At an I.A.S. Trial Term, Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 10th day of January 2018.

P R E S E N T:
Honorable Reginald A. Boddie
Justice, Supreme Court

----------x

RHONDA CANTY,

Plaintiff,

-against-

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, and THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendant.

----------x

Mot. Seq. 2

Index No. 500257/2015
Cal. No. 13

DECISION AND ORDER

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

Papers	Numbered
Df. Notice of Motion & Annexed Affirmation/Affidavits	1-2
Pl. Affirmation in Opposition	3
Df. Reply	4

Upon the foregoing cited papers, and after oral argument, the decision and order on defendants' motion to dismiss the amended complaint, pursuant to CPLR 3211 (a) (5) and 3211 (a) (7), is as follows:

Plaintiff, a 61 year-old, African American teacher, began teaching in 1993. Plaintiff is employed at Middle School 391X (MS 391X) in the Bronx and commenced this action to recover lost wages, pain and suffering, attorney's fees and costs arising from alleged age and race discrimination and retaliation. On May 28, 2014, plaintiff filed a notice of claim and on January 8, 2015, she served an inartfully drafted complaint alleging the following:

In 2008, Lucy Rodriquez, a guidance counselor at MS 391X filed a race and disability discrimination action against the principal and vice principal. Plaintiff's support of Ms. Rodriquez's discrimination action lead the principal and vice principal to retaliate against her. Plaintiff alleges, in summary, unlike younger teachers with no EEO involvement, she was given the most difficult students to teach, her schedule and the subjects she was assigned to teach changed from year to year, and she did not receive professional development. In "June 2009-2010," plaintiff received a letter of termination which cited performance issues, although she was rated satisfactory, and her Common Branch (CB) license was discontinued. Plaintiff filed a grievance and was reinstated on March 15, 2010, her record was expunged, her "D" rating was overturned, and she received CB tenure. However, DOE denied her compensation for lost wages and contributions to her retirement account. Additionally, during this period, plaintiff was precluded from applying to the open market for reassignment out of MS 391X because she had an "administrative bar" based on the negative rating.

The principal and regional HR manager allegedly continued a campaign to terminate plaintiff for pretextual reasons. During the 2010-2011 school year, plaintiff received a "D" rating for the three months after she returned to work and was the only teacher to receive such rating. During the 2011-2012 school year, plaintiff was given multiple assignment changes unlike other younger teachers without EEO activity, had 14 classes, and was assigned to Bilingual Special Education with Spanish dominant students without materials or assistance to bridge the language gap. She was assigned to a Collaborative Team Teaching (CTT) position but, unlike the other younger non-black CTT teachers without EEO activity, was never assigned a second teacher. Plaintiff alleges she was the only African American CTT teacher and the oldest, and she received

a "U" rating at the end of that year.

In 2012, plaintiff was granted the Special Education license, but alleges that unlike younger non-black teachers with less seniority and without EEO activity, the principal denied her preference placement. In an effort to discredit her, the principal assigned Ms. Wheal to mentor plaintiff from December 2013 to June 2013. Ms. Wheal had less experience and qualifications than plaintiff, and younger teachers without EEO activity were not assigned mentors.

In January 2013, plaintiff was denied the use of a loaner laptop when the one assigned to her went missing. She was forced to write her lessons by hand until the principal approved a loaner upon plaintiff's showing of a precinct report and a letter to the assistant principal.

Plaintiff alleges her authority was constantly undermined, she was intentionally placed in an environment with the most dangerous students and not provided administrative support or intervention, and that incidents arising from disruptive student behavior which took place on March 3, April 28, May 1, and May 6, 2014, are demonstrative. Earlier that year, an assistant principal told students their performance in plaintiff's class had no bearing on their GPA which reduced the students' participation and follow up in her class. Students also threatened to falsely accuse her of corporal punishment because they were told the assistant principal would write her up for anything.

On February 6, 2017, plaintiff filed an amended complaint to include additional allegations dated June 2015, June 2016, and anticipated future damages. Defendant's motion to dismiss the amended complaint was calendared in Part 22 on January 5, 2018. After oral argument, the parties stipulated that plaintiff cannot recover monetary damages for allegations occurring after May 28, 2014. The parties disputed whether equitable relief is available to

plaintiff for claims occurring after May 28, 2014. The Court concludes it is not.

It is well-settled that a timely notice of claim is a condition precedent to suit alleging discrimination against a school district or board of education, as here (Education Law § 3813 [1]; *Matter of Smith v Brenner*, 106 AD3d 1018 [2d Dept 2013]; *see Varsity Tr., Inc. v Board of Educ. Of City of N.Y.*, 5 NY3d 532, 536 [2005]). A written notice of claim must be presented to the governing body of said district or school within three months after the accrual of such claim (Education Law § 3813 [1]). The statutory notice of claim requirements are strictly construed and require plaintiff to continue to file timely notices of claim for acts which take place subsequent to the date of notice (*see* Education Law § 3813 [1]; *Matter of Smith v Brenner*, 106 AD3d 1018 [2d Dept 2013]; *Agostinello v Great Neck Union Free Sch. Dist.*, 102 AD3d 638, 639 [2d Dept 2013]; *see Varsity Tr., Inc. v Board of Educ. Of City of N.Y.*, 5 NY3d 532, 536 [2005]). Here, plaintiff filed a notice of claim on May 28, 2014. Accordingly, the claims that post-date the notice of claim are dismissed for plaintiff's failure to satisfy a condition precedent to suit.

However, timely notice was provided for claims from February 28, 2014, through May 28, 2014 (Education Law § 3813 [1]). Plaintiff alleged that during this period, her authority was constantly undermined, she was intentionally placed in an environment with the most dangerous students and not provided administrative support or intervention. She further alleged that incidents arising from disruptive student behavior which took place on March 3, April 28, May 1, and May 6, 2014, were demonstrative of the hostile work environment created by ongoing racial and age discrimination and retaliation.

Defendants argue the remainder of plaintiff's claims, which precede the notice of claim in excess of 90 days, should be dismissed on the ground that plaintiff failed to file a timely notice of

claim pursuant to Education Law § 3813 (1). Defendants also argue Education Law § 3813 (2-b) imposes a one-year statute of limitations on the commencement of actions for discrimination against any school district or governing body, as here (*Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d 367, 373 [2007]), precluding claims prior to January 8, 2014, one year before the filing date of the original summons and complaint. These claims include plaintiff's allegations from 2008 through February 27, 2014, including the claims that earlier in the [2013-2014 school] year, an assistant principal told students their performance in plaintiff's class had no bearing on their GPA causing the students' to reduce participation and follow up in her class, and students threatened to falsely accuse her of corporal punishment because they were told the assistant principal would write her up for anything.

Plaintiff argues these claims are timely because she was subject to continuous age and racial discrimination and retaliation dating back to 2008, that created a hostile work environment (citing *National R.R. Passenger Corp. v Morgan*, 536 US 101, 117 [2002] [A hostile work environment claim is composed of a series of separate acts that collectively constitute one "unlawful employment practice" (42 U.S.C. § 2000e-5 [e][1]; *United Air Lines, Inc. v Evans*, 431 US 553, 558 [1997] ["A discriminatory act which is not made the basis for a timely charge . . . may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences."]).

In deciding a motion to dismiss, the Court must afford the complaint a liberal construction, accept all facts as alleged to be true, and accord the plaintiff the benefit of every favorable inference (*Kaplan v New York City Dept. of Health & Mental Hygiene*, 142 AD3d

1050, 1051 [2d Dept 2016] [citations omitted]). A motion to dismiss addresses the adequacy of the pleading, not the substantive merits of plaintiff's cause of action (*Id.*).

The New York City Human Rights Law (NYCHRL), plead here, expressly forbids discrimination and retaliation in any manner and requires a more liberal interpretation than state or federal anti-discrimination law (Administrative Code of the City of New York §§ 8-107, 8-130; *Albunio v City of New York*, 16 NY3d 472, 477 [2011]; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 70 [1st Dept 2009]). Plaintiff need only show that she was treated differently from others in a way that was more than trivial, insubstantial or petty, at least in part for discriminatory reasons (*see* Administrative Code § 8-107; *Albunio*, 16 NY3d at 477-478; *Nelson v HSBC Bank USA*, 87 AD3d 259, 264 [2d Dept 2011]; *see Mihalik v Credit Agricole Cheuvreux North America, Inc.*, 715 F3d 102,110 [2d Cir 2013]).

Here, plaintiff alleges that her support of Ms. Rodriquez's 2008 discrimination claim lead to her retaliatory firing during the 2009-2010 school year. She alleges that although her termination and "D" rating were overturned, her records were expunged, and she was granted CB tenure, DOE retaliated against her by denying back pay for lost time and contributions to her retirement fund. Plaintiff alleges the principal and the regional HR manager maintained a campaign to terminate her for pretextual reasons and she was subjected to ongoing race and age discrimination and retaliation. Although plaintiff was never subsequently terminated, she avers that after her reinstatement in March 2010, her teaching assignments, negative ratings for the 2010-2011 and 2011-2012 school year, the lack of materials, the failure to assign a second teacher, the denial of preferential placement and assignment of a mentor, the initial denial of the use of a loaner laptop, and the incidents with students and lack of administrative response on

March 3, April 28, May 1, and May 6, 2014, demonstrate a continuous pattern of age and race discrimination and retaliation for her support of Ms. Rodriquez in 2008. Throughout the complaint, plaintiff alleges she was treated differently than younger, non-black colleagues without EEO activity.

Viewed in the light most favorable to plaintiff, these allegations state a cause of action for retaliation and discrimination under the NYCHRL, which is more liberal than the state or federal anti-discrimination laws (Administrative Code § 8-130; *Kaplan*, 142 AD3d at 1052, citing *Brightman v Prison Health Servs., Inc.*, 62 AD3d 472 [1st Dept 2009]. Accordingly, defendants' motion to dismiss is granted only to the extent plaintiff's claims after May 28, 2014, are dismissed.

Dated: January 10, 2018

E N T E R:

RAB

Hon. Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.