SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART** **52**

Justice

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ISMAT JAHAN

Plaintiff,

- v -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

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INDEX NO. 158707/2021

MOTION DATE 02/28/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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

were read on this motion to/for DISMISS

Defendant the New York City Health and Hospitals Corporation (HHC) move pursuant to CPLR 3211 (a) (7) to partially dismiss the complaint of plaintiff Ismat Jahan (plaintiff). Plaintiff opposes the motion.

I. Background

The instant motion arises from an action seeking relief for alleged civil rights violations and employment discrimination suffered by plaintiff, a 55-year-old woman of Indian ethnicity, Muslim religion, and Bangladesh national origin, who was employed by HHC as a hospital care investigator since October 7, 2013. She alleges she was subjected to employment discrimination and to a hostile work environment due to her race, religion, age, national origin, disabilities, and perceived disabilities. Plaintiff also claims that she was unlawfully retaliated against for complaining of the discrimination.

In her complaint, plaintiff alleges many purported instances of discriminatory and retaliatory behavior upon commencing her employment with HHC. She alleges that between 2013

and 2018, she was purposely assigned harder cases, denied requested leaves, subject to insulting comments by her co-workers and supervisors, transferred to different units without explanation, denied promotions, and denied training opportunities. In light of these allegations, plaintiff filed a charge with Equal Employment Opportunity Commission (EEOC). Plaintiff contends that afterward, HHC failed to take any corrective action and continued its pattern of discriminatory behavior.

Plaintiff also alleges in her complaint that from February to April of 2020, her supervisor Marilu Nerone did the following: (1) offered plaintiff a food item containing ham, which she does not eat due to her religious beliefs, and when plaintiff declined, two co-workers laughed, (2) said that plaintiff was "disgusting," (3) did not reprimand a co-worker who told plaintiff "we do the same with your people" regarding language interpretation, (4) did nothing when plaintiff reported two co-workers who were speaking while plaintiff was speaking, and (5) reprimanded plaintiff for reporting two individuals for not being masked. NYSCEF doc. no. 1, complaint at ¶¶ 50(a)- (f), 64. Moreover, Ms. Nerone allegedly denied Plaintiff's "request for learning about how to report," telling plaintiff that she only taught two other individuals because "they are young." *Id.* at ¶65. In fact, plaintiff claims that since 2018, she has requested training numerous times from her supervisors, but has been denied same.

Plaintiff also alleges in that during the Observance of Ramadan, "Plaintiff's supervisors escalated the hostile work environment to further stress Plaintiff." *Id.* at ¶63. She further maintains that, generally, the "Customer Service Department" did not provide Halal food during celebrations such as birthdays. *Id.* at ¶64. Plaintiff claims that this ongoing harassment and poor treatment caused her to fall ill twice.

Plaintiff began working from home on April 9th, 2020 and was allegedly subsequently subject to "microscopic scrutiny, which no other similarly situated employees were." Complaint at ¶¶52, 54. She alleges that she was "routinely assigned complex work tasks to hinder abilities to perform her daily job duties." Complaint at ¶¶52, 54. Plaintiff contends that in retaliation for an investigation of the purported issues with Ms. Nerone, Ms. Nerone claimed in an e-mail that plaintiff had not been working on an assigned project and did not work on assignments in their designated time frame. Plaintiff asserts that she asked Ms. Nerone to discuss the issues on June 10, 2020, but that, instead, a disciplinary counseling session was scheduled for July 21, 2020.

Plaintiff alleges that after November 2019 she applied for 18 HHC positions and was interviewed for three positions but not hired for any of them. These positions allegedly were given to "less qualified" applicants. Ex. *Id.* at ¶ 69. Specifically, a HCPPA2 position and Senior System Analyst positions were given to "younger employee[s]" with one year of experience and a "CM3" position was given to an employee with "three years of experience". *Id.* Plaintiff claims that she repeatedly tried to transfer her position but was denied.

HHC now moves to partially dismiss the complaint on the grounds that: (1) plaintiff's claims are time-barred to the extent they accrued prior to September 22, 2018; (2) the complaint fails to state a cause of action for retaliation; (3) the complaint fails to a state a claim of disability, racial, or religious discrimination; (4) the complaint fails to state a claim for age discrimination under State Human Rights Law, Executive Law § 290 (State HRL) or the City Human Rights Law, Administrative Code § 8-101, *et seq.* (City HRL).

II. Discussion

A. Statute of Limitations

HHC first argues that as plaintiff commenced this action on September 22, 2021, plaintiff's claims arising prior to September 22, 2018 are time-barred by the applicable three-year statute of limitations. Pursuant to CPLR 3211 (a) (5), the Court may dismiss a cause of action as time barred under the statute of limitations. The initial burden is on the defendant to show that the claims are time barred by the applicable statute of limitations, after which "[t]he burden...shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether they actually commenced the action within the applicable limitations period." *Jalayer v Stigliano,* 94 AD3d 702, 703 (2d Dept 2012).

An action to recover damages for discriminatory practices under State HRL and City HRL is governed by a three-year statute of limitation. *See* CPLR 214 (2); Administrative Code 8-502 (d); *Koerner v State of N.Y., Pilgrim Psychiatric Ctr.*, 62 NY2d 442, 446 (1984). The Appellate Division, First Department has held that otherwise time-barred acts can be considered timely under the "continuing violation" doctrine where an employer permits discrimination to continue for so long that it amounts to a discriminatory policy or practice. *Williams v N.Y.C. Hous. Auth.,* 61 AD3d 62, 72 (1st Dept 2009). However, in contrast to ongoing harassment and hostile work environment, claims of discrete instances of discrimination do not constitute a single continuing pattern of unlawful conduct warranting the application of the continuing violations doctrine. *Id.*, citing *National Railroad Passenger Corporation v Morgan,* 536 US 101 (2002).

Plaintiff does not contest that the three-year statute of limitations applies to the following claims: 1) failure to promote to 18 positions for which she applied from November 2019 to present,

2) biased performance evaluations in February 2020, 3) denial of overtime hours, 4) baseless counseling sessions, and 5) hostile work environment.

However, plaintiff argues that to the extent that plaintiff alleges that she was subjected to a hostile work environment prior to September 22, 2018, such claims are timely as she has adequately pled a continuous violation. In opposition, HHC argues that plaintiff fails to sufficiently plead that any untimely incidents of alleged harassment or hostility were part of the same, ongoing, hostile work environment, as required by the continuing violation doctrine.

Here, plaintiff has sufficiently raised an issue of fact that the continuing violation doctrine applies to her hostile work environment claims. She alleges facts to support the claim that HHC subjected her to discriminatory acts throughout her employment. Specifically, between 2013 and 2018, plaintiff alleges that she began to receive complicated and old cases, that she was denied leave, that she was subject to discriminatory language and unfair treatment, that she was denied promotions or other positions, and that she was transferred to less desirable positions. *See* Complaint, ¶ 5- 42.

As plaintiff raises an issue of fact as to whether the allegations pled constitute a continuing pattern of unlawful conduct constituting a hostile work environment prior to September 22, 2018, such claims are not dismissed at this early pleading stage. However, plaintiff's remaining claims are deemed time-barred to the extent they accrued prior to September 22, 2018.

B. Retaliation Claims

HHC also argues that plaintiff fails to state a claim for retaliation. Pursuant to CPLR 3211 (a) (7), a party may move to dismiss a claim on the ground that the pleading fails to state a cause of action. Upon such a motion the Court must accept the facts alleged as true and determine simply whether plaintiff's facts fit within any cognizable legal theory. *See* CPLR 3026; *Morone v*

Morone, 50 NY2d 481 (1980). The complaint shall be liberally construed, and the allegations are given the benefit of every possible favorable inference. *See Leon v Martinez*, 84 NY2d 83, 87 (1994).

To make a prima facie claim of retaliation under the State HRL, a plaintiff must show that (1) she has engaged in a protected activity; (2) her employer was aware of such activity; (3) she suffered an adverse employment action based upon the activity; and (4) a causal connection exists between the protected activity and the adverse action. *See Santiago-Mendez v City of New York*, 136 AD3d 428, 428-429 (1st Dept 2016); *Forrest*, 3 NY3d at 312-313. "Under the City HRL, the test is similar, though rather than an adverse action, the plaintiff must show only that the defendant 'took an action that disadvantaged' him or her." *Harrington v City of New York*, 157 AD3d 582, 585 (1st Dept 2018), *citing Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012). Pursuant to the City HRL, the employer's actions need not be "materially adverse" to the plaintiff, but merely "reasonably likely to deter a person from engaging in protected activity." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 71 (1st Dept 2009); Administrative Code § 8-107 (7).

With respect to the causal connection, there is no "bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship…" *See Gorman-Bakos v Cornell Co-op Extension of Schenectady County,* 252 F 3d 545, 554 (2d Cir 2001). Nevertheless, "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality...uniformly hold that the temporal proximity must be 'very close'." *Clark County Sch. Dist. v Breeden,* 532 US 268, 273 (2001) (internal citations omitted). Courts have however recognized that employers may have "waited to exact their retaliation at an opportune time." *See Espinal v Goord*, 558 F3d 119, 129 (2d Cir 2009).

Plaintiff claims, and HHC concedes, that plaintiff engaged in protected activity in filing an EEOC charge on September 22, 2018. HHC asserts that plaintiff complains of two retaliatory acts: (1) an e-mail from her supervisor Marilu Nerone's on May 15, 2020 that included false accusations regarding plaintiff and (2) the scheduling of a disciplinary counseling session on June 24, 2020. HHC maintains that the two-year span between plaintiff's September 2018 EEOC complaint and the alleged retaliatory acts negates any plausible causal connection to establish retaliation.

In opposition, plaintiff asserts that HHC fails to consider her continued engagement in protected activity after the filing of the EEOC charge and that, regardless, she sufficiently pleads that there is causal connection between her actions and numerous retaliatory actions. In addition to the two complaints noted by HCC, plaintiff also argues that in retaliation for her EEOC charge – as well as for a complaint she made about another employee on May 15, 2020 – HHC retaliated against her by failing to take any action to resolve the complained-of hostile work environment, and that HHC harassed, embarrassed, and humiliated plaintiff in front of patients and employees, denied her promotions and transfers, subjected her to biased performance evaluations, and denied her overtime hours.

Here, plaintiff has adequately pled that she engaged in protected activity in filing an EEOC charge and that her employer was aware of such activity. Additionally, plaintiff sufficiently claims that she suffered adverse employment actions based on her protected activity, including denial of promotions and transfers, denial of overtime, and subjection to baseless discipline, amounting to adverse employment actions. Plaintiff also sufficiently pleads that a causal connection exists between her protected activity and the alleged adverse employment actions. While plaintiff made her EEOC charge two years before Ms. Nerone's e-mail and the scheduling of plaintiff's disciplinary counselling session, plaintiff pleads that HHC took no action following her EEOC

complaint on September 24, 2018 and failed to resolve the complained of hostile work environment, which caused the adverse treatment of plaintiff to continue.

In addressing a pre-answer motion to dismiss, the Court only considers the adequacy of the pleading and not the substantive merits of the cause of action. As "no bright line" exists to define the temporal bounds of a causal connection, the plaintiff has sufficiently pled a casual connection. *See Gorman-Bakos,* 252 F 3d 545, 554 (2d Cir 2001). Accepting plaintiff's allegations as true, and drawing all inferences in her favor, as the Court must do at this stage of the proceeding, the Court finds that plaintiff has sufficiently alleged retaliation under the City and State HRL.

C. Race, Religion, or Disability Claims

HHC next moves to dismiss the complaint for failure to state a race, religion, or disability discrimination claim. In the context of a motion to dismiss, employment discrimination cases are generally reviewed under notice pleading standards and therefore "a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds." *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (1st Dept 2009), *citing Swierkiewicz v Sorema N.A.*, 534 US 506, 514-515 (2002).

Under the State HRL, plaintiffs must state a prima facie cause of action for employment discrimination by pleading that (1) they are members of a protected class; (2) they are qualified to hold the position; (3) they suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. *See Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270 (2006); *see also Forrest*, 3 NY3d at 305.

While the analysis of pleading a discrimination claim under the City HRL follows the same four rubrics as the State HRL, the more liberal intent of the City HRL must be considered in evaluating the adequacy of a plaintiff's claim. *See Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 884-885 (2013); *Bennett v. Health Mgt. Sys., Inc.*, 92 AD3d 29, 36-37 (1st Dept 2011); Local Law No. 85 (2005) of City of NY § 7, *amending* Administrative Code § 8-130 (declaring that the provisions of the City HRL "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws ... have been so construed"). The City HRL applies a more lenient standard, wherein the plaintiff need "only show she was treated differently from others in a way that was more than trivial, insubstantial, or petty." *Dimitracopoulos v City of New York,* 26 F Supp 3d 200, 216 (ED NY 2014). However, the City HRL is not a "general civility code," and a plaintiff must still show "that the conduct is caused by a discriminatory motive." *See Mihalik v Credit Agricole Cheuvreux N. Am., Inc.,* 715 F 3d 102, 110 (2d Cir 2013).

HHC argues that plaintiff has not sufficiently pled facts showing that she suffered an adverse employment action, in that they did not alter the terms and conditions of her employment. Specifically, HHC argues that as plaintiff has not alleged any monetary consequences resulting from her allegations, her discrimination claim must fail, Moreover, defendant argues plaintiff has not sufficiently pled differential treatment based on her protected class, because she failed to identify similarly situated individuals who are not in her protected class and were treated more favorably.

In opposition, Plaintiff argues that her denial of promotions and transfers, as well as being denied overtime, materially altered the terms and conditions of her employment, thereby constituting adverse employment actions. Further, she asserts that she sufficiently pled that she

was treated differently based on her protected class, arguing that the positions for which she applied were given to less-qualified, younger employees.

At this preliminary stage, before discovery has occurred, HHC's motion for summary judgment is denied. Plaintiff sufficiently alleges in her complaint that the alleged insults, harassment, and degradation she suffered from her supervisor and co-workers and her negative performance evaluation were based on her race, ethnicity, and/or national origin. She alleges co-workers made comments such as insulting her accent, calling her food disgusting, and generally remarking about her race. Accordingly, plaintiff's complaint, on its face, is sufficient to withstand a CPLR 3211(a) (7) challenge to her State and City HRL causes of action sounding in discrimination.

D. Hostile Work Environment Claim

Defendant argues that plaintiff fails to state a hostile work environment claim. To determine whether a work environment is hostile, the Court must consider whether "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v Forklift Sys.*, 510 US 17, 21 (1993). Factors to consider include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with the employee's work performance. *Id.* at 23.

HHC argues that alleged sporadic events and comments do not amount to a hostile work environment under the State HRL or City HRL. Again, defendant asserts that none of the allegations sufficiently altered plaintiff's employment and that plaintiff fails to plead facts to

suggest the alleged unequal treatment is more than "petty slights and trivial inconveniences." *Williams v NY City Hous. Auth.*, 61 AD3d 62, 79-80 (1st Dept 2009).

Plaintiff contends that she set forth sufficient facts to plead a hostile work environment claim, including her continuous promotion denials, negative performance evaluations, overtime denials, and counseling sessions. Plaintiff also asserts that she was harassed during Ramadan, a period of religious fasting, and that it was this harassment that led her to become physically and mentally ill.

Based on the standards articulated above, and considering all of the circumstances, the Court finds that plaintiff has sufficiently plead a hostile work environment claim. Plaintiff need not show that the alleged behavior constitutes more than a "petty slight or trivial inconvenience." *Williams v NY City Hous. Auth.*, 61 AD3d 62, 79-80 (1st Dept 2009). Liberally construing the complaint and accepting all of the facts therein as true, plaintiff sufficiently pleads that the alleged conditions created a hostile work environment.

E. Age Discrimination Claims

HHC argues separately that plaintiff fails to state a claim for age discrimination for a failure to promote and a failure to train claim. To assert a failure to promote claim under either the City HRL or the State HRL, a plaintiff must allege: 1) she is a member of a protected class; 2) performed satisfactorily; 3) applied for and was denied a promotional opportunity for which she was qualified; and 4) the position remained open or the position was filled with a person not within plaintiff's protected classes. *See Pelepelin v The City of New York,* 2019 WL 2371880, at *4 (Sup Ct, NY County June 04, 2019), *affd in part, modified in part by* 189 AD3d 450 (1st Dept 2020).

With respect to plaintiff's failure to train claim, HHC argues that plaintiff fails to plead facts showing that eight of the positions for which she claims to have applied either remained open

or were filled with a person not within plaintiff's protected class. As to plaintiff's claim for failure to train due to age discrimination, HHC argues that her complaint lacks sufficient facts to show that any such failure would constitute an adverse employment action.

The Court declines to dismiss these claims at this early pleading state. Plaintiff plainly alleges that positions that she applied for were given to younger, less experienced employees, as discussed above. Plaintiff maintains that that she applied for 18 positions from November 2019 through the present and received interviews for only three of these positions, which were ultimately unsucessful. The positions were given to individuals outside of Plaintiff's protected classes and to individual less qualified than her. For each of the above promotions, plaintiff adequately pled that she was denied these positions, for which she was qualified, in favor of younger employees who were less experienced than her.

Moreover, plaintiff alleges that the failure to train resulted in adverse employment action in the form of denied promotions, negative performance evaluations, and transfers, which would make it plausible that such failure to train constituted a materially adverse change in the conditions of plaintiff's employment. *C.f. Henvill v Metro. Transp. Auth.*, 600 Fed. Appx. 38, 39 (2d Cir 2015). The denial of opportunities to enhance her skills and receive training, directly impacted plaintiff in her evaluations and her attempts at seeking promotions and transfers. Thus, plaintiff adequately pleads that HHC's actions constituted an adverse employment action. Therefore, the Court denies HHC's motion to dismiss plaintiff's claims for failure to promote and failure to train for age discrimination.

F. Conclusion

In sum, liberally construing the complaint, plaintiff has sufficiently pled her discrimination, retaliation, hostile work environment, failure to promote, and failure to train claims. However, any

of plaintiff's claims accruing prior to September 22, 2018, with the exception of plaintiff's hostile work environment claim, are dismissed as untimely, on consent of the parties.

Accordingly, it is hereby

ORDERED that defendant the New York City Health and Hospitals Corporation's motion to dismiss the complaint is denied in part and granted in part, as outlined below:

It is ORDERED that plaintiff's claims accruing prior to September 22, 2018, with the exception of plaintiff's hostile work environment claim, are dismissed as untimely; and it is further

ORDERED that all other parts of HHC's motion are denied in their entirety; and it is further

ORDERED that notice of entry of this decision and order shall be served and filed within 30 days of the date of this order; and it is further

ORDERED that defendant shall serve an answer to the complaint or otherwise respond thereto within 20 days from the date of said service.

The foregoing constitutes the decision and order of the Court.

1/11/2023
DATE

LESLIE A. STROTH, J.S.C.

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