SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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10/9/14
E

PRESENT: JEFFREY K. OING JUDGE, SUPREME COURT _____ PART 48

Justice

Index Number : 111311/2009
CADET-LEGROS, JESSIE
VS.
NEW YORK UNIVERSITY HOSPITAL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

"This motion is decided in accordance with the annexed decision and order of the Court."

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

RECEIVED
OCT 09 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

FILED
OCT 09 2014
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/8/14

_____, J.S.C.
JEFFREY K. OING
JUDGE, SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

----------x

JESSIE CADET-LEGROS,

Plaintiff,

-against-

NEW YORK UNIVERSITY HOSPITAL CENTER, d/b/a NEW YORK UNIVERSITY LANGONE MEDICAL CENTER,

Defendant.

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Index No.: 113111/09

Mtn. Seq. No. 001

DECISION AND ORDER

JEFFREY K. OING, J.:

Plaintiff, Jessie Cadet-Legros, alleges four causes of action against defendant New York University Hospital Center: racial discrimination, failure to promote, hostile work environment, and retaliation, all in violation of the New York City Human Rights Law ("NYCHRL") (New York City Administrative Code § 8-107, et seq.).

Defendant steadfastly maintains that it terminated plaintiff for well documented insubordination and hostile, disruptive conduct. Defendant further argues that plaintiff has failed to establish that these reasons were either pretextual or co-extant with a racially-motivated reason for terminating her. For these reasons, defendant moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint.

Background

Plaintiff, an African-American female, graduated from Long Island University with a Master's Degree in Medical Microbiology in 1983. Plaintiff initially worked for defendant in 1978 and

1979 as an intern, and then as a medical technologist. After working elsewhere for thirteen years, in 1992 defendant hired her as a Clinical Supervisor in the Serology/Diagnostic Immunology Laboratory. Plaintiff's employment was uneventful until 2001.

In 2001, plaintiff and two other African-American female supervisors, Faye Charles and Annette Chapman, filed an internal complaint because they did not receive a bonus. In that regard, plaintiff testified at her EBT that although she did not know the basis for awarding bonuses she believed that the three of them had been denied a bonus because they were black and the other supervisors, Kenneth Inglima, Lorraine Marchand, Peggy Ross, Jeanette Hennig, who received bonuses, were white (Legros 5/23/11 EBT at pp. 116-124). With respect to Inglima's bonus, Dr. Phillip Tierno, who was, during the relevant period, Assistant Director of Microbiology, testified that he had a $1,000 bonus available and awarded it to Inglima instead of plaintiff based on his performance and work beyond his general duties (Tierno 1/24/12 EBT at pp. 118-119). Faye Charles testified at her EBT that she received a $500 bonus, but felt she deserved more (Charles 8/13/13 EBT at p. 47). As a result of their internal complaint, all three received a $1,000 bonus (Legros 5/23/11 at p. 122). At the same time, Locksley Dyce, an African-American male, received a $1,000 bonus (Delts Aff., 10/18/13, ¶ 5).

In 2005, Dr. Tierno and Irina Lutinger, the Administrative Director of the Clinical Laboratories, promoted Kenneth Inglima

to Manager of Microbiology (Inglima Aff., 10/17/13, ¶ 17). Plaintiff was not considered for the position (Tierno 1/24/12 EBT at pp. 121-122). In that regard, Dr. Tierno testified that the promotion was not to an open position, but rather a recognition that Inglima was doing work far beyond his salary and title of supervisor (Id.). Plaintiff, however, testified that she felt Inglima's "promotion" was meant to demean her and was at least partially racially motivated (Legros 5/23/11 EBT at pp. 94-95, 172; Legros 6/13/11 EBT at p. 230).

Beginning in 2007, there were a series of incidents between plaintiff and Dr. Tierno, Inglima, and Lutinger, which ultimately culminated in her termination on May 14, 2009.

I. 2007

On May 18, 2007, plaintiff transferred a diagnostic call to Dr. Tierno rather than Inglima, which she believed to be the correct course of action (Legros 5/23/11 EBT at pp. 264-265). Dr. Tierno reprimanded her for not speaking to Inglima (Id. at p. 263). Later that day, plaintiff telephoned Dr. Tierno to complain about having to report to Inglima and proceeded to discuss her independence with him for several minutes. The conversation was set forth in an email (5/22/07 Email to Legros, Tierno Aff., 10/11/13, Ex. E). In the course of the telephone conversation, Dr. Tierno realized that plaintiff was complaining to him in the laboratory rather than in private (Id.). Plaintiff asserts that she never said she did not require supervision, and

was not within earshot of anyone during the telephone conversation (Legros 1/22/14 Aff., ¶¶ 81-83). Nonetheless, Dr. Tierno wrote up plaintiff and admonished her for airing her grievances with her supervisors in front of her laboratory technicians, which he stated she had done before (5/22/07 Email to Legros, Tierno Aff., 10/11/13, Ex. E).

Five days later, on May 23, 2007, plaintiff received a "final warning" memorandum regarding her insubordination, and failure to cooperate and communicate (5/23/07 Final Warning, Inglima Aff., 10/17/13, Ex. E). As part of the warning, Dr. Tierno and Inglima directed her to attend the Faculty and Staff Assistance Program (Id.). Plaintiff claims that she was singled out and that it was unprecedented for her to be forced to attend the program (Legros 5/23/11 EBT at pp. 175-76). Reginald Odom, defendant's Vice President of Employee and Labor Relations, testified that while participation in the program was usually optional, plaintiff was not the only employee assigned to attend the program (Odom 8/14/12 EBT at pp. 138-39).

At the same time, plaintiff received a Performance Competency Assessment with a rating of 2 out of 5 for the period from January 2006 through April 2007 (06-07 Assessment, DeLince Affirm., 1/23/14, Ex. M, Cadet_00602). Plaintiff claims it was initially a 5 and was downgraded (Id., Ex. G). On July 30, 2007, plaintiff wrote to Dr. Mark Lifshitz, Director of Clinical Laboratories, and complained that she was missing other

evaluations and had only been given one for 2002-2004 recently (7/30/07 Letter to Lifshitz, DeLince Affirm., 1/23/14, Ex. I[7]).

On November 13, 2007, Inglima and plaintiff had a disagreement regarding whether certain requests had to go through Inglima as plaintiff's supervisor. Inglima reported that, in front of one of the laboratory workers, plaintiff stated this disagreement was a "petty reason" to chastise her, accused him of taking the matter "personally," and stated that she had "no time for such nonsense" (11/13/07 Email to Tierno, DeLince Affirm., 1/23/14, Ex. I[11]).

On December 20, 2007, plaintiff complained to Odom that Inglima was unfairly evaluating her and had not given her an adequate raise based on his perceived problems with her (12/20/07 Email to Odom, DeLince Affirm., 1/23/14, Ex. I[14]). She further stated that he had rated her poorly because she would not train him and that he told her if she did train him in Diagnostic Immunology he would insure a raise for her next year (Id.). Finally, she accused Inglima of using the assessment to retaliate against her (Id.). She followed up with Lutinger, Odom, Dr. Lifshitz, Dr. Tierno, Inglima, and Nancy Sanchez, the head of Human Resources, and complained that she was being unfairly labeled as "combative" and that "the leadership of the Clinical Lab has grossly violated [her] rights as a long time employee" (1/2/08 Email to Lutinger, DeLince Affirm., 1/23/14, Ex. J[1]).

II. 2008

On January 3, 2008, plaintiff received her Performance Assessment for May 2007 to December 2007. She again received an overall rating of 2 (December 2007 Assessment, DeLince Affirm., 1/23/14, Ex. N, NYUHC 000057). Further, Inglima and Dr. Tierno noted that she had failed to improve her communication or respect for the chain of command and continued to inappropriately complain to her staff regarding her grievances (Id. at NYUHC 000057-59). Finally, they warned plaintiff that she would be terminated unless she immediately improved (Id. at NYUHC 000059).

On February 29, 2008, Lutinger and Inglima discussed plaintiff in a way she asserts is racist. After plaintiff contacted Dr. Lifshitz about a problem in the laboratory, Lutinger wrote to Inglima that the "leopard does NOT change its spots" (Email Chain, DeLince Affirm., 1/23/14, Ex. J[2]). Inglima replied that plaintiff's attitude was much improved and stated, "I am not suggesting that the 'leopard' has 'changed its spots' but simply that the leopard, spots and all, has been very cooperative and tame'" (Id.).

On May 7, 2008, plaintiff arrived at the laboratory and found that one of her technicians was exposed to an HIV positive sample (File Notes re: 6/23/08 Letter to Dr. Bernard Birnbaum, Inglima Aff., 10/17/13, Ex. F, p. 4). She arranged treatment and reported to Dr. Tierno, but neglected to inform Inglima about the incident (Id.). She later told Inglima that she was not

obligated to inform him and that she had followed hospital procedure (Id. at pp. 4-5). That night, she wrote to Dr. Bernard Birnbaum, Chief of Hospital Operations, and complained that, "[f]or almost a year," she had been "subjected to harassment and a great deal of unnecessary stress" (5/7/08 Email to Birnbaum, DeLince Affirm., 1/23/14, Ex J[4]). On May 21, 2008, there was another incident in the laboratory that plaintiff did not tell Inglima about directly (File Notes re: 6/23/08 Letter to Birnbaum, Inglima Aff., 10/17/13, Ex. F, pp. 5-6).

On June 17, 2008, plaintiff claimed that Inglima aggressively questioned her about starting a sales meeting without him earlier in the day and failing to inform him that the sales representative had arrived (Id. at p. 2). The meeting "quickly deteriorated" (Id. at p. 3). After Inglima told her that he was fighting to keep her employed when his other management colleagues wanted to fire her, plaintiff began to mock Inglima and repeatedly called him a liar (Id. at p. 4).

After several other incidents, Lutinger and Inglima issued plaintiff a second Final Warning for her "refusal to accept Ken Inglima as your superior and to communicate with him as required" and her "consistent[] fail[ure] to recognize the departmental chain of command by refusing to support and cooperate with management's directives" (8/18/08 Final Warning, Inglima Aff., 10/17/13, Ex. Q). The memorandum cited her for the same previous five problem areas as the first Final Warning and noted that

plaintiff had not improved in the interim (Id.). Further, Inglima and Lutinger warned her that "future occurrences of this nature will result in immediate termination" (Id.). As plaintiff was on vacation on August 18, she did not receive the Final Warning until August 26 (Legros Aff., 1/22/14, ¶ 129).

In the interim, plaintiff filed a formal discrimination complaint with defendant's Human Resources department (Internal Grievance, DeLince Affirm., 1/23/14, Ex. Q). In it, she explicitly stated that she believed she was being racially discriminated against (Id.). She mentioned her 2001 bonus complaint and the fact that Inglima was promoted over her (Id.). Further, she complained that her white colleagues were either not punished for having poor ratings, inappropriately promoted, or given special privileges (Id.).

On September 19, 2008, some of plaintiff's co-workers nominated her for an Employee Recognition award (9/18/08 Email to Tierno, DeLince Affirm., 1/23/14, Ex. J[7]). Inglima ultimately turned down her nomination, explaining that not only could his office not process the nomination because it was the last day for nominations, but also because plaintiff had been disciplined within the last year (9/18/08 Email to Tierno and Ruddy, DeLince Affirm., 1/23/14, Ex. J[7]). Inglima testified that the nomination form itself required him to disclose whether she had been disciplined (Inglima Aff., 10/17/13, ¶ 53; Ex. S).

In November 2008, plaintiff reviewed her personnel file and discovered the email from Inglima (11/10/08 Email to Inglima, DeLince Affirm., 1/23/14, Ex. J[9]). She accused him, first in person (Inglima Aff., 10/17/13, ¶ 54) and then by email, of undermining her professionally and inappropriately revealing that she had been disciplined (11/10/08 Email to Inglima, DeLince Affirm., 1/23/14, Ex. J[9]). Further, she implied that he was responsible for many problems in the laboratory since he took over (Id.). She sent the email to other members of the laboratory staff who had nominated her, as well as Inglima and Dr. Tierno. In later talks with Inglima and Dr. Tierno, she informed them of her August grievance and demanded that they respect the grievance process and refrain from disclosing further information (Inglima Aff., 10/17/13, Ex. V). Dr. Tierno agreed, and told her that neither he nor Inglima were aware of the grievance until she told them about it (11/14/08 Email to Legros, Steer Reply Affirm., 3/24/14, Ex. K). Plaintiff eventually retracted the sentence which implied that she blamed Inglima for the problems in the laboratory (11/16/08 Legros Email, Inglima Aff., 10/17/13, Ex. W)

At the same time, Inglima and Dr. Tierno issued plaintiff a "Critical Alert" based on her continued insubordination and failure to communicate with Inglima (Critical Alert Letter, Inglima Aff., 10/17/13, Ex. R). The letter documented four recent incidents of her clashing with Inglima, including her

confrontation with him regarding the award nomination (Id.). Further, Inglima and Dr. Tierno advised her that her "recent pattern of insubordinate behavior" was unacceptable and could lead to her termination (Id.).

III. 2009

On February 18, 2009, Dr. Tierno issued a third Final Warning to plaintiff regarding her inability keep Inglima in the loop regarding reports and problems in the laboratory (2/18/09 Final Warning, Tierno Aff., 10/11/13, Ex. G). He also referenced her blatant disrespect for Inglima (Id.). He concluded by warning her that the next incident would result in a suspension, and possibly her termination (Id.).

Inglima testified that he was unable in late spring of 2009 to keep defending plaintiff and agreed with Lutinger to terminate her (Inglima Aff., 10/17/13, ¶¶ 62-65). On May 11, 2009, Robert Gardner, defendant's Manager for Employee Relations, emailed Lutinger a draft termination letter dated May 14, 2009 (5/11/09 Email to Lutinger, Steer Reply Aff., 3/24/24, Ex. H). At the same time, Inglima and Dr. Tierno completed plaintiff's last performance assessment, again rating her as a 2 (01/08-4/09 Assessment, DeLince Affirm., 1/23/14, Ex. O).

On May 13, 2009, plaintiff testified that Lutinger and Inglima gave her the evaluation and asked her to sign it on the spot (Legros 6/13/11 EBT at pp. 289-290). Plaintiff refused on the grounds that hospital policy was to give the employee time to

review the evaluation before signing (Id.). The next day, Dr. Tierno called plaintiff into his office and, in the presence of Lutinger and Inglima, gave her the termination letter and had her escorted out of the building (Tierno Aff., 10/11/13, ¶ 48).

Discussion

The NYCHRL makes illegal certain discriminatory employment practices, including discrimination in hiring, compensation, termination, and retaliation against an employee for engaging in protected activity with respect to any such unlawful practice (NYC Admin. Code §§ 8-107[1][a], [7]). As amended by the Local Civil Rights Restoration Act of 2005 (the "Restoration Act"), the NYCHRL must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (Melman v Montefiore Med. Ctr., 98 AD3d 107, 112 [1st Dept 2012]).

NYCHRL claims are subject to a three year statute of limitations (NYC Admin. Code § 8-502[d]). Plaintiff commenced this action on August 7, 2009. As such, she acknowledges that her claims based on any purported transgressions perpetrated by defendant occurring prior to August 8, 2006 are barred by the statute of limitations (Pl. Mem. of Law, p. 4 n. 1).

Courts evaluate claims under the NYCHRL under two tests -- the three part McDonnell Douglas Corp. v Green (411 US 792 [1973]) framework, and the mixed motive analysis. The McDonnell Douglas framework is a burden shifting analysis. First, the

plaintiff must establish a prima facie case for discrimination (Melman, 98 AD3d at 113). Defendant must counter this by showing "through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision" (Id. at 113-114). If defendant makes that showing, plaintiff may still prevail if plaintiff shows those reasons to be pretextual (Id. at 114). Ultimately, "the burden of persuasion on the ultimate issue of discrimination always remains with the plaintiff" (Id.).

Alternatively, under the mixed-motive analysis, a plaintiff must only show that discrimination was "was just one of the motivations for the conduct" (Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 40 [1st Dept 2011]). To obtain summary judgment, a defendant must show that no jury could find it liable under either test (Id. at 41).

I. Racial Discrimination (First Cause of Action)

To make out a prima facie case for racial discrimination, plaintiff must satisfy four elements: (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 (Forrest v Jewish Guild for the Blind, 3 NY3d 295, 305 [2004]).

The record demonstrates that plaintiff has established that she is a member of a protected class and that she was qualified to hold her position. The NYCHRL does not define what an "adverse employment action" other than termination is in the context of a racial discrimination claim, but the First Department has interpreted such claims to require proof of:

> a change in working conditions ... 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

(Messinger v Girl Scouts of the U.S.A., 16 AD3d 314, 315 [1st Dept 2005]; Block v Gatling, 84 AD3d 445 [1st Dept 2011]["The transfer was merely an alteration of her responsibilities and did not result in a 'materially adverse change,' since petitioner retained the terms and conditions of her employment, and her salary remained the same"]).

i. Pay Disparity

Plaintiff alleges that white employees are better paid in defendant's Clinical Laboratories than African-Americans. To allege discrimination based on a salary disparity, plaintiff, as a member of a protected class, must show that she was paid less than similarly situated non-members of that class (Herrington v Metro-North Commuter R.R. Co., 118 AD3d 544 [1st Dept 2014]). To be similarly situated, "[t]he individuals being compared must be similarly situated in all material respects" and "[w]hile their

circumstances do not have to be identical, there should be a reasonably close resemblance of facts and circumstances. What is key is that they be similar in significant respects" (Shah v Wilco Sys., Inc., 27 AD3d 169, 177 [1st Dept 2005]).

Plaintiff testified that she and Annette Chapman, another African-American female supervisor, were paid less at various times than Inglima, Marchand, Peggy Ross, and Jeanette Hennig, their White counterparts. Further, in the case of Hennig and Ross, plaintiff testified that defendant paid her and Chapman less than Hennig and Ross even though Hennig had consistently poor ratings and Ross was demoted.

Defendant correctly argues that plaintiff's comparisons are inapposite. In that regard, defendant points out that none of the four employees are similarly situated to plaintiff or Chapman. The record reflects that all four individuals were or are managers, a rank higher than supervisor (Marchand Aff., 1/17/14, ¶ 4; Lutinger Aff., 10/17/13, ¶ 42). Marchand, who happens to be white, retired in 2008 after 39 years of service with defendant -- more than twice plaintiff's service time -- and managed two departments whereas plaintiff supervised only one (Marchand Aff., 1/17/14, ¶¶ 3-4). Indeed, nothing in Marchand's EBT is contrary to these facts. In addition, Marchand's affidavit prepared after her EBT does not raise a factual issue concerning plaintiff's pay disparity claim (Id. at ¶¶ 64-70). In fact, a review of her statements indicates that she had no

personal knowledge of any pay disparity. Similarly, plaintiff herself testified that she had no direct knowledge of Hennig's performance assessments, and therefore has no basis to say that Hennig was a known poor performer (Legros 6/13/11 EBT at p. 338). Moreover, Ross was never actually demoted (Delts Reply Aff., 3/19/14, ¶ 6), and in fact was at one point making less than Chapman, who was only a supervisor when she was a manager (Salary History, DeLince Affirm., 1/23/14, Ex. H, NYUHC 003642-47). Therefore, the fact that plaintiff was making less at the time of her termination than any of the four individuals is of no moment because none of the identified individuals were similarly situated with plaintiff.

Under these circumstances, plaintiff has failed to raise a factual issue on her claim that her salary discrepancy was racially based.

ii. Termination

Plaintiff claims her termination was racially motivated. In that regard, plaintiff testified at her EBT that "the Clinical Labs at [defendant] have a perceived history of disparate treatment" and points to the 2001 bonus complaint, and her belief that defendant passed her over for multiple promotions (Legros 6/13/11 EBT at p. 233). As the record shows, defendant denied plaintiff a bonus initially in 2001 because there was only one bonus to award. In addition, other non-white employees received bonuses even if she did not. With respect to Inglima's promotion

over her, the record reflects that she was never eligible for the promotion because it was not to an open position.

In addition, defendant argues it had a legitimate, non-discriminatory reason for terminating her. Beginning in 2007, plaintiff was repeatedly spoken to and cited for insubordination, disrespect of her supervisors, and failure to communicate. The key individuals making these determinations were Inglima, Tierno, and Lutinger. Her alleged pattern of behavior is reflected in her performance assessments. One assessment that plaintiff claims was unfairly backdated actually rated her favorably (02-04 Assessment, DeLince Affirm., 1/23/14, Ex. L). Plaintiff's purported behavior resulted in three successive Final Warning letters and a Critical Alert letter, the last Final Warning coming three months before her termination. The letters all documented the same issues and referenced the earlier letters warning plaintiff that her behavior needed to change (e.g., (8/18/08 Final Warning, Inglima Aff., 10/17/13, Ex. Q ["We warned you about these behaviors for over 1.5 years and your[sic] received a Final Warning on 5/23/07 addressing the very issues listed in this document but we have not seen any improvements"]). Indeed, the record reflects that Inglima apparently went to great lengths to keep plaintiff employed while imploring her to change her behavior (e.g., Inglima Aff., 10/17/13, ¶ 42). Despite Inglima's efforts, plaintiff allegedly continued to clash with her supervisors in an insubordinate manner. Arguably, these

apparent, unconverted facts appear to support defendant's summary judgment motion. A further review of the record compels otherwise.

For each specific instance noted, supra, plaintiff relies on Marchand's affidavit, which provides the following statements:

> 22. In all the years that I attended the CLIP-IT meetings, I have never observed Jessie Cadet-Legros being unprofessional toward Kenneth Inglima or, for that matter, toward anyone else.
>
> 23. I have never observed her to have an outburst or to have an unprofessional, argumentative conversation with anyone, especially not with Mr. Kenneth Inglima.
>
> 24. During meetings, there were occasional professional disagreements among participants on procedural or substantive matters. But such disagreements should not be characterized as insubordination.
>
> * * *
>
> 26. I never observed Ms. Cadet-Legros articulate negative feelings toward or disrespect Mr. Kenneth Inglima in these meetings, nor did she cause any friction in the clinical laboratory.
>
> * * *
>
> 30. However, in the years beyond 2006, I noticed that Jessie Cadet-Legros was really being treated differently.
>
> 31. For example, Irina Lutinger sometimes permitted some of her managers and supervisors, such as me, to complete their own performance evaluations, while not extending the same privilege to Jessie Cadet-Legros.
>
> 32. During one instance, Irina Lutinger permitted me to write my own evaluation, which I then submitted to her for review.

33. When I mentioned this to Jessie Cadet-Legros she told me that while I was permitted to write and see my own evaluations, she wasn't even being allowed to look at her employee file to read her reviews.

34. In another instance, I noticed the difference between how Jessie Cadet-Legros was treated compared with the treatment of Jeannette Hennig, a white female, who was Manager of Hematology in the Clinical Labs.

* * *

37. Results of the proficiency testing for Jessie Cadet-Legros' Serology/Immunology lab were always excellent.

38. Jeannette Hennig's Hematology lab's proficiency testing had an unusually high number of poor scores.

* * *

42. Dr. Lifshitz and Irina Lutinger were aware of the problem; however, no disciplinary action was implemented.

43. Jeannette Hennig, to the best of my knowledge, is still employed at NYU-Langone.

44. Jessie Cadet-Legros, however, was being harassed and receiving warnings despite the fact that she was doing good work.

* * *

45. I was present when some of the racial patterns in the department occurred, such as the bonus being denied to Annette Chapman, Fay Charles, and Jessie Cadet-Legros, all of whom were Black.

46. I understand from this litigation that NYU justified the bonus given to Kenneth Inglima, as compared to Jessie Cadet-Legros, by claiming that it was due to Kenneth Inglima's involvement with the Sunquest computer system. I totally disagree. Working on Sunquest was not extra work just for Mr. Inglima; it was a new computer system with a new database which the management team all had to contribute to.

* * *

52. I never observed Jessie Cadet-Legros discussing her employment issues and concerns with her Serology techs or with others in the lab.

53. The Faculty and Staff Assistance Program ("FASAP") is an employee assistance program available for employees who are having personal problems.

54. I never directed an employee to sign up for FASAP as a disciplinary tool, but I might have informed them that it was available.

55. Jessie Cadet-Legros was forced to attend FASAP, which is improper protocol.

* * *

59. At NYU-Langone, employees were allowed to have a copy of their evaluation whether or not they agreed with its contents. Employees were allowed to comment at their own convenience, and if they wanted the time to think about it or take it home to their significant others to discuss it, that was permitted.

60. Employees were not required to sign their evaluations and could also make comments if they disagreed with the content of an evaluation; the refusal to sign an evaluation would not be proper cause for termination.

61. I have come to understand that, prior to her termination, it was demanded that Jessie Cadet-Legros sign her performance review on the spot and it was a cause of her termination. This is completely improper and contrary to the NYU policy.

62. Also, it was the practice to indicate on the termination letter the reason for the employee's termination.

63. I understand that Jessie Cadet-Legros's termination letter did not set forth a written reason. This is most unusual and contrary to NYU-Langone's general practices.

(Marchand 1/17/14 Aff.). Her statements do not conflict with the excerpts of her EBT testimony (defendant did not provide this Court with a complete copy of Marchand's EBT), which was taken

before execution of her affidavit. Nor does the record indicate that defendant sought to have Marchand appear for another EBT so as to question her on these statements. Under these circumstances, Marchand's statements clearly raise a factual issue as to whether defendant's decision to terminate plaintiff was motivated in part by race, or whether the purported reasons for the termination were pretextual. Indeed, the additional excerpts of her EBT proffered by defendant in response to her statements do not serve to eliminate this factual issue. Further, with respect to the pretextual nature of the termination, whether hospital personnel acted in good faith is an issue best left for the trier of fact (Bennett v Health Mgt. Sys., Inc., 92 AD3d at 44 ["evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied"]).

Lastly, plaintiff points to emails to show that her supervisors used coded racial language when referring to her in their conversations. In particular, they said she had "tirades," and Lutinger's comment that the "leopard does not change its spots." (Email Chain, DeLince Affirm., 1/23/14, Ex. J[2]). Plaintiff argues that such facially neutral terms can still be evidence of racial harassment in the proper context (Ewing v. Coca Cola Bottling Co. of New York, Inc., 2001 WL 767070, *7 [SDNY, June 25, 2001]). In response, defendant points out that the plaintiff in Ewing described an atmosphere where racial

epithets and slurs were constant. Here, defendant notes that plaintiff's EBT testimony indicates that she was never the subject of any racial slurs (Legros 5/23/11 EBT at pp. 110-11), and that no one ever made any racially offensive jokes or comments in her presence (Id. at p. 111). Defendant misses the point.

To begin, the issue is the supervisors' motivation for the employment actions taken against plaintiff. Such utterances may be evidence of their motive. Defendant argues, however, that the noted words do not demonstrate racial animus and that the phrase a "leopard does not change its spots" is a well known colloquialism with no racial implications (Def. Reply Mem. of Law, p. 21 n. 21). Defendant's argument is unavailing. While such words may have no racial undertones, defendant fails to appreciate the need to consider the context and circumstances in which the phrase is uttered. Indeed, in certain contexts and circumstances, such utterances may be deemed to betray an individual's intentions. Under these circumstances, resolution of this issue is for the trier of fact.

Accordingly, a factual issue exists as to whether her termination was racially based.

II. Failure to Promote (Second Cause of Action)

Plaintiff alleges that Inglima was promoted over her in 2005, despite being less qualified, because he was not black (Legros 6/13/11 EBT at pp. 229-230, 233:20-25). Plaintiff

acknowledges, however, that this promotion occurred in 2005, and, as such, is time-barred (Pl. Mem. of Law, p. 4, n. 1).

Accordingly, that branch of defendant's motion for summary judgment dismissing the second cause of action for failure to promote is granted, and that claim is dismissed as time barred.

III. Hostile Work Environment (Third Cause of Action)

A plaintiff must show that she was treated worse than other employees because of her "protected status," and that her employer was motivated at least in part by discrimination in order to demonstrate the existence of a hostile work environment (Chin v New York City Hous. Auth., 106 AD3d 443, 445 [1st Dept 2013]). "[Q]uestions of severity and pervasiveness are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability" (Williams v New York City Hous. Auth., 61 AD3d 62, 76 [1st Dept 2009]). Courts have frequently held that the NYCHRL is not a civility code, and a defendant may have summary judgment if it shows "that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences" (Id. at 80).

Here, plaintiff testified that she could not remember being the subject of racial, jokes, slurs, or comments, and that she could not remember ever hearing anyone else make them around her (Legros 5/23/11 EBT at pp. 110-111). Further, her initial complaint to Dr. Birnbaum in 2008 was not based on race; she

stated only that for the past year she had been "subjected to harassment and a great deal of unnecessary stress" (5/7/08 Email to Birnbaum, DeLince Affirm., 1/23/14, Ex J[4]). She relies on the problems surrounding her hiring (Legros 5/23/11 EBT at p. 111), her 2001 bonus complaint (id. at p. 115), her irregularly dated performance evaluations in 2007 (id. at p. 125), the fact that she did not receive an employee recognition award (id. at p. 166), the fact that Inglima was promoted over her (id. at p. 229), and her termination to show a hostile work environment. Contrary to plaintiff's argument, considering the totality of the evidence, none of these incidents, viewed singularly, demonstrate that defendant created, fostered, or condoned a hostile work environment (cf. Hernandez v Kaisman, 103 AD3d 106, 115 [1st Dept 2012] ["While such statements may have been isolated, that is irrelevant under the City HRL, since [o]ne 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"]).

Accordingly, that branch of defendant's motion for summary judgment dismissing the third cause of action for hostile work environment is granted, and that claim is dismissed.

IV. Retaliation (Fourth Cause of Action)

To maintain a retaliation claim under the City's Human Rights Law, plaintiff must demonstrate: (1) that she participated in a protected activity known to defendant; (2) that defendant

took an action that disadvantaged plaintiff; and (3) that a causal connection exists between the protected activity and the adverse action (Fletcher v Dakota, Inc., 99 AD3d 43, 51-52 [1st Dept 2012]). "[T]he retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity" (Williams, supra, 61 AD3d at 71). If the claim does not involve a materially adverse or ultimate action, a court should be sensitive to "workplace realities," the fact that the "chilling effect" of an action is context-specific, "and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities (Id.).

The record demonstrates that plaintiff participated in a protected activity only twice -- her 2001 bonus complaint and her 2008 internal grievance regarding alleged racial discrimination. "Protected activity" only includes complaints about or opposition to unlawful discrimination (Brook v Overseas Media, Inc., 69 AD3d 444 [1st Dept 2010]).

With respect to the 2001 bonus complaint, plaintiff contends that defendant failed to promote her and instead promoted Inglima in 2005 in retaliation for her complaint. Initially, given the four year interval between her protected activity and Inglima's promotion the bonus complaint is not "temporally proximate enough" to be connected to her protected activity (Kim v New York State Div. of Human Rights, 107 AD3d 434 [1st Dept 2013][three

year gap between protected activity and employer action shows insufficient temporal proximity]). Further, Dr. Tierno initially recommended Inglima for promotion in 1996, five years prior to plaintiff's complaint (Inglima 95-96 Assessment, Tierno Aff., 10/11/13, Ex. C, NYUHC 003022). Thus, continuation of a course of conduct begun prior to plaintiff's complaint does not constitute retaliation (Melman, 98 AD3d at 129).

With respect to the 2008 internal grievance, plaintiff contends that Inglima, Lutinger, and Dr. Tierno retaliated against her by issuing her a second Final Warning, denying her award nomination, and terminating her. The record demonstrates, however, that Dr. Tierno and Inglima did not know about the grievance until three months after it was filed, and after they issued the second Final Warning and turned down her nomination (11/14/08 Email to Legros, Steer Reply Aff., 3/24/14, Ex. K). Nothing in the record indicates that Lutinger knew of her grievance either. When an employer allegedly retaliates before it is even aware of the employee's protected activity, there is no causal connection as a matter of law (Bendeck v NYU Hospitals Ctr., 77 AD3d 552, 553 [1st Dept 2010]). Further, plaintiff received her initial Final Warning in May 2007, more than a year prior to her internal grievance. The second Final Warning, and the subsequent disciplinary letters, explicitly reference the continuing course of conduct that resulted in the first Final

Warning. Therefore, defendant's continuing disciplinary conduct cannot be deemed retaliatory (Melman, 98 AD3d at 129).

Nonetheless, plaintiff argues that defendant cannot rely on the first and second Final Warnings to demonstrate a continuing course of conduct because both warnings are too far removed from her termination. That argument is unavailing. The record also reflects that she received a Critical Alert letter in November 2008 for the same behavior (Critical Alert Letter, Inglima Aff., 10/17/13, Ex. R), six months prior to her termination. She also received a third Final Warning in February 2009, just three months prior to her termination (2/18/09 Final Warning, Tierno Aff., 10/11/13, Ex. G). Thus, the record sufficiently demonstrates that there was a continuing course of conduct so that there was no causal connection between her protected activity and defendant's decision to terminate her employment. As such, plaintiff fails to raise an issue of fact to maintain her claim for retaliatory discharge.

Accordingly, that branch of defendant's motion for summary judgment dismissing the fourth cause of action for retaliation is granted, and that claim is dismissed.

It is therefore,

ORDERED that the branch of defendant's motion for summary judgment dismissing the first cause of action for racial discrimination is granted to the extent of dismissing the claim

based on pay disparity and is denied as to the claim based on her termination; and it is further,

ORDERED that the branch of defendant's motion for summary judgment dismissing the second cause of action for failure to promote is granted without opposition, and that claim is dismissed; and it is further,

ORDERED that the branch of defendant's motion for summary judgment dismissing the third cause of action for hostile work environment is granted, and that claim is dismissed; and it is further,

ORDERED that the branch of defendant's motion for summary judgment dismissing the fourth cause of action for retaliation is granted, and that claim is dismissed;

ORDERED that upon service of a copy of this order with notice of entry the Clerk of Trial Support is respectfully directed to place this action on the TAP calendar (IAS Part 40) for trial assignment.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/8/14

HON. JEFFREY K. OING, J.S.C.