UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TANYA MORALES,

Plaintiff,

-against-

THE STATE OF NEW YORK; NEW YORK, STATE OFFICE OF MENTAL HEALTH, New York State Psychiatric Institute; LEIGH, GHOLSON, Chief Safety and Security Officer, New York State Psychiatric Institute; and JORGE COLON, Sergeant, New York State Psychiatric Institute,

Defendants.

MEMORANDUM AND ORDER

05-CV-5006 (ENV)(SMG)

VITALIANO, D.J.

Tanya Morales ("Morales" or "plaintiff") brings this action against the State of New York ("State"), its Office of Mental Health ("OMH"), and two of its employees, Leigh Gholson and Jorge Colon, alleging that she was discriminated against because of her gender, retaliated against and subjected to a hostile work environment while working as a security officer at the New York State Psychiatric Institute ("NYPI"), an OMH-operated hospital in upper Manhattan. Plaintiff was terminated from her employment at NYPI on March 1, 2006. She asserts claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII"), 42 U.S.C. § 1983 ("§ 1983"), the New York State Human Rights Law, N.Y. Exec. § 290 ("NYSHRL"), and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107 ("NYCHRL"). The State, OMH and Gholson (the "state defendants") have moved collectively for summary judgment dismissing plaintiff's claims against them, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Colon has submitted a separate Rule 56 motion seeking dismissal of the claims against him. For the reasons stated below, defendants' motions are granted.

BACKGROUND

The following facts are drawn from the complaint and the submissions of the parties on the motions for summary judgment, including their respective Local Rule 56.1 filings.[1] All reasonable inferences are drawn in favor of plaintiff, the nonmoving party. See Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc., 473 F.3d 450, 456 (2d Cir. 2007).

I. Plaintiff's Employment by OMH

Morales began working for OMH as an NYPI Safety and Security Officer trainee on March 26, 1998. After a one-year probationary period, she was promoted from trainee to Safety and Security Officer, Level 1 ("SS-1"). Her duties as an SS-1 included foot patrolling and monitoring of assigned areas on NYPI grounds. Additionally, Morales handled all identification/access card creations for the NYPI Safety and Security Department.

Another OMH employee, Karen Doty, was hired as an SS-1 trainee at NYPI around the same time as Morales in 1998. After working together for a year or two, Morales and Doty began to socialize outside the workplace, talking daily on the phone.

When Morales began working at NYPI, her immediate supervisor was Angel Vasquez, and Willie Herriot was the Chief of Safety and Security. Upon Vasquez's retirement in 1999, Colon became Morales's immediate supervisor, a position he kept for the remainder of Morales's time at NYPI. Herriot retired in January 2002 and was succeeded by Gholson, who remained Chief of Safety and Security of NYPI at all times relevant to this litigation.

From 1998 to 2003, Morales was consistently rated 'good' in most aspects of her job performance by her superiors at NYPI, but repeatedly received a rating of 'needs improvement'

[1] Any fact alleged in a moving party's Rule 56.1 statement that is supported in fact by the record and not specifically and expressly contradicted by properly supported allegations in plaintiff's corresponding Rule 56.1 statement has been deemed to be admitted by plaintiff. Moreover, the Court has disregarded any party's assertion of a legal conclusion in the guise of an undisputed statement of fact. See E.D.N.Y. Local Rule 56.1(b), (e); Wojcik v. 42nd St.

with respect to her time and attendance. According to Ann Muzicka, Director of Personnel at NYPI,[2] poor attendance and failure to provide proper documentation for absences were recurring problems for Morales throughout her tenure at the hospital. (Muzicka Decl. ¶ 5.) Muzicka's assessment is borne out by the deposition testimony of at least one of Morales's coworkers, who recalled that Morales called in sick "constantly," (Latin Aff., Ex. I at 62:15-23), and Gholson, who recalls that Morales "had a serious attendance problem, that she was chronically late and absent, and [that they] spoke quite often about her attendance issues." (Latin Aff., Ex. Q at 97:9-13.) In May 2000, Morales missed work for three straight weeks without providing any medical documentation to explain her absence.

Like others, Colon was openly critical of Morales's punctuality and attendance record. Plaintiff asserts that she protested throughout her employment by OMH that Colon disciplined her for time and attendance infractions that he ignored from similarly situated male officers; however, this is uncorroborated by any other testimony or record evidence. Gholson, who supervised both Morales and Colon, recalls that Morales occasionally complained to him about being unfairly disciplined by Colon for her time and attendance issues, but stated that this was unremarkable and similar complaints "were fairly common amongst both male and female officers." (Gholson Decl. ¶ 8.)

In a May 22, 2001 counseling memorandum[3] addressed to Morales regarding her time and attendance issues, Colon professed to be understanding of the challenges that Morales was

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Dev. Project, Inc., 386 F. Supp. 2d 442, 448 & n.5 (S.D.N.Y. 2005).

[2] Muzicka was originally named as a defendant in this action, but plaintiff's claims against her were withdrawn pursuant to stipulation prior to the summary judgment phase. (Dkt. No. 21.)

[3] At NYPI, "[c]ounseling memoranda are issued as a corrective measure to instruct and educate staff as to better practices and to properly follow institute procedures . . . . [but] are not discipline and do not impose a penalty or affect pay or rank." (State Def. 56.1 ¶ 40.) Plaintiff's argument that such memoranda may nonetheless be "construed by employees as a form of discipline or adverse employment action" is without merit. See Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (a materially adverse change must be "more disruptive than a mere inconvenience or an alteration of job responsibilities [and] might be indicated by a

facing then as a mother going through a divorce, and solicited her input for accommodations that could be made by NYPI. Despite this apparent attempt at amicable resolution, Morales filed a formal grievance against Colon in December 2001, disputing several instances where he had marked her late for shifts. Ultimately, the grievance was resolved by the replacement of a faulty clock in the control room. Notably, in that grievance, Morales did not contend that Colon's allegedly unfair finding of fault with her punctuality was based on her gender.

According to Morales, the professional relationship between her and Colon was always contentious, and a "personality clash" between the two occurred as soon as Colon became her boss. Further, plaintiff maintains that Colon constantly made her "very aware of how he felt that [she] shouldn't have even been there, working in that department, and how he felt about women working in that department," and that "any time he had something negative to say to [her] . . . , he would always start off with 'you women.'" (Latin Aff., Ex. E at 18:12-17. 23:9-12.) However, other than recalling that Colon commented at some point between 1999 and 2004 that women should not get special treatment and needed to learn to work like men (a recollection which Doty corroborated), plaintiff has offered no particularized allegations of statements made by Colon indicative of gender-based animosity. Gholson again did not recall any occasion during Morales's employment at NYPI when she complained of such comments from Colon.

II. The March 8, 2003 Incident

In early 2003, according to Morales, it was common knowledge among security staff at NYPI, including Gholson, that Colon was having an intimate relationship with a female hospital kitchen staff member and, on numerous occasions, the two had been spotted entering locked

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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.") (internal quotation marks and citations omitted).

rooms in the facility together.[4] On Saturday, March 8, 2003, Morales was on duty in the NYPI surveillance control room, where both she and Doty observed, via surveillance camera, Colon and his paramour entering a doctor's office. They emerged after about an hour, "fixing their clothing." (Latin Aff., Ex. E at 124:9-13.) At the end of her shift, Morales removed the videotape from the control room and took it home with her.

By happenstance, on the following Monday, March 10, 2003, Gholson was informed that three laptops, a PDA device, and an unspecified amount of cash had been stolen from NYPI offices over the weekend. Gholson went to the control room to investigate the thefts, but was stopped by Morales and Doty, who told him about Colon's at-work tryst the past weekend and admitted that Morales had taken the inculpatory security videotape home with her.[5] Plaintiff told Gholson that Colon's conduct had been vexatious to her because she had needed his assistance with a "supervisory problem" during her shift – an unruly and uncooperative hospital visitor – but had been unable to reach him on the radio. (State Def. 56.1 ¶ 27; Latin Aff., Ex. E at 122:19-124:5). When Gholson asked for the tape, Morales and Doty asked for a guarantee that Colon would be disciplined and they would not be, which Gholson declined to give them.

The relationship between Morales and Colon immediately took a turn for the worse. On March 24, 2003, Morales wrote a letter to Muzicka complaining that Colon had become "extremely over bearing and borderline harass[ing] towards Officer Doty & myself." (Muzicka Decl. ¶ 11, Ex. E.) That same day, Morales and Doty spoke to NYPI's Affirmative Action Administrator Abigail Martinez about Colon's behavior. Plaintiff asked Martinez if the fact that

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[4] Morales stated at her deposition in this action that, to the best of her knowledge, the relationship was consensual, Colon never engaged in any type of sexual or intimate relationship with anyone that was in his chain of command, and Colon never tried to use his supervisory position to initiate sexual contact with people who reported to him. (Latin Aff., Ex. E. at 125:8-19.)

[5] Gholson's impression was that Morales would not have "notified [him] that she had taken the tape home had she not seen [him] looking for it." (Gholson Decl. ¶ 14.)

she had seen Colon enter the office with the female foodworker constituted sexual harassment, and Martinez explained that it did not. When Martinez offered some examples of behavior that might be considered sexual harassment, Morales admitted that Colon had never engaged in similar conduct. Before their meeting ended, in accordance with NYPI policy, Martinez provided Morales with a complaint form that she could file to open an investigation into any possible discrimination on Colon's part. Plaintiff never filled out this form.[6] After the meeting on March 24, 2003, Martinez tried to contact Morales several times for a follow-up discussion, but received no response.

In May 2003, Colon and Gholson gave Morales a poor performance review which differed substantially from her previous evaluations. Gholson attributed the negativity in large part to Morales's decision to take the surveillance videotape without authorization, which had compromised the video's chain of custody. Plaintiff does not dispute that NYPI SS-1s are trained and required to properly preserve evidence of possible wrongdoing.

On May 12, 2003, plaintiff complained to Gholson that Colon's behavior towards her was becoming increasingly hostile, and expressed suspicion that Gholson had informed Colon of her role in reporting his behavior. She was, however, unable to provide any specific details as to how Colon's attitude toward her had changed. At that meeting, Gholson issued Morales a counseling memo indicating that she had violated NYPI policy when she removed the videotape. Plaintiff claims that Gholson also said to her: "Sergeant Colon really did not do anything wrong. You are the one facing more serious disciplinary actions for removing the tape. I wouldn't rock the boat. You can either deal with the counseling memo from me and squash the issue with Colon or take your chances with Personnel in which you will face harsher disciplinary action I

[6] The complaint form was made available to Doty as well, who also never submitted one. Doty has stated that Colon did treat her and Morales differently after the March 8, 2003 incident, but she believed that was because he knew

can guarantee that." (Latin Aff., Ex. K.) Nonetheless, the evidence demonstrates that Gholson recommended to Muzicka that Colon be disciplined (which he later was) and that Morales and Doty not be disciplined. (Muzicka Decl. ¶ 13.)

On May 27, 2003, Gholson discovered that his access to NYPI's ID/access card computer system had been deleted. When Gholson investigated the cause for the deletion, he uncovered further problems with the card system, which had been overseen by Morales since the early days of her employment at NYPI. The ID/access cards issued at NYPI customarily "have a photograph and a name attached to them and then some of them … if they are authorized will access the parking garage or other offices and areas." (Sanders Aff., Ex. C at 13:23-14:3.) However, Gholson determined that during 1998 and 1999, over 60 ID cards without associated names or photographs labeled "EXTRA-EXTRA" had been created without authorization, and that the bulk of these EXTRA-EXTRA cards were created under Morales's computer passcode. Gholson promptly had SS-1 Justin Maynard delete the EXTRA-EXTRA cards from the system.

At her deposition, Morales admitted to creating 40 to 50 of the EXTRA-EXTRA cards. She also admitted that she had created an ID card for a pharmaceutical representative who was not an employee at NYPI, although she knew ID cards were not supposed to be issued to anyone other than NYPI employees. Shortly after Morales had created this out of policy card, Herriot, who was then the Chief of Safety and Security, had learned of her unauthorized action and ordered her to deactivate it. Nevertheless, as of July 2004, it was still active.

Plaintiff asserts that, after the March 8, 2003 incident, she received the desirable duty posts in the main building at NYPI less frequently. According to Gholson, starting in May 2003 he decided to limit Morales's unsupervised presence in the control room due to her ID card hijinks and her unauthorized removal of the surveillance video. Notwithstanding, between the

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that they had reported him, not because they were women. (State Def. 56.1 ¶ 55.)

March 8, 2003 incident and the end of her employment at NYPI, plaintiff worked 113 shifts at the two main building locations, a number comparable to that worked by other employees. Plaintiff also worked more shifts at the main building than any male officer, and more than any other officer besides Doty, who was pregnant for much of that time.

According to plaintiff, Colon denied her requests for vacation days for approximately six months after she reported the March 8, 2003 incident, so she sought and obtained approval for the requests from Gholson instead. Between March 2003 and the end of March 2004, plaintiff had 31 requests for days off approved. Plaintiff claims that, after she submitted one vacation request to Colon in December 2003, in Gholson's presence, Colon refused to approve it and told her that "no female officer with less time than me is going to tell me how to do my job." Further, plaintiff alleges that on Saturday, April 10, 2004, upon her arrival at work, she was told by Colon that he had created a new patrol rule that required her to account for her whereabouts at all times. According to contemporaneous notes made by plaintiff, Colon told her that the new rule was just for Saturdays, because he had heard complaints about officers going missing during shifts on that day. Two days later, plaintiff complained to Gholson, who agreed with her that it was unfair and should not be enforced. There is no indication that Colon or anyone else ever tried to enforce the rule again after April 10, 2004, the day it was allegedly imposed on plaintiff.

III. Doty's Arrest and the Subsequent OMH Investigation

On May 20, 2004, Doty was arrested in her car outside a Staples office supply store in midtown Manhattan with toner cartridges taken from NYPI in her possession. In custody, Doty implicated herself and Morales in multiple thefts of NYPI property, and confessed that she and Morales had conspired in a scheme to steal office supplies from NYPI and return them to Staples locations for store credit. Doty explained that she would alert Morales about which areas the

surveillance cameras were monitoring during her shift, and Morales would then pilfer items from unmonitored areas. While she was in custody, Doty called Morales to inform her that she had been arrested, had confessed to the thefts and had fingered Morales as well.

Gholson was informed of Doty's arrest and the accusations against her and Morales; he immediately put them both on administrative leave. Not yet knowing she was on administrative leave, Morales called in sick throughout the weekend, and only set foot in the hospital again when Gholson ordered her to come in on May 24, 2004. On that date, Gholson searched Morales's locker in her presence, where he found a Motorola radio which had been reported stolen by Officer Sheila McNeil on August 17, 2002. Gholson also found several ID cards for other NYPI employees and at least one other employee's driver's license. Gholson ordered plaintiff to turn in her work keys, which she did. Among the keys turned in was one which accessed the mens' locker room, which Morales was not authorized to have.[7]

Soon after Doty's arrest, OMH Chief Investigator Anthony Doringrichia came down to NYPI from Albany to conduct a formal investigation into the suspected misconduct of Morales and Doty. Doty again admitted to Doringrichia that she and Morales had collaborated on NYPI property thefts. Doringrichia corroborated Doty's testimony that Morales returned stolen toner cartridges to stores for store credit by contacting Staples and verifying that Morales had returned cartridges on March 14, 2004 which matched the printer model used at NYPI. On June 9, 2004, Dorangrichia interrogated Morales regarding the stolen radio, and "she was unable to account for its presence in her locker." (Dorangrichia Decl. ¶ 25.) Subsequently, Dorangrichia drew up an investigative report of his findings. Although Morales dismisses Dorangrichia's damning investigative report as "biased" and "specious at best" (Pl.'s Resp. to State Defendants' 56.1 ¶

[7] In the course of her confession, Doty also told the authorities that Morales had stolen male officers' work clothes from the men's locker room.

73), the record simply contains no basis for her assertion. Dorangrichia did not know any of the parties involved prior to starting his investigation, and was also unaware of the March 8, 2003 incident in which Morales and Doty had outed Colon.

On August 6, 2004, plaintiff was notified that she was suspended effective immediately, and that a disciplinary proceeding had been initiated against her. Plaintiff was charged with four specific incidents of misconduct involving several reported thefts, possession of stolen state property, and the improper use of and tampering with the hospital ID card system. The proposed penalty was dismissal from State service. Doty received a similar notification.

As a member of the New York State Correctional Officers and Police Benevolent Association ("NYSCOBA"), Morales was entitled, pursuant to the union's collective bargaining agreement, to an evidentiary hearing before an independent arbitrator in relation to the disciplinary charge. On December 13, 2004, counsel representing Morales informed NYPI that Morales considered herself "constructively discharged" and would "not return to adjudicate the outstanding disciplinary charges." (State Def. 56.1 ¶ 110; Muzicka Decl. ¶ 26, Ex. J.) On January 9, 2006, the arbitrator notified plaintiff's counsel that the hearing would be held on January 11, 2006. When plaintiff's counsel responded that neither he nor his client would attend, the arbitrator informed him that the record would be held open for 30 days if she changed her mind. Neither counsel nor plaintiff communicated further with the arbitrator. On March 1, 2006, the arbitrator found that the State had proven the theft charges against Morales by a "preponderance of the credible evidence on the record." (State Def. 56.1 ¶¶ 117-18.) As a result, NYPI terminated Morales on March 1, 2006.

On December 2, 2004, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). She received a "Right to Sue" letter from the Department of Justice on July 29, 2005, and filed the instant action on October 26, 2005.

DISCUSSION

I. Summary Judgment Standard

The Court's responsibility in assessing the merits of a summary judgment motion is not to try issues of fact, but rather to "determine whether there are issues of fact to be tried." Sutera v. Schering Corp., 73 F.3d 13, 16 (2d Cir. 1995) (internal quotation marks omitted). As the moving parties, defendants bear the initial burden of demonstrating that there is no genuine issue of material fact, see, e.g., Jeffreys v. City of New York, 426 F.3d 549, 553 (2d Cir. 2005), and the Court will resolve all ambiguities and draw all permissible factual inferences in favor of plaintiff, the party opposing the motion. See, e.g., Sec. Ins. Co. of Hartford v. Old Dominion Freight Line. Inc., 391 F.3d 77, 83 (2d Cir. 2004); Hetchkop v. Woodlawn at Grassmere, Inc., 116 F.3d 28, 33 (2d Cir. 1997) ("If, as to the issue on which summary judgment is sought, there is any evidence in the record from which a reasonable inference could be drawn in favor of the opposing party, summary judgment is improper."). If a moving party meets its initial burden of demonstrating the absence of a disputed issue of material fact, the burden shifts to the nonmoving party, see Fed. R. Civ. P. 56(e), which may not rely solely on "conclusory allegations or unsubstantiated speculation" in order to defeat summary judgment, Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998), but rather must "make a showing sufficient to establish the existence of [each] element to that party's case . . . . since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). If

the evidence favoring the nonmoving party is "merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511 (1986) (citations omitted).

The Second Circuit has cautioned that courts should be "chary" in granting summary judgment in employment discrimination cases, where intent of the employer is usually a central factual issue. See Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 71 (2d Cir. 2000) (citing Chertkova v. Conn. Gen. Life Ins., 92 F.3d 81, 87 (2d Cir. 1996)); Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997). "[E]mployers are rarely so cooperative as to include a notation in the personnel file that the firing is for a reason expressly forbidden by law." Bickerstaff v. Vassar College, 196 F.3d 435, 448 (2d Cir. 1999). Notwithstanding, it is "beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases." Abdu-Brisson v. Delta Air Lines, 239 F.3d 456, 466 (2d Cir. 2001). "[E]ven in the discrimination context, a plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." Schwapp, 118 F. 3d at 110; see Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 40 (2d Cir. 1994) ("[S]ummary judgment remains available to reject discrimination claims in cases lacking genuine issues of material fact.")).

II. Plaintiff's Title VII Claims

Title VII provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a), or to retaliate against an employee who complains of a Title VII violation. See 42 U.S.C. § 2000e-3(a). Plaintiff alleges that, in

violation of Title VII, defendants discriminated against her and other female security officers on the basis of gender, subjected them to a hostile work environment, and retaliated against plaintiff for complaining about alleged discrimination.

A. Title VII Defendant Must Be Plaintiff's Employer

Individuals are not subject to personal liability under Title VII. See Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir. 1995), abrogated on other grounds by Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998); see also Patterson v. Cnty. of Oneida, 375 F.3d 206, 221 (2d Cir. 2004); Wrighten v. Glowski, 32 F.3d 119, 120 (2d Cir. 2000) (per curiam). Accordingly, plaintiff expressly states in her summary judgment opposition that she does not seek to hold defendants Gholson and Colon liable under Title VII (although this was not indicated in the complaint). (See Opp. at 9 n.3.) It remains unclear, however, whether plaintiff intends to assert her Title VII claims against the State, OMH or both.[8] Defendants argue that the sole defendant that could possibly be held liable under Title VII is OMH, because OMH was plaintiff's "employer" within the meaning of Title VII, and the State was not.

The past or present "existence of an employer-employee relationship is a primary element of Title VII claims." Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 370 (2d Cir. 2006). See also Kern v. City of Rochester, 93 F.3d 38, 45 (2d Cir. 1996). Failure to prove the relationship is a ground for dismissal of a Title VII claim on the merits. See Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16, 126 S. Ct. 1235, 1245 (2006); Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 365 (2d Cir. 2000). A putative defendant qualifies as an employer under Title VII when it "exercise[s] a direct and significant degree of control over the complaining party's direct employer or the

[8] The complaint states: "Plaintiff was an employee of THE STATE OF NEW YORK (hereinafter referred to as 'SONY'). More specifically[,] defendant NEW YORK STATE OFFICE OF MENTAL HEALTH (hereinafter referred to as the 'OMH'). For the purposes of this litigation, defendant SONY or OMH may be used

complaining party's work environment." Goyette v. DCA Advertising, Inc., 830 F. Supp. 737, 744 (S.D.N.Y. 1993) (internal quotation marks omitted); see Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40, 109 S. Ct. 2166, 2172 (1989); Gulino, 460 F.3d at 371-72. In determining whether this standard has been met, courts consider factors including whether the putative defendant had "authority to hire or fire . . . , to supervise . . . work or conditions of employment, to determine [the] rate or method of pay, or to maintain records of . . . employment." Kern, 93 F.3d at 45.

Plaintiff, her direct supervisors at NYPI and the administrators at NYPI and in Albany who dealt with plaintiff's complaints about Colon and formally investigated plaintiff's conduct on the job were all employees of OMH. OMH and the State are separate and distinct, albeit related, governmental entities; OMH is an "autonomous agency" that was established by the State "[t]o facilitate the implementation of [mental health] policies and to further advance the interests of the mentally ill and their families."[9] McKinney's Mental Hygiene Law § 701. While sometimes entities are so "intertwined that they are a joint employer for purposes of Title VII," Ross v. Mitsui Fudosan, Inc., 2 F. Supp. 2d 522, 529 (S.D.N.Y. 1998) (internal quotation marks omitted) (collecting cases), there is no evidence of such intertwining with respect to the subject matter of plaintiff's Title VII claims. OMH, not the State, operates NYPI, and OMH, not the State, was responsible for all of the relevant personnel decisions in this case. Indeed, OMH was separately organized by the State to handle exclusively all of the State's day-to-day mental health activities with respect to the employment of those performing these activities. The relationship

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interchangeably to identify the employer which is SONY . . . . Defendant SONY or OMH is an employer within the definitions contained in [Title VII]." (Compl. ¶¶ 5-7).

[9] A state government department or agency can be sued under its own name and on its own account, separate and apart from the State itself. See, e.g., Farrell v. New York, 946 F. Supp. 185, 191 (N.D.N.Y. 1996) (Title VII claims properly asserted against Division of State Police, but not the State); Butterfield v. New York, No. 96-cv-5144, 1998 WL 401533, at *14 (S.D.N.Y. July 15, 1998) (discrimination claims under Americans with Disabilities Act properly asserted against State Department of Correctional Services, but not the State).

between the two entities is insufficient to permit plaintiff to raise Title VII claims against the State in addition to or instead of her Title VII claims against OMH. To the extent that plaintiff has done so, those claims are dismissed with prejudice.[10] See, e.g., Farrell v. New York, 946 F. Supp. 185, 191 (N.D.N.Y. 1996) (dismissing state trooper's Title VII claims against the State while permitting them to proceed against the New York State Division of State Police); cf. Butterfield v. New York, No. 96-cv-5144, 1998 WL 401533, at *14 (S.D.N.Y. July 15, 1998) (noting similarity of definitions of "employer" in Title VII and the Americans with Disabilities Act, and dismissing correctional officer's claims of disability discrimination against the State while permitting them to proceed against the New York State Department of Correctional Services). And, of course, to the extent they remain in place, the Title VII claims against the individual defendants are also dismissed with prejudice.

B. Title VII Time Limitations

In New York, an individual must file a charge of a Title VII violation with the EEOC within 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1); see Lukasiewicz-Kruk v. Greenpoint YMCA, No. 07-CV-2096, 2009 WL 3614826, at *6 (E.D.N.Y. Oct. 30, 2009). In the instant case, plaintiff filed her complaint with the EEOC on December 2, 2004. Thus, as plaintiff acknowledges in her opposition to summary judgment, the limitations period for her Title VII claims began 300 days earlier, on February 6, 2004. "When, as in this case, a plaintiff's allegations of discrimination extend beyond the 300-day limitations period, the nature of the claim determines what consideration will be given to the earlier conduct." Petrosino v. Bell Atl., 385 F.3d 210, 220 (2d Cir. 2004).

[10] While the Court analyzes to identify the correct legal principle, "the state is the real, substantial party in interest," as plaintiff is a private party seeking to recover damages; ultimately, any money judgment against OMH would "be paid from public funds in the state treasury," just as any money judgment against the State itself would be. Edelman v. Jordan, 415 U.S. 651, 663, 94 S. Ct. 1347, 1355-56 (1974) (internal quotation marks and citations omitted).

1. Discrimination and Retaliation Claims

The Supreme Court has held that Title VII "precludes recovery for discrete acts of discrimination or retaliation that occurred outside the statutory time period." Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 105, 122 S. Ct. 2061, 2068 (2002) (emphasis added). Examples of discrete acts of discrimination or retaliation that are "easy to identify" include "termination, failure to promote, denial of transfer, or refusal to hire," Morgan, 536 U.S. at 114, 122 S. Ct. 2061; additionally, Title VII prohibits discrimination or retaliation through an employee's "compensation, terms, conditions or privileges of employment." 42 U.S.C. § 2000e-2(a). "Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice," and accordingly, "starts a new clock for filing charges alleging that act." Morgan, 536 U.S. at 113-14, 122 S. Ct. at 2072-73.

Although plaintiff makes numerous allegations of discriminatory and/or retaliatory behavior by defendants, the only post-February 6, 2004 "discrete acts" alleged are Colon's establishment of an unofficial rule requiring Morales to report constantly on her location during Saturday shifts, OMH's notification to plaintiff that she had been placed on administrative leave in May 2004, plaintiff's receipt of a notice of suspension in August 2004, and her termination in March 2006. However, plaintiff points out, and the Court acknowledges, that Title VII does not "bar an employee from using the prior [time-barred] acts as background evidence in support of a timely claim." Morgan, 536 U.S. at 113, 122 S. Ct. at 2072.

2. Hostile Work Environment Claim

A "hostile work environment" in violation of Title VII exists where "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." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct 367, 370 (1993) (internal quotation marks omitted). "Hostile work environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." Morgan, 536 U.S. at 115, 122 S. Ct. at 2073 (internal citation omitted). Accordingly, "in the case of a hostile work environment claim, the statute of limitations requires that only one sexually harassing act demonstrating the challenged work environment occur within 300 days of filing; once that is shown, a court and jury may consider the entire time period of the hostile environment in determining liability." Petrosino, 385 F.3d at 220 (internal quotation marks omitted). Relying on this principle, plaintiff seeks to base her Title VII hostile work environment claim on "the totality of the circumstances raised in [support of her Title VII gender discrimination claim], as well as her entire history of employment." (Opp. at 20.)

To the extent that plaintiff claims that she was subjected to mistreatment and verbal harassment on the basis of her gender while employed at OMH, plaintiff does not proffer any specific allegations that this sort of misconduct occurred at any point after February 6, 2004.[11] In order for her Title VII hostile work environment claim to be timely, plaintiff must have filed a charge with the EEOC within 300 days of an "act that is part of the hostile work environment." Morgan, 536 U.S. at 115, 118, 122 S. Ct. at 2073, 2075. "[T]he mere fact that an employee was dismissed within the statutory period cannot be used to pull in a time-barred discriminatory act."

[11] Plaintiff's allegation that Colon created a "new workplace rule specifically for her" in April 2004 does not support a hostile work environment claim. She contends not that the rule was discriminatory against female officers, but rather "that it was unfair to implement 'unofficial' workplace rules against her" in particular. (Opp. at 4.) Given that plaintiff was by all accounts the only officer, male or female, who was ever required to follow the rule, and that she apparently was required to do so only for a single day, plaintiff's post-hoc assertion that "other similarly situated male [ ] [o]fficers were not required to" follow the rule rings hollow. (Id.)

Patterson, 375 F.3d at 220. Accordingly, plaintiff's Title VII hostile work environment claim is time-barred.[12]

C. Title VII Discrimination Claim

Gender discrimination claims brought pursuant to Title VII are analyzed under the McDonnell Douglas burden-shifting test. See McDonnell Douglas, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973). The initial burden of production lies with the plaintiff. To establish a prima facie case of gender discrimination, a plaintiff must show (1) she was within the protected class, (2) her job performance was satisfactory, (3) she was subjected to an adverse employment action, and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. See Meiri v. Dacon, 759 F.2d 989, 995 (2d Cir. 1995); Kaplan v. Multimedia Ent., Inc., No. 02-cv-0447, 2005 WL 2837561, at *5 (W.D.N.Y. Oct. 27, 2005); Schnabel v. Abramson, 232 F.3d 83, 87 (2d Cir. 2000); see generally McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824. Although "the burden of establishing a prima facie case is not onerous, and has been frequently described as minimal," Scaria v. Rubin, 117 F.3d 652, 654 (2d Cir. 1997), the Second Circuit has also noted that "[a] jury cannot infer discrimination from thin air."

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[12] Even if the Title VII hostile work environment claim were not time-barred, it would nevertheless fail on its merits. "In short, a plaintiff alleging a hostile work environment must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted to have altered the conditions of her working environment. To decide whether the threshold has been reached, courts examine the case-specific circumstances in their totality and evaluate the severity, frequency, and degree of the abuse. Finally, it is axiomatic that in order to establish a sex-based hostile work environment under Title VII, a plaintiff must demonstrate that the conduct occurred because of her sex." Alfano v. Costello, 294 F.3d 365, 374 (2d Cir. 2002). Taking into account all of the relevant allegations made by plaintiff in her complaint and at her deposition, there are simply no assertions that create a genuine issue of material fact regarding her hostile work environment claim. Plaintiff does not claim that she heard anyone at NYPI make any sexist comments other than Colon, and the only such conduct on Colon's part that plaintiff alleges with any specificity is that, sometime between 1999 and 2004, he stated that women think they should receive preferential treatment and "need to learn how to work just like [men]." (Latin Aff., Ex. E at 19:18-20:2.) More importantly, plaintiff concedes at the outset of her opposition to summary judgment that, although she "had some problems related to her employment with [OMH], especially dealing with [Colon], they were essentially uneventful" until after she reported Colon's March 8, 2003 on-the-job sexual escapade to Gholson. (Opp. at 2.) Plaintiff admittedly was aware that Colon was engaging in similar activities for months before she spotted him sneaking off on March 8, 2003, and told Gholson about the events of that day because Colon's temporary unavailability had caused an inconvenience, not because she felt that Colon's behavior fomented a sexually pressuring or intimidating environment.

Norton v. Sam's Club, 145 F.3d 114, 119 (2d Cir. 1998).

If a Title VII plaintiff is able to establish a prima facie case of discrimination, the burden of persuasion shifts to the employer-defendant to articulate a legitimate, nondiscriminatory rationale for its actions. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094 (1981). Once the employer meets its burden, the presumption of discrimination that arose from plaintiff's statement of a prima facie case is eliminated. See Hunter v. St. Francis Hosp., 281 F. Supp. 2d 534, 541-42 (E.D.N.Y. 2003). The burden then shifts back to the plaintiff to demonstrate that the employer's stated rationale is merely a pretext for discrimination. See McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11, 113 S. Ct. 2742, 2749 (1993); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 120 S. Ct. 2097, 2106 (2000); see also Droutman v. N.Y. Blood Ctr., Inc., No. 03-cv-5384, 2005 WL 1796120, at *6 (E.D.N.Y. July 27, 2005) (plaintiff must "prove that the employer's stated reason for its actions is merely pretextual, and that discrimination was an actual reason for the adverse employment action"). Thus, to defeat a defendant's properly supported motion for summary judgment, the plaintiff must produce sufficient evidence to support a rational finding that the legitimate, nondiscriminatory reason proffered by the employer was false, and that, more likely than not, discrimination was the real reason for the adverse action. See Viola v. Philips Med. Sys. of N. Am., 42 F.3d 712, 716 (2d Cir. 1994). Aside from the burden of proof-shifting framework laid out in McDonnell Douglas, courts must be mindful that the plaintiff always bears the ultimate burden of proof to show that the employer's motivation was discriminatory. See Norton, 145 F.3d at 118-19.

As a woman, plaintiff is a member of a protected class, and her suspension and

termination constituted adverse employment actions.[13] But, more consequentially, plaintiff cannot establish a prima facie case of discrimination in violation of Title VII because she cannot show that her job performance was satisfactory, nor has she demonstrated that the circumstances surrounding her suspension and/or discharge give rise to an inference of gender discrimination.

The Second Circuit has explained that the determination of whether a terminated employee's job performance was satisfactory should be analyzed from the perspective of the employer at the time of discharge. See Thornton v. Penton Publ'g, 104 F.3d 26, 29 (2d. Cir. 1997) ("Whether job performance was satisfactory depends on the employer's criteria for the performance of the job – not the standards that may seem reasonable to the jury or judge.").

The Court finds that, based on the record before OMH at the time of plaintiff's termination, her job performance could not reasonably have been considered "satisfactory." First, and by far the most innocuous of her failings, despite her supervisors' repeated verbal and written warnings that her punctuality and attendance were in severe need of improvement, plaintiff never did improve. Second, OMH had been alerted to plaintiff's knowing violations of hospital policies and specific directives from her bosses when she took a security videotape home without so much as informing a superior (Gholson Decl., ¶¶ 13-14, 17-18), and subverted the NYPI access card system. Finally, just prior to plaintiff's suspension, an OMH investigator identified substantial evidence that Morales (and her confederate, Doty) had abused her position

[13] It is unclear whether or not plaintiff intended to argue that Colon's April 10, 2004 imposition of a short-lived rule that specifically affected her constituted an adverse employment action. If so, this contention fails. The Second Circuit defines an adverse employment action as a "materially adverse change" in the terms and conditions of an individual's employment. Sanders v. N.Y. City Human Res. Admin., 361 F.3d 749, 755 (2d Cir. 2004); Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000). A materially adverse change must be "more disruptive than a mere inconvenience or an alteration of job responsibilities [and] 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." Galabya, 202 F.3d at 640 (internal quotation marks and citations omitted). The fact that plaintiff was required to hew to more stringent reporting requirements than she was accustomed to for a single day of her employment does not signify anything other than a 'mere inconvenience.'

by rampantly stealing property from NYPI for personal profit. (Gholson Decl., Ex. J.) While it is true that job-site misconduct does not inherently disprove an employee's "qualification" for a position, see Owens v. N.Y. City Hous. Auth., 934 F.2d 405, 409 (2d. Cir. 1991), it is equally true that "misconduct indicates a high likelihood that an employee's performance is not satisfactory." Thornley, 104 F.3d at 29-30. Hired to protect the chicken coop, through this misconduct, which is uncontested on the summary judgment motions, Morales had become the fox that plundered it. Clearly, the nature and severity of the misconduct attributed to plaintiff by her employer, coupled with her consistently poor attendance record and general unreliability, all unchallenged, prohibit her from establishing satisfactory job performance.

Plaintiff also utterly fails to show that any of the circumstances surrounding her discharge give rise to an inference of gender discrimination. To support an inference of discrimination, plaintiff must show that similarly situated male employees of NYPI were treated more favorably than plaintiff. See Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000) (collecting cases where inference of discrimination was supported by evidence of disparate treatment). Apart from vague and unsubstantiated claims by plaintiff herself, the record does not provide any support for the conclusion that male SS-1s at NYPI received any preferential treatment in the ordinary course of the job, or that plaintiff's termination was the result of a discriminatory practice based on gender. Although plaintiff claims Colon unfairly cited her for poor time and attendance because she was a woman, Gholson described such complaints as "common amongst both male and female officers" while noting that plaintiff's record reflected a particularly problematic "pattern of lateness and an excessive pattern of calling out sick." (Gholson Decl. ¶ 8.) Even so, plaintiff has not shown that she or any other female officer was allotted fewer vacation days than male officers typically were. Plaintiff's markedly negative evaluation in May

2003 and her supervisor's curtailment of her shifts in the control room are plainly attributable to the fact that she had been caught breaking NYPI rules, and plaintiff offers no proof (documentary or otherwise) that male officers who committed the same infractions Morales cannot deny she committed would not have been censured in the same manner. With respect to plaintiff's claim that, in April 2004, Colon made up a special workplace rule for her that did not apply to similarly-situated male officers, the rule was facially gender-neutral and was repealed almost as soon as it was enacted, so it never impacted any other officers at all. Finally, any claim of disparate treatment of plaintiff with respect to the suspension, investigation and arbitration proceeding that preceded her termination is necessarily untenable, because her employer's suspicions and, ultimately, formal findings that she engaged in egregious misconduct render it essentially impossible for the Court to identify any "similarly situated" male employees. See Richardson v. City of New York, 285 F. Supp. 2d 303, 305 (E.D.N.Y 2003) (finding that a plaintiff who had committed substantial infractions could not produce evidence of "similarly situated" coworkers). In the absence of such a basis for comparison, no inference of discrimination can reasonably be drawn.

Furthermore, assuming *arguendo* that plaintiff had sufficiently established a prima facie case, her Title VII discrimination claim would still fail, as OMH has adduced legitimate, nondiscriminatory reasons for plaintiff's termination and plaintiff has not shown those reasons to be pretextual. To meet its burden under McDonnell Douglas, "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Burdine, 450 U.S. at 254, 101 S. Ct. at 1094 (citing Bd. of Trs. of Keene State Coll. v. Sweeney, 439 U.S. 24, 25 (1978)). OMH maintains that its discovery of thefts and other

misconduct committed by Morales precipitated her termination. Courts have consistently held that an employee's thieving may constitute a legitimate, nondiscriminatory reason for termination. See Crews v. Trustees of Columbia Univ., 452 F.Supp.2d 504, 523 (S.D.N.Y. 2006) (collecting cases granting summary judgment because theft constituted legitimate reason). In any case, it is not necessary for the employer to prove beyond a reasonable doubt that the plaintiff committed any thefts; it is enough to show that the employer genuinely believed it to be so at the time of termination. See Augugliaro v. Brooks Bros., 927 F. Supp. 741, 747 (S.D.N.Y. 1996). This is plainly the case here. An internal OMH investigation and an independent arbitration proceeding both resulted in determinations that OMH had shown by a preponderance of the evidence that plaintiff was guilty of numerous property thefts at NYPI. (Dorangrichia Decl., Ex. A; Muzicka Decl., Ex. N.) While not determinative, a decision made by an "undisputedly independent, neutral, and unbiased adjudicator" affirming termination is "highly probative of the absence of discriminatory intent in that termination." Collins v. N.Y. City Transit Auth., 305 F.3d 113, 119 (2d Cir. 2002).

Plaintiff maintains that the legitimate nondiscriminatory basis for her termination cited by defendant was pretextual based on generalized conclusory statements such as "as a result of the biased specious investigations by agents of Defendant SONY, they merely created a legitimate business reason for terminating her employment when they had none" (Opp. at 12), and "no female has ever been able to sustain a career in law enforcement with defendant OMH . . . because the male officers do not want women to work in the same civil service title." (Compl. ¶ 40.) However, the Second Circuit has held that "sweeping allegations unsupported by admissible evidence do not raise a genuine issue of material fact." Shumway v. UPS, 118 F.3d 60, 65 (2d Cir. 1997) (citing Union Ins. Soc'y of Canton, Ltd. v. William Gluckin & Co., 353

F.2d 946, 952 (2d Cir. 1965)) (granting summary judgment where plaintiff based gender discrimination claim wholly on unsubstantiated statements that "similarly situated males" were treated disparately). It also bears mention that no fewer than three female NYPI employees explicitly disagreed with plaintiff's charge that she (or anyone else at NYPI) was discriminated against based on gender. (Muzicka Decl. ¶ 2; Martinez Decl. ¶¶ 2, 7-8, 14; State Def. 56.1 ¶ 55.)

For the foregoing reasons, plaintiff's Title VII discrimination claim against OMH is dismissed with prejudice.

D. Title VII Retaliation Claim

With respect to retaliation, Title VII provides that "[i]t shall be unlawful . . . for an employer to discriminate against any of his employees . . . because he has opposed any practice made unlawful by this subchapter, or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Title VII retaliation claims are also analyzed under McDonnell Douglas. See McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824. First, a plaintiff must establish a prima facie case showing that: (1) the plaintiff was engaged in protected activity by opposing an employment practice made unlawful by Title VII; (2) her employer knew of the activity; (3) plaintiff suffered an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. See McMenemy v. Rochester, 241 F.3d 279, 282-83 (2d Cir. 2001); Reed v. A.W. Lawrence & Co., Inc., 95 F.3d 1170, 1178 (2d Cir. 1996). If a prima facie showing is made, the burden shifts to the defendant to establish a legitimate, nonretaliatory basis for the complained-of action, and subsequently shifts back to the plaintiff, who must show that the legitimate, nonretaliatory reason articulated by the defendant is a mere "pretext," and that retaliation was more likely than not the

reason for the complained-of action. See Schnabel, 232 F.3d at 90; Gallagher v. Delaney, 139 F.3d 338, 349 (2d Cir. 1998).

Plaintiff claims that she was treated unfairly by her superiors and ultimately terminated by OMH in retaliation for her reporting of Colon's March 8, 2003 clandestine liaison. But, construing the facts in plaintiff's favor, that activity was not a complaint in opposition to an unlawful employment practice. Plaintiff's stated reason for bringing Colon's March 8 extracurricular activity to Gholson's attention was that Colon had been unresponsive when she needed his assistance that day. "[I]n order for an employee's complaints to be a 'protected activity' they must relate to an alleged violation of Title VII, i.e., the complaints must relate to race or gender. Otherwise, any employee who is disgruntled or dissatisfied with any aspect of his or her employment would ultimately find relief in Title VII even when race or gender was not an issue." Taylor v. Family Residences & Essential Enters., No. 03-cv-6122, 2008 WL 268801, at *13, (E.D.N.Y. Jan. 30, 2008) (internal quotation marks and citation omitted). See also Cruz v. Coach Stores Inc., 202 F.3d 560, 566 (2d Cir. 2000) (protected activity for Title VII retaliation claims "refers to an action taken to protest or oppose statutorily prohibited discrimination").

Granted, to establish participation in a protected activity, plaintiff "need not prove that the conditions against which [s]he protested actually amounted to a violation of Title VII. Rather, [plaintiff] must demonstrate only that [s]he had a 'good faith, reasonable belief that the underlying challenged actions of the employer violated the law.'" Wimmer v. Suffolk Cnty. Police Dep't, 176 F.3d 125, 135-36 (2d Cir. 1999) (quoting Manoharan v. Columbia Univ. Coll. of Physicians & Surgeons, 842 F.2d 590, 593 (2d Cir. 1988)). However, there is simply no indication here that Morales reported Colon because she intended to expose a discriminatory practice (as opposed to exposing Colon himself). Although plaintiff had complained for years of

problems arising from a personality clash with Colon, nowhere in her original grievances and informal complaints against him did plaintiff allege unlawful discrimination. (See Muzicka Decl., Ex. E; Gholson Decl. ¶ 13.) Further, according to Morales, she and many other officers had witnessed Colon and his inamorata stealing off together on numerous occasions in the months leading up to March 8, 2003 – none of which she reported as discriminatory or harassing actions. In the letter that Morales sent to Human Resources a few weeks after the March 8, 2003 incident, she complained that Colon had become extremely hostile towards her and Doty, but did not claim that his antagonism was based on their gender. Later, Morales asked Martinez whether or not what she had seen on March 8, 2003 amounted to sexual harassment, but Martinez informed her that it did not and, when Martinez provided illustrative examples of harassment, Morales conceded that Colon's conduct did not resemble those examples. (Martinez Decl. ¶¶ 7-8.) See De Los Santos v. City of New York, 482 F. Supp. 2d 346, 348 (S.D.N.Y. 2007). Her complaint about Colon's conduct that day was not a Title VII protected activity.

Plaintiff also fails to establish retaliation prima facie because there is no evidence whatsoever of causation between the putative protected activity and her termination. "[C]ausation can be established by showing that the retaliatory action was close in time to the protected activity; that other similarly situated employees were treated differently; or with direct proof of retaliatory animus." Reed, 95 F.3d at 1178 (citing Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990); DeCintio v. Westchester Cnty. Med. Ctr., 821 F.2d 111, 115 (2d Cir. 1987)).

The record is bereft of direct evidence of retaliatory animus or retaliatory disparate treatment . After Colon's rendezvous and plaintiff's removal of the videotape came to light, Gholson did not initially recommend disciplinary action against anyone but Colon. Although she

asserts that she was prevented from working the normal number of shifts in the main building and denied vacation requests that were granted routinely to others, the record shows that plaintiff worked in the main building more than anyone except Doty, who also reported Colon's behavior, between March 2003 and May 2004, and that she took a generous number of vacation days. (Gholson Decl., Ex. I.) Furthermore, any claim that plaintiff's termination was the result of retaliatory disparate treatment is unsupportable because that decision was based on a thorough investigation by Dorangrichia – who was not at NYPI in March 2003 and had no prior knowledge of the March 8, 2003 incident or any of the people involved – and was upheld by an independent arbitrator.

Although a causal connection between a putative protected activity and an adverse action can sometimes be established through circumstantial evidence of temporal proximity, see Sumner, 899 F.2d at 209, plaintiff fails to do so here. "The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.'" Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273, 121 S. Ct. 1508, 1511 (2001) (quoting O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (10th Cir. 2001)). More specifically, "[t]hree months is on the outer edge of what courts in this circuit recognize as sufficiently proximate to admit of an inference of causation." Yarde v. Good Samaritan Hosp., 360 F. Supp. 2d 552, 562 (S.D.N.Y. 2005), and "[s]ix months between protected activity and discharge is well beyond the time frame for inferring retaliatory causation." Id. (citing Breeden, 532 U.S. at 273-74, 121 S. Ct. at 1511); see Jimenez v. City of New York, 605 F. Supp. 2d 485, 528 (S.D.N.Y 2009) (noting that, "[i]n general, when more than three months have passed between a protected activity and an alleged retaliatory response, the

Second Circuit has deemed the evidence insufficient to raise an issue of fact concerning causation."). As 17 months elapsed between the purportedly protected activity in March 2003 and plaintiff's suspension in August 2004, the temporal connection is clearly far too attenuated to support unilaterally a reasonable finding of causation.

Accordingly, plaintiff's Title VII retaliation claim must be dismissed with prejudice as well.

III. Plaintiff's § 1983 Claims

Based on the same factual allegations as those offered in support of plaintiff's Title VII claims, plaintiff also asserts claims of gender discrimination, hostile work environment and retaliation in violation of § 1983 against Colon and Gholson in their respective individual capacities.[14] "To state a valid claim under 42 U.S.C. § 1983, the plaintiff must allege that the challenged conduct (1) was attributable to a person acting under color of state law, and (2) deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States." Whalen v. Cnty. of Fulton, 126 F.3d 400, 405 (2d. Cir.1997) (citing Eagleston v. Guido, 41 F.3d 865, 875-76 (2d Cir. 1994)). By its clear terms, § 1983 does not itself provide substantive rights, but rather offers "a method for vindicating federal rights elsewhere conferred." Patterson, 375 F.3d at 225 (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689 (1979)); see Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993).

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[14] As plaintiff concedes in her opposition to summary judgment, the State and OMH, as well as Gholson and Colon in their respective official capacities, are entitled to immunity from § 1983 liability by the Eleventh Amendment to the Constitution, which bars federal court claims against states absent their consent to such suit or an express statutory waiver of immunity. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 66, 109 S. Ct. 2304, 2309-10 (1989); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98-100, 104 S. Ct. 900, 906-08 (1984). The Eleventh Amendment bar extends to state agencies and state officials sued in their official capacities, see Kentucky v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105 (1985), because they are effectively official arms of the state. See Posr v. Court Officer Shield No. 207, 180 F.3d 409, 414 (2d Cir. 1999); see, e.g., Avni v. Pilgrim Psych. Ctr., No. 05-cv-5346, 2006 WL 2505241, at *4 (E.D.N.Y. Aug. 28, 2006) ("OMH, as a state agency, is immune from suit under section 1983.") (citing Greenwood v. New York, 939 F. Supp. 1060 (S.D.N.Y. 1996) (finding that OMH and OMH-run psychiatric facility were immune from § 1983 suit under the Eleventh Amendment), vacated in part on

A. Equal Protection

The predicate constitutional violations allegedly giving rise to plaintiff's § 1983 causes of action were neither stated clearly in the complaint nor elucidated any further in her opposition to summary judgment.[15] The Second Circuit has observed as a general matter that "sex-based discrimination may be actionable under § 1983 as a violation of equal protection. Accordingly, § 1983 and the Equal Protection Clause protect public employees from various forms of discrimination, including hostile work environment and disparate treatment, on the basis of gender. Once action under color of state law is established, the analysis for such claims is similar to that used for employment discrimination claims brought under Title VII." Demoret v. Zegarelli, 451 F.3d 140, 149 (2d Cir. 2006) (citing Kern v. City of Rochester, 93 F.3d 38, 43 (2d Cir. 1996); Feingold v. New York, 366 F.3d 138, 159 & n.20 (2d Cir. 2004) (reasoning that § 1983 equal protection claims parallel Title VII claims); Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 123 (2d Cir. 2004) (applying McDonnell Douglas framework to § 1983 case)); Annis v. Cnty. of Westchester, 136 F.3d 239, 245 (2d Cir. 1998) (noting that, where a plaintiff asserts a claim under § 1983 which mirrors a claim brought under Title VII, the elements of the claims are the same, and the same burden-shifting framework applies to each) (citing St. Mary's Honor Ctr., 509 U.S. at 506 n.1, 113 S. Ct. at 2747 n.1). Thus, for the same reasons that plaintiff's Title VII gender discrimination and hostile work environment claims are dismissed on their merits, her § 1983 gender discrimination and hostile work environment claims must be dismissed as well. Simply, on this record, there are no material facts in dispute – no

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other grounds, 163 F.3d 119 (2d Cir.1998)).

[15] Plaintiff's complaint recites boilerplate allegations that defendants deprived her of nearly every constitutional right under the Sun, "including the rights: to enjoy freedom of speech, movement, association and assembly, to petitioner her government for redress of her grievances, to be secure in her person, to be free from unreasonable searches and seizures, to enjoy privacy, to be free from slavery and deprivation of life, liberty and property without due process of law." (Compl. ¶¶ 71, 72). However, it identifies no specific facts regarding how or by whom any one of the enumerated rights was violated, or on what dates such violations allegedly occurred.

adverse consequence experienced by Morales was caused by gender discrimination.

B. First Amendment

Retaliation against an employee for complaining about unlawful and discriminatory practices may be actionable under § 1983 as a First Amendment violation. See Gorman-Bakos v. Cornell Co-op. Extension of Schenectady Cnty., 252 F.3d 545, 553 (2d Cir. 2001). In a First Amendment retaliation case involving a public employee, a district court first determines whether the employee's speech addresses a matter of public concern and, if it does, the court balances the employee's First Amendment rights against the interests of the government. See Hoyt v. Andreucci, 433 F.3d 320, 330 (2d Cir. 2006) (citations omitted). "In assessing whether an employee's speech addresses a matter of public concern," the court should "evaluate whether the speech relates to any matter of political, social, or other concern to the community, and whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." Id. (internal quotation marks and citations omitted).

Plaintiff claims that she was retaliated against for reporting Colon's March 8, 2003 sexual rendezvous at NYPI. Although the vigilance of psychiatric hospital security guards might well be deemed a matter of public concern, plaintiff's acknowledged motive for complaining about Colon's behavior was to voice her personal displeasure with his mode of supervision. Accordingly, the Court finds that plaintiff has not shown any potential protected speech to support a § 1983 First Amendment retaliation claim. See Blum v. Schlegel, 18 F.3d 1005, 1012 (2d Cir. 1994) (fact that employee's speech touches on matters of public concern will not render that speech protected where employee's motive for the speech is private and personal).

In accordance with the above, plaintiff's § 1983 claims are dismissed in their entirety.[16]

[16] Other defenses were asserted by defendants but, in light of the Court's disposition of plaintiff's claims, they need not be reached.

IV. Plaintiff's NYSHRL and NYCHRL Claims

On the same factual allegations as those offered in support of plaintiff's federal claims, plaintiff asserts claims of gender discrimination, hostile work environment and retaliation in violation of NYSHRL and NYCHRL against Colon and Gholson in their respective individual capacities.[17]

A. NYSHRL

"Claims under the New York State Human Rights Law are analyzed under the same framework as claims under Title VII." White v. Eastman Kodak Co., 368 F. App'x 200, 202 n.1 (2d Cir. 2010) (citing Schiano v. Quality Payroll Sys., 445 F.3d 597, 609 (2d Cir. 2006)); see Salamon v. Our Lady of Victory Hosp., 514 F.3d 217, 226 n.9 (2d Cir. 2008) (noting, in considering sex discrimination claims, that"[w]e typically treat Title VII and NY[S]HRL discrimination claims as analytically identical, applying the same standard of proof to both claims"). Accordingly, plaintiff's state law claims are dismissed with prejudice, for the same reasons that plaintiff has failed to present a triable issue of fact for her Title VII claims. See supra; see, e.g., Babcock v. OMH, No. 04-cv-2261, 2009 WL 1598796, at *26 & n.27 (S.D.N.Y. June 8, 2009) (granting summary judgment against plaintiff on NYSHRL claim against OMH employee in his individual capacity where summary judgment was granted on the merits of Title VII claim against OMH).

B. NYCHRL

By contrast, plaintiff's claims under NYCHRL are to be evaluated independently from, and more liberally than, their federal and state counterparts. See Melie v. EVCI/TCI College

[17] As with plaintiff's § 1983 claims, plaintiff concedes in her opposition to summary judgment that any claims against the State, OMH and Gholson and Colon in their official capacities under NYCHRL and NYSHRL are barred by the Eleventh Amendment. See, e.g., Feingold, 366 F.3d at 149 (NYCHRL claims against state agency barred by state sovereign immunity); Babcock v. OMH, No. 04-cv-2261, 2009 WL 1598796, at *26 (S.D.N.Y. June 8, 2009)

Admin., No. 09-2611-cv, 2010 WL 1531325, at *2 (2d Cir. Apr. 19, 2010) (citing Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 278 (2d Cir. 2009). The New York City Restoration Act of 2005, which amended NYCHRL, "notified courts that (a) they had to be aware that some provisions of [NYCHRL] were textually distinct from its state and federal counterparts, [and] (b) all provisions of [NYCHRL] required independent construction to accomplish the law's uniquely broad purposes." Loeffler, 582 F.3d at 278 (citing Williams v. N.Y. City Hous. Auth., 61 A.D.3d 62, 66, 872 N.Y.S.2d 27, 31 (1st Dep't 2009)) (emphasis omitted); see also Panzarino v. Deloitte & Touche, LLP, No. 05-cv-8502, 2009 WL 3539685, at *9-*10 (S.D.N.Y. Oct. 29, 2009) (construing NYCHRL sex discrimination claim as requiring an independent and liberal construction). Notwithstanding, gender discrimination claims brought pursuant to NYCHRL are also analyzed under the Title VII McDonnell Douglas burden-shifting framework. See Leibowitz v. Cornell Univ., 584 F.3d 487, 498 n.1 (2d Cir. 2009). Ultimately, based on an independent and fulsome analysis of plaintiff's NYCHRL claims, the Court concludes that plaintiff has not demonstrated a material issue of disputed fact with respect to any of them.

NYCHRL protects employees from discrimination based on their "actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status." N.Y.C. Admin. Code § 8-107(1). "No 'type of challenged conduct [may] be categorically rejected as nonactionable' under [NYCHRL]. Nevertheless, a plaintiff asserting claims under [NYCHRL] must demonstrate 'by a preponderance of the evidence that she has been treated less well than other employees' due to unlawful discrimination." Sealy v. Hertz Corp., 688 F. Supp. 2d 247, 258 (S.D.N.Y. 2009) (citing Williams, 61 A.D.3d at 71, 78, 872 N.Y.S.2d at 34, 39). As discussed supra, plaintiff has presented no competent evidence showing discriminatory animus on the part of her supervisors

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(NYSHRL claims against OMH and OMH-operated psychiatric facility barred by state sovereign immunity).

at OMH at any point during her employment there. Nor does the record show a material fact in dispute that would prevent the summary judgment court from finding that plaintiff was not subject to higher standards, more restrictive conditions of employment, or a different review process than, or that she was otherwise not treated as well as, similarly-situated male employees.

As to plaintiff's hostile work environment claim, the Court notes that, unlike Title VII, NYCHRL imposes liability for harassing conduct that does not qualify as "severe or pervasive," and "questions of 'severity' and 'pervasiveness' are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability." Williams, 61 A.D.3d at 76, 872 N.Y.S.2d at 38 (citation omitted). While NYCHRL thus establishes a more liberal standard for hostile work environment claims than Title VII, "the broader purposes of [NYCHRL] do not connote an intention that the law operate as a general civility code," id., 61 A.D.2d at 79, 872 N.Y.S.2d at 40 (internal quotation marks and citation omitted), and "summary judgment [is] still . . . available where [the defendant] can prove that the alleged discriminatory conduct in question . . . could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences." Id., 61 A.D.2d at 80, 872 N.Y.S.2d at 41. Plaintiff alleges no conduct by anyone that reasonably could be considered as rising above the level of "petty slights or trivial inconveniences." See n.11, supra; see, e.g., Kaur v. New York City Health & Hosps. Corp., 688 F. Supp. 2d 317, 340 (S.D.N.Y. 2010).

Finally, the Court recognizes that to support a retaliation claim under NYCHRL, plaintiff need not show a materially adverse change in the terms and conditions of her employment, but is required to show only "that the retaliatory or discriminatory act or acts complained of [were] reasonably likely to deter a person from engaging in protected activity." N.Y.C. Admin. Code § 8-107(7); see also Williams, 61 A.D.3d at 70-71, 872 N.Y.S.2d at 34-35 ("no challenged conduct

may be deemed nonretaliatory [under NYCHRL] before a determination that a jury could not reasonably conclude from the evidence that such conduct was, in the words of the statute, 'reasonably likely to deter a person from engaging in protected activity.'"). Despite this more permissive definition of retaliatory conduct, to plead a prima facie retaliation claim under NYCHRL, plaintiff still must show that she engaged in protected activity (of which her employer was aware) by opposing an unlawfully discriminatory practice, and that there was a causal connection between the protected activity and the allegedly retaliatory conduct. See Pilgrim v. McGraw-Hill Cos., Inc., 599 F. Supp. 2d 462, 469 (S.D.N.Y. 2009). Plaintiff has not shown that her reporting of Colon's March 8, 2003 tryst constituted a protected activity, nor has she proffered any evidence of a causal connection, whether direct or circumstantial, between that activity and her suspension following Doty's arrest outside Staples over a year later.

Therefore, even under the more expansive protections of municipal law, plaintiff has still failed to raise a genuine issue of material fact with respect to her NYCHRL claims of gender discrimination, hostile work environment and retaliation and, accordingly, these last remaining claims are also dismissed with prejudice.

CONCLUSION

For all of the foregoing reasons, defendants' motions for summary judgment are granted, and plaintiff's claims are dismissed in their entirety with prejudice.

The Clerk is directed to enter judgment for defendants and to close this case.

SO ORDERED.

Dated: Brooklyn, New York
August 30, 2010

s/ENV

ERIC N. VITALIANO
United States District Judge