Lebowitz v New York City Dept. of Educ.
2022 NY Slip Op 33166(U)
September 1, 2022
Supreme Court, Kings County
Docket Number: Index No. 526062/20
Judge: Gina Abadi
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At an IAS Term, City Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of September, 2022.

PRESENT:

HON. GINA ABADI,
Justice.

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HERMAN LEBOWITZ, EKATERINA REZNIKOV, and KEITH BLACK,

Plaintiffs,

-against-

Index No.: 526062/20

NEW YORK CITY DEPARTMENT OF EDUCATION, JOHN O'MAHONEY and LAURA IZZO (individually and in their official capacities),

DECISION/ORDER

Defendants.

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KINGS COUNTY CLERK FILED 2022 SEP 16 AM 9:51

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits (Affirmations) Annexed	11, 13, 33
Opposing Affidavits (Affirmations)	40, 62
Affidavits/ Affirmations in Reply	

Upon the foregoing papers, defendants New York City Department of Education (DOE), John O'Mahoney (O'Mahoney), and Laura Izzo-Iannelli s/h/a Laura Izzo (Izzo-Iannelli) move, motion sequence 1, for an order pursuant to CPLR § 3212, granting them summary judgment dismissing the complaint.

The motion sequence 1 is granted to the extent that (1) the complaint, with respect to plaintiff Herman Lebowitz, is dismissed, and (2) plaintiffs Ekaterina Reznikov and Keith Black's claims against the DOE (but not those against Izzo-Iannelli and O'Mahoney) are

dismissed with respect to acts occurring after June 25, 2014, the date on which the notice of claim was served on the DOE. All other relief requested is denied.

BACKGROUND

Plaintiffs Herman Lebowitz, Ekaterina Reznikov, and Keith Black commenced this action on December 29, 2020 with the filing of the summons and complaint.[1] In the complaint, plaintiffs allege that defendants discriminated against them based on their age in violation of the New York City Human Rights Law (City HRL) (Administrative Code City of N.Y. § 8-107 [7]) by subjecting plaintiffs to a hostile work environment while they were teachers at Sheepshead Bay High School (Sheepshead Bay). Plaintiffs are DOE teachers each of whom, as of the 2011-2012 school year, were tenured, over 40 years of age, and working at Sheepshead Bay. O'Mahoney became principal of Sheepshead Bay in January 2012 and Izzo-Iannelli became an assistant principal in or around February 2012 along with being a supervisor of plaintiffs.

At some point before the end of the 2011-2012 school year, the New York State Education Department designated Sheepshead Bay as a failing school. In view of this designation, the DOE labeled Sheepshead Bay a "turnaround" school resulting in the entire teaching staff being discharged with the opportunity to reapply for their former jobs. On June 29, 2012, an arbitrator sustained a union grievance brought challenging this action at Sheepshead Bay and other failing schools as a violation of collective bargaining agreements. In sustaining the grievance, the arbitrator required, pursuant to a stipulation between the unions and the DOE, that the teachers who had been working at such schools would be allowed to continue working at their schools as if there had been no interruption in their employment, including their reinstatement to their rightful place in seniority order. Given that Sheepshead Bay had already

[1] The court notes that, although the parties did not attach a copy of the complaint as an exhibit to their respective motion and opposition papers, defendants did refer to the complaint by giving its document number in the electronic filing system (*see* CPLR 2214 [c]) in their memorandum of law in support of their motion.

hired some replacement teachers for the 2012-2013 school year at the time of the arbitrator's ruling, Sheepshead Bay ended up being overstaffed at the commencement of the 2012-2013 school year. Since school funding is tied to the number of students at a school, and because Sheepshead Bay lost students for the 2012-2013 school year, this overstaffing compounded budget issues caused by Sheepshead Bay's loss of students.

In Spring of 2013, the DOE formally decided to phaseout Sheepshead Bay through a multi-year process in which it would not accept incoming ninth graders in the 2013-2014, 2014-2015, and 2015-2016 school years and would graduate its last class at the end of the 2015-2016 school year. This loss of students caused budgetary issues for each of those years and required that teachers be excessed each of those years. Teacher tenure and seniority rules required that teachers be excessed based on seniority (*see* Education Law §§ 2585 and 2588) and precluded the discharge of more senior teachers except for just cause (*see* Education Law §§ 3020 and 3020-a).

Plaintiffs generally allege that the DOE, through the acts of O'Mahoney and Izzo-Ianelli, began a campaign of harassment and discrimination of plaintiffs and other tenured senior teachers who made more money than younger, less experienced teachers with the goal of pushing them to leave Sheepshead Bay or obtaining "just cause" dismissals in order to reduce the average teacher salary. According to Lebowitz, O'Mahoney stated, in January 2012, that Sheepshead Bay was overbudget and that some teachers were paid more simply because they had more years in the system rather than because they contributed to the school. Each of the plaintiffs was present at a staff meeting held during the 2013-2014 school year at which O'Mahoney allegedly stated that the older teachers were in their "fuck you years" earning their "fuck you money" and that he wanted them out of the school. When Lebowitz asked

O'Mahoney what he meant by his comments, O'Mahoney purportedly stated, in substance, that "I tried to get rid of senior teachers, but I couldn't" because "[e]ither it takes too long or the union steps in" (Complaint, at ¶¶ 23-26). Black and Lebowitz each testified at their depositions that O'Mahoney allegedly repeated his "fuck you years" and "fuck you money" comments at a staff meeting during the 2014-2015 school year (Black Dep. Trans. at 33, lns. 6-7 & lns. 16-17; Lebowitz Dep. Trans. at 53, lns 14-18).

In the complaint, plaintiffs allege that the observation reports for plaintiffs, who had each received positive reports throughout their careers, were negative for the 2012-2013 and 2013-2014 school years, that the reports were negative for the 2014-2015 school year with respect to Lebowitz and Black (Reznikov had left the school during that year) and were negative with respect to Lebowitz for the 2015-2016 school year (Black was excessed prior to that school year) (Complaint ¶¶ 41-44).[2] Plaintiffs also assert that differential treatment with respect to the reports is borne out by DOE records showing that for the 2013-2014 school year, which was also the first year the evaluations were performed using the "Advance," "Danielson" or HEDI (i.e. "highly effective," "effective," "developing, and "ineffective") rating system/scale, 16 teachers received negative ratings of developing or ineffective, and of these 16, 15 were over the age of 40 (the one under 40 was 39 years old) (Complaint at ¶ 119; Defendants Statement of Material Facts at ¶ 29-36; Plaintiffs' Counterstatement of Material Facts at ¶¶ 29-36).[3] In addition, each of the 10 teachers placed on the teacher improvement plan (which is only done if the teacher received a developing or ineffective rating in the previous year) for the 2014-2015 school year

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[2] The court notes that Reznikov does not assert that her leaving the school after the 2013-2014 school year was a result of the harassment. Similarly, Black makes no assertion that his being excessed is part of his harassment claim.

[3] Although plaintiffs, in their counterstatement, dispute some of defendants' factual assertions regarding the rating rubrics, the dispute relates to the application of the rubrics in rating plaintiffs, not to the fact that new rubrics were used, which years the rubrics were used, and which teachers were rated effective, developing, or ineffective.

was an older, senior teacher (Complaint at ¶ 120). The complaint alleges that for the 2014-2015 school year all 6 of the teachers given developing ratings were over the age of 40 and that for the 2015-2016 school year the 2 teachers given developing ratings were over 40 years old (Complaint at ¶¶ 121-123).

With respect to teacher ratings, defendants note that the records relied upon by plaintiffs also show that, of the 60 teachers evaluated for the 2013-2014 school year, 44 received effective ratings, with 21 of those teachers being over 40, that for the 2014-2015 school year, of the 36 teachers evaluated, 29 received effective ratings, with 17 of those teachers being over 40, and that for the 2015-2016 school year, of the 24 teachers evaluated, 21 received effective ratings, with 16 of them being over 40.

Specifically with respect to Lebowitz, plaintiffs allege in the complaint that he was one of the teachers who did not get his job back after the 2012 school year when teachers were initially forced to reapply for their positions at Sheepshead Bay, and that he only was able to get his position back for the 2012-2013 school year following the arbitrator's ruling (Complaint at ¶¶ 27-33). During the 2014-2015 school year, O'Mahoney denied Lebowitz's request to be an ICT teacher and cafeteria supervisor despite Lebowitz's entitlement to the position due to his seniority,[4] and Lebowitz ultimately only obtained the position after filing a grievance (Complaint at ¶¶ 55-56). Regarding the 2014-2015 school year rating, Izzo-Ianelli allegedly told Lebowitz that she had rated Lebowitz in two previous reports, and that she had to give him a low rating in the third report and that O'Mahoney was going to give him low rating in another report so as to bring down his year-end rating. These improperly low observation ratings continued during the

[4] During his deposition, Lebowitz stated that he had applied for two cafeteria positions, and only received one. The other position was initially filled by co-plaintiff, Keith Black, but Lebowitz's grievance was successful.

2015-2016 school year and were used by O'Mahoney to bring charges against Lebowitz under Education Law § 3020-a in order to discharge him (Complaint at ¶¶ 42-53).

With respect to Reznikov, plaintiffs allege in the complaint that Izzo-Ianelli, at a meeting held in a computer room in September 2012, told the older teachers that they were "yesterday" while younger teachers were "tomorrow," "that teachers needed to work with technology," and that she was "not going to tolerate stale teaching methods of older teachers." When Reznikov tried to contribute during this meeting, Izzo-Ianelli told Reznikov that "nobody needs your stale methods" and "we don't want your experience" (Complaint at ¶¶ 61-62). In September 2013, when Reznikov was dealing with damage to her home caused by Hurricane Sandy, Izzo-Ianelli allegedly told Reznikov that, at her age, she could not handle both teaching and fixing her home, and that she should think about retirement (Complaint at ¶ 64). When Reznikov responded by stating that Sheepshead Bay needed math teachers, Izzo-Ianelli allegedly told Reznikov, to the effect, that there are plenty of young, effective, and energetic teachers available to replace her (Complaint at ¶ 64). Izzo-Ianelli would purportedly call older teachers oldies, would laugh at Reznikov and slam the door in her face when she came to a meeting at Izzo-Ianelli's office, and, when Reznikov asked Izzo-Ianelli to change an undeserved comment made in an observation report for the 2013-2014 school year, Izzo-Ianelli responded, "get it through your head, you are not going to work here" (Complaint at ¶¶ 66-67, 69). At the end of 2013, O'Mahoney allegedly told Reznikov that "you've been in the system long enough and all you managed to do was get a high salary" (Complaint at ¶ 65). Izzo-Ianelli supposedly made comments to Raznikov that she, in effect, wished that Raznikov would die, that Raznikov was getting paid $100,000 to take bathroom breaks, and that there was always a problem with senior teachers during regents (Complaint at ¶¶ 70-72).

With respect to Black, the complaint primary alleges that he was subjected to a hostile work environment based on the negative and purportedly fabricated observation reports (Complaint at ¶¶ 88-98), based on O'Mahoney making comments in Black's presence regarding older teachers being closed minded regarding the use of technology (Complaint at ¶ 83), based on O'Mahoney handing Black a negative observation report and yelling at him in front of teachers on March 26, 2014 (Complaint at ¶¶ 93, 95), based on O'Mahoney giving him a negative rating for classroom appearance when a younger teacher who shared the classroom received an effective rating (Complaint ¶ 89), and based on unfair treatment with respect to medical leaves in March/April 2013 and February/March 2015 (Complaint at ¶¶ 99-104). Even though a DOE psychiatrist thereafter found Black unfit to teach in April 2015, O'Mahoney referred Black's leave and absence issues to the Office of Special Investigations (OSI), which, however, ultimately found no impropriety in Black's medical leave (Complaint at ¶¶ 105-106).

In view of these allegations, each plaintiff served a notice of claim on the DOE on June 25, 2014 by way of certified mail return receipt requested at 52 Chambers St., New York, New York, in which they each alleged that the DOE discriminated against them based on their age and subjected them to a hostile work environment based on their age in violation of the Age Discrimination in Employment Act (ADEA) (29 USC §§ 621 *et seq.*), Title VII of the Civil Rights Act of 1964 (Title VII) (42 USC § 12101, *et seq.*), the New York State Human Rights Law (State HRL) (Executive Law § 296) and the New York City Human Rights Law (City HRL) (Administrative Code of the City of New York § 8-107 [1] [a], [7]).[5]

Thereafter, Lebowitz filed a complaint with the New York State Division of Human Rights (NYSDHR) on June 30, 2014 in which he alleged that the DOE had discriminated against

[5] Of note, plaintiffs attached copies of the signed receipts showing that the notices of claim were received by the DOE to their affidavits of service.

him based on his age under the ADEA and the State HRL. On December 26, 2014, the NYSDHR issued an order dismissing Lebowitz's complaint based on administrative convenience in order to allow him to pursue his remedies in a lawsuit. The United States Equal Employment Opportunity Commission (EEOC), with which all NYSDHR complaints are deemed filed pursuant to a work sharing agreement (*Martinez-Tolentino v Buffalo State Coll.*, 277 AD2d 899, 899 [4th Dept 2000]; *Nixon v TWC Administration LLC*, 2017 WL 4712420 [U], *2-4 [SDNY 2017]), issued Lebowitz a right to sue letter on February 19, 2015. Reznikov filed a charge of discrimination with the EEOC on November 10, 2014, alleging, among other things, that the DOE had discriminated against her based on her age in violation of Title VII and the ADEA. The EEOC issued Reznikov a right to sue letter on November 6, 2015. On December 2, 2014, Black filed a charge with the EEOC, likewise alleging, among other things, that the DOE had discriminated against him based on his age in violation of Title VII and the ADEA. The EEOC issued Black a right to sue letter on July 1, 2015.

On May 19, 2015 (Lebowitz) and on September 24, 2015 (Reznikov and Black), plaintiffs commenced actions in the United States District Court for the Eastern District of New York (EDNY) against defendants that were thereafter consolidated (Federal Action). In the consolidated Federal Action, plaintiffs alleged, as is relevant here, that defendants violated plaintiffs' rights under the ADEA, Title VII, the State HRL, and the City HRL by discriminating against them and subjecting them to a hostile work environment based on their ages. The factual allegations in the Federal Action largely mirror those in the current action before the court.

In an order dated November 30, 2020, the district court granted defendants' summary judgment motion and dismissed the Federal Action (*Lebowitz v New York City Dept. of Educ.*, 2020 WL 7024362 [U], *10 [EDNY 2020]). In deciding the portion of the motion addressed to

the discrimination claims under the ADEA, the district court expressly found that neither Black nor Reznikov suffered an adverse employment action for purposes of the ADEA since Black did not suffer any negative consequences from being excessed from Sheepshead Bay and Reznikov did not suffer any negative consequences from being placed in Absent Teacher Reserve (ATR) (*id.* at 6). The district court, however, found that the filing of the Education Law § 3020-a charges against Lebowitz constituted an adverse employment action. Nevertheless, the district court found that Lebowitz had failed to demonstrate that the section 3020-a charges were brought under circumstances giving rise to an inference of discrimination because: (1) the charges were sustained by an independent hearing examiner; (2) O'Mahoney and Izzo-Ianelli - who allegedly were targeting Lebowitz because of his age - were not the only persons whose observations were used to support the charges; (3) O'Mahoney and Izzo-Ianelli's offensive remarks regarding older workers were too remote from the June 1, 2016 filing of the section 3020-a charges to allow an inference of discrimination; and (4) the statistical proof regarding evaluations of teachers at Sheepshead Bay did not support Lebowitz's argument that the observations were discriminatory, and, in any event, was inadmissible because it was not supported by expert analysis (*id.* at 7-8). With respect to Reznikov's hostile work environment claim under the ADEA,[6] the district court found that the comments by O'Mahoney and Izzo-Ianelli, while objectionable, could not be deemed sufficiently severe or pervasive to make out a hostile work environment when viewed under the totality of the circumstances over the relevant three-year period and that there was no evidence that the other actions they took against Reznikov were based on her age (*id.* at 9-10). Having dismissed all of the federal claims in the action, the court declined to exercise

[6] According to the district court, only Reznikov asserted a hostile work environment claim under the ADEA (*Lebowitz*, 2020 WL 7024362, *9).

supplemental jurisdiction over plaintiffs' NYSHRL and NYCHRL claims and dismissed them, without prejudice, for lack of subject-matter jurisdiction (*id.* at 10).[7]

DISCUSSION

Collateral Estoppel

Defendants initially assert that, in view of the factual determinations made by the district court in dismissing the Federal Action, plaintiffs' current City HRL claims are barred by collateral estoppel.[8] Even where a federal court declines to exercise jurisdiction over a plaintiff's state law claims, "collateral estoppel may still bar those claims provided that the federal court decided issues identical to those raised by the plaintiff's state claims" (*Williams v New York City Tr. Auth.*, 171 AD3d 990, 992 [2d Dept 2019] [internal quotation marks omitted]; *see Johnson v IAC/InterActiveCorp*, 179 AD3d 551, 552 [1st Dept 2020], *lv denied* 35 NY3d 912 [2020]; *Milione v City Univ. of N.Y.*, 153 AD3d 807, 808-809 [2d Dept 2017], *lv denied* 30 NY3d 907 [2017], *cert denied* ___ US ___, 138 SCt 2027 [2018]). In determining whether the identical issues have been decided, the court must closely analyze the federal court's factual determinations to ensure that they would require dismissal under the more liberal, protective standards of the City HRL (*see Russell v New York Univ.*, 204 AD3d 577, 578-579 [1st Dept 2022]; *Johnson*, 179 AD3d at 552; *Williams*, 171 AD3d at 993; *Karimian v Time Equities, Inc.*, 164 AD3d 486, 488-489 [2d Dept 2018], *lv dismissed* 32 NY3d 1074 [2018]; *Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP*, 116 AD3d 134, 140-141 [1st Dept 2014]; *see also*

[7] Although the district court, in an order dated March 31, 2017, partially granted defendants' Federal Rule of Civil Procedure 12 (b) (c) motion to dismiss with respect to several of plaintiffs' claims, the court denied the motion with respect to plaintiffs' age discrimination and hostile work environment claims under the City HRL (*Lebowitz v New York City Dept. of Educ.*, 407 F Supp3d 158, 183 [EDNY 2017]). Defendants' make no argument that this determination bars any of plaintiffs' claims here.

[8] The court notes that the order granting defendants summary judgment in the Federal Action is a disposition on the merits that may be entitled to preclusive effect for purposes of collateral estoppel (*see Emmons v Broome County*, 180 AD3d 1213, 1216-1217 [3d Dept 2020).

Administrative Code of City of NY § 8-130 [a]; *Albunio v City of New York*, 16 NY3d 472, 477 [2011]).

Initially, the district court's determination that Black and Reznikov's discrimination claims under the ADEA failed because they did not experience an adverse employment action is not determinative of their claims under the City HRL. This is because the ADEA requires a showing that the employment action constituted a materially adverse change in the terms and conditions of employment (*see Mathirampuzha v Potter*, 548 F3d 70, 78 [2d Cir 2008]). In contrast, under the City HRL, the employment action need not be a materially adverse change and a plaintiff need only show that "she or he was subject to an unfavorable change or treated less well than other employees on the basis of a protected characteristic" (*Golston-Green v City of New York*, 184 AD3d 24, 37-38 [2d Dept 2020]; *see Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]). In view of this different standard, the district court's finding that Reznikov and Black were not subjected to adverse employment actions is not determinative of any issue in plaintiffs' current action under the City HRL.

On the other hand, the district court's determination that Lebowitz failed to demonstrate that the filing of the Education Law § 3020-a charges occurred under circumstances giving rise to an inference of discrimination is determinative of that issue even under the City HRL's more liberal standard (*see Pelepelin v City of New York*, 189 AD3d 450, 451 [1st Dept 2020]; *Golston-Green*, 184 AD3d at 39; *Reichman v City of New York*, 179 AD3d 1115, 1117 [2d Dept 2020], *lv denied* 36 NY3d 904 [2021]). Of note in this respect, although the summary judgment burdens work somewhat differently in federal court, the discrete factual determinations that the district court made in finding the absence of discriminatory inferences are the same as would apply under the City HRL (*see Johnson*, 179 AD3d at 552; *Simmons-Grant*, 116 AD3d at 140-141; *see*

also Russell, 204 AD3d at 578-579). While perhaps not determinative on its own, the finding that the statistical proof regarding evaluations of teachers at Sheepshead Bay did not support Lebowitz's argument that the observations were discriminatory is certainly relevant to Lebowitz's ability to make out his current claim under the City HRL.[9]

This court, however, rejects defendants' contention that this action is collaterally estopped by the factual determinations made at Lebowitz's Education Law § 3020-a hearing. The hearing officer at the section 3020-a hearing expressly stated that she was not making any rulings based on Lebowitz's claims of age discrimination (*see Chiara v Town of New Castle*, 126 AD3d 111, 123 [2d Dept 2015], *lv dismissed* 26 NY3d 945 [2015]; *cf. Ferraro v New York City Dept. of Educ.*, 752 Fed Appx 70, 74 [2d Cir 2018]).

Statute of Limitations

Defendants next assert that the one-year statute of limitations of Education Law § 3813 (2-b) (*see Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d 367, 371 [2007]) bars Lebowitz's claims against the DOE to the extent they are premised on events that occurred before May 19, 2014 (a date one year prior to his filing of his complaint in the Federal Action) and bars Reznikov and Black's claims to the extent that they are premised on events that occurred before September 24, 2014 (a date one year prior to their filing of their complaint in the Federal Action).[10] This court, however, finds that plaintiffs' respective complaints filed with the EEOC and the NYSDHR tolled the statute of limitations during the pendency of those

[9] The district court's findings regarding statistical proof are only binding against Lebowitz because, in New York, collateral estoppel only precludes a party from relitigating an issue decided against "that part or those in privity" (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *but see Ali v Jeng*, 86 F3d 1148[A], 1996 WL 293181[U], *2 [4th Cir 1996]; *Maryland Auto. Ins. Fund v Soffas*, 89 Md App 663, 670-675, 599 A2d 837, 841-843 [Ct Spec App 1991]). Nothing in the language of the district court's decision suggests that its findings regarding statistical proof underlay its determinations regarding Black and Reznikov.

[10] Defendants evidently concede that this action is based on the same transactions or occurrences as the Federal Action for purposes of CPLR 205 (a) and that this action was timely commenced following the dismissal of the Federal Action for purposes of CPLR 205 (a).

proceedings (*see* Administrative Code of City of N.Y. § 8-502 (d); *New York State Division of Human Rights v Folino*, 140 AD3d 1730, 1731 [4th Dept 2016]; *Forest v Jewish Guild for the Blind*, 309 AD2d 546, 552 [1st Dept 2003], *affd* 3 NY3d 295 [2004]; *Martinez-Tolentino*, 277 AD2d at 899; *Strusman v NYU Langone Hosps.*, 2020 WL 3415111[U], *4-7 [SDNY 2020]; *Nixon v TWC Administration LLC*, 2017 WL 4712420[U], *2-4 [SDNY 2017]).[11] Based on the proceedings before the EEOC and NYSDR, Lebowitz's claims were tolled for 234 days – making September 27, 2013 the determinative date for Lebowitz. Black's claims were tolled for 233 days - making February 26, 2014 the determinative date for Black. Reznikov's claims were tolled for 318 days – making November 10, 2013 the determinative date for Reznikov.

Plaintiffs contend that conduct prior to those dates may be considered based on the continuing violation doctrine. Under the continuing violation doctrine, even if acts that make up a hostile work environment occurred outside the limitations period, the claim will be considered timely as long as one of the acts making up the claim occurred within the limitations period (*see Matter of Lozada v Elmont Hook & Ladder Co. No. 1*, 151 AD3d 860, 861-862 [2d Dept 2017]; *see also Center for Independence of the Disabled v Metropolitan Transp. Auth.*, 184 AD3d 197, 201 [1st Dept 2020]; *Petit v Department of Educ. of City of N.Y.*, 177 AD3d 402, 403-404 [1st Dept 2019]; *Williams v New York City Housing Auth.*, 61 AD3d 62, 72-73 [1st Dept 2009]). A continuing violation may be found upon "proof of specific ongoing discriminatory policies or

[11] Concededly, there is case law holding that the toll contained in Administrative Code of City of N.Y. § 8-502 (d) for such filings does not apply to actions governed by Education Law § 3813 (2-b) (*see Bertuzzi v Copiague Union Free School Dist.*, 2020 WL 5899949 [U], *22 [EDNY 2020], *report & recommendation adopted as modified* 2020 WL 3989493 [U] [EDNY 2020]; *Ayazi v New York City Dept. of Educ.*, 2012 WL 4503257 [U], *8 [EDNY 2012], *affd* 586 Fed Appx 600 [2d Cir 2014]). This court rejects these decisions since nothing in the language of section 3813 (2-a) suggests that tolling does not apply (*see Langella v Mahopac Central School Dist.*, 2020 WL 2836760 [U], *16 [SDNY 2020]; *Riccardo v New York City Dept. of Educ.*, 2016 WL 7106048 [U], *6-7 [SDNY 2016], *report & recommendation adopted* 2017 WL 57854 [U] [SDNY 2017]), and because Appellate Courts have found that other statutory tolls apply to actions governed by section 3813 (2-a) (*see Matter of Melissa G. v North Babylon Free School Dist.*, 50 AD3d 901, 902 [2d Dept 2008] [addressing CPLR 208's infancy toll]; *Matter of Hinton v New Paltz Cent. School Dist.*, 50 AD3d 1414, 1415 [3d Dept 2008] [addressing CPLR 208's infancy toll]).

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*, 151 AD3d at 861-862; *see Campbell v New York City Dept. of Educ.*, 200 AD3d 488, 488-489 [1st Dept 2021]; *Petit*, 177 AD3d at 403-404). Here, there are at least factual issues as to whether the actions involving the ageist comments allegedly made by O'Mahoney and Izzo-Ianelli and their allegedly discriminatory performance reviews that occurred prior to the limitations period continued into the limitations period for each of the plaintiffs, such that the DOE is not entitled to dismissal of plaintiffs' claims with respect to conduct that occurred earlier than the dates noted above (*see Petit*, 177 AD3d at 403-404; *Jeudy v City of New York*, 142 AD3d 821, 822-823 [1st Dept 2016]; *Sotomayor v City of New York*, 862 F Supp2d 226, 250-251 [EDNY 2012], *affd* 713 F3d 163 [2d Cir 2013]; *cf. Campbell*, 200 AD3d at 488-489; *Matter of Lozada*, 151 AD3d at 861-862).

For the same reasons, factual issues regarding application of the continuing violation doctrine likewise preclude dismissal of any of plaintiff's claims against O'Mahoney and Izzo-Ianelli under the three-year statute of limitations applicable to them (Administrative Code of City of N.Y. § 8-502 [d]; *see Petit*, 177 AD3d at 403-404; *cf. Campbell*, 200 AD3d at 488-489).

Notice of Claim

Defendants assert that they are entitled to dismissal of the action since plaintiffs failed to properly serve notices of claim regarding the claims in this action as is required by Education Law § 3813 (1). As is relevant here, section 3813 (1) provides that:

> "No action or special proceeding, for any cause whatever . . . or involving the rights or interests of any district or any such school shall be prosecuted or maintained against any school district, board of education ... or any officer of a school district, board of education, board of cooperative educational services, or school provided for in article eighty-five of this chapter or chapter ten

> hundred sixty of the laws of nineteen hundred seventy-four unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim."

In view of this statutory language, a notice of claim must be served with respect to a City HRL claims against the DOE (*see Rodriguez v City of New* York, 193 AD3d 603, 603-604 [1st Dept 2021]; *Seifullah v City of New York*, 161 AD3d 1206, 1206-1207 [2d Dept 2018]).

In moving, defendants submitted copies of the above noted notices of claim for each plaintiff and a copy of an affidavit of service from plaintiffs' former counsel who stated that the notices of claim were served on the DOE at 52 Chambers Street, New York, New York by certified mail return receipt requested. The appended return receipts show that the notices of claim were received by the DOE on June 25, 2014. Defendants only basis for asserting that this service was inadequate under the statute is a notice that the Office of the Corporation Counsel (Corp Counsel) placed in the New York Law Journal in November 2002 that indicated that Corp Counsel was the "sole representative for the New York City Department or Board of Education" for service of notices of claim and process (*see Padilla v Department of Educ. of the City of N.Y.*, 90 AD3d 458, 458 [1st Dept 2011]; *Nacipucha v City of New York*, 18 Misc 3d 846, 851 [Sup Ct, Bronx County 2008]). This court, however, declines to find that service of a notice of claim on the DOE in June 2014 at an address that appears to be the address for the DOE's headquarters is not service upon the "the governing body of said district" for purposes of section 3813 (1) solely based on an announcement posted in the New York Law Journal in November 2002.[12] Defendants have provided no evidence that the DOE had provided notice of a particular location for service of a notice of claim in June 2014, that the DOE refused to accept service of notices of

[12] The court notes that the DOE admitted in the answer that it has offices at 52 Chamber Street (Defendants Ans. At ¶ 12).

claim at 52 Chambers Street at that time, or that the Corp Counsel had continued as the DOE's sole representative for the service of notices of claim. Under these circumstances, this court finds that defendants have failed to demonstrate that the plaintiffs' notices of claim were improperly served.[13]

On the other hand, this court finds that plaintiffs' failure to serve additional notices of claim to address acts that occurred after the June 2014 service of the notices of claim requires dismissal of the claims as against the DOE to the extent that plaintiffs' claims rely on acts that occurred after the notice of claim as served on the DOE (*see Varsity Tr., Inc. v Board of Educ. of City of N.Y.*, 5 NY3d 532, 535-537 [2005]; *Matter of Smith v Brenner*, 106 AD3d 1018, 1018 [2d Dept 2013]; *Agostinello v Great Neck Union Free Sch. Dist.*, 102 AD3d 638, 639-640 [2d Dept 2013]). While, as contended by plaintiffs, "[a] hostile work environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice'" (*National R.R. Passenger Corp. v Morgan*, 536 US 101, 117 [2002]; *Matter of Lozada*, 151 AD3d at 861-862), in view of the strict notice of claim requirements of Education Law § 3813 (1) (*see Varsity Tr., Inc.*, 5 NY3d at 536), the DOE is entitled to notice of the subsequent acts making up a claim for which it may be held liable for damages. Indeed, this result is compelled by the rationale of the Court of Appeals' decision in *Varsity Tr., Inc. v Board of Educ. of City of N.Y.*, where, even though the primary issue in the breach of contract action was whether the defendant Board of Education was applying the correct formula for calculating payments owed to plaintiffs - an issue that was the same for any payment period - the Court of Appeals held that plaintiffs' failure to serve notices of claim for underpayments made after the initial notice of claim required denial of plaintiffs' motion to serve a supplemental complaint (*Varsity Tr., Inc.*, 5 NY3d at 536-537).

[13] Except for the issues of proper service and plaintiffs' failure to supplement the notices of claim, defendants have raised no other issue with respect to the adequacy of the notices.

Contrary to plaintiffs' contention, nothing in the language of section 3813 (1) or of *Varsity Tr., Inc. v Board of Educ. of City of N.Y.* suggests that a different result would apply here based on the fact that this action involves a hostile work environment claim under the City HRL rather than a contract dispute (*see Matter of Smith*, 106 AD3d at 1018; *Agostinello*, 102 AD3d at 639-640; *Diaz v New York City Dept. of Educ.*, 2020 NY Slip Op 30341 [U], *11-12 [Sup Ct, New York County 2020]; *Canty v Department of Educ. of City of N.Y.*, 2018 NY Slip Op 30177 [U], *4 [Sup Ct, Kings County 2018]).

Plaintiffs' failure to serve additional or amended notices of claim to include subsequent acts has no bearing on their claims as against O'Mahoney and Izzo-Ianelli since neither is a school officer for purposes of the notice of claim requirements of Education Law § 3813 (1) (*see Collins v Indart-Etienne*, 59 Misc 3d 1026, 1044-1045 [Sup Ct, Kings County 2018]; *Bertuzzi v Copiague Union Free School Dist.*, 2020 WL 5899949 [U], *22 [U] [EDNY 2020], *report & recommendation adopted as modified* 2020 WL 3989493 [U] [EDNY 2020]; *Benedith v Malverne Union Free School Dist.*, 38 F Supp3d 286, 311-312 [EDNY 2014]; Education Law § 2 [13]).

Hostile Work Environment

Defendants also assert that they are entitled to dismissal of the action because plaintiffs cannot show that they were treated less well than similarly situated teachers outside their protected class and/or because defendants had legitimate, non-pretextual, non-discriminatory reasons for their actions. "Under the [City HRL], a plaintiff claiming a hostile work environment need only demonstrate that he or she was treated 'less well than other employees' because of the relevant characteristic" (*Reichman v City of New York*, 179 AD3d 1115, 1118 [2d Dept 2020] [internal quotation marks omitted], *lv denied* 36 NY3d 904 [2021]; *see Nelson v*

HSBC Bank USA, 87 AD3d 995, 999 [2011]). Since even the more liberal standards of the City HRL are not intended as a general civility code (*see Ellison v Chartis Claims, Inc.*, 178 AD3d 665, 669 [2d Dept 2019], *lv dismissed* 35 NY3d 997 [2020]), the conduct alleged must "exceed 'what a reasonable victim of discrimination would consider petty slights and trivial inconveniences' (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 80 [1st Dept 2009] [internal quotation marks omitted]), and 'mere personality conflicts' will not suffice to establish a hostile work environment (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 309)" (*Bilitch v New York City Health & Hosps. Corp.*, 194 AD3d 999, 1003 [2d Dept 2021]).

Despite this more liberal standard, this court finds that defendants have demonstrated that the action should be dismissed with respect to Lebowitz's claim. Lebowitz's claim is primarily premised on O'Mahoney's statement made at faculty meetings that older teachers were in their "fuck you years" and making "fuck you money," the negative performance reviews, being placed on TIP, the initial denial of the ICT teacher position, and the Education Law § 3020-a charges and hearing proceeding that resulting in a fine and training requirements.

Both the "fuck you years" and "fuck you money" comment and the comment about the difficulty of getting rid of senior teachers, however, are not unambiguously ageist because they can also be seen as addressing the elevated cost of senior employees based on years of service, which, in and of itself, does not establish age discrimination (*see Williams v City of New York*, 602 Fed Appx 28, 29 [2d Cir 2015]; *James v New York Racing Assoc.*, 233 F3d 149, 153 [2d Cir 2000]; *Mete v New York State Off. Of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 293 [1st Dept 2005]; *see also Hazen Paper Co v Biggins*, 507 US 604, 611-612 [1993]), as well as the difficulty of discharging underperforming tenured staff at a failing school in view of the just cause requirements of Education Law §§ 3020 and 3020-a. Given this ambiguity, and given

that these general comments were not specifically directed at Lebowitz, this court finds that they constitute isolated stray remarks that constitute no more than petty slights under the City HRL (*see Ellison*, 178 AD3d at 669; *Abe v New York Univ.*, 169 AD3d 445, 447 [1st Dept 2019], *lv dismissed* 34 NY3d 1089 [2020]; *Mejia v T.N. 888 Eight Ave. LLC Co.*, 169 AD3d 613, 614 [1st Dept 2019]; *Basso v EarthLink, Inc.*, 157 AD3d 428, 430 [1st Dept 2018]; *Kosarin-Ritter v Mrs. John L. Strong, LLC*, 117 AD3d 603, 604 [1st Dept 2014]; *Williams*, 61 AD3d at 80; *Livingston v City of New York*, 563 F Supp3d 201, 252-555 [SDNY 2021]; *see also Blackman v Metropolitan Tr. Auth.*, 206 AD3d 602, 605 [2d Dept 2022]; *cf. Mihalik v Credit Agricole Cheuvreux North America, Inc.*, 715 F3d 102, 114-115 [2d Cir 2013]).

Defendants also demonstrate, prima facie, that Lebowitz's negative performance reviews were based on inadequate performance during the observations, a legitimate non-discriminatory reason for the reviews and that the reviews were not a pretext for age related discriminatory acts for purposes of Lebowitz's hostile work environment claim. Initially, while negative reviews, in and of themselves, might not constitute discriminatory conduct (*see Kwong v City of New* York, 204 AD3d 442, 443 [1st Dept 2022]), they may be seen as part of the conduct making up a hostile work environment (*see Clarke-Green v New York City Dept. of Educ.*, 2019 WL 13149583 [U], *9-10, 13 [EDNY 2019]; *Sotomayor*, 862 F Supp2d at 258; *Garvin v Potter*, 367 F Supp2d 548, 570-571 [SDNY 2005]), and, in any event, led to him being placed on TIP. Nevertheless, the fact that, according to Lebowitz, he had previously received favorable performance reviews fails to show that the negative performance reviews were based on his age (*see Kwong*, 204 AD3d at 443-445). Even assuming Lebowitz's proof would be sufficient to demonstrate a factual issue as to whether his performance was truly deficient, "the question is not whether the decision was correct or wise, but whether the reason for the decision was a

pretext for discrimination" (*Bilitch*, 194 AD3d at 1002; *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 121 [1st Dept 2012]; *Rorie v United Parcel Serv., Inc.*, 151 F3d 757, 761 [8th Cir 1998]; *Saenger v Montefiore Med. Ctr.*, 706 F Supp2d 494, 515 [SDNY 2010]).

Although Lebowitz asserts that discriminatory-hostile intent can be inferred based on O'Mahoney's purportedly ageist comments, Lebowitz's testimony that O'Mahoney made the comments at some point during the 2013-2014 school year and repeated them during the 2014-2015 school year fails to demonstrate that the comments were made in any relevant temporal proximity to the negative performance reviews (*see Kwong*, 204 AD3d at 444; *Tihan v Apollo Mgt. Holdings, L.P.*, 201 AD3d 557, 558 [1st Dept 2022]; *Breitstein v Michael C. Fina Co.*, 156 AD3d 536, 537 [1st Dept 2017]; *Wecker v City of New York*, 134 AD3d 474, 475 [1st Dept 2015]; *Mete*, 21 AD3d at 293; *Sotomayor*, 862 F Supp2d at 260).

The district court's factual findings in the Federal Action might not address every aspect of Lebowitz's current claim under the City HRL. As discussed above, however, the finding that the statistical proof relating to the number of teachers over the age of 40 who received negative performance evaluations does not support Lebowitz's claim (*see Lebowitz*, 2020 WL 7024362, *8) bars relying on that proof as evidence of pretext in this action (*see Pelepelin*, 189 AD3d at 451; *Golston-Green*, 184 AD3d at 39; *Reichman*, 179 AD3d at 1117). Likewise, the district court's finding that the Education Law § 3020-a charges against Lebowitz were not brought under circumstances giving rise to an inference of animus (*see Lebowitz*, 2020 WL 7024362, *7-8) precludes reliance on those charges as an element of his current claim.

Finally, Lebowitz's testimony regarding the ICT teacher position fails to show that his age played a part in the initial denial of his application for that position, and, given that he ultimately obtained the position after filing a union grievance, the initial denial cannot be seen as

more than a petty slight or trivial inconvenience (*see Bilitch*, 194 AD3d at 1003; *Guluma v De Joy*, 2022 WL 1642261 [U], *6 [D Md 2022]; *Powell v Consolidated Edison Co.*, 2001 WL 262583 [U], *8 n9 [SDNY 2001]).

In sum, defendants have demonstrated, prima facie, that they are entitled to dismissal of Lebowitz's action premised on harassment by showing that he was not treated less well than other employees because of his age, and Lebowitz has failed to demonstrate an issue of fact in this respect. Defendants are thus entitled to summary judgment dismissing the action with respect to Lebowitz.

On the other hand, this court finds that factual issues preclude the dismissal of the action as against Black and Reznikov. Black's claim is primarily predicated on O'Mahoney's statements made at faculty meetings that older teachers were in their "fuck you years" and making "fuck you money" that older teachers were closeminded about the use of technology, negative performance reviews, and the reaction to his medical leave requests. However, unlike Lebowitz, Black is not bound by the district court's finding that the statistics regarding the number of older teachers who received negative performance evaluations fail to show an inference of age discrimination (*see* footnote 8 above). Contrary to the district court, this court finds the fact that 15 of the 16 teachers who received negative performance reviews during the 2013-2014 school year and the fact that all 6 of the teachers who received negative performance reviews during the 2014-2015 school year were over 40 is statistically significant.[14] In addition, contrary to the district court, this court finds that Black is not required to present expert proof

[14] In this regard, in 2013-2014, 15 of the 36 teachers 40 and over received negative reviews, while only 1 of 24 teachers under 40 received a negative review. Thus, in percentage terms, 42 percent of the older teachers received negative reviews, while only 5 percent of the younger teachers received negative reviews for that school year. In 2014-2015, 6 of the 23 teachers 40 and over received negative reviews, while none of the 13 teachers under 40 received a negative review. In percentage terms, 26 percent of the older teachers received negative reviews while 0 percent of the younger teachers received negative reviews.

regarding the statistics because the negative observation reports are taken straight from the DOE's own records and do not involve a sophisticated statistical theory that would be beyond the ken of a juror without expert testimony (*see Stratton v Department for the Aging for City of N.Y.*, 132 F3d 869, 877 [2d Cir 1997]; *Singh v Bay Crane Serv. Inc.*, 2015 WL 918678 [U], *4 [EDNY 2015]; *cf. Saenger*, 706 F Supp2d at 515-516). As such, this court finds that the statistics are sufficient to raise an inference that the negative evaluations were based on age and/or were pretextual (*see Baldwin v Cable Vision Sys. Corp.*, 65 AD3d 961, 966-967 [1st Dept 2009], *lv denied* 14 NY3d 701 [2010]; *see also see Clarke-Green*, 2019 WL 13149583, *9-10, 13). While, when considered separately, the borderline ageist comments and negative evaluations might not be sufficient to establish harassment under the City HRL, in view of the statistical evidence suggesting that the evaluations may have been pretextual, the evaluations and comments, taken together with other alleged indignities suffered by Black, demonstrate that there are factual issues as to whether he was treated less well than other employees because of his age such that the motion must be denied.

The rationale that warrants denial of the motion as against Black also warrants denial as against Reznikov, who like Black, relies on O'Mahoney's "fuck you years" and making "fuck you money" comments and the negative evaluation reports, and, who like Black, is not bound by the portion of the district court's decision relating to statistics. Reznikov's claim is additionally supported by a series of comments by Izzo-Ianelli. While many of the comments by Izzo-Ianelli, although insensitive and nasty, do not relate to Reznikov's age (*see Basso*, 157 AD3d at 430), several of them are clearly age related (i.e. telling older teachers that they were "yesterday" while younger teachers were "tomorrow," that she was not going to tolerate stale teaching methods of older teachers, and that we don't want your experience). These comments, when

considered in conjunction with those of O'Mahoney and the negative evaluations, demonstrate that there are factual issues as to whether Reznikov was treated less well because of her age such that the motion to dismiss the complaint must be denied. This action is therefore severed accordingly.

This constitutes the decision and order of the court.

ENTER

HON. GINA ABADI
J.S.C.

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