21-267

United States Court of Appeals
for the Second Circuit

CLARA LEROY,

Plaintiff-Appellant,

-against-

DELTA AIR LINES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK (Brooklyn)

BRIEF FOR PLAINTIFF-APPELLANT

KOUSOULAS & ASSOCIATES
Attorneys for Plaintiff-Appellant
48 Wall Street, 25th Floor
New York, New York 10005
212-509-2566
akousoulas@kalawyers.com

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PRELIMINARY STATEMENT

Plaintiff-Appellant Clara Leroy ("Plaintiff") submits this brief in support of her appeal of the Judgment of the United States District Court for the Eastern District of New York dated January 11, 2021, (App. at A45), and the underlying Memorandum and Order dated January 11, 2021, (App. at A40-A44), granting Defendant-Appellee Delta Airlines, Inc.'s ("Defendant") motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff, a flight attendant employed by Defendant for nearly 17 years, alleges that she was removed from a flight, subjected to random drug testing, wrongfully suspended and ultimately terminated after she complained to her supervisor on a flight that a racist passenger had called her a "black bitch," and later complained to a manager about the incident. The District Court dismissed Plaintiff's retaliation and vicarious liability claims under the New York Human Rights Law, N.Y.C. Admin. Law §§ 8-101, *et seq*. ("NYCHRL"), holding in pertinent part, that, "While [Plaintiff] does allege that she complained about a racist remark made by a passenger on a Delta flight, the remark was not a discriminatory practice or action of Delta" under the NYCHRL. (App. at A43-44). Plaintiff respectfully submits that the District Court's decision is contrary to this Court's holding in *Summa v. Hofstra Univ.,* 708 F.3d 115, 124 (2d Cir. 2013) and the NYCHRL.

JURISDICTIONAL STATEMENT

The District Court has diversity jurisdiction pursuant to 28 U.S.C. §§ 1332(a)(1), (c)(1) because the matter in controversy exceeds the sum of seventy-five thousand dollars ($75,000.00) exclusive of interest and costs, Plaintiff is a citizen of New York, and Defendant, a corporation incorporated, organized and existing under the laws of Delaware, with its principal place of business in Georgia, is deemed a citizen of Delaware and Georgia. (App. at A6-A11, A17.)

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this appeal is from a final decision of a United States District Court. (App. at A40-A45.)

This appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A) because the judgment and order appealed from were filed on January 11, 2021, (App. A40-A44), and the notice of appeal was filed on February 9, 2021, (App. at A46-A47).

This appeal is from a final order or judgment that disposes of all parties' claims. (App. at A40-A45.)

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in granting Defendant's motion to dismiss the Complaint when it held that Plaintiff's complaint about a passenger's racist remark was not a discriminatory practice or action of Defendant, and that under the New York City Human Rights Law a racist remark by a customer, even if made in the workplace, is not actionable employer discrimination?

STATEMENT OF THE CASE

Plaintiff brings this action against Defendant for retaliation and discrimination in violation of the New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-101, *et seq.* ("NYCHRL"). On December 31, 2019, Plaintiff filed a summons and verified complaint in New York State Supreme Court, Kings County. (App. at A15-A24.) On February 25, 2020, Defendant filed a notice of removal in the United States District Court for the Eastern District of New York. (App. at A5-A29.) On August 10, 2020, Defendant filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). (App. at A30-A39.) On January 11, 2021, Chief United States District Judge Roslynn R. Mauskopf granted Defendant's motion to dismiss in a Memorandum and Order. (App. at A40-A44.) The same day, the District Court entered a Judgment dismissing Plaintiff's claims. (App. at A45.) This appeals follows.

Statement of Facts

Plaintiff was employed by Defendant as a flight attendant for nearly 17 years, from October 2000 to July 20, 2017.[1] (App. at A18 ¶ 8.) Throughout her employment, Plaintiff had several supervisors; the most recent was John Marsh ("Marsh").

[1] The factual allegations in this brief are taken from the complaint, (App. at A17-A24), and must be accepted as true on a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

(App. at A18 ¶¶ 9-10.) Plaintiff never had any problems with any of her previous supervisors and was never previously suspended or disciplined. (App. at A18 ¶¶ 11-12.)

On May 18, 2017, Plaintiff was assigned to work on a Delta flight with Pilot Carns ("Carns"). (App. at A18 ¶¶ 13-14.) Carns, as the pilot on that flight, was a supervisor of Delta and supervised Plaintiff. (App. at A18 ¶¶ 14-15.) Before takeoff, Plaintiff complained to Carns about a disgruntled passenger who was racist and called her a "black bitch." (App. at A18 ¶ 16.) Carns responded to Plaintiff's complaint by telling her to step out onto the jet bridge with the passenger. (App. at A18 ¶ 17.) Plaintiff told Carns that, according to FAA regulations, she could not leave the airplane, and that she did not wish to continue a conversation with the racist passenger. (App. at A18 ¶ 18.) Carns became annoyed and asked the Operational Control Center ("tower") to remove Plaintiff from the flight. (App. at A18 ¶ 19.) The tower initially denied Carns's request, but after he threatened to leave the flight himself if Plaintiff was not removed, the tower acquiesced to his demand and removed Plaintiff from the flight. (App. at A19 ¶ 20-22.)

On or around May 20, 2017, Marsh contacted Plaintiff to have her fill out a report about the May 18, 2017 incident with Carns. (App. at A19 ¶ 23.) Meanwhile, Plaintiff received a letter from a passenger complementing her

composure during the incident with Carns on May 18, 2017, which Defendant acknowledged with its own letter and award points. (App. at A19 ¶ 24.)

On or around June 14, 2017, Plaintiff reached out to her manager, David Gilmartin ("Gilmartin") and informed him fully about the May 18, 2017 incident. (App. at A19 ¶ 27.) The following day, Defendant scheduled Plaintiff for a random drug test. (App. at A19 ¶¶ 28-19.) On or around June 15, 2017, Plaintiff was pulled off of a flight in Salt Lake City for the random drug test. (App. at A19 ¶¶ 29, 32.) Plaintiff submitted to the drug test but she did not produce enough urine and, under observation, submitted to a second drug test later that day. (App. at A19 ¶¶ 30-31, 33.)

The second drug test was administered by Jim Lawson ("Lawson") and observed by Cynthia Atkinson ("Atkinson"). (App. at A19 ¶¶ 32-33.) During the second drug test, Lawson questioned Plaintiff about her past drug use, and Plaintiff responded that she was not taking any drugs. (App. at A19-A20 ¶¶ 33-34.) Plaintiff was asked to turn in her identification and immediately suspended for 30-days. Atkinson told Plaintiff that if her drug test were negative, her suspension would end. (App. at A20 ¶¶ 35-37.) Plaintiff did not fail any drug test while employed at Delta, including the second test she took on June 15, 2017 just prior to her suspension. (App. at A20 ¶¶38-39). On or about June 22, 2017, Gilmartin informed Plaintiff that she had been wrongfully suspended. (App. at A20 ¶41). On

July 3, 2017, after serving several days on an admittedly wrongful suspension, Plaintiff received a suspension letter and, on or around July 20, 2017, Defendant terminated her employment. Plaintiff alleges that these actions leading up to her termination were in retaliation for complaining about the discrimination to which she was subjected on the May 18, 2017 flight. (App. at A20 ¶¶ 38-42.)

SUMMARY OF THE ARGUMENT

The District Court erred in granting Defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). The District Court dismissed Plaintiff's retaliation and vicarious liability claims brought pursuant to the New York Human Rights Law, N.Y.C. Admin. Law §§ 8-101, *et seq*., holding, in pertinent part, that while "Plaintiff complained about a racist remark made by a passenger on a Delta flight, the remark was not a discriminatory practice or action of Delta." (App. at A43-44). Plaintiff respectfully submits the District Court's decision is contrary to this Court's holding in *Summa v. Hofstra Univ.,* 708 F.3d 115, 124 (2d Cir. 2013) and the decisions in this Circuit interpreting the provisions of the New York Human Rights Law, N.Y.C. Admin. Law §§ 8-101, *et seq*. ("NYCHRL"). The complaint states a claim upon which relief can be granted under the NYCHRL. Plaintiff, a flight attendant with 17 years of unblemished work history at Delta, was working on a flight when passenger called her a "black bitch." Prior to takeoff, Plaintiff

complained about the comments to the pilot, who was her supervisor on the flight. The pilot, in response, directed her to go on the jet bridge and speak with the racist passenger. When she refused, the pilot caused her to be removed from the flight. Subsequently, approximately one month later, Plaintiff complained to her manager about what occurred on the flight. The following day, Plaintiff was subjected to a random drug test, removed from her flight, and summarily suspended for 30 days. The suspension was not because she had failed the drug testing and her manager later acknowledged that she was wrongfully suspended. A few weeks later, Plaintiff received a written suspension notice and was ultimately terminated. As Defendant may be held liable for the discriminatory comment of the passenger under both Title VII (not at issue here) and the NYCHRL, Plaintiff's complaints to her supervisor on the flight and to her manager were protected activities. Plaintiff complained about and opposed not only a passenger's racist comment, but also her supervisor's ensuing conduct. Plaintiff is not required to establish that the conduct she complained of actually violated the NYCHRL, but only that she possessed a good faith belief that that she complained of and opposed racial discrimination in the workplace. Further, the issues of fact raised by Defendant in its motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) do not warrant dismissal of the Complaint at this first stage of the action, where Plaintiff, in the absence of any

discovery, has not had the opportunity to controvert the self-serving and disputed documents upon which Defendant relies.

ARGUMENT

Standard of Review

This Court reviews *de novo* a dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6). *Littlejohn v. City of New York,* 795 F.3d 297 (2d Cir. 2014). On a motion to dismiss, all factual allegations in the Complaint are accepted as true and all inferences are drawn in the plaintiff's favor. *Littlejohn v. City of New York,* 795 F.3d 297 (2d Cir. 2014) (citation and internal quotations marks omitted). A motion to dismiss should be denied where the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility does not require probability. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556. "In ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the duty of a court is to merely assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *DiFolco v. MSNBC Cable L.L.C.,* 622 F.3d 104, 113 (2d Cir. 2010) (citation and internal quotation marks omitted).

POINT I

A COMPLAINT ABOUT DISCRIMINATION BY A CUSTOMER IS ACTIONABLE AND CONSTITUTES PROTECTED ACTIVITY UNDER THE NYCHRL

The District Court's Memorandum and Order granting Defendant's motion to dismiss focuses on whether Plaintiff's complaints about a disgruntled passenger who was racist and called Plaintiff a "black bitch" constituted protected activity under the NYCHRL. Specifically, Judge Mauskopf wrote:

> While [Plaintiff] does allege that she complained about a racist remark made by a passenger on a Delta flight, the remark was not a discriminatory practice or action of Delta. Nowhere does the NYCHRL enumerate a derogatory remark by a customer, even if made in the workplace, as actionable employer discrimination. Leroy therefore fails to state a claim for retaliation against Delta.

(App. at A 43-A44.) The District Court's conclusion that Plaintiff's complaints about the passenger's conduct do not constitute protected activity is erroneous and contrary to this Court's holding in *Summa v. Hofstra Univ.,* 708 F.3d 115 (2d Cir. 2013).

This Court has "adopt[ed] the well-reasoned rules of the Equal Employment Opportunity Commission ("EEOC") in imputing employer liability for harassment by non-employees according to the same standards for non-supervisory co-workers, with the qualification that the court "will consider the extent of the

employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." *Summa v. Hofstra Univ.,* 708 F.3d 115, 124 (2d Cir. 2013) (citing 29 C.F.R. § 1604.11(e)). Since "the construction of federal and state civil rights legislation with language comparable to that of the NYCHRL acts as a floor below which the City's Human Rights Law cannot fall, rather than a ceiling above which the local law cannot rise," *Zabrzewska v. The New Sch.,* 543 F. Supp. 2d 185, 187 (S.D.N.Y. 2008) (citation omitted) (internal quotation marks omitted), the same principles naturally apply under the NYCHRL.

District Courts in the Second Circuit have specifically permitted claims against employers pursuant to the NYCHRL based on discrimination by customers. *See, e.g., Swiderski v. Urban Outfitters, Inc.,* No. 14-CV-6307 (JPO), 2017 U.S. Dist. LEXIS 207451, at *24 (S.D.N.Y. Dec. 18, 2017) ("Because a genuine factual dispute remains as to whether the Defendant failed to take immediate and appropriate corrective action once it knew of the customer's discriminatory conduct, a reasonable jury could conclude that the conduct may be imputed to Defendant under NYCHRL.") (citation omitted) (internal quotation marks omitted); *Creacy v. BCBG Max Azria Grp.,* No. 14 Civ. 10008 (ER), 2017 U.S. Dist. LEXIS 49523, at *26 (S.D.N.Y. Mar. 31, 2017) (holding that "it is for the jury to determine whether BCBG took appropriate and timely remedial action in

light of the circumstances, including the level of control and legal responsibility that BCBG had" in response to discrimination by a customer).

In *Swiderski*, the District Court rejected the employer's argument that it could not be liable for customer harassment where the employer claimed that it had taken remedial action—immediate removal of the offending customers. The Court aptly noted that under the NYCHRL the employer's obligation is not necessarily satisfied by ejecting the offending customer. Instead under the N.Y. City Admin. Code §8-107 (13)(b), "proactive steps" must be undertaken with respect to customer harassment. *Swiderski v. Urban Outfitters, Inc.,* No. 14-CV-6307 (JPO), 2017 U.S. Dist. LEXIS 207451, at *20 (S.D.N.Y. Dec. 18, 2017)

In this case, Plaintiff's supervisor, Carns, knew of the passenger's conduct once Plaintiff complained about it and not only failed to take any corrective action against the passenger, but he penalized Plaintiff by forcing her to continue talking to the racist passenger and, upon her objection, removing Plaintiff from the flight. Insofar as a jury could find that the passenger's conduct was imputed to the employer, this constitutes an unlawful discriminatory practice under the NYCHRL. Plaintiff's complaint about the passenger's conduct constitutes "oppos[ition to a] practice forbidden under this chapter . . . .," N.Y.C. Admin. Code § 8-107(7), i.e., protected activity. Relatedly, insofar as Carns's response to Plaintiff's complaint was itself an unlawful discriminatory practice under the NYCHRL, Defendant is

also liable for it, regardless of whether Plaintiff's complaint about the passenger's conduct constitutes protected activity. *See infra* Point III.

The District Court's decision, to the extent it requires Plaintiff to establish or plead an actual violation of NYCHRL, is also contrary to this Court's holding in *Summa v. Hofstra Univ.,* 708 F.3d 115, 124 (2d Cir. 2013). While this Court in *Summa* found that the defendant had met its obligation to address non-employee harassment, it also held that Plaintiff need not establish that the conduct she opposed was actually a violation of Title VII, but only that she possessed a good faith reasonable belief that she was opposing an unlawful employment action. *Id.* at 126.

The District Court cited *Corrado v. New York Unified Court Sys.,* 163 F. Supp. 3d 1, 25 (E.D.N.Y. 2016), and *Mi-Kyung Cho v. Young Bin Cafe,* 42 F. Supp. 3d 495, 508 (S.D.N.Y. 2013) for the proposition that the NYCHRL "does not bar all adverse employer actions, nor all negative experiences in the workplace, and complaints about such actions or experiences falling outside of the NYCHRL's protections do not constitute protected activity." (App. at A43.) While that proposition is true, those cases are distinguishable from this case because the former concerned family and medical leave, which is not a right granted by the NYCHRL, and the latter concerned an assault by a customer that was apparently unrelated to Plaintiff's membership in any protected class under the NYCHRL. In

this case, however, the passenger explicitly referred to Plaintiff's race and/or color, both of which are protected classes under the NYCHRL.

POINT II

THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED FOR RETALIATION PURSUANT TO THE NYCHRL

Pursuant to the NYCHRL, "It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has . . . opposed any practice forbidden under this chapter . . . ." N.Y.C. Admin. Code § 8-107(7). "[T]o prevail on a retaliation claim under the NYCHRL, the plaintiff must show that she took an action opposing her employer's discrimination, and that, as a result, the employer engaged in conduct that was reasonably likely to deter a person from engaging in such action." *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.,* 715 F.3d 102, 109 (2d Cir. 2013) (citing *Albunio v. City of New York,* 16 N.Y.3d 472, 479 (N.Y. 2011); *Williams v. N.Y.C. Housing Auth.,* 872 N.Y.S.2d 27, 33-34 (N.Y. App. Div. 2009)).

"The provisions of [the NYCHRL] shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of [the NYCHRL], have

been so construed." N.Y.C. Admin. Code § 8-130(a). Accordingly, the NYCHRL must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Albunio*, 16 N.Y.3d 472 at 477-78. This Court has recognized that "opposing any practice," as used in N.Y.C. Admin. Code § 8-107(e), "can include situations where a person, before the retaliatory conduct occurred, merely 'made clear her disapproval of [the defendant's] discrimination by communicating to [him], in substance, that she thought [his] treatment of [the victim] was wrong.'" *Mihalik*, 715 F.3d at 112 (quoting *Albunio* at 479).

Plaintiff has pleaded plausible facts that she "opposed any practice" prohibited by the NYCHR, and that she had a good faith basis to believe she was opposing impermissible race discrimination in the workplace. Plaintiff has alleged that she complained to Carns about the disgruntled passenger who was racist and called her a "black bitch" and, in turn, complained to Gilmartin about the incident, and Carns's actions. Furthermore, during the May 18, 2017 incident itself, Plaintiff opposed Carns's actions directly by refusing to leave the airplane to converse with the passenger who called her a "black bitch." Accordingly, leaving aside the issue of whether Plaintiff's complaint about the passenger's actions constituted protected activity, *see supra* Point I, Plaintiff's complaint about and

opposition to Carns's own conduct clearly constituted protected activity, insofar as Carns was Plaintiff's supervisor, not a third party.

Pursuant to the NYCHRL:

> It shall be an unlawful discriminatory practice . . . [f]or an employer or an employee or agent thereof, because of the actual or perceived . . . race [or] color . . . of any person . . . [t]o refuse to hire or employ or to bar or to discharge from employment such person . . . or [t]o discriminate against such person in compensation or in terms, conditions or privileges of employment.

N.Y.C. Admin. Code § 8-107(1)(a). Although Carns himself did not explicitly refer to Plaintiff's race and/or color, his response to Plaintiff's complaint, especially in the context of the disgruntled passenger's actions of calling her a "black bitch," imputes liability to the employer under the NYCHRL. Carns's response to Plaintiff's complaint that the disgruntled passenger was racist and called her a "black bitch" was not to take any remedial actions with regard to the passenger. Instead, Carns directed Plaintiff to step onto the jet way and continue talking to the racist passenger, (thereby condoning the passenger's actions), and then removed Plaintiff from the plane, barring Plaintiff from working on her flight, (thereby denying her the normal terms, conditions, and privileges of employment). When Plaintiff opposed Carns's directive to leave the plane and continue speaking with the racist passenger, and later complained to Gilmartin about Carns's actions, she opposed an unlawful discriminatory practice under the NYCHRL.

Carn's response to Plaintiff's complaint, removing her from the flight on which she was scheduled to work, is reasonably likely to deter a reasonable person from complaining of discrimination. Subjecting an employee to a "random" drug test, questioning her about past drug use, and summarily and wrongfully suspending her within two months of her complaint are also actions reasonably likely to deter a reasonable person from opposing or complaining about discriminatory treatment in the workplace. While Plaintiff submits that the events leading to Plaintiff's termination were consequential and not intervening events, the initial actions against Plaintiff, standing alone, suffice to establish liability under the NYCHRL. *See* N.Y.C. Admin. Code § 8-107(7) ("The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment . . . or in a materially adverse change in the terms and conditions of employment, . . . provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity."); *Williams,* 872 N.Y.S.2d at 34 ("[N]o challenged conduct may be deemed nonretaliatory 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").

The Complaint has also set forth plausible facts establishing a causal connection between the protected activity and each of the materially adverse changes in the terms and conditions of Plaintiff's employment. All of the retaliatory actions complained of occurred within a two-month span of Plaintiff's May 18, 2017 complaint. Plaintiff's removal from the flight occurred immediately after she complained to Carns about the racist comment; the random drug testing and wrongful suspension occurred one day after Plaintiff complained to Gilmartin. Where temporal proximity between protected activities and adverse actions is close, causation may be inferred. *See Gorzynski v. JetBlue Airways Corp.,* 596 F.3d 93, 110 (2d Cir. 2010) ("Though this Court has not drawn a bright line defining, for the purposes of a prima facie case, the outer limits beyond which a temporal relationship is too attenuated to establish causation, we have previously held that five months is not too long to find the causal relationship"); *Quinn v. Green Tree Credit Corp.,* 159 F.3d 759, 769 (2d Cir. 1998) (two months between the protected activity and the allegedly adverse action is sufficient to establish causation). Where, as here, the Complaint has set forth the elements of a prima facie case of retaliation, and alleged that Plaintiff's protected activity was followed closely by the retaliatory actions, the pleading is sufficient to withstand a motion to dismiss. *See Littlejohn v. City of New York,* 795 F.3d 297, 320 (2d Cir. 2014).

POINT III

THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED FOR VICARIOUS LIABILITY PURSUANT TO THE NYCHRL

Based on its dismissal of Plaintiff's retaliation claim, the District Court also summarily dismissed Plaintiff's claim for vicarious liability. (App. at 44.) If this Court reverses the decision of the District Court on the issue of retaliation for the reasons explained above, *see supra* Points I and II, then Plaintiff's claim for vicarious liability must also survive.

Pursuant to the NYCHRL:

> a. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions 1 and 2 of this section.
>
> b. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision 1 or 2 of this section only where:
>
> (1) The employee or agent exercised managerial or supervisory responsibility; or
>
> (2) The employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another

> employee or agent who exercised managerial or supervisory responsibility; or
>
> (3) The employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

N.Y.C. Admin. Code § 8-107(13). In this case, under N.Y.C. Admin. Code § 8-107(13), Defendant is vicariously liable for the actions attributable to Carns and other supervisors (Lawson, Gilmartin), whom Plaintiff alleges were acting in a supervisory capacity when they committed the retaliatory acts. Pursuant to N.Y.C. Admin. Code § 8-107(13), Delta is also vicariously liable for the discriminatory actions of Carns during the May 18, 2017 incident.

POINT IV

THE ISSUES OF FACT RAISED BY DEFENDANT DO NOT WARRANT DISMISSAL OF THE COMPLAINT

In support of its motion to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), Defendant submitted a declaration with four exhibits annexed thereto. (App. at A32-A33.) The four exhibits purport to be Plaintiff's Suspension Letter, (App. at A34), Plaintiff's Termination Letter, (App. at A35), a Summary of Events and Employment Recommendation, (App. at A36-A37), and a Flight Attendant Comment Tracking System ("FACTS") report, (App. at A38-A39). Although it

appears that the District Court did not consider the exhibits in deciding the motion, insofar as they are part of the record on this appeal, and the standard of review is *de novo,* they must be addressed.

A court should not "consider affidavits and exhibits submitted by defendants or rel[y] on factual allegations contained in legal briefs or memoranda in ruling on a 12(b)(6) motion to dismiss." *Friedl v. City of New York,* 210 F.3d 79, 83-84 (2d Cir. 2000) (citations omitted) (internal quotation marks omitted). While "[d]ocuments that are attached to the complaint or incorporated in it by reference are deemed part of the pleading and may be considered," *Roth v. Jennings,* 489 F.3d 499, 509 (2d Cir. 2007), this Court must still "constru[e] the complaint liberally, accept[] all factual allegations as true, and draw[] all reasonable inferences in the plaintiff's favor." *Nicosia v. Amazon.com, Inc.,* 834 F.3d 220, 230 (2d Cir. 2016) (citing *Chen v. Major League Baseball Props., Inc.*, 798 F.3d 72, 76 (2d Cir. 2015)). Further, even if a document is considered "integral" to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document, and there are no material disputed facts regarding the relevance of the document. *DiFolco v. MSNBC Cable L.L.C.,* 622 F.3d 104, 113 (2d Cir. 2010). That is not the case here.

At best, the four exhibits raise questions about the parties' credibility that can be addressed during discovery, on a motion for summary judgment, and/or at

trial. Three of the four exhibits are self-serving documents that were prepared by Defendant. One of the documents, providing a disputed narrative from Defendant's perspective, was not referenced or incorporated in the Complaint. Insofar as they differ from the factual allegations in the Complaint, they show only that there are issues of fact that cannot be resolved at this stage. Moreover, even if some of the factual allegations in those three exhibits are true, that does not preclude a finding that Plaintiff's removal from the flight on May 18, 2017, the admittedly wrongful suspension, her removal from her assigned flight on June 15, 2017, and the selection of Plaintiff for a "random" drug test one day after she complained to her manager were retaliatory or that the reasons propounded by Defendants for the suspension and termination are pretextual.

The District Court made reference to a FACTS report, noting that Plaintiff does not allege that she used the FACTS report to complain about discrimination by Delta. (App. at a43). Plaintiff's failure to allege that she complained in writing is not dispositive on this issue, as Plaintiff alleges that she complained verbally to Carns on May 18, 2017 incident (before she submitted the FACTS report) and again to Gilmartin approximately one day before she was subjected to the "random" drug test. Plaintiff's allegations that she verbally complained to Carns and Gilmartin suffice to establish that Plaintiff engaged in protected activity under

the NYCHRL. *See Redd v. N.Y. State Div. of Parole,* 678 F.3d 166, 183 (2d Cir. 2012) (holding that plaintiff's verbal complaint was sufficient).

By relying on its own self-serving narrative of the events leading to Plaintiff's termination in support of its motion to dismiss, Defendant is seeking to place a more onerous pleading burden on Plaintiff at this first stage of the litigation. As this Court noted in *Littlejohn v. City of New York,* 795 F.3d 297, 311 (2d Cir. 2015), "The discrimination complaint, by definition, occurs in the first stage of the litigation. Therefore, the complaint also benefits from the temporary presumption and must be viewed in light of the plaintiff's minimal burden to show discriminatory intent. The plaintiff cannot reasonably be required to allege more facts in the complaint than the plaintiff would need to defeat a motion for summary judgment made prior to the defendant's furnishing of a non-discriminatory justification." (Citation omitted).

While Defendant may disagree with Plaintiff's allegations, by introducing its evidence of its own version of events leading to Plaintiff's suspension and termination, it cannot—at this stage—place on Plaintiff a pleading burden more onerous than her burden during the summary judgment stage, without the benefit of discovery or the opportunity to refute Defendant's narrative.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court reverse and vacate the order and judgment of the District Court, remand this matter for further proceedings, and grant any other relief as deemed appropriate.

Dated: New York, New York
April 5, 2021

KOUSOULAS & ASSOCIATES, P.C.

By: 

Antonia Kousoulas
Attorneys for Plaintiff-Appellant
110 East 59th Street, Suite 3200
New York, NY 10022
(212) 509-2566
akousoulas@kalawyers.com

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