SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM **PART** 05RCP

Justice

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HIBA ALMASRI,

Plaintiff,

- v -

CITY OF NEW YORK - N.Y.C. DEPARTMENT OF EDUCATION, CITY OF NEW YORK - N.Y.C. DEPARTMENT OF SOCIAL SERVICES,

Defendants.

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INDEX NO. 155062/2021

MOTION DATE 08/30/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion for DISMISSAL.

On May 24, 2021, plaintiff commenced this action against the Board of Education of the City School District of the City of New York, operating as the New York City Department of Education ("DOE"), and the New York City Department of Social Services ("DSS"), asserting claims under Administrative Code §8-107 of the New York City Human Rights Law ("NYCHRL"). Plaintiff's amended complaint asserts claims against the DOE for: (1) discrimination based on race; (2) hostile work environment based on race; (3) discrimination based on national origin; (4) hostile work environment based on national origin; (5) discrimination based on disability status; (6) hostile work environment based on disability; (7) failure to accommodate; and (8) retaliation. Plaintiff also asserts a claim against DSS for retaliation.

In August 2018, DOE hired plaintiff, an Arabic, Middle Eastern, woman as a business analyst (Id. at ¶¶5, 17). Plaintiff alleges that from the date she started her job, she was frequently disciplined by supervisors for speaking too loudly and acting in an "explosive" and "aggressive"

manner (Id. at ¶¶26, 41, 45). Between May and August 2019, plaintiff received three disciplinary letters for such behavior and was required to attend a communications training entitled, "Successful Workplace Communication" (Id. at ¶¶28, 40, 43). She was also reprimanded for wearing headphones covering both ears while other employees who were neither Arabic nor Middle Eastern were permitted to do so (Id. at ¶¶19-20).

During meetings with her supervisors and DOE Human Resources personnel, plaintiff expressed that she believed this discipline was unwarranted and was due solely to the fact that she was Arabic and Middle Eastern (Id. at ¶¶37, 52). Plaintiff also alleges, that at "all times relevant to the complaint," her supervisor, Matthew Liebowitz, would "[make] fun of Arabic names, acting as if he was clearing his throat, and pretending to hurt himself while trying to pronounce words like 'Tariq'" (Id. at ¶57). Plaintiff's colleagues and supervisors mocked her frustration with this frequent criticism and discipline (Id. at ¶65).

As a result of this frequent criticism and discipline, plaintiff's psychological health suffered leading to, inter alia, elevated heart rate, high blood pressure, headaches and shortness of breath (Id. at ¶32). Liebowitz also allegedly engaged in behavior intended to trigger plaintiff's anxiety such as ignoring e-mails, refusing to answer her calls, and then criticizing her for acting without conferring with him (Id. at ¶71). On June 17, 2019, when plaintiff telephoned her doctor from her desk, her supervisor made comments to her coworkers about her "emotional issues" (Id. at ¶67).

On or about June 25, 2019, plaintiff sought permission to move her desk away from her team or be transferred and to extend her hours so she could make up for doctors' appointments (Id. at ¶69). According to plaintiff, "[t]he DOE did nothing to even try to accommodate plaintiff's request and in fact scoffed at her for asking, belittling her and treating her illness as an exaggeration" (Id. at ¶70). Plaintiff's supervisors then made plaintiff "jump through hoops to take

her rightful sick time and submit doctors' note[s]" (Id. at ¶71). On July 11, 2019, plaintiff was "forced" to sign a six month and twenty-three day extension of her probationary period, as a consequence of taking time off for her illness (Id. at ¶¶73-74). Plaintiff asserts that other DOE employees who were similarly situated to her but were not Arabic, Middle Eastern, or disabled, were not required to extend their probationary period by the same duration (Id. at ¶75).

On or about July 22, 2019, plaintiff was diagnosed with adjustment disorder, depression, and anxiety (Id. at ¶63). Plaintiff's doctor informed the DOE of her diagnosis on that date (Id. at ¶76). In response, plaintiff's supervisors required that she complete an onerous amount of sick leave documentation for her weekly doctor's appointment and required that she provide proof of these doctor's appointments immediately (Id. at ¶¶77-78). The Complaint implies, without expressly stating, that these requirements were beyond the norm.

On or about September 11, 2019, plaintiff submitted an "Accommodation Request" form seeking excused leave for future doctors' appointments (Id. at ¶79). Plaintiff alleges that, in response, "[t]he DOE did not engage in an interactive process concerning [her] reasonable accommodation request" but instead "made it even more difficult for her to accurately record sick days and request[ed] unnecessary amounts of information and doctor's notes" (Id. at ¶¶80-81).

On or about October 4, 2019, plaintiff filed a complaint against the DOE with the Office of Equal Opportunity alleging that she was being discriminated against based on her ethnicity and national origin. On or about February 11, 2020, DOE terminated plaintiff's employment by letter, stating that she was being terminated for unprofessional volume during conversations, as well as acting combative, confrontational, and aggressive during meetings with Liebowitz on September 24, 2019 and November 13, 2019 (Id. at ¶87).

After her termination, plaintiff applied for unemployment benefits (Id. at ¶92). The DOE challenged this application, in an act that plaintiff alleges was retaliation for her EEO complaint (Id. at ¶93). Plaintiff was eventually granted unemployment benefits, however (Id. at ¶96). In 2021, plaintiff applied for a position as a Computer Associate with the DSS (Id. at ¶97). Plaintiff was not hired for this position which, she maintains, was due to her EEO complaint against the DOE (Id. at ¶¶97-99).

Defendants now move, pursuant to CPLR §§3211(a)(5) and (7), to dismiss plaintiff's hostile work environment, failure to accommodate, and discrimination claims against DOE, as well as her retaliation claim against DSS. Defendants argue that any allegations pertinent to plaintiff's hostile work environment and failure to accommodate claims are untimely and barred by Education Law §§3813(1) and (2-b). Defendants further argue that plaintiff's discrimination claims against DOE and retaliation claim against DSS must be dismissed as the complaint fails to allege facts supporting these claims. Plaintiff opposes the motion, arguing that the hostile work environment and failure to accommodate claims were timely asserted and are, in any event, timely under the continuing violation doctrine, and that her discrimination claims against DOE and her retaliation claim against DSS are adequately pleaded.

DISCUSSION

That branch of defendants' motion, pursuant to CPLR §3211(a)(5) to dismiss plaintiff's claims for hostile work environment and failure to accommodate is granted—all of the factual allegations potentially relevant to plaintiff's hostile work environment claim or failure to accommodate claim are untimely under Education Law §§3813(1) and (2-b).

Education Law §3813(1) provides that, as a prerequisite to any action against a school district, plaintiff must serve a notice of claim within three months after the accrual of that claim.

As plaintiff served her notice of claim upon defendants on May 18, 2020 plaintiff would, ordinarily, be barred from asserting any claims that accrued prior to February 18, 2020. However, in light of Executive Order 202.8's toll of the time for the filing of any "legal action, notice, motion, or other process or proceeding" from March 20, 2020 through November 3, 2020 (Executive Order [A. Cuomo] No. 202.8 [9 NYCRR 8.202.8] et seq), plaintiff's notice of claim serves as a notice for claims accruing on or after December 20, 2019.

Education Law § 3813(2-b), in turn, provides that any action against the DOE must be commenced within a year after that cause of action arose (Education Law § 3813[2-b]; see also Amorosi v S. Colonie Ind. Cent. School Dist., 9 NY3d 367, 373 [2007]). As plaintiff commenced this action on May 24, 2021, she would normally be barred from asserting any claims that accrued prior to May 24, 2020. In light of Executive Order §202.8, plaintiff's claims stemming from acts taken on or after October 8, 2019 are timely. Ultimately, none of the complaint's post-October 8, 2019 allegations support a hostile work environment or failure to accommodate claim.

To state a hostile work environment claim under the NYCHRL plaintiff must allege that 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 citations omitted], lv to appeal denied, 36 NY3d 904 [2021]). This treatment must exceed "what a reasonable victim of discrimination would consider petty slights and trivial inconveniences" (Id.). None of the post-October 8, 2019 events alleged in the complaint satisfy any of these elements: the January 2020 denial of plaintiff's request to attend a free training on effective email writing is, at most, a slight or trivial inconvenience. Plaintiff's termination on February 11, 2020 is relevant to her retaliation claim against DOE rather than her hostile work environment claims, while DOE's challenge to

plaintiff's application for unemployment insurance benefits and DSS's failure to hire plaintiff are irrelevant as they occurred after she was no longer a DOE employee.

Neither do these allegations support a failure to accommodate claim under the NYCHRL, which requires that plaintiff plead that: (1) she has a disability under the relevant statute; (2) the employer had notice of her disability; (3) with reasonable accommodations, plaintiff could have performed the essential functions of her job; and (4) the employer refused to make such accommodations (See Miloscia v B.R. Guest Holdings LLC, 33 Misc3d 466 [Sup Ct, New York County, 2011]; Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881, 885 [2013]). Notably, no request for accommodation was made within the statute of limitations. Plaintiff's argument that DOE's ongoing failure to engage in an interactive process after her September 11, 2019 accommodation request extends the accrual of this claim into the statute of limitations period is unavailing (See e.g., Lowe v New York City Health and Hosps. Corp., 2008 NY Slip Op 30121[U] [Sup Ct, NY County 2008] ["According to plaintiff's own testimony, she made complaints to defendant Hall-Hawker with respect to her physical limitations in October or November of 2001, in July of 2002, and on August 14, 2002. As a result, even if the Court viewed such complaints as proposals for a reasonable accommodation, all such proposals were made outside the limitations period"]; see also Williams v New York City Health & Hosps. Corp., 44 Misc 3d 1231(A) [Sup Ct, Bronx County 2014] [plaintiff's accommodation claim accrued in 2007 or 2008, at the point his work schedule was altered]).

Contrary to plaintiff's argument in opposition, the continuing violation doctrine does not apply here. This doctrine "provides a narrow exception to the … [statute of] limitations period 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" (Kuzminski v New York State Div. of Human Rights, 2013 NY Slip Op 31416[U] [Sup Ct, NY County 2013] [internal citations and quotations omitted]). In this case, these "later incidents do not evince a consistent pattern warranting application of the continuing violation doctrine to the earlier time-barred conduct" Pichardo v Carmine's Broadway Feast Inc., 199 AD3d 593 [1st Dept 2021] [internal citations omitted]).

The Court now turns to the branch of DOE's motion, pursuant to CPLR §3211(a)(7), to dismiss plaintiff's employment discrimination claims. To state a claim for discrimination under the NYCHRL, plaintiff must allege that: (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was adversely or differently treated based on her protected characteristic in a way that disadvantaged her; and (4) such treatment occurred under circumstances giving rise to an inference of discrimination (See e.g., Hosking v Mem. Sloan-Kettering Cancer Ctr., 186 AD3d 58, 62 [1st Dept 2020]; see also Harrington v City of New York, 157 AD3d 582 [1st Dept 2018]).

Defendants do not dispute that plaintiff is a member of a protected class based on her race, nationality, and disability status. Neither do defendants dispute that her termination constitutes a disadvantageous treatment under the NYCHRL. Rather, they argue that this claim must be dismissed because plaintiff has not alleged facts permitting an inference of discriminatory intent on the part of defendants. The Court disagrees. Under the liberal pleading standards for NYCHRL claims (See Petit v Dept. of Educ. of City of New York, 177 AD3d 402 [1st Dept 2019] [to state NYCHRL claim, allegations need only give defendant "fair notice" of the nature of plaintiff's claims]), the complaint's allegations that plaintiff faced frequent criticism and discipline for conduct that colleagues who were not Arabic or Middle Eastern did not face and was denied

privileges that other colleagues received are, taken together with her allegation that supervisor made mocking comment about Arabic names, is sufficient to permit an inference of discriminatory intent[1] (See Harrington v City of New York, 157 AD3d 582, 584-85 [1st Dept 2018]; see also Pease v The City of New York, 2022 NY Slip Op 32728[U], 19-20 [Sup Ct, NY County 2022]). Accordingly, defendants' motion to dismiss plaintiff's employment discrimination claims is denied.

Finally, that branch of defendants' motion to dismiss plaintiff's retaliation claim against DSS is granted. To state a retaliation claim under the NYCHRL, plaintiff must allege that: (1) plaintiff participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged her; and (3) a causal connection exists between the protected activity and the adverse action (Fletcher v Dakota, Inc., 99 AD3d 43, 51 [1st Dept 2012] citing Albunio v City of New York, 67 AD3d 407, 413 [2009]). In this context, "protected activity" means "actions taken to protest or oppose statutorily prohibited discrimination" (Thomas v Mintz, 60 Misc 3d 1218(A) [Sup Ct, NY County 2018] [internal citations omitted], affd as mod, 182 AD3d 490 [1st Dept 2020]). While plaintiff has pled that she engaged in protected activity in filing of a complaint with the EEO on October 4, 2019, she has not alleged any facts indicating a causal connection between this protected activity and DSS's rejection of her application for a position as a computer associate. "A causal connection may be established either indirectly, by showing that the adverse closely followed in time the protected activity, or directly, through evidence of retaliatory animus, such as verbal or written remarks" (Thomas v Mintz, 60 Misc 3d 1218(A) [Sup Ct, NY County 2018], affd as mod, 182 AD3d 490 [1st Dept 2020]; see also Albunio v City of New York, 67 AD3d 407, 408

[1] To the extent that these factual allegations occurred beyond the statute of limitations, such conduct may nevertheless be considered in determining discriminatory intent (See e.g., Miller v City Univ. of New York, 66 Misc 3d 1227(A) [Sup Ct, NY County 2019]).

[1st Dept 2009], affd, 16 NY3d 472 [2011]). Here, the alleged actions that disadvantaged plaintiff occurred well over a year after plaintiff's EEO complaint on October 4, 2019. As such, these events are not sufficiently close in time to establish a causal nexus based solely on temporal proximity (See Baldwin v Cablevision Sys. Corp., 65 AD3d 961, 967 [1st Dept 2009] [four-month gap between protected activity and retaliatory act too distant to establish causal connection]; Bantamoi v St. Barnabas Hosp., 146 AD3d 420, 420 [1st Dept 2017] [five-month gap too distant to establish causal connection]). Accordingly, plaintiff's retaliation claim against DSS is dismissed (See Brown v City of New York, 185 AD3d 410, 410-11 [1st Dept 2020]).

Accordingly, it is

ORDERED that defendants' motion is granted, in part, and plaintiff's second, fourth, sixth, seventh, and ninth causes of action in her First Amended Complaint are hereby dismissed; and it is further

ORDERED that counsel for defendants are directed to serve a copy of this decision and order, with notice of entry, upon plaintiff and as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

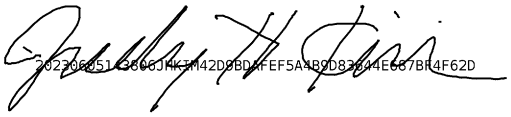
ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that upon proof of service of a copy of this order with notice of entry upon all parties, the Clerk of the Court is directed to enter judgment dismissing the complaint in its entirety as against defendant the New York City Department of Social Services; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the Court bear the amended caption; and it is further

ORDERED that the action is severed and continued under this index number with respect to the remaining defendant, the New York City Department of Education.

This constitutes the decision and order of the Court.



6/5/2023
DATE

HON. JUDY H. KIM, J.S.C.

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