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United States District Court,
S.D. New York.

Faye RUBIN, Plaintiff,
v.
ABBOTT LABORATORIES, Defendant.

No. 13 Civ. 8667(CM). | Signed Sept. 22, 2015. | Filed Sept. 23, 2015.

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

McMAHON, District Judge.

***1** On December 6, 2013, Plaintiff Faye Rubin ("Plaintiff") brought claims for gender discrimination against Defendant Abbott Laboratories ("Defendant"). Plaintiff asserts claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *ei seq.;* N.Y. Labor Law § 194; New York Executive Law § 296, and New York State and New York City's human rights laws (the "NYSHRL" and "NYCHRL," respectively).

On April 2, 2015, Defendant moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. Defendant contends that Plaintiff has abandoned all her claims except the hostile work environment claims. Defendant also argues Plaintiff's Title VII hostile work environment claim is time-barred, and all of the hostile work environment claims fail as a matter of law.

For the reasons discussed below, Defendant's motion for summary judgment is granted in significant part-Rubin's abandoned claims and her hostile work environment claim under federal and state law are dismissed-but is denied insofar as it relates to her claim of hostile work environment under the New York City Human Rights Law.

BACKGROUND

Defendant's lawyer filed the required statement of undisputed material facts pursuant to Local Rule 56.1 of this Court, but Plaintiff's counsel failed to submit a response to that statement. Instead, Plaintiff's counsel provided two unnumbered paragraphs in Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment entitled "Disputed Facts." These two paragraphs in no way correspond to the 55 paragraphs included in Defendant's 56.1 Statement. In the "Disputed Facts" section of Plaintiff's Memorandum, Plaintiff cites to a document entitled "Plaintiff's Statement of Facts," but that document has not been filed with this Court.

Local Rule 56.1(b) requires that papers opposing a motion for summary judgment include a "correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short, and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried." Local Rule 56.1(b). Failure to provide a responsive 56.1 statement means that the material facts in Defendant's Local Civil Rule 56.1(a) statement are deemed admitted as a matter of law. *See* Local Rule 56.1(c); *Hi Pockets, Inc. v. Music Conservatory of Westchester, Inc.*, 192 F.Supp.2d 143, 147 (S.D.N.Y .2002); *Davis–Bell v. Columbia Univ.*, 851 F.Supp.2d 650, 658 (S .D.N.Y.2012). I will, therefore, accept all of Defendant's proposed facts in the 56.1 Statement as true for purposes of this motion.

I. Plaintiff's Employment with Abbott

Defendant is a global, broad-based health care company with its principal place of business in Illinois. Plaintiff, a resident of New Jersey, began her at-will employment with Abbott on October 11, 1999 as a sales representative. She resigned on March 19, 2000. (Def.'s 56.1 Statement ¶ 2). Plaintiff was re-hired by Defendant's Molecular Division on January 7, 2008, as a Molecular Physician Specialist sales representative ("MPS"), and worked in New York. (*Id.* ¶ 3).

***2** On June 17, 2008, Plaintiff began reporting to Michael Kohler, MPS Sales Manager. (*Id.* ¶ 4). Kohler reported to Christopher Jowett, GM U.S. & Canada Commercial Ops. (*Id.* ¶ 4).

II. Defendant's MPS Program

MPS' were responsible for sales to physicians. (*Id.* ¶ 5). In her role as an MPS, Plaintiff initially focused on selling a product to physicians called "UroVysion," a urine-based molecular test used to diagnose and monitor bladder cancer. (*Id.* ¶ 6).

Effective January 1, 2011, Medicare substantially decreased reimbursement for the UroVysion product. (*Id.* ¶ 13). Market demand for UroVysion also decreased significantly, causing Defendant to reallocate resources away from selling UroVysion. (*Id.* ¶ 13). In 2011, Defendant reduced the nationwide MPS headcount from 15 to 8. Several male MPS' lost their jobs, but Plaintiff kept hers. (Kirshenbaum Declaration Exhibit 1 (Rubin Dep. At 18:4–19:11); Jowett Declaration ¶ 10).

In late 2010 and early 2011, several remaining MPS territories, including the territories of Plaintiff and her male colleague Frank Dalli, were expanded to include the geographies that had been covered by MPSs who lost their jobs in the reduction in force. (Def .'s 56.1 Statement ¶ 15).

In 2012, the MPS headcount continued to decrease; several of the remaining MPS' territories, including Plaintiffs, were again expanded. (*Id.* ¶ 17).

All of the decisions related to territory modifications were made primarily by Jowett and Steven Cielocha, Senior Analyst, Strategic Planning, with Kohler's input. (*Id.* ¶ 18).

By the end of 2012, the MPS nationwide headcount decreased to four. (*Id.* ¶ 19). In 2013, the entire MPS program was disbanded. (*Id.* ¶ 19).

III. Plaintiff's Performance as an MPS

In 2008, when Plaintiff initially began reporting to Kohler, her sales territory consisted of the Manhattan area of New York City, which was the smallest MPS territory nationwide. (*Id.* ¶ 20).

Plaintiff performed well in 2008 and 2009, and Kohler rated her as “Achieving Expectations” (“AE”) on her annual reviews. (*Id.* ¶ 21).

In 2010, however, Defendant's management decided to shift the MPS sales strategy to selling the UroVysion product directly to laboratories (“direct sales”). (*Id.* ¶ 11). As a result of this shift, Plaintiff's job became more challenging. (*Id.* ¶ 22). Because of the high cost of Manhattan real estate, the physicians in Plaintiff's territory were reluctant and/or unable to set up UroVysion laboratories. (*Id.* ¶ 22). Accordingly, Plaintiff's sales performance was poor in 2010: she ranked 17 out of 17 MPSs for sales and achieved only 19% of her sales goal. (*Id.* ¶ 23).

In early 2011, Plaintiff complained that her territory was not profitable. (*Id.* ¶ 29). In response to Plaintiff's concerns and the reduced headcount nationwide, her sales territory expanded to include areas where physicians might be more likely to set up laboratories-the Bronx, Connecticut, Rhode Island, and some parts of New York State. (*Id.* ¶ 29). Even after the 2011 territory expansions, Plaintiff's territory was the smallest geographically of all territories. (*Id.* ¶ 29).

***3** During the first two quarters of 2011, Plaintiff's sales remained poor. Plaintiff's overall sales goal was much lower than most other MPS representatives, yet she only reached 42% of her goal as of the second quarter. (*Id.* ¶ 31).

As part of the 2011 territory expansion, Plaintiff acquired two accounts, Hudson Valley and Histopathology, which had in previous years placed large orders. Both stopped ordering before Plaintiff acquired those accounts. (*Id.* ¶ 32). Kohler worked with Jowett and Cielocha to ensure that Plaintiff's bonus would not be impacted by those lost accounts, and they were removed from her 2011 goals. (*Id.* ¶ 32). Plaintiff concedes that problems related to her bonus calculation were resolved. (Kirshenbaum Declaration Ex. 1 (Rubin Dep. at 85:9–20, 86:20–87:14, 168:25–169:22, 211:6–21)).

By July 2011, though, Kohler had observed that Plaintiff did not seem to understand (and did not utilize) the sales model, and was again not on pace to meet her 2011 sales goals. (Def.'s 56.1 Statement ¶ 34). Thus, after seeking advice from Defendant's Employee Relations (“ER”) department, Kohler delivered a performance memorandum to Plaintiff on July 12, 2011. (*Id.* ¶ 35; Kohler Declaration Ex. C). To help Kohler monitor her performance, Plaintiff was required to submit weekly call planners to him. (Def.'s 56.1 Statement ¶ 35). More or less simultaneously, Kohler issued a substantially similar memo to a male underperforming MPS, Phillip Crawford, and also required Crawford to submit weekly call planners. (*Id.* ¶ 36).

In weekly call planners from October 22, 2011 to December 31, 2011, Plaintiff noted only two sales trips outside of Manhattan, to locations less than one hour away. (Kohler Declaration, ¶ 15). Kohler did not discipline Plaintiff for failing to visit territories outside of Manhattan, but told her to do so, and to explore opportunities in the rest of her territory. (Def.'s 56.1 Statement ¶ 37).

Further, in January 2012, after reviewing Plaintiff's most recent sales numbers, Kohler recommended that Plaintiff be removed from her coaching plan, and told Defendant's ER department that Plaintiff would be receiving an AE rating for her 2011 review. (*Id.* ¶ 38).

On March 6, 2012, prior to receiving her 2011 review, Plaintiff began a medical leave of absence related to her pregnancy. (*Id.* ¶¶ 39, 42). While on leave, on March 30, 2012, Kohler informed Plaintiff that her territory was being expanded to include parts of Massachusetts. (*Id.* ¶ 40, Kohler Declaration, Ex. G). Around the same time, all other MPS' territories were restructured as well. (Def.'s 56.1 Statement 40). Even after the expansion, Plaintiff's territory remained one of the smallest. (*Id.* ¶ 40).

IV. Plaintiff's Claims of Harassment

Plaintiff asserts she began being subject to a hostile work environment because of her gender in the beginning of 2009. (Kirshenbaum Declaration Ex. 1 (Rubin Dep. at 137:19–138:21)). Plaintiff testifies that she suffered a hostile work environment because, after she told Kohler of her desire to become pregnant in the beginning of 2009, she regularly perceived Kohler as harsh, intolerant, curt, and intimidating. (Nichols Declaration Ex. 1 (Rubin Dep. at 141:7–12) ("His tone of voice was always very curt with me, like it wasn't just one day, one incident, it was on a regular basis and I was kind of afraid to call him even starting probably like in mid 2009....")). Plaintiff stated in her deposition: "I can't tell you like the first instance because I don't remember the first instance because like I said this happened regularly everyday something would happen...." (Kirshenbaum Declaration Ex. 1 (Rubin Dep. at 137:23–138:3)).

***4** Plaintiff testified that Kohler regularly used aggressive tones and statements such as "duh duh duh," "are you stupid," "you are going to have a bad day," "you are acting girlie," "girls are emotional," and "you are emotional." (Kirshenbaum Declaration Ex. 1 (Rubin Dep. at 63:16–66:8, 138:22–139:20, 329:23–331:7). Plaintiff also testified: "Mike [Kohler] had a way of saying things all the time so to tell you that, tell me everything he said, I can't remember everything ... this was an ongoing process." (Nichols Declaration Ex. 1 (Rubin Dep. at 60:23–61:4)). Plaintiff admits that some of these comments made by Kohler may have had a totally innocent construction to them. (Def.'s 56.1 Statement ¶ 53, Kirshenbaum Declaration Ex. 1 (Rubin Dep. at 95:17–21)).

At her deposition, Plaintiff claims there were two or three times she felt physically threatened by Kohler while working with him. (Nichols Declaration Ex. 1 (Rubin Dep. at 101:4–11)). Plaintiff mentions the first time she felt physically threatened by Kohler was in the fall of 2011 while riding in a cab on a sales call. (Nichols Declaration Ex. 1 (Rubin Dep. at 100:13–101:25)). Plaintiff claims Kohler was yelling at her and challenging the categorization of her current pregnancy as high risk. (Nichols Declaration Ex. 1 (Rubin Dep. at 100:13–101:14)). Plaintiff did not testify to the other two times she felt physically threatened, but did admit that Kohler never physically touched her. (Nichols Declaration Ex. 1 (Rubin Dep. at 101:15–16)).

Plaintiff believes she was subject to a hostile work environment by Kohler due to her gender. She believes the hostile work environment was due to her gender because, from her observations of Kohler interacting with other members of the office, she felt females were always treated more harshly than their male counterparts. (Nichols Declaration Ex. 1 (Rubin Dep. at 142:15–143:15) ("I heard him I am sure speak to men in a way that was not nice but it was not to the level that the women got it....")). Plaintiff also believes this because during various car rides she went on alone with Kohler, he made regular discriminatory statements such as "Jay Downing has her job because she is a black woman" and "Eileen Schwab is useless." (Nichols Declaration Ex. 1 (Rubin Dep. at 60:3–61:9)). Plaintiff also testified: "... I just know little comments were made about women, like just in reference to when [Kohler] would say it is girlie or don't be so emotional or in reference to whatever he was talking about, little comments would be made, so I can't give you—cite you each and every example but it was pretty regular." (Kirshenbaum Declaration Ex. 1 (Rubin Dep. at 65:6–13)). Plaintiff admits, however, that Kohler was curt and aggressive to all MPS', male and female. (Def.'s 56.1 Statement ¶ 54, Kirshenbaum Declaration Ex. 1 (Rubin Dep. at 141:14–143:15)).

After Plaintiff received Kohler's March 30, 2012 about the expansion of her territory, she had not no more interaction with him. (Def.'s 56.1 Statement ¶ 43). Kohler did not make any statements to Rubin related to her gender or pregnancy while she was on leave. (*Id.*).

***5** On May 10, 2012, while still on medical leave, Plaintiff sent an email to the email address "amhicir@abbott.com" to request the review of a secure hospital policy and seemingly to approve an action Plaintiff wanted to take relating to

facility credentialing. (Nichols Declaration Ex. 2). Later that day, a woman named Polly responded to Plaintiff from the "amhcir@abbott.com" email address and copied Kohler on the email. (*Id.*). Polly told Plaintiff that per the policy Plaintiff asked about, which had to do with certain facilities accepting vendors on-site, Plaintiff was not allowed to go to a specific facility. (*Id.*). Plaintiff claims this email constituted a reprimand by Defendant. Defendant disputes Plaintiff's portrayal of this email as reprimand.

At all relevant times, Defendant had in place a Workplace Harassment Policy that prohibits harassment, discrimination, and retaliation based on gender. (Wilson Declaration ¶ 4, Wilson Declaration Ex. A). The policy stated: "Individuals who believe that they have been subject to [harassment] or believe they have witnessed such conduct, should discuss their concerns with their immediate supervisor, manager, Employee Relations, or the Office of Ethics and Compliance (OEC)." (Wilson Declaration Ex. A). Plaintiff never complained to anyone in Employee Relations or the Office of Ethics and Compliance sexual harassment or a hostile work environment, although she was familiar with how to contact ER about various issues, and had done so on more than one occasion. (Def.'s 56.1 Statement ¶ 49). Once, during 2011, she told Kohler (her immediate supervisor) that she believed a negative performance review he gave her and "all of this" occurred because of her gender. (Nichols Declaration Ex. 1 (Rubin Dep. at 149:2–8)). However, Kohler was the subject of her complaint; it was his behavior that she had to bring to the attention of the company in order to comply with the policy. It is undisputed that she never told anyone else in management-not in Employee Resources, not in the Office of Ethics-about Kohler's behavior.

V. Plaintiff Resigns

Plaintiff never returned to work at Abbott; prior to the scheduled end of her medical leave, Plaintiff interviewed and accepted a sales position at Genoptix, where her compensation package had the potential to be greater than it was with Defendant. (Def.'s 56.1 Statement ¶ 47, Kirshenbaum Declaration Ex. 2). Soon before her leave was scheduled to end, on August 27, 2012, Plaintiff advised ER by email that she was resigning for "professional and personal" reasons. (Def.'s 56.1 Statement ¶ 46, Kirshenbaum Declaration Ex. 1 (Rubin Dep. at 308:17–309:17)). Plaintiff also called human resources. She asserts she told someone on the phone she was resigning due to difficulties with her manager she believed were due to her gender. (Nichols Declaration Ex. 1 (Rubin Dep. at 310:13–312:7)). This was admittedly the first time Plaintiff had ever brought this matter to the attention of anyone who was in a position to do anything about it.

PROCEDURAL HISTORY

***6** On February 6, 2013, Plaintiff filed a complaint with the U.S. Equal Opportunity Commission ("EEOC"). (Hauser Declaration Ex. A). On September 10, 2013, the EEOC issued Plaintiff a right to sue letter. (Compl.¶ 4). Plaintiff brought this lawsuit alleging gender discrimination, constructive discharge, hostile work environment, and retaliation on December 6, 2013, which is within 90 days of her receipt of the right to sue letter. (Compl.53–55).

On May 30, 2014, this Court issued an order granting in part and denying in part Defendant's motion to dismiss. With regard to Plaintiff's federal claims, the motion to dismiss was denied insofar as it related to actions that occurred within the 300 day period before the EEOC complaint was filed on February 6, 2013. Therefore, to be considered timely, an action by Defendant had to have occurred on April 12, 2012 or later.

DISCUSSION

I. Standard of Review

A party is entitled to summary judgment when there is no "genuine issue of material fact" and the undisputed facts warrant judgment for the moving party as a matter of law. Fed.R.Civ.P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). On a motion for summary judgment, the court must view the record in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Whether any disputed issue of fact exists is for the Court to determine. *Balderman v. U.S. Veterans Admin.*, 870 F.2d 57, 60 (2d Cir.1989). The moving party has the initial burden of demonstrating the absence of a disputed issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986).

Once the motion for summary judgment is properly made, the burden shifts to the non-moving party, which "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250. The nonmovant "may not rely

on conclusory allegations or unsubstantiated speculation," *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir.1998), but must support the existence of an alleged dispute with specific citation to the record materials. Fed.R.Civ.P. 56(c).

While the Court must view the record "in the light most favorable to the non-moving party," *Leberman v. John Blair & Co.*, 880 F.2d 1555, 1559 (2d Cir.1989) (citations omitted), and "resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought," *Heyman v. Commerce and Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir.1975) (citations omitted), the non-moving party nevertheless "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec.*, 475 U.S. at 586 (citations omitted). Not every disputed factual issue is material in light of the substantive law that governs the case. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson, All* U.S. at 248.

***7** The Second Circuit has provided additional guidance regarding summary judgment motions in discrimination cases:

> We have sometimes noted that an extra measure of caution is merited in affirming summary judgment in a discrimination action because direct evidence of discriminatory intent is rare and such intent often must be inferred from circumstantial evidence found in affidavits and depositions. Nonetheless, summary judgment remains available for the dismissal of discrimination claims in cases lacking genuine issues of material fact.

Holtz v. Rockefeller & Co., 258 F.3d 62, 69 (2d Cir.2001) (internal quotations omitted).

II. Plaintiff Has Abandoned Her Discrimination, Retaliation, and Constructive Discharge Claims

Plaintiff has not opposed Defendant's motion with respect to her claims under federal, state and city law for discrimination, retaliation, and constructive discharge. The only claim Plaintiff discusses in her opposition brief is her hostile work environment claim. "This Court may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed." *Lipton v. Cnty. of Orange, N.Y.*, 315 F.Supp.2d 434, 446 (S.D.N.Y.2004) (citing cases); *see also S.E.C. v. Kelly*, 765 F.Supp.2d 301, 323 (S.D.N.Y.2011).

Accordingly, Defendant's motion for summary judgment dismissing Plaintiff's federal, state and city law claims for discrimination, retaliation, and constructive discharge is GRANTED.

III. Plaintiff's Federal Claim for Hostile Work Environment is Dismissed as Time Barred

Plaintiff asserts a claim for hostile work environment under Title VII. She brings the claim too late.

In New York, Title VII charges must be filed with the EEOC within 300 days of the alleged discriminatory act, or the claim is time-barred and the court lacks jurisdiction to hear it. *Gross v. Natl Broad Co.*, 232 F.Supp.2d 58, 69 (S.D.N.Y.2002); *Butts v. City of N.Y. Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1401 (2d Cir.1993), (superseded by statute on other grounds); *see also* 42 U.S.C. § 2000e–5(e)(1). A hostile work environment claim is, of course, a continuing violation, and can encompass conduct that took place more than 300 days prior to the filing of the charge. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 118 (2002). However, a hostile work environment claim will be dismissed as untimely when no act the allegedly contributed to the hostile work environment occurs less than 300 days from the filing of the charge.

Plaintiff contends that her supervisor, Kohler, created a hostile work environment by making comments to her that she interpreted as sexist and intimidating, and by causing her to feel physically threatened on at least one and possibly as many as three occasions.

However, the undisputed facts demonstrate that Plaintiff had no dealings of any sort with Kohler after he emailed her, on March 30, 2012, to advise her that her territory had been expanded to include Massachusetts. Assuming for the purposes of argument that expanding her territory could be construed as part of a gender-based hostile work environment pattern (although it is nothing of the sort), Plaintiff points to nothing at all that Kohler did after March 30, 2012 in connection with her employment.

***8** Plaintiff filed her charge on February 13, 2013, which is 313 days after she received her last documented

communication from Kohler. Therefore, her charge was filed 13 days too late.

The last communication that Plaintiff received from Kohler arrived when Plaintiff was on pregnancy leave; her last day of work before embarking on that leave was March 6, 2012. If this email were not deemed part of a pattern of harassing behavior-and the undisputed facts all but compel such a conclusion—then the last possible date on which he could have been harassed was March 6, her last day of work. That is 344 days before she filed her charge, or 44 days too late.

Accordingly, Plaintiff's federal hostile work environment claim is barred by the statute of limitations and must be dismissed.

In an effort to keep her federal claim alive, Plaintiff alleges that an email she received on May 10, 2012 from someone named Polly was a "reprimand" that constituted part of the hostile work environment. But her effort to shoehorn this email into her hostile work environment claim, and to avoid the statute of limitations, does not work, for many reasons.

First, on its face, Polly's email is not a reprimand, but is simply a response to an inquiry from Plaintiff herself about whether she was permitted, under company policy, to visit a certain hospital. Polly is perhaps a bit over-emphatic in telling Plaintiff that it is against policy to visit Ascension Hospital, but she does nothing more than respond to Plaintiff's question. An employer's terse or even peremptory response to a request for information does not violate Title VII, which is not a "general civility code." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

Second, assuming *arguendo* that the tone of the email turned what would otherwise have been purely informative into a reprimand, nothing in Title VII prohibits an employer from reprimanding an employee who apparently has failed to understand company policy. *Tepperwien v. Entergy Nuclear Operations, Inc.*, No. 07–CV–433(CS), 2010 WL 8938797, at *5 (S.D.N.Y. March 16, 2010). Furthemore, an employer's reprimand, while no doubt unpleasant to receive, does not give rise to the sort of unpleasantness that creates an actionable hostile work environment. A hostile work environment is one that is pervaded by inappropriate workplace behavior that interferes with an employee's ability to do her job-not to discipline. In any event, plaintiff was on leave when this email exchange occurred; she was not even in the workplace.

Third, there is no evidence that Kohler-the person who allegedly created the hostile work environment through a pattern of sexist comments over a period of time—had anything to do with Polly's email.

Fourth, on no view of the evidence can it be said that Polly's email was more than a oneoff communication, as opposed to part of a pattern of hostile communications from Polly, or from people in the company generally. One stray remark does not a hostile work environment make. *Brennan v. Metropolitan Opera Ass'n, Inc.*, 192 F.3d 310, 318 (2d Cir.1999).

***9** Fifth, on no view of the evidence can it be said that Plaintiff's gender had anything to do with either the content or the tone of Polly's response to Plaintiff's inquiry. *Manessis v. New York City Dep't of Transp.*, No. 02 CIV. 359(SAS), 2003 WL 289969, at *6 (S.D.N.Y. Feb. 10, 2003) *aff'd sub nom. Manessis v. Chasin*, 86 F. App'x 464 (2d Cir.2004) (explaining that for a reasonable fact-finder to conclude that facially sex-neutral comments were actually based on sex there has to be "... some circumstantial basis for inferring that facially discriminatory neutral incidents were actually discriminatory."); *see also Alfano v. Costello*, 294 F.3d 365, 378 (2d Cir.2002).

Therefore, the last conceivable act that could be part of a pattern of hostile work environment occurred more than 300 days before the filing of the charge. That being so, the Title VII hostile work environment claim must be, and is, dismissed.

If there were not diversity of citizenship between Plaintiff and Defendant, I would dismiss the state and local claims without prejudice, so they could be pursued in a local court now that there is no federal interest in the subject matter of the complaint. *See Johnson v. IAC/Interactive Corp.*, 2 F.Supp.3d 504, 518 (S .D.N.Y.2014); *Brodt v. City of New York*, 4 F.Supp.3d 562, 573 (S.D.N.Y.2014). However, as the parties are diverse, I am constrained to address Plaintiff's hostile work environment claim under state and local law.

IV. Plaintiff's NYSHRL Hostile Work Environment Claim

A. Standard of Review

Being forced to endure a hostile work environment qualifies as an adverse employment action under New York State

law. *See* *Lee v. Sony BMG Music Entm't, Inc.*, No. 07 Civ. 6733(CM), 2010 WL 743948, at *6 (S.D.N.Y. Mar. 3, 2010).

The NYSHRL mirrors Title VII, and New York follows federal law in interpreting its own employment discrimination statute. So in order to survive a summary judgment motion on a hostile work environment claim under the NYSHRL, Plaintiff must introduce evidence showing that her "workplace was permeated with discriminatory intimidation, ridicule, and insult," which was "sufficiently *severe or pervasive* to alter the conditions of the victim's employment and create an abusive work environment." *Harris v. Forklift Sys., Inc* ., 510 U.S. 17, 21 (1993) (quotation marks and citations omitted) (emphasis added); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 310, 786 N.Y.S.2d 382, 819 N.E.2d 998 (N.Y.2004) (applying the Harris standard to claims arising under the NYSHRL). In establishing this element, a plaintiff needs to show only that her hostile working environment was "sufficiently severe *or* sufficiently pervasive, or a sufficient combination of these elements, to have altered her working conditions." *Pucino v. Verizon Wireless Commc'ns, Inc.*, 618 F.3d 112, 119 (2d Cir.2010) (emphasis in original).

Courts must look to the totality of the circumstances to determine whether an environment is "hostile" or "abusive," and should consider the following nonexclusive list of factors: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. "Although one encounter may constitute a hostile work environment, conduct that can be categorized as a few isolated incidents, teasing, casual comments or sporadic conversation will not be deemed to create a hostile work environment." *Jessamy v. City of New Rochelle*, 292 F.Supp.2d 498, 511 (S.D.N.Y.2003) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 768 (2d Cir.1998); *Snell v. Suffolk Cnty.*, 782 F.2d 1094, 1103 (2d Cir.1986)).

***10** Plaintiff's evidence must show that the conduct at issue created an environment that is both objectively and subjectively hostile. *See* *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 436 (2d Cir.1999); *Forrest*, 3 N.Y.3d at 311. At all times, one must remember, as Justice Scalia put it, that Title VII is not a "general civility code" for the workplace. *Oncale*, 523 U.S. at 80.

"A hostile work environment claim is actionable only as a form of prohibited discrimination, with the hostile work environment being the adverse employment action to which the plaintiff is subjected *on account of race, gender, religion or national origin.*" *Lee*, 2010 WL 743948, at *7 (emphasis added). Regardless of whether Plaintiff can prove that she was exposed to a work environment that was both objectively and subjectively hostile, Plaintiff can only succeed on her claim if she can prove that her "mistreatment at work ... through subjection to a hostile environment ... occur[ed] because of a[ ] ... protected characteristic." *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir.2001) (emphasis added).

Finally, the plaintiff must demonstrate that a specific basis exists for imputing the conduct that created the hostile environment to the employer. *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir.1996). The plaintiff must demonstrate that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it. *Id.* (quoting *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir.1995) (quotations omitted); *see* *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 311 (state hostile work environment claim failed where plaintiff failed to offer any evidence that plaintiff ever reported allegations of racial epithets or harassment to anyone at the employer). In actions where no tangible employment action was taken, an employer is not liable if it demonstrates that (1) it took reasonable steps to prevent and to promptly remedy harassing conduct, and (2) the harassed employee unreasonably failed to avail herself of any corrective or preventive opportunities made available by the employer. *See* *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760–61, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher*, 524 U.S. at 807. *See also* *Perks v. Town of Huntington*, 251 F.Supp.2d 1143, 1159 (E.D.N.Y.2003) (applying this federal standard to a harassment claim brought under the NYHRL); *Weston v. Optima Communications Systems, Inc.*, No. 09 CIV. 3732(DC), 2009 WL 3200653, at *3 (S.D.N.Y. Oct. 7, 2009) (same).

B. Plaintiff's NYSHRL Claim is Dismissed

The Defendant does not dispute that Plaintiff subjectively feels her work environment was hostile. What Defendant does dispute is whether: (1) Plaintiff was subject to an objectively hostile work environment and (2) if she was, whether it was because of her gender.

***11** For harassment to be considered pervasive, "The incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief." *Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59, 62 (2d Cir.1992); *see also Carrero v.. N.Y.C. Housing Auth.*, 890 F.2d 569, 577 (2d Cir.1989) ("The incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive."). Based on Plaintiff's testimony, which is the only evidence offered in support of her claim, it is a close call as to whether Kohler's conduct was actual pervasive discrimination or simply violations of the "general civility code." *Oncale*, 523 U.S. at 80. Plaintiff testified that Kohler-her direct supervisor-repeatedly, even daily, used curt and intimidating tones with her, and frequently made statements such as "are you stupid," "you are going to have a bad day," "you are acting girlie," "girls are emotional," and "you are emotional." Some of what Plaintiff complains of appears to be nothing more than uncivil conduct (using a curt tone of voice, for example, or telling Plaintiff that she is stupid). Some of it appears to have overtones of sexism ("girls are emotional"), but the record is at best unclear as to how frequently such remarks were made. Furthermore, it is not clear whether the allegedly discriminatory conduct was due to Plaintiff's gender; Kohler was apparently an "equal opportunity" yeller, who was known to be curt and aggressive toward all MPS's, male and female. (Def.'s 56.1 Statement ¶ 54, Kirshenbaum Declaration Ex. 1 (Rubin Dep. at 141:14–143:15)).

As discussed above, facially gender neutral statements can be included in a hostile work environment claim as long as there is some circumstantial basis for inferring that the facially neutral statements were actually based on Plaintiff's gender. *Manessi*, 2003 WL 289969, at *6. Here it seems that Plaintiff has provided some circumstantial basis for inferring the facially neutral actions occurred because of her gender: in her almost four years with Defendant she observed Kohler regularly treating women more harshly than their men counterparts, and on various car rides she took with Kohler he frequently made comments such as "Jay Downing has her job because she is a black woman." "So long as there is some evidentiary basis for inferring that facially sex-neutral incidents were motivated by the plaintiff's gender, the ultimate question of whether such abuse was "because of" the plaintiff's gender, 42 U.S .C. § 2000e–2(a)(1), is a question of fact for the factfinder." *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 548 (2d Cir.2010).

Plaintiff also testified that at least once, possibly three times, she felt physically threatened by Kohler due to him moving his body closer to hers while the two were in a confined space and he was yelling at her. However, plaintiff admitted that Kohler never physically touched her.

***12** So if Abbott were not entitled to prevail on one of its defense, I would send Plaintiff's NYSHRL claim to a jury. Her claim fails, however, because she cannot show a specific basis for imputing any of Kohler's objectionable conduct to the Defendant.

It is undisputed that at all relevant times Defendant had in place a Workplace Harassment Policy. (Def.'s 56.1 Statement ¶ 55). As described above, the policy stated an employee is to bring concerns about potential harassment to either a supervisor, Employee Relations or the Office of Ethics and Compliance. (Wilson Declaration Ex. A). Prior to her resignation, Plaintiff never complained to Defendant's ER Department or to the Office of Ethics that Kohler discriminated against her based on her gender or that he otherwise treated her unfairly. The only person to whom she complained was Kohler himself-the alleged harasser. (*Id.* ¶ 50; Nichols Declaration Ex. 1 (Rubin Dep. at 149:2–8)). Furthermore, the record contains no evidence that anyone in a position of authority at Abbott was aware of Kohler's behavior and ignored it. Accordingly, Plaintiff cannot prove that Defendant was aware of the harassment and did nothing about it, as is required in order to prevail on a NYSHRL claim for hostile work environment. As the court held in *Weston, supra.*, 2009 WL 3200653, at *3, there is no way to impute the discriminatory employee's behavior to the employer if the employee fails to report the discriminatory behavior to her employer and there is no evidence that the employer knew of offending behavior and ignored it.

Plaintiff cannot save her hostile work environment claim by noting that she complained to Kohler, her alleged harasser, about Kohler's own behavior. A corporate policy against sexual harassment in the workplace protects the company as well as the employee; it gives the employee an avenue to obtain redress against a harassing co-worker or supervisor, but it also is designed to alert the company to potential misbehavior for which it could be held liable in a lawsuit like this one. By mentioning her belief that she was being harassed only to her harasser-who could hardly be counted on to turn himself in to Employee Relations or the Office of Ethics (and who probably did not think her complaint was warranted)-Plaintiff failed to avail herself of the very

remedy the corporation devised for her benefit and for its own. That gives Abbott an ironclad defense under the State Human Rights Law.

Accordingly, Defendant's motion for summary judgment dismissing Plaintiff's NYSHRL hostile work environment claim is GRANTED.

V. Plaintiff's NYCHRL Hostile Work Environment Claim

A. Standard of Review

While courts had previously interpreted the NYCHRL as being coextensive with Title VII and the NYSHRL, the New York City Council rejected such equivalence by passing the Local Civil Rights Restoration Act of 2005 ("Restoration Act"). *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 277–79 (2d Cir.2009) (explaining that the Restoration Act "abolish[ed] 'parallelism' between the [NYCHRL] and federal and state anti-discrimination law"). Accordingly, this Court must evaluate Plaintiff's NYCHRL hostile work environment claim separately from her Title VII and NYSHRL claims.

***13** Because the NYCHRL was designed to be "broader and more remedial" than Title VII and the NYSHRL, a plaintiff bringing a hostile work environment claim need not meet the Supreme Court's "severe or pervasive" threshold to be actionable. *Williams v. New York City Housing Authority*, 61 A.D.3d 62, 76 (2009). Instead, in determining whether a claim of hostile work environment survives summary judgment, the relevant consideration is whether there is a triable issue of fact as to whether the plaintiff "has been treated less well than other employees because of her gender." *Id.* at 78; *see also Campbell v. Cellco Partnership*, 860 F.Supp.2d 284, 298 (S.D.N.Y.2012).

With that said, the NYCHRL, like Title VII and the NYSHRL, is still not a " 'general civility code,' " and "petty slights and trivial inconveniences" are not actionable. *Campbell*, 860 F.Supp.2d at 298 (*quoting Williams*, 872 N.Y.S.2d at 38, 40). And of course the employee must still prove that the reason why she was treated less well than others was her gender; the NYCHRL is not an anti-harassment statute, but an employment discrimination law; to be actionable, harassment must be predicated on a forbidden factor.

Finally, under the NYCHRL, an employer is liable for the discriminatory acts of an employee where the employee or agent exercised managerial or supervisory responsibility. N.Y.C. Admin. Code § 8–107(13)(b). With the NYCHRL claim, unlike with the NYSHRL claim, Defendant does not have available to it the affirmative defense that it provided a reasonable avenue for the complaint of harassment and that Plaintiff did not avail herself to it. With this claim, Defendant is liable for the discriminatory acts of Kohler because Kohler exercised managerial and supervisory authority in his position as MPS Sales Manager.

For the reasons discussed above, Plaintiff has provided enough evidence of sexual harassment to withstand a motion for summary judgment on her NYCHRL hostile work environment claim. I recognize that a reasonable jury could just as easily conclude that she was not subjected to a hostile work environment on the basis of her gender, but that is why we empanel juries.

Accordingly, Defendant's motion for summary judgment dismissing Plaintiff's NYCHRL hostile work environment claim is DENIED.

CONCLUSION

For the foregoing reasons, the motion for summary judgment is granted in part, and denied in part. The Clerk of the Court is directed to remove Docket No. 27 from the Court's list of pending motions.

All Citations

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