To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT: STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

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EILEEN REILLY,

Plaintiff,

-against-

FIRST NIAGARA BANK, N.A.,

Defendant.

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DECISION AND ORDER

Index No. 033878/2014

Motion Sequence #3

The following papers, numbered 1 to 6, were read in connection with Defendant's motion to dismiss pursuant to CPLR 3211(a)(7):

Notice of Motion/Affirmation/Exhibit (A)/Memorandum of Law.....1-3
Affirmation in Opposition/ Exhibit (A)/ Memorandum of law.....4-5
Reply Memorandum.....6

Upon the foregoing papers, it is ORDERED that this application is disposed of as follows:

Plaintiff initiated this action on August 8, 2014 alleging that her employer has subjected her to a continuing pattern of discrimination and a hostile work environment based upon her sex. Defendant now brings the instant motion to dismiss pursuant to CPLR 3211(a)(7) alleging that Plaintiff has failed to state a cause of action. Defendant argues that Plaintiff's Amended Verified Complaint fails to make any connection between the alleged conduct and Plaintiff's gender. Further, Defendant argues that Plaintiff has not pleaded sufficient facts to state a cause of action for a hostile work environment. Defendant further contends Plaintiff did not plead sufficient facts to state a *prima facie* case for employment discrimination.

In reply, Plaintiff avers that her Amended Verified Complaint establishes a *prima facie* case of employment discrimination and a hostile work environment. Plaintiff states that she should be given the opportunity to conduct discovery in an effort to establish the facts necessary to prove her case and that dismissing the complaint at this juncture is premature.

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference. The role of the court is to determine only whether the facts as alleged fit within any cognizable legal theory. Therefore, a complaint is legally sufficient if the court determines that a plaintiff would be entitled to relief on any reasonable view of the facts stated. Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus". *Dee v Rakower*, 112 AD3d 204, 208 [2d Dept 2013][internal citations and quotations omitted]; *Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1 [2013].

"To state a cause of action alleging [sex] discrimination under the New York Human Rights Law (Executive Law § 296), a plaintiff must plead facts that would tend to show (1) that he or she was a member of a protected class, (2) that he or she was actively or constructively discharged or suffered an adverse employment action, (3) that he or she was qualified to hold the position for which he or she was terminated or suffered an adverse employment action, and (4) that the discharge or adverse employment action occurred under circumstances giving rise to an inference of [sex] discrimination." *Godino v Premier Salons, Ltd.*, 140 AD3d 1118, 1119 [2d Dept 2016][internal citations omitted].

In reviewing the parties' submissions, prongs (1) and (3) were sufficiently pled, however, as to prong (2), Plaintiff did not state that she suffered an adverse employment action. Plaintiff proffered that the alleged discrimination forced Plaintiff to completely change her working conditions which included her schedule, the time she worked at certain branches and her relationships with co-workers and clients. These facts and allegations, as pled by Plaintiff, do not constitute an adverse employment action. Furthermore, Plaintiff did not plead any facts to satisfy prong (4). Plaintiff's statement that other female co-workers had been subjected to similar discrimination and that management entertained male employees with their clients outside of the office at events such as Yankee games, but that female employees did not enjoy the same treatment, without more, are insufficient to state a *prima facie* cause of action for employment discrimination based on sex under New York Executive Law §296.

"A hostile work environment exists where the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Various factors, such as frequency and severity of the discrimination, whether the allegedly discriminatory actions were

threatening or humiliating or a "mere offensive utterance," and whether the alleged actions unreasonably interfere[ ] with an employee's work are to be considered in determining whether a hostile work environment exists. The allegedly abusive conduct must not only have altered the conditions of employment of the employee, who subjectively viewed the actions as abusive, but the actions must have created an objectively hostile or abusive environment—one that a reasonable person would find to be so." *La Marca-Pagano v Dr. Steven Phillips, P.C.,* 129 AD3d 918, 919–20 [2d Dept 2015][internal citations omitted].

Plaintiff alleges that over the past two years, her supervisor created a hostile work environment by telling her co-workers to stop working with her and withhold any help or assistance, making "ill-tasting" comments about Plaintiff, lying to branch managers in order to ensure the Plaintiff did not receive new loans and commissions, refuting all complaints made by Plaintiff to Human Resources and embarrassing and ridiculing her regarding her complaints to Human Resources. Plaintiff stated that these actions by her supervisor forced her to change her working conditions including the time she worked at certain branches and her relationships with co-workers and clients. The court finds that the actions outlined by Plaintiff did not permeate her workplace so severely and frequently so as to create a hostile work environment. Therefore, upon review of the parties' submissions and according Plaintiff the benefit of every possible favorable inference, the Court finds that Plaintiff has not stated sufficient facts to allege a *prima facie* case of a hostile work environment.

Given the foregoing, the Plaintiff has failed to state a cause of action alleging sex discrimination or a hostile work environment. Thus, Defendant's motion to dismiss is granted pursuant to CPLR 3211(a)(7).

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
February 2, 2017

ENTER

HON. ROBERT M. BERLINER, J.S.C

To:

Counsel for Plaintiffs
Condon & Associates, PLLC

Counsel for Defendants
Bond, Schoeneck & King, PLLC