

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

NANCY JENKINS et al.

INDEX NO. 153761/13

- v -

MOT. DATE

NEW YORK CITY TRANSIT AUTHORITY et al.

MOT. SEQ. NO. 002

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS Doc. No(s). 37-68

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS Doc. No(s). 71-112, 113

Replying Affidavits

ECFS Doc. No(s). 114-122

This action arises from alleged sexual harassment and retaliation. Defendants New York City Transit Authority ("Transit") and Manhattan and Bronx Surface Transit Operating Authority ("MABSTOA") move for summary judgment dismissing the complaint (CPLR § 3212[a]). Plaintiffs oppose the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The motion is decided as follows.

Plaintiffs Nancy Jenkins ("Jenkins"), Teresa Garcia ("Garcia") and Stephanie Lopez ("Lopez") are three female bus operators employed by MABSTOA. They claim that they were sexually harassed by Earl Bryan ("Bryan"), a Surface Line Dispatcher ("dispatcher") and retaliated against after they complained of the harassment, in violation of the New York City Human Rights Law ("NYCHRL"). In April 2012, Plaintiffs reported to Transit's Equal Employment Opportunity ("EEO") Office incidents that occurred with Bryan between January and April of that year. Defendants maintain that it promptly investigated plaintiffs' complaints and ultimately terminated Bryan's employment for violations of its internal policies based upon plaintiffs' allegations. In their complaint, plaintiffs have asserted six causes of action: gender discrimination and retaliation on behalf of each individual plaintiff. Specifically, plaintiffs contend that defendants are liable for the sexually hostile and abusive workplace environment they suffered.

Defendants argue that no reasonable jury could conclude that Bryan's actions constituted violations of the NYCHRL such that defendants should be held liable. Defendants further argue that the plaintiffs cannot factually support their claims of perceived retaliation.

Facts

Many of the facts are not in dispute. The following facts are based upon the complaint. Jenkins began working as a bus operator in 1994 and was assigned to the Kingsbridge Bus Depot (the "Depot") in

Dated: 7/17/17

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

the Bronx shortly thereafter. Lopez began working as a bus operator in 1996 and was assigned to the Depot in 2011. Garcia began working as a bus operator and was assigned to the Depot in 1999. Meanwhile, Bryan started working for MABSTOA as a bus operator in 1999 and was promoted to dispatcher in 2007 and assigned to the Depot. Mark Clark was the Assistant General Manager ("AGM") of the Depot and was responsible for running the depot.

### Sexual harassment and hostile work environment

#### *Jenkins' claims*

The following claims are based upon Jenkins' deposition. In April 2012, Jenkins operated the Bx13 bus route from approximately 4:30am to 2pm, Monday through Friday. Jenkins testified that she did not often encounter Bryan at work but described him generally as "flirtatious." Jenkins testified that on one occasion sometime in 2011 she overheard Bryan make the following comments to another female bus operator whom she could not identify: "You got a fat ass girl," "you should let me take you out," and "you got a big pussy in that uniform." Jenkins also testified that Bryan asked her out in 2011. She turned him down.

The main incident between Jenkins and Bryan occurred on April 16, 2012. On that date, Jenkins arrived at the Depot to begin her run. Bryan was the dispatcher that morning assigned to the crew office. Jenkins approached the window and said "good morning," stated her run, "Bx13," and waited for Bryan to give her a trip sheet. Bryan responded "good morning...you got your hair done ... it looks nice. Turn around. Let me see it." When Jenkins refused to comply with Bryan's request, Bryan refused to give her the trip sheet. Jenkins ultimately acquiesced to Bryan's request, and Bryan gave her the trip sheet. Bryan then told Jenkins that she had a student shadowing her that day. Jenkins became upset that he was "playing around like that" when she had a student waiting for her. Bryan then apologized and asked for a hug. When Jenkins leaned into the window to hug Bryan, she claims he licked her face from her left chin up to her temple. She cursed at him and left to begin her run.

Later that day, Jenkins complained to Clark. In her affidavit, Jenkins claims that Clark responded: "Are you serious? I'm so sorry, I just had this guy in my office and I just talked to him for hours about the same thing... I don't know what I'm going to do with this guy." Plaintiffs claim that prior to Jenkins' April 2012 incident, two other female bus operators had complained about Bryan's conduct to Clark. Clark did not take any action with respect to those complaints.

Clark notified EEO of Jenkins April 2012 incident. Meanwhile, Jenkins continued to see Bryan at the dispatcher's window on the days following the incident. On Thursday, April 19th, Jenkins went to Transit's EEO office and filed a complaint against Bryan. The EEO Complaint Intake Form dated April 19, 2012 has been provided to the court. On Friday, April 20, 2012, Bryan was moved from the crew window to the office of General Superintendent Walsh.

When Jenkins returned to work the following Monday, she claimed that customers and bus operators were asking her about the incident, making jokes about it. Jenkins said the situation "...was just too much." That day, Jenkins filled out an injury on duty form and told the investigating dispatcher that she felt "emotionally overwhelmed" and stopped working. On April 24, 2012, Bryan was transferred from the Depot and assigned to the Bronx Road Operations at the Fresh Pond Bus Depot.

Jenkins was ultimately awarded Workers Compensation and remained out of work until she was terminated in 2014 pursuant to Civil Service Law § 71. Jenkins was reinstated as a Bus Operator on December 27, 2015 and continued to work in that position. In April or May 2012, Jenkins voluntarily spoke with a newspaper journalist, Peter Donahue, about Bryan. Copies of newspaper articles dated May 18, 2012 and June 21, 2012 have been provided to the court.

*Lopez' claims*

The following claims are based upon Lopez' deposition. Lopez admitted that she and Bryan had been friends and spoke on the phone regularly from 2011 to February 2012. She claims that Bryan did and said inappropriate things during that time, but stopped speaking in February 2012 because Bryan was upset at Lopez over a comment she made about his girlfriend. Lopez claims that in March 2012, she went to the crew window and Bryan, who was on duty at the window, complimented her lips and said "I haven't had pussy in weeks." About a week later, Lopez was sitting in her bus, about to begin her run. Bryan boarded the bus and moved his hand toward her upper thigh. Lopez claims that she slapped Bryan's hand away before he could touch her.

Lopez complained about this incident to Superintendent Robert Williams who worked in a different depot. Williams spoke to Clarence Pryor, General Superintendent of Operations at the Depot, about the incident without naming Lopez. Pryor informed Clark of the allegation, and Clark asked the union officials at the depot if they were aware of any complaints by female bus operators. The union officials told Clark they had no information "at all of any complaints whatsoever." Clark also asked General Superintendent of Transportation, Robert Walsh, if he was aware of any complaints about Bryan, but he was not. Clark then spoke to Bryan who denied any improper conduct. Lopez claims that after Clark talked to Bryan, she encountered Bryan who threw her paystub at her and told her she was "f'd up" for complaining about him.

*Garcia's claims*

After hearing of the incident between Jenkins and Bryan, Garcia came forward with claims against Bryan that she had not reported to EEO or management. According to Garcia, she first met Bryan at the Gun Hill Bus Depot where they were both bus operators, and she claims that he made sexual remarks to her. She claims to have transferred out of the Gun Hill Bus Depot because of Bryan and did not see him again until January 2012 at the Depot. Garcia maintains that in January 2012, Bryan grabbed her arm and kissed her on the cheek when he saw her for the first time at the Depot. Garcia further claims that Bryan attempted to kiss her again the next day but that she pulled away from him. Thereafter, Garcia testified that Bryan put his arm around her and made the following comments: "I need a white lady;" "I like my women white;" and "Are you ready for your black boyfriend?"

In or around February or March 10, 2012, Garcia told Bryan that her husband also worked at the Depot, which caused Bryan to stop his alleged sexual harassment, but he became hostile towards her. Garcia filed a complaint with Transit's Office of EEO on April 24, 2012. Garcia's EEO Intake Form has been provided to the court.

Retaliation

Plaintiffs' claim that they as a result of the complaints they made, they were retaliated against. Plaintiffs specifically claim that Jenkins was subjected to degraded comments and her request for a few days off was denied by Clark, who said "No! Y'all wanted to go through EEO, so go through them!". Plaintiffs also claim that defendants conducted sexual harassment training sessions wherein they referred to plaintiffs' complaints about Bryan and specifically referred to Jenkins by name as an "example" of sexual harassment.

On May 21, 2012, Jenkins and Garcia participated in a press conference held by their union where they spoke about the sexual harassment they suffered. Garcia claims that she was retaliated against the next day when a Transit superintendent boarded her bus, traveled for three stops, and gave her an observation ride. Garcia and Lopez complain that coworkers bombarded them with questions and made demeaning and humiliating comments to them. Garcia suffered a severe panic attack while operating a bus and stopped working for a few years. Lopez' herself made a hardship transfer request which she claims was not even considered.

## Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Under the NYCHRL, "[i]t shall be unlawful discriminatory practice: (a) [f]or an employer or an employee or agent thereof, because of the ... gender... of any person to discriminate against such person in compensation or in terms, conditions or privileges of employment" (Admin Code § 8-107 [1] [a]). The First Department explained that a defendant's motion for summary judgment in a sexual harassment case should be denied where there is a triable issue of fact as to whether a plaintiff has been treated less well than other employees because of her gender (*Williams v. New York City Hous. Auth.*, 61 AD3d 62 [1st Dept 2009]. Justice Rolando Acosta wrote in *Farrugia v. North Shore Univ Hosp.* (13 Misc 3d at 748-749, Sup Ct, NY Co 2006), which was cited by the First Department in *Williams*, that "liability should be determined by the existence of unequal treatment, and questions of severity and frequency reserved for consideration of damages."

To establish a claim of retaliation under the broad standards of the New York City Human Rights Law, Plaintiffs must demonstrate: "(1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse action." Feingold, 366 F.3d at 156.

Here, there can be no dispute that there are triable issues of fact as to defendants' liability and based upon this record a jury could reasonably conclude that Bryan's conduct constitutes sexual harassment under the NYCHRL and that plaintiffs were retaliated against based upon their complaints. The court must reject defendants' arguments because they would have this court make credibility determinations, which is not ordinarily within the scope of a motion for summary judgment motion. Further, defendants' arguments go to the nature and extent of the sexual harassment and hostile work environment, which as Justice Acosta noted, goes to damages rather than liability. Accordingly, defendants' motion for summary judgment dismissing plaintiff's gender discrimination and retaliation claims are denied.

### *Remaining issues*

Finally, defendants contend, as to Garcia, that her claims are barred based upon her failure to disclose her claims in a bankruptcy petition she filed in the Middle District of Pennsylvania. "It is well settled that the failure to schedule a legal claim as an asset in a bankruptcy proceeding deprives the debtor of standing to raise it in a subsequent legal action" (*Hutchinson v. Chana Wiler, DDS, PLLC*, 93 AD3d 509 [1st Dept 2012] quoting *Barranco v. Cabrini Med. Ctr.*, 50 AD3d 281[2008]). Here, there is no dispute that Garcia did not disclose the underlying claims in her Chapter 13 bankruptcy petition, which was dismissed before the complaint was filed in this case.

According to her affidavit, Garcia and her husband filed for Chapter 13 bankruptcy on March 31, 2011. Because they could not afford the payment plan, Garcia and her husband defaulted under the plan and the trustee filed for a default. The bankruptcy petition was dismissed on February 13, 2013,

and based upon the Trustee's Final Report and Account, no debts were discharged. Meanwhile, this action was commenced on April 25, 2013.

Defendants' rely on *Whelan v. Longo* (7 NY3d 821, 822 [2006]) for the proposition that a plaintiff's "failure to disclose [a cause of action] in her bankruptcy petition deprive[s] her of legal capacity to sue" when she knew or should have known of the claim at the time she filed or when the claim accrued. Since plaintiff's claims arose during the pendency of the bankruptcy proceeding, she had an obligation to disclose the underlying causes of action prior to its dismissal (11 USC § 1306(a)(1); see also *Burnes v. Pemco Aeroplex, Inc.*, 291 F3d 1282 [11th Cir 2002]).<sup>1</sup> Therefore, defendants are correct. It is of no moment that the bankruptcy petition was dismissed and the no debts were discharged thereunder (*Potruch & Daab, LLC v. Abraham*, 97 AD3d 646 [2d Dept 2012]). Accordingly, defendants' motion must be granted as to Garcia's claims, only.

## CONCLUSION

In accordance herewith, it is hereby:

**ORDERED** that defendant's motion is granted only to the extent that plaintiff Garcia's claims are hereby severed and dismissed (third and fourth causes of action); and it is further

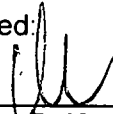
**ORDERED** that the motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

7/17/17  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.

<sup>1</sup> The court notes that plaintiffs do not argue that any of Garcia's retaliation claims arose after the bankruptcy petition was dismissed.