SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JEANINE R. JOHNSON** **PART** **52M**

Justice

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JANE B. MODELL ROSEN,

Plaintiff,

- v -

N.Y.C. DEPARTMENT OF EDUCATION, MELITINA HERNANDEZ, JENNIFER JOHNSON, SEAN DUNNING, BRITTANY VELAZQUEZ, and JOSHUA FURNELL

Defendant.

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INDEX NO. 158762/2023

MOTION DATE 03/06/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31

were read on this motion to/for DISMISSAL.

This is an action brought by Plaintiff Jane B. Modell Rosen (Rosen), a Special Education Teacher, against defendants New York City Department of Education (DOE), Melitina Hernandez (Hernandez), who was the Principal of P.S. 123, and Assistant Principals Jennifer Johnson (Johnson), Sean Dunning (Dunning), Brittany Velazquez (Velazquez), and Joshua Furnell (Furnell), (collectively DOE defendants), who allegedly engaged in age-based discrimination and created a hostile work environment in violation of the New York City Human Rights Law (NYCHRL).

In July 2018, Plaintiff had commenced a federal action against the same defendants asserting a cause of action under the (i) Age Discrimination in Employment Act, 29 U.S.C § 623 (ADEA), (ii) Americans with Disabilities Act, 42 U.S.C. § 12101 (ADA), (iii) New York State Executive Law § 290 (NYSHRL), (iv) and Title 8 of the New York City Administrative Code (NYCHRL). In the federal action, by order dated March 27, 2023, United States District Judge

Analisa Torres granted defendants' motion for summary judgment on those of Plaintiff's claims that remained following a decision rendered on August 27, 2019. These included Rosen's ADEA claim against the DOE, and Rosen's NYSHRL claim against all defendants. The District Court declined to exercise supplemental jurisdiction over Plaintiff's remaining NYCHRL claim. On or about September 5, 2023, Plaintiff commenced the instant action, alleging essentially the same facts as pled in the federal action, now arguing violation under NYCHRL. Defendants-DOE, Hernandez, Dunning and Furnell ("Movants") are represented by counsel and have filed the instant motion to dismiss. Johnson and Velazquez are not represented. Plaintiff opposes the motion and filed a cross-motion seeking to amend the complaint to include additional facts.

FACTUAL BACKROUND

The complaint dated September 5, 2023, alleges that Rosen, a 76-year-old woman, was a teacher with DOE for 38 years prior to being forced to retire by way of constructive discharge. Plaintiff has been licensed with the State of New York since 1981, holding a Special Education license. She was a special education teacher from when she was first appointed to the DOE until her retirement on May 8, 2017. Rosen had worked as an Individualized Education Plan (IEP) [1] teacher for many years, including prior to 2015. (NYSCEF Doc. No. 2 ¶¶ 11-14,16).

In August 2015, after an interview with Hernandez, Rosen was hired by the DOE as an IEP teacher at P.S. 123. Rosen alleges that when she was hired, P.S. 123 was out of compliance with the IEP legal requirements. Rosen explains, at the time, classroom teachers were individually responsible for drafting their own student's IEPs but failed to do so correctly and/or timely. Rosen explains that her assignment was to monitor the IEP compliance guidelines with respect to the Federal and New York State Laws concerning students with disabilities. She alleges that her efforts

[1] An IEP is a legal document developed for a child with special education needs, as is required under the Individual with Disabilities Education Improvement Act. (NYSCEF Doc. No. 2 ¶ 15).

to remedy the issue were ultimately "thwarted" by the defendants, principally, Hernandez. (*id.*, ¶¶ 18-23).

Furthermore, Rosen alleges that the lack of compliance with the IEP requirements was used as a pretextual excuse to discriminate against Rosen's age. Hernandez allegedly replaced Rosen with a younger colleague, Ms. Malverty (Malverty), whom Rosen was asked to mentor and train. Rosen alleges that she was subject to harassment, belittling, pitting of teachers and staff against her, baseless attacks from the DOE defendants, and that she was assigned tasks that were not within her job description as an IEP teacher. Collectively, she alleges that these conditions made her work-place intolerable. (*id.*, ¶¶ 24-26, 50).

The Court lists in relevant part, a timeline of alleged acts, including approximate dates, made within the complaint. (NYSCEF Doc. No. 2):

1. *August 2015* - Rosen was hired. She did not receive disciplinary letters throughout her first year at P.S.123. (*id.*, ¶ 38).

2. *March 2016* - **Hernandez** asked Rosen to write all outstanding IEPs for the students at P.S. 123 going forward. The individual classroom teachers were required to submit forms to Rosen so that she could complete this task, but she could not do so since the individual teachers did not complete their forms. (*id.*, ¶¶ 31, 32).

3. *Spring 2016*- Dozens of IEPs were registered in the SESIS system as out of compliance for P.S. 123. (*id.*, ¶ 33).

4. *May 2016* - **Johnson** publicly and during a meeting in Hernandez's office screamed at Rosen, baselessly calling her a "liar." (*id.*, ¶ 27).

5. *May 2016* - **Dunning** sent an email to the special education teachers offering overtime pay, for weekend work, to work on the out of compliance IEPs. Rosen was excluded from the email. Rosen alleges this was due to discriminatory animus held by Dunning toward older people. Rosen stated that this caused her to feel humiliated and belittled in front of her colleagues and caused her colleagues to question her competence. It also kept Rosen from earning additional pay which the younger teachers were offered. (*id.*, ¶ 29).

6. *2015-2016 School Year* - Rosen continued to inform **Hernandez** that the classroom teachers were not completing and finalizing proper IEPs, Hernandez allegedly ignored the emails. (*id.*, ¶ 30).

7. *2015-2016 School Year* - Rosen alleges **Hernandez** wrote derogatory and divisive remarks about Rosen to Rosen's peers. (*id.*, ¶ 28).

8. *2015-2016 School Year* - Rosen worked 4 days overtime "per session" per week, but **Hernandez** refused to compensate her for it. Rosen filed a salary grievance. Rosen alleges in retaliation of the salary grievance, **Hernandez** assigned Rosen to oversee an 8th grade afterschool class, once a week. Rosen alleges the 8th grade included dangerous and out of control student behavior. (*id.*, ¶¶ 37, 49).

9. *2015-2016 End of School Year* - Rosen alleges that **Hernandez** wrongfully and pretextually blamed Rosen for the large number of out of compliance IEPs. Rosen alleges that Hernandez continued her harassing pattern when Hernandez made notations on Rosen's end of year performance for the 2015-2016 school year, that read "communication and completion of IEPs not complete in timely manner and lack of feedback to families in the process." Rosen filed a rating sheet grievance hearing in connection with the comments, and Hernandez was ordered to remove the comments. (*id.*, ¶¶ 34-36).

10. *2015-2016 Summer*- DOE sent **Hernandez** information on modifying IEP teacher's job requirements. Hernandez did not share the information with Rosen, allegedly to make it more difficult for her to perform her job and justify replacing her. (*id.*, ¶ 39).

11. *2016-2017 Beginning of School Year* - **Hernandez** screamed at Rosen in front of colleagues and peers. (*id.*, ¶ 43).

12. *2016-2017-Beginning of School Year* - Assistant Principal **Furnell** was hired. Hernandez told Rosen that Furnell would supervise her. Rosen alleges Furnell began to "bombard" Rosen with clerical work, which was not a part of her job description. Rosen alleges this was to sabotage her and interfere with her responsibilities as an IEP teacher. (*id.*, ¶¶ 42, 44).

13. *2016-2017 School Year* - Assistant Principal **Velazquez** took pictures of Rosen's computer screen, without her consent, allegedly to harass her. This caused Rosen emotional distress. (*id.*, ¶ 46).

14. *2016-2017 School Year* - Rosen was regularly summoned to **Hernandez's** office to defend herself from baseless and pretextual allegations of misconduct. (*id.*, ¶ 45).

15. *2016-2017 School Year* - Rosen alleges **Hernandez** wrongfully penalized her by docking her pay in connection with her attendance at a DOE required professional development seminar, for the new revised IEP teacher position for the 2016-2017 school year. Furthermore, Rosen alleges that she applied for 4 days of extended-day overtime "per session" pay as she did the prior school year, but Hernandez wrongfully denied her request due to discriminatory animus toward Rosen. Rosen again filed a salary grievance. (*id.*, ¶¶ 40, 47).

16. *2016-2017 Summer*- DOE sent **Hernandez** information on modifying IEP teacher's job requirements. Hernandez again did not share information with Rosen, allegedly to make it more difficult for her to perform her job and justify replacing her. (*id.*, ¶ 39).

17. *August 2016* - **Hernandez** asked Rosen if she would return to the classroom teaching position as a grade level teacher. Rosen alleges **Hernandez** did so systematically, so that she could be replaced with Malverty. (*id.*, ¶¶ 41, 50).

18. *2016-2017 School Year/Summer* - Rosen alleges that there were several occasions during the school year and during the summer proceeding it, where she was forcibly removed from P.S. 123, and that **Hernandez** provided false and pretextual reasons to justify the removals. Rosen alleges Hernandez had her physically removed to cause her emotional distress, and to compel her to resign. Rosen states that in one instance, **Furnell** escorted her out of the building. (*id.*, ¶ 51).

19. *April 17,2017*- Rosen had surgery and was briefly absent from work. (*id.*, ¶ 52).

20. *May 1, 2017* - Rosen returned to work and discovered the files that she had created for the special education students at P.S.123 were removed from her office and placed in **Velazquez's** office. Rosen alleges the files were removed to demean and negate her position as the IEP teacher and make it difficult for her to perform. (*id.*, ¶ 53).

21. *May 8, 2017* -Due to the ongoing harassment, belittling and intimidation, Rosen was unable continue at her employment and retired due to alleged constructive discharge. (*id.*, ¶ 54).

MOTION TO DISMISS

CPLR § 3211 (a) (5)

"Collateral estoppel, or issue preclusion, 'precludes a party from relitigating an issue in a subsequent action that was clearly raised and decided in a prior action against that party,' which applies whether the tribunals or causes of action are the same." (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]). If the issue has been raised prior and decided, the issue must be precluded. "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absences of a full and fair opportunity to litigate the issue in prior action or proceeding." (*Ryan v NY Tel. Co.*, 62 NY2d 494, 501 [1984]). For collateral estoppel to apply, the issue in the second

action must be identical to the one raised in the first action. (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343 [1999]).

To prove discrimination under the ADA, NYSHRL and NYCHRL, a Plaintiff must satisfy similar elements. (see *Fitzgerald v We Work Mgt., LLC*, 2023 NY Slip Op 31627[U] [Sup Ct, NY County 2023]; *Woolf v Bloomberg L.P.*, 2021 N.Y. Misc. LEXIS 10777 [Sup Ct, NY County Sep. 27, 2021, No. 155152/2020). In both NYSHRL and NYCHRL discrimination claims, a plaintiff must show that (1) she is a member of the protected class, (2) she has qualified to hold the position, (3) she was terminated from employment or suffered other adverse employment action, and (4) the discharge or adverse action took place under circumstances giving rise to an inference of discrimination. (see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]).

Distinguished from discrimination under the ADA and the NYSHRL, the NYCHRL must be liberally construed to achieve "uniquely broad and remedial purpose" reaching beyond the counterpart of the federal and state civil rights laws. (see NYC Administrative Code § 8-130; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66, 872 N.Y.S.2d 27 [1st Dept 2009]). However, "[e]ven if the NYCHRL was intended to be more protective than the state and federal counterparts, and even if its legislative history contemplates that the law be independently construed with the aim of making it the most progressive in the nation, the NYCHRL still must be interpreted based on its plain meaning." (*Makinen v City of New York*, 30 NY3d 81, 88, [2017]). Distinguished further, "[t]o establish [an age] discrimination claim under the NYCHRL, the plaintiff need only demonstrate 'by a preponderance of the evidence that she has been treated less well than other employees because of her [age].'" *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 110 (2d Cir. 2013). In order to "prevail on liability, the plaintiff need only show differential treatment—that she is treated 'less well' because of a discriminatory intent." (*id.*).

Plaintiff must show discriminatory motive. "It is not enough that a plaintiff has an overbearing or obnoxious boss. She must show that she has been treated less well at least in part '*because* of her [age].'" (*id.*).

Movants argue, that pursuant to CPLR 3211(a)(5), Plaintiff is precluded by collateral estoppel, from alleging any issues of fact or law that was already decided and rejected by the federal action. (see *Rosen v N.Y.C. Dep't. of Educ.*, 2023 U.S. Dist. LEXIS 52150 [SDNY Mar. 27, 2023]). Specifically, according to Movants, the issue of exclusion of overtime pay for IEP completion was litigated in the federal action, and the District Court found that "Rosen provide[d] no evidence regarding the ages of the teachers who were offered this opportunity, and the records show that Hernandez did not authorize or approve of Rosen's exclusion…" (NYSCEF Doc No. 18, p 11). Furthermore, the District Court found "Rosen ha[d] not established that she was excluded because of her age, much less that this was a part of a larger scheme by Hernandez to replace Rosen with Malverty." (*id.*).

Additionally, according to Movants, the issue of docked pay in relation to Plaintiff's attendance at the mandatory professional development session was litigated in the federal action, and the District Court found "Rosen ha[d] not shown that Hernandez's proffered reasons for the actions taken against Rosen were pretextual, let alone taken for a discriminatory purpose." (*id.*). According to Movants, the issue of Plaintiff's overtime "per session" per week pay was litigated in federal court, and the District Court held that the DOE defendants "satisfied their burden of articulating legitimate nondiscriminatory business reasons for the adverse employment actions [of] which Rosen complains." (*id.*). According to Movants, the issue of reassignment to a class with "dangerous and out of control student behavior," was litigated in federal court, and the District Court found that "[t]he record [did] not establish that there was an actual threat to Rosen's safety."

Furthermore, the District Court recognized that Assistant Principal Furnell routinely checked in with Plaintiff and that "Rosen ha[d] not demonstrated that she was assigned to this class for [a] punitive or discriminatory purpose…" (*id.,* at 12). According to Movants, the issue of the reassignment of Plaintiff's job responsibilities to a younger colleague in 2016-2017 was litigated in federal court, and the District Court found that "Rosen's role [being] subsequently filled by a younger teacher is insufficient to show age discrimination." (*id.,* at 13). According to Movants, the issue of Plaintiff's forcible removal from P.S. 123 on several occasions based on Hernandez's pretextual reasons was litigated in federal court and the District Court held that "all P.S. 123 staff, not just Rosen, were informed about the building permit restricting access to the 3rd floor after 4:00 p.m." (*id.*). "Rosen has not demonstrated that she was treated differently from other employees…" (*id.*). According to Movants, the issue of Plaintiff's allegations of files being moved to make it harder for her to access, based a discriminatory agenda was litigated in federal court, and although the District Court did not specifically address this allegation, it held that " Rosen ha[d] presented no evidence from which it could reasonably be inferred that she was discriminated against on the basis of age." (*id.*). Movants contend, the allegations that Dunning sent an email to all special education teachers at P.S. 123, except for Plaintiff, based on a discriminatory animus held by Dunning towards older people was litigated in federal court and the District Court found that "Rosen provide[d] no evidence regarding the ages of the teachers who were offered this opportunity, and records show[ed] that Hernandez did not authorize or approve of Rosen's exclusion, and that the opportunity was canceled." (*id.,* at 11). In sum, Movant aver that the District Court made determinations after a full and fair hearing; therefore, Plaintiff should be precluded from litigating these issues anew. (*id.*, at 14).

In opposition, Plaintiff argues that her claim for hostile work environment, pursuant to NYCHRL, is not barred by the doctrine of collateral estoppel. Plaintiff points out that the Movant's analysis is flawed because, in the federal lawsuit, the court explicitly declined to assert supplemental jurisdiction over Plaintiff's claim for hostile work environment pursuant to NYCHRL. Plaintiff contends that the District Court held that "[b]ecause the NYCHRL sets out a different, more liberal standard for discrimination claims, which [it] ha[d] not considered in [its] opinion, the Court decline[d] to exercise supplemental jurisdiction over Rosen's remaining claims under NYCHRL." (NYSCEF Doc No. 27, p 2). Plaintiff asserts that the NYCHRL standards differ, and that she adequately plead a cause of action under NYCHRL by alleging she was treated "less well" than her younger employees due to her age. In reply, Movants reiterate that the facts presented in the instant action are identical to those in the federal action, and therefore require dismissal under CPLR § 3211. (NYSCEF Doc. No. 31 p 8-9).

Here, Plaintiff is in her 70s, and therefore a member of a protected class. She is also qualified to hold the position of IEP teacher, as she has been working with the DOE in various special education assignments since the early 1980s. Plaintiff explains that when she was initially hired at P.S. 123, her assignment was to monitor compliance of the IEP process at P.S. 123 with respect to Federal and New York State Laws. Plaintiff explains that the IEP teacher position is not a position where the teacher is assigned to a classroom, yet she was assigned to a classroom at her time at P.S.123. She also indicates that she was assigned other clerical tasks that were not a part of her job duties as an IEP teacher. Based on these facts, Plaintiff successfully alleges that she was subject to an adverse employment action, since there have been materially adverse changes in the terms and conditions of her employment. Plaintiff also alleges that the adverse actions that took place at P.S. 123 were due to a discriminatory animus that the DOE defendants held against

her based on her age. However, Plaintiff failed to satisfy the fourth element and connect the cause- her age, to the hostile work environment. This Court finds that Plaintiff failed to satisfy the fourth element of NYCHRL based discrimination.

Even under the more liberal and progressive standard, the Court finds Plaintiff failed to sufficiently satisfy her pleading burden under NYCHRL. Since both NYSHRL and NYCHRL require Plaintiff to demonstrate that the discharge or adverse action took place under circumstances giving rise to an inference of discrimination, and since Plaintiff failed to satisfy all required elements under NYSHRL, by providing essentially the same set of facts as in the prior federal action, the Movants are correct in arguing that Plaintiff's claims are barred by collateral estoppel in this action. Moreover, although the NYCHRL is more liberally construed, the plain language in the NYC Administrative Code cannot be so liberally construed as to lose its meaning. Plaintiff must properly allege discrimination; conclusions of discrimination do not give the acts a discriminatory meaning. It is not enough to allege that Plaintiff is a person within a specific age bracket who was treated adversely under the State law or the "less well" standard under the City HRL. (see *Askin v Dept. of Educ. of the City of NY*, 110 AD3d 621, 622 [1st Dept 2013]). There must be a connection to her relevant characteristic. Therefore, the Court agrees with Movants position on the issue of collateral estoppel.

CPLR § 3211 (a) (7)

Failure to state a cause of action, pursuant to CPLR § 3211 (a) (7), addresses the facial sufficiency of the complaint. The complaint must be liberally construed, and the court must presume the facts alleged in the complaint as true and provide the Plaintiff "the benefit of every possible favorable inference." (*Askin,* 110 AD at 622). "However, allegations that are bare legal conclusions or are inherently incredible, or that are flatly contradicted by the documentary

evidence, are not accorded such favorable inferences." (*Matter of Daudier v City of NY Commn.*, 2013 NY Slip Op 30176[U] *8 [Sup Ct, NY County 2013]).

Pursuant to CPLR § 3211 (a)(7), defendants may argue that the claims asserted in the complaint are conclusory and do not adequately demonstrate that the defendants' conduct toward the Plaintiff was motivated by a discriminatory animus. Specifically, Movants argue that Plaintiff fails to allege facts that raise an inference that the DOE defendants' treatment of her was based on age discrimination; rather, Plaintiff merely *concludes* that the treatment was based on discrimination due to her age. Movants argue that Plaintiff's claims do not even raise a minimal inference of age-based discrimination, and the complaint does not even set forth a "stray remark" that can be viewed as discriminatory. (NYSCEF Doc No. 18 p 8-9). Movants assert that a proper claim for hostile work environment due to age discrimination under NYCHRL, must demonstrate that Plaintiff was subject to an unfavorable change or treated "less well" than other employees based on the protected characteristic, and that this has not been satisfied here. (*id.*, at 7).

In opposition, Plaintiff argues that she was treated "less well" than other younger employees, and that the facts in the complaint, including *inter alia*, the exclusion from Dunning's email, the additional "per session" hours given to younger colleagues, the systematic reassignment of her job responsibilities to a "much younger" colleague, and the ultimate replacement of her with Malverty, clearly and unequivocally demonstrate that she was treated less well than younger employees because of her age. (NYSCEF Doc. No. 27, p 12 ¶ 2, p 13 ¶ 1).

In support of her argument, Plaintiff explains there were numerous occasions where she was discriminated against due to her age. Plaintiff points to her exclusion from Dunning's May 2016 e-mail regarding overtime She alleges that her exclusion was because of discriminatory animus held by Dunning toward older people. Plaintiff also mentions that Dunnings' May 2016

email was subsequent to Hernandez's March 2016 request to Rosen for her completion of all outstanding IEPs going forward, in which Rosen replied that the individual classroom teachers must complete and submit their relevant forms, in order for her to complete her own. Rosen further alleges that sometime in Spring of 2016, the SESIS system showed dozens of IEPs to be out of compliance in the SESIS system. Plaintiff argues that these instances, which lead to the incomplete IEPs, were pretextual excuses to discriminate against her. (*id.*, p 3, ¶ 4, p 4 ¶ 2,). Furthermore, Plaintiff also points to her lack of assignments for the "per-session" overtime as compared to her younger colleagues as evidence of discrimination. In reply, Movants argue that none of Plaintiff's conclusory allegations support her theory that she adequately pled she was treated less well than other employees as a result of her age.

The Court finds that Plaintiff failed to connect the payment opportunities to age discrimination. Instead, she simply asserts that the "per-session" overtime was provided to younger teachers. In addition, Plaintiff does not specify the ages of the younger teachers, or whether they were substantially younger, or a few years younger. In the complaint, Plaintiff also alleges that she was wrongfully withheld pay for a DOE professional development seminar regarding the revision of IEP teacher position for the 2016-2017 school year; however, Plaintiff also states that she mistakenly did not attend the seminar. Conversely, also in the complaint, Plaintiff alleges that in the summer of 2015-2016 and 2016-2017, Hernandez did not share information with her concerning any modifications of the IEP teacher's job requirements for the purpose of making it more difficult for her to perform her job. These allegations are contradictory.

Even when giving Plaintiff, the benefit of every possible favorable inference, Plaintiff does not bridge the gap that would connect the adverse allegations to age discrimination. The Court finds Plaintiff's argument unpersuasive. She does not adequately explain how the

events leading to the lack of IEP compliance and/or the offer for overtime was used as a pretextual excuse to discriminate against her based on her age. The Court finds further that the facts allege that the Dunning's offer for overtime followed Rosen's express concern for the lack of timely submissions made from the individual special education teachers. It is not as clear, as Plaintiff suggests it is, that these events, in addition to the others listed in the complaint are evidence that Hernandez systematically reassigned Rosen's position to a younger colleague. Therefore, the Court concludes that Plaintiff's allegations are conclusory and without legal basis pursuant to CPLR § 3211 (a) (7).

MOTION TO AMEND

"A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." However, "[l]ateness, coupled with significant prejudice to the other side" will bar the amendment of a pleading. *Heller v Louis Provenzano*, 303 AD2d 20, 22, 756 N.Y.S.2d 26 (1st Dept 2003). Furthermore, a *pro se* litigant may be afforded "some latitude," a *pro se* litigant is not entitled to rights greater than any other litigant. (*Mirzoeff v Nagar*, 52 AD3d 789, 789, 861 NYS2d 740 [2008]).

In her cross-motion, Plaintiff seeks to amend the complaint to include additional occurrences of alleged discrimination, which include Hernandez filing a "baseless" SCI complaint against her which "forced" Plaintiff to participate in an interview on July 24, 2017. Additionally, Plaintiff seeks to include an occurrence that happened the following school year, after her retirement, when the IEP teacher position was replaced by Malverty.

Movants argue that Plaintiff's claim is time-barred under Education Law § 3813 because such claims against schools, school districts, board of education, and its officers are subject to a one-year statute of limitations. Movants contend that since Plaintiff originally commenced the federal action on July 24, 2018, asserting claims under NYSCHRL and NYCHRL for hostile work environment, and since the District Court held that Plaintiff's hostile work environment claims accrued on July 10, 2017; and because Plaintiff commenced this action more than one year after the hostile work environment claims accrued, the claim must be dismissed as time barred against the DOE.

In opposition and cross-motion, Plaintiff contends that her NYCHRL claims are not time barred. Plaintiff avers that the Court should rule that her cause of action for hostile work environment accrued on July 24, 2017, not July 10, 2017, because that was the date she participated in the SCI interview in connection with Hernandez's SCI complaint which was rooted in discriminatory animus. Plaintiff asserts that in the federal action, the District Court Judge was not made aware of the SCI complaint or interview. Plaintiff explains at the time she filed the federal complaint, she was *pro se* and did not think to include the SCI complaint, or the July 24, 2017, interview. Plaintiff concludes therefore, the District Court Judge wrongfully reached the conclusion that her hostile work environment claim accrued on July 10, 2017. Plaintiff seeks leave to file an amended complaint.

In reply, Movant argues that Plaintiff's motion to file an amended complaint should be denied because the proposed amendments would be futile. Movant explains that the SCI interview that Plaintiff seeks to include in the complaint happened when there was no longer an employment relationship between the parties, because Plaintiff retired on May 8, 2017. Furthermore, Movant

argues that Plaintiff's proposed amendment of her complaint, which seeks to include that Malverty replaced Rosen as the IEP teacher for the school year following her retirement would also be futile.

Here, the District Court found July 10, 2017, to be the date of accrual for Plaintiff's hostile work environment claims under NYSHRL and NYCHRL, which was the date of Hernandez's alteration to Plaintiff's performance rating. (*Rosen v. N.Y.C Dept. of Educ.* 2019 US Dist LEXIS 145380, 12 [SDNY Aug. 27, 2019]). A final decision was made in March of 2023. Plaintiff did not move, or cross-move to amend in the federal action.

The Court finds significant amount of time passed without Plaintiff amending her complaint from 2018 to 2023, therefore the request is untimely, and prejudicial. The Court finds further that even if amended, the additional facts do not hold such probative value to lead to a different outcome, as they also do not connect the event to Plaintiff's relevant characteristic, therefore, failing to sufficiently allege discriminatory animus.

Accordingly, it is hereby

ORDERED that the Movants' motion to dismiss Plaintiff's complaint is granted against DOE and all named DOE defendants for failure to state a cause of action and collateral estoppel and it is further,

ORDERED that the portion of Plaintiff's motion seeking to amend complaint is denied as prejudicial.

HON. JEANINE R. JOHNSON
J.S.C.

04/01/2025
DATE

JEANINE R. JOHNSON, J.S.C.

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