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August 9, 2013

VIA EMAIL
Honorable Analisa Torres
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: Burhans and Rivera v. Lopez and Silver, No. 13 Civ. 3870 (AT)

Dear Judge Torres:

I represent plaintiffs Victoria Burhans and Chloë Rivera (collectively, "plaintiffs") in the above action and write in response to the letter of August 2, 2013, from defendant Sheldon Silver ("defendant" or "Silver") concerning his anticipated motion to dismiss. ("Silver Let.") Silver's motion is entirely without merit. As explained below: i) plaintiffs have pleaded facts establishing each element of their claims against Silver under Section 1983; ii) Silver is not entitled to qualified immunity because his conduct violates clearly established law; and iii) Silver's arguments to dismiss plaintiffs' state and city law claims are directly contrary to controlling authority. Silver's proposed motion would accomplish nothing other than to obstruct a "just, speedy and inexpensive determination" of plaintiffs' claims. Fed. R. Civ. P. 1.

I. Background

The New York State Assembly ("Assembly") hired plaintiffs to serve as Legislative Aides in the office of former Assemblyman Vito Lopez ("Lopez") in April 2012. (Complaint ¶¶45-46) At the time, Lopez was Chairman of the Assembly's Standing Committee on Housing and the head of the Democratic Party in Brooklyn. (*Id.* ¶¶ 11-12) Sheldon Silver has been the Speaker of the Assembly since 1994 and exercises sweeping powers over the institution and its members, including the power to issue and enforce a policy prohibiting sexual harassment in the workplace. (*Id.* ¶¶ 15, 17, 20)

In the weeks after plaintiffs began working for Lopez, he sexually harassed them by, among other things, inappropriately touching them, making unwelcome sexual advances, and commenting incessantly about their bodies, clothing and appearance. (Complaint ¶¶ 1, 49-56) But Lopez would not have been able to engage in any of this conduct without the support and assistance of Silver. (*Id.* ¶ 1, 38-44) In December 2011, about five months before plaintiffs were hired, two other female employees in Lopez's office complained to the Assembly's counsel that Lopez had been sexually harassing them as well. (*Id.* ¶¶19-29) In March 2012, yet another

woman in Lopez's office, in obvious distress, urgently requested that the Assembly's counsel transfer her to a new position outside of Lopez's control. (*Id.* ¶¶ 38-39)

Silver learned about the complaints from all three women and was advised by his internal counsel and the office of the New York State Attorney General that the Assembly had a legal obligation to conduct a prompt investigation into the sexual harassment complaints. (Complaint ¶¶ 32-36, 39-40) Moreover, the Assembly's sexual harassment policy, issued by Silver, provided that "complaints of sexual harassment and/or retaliation against a Member of the Assembly *shall* be referred to the Assembly Committee on Ethics and Guidance for investigation." (*Id.* ¶¶ 17, 20 (emphasis added)) Despite receiving this legal advice and knowing the requirement of the Assembly's policy, Silver did not refer the complaints to the Ethics Committee. (*Id.* ¶ 36) Nor did he do anything else to investigate the allegations against Lopez or to ensure that Lopez would not continue to sexual harass the women in his office. (*Id.* ¶ 37)

Instead, Silver assisted Lopez in covering up his unlawful behavior. (Complaint ¶¶ 1, 40) Silver authorized the Assembly to pay two of Lopez's victims over $100,000 as part of a confidential settlement in which the victims were required not to disclose anything about their complaints against Lopez or even the fact that there had been a settlement. (*Id.* ¶¶ 1, 42-43) Silver and his staff transferred the third woman out of Lopez's office to a position on the Assembly's central staff. (*Id.* ¶ 41) Lopez, having suffered no consequences for having sexually harassed three of his staffers and having maintained the support of Silver throughout, continued his pattern of serial sexual harassment against Burhans and Rivera. (*Id.* ¶¶ 44-56)

Only after plaintiffs suffered months of abuse and complained to the Assembly's counsel about Lopez did the Assembly belatedly refer Lopez to the Ethics Committee, which eventually concluded that plaintiffs had been sexually harassed and recommended sanctions against Lopez. (Complaint ¶¶ 57-61) Silver adopted those recommendations and publicly sanctioned Lopez on August 24, 2012. (*Id.* ¶ 61) Plaintiffs thereafter were transferred to other positions in the Assembly; as a result of these transfers, they have each experienced a significant diminution in their job duties and responsibilities. (*Id.* ¶¶ 57-58)

Almost immediately after Lopez was sanctioned for his conduct toward plaintiffs, the earlier complaints about Lopez and the settlement became public despite efforts by Silver to conceal the truth. (Complaint ¶¶ 63-64) Silver then falsely claimed he did not refer the initial complaints against Lopez to the Ethics Committee because the victims supposedly did not want an investigation. In fact, the victims had requested that the Assembly investigate Lopez. (*Id.* ¶ 65) In May 2013, following the release of a report regarding Lopez's conduct by the Joint Commission on Public Ethics, Silver acknowledged and apologized for his "glaring" failure in the handling of the earlier complaints against Lopez. (*Id.* ¶¶ 72-73)

II. Section 1983 Claims

Contrary to defendant's arguments, the Complaint properly pleads that Silver violated plaintiffs' rights under 42 U.S.C. § 1983. "In order to establish individual liability under § 1983, a plaintiff must show (a) that the defendant is a "person" acting "under the color of state law,"

and (b) that the defendant caused the plaintiff to be deprived of a federal right." *Back v. Hastings On Hudson Union Free Sch. Dist.,* 365 F.3d 107, 122 (2d Cir. 2004). The Complaint concerns Silver's conduct as Speaker of the Assembly and therefore properly pleads that Silver acted under color of state law. (Complaint ¶¶ 6, 15-17, 77) *See Polk County v. Dodson,* 454 U.S. 312, 317-18 (1981) (holding that a person acts under color of state law "when exercising power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law") (internal quotations omitted). Furthermore, the Complaint alleges that the conduct of Lopez and Silver denied plaintiffs their right to be free of sexual harassment in public employment, in violation of the Equal Protection Clause of the Fourteenth Amendment. (Complaint ¶ 77)

Silver contends that plaintiffs' Section 1983 claims fail because plaintiffs do not allege that he took "actions" under color of state law and that he cannot be liable for alleged inaction. (Silver Let. 2) However, defendant cites no authority for this proposition and it is not the law. Rather, plaintiffs need only demonstrate that Silver was "personally involved" in the deprivation of their rights. *Back*, 365 F.3d at 127. Personal involvement can be shown by evidence that, *inter alia*, "the defendant participated directly in the alleged constitutional violation . . . [or] the defendant created a policy or custom under which unconstitutional practices occurred." *Id.* (internal quotation omitted).[1] Both of those circumstances are pleaded in the Complaint.

Silver assisted Lopez in sexually harassing plaintiffs by: 1) authorizing a secret settlement with two of Lopez's previous victims using state funds; 2) requiring those victims agree to complete confidentiality regarding their allegations against Lopez or even the fact that there had been a settlement; 3) arranging for the transfer of a third victim out of Lopez's office to the Assembly's central staff; and 4) failing to investigate Lopez, in violation of the Assembly's sexual harassment policy, or take any other steps to ensure the safety of the Assembly employees in Lopez's office. (Complaint ¶¶ 1, 37-44, 77) By his actions and omissions, Silver enabled Lopez's unlawful conduct toward plaintiffs.

The Complaint also pleads that Silver, by his failure to appropriately respond to multiple sexual harassment complaints over the course of his Speakership, has created a policy or custom

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[1] The Second Circuit has recognized alternative bases of liability under Section 1983 that would also apply to Silver's conduct, including gross negligence in supervising subordinates who commit wrongful acts and deliberate indifference to known constitutional violations. *Back*, 365 F.3d at 127 (quoting *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995); *Atkinson v. New York State Olympic Reg'l Dev. Auth.*, 822 F. Supp. 2d 182, 192 (N.D.N.Y. 2011). The status of these alternative bases of liability has been questioned by some district courts in light of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See e.g.*, *Liner v. Fischer*, 11 CIV. 6711 PAC JLC, 2013 WL 3168660, at *7-8 (S.D.N.Y. June 24, 2013) (noting that the Second Circuit has not decided whether *Iqbal* has limited *Colon*). However, even under the most restrictive interpretation of *Iqbal*, a supervisor who directly participates in the deprivation of constitutional rights or creates a policy or custom in which unconstitutional practices occur, as alleged here, is liable. *Id.* (summarizing decisions adopting the most restrictive view of *Iqbal*). Thus, Silver is incorrect in asserting that *Iqbal* precludes plaintiffs' Section 1983 claims against him.

in which sexual harassment of Assembly staffers is tolerated. (Complaint ¶¶ 1, 18-44, 77)[2] These circumstances directly led Lopez to believe he could sexually harass plaintiffs with impunity. *See Gierlinger v. New York State Police*, 15 F.3d 32, 34 (2d Cir. 1994) ("Section 1983 liability can be imposed upon individual employers, or responsible supervisors, for failing properly to investigate and address allegations of sexual harassment when through this failure, the conduct becomes an accepted custom or practice of the employer").

Silver is not entitled to qualified immunity because he cannot demonstrate that it was objectively reasonable for him to believe that his conduct did not violate plaintiffs' rights under clearly established law. *See Olsen v. Cnty. of Nassau*, 615 F. Supp. 2d 35, 44 (E.D.N.Y. 2009) (discussing qualified immunity standards). It has long been established that plaintiffs had a right under the Equal Protection Clause to be free from sexual harassment in public employment. *Saulpaugh v. Monroe Cmty. Hosp.*, 4 F.3d 134, 144 (2d Cir. 1993). The law has likewise been clear for decades that a supervisory official such as Silver may be liable for creating a custom or practice in which sexual harassment is tolerated. *Gierlinger*, 15 F.3d at 34.

Silver's protest that he would face a "crushing litigation burden" if held responsible for alleged inaction (Silver Let. 3) is baseless. Silver is not being sued solely for his failure to act, but also for the affirmative assistance he provided to Lopez in perpetrating and concealing his unlawful conduct. Moreover, it is not too high a standard to require the Speaker of the Assembly to refrain from creating a policy or custom in which sexual harassment is tolerated or enabling sexual harassment by a senior Member of the Assembly. The notion that no one would be willing to serve as Speaker if liability was imposed under these circumstances, as Silver suggests, is implausible and should be rejected by this Court.

II. NYSHRL and NYCHRL Claims

Silver's arguments to dismiss plaintiffs' claims under the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL") are equally unpersuasive. As an initial matter, Silver is wrong in asserting that plaintiffs' NYSHRL and NYCHRL claims are analyzed under identical standards. (Silver Let. 4 n.3) Rather, "courts must analyze NYCHRL claims separately and independently from any federal and state law claims . . . construing the NYCHRL's provisions broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013) (internal citations and quotations omitted).

Silver's contention that he is not an "employer" under the NYSHRL and the more protective NYCHRL is incorrect as a matter of law. As defendant concedes, in *Patrowich v.*

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[2] Within the last few weeks, we have learned yet more evidence of Silver's policy or custom of indifference to sexual harassment. In 2009, the Counsel for the Majority, who reported directly to Silver, learned of sexual harassment complaints against an Assemblyman and reportedly took no action at all to investigate those complaints or to ensure the safety of the complainant or the other employees in the Assembly. *See* Danny Hakim, *Assembly Lawyer to Step Down Over Failure to Investigate Harassment Claims*, N.Y. Times, July 24, 2013 at A21.

Chem. Bank, 63 N.Y.2d 541, 542, 473 N.E.2d 11, 12 (1984), the New York Court of Appeals held that an individual may be liable under the NYSHRL as an employer when he or she has the "power to do more than carry out personnel decisions made by others." *Id.; see also Townsend v. Benjamin Enterprises, Inc.*, 679 F.3d 41, 57 (2d Cir. 2012); *McRedmond v. Sutton Place Rest. & Bar, Inc.*, 945 N.Y.S.2d 35, 38 (1st Dep't 2012). New York law confirms that Silver, the most senior official in the Assembly, is an employer under this standard. New York Legislative Law § 7 provides, in relevant part: "When an appropriation has been made for the services, temporary or otherwise, of officers and employees of the assembly and their appointment is not otherwise authorized by law, the speaker of the assembly may appoint such officers and employees and fix their compensation, respectively, within the amount provided by appropriation." This statute, standing alone, belies Silver's argument that he does not satisfy the *Patrowich* standard.

Moreover, the Complaint alleges that Silver has been responsible for numerous personnel decisions, including transferring a member of Lopez's staff to the Assembly's central office (*id.* ¶ 41), placing Silver's allies in positions throughout state government (*id.* ¶ 16), controlling how much money Members of the Assembly can spend on their staffs (*id.*), and imposing discipline on members on the Assembly. (*Id.* ¶ 61) In addition, the Assembly's sexual harassment policy during the period in question, which was promulgated by Silver (Complaint ¶¶ 17, 20), provides that Assembly employees may be terminated for sexual harassment and that the Speaker has the final authority to resolve internal appeals related to the policy. Accordingly, based on the facts alleged in the Complaint and New York law, Silver has the authority to make personnel decisions within the Assembly, including hiring and firing decisions, and is therefore an "employer" within the meaning of NYSHRL and NYCHRL.

Finally, Silver is also liable as an "aider and abettor" of sexual harassment under both the NYSHRL and NYCHRL based on his conduct as described in the Complaint and summarized above. Numerous decisions, including one cited by defendant, have held that the "actual participation" standard set forth in *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1317 (2d Cir. 1995), is satisfied where a supervisor is made aware of a subordinate's unlawful harassment conduct and fails to take effective remedial measures. *Turley v. ISG Lackawanna, Inc.*, 06-CV-794S, 2013 WL 150382, at *9 (W.D.N.Y. Jan. 14, 2013); *Cid v. ASA Inst. of Bus. & Computer Tech., Inc.*, 12-CV-2947 DLI VMS, 2013 WL 1193056, at *6 (E.D.N.Y. Mar. 22, 2013); *Morgan v. NYS Atty. Gen.'s Office,* 2013 WL 491525, at *13 (S.D.N.Y. Feb. 8, 2013); *Lewis v. Triborough Bridge & Tunnel Auth.*, 77 F. Supp. 2d 376, 384 (S.D.N.Y. 1999). Silver emphasizes that he referred plaintiff's internal complaints to the Ethics Committee. However, had Silver not previously enabled Lopez and helped conceal his serial sexual harassment of Assembly employees, plaintiffs would not have been sexually harassed in the first instance. Silver is liable for this conduct under the NYSHRL and NYCHRL.

Respectfully submitted,

Kevin Mintzer

cc: Bettina B. Plevan, Esq. (by email)
Laura Sack, Esq. (by email)