SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN Justice PART 63

Index Number : 151112/2012
WILLIAMS, JOAN
vs.
DEUTSCHE BANK GROUP
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court.

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

Dated: 4/4/13

_____, J.S.C.
HON. ELLEN M. COIN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 63

JOAN WILLIAMS,

Plaintiff,

- against -

DEUTSCHE BANK GROUP, CHRISTINE BERTI, TRACY MCNAMARA, MARIANNE PERRY, CHRISTOPHER MAHON, JONATHAN PINDER, and MARCY WALBY,

Defendants.

Index No.: 151112/12

DECISION/ORDER

COIN, ELLEN, J.:

In this action, plaintiff Joan Williams (Williams) sues her employer, Deutsche Bank Group (Deutsche Bank, or the company), and individual employees of Deutsche Bank to recover damages for alleged employment discrimination based on race and gender, and for unlawful retaliation, aiding and abetting discrimination, and intentional infliction of emotional distress. Defendants make this pre-answer motion for partial dismissal of the complaint, pursuant to CPLR 3211(a)(5), based on the statute of limitations, and, pursuant to CPLR 3211(a)(7), for failure to state a cause of action.

Background

In 1994, plaintiff, an African American woman, began working as an administrative assistant for Banker's Trust, and when Deutsche Bank acquired Banker's Trust in 1999, plaintiff was hired to work in Deutsche Bank's Control Room, which is responsible for managing all material non-public information.

Verified Complaint (Complaint), ¶¶ 14, 15. Plaintiff, hired by Katie Sharpe (Sharpe), Director and Head of Deutsche Bank's Control Room, is the only African-American woman employed in the Control Room. *Id.*, ¶ 15. At all relevant times, defendants Christine Berti, Marianne Perry, Tracy McNamara, Christopher Mahon, Jonathan Pinder and Marc Walby were Deutsche Bank employees. *Id.*, ¶¶ 6-11.

In 2002, plaintiff was promoted to "Professional-Non Professional," and received a "nominal" raise *(id.*, ¶ 20), but, plaintiff alleges, she effectively earned less after she was promoted because, in her new position, she was no longer eligible for overtime. *Id.* In 2004, plaintiff was promoted to Associate. *Id.*, ¶ 21. She alleges that her duties were similar to those of a white, male Assistant Vice President, but she was paid substantially less than he and other similarly situated male and white colleagues were paid. *Id.* In 2004 she received a $6,000 bonus, while her male and white colleagues allegedly received "nearly ten times as much." *Id.*, ¶ 52.

In 2007, following a reorganization of the Control Room, plaintiff's "role and expectations" changed, and she was "primarily performing tasks performed by senior level executives." *Id.*, ¶ 22. Despite performing the duties of a Vice President, she was not paid "a comparable salary, or even a salary on par with other Associates." *Id.* Her bonus for 2007

was reduced from the prior year, while "her non-black colleagues received significant bonuses nearing $60,000." *Id.*, ¶ 52. In 2008, plaintiff was promoted to Assistant Vice President, but was allegedly expected to continue performing administrative duties, when "other white and/or male peers" were not. *Id.*, ¶ 23. She was relieved of these administrative duties only after months of complaining, and was not compensated for assuming the additional duties. *Id.* In February 2011, plaintiff was promoted to Vice President. *Id.*, ¶ 25. Plaintiff alleges that despite receiving promotions, she has been paid less than similarly situated white and male employees throughout her career at Deutsche Bank, and has received lower annual bonuses every year since 2002, including 2010, when "other colleagues" received more than double her bonus. *Id.*, ¶¶ 20, 51-54.

In mid-2009, plaintiff complained to Deutsche Bank's human resources department that two co-workers were making "disparaging and racist comments" to her. *Id.*, ¶¶ 26-28. After she complained about her colleagues' conduct, Deutsche Bank allegedly retaliated against her, by forcing her to participate in a "sham" investigation conducted by human resources' staff members, including defendant Christine Berti (Berti). *Id.*, ¶¶ 29-31. At the end of the four-month investigation, plaintiff's "tormentors" were not disciplined, but plaintiff was found to have "interpersonal and communications issues with her co-workers

(*id.*, ¶¶ 30-31), and she subsequently was punished for an alleged infraction of the company's rules. *Id.*, ¶ 34. Plaintiff claims that the investigation itself was designed to harass her, and that Deutsche Bank has a "longstanding policy" of conducting such sham investigations into complaints of race discrimination, investigations orchestrated by Berti which "invariably end up with findings of no discrimination or retaliation." *Id.*, ¶¶ 32-33.

Plaintiff also alleges that Deutsche Bank retaliated against her for complaining about discrimination by denying her a promotion to Vice President in 2009 (*id.*, ¶¶ 26, 37), despite having successfully worked on a prestigious project, getting a "'high' mid-year rating" and being nominated by her supervisor (*id.*, ¶¶ 37-38), and despite five less qualified men being promoted to Vice President in 2009. *Id.*, ¶ 44. According to plaintiff, defendant Christopher Mahon (Mahon), a member of senior management, challenged her high rating to "thwart [her] promotional track," and she was told by a colleague that Mahon and other senior managers were unhappy that she had complained about discrimination. *Id.*, ¶¶ 38, 40. Plaintiff claims that in February 2010, when she learned that her promotion was denied, Mahon provided a "pretextual explanation" that there were only a limited number of promotions available. *Id.*, ¶ 45. After plaintiff complained about being denied a promotion, Mahon,

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Sharpe and another manager, Eric Gallinek (Gallinek), met with her to identify areas in which she needed to improve, but Mahon and Gallinek, who did not directly supervise plaintiff's work, did not accurately evaluate her performance. *Id.*, ¶¶ 46-49. Plaintiff asserts that Gallinek "eventually" admitted that she was denied a promotion because of communications made to him during the 2009 investigation by defendant Marianne Perry (Perry), an employee in the human resources department, who "belittled" plaintiff for her work with the Black Women's Leadership Alliance. *Id.*, ¶ 50.

Plaintiff further claims that she was promoted to Vice President in February 2011 only because she complained that the refusal to promote her was retaliatory. *Id.*, ¶ 24. She also claims that she was retaliated against again in March 2011, when she was denied a promotion to Control Room Deputy, even though she was performing many of the responsibilities of the position. *Id.*, ¶¶ 55-56. In addition, plaintiff alleges that she was retaliated against by defendant Tracy McNamara (McNamara), editor of the company newsletter, who, after plaintiff complained about discrimination, stopped speaking to plaintiff and excluded from the newsletter a story about plaintiff, which they had worked on together, and published instead a story about a non-black, female employee. *Id.*, ¶ 58. Plaintiff claims that defendant Jonathan Pinder (Pinder), Deutsche Bank's Chief Financial Officer,

retaliated against her by delaying approval of a tuition reimbursement request for six months. *Id.*, ¶ 60.

Plaintiff commenced the instant action in March 2012, seeking declaratory and injunctive relief, as well as monetary damages. The complaint alleges seven causes of action for: race and gender discrimination under the New York State Human Rights Law (Executive Law § 296 [1]) (NYSHRL) and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-107 [1])(NYCHRL) (first and fourth); retaliation under the NYSHRL and NYCHRL (second and fifth); aiding and abetting discrimination, as against the individual defendants (third and sixth); and intentional infliction of emotional distress (twelfth [sic]). Defendants do not move at this stage to dismiss the complaint in its entirety, but seek an order dismissing plaintiff's disparate pay and failure to promote claims occurring prior to October 6, 2008, all claims against the individual defendants, and the claims for hostile work environment and intentional infliction of emotional distress.

Discussion

It is well settled that on a motion to dismiss pursuant to CPLR 3211, the pleadings are 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, 152 (2002); *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001). However, while the pleading standard is a liberal one, "'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 Shariff v Murray*, 33 AD3d 688, 690 (2nd Dept 2006); *Scarfone v Village of Ossining*, 23 AD3d 540, 541 (2nd Dept 2005).

At the outset, defendants move to dismiss certain of plaintiff's discrimination claims as barred by the statute of limitations. Actions to recover damages for alleged employment discrimination under the NYSHRL and the NYCHRL are subject to a three-year statute of limitations. *See* CPLR 214(2);

Administrative Code § 8-502(d); *Koerner v State of New York, Pilgrim Psych. Ctr.*, 62 NY2d 442, 446 (1984); *Kent v Papert Cos.*, 309 AD2d 234, 240 (1st Dept 2003); *Milani v International Bus. Machs. Corp., Inc.*, 322 F Supp 2d 434, 451 (SD NY 2004), *affd* 137 Fed Appx 430 (2d Cir 2005). Although the instant action was commenced in March 2012, it is undisputed that plaintiff and Deutsche Bank entered into an agreement tolling the statute of limitations, with respect to plaintiff's discrimination claims against Deutsche Bank, as of October 6, 2011. Defendants contend that plaintiff's claims based on unequal pay and failure to promote are time-barred to the extent that they arise from events that occurred prior to October 6, 2008. Plaintiff argues that those claims are timely as part of a "continuing violation."

CONTINUING VIOLATION DOCTRINE

The continuing violation doctrine "extends the limitations period for all claims of discriminatory acts committed under an ongoing policy of discrimination even if those acts, standing alone, would have been barred by the statute of limitations." *Quinn v Green Tree Credit Corp.*, 159 F3d 759, 765 (2d Cir 1998) (internal citations, quotation marks, and emphasis omitted). "Under the continuing violation doctrine, '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.'"

Bermudez v City of New York, 784 F Supp 2d 560, 574 (SD NY 2011), quoting *Fitzgerald v Henderson*, 251 F3d 345, 359 (2d Cir 2001); The continuing violation exception "is most often applied to Title VII [of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*)] claims, but has been applied to NYCHRL and NYSHRL claims as well." *Campbell v Cellco Partnership*, 860 F Supp 2d 284, 297 (SD NY 2012); *see Williams v New York City Hous. Auth.*, 61 AD3d 62, 71 (1st Dept 2009); *Bermudez*, 783 F Supp 2d at 574. "The doctrine has generally been limited to situations where there are specific policies or mechanisms, such as discriminatory seniority lists or employment tests" (*Crosland v City of New York*, 140 F Supp 2d 300, 307 [SD NY 2001], *affd* 54 Fed Appx 504 [2d Cir 2002]), and where "a series of separate acts ... collectively constitute one 'unlawful employment practice,'" such as a hostile work environment. *National R.R. Passenger Corp. v Morgan*, 536 US 101, 117 (2002); *see Kimmel v State of New York*, 49 AD3d 1210, 1210-1211 (4th Dept 2008); *Hughes v United Parcel Serv.*, 4 Misc 3d 1023(A), 2004 NY Slip Op 51008(U), *5-6 (Sup Ct, NY County 2004).

As limited by the United States Supreme Court in *Morgan*, the continuing violation exception does not extend to "discrete discriminatory acts" that occur outside the limitations period, "even when they are related to acts alleged in timely filed charges." 536 US at 113; *see Milani*, 322 F Supp 2d at 452 ("even

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serial violations — a series of discrete but related acts of discrimination — do not warrant application of the continuing violations doctrine"). Discrete acts, which have "a fixed point in time" (*Pressley v City of New York*, 2013 WL 145747, *9, 2013 US Dist LEXIS 5374, *24-25 [ED NY 2013]), include "termination, failure to promote, denial of transfer, or refusal to hire" (*Morgan*, 536 US at 113), as well as demotions, transfers, job assignments, negative performance evaluations, and promotion with a diminution of pay. *See Chin v Port Auth. of N.Y. & N.J.*, 685 F3d 135, 157 (2d Cir 2012); *Valtchev v City of New York*, 400 Fed Appx 586, 589 (2d Cir 2010); *Jackson v New York State Ofc. of Mental Health*, 2012 WL 5862741, *2, 2012 US Dist LEXIS 165876, *4-5 (SD NY 2012); *Gutierrez v City of New York*, 756 F Supp 2d 491, 500 (SD NY 2010). Each such discrete "incident of discrimination ... 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.

"The narrower definition of the continuing violations doctrine under *Morgan* applies to plaintiff's discrimination claims under state law." *Sotomayor v City of New York*, 862 F Supp 2d 226, 250 (ED NY 2012); *see Milani*, 322 F Supp 2d at 452 n 32; *Blake v Bronx Lebanon Hosp. Ctr.*, 2003 WL 21910867, *6, 2003 US Dist LEXIS 13857, *16-17 (SD NY 2003). In contrast, while

earlier decisions also applied the *Morgan* standard to claims under the NYCHRL (*see e.g. Hughes v United Parcel Serv.*, 4 Misc 3d 1023[A]), the First Department, in *Williams*, has made clear that in view of the NYCHRL's mandate that its provisions be interpreted liberally and independently from its state and federal counterparts, a "more generous" pre-*Morgan* standard applies to NYCHRL claims. 61 AD3d at 66, 72; *see Morgan v NYS Attorney Gen.'s Ofc.*, 2013 WL 491525, *12, 2013 US Dist LEXIS 17458, *36-37 (SD NY 2013); *Sotomayor*, 862 F Supp 2d at 250; *Smith v New York City Dept. of Homeless Servs.*, 2009 WL 4728826, 2009 NY Misc LEXIS 5374, *6 (Sup Ct, NY County 2009). That is, under the NYCHRL, a continuing violation may be found "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." *Morgan v NYS Attorney Gen.'s Ofc.*, 2013 WL 491525, at *12, 2013 US Dist LEXIS 17458, at *37 (internal quotation marks and citations omitted); *see Fitzgerald*, 251 F3d at 359; *Quinn*, 159 F3d at 766; *Clark v State of New York*, 302 AD2d 942, 945 (4th Dept 2003).

Failure to Promote

Under the NYSHRL, as under Title VII, "a decision not to promote is a discrete act, and provides no basis for finding a continuing violation." *Kumaga v New York City School Constr. Auth.*, 27 Misc 3d 1207(A), 2010 WL 1444513, *11, 2010 NY Misc

LEXIS 736, **29 (Sup Ct, NY County 2010); *see Chin*, 685 F3d at 157. Even under the NYCHRL, courts also have continued to hold that a failure to promote claim cannot be the basis for a continuing violation. *See Bayley v City of New York*, 2010 WL 898083, 2010 NY Misc LEXIS 2527, *9 (Sup Ct, NY County 2010); *see also Hughes v United Parcel Serv., Inc.*, 4 Misc 3d 1023(A) (noting that such untimely discrete acts may, however, be used as "background evidence" in support of a timely claim); *but see Morgan v NYS Attorney Gen.'s Ofc.*, 2013 WL 491525, at *12, 2013 US Dist LEXIS 17458, at *37-38 (continuing violation may apply where failure to promote was beginning of long and continuing pattern of discrimination).

In this case, even if, following *Williams*, an untimely failure to promote claim under the NYCHRL could be considered part of a continuing violation, plaintiff's allegations do not state a viable claim for failure to promote prior to 2009. Other than her conclusory allegation that for years before her 2011 promotion she was performing senior executive work, and other non-black and male colleagues were promoted before her (Complaint, ¶ 25), plaintiff does not allege that she was denied any promotions before 2009, and alleges no facts to support her claim that there was a promotional lag. To the contrary, plaintiff alleges that she received promotions in 2002, 2004, and 2008, but was not adequately compensated. Plaintiff alleges that

she first was denied a promotion to Vice President in 2009 (*id.*, ¶¶ 26, 37); that she was promoted to Vice President in February 2011, only after she complained about retaliation (*id.*, ¶ 24); and that she was again denied a promotion, to Control Room Deputy, in March 2011. *Id.*, ¶ 56. As plaintiff cannot establish a failure to promote claim arising prior to 2009 (*see Deshpande v TJH Med. Servs., P.C.*, 52 AD3d 648, 651 [2d Dept 2008] [no cause of action for failure to promote where no allegations that plaintiff was refused a promotion to a position for which he applied and was qualified]), there is no basis for finding a continuing violation based on a failure to promote.

Unequal Pay

In her claim of discriminatory compensation, plaintiff alleges that despite her promotions, she was paid less than her similarly situated white and male colleagues throughout her career at Deutsche Bank, starting in 2002 and continuing to the present. Complaint, ¶¶ 20, 51. More particularly, she alleges that she received lower bonuses than her white and male counterparts in 2004, 2007, and 2010 (*id.*, ¶ 52); that, when she was promoted in 2002, she made less money than similarly situated white and male colleagues (*id.*, ¶ 20); that, in 2004, as an Associate, she was paid less than a white male employee performing similar work (*id.*, ¶ 21); that, in 2007, she was doing senior level executive tasks, but was not paid at the level of a

Vice President, or even on par with "other" Associates (*id.*, ¶ 22); and that, when she was promoted to Assistant Vice President in 2008, she was asked to do more work and was paid less than her white and/or male peers. *Id.*, ¶ 23.

After *Morgan*, courts repeatedly held that "compensation decisions are 'discrete acts' that do not trigger the continuing violation exception." *Workneh v Pall Corp.*, 2012 WL 4845836, *6, 2012 US Dist LEXIS 147397, *17 (ED NY 2012); *see Kent*, 309 AD2d at 240; *Plant v Deutsche Bank Sec., Inc.*, 2007 WL 2187109, *3-4, 2007 US Dist LEXIS 55100, *6 (SD NY 2007); *Gross v National Broadcasting Corp.*, 232 F Supp 2d 58, 68 (SD NY 2002); *see also Ledbetter v Goodyear Tire & Rubber Co., Inc.*, 550 US 618 (2007) (where plaintiff sued because she had received lower salary, based on gender, for 20 years, court held each paycheck was a discrete act and did not toll limitations period). In response to *Ledbetter*, Congress enacted the Lilly Ledbetter Fair Pay Act of 2009 (Fair Pay Act) (42 USC § 2000e-5 [e] [3]), which "effectively nullifies *Ledbetter.*" *Siri v Princeton Club of N.Y.*, 59 AD3d 309, 310 n * (1st Dept 2009); *see Schwartz v Merrill Lynch & Co.*, 665 F3d 444, 449-450 (2d Cir 2011) (the Act was passed to overrule *Ledbetter*); *Finkel v New York City Hous. Auth.*, 2010 WL 4530228, 2010 NY Misc LEXIS 5378, *14 (Sup Ct, NY County 2010), *affd* 89 AD3d 492 (1st Dept 2011) (same).

"The Fair Pay Act provides that 'an unlawful employment

practice occurs, with respect to discrimination in compensation in violation of [Title 42 of the U.S. Code]' not only when the discriminatory compensation decision is made, but also when the victim of that decision 'is affected by application of' that decision, 'including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.'" *Schwartz*, 665 F3d at 449-450, (internal citation omitted); *see Vuong v New York Life Insur. Co.*, 2009 WL 306391, *7-8, 2009 US Dist LEXIS 9320, *23-24 (SD NY 2009), *affd* 360 Fed Appx 218 (2d Cir 2010). Thus, following enactment of the Fair Pay Act, even if a discriminatory compensation decision did not occur within the limitations period, claims to recover for each subsequent paycheck may be timely. *See Miller v Kempthorne*, 357 Fed Appx 384, 386 (2d Cir 2009); *Equal Empl. Opportunity Commn. v Bloomberg*, 751 F Supp 2d 628, 651 (SD NY 2010); *Robinson v Brooklyn Coll.*, 2010 WL 3924012, *4, 2010 US Dist LEXIS 103131, *12-13 (ED NY 2010); *Russell v County of Nassau*, 696 F Supp 2d 213, 227 (ED NY 2010).

Contrary to defendants' argument that the Fair Pay Act is not applicable here, the statute has been found to apply to discrimination claims brought under state and city law. *See Siri v Princeton Club of N.Y.*, 59 AD3d 309, *supra* (recognizing applicability of Fair Pay Act to state and city discrimination claims, but finding pay decisions were not discriminatory);

Matter of Finkel v New York City Hous. Auth., 89 AD3d 492, *supra* (Fair Pay Act applies, but not to pension payments); *Grant v Pathmark Stores, Inc.*, 2009 WL 2263795, 2009 US Dist LEXIS 65393 (applying Fair Pay Act to Title VII and NYSHRL claims, but finding no evidence of discrimination). Moreover, it is well settled that claims under the NYSHRL generally are analyzed under the same standards used to evaluate claims brought under Title VII (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 n 3 [2004]), "including the calculation and tolling of the limitations period" (*Finkel*, 2010 WL 4530228, 2010 NY Misc LEXIS 5378, at *16), and "a liberal reading of the statute is explicitly mandated to effectuate the statute's intent." *Aurecchione v New York State Div. of Human Rights*, 98 NY2d 21, 26 (2002); *see also Aspilaire v Wyeth Pharms., Inc.*, 612 F Supp 2d 289, 303 (SD NY 2009) (accepting recently enacted Fair Pay Act applies to § 1981 claims, although not expressly included in the Act, because such cases are frequently analyzed under Title VII framework).[1]

The NYCHRL similarly looks to federal and state law for guidance, but only to the extent that state or federal statutes provide "'a floor below which the City's Human Rights law cannot

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[1]Accordingly, the court rejects the reasoning of the federal district court in *Russell* (696 F Supp 2d at 230), on which defendants rely, that absent a New York statute similar to the Fair Pay Act, NYSHRL salary discrimination claims are governed by the *Ledbetter* case.

fall, rather than a ceiling above which the local law cannot rise.'" *Williams*, 61 AD3d at 66-67 (internal citations omitted); *see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 38 n 6 (1st Dept 2011). Thus, for purposes of the instant CPLR 3211 motion to dismiss, plaintiff has sufficiently alleged a continuing violation based on unequal pay.

Hostile Work Environment

To establish a hostile work environment claim under the NYSHRL, as under Title VII, 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 v Vinson*, 477 US 57, 65, 67 (1986). "Merely offensive" conduct is not actionable. *See Harris*, 510 US at 21; *Forrest*, 3 NY3d at 311. Similarly, to be actionable, "[t]he incidents [of harassment] must be repeated and continuous; isolated acts or occasional episodes will not merit relief." *Kotcher v Rosa & Sullivan Appliance Ctr., Inc.*, 957 F2d 59, 62 (2d Cir 1992); *see Clark County School Dist. v Breeden*, 532 US 268 (2001); *Davis-Bell v Columbia Univ.*, 851 F Supp 2d 650, 673 (SD NY 2012); *Ferrer v New York State Div. of Human Rights*, 82 AD3d 431, 431 (1st Dept 2011).

Under the NYCHRL, which, again, must "be construed more

broadly than federal civil rights laws and the State HRL" (*Williams*, 61 AD3d at 74; *see Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]), a plaintiff need not show that the harassment was "severe and pervasive," but she must show that she was subjected to conduct that amounted to more than "petty slights and trivial inconveniences," because of her membership in a protected category. *Williams*, 61 AD3d at 80; *see Chinnici v Fraas USA, Inc.*, 2010 WL 2019456, 2010 NY Misc LEXIS 2053, *22 (Sup Ct, NY County 2010); *Tu v Loan Pricing Corp.*, 21 Misc 3d 1104(A), 2008 NY Slip Op 51945(U), *7-8 (Sup Ct, NY County 2008). The primary focus under the NYCHRL is on whether the alleged harassment "constitutes inferior terms and conditions based on gender [or race]." *Williams*, 61 AD3d at 75. Under either state or city law, "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).

Here, plaintiff predicates her claim that she was subjected to a gender and race-based hostile work environment on the allegedly harassing investigation Deutsche Bank conducted after she complained of racially derisive remarks made by two co-workers. Complaint, ¶ 34. Her allegations of harassment are, however, devoid of facts to support a claim that the alleged harassment was based on either race or gender. Rather, the

complaint alleges that this investigation was "designed to harass" her for complaining about her co-workers' conduct. *Id.*, ¶ 32. Notably, there simply are no allegations of any gender-based harassment, and no factual allegations to show how the investigation was "designed to harass" her, other than via its unfavorable outcome. Nor does plaintiff's allegation that Deutsche Bank conducted similar "sham" investigations following other employees' race discrimination complaints demonstrate harassment against plaintiff. Thus, under any view of the allegations, plaintiff has failed to state a claim for race or gender discrimination based on a hostile work environment.

Claims Against Individual Defendants

Under the NYSHRL, which prohibits an "employer" from discriminating against individuals on the basis of certain protected characteristics,[2] corporate employees, even managers and supervisors, cannot be held individually liable for employment discrimination unless they have an "ownership interest [in the company] or power to do more than carry out personnel decisions made by others." *Patrowich v Chemical Bank*, 63 NY2d

[2]Executive Law § Section 296(1)(a) provides that it is an unlawful discriminatory practice "[f]or an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

541, 543-544 (1984); *see Kaiser v Raoul's Rest. Corp.*, 72 AD3d 539 (1st Dept 2010); *Mitchell v TAM Equities, Inc.*, 27 AD3d 703, 707 (2d Dept 2006); *Pepler v Coyne*, 33 AD3d 434 (1st Dept 2006). The NYCHRL, which expressly extends liability to "an employee,"[3] also generally has been interpreted to "include fellow employees under the tent of liability ... only where they act with or on behalf of the employer in hiring, firing, paying, or in administering the 'terms, conditions or privileges of employment.'" *Priore v New York Yankees*, 307 AD2d 67, 74 (1st Dept 2003); *see Ballard v Children's Aid Socy.*, 2011 WL 1664980, *10, 2011 US Dist LEXIS 48203, *29 (SD NY 2011); *Mitra v State Bank of India*, 2005 WL 2143144, *7, 2005 US Dist LEXIS 19138, *11-12 (SD NY 2005); *but see Henry-Offor v City Univ. of N.Y.*, 2012 WL 2317540, *6, 2012 US Dist LEXIS 84817, *18-19 (SD NY 2012) (noting that courts have differed on degree to which employee must control or supervise before being subject to "principal liability" under the NYCHRL).

In contrast, an individual employee may be held liable, under both the NYSHRL and the NYCHRL, for aiding and abetting an

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[3]Administrative Code § 8-107(1)(a) provides that it is unlawful "[f]or an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment."

employer's discriminatory conduct, even when the individual lacks the authority to hire or fire the plaintiff. Executive Law §296(6); Administrative Code §8-107(6); *see Mitchell*, 27 AD3d at 707; *D'Amico v Commodities Exch.*, 235 AD2d 313, 315 (1st Dept 1997); *Peck v Sony Music Corp.*, 221 AD2d 157, 158 (1st Dept 1995); *see also Feingold v State of New York*, 366 F3d 138, 158 (2d Cir 2004). An aiding and abetting claim against an individual employee requires a plaintiff to show that the employee actually participated in the conduct giving rise to the discrimination claim. *See Feingold*, 366 F3d at 158; *Morgan v NYS Attorney Gen.'s Ofc.*, 2013 WL 491525, at *13, 2013 US Dist LEXIS 17458, at *38-39 (failure to take remedial actions can rise to level of actual participation).

It is unclear here whether plaintiff is even alleging direct liability against the individual defendants. While she contends that the individual defendants are liable for discrimination, and the complaint asserts causes of action for race and gender discrimination and retaliation against all "defendants," her argument, in opposition to defendants' motion to dismiss, focuses almost exclusively on her claim that the individual defendants "aided and abetted their employer in continuing to perpetuate a hostile work environment against the Plaintiff as well as other

unlawful discriminatory practices." Correa Aff. in Opp., ¶ 17.[4] Plaintiff does not allege that the individual defendants had any ownership interest in Deutsche Bank, or had the power to hire or fire her. To the contrary, the complaint alleges that non-party Sharpe hired her (Complaint, ¶ 15), and that defendant Mahon, in particular, had no supervisory control over her. *Id.*, ¶ 46. Further, there are no factual allegations to show, and plaintiff does not now argue, that any of the individual defendants displayed any racial or gender animus toward her, through words or actions. Thus, to the extent that plaintiff has asserted claims against the individual defendants for direct liability under Executive Law § 296 and Administrative Code § 8-107, those claims cannot survive.

Plaintiff's claims against the individual defendants rest, essentially, on allegations that each engaged in conduct, which chronologically followed and was part of Deutsche Bank's alleged retaliation against her for making a race discrimination complaint in 2009. Plaintiff alleges that following her complaint, defendants retaliated against her by denying her promotions, and by creating a hostile environment, which included the harassing investigation into her complaint.

Both the NYSHRL and the NYCHRL make it unlawful to retaliate

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[4]The cases on which plaintiff relies to support her argument that she has a claim against the individual defendants also all chiefly address the viability of aiding and abetting claims.

or discriminate against an employee for filing a discrimination complaint or otherwise opposing any practice prohibited by the statute. Executive Law §296(7); Administrative Code §8-107(7). To establish a claim of unlawful retaliation under the NYSHRL, 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 existed between the protected activity and the adverse action. *See Forrest,* 3 NY3d at 312-313; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 (1st Dept 2012); *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 967 (1st Dept 2009). "An adverse employment action requires a materially adverse change in the terms and conditions of employment ... [such as] 'a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished material responsibilities.'" *Forrest*, 3 NY3d at 306, quoting *Galabaya v New York City Bd. of Educ.*, 202 F3d 636, 640 (2d Cir 2000); *see Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 314-315 (1st Dept 2005); *Costello v New York State Nurses Assn.*, 783 F Supp 2d 656, 671-672 (SD NY 2011). "To be materially adverse, a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" *Forrest*, 3 NY3d at 306, quoting *Galabaya,* 202 F3d at 640; *see Mejia v Roosevelt Is. Med. Assoc.*, 95 AD3d 570, 571 (1st Dept

2012); *Block v Gatling*, 84 AD3d 445, 445 (1st Dept 2011); *see generally Tu v Loan Pricing Corp.*, 21 Misc 3d 1104(A) (describing what is and is not adverse action).

Under the more protective NYCHRL, a retaliation claim does not require "a materially adverse change in the terms and conditions of employment," but, instead, the alleged retaliatory acts need only "be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7); *see Williams*, 61 AD3d at 70-71. To establish a prima facie claim of retaliation under the NYCHRL, a plaintiff must show that (1) she participated in a protected activity known to defendants; (2) defendants took an employment action that disadvantaged the plaintiff; and (3) a causal connection existed between the protected activity and the adverse employment action. *See Fletcher*, 99 AD3d at 51-53; *Farrugia v North Shore Univ. Hosp.*, 13 Misc 3d 740, 752 (Sup Ct, NY County 2006); *Selmanovic v NYSE Group, Inc.*, 2007 WL 4563431, *5, 2007 US Dist LEXIS 94963, *16 (SD NY 2007).

As against the individual defendants, plaintiff's claim of retaliation against Berti alleges that Berti conducted a sham, harassing investigation, which resulted in criticism of plaintiff, but no finding of discrimination and no action taken against the co-workers. Complaint, ¶ 31. Plaintiff also alleges that Berti subsequently subjected her to disciplinary action

following an improper finding that plaintiff had violated the company's rules. *Id.*, ¶¶ 31-34.

As against Mahon, plaintiff alleges that he was instrumental in preventing her from getting a promotion in 2009, and falsely evaluated her. *Id.*, ¶¶ 38, 40, 45-48. Plaintiff alleges that Perry aided in the denial of the 2009 promotion, by making "disclosures" about the 2009 investigation to other employees, in violation of Deutsche Bank's policy, and by criticizing plaintiff's initiative, the Black Women's Leadership Alliance. *Id.*, ¶ 50. Plaintiff further alleges that Walby retaliated against her in 2011, when he, together with Sharpe, refused to appoint her to the position of Control Room Deputy. *Id.*, ¶¶ 57-58.

Plaintiff's claim against McNamara is based on allegations that after working with plaintiff on an article for the company newsletter, she stopped speaking to plaintiff and did not publish the piece. *Id.*, ¶ 59. Plaintiff's sole allegation against Pinder, Deutsche Bank's Chief Financial Officer, is that at some unspecified time, he "delayed" the approval of a tuition reimbursement request for six months. *Id.*, ¶ 60.

In this case, giving the plaintiff the benefit of every favorable inference, as the court must, and considering the early stage of the proceedings, the court finds that the allegations against Berti, Mahon and Walby are sufficient, under the NYSHRL

and the NYCHRL, to support her claim that they aided and abetted Deutsche Bank's alleged retaliation, by actually participating in adverse employment actions. *But see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 129 (1st Dept 2012) ("an employer's continuation of a course of conduct that had begun before the employee complained does not constitute retaliation").

However, the allegations against Perry, McNamara and Pinder are insufficient to state a claim under the NYSHRL or the NYCHRL, as none of their actions constituted material adverse actions, or, under the NYCHRL, could be said to have "disadvantaged" plaintiff. Although the First Department has cautioned that the NYCHRL "does not permit any type of challenged conduct to be categorically rejected as nonactionable" (*Williams*, 61 AD3d at 71), courts have continued to find that certain conduct is insufficient, as a matter of law, to support a retaliation claim, even under the broad NYCHRL standard. *See e.g. Melman*, 98 AD3d at 129-130 (refusal to talk to employee is too "amorphous" an allegation to set forth retaliation claim); *Poolt v Brooks*, 38 Misc 3d 1216(A), 2013 WL 323253, *13, 2013 NY Misc LEXIS 265, *36 (Sup Ct, NY County 2013) (telling bookkeeper to do all accounting work in one day did not "disadvantage" plaintiff). The alleged actions of Perry, McNamara and Pinder, consisting of criticism by a co-worker, refusal to publish a story about her in the company newsletter, and a six-month delay in a tuition reimbursement,

cannot be considered more than trivial events, or events reasonably likely to deter a person from complaining about discrimination. Those actions are insufficient to state a claim for retaliation, and, therefore, are insufficient to support an aiding and abetting claim.

Moreover, the complaint does not allege, at least as to McNamara and Pinder, that they were aware of plaintiff's protected activity, or that their actions were causally connected, through temporal proximity or evidence of retaliatory animus, to plaintiff's discrimination complaint. *See Fletcher*, 99 AD3d at 54 (complaint without allegations that defendants knew or should have known about protected activity fails to state a cause of action); *Deshpande v Medisys Health Network, Inc.*, 2010 WL 1539745, *22 n 22, 2010 US Dist LEXIS 37891, *77 (ED NY 2010), *affd* 423 Fed Appx 31 (2d Cir 2011) (even if question whether defendants' conduct was "reasonably likely to deter a person from engaging in protected activity," the plaintiff must also demonstrate a causal connection between the protected activity and the adverse employment action).

Intentional Infliction of Emotional Distress

A cause of action for intentional infliction of emotional distress must be supported by allegations of conduct "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." *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 (1983)(internal quotation marks and citation omitted); *see Howell v New York Post Co.*, 81 NY2d 115, 122 (1993); *Freihofer v Hearst Corp.*, 65 NY2d 135, 143-144 (1985); *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 125 (1st Dept 2007). "[T]he 'requirements of the rule are rigorous, and difficult to satisfy.'" *Howell*, 81 NY2d at 122 (citation omitted). "Such extreme and outrageous conduct must be clearly alleged in order for the complaint to survive a motion to dismiss." *Sheila C. v Povich*, 11 AD3d 120, 131 (1st Dept 2004); *see Seltzer v Bayer*, 272 AD2d 263, 264-265 (1st Dept 2000) (allegations generally must detail "a longstanding campaign of deliberate systematic and malicious harassment of the plaintiff").

"Where, as here, the plaintiff premises an intentional infliction of emotional distress claim on harassment, discrimination, or retaliation in the employment context, New York courts are particularly reluctant to find that such conduct is sufficiently extreme or outrageous to satisfy this demanding standard 'absent a deliberate and malicious campaign against the plaintiff.'" *Robles v Cox & Co.*, 841 F Supp 2d 615, 631-632 (ED NY 2012) (internal citation omitted); *see Gioia v Forbes Media LLC*, 2011 WL 4549607, *12, 2011 US Dist LEXIS 113999, *34-35 (SD NY 2011), *affd* __ Fed Appx__, 2012 WL 5382256, 2012 US App LEXIS

22689 (2d Cir 2012); *Fertig v HRA Medical Assistance Program*, 2011 WL 1795235, *6, 2011 US Dist LEXIS 48789, *18 (SD NY 2011); *Emmons v City Univ. of N.Y.*, 715 F Supp 2d 394, 424 (ED NY 2010).

"Acts which merely constitute harassment, disrespectful or disparate treatment, a hostile environment, humiliating criticism, intimidation, insults or other indignities fail to sustain a claim of [IIED] because the conduct alleged is not sufficiently outrageous." *Semper v New York Methodist Hosp.*, 786 F Supp 2d 566, 587 (ED NY 2011) (internal quotation marks and citations omitted); *see Fama v American Intl. Group, Inc.*, 306 AD2d 310 (2d Dept 2003) (allegations that plaintiff's manager made sexually offensive remarks, and sabotaged her performance by lying about her, insufficient for IIED claim); *Diaz v Cayre Group Ltd.*, 2009 WL 4927177, 2009 NY Misc LEXIS 4448 (Sup Ct, NY County 2009) (claims of repeated sexual advances, sexually oriented written materials and sexual remarks, and of false accusations of harassment against her, not sufficiently outrageous to meet IIED standard); *Baraliu v Vinya Capital, L.P.*, 2009 WL 959578, *12, 2009 US Dist LEXIS 35712, *37-38 (ED NY 2009) (employer's baseless assessment of plaintiff's work performance and accusations of misconduct insufficient to sustain IIED claim).

Plaintiff alleges that defendants caused her emotional distress by paying her less than similarly situated male and white employees, denying her promotions, harassing her with a

four-month investigation of her race discrimination complaint, belittling her, deciding not to publish a feature story about her in the company newsletter, and delaying reimbursement of tuition fees. Even if true, plaintiff's allegations do not come close to meeting the standard of "extreme and outrageous" conduct necessary to state a cause of action for intentional infliction of emotional distress. Therefore, the cause of action for intentional infliction of emotion distress is dismissed

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted to the extent of dismissing the twelfth (sic) cause of action, for intentional infliction of emotional distress; and it is further

ORDERED that the first, second, fourth and fifth causes of action are dismissed as against defendants Christine Berti, Tracy McNamara, Marianne Perry, Christopher Mahon, Jonathan Pinder, and Marc Walby; and it is further

ORDERED that the third and sixth causes of action are dismissed as against defendants Tracy McNamara, Marianne Perry, and Jonathan Pinder; and it is further

ORDERED that plaintiff's claims based on (1) failure to promote her prior to October 2009 and (2) hostile work environment are dismissed; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that defendants serve and file their answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 311, 71 Thomas Street, on June 12, 2013 at 2:00 PM.

Dated: 4/4/13

HON. ELLEN COIN, A.J.S.C.