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Handling Motions to Dismiss Based on the Non-Residency Application of the NYSHRL, NYCHRL and NYLL

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The Panel

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Molly Smithsimon is an experienced litigator with over 15 years of experience practicing employment law in state and federal court. She negotiates severance and employment agreements on behalf of employees, represents federal employees, handles administrative charges and hearings, and has tried civil rights cases before juries in federal court. She advises clients on federal, state, and local employment laws, and represents executives and employees in negotiating employment agreements, restrictive covenants, and separation agreements.

Her diverse practice includes representing individuals, classes of individuals, and companies in matters including employment discrimination; wage and hour claims; and tort and contract disputes. She has briefed appeals in the Second Circuit Court of Appeals and the First Department Appellate Division.

A certified mediator, Molly supports resolving litigation through alternative dispute resolution and regularly represents clients in mediation.

She serves as Vice President of the Board of the National Employment Lawyer's Association/NY and serves on the Board and the Governance Committee of the Northwest Connecticut Arts Council.

Molly received her Juris Doctor from the University of Pennsylvania School of Law, and her Bachelor of Arts degree from Brown University.

She is admitted to the bar in New York State, the Southern and Eastern Districts of the United States District Court, and the Second Circuit Court of Appeals.

Craig Gurian

Craig Gurian has practiced civil rights law since 1988. Craig litigated the first Title IX sexual harassment case tried to a jury in the United States. His day job is executive director of the Anti- Discrimination Center (ADC), the motto of which is "One Community, No Exclusion." ADC recently submitted comments on HUD's proposed "affirmatively furthering fair housing" rule.

Craig is perhaps best known in the litigation context for the unprecedented action that the Anti- Discrimination Center brought against Westchester County pursuant to the federal False Claims Act for the county's having falsely represented that it was affirmatively furthering fair housing. The litigation phase of that case resulted in a landmark consent decree intended to make structural change to Westchester's segregated housing patterns. He is currently lead counsel in the Fair Housing Act and City Human Rights Law challenge to New York City's outsider-restriction policy in its affordable housing lotteries.

Among other legislative accomplishments, Craig was a principal author of the comprehensive 1991 amendments to the New York City Human Rights Law, the principal author of the 2005 Local Civil Rights Restoration Act, and the principal author of a slew of 2016 enactments (including this one and this one) designed to protect the law from narrow judicial interpretations.

Craig is currently working to pass a "coop disclosure law" to end the secrecy and unaccountability of the coop application process, secrecy that significantly impairs the robust enforcement of fair housing law. Inquiries and support welcome.

Craig's scholarly articles include "A Return To Eyes On The Prize: Litigating Under The Restored New York City Human Rights Law," the definitive treatment of the intent and intended consequences of the Restoration Act, and "Let Them Rent Cake: George Pataki, Market Ideology, and the Attempt to Dismantle Rent Regulation in New York." Other writing has appeared in Bloomberg CityLab; the Daily News (most recently, this and this); Gotham Gazette (most recently, this) and The Daily Beast.

Craig received his B.A., J.D., and M.A. in United States history from Columbia. He has taught on both the graduate level (Fordham Law School) and at the undergraduate level (Columbia College).

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Miriam F. Clark

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Miriam F. Clark has practiced labor and employment law for more than 25 years, and has handled dozens of employment-related cases in federal and state courts, arbitration agencies and before federal and state administrative agencies. She negotiates severance agreements and employment contracts, and counsels employees on a variety of employment-related legal issues. She also provides independent investigation and mediation services in connection with complaints of discrimination and/or harassment and serves as a voluntary, court-appointed mediator for the United States District Court for the Southern District of New York. She advises non-profit organizations on employment-related issues. Since 2005 she has been listed in *The Best Lawyers in America* and *Super Lawyers.* She has received an AV Preeminent Rating from Martindale Hubbell, a "superb" (10 out of 10) rating from Avvo, and is a member of the Bar Registry of Preeminent Women Lawyers. She is Chair of the Legislative Committee, and former President of the National Employment Lawyers Association- New York Chapter.

Ms. Clark was recently appointed to the New York City Commission on Gender Equity. She has lectured widely on employment law and related topics and served as Chapter Editor for the Annual Supplement to Family and Medical Leave Act (ABA Section on Labor and Employment Law/BNA Books). She is a member of the Planning Committee of the American Law Institute Current Developments in Employment Law Conference. Ms. Clark is a graduate of New York University School of Law, where she was a Root-Tilden-Snow Scholar, and a graduate of Harvard College. She served as law clerk for Hon. Max Rosenn, of the United States Court of Appeals for the Third Circuit.

Desiderio vs. Hudson Technolgy,
a territorial challenge to the NYSHRL in the SDNY
Jan. 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STARYL DESIDERIO,

Plaintiff,

- against -

HUDSON TECHNOLOGIES, INC. and BRIAN COLEMAN,

Defendants.

ECF

Case No. 22-CV-541(ER)(KHP)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS

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Preliminary Statement

Plaintiff Staryl Desiderio initiated this action to vindicate her rights under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §2601 et seq., the New York State Human Rights Law ("NYSHRL"), and the New York City Human Rights Law ("NYCHRL") based on gender and disability discrimination claims, and for breach of contract. Plaintiff suffered a psychiatric crisis as a result of gender-based harassment by her supervisor. Then while she was on leave for her serious medical condition,, which was never approved by her employer, defendants unlawfully terminated her employment, interfering with her FMLA rights, retaliating against her for taking medical leave, and discriminating against her based on her sex and disability.

Ms. Desiderio alleged all of the elements of her claims with sufficient detail to readily withstand defendants' motion to dismiss her first six claims for relief, as more fully set forth below. Defendants have not moved to dismiss the seventh claim for relief for breach of contract.

Facts

Plaintiff's complaint sufficiently alleges all the elements of FMLA interference. She alleged at ECF 1 ¶ 29 that she was an eligible employee, in that she "worked a full-time schedule, and her total hours exceeded 1,250 hours per year." She alleged at ECF 1 ¶ 6 that Hudson constituted an employer under the FMLA, stating "Hudson employs more than 50 employees … and, at all relevant times, Hudson met the definition of an 'employer' under all applicable statutes." At ECF 1 ¶ 23 she alleges that she was entitled to leave under the FMLA in that she "was diagnosed with a serious medical condition, … anxiety, depression, panic attacks, and insomnia." She alleged at ECF 1 ¶ 24 that she

informed her employer on July 18, 2021 of her need to take "medical leave for her serious psychiatric condition." In addition, she alleged at ¶¶ 25-27 that she timely submitted FMLA forms completed by her doctor and confirmed receipt by Defendants. Plaintiff alleged at ¶ 30 that defendants failed to approve her FMLA leave, to which she was entitled. Defendants falsely claim "plaintiff acknowledges that Hudson treated her leave as covered by the FMLA." This is nowhere alleged in the complaint, so cannot be accepted as true. In fact, Ms. Desiderio states that they "did not receive any notice from Hudson that Ms. Desiderio's leave was approved or denied, or of any expiration date of the FMLA leave." ECF 1 ¶ 30.

Defendants also falsely state that Mr. Desiderio emailed Mr. Coleman that plaintiff was "nowhere near well enough to return." In fact, Mr. Desiderio simply stated in his email dated October 12, 2021 that "Star had a setback." ECF 1 ¶ 33.

Plaintiff alleged at ECF 1 ¶ 37 that defendants further interfered with her FMLA rights by terminating her on October 27, 2021 without ever informing her of approval or an expiration date of any leave. She alleged that she was unlawfully terminated by defendant, Mr. Coleman, when he falsely claimed, "By failing to return to work upon expiration of her FMLA leave, Star effectively resigned her position at Hudson Technologies." ECF 1 ¶ 37.

Plaintiff sufficiently alleged that defendants retaliated against her for taking leave by discharging her and denying plaintiff her earned stock options immediately upon the expiration of her FMLA leave. ECF 1 ¶ 37-38. Defendants falsely claim plaintiff failed to plead a causal connection between the FMLA leave and her termination. In fact, an allegation of the complaint quotes Coleman's email explicitly connecting the expiration

of FMLA leave to the termination of her employment: "By failing to return to work upon expiration of her FMLA leave, Star effectively resigned her position at Hudson Technologies." ECF 1 ¶ 37. Plaintiff alleged "Mr. Coleman also falsely claimed that Ms. Desiderio's stock options had been canceled as a result of the 'voluntary termination.'" See ECF 1 ¶ 38; see also ECF 1 ¶ 42 temporally and causally connecting the termination to the exercise of her FMLA rights: "Defendants' actions in terminating Ms. Desiderio's employment were in retaliation for her taking FMLA leave…"

Plaintiff alleged that she was a protected employee under the meaning of the New York City and State Human Rights Laws. At ECF 1 ¶ 9, she stated that she "worked at the Long Island City location at 38-18 33rd Street, Long Island City, NY during her employment with Hudson, although she also worked remotely during the pandemic, as did other managerial employees." At ECF 1 ¶ 5, she alleged, "Hudson Technologies, Inc. ("Hudson") is and was a corporation organized and existing under the laws of the State of New York…." At ECF 1 ¶ 7 she alleged that defendant Brian Coleman "is a resident of the State of New York and is employed by Hudson as President and Chief Executive Officer." At ECF 1 ¶ 11, Ms. Desiderio alleged that she reported to Mr. Coleman and that he promoted her to VP of Supply Chain Management on March 24, 2021. At ECF 1 ¶ 18 she alleged she attended a meeting at Hudson's headquarters in Pearl River, New York to discuss a personnel issue with a New York-based staff member she supervised, specifically "to discuss the results of the investigation and decide on appropriate disciplinary action, if any…." At ECF 1 ¶¶ 19-21, Ms. Desiderio alleged gender discrimination by Mr. Coleman at a meeting on June 9, 2021 in New York City. At ECF 1 ¶ 37 she alleged that Mr. Coleman told her via email that she was no longer employed

with Hudson after 39 years of employment for it and its predecessor companies because she "fail[ed] to return to work upon expiration of her FMLA leave."

I. Standard for ruling on a Rule 12(b)(6) motion to dismiss a complaint

A complaint need not establish a prima facie case of employment discrimination to survive a motion to dismiss. *Swierkiewicz v. Sorema,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). However, 'the claim must be facially plausible and must give fair notice to the defendants of the basis for the claim.'" *Barbosa v. Continuum Health Partners, Inc.,* 716 F.Supp.2d 210, 215 (S.D.N.Y.2010) (citations omitted).

Rule 8 of the Federal Rules of Civil Procedure requires, inter alia, that a pleading seeking relief "must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. "On a Rule 12(b)(6) motion to dismiss a complaint, the court must accept a plaintiff's factual allegations as true and draw all reasonable inferences in [the plaintiff's] favor." *Gonzalez v. Caballero,* 572 F.Supp.2d 463, 466 (S.D.N.Y.2008); see also *Ruotolo v. City of New York,* 514 F.3d 184, 188 (2d Cir. 2008).

II. Argument

A. Plaintiff Sufficiently Alleged Defendants Interfered With FMLA Rights

To state a claim for FMLA interference, a plaintiff must allege: "1) she is an eligible employee under the FMLA; (2) the defendant is an employer as defined in the FMLA; (3) she was entitled to leave under the FMLA; (4) she gave notice to the defendant of her intention to take leave; and (5) she was denied benefits to which she was entitled under the FMLA." *Hill v. City of New York,* 136 F. Supp. 3d 304, 342 (E.D.N.Y. 2015). Contrary to defendants' claim, she does not have to "establish" a prima facie case to defeat a 12(b)(6) motion to dismiss.

Plaintiff's complaint sufficiently alleges all the elements of FMLA interference. Specifically, (1) she alleged at ECF 1 ¶ 29 that she was an eligible employee, in that she "worked a full-time schedule, and her total hours exceeded 1,250 hours per year." Similarly, (2) she alleged at ECF 1 ¶ 6 that Hudson constituted an employer under the FMLA, stating "Hudson employs more than 50 employees … and, at all relevant times, Hudson met the definition of an 'employer' under all applicable statutes." (3) At ECF 1 ¶ 23 she alleges that she was entitled to leave under the FMLA in that she "was diagnosed with a serious medical condition, … anxiety, depression, panic attacks, and insomnia." (4) She alleged at ECF 1 ¶ 24 that she informed her employer on July 18, 2021 of her need to take "medical leave for her serious psychiatric condition." In addition, she alleged at ¶¶ 25-27 that she timely submitted FMLA forms completed by her doctor and confirmed receipt by Defendants. (5) Plaintiff alleged at ¶ 30 that defendants failed to approve her FMLA leave, to which she was entitled: "The Desiderios did not receive any notice from Hudson that Ms. Desiderio's leave was approved…." Plaintiff alleged at ECF

1 ¶ 37 that defendants further interfered with her FMLA rights by terminating her on October 27, 2021 without ever informing her of approval or an expiration date of any leave. She alleged that she was unlawfully terminated by defendant, Mr. Coleman, when he falsely claimed, "By failing to return to work upon expiration of her FMLA leave, Star effectively resigned her position at Hudson Technologies." ECF 1 ¶ 37.

Courts in this Circuit have held that withholding approval of FMLA leave, as defendants did here, constitutes FMLA interference. See, e.g., *Graziadio v. Culinary Institute of America,* 817 F.3d 415, 425 (2d Cir. 2016). Similarly, courts have allowed plaintiffs' FMLA interference claims to proceed where the employer failed to advise the plaintiff as to when her FMLA leave would expire. See *Spagnoli v. Brown & Brown Metro, Inc.,* 2007 WL 2362602, at *14 (D.N.J. Aug. 15, 2007). Defendants cite *Sarno v. Douglass Elliman-Gibbons & Ives, Inc.,* 183 F.3d 155, 162 (2d Cir. 1999), to claim that plaintiff wasn't entitled to be reinstated because she may have needed more than 12 weeks of leave. *Sarno* is unavailing because it is distinguishable – there it was undisputed that the employer informed plaintiff that it would treat his leave as FMLA leave, whereas here defendants did not, therefore the defense is unavailable. See *Spagnoli, supra* at *14.

Defendants' argument that plaintiff failed to state a claim for interference simply because she may have been unable to return to work at the expiration of 12 weeks of leave confuses the determination of damages with the establishment of liability. *Roberts v. AIG Glob. Inv. Corp.,* 2008 WL 4444004, at *4 (S.D.N.Y. Sept. 30, 2008) (denying dismissal of interference claim even though plaintiff was unable to return to work at the expiration of 12 weeks where defendant failed to approve FMLA leave). If Ms. Desiderio was unable to return to work after the statutorily-protected period of 12 weeks, that fact

may be relevant to the amount of her damages. However, it would not have any bearing on whether she was denied benefits to which she was entitled under the FMLA – reinstatement to her position after taking FMLA leave. "Liability for denial of a benefit accrues at the time the benefit is denied." See *id.* citing *Throneberrv v. McGehee Desha County Hosp.,* 403 F .3d 972, 981, n. 7 (8th Cir. 2005). Defendants cite *Roberts v. Health Ass'n,* 308 F. App'x 568, 569-70 (2d Cir. 2009) in support of their argument, but it is inapposite because it dismissed interference claims at summary judgment, not on Fed. R. Civ. Proc. 12(b)(6) grounds. *Stuart v. T-Mobile USA, Inc.,* 2015 WL 4760184, at *4 (S.D.N.Y. Aug. 12, 2015) is distinguishable on the same grounds, as it concerned dismissal pursuant to a summary judgment motion; plaintiff need not prove her case, but only present plausible claims.

"Where the employee is not provided with the necessary information regarding the employer's FMLA leave policies, the employee is denied the ability to conform a desired period of leave to the employer's policies so as to preserve the right to reinstatement, a benefit at the crux of the FMLA's provisions." *Fernandez v. Windmill Distrib. Co.,* 159 F. Supp. 3d 351, 363 (S.D.N.Y. 2016). To the extent the complaint fails to allege that plaintiff would have conformed her leave period to the employer's policies, plaintiff seeks leave to amend the complaint.

B. Plaintiff Sufficiently Alleges FMLA Retaliation under *Iqbal* and *Twombly*

Defendants misstate the standard to plead an FMLA retaliation claim, erroneously setting forth the standard on summary judgment, even though they have moved for partial dismissal of claims under Federal Rule of Civil Procedure 12(b)(6), not Rule 56. To state a claim for retaliation under the FMLA, Plaintiff must ***allege*** that: "1) [s]he exercised

rights protected under the FMLA; 2) [s]he was qualified for his position; 3) [s]he suffered an adverse employment action; and 4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent." *Smith v. Westchester Cnty.,* 769 F. Supp. 2d 448, 469 (S.D.N.Y. 2011) (citing *Potenza v. City of New York,* 365 F.3d 165, 168 (2d Cir. 2004)). To state an FMLA retaliation claim, Plaintiff "need only show that [her] claims are plausible under *Iqbal* and *Twombly*," by "plead[ing] facts sufficient to state a claim to relief that is plausible on its face." *Smith,* 769 F. Supp. 2d at 469 (S.D.N.Y. 2011) (denying motion to dismiss FMLA retaliation claim).

Ms. Desiderio sufficiently pled retaliatory discharge claims, stating at ECF 1 ¶ 42, "Defendants' actions in terminating Ms. Desiderio's employment were in retaliation for her taking FMLA leave…" and similarly at ¶ 51, "… Hudson retaliated against plaintiff by terminating her as a result of her request for FMLA leave." Plaintiff is not required to demonstrate that there was a causal connection [between her statutorily protected activity and the adverse employment action] at the pleading stage, but only to set forth a legally cognizable claim." See *Smith.,* 769 F. Supp. 2d at 472; *cf. Perry v. NYSARC, Inc.,* 424 Fed. App'x 23, 26 (2d Cir. 2011) (dismissing retaliation claims under distinguishable circumstances where an eleven-month interval separated Perry's protected activity and the first action of alleged retaliation, in contrast to an interval of less than three months here). Here the temporal proximity between plaintiff's FMLA leave and defendants unlawful termination is so close in time as to make causation highly plausible.

Contrary to defendants' spurious claim in their memorandum of law, plaintiff nowhere in the Complaint conceded her termination was precipitated by a request for a severance package. Plaintiff, rather, alleges that Coleman claimed that her medical

inability to return to work at the expiration of 12 weeks of leave constituted a "voluntary termination." ECF 1 ¶ 38.

Plaintiff sufficiently alleged that defendants retaliated against her for taking leave by discharging her and denying plaintiff her earned stock options immediately upon the expiration of her FMLA leave. ECF 1 ¶ 37-38. Defendants falsely claim plaintiff failed to plead a causal connection between the FMLA leave and her termination. In fact, an allegation of the complaint quotes Coleman's email explicitly connecting the expiration of FMLA leave to the termination of her employment: "By failing to return to work upon expiration of her FMLA leave, Star effectively resigned her position at Hudson Technologies." ECF 1 ¶ 37. Plaintiff alleged "Mr. Coleman also falsely claimed that Ms. Desiderio's stock options had been canceled as a result of the 'voluntary termination.'" See ECF 1 ¶ 38; see also ECF 1 ¶ 42 temporally and causally connecting the termination to the exercise of her FMLA rights: "Defendants' actions in terminating Ms. Desiderio's employment were in retaliation for her taking FMLA leave in that she was terminated while she was absent from work on FMLA leave." Recently, a Southern District Court held that a plaintiff stated a retaliation claim under the FMLA where she suffered an adverse employment action in close proximity to when she exercised her FMLA rights. *Williams v. City of New York,* 2022 WL 976966, at *5 (S.D.N.Y. Mar. 31, 2022). There plaintiff ended her leave on April 20, 2020. She alleged defendants were aware of that activity and identified a materially adverse action with an adequately alleged causal connection to the paid leave: being issued "chronic papers by Deputy Warden Morales as a result of her extended absence due to COVID-19" on May 11, 2020. See *id.* The court concluded under these circumstances that this constituted an adverse action with a

sufficient causal connection, and Plaintiff therefore states a claim. See *id.* Similarly, here, plaintiff has alleged a sufficient causal connection in that she was terminated while out on FMLA leave in retaliation for taking leave.

C. Defendants' argument that plaintiff is not protected by New York City and State discrimination laws is frivolous

Plaintiff adequately alleged that she was a protected employee under the meaning of the New York City and State Human Rights Laws. At ECF 1 ¶ 9, she stated that she "worked at the Long Island City location at 38-18 33rd Street, Long Island City, NY during her employment with Hudson, although she also worked remotely during the pandemic, as did other managerial employees." At ECF 1 ¶ 5, she alleged, "Hudson Technologies, Inc. ("Hudson") is and was a corporation organized and existing under the laws of the State of New York…." At ECF 1 ¶ 7 she alleged that defendant Brian Coleman "is a resident of the State of New York and is employed by Hudson as President and Chief Executive Officer." At ECF 1 ¶ 11, Ms. Desiderio alleged that she reported to Mr. Coleman and that he promoted her to VP of Supply Chain Management on March 24, 2021. At ECF 1 ¶ 18 she alleged she attended a meeting at Hudson's headquarters in Pearl River, New York to discuss a personnel issue with a New York-based staff member she supervised, specifically "to discuss the results of the investigation and decide on appropriate disciplinary action, if any…." At ECF 1 ¶¶ 19-21, Ms. Desiderio alleged that Mr. Coleman discriminated against her based on her gender at a meeting on June 9, 2021 in New York City, where he belittled her, treated her like a child, and verbally threatened her, pointing his finger in her face while towering over her. At ECF 1 ¶ 37 she alleged that Mr. Coleman told her via email that she was no longer employed with Hudson after 39 years of employment with the company and its predecessor entities because she

"fail[ed] to return to work upon expiration of her FMLA leave," although she had not been told in advance the date on which it would expire, or even that it had been approved.

Defendants argue that plaintiff has not alleged that the impact of the discriminatory conduct was felt in the City or State of New York, which is patently false. As outlined above, Ms. Desiderio clearly alleged (1) she worked for a New York company, (2) reported to the New York-based CEO, (3) attended multiple meetings in New York City and State, (4) supervised a staff based in New York City and State, (5) physically worked at Hudson's Long Island City and Pearl River offices, in addition to working remotely, (6) experienced gender discrimination and harassment at an in-person meeting with Mr. Coleman in New York City, and (7) had her employment discriminatorily terminated by Mr. Coleman, who lives and works in New York. All of the foregoing plausibly allege that plaintiff felt the impact of the discriminatory conduct in New York City and State. In a similar case, the Southern District held that plaintiff stated a claim under the NYCHRL, finding that the alleged discriminatory conduct both occurred in New York City and had an impact in New York City. *Regan v. Benchmark Co. LLC,* 2012 WL 692056, at *14 (S.D.N.Y. Mar. 1, 2012). The court noted the significance that Ms. Regan continued to service New York City-based clientele and remained under the management and supervision of Benchmark's New York City office, like Ms. Desiderio, even after plaintiff, who lived in Jersey City, was transferred to Benchmark's Jersey City office. See *id.* at *14; see also *Pouncy v. Danka Office Imaging,* 2009 U.S. Dist. LEXIS 44752, at *42 (S.D.N.Y. May 19, 2009) (finding that discriminatory conduct had an impact in New York City where the majority of plaintiff's client accounts were located in New York City). Where the discriminatory conduct

occurs outside the geographical bounds of New York City, courts have found that the impact requirement is satisfied if the plaintiff alleges that the conduct has affected the terms and conditions of plaintiff's employment within the city. See, e.g., *Chin v. CH2M Hill Companies,* Ltd., 2012 WL 4473293, at *3 (S.D.N.Y. Sept. 28, 2012) (finding that defendants "failed to show that there is no possibility that there was an impact in New York," since the impact of defendants' alleged conduct may have been felt in New York City).

Defendants erroneously rely on factually distinguishable cases. For example, the First Department held in *Pakniat v. Moor,* 192 A.D.3d 596, 145 N.Y.S.3d 30 (1st Dept. 2021) that a plaintiff who lived and worked in Montreal failed to allege an impact felt in New York. The facts are very different here, as Ms. Desiderio worked in New York over the course of her multi-decade-long employment for a New York employer.[1]

Courts in this Circuit have recently held that remote work from an out of state residence cannot establish sufficient contacts with that state to trigger application of its employment law where, as here, it is undisputed that plaintiff was employed in New York by a New York employer. See, e.g., *Supino v. SUNY Downstate Med. Ctr.,* 2021 WL 4205181, at *13 (E.D.N.Y. Mar. 15, 2021) (declining to apply the New Jersey Law Against Discrimination to a New Jersey resident who worked from home for a New York employer, finding that 10 months of exclusive remote work was insignificant compared to her decade of employment in New York). Courts should "[look] to the state of

[1] Defendants' unsworn allegation at footnote 1 of Defendants' Memorandum of Law must be disregarded, as its claim is not contained within the pleadings. See *Friedl v. City of New York,* 210 F.3d 79, 83–84 (2d Cir. 2000) (holding that a district court errs when it relies on factual allegations contained in legal briefs or memoranda, in ruling on a 12(b)(6) motion to dismiss).

employment [to ensure] that the law in the jurisdiction with the strongest interest in the outcome of the litigation controls." *Id*. (citing *Shamley v. ITT Corp.,* 869 F.2d 167, 171–72 (2d Cir. 1989)). Defendants erroneously claim *Supino* is inapposite, however its holding relies on sound Second Circuit caselaw (reasoning "New York has an unusually strong interest in applying its own law to employment contracts involving work in New York State. Because workers who reside in several states work side by side in New York State, New York has a very practical reason for maintaining a uniform approach to employer/employee relations." *Shamley*, 869 F.2d at 172).

Defendants cite *Hoffman v. Parade Publs.,* 15 N.Y.3d 285 (2010) to spuriously claim that Plaintiff lacks sufficient contacts with New York to be covered by the New York State and City Human Rights Laws. *Hoffman* concerned an employee who both worked for his employer at their Georgia office and lived in Georgia but sued under New York law because the termination decision was made in New York City. *Hoffman* in fact supports liability here, where plaintiff worked in both New York City and State for a New York employer. The court explained the expansive protections of the City Human Rights Law: "the application of the impact requirement does not exclude all nonresidents from its protection; rather, it expands those protections to nonresidents who work in the city…." *Hoffman*, 15 N.Y.3d at 291. Similarly, "[t]he obvious intent of the State Human Rights Law is to protect "inhabitants" and persons "within" the state, meaning that those who work in New York fall within the class of persons who may bring discrimination claims in New York." See *id*.

Defendants cite *Shiber v. Centerview Partners LLC,* 202 WL 1173433, at *5 (S.D.N.Y. Apr. 20, 2022) (Ramos, J.) to claim plaintiff is excluded from coverage under

the NYCHRL and NYSHRL, but it is distinguishable because the plaintiff there never actually worked in New York, but rather exclusively worked remotely from her home in New Jersey. In contrast, Ms. Desiderio alleged that she supervised staff in New York, attended meetings in the city and state, and worked both from home in Florida and in her Long Island City office, in addition to alleging that the discriminatory acts emanated from New York. Dismissal of NYSHRL and NYCHRL claims would be at odds with these statutes' "expansive protections" and the detailed allegations in the complaint. *Hoffman, supra.* Plaintiff's only relevant contact with Florida is that it is her current residence. However, it is not the locus of any of her employment discrimination allegations. *Wolf v. Imus,* 170 A.D.3d 563, 96 N.Y.S.3d 54, 55 (1st Dept. 2019), is similarly inapposite, as there the plaintiff both lived and worked in Florida.

Plaintiff's allegation that she suffered gender-based harassment and discrimination at an in-person meeting in New York City within weeks before she took FMLA leave certainly meets the plausibility standard for her NYSHRL/NYCHRL claims. ECF 1 ¶ 19-21. Defendants admit in their summary of factual allegations that Ms. Desiderio alleged she attended meetings in both Pearl River, NY and Long Island City, New York; that she alleged Coleman "berated her" and "verbally abused her" at an in-person meeting in Long Island City; and that his harassment was "motivated by gender discrimination." ECF 1 ¶ 18-21. She also alleged male employees weren't berated for personnel management decisions, nor were they belittled. ECF 1 ¶ 21. Her allegations must be accepted as true for the purposes of this motion.

Defendants rely on *EEOC v. Bloomberg L.P.,* 967 F. Supp. 2d 816, 865 (S.D.N.Y. 2013) to claim plaintiff failed to prove sufficient contacts, however it is unavailing as it

was decided on summary judgment, a higher standard than mere plausibility at the motion to dismiss stage. *See id.* at 830. Furthermore, Ms. Desiderio has alleged more "impacts" in New York City and State than merely attending meetings.

Defendants erroneously claim that she failed to allege that she worked in New York City, wrongly claiming that she stated she attended two meetings in Pearl River. Plaintiff in fact alleged she attended one meeting in Pearl River (ECF 1 ¶ 18) and one meeting in Long Island City (ECF 1 ¶ 19). Plaintiff described these particular meetings due to the harassment and discriminatory conduct that ensued there. However, in the event that the Court finds these are not sufficient to show that she is protected by the New York City and State Human Rights Laws, she requests to amend her complaint to add allegations about the extensive business she conducted in New York City and State in her role as VP of Supply Chain Management at Hudson and the impact in New York on her, her customers, and staff as a result of her termination. Plaintiff clearly alleged that she was present in Long Island City when she suffered abuse and gender discrimination by Mr. Colemen and felt the impact of the discrimination in New York City. ECF 1 ¶ 18-19. Ms. Desiderio has alleged much more than just "occasional meetings in or travel to the city" in that she supervised NY staff and had physically worked for years in New York City for her New York employer, therefore dismissal of her NYSHRL and NYCHRL claims is not warranted. *Shiber*, supra at *3 (citing *Hoffman*, supra 933 N.E.2d at 748); see also *Pakniat*, *supra* at 597 ("plaintiff is correct that the State and City Human Rights Laws are meant to deter discriminatory behavior by New York employers, as well as to compensate the employees impacted by that behavior.")

Plaintiff alleged at ECF 1 ¶ 54 that "Hudson discriminated against plaintiff on account of her disability by terminating her because of her disability" in violation of the NYSHRL. She made a similar allegation under the NYCHRL at ECF 1 ¶60. "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, significantly diminished material responsibilities, or other indices ... unique to a particular situation." *Shultz v. Congregation Shearith Israel,* 867 F.3d 298, 304 (2d Cir. 2017). The Second Circuit has held that a close temporal connection between the protected activity and the adverse action may be sufficient to support an inference of a causal connection. *Espinal v. Goord,* 558 F.3d 119, 129 (2d Cir. 2009). Under the caselaw in this Circuit, Ms. Desiderio has adequately alleged a causal connection where she was terminated while on disability leave. ECF 1 ¶¶ 54, 60.

She also alleged gender discrimination at ECF 1 ¶ 57 in that "defendants discriminated against plaintiff on account of her gender by terminating her because she took disability leave, whereas they permitted a male employee to remain on disability leave for approximately one year." Drawing all inferences in favor of plaintiff, it's plausible that her adverse treatment was because of her gender, therefore dismissal is not warranted. See *Regan,* 2012 WL 692056, at *10 (denying motion to dismiss where plaintiff claimed management expected her to flirt with clients and prospective clients, while male employees were not asked to do so).

In the unlikely event the Court considers plaintiff's allegations insufficient, she requests leave to amend her complaint to add detailed allegations that she conducted business with customers throughout New York City and State, attended regular, frequent

meetings in New York City and State during the relevant time period, and maintained an office space in the Long Island City office during the pandemic. "Although the decision of whether to allow plaintiffs to amend their complaint is left to the sound discretion of the district court, there must be good reason to deny the motion." *Acito v. IMCERA Group, Inc.,* 47 F.3d 47, 55 (2d Cir. 1995); see also Fed. R. Civ. Proc. 15(a).

Conclusion

For the foregoing reasons, plaintiff has sufficiently and plausibly pled the allegations of plaintiff's First, Second, Third, Fourth, Fifth and Sixth Claims for relief and Defendants' arguments to dismiss them are meritless.

Dated: June 3, 2022
New York, NY

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STARYL DESIDERIO,

Plaintiff,

– against –

HUDSON TECHNOLOGIES, INC. and BRIAN COLEMAN,

Defendants.

OPINION & ORDER

22 Civ. 541 (ER)

RAMOS, D.J.:

Staryl Desiderio brings this action for damages against Hudson Technologies, Inc. ("Hudson") and Brian Coleman for violation of the Family and Medical Leave Act ("FMLA"), disability and gender discrimination in violation of the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL"), and breach of contract. Doc. 5. Desiderio filed her complaint on January 21, 2022, alleging seven claims for relief. *Id.* On May 12, 2022, Defendants filed a motion to dismiss Counts One through Six pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Doc. 20. Defendants do not move to dismiss Count Seven, the breach of contract claim. *Id.* For the reasons set forth below, Defendants' motion to dismiss is GRANTED with respect to Counts, Two, Three, and Five, and DENIED with respect to Counts One, Four, and Six.

I. BACKGROUND

The Court accepts the following allegations as true for the purposes of this motion. Desiderio is currently a resident of Florida. Doc. 5 ¶ 4. Hudson hired Desiderio on October 10, 2017 after it acquired Airgas Refrigerants, Inc., Desiderio's former employer. *Id.* ¶ 8. While employed by Hudson, Desiderio worked at its office in Long Island City, New York, and also

remotely during the COVID-19 pandemic. *Id.* ¶ 9. On March 24, 2021, Brian Coleman, President and CEO of Hudson, promoted Desiderio from Vice President of Purchasing to Vice President of Supply Chain Management, reporting to Coleman. *Id.* ¶¶ 7, 11.

On June 4, 2021, Nicole Hagan, Human Resources Manager for Hudson, called Desiderio to inform her that a customer service manager under Desiderio's supervision had allegedly made inappropriate remarks to a co-worker about "naked yoga." *Id.* ¶ 14. The manager of the employee who made the comments called Desiderio later that day, expressing her opinion that the employee should be fired. *Id.* ¶ 15. That same day, Desiderio requested that Hagan do a full investigation of the complaint against the employee. *Id.* ¶ 16. The following day, on June 5, 2021, Hagan informed Desiderio that Hudson's attorneys had advised that the company could fire the employee or take other corrective action at its discretion. *Id.* ¶ 17. During that conversation, Desiderio suggested that they meet in person to decide whether to fire the employee. *Id.* On June 8, 2021, Desiderio met with Hagan at Hudson's office in Pearl River, New York to discuss the investigation and how to proceed. *Id.* ¶ 18. During this meeting, Hagan informed Desiderio that the employee had already been terminated at some point between June 5 and June 8, 2021 at Coleman's instructions. *Id.*

The next day, on June 9, 2021, Coleman called Desiderio into a conference room in the Long Island City office to question her about why she did not immediately fire the employee. *Id.* ¶ 19. Desiderio explained that she had requested a full investigation, but Coleman accused her of keeping the employee "just to make [her] job easier," despite "knowing that he was a predator." *Id.* Additionally, Coleman allegedly stood over Desiderio, angrily yelled at her, sat down and pointed his finger in her face, said "I want you to think about what you've done," and demanded that she apologize to everyone involved. *Id.* ¶¶ 19–20. Desiderio alleges that Coleman's

treatment of her was motivated by gender discrimination, since he did not treat the male employees in a similar way for personnel decisions. *Id.* ¶ 21.

In the weeks that followed this meeting with Coleman, Desiderio began suffering from, and was diagnosed with, panic attacks, anxiety, depression, and insomnia. *Id.* ¶¶ 22–23. On July 18, 2021, Mike Desiderio, Desiderio's husband, emailed Coleman and Hagan that Desiderio required medical leave for her condition. *Id.* ¶ 24. Desiderio completed medical/disability forms and sent them to Anthem's Life and Disability Claims Service Center on July 22, 2021. *Id.* ¶ 25. Hagan acknowledged receipt of these forms the following day. *Id.* ¶ 26.

On August 11, 2021, Mr. Desiderio confirmed that Hudson had received the completed FMLA forms from his wife's doctor. *Id.* ¶ 27. Mr. Desiderio followed up with Hagan multiple times in September to see if additional medical documentation was necessary, though neither he nor Desiderio's doctor received any additional forms to complete. *Id.* ¶ 28. Hudson did not provide notice to Desiderio about whether her leave was approved or denied, or about an expiration date for FMLA leave. *Id.* ¶ 30.

During Desiderio's time off, Hudson paid her prorated sick days, vacation, personal days, and paid time off ("PTO"), but stopped paying once she exhausted her PTO on August 21, 2021. *Id.* ¶¶ 31–32. Nearly two months later, on October 12, 2021, Mr. Desiderio emailed Coleman to let him know that his wife had a medical "setback," and to inquire about whether Hudson would be interested in offering severance, though neither of the Desiderios ever communicated that Desiderio was resigning. *Id.* ¶ 33. On October 22, 2021, Coleman emailed Mr. Desiderio with a severance offer, and that same day Mr. Desiderio stated that Desiderio wished to exercise her stock options. *Id.* ¶¶ 35–36. On October 27, 2021, Coleman emailed Mr. Desiderio that, "[b]y failing to return to work upon expiration of her FMLA leave, [Desiderio] effectively resigned her

position at Hudson," and that her stock options were canceled due to the "voluntary termination." *Id.* ¶¶ 37–38. The period of time between Desiderio's email that she required medical leave—July 18, 2021—and her termination—October 27, 2021—was approximately three months.[1] *Id.* ¶¶ 24–26, 37. Desiderio states, upon information and belief, that a male, vice-president-level employee of Hudson was permitted by Defendants to remain on paid leave for approximately one year. *Id.* ¶ 39.

On January 21, 2022, Desiderio filed the instant complaint against Hudson and Coleman, alleging seven claims for relief. *Id.* at 1. Counts One and Two are against Hudson for violating the FMLA and for FMLA retaliation. *Id.* ¶¶ 45–52. Counts Three and Four are against both Defendants for discrimination based on gender and for discrimination based on disability under the NYSHRL. *Id.* ¶¶ 53–58. Similarly, Counts Five and Six are against both Defendants for discrimination based on gender and for discrimination based on disability under the NYCHRL. *Id.* ¶¶ 59–66. Count Seven, which is not at issue in this opinion, is against Hudson for breach of contract. *Id.* ¶¶ 67–71. On May 12, 2022, Defendants filed a motion to dismiss Counts One through Six pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Doc. 20.

II. LEGAL STANDARD

A. Rule 12(b)(6)

When ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014). The court is

[1] It is unclear from the complaint whether the FMLA leave period began on July 18 (the date Mr. Desiderio informed Hudson that Desiderio would be taking leave), July 22 (the date that she submitted the FMLA forms), July 23 (the date Hudson acknowledged receipt of the FMLA forms) or August 21, 2021 (the date Desiderio's PTO expired and Hudson stopped paying her any salary). Doc. 5 ¶¶ 24–26, 31–32, 37.

not required to credit "mere conclusory statements" or "threadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see also id.* at 681 (citing *Twombly*, 550 U.S. at 551). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). More specifically, the plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* If the plaintiff has not "nudged [his] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 680.

The question in a Rule 12 motion to dismiss "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 615 (S.D.N.Y. 2012) (quoting *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 278 (2d Cir. 1995)) (internal quotation marks omitted). "[T]he purpose of Federal Rule of Civil Procedure 12(b)(6) 'is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits,'" and without regard for the weight of the evidence that might be offered in support of the plaintiff's claims. *Halebian v. Berv*, 644 F.3d 122, 130 (2d Cir. 2011) (quoting *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006)).

III. DISCUSSION

A. FMLA Interference Claim

Count One of the complaint alleges that Hudson violated the FMLA by failing to provide Desiderio with required notices and by not offering to reinstate her upon completing her FMLA leave. Doc. 5 ¶¶ 45–49. To prove FMLA interference, a plaintiff must establish that the defendant "denied or otherwise interfered with a benefit to which she was entitled under the FMLA." *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 424 (2d Cir. 2016). The FMLA entitles eligible employees, like Desiderio, to take unpaid, job-protected leave in a defined 12-month period for specified family and medical reasons. 29 U.S.C. § 2612(a)(1). Interference includes "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." *Ejiogu v. Grand Manor Nursing and Rehab. Ctr.*, No. 15 Civ. 505 (DLC), 2017 WL 1184278, at *5 (S.D.N.Y. Mar. 29, 2017) (quoting *Potenza v. City of New York*, 365 F.3d 165, 167 (2d Cir. 2004)). Therefore, a plaintiff must show: (1) she is an eligible employee under the FMLA; (2) the defendant is an employer as defined by the FMLA; (3) she was entitled to take leave under the FMLA; (4) she gave notice to the defendant of her intention to take leave; and (5) she was denied benefits to which she was entitled under the FMLA. *Graziadio*, 817 F.3d at 424. Here, Defendants argue that the complaint fails to meet the fifth element because Desiderio does not purport to have been denied any of her rights under the FMLA. Doc. 21 at 6, 10.

An employer's failure to provide an employee with necessary information about its FMLA leave policies that affects the employee's ability exercise a substantive right provides a basis for an FMLA interference claim. *Fernandez v. Windmill Distrib. Co.*, 159 F. Supp. 3d 351, 363 (S.D.N.Y. 2016). The right to reinstatement, for example, is "a benefit at the crux of the FMLA's provisions." *Id.* However, "where the lack of notice [has] had no effect on the employee's exercise of or attempt to exercise any substantive right conferred by the Act," no

denial has occurred. *Sarno v. Douglas Elliman–Gibbons & Ives, Inc.*, 183 F.3d 155, 161–62 (2d Cir. 1999); *see also Ragsdale v. Wolverine World Wide, Inc*, 535 U.S. 81, 91 (2002) ("The purpose of the [FMLA interference] cause of action is to permit a court to inquire into matters such as whether the employee would have exercised his or her FMLA rights in the absence of the employer's actions."). In *Sarno*, the Second Circuit found that an employer's failure to provide an employee notice that he had exhausted his leave did *not* impede the employee's right to reinstatement because he was unable to return to work at the time his leave ran out. *Sarno*, 183 F.3d at 161–62 ("[The plaintiff-employee's] right to reinstatement could not have been impeded or affected by the lack of notice because his leave was caused by a serious health condition that made him unable to perform the functions of his position, and it is undisputed that that inability continued for some two months after the end of his 12-week FMLA period.") (internal quotation marks and citations omitted). However, "where an employee uses leave which might be counted as vacation time, FMLA leave, or both, an employer's failure to provide notice that the leave counts against the FMLA allotment might interfere with the employee's ability to plan and use future FMLA leave to, for example, schedule elective surgery[.]" *Fernandez*, 159 F. at 363 (internal quotation marks and citation omitted).

Here, the complaint alleges that Hudson paid Desiderio her prorated sick days, vacation days, personal days, and PTO between approximately July 18, 2021—when Mr. Desiderio informed Hudson that his wife was unable to work—and August 21, 2021. *See* Doc. 5 ¶¶ 24–6, 31–32. On August 21, 2021, Hudson stopped paying Desiderio any salary because she had exhausted her PTO. *Id.* ¶ 31. At that point, Desiderio's employment nonetheless *continued*. She did not resign, and Hudson did not yet terminate her. *Id.* ¶ 34. Approximately seven weeks later, on October 12, 2021, Mr. Desiderio informed Mr. Coleman by email that his wife had a

"set back," with her medical condition and asked whether Hudson would offer her severance. *Id.* ¶ 33. On October 22, 2021, Coleman made an offer of severance in an email to Mr. Desiderio. That same day, Mr. Desiderio responded that his wife wished to exercise her stock options. *Id.* ¶¶ 35–36. On October 27, 2021—approximately nine-and-a-half weeks from the date Desiderio depleted her PTO—Hudson advised Desiderio in an email to Mr. Desiderio that her FMLA leave had expired and that, by consequence, she had voluntarily terminated her employment and could not exercise her stock options. *Id.* ¶¶ 37–38.

Defendants argue that like in *Sarno*, Hudson's failure to provide notice did not substantively affect Desiderio's right to FMLA leave, since Desiderio was unable to return to work after her 12 weeks of FMLA had expired. The Court disagrees for the following reasons. First, had Hudson provided Desiderio notice of when it intended to commence her 12-week FMLA leave period, Desiderio may have been able to structure her FMLA leave so that it did not run concurrently with her PTO. *See Fernandez*, 159 F. at 363. The complaint alleges that Hudson paid Desiderio until August 21, 2021, at which time she had exhausted her vacation days, personal days, sick days, and other PTO. The 12-weeks of FMLA leave is *unpaid.* Accepting the complaint as true, to justify terminating Desiderio on October 22, 2021, Hudson must have started Desiderio's FMLA leave at least 12 weeks prior. Twelve weeks prior to October 22, 2021 is July 30, 2021. On that date, Desiderio was *also* using her PTO. Had notice been provided, Desiderio could have avoided this overlap and initiated her FMLA period on August 21, 2021, the date her PTO expired. Desiderio could have thereby extended her time off until mid-November 2021. Construing the complaint in the light most favorable to Desiderio, it is not necessarily true that she would not have been able to return to work in mid-November, more than a month after the October 12, 2021 email from Mr. Desiderio to Coleman, describing

his wife's medical setback. Accordingly, the Court finds that Desiderio has adequately pleaded a claim for FLSA interference.

B. FMLA Retaliation Claim

Count Two alleges that Hudson terminated Desiderio's employment in retaliation for her requesting FMLA leave. Doc. 5 ¶¶ 50–52. To state a claim for FMLA retaliation, Desiderio must allege that: (1) she exercised rights protected under the FMLA; (2) she was qualified for her position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent. *See Potenza v. City of New York*, 365 F.3d 165, 168 (2d Cir. 2004). Defendants argue that Desiderio's FMLA retaliation claim is based entirely on conclusory allegations and lacks the required inference of retaliatory intent. Doc. 21 at 14–15.

Retaliatory intent may be shown through a variety of means. *See, e.g.*, *DeCintio v. Westchester Cnty. Med. Ctr.*, 821 F.2d 111, 115 (2d Cir. 1987). When alleged retaliation occurs in close temporal proximity to an employee's exercising of federally protected employment rights, courts have inferred a retaliatory intent in satisfaction of that pleading requirement. *See Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 552 (2d Cir. 2010). To state a claim for retaliation under the FMLA, a plaintiff need only plead facts sufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Here, Desiderio does not plausibly allege that Defendants terminated her in retaliation for exercising her FMLA leave because Hudson did not inform her of her "voluntary termination" until *after* the date that Hudson believed that she had exhausted her leave. If an employee has not returned to work at the end of the FMLA leave, "the employer can replace the employee, as

long as the employer is not doing so to punish the employee for exercising her FMLA rights." *Reilly v. Revlon, Inc.*, 620 F. Supp. 2d 524, 534 (S.D.N.Y. 2009). Additionally, the duration of time between her exercising her FMLA leave and her termination was not particularly short, at approximately three months. "In the absence of any further evidence suggesting retaliation, months of separation between protected activity and alleged retaliation cannot be considered very close." *Miller v. McHugh*, 814 F. Supp. 2d 299, 321 (S.D.N.Y. 2011) (finding temporal proximity of five months insufficient to establish a causal connection); *see also Harrisman v. City of New York Dep't of Transporation*, No. 19 Civ. 2986 (JMF), 2020 WL 5211043, at *5 (S.D.N.Y. Sept. 1, 2020) (same for a period of three to four months). Other than Desiderio's claim that the temporal proximity between the FMLA leave and the termination demonstrates retaliatory intent, the retaliation allegations in the complaint are conclusory. Thus, the facts surrounding Desiderio's termination do not give rise to an inference of retaliatory intent, and as such, the FMLA retaliation claim is dismissed.

C. State Law Discrimination Claims

Count Three alleges that Defendants terminated her employment because of her disability, in violation of the NYSHRL. Doc. 5 ¶¶ 53–55. Count Four alleges that Defendants violated the NYSHRL by discriminating against her on account of her gender. *Id.* ¶¶ 56–58. Similarly, Counts Five and Six allege disability and gender discrimination, respectively, by Defendants in violation of the NYCHRL.[2] *Id.* ¶¶ 59–66. In support of Counts Four and Six for gender discrimination, Desiderio primarily points to the contrast in how Defendants permitted a male employee to remain on disability leave for approximately one year, while she was

[2] The complaint specifically alleges discrimination by Hudson, and not by Coleman, for Counts Three and Five. However, the headers for Counts Three and Five state that the claims are against "all Defendants." Thus, the Court interprets these claims as being brought against both Defendants. Doc. 5 ¶¶ 53–55, 59–62.

permitted to take leave for 12 weeks. *Id.* ¶¶ 57, 64. As part of both Counts Five and Six, Desiderio also claims that Coleman participated in gender discrimination, had the power to make personnel decisions, and aided and abetted the discrimination in violation of the NYCHRL. *Id.* ¶¶ 61, 65.

Defendants assert that Desiderio cannot state claims pursuant to either the NYSHRL or NYCHRL because the complaint alleges that at the time of her allegedly unlawful termination, Desiderio was living and working remotely in Florida. Doc. 21 at 6, 15–19. Defendants also argue that the complaint does not allege facts allowing for the conclusion that Desiderio was subjected to an adverse employment action on account of her gender or disability. *Id.*

Non-residents who work in New York City may state claims pursuant to the NYSHRL and the NYCHRL. *See Hoffman v. Parade Publications*, 933 N.E.2d 744, 746–47 (N.Y. 2010); *E.E.O.C. v. Bloomberg L.P.*, 967 F. Supp. 2d 816, 865 (S.D.N.Y. 2013). To state a claim under either the NYSHRL or NYCHRL, a non-resident plaintiff must allege that the impact of the discriminatory conduct was felt in New York or New York City, respectively. *See Shiber v. Centerview Partners LLC*, 21 Civ. 3649 (ER), 2022 WL 1193433, at *4 (S.D.N.Y. Apr. 20, 2022). It matters not where the conduct originated. *Id.* at *4 (citing *Vangas v. Montefiore Med. Ctr.*, 823 F.3d 174, 183 (2d Cir. 2016)). This requirement applies even to employees working remotely, out-of-state for a New York employer; the fact that an allegedly unlawful decision terminating a plaintiff's employment occurred in New York is insufficient to plead impact in New York. *See Pakniat v. Moor*, 145 N.Y.S.3d 30, 31 (N.Y. App. Div. 2021).

Desiderio alleges that she, like other Hudson employees, worked remotely during the COVID-19 pandemic, but describes two meetings that took place in New York State, with one being in New York City. Doc. 5 ¶¶ 18–19. Those meetings include the June 8, 2021 meeting in

Pearl River, and the June 9, 2021 meeting in Long Island City, which is in New York City. *Id.* As detailed in the complaint, Desiderio does not allege any discriminatory treatment by Hagan in Pearl River, and thus that meeting is not relevant to Desiderio's claims of discrimination. Regarding the Long Island City meeting, Desiderio alleges harsh treatment at the hands of Coleman, which she describes as motivated by gender discrimination. *Id.* ¶ 21. That is, she alleges Coleman stood over her, angrily and condescendingly berated her, and demanded that she apologize to other employees. *Id.* ¶ 19–20. The complaint also alleges that Desiderio suffered from medical conditions in the weeks following the meeting. *Id.* ¶ 22.

Defendants argue that the impact of the alleged discriminatory conduct did not occur in New York because her panic attacks, anxiety, depression, and insomnia did not begin until after she returned to Florida.[3] *Id.* ¶¶ 22–23. In support of that argument, Defendants cite the proposition set forth in *Meilus v. Restaurant Opportunities Center United, Inc.*, that "impact is not measured by where the discriminatory acts took place." No. 21 Civ. 2554 (CM), 2021 WL 4868557, at *11 (S.D.N.Y. Oct. 15, 2021). The facts of that case, however, are not analogous.

There, an out-of-state employee brought a race-based discrimination claim against her New York-headquartered employer pursuant to the NYSHRL. *Id.* at *9. In support of her claims, the plaintiff alleged that she attended events in New York at which discriminatory acts occurred. *Id.* at *11. In reviewing the defendant-employer's motion to dismiss, the *Meilus* court explained that the issue in evaluating whether or not to dismiss the claims was not whether they stemmed from New York-based discriminatory conduct, but whether the impact of the contested employment action was felt by plaintiff in New York. *Id.* at *10 (citing *Vangas v. Montefiore*

[3] The complaint does not plead when Desiderio returned to Florida. However, the opposition to Defendants' motion to dismiss does not resist Defendants' suggestion that Desiderio experienced medical issues resulting from the meeting in Florida.

Med. Ctr., 823 F.3d 174, 183 (2d Cir. 2016)). The court concluded that the complaint did "not make clear whether any of the incidents on which [she] base[d] her claims took place while she was in New York," and therefore dismissed the action. *Id.* at *11. The court, however, made clear that other courts have found that to the degree incidents of harassment or retaliation occur while a plaintiff is in New York City and among those who work in the city, there is no reason those claims cannot proceed. *Id.* (citing *Kraiem v. JonesTrading Institutional Services LLC*, 492 F. Supp. 3d 184, 200 (S.D.N.Y. 2020)); *see also Hoffman v. Parade Publications*, 933 N.E.2d 744, 747 (N.Y. 2010).[4]

Unlike *Meilus* and *Shiber*, here, Desiderio alleges that she *did* attend a meeting at her employer's New York City office at which she experienced gender-based discriminatory treatment. Doc. 5 ¶¶ 19–21. "[C]ourts have consistently emphasized that the location of the impact of the offensive conduct is the location where the plaintiff feels the impact of a violation of the NYCHRL on his or her employment." *Anderson v. HotelsAB, LLC*, No. 15 Civ. 712 (LTS) (JLC), 2015 WL 5008771, at *3 (S.D.N.Y. Aug. 24, 2015) (further noting that impact analysis under these statutes calls for a "practical substantive consideration of how and where the injury actually affected the plaintiff with respect to her employment."). The Long Island City meeting is sufficient for NYCHRL and NYSHRL purposes because it is not simply the location where the discriminatory act took place, but also where Desiderio alleges that she felt the impact of the discriminatory conduct. Accordingly, Defendants' motion to dismiss Counts Four and Six is denied.

[4] Defendants also rely on *Shiber v. Centerview Partners LLC*, No. 21 Civ. 3649 (ER), 2022 WL 1173433 (S.D.N.Y. Apr. 20, 2022. But there, the plaintiff-employee could not have experienced any impact in New York, since she "she never stepped foot inside [her employer's] New York City office and instead worked exclusively from her home in New Jersey." *Id.* at *2.

However, the complaint does not allege facts supporting a disability discrimination claim under the NYCHRL or the NYSHRL, as Desiderio does not allege that she ever felt the impact of disability discrimination in New York. Indeed, there is no support for the claim that Desiderio was discriminated against on account of her disability at either of the New York meetings, as those meetings took place before Desiderio's medical conditions began. *Id.* ¶¶ 18–19, 22–23. Accordingly, Counts Three and Five are dismissed.

IV. LEAVE TO AMEND

To the extent that this Court considers Desiderio's allegations to be insufficient to support her claims, Desiderio requests leave to amend her complaint. Doc. 22 at 11, 20. As a general rule, leave to amend a complaint should be freely granted. *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002). District courts have broad discretion in deciding whether to grant leave to amend. *Pasternack v. Laboratory Corp. of Am.*, 892 F. Supp. 2d 540, 548–49 (S.D.N.Y. 2012). A court should allow leave to amend a pleading unless the non-moving party can establish prejudice or bad faith. *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 725 (2d Cir. 2010).

Denying leave to amend is proper where the amendment would be futile, would result in undue prejudice to the opposing party, or would be made in bad faith. *Holmes v. Grubman*, 568 F.3d 329, 334–35 (2d Cir. 2009). An amendment is considered futile where the plaintiff is unable to demonstrate that she would be able to cure the defects in a manner that would survive a motion to dismiss. *Hayden v. County of Nassau*, 180 F.3d 42, 53–54 (2d Cir. 1999). Given that this would be Desiderio's first time amending the complaint, and the possibility that this leave would allow Desiderio to assert additional facts to fully state her claims, the Court cannot conclude that amendment would be futile. Therefore, Counts Two, Three, and Five will be

Extraterritoriality and the NYS Human Rights Law/NYC Human Rights Law
Molly Smithsimon, Book Law LLP

Hoffman v. Parade Publications, 15 N.Y.3d 285, 933 N.E.2d 744 (2010)

The Court of Appeals answered certified questions and held that, in order to assert claims under NYSHRL and NYCHRL, plaintiff was required to plead and prove that alleged discriminatory conduct had an impact within New York State and New York City.

Regan v. Benchmark Co. LLC, 2012 WL 692056, at *13–14 (S.D.N.Y. Mar. 1, 2012)

Judge McMahon denied motion to dismiss Regan's NYCHRL claims where plaintiff both lived and worked in New Jersey, finding that Regan's claims under the NYCHRL included both discriminatory treatment and retaliation which occurred in and had an impact in New York City. Plaintiff's transfer from the NYC to the Jersey City office was the culmination of a series of alleged discriminatory acts that took place at Benchmark's New York City office while Regan worked there. Even after Regan was transferred to Benchmark's Jersey City office, she remained affiliated with the New York City office, continuing to service New York City-based clientele and remaining under the management and supervision of Benchmark's New York City office. Although Regan was physically working out of Jersey City, all other aspects of her employment connected her to Benchmark's New York City office. As a result, the alleged discriminatory conduct both occurred in New York City and had an impact in New York City.

Robles v. Cox & Co., 841 F. Supp. 2d 615, 623–24 (E.D.N.Y. 2012)

Judge Spatt dismissed plaintiff's claims, extending Hoffman's rationale to NYC residents. Plaintiff was transferred from the NYC plant to the NJ office as part of a series of continuing violations but resided in NYC at all times. The court found that an employee's residence is "irrelevant to the impact analysis," which "confines the protection of the NYCHRL to … those who work in the city" (citing *Hoffman*, 933 N.E.2d at 747). The court explained that the impact of discriminatory conduct occurs "within New York City for purposes of the NYCHRL 'either when the initial discriminatory act (for example, a termination) occurs in New York [City] or when the original experience of injury, which occurs at the employee's workplace, is in New York [City].'" The court then disregarded whether the termination decision was made in NYC, and held that the impact was felt in NJ because that was plaintiff's place of employment.

Hardwick v. Auriemma, 983 N.Y.S.2d 509, 512 (N.Y. App. Div. 1st Dep't 2014)

The First Department upheld dismissal of claims against non-NY residents, holding that plaintiff failed to show defendant's actions in diminishing her responsibilities while in London had an impact in New York, even though plaintiff alleged the decision to reduce her responsibilities was made in New York City. Plaintiff expected to provide security to the Women's National Basketball team at the 2012 London Olympics but Auriemma, motivated by her rejection of his sexual advances, limited her access and involvement. The Court held that the "State and City Human Rights Laws do not apply to acts of discrimination against New York residents committed outside their respective boundaries by foreign defendants" (citations omitted).

Vangas v. Montefiore Med. Ctr., 823 F.3d 174, 182-183 (2d Cir. 2016)

The Second Circuit examined Hoffman and reiterated that "[u]nder the NYCHRL the impact of the employment action must be felt by the plaintiff in NYC." 823 F.3d at 183. Accordingly, the Court held that a plaintiff who worked at a call center outside NYC whose only contacts with the city were telephone conversations with people in NYC did not meet the impact test. Although the plaintiff was terminated by a New York City-based company, the Second Circuit dismissed her NYCHRL claims, where she "worked in Yonkers, was supervised in Yonkers, was terminated in Yonkers, and d[id] not allege that she ever went to NYC for work." The Court claimed, "to hold otherwise ... would broaden the statute impermissibly beyond those 'who work in the city.'"

Pakniat v Moor, 145 N.Y.S. 3d 30, 31 (N.Y. App. Div. 2021)

The First Department rejected the argument that the pandemic changed the legal landscape for the "impact requirement" and applied the impact test to "ensure that the NYCHRL and NYSHRL are targeted to protect individuals who live or work in New York City and State." The Court held that the plaintiff failed to state claims under the NYCHRL and NYRHL where she was "living and working in Montreal, Canada, at the time of the alleged discriminatory conduct and she failed to allege that the conduct had any impact in either New York State or New York City").

Shiber v. Centerview Partners LLC, 2022 WL 1193433, at *4 (S.D.N.Y. Apr. 20, 2022)

Judge Ramos dismissed plaintiff's NYSHRL and NYCHRL claims holding that she failed to meet the impact test and noting that the City and State had not amended the human rights laws to nullify the impact requirement during the pandemic. Plaintiff worked remotely from home in NJ, never going to her employer's NY office. She requested a reasonable accommodation of her anxiety and mood disorder, specifically that she be allowed to log off her computer at a given hour to allow for uninterrupted sleep, for example after working from 8:00 a.m. to 1:00 a.m. for two or three consecutive days, yet she was terminated from her analyst position at the investment firm a month later on the basis that she could not perform the "essential functions" of her job, which required many 120-hour work weeks.

Desiderio v. Hudson Techs., Inc., 2023 WL 185497, at *5 (S.D.N.Y. Jan. 13, 2023)

Judge Ramos sustained plaintiff's NYSHRL and NYCHRL gender discrimination claims and denied motion to dismiss where plaintiff worked remotely in Florida but alleged that she felt the impact of the gender discrimination at meetings she attended in LIC and Pearl River. However, the court dismissed disability discrimination claims because plaintiff failed to allege she experienced panic attacks or other symptoms in NYC or State.

Failure to Hire Cases

Anderson v. HotelsAB, LLC, 2015 WL 5008771, at *3 (S.D.N.Y. 2015)

Held: Plaintiff stated a claim where although she "never worked in New York City ... the job for which she alleges she was not hired in violation of the NYCHRL and NYSHRL would have offered her employment within New York City."

"Defendants argue that, because the job for which Plaintiff was rejected would not have required her to shift the locus of her employment to New York City until several months after she commenced work on Long Island, Plaintiff's claim of an impact in New York City is overly speculative. While it is true that Plaintiff could have resigned or been fired before the time set for transition to New York City, Defendants' argument would cabin unduly the remedial purposes of the NYCHRL, which was amended in 2005 to broaden its protections "because the provisions of the City HRL had been 'construed too narrowly to ensure protection of the civil rights of all persons covered by the law.' "Williams v. New York City Hous. Auth., 61 A.D.3d 62, 66 (1st Dep't 2009) (quoting Local Law No. 85 [2005] of City of New York § 1). See also St. Jean v. United Parcel Serv. Gen. Serv. Co., 509 F. App'x 90, 90–91 (2d Cir. 2013) (summary order) ("'[I]t is beyond dispute that the City HRL now explicitly requires an independent liberal construction analysis in all circumstances, an analysis that must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's uniquely broad and remedial purposes, which go beyond those of counterpart state or federal civil rights laws.'") (quoting Bennett v. Health Mgmt. Sys., Inc., 92 A.D.3d 29, 34 (1st Dep't 2011)). Defendants' interpretation of the NYCHRL would deny protection against hiring discrimination to anyone who did not actually cross the employer's threshold in New York. Such a reading is inconsistent with the letter and spirit of the law, and the Court rejects it. According to the Complaint, Plaintiff interviewed for, and was denied, a position that included duties in a New York City workplace. Her rejection from the position denied her the opportunity to work in New York City, thus providing the necessary New York City workplace nexus for her claim of a NYCHRL-covered injury. The Court thus finds Plaintiff's allegations sufficient to satisfy the impact requirement of the NYCHRL and that she has successfully stated a claim under the statute." *Anderson,* 2015 WL 5008771, at *4.

Chau v. Donovan , 357 F. Supp. 3d 276, 283–84 (S.D.N.Y. 2019), (relying on *Anderson* to hold that plaintiff stated a claim where "[a]lthough Chau never worked in New York City ... the job for which she alleges she was not hired in violation of the NYCHRL and NYSHRL would have offered her employment within New York City").

Scalercio-Isenberg v. Morgan Stanley Services Group, Inc., 2019 WL 6916099, *4 (S.D.N.Y. Dec. 19, 2019) (relying on *Anderson* and *Chau* to hold that "when non-resident plaintiffs allege that that they were not hired for a job in New York City on a discriminatory basis, the impact requirement for both the NYSHRL and NYCHRL is met").

Syeed v. Bloomberg, L.P., 568 F. Supp. 3d 314, 321 (S.D.N.Y. 2021)

Judge Woods declined to follow these three cases, instead finding that impact test wasn't met where plaintiff was not yet a NY resident due to failure to hire.

Syeed v. Bloomberg, L.P., 22-1251

Second Circuit certified question to NY State Court of Appeals: Whether a non-resident plaintiff not yet employed in NYC or state satisfies the impact requirement if the plaintiff pleads and later proves that an employer deprived the plaintiff of a New York City- or State-based job opportunity on discriminatory grounds.

dismissed without prejudice. The Court directs Desiderio to submit an amended complaint, if at all, by no later than February 3, 2023.

V. CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss is GRANTED with respect to Counts Two, Three, and Five, and DENIED with respect to Counts One, Four, and Six. Desiderio must file her amended complaint, if at all, by February 3, 2023. The Clerk of Court is respectfully directed to terminate the motion, Doc. 20.

SO ORDERED.

Dated: January 13, 2023
New York, New York

Edgardo Ramos, U.S.D.J.

Question to the NYS Court of Appeals on the impact requirement of the NYCHRL and the NYSHRL application to a non-resident plaintiff

§ 8-101 Policy.

Policy. In the city of New York, with its great cosmopolitan population, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on [protected-class status]. The council hereby finds and declares that prejudice, intolerance, bigotry, and discrimination, bias-related violence or harassment and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state. A city agency is hereby created with power to eliminate and prevent discrimination from playing any role in actions relating to employment, public accommodations, and housing and other real estate, and to take other actions against prejudice, intolerance, bigotry, discrimination and bias-related violence or harassment as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

§ 8-107.

1. Employment. It shall be an unlawful discriminatory practice:

(a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or immigration or citizenship status of any person:

(1) To represent that any employment or position is not available when in fact it is available;

(2) To refuse to hire or employ or to bar or to discharge from employment such person; or

(3) To discriminate against such person in compensation or in terms, conditions or privileges of employment.

. . .

(e) The provisions of this subdivision and subdivision 2 of this section: (i) as they apply to employee benefit plans, shall not be construed to preclude an employer from observing the provisions of any plan covered by the federal employment retirement income security act of 1974 that is in compliance with applicable federal discrimination laws where the application of the provisions of such subdivisions to such plan would be preempted by such act; (ii) shall not preclude the varying of insurance coverages according to an employee's age; (iii) shall not be construed to affect any retirement policy or system that is permitted pursuant to paragraphs (e) and (f) of subdivision 3-a of section 296 of the executive law; (iv) shall not be construed to affect the retirement policy or system of an employer where such policy or system is not a subterfuge to evade the purposes of this chapter.

(f) The provisions of this subdivision do not govern the employment by an employer of the employer's parents, spouse, domestic partner, or children; provided, however, that such family members shall be counted as persons employed by an employer for the purposes of the definition of employer set forth in section 8-102.

§ 8-130. Construction.

a. The provisions of this title 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 laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.

b. Exceptions to and exemptions from the provisions of this title shall be construed narrowly in order to maximize deterrence of discriminatory conduct.

c. Cases that have correctly understood and analyzed the liberal construction requirement of subdivision a of this section and that have developed legal doctrines accordingly that reflect the broad and remedial purposes of this title include Albunio v. City of New York, 16 N.Y.3d 472 (2011), Bennett v. Health Management Systems, Inc., 92 A.D.3d 29 (1st Dep't 2011), and the majority opinion in Williams v. New York City Housing Authority, 61 A.D.3d 62 (1st Dep't 2009).

65 A.D.3d 48, 878 N.Y.S.2d 320, 106 Fair Empl.Prac.Cas. (BNA) 561, 157 Lab.Cas. P 60,806, 2009 N.Y. Slip Op. 03678

**1 Howard Hoffman, Appellant

v

Parade Publications et al., Respondents.

Supreme Court, Appellate Division,
First Department, New York
115851/07, 48
May 7, 2009

CITE TITLE AS: Hoffman v Parade Publs.

SUMMARY

Appeal from an order of the Supreme Court, New York County (Martin Shulman, J.; *see* 2008 NY Slip Op 31892[U]), entered July 7, 2008. The order granted defendants' motion to dismiss the complaint.

HEADNOTE

Civil Rights
Discrimination in Employment
Subject Matter Jurisdiction—"Impact" Rule

Supreme Court had subject matter jurisdiction over claims of discrimination under the New York State Human Rights Law (NYSHRL) (Executive Law § 290 *et seq.*) and the New York City Human Rights Law (NYCHRL) (Administrative Code of City of NY § 8-101 *et seq.*) arising from the termination of plaintiff's employment where the decision to terminate was made in this state and the call to plaintiff was made from this state, but plaintiff worked out of an office located in another state, resided in another state and received the call communicating his termination while in another state. Notwithstanding that Supreme Court held that it lacked subject matter jurisdiction over plaintiff's claims under the NYCHRL and NYSHRL because the impact of defendants' alleged misconduct was not felt inside either New York City or New York State, the so-called "impact" rule should not be applied so broadly as to preclude a discrimination action where the allegations support the assertion that the act of discrimination, the discriminatory decision, was made in this state. A nonresident is not precluded from interposing claims under the NYSHRL and NYCHRL when the New York employer is alleged to have made its employment decisions in a discriminatory manner in this state.

RESEARCH REFERENCES

Am Jur 2d, Job Discrimination § 160.

Carmody-Wait 2d, Courts and Their Jurisdiction § 2:72; Carmody-Wait 2d, Pretrial Motions to Dismiss § 38:60.

McKinney's, CPLR 3211; Executive Law § 296 (1) (a).

NY Jur 2d, Civil Rights §§ 8, 9, 11, 12, 28, 74, 75.

ANNOTATION REFERENCE

See ALR Index under Age Discrimination; Civil Rights and Discrimination; Jurisdiction.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

*49 Query: age /2 discrimination & employ! & jurisdiction & impact

APPEARANCES OF COUNSEL

Cohen, Weiss & Simon LLP, New York City (*James L. Linsey, Robin H. Gise* and *Oriana Vigliotti* of counsel), for appellant. *Proskauer Rose LLP*, New York City (*Elise M. Bloom* and *Alychia L. Buchan* of counsel), for respondents.

OPINION OF THE COURT

Saxe, J.

This appeal raises the issue of New York courts' subject matter jurisdiction over claims of discrimination under the New York State Human Rights Law (NYSHRL) (Executive Law § 290 *et seq.*) and the New York City Human Rights Law (NYCHRL) (Administrative Code of City of NY § 8-101 *et seq.*) arising from the termination of plaintiff's employment where the decision to terminate was made in this state, and the call to the employee was made from this **2 state, but the employee worked out of an office located in another state,

resided in another state, and received the call communicating his termination while in another state.

According to the complaint, plaintiff was employed by defendants from 1992 until his termination on January 1, 2008, at which time he was 62 years old. From the beginning of the employment, except for the period of July 2001 to September 2002, when he worked in New York, plaintiff was almost exclusively based in defendants' Atlanta, Georgia office. In September 2002, plaintiff was promoted to managing director for the newspaper relations group, a position he held until his termination. His responsibilities consisted of developing newspaper accounts for defendants' Parade magazine in 12 states located in the South and West.

Plaintiff describes his responsibilities as that of a "traveling salesmen" who had "frequent in-person meetings in New York City." While defendants maintain that he operated from the Atlanta office, plaintiff characterizes the Atlanta office as a "mail-drop office" and denies that he could be characterized as an Atlanta employee. It appears from the allegations that plaintiff reported to, and occasionally traveled to meet with, Parade's management in New York.

On October 2, 2007, while in Atlanta, plaintiff received a telephone call from Randy Siegel, president and publisher of Parade ***50** in New York, informing him that defendants had decided to close the Atlanta office and terminate both plaintiff's and his assistant's employment. On October 12, 2007, plaintiff went to New York to meet with Siegel to discuss the termination and to suggest an alternative to discharge. On October 16, 2007, Siegel telephoned plaintiff, then in West Virginia on business, and told him that his alternative plan had been rejected and that the Atlanta office would be closed on January 1, 2008, at which time plaintiff's employment would end.

Plaintiff commenced this age discrimination action under the NYSHRL and the NYCHRL, alleging that he was the oldest employee in the newspaper relations group and the only one who was terminated, that the economic rationale given for his termination was pretextual, and that he had indisputably been an exemplary employee. Plaintiff also alleges that his former responsibilities were transferred to an employee in defendants' New York office who, at the age of 56, was "considerably younger" than plaintiff.

Defendants moved to dismiss the complaint under CPLR 3211 (a) (2) for lack of subject matter jurisdiction and under CPLR 3211 (a) (7) for failure to state a cause of action. The motion court agreed that it lacked subject matter jurisdiction over plaintiff's claims under the NYCHRL and NYSHRL, holding as a matter of law that the impact of defendants' alleged misconduct was not felt inside either New York City or New York State, as required by *Shah v Wilco Sys., Inc.* (27 AD3d 169 [2005], *lv dismissed in part, denied in part* 7 NY3d 859 [2006]).

We conclude that the complaint should not have been dismissed on a CPLR 3211 motion. The so-called "impact" rule as expressed in *Shah* should not be applied so broadly as to preclude a discrimination action *where the allegations support the assertion that the act of discrimination, the discriminatory decision, was made in this state and city*.

The New York State and New York City Human Rights Laws were enacted to combat discrimination within this state and city respectively (*see* Executive Law § 296 [1] [a] [NYSHRL]; Administrative Code of City of NY § 8-107 [1] [a] [NYCHRL]). The issue of subject matter ****3** jurisdiction arises where the alleged discrimination occurs in more than one state.

The assertion of this Court in *Shah*, that the NYCHRL is "limited to acts occurring within the boundaries of New York City" (27 AD3d at 175), remains true in its essence, but does not resolve the question of subject matter jurisdiction in the ***51** case of acts occurring in this as well as other jurisdictions. To add a complication to the issue, I note that the NYSHRL by its terms may be applied to acts committed outside New York State if committed against a New York State resident (*see* Executive Law § 298-a [1])—although this provision is inapplicable in this instance, since plaintiff is a nonresident.

The issue here is how we define the concept of "acts occurring within . . . New York." Under what, if any, circumstances may a nonresident be entitled to the coverage of the NYSHRL?

"When a non-resident seeks to invoke the coverage of the New York City and State human rights laws, he or she must show that the alleged discrimination occurred within New York City and New York State respectively" (*Rylott-Rooney v Alitalia-Linee Aeree Italiane-Societa Per Azioni*, 549 F Supp 2d 549, 551 [SD NY 2008]). Application of logic and common sense alone would dictate that if an employer located in New York made discriminatory hiring or firing decisions, those decisions would be properly viewed as discriminatory

acts occurring within the boundaries of New York. In fact, early case law from this Court supports that view.

The first such case involved a 1971 claim of sex discrimination brought before the New York City Commission on Human Rights (*see Matter of Walston & Co. v New York City Commn. on Human Rights*, 41 AD2d 238 [1973]). In *Walston*, an Illinois resident applied to the Gary, Indiana office of a securities trading firm to open a commodity futures account for her, and was initially told that the firm did not handle commodity accounts for women. When she expressed her displeasure, the manager of the Gary office sought approval for opening the account from the vice-president in charge of commodity accounts, who was located in Chicago. The Gary office then sent her three forms to complete; one of the three was a "woman's commodity account form," a form that male applicants were not required to sign. The customer signed and returned the other two forms to the firm's New York City office but refused to sign the woman's commodity account form. When she called the New York City office the following month to inquire, she was informed that her application was refused because of her failure to sign that form.

After the customer filed a complaint with the New York City Commission on Human Rights, the firm challenged the Commission's jurisdiction; the Commission rejected the challenge and ordered a hearing. Supreme Court granted the firm's CPLR article 78 petition challenging the Commission's assertion of jurisdiction ***52** through its holding a hearing. This Court reversed and dismissed the firm's petition, observing that the issue of jurisdiction was one of fact, because there was a factual dispute about the location from which the denial of the application emanated, and the record was "too incomplete to make an informed determination" as to "whether the allegedly discriminatory acts occurred in New York or elsewhere" (*id.* at 241, 242).

The second applicable case is *Iwankow v Mobil Corp.* (150 AD2d 272 [1989]), in which ****4** this Court dismissed the NYSHRL claim of age discrimination on grounds of lack of subject matter jurisdiction, because the asserted jurisdictional nexus to New York did not include a discriminatory act. The plaintiff, who had been employed by the defendant corporation in London, alleged that his termination was "part of a world-wide reduction in force which was decided upon at corporate headquarters in New York"; however, he did *not* allege "that the decision to implement this reduction in an age-discriminatory manner originated at corporate headquarters" (*id.* at 273, 274). This Court explained that "*absent an allegation that a discriminatory act was committed in New York* or that a New York State resident was discriminated against, New York's courts have no subject matter jurisdiction over the alleged wrong" (*id.* at 274 [emphasis added]).

Following *Walston* and *Iwankow*, it seems apparent that a supportable allegation by an out-of-jurisdiction resident that a discriminatory employment decision was made against him or her in New York may be treated as a discriminatory act committed in New York and therefore as an act covered by New York's Human Rights Law. Yet, as the motion court recognized, this Court recently said that the place where the act of discrimination occurred is irrelevant (*see Shah*, 27 AD3d at 176). In granting summary judgment dismissing a discrimination claim brought under NYCHRL, the Court in *Shah* stated that "the locus of the decision to terminate [the plaintiff] is of no moment. What is significant is where the impact is felt" (*id.*).

After consideration of the *Shah* decision and the federal case law it cites in support, we decline to apply that portion of the *Shah* decision as the settled law of this State. Initially, we observe that the quoted language is not necessary to the holding, and therefore constitutes obiter dictum. As the *Shah* Court acknowledged, the plaintiff in that case, like the plaintiff in *Iwankow*, did not even "allege that the decision to terminate ***53** her was made in New York City" (*id.* at 175, citing *Iwankow v Mobil Corp.*, *supra*).

The *Shah* Court's grant of summary judgment dismissing the discrimination claim for lack of subject matter jurisdiction relied on the facts pointing exclusively to New Jersey events. Shah resided in New Jersey, and was working for a client located in New Jersey, was informed of her termination at that New Jersey office, and the reasons she was given for her termination—insubordination, poor or inappropriate attitude, and inability to work in a team environment—concerned her conduct at that New Jersey office. Indeed, the Court asserted that it could be "fairly inferred" from Shah's own account that the explanation for her termination was based upon her conduct at the New Jersey site; in fact, the majority explicitly rejected the dissenting Justice's suggestion that there were allegations from which it could be inferred that the termination decision was made in New York City (27 AD3d at 176).

Accordingly, we do not take issue with the result in *Shah*, insofar as it says it is based on facts exclusively pointing not only to an impact in New Jersey but also to a termination decision made in New Jersey, and the absence of an allegation that a discriminatory employment decision was made in New York. However, we view that portion of the *Shah* decision that asserts that "the locus of the decision to terminate her is of no moment" as overbroad and unnecessary, lacking sufficient support in prior case law. We adopt and employ the reasoning of the District Court in ****5** *Rylott-Rooney v Alitalia-Linee Aeree Italiane-Societa Per Azioni* (549 F Supp 2d 549, 551-552 [2008]), in which the court pointed out that the aspect of *Shah* precluding subject matter jurisdiction unless the impact was within this jurisdiction was dictum, and that prior New York case law had turned on whether it was alleged that a discriminatory act occurred in New York.

Examination of the Southern District Court case relied upon in *Shah*, as well as other federal cases employing a similar "impact" rule, fails to disclose any convincing reason to support adoption of a rule that a New York court does not have subject matter jurisdiction where a discriminatory decision was made here, but the impact may be said to have been felt elsewhere. Indeed, the reasoning of those federal cases has been convincingly challenged elsewhere.

While the *Shah* decision provided no direct citation for its assertions that "the locus of the decision to terminate [the ***54** plaintiff] is of no moment" and that "[w]hat is significant is where the impact is felt," that aspect of its discussion ended with a citation to *Wahlstrom v Metro-North Commuter R.R. Co.* (89 F Supp 2d 506 [SD NY 2000]).

Wahlstrom concerned a female railroad conductor's claim of verbal and physical assault and sexual harassment by a coworker. While some of her numerous causes of action were upheld, the court granted summary judgment dismissing her causes of action against Metro-North Railroad under the NYSHRL and the NYCHRL. Relying on evidence that the employer had reasonably investigated the complaint of discriminatory conduct and taken corrective action, the court concluded that no reasonable finder of fact could conclude that Metro-North supported or condoned the coworker's conduct (*id.* at 527).

As to the claim under the NYCHRL, the District Court dismissed it because the incidents arguably comprising sexual harassment by the coworker that formed the basis for the discrimination claim took place in White Plains, outside of New York City. The court observed that "[t]he only allegation of sexual harassment that occurred in New York City was [the harasser's] final statement to plaintiff: 'You better shape up . . . or you're going to get it,' " and that "[t]his statement, standing alone, hardly constitutes sexual harassment, let alone a hostile work environment" (*id.*).

The *Wahlstrom* court properly rejected the plaintiff's suggestion that subject matter jurisdiction under the NYCHRL could be based on the facts that Metro-North's equal employment opportunity policies are distributed from its New York City offices, and the decisions to schedule, adjourn, and reschedule the coworker's disciplinary hearing were made there (*id.* at 527-528). Importantly, there was no claim that a *discriminatory* decision had been made in the employer's New York City office. Since decisions to adjourn or reschedule a disciplinary hearing or the issuance of equal employment opportunity policy statements cannot be permitted to alone form the basis for an assertion of discrimination, the court could have granted summary judgment dismissing the NYCHRL claim without further analysis. Yet, it went on to gratuitously assert that the NYCHRL only applies where the actual impact of the discriminatory conduct or decision is felt within the five boroughs, even if a discriminatory decision is made by an employer's New York City office, citing *Duffy v Drake Beam Morin* (1998 WL 252063, *12, 1998 US Dist LEXIS 7215, *36 [SD NY, May 19, 1998]) and ***55** ****6** *Lightfoot v Union Carbide Corp*. (1994 WL 184670, *5, 1994 US Dist LEXIS 6191, *17 [SD NY, May 12, 1994], *affd* 110 F3d 898 [2d Cir 1997]).

However, neither *Duffy* nor *Lightfoot* provides appropriate support for our adoption of the "impact" rule. In *Lightfoot*, the plaintiff was employed in Connecticut by Union Carbide when his job was terminated as part of a "reduction in force" program effectuated by a "forced-ranking" system; the plaintiff offered proof establishing that his age was a factor in his termination. Notably, while the court upheld the plaintiff's federal and state age discrimination claims, it dismissed the plaintiff's claims under the NYCRHL "because there are no allegations that the defendants intentionally discriminated against him within the boundaries of New York City" (1994 WL 184670 at *5, 1994 US Dist LEXIS 6191 at *17). Of course, it was not enough that the company's use of the reduction in force program had been approved at a meeting in New York City; it had to be alleged that the decision to implement the program in a discriminatory manner had been made in New York City. That pleading failure would

have been sufficient to justify a dismissal if the claim had been by a nonresident. However, the court in *Lightfoot*, while acknowledging that the plaintiff was living in New York City at the time and occasionally worked at home, also went on to employ the "impact" analysis, and found that the impact on the plaintiff had "occurred while he was employed in Connecticut" (*id.*). This remark is puzzling, to say the least. In fact, under *Shah*, the plaintiff's residence in New York City would have been a critical consideration.

Following the *Lightfoot* decision, in *Duffy*, the Southern District Court dismissed the New York City and New York State Human Rights Laws claims of a plaintiff who worked in New Jersey and the New York City Human Rights Law claims of another plaintiff who worked on Long Island. It observed that the Human Rights Laws were limited to discriminatory acts occurring within their respective jurisdictions and that "nothing in the record suggest[ed] that either [plaintiff] was subjected to discriminatory conduct by [the defendant] in New York City" (1998 WL 252063 at *12, 1998 US Dist LEXIS 7215 at *35). It went on to reason that

> "even if, as [the plaintiffs] claim, the decision to fire them was made by [the defendant employer] at its headquarters in New York City, that fact, standing alone, is insufficient to establish a violation of the ***56** City Human Rights Law when the employees affected by that decision did not work in New York City" (*id.*).

The *Lightfoot* and *Duffy* cases remind us of the important distinction between a mere decision to terminate an employee and a *discriminatory* decision to terminate an employee. For instance, a nationwide or worldwide corporate staff-reduction policy may be decided on in a corporate headquarters in New York but implemented in a discriminatory manner only in an out-of-town branch office. Only if a discriminatory decision was made in New York may a claim of discrimination be actionable here. Thus, the allegations of a complaint must include a founded assertion that a firing decision was discriminatory in nature.

The *Duffy* decision is far from clear as to whether the plaintiffs asserted that the decision to fire them was made on a discriminatory basis. Other grounds for declining to apply *Duffy*'s ruling are discussed in a decision by the U.S. Court of Appeals for the District of Columbia (*see Schuler v PricewaterhouseCoopers, LLP*, 514 F3d 1365 [DC Cir 2008]). The *Schuler* court begins its analysis by pointing out that the New York State Human Rights Law itself "contains ****7** no requirement that the unlawful discriminatory impact occur in New York" (at 1377). It points out that the NYSHRL even specifically applies to acts committed outside New York State if committed against a New York State resident (citing Executive Law § 298-a [1]). Finally, it observes that the cases upon which the *Duffy* court relied "merely require [ ] [plaintiffs] to allege an in-state discriminatory act" and "say[ ] nothing about where plaintiffs may 'suffer[ ] discrimination' " (*id.* at 1378), and concludes "no New York authority . . . suggest[s] that the impact of a discriminatory act must be felt within New York for the NYHRL to apply" (*id.* at 1379).

We agree with the *Schuler* court's view, and find nothing in the cited federal cases to convince us that an out-of-jurisdiction plaintiff is precluded from interposing claims under the NYSHRL and the NYCHRL when the New York employer is alleged to have made its employment decisions in a discriminatory manner here. We also note that the impact analysis suggested in *Duffy* and *Lightfoot* has not been uniformly adopted in federal decisions under New York law; a number of cases have held that the place where a discriminatory employment decision was made is the focus of the subject matter jurisdiction ***57** analysis (*see Hart v Dresdner Kleinwort Wasserstein Sec., LLC*, 2006 WL 2356157, 2006 US Dist LEXIS 56710 [SD NY 2006]; *Tebbenhoff v Electronic Data Sys. Corp.*, 2005 WL 3182952, 2005 US Dist LEXIS 29874 [SD NY 2005], *affd* 244 Fed Appx 382 [2d Cir 2007]; *Torrico v International Bus. Machs. Corp.*, 319 F Supp 2d 390 [SD NY 2004]; *Launer v Buena Vista Winery, Inc.*, 916 F Supp 204 [ED NY 1996]).

Finally, we observe that it would be contrary to the purpose of both statutes to leave it to the courts of other jurisdictions to appropriately respond to acts of discrimination that occurred here.

Since for purposes of this motion pursuant to CPLR 3211 we must accept as true the allegations that the decision to terminate plaintiff's employment was made in New York City *and* that the economic reasons given by the employer for the decision to terminate him were a pretext for discrimination on the basis of his age (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]), we cannot reject as a matter of law at this juncture plaintiff's claim that a New York City and New York State employer made a discriminatory decision here. If that assertion is ultimately established, it will be enough to demonstrate that the New York court has subject matter jurisdiction over his claims.

Accordingly, the appeal from the order of the Supreme Court, New York County (Martin Shulman, J.), entered July 7, 2008, which granted defendants' motion to dismiss the complaint, is deemed to be an appeal from the judgment, same court and Justice, entered July 24, 2008 (CPLR 5501 [c]), dismissing the complaint, and, the appeal so considered, the judgment should be reversed, on the law, without costs, and the complaint reinstated.

Andrias, J.P., Acosta and Renwick, JJ., concur.

Appeal from order, Supreme Court, New York County, entered July 7, 2008, deemed to be an appeal from the judgment, same court, entered July 24, 2008, and so considered, said judgment reversed, on the law, without costs, and the complaint reinstated.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Syeed v. Bloomberg L.P., 2nd Cir.(N.Y.), January 23, 2023

15 N.Y.3d 285
Court of Appeals of New York.

Howard **HOFFMAN**, Respondent,
v.
PARADE PUBLICATIONS et al., Appellants.

July 1, 2010.

Synopsis

Background: Non-resident employee brought action against New York employer, alleging violations of the New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL) related to his termination. The Supreme Court, New York County, Martin Shulman, J., dismissed action. Employee appealed. The Supreme Court, Appellate Division, 65 A.D.3d 48, 878 N.Y.S.2d 320, reversed, and certified question.

[Holding:] The Court of Appeals, Pigott, J., held that in order to assert claims under NYSHRL and NYCHRL, plaintiff was required to plead and prove that alleged discriminatory conduct had impact within New York and New York City.

Reversed; certified question answered.

Jones, J., filed dissenting opinion.

West Headnotes (2)

[1] **Civil Rights** Territorial limitations
Civil Rights Employment practices

Non-residents of New York City and New York State were required to plead and prove that the alleged discriminatory conduct had an impact within those respective boundaries in order to assert employment discrimination claims under the New York City Human Rights Law (NYCHRL) and the New York State Human Rights Law (NYSHRL); the laws generally did not protect non-residents, unless they were employed in the City or the State of New York. McKinney's Executive Law §§ 296(1)(a), 298–a; New York City Administrative Code, § 8-101 et seq.

85 Cases that cite this headnote

[2] **Civil Rights** Territorial limitations

Purpose of New York State Human Rights Law (NYSHRL) is to protect inhabitants and persons within the State, meaning that those who work in New York fall within class of persons who may bring employment discrimination claims in New York. McKinney's Executive Law § 290(2).

66 Cases that cite this headnote

Attorneys and Law Firms

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***288 **745 OPINION OF THE COURT**

PIGOTT, J.

Defendant Parade Publications is the publisher of a nationally syndicated general interest magazine that is distributed in hundreds of American newspapers. Between 2002 and January 1, 2008, plaintiff Howard Hoffman—a resident of Georgia who worked with his assistant at Parade's office

in Atlanta—served as a managing director for Parade's Newspaper Relations Group (NRG). His duties included developing and overseeing accounts relative to the inclusion of Parade in newspapers in 10 states primarily located in the south and southwest. Hoffman did not service any accounts in New York.

In October 2007, Randy Siegel, president and publisher of Parade, called Hoffman in Atlanta from Parade's New York City headquarters and advised Hoffman that the Atlanta office would be closed by year's end and that his employment was being terminated. Hoffman thereafter commenced this age discrimination action against defendants Parade Publications, Conde Nast Publications and Advance Publications, Inc., asserting that his termination violated the New York City Human Rights Law (NYCHRL) (*see* Administrative Code of City of N.Y. § 8–101 *et seq.*) and the New York State Human Rights Law (*see* Executive Law § 290 *et seq.*).

Defendants moved to dismiss the complaint for, among other things, lack of subject matter jurisdiction. Hoffman opposed the motion, asserting that he attended quarterly meetings in New York City, that the NRG was managed from—and all corporate contracts were negotiated through—the New York City office, and that defendants' decision to terminate him was made and executed in New York City.

***289** Supreme Court dismissed the complaint for want of subject matter jurisdiction, holding that neither the City nor State Human Rights Law applied to a plaintiff who does not reside in New York because the "impact" of defendants' alleged discriminatory conduct was not felt within those boundaries (*see* 2008 N.Y. Slip Op. 31892[U], 2008 WL 2713577). The Appellate Division reversed and reinstated ****746** *****147** the complaint, holding that an "out-of-jurisdiction" employee's allegation that a discriminatory decision to terminate was made in New York City, if established, is sufficient to demonstrate that New York has subject matter jurisdiction over the claims (65 A.D.3d 48, 56–57, 878 N.Y.S.2d 320 [1st Dept.2009]). The Appellate Division certified to this Court the question whether its order reversing the judgment of Supreme Court was properly made. We answer the certified question in the negative and reverse.

[1] Both the City and the State Human Rights Laws deem it an "unlawful discriminatory practice" for an employer to discharge an employee because of age (*see* Administrative Code of City of N.Y. § 8–107[1][a]; Executive Law § 296[1][a]). The question raised on this appeal is whether nonresidents of the city and state must plead and prove that the alleged discriminatory conduct had an impact within those respective boundaries. We hold that the policies underpinning those laws require that they must.

Addressing Hoffman's City Human Rights Law claim first, it is clear from the statute's language that its protections are afforded only to those who inhabit or are "persons in" the City of New York. The law declares, among other things, that "prejudice, intolerance, bigotry, and discrimination ... threaten the rights and proper privileges of [the city's] *inhabitants,*" and that "[i]n the city of New York ... there is no greater danger to the health, morals, safety and welfare of the city *and its inhabitants* than the existence of groups prejudiced against one another ... because of their actual or perceived differences, including those based on ... age...." (Administrative Code of City of N.Y. § 8–101 [emphasis supplied].) To combat these prejudices, the law created the City Commission on Human Rights to, among other things, "foster mutual understanding and respect among all persons *in the city of New York* " (Administrative Code § 8–104[1] [emphasis supplied]). In addition to investigating complaints of discrimination (*see* Administrative Code § 8–105 [4] [a]), the commission is also charged with working with other municipal agencies in "developing courses of instruction ... on ***290** techniques for achieving harmonious intergroup relations within the city of New York" (Administrative Code § 8–105[1]).

There is disagreement among state and federal courts concerning the territorial reach of the City Human Rights Law in circumstances where the alleged discriminatory conduct is against a nonresident who does not work in New York City. Some courts have concluded that a nonresident plaintiff may invoke the protections of the NYCHRL by merely alleging and proving that the discriminatory decision to terminate was made in the city (*see Hoffman v. Parade Pubis.,* 65 A.D.3d at 50, 878 N.Y.S.2d 320; *Rohn Padmore, Inc. v. LC Play Inc.,* 679 F.Supp.2d 454, 465 [S.D.N.Y.2010] [nonresident plaintiff working in California need only show that the alleged discriminatory decision to terminate occurred in the city]).

Other courts have taken the view that the nonresident plaintiff must demonstrate that the alleged discriminatory conduct had an "impact" within the city (*see Shah v. Wilco Sys., Inc.,* 27 A.D.3d 169, 176, 806 N.Y.S.2d 553 [1st Dept.2005] [even if termination decision was made in the city, its impact on the plaintiff was felt outside the city]; *Pearce v. Manhattan Ensemble Theater, Inc.,* 528 F.Supp.2d

175, 184–185 [S.D.N.Y.2007] [same]; *Wahlstrom v. Metro–North Commuter R.R. Co.,* 89 F.Supp.2d 506, 527–528 [S.D.N.Y.2000]; ****747 ***148** *Duffy v. Drake Beam Morin,* 1998 WL 252063, *11, 1998 U.S. Dist LEXIS 7215, *32–33 [S.D.N.Y.1998]). Courts adopting the impact requirement have done so out of concern that merely focusing the inquiry on where the termination decision is made—as opposed to where the impact of that decision is felt—results in the expansion of the NYCHRL to cover any plaintiff who is terminated pursuant to a decision made by an employer from its New York City headquarters regardless of where the plaintiff works (*see Wahlstrom,* 89 F.Supp.2d at 527–528, citing *Duffy,* 1998 WL 252063, *12, 1998 U.S. Dist LEXIS 7215, *36).

We hold that the impact requirement is appropriate where a nonresident plaintiff invokes the protection of the City Human Rights Law. Contrary to Hoffman's contention, the application of the impact requirement does not exclude all nonresidents from its protection; rather, it expands those protections to nonresidents who work in the city, while concomitantly narrowing the class of nonresident plaintiffs who may invoke its protection.

The Appellate Division's rule that a plaintiff need only plead and prove that the employer's decision to terminate was made ***291** in the city is impractical, would lead to inconsistent and arbitrary results, and expands NYCHRL protections to nonresidents who have, at most, tangential contacts with the city. Indeed, the permutations of such a rule are endless, and, although the locus of the decision to terminate may be a factor to consider, the success or failure of an NYCHRL claim should not be solely dependent on something as arbitrary as where the termination decision was made. In contrast, the impact requirement is relatively simple for courts to apply and litigants to follow, leads to predictable results, and confines the protections of the NYCHRL to those who are meant to be protected—those who work in the city (*see* Administrative Code of City of N.Y. § 2–201 [defining the territory of the city as constituting the five boroughs, and declaring that the "jurisdictions and powers of the city are for all purposes of local administration and government ... co-extensive with the territory ... described"]).

For similar reasons, Hoffman's State Human Rights Law claim should also be dismissed. The Legislature enacted that law through its invocation of "the police power of [New York State] for the protection of the public welfare, health and peace *of the people of this state* " (Executive Law § 290[2] [emphasis supplied]). The law declares that the State of New York "has the responsibility to act to assure that every individual *within* [New York State] is afforded an equal opportunity to enjoy a full and productive life," and that failure to afford equal opportunity "threatens the peace, order, health, safety and general welfare of the state and its *inhabitants* " (Executive Law § 290 [3] [emphasis supplied]).

[2] The obvious intent of the State Human Rights Law is to protect "inhabitants" and persons "within" the state, meaning that those who work in New York fall within the class of persons who may bring discrimination claims in New York. Application of the "impact" requirement to State Human Rights Law claims achieves the same ends as is the case with its City counterpart, because it permits those who work in the state to invoke its protections. Therefore, we conclude that a nonresident must plead and prove that the alleged discriminatory conduct had an impact in New York (*see e.g. Pearce,* 528 F.Supp.2d at 185; *Lucas v. Pathfinder's Personnel, Inc.,* 2002 WL 986641, *2, 2002 U.S. Dist LEXIS 8529, *4 [S.D.N.Y.2002]; *Duffy,* 1998 WL 252063, *12, 1998 U.S. Dist LEXIS 7215, *36).

*****149 **748** The State Human Rights Law's "extraterritorial" provision underscores defendants' argument that the law does not protect ***292** a nonresident like Hoffman. Enacted in 1975, this amendment called for the application of the State Human Rights Law "to certain acts committed outside" New York (Executive Law § 298–a). The thrust of section 298–a is to "outlaw [ ] certain discriminatory practices committed outside New York State against New York residents and businesses" (Sponsor's Mem., Bill Jacket, L. 1975, ch. 662, at 9). Specifically it protects New York residents, domestic corporations, and corporations doing business in New York from discriminatory acts committed outside the state (*see* Executive Law § 298–a [1]), and subjects New York residents and domestic corporations who commit an "unlawful discriminatory practice" against New York residents outside the state to almost all of the provisions of the law (Executive Law § 298–a [2] [excepting the application of the penal provisions]; *see* Mem. of Exec. Director of Law Rev. Commn., Bill Jacket, L. 1975, ch. 662, at 22–23; *see also* Budget Rep. on Bills, Bill Jacket, L. 1975, ch. 662, at 16). Under this statutory scheme, while New York residents may bring a claim against New York residents and corporations who commit "unlawful discriminatory practices" outside the state, the Legislature plainly has not extended such protections to nonresidents like

Hoffman, who are unable to demonstrate that the impact of the discriminatory act was felt inside the state.

According to the complaint, Hoffman was neither a resident of, nor employed in, the City or State of New York. Nor does Hoffman state a claim that the alleged discriminatory conduct had any impact in either of those locations. At most, Hoffman pleaded that his employment had a tangential connection to the city and state. Therefore, Supreme Court properly dismissed Hoffman's age discrimination claims for want of subject matter jurisdiction.

Accordingly, the order of the Appellate Division should be reversed, with costs, the judgment of Supreme Court reinstated, and the certified question answered in the negative.

JONES, J. (dissenting).

At issue is whether New York courts have subject matter jurisdiction over a nonresident plaintiff's claims against a New York employer for an alleged unlawful discriminatory practice that occurred in New York City. Plaintiff Howard Hoffman, a resident of Georgia, commenced this action under the New York City Human Rights Law (NYCHRL) and New York State Human Rights Law (NYSHRL) against his New York City employer, defendant Parade Publications, and others, ***293** alleging that Parade terminated his employment because of his age. The complaint states the following. Hoffman maintained the company's Atlanta office —staffed by himself and an assistant. In performing his duties of developing and maintaining Parade's accounts in southern and southwestern states, Hoffman maintained constant communications with the New York City office, including personal visits to Parade's management in New York City. His supervisor and Parade's president and publisher were based in the New York City office. Additionally, the decision to discharge him was made and communicated to him from the New York City office. Because the alleged unlawful discriminatory act occurred in New York City by a New York City employer, I believe Supreme Court has subject matter jurisdiction over Hoffman's NYCHRL and NYSHRL claims of age discrimination. Accordingly, I respectfully dissent.

*****150** ****749** In promulgating the State's Human Rights Law, the Legislature

> "declare[d] that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice [or] intolerance ... not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants" (Executive Law § 290[3]).

The purpose of the act is broad and appears to be threefold: to prevent discrimination against individuals within this state; to protect the inhabitants of this state from discrimination; and to protect the general welfare of this state by curbing unlawful discriminatory practices within the state. Section 297(9) of the Executive Law provides that "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages." Similarly, the NYCHRL (Administrative Code of City of N.Y. § 8–101) states that "the existence of groups prejudiced against one another" based on, among other things, age, endangers "the health, morals, safety and welfare of the city and its inhabitants." Discrimination "menace[s] the institutions and foundation of a free democratic state" (*id.*). Under both Human Rights Laws, the discharge of an employee by an ***294** employer because of his or her age is an "unlawful discriminatory practice" (*see* Executive Law § 296[1][a]; Administrative Code of City of N.Y. § 8–107[1][a]).

Although neither act has a residency requirement to assert a claim, some New York State and federal courts have adopted a jurisdictional limitation applicable to nonresidents asserting NYCHRL and NYSHRL actions, requiring that the discriminatory act take place within the jurisdiction in question and the impact of such discriminatory conduct be felt within that jurisdiction (*see Pearce v. Manhattan Ensemble Theater, Inc.,* 528 F.Supp.2d 175, 184–185 [S.D.N.Y.2007]). However, these cases, upon which the majority relies, are wholly distinguishable from the case at bar. For example, in *Pearce,* the plaintiff, a resident of Idaho, alleged that New York defendants rescinded their oral agreement for her to act in a national tour. The District Court dismissed the plaintiff's NYCHRL and NYSHRL claims of disability discrimination. It noted that the complaint did "not specify whether any performances were expected to take place in New York State" and concluded that the plaintiff "failed to make the requisite allegation that the decision had an impact in New York City and State" (*id.* at 184). In *Wahlstrom v. Metro–North Commuter R.R. Co.*, 89 F.Supp.2d 506, 527–528 (S.D.N.Y.2000), the plaintiff's NYCHRL claim involved a sexual harassment allegation regarding an act that occurred

in White Plains, New York. The court, characterizing White Plains as "well outside the borders of New York City," concluded that the act had no impact in New York City (*id.* at 527).

In *Duffy v. Drake Beam Morin*, 1998 WL 252063, 1998 U.S. Dist LEXIS 7215 (S.D.N.Y.1998), two plaintiffs asserted NYCHRL claims against their employer, alleging that the decision to fire them occurred in New York City. The plaintiffs worked in Melville, New York and Parsippany, New Jersey, respectively. Their immediate supervisors worked in those offices as well. There, the District Court concluded that an allegation that the decision to fire them occurred in the city "is ****750 ***151 insufficient to establish a violation of the [NYCHRL] when the employees affected by that decision did not work in New York City ... [and were not] subject to any discriminatory conduct in New York City" (1998 WL 252063 at *12, 1998 U.S. Dist LEXIS 7215 at *35–36). Also, in *Shah v. Wilco Sys., Inc.*, 27 A.D.3d 169, 806 N.Y.S.2d 553 (1st Dept.2005), the plaintiff, a resident of New Jersey, worked as a programmer for a New York City defendant, but was assigned to work on a project in Jersey City, New Jersey. ***295** For several months, she worked only in Jersey City, and was fired at the client's office in Jersey City. Plaintiff commenced a NYCHRL action against the defendant. The Appellate Division, citing *Wahlstrom,* concluded that "the NYCHRL would not apply since its impact on her occurred in New Jersey" (*id.* at 176, 806 N.Y.S.2d 553).

On the other hand, in *Tebbenhoff v. Electronic Data Sys. Corp.,* 2005 WL 3182952, 2005 U.S. Dist LEXIS 29874 (S.D.N.Y.2005), the plaintiff, a New Jersey resident, asserted NYCHRL and NYSHRL claims against his former employer. In that case, the plaintiff traveled through the Mid–Atlantic region as a salesperson, and worked from home for convenience. The plaintiff alleged to have maintained a "presence" in the New York City office. The District Court held that the "plaintiff's action [fell] within the jurisdictional bounds of the NYSHRL" because the decision to terminate and the termination occurred in New York (2005 WL 3182952 at *5, 2005 U.S. Dist LEXIS 29874 at *14). As to the NYCHRL claim, the court took note of cases applying an impact rule, but permitted the plaintiff to proceed in his NYCHRL claim, reasoning, because the discriminatory act was committed within New York City, "his termination cannot be said to have had no impact within New York City" (2005 WL 3182952 at *6, 2005 U.S. Dist LEXIS 29874 at *15).

Subsequently, in *Rylott–Rooney v. Alitalia–Linee Aeree Italiane–Societa Per Azioni,* 549 F.Supp.2d 549 (S.D.N.Y.2008), the plaintiff, a resident of Minnesota working out of the defendant's Minneapolis office, commenced NYCHRL and NYSHRL claims against her employer, alleging age discrimination. The complaint alleged that the plaintiff reported to the defendant's New York City office by phone and occasionally in person; attended work-related meetings in the New York office; and the decision to discharge her was made in New York and communicated to her while in New York. The District Court reviewed *Shah, Tebbenhoff* and other conflicting federal authority, as well as New York's long-arm jurisdiction over tortfeasors, and held that the Human Rights Laws should "apply *either* when the initial discriminatory act (for example, a termination) occurs in New York or when the original experience of injury, which occurs at the employee's workplace, is in New York" (*id.* at 554). It concluded that, because the termination occurred in New York, plaintiff "establish[ed] discrimination 'within' New York, even if ... [plaintiff] felt the effects of this termination at her workplace in Minnesota" (*id.* at 554).

New York State and federal courts have, until now, tailored jurisdictional limitations to permit nonresident plaintiffs to ***296** maintain NYCHRL and NYSHRL claims against employers and have reached reasonable results, despite the lack of clarity as to the appropriate rule. While the majority correctly asserts that a disagreement exists among state and federal courts concerning the jurisdictional parameters of the Human Rights Laws, the cases upon which it relies to impose the so-called "impact" rule involve plaintiffs alleging few, if any, instances of unlawful discriminatory ****751 ***152 practices occurring within New York City or State. Here, Hoffman asserts that he was managed from New York, the decision to terminate his position occurred in New York and he was informed of that decision via a telephone call from New York City. Hoffman additionally asserted that he went to New York City to negotiate retaining his employment with the president and publisher of Parade. He asserts age discrimination as the cause of his discharge, which is unlawful conduct in New York City and New York State. The Appellate Division below observed, and I agree, "that it would be contrary to the purpose of both statutes to leave it to the courts of other jurisdictions to appropriately respond to acts of discrimination that occurred here" (65 A.D.3d 48, 57, 878 N.Y.S.2d 320 [2009]). In short, the "impact" rule—a rule that appears nowhere in the text of the Human Rights Laws —unnecessarily precludes New York courts from protecting

individuals from discrimination within the city and state and handicaps the city and state from curbing such practices.

Accordingly, I would affirm the order of the Appellate Division and answer the certified question in the affirmative.

Judges GRAFFEO, READ and SMITH concur with Judge PIGOTT; Judge JONES dissents and votes to affirm in a separate opinion in which Chief Judge LIPPMAN and Judge CIPARICK concur.

Order reversed, etc.

All Citations

15 N.Y.3d 285, 933 N.E.2d 744, 907 N.Y.S.2d 145, 109 Fair Empl.Prac.Cas. (BNA) 1238, 2010 N.Y. Slip Op. 05706

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568 F.Supp.3d 314
United States District Court, S.D. New York.

Nafeesa SYEED and Naula Ndugga, on behalf of themselves and similarly situated women, Plaintiff,

v.

BLOOMBERG L.P., Defendant.

1:20-cv-7464-GHW
|
Signed 10/25/2021

Synopsis

Background: Two employees of privately-held media company, a South Asian-American woman and a Black woman, brought putative class action in state court against employer, alleging violations of Title VII, New York State Human Rights Law (NYSHRL), and New York City Human Rights Law (NYCHRL). Employer removed action and moved to dismiss for failure to state claim or, in the alternative, to strike employees' demand for jury trial.

Holdings: The District Court, Gregory H. Woods, J., held that:

[1] second amended complaint (SAC) would be treated as operative complaint;

[2] employee based in District of Columbia could not maintain claims under NYSHRL or NYCHRL;

[3] employee failed to administratively exhaust Title VII claims;

[4] employee stated claim for disparate pay under NYCHRL and NYSHRL;

[5] employee failed to state claim under NYCHRL for failure to promote;

[6] employee stated claim for hostile work environment under NYCHRL; but

[7] employees filed to state claim for disparate impact under NYSHRL.

Motions granted in part and denied in part.

West Headnotes (55)

[1] **Federal Civil Procedure** Matters considered in general

On motion to dismiss for failure to state a claim, district court may consider a document solely relied on by the plaintiff if it is integral to the complaint. Fed. R. Civ. P. 10(c), 12(b)(6).

[2] **Federal Civil Procedure** Matters considered in general

A document is "integral to the complaint," thus permitting district court to consider it on motion to dismiss for failure to state a claim, if the complaint relies heavily on the document's terms and effect. Fed. R. Civ. P. 10(c), 12(b)(6).

[3] **Federal Civil Procedure** Matters considered in general

In order for document to be integral to complaint, so as to allow district court to rely on it in ruling on motion to dismiss for failure to state a claim, plaintiff must rely on the terms and effect of the document in drafting the complaint; mere notice or possession is not enough. Fed. R. Civ. P. 10(c), 12(b)(6).

[4] **Removal of Cases** Effect of proceedings in state court before removal

Removal of Cases Amendment of pleading and process, and repleading

Employees of privately-held media company failed to comply with federal civil procedural rule governing amendments before trial when they filed second amended complaint (SAC), in employment discrimination action which had been removed from state to federal court, without

consent of employer or leave of district court, where employee who initiated action amended complaint once in state court on her own initiative and without employer's consent, and that amendment would have exhausted her right to amend if had been made in federal court. Fed. R. Civ. P. 15(a)(1), (2).

[5] **Removal of Cases** Effect of proceedings in state court before removal

When a case is removed to federal court, the federal court takes the case up where the state court left it off.

[6] **Removal of Cases** Effect of proceedings in state court before removal

When a case is removed to federal court, the federal court treats the case as if it originally had been filed in federal court.

[7] **Federal Civil Procedure** Complaint

District court would treat employees' second amended complaint (SAC) in employment discrimination action against employer as operative complaint, although employees failed to comply with federal civil procedural rule governing amendment before trial when they filed SAC without consent of employer or leave of court, where parties had already expended substantial time and resources on motion to dismiss SAC, which added claims that were not present in former pleadings, and employer did not suggest that court would have denied employees' leave to amend had it been requested at appropriate time. Fed. R. Civ. P. 15(a).

[8] **Federal Civil Procedure** Discretion of Court

District court has discretion to grant requests for leave to amend nunc pro tunc when parties file amended pleadings without complying with federal civil procedural rule governing amendment of pleadings. Fed. R. Civ. P. 15(a)(2).

[9] **Civil Rights** Territorial limitations

Civil Rights Employment practices

"Impact test" for nonresident employees seeking recovery under New York City Human Rights Law (NYCHRL) requires that a nonresident plaintiff must plead and prove that the alleged discriminatory conduct had an impact in New York. New York City Administrative Code, § 8-101 et seq.

1 Case that cites this headnote

[10] **Civil Rights** Territorial limitations

Impact test for nonresident plaintiffs seeking recovery under New York City Human Rights Law (NYCHRL) or New York State Human Rights Law (NYSHRL) is not satisfied where a plaintiff's contacts with New York City or New York State are merely tangential; rather, to state a claim, the impact of the employment action must be felt by the plaintiff in New York City or, with respect to NYSHRL, New York State. N.Y. Executive Law § 290 et seq.; New York City Administrative Code, § 8-101 et seq.

[11] **Civil Rights** Territorial limitations

South Asian-American female employee of privately-held media company, whose global headquarters were located in New York, failed to establish that she felt impact of employer's alleged constructive discharge in New York, and thus employee could not maintain action against employer under New York State Human Rights Law (NYSHRL) or New York City Human Rights Law (NYCHRL), where employee worked in District of Columbia at all relevant periods. N.Y. Executive Law § 290 et seq.; New York City Administrative Code, § 8-101 et seq.

[12] **Civil Rights** Employment practices

Allegation of South Asian-American female employee of privately-held media company, whose global headquarters were located in New

York, that she applied for, and was denied certain New York-based positions while she was based in District of Columbia was insufficient to state discrimination claims against employer under New York State Human Rights Law (NYSHRL) or New York City Human Rights Law (NYCHRL), absent allegations as to how employer's decision impacted her in New York. N.Y. Executive Law § 290 et seq.; New York City Administrative Code, § 8-101 et seq.

[13] **Civil Rights** Exhaustion of Administrative Remedies Before Resort to Courts

Exhaustion of administrative remedies through the Equal Employment Opportunity Commission (EEOC) is an essential element of the Title VII statutory scheme and, as such, a precondition to bringing such claims in federal court. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)-(f).

[14] **Civil Rights** Exhaustion of Administrative Remedies Before Resort to Courts

The purpose of Title VII's exhaustion requirement is to give the administrative agency the opportunity to investigate, mediate, and take remedial action; that purpose would be defeated if a complainant could litigate a claim not previously presented to and investigated by the EEOC. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)-(f).

2 Cases that cite this headnote

[15] **Civil Rights** Exhaustion of Administrative Remedies Before Resort to Courts

Civil Rights Presumptions, Inferences, and Burden of Proof

The failure to exhaust administrative remedies under Title VII is an affirmative defense, for which defendant bears the burden of proof. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)-(f).

[16] **Federal Civil Procedure** Affirmative Defenses, Raising by Motion to Dismiss

While affirmative defenses are most typically asserted in an answer, they may be raised on a motion to dismiss where the complaint itself establishes the circumstances required as a predicate to a finding that the affirmative defense applies.

1 Case that cites this headnote

[17] **Civil Rights** Right to sue letter or notice; official inaction

A plaintiff's failure to obtain a notice-of-right-to-sue-letter is not a jurisdictional bar, but only a precondition to bringing a Title VII action that can be waived by the parties or the court, and accordingly, a failure to obtain a right-to-sue letter can be excused by the court on equitable grounds. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(f)(1).

1 Case that cites this headnote

[18] **Civil Rights** Particular cases

Civil Rights Right to sue letter or notice; official inaction

Black employee of privately-held media company failed to exhaust her administrative remedies, as prerequisite to bringing claims for retaliation and disparate impact against employer under Title VII, where second amended complaint (SAC) was filed prior to her receipt of right-to-sue letter from Equal Employment Opportunity Commission (EEOC). Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(f)(1).

[19] **Civil Rights** Pleading

Where a plaintiff has pleaded non-Title VII claims alongside a Title VII claim, he may file suit on the non-Title VII claims and then amend the complaint to include the Title VII claim after receiving a right-to-sue letter. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(f)(1).

4 Cases that cite this headnote

[20] **Civil Rights** Discrimination in General

To plead a discrimination claim under New York City Human Rights Law (NYCHRL), a plaintiff must allege only that she was treated less well because of a discriminatory intent. New York City Administrative Code, § 8-107(1)(a).

5 Cases that cite this headnote

[21] **Civil Rights** Adverse actions in general

For an employee to plead a discrimination claim under New York City Human Rights Law (NYCHRL), the challenged conduct need not even be tangible like hiring or firing. New York City Administrative Code, § 8-107(1)(a).

[22] **Civil Rights** Discrimination in General

Because New York City Human Rights Law (NYCHRL) standard for discrimination claims is more liberal than the corresponding federal and state law standards, courts must analyze NYCHRL claims separately and independently from any federal and state law claims. New York City Administrative Code, § 8-107(1)(a).

1 Case that cites this headnote

[23] **Civil Rights** Purpose and construction in general

The New York City Human Rights Law (NYCHRL) must be construed broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible. New York City Administrative Code, § 8-107(1)(a).

1 Case that cites this headnote

[24] **Civil Rights** Acts or Conduct Causing Deprivation

The court considers the totality of the circumstances, and while courts may dismiss truly insubstantial cases, even a single comment may be actionable in the proper context, for purposes of the New York City Human Rights Law (NYCHRL). New York City Administrative Code, § 8-107(1)(a).

1 Case that cites this headnote

[25] **Civil Rights** Threats, intimidation, and harassment

While the New York City Human Rights Law (NYCHRL) confers broad protections, it is not a general civility code. New York City Administrative Code, § 8-107(1)(a).

[26] **Civil Rights** Discrimination in General

Plaintiff alleging discrimination under New York City Human Rights Law (NYCHRL) bears the burden of showing that the conduct is caused by a discriminatory motive. New York City Administrative Code, § 8-107(1)(a).

[27] **Civil Rights** Motive or intent; pretext

Civil Rights Practices prohibited or required in general; elements

To establish discrimination under New York City Human Rights Law (NYCHRL), it is not enough that a plaintiff has an overbearing or obnoxious boss; she must show that she has been treated less well at least in part because of her protected characteristic. New York City Administrative Code, § 8-107(1)(a).

6 Cases that cite this headnote

[28] **Civil Rights** Discrimination in General

Under the New York City Human Rights Law (NYCHRL), the plaintiff must allege that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for her unequal treatment. New York City Administrative Code, § 8-107(1)(a).

3 Cases that cite this headnote

[29] **Civil Rights** Employment practices

A plaintiff can raise an inference of discrimination under New York City Human Rights Law (NYCHRL) with respect to disparate pay by demonstrating the disparate treatment of at least one similarly situated employee outside his protected group and sufficient facts from which it may reasonably be inferred that the plaintiff's and comparator's circumstances bear a reasonably close resemblance. New York City Administrative Code, § 8-107(1)(a).

2 Cases that cite this headnote

[30] **Civil Rights** Employment practices

To raise inference of discrimination under New York City Human Rights Law (NYCHRL) with respect to disparate pay, alleged comparator must be similar enough to support at least a minimal inference that the difference of treatment may be attributable to discrimination. New York City Administrative Code, § 8-107(1)(a).

2 Cases that cite this headnote

[31] **Civil Rights** Employment practices

Whether two employees are similarly situated, for purposes of raising inference of discrimination under New York City Human Rights Law (NYCHRL) with respect to disparate pay, ordinarily presents a question of fact for the jury. New York City Administrative Code, § 8-107(1)(a).

[32] **Civil Rights** Compensation; comparable worth

Allegations of female employee of privately-held media company that she was compensated less than employer's male employees, that male producers hired out of her internship program were paid a starting salary $10,000 more than hers, that 18 male team members received increased compensation for performing similar job duties, and that she was denied raises and compensation compared to her male peers sufficiently pled that employee was treated less well with respect to compensation than male employees, and that male employees she identified were similarly situated to her, as required to state claim for disparate pay under New York City Human Rights Law (NYCHRL) and New York State Human Rights Law (NYSHRL). N.Y. Executive Law § 296(1)(a); New York City Administrative Code, § 8-107(1)(a).

[33] **Civil Rights** Promotion, demotion, and transfer

To establish a prima facie case of discrimination for failure to promote under Title VII, a plaintiff must show that: (1) he is a member of a protected class, (2) his job performance was satisfactory, (3) he applied for and was denied promotion to a position for which he was qualified, and (4) the position remained open and the employer continued to seek applicants. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[34] **Civil Rights** Promotion, demotion, and transfer

Civil Rights Public employment

Allegations of Black female employee of privately-held media company that she "discussed" her interest in promotion to fill position specifically focusing on her race and identity to "guide the team," and that her supervisors told her that there was no point in creating that role and promoting her if she already filled that role by being a Black woman on team, failed to state claim for failure to promote under New York City Human Rights Law (NYCHRL), absent allegations that employer refused to create new positions for employees who were not member of her protected classes. New York City Administrative Code, § 8-107.

[35] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

In order to succeed on claim for hostile work environment under New York City Human Rights Law (NYCHRL), a plaintiff must show that he was treated less well than

other employees on the basis of a protected characteristic. New York City Administrative Code, § 8-107.

11 Cases that cite this headnote

[36] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

To adequately state claim for hostile work environment under New York City Human Rights Law (NYCHRL), at a minimum, a plaintiff must plead facts tending to show that actions that created the hostile work environment were taken against him because of a prohibited factor. New York City Administrative Code, § 8-107.

5 Cases that cite this headnote

[37] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

To state a hostile work environment claim under Title VII, a plaintiff must allege that her workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter conditions of victim's employment and create abusive working environment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2 Cases that cite this headnote

[38] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

The New York City Human Rights Law (NYCHRL) standard for hostile work environment claims is more lenient than Title VII's standard, and is not limited to Title VII's "severe and pervasive" analysis. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; New York City Administrative Code, § 8-107.

5 Cases that cite this headnote

[39] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Allegations of female employee of privately-held media company that she was paid less for similar work than her male comparators, that she was denied resources, such as certain remote-work technologies, that were provided to her male colleagues, and that male reporters were consulted regarding thematic topic areas that they would cover, but employee was assigned to cover "scraps," sufficiently pled that she was treated less well due to her gender, as required to state claim for hostile work environment under New York City Human Rights Law (NYCHRL). New York City Administrative Code, § 8-107.

3 Cases that cite this headnote

[40] **Limitation of Actions** Civil rights

A cause of action for discrimination under the New York State Human Rights Law (NYSHRL) accrues and the limitation period begins to run on the date of the alleged discriminatory act. N.Y. Executive Law § 296(1)(a).

1 Case that cites this headnote

[41] **Civil Rights** Practices prohibited or required in general; elements

To state claim under New York State Human Rights Law (NYSHRL), a plaintiff must plausibly allege that (1) the employer took adverse action against him, and (2) his race, color, religion, sex, or national origin was a motivating factor in the employment decision. N.Y. Executive Law § 296(1)(a)(2019).

1 Case that cites this headnote

[42] **Civil Rights** Compensation and benefits

Subjecting an employee to unequal pay can constitute a materially adverse employment action, as required to state claim under New York State Human Rights Law (NYSHRL). N.Y. Executive Law § 296(1)(a)(2019).

1 Case that cites this headnote

[43] **Civil Rights** Disparate treatment

To state a claim for disparate impact under Title VII, plaintiffs must (1) identify a specific employment practice or policy; (2) demonstrate that a disparity exists; and (3) establish a causal relationship between the two. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[44] **Civil Rights** Pleading

A plaintiff must at least set forth enough factual allegations to plausibly support each of the three basic elements of a disparate impact claim under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[45] **Civil Rights** Prima facie case

At prima facie stage of disparate impact claim under Title VII, statistical analysis put forth to support existence of disparity must demonstrate that disparity is substantial or significant, and must be of kind and degree sufficient to reveal causal relationship between challenged practice and disparity. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[46] **Civil Rights** Prima facie case

At prima facie stage of disparate impact claim under Title VII, a plaintiff is not required to prove in detail the methodological soundness of her statistical assessment or to supplement the complaint's statistical analysis with corroborating evidence; but even at this early juncture, statistics must plausibly suggest that the challenged practice actually has a disparate impact. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

1 Case that cites this headnote

[47] **Civil Rights** Employment practices

Allegations of female employees of privately-held media company that male reporters were frequently hired at salaries that were $20,000 or more above salaries of their female peers lacked sufficient detail to support existence of a disparity, as required to state claim for disparate impact under New York State Human Rights Law (NYSHRL). New York City Administrative Code, § 8-107(17).

[48] **Civil Rights** Disparate impact

To show that the challenged practice actually has a disparate impact, for purposes of disparate impact claim under New York State Human Rights Law (NYSHRL), plaintiffs must focus on the disparity between appropriate comparator groups; the relevant comparison is between the alleged disparity at issue and the composition of the qualified population in the relevant labor market. New York City Administrative Code, § 8-107(17).

2 Cases that cite this headnote

[49] **Civil Rights** Weight and Sufficiency of Evidence

In context of claim for disparate impact under Title VII, statistics must reveal disparities between populations that are relevant to the claim the plaintiff seeks to prove. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[50] **Civil Rights** Employment practices

Allegations of female employees of privately-held media company that only 1,000 of employer's 2,700 reporters were women failed to state causation element of claim for disparate impact under New York State Human Rights Law (NYSHRL), absent allegations regarding relative number of men and women eligible to be hired as reporters in first place. New York City Administrative Code, § 8-107(17).

[51] **Civil Rights** Employment practices

Plaintiffs are free to rely on anecdotal or qualitative allegations, rather than statistical analysis, in alleging a claim for disparate impact under New York State Human Rights Law (NYSHRL), but even these allegations must be sufficient to plausibly suggest that the challenged

practice actually has a disparate impact. New York City Administrative Code, § 8-107(17).

1 Case that cites this headnote

[52] **Jury** Time for making demand

District court would exercise its discretion to excuse employees' untimely demand for jury trial in employment discrimination action, which was removed by employer from state to federal court; employment discrimination cases were frequently tried before juries, there was no question that employees expressed their desire that case be tried before jury, as they included "JURY TRIAL DEMANDED" in captions both of complaint filed in state court as well as second amended complaint (SAC), and employer did not demonstrate that it would suffer prejudice if case was tried before jury, as case had not yet proceeded past initial motion practice. N.Y. CPLR § 4102; Fed. R. Civ. P. 81(c)(3).

[53] **Removal of Cases** Trial, judgment, and review

In absence of prejudice to nonmovant, even untimely jury demand usually will be permitted in removed cases. Fed. R. Civ. P. 81(c)(3).

[54] **Federal Civil Procedure** Complaint

Leave to amend complaint may be denied for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party. Fed. R. Civ. P. 15(a)(2).

[55] **Federal Civil Procedure** Form and sufficiency of amendment; futility

Any attempt by employee of privately-held media company to replead her employment discrimination claims under New York State Human Rights Law (NYSHRL) or New York City Human Rights Law (NYCHRL) would be futile, and thus leave to amend complaint was not warranted, where employee did not live or work in New York, as required to bring claims under NYSHRL or NYCHRL. N.Y. Executive Law § 290 et seq.; New York City Administrative Code, § 8-101 et seq.

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MEMORANDUM OPINION & ORDER

GREGORY H. WOODS, United States District Judge:

I. INTRODUCTION

Plaintiff Nafeesa Syeed, who is a South Asian-American woman, worked as a reporter and producer for Bloomberg's Dubai news bureau before relocating to the United States, at which time she began reporting from Bloomberg's Washington D.C. bureau. She claims that while working in Washington D.C., she was denied promotions for which she was well-qualified, paid less than her male counterparts, and regularly subjected to derogatory conduct and remarks targeting her race and gender until she was allegedly constructively discharged in 2018. Plaintiff Naula Ndugga, a Black woman who works for Bloomberg's Media Division in New York, raises similar allegations, focused on the allegedly discriminatory policies and practices imposed by the firm's three man "Editorial Management Committee," which controls hiring and advancement at Bloomberg.

Ms. Syeed and Ms. Ndugga assert claims on behalf of themselves and a putative class of similarly situated current and former women employees under Title VII, the New York State Human Rights Law ("NYSHRL"), and the New York City Human Rights Law ("NYCHRL"). Defendant has moved under Rule 12(b)(6) to dismiss the complaint for failure to state a claim. Because Ms. Syeed, who at all relevant times worked in Washington D.C., has not pleaded that felt

the impact of Bloomberg's discrimination in New York City or State, her claims under the NYSHRL and NYCHRL must be dismissed. Because Ms. Ndugga has plausibly pleaded that she is treated less well than comparable men at Bloomberg, the bulk of her discrimination claims against Bloomberg may proceed. However, her Title VII claims, failure to promote claims under the NYCHRL and NYSHRL, and disparate impact claims under the NYSHRL are dismissed.

II. BACKGROUND AND PROCEDURAL HISTORY[1]

A. Defendant Bloomberg L.P.

Bloomberg L.P. ("Bloomberg") is a privately held media company. SAC ¶ 11. Its global headquarters are located in in New York City. *Id.* ¶ 9. Bloomberg operates Bloomberg Media, a news organization that employs approximately 2,700 reporters, producers, editors across over 120 news bureaus worldwide. *Id.* ¶¶ 12, 16. Approximately 1,000 of those 2,7000 reporters, producers and editors are women. *Id.* ¶ 16.

Bloomberg Media's news content and employment decisions are controlled by its Editorial Management Committee, which operates from its New York headquarters and reports to Bloomberg founder and CEO Michael Bloomberg. *Id.* ¶¶ 12, 14, 17–18. All three members of the Editorial Management Committee are men. *Id.* ¶¶ 14, 17.

1. Promotion Practices

When Bloomberg Media has a job opening, it first posts the opening on an internal career portal. *Id.* ¶ 27. If it is unable to fill the opening internally, it advertises the opening publicly. *Id.* Candidates for hiring or promotion are interviewed by bureau chiefs and senior editors. *Id.* ¶ 28. However, only the Editorial Management Committee has the authority to hire or promote employees. *Id.* ¶¶ 16, 28.

Reporters at Bloomberg Media can be promoted from reporter to senior reporter, then to editor, to senior editor, and ultimately bureau chief. *Id.* ¶ 29. There are also gradations within reporter positions: reporters assigned to certain subject areas, such as foreign policy, are considered "higher level positions" and employees who hold those roles are more likely to be promoted to a position as a senior reporter or editor. *Id.* Producers at Bloomberg Media can be promoted from producer to a position as senior producer and subsequently, executive producer. *Id.* ¶ 30. Like reporters, producers assigned to certain subject areas are considered "higher level" and those who hold the positions are more likely to be promoted. *Id.*

Both Plaintiffs allege that they were passed over for promotions for which they were well qualified. *Id.* ¶ 31. They allege that Bloomberg Media engages in practices that limit the opportunities for promotion available to individuals who are not white men. For example, the Editorial Management Committee designated certain positions as "diversity slots." *Id.* ¶ 32. Ms. Syeed understood that while "diversity slot" positions might be filled by women or people of color, non-"diversity slot" positions would effectively be filled only by white men. *Id.* Ms. Syeed was once told by a managing editor that she had not been considered for a particular promotion because the position had not been designated a "diversity slot." *Id.*

2. Compensation and Evaluation Practices

When an individual is hired by Bloomberg, they are asked what their current or most recent salary is or was. *Id.* at ¶ 33. The Editorial Management Committee then decides the starting salary that will be authorized for the individual, determining that salary largely based on the individual's prior pay. *Id.* The Editorial Management Committee often agrees to offer more money to male reporters or editors who "seek[ ] a better salary," but declines to do the same for new female hires; male reporters are frequently hired at salaries that are $20,000 or more above the salaries of their female peers. *Id.* ¶¶ 34–35. These starting salaries continue to impact compensation throughout an employee's tenure at Bloomberg Media because, even if equal pay raises were given to men and women, the disparities created by this disparate starting pay would continue in a phenomenon called "start low, stay low." *Id.* ¶ 36.

Compensation for reporters, producers, and editors can be impacted by evaluations that take place every six months, but the ultimate decisions on compensation, including bonuses and pay raises, are made by the Editorial Management Committee. *Id.* ¶¶ 40–42. At mid-year and year-end, reporters, producers, and editors are evaluated by their team leaders, who rate each employee on a scale from one to five, with five being the best rating. *Id.* ¶¶ 40. Those draft evaluations are then approved by bureau chiefs and forwarded to the Editorial Management Committee. *Id.* The

Editorial Management Committee routinely directs bureau chiefs to change certain employees' ratings, and dictates which employees should have their ratings reduced. *Id.* The Editorial Management Committee then uses the employees' low ratings to justify denying or limiting the employees' bonuses, raises, and promotions. *Id.* ¶ 41–42.

B. Plaintiff Nafeesa Syeed

Ms. Syeed is a South Asian-American woman who currently resides in California. *Id.* ¶ 7. Ms. Syeed worked for Bloomberg from October 19, 2014 to June 8, 2018. *Id.* ¶¶ 7, 56. She began her work for Bloomberg as a Persian Gulf economy and government reporter in Bloomberg's Dubai news bureau. *Id.* ¶ 56.

1. Ms. Syeed Relocates to Washington D.C.

In or around October 2015, Ms. Syeed told Bloomberg that she had married and needed to relocate to the United States. *Id.* ¶ 61. She told Bloomberg that she intended to apply for editorial positions in the company's New York and Washington, D.C. offices. *Id.* She visited the New York and Washington D.C. offices and met with editors in both offices to express her interest in open positions relating to foreign policy, her preferred topic and area of expertise. *Id.* ¶¶ 62–63.

In early 2016, Ms. Syeed unsuccessfully applied for multiple reporting positions in New York and Washington, D.C. *Id.* ¶¶ 64–66. In January or February, she applied for a position as a foreign policy reporter in Bloomberg's Washington D.C. news bureau. *Id.* ¶ 64. The position was initially posted internally but later posted publicly. *Id.* It was ultimately filled by a man. *Id.*

Ms. Syeed was hired for a position in Bloomberg's Washington D.C. news bureau on March 20, 2016. *Id.* ¶¶ 64–66. While initially hired for a broadly defined role that would have her report on technology, national security, and foreign policy, she learned after being hired that she was a finalist for a foreign policy reporting position. *Id.* ¶ 66. However, after further interviews, she was instead asked to cover cybersecurity to replace a man who had been promoted. *Id.*

After Ms. Syeed moved to Washington, a representative from human resources told Ms. Syeed that her salary would be increased to be "more in line" with other D.C.-based reporters' salaries. *Id.* ¶ 70. Ms. Syeed learned that despite her raise, she still earned less than her male peers and that, on average, women reporters' salaries were 20% lower than male reporters' salaries. *Id.* ¶¶ 70, 76. In 2017, her manager told her that she could ask for a raise, but then denied her request for a five-percent raise because she had made it "too late." *Id.* ¶ 76.

2. Ms. Syeed Faces Alleged Discrimination

While in Washington, Ms. Syeed encountered behavior by her male colleagues that she considered to be discriminatory. For instance, Ms. Syeed's superiors at the Washington D.C. bureau frequently confused Ms. Syeed with another South Asian female colleague. *Id.* ¶ 71. She also overheard her superiors make negative comments about the professional acumen of female minority employees, and her work was marginalized in favor of male reporters and editors. *Id.* ¶ 72. She also found herself excluded from roundtables with high-profile sources, even where she was the reporter in charge of covering the story to whom the source was relevant. *Id.* ¶ 75. Ms. Syeed's superiors also declined her request for access to Bloomberg's secure communications equipment while granting similar requests made by "[f]avored male members of the newsroom." *Id.* ¶ 80. Moreover, throughout her time at Bloomberg. Ms. Syeed continued to be paid "well below the level of her male peers." *Id.* ¶ 76.

In addition, Ms. Syeed was denied the opportunity to report on topics that she wanted to cover, while she saw male reporters having their preferred beats assigned to them. *Id.* ¶ 78. For instance, even though Ms. Syeed expressed an interest in covering the Middle East and foreign policy, she was told that the Washington D.C. bureau's chief wanted her to cover election security. *Id.* After that, a male reporter who covered Middle East later confided to Ms. Syeed that he had been instructed to stop talking to her and that if he was seen talking to Ms. Syeed he would be reprimanded by senior management. *Id.* Editors in Bloomberg's Dubai bureau also informed Ms. Syeed that they had been instructed to longer contact her about anything related to the Middle East. *Id.* Because Ms. Syeed was unable to work on her preferred topics, she was prevented from developing deeper expertise within a subject area. *Id.* ¶ 77. That, in turn impeded her chances at promotion because male executives judged reporters based on "scoops and depth of sourcing within institutions, rather than coverage of breaking news." *Id.*

In mid-2018, Ms. Syeed realized that there was no career path for her in Bloomberg's Washington D.C. bureau because she had been completely shut out of Middle East coverage. *Id.* ¶ 81. She then applied for several reporting jobs with Bloomberg in New York. *Id.* ¶¶ 81–82. In particular, Ms. Syeed repeatedly told her team leader that she was interested in filling a particular vacancy in the United Nations bureau. *Id.* ¶¶ 79, 82. That vacancy was ultimately filled by a man. *Id.* ¶ 82. When Ms. Syeed asked her team leader why she had not been considered for the position, he claimed that she had never said that she wanted to cover foreign policy and that she had to advocate for herself if she wanted to advance at Bloomberg. *Id.* ¶ 82. Another editor also told Ms. Syeed that she needed to advocate for herself to be promoted. *Id.* ¶ 83. However, Ms. Syeed had watched several of her male co-workers receive promotions after working at Bloomberg for the same amount of time as she. *Id.* Moreover, Ms. Syeed had not observed them "advocating" for themselves in the manner that Bloomberg required from its female employees. *Id.*

During the same conversation, an editor told Ms. Syeed that one of the reasons she was not considered for the U.N. job was that the job had not been designated as a "diversity slot." *Id.* ¶ 84. Ms. Syeed explained her belief that she would only be considered for positions that had been designated as diversity slots, rather than any and all vacant positions. *Id.* She further explained that she did not want to be treated as a "token" employee, and pointed out that there were "no minority women in leadership roles," and that she felt like she had no future in Bloomberg Media overall. *Id.*

3. Ms. Syeed and Bloomberg Part Ways

Ms. Syeed met with Tamika Alexander, Head of Human Resources for the Washington, D.C. bureau on June 6, 2018, and told her about the editor's comments about "diversity slots" and about her belief that that Bloomberg had a "racist and sexist culture." *Id.* ¶ 87. Ms. Alexander, who had previously filed a complaint against Bloomberg with the Equal Employment Opportunity Commission (the "EEOC") after experiencing pregnancy discrimination, said that she was aware of the issues Ms. Syeed raised. *Id.* Ms. Alexander instructed Ms. Syeed to pass along her concerns to a recently named senior executive editor for diversity, talent, standards, and training at Bloomberg Media, who worked in Bloomberg's New York offices.

On June 8, 2016, Ms. Syeed informed her team leader that she could not continue working at Bloomberg because of the discrimination that she faced. *Id.* ¶ 88. She then met with her managing editor to tell him that she was leaving Bloomberg, an interaction that ended with him "pressing [her] about where she would be working next, and if it was for a competitor." *Id.*

C. Plaintiff Naula Ndugga

Ms. Ndugga is a Black woman who lives and works in New York. *Id.* ¶¶ 8–9. She began working at Bloomberg as a paid intern in September 2017 before obtaining a full-time position in January 2018 as a news producer for Bloomberg Media's "Quicktake" department, which remains her current position. *Id.* ¶¶ 8, 93.

1. Ms. Ndugga's Salary

When she began her full-time role, Ms. Ndugga earned a salary of $65,000, while male producers also hired from her intern class earned a salary of $75,000. *Id.* ¶¶ 37, 94. Over the next three years, Ms. Ndugga received positive feedback from her supervisors but nevertheless received only one $1,500 raise. *Id.* ¶ 96–97, 99, 103. Ms. Ndugga did not receive a bonus in 2018. *Id.* ¶ 98. In 2019, although her team leader recommended that she receive a raise and bonus, the Editorial Management Committee ultimately denied Ms. Ndugga a raise and gave her only half of her bonus. *Id.* ¶¶ 98–99. Again in February 2020, Ms. Ndugga did not receive a raise, despite her manager's recommendation that she be given one. *Id.* ¶ 103. Although Ms. Ndugga was told that she had not received a raise because company could not afford raises for her division, she learned from some of her male colleagues that they had received raises. *Id.* In a July 2020 meeting with the Editorial Management Committee, Ms. Ndugga asked about the gender pay gap at the company. *Id.* ¶ 110. A member of the committee told her that no such pay gap existed. *Id.*

Ms. Ndugga received fewer resources from Bloomberg than her male colleagues. *Id.* ¶ 100. For example, Bloomberg denied Ms. Ndugga's request for technology to work remotely, while granting the same request when made by her male peers. *Id.* The company also denied her request to take courses to maintain language skills useful to her reporting, although Bloomberg supported other employees in similar endeavors. *Id.* When she reported the differences in

the way that she was treated to Bloomberg's human resources department, they defended management. *Id.* ¶ 101.

2. Ms. Ndugga's Professional Opportunities

In fall 2019, Ms. Ndugga's male colleagues were assigned to cover their preferred topics, while Ms. Ndugga "was assigned to cover 'scraps' "—subjects no one else wanted, which were generally considered less desirable assignments that provided fewer opportunities for career advancement." *Id.* ¶ 102. Although some colleagues noticed that Ms. Ndugga was being treated differently and mentioned that fact to management, their concerns were ignored, and Ms. Ndugga continued to receive undesirable assignments. *Id.*

In March 2020, Ms. Ndugga approached her team leader about promoting her to a position "specifically focused on race and identity to guide the team." *Id.* ¶ 104. After making the request, two colleagues approached Ms. Ndugga and told her that "there was no point in creating that role and promoting her if she already filled that role by being a Black woman on the team." *Id.*

Bloomberg's Editorial Management Committee "repeatedly refused to cover racial topics" even when they were among the "top news stories." *Id.* ¶ 110. Ms. Ndugga's help was solicited to "help guide the team," on racial issues, which required her to "recount her own trauma," but the team did not defer to her when she advised them to stop using the word "colored" in news scripts. *Id.* On one occasion, Ms. Ndugga had prepared to conduct a live interview with one of her sources regarding the murder of George Floyd, including by participating in a required training for on-air interviews, but was prevented from doing so because her superiors said that only "certain people" were qualified to conduct on-air interviews. *Id.* ¶ 109. Her male colleagues, however, were allowed to conduct such interviews even though they had not received the required training. *Id.*

3. Colleagues' Conduct and Alleged Retaliation

Ms. Ndugga also faced regular derogatory comments from colleagues and pushback when she questioned racist behavior. *Id.* ¶¶ 105–06. Some of her more senior colleagues "would opine regularly on Black culture and issues, making pronouncements such as that Black people should not criticize Bruno Mars or asking Black team members whether it was appropriate for them to refer to February as Black history month." *Id.* ¶ 105.

On one occasion, Ms. Ndugga questioned the choice to depict a "young white woman holding seemingly impoverished Black Ugandan children" in a piece on marathons. *Id.* ¶ 106. Ms. Ndugga's supervisor became angry, threw his headphones towards her, and yelled at her. *Id.* Ms. Ndugga reported the incident to her division head, who refused to acknowledge that her supervisor had done anything wrong. *Id.* Her supervisor told her division head and her coworkers that she had raised her voice and behaved aggressively towards him. *Id.* ¶ 107.

Following that altercation, Ms. Ndugga's supervisor excluded her from emails and meetings, which denied her information she required to do her job. *Id.* ¶ 108. Ms. Ndugga reported her supervisor's behavior to her division head, but her division head did nothing about it. *Id.*

D. Procedural History

On August 9, 2020, Ms. Syeed commenced this action in New York state court against Bloomberg and several of its employees. Dkt. No. 1-1, Complaint. Ms. Syeed amended her complaint in the state court action on August 11, 2020. Dkt. No. 1-2, Amended Verified Complaint. On September 11, 2020, the defendants removed the case to this Court pursuant to the Class Action Fairness Act. Dkt. No. 1, Notice of Removal.

On October 9, 2020, the defendants moved to dismiss the amended complaint under Rule 12(b)(6) for failure to state a claim. Dkt. No. 20, Mem. in Supp. of Defs.' Mot. to Dismiss the Am. Verified Compl. Rather than oppose the defendants' motion to dismiss, on November 16, 2020, Ms. Syeed amended her complaint a second time. SAC. The second amended complaint added Ms. Ndugga as a plaintiff. *Id.* It also dropped all of the individual defendants, leaving Bloomberg as the sole defendant in the case. *Id.*

On January 15, 2021, Bloomberg moved to dismiss the second amended complaint or, in the alternative, to strike Plaintiffs' demand for a jury trial. Dkt. No. 43, Mem. of L. in Supp. of Def.'s Mot. to Dismiss ("Def.'s Br.") at 1. On February 12, 2021, Plaintiffs filed a brief in opposition. Dkt. No. 45, Mem. in Opp'n to Def.'s Mot. to Dismiss ("Pls.' Opp'n"). On February 26, 2021, Bloomberg filed a motion in reply. Dkt. No. 47, Reply Mem. of L. ("Def.'s Reply"). On March

4, 2021, Plaintiffs' surreply was filed. Dkt. Nos. 48–49 ("Surreply").

III. LEGAL STANDARD

A complaint need only contain "a short and plain statement ... showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a claim that does not meet this pleading standard for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). On a motion filed under Rule 12(b)(6), the court accepts as true the facts alleged in the complaint and draws all reasonable inferences in the plaintiff's favor. *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 124 (2d Cir. 2008) (per curiam). But "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are inadequate. *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). And "[t]he tenet that a court must accept as true" a complaint's factual allegations does not apply "to legal conclusions." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (alterations omitted).

To survive dismissal, a complaint must allege sufficient facts to state a plausible claim. *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. A claim is plausible when the plaintiff pleads facts to support the reasonable inference that the defendant has acted unlawfully. *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). The plaintiff's claim must be more than merely "speculative." *Twombly*, 550 U.S. at 545, 127 S.Ct. 1955. And a reviewing court must "draw on its judicial experience and common sense" to determine plausibility. *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937 (citation omitted).

[1] **[2]** **[3]** On a motion to dismiss, a court must generally "limit itself to the facts stated in the complaint." *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 192 (2d Cir. 2006) (quoting *Hayden v. County of Nassau*, 180 F.3d 42, 54 (2d Cir. 1999)). But a court may consider "any 'written instrument' ... attached to [the complaint] as 'an exhibit' or ... incorporated in it by reference." *Lynch v. City of New York*, 952 F.3d 67, 79 (2d Cir. 2020) (quoting Fed. R. Civ. P. 10(c) (other citations omitted)). A court may also consider a document "solely relie[d]" on by the plaintiff if it "is integral to the complaint." *Id.* (quotation and brackets omitted). A document is "integral to the complaint" if the complaint "relies heavily" on the document's "terms and effect." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016); *see also Littlejohn v. City of N.Y.*, 795 F.3d 297, 305 n.3 (2d Cir. 2015) (holding that a court may "consider the plaintiff's relevant filings with the EEOC" on a motion to dismiss if the filings "are integral to and solely relied upon by the complaint" (quotation and brackets omitted)). A plaintiff must "*rely* on the terms and effect of the document in drafting the complaint; mere notice or possession is not enough." *Nicosia*, 834 F.3d at 231 (emphasis added) (quoting *Glob. Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 156 (2d Cir. 2006)).

IV. ANALYSIS

A. The Court Treats the Second Amended Complaint as the Operative Complaint

[4] **[5]** **[6]** The Court treats the SAC as the operative complaint in this action, even though Plaintiffs filed it without complying with Rule 15(a). When a case is removed to federal court, "the federal court 'takes the case up where the State court left it off.' " *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 436, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974) (quoting *Duncan v. Gegan*, 101 U.S. 810, 812, 25 L.Ed. 875 (1880)). The federal court treats the case "as if it originally had been filed in the federal court." 14C Wright et al., Federal Practice and Procedure § 3738 (4th ed. 2012); *see also Carvalho v. Equifax Info. Servs.*, 629 F.3d 876, 887 (9th Cir. 2010) ("The federal court ... treats everything that occurred in the state court as if it had taken place in federal court." (alteration in original) (citation omitted)). Therefore, a party's ability to amend its pleading after removal may be limited by amendments made in state court, even though the validity of those amendments was governed entirely by state procedure at the time. Accordingly, a party that has already amended its pleading once as a matter of course in state court may not do so a second time in federal court without seeking the consent of the other parties or leave of the federal court as required by Rule 15(a)(2). *See, e.g., Gibson v. N.Y. State Office of Mental Health*, No. 6:17-CV-0608 (GTS/TWD), 2018 WL 3850632, at *7 n.7 (N.D.N.Y. 2018); *accord Whitehead v. Viacom*, 233 F. Supp. 2d 715, 719 (D. Md. 2002), *aff'd* 63 F. App'x 175 (4th Cir. 2003); *Matemu v. Brienzi*, No. 5:19-cv-00380-M, 2020 WL 1963471, at *4 (E.D.N.C. April 23, 2020). Because Ms. Syeed amended her complaint once in state court on her own initiative and without the consent of the defendants, and because that amendment would have exhausted her right to amend under Rule 15(a)(1) if it had been made in federal court, Plaintiffs failed to comply with Rule 15(a)(2) when they filed the SAC without the consent of Defendant or leave of the Court.

[7] **[8]** Nonetheless, the Court will treat the SAC as the operative complaint. The Court has discretion to grant requests for leave to amend *nunc pro tunc* when parties file amended pleadings without complying with Rule 15(a)(2). *See, e.g., Lewittes v. Cohen*, No. 03 Civ. 189 (CSH), 2004 WL 1171261, at *3 (S.D.N.Y. May 26, 2004) (granting leave to amend *nunc pro tunc* "in the interests of clarity, consistency, and justice"); *Bledsoe v. Saaqin*, No. 15-CV-0181 (JS) (ARL), 2017 WL 11511144, at *1 n.1 (E.D.N.Y. Jan. 10, 2017) (granting plaintiff leave to amend *nunc pro tunc* to add an additional defendant). Granting such requests is particularly appropriate given the lenient standard applied to those requests when they are made at the appropriate time. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires.").

Here, a number of factors weigh in favor of treating the SAC as the operative complaint in this case. First, the parties have already expended substantial time and effort on this motion to dismiss the SAC, which adds claims that were not present in its former pleadings. In addition, Defendant has not suggested that the Court would have denied Plaintiffs leave to amend had it been requested at the appropriate time. Accordingly, the Court will exercise its discretion under Rule 15(a) to treat the SAC as the operative complaint. *See Lewittes*, 2004 WL 1171261, at *3 (granting leave to file an untimely amended Complaint where the amended complaint "provide[d] the most complete and current account of the factual allegations, claims, and parties in this case"); *see also Purchase Partners, LLC v. Carver Fed. Sav. Bank*, No. 09 CIV. 9687 JMF, 2013 WL 1499417, at *6 (S.D.N.Y. Apr. 10, 2013) (granting leave to amend an answer no pro tunc in part because "inconvenience to the parties and the Court was minimal").

B. Ms. Syeed's Claims[2]

1. Ms. Syeed Did Not Feel the Impact of Defendant's Discrimination in New York, so her NYCHRL and NYSHRL Claims are Dismissed

[9] **[10]** Ms. Syeed does not adequately plead a cause of action under the NYSHRL or the NYCHRL because Ms. Syeed did not experience the impact of the alleged discrimination in New York. "The New York Court of Appeals has adopted an "impact" test for nonresident plaintiffs seeking recovery under the NYCHRL." *Vangas v. Montefiore Med. Ctr.*, 823 F.3d 174, 182 (2d Cir. 2016) (citing *Hoffman Hoffman v. Parade Publ'ns*, 15 N.Y.3d 285 (2010)). This test requires that a nonresident plaintiff must "plead and prove that the alleged discriminatory conduct had an impact in [New York]." *Hoffman*, 15 N.Y.3d at 289–91, 907 N.Y.S.2d 145, 933 N.E.2d 744; *see also, Pakniat v. Moor*, 192 A.D.3d 596, 145 N.Y.S.3d 30, 31 (2021) ("To avail herself of these statutes, plaintiff must still satisfy the jurisdictional requirement that the impact of the discrimination was felt in New York City and State."). The impact test is not satisfied where a plaintiff's contacts with NYC are merely "tangential." *Vangas*, 823 F.3d at 182. Rather, to state a claim, "the impact of the employment action must be felt *by the plaintiff in* NYC" or, with respect to the NYSHRL, New York State. *Id.* at 183.

[11] Here, Ms. Syeed cannot establish that she felt the impact of Defendant's constructive discharge or their failure to promote her in New York as required by the NYCHRL and NYSHRL. To the extent Ms. Syeed makes a constructive discharge claim,[3] Ms. Syeed lived and worked in Washington D.C. at all relevant periods. SAC ¶¶ 66–91. Courts routinely hold that a plaintiff who lives and works outside of New York, but whose employment is terminated by a New York employer, does not feel the impact of that termination in New York. *See Vangas*, 823 F.3d at 182 (holding that a Plaintiff terminated by a New York company did not state a claim under the NYCHRL where she did not live or work in the city); *Pakniat*, 145 N.Y.S.3d at 30 (2021) ("The fact that the alleged discriminatory acts and unlawful decision to terminate plaintiff's employment occurred in New York is insufficient to plead impact in New York"); *Wolf v. Imus*, 170 A.D.3d 563, 96 N.Y.S. 3d 54, 55 (2019) ("The Supreme Court properly dismissed plaintiff's age discrimination claims brought under the City and State Human Rights Laws, because the impact on plaintiff from the termination of his employment occurred in Florida, where he lived and worked."). Accordingly, Ms. Syeed's claims for constructive discharge under the NYCHRL and NYSHRL are dismissed.

[12] As to Ms. Syeed's failure to promote claims, she similarly cannot show that Defendant's failure to promote her impacted her in New York. Ms. Syeed was living and working in Washington D.C. when Defendant determined not to promote her to certain positions based in New York—at no point did she live or work in New York State or City. SAC ¶¶ 66–91. Indeed, Ms. Syeed does not describe how Defendant's decision impacted her in New York; instead, she rests her claim solely on her allegations that that she applied for, and was denied, certain New York-based positions. SAC ¶ 82. Without more, Ms. Syeed's allegations fall short of stating a

claim under the NYCHRL or NYSHRL. *See Wang v. Gov't Employees Ins. Co.*, 2016 WL 11469653, at *7 (E.D.N.Y. Mar. 31, 2016) (finding that Plaintiff could not assert claims under the NYCHRL where she did not live in New York City and alleged that she was denied a supervisory position that would have allowed her to "handle[ ] cases in New York City Civil Courts and District Courts").

Relying on three decisions from this district, Ms. Syeed argues that the alleged discrimination she experienced by being denied a promotion to a position in New York is sufficient to state a claim under the NYCHRL and NYSHRL. *See* Opp'n at 7–8 (citing *Anderson v. HotelsAB, LLC*, 2015 WL 5008771, at *3 (S.D.N.Y. 2015); *Chau v. Donovan*, 357 F. Supp. 3d 276 (S.D.N.Y. 2019); and *Scalercio-Isenberg v. Morgan Stanley Services Group, Inc.*, 2019 WL 6916099 (S.D.N.Y. Dec. 19, 2019)). However, as explained below, these decisions run contrary to the holdings in *Hoffman, Vangas*, and other binding New York State precedent. Accordingly, the Court respectfully declines to follow them.

In *Hoffman*, the New York Court of Appeals adopted an impact test for nonresident plaintiffs seeking recovery under the NYCHRL. The Court of Appeals explained that the NYCHRL is intended "to protect 'inhabitants' and persons 'within' the state, meaning that those who work in New York fall within the class of persons who may bring discrimination claims in New York." *Hoffman*, 15 N.Y.3d at 291, 907 N.Y.S.2d 145, 933 N.E.2d 744 (emphasis added). Thus, the Court of Appeals determined that, to satisfy the impact test, a plaintiff "must demonstrate that the alleged discriminatory conduct had an 'impact' within the city." *Id.* at 290, 907 N.Y.S.2d 145, 933 N.E.2d 744. According to *Hoffman*, that requirement would properly "confine[ ] the protections of the NYCHRL to those who are meant to be protected—those *who work in the city.*" *Id.* at 291, 907 N.Y.S.2d 145, 933 N.E.2d 744 (emphasis added). Turning to the NYSHRL, *Hoffman* reached a similar conclusion, explaining that "[t]he obvious intent of the State Human Rights Law is to protect 'inhabitants' and persons 'within' the state, meaning that those who work in New York fall within the class of persons who may bring discrimination claims in New York." *Id.*

In *Vangas*, the Second Circuit examined *Hoffman* and reiterated that "[u]nder the NYCHRL the impact of the employment action must be felt by the plaintiff in NYC." 823 F.3d at 183. Accordingly, the Second Circuit held that a plaintiff terminated by a New York City-based company could not state a claim under the NYCHRL where she "worked in Yonkers, was supervised in Yonkers, was terminated in Yonkers, and d[id] not allege that she ever went to NYC for work." *Id.* at 183. Echoing *Hoffman's* focus on the nature by which the impact test confined the scope of the NYCHRL, *Vangas* explained, "to hold otherwise ... would broaden the statute impermissibly beyond those 'who work in the city.' " *Id.*

New York State appellate courts have also consistently applied the impact test to ensure that the NYCHRL and NYSHRL are targeted to protect individuals who live or work in New York City and State. *See, e.g.*, *Pakniat*, 145 N.Y.S. 3d at 31 (holding that the plaintiff failed to state claims under the NYCHRL and NYRHL where the she was "living and working in Montreal, Canada, at the time of the alleged discriminatory conduct and she failed to allege that the conduct had any impact in either New York State or New York City")[4]; *Hardwick v. Auriemma*, 116 A.D.3d 465, 983 N.Y.S.2d 509, 512 (2014) (holding that the plaintiff failed to show defendant's actions had an impact in New York when the actions were committed while plaintiff was in London). Indeed, some New York State courts have taken this analysis a step further, expressly holding that plaintiffs fail to satisfy *Hoffman*'s impact test where discriminatory "conduct occur[s] while [a] plaintiff [is] physically situated outside of New York." *Benham v. eCommission Solutions, LLC*, 118 A.D.3d 605, 989 N.Y.S. 2d 20, 20 (2014) ("[A] nonresident plaintiff's claims ... turn[ ] primarily on her [or his] physical location at the time of the alleged discriminatory acts."); *see also, Wolf*, 96 N.Y.S.3d at 55 (same).

Contrary to this binding case law, the cases upon which Ms. Syeed relies—*Anderson, Chau*, and *Scalerico-Isenberg*—find that being denied a promotion to a position in New York is sufficient to state a claim under the NYCHRL and NYSHRL even where the plaintiff does not live or work in New York City or State. As an initial matter, *Anderson* progenerated all three cases; both of the subsequent decisions relied on its holding without substantial independent analysis *See Chau*, 357 F. Supp. 3d at 283–84 (relying on *Anderson* to find that a plaintiff stated a claim where "[a]lthough Chau never worked in New York City ... the job for which she alleges she was not hired in violation of the NYCHRL and NYSHRL would have offered her employment within New York City"); *Scalercio-Isenberg*, 2019 WL 6916099 (S.D.N.Y. Dec. 19, 2019) (relying on *Anderson* and *Chau* and explaining "when non-resident plaintiffs allege that that they were not hired for a job in New York City on a discriminatory basis, the impact requirement for both the NYSHRL and

NYCHRL is met"). In other words, the later cases upon which Ms. Syeed relies rest on *Anderson*'s shaky foundation.

In *Anderson*, the court considered failure to hire claims brought by a plaintiff who lived on Shelter Island, and was denied a position working for a New York company. *Anderson*, 2015 WL 5008771, at *2–3. In determining that the plaintiff had felt the impact of the defendant's alleged discrimination in New York, the court first rejected the defendant's argument that the impact of an allegedly discriminatory failure-to-hire occurs only at the time of the act—i.e., at the location "where the plaintiff was interviewed and where [the defendant] allegedly made the discriminatory statements and hiring decision." *Id.* at *3. According to the court, such a test would "would narrow the impact analysis of a NYCHRL violation to consideration solely of the physical locations where [the plaintiff] experienced 'the initial discriminatory act' and 'the original experience of the injury.' "[5] *Id.* Instead, the court determined that it would be better to engage in "a practical substantive consideration of how and where the injury actually affected the plaintiff with respect to her employment." *Id.*

Then, ostensibly relying on this "practical substantive consideration" but without citing any case law, the court determined that allegations that defendant's discrimination had an "impact with respect to [plaintiff's] *prospective* employment responsibilities in New York City" were sufficient to state an NYCHRL claim, even where a plaintiff did not live or work in New York City. *Id.* (emphasis added).

There are numerous issues with *Anderson's* analysis. First, in support of its "practical substantive consideration" test, *Anderson* cites *Regan v. Benchmark Co. LLC*, where the Court considered NYCHRL claims by a plaintiff who worked in New York City but was transferred to an office in New Jersey. No. 11 CIV. 4511 CM, 2012 WL 692056, at *4–5 (S.D.N.Y. Mar. 1, 2012). Notably, the only case that *Regan* cites in support of its impact finding, *Pouncy v. Danka Office Imaging*, No. 06-cv-4777, 2009 WL 10695792 (S.D.N.Y. May 19, 2009), *see id.* at *14, was published nearly a year before *Hoffman* was decided. *See id.* at *13–14. This lack of reliance on post-*Hoffman* decisions is grounds for concern as to the legitimacy of *Regan's* analysis.

But even then, *Regan's* analysis is grounded in the impact of discrimination that took place while the plaintiff worked in New York City: the court reasoned that the plaintiff's transfer to New Jersey was "the culmination of a number of alleged *discriminatory acts that took place at Benchmark's New York City office while Regan worked there.*" *Id.* at *14. As such, it is still the case that the plaintiff in *Regan* experienced the impact of the discrimination while working in New York City.

More broadly, *Anderson's* purported application of the impact test undermines the central tenet proclaimed in *Hoffman*: the impact test is intended to limit the NYCHRL's and NYSHRL's scope to protect only individuals who work "in the city," and "within the state," and who feel the impact of the discrimination "in" the City or State. *Hoffman*, 15 N.Y.3d at 289–90, 907 N.Y.S.2d 145, 933 N.E.2d 744. *Hoffman* expressly acknowledged that the test would "*narrow[ ]* the class of nonresident plaintiffs who may invoke [the NYCHRL's] protection" to individuals working in New York City. *Id.* at 290, 907 N.Y.S.2d 145, 933 N.E.2d 744 (emphasis added). So too did *Vangas*—which was decided nearly a year after *Anderson*—provide clear Second Circuit authority that warned against "broaden[ing] the [NYCHRL] impermissibly beyond those 'who work in the city.' " *Vangas*, 823 F.3d at 183. But *Anderson's* misapplication of the impact test does exactly that: it expands the class of nonresident plaintiffs protected by the NYCHRL to include individuals who do not work in the city or state, but who merely speculate that they might have done so someday in the future. Accordingly, because this finding is inconsistent with binding authority, the Court declines to adopt the prospective impact test put forth in *Anderson* and its progeny. The Court is comfortable staying within the clear lines drawn by New York State's highest court in *Hoffman*, rather than drawing new ones based on "practical substantive considerations," as *Anderson* did.

To be sure, *Anderson* correctly pointed out that the NYCHRL "was amended in 2005 to broaden its protections because the provisions of the City HRL had been 'construed too narrowly to ensure protection of the civil rights of all persons covered by the law.' " *Anderson*, 2015 WL 5008771, at *4. However, while we must broadly construe types of discrimination against which the statute is meant to protect, *Hoffman, Vangas*, and the aforementioned state court decisions leave no doubt that courts cannot expand the scope of the persons to whom those protections are afforded, namely, individuals who live and work in New York City and State.

Here, Ms. Syeed—who lived at worked at all relevant times in Washington D.C.— pleads only that defendant's discrimination had an impact with respect to her prospective employment in the city. Because those allegations are insufficient to plead that Defendant's discrimination had an

impact on Plaintiff in New York, Defendant's motion to dismiss is granted with respect to Ms. Syeed's claims.

C. Ms. Ndugga's Title VII Claims

1. Because Ms. Ndugga Failed to Exhaust her Administrative Remedies Prior to Filing Suit, her Title VII Claims Are Dismissed

[13] **[14]** **[15]** **[16]** Ms. Ndugga's claims Title VII claims, including her claims for retaliation and disparate impact pleaded under Title VII, *see* SAC ¶¶ 143–47, 157–163, are dismissed because Ms. Ndugga did not exhaust her remedies before the EEOC prior to filing her Complaint.[6] "As a precondition to filing a Title VII claim in Federal court, a plaintiff must first pursue available administrative remedies and file a timely complaint with the EEOC." *Deravin v. Kerik*, 335 F.3d 195, 200 (2d Cir. 2003); *see also* 42 U.S.C. § 2000e–5(e)-(f). "Exhaustion of administrative remedies through the EEOC is 'an essential element' of the Title VII ... statutory scheme[ ] and, as such, a precondition to bringing such claims in federal court." *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 686 (2d Cir. 2001) (per curiam) (quoting *Francis v. City of New York*, 235 F.3d 763, 768 (2d Cir. 2000)). "The purpose of this exhaustion requirement is to give the administrative agency the opportunity to investigate, mediate, and take remedial action." *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 384 (2d Cir. 2015) (quoting *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712 (2d Cir. 1998)). That purpose "would be defeated if a complainant could litigate a claim not previously presented to and investigated by the EEOC." *Miller v. Int'l Tel. & Tel. Corp.,* 755 F.2d 20, 26 (2d Cir. 1985).

[17] Under Title VII's exhaustion requirements, a "right-to-sue letter is a necessary prerequisite to filing suit." *Newsome v. Berman*, 24 F. App'x 33, 34 (2d Cir. 2001) (citing 42 U.S.C. § 2000e–5(f)(3); 29 C.F.R. 1601.28(e)(1)). Title VII expressly provides that a plaintiff must receive a right-to-sue letter before filing a civil action asserting a Title VII claim:

> If a charge filed with the Commission ... is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge ... the Commission has not filed a civil action under this section ... or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission ... *shall so notify the person aggrieved* and within ninety days after the giving of such notice *a civil action may be brought against the respondent named in the charge* ... by the person claiming to be aggrieved ....

42 U.S.C. § 2000e–5(f)(1) (emphasis added). "[A] plaintiff's failure to obtain a notice-of-right-to-sue-letter is not a jurisdictional bar, but only a precondition to bringing a Title VII action that can be waived by the parties or the court," and accordingly, a failure to obtain a right-to-sue letter can be excused by the Court on equitable grounds. *Pietras v. Bd. of Fire Comm'rs of Farmingville Fire Dist.,* 180 F.3d 468, 474 (2d Cir. 1999). In addition, in certain circumstances, "[t]he EEOC has authorized itself to issue 'early' right-to-sue letters when a complainant requests a right-to-sue letter prior to the running of 180 days." *Gibb v. Tapestry, Inc.*, No. 18-CV-6888, 2018 WL 6329403, at *4 (S.D.N.Y. Dec. 3, 2018) (citing C.F.R. § 1601.28(a)(2) (2004)).

[18] Here, Ms. Ndugga filed her EEOC complaint on November 11, 2020, the same day as the Second Amended Complaint. SAC ¶ 6. Although she eventually received an early right-to-sue letter on February 2, 2021, there is no question that the Second Amended Complaint was filed prior to the receipt of this letter. Pl.'s Opp'n at 9. Thus, Ms. Ndugga unequivocally failed to exhaust her Title VII remedies, and her Title VII claims must be dismissed, unless Ms. Ndugga were to show that waiver should be permitted on equitable grounds. *See Ali v. Bank of New York*, 934 F. Supp. 87, 93 (S.D.N.Y. 1996) (dismissing Title VII claims where plaintiff had not received right-to-sue letter from the EEOC); *Johnson v. Xylem Inc.*, No. 1:19-cv-130, —— F.Supp.3d ——, ——, 2020 WL 1963125, at *2 (W.D.N.Y. Apr. 16, 2020) (dismissing Title VII claims where plaintiff had not received a right-to-sue letter prior to initiating his lawsuit).

However, Plaintiffs do not argue that there are equitable grounds to excuse Ms. Ndugga's failure to obtain a right-to-sue letter prior to filing suit. Instead, they argue only that the receipt of an early right-to-sue letter "after a Title VII suit beg[ins] satisfies the exhaustion requirements under Title VII." Opp'n at 9–10. But Plaintiffs' purported support for that proposition is inapposite because those courts excused the failure *on equitable grounds.* For instance, Plaintiffs point to cases collected in *Brunson-Bedi v. New York,* No. 15-cv-9790, 2018 WL 2084171 (S.D.N.Y. May 1, 2018) for support that courts may consider claims where a right-to-sue letter has not yet been filed. Surreply at 1. However, Plaintiff overlooks that the courts in those cases waived the requirement that plaintiff receive a right-to-sue letter "based on *equitable* principles." *Brunson-Bedi*, 2018 WL 2084171 at *4.[7] Ms. Ndugga has provided no justification for her failure to comply with the

rule—she appears merely to have chosen not to follow it. In any event, the Court has no equitable basis upon which to excuse her failure here.

The parties also squabble over whether Ms. Ndugga's receipt of an early right-to-sue letter—one issued prior to the expiration of the 180-day period for the EEOC's investigation prescribed by Title VII—sufficiently exhausted her administrative remedies, but those arguments are inapplicable to the facts at hand. Reply at 7; Surreply at 1–4. While there is some debate regarding whether early right-to-sue letters satisfy the statute's exhaustion requirements, *see Gibb v. Tapestry, Inc.*, No. 18-cv-6888, 2018 WL 6329403, at *4-5 (S.D.N.Y. Dec. 3, 2018) ("Courts are divided on whether the EEOC may issue a valid right-to-sue letter within the 180-day waiting period contemplated by section 2000e-5(f)(1)"), that debate concerns plaintiffs who received an early right-to-sue letter *before* filing their Title VII claims in district court.[8] *See e.g.*, *id.* (considering whether the receipt of an early right-to-sue letter sufficiently exhausted plaintiff's remedies where plaintiff filed the complaint *after* receiving the early right-to-sue letter); *Stidhum v. 161-10 Hillside Auto Ave., LLC*, No. 19-cv-5458, 2021 WL 2634915, at *1 (E.D.N.Y. June 25, 2021) (noting that the plaintiff brought his claims in federal court after receiving an early right-to-sue letter); *Hernandez v. Premium Merchant Funding One, LLC*, No. 19-cv-1727, 2020 WL 3962108, at *4 (S.D.N.Y. July 13, 2020) (same). Here, the Court need not decide whether the receipt of a right-to-sue letter prior to the statutorily provided 180-day waiting period satisfies Title VII's exhaustion requirements because Ms. Ndugga did not receive *any* right-to-sue letter prior to filing her claims—rather, she received an early right-to-sue letter months after filing her claims before this Court.

[19] There is an easy solution that would have allowed Ms. Ndugga to preserve her Title VII claims: "where a plaintiff has pleaded non-Title VII claims alongside a Title VII claim, he may file suit on the non-Title VII claims and then *amend the complaint* to include the Title VII claim after receiving a right-to-sue letter." *Sughrim v. New York*, 503 F. Supp. 3d 68, 95 (S.D.N.Y. 2020) (emphasis added); *see also Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 41 (2d Cir. 1992) (dismissing a Title VII claim and commenting that a plaintiff could have preserved the claims if she had brought an action, sought a right-to-sue letter, and then amended her complaint to include Title VII claims). Here, Plaintiffs included Ms. Ndugga's Title VII claims from the get-go. They did not file Ms. Ndugga's state claims, wait to receive a right-to-sue letter, and only then amend their complaint to add her Title VII claims. *See Sughrim*, 503 F. Supp. 3d at 95 (dismissing Title VII claims asserted before receiving right-to-sue letters, commenting that complaint could be amended should these right-to-sue letters be obtained). Accordingly, Defendant's motion to dismiss is granted with respect to Ms. Ndugga's Title VII claims, including her claims for retaliation and disparate impact under Title VII.

D. Ms. Ndugga's NYCHRL Claims

1. Legal Standard

[20] **[21]** **[22]** "Section 8-107(1)(a) of the NYCHRL makes it 'an unlawful discriminatory practice for an employer or an employee or agent thereof, because of the [protected characteristic] of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.' " *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109–10 (2d Cir. 2013) (quoting N.Y.C. Admin. Code § 8-107(1)(a)) (brackets and ellipsis omitted). To plead a discrimination claim under the NYCHRL, a plaintiff must allege only that "she [was] treated 'less well' ... because of a discriminatory intent." *Id.*, 715 F.3d at 110 (citing *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 872 N.Y.S.2d 27, 39 (2009)). "[T]he challenged conduct need not even be 'tangible' (like hiring or firing)." *Id.* (quoting *Williams*, 872 N.Y.S.2d at 40); *see also Wolf v. Time Warner, Inc.*, 548 F. App'x 693, 696 (2d Cir. 2013) ("To state a claim for discrimination, a plaintiff must only show differential treatment of any degree based on a discriminatory motive."). Because the NYCHRL standard is more liberal than the corresponding federal and state law standards, courts must analyze NYCHRL claims "separately and independently from any federal and state law claims." *Mihalik*, 715 F.3d at 109.

[23] **[24]** "The NYCHRL must be construed 'broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.' " *Nguedi v. Fed. Rsrv. Bank of New York*, No. 1:16-CV-636-GHW, 2019 WL 1083966, at *10 (S.D.N.Y. Mar. 7, 2019) (quoting *Mihalik*, 715 F.3d at 109), *aff'd,* 813 F. App'x 616 (2d Cir. 2020), *cert. denied*, —— U.S. ——, 141 S. Ct. 825, 208 L.Ed.2d 404 (2020). "The Court considers the totality of the circumstances, and while courts may dismiss truly insubstantial cases, even a single comment may be actionable in the proper context, for purposes of the NYCHRL." *Bacchus*

v. New York City Dep't of Educ., 137 F. Supp. 3d 214, 245 (E.D.N.Y. 2015) (cleaned up) (quoting *Williams*, 872 N.Y.S.2d at 41).

[25] [26] [27] [28] However, while the NYCHRL confers broad protections, it is "not a 'general civility code.' " *Mihalik*, 715 F.3d at 110 (quoting *Williams*, 872 N.Y.S.2d at 40–41). "The plaintiff still bears the burden of showing that the conduct is caused by a discriminatory motive. It is not enough that a plaintiff has an overbearing or obnoxious boss. She must show that she has been treated less well at least in part 'because of [her protected characteristic].' " *Id.* (citing *Williams*, 872 N.Y.S.2d at 39, 40 n.27). Under the NYCHRL, the plaintiff must allege "that "unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for" her unequal treatment. *Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 946 N.Y.S.2d 27, 40–41 (2012) (citing *Williams*, 872 N.Y.S.2d at 27); *see also Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 936 N.Y.S.2d 112, 120 (2011) ("It is not uncommon for covered entities to have multiple or mixed motives for their action, and the [NYC]HRL proscribes such 'partial' discrimination.") (quoted in *Velazco v. Columbus Citizens Found.*, 778 F.3d 409, 411 (2d Cir. 2015) (alterations omitted)).

Ms. Ndugga brings claims under the NYCHRL for disparate compensation, denial of promotions, and what she frames as a hostile work environment. For each of those claims, she must show that she was treated "less well" on the basis of her race or gender due to Defendant's discriminatory intent.

2. Ms. Ndugga's Allegations that she is Paid Less than Similarly Situated Men State a NYCHRL Claim for Disparate Pay

[29] [30] [31] Ms. Ndugga's allegations inch across the line to state a claim for disparate pay under the NYCHRL. "[A] plaintiff can raise an inference of discrimination by demonstrating the disparate treatment of at least one similarly situated employee outside his protected group and sufficient facts from which it may reasonably be inferred that 'the plaintiff's and comparator's circumstances ... bear a reasonably close resemblance.' " *Sutter v. Dibello*, No. 18-cv-817, 2021 WL 930459, at *21 (E.D.N.Y. Mar. 10, 2021) (quoting *Hu v. City of New York,* 927 F.3d 81, 96-97 (2d Cir. 2019)).[9] The alleged comparator must be similar enough "to support at least a minimal inference that the difference of treatment may be attributable to discrimination." *McGuinness v. Lincoln Hall*, 263 F.3d 49, 54 (2d Cir. 2001); *see also Johnson v. Schmid*, 750 F. App'x 12, 17 (2d Cir. 2018); *Cardwell v. Davis Polk & Wardwell LLP*, 2020 WL 6274826, at *22 (S.D.N.Y. Oct. 24, 2020). "Whether two employees are similarly situated ordinarily presents a question of fact for the jury." *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000).

[32] Before turning to whether Ms. Ndugga is similarly situated to the men identified in her Complaint, the Court notes that Ms. Ndugga sufficiently alleges that she was compensated less than Bloomberg's male employees. Ms. Ndugga alleges, among other things, that male producers hired out of her internship program were paid a starting salary $10,000 more than hers, SAC ¶ 94; that eighteen male team members received increased compensation for performing similar job duties, *id.* ¶ 95; that she was denied raises and compensation compared to her male peers, *id.* ¶ 99, and that Brian Wall, "a producer who began his employment at the same time as Ms. Ndugga for the same position, with similar education" received increased compensation and a promotion, *id.* ¶ 103. These allegations are sufficient to state that Ms. Ndugga was treated less well with respect to compensation than male employees. *See Nguedi v. Federal Reserve Bank of New York*, 2017 WL 5991757, at *8 (finding that plaintiff, a Black man, pleaded sufficient facts to suggest that his employer "gave preferential treatment to employees outside of Plaintiff's protected classes" where, among other things, he was surveilled while white employees were not, and that white employees were encouraged to share ideas whereas he was told "to display less leadership").

Then, construing all allegations in Ms. Ndugga's favor, she sufficiently alleges that the male Bloomberg employees she identified are similarly situated to her. For instance, Ms. Ndugga claims that she and the higher-paid male producers were hired out of the same internship program. Drawing all inferences in Ms. Ndugga's favor, one could reasonably infer that the members of the internship class had a similar educational background and work history so as to be similarly situated. Similarly, construing in Ms. Ndugga's favor her allegations that she and Brian Wall worked in the "same position, with similar education," is it reasonable to infer that the two were similarly situated in terms of experience and their respective job responsibilities. *See id.*, 2017 WL 5991757, at *7–8 (determining that the plaintiff had alleged sufficient facts to suggest that plaintiff's membership in protected classes were "at least motivating factors in his termination" where he alleged that comparators "were subject

to the same standards" because "they, like he, had obtained security clearances," and that comparator employees worked in the "same area" as the plaintiff); *see also*, *Torre*, 493 F. Supp. 3d at 285–86 (finding claims sufficiently pled where plaintiff alleged that comparators were "paid more than she was, despite having similar responsibilities and equal or lesser credentials") (alteration omitted) (quoting *Craven v. City of New York*, No. 19-CV-1486 (JMF), 2020 WL 2765694, at *4 (S.D.N.Y. May 28, 2020)).[10]

It is not the case, as Defendants suggest, that Ms. Ndugga's claims fail because she has not pleaded sufficiently detailed facts concerning her comparators relevant experience, length of employment, job titles, job responsibilities or annual review. *See* Mot. at 17 (citing *Humphries v. City Univ. of N.Y.*, No. 13-cv-2641, 2013 WL 6196561 (S.D.N.Y. Nov. 23, 2013).) To be sure, Ms. Ndugga's claims could be more detailed. However, the Court must "accept[ ] all factual allegations as true and draw[ ] all reasonable inferences in favor of [Ms. Ndugga]." *Sierra Club v. Con-Strux, LLC*, 911 F.3d 85, 88 (2d Cir. 2018) (quoting *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016)). Here, Ms. Ndugga's claims, construed in her favor, inch over the line to create a reasonable inference that men were similarly situated to her. *See Lenart v. Coach Inc.*, 131 F. Supp. 3d 61, 69 (S.D.N.Y. 2015) (finding, under the "broad and remedial purposes" of the NYCHRL, plaintiff's allegations of discrimination "[a]lthough thin, ... [were] sufficient to state a claim").

Neither are Ms. Ndugga's claims defeated by the fact that three of the eighteen men identified by Ms. Ndugga occupied more senior positions at Bloomberg than she did. *See* Mot. at 17–18. Notably, even if the court declined to consider these three individuals as comparators, Ms. Ndugga alleges that the men were her "team members" and performed "similar job duties" to her. SAC ¶ 95. Drawing all inferences in her favor and viewing these allegations in light of the rest of Ms. Ndugga's complaint, it is at least reasonable to infer that at least some of these "team members" had the same level of seniority as Ms. Ndugga. Moreover, the Court must consider Ms. Ndugga's allegations she was systematically looked over for promotions and opportunities that were "given to her male peers," *id.* at ¶ 96, which suggests that Ms. Ndugga could have occupied a similarly senior position, but was denied the chance to do so because of Bloomberg's discrimination. And regardless, Ms. Ndugga's identification of these individuals provides contextual support for the remainder of her claims. *Cf. Bonilla*, 2019 WL 6050757, at *14 ("Besides providing a laundry list of white officers whom Bonilla alleges were treated more favorably than he, Bonilla fails in many ways to show that these officers were similarly situated to him. However, when combined with his allegations of direct racial animus, [the plaintiff] has done enough to nudge his claim of race discrimination over the line from conceivable to plausible.").

Accordingly, Defendant's motion to dismiss Ms. Ndugga's disparate pay claims under the NYCHRL is denied.

3. Ms. Ndugga Does Not Allege a Failure to Promote Because She Wanted to Be Promoted to a Non-Existent Position

[33] Ms. Ndugga fails to allege a claim for failure to promote under the NYCHRL. "[C]ourts have yet to establish a test for analyzing failure to promote claims under the NYCHRL." *Campbell v. Cellco P'ship*, 860 F. Supp. 2d 284, 297 (S.D.N.Y. 2012). However, '[t]o establish a prima facie case of discrimination for failure to promote under Title VII a plaintiff must show that: "1) [he] 'is a member of a protected class;' 2) [his] job performance was satisfactory; 3) [he] applied for and was denied promotion to a position for which [he] was qualified; and 4) the position 'remained open and the employer continued to seek applicants.' " *Id.* (quoting *Campbell v. All. Nat'l, Inc.*, 107 F.Supp.2d 234, 242 (S.D.N.Y. 2000)). While the NYCHRL is subject to more liberal pleading standards than Title VII, Title VII's test still provides guidance for analysis of Ms. Ndugga's Title VII claims. *See id.* ("While bearing in mind the more liberal standards of the NYCHRL, I use [the Title VII] test as a guide in analyzing plaintiff's failure to promote claims.").

[34] Here, Ms. Ndugga's claims for failure to promote fail because she has not identified a position for which she applied and was denied a promotion. Instead, she claims that she "discussed ... her interest in promotion to fill a position specifically focusing on race and identity to guide the team" and that her supervisors told her that "there was no point in creating that role and promoting her if she already filled that role by being a Black woman on the team." SAC ¶ 104. However, she does not claim that Defendants refused to create new positions for employees who were not a member of Ms. Ndugga's protected classes. In essence, Ms. Ndugga claims that Defendant's treated her "less well" than others because it refused to create a new position especially for her —such an allegation is insufficient to state a claim even under

the NYCHRL's liberal standard. Accordingly, her claims for failure to promote cannot withstand Defendant's motion to dismiss. *See Tulino v. City of New York*, No. 15-cv-7106, 2016 WL 2967847, at *6 (denying failure to promote claims where the plaintiff conceded that "she did not formally apply for a known vacant position"); *Bernstein v. MONY Grp., Inc.*, 228 F. Supp. 2d 415, 419 (S.D.N.Y. 2002) (denying failure to promote claims because the plaintiff "ha[d] not alleged, among other things, that any position 'in recruiting and marketing' was ever created or that she was rejected from such position").[11]

Plaintiffs cite to numerous cases to support their argument that "there are exceptions to the general rule that a plaintiff must identify a specific position that she applied for," all of which are inapposite. *See* Opp'n at 16–17. None of these cases involved instances where a defendant would necessarily need to create a new position to satisfy plaintiff's request for a promotion, as is the case here. *See Woods-Early v. Corning Inc.*, 330 F.R.D. 117, 126 (W.D.N.Y. 2019) (regarding discrimination that prevented employees from advancing to an already established "pay band"); *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 129 (2d Cir. 2004) (commenting that the plaintiff had applied to an "available position").

Accordingly, Defendant's motion to dismiss is granted with respect to Ms. Ndugga's failure to promote claims under the NYCHRL and NYSHRL.

4. Ms. Ndugga Sufficiently Alleges that Bloomberg's Conduct Subjected Her to a "Hostile Work Environment" Under the NYCHRL

[35] **[36]** **[37]** **[38]** Ms. Ndugga adequately pleads a claim for "hostile work environment" under the NYCHRL. "In order to succeed on a NYCHRL hostile work environment claim, a plaintiff must show that he was treated 'less well than other employees' on the basis of a protected characteristic." *Alvarado v. Nordstrom, Inc.*, 685 F. App'x 4, 8 (2d Cir. 2017) (citing *Mihalik*, 715 F.3d at 110). Thus, at a minimum, a plaintiff must "plead facts tending to show that actions that created the hostile work environment were taken against him *because of* a prohibited factor." *Williams v. Metro-N. Commuter R. R. Co.,* No. 11 CIV. 7835, 2012 WL 2367049, at *13 (S.D.N.Y. June 20, 2012) (emphasis added).[12]

[39] Here, Ms. Ndugga has plausibly alleged that she was "treated less well" due to her gender. In addition to Ms. Ndugga's claims that she was paid less for similar work than her male comparators, Ms. Ndugga also alleges that she was denied resources, such as certain remote-work technologies, that were provided to her male colleagues, SAC ¶ 100, and that male reporters were consulted regarding thematic topic areas that they would cover, but Ms. Ndugga was assigned to cover "scraps," *id.* ¶ 102. Under the NYCHRL's broad pleading standards, Ms. Ndugga's allegations, all of which suggest that she was treated less well than her male colleagues, are sufficient to state a claim. *See Lenart,* 131 F. Supp. 3d at 69 (finding the plaintiff's "thin" allegations were nonetheless sufficient to state a claim under the NYCHRL where the plaintiff alleged that he had to "undergo extra interviews and psychological testing, whereas his female colleagues did not," and that he had heard his supervisors expressed a preference for working with women); *Encarnacion v. Isabella Geriatric Ctr. Inc.*, No., No. 11-cv-3757, 2014 WL 7008946, at *11 (S.D.N.Y. Dec. 12, 2014) (finding that plaintiff's hostile work environment claims under Title VII's more rigorous standard survived summary judgment where she showed, among other things, that her supervisors "confin[ed] plaintiff to the most difficult assignments" and "refused to meet with her"). Accordingly, Defendant's motion to dismiss Ms. Ndugga's NYCHRL resulting from an environment in which she was treated less well than others is denied.[13]

E. Ms. Ndugga's NYSHRL Claims

1. Because Ms. Ndugga's Claims Accrued Before and After the NYSHRL was Amended, Two Standards must Be Used to Analyze her Claims.

The NYSHRL "prohibits employers from 'discriminating against [an] individual in compensation or in terms, conditions or privileges of employment.' " *Tolbert v. Smith*, 790 F.3d 427, 436 (2d Cir. 2015) (quoting N.Y. Exec. Law § 296(1)(a)). However, two different standards apply to Ms. Ndugga's NYSHRL claims.

Prior to August 19, 2019, the pleading standards were generally the same for Title VII, section 1981, and NYSHRL claims. *See Awad v. City of New York.*, No. 13 civ. 5753, 2014 WL 1814114, at *5 (E.D.N.Y. May 7, 2014) ("Discrimination claims under § 1981 ... and [the] NYSHRL are analyzed under the same framework and pleading standard as Title VII

claims.") (citing *Ruiz v. Cnty. of Rockland*, 609 F.3d 486, 491 (2d Cir. 2010); *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n.1 (2d Cir. 2000); *Williams v. N.Y.C. Hous. Auth.*, 458 F.3d 67, 72 (2d Cir. 2006) (per curiam)). As a result, it was generally more difficult to state a claim under the NYSHRL than under the NYCHRL. *See, e.g.*, *Soloviev v. Goldstein*, 104 F. Supp. 3d 232, 250 (E.D.N.Y. 2015) ("[A] complaint may fail to state a claim under Title VII and NYSHRL but still be allowed to proceed under NYCHRL.")

[40] However, the New York legislature amended the NYSHRL on August 19, 2019 to establish that its provisions should be construed liberally even if "federal civil rights law, including those laws with provisions worded comparably to the provisions of this article" have been construed narrowly. *Deveaux v. Skechers USA, Inc.*, No. 19-cv-9734 (DLC), 2020 WL 1812741, at *3 n.3 (S.D.N.Y. Apr. 9, 2020) (quoting NY Legis 160 (2019), 2019 Sess. Law News of N.Y. Ch. 160 (A. 8421)).[14] "The effect of [that amendment] is to render the standard for claims closer to the standard under the NYCHRL." *Wellner v. Montefiore Med. Ctr.*, No. 17 CIV. 3479 (KPF), 2019 WL 4081898, at *5 n.4 (S.D.N.Y. Aug. 29, 2019). "However, these amendments only apply to claims that accrue on or after the effective date of October 11, 2019." *Id.* "[A] cause of action for discrimination under the NYSHRL accrues and the limitation period begins to run on the date of the alleged discriminatory act." *Fair Hous. Just. Ctr., Inc. v. JDS Dev. LLC*, 443 F. Supp. 3d 494, 504 (S.D.N.Y. 2020) (alterations omitted) (quoting *Flaherty v. Massapequa Pub. Sch.*, 752 F. Supp. 2d 286, 293 (E.D.N.Y. 2010)).

Ms. Ndugga specifically alleges only two discrete acts that occurred prior to October 11, 2019, both of which relate to her claims of disparate pay: first, she alleges that she was paid less than male producers hired out of her internship program, SAC ¶ 94; and second, she alleges that she was denied a bonus in 2018 despite receiving positive performance evaluations. *Id.* ¶ 98. Thus, under the NYSHRL, the Court must evaluate whether this conduct supports Ms. Ndugga's claims under the pre-October 11, 2019 standard.

For the remainder of her allegations, Ms. Ndugga either specifies that the conduct took place after October 11, 2019 or the SAC is ambiguous as to the date when the conduct took place. *See, e.g.*, *id.* ¶ 102 (allegations regarding discrimination that took place in the "Fall of 2019"); *id.* ¶ 106 (describing alleged discrimination by a male supervisor without providing any date). Construing these allegations in the light most favorable to Ms. Ndugga, the Court will assume that this conduct took place after October 11, 2019 and analyze this conduct under the amended and more lenient NYSHRL standard.

2. The Alleged Pre-October 11, 2019 Conduct Is Sufficient to State a Claim Under the NYSHRL

[41] Ms. Ndugga states a claim under the NYSHRL with respect to the pre-October 11, 2019 conduct. Under the pre-October 11, 2019 NYSHRL standard, "a plaintiff must plausibly allege that (1) the employer took adverse action against him, and (2) his race, color, religion, sex, or national origin was a motivating factor in the employment decision." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 87 (2d Cir. 2015); *see also Menaker v. Hofstra Univ.*, 935 F.3d 20, 30 (2d Cir. 2019) ("To survive a motion to dismiss, a plaintiff need only [allege] a prima facie case of ... discrimination by [alleging] that (1) he was within [a] protected class; (2) he was qualified for the position; (3) he was subject to an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination.") (alterations omitted) (quoting *Walsh v. N.Y.C. Hous. Auth.*, 828 F.3d 70, 75 (2d Cir. 2016)).

[42] As to the first factor, the parties do not dispute that Ms. Ndugga is a member of a protected class or that she was qualified for her position. With respect to the second factor, "[s]ubjecting an employee to unequal pay can, of course, constitute a materially adverse employment action." *Humphries v. City Univ. of N.Y.*, No. 13 Civ. 2641 (PAE), 2013 WL 6196561, at *6 (S.D.N.Y. Nov. 26, 2013) (quoting *Butler v. N.Y. Health & Racquet Club*, 768 F. Supp. 2d 516, 532 (S.D.N.Y. 2011)). Thus, because Ms. Ndugga alleges that she was paid less than the men hired out of her internship class, SAC ¶ 94, and that she was denied a bonus in 2018, *id.* ¶ 98, Ms. Ndugga sufficiently alleges she was subject to an adverse employment action. *See Humphries*, 2013 WL 6196561 at *6 ("[S]ubjecting an employee to unequal pay can, of course, constitute a materially adverse employment action.").

The NYSHRL's standard for determining whether the plaintiff's protected characteristic was a motivating factor in an employment decision appears to be "equivalent to" the standard for determining whether, under the NYCHRL, a plaintiff was treated less well than similarly situated others because of their membership in a protected group. *Cardwell*, 2020 WL 6274826, at *20 (commenting that the NYCHRL's standard for determining whether a plaintiff is treated less

well under the NYCHRL "seems to be equivalent to the 'motivating factor' standard of causation under Title VII and the NYSHRL"); *see also, Bivens v. Inst. for Cmty. Living*, No. 14-cv-7173, 2016 WL 11701799, at *1 (S.D.N.Y. Feb. 3, 2016) (quoting *Weiss v. JPMorgan Chase & Co.*, No. 06-cv-4402 (DLC), 2010 WL 114248, at *3 (S.D.N.Y. Jan. 13, 2010)) ("[T]he Second Circuit has continued to apply the same 'motivating factor' causation standard to employment discrimination claims under the NYCHRL that applies to equivalent claims under Title VII."). As noted above, Ms. Ndugga sufficiently alleges a minimal inference of discriminatory intent because she alleges that she was treated "less well" than her male comparators for purposes of her NYCHRL claim: *See supra* Part D.2. Thus, her allegations are similarly sufficient for purposes of her NYSHRL claim. *See Nguedi*, 2017 Wl 5991757, at *7–11 (finding plaintiff stated claims under the NYSHRL and NYCHRL on the same basis); *see Torre*, 493 F. Supp. 3d at 285–86 (finding that plaintiff stated disparate pay claims under the NYCHRL and NYSHRL on the same basis). Accordingly, to the extent Defendant's motion seeks to dismiss Ms. Ndugga's NYSHRL claims on the basis of conduct that occurred prior to the amended NYSHRL's enactment on October 11, 2019, their motion is denied.

3. Allegations Regarding the Remaining, Post-October 2019 Conduct Sufficiently State a Claim under the NYSHRL.

As explained, the amended NYSHRL adopts the same standard as the NYCHRL. *McHenry v. Fox News Network, LLC*, 510 F. Supp. 3d 51, 68 (S.D.N.Y. 2020) ("[T]he NYSHRL was amended to direct courts to construe the NYSHRL, like the NYCHRL, 'liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws including those laws with provisions worded comparably to the provisions of [the NYSHRL] have been so construed.' ") (quoting N.Y. Exec. Law § 300); *Wellner*, 2019 WL 4081898, at *5 n.4 ("The New York State Legislature passed several amendments to the NYSHRL in June 2019, the effect of which is to render the standard for claims closer to the standard under the NYCHRL."). Thus, Ms. Ndugga's remaining NYSHRL claims rise and fall with her NYCHRL claims. Accordingly, Ms. Ndugga has sufficiently stated claims under the NYSHRL for disparate pay and "hostile work environment" based on conduct occurring after October 11, 2019, but fails to state a claim for failure to promote. *See supra* Part D. Defendant's motion to dismiss Ms. Ndugga's NYSHRL claims based on conduct occurring after October 11, 2019 is thus granted in part and denied in part.

F. Disparate Impact

1. Legal Standard

[43] **[44]** Prior to the NYSHRL's 2019 amendment, plaintiffs were required to plead NYSHRL claims for disparate impact under the same pleading standard as applied to such claims under Title VII, which prohibits "discrimination resulting from employment practices that are facially neutral, but which have a 'disparate impact' because they fall more harshly on a protected group than on other groups and cannot otherwise be justified." *Waisome v. Port Auth. of New York & New Jersey*, 948 F.2d 1370, 1374 (2d Cir. 1991). To state a claim for disparate impact under Title VII, plaintiffs must "(1) identify a specific employment practice or policy; (2) demonstrate that a disparity exists; and (3) establish a causal relationship between the two." *Chin v. Port Authority of N.Y. & N.J.*, 685 F.3d 135, 151 (2d Cir. 2012) (internal quotation marks omitted) (first quoting *Malave v. Potter*, 320 F.3d 321, 326 (2d Cir. 2003)), and then quoting *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 160 (2d Cir. 2001); *see also Fitchett v. City of New York*, No. 18 CIV. 8144 (PAE), 2021 WL 964972, at *22 (S.D.N.Y. Mar. 15, 2021). A plaintiff "must at least set forth enough factual allegations to plausibly support each of the three basic elements of a disparate impact claim." *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 209 (2d Cir. 2020).

As explained previously, because the NYSHRL was amended to more closely mirror the NYCHRL than Title VII, the Court analyzes under the NYCHRL's standard Ms. Ndugga's NYSHRL claims for conduct occurring after October 11, 2019. *See Wellner*, 2019 WL 4081898, at *5 n.4. Under the NYCHRL, a plaintiff "must establish 'that a policy or practice of a covered entity or a group of policies or practices of a covered entity results in a disparate impact to the detriment of any group protected by the provisions of [the NYCHRL].' " *Fitchett*, 2021 WL 964972, at *24 (quoting N.Y.C. Admin. Code, § 8-107(17)). That analysis considers the same three factors analyzed under ... Title VII, but the claims are "construed more liberally than their counterparts under Title VII" and the previous version of the NYSHRL. *Id.* at *24.

2. Plaintiffs Do Not Allege Any Disparities that Were Caused by Defendant's Employment Practices

[45] **[46]** Plaintiffs do not sufficiently allege a causal relationship between Defendant's employment policies and any alleged disparities.[15] "At the prima facie stage" under Title VII, statistical analysis put forth to support the existence of a disparity " 'must [demonstrate] that the disparity is substantial or significant, and must be of a kind and degree sufficient to reveal a causal relationship between the challenged practice and the disparity.' " *Mandala*, 975 F. 3d at 209 (quoting *Chin*, 685 F.3d at 151). "[T]hat standard is relaxed at the pleading stage," *id.*, especially under the newly liberalized NYSHRL. For instance, a "plaintiff is not required 'to prove in detail the methodological soundness of her statistical assessment' or to 'supplement [the complaint's] statistical analysis with corroborating evidence.' " *Cardwell v. Davis Polk & Wardwell LLP*, No. 19-cv-10256, 2021 WL 4434935, at *36 (S.D.N.Y. Sept. 23, 2021) (quoting *Mandala*, 975 F.3d at 209). "But even at this early juncture, the statistics must plausibly suggest that the challenged practice *actually* has a disparate impact." *Mandala*, 975 F.3d at 209 (emphasis in original).

[47] Plaintiffs point to several alleged disparities between men and women at Bloomberg, including that "[m]ale reporters are frequently hired at salaries that are $20,000 or more above the salaries of their female peers," SAC ¶ 35; *see also id.* ¶ 38. However, these allegations lack sufficient detail to support the existence of a disparity. Even at the pleading stage, Plaintiffs must "set forth enough factual allegations to plausibly support" the existence of a disparity. *Mandala*, 975 F.3d at 209. Merely alleging that men are "frequently" hired at higher salaries than their female peers does not sufficiently demonstrate that a disparity between the starting salaries of male and female reporters exists; Plaintiffs do not allege, for instance, that "the majority" of men are provided higher starting salaries than their female peers or that "on average" men are paid $20,000 more than women. Without more, the allegations related to male salaries are insufficient to show a disparity, let alone one caused by Defendant's employment practices. *Cf. Richardson v. City of New York*, No. 17-CV-9447 (JPO), 2018 WL 4682224, at *8 (S.D.N.Y. Sept. 28, 2018) (finding "sparse and decontextualized data points" were insufficient to state a claim for disparate impact under the NYCHRL).[16]

[48] **[49]** Second, while Plaintiffs allege that only 1,000 of Bloomberg's 2,700 reporters are women, SAC ¶ 16, they fail to allege a causal connection between that disparity and the Editorial Management Committee's unfettered hiring and promotion discretion. As *Mandala* emphasized, allegations of a disparity—in that case, statistical allegations—must "plausibly suggest that the challenged practice *actually* has a disparate impact." *Mandala*, 975 F.3d at 210. To show that the challenged practice actually has a disparate impact, plaintiffs must "focus on the disparity between appropriate comparator groups." *Id.* The relevant comparison is between the alleged disparity at issue and the "composition of the qualified population in the relevant labor market.' "[17] *Id.* at 210–11 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989)).

[50] Here, Plaintiffs fail to provide relevant comparisons to allege a sufficient causal connection between the Executive Management Committee's unfettered discretion over hiring and their allegation that only 1,000 of Defendant's 2,700 reporters are women. Under *Mandala*, to allege that the Executive Management Committee's hiring discretion was the *cause* of the disparity—rather than, for instance, an existing gender disparity in qualified journalists—Plaintiffs must provide some allegation regarding the relative number of men and women eligible to be hired as reporters in the first place. Plaintiffs do not do so; they do not allege, for instance, that the pool of qualified applicants for Defendant's reporter jobs has a 50/50 gender breakdown.[18] Without more, their allegations are insufficient to permit the court to infer a causal connection between the Executive Management Committee's discretion and the disparity between male and female reporters. *See id.* (holding that plaintiffs failed to state a claim where Plaintiffs had not "offered [any] allegations to suggest that the general population statistic on which they rely 'might accurately reflect [the] pool of qualified job applicants").

[51] This is not to suggest that Plaintiffs must put forth "statistical analysis" to state a claim for disparate impact. As *Mandala* notes, "plaintiffs *typically* rely on statistical evidence to show a disparity in outcome between groups." *Mandala*, 975 F.3d at 209. (emphasis added). Accordingly, Plaintiffs are free to rely on anecdotal or qualitative allegations, rather than statistical analysis, in alleging a disparate impact claim. *See, e.g.*, *Gittens-Bridges v. City of New York*, No. 19cv-272, 2020 WL 3100213, at *15–16 (S.D.N.Y. June 11, 2020) (relying on anecdotal evidence, rather than statistics, to state a claim). But even these

allegations must be sufficient to "plausibly suggest that the challenged practice *actually* has a disparate impact." *Mandala*, 975 F.3d at 210. Without *any* allegations to regarding the relevant pool of qualified applicants, Plaintiffs claims are insufficient to show the requisite causal link. Even under the liberalized standard applicable to the NYSHRL claims, a plaintiff must allege more than that their employer had discretion in hiring and that the current distribution of employees' gender does not match the assumed gender distribution in the U.S. population. Accordingly, Defendant's motion to dismiss Plaintiffs' disparate impact claims under the NYSHRL is granted.

G. Right to Jury Trial

1. The Court Will Honor Plaintiffs' Demand for a Jury Trial

The Court will honor Plaintiffs' demand for a jury trial. In cases which have been removed from state court to federal court, Federal Rule of Civil Procedure 81(c)(3) describes the process for demanding a jury trial in three different situations: (1) when "all necessary pleadings have been served before removal"; (2) "where a party has, before removal, requested a jury in accordance with state law"; and (3) "state law does not require the parties to expressly claim trial by jury." *Cascone v. Ortho Pharm. Corp.*, 702 F.2d 389, 391 (2d Cir. 1983). Rule 81 also provides that in the third situation, a court may still order parties to request a jury trial, and "[a] party who fails to make a demand when so ordered waives a jury trial." Fed. R. Civ. P. 81(c)(3).

[52] At the time of removal, Plaintiffs had filed the First Amended Complaint, which includes the statement "JURY TRIAL DEMANDED" on its first page. Dkt. No. 1, Ex. 2, at 2. Plaintiffs had not filed a demand for jury trial in state court, however, because, under New York law, a jury demand cannot be accepted unless a note of issue has been served, and a note of issue cannot be served until discovery is complete. *See Breedlove v. Cabou*, 296 F. Supp. 2d 253, 277–78 (N.D.N.Y. 2003) (citing N.Y. C.P.L.R. 4102) (explaining the New York process for issuing a jury demand). Because this case is currently in its preliminary stages, discovery had not yet commenced in the state action, let alone been completed prior to the removal of this case, rendering Plaintiffs unable to file a demand for a jury trial.

Then, on September 14, 2020, following removal, this Court issued an order stating that "[p]ursuant to Fed. R. Civ. P. 81(c)(3), if any party wishes to demand a jury trial in this matter, the demand must be served and filed no later than September 25, 2020." Dkt. No. 7. Between September 14 and September 25, 2020, Plaintiffs did not serve or file a jury trial demand. On November 16, 2020, Plaintiffs filed the Second Amended Complaint which also included the statement "JURY TRIAL DEMANDED" in its caption. Dkt. No. 26, at 1.

[53] Here, there can be no dispute that the parties failed to request a jury trial under the circumstances outlined in Rule 81(c)(3). Nonetheless, the Court will exercise its discretion to excuse the untimely jury demand. "The Second Circuit in *Higgins* identified three factors which would allow the district court on remand to allow a 'late' request for a jury trial" ... (1) "whether the case is of a type 'traditionally triable by jury' "; (2) "the parties' assumptions as to whether the case would be tried to a jury;" and (3) "prejudice to the non-movant." *Turkenitz v. Metromotion, Inc.,* No. 97CIV.2513(AJP)(JGK), 1997 WL 773713, at *5 (S.D.N.Y. Dec. 12, 1997) (quoting *Higgins v. Boeing Co.*, 526 F.2d 1004, 1007 (2d Cir. 1975)). "In the absence of such prejudice, even an untimely jury demand usually will be permitted in removed cases." *Id.* at *7.

Here, all three factors weigh in favor of excusing Plaintiff's untimely jury demand. First, employment discrimination cases are frequently tried before juries. Second, there can be no question that Plaintiffs have expressed their desire that this case to be tried to a jury: Plaintiffs included "JURY TRIAL DEMANDED" in the captions both of the complaint filed in state court, Dkt. No. 1-1, as well as in the SAC, SAC at p. 1. The Court is reluctant to deprive Plaintiff of the opportunity to try this case before a jury given that their desire to do so has been evident throughout—even if it was not presented in the proper procedural manner. Moreover, Defendants have not relied to their detriment on Plaintiffs' failure to properly file their demand, given that this case has not yet proceeded past initial motion practice. As follows, Defendants have not demonstrated that they will suffer prejudice if this case is tried to a jury. *See Turkenitz*, 1997 WL 773713, at *6–7 (excusing untimely jury demand where defendants made showing of prejudice); *Breedlove*, 296 F. Supp. 2d at 278 (same); *Encarnacion v. Isabella Geriatric Ctr.*, No. 11-cv-3757, 2014 WL 4494160, at *4 (S.D.N.Y. Sept. 11, 2014) (excusing untimely jury demand where the defendants' "representations lack[ed] the requisite specificity to demonstrate that [they] suffered any meaningful prejudice" from the untimely jury demand). Accordingly, the

Court does not find that Plaintiffs have waived their right to a jury trial and will grant their demand for a jury trial on the remaining claims.

V. LEAVE TO AMEND

[54] Although Plaintiffs have already amended their complaint twice, Dkt. No. 26, the Court grants Plaintiffs leave to replead the dismissed claims with the exceptions noted below. *See Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("It is the usual practice upon granting a motion to dismiss to allow leave to replead."); *see also* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."). While leave may be denied "for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party[,]" those circumstances do not apply in this case with respect to the majority of the dismissed claims. *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014) (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007)).

[55] However, any attempt by Ms. Syeed to replead her claims under the NYSHRL and NYCHRL would necessarily be futile because she did not live or work in New York. Therefore, Plaintiffs may not amend Ms. Syeed's claims. *Cf. Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 18 (2d Cir. 1997) (noting that leave to amend need not be granted where the proposed amendment would be futile").

VI. CONCLUSION

For the reasons stated above, Defendant's motion to dismiss the Second Amended Complaint is granted in part and denied in part. Specifically, Defendant's motion to dismiss Ms. Syeed's claims under the NYCHRL and NYSHRL is GRANTED. Defendant's motion to dismiss Ms. Ndugga's Title VII claims is GRANTED. Defendant's motion to dismiss Ms. Ndugga's disparate pay and hostile work environment claims under the NYCHRL and NYSHRL is DENIED. Defendant's motion to dismiss Ms. Ndugga's disparate impact claims under the NYSHRL is GRANTED. Defendant's motion to dismiss Ms. Ndugga's failure to promote claims under the NYCHRL and NYSHRL is GRANTED.

SO ORDERED.

All Citations

568 F.Supp.3d 314

Footnotes

1 The facts are drawn from Plaintiffs' second amended complaint ("SAC"), Dkt. No. 26, and are accepted as true for the purposes of this motion to dismiss. *See, e.g., Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). But "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

2 Ms. Syeed concedes that she asserts claims only under the NYCHRL and the NYSHRL. Opp'n at 17.

3 In the Opposition, Ms. Syeed expressly states that she "agrees that her claims of pay discrimination and hostile work environment did not have a New York impact in the way that the promotion discrimination *and constructive discharge* she experience had a New York impact." Opp'n at 8 n.3 (emphasis added). However, Ms. Syeed entirely fails to respond to Bloomberg's arguments regarding her constructive discharge claim; instead, Syeed's allegations focus only on Bloomberg's arguments regarding failure to promote. See Opp'n at 5–8, *see also id.* at 6 (noting that Ms. Syeed "precisely" alleges that "she sought and was denied numerous positions with BLP in New York" without mentioning constructive discharge). Thus, it is unclear whether Ms. Syeed intends to argue that her constructive discharge claim falls under the NYCHRL or NYSHRL. However, to the extent she does, that claim fails for the reasons explained herein.

4 *Pakniat* also emphasized the enduring nature of the impact test in light of the COVID-19 pandemic and corresponding proliferation of remote work, explaining

> In arguing that that the statutes should reach discriminatory conduct that occurs in New York even if the impact is felt by an out of state worker, plaintiff points to the increase in remote working arrangements since the Court of Appeals decided *Hoffman*. The Covid 19 pandemic has only expanded the diaspora of remote workers, many of them laboring in other states for New York firms. Certainly, the electronic tools that enable this new expanded workplace can be conduits for discriminatory conduct. Additionally, plaintiff is correct that the State and City Human Rights Laws are

> meant to deter discriminatory behavior by New York employers, as well as to compensate the employees impacted by that behavior. While these arguments have force, the clear directive of *Hoffman* bars this Court from expanding the jurisdictional breadth of either statute to encompass behavior such as that alleged in the complaint.

145 N.Y.S.3d. at 31.

5 Exactly the position taken by the First Department in *Benham. Benham*, 989 N.Y.S. 2d at 20 ("[A] nonresident plaintiff's claims ... turn[ ] primarily on her [or his] physical location at the time of the alleged discriminatory acts.").

6 "The failure to exhaust administrative remedies is an affirmative defense, for which defendant bears the burden of proof." *Jordan v. Forfeiture Support Assocs.*, 928 F. Supp. 2d 588, 594 n.5 (E.D.N.Y. 2013). While affirmative defenses are most typically asserted in an answer, they "may be raised on a motion to dismiss ... where the complaint itself establishes the circumstances required as a predicate to a finding that the affirmative defense applies." *In re Sept. 11 Prop. Damage & Bus. Loss Litig.*, 481 F.Supp.2d 253, 258 (S.D.N.Y. 2007) (alteration omitted) (quoting *McKenna v. Wright*, 386 F.3d 432, 435 (2d Cir. 2004)). Here, Ms. Ndugga's failure to exhaust her remedies before the EEOC is clear from the face of her complaint and documents within the purview of judicial notice, and the Court will consider Defendant's exhaustion defense in considering the current motion to dismiss. *See Jordan*, 928 F. Supp. 2d at 594 n.5 (considering the plaintiff's failure to exhaust their remedies before the EEOC in deciding the defendant's motion to dismiss).

7 In addition, Plaintiffs cite, *Kounitz v. Slaatten*, 901 F. Supp. 650 (S.D.N.Y. 1995), Opp'n at 9, which relies on a footnote in *Spirt v. Tchrs. Ins. & Annuity Ass'n*, that cursorily states, without analysis, that the court retained jurisdiction where a plaintiff failed to file a complaint with the EEOC prior to initiating her lawsuit—leaving open the possibility that the Court found equitable principles on which to excuse the plaintiff's failure. 691 F.2d 1054, 1059 n.4 (2d Cir. 1982), cert. granted, judgment vacated sub nom. *Long Island Univ. v. Spirt*, 463 U.S. 1223, 103 S.Ct. 3566, 77 L.Ed.2d 1406 (1983). *Spirt's* footnote, in turn, relies on *Egelston v. State Univ. College at Geneseo*, where the plaintiff, "after obtaining a right-to-sue notice from the Equal Employment Opportunity Commission ... brought suit in the Western District of New York." 535 F.2d 752, 754 (2d Cir. 1976). Indeed, in *Egelston*, it appears again that the court excused the plaintiffs failure to receive a right-to-sue letter on equitable principles.

8 In some cases, a court has discussed the impact of early right-to-sue letters, but eventually excused the plaintiff's failure to obtain a right-to-sue letter on equitable grounds. *See e.g.*, *Commodari v. Long Island Univ.*, 89 F. Supp. 2d 353, 383 (E.D.N.Y. 2000) (discussing the debate over early right-to-sue letters but finding it was "unnecessary to reach a decision whether the EEOC's practice of issuing right-to-sue letters before the expiration of the 180–day period contravenes the statute" because "the *balance of equities* supports excusing the 180–day waiting period") (emphasis added).

9 Courts have come to disparate conclusions regarding the level of detail necessary to sufficiently show that a comparator is similarly situated to a plaintiff: while it is undisputed that, at summary judgment, "[a] plaintiff relying on disparate treatment evidence must show she was similarly situated in all material respects to the individuals with whom she seeks to compare herself ... whether a plaintiff must carry a similar burden at the motion to dismiss stage is hardly settled." *Ray v. New York State Ins. Fund*, No. 16-cv-2895, 2018 WL 3475467, at *16, (S.D.N.Y. July 18, 2018) (quoting *Raspardo v. Carlone*, 770 F.3d 97, 126 (2d Cir. 2014)) (collecting cases). Indeed

> [N]umerous courts within the Second Circuit have granted motions to dismiss disparate treatment claims where the complaint was entirely devoid of any details regarding the purported comparators, e.g., who they are, what their positions or responsibilities were at the company, how their conduct compared to plaintiffs' or how they were treated differently by defendants, ... [.]. [T]he Second Circuit has also so required in a number of nonprecedential summary orders, other courts have held to the contrary.

Id. (quoting *Blige v. City Univ. of N.Y.*, No. 15-cv-8873, 2017 WL 498580, at *9 (S.D.N.Y. Jan. 19, 2017)) (cleaned up) (collecting cases); *compare Solomon v. Fordham University*, No. 18-cv-4615, 2020 WL 7711697, at *9 (S.D.N.Y. Dec. 29, 2020) (dismissing claims where plaintiff did not provide sufficient details regarding her each of her comparators' "specific work duties") *and Torre v. Charter Commc'ns, Inc.*, 493 F. Supp. 3d 276, 285 (S.D.N.Y. 2020) (finding plaintiff's allegations sufficient where the plaintiff alleged that comparators were "paid more than she was, despite having similar responsibilities and equal or lesser credentials") (alterations and citation omitted). Here, however, the Court need not

establish the appropriate standard because, drawing all inferences in Ms. Ndugga's favor, she has adequately supported a minimal inference that the difference of treatment is attributable to discrimination.

10 Ms. Ndugga's other allegations further support an inference of discrimination. *See Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 87 (2d Cir. 2015) (commenting, in the Title VII context, that a plaintiff may show evidence of intentional discrimination by "creating a 'mosaic' of intentional discrimination by identifying 'bits and pieces of evidence' that together give rise to an inference of discrimination) (quoting *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998)). Such allegations include that that she was assigned to cover "scrap" assignments while men were assigned topics in which they had an interest, SAC ¶ 102; and that Defendants provided male colleagues raises, despite Defendant's telling Ms. Ndugga that Defendants could not afford raises for her news division, *id.* ¶ 103. These claims, though perhaps insufficient to state a claim in and of themselves, provide support for Ms. Ndugga's claims that her similarly situated comparators were compensated more because of Defendant's discrimination. *Cf. Bonilla v. City of New York*, No. 18-cv-12142, 2019 WL 6050757, at *14 (S.D.N.Y. Nov. 15, 2019) (citing Vega and finding that a Black plaintiff "bolster[ed]" more expressly-pled race discrimination allegations through a number of more "vague" allegations that white coworkers were "given preferential treatment").

11 Ms. Ndugga also suggests, without expressly alleging, that discrimination played a role in Mr. Wall's receiving a promotion even after she received a positive performance evaluation and was recommended for a raise. SAC ¶ 103. But this conclusory allegations is insufficient to state a claim. *See Cardwell v. Davis Polk & Wardwell LLP*, 2020 WL 6274826, at *23 (S.D.N.Y. Oct. 24, 2020) (denying claims where plaintiff's "conclusory" allegations contained "no facts to support" the assertion that employment actions occurred "because of" plaintiff's membership in a protected class).

12 In framing Ms. Ndugga's "hostile work environment" claims under the NYCHRL, the parties parrot language from the analysis of hostile work environment claims under Title VII. *See e.g.*, Reply at 17 (citing *Cardwell*, 2020 WL 6274826, at *27 for the proposition that "[a]llegations of 'discrete, adverse employment decisions concerning promotions, discipline, and appraisal, and about employer criticism' are insufficient to state a claim for hostile work environment"—a standard for hostile work environment claims under Title VII). But the NYCHRL does not require that a plaintiff show a "hostile" work environment—just one in which she is treated "less well" than others because of her protected characteristic. Thus, claims under the NYCHRL differ significantly from a hostile work environment claim under Title VII. Under Title VII, to state a hostile work environment claim, a plaintiff must allege that her "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." *Littlejohn*, 795 F.3d at 320–21 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)); *see also Bentley v. AutoZoners, LLC*, 935 F.3d 76, 90 (2d Cir. 2019). The NYCHRL is "more lenient," *McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 157 (2d Cir. 2017), and is not limited to Title VII's "severe and pervasive" analysis. *Mihalik*, 715 F.3d at 109. Under the NYCHRL, a plaintiff need only show that she was "treated less well" because of her membership in a protected group. As a result, the phrase "hostile work environment" does not accurately reflect the nature of the standard applicable to a claim under the NYCHRL; a "less nice work environment" claim is not quite as gripping of a title. Like the parties, the Court parrots Title VII's vocabulary, but believes that it is important to note that it is a bit of a misnomer when applied to a claim under the NYCHRL.

13 Because Ms. Ndugga has sufficiently alleged gender as a basis for her hostile work environment claim, the Court need not consider the alternatives bases for her claim, i.e., her race and identify as a black woman. *Cf. Rodriguez v. City of Danbury*, No. 15-cv-1269, 2019 WL 4806032, *14 n.19 (D. Conn. Sept. 30, 2019) ("Though plaintiff has alleged conduct on the basis of both race and sex within the limitations period, even if he had alleged conduct related to only one protected characteristic during this period, it would be sufficient"); *see also Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 572 (2d Cir. 2000) ("Given the evidence of both race-based and sex-based hostility, a jury could find that Bloom's racial harassment exacerbated the effect of his sexually threatening behavior and vice versa."), *superseded by statute on other grounds as stated in Johnson v. IAC/Interactive Corp.*, 2 F. Supp. 3d 504, 516 (S.D.N.Y. 2014).

14 Specifically, the statute was amended "to eliminate the requirement that harassing or discriminatory conduct be "severe or pervasive" for it to be actionable and to adopt instead a more protective standard that prohibits conduct that results in "inferior terms, conditions or privileges of employment." *Maiurano v. Cantor Fitzgerald Sec.*, No. 19 CIV. 10042 (KPF), 2021 WL 76410, at *3 n.2 (S.D.N.Y. Jan. 8, 2021) (citing N.Y. Exec. Law § 296(1)(h)).

15 As to the first element required to show a disparate impact claim, Bloomberg's alleged employment practices, Plaintiffs allege that Defendant's Editorial Management Committee holds the exclusive authority to make hiring or promotion decisions, as well as decisions related to employee pay and also that that the Editorial Management Committee often makes such salary decisions based on a new hire's "prior pay." SAC ¶¶ 14, 28, 33–36, 40, 42. Assuming without deciding that those allegations are sufficient to identify a specific employment practice, Plaintiffs' allegations nonetheless fail for the reasons stated herein.

16 Plaintiffs' allegations that "numerous female reporters complained to Plaintiff Syeed that Bloomberg's male editors undermined them and bypassed them for promotion," SAC ¶ 31, that "many female colleagues spoke openly with Plaintiff Syeed about the gender pay disparity them observed" *id.* ¶ 38, that a D.C. bureau chief "disclosed that there was a known gender pay disparity in the News Bureaus," *id.*, that data collected from Bloomberg's offices in the United Kingdom confirmed a pay disparity. and that the head of human resources at Bloomberg's D.C. office agreed that there was a "racist and sexist" culture at Bloomberg, *id.* ¶ 87, are similarly too conclusory to support their claim.

17 Plaintiffs misrepresent *Mandala*'s holding by arguing that *Mandala* requires only that they allege "disparities specific to [Bloomberg]." Surreply at 5. *Mandala* instead holds that statistics must "reveal disparities between populations that are relevant to the claim the plaintiff seeks to prove." *Mandala*, 975 F.3d at 210.

18 Plaintiffs seem to ask the Court to assume that a 50/50 gender split represents the appropriate benchmark from which Bloomberg has deviated as a result of the identified policy. But not only have they provided no data regarding the gender distribution in the relevant pool of qualified applicants for positions as Bloomberg reporters, they have provided no data regarding the gender breakdown in New York State—the geographic area relevant to Plaintiffs' disparate impact claims under the NYSHRL. The data presented by Plaintiffs reflects Defendant's global work force. As described above, Defendant's non-New York employees are not generally protected by the NYSHRL. In the same way, its non-U.S. employees would not generally be protected by Title VII. *See Boustany v. Xylem Inc. et al.*, 235 F. Supp. 3d 486, 498 (S.D.N.Y. 2017).

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58 F.4th 64
United States Court of Appeals, Second Circuit.

Nafeesa **SYEED**, Plaintiff-Appellant,

v.

BLOOMBERG L.P., Defendant-Appellee.*

No. 22-1251
|
August Term 2022
|
Argued: January 9, 2023
|
Decided: January 23, 2023

Synopsis

Background: Former employee who was not a New York resident brought putative class action in New York state court against employer, alleging that employer violated the New York City Human Rights Law (NYCHRL) and the New York State Human Rights Law (NYSHRL) by discriminating against class members based on sex and by discriminating against her on the basis of race and sex in denying a promotion she sought to a position based in New York City, in setting her compensation, and in creating a hostile work environment. After removal under the Class Action Fairness Act (CAFA), the United States District Court for the Southern District of New York, Gregory H. Woods, J., 568 F. Supp. 3d 314, granted employer's motion to dismiss for failure to state a claim, holding that as a nonresident who had not been employed in New York, employee could not bring claims under the NYCHRL and NYSHRL. Employee appealed.

[Holding:] The Court of Appeals, Sullivan, Circuit Judge, held that certification to the New York Court of Appeals was warranted of question whether a nonresident plaintiff not yet employed in New York City or State satisfies the impact requirement of the NYCHRL or the NYSHRL if the plaintiff pleads and later proves that an employer deprived the plaintiff of a New York City- or State-based job opportunity on discriminatory grounds.

Decision reserved and question certified.

West Headnotes (7)

[1] **Federal Courts** Pleading

An appellate court reviews de novo a district court's grant of a motion to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6).

[2] **Federal Courts** Pleading

Federal Courts Dismissal for failure to state a claim

When conducting de novo review of a district court's grant of a motion to dismiss for failure to state a claim, an appellate court considers the legal sufficiency of the complaint, taking its factual allegations to be true and drawing all reasonable inferences in the plaintiff's favor. Fed. R. Civ. P. 12(b)(6).

[3] **Federal Courts** Particular questions

Question whether a nonresident plaintiff not yet employed in New York City or State who pleads and later proves that an employer deprived the plaintiff of a New York City- or State-based job opportunity on discriminatory grounds can satisfy the New York-impact requirement for bringing a claim under the New York City Human Rights Law (NYCHRL) or the New York State Human Rights Law (NYSHRL) would be certified to the New York Court of Appeals in action by employee, a nonresident, alleging that her former employer discriminated against her when she sought a job in New York City, where there were no state-court decisions directly on point, resolving the issue involved weighing competing policy interests, and resolving the issue would control the outcome of employee's suit. N.Y. Executive Law § 290 et seq.

2 Cases that cite this headnote

[4] **Federal Courts** Withholding Decision; Certifying Questions

An appellate court is empowered to seek certification of a state-law issue to a state's high court sua sponte, even if the parties did not request certification.

[5] **Federal Courts** Withholding Decision; Certifying Questions

A federal appellate court may certify a question to the New York Court of Appeals where that court has not spoken clearly on an issue and the federal court is unable to predict, based on other decisions by New York courts, how the New York Court of Appeals would answer a certain question. N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a); Second Circuit Rule 27.2(a).

2 Cases that cite this headnote

[6] **Federal Courts** Withholding Decision; Certifying Questions

An appellate court's discretion to certify an issue of state law to a state's highest court is principally guided by three factors: (1) the absence of authoritative state-court decisions; (2) the importance of the issue to the state; and (3) the capacity of certification to resolve the litigation.

[7] **Statutes** Prior or existing law in general

Statutes Other Statutes

Under New York law, the legislature is presumed to be aware of the decisional and statute law in existence at the time of an enactment.

***65** Appeal from the United States District Court for the Southern District of New York, No. 20-cv-7464, Gregory H. Woods, *Judge*.

Attorneys and Law Firms

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Elise M. Bloom, Proskauer Rose LLP, New York, NY (Allison L. Martin, Proskauer Rose LLP, New York, NY, Mark W. Batten, Proskauer Rose LLP, Boston, MA, on the brief), for Defendant-Appellee Bloomberg L.P.

Before: Jacobs, Sullivan, and Pérez, Circuit Judges.

Opinion

Richard J. Sullivan, Circuit Judge:

***66** This case presents an unresolved question of New York law: Whether a nonresident plaintiff not yet employed in New York City or State satisfies the impact requirement of the New York City Human Rights Law (the "NYCHRL") or the New York State Human Rights Law (the "NYSHRL") if the plaintiff pleads and later proves that an employer deprived the plaintiff of a New York City- or State-based job opportunity on discriminatory grounds. Because we conclude that this issue implicates a host of important state interests, we reserve decision and certify the question to the New York Court of Appeals.

I. Background

Bloomberg L.P. ("Bloomberg") is a privately held company that operates Bloomberg Media, a news organization that employs approximately 2,700 reporters, producers, and editors across over 120 news bureaus worldwide.[1] Bloomberg Media's employment decisions are controlled by its Editorial Management Committee, which operates from Bloomberg's New York City headquarters.

In October 2014, Nafeesa Syeed, a South Asian-American woman, began working for Bloomberg's Dubai news bureau as a Persian Gulf economy and government reporter. A year later, Syeed informed Bloomberg that she wished to transfer to its New York or Washington, D.C. bureaus because of her husband's job location. After applying for multiple positions, Syeed ultimately obtained a position in the Washington, D.C. bureau reporting on cybersecurity. By mid-2018, Syeed realized that there was no career path for her at that bureau, and she applied for several reporting jobs with Bloomberg in New York City. In particular, Syeed repeatedly told her team leader that she was interested in filling a U.N.-reporter position. That vacancy, however, was ultimately filled by a man.

When Syeed subsequently asked why she had not been considered for the U.N. position, her team leader responded that Syeed had never said that she wanted to cover foreign policy; he also advised her that she had to advocate for herself if she wanted to advance at Bloomberg. Another editor told Syeed that one of the reasons she was not considered for the U.N. position was that the position had not been designated as a "diversity slot." J. App'x at 48. In June 2018, Syeed met with the Head of Human Resources for the Washington, D.C. bureau and complained that Bloomberg had a racist and sexist culture. The Head of Human Resources instructed Syeed to report her concerns to a senior executive editor for diversity, talent, standards, ***67** and training at Bloomberg Media. Two days later, Syeed informed her team leader and managing editor that she could not continue to work at Bloomberg because of the discrimination that she faced.

On behalf of herself and other similarly situated individuals, Syeed – now a resident of California – filed a class-action lawsuit in New York state court against Bloomberg and several of its employees on August 9, 2020; shortly thereafter, she amended her complaint. Prior to any further proceedings in state court, the Defendants removed the case to federal court pursuant to the Class Action Fairness Act and moved to dismiss the amended complaint under Federal Rule of Civil Procedure 12(b)(6). Rather than oppose the motion, Syeed again amended her complaint, dropping all of the individual employee defendants. In her second amended complaint, Syeed alleged class claims under NYSHRL for disparate treatment and disparate impact on the basis of sex, as well as individual claims for constructive discharge and, under NYSHRL and NYCHRL, for discrimination on the basis of race and sex in denying her promotions, setting her compensation, and creating a hostile work environment.

Thereafter, Bloomberg again moved to dismiss under Rule 12(b)(6). Upon that motion, the district court (Woods, *J.*) dismissed all of Syeed's claims against Bloomberg, including her NYCHRL and NYSHRL claims based on Bloomberg's failure to promote her to positions in New York. *See Syeed v. Bloomberg L.P.*, 568 F. Supp. 3d 314, 321, 329–34 (S.D.N.Y. 2021).[2] More specifically, the district court concluded that Syeed's failure-to-promote claims must be dismissed because, at all relevant times, Syeed was a nonresident of New York City and State who worked in Washington, D.C., and thus did not and could not adequately plead that she had felt the impact of Bloomberg's discrimination *in* New York City or State. *Id.* The district court entered a final judgment pursuant to Federal Rule of Civil Procedure 54(b) on Syeed's claims, and Syeed timely appealed.

II. Standard of Review

[1] **[2]** We review de novo a district court's grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009). Accordingly, we consider the legal sufficiency of the complaint, taking its factual allegations to be true and drawing all reasonable inferences in Syeed's favor. *See id.*

III. Discussion

[3] Syeed's appeal raises a single legal question: Whether a nonresident plaintiff not yet employed in New York City or State satisfies the NYCHRL or NYSHRL impact requirement if the plaintiff pleads and later proves that an employer deprived the plaintiff of a New York City- or State-based job opportunity on discriminatory grounds. We find that this core question is an unsettled issue of New York law that merits certification to the New York Court of Appeals.

[4] **[5]** **[6]** "Although the parties did not request certification, we are empowered to seek certification *nostra sponte*." *Kuhne v. Cohen & Slamowitz, LLP*, 579 F.3d 189, 198 (2d Cir. 2009). "We may certify a question to the New York Court of Appeals where that court has not spoken clearly on an issue and we are unable to ***68** predict, based on other decisions by New York courts, how the Court of Appeals would answer a certain question." *Ortiz v. Ciox Health LLC*, 961 F.3d 155, 158 (2d Cir. 2020) (internal quotation marks omitted); *see also* 2d Cir. R. 27.2(a); 22 N.Y.C.R.R. § 500.27(a). Our discretion to certify is principally guided by three factors: "(1) the absence of authoritative state court decisions; (2) the importance of the issue to the state; and (3) the capacity of certification to resolve the litigation." *O'Mara v. Town of Wappinger*, 485 F.3d 693, 698 (2d Cir. 2007). Each of these factors weighs in favor of certification here.

As to the first certification factor, the New York Court of Appeals has *not* decided the specific question raised in this case. The closest case is *Hoffman v. Parade Publications*, where the New York Court of Appeals held that, because NYCHRL and NYSHRL were intended to protect persons who inhabit or are persons within New York City and State, respectively, "nonresidents of the city and state must

plead and prove that the alleged discriminatory conduct had an impact within those respective boundaries." 15 N.Y.3d 285, 289, 291, 907 N.Y.S.2d 145, 933 N.E.2d 744 (2010).[3] Applying that test, the *Hoffman* court found that the plaintiff – who resided and worked in Georgia, but who attended quarterly meetings in, and was managed and fired from, New York City – was not himself sufficiently impacted within New York City or State to be able to bring a claim for discriminatory termination. *Id.* at 288, 292, 907 N.Y.S.2d 145, 933 N.E.2d 744. *Hoffman*, however, was silent as to whether, in discriminatory failure-to-hire or failure-to-promote cases, a nonresident plaintiff – who did not work in New York City or State, but who alleged that but for an employer's unlawful conduct, he or she would have worked in New York City or State – would also be unable to assert sufficient personal impact in New York City or State.

Nor does *Hoffman* provide clear guidance from which we can predict how the New York Court of Appeals would answer our question. Certain portions of *Hoffman* seem to imply that nonresidents can satisfy the NYCHRL or NYSHRL impact requirement only if they currently work in New York City or State. *See, e.g.*, *id.* at 291, 907 N.Y.S.2d 145, 933 N.E.2d 744 ("[T]he impact requirement [for nonresidents] ... *confines* the protections of the NYCHRL to those who are meant to be protected – *those who work in the city*." (emphasis added)); *id.* ("Application of the 'impact' requirement to [NYSHRL] claims achieves the same ends as is the case with its City counterpart, because it permits those who *work in the state* to invoke its protections." (emphasis added)). But given ***69** that the *Hoffman* court was only asked to address a claim related to a discriminatory termination, we do not think it is our place to read *Hoffman*'s references to "those who work in" New York City or State to necessarily preclude those who *would* work in New York City or State absent discrimination. *Id.* Furthermore, we note that another portion of *Hoffman* seems to allow for the possibility that a plaintiff could satisfy the impact requirement without living or working in New York City or State at the time of the discriminatory acts. *See id.* at 292, 907 N.Y.S.2d 145, 933 N.E.2d 744 (finding that dismissal was proper because "Hoffman was neither a resident of, nor employed in, the City or State of New York. *Nor* does Hoffman state a claim that the alleged discriminatory conduct had any impact in either of those locations." (emphasis added)).[4]

Other decisions by New York courts are equally ambiguous on this issue. For starters, the parties have not cited, and we are not aware of, *any* lower state-court case where a nonresident plaintiff who was not yet employed in New York City or State raised a failure-to-hire or failure-to-promote claim. And to the extent that lower state-court cases applying the impact requirement to the more typical hostile-work-environment or termination fact patterns are relevant, the cases cut both ways. For example, some cases have interpreted the impact requirement to "turn[ ] primarily on [the plaintiff's] physical location at the time of the alleged discriminatory acts," *Benham v. eCommission Sols., LLC*, 118 A.D.3d 605, 989 N.Y.S.2d 20, 21 (1st Dep't 2014); *see also Wolf v. Imus*, 170 A.D.3d 563, 96 N.Y.S.3d 54, 55 (1st Dep't 2019) (same), while others seem to have more broadly posited that a plaintiff can allege impact if he or she can show that the discriminatory acts affected "the terms, conditions[,] or extent of [his or her] employment ... within the boundaries of New York," *Hardwick v. Auriemma*, 116 A.D.3d 465, 983 N.Y.S.2d 509, 512 (1st Dep't 2014); *see also Jarusauskaite v. Almod Diamonds, Ltd.*, 198 A.D.3d 458, 152 N.Y.S.3d 579, 580 (1st Dep't 2021) (same).

Federal courts have been no more conclusive. Although this is a matter of first impression in this Circuit,[5] district courts ***70** within this Circuit have reached different conclusions. As already described, the district court in this case concluded that the NYCHRL and NYSHRL impact requirement could not be met by a nonresident plaintiff whose only asserted geographical connection was that she was denied a promotion to a position in New York City and State. *See Syeed*, 568 F. Supp. 3d at 330–34. In reaching this conclusion, the district court relied heavily on the statements in *Hoffman* seeming to imply that a nonresident plaintiff must work in the City or State at the time of the discriminatory act to be impacted in either location. *See, e.g.*, *id.* at 331; *see also id.* at 331–32 (also citing favorable language from *Pakniat*, *Hardiwick*, *Benham*, and *Wolf*).

But the three other district courts that have considered the pertinent question have reached the opposite conclusion. For example, in *Anderson v. HotelsAB, LLC*, the plaintiff alleged that, due to her relationship with her disabled son, she was not hired for a position that would have required her to work about half the year in New York City. No. 15-cv-712 (LTS), 2015 WL 5008771, at *1–2 (S.D.N.Y. Aug. 24, 2015). Invoking language similar to *Hardwick* and *Jarusauskaite*, the district court noted that "the [NYCHRL] impact requirement is satisfied if the plaintiff alleges that the conduct has affected the terms and conditions of plaintiff's employment within the city," and thus refused to dismiss the case because the allegedly discriminatory refusal to hire

"had an impact with respect to [the plaintiff's] prospective employment responsibilities in New York City." *Id.* at *2–4; *see also Chau v. Donovan*, 357 F. Supp. 3d 276, 283–84 (S.D.N.Y. 2019) (finding that a California plaintiff alleging that she was not hired for a New York City position due to her refusal to submit to sexual demands had adequately pleaded the NYCHRL and NYSHRL impact requirement); *Scalercio-Isenberg v. Morgan Stanley Servs. Grp. Inc.*, No. 19-cv-6034 (JPO), 2019 WL 6916099, at *1, *4 (S.D.N.Y. Dec. 19, 2019) (finding that a New Jersey plaintiff alleging that she was not hired for a New York City position due to her age, gender, and disability had adequately pleaded the NYCHRL and NYSHRL impact requirement).

In sum, given the absence of *any* state-court decisions directly on point, as well as the absence of clear guidance from any state-court decisions from which we can predict how the New York Court of Appeals would answer our question, we conclude that certification of the question is preferable to resolving it ourselves. *See CFTC v. Walsh*, 618 F.3d 218, 231 (2d Cir. 2010) (observing that certification is appropriate where an issue has not been litigated often enough in New York courts to give rise to "sufficient precedents ... to make a determination concerning [its] proper outcome" (internal quotation marks omitted)).

[7] As to the second certification factor, resolving this issue involves making value judgments and weighing competing policy interests, which the New York Court of Appeals is better positioned to do. *See Ortiz*, 961 F.3d at 159. On the one hand, a ruling for Syeed would allow NYCHRL and NYSHRL suits against prospective employers who hire for jobs in New York City or State by plaintiffs who have no past or present geographical connections. *See Syeed*, 568 F. Supp. 3d at 333 ("*Anderson's* misapplication of the impact test ... expands the class of nonresident plaintiffs protected by the NYCHRL [and NYSHRL] to include individuals who do not work in the city or state, but who merely speculate that they might have ***71** done so someday in the future.").[6] On the other hand, a ruling for Bloomberg would serve to immunize employers from liability under NYCHRL or NYSHRL for discriminatory conduct pertaining to New York City- or State-based jobs – conduct which does arguably have an impact within New York City or State. *See Pakniat*, 145 N.Y.S.3d at 31 ("[NYCHRL and NYSHRL] are meant to deter discriminatory behavior by New York employers, as well as to compensate the employees impacted by that behavior.").[7] Given these competing state interests, we find that this issue is best answered by the New York Court of Appeals. *See Brooklyn Ctr. for Psychotherapy, Inc. v. Phila. Indemnity Ins. Co.*, 955 F.3d 305, 314 (2d Cir. 2020).

As to the third and final certification factor, the answer to the certified issue will no doubt control the outcome of the case before us. If the New York Court of Appeals determines that a nonresident plaintiff not yet employed in New York City or State may nevertheless satisfy the NYCHRL or NYSHRL impact requirement by pleading and later proving that an employer deprived the plaintiff of a New York City- or State-based job opportunity on discriminatory grounds, the district court's Rule 12(b)(6) dismissal of Syeed's failure-to-promote claims would have to be reversed and the case remanded for further proceedings. But if the New York Court of Appeals decides that only nonresident plaintiffs who are already employed in New York City or State can meet the NYCHRL or NYSHRL impact requirement, the district court's decision would have to be affirmed.

IV. Conclusion

For the reasons stated above, we **RESERVE** decision and **CERTIFY** the following question to the New York Court of Appeals:

> Whether a nonresident plaintiff not yet employed in New York City or State satisfies the impact requirement of the New York City Human Rights Law or the New York State Human Rights Law if the plaintiff pleads and later proves that an employer deprived the plaintiff of a New York City- or State-based job opportunity on discriminatory grounds.

Of course, the New York Court of Appeals is not limited to the question stated. Rather, the New York Court of Appeals may modify the certified question as it sees fit and may direct the parties to address other issues that it deems relevant to the circumstances presented in this appeal.

It is hereby **ORDERED** that the Clerk of this Court transmit to the Clerk of the New York Court of Appeals a certificate, ***72** as set forth below, together with a copy of this opinion and a complete set of briefs, appendices, and the record filed by the parties in this Court. This panel will retain jurisdiction to decide the case once we have had the benefit of the views of the New York Court of Appeals or once that court declines to accept certification.

Certificate

The foregoing is hereby certified to the New York Court of Appeals pursuant to Second Circuit Local Rule 27.2 and New York Codes, Rules, and Regulations Title 22, § 500.27(a), as ordered by the United States Court of Appeals for the Second Circuit.

All Citations

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Footnotes

* The Clerk of Court is respectfully directed to amend the caption as set forth above.

1 The facts are drawn from the second amended complaint and are accepted as true for the purposes of this opinion. *See, e.g.*, *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002).

2 On appeal, Syeed only contests the district court's dismissal of her failure-to-promote claims.

3 *Hoffman* based its intent conclusions on certain statutory provisions. *See, e.g.*, *id.* at 289, 907 N.Y.S.2d 145, 933 N.E.2d 744 (noting that NYCHRL "declares, among other things, that 'prejudice, intolerance, bigotry, and discrimination ... threaten the rights and proper privileges of [the city's] *inhabitants*' "; also noting that the NYCHRL "created the City Commission on Human Rights to, among other things, 'foster mutual understanding and respect among all persons *in the city of New York*' " (quoting N.Y.C. Admin. Code §§ 8-101, 8-104) (alterations and emphasis added by *Hoffman*)); *id.* at 291, 907 N.Y.S.2d 145, 933 N.E.2d 744 (noting that NYSHRL "declares that the State of New York 'has the responsibility to act to assure that every individual *within* [New York State] is afforded an equal opportunity to enjoy a full and productive life,' and that failure to afford equal opportunity 'threatens the peace, order, health, safety and general welfare of the state and its *inhabitants*' " (quoting N.Y. Exec. Law § 290) (alterations and emphasis added by *Hoffman*)). We recognize, though, that N.Y.C. Admin. Code § 8-104 has been repealed.

4 *See also Pakniat v. Moor*, 192 A.D.3d 596, 145 N.Y.S.3d 30, 30–31 (1st Dep't 2021) (like *Hoffman*, emphasizing that NYSHRL is "intended to protect the residents of this State or nonresidents who work in this State," but also concluding that the plaintiff could not make out her NYCHRL or NYSHRL claims "because plaintiff was living and working in Montreal, Canada at the time of the alleged discriminatory conduct *and* she failed to allege that the conduct had any impact in either New York State or New York City" (emphasis added)).

5 There are no Second Circuit decisions, precedential or non-precedential, on point. *See, e.g.*, *Vangas v. Montefiore Med. Ctr.*, 823 F.3d 174, 182–83 (2d Cir. 2016) (in a discriminatory-termination case, holding that a plaintiff who "worked in Yonkers, was supervised in Yonkers, and was terminated in Yonkers," but spoke on the phone to patients in New York City, did not satisfy the NYCHRL impact requirement, because she was not personally impacted in the City); *Ware v. L-3 Vertex Aerospace, LLC*, 833 F. App'x 357, 358–59 (2d Cir. 2020) (in a hostile-work-environment and retaliatory-termination case, holding that a plaintiff who was a Florida resident, worked as a supply technician in Afghanistan, and signed an employment agreement with a Mississippi choice-of-law provision, did not satisfy the NYCHRL or NYSHRL impact requirement by virtue of his employer's parent company being headquartered in New York); *Fried v. LVI Servs., Inc.*, 500 F. App'x 39, 42 (2d Cir. 2012) (in a discriminatory- and retaliatory-termination case, holding that a plaintiff who "at all times relevant to his complaint lived and worked in Connecticut," but frequently communicated with his former employer's New York headquarters and attended meetings there, did not satisfy the NYCHRL impact requirement through those tangential connections).

6 *Cf. Shiber v. Centerview Partners LLC*, No. 21-cv-3649 (ER), 2022 WL 1173433, at *4 (S.D.N.Y. Apr. 20, 2022) ("[I]f 'impact can be shown by a mere hope to work in New York down the line, the flood gates would be open.' ") (quoting *Kraiem v. JonesTrading Inst. Servs. LLC.*, 492 F. Supp. 3d 184, 199 (S.D.N.Y. 2020)).

7 We also note that the New York City Council amended NYCHRL post-*Hoffman* "to clarify its intent to foster jurisprudence maximally protective of civil rights in all circumstances." *Makinen v. City of New York*, 857 F.3d 491, 495 (2d Cir. 2017) (internal quotation marks omitted); *see also* N.Y.C. Admin. Code § 8-130 (identifying three cases "that have correctly understood and analyzed the liberal construction requirement"). Of course, "it is well settled that the Legislature is

presumed to be aware of the decisional and statute law in existence at the time of an enactment." *Odunbaku v. Odunbaku*, 28 N.Y.3d 223, 229, 43 N.Y.S.3d 799, 66 N.E.3d 669 (2016) (internal quotation marks and alterations omitted). But where, as here, no decisional law appears to have definitively answered our question, the post-*Hoffman* (and other previous) amendments may have some bearing on how broadly to interpret the NYCHRL impact requirement.

End of Document

The Application of Extraterritoriality to the NYLL

Extraterritoriality and the NYLL
Miriam F. Clark,
Ritz Clark & Ben-Asher LLP
(With the assistance of Scott Lucas)

(1) Padula v. Lilarn Properties Corp., 84 N.Y.2d 519, 644 N.E.2d 1001, 620 N.Y.S.2d 310 (1994). NY Labor Law Section 240 did not apply where New York resident sustained an injury while working in Massachusetts for a NY corporation. Court holds that the relevant standard is "intended to regulate conduct", requiring adequate safety measures at the worksite, and therefore the law at the worksite should govern.

(2) Kingston v. Int'l Bus. Machs. Corp., 87 A.D.3d 578, 135 N.Y.S.3d 9 (App. Div. 1st Dept. 2020). NY Labor Law 215 did not apply where plaintiff lived in Texas and worked from his home office there, reporting to NY managers and traveling to NY two to three times a year)

(3) Rodriguez v. KGA Inc., 155 A.D.3d 452, 64 N.Y.S.3d 11(App. Div. 1st Dep't 2017). Labor Law Articles 6 and 19 did not apply to work performed outside of New York.

(4) Hernandez v. NJK Contractors, Inc., No. 09-CV-4812 (RER), 2015 U.S. Dist. LEXIS 57568, 2015 WL 1966355 (E.D.N.Y. May 1, 2015). Awarding plaintiffs compensation for New Jersey travel time under the NYLL, where the time was "incident to" plaintiffs' labor performed in New York.

(5) Heng Guo Jin v. Han Sung Sikpoom Trading Corp., No. 13-CV-6789 (CBA) (LB), 2015 U.S. Dist. LEXIS 125961(E.D.N.Y. Sep. 18, 2015). Holding that NY law applied where employee began and ended workday in NY but spent substantial part of workday transporting goods to out of state buyers.

(6) Aminov v. EC Commodities Corp., 16-CV-4800 (AMD) (SMG), 2017 U.S. Dist. LEXIS 106228, 2017 WL 9511075 (E.D.N.Y. July 6, 2017), adopted, 2018 U.S. Dist. LEXIS 11605, 2018 WL 5442245 (E.D.N.Y. Jan. 24, 2018). Although defendant company had an office in New York and plaintiff resided in New York, the NYLL did not apply to claims for wages and overtime based on labor performed outside of New York State.

(7) Solouk v. European Copper Specialties, Inc., No. 14-CV-8954 (DF), 2019 U.S. Dist. LEXIS 81267 (S.D.N.Y. May 2, 2019). NY prevailing wage law applied where a job site was located in New York, but some work was performed at out of state shop. Court held that the work performed out of state was "integral" to the work performed in NY. Travel time between the shop and the work site was also covered.

(8) Kloppel v. HomeDeliveryLink, Inc., No. 17-CV-6296-FPG, 2020 U.S. Dist. LEXIS 97677 (W.D.N.Y. June 3, 2020). Court allows class certification, leaving open question of whether NYLL applies to deliveries made into, and out of state.

(9) Ok Kim v. Family Bob Inc., No. 20-CV-906 (ENV), 2021 U.S. Dist. LEXIS 15713 (E.D.N.Y. Jan. 26, 2021) New York Labor Law did not apply where plaintiff resided in New York and defendants operated a catering business in New York, but almost all of plaintiff's working hours were spent in New Jersey, and her work assignments in New York (such as grocery shopping and picking up co-workers) were largely incidental to her work in New Jersey.

STATE OF NEW YORK

1326

2023-2024 Regular Sessions

IN SENATE

January 11, 2023

Introduced by Sen. RAMOS -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the labor law, in relation to disclosure and advertisement of a job, promotion, or transfer opportunity

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 194-b of the labor law, as added by a chapter of the laws of 2022 amending the labor law relating to requiring employers to disclose compensation or range of compensation to applicants and employees, as proposed in legislative bills numbers S. 9427-A and A. 10477, is amended to read as follows:

§ 194-b. Mandatory disclosure of compensation or range of compensation. 1. a. No employer, employment agency, employee, or agent thereof shall advertise a job, promotion, or transfer opportunity that [~~can or~~] will **physically** be performed, at least in part, in the state of New York, **including a job, promotion, or transfer opportunity that will physically be performed outside of New York but reports to a supervisor, office, or other work site in New York** without disclosing the following:

(i) the compensation or a range of compensation for such job, promotion, or transfer opportunity; and

(ii) the job description for such job, promotion, or transfer opportunity, if such description exists.

b. [~~Advertisements~~] **An employer, employment agency, employee, or agent thereof advertising** for [~~jobs~~] **a job**, [~~promotions~~] **promotion**, or transfer [~~opportunities~~] **opportunity** paid solely on commission shall maintain compliance with subparagraph (i) of paragraph a of this subdivision by disclosing [~~in writing in~~] a general statement that compensation shall be based on commission.

2. No employer shall refuse to interview, hire, promote, employ or otherwise retaliate against an applicant or current employee for exercising any rights under this section.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD04316-01-3

3. The commissioner shall promulgate rules and regulations to effectuate the provisions of this section.

4. The department shall conduct a public awareness outreach campaign, which shall include making information available on its website and otherwise informing employers of the provisions of this section.

5. a. Any person claiming to be aggrieved by a violation of this section may file with the commissioner a complaint regarding such alleged violation for an investigation of such complaint and statement setting the appropriate remedy, if any, pursuant to the provisions of section one hundred ninety-six-a of this article.

b. An employer who fails to comply with any requirement of this section or any regulation published thereunder shall be deemed in violation of this section and shall be subject to a civil penalty in accordance with section two hundred eighteen of this chapter.

6. [~~**An employer shall keep and maintain necessary records to comply with the requirements of this section including, but not limited to, the history of compensation ranges for each job, promotion, or transfer opportunity and the job descriptions for such positions, if such descriptions exist.**~~

~~**7.**~~] For the purposes of this section the following terms shall have the following meanings:

a. "range of compensation" shall mean the minimum and maximum annual salary or hourly range of compensation for a job, promotion, or transfer opportunity that the employer in good faith believes to be accurate at the time of the posting of an advertisement for such opportunity.

b. "employer" shall mean:

(i) any person, corporation, limited liability company, association, labor organization or entity employing four or more employees in any occupation, industry, trade, business or service, or any agent thereof; and

(ii) any person, corporation, limited liability company, association or entity acting as an employment agent or recruiter, or otherwise connecting applicants with employers, provided that "employer" shall not include a temporary help firm as such term is defined by subdivision five of section nine hundred sixteen of this chapter.

c. "advertise" shall mean to make available to a pool of potential applicants for internal or public viewing, including electronically, a written description of an employment opportunity.

[~~**8**~~] **7**. The provisions of this section shall not be construed or interpreted to supersede or preempt any provisions of local law, rules, or regulations.

§ 2. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2022 amending the labor law relating to requiring employers to disclose compensation or range of compensation to applicants and employees, as proposed in legislative bills numbers S. 9427-A and A. 10477, takes effect.