

Appleton v City of New York
2019 NY Slip Op 30627(U)
March 13, 2019
Supreme Court, New York County
Docket Number: 157849/2017
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 52

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ROSEMARIE APPLETON,

Plaintiffs,

DECISION & ORDER

-against-

CITY OF NEW YORK, DEPARTMENT OF EDUCATION
OF THE CITY OF NEW YORK, CHARLES OGUNDIMU,
EVELYN KATZ, and MICHAEL FALZONE,

Index No. 157849/2017

Defendants.

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ALEXANDER M. TISCH, J.:

Plaintiff brings this action seeking damages on the ground that she experienced age, racial, and disability discrimination at work, as well as a hostile work environment. Defendants make this pre-answer motion to dismiss the complaint on the ground that plaintiff fails to state a cause of action. For the reasons stated herein, the defendants motion is granted and the action is dismissed.

Factual and Procedural Background

Plaintiff, a 65-year-old African-American female, is employed by defendant Department of Education of the City of New York (DOE) as an Assistant Principal (AP). She has been an AP at Frederick Douglass Academy VI High School in Far Rockaway, Queens (the high school) since 2008. Defendant Charles Ogundimu, a person of color under the age of 50 who, as described by plaintiff, “thinks he is White,” became the principal of the high school in September 2014 (see Weinstein affirmation, Exhibit B). Defendant Evelyn Katz, also an AP at the high school since February 2014, is about 40 years old and Caucasian. Defendant Michael Falzone, a dean at the high school since 2008, is about 40 years old and Caucasian.

Plaintiff commenced this action on September 3, 2017, claiming that defendants created a hostile work environment and discriminated against her based on her age, race and physical restrictions. Plaintiff’s first cause of action seeks damages for such discrimination pursuant to New York State

Executive Law § 296 et seq.; her second cause of action seeks damages pursuant to the New York City Administrative Code 8-101 et seq.; and her third cause of action seeks damages pursuant to the Local Civil Rights Restoration Act of 2005. Plaintiff also states that she filed a notice of claim with the DOE on November 15, 2016, that a 50-h hearing was held on April 24, 2017, and that this action was commenced within one year and 90 days of the alleged occurrences of discrimination.

In her complaint, plaintiff states that sometime after February 2016, defendants continuously harassed her both publicly and privately. Plaintiff cites the following incidents of harassment:

(a) Defendants shouted at her and demeaned in front of her peers during staff meetings and over the school's public-address system;

(b) Katz suggested to another high school employee that plaintiff should retire so that Falzone would take her position as AP;

(c) In November 2015, plaintiff sustained personal injuries from a car accident. Due to those injuries, she went out on medical leave until February 2016. Shortly after returning to work, plaintiff was injured again trying to break up a fight between two students. Plaintiff then went out on medical leave for five months, returning on June 2016. Upon her return to work, plaintiff was not provided with a reasonable accommodation for her "known medical condition" and "known reported physical restrictions";

(d) In June 2016, upon her return to work, plaintiff was reassigned more vigorous and physically challenging responsibilities, even though she was physically restricted. Prior to her medical leave, plaintiff was assigned to supervise school aides, secretaries, and testing coordinators, and do some programming. Upon her return to work, she was assigned to supervise the cafeteria, patrol the hallways, collect cell phones, handle the morning entry and afternoon dismissals, and other duties that had previously been done by school aides or other non-administrative personnel;

(e) Defendants intentionally and improperly denied her Line of Duty Injury (LODI) benefits request;

(f) After plaintiff returned to work, she was assigned to a new office, which was formerly a storage classroom, without the proper equipment and technology she needed to perform her duties as an AP;

(g) DOE employees routinely asked her when she was going to retire;

(h) Plaintiff was not invited to meetings between Ogundimu and Katz;

(i) Ogundimu told her that the school had run well in her absence;

(j) Defendants issued disciplinary letters to her for the first time in her career;

(k) Falzone treated her like a subordinate, when he was her subordinate.

Plaintiff states that defendants took these actions to force her to retire so that Falzone could take her position. She also states that no other employee at the high school was treated in this manner. In fact, plaintiff claims that this continuing harassment caused her to submit a proposed resignation letter effective July 1, 2017.¹

Plaintiff had filed a notice of claim with the DOE in February 2016, stating that she re-injured her neck, shoulders, knees, right wrist, and back, while trying to prevent a fight between two students on February 24, 2016 (see Coyne aff, exhibit 1).

On November 15, 2016, plaintiff filed a second notice of claim with the DOE setting forth the nature of her claim as:

To recover for personal and psychological injuries, medical, and medicine expenses sustained as a result of the carelessness, recklessness and negligence and intentional actions of the CITY OF NEW YORK, and the DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK and [sic] by their agents, servants and/or employees in the control and supervision sustained by reason of the hostile work environment created by their employees. and specifically by Charles Ogundimu Ms. Katz and Mr. Falzone by intentionally discriminating without justification and in harassing the claimant by reason

¹ Plaintiff, however, did not retire and is still employed as an AP at the high school.

of the claimant's age, race, religion and/or National origin in order that she be forced to resign from her position as assistant principal, and by reason, [sic] and in failing to supervise their employees by allowing the aforementioned discriminatory conduct to take place and which continues to date.

(see Coyne aff, exhibit 1).

Plaintiff described the manner in which the claim arose as:

That commencing on or before September 7, 2016, the respondents, by their agents, servants and/or employees above listed set out on an illegal and discriminatory course of conduct for the sole purpose of forcing the claimant to resign her position as the assistant principal at the said school. The hostile actions of the said agents, servants and/or employees against the claimant were premised upon her age, her race, her religion and/or her national Origin

(*id.*).

At her 50-h hearing, plaintiff testified that in 2014, when Ogundimu started working as the principal of the high school, she and Ogundimu had a good relationship. However, that relationship changed after she returned to work in June 2016. Plaintiff testified that, as a result of her car accident, she suffered back, neck, knee and shoulder injuries, and that she reinjured those areas in February 2016 when she attempted to prevent a fight between two students at the high school. Plaintiff testified that she applied for LODI benefits which were denied by Ogundimu, who found her claims unsubstantiated (27-29).² Plaintiff has a pending grievance for that denial of LODI benefits (29-30).

Plaintiff further testified that the “biggest” discrimination she experienced was when she returned to work in June 2016 and was assigned a classroom, which was being used for storage, as her new office (22). She claims Ogundimu told her that she could not return to her former office because it was being used by two newly hired employees, a part-time computer programmer and an assistant principal reserve, each of whom performed a portion of plaintiff’s duties while she was out on medical leave. After she returned to work, the part-time programmer remained employed at the high school, and the assistant principal reserve retired, but continued to work at the high school part time (22-26). Plaintiff’s new office

² The page references are for plaintiff’s 50-h hearing transcript (see Weinstein affirmation, exhibit B).

did not have a locker for her personal items, desk, computer or printer. After being assigned the classroom as an office, plaintiff immediately contacted her union representative about the situation. After a meeting with Ogundimu and a union representative, the classroom was cleaned of storage items and plaintiff was given a locker, a desk, a computer and a printer (33-34).

Plaintiff also testified that when she returned to work, she was not given her previous job responsibilities, but was assigned to patrolling the hallways and supervising the cafeteria, tasks that were previously performed by teachers and aides (25). Plaintiff asked Ogundimu to change her job responsibilities so that she wouldn't have to be in the hallways and cafeteria every day, and asked to be permitted to perform more supervisory duties. However, Ogundimu refused to change her duties (26). Plaintiff testified that when she returned to work, due to her disability, her job restrictions were that she should not be in a crowded hall and that she needed a foot rest (27). However, she did not receive those accommodations. Rather, in July 2016, she was sent to "medical," where she was examined by a physician and cleared for work without accommodations (27-28).

Plaintiff also testified that Ogundimu improperly blamed her, instead of Falzone, for an incident where a student was permitted to enter the school without a parent (36-37). After that incident, a disciplinary meeting was held with Ogundimu and a union representative (36). Plaintiff testified that she also received a disciplinary letter due to her absences (37-38). Plaintiff testified that she received a second disciplinary letter the same week, when Ogundimu claimed that she was not meeting her job requirement by not preparing certain reports (37). Plaintiff also received an unsatisfactory rating (37).

Plaintiff testified that once Katz told her, in a demeaning way, to attend to an issue in a classroom while plaintiff was at lunch (38-39). Plaintiff testified that in meetings, when she would make a point, Katz would make the opposite point (39). Plaintiff further testified that Ms. Reece, a social studies teacher, told her that she had overheard Katz say that the reason Katz and Ogundimu were treating plaintiff so poorly was because they wanted plaintiff to retire and have Falzone replace her (40-41).

Plaintiff testified that she thinks she is being discriminated against because Katz and Falzone are young and Caucasian, and Ogundimu, although a person of color, “thinks he’s white”, and she “is black and old (43).” However, she had no emails to support this feeling. She only had the oral statement of Ms. Reece, with whom she discussed the matter one or two times, and with whom she hasn’t spoken in a while (43-44). Plaintiff testified that she has not suffered a change in salary, but is having headaches from the stress (45-46). Plaintiff also sees a psychologist, Dr. Reiss, for stress reduction (50).

Defendants make this pre-answer motion to dismiss the complaint for failure to state a cause of action. Initially, defendants argue that plaintiff failed to file a proper notice of claim. Defendants argue that Education Law § 3813(1) requires that a notice of claim be filed in accordance with General Municipal Law § 50-e prior to the commencement of an action against the DOE. Defendants argue that although plaintiff filed two notices of claims, one in February 2016, alleging injuries from the school fight, and another on November 15, 2016, asserting claims of age and racial discrimination, and hostile work environment, neither of these notices provide any factual allegations. Moreover, according to defendants, neither of the notices assert a claim of discrimination based upon a disability.

Defendants also argue that since plaintiff’s second notice of claim, asserting claims of discrimination, was filed on November 15, 2016, it could only refer to events that occurred 90 days prior to filing of the notice of claim; August 16, 2016. Thus, any claims that rose prior to August 16, 2016 must be dismissed.

Defendants also argue that to assert a discrimination claim under NYSHRL, plaintiff must allege, in a non-conclusory manner, that she is a member of protected class, that she was qualified to hold her position, that she suffered an adverse employment action, and that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. However, plaintiff has not sufficiently alleged any facts to support her claim that she suffered an adverse employment action since she is still employed as an AP at the high school.

With respect to her disability discrimination claim, defendants argue that the complaint provides no factual description of her disability, other than “she suffers from certain physical disabilities,” and is “partially disabled,” from a “known medical condition” (see Weinstein affirmation, exhibit A - paragraphs 18, 24, 25). Defendants note that plaintiff has not identified her legal disability, has not claimed that she asked for specific accommodations, nor has she specified how defendants failed to provide adequate accommodations.

Defendants also argue that plaintiff has not alleged any discriminatory acts; rather her claims that she was belittled and treated like a subordinate by school employees, are merely instances of personality conflicts, and not unlawful discrimination. Further, plaintiff’s claim that she was forced to submit a proposed resignation letter effective July 1, 2017, is not a discriminatory act, since plaintiff did not resign and is still employed at the high school.

With respect to her age discrimination claim, defendants argue that plaintiff’s claim that: (1) Ogundimu told her things had gone well at the high school in her absence; (2) Katz told another employee that she thought plaintiff should retire; and (3) some school employees asked her when she planned to retire, are not sufficient to allege an age discrimination case.

Defendants also argue that Ogundimu is the same race as plaintiff, and therefore, an inference of discrimination does not exist because plaintiff and Ogundimu are in the same protected class. Likewise, defendants argue that plaintiff did not allege that she was treated differently than similarly situated APs.

With respect to her hostile work environment claim, defendants argue that plaintiff did not allege facts that establish that her work place was permeated with discriminatory intimidation, ridicule, and insult that were sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment.

Finally, defendants argue that defendant the City of New York is not a proper party because it is a separate entity from the DOE, and therefore, the complaint must be dismissed as to The City of New York.

In opposition, plaintiff, who only submits her attorney's affirmation, argues that her notice of claims is sufficiently factual to provide defendants with the proper notice to be able to investigate her claims. Further, plaintiff appeared and participated in a 50-h hearing during which she set forth facts supporting her age, race, and disability discrimination claims, and her hostile work environment claim. Plaintiff contends that her allegations that her job was more difficult after she returned from her injuries were sufficient to factually support her claim of discrimination. Plaintiff notes that, while defendants assert that she did not suffer an adverse action by defendants and that any actions taken by them were minor annoyances, such claims were factual issues and do not warrant dismissal.

With respect to the scope of her notice of claims, plaintiff contends that she was subjected to a continuous pattern of harassment and discrimination and that there is no legal requirement for her to file numerous notices of claim for such a continuous pattern of discrimination. Further, even if the scope of the notice of claim, as against the DOE, is limited by the language of the Education Law, there is no such notice of claim requirement or limitation for the claims asserted against the individual defendants. Plaintiff also alleges that defendants Ogundimu and Katz are currently being investigated by the DOE Office of Investigations for carrying on inappropriate liaisons outside and inside the school. Plaintiff submits a photograph of a man and woman embracing, which she alleges is evidence of a liaison between Ogundimu and Katz. Plaintiff alleges that Katz consorted with Ogundimu to influence her to resign.

With respect to defendants' claim that the City of New York is not a proper party, plaintiff argues that defendants did not prove that the City of New York did not own, operate or control the high school where plaintiff worked. Therefore, dismissal of the complaint against the City of New York should be denied.

In reply, defendants again argue that the notice of claims filed by plaintiff never mentioned or set forth any allegations regarding disability discrimination and defendants' failure to provide proper disability accommodations. Therefore, those claims must be dismissed. Defendants argue further that a

50-h hearing is held for the purpose of adding facts to claims asserted in a notice of claim, not to add new theories of liability. Defendants argue that, even if the disability discrimination claims were properly raised in the notice of claims, they must be dismissed because plaintiff has not plead any facts regarding that claim. Defendants note that plaintiff never sets forth what type of disability she suffers from, and what her limitations are.

DISCUSSION

Sufficiency of the November Notice of Claim

Education Law § 3813 (1) requires that a notice of claim be filed in accordance with General Municipal Law § 50-e prior to commencing an action against the DOE. The underlying rationale of the notice of claim requirement in General Municipal Law § 50-e is to protect the municipality from unfounded claims and ensure that it has an adequate opportunity to timely explore the merits of the claim while the facts are still “fresh” (*Adkins v City of New York*, 43 NY2d 346, 350 [1977]; *see also Brown v City of New York*, 95 NY2d 389, 392 [2000] [in order “[t]o enable authorities to investigate, collect evidence and evaluate the merits of a claim, persons seeking to recover in tort against a municipality are required, as a precondition to suit, to serve a Notice of Claim”]). The General Municipal Law requires that the notice of claim set forth, among other things, “the nature of the claim” and “the time when, the place where and the manner in which the claim arose” (General Municipal Law § 50-e [2]; *see Brown*, 95 NY2d at 393). “The requirements of the statute are met when the notice describes the [incident] with sufficient particularity so as to enable the defendant to conduct a proper investigation thereof and to assess the merits of the claim” (*Palmer v Society for Seamen's Children*, 88 AD3d 970, 971 [2d Dept 2011]; *see Vargas v City of New York*, 105 AD3d 834, 836 [2d Dept 2013], lv granted 22 NY3d 858 [2013]).

“In making a determination on the sufficiency of a notice of claim, a court's inquiry is not limited to the four corners of the notice of claim” (*Vallejo-Bayas v New York City Tr. Auth.*, 103 AD3d 881, 882-883 [2d Dept 2013]; *see D'Alessandro v New York City Tr. Auth.*, 83 NY2d 891, 893 [1994]). A court may

consider the testimony provided during an examination conducted pursuant to General Municipal Law § 50-h and any other evidence properly before it to correct a good faith and nonprejudicial technical mistake, omission, irregularity, or defect in the notice of claim (*see Castillo v Kings County Hosp. Ctr.*, 149 AD3d 896 [2d Dept 2017]; *Vallejo-Bayas*, 103 AD3d at 882-883; see also General Municipal Law § 50-e [6]; *D'Alessandro v New York City Tr. Auth.*, 83 NY2d at 893). However, in determining the sufficiency of a notice of claim, testimony during an examination conducted pursuant to General Municipal Law § 50-h cannot be used to substantively change the nature of the claim or the theory of liability set forth in the notice of claim (*see Scott v City of New York*, 40 AD3d 408, 410 [1st Dept 2007]; *Figueroa v New York City Hous. Auth.*, 271 AD2d 238, 239 [1st Dept 2000]).

Causes of action for which a notice of claim is required, that are not delineated in the plaintiff's original notice of claim, may not be interposed because “[t]he addition of such causes of action which were not referred to, either directly or indirectly in the original notice of claim, would substantially alter the nature of the plaintiffs’ claims” (*Mazzilli v City of New York*, 154 AD2d 355, 357 [2d Dept 1989], quoting *Demorcy v City of New York*, 137 AD2d 650, 650-651 [2d Dept 1988]).

Here, plaintiff filed two notices of claims, neither of which made any reference to disability discrimination and defendants’ failure to accommodate plaintiff’s alleged disability. Accordingly, those claims must be dismissed. Nevertheless, plaintiff argues that even if her notice of claims did not reference her disability discrimination claims, she raised these issues at her April 24, 2017 50-h hearing, thereby providing defendants with sufficient notice of her claims. Contrary to plaintiff’s arguments, while testimony at a 50-h hearing may be used to provide further factual support for a claim set forth in that notice of claim or to correct an error in the notice of claim, it cannot be used to assert a new theory of liability. Accordingly, plaintiff cannot rely on her 50-h testimony as a basis to assert new claims of disability discrimination or failure of defendants to accommodate her disability (*see Mazzilli*, 154 AD2d at 357).

With respect to plaintiff's age and race discrimination claims, taking into consideration the allegations in the November 15, 2016 notice of claim³ as well as plaintiff's 50-h testimony, plaintiff has set forth sufficient facts to put defendants on notice of the nature of her claims (*see Portillo v New York City Tr. Auth.*, 84 AD3d 535, 536 [1st Dept 2011] [even if notice of claim was not sufficient other evidence permitted defendants to investigate plaintiff's allegations]). However, since such claims are limited to the 90-days prior to the filing of the November 15, 2016 notice of claim, all claims against the DOE that pre-date August 17, 2016 must be dismissed (see Education Law§ 3813 [1]; *see also Clune v Garden City Union Free School Dist*, 34 AD3d 618, 619 [2d Dept 2006] [a notice of claim must be presented to the governing body of the school district within three months from the accrual of the claim]). Likewise, any of plaintiff's claims against the DOE which accrued after November 15, 2016, must be dismissed (*see Varsity Tr., Inc. v Board of Educ. of City of N.Y.*, 5 NY3d 532, 353 [2005]; *see also Agostinello v Great Neck Union Free School Dist.*, 102 AD3d 638 [2d Dept 2013] [plaintiff's notice of claim dated February 4, 2003 did not satisfy the statutory requirement of placing the school district on notice of those allegedly discriminatory acts which took place subsequent to the date of the notice]).

Failure to State a Cause of Action

In considering a CPLR 3211 (a) (7) pre-answer motion to dismiss a complaint for failure to state a cause of action, a "court must accept all of the allegations in the complaint as true, and, drawing all inferences from those allegations in the light most favorable to the plaintiff, determine whether a cognizable cause of action can be discerned therein, not whether one has been properly stated" (*see MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011], citing *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634, 636 [1976]). However, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary

³ The February 2016 notice of claim contains no allegations of discriminatory conduct by defendants.

evidence are not entitled to such consideration” (*Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]).

A plaintiff alleging discrimination in employment, pursuant to the New York State Human Rights Law (NYSHRL) (Exec L §§ 296, *et seq.*), has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]).

Under the New York City Human Rights Law (NYCHRL) (New York City Administrative Code §§ 8-101, *et seq.*), “courts must analyze NYCHRL claims separately and independently from any federal and state law claims, construing the NYCHRL’s provisions ‘broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible’” (*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 109 [2d Cir 2013] [citations omitted]; *see Dillon v Ned Mgt., Inc.*, 85 F Supp 3d 639, 653 [EDNY 2015] “[The] NYCHRL is no longer construed to be coextensive with its federal and state counterparts.”). “To state a claim for discrimination under the NYCHRL, a plaintiff must only show differential treatment of any degree based on a discriminatory motive” (*Gorokhovsky v New York City Hous. Auth.*, 552 Fed Appx 100, 102 [2d Cir 2014] citing *Mihalik*, 715 F3d at 114). However, even under this more liberal pleading standard, a plaintiff must plausibly allege that she was subjected to unequal treatment because of her protected characteristic (*see Mathew v N. Shore-Long Island Jewish Health Sys., Inc.*, 582 Fed Appx 70, 71 [2d Cir 2014] [disability discrimination]; *Mihalik*, 715 F3d at 110 [gender-based discrimination]; *LaSalle v City of New York*, No. 13-CV-5109, 2015 WL 1442376, at *6 [SDNY Mar. 30, 2015] [race discrimination]). “[C]ourts must be mindful that the NYCHRL is not a general civility code . . . [and] [t]he plaintiff still bears the burden of showing that the conduct is caused by a

discriminatory motive” (*Mihalik*, 715 F3d at 110 [internal quotation marks and citations omitted]).

“An inference of discrimination can arise from circumstances including, but not limited to, ‘the employer’s criticism of the plaintiff’s performance in ethnically degrading terms; or its invidious comments about others in the employee’s protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff’s discharge” (*Littlejohn v City of New York*, 795 F3d 297, 312 [2d Cir 2017] quoting *Leibowitz v Cornell Univ.*, 584 F3d 487, 502 [2d Cir 2009]).

“A showing of disparate treatment—that is, a showing that the employer treated plaintiff ‘less favorably than a similarly situated employee outside his protected group’—is a recognized method of raising an inference of discrimination for purposes of making out a prima facie case” (*Mandell v County of Suffolk*, 316 F3d 368, 379 [2d Cir 2003] quoting *Graham v Long Island R.R.*, 230 F3d 34, 39 [2d Cir 2000]). “A plaintiff relying on disparate treatment evidence ‘must show she was similarly situated in all material respects to the individuals with whom she seeks to compare herself” (*id.* [citations omitted]).

Here, on this motion to dismiss, accepting all the allegations in the complaint as true and drawing all inferences from those allegations in the light most favorable to the plaintiff, the Court finds that plaintiff has not sufficiently alleged a cause of action for age or race discrimination. While there is no dispute that plaintiff is in a protected racial and age class or that she was qualified to hold her position as AP, plaintiff has not alleged that she suffered an adverse employment action which gave rise to an inference of discrimination.

At the outset, the Court notes that plaintiff has not alleged that defendants made any explicitly or implicitly invidious comments regarding her race or age. Rather, she alleges in a general, conclusory manner that “defendants routinely asked her when she was going to retire” (see Weinstein affirmation, exhibit A). Further, the only allegation regarding a specific comment made by defendants about her age or race, is plaintiff’s claim that a social studies teacher, Ms. Reece, overheard Katz say the reason she and

Ogundimu were treating plaintiff poorly was because they wanted her to retire. However, even accepting that alleged statement as discriminatory, it was made by Katz, plaintiff's peer, not made by Ogundimu, plaintiff's superior (*see Mete v NYS Off. Of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 294 [1st Dept 2005]; *see also Schreiber v Worldco, LLC*, 324 F Supp 2d 512, 519 [SDNY 2004]; *Ezold v Wolf, Block, Schorr & Solis-Cohen*, 983 F2d 509, 545 [3d Cir 1992] ["Stray remarks by non-decision-makers or by decision-makers unrelated to the decision process are rarely given great weight."]). Plaintiff does not set forth how Katz, her peer, was involved in any decision making with regard to her job duties. In fact, plaintiff states that it was Ogundimu who assigned her to new job responsibilities and to a new office space.

While plaintiff claims that, upon her return to work in June 2016, defendants improperly reassigned her office to a classroom that was used as storage; assigned her more vigorous and physical responsibilities; denied her LODI benefits; issued two disciplinary letters; and excluded her from meetings, she fails to make a factual connection between these alleged acts and how they are related to her age or race. Further, she has not alleged that Katz or any other AP or employee at the high school, received better treatment because of their race or age. The fact that Ogundimu and Katz maybe in a personal intimate relationship, or that Ogundimu, a person of color, "thinks he is white," does not give rise to an inference of age or racial discrimination against plaintiff. Moreover, since plaintiff is still employed as an AP at the high school she has not made a factual connection about how any actions taken by defendants have resulted in an adverse employment outcome for her.

With respect to plaintiff's hostile work environment claims, "[i]n order to prevail on a hostile work environment claim, a plaintiff must make two showings: (1) that 'the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'; and (2) that there is a 'specific basis for imputing the conduct creating the hostile work environment to the employer'" (*Duch v Jakubek*, 588 F3d 757, 762 [2d Cir 2009] [quoting *Feingold v*

New York, 366 F3d 138, 149-50 [2d Cir 2004]). A hostile work environment claim contains both an objective and subjective component. “[T]he misconduct shown must be ‘severe or pervasive enough to create an objectively hostile or abusive work environment,’ and the victim must also subjectively perceive that environment to be abusive” (*Alfano v Costello*, 294 F3d 365, 374 [2d Cir 2002] quoting *Harris v Forklift Sys., Inc.*, 510 US 17, 21 [1993]). “As a general rule, incidents must be more than ‘episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive” (*id.* quoting *Perry v Ethan Allen, Inc.*, 115 F3d 143, 149 [2d Cir 1997]).

“Isolated acts, unless very serious, do not meet the threshold of severity or pervasiveness” (*Alfano*, 294 F3d at 374). Therefore, a plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were “sufficiently continuous and concerted’ to have altered the conditions of her working environment” (*Perry* 115 F3d at 149). “To decide whether the threshold has been reached, courts examine the case-specific circumstances in their totality and evaluate the severity, frequency, and degree of the abuse” (*Alfano*, 294 F3d at 374; *see also Harris* 510 US at 23 [noting relevant factors to a hostile work environment determination to be “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance”]).

Plaintiff’s hostile work environment claims must also be dismissed. Again, plaintiff fails to support her claims with any facts relating to her being in a protected class regarding her age or race. The grievances alleged by plaintiff, that defendants belittled her, shouted at her, and demeaned her in front of her peers; and discussed her retirement, were minor annoyances and not adverse employment actions pursuant to the NYSHR and NYCHRL. Notably, the only factual allegations to support these contentions is that Katz spoke to her in a condescending manner, that Katz disagreed with her during meetings, and that Falzone treated her as a subordinate. These allegations, while offensive, are not of sufficient severity or such a continuous pattern to create a hostile work environment (*see Whitfield-Otiz v Department of Educ. of City*

of *N. Y.*, 116 AD3d 580, 581 [1st Dept 2014]).

The Court notes that while the vast majority of the cases relied upon by defendants are decisions on motions for summary judgment (e.g., *Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]; *Hernandez v Kaisman*, 103 AD3d 106 [1st Dept 2012]; *Melman v Montefiore Med. Ctr.*, 98 AD3d 107 [1st Dept 2012]; *Silvis v City of New York*, 95 AD3d 665 [1st Dept 2012]; *Williams v New York City Hous.* 61 AD3d 62 [1st Dept 2009]; *Mete v NYS Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288 [1st Dept 2005]; *Gonzalez v New York State Office of Mental Health*, 26 Misc 3d 1227 [A] [Sup Ct, Kings County 2010]; *Joseph v Lavitt*, 465 F3d 87 [2d Cir 2006]; *Woodman v WWOR-TV, Inc.*, 411 F3d 69 [2d Cir 2005]; *Bermundez v City of New York*, 783 F Supp 2d 560 [SDNY 2011]; *Walder v White Plains*, 738 F Supp 2d 483 [SDNY 2010]), defendants do rely on two cases determining pre-answer motions to dismiss which are instructive: *Whitfield-Otiz v Department of Educ. of City of N. Y.* (2012 WL 11045620 [Sup Ct NY County 2012], *affd* 116 AD3d 580 [1st Dept 2014]) and *Massaro v Department. of Educ. of City of New York* (2013 WL 2142259 [Sup Ct, NY County 2013], *affd* 121 AD3d 569 [1st Dept 2014]).

In *Whitfield*,⁴ the plaintiff, a 51 year-old African-American teacher, alleged that she had been subjected to a continuing pattern of age and racial discrimination because defendants: monitored to whom she spoke on a daily basis, subjected her to micro management, harassed her in an effort to force her to retire, threatened her, demeaned her, treated her differently with regard to personal time off, falsely accused her of not following procedures, and informed parents that plaintiff was crazy and that they should remove their children from her class. In granting defendants' motion to dismiss and denying plaintiff's cross motion to amend her complaint the court (Engoron, J.), held that there was nothing in the complaint or proposed amended complaint to suggest that plaintiff was treated any different than her co-workers or that defendants' actions had any effect on her pay or had any other adverse employment outcome. Further, the court held that plaintiff's claim of a hostile work environment must be dismissed because the alleged

⁴ The recited claims of discrimination are taken from pages 2-3 of the underlying complaint in *Whitfield*, index No. 150118/2012.

incidents were not sufficiently severe or such a continuous pattern to create a hostile work environment, rather than merely being offensive.

In *Massaro*, the plaintiff, a 51-year-old art teacher, claimed that she suffered age discrimination, among other things, because the younger teachers had the best schedules and students, access to computers, printers, books, materials, supplies, that the younger teachers often missed departmental meetings, and that many of the school's staff had asked plaintiff when she is going to retire (*id.* at *4). Plaintiff also stated that she was harassed at work, but the younger teachers were not (*id.*). However, the complaint did not state the ages of the younger teachers. In dismissing plaintiff's age discrimination claim, the court (Singh, J.), found plaintiff's age discrimination claim to border on frivolous, stating that the complaint "failed to allege a single fact to support the conclusion that any of the work conditions about which plaintiff complains were imposed on her because of her age" (*id.*).

Here, like the plaintiff's allegations in *Whitfield* and *Massaro*, plaintiff's claims do not sufficiently allege a cause of action for age or racial discrimination because plaintiff has failed to sufficiently allege any connection between her treatment by defendants and her age or race, or that suffered any adverse employment outcome.

In contrast, the plaintiff in *Wiesen v New York Univ.* (304 AD2d 459 [1st Dept 2003]), alleged sufficient facts in support of his age discrimination claim to survive a motion to dismiss. In *Wiesen*, the plaintiff alleged, among other things, that after teaching graduate level entrepreneurship studies courses at the Stern School of Business for at least 15 years, he was informed by a superior that he was being reassigned because of a desire for younger faculty; that after he filed a grievance, defendant retaliated by assigning him to teach less desirable undergraduate courses; and that he was informed, while on sabbatical, that he was dismissed.

Likewise, the plaintiff in *Godino v Premier Salons, Ltd.* (140 AD3d 1118 [2d Dept 2016]), also set forth sufficient factual allegations to survive a motion to dismiss. In *Godino*, the plaintiff alleged in

the complaint that she was a 54-year-old hairstylist with more than 20 years of experience and a loyal clientele when she began working for the defendants. She alleged that her coworkers, managers, and supervisors frequently ridiculed and harassed her because of her age by stating that she was “too old” and that she “should retire.” According to the complaint, the plaintiff’s work station was moved by a supervisor to a less desirable location in the salon, facing a fire exit, which resulted in a decrease in the plaintiff’s income. She alleged that a younger hairstylist, who happened to be one of the individuals who harassed her, was assigned to her former work station. The plaintiff claimed that her manager informed her that the supervisor made this decision “to promote the young girl with lots of energy.” The plaintiff alleged that she complained to management about the harassment and the change of work station, but that no remedial action was taken. She further alleged that on a particular occasion, she was attacked by two younger hairstylists, one of whom scratched her arm and screamed that she was “ugly and old,” and told her she “should retire.” According to the complaint, the plaintiff’s managers and supervisors failed to intervene during the attack, and, thereafter, the defendants terminated the plaintiff’s employment.

Unlike the *Wiesen* and *Godino* plaintiffs, plaintiff herein has not connected how the actions taken by defendants related to her age or race, or that she suffered an adverse employment outcome. In *Wiesen*, the complaint alleged that plaintiff was expressly told he was being replaced because his superior wanted a younger more youthful faculty, and he was ultimately fired after filing a grievance against his employer. In *Godino*, the plaintiff alleged that her salon chair was moved to a less desirable location and that she lost income. Further, she alleged specific instances of severe acts including a physical altercation during which was called “ugly and old.” Notably, the *Godino* plaintiff was ultimately fired. Here, the complaint makes no such specific factual allegations of conduct upon which an inference of age and racial discrimination, or a hostile work environment, can be drawn.

Accordingly, plaintiff’s claims of age and racial discrimination and her hostile work environment claims under New York State Executive Law § 296 et seq., New York City Administrative Code 8-101 et

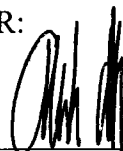
seq., and the Local Civil Rights Restoration Act of 2005,⁵ must be dismissed.

Finally, defendants move to dismiss the claims against the City of New York as said defendant is an improper party. While this Court has dismissed all claims against all defendants for the reasons stated above, for clarity the Court finds that the City of New York is a separate legal entity from, and not responsible for, the actions of the DOE.

Accordingly, it is ORDERED that defendants' motion to dismiss the complaint is granted and the complaint is dismissed.

DATED: March 13, 2019

ENTER:



J.S.C.

HON. ALEXANDER M. TISCH

⁵ Plaintiff's separate claim under the Local Civil Rights Restoration Act of 2005, is duplicative of her claims under the NYCHRL since the Local Civil Rights Restoration Act of 2005 was an amendment to the NYCHLR (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 66-68 [2d Dept 2009]).