Kassapian v City of New York
2015 NY Slip Op 30630(U)
March 10, 2015
Supreme Court, Kings County
Docket Number: 506287/13
Judge: Dawn M. Jimenez-Salta
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At an IAS Term, Part 25 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on March 10, 2015.

PRESENT:
HON. DAWN JIMENEZ-SALTA,
Justice.

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FORMER HONORABLE SUSAN KASSAPIAN,

Index No.: 506287/13

Plaintiff,

- against -

DECISION AND ORDER

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, JONATHAN MINTZ, individually and in his official capacity as Commissioner of the New York City Department of Consumer Affairs, BRUCE DENNIS, individually and in his official capacity as Director of Adjudication of the New York City Department of Consumer Affairs, ALBA PICO, individually and in her official capacity as Deputy Commissioner of Operations of the New York City Department of Consumer Affairs, MARLA TEPPER, individually and in her official capacity as Deputy Commissioner and General Counsel of the New York City Department of Consumer Affairs, and NANCY SCHINDLER, individually and in her official capacity as Former Director of Adjudications of the New York City Department of Consumer Affairs,

Defendants.

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Recitation, as required by *CPLR 2219(a)*, of the papers considered in the review of:

1) Defendant City of New York's ("City") Notice of Motion to Dismiss the Complaint pursuant to *CPLR 3211(a)(1)* and *3211(a)(7)* on the grounds that:

a) Plaintiff failed to state a claim; b) Plaintiff failed to file a timely Notice of Claim; c) Plaintiff had alternative remedies available to her; d) Plaintiff's claims are time barred in part by applicable limitations period; e) Plaintiff failed to offer factual allegations supporting her claims and/or the documentary evidence shows that Defendants had legitimate business reasons for their actions. Defendant requests judgment in its favor along with costs, fees, disbursements and such other and further relief, dated April 30, 2014;

2) Defendant City's Affirmation in Support of its Motion to Dismiss the Complaint, dated April 30, 2014;

3) Defendant City's Memorandum of Law in Support of its Motion to Dismiss the Complaint, dated April 30, 2014;

4) Plaintiff Former Honorable Susan Kassapian's ("Kassapian") Memorandum of Law in Opposition to Defendant City's Motion to Dismiss the Complaint, dated September 12, 2014;

5) Plaintiff Kassapian's Notice of Cross Motion to Amend the Complaint, pursuant to *CPLR 3025(b),* to supplement and add an alternative cause of action in the Complaint pursuant to the *U.S. Constitution* if this Court finds that Plaintiff's constitutional claims are time barred for failure to file a timely Notice of Claim and/or Plaintiff had alternative remedies available, dated September 19, 2014;
6) Plaintiff Kassapian's Amended Notice of Cross Motion to Amend the Complaint, pursuant to *CPLR 3025(b),* to supplement and add an alternative cause of action in the Complaint pursuant to the *U.S. Constitution* if this Court finds that Plaintiff's constitutional claims are time barred for failure to file a timely Notice of Claim and/or Plaintiff had alternative remedies available, dated November 6, 2014;
7) Defendant City's Reply Memorandum of Law in Further Support of its Motion to Dismiss and in Opposition to Plaintiff's Cross Motion to Amend, dated November 12, 2014;
8) Defendant City's Reply Affirmation and Memorandum of Law, dated November 13, 2014, all of which submitted November 14, 2014.

Papers	Numbered
Notice of Motion and Affidavits Annexed	Defendant 1 [Exh. A-F]
Notice of Cross-Motion and Affidavits Annexed	Plaintiff 4 [Exh. A, 1-7] Plaintiff 5
Order to Show Cause and Affidavits	
Answering Affidavits	
Replying Affidavit	Defendant 6
Supplemental Affidavits	
Exhibits	
Other [Memorandum of Law-Defendant]	Defendant 2
Other [Memorandum of Law-Plaintiff]	Plaintiff 3
Other [Reply Memorandum of Law- Defendant]	Defendant 7

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows: Defendant City's motion to dismiss the complaint is granted pursuant to *CPLR 3211 (a)(7).* Defendant City's request for costs, fees, and disbursements is denied [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Plaintiff Kassapian's cross motion and amended cross motion to amend the Complaint to supplement and add a *U.S. Constitution* claim as an alternative cause of action is denied pursuant to *CPLR 3025(b)* [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

PROCEDURAL HISTORY AND BACKGROUND

Plaintiff Former Honorable Susan Kassapian[1] ("Kassapian"), a former Administrative Law Judge ("ALJ") and currently Senior Counsel in the General Counsel's Office of the Department of Consumer Affairs

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[1]Plaintiff served as the Principal Administrative Law Judge ("ALJ") for Consumer Dockets in the Adjudication Division of the New York City Department of Consumer Affairs ("DCA") from May 2009 to August 23, 2013. Prior to May 2009, she held various positions within DCA, including Assistant Commissioner for the Legal Division and General Counsel [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

("DCA") filed a Summons and Verified Complaint on October 17, 2013 in which she contended that the named Defendants violated her *New York State Constitution Article 1, Sections 8 and 9* rights of free speech and to petition the government and the *Administrative Code of the City of New York Section 8-107* (also known as the *City Human Rights Law ("CHRL"))* which subjected her to discrimination. Her *New York State Constitutional* claims were allegedly the result of her speaking out externally and internally on matters of public concern when she was employed at DCA from 2008 through 2013. As a result, she faced retaliation because of her objections to Defendants' alleged policy and practice which pressured the Administrative Law Judges ("ALJ's") to issue decisions which ruled in favor of DCA and imposed maximum fines. Her *Administrative Code of the City of New York Section 8-107 ("CHRL")* allegations include a hostile work environment as well as disparate treatment due to her age and sex. She claims that she was subjected to retaliation because of her complaints regarding gender, sexual harassment and age discrimination[2]. She seeks compensatory damages which are not limited to back pay which was lost due to demotions and pay cuts as well as pain and suffering and damage to Plaintiff's reputation [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

In her Verified Complaint, dated October 17, 2013, she claims age discrimination and disparate treatment on behalf of herself and her DCA colleagues because of a statement attributed to Defendant Commissioner Mintz on July 22, 2008 when he allegedly declared that he intended to "clean house" in the division. She regarded that statement as implying that older workers would be let go and replaced by younger ones [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

She claims sex discrimination and sexual harassment because of an October 28, 2010 incident when Plaintiff entered Defendant Dennis' office on business as he was allegedly flaunting a sex toy which he was demonstrating to two male colleagues[3]. Although Plaintiff protested, Defendant Dennis allegedly continued to press the sex toy three times which caused a bulging motion which she found disturbing. Consequently, Plaintiff claims that she was uncomfortable and thus unable to discuss business with him. She contends that Defendant Dennis continued to flash the sex toy over the next two days despite her protests. In November 2010, Plaintiff claimed that Defendant Dennis again showed the sex toy to Defendant DCA Director of Adjudication Schindler. In December 2010, Plaintiff subsequently complained to Defendant Schindler about the prior sex toy incident in October 2010. A month later in January 2011, Plaintiff states that Defendant Schindler announced that she would be leaving the division to assume Plaintiff's former position of Assistant Director for Legal. Consequently, Plaintiff alleges that there was no follow up to her complaint by Defendant Schindler [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Plaintiff alleges retaliation as a result of her complaints[4]. She believes that her heavy work load and increased scrutiny of her draft decisions are because of Defendant Dennis' promotion to Acting Director

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[2] Plaintiff's date of birth is February 7, 1955 [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

[3] Those male colleagues were ALJ James Plotkin and Deputy Director for Settlement Officers Igo Simon [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

[4] The sex toy incident occurred in October 2010. Her subsequent request for an investigation into the matter was on April 11, 2011, some seven (7) months after the incident [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

of the Tribunal on February 8, 2011. She claims that she received an insulting e-mail reply from Defendant Dennis after her complaints about her work assignments on May 11, 2011. She also complained to her union about her work overload, the unwarranted scrutiny of her work and the retaliation by her supervisors after her report of the sex toy incident to her supervisors from 2011 to 2013 [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Plaintiff alleges that her *New York State Constitutional* rights of free speech and to petition the government (as well as her DCA colleagues) were violated because Defendants Schindler and Dennis removed the ALJ's power to issue decisions without supervisory approval in September 2008. Defendants Schindler and Dennis issued adjudication directives and templates for draft decisions, putting pressure on the ALJ's to issue draft decisions as recommended in favor of the DCA and imposing maximum fines. As a result, the ALJ's sent a letter regarding these practices in October 2009 to the President of the Civil Service Bar Association; initiated labor/management meetings in May 2010 and September 2010; e-mailed NYS Assemblyman Dov Hikand and the NYS Bar Association[5] in May 2012; and contacted Public Advocate Bill DiBlasio's office in April 2013. When the ALJ's contacted "New York Daily News" reporter, Juan Gonzalez in March 2013, Plaintiff authorized permission to use her name as a contact for the story. As a result, she was contacted and quoted as a "high ranking DCA official" in the June 17, 2013 story. She also points to an incident when there was an inadvertent taping of a personal conversation between Plaintiff and another ALJ, criticizing the DCA policy on August 4, 2011[6] . Thus, she contends that she and her colleagues faced retaliation because DCA was allegedly aware of their complaints about the DCA policies [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Plaintiff claims retaliation after she had a gall bladder attack in her office on February 12, 2012. Defendant Dennis allegedly ordered ALJ Plotkin to remove her from her office and bring her to the lobby of the building where she lay on the floor, moaning, for approximately twenty minutes while ALJ Plotkin attempted to find a cab. According to Plaintiff, ALJ Michele Mirro was allegedly so appalled by the incident that she reported it to the union. Thereafter, Plaintiff was written up for requesting permission to leave the office twenty minutes early to take her son to a doctor's appointment. She was again reprimanded for inadvertently not recording a hearing. After she contacted her union representative John Picucci to speak with Deputy General Counsel Cohen, no charges were brought [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Pursuant to her request to Defendant Commissioner Mintz, Plaintiff was approved to be transferred to the General Counsel's office as Senior Counsel to perform Consumer Docket Mediation work in July 2012. The move was a demotion with a drop in her salary. She felt that the retaliation and disparate treatment continued because of her allegedly overwhelming level of work assignments, deadlines, charting results and other tasks. She complained to her union president, Saul Fishman who formally requested a labor/management meeting on July 18, 2013 with a follow up meeting on September 5, 2013. Despite minor concessions,

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[5] Plaintiff reviewed the document to the NYS Bar Association, helping to edit it [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

[6] She claims that she received a telephone call from Deputy General Counsel Cohen, asking her to resign on that same day of August 4, 2011 and if she did not do so, her salary would be reduced. If she would agree to retire or resign from her position, the reduction in salary would be deferred. According to Plaintiff, Defendant Commissioner Mintz granted her a grace period to search for a new job but denied any further extension after September 2, 2011 [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Plaintiff claims that her workload continued to be heavier than that of other agency attorneys and was unmanageable without skipping lunch and working a great amount of uncompensated overtime. As a result, she filed her October 17, 2013 lawsuit [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

In Defendant City's Motion to Dismiss, Affirmation in Support and Memorandum of Law, dated April 30, 2014, the City argues that Plaintiff's constitutional claims should be dismissed both procedurally and substantively. The City points out that she failed to file a timely Notice of Claim because her constitutional claims are subject to a three year limitations period. Any of Plaintiff's constitutional claims that occurred before October 18, 2010 are time-barred. See *CPLR Section 214; Brown v. State,* 681 NYS2d 170 (3rd Dept., 1999); *NYC Administrative Code Section 8-502-d; Brown v. State of New York,* 652 NYS2d 223 (1996); *South Salina Street, Inc. v. City of Syracuse,* 510 NYS2d 507 (1986); *Mills v. County of Monroe,* 59 NY2d 307 (1983) [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7]

Plaintiff had alternative remedies because New York courts will only imply a private right of action under the *State Constitution* when no alternative remedy is available to the plaintiff. Plaintiff could have brought her claims under the *U.S. Constitution* because her *State Constitutional* claims are subject to the same analysis as *U.S. Constitutional* claims. In fact, Plaintiff acknowledged that she had alternative remedies when she described a *First Amendment* claim brought by a colleague[7]. Thus, her failure to bring a *U.S. Constitutional* claim is fatal to her *State Constitutional* claim. See *Flores v. City of Mount Vernon,* 41 F. Supp. 2d 439 (S.D.N.Y. 1999); *Carter v. Inc. Vill. of Ocean Beach,* 693 F.Supp.2d 203 (E.D.N.Y. 2010), decision aff'd 2011 U.S. App. (2nd Circuit March 18, 2011, cert denied sub nom. *Fiorella v. Inc. Vill. of Ocean Beach,* 132 S. Ct. 2710 (2012); *Kamholtz v. Yates County,* 800 F. Supp.2d 462 (W.D.N.Y. 2011) [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Defendant City argues that there was no undue pressure on the ALJ's because *6 RCNY Section 6-34(8)* established that ALJ's could only issue recommended decisions[8]. Thus, there was no reason for the Defendants to pressure the ALJ's. The documentary evidence shows that Plaintiff was not forced to change her decisions because both Plaintiff's decisions and the agency's final determinations were and are available on a website at http://archive.citylaw.org/dca In addition, DCA had and has a long standing policy of posting online both the ALJ's recommended decision and the agency's final determination. See http://archive.citylaw.org/dca. [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

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[7] Defendant City notes that the colleague's federal action was withdrawn after defendants, many of whom are also Defendants in this action, requested permission to file a motion to dismiss and filed a letter outlining their proposed motion. See Docket Sheet in *Mirro v. City of New York et al,* 13 Cv. 4257 (E.D.N.Y.). The federal plaintiff then filed a state action, and Defendants' motion to dismiss is pending. See Docket Sheet in *Mirro v. City of New York et al,* Kings County Supreme Court Docket Number 507000/2013 [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

[8] According to Defendant City, this change of policy occurred approximately nine (9) months before Plaintiff became an ALJ in May 2009 [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

The City contests Plaintiff's free speech argument because: 1) she did not speak as a citizen on a matter of public concern; 2) she was not subjected to adverse employment action and 3) there was no causal connection between her speech and the adverse employment action. Plaintiff's and her colleagues' "speech" was not made by citizens but by public employees in an employment dispute. Thus, it is not constitutionally protected. Moreover, the "speech" identified by Plaintiff was not made by her but by her colleagues. The only instance when Plaintiff identifies herself as a speaker occurs in July 2013 when she was quoted anonymously in a news article. Even if it constituted "speech", it occurred years after the alleged retaliation. Consequently there is no causal link between her speech and any adverse action. Case law shows that the actions Plaintiff identified as "adverse" do not rise to that level in the context of constitutional claims. See *Ross v. The New York City Department of Education,* 935 F. Supp2d 508 (E.D.N.Y. 2010), *Carter v. Inc. Vill. of Ocean Beach, supra; Almontaser v. NYC Dept. Of Educ.,* 2014 WL 3110019 (E.D.N.Y. 2009); *Kamholtz v. Yates, supra; Weintraub v. Board of Education,* 593 F3d 196 (2nd Circ. 2010), cert. denied 2010 (October 18, 2010); *Looney v. Black,* 702 F3d 701 (2nd Cir. 2012); *Garcetti v. Ceballus,* 547 U.S. 410 (2006); *Glicksman v. NYC Environmental Board,* 345 Fed Appx. 688 (S.D.N.Y. January 25, 2008), aff'd 2009 U.S. App (2d Cir. September 15, 2009); *Tessler v. Patterson,* 768 F.Supp2d 661 (S.D.N.Y. 2011), aff'd (2d Cir. December 19, 2011), cert denied sub nom. *Tessler v. Cuomo,* 132 S.Ct. 2442 (2012); *Anemone v. MTA,* 629 F3d 97 (2d Cir. 2011); *Ruotolo v. City of New York,* 514 F3d 184 (2d Cir. Ct. App.2008); *McAllen v. Von Essen,* 517 F. Supp2d 672 (S.D.N.Y. 2007); *Murray v. Town of North Hempstead,* 853 F.Supp.2d 247 (E.D.N.Y. 2012); *Fenton v. St. Lawrence County,* 828 NYS2d 647 (3d Dept., 2007), appeal denied 8 NY3d 812 (2007); *Rose v. Goldman Sachs & Co.,* 163 F. Supp2d 238 (S.D.N.Y. 2001) [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Plaintiff's *CHRL* claims of age based discrimination fail because there was no adverse employment action against her or her DCA colleagues. She never complained about age discrimination and all of the individual DCA Defendants are approximately the same age as Plaintiff and one of them is older. The City refutes her claim that four of her DCA colleagues faced age discrimination because she does not claim age discrimination was Defendants' motivation for its actions. Instead she argues that it was the alleged DCA policy that was the instigating factor. While she admits that one alleged individual retired, she fails to demonstrate that this retirement was forced or any alleged adverse action was taken against this person. Defendants' documents demonstrate that the three alleged additional individuals settled their disciplinary charges. Consequently, any suggestion by Plaintiff that the charges were a pretext for discrimination has been eviscerated. See *McDonnell Douglas Corp. v. Green,* 93 S.Ct. 1817 (1973); *Lambert v. Macy's East Inc.,* 922 NYS2d 210 (2nd Dept., 2011)[Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

The City challenges her claims of gender discrimination and retaliation since: 1) she does not allege any employment action to support these claims and 2) there is too significant a time gap between her alleged complaints and any subsequent employment actions. Her claim is the result from conduct alleged against only one defendant, Defendant Dennis, which occurred on three occasions in October 2010 when he displayed a purported sex toy. Although the City concedes solely for the purposes of the motion that the conduct allegedly occurred, the conduct fails to support her claims because she did not plead and prove that she was treated differently on the basis of her gender. Her Complaint acknowledges that: 1) the alleged sex toy was displayed to both males and females; 2) the toy was displayed to Plaintiff briefly on three occasions and 3) Defendant Dennis stopped using the toy prior to any of Plaintiff's complaints to anyone. Thus, the conduct amounts to nothing more than petty slights or trivial inconveniences. If this claim were to survive, it would only be viable against Defendant Dennis, the alleged perpetrator and should be dismissed against all other Defendants. See *O'Neill v. Roman Catholic Diocese of Brooklyn,* 949 NYS2d 447 (2d Dept., 2012); *Melman v. Montefiore*

Medical Center, 946 NYS2d 27 (1st Dept., 2012) [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

In her Memorandum of Law in Opposition, dated September 12, 2014, Plaintiff argues that her constitutional claims are not time barred because her claims deal with free speech and the right to petition clauses of the *New York State Constitution Article 1, Sections 8 and 9.* Thus, the filing of a Notice of Claim is not required since her constitutional claims do not fall under *General Municipal Law Section 50-e* which is limited to tort claims for personal injury, wrongful death or damage to property but not to torts generally. Even if a Notice of Claim were required for her constitutional claims, she believes that they fall under the public interest exception. See *Mills v. County of Monroe,* 59 NY2d 307 (1983); *Sirkl LLC v. City of Troy,* 259 AD2d 920, 686 NYS2d 892 (3rd Dept., 1999) [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Her *New York State Constitutional* claims should not be denied merely because she failed to pursue alternative remedies. Although her *New York State Constitutional* claims may be subject to a similar analysis of a *U.S. Constitution First Amendment* claim, she argues that the *New York Constitution Article 1, Section 8* provides a more expansive protection of speech and proceeding. Thus, it is not an identical claim or viable alternative. See *Clear Channel Outdoor Inc. v. City of New York,* 594 F3d 94 (2nd Circuit 2010) [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

She believes that she has established the elements of her free speech and petition clause claims because of continuing *CHRL* and *State Constitutional* violations. Thus, any of her constitutional claims that occurred prior to October 18, 2010 are timely and remain viable. See *Clear Channel Outdoor Inc. v. City of New York,* 594 F3d 94 (2nd Circuit 2010); *Ashcroft v. Iqbal,* 556 US 662 (2009); *Kamholz v. Yates County,* 2008 WL 5114964 [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Plaintiff reiterates her adverse employment retaliation arguments about alleged sexual harassment, age discrimination and protected rights of speech under *NYCHRL* because they were due to Defendants' pretextual actions. See *NYCHRL; McDonnell-Douglas v. Green, supra* [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Plaintiff filed her Notice and Amended Notice of Cross Motion to Amend the Complaint, dated September 19, 2014 and November 6, 2014, seeking to supplement and amend her Complaint. She now makes a claim for violation of her right to free speech pursuant to the *United States Constitution,* including her rights guaranteed by the *First Amendment of the U. S. Constitution* [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

In its Reply Affirmation and Memorandum of Law, dated November 12 and 13, 2014, Defendant City argues that Plaintiff's alleged *State Constitutional* claims are indeed "tort" claims and not exempt from filing a Notice of Claim. See *Brown v. State of New York,* 652 NYS2d 223(1996) where the Court of Appeals ruled that: 1) a constitutional tort is any action for damages for violation of a constitutional right against a government or individual defendants and 2) the applicability of the Notice of Claim provisions was not limited in certain tort claims. See also *Mills v. County of Monroe,* 59 NY2d 307 (1983) where the Court of Appeals barred a plaintiff's claim for employment discrimination because she failed to file a timely Notice of Claim. Therefore, Plaintiff's failure to file a Notice of Claim is fatal to her *State Constitutional* claims. Moreover, her new *U.S. Constitution First Amendment* argument about no need for the Notice of Claim also fails. While she

now contends that the individual Defendants were acting outside the scope of their employment and thus do not require a Notice of Claim, it is in direct contradiction to her prior claim that the Defendants were acting pursuant to an agency policy [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Defendant City reiterates that in cases where the *State Constitution* offers no broader protection than the *First Amendment*, the otherwise broader interpretations of the *State Constitution* are immaterial. See *Clearchannel Outdoor Inc. v. City of New York, supra.* Thus, Plaintiff's *State Constitutional* claims regarding free speech and right to petition must be dismissed because of the alternative remedies available to her. In fact, virtually all of the "speech" at issue was not made by Plaintiff but by her colleagues. Thus, any "speech" in which Plaintiff engaged was not constitutionally protected since she and her colleagues spoke as employees but not citizens. Consequently, the "speech" was not a matter of public concern and there was no causal connection between her alleged "speech" and any adverse action. See also *Ashcroft v. Iqbal, supra* [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Defendant City emphasizes that her age and sex discrimination claims also fail because the conduct was nothing more than a petty slight and there were no adverse employment actions regarding age in her Complaint. See *Clark County School District v. Breeden,* 532 U.S. 268 (2001) [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Thus, Plaintiff's cross motion to amend her Complaint and file the proposed Amended Complaint should be denied because it fails to state a claim under the *First Amendment to the United States Constitution* and her additional multiple claims after the filing of her original Complaint are barred because they do not rise to the level of adverse employment actions and are too far removed in time [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

COURT RULINGS

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues of material fact. See *Andre v. Pomeroy,* 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Alvarez v. Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS 2d 316, 476 NE2d 642 [1985].

Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. See *Alvarez v. Prospect Hospital, supra.*

The Appellate Division, Second Department has addressed the standards required to succeed on a motion to dismiss pursuant to *CPLR (a)(7).* The Court found in *M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. et al,* 2015 WL 1213108 (2nd Dept., March 18, 2015) that in evaluating a motion to dismiss a pleading for failure to state a cause of action under *CPLR 3211(a)(7),* a court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible inference and determine only whether the facts as alleged fit within any cognizable legal theory. See also *Fuller v. Collins,* 114 AD3d 827, 982 NYS2d

484 (2nd Dept., 2014) where the Court held that the pleading must be liberally construed, the factual allegations must be deemed true, and the pleading party must be accorded the benefit of every possible inference.

Therefore, after liberally construing Plaintiff's pleading, deeming Plaintiff's factual allegations as true, and according Plaintiff the benefit of every possible inference, this Court grants Defendant City's motion to dismiss the complaint pursuant to *CPLR 3211(a)(7).* Plaintiff failed to file a timely Notice of Claim because her *State Constitutional* claims are subject to a three year limitations period. See *CPLR Section 214; Brown v. State, supra; NYC Administrative Code Section 8-502-d; Brown v. State of New York, supra*; *South Salina Street, Inc. v. City of Syracuse, supra*; *Mills v. County of Monroe, supra.* Moreover, her Complaint fails to state a cause of action regarding her *New York State Constitution Article 1, Sections 8 and 9* rights of free speech and to petition the government as well as her *Administrative Code of the City of New York Section 8-107 ("CHRL")* allegations of discrimination based on age, sex, sexual harassment and retaliation. This Court denies Plaintiff's cross and amended cross motions to amend the Complaint because the amendment would be futile since the proposed new pleading fails to state a claim on which relief can be granted. See *Ross v. New York City Department of Education, supra; Ruotolo v. City of New York, supra* [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

As pointed out by Defendant City, Plaintiff's and her colleagues' "speech" was not made by citizens on a matter of public concern but by public employees in an employment dispute. Thus, it is not constitutionally protected. Moreover, the "speech" identified by Plaintiff was not made by her but by her colleagues. The only instance when Plaintiff identifies herself as a speaker occurs in July 2013 when she was quoted anonymously in a news article, and it occurred years after the alleged retaliation. See *Ross v. The New York City Department of Education, supra; Carter v. Inc. Vill. of Ocean Beach, supra; Almontaser v. NYC Dept. Of Educ., supra; Kamholtz v. Yates, supra; Weintraub v. Board of Education, supra*; *Looney v. Black, supra*; *Garcetti v. Ceballus, supra; Glicksman v. NYC Environmental Board, supra; Tessler v. Patterson, supra; Anemone v. MTA, supra; Ruotolo v. City of New York, supra; McAllen v. Von Essen, supra; Murray v. Town of North Hempstead, supra; Fenton v. St. Lawrence County, supra; Rose v. Goldman Sachs & Co., supra* [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Her *State Constitutional* claims are denied because she failed to pursue alternative remedies. New York courts will only imply a private right of action under the *State Constitution* when no alternative remedy is available to the plaintiff. Plaintiff's belated efforts to amend and supplement her Complaint by now attempting to bring a *U.S. Constitution First Amendment* claim is fatal to her *State Constitutional* claim since she failed to file a timely Notice of Claim. Even if this Court were to allow her to amend and supplement her Complaint, Plaintiff has failed to establish a *U.S. Constitution First Amendment* claim because her "speech" was made by public employees in an employment dispute. Thus, it is not constitutionally protected. See *Flores v. City of Mount Vernon, supra; Carter v. Inc. Vill. of Ocean Beach, supra; Kamholtz v. Yates County, supra; Ross v. The New York City Department of Education, supra; Carter v. Inc. Vill. of Ocean Beach, supra; Almontaser v. NYC Dept. Of Educ., supra; Kamholtz v. Yates, supra; Weintraub v. Board of Education, supra; Looney v. Black, supra; Garcetti v. Ceballus, supra; Glicksman v. NYC Environmental Board, supra; Tessler v. Patterson, supra; Anemone v. MTA, supra; Ruotolo v. City of New York, supra; McAllen v. Von Essen, supra; Murray v. Town of North Hempstead, supra; Fenton v. St. Lawrence County, supra; Rose v. Goldman Sachs & Co., supra* [Defendant 1, Exhs. A-F; Defendant 2; Plaintiff 3; Plaintiff 4, Exhs. A, 1-7; Plaintiff 5; Defendant 6; Defendant 7].

Her *CHRL* claims of age, sex, sexual harassment and retaliation also fail. She never complained about age discrimination and all of the individual DCA Defendants are approximately the same age as Plaintiff and

one is older. She does not allege any employment action to support her gender, sex discrimination and retaliation claims and there is too significant a gap between her alleged complaints and any subsequent employment actions. Her allegations regarding sex and age discrimination because of her salary cut and demotion were the result of Plaintiff's own request to be transferred. Moreover, her Complaint clearly acknowledged that she was not treated differently on the basis of her gender regarding the sex toy incident in October 2010 because: 1) the alleged sex toy was displayed to both males and females; 2) the toy was displayed to Plaintiff briefly on three occasions and 3) Defendant Dennis stopped using the toy prior to any of Plaintiff's complaints to anyone. Thus, the conduct amounts to nothing more than petty slights or trivial inconveniences. See *Williams v. New York City Housing Authority*, 61 AD3d 62, 872 NYS2d 27 (1st Dept., 2009); *CPLR 3211(a)(7)*.

Based on the foregoing, it is hereby ORDERED as follows:

Defendant City's motion to dismiss the complaint pursuant to *CPLR 3211(a)(7)* is granted. Its request for costs, fees and disbursements is denied.

Plaintiff's cross motion and amended cross motion to amend the complaint pursuant to *CPLR 3025(b)* is denied.

It is hereby further ORDERED that:

The complaint against the City of New York, New York City Department of Consumer Affairs, Jonathan Mintz, individually and in his official capacity as Commissioner of the New York City Department of Consumer Affairs, Bruce Dennis, individually and in his official capacity as Director of Adjudication of the New York City Department of Consumer Affairs, Alba Pico, individually and in her official capacity as Deputy Commissioner of Operations of the New York City Department of Consumer Affairs, Marla Tepper, individually and in her official capacity as Deputy Commissioner and General Counsel of the New York City Department of Consumer Affairs, and Nancy Schindler, individually and in her official capacity as Former Director of Adjudication of the New York City Department of Consumer Affairs is dismissed, and the clerk is directed to enter judgment accordingly dismissing the complaint against the City.

This constitutes the Decision and Order of the court.

Date: March 10, 2015
Kassapian v. The City of New York et al
(Index Number 506287/13)

Dawn Jimenez-Salta
J.S.C.

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court