SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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SANDRA BOGOTA, MARILYN RIVAS, GLADYS VILLANUEVA, RUTH CUEVAS, EMILINA APORTELA and CLAUDIA CRISTANCHO,

Plaintiffs,

against

THE UNIVERSITY CLUB and MELQUISEDEC GUZMAN,

Defendants.

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Index Number 114951/2005E
Mot. Seq. Nos. 009, 010

DECISION AND ORDER

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E-Filed papers considered in review of these motions to dismiss and for summary judgment and cross-motion for default:

	Papers	E-Filing Document Number
Seq. 009	Notice of Motion and Affidavits Annexed	29, 29-1 - 29-5
	Notice of Cross Motion , Affirmation, Exhibits	35, 36, 36-1 - 36-9
	Corrected Aff. in Reply & Opp.	45, 45-1 - 45-4; 46, 46-1 - 46-4
Seq. 010	Notice of Motion, Affirmation, Exhibits, Affidavits	24, 25, 25-1, 26, 27, 28
	Memo of Law in Opposition, Exhibits	31, 32, 32-1 - 32-9, 33, 33-1 - 33-10, 34, 34-1 - 34-10
	Reply Affirmation, Affidavit, Exhibits	40, 40-1, 41, 41-1, 42

PAUL G. FEINMAN, J.:

Motions bearing sequence numbers 009 and 010, and the cross motion filed in response to motion sequence number 009 are all joined for purposes of decision.

In motion sequence 009, defendant Guzman moves for an order dismissing the first amended complaint in its entirety pursuant to CPLR 3211 (a) (8). Plaintiffs cross-move for leave to enter a default judgment against Guzman or, alternatively, for permission to serve an amended

complaint pursuant to CPLR 2215, 3025, and 3215.[1]

In motion sequence 010, the University Club seeks summary judgment and dismissal of the first amended complaint as against it, specifically the first, second, third, and fifth causes of action, pursuant to CPLR 3212.[2]

For the reasons which follow, defendant Guzman's motion and plaintiffs' cross motion are denied, as is defendant University Club's motion.

Background

At the time this litigation commenced in October 2005,[3] plaintiffs were all employed as "C" banquet servers at defendant University Club, meaning they were considered "extra" workers, worked less than 750 hours a year, and received no benefits (Am. Compl. ¶¶ 6, 9 [Doc. 29-3]).[4] Plaintiffs allege that during their employment, they were variously the subjects of sexual molestation, unwanted sexual propositions, sexual speech, and touching by co-defendant Melquisedec Guzman, the First Banquet Captain and their supervisor in charge of their work assignments (Am. Compl. ¶¶ 7, 8, 11 [Doc. 29-3]). According to the First Amended Complaint,

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[1] The court notes that not all parties adhered to their agreed upon schedule for submitting papers; however, the court has considered all submitted papers.

[2]Defendant references a *second* amended complaint, however this document has never been filed with the court, nor was court permission, if needed, granted (CPLR 3025). The document is not being addressed in this decision.

[3]Plaintiff Rivas has since been promoted as of February 2006, to the "B" list, because she had worked more than 750 hours during the 2005 calendar year (Marasciullo Aff. in Supp. ¶ 5 [Doc. 25]). Plaintiff Bogota has since resigned and moved out of state (Marasciullo Aff. in Supp. ¶ 5, n. 2 [Doc. 25]).

[4]Document references throughout this decision are to the e-filed documents filed by the parties in the NYSCEF system.

Guzman subjected various plaintiffs to inappropriate behaviors beginning as long ago as about 1999 (Aportela ¶ 27), and 2000 (Cuevas ¶ 31), and escalating in intensity in 2003-2005 (Cristancho ¶ 21; Aportela ¶ 28); 2004 (Villanueva ¶ 20; Cuevas ¶ 35), and 2005 (Bogata, ¶ 15; Rivas ¶ 17; Villanueva ¶ 19; Cuevas ¶ 38). Plaintiffs understood that acceding to Guzman's sexual advances would enable them to obtain more and better work assignments, and perhaps enable them to be promoted to "B" banquet workers with benefits and more hours (Am. Compl. ¶¶ 10, 12-14).

The original complaint, filed in the names of plaintiffs Bogota, Rivas, and Villanueva, alleged, as against both defendants: a hostile work environment based on sexual harassment, and quid pro quo harassment in violation of New York City Human Rights Law §§ 8-107 (1) and (13); common law sexual assault and battery as against Guzman; and common law negligent retention of Guzman by the University Club (Compl. [Doc. 2]). It sought a temporary restraining order, preliminary injunction, and permanent injunction, declaratory relief, punitive damages, and recovery of lost wages, tips, and benefits, as well as compensatory damages (*id.*).

Issue was joined on November 29, 2005 when the University Club served its answer containing seven affirmative defenses (U.C. Answer [Doc. 4]). Guzman apparently served his answer on or after the April 19, 2006, date of his pleading, in which he denied the allegations and submitted seven affirmative defenses (Guzman Answer [Doc. 29-2], without affidavit of service).

In July 2006, in response to plaintiffs' motion seeking a preliminary injunction and a finding of civil contempt against the University Club, the justice previously assigned to this litigation ordered an evidentiary hearing. By order dated September 21, 2006, that court then permitted the motion to be withdrawn pursuant to a so-ordered stipulation of the same date (Doc.

7). The stipulation, signed by plaintiffs' attorney and the attorney for the University Club, agreed not only to withdraw the motion, but also, in order to "obviate motion practice concerning the proposed amendments to the Complaint," that plaintiffs could file their proposed first amended complaint without opposition, and that it be deemed filed and served as of the date the stipulation was so-ordered (Doc. 7, 8). The court's permission was given "notwithstanding the fact that counsel for defendant Guzman did not sign the Stipulation" (Doc. 8). The stipulation provided 30 days for the defendants "to respond to answer or otherwise move with respect to the amended complaint" (Doc. 29-4, ¶ 3).[5]

Plaintiffs' First Amended Complaint, dated June 16, 2006, was actually filed in the New York County Clerk's Office on October 5, 2006, and added plaintiffs Cuevas, Aportela, and Cristancho as well as an additional cause of action alleging retaliation by the University Club in violation of Human Rights Law § 8-107 (7), based on its conducting interviews of its employees and spreading rumors that plaintiffs were prostitutes (Doc. 9). The claims seeking injunctive and declaratory relief were withdrawn (*id.*).

The University Club filed its Answer to the First Amended Complaint on February 21, 2007 (Doc. 10). Its answer denies the allegations and contains seven affirmative defenses. Guzman did not file or serve an answer to the amended complaint.

The parties all appeared for a preliminary conference on January 31, 2007 (Doc. 11), after which they engaged in discovery under Article 31 of the CPLR. During the next two years,

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[5]Although Guzman does not explicitly contend that he was never served in any manner with a copy of the proposed amended complaint, plaintiffs' counsel submits a copy of an e-mail sent by him on June 22, 2006, to Guzman's attorney, indicating that attached to the e-mail was a copy of the proposed amended complaint (Doc. 36-2). It does not appear that Guzman's attorney objected to receipt of the proposed amended complaint.

3. Motion for Summary Judgment

The University Club moves pursuant to CPLR 3212 for summary judgment and dismissal of the First Amended Complaint as against it. It argues that plaintiffs cannot establish the prima facie elements of their quid pro quo harassment, negligent retention, and retaliation claims. It further argues that it is entitled to summary judgment and dismissal as to the claims of hostile work environment and quid pro quo harassment because it can establish affirmative defenses, namely that it prohibited sexual harassment and had established a meaningful complaint process, that none of the plaintiffs ever explicitly complained about sexual harassment, and when plaintiff Bogota did complain, the University Club took prompt corrective action, including pulling Guzman from the job. It also argues that the punitive damages claim should be dismissed because there is no evidence that it was aware of the alleged harassment and, when it found out about it, it took immediate corrective action.

Summary judgment is proper when there are no issues of triable fact *(Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]). The evidence will be construed in the light most favorable to the one moved against *(Corvino v Mount Pleasant Centr. Sch. Dist.,* 305 AD2d 364, 364 [2d Dept 2003]; *Bielar v Montrose,* 272 AD2d 251, *251* [1St Dept. 2000]). Issue finding rather than issue determination is its function *(Sillman v Twentieth Century Fox Film Corp.,* 3 NY2d 395 [1957]).

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its favor *(GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.,* 66 NY2d *965,* 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial *(Kosson v Algaze,* 84 NY2d 1019 [1995]). A party opposing summary judgment must lay bare its proofs so that the matters raised in the pleadings are shown to be real and capable of being established upon trial *(W W. Norton & Co. v Roslyn Targ Literary Agency, Inc.,* 81 AD2d 798 **[itt** Dept. 1981]). It is not the court's function to assess credibility *(Ferrante* v *American Lung Assn.,* 90 NY2d 623, 630 [1997], citing *Glick & Dolleck v Tri-Pac Export Corp.,* 22 NY2d 439, 441 [1968]).

Section 107 of the New York City Human Rights Law, codified in the New York City Administrative Code, defines illegal employment practices and prohibits sexual harassment, among other conduct (NYC Admin. Code § 8-107 *et seq.).* It is unlawfUl for an employer or an employee to discriminate against an employee because of gender in the terms, conditions, or privileges of employment (NYC HRL § 8-107 [1] [a]).
The New York City Human Rights Law imposes liability on employers for the unlawful discriminatory practices of their employees or agents when they exercise managerial or supervisory responsibility, or when the employer knew of the employee's discriminatory conduct and either acquiesced or failed to take immediate and appropriate corrective action, or when the employer should have known of the conduct and failed to exercise reasonable diligence to prevent it (NYC Admin. Code § 8-107 [13] [b] [1 -3]). An employer is deemed to have knowledge of an employee's unlawful conduct where the conduct was known to another employee or agent exercising managerial or supervisor responsibility (NYC Admin. Code § 8-107 [13] [b] [2]).

Where an employer's liability is established based solely on the conduct of its employee, the employer is permitted to plead and prove that, prior to the discriminatory

conduct for which it was found liable, it had established and complied with policies, programs, and procedures to prevent and detect unlawful discriminatory practices by employees, including a meaningful and responsive investigative procedure and procedures for taking appropriate action; it had a firm policy communicated to employees indicating that the company is against such practices; it had a program to educate employees and agents about unlawful discriminatory practices, and had procedures for supervision and oversight of employees directed at prevention and detection and, as well, that it had a record of no or few prior incidents of discriminatory conduct by the employee (NYC Admin. Code § 8-107 [13] [dl [1-2]). According to subsection (e) of the same section, a demonstration of "any or all of the factors listed above" in addition to any other relevant factors, will be considered in mitigation of the amount of civil penalties or punitive damages which may be imposed, and will be among the factors considered in determining an employer's liability under subparagraph three of paragraph b of this subdivision (pertaining to situations where the employer should have known of the employee's discriminatory conduct and failed to exercise reasonable diligence to prevent such conduct).

However, under section 8-107 (13) (f) of the Administrative Code, an employer found liable for the unlawful discriminatory conduct of its employee or agent, who establishes that it has policies, programs, and procedures in place, as established by the Human Rights Commission, and that they were being complied with at the time of the unlawful conduct, will not be held liable for any civil penalties or punitive damages which might be imposed under the New York City Human Rights Law.

A. Sexually Hostile Work Environment (First Cause of Action)

"[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex" *(Meritor Sav. Bank, FSB v Vinson,* 447 U.S. *57,* 64 [19861 [internal quotations omitted]). As noted by *Meritor,* the kinds of workplace conduct that may be actionable include unwelcome sexual advances, requests for sexual favors, and verbal or physical conduct of a sexual nature (447 U.S. at 65, citing 29 CFR § 1604.11 [a] [1985]). To establish a prima facie case of hostile work environment sexual harassment, a plaintiff must show that her employer knew or should have known that she was subjected to unwelcome sexual harassment and that the employer failed to take remedial action *(Matter of Bracci v New York State Division of Human Rights,* 62 AD3d 1146, 1148 [3d Dept. 2009], citation omitted). Plaintiffs assert many instances of inappropriate sexual conduct on the part of defendant Guzman, some of which he concedes took place but were consensual, and also that the University Club had knowledge of his propensities because plaintiff Aportela spoke to defendant's Kevin Fiske in 2009 about Guzman's actions.

Defendant University Club argues that it is entitled to summary judgment and dismissal of the first cause of action because co-defendant Guzman was not a supervisor or manager within the meaning of the law, relying in part on the reasoning in *Mack v Otis Elevator Co.,* 326 F.3d 116, 125 [2d Cir.], *cert. denied* 540 U.S. 1016 [2003]). Defendant argues that Guzman was not the senior employee on site, and lacked authority to terminate, control wages, promote, or transfer the "C"-list workers. It points to the testimony of plaintiff Rivas, in support of its argument, who stated that at one point she

spoke with defendant's General Manager, John Dorman, to request more hours, rather than with Guzman (Rivas EBT 103-105 [Doc. 25-1:173 - 175]). Thus, defendant argues that because Guzman is not a supervisor, his actions cannot in any manner be imputed to the Club, and thus the first cause of action should be summarily dismissed as against it.

However, according to *Mack,* it is when a "supervisor with immediate (or successively higher) authority over the employee" has engaged in the complained of conduct, that the "employer [may be] subject to vicarious liability." (326 F 3d at 123, quoting *Burlington Indus. Inc. v Ellerth, 524* U.S. 742, 765 [1998]; *see also Faragher v City of Boca Raton, 524* U.S. 775, 807 [1998]). It is not sufficiently established that Guzman was not functioning at least in a limited supervisory capacity, given that he was charged with scheduling the banquet workers for the various shifts. Guzman testified that he had to find people to fill the work slots, and that he did payroll, recorded time and split up the tips (Guzman EBT 21 [Doc. 34-6:3-4]). To find the workers, he would telephone the 60 people to find who was available to work and give them the day and rotate among them (Guzman EBT 136-138 [Doe. 34-6:35-36]). In sum, it could be found that he wielded power over plaintiffs' schedules because to the extent there were work slots open for the "C" list workers, he then chose who first to contact to ask to work. Although Guzman's authority was limited in nature, the fact that he had the power to pick and choose which workers would be asked to work, raises a question of fact as to whether he can be considered a supervisor under the law and thus, whether defendant University Club should be held liable.

The University Club also argues that it has a no-tolerance policy toward employee harassment of any kind. It points to its anti-harassment provisions included in its 2005 Work Rules & Policies for Part-Time Employees (Doc. 25-1:28 *el. seq.)* and its Spanish-language anti- harassment policy (Doe. 25-1:33 c/ *seq.).* It notes that it includes sexual harassment training for its employees including policies for reporting harassment. It also points to General Manager John Dorman's actions when plaintiff Bogota complained to him in October 2005 about Guzman: Dorman took Guzman off the floor within about 30 minutes, allowed no further contact with any employees, and suspended him (Dorman Memo to File, *10/27/2005* [Doe. *25*- 1:158-160]; Dorman EBT 209-2 19 [Doe. 25-1:79-83]),

The University Club cannot show that any of the plaintiffs actually received a written copy of the Club's policy, or attended a sexual harassment training. General Manager Dorman testified that the Club had a training session in about 1999 (Dorman EBT 52 [Doc. 25-1:55]). He also testified that a handbook was distributed in 2001 and that managers would go through the handbook with employees (Dorman EBT 71, 87 [Doc. 25-1:58, 60]). A training was also done in 2005, and a separate handbook was created in 2005 for part-time staff (Dorman EBT 77, 87 [Doe. 25-1:59, 60j). Every department was required to take the training (Dorman EBT 107 [Doe. 25-1:64]). This included the banquet department and the banquet extras (Dorman EBT 111-112 [Doe. 25-1:68-69]). Dorman does not recall whether any trainings were specifically set up for the banquet extras, given that their work was less scheduled, and he cannot recall whether any of the plaintiffs were at any of the training sessions (Dorman EBT *58,* 118 [Doe. 34-5:8, 17]). As to the manual, he gave instructions to the food and beverage director, and to Guzman and to another employee, to distribute the handbook to the part-time banquet servers when they arrived for work (Dorman EBT 114 [Doe. 25-1:71]). He had no actual

knowLedge that any of the plaintiffs received a copy of the handbook (Dorman EBT 115 [Doe. 25-1:72]).

Defendant has established that it has policies and procedures in place, but not that the "C" list workers were actually included in the sexual harassment training, or that they knew their rights and the procedures to folLow. As set forth below, plaintiffs raise a question of fact as to whether the Club was in fact on notice as long ago as 2003, about Guzman's manner of filLing the time slots. Accordingly, summary judgment is not appropriate as to the first cause of action, as there remain unresolved material questions of fact.

B. Quid Pro Quo Harassment (Second Cause of Action)

To establish a prima facie case of quid pro quo sexual harassment, a plaintiff must present evidence that she was subjected to unwelcome sexual conduct and that the reaction to that conduct was then used as a basis for decisions, either actual or threatened, affecting compensation, terms, conditions or privileges of empLoyment *(Mauro v Orville,* 259 AD2d 89, 92 [3d Dept. 1999], *lv denied* 94 NY2d 759 [2000]). "The relevant inquiry in a quid pro quo case is whether the [employer] has linked tangible job benefits to the acceptance or rejection of sexual advances" *(Karibian v Columbia Univ.,* 14 F.3d 773, 777-778 [2d Cir.]; *cert. denied* 512 U.S. 1213 [1994]). By definition, the quid pro quo harasser wields the employer's authority to alter the terms and conditions of employment, either actually or apparently, and the law thus imposes strict liability on the employer for quid pro quo harassment *(Karibian, supra,* citing *Kotcher v Rosa & Sullivan Appliance Ctr., 957* F. 2d *59,* 62 [2d Cir. 1992] ["The supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee."]).

The allegations here are that plaintiffs were inappropriately touched and spoken to, that Guzman attempted to or successfully coerced them into allowing him to touch their bodies in a sexual manner based on promises that he could help them and give them work hours, and that when they rebuffed him, or tried to rebuff him, he would for some period of time, not contact them about available work, resulting in a decrease in their hours worked.6 Specifically, as to plaintiff Villanueva, the amended complaint alleges Guzman asked her out for coffee in April 2004, and when she got in his car, suggested they go to a hotel; upon her refusal, he assaulted her, then told her she would get money by going with him, gave her $80, and thereafter continued to ask her out for coffee (Am. Compl. ¶ 20). After several refusals by her, he reduced the number of hours offered to her for work (Am. Compl. ¶ 20). As to plaintiff Cuevas, Guzman asked Cuevas to go with him to a hotel in about 2003, telling her should would receive a lot more work and money, and she would agree but then make excuses, and in 2004, he cut the number of her work assignments (Am. Compl.3fl{ 31-34). He then again telephoned her and suggested she let him help her, and after breaking more promises to go with him to a hotel, she ultimately went twice with him in the winter of 2004 (Am Compl. ¶] *35,* 36). She began receiving more work,

6Counsel has withdrawn this claim as to plaintiff Bogota (Bogota EBT 6 1-62 [Doc. *25-1:254-255]).* but in the spring or summer of 2005, Guzman *again* "significantly" reduced her hours because she would not go again to a hotel (Am. Compl. ¶ 38). As to plaintiff

Aportela, since beginning her work in 1999 at the Club, Guzman had frequently made inappropriate comments, but in about 2003 he became much more insistent, including meeting her in her neighborhood, touching her inappropriately, and aggressively asking her out and, after she complained "vociferously,"

Guzman gave her assignments only sporadically throughout the year (Am. Compi. ¶31 28, 29). Aportela testified that she complained to the Club's Kevin Fiske, and then to the union, after which Guzman did not give her any work (Aportela EBT 180 [Doc. 34-2:2 1]). As to plaintiff Cristancho, the amended complaint alleges that in about May 2003, when she told him she needed more work as she had separated from her husband and had to support her son, he said he would take care of her, and gave her steady work for several months, however, after she turned down his invitations for coffee, "for approximately several months the frequency of the work she received from Guzman was reduced, or stopped entirely for periods." (Am Compl. ¶3J 23, 24). This pattern repeated itself several times prior to his assaulting her (Am. Compl. ¶ 25).

Defendant argues that plaintiffs cannot establish their claim as to quid pro quo harassment, and that it is entitled to summary judgment and dismissal of the quid pro quo harassment claim. Its first argument, that Guzman is not a supervisor over plaintiffs, is unpersuasive for the reasons already explained above in section 3. A. Its second argument is that, based on the payroll records, with the exception of plaintiff Aportela, all plaintiffs worked a greater number of hours in 2004 than in 2003, and again in 2005 than in 2004 (Doc. 25-1:636; Doc. 25-1:638; Doc. *25-1:644;* Doc. 25-1:649). Defendant argues that Aportela's hours were diminished because, as she testified, she traveled to Colombia for one month and then found full-time work at another company from August 2003 to October 2004, thus precluding her from also working at the University Club, However, Aportela testified that her hours at this job were between 5:00 a.m. to 2:00 p.m., and that she took those hours in order to leave her afternoons and evenings, and Saturdays and Sundays, open for any work assignments at the Club (Aportela EBT 293-294 [Doc. 34-2:25-26]).

Defendant also argues in support of this branch of their motion that plaintiffs do not specify any particular date on which they rebuffed Guzman's advances after which their hours were decreased, and that they do not show that their hours were actually decreased. It points to Villanueva's testimony that she rebuffed Guzman's invitation in January 2004 but still worked significant hours in February 2004, a traditionally slow month at the Club (Villaneuva EBT 249- 251, 279 [Doc. 25-:417-420, 426]). It notes that Rivas worked enough hours in 2005 so that she was promoted to the B-List in 2006 (Rivas EBT 274-275 [Doc. 25-1:205-206]).

Although these records tend to belie plaintiffs' claim, other than Aportela's, that Guzman cut their hours overall in a significant fashion, defendant has not shown that Guzman did not, as plaintiffs claim, temporarily stop assigning them work based on their unwillingness to go out with him, only later offering them hours when he had no other workers to fill out his schedule. Thus, the branch of defendant's motion to dismiss the second cause of action on summary judgment is denied.

C. Negligent Retention (Third Cause of Action)

To establish a claim against an employer for negligent retention of an employee, a

plaintiff must show that the employer was on notice that the employee had a propensity to commit the alleged acts (G.G. *v Yonkers Gen. Hosp.,* 50 AD3d 472 [1St Dept. 2008] [quotation and citation omitted] [employer established prima facie case for summary judgment dismissal where it showed that during the six years the nurse had worked at the hospital prior to the incidence, he had received positive reviews]); *Gomez v City ofNY,* 304 AD2d 374, 374 [1's Dept. 2003] [recovery on a negligent hiring and retention theory requires a showing that the employer was on notice of the relevant tortious propensities of the wrongdoing employee, and the employee submitted sufficient proof of its lack of notice to demonstrate prima facie entitlement to a judgment as a matter of law]).
The Club argues that plaintiffs cannot establish this cause of action. It contends that Guzman was employed for more than 30 years, and that it never heard any complaints about him in that vein. The Club's General Manager John Dorman never heard any complaints about him prior to these at issue, nor had Food & Beverage Director Kevin Fiske (Dorman AlT. ¶ 22 [Doe 27]; email Fiske to Dorman, 10/31/2005 [Doe 25-1:595]). Defendant points out that Bogota, Rivas, Villanueva, Cueva, and Cristancho all conceded they did not complain to anyone in management about Guzman or about sexual harassment prior to filing the lawsuit (Marasciullo Aff. in Supp. ¶ 77, n. 24 [Doe. 25]). Bogota admitted to Dorman that the University Club would have had no knowledge of Guzman's alleged actions prior to her October 2005 complaint (and see Bogota EBT 83-84 [Doe. 25-1:258-259]). Defendant also argues that the record shows that Aporrela did not complain about Guzman or sexual harassment (Marasciullo Aff. in Supp. ¶ 77, n. 25), although this is disputed by Aportela, thus raising a material question of fact.

Aportela contends that she approached defendant's Food & Beverage Director Kevin Fiske in 2003 to complain about the number of hours that she was being given to work. She told him that Guzman put the people he preferred into the work schedule, and she did not think it was fair that she would have to go out with Guzman to be assured of enough hours of work so as to get to the "B" list. (Aportela EBT 100-101 [Doc. 34-2:3-4]). She did not tell Fiske that Guzman tried to touch her breast or that he had touched her or that he was sexually harassing her, but rather told him about the "invitation" that Guzman presented and the "under the table" arrangements that included her going out with Guzman in order to make it onto the "B" list of workers (Aportela PBT 109 [Doc. 34-2:7]). According to Aportela, Fiske laughed and said he would investigate because that could not be happening at the Club (Aportela EBT 102 [Doc. 34- *2:5]).* Later, he told her to make a complaint through her union representative (Aportela EBT 108 [Doc. 34-2:6]).

Defendant argues that Aportela's "isolated and vague complaint" was "clearly too equivocal" to put the University Club on notice that Guzman had a propensity to commit sexual harassment; they argue it was simply too vague for Fiske, and thus defendant, to be put on notice of Guzman's activities (Reply Aff. ¶ 18 [Doc. 40]).[7] However, if Aportela's description of Fiske's response is credited by a jury, the jury could find that his promise to investigate because this behavior could not be going on at the University Club demonstrated that he very clearly understood the implication of Guzman' s alleged behavior and that he had clear notice of same. Ultimately, this is a jury question.

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7 Defendant also argues that Aportela' s claims to have spoken with two different union representatives, once alone and once with her husband, are uncorroborated by any union records (see, AportelaEBT 110, *etseq.;* 120 *etseq.* [Doc. 34-2:8-13 *etseq.]).*

Defendant's argument in the alternative, that the exclusive remedy for an employee's negligent retention claim falls under the Workers Compensation Law § 11, 29 (6), has no merit, given that the definition of "injury" in the Workers Compensation Law "means only accidental injuries arising out of an in the court of employment"(sic) (Workers' Comp. Law § 2). The branch of the motion for summary judgment and dismissal of the third cause of action is denied.

D. Retaliation (Fifth Cause of Action)

Under City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practice *(see* Administrative Code of City of NY § 8407 [7]). "The retaliation or discrimination complained of. . . 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." (Id.).

In order to make out the claim, plaintiff must show that: (1) she has 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 *(Forrest v Jewish Guild for the Blind,* 3 NY3d *295,* 312-313 [2004]). Recent decisions have held that it is not necessary to demonstrate that an employee suffered an adverse employment action *(see, Williams v New York City Hous. Auth.,* 61 AD3d 62, 69-70 [1 ' Dept.], *lv denied* 13 NY3d 702 [2009]). Rather, the alleged act of retaliation must be considered in context, to determine if it is "chilling" *(Williams* at 71).

The Club argues that there is no basis for the claim of retaliation and that the allegations are insufficient to maintain a cause of action. Plaintiffs allege that when defendant commenced an investigation after plaintiffs filed their complaint and also filed a criminal complaint, it caused rumors to be spread to the other workers that Rivas and the other plaintiffs were prostitutes. Defendant argues that the source of any rumors was likely to have come from plaintiffs' actions with undertaking the lawsuit. It points to the contents of the initial complaint and the amended complaint which include allegations that Guzman gave money to some of the plaintiffs during or after their physical interactions and does not state that the money was returned or that a complaint was made (First Am. Compi. 1111 16, 18, 20, 36). It points to three articles published by THE NEW YORK POST, one on October 30, 2005, which included a photograph of the original plaintiffs and their names, and one on November 6, 2005, neither of which mention anything about paying money for sex, and a third on March *5,* 2006, which included a reference to a "smear campaign" involving investigators telling witnesses that one of the plaintiffs charged money for sex (Doe. 25-1:629-635).

The Club also argues that it was required to investigate the allegations under section 8- 107 (13) (d) (1) (ii) of the New York City Administrative Code, and that decisional law has held that employers cannot be held liable for emotional distress during their investigative efforts, citing *Malik v Carrier Corp.,* 202 F.3d 97, 106 (2d Cir. 2000). It argues that the investigation itself cannot be considered retaliation *per se* because an employer cannot be barred from investigating a complaint against an employee, citing

Dixon v City ofNY., 2008 WL 4453201, 2008 U.S. Dist. LEXIS 75721 (EDNY Sept. 30, 2008). Moreover, it suggests that plaintiff Rivas may be the source of the statements. They note Rivas's testimony in which she named several co-workers who told her that the investigators stated or suggested that she was a prostitute, but although she asked for the name or names of the investigators, she could not remember what she was told (Rivas EBT 393-398 [Doe. 25-1:225-230]). Jndeed, Cristancho testified that Rivas told her that there were rumors that some of the plaintiffs were prostitutes (Lovera EBT 198 [Doc 25-1:506]). In comparison, Villaneuva testified that she heard no rumors about Rivas nor had Rivas told her that rumors were being spread about her (Villaneuva EBT *432-435* [Doe. 434-437]). Aportela testified that she never heard rumors that Rivas and Bogota were prostitutes and did not know why her answer to an interrogatory said that she had heard such rumors (Aportela EBT 190-192 [Doe. 25-1:313-315]). Cuevas, when asked whether she heard any rumors at work about any of them, she said she had not, but when asked whether she had heard that Rivas had been called a term synonymous with a prostitute, said she had heard certain rumors but she would ignore them and then leave the area where the comment had been made (Cueva EBT 320-322 [Doe. 25-1:472-474]).

Defendant University Club suggests that if there were such rumors and they did not originate from Rivas, they were likely the result of what was alleged in the complaint itself considering that it contains allegations about sex and money. Defendant denies that it spread rumors and argues that there is no admissible evidence that indicates it started the rumors. It argues that plaintiffs' evidence is solely from Rivas, in the form of self-serving uncorroborated hearsay statements that other people told her they heard rumors about her. Nonetheless, otherwise inadmissible evidence can be considered to *defeat* an application for summary judgment *(Cohen v Herbal Concepts, Inc.,* 100 AD2d 175, 182 [151 Dept.], *aff'd* 63 NY2d 370 [1984], citing *Phillips v Joseph Kantor & Co.,* 31 NY2d 307, 312-313 [1972] [matter involving the Dead Man's Statutel). In so ruling, the court need not rule upon the trial admissibility of such testimony.[8] Here, it remains a question of fact as to whether there were rumors concerning plaintiffs' sexual activity that surfaced during the course of defendant's investigation and whether these rumors were improperly spread by defendant's investigators.

E. Punitive Damages

Because the claims against defendant University Club are not dismissed based on summary judgment, and some of the surviving claims could, if proven at trial, theoretically warrant a trial judge submitting the question of punitive damages to a jury, the branch of the motion which seeks to strike the demand for punitive damages from the complaint is denied. Obviously, the trial justice is free afier hearing all the evidence at trial to make her or his own determination as to what damages claims should be submitted to the jury.

It is therefore,

8The court takes note of defendant's argument that a previous decision by the justice originally assigned to this litigation has "already held that Rivas' self-serving testimony on this very issue is inadmissible hearsay," and that this is Law of the case and cannot be litigated (ReplyAff. ¶ 47 [Doc. 40], citing *Bogota et al. v The University Club et aL,* Index No. 114951/2005, Dec. & Order of dated July 10, 2006 [Kapnick, J.] [see Doe. 40-1:13-16])

ORDERED that the defendant Guzman's motion to dismiss and the plaintiffs' cross motion for entry of a default judgment (Motion Sequence No. 009) against Ouzman are both denied; and it is thrther

ORDERED that defendant Guzman shall serve and file an answer to the First Amended Complaint within 20 days of entry of this decision and order; and it is further

ORDERED that the defendant University Club's motion for summary judgment (Motion Sequence No. 010) is denied in its entirety; and it is further

ORDERED that the parties are to appear in Mediation-I in Supreme Court, 80 Centre Street, New York, New York 10013 for mediation as previously scheduled for August 18, 2010.

This constitutes the decision and order of the court.

Dated: July 3, 2010