SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

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RUBY ANAYA,

Plaintiff,

- v -

WEWORK COMPANIES, INC., and MIGUEL MCKELVEY,

Defendant.

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INDEX NO. 159414/2018

MOTION DATE 11/28/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 32

were read on this motion to/for DISMISSAL.

In this action to recover damages for sexual harassment in violation of the New York City Human Rights Law (Admin. Code of City of N.Y. § 8-101, *et seq.*; hereinafter NYC HRL), retaliation, sex discrimination in employment, and aiding and abetting discrimination in violation of both the NYC HRL and the New York State Human Rights Law (Executive Law § 290, *et seq.*; hereinafter NYS HRL), and defamation, the defendants, WeWork Companies, Inc. (WeWork) and Miguel McKelvey, move to dismiss the amended complaint based on documentary evidence and for failure to state a cause of action. The plaintiff opposes the motion. The motion is granted to the extent that so much of the third cause of action as seeks to recover against WeWork under the NYS HRL is dismissed, the fourth cause of action, which seeks to recover from McKelvey for aiding and abetting WeWork's retaliation, is dismissed, and the fifth cause of action, which seeks to recover for defamation, is dismissed, and the motion is otherwise denied.

The plaintiff, who was formerly employed by WeWork, alleges in her first amended complaint that she was sexually harassed on two occasions in August 2017 and January 2018 by coworkers at company events, that WeWork had knowledge that inappropriate sexual

conduct at these events was a recurring problem, and that she complained to its human resources department. She further alleges that, in response to her complaints, the human resources department did not adequately address the conduct of her alleged assailants in particular, and did nothing at all to address the general problem of inappropriate sexual behavior at company events. The plaintiff alleges that she further complained in March 2018 about WeWork's inadequate responses to the problem of sexual harassment, including her fear that the male coworkers who had previously harassed her would be permitted to attend WeWork's "Summer Camp" event only a few months away. In addition, she asserts that she participated in several meetings with female coworkers concerning their belief that women were not paid equally to men who performed the same or similar functions, and that she complained to management about the disparity in or about April 2018. The plaintiff alleges that, in June 2018, in retaliation for her ongoing complaints, her employer undertook surveillance of her. She asserts that WeWork surreptitiously photographed her having a glass of wine with a coworker at 4:30 p.m. in order to accuse her of drinking alcohol during work hours, even though WeWork touts its provision of free beer to its employees all day long and hosts a "mandatory" happy hour on Fridays at 4 p.m. The plaintiff asserts that, despite receiving only positive performance reviews from the time that she began working for WeWork in 2014, McKelvey terminated her employment at an August 3, 2018, meeting that she herself had requested.

The plaintiff further alleges that, after she commenced this action, McKelvey emailed a message to all of WeWork's almost 6,000 employees in which he suggested that the plaintiff's employment was terminated because she was a poor performer.

The defendants move to dismiss the amended complaint, arguing that WeWork cannot be held liable for discriminatory conduct committed by nonsupervisory employees where it had no knowledge of any prior or continuing problems, and that it had no knowledge of problems either with the plaintiff's alleged assailants or the general behavior of male employees at company events. They contend that once they received complaints about this conduct, they

took measures to make sure that it did not recur, that the plaintiff's employment was terminated for poor work performance, and that her termination from employment was too remote in time from her complaints of inappropriate sexual conduct to permit any inference of retaliation.

Under CPLR 3211(a)(1), a dismissal is warranted "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see Ellington v EMI Music, Inc.*, 24 NY3d 239 [2014]). In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and "essentially undeniable" (*Dixon v 105 W. 75th St., LLC*, 148 AD3d 623, 629 [1st Dept 2017], citing *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). Affidavits do not qualify as documentary evidence (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010]; *Suchmacher v Manana Grocery*, 73 AD3d 1017 [2d Dept 2010]; *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). Nor does an employee's performance review constitute documentary evidence within the meaning of CPLR 3211(a)(1) (*see Ore v New York Hotel Trades Council*, 2017 NY Slip Op 31957[U] [Sup Ct, N.Y. County, Sep. 7, 2017]). Hence, dismissal is not warranted pursuant to CPLR 3211(a)(1).

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (*id.* at 152; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881 [2013]; *Simkin v Blank*, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory (*see Hurrell-Harring v State of New York*, 15 NY3d 8 [2010]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept 2004]; CPLR 3026). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any

cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 152 [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d 83 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). Where, as here, the court considers evidentiary material beyond the complaint, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d at 275), but dismissal will not eventuate unless it is "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no significant dispute exists regarding it" (*id.*).

In 2005, the New York City Council amended the NYC HRL to add Admin. Code § 8-130(a) as part of the New York City Civil Rights Restoration Act. That section states that:

> "[t]he provisions of [the NYC HRL] shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights law, including those laws with provisions worded comparably to the provisions of this title, have been so construed."

In construing claims of sex harassment prosecuted under the NYC HRL, the Appellate Division, First Department, thus rejected the contention that a claimant must establish that any such harassment was "severe or pervasive," as required under federal and state law. Rather, the Court concluded that "liability is normally determined simply by the existence of unwanted gender-based conduct" constituting "differential treatment," and that "questions 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]). "For [Human Rights Law] liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms-and-conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender" (*id.* at 78; *see Suri v Grey Global Group, Inc.*, 164 AD3d 108, 114 [1st Dept 2018]).

Moreover, pursuant to Admin. Code § 8-107(13)(b),

> "An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision 1 or 2 of this section only where:
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> *****
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> "(2) The employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or
>
> "(3) The employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct."

The Report of the New York City Council Committee on General Welfare explained that this section provided for

> "[s]trict liability in employment context for acts of managers and supervisors; also liability in employment context for acts of co-workers where employer knew of act and failed to take prompt and effective remedial action or should have known and had not exercised reasonable diligence to prevent. Employer can mitigate liability for civil penalties and punitive damages by showing affirmative anti-discrimination steps it has taken"

(1991 NY City Legis Ann, at 187; *see generally Zakrzewska v New School*, 14 NY3d 469 [2010]).

> "Despite the popular notion that 'sex discrimination' and 'sexual harassment' are two distinct things, it is, of course, the case that the latter is one species of sex- or gender-based discrimination. There is no 'sexual harassment provision' of the law to interpret; there is only the provision of the law that proscribes imposing different terms, conditions and privileges of employment based, inter alia, on gender (Administrative Code § 8-107[1][a])"

(*Williams v New York City Hous. Auth.*, 61 AD3d at 75).

Here, the plaintiff alleges in her amended complaint that WeWorks knew about sexually inappropriate behavior by its employees at corporate events, that it failed to take appropriate corrective action when she lodged complaints against two coworkers in August 2017 and January 2018, and that those coworkers engaged in unwanted sexual touching and grabbing. These allegations are sufficient to state a cause of action against WeWorks for sexual harassment (first cause of action) and gender discrimination (third cause of action) under the

NYC HRL, and there is significant dispute regarding both those allegations and the defendants' contention that her employment was terminated for poor performance (*see Suri v Grey Global Group, Inc.*, 164 AD3d 108 [1st Dept 2018]).

Nonetheless, so much of the third cause of action as seeks to recover for gender discrimination under the NYS HRL must be dismissed. The two incidents of sexual harassment described by the plaintiff certainly do not describe a "pervasive" course of discriminatory intimidation against her, and fall short of constituting the "severe" type of conduct required to sustain a cause of action to recover for gender discrimination under State law (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004]; *see Meritor Sav. Bank, FSB v Vinson*, 477 US 57, 67 [1986]; *Mascola v City Univ. of N.Y.*, 14 AD3d 409, 409-410 [1st Dept 2005]; *Macksel v Riverhead Cent. Sch. Dist.*, 2 AD3d 731 [2d Dept 2003]). Moreover, although the amended complaint refers to the plaintiff's involvement in a women's employee group that complained to management about disparate pay between men and women doing the same or similar work, she does not allege facts supporting any claim of discrimination based on disparate pay.

Admin. Code § 8-107(7) and Executive Law § 296(7) make it an unlawful discriminatory practice to retaliate or discriminate in any manner against any person who opposed or complained about a discriminatory practice. "To establish a prima facie case of retaliation, the plaintiff must show participation in a protected activity known to the employer, an adverse employment action based upon that protected activity, and a causal connection between the protected activity and the adverse employment action" (*Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 967 [1st Dept 2009]). To establish retaliation, "a causal connection cannot be established by the timing of [relevant] events unless the temporal proximity is very close" (*Clark County School Dist. v Breeden*, 532 US 268, 273 [2001]; *see Dotson v J.C. Penney Co., Inc.*, 159 AD3d 1512 [4th Dept 2018] *Matter of Abram v New York State Div. of Human Rights*, 71 AD3d 1471, 1475 [4th Dept 2010]; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 967 [1st Dept 2009]).

Here, although the plaintiff alleged that the inappropriate sexual conduct of which she complains occurred 12 and 7 months, respectively, prior to the termination of her employment, she alleges in her amended complaint that she made a report of inadequate remedial action only 5 months before the termination, and "pressed her case" of disparate pay based on sex only 4 months prior to that event. Moreover, she alleges that only 2 months after she complained of disparate pay, WeWorks engaged in retaliatory behavior by placing her under surveillance. At the pleading stage, these allegations are sufficient to state a cause of action to recover for proscribed retaliation.

The cause of action alleging that McKelvey aided and abetted WeWork in retaliating against the plaintiff for engaging in protected activity must be dismissed. The plaintiff alleges that McKelvey aided and abetted the very discriminatory conduct that she accuses him of committing directly. An individual cannot aid and abet his own alleged discriminatory conduct (*see Hardwick v Auriemma,* 116 AD3d 465, 468 [1st Dept 2014]; *Matter of Medical Express Ambulance Corp. v Kirkland*, 79 AD3d 886 [2d Dept 2010]; *Mitchell v TAM Equities, Inc.*, 27 AD3d 703 [2d Dept 2006]).

"The elements of a cause of action [to recover] for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Gaccione v Scarpinato*, 137 AD3d 857, 859 [2d Dept 2016], quoting *Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009]; *see Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014]). "To establish actionable defamation, it must be shown that the facts are false and," depending on whether the plaintiff is or is not a public figure, "that their publication was generated by actual malice, i.e. with a purpose to inflict injury upon the party defamed, or in a grossly irresponsible manner" (*Kuan Sing Enterprises, Inc. v T.W. Wang, Inc.*, 86 AD2d 549, 550 [1st Dept 1982], *affd* 58 NY2d 708 [1982] [internal quotation marks and citations omitted]). To impose liability in a defamation action commenced by a person who is not a public figure,

"the party defamed must establish by preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (*Chapadeau v Utica Observer-Dispatch, Inc.* 38 NY2d 196, 199 [1975]; *see Huggins v Moore*, 94 NY2d 296 [1999]; *Farber v Jefferys*, 103 AD3d 514 [1st Dept 2013]). A person is grossly irresponsible in this regard when he or she fails to verify the accuracy or veracity of information before disseminating it (*see Matovcik v Times Beacon Record Newspapers*, 108 AD3d 511 [2d Dept 2013]), or evinces an inability or unwillingness to take any steps to obtain such a verification (*see Fraser v Park Newspapers of St. Lawrence, Inc.*, 246 AD2d 894 [3d Dept 1998]).

The plaintiff must allege "the precise words allegedly giving rise to defamation [as well as the] time, place and manner of publication" (*Khan v Duane Reade*, 7 AD3d 311, 312 [1st Dept 2004]). In the First Department, a claim based upon an allegedly libelous statement that does not constitute libel per se must plead special damages (*see Rall v Hellman*, 284 AD2d 113 [1st Dept 2001]; *cf. Matherson v Marchello*, 100 AD2d 233, 236 [2d Dept 1984] [cause of action asserting slander must plead special damages, but cause of action asserting libel need not]).

Only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue (*see Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]; *Martin v Daily News L.P.*, 121 AD3d 90, 100 [1st Dept 2014]). "Allegations [in a] letter communicated to third parties that 'in sum and substance [plaintiff was] unprofessional and cavalier' are conclusory rather than accusatory" (*Dillon v City of New York*, 261 AD2d 34, 40 [1st Dept 1999] [citation omitted]). Moreover, "a general accusation of 'unprofessional conduct' [is] a protected statement of opinion [and] not sufficiently factual to be actionable" (*Chiavarelli v Williams*, 256 AD2d 111, 114 [1st Dept 1998]).

The plaintiff here does not set forth the precise words allegedly giving rise to defamation, alleging only that McKelvey stated that she was, in sum and substance, terminated from employment for poor performance. In any event, such an allegation is conclusory rather than

accusatory and is essentially a protected statement of opinion. Moreover, inasmuch as the allegedly defamatory statement did not constitute libel per se, the plaintiff's failure to allege special damages renders the defamation cause of action insufficient. Hence, the fifth cause of action must be dismissed for failure to state a cause of action.

Accordingly, it is

ORDERED that the defendants' motion is granted to the extent that so much of the third cause of action as seeks to recover against the defendant WeWork Companies, Inc., under Executive Law § 296, the fourth cause of action, which seeks to recover for against the defendant Miguel McKelvey for aiding and abetting WeWork Companies, Inc., in retaliating against the plaintiff, and the fifth cause of action, which seeks to recover for defamation, are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that the defendants are directed to serve an answer to the remaining causes of action in the amended complaint within 10 days of service upon them of a copy of this order with notice of entry (CPLR 3211[f]).

This constitutes the Decision and Order of the court.

4/10/2019
DATE

JOHN J. KELLEY, J.S.C.

HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE