.2d 546, 553–554, 765 N.Y.S.2d 326 [2002] [citations omitted]).

*322 This Court granted appellant leave to appeal.

IV

It is not often that an employer will use overt methods to discriminate (*see Matter of Holland v. Edwards,* 307 N.Y. 38, 45, 119 N.E.2d 581 [1954] ["Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which 'subtleties of conduct ... play no small part' "], quoting *National Labor Relations Bd. v. Express Pub. Co.,* 312 U.S. 426, 437, 61 S.Ct. 693, 85 L.Ed. 930 [1941]; *National Org. for Women v. State Div. of Human Rights,* 34 N.Y.2d 416, 420, 358 N.Y.S.2d 124, 314 N.E.2d 867 [1974] ["(I)llegal discrimination will not be announced in public but will usually be effected by 'subtle' and 'elusive' means"]). Further, employers who discriminate are not likely to do so in an "open, plainly-appearing fashion" (*see* **1019 ***403 *Matter of Pace Coll. v. Commission on Human Rights of City of N.Y.,* 38 N.Y.2d 28, 40, 377 N.Y.S.2d 471, 339 N.E.2d 880 [1975]).[9] "Instead, there is likely to be covert resort to subtle tactics and the pretext of intermingled motives and reasons to obscure the substantial cause" (*see id.*).

Appellant's allegations of discriminatory treatment fall into several categories. Each category will be discussed.

DISPARATE TREATMENT

Prima Facie Case of Racial Discrimination

Disparate treatment is the treatment of persons in a manner less favorable than others because of their race. (*International Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 [1977]; *see also Raytheon Co. v. Hernandez,* 540 U.S. 44, 52–53, 124 S.Ct. 513, 157 L.Ed.2d 357 [2003].)[10] " 'Disparate treatment' ... is the most easily understood type ***323** of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment" (*International Bhd. of Teamsters v. United States,* 431 U.S. at 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396).

Disparate treatment applies to complaints about acts of discrimination against an individual brought under title VII of the Civil Rights Act of 1964 (78 U.S. Stat 253 as amended, codified at 42 USC § 2000e *et seq.*).

In order to establish at trial a claim of disparate treatment in employment based upon race, a prima facie showing of racial discrimination must be made (*see McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802–804, 93 S.Ct. 1817, 36 L.Ed.2d 668 [1973]).[11] According to *Ferrante,* in order *****404 **1020** to establish a prima facie case of racial discrimination, appellant ***324** has "the initial burden [of] prov[ing] by a preponderance of the evidence a prima facie case of discrimination" (90 N.Y.2d at 629, 665 N.Y.S.2d 25, 687 N.E.2d 1308; *see also St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 [1993]; *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 252–254, 101 S.Ct. 1089, 67 L.Ed.2d 207 [1981]; *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. 1817). The following elements must be proven: (1) the complainant is a member of a class protected by the statute; (2) the complainant was actively or constructively discharged; (3) the complainant was qualified to hold the position from which she was terminated; (4) and the discharge occurred under circumstances giving rise to an inference of race discrimination.

Because Forrest is an African–American female, she is a member of a protected class. She resigned from her position, by letter effective October 22, 1994, but before the Guild received her letter, the Guild fired her, effective August 5, 1994, in a letter dated November 2, 1994. The resignation letter was marked by the Guild and received on November 4, 1994. In any event, the Guild states that it was not aware of the letter of resignation when the letter of termination was drafted and mailed. For the purposes of this motion for summary judgment, it must be assumed that Forrest was terminated. Accordingly, appellant meets criteria one and two of *Ferrante.*

There is no dispute that Forrest was qualified for the position as evidenced by her credentials and tenure on the job. She was a professional music therapist with graduate degrees in music therapy and urban education. Appellant argues that she was discharged after filing several grievances and a little more than two months after filing a complaint with the New York City Commission on Human Rights for race and color discrimination in September 1994.[12] Thus, taken together, the racial epithets and assertions of disparate treatment are sufficient to establish a prima facie case of racial discrimination.

*****405 *325 **1021** Burden Shifts to Employer

Once appellant has established a prima facie case of racial discrimination, the burden shifts to the employer "to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision" (*see Ferrante,* 90 N.Y.2d at 629, 665 N.Y.S.2d 25, 687 N.E.2d 1308; *Burdine,* 450 U.S. at 257–258, 101 S.Ct. 1089; *Hicks,* 509 U.S. at 507, 113 S.Ct. 2742). The employer in this instance states that the reason for the termination was Forrest's failure to complete the "Certification of Physician or Practitioner" form. Defendants assert that several requests were made to secure the documentation but appellant was unresponsive. Thus, defendants have put forward a nonracial reason for appellant's termination.

Evidence That Respondents' Claims Are Pretextual

On February 1, 1994, appellant filed a complaint with the New York State Division of Human Rights complaining that her grievances were not being taken seriously by the

union. Forrest filed a complaint with the EEOC for racial discrimination just three months before the Guild fired her. The close proximity of the termination and complaints arguably suggests that there may have been nonpermissible reasons for her firing (*see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 [2000] ["a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated"]). However, in contending that the defendants' reasons are pretextual, appellant must lay bare her proof on this motion for summary judgment.

Appellant must have a "full and fair opportunity" to demonstrate that the employer's reason for termination is pretextual and that the real reason for termination was racially based (*see Burdine*, 450 U.S. at 256, 101 S.Ct. 1089; *Ferrante*, 90 N.Y.2d at 629–630, 665 N.Y.S.2d 25, 687 N.E.2d 1308; *McDonnell Douglas*, 411 U.S. at 805, 93 S.Ct. 1817 [complainant may show that employer's presumptively valid reasons for termination were a cover-up for racial discrimination]). Appellant contends that the employer used the failure to file the certification form as a pretext for racial discrimination (*see Matter of State Div. of Human Rights v. County of Onondaga Sheriff's Dept.*, 71 N.Y.2d 623, 632, 528 N.Y.S.2d 802, 524 N.E.2d 123 [1988] [employer's reasons for termination gave rise to an inference of discrimination]; ***326** *Matter of Imperial Diner v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 78, 436 N.Y.S.2d 231, 417 N.E.2d 525 [1980][3] [anti-semitic statements made by ***406 **1022** employer to employee could give rise to constructive discriminatory discharge]).

Direct and Circumstantial Evidence in a Mixed Motive Case

A person alleging racial or other discrimination does not have to prove discrimination by direct evidence. It is sufficient if he or she proves the case by circumstantial evidence (*Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 [2003]). Here, appellant could prove her case even if there were mixed motives for her firing, that is a legitimate and an illegitimate reason (*id.* at 99–102, 123 S.Ct. 2148).

RACIALLY HOSTILE WORK ENVIRONMENT

An employee has a right under title VII of the Civil Rights Act of 1964 "to work in an environment free from discriminatory intimidation, ridicule, and insult" (*Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 [1986]). "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include 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 an employee's work performance" (*Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 [1993]). The evidence is judged by the totality of the circumstances test (*see id.; Williams v. County of Westchester*, 171 F.3d 98, 100 [2d Cir.1999]; *Dooner v. Keefe, Bruyette & Woods, Inc.*, 157 F.Supp.2d 265, 281 [S.D.N.Y.2001] ["(T)he Plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted to have altered the conditions of her working environment"], quoting ***327** *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 [2d Cir.2000]; *accord Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 [2d Cir.2000]). "[T]he objective severity of **harassment** should be judged from the perspective of a reasonable person in the plaintiff's position considering 'all the circumstances' " (*Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 [1998]; *Harris v. Forklift*, 510 U.S. at 23, 114 S.Ct. 367). Thus, plaintiff does not have to prove an intent to discriminate.

Addressing only the racial epithets, appellant should be entitled to show that such statements interfered with Forrest's work environment (*see Schwapp v. Town of Avon*, 118 F.3d 106, 110 [2d Cir.1997] [opprobrious racial comments were evidence enough to deny summary judgment motion]). If White staff were encouraged to call appellant "our Black American Princess," on several occasions, and/or she was perceived to be or stated to be "an uppity nigger," and/or appellant and other African–Americans were perceived as lazy people requiring stroking in order to work, appellant has alleged enough to withstand summary judgment.

RETALIATION

In order to make a prima facie showing of retaliation, Forrest must show: (1) participation in a protected activity known to defendant; (2) an adverse employment action; and (3) a causal connection between the protected activity and the adverse employment action (*see Francis v. Chemical Banking Corp.*, 62 F.Supp.2d 948, 961 [E.D.N.Y.1999]). Forrest filed several grievances with the union and with personnel ***407 **1023** director, Carol Handfus. For a union member, filing grievances with the union is a protected activity (*see Vara v. Mineta*, 2004 WL 2002932, *13–14, 2004 U.S. Dist LEXIS 17961, *41–46 [S.D.N.Y., Sept. 7, 2004]; *Feingold v. New York*, 366 F.3d 138, 156 [2d Cir.2004]). Filing complaints with the EEOC and Human Rights Commission are also protected activities (*id.*). Defendants' knowledge of appellant's assertions is evidenced by the signatures of Carol Handfus and Dersh on the grievance letters and the meetings on the grievances.

Adverse actions are those which affect the "terms, privileges, duration, or conditions of the plaintiff's employment" (*see Dortz v. City of New York*, 904 F.Supp. 127, 156 [S.D.N.Y.1995] [citation omitted]). Forrest claims that after filing grievances, her job title, office space, vacation requests, and job duties were adversely affected. Appellant alleges that she was demoted from music therapist to creative arts therapist, case manager and/or *328 that she was required to perform the duties of both the creative arts therapist and case manager. Appellant filed a grievance concerning the increase in job duties without any commensurate increase in pay. Further, appellant claims that she suffered a reduction in pay of approximately $2,500 as a result of her grievances.

Appellant claims retaliation by changing the conditions of her employment (e.g., change of her lunch hour, and constant complaints about her written work product). Appellant in a letter to Handfus complained about the denial of her previous lunch hour, and made a request for clarification concerning what if any changes had been made which would cause her to have a different lunch hour than prior to November 1992.

Respondent claims that any changes in job title and duties were the result of a state-mandated restructuring which occurred in 1991. Because of the restructuring, the employees with titles of music therapist were allegedly changed to creative arts therapist and later case manager. What restructuring was required is not shown in this record. However, even with the restructuring, many of the complaints of appellant to her supervisor came much later in 1992 and concerned the change in matters of benefits, not just job title. Further, appellant consistently stated that her credentials were superior to the new job duties, and that the new job was not the job she accepted with the Guild.

Whether or not these changes occurred as a result of the grievances filed by appellant would arguably be a question of fact for the jury. Further, whether or not appellant was terminated as a result of her grievances and for filing a complaint in September 1994 with the EEOC and New York City Human Rights Commission would also arguably be questions for the jury.

CLAIMS OF AIDING AND ABETTING RACIAL DISCRIMINATION

Appellant asserts that Handfus, Dersh, Adlivankina, and Finocchiaro aided and abetted the racial discrimination in employment against her. Appellant points to Executive Law § 296(6) and Administrative Code § 8–107(6) which both proscribe aiding and abetting in unlawful discrimination. The standard for proving aiding and abetting is that the defendants "actually participate[d]" in the alleged discriminatory acts (*see Dunson v. Tri–Maintenance & Contrs., Inc.*, 171 F Supp 2d 103, 114 [E.D. *329 N.Y.2001] [finding of actual participation in firing]). The person alleged to have engaged in the discrimination does not have to have power to hire and fire, just "direct participation" in the discrimination (*see id.*).

***408 **1024** Appellant claims that the Guild failed to act on her numerous grievances, and failed to remedy the problems of **harassment**. While there are no grievances explicitly stating racial **harassment**, appellant alleges that this was due to the advice and guidance of her union representative and there is a grievance for "**harassment**" and "special treatment" and for "a standard only being applied to me."

Appellant has made out a prima facie case of racial discrimination. What is lacking in the record and in appellant's presentation is an adequate showing that respondents' claims are pretextual. The Appellate Division considered each of appellant's claims and concluded that the respondents had met their burden of showing legitimate reasons for their actions. In response to respondents' assertions, plaintiff had to lay bare her proof that these claims were pretextual.

There are several reasons why appellant's responses on pretext are inadequate. First, appellant does not rebut respondents' claims that some of their administrative moves were mandated by the State. A proper response would have been to show that there was no mandated state policy or that respondents did not address that policy in their actions involving appellant. Second, appellant does not adequately address the allegedly comprehensive settlement agreement of February 1994 and show that the settlement included racial matters or, if it did not, why not. Third, appellant does not address why she did not respond to the communications sent to her in Florida in the manner requested, specifically why she did not obtain from her father's doctor the specific information sought. Finally, appellant does not present adequate medical evidence that her psychological treatment was related to the racial hostility of the defendants. In sum, appellant has not demonstrated that the respondents' reasons for their various actions toward her were pretextual and that the real motivating factor was racial.

If appellant had met her burden of demonstrating that the respondents' claims were pretextual, a jury should determine whether appellant's evidence supported her claims of discrimination based on race. Thus, she would be entitled to present evidence of whether the racial epithets, combined with the alleged ***330** actions toward her, were enough to alter her job conditions and work and even resulted in a constructive discharge (*see Matter of Imperial Diner v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 436 N.Y.S.2d 231, 417 N.E.2d 525 [1980], *supra; Matter of Pace Coll. v. Commission on Human Rights of City of N.Y.*, 38 N.Y.2d 28, 377 N.Y.S.2d 471, 339 N.E.2d 880 [1975], *supra*). Similarly, whether or not the conduct towards her was the result of grievances filed and whether her termination resulted from her grievances and her filing a complaint in September 1994 with the EEOC and the New York City Human Rights Commission would be questions for a jury.

Because respondents have offered nonracial reasons for their actions and because appellant did not lay bare her proof and show that the respondents' claims were pretextual, I concur in the affirmance of the order of the Appellate Division.

Judges CIPARICK, ROSENBLATT, GRAFFEO, READ and R.S. SMITH concur with Chief Judge KAYE.

Judge G.B. SMITH concurs in result in a separate opinion.

Order affirmed, with costs.

All Citations

3 N.Y.3d 295, 819 N.E.2d 998, 786 N.Y.S.2d 382, 2004 N.Y. Slip Op. 07620

Footnotes

1 Except where noted, the facts are undisputed. They are also set out in a comprehensive writing by the Appellate Division (*see Forrest v. Jewish Guild for Blind,* 309 A.D.2d 546, 547–552, 765 N.Y.S.2d 326 [1st Dept.2003]).

2 29 USC § 2613(b) provides that certification by a health care provider of the serious medical condition of an eligible employee's family member shall be sufficient if it states the date on which the serious health condition commenced; the probable duration of the condition; the appropriate medical facts within the knowledge of the health care provider regarding the condition; and a statement that the eligible employee is needed to care for the family member and an estimate of the amount of time that such employee is so needed. The Guild's form, which plaintiff agreed to submit, additionally requested her father's regimen of treatment and schedule of medical visits or treatment; information from the physician concerning assistance her father might need for basic medical, hygiene or nutritional needs, safety, or transportation; and a statement from plaintiff as to the care she would be providing.

3 The standards for recovery under the New York State Human Rights Law (*see* Executive Law § 296) are the same as the federal standards under title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.; see Rainer N. Mittl, Ophthalmologist, P.C. v. New York State Div. of Human Rights,* 100 N.Y.2d 326, 330, 763 N.Y.S.2d 518, 794 N.E.2d 660 [2003]). Thus, "[b]ecause both the Human Rights Law and title VII address the same type of discrimination, afford victims similar forms of redress, are textually similar and ultimately employ the same standards of recovery, federal case law in this area also proves helpful to the resolution of this appeal" (*Matter of Aurecchione v. New York State Div. of Human Rights,* 98 N.Y.2d 21, 26, 744 N.Y.S.2d 349, 771 N.E.2d 231 [2002] [citation omitted]). Further, the human rights provisions of the New York City Administrative Code mirror the provisions of the Executive Law and should therefore be analyzed according to the same standards.

4 The concurrence's statement that plaintiff alleges a reduction in pay as a result of discrimination is misleading (*see* concurring op. at 318, 328, 786 N.Y.S.2d at 400, 407, 819 N.E.2d at 1016, 1023). Plaintiff's salary did not change when her job title changed from music therapist to creative arts therapist to case manager. When she later requested a voluntary transfer to a different department, which she does not claim was discriminatory, she accepted a different job at a lower pay grade.

5 Of course, it matters not whether the Guild's stated reason for terminating plaintiff was a good reason, a bad reason, or a petty one. What matters is that the Guild's stated reason for terminating plaintiff was nondiscriminatory.

6 Plaintiff's mere assertion that defendants' explanations were pretextual is not enough. As the concurrence notes (*see* concurring op. at 325, 786 N.Y.S.2d at 405, 819 N.E.2d at 1021), "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated" (*Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 [2000]). But plaintiff's prima facie case, combined with *no* evidence that the stated justification is false other than plaintiff's unsupported assertion that this is so, may not.

7 In other instances—the shift in job titles, the assumption of management responsibilities, the consolidation of professional employees' offices—plaintiff continues to insist without explanation that these actions, when applied to her, were racially discriminatory, even while admitting that others were subjected to identical changes and policies. Such conclusory assertions cannot rebut the evidence proffered by defendants that the actions taken were nondiscriminatory.

8 While we agree with the conclusion reached by the Appellate Division, that Court should not have preliminarily left aside the asserted racial epithets in analyzing whether the remainder of the complained-of conduct occurred under circumstances giving rise to an inference of discrimination. All of the relevant facts and circumstances must be considered together.

9 Plaintiff's claim that she has suffered disparate treatment in the workplace may be shown through proof either of discriminatory employment action or that she has been subjected to a hostile work environment.

10 Since plaintiff has failed to establish the elements of a hostile work environment claim with respect to either her state or city causes of action, we need not address the affirmative defense to such a claim against an employer—that the employer exercised reasonable care to prevent and correct promptly discriminatory conduct committed by its supervisory personnel, such as by promulgating an antidiscrimination policy with complaint procedure, and that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm (*see Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 [1998]; *Faragher v. City of Boca Raton,* 524 U.S. 775, 805–808, 118 S.Ct. 2275, 141 L.Ed.2d 662 [1998]).

11 The concurrence states that "[f]or a union member, filing grievances with the union is a protected activity" (concurring op. at 327, 786 N.Y.S.2d at 407, 819 N.E.2d at 1023). Under the New York State and City Human Rights Laws—the only statutes under which plaintiff has brought causes of action—retaliation is actionable only when it is done because the employee has, for example, filed a complaint, testified, or assisted in any proceeding, or opposed any practices forbidden "under this article" (Executive Law § 296[7]) or "under this chapter" (Administrative Code of City of N.Y. § 8–107[7]). Filing a grievance complaining of conduct other than unlawful discrimination—as plaintiff did—is simply not a protected activity subject to a retaliation claim under the statutes at issue here.

12 Plaintiff's discrimination complaint with the New York City Commission on Human Rights was filed in September 1994, after plaintiff had begun her final leave of absence from the Guild. Plaintiff has offered no evidence that the Guild was made aware of this complaint before her alleged termination.

13 Indeed, although plaintiff argues that the close proximity of the termination and complaints suggests that there may have been nonpermissible reasons for her firing, all of plaintiff's grievances were filed in 1992. Plaintiff's alleged termination, however, did not occur until early November 1994. And although plaintiff filed a complaint with the Commission on Human Rights in September 1994, there is no evidence that defendants had yet learned of the existence of this complaint prior to her termination.

1 Human Rights Law (Executive Law) § 296(1)(a) states: "It shall be an unlawful discriminatory practice ... [f]or an employer or licensing agency, because of the age, race, creed, color, national origin, sex, disability, genetic predisposition or carrier status, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to

discriminate against such individual in compensation or in terms, conditions or privileges of employment."

2 Administrative Code § 8–107 states:

"Unlawful discriminatory practices.

"1. Employment. It shall be an unlawful discriminatory practice:

"(a) For an employer or an employee or agent thereof, because of the actual, or perceived age, race, creed, color, national origin, gender, disability, marital status, **sexual** orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment."

3 Plaintiff in *Ferrante* raised a triable issue of fact that he had been fired because of age discrimination. Specifically, plaintiff demonstrated that defendant's reasons for terminating him could be pretextual for age discrimination.

4 Article IV, section 1 pertains to management rights and article XVII addresses vacation schedules.

5 Article XXI, section 13 pertains to job classification.

6 Letter to Thomas Winter from Carol Handfus in pertinent part—

"In light of the foregoing, I have concluded that the addition of case management functions to the Grievant's job content does not justify a new classification nor prompt the need to negotiate an upgrade in compensation. And, while your argument that in job evaluation the whole can be greater that [*sic*] the sum of its parts is an interesting one, I take the traditional position that salary upgrades are usually not warranted where an employee is asked to perform additional job duties that are of the same type as those being performed by other staff members, in a job classification that is in the same labor grade as that of the employee. This argument is particularly relevant when, as in this case, the new duties in question do not represent those that require the highest skill and attainment levels required by the other classification.

"For all of the foregoing reasons, I am denying this grievance and the remedies proposed by the Union."

7 Article IV, section 2 addresses client care and the participation of employees in the process of client care.

8 Article VII, section 1 refers to discharge and penalties.

9 Complainant filed a claim of gender discrimination and failure to promote against the former Pace College, now Pace University. The New York City Commission on Human Rights found that Pace discriminated against women faculty generally and complainant, Dr. Winsey, in particular. The Appellate Term set aside the decision, and Appellate Division affirmed for lack of sufficient evidence. The Court of Appeals determined that there was not enough evidence to determine that there was a pattern of discrimination but that there was enough to find that Pace had discriminated against Dr. Winsey.

10 After 25 years of employment as a product test specialist with Hughes Missile Systems, later Raytheon Company, complainant in *Raytheon* was forced to resign because of workplace misconduct. He tested positive for cocaine while at work. Two years later, he reapplied for his job but his application was denied. He later filed a complaint with the Equal Employment Opportunity Commission (EEOC) for discrimination based on the Americans with Disabilities Act (ADA). Complainant argued that he was denied his position because of his past drug and alcohol abuse but that he was now rehabilitated. Complainant put forth claims of both disparate impact and disparate treatment. The District Court rejected the disparate treatment claim and denied review of the disparate impact claim as untimely. Petitioner's summary judgment motion was granted.

The Court of Appeals, Ninth Circuit, determined that there were triable issues of fact regarding whether complainant was denied his position because of his past record of drug addiction. The Court of Appeals then applied a disparate impact analysis to a disparate treatment claim by determining that Raytheon's legitimate reason for firing was illegitimate as applied to recovering drug addicts. Summary judgment was vacated.

The Supreme Court determined that the Ninth Circuit erred in its analysis, and thus, set out the proper analysis for both disparate treatment and disparate impact claims. Further, after applying the proper analysis to the disparate treatment claim, the Supreme Court held that the employer had met its burden in showing a legitimate reason for failing to rehire.

11 *McDonnell* is a seminal case in the area of disparate treatment. In this case, complainant worked for McDonnell for eight years as a mechanic and laboratory technician when he was laid off as a result of work force reduction. (*See* 411 U.S. at 794, 93 S.Ct.

1817.) Complainant as part of a civil rights protest of the racially discriminatory policies of the employer, engaged in civil disobedience by blocking the main roads to petitioner's plant preventing workers from participating in the morning shift change. (*See id.*) Complainant was arrested for his participation in what was referred to as the "stall-in." (*Id.*) Another civil rights action took place some weeks later but it was unclear to what extent complainant participated in the second action. Subsequently, petitioner advertised for mechanics and complainant applied for re-employment but was rejected.

Upon rejection, complainant filed a complaint with the EEOC. The Commission found discrimination based upon civil rights violations but not racial discrimination. The District Court found no discrimination in hiring and no discrimination based on civil rights activities. The Court of Appeals, Eighth Circuit, reversed and determined that an EEOC claim was not a judicial determination and that the trial court could make a finding based upon racial discrimination. The United States Supreme Court granted certiorari to clarify standards for a claim of racial discrimination. The Court set out the standards for proving a title VII claim for disparate treatment based upon a prima facie showing of racial discrimination. The Court was especially concerned about complainant's opportunity to rebut petitioner's legitimate reason for its employment determination as pretext (*see id.* at 806, 93 S.Ct. 1817).

12 A complaint was filed with the Commission on Human Rights in September 1994. The complaint was closed on June 30, 1997. Appellant filed an action in the Federal District Court for the Southern District of New York in July 1997 alleging discrimination raising federal, state, and New York City antidiscrimination claims. The complaint was withdrawn in October 1997.

13 "As in other areas of discrimination it is unrealistic to hold that an employee can only be said to have been the victim of a discriminatory discharge when the employer has expressly fired him on the basis of race or creed or some other discriminatory ground. It is also possible, and perhaps more likely, that an employer who believes certain individuals are undesirable employees because of some discriminatory factor, will engage in conduct which encourages the employee to quit, in which case it may be said that there has been a constructive discriminatory discharge" (52 N.Y.2d at 78, 436 N.Y.S.2d 231, 417 N.E.2d 525).

Complainant was told by her company president that she was "Just like all the other f——ing Jewish broads around here" (52 N.Y.2d at 76, 436 N.Y.S.2d 231, 417 N.E.2d 525). The president then went on to say that in this diner the "f——ing Jewish women ... think they are something special and deserve more than the others" (52 N.Y.2d at 76, 436 N.Y.S.2d 231, 417 N.E.2d 525). The president then refused to apologize for his comments. Complainant resigned. The Court of Appeals found that there was enough evidence to support a claim of constructive discharge.

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