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August 2, 2013

**BY EMAIL ONLY**

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

Re: *Victoria Burhans & Chloe Rivera v. Vito Lopez & Sheldon Silver*
*U.S.D.C., S.D.N.Y., Civil Action No. 13 CIV 3870*

Dear Judge Torres:

We represent defendant Sheldon Silver ("Silver") in the above-referenced matter. Pursuant to Your Honor's Individual Practice Rule III(A)(ii) we respectfully request a pre-motion conference regarding our anticipated motion to dismiss Plaintiffs' claims against Silver in their entirety, pursuant to Federal Rule of Civil Procedure 12(b)(6).[1]

Pursuant to Individual Practice Rule III(B)(i), before transmitting this letter, we sent Plaintiffs' attorney a letter setting forth the specific pleading deficiencies in the Complaint with regard to Plaintiffs' claims against Silver, citing controlling authorities. Plaintiffs responded but did not agree to withdraw any of their claims against Silver.

Factual Background

Plaintiffs Victoria Burhans and Chloe Rivera ("Plaintiffs") joined the staff of former New York State Assembly Member Vito Lopez ("Lopez") as Legislative Aides on April 16, 2012 and April 17, 2012, respectively. (Compl. ¶¶ 45, 46.)[2] Plaintiffs allege that, throughout their tenure, Lopez sexually harassed them both physically and verbally. (Compl. ¶ 49.) Prior to Plaintiffs' employment, Lopez subjected two other females on his staff (referred to as Complainants 1 & 2) to sexual harassment. (Compl. ¶¶ 19, 26.) The complaints of Complainants 1 & 2 to persons other than Silver were not referred to the Assembly Ethics Committee for investigation, but were resolved by a private settlement agreement reached between counsel for Complainants 1 & 2, Lopez and the Assembly. (Compl. ¶ 42.)

[1] Silver's Answer is due on August 2, 2013. Pursuant to Individual Practice Rule III(A)(iii), the transmittal of this letter stays the time to Answer or otherwise move until further order of the Court. An initial pre-trial conference is scheduled on August 19, 2013 at 4:00 p.m.

[2] As we are required to do, we assume all the allegations contained in the Complaint to be true only for purposes of this letter and Silver's anticipated motion to dismiss.

On July 16 and 17, 2012, Plaintiffs reported Lopez's alleged sexual harassment to the Assembly's office of the Counsel for the Majority. (Compl. ¶¶ 57, 58.) Pursuant to Assembly policy, Plaintiffs' complaints were forwarded to the Assembly Ethics Committee for investigation. (Compl. ¶ 59.) Plaintiffs transferred from Lopez's staff to other open positions within the Assembly in July of 2012. (Compl. ¶¶ 57, 58.) On August 24, 2012, after completing its investigation of Lopez's conduct, the Ethics Committee recommended a series of sanctions against Lopez. Silver, the Speaker of the Assembly, adopted and implemented all of the recommendations. (Compl. ¶ 61.)

On June 6, 2013, Plaintiffs filed the instant Complaint asserting claims against Lopez and Silver for sex discrimination and sexual harassment under 42 U.S.C. § 1983 ("Section 1983"), the New York State Human Rights Law, N.Y. Exec. Law § 296(1) ("NYSHRL") and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107(1) ("NYCHRL"). Plaintiffs' claims against Silver must be dismissed in their entirety because, as explained more fully below, the Complaint does not set forth sufficient factual allegations to state claims for which Silver can be held liable under Section 1983, the NYSHRL or the NYCHRL. Plaintiffs' claims against Silver are supported by nothing more than mere conclusory allegations and are simply not viable as a matter of law.

**Section 1983 Claim**

Plaintiffs' Section 1983 claim should be dismissed because Plaintiffs have not alleged sufficient facts to demonstrate that Silver acted under color of state law or that Silver deprived Plaintiffs of their constitutional rights as required to deprive him of qualified immunity. Plaintiffs' Section 1983 claim should also be dismissed because Silver cannot be held liable as a supervisor and Plaintiffs do not allege that Silver intentionally discriminated against them based on their gender.

In order to state a claim against Silver for violation of Section 1983, Plaintiffs must set forth sufficient factual allegations to show that he acted under color of state law and that he deprived Plaintiffs of their constitutional rights. *See* 42 U.S.C. § 1983; *Guan N. v. NYC Dept. of Educ.*, No. 11 Civ. 4299(AJN), 2013 WL 67604, at *12 (S.D.N.Y. Jan. 7, 2013). A defendant acts under color of state law only "when he abuses the position given to him by the State." *West v. Atkins*, 487 U.S. 42, 49-50 (1988). Plaintiffs have not alleged any such abuse or even that Silver took any action at all with respect to them in his official capacity. Rather, Plaintiffs rely solely on alleged inaction, *i.e.* that Silver failed to investigate two prior sexual harassment complaints against Lopez. By definition, however, inaction cannot constitute action by Silver "under color of state law" or an abuse of his official power prohibited by Section 1983.

Rendering the Speaker of the Assembly liable not just for the discharge of his duties but also for alleged inaction, as Plaintiffs propose, would stretch the bounds of liability to an absurd degree and would be inconsistent with the protective purpose of the qualified immunity doctrine. *Pearson v. Callahan,* 555 U.S. 223, 231 (2009) ("Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly

and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."); *see also Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) (explaining that qualified immunity serves to protect society as a whole from the "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office", and the possibility that the "fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.") (internal quotations and citations omitted). Absent qualified immunity for all alleged inaction, the Speaker could be subjected to suit for failing to take action in a myriad of circumstances that later give rise to allegations of wrongs committed by the other 149 Assembly members. Such unrestrained potential liability would render the position untenable, as no public official could endure the crushing litigation burden.

Moreover, since Silver does not have any statutory or constitutional obligation to report sexual harassment claims to the Ethics Committee, and Plaintiffs cannot contend otherwise, Silver is entitled to qualified immunity for any alleged failure to report the first complaints of sexual harassment against Lopez to the Ethics Committee. *See Harlow*, 457 U.S. at 818 (finding that government official performing discretionary functions may not be held liable for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

Plaintiffs have also failed to allege that Silver's conduct deprived them of their constitutional right to be free from sexual harassment, as required to plead a Section 1983 claim. *See Walker v. City of N.Y.*, No. 05–CV–1283 (RER), 2010 WL 5186779, at *3 (E.D.N.Y. Dec. 15, 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) ("A plaintiff must establish the personal involvement of each defendant in the alleged constitutional deprivation."). Plaintiffs, of course, do not allege that Silver himself subjected them to sexual harassment and there are no facts alleged that indicate that any of Silver's actions directly caused any of the alleged sexual harassment perpetuated by Lopez. In fact, the Complaint allegations demonstrate that all appropriate steps were taken regarding Plaintiffs' complaints, including the referral of the complaints to the Ethics Committee for investigation and Silver's implementation of all the Ethics Committee's recommendations for sanctions against Lopez. (Compl. ¶¶ 59, 61.)

Plaintiffs' claims also fail because there are no facts set forth in the Complaint to show that Silver acted with "discriminatory intent." *See, e.g., Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979) ("Claims of . . . gender discrimination under the Equal Protection Clause require a showing of discriminatory intent in order to invoke heightened judicial scrutiny."). The Complaint merely alleges that Silver did not report earlier complaints of sexual harassment against Lopez to the Ethics Committee. Nowhere in the Complaint do Plaintiffs allege that Silver acted with intent to discriminate against Plaintiffs.

Likewise, Plaintiffs cannot establish supervisory liability against Silver based on acts of his subordinates because, under Section 1983, a supervisor may be held liable only for his own violation of Plaintiffs' constitutionally protected rights. *Iqbal*, 556 U.S. at 677. And, as stated

above, Plaintiffs have not alleged that Silver himself subjected them to sexual harassment or that any of Silver's actions were taken with the intent to discriminate against Plaintiffs. Accordingly, Plaintiffs' Section 1983 claim against Silver should be dismissed.

**NYSHRL & NYCHRL Claims**

Plaintiffs' NYSHRL and NYCHRL claims against Silver should be dismissed because Silver cannot be held liable as an "employer" or as an "aider and abettor" under either statute on the facts alleged.

An individual may be liable as an "employer" under the NYSHRL or the NYCHRL[3] only if he or she has "an ownership interest," or "the authority to 'hire and fire' employees." *Gentile v. Town of Huntington*, 288 F.Supp.2d 316, 321 (E.D.N.Y. 2003) (citation omitted); *see also Patrowich v. Chem. Bank*, 63 N.Y.2d 541, 542, (1984) (holding that an individual is not liable as an employer unless he is "shown to have any ownership interest or any power to do more than carry out personnel decisions made by others"). Public employees like Silver have no ownership interest in the public institutions they serve. *See, e.g., Walter v. Hamburg Cent. Sch. Dist.*, No. 04-CV-996S, 2007 WL 1480965, at *9-10 (W.D.N.Y. May 18, 2007). Plaintiffs have not and cannot allege that Silver maintains any type of "ownership interest" in the New York State Assembly. And, although Silver is the Speaker of the Assembly, he does not have the power to "hire and fire" the personal and district office staff of individual Assembly members, such as Plaintiffs.

Indeed, in describing Silver's powers, Plaintiffs allege only that: (i) Silver has the "right to name chairpersons and members of the various committees of the Assembly, the right to decide which bills are considered by the body, and the ability to control all Assembly property;" (ii) Silver "reward[s] his loyal supporters with higher paying leadership posts, placing his allies throughout state government and using his considerable campaign war chest and redistricting know-how to assist any endangered Democratic candidates;" and (iii) upon completion of the investigation of Plaintiffs' complaints, Silver imposed upon Lopez the sanctions recommended by the Ethics Committee. (Compl. ¶¶ 15, 16, 61.) Even if all of these allegations are true, none of the powers alleged are of the type that would make Silver liable as an "employer" under the NYSHRL or the NYCHRL. *See Walter,* 2007 WL 1480965, at **9-10 (holding that only the Board of Education has the power to make personnel decisions and that the individual defendants' authority to screen applications, interview candidates and make recommendations did not vest them with authority to make decisions relative to hiring and firing); *Lewis v. Triborough Bridge and Tunnel Auth.*, 77 F. Supp. 2d 376, 380 (S.D.N.Y. 1999) (holding that even though defendant had supervisory control over employees and could review and comment on their performance, defendant was not

[3] Both the NYSHRL and the NYCHRL evaluate claims under identical standards. *Bind v. City of N.Y.*, No. 08 Civ. 11105(RJH), 2011 WL 4542897, at *20 (S.D.N.Y. Sept. 30, 2011) (quoting *Feingold v. N.Y.*, 366 F.3d 138, 158 (2d Cir. 2004).

subject to supervisory liability). Accordingly, to the extent Plaintiffs attempt to assert claims against Silver as an "employer" under the NYSHRL or the NYCHRL, they must be dismissed.

To be held liable as an "aider and abettor," an individual must "actually participate[] in the conduct giving rise to a discrimination claim." *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1317 (2d Cir. 1995). Nowhere in the Complaint, however, do Plaintiffs allege that Silver played any role in the sexual harassment allegedly suffered by Plaintiffs. As Plaintiffs in fact concede, all appropriate steps were taken regarding Plaintiffs' complaints, including the referral of the complaints to the Ethics Committee for investigation and Silver's imposition of the sanctions recommended by the Ethics Committee on Lopez for his conduct. (Compl. ¶¶ 59-61.)

Plaintiffs also cannot maintain a claim against Silver as "aider and abettor" for his alleged failure to refer prior complaints regarding Lopez to the Ethics Committee for investigation. New York courts have consistently rejected similar claims unless plaintiffs can show that the alleged aider and abettor "share[d] the intent or purpose of the principal actor." *Brice v. Sec. Operations Sys., Inc.*, No. 00 Civ. 2438(GEL), 2001 WL 185136, at *4 (S.D.N.Y. Feb. 26, 2001) (quotations and citation omitted); *Lewis*, 77 F. Supp. 2d at 381 ("[I]f the plaintiff fails to plead any facts suggesting that a defendant displayed any intent to discriminate or was in any way involved in the alleged discriminatory scheme, the defendant may not be held liable" as an aider and abettor.). Plaintiffs have not and cannot allege that Silver's alleged failure to refer the earlier complaints against Lopez to the Ethics Committee was intended to encourage or condone Lopez's sexual harassment of Plaintiffs. Accordingly, Plaintiffs' claims against Silver as an "aider and abettor" must be dismissed.

Accordingly, all of Plaintiff's claims are meritless and should be dismissed. Therefore, Silver respectfully requests a pre-motion conference with the Court and seeks permission to file a motion to dismiss Plaintiff's claims against Silver in their entirety, with prejudice.

Very truly yours,

Bettina B. Plevan

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cc: Kevin Mintzer, Esq., Attorney for Plaintiffs (by email)