UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IDA SCOTT-ROBINSON,

Plaintiff,

- against -

THE CITY OF NEW YORK, HARRY COMEAU, Individually, ZORAIDA DIAZ, Individually, and JODI M. SAVAGE, Individually,

Defendants.
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MEMORANDUM AND ORDER

15-CV-09703 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiff Ida Scott-Robinson brings this action against the City of New York (the "City") and three New York City Administration for Children's Services (the "ACS") employees, alleging employment discrimination claims in violation of the American Disabilities Act ("ADA"), 42 U.S.C. §§ 12112-12117, and the New York City Human Rights Law ("NYCHRL"), N.Y. City Admin. Code § 8–101 et seq. Defendants moved to dismiss, in part, pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated herein, defendants' motion is granted in part and denied in part.

BACKGROUND[1]

I. Factual Background

ACS is a department subdivision of the City responsible for protecting and promoting the safety and well-being of the City's children and families. Individual defendants Harry Comeau, Zoraida Diaz, and Jodi M. Savage are ACS employees.

Plaintiff Scott-Robinson began working for ACS in 2002. Compl. ¶ 20. Since March 2012, Scott-Robinson has worked as a Child and Family Specialist. As such, she is "responsible for assessing the service needs and serving as a resource for children, families and providers, making recommendations for appropriate foster care system placement and services, and advocating best practices and decisions for children and families." Id. ¶¶ 23-24. She is also required to facilitate and attend "child safety/family team conferences," which are held at child welfare agencies throughout New York City. Id. ¶ 25.

In June 2013, Scott-Robinson was diagnosed with sciatica, id. ¶ 26, a type of pain affecting the sciatic nerve, which runs from the lower back down each leg. Plaintiff alleges that her sciatica makes it difficult to climb stairs and walk long distances. Id. ¶ 28. In July 2013, she requested that ACS

[1] The following allegations are drawn from the Complaint filed December 11, 2015 (ECF No. 1) (the "Complaint" or "Compl."), and are assumed to be true.

accommodate her sciatica and gave defendant Comeau a doctor's note saying that "[d]ue to her medical conditions, it is recommended that Ms. Scott-Robinson be limited in walking long distances and climbing stairs." Id. At the time, Comeau was acting director of ACS's Preventive Family Team Conferencing and had supervisory authority over Scott-Robinson. Id. ¶¶ 13-14.

According to plaintiff, ACR granted her accommodation request and eliminated two conferences from her schedule that required "excessive walking" and were "only accessible by elevated subway stations with stairs." Id. ¶ 30.

This scheduling arrangement continued until January 2015 when ACS added the two locations back to Scott-Robinson's schedule, allegedly at Comeau's direction. Id. ¶ 32-33. When Scott-Robinson told Comeau that her sciatica still made it difficult to attend conferences at the two locations, he told her that she needed to provide an updated doctor's note in order for the accommodation to continue. Id. ¶ 34.

Later that month, Scott-Robinson obtained an updated doctor's note stating that she had a "chronic neurological condition" and "was advised to avoid prolonged sitting, standing, and heavy lifting" and "proceed with caution when climbing stairs." Id. ¶ 35. Scott-Robinson gave the note to defendant Diaz, a trainer/investigator in ACS's Office of Equal Employment Opportunity. Id. ¶¶ 15, 35. Diaz asked for additional

information, which Scott-Robinson provided. Id. ¶¶ 36-37. On March 3, 2015, Diaz informed Scott-Robinson that her accommodation request was denied, but that Diaz would speak to her supervisor to see if anything else could be done. Id. ¶ 39. At the meeting, Scott-Robinson also asked Diaz whether ACS could transfer her to another Child and Family Specialist position that did not require field work. Id. ¶ 41.

On March 19, 2015, Scott-Robinson sent Diaz a follow-up email saying that she was sending "this email to find out what is happening with the above request. I have not had any on-going communication with you." The email further stated that "[t]he manner in which; [sic] I am being dealt with is a direct violation of my Due Process Rights. . . ." Id. ¶ 44.

On April 22, 2015, Scott-Robinson sent another follow-up email, this time to defendant Savage, director of ACS's Office of Equal Employment Opportunity. Id. ¶ 49. The next day, Savage informed Scott-Robinson that her accommodation request "was initially denied," but that the Office of Equal Employment Opportunity "is reviewing your request to determine whether there is some other way in which you can be accommodated." Id. ¶ 50.

Scott-Robinson claims that defendants retaliated against her due to the above communications. Specifically, Scott-Robinson claims that on three occasions in March and April 2015 defendant Comeau scheduled conferences in order to prevent plaintiff from

attending certain ACS events scheduled on the same day. For example, Scott-Robinson claims that she was scheduled to attend two conferences on March 31, 2015, which prevented her from attending an ACS Celebration of National Social Work Month event with her coworkers. Id. ¶ 46. Likewise, Scott-Robinson claims that she was scheduled to attend a conference from 1 to 3 p.m. on April 24, 2015, which prevented her from attending the "Division of Preventive Services Preventive Family Team Conferencing Bake Sale" held that day from noon to 2 p.m. Id. ¶ 51. She also alleges that she was scheduled to attend a conference from 2 to 4 p.m. on April 28, 2015, which prevented her from attending a "Child Abuse Prevention Awareness Walk" held from 3 to 5 p.m. Id. ¶ 52. According to Scott-Robinson, none of her coworkers had similar scheduling conflicts. Id. ¶¶ 46, 51, 52.

Scott-Robinson subsequently complained of this retaliation on May 6, 2015, by emailing defendant Savage that "I feel that Mr. Comeau; [sic] is once again Retaliating against me. He Abusing [sic] his Title as Acting Director to unjustly; [sic] deny me the same rights and privileges as my other Team members." Id. ¶ 53.

Sometime around July 9, 2015, Scott-Robinson fell and injured her knee while walking to a conference. Id. ¶ 55. Plaintiff alleges that she fell because of her sciatica symptoms, which were exacerbated by having to walk long distances and climb stairs in

order to attend conferences. Id. ¶ 54-55. Scott-Robinson has been on medical leave since August 2015. Id. ¶¶ 57-58.

II. Procedural Background

Plaintiff filed her Complaint on December 11, 2015. The Complaint asserts five causes of action under the ADA and NYCHRL. Plaintiff claims that the City and individual defendants discriminated against her by failing to accommodate her sciatica and by retaliating against her. Plaintiff also brings aiding and abetting claims against the individual defendants and seeks to hold the City vicariously liable. On April 29, 2016, defendants moved to dismiss the NYCHRL retaliation claims and all claims brought against the individual defendants.

DISCUSSION

I. Motion to Dismiss Standard

A court ruling on a Rule 12(b)(6) motion to dismiss must accept as true all factual allegations in the complaint and draw all reasonable inferences in plaintiff's favor. Harris v. Mills, 572 F.3d 66, 71 (2d Cir. 2009). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). A claim has "facial plausibility" when the plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at

678. A court, however, need not accept conclusory allegations as true. Harris, 572 F.3d at 72.

II. NYCHRL Retaliation Claim

To state an employment retaliation claim under the NYCHRL, plaintiff must allege that (1) she engaged in a protected activity, (2) her employer was aware of the activity, (3) she suffered an action that would be reasonably likely to deter a person from engaging in a protected activity, and (4) there was a causal connection between the protected activity and the action. Pilgrim v. McGraw-Hill Cos., Inc., 599 F. Supp. 2d 462, 469 (S.D.N.Y. 2009); see also Dixon v. Int'l Fed'n of Accountants, 416 F. App'x 107, 110 n.1 (2d Cir. 2011). The NYCHRL's retaliation provision is broader than its federal and state counterparts in that an employer's actions need not be "materially" adverse, but merely "reasonably likely to deter a person from engaging in protected activity." N.Y. City Admin. Code § 8–107(7); see also Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 723 (2d Cir. 2010). Moreover, the NYCHRL is to be construed "liberally," consistent with its "uniquely broad and remedial purposes." Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 109 (2d Cir. 2013) (internal quotation marks omitted).

Even under this liberal standard, the Complaint fails to state a NYCHRL retaliation claim for the reasons set forth below.

A. Protected Activity

Under the NYCHRL, "protected activity" includes any "action taken to protest or oppose statutorily prohibited discrimination." Fernandez v. Windmill Distrib. Co., 159 F. Supp. 3d 351, 367 (S.D.N.Y. 2016) (internal quotation marks omitted); see also N.Y. City Admin. Code 8-107(7); Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 313, 819 N.E.2d 998, 1012 (2004). "An employee engages in a protected activity when he complains of an employment practice that he reasonably believes violates the law." Fernandez, 159 F. Supp. 3d at 367.

As an initial matter, it is not entirely clear what protected activity plaintiff claims she engaged in. The Complaint alleges that defendants retaliated against plaintiff for making her accommodation request. See, e.g., Compl. ¶ 46 ("[N]ot only did Defendants refuse to provide Plaintiff SCOTT-ROBINSON with an accommodation for her disabilities, but Defendant COMEAU actually began to retaliate against Plaintiff SCOTT-ROBINSON for even making the request."); see also id. at 18 ("Defendants . . . retaliat[ed] against Plaintiff for requesting a reasonable accommodation."). But, as defendants point out, a retaliation claim cannot be based on the same conduct that comprises a failure-to-accommodate claim. See, e.g., Snowden v. Trs. of Columbia Univ., No. 12 CIV. 3095 (GBD), 2014 WL 1274514, at *6 (S.D.N.Y. Mar. 26, 2014) (noting under ADA that "any activity comprising

Plaintiff's primary failure-to-accommodate claim, such as the submission of a reasonable accommodation request form or participation in the post-request interactive process, cannot also constitute protected activity such as that required to form the basis of a retaliation claim"), aff'd, 612 F. App'x 7 (2d Cir. 2015).

Apparently recognizing this flaw in her claim, plaintiff relies on a different theory in her opposition. Plaintiff claims that she engaged in protected activity when she emailed defendant Diaz on March 19, 2015, "to find about what is happening with the above request" and stated that "[t]he manner in which; [sic] I am being dealt with is a direct violation of my Due Process Rights." Compl. ¶ 44; Pl.'s Mem. of Law in Opp. to Def.'s Mot. to Dismiss (ECF No. 19) ("Opp.") at 10. Defendants argue that this email is too "vague and generalized" to constitute protected action. See Reply Mem. of Law in Further Supp. of Def.'s Mot. to Dismiss (ECF No. 21) at 3-4. However, the New York Court of Appeals has held that a NYCHRL plaintiff need not say in "so many words that [she] was a discrimination victim" as long as she "made clear her disapproval of that discrimination by communicating to [her employer], in substance, that she thought [the employer's] treatment of [her] was wrong." Albunio v. City of N.Y., 16 N.Y.3d 472, 479, 947 N.E.2d 135, 138 (2011). Although the email could be clearer, one could reasonably infer that it refers to ACS's

continued denial of plaintiff's accommodation request, see Compl. ¶¶ 39, 42, 44, 49, 50, and that plaintiff's reference to "due process rights" was intended to protest that decision.[2] Accordingly, the email constitutes protected activity independent of the underlying accommodation request.

Moreover, plaintiff engaged in other protected activity, even though she does not specifically identify it as such. For example, plaintiff alleges that she emailed defendant Savage on May 6, 2015, stating that "I feel that Mr. Comeau; [sic] is once again Retaliating against me. . . . This is Overt Discrimination." Id. ¶ 53. Likewise, plaintiff filed a discrimination charge with the U.S. Equal Employment Opportunity Commission, id. ¶ 5, which sent ACS a notice of the charge dated April 17, 2015, see Kamen Decl. (ECF No. 18), Ex. A. Both acts constitute protected activity.

B. Adverse Action[3]

Even if plaintiff engaged in protected activity, the Complaint fails to adequately allege that she suffered an adverse action.

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[2] While this inference is appropriate on a motion to dismiss, a more reasonable inference is likely that plaintiff was protesting ACS's delay in responding to plaintiff, which would not be protected activity. Indeed, the ADA anticipates a dialogue between the employer and employee.

[3] Defendants do not dispute the second element of the retaliation claim, i.e., that they were aware of the protected activity.

Under the NYCHRL, adverse action is any action that would be reasonably likely to deter a person from engaging in a protected activity. See Pilgrim, 599 F. Supp. 2d at 469. However, "the NYCHRL is not a general civility code"; accordingly, it does not bar conduct that amounts to "nothing more than petty slights or trivial inconveniences." Mihalik, 715 F.3d at 113 (internal quotation marks omitted) (citation omitted). As the Supreme Court has noted under a similar standard, "[c]ontext matters":

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 69 (2006) (internal quotation marks omitted) (citations omitted).

According to plaintiff, defendants retaliated against her on three occasions by scheduling conferences that prevented her from going to "special" ACS-related events attended by her coworkers. Opp. at 12; Compl. ¶¶ 46, 51, 52. Specifically, plaintiff was unable to attend a bake sale, walk, and "Celebration of National Social Work Month." Id.

We do not believe that Scott-Robinson's inability to attend these events constitutes adverse action, even under the NYCHRL's relatively liberal standard. As an initial matter, there are no allegations that Scott-Robinson had a right or was otherwise entitled to attend the events.[4] See, e.g., Audrey v. Career Inst. of Health & Tech., No. 06-CV-5612 (RRM)(SMG), 2010 WL 10094570, at *18 (E.D.N.Y. Jan. 12, 2010) (finding that defendant's "denial of a parking pass and . . . failure to submit [plaintiff's] trade school application" did not satisfy NYCHRL standard where "Plaintiff has not demonstrated that these were benefits previously bestowed upon her and then revoked after her complaint, or that she was entitled to or ever promised such benefits"), report and recommendation adopted, No. 06-CV-5612 (RRM)(SMG), 2014 WL 2048310 (E.D.N.Y. May 18, 2014).

Nor are there any allegations suggesting that plaintiff's attendance at the events was of particular significance, such as being connected to employee training or advancement. The Complaint does not allege, for example, how often the events occurred, how many of plaintiff's coworkers attended, whether they attended for

[4] It is worth noting that if plaintiff's theory of entitlement is accepted, then all ACS employees holding her title, and perhaps many others, would be able to assert the right not to have work assignments conflict with the events, with a consequent reduction in productivity during such work events.

the entire event or just a few minutes, or whether plaintiff even intended to attend them.[5]

Indeed, plaintiff's own allegations tend to undermine the importance of her attending the events. For two of the events, the scheduled conference only partially overlapped with the event, such that it appears that plaintiff could have attended at least part of the event. And one of the events was a walk, which given plaintiff's sciatica, would have been difficult for plaintiff to fully participate in.

Finally, plaintiff's subjective belief that she was "insulted, humiliated, and upset by this obvious discrimination and retaliation," Compl. ¶ 52, is insufficient under the NYCHRL's objective standard. See, e.g., Mendez v. Starwood Hotels & Resorts Worldwide, Inc., 746 F. Supp. 2d 575, 595 (S.D.N.Y. 2010); see also Billings v. Town of Grafton, 515 F.3d 39, 53 (1st Cir. 2008) ("[A]n employee's displeasure at a personnel action cannot, standing alone, render it materially adverse.").[6]

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[5] Although plaintiff argued in her opposition memorandum and at oral argument that "all other Child & Family Specialists attended" the events, Opp. at 12, 14 (emphasis added), the Complaint only alleges that defendants "did not schedule any conferences for [plaintiff's] coworkers so that each could attend the [event]," see Compl. ¶¶ 46, 51, 52, without indicating whether the unspecified "coworkers" actually attended.

[6] The Complaint does not include any allegations suggesting that plaintiff's subjective belief of humiliation was objectively reasonable, such as allegations that her coworkers knew she was being intentionally excluded from the events.

Accordingly, we do not believe that Scott-Robinson's inability to attend three social events during work hours would be reasonably likely to deter someone in her position from engaging in protected activity or that it amounts to anything other than the "petty slights or minor annoyances that often take place at work and that all employees experience." Burlington, 548 U.S. at 68; see also Dudley v. N.Y. City Hous. Auth., No. 12 CIV. 2771 (PGG), 2014 WL 5003799, at *29 (S.D.N.Y. Sept. 30, 2014) (finding that hour and fifteen minute change in plaintiff's work schedule "was nothing more than an inconvenience, and such trivial matters do not constitute retaliatory actions even under the NYCHRL's liberal standard").

C. Casual Connection

Because plaintiff fails to adequately allege that she suffered an adverse action, we do not consider whether she has alleged a causal connection between the protected activity and the adverse action.

We therefore grant defendants' motion to dismiss plaintiff's NYCHRL retaliation claims.

III. Claims Against Individual Defendants

Defendants also move to dismiss all claims against the individual defendants on the grounds that the Complaint fails to allege that each defendant participated in the wrongful conduct.[7]

The NYCHRL permits both direct and aiding and abetting liability. See, e.g., Malena v. Victoria's Secret Direct, LLC, 886 F. Supp. 2d 349, 366 (S.D.N.Y. 2012); Banks v. Corr. Servs. Corp., 475 F. Supp. 2d 189, 200 (E.D.N.Y. 2007). Under both types of liability, plaintiff must show that the individual defendant "actually participated" in the discriminatory conduct. Malena, 886 F. Supp. 2d at 367.

Applying this standard to plaintiff's failure-to-accommodate claim, the Complaint adequately alleges that the individual defendants participated in the alleged discrimination.

With respect to defendant Comeau, the Complaint alleges that he had supervisory authority over plaintiff, that he "specifically asked that [plaintiff's] accommodation be removed," and that he asked plaintiff to provide an updated doctor's note to support her accommodation request. Compl. ¶¶ 14, 33, 34. Even if Comeau did

[7] Because the ADA does not permit individual liability, plaintiff dropped her ADA claim (Count I) against the individual defendants. See ECF No. 12. The remaining claims are brought under the NYCHRL. Counts II and IV seek to hold the individual defendants directly liable under discrimination and retaliation theories. Count III seeks to hold them liable as aiders and abettors.

not ultimately decide to deny plaintiff's accommodation request, these allegations show that he participated in that process.

The allegations are also sufficient with respect to defendant Savage. According to the Complaint, Savage told plaintiff that her accommodation request "was initially denied," but that ACS's Office of Equal Employment Opportunity was still reviewing the request to determine whether plaintiff could be accommodated in some other way. Id. ¶ 50. Because Savage was the director of ACS's Office of Equal Employment Opportunity at the time, id. ¶ 17, it is reasonable to infer that she participated in the process of denying plaintiff's accommodation request.

With respect to defendant Diaz, the Complaint alleges that she met with plaintiff regarding the status of the accommodation request, that plaintiff gave Diaz a doctor's note in connection with that request, and that Diaz requested certain follow-up information from plaintiff. Id. ¶¶ 35-36. Diaz also subsequently informed plaintiff that her accommodation request was denied but agreed to speak with her supervisor to see if anything else could be done. Id. ¶ 39. Finally, plaintiff allegedly directed an additional accommodation request to Diaz when plaintiff asked whether ACS could transfer her to another Child and Family Specialist position that did not require field work. Id. ¶ 41. As with Savage, these allegations are sufficient to suggest Diaz's participation in denying plaintiff's accommodation request.

Accordingly, we deny defendants' motion to dismiss the individual defendants in connection with plaintiff's failure-to-accommodate claims.

Because we granted defendants' motion to dismiss the retaliation claims, see Part II, we do not consider whether the Complaint adequately alleges the individual defendants' participation in the alleged retaliation.

IV. Leave to Amend

Plaintiff's opposition requests leave to amend the Complaint to cure any deficiencies. See Opp. at 15. Under Federal Rule of Civil Procedure 15(a), "leave to amend 'shall be freely given when justice so requires,' [but] it is within the sound discretion of the district court to grant or deny leave to amend." McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir.2007) (quoting former Fed. R. Civ. P. 15(a)).

Plaintiff's request is denied. Defendant placed plaintiff on notice of the Complaint's deficiencies when the parties exchanged pre-motion letters over three weeks prior to the filing of the motion to dismiss. See ECF No. 11 at 3; ECF No. 12 at 3. Accordingly, plaintiff had ample time to amend the Complaint prior to defendants' motion.

Plaintiff's request, which is perfunctory, also fails to indicate the grounds for seeking her motion as required by Federal Rule of Civil Procedure 7(b). Plaintiff did not attach a proposed

amended complaint to her request, and plaintiff's counsel failed to explain what amendments would be made when asked at oral argument. See, e.g., Campo v. Sears Holdings Corp., 371 F. App'x 212, 218 (2d Cir. 2010) (upholding denial of leave to amend where "plaintiffs provide[d] no explanation of what they would allege in an amended complaint to save their claims").

CONCLUSION

For the above reasons, defendants' motion to dismiss is granted in part and denied in part. This Memorandum and Order resolves Docket Nos. 11 and 16, and defendants are ordered to answer the Complaint within fourteen days of the entry of this decision.

SO ORDERED.

Dated: New York, New York
December 15, 2016

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE