Leader v City of New York
2020 NY Slip Op 30807(U)
March 16, 2020
Supreme Court, New York County
Docket Number: 451619/2016
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART 52**

Justice

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INDEX NO. 451619/2016

LILY LEADER,

MOTION DATE 12/11/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF CORRECTIONS, AND JEAN YAREMCHUK, INDIVIDUALLY AND ON BEHALF OF, THE NEW YORK CITY DEPARTMENT OF CORRECTIONS

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 80, 81, 82, 83, 84, 85, 86

were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of plaintiff Lily Leader's claims that she was subject to discrimination, retaliation and a hostile work environment, on the basis of her age and gender, in violation of the New York City Human Rights Law (NYCHRL). Defendants the City of New York, The New York City Department of Corrections (DOC) and Jean Yaremchuk (Yaremchuk), individually and on behalf of the DOC (collectively, defendants), move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. For the reasons set forth below, defendants' motion is granted in its entirety.[1]

BACKGROUND AND FACTUAL ALLEGATIONS

In 1998, plaintiff commenced her employment with defendants, working as a consultant and programmer/analyst in the DOC's information technology department. In March 2001, plaintiff was directly hired by defendants as a provisional Computer Associate Level III. In

[1] The Court would like to thank Beth Pocius, Esp. for her assistance in this matter.

March 2005, plaintiff became a Computer Specialist Software Level I, and continues to be employed in this position.

Plaintiff is female; she was born in 1944. Plaintiff's complaint contains allegations that, since she started working at the DOC, she has been discriminated against on the basis of gender and age. Specifically, plaintiff believes that has been passed over for assignments and promotions and that these were given to younger or male colleagues who did not have the same qualifications as she did. Plaintiff further alleges that Yaremchuk, her supervisor, subjected plaintiff to a hostile work environment due to her age and gender and retaliated against her.[2]

Disparate Treatment and Hostile Work Environment Claims

The complaint provides various disparate and discriminatory treatment that plaintiff was allegedly subjected to throughout her employment. For example, in August 2003, plaintiff's job title was changed to Senior Program Specialist, which was not a "Computer Title." NYSCEF Doc. No. 61, Complaint, ¶ 11. Yaremchuk initiated and approved this change, which also resulted in a salary deduction. Plaintiff explains, "[a]t that time in IT Division [sic] there existed about 20 provisional employees with the different computer titles for which the civil service lists were issued also, and no other employee's title was changed, and salary was reduced in the IT Division, including people who got negative performance evaluations. Only Plaintiff was subject to this salary reduction and demotion." *Id.*, ¶ 12.

In 2006, plaintiff submitted a complaint to the New York State Division of Human Rights (NYSDHR), charging the DOC with discriminating against her on the basis of age. "Complainant alleges in her complaint that she was the victim of disparate and

[2] Yaremchuk supervised plaintiff from 2009-2011. Tatyana Koval (Koval) supervised plaintiff from 2011 to 2012 and Maureen Danko (Danko) supervised plaintiff from 2012 to 2015.

discriminatory treatment at the behest of [defendants] due to her age." NYSCEF Doc. No. 66, NYSDHR Determination and Order After Investigation (NYSDHR Determination), at 1.

In January 2007, the NYSDHR issued its Determination and dismissed plaintiff's complaint. It found "no probable cause" to believe that the DOC engaged in the unlawful discriminatory practice complained of. *Id.* at 1. The decision stated that, "plaintiff notes the fact that her position title was changed, and views her reassignment as a demotion." However, the NYSDHR held, "[i]t is clear that there is no causal nexus between complainant's age and the actions of the respondent." *Id.* at 2.

In March 2007, plaintiff "filed a grievance with the union 'Work out of Title' [sic]. The Work out of Title grievance was result [sic] of the discrimination Plaintiff was subjected to." Complaint, ¶ 21. "On February 15, 2012, the arbitrator rendered a decision on Plaintiff's grievance in her favor. The grievance was sustained and it was concluded that Plaintiff was assigned to duties substantially different from those stated in her position." *Id.*, ¶ 27. The more recent procedural history is as follows:

In October 2010, at plaintiff's request, Yaremchuk assigned plaintiff a Service Desk Express project based on the Fire Safety Unit application (Service Desk Express project). Plaintiff states that, in February 2011, after working on the project for over three months, Yaremchuk removed plaintiff from the project and "accused her for speaking at the meeting." *Id.*, ¶ 23.

Plaintiff claims that she was also removed, a few months later, without any explanation, from the "SRG" project. Further, in December 2011, Yaremchuk held a meeting where Yaremchuk humiliated plaintiff and "spread false rumors that Plaintiff had performance issues." *Id.*, ¶ 24.

On July 22, 2011, plaintiff applied for the position of Cognos specialist.[3] She claims that, although she was fully qualified, she was not given an interview.

With respect to a hostile work environment claim, plaintiff alleges that she is "subjected to open hostility, and mocked regarding her attire although her attire is appropriate." *Id.*, ¶ 39. On one occasion Yaremchuk's secretary asked plaintiff if she signed the doctor's note, "implying" that she forged the note. In March 2013, plaintiff and Roman Minevich (Minevich), a colleague, were asked to move their desks to make room for 25 newly hired consultants. Plaintiff's desk was placed right by the kitchen. She told Danko, the group manager, that Minevich offered to switch seats with plaintiff and that she is "allergic to and cannot tolerate kitchen odors." *Id.*, ¶ 40. "However [Yaremchuk] insisted that Plaintiff sit on the right side and [Minevich] on the left side of the cubicle. On the meeting [sic] [Danko] informed that [Yaremchuk] will watch Plaintiff on the video camera." *Id.*, ¶ 41.

Retaliation

Plaintiff states that Yaremchuk retaliated against her as a result of the "arbitration decision" and that Yaremchuk continued to discriminate against her on the basis of age and gender. *Id.*, ¶ 24. For example, plaintiff was excluded from meetings and was not allowed to attend training courses with her colleagues. She states that Yaremchuk does not give her the same opportunities that are given to younger employees. For instance, plaintiff states new assignments were given to Carol Dewey (Dewey), who is younger. Yaremchuk "elevated Dewey from an Assistant Staff Analyst, doing data entry work, to a Project Manager despite not having the necessary skills. Plaintiff has the skills, but did not get the assignments" *Id.*, ¶ 35.

[3] Cognos is a structured reporting tool, which means that it generates statistical summaries, charts and graphs based on data models." NYSCEF Doc. No. 65, Yaremchuk tr at 41.

As another example, plaintiff claims that she was excluded from working on new application developments and that "[f]or this work R. Nagpurkar, Director of Application Development, hires exclusively young males of Indian origin (from India region)." *Id.*, ¶ 37. She summarizes that Yaremchuk "deliberately excluded Plaintiff from IT division activities, from some training, and underutilizes Plaintiff's skills, knowledge, abilities, and experience with the goal not to restore the level of her title and salary." *Id.*, ¶ 36.

On January 6, 2012 plaintiff filed a complaint with the DOC's Office of Equal Opportunity (EEO) alleging that Yaremchuk engaged in age discrimination and retaliation. Plaintiff states that the EEO office treated her with hostility, failed to conduct an investigation and refused to allow her to view her file.

The relevant portions of Yaremchuk and plaintiff's depositions are as follows:

Yaremchuk's testimony

Yaremchuk testified that plaintiff received two corrective interviews during the time she supervised plaintiff.[4] For instance, Yaremchuk met with plaintiff on September 2, 2011 to discuss a "substandard work performance" on an assignment. NYSCEF Doc. 69 at 1. Yaremchuk testified that she was in charge of hiring for the Cognos Specialist position. There were several applicants, but plaintiff was the only internal applicant who applied for the position. Yaremchuk did not initially fill the position and it had to be reposted because "there were no job applications who were qualified for the position." Yaremchuk tr at 43. Plaintiff "did not have the three years of experience designing and building. She did not have experience in data modeling and ETL. She had no experience in SQL or DB2. She was very weak in

[4] A corrective interview is not a formal performance evaluation but it is a "discussion with the employee" that goes in their personal file." NYSCEF Doc. No. 65, Yaremchuk tr at 39.

communication analysis and problem solving skills. She's not quick to learn." *Id.* at 43. Yaremchuk explained that defendants ultimately did not find anyone to fill the position and hired consultants. *Id.* at 61.

Yaremchuk testified that plaintiff was removed from the Service Desk Express Project "at the recommendation of" Brian Charkowick (Charkowick), executive director of operations. Charkowick notified Yaremchuk that plaintiff "was being disruptive during meetings." *Id.* at 50. When Yaremchuk asked Charkowick to explain why he wanted plaintiff removed, he wrote the following:

"In my 29 years working in the Information Technology field and having the knowledge and experience from working on many legacy and modern systems as well as projects Involving new application developments, Lily Leader did not demonstrate a good knowledge or understanding of how to work on such a project. During our Business Analysis and design sessions, she would ask questions about Tables and Databases fields at inappropriate times, when we were still just trying to figure out the business process/workflow for the manual process we were trying to automate. She did not seem to have any knowledge or understanding of a Web based, three tier application and after having private sessions with our Vendor, Column Technologies to go over that architecture, Column Technologies advised me that they did not feel Lilly possessed the skills or abilities to learn what they were showing her."

NYSCEF Doc. No. 67 at 1.

Yaremchuk testified that she decided to remove plaintiff from the SRG application project because Yaremchuk felt that plaintiff "was not performing the tasks that she was given in a timely manner . . . ." Yaremchuk tr at 51. Yaremchuk reorganized the desks in the office due to the "additional 20 to 30 individuals coming and joining the department for a prolonged period." *Id.* at 52. She stated that "[t]here are security cameras by the entrance and exit doors to the workspace. There is also a correction officer positioned at the entrance." *Id.* at 52. However, Yaremchuk testified that she did not inform anyone that she would be watching plaintiff on a video camera. She did not accommodate plaintiff's request to change desks because she needed to separate employees by group and because certain employees were

disruptive when seated together. Yaremchuk chose Minevich to attend the SharePoint training because he had a "background in some operations maintenance." *Id.* at 58.

Plaintiff's testimony

Plaintiff testified that in 2007, her union filed a grievance on her behalf, "arguing that [she was] working as a Computer Specialist, Software Level I but claiming that [she was] doing the work of a Computer Specialist, Software Level II." NYSCEF Doc. No, 63, plaintiff's tr at 72. Plaintiff won this grievance in 2012 and was awarded compensation for "Out-of-Title" work. *Id.* Yaremchuk was present in the union meeting and her subsequent actions purportedly "demonstrated her attitude" towards plaintiff. *Id.* at 111. For instance, in February 2011, plaintiff believes that she was retaliated against when Yaremchuk removed plaintiff from the Service Desk Express project, as this was "immediately after the meeting with the Union." *Id.* at 110.

Plaintiff further testified that removing her from the Service Desk Express project was part of Yaremchuk's pattern of assigning younger people in plaintiff's place. Specifically, plaintiff testified that Yaremchuk, "appointed to this project people who not familiar with the project who is younger than me [sic]." *Id.* at 111. She continued that she thought this was discriminatory "[b]ecause people who not familiar with this project, younger than I for 22 years and for 12 years, were appointed -- and not familiar with the project were appointed." *Id.* at 112.

"Svetlana" and "Irina Smeiglazova," were some of the younger employees appointed to the Service Desk Express project. Dewey transferred to plaintiff's department in 2012 from the nutritional department. Plaintiff thought it was "strange." *Id.* at 213. She claimed that she was excluded from certain trainings that Yaremchuk underutilized her skills due to "discrimination."

Id. at 153. However, plaintiff did not believe that Charkowick, or any of the younger employees, ever discriminated against her.

Plaintiff testified that she was excluded from "[n]ew assignments." When asked which projects specifically, plaintiff states that there was a new project for SharePoint. But then plaintiff followed up that she ultimately was allowed to be on this new project. According to plaintiff, she was excluded from two or three meetings until "Minevich spoke to [Koval] in February 2012 to mention that [she] should be included in meetings regarding SharePoint." *Id.* at 138. After this conversation, Koval received permission for plaintiff to attend the meetings. Plaintiff also attended a training in "building applications and workflows with SharePoint designer." *Id.* at 139.

When describing her familiarity with specific computer programs, in relevant part, plaintiff testified that she had "occasional" use with DB-2. *Id.* at 77. Further, she is not working with SharePoint Administration and she has no familiarity with this program. Plaintiff claims that she was qualified for the Cognos Specialist position because she "worked with all software that was mentioned in the requirements." *Id.* at 128. She reiterated, "I qualify." *Id.* at 129. Plaintiff was aware that the DOC never hired anyone for the Cognos Specialist Position.

Plaintiff claimed that Yaremchuk harassed and humiliated her. She testified that, on one Friday, she was wearing blue jeans to the office and Yaremchuk said to her, "[w]hy you dressed like this [sic]?" *Id.* at 157. Plaintiff told her that it was dress-down Friday. Although there was a memo advising employees not to wear blue jeans, plaintiff testified that she did not believe the policy applied to her. After Yaremchuk commented on her blue jeans that one time, plaintiff did not wear jeans again to the office. Plaintiff felt that Yaremchuk was a "mean person" who had

poor manners. She continued that Yaremchuk acted this way with other employees as well. *Id.* at 114.

When asked about her allegation that Rekha Nagpurkar (Nagpurkar), a woman, hired young males of Indian origin, plaintiff testified that she was not supervised by Nagpurkar and that it was a different group. She continued,"[i]f they hired in that group, it was always from one region and male." *Id.* at 155.

Plaintiff testified that, in January 2012, as a result of Yaremchuk's actions, she filed a complaint with the DOC's internal EEO office alleging discrimination, retaliation and a hostile work environment. Plaintiff included Koval and Nagpurkar in her complaint and testified that the basis of the complaint was "discrimination, retaliation, and unequal treatment hostile environment." NYSCEF Doc. No. 64, second part of plaintiff's tr at 188. Plaintiff's EEO complaint had alleged that she was denied an equal employment opportunity based on the alleged demotion received in 2003.[5]

Ultimately, plaintiff received a letter from the EEO office "that they did not find anything wrong." *Id.* at 191. Although not included in the papers, plaintiff testified that she filed a similar complaint with the US Equal Employment Opportunity Commission (EEOO) against the DOC's administration and Yaremchuk. In the EEOO complaint, plaintiff stated that she was removed from the Service Desk Express project, for the "absurd" reason, "because [she] talked." *Id.* at 205. Plaintiff testified that she was only retaliated against for filing the 2007 union grievance and also for applying for the Cognos Specialist position.

The Instant Action

[5] Plaintiff testified that she did not believe Koval or Nagpurkar ever discriminated against her.

On October 10, 2013, plaintiff commenced an action by filing the instant complaint alleging, by one cause of action, that she was subjected to a hostile work environment and disparate treatment by reason of her age and gender and that she was also retaliated against. The complaint indicates that Yaremchuk is plaintiff's supervisor and "is being sued in her individual capacity (aider and abettor) . . . ." Complaint, ¶ 3. Plaintiff is seeking compensatory damages for the psychological injuries she sustained as a result of the defendants' conduct. She is also seeking to be compensated for back pay and is requesting attorney's fees and costs.

Statute of Limitations

In its motion for summary judgment, defendants argue that any claims predicated on alleged incidents that took place prior to October 10, 2010 must be dismissed as they are time barred by the three year statute of limitations. In addition, defendants note that the continuing violation doctrine cannot apply to toll discrete acts, such as issues related to her compensation. For example, plaintiff testified to adverse actions occurring between 2001 and 2005. Notwithstanding that plaintiff testified that these issues were resolved when she was appointed to her current title in 2005, these allegations would be barred by either the statute of limitations or the election of remedies.

Plaintiff concedes that a three-year statute of limitations applies. She states that her timely allegations include: "[p]laintiff's removal from the [] project; failure to promote Plaintiff to the position of Cognos Specialist; Plaintiff's EEO complaint and subsequent retaliation; failure to allow Plaintiff to train; exclusion from new assignments; and the placement of Plaintiff's cubicle next to the kitchen despite her stated allergies." *Id.* at 10.

Nonetheless, plaintiff then states that all of her claims are timely under the continuing violation doctrine. "Plaintiff has alleged a pattern of harassment discrimination and retaliation,

dating back to August 2003 when she suffered a demotion and salary reduction, by the same supervisor, Jean Yaremchuk, who would remain the main discriminating official throughout Ms. Leader's employment at DOC." *Id.* at 12.

Election of Remedies

As noted above, plaintiff filed a prior complaint with the NYSDHR charging defendants with engaging in discriminatory employment practices based on age. Defendants further argue that claims based on events that occurred prior to January 25, 2007, the date of NYSDHR's Determination, should be dismissed based on the election of remedies doctrine. Plaintiff concedes that the NYSDHR determination precludes claims predicated on events prior to January 2007. However, she proffers that any claims made from January 2007 to October 2010, to the extent they comprise a hostile work environment claim, are still timely under the continuing violation doctrine.

Cognos Specialist Position

According to defendants, plaintiff cannot prove that she was qualified for the position or that she suffered an adverse action. Further, although plaintiff believes that she had the relevant experience for the Cognos Specialist position, the record indicates that she did not have the required specialized skills. For instance, under job description, the job vacancy notice indicates, "[r]elational databases and SQL (DB2 is a must)." NYSCEF Doc. No. 71 at 1. However, when asked if she was familiar with DB2, plaintiff testified that, "[i]t was occasionally used. I'm not expert." NYSCEF Doc. No. 63, plaintiff's tr at 76.

In opposition, plaintiff believes that her application to the Cognos Specialist Position was ignored, despite the fact that she was both fully qualified for the position and the only internal applicant.

Adverse Actions

Defendants argue any allegations regarding staffing decisions, such as not being able to attend certain trainings or having her desk moved, are not adverse actions as they did not affect the terms and conditions of her employment. Furthermore, although plaintiff believed that she was targeted, for example, by her attire and by having her desk moved, the policies were applied to all employees.

According to defendants, even if any of the complained-of actions were adverse, plaintiff cannot show they occurred under circumstances giving rise to an inference of discrimination. They continue that Yaremchuk, the alleged perpetrator, is of the same gender and approximately the same age as plaintiff, weakening any inference of discrimination. In addition, defendants argue that plaintiff's claims are undermined by the "same actor inference," as the record indicates that Yaremchuk both assigned plaintiff, and then removed her, from certain projects.

Defendants provide nondiscriminatory reasons for why other younger, or male, employees who were sent to trainings or placed on projects. For instance, even plaintiff testified and concedes that, Minevich, who was sent to a course on SharePoint Administration, was qualified for his position and title and was a good employee.

Plaintiff does not address any of these arguments. She reiterates that, in light of her qualifications and experience, the circumstances surrounding defendants' employment decisions raise an inference of discrimination.

Hostile Work Environment

According to defendants, plaintiff fails to establish a viable hostile work environment claim as her claims are predicated on discrete employment decisions. Furthermore, plaintiff has

not identified any comments related to her age or gender. In addition, plaintiff cannot establish that Yaremchuk's treatment of plaintiff was motivated by a discriminatory animus.

As noted in the complaint and reiterated in plaintiff's affidavit, plaintiff claims that Yaremchuk harassed and humiliated her by mocking her attire, implied that she was lying about being sick and subjected her to microscopic scrutiny. Plaintiff provides the example of when her desk was moved and warned that she would be watched on video camera.

Retaliation

Defendants concede that any internal EEO claim would constitute protected activity. However, the "out of title" grievance made by plaintiff does not constitute protected activity. Here, plaintiff testified that Yaremchuk retaliated against her as a result of the union grievance, not due to the EEO complaint. As a result, defendants assert that plaintiff cannot establish a retaliation claim. Furthermore, even if plaintiff claimed to be retaliated against after filing the EEO complaint, she cannot establish a causal connection, as most of the allegedly retaliatory conduct occurred prior to when the complaint was filed.

Defendants argue that the retaliation claim also fails as plaintiff cannot establish that defendants took any actions reasonably likely to deter a person from engaging in protected activity. Finally, even if plaintiff was able to set forth a prima case of retaliation, defendants have provided legitimate nonretaliatory reasons for the actions taken against her, such as poor work performance.

In opposition, plaintiff again argues that "subsequent to the arbitration decision [issued on February 15, 2012] the age discrimination and the retaliation by Jean Yaremchuk continued unabated." Plaintiff's memorandum of law at 22. She explains that the arbitrator concluded that she "was assigned to duties substantially different from those stated in her position." *Id.* She

also testified that she was retaliated against because she applied for the Cognos Specialist position. NYSCEF Doc. No. 64, second part of plaintiff's tr at 243.

In her memorandum of law, she argues that, after filing her EEO complaint, defendants failed to properly investigate the complaint and also denied her access to the file during the investigation. According to plaintiff, these actions are retaliatory, as they would deter an individual from engaging in a complaint of discrimination. Further, particularly after the 2012 complaint, plaintiff was denied multiple training opportunities that were not denied to younger, male employees who had not made the same complaints of discrimination. Plaintiff argues that defendants sought to further isolate her by both moving her desk and systematically excluding her from meetings that were related to her job responsibilities.

Individual Liability of Yaremchuk

Defendants argue that Yaremchuk should be dismissed from the complaint as plaintiff failed to establish that Yaremchuk engaged in any unlawful discrimination or retaliation. They continue that, even if plaintiff's claims were valid, there is no basis to establish individual liability.

In opposition, plaintiff argues that Yaremchuk, her supervisor, "was responsible for the majority of the discriminatory and retaliatory actions," and should be liable as an aider and abettor under the NYCHRL. Plaintiff's memorandum of law at 27.

The DOC

Finally, defendants argue that all claims should be dismissed as against the DOC because, as an agency of the City of New York, the DOC is not a suable entity.

Plaintiff concedes that the DOC is not a proper party to this action.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

II. The DOC

At the outset, as noted by defendants, the DOC is a non-suable agency as it is an agency of the City of New York. *See* New York City Charter § 396: "All actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law." Accordingly, all claims against the DOC must be dismissed as a matter of law. *See e.g. Adams v Galletta,* 966 F Supp 210, 212 (SD NY 1997) (court dismissed complaint as against the DOC holding, "[t]hus where a plaintiff has named the Department of Corrections as a defendant, he has sued a non-suable entity").

III. Election of Remedies-Claims Pre-Dating January 2007

"Pursuant to the election of remedies doctrine, the filing of a complaint with [the NYSDHR] precludes the commencement of an action in the Supreme Court asserting the same discriminatory acts." *Luckie v Northern Adult Day Health Care Ctr.*, 161 AD3d 845, 846 (2d Dept 2018) (internal quotation marks and citations omitted); *See* Administrative Code of the City of NY (Administrative Code) § 8-502 (a).

Here, the election of remedies now bars plaintiff's claims in the instant complaint pre-dating January 2007, as they are based on the "same allegedly discriminatory conduct asserted in the proceedings before the [NYSDHR]." *Luckie v Northern Adult Day Health Care Ctr.*, 161 AD3d at 846. For example, in both the instant and the NYSDHR complaint, plaintiff alleges that defendants subjected her to disparate and discriminatory treatment on the basis of her age. Among other things, plaintiff had argued that the change in her job title had been motivated by an age-based animus.

As set forth above, the NYSDHR conducted an investigation into plaintiff's allegations and found that there was no probable cause "to believe that [defendants] ha[d] engaged in or [are] engaging in the unlawful discriminatory practice complained of." Determination at 1. It continued that, "while [plaintiff] was the oldest employee in her job title, she has failed to establish a causal nexus between her age and the actions of [defendants]." Although, unlike here, the NYSDHR complaint did not specifically assert a claim for hostile work environment, "the instant claims are based on the same continuing allegedly discriminatory underlying conduct asserted in the Commission proceedings, and thus the statutory election of remedies applies." *Benjamin v New York City Dept. of Health*, 57 AD3d 403, 404 (1st Dept 2008).

In conclusion, the complaint sets forth several allegations based on incidents occurring prior to January 2007. As these claims stem from the same discriminatory acts presented to the NYSDHR, they are barred and dismissed by the election of remedies.

IV. Statute of Limitations

Actions to recover damages for alleged discrimination under the NYCHRL are subject to a three-year statute of limitations. Administrative Code § 8-502 (d). Defendants state that any claims predicated on incidents occurring prior to October 10, 2010 must be dismissed as time-barred. Plaintiff acknowledges the statute of limitations and provides discrete timely allegations occurring after October 2010. She also concedes that the NYSDHR determination bars any claims predicated on events occurring prior to January 2007. However, she also argues that "all" of her claims are timely under the continuing violation as these are "part and parcel of continuing acts of discrimination and retaliation." Plaintiff's memorandum of law at 12.

As discussed, the election of remedies effectively bars plaintiff's claims stemming from incidents occurring prior to January 2007. Plaintiff does not provide any specific allegations of a hostile work environment occurring between January 2007 and October 2010. She only broadly reiterates that she has alleged a pattern of discrimination, retaliation and harassment dating back to August 2003 when Yaremchuk's actions caused her to suffer a demotion and salary reduction.

In certain situations, a "continuing violation exception" applies to the statute of limitations period in NYCHRL hostile work environment claims. This is because a hostile work environment is not merely comprised of several discrete acts, but of a "series of separate acts that collectively constitute an unlawful discriminatory practice." *Matter of Lozada v Elmont Hook & Ladder Co. No. 1*, 151 AD3d 860, 861 (2d Dept 2017). Here, however, the continuing violation doctrine does apply to any of plaintiff's time-barred claims. The alleged demotion and salary

reduction was not only addressed by the NYSDHR, but is a discrete act, which would not act to toll the statute of limitations as a continuing violation. Thus, plaintiff's claims prior to October 10, 2010 are time-barred, as she failed to establish how these isolated incidents, which took place outside of the limitations period, "collectively constitute[d] an unlawful discriminatory practice." *Matter of Lozada*, 151 AD3d at 861.

V. Gender/Age Discrimination in Violation of the NYCHRL

Pursuant to the NYCHRL it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to fire or discriminate against an individual in the terms, conditions or privileges of employment, because of the individual's actual or perceived age or gender. *See* Administrative Code § 8-107 (1) (a). The provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts. *Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 (1st Dept 2016).

On a motion for summary judgment dismissing a claim for discrimination under the NYCHRL, courts have reaffirmed the applicability of the burden-shifting analysis as developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), in addition to the mixed-motive analysis. *See Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 (1st Dept 2016) (internal quotation marks, citations and brackets omitted) ("A motion for summary judgment dismissing a City Human Rights Law claim can be granted only if the defendant demonstrates that it is entitled to summary judgment under both the *McDonnell Douglas* burden-shifting framework and the mixed-motive framework").

In the burden-shifting analysis, the plaintiff must set forth that he or she "is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under

circumstances giving rise to an inference of discrimination." *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009). If the plaintiff is able to set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating nondiscriminatory reasons for its employment actions. *Baldwin v Cablevision Sys. Corp.*, 65 AD3d at 965. If the employer meets this burden, the plaintiff must "prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination." *Id.* (internal quotation marks and citation omitted).

Under the mixed-motive analysis, "the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination." *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 (1st Dept 2012) (internal quotation marks and citations omitted).

Disparate Treatment Based on Age/Gender

Plaintiff has made various intertwined discrimination, hostile work environment and retaliation claims. In light of plaintiff's opposition papers, it appears that the adverse actions/disparate treatment claims are as follows: being denied the Cognos Specialist promotion, being removed from the Service Desk Express project, being denied training opportunities and placement on new assignments and being under microscopic scrutiny by having her desk moved.

Cognos Specialist Position

To establish a prima facie case of discriminatory failure to promote, plaintiff must demonstrate that "(1) she is a member of a protected class; (2) she applied and was qualified for a job for which the employer was seeking applicants; (3) she was rejected for the position; and (4) the position remained open and the employer continued to seek applicants having the

plaintiffs qualification." *Brown v Coach Stores, Inc.*, 163 F3d 706, 709 (2d Cir 1998) (internal quotation marks and citation omitted).

"[F]ailure to promote can constitute an adverse employment action." *Mejia v Roosevelt Is. Med. Assoc.*, 31 Misc 3d 1206[A], 2011 NY Slip Op 50506[U], *3 (NY Sup Ct, 2011), *affd* 95 AD3d 570 (1st Dept 2012). Here, however, plaintiff cannot establish that she was qualified for the job. First, Yaremchuk testified that, in addition to not having the relevant programming skills for the job, she thought plaintiff was "very weak in communication analysis and problem solving skills." Although plaintiff believes that she was qualified, her testimony indicates that she did not have the required work experience to be hired as an expert in Cognos technology.

Moreover, even if plaintiff was qualified, Yaremchuk testified that she ultimately did not fill this position and that the DOC eventually hired consultants for this role. Plaintiff conceded that no one ended up filling the position. As a result, plaintiff is unable to demonstrate that the "position remained open and the employer continued to seek applicants having the plaintiff's qualification." *Brown v Coach Stores, Inc.*, 163 F3d at 709; *see also Okocha v City of New York*, 122 AD3d 550, 550 (1st Dept 2014) ("The court correctly dismissed plaintiff's discrimination claim based on defendants' alleged failure to promote plaintiff from an Attorney Level II position to one of two Attorney Level III positions . . . . Plaintiff's claim fails because the latter positions were never filled . . . .").

Even if plaintiff could establish a prima facie claim, in response, defendants have proffered a legitimate nondiscriminatory reason for why plaintiff was not promoted. As noted, other supervisory employees, not just Yaremchuk, found that she did not demonstrate a good understanding of how to work on a project involving application developments. In opposition, "[p]laintiff failed to raise triable issues of fact as to whether defendants' proffered reasons for

these decisions were pretextual or incomplete, given the absence of any evidence from which a reasonable jury could infer that [her age] played a role in defendants' decision to pass him over for promotions." *Uwoghiren v City of New York*, 148 AD3d 457, 457 (1st Dept 2017).

Being Removed from the Service Express Desk Project

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). Ultimately, plaintiff's allegations with respect to her work assignments do not constitute adverse actions. While plaintiff may have been dissatisfied with these assignments, as plaintiff retained the same job responsibilities, title and pay, she has failed to show how any of the above actions materially changed the terms and conditions of employment. *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 if this was an adverse action, plaintiff does not establish any inference of discrimination with respect to Yaremchuk's decision to remove her from the Service Desk Express project. The record indicates that Yaremchuk appointed plaintiff to this project but subsequently removed her after receiving a complaint from Charkowick that plaintiff was being disruptive during meetings. As presented in the facts, Charkowick provided Yaremchuk with several reasons for why he wanted plaintiff removed from the project.

Plaintiff did not believe that Charkowick, who made the decision, discriminated against her. Moreover, there are no allegations that Yaremchuk, or anyone, wrote or said anything that would reveal Yaremchuk's bias against plaintiff's age. *Compare Krebaum v Capital One, N.A.,* 138 AD3d 528, 528 (1st Dept 2016) ("Plaintiff asserted that for five months before the termination of his employment, he endured repeated negative comments about his age from his manager").

Further, plaintiff only speculates that she was replaced by younger employees for discriminatory reasons. She provides the names of two women, who are younger than plaintiff, who were assigned to the Service Desk Express project. However, the record indicates that plaintiff was assigned, and then removed, due to her own behavior, regardless of the other younger employees placed on the project.

Being Denied Training and New Assignments

Plaintiff's allegations are minimal, but reference that both younger and male employees were chosen to attend the SharePoint training and also to work on new assignments, and that she was denied these same opportunities. In addition, plaintiff gave various examples of younger, female employees who plaintiff did not believe were qualified to be working on certain projects. Although not well articulated, plaintiff evidently argues that she can establish that these adverse actions were taken under circumstances giving rise to an inference of discrimination by demonstrating that she was subject to disparate treatment. *See e.g. Mandell v County of Suffolk*, 316 F 3d 368, 379 (2d Cir 2003) (internal quotation marks and citation omitted) ("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").

It is unlikely that these employment staffing decisions are adverse actions. Nonetheless, even if these are adverse actions, plaintiff provides no more than conclusory allegations that the failure to select her for the trainings or assignments demonstrates gender or age bias. In addition, her own testimony contradicts any assertion that age/gender discrimination motivated the way defendants chose employees for certain trainings and assignments. For instance, Yaremchuk chose Minevich to attend the SharePoint training because he had the "background in some operations maintenance." Yaremchuk tr at 58. Plaintiff testified that she did not know how to use SharePoint Administration. While plaintiff may have been displeased with the way defendants handled these employment decisions, she has provided no evidence that they were motivated on account of plaintiff's age/gender. It is well settled that the court will "not sit as a super-personnel department that reexamines an entity's business decisions." *Baldwin v Cablevision Sys. Corp.*, 65 AD3d at 966 (internal quotation marks and citation omitted).

With respect to age discrimination, if plaintiff "does not produce direct or statistical evidence that would logically support an inference of discrimination, she must show her position was subsequently filled by a younger person or held open for a younger person." *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 123 (1st Dept 2007). Plaintiff broadly asserts that if Nagpurkar, a woman, hired, it was always from one region in India and that the employees were always younger males. However, it is unclear if plaintiff even held the same position as these purported other employees, as plaintiff testified that she was not supervised by Nagpurkar and she worked in a different group.

Similarly, plaintiff only testified, that it was "strange," when Dewey, who is younger, moved into her department from the nutritional division. Plaintiff only speculates that Dewey was not as qualified as plaintiff to work on certain assignments. The limited information

provided by plaintiff is conclusory and "does not indicate whether the cited employees were similarly situated, and, unsupported by any expert testimony, otherwise fails to support an inference of discriminatory motive." *Ellison v Chartis Claims, Inc.*, 178 AD3d 665, 669 (2d Dept 2019) (internal quotation marks and citations omitted).

Accordingly, even viewing the evidence in a light most favorable to plaintiff, plaintiff fails to produce any evidence that she was treated differently from anyone else under the circumstances, due to her age. "Stated otherwise, on this record, no triable issue exists as to whether the employer, in taking the challenged action, was motivated at least in part by [age] discrimination." *Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 81 (1st Dept 2017) (internal quotation marks and citation omitted).

Moving Plaintiff's Desk

While plaintiff may not have been pleased with moving her desk, changing a seat assignment is not an adverse action. Even if it could be considered an adverse action, plaintiff cannot establish that it occurred under circumstances giving rise to an inference of discrimination. For instance, the record indicates that plaintiff and other employees had to move their desks to make space for 25 newly hired consultants. Yaremchuk testified that desks were grouped together by employee group and also to separate certain employees. Further, the entire floor was subject to the same security measures. Yaremchuk testified that there was a correction officer placed at the entrance and that there were security cameras by both the entrance and exit of the workspace. *See e.g. Kosarin-Ritter v Mrs. John L. Strong, LLC,* 117 AD3d 603, 604 (1st Dept 2014) (In dismissing plaintiff's age discrimination claim, court held, among other things, plaintiff "submitted no evidence that the dress code with respect to hair style was not applied equally to all employees").

VI. Hostile Work Environment

A hostile work environment exists in violation of the NYCHRL where an employee "has been treated less well than other employees because of her protected status." *Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 (1st Dept 2013). Under the NYCHRL, "the conduct's severity and pervasiveness are relevant only to the issue of damages. To prevail on liability, the plaintiff need only show differential treatment -- that she is treated 'less well' -- because of a discriminatory intent." *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 110 (2d Cir 2013) (internal citation omitted).

To establish a hostile work environment claim under the NYCHRL, "the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her [protected status]." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 (1st Dept 2009). Despite the broader application of the NYCHRL, conduct that consists of "petty slights or trivial inconveniences . . . do[es] not suffice to support a hostile work environment claim." *Buchwald v Silverman Shin & Byrne PLLC*, 149 AD3d 560, 560 (1st Dept 2017) (internal quotation marks and citation omitted).

Plaintiff's hostile work environment claim, as with the other discrimination claims, includes the failure to promote and decisions regarding certain work assignments. However these employment decisions are discrete acts and are therefore addressed under plaintiff's disparate treatment allegations.[6] "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify.. . . Hostile environment claims are different in

[6] As noted, even if the court considered these actions as part of the hostile work environment claim, plaintiff has not presented any evidence that gender/age discrimination played any role in the actions taken against her.

kind from discrete acts." *National R.R. Passenger Corp. v Morgan*, 536 US 101, 114-115 (2002). The remaining instances in support of plaintiff's hostile work environment claim are as follows: when Yaremchuk's secretary asked plaintiff if she forged the doctor's note, when Danko allegedly informed plaintiff that she will be watched on camera and when plaintiff was mocked for her attire although it was appropriate.

Here, in support of their motion, defendants have established that the alleged incidents, such as being mocked for her attire, "constituted no more than petty slights or trivial inconveniences." *Buchwald v Silverman Shin & Byrne PLLC*, 149 AD3d at 560. In opposition, plaintiff failed to raise a triable issue of fact. For instance, with respect to mocking her attire, plaintiff herself testified that, on one Friday only, Yaremchuk asked her why she was "dressed like this" when she was wearing blue jeans.

Plaintiff believed that Yaremchuk commented on her blue jeans, "[j]ust to do something to me maybe." Plaintiff's tr at 160. However, "a plaintiff's feelings and perceptions of being discriminated against are not evidence of discrimination." *Basso v Earthlink, Inc.*, 157 AD3d 428, 430 (1st Dept 2018) (internal quotation marks and citation omitted). Accordingly, defendants are granted summary judgment dismissing plaintiff's hostile work environment claim.

VII. 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). Under the broader interpretation of the NYCHRL, "[t]he retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity." 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).

Union Grievance

In March 2007, plaintiff's union filed a grievance on her behalf for "Out-of-Title" work. Plaintiff won this grievance in 2012 and was awarded compensation for performing duties substantially different from those stated in her position. According to plaintiff, Yaremchuk retaliated against her for filing the grievance.[7] For instance, plaintiff believes that she was retaliated against when she was removed from the Service Desk Express project, as this was "immediately after the meeting with the Union." Plaintiff's tr at 110.

As set forth above, when describing her "Out-of-Title," grievance, plaintiff indicates that she believed that she had not been properly paid for the job she was performing. Plaintiff did not allege that, through this union grievance, she had complained to anyone of unfair treatment due to her gender or age. Accordingly, plaintiff cannot establish the first element in a prima facie case of retaliation under the NYCHRL because she did not engage in protected activity. *Breitstein v Michael C. Fina, Co.*, 156 AD3d 536, 537 (1st Dept 2017) ("In support of his retaliation claim, plaintiff failed to demonstrate that he engaged in a protected activity").

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[7] Plaintiff testified that Yaremchuk retaliated against for applying for the Cognos Specialist position, but provides no additional support this allegation.

EEO Complaint

Plaintiff testified that she was only retaliated against for filing the union grievance and reiterates this in her papers. In her opposition, plaintiff now argues that, after she filed her EEO complaint, defendants retaliated against her by failing to conduct an investigation in good faith and by not allowing her access to the EEO file.[8]

Plaintiff testified that she received a letter from the EEO office advising her that it did not find support for the charges of discrimination. Although plaintiff was clearly dissatisfied with the result, in response to defendants' motion, she has not set forth evidence that, after the EEO complaint, she was subjected to retaliatory acts that reasonably would have deterred her from engaging in protected activity. "The plaintiff offered nothing but speculation that any of the defendants' challenged actions were motivated, even in part, by unlawful discrimination or retaliation, and such speculation is insufficient to defeat summary judgment." *Ellison v Chartis Claims, Inc.*, 178 AD3d at 669.

Accordingly, defendants are granted summary judgment dismissing the retaliation claim.

VIII. Defendant Yaremchuk

Pursuant to Administrative Code § 8-107 (1) (a), it is an unlawful discriminatory practice for an "employer or an employee or agent thereof" to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's actual or perceived age or gender. Courts have found that individual employees, such as Yaremchuk, who is plaintiff's supervisor, may be held liable when they "act with or on behalf of the employer in hiring, firing, paying, or in administering the 'terms, conditions or privileges of employment.'" *Priore v New*

[8] Plaintiff also alleges, in her memorandum of law, that defendants retaliated against her for filing the EEO complaint. Plaintiff does not support this allegation in either her affidavit or her testimony, and the court will not consider it at this time.

York Yankees, 302 AD2d 67, 74 (1st Dept 2003).[9] As Yaremchuk did not commit any actionable conduct, she cannot be found individually liable as a supervisory employee under the NYCHRL.

Administrative Code § 8-107 (6) provides that an individual employee may be held liable for aiding and abetting discriminatory conduct. *See e.g. Ananiadis v Mediterranean Gyros Prods., Inc.*, 151 AD3d 915, 917 (2d Dept 2017) ("An employee who did not participate in the primary violation itself, but who aided and abetted that conduct, may be individually liable based on those actions under both the [New York State Human Rights Law] and the NYCHRL").

Plaintiff seeks to hold Yaremchuk liable as an aider and abettor under the NYCHRL. Here, however, plaintiff alleges that it was the majority of Yaremchuk's conduct that gives rise to the discrimination claim.[10] Yaremchuk cannot be held liable for aiding and abetting her own alleged discriminatory conduct. *See Hardwick v Auriemma*, 116 AD3d 465 (1st Dept 2014). Regardless, as the underlying discrimination claim against the City of New York, as plaintiff's employer, is dismissed, any claim against Yaremchuk as an aider and abettor of the employer's allegedly discriminatory conduct fails as a matter of law. *See e.g. Abe v Cohen*, 115 AD3d 491, 492 (1st Dept 2014) ("[Defendant] cannot be held liable for aiding and abetting an act which itself is not actionable").

CONCLUSION

Accordingly, it is

ORDERED that defendants The City of New York, The New York City Department of Corrections and Jean Yaremchuk's motion for summary judgment is granted and the complaint

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[9] Both parties are mistaken in their arguments and also incorrectly cite to caselaw that addresses aiding and abetting under the New York State Human Rights Law, not the NYCHRL.

[10] Yaremchuk "was responsible for the majority of the discriminatory and retaliatory actions above, and those [sic] is liable as an aider and abettor under the [NY]CHRL." Plaintiff's memorandum of law at 27.

is dismissed with costs and disbursements to said defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

3/16/2020
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