SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **46M**

Justice

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MARGARET O'HALLORAN,

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, GEORGE MENDUINA

Defendant.

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INDEX NO. 160953/2013

MOTION DATE 04/21/2025, 04/21/2025

MOTION SEQ. NO. 010 011

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 446, 447, 448, 449, 450, 451, 452, 453, 454, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 521, 523, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

The following e-filed documents, listed by NYSCEF document number (Motion 011) 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 522, 524, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561

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In this action for employment discrimination and retaliation, plaintiff Margaret O'Halloran moves, pursuant to CPLR 3212, for summary judgment against defendants Metropolitan Transportation Authority ("MTA"), New York City Transit Authority ("NYCTA"), MTA Bus Company, and George Menduina, granting O'Halloran the relief she demanded in her third amended complaint (motion sequence 010). Additionally, defendants MTA, NYCTA and Menduina move, pursuant to CPLR 3212, for summary judgment, to dismiss the complaint (motion sequence 011).

BACKGROUND

O'Halloran was a "career civil servant" who was employed by defendants MTA and NYCTA for nearly thirty-seven years from 1987 to 2024, when she retired. She began her employment as a Computer Associate Technical Level I and worked her way up to the management position of Assistant Chief Facilities Officer (ACFO), where she earned an annual salary of approximately $122,000.00. As a result of disciplinary charges issued against her by Menduina, in November 2012, and of a Step 1 and Step 2 hearing process, O'Halloran was demoted to the title of Associate Transit Management Analyst and her salary was decreased by more than $35,000 per year. She retired from this title.

From November 24, 2008 through September 20, 2011, O'Halloran held the position of ACFO, Business Planning and Administration and during that time she reported to Jennie Mandelino who was the Chief Facilities Officer at NYCTA and Vice President of Facilities at MTA bus. Mandelino is a woman and a lesbian and O'Halloran is also a woman and a lesbian. According to the submissions of the parties, at all relevant times, Menduina was aware of her sexual orientation (see Healey-Kagan, exhibit J at 84, 96-97, 134-135 (references to Menduina referring to O'Halloran as a "dyke")).

On or about September 21, 2011, Menduina was promoted to replace Mandelino as Acting-Chief Facilities Officer at NYCTA and Acting-Vice President of Facilities at MTA Bus and began acting as O'Halloran's supervisor. O'Halloran alleges that she was not invited to interview for, or be promoted into, the position, while similarly-situated heterosexual male colleagues were granted interviews and Menduina, who is heterosexual and male, was promoted into that position and began acting as O'Halloran's supervisor.

Prior to Menduina becoming O'Halloran's supervisor, O'Hallaran was never the subject of disciplinary charges and received "excellent" ratings for her work in 2008, 2009 and 2010 in her NYC Transit Managerial Performance Evaluations. She received no performance evaluations for 2011 or 2012, "in fact, when Menduina was [O'Halloran's] supervisor, [O'Halloran's] performance was never evaluated in an annual performance evaluation despite the fact that annual evaluations were required" (O'Halloran affidavit in support, ¶ 14). Prior to Menduina becoming her supervisor, O'Halloran received performance ratings of "good" or "excellent" by 13 different supervisors and she was promoted 10 times during her employment in three MTA Agencies: MTA New York City Transit, MTA Bridge and Tunnels, and MTA Bus.

O'Halloran alleges that after becoming her supervisor,

> "Menduina made false and disparaging statements about [O'Halloran] to other employees and agents of Defendants. Many of these statements made reference to [her] sexual orientation and even sexual acts that Defendant Menduina fabricated I participated in, which exposed me to contempt, ridicule and/or aversion by my colleagues"

(O'Halloran affidavit in support, ¶ 17 [internal citations omitted]).

O'Halloran asserts that in or around July 2012, Menduina denied her the opportunity to be involved in operations work thereby rendering her ineligible for future promotions in the Division. O'Hallaran further states that after Menduina became her supervisor, from around June 2012 to August 2012, he would:

> "assign tasks to her without proper support, resources and/or training and then criticized her inability to complete those assignments in a timely manner and also set arbitrary and unreasonable deadlines for the completion of her assignments which were less favorable than the deadlines assigned to similarly-situated male colleagues"

(O'Halloran affidavit in support, ¶ 20).

O'Halloran further alleges that while she requested in writing that her Managerial Performance Questionnaire (MPQ) be revised on July 20, 2012 and again on August 18, 2012, Menduina refused to update her MPQ, which was last updated on June 11, 2001, prior to the establishment of MTA Bus Company, which "altered and increased the position's responsibilities substantially" (*id.*, ¶ 23). According to O'Halloran, this had the effect of denying her "promotional opportunities and created ambiguities in my job description" (*id.*,¶ 24).

On August 17, 2012, O'Halloran notified the Office of Equal Employment Opportunity at NYCTA ("OEEO") of her complaint against Menduina's discriminatory treatment and amended the complaint on October 2, 2012. On September 10, 2012, O'Halloran received an email from Menduina advising her that she and her staff were to report to Kevin Jones, for all administrative work, "thereby replacing [O'Halloran], the ACFO for Planning and Administration, with Jones, a heterosexual male" (*id.*, ¶ 27). On September 12, 2012, O'Halloran commenced a short-term disability leave of absence after her doctor confirmed that she was experiencing "high-blood pressure, extreme stress and anxiety, humiliation and related mental anguish, as a result of [Menduina's] treatment of her" (*id.*, ¶ 30). She complied with defendants' policies for submission of disability-related leave paperwork.

While out on a short-term disability leave and at the recommendation of her treating physician, O'Halloran requested the reasonable accommodation of a transfer to "any position that would not require her to interact with, or report to, [Menduina]" (second amended complaint, para. 38). O'Halloran alleges that defendants ignored this request (id., para. 39). Additionally, while O'Halloran was out on disability leave, Menduina served her with a "Notice of Disciplinary Charges," dated November 29, 2012.

In this Notice of Disciplinary Charges, Menduina: (1) stated that O'Halloran engaged in "misconduct" and was "incompetent, and (2) recommended that O'Halloran be demoted from her managerial position to a civil service title with a "downward modification of her salary" (id., 43 and 44). O'Halloran alleges that this was retaliatory for her internal complaints with the OEEO. In response, O'Halloran requested a "step 1" hearing, which commenced an appeal process. Furthermore, as O'Halloran believed that the agency's EEO unit was not investigating her complaint, she wrote a letter to Darryl Irick, the President of MTA Bus and Senior Vice President of NYCTA, on or about December 10, 2012. In her letter, she described the alleged discriminatory and retaliatory conduct of defendants.

On February 27, 2013, NYCTA dismissed O'Halloran's appeal and upheld the disciplinary charges, but also found that the discipline of demotion to Staff Analyst I was "excessive," and thereafter modified the penalty and instead demoted O'Halloran to Associate Transit Management Analyst with an annual salary of $87,159.00, (Healey-Kagan aff, exhibit E), a decrease of approximately $35,000.00 from O'Halloran's previous salary.

In the complaint, O'Halloran alleges six separate causes of action: (1) discrimination pursuant to the New York State Human Rights Law (NYSHRL) as against all defendants; (2) discrimination pursuant to the New York City Human Rights Law (NYCHRL) as against all defendants; (3) retaliation pursuant to the NYSHRL and the NYCHRL as against all defendants; (4) failure to engage in an interactive process in response to O'Halloran's request for a reasonable accommodation; (5) breach of contract as against the MTA and the NYCTA; and (6) defamation as against Menduina.

DISCUSSION

A. **There are Questions of Fact that Defendants Discriminated against O'Halloran on the Basis of Sex and Sexual Orientation**

O'Halloran argues that the evidence stablishes that she is a woman and a lesbian and that defendants were aware of her sexual orientation at all relevant times, including when Menduina met O'Halloran's wife, Andrea.

According to the deposition testimony of Paul Sciara, an employee of NYCTA for 30 years, who at the time of his deposition was the Assistant Chief Facilities Officer in the NYCTA department of buses, facilities division. In that title, he reported directly to Menduina from April 1, 2014. According to Sciara's testimony, Alanzo Marshall who was also employed by the NYCTA, started coming to speak with Sciara around the summer of 2012 about "coming back to work for buses, to work for [Menduina]" (exhibit GGG (Sciara Deposition Tr.) at 20). Sciara testified that he assumed that Menduina wanted Marshall to speak with him to ask him to come back to facilities. Sciara testified that he understood Marshall as saying that Menduina was:

> "cleaning the house of the people that were reporting under [Menduina's] predecessor, [Mandelino] . . .[Marshall] was talking about, you know, how [Menduina] was, had to get rid of [Mandelino's] 'dyke crew,' as he referred to it. And I could only have assumed that that was in reference to [O'Halloran] at the time"

(*id*. at 23-24).

It was Sciara's understanding that those words came from Menduina himself (*id*. at 24). Additionally, Sciara understood that O'Halloran is "gay" (*id*.at 28) and that Mandelino is gay, which was "kind of common knowledge" (*id.* at 29).

In support of her motion, O'Halloran includes an affidavit from Mandelino to establish that during their work together, Mandelino never gave O'Halloran a negative work evaluation. In her

affidavit in support of O'Halloran's motion, Mandelino avers: "During my supervision of [O'Halloran] from 2008 to 2011, she excelled in her work performance and she received a rating of "excellent" in 2008, 2009, and 2010 in her NYCTA Managerial Performance Evaluations" (Healey-Kagan aff, exhibit F, ¶ 3). Mandelino avers that as O'Halloran's supervisor, she should have been consulted regarding any disciplinary charges against O'Halloran, which is why she wrote a December 16, 2012 letter in O'Halloran's defense "in which [she] corrected the inaccuracies in substantial portions of the disciplinary charges against her" (*id*., ¶ 8). According to Mandelino, after she wrote that letter she was demoted and she believes that "this demotion was motivated by discriminatory animus as well as retaliation for my involvement in [O'Halloran's] appeal" (*id*., ¶ 10).

Finally, Mandelino states that she believes that O'Halloran was not treated fairly on account of her gender and sexual orientation:

> "During my employment, it is my understanding that [O'Halloran] and I were the only out-lesbians employed by NYCTA and MTA Bus in the Division of Facilities. I believe Defendants' mistreatment of [O'Halloran] and myself was motivated by discriminatory animus because of sex, gender, and sexual orientation"

(*id*., ¶ 11).

Also attached to O'Halloran's motion is the November 29, 2012 notice of disciplinary charges addressed to O'Halloran from Menduina. In the notice, Menduina states that O'Halloran is charged with misconduct and incompetence, dereliction of duty and unsatisfactory work performance in violation of MTA NYCT and MTA Bus Company policy. Underlying these charges, the notice states that O'Halloran failed to timely and properly perform her duties as ACFO, including completing projects within the proposed financial and deadline parameters and that she failed to streamline and coordinate budget monitoring and controls with department

engineering and construction management, which meant that she failed to uncover and report extensive and serious project delays, cost overruns and the potential for impact cost litigation.

During his deposition, Menduina testified that in 2012 he was promoted by Darryl Irick, the President of the MTA to replace Mandelino as Acting-Vice President at MTA Bus and as Chief facility Officer at NYCTA. According to Menduina's testimony, he was told not to conduct evaluations because "the process was being re-evaluated" but that they did evaluations anyway that were not "signed off and sent in" (Healey-Kagan aff., exhibit B (Menduina Dep Tr) at 50). Menduina testified that it was his decision to issue disciplinary charges against O'Halloran after he consulted and discussed the charges with Heidi Lemanski, Chief of Staff of the President of MTA bus (*id.* at 64-65). O'Halloran's discipline is the only one he can recall that recommended demotion (*id*. at 323). Kevin Jones took over all the work that O'Halloran had been responsible for.

O'Halloran argues that Menduina's decision to demote her after having been her supervisor for a limited time and without conferring with Mandelino raises questions about Menduina's motivation and discriminatory animus. Irick did not participate in the decision to discipline O'Halloran (Healey-Kagan aff, exhibit Q (Irick Dep Tr) at 29). But he testified that Lemanski was likely involved in discussing the discipline and someone from labor relations might have been involved (*id*. at 33-34). Irick further testified that labor relations would need to be involved in all discipline against managerial employees (*id*. at 54). He testified about the use of progressive discipline (*id*. at 53) and that O'Hagan and Santos were subjected to similar discipline as O'Halloran but, unlike O'Halloran, they were permitted to keep their positions . . .They were offered settlements (*id*. at 100 and 101). Additionally, Brian Brennan, the Step I Hearing Officer and General Manager testified that in his view "discipline . . . is an action of last resort" (Healey-

Kagan aff, exhibit X (Brennan Dep Tr) at 89). Brennan further testified that he sent a January 8, 2013 email to Menduina, after the Step I hearing concerning the disciplinary charges against O'Halloran, asking "George, please let me know when you are available to meet to discuss the O'Halloran case," (*id*. at 90) and he issued a decision on those charges on January 17, 2013 (Healey-Kagan aff, exhibit D).

During his deposition, Joe Murphy testified that in 2012 he began working directly for Menduina, and prior to that he worked "indirectly" for Menduina, with the general superintendent as intermediary (Healey-Kagan aff, exhibit J (Murphy Dep Tr) at 26). Murphy testified that from 2012 to 2018, he observed Menduina engage in unethical conduct. He heard Menduina use the term "toothless monster" to "describe a vicious woman's vagina" on "multiple occasions (*id*. at 40).

Murphy testified that Menduina would use this term:

> "in the context of the conversations. He would be talking about -- he would be talking about Maureen Wrightenger, Peggy O'Halloran, Gia Gorelle (phonetic), Jennie Mandelino. All of which he thought conspired to cheat him out of getting that position. And when he spoke of them he spoke about them in derogatory terms. So it wouldn't be unusual for him to say, oh, that fucking Jennie Mandelino with her fucking toothless monster"

(*id.* at 41-42).

Although Murphy saw Menduina say these derogatory things about women, he did not report any of it for at least five years, because:

> "I, [Murphy], was afraid for my job. George Menduina is a vindictive and a hurtful person. I wasn't going to be the one to drop a dime on him. Because sooner or later it would come back on me and I am not the only one who felt that way. There were many people who seen and heard the same derogatory comments and vile actions from Mr. Menduina and no one else spoke up, that I'm aware of. . . He was vile about O'Halloran and Mandelino"

(*id*. at 50; 76).

Michael Campana testified that he had a falling out with Menduina at a point when Menduina began saying that Campana was "part of Jennie's crew and [Menduina] did not trust [Campana]no longer" (Healey-Kagan aff., exhibit I (Campana Dep Tr.) at 36). Menduina referred to an employee as a part of "Jennie's crew" if they came from MTA Bus (41) or "if you've taken her side (*id*.). After a staff meeting, Meduina stated that "he is going to get rid of all of Jennie's people because they're all incompetent and they're useless" (*id.* at 44-45). Menduina referred to O'Halloran as a "dike" (*id*. at 47). Referring to O'Halloran as a "dike," Menduina stated at that same meeting, "I'm going after all of Jennie's people and the dike next door," referring to O'Halloran (*id.* at 47). Additionally, Menduina told a story after a staff meeting about O'Halloran and Mandelino going to Atlantic City and "doing lesbian things" (48).

According to Campana, Menduina told him in person and during phone calls about a plan that Menduina had to set O'Halloran up to make her look incompetent:

> "The only way I know is what I witnessed as far as -- I know there was a setup and I was there when he was explaining the setup, how he was going to set [O'Halloran] up. I was right there. That I remember. It was very clear because I was there. He was talking about how he's going to use -- a woman that we used on interviews. Her name was Shelley Prettyman I think it was. He was going to borrow her from Heidi Lemanski to prove how [O'Halloran] is incompetent and she don't know her job and try to set her up for insubordination. I would like to say I remember the details. It is foggy but it has something to do with a project that he would ask [O'Halloran] to do. And I know he used to come in and brag that Shelley Prettyman completed it in a better time. Like, in other words, he would like to display how incompetent she was to people to show. And then she got demoted. I don't know the details for that. I wasn't privy to that but I know she got demoted"

(*id*. at 52-53).

Menduina "got rid of a lot of people" (*id.* at 56). He tried to fired Joe O'Hagan, but they couldn't fire him so they made him retire (*id.*). Tony Muratore left the department because of the nonsense and to save his career. Bill Keenan left for the Long Island Railroad "I remember he told me he doesn't want to deal with George's bullshit anymore" (*id.*). Meduina sought to get rid of Joe Novak. Novak "went out with a mental disability. And what happened was George wanted – they wanted light duty of John [sic] Nowak but George wouldn't give it to him, so the guy had no choice but to leave" (*id.*). Menduina asked Campana to monitor Nowak's emails (*id.* at 58). Bob Mazzola retired saying "he ain't dealing with the bullshit no more" (*id.* at 57). John Harkins left, he was also one of "Jennie's people." Campana testified that the day after he got the ACFO position, Menduina was threatening to make him a "general again" (*id.* at 64). Menduina referred to Joe O'Hagan as a "fag," and Menduina stated of Joe O'Hagan, "we're going to get that fag" (*id.* at 67).

Campana testified of Menduina:

> "If you're in his inner circle, you're a good guy. If you're out of the circle, he'll go out of his way to humiliate you in front of people" (*id.* at 97). Campana had the impression that Menduina had a "particular hatred" for [Mandelino] and [O'Halloran] because they were lesbians" (*id.* at 99).

In an affidavit, Domingo Santos averred that:

> "he believed that the disciplinary charges issued against [him] were fueled by discriminatory animus towards [Mandelino], who was my previous supervisor when she was Vice President of Facilities. I had been a member of Ms. Mandelino's team for Capital Programs, but I believe George Menduina, who became Vice President of Facilities after Ms. Mandelino, was hostile to Ms. Mandelino and anyone who worked closely with her. . . I believe Mr. Menduina developed a plan to get rid of as many members of Ms. Mandelino's team as he could, including myself, Joseph O'Hagan, and Margaret O'Halloran.

In support of her motion, O'Halloran argues that she is able to satisfy her evidentiary burden in compliance with the burden-shifting framework set forth in *McDonnell Douglas Corp. v Green* and pursuant to the legal standards of the NYSHRL and the NYCHRL (*see Ferrante American Lung Assn*, 90 NY2d 623, 629 [1997]).

In order to successfully state a claim for discrimination pursuant to the NYCHRL, a plaintiff must establish: (1) [she] is a member of a protected class; (2) [she] was qualified to hold the position; (3) [she] was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination (*Melman v Montefior Med. Ctr.*, 98 Ad3d 107 [1st Dept 2012]). The burden shifts to the employer to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision. In order to succeed on its claim a plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason (*id.*).

In support of her motion, O'Halloran argues that the evidence establishes that she is a woman and a lesbian and that defendants were aware of her sexual orientation. O'Halloran contends that defendants were at all relevant times aware of her sexual orientation (*see* Healy-Kagan aff, exhibit I (deposition of Michael Campana) at 47-48 [Menduina referred to O'Halloran as a "dike" (p. 47)). Referring to O'Halloran as a "dike," Menduina stated at that same meeting, "I'm going after all of Jennie's people and the dike next door" (*id.* at 47). Additionally, Menduina told a story after a staff meeting about O'Halloran and Mandelino going to Atlantic City and "doing lesbian things" (*id.* at 48)].

O'Halloran's submission establishes that in or around January 2012, despite having received excellent performance evaluations for 2008, 2009, and 2010 in her NYCTA Managerial Performance Evaluations (Mandelino affidavit, para 3) and despite never having any discipline against her, defendants denied her the opportunity to interview for, or be promoted to, the position of Chief Facilities Officer at NYCTA and Vice President, Facilities at MTA Bus, while similarly-situated heterosexual male colleagues of hers who held the same title as O'Halloran were (see O'Halloran affidavit, ¶ 10; Healy-Kagan aff, exhibit G (O'Halloran application for Vice President and Chief of Facilities; Healy-Kagan aff, exhibit B at 46). Heidi Lemansky testified that she discussed whether to give an interview to O'Halloran with Irick. Lemansky stated that she recommended Irick not interview O'Halloran and he agreed (Lemansky dep tr. at 82).

After Menduina became O'Halloran's supervisor, he made negative statements about O'Halloran's sexual orientation, that included comments about sexual acts (O'Halloran affidavit, ¶ 17; Healy-Kagan aff, exhibit J (Murphy deposition transcript) at 41-42; 76-78). In November 2012, O'Halloran was employed by defendants in the management position of Assistant Chief Facilities Officer and earned an annual salary of approximately $122,000.00 (O'Halloran affidavit, ¶ 5; Menduina made the decision by himself, with guidance from others, to issue charges against O'Halloran (see Healy-Kagan aff, exhibit B (deposition of George Menduina) at 76). As a result of the disciplinary charges, O'Halloran was demoted to the title of Associate Transit Management Analyst and her salary was decreased by $35,000.00 per year (O'Halloran affidavit, ¶ 6; Healy-Kagan aff, exhibit C (Disciplinary charges), exhibit D (step 1 decision), and exhibit E (step 2 decision)).

In opposition, defendants argue that O'Halloran's evidence that Menduina was an "aggressive, bullying, foul-mouthed manager who terrified his subordinates is insufficient to

establish a violation of the NYSHRL or the NYCHRL. Defendants further argue that O'Halloran's motion for summary judgment cannot be successful simply because O'Halloran asserts that she is a member of a protected class and by stating that the adverse employment actions against are linked to her membership in that class: "Plaintiff must adduce evidence connecting the two (defendants memo in opp at 2).

In support of this point, defendants cite to Murphy's deposition testimony, in which he states that Menduina treated men, women, straight, gay employees with equal animus:

> "Q: You pointed out that [Menduina] was essentially eager to clean house. Anybody who worked for Mandelino he wanted to get rid of. Is that a fair assessment?
> A: Get rid of was his words, correct.
> Q: And he was successful in that effort?
> A: I don't know what his measure of success is, but he certainly did get rid of a lot of people who worked for Jennie Mandelino.
> Q: Would it be a fair statement, Mr. Murphy, that [Menduina] got rid of men as well as women?
> A: Well, yeah. Yeah.
> Q: Would it be a fair statement, Mr. Murphy, that [Menduina] got rid of gays as well as straights?
> A: Yes."

(Healy-Kagan aff, exhibit J at 67-68, 72).

Furthermore, defendants point to Santos' deposition testimony to support their point that Menduina was not targeting O'Halloran, but that his motive in demoting her was part of a plan to terminate employees who were loyal Mandelino:

> "Q: And then your relationship with [Menduina] changed that point in time [in 2012, When Menduina became chief facilities officer]?
> A: Well, [Menduina], when he took power, clearly he started working, not to improve the department, not to make the department better, not to increase our manpower, but all his efforts were to dismantle what he probably thought was the people that were loyal to Mandelino. So he tried to fire [O'Hagan]. I think he succeeded. He tried to fire myself. He tried to fire O'Halloran. He kicked the—Bill Keenan out and sent – he went to Long Island Railroad. And Tony Muratore, I think he went to CPM, if I'm not

> mistaken, in Transit. So basically all the people that came from MTA Bus Company, he went after. And that's all he did in the first six months he was in power"

(Healy-Kagan aff, exhibit BB at 29-30).

Additionally, defendants rely on the statements of O'Hagan that Menduina was condescending, and a chauvinist, a racist and jealous of anyone who had success:

> "I found that, in general, he was condescending. He was –let's see, definitely a chauvinist. There's no questions about that. I also felt that he was a racist. He struck me also as very jealous of people who had any kind of success. It didn't matter if they were in a position higher than his or in a position lateral to his or in a position below his. He wanted to be in control of all the pieces on the, you know, chess board"

(Healy-Kagan, exhibit AA at 16).

Defendants cite to O'Halloran's own deposition testimony to establish that she is speculating as to the reasons that Menduina treated her in a negative way and was the source of adverse employment actions against her. During her deposition, O'Halloran testified that she worked with Menduina between 2003 and 2008 and there were no issues:

> "Q: Between August 2003 and November 2008, did you have any issues, problems, concerns about [Menduina]?
> A: No."
> (O'Halloran dep. tr. at 108-109).
> O'Halloran further testified that after Menduina was selected for promotion to Vice President Chief Facilities Officer, their relationship was close until suddenly it changed:
> "Q: At some point later on in the summer of 2012 I went from 30 meetings to one a month. Eight e-mails a day to one a day * * * Everything had to be done and I was the one he grabbed to go to all of the meetings and then it was complete ostracization"

(id. at 61).

O'Halloran was unable to account for this change:

"Q: I don't mean to sound facetious, but your gender didn't change at any point in time, that remained the same, correct?

A: Yes. But as I said, I worked with him for nine months. What suddenly changed, you really have to, um, ask Mr. Menduina because he certainly knew everything that was going on after nine months" (*id.*).

Finally, defendants use the deposition testimony of Mandelino to support the point that Menduina was "cleaning house" as any new department head might do:

> "Listen, whenever a new department and a new heard comes in, they pick their direct reports, that's the way it is, and move people moved aside and other people take the job. That's the way it has been through my entire career in New York City Transit, and it was probably 20 years before that, the new group comes and sweeps clean. They usually don't sweep clean and hurt people in the way"

(Healy-Kagan, exhibit S at 187).

In order to successfully state a claim for discrimination pursuant to the NYSHRL and NYCHRL, a plaintiff must establish: (1) [she] is a member of a protected class; (2) [she] was qualified to hold the position; (3) [she] was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination *(Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]); *Melman v Montefior Med. Ctr.*, 98 Ad3d 107 [1st Dept 2012]). The burden shifts to the employer to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision. In order to succeed on its claim a plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason (*id.*).

Here, it is undisputed that O'Halloran has established the first three elements of a prima case of discrimination. As a woman and an openly gay woman, she is a member of a protected

class (*see James v City of New York*, 144 AD3d 466, 466-467 [1st Dept 2016]) and she was qualified for the position since she was hired for the position. As far as the third element, she was demoted by the defendants in 2012. The only question in contention is whether the demotion occurred under circumstances giving rise to an inference of discrimination.

As outlined above, O'Halloran demonstrates that Menduina made many comments identifying O'Halloran as a dyke, and that Menduina was the dominant figure on O'Halloran's demotion. O'Halloran has also asserted that her demotion occurred under circumstances giving rise to an inference of discrimination. According to Murphy's testimony, Menduina stated that he wanted to "get rid of that dyke" (Murphy dep tr. at 86), and according to the testimony of Campana, during a work meeting, Menduina told whoever was present that "I'm going after all of Jennie's people and the dike next door," referring to O'Halloran. Additionally, Campana testified in detail about Menduina's "plan" to set up O'Halloran for failure. Further, Santos testified that it was his impression that Menduina had a "particular hatred" for Mandelino and O'Halloran because they were lesbians. These statements raise questions about whether Menduina's intentions with respect to demoting O'Halloran were discriminatory on the basis of her sexual orientation. The statements Menduina allegedly made about O'Halloran and Mandelino similarly raise questions about his intentions regarding O'Halloran as a gay woman.

In opposition, defendants argue that Menduina was an "aggressive, bullying, foul-mouthed manager who terrified his subordinates," who wanted to clean house in a neutral way, regardless of sexual orientation. At the core of defendants' argument is that O'Halloran cannot establish a causal relationship between her gender or sexual orientation and her demotion by Menduina. Defendants quote Murphy's deposition testimony where he states that Menduina wanted to get rid of anyone who worked for Mandelino, that Menduina got rid of men as well as

women, and got rid of gays as well as straights (Murphy dep at 67-68, 72). Defendants cite the testimony of Santos, wherein he opines that if Menduina wasn't discriminating against O'Halloran why would he demote her, and then adds that Menduina wanted to destroy anyone who he felt were loyal to Mandelino and he hated all people that had a degree. Furthermore, defendants support their argument that Menduina was simply and neutrally cleaning house by relying on the testimony of Mandelino, who states: "Listen, whenever a new department and a new head comes in, they pick their direct reports, that's the way it is . . . ." (Healey-Kagan aff, exhibit S at 187). Further, defendants describe the discipline of O'Halloran, Joseph O'Hagan and Domingo Santos as proof that gender and sexual orientation did not figure into O'Halloran's demotion. Specifically, defendants take issue with O'Halloran's characterization of Menduina's treatment of O'Hagan and Santos as "more favorable treatment" than what she got (defendants' aff in opp at 5), and yet Santos and O'Hagan's discipline was termination, a consequence of which was that they both lost pension benefits.

In an affidavit, Santos avers that he "faced no penalty for the disciplinary charges against [him]" (Healey-Kagan aff, exhibit Z).

Under the NYCHRL, the employer must establish that "discrimination play[ed] no role in its actions" (*Williams v New York City Hous. Auth.*, 61 AD3d at 76). O'Halloran having disciplinary chargers or Menduina wanting to "clear house" is only another side to the issue, requiring a factfinder, and does not undermine O'Halloran's claim.

This court is mindful of the Court of Appeals 'directive that "statements by decisionmakers unrelated to the decisional process itself are insufficient to establish discriminatory intent" (Forrest, 3 NY3d at 308). In this case, however, Menduina's statements that he sought to "get rid of that dyke," and that he was" going after that dyke next door" connect his actions in demoting

O'Halloran to the discriminatory animus he is being charged with in this lawsuit. Thus, even though defendants offer a non-discriminatory reason for demoting O'Halloran, which occurred because of the disciplinary charges, this court finds that based upon her submission, O'Halloran is able to establish that those charges may indeed be pretextual.

It would not be consistent with the facts for this court to find that Menduina was simply a bad guy who didn't like anyone, and was neutrally cleaning house, or, instead, may very well have taken the actions that he did against O'Halloran based upon her sexual orientation. On these facts, the court denies both O'Halloran's motion for summary judgment and defendants' motion for summary judgment.

B. **There are questions of fact concerning O'Halloran's claims of retaliation**

O'Halloran argues that defendants retaliated against her after her complaints to the OEEO and the NYCTA in August and October 2012. O'Halloran argues that after her first complaint of discrimination in August 2012, she was demoted within months, in retaliation for "calling out" Menduina's conduct (memo in support at 15).

Through her submission, O'Halloran establishes that after Menduina was promoted to Chief facilities officer at NYCTA in or about January 2012 and prior to her demotion, she made complaints of discrimination to the defendants. O'Halloran offers testimony that she made a complaint of discrimination to Anna Grimes, the Senior Director in the Chief of Staff's Office in February 2012 that she was the only "female direct report in the division," and that she did not get an interview for the promotion to the position of Chief facilities officer (Healey-Kagan aff, exhibit J-1 at 32-33) and offers additional testimony that she made a second discrimination complaint to Shelley Prettyman, Director in the Chief of Staff's Office (Prettyman), in June 2012 (*id.* at 36 and 40).

O'Halloran further demonstrates that she first notified that Office of Equal Employment Opportunity (OEEO) at NYCTA of her complaint against Menduina on August 17, 2012 and she amended it on October 2, 2012. On September 10, 2012, she received an email from Menduina advising her and her staff that they were all to report to Kevin Jones.

This September 10, 2012 email from Menduina states in part: "All, Effective immediately and until further notice the entire administrative staff in our department will report to Kevin Jones" (Healey-Kagan, exhibit M). According to O'Halloran, Menduina appointed Jones to replace her (Healey-Kagan aff, exhibit J-2 at 192; exhibit M).

Believing that she was being replaced on that same day, September 10, 2012, O'Halloran notified Irick of this change, explaining that it humiliated and embarrassed her. On September 12, 2012, O'Halloran began her short-term disability leave of absence. She received a notice of disciplinary charges that were dated November 29, 2012, recommending that she be demoted. After a Step I and an informal Step 2 hearing on the charges, O'Halloran was demoted to Assistant Transit Management Analyst, and her salary was reduced from $122,000 to $87,159 (O'Halloran affidavit, ¶ 78; Healey-Kagan aff, exhibit TT). O'Halloran offers the testimony of the Step I hearing officer, Brennan, in which he admitted he sent an email to Menduina after the hearing, but before his decision was issued, to speak with Menduina about the case.

In opposition, Defendants argue that an investigation into O'Halloran's conduct preceded by a month her filing of the internal EEO complaint in August 2012 and that Menduina's filing of disciplinary charges was not until November 2012, and, therefore, there is no correlation between her complaints and defendants' filing of disciplinary charges or their demotion of plaintiff. Specifically, defendants posit that beginning in July 2012, Menduina met "several times" with Robert Finnegan, Senior Director of Labor Relations, Elizabeth Cooney, General Counsel,

and Heidi Lemanski, Chief of Staff to MTA Bus's President, to discuss plaintiff's conduct and whether she should be brought up on disciplinary charges (defendants' memo in support at 6-7).

"Under both the State and City Human Rights laws, it is unlawful to retaliate against an employee for opposing discriminatory practices" *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312 [2004]). "In order to make out a claim of retaliation, plaintiff must show that (1) she was engaged in protected activity; (2) her employer was aware that she participated in such activity; (3) she suffered an adverse employment action based upon her activity; and (4) there is a causal connection between the protected activity and the adverse action" (*id*.)

"The causal connection needed for proof of a retaliation claim can be established indirectly by showing that the protected activity was closely followed in time by the adverse action" (*Hershkowitz v State of New York*, 222 AD3d 587 [1st Dept 2023] [internal citation omitted]). According to the First Department, "[c]ourts have 'not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action" (*id.*).

In *Hershkowitz*, the Court found that the four-month period between plaintiff's interview and termination fell "within the acceptable temporal range to establish a causal connection between his protected activity and his termination (222 AD3d at 588; *see Rasmy v Marriott Intl., Inc*. 952 F3d 379, 391-392 [2d Cir. 2020] [five months]; *Summa*, 708 F3d 115, 128 [2d Cir 2013][four months and seven months for separate retaliatory actions]; *Espinal*, 558 F3d 119, 129 [2d Cir 2009][six months]; *Collins*, 59 Misc3d at 1054 [four months]).

Here, O'Halloran complained to OEEO in August 2012 and, one month after, in September 2012, her staff was directed to report to Kevin Jones. O'Halloran viewed this as a

demotion. Defendants argue that thoughts about disciplining O'Halloran precede her OEEO complaint and, therefore, there is no causal connection between the discipline and O'Halloran's complaint. In November, 2012, three months after she filed her OEEO complaint concerning Menduina's treatment of her and the alleged discrimination, there were disciplinary charges filed against her. These charges resulted in her demotion, including a change in title and a decrease in pay.

The Court finds that this time period is "within an acceptable temporal range" to support her claim of retaliation. Those actions, in that time frame of a few months, might discourage an employee from lawfully filing a complaint. Defendants' argument that discussions concerning the discipline of O'Halloran took place in July 2012, one month prior to O'Halloran's OEEO complaint, does not undermine the causal connection as the disciplinary charges were filed in November 2012. Finnegan testified that he did not know who made the decision to go forward with discipline, but it was not him (Efron aff, exhibit C at 92); Lemanski testified that she did not recall when she learned of disciplinary charges against O'Halloran; she testified that the charges were brought against O'Halloran in 2012, but could not recall "the exact dates, months" (Efron aff, exhibit H at 39-40). The court finds that O'Halloran is entitled to a trial on this claim and denies both O'Halloran's and defendants' motions for summary judgment.

C. **O'Halloran's claims of disability discrimination**

O'Halloran argues that defendants discriminated against her under the NYSHRL and the NYCHRL while she suffered from a disability that created the behaviors for which she suffered an adverse employment action (O'Halloran memo in support at 10). Specifically, O'Halloran argues that she, suffering from a medically diagnosed condition, requested "a reassignment out of the MTA New York City Transit Department of Buses and MTA Bus to a comparable position,"

to accommodate and ameliorate her condition (Healey-Kagan aff in opp, exhibit 28), and this request was unreasonably denied, with no interactive process, in violation of the NYSHRL and the NYCHRL. As a result, O'Halloran posits that she was forced to use her her sick and vacation time accrued over 25 years of work to pay for the 117 workdays she was on disability (O'Halloran memo in opp at 18).

On September 12, 2012, O'Halloran began a short-term disability leave of absence after her physician confirmed that she was experiencing high-blood pressure, extreme stress and anxiety. Her conditions required medication and "prevented her from performing the essential functions of her job" (O'Halloran memo in supp at 13). O'Halloran contends that during this short-term disability leave, she requested a reasonable accommodation which included "that she be permitted to transfer out of Defendants' NYCTA's Department of Buses and Defendant MTA Bus, and more specifically, to any position that would not require her to interact with, or report to, Menduina" (*id.* at 13; Healey-Kagan aff, exhibits N and O). O'Halloran did not receive a response to this request. Further, although Menduina "understood" that he was not supposed to communicate with O'Halloran when she was out on leave, during her leave, Menduina served her with Notice of Disciplinary Charges, recommending her demotion. O'Halloran argues that this was a violation of policy and that it exacerbated her symptoms.

O'Halloran argues that defendants violated their policy for processing reasonable accommodation requests of employees by failing to engage in an interactive process with her regarding her request to transfer out of NYCTA's Department of Buses and Defendant MTA Bus, or to any position that would not require her to interact with, or report to, Menduina.

In opposition, defendants argue first that O'Halloran did not have a disability prior to September 12, 2012, during the time that Menduina engaged in the alleged mistreatment of

her. Defendants argue that this means that O'Halloran did not have a disability at the time of the adverse employment action, as the law warrants. Further, defendants argue that O'Halloran requested a reasonable accommodation "during the lead up to—and recovery from—Superstorm Sandy" (defendants' memo in opp at 8), and, therefore, according to defendants, providing any accommodation to O'Halloran would have been an undue hardship and not warranted under the law. Finally, defendants argue that under the law, they are not mandated to: "locate another job for the employee, establish a new position, or create a light-duty version of the current role" (*id.* at 12, quoting *Ellis v City of New York*, 2024 NY Misc LEXIS 1384, at *19 [Sup Ct NY County 2024]).

Ultimately, it is defendants' position that the inability to find O'Halloran "an acceptable new job within nine days of receiving her request for a 'reasonable accommodation'" (defendants' memo in opp at 9) does not violate the NYSHRL or the NYCHRL. On this point, defendants quote Lemanski's deposition testimony that she was aware of O'Halloran's request for a reasonable accommodation, and she describes the steps necessary to re-assign O'Halloran:

> Q: "So you were aware at that time that [O'Halloran] had submitted a request for a different supervisor, correct?
> A: I-again, I recall the approved leave of absence papers, I don't recall her asking for a leave of absence, if that is what you mean.
> Q: I am asking you more so were you involved in making the decision about whether or not to assign [O'Halloran] to a different position to give her a different supervisor?
> A: Yes, I would be part of that decision. We only had budgeted positions available, so she would- there would have to be a vacancy in another area with a similar level title, she would have to qualify for that position and I would have to have a discussion with the supervisor about having her come work on their team. Yes, I would be part of that.
> * * *
> Q: If a budgeted position was available that she qualified for, would she have been reassigned to that position?
> A: Again, not automatically I would have had a conversation with the department head, and the department head may or may not

> have wanted to interview her. I could not just tell a department head, 'I am transferring this employee to you'"

(defendants' memo in supp at 12, quoting Lemanski dep tr. at 58-59).

"A prima facie case of failure to accommodate requires a showing that (1) plaintiff was disabled within the meaning of the [NYSHRL and the NYCHRL]; (2) the employer had notice of the disability; (3) plaintiff could perform the essential functions of his or her job, with a reasonable accommodation; and (4) the employer refused to make a reasonable accommodation" (*Miloscia v B.R. Guest Holdings LLC*, 33 Misc3d 466 [Sup Ct, New York County 2011]). Section 8-107 (1) (a) of the NYCHRL makes it an unlawful discriminatory practice for an employer to discriminate in terms and conditions of employment or discharge an employee because of a disability (*see Watson v Emblem Health Servs*., 158 AD3d 179, 182 [1st Dept 2018]). Pursuant to the NYCHRL, there is no accommodation, including indefinite leave or any other need created by a disability, which is excluded from the category of reasonable accommodation (*Watson*, 158 AD3d at 182). This rule is subject to the exception that employers are "not forced to provide accommodations that would subject the employer to undue hardship" (*Romanello v Shiseldo Cosmetics Am. Ltd*., 2002 U.S. Dist. LEXIS 18538, at *23 (SD NY 2002]).

Under both the State HRl and the City HRL, an employer is obligated to engage a disabled employee in a 'good faith interactive process' to identify a reasonable accommodation that will permit the employee to continue in the position" (*Romanello v Intesa Sanpaolo S.p.A.*, 97 AD3d 449, 451 [1st Dept 2012]). On the issue of reasonable accommodations and summary judgment, the Court of Appeals held: "the employer normally cannot obtain summary judgment on a State HRL claim unless the record demonstrates that there is no triable issue of fact as to whether the employer duly considered the requested accommodation. . . . Consequently, to prevail on a summary judgment motion with respect to a State HRL claim, the employer must show that it

"engage[d] in a good faith interactive process that assesse[d] the needs of the disabled individual and the reasonableness of the accommodation requested" (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 837 [2014]; see also *Phillips v City of New York*, 66 AD3d 170, 176 [1st Dept 2009][under the City HRL, the employer must engage in interactive discussions with the employee to fulfill its statutory duty in considering a reasonable accommodation]).

The court finds questions of fact as to whether O'Halloran was denied a reasonable accommodation in violation of the NYSHRL and the NYCHRL. With respect to this cause of action, what is in contention is whether the accommodation was reasonable and whether it posed an undue hardship to the defendants. The court notes that O'Halloran took a short-term disability leave that began September 12. 2012 and during this leave, and as a consequence of her physical and emotional status, including medically documented high-blood pressure and anxiety, she requested a reasonable accommodation that she be permitted to transfer out of NYCTA's Department of Buses and MTA Bus, or to hold any position that would not require her to interact with Menduina. Defendants did not offer any interactive process in response to this request, despite being required to do so under both the NYSHRL and the NYCHRL (*see Phillips*, 66 AD3d 170 ["[t]he resolution of these issues [under the NYSHRL] is, singularly case-specific]), further illustrating the need for an individualized, interactive fact-specific process"]). Defendants' reasons for denying the request are not conclusive of the fact that they were unable to offer the accommodation but leave open questions as to whether this accommodation was feasible or whether it constituted an undue hardship. Defendant offers no evidence of interactive discussions with O'Halloran on this issue. Further, during his deposition, Gorman testified that the only question raised and discussed at defendants' meeting concerning O'Halloran's request for a reasonable accommodation was whether she would be able to stay in her position and not report

to Menduina (Healey-Kagan aff, exhibit EEE at 67-69). There was no discussion of transferring out of her position (*id*.), even though O'Halloran raised the issue with Gorman about potential placement in other divisions of MTA Bus (*id*. at 68).

On this record, therefore, there are questions of fact as to whether the requested accommodation would be effective, would cause the defendants an undue hardship and the court will not grant either party's motion for summary judgment.

D. **O'Halloran's breach of contract claims**

O'Halloran additionally moves for summary judgment on her breach of contract cause of action. O'Halloran argues that she is able to establish the defendants' are liable on this claim as a matter of law since they, as the employer, "[violated their] own policies, including [violating] their own Progressive Discipline Policy, their Equal Employment Opportunity Policy, and their Reasonable Accommodation Policy, as well as their policy "Updating of Position Descriptions," requiring regular review and updates of position descriptions" (O'Halloran memo in support at 17).

O'Halloran further argues that her breach of contract claim, arising from defendants' failure to comply with their own policies, is supported by the Court of Appeals holding in *Weiner v McGraw-Hill*, 57 NY2d 458, 465 [1982]. In *Weiner*, the plaintiff alleged a breach of contract claim against his employer where he was discharged without just cause or "the rehabilitative efforts specified" in the employer's handbook (*Weiner*, 57 NY2d at 460). The Court found sufficient evidence to deny defendant's motion to dismiss plaintiff's breach of contract cause of action. That evidence included the facts that, although plaintiff was an at-will employee, plaintiff left his previous employment in reliance on assurances that he would not be fired from defendant without just cause, the just cause policy was contained in a company handbook, plaintiff incorporated that assurance

into his employment application by referring to the handbook in writing, plaintiff rejected other offers of employment in reliance upon this policy, and plaintiff had been instructed on prior occasions that any termination of employees had to be in strict compliance with the handbook (*Weiner*, 57 NY2d at 465-466).

In opposition, defendants argue that they did not have a binding and enforceable contract with O'Halloran, and, thus, the alleged violation of several policies cannot constitute breach of contract. In support of their position, defendants rely on the Court of Appeals decision in *Lobosco v New York Tel. Co./NYNEX*, 96 NY2d 312 [2001]. In *Lobosco*, while the Court recognized its earlier determination that the plaintiff in *Weiner* was able to state a cause of action for breach of contract, the Court supported the position that "[r]outinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employment agreements" (*id.* at 317). The Court continued:

> "That would be an unwise expansion of Weiner. It would subject employers who have developed written policies to liability for breach of employment contracts upon the mere allegation of reliance upon a particular provision. Clearly that cannot be, especially in light of conspicuous disclaiming language. An employee seeking to rely on a provision arguably creating a promise must also be held to reliance on the disclaimer"

(*id.*).

This court follows the Court of Appeals holding in *Lobosco* that in general employee manuals, handbooks and policy statements should not "lightly" be converted into employee contracts (*id.*). Likewise, this case is unlike the First Department's decision in *Mulder v Donaldson, Lufkin & Jenrette*, 208 AD2d 301 [1st Dept 1995]). in which the First Department held that the employer's employment manual could serve as a contract with the plaintiff employee where the plaintiff very specifically relied upon the manual when he encouraged the defendant to report the misconduct of another employee. The manual expressly stated that this kind of reporting

would be protected against reprisals, and yet defendant allegedly terminated plaintiff for his report. The First Department held: "Thus, since this reporting requirement and reciprocal promise of protection in the [employment] manual impose an express limitation on the right of [the defendant employer] to terminate employees who make such reports, plaintiff possesses a cause of action for breach of contract" (*Mulder*, 208 AD2d at 307; *see also Cavanaugh v Doherty*, 243 AD2d 92, 100 [3d Dept 1998][plaintiff, who was terminated for conversation outside of the workplace in which her political affiliations became an issue, sufficiently plead claim for breach of contract where the employee manual had an express limitation on at will employment, the manual was distributed to 30,848 employees and plaintiff specifically pointed to a provision providing for discipline for good and sufficient cause]).

The court does not find that O'Halloran's breach of contract claim is sustainable on these facts. O'Halloran argues that defendants, by treating her in an unlawfully discriminatory manner, defendants violated their own policies as a result of their unlawful animus against her. Specifically, O'Halloran argues that by failing to investigate her complaint, by failing to engage in an interactive process, by failing to offer her an opportunity to rehabilitate herself, and by failing to update her employment description, defendants breach a contract with her. In this instance, the court finds that these allegations align with the circumstances in *Lobosco*, and that this court cannot lightly create a contract from these employment policies. O'Halloran has not shown a previous reliance on the policies or any unique circumstance in her case as to how these policies can be construed as a contract. Her alleged violations of defendants' own policies are support for O'Halloran's causes of action that defendants violated NYSHRL and NYCHRL in their treatment of her. As for this cause of action, the court denies O'Halloran's motion for summary judgment and grants defendant's motion for summary judgment dismissing it.

E. **O'Halloran's Claim of Defamation**

O'Halloran argues for summary judgment on her defamation claim by relying on the evidence that Menduina referred to her as a "dyke," a "fuckin' dyke," a "bitch," a "disgusting bitch," and a "dyke bitch," and other derogatory labels when speaking to O'Halloran's colleagues. Additionally, O'Halloran argues that Menduina "made up [a] story" about Mandelino and O'Halloran being involved in sexual acts together "in order to ridicule her" (O'Halloran's memo in support at 20 citing Campana dep tr.). O'Halloran also cites Menduina's comments to other employees about O'Halloran wearing flannel shirts, and "something about that she wants to be a man, she's going to get her tits cut off" (O'Halloran's memo in opp at 24 citing Campana dep tr. at 100). And further that Menduina used derogatory language to refer to O'Halloran that was "vile" (Citing joseph Murphy dep tr). Finally, O'Halloran argues that Menduina's use of the "toothless monster" to refer to a "vicious woman's vagina" was defamatory, and that he stated that he was "going to get rid of that dyke" (exhibit A at 143 and exhibit E at 4-18).

Defamation is the making of a false statement that tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace or induce an evil opinion of him in the minds of right thinking persons and deprive him of their friendly intercourse in society" (*Franklin v Daily Holdings Inc.,* 135 AD3d 87, 91 [1st Dept 2015]). "The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory. Since falsity is a sine qua non of a libel claim and since only assertions of fact are capable of being proven false, we have consistently held that a libel action cannot be maintained unless it is premised on published assertions of fact" *(Brian v Richardson*, 87 NY2d 46, 51 [1995]). "Distinguishing between assertions of fact and nonactionable expressions of opinion has often proved a difficult task. The factors to be considered are: '(1) whether the specific language in issue has a precise meaning

which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to' signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact" (Brian, 87 NY2d at 51).

Though name-calling may be vicious, ugly or insulting, it is not, under the law, defamatory because it is opinion rather than the assertion of a fact. For example, in *Wahrendorf v City of Oswego*, 72 AD3d 1604, 1605 [4th Dept 2010], the Court found that the defendant's characterization of the plaintiffs as slumlords and sociopaths, among other things, was not defamation.

In addition, to establish his right to relief, plaintiff also must show special damages (*see Franklin v Daily Holdings, Inc*, 135 AD3d 87, 92-93 [1st Dept 2015]). Special damages consist of the loss of something having economic or pecuniary value, which must flow directly from the injury to his reputation caused by the defamation and not from the effects of the defamation" (*id*., at 93).

The complaint and O'Halloran's affidavit both identify the alleged defamatory statements made by Menduina as referring to O'Halloran as a "fucking dyke," and a "dyke bitch" and other bases for a defamation claim, however, Menduina's false statements to colleagues that O'Halloran had travelled to Atlantic City with her former supervisor, Mandelino and that they were engaging in sexual conduct together are assertions capable of being proven false and tend to expose O'Halloran to public ridicule. Defendants argue that because Menduina is entitled to the common-interest privilege, O'Halloran's defamation claim fails. Defendants cite the rule of law that this privilege extends to a "communication made by one person to another upon a subject in which both have an interest" (*Liberman v Gelstein*, 80 NY2d 429, 434 [1992]). The Court finds that

Menduina's insults about O'Halloran are not covered by this privilege as they are not communications in which Menduina's "have an interest" under the meaning of the law. Nonetheless, O'Halloran is unable to establish that her demotion or financial damages were caused by Menduina's comments. This is so because Menduina, who made the offensive comments, testified that he made the decision to demote O'Halloran with imput from Lemanski. O'Halloran does not establish facts that Lemanski was privy Menduina's false statements about O'Halloran and Mandelino. O'Halloran is, therefore, unable to establish special damages.

As set forth above, "[s]lander as a rule is not actionable unless the plaintiff suffers special damage" (*Liberman*, 80 NY2d at 434). Since O'Halloran is unable to establish special damages, her slander claim is not sustainable unless it falls within one of the exceptions to this rule.

The four established exceptions (collectively "slander per se") includes statements that "tend to injure another in his or her trade, business or profession" (*id.* at 435). As Menduina's stories concerning O'Halloran and Mandelino had the capacity to do just this, O'Halloran is not tasked with proving special damages. Thus, there are questions of fact concerning Menduina's comments, as established by O'Halloran's motion papers, that prevent the court from ruling on this cause of action as a matter of law. Consequently, the court will not grant either party's motion for summary judgment as to O'Halloran's claim for defamation.

F. **O'Halloran's Claim for Punitive Damages**

O'Halloran moves for summary judgment on her claim for punitive damages and relies on New York case law to establish that a plaintiff is entitled to punitive damages where "the wrongdoer's actions amount to willful or wanton negligence, or recklessness, or where there is 'a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard"

(O'Halloran's memo in reply at 14, citing *Chauca v Abraham*, 30 NY3d 325, 329 [2017]). Pursuant to the NYCHRL, "a plaintiff is entitled to punitive damages where the wrongdoer's actions amount to willful or wanton negligence, or recklessness, or where there is 'a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard'" (*Chauca*, 30 NY3d 325).

In support of this argument that Menduina's conduct was willful and intentional, O'Halloran relies upon Campana's testimony that Menduina planned to "'set [O'Halloran] up' to be demoted," as well as Murphy's testimony that Menduina "had been trying to get rid of [O'Halloran] for a long time but he had difficulty finding 'dirt' on her so he planned to 'make something small seem large.'"

In opposition, defendants concede that if Menduina's actions amounted to willful or wanton negligence or recklessness, "[O'Halloran] could be awarded punitive damages under the NYCHRL," but, according to defendants, plaintiff has not established this. The Court finds, based upon the parties' motion papers, there is a question of fact ripe for submission to a factfinder, and will not dismiss this claim for punitive damages (*see Rivera v United Parcel Service, Inc*., 148 AD3d 574, 575-576 [1st Dept 2017]; *Salemi v Gloria's Tribeca Inc*., 115 AD3d 569 [1st Dept 2014]).

In accordance with the foregoing, it is

ORDERED that plaintiff Margaret O'Halloran's motion for summary judgment on her complaint is denied in its entirety; and it is further

ORDERED that defendants Metropolitan Transportation Authority and New York City Transit Authority, MTA Bus Company and George Meduina's motion for summary judgment is granted

solely to the extent that O'Halloran's cause of action for breach of contract is dismissed, but denied in all other respects; and it is further

ORDERED that the parties in this action are directed to appear at a conference before the Honorable Richard G. Latin, 71 Thomas Street, Room 210, on September 17, 2025 at 2:00PM.

This constitutes the decision and order of the Court.

8/18/2025
DATE

RICHARD G. LATIN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE