

Baez v State of New York

2010 NY Slip Op 33177(U)

November 9, 2010

Supreme Court, New York County

Docket Number: 110301/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Index Number : 110301/2009
BAEZ, SARAH
VS.
NYS OFF. OF TEMP & DISABILITY
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion


FILED

NOV 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*and PC Scheduled for
December 2, 2010 in
Part 10 @ 9:30 am. Rm 232*

Dated: NOV 09 2010


HON. JUDITH J. GISCHE ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 10

SARAH BAEZ,

Plaintiff,

- against -

STATE OF NEW YORK, and NEW YORK
STATE OFFICE OF TEMPORARY AND
DISABILITY ASSISTANCE,

Defendants.

DECISION/ORDER

Index No.: 110301/09

Seq No.: 001

Present:

Hon. Judith J. Gische

FILED

NOV 10 2010

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers
considered in the review of this (these) motion(s):

Papers	Numbered
Defs' n/m dismiss w/JLJ affirm, exhs	1,2
Pltff's opp	3
Defs' Reply	4

*Upon the foregoing papers, the decision and order of the
court is as follows:*

GISCHE J. :

In this action, plaintiff Sarah Baez (Baez) sues to recover damages for alleged employment discrimination in violation of the New York State Human Rights Law (Executive Law § 296) (NYSHRL), asserting causes of action for retaliation and disability and age discrimination. Defendants New York State and New York State Office of Temporary and Disability Assistance (OTDA) move to dismiss the complaint, pursuant to CPLR 214 (2), and CPLR 3211 (a) (5) and (a) (7), on the grounds that the complaint is time-barred and/or fails to state a cause of action.

It is well settled that in considering a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. See CPLR 3026. The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); see *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 (2002). However, "'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence' are not presumed to be true and accorded every favorable inference." *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999) (citation omitted), *affd* 94 NY2d 659 (2000); see *Tal v Malekan*, 305 AD2d 281, 281 (1st Dept 2003); *Robinson v Robinson*, 303 AD2d 234, 235 (1st Dept 2003). "[C]onclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts." *Vanscoy v Namic USA Corp.*, 234 AD2d 680, 681-682 (3d Dept 1996) (internal quotation marks and citation omitted); see *Scarfone v Village of Ossining*, 23 AD3d 540, 541 (2d Dept 2005).

BACKGROUND

Plaintiff was hired by OTDA in or around 1978, and has been continuously employed by OTDA since 1985 as a Disability Analyst.

As a Disability Analyst, her responsibilities include evaluating disability claims made to the Social Security Administration. Verified Amended Complaint, Ex. A to Johnson Aff. in Support, ¶¶ 9, 13, 15. In 1990, plaintiff filed an employment discrimination complaint against OTDA with federal and state agencies, and, subsequently, in 1992, she commenced an action in federal court alleging employment discrimination based on national origin and unlawful retaliation. *Id.*, ¶ 16. The action was settled in January 1999, and, according to plaintiff, she received "a significant financial sum." *Id.* In this action, plaintiff claims that defendants have retaliated against her for filing the 1990 and 1992 complaints, that defendants' retaliatory actions have created a hostile work environment, and that some of the retaliatory actions also constitute disability and age discrimination. Plaintiff, who was 57 years old at the time of the commencement of this action, has been diagnosed with cervical spine stenosis, neuropathy, carpal tunnel syndrome, and degenerative disc disease. *Id.*, ¶¶ 8, 10. For purposes of the instant motion, defendants do not dispute that plaintiff suffers from a disability.

The amended complaint alleges that, commencing in or around 1990, defendants retaliated against plaintiff for filing a discrimination complaint, and discriminated against her based on disability and age, by maintaining a "profile" on her; by denying

her requests for a new computer and other equipment to accommodate her disabilities; by reprimanding her in ways that other employees were not; by denying her requests for reassignments, and reassigning her to a position that was a demotion; by falsely accusing her of insubordination; and by failing to take action to protect her from an allegedly harassing co-worker. Plaintiff claims that defendants' actions have created a severe or pervasive hostile work environment. *Id.*, ¶ 17.

Pre-July 2006 allegations of the complaint

More specifically, plaintiff alleges that, in September 2000 and September 2001, respectively, she was denied the use of voice recognition equipment and hanging files, which were necessary to alleviate her disabilities (*id.*, ¶¶ 19-20), and that, in October 2001, she was reprimanded for deficiencies in her work that could have been corrected if her requests had been granted. *Id.*, ¶ 23. Plaintiff further alleges that the following requests for accommodations were denied: in September 2003, her request for an electric stapler was denied (*id.*, ¶ 31); in June 2005, her request to use an articulating keyboard was denied (*id.*, ¶ 32); and, in July 2005, she was denied a request for a flat screen computer monitor. *Id.*, ¶ 33.

Plaintiff also claims that, in January 2002, she was reprimanded by a supervisor, Janet Kemma (Kemman), for using a

restroom on a floor other than the floor where she worked, and other workers were not reprimanded for such conduct. *Id.*, ¶ 24. In February 2002, she asked to be reassigned to work "out of Kemma's supervision," but her request was ignored. *Id.*, ¶ 25. In June 2002, after Kemma ordered plaintiff to perform clerical duties which were not her responsibility, plaintiff again asked to be reassigned away from Kemma's supervision. This request was granted, and in late June 2002, plaintiff was reassigned to the Medical Assistance Aide to the Disabled Unit (MAAD), which plaintiff asserts was not the unit that she requested, and which she considered a demotion, because "the MAAD Unit was disparaged throughout the OTDA." *Id.*, ¶ 28. Plaintiff retained her civil service title of Disability Analyst throughout her assignment to the MAAD Unit (*id.*, ¶ 28), but alleges that the MAAD assignment offered no career advancement or promotional opportunities, and that, from July 2002 until June 2009, she was excluded "from the ability to participate in any training courses that were related to her position of employment." *Id.*, ¶ 29, 30.

Plaintiff further claims that in November 2005, she was falsely accused of calling a supervisor a "liar," and was warned that her actions constituted insubordination and were potential grounds for disciplinary action. *Id.*, ¶ 34. Plaintiff also claims that, in retaliation for her alleged insubordination, she was denied an "independent ergonomic evaluation" to determine

whether her requests for accommodations were warranted. *Id.*, ¶ 35.

In April 2006, plaintiff alleges, she was harassed by a co-worker, who apparently entered her workstation while she was using a vacuum cleaner, and ripped the vacuum cord out of the wall, "menacingly" daring her to reconnect it. *Id.*, ¶ 36; see Complaint, Ex. B to Johnson Aff. in Support, ¶¶ 103-106. When plaintiff complained, she was granted permission to work on another floor for about a month, but, after the human resources department investigated plaintiff's complaint, her request to move permanently out of the unit was not granted. Amended Complaint, ¶¶ 113-120.

Post-July 2006 allegations of the complaint

In January 2007, plaintiff's request for ergonomic computer equipment, including a monitor, a keyboard and a mouse, was denied, notwithstanding her submission of a doctor's note explaining the need for such accommodation. *Id.*, ¶ 40-41. Plaintiff alleges that her request was denied by supervisor Helen Torres (Torres), based on plaintiff's failure to submit adequate medical documentation, after Torres told plaintiff she was not required to submit any additional medical information. *Id.*, ¶ 42-43. According to plaintiff, in February 2007, after Torres approved plaintiff's request for an ergonomic computer mouse, supervisor Richard Sacco told plaintiff that she was required to

submit an "additional" request for the equipment, even though, plaintiff alleges, no other employee was required to submit an additional request to receive an "approved" accommodation. *Id.*, ¶ 47. At the same time, plaintiff's request for an articulating computer keyboard was approved, but she alleges that it was not properly installed. *Id.*, ¶ 48.

Plaintiff claims that, in November 2007, she again was accused of calling a supervisor a "liar," was accused of "misusing" the term "Jesus Christ," and was threatened with discipline if either act was repeated. *Id.*, ¶ 53-54. In January 2008, plaintiff's request to be returned to an SSA claims processing unit was denied, and she remained in the MAAD Unit. *Id.*, ¶ 55. Plaintiff claims that the denial of this request was based on age discrimination, because OTDA allegedly had a policy and practice of hiring workers younger than plaintiff for the position of Disability Analyst. *Id.*, ¶ 55-56. Plaintiff also alleges that defendants continued to retaliate against her, and discriminated against her based on disability, when they denied her a promotion to the position of Disability Analyst III, in May 2008, while promoting less qualified workers. *Id.*, ¶ 57.

Plaintiff further alleges that in June 2009, she again was denied a reasonable accommodation for her disability when, during a presentation of a training film to OTDA employees, supervisor Sacco refused to move the screen, and she was forced to watch

from a position that caused severe neck pain, aggravating her cervical spine condition. *Id.*, ¶ 59. Finally, plaintiff alleges that, in October 2009, she was returned to SSA claims adjudication duties, but has been denied overtime that other employees have been offered. *Id.*, ¶ 60.

DISCUSSION

At the outset, defendants move to dismiss the complaint as time-barred, to the extent that it is based on incidents that occurred prior to July 21, 2006. Under the NYSHRL, claims of employment discrimination are subject to a three-year statute of limitations. See CPLR 214 (2); *Koener v State of New York, Pilgrim Psych. Ctr.*, 62 NY2d 442, 446 (1984); *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 307 (1983). Plaintiff commenced this action, by filing a summons with notice, on July 21, 2009. Thus, any alleged discrimination that occurred prior to July 21, 2006 is not actionable unless, as plaintiff contends, it is part of a "continuing violation."

CONTINUING VIOLATION DOCTRINE

The continuing violation doctrine provides a narrow exception to the NYSHRL limitations period "where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." *Quinn v Green*

Tree Credit Corp., 159 F3d 759, 766 (2d Cir. 1998), quoting *Cornwell v Robinson*, 23 F3d 694, 704 (2d Cir 1994); see *Clark v State of New York*, 302 AD2d 942, 945 (4th Dept 2003); *Cruz v Coach Stores Inc.*, 202 F3d 560, 569 n 4 (2d Cir 2000); see generally *National R.R. Passenger Corp. v Morgan*, 536 US 101 (2002).¹ Although an employment discrimination claim normally accrues on the date that plaintiff has notice of the alleged discriminatory act (see *Pinder v City of New York*, 49 AD3d 280, 281 [1st Dept 2008]; *Van Zant v KLM Royal Dutch Airlines*, 80 F3d 708, 713 [2d Cir 1996]; *Ortiz-Moss v New York City Dept. of Transp.*, 623 F Supp 2d 379, 391 [SD NY 2008]), under the continuing violation exception, "if a plaintiff has experienced a continuous practice and policy of discrimination, ... the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it." *Washington v County of Rockland*, 373 F3d 310, 318 (2d Cir 2004) (internal quotation marks and citation omitted); see *Crosland v City of New York*, 140 F Supp 2d 300, 307 (SD NY 2001), *affd* 54

¹The standards for analyzing discrimination claims brought under the NYSHRL are the same as for claims brought under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e-2 [a] [1]) (see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]), including claims of continuing violations. See *Farage v Johnson-McClean Tech., Inc.*, 2002 WL 1067824, *6, 2002 US Dist LEXIS 9471, *16-17 (SD NY 2002); see also *Blake v Bronx Lebanon Hosp. Ctr.*, 2003 WL 21910867, *6, 2003 US Dist LEXIS 13857, *16-17 (SD NY 2003); *Matter of Ballard v HSBC Bank USA*, 42 AD3d 938, 939 (4th Dept 2007); *Clark*, 302 AD2d at 945; *Walsh v Covenant House*, 244 AD2d 214, 215 (1st Dept 1997).

Fed Appx 504 (2d Cir 2002); *Lomako v New York Inst. of Tech.*, 2010 WL 1915041, *5, 2010 US Dist LEXIS 46549, *17 (SD NY 2010).

"The doctrine has generally been limited to situations where there are specific policies or mechanisms, such as discriminatory seniority lists or employment tests" (*Crosland*, 140 F Supp 2d at 307; see *Van Zant*, 80 F3d at 713; *Gross v National Broadcasting Corp.*, 232 F Supp 2d 58, 69 [SD NY 2002]), and where "a series of separate acts ... collectively constitute one 'unlawful employment practice,'" such as the acts underlying a hostile work environment claim. *Morgan*, 536 US at 117; see *Kimmel v State of New York*, 49 AD3d 1210, 1210-1211 (4th Dept 2008); *Washington*, 373 F3d at 318). The doctrine does not apply, however, to discrete incidents of discrimination that are not part of a discriminatory policy or practice, "even when they are related to acts alleged in timely filed charges." *Morgan*, 536 US at 113. Thus, "multiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation." *Lambert v Genesee Hosp.*, 10 F3d 46, 53 (2d Cir 1993), cert denied 511 US 1052 (1994); see *Glaser v Fulton-Montgomery Community Coll.*, 50 Fed Appx 17, 20 (2d Cir 2002).

"[T]ermination, failure to promote, denial of transfer, or refusal to hire" are all easily identifiable discrete acts. *Morgan*, 536 US at 114. Discrete acts also include demotions,

transfers, job assignments, and discontinuance of job assignments, as well as "false charges, [and] refusal to train." *Crosland*, 140 F Supp 2d at 308; see *McPhee v New York City Health & Hosp. Corp.*, 2008 WL 3930089, *4, 2008 US Dist LEXIS 67455, *12 (SD 2008); *Ortiz-Moss*, 623 F Supp 2d at 390-391; *Plant v Deutsche Bank Sec., Inc.*, 2007 WL 2187109, *3-4, 2007 US Dist LEXIS 55100, *6 (SD NY 2007); *Benson v New York City Bd. of Educ.*, 2006 WL 2853877, *5, 2006 US Dist LEXIS 73295, *12-13 (ED NY 2006); see also *Brown v Principi*, 2007 WL 959375, *3, 2007 US Dist LEXIS 23549, *10 (SD NY 2007) (denial of reasonable accommodation is discrete act); *Elmenayer v ABF Freight Sys., Inc.*, 318 F3d 130, 134 (2d Cir 2003) (rejection of proposed religious accommodation is discrete act). Each such discrete "incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice'" (*Morgan*, 536 US at 114), and "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* at 113.

Further, "'a continuing violation cannot be established merely because the claimant continues to feel the effects of a time-barred discriminatory act. Nor can an otherwise barred claim be rendered timely by the mere continuation of the claimant's employment.'" *McPhee*, 2008 WL 3930089, at *4, 2008 US Dist LEXIS 67455, at *14, quoting *Harris v City of New York*, 186 F3d 243, 250 (2d Cir 1999); see *Marinelli v Chao*, 222 F Supp 2d

402, 413 (SD NY 2002); *Little v National Broadcasting Co.*, 210 F Supp 2d 330, 336 (SD NY 2002); *but see Miller v Kempthorne*, 357 Fed Appx 384, *4-5 (2d Cir 2009) (following enactment of Lily Ledbetter Fair Pay Act of 2009, even if discriminatory compensation decision did not occur in limitations period, claims to recover for each subsequent paycheck may be timely). Moreover, to demonstrate a continuing violation, "alleged acts of discrimination must actually be continuous." *Richards v City of New York*, 2007 WL 1030294, *10, 2007 US Dist LEXIS 23726, *33 (ED NY 2007); *see Quinn*, 159 F3d at 766 (discontinuity is "fatal" to continuing violation claim).

Here, although plaintiff alleges a number of specific events, and even accepting as true plaintiff's allegations and giving them every favorable inference, the continuing violation exception does not save the amended complaint's untimely claims. The pre-July 2006 allegations include a denial of a request for voice recognition equipment in September 2000, a denial of a request to use hanging files in September 2001, a denial of a request for an electric stapler in September 2003, and a denial of a request for new computer equipment in June 2005. Plaintiff also alleges that she was reprimanded by a supervisor in January 2002 for using a restroom on a floor other than where she worked, was denied a request to be assigned out of that supervisor's unit in May 2002, and, although her transfer request was subsequently

granted in June 2002, she claims that she was assigned to a unit with less prestige and fewer opportunities for advancement. She further alleges that, in November 2005, she was falsely accused of calling a supervisor a "liar," and consequently warned that she could be disciplined and denied an "independent ergonomic evaluation" of her need for ergonomic computer equipment; and that, in April 2006, defendants did not properly respond to her complaint that she was harassed by a co-worker.

Assuming, without deciding, that the alleged incidents can be considered materially adverse employment actions (*but see Forrest*, 3 NY3d at 307 [and citations within] [negative treatment by supervisor, unfair criticism, and unfavorable work assignments are not materially adverse employment actions]), there is no allegation of any specific policy or practice of discrimination, and the separate and discrete acts of alleged retaliation, occurring over a period of several years, are not sufficiently related or sufficiently close in time, to each other or to the timely allegations, to constitute one continuing violation. See *Boxill v Brooklyn Coll.*, 115 Fed Appx 516, 517 (2d Cir 2004); *Quinn*, 159 F2d at 766; *Lomako*, 2010 WL 191504 at *5, 2010 US Dist LEXIS 46549 at *18; *Matthews v Corning Inc.*, 2010 WL 3590537, *2, 2010 US Dist LEXIS 96876, *5-7 (WD NY 2010); *Falinski v Kuntz*, 38 F Supp 2d 250, 257-258 (SD NY 1999). Therefore, plaintiff's claims based on alleged retaliatory or discriminatory conduct

occurring prior to July 2006 are time-barred.

HOSTILE WORK ENVIRONMENT

Nor can plaintiff avoid the statute of limitations by alleging that the separate retaliatory acts created a hostile work environment. See *Khalil v State of New York*, 17 Misc 3d 777, 784-785 (Sup Ct, NY County 2007).

A hostile work environment occurs when the employer's conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Savings Bank, FSB v Vinson*, 477 US 57, 65 (1986) (citation omitted); see *Barnum v New York City Tr. Auth.*, 62 AD3d 736, 737 (2d Dept 2009); *Mauro v Orville*, 259 AD2d 89, 91 (3d Dept 1999). Under the NYSHRL, as under Title VII, to establish a hostile work environment claim, a plaintiff must demonstrate that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Harris v Forklift Systems, Inc.*, 510 US 17, 21 (1993), quoting *Meritor Sav. Bank, FSB*, 477 US at 65, 67. "Merely offensive" conduct is not actionable. See *Harris*, 510 US at 21; *Forrest*, 3 NY3d at 311. Similarly, to be actionable, the incidents of harassment must be more than episodic; they must be repeated and continuous. *Kotcher v Rosa &*

Sullivan Appliance Ctr. Inc., 957 F2d 59, 62 (2d Cir. 1992); see *Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 51 (4th Dept 1996). "In addition, the plaintiff must demonstrate that the abusive conduct was motivated by animus toward a protected class." *Cortes v City of New York*, 700 F Supp 2d 474, 485 (SD NY 2010); see *Brown v Henderson*, 257 F3d 246, 252 (2d Cir 2001).

Plaintiff's allegations, even if true, are insufficient to support a claim of hostile work environment. Plaintiff has not alleged that she was harassed or subjected to a hostile work environment based on her membership in a protected class; there are no allegations of discriminatory comments or conduct directed at her age or disability. Rather, plaintiff claims that separate acts of retaliation created a hostile environment. However, the allegations of denials of requests for equipment, reprimands, co-worker harassment, and unsatisfactory job assignments do not meet the threshold showing for frequency and severity; the incidents are "too few, too separate in time, and too mild ... to create an abusive environment." *Figueroa v City of New York*, 118 Fed Appx 524, 526 (2d Cir 2004), quoting *Alfano v Costello*, 294 F3d 365, 380 (2d Cir 2002). Further, "'cobbling together a number of distinct, disparate acts will not create a hostile work environment.'" *Khalil*, 17 Misc 3d at 785, quoting *Rattigan v Gonzales*, 503 F Supp 2d 56, 82 (D DC 2007).

RETALIATION

In any event, plaintiff's allegations, timely or not, are insufficient to support a claim of retaliation. Under the NYSHRL, it is unlawful to retaliate against an employee for filing a discrimination complaint or otherwise opposing discrimination prohibited by the statute. See Executive Law § 296 (7). To establish a claim of unlawful retaliation, a plaintiff must show that (1) she engaged in a protected activity; (2) the employer was aware of the activity; (3) the employer took adverse action against the plaintiff; and (4) a causal connection exists between the protected activity and the adverse action. See *Forrest*, 3 NY3d at 312-313; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 967 (1st Dept 2009); *Hernandez v Bankers Trust Co.*, 5 AD3d 146, 148 (1st Dept 2004).

A causal connection can be established directly, through evidence of retaliatory animus, such as verbal or written remarks (see e.g. *Mandell v County of Suffolk*, 316 F3d 368, 383 [2d Cir 2003]), or indirectly, by showing that the adverse action closely followed in time the protected activity. See *Dubois v Brookdale Univ. Hosp.*, 6 Misc 2d 1023(A), *8, 800 NYS2d 345 (Sup Ct, Kings County 2004), *affd* 29 AD3d 731 (2d Dept 2006); *McCoy v State of New York*, 16 Misc 3d 1128(A), *5, 847 NYS2d 903 (Ct Claims 2007); *Gordon v New York City Bd. of Educ.*, 232 F3d 111, 117 (2d Cir 2001). While there is no "bright line to define the outer limits

beyond which a temporal relationship is too attenuated to establish a causal relationship" (*Gorman-Bakos v Cornell Co-op Ext. of Schenectady County*, 252 F3d 545, 554 [2d Cir 2001]), "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality ... uniformly hold that the temporal proximity must be 'very close.'" *Clark County Sch. Dist. v Breeden*, 532 US 268, 273-74 (2001) (internal citations omitted); see *Walder v White Plains Bd. of Educ.*, 2010 WL 3724464, *14, 2010 US Dist LEXIS 100831, *50-51 (SD NY 2010); *Rompage v MTA Long Isl. R.R.*, 2010 WL 4038754, *15, 2010 US Dist LEXIS 104882, *46 (ED NY 2010); *Dubois*, 6 Misc 2d 1023(A), *8, 800 NYS2d 345, *supra*.

Courts have repeatedly held that as little as a few months between the protected activity and the alleged retaliation breaks any causal connection as a matter of law. See e.g. *Hollander v American Cyanamid Co.*, 895 F2d 80, 85-86 (2d Cir 1990) (three and a half months too long to establish retaliation); *Garrett v Garden City Hotel, Inc.*, 2007 WL 1174891, *20-21, 2007 US Dist LEXIS 31106, *69 (ED NY 2007) (two and one-half months precludes finding of a causal connection); *Cunningham v Consolidated Edison Inc.*, 2006 WL 842914, *19, 2006 US Dist LEXIS 22482, *55 (ED NY 2006) (passage of two months between the protected activity and the adverse employment action seems to be the dividing line);

Carr v WestLB Admin., Inc., 171 F Supp 2d 302, 310 (SD NY 2001) (four month lapse of time insufficient); *Nicastro v Runyon*, 60 F Supp 2d 181, 185 (SD NY 1999) (retaliation claims "routinely dismissed" when as few as three months elapse between protected activity and alleged retaliation). See also *Williams v City of New York*, 2006 WL 5255391 (Sup Ct, NY County 2006), *affd* 38 AD3d 238 (1st Dept 2007) (two year gap defeats claim of causal connection); *Ponterio v Kaye*, 25 AD3d 865 (3d Dept 2006) (five year gap negates causal connection); *Chang v Safe Horizons*, 254 Fed Appx 838 (2d Cir 2007) (gap of almost one year undermines any causal connection); *Cook v CBS, Inc.*, 47 Fed Appx 594, 596 (2d Cir 2002) (no inference of causation after four years); *Harris v South Huntington School Dist.*, 2009 WL 875538, *18, 2009 US Dist LEXIS 27392 (ED NY 2009) (three years is "far too long as a matter of law" to establish causal nexus); *Stroud v New York City*, 374 F Supp 2d 341, 351 (SD NY 2005) ("yawning temporal gap" of two years cannot give rise to inference of causation).

In this case, plaintiff alleges that she was retaliated against for filing an administrative complaint in 1990, and for commencing an action in federal court in 1992, both alleging national origin discrimination. Plaintiff alleges no retaliatory actions by defendants, other than a vague, conclusory allegation that defendants were "profiling" her, prior to September 2000, when she claims that she was denied a request for voice

recognition equipment. This "yawning temporal gap" of at least eight years between the filing of her complaint and the alleged retaliation defeats any claim of a causal connection. See *Williams v City of New York*, 2006 WL 5255391, *supra*; *Stroud*, 374 F Supp 2d at 351.

To the extent that plaintiff suggests that settlement of the 1992 lawsuit, in January 1999, was the impetus for defendants' retaliation, she offers no authority to support finding that the settlement of an action constitutes "opposition" to discrimination or is otherwise a protected activity under the NYSHRL. The court notes, moreover, that the settlement occurred more than a year and a half prior to any alleged retaliation and therefore also would be too attenuated to show a causal relationship. See *Miller*, 357 Fed Appx at 386-387 (one year "well beyond" time frame allowing for inference of causation); *Quinn*, 159 F3d at 766 (gaps of one or more years between alleged incidents precludes finding a continuing violation). Therefore, as plaintiff fails to establish the fourth element of her retaliation claim, she fails to set forth a cause of action.

AGE DISCRIMINATION

. . . .

Plaintiff's age discrimination claim rests solely on the allegation that OTDA had a "policy and practice of hiring younger workers than Plaintiff to the position of Disability Analyst," which, she alleges, was a factor in maintaining her in the MAAD

unit and not returning her to her "official duties." Amended Complaint, ¶ 56. This conclusory assertion fails to allege facts sufficient to state a claim for age discrimination, especially when plaintiff acknowledges that she retained her position as Disability Analyst II at all times relevant to the complaint, and makes no claim that "her compensation was inadequate, or that she had a problem with her specific job duties." See Memorandum of Law in Opp. to Defendants' Motion, at 11. To the extent that plaintiff alleges that she was denied a promotion to the position of Disability Analyst III, she does not allege any facts to show that this denial was based on age, or disability, but alleges only that other "less qualified" workers were promoted. Amended Complaint, ¶ 57.

DISABILITY DISCRIMINATION

Plaintiff's claim for disability discrimination is based on allegations that defendants failed to grant her requests for reasonable accommodations, by denying her requests for computer equipment, in January and February 2007, and by denying her request to move a training screen, in June 2009. *Id.*, ¶¶ 75-76. A prima facie case of failure to accommodate under the NYSHRL requires a showing that 1) plaintiff was disabled within the meaning of the statute; 2) the employer had notice of the disability; 3) plaintiff could perform the essential functions of her job, with or without a reasonable accommodation; and 4) the

employer refused to make a reasonable accommodation. See *Vinokur v Sovereign Bank*, 701 F Supp 2d 276, 293-294 (ED NY 2010); see also *Evans v City of New York*, 64 AD3d 468 (1st Dept 2009); *Pimentel v Citibank, N.A.*, 29 AD3d 141, 145-146 (1st Dept 2006). For purposes of this motion, the first three elements are not in dispute. At issue is whether OTDA failed to provide a reasonable accommodation.

The complaint alleges that, in January 2007, plaintiff requested computer equipment, including a flat screen computer monitor, an articulating keyboard, and an ergonomic mouse, as an accommodation to her disabilities. Amended Complaint, ¶¶ 76, 40. Plaintiff claims that her requests were denied. She acknowledges that her request for the keyboard was approved, but she alleges that it was never properly installed at her workstation. *Id.*, ¶ 48. She further alleges that she received a verbal approval for the computer mouse from one supervisor, but then was told by another supervisor that she needed to submit a new request, and never received the ergonomic computer mouse. *Id.*, ¶ 50. As to the June 2009 incident, plaintiff claims that during a training session at which a film was being shown, the screen was placed in a corner of the room, requiring her to strain her neck to see it, causing her cervical spinal pain and neurological symptoms in her hands. *Id.*, ¶ 58. Plaintiff claims that she requested that the screen, which was on wheels, be moved, and that her request was

denied. As a pleading matter, these allegations are sufficient to withstand a pre-answer motion to dismiss. To the extent that defendants dispute these claims, and argue that plaintiff's allegations "suggest" that she was provided with accommodations, which were reasonable, even if not satisfactory to plaintiff, defendants' contentions raise issues of fact not properly decided on a motion to dismiss. While ultimately the choice of which of several reasonable accommodations will be provided is left to the discretion of the employer, the NYSHRL envisions that the employer and employee will engage in an "interactive process" to find a satisfactory accommodation. See *Pimentel*, 29 AD3d at 149; *Vinokur*, 701 F Supp 2d at 292. Further, while plaintiff's failure to accommodate claims pre-dating July 2006 are time-barred, plaintiff is not precluded from "using the prior acts as background evidence in support of a timely claim." *Morgan*, 536 US at 113.

Accordingly

It is Hereby

ORDERED that defendants' motion to dismiss is granted to the extent that the first and third causes of action of the amended complaint are dismissed; and it is further

ORDERED that the remaining (second) cause of action is severed and shall continue; and it is further

ORDERED that defendants shall serve an answer to the amended

complaint within ten days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a **Preliminary Conference in Part 10 (Room 232) on Thursday, December 2, 2010, at 9:30 A.M.**

Dated: New York, New York
November 9, 2010

ENTER:



HON. JUDITH GISCHE, J.S.C.

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