SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JEANINE R. JOHNSON** **PART** **52M**

Justice

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DIANNA PENNETTI,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY TAXI & LIMOUSINE COMMISSION, ALOYSEE HEREDIA JARMOSZUK, IRA GOLDAPPER, CARMEN ROJAS

Defendant.

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INDEX NO. 154367/2023

MOTION DATE 11/09/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 31

were read on this motion to/for DISMISS.

Upon the foregoing documents and oral argument held on 04/24/2024, Defendant–The City of New York's motion, pursuant to CPLR § 3211(a)(7) for dismissal of the New York City Taxi & Limousine Commission as a party is granted, on consent of Plaintiff; and granted for dismissal of Plaintiff's disability discrimination claim. The motion is denied as to the remainder of all relief requested.

On a motion to dismiss pursuant to CPLR § 3211(a)(7), the pleading is to be afforded a liberal construction." *Leon v Martinez,* 84 NY2d 83, 87 (1994). This Court is required to "determine only whether the facts alleged fit within any cognizable legal theory." *Bernberg v Health Mgmt. Sys.*, 303 AD2d 348, *3 (2d Dept 2003). However, allegations comprising bare legal conclusions are not entitled to the same consideration. *See Connaughton v Chipotle Mexican Grill, Inc.,* 29 NY3d 137 (2017) *quoting Simkin v Blank,* 19 NY3d 46 (2012). Plaintiff commenced this action alleging violations of the New York State Human Rights Law § 296 et seq. ("State HRL")

and The New York City Human Rights Law: N.Y.C Administrative Code § 8-101, et seq. ("City HRL").

Disability Discrimination / Article 78

To demonstrate a prima facie case of disability discrimination under State HRL and City HRL, the plaintiff must proffer facts and evidence that they suffered from a disability known to their employer and the disability caused the behavior for which they were terminated. *Pimentel v. Citibank, N.A.*, 29 A.D.3d 141 (1st Dep't 2006). State HRL provides an employee protection for a disabling "physical, medical or mental impairment that does not prevent the complainant from performing in a reasonable manner the activities involved in the job." *Id.* at 145 An employer is obligated to provide a reasonable accommodation, subject to undue hardship on the business. Under City HRL, disability is defined as "any physical, medical, mental, or psychological impairment…and an employee has the obligation to "make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job…provided that the disability is known or should have been known by the [employer]."" *Watson v. Emblem Health Services*, 158 A.D.3d 179, 182 (1st Dep't 2018).

Plaintiff alleges that she was discriminated against based on her inability to take the COVID-19 vaccine due to a disability. Plaintiff alleges that she suffers from Guillain-Barre Syndrome ("GBS"), which may unforeseeably spur an allergic reaction to vaccinations and subsequent paralysis – she alleged that she suffered an episode from the condition in 1976. In support of her argument, Plaintiff offered a physician's letter advising her not to get the COVID-19 vaccine due to having GBS. Plaintiff alleges that GBS is recognized by the Center for Disease Control as a rare potential reaction to the COVID-19 vaccine. Plaintiff alleges that she requested a reasonable accommodation to either work from home or submit a negative COVID-19 test to continue

working and made Defendant aware of her disability. Plaintiff alleges that she submitted an email to request a medical exemption from taking the COVID-19 vaccine. The email was sent 2 days after the reasonable accommodation request deadline. Plaintiff further alleges that her reasonable accommodation request was denied and she appealed this decision. Consequently, Plaintiff claims that upon denial of her appeal she was unreasonably terminated for having a disabling condition and not complying with the vaccine mandate.

Defendant argues that Plaintiff was terminated from her position for her failure to comply with the COVID-19 vaccine mandate – not for having a disability. Defendant makes an untenable argument that Plaintiff does not have a recognized disability. Defendant's argument that Plaintiff cannot bring this suit because she did not go through Article 78 proceedings stands only as to Plaintiff's disability discrimination claim. The Court of Appeals has held that "those who wish to challenge agency determinations under Article 78 may not do so until they have exhausted their administrative remedies, but once this point has been reached, they must act quickly—within four months—or their claims will be time barred." *Walton v. New York State Dep't of Correctional Services*, 8 N.Y.3d 186, 195 (2007).

Pursuant to CPLR § 7801, Plaintiff was required to commence a proceeding to challenge the determination within 4 months, but she failed to do so. This Court finds that based upon the facts as alleged, Plaintiff sufficiently pled a claim for disability under State HRL and City HRL. However, since Plaintiff did not bring an Article 78 proceeding within 4 months after Defendant's determination to terminate Plaintiff, Defendant's motion to dismiss Plaintiff's claim for disability discrimination is granted as time-barred.

Age Discrimination

Defendant's motion to dismiss Plaintiff's claim of age discrimination is denied. A plaintiff alleging discrimination in employment under State HRL and City HRL has the initial burden to establish a prima facie case of discrimination. *See generally Hosking v. Mem. Sloan-Ketterin Canter Ctr.*, 186 A.D.3d 58 (1st Dep't 2020). To meet this burden, plaintiff must show that (1) they are a member of a protected class; (2) they were qualified to hold the position; (3) they were terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. *Id.*, *see Hamburg v. New York University School of Medicine*, 155 A.D.3d 66 (1st Dep't 2017).

Defendant argues that Plaintiff did not allege any facts that support an inference of being discriminated against based upon her age. Plaintiff alleges she is part of a protected class because she is in her early 60s; she is qualified to hold her position of employment because she spent over 25 years as an NYPD officer and 9 years working in public safety; and that she faced an adverse employment action when eventually terminated from her position for improper cause. She also alleges that there is a pattern and practice of age discrimination in the workplace based on Defendant firing older employees and replacing them with younger, less qualified employees. This Court finds Plaintiff sufficiently pled facts for an age discrimination claim under State and City HRL. Thus, Defendant's motion to dismiss Plaintiff's claim is denied.

Retaliation

Defendant's motion to dismiss Plaintiff's retaliation claim is denied. "Under both State and City [HRL], it is unlawful to retaliate against an employee for opposing discriminatory practices." *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 312 (2004). To maintain a claim for retaliation

under State and City HRL, plaintiff must show: (1) they engaged in protected activity by opposing conduct prohibited thereunder, (2) the defendant was aware of participation in the activity, (3) plaintiff suffered an adverse employment action based upon the activity, and (4) a causal connection existed between the protected activity and the adverse action. *Id.*

Defendant argues that Plaintiffs claims for retaliation are conclusory, speculative, and without basis. Plaintiff alleges she made several complaints about Defendant–Jarmoszuk's misconduct and made complaints in support of male colleagues who were being discriminated against based on age. Plaintiff alleges that Defendant–Jarmoszuk informed Plaintiff that her concerns do not matter and that she would be discriminatorily terminating several of The Taxi and Limousine Commission ("TLC") employees. Additionally, Plaintiff pled that Defendant–Jarmoszuk focused on destroying Plaintiff's career advancement at TLC.

This Court finds that Plaintiff sufficiently pled a claim for retaliation because Plaintiff engaged in protected activity by opposing the alleged discrimination, Defendant was aware of the participation because complaints were made, Plaintiff suffered adverse employment action because she was subsequently terminated, and Plaintiff alleges that she was being targeted by Defendant for opposing discriminatory conduct. Thus, Defendant's motion to dismiss Plaintiff's claim is denied.

Aiding and Abetting

Defendant's motion to dismiss Plaintiff's aiding and abetting claim against individually named Defendants—Goldapper, Rojas, and Jarmozsuk is denied. Under State and City HRL, to maintain a cause of action against an individual for aiding and abetting discriminatory or harassing conduct, Plaintiff must first set forth an actionable claim against the employer because it is the

employer's participation in the discriminatory practice which serves as the predicate for the imposition of liability on others for aiding and abetting. *See generally DeWitt v. Lieberman*, 48 F.Supp.2d 280 (S.D.N.Y. 1999).

Defendant argues that Plaintiff did not set forth an actionable claim against the employer for discrimination and therefore, Plaintiff cannot sustain a claim for aiding and abetting. Plaintiff alleges that Defendant–Goldapper, Defendant–Rojas, and Defendant–Jarmozsuk consistently ignored Plaintiff's complaints of discrimination, refused to investigate the complaints, or take any preventative and corrective measures to remedy the alleged discrimination.

This Court finds that Plaintiff has an actionable claim against Defendant for discrimination and retaliation. Thus, Defendant's motion to dismiss Plaintiff's aiding and abetting claim is denied.

Hostile Work Environment

Defendant's motion to dismiss Plaintiff's hostile work environment claim is denied. Under the State HRL, a hostile work environment is one that 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." *Forrest*, 3 N.Y.3d 295, 311 (2004).

Defendant argues that Plaintiff only alleges that a hostile work environment was created for older male staff and does not allege that she was the subject of any actions that could form the basis of a hostile work environment. Plaintiff alleges in her complaint that Defendant–Jarmoszuk created a hostile work environment by yelling, demeaning, and threatening to terminate the employment of older male employees. Plaintiff states that she was offended the behavior of

Defendant–Jarmoszuk's, alleges that this behavior became a pattern and practice in the workplace and reported the behavior on several occasions.

The Court finds that Plaintiff sufficiently pled that Defendant created a hostile work environment based on the continuous allegations of discriminatory behavior towards a protected group. Thus, Defendant's motion to dismiss Plaintiff's hostile work environment claim is denied.

Accordingly it is hereby,

ORDERED that Defendant's motion to dismiss is granted to the extent the complaint is dismissed against the New York City Taxi & Limousine Commission; it is further

ORDERED that Defendant's motion to dismiss is granted to the extent Plaintiff's claim for disability discrimination is dismissed as time-barred; it is further

ORDERED that all other requests for relief are denied; it is further

ORDERED that the action is severed and continued against the remaining Defendants — The City of New York, Aloysee Heredia Jarmoszuk, Ira Goldapper, and Carmen Rojas; it is further,

ORDERED that the caption be amended to reflect said dismissal and that all future papers filed with the court bear the amended caption;

ORDERED that the caption is amended and read as follows:

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DIANNA PENNETTI,

Plaintiff,

- v -

THE CITY OF NEW YORK, ALOYSEE HEREDIA JARMOSZUK, IRA GOLDAPPER, CARMEN ROJAS

Defendant.

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it is further,

ORDERED that counsel for the moving party shall serve a copy of this order with Notice of Entry upon the Clerk of the Court, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).

This constitutes the Decision and Order of the Court.

6/24/2024
DATE

JEANINE R. JOHNSON, 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