

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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JENNIFER ECKHART,	:	
	:	Civil Case No. 1:20-cv-05593 (RA)(GWG)
Plaintiff,	:	
	:	
v.	:	
FOX NEWS NETWORK, LLC and ED HENRY,	:	
in his individual and professional capacities,	:	
Defendants.	:	
-----	X	

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT FOX NEWS NETWORK, LLC'S
MOTION FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

Plaintiff Jennifer Eckhart, a former associate producer at Fox Business Network, has accused defendant Ed Henry, a former correspondent at Fox News Network, LLC (“FNN”), of sexual misconduct, including raping her in a hotel room.¹ But Eckhart goes a step further and also attempts to hold FNN liable for Mr. Henry’s alleged actions. FNN is entitled to summary judgment on Eckhart’s remaining claims of sexual harassment, negligence, and retaliation because the undisputed facts prove that FNN neither knew nor had any reason to know about Henry’s conduct at the time it occurred.

Eckhart admits that she told no one at FNN about Henry’s alleged misconduct either at the time it was happening or during the entire time she worked at FNN. Rather, Eckhart raised these allegations with FNN for the first time through her lawyers on June 25, 2020—three years after the alleged harassment ended, and two weeks after Eckhart was terminated by FNN for longstanding, unremedied performance failures. Even though Eckhart was no longer employed by FNN, upon hearing of Ms. Eckhart’s allegations, FNN President Jay Wallace and Executive Vice President of Human Resources Kevin Lord suspended Henry that very day, took him off the air, and immediately hired an independent law firm to investigate. Notably, during that investigation Eckhart refused to disclose her communications with Henry—communications that, as FNN learned in discovery, contained numerous sexually provocative messages and intimate photographs that Eckhart sent to Henry and that she conspicuously omitted from her Complaint. FNN’s outside investigator issued findings, and Wallace and Lord fired Henry for his admitted violations of workplace policy *six days* after FNN first received Eckhart’s complaint. On the same day as

¹ Henry disputes Eckhart’s rape allegation, and FNN takes no position as to whether their sexual encounters were consensual—an issue that need not be resolved for purposes of FNN’s motion.

Henry's termination, Wallace and FNN CEO Suzanne Scott informed all employees that FNN had received a complaint of sexual misconduct against Henry, investigated, and fired him—and reminded everyone that FNN prohibits all forms of sexual harassment, misconduct, and discrimination.

FNN, in other words, took exactly the steps that would be expected of a reasonable employer and swiftly responded as soon as Eckhart brought Henry's alleged misconduct to the company's attention. These undisputed facts foreclose the conclusion that FNN had the contemporaneous knowledge that must be shown before an employer may be liable for the conduct of its employee. Eckhart therefore cannot satisfy the basic elements of her claims against FNN because, as the undisputed facts confirm, FNN neither knew nor had any reason to know about Henry's actions at the time they occurred. No reasonable jury could conclude otherwise, and FNN is entitled to summary judgment on Eckhart's remaining claims of sexual harassment, negligence, and retaliation.

First, Eckhart's claim against FNN under the New York State Human Rights Law, N.Y. Exec. Law § 290 *et seq.* ("NYSHRL"), fails as a matter of law because that statute does not permit a plaintiff to hold an *employer* liable for an *employee's* harassment unless she proves that the employer "encouraged or condoned" that behavior—a standard Eckhart does not come close to satisfying. To the contrary, Eckhart and Henry each confirmed under oath that they kept their relationship secret from FNN during the entire three-year period it lasted. Even though Eckhart had multiple opportunities to report any concerns about his behavior through multiple channels, Eckhart confirmed that she did not tell anyone at FNN about what allegedly happened to her until her lawyer did so after she was fired.

Nor can Eckhart satisfy the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 *et seq.* (“NYCHRL”), which imputes liability to an employer only if it should have known about the sexual harassment yet failed to exercise reasonable diligence to prevent it. FNN had no indication that Eckhart, a Fox Business Network associate producer based in New York, and Henry, a Fox News Channel correspondent based primarily in Washington, D.C., even had a personal relationship, let alone that they had been secretly communicating, often by way of sexually charged text messages, and having sex over a multiyear period. They worked for different FNN divisions, in different cities, in different roles, and on different shows. Henry was not Eckhart’s supervisor. (Dkt. 157 at 34.) Nor is there any evidence that should have placed FNN on notice that Henry would sexually harass Eckhart. Although FNN learned during the period of Eckhart’s employment that Henry had *consensual* affairs with two women other than Eckhart—one with no affiliation with FNN—it did not receive any complaints or other information suggesting that Henry had engaged in unwelcome sexual behavior until after Eckhart filed her lawsuit.

Second, FNN is entitled to judgment on Eckhart’s negligent supervision and retention claim because the New York Workers’ Compensation Law provides the exclusive remedy for damages allegedly caused by the negligence of an employer. This claim also fails because an employer can be liable for negligent supervision and retention only if it knew or should have known that its employee had a propensity to commit the same type of offense that the plaintiff alleges, and FNN’s knowledge of Henry’s prior consensual extramarital affairs did not, as a matter of law, put FNN on notice that Henry might commit sexual assault or rape.

Third, FNN is entitled to judgment on the retaliation claims under Title VII and the NYCHRL because retaliation requires that the plaintiff engage in protected activity, and Eckhart admitted she “*did not tell [FNN] at all about sexual harassment.*” (FNN’s Statement of Undisputed

Material Facts Pursuant to Local Civil Rule 56.1 (“56.1”) ¶¶ 95, 150.) And the undisputed facts further establish that Eckhart’s firing was entirely unconnected to her complaints. She was fired because she had a long history of documented poor performance that she failed to address notwithstanding escalating warnings that she would be subject to disciplinary action. Even if Eckhart had reported sexual harassment before being fired—which she concededly did not—no reasonable factfinder could conclude on this record that FNN fired her in retaliation for that (nonexistent) reporting.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. ECKHART’S EMPLOYMENT AT FNN AND HER SUBSTANTIAL PERFORMANCE DEFICIENCIES.

A. Eckhart’s Performance Deficiencies.

Eckhart began working at FNN in January 2013 as an administrative assistant to Liz Claman, the anchor of *Countdown to the Closing Bell*, a show on Fox Business Network. (56.1 ¶ 3.) In December 2015, Eckhart was promoted to the role of “researcher/booker” for *Countdown*, reporting to Brad Hirst, *Countdown*’s executive producer. (*Id.* ¶¶ 6-7.)

Eckhart’s production responsibilities included booking guests for *Countdown*; producing segments for the show, including creating “research packets” for Claman to use during the show to assist with guest interviews; drafting questions and talking points for Claman to use in interviews; and preparing “elements” of the show, such as graphics and banners that would appear on the screen while segments aired. (*Id.* ¶ 19.) Eckhart was expected to attend the production team’s daily meeting at 9am and to attend a meeting at 10am to brief Claman on the day’s show. (*Id.*) Eckhart, specifically, was responsible for creating and circulating a “morning rundown sheet,” which identifies the guest blocks and commercial breaks for the day’s show, before the 9am meeting. (*Id.*)

1. Eckhart's Chronic Tardiness and Absenteeism.

Eckhart consistently failed to arrive to work on time, which impeded her ability to accomplish her day-to-day tasks, including completion of the morning rundown sheet. In March 2018, during Eckhart's mid-year review, Hirst listed her "consistent tardiness" among the "main topics" for discussion. (*Id.* ¶¶ 29, 31.) In 2017, Eckhart was late or absent from work 16 times, mostly in the second half of the year, and in 2018, she was late or absent from work 15 times in the first two-and-a-half months of the year. (*Id.* ¶¶ 20, 28.) In an email memorializing Eckhart's mid-year review, Hirst wrote that he "told her that lateness would not be tolerated and could lead to disciplinary action." (*Id.* ¶¶ 29, 32.) Despite this warning about the potential for disciplinary action if her tardiness persisted, Eckhart was late at least another 33 times in 2018. (*Id.* ¶ 33.)

In August 2018, there was an opening for an associate producer on *Countdown*. (*Id.* ¶ 8.) Aside from her attendance issues, Eckhart had performed relatively well in the prior year, and Hirst promoted Eckhart to the associate producer role. (*Id.* ¶¶ 8, 24.) In doing so, Hirst explained to Eckhart that *Countdown* would begin to depend on her to "carry a heavier load in the production of the show." (*Id.* ¶ 25.)

2. Eckhart Receives a "Below Expectations" Overall Performance Rating Following Her Promotion.

Rather than fulfill the expectations of her new role, Eckhart's absences and tardiness became more frequent and problematic. Between her promotion in August 2018 and her mid-year review in January 2019, Eckhart was late or absent from work at least 19 times. (*Id.* ¶ 33.) During Eckhart's January 2019 mid-year review, Hirst addressed the timeliness issue with her once again. (*Id.* ¶ 35.) Nevertheless, between January 2019 and her July 2019 year-end review, Eckhart was late or absent at least 19 more times; by June 6, she had used her allotted sick days for 2019. (*Id.* ¶¶ 36-38.)

In Eckhart's 2019 year-end review, Hirst rated her overall performance as a 2 out of 5, "Below Expectations." (*Id.* ¶¶ 40-42.) The review again underscored her chronic lateness, which persisted even after Hirst "discussed this situation with [Eckhart] multiple times over the last year and a half, including [at] her quarterly review on March 19, 2018, yearly review the first week of July 2018, and again at [her] mid-year review the third week of January 2019." (*Id.* ¶ 43.) Hirst described Eckhart's timeliness problem as a "morale killer[]" and made clear that this was "her final warning and the next lateness will lead to disciplinary action." (*Id.*)

Eckhart failed to rectify this behavior in the face of Hirst's crystalline warning. In the short time between her review and September 13, 2019, Eckhart was late to work at least four more times. (*Id.* ¶ 44.) When Eckhart told Hirst that she would be late on September 13, 2019, Hirst responded: "I want to make sure you understand that lateness is unacceptable. We discussed this in your review. This is your final warning and any further infractions will be reported directly to Human Resources for disciplinary action." (*Id.* ¶ 45.)

3. Eckhart Releases Proprietary Company Information Without Approval and Fails to Follow Company Policy.

In September 2019, FNN was preparing to unveil a new costly on-screen graphics package. (*Id.* ¶ 47.) Before the launch, FNN conducted rehearsals using the new graphics during which Eckhart was videoed as a mock "anchor." (*Id.* ¶¶ 47-48.) After the rehearsal, Eckhart downloaded that video footage from FNN's proprietary system and posted the images of herself as an "anchor" on her personal Instagram page. (*Id.* ¶ 49.) In doing so, Eckhart publicly revealed a costly, proprietary graphics package weeks before the planned release. (*Id.* ¶ 50.) Hirst reprimanded Eckhart for revealing FNN's proprietary information and directed her immediately to remove the photos from Instagram, which she did. (*Id.* ¶¶ 51-54.)

Also in 2019, FNN’s Media Relations department complained to Human Resources that Eckhart had violated another company policy by appearing on material promoting an event that listed her as a “representative” of FNN, or at least gave the impression that she was representing FNN, without obtaining prior approval. (*Id.* ¶¶ 55-57.) In connection with that appearance, Eckhart also misrepresented her position at FNN by using a title different from her actual title of “associate producer.” (*Id.* ¶ 58.) Denise Collins, FNN’s Senior Vice President of Human Resources, counseled Eckhart that she must obtain approval from Media Relations before appearing as a representative for FNN and must use her accurate title. (*Id.* ¶ 60.)²

B. Eckhart is Placed on a Performance Improvement Plan.

Eckhart’s attendance and performance issues continued into 2020. Despite receiving a “final warning,” Eckhart was late or absent at least 16 times between September 2019 and mid-January 2020. (*Id.* ¶ 61.) On January 6, 2020, Alicia Cascardi, *Countdown*’s senior producer, emailed Hirst that “there’s a point at which I can’t do [Eckhart’s] work for her. It’s becoming a daily thing.” (*Id.* ¶ 62.) On January 30, Cascardi again complained to Hirst that “Jen’s demeanor and work ethic weighs on the team as whole, has been noticed by Liz [Claman] and interferes with you and me most in particular because we are [the] ones left constantly to do actually do [sic] the work she refuses to do.” (*Id.* ¶ 63.) Claman told Hirst that she believed Eckhart was prioritizing her personal ambition of becoming an on-air journalist over serving as Claman’s producer. (*Id.* ¶ 64.)

² In December 2017, Eckhart had been reprimanded for similar conduct. Eckhart conducted on-camera interviews; wrote an article about an event; and edited a video package of her “reporting for Fox Business,” which she thereafter sent to FoxBusiness.com for publication. Eckhart did not pitch the story to Fox Business or get editorial approval beforehand. She was instructed that in the future, she must pitch story ideas in advance for approval. (*Id.* ¶¶ 21-22.) Footage of Eckhart’s on-camera interviews from this event is featured in her publicly available “demo reel,” which is a compilation of video footage to help Eckhart achieve her on-air aspirations of becoming a TV journalist. (*Id.* ¶ 23; *see also* <https://jennifereckhart.com/reel>.)

At her February 3, 2020 mid-year review, Hirst told Eckhart that she was “slipping backward.” (*Id.* ¶ 66.) Cascardi prepared a comprehensive list of Eckhart’s performance problems from December 31, 2019, through February 4, 2020. (*Id.* ¶ 65.) In early February, Hirst, Cascardi, and Collins met and discussed Eckhart’s performance issues and placing Eckhart on a Performance Improvement Plan. (*Id.* ¶¶ 67-73.)

Shortly after that meeting with Collins and Cascardi, Hirst discovered that Eckhart had misappropriated Company resources. (*Id.* ¶ 74.) Without obtaining his approval, Eckhart had arranged “red carpet” access for her and an FNN cameraman to shoot footage of Eckhart interviewing celebrities at a charity event called “Go Red for Women.” (*Id.* ¶¶ 74, 76.) Eckhart then had an FNN editor “cut a whole package starring her.” (*Id.* ¶¶ 74, 81.) Eckhart charged the cost of the camera crew and editing work to the *Countdown* budget. (*Id.* ¶ 78.) Hirst suspected, and discovery has confirmed, that Eckhart created this content to use in her personal demo reel. (*Id.* ¶¶ 23, 87-88.) Eckhart also shared five different posts of these interviews on Instagram, during which she held a “Fox Business” microphone and appeared as “Jennifer Eckhart, Fox Business.” (*Id.* ¶ 89.) Hirst was the only person with authority to approve Eckhart’s use of FNN resources and funds for the Go Red event, but Eckhart neither requested nor otherwise obtained his approval. (*Id.* ¶¶ 77-80, 82-83.)

Hirst and Collins met with Eckhart to discuss her ongoing performance issues and her misconduct with respect to the Go Red event. (*Id.* ¶ 90.) They informed Eckhart that they were considering placing her on a performance improvement plan (“PIP”). (*Id.* ¶ 91.) Eckhart conceded that she told Collins and Hirst *after* receiving this notice that *Countdown* had a “toxic” and “hostile” environment because of alleged “screaming,” “cursing,” and “jealous ‘mean girls’ on . . . staff.” (*Id.* ¶¶ 92-94.) Eckhart identified by name the female employees who supposedly

contributed to this environment—she did not include Henry (who was not on the *Countdown* staff). (*Id.* ¶¶ 93, 95.) Eckhart conceded that her complaint of a “toxic” or “hostile” work environment did not relate to sexual harassment. (*Id.* ¶ 95.) Indeed, Eckhart’s contemporaneous notes state: “I *have not* yet mentioned the sexual harassment.” (*Id.* ¶ 96) (emphasis added).

Following this meeting, Collins and Hirst developed Eckhart’s PIP. (*Id.* ¶ 99.) While they finalized the PIP, Eckhart’s lateness, absences, and unprofessional behavior persisted, demonstrating to Hirst that his discussion with Eckhart “clearly didn’t have a major impact.” (*Id.* ¶ 100.) For example, the week after her meeting with Hirst and Collins, Eckhart arrived late without notice, and appeared to be inattentive and on her phone during multiple team meetings. (*Id.* ¶ 98.)

On March 6, 2020, Eckhart was placed on a PIP. (*Id.* ¶ 101.) The purpose of the PIP was to address “serious concerns regarding [Eckhart’s] performance and outline the specific criteria that [she] must meet to improve [her] job performance, workplace behaviors, and communication style to an acceptable level.” (*Id.* ¶ 103.) The many areas for improvement included professionalism and reliability. (*Id.*) The PIP warned Eckhart that she was not currently meeting expectations and needed to “immediately improve . . . in order to meet the minimum requirements for [her] position as an Associate Producer.” (*Id.* ¶ 105.)

But Eckhart’s performance continued to deteriorate. On a weekly basis, Cascardi sent Hirst comprehensive reports that described Eckhart’s performance deficiencies. (*Id.* ¶ 108.) These contemporaneous reports reflect that, during the PIP period, Eckhart was unresponsive both during business hours and after hours and made less progress in booking guests than any other producer on the show. (*Id.* ¶¶ 108-10, 112-17.) This unreliability forced Eckhart’s colleagues to complete tasks assigned to Eckhart, including booking guests, completing the morning rundown sheet, and

sending video clips to guests. (*Id.* ¶¶ 108-10, 112-17.) Eckhart’s lack of reliability forced Hirst and Cascardi to assign Eckhart the easiest segment of the show, and even then she underperformed. (*Id.* ¶ 116.) Eckhart also continued to show a significant lack of editorial ability and judgment, as she repeatedly failed to do basic research and diligence on guests and potential guests for *Countdown*. (*Id.* ¶¶ 110-17.) This led to Claman asking that Eckhart “not be responsible for producing any high-profile guests anymore given her lack of effort and attention to her segments.” (*Id.* ¶ 116.)

C. FNN Terminates Eckhart for Poor Performance.

FNN terminated Eckhart’s employment on June 12, 2020 because of her persistent poor performance. (*Id.* ¶¶ 122-23.) Hirst testified that he ended Eckhart’s employment because she was continuously late to work even in the face of warnings, failed to produce the morning production note on a regular basis, revealed the FNN graphics package prematurely, misused company funds to produce the “Go Red” tapes for her own personal gain, and made multiple editorial errors while on the PIP. (*Id.* ¶¶ 122, 124.)

Hirst and Collins met with Eckhart and communicated the termination decision. (*Id.* ¶¶ 123-24.) Eckhart *then* read aloud from a script that referenced the “verbal and the sexual harassment that goes on at every level in [the Fox] building.” (*Id.* ¶¶ 125-26.) This marked the first time Eckhart alerted anyone at FNN of alleged “sexual harassment.” (*Id.* ¶ 127.) Even then, she did not claim that *she* had been sexually harassed or assaulted, nor did she mention Henry. After Eckhart finished reading from her prepared remarks, Collins asked Eckhart whether she had been sexually harassed or assaulted. (*Id.* ¶ 128.) Eckhart refused to answer the question. (*Id.* ¶ 129.)

II. ECKHART’S FAILURE TO REPORT SEXUAL HARASSMENT BEFORE TERMINATION AND FNN’S PROMPT RESPONSE AFTERWARD.

A. Eckhart Does Not Report Sexual Harassment by Henry Using Any of the Multiple Channels Available to Her at FNN.

Eckhart alleges that Henry’s improper conduct began in or around 2014 and culminated in her alleged rape in February 2017. Nevertheless, during the entire course of her employment at FNN, Eckhart never once complained that she had been sexually harassed by Henry—or raised any concerns about Henry at all—despite having ample opportunity to do so. (56.1 ¶¶ 148, 150.) Indeed, FNN not only had established procedures for employees to report harassment complaints through numerous channels—including Human Resources, the legal department, outside counsel, and an anonymous third-party hotline—but also repeatedly and affirmatively informed employees about those reporting mechanisms and took steps to ensure that employees felt comfortable using them. (*Id.* ¶¶ 130-31, 136-41, 144.)

For example, in 2016, FNN increased the frequency of its sexual harassment trainings, requiring all employees to attend annual trainings; prominently placed posters regarding how to report sexual harassment in high-traffic areas in its offices; and informed employees both orally (*e.g.*, during training sessions and town halls) and in writing (*e.g.*, through posters, emails, and the employee handbook) about how to raise complaints. (*Id.* ¶¶ 131, 137-41, 144.) Eckhart attended these sexual harassment trainings, received these communications, and had a copy of the employee handbook that contained information about how to report concerns. (*Id.* ¶¶ 138-47.) Eckhart consulted the employee handbook on numerous occasions and knew how to find information about how to report sexual harassment. (*Id.* ¶ 143.) Additionally, in April 2017, Kevin Lord, the Executive Vice President of Human Resources, sent an email to all employees to “re-emphasize the message we have been conveying at our training sessions” and urge “any employee [who] has any concerns about behavior in our workplace” to raise those concerns to Human Resources,

FNN’s general counsel, the Chief Compliance Officer of 20th Century Fox (FNN’s then-parent company), or an outside attorney. (*Id.* ¶ 141.) Relying upon Eckhart’s timeline of events as alleged in the Fourth Amended Complaint, this email was sent shortly after her final alleged in-person sexual encounter with Henry. Although FNN provided multiple channels for reporting sexual harassment and instructed its employees how to use them, Eckhart did not raise a single complaint about sexual harassment during her employment at FNN.³ (*Id.* ¶¶ 148, 150.)

B. FNN Promptly Investigates Eckhart’s After-the-Fact Complaint of Harassment and Terminates Henry.

On June 25, 2020, two weeks after Eckhart’s termination, her counsel at Wigdor LLP communicated for the first time to FNN that Henry sexually harassed Eckhart. (*Id.* ¶ 151.) On that same day, FNN hired the law firm Davis & Gilbert LLP (“D&G”) to investigate. (*Id.* ¶ 152.) The D&G attorneys interviewed Henry, attempted to interview Eckhart (who declined to cooperate unless FNN agreed that nothing she said could be used in any future proceedings), and collected and reviewed emails, photos, receipts, invoices, and other documents. (*Id.* ¶¶ 154-67.) They also requested that Eckhart provide her communications with Henry, but she refused. (*Id.* ¶¶ 162-63.) Henry admitted that he had sex with Eckhart but insisted that those encounters were consensual. (*Id.* ¶ 155.) He provided the investigators with intimate photos that Eckhart had sent to him. (*Id.* ¶ 159.)

³ Eckhart testified that she did not complain about sexual harassment during her employment because other women faced retaliation, but she admitted she only learned about this alleged retaliation *after* she was terminated and filed her lawsuit. (*Id.* ¶ 149.)

On June 30, 2020, D&G sent a preliminary report to FNN memorializing its findings as of that date.⁴ (*Id.* ¶ 168.) Its investigation found that Henry and Eckhart exchanged numerous communications between 2014-2017 and that Henry admitted to having sex with Eckhart, including an oral-sex encounter in FNN’s New York office. (*Id.* ¶¶ 170-71.) D&G could not determine whether the sexual encounters were welcome or unwelcome. However, based on this report and, specifically, Henry’s admission that he had engaged in sexual conduct on FNN premises, Wallace, the FNN President, and Kevin Lord, then the Executive Vice President of Human Resources, fired Henry on July 1, 2020. (*Id.* ¶¶ 171-74.)

That same day, FNN CEO Suzanne Scott and Wallace sent a company-wide memo to all employees advising them of Henry’s termination, “encourag[ing] any employee who has a sexual harassment, discrimination or misconduct complaint of any form to report it immediately, as we have said repeatedly over the last four years,” and reiterating the numerous available methods of reporting concerns about sexual harassment or misconduct. (*Id.* ¶ 175.)

C. FNN Learns Details About Eckhart and Henry’s Relationship Through Its Investigation and Discovery in This Litigation.

During their employment, both Eckhart and Henry kept their relationship a secret from FNN. Before being interviewed by D&G, Henry never told anyone at FNN that he had sexual relations with Eckhart, and he had no reason to believe that anyone at FNN knew about their sexual encounters. (*Id.* ¶ 156.) Indeed, after Henry returned to work from his suspension in 2016, he believed that he could be terminated if FNN management knew he was having sexual relations with a FNN employee, and he consequently made an effort to conceal his relationship with

⁴ The report was “preliminary” because the investigators were awaiting receipt of requested further information such as expense reports and emails. (*Id.* ¶ 169.) The investigators did not receive any further documentation and sent their final report to FNN on July 17, 2020, which was not substantively different from the preliminary report. (*Id.* ¶¶ 177-81.)

Eckhart. (*Id.* ¶¶ 156, 157.) Before her termination, Eckhart likewise did not tell anyone at FNN that Henry was “coming on” to her; that Henry was sending her materials that allegedly made her feel uncomfortable; that she had sexual contact with Henry; or that she supposedly had been assaulted by Henry. (*Id.* ¶ 150.)

FNN instead learned the following information about the relationship between Eckhart and Henry only from D&G’s investigation and discovery in this case:

- Henry and Eckhart met through Twitter in December 2013, when Henry was the Chief White House Correspondent based in Washington, D.C. and Eckhart was a production assistant based in New York. (*Id.* ¶ 200.)
- Eckhart and Henry exchanged numerous sexually charged messages, mostly over text message or the messaging application WhatsApp, between 2014 and 2017. (*Id.* ¶¶ 208-10, 226, 228-32, 239-41.)
- Eckhart and Henry had three sexual encounters. The first time they had sex was at the Marriott Marquis hotel in New York City, outside of business hours, in 2014. (*Id.* ¶¶ 215-16.) Eckhart alleges that this encounter was not consensual, while Henry claims that it was. (*Id.* ¶ 155.)
- After this first encounter, both Eckhart and Henry continued to communicate flirtatiously, (*id.* ¶¶ 217, 226, 228-32), although the full extent of their communications is unknown because neither preserved their communications. (*Id.* ¶¶ 211, 214, 242.)⁵
- Eckhart and Henry’s second sexual encounter occurred on September 16, 2015. (*Id.* ¶¶ 218-27.) Henry was working in New York that day, and he messaged Eckhart, asking her to remove her underwear and put them in an envelope for him to pick up at her desk. (*Id.* ¶ 219.) She agreed,

⁵ Neither Eckhart nor Henry preserved all their text messages. Some of the many messages that were in fact saved lack contextual information like dates and times, which would have been available if the messages had been preserved.

and Henry went to her desk and retrieved the envelope. (*Id.* ¶ 220.) Henry then messaged Eckhart and invited her to visit his guest office, (*id.* ¶ 221), where Eckhart performed oral sex on Henry. (*Id.* ¶ 223.) Shortly afterwards, Eckhart emailed Henry, saying: “[REDACTED]” (*Id.* ¶ 226.) This is a reference to a tattoo that Henry has directly above his penis. (*Id.* ¶ 227.) As with the first sexual encounter, Eckhart alleges that this sexual encounter was not consensual, (Fourth Am. Compl. ¶ 57), which Henry disputes. (56.1 ¶ 155.)

- Eckhart and Henry had their third sexual encounter in February 2017. (*Id.* ¶¶ 233-38.) They met for drinks before going to Henry’s room at the Omni Hotel in New York, where they had sex. (*Id.* ¶¶ 233-35.) Henry placed handcuffs on Eckhart and photographed her naked. (*Id.* ¶ 236.) Eckhart has characterized this encounter as a rape, (Fourth Am. Compl. ¶ 74), which Henry denies. (56.1 ¶ 155.)
- Days after the alleged rape, Henry sent Eckhart a text message that said, “[REDACTED]” and indicated that he “[REDACTED],” to which Eckhart replied, “[REDACTED].” (*Id.* ¶ 239.) She sent Henry a picture of herself in a taxi inviting further sexual activity, with the message “[REDACTED]” (*Id.* ¶ 240.)
- The frequency of Eckhart and Henry’s communications slowed by June 2017 after Eckhart began a relationship with a different man. (*Id.* ¶¶ 243-44.)
- On a “handful of occasions” between the February 2017 sexual encounter and October 2018, Eckhart would see Henry in an elevator or around her desk, where he would “wave” or “signal” her, but she “would never respond or reciprocate.” (*Id.* ¶ 245.) On some of these occasions, Henry would “hang around” Eckhart’s desk, and Eckhart claimed she would leave the area until he was gone. (*Id.*)

- On October 5, 2018, Henry emailed Eckhart asking why she turned away from him; Eckhart did not respond. (*Id.* ¶ 246.) About a week later, Henry then sent her a one-word direct message on Twitter: “YO!”; Eckhart did not respond. (*Id.* ¶ 247.) Finally, around the same time, Henry messaged Eckhart a picture of the Heisman Trophy—which depicts a football player with his hand out to push away opponents—to ask why Eckhart was turning away from him; Eckhart did not respond. (*Id.* ¶ 248.)
- Eckhart and Henry did not communicate after October 2018, 17 months before FNN placed her on the PIP and 20 months before it terminated her employment. (*Id.* ¶¶ 101, 123, 250.)

D. FNN Never Received Any Sexual Harassment Complaints About Henry Before The Call From Eckhart’s Counsel.

Before Eckhart raised her allegations in June 2020 through her counsel, FNN never received sexual harassment complaints about Henry. Previously, FNN had received two reports of *consensual* sexual activity regarding Henry, but neither concerned unwelcome conduct.

In 2016, FNN learned—as did the public—that beginning in 2015, Henry had a consensual extramarital affair with a stripper in Las Vegas. (*Id.* ¶ 12.) This incident publicly embarrassed FNN, which responded by suspending Henry, taking him off the air for four months, and reducing his pay. (*Id.* ¶ 13.) Henry also visited a therapist at FNN’s suggestion. (*Id.* ¶ 14.) Henry returned to work after he completed a treatment program and satisfied the program’s requirements.⁶ (*Id.* ¶ 15.)

A year later, in April 2017, a producer disclosed to FNN that she previously had a consensual affair with Henry. (*Id.* ¶ 186.) The producer informed Wallace (the then-President of

⁶ In or around March 2017, **Jane Doe 8**, an FNN journalist, raised concerns to Lord about FNN continuing to employ Henry after his extramarital affair with the Las Vegas stripper became public. Lord, who had only joined the Company two months prior, was unfamiliar with the incident and therefore escalated the concerns to Bill Shine, then the Co-President of FNN. Shine advised Lord that Henry had successfully completed a treatment program. (*Id.* ¶¶ 182-83, 185.) In May 2017, **Jane Doe 8** again expressed her belief that Henry’s 2016 return to work was “demoralizing” for female employees, given his affair with the stripper. (*Id.* ¶ 184.)

News and Editorial) and Lord (the Executive Vice President of Human Resources) of this affair after she heard that Henry might become an anchor on the show that she produced, and she wanted to make management aware of the prior romantic relationship. (*Id.* ¶¶ 186-88.) She also told Lord that she had heard rumors that Henry was in a sexting relationship with a woman employed by a different news organization; that two FNN employees had helped Henry “cover up” a prior sexting relationship; and that Henry was “sleeping with a desk assistant at the D.C. Bureau.” (*Id.* ¶ 191.) The producer did not allege that any of Henry’s behavior was unwelcome, non-consensual, or otherwise harassing. (*Id.* ¶ 193.) Nevertheless, she declined to identify the sources of these rumors except to report that another FNN employee **Jane Doe 11** told her that **Jane Doe 11** had heard about Henry’s alleged sexting relationship from a friend whose boyfriend worked at the news organization where the woman with whom Henry had “sexted” also worked. (*Id.* ¶ 192.)

Lord investigated the producer’s hearsay allegations and could not substantiate them. (*Id.* ¶¶ 194-99.) With respect to the rumor that Henry was engaged in a sexting relationship with a woman at a different news organization, Lord interviewed **Jane Doe 11** and called the head of that news organization, who told Lord that he was not aware of any such relationship. (*Id.* ¶¶ 195-96.) Bill Shine, then the Co-President of FNN, also contacted the head of that organization, who likewise reported to Shine that he knew nothing about Henry making any of his employees uncomfortable. (*Id.* ¶ 197.) Lord also investigated the allegation that two FNN employees had helped “cover up” a prior sexting incident by speaking to the employee who was still employed at Fox. That employee had never heard of Henry sexting with anyone. (*Id.* ¶ 198.) Furthermore, Lord investigated the allegation that Henry was sleeping with a desk assistant in the D.C. Bureau by determining who held that title and then directing a Human Resources business partner to speak with employees in that office. None reported any concerns about Henry. (*Id.* ¶ 199.)

E. FNN Was Not Aware of Henry's Other Extramarital Interactions with Women Until After Eckhart Asserted Her Claims Through Counsel in June 2020.

Before Eckhart asserted her claims through counsel in June 2020, FNN was not aware that Henry had engaged in extramarital interactions with women other than his consensual affairs with the Las Vegas stripper and the producer. During this litigation, FNN became aware of additional consensual extramarital affairs by Henry, as well as claims by three women that Henry had made unwanted sexual advances towards them. Eckhart cannot dispute that no one informed FNN about these allegations until after it had fired both her and Henry.

After Eckhart filed her lawsuit, her lawyers produced declarations from two female former employees claiming that Henry allegedly made unwanted sexual advances towards them. One woman, a former FNN production assistant with whom Henry did not have a reporting relationship, claimed to have had mutually flirtatious banter with Henry that never led to any physical sexual relationship, but allegedly involved Henry once sending an unsolicited photo of his penis. (*Id.* ¶¶ 288-92.) The woman did not tell anyone at FNN about the photo until after Eckhart filed her lawsuit. (*Id.* ¶ 293.) The second woman claimed that Henry once kissed her in a Las Vegas hotel room before she told him to stop. (*Id.* ¶ 280.) The woman was not a FNN employee at that time but became a producer at FNN several months later. (*Id.* ¶¶ 280-81.) The woman also claimed that Henry once attempted to kiss her at a bar, but she told him to stop. (*Id.* ¶ 282.) She claims that Henry put his hand under a table and sexually touched her without consent at her going away party. (*Id.* ¶¶ 285-86.) She never told anyone at FNN about her alleged experiences with Henry. (*Id.* ¶ 283.)

In connection with discovery in Eckhart's lawsuit, FNN also learned for the first time that, in or around 2015, Henry had consensual sexual relations with another producer at FNN, with whom he did not have a reporting relationship. (*Id.* ¶¶ 294-96.) Henry concealed this relationship

from FNN. (*Id.* ¶ 297.) From approximately November 2016 until March or April 2020, Henry had a consensual extramarital affair with a different FNN producer with whom he also did not have a reporting relationship. (*Id.* ¶¶ 269-72.) Neither Henry nor the producer told anyone at FNN about their consensual affair until after Eckhart filed her lawsuit, and in fact both went to great lengths to hide their relationship from FNN. (*Id.* ¶¶ 273-75.)⁷

LEGAL STANDARD

Summary judgment must be granted where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000). “[A] plaintiff must provide more than conclusory allegations and show more than some metaphysical doubt as to the material facts” to overcome a motion for summary judgment. *Mercado v. Mount Sinai Beth Isr.*, No. 1:21-CV-10467 (JLR), 2023 WL 5975322, at *5 (S.D.N.Y. Sept. 14, 2023) (citation omitted). Summary judgment is appropriate in discrimination and retaliation cases, as the “salutary purposes of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to other areas of litigation.” *Macias v. Barrier Free Living, Inc.*, No. 16-cv-1735 (ER), 2018 WL 1603566, at *5 (S.D.N.Y. Mar. 28, 2018).

⁷ Henry testified during his deposition that he had extramarital relationships with two other women who were never FNN employees. (*Id.* ¶¶ 251-61.) Henry never told anyone at FNN about his romantic interactions with them. (*Id.*) After Henry’s termination, FNN learned that he had exchanged sexual pictures and GIFs with Cathy Areu, a woman who served as an occasional unpaid guest for FNN. Ms. Areu was not a FNN employee. (*Id.* ¶¶ 262-67.) Ms. Areu asserted claims against FNN, which the Court dismissed. (Dkt. 158.)

ARGUMENT

I. THERE IS NO TRIABLE ISSUE OF FACT ON PLAINTIFF’S SEXUAL HARASSMENT CLAIMS AND THEY SHOULD BE DISMISSED.

FNN is entitled to summary judgment on Eckhart’s NYSHRL and NYCHRL sexual harassment claims because there is no basis to impute Henry’s alleged conduct to FNN.⁸ As the Court previously held, Henry was not Plaintiff’s supervisor. (Dkt. 157 at 34.) Therefore, under the NYSHRL, FNN cannot be liable for Henry’s alleged harassment unless it knew about and condoned his conduct, and under the NYCHRL it cannot be liable unless it “should have known” of Henry’s alleged harassment yet did nothing. The record is devoid of any evidence that FNN knew or should have known about Henry’s alleged harassment—which Eckhart admittedly did not report until weeks after she was terminated.

A. Eckhart’s NYSHRL Claim Should Be Dismissed Because FNN Did Not Know About, Condone, Encourage, or Approve of Henry’s Alleged Harassment.

Under the NYSHRL, FNN cannot be liable for Henry’s alleged discriminatory acts “unless [FNN] became a party to it by encouraging, condoning, or approving it.” (Dkt. 157 at 36 (citing *Forrest v. Jewish Guild for the Blind*, 819 N.E.2d 998, 1011 (N.Y. 2004)).) Condonation “contemplates a knowing, after-the-fact forgiveness or acceptance of an offense.” *State Div. of Hum. Rts. ex rel. Greene v. St. Elizabeth’s Hosp.*, 66 N.Y.2d 684, 687 (1985). That is, condonation “requires actual notice.” *Int’l Healthcare Exch., LLC v. Global Healthcare Exch., LLC*, 470 F. Supp. 2d 345, 361 (S.D.N.Y. 2007). Thus, “imputing liability to an employer under the NYSHRL is no mean feat.” *Peck v. Cnty. of Onondaga*, No. 5:21-cv-651, 2021 WL 3710546, at *14 (N.D.N.Y. Aug. 20, 2021).

⁸ For purposes of this motion, FNN takes no position as to whether or not Eckhart welcomed Henry’s sexual conduct. Her sexual harassment claims against FNN fail as a matter of law whether or not she consented.

FNN could not have encouraged, condoned, or approved of Henry’s alleged sexual harassment of Eckhart because it is undisputed that FNN lacked actual notice of Henry’s conduct toward Eckhart until she first complained about him on June 25, 2020—two weeks *after* FNN terminated her employment, and long after Henry and Eckhart’s final sexual encounter in 2017 and Henry’s limited contact with Eckhart in 2018. FNN is entitled to summary judgment on Eckhart’s NYSHRL claim for this reason alone.

Eckhart’s allegation that she complained of a “toxic” or “hostile” work environment on February 10, 2020, does not create a triable issue of fact on actual notice because “vague and conclusory grievances fail as matter of law to alert an employer to discriminatory wrongdoing.” *Wilkins v. United Parcel Serv., Inc.*, No. 19-cv-8180, 2022 WL 597431, at *10 (S.D.N.Y. Feb. 28, 2022); *Murphy v. Wappingers Cent. Sch. Dist.*, No. 15-CV-7460 (VB), 2018 WL 1831847, at *8 (S.D.N.Y. Apr. 16, 2018) (granting summary judgment to employer on NYSHRL claim because plaintiff “complained that [harasser] was rude, unprofessional, and unfairly critical, not that she was discriminatory”). Additionally, it is well-established in New York that an employer does not approve, encourage, or condone discriminatory behavior where it “reasonably investigated a complaint of discriminatory conduct and took corrective action.” *Father Belle Cmty. Ctr. v. N.Y. State Div. of Hum. Rts.*, 221 A.D.2d 44, 53-54 (4th Dep’t 1996).⁹ Here, as soon as FNN learned about Eckhart’s allegations, it launched an investigation, terminated Henry’s employment for

⁹ See also *Totem Taxi, Inc. v. N.Y. State Hum. Rts. Appeal Bd.*, 65 N.Y.2d 300, 305 (1985) (holding employer not liable for discriminatory conduct because, “when the president of the company learned of it he immediately apologized and suspended the offending [employee]”); *State Univ. of N.Y. at Albany v. State Hum. Rts. Appeal Bd.*, 81 A.D.2d 688, 689 (3d Dep’t 1981) (finding that the employer “did not condone” its employee’s conduct where it “investigated the charges” and ultimately terminated the accused employee), *aff’d*, 55 N.Y.2d 896 (1982).

engaging in sex on company premises, and sent an email to staff explaining that FNN will not tolerate sexual harassment and misconduct.

B. Eckhart’s NYCHRL Claim Should Be Dismissed Because FNN Did Not and Should Not Have Known of Any Allegedly Unwelcome Sexual Conduct by Henry.

Summary judgment also should be granted on Eckhart’s NYCHRL sexual harassment claim because it is undisputed that FNN did not know of Henry’s alleged sexual harassment of Eckhart, and there is no evidence that FNN “should have known” of it yet “failed to exercise reasonable diligence to prevent” it. N.Y.C. Admin. Code § 8-107(13)(b)(1-3); *see also* Dkt. 157 at 34 (citing *Zakrzewska v. New Sch.*, 928 N.E.3d 1035, 1039 (N.Y. 2010) and N.Y.C. Admin. Code §§ 8-107(13)(b)(1)-(3)). The NYCHRL’s “should have known” standard is, in effect, a negligence standard that asks whether the employer was negligent in not discovering and preventing the sexual harassment. *See Williams v. N.Y.C. Dep’t of Educ.*, No. 1:19-cv-01353 (MKV), 2021 WL 1178118, at *11 (S.D.N.Y. Mar. 29, 2021).

As set forth above, it is undisputed that FNN did not know of Henry’s alleged harassment of Eckhart until Eckhart reported it after she was terminated. (*Supra* Section I-A.) The record is also devoid of any evidence that FNN “should have known” about Henry’s alleged harassment because both Eckhart and Henry concealed it, and FNN was not on notice of Henry’s alleged propensity to engage in sexually harassing conduct.

1. Both Henry and Eckhart Concealed Their Interactions From FNN.

It is undisputed that neither Eckhart nor Henry told anyone at FNN about their sexual relationship; Henry believed such conduct could lead to his termination. FNN cannot be liable for failing to discover and remedy interactions that Eckhart and Henry concealed and that Eckhart never reported through any of FNN’s complaint mechanisms. *See Mejia v. City of N.Y.*, No. 17-cv-2696, 2020 WL 2837008, at *16 (E.D.N.Y. May 30, 2020) (granting summary judgment in

favor of employer on NYCHRL claim where there were no witnesses to alleged harassment and there was “no evidence that she reported” offensive conduct “nor did she avail herself of the formal complaint process”). As there is no basis to find that FNN should have known of Henry’s harassment of Eckhart, dismissal is warranted for this reason alone.

2. Knowledge of Consensual Extramarital Affairs Does Not Support a Sexual Harassment Claim.

Consensual sexual relationships—including consensual relationships between employees—are indisputably non-actionable. *See, e.g., DeCintio v. Westchester Cnty. Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986) (stating that it would be both “impracticable and unwarranted” to interpret Title VII in a way that “would involve the EEOC and federal courts in the policing of intimate relationships”); *Fattoruso v. Hilton Grand Vacations Co.*, 873 F. Supp. 2d 569, 581 (S.D.N.Y. 2012) (plaintiff’s complaints about consensual, romantic relationship between her superior and another subordinate could not have put Hilton on notice plaintiff was complaining about unlawful behavior for NYCHRL retaliation claim purposes), *aff’d*, 525 F. App’x 26 (2d Cir. 2013). Consistent with New York cases, courts across the country have consistently held that an employer’s knowledge that an accused employee has engaged in *consensual* sexual relationships, even with co-workers, is not a basis from which a jury can conclude that the employer should have known about sexual harassment. *See, e.g., Schmidt v. Medicalodges, Inc.*, 492 F. Supp. 2d 1302, 1309 (D. Kan. 2007) (knowledge of an alleged harasser’s consensual sexual relationship with a co-worker “does not raise a reasonable inference that [he] was also engaging in unwelcome sexual

harassment”).¹⁰ Accordingly, constructive knowledge of sexual harassment cannot be established based on FNN’s awareness Henry had consensual extramarital affairs.

First, prior to Eckhart’s report of sexual harassment after she left the Company and through her counsel in June 2020, FNN was aware that: (i) Henry had an extramarital affair with a woman in Las Vegas and (ii) a producer disclosed a previous consensual affair with Henry and unsubstantiated rumors about him. FNN’s awareness of Henry’s consensual affairs, however, is insufficient as a matter of law to establish that FNN should have known that Henry might sexually harass Eckhart because an employer’s knowledge of non-actionable conduct does not support a finding that an employer should have known about actionable conduct. *See, e.g., Del Villar v. Hyatt Hotel Corp.*, No. 19-CV-10891, 2022 WL 2316205, at *6 (S.D.N.Y. June 28, 2022) (holding that knowledge of non-actionable conduct in the workplace was insufficient to impute liability for sexual harassment to the employer).

Second, the unsubstantiated rumors floated by the producer in April 2017 do not put FNN on notice that Henry was engaging in harassment. Her reported rumors are insufficient because these did not relate to nonconsensual behavior and occurred months after Eckhart and Henry’s last undisputed sexual encounter in February 2017. *See Springs v. City of N.Y.*, No. 17-CV-451 (AJN), 2019 WL 1429567, at *13-14 (S.D.N.Y. Mar. 29, 2019) (declining to hold under the NYCHRL

¹⁰ *See also, e.g., King v. MCI Telecomms. Corp.*, No. 94 C 421, 1997 WL 124254, at *7 n.2 (N.D. Ill. Mar. 17, 1997) (knowledge of an alleged harasser’s “consensual” sexual relationship with his previous secretary “cannot reasonably be regarded as giving [the employer] notice that [he] sexually harassed his secretaries”), *aff’d*, 142 F.3d 440 (7th Cir. 1998); *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1154 (10th Cir. 2006) (a professor’s consensual relationships with two students did not put the university on notice that students, including the plaintiff, were at risk of sexual harassment); *Jackson v. Cintas Corp.*, 391 F. Supp. 2d 1075, 1101 (M.D. Ala. 2005) (“The court is not persuaded that the ‘rumors’ of Angell’s alleged consensual affair with another subordinate employee is sufficient to place Cintas on constructive notice of Angell’s alleged propensity to engage in *unwelcome* sexually harassing conduct.”).

that rumors of “pranks involving naked employees” put the City on notice of the risk of harassment where “there is no evidence in the record” to suggest that such conduct had actually occurred). Likewise, Jane Doe 8 May 2017 email was not a complaint of sexual harassment concerning Henry but referred to Henry’s affair with a stripper, for which he already had been disciplined.

Third, the producer’s allegations and Jane Doe 8 email also came too late to provide constructive notice as a matter of law because they postdated the final sexual encounter between Eckhart and Henry. The NYCHRL requires a plaintiff to prove that the employer “should have known of the offending employee’s unlawful discriminatory conduct yet failed to exercise reasonable diligence to *prevent* it.” N.Y.C. Admin. Code § 8-107(13)(b)(3) & n.151 (emphasis added). An employer must have constructive knowledge of the harassment at the time it occurred (so as to have the opportunity to prevent it). Here, however, even if the producer’s allegations or Jane Doe 8 email could in theory put FNN on constructive notice that Henry represented a threat of future unlawful sexual harassment, that knowledge came too late for purposes of Eckhart’s NYCHRL claims because FNN could not have done anything to prevent the alleged harassment that occurred months and years prior.¹¹

II. ECKHART’S NEGLIGENCE CLAIM SHOULD BE DISMISSED.

When Eckhart amended her complaint for a fourth time after the Court dismissed her claims in part, she added a claim alleging FNN negligently supervised, retained, and disciplined Henry. (Fourth Am. Compl. ¶¶ 267-76.) This negligence claim is barred as a matter of law because the New York Workers’ Compensation Law provides the exclusive remedy for common-law negligence claims. Even if it were not barred, FNN is still entitled to summary judgment because

¹¹ For the same reason, Henry’s interactions with women that FNN learned about only after Eckhart filed her lawsuit could not have put FNN on notice of Henry’s alleged harassment of Eckhart during her employment.

there is no evidence that the alleged sexual assaults were foreseeable based on Henry's known conduct.

A. The New York Workers' Compensation Law Bars Eckhart's Claim.

Eckhart's negligence claim should be dismissed because it is barred by the New York Workers' Compensation Law, which is the sole remedy for damages allegedly caused by the negligence of an employer. *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997). This exclusive statutory remedy applies to claims based on sexual assault. *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 138 (2d Cir. 2001) (negligent retention and supervision claims by flight attendant raped by a co-worker barred by NYWCL exclusive remedy provision); *Arbouin v. Bob's Disc. Furniture, LLC*, No. 20-cv-1893, 2021 WL 4813228, at *10 (E.D.N.Y. June 30), *report & recommendation adopted by*, 2021 WL 4458932 (E.D.N.Y. Sept. 29, 2021) (dismissing claims of negligence in the hiring and supervising of alleged abuser because the NYWCL provides the exclusive remedy); *Tainsky v. Clarins, USA, Inc.*, 363 F. Supp. 2d 578 (S.D.N.Y. 2005) (similar). Eckhart's negligent supervision and retention claim should be dismissed for this reason alone.

B. Eckhart's Negligence Claim Also Fails on the Merits.

A negligent supervision claim requires a plaintiff to establish "that the employer knew or should have known of the employee's propensity for the conduct which caused the injury before the injury's occurrence." *Ehrens v. Lutheran Church*, 385 F.3d 232, 235 (2d Cir. 2004) (citation omitted); *accord Moore Charitable Found. v. PJT Partners, Inc.*, 40 N.Y.3d 150, 156 (2023). This means a plaintiff must produce evidence that the employer knew or should have known that the accused employee engaged in "prior misconduct" that was "of the same kind that caused the injury." *Doe v. Alsaud*, 12 F. Supp. 3d 674, 681 (S.D.N.Y. 2014). Prior conduct is "of the same kind" when it is sufficiently similar in nature and severity that an employer should have reasonably foreseen its occurrence. *See Mucciarone v. Initiative, Inc.*, No. 18-CV-567 (PKC), 2020 WL

1821116, at *5 (S.D.N.Y. Apr. 10, 2020) (granting summary judgment where evidence would not lead a “reasonable person to conclude that a sexual assault by [employee] was reasonably foreseeable”).

There is no evidence that Henry engaged in any conduct of the “same kind” as sexual assault or rape before his relationship with Eckhart, much less that FNN knew about it.¹² Consensual sexual behavior, even with co-workers, is not sufficiently similar in nature and severity to sexual assault and rape such that FNN should have reasonably foreseen that Henry would sexually assault Eckhart or anyone else. *See Alsaud*, 12 F. Supp. 3d at 682 (“If [employee] had not committed any sexual assault before, then, as a matter of law, [employer] could not have known that he had a propensity for such misconduct.”); *Dejesus v. Moshiashvili*, No. 153314/2012, 2017 WL 1362695, at *3 (Sup. Ct. N.Y. Cnty. Apr. 14, 2017) (“[a] consensual relationship does not evidence a propensity to assault”); *Ameduri v. Vill. Of Frankfort*, 10 F. Supp. 3d 320, 344 (N.D.N.Y. 2014) (sexual banter and consensual sexual relationships are “of a different kind and magnitude” from assault and rape).

FNN is therefore entitled to summary judgment on Eckhart’s negligent supervision and retention claim.

III. ECKHART CANNOT ESTABLISH RETALIATION

To establish a *prima facie* case of retaliation under Title VII or the NYSHRL, Eckhart must establish that: (1) she engaged in a legally protected activity; (2) FNN was aware of her participation in the protected activity; (3) FNN took adverse action against Eckhart; and (4) a causal connection existed between Eckhart’s protected activity and the adverse action. *Id.* Under

¹² To the extent that two women came forward *after* Eckhart filed her lawsuit and claimed that Henry had made unwanted sexual advances towards them, those belated complaints certainly could not have led FNN to foresee the conduct that Henry allegedly engaged in towards Eckhart several years before.

the NYCHRL, the plaintiff must show that she “took an action opposing her employer’s discrimination . . . and that, as a result, the employer engaged in conduct that was reasonably likely to deter a person from engaging in such action.” *Raji v. Societe Generale Ams. Sec., LLC*, 15-CV-1144, 2018 WL 1363760, at *8 (S.D.N.Y. Feb. 28, 2018) (citation omitted). If Plaintiff establishes a *prima facie* case, FNN must “articulate a legitimate, non-retaliatory rationale for its actions.” *Aspilaire v. Wyeth Pharms., Inc.*, 612 F. Supp. 2d 289, 308 (S.D.N.Y. 2009). Under Title VII and the NYSHRL, Plaintiff must then show that the reason is pretextual and that retaliation was the “but-for” cause. *Abromavage v. Deutsche Bank Sec. Inc.*, No. 21-668, 2022 WL 4360950 (2d Cir. Sept. 21, 2022).

Eckhart’s complaint alleges that FNN unlawfully retaliated against her for complaining about sexual harassment at the February 10, 2020, meeting with Collins and Hirst. But Eckhart’s deposition testimony and her contemporaneous notes both show she never mentioned sexual harassment at that meeting or engaged in any other protected activity. Indeed, she did not report any harassment until FNN had fired her. Moreover, even if Eckhart had reported the alleged harassment while she was employed—which she did not—the record supporting her termination for poor performance is robust and uncontradicted. She thus cannot establish a *prima facie* case of retaliation, much less rebut FNN’s “legitimate, non-retaliatory rationale for its actions.” *Aspilaire*, 612 F. Supp. 2d at 308.

A. Eckhart Cannot Establish a *Prima Facie* Case to Shift the Burden of Production to FNN.

1. Eckhart Did Not Engage in Protected Activity.

Eckhart’s retaliation claim fails out of the gate because the undisputed facts establish that she did not engage in protected activity. Indeed, she *admitted* that she did not complain of sexual harassment until weeks after she was terminated. (See 56.1 ¶¶ 94-96.) Eckhart says only that in

her February 10, 2020, meeting with Collins and Hirst she complained of a “toxic” and “hostile” work environment, which she described as a “jealous mean girls” environment in which the women Plaintiff worked with, and Hirst, engaged in screaming and cursing and “talked down” to Plaintiff. (*Id.* ¶¶ 93-94.) Eckhart testified she did not complain about sexual harassment at that meeting. (*Id.* ¶ 95.) And her contemporaneous notes memorializing the meeting confirm her testimony. She wrote: “In addition to the emotional and verbal abuse that goes on [*i.e.* the screaming and cursing], *I have not yet mentioned the sexual harassment.*” (*Id.* ¶ 96 (emphasis added).)

Eckhart’s self-styled “complaint” about her “mean girls” work environment cannot form the basis of a retaliation claim because, as this Court recognized in its motion to dismiss ruling, “[g]eneralized complaints of unfair treatment’ do not qualify as a protected activity.” (Dkt. 157 at 38) (citing cases). Rather, Eckhart must have been “protest[ing] or oppos[ing] statutorily prohibited discrimination.” *Bryant v. Verizon Commc’ns, Inc.*, 550 F. Supp. 2d 513, 537 (S.D.N.Y. 2008). At minimum, this requires that the employee “complain[] about conduct [s]he reasonably believes constitutes illegal discrimination.” *Gerald v. DCV Holdings, Inc.*, No. 17-cv-6525, 2021 WL 2809915, at *11 (E.D.N.Y. July 6, 2021); *see Robinson v. De Niro*, No. 19-cv-09156, 2023 WL 4862772, at *42 (S.D.N.Y. May 25, 2023) (dismissing NYCHRL claim because “[w]hile plaintiff did use certain buzzwords like ‘harassment’ and ‘toxic work environment’, Plaintiff said nothing that could be understood, even in context, to be about her gender or other protected characteristics.”). The undisputed facts establish that Eckhart never did so.

2. FNN Was Not Aware of Plaintiff’s Alleged “Protected Activity.”

Moreover, a retaliation claim requires evidence that the employer was aware of the Plaintiff’s protected activity. *Aspilaire*, 612 F. Supp. 2d at 310. “[I]mplicit in the requirement that [FNN] have been aware of the protected activity is the requirement that it understood, or could reasonably have understood, that [Eckhart’s] opposition was directed at conduct prohibited by

Title VII.” *Galdieri-Ambrosini v. Nat’l Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998); *Paupaw-Myrie v. Mount Vernon City Sch. Dist.*, No. 21-CV-11237 (CS), 2023 WL 1109702, at *12 (S.D.N.Y. Jan. 30, 2023).

It is undisputed that neither Hirst nor Collins understood Plaintiff’s complaints during their meeting with her of a “mean girls” environment to mean Plaintiff had experienced sexual harassment. This is not surprising, as Plaintiff admits that she did not actually complain of sexual harassment at that time. “I have not yet mentioned the sexual harassment,” she wrote in her own notes memorializing the meeting. (56.1 ¶¶ 92-96.) An employer cannot possibly retaliate against an employee unless the employer is aware of that employee’s protected activity, and it is undisputed that FNN was not aware.

3. Eckhart Cannot Establish a Causal Connection.

Even if the Court were to conclude that Eckhart’s earlier complaint during her February 2020 meeting with Collins and Hirst about “mean girls” in a “toxic” workplace constituted protected activity, her claims still fail because there is no causal connection between Eckhart raising those concerns at that meeting and the termination of her employment four months later.¹³ The Second Circuit has consistently held that a plaintiff terminated for poor performance cannot demonstrate a causal connection where “gradual adverse job actions” began well before the

¹³ In addition, “the causal relationship is not established” where “there is nothing other than that temporal proximity invoked to establish a retaliatory intent.” *Stoddard v. Eastman Kodak Co.*, 309 F. App’x 475, 480 (2d Cir. 2009) (summary order). Indeed, “[d]istrict courts within the Second Circuit have consistently held that the passage of two to three months between the protected activity and the adverse employment action does not allow for an inference of causation.” *Galimore v. City Univ. of N.Y. Bronx Cmty. Coll.*, 641 F. Supp. 2d 269, 288 (S.D.N.Y. 2009). *Accord Gonzalez v. City of N.Y.*, 442 F. Supp. 3d 665, 688 (S.D.N.Y. 2020), *aff’d*, 845 F. App’x 11 (2d Cir. 2021). With nothing else in the record to support a causal connection, the four-month gap is legally insufficient for Eckhart to carry her burden to establish a *prima facie* claim of retaliation.

plaintiff invoked protected rights. *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001).¹⁴

It is undisputed that *before* Eckhart ever mentioned a “hostile” and “toxic” work environment in February 2020, she had already been subject to substantial criticism and repeated negative evaluations. For example, Eckhart received a critical mid-year review in March 2018, in which the “main topics were [her] consistent tardiness, failure to complete her social media responsibilities, and overall performance” (56.1 ¶ 31); she received a “below expectations” rating in July 2019, which noted Eckhart’s chronic lateness and warned that it was “her final warning and the next lateness will lead to disciplinary action” (*id.* ¶¶ 41-43); she received a “final warning” about her lateness in September 2019 (*id.* ¶ 45); she was admonished in 2019 for disclosing FNN’s new costly, proprietary graphics package on her personal social media page (*id.* ¶¶ 47-54); she was called to a meeting with Human Resources to discuss her misappropriation of company resources at the “Go Red” charity event (*id.* ¶¶ 74-89); and she had a documented history of persistent tardiness and a failure to perform her responsibilities (*see, e.g., id.* ¶¶ 31-32, 35, 38-39, 43, 45, 62-73.).

These events led to Collins and Hirst scheduling the February 10, 2020 meeting with Eckhart in which they told her—again, before she uttered a word about her work environment—that they were considering “putting her on a performance improvement plan.” (*Id.* ¶ 91.) The

¹⁴ *See also Bassi v. N.Y. Med. Coll.*, No. 19-cv-7542, 2023 WL 2330478, at *13 (S.D.N.Y. Mar. 2, 2023) (no causal connection where plaintiff’s performance deficiencies were identified “several months before” plaintiff’s complaint), *aff’d*, 2024 WL 3717317 (2d Cir. Aug. 8, 2024); *Woolf v. Bloomberg L.P.*, No. 16-cv-6953, 2019 WL 1046656, at *14 (S.D.N.Y. Mar. 5, 2019) (finding no inference of retaliation where there was an “extensive record of negative reviews and feedback that predate[d] and postdate[d]” the plaintiff’s assertion of discrimination claims) *aff’d sub nom. Woolf v. Strada*, 792 F. App’x 143 (2d Cir. 2020); *Ya-Chen Chen v. City Univ. of N.Y.*, 805 F.3d 59, 71 (2d Cir. 2015) (affirming dismissal of retaliation claim where negative opinions and evaluations about plaintiff’s performance and collegiality were formed “long before” complaints).

negative feedback and documented performance concerns pre-dating Eckhart's alleged protected activity establish that no reasonable jury could find a causal link between that alleged protected activity and her termination four months later as a result of her failure to meet her performance improvement plan.¹⁵ See *El-Bey v. City of N.Y.*, 151 F. Supp. 2d 285, 299 (S.D.N.Y. 2001) (“[A]n employee cannot establish the causal connection element of his *prima facie* case . . . when his complaints of discriminatory treatment are preceded by a well-documented record of employer complaints about the employee's performance”), *aff'd*, 33 F. App'x 10 (2d Cir. 2002).

B. FNN Indisputably Had Legitimate, Non-Retaliatory Reasons to Terminate Eckhart.

There is no genuine dispute that there were numerous legitimate and non-retaliatory reasons to fire Eckhart. The record is replete with evidence that Eckhart was routinely late to work and demonstrated significant performance deficiencies, including poor judgment and lack of attention to detail, among other concerns. (*See supra* at 4-10.) “Courts in this Circuit routinely find that evidence indicating unsatisfactory work performance by the plaintiff is sufficient to establish a legitimate, non-[retaliatory] reason for an adverse employment action.” *Cruz v. Bernstein Litowitz Berger & Grossman LLP*, No. 20-CV-8596, 2023 WL 2691456, at *8 (S.D.N.Y. Mar. 29, 2023) (collecting cases); *see also Rosario v. Hilton Worldwide, Inc.*, No. 09-cv-5336, 2011 WL 336394, at *5 (E.D.N.Y. Jan. 24, 2011) (New York courts have “repeatedly recognized poor performance and the failure to satisfactorily complete a performance improvement plan as a legitimate reason for termination.”), *aff'd*, 476 F. App'x 900 (2d Cir. 2012).

¹⁵ In addition, Cascardi had a primary role in documenting Plaintiff's deficient performance. It is undisputed that Cascardi had no knowledge whatsoever of any purported protected activity by Plaintiff at the time she noted the many instances of Plaintiff's poor performance and misconduct.

C. There Is No Evidence of Pretext.

Moreover, Eckhart cannot present any evidence that her well-documented performance deficiencies were not the true reasons for her termination, let alone that retaliation was the “but-for” cause. Eckhart has the burden of establishing pretext, and “[o]nly where an employer’s business decision is so implausible as to call into question its genuineness should [a] Court conclude that a reasonable trier of fact could find that it is pretextual.” *Barletta v. Life Quality Motor Sales Inc.*, No. 13-cv-2480, 2016 WL 4742276, at *5 (E.D.N.Y. Sept. 12, 2016) (citation omitted). *See also Spires v. MetLife Grp., Inc.*, No. 18-cv-4464, 2021 WL 3544719, at *4 (S.D.N.Y. Aug. 10, 2021) (citation omitted) (defendant “is entitled to summary judgment unless the plaintiff” can “‘produce not simply some evidence, but sufficient evidence from which a jury could reasonably conclude that discrimination was the real reason’ for the employer’s action”), *aff’d*, 2023 WL 545350 (S.D.N.Y. Jan. 27, 2023).

The consistent and extensively documented criticisms of Eckhart’s performance defeat any potential assertion of pretext. *See Hill v. N.Y.C. Hous. Auth.*, 220 F. Supp. 3d 499, 508 (S.D.N.Y. 2016) (finding that the decision to terminate plaintiff’s employment was “divorced from any retaliatory motive” where plaintiff’s poor work performance was “clearly well-documented” and predated her protected activity); *Yeager v. Inst. of Culinary Educ., Inc.*, No. 14-cv-8202, 2017 WL 377936, at *16 (S.D.N.Y. Jan. 25, 2017) (finding no evidence of pretext and granting summary judgment when the plaintiff’s termination was “part of a sustained progression of performance critiques and discussions . . . all of which began many months (and even several years) prior to Plaintiff’s letters [asserting claims] being sent.”); *El-Bey*, 151 F. Supp. 2d at 299 (employee cannot “a showing of pretext when his complaints of discriminatory treatment are preceded by a well-documented record of employer complaints about the employee’s performance”).

The evidence undisputedly establishes a legitimate and non-retaliatory basis for Eckhart's termination: consistently poor work performance. Eckhart cannot muster any evidence on which a reasonable jury could infer that well-documented decision was pretext to fire her for alleging reporting sexual harassment. FNN is thus entitled to summary judgment on her retaliation claims.

CONCLUSION

This Court should grant summary judgment for FNN on all of Eckhart's claims.

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Respectfully submitted,

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