Department of Education
Chancellor Richard A. Carranza

Howard Friedman
General Counsel

June 4, 2020

Via Respondent Portal
Perry Canales
U.S. Equal Employment Opportunity Commission
New York District Office
33 Whitehall Street, 5th Floor
New York, NY 10004-2112

Re: Rafaela Espinal-Pacheco v. New York City Department of Education
EEOC Charge No. 520-2020-02726

Dear Mr. Canales:

This letter and the attached exhibits comprise the New York City Department of Education's (the "NYCDOE") position statement in response to the complaint filed by Rafaela Espinal-Pacheco ("charging party") on or around April 16, 2020. A review of the complaint and relevant documents conclusively demonstrates that charging party's allegations of discrimination on the basis of race, sex, national origin, age, and retaliation in violation of the New York State Human Rights Law ("NYSHRL"), N.Y. Executive Law § 296, et. seq., Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e, et. seq., ("Title VII"), and the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621(b), are factually incorrect, legally insupportable, and entirely without merit.

I. Allegations

Charging party filed this complaint on or about April 16, 2020 alleging that she was discriminated against as early as September 1, 2018 on the basis of race, sex, age, and national origin, and subjected to retaliation for making complaints about discrimination. Any allegations made by charging party that allegedly occurred prior to April 16, 2019 are time-barred and will be discussed for background purposes only.

Charging party specifically alleges that: (1) the NYCDOE discriminated against her when she was demoted from her position as Superintendent of Schools for District 12 in September 2018; (2) she raised complaints that the NYCDOE's actions were discriminatory; (3) she was assigned to work at a location without a desk, supplies, and lack of supervision; (4) she was given a position as a school based investigator that was lower in status and less in pay in 2018; (5) she is being denied the opportunity to work from home; (6) she has been denied other jobs since September 2018; and (7) the Chancellor made a statement possibly related to her age regarding a new position she was offered in fall 2018. See Exhibit A (Complaint).

Charging party's allegations of discrimination and retaliation are baseless and lack foundation in fact or law. Additionally, charging party's allegations prior to April 16, 2019 are time-barred. Charging party has not put forth any evidence that she was discriminated against or subjected to retaliation. There is no direct or indirect evidence of discrimination or retaliation, and charging party is still employed by the NYCDOE earning a substantially similar salary.

II. Statement of Facts

Charging Party's Employment History Prior to Covered Period

Charging party is a 49-year-old female who self-identifies as Hispanic and Dominican. She commenced employment with the NYCDOE on September 7, 1993 as a teacher at P.S. 169 and became a principal at P.S. 147 in 2004. On February 25, 2015, former NYCDOE Chancellor Carmen Fariña appointed charging party as the Community Superintendent of District 12. See Exhibit B (Service History). Charging party signed a letter stating that her appointment "remains in effect until such time as you are informed that your appointment is terminated or a new appointment is made pursuant to the Chancellor's Regulation C-37."[1] See Exhibit C (District 12 Appointment Letter).

In April 2018, Richard Carranza ("Chancellor Carranza"), who is age 53 and self-identifies as Hispanic, was appointed as the new Chancellor of the NYCDOE. Charging party received a letter on August 31, 2018, in compliance with Chancellor's Regulation C-37(VII), informing her that Chancellor Carranza was making changes to the District 12 leadership and she was being terminated from her position as the Superintendent. Charging party's last day of employment as Superintendent was scheduled for September 28, 2018. See Exhibit D (District 12 Termination Letter). Chancellor Carranza appointed Jacqueline Rosado (age 51, Hispanic female) to replace charging party as the new District 12 Superintendent.

Instead of terminating charging party from the NYCDOE, the NYCDOE offered charging party a new position as a school based investigator in September 2018.[2] A school based investigator assists school principals and assistant principals with investigations concerning allegations of corporal punishment and verbal abuse by a teacher or staff member towards a student. As a school based investigator, charging party would be working for Randy Asher (age 47, White) and Theresa Europe (age 55, Black). Mr. Asher, currently the Deputy Chief Executive Officer for Labor Policy, was charging party's supervisor and in that role addressed escalated non-legal issues during school based investigations. Ms. Europe, Deputy Counsel and Director of the

[1] Chancellor's Regulation C-37(VII). Waiver: "Community superintendents serve at the pleasure of the Chancellor. They may be terminated with or without advance notice, with or without reason, and they have no right to a pre or post termination hearing. As a condition of appointment, community superintendents are requested to sign a waiver of any rights provided by the Education Law to acknowledge that they knowingly waive such rights. https://www.schools.nyc.gov/docs/default-source/default-document-library/c-37-8-1-2019-final-remediated-wcag2-0

[2] The NYCDOE strongly disputes charging party's allegation that Chancellor Carranza spoke with her about the school based investigator position and told her "you are a single mother with 2 kids and the clock is ticking you can take it or leave it." See Exhibit A (Complaint).

Office of Case Assessments and Review in the Office of the General Counsel, addresses legal issues related to school based investigations.

Charging party's last day as a Community Superintendent was September 30, 2018. With no gap in her employment, pay or benefits, charging party started as a school based investigator on October 1, 2018. See Exhibit B (Service History). Charging party continues to receive a salary that is comparable to the salary she earned as the Superintendent of District 12. Moreover, she continues to receive annual managerial salary increases as a school based investigator. In the current 2019-2020 school year, charging party earns $170,179.00.[3] See Exhibit E (Salary History 2003 to Present).

As a school based investigator, charging party's job responsibilities include assisting school principals and assistant principals with investigations. School Based Investigators conduct investigatory interviews, draft witness statements, interview employee(s) accused of misconduct, determine whether the evidence and witnesses are credible, and consult with legal counsel. See Exhibit F (School Based Investigator Job Description).

School based investigators are field employees who work at multiple sites, typically at the school location they are assigned to support. On days when the school based investigators cannot work in the field (e.g., schools are closed, or there is a special school schedule), they report to the Talent Management Office in room 301 at 65 Court Street in Brooklyn. There are open desks, supplies and an office manager available for the field staff who report to this location. Id. Charging party's access to the desks and supplies in the Talent Management Office has been the same during the 2018-2019 school year and the 2019-2020 school year.[4]

Charging Party's Employment Within Covered Period

Charging party has performed well at her job as a school based investigator. She has never been given a letter to file or a counseling memo nor has she ever been disciplined. Additionally, charging party did not file an OEO complaint against her supervisors nor did she complain of discrimination to her supervisors.

Charging party alleges that she is not allowed to work from home during the COVID-19 emergency. This allegation is false. All school based investigators, including charging party, are working from home. To the extent school based investigators are receiving less work because the schools are closed, they are still receiving their full salaries.

Charging party was approved to work from home starting on March 20, 2020. Prior to that date, charging party was still expected to report to her worksite, as were other NYCDOE staff working in schools or field offices. On March 16, 2020, Ms. Europe sent an email to her staff

[3] When charging party was a Superintendent during the 2017-2018 school year, she earned $173,349. There was an annual managerial increase on September 24, 2018 to $177,249; however, charging party only received this salary for one week prior to her starting the new role as a school based investigator.

[4] Due to the COVID-19 pandemic, charging party was approved to work from home on March 20, 2020. On March 21, 2020, the Chancellor instructed staff to work from home (with the exception of certain staff who could not perform essential work from home), starting on March 22, 2020.

stating that they are still required to report to work and assist the schools, and noting that there was no applicable work from home policy. She explained that staff could also opt to stay home, using applicable leave. Charging party replied that she did not know staff were reporting to work, and that she stayed home. Ms. Europe responded, "I completely understand your decision today due to your mother's health condition." Ms. Europe further stated that she and the rest of her staff came to work. See Exhibit G (March 16, 2020 Email).

By March 23, 2020, NYCDOE employees, with the exception of those who could not perform essential work from home, were working from home. See Exhibit H (March 21, 2020 Email) and Exhibit I (April 10, 2020 Personnel Memo). All school based investigators are working from home and receiving their full salary.

Finally, the NYCDOE disputes charging party's allegation that she has been denied multiple jobs since September 2018. See Exhibit A (Complaint). Although charging party alleges she has been denied multiple jobs since September 2018, the NYCDOE offered charging party her current job in October 2018. Moreover, charging party's allegation that she has been denied other positions since September 2018 is vague and fails to include any details about any positions she applied for and her qualifications for such positions. Charging party has not been prevented from applying for other positions, and the NYCDOE has not taken any steps to prevent her from obtaining another position. Charging party's supervisors have no knowledge of her job applications and have never been contacted for a reference.

III. Legal Analysis

A. Timeliness

An individual claiming discrimination under Title VII and the ADEA must file a charge of employment discrimination with an administrative agency within 300 days of the alleged unlawful employment practice. See 42 U.S.C. § 2000e-5(e)(1). Similarly, under the NYSHRL, an individual must file a complaint "within one year after the alleged unlawful discriminatory practice." See N.Y. Exec. Law § 297(5); see Freudenthal v. County of Nassau, 99 N.Y.2d 285, 290 (2003).

Charging Party filed her EEOC charge on April 16, 2020. Accordingly, to the extent that any of charging party's claims are based on events that allegedly occurred prior to April 16, 2019, including her termination as a Superintendent in September 2018 and subsequent hiring as a school-based investigator in October 2018, they are untimely and must be dismissed. Information from that time period has been discussed for background purposes only.

B. No Evidence of Discrimination Based on Race, Sex, National Origin, and Age

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to [their] compensation, terms, conditions, or privileges of employment, because of such individual's race, . . . sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). Discrimination claims brought under Title VII are analyzed using the burden-shifting framework established in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). See Walsh v. N.Y.C. Housing

Auth., 828 F.3d 70, 74–75 (2d Cir. 2016). The NYSHRL similarly prohibits employment discrimination against any individual on the basis of race, national origin, or sex. See N.Y. Exec. Law § 296(1)(a). Courts analyze discrimination claims brought under the NYSHRL through the prism of the McDonnell Douglas framework. See, e.g., Pucino v. Verizon Commc'ns, Inc., 618 F.3d 112, 117 n.2 (2d Cir. 2010) ("We review discrimination claims brought under the NYSHRL according to the same standards that we apply to Title VII discrimination claims.") (internal citation omitted).

The ADEA protects employees who are at least 40 years old from discrimination on the basis of age. See 29 U.S.C. §§ 623(a)(1), 631. Similarly, the NYSHRL prohibits discrimination based on an employee's age for those who are at least 18 years old. See N.Y. Exec. Law §§ 291, 296(3-a)(a). For ADEA claims, in order to satisfy charging party burden at the final stage, complainant must offer evidence that age discrimination was the "but-for" cause of the challenged actions rather than "just [being] a contributing or motivating factor." Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009); Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 106 n.6 (2d Cir. 2010) (assuming without deciding the ADEA "but-for" requirement also applies to NYSHRL age discrimination claims).

To establish a prima facie case of discrimination, complainant must show that: (1) she was a member of a protected group; (2) she was qualified for the position or performed it satisfactorily; (3) she suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination based on her membership in a protected class. Mario v. P & C Food Markets, Inc., 313 F.3d 758, 767 (2d Cir. 2002); Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 466 (2d Cir. 2001); see generally N.Y. Exec. Law § 296(3-a). Additionally, a complainant must demonstrate that the adverse employment action occurred "because of" her protected class. See Patane v. Clark, 508 F.3d 106, 112 (2d Cir. 2007). If complainant establishes the above-stated prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action in question. Mario, 313 F.3d at 767. If the employer provides such a reason, the complainant then must show that the proffered legitimate reason is merely a pretext for discrimination. Id.

Charging party cannot establish a prima facie case of discrimination because she has not suffered an adverse employment action during the relevant time period and cannot show that any actions were taken under circumstances giving rise to an inference of discrimination. An employment action is considered adverse if the employee endures a "materially adverse change" in the terms and conditions of her employment. Galabya v. N.Y. City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000). "To be materially adverse a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities." Id. (internal quotation marks omitted). Employment actions that have been deemed adverse include "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." Id. (ellipsis in original). As noted, claims regarding charging party's termination as Superintendent in September 2018 are time-barred.

Charging party's remaining allegations do not involve an adverse employment action. Charging party is still employed by the NYCDOE, has not received unsatisfactory ratings or been the subject of discipline, receiving her full salary of $170,179.00 and benefits as a school-based investigator (including the annual managerial salary increase), and is allowed to work from home.

Furthermore, an inference of discrimination is undermined because, as noted above, Mr. Asher (47), Ms. Europe (55) and Chancellor Carranza (53) are all in the same protected age category as charging party and Chancellor Carranza also self-identifies as Hispanic. Additionally, the person who replaced charging party was a female older than charging party who self-identifies as Hispanic. See, e.g., Fosen v. N.Y. Times, No. 03-CV-3785, 2006 WL 2927611, at *5 (S.D.N.Y. Oct. 11, 2006) (noting that an inference of discrimination is "critically undermined" where an employee's supervisor is a member of the same protected class as the employee). "Pleading one's [protected class], without pleading any facts to show that membership in [the protected class] actually gave rise to adverse action by the employer, is an insufficient basis from which a trier of fact could infer unlawful animus." McLeod v. N.Y. State Div. of Housing & Cmty. Renewal, No. 91-CV-1086, 1996 WL 131843, at *4 (S.D.N.Y. Mar. 21, 1996); see also Bermudez v. City of New York, 783 F. Supp. 2d 560, 581 (S.D.N.Y. 2011) (reiterating that "recitation of a false syllogism: (1) I am (insert name of protected class); (2) something bad happened to me at work; (3) therefore, it happened because I am (insert protected class)" does not meet plausibility standard).

Additionally, charging party's inference of discrimination is refuted by several additional facts, including that charging party was hired in October 2018 for her current position, at a salary almost identical to her Superintendent's salary, rather than being terminated from the NYCDOE; never filed any claims of discrimination within the NYCDOE; and only raised her current claims more than a year and a half after her change in position. Moreover, charging party, along with other school based investigators, has been working from home since late March.

In sum, charging party is unable to establish a prima facie case of discrimination because there have been no adverse actions taken against her during the relevant period. Charging party remains employed as a school based investigator, has never been disciplined, and continues to work from home during the COVID-19 emergency receiving her full salary and benefits.

C. No Evidence of Retaliation

Complainant's retaliation claim that she has not been allowed to work from home during the COVID-19 emergency and has been denied other job opportunities is unfounded. Title VII, the ADEA and the NYSHRL prohibit retaliation against employees who exercise rights protected by these statutes. See 42 U.S.C. § 2000e-3(a); N.Y. Exec. Law § 297. Such claims are also analyzed under the McDonnell Douglas burden-shifting framework. See Salahuddin v. N.Y. City Dep't of Educ., No. 15 CV 6712-LTS-DCF, 2017 WL 3724287, at *3 (S.D.N.Y. Aug. 28, 2017), appeal dismissed, No. 17-3671, 2018 WL 2138290 (2d Cir. Apr. 18, 2018). To establish a prima facie retaliation claim, a complainant must show that "(1) she engaged in a protected activity; (2) her employer was aware of this activity; (3) the employer took adverse employment action against her; and (4) a causal connection exists between the alleged adverse action and the protected

activity." Schiano v. Quality Payroll Sys., Inc., 445 F.3d 597, 608 (2d Cir. 2006). If the complainant sets forth a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse decision or action. See Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 94 (2d Cir. 2001). If the employer satisfies this burden of production, the burden lies with the complainant to establish that the employer's offered reason is merely a pretext for discrimination. Id.

Complainant cannot establish a prima facie case of retaliation because her complaint is void of any information showing that she engaged in a protected activity or that she suffered any adverse action as a result of engaging in a protected activity. Complainant did not file an OEO complaint nor did she complain of discrimination to her supervisors.

Even assuming charging party did engage in a protected activity, which she did not, there is no connection whatsoever between any protected activity and any adverse employment action. See, e.g., Fraser v. MTA Long Island Rail Rd., 307 F. Supp. 3d 105, 120 (E.D.N.Y. 2018) (dismissing Title VII retaliation claims because plaintiff did not establish a prima facie case where there was no evidence of causal connection or pretext). To demonstrate causation, charging party must adduce evidence showing that retaliation was "at least a substantial or motivating factor behind the adverse action." Raniola v. Bratton, 243 F.3d 610, 625 (2d Cir. 2001) (citation and quotation marks omitted).

To the extent charging party's claim of retaliation relates to working from home, as discussed, charging party was permitted to work from home on March 20, 2020, consistent with when other school based investigators were permitted to work from home, and prior to such date had the option to take leave if she did not want to report.

To the extent charging party alleges that the NYCDOE retaliated against her by denying her other job opportunities, charging party has not provided any information supporting such allegations. She provides no details about when she applied to other positions, where they were located, or her qualifications for those positions. Moreover, the NYCDOE hired her for her current position in October 2018.

IV. Conclusion

There is no evidence that charging party was discriminated against based on race, sex, national origin, or age, or subjected to retaliation. Accordingly, the NYCDOE respectfully requests that the EEOC dismiss the complaint or, in the alternative, issue a finding of no probable cause.

Sincerely,

Sari Goldmeer Rella

Sari Goldmeer Rella
Agency Attorney

Exhibits

Exhibit A	Complaint
Exhibit B	Charging Party's Service History
Exhibit C	District 12 Appointment Letter
Exhibit D	District 12 Termination Letter
Exhibit E	Salary History 2003 to Present
Exhibit F	School Based Investigator Job Description
Exhibit G	March 16, 2020 Email
Exhibit H	March 21, 2020 Email
Exhibit I	April 10, 2020 Personnel Memorandum