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

PRESENT: HON. DEBRA A. JAMES PART 59

Index Number : 104989/2007

HERNANDEZ, YAHAIRA

VS

KAISMAN, DR.ARDEN

Sequence Number : 015

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

for summary judgment in favor of defendants is disposed according to the attached decision and order.

FILED

APR 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 13, 2011

HON. DEBRA A. JAMES J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

----------X

YAHAIRA HERNANDEZ, ESTHER HERARTE and JENNIFER V. STERN,

Plaintiffs,

Index No.: 104989/2007

-against-

DR. ARDEN KAISMAN,

Mot. Seq. No. 015

Defendant.



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DEBRA A. JAMES, J.:

This action arises out of plaintiffs Yahaira Hernandez's (Hernandez), Esther Herarte's (Herarte), and Jennifer V. Stern's (Stern) claims that, among other causes of action, they were subject to an alleged hostile work environment based on sexual harassment under the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL). Defendant Dr. Arden Kaisman (Kaisman) moves, pursuant to CPLR 3212, for an order granting partial summary judgment dismissing plaintiffs' NYSHRL and NYCHRL claims.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiffs were employed by defendant, who is a doctor specializing in pain management. At the time plaintiffs worked for defendant, defendant shared an office with Dr. Paul Brisson (Brisson), an orthopedic surgeon. Brisson and defendant owned separate medical practices in the building since 2000. Brisson

would refer patients to defendant for spinal pain. Along with approximately 11 other employees, plaintiffs worked for Brisson some of the time and defendant some of the time, although Brisson was out of the office most of the time performing surgeries. Hernandez was employed by defendant and Brisson from January 2006 through December 2006 as a medical clerk, and then as an assistant office manager. Herarte was employed by defendant and Brisson as a medical clerk for over three years. Since June 2003, Stern was employed as a physician's assistant to work for defendant and Brisson.

Plaintiffs maintain that they were subject to sexual harassment and gender discrimination which created a hostile work environment. Most of this conduct allegedly occurred and escalated between October 2006 and December 2006. In December 2006, Brisson decided to leave the office shared with defendant. Plaintiffs allege that, as a result of the work environment defendant had created, they were forced to a leave defendant's practice and go with Brisson to his new practice. In January 2007, plaintiffs started to work solely with Brisson.

Among other things, plaintiffs allege that defendant e-mailed them pornographic e-mails and videos which contained obscene material. These e-mails were distributed between October and November 2006. The first e-mail was "The Indian Lecture" audio file attachment explaining the various contexts of the word

"f**k." Defendant e-mailed the following with the attachment, "[t]his is hysterical. Do not listen if u are potentially offended." The second e-mail was a video file attachment of volunteers in a supermarket being blindfolded and getting tricked into thinking they were feeling a butterball turkey when they were feeling the buttocks of a man. The image attached to the third e-mail depicted a phallic snow sculpture shooting snowballs. The fourth e-mail, entitled "Birthday Vibrator," contained a video file of a women simulating masturbation under a sheet from the movie "Not Another Teen Movie." Defendant's Exhibit 4. The fifth e-mail, entitled the "Perfect Woman," contained a picture attachment of two pairs of female legs attached at the waistline on a beach. Herarte forwarded Stern the "Perfect Woman" e-mail and stated the following, "Jen can you believe this another e-mail from Dr K, but this time I didn't get it. Hope you can view the attachment. eh."

Plaintiffs also allege that they were subject to a hostile work environment because defendant would allegedly refer to himself as "pimp Kaisman." Defendant also walked around the office approximately four times in his long johns. Plaintiffs contend that "by walking around the office in his long johns and by the use of sexual innuendo and his various other actions, defendant created a sexually permeated hostile work environment." Plaintiffs allege that defendant put photos on the office

computer of patients dressed as playboy bunnies.

Plaintiffs claim that defendant took females, including female employees, and would be alone with them in the office for an extended period of time. Plaintiffs claim that defendant spoke to them about wild nights that he had, including frequenting Asian massage parlors and seeing women dancing on tables.

In response to these allegations, defendant denies that he had sexual conduct with any employee at any time or that he put the pictures on the computer.

Defendant admits to walking around in his underwear although claims that they were not tight fitting and did not expose any genitalia. With respect to the e-mails, defendant claims that plaintiffs voluntarily chose to open them and that at least one of the e-mails advised, "do not open." Defendant contends that the conduct was not severe and pervasive, nor was it gender-based. He also claims that plaintiffs just assumed that he was referring to sexual encounters when he spoke about his plans outside of work.

A. Plaintiff Hernandez:

In the complaint, Hernandez individually alleges the following with respect to defendant's conduct:

- Defendant showed Hernandez a model of a person with a phallic object being stuck in its rectum.
- Defendant told Hernandez that it would be a good idea if she got breast implants and that he would take her to a place in

Philadelphia where she should have the surgery performed.

- Hernandez claims that as a result of this discussion, she felt "embarrassed, insulted, self-conscious and humiliated."

- Hernandez did not seek any medical treatment for her emotional injuries nor did she miss work.

- Defendant asked Hernandez to stay late at the office with him on the premise that he "would be bored."
- Defendant looked down Hernandez' pants on one occasion while she was bending over and when she got up, allegedly said "oh please let me enjoy myself."

- In front of Hernandez, in May 2006, defendant allegedly put whipped cream on the side of his mouth and asked another female employee if that "looked familiar."

- Hernandez claims that defendant threatened her that he knew the best lawyers in New York if anyone ever tried to get in his way.

- Hernandez testified that defendant attempted to give her more money to stay at defendant's office instead of leaving with Brisson. However Hernandez claims that, at that point in time, she did not feel comfortable working with defendant and did not accept his offer. Hernandez also states that defendant commented on another employee's breasts in front of her approximately five times.

B. Plaintiff Herarte

- Over three years, defendant allegedly told Herarte that she should lose weight four times.

- Defendant allegedly touched Herarte's bottom on one occasion in 2004.

- Defendant once told Herarte that she should "meet" his friends.

- Herarte was present for the whipped cream incident.

- Herarte claims that she suffered from headaches, fear, lack of sleep from October 2006 through December 2006. Herarte did not seek medical treatment nor did she miss work.

- Herarte received four out of the five e-mails.

- Herarte also testified that neither the female employees nor defendant confirmed that they engaged in sexual conduct.

C. Plaintiff Stern:

- On October 17, 2006, defendant "physically grabbed Stern's arm in anger" at the office. Defendant then continued to scream obscenities at Stern in front of other employees and patients.

- Stern states that she was about to quit after this incident but that Brisson encouraged her to stay. After the arm incident, Stern states that she tried to work from home more and also avoid defendant.

- Stern claims that she found condoms in a drawer that were accessible to all employees which she believed were placed there by defendant.

- Stern testified that it "didn't make [her] feel good" to know that defendant was going behind closed doors with female employees.

- Stern described defendant as "perverted and sick" and stated the following, "he has always been sort of this - - he has always been, like, everybody talked about how perverted Dr. Kaisman was, it just got worse in 2006 especially at the end."

- Stern alleges that she saw female visitors coming up to the office as she was leaving work approximately five or six times.

Defendant claims that the comments regarding weight were not harassing, and that Herarte had asked defendant about losing weight. Apparently defendant's wife is a nutritional doctor. Defendant also claims that after Herarte informed him that she did not want to meet his friend, he did not ask her about it again. Defendant also claims that Stern only assumed that the condoms were placed in the drawer by defendant.

The court notes that the five e-mails were sent to multiple

employees, including Brisson and several male employees. One male employee testified that he believed the e-mails were unprofessional and not appropriate to send to female employees. Brisson testified that he believed the e-mails to be "obscene" and that they do not "belong in the workplace." Brisson also testified that the e-mails/videos were offensive to both men and women.

Brisson also testified to the following with respect to why he left the office:

> I vacated the place because as demonstrated by the e-mails, such behavior does not belong in a medical office and I vacated the place as well because my employees felt the same and I vacated the place because Jennifer Stern had been grabbed forcibly during an altercation in the office by Dr. Kaisman.

Brisson contends that he left voluntarily and that the day Stern was assaulted, "at this point we were talking about selling." Brisson testified that he wrote defendant a letter with his intention to sell the practice around November 2006. Although Brisson testified that he decided to leave due to defendant's behavior, he also testified that he and defendant had professional differences such as differences in training.

Another male employee testified that he felt "uncomfortable" knowing that defendant may have put up pictures on the computer of "nude" patients.

In December 2006, Brisson informed the office that he and

defendant would be separating. The three plaintiffs, along with at least one other employee, requested to leave with Brisson. The other employees stayed with defendant. The plaintiffs received higher salaries starting in January 2007. Defendant asked Hernandez to stay with him, and offered her more money. However, Hernandez decided to work for Brisson for her "sanity."

The court also notes that defendant admits to most of the offensive behavior; he just does not believe that it rose to an actionable level.

In April 2007, plaintiffs brought a complaint against defendant, alleging four causes of action. The first cause of action claims that defendant, as an employer, violated both the State and City Human Rights Laws by creating a hostile work environment.

In their complaint, plaintiffs allege that the office was "permeated with sexual tension" due solely to defendant's behavior. Plaintiffs also state that they were subjected to a severe and pervasive hostile work environment. They also allege that they were "emotionally injured by the defendant's conduct and they suffered from fear, anxiety, embarrassment, humiliation and other emotional harms."

The second cause of action is brought by Stern, alleging that a battery occurred when defendant grabbed Stern's arm. The third cause of action is a claim for assault on behalf of all of

the plaintiffs. In the fourth cause of action, plaintiffs claim the intentional infliction of emotional distress.

The third and fourth causes of action have been dismissed as a result of defendant's prior motion to dismiss. Defendant now moves, pursuant to CPLR 3212, for an order granting partial summary judgment dismissing the first cause of action. Defendant does not dispute Stern's cause of action for battery on this motion.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion." *Id.* at 544, citing *Marine Midland Bank, N.A. v Dino &*

*Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990).

II. New York State Human Rights Law:

Pursuant to NYSHRL, as set forth in Executive Law § 296 (1) (a), it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's gender.

As under Title VII of the Civil Rights Act of 1964, 42 USC § 2000 *et seq.* (Title VII), sexual harassment that results in a "hostile or abusive work environment" is prohibited as a form of employment discrimination. *Meritor Savings Bank, FSB v Vinson*, 477 US 57, 66 (1986). The standard for proof for discrimination claims brought pursuant to NYSHRL is the same for claims brought under Title VII. *Maher v Alliance Mortgage Banking Corp.*, 650 F Supp 2d 249, 259 (ED NY 2009).

A hostile work environment is present when "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment [interior quotation marks and citation omitted]." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 (2004).

"Whether a workplace may be viewed as hostile or abusive -- from both a reasonable person's standpoint as well as from the victim's subjective perspective -- can be determined only by

considering the totality of the circumstances." *Matter of Father Belle Community Center v New York State Division of Human Rights*, 221 AD2d 44, 51 (4th Dept 1996). These circumstances include "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance [interior quotation marks and citation omitted]." *Forrest v Jewish Guild for the Blind*, 3 NY3d at 310-311. Generally, isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment; in order to be actionable, the offensive conduct must be pervasive. *Matter of Father Belle Community Center v New York State Division of Human Rights*, 221 AD2d at 51.

As set forth below, each of plaintiffs' hostile work environment claims fail because they do not rise to the level of actionable harassment based on gender. Most of the complained-of conduct was directed at both the men and the women in the office and could be perceived as offensive to both men and women. The conduct that was directed specifically at the plaintiffs due, allegedly, to their gender, was too sporadic to rise to an actionable level.

In order to sustain a claim for a sex-based hostile work environment, plaintiff must demonstrate that defendant's conduct exposed members of one sex to "disadvantageous terms or

conditions of employment to which members of the other sex are not exposed [internal quotation marks and citation omitted]." *Oncale v Sundowner Offshore Services*, 523 US 75, 80 (1998). The e-mails/videos sent to plaintiffs were evidently and undisputedly inappropriate for an employer to send to his employees. However, the record indicates that defendant sent them to everyone in the office. As such, plaintiffs were not targeted with these e-mails due to their gender. In fact, some of the e-mails were not even sent directly to plaintiffs, but were forwarded from other people in the office, even by one of the plaintiffs herself.

Brisson testified that the e-mails would be offensive to both men and women. Defendant's other conduct, including allegedly putting pictures up of patients on the computer either nude or as playboy bunnies, albeit not confirmed, was also testified to be equally offensive to both men and women.

"[W]orkplace harassment, even harassment between men and women, is [not] automatically discrimination because of sex merely because words used have sexual content or connotations." *Oncale v Sundowner Offshore Services*, 523 US at 80. The evidence above fails to show that the defendant's conduct occurred due to plaintiffs' gender, or that plaintiffs were exposed to "disadvantageous terms or conditions of employment to which members of the other sex [were] not exposed." *Id.* Plaintiffs did not miss work because of defendant's behavior, nor were their

salaries impacted. In fact, plaintiffs received bonuses in December 2006. They also received pay raises when they voluntarily decided to work with Brisson. Moreover, plaintiffs did not complain to defendant about his conduct. Accordingly, the conduct that was directed at both men and women does not rise to an actionable level for hostile work environment.

Gender-Based Conduct:

As set forth below, considering the totality of the circumstances, even in the light most favorable to plaintiffs, plaintiffs fail to raise a triable issue of fact with respect to their NYSHRL hostile work environment claims. As set forth comprehensively in the facts, in summary, plaintiffs claim that they received five obscene e-mails in one month. Plaintiffs claim that defendant walked around approximately four times in his long johns during the course of their employment. Stern contends that she found condoms in a drawer allegedly placed there by defendant. It is alleged that defendant had female visitors to the office approximately five times. He also is alleged to have placed nude or playboy bunny pictures of two patients on the shared computer. He put whipped cream on his face, once, and made a sexual comment not directed at plaintiffs. Defendant allegedly made comments about another female employee's breasts five times. He also is alleged to have spoken to Herarte about her weight four times over three years.

While plaintiffs may have been exposed to a "mere offensive utterance" on several occasions, a reasonable person cannot find that plaintiffs were subject to a hostile work environment. *Brennan v Metropolitan Opera Association, Inc.*, 284 AD2d 66, 72 (1st Dept 2001). Even considering the totality of the circumstances, including the conduct mentioned above, the incidents directed specifically at plaintiffs due to their gender were isolated and sporadic, rather than pervasive, ongoing harassment. As stated in *O'Dell v Trans World Entertainment Corp.* (153 F Supp 2d 378, 386 [SD NY 2001], *affd* 40 Fed Appx 628 [2d Cir 2002]), courts must distinguish between "'merely offensive or boorish conduct' and conduct that is sufficiently severe or pervasive as to alter the conditions of employment."

"A work environment will be considered hostile if a reasonable person would have found it to be so and if the plaintiff subjectively so perceived it." *Brennan v Metropolitan Opera Association, Inc.*, 192 F3d 310, 318 (2d Cir 1999). "[I]n order to be actionable, the incidents of harassment must occur in concert or with a regularity that can reasonably be termed pervasive [internal quotation marks and citation omitted]." *Hamilton v Bally of Switzerland*, 2005 WL 1162450, 2005 US Dist LEXIS 9319, *27 (SD NY 2005). Herarte and Stern worked for defendant for over three years. The e-mails were sent during a one-month time period and defendant's alleged behavior was

sporadic over the course of their employment. As such, no rational fact finder could conclude that these allegations, considering the time period in which they occurred and the totality of the circumstances, could alter the conditions of the plaintiffs' employment so as to create a hostile work environment.

Although Stern mentioned that it "didn't feel good" when she saw female visitors arriving at the office after hours, the "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' ... [C]onduct must be extreme to amount to a change in the terms and conditions of employment ... [internal quotation marks and citations omitted]." *Faragher v City of Boca Raton*, 524 US 775, 788 (1998). Moreover, although "evidence of harassment directed at other co-workers can be relevant to an employee's own claim of hostile work environment discrimination" *(Leibovitz v New York City Transit Authority*, 252 F3d 179, 190 [2d Cir 2001]), much of what plaintiffs knew of the alleged sexual conduct with female visitors and employees was "second-or third-hand." *Id.* at 189.

The comment that defendant made to Hernandez suggesting that she receive breast implants, is clearly offensive, humiliating and gender-based. Hernandez claims that she felt "degraded, embarrassed, insulted, self conscious and humiliated" by the discussion. On one occasion, defendant also told Hernandez that

he enjoyed looking at her behind while she was bent over. Although even a single incident of harassment can create a hostile work environment if the alleged conduct is "extraordinarily severe," this sporadic conduct does not rise to the level of being extraordinarily severe. *San Juan v Leach*, 278 AD2d 299, 300 (2d Dept 2000). Moreover, the Appellate Division, First Department, has held that "a decision maker's stray remark, without more, does not constitute evidence of discrimination." *Mete v New York State Office of Mental Retardation and Developmental Disabilities*, 21 AD3d 288, 294 (1st Dept 2005).

In light of existing case law, the complained-of conduct being alleged herein is not of sufficient severity to have altered plaintiffs' working conditions. *See e.g. Quinn v Green Tree Credit Corp.*, 159 F3d 759, 768 (2d Cir 1998) (finding no triable issue of hostile work environment where supervisor told plaintiff she had been voted the "sleekest ass" in the office and he deliberately touched her breasts with papers he was holding); *Alfano v Costello*, 294 F3d 365, 380 (2d Cir 2002) (Court reversed jury verdict where, out of twelve incidents, only five could be considered sex-based hostility. The five remaining, which included three comments or pranks involving carrots and intimating plaintiff's sexual practices and vulgar cartoon depicting a subordinate with whom plaintiff allegedly had inappropriate physical contact, despite being humiliating and

"plainly offensive," were considered "too few, too separate in time, and too mild, under the standard so far delineated by the case law, to create an abusive working environment"); *Grossman v Gap, Inc.*, 1998 WL 142142, 1998 US Dist LEXIS 3626 (SD NY 1998) (employer granted summary judgment on plaintiff's hostile work environment claim where supervisor called plaintiff at home, followed her around store, asked her out on dates, asked her to model a bathing suit, made one sexually suggestive comment); *Gregg v New York State Department of Taxation & Finance*, 1999 WL 225534, 1999 US Dist LEXIS 5415 (SD NY 1999) (at least ten to fifteen inappropriate conversations, four instances of offensive touching and invitations to drinks and meals not severe and pervasive); *compare Raniola v Bratton*, 243 F3d 610, 621 (2d Cir 2001) (finding a triable issue of fact where plaintiff stated that, over a period of two and a half years, she was subjected to offensive sex-based remarks, workplace sabotage, disproportionately burdensome work assignments, and one serious public threat of physical harm).

Additionally, except for Stern's alleged battery, which is set forth in a separate cause of action, plaintiffs do not claim that they were physically threatened in any way. *See e.g. Barnum v New York City Transit Authority*, 62 AD3d at 738 (touching thigh, patting buttocks, offensive comments not severe and pervasive). Plaintiffs had the opportunity to move with Brisson

and voluntarily decided to do so. Moreover Stern contended that she wanted to leave defendant's office as a result of defendant grabbing her arm, which was evidently not sex-based, not because of any alleged sexual harassment.

Accordingly, defendant is granted summary judgment with respect to plaintiffs' NYSHRL hostile work environment claims.

III. New York City Human Rights Law:

As a result of revisions created to the NYCHRL in 2005 through the Local Civil Rights Restoration Act of 2005 (Restoration Act), the NYCHRL or Administrative Code § 8-130, is to be construed more liberally than its state or federal counterparts. *Barnum v New York City Transit Authority*, 62 AD3d at 738. Pursuant to NYCHRL, as stated in Administrative Code § 8-107 (1) (a), it is an unlawful discriminatory practice for an employer to refuse to hire or employ or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's gender. Analysis of claims under the NYCHRL is to be independent, and the court must evaluate the claims with regard for the NYCHRL's "uniquely broad and remedial purposes." *Williams v New York City Housing Authority*, 61 AD3d 62, 66 (1st Dept 2009). *Williams* concludes that a

> "focus on unequal treatment based on gender-regardless of whether the conduct is 'tangible' (like hiring or firing) or not -- is in fact the approach that is most

> faithful to the uniquely broad and remedial purposes of the local statute. To do otherwise is to permit far too much unwanted gender-based conduct to continue befouling the workplace."

*Id.* at 79.

Under *Williams*, the test for dismissing a NYCHRL hostile work environment claim is whether the "alleged discriminatory conduct in question does not represent a 'borderline' situation but one that could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences." *Williams v New York City Housing Authority*, 61 AD3d at 80. The Court in *Williams* held, "[f]or [Human Rights Law] liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender." *Id.* at 78.

Despite the broader application of the NYCHRL, *Williams* also recognized that the law does not "operate as a general civility code [internal quotation marks and citation omitted]." *Id.* at 79.

Plaintiffs contend that the office situation deteriorated between October 2006 and December 2006.[1] However, as set forth

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[1]Plaintiffs do not address the NYCHRL claims in their opposition papers. During oral argument, plaintiffs' counsel noted that, since plaintiffs believe that their NYSHRL claims should survive summary judgment, so too should their NYCHRL

below, plaintiffs have not rebutted defendant's prima facie defense that the totality of his conduct, including the gender-based and non-gender-based acts, reveals that plaintiffs were treated no less well than the men due to their gender.

For instance, defendant does not dispute most of the alleged behavior, including, but not limited to, the e-mails, the comments that he made to plaintiffs or in the plaintiffs' vicinity, the fact that he did have female visitors and the fact that he did walk around in his long johns. Herarte claims that she suffered emotional damage as a result of defendant's behavior. Stern claims that knowing female visitors were with defendant in the office alone did not make her "feel good." However, the fact that defendant had women visit his office after hours, even for sexual relations, is not evidence of treating the women employees less well than the men employees due to their gender.

Although Stern personally may have felt "not good" about knowing that the defendant was with female visitors, her own personal feelings are not enough to demonstrate that this conduct is harassment. The NYCHRL does not "operate as a general civility code." The same applies with the e-mails, alleged pictures and other comments. Moreover, Herarte for example, forwarded one of the e-emails to Stern, who was not even an

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claims.

original recipient. Herarte was apparently not that negatively impacted by the e-mail if she forwarded it to Stern with the intention that Stern open it.

Moreover, as previously mentioned, the e-mails and defendant's conduct could be construed as inappropriate by both the men and the women. This is not a "borderline" situation where the behavior was more hostile to the women than to the men.

Applying the standard set forth in *Williams* to the present case, plaintiffs' allegations with respect to the clear gender-based conduct can also be reasonably interpreted by a trier in fact to be no more than "petty slights and trivial inconveniences." *Id.* at 80. For instance, defendant asking Hernandez to get breast implants one time is offensive, but does not rise to an actionable level. *See e.g. Wilson v N.Y.P Holdings, Inc.*, 2009 WL 873206, *29, 2009 US Dist LEXIS 28876 (SD NY 2009)(holding that despite plaintiffs' claims that defendant discriminated against black and female employees, there was no viable hostile work environment claim under the NYCHRL when black female employees were allegedly subject to some derogatory language over a number of years, as this only resulted in "petty slights and trivial inconveniences").

Additionally, defendant does not deny that he offered Hernandez more money to stay but that she refused it. Hernandez's refusal to return to defendant, even considering the

totality of the circumstances, simply just does not create an actionable hostile work environment claim.

Accordingly, defendant's motion for partial summary judgment is granted with respect to plaintiffs' NYCHRL hostile work environment claims.

CONCLUSION

Accordingly, it is

ORDERED that defendant's motion for partial summary judgment is granted with respect to plaintiffs' hostile work environment claims under the NYSHRL and the NYCHRL in the first cause of action; and it is further

ORDERED that the remaining claim is severed and shall continue.

Dated: April 13, 2011

ENTER:

J.S.C.

DEBRA A. JAMES

FILED

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