Index No. 151246/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RAFAELA ESPINAL-PACHEO,

Plaintiff,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION, ET AL.,

Defendants.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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Matter No. 2021-005352

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PRELIMINARY STATEMENT

Plaintiff, who is currently employed by the New York City Department of Education ("DOE") as a school-based investigator, brought this action alleging that her September 2018 demotion-in-lieu-of-termination was motivated by gender, race, and age discrimination in violation of the New York City Human Rights Law ("NYCHRL") and the New York State Human Rights Law ("SHRL"). Plaintiff also alleged that she applied to several other unspecified jobs at DOE but did not receive them, allegedly because of her gender, race and age.

Defendants moved to dismiss the complaint because: (1) all of plaintiff's claims are barred by Education Law § 3813(2-b)'s one year statute of limitations; (2) plaintiff failed to file a notice of claim, as required by Education Law § 3812(1); (3) the Complaint fails to establish a basis for personal liability against defendant Ursulina Ramirez because it alleges no unlawful conduct by her; (4) plaintiff's discrimination claims fail as a matter of law because she cannot establish that any of the challenged employment actions occurred under circumstances giving rise to an inference of discrimination; and (5) plaintiff's claims of aiding and abetting against defendants Richard Carranza and Cheryl Watson-Harris fail as a matter of law because an individual cannot aid and abet in his or her own alleged discriminatory conduct.

In opposition, Plaintiff attempts to interject new facts into the complaint by submitting a nine-page, 60-paragraph, affidavit, and a 35-page, 9,000-plus word memorandum of law. As an initial matter, Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, NYSECF Doc. No. 22 ("Pl. Memo"), should be stricken, as it violates Uniform Rule 202.8-b because it exceeds the permissible length of 7,000 words. Similarly, both the affidavit and the memorandum fail to certify compliance

with the above-cited Rule, as required by Rule 202.8-b(c), and should be stricken for that reason as well. In addition, it is well settled that plaintiff may not amend her complaint via papers in opposition to a motion to dismiss.

Plaintiff has also abandoned all claims against defendant Ramirez, and her aiding and abetting claims against defendants Carranza and Watson-Harris, because she did not respond to the portion of defendants' motion that sought the dismissal of those claims.

The remainder of plaintiff's opposition makes nothing more than several novel, albeit inconsequential arguments. For example, plaintiff argues that the handful of discrete acts on which her complaint is based constitute a continuing violation, despite the fact that they are separated in time by months and years, and involve separate decision-makers. This theory, of course, has no legal support.

Similarly, Plaintiff's argument that the charge she filed with the Equal Employment Opportunity Commission ("EEOC") in April 2020 (one year and 7 months after her demotion) can substitute for the filing of a notice of claim, is without merit, because it is well settled that in order for such a charge to serve as a substitute for a notice of claim, it must be filed within the statutory period; here, 90 days. Plaintiff's EEOC charge was filed more than one year after the deadline to file a notice of claim expired, and it therefore cannot serve as a substitute for a *timely* notice of claim.

Finally, documents annexed by plaintiff to her Affidavit in Opposition to Defendants' Motion to Dismiss, NYSECF Doc. No. 18 ("Pl. Aff."), directly undermine her claim that her gender, race, and age motivated her demotion-in-lieu-of-termination. Specifically, the DOE's response to plaintiff's EEOC charge, which plaintiff annexed to

her affidavit as Exhibit C, NYSECF Doc. No. 21, establishes, among other things, that: (1) "Mr. Asher (47), Ms. Europe (55) and Chancellor Carranza (53)" belong to some of the same protected groups as Plaintiff; and, critically, (2) plaintiff's replacement was "a female older than plaintiff who self-identifies as Hispanic." Id. at 6.

In light of the foregoing, the Complaint should be dismissed, with prejudice.

ARGUMENT

POINT I

PLAINTIFF'S OPPOSITION PAPERS SHOULD BE STRICKEN

Rule 202.8-b(a) of the Uniform Civil Rules For The Supreme Court & The County Court provides that: "Unless otherwise permitted by the court: (i) affidavits, affirmations, briefs and memoranda of law in chief **shall be** limited to 7,000 words each..." (emphasis added). Subsection (c) of Rule 202.8-b further provides that: "(c) Every brief, memorandum, affirmation, and affidavit **shall include** on a page attached to the end of the applicable document, a certification by the counsel who has filed the document setting forth the number of words in the document and certifying that the document complies with the word count limit." (emphasis added). As the language of the Rule makes clear, the rule is mandatory, and these requirements are not optional. Here, plaintiff filed a memorandum of law that is 35 pages long and in excess of 9,000 words, and neither her memorandum of law nor affidavit certify compliance with the above-referenced Rule. As such, plaintiff's opposition papers should be stricken.

POINT II

PLAINTIFF ABANDONED HER CLAIMS AGAINST DEFENDANT RAMIREZ, AND HER AIDING AND ABETTING CLAIMS

In their motion to dismiss, defendants argued that: (1) all claims against defendant Ramirez should be dismissed because plaintiff did not allege any conduct, let alone any unlawful conduct, against her (see Defendants' Memorandum of Law in Support of Their Motion to Dismiss, NYSECF Doc. No. 13, ("Def. Memo"), at 8); and (2) plaintiff failed to state an aiding and abetting claim against defendants Carranza and Watson-Harris because an individual cannot aid his or her own allegedly discriminatory conduct (see id. at 15-16). Plaintiff entirely failed to address these arguments in her opposition papers, and those claims have therefore been abandoned. See Kronick v. L.P. Thebault Co., Inc., 70 A.D.3d 648, 649 (2d Dep't 2010) (holding that a claim is deemed abandoned if the party asserting it fails to oppose the branch of a motion to dismiss it); accord Patmos Fifth Real Estate Inc. v. Mazl Bldg. LLC, 975 N.Y.S.2d 711, 711 (Sup. Ct. N.Y. Co. 2013).

POINT III

THE CONTINUING VIOLATION DOCTRINE CANNOT SAVE PLAINTIFF'S TIME-BARRED CLAIMS

In opposition to defendants' arguments that all of her claims are time-barred by Law § 3813 (2-b)'s one year statute of limitations, plaintiff argues that the Court should apply the continuing violation doctrine and deem her otherwise time-barred claims as timely. See Pl. Memo at 9-12. As explained below, this argument is based on a misapplication of the applicable law.

"New York courts have held that the pre-Morgan, more generous continuing violations doctrine continues to apply to discrete acts of employment discrimination under NYCHRL." Dimitracopoulos v. City of New York, 26 F. Supp. 3d 200, 212 (E.D.N.Y. 2014) (citing Williams v. N.Y.C. Hous. Auth., 61 A.D.3d 62 (1st Dep't 2009)). But although "[t]ime-barred discrete acts can be considered timely," a plaintiff must still show that "*specific and related* instances of discrimination [were] permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." Dimitracopoulos, supra at 212 (emphasis added) (quoting Fitzgerald v. Henderson, 251 F.3d 345, 359 (2d Cir. 2001)). For example, discrete discriminatory acts perpetrated by different individuals may still be insufficient to invoke the continuing violation doctrine even under the more liberal NYCHRL standard. Dimitracopoulos, supra at 212-213. Similarly,

Applying the above-cited principles to the facts of this case makes clear that the continuing violation doctrine cannot save plaintiff's otherwise untimely claims. First, the allegedly discriminatory acts at issue, which include plaintiff's demotion by former DOE Chancellor Richard Carranza in September 2018 (Complaint, ¶¶ 74-75), the denial of her applications to various jobs on unspecified dates and by unspecified individuals (Id., ¶ 92), being initially denied permission to work from home at the onset of the COVID-19 pandemic by her then-supervisors (Id., ¶ 97),[1] involve different decisionmakers—Carranza, Europe, and Asher, among others. See Dimitracopoulos,

[1] This assertion is undermined by Plaintiff's own affidavit, where she states that she has in fact worked remotely (see Pl. Aff., ¶¶ 52-56). Similarly, the DOE's Position Statement, which plaintiff annexed to her affidavit, states that: "All school based investigators, including [plaintiff] 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. [Plaintiff] was approved to work from home starting on March 20, 2020. … By March 23, 2020, NYCDOE employees, with the exception of those who could not perform essential work from home, were working from home.). All school based investigators are working from home and receiving their full salary." Pl. Aff., Ex. C, at 3-4.

supra, at 212-213. A second and related point, is that the allegations at issue are entirely unspecific (plaintiff does not provide any detail concerning to whom she applied for jobs or the positions to which she applied), and unrelated (Chancellor Carranza left the DOE in March 2021, see https://www.nytimes.com/2021/02/26/nyregion/richard-carranza-nyc-schools.html).

Finally, and critically, plaintiff's continuing violation claims are far too conclusory to justify the application of that doctrine. Indeed, the complaint contains nothing more than boilerplate conclusory statements about an alleged continuing pattern of conduct. See, e.g., Complaint, ¶¶ 38 ("I stated in the EEOC Complaint that the DOE discriminated against me on the basis of national origin, race, sex, and age commencing when I was demoted from my position as Superintendent of Schools for District 12 and continuing to the present time."); 58 ("I continue to be treated worse than my counterparts in retaliation for my filing this case and the EEOC complaint."); 59 ("The prior discriminatory conduct has continued unabated"). These are precisely the sort of unspecific, conclusory allegations which Courts have repeatedly found to be insufficient to apply the continuing violation doctrine. See, e.g., Doe v. Anonymous Inc., No. 18 Civ. 10924 (PAC), 2019 U.S. Dist. LEXIS 107886, at *10 (S.D.N.Y. June 25, 2019) ("Stating in a conclusory fashion that Defendants failed to pay or promote her through October 2015 and that the continuing violation thus applies does not save [Plaintiff's] untimely claims."); Grimes-Jenkins v. Consol. Edison Co. of N.Y., No. 16 Civ. 4897 (AT), 2017 U.S. Dist. LEXIS 77710, at *22-23 (S.D.N.Y. May 22, 2017)(Court found allegations untimely and not actionable under the NYCHRL as continuing violations, even though "some individuals involved in timely allegations are also involved in untimely

allegations," as "the incidents are sporadic, and the plaintiff fails to connect the timely and untimely allegations in any meaningful way."). Accordingly, any claims accruing prior to January 3, 2020 (one year prior to when plaintiff commenced this action), are time-barred and must be dismissed.

POINT IV

PLAINTIFF'S EEOC CHARGE IS NOT A PROPER SUBSTITUTE FOR A *TIMELY* NOTICE OF CLAIM

In an attempt to cure her fatal failure to file a notice of claim, plaintiff argues that the EEOC charge which she filed on April 16, 2020 satisfied the notice of claim requirements. See Pl. Memo at 12-15. In support of this contention, Plaintiff cites to the well-established rule that "an EEOC complaint can satisfy the notice of claim requirement in limited circumstances where the charge puts the school district on notice of the precise claims alleged, **is served on the governing board of the district (and not a different arm of the district), and is served within the statutory time period**." Pl. Memo at 14 (emphasis added) (citing Riccardo v. N.Y.C. Dep't of Educ., No. Civ. (LAK), 2016 U.S. Dist. LEXIS 167081, at **22-23 (S.D.N.Y. Dec. 2, 2016) (internal citations and quotations omitted). As explained below, the cases to which plaintiff cites, including Riccardo, supra, require the dismissal of her claims against the DOE for failure to file a notice of claim.

As Riccardo and many of the decisions applying the above-referenced rule acknowledge, a critical component of accepting an EEOC charge as a substitute for a notice of claim is that the charge be "served within the statutory time period"; that is, within 90 days of the allegedly discriminatory act. See N.Y. Education Law § 3813(1). Here, plaintiff was demoted in September 2018, and thus had until, at the latest

December 2018 to file a notice of claim, or an adequate substitute. However, she did not file a notice of claim by December 2018, and the EEOC charge that allegedly put DOE on notice of her claims was not filed until April 2020, more than one year and four months *after* the statutory period of 90 days. See Pl. Aff., Ex. A. Indeed, she did not even file her EEOC charge until 8 months after statutory deadline on her claims (one year, per Education Law § 3813(2-b)), expired.

Similarly, "[w]hile the plaintiff alleges that [s]he filed a charge with the EEOC, the plaintiff has not alleged that [s]he served the EEOC charge on the governing body of the district. The EEOC charge therefore was not a substitute for the required notice of claim." Rettino v. N.Y.C. Dep't of Educ., No. 19 Civ. 5326 (JGK), 2021 U.S. Dist. LEXIS 132088, at *20 (S.D.N.Y. July 14, 2021); Grassel v. Dep't of Educ., No. 12 CV 1016 (PKC), 2015 U.S. Dist. LEXIS 128607, at *30 (E.D.N.Y. Sep. 24, 2015) ("[Plaintiff's] Complaint does not plead that his EEOC charge was served on the DOE's governing body or that it was served within three months of [the challenged employment action]. Thus, [Plaintiff's] NYSHRL claims must be dismissed for failure to comply with Education Law § 3813."). Accordingly, plaintiff's EEOC charge cannot, as a matter of law, serve as a substitute for a *timely filed* and *duly served* notice of claim, and all claims against the DOE and Chancellor Carranza must be dismissed.

POINT V

PLAINTIFF FAILS TO STATE A DISCRIMINATION CLAIM

Even if plaintiff could overcome the untimeliness of her claims, or her failure to time a notice of claim, her discrimination claims would still fail as a matter of law. In an attempt to cure the fact that the Complaint is devoid of *facts* (as opposed to

legal conclusions), that plaintiff's demotion and later unsuccessful job applications were based on discriminatory animus, plaintiff has furnished a 9-page, 60-paragraph affidavit with exhibits. These exhibits include a purported list of comparators whom plaintiff alleges were also discriminated against. See NYSECF Doc. No. 19. However, it is axiomatic that a Complaint may not be amended by papers submitted in opposition to a motion to dismiss. See, e.g., MediaXposure Ltd. (Cayman) v Omnireliant Holdings, Inc., 918 N.Y.S.2d 398, 2010 NY Slip Op 51835[U]*6 (Sup. Ct. NY County 2010) (denying plaintiffs attempt to "amend the complaint through an opposition brief, which is not permissible"); Rubin v Nine West Group, Inc., 1999 N.Y. Misc. LEXIS 655, 1999 WL 1425364, *4 (Sup. Ct. Westchester County 1999) ("'A claim for relief may not be amended by the briefs in opposition to a motion to dismiss"); see also O'Brien v. Nat'l Prop. Analysts Partners, 719 F. Supp. 222, 229 (S.D.N.Y. 1989) ("[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss.").

As Defendants explained in their moving papers, the Complaint is bereft of allegations tying plaintiff's demotion to any of her protected characteristics. See Def. Memo at 9-13. Plaintiff's submissions in opposition to Defendants' motion provide further support for this. For example, Exhibit C to plaintiff's affidavit in opposition establishes that: "Mr. Asher (47), Ms. Europe (55) and Chancellor Carranza (53)" belong to some of the same protected groups as plaintiff, which undermines her discrimination claims. Id. at 6. See Enyia v. N.Y.C. Health & Hosps. Corp., No. 16-CV-6344 (RA), 2019 U.S. Dist. LEXIS 181649, at *21-22 (S.D.N.Y. Oct. 18, 2019) ("Any inference of gender discrimination is further undermined by the fact that Cook and Blackburn, the only individuals that Plaintiff has alleged to have discriminated against her, are both

women."); Walder v. White Plains Bd. of Educ., 738 F. Supp. 2d 483, 501 (S.D.N.Y. 2010) ("Any inference of sex discrimination is further undermined by the fact that Medina, the supervisor who allegedly discriminated against Walder as to the terms of her duties, is a woman.").

Critically, upon her demotion, Plaintiff was immediately replaced by Jaqueline Rosado, "a female older than plaintiff who self-identifies as Hispanic." Exhibit C to Pl. Aff. at 6; see also http://bronxink.org/2018/09/07/27769-new-school-chancellor-cleans-house-replacing-two-district-superintendents/. This fact critically undermines plaintiff's claim that her demotion was motivated by her race, gender, or age. See, e.g., Inguanzo v. Hous. & Servs., Inc., No. 12-CV-8212 (ER), 2014 U.S. Dist. LEXIS 132197, at *57 (S.D.N.Y. Sep. 19, 2014), aff'd 621 F. App'x 91 (2d Cir. 2015); Fleming v. MaxMara United States, Inc., 644 F. Supp. 2d 247, 261 (E.D.N.Y. 2009) (Citing cases, and holding that "[w]here a member of the plaintiff's protected class is contemporaneously hired as a replacement, the offering of proof of intentional discrimination appears extremely difficult, if not practically impossible.") (internal quotations omitted), aff'd 371 Fed. Appx. 115 (2d Cir 2010); Montanile v. Nat'l Broad. Co., 211 F. Supp. 2d 481, 487 (S.D.N.Y. 2002) (noting that the replacement of a plaintiff with another employee in same protected class weighs heavily against inference of discrimination).

Finally, plaintiff's attempt to save her claims by amending her complaint via opposition papers and furnishing the Court with a list of purported comparators is unavailing. See Pl. Aff., Ex. A "List of Demoted Women." The list of purported comparators provides no information for the Court to determine whether these

individuals are at all similarly situated to Plaintiff. Notably, the list provides no facts whatsoever about the circumstances of these individuals' departures from the Department or their purported demotions. Moreover, most of these individuals held titles that substantially differed from that of Plaintiff, including Deputy Chancellors, a Senior Deputy Chancellor, and Executive Superintendents. Thus, plaintiff's feeble attempt to amend her complaint and save her claims should be rejected. See Shah v. Wilco Sys., Inc., 27 A.D.3d 169, 177 (1st Dep't 2005) ("The individuals being compared must be similarly situated in all material respects") (internal quotations omitted).

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court dismiss the Complaint and deny the relief sought therein in all respects, and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 17, 2021

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CERTIFICATION

In accordance with Rule 202.8-b(a) of the Uniform Civil Rules For The Supreme Court & The County Court, the undersigned certifies that the word count in this reply memorandum of law (excluding the caption, table of contents, table of authorities, signature block, and this certification), as established using the word count on the word-processing system used to prepare it, is 3,131 words.

Dated: New York, New York
September 17, 2021

By: *Iván A. Méndez, Jr.*
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