SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHLOMO HAGLER J.S.C. PART 17
Justice

Index Number : 160830/2013
EDWARDS, DILEK
vs
NICOLAI, CHARLES V
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 12, were read on this motion to/for _____

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits Memorandum of Law-2 | No(s). 1-2
Answering Affidavits — Exhibits Pls Memorandum of Law-3 Declaration of Pls Counsel-4 Exhibit A-5 | No(s). 3-5
Replying Affidavits Memorandum of Law- 6 | No(s). -6
Letter Submission by Pl's Counsel 4/18/14-7; Letter Submission by Ds Counsel 4/18/14-8 Letter Submission Ds Counsel 5/9/14-9; Letter Submission Pls Counsel 5/20/14-10 | Nos. 7-10
Upon the foregoing papers, it is ordered that this motion is Transcript of Ct Proceedings 3/31/14 + 5/9/14 | Nos. 11-12

Decided in accordance with the attached Decision/Order

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

Dated: May 11, 2016

_____, J.S.C.
SHLOMO HAGLER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

DILEK EDWARDS,

Plaintiff,

- against -

CHARLES V. NICOLAI and STEPHANIE ADAMS,

Defendants.

Index No.: 160830/2013

Motion Seq. No.: 001

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

Plaintiff Dilek Edwards ("Edwards") seeks to recover damages for alleged employment discrimination based on gender, and for defamation to the extent her claim is based on an allegedly false police report filed by defendant Stephanie Adams ("Adams").[1] Defendants make this pre-answer motion to dismiss the complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. Plaintiff opposes the motion.

Background

The following factual allegations are taken from plaintiff's Amended Complaint, and are presumed to be true for purposes of this motion.

Plaintiff Edwards was employed as a yoga and massage therapist by Wall Street Chiropractic and Wellness ("WSCW"), located at 75 Wall Street in lower Manhattan, from April 2012 to

[1]At oral argument on March 31, 2014, and in plaintiff's Memorandum of Law in Opposition, plaintiff has withdrawn the prong of her defamation claim relating to statements allegedly made by Adams to the New York Post (Tr. of Oral Argument, dated March 31, 2014 at 34; plaintiff's Memorandum of Law at 8, fnt. 4).

October 2013 (Notice of Motion, Exhibit "A" [Amended Complaint, ¶¶ 3, 11, 25]). Defendant Charles V. Nicolai ("Nicolai") is co-owner of WSCW, and oversees all of the chiropractic and therapeutic services provided by WSCW (*Id.* at ¶¶ 4, 5). He hired plaintiff, trained her, oversaw her work, and fired her (*Id.* at ¶¶ 5, 25). Defendant Adams is co-owner and chief operating officer of WSCW and is married to Nicolai (*Id.* at ¶¶ 6, 17).

Throughout the period of her employment at WSCW, plaintiff's work was praised by Nicolai. Although he told her, in June 2013, that his wife might become jealous of her because she was "too cute," plaintiff maintained a strictly professional relationship with him (*Id.* at ¶¶ 18-20). Plaintiff met Adams only one time, at the WSCW office, and their meeting was cordial (*Id.* at ¶ 21).

On October 29, 2013, at approximately 1:15 a.m., plaintiff noticed a missed call on her personal phone from Adams. Approximately fifteen minutes later, plaintiff received a text message from Adams "out of the blue", which stated that she wanted to make it clear to plaintiff that "[y]ou are NOT welcome any longer at Wall Street Chiropractic, DO NOT ever step foot in there again, and stay the [F...] away from my husband and family!!!!!!! And remember I warned you" (*Id.* at ¶¶ 22-24). The following day on October 30, 2013, at approximately 9:00 a.m., plaintiff received an email from Nicolai, which stated: "You are fired and no longer welcome in our office. If you call or try to come back, we will call the police" (*Id.* at ¶ 25). Plaintiff

subsequently tried to call the WSCW office, but discovered that her number was blocked. Plaintiff was too afraid to collect her personal belongings from WSCW's office (*Id.* at ¶¶ 26, 29).

In addition, on October 30, 2013, Adams filed a complaint with the New York City Police Department, claiming that plaintiff made threatening phone calls and threatened to come to the WSCW office. Adams further reported that this so alarmed her that she changed the locks to her home and office (*Id.* at ¶¶ 33, 36). The Amended Complaint alleges that Adams' statements were false, that Adams knew the statements to be false and that these statements were made with the intent of harming plaintiff (*Id.* at ¶¶ 34-35, 39). Plaintiff contends, rather, that what actually occurred was that Nicolai changed the locks to his office, where he was temporarily staying, because he was afraid of Adams, who had raged at him about her suspicions of plaintiff (*Id.* at ¶ 38).

Plaintiff commenced the instant action in December 2013, alleging two causes of action against Nicolai and Adams for "Gender Discrimination - Sexual Harassment and Wrongful Termination," in violation of the New York State Human Rights Law (Executive Law § 290 et seq.) ("NYSHRL"), and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code § 8-101 et seq.]) ("NYCHRL"); and a third cause of action against Adams for defamation. At oral argument on the instant motion, on the record, plaintiff withdrew any hostile work environment claim (Tr. of Oral Argument, dated March

31, 2014 at 34). *See also* Plaintiff's Memorandum of Law at 8. To the extent that plaintiff suggested at oral argument that a quid pro quo sexual harassment claim may still exist (Tr. of Oral Argument, dated March 31,2014 at 33), plaintiff offers no argument in support of that claim, and her opposition papers make clear that her claim here is for wrongful termination based on gender. *See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion, at 8.

Motion to Dismiss

It is well settled that on a CPLR 3211 (a) (7) motion to dismiss addressed to the facial sufficiency of the complaint, the pleadings are to be liberally construed (*see* CPLR 3026), and "[t]he scope of the court's inquiry . . . is narrowly circumscribed" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 [1st Dept. 2003]; *DeMicco Bros., Inc. v Consolidated Edison Co. of N.Y.*, 8 AD3d 99, 99 [1st Dept. 2004]). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[T]he court must accept as true not only 'the complaint's material allegations' but also 'whatever can be reasonably inferred therefrom' in favor of the pleader" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d at

375-376 (citation omitted); *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). However, as stated in *SWR Assocs. v Bellport Beach Prop. Owners*, 129 AD2d 328 [2d Dept 1987]:

> The rule that the facts alleged are presumed to be true and are to be accorded every favorable inference which can be drawn therefrom on a motion addressed to the sufficiency of the pleadings . . . does not apply to allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence.

(129 AD2d at 331 [citations omitted]:)

In opposition to such a motion, "a plaintiff may submit affidavits 'to remedy defects in the complaint' and 'preserve inartfully pleaded, but potentially meritorious claims'" *(Cron v Hargro Fabrics, Inc.*, 91 NY2d 362 [1998] *quoting Rovello v Orofino Realty Co.*, 40 NY2d 633, 635, 636 [1976].

Discrimination under the NYSHRL and the NYCHRL

Under both the NYSHRL and the NYCHRL, it is unlawful for an employer to fire or refuse to hire or otherwise to discriminate against an individual in the terms, conditions or privileges of employment because of, as pertinent here, the individual's sex or gender. *See* Executive Law § 296(1)(a); Administrative Code § 8-107(1)(a).[2] Both the NYSHRL and the NYCHRL also require that

[2]"Sex" and "gender" generally are considered to be interchangeable terms for purposes of the human rights laws. *See DeCintio v Westchester County Med. Ctr.*, 807 F2d 304, 306 [2d Cir 1986], *cert denied* 484 US 965 [1986].

their provisions be "construed liberally" to accomplish the remedial purposes of prohibiting discrimination. Executive Law § 300; Administrative Code § 8-130. Further, the NYCHRL, as amended by the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 of City of New York [2005]) ("Restoration Act"), "explicitly requires an independent liberal construction analysis in all circumstances . . . targeted to understanding and fulfilling . . . the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart state or federal civil rights laws" *Williams v New York City Housing Authority*, 61 AD3d at 66. *See* Administrative Code § 8-130; *Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 [1st Dept. 2011]; *Nelson v HSBC Bank USA*, 87 AD3d 995, 996-997 [2d Dept. 2011]; *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (state law provides greater disability protection than federal law and city law provides even broader disability protections than the state).[3]

In addition, employment discrimination claims are assessed "under a particularly relaxed "notice pleading" standard. *Krolick v Natixis Sec. N. Am. Inc.*, 36 Misc 3d 1227(A), *5, 2011 NY Slip Op. 52525(U) (Sup Ct, NY County 2011), quoting *Vig v New*

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[3]Section 8-107(1)(a) of the NYCHRL provides that "it shall be an unlawful discriminatory practice: (a) for an employer....because of the actual or perceived...gender...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."

York Hairspray Co., L.P., 67 AD3d at 145 [1st Dept. 2009]. Under that standard, "a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds." *Vig v New York Hairspray Co., L.P.*, 67 AD3d at 145, *quoting Swierkiewicz v Sorema, N.A.*, 534 US 506, 514-515 (2002). *See Krzyzowska v Linmar Constr. Corp.*, 2014 WL 4787283, *8 (Sup Ct, NY County 2014).

To state a claim for employment discrimination, a plaintiff must allege that she is a member of a protected class, that she was discharged from a position for which she was qualified, and that the discharge occurred under circumstances giving rise to an inference of unlawful discrimination. *See Rainer N. Mittl Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 330 [2003] (under the NYSHRL); *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept. 2012] (under the NYCHRL).

Applying the above standards, plaintiff's Amended Complaint alleging claims of gender-based discrimination under the NYSHRL and NYSHRL, given every favorable inference, is insufficient to withstand a pre-answer motion to dismiss.[4]

Plaintiff's Allegations in the Amended Complaint of Discrimination based on Jealousy

The first two causes of action allege that defendants

[4]Plaintiff has failed to submit any affidavits in opposition to defendants' motion to dismiss.

discriminated against plaintiff on the basis of her gender or sex by terminating her employment in violation of the NYSHRL and NYCHRL (Notice of Motion, Exhibit "A" [Amended Complaint ¶¶ 42, 47]). In the Amended Complaint, the basis of plaintiff's discrimination causes of action is the allegation that "defendant Nicolai informed plaintiff that his wife might become jealous of plaintiff, because plaintiff was 'too cute'" (Notice of Motion, Exhibit "A" [Amended Complaint ¶¶ 42, 47]).[5]

Several of the decisions on which defendants' arguments rest, from federal and state courts in Georgia (*Platner v Cash & Thomas Contrs., Inc.*, 908 F2d 902 [11th Cir 1990], addressing Title VII), and Iowa (*Tenge v Phillips Modern Ag Co.*, 446 F3d 903 [8th Cir 2006]; *Nelson v James H. Knight DDS, P.C.*, 834 NW2d 64 [Iowa 2013]), addressing Title VII and Iowa state law), involve jealousy or concerns by a female spouse about her husband-employer's conduct, are of course, not binding but offer some guidance.

In *Tenge v Phillips Modern Ag Co.*, plaintiff engaged in consensual "sexually suggestive" conduct with defendant, which

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[5]Defendants rely on several cases interpreting NY Law which generally found that adverse actions, other than sexual harassment, taken against a plaintiff following the end of a voluntary intimate relationship between an employer and an employee, do not give rise to a sex discrimination claim. *See Mauro v Orville*, 259 AD2d 89, 92-93 [3d Dept. 1999] (under the NYSHRL); *Kahn v Objective Solutions Intl.*, 86 F Supp2d 377, 380-381 [SDNY 2000] (under Title VII); *but see Rietschel v Maimonides Med. Ctr.*, 83 AD3d 810, 810-811 [2d Dept. 2011] (prior consensual relationship does not preclude discrimination claim where unwelcome sexual advances made after end of such relationship).

led to defendant's dismissal of plaintiff to "allay his wife's concerns over Tenge's admitted sexual behavior with him." 446 F3d at 910. The court considered and found relevant, cases which address issues of "'sexual favoritism,' where one employee was treated more favorably than members of the opposite sex because of a consensual relationship with the boss" (446 F3d at 908), and cases in which an employee is treated less favorably because of a consensual sexual relationship. The court affirmed the lower court's granting of summary judgment to the defendants and held that plaintiff "was terminated due to the consequences of her own admitted conduct with her employer, not because of her status as a woman." *Id.* at 910; *See DeCintio v Westchester County Med. Ctr.*, 807 F2d 304, 306 [2d Cir 1986], *cert denied* 484 US 965. The *Tenge* court expressly declined to consider a situation where a plaintiff was "terminated because [defendant's spouse] perceived plaintiff as a threat to [the spouse's] marriage but there was no evidence that [the plaintiff] had engaged in any sexually suggestive conduct" 446 F3d at 911 fnt. 5.

In *Nelson v James H. Knight DDS, P.C.*, the court considered the question of whether the termination of a female employee by a male employer, "because the employer's wife, due to no fault of the employee, is concerned about the nature of the relationship between the employer and the employee," amounts to unlawful sex discrimination under the Iowa Civil Rights Act (834 NW2d at 65). In that case, plaintiff employee and defendant employer, a

dentist, worked together for more than ten years and developed a personal relationship which eventually extended beyond the workplace, and included personal communications outside of work by both parties and inappropriate sexual comments by defendant, but was not otherwise a sexual relationship. After defendant's wife complained that plaintiff was a threat to their marriage, defendant fired plaintiff, asserting that their relationship had become a detriment to his family, and he feared he might try to have an affair with plaintiff if she remained. *Id.* at 66. The court affirmed the lower court's granting of summary judgment to defendants holding that plaintiff was terminated not because of her gender "but because of the wife's perception that the relationship between defendant and plaintiff was a threat to [defendant's] marriage" (*Id.* at 67, 81 fnt. 5).

In *Platner v Cash & Thomas Contrs., Inc.*, defendant employer dismissed plaintiff employee because of a perceived relationship between plaintiff and defendant's son, also an employee, which resulted in the son's wife becoming jealous. The court in *Platner* decided, after trial, that defendant had shown a legitimate, nondiscriminatory reason for firing plaintiff, which was his desire to protect his son and to restore equilibrium to his business and family. The court found that defendant's decision to retain his son as an employee over plaintiff was not based on gender but was "simply favoritism for a close relative." 908 F2d at 905. Recognizing that "an employer may not, simply on

grounds of gender, punish the female but not the male participant in a real or suspected inter-employee liaison" (*Id.* at 904), the court nonetheless found that "nepotism," "however unseemly and regrettable" it may be, does not constitute discrimination under Title VII. *Id.* at 905.

Here, the only allegation in the Amended Complaint is that plaintiff was terminated by Nicolai because of the jealousy of Adams, namely that she thought plaintiff was "too cute." The Amended Complaint includes no other fact or allegation to support a discrimination cause of action, including any allegation that plaintiff was treated differently than male employees[6], which may colorably give rise to a claim for sex discrimination at the pleading stage. There is no allegation in the Amended Complaint that plaintiff was terminated because of her status as a woman. The court is unable to find a case interpreting either NYSHRL or the NYCHRL which holds that a termination motivated by spousal jealousy alone, constitutes gender or sex based discrimination under the NYCHRL or the NYCHRL.

Plaintiff's Allegation of Unpled and Unsupported Discrimination Based on 'Appearance'

In a supplemental submission (Letter, dated April 18, 2014, from plaintiff's counsel), plaintiff asserts, for the first time,

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[6]In fact, there is no evidence in the record that Nicolai employed any other employees. "In proscribing discrimination because of sex, the critical concern is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the opposite sex are not exposed" (*Mauro v Orville*, 259 AD2d 89, 92 [3d Dept. 1999]).

that defendants' actions constituted unlawful discrimination based on 'appearance' under the NYCHRL. Plaintiff cites to Section 8-102(23) which defines the term 'gender' as including "a person's gender identity, self-image, *appearance*, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth (emphasis supplied)." Plaintiff argues that "under the plain meaning of the NYCHRL...firing a woman because of a gender-related aspect of her appearance is unlawful discrimination" and that "the allegations in plaintiff's [Amended] Complaint that [plaintiff] was fired because she was 'too cute' clearly falls within this prohibition, as [plaintiff's] attractiveness is directly tied to her gender" (Letter, dated April 18, 2014, from plaintiff's counsel at 2).

As an initial matter, this Court notes that on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), a court can consider affidavits submitted by plaintiff in opposition to remedy any defects in the complaint *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]. *See Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635-636). Here, however, not only has plaintiff presented a new theory of recovery, namely, 'appearance based discrimination', but plaintiff has done so in the form of a supplemental letter submission not in admissible or affidavit form. Plaintiff failed to mention Section 8-102(23) of

the NYCHRL in her Amended Complaint, opposition papers to defendants' motion to dismiss or at oral argument before the court. As such, this Court may not consider the new grounds for plaintiff's gender discrimination claims.

However, even were this Court to consider plaintiff's new theory of 'appearance based discrimination', this Court is constrained under the law to make a determination that defendants' behavior, no matter how abhorrent, fails to constitute gender discrimination. Plaintiff has failed to plead in the Amended Complaint in sufficient detail what the term "too cute" is alleged to mean. The reference to the term "too cute" may not be a remark about physical appearance in the first place. In any event, plaintiff has also failed to allege that a reference to "too cute" is gender related, namely that the term was applied by plaintiff herein to men and women differently. *See generally Blitzer v New York City Tr. Auth.*, 12 AD3d 222, 222 [1st Dept. 2004].

Moreover, courts have only interpreted, although rarely, section NYCHRL 8-102(23) to matters involving transgender or gender identity issues. *See Wilson v Phoenix House*, 42 Misc3d 677, 687 [Sup. Ct. Kings County 2013] (sex or gender discrimination encompasses "discrimination based on a failure to conform to stereotypical gender norms," including, in that case, the appearance of a transgender woman); *see generally Birney v New York City Department of Health and Mental Hygiene*, 34 Misc3d

1243(A) [Sup. Ct. New York County 2012]. In fact, upon enacting Section 23, the New York City Council stated "[g]ender-based discrimination is especially debilitating for those whose gender self-image and presentation do not fully accord with the legal sex assigned to them at birth. For those individuals, gender-based discrimination often leads to pariah status including the loss of a job[]" (New York City Administrative Code, Section 8-102, footnote 1).

With respect to whether appearance can be the basis of a discrimination claim under other statutory authority, courts have not found discrimination when the subject conduct or policy was not applied differently to men and women. *See e.g. Delta Air Lines v New York State Div. of Human Rights*, 229 AD2d 132, 141 [1st Dept. 1996], *affd* 91 NY2d 65 (1997)] (no sex discrimination under the NYSHRL as no evidence that weight requirement applied in discriminatory manner); *Galdieri-Ambrosini*, 136 F3d 276, 289 [2d Circuit 1998] (evidence presented at trial did not support finding that plaintiff was treated less favorably than male or younger female employees due to her gender for purposes of a discrimination claim under Title VII); *Marks v National Communications Assn., Inc.* 72 F Supp2d 322 [SDNY 1999] (under Title VII, weight requirement for women not discriminatory where no proof that men were not subjected to same standards[7]);

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[7]Having dismissed plaintiff's Title VII claims, the court refused to exercise jurisdiction over plaintiff's claims under the NYSHRL and NYCHRL [72 F Supp2d 322, 341].

Malarkey v Texaco, Inc., 559 F Supp 117, 121-122 [SDNY 1982] (under Title VII, allegations that men were not subjected to same age or beauty criteria for promotions would state a discrimination cause of action, but allegation that younger, more attractive women treated more favorably is age, not gender, discrimination claim).

Accordingly, defendants' motion to dismiss plaintiff's causes of action for gender based discrimination under the NYSHRL and the NYCHRL is granted.

Defamation

Plaintiff's third cause of action for defamation against Adams is based on statements Adams allegedly made to the police. Specifically, plaintiff claims that "on or about October 20, 2013, [A]dams made a complaint to the New York [City] Police Department regarding Plaintiff. [A]dams falsely told the police that she received threatening phone calls from plaintiff and that plaintiff 'stated' 'I am going to come to the office' in a threatening manner" (Notice of Motion, Exhibit "A" [Amended Complaint ¶ 33]). Plaintiff claims that said statement was false as "[p]laintiff did not call [A]dams and make this statement" and that defendant made this statement with "the intent of harming plaintiff" (Notice of Motion, Exhibit "A" [Amended Complaint ¶¶ 34-35, 53]). Plaintiff alleges further that Adams stated that "she [Adams] was 'so alarmed that she changed the locks to her home and office" and that said statement was likewise false and

made with the intent of harming plaintiff (Notice of Motion, Exhibit "A" [Amended Complaint ¶¶ 36-37, 53]). Plaintiff alleges rather that it was Nicolai who "changed the locks to his office because he was afraid of Adams" (Notice of Motion, Exhibit "A" [Amended Complaint ¶ 38]). Adams had allegedly yelled at Nicolai the prior night in a fit of rage regarding her suspicions of plaintiff (*Id.*).

Plaintiff's third cause of action alleges that the above "defamatory statements ascribe criminal behavior to plaintiff and are therefore defamation *per se*" (Notice of Motion, Exhibit "A" [Amended Complaint ¶ 54]). As a result of these statements, plaintiff alleges she suffered injury to her personal and business reputation causing her severe emotional distress" (Notice of Motion, Exhibit "A" [Amended Complaint ¶ 55]).

To establish a cause of action for defamation, plaintiffs must demonstrate the following elements:

> 1) a false statement on the part of the defendants concerning the plaintiffs;
> 2) published without privilege or authorization to a third party;
> 3) with the requisite level of fault on the part of the defendants; and
> 4) causing damage to plaintiffs' reputation by special harm or defamation *per se*.

(*See* Restatement [Second] of Torts § 558; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept. 1999].)

CPLR § 3016(a) requires that the alleged false and defamatory words be specified with particularity in the

complaint. The complaint must also allege the "time, place and manner of the false statement and to specify to whom it was made" (*Dillon v City of New York*, 261 AD2d at 38 [citations omitted]).

Defendants contend that the statements made by Adams to the police set forth in the Amended Complaint fall under the purview of the qualified common interest privilege, and accordingly the pleading fails to state a cause of action. Defendants argue that plaintiff has not adequately pled malice in order to overcome the qualified privilege. Plaintiff concedes that the qualified common interest privilege applies to the allegedly defamatory statements but argues that the Amended Complaint sufficiently pleads malice.

A qualified common interest privilege exists where the communications relevant to a slander or defamation claim concern a subject matter in which both parties have an interest (*Frechtman v Gutterman*, 115 AD3d 102, 107 [1st Dept. 2014], *citing Shapiro v Health Ins. Plan of Greater N.Y.*, 7 NY2d 56, 60 [1959]). The qualified privilege has been applied to reports made to the police about another's suspected crimes (*Present v Avon Prods*, 253 AD2d 183, 188 [1st Dept. 1999]). "Essentially, to overcome the privilege, plaintiff needs to challenge the good faith of the defendants by showing that they acted with malice" (*Id.*; *See Liberman v Gelstein*, 80 NY2d 429, 437-438 [1992]; *Loughry v Lincoln First Bank*, 67 NY2d 369, 376 [1986]).

"A defamation complaint should not be dismissed on a pre-answer motion to dismiss based on a qualified privilege claim, where...the content and context of the alleged defamatory statements in the complaint or supporting materials on the motion 'are sufficient to potentially establish malice' or are such that malice can be inferred" (*Weiss v Lowenberg*, 95 AD3d 405,406 [1st Dept. 2012] [internal citations omitted]; *See Pezhman v City of New York*, 29 AD3d 164, 168 [1st Dept. 2006]. The defense of a qualified privilege will be defeated by a demonstration that defendant's "motivation for making such statements was spite or ill will (common-law malice) or where the 'statements [were] made with [a] high degree of awareness of their probable falsity (constitutional malice)' " (*Foster v Churchill*, 87 NY2d 744, 752 [1996]).

Here, the allegations regarding Adams' statements to the police are set forth with sufficient specificity to satisfy the pleading requirements of CPLR 3016(a) for purposes of a motion to dismiss. Moreover, plaintiff refers to the falsity of Adams' statements, and has provided the "content and context of the statements...[which are] sufficient to potentially establish malice" (*Pezhman v City of New York*, 29 AD3d at 168). Plaintiff's allegation that such false statements arose out of Adams' jealousy of plaintiff's relationship with Nicolai, could be motivated by Adams' personal spite or ill will, or made with awareness that the statements were false or with reckless

disregard of their probable falsity. *See Weiss v Lowenberg*, 95 AD3d at 406-407; *Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept. 2010]; *Pezhman v City of New York*, 29 AD3d at 168-169.

Accordingly, defendants' motion to dismiss plaintiff's third cause of action for defamation is denied.

Conclusion

On the basis of the foregoing, it is

ORDERED, that defendants' motion to dismiss is granted to the extent of dismissing plaintiff's first two causes of action for gender discrimination under the NYSHRL and NYCHRL, respectively; defendants' motion seeking to dismiss plaintiff's third cause of action for defamation is denied; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: May 11, 2016

ENTER:

SHLOMO HAGLER
J.S.C.