UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| COLLEEN MANSUETTA,<br>Plaintiff,<br><br>v.<br><br>CLARKSTOWN CENTRAL SCHOOL DISTRICT,<br>Defendant. | **MEMORANDUM DECISION**<br><br>11 CV 649 (VB) |

Briccetti, J.:

Plaintiff Colleen Mansuetta brings this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., and the New York State Human Rights Law ("NYSHRL"), N.Y. Executive Law §§ 290, et seq. Defendant Clarkstown Central School District (the "District") moves for summary judgment (Doc. #18). For the following reasons, the motion is GRANTED in part and DENIED in part.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

## BACKGROUND

The following facts are set forth in the light most favorable to plaintiff.

Plaintiff began working as a middle school teacher at Felix Festa Middle School in August 2006. The following year, Felix Festa teacher Scott Cooper became chairperson of plaintiff's department. As chairperson, Cooper was responsible for observing and evaluating plaintiff's performance and acted as a mentor to plaintiff. Plaintiff and Cooper initially were friendly with one another and occasionally socialized outside of work. However, at a school-sponsored holiday party in December 2007, Mr. Cooper inappropriately "smacked" plaintiff's

"rear end." Cooper had not previously touched plaintiff in that manner, and the contact was unwelcomed and upsetting to plaintiff. At least two of plaintiff's coworkers witnessed the incident.

In January 2008, after the school's winter recess, plaintiff reported the incident to Felix Festa's principal, Dianne Basso. Plaintiff also told Basso that Cooper had previously made comments plaintiff felt were inappropriate, although plaintiff acknowledged she may have taken those comments "out of context." For example, on one occasion a janitor witnessed plaintiff and Cooper exiting Cooper's classroom together. Cooper turned to the janitor and said: "Look at that smile on her face[, w]here do you think that came from?" Plaintiff also told Basso that Cooper had embarrassed her by (1) making disparaging comments about the cleanliness of her car in front of plaintiff's students, and (2) criticizing the organization of her file cabinets.

Principal Basso promptly reported the incident to Dr. Deborah O'Connell, the District's deputy superintendent, who instructed Basso to conduct an investigation. Plaintiff subsequently met several times with Basso, O'Connell, and others. Cooper was present at one such meeting and apologized to plaintiff for inappropriately touching her, but plaintiff felt his apology was insincere. At another meeting, an administrator asked plaintiff how she wanted the situation to be resolved, and plaintiff indicated she "didn't want [Cooper] to be part of [her] professional development," specifically requesting that Cooper no longer observe plaintiff's classes or otherwise have contact with her.

Ultimately, the District disciplined Cooper by: (1) removing him from his position as department chairperson; (2) prohibiting him from contacting plaintiff, other than communicating

with her concerning official District business; and (3) requiring him to attend sexual harassment training at his own expense.

Despite the general communication ban, Cooper and plaintiff did exchange several emails regarding school business after the incident. On one occasion, plaintiff sent Cooper an email concerning teaching materials in Cooper's possession that another teacher (who was unable to email Cooper himself) needed on short notice. On other occasions, Cooper sent emails to plaintiff concerning her involvement in various teaching workshops. Plaintiff complained about these emails to Principal Basso and other administrators, objecting to Cooper's "scheduling [her] events." The administrators instructed plaintiff to "keep it professional," and to copy the administrators on any emails exchanged between plaintiff and Cooper so the administrators could ensure the communications were appropriate.

Although plaintiff attempted to avoid contact with Cooper throughout the 2008 school year, she occasionally encountered him at department meetings, during "professional development days" held roughly once each semester, and when plaintiff taught classes in the same wing of the school as Cooper. Plaintiff occasionally elected not to attend conferences because she knew Cooper would be in attendance. Additionally, an administrator told plaintiff it was "not a good idea" for her to attend one particular conference because Cooper would be present. Plaintiff also ceased to participate on a task force that Cooper supervised, pursuant to which teachers were paid extra wages to chaperone students at events outside of school.

Unhappy that she continued to interact with Cooper "almost every day," plaintiff told her union representative she believed either plaintiff or Cooper should be transferred to another school in the District. Additionally, plaintiff complained to Principal Basso that other teachers at

the school were supportive of Cooper, and plaintiff felt the holiday party incident "wasn't taken seriously" by her co-workers or the administration. Basso responded that "people are going to talk," and noted plaintiff had no proof Cooper had said anything inappropriate to plaintiff's co-workers.

Generally, at the conclusion of a teacher's third year in the District, the District determines whether that teacher will be granted tenure. Teachers not granted tenure after their third year are usually terminated. In certain circumstances, however, a teacher who is denied tenure can apply for a fourth year of probationary employment, after which the teacher will again be considered for tenure. At the conclusion of plaintiff's third year at Felix Festa, the District denied plaintiff tenure but granted her request for a fourth probationary year. Plaintiff was surprised by the District's decision not to grant her tenure after her third year because she was under the impression that both Principal Basso and the teacher who had replaced Cooper as chairperson of plaintiff's department had recommended she be tenured. The Board of Education, which ultimately makes decisions concerning tenure, nevertheless decided not to offer plaintiff a permanent position.

In December of plaintiff's fourth year, Dr. O'Connell observed plaintiff's class and prepared a performance review. In contrast to most of plaintiff's previous reviews – which generally devoted roughly equal time to plaintiff's strengths and weaknesses – O'Connell's review was overwhelmingly negative. Shortly after receiving that review, plaintiff told a co-worker that "the District had made up [its] mind" about plaintiff, i.e., it did not intend to grant her tenure at the end of the year.

Later that month, Principal Basso gave plaintiff a mid-year performance review. That review was also overwhelmingly negative, noting in particular that plaintiff had failed timely to submit a document to a supervisor.

Plaintiff acknowledges missing substantially more days of work during her fourth year than she had during the previous three, although she contends she had valid medical reasons for her absences. At some point during plaintiff's fourth year, Basso took issue with some of the lesson plans plaintiff had prepared for her substitute teachers, indicating the plans were unclear and less engaging than the lesson plans executed by plaintiff.

In late January or early February 2010, plaintiff was informed she would not receive tenure and instead would be terminated effective March 31, 2010. By letter dated February 3, 2010, plaintiff asked the District to provide her with the reasons for her termination. District Superintendant Dr. Margaret Keller-Cogan responded to plaintiff's request by letter dated February 5, 2010. Keller-Cogan explained the District had expressed concerns regarding plaintiff's "rigor of lesson planning and developing questions to foster critical thinking" as early as 2006, causing the District to present plaintiff with "Teacher Improvement Plans" in 2007 and 2008, and to extend her probationary period for a fourth year. Despite the District's efforts to help plaintiff improve her performance, plaintiff had failed to demonstrate satisfactory improvement in 2009 and 2010. Additionally, Keller-Cogan expressed concern regarding the "lack of instructional planning and continuity" resulting from plaintiff's failure adequately to prepare substitute teachers in connection with her numerous absences during the 2009-2010 school year.

Despite Dr. Keller-Cogan's performance-based explanation for plaintiff's termination, plaintiff maintains the District "kept [her] there an extra year to keep [her] quiet" and then fired her in retaliation for having complained about Cooper.

**DISCUSSION**

I. Standard of Review

The Court must grant a motion for summary judgment if the pleadings, discovery materials before the Court, and any affidavits show there is no genuine issue as to any material fact and it is clear the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986).

A dispute regarding a material fact is genuine if there is sufficient evidence upon which a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." Wilson v. Nw. Mut. Ins. Co., 625 F.3d 54, 60 (2d Cir. 2010) (citation omitted). It is the moving party's burden to establish the absence of any genuine issue of material fact. Zalaski v. City of Bridgeport Police Dept., 613 F.3d 336, 340 (2d Cir. 2010).

If the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which she has the burden of proof, then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. at 323. If the nonmoving party submits evidence which is "merely colorable," summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. at 249-50. The mere existence of a scintilla of evidence in support of the nonmoving party's position is likewise insufficient; there must be evidence on which the jury

could reasonably find for her. Dawson v. Cnty. of Westchester, 373 F.3d 265, 272 (2d Cir. 2004).

On summary judgment, the Court resolves all ambiguities and draws all permissible factual inferences in favor of the nonmoving party. Nagle v. Marron, 663 F.3d 100, 105 (2d Cir. 2011). If there is any evidence from which a reasonable inference could be drawn in favor of the opposing party on the issue on which summary judgment is sought, summary judgment is improper. See Sec. Ins. Co. of Hartford v. Old Dominion Freight Line Inc., 391 F.3d 77, 83 (2d Cir. 2004).

II. Hostile Work Environment Claim

Plaintiff first claims the District violated her rights under Title VII by creating a hostile work environment. Such a claim requires plaintiff to demonstrate a course of conduct "(1) that is objectively severe or pervasive – that is, if it creates an environment that a reasonable person would find hostile or abusive . . . , (2) that the plaintiff subjectively perceives as hostile or abusive . . . , and (3) that creates such an environment because of plaintiff's sex." Gregory v. Daly, 243 F.3d 687, 691-92 (2d Cir. 2001). The District does not dispute that plaintiff subjectively perceived her workplace as hostile or abusive as a result of Cooper's alleged sexual harassment. Consequently, the only issue with respect to plaintiff's hostile work environment claim is whether the alleged harassment was "objectively severe or pervasive." Id.

By their nature, hostile work environment claims usually involve allegations of repetitive misconduct occurring over an extended period of time. However, in certain circumstances the allegation of a single instance of unwanted physical contact is sufficient to send a hostile work

environment claim to a jury. As the Second Circuit recently observed in Redd v. New York Division of Parole:

> The line between complaints that are easily susceptible to dismissal as a matter of law and those that are not is indistinct. "Casual contact that might be expected among friends—[a] hand on the shoulder, a brief hug, or a peck on the cheek—would normally be unlikely to create a hostile environment in the absence of aggravating circumstances such as continued contact after an objection. . . . And [e]ven more intimate or more crude physical acts—a hand on the thigh, a kiss on the lips, a pinch of the buttocks—may be considered insufficiently abusive to be described as 'severe' when they occur in isolation. . . . But when the physical contact surpasses what (if it were consensual) might be expected between friendly coworkers . . . it becomes increasingly difficult to write the conduct off as a pedestrian annoyance."

678 F.3d 166, 177 (2d Cir. 2012) (quoting Patton v. Keystone RV Co., 455 F.3d 812, 816 (7th Cir. 2006)) (emphasis in original).

Here, although it is a close call, plaintiff has demonstrated the existence of a material issue of fact as to whether Cooper's conduct created a hostile work environment. The incident at the holiday party – viewed together with the inappropriate comments Cooper allegedly made prior to the incident, and also viewed in a light most favorable to plaintiff – amounted to conduct more severe than a mere "pedestrian annoyance." Redd v. New York Division of Parole, 678 F.3d at 177. Importantly, Cooper was the chairperson of plaintiff's department at the time of the incident, and plaintiff was in only her second year of probationary employment. Around the time of the incident Cooper regularly observed plaintiff's classes, and his written evaluations presumably could have played a role in determining whether plaintiff would eventually be tenured. In this context, for Cooper to approach plaintiff from behind and "smack her on the

rear," without plaintiff's implied or actual consent and in the presence of her coworkers, constituted behavior inconsistent with what one would expect to see between a supervisor and his subordinate at a work-related holiday party. Plaintiff has thus raised a triable issue of fact with respect to her hostile work environment claim. See id.

In the alternative, the District contends it is entitled to summary judgment because the District is not liable for sexual harassment committed by plaintiff's co-workers or supervisors. That argument is without merit.

"The Supreme Court has ruled that employers are not automatically liable for sexual harassment perpetrated by their employees." Petrosino v. Bell Atl., 385 F.3d 210, 225 (2d Cir. 2004) (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998)). "Where an employee is the victim of sexual harassment, including harassment in the form of a hostile work environment, by non-supervisory co-workers, an employer's vicarious liability depends on the plaintiff showing that the employer knew (or reasonably should have known) about the harassment but failed to take appropriate remedial action." Petrosino v. Bell Atl., 385 F.3d at 225. Additionally, "[w]here the harassment is attributed to a supervisor with immediate or successively higher authority over the employee, a court looks first to whether the supervisor's behavior 'culminate[d] in a tangible employment action' against the employee," in which case "'the employer will, ipso facto, be vicariously liable.'" Id. (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. at 765, and Mack v. Otis Elevator Co., 326 F.3d 116, 122 (2d Cir. 2003)). "In the absence of such tangible action, an employer will still be liable for a hostile work environment created by its supervisors unless it successfully establishes as an affirmative defense that (a) it 'exercised reasonable care to prevent

and correct promptly any sexually harassing behavior,' and (b) 'the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.'" Petrosino v. Bell Atl., 385 F.3d at 225 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. at 765).

In this case, plaintiff has sufficiently alleged that Cooper was a "supervisor with immediate or successively higher authority over [her]." Petrosino v. Bell Atl., 385 F.3d at 225. Cooper was chairperson of plaintiff's department, and his duties included observing her performance and producing written reviews that presumably would affect plaintiff's professional advancement. Because Cooper's behavior failed to "culminate in a tangible employment action" against plaintiff, Burlington Indus., Inc. v. Ellerth, 524 U.S. at 765, it is the District's burden to prove the affirmative defense that (1) it reasonably and promptly corrected the harassing behavior, and (2) plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Petrosino v. Bell Atl., 385 F.3d at 225 (internal quotations omitted).

The District has failed, at least for the purposes of this motion, to meet its burden on the second prong of that affirmative defense. Plaintiff promptly complained about Cooper's behavior to Principal Basso, and took every opportunity to avoid further harm. To the extent she failed to complain promptly about the inappropriate comments Cooper made before the holiday party incident, her failure to report such comments – which were made by a supervisor and not obviously inappropriate to plaintiff – was hardly unreasonable. Therefore, the District is not entitled to summary judgment on a vicarious liability theory.

III. Retaliation Claim

Plaintiff also claims the District failed to grant her tenure in 2010 in retaliation for having complained about Cooper approximately two years earlier. As to this claim, the Court finds that the District is entitled to summary judgment.

Title VII provides "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees because [such employee] has opposed any practice made an unlawful employment practice" by Title VII. 42 U.S.C. § 2000e–3(a). A Title VII prima facie case of retaliation requires plaintiff to show: (1) she engaged in protected activity; (2) the employer was aware of the activity; (3) the employer took an adverse action against plaintiff; and (4) a causal connection exists between the protected activity and the adverse action. Feingold v. New York, 366 F.3d 138, 156 (2d Cir. 2004). Once plaintiff has established a prima facie case, the burden-shifting paradigm of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), applies. If the employer states a legitimate, non-discriminatory reason to justify the adverse employment action, the presumption of discriminatory retaliation is removed and plaintiff is left with the burden of proving that the defendant intentionally discriminated against her in retaliation for her protected activity. See Coffey v. Dobbs Int'l Servs., Inc., 170 F.3d 323, 326 (2d Cir. 1999). Temporal proximity alone between the protected activity and the adverse employment action is insufficient to establish pretext. El Sayed v. Hilton Hotels Corp., 627 F.3d 931, 933 (2d Cir. 2010).

Assuming plaintiff has established a prima facie case for retaliation, the District has demonstrated a legitimate, non-discriminatory reason for deciding not to grant plaintiff tenure; namely, that plaintiff's performance failed to meet the District's standards for tenured teachers.

Notably, plaintiff's performance reviews – from both before and after the holiday party incident – consistently noted that plaintiff could improve the pacing of her lessons and the quality of the questions she asked her students. Plaintiff also acknowledges she missed a substantial amount of work during her final year, and the District took issue with the quality of the lesson plans she prepared for her substitutes. As such, it is plaintiff's burden to prove that the non-discriminatory explanation proffered by the District is pretext for unlawful discrimination.

In her effort to meet this burden, plaintiff argues that the temporal proximity between her engagement in protected activity and the District's decision not to grant her tenure would allow a jury to infer that the District's non-discriminatory explanation was pretext. This argument fails for two reasons. First, nearly two years passed between plaintiff's sexual harassment complaint and the District's decision not to grant her tenure. Such a gap in time between the protected activity and alleged retaliation is too great to allow an inference of pretext. See, e.g., Woods v. Enlarged City Sch. Dist. of Newburgh, 473 F. Supp. 2d 498, 528-29 (S.D.N.Y. 2007), aff'd sub nom. Woods v. Newburgh Enlarged City Sch. Dist., 288 F. App'x 757 (2d Cir. 2008) (district courts have found two to three months to be the outer limit of a gap in time sufficiently proximate to support an inference of causation).

Second, "[t]he temporal proximity of events may give rise to an inference of retaliation for the purposes of establishing a prima facie case of retaliation under Title VII, but without more, such temporal proximity is insufficient to satisfy [plaintiff]'s burden to bring forward some evidence of pretext." El Sayed v. Hilton Hotels Corp., 627 F.3d at 933 (emphasis added). Plaintiff has adduced no evidence of pretext. To the extent she relies on unsworn letters of recommendation written by former co-workers or supervisors in furtherance of plaintiff's efforts

to find a new job or gain admission to graduate school, those letters are inadmissible hearsay and thus improper for consideration on summary judgment. Fed. R. Civ. P. 56(c)(4). In any event, the letters in no way prove the District acted with discriminatory intent.

In sum, the District is entitled to summary judgment on plaintiff's retaliation claim because plaintiff has failed as a matter of law to prove that the District intentionally discriminated against her in retaliation for her protected activity. See Coffey v. Dobbs Int'l Servs., Inc., 170 F.3d at 326.

IV. NYSHRL Claims

Plaintiff also brings hostile work environment and retaliation claims pursuant to the NYSHRL. The District is entitled to summary judgment on those claims because plaintiff failed properly to file a notice of claim.

Pursuant to Section 3813 of the New York State Education Law, a notice of claim must be filed within ninety days of an alleged act of discrimination committed by a school district. See Putkowski v. Warwick Valley Cent. Sch. Dist., 363 F. Supp. 2d 649, 653-54 (S.D.N.Y. 2005). "The New York Court of Appeals has clearly stated that this law means what it says: 'The Legislature has spoken unequivocally that no action or proceeding may be prosecuted or maintained against any school district or board of education unless a notice of claim has been 'presented to the governing body,' and this court may not disregard its pronouncement.'" Id. (quoting Parochial Bus Sys., Inc. v. Board of Educ., 60 N.Y.2d 539, 458 (1983)). Plaintiff does not dispute that she failed to file a notice of claim. To the extent plaintiff contends her EEOC charge is somehow an adequate substitute for a timely filed notice of claim, that argument fails

because her EEOC charge was not filed within ninety days of the District's decision not to grant plaintiff tenure.

**CONCLUSION**

Defendant's motion for summary judgment is GRANTED with respect to plaintiff's Title VII retaliation claim and NYSHRL claims, and DENIED with respect to plaintiff's Title VII hostile work environment claim.

The Clerk is instructed to terminate this motion (Doc. #18).

The parties are directed to submit a joint pretrial order in accordance with the Court's Individual Practices by December 13, 2012.

The parties shall appear for a pretrial conference on December 19, 2012, at 10 a.m.

Dated: November 13, 2012
White Plains, NY

SO ORDERED:

Vincent L. Briccetti
United States District Judge