SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Bradford, Susan Kendall

INDEX NO. 108471/08

MOTION DATE 12/10/08

-v-

MOTION SEQ. NO. 001

MOTION CAL. NO.

Burrell, Anne W

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

Based on the foregoing, it is hereby

ORDERED that the motions (sequence 001 and 002) by defendants Anne W. Burrell, 74 Seventh, LLC d/b/a Centro Vinoteca, Sasha Muniak, and George W. Elkins to dismiss the Complaint pursuant to CPLR 3211(a)(7) is denied, in their entirety; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry within 20 days of entry; and it is further

ORDERED that the parties appear for a preliminary conference on April 14, 2009, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: 3/16/09

HON. CAROL EDMEAD

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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SUSAN KENDALL BRADFORD, JENNIFER SUE LIM, and SARRA HENNIGAN,

Plaintiffs,

-against-

ANNE W. BURRELL, 74 SEVENTH, LLC d/b/a CENTRO VINOTECA, SASHA MUNIAK, and GEORGE W. ELKINS,

Defendants.

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Index No. 108471-2008

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiffs Susan Kendall Bradford, Jennifer Sue Lim, and Sarra Hennigan (collectively "plaintiffs") commenced this action against defendants Anne W. Burrell ("Burrell"), 74 Seventh, LLC d/b/a Centro Vinoteca ("Centro"), Sasha Muniak ("Muniak"), and George W. Elkins ("Elkins") alleging that defendants discriminated and retaliated against them in violation of the New York State Human Rights Law (Executive Law § 296 *et seq.*) (the "State HRL") and the New York City Human Rights Law (Administrative Code § 8-101 *et seq.*) (the "City HRL").[1]

Centro, Muniak, and Elkins (collectively the "Centro defendants") now move pursuant to CPLR 3211(a)(7) to dismiss the first and second causes of action as asserted by Hennigan against Centro, the third and fourth causes of action as asserted by all plaintiffs, the fifth and sixth causes of action as asserted by all plaintiffs against Muniak and Elkins, and as asserted by Hennigan against Centro, and the seventh and eighth causes of action asserted by all plaintiffs.

[1] Specifically, at this time, the moving defendants are not seeking to dismiss the fifth, sixth, seventh and eighth causes of action asserted by Lim and Bradford against Centre.

By separate motion,[2] Burrell also moves to dismiss the first and second causes of action as asserted by Hennigan, the third and fourth causes of action as asserted by all plaintiffs, the fifth and sixth causes of action as asserted by Hennigan, and the seventh and eighth causes of action as asserted by all plaintiffs.

Complaint

According to the complaint, 74 Seventh LLC operates a restaurant under the trade name "Centro Vinoteca" at 37 Barrow Street d/b/a 74-76 Seventh Avenue South, New York, New York. Plaintiffs Bradford and Lim were bartenders, and Hennigan was the manager and shift supervisor at the restaurant. Defendant Burrell, the chef at Centro Vinoteca, and Muniak and Elkins were also managers there. Elkins was Hennigan's direct supervisor.

Plaintiffs allege the following facts:

In August 2007, Burrell began to repeatedly comment on Bradford's cleavage, saying that her chest is hanging out.

In September 2007, Burrell began mocking Lim, saying that Lim's "jeans are slutty" and that her leaning over the bar is "slutty," even though Lim was wearing a mandatory uniform, and leaning over the bar was a necessary requirement of Lim's and Bradford's jobs in order to point menu items out to customers.

When Bradford began to wearing large necklaces to cover her cleavage, Burrell said "its impossible," cover her cleavage, and laughed and walked away.

In September 2007, a new bartender, "Virginie," was hired. Burrell then repeatedly commented that Virginie "has saggy boobs and doesn't wear a bra" and that she "smells, doesn't

[2] By Stipulation dated October 29, 2008, both motions to dismiss were consolidated.

shave her pits and does not shower." Burrell also created a symbol for Virginie by holding her fingers in the shape of an "L," demonstrated this symbol to the employees, and told the kitchen employees that this refers to Virginie's "saggy boobs." In the same month, a new female server was hired, Gabie. When Burrell began harassing Gabie, calling her a "ho," Gabie, quit.

In early November 2007, Burrell told Bradford that "Jenny [Lim] is a stupid dumb whore and an idiot. I want to get rid of her!" That same evening, Bradford complained to her manager, Hennigan, about Burrell's behavior toward women and that this behavior makes Bradford uncomfortable. Also in November 2007, when Bradford let a male co-worker stay with her temporarily, Burrell, began harassing Bradford daily, saying: "did you f[- - -] him yet?," "you f[- - -]ed him! You must be tired today from f[- - -]ing all night." Burrell took bets among the kitchen workers as to how long it would take for Bradford to "f[- -]k" this male co-worker. At the end of November 2007, Burrell's no longer spoke to Lim or Virginie, and spoke to Bradford only when absolutely necessary. When Virginie resigned as bartender, she was replaced by a male waiter, with no bartending experience. During this time period, Burrell told Hennigan on more than one occasion that she wanted Bradford fired, but failed to state a reason. Burrell also remarked about the clothing and physical attributes of the female staff, specifically calling Lim a "whore" and the girls behind the bar "sluts."

On December 31, 2007, Bradford was told to dress nicely for New Year's Eve. When Bradford arrived to work wearing black pants and a top, Burrell glared at Bradford all night and commented to Hennigan about Bradford's attire.

In January 2008, "Juliana" was hired as a "trainee." Two days later, she was fired at the behest of Burrell because of her sex. Centro Vinoteca began searching for a new bartender, even

though the bar was already full-staffed. To force Lim and/or Bradford to quit, the manager send text messages to both Lim and Bradford requiring them to work during brunch. Both Lim and Bradford agreed to work.

"In mid-January 2007," Lim left for a few days when her mother passed away in California. While Lim was away, defendants replaced her with a male bartender with no experience. Bradford was fired a few days later, and her shifts were given to this new male bartender.

Then in February 2008, Lim was "suspended" for two weeks for allegedly "stealing" a piece of cheese from the kitchen, giving away "too much" to customers at the bar, and drinking one shot of tequila behind the bar. These untrue allegations were pretexts for terminating Lim's employment for discriminatory reasons. Two weeks later, when Lim called the then-manager to return to work, the manager never returned her call, indicating that the "suspension" was in fact a termination.

Throughout this time period, Burrell also made efforts to discredit and undermine Hennigan's authority as a manager and render her ineffective. In 2007, Hennigan missed a week of work due to an ovary condition. Burrell and another manager mocked her at staff meetings, insinuating that she was on vacation somewhere or faking her illness.

Thereafter, Hennigan was ascending the stairwell by the open kitchen and overheard Burrell telling the new General Manager that Hennigan was "under-dressed," that she was "constantly" running out to get manicures, that she faked an ovarian cyst, and that the only reason that she had her job was that she "curried good favor with the owner."

Due to Burrell's discriminatory conduct, Hennigan felt forced to resign upon two week's

notice. After informing Burrell that she was leaving, Burrell told Hennigan that she "didn't care" since she "didn't like [Hennigan] anyway." Even after she submitted her notice, Burrell continued to regard Hennigan with sneers and nasty looks, sending servers with messages in order to avoid contact with Hennigan.

When Hennigan told Burrell that she was the manager on duty and Burrell would have to communicate and acknowledge her for the health of the restaurant, she huffed and banged a pan, then rolled her eyes in front of her whole kitchen staff. The male employees were not treated in the same or similar manner by defendants and plaintiffs were treated in this manner because of their sex.

Lim and Bradford complained repeatedly to Hennigan, their supervisor and manager about the discriminatory treatment by Burrell. Hennigan, in turn, passed these complaints as well as her own to her supervisor, Elkins and to Muniak. In February 2008, after one such complaint, Elkins responded to Hennigan by email stating: "don't buy into her [Burrell's] s##t. I will find a way to deal with her early next week." Defendants terminated both Bradford and Lim outright and constructively terminated Hennigan, in whole or in part in retaliation for their complaints of the discriminatory mistreatment they suffered.

In their first and second causes of action, plaintiffs allege that Centro failed to provide them with a nondiscriminatory work environment and that Burrell aided and abetted Centra in said alleged conduct. In their third and fourth causes of action, plaintiffs allege that the defendants took adverse employment actions against them, by failing to provide a nondiscriminatory workplace. In their fifth and sixth causes of action, plaintiffs allege that the defendants harassed them and created a hostile work environment. In their seventh and eighth

causes of action, plaintiffs allege, *inter alia*, that defendants retaliated against them based on plaintiffs' complaints.

Motion by the Centro Defendants

It is argued that the first and second causes action against Centro, for failing to provide a nondiscriminatory work environment, should be dismissed as to Hennigan. Centro's alleged failure to address the two alleged instances, wherein Burrell commented about Hennigan faking her illness, and Hennigan being under-dressed, getting manicures, and job favoritism, hardly evidence "discriminatory mis-treatment" by Centro. Since the alleged instances committed by Burrell did not constitute discriminatory mistreatment, Centro cannot be held liable for failure to provide Hennigan with a nondiscriminatory work environment.

Also, plaintiffs' claim in their third and fourth causes of action that defendants took adverse employment actions against them should also be dismissed, for failing to adequately allege that: (1) they were qualified for their position; (2) they suffered an adverse employment action; and (3) the adverse action occurred under circumstances giving rise to an inference of discrimination.

The conclusory allegation that "Bradford, Lim and Hennigan were all dedicated and excellent employees" is insufficient to allege that they were qualified for their positions to support such causes of action. And, plaintiff Bradford's allegation of two alleged anonymous and unsolicited customer internet postings (Comp. ¶25) is insufficient.

Additionally, plaintiffs have failed to adequately allege that they suffered adverse employment actions by Muniak and Elkins. As to the remaining allegations which do not involve Burrell, such allegations do not identify (1) who allegedly told Bradford to dress nicely

for New Years' Eve, (2) the manager who allegedly told Lim and Bradford to work during brunch, (3) who allegedly replaced Lim after she left for a few days when her mother passed away, (4) who fired Bradford and gave Bradford's shifts to the new bartender, (5) who allegedly fired Lim, told her she was being suspended, or which manager never returned her calls, or (6) who allegedly terminated each of them Bradford or Lim, or constructively terminated Hennigan. And, to the extent any of the above-allegations constitute adverse employment actions, plaintiffs have failed to allege individual liability against Muniak or Elkins under New York law. Their names are absent from all such allegations, and plaintiffs do not specifically allege that either Muniak or Elkins were personally involved in any of said conduct. In addition, those allegations made "collectively" against defendants are similarly insufficient. Thus, plaintiffs failed to state causes of action against Muniak and Elkins.

Hennigan has also failed to state a cause of action against defendants as a matter of law. The only adverse employment action alleged by Hennigan against defendants is that defendants allegedly "constructively terminated" her in retaliation for her complaints of discriminatory mistreatment. However, in light of the allegation that Hennigan gave two weeks' notice of her intention to resign, such a claim fails as a matter of law.

Plaintiffs have failed to adequately allege circumstances giving rise to an inference of discrimination. As to Muniak and Elkins, the Complaint is devoid of any acts or statements by Muniak or Elkins from which it can be inferred that, any employment actions undertaken by them were motivated by discriminatory animus toward any of plaintiffs. Plaintiffs' conclusory allegations that "[t]he male employees were not treated in the same or similar manner by defendants and plaintiffs were treated in this manner because of their sex cannot defeat a CPLR

3211 (a)(7) dismissal motion.

Hennigan also failed to adequately allege that the circumstances surrounding those few comments by Burrell give rise to an inference of discrimination by Centro. Thus, Hennigan failed to state causes of action against Centro.

Further, plaintiffs' claim in their fifth and sixth causes of action that defendants' "verbal abuse and use of demeaning language" constituted hostile work environment harassment based on their sex, is insufficient. The Complaint is devoid of a single allegation against either Muniak or Elkins relating to plaintiffs' hostile work environment claims, and as such, this claim should be dismissed in favor of Muniak and Elkins. Likewise, Hennigan's hostile work environment claims against Centro, which are based on two alleged instances involving five alleged comments by defendant Burrell more than a four (4) month period, fall short. At most, the alleged comments were offensive utterances. Thus, Hennigan's hostile work environment claim against Centro should fail.

Also, plaintiffs' claims in their seventh and eighth causes of action that defendants retaliated against them also should be dismissed. Plaintiffs claim that defendants' discriminatory adverse employment actions taken against plaintiffs were retaliatory in nature in that they were motivated in whole or in part by plaintiffs' complaints of the discrimination that they suffered by Burrell fails to adequately allege that plaintiffs suffered adverse employment actions by defendants.

Although the mere fact that defendant Burrell is a female and was not the supervisor of any of plaintiffs are not, standing alone, grounds for dismissal, Burrell's gender and job responsibilities is worth noting when evaluating whether her comments, even if true, were merely

offensive.

Defendant Burrell's Motion to Dismiss

Defendant Burrell likewise claims that the allegations in the first and second causes of action fail to indicate that Burrell somehow aided and abetted Centra's failure to provide Hennigan with a nondiscriminatory working environment, or any other allegations of discriminatory conduct against her by Burrell for that matter. The few alleged instances hardly evidence "discriminatory mis-treatment" by Burrell. The complaint does not allege that Burrell subjected Hennigan to a discriminatory work environment, or that Centra failed to provide Hennigan with a nondiscriminatory work environment, or explain how Burrell allegedly aided and abetted same. Thus, the first and second causes of action against Burrell, should be dismissed.

Further, Burrell argues, plaintiffs' claim in their third and fourth causes of action that Burrell took adverse employment actions against them should be dismissed, for the reasons noted by the Centro Defendants. Burrell also adds that the alleged conduct of Burrell, and instances of nasty looks, sneers and comments, her rolling of the eyes, and banging of a pan hardly evidence of discriminatory conduct.

Plaintiffs have failed to adequately allege that the circumstances give rise to an inference of discrimination by Burrell. Plaintiffs have not alleged any adverse employment actions by Burrell. Moreover, with respect to Hennigan, the few alleged comments by Burrell hardly suffice. Beyond this, plaintiffs' conclusory allegations regarding the difference in treatment between the male employees and plaintiffs because of plaintiffs' gender is also insufficient.

Further, Hennigan's hostile work environment claims in the fifth and sixth causes of

action against Burrell should be dismissed. Hennigan's hostile work environment claims against Burrell are based on two alleged instances involving five alleged comments by Burrell more than a four (4) month period. Such "offensive utterances" fall short of stating hostile work environment claims.

Plaintiffs' claims in their seventh and eighth causes of action that Burrell retaliated against them should be dismissed. Although plaintiffs' claim that defendants' discriminatory adverse employment actions taken against plaintiffs were retaliatory and motivated by complaints of discrimination by Burrell, plaintiffs failed to allege that they suffered any adverse employment actions by Burrell. Thus, these causes of action should be dismissed.

Opposition

As to the first and second causes of action, the Complaint provides many examples of how Burrell constantly harassed plaintiffs with sexually discriminatory and derogatory remarks. Defendants selectively included only those allegations in the Complaint detailing Burrell's comments specifically regarding Hennigan, and omitted the litany of Burrell's remarks and actions which were directed at Lim, Bradford and the other female employees at Centro. Hennigan's claim requires consideration of all of the examples of defendants' misconduct, including instances of discriminatory misconduct directed toward other women. Burrell's misconduct constituted sexual harassment, and it is undisputed that Burrell harassed and discriminated against all of the plaintiffs, including Hennigan.

Further, Muniak and Elkins, who are partial owners, principals, managers, directors and officers of Centro, and Centro, are vicariously liable when a supervisor, such as Burrell, sexually discriminates against, and sexually harasses, its employees. In addition, even assuming *arguendo*

that Burrell were plaintiffs' co-worker and not their supervisor, Centro would still be liable since plaintiffs relayed their complaints regarding Burrell's to Muniak and Elkins, who in turn, failed to investigate or address those complaints. As Centro knew or should have known about the harassment, yet failed to take appropriate remedial action, Centro is directly liable to plaintiffs for failing to investigate and address plaintiffs' complaints and for causing plaintiffs' terminations and constructive discharge.

By engaging in the sexually discriminatory conduct that Centro, through Muniak and Elkins, failed to investigate and address, Burrell "aided, abetted, incited, compelled or coerced" the commission of Centro's violations, and is thus liable under N.Y. Exec. Law and N.Y.C. Administrative Code. Thus, plaintiffs' first and second causes of action must be upheld.

Further, Hennigan has alleged that Centro failed to provide her with a nondiscriminatory work environment, and thus, Hennigan may allege liability against Burrell for aiding and abetting Centro's misconduct. The Complaint describes how Elkins and Muniak failed to deal with the complaints lodged by Hennigan, Lim and Bradford regarding Burrell's misconduct. The Complaint also alleges that Centro's agents terminated both Bradford and Lim, and constructively terminated Hennigan, in retaliation for their complaints of discrimination.

Once an employer is found to have inadequately investigated the complaints of discrimination, the party whose conduct gave rise to the complaints will then be liable for aiding and abetting the employer's violation. Contrary to defendants' contention, this is not an instance where there has been a determination that the plaintiffs have no claim against their employer, so as to find that plaintiffs cannot bring aiding and abetting claims against the person who committed the discriminatory actions.

Plaintiffs also argue that they have established sexual harassment through the existence of a hostile work environment, based on Burrell's sexual harassment, as well as Muniak's and Elkins' failure to address such conduct.

Further, plaintiffs' hostile work environment claims found in the fifth and sixth causes of action must be upheld. The alleged comments by defendant Burrell over a four-month period were not merely offensive utterances or "isolated, relatively mild comments." Burrell's actions and comments were overtly sexual and occurred with regularity. Moreover, Burrell worked closely with all of the plaintiffs, and as such, her discriminatory behavior directly altered the conditions of plaintiffs' employment and created an abusive working environment.

Further, by virtue of their status of employers of a supervisor who created a hostile work environment, as well as their failure to investigate and address plaintiffs' complaints regarding Burrell's sexual harassment, Centro, Muniak and Elkins are personally liable for the hostile work environment created by Burrell. Another basis for the personal liability of Muniak and Elkins to Plaintiffs is their ownership interests in Centro, as alleged in the Complaint.

Plaintiffs' third and fourth causes of action must be upheld. Plaintiffs, who possessed the basic skills necessary for the performance of their jobs, were qualified for their positions. Defendants can be held to have conceded that plaintiffs are minimally qualified by the very fact that they hired her. Further, Bradford attached two positive customer reviews to her affidavit, both of which were acknowledged by defendants. Also, the Complaint states that Lim and Bradford were "dedicated and excellent employees." And, as indicated in their affidavits and resumes, Lim and Bradford were "well-qualified," did not receive any legitimate complaints that they were not qualified for their jobs, and had years of experience in their fields.

Plaintiffs indeed suffered adverse employment actions by defendants. The terminations of Lim and Bradford and the constructive discharge of Hennigan, are adverse employment actions Further, where the circumstances from which the plaintiff was constructively discharged are egregious, constructive discharge exists despite the common courtesy of two weeks' notice, and here, Hennigan was forced to resign by the very environment in which the sexual harassment existed.

Plaintiffs' properly alleged that defendants took adverse employment actions against them. With regard to Hennigan's constructive discharge claim, plaintiffs detailed in their Complaint a litany of instances of Burrell's sexually harassing remarks and actions which forced Hennigan to resign. Further, plaintiffs properly alleged that Muniak, Elkins and Burrell were responsible for both Hennigan's constructive discharge and Bradford and Lim's termination. Specifically, plaintiffs alleged that when Muniak and Elkins received reports of Burrell's sexually discriminatory treatment, Elkins responded by sending Hennigan and e-mail stating: "Don't buy into her [Burrell's] s##t. I will find a way to deal with her early next week." However, "defendants 'dealt' with the plaintiffs. Defendants terminated both Bradford and Lim outright and constructively terminated Hennigan, in whole or in part in retaliation for their opposition to, and complaints of, the discriminatory treatment they suffered." These facts, along with the fact that Elkins, Muniak and Burrell each had the power to "hire and fire employees, including the plaintiffs herein," clearly support Plaintiffs' accusations against Muniak, Elkins and Burrell of terminating Lim and Bradford, and causing the constructive discharge of Hennigan.

The cases on which defendants rely for the proposition that, the alleged misconduct did not amount to discrimination or an adverse employment action, are inapplicable since plaintiffs'

termination and constructive discharge both constitute adverse employment actions. Plaintiffs properly pleaded that defendants had authority to fire plaintiffs, and did, in fact, cause Lim and Bradford's termination, as well as Hennigan's constructive discharge.

Similarly, plaintiffs have not improperly made their allegations "collectively." Plaintiffs alleged that Muniak and Elkins received complaints regarding Burrell's discriminatory misconduct, but did not take any action in respect of such complaints, except to fire Lim and Bradford and cause Hennigan's constructive discharge. Additionally, plaintiffs' alleged many examples of Burrell's sexually harassing remarks and actions which forced Hennigan to resign.

Plaintiffs also argue that the Complaint alleges sufficient facts indicating that defendants' adverse employment actions occurred under circumstances giving rise to an inference of discrimination by defendants. Plaintiffs point out that the Complaint alleges that (i) plaintiffs received disparate treatment at Centro, (ii) that male employees were given the positions formerly held by female employees, (iii) Burrell made sexually discriminatory remarks and (iv) Muniak and Elkins failed to investigate the complaints regarding Burrell. Plaintiffs have demonstrated all of factors necessary to sustain a retaliation claim. Therefore, plaintiffs' seventh and eighth causes of action must be upheld.

A plaintiff need not establish that the conduct she opposed was actually a violation of sexual discrimination laws, but only that she possessed a good faith, reasonable belief that the underlying employment action was unlawful.

Plaintiffs have also established that they engaged in a protected activity, as Lim and Bradford "complained repeatedly to Hennigan, their supervisor and manager about the discriminatory treatment that they suffered at the hands of Burrell." Hennigan, "in turn, passed

these complaints as well as reports of the discriminatory mis-treatment that she suffered herself to her supervisor, Elkins, as well as to Muniak." Also, plaintiffs complained to Centro's management regarding Burrell's sexual misconduct, and defendants do not dispute that they were aware of such' complaints. Further, plaintiffs have demonstrated that they suffered adverse employment actions by defendants. Notably, plaintiffs need not prove at this stage that defendants were aware of her sexual harassment complaints. They must only produce evidence that would support an inference that defendants were so aware. And, plaintiffs have directly and indirectly demonstrated a causal connection between their complaints regarding Burrell's misconduct and their termination and constructive discharge. Plaintiffs specifically alleged that they were terminated and constructively discharged shortly after relaying their complaints regarding Burrell's misconduct to Centro's management. Burrell's reaction to Hennigan's constructive discharge directly evidenced her "retaliatory animus."

Defendants' Reply[3]

Plaintiffs' argument that Hennigan may maintain her claims for sexual harassment, failing to provide a nondiscriminatory work environment, and constructive discharge, against Centro and Burrell, even if she experienced no alleged actionable sexual harassment herself, is not supported by New York law. Plaintiff Hennigan's first and second causes of action, as well as her third, fourth, fifth, sixth, seventh and eighth causes of action against Centro and Burrell, should be dismissed.

Defendants note that plaintiffs have not brought causes of action against Muniak or Elkins for allegedly failing to provide a nondiscriminatory work environment. The first and

[3] The Reply Memorandum was submitted by all defendants, collectively.

second causes of action are against Centro and Burrell and are unlike the remaining six, third through eighth causes of action, wherein plaintiffs have specifically and only made collective allegations against all defendants. If plaintiffs wish to assert such causes of action against Muniak and Elkins, plaintiffs may seek leave to amend their complaint

The cases on which plaintiffs rely do not stand for the proposition that a plaintiff who experiences discriminatory harassment need not be the target of other instances of hostility in order for those incidents to support her claim, or involve plaintiffs which had personally experienced sexual harassment in support their own claims (and many of which were sexual and graphic in nature). Since Hennigan has not experienced discriminatory harassment herself based upon the conduct of Burrell, her claims should be dismissed.

Plaintiffs' claims against Muniak and Elkins for sexual harassment, adverse employment action discrimination, and retaliation should be dismissed, given that Muniak and Elkins did not engage in any sexual harassment of plaintiffs or that plaintiffs' claims of adverse employment discrimination and retaliation against Muniak and Elkins are only alleged collectively. Muniak and Elkins cannot be held personally and vicariously liable for all such claims.

To the extent the Court determines that Muniak and Elkins may be held personally and/or vicariously liable, then Hennigan's Causes of Action against them should otherwise be dismissed.

With respect to plaintiffs' fifth and sixth causes of action for sexual harassment, nowhere do plaintiffs dispute that Muniak or Elkins sexually harassed them. Plaintiffs' allegations that Muniak and Elkins were "employers" (under Section 296(1) of the State HRL) and that they failed to investigate and address plaintiffs' alleged complaints relating to Burrell is insufficient to hold Muniak and Elkins personally and vicariously liable.

With respect to their third, fourth, seventh and eighth causes of action for adverse employment actions (third and fourth causes of action) and retaliation (seventh and eighth causes of action), plaintiffs' allegations that Muniak and Elkins were "employers" (under Section 296(1) of the State HRL) and failed to investigate plaintiffs' alleged complaints relating to Burrell is insufficient to hold Muniak and Elkins personally and vicariously liable under New York law. Plaintiffs' failure to specifically allege that Muniak or Elkins actually participated in their terminations/constructive discharge is fatal to said claims. Accordingly, these claims should be dismissed.

Plaintiffs' claims against Burrell for adverse employment action, discrimination and retaliation should be dismissed. Plaintiffs' position that, notwithstanding the fact that their claims of adverse employment discrimination and retaliation against Burrell are alleged collectively, Burrell is nonetheless personally and vicariously liable for all such claims, is not the existing law in New York. Plaintiffs' third, fourth, seventh and eighth causes of action against Burrell should be dismissed.

Plaintiffs do not dispute that their specific allegations of discriminatory and retaliatory discharge were only asserted against all "Defendants" collectively. As set forth above, plaintiffs' allegation that Burrell is an "employer" is insufficient to hold Burrell personally and vicariously liable under New York law. Indeed, plaintiffs' failure to specifically allege that Burrell actually participated in their terminations/constructive discharge is fatal to said claims.

Hennigan's claims against defendants for constructive discharge should be dismissed. Plaintiffs' attempt to equate their sexual harassment causes of action with their causes of action either for adverse employment action or retaliation for purposes of withstanding defendants'

motion should be rejected by the Court. Since the underlying alleged conduct of Burrell clearly fails to establish "the required threshold of interolerability," Hennigan's providing of two (2) weeks' notice of her resignation further establishes that said claims are insufficient. The Complaint is also devoid of any allegations that defendants specifically engaged in such conduct in order to try to force Hennigan to quit.

Analysis

In determining a motion to dismiss, the court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (see CPLR §3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference [*Biondi v Beekman Hill House Apt. Corp.*, 257

AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see also Leon v Martinez*, 84 N Y2d 83, 88, 614 NYS2d 972 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]).

Hennigan's First and Second Causes of Action Against Centro and Burrell

Whether Hennigan's first cause of action for failure to provide a nondiscriminatory work environment, which is essentially a hostile work environment claim, may be maintained turns on whether Burrell's alleged conduct constitutes discriminatory conduct actionable by Hennigan.

To support a claim of hostile work environment, a plaintiff must allege facts indicating that "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'" (*Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 310, 786 NYS2d 382 [2004]). A plaintiff must allege either that a single incident was extraordinarily severe, or that a series of incidents were "sufficiently continuous and concerted" to have altered the conditions of her working environment (*Perry v Ethan Allen, Inc.*, 115 F3d 143, 149 [2d Cir 1997], *quoting Carrero v New York City Housing Auth.*, 890 F2d 569, 577 [2d Cir 1989]; *Kotcher v Rosa and Sullivan Appliance Center, Inc.*, 957 F2d 59 [2d Cir 1992] [the incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief]).[4]

Evidence of harassment directed at other co-workers can be relevant to an employee's

[4] The Court notes that the "virtually identical ... federal standards for actionable sexual harassment are used in determining claims brought under the New York Human Rights Law" (*Espaillat v Breli Originals, Inc.*, 227 AD2d 266, 642 NYS2d 875 [1st Dept 1996] *citing Zveiter v Brazilian Natl. Superintendency*, 833 F Supp 1089, 1095).

own claim of hostile work environment discrimination (*Leibovitz v New York City Trans. Auth.*, 252 F3d 179 [2d Cir 2001]). "Because the crucial inquiry focuses on the nature of the workplace environment as a whole, a plaintiff who herself experiences discriminatory harassment need not be the target of other instances of hostility in order for those incidents to support her claim" (*Cruz v Coach Stores, Inc.*, 202 F3d 560, 570 [2000], *Whidbee v Garzarelli Food Specialties, Inc.*, 223 F3d 62, 70 n. 9 [2d Cir 2000][citing *Cruz* for proposition that environment as a whole is relevant to individual plaintiff's hostile work environment claim]; *Perry v Ethan Allen, Inc.*, 115 F3d 143, 151 [2d Cir 1997][evidence of harassment directed at women other than plaintiff is relevant to hostile environment determination]; *cf. Schwapp v Town of Avon*, 118 F3d 106, 112 [2d Cir 1997][noting incidents directed at others or outside plaintiff's presence "may be of limited probative value" at trial]). Furthermore, remarks made outside a plaintiff's presence can be relevant to a hostile work environment claim (*Leibovitz v New York City Trans. Auth.*, 252 F3d 179, *supra, citing Schwapp*, 118 F3d at 111 [holding comments made outside plaintiff's presence and learned second-hand may also contribute to a hostile work environment]; *Torres v Pisano*, 116 F3d 625, 633 [2d Cir 1997]["The fact that many of [the defendant's] statements were not made in [plaintiff's] presence is, in this case, of no matter; an employee who knows that her boss is saying things of this sort behind her back may reasonably find her working environment hostile"]).

As to comments directed to Hennigan, Burrell insinuated that Hennigan was on vacation somewhere or faking her illness, and complained to the new General Manager that Hennigan was "under-dressed" and "constantly" ran "out to get manicures," "faked an ovarian cyst," and that the only reason Hennigan had her job was that she "curried favor with the owner." "As held by

both Federal and State courts, the conduct or words upon which plaintiff's claim of discrimination is predicated need not be of a sexual nature in order to create a hostile work environment as long as the conduct or words are prompted because of the employee's gender" (*McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc 2d 795, 669 NYS2d 122 [Sup Ct New York County 1997] *citing Rudow v New York City Commission on Human Rights*, 123 Misc 2d 709, 474 NYS2d 1005 [Sup.Ct.1984], *Equal Employment Opportunity Commission v A. Sam & Sons Produce Company, Inc.*, 872 F Supp 29 [WDNY1994]). In any event, the references to her anatomy were of a sexual nature (*McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc 2d 795).

Moreover, plaintiffs, including Hennigan, also pleaded that Burrell (1) commented on Bradford's cleavage, saying that her chest was hanging out; (2) commented that Lim's "jeans are slutty" and that her leaning over the bar is "slutty," (3) commented that a bartender "has saggy boobs and doesn't wear a bra," (4) created a symbol indicating a bartender's "saggy boobs," (5) called a new female server and called her a "ho," (6) asked Bradford on a daily basis, "did you f - -k him yet?" and commented: "you f - - - ed him! You must be tired today from f - - - ing all night, (6) Burrell also took bets among the kitchen workers as to how long it would take for Bradford to "f - - k" a male co-worker, (7) called Lim "a stupid dumb whore and an idiot," commenting: "I want to get rid of her!", (8) refused to speak to the female employees, (9) commented to Hennigan that she wanted Bradford fired, remarked on the clothing and physical attributes of the female staff, called Lim a "whore" and the female bartenders "sluts," and (10) glared at Bradford during New Years' Eve and commented to Hennigan about Bradford's attire.

Thus, although Hennigan was not the "target" of many of these instances of hostility,

Hennigan was present during at least one occasion, when Burrell commented to Hennigan on the clothing and physical attributes of the female staff, called Lim a "whore" and the female bartenders "sluts," and discovery may reveal that she had knowledge of the many other instances of discriminatory remarks made by Burrell. Therefore, it cannot be said that Hennigan failed to sufficiently allege facts to support her claim that she was subjected to a discriminatory workplace.

As defendants contend, the *Liebovitz* court stated that it was not considering whether a woman, who was never herself the object of harassment might have a federal hostile work environment claim if she were forced to work in an atmosphere in which such harassment was pervasive. However, the Court acknowledged that, based on other Second Circuit caselaw, evidence of harassment directed at other co-workers, even made outside a plaintiff's presence, can be relevant to an employee's own claim of hostile work environment discrimination. Because the plaintiff in *Leibovitz* presented no evidence that her "own working environment was hostile, and failed to allege or prove that harassment of other women adversely affected the terms and conditions of her own employment," the Court held that the plaintiff "who was not herself a target of the alleged harassment, was not present when the harassment supposedly occurred, and did not even know of the harassment while it was ongoing-failed to prove that an environment existed at work that was hostile to her because of her sex." Here, the Complaint alleges that Hennigan was the target of discrimination based on sex, and that the harassment of Lim and Bradford affected the conditions of Hennigan's own employment environment at Centro.

Further, an employer is liable for a hostile work environment created by its employees if the employer acquiesced in the discriminatory conduct or subsequently condoned it (*McIntyre v*

Manhattan Ford, Lincoln-Mercury, Inc., 175 Misc 2d 795, 669 NYS2d 122 [Sup Ct New York County 1997] *citing State Division of Human Rights ex rel. Greene v St. Elizabeth's Hosp.*, 66 NY2d 684, 496 NYS2d 411 [1985]; *Goering v NYNEX Information Resources Co.*, 209 AD2d 834, 619 NYS2d 167 [3d Dept 1994]). Condonation may be established by knowledge of the discriminatory conduct acquired after the fact, combined with insufficient investigation and/or insufficient corrective action (*see, Father Belle Community Center v State Div. of Human Rights*, 221 AD2d 44, 642 NYS2d 739 [4th Dept 1996], *lv denied* 89 NY2d 809 [1997]).

Since it is alleged that Burrell held a supervisory position over plaintiffs, and Burrell's sexual harassment culminated in their discharge, Centro may be held liable for Burrell's actions. N.Y.C. Administrative Code § 8-107.13(1) provides that employers will be absolutely liable for an agent's or employee's discriminatory conduct where the employee or agent exercised managerial or supervisory responsibility. The Complaint alleges that Burrell held a managerial position with the power to (i) discipline employees, (ii) set rates of pay and (iii) hire and fire employees, including the plaintiffs herein.

Even assuming *arguendo* that Burrell were not plaintiffs' supervisor, Centro could still be liable. "[W]here the complainant is harassed by a low-level supervisor or a co-employee, the complainant is required to establish only that upper-level supervisors had knowledge of the conduct and ignored it; if so, the harassment will be imputed to the corporate employer and will result in imposition of direct liability" (*Vitale v Rosina Food Products Inc.*, 283 AD2d 141, 727 NYS2d 215 [4th Dept 2001]). In such an instance, the Centro may assert is that (a) it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective

opportunities provided by the employer or to avoid harm otherwise" (*Vitale v Rosina Food Products Inc.*, 283 AD2d 141, 727 NYS2d 215 [4th Dept 2001] *citing Faragher v City of Boca Raton*, 524 US 775 [1998]).

The Complaint alleges that Lim and Bradley complained to Hennigan about Burrell's sexually offensive conduct, who then relayed their complaints, as well as her own, to Muniak and Elkins. Plaintiffs allege that their manager Muniak and Elkins failed to investigate or address those complaints. Thus, Centro, who arguably knew or should have known, about the harassment yet failed to take appropriate remedial action, may be found liable (*State Div. of Human Rights ex rel. Greene v St. Elizabeth's Hosp.*, 66 NY2d 684, 687 [1985] [an employer may be liable under the Executive Law for its employee's discriminatory acts if it condoned the discriminatory acts by failing to take action to address them]).

As to Burrell's motion to dismiss the aiding and abetting claims found in the first and second causes of action, New York Exec. Law § 296(6) and New York City Adm. Code § 8-107 state that it shall be an unlawful discriminatory practice "for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden" thereunder. Given that Burrell's motion to dismiss these causes of action against her is premised on the notion that the allegations concerning Burrell "hardly evidence 'discriminatory mis-treatment'" by Burrell, that Hennigan "was never subjected to a discriminatory work environment" by Burrell, and that Centro never failed to provide Hennigan with a nondiscriminatory workplace, and that such contention lacks merit, dismissal of the aided and abetted theories in the first and second causes of action as against Burrell is unwarranted.

An individual employee who actually participates in conduct giving rise to a

discrimination claim may be held personally liable (*Miotto v Yonkers Public Schools*, 534 FSupp2d 422 [2008]; *Storr v Anderson School*, 919 FSupp 144 [1996][plaintiff stated cause of action against former supervisor under statute making it an unlawful practice to aid and abet acts forbidden under Human Rights Law where plaintiff alleged that supervisor created hostile work environment by making sexually lewd remarks and derogatory remarks about employee's age while in her presence]; *Gentile v Town of Huntington*, 288 FSupp2d 316 2003] [former employee could maintain an employment discrimination claim against his former supervisor under provision making it an "unlawful discriminatory practice for any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden" by NYHRL, where employee's complaint alleged that supervisor actually participated in the conduct giving rise to his discrimination claim]).

Therefore, the branch of the defendants' motion to dismiss the first and second causes of action against Centro and Burrell as asserted by Hennigan, is denied.

Plaintiffs' Third and Fourth Causes of Action Against all Defendants

In order to make out their claim for intentional discrimination under both the State HRL and the City HRL, a plaintiff must adequately allege that: (1) they are a member of a protected class; (2) they were qualified for their position; (3) they suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 305).

Contrary to defendants' contention, plaintiffs Lim and Bradford have adequately alleged that they were qualified for their position as bartenders. To satisfy this element of their claim, plaintiffs need only demonstrate that they "possesses the basic skills necessary for performance

of [the] job" (*Stephenson v Hotel Employees and Restaurant Employees Union Local 100 of the AFL-CIO*, 14 AD3d 325, 787 NYS2d 289 [1st Dept 2005]). To defeat dismissal, both Lim and Bradford have submitted affidavits and resumes, indicating that Lim and Bradford had three and four years of bartending experience, respectively, at the time they started at Centro Vinoteca. Both plaintiffs also asserted that at no time during their time at Centro Vinoteca did they receive any legitimate complaints that they were not qualified for their jobs. On a motion to dismiss for failure to state a cause of action where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

Here, since plaintiffs' affidavits overcome defendants' claim that the Complaint fails to allege that Lim and Bradford were qualified for the position for which they were terminated, dismissal on this ground is unwarranted.

"An adverse employment action requires a materially adverse change in the terms and conditions of employment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, *supra*). To be materially adverse, "a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, or significantly diminished material

responsibilities . . . .'" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, *supra*).

The Complaint alleges that defendants Muniak and Elkins both had the power to (i) discipline employees, (ii) set rates of pay and (iii) hire and fire employees, including the plaintiffs herein. (Comp. ¶¶19, 20). The Complaint also alleges that Muniak and Elkins were "partial owner[s], principal[s], manager[s], director[s], and/or officer[s]" of Centro (Comp. ¶¶14, 15). The Complaint also alleges that Burrell was and still is a partial owner, principal, manager, director, and/or officer of Centro, and had the power to (i) discipline employees, (ii) set rates of pay and (iii) hire and fire employees, including the plaintiffs (Comp. ¶¶ 12, 13).

The Complaint alleges that defendants failed to properly investigate complaints concerning Burrell, and that Lim and Bradford were terminated and that Hennigan was constructively discharged after plaintiffs made complaints about Burrell's actions. Accepting as true the allegations of the Complaint, and affording plaintiffs a liberal reading of the Complaint, it cannot be said that the Complaint fails to allege that Muniak and Elkins terminated and constructively terminated plaintiffs, at this pleading stage.

Further, it is undisputed that to state a constructive discharge claim, a plaintiff must establish that the employer rendered their employment so difficult or unpleasant that a reasonable person in their position would have felt compelled to resign (*Polidori v Societe Generale Groupe*, 39 AD3d 404, 835 NYS2d 80 [1st Dept 2007]; *see Nichols v Memorial Sloan-Kettering Cancer Ctr.*, 36 A.D.3d 426, 427 [1st Dept 2007]). Hennigan's constructive discharge qualifies as an adverse employment action, notwithstanding the allegation that she gave two weeks notice of her resignation (*Cioffi v New York Community Bank*, 465 FSupp2d 202, 211-12 [EDNY 2006] [denying defendant's motion for judgment on issue of constructive discharge, despite fact that

employee gave two weeks' notice]; *Chamblee v Harris & Harris, Inc.*, 154 F.Supp.2d 670 [SDNY 2001][same]).

Eichler v American Intern. Group, Inc. (2007 WL 963279 [SDNY 2007]), on which defendants rely does not warrant a different result. Although the Court found that dismissal of plaintiff's constructive discharge claim, where plaintiff gave two weeks notice, the Court had already concluded that the evidence did not establish that plaintiff was left with no choice to resign. The Court also found that nothing occurred for six months after plaintiff returned to work, that suddenly transformed her work environment from one which was merely unpleasant to one that a reasonable person would have considered so intolerable that quitting was the only viable option. Further, there was no evidence that defendant wanted to force plaintiff to leave its employ. Notably, the decision was made on a motion for summary judgment, and not at the pleading stage as herein.

Finally, the Complaint sufficiently alleges that the adverse actions occurred under circumstances giving rise to an inference of discrimination. "A showing that the employer treated a similarly situated employee differently is a common and especially effective method of establishing a prima facie case of discrimination" (*Collins v Cohen*, 2008 US Dist. LEXIS 58047, *31 [finding inference of discrimination where female employee had to seek out work, while male employees were assigned work]; *Hinton v City Coll. Of New York*, 2008 US Dist. LEXIS 16058, 52, 2008 WL 591802, *16 [SDNY 2008] [issue of fact as to whether inference of discrimination existed where female employee who was denied a promotion had stronger qualifications than a male employee who received a promotion]). Here, the Complaint sufficiently alleges that Burrell's sexually discriminatory misconduct was "directed against

plaintiffs and other female employees at Centro, but not the male employees." Further, plaintiffs alleged that the "male employees were not treated in the same or similar manner by defendants. . . ""[a]ll of the female employees that quit or were fired as a result of this treatment were replaced by males, such that currently there are no longer any female managers or bartenders at Centro. Plaintiffs also alleged that a female bartender was replaced by a male waiter with no bartending experience, and that Lim and Bradford were replaced with a man with no bartending experience.

Plaintiffs' allegations giving rise to an inference of discrimination are the numerous sexually discriminatory remarks made by Burrell. Burrell's discriminatory remarks regarding the female employees' appearance and apparel, as well as her gender-specific insults such as "ho" and "whore," indicate that plaintiffs were fired and constructively discharged based on their sex (*see Gregory v Daly*, 243 F3d 687, 697 [2d Cir 2001][stating that actions or remarks made by decisionmakers that could be viewed as reflecting a discriminatory animus "may give rise to an inference of discriminatory motive"]).

It is also alleged that Muniak and Elkins failed to investigate and address the discrimination complaints they received regarding Burrell's misconduct. An employer's failure to conduct such an investigation has been held to be probative of discriminatory intent (*Collins v Cohen Pontani Lieberman & Pavane*, 2008 WL 2971668, *12 [SDNY 2008] [comments to plaintiff and defendant's failure to investigate her discrimination claim strengthen the inference that the proffered explanation masks discriminatory animus]). Such failure, as well as Muniak's and Elkins' alleged termination of Lim and Bradford, and constrictive discharge of Hennigan, sufficiently allege circumstances giving rise to an inference of discrimination.

Consequently, the allegations are sufficient to hold Centro liable for the actions and inactions of Burrell, Muniak and Elkins.

Therefore, defendants' motions to dismiss of the third and fourth causes of action as asserted by all plaintiffs are denied.

Plaintiffs' Fifth, Sixth, Seventh and Eighth Causes of Action Against Muniak and Elkins

As to plaintiffs' fifth and sixth causes of action, in order to state a hostile work environment claim under both the State HRL and the City HRL, a complaint must sufficiently allege that the workplace was "permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment'" and that the ridicule and insults were gender-based (*McGarvey v Foley, Hickey, Gilbert & O'Reilly*, 294 AD2d 226, 741 NYS2d 858 [1st Dept 2002]; *see also Clayton v Best Buy Co., Inc.*, 48 AD3d 277, 851 NYS2d 485 [1st Dept 2008]). This determination may be made by considering the frequency of the alleged conduct, its severity, whether it was physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interfered with any of plaintiff s work performance (*Brennan v Metropolitan Opera Ass'n, Inc.*, 284 AD2d 66, 729 NYS2d 77 [1st Dept 2001]).

Defendants' motions to dismiss these claims as to Muniak and Elkins, as asserted by all plaintiffs, and as asserted by Hennigan against Burrell, are based on the assertion the Complaint is devoid of any allegation against either Muniak or Elkins or of any actionable comments made by Burrell. For the reasons stated above, the Complaint sufficiently alleges Muniak's, Elkin's and Burrell's alleged managerial roles at Centro, their ability to hire and fire plaintiffs, their failures to sufficiently investigate the complaints made against Burrell, and the ultimate

termination of Lim and Bradford, and constructive termination of Hennigan.

Likewise, Hennigan's hostile work environment claims against Centro, are sufficiently alleged, as noted above.

Therefore, dismissal of the fifth and sixth causes of action is unwarranted.

As to the seventh and eighth causes of action, in order to make out a claim for retaliation under both the State HRL and the City HRL, a plaintiff must adequately allege that: (1) they engaged in a protected activity; (2) their employer was aware that they participated in such activity; (3) they suffered an adverse employment action; and (4) there is a causal connection between the protected activity and the adverse action (*Hernandez v Bankers Trust Co.*, 5 AD3d 146, 773 NYS2d 35 [1st Dept 2004]).

Defendants' motions to dismiss these claims are premised on the assertion that plaintiffs failed to adequately allege that they suffered adverse employment actions by the defendants. As noted above, however, plaintiffs' complaint sufficiently alleges that defendants terminated or constructively terminated the plaintiffs after defendants received complaints concerning Burrell's alleged discriminatory conduct. Therefore, dismissal of the seventh and eighth causes of action for retaliation is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motions (sequence 001 and 002) by defendants Anne W. Burrell, 74 Seventh, LLC d/b/a Centro Vinoteca, Sasha Muniak, and George W. Elkins to dismiss the Complaint pursuant to CPLR 3211(a)(7) is denied, in their entirety; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry within 20

days of entry; and it is further

ORDERED that the parties appear for a preliminary conference on April 14, 2009, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: March 16, 2009

Hon. Carol Robinson Edmead, J.S.C.

CAROL EDMEAD
J.S.C.

FILED
MAR 23 2009
COUNTY CLERK'S OFFICE
NEW YORK