SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART 52**

Justice

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MERIH ANIL,

Plaintiff,

- v -

THE CITY OF NEW YORK, STEVEN BANKS AS THE FORMER COMMISSIONER THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES HUMAN RESOURCES ADMINISTRATION, DENITA WILLIAMS, KRISTEN MITCHELL, MARTHA KENTON,

Defendant.

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INDEX NO. 157736/202

MOTION DATE 03/17/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 71

were read on this motion to/for DISMISS.

Upon the foregoing documents, after oral argument, it is

The defendants move, pursuant to CPLR 3211(a)(7), to dismiss the First Amended Complaint ("Complaint") for failure to state a cause of action. The plaintiff opposes the motion and requests that if the motion is granted, she be granted another opportunity to replead.

Plaintiff Merih Anil, an employee with the New York City Department of Social Services/Human Resources Administration ("DSS"), commenced this action against Defendants the City of New York ("City"), Steven Banks, Denita Williams, Kristen Mitchell, and Martha Kenton alleging that Defendants discriminated and retaliated against her because of her sex, age, and national origin in violation of the New York State Human Rights Law, New York Executive Law § 296 ("State HRL"), and the New York City Human Rights Law, New York City Administrative Code § 8-107 ("City HRL").

Factual allegations

Plaintiff is a 55-year-old woman who is originally from Turkey who received her Ph.D. from the City University of New York. She is a non-native English speaker and non-practicing Muslim. After completing her Ph.D., she began working for the DSS on or about May 28, 2007. Plaintiff contends that from the time she was hired and for approximately two years, she effectively performed the work of two positions, one at the n Associate Staff Analyst ("ASA") position in which she was employed, and one at the higher Special Projects Manager level for which she did not receive any additional compensation. On July 12, 2012, Plaintiff was appointed to a higher-level title of Administrative Staff Analyst, a promotion without a pay increase. However, in September of 2016, she was demoted back to the ASA title.

A core element of the complaint are plaintiff's allegations that she was repeatedly and continuously denied promotions. Specifically, she states that she was denied promotions in February and September of 2016, and denied promotions between March 2017 and March 2022, she specifically states that she was denied civil service promotions to the "Admin. Staff Analysts" positions which came up on the list of available positions on 9/17/2018, 11/7/2018, 7/17/2019, 9/27/2019, 1/7/2020, 11/2/2020, 3/4/2021 and 11/29/2021. Plaintiff alleges that her manager has stated a preference for hiring younger workers – millennials – and that the promotions have been awarded to younger workers, who often have less experience. Plaintiff further contends that defendant Kristen Mitchell stopped considering plaintiff for promotions when she learned that plaintiff had filed Equal Employment Opportunity ("EEO") reports alleging sexual harassment and gender discrimination by defendant Charles Winkler. Plaintiff

also alleges that there were no annual performance evaluations of her job performance from July 2016 to September 2019, and that performance evaluations were performed selectively to advance supervisors' favorite employees.

Dr. Anil contends that in retaliation for filing an EEO complaint against him, Mr. Winkler changed plaintiff's weekly check-ins from Thursdays to Tuesdays even though he knew that plaintiff had every other Tuesday off as her regular day off. Likewise, plaintiff alleges that in March 2020, Martha Kenton moved plaintiff's weekly team meeting from Mondays to Tuesdays, and that when the meetings were missed because they were on plaintiff's regular day off, Ms. Kenton would humiliate plaintiff in the presence of the entire team.

Dr. Anil further contends that defendant Steven Banks, who was the Agency Head at the time, failed to fully and fairly investigate the EEO reports plaintiff filed on October 11, 2019, and August 31, 2020. Plaintiff additionally complains that she was denied leave requests in January 2013 and Summer of 2015; that she was pulled out of Hurricane Ida volunteer list in September 2021 because she was needed in her unit. Plaintiff also complains that at various times she has been assigned work outside of her title standards and been assigned an excessive workload.

As evidence of discriminatory animus, plaintiff alleges Martha Kenton, the Executive Director of DSS, has stated "no offense, but I need more millennials," made remarks commenting that an employee at a federal agency that they work with is "sharp given his age," and has targeted the plaintiff at staff meetings by questioning plaintiff's knowledge of and proficiency with the English language. Plaintiff further contends that of two temporary contract employees who were hired together, a full-time position was

only offered to one and that the second, who would have been the second employee in the CoC unit with a Muslim background, was not offered a full-time position.

Plaintiff contends that she was continuously treated in a discriminatory manner and less well than co-workers with similar or lesser educational backgrounds and work experience due to her differing national origin, gender, religion, and age.

Standard on a motion to dismiss.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, accord plaintiffs the benefit of every favorable inference, and determine whether the facts alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Plaintiff has stated claims under the City and State Human Rights Laws.

State Human Rights Law

A plaintiff alleging discrimination in employment has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that (1) they are a member of a protected class; (2) they were qualified to hold the position; (3) they were terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *see also McDonnell Douglas Corp. v Green*, 411 US 792, 793, 93 S Ct 1817, 1820, 36 L Ed 2d 668 [1973], *holding mod by Hazen Paper Co. v Biggins*, 507 US

604, 113 S Ct 1701, 123 L Ed 2d 338 [1993]). New York courts look to federal law when determining claims under the New York State Human Rights Law (*McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc 2d 795, 802 [Sup Ct New York County 1997]). However, the provisions of the State HRL must be "construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed" (Executive Law § 300).

Plaintiff has adequately plead that she is a member of a protected class – she claims that she is discriminated against on the basis of her gender, age, national origin, and religion. Likewise, plaintiff has set forth allegations that she is qualified for the position for which she has been denied promotion in that she passed the civil service exam for the position, has a Ph.D., and has been performing the duties of the position.

Plaintiff has sufficiently plead that she suffered an adverse employment action in the form of failure to promote. "[F]ailure to promote falls within the core activities encompassed by the term 'adverse actions'" (*Treglia v Town of Manlius*, 313 F3d 713, 720 [2d Cir 2002]; *see also Santiago-Mendez v City of New York*, 136 AD3d 428, 429 [1st Dept 2016]).

For pleading purposes, plaintiff has set forth sufficient allegations that the alleged discriminatory practice occurred under circumstances giving rise to an inference of age discrimination. As set forth hereinabove, plaintiff's manager has allegedly stated a preference for hiring millennials. Plaintiff has further alleged that many younger, less experienced, co-workers have been promoted to permanent positions while plaintiff has

been denied promotions. This suffices, for pleading purposes, to state a claim for age discrimination.

Furthermore, plaintiff has sufficiently plead retaliation. Dr. Anil indicates that she filed EEO complaints against her supervisor Charles Winkler and that defendant Kenton stopped considering plaintiff for promotion after learning of the EEO complaints. Accordingly, for failures to promote occurring after the filing of the October 11, 2019, EEO complaint, plaintiff has sufficiently plead retaliation.

City Human Rights Law

Claims under the New York City Human Rights Law must be analyzed separately and independently from claims under the federal and New York State Human Rights Laws (*Russell v New York Univ.*, 204 AD3d 577, 578 [1st Dept 2022]). The City Human Rights Law explicitly requires an independent liberal construction analysis in all circumstances, an analysis that must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's uniquely broad and remedial purposes, which go beyond those of counterpart State or federal civil rights laws (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 [1st Dept 2011]). The City HRL must be construed broadly in favor of discrimination plaintiffs (*see Albunio v City of New York*, 16 NY3d 472, 477 [2011]). It is proper to dismiss a claim under the City HRL only if the defendant demonstrates that it is entitled to summary judgment under both the *McDonnell Douglas* and mixed motive frameworks (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]).

As set forth herein above, the plaintiff has sufficiently plead claims under the State HRL. Accordingly, those claims are also sufficiently plead under the more liberal City HRL.

Plaintiff has failed to adequately plead discrimination on the basis of religion, national origin, or gender.

Plaintiff points to a single incident, on November 4, 2022, in which plaintiff was asked "do you know what Gaelic is?" as an indication that she received disparate treatment on the basis of her foreign accent. However, this single incident, which occurred after plaintiff commenced the instant lawsuit, does not support her claim that she has been discriminated against on the basis of her linguistic characteristics, and thereby her national origin.[1]

Plaintiff has not made factual allegations sufficient to allege discrimination based upon her religious beliefs. The sole allegation in the Complaint regarding religious beliefs is that in June of 2018, there were two temporary contract employees who were hired together, one of whom was Muslim, and that only the non-Muslim individual was offered a full-time position. However, there is no indication that these two individuals were otherwise similarly situated, had similar performance in their jobs, that the Muslim temporary employee was interested in the full-time position, or that bias against Muslims was a factor in deciding whom to offer a full-time position to. Accordingly,

[1] "[D]isparate treatment on the basis of a foreign accent is evidence of discrimination based on race or national origin" (*St. Jean Jeudy v City of New York*, 142 AD3d 821, 823 [1st Dept 2016]).

plaintiff has not sufficiently plead that religious bias was a basis for any discriminatory conduct.

Plaintiff's First Amended Complaint does not state any facts to support a claim for discrimination on the basis of her gender. Although plaintiff does claim that she made EEO reports complaining about sexual harassment, the factual predicates for said EEO reports are not specified in the complaint.

Accordingly, the plaintiff's claims should be dismissed to the extent that they are based on purported discrimination on the basis of religion, national origin, or gender.

Certain of Plaintiff's claims are time barred.

Statute of Limitations

The statute of limitations for claims under both the State HRL and City HRL is three years (*see* CPLR 214 [2]; Administrative Code of City of NY § 8-502 [d]; *Santiago-Mendez v City of New York*, 136 AD3d 428 [1st Dept 2016]). The instant action was commenced on or about September 10, 2022. Therefore, to the extent that plaintiff's claims regard discrete acts occurring before September 10, 2019, they are facially untimely (*see St. Jean Jeudy v City of New York*, 142 AD3d 821, 822 [1st Dept 2016]; *see also Santiago-Mendez v City of New York*, 136 AD3d 428 [1st Dept 2016]). However, to the extent that any of the complained of acts are part of a single continuing pattern of unlawful conduct extending into the period after September 10, 2019, they would not be time barred (*see Ferraro v New York City Dept. of Educ.*, 115 AD3d 497, 497-98 [1st Dept 2014]). Furthermore, the plaintiff is not precluded from using the prior acts as background evidence in support of her timely claims (*see Petit v Dept. of Educ. of City of New York*, 177 AD3d 402, 404 [1st Dept 2019]; *Natl. R.R. Passenger Corp. v*

Morgan, 536 US 101, 113, 122 S Ct 2061, 2072, 153 L Ed 2d 106 [2002]). "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act" (*Natl. R.R. Passenger Corp. v Morgan*, 536 US 101, 113, 122 S Ct 2061, 2072, 153 L Ed 2d 106 [2002]).

Plaintiff's claims for failure to promote are not time barred.

Generally, failure to promote is considered a discreet discriminatory act (*see Natl. R.R. Passenger Corp. v Morgan*, 536 US 101, 113, 122 S Ct 2061, 2072, 153 L Ed 2d 106 [2002] ["Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice"]). However, where discriminatory conduce within the limitations period is sufficiently similar to the alleged conduct without the limitations period to justify the conclusion that both were part of a single discriminatory practice, then the entire claim is timely under the continuing violations doctrine (*see Walsh v Covenant House*, 244 AD2d 214, 215 [1st Dept 1997]). A standing practice of refusing to promote individuals based on membership in a protected class, invocation of such practice against the plaintiff, and a resulting adverse employment action may suffice to make out a continuing pattern of unlawful conduct starting from the first promotion rejection extending into the limitations period immediately preceding the filing of the complaint (*see St. Jean Jeudy v City of New York*, 142 AD3d 821, 823 [1st Dept 2016]). "[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" (*Cornwell v Robinson*, 23 F3d 694, 704 [2d Cir 1994]).

In the instant matter, giving the plaintiff every favorable inference, at this early stage of litigation, Dr. Anil has alleged repeated and continuous failures to promote her which are sufficient to plead a continuing violation. In the entire time since she was hired by the DSS in 2007, her only promotion was in 2012, and that promotion was in title only, and did not include a pay increase. Plaintiff passed the civil service exam for Administrative Staff Analyst and requested appointment when her number came up in 2016. In particular, plaintiff indicates that she was denied appointment to the Admin. Staff Analysts positions offered from the list on 9/17/2018, 11/7/2018, 7/17/2019, 9/27/2019, 1/7/2020, 11/2/2020, 3/4/2021 and 11/29/2021. Plaintiff alleges that many younger, less experienced, co-workers were promoted to the higher-level, permanent positions that plaintiff was denied. Plaintiff has further alleged that her manager has expressed a preference for hiring millennials, which is some indication of discriminatory bias based on age. This is sufficient to allege, at the pleading stage, a continuing pattern of unlawful conduct starting from the first promotion rejection extending into the limitations period immediately preceding the filing of the complaint (*see St. Jean Jeudy v City of New York*, 142 AD3d 821, 823 [1st Dept 2016]). Accordingly, plaintiff's claims under the City and State HRLs for failure to promote are not time barred.

Plaintiff's other claims for acts occurring before September 10, 2019, are time barred.

The remainder of plaintiff's complaints regarding actions which occurred prior to September 10, 2019, are for discrete actions such as denying leave and failing to

conduct performance reviews, and do not meet the standard to constitute continuing violations. Therefore, these claims are barred by the statute of limitations and dismissed.

Plaintiff's claims under the State Constitution are dismissed.

Plaintiff is alleging that she suffered discrimination and adverse treatment by the defendants, violating her equal protection rights, pursuant to Article 1, § 11 of the New York State Constitution. Article I, § 11 of the New York State Constitution provides that, "[n]o person shall be denied the equal protection of the law of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by a firm, corporation or institution, or by the state or any agency or subdivision of this state".

The Court of Appeals has held that a cause of action to recover damages may be asserted against the State for the violation of the State Constitution (*Brown v State*, 89 NY2d 172, 188 [1996]). However, the private right of action for a constitutional tort is available only where the plaintiff has no alternative remedy (*Sullivan v City of New York*, 17 CIV. 3779 (KPF), 2018 WL 3368706, at *20 [SDNY July 10, 2018]). An action for damages under common law is considered an adequate alternative remedy that precludes the assertion of a claim for damages under the New York State Constitution (*Biswas v City of New York*, 973 F Supp 2d 504, 522 [SDNY 2013]). Here, plaintiff had alternative remedies available under both state and common law and is therefore unable to bring a constitutional tort claim. Therefore, the New York State Constitution claims are dismissed.

Plaintiff's cross-motion for leave to amend the complaint

To the extent that the plaintiff's opposition to the motion seeks leave to file a second amended complaint, such request is denied without prejudice. Pursuant to CPLR § 3025(b), any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading. The plaintiff did not include a proposed amended or supplemental pleading.

Conclusion

For the reasons set forth herein above, it is hereby

ORDERED that the motion to dismiss is granted to the extent that plaintiff's claims for national origin and gender discrimination, as well as plaintiff's claims under the New York State Constitution are dismissed and the first, second, and seventh causes of action of the complaint are dismissed; and it is further

ORDERED that the portion of defendants' motion to dismiss which sought dismissal of plaintiff's claims which accrued prior to September 10, 2019, is denied as to the age discrimination claims and/or retaliation claims for failure to promote, and is otherwise granted; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 103, 80Centre Street, New York, New York, on January 17, 2024 , at 2:00 PM.

This constitutes the decision and order of the court.

10/23/2023
DATE

NICHOLAS W. MOYNE, 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