Bagley v Baruch College
2012 NY Slip Op 33412(U)
August 27, 2012
Sup Ct, New York County
Docket Number: 104904/11
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE PART 61

Justice

Index Number : 104904/2011
BAGLEY, PHYLLIS T.
vs.
BARUCH COLLEGE
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

tion to/for _____
No(s). _____
No(s). _____
No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/27/12

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 61

PHYLLIS T. BAGLEY,
Plaintiff,

- against -

BARUCH COLLEGE, CITY UNIVERSITY OF NEW YORK, MARYBETH MURPHY, Individually, and BEN COPUS, Individually,
Defendants.

DECISION AND ORDER

Index No. 104904/11

SINGH, ANIL, J.:

In this action, plaintiff sues to recover damages for alleged employment discrimination based on age, race and disability, and for unlawful retaliation. Defendants make this pre-answer motion to dismiss the complaint, pursuant to CPLR 3211(a)(2), based on lack of subject matter jurisdiction, and pursuant to CPLR 3211(a)(7), for failure to state a cause of action.

Background

The following facts are taken from the allegations of the complaint, and are presumed to be true for purposes of this motion.

Plaintiff Phyllis Bagley (Bagley), an African American woman now over 63 years old, was employed as Senior Registrar, from September 11, 2002 until her termination on June 30, 2009, in the Office of the Registrar of Baruch College (Baruch), a senior college of the City University of New York (CUNY). Verified Complaint (Complaint), ¶¶ 2, 9, 28. As Senior Registrar,

plaintiff was responsible for managing the registration and academic record-keeping operations for 16,000 Baruch students, and her duties included supervising a staff of twenty, maintaining student academic records, preparing class schedules, and preparing reports for Baruch administrators. *Id.*, ¶ 11. Plaintiff's position was subject to biannual reappointments, and in February 2007, she was reappointed to her position through June 30, 2009.

During her first five years of employment, from 2002 through June 2007, plaintiff was supervised by James Murphy, Baruch's Assistant Vice President for Enrollment Services. According to plaintiff, she consistently received positive performance reviews while under the supervision of James Murphy. *Id.*, ¶ 13. In the summer of 2007, Marybeth Murphy (Murphy) replaced James Murphy, and became plaintiff's supervisor. *Id.*, ¶ 15. Plaintiff alleges that soon after Murphy joined the staff of Baruch, she began to treat plaintiff in a hostile manner. *Id.*, ¶ 16.

Plaintiff claims that, during the office's move in May 2008, plaintiff was forced by Murphy to pack up dusty boxes, despite informing Murphy that the dust would aggravate her asthma, and plaintiff claims that as a result of exposure to the dust, she had asthma attacks which required her to take sick leave. *Id.*, ¶¶ 16-17. While plaintiff was on sick leave, her duties were assigned to two associate registrars, and when plaintiff returned

to work, Murphy blamed her for mistakes made by the associates. *Id.*, ¶ 18.

In May 2008, Murphy gave plaintiff an unsatisfactory performance evaluation for the 2007-2008 academic year, citing plaintiff's failure to anticipate problems, to lead staff and to gain the staff's trust as reasons for the unsatisfactory review. *Id.*, ¶ 19. Plaintiff believed that the evaluation was untrue and unfair, and she filed a formal grievance with her union contesting the negative evaluation. *Id.*, ¶¶ 19-20. Plaintiff claims that, after she returned from sick leave in May 2008, Murphy continued to treat her with hostility, by undermining her authority with employees, failing to give her credit for her accomplishments, and refusing to address the chronic problem of understaffing and plaintiff's request for additional staff. *Id.*, ¶ 21.

In December 2008, plaintiff took sick leave to have necessary knee surgery, and, in February 2009, plaintiff required a second surgery. *Id.*, ¶¶ 24, 25. While plaintiff was out on medical leave in February 2009, she received another unsatisfactory performance evaluation from Murphy, who noted that plaintiff had not corrected the problems identified in the previous review. Plaintiff claims that the criticisms were directly related to the problem of understaffing, and did not take into account the fact that she was on approved sick leave to

undergo knee surgery. *Id.*, ¶ 26. After plaintiff's union advised her that it was improper for Murphy to have evaluated plaintiff while she was on approved medical leave, plaintiff filed another formal grievance about this evaluation, which grievance was consolidated with the earlier one. *Id.*, ¶ 27.

In late February 2009, plaintiff was notified by Baruch that her employment contract would not be renewed after June 30, 2009, based on the two consecutive unsatisfactory performance evaluations. *Id.*, ¶ 28. Plaintiff asserts that, after she was terminated, the second unsatisfactory evaluation was removed from her record, but she was not offered reinstatement. *Id.*, ¶ 29. Plaintiff alleges that she was replaced by a "much younger" Caucasian woman, who was provided with the additional staff that plaintiff had requested. *Id.*, ¶¶ 33-34. If plaintiff's contract had been renewed, she would have been eligible for tenure in September 2009. *Id.*, ¶ 30.

Plaintiff also alleges that, in August 2008, she received an "unexpected" telephone call from Dr. Ben Corpus (Corpus),[1] Baruch's Vice President for Student Enrollment, who commented to her that he was looking at her file and noticed she would be having a birthday soon. *Id.*, ¶ 22. At the time, plaintiff was approaching her 61st birthday, and she claims that this call, together with her unsatisfactory review, led her to believe that

[1]Sued herein as Ben Copus.

Corpus and Murphy wanted her to retire due to her age. *Id.*

The instant action was commenced in April 2011. The complaint alleges four causes of action: the first and second allege discriminatory termination, based on age, race and disability, in violation of, respectively, the New York State Human Rights Law (Executive Law § 296 *et seq.*) (NYSHRL) and the New York City Human Rights Law (Administrative Code of the City of New York [Admin. Code] § 8-107 *et seq.*) (NYCHRL). The third and fourth causes of action allege unlawful retaliation, in violation of the NYSHRL and the NYCHRL, for protesting her unsatisfactory performance evaluation for the 2007-2008 academic year. Defendants move to dismiss the NYCHRL claims against CUNY and Baruch based on sovereign immunity, and move to dismiss the complaint in its entirety for failure to state a cause of action.

Discussion

At the outset, the branch of defendants' motion seeking dismissal of plaintiff's NYCHRL claims against CUNY and Baruch is not opposed. *See* Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint (Pl. Memo of Law), at 8. Defendants argue, and plaintiff does not dispute, that defendants CUNY and Baruch, as instrumentalities of the State of New York, are not subject to the provisions of the NYCHRL, based on sovereign immunity. *See Jattan v Queens Coll. of City Univ. of N.Y.*, 64 AD3d 540, 542 (2d Dept 2009); *Khalil v State of New*

York, 17 Misc 3d 777, 786 (Sup Ct, NY County 2007); *Gengo v City Univ. of N.Y.*, 2012 WL 2161156, *1, 2012 US App LEXIS 12149, *3 (2d Cir 2012). Accordingly, the second and fourth causes of action are dismissed as against CUNY and Baruch.

Turning to the branch of the motion seeking dismissal for failure to state a cause of action, it is by now axiomatic that, on a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleadings are to be afforded a liberal construction. *See* CPLR 3026. The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *see People v Coventry First LLC*, 13 NY3d 108, 115 (2009); *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002). "Stated another way, the court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint." *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 (1st Dept 2002); *see Weiss v Lowenberg*, 95 AD3d 405, 406 (1st Dept 2012). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005); *see Roni LLC v Arfa*, 18 NY3d 846, 848

(2011). However, while the pleading standard is a liberal one, "conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts." *Vanscoy v Namic USA Corp.*, 234 AD2d 680, 681-682 (3d Dept 1996) (internal quotation marks and citation omitted); *see Shariff v Murray*, 33 AD3d 688, 690 (2nd Dept 2006); *Scarfone v Village of Ossining*, 23 AD3d 540, 541 (2nd Dept 2005); *Tal v Malekan*, 305 AD2d 281, 281 (1st Dept 2003).

In employment discrimination cases, claims are "generally reviewed under notice pleading standards ... [That is,] a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds." *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (1st Dept 2009) (internal citation omitted); *see Krolick v Natixis Sec. N. Am. Inc.*, 2011 WL 6891326, 2011 NY Misc LEXIS 6188, *12 (Sup Ct, NY County 2011); *Falu v Seward & Kissel LLP*, 2010 WL 1004540, 2010 NY Misc LEXIS 2562, *7 (Sup Ct, NY County 2010). Contrary to defendants' argument, the United States Supreme Court's decision in *Ashcroft v Iqbal* (556 US 662 [2009]) has not changed that standard for claims brought under the NYSHRL and NYCHRL. Although *Vig* "cites a 2002 United States Supreme Court decision applying the Federal Rules of Civil Procedure, the First Department decided *Vig* ... after the Supreme

Court's rearticulation of federal pleading standards in *Ashcroft v Iqbal* ... [and] *Vig* therefore represents the First Department's determination to adhere to notice pleading standards under New York law regardless of *Iqbal*'s implications for notice pleading under federal law." *Krolick*, 2011 WL 6891326, 2011 NY Misc LEXIS 6188, at *12-13; *see also Barbosa v Continuum Health Partners, Inc.*, 716 F Supp 2d 210, 218 (SD NY 2010) (applying *Iqbal* to federal claims, court found that "to survive a motion to dismiss, a plaintiff need not allege specific facts establishing a prima facie case of discrimination ... complaint is sufficient if it states a facially plausible claim and gives fair notice to defendants of the basis for the claim").

Employment Discrimination

Under both the New York State and New York City Human Rights Laws, it is an unlawful discriminatory practice for an employer to refuse to hire or employ or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of, as pertinent here, the individual's age, race or disability. Executive Law § 296 (1) (a); Admin. Code § 8-107 (1) (a). Generally, to establish a prima facie case of employment discrimination, a "plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was 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." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004), citing *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 (1997); *see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270 n 2 (2006); *Mittl v New York State Div. of Human Rights*, 100 NY2d 326, 330 (2003); *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009). To state a prima facie case of disability discrimination, a plaintiff must also allege that he or she suffers from a disability and the disability caused the behavior for which he or she was terminated. *Matter of McEniry v Landi*, 84 NY2d 554, 558 (1994); *see Vig*, 67 AD3d at 146; *Cuccia v Martinez & Ritorto, PC*, 61 AD3d 609, 610 (1st Dept 2009); *Vinokur v Sovereign Bank*, 701 F Supp 2d 276, 290 (ED NY 2010).

A plaintiff's initial burden of establishing a prima facie case of discrimination "is not a significant hurdle" (*Hardy v General Elec. Co.*, 270 AD2d 700, 701 [3d Dept 2000] [internal quotation marks and citation omitted]), and has often been described as minimal. *See St. Mary's Honor Ctr. v Hicks*, 509 US 502, 506 (1993); *Melman v Montefiore Med. Ctr.*, __ AD3d __, 946 NYS2d 27, 32 (1st Dept 2012); *Wiesen v New York Univ.*, 304 AD2d 459, 460 (1st Dept 2003); *Schwaller v Squire Sanders & Dempsey*, 249 AD2d 195, 196 (1st Dept 1998); *see also Denigris v New York City Health & Hosp. Corp.*, 2012 WL 955382, 2012 US Dist LEXIS

39321, *22 (SD NY 2012). An inference of discrimination "may be drawn from direct evidence, from statistical evidence, or merely from the fact that the position was filled or held open for a person not in the same protected class." *Sogg v American Airlines, Inc.*, 193 AD2d 153, 156 (1st Dept 1993) (internal citations omitted); *see Forrest*, 3 NY3d at 326 (plaintiff does not need to prove discrimination by direct evidence; circumstantial evidence is sufficient); *James v New York Racing Assn.*, 233 F3d 149, 153-54 (2d Cir 2000) (minimal showing for prima facie case requires no evidence of discrimination; preference for person not in protected class is enough); *Hnot v Willis Group Holdings Ltd.*, 2005 WL 831664, *4 2005 US Dist LEXIS 6066, *13 (SD NY 2005) (same); *see also Desir v City of New York*, 453 Fed Appx 30, 34 (2d Cir 2011) ("showing that employer treated plaintiff less favorably than a similarly situated employee outside his protected group - is a recognized method of raising an inference of discrimination"); *but see Banks v Correctional Servs. Corp.*, 475 F Supp 2d 189 (ED NY 2007) (allegation that plaintiff was replaced by a white male, without more, is insufficient for race discrimination claim). In an age discrimination claim, for instance, absent direct or statistical evidence of discrimination, an inference of discrimination may be supported by showing that a plaintiff's "position was subsequently filled by a younger person or held open for a

younger person." *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 123 (1st Dept 2007), citing *Ioele v Alden Press*, 145 AD2d 29, 35 (1st Dept 1989); *see Yanai v Columbia Univ.*, 2006 WL 684941, 2006 NY Misc LEXIS 9354, *27-28 (Sup Ct, NY County 2006); *Cellamare v Millbank, Tweed, Hadley & McCloy LLP*, 2003 WL 22937683, *5, 2003 US Dist LEXIS 22336, *17 (ED NY 2003) (allegations that employer "has been hiring younger people at a lower rate" were sufficient to state claim for discriminatory termination based on age); *Moskowitz v Alliance Capital Mgmt., Inc.*, 2003 WL 22427845, *1, 2003 US Dist LEXIS 18893, *2-3 (SD NY 2003) (allegations that plaintiff, over 60, was discharged because of his age, and that employer's nepotism policies were applied to him because of his age, were sufficient to support age discrimination claim).

Moreover, both the NYSHRL and NYCHRL require that their provisions be "construed liberally" to accomplish the remedial purposes of prohibiting discrimination. Executive Law § 300; Administrative Code § 8-130; *see Matter of Binghamton GHS Employees Fed. Credit Union v State Div. of Human Rights*, 77 NY2d 12, 18 (1990); *Williams v New York City Hous. Auth.*, 61 AD3d 62, 65 (1st Dept 2009). The NYCHRL further requires "an independent liberal construction analysis ... targeted to understanding and fulfilling ... the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart State or federal

civil rights law." *Williams*, 61 AD3d at 66; *see* Admin. Code § 8-130; *Albunio v City of New York*, 16 NY3d 472, 477-478 (2011); *Phillips v City of New York*, 66 AD3d 170, 172 (1st Dept 2009).

In view of the above standards, and mindful that courts urge caution in summarily disposing of employment discrimination claims, because direct evidence of an employer's discriminatory intent is rarely available (*see Ferrante*, 90 NY2d at 631; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 43-44 [1st Dept 2011]), the court finds that plaintiff's allegations, given every favorable inference, are sufficient to withstand a pre-answer motion to dismiss. *See Vallone v Banca Nazionale del Lavoro, N.Y. Branch*, 2004 WL 2912887, *1, 2004 US Dist LEXIS 25252, *2 (SD NY 2004) (court cannot conclude that "no relief could be granted under any set of facts that could be proved consistent with the allegations"); *compare DuBois v Brookdale Univ. Hosp. & Med. Ctr.*, 6 Misc 3d 1023(A) (Sup Ct, Kings County 2004), *affd* 29 AD3d 731 (2nd Dept 2006) (conclusory allegations of discrimination dismissed in view of unrebutted documentary evidence submitted by defendants showing discipline issues were non-discriminatory basis for termination); *Cruse v G & J USA Publ.*, 96 F Supp 2d 320, 328 (SD NY 2000) (plaintiff made prima facie case by showing that she was a black woman terminated after 2½ years of employment who performed her job satisfactorily, but, at summary judgment stage, she did not rebut defendant's showing of non-

discriminatory reason for termination).

It is undisputed that plaintiff, as an African-American woman over 60 years of age, belongs to a protected category. For purposes of this motion, defendants also do not contest that plaintiff suffered from a disability as defined by the New York statutes, and that she was terminated from a position for which she was qualified. *See Slattery v Swiss Reins. Am. Corp.*, 248 F3d 87, 92 (2d Cir 2001) (to demonstrate qualification, "all that is required is that the plaintiff establish basic eligibility for the position at issue, and not the greater showing that he satisfies the employer").

Plaintiff alleges that, after 5 years of employment and consistently good performance evaluations, a new supervisor took over her department, and the new supervisor mistreated her, by requiring her to do work that aggravated her asthma, by undermining her authority, by refusing to address her requests for additional staff, and by giving her two consecutive unsatisfactory performance reviews. She alleges that the two negative evaluations were neither correct nor fair in their criticisms, and were in sharp contrast to the positive evaluations she consistently received for five years while performing the same functions. Plaintiff also alleges that the second evaluation was improperly given to her while she was out on sick leave, and that she also received her notice of

termination while she was out. She claims that although the second evaluation was removed from her record, she was not offered reinstatement. She further alleges that she was replaced by a substantially younger white woman, who was given the additional staff that plaintiff had requested.

Even in the absence of alleged overt discriminatory conduct or comments,[2] plaintiff's allegations of disparate treatment, assuming them to be true, meet the minimal requirements to state a cause of action for discrimination. *See Carryl v MacKay Shields, LLC*, 93 AD3d 589, 589-590 (1st Dept 2012) (plainitff made prima facie case of race discrimination by showing he was a member of a protected class and was paid less than Caucasian peer); *Vallone v Banca Nazionale del Lavoro*, 2004 WL 2912887, 2004 US Dist LEXIS 25252, *supra* (two employees' allegations that they were over 40 and fired because of their age to avoid paying them pensions sufficiently allege age discrimination). As noted above, "plaintiff's ultimate ability to prove those allegations is not relevant" at this stage. *Wang v Wang*, 96 AD3d 1005, 1008 (2d Dept 2012); *see EBC I, Inc.*, 5 NY3d at 19.

Retaliation

---

[2]By itself, the single comment of defendant Corpus regarding plaintiff's birthday is innocuous and does not support a finding of discriminatory animus. *See Mete v New York State Ofc. of Mental Retardation & Developmental Disabilities*, 21 AD3d 288, 294 (1st Dept 2005); *Moon v Clear Channel Communications*, 307 AD2d 628, 632 (3d Dept 2003); *Green*, 209 AD2d at 182; *Adia v MTA Long Is. R. R. Co.*, 2006 WL 2092482, *9, 2006 US Dist LEXIS 51045, *18-19 (ED NY 2006).

To establish a claim of unlawful retaliation under the NYSHRL (Executive Law § 296 [1] [e]), a plaintiff must show that she participated in a protected activity known to defendants, an adverse employment action was taken against her, and a causal connection existed between the adverse action and the protected activity. *See Forrest*, 3 NY3d at 312-313; *Fletcher v Dakota, Inc.*, 2012 WL 2532149, *4, 2012 NY App LEXIS 5245, *10-11 (1st Dept 2012); *Bendeck v NYU Hosps.*, 77 AD3d 552, 553 (1st Dept 2010); *Hernandez v Bankers Trust Co.*, 5 AD3d 146, 148 (1st Dept 2004). Under the more protective NYCHRL, a plaintiff need not show that termination or another materially adverse action resulted, but, rather, that she was deterred from engaging in protected activity. *See* Admin. Code § 8-107 (7); *Fletcher*, 2012 WL 2532149, at *4, 2012 NY App Div LEXIS 5245, at *11; *Williams*, 61 AD3d at 70-71; *Rozenfeld v Department of Design & Constr. of City of N.Y.*, 2012 WL 2872157, *13, 2012 US Dist LEXIS 97030, *36-37 (ED NY 2012).

"Protected activity" refers to action taken to oppose or complain about any discriminatory practices prohibited by the state and city human rights statutes. *See Forrest*, 3 NY3d at 313 n 11; *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dept 2010); *Sharpe v MCI Communications Servs., Inc.*, 684 F Supp 2d 394, 406 (SD NY 2010); *Bryant v Verizon Communications Inc.*, 550 F Supp 2d 513, 537 (SD NY 2008). "[C]omplaining of conduct other

than unlawful discrimination is not a protected activity subject to a retaliation claim under the State and City Human Rights Laws." *Pezhman v City of New York*, 47 AD3d 493, 494 (1st Dept 2008); *see Ciullo v Yellow Book, USA, Inc.*, 2012 WL 2676080, *13, 2012 US Dist LEXIS 93912, *39 (ED NY 2012) ("general complaints ... that did not relate to allegations of discrimination do not trigger retaliation protections").

While opposition to discrimination may be inferred from other evidence even when a plaintiff "does 'not say so in so many words'" (*Fletcher*, 2012 WL 2532149, at *6, 2012 NY App Div LEXIS 5245 at *17, citing *Albunio*, 16 NY3d at 479), "[i]n order for a complaint to form the basis of a retaliation claim, ... the employer must have 'understood, or could reasonably have understood, that the plaintiff's opposition was directed at conduct prohibited by the employment discrimination laws.'" *Mayers v Emigrant Bancorp, Inc.*, 796 F Supp 2d 434, 448, quoting *Galdieri-Ambrosini v National Realty & Dev. Corp.*, 136 F3d 276, 292 (2d Cir 1998); *see Turner v NYU Hosps. Ctr.*, 784 F Supp 2d 266, 285-286 (SD NY 2011), *affd* 470 Fed Appx 20 (2d Cir 2012). "[A]mbiguous complaints that do not make the employer aware of alleged discriminatory misconduct do not constitute protected activity." *International Healthcare Exch., Inc. v Global Healthcare Exch., LLC*, 470 F Supp 2d 345, 357 (SD NY 2007); *see St. Jean v United Parcel Serv. Gen. Serv. Co.*, 2012 WL 71843,

*11, 2012 US Dist LEXIS 2732, *35 (ED NY 2012); *Bennett v Hofstra Univ.*, 842 F Supp 2d 489, 501 (ED NY 2011); *Lartey v Shoprite Supermkts., Inc.*, 2011 WL 2416880, *2, 2011 US Dist LEXIS 66676, *5-6 (SD NY 2011).

Further, "if the discriminatory nature of the complaint is not readily apparent, 'the onus is on the speaker to clarify to the employer that [she] is complaining of unfair treatment due to [her] membership in a protected class and that [she] is not complaining merely of unfair treatment generally.'" *Mayers*, 796 F Supp 2d at 448, quoting *Aspilaire v Wyeth Pharms., Inc.*, 612 F Supp 2d 289, 308-309 (SD NY 2009). Even where plaintiff "may have believed that she was the victim of discrimination, an undisclosed belief of such treatment will not convert an ordinary employment complaint into a protected activity." *Aspilaire*, 612 F Supp 2d at 309.

In the instant complaint, plaintiff alleges that, after she contacted her union and filed a grievance protesting her unsatisfactory evaluation for the 2007-2008 school year, defendants retaliated against her, by continuing to harass her and by terminating her employment. Complaint, ¶¶ 43, 47. She complained that the evaluation was untrue, unfair, improper, and in violation of the union's collective bargaining agreement. *Id.*; *see* Grievance, Ex. C to Klekman Aff. in Support of Defendants' Motion. There are, however, no allegations that she

complained about any discriminatory conduct or actions, in the grievance, or otherwise to Murphy or Corpus or anyone at Baruch. Absent such allegations, the retaliation claim cannot stand, even under the NYCHRL. *See Fletcher*, 2012 WL 2532149, *6, 2012 NY App Div LEXIS 5245, at *16-17; *International Healthcare Exch.*, 470 F Supp 2d at 357.

Contrary to plaintiff's assertions that the context of plaintiff's grievance may "rais[e] the spectre" of a discrimination complaint (*see* Pl. Memo of Law, at 10-11), the mere fact that she was a member of a protected category, or of several protected categories, does not convert her union grievance into a discrimination complaint or provide a basis for inferring that defendants could have reasonably understood the grievance to be directed at a discriminatory practice. *See St. Jean*, 2012 WL 71843, at *11, 2012 US Dist LEXIS 2732, at *35; *Aspilaire*, 612 F Supp 2d at 310.

In addition, where, as plaintiff has alleged here, adverse actions began before the employee complained, "an employer's continuation of a course of conduct that had begun before the employee complained does not constitute retaliation because, in that situation, there is no causal connection between the employee's protected activity and the employer's challenged conduct." *Melman*, 946 NYS2d at 42; *see Alfano v Starbucks Corp.*, 2012 WL 2353763, 2012 NY Misc LEXIS 2746, *11 (Sup Ct, NY County

2012).

It is accordingly

ORDERED that defendants' motion is granted in part and denied in part, and the third cause of action, alleging discrimination in violation of the NYCHRL, is dismissed only as against defendants City University of New York and Baruch College; and it is further

ORDERED that the second and fourth causes of action, alleging retaliation, are dismissed in their entirety; and it is further

ORDERED that the remaining claims are severed and shall continue.

Dated: 8/27/12

ENTER:

HON. ANIL C. SINGH, J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE