

Elco v Aguiar
2021 NY Slip Op 34310(U)
April 26, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 614414/2020
Judge: William G. Ford
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SHORT FORM ORDER**INDEX NO.: 614414/2020****SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY*****PRESENT:*****HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT****x****MELISSA BREITENBACH ELCO,****Plaintiff,****-against-****YVETTE AGUIAR INDIVIDUALLY AND AS
POLICE COMMISSIONER AND
SUPERVISOR OF THE TOWN OF
RIVERHEAD, THE TOWN OF RIVERHEAD,
DAVID HEGERMILLER INDIVIDUALLY
AND AS CHIEF OF POLICE OF THE TOWN
OF RIVERHEAD, THE RIVERHEAD
POLICE DEPARTMENT & RICHARD
FREEBORN,****Defendants.****x****Motion Submit Date: 08/13/20****Mot Seq: 002 - Mot D****Mot Seq: 003 - Mot D****PLAINTIFF'S COUNSEL:****THE LAW OFFICES OF HARIRI & CRISPO**250 Park Avenue, 7th Floor

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In this electronically filed action, concerning defendants' motions to dismiss the plaintiff's complaint & plaintiff's cross-motion to compel discovery, the Court considered the following in reaching its determination: NYSCEF Docs. Nos. 25 – 41 & 45 – 61; and upon due deliberation and full consideration of the same; it is

ORDERED that the defendants' motions are **granted in part** for the following reasons ; and it is further

ORDERED that plaintiff's complaint is **dismissed** as to defendants Town of Riverhead, Riverhead Town Police Department, Yvette Aguiar in her official and individual capacities, and David Hegermiller solely in his official capacity, in accord with all of the following; and it is further

ORDERED that defendants-movants' counsel is hereby directed to serve a copy of this decision and order with notice of entry via electronic filing and electronic mail on all counsel; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required; and it is further

ORDERED that counsel for the remaining parties are hereby **directed** to meet and confer and file via NYSCEF a proposed preliminary conference order to schedule and commence pretrial disclosure **no later than June 18, 2021**.

FACTUAL BACKGROUND & PROCEDURAL POSTURE

This matter commenced with plaintiff's filing of summons with notice electronically. Defendants appeared by counsel and demanded a complaint, which was then also filed electronically. Plaintiff is presently employed by defendant Town of Riverhead at its police department as a public safety dispatcher. By her complaint, she asserts causes of action seeking recovery for compensatory and punitive damages of gender/sex, disability, familial status discrimination (disparate treatment) and a hostile work environment violative of federal and state anti-discrimination statutes, in addition to state tort claims asserting intentional and negligent infliction of emotional distress and abuse of process as to defendant Freeborn solely.

According to the complaint, plaintiff states that beginning sometime in 2010, she has been the subject of disparate treatment and a hostile work environment stemming from negative interactions with her former paramour and father of her eldest daughter, defendant Freeborn, a town police officer who also works for the town police department. Plaintiff's relationship with Freeborn devolved to the point where the two have been involved in protracted and contentious child custody proceedings before the Family Court which most recently involved appellate litigation before the Appellate Division, Second Department.¹ In sum and substance, plaintiff alleges that she believes herself to be the only single working mother in the town police department, and that the department and other superior officers have injected themselves into her child custody disputes with Freeborn, often taking his side. Further she claims that at times superior officers at the department refused to accept domestic incident reports and other complaints against Freeborn concerning child custody or related family court orders. She claims that Freeborn has made complaints about her to her superiors which have resulted in her being reassigned shifts. She also alleges that Freeborn and other fellow officers have engaged in a harassment or stalking campaign against her, keeping tabs on who she sees socially and reporting back to Freeborn. Plaintiff asserts that her co-workers have been made privy to private and intimate details of her life and accusations have been levelled at her regarding her fitness as a mother.

With this context and background, plaintiff continues to allege that because of the all difficulties she has encountered because of her negative interactions with Freeborn, she had to commence this action.² As a result of its filing, plaintiff asserts that she was denied opportunities of earning overtime, denied an opportunity to participate in interviewing prospective hires and

¹ See e.g. *Freeborn v Elco*, 188 AD3d 677, 134 NYS3d 389, 392 [2d Dept 2020].

² The Court acknowledges as undisputed that plaintiff commenced this action before and without first making any administrative complaint before either the federal Equal Employment Opportunity Commission ("EEOC") or New York State Division of Human Rights ("NYSDHR"). Further, at the making of defendants' motion under consideration, plaintiff had not filed a notice of claim pursuant to either General Municipal Law § 50-e or Town Law § 67.

supervisees, and that human resources at her department has misplaced and failed to process insurance buyback forms, all depriving her of income or prestige at work. Moreover, plaintiff asserts that she has sustained actual concrete injury taking the form of mental stress, anxiety, depression or distress.

Upon receipt of the complaints, defendants answered and joined issue. Thereafter, the Town defendants moved to dismiss plaintiff's complaint as time-barred and/or for failure to state a cause of action. Plaintiff has cross-moved to compel discovery arguing that defendants' motion is nothing more than a dilatory tactic to unduly prolong the proceedings. On making of the motion, the matter was assigned to this Court which held a conference with counsel concerning the pending applications.

SUMMARY OF THE ARGUMENTS

For sake of judicial economy and expediency, the Court outlines on the salient and relevant points of law advanced by the parties as concerns the pending motions. The Town defendants, amongst other things, chiefly argue that plaintiff's federal and state discrimination and hostile work environment claims must be dismissed as a matter of law as untimely for 1. failure to administratively exhaust those claims and 2. failure to plead and prove compliance with the municipal notice of claim requirement. In opposition, plaintiff argues that neither requirement applies to the claims raised by her complaint. Because this Court finds defendants' arguments persuasive and determinative, the Court does not reach the other grounds raised by the motions and denies them as moot or academic.

STANDARDS OF REVIEW

On a motion to dismiss pursuant to CPLR 3211, the complaint is to be afforded a liberal construction. "In reviewing a motion pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action, the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Baughner v Cullen and Dykman, LLP*, 173 AD3d 959, 961, 103 NYS3d 136, 138 [2d Dept 2019]).

When considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court must determine whether, accepting as true the factual statements of the complaint, the plaintiff can succeed upon any reasonable view of the facts stated (*Strujan v Kaufman & Kahn, LLP*, 168 AD3d 1114, 1115, 93 NYS3d 334, 336 [2d Dept 2019]; *Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, N.A. v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017]; *Nonnon v. City of New York*, 9 NY3d 825, 827; *Leon v. Martinez*, 84 NY2d 83, 87-88; *Paolicelli v. Fieldbridge Assoc., LLC*, 120 AD3d 643, 644; *Wallkill Med. Dev., LLC v Catskill Orange Orthopaedics, P.C.*, 131 AD3d 601, 603 [2d Dept 2015]). The test of the sufficiency of a pleading is 'whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments'" (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902, 998 NYS2d 107, 108 [2d Dept 2014]).

Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the

determination of a prediscovery CPLR 3211 motion to dismiss” (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38). Unless the motion is converted into one for summary judgment pursuant to CPLR 3211(c), affidavits may be received for a limited purpose only, usually to remedy defects in the complaint, and such affidavits are not to be examined for determining whether there is evidentiary support for the pleading (see *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635–636, 389; *Kempf v. Magida*, 37 AD3d 763). “[A] court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint” (*McGuire v. Sterling Doubleday Enters., L.P.*, 19 AD3d 660, 661; see *Morris v. Chase Bank*, 125 AD3d 731; *Tirpack v 125 N. 10, LLC*, 130 AD3d 917, 918–19 [2d Dept 2015]). The test of the sufficiency of a pleading is ‘whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments’” (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902, 998 NYS2d 107, 108 [2d Dept 2014]).

Nonetheless, the courts are reminded that on a motion to dismiss the facts pleaded are presumed to be true and are to be accorded every favorable inference, “bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration” (*Intl. Fid. Ins. Co. v Quenzer Elec. Sys., Inc.*, 132 AD3d 811, 812 [2d Dept 2015]). “At the same time, however, allegations consisting of bare legal conclusions ... are not entitled to any such consideration.” Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141–42 [2017]).

“Bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true.” Moreover, where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (*Gawrych v Astoria Fed. Sav. and Loan*, 148 AD3d 681, 683, 48 NYS3d 450, 453–54 [2d Dept 2017]). Where, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and the motion should not be granted unless the movant can show that a material fact as claimed by the plaintiff is not a fact at all and unless it can be said that no significant dispute exists regarding it (*Georgica Builders, Ltd. v 136 Bishops Lane, LLC*, 175 AD3d 610, 611, 106 NYS3d 345, 347 [2d Dept 2019]).

A defendant who moves to dismiss a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired. The burden then shifts to the nonmoving party to raise a question of fact as to the applicability of an exception to the statute of limitations, as to whether the statute of limitations was tolled, or as to whether the action was actually commenced within the applicable limitations period (*Plaza Investments v Capital One Fin. Corp.*, 165 AD3d 853, 854, 86 NYS3d 511, 512–13 [2d Dept 2018]). “In considering the motion, a court must take the

allegations in the complaint as true and resolve all inferences in favor of the plaintiff” (*Cataldo v Herrmann*, 154 AD3d 641, 642, 62 NYS3d 130, 131 [2d Dept 2017]).

DISCUSSION

A. Subject Matter Jurisdiction

Defendants first raise a jurisdictional objection to maintenance of plaintiff’s action before this Court arguing that because plaintiff failed to exhaust administrative remedies before the federal EEOC or NYSDHR, this Court lacks subject matter jurisdiction and the matter should be dismissed. Plaintiff opposes this arguing that plaintiff’s disability and gender/sex disparate treatment and related hostile work environment claims do not require administrative exhaustion in the state courts. Put differently, plaintiff does not appear to contest defendants’ claims that disparate treatment claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 4000-e(2) *et seq.*, and possibly under the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, require filing before the appropriate administrative agencies in federal actions. However, because plaintiff asserts both federal and state law claims, plaintiff seeks to stave off dismissal and distinguish her case contending that her state law disparate treatment and hostile work environment causes of action under Executive Law § 296, the New York State Human Rights Law (“NYSHRL”) do not require such administrative exhaustion and thus survive defendants’ application.

To begin, the Court notes that nowhere within the four corners of plaintiff’s complaint appears any mention of having filed an administrative charge with either the EEOC or NYSDHR. Further, plaintiff does not contest this point nor does she claim that she has received a “right to sue letter” since she concedes no such administrative filing was made with any appropriate administrative agency with jurisdiction to investigate such a claim. Thus, settled law in New York would appear as an initial matter to favor defendants’ position (*see Nordenstam v State Univ. of New York Coll. of Env’tl. Science & Forestry*, 184 AD3d 1157, 1160, 125 NYS3d 820, 824 [4th Dept 2020])[concerning Title VII claims raised in state court and affirming motion court that granted dismissal motion with respect to the cause of action alleging violations of Title VII based on unlawful retaliation where plaintiff failed to exhaust her administrative remedies]; *see also Guy v MTA New York City Tr.*, 407 F Supp 3d 183, 191-92 [EDNY 2016][determining that as a matter of federal law and dismissing a claim of disparate treatment because of race, a condition precedent to a federal claim under Title VII, a plaintiff must show that he exhausted his administrative remedies provided by the EEOC]). In fact, as noted by the Town defendants, the Supreme Court has recognized this settled principle of law (*D’Amico v Arnold Chevrolet, LLC*, 31 Misc3d 1201(A), 926 NYS2d 343 [Sup Ct, Suffolk Co. 2011][Rebolini, J.][reasoning that “a plaintiff must exhaust his administrative remedies as a precondition to bringing a Title VII action”]).

Thus, it would appear that plaintiff’s federal Title VII claims cannot survive here where plaintiff has not plead and proved compliance with the administrative exhaustion condition precedent.

In resolving a motion to dismiss pursuant to CPLR 3211(a)(5), this Court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference (*Elia v Perla*, 150 AD3d 962, 963, 55 NYS3d 305, 307 [2d Dept 2017]). On such an application, defendant-movant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired. The burden then shifts to the plaintiff

to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether the action was actually commenced within the applicable limitations period. To make a *prima facie* showing, the defendant must establish, *inter alia*, when the plaintiff's cause of action accrued (*Campane v Panos*, 142 AD3d 1126, 1127, 38 NYS3d 226, 227 [2d Dept 2016]; *Loiodice v BMW of N. Am., LLC*, 125 AD3d 723, 724–25, 4 NYS3d 102, 103–04 [2d Dept 2015]). “In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff” (*Cataldo v Herrmann*, 154 AD3d 641, 642, 62 NYS3d 130, 131 [2d Dept 2017]).

Defendants further argue that those federal claims should also be dismissed as untimely, where plaintiff failed to commence her action within 90 days of receiving a notice of right to sue from either the EEOC or NYSDHR. Here, it is clear that plaintiff cannot plausibly argue compliance with this requirement having conceded that she never made any administrative charge. This alone is fatal to those claims as binding precedent from the Second Department clearly holds that not only is administrative exhaustion required, but also that a plaintiff's Title VII discrimination claim should be dismissed where it was not commenced within 90 days of receipt of an administrative notice of right to sue (*Romney v New York City Tr. Auth.*, 294 AD2d 481, 482–83, 742 NYS2d 651, 653 [2d Dept 2002]; *see also Duplan v City of New York*, 888 F3d 612, 621–22 [2d Cir 2018])[generally affirming that a Title VII plaintiff must first administratively exhaust remedies prior to commencing suit i.e. filing a charge of discrimination with the EEOC within 300 days of the alleged unlawful employment practice and commencing litigation within 90 days of receiving a right-to-sue letter from the agency]; *Fowlkes v. Ironworkers Local 40*, 790 F3d 378, 384 [2d Cir. 2015]; *accord Lewis v New York City Police Dept.*, 908 F Supp 2d 313, 323–24 [EDNY 2012], *aff'd sub nom. Lewis v NYC Police Dept.*, 537 Fed Appx 11 [2d Cir 2013][applying the same reasoning to ADA claims of disability discrimination]).

Given the above, this Court finds no persuasive reason not to adhere to the cogent reasoning and prevailing precedent of the state and federal appellate authorities on point, which require dismissal of plaintiff's federal claims of disparate treatment and/or hostile work environment arising under the ADA or Title VII for her failure to administratively exhaust prior to suing the defendants. Plaintiff offers no meaningful distinction or binding precedent requiring any other outcome. Accordingly, plaintiff's causes of action seeking recovery for disability, and gender/sex disparate treatment under the ADA and Title VII and hostile work environment under either ground are hereby **dismissed** as against the Town defendants for failure to comply with the administrative exhaustion condition precedent.

B. Timeliness of the State Law Claims

Defendants further seek dismissal of plaintiff's state law claims for discrimination under the NYSHRL, which mostly mirror her federal claims of disparate treatment and hostile work environment, as well as for the state law tort claims for recovery for emotional distress. Here, defendants argue dismissal is required because plaintiff failed to plead or prove compliance with the Town's municipal notice of claim requirement residing in Town Law § 67. Plaintiff has opposed this aspect of defendants' application seeking refuge in precedent of the New York Court of Appeals. In *Margerum v City of Buffalo*, 24 NY3d 721 (2015), the Court of Appeals presided of a state law appeal on a long running dispute concerning a “reverse discrimination” claim by

certain Caucasian city firefighters. Long running and protracted litigation between appellants, affinity groups and the City had pended in the district courts in the region for decades stemming from affirmative action challenges and other claims and contentions concerning firefighter testing and selection. In *Margerum* and other affinity groups had then Chief Judge Lippman, resolving a claim by defendants-appellees the City of Buffalo that the plaintiff's claims of discrimination against them were time-barred for noncompliance with the general notice of claim requirement in Gen. Mun. L. § 50-e, Chief Judge Lippman, writing for a majority of the court, amongst other things held that, that plaintiff's discrimination claims under the NYSHRL were not tort actions as contemplated by General Municipal Law and its notice of claim requirement at Section 50-e & 50-i. Accordingly, the Court of Appeals ruled that discrimination claims arising under the NYSHRL no longer required municipal notice under Gen. Mun. L. §§ 50-e & 50-I (*Margerum v City of Buffalo*, 24 NY3d 721, 730, 28 NE3d 515, 519 [2015][Lippman, C.J.]).

However, both before and since, myriad courts have long acknowledged a distinction exists between the general municipal notice requirement in Gen. Mun. Law and other requirements stated in County, Town and Education Law, to state a few examples. Thus, as recently as in 2018, the Appellate Division, Second Department put to rest any confusion in this area noting that:

The Town Law's notice requirement has indeed been found by our courts to be similarly more narrowly applied than the generic state notice of claim requirement found in Gen. Mun. L. As a result, precedent holds that contrary to the plaintiff's contention, since her complaint seeks both equitable relief and the recovery of damages, the filing of a notice of claim within three months after her claim arose was a condition precedent to the maintenance of this action against the defendants . . . In contrast to General Municipal Law §§ 50-e(1) and 50-i(1), Education Law § 3813(1) broadly requires the filing of a notice of claim as a condition precedent to an "action ... for any cause whatever," which includes the plaintiff's causes of action pursuant to the New York State Human Rights Law. Accordingly, the plaintiff's reliance upon *Margerum v. City of Buffalo* . . . is misplaced.

(*Seifullah v City of New York*, 161 AD3d 1206, 1206-07, 74 NYS3d 506, 507 [2d Dept 2018][internal citations purposefully omitted][construing the Education Law's notice of claim requirement]). The Third Department has also taken this approach (see e.g. *Sager v County of Sullivan*, 145 AD3d 1175, 1176-77, 41 NYS3d 443, 444 [3d Dept 2016][reasoning County Law's notice of claim requirement is narrower than that of Gen. Mun. L. thus ruling that notice of claim was required for a NYSHRL claim against a county]).

Further, settled precedent within the Second Department has similarly determined that the County Law has provided a narrower municipal notice requirement as well. Thus, the Appellate Division has held that "[t]he failure to timely serve a notice of claim pursuant to County Law § 52 in an action against a county to recover damages based on the Human Rights Law is fatal unless the action has been brought to vindicate a public interest or leave to serve a late notice of claim has been granted" (*Picciano v Nassau County Civ. Serv. Com'n.*, 290 AD2d 164, 169, 736 NYS2d 55, 59-60 [2d Dept 2001]). Moreover, it is well settled within the Second Department that individual claims of disparate treatment under the NYSHRL constitutes matters requiring municipal notice because they seek to vindicate individualized interests (*Weslowski v Zugibe*, 167 AD3d 972, 974-75, 91 NYS3d 114, 117-18 [2d Dept 2018]; *Zarate v Nassau County Med. Ctr.*, 9 AD3d 427, 427-28, 781 NYS2d 39, 40 [2d Dept 2004]; *Sangermano v Bd. of Co-op. Educ.*

Services of Nassau County, 290 AD2d 498, 498, 736 NYS2d 258 [2d Dept 2002][where a plaintiff seeks private relief, damages, or reinstatement for employment discrimination in violation of the Executive Law, the filing of a timely notice of claim is a condition precedent to suit]; *Nostrom v County of Suffolk*, 100 AD3d 974, 975, 954 NYS2d 611, 612-13 [2d Dept 2012]; *Russell v Town of Brookhaven*, 2013 N.Y. Slip Op. 31247[U][Sup Ct, Suffolk Co. 2013][Asher, J.]).

Adherence to prevailing precedent thus would seem to dictate that the Town Law is subject to similar treatment, and indeed, binding precedent from the Second Department instructs that the Town Law's municipal notice requirement is no different from its county counterpart. Decades ago the Second Department ruled that Town Law's municipal notice requirement applied to employment discrimination claims of the like and kind alleged here (*Scopelliti v Town of New Castle*, 210 AD2d 308, 309, 620 NYS2d 405, 406 [2d Dept 1994][dismissing plaintiff's discrimination claims for failure to file notice of claim with the Town]). This has principle has been subsequently affirmed by the Appellate Division (see *Matter of Town of Brookhaven v New York State Div. of Human Rights*, 282 AD2d 685, 685-86, 723 NYS2d 410, 411 [2d Dept 2001])[holding that compliance with the notice of claim requirements set forth in Town Law § 67 is a condition precedent to the pursuit of an employment discrimination claim against a town]).

More importantly, the federal district courts for each and every district of our State have acknowledged, and indeed relied upon this principle in resolving supplemental and pendent state law claims filed before them (see e.g. *Keles v Yearwood*, 254 F Supp 3d 466, 472 [EDNY 2017]; *Washington v Borough of Manhattan Community Coll.*, 16- CIV-6168 (PAE), 2016 WL 7410717, at *2 [SDNY Dec. 21, 2016]; *Croci v Town of Haverstraw*, 175 F Supp 3d 373, 389 [SDNY 2016]; *Arnold v Town of Camillus, New York*, 20-CV-1364(MAD)(ML), 2021 WL 326886, at *4 [NDNY Feb. 1, 2021]).

Thus, in view of the above, this Court pauses to acknowledge the fundamental purpose underlying the municipal notice requirement. It is beyond cavil that "[t]he purpose of the notice of claim requirement is to allow the municipality [or school district] to conduct an investigation of the circumstances surrounding the accident, and to assess the merits of the claim, while information is still readily available" (*K.A. ex rel. D.A. v Wappingers Cent. School Dist.*, 151 AD3d 828, 830 [2d Dept 2017]; see also *Stiff v City of New York*, 114 AD3d 843, 843 [2d Dept 2014][purpose of the requirement that notice of a tort claim be given to a municipality or public authority within 90 days after the claim arises is to protect the municipality or authority from stale tort claims and to provide it with an opportunity to timely and effectively investigate the claim]). Here, the Town defendants have argued that when plaintiff initially commenced this action via summons with notice, not until they demanded a complaint were, they more than generally aware of what plaintiff's primary complaints were.

Given the overwhelming precedent in defendants' favor, this Court **grants** defendants' motion under CPLR 3211(a)(5) seeking dismissal under the statute of limitations for plaintiff's failure to plead and prove compliance with the notice of claim requirement and condition

precedent set out in Town Law § 67. Accordingly, plaintiff's state law discrimination claims arising under the NYSHRL are hereby **dismissed** as against all of the Town defendants.

C. Plaintiff's Remaining Claims

1. Official Capacity Claims

The individual Town defendants, Town Supervisor Aguiar and Town Police Chief Hegermiller also separately move to dismiss the claims asserted against them in both their official and individual capacities. Both defendants essentially argue individual liability imposed on them is unwarranted here since in their view plaintiff's complaint adduces no facts of direct, firsthand or personal knowledge of the allegations asserted. As an initial matter, this Court notes that the federal claims levelled at the individual defendants do not materially or substantially differ from the now dismissed claims against the Town. Settled federal law makes clear that official capacity suits against individual defendants under Title VII are legally indistinct from suits against the municipality (*see e.g. Davis v Stratton*, 360 Fed Appx 182, 183 [2d Cir 2010])[reasoning that plaintiff's official capacity claims against a mayor and police chief essentially were a suit against the city]; *see also Daytree at Cortland Sq., Inc. v Walsh*, 332 F Supp 3d 610, 639 [EDNY 2018][Bianco, J.][ruling that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent"])). Accordingly, defendants' motion to dismiss plaintiff's official capacity claims against individual defendants Aguiar and Hegermiller is **granted** and those claims are also **dismissed**.

2. Claims against the Police Department

Similarly, plaintiff's claims against the Riverhead Town Police Department must be **dismissed**. Here, the law is clear that suits against an administrative arm or department of municipal government also do not differ from the claim against the municipality. Further, courts have held that the administrative arm or department is not itself a legally distinct entity capable of being sued (*see O'Neal v E. Hampton Town*, 16-CV-579 (JFB)(GRB), 2017 WL 4174788, at *3 [EDNY Aug. 28, 2017][collecting cases], *report and recommendation adopted sub nom. O'Neal v Spota*, 16-CV-00579 (JFB)(GRB) 2017 WL 4162307 [EDNY Sept. 19, 2017], *aff'd*, 744 Fed Appx 35 [2d Cir 2018]).

3. Individual Capacity Claims

Turning next to plaintiff's claims asserted under state law against defendants in their individual capacities, a different result is merited. Despite the dismissal of plaintiff's federal discrimination and hostile work environment claims, the complaint can be read to assert "aider and abettor" theories as to Aguiar and Hegermiller, given each individual's respective status as supervisors. Defendants have argued first that under Title VII, no individual may be held liable on a disparate treatment claim (*Mussallihattillah v McGinnis*, 684 Fed Appx 43, 47 [2d Cir 2017][Title VII claims as against the individual defendants fail as a matter of law]; *Patterson v. County of Oneida*, 375 F3d 206, 221 [2d Cir 2004]; *St. Louis v New York City Health and Hosp. Corp.*, 682 F Supp 2d 216, 228 [EDNY 2010]).

However, the Supreme Court of the United States has recently made clear that on a hostile work environment theory, there may be respondeat superior based upon an individual supervisor's misconduct. Thus, in *Vance v. Ball State University* the Supreme Court laid out the test to be utilized for determining whether and when an individual is a "supervisor" for hostile work environment claims and where and when employers may be held vicariously liable for their tortious conduct:

an employer may be held vicariously liable for the tortious and discriminatory or retaliatory conduct of one of its supervisors . . . where an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.*, to effect a “significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits

(*Vance v Ball State Univ.*, 570 US 421, 431 [2013]).

Applying this precedent, the Second Circuit has reasoned that “that for [a plaintiff to survive judgment as a matter of law dismissing her complaint of hostile work environment vicarious liability against her employer, based upon supervisor’s misconduct] she must adduce admissible evidence showing that [her employer] had authorized [her supervisor] to do more than oversee her day-to-day performance of assigned tasks. It had to have authorized [the supervisor] to take *tangible employment actions* that could inflict direct economic injury”(*Bentley v AutoZoners, LLC*, 935 F3d 76, 91 [2d Cir 2019]). The Circuit has further explained in *Wiercinski v Mangia 57, Inc.*, 787 F3d 106, 113-14 [2d Cir 2015] that the *Vance* test holds that:

an employee is a “supervisor” for purposes of the employer's vicarious liability under Title VII if he or she is empowered by the employer ‘to take tangible employment actions against the victim, *i.e.*, to effect a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits . . . In other words, a supervisor is an individual ‘empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control

First, there can be no doubt that both Hegermiller and Aguiar qualify, for purposes of this motion, under the law and the test articulated above to be “supervisors” of the plaintiff, since defendants cannot persuasively argue that neither lacked the requisite supervisory authority and control over the material and tangible terms and conditions of plaintiff’s employment, or that they could not effectuate tangible adverse employment actions over her. However, the analysis only begins rather than ends there. The determinative question then becomes whether both had sufficient knowledge, awareness or involvement to warrant individual liability as “aiders and abettors” under NYSHRL on either a disparate treatment or hostile work environment theory. To be sure, the law holds that “[a]n employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it”(*Reynolds v State*, 180 AD3d 1116, 1118, 119 NYS3d 266, 269-70 [3d Dept 2020]; *Croci v Town of Haverstraw*, 146 AD3d 748, 749, 44 NYS3d 546, 548 [2d Dept 2017]). However, to hold individuals liable under the “aider and abettor” theory under the NYSHRL, plaintiff must adduce facts of personal involvement and individual knowledge (*Ananiadis v Mediterranean Gyros Products, Inc.*, 151 AD3d 915, 917, 54 NYS3d 155, 158 [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 NYSHRL]). Here, plaintiff’s complaint is thin on actual knowledge as regards Supervisor Aguiar. But the complaint does allege that Hegermiller, as the chief of the police department, was involved in or aware of the decision to excise plaintiff out of the interviewing process for prospective dispatchers after she

commenced this lawsuit. Thus, to the extent that plaintiff relies on Aguiar's *pro forma* title as "Police Commissioner" to hold her liable under the NYSHRL as an "aider and abettor," this Court determines that the pleadings, in their current state, are insufficient to serve that purpose and thus defendants' motion to dismiss the claims asserted against Aguiar in her individual capacity is **granted** and those claims are thereby **dismissed**. However, since the Court must construe plaintiff's pleadings in a light most favorable to her as the non-movant, the NYSHRL claims of disparate treatment and/or hostile work environment against Hegermiller in his individual capacity will survive for now and defendants' motion in that regard is **denied**.

4. Sufficiency of Hostile Work Environment Claims

Defendants have argued that plaintiff's state hostile work environment claim should be summarily dismissed as a matter of law for failure to state a cause of action for not pleading the requisite "severe and pervasive" pattern of behavior. However, as plaintiff notes this is the incorrect legal standard, since the New York Legislature amended the NYSHRL in October 2019. The New York Legislature's amendment which resulted in enactment of Exec. L. § 296(h) clearly states that it applies to claims arising after its effective date of October 2019 and further removed the "severe and pervasive" pleading hurdle (*see e.g. Golston-Green v City of New York*, 184 AD3d 24, 41, 123 NYS3d 656, 669,n.3 [2d Dept 2020])[analyzing Exec. L. § 296(1)(h) and concluding that the amendment applies to claims filed after the amendment's effective date of October 11, 2019]. Further, Exec. L. § 296(1)(h) has effected substantive change including, but not limited to, reducing the standard of proof plaintiffs must demonstrate to plead actionable hostile work environment, eliminating the "severe and pervasive" standard and replacing it with a requirement that plaintiff show that she suffered "inferior terms, conditions or privileges of employment because of the individual's membership in one or more [] protected categories." (*see* Exec. L. § 296(1)(h);

Here, the bulk of plaintiff's federal and state disparate treatment and hostile work environment claims asserted against the defendants have been dismissed for failure to comply with statutory conditions precedent and ultimately on timeliness grounds. Moreover, it is undisputed that at the time of the making of defendants' motion, plaintiff neither filed a notice of claim, nor sought leave of court to file late notice.³ Plaintiff's complaint heavily cites and replies on a litany of allegations spanning the last decade. However, pursuant to municipal statute of limitations originally set forth in Gen. Mun. L. and also imposed by Town Law, plaintiff's claims necessarily must have been noticed within 90 days of accrual and suit commenced within 1 year and 90 days. Under federal law, having not administratively exhausted her claims, plaintiff would have had to commence suit on her Title VII and ADA claims within 180 days. Thus, defendants have considerable support for their contention that the bulk of the complaint raises untimely claims. Defendants agree that the only actionable conduct asserted would be prospective from July 2019, which cites a sole and isolated instance. Further, defendants emphasize that since the initiation of this lawsuit, plaintiff has been promoted. Nevertheless, on a motion to dismiss the Court's role is not to determine all issues, but rather to determine whether claims are properly pleaded. Here, the isolated instances alleged concerning plaintiff's denial of overtime, preclusion of involvement of

³ The Court also notes that absent leave of court or obtaining prior authorization, plaintiff has submitted sur-reply in further support of her motion. Included in those papers was a filing putative indicative that plaintiff has served defendants with notice of claim. Those submissions however were not considered as pursuant to CPLR 2214(c), there shall be no sur-reply absent leave of court, particularly where it would work substantial or unfair prejudice or affect a substantive right of a party.

interviewing prospective hires, and refusal to accept/process/issue insurance buyback forms, to the extent they occurred on or after July 2019, suffice to plead actionable conduct for the purposes of the instant motion and thus defendants' motion concerning those claims is **denied**.

Moreover, plaintiff invokes the continuing violation doctrine to prevent dismissal of her hostile work environment claims. On this area of argument, defendants urge dismissal claiming that the doctrine is disfavored amongst the federal courts and plaintiff's pleadings and arguments are insufficient to warrant its application. "[A] hostile work environment claim, by its very nature, is predicated on a series of separate acts that collectively constitute an unlawful discriminatory practice. Thus, under the 'continuing violation' doctrine, even though one of those acts might have occurred outside of the limitations period, the claim will be considered to be timely as long as one of the acts occurred within the limitations period. '[A] continuing violation may be found where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice' (*Matter of Lozada v Hook*, 151 AD3d 860, 861-62, 54 NYS3d 688, 689-90 [2d Dept 2017]).

However, at the pleading and motion to dismiss stage, the Court must take the pleadings at face value and determine whether legally a claim is stated. Here, viewing claims asserted on or after July 2019, plaintiff has stated a viable claim concerning a hostile work environment regarding the denial of overtime, loss of interviewing privileges and insurance buyback forms. Thus as regards Hegermiller as her ultimate supervisor, those claims shall remain for now and defendants' motion to dismiss for failure to state a cause of action plaintiff's hostile work environment claims is **denied**.

5. Emotional Distress Claims

Defendants also seek dismissal of plaintiff's claims for intentional and negligent infliction of emotional distress because they are state tort claims and plaintiff has failed to file a timely notice of claim. Here, defendants are correct as it is undisputed that, unlike the employment discrimination claims asserted, the tort claims are subject to Gen. Mun. L. §§ 50-c & 50-i. Accordingly, as regards the Town defendants, their motion to dismiss those claims is **granted** and the claims for intentional and negligent infliction of emotional distress are **dismissed** for plaintiff's failure to plead and prove compliance with the municipal notice of claim condition precedent.

CONCLUSION

In sum, defendants' motion to dismiss plaintiff's complaint for plaintiff's failure to plead and prove compliance with federal conditions precedent to administratively exhaust her federal employment discrimination disparate treatment and hostile work environment claims arising under Title VII and the ADA for gender/sex and disability is **granted** and those claims are **dismissed**. Further, defendants' motion to dismiss plaintiff's complaint for plaintiff's failure to plead and prove compliance with the municipal notice of claim condition precedent set out in Town Law is **granted** and plaintiff's analog state law claims under the NYSHRL are **dismissed** as against the

Town of Riverhead. Similarly, defendants' motion to dismiss plaintiff's official capacity claims against defendants Yvette Aguiar and David Hegermiller is **granted** and those claims are **dismissed**. However, defendants' motion to dismiss plaintiff's individual capacity claim as against defendant Aguiar is **granted but denied** as to defendant Hegermiller. Defendants' motion to dismiss plaintiff's claims of emotional distress is also **granted** and those claims are **dismissed**.

Any remaining contention not expressly or explicitly addressed herein is **denied**.

The foregoing constitutes the decision and order of this Court.

Dated: April 26, 2021
Riverhead, New York



WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION

____X____ NON-FINAL DISPOSITION