Brown v City of New York
2019 NY Slip Op 30565(U)
March 5, 2019
Supreme Court, New York County
Docket Number: 153013/2018
Judge: Lyle E. Frank

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** IAS MOTION 52EFM

Justice

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SHEILA BROWN

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 153013/2018

MOTION DATE 01/23/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISS.

Upon the foregoing documents, the Decision/Order of the Court is as follows:

This action arises out of plaintiff Sheila Brown's claims that, in violation of the New York City Human Rights Law (NYCHRL), she was subject to retaliation for opposing defendant the City of New York's discriminatory practices. Defendant moves, pursuant to CPLR 3211 (a) (5) and (7), for an order dismissing plaintiff's complaint.[1]

BACKGROUND AND FACTUAL ALLEGATIONS

In 1990, plaintiff commenced her employment with the New York City Human Resources Administration (HRA) as a caseworker. In 1999, plaintiff was promoted to the title of Supervisor I, Social Services, and has been assigned to work at the Adult Protective Services (APS) Unit since 2001. According to plaintiff, after an employee receives a master's degree in social work, the head of the employee's agency can contact the personnel department and request

[1]The Court would like to thank Beth M. Pocius, Esq., from the NYS Supreme Court's Law Department, for her assistance in this matter.

"social work differential pay." Plaintiff claims that, in 2004, despite receiving her master's in social work degree, Jerry Victor (Victor), the relevant head of agency, ignored plaintiff's requests to contact the personnel department regarding the pay increase. Plaintiff states, "[t]hereafter, I was targeted and discriminated against by Victor." Plaintiff's aff, ¶ 4.

Prior Litigation History

Plaintiff's relevant litigation history with defendant is set forth as follows: By 2011, plaintiff "still never received the pay differential [she] was entitled to." *Id.* In April 2011, plaintiff commenced a federal action in the United States District Court, Southern District of New York (Southern District), alleging that she was subjected to a hostile work environment and that she was retaliated against, in violation of Title VII, the New York State Human Rights Law (NYSHRL) and the NYCHRL. *See Brown v City of New York*, 2013 WL 3789091, 2013 US Dist LEXIS 101337 (SD NY 2013) (Brown I). The court granted defendants' motion dismissing the retaliation claim but did not dismiss the hostile work environment claim. After a jury trial on the hostile work environment claim, a jury rendered a verdict in defendants' favor.

In March 2014, plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that the HRA discriminated against her on the basis of gender and retaliated against her when she complained of this behavior. The EEOC issued a notice of dismissal and a right to sue. In April 2014, plaintiff commenced a federal action against defendant and the HRA in the Southern District alleging that they "denied Brown a pay increase because of her gender, and (2) took disciplinary actions against Brown in retaliation for her complaints of discrimination," in violation of "Title VII and parallel state and city laws." *Brown v City of New York*, 2014 WL 5394962, *3, 2014 US Dist LEXIS 150577, *11 (SD NY 2014)

(Brown II). The court dismissed the pay discrimination claim on the basis of res judicata, noting that "all of the facts relevant to Brown's pay discrimination claim had arisen a full seven years before she filed the complaint in Brown I. . . . [Even though] this action primarily alleges pay discrimination [,] [b]oth suits arise out of the same 'series of transactions.'" 2014 WL 5394962, *5, 2014 US Dist LEXIS 150577, *15-16. The court still addressed plaintiff's pay discrimination claim and found that plaintiff only speculated "that her static pay resulted from gender discrimination." 2014 WL 5394962, *7, 2014 US Dist LEXIS 150577, *22.

The court in Brown II found that res judicata could not bar the retaliation claims as they could not have been brought in Brown I because they involved incidents that postdated the complaint in Brown I. It further held that plaintiff engaged in protected activity when she commenced Brown I, Brown II and when she filed the 2014 EEOC charge. However, it found that plaintiff was unable to plead a prima facie case of retaliation as she failed to plead that she was subjected to a materially adverse employment action. Plaintiff had claimed that she was subject to an adverse action by receiving an unsatisfactory evaluation in 2012 and then subject to an adverse action in June 2014 when "defendants sent her a notice requiring her to appear for an '[New York City Office of Administrative Trials and Hearings] OATH Court' disciplinary hearing." 2014 WL 5394962, *8, 2014 US Dist LEXIS 150577, *24. However, the court held that these are not adverse actions, as they did not alter the conditions of her employment. The court noted that, even if these could be construed as adverse actions, there was no inference of causation. One year had lapsed between Brown I and the negative performance evaluation and plaintiff did not receive the OATH hearing notice until two months after she commenced Brown

II. "These acts-even if they qualify as adverse actions-are too attenuated from the protected activities to establish a causal link." 2014 WL 5394962, *9, 2014 US Dist LEXIS 150577, *26.

In pertinent part, in Brown II, plaintiff sought leave "to amend her pleading to allege that, following the OATH hearing, she faced a 10-day suspension and is now barred from receiving a promotion." 2014 WL 5394962, *9, 2014 US Dist LEXIS 150577, *27. However, the court denied plaintiff's request as futile, stating that "there remains no basis to infer a causal connection between Brown's earlier protected activity and her later suspension." *Id.*

Plaintiff appealed Brown II's decision denying her leave to amend the complaint. The United States Court of Appeals for the Second Circuit affirmed the determination of the District Court, holding that "facts alleged in the second amended complaint did not state a colorable claim." *Brown v City of New York*, 622 Fed Appx 19, 20 (2d Cir 2015). "The time lapses between Brown's protected activities and the alleged retaliatory acts—ranging from two months to several years—were simply too attenuated to establish that the alleged adverse employment actions were the product of a retaliatory motive . . . ." *Id.*

Instant Action

Plaintiff states that she is still being retaliated against based on the "aforementioned prior protected activity." *Id.*, ¶ 13. Plaintiff reiterates the allegations from Brown I and II, including that, in 2012, she received a retaliatory unsatisfactory evaluation, that she is still not receiving the pay that she is entitled to and that she is being passed up for promotions. For example, plaintiff claims that, in November 2014, "HRA gave a second promotional for Supervisor II, Social Work – Pool. Plaintiff's list number 7 was not called for an interview but the list number 7 was automatically placed back on the promotional list." Plaintiff's aff. ¶ 16.

Plaintiff alleges that she is still being "micromanaged, bypassed for promotions and targeted by Victor who has deliberately put me on suspension without pay several times." Plaintiff's aff, ¶ 8. Plaintiff's disciplinary and suspension history is as follows:

10-day suspension

As referenced in Brown II, plaintiff was subject to an employee disciplinary proceeding pursuant to Section 75 of the Civil Service Law. In June 2014, plaintiff received notice that she was being charged: "with being insubordinate and discourteous, failing to perform all duties listed in her tasks and standards, and engaging in conduct detrimental to the agency for failing to conduct six provider home visits as directed by her supervisor and refusing to attend a mandatory forum." Defendant's exhibit E at 1.

Following a hearing, an Administrative Law Judge (ALJ) issued a determination sustaining the charges and recommending that plaintiff be suspended for 10 days without pay. The ALJ noted, in relevant part: "It is very clear from [plaintiff's] testimony and demeanor that she does not hold her supervisor in high esteem. [Plaintiff] must be mindful, however, that she does not have the prerogative to select her supervisor and even if she dislikes Mr. Victor, she must still comply with his directives." *Id.* at 10.

The ALJ's recommendation was issued on October 3, 2014. However, the record indicates that the HRA's Commissioner did not review the ALJ's determination until almost three years later. On March 23, 2017 plaintiff received a notice from the HRA that the Commissioner adopted "all the findings of fact of the [ALJ] and finds [plaintiff] guilty of misconduct." *Id.* at 13. Plaintiff was advised that her suspension without pay was effective immediately. She was also informed that she was entitled to appeal the determination.

25-day suspension

On January 19, 2017, the HRA served plaintiff with disciplinary charges for her conduct associated with renting a room to her sister, a public assistance recipient. Plaintiff was "charged with inappropriately utilizing the WMS system to access the public assistance records of her sister, renting a room to her sister without obtaining Agency approval, and failing to comply with Agency directives issued in the course of an official investigation . . . ." Defendant's exhibit F at 2. In addition, the charges noted that, since 2014, plaintiff began charging her sister $215.00 a month in rent. An internal informal conference was held regarding the charges, and plaintiff was accompanied by a union representative. Plaintiff had stated, in pertinent part, that she had accessed her sister's public assistance information to determine her sister's benefit status, but only because her sister had mental health issues and could not manage her funds.

On March 2, 2017, the hearing officer and the director of the office of disciplinary affairs issued a determination, upholding the charges and recommending a 25-day suspension. In relevant part, the hearing officer determined that plaintiff "made 71 inappropriate inquiries" about her sister and failed to comply with agency directives. The decision concluded with the following:

> "It should be noted that it is highly improbable that [plaintiff], in her capacity as a Supervisor I, with nearly 30 years of service, was unaware of Agency policy regarding renting living space to recipients. Moreover, when contacted telephonically, Special Investigator Vinson Chan expressed that [plaintiff] was evasive and uncooperative when he attempted to obtain information regarding her availability or that of her attorney, to appear for an interview."

Id. at 4.

On March 15, 2017, plaintiff signed a waiver, accepting the penalty of a 25-day suspension and waiving her right to a disciplinary hearing pursuant to Civil Service Law Section

75. The waiver explained that a penalty had been issued after an informal conference and that plaintiff is entitled to a disciplinary hearing and to appeal that determination. However, by signing the waiver and accepting the penalty, plaintiff waived "all rights granted to [her] under the provisions of section 75 and 76 of the Civil Service Law . . . ." *Id.* at 10.

29-day suspension

On February 23, 2017 an incident occurred in Victor's office where Victor and another supervisor were allegedly shouting at one another. Plaintiff indicates that she "entered the office and stopped the argument . . . ." Plaintiff's aff, ¶ 11. Further, plaintiff asserts that she entered the office to diffuse the argument. However, Victor wrote a letter to the Regional Director "recounting a different interaction." Defendant's exhibit G at 3. Victor emailed plaintiff a few days after the incident, asking her to meet with him to address the misconduct. On March 1, 2017, plaintiff emailed Victor, claiming that he was harassing her and discriminating against her, and that she would not appear for a meeting without her union representative.

The HRA served plaintiff with disciplinary charges stemming from this incident, charging her with "insubordination and failing to comply with the Agency's Code of Conduct Executive Order No. 726 in relation to Agency-participant and staff relationships." *Id.* at 2. An internal hearing was held on May 22, 2017 and a hearing officer upheld the charges and recommended a 30-day suspension. On August 3, 2017, plaintiff entered into a stipulation of settlement, agreeing to a 29-day suspension without pay. The stipulation indicated that it was resolving the charges of misconduct and that plaintiff voluntarily entered into the disposition. It further stated, in pertinent part:

> "[Plaintiff] waives any and all rights, including any right to a disciplinary hearing pursuant to Section 75 and 76 of the Civil Service Law and any applicable collective bargaining agreement.
> "This stipulation of settlement resolves all misconduct consistent with the charges and specifications specified in the pending charges up to the date of the execution and acceptance of this stipulation of settlement.
> ***
> "IT IS FURTHER AGREED that no appeal of this action, at law or equity, will be taken, and that this agreement is final and binding."

Id. at 5-6.

In addition to the above referenced March 1, 2017 email requesting that Victor stop discriminating against her, plaintiff states that she made additional complaints about Victor's behavior. In May 2017, plaintiff "filed an internal EEO complaint that [she] was being discriminated against and retaliated against by her supervisors." Plaintiff's aff, ¶ 14. She continues that she requested to be transferred away from Victor "due to Victor's constant harassment and recommendations for me to be Suspended without pay . . . ." *Id.*, ¶ 15.

In June 2017, plaintiff wrote a letter to her union requesting an arbitration hearing to separate her from Victor. The HRA's EEO office advised plaintiff that she "did not have a discrimination case" against Victor. According to plaintiff, her union advised her that "HRA Labor Relations felt that I was imagining being discriminated by Jerry Victor and that my court case finished years ago and cannot be heard of again. However, all these allegations are new and a Court has never heard them." *Id.*, ¶ 18 (internal quotation marks omitted).

In July 2017, plaintiff was transferred with Victor's unit from Manhattan to Brooklyn. In August 2017, plaintiff's union requested that she be transferred away from Victor. Plaintiff was instructed to take a 4-week training class. After the class, she was reassigned to the "APS-Housing unit" located in the Union Square Office. She "shadowed 4 caseworkers whose years of

service's ranges from 9 months – 3 years within HRA in their Civil Service title, Caseworker." *Id.*, ¶ 19.

In September 2017 plaintiff was also advised that she was "being transferred to the [APS], Bronx Field Office to Shadow Caseworkers in the Field Home Visits. This was an 'involuntary' transfer." *Id.*, ¶ 20. Plaintiff states that it now takes her two to three hours to get to work. Plaintiff further alleges that the HRA "refuses to approve her weekly time sheet to receive her pay check." *Id.*, ¶ 22. Plaintiff believes that her suspensions and her transfer to the Bronx were all done in retaliation for her previous complaints and due to Victor's pattern of retaliation.

Plaintiff's complaint, containing one cause of action, states that the HRA violated the NYCHRL by subjecting her to "race and gender discrimination and retaliation." Complaint, ¶ 44. Plaintiff is seeking compensatory damages, a promotion at work and is also seeking a declaration that defendant's actions "intentionally deprived plaintiff of her rights because of race and gender discrimination and retaliation for opposing discriminating practices of defendant ...." *Id.* at 9.

Defendant's Motion to Dismiss

Statute of Limitations

Defendant argues that any claim resulting from conduct that occurred prior to April 3, 2015 is barred by the three-year statute of limitations.

Plaintiff does not address this argument and repeats the same allegations from the complaint.

Res Judicata

As previously set forth, plaintiff's prior claims, asserting sex discrimination and retaliation, had been dismissed under Brown I and II. The claims are repeated in the instant

complaint, even dating back to 2004. As a result, defendant maintains that res judicata bars the allegations of discriminatory conduct that had already been addressed by the federal court in Brown I and II. In addition, defendant argues that the claims arising after 2015 are also precluded, as they do not amount to new claims, but are additional instances of what plaintiff had asserted in Brown I and II. According to defendant, just like in Brown I and II, plaintiff now alleges that, in violation of the NYCHRL, she has not been promoted, has not been provided with a pay increase and that she has been subject to disciplinary proceedings.

In relevant part, plaintiff argues that her claims are not collaterally estopped or barred by res judicata because they arose after 2014 and have not yet been litigated. In addition, although not argued by defendant, she adds that retaliation was never addressed in her administrative hearing and collateral estoppel cannot preclude this claim. She continues that her prior litigation is only relevant to demonstrate her protected activity and that the adverse actions would be the three suspensions in 2017.

Waiver

Plaintiff voluntarily signed waivers for the disciplinary matters related to both the 25- and 29-day suspensions. As a result, defendant argues that plaintiff is now precluded from challenging these suspension decisions.

With respect to the 25-day suspension, plaintiff argues that she did not release any potential claims for discrimination when she signed the waiver because there is no mention of this in the waiver. Regarding the 29-day suspension, although there is an additional clause advising her that she is precluded from appealing the determination, plaintiff alleges that it is unambiguous as to any potential claim for discrimination and does not bar her claims. She adds

that the waiver is ambiguous as it does not define legal or equitable claim. Although not well articulated, she explains that now, she seeks to address defendant's motivation for the disciplinary charges, not the penalty assessed or whether she committed misconduct.

Discrimination

Defendant contends that any race or gender based discrimination claim must be dismissed as plaintiff failed to plead that she was treated less well or suffered from an adverse employment action due to her gender or race.[2] For example, plaintiff does not dispute that she committed the acts leading up to her suspensions nor does she ever claim that she was transferred on the basis of her gender or race.

Plaintiff does not oppose defendant's argument.

Retaliation

Defendant argues that plaintiff's only timely claims must be dismissed as plaintiff did not sufficiently plead that she engaged in protected activity. According to defendant, plaintiff did not allege in her communication with the HRA that she was being discriminated against on the basis of race or gender. In addition, defendant argues that the suspensions cannot be considered retaliation because, as they commenced prior to plaintiff's internal complaints, there can be no causal connection. Among other arguments, defendant also contends that plaintiff fails to link her September 2017 "involuntary" transfer with her May 2017 HRA EEO communication and that the four-month time lag is not temporally proximate enough to satisfy an inference of causation.

[2] Defendant notes that the complaint "fails to identify with which race Plaintiff identifies." Defendant's memorandum of law at 15.

Plaintiff believes that her suspensions and her transfer to the Bronx were all done in retaliation for her previous complaints. She argues that she has an extensive history and pattern of protected activity, including two lawsuits and EEOC charges. "Put simply, [Victor] does not easily forget the claims asserted in federal court against him and others." Plaintiff's memo of law at 18. She adds that her lawsuit did not end until the Court of Appeals determination in November 2015. According to plaintiff, she has three instances of protected activity that occurred in 2017; the March 1, 2017 email to Victor alleging discrimination, the May 2017 internal EEO complaint and transfer request alleging discrimination and retaliation and the June 2017 letter requesting an arbitration hearing regarding a transfer. Plaintiff argues that the suspensions "are in close proximity to the March 1, 2017 email." *Id.* at 21.

DISCUSSION

I. Dismissal

On a motion to dismiss pursuant to CPLR 3211 (a) (7), "the facts as alleged in the complaint [are] accepted as true, the plaintiff is [given] the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." *Mendelovitz v Cohen,* 37 AD3d 670, 671 (2d Dept 2007). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted). "In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards . . . . [I]t has been held that a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its

grounds." *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (1st Dept 2009) (internal citation omitted).

II. Statute of Limitations

"On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on the ground that the complaint is barred by the applicable statute of limitations, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 (2d Dept 2016). Actions to recover damages for alleged discrimination under the NYCHRL are subject to a three-year statute of limitations. Administrative Code of the City of NY (Administrative Code) § 8-502 (d). Defendant states that any claims predicated on incidents occurring prior to April 3, 2015 must be dismissed as time-barred.

Plaintiff does not directly address this argument. However, evidently, by alleging that defendant engaged in a "pattern" of retaliation, plaintiff seems to be insinuating that her claims would constitute continuing violations that are part of one unlawful discriminatory practice and not be barred by the statute of limitations. However, the acts cited by plaintiff, such as the 2012 unsatisfactory performance evaluation, the disciplinary proceedings and the failure to promote, "are discrete acts that cannot form the basis for a continuing violation claim." *Gutierrez v City of New York*, 756 F Supp 2d 491, 500 (SD NY 2010).

Accordingly, any claims predicated on events taking place prior to April 3, 2015 are dismissed as time-barred.

III. Res Judicata

Pursuant to CPLR 3211 (a) (5), a party may move to dismiss on the ground that a cause of action may not be maintained because of res judicata. "Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter." *Matter of Hunter*, 4 NY3d 260, 269 (2005).

Claims that are predicated on events taking place prior to April 3, 2015 are alternatively dismissed under the doctrine of res judicata. In brief, plaintiff's claims that she has not yet received her pay increase, her promotion and that she was retaliated against for filing EEOC charges and commencing Brown I and II, have already been addressed and dismissed in the prior federal actions.

However, res judicata does not bar plaintiff's remaining retaliation claims which are based on events that took place after Brown I and II, even if they involve the "same course of conduct." *See UBS Sec. LLV v Highland Capital Mgt., L.P.*, 159 AD3d 512, 514 (1st Dept 2018) (internal quotation marks and citation omitted) ("a claim arising *subsequent* to a prior action . . . (is) not barred by res judicata even if the new claim is premised on facts representing a continuance of the same course of conduct").

IV. Discrimination Claims

Pursuant to the NYCHRL, it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's actual or perceived race or gender. Administrative Code § 8-107 (1) (a). While the complaint alleges that plaintiff has been

subject to race and gender discrimination, she gives no indication of a relationship between these protected characteristics and any of the actions taken.

Accordingly, any asserted discrimination claims in the complaint are not actionable, as, "[n]otwithstanding the broad pleading standard, bare legal conclusions with no factual specificity do not suffice to withstand a motion to dismiss." *Mid-Hudson Val. Fed. Credit Union v Quartararo & Lois, LLC,* 155 AD3d 1218, 1219 (3d Dept 2017), *affd* 31 NY3d 1090 (2018). Moreover, plaintiff abandoned this claim by failing to address it in response to defendant's motion. *See e.g. Cassell v City of New York*, 159 AD3d 603, 603 (1st Dept 2018) ("Plaintiff's claim of municipal liability under 42 USC § 1983 is abandoned because, in the motion court, he did not oppose the City's argument that the complaint had failed to state a section 1983 claim").

V. Waiver

"Generally a valid release constitutes a complete bar to an action on a claim which is the subject of the release." *Allen v Riese Org., Inc.,* 106 AD3d 514, 516 (1st Dept 2013) (internal quotation marks and citation omitted). As set forth below, the court agrees with plaintiff that stipulation of settlements signed in relation to the 25- and 29-day suspensions do not waive her right to bring discrimination or retaliation claims. After internal administrative hearings were held, the settlements were signed as a way to resolve disciplinary charges.[3] Here, the settlement for the 29-day suspension specifically mentioned that it resolves all misconduct related to the specified charges. As a result, plaintiff effectively waived her rights to bring any claims relating to the facts of the charges or their resulting suspensions.

[3] Due to her status as a civil service employee, plaintiff would have otherwise been entitled to a formal disciplinary hearing determination and then to appeal this determination to the court or to the civil service commission.

However, in the instant situation, plaintiff is not disputing the charges or their resulting suspensions. She is disputing the purported retaliatory motivation behind her employer's issuance of the charges. Although plaintiff advised the ALJ that Victor harassed and discriminated against her, the ALJ never determined the merit of these claims. Accordingly, the court finds that plaintiff's current retaliation claims were never waived as a result of signing the settlements.

VI. NYCHRL Retaliation

Under the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Administrative Code § 8-107 (7). For plaintiff to successfully plead a claim for retaliation under the NYCHRL, she must demonstrate that: "(1) [she] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [her]; and (3) a causal connection exists between the protected activity and the adverse action." *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012). Protected activity under the NYCHRL refers to "opposing or complaining about unlawful discrimination." *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dept 2010) (internal quotation marks and citations omitted).

Plaintiff claims that she has been retaliated against for filing her prior lawsuits and for filing charges with the EEOC. To begin, as discussed, the protected activity of filing the EEOC charges and the corresponding lawsuits in connection to Brown I and II are barred as untimely and by res judicata. In any event, this protected activity, occurring many years prior to the 2017 suspensions and transfer, are far too attenuated to support a retaliation claim against defendants for incidents occurring after April 3, 2015. This includes plaintiff's claim that Victor retaliated

against her in 2017 as he "does not easily forget the claims asserted in federal court against him and others." *See e.g. Herrington v Metro-North Commuter R.R. Co.*, 118 AD3d 544, 545 (1st Dept 2014) ("The initial protected activity alleged by plaintiff - her late-2008 complaint about offensive comments . . . is far too removed from defendant's alleged post-2009 (non-time-barred) actions to establish the requisite causal nexus between the protected activity and the adverse action").

Plaintiff broadly explains that she wrote three communications/transfer requests regarding Victor's discriminatory behavior and his alleged propensity for seeking to suspend her without pay. Plaintiff does not indicate that she advised her employer that she was being discriminated against on the basis of race or gender. Thus, it is unlikely that plaintiff's communications "constitute protected activity," under the NYCHRL as plaintiff never asserted to anyone that she suffered from this mistreatment, as a result of a protected characteristic. *Fruchtman v City of New York*, 129 AD3d 500, 501 (1st Dept 2015) (internal quotation marks and citations omitted).

Nonetheless, giving plaintiff every favorable inference on this motion, even assuming that the March, May and June 2017 communications with defendant constituted protected activity, plaintiff cannot establish a causal connection between her three suspensions and these communications. Plaintiff's argument that the three suspensions "are in close proximity to the March 1, 2017 email," is inaccurate. The record indicates that the investigation, hearings and recommended penalty in connection to the 10- and 25-day suspensions occurred prior to March 1, 2017. While plaintiff claims that the actual punishment was not "meted out" until after the March 2017 email, the allegedly retaliatory acts of commencing disciplinary proceedings

occurred prior to this date. As a result, plaintiff cannot show a causal connection between this protected activity and these retaliatory acts.

In addition, the charges related to the 29-day suspension stemmed from Victor's February 28, 2017 letter to HRA advising that plaintiff engaged in misconduct. Nonetheless, even if the hearing for the 29-day suspension was held after March 1, 2017, there is still no causal connection between the protected activity and the retaliatory act of suspension. Plaintiff's complaint "only showed that [she] experienced a continuation of a course of conduct that had begun before [she] complained," which does not constitute retaliation. *Sims v Trustees of Columbia Univ. in the City of N.Y.*, 2019 NY Slip Op 00672, *1 (1st Dept 2019) (internal quotation marks and citation omitted); *see also Gaffney v City of New York*, 101 AD3d 410, 411 (1st Dept 2012) ("Nor is there any evidence of a causal connection between plaintiff's commencement of litigation and the allegedly adverse actions against her. Indeed, the conduct at issue began months before plaintiff filed the notice of claim").

Transfer

Plaintiff alleges that she suffered from an additional adverse action when she was involuntarily transferred to another APS office. Plaintiff claims that working in this office presents a travel hardship. Further, during the training for this position, she was assigned to shadow caseworkers who had been employed for less than three years in their titles. Plaintiff also alleges that the HRA refuses to approve her weekly time sheet.

Plaintiff's transfer is not an adverse employment action, because it did not "amount to a materially adverse change in the terms and conditions of [plaintiff's] employment." *Humphries v City Univ. of N.Y.*, 146 AD3d 427, 427 (1st Dept 2017). To be considered materially adverse, a

change in working conditions must be more disruptive than a "mere inconvenience or an alteration of job responsibilities." *Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 315 (1st Dept 2005) (internal quotation marks and citations omitted). Therefore, having to travel more, along with plaintiff's other complaints, are simply inconveniences. *See e.g. Silvis v City of New York*, 95 AD3d 665, 665 (1st Dept 2012) (internal quotation marks and citation omitted) ("Plaintiff's transfer from the position of literacy coach to a classroom teacher was merely an alteration of her responsibilities, and not an adverse employment action. Apart from a change in the nature of her duties, plaintiff retained the terms and conditions of her employment, and her salary remained the same").

Even assuming, arguendo, that being transferred to a different office or unit could be construed as an adverse employment action, plaintiff cannot adequately plead that this transfer "occurred under circumstances giving rise to an inference of discrimination." Plaintiff states that her union actually requested that she be transferred "to another unit away from [Victor]." Plaintiff's aff, ¶ 19. *See e.g. Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 (1st Dept 2013) (Plaintiff has failed to demonstrate how "discrimination was one of the motivating factors for the defendant's conduct").

Accordingly, defendant's motion dismissing the retaliation claim is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant the City of New York's motion for an order, pursuant to CPLR 3211 (a) (5) and (7), dismissing the complaint is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision/order of this Court.

3/5/2019
DATE

LYLE E. FRANK, J.S.C.

HON. LYLE E. FRANK J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE