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

PRESENT: Jaffe BARBARA JAFFE J.S.C. PART 5

Index Number : 107675/2005
GAFFNEY, KATE
vs
CITY OF NEW YORK
Sequence Number : 001
SUMMARY JUDGMENT
CAL # 46

INDEX NO. 107675/05
MOTION DATE 6/7/11
MOTION SEQ. NO. 001
MOTION CAL. NO. 46

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3,4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 26 2011
NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 9/22/11

SEP 22 2011

BARBARA JAFFE J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

KATE GAFFNEY,

Plaintiff,

- against -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, JOAN WEBSON, CLARENCE G. ELLIS, KATHLEEN M. CASHIN and MARTIN WEINSTEIN,

Defendants.

----------x

Index No. 107675/05

Argued: 6/7/11
Motion Seq. No.: 001

DECISION AND ORDER

BARBARA JAFFE, JSC:

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By notice of motion dated December 15, 2010, defendants move pursuant to CPLR 3212 for an order dismissing the amended complaint. Plaintiff opposes.

I. FACTUAL BACKGROUND

Plaintiff, now 60 years old, began working for defendant New York City Department of Education (DOE) in 1983. (Affirmation of Daniel Gomez-Sanchez, ACC, dated Dec. 15, 2010 [Gomez-Sanchez Aff.], Exh. WW). In 2001, she began working as Assistant Principal at Public School (P.S.) 213 in Brooklyn, New York, assigned to supervise pre-kindergarten, kindergarten, first grade, second grade, and special education classes. (*Id.*, Exh. J). At that time, and throughout plaintiff's tenure at the school, defendant Webson was Principal, and defendant Ellis

was Local Instructional Superintendent. (*Id.*, Exh. WW).

The 2001 to 2002 and 2002 to 2003 school years proceeded without incident, as plaintiff received no letters to file or disciplinary memoranda, no disciplinary actions were instituted against her, and she received satisfactory job performance ratings. (*Id.*, Exhs. G, J).

During the 2003 to 2004 school year, three school employees asked plaintiff when she planned to retire, which plaintiff interpreted as references to her age. (*Id.*, Exh. G). Webson never spoke to plaintiff about her retirement plans. (*Id.*).

Beginning in the fall of 2004, plaintiff's job responsibilities changed insofar as she began to administer the "Earobics" program, a literacy program previously administered by one of the employees who had asked her about her retirement plans, and the paraprofessional who usually assisted her with the fourth grade lunch period was removed from this assignment. (*Id.*, Exhs. G, J, AA).

By email dated October 12, 2004, plaintiff told defendant Cashin that Webson had been yelling at "adults" in the school, and on an unknown date later in October, plaintiff, Cashin, Webson, and Ellis met to discuss it. (*Id.*, Exhs. G, RR). Sometime during the fall of 2004, plaintiff sought assistance from her union regarding the change in her job responsibilities and her allegation that Webson was yelling at "adults." (*Id.*, Exh. G).

On October 28, 2004, a student's father accused plaintiff of corporally punishing his child by pulling the child's hair. (*Id.*, Exh. J). Webson scheduled a meeting with the student's mother to discuss the allegation the following morning. (*Id.*). On the day of the meeting, notwithstanding Webson's instruction that plaintiff not meet with the mother, plaintiff did so, and after the parent began to yell, plaintiff asked that the police be called. (*Id.*). After the police

arrived, the parent demanded that Webson file a report regarding the allegation. (*Id.*). Webson filed a corporal punishment report pursuant to Chancellor's Regulation A-420 and was then directed by the Office of Special Investigations (OSI) to investigate the allegation. (*Id.*, Exhs. J, P).

By letter dated November 1, 2004, Webson informed plaintiff that her "failure to adhere to [her] directives [regarding the parent meeting] compromised the safety of all parties and was an act of insubordination . . . . [that] could lead to disciplinary action which could result in an unsatisfactory rating for the school year 2004-2005." (*Id.*, Exh. O). By letter of the same date, Ellis informed plaintiff that she was reassigned to the Regional Operation Center pending disposition of the investigation of the corporal punishment allegation. (*Id.*, Exhs. G, H, Q).

By email dated November 4, 2004, plaintiff informed Webson that security warnings appeared on the computer that had been brought into her office. (*Id.*, Exh. CC). Webson directed the technology teacher to assess the computer, and he determined that there was nothing to report. (*Id.*, Exh. J).

On November 5, 2004, Webson determined that the allegation of corporal punishment was unsubstantiated, and on November 8, 2004, plaintiff returned to the school. (*Id.*, Exh. R). On November 12, 2004, Webson filed her report with the Office of Special Investigations. (*Id.*, Exh. S).

On or about December 14, 2004, Ellis conducted a walk-through inspection of the school, and by letter of the same date, defendant Weinstein directed plaintiff to appear at the Region 5 Learning Support Center on December 22, 2004 to discuss her "failure to provide an appropriate instructional environment and failure to provide supervisory/professional support." (*Id.*, Exh.

EE). The meeting was eventually held on January 5, 2005, and by letter dated January 21, 2005, Ellis and Weinstein described Ellis's observations during the inspection and detailed their conclusions and supervisory advice, stating that plaintiff had repeatedly disregarded Webson's correspondence "emphasizing the importance of the upkeep of writing folders and portfolios," that her excuse that Ellis visited before she had a chance to follow-up on this correspondence was unacceptable, and that her "actions constitute a failure to provide appropriate supervisory follow through," and directing her "to adhere to the directives, mandates, policies, procedures, and practices established by Department of Education, Region 5, and [Webson]." (*Id.*, Exh. DD).

By letter dated December 20, 2004, plaintiff filed a grievance seeking the removal of Webson's November 1, 2004 letter from her file, which was ultimately denied. (*Id.*, Exhs. W, X, Y, Z).

By letter dated January 7, 2005, Webson advised plaintiff that she had been absent three times and that more than 10 absences could result in an unsatisfactory job performance rating for the school year. (*Id.*, Exh. BB). By memorandum of the same date, Webson informed plaintiff of deficiencies in student decoding skills and requested that she submit a plan for improving the deficiencies by January 15, 2005. (*Id.*, Exh. SS).

On February 14, 2005, plaintiff sent Webson and Ellis an email wherein she alleged that certain employees were abusing drugs, and the same day, she forwarded the email to her union representative. (*Id.*, Exh. HH). By memorandum dated March 3, 2005, Webson advised plaintiff that she had violated the employees' privacy rights by forwarding the email. (*Id.*, Exh. JJ).

By letter dated March 17, 2005, Webson informed plaintiff that she had failed to comply with the chain of command in copying Ellis on certain emails. (*Id.*, Exh. MM). Subsequently,

plaintiff filed a grievance seeking removal of Webson's letter from her file, which was denied on March 25, 2005. (*Id.*, Exh. NN).

By memorandum dated April 12, 2005, Webson informed plaintiff that concerns about afternoon dismissal had been expressed during a Safety Committee meeting, asked her to review her supervisory procedures, and notified her that one of the employees that had asked plaintiff about her retirement plans had been assigned to assist her in monitoring afternoon dismissal. (*Id.*, Exh. TT).

By memorandum dated June 17, 2005, Webson informed plaintiff of administrative changes she planned to institute for the 2005 to 2006 school year, including that plaintiff would supervise pre-kindergarten, kindergarten, fifth grade, and third, fourth, and fifth grade special education classes and that her office would move from the second floor to the third. (*Id.*, Exh. OO).

On July 29, 2005, plaintiff submitted her application for retirement. (*Id.*, Exh. PP).

By letter dated August 10, 2005, plaintiff was directed to appear at a disciplinary conference regarding her absence from summer school on July 19 and 20, 2005. (*Id.*, Exh. UU). After the meeting was held, no disciplinary action was taken against her. (*Id.*, Exh. G).

By letter dated August 29, 2005, Webson advised plaintiff that she scheduled a meeting for August 30, 2010 to discuss plaintiff's "supervisory responsibilities, and goals and objectives for the 2005-06 school year." (*Id.*, Exh. VV).

By memorandum dated August 30, 2005, Webson asked plaintiff to create a bulletin board schedule for the school's teachers by September 2, 2005. (*Id.*). By memorandum dated September 2, 2005, Webson informed plaintiff that attendance was to be one of her

responsibilities during the 2005 to 2006 school year. (*Id.*). By memorandum dated September 8, 2005, Webson prohibited plaintiff from sending correspondence to school employees or parents without first receiving her approval. (*Id.*). By memorandum of the same date, Webson advised plaintiff that her attendance plan was due by close of business that day and asked her to give school aides their work schedules. (*Id.*).

Plaintiff retired on September 14, 2005. (*Id.*, Exhs G, PP). In November of 2005, a man in his mid-30s (*id.*, Exh. G) replaced plaintiff as Assistant Principal, assuming the duties set forth in Webson's June 17, 2005 memorandum and occupying a third-floor office *(id.*, Exh. J).

II. PERTINENT PROCEDURAL BACKGROUND

On or about December 9, 2004, plaintiff filed a notice of claim in which she set forth the following causes of action: age discrimination, intentional infliction of emotional distress, defamation, retaliation for seeking union assistance, and denial of her first amendment rights, namely, the right to seek redress of a grievance. (*Id.*, Exh. WW). She asserted that during the 2003 to 2004 school year, school personnel regularly asked her when she was going to retire, which she took as a reference to her age, and that during the following school year, Webson undermined her authority as an assistant principal by among other things, assigning her non-supervisory duties that teachers or aides usually performed, requiring her to clear all teacher directives and instructions with a subordinate teacher, excluding her from meetings, and yelling at her in front of subordinate staff members. (*Id.*). She also alleged that on November 1, 2004, Webson falsely accused her of insubordination and threatened her with an unsatisfactory rating, and on the same day, Ellis advised her that she was being reassigned to the Regional Operations Center due to the allegation that she had corporally punished a student. (*Id.*). She additionally

claimed that on November 5, 2004, Webson accused her of corporal punishment and threatened her with disciplinary action, and that after she complained to her union about defendants' actions, defendants retaliated against her by engaging in the aforementioned disciplinary actions. (*Id.*).

On or about May 6, 2005, plaintiff served defendants with a summons and verified complaint, asserting claims for age discrimination, retaliation, negligent and intentional infliction of emotional distress, and a violation of New York Civil Rights Law § 40-c by discriminating against her based on her age and retaliating against her. (*Id.*, Exh. A). On or about September 21, 2005, defendants joined issue with service of their answer. (*Id.*, Exh. B).

On or about July 17, 2008, plaintiff served defendants with an amended verified complaint, adding a claim for constructive discharge based on her allegation that she retired solely because of the hostile work environment created by defendants. (*Id.*, Exh. E). On or about September 26, 2008, defendants served their answer to the amended complaint. (*Id.*, Exh. F).

On November 10, 2009, plaintiff testified at an examination before trial (EBT) that, as pertinent here, between September and December of 2004, Webson yelled at her in public, blamed her for things she did not do, excluded her from meetings, and kept her from receiving information. (*Id.*). She also testified that she believed Webson was trying to force her out because of her age and that she had "nothing to point to other than the discussions about when [she was going] to retire" to support this assertion. (*Id.*). Additionally, according to plaintiff, Cashin and Weinstein discriminated against her by supporting Ellis and Webson in their allegedly discriminatory actions. (*Id.*).

On February 5, 2010, Ellis testified at an EBT that it was his practice to assign teachers accused of corporal punishment to the Regional Operations Center "for the protection of the

school building" and that on December 14, 2010, he conducted a walk-through inspection of P.S. 213 and determined that the students' work and the teachers' organization was deficient. (*Id.*, Exh. H).

The same day, Cashin testified at an EBT that it is a "general practice" to reassign teachers accused of corporal punishment outside the school. (*Id.*, Exh. I).

At an EBT conducted on August 10, 2010, Webson testified that plaintiff was assigned to the "Earobics" program because she was the early grade supervisor, and she could not force the previous supervisor, who no longer wanted the responsibility, to continue, as she was only a teacher. (*Id.*, Exh. J). Additionally, Webson testified that she removed the paraprofessional assigned to fourth period lunch because his union contract forbade him from supervising lunch periods and that the payroll secretary mistakenly sent plaintiff the attendance letter, as such letters are sent only to teachers. (*Id.*). She also testified that she never excluded plaintiff from meetings, that she filed an official report of the corporal punishment allegation because the police had been involved and "there was no going back," that the memoranda she sent to plaintiff just before she retired were simply "notes" typical of those she sent to all of the school's staff, and that she moved plaintiff's office and changed the grades she supervised because "administratively [they] were stagnating and a change was needed." (*Id.*, Exh. J).

By affidavit in opposition dated February 7, 2011, plaintiff states, *inter alia*, that on June 21, 2005, Webson reprimanded her while holding a copy of her summons and complaint and told her that a meeting with Cashin would be scheduled to discuss the suit, that Ellis visited her during the summer of 2005 and mentioned her lawsuit, and that a union representative visited her soon thereafter and informed her that "things were not good and [that she] was going to be

'called in' to prove" that her summer school absences resulted from her attendance at professional development training. (Affidavit of Kate Gaffney in Opposition, dated Feb. 7, 2011 [Pl.'s Affid. in Opp.]). Additionally, according to plaintiff, one of the employees who asked her about her retirement plans wanted her job, and Webson worked with the employee to humiliate her and force her out of her job by instituting various disciplinary actions against her, altering her work responsibilities, and changing her office location. (*Id.*).

III. DEFENDANTS' MOTION

A party seeking summary judgment must demonstrate, *prima facie,* entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut this showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]); "unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d 557, 562), as are self-serving affidavits clearly created to contradict previous testimony and create issues of fact (*Harty v Lenci,* 294 AD2d 296 [1st Dept 2002]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318 [1st Dept 2000]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

In employment discrimination cases, the "the employer's intent is often at issue, and careful scrutiny may reveal circumstantial evidence supporting an inference of discrimination." (*Belfi v Prendergast*, 191 F3d 129, 135 [2d Cir 1999]). Nonetheless, "a plaintiff must provide more than conclusory allegations to resist a motion for summary judgment." (*Holcomb v Iona*

College, 521 F3d 130, 137 [2d Cir 2008]).

A. Plaintiff's age discrimination claims

1. Contentions

Defendants argue that plaintiff is unable to demonstrate, *prima facie*, that they discriminated against her based on her age as she cannot show that she suffered an adverse employment action or that it occurred under circumstances giving rise to an inference of age discrimination. (Memorandum of Law in Support of Defendants' Motion for Summary Judgment [Defs.' Mem.]). They deny that questions about plaintiff's retirement plans raise an inference of age discrimination and observe that plaintiff does not allege that Webson asked her such questions. (*Id.*). Defendants also maintain that because Webson was in the same protected class that she was in when she hired her, it may be inferred that there was no discrimination, and note that plaintiff does not allege that any of the named defendants made any age-based or age-biased comments to her and that several staff members who are older than plaintiff remained employed at P.S. 213 after her retirement. (*Id.*). Even if plaintiff had set forth a *prima facie* case, defendants maintain that they had legitimate, non-discriminatory reasons for their actions and that plaintiff cannot establish that these reasons constitute a pretext for age discrimination. (*Id.*).

In opposition, plaintiff claims that defendants' actions, when considered together, constitute adverse employment actions that occurred under circumstances giving rise to an inference of age discrimination, as Webson, although she both hired and constructively discharged plaintiff, may have developed a discriminatory animus against her over time, and that as her replacement is younger than she is, she was replaced by someone outside of her protected class. (Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary

Judgment [Pl.'s Mem. in Opp.]; Pl.'s Affid. in Opp.).

In reply, defendants assert that plaintiff fails to raise any genuine issues of material fact as to whether she was subjected to adverse employment actions under circumstances giving rise to an inference of age discrimination, as her affidavit is self-serving and contradicts her deposition testimony insofar as she claims that Webson colluded with one of the employees who asked plaintiff about her retirement to force her out of her position. They distinguish cases in which the replacement of an employee with an individual outside of her protected class gave rise to an inference of discrimination. (Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment [Defs.' Reply Mem.]).

2. Analysis

Pursuant to Executive Law § 296(1)(a), it is unlawful "[f]or an employer . . . , because of an individual's age . . . , to refuse to hire or employ or to bar or discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment."

A three-step burden-shifting analysis is applied to determine whether a plaintiff has established a claim under Executive Law § 296(1)(a). (*Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of the AFL-CIO*, 6 NY3d 265, 271 [2006]). First, the plaintiff must establish a *prima facie* claim, requiring that she demonstrate: (1) that she is a member of a protected class; (2) that she was qualified to hold her position; (3) that she suffered an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of age discrimination. (*Stephenson*, 6 NY3d at 271; *Ferrante v Am. Lung. Assn.*, 90 NY2d 623 [1997]; *Mete v N.Y. State Office of Mental Retardation & Dev. Disabilities*, 21 AD3d

288 [1st Dept 2005]). If the plaintiff establishes a *prima facie* claim, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its challenged action. (*Stephenson*, 6 NY3d at 270-71). Then, if the defendant does so, the burden shifts back to the plaintiff to demonstrate that the reason is pretextual, which requires that she show both that the defendant's reason is false and that discrimination was the real reason for the action. (*Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of the AFL-CIO*, 14 AD3d 325, 329 [1st Dept 2005], *affd* 6 NY3d 265 [2006]).

As age discrimination claims under this section are analyzed in the same manner as claims brought pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 - 634, federal case law is instructive. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 n 3 [2004]).

a. Elements one and two

Here, there is no dispute that plaintiff was a member of a protected class and was qualified for her position.

b. Element three

For an employment action to be adverse, the plaintiff must demonstrate that it affected a change in the terms and conditions of employment "more disruptive than a mere inconvenience or an alteration of job responsibilities." (*Forrest*, 3 NY3d at 306). Adverse employment actions include "a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation" (*Id.*). Thus, constructive discharge constitutes an adverse employment action (*Stetson v NYNEX Serv. Co.*, 995 F2d 355, 360 [2d Cir 1993]; *Stembridge v*

City of New York, 88 F Supp 2d 276, 284 [SD NY 2000]), whereas disciplinary measures or negative evaluations do not "unless [they] affect ultimate employment decisions such as promotion, wages, or termination" (*Katz v Beth Israel Med. Ctr.*, 2001 WL 11064, *14 [SD NY 2001]).

Here, Webson altered plaintiff's job responsibilities by assigning her as supervisor of Earobics, removing the paraprofessional from the fourth grade lunch period, changing the grades to which she was assigned, communicating with employees under plaintiff's supervision, requiring that she submit for her approval all written communications to the school community, requiring that she submit various plans for her review, and moving her office. Plaintiff's job responsibilities, however, did not significantly lessen as a result, as she was still charged with the supervision of multiple grades and special education classes and was permitted to communicate with teachers and parents. (*See Galabya v New York City Dept. of Educ.*, 202 F3d 636 [2d Cir 2000] [transfer of plaintiff teacher from special education class to mainstream class in same subject not adverse employment action, as he failed to show that transfer was "materially less prestigious, materially less suited to his skills and expertise, or materially less conducive to career advancement"]; *Castro v New York City Dept. of Educ. Personnel Dir.*, 1998 WL 108004 [SD NY, Mar. 11, 1998] [transfer of plaintiff teacher from kindergarten to second grade, unsatisfactory ratings, and close monitoring of classroom performance not adverse employment actions, as she was not deprived of opportunity or wages]).

Moreover, plaintiff offers no evidence demonstrating that Webson's yelling and defendants' various disciplinary actions affected her salary or promotion opportunities. (*See Bennett v Watson Wyatt & Co.*, 136 F Supp 2d 236 [SD NY 2001] [threats of disciplinary action

and excessive scrutiny without negative consequences not considered adverse employment actions]; *Katz*, 2001 WL at *14 [plaintiff failed to show that "being yelled at, receiving unfair criticism, receiving unfavorable work schedules or work assignments, and being told to retire or work part time if she did not like the schedule" affected her wages, possible promotion, or other "ultimate employment decision"]; *Forrest*, 3 NY3d at 307 ["snatching of a pad from [plaintiff's] hands, the patting of a seat in a humiliating way, the shouting at her in a meeting, the circling of her name on a time sheet, the rolling of eyes when she spoke" not considered adverse employment actions, as not shown to affect ultimate employment decisions]).

And, as plaintiff has failed to establish that she was constructively discharged (*see infra*, III.B.2.b.), her resignation does not constitute a basis for her discrimination claim.

c. Element four

As plaintiff fails to demonstrate that defendants' actions constitute adverse employment actions, I need not consider whether those actions occurred under circumstances giving rise to an inference of age discrimination.

In any event, even assuming that the employees who questioned plaintiff about her retirement were referring to her age, plaintiff has failed to establish any connection between these questions and defendants' actions. (*See Mete,* 21 AD3d at 290 [employee's statement that plaintiff was "old, lazy, and overpaid" did not give rise to inference of age discrimination, as employee was not decision-maker and statement not made in close temporal proximity to plaintiff's termination]). And, her allegation of collusion between Webson and one of these employees is not only conclusory but contradicts her deposition testimony. (*See supra,* III).

Given this result, I need not consider whether Webson developed a discriminatory animus

toward her after hiring her or whether the replacement of plaintiff with a younger person gives rise to an inference of age discrimination.

d. Legitimate, non-retaliatory reason and pretext

As plaintiff fails to establish a *prima facie* claim of age discrimination, whether defendants offered a legitimate, non-retaliatory explanation for their actions and, if so, whether plaintiff established that this explanation is pretextual, need not be considered.

In any event, defendants offer legitimate non-discriminatory reasons for their actions. Webson testified that the child's father, not her, accused plaintiff of corporally punishing the child, that she filed an official report because "there was no going back" after the police were involved, that the letters and memoranda she sent plaintiff were typical of "notes" sent to all of her staff, that the payroll secretary mistakenly sent plaintiff the attendance letter, that she removed the paraprofessional from the lunch period because his contract forbade him from supervising lunch, and that she moved plaintiff's office and changed the grades because she felt that a change was needed. Additionally, Ellis testified that he reassigned plaintiff outside of the school because it was his policy to do so, and he and Weinstein cited Ellis's observations during the walk-through investigation and plaintiff's failure to comply with Webson's correspondence in concluding in their January 21, 2005 letter that she needed to comply with directives to improve her job performance.

Plaintiff only speculates as to the existence of discriminatory animus and thus demonstrates neither that defendants' reasons are false nor that discrimination is the real reason for their actions.

B. Plaintiff's hostile work environment and constructive discharge claims

1. Contentions

Defendants argue that plaintiff fails to demonstrate that her work environment was hostile and, as her constructive discharge claim is predicated on the existence of a hostile work environment, that both claims must be dismissed. (Defs.' Mem.).

In opposition, plaintiff contends that defendants' conduct was so severe and pervasive as to create a hostile work environment and that a reasonable employee in her position would have felt compelled to resign as a result. (Pl.'s Mem. in Opp.; Pl.'s Affid. in Opp.).

In reply, defendants claim that plaintiff fails to demonstrate that their actions were related to her age and that she suffered a hostile work environment on the basis of her age. (Defs.' Reply Mem.). They ask that her affidavit in opposition be disregarded to the extent that it is self-serving and contradicts her deposition testimony, and that she has "nothing to point to other than the discussions about when [she was going] to retire" to show that she was subject to a hostile work environment due to her age. (*Id.*).

2. Analysis

a. Hostile work environment

To establish a claim for hostile work environment discrimination, a plaintiff "must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were 'sufficiently continuous and concerted' to have altered the conditions of the working environment." (*Alfano v Costello*, 294 F3d 365, 374 [2d Cir 2002]). In determining whether a hostile work environment exists, courts consider the totality of the circumstances, including "the frequency of the discriminatory conduct, its severity, whether it is physically threatening or

humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." (*Howley v Town of Stratford*, 217 F3d 141, 154 [2d Cir 2000]).

A plaintiff must also demonstrate that she was subjected to hostility as a result of her membership in a protected class. (*Kassner v 2nd Ave. Delicatessen, Inc.*, 496 F3d 229, 241 [2d Cir 2007]). Thus, although courts must consider the totality of the circumstances, they must also "exclude from consideration personnel decisions that lack a linkage or correlation to the claimed ground of discrimination." (*Alfano*, 294 F3d at 378). Facially neutral actions may only be considered if a reasonable fact finder could conclude that they were based upon a bias against the protected class to which the plaintiff belongs. (*Id.*).

Here, all of defendants' actions were facially age-neutral, and absent any evidence in the record that they referenced plaintiff's age in taking those actions, plaintiff provides only conclusory assertions that they arose from defendants' bias against her for her age (*see supra*, III.A.2.c), and there is no basis on which a reasonable fact finder could conclude that they were age-based. (*See Meder v Bd. of Educ. of the City of New York*, 135 Fed Appx 467 [2d Cir 2005] [no hostile work environment claim where no evidence in record suggesting that excessive monitoring, denial of request to remove paraprofessional from classroom, and corporal punishment investigation motivated by age bias]; *Alfano*, 294 F3d at 378 [circumstances surrounding facially-neutral actions, including "merely 'good'" evaluations, warnings, and disciplinary actions, did not demonstrate sex bias]). And, even if the employees' questions regarding plaintiff's retirement plans referred to her age, plaintiff does not state how often or over what period of time the questions were asked. Thus, they are not shown to be either severe or so continuous and concerted as to alter plaintiff's work environment. (*Cf. Kassner*, 496 F3d at

240-41 [considering "continued harassment," including comments like "'drop dead,' 'retire early,' 'take off all that make-up[,]' and 'take off your wig'" to create hostile work environment; considering allegation that defendants pressured plaintiff to retire to not create hostile work environment]).

b. Constructive discharge

A plaintiff who alleges that she was constructively discharged as a result of a hostile work environment must demonstrate that her "working conditions [were] so intolerable that a reasonable person would have felt compelled to resign. This standard is higher than the standard for establishing a hostile work environment." (*Fincher v Depository Trust & Clearing Corp.*, 604 F3d 712, 724-25 [2d Cir 2010]).

As plaintiff has not demonstrated that she was subjected to a hostile work environment (*see supra*, III.B.2.a.), she has not demonstrated that she was constructively discharged.

C. Plaintiff's retaliation claim

1. Contentions

Defendants deny that plaintiff engaged in a protected activity by complaining to her union absent proof that she complained about alleged discrimination or that their alleged retaliatory actions were materially adverse to her employment. They also argue that plaintiff did not show a causal connection between the filing of her notice of claim or complaint and their actions, and that they had legitimate, non-retaliatory reasons for them. (Defs.' Mem.).

In opposition, plaintiff claims that defendants' actions constituted adverse employment actions, and as they occurred in close temporal proximity to her engagement in protected activity, that they were causally related thereto. (Pl.'s Mem. in Opp.).

In reply, defendants deny that their actions were causally related to her filing of a notice of claim, as these actions commenced before she contacted her union, filed her notice of claim, or filed her complaint. (Defs.' Reply Mem.).

2. Analysis

Pursuant to Executive Law § 296(7), an employer may not "retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified, or assisted in any proceeding under this article."

A three-step burden-shifting analysis is applied to determine whether a plaintiff has established a claim under Executive Law § 296(7). First, the plaintiff must establish a *prima facie* claim, which requires that she demonstrate: (1) that she engaged in a protected activity; (2) that the employer was aware of the protected activity; (3) that the employer took an adverse employment action against her; and (4) that her protected activity and the adverse employment action were causally related. (*Forrest*, 3 NY3d at 312-13). Second, if the plaintiff establishes a *prima facie* claim, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for its action. (*Cosgrove v Sears, Roebuck & Co.*, 9 F3d 1033, 1039 [2d Cir 1993]). Third, if the defendant does so, the burden shifts back to the plaintiff to demonstrate that the reason is pretextual. (*Id.*).

As retaliation claims under this section are analyzed in the same manner as those brought pursuant to Title VII, 42 USC § 2000e, *et seq.*, federal case law is instructive. (*E.g. Forrest*, 3 NY3d at 313).

a. Protected activity

Complaints of general harassment do not constitute protected activity. (*Forrest*, 1 NY3d at 313). As plaintiff sought assistance from her union regarding the changes in her job responsibilities and Webson's yelling, absent any claim that she was discriminated against as a result, she did not engage in a protected activity in doing so. (*See id.* [plaintiff did not engage in protected activity in filing "numerous grievances claiming generalized 'harassment,'" as she did not allege discrimination]).

Defendants concede, however, that plaintiff's filing of a notice of claim and commencement of the instant suit constitute protected activity.

b. Defendants' awareness of plaintiff's protected activity

Plaintiff states in her affidavit that both Webson and Ellis mentioned her law suit to her, Webson on June 21, 2005, and Ellis during the summer of 2005. Absent evidence to the contrary, plaintiff has established that they were aware at those times of her summons and complaint.

c. Adverse employment action and causal relationship

To establish that she was subject to an adverse employment action, a plaintiff must demonstrate that a reasonable employee would consider the action to be materially adverse, "which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (*Burlington N. & Santa Fe Railway. Co. v White*, 548 US 53, 68 [2006]; *Kessler v Westchester County Dept. of Social Servs.*, 461 F3d 199, 207 [2d Cir 2006]).

Although temporal proximity may demonstrate a causal connection between protected

activity and an adverse employment action, "[w]here timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise." (*Slattery v Swiss Reins. Am. Corp.*, 248 F3d 87, 95 [2d Cir 2001]; *Mattera v JP Morgan Chase Corp.*, 740 F Supp 2d 561, 581 [SD NY 2010]).

Here, plaintiff claims that defendants' various letters, memoranda, disciplinary actions and meetings, the removal of the paraprofessional from lunch, and the change in her job responsibilities constitute adverse employment actions. Even assuming that a reasonable employee would consider the actions materially adverse and that defendants were aware of her filing of a note of issue, as the actions began in the fall of 2004, three months before plaintiff filed her note of issue and eight months before she filed her summons and complaint, plaintiff has failed to demonstrate causation.

D. Plaintiff's intentional and negligent infliction of emotional distress claims

1. Contentions

Defendants first assert that as a government body cannot be held liable for the intentional infliction of emotional distress, that claim must be dismissed against defendants City and DOE, and as the emotional distress was allegedly inflicted while plaintiff was employed by defendants, these claims are barred by the Workers Compensation Law. (Defs.' Mem.). They also deny that plaintiff has established that their conduct rose to the level of outrageousness required to prove negligent or intentional infliction of emotional distress. (*Id.*).

In opposition, as to her claim of intentional infliction of emotional distress, plaintiff argues that material issues of fact exist as to whether defendants' actions were sufficiently

outrageous. (Pl.'s Mem. in Opp.).

Defendants assert in reply that plaintiff's negligent infliction of emotional distress claim was abandoned when she failed to address it in opposition, and they otherwise deny that their actions were so outrageous as to give rise to a claim for intentional infliction of emotional distress. (Defs.' Reply Mem.).

2. Analysis

a. Negligent infliction of emotional distress

A claim is deemed abandoned if the party asserting it fails to oppose the branch of a motion to summarily dismiss it. (*Kronick v L.P. Thebault Co., Inc.* 70 AD3d 648 [2d Dept 2010]; *Genovese v Gambino*, 309 AD2d 832 [2d Dept 2003]; *Fairchild v Servidone Constr. Corp.*, 288 AD2d 665 [3d Dept 2001]). Having failed to address that branch of defendants' motion seeking to dismiss her claim of negligent infliction of emotional distress where she addresses the motion with respect to her claim of intentional infliction of emotional distress, it is deemed abandoned.

b. Intentional infliction of emotional distress

Claims of intentional infliction of emotional distress against government bodies are barred as a matter of public policy. (*Dillon v City of New York*, 261 AD2d 34, 41 [1st Dept 1999]). Therefore, plaintiff's intentional infliction of emotional distress claims against City and DOE are barred.

In order to state a claim for intentional infliction of emotional distress, a plaintiff must demonstrate: "(I) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and the injury; and (iv) severe emotional distress. . . . Liability has been found only

where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (*Howell v New York Post Co.*, 81 NY2d 115, 121-22 [1993]).

"New York courts are extremely wary of claims for intentional infliction of emotional distress in the employment context because of their reluctance to allow plaintiffs to avoid the consequences of the employment-at-will doctrine by bringing a wrongful discharge claim under another name." (*Mariani v Consol. Edison Co.*, 982 F Supp 267, 275 [SD NY 1997], *affd* 172 F3d 38 [2d Cir 1998]).

Here, defendants' conduct, which includes altering plaintiff's work responsibilities, instituting disciplinary proceedings against her, sending her letters and memoranda, and communicating with employees under her supervision, does not rise to the level of outrageousness necessary to support a claim for intentional infliction of emotional distress. (*Cf. Epifani v Johnson,* 65 AD3d 224 [2d Dept 2009] [using abusive speech, requiring employee to stand for duration of workday, prohibiting employees from speaking to one another, demanding that employee bring her child to work and lock her in a dog cage, and calling employees late at night not sufficiently outrageous to give rise to a claim for intentional infliction of emotional distress]). Consequently, plaintiff's intentional infliction of emotional distress claims against the individual defendants are also dismissed.

E. Plaintiff's claims against City

1. Contentions

City argues that as plaintiff was employed by DOE and as it and DOE are separate legal entities, it is not a proper party to the action. (Defs.' Mem.). And, as plaintiff asserts no

argument in opposition, defendants maintain that these claims should be deemed abandoned. (Defs.' Reply Mem.).

As plaintiff fails to address the branch of defendants' motion seeking to dismiss summarily her claims against City, they too are deemed abandoned. (*See supra*, III.D.2.a).

2. Analysis

F. Plaintiff's claims pursuant to Civil Rights Law § 40-c

1. Contentions

Defendants assert that plaintiff's failure to serve a notice of claim upon the New York State Attorney General as required by Civil Rights Law § 40-d mandates dismissal of her claim pursuant to Civil Rights Law § 40-c (Defs.' Mem.), and in any event, that they should be deemed dismissed for her failure to assert argument in opposition (Defs.' Reply Mem.).

As plaintiff does not address the branch of defendants' motion to dismiss her claims under Civil Rights Law § 40-c, these claims are deemed abandoned. (*See supra*, III.D.2.a).

2. Analysis

G. Plaintiff's claims accruing after December 9, 2004

1. Contentions

Plaintiff failed to file a notice of claim as to any claims accruing after December 9, 2004, and failed to amend her notice of claim to include any post-December 9, 2004 alleged mistreatment. Defendants thus maintain that any claims that accrued thereafter are time-barred. (Defs.' Mem.).

In opposition, plaintiff contends that any claims that arose after she filed her notice of claim relate back to and are incorporated in her notice of claim and that, in any event,

defendants' violations were continuous, thereby tolling the limitations period for these claims. (Pl.'s Mem. in Opp.).

In reply, defendants assert that plaintiff's constructive discharge claim is barred, as it is a new theory of liability that she raised after she filed her notice of claim. (Defs.' Reply Mem.).

2. Analysis

As plaintiff failed to establish a claim of constructive discharge (*see supra*, III.B.2.b.), whether this claim is barred need not be addressed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted, and the complaint is hereby dismissed; with costs and disbursements to defendants, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants.

ENTER:

Barbara Jaffe, JSC

FILED
BARBARA JAFFE
J.S.C. SEP 26 2011

DATED: September 22, 2011
New York, New York

SEP 22 2011