SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

----------X

STEVENSON PETIT,

Plaintiff,

-against-

Index No.: 155523/2016

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK,

Defendant.

----------X

W. FRANC PERRY, J.:

This action arises out of plaintiff Stevenson Petit's claims that he was subject to discrimination, retaliation and a hostile work environment based on his age, race, color, national origin and religion, in violation of the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL). Defendant the Department of Education of the City of New York (DOE), moves, pursuant to CPLR 3211 (a) (5) and (7), for an order dismissing the complaint. Plaintiff cross-moves, pursuant to CPLR 3025 (b), for an order granting him leave to serve and file a second amended complaint.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff commenced his employment with the DOE in 1994 and received tenure in 2010. During the relevant time period, plaintiff had been employed by the DOE as a guidance counselor at the Tilden Educational Campus. Plaintiff identifies himself as a 55-year old African

American male from Haiti who "studies Voodoo." Amended complaint, ¶ 1.

Marina Vinitskaya (Vinitskaya) became principal of plaintiff's school starting in the 2008-2009 school year. Plaintiff claims that Vinitskaya discriminated against him on the basis of his Haitian origin and because he studied Voodoo. According to plaintiff, Vinitskaya, who is Caucasian and Russian, "openly accused" plaintiff of being a Voodoo priest who practices Voodoo. *Id.*, ¶ 6. Plaintiff states that he is not a Voodoo priest and does not practice Voodoo, although he studied the religion. However, as Vinitskaya believes that he is, Vinitskaya targeted plaintiff by "papering" his file and also creating a hostile work environment, in an attempt to force him out of the school. He alleges that, prior to the 2008-2009 school year, there were no issues with his work performance.

Plaintiff's allegations regarding discrimination and hostile work environment are as follows, in pertinent part:

- Plaintiff alleges that, in June 2011, he was falsely accused of misconduct. In a subsequent investigation by the Office of Special Investigations (OSI), Vinitskaya allegedly referred to plaintiff as a "Voodoo priest." *Id.*, ¶ 7.[1]
- Although Vinitskaya informed plaintiff that parents had complained about him during the 2013-2014 school year, she did not identify the parents.
- On June 17, 2014, plaintiff states that he was involved in a car crash and he was charged with menacing.[2] He was told to report to the District office while the accident was being investigated. On June 18, 2014, a woman in the office asked him to carry boxes, however, plaintiff stated that he could not carry them because of a herniated disc. The unidentified woman allegedly then stated "this Mexican donkey doesn't want to do anything." *Id.*, ¶ 10. Plaintiff states that he complained about the unidentified woman's behavior, to no avail.[3]

---

[1] Plaintiff does not provide any documentation in support of this allegation.

[2] The record indicates that plaintiff was arrested on this date for attempted vehicular assault and menacing. The DOE's exhibit B at 1.

[3] Plaintiff does not provide any supporting documentation about this alleged complaint.

- The charges from plaintiff's accident were dropped on March 17, 2015. Upon plaintiff's return to school, Vinitskaya informed plaintiff that an "ATR guidance counselor" was using plaintiff's office and that plaintiff was reassigned to a "musty, dirty storage room in the basement." *Id.*, ¶¶ 11,12. Plaintiff alleges that Vinitskaya engaged in discriminatory conduct and moved him "maliciously as Plaintiff had seniority and there were other offices available." *Id.* As a result of being placed in this office, plaintiff experienced health issues, including headaches.

- Plaintiff states that his union tested the air quality of the office and that it was "unfit" for a person. *Id.*, ¶ 13. Despite complaining to Vinitskaya, she would not move him.

- As a result, in April 2015, his union filed a discrimination complaint on his behalf. Plaintiff further alleges that there was "another OEO complaint."[4]

Despite plaintiff's complaints, plaintiff states that he was "excessed" by mail in July 2015 and is currently in the Absent Teacher Reserve (ATR).[5] According to petitioner's collective bargaining agreement, the guidance counselor with the least seniority is excessed first. *See* DOE's exhibit D at 29.

Plaintiff commenced this action on July 1, 2016, alleging that he was subject to disparate treatment, a hostile work environment and retaliation, in violation of the NYCHRL and NYSHRL. Plaintiff summarizes that he has been subjected to discrimination and retaliation "based on race, color, age, national origin [and] religion . . . ." Amended complaint, ¶ 16.[6] As a

---

[4] Plaintiff does not attach any of these complaints or provide details of the content or to whom they were sent.

[5] The DOE explains that "excessing" occurs when a school needs to lay off certain staff as a result of budget cuts and enrollment changes, among other things. The excessed teacher becomes a member of the ATR while he fills in for absent staff members and waits to secure another permanent position. While in the ATR, the employee receives a full salary and benefits.

[6] Plaintiff states that he was subject to age discrimination under the NYSHRL, but does not allege age discrimination in violation of the NYCHRL. The amended complaint and the memo of law do not provide any allegations of discrimination or retaliation based on age.

result of the DOE's actions, plaintiff claims that he "has been damaged in that he has lost his permanent assignment and is now a temporary substitute being assigned on a weekly basis to different school [sic] due to the foregoing discriminatory conduct, despite having seniority over other counselors that were not excessed." *Id.*, ¶ 15.

Notice of claim

The DOE moves to dismiss the amended complaint, on the basis that plaintiff failed to satisfy his burden of complying with the notice of claim requirements. The amended complaint does not set forth that plaintiff filed a timely notice of claim. According to the DOE, it was able to locate a notice of claim filed by plaintiff on September 21, 2015.[7] As a result, all claims that accrued prior to June 21, 2015 would be barred.

Plaintiff acknowledges that the notice of claim in the record is the notice of claim he submitted to the DOE. Plaintiff filed this notice of claim on September 18, 2015, along with a charge to the Equal Employment Opportunity Commission (EEOC) on the same date.

One year statute of limitations

In addition, as plaintiff commenced the action on July 1, 2016, the DOE argues that any claim that took place prior to July 1, 2015 would be barred due to the one-year statute of limitations on NYSHRL and NYCHRL claims. The DOE explains that the majority of plaintiff's claims, which include the 2011 OSI investigation, the 2013-2014 allegation about parental complaints, the June 2014 comment in the district office and the March 2015 placement in the basement office, even if actionable, are time-barred. According to the DOE, the only remaining

---

[7] In this notice of claim, which is dated September 18, 2015, plaintiff alleges that the DOE discriminated against plaintiff on the basis of race, national origin and perceived religion. The paragraphs set forth in the notice of claim are almost identical to the amended complaint.

timely claim would be plaintiff's claim that, in July 2015, he was excessed for discriminatory and retaliatory reasons.

The DOE maintains that the allegedly time-barred claims would not meet the threshold to be timely as a part of a continuing violation, because they are discrete acts that do not comprise a continuing practice of discrimination. According to the DOE, plaintiff has not identified a single unlawful employment policy or practice that would link the untimely claims to the timely one. For example, the DOE contends that the comment in the district office is not related to plaintiff's office reassignment once he returned to school. In addition, the DOE argues that the time gap between the alleged acts would undermine a claim for a consistent pattern of discriminatory conduct.

In opposition to the DOE's motion, plaintiff concedes that his NYSHRL and NYCHRL claims are subject to a one-year statute of limitations. However, plaintiff argues that the allegations prior to July 1, 2015 should be allowed in as timely, as they comprise a continuing violation of being subject to a hostile work environment by the DOE.

Specifically, plaintiff alleges that, when plaintiff returned to work in March 2015, he was assigned to a dirty storage room, despite his seniority and the availability of other offices.[8] Plaintiff complained to his union in April 2015 and, despite the fact that the office was "unfit," he was not given another office. After plaintiff's union filed a discrimination complaint in April 2015 and also another complaint, he was unlawfully excessed in July 2015.

According to plaintiff, even if he has not adequately pled a continuing violation, the act of being excessed in July 2015 is timely.

---

[8] Plaintiff does not address the timeliness of the remaining allegations.

Discrimination under the NYSHRL and NYCHRL

The DOE argues that plaintiff fails to state a discrimination or retaliation claim with respect to being excessed. The DOE maintains that being assigned to the ATR does not constitute an adverse employment action, because plaintiff's salary and benefits are not impacted. Plaintiff is still employed by the DOE and assigned to the ATR. Even if being assigned to the ATR could be construed as an adverse employment action, plaintiff does not allege any facts establishing that this assignment was motivated by discriminatory intent.

In opposition to the DOE's motion, plaintiff argues that he was subject to an adverse employment action when he was excessed. As part of the ATR, plaintiff experienced a change in his responsibilities, as he is now a substitute teacher who is required to travel to different schools.[9]

Further, plaintiff argues that he has pled circumstances which raise an inference of discrimination. When plaintiff returned in March 2015 from his leave, Vinitskaya assigned him to an uninhabitable office due to his "race, national origin and religion as Plaintiff had seniority and there were other offices available." Plaintiff's mem of law at 15.

Plaintiff explains that the allegations as set forth in his amended complaint, commencing in June 2011 and ending with his eventual excess in July 2015, comprise the circumstantial evidence of Vinitskaya's bias i.e., that Vinitskaya targeted plaintiff due to his Haitian origin and

[9] The record indicates that, through his union, plaintiff challenged his placement in the ATR. On February 3, 2016, the Chancellor's representative denied plaintiff's grievance and found that the terms of plaintiff's collective bargaining agreement were not violated by his excess. The Chancellor's representative concluded that plaintiff was excessed because he was the least senior guidance counselor at his school. The guidance counselors who were retained were more senior than plaintiff as one had 16 years of service and the other had 27 years.

because he studied Voodoo. In addition, plaintiff claims that there was a direct admission of bias against plaintiff during the June 2011 OSI investigation, when Vinitskaya "openly accused" plaintiff of being a Voodoo priest.

Retaliation

The DOE argues that plaintiff cannot state a cause of action for retaliation because he cannot claim to have suffered an adverse action or one that disadvantaged him. Moreover, the DOE argues that plaintiff has not provided more than vague assertions that he engaged in any protected activity. Finally, the DOE contends that, even assuming that plaintiff engaged in protected activity and suffered an adverse employment action, plaintiff cannot establish a causal connection between the protected activity and the adverse action because he complained in April 2015 and he was excessed in July 2015.

Plaintiff argues that he has established a claim for retaliation because there is a causal connection between his protected activity and his placement in the ATR. Shortly after plaintiff complained to his principal and then filed formal "discrimination" complaints, he was excessed. Further, in light of the elements of a NYCHRL retaliation claim, being excessed would deter any reasonable worker from complaining.

Hostile work environment

The DOE argues that plaintiff has not provided any timely facts to support a hostile work environment claim. In any event, the stray remarks alleged in the amended complaint, without more, do not rise to the level of an actionable hostile work environment. In addition, the DOE maintains that being reassigned to an available office space cannot support a claim for a discriminatory hostile work environment.

Plaintiff argues that he has adequately pled a claim for hostile work environment under the NYCHRL and NYSHRL. He maintains that he is a member of a protected class and that he was subject to unwelcome harassment on the basis of his race, national origin and religion when Vinitskaya refused to move him from an office that was purportedly causing him to be ill. Plaintiff believes that being assigned to this office "amounted to more than petty inconveniences and could be considered severe and pervasive." Plaintiff's mem of law at 21.

Plaintiff's cross motion

Plaintiff seeks to amend the complaint to include an additional cause of action alleging that the DOE violated Title VII by subjecting him to discrimination, retaliation and a hostile work environment. Plaintiff states that the "facts in the complaint remain identical as well as the actual claims, however, an added claim under Title VII has been added." Karlin affirmation, ¶ 3.

According to plaintiff, he filed charges with the EEOC on September 17, 2015, alleging that he was discriminated against on the basis of race, religion and national origin, and that he was retaliated against.

The record indicates that the EEOC closed its investigation and issued plaintiff a right to sue letter on April 13, 2016. In the cross motion, while acknowledging that the EEOC did mail a letter, plaintiff's counsel claims that he never received a copy of this letter. As a result, he argues that "[s]ince the complaint remain [sic] identical and was filed on July 1, 2016, the Title VII claim relates back to the date of the initial filing of the Complaint and Plaintiff should be allowed to amend the complaint to add the Title VII claim." *Id.*, ¶ 4.

Plaintiff continues that the proposed second amended complaint arises from the same set of facts as the amended complaint, the theories of recovery are the same, and that the DOE will

not suffer prejudice or surprise if the cross motion to amend is granted.

In opposition, the DOE argues that the cross motion should be procedurally denied as time-barred. The EEOC mailed plaintiff a right to sue letter dated April 13, 2016, and it is presumed that plaintiff received this letter on April 16, 2016. Plaintiff then had ninety days from April 16, 2016 to file an action asserting federal claims. As plaintiff's cross motion to amend the complaint was filed in January 2017, the Title VII claims should be dismissed as untimely. According to the DOE, plaintiff has not provided any reason that his federal claims should qualify for equitable tolling and be considered timely. The DOE notes that the right to sue letter is addressed to plaintiff, who then had the responsibility to notify his counsel of its receipt.

In addition, the DOE argues that the cross motion should be denied as futile. Title VII claims are subject to the same standard as the NYSHRL claims. As plaintiff has allegedly failed to state a cause of action under the NYSHRL, he has therefore also failed to state a claim under Title VII.

DISCUSSION

I. Dismissal

On a motion to dismiss pursuant to CPLR 3211, "the facts as alleged in the complaint [are] accepted as true, the plaintiff is [given] the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." *Mendelovitz v Cohen,* 37 AD3d 670, 671 (2d Dept 2007). "In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards. . . . [I]t has been held that 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). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted).

II. Notice of Claim and Statute of Limitations

Pursuant to Education Law § 3813 (1), prior to maintaining an action against the DOE, a plaintiff must file a notice of claim within three months of the accrual of the claim. *See e.g. Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 547 (1983) ("Satisfaction of these [notice of claim] requirements is a condition precedent to bringing an action against a school district or a board of education . . ."). Therefore, a claimant seeking to commence an action against the DOE for violations of the NYSHRL and the NYCHRL must serve a notice of claim on the DOE within three months of the claim arising. *United States v New York City Dept. of Educ.*, 2017 US Dist Lexis 45816, *7, 2017 WL 1169653, *2 (SD NY 2017); *see also Munro v Ossining Union Free School Dist.*, 55 AD3d 697, 698 (2d Dept 2008) (claimant seeking to commence an action against a school district for violations of the Human Rights Law must file a notice of claim within three months of the claim's accrual). "Compliance with this requirement is a condition precedent to suit and must be pleaded in the complaint." *Munro v Ossining Union Free School Dist.*, 55 AD3d at 698.

Here, as plaintiff served a notice of claim on September 18, 2015, any cause of action that accrued prior to June 18, 2015 is time-barred. *See e.g. Pinder v City of New York*, 49 AD3d 280, 281 (1st Dept 2008) ("Dismissal of the Executive Law § 296 claim was also proper because

plaintiff did not file a notice of claim within three months of her termination").

Similarly, a one-year statute of limitations applies to plaintiff's NYSHRL and NYCHRL claims. *See e.g. Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d 367, 369 (2007) ("the clear and unambiguous language of Education Law § 3813 (2-b) provides that the statute of limitations on such a claim is one year"). As plaintiff commenced this action on July 1, 2016, any claims that are based on actions occurring prior to July 1, 2015, are time-barred.

Therefore, between the two statutory limitations on the timeliness of plaintiff's claims, plaintiff's claim that he was excessed on July 7, 2015 for discriminatory and retaliatory reasons is the only remaining timely claim.

Continuing violation doctrine

Plaintiff does not dispute the timeliness of any of the allegations that took place prior to March 18, 2015. For the claims arising between March 18, 2015, upon his return to school, and July 7, 2015, when he was excessed, he argues that a "continuing violation exception" should apply, as these claims are part and parcel of a hostile work environment claim.

The "continuing violation exception" applies to the statute of limitations period in NYSHRL and NYCHRL hostile work environment claims. This is because a hostile work environment is not merely comprised of several discrete acts, but of a "series of separate acts that collectively constitute an unlawful discriminatory practice." *Matter of Lozada v Elmont Hook & Ladder Co. No. 1*, 151 AD3d 860, 861 (2d Dept 2017). Therefore, a claim for hostile work environment will not be time-barred if all of the acts complained of are part of the same unlawful practice, and at least one discriminatory act falls within the statute of limitations. *Id.* at 861, 862. Courts have found that "completed acts such as a termination through discharge or resignation, a

job transfer or discontinuance of a particular job assignment, are not acts of a continuing nature . . ." *Marinelli v Chao*, 222 F Supp 2d 402, 413 (SD NY 2002) (internal quotation marks and citation omitted).

Plaintiff claims that, upon his return to school, he was maliciously placed in an uninhabitable office. Vinitskaya refused to move him, despite his complaints, his seniority and the availability of other offices.

However, plaintiff has not established how the incidents related to the poor office conditions, which took place outside of the limitations period, relate to the one timely act of being placed in the ATR. Accordingly, plaintiff's claims prior to July 1, 2015 are time-barred, as he failed to establish that they "collectively constitute[d]" an unlawful employment practice. *Matter of Lozada v Elmont Hook & Ladder Co. No. 1*, 151 AD3d at 861.

III. NYSHRL/NYCHRL

Pursuant to the NYSHRL and the NYCHRL, 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 the individual's age, race, religion, color or national origin. *See* Executive Law § 296 (1) (a); Administrative Code of the City of NY (Administrative Code) § 8-107 (1) (a).

Under both the NYSHRL and the NYCHRL, the court applies the burden shifting analysis developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), where the plaintiff has the initial burden to establish a prima facie case of discrimination. *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004). Plaintiff must set forth that "the plaintiff is a member of a protected class, was qualified for the position, and was terminated or suffered some

other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009).

If the plaintiff is able to set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating that the plaintiff was discharged for a nondiscriminatory reason. *Id.* at 965. If the employer meets this burden, the plaintiff is still entitled to "prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination." *Id.* (internal quotation marks and citation omitted).

The provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts. *Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 (1st Dept 2016). "For HRL liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that [he] has been treated less well than other employees because of [his protected status]." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 (1st Dept 2009); *see e.g. Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 (1st Dept 2013) (Granting DOE's motion to dismiss plaintiff's employment discrimination claim, Court held that plaintiff failed to adequately plead under the NYSHRL and NYCHRL "that she was either terminated or treated differently under circumstances giving rise to an inference of discrimination").

Applying the standards above to the instant situation, plaintiff cannot adequately plead a cause of action for discrimination under the NYSHRL or the NYCHRL, because plaintiff cannot establish the third element of a discrimination claim; namely, that he was subject to an adverse employment action.

The Appellate Division, First Department, describes an adverse employment action, in pertinent part, as follows:

> "An adverse employment action requires a materially adverse change in the terms and conditions of employment. To be materially adverse a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. . . . A materially adverse change might be indicated by 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."

Messinger v Girl Scouts of U.S.A., 16 AD3d 314, 314-315 (1st Dept 2005) (internal quotation marks and citations omitted).

Plaintiff alleges that he was adversely affected because now, in the ATR, he is a temporary substitute who is assigned on a weekly basis to a different school. However, being placed in the ATR is not an adverse employment action, because it did not "amount to a materially adverse change in the terms and conditions of [plaintiff's] employment." *Humphries v City Univ. of N.Y.*, 146 AD3d 427, 427 (1st Dept 2017). It is undisputed that, while in the ATR, plaintiff still receives his full salary and benefits while waiting for another permanent position to become available. *See e.g. Harris v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 230 F Supp 3d 88, 106 (ED NY 2017) ("Becoming a member of the ATR also does not by itself qualify as a materially adverse employment action. Plaintiff did not experience a change in salary or benefits after she received an appropriate letter of excess, a further indication that she did not suffer an adverse employment action").

Furthermore, to be considered materially adverse, a change in working conditions must be more disruptive than a "mere inconvenience or an alteration of job responsibilities." *Messinger v Girl Scouts of U.S.A.*, 16 AD3d at 315. Thus, requiring plaintiff to teach at a different school every week does not amount to an adverse employment action. Having to travel more, along with plaintiff's other complaints, are simply inconveniences. *See e.g. Silvis v City of New York*, 95 AD3d 665, 665 (1st Dept 2012) (internal quotation marks and citation omitted) ("Plaintiff's transfer from the position of literacy coach to a classroom teacher was merely an alteration of her responsibilities, and not an adverse employment action. Apart from a change in the nature of her duties, plaintiff retained the terms and conditions of her employment, and her salary remained the same").

Even assuming, arguendo, that being placed in the ATR could be construed as an adverse employment action, plaintiff cannot adequately plead that his placement in the ATR "occurred under circumstances giving rise to an inference of discrimination." The record indicates that plaintiff was the least senior guidance counselor in his school and was placed in the ATR in accordance with the procedures set forth by his collective bargaining agreement.

Notwithstanding the grievance determination above, giving plaintiff every favorable inference, plaintiff still fails to establish a discriminatory animus on the part of the DOE. Plaintiff states, in a conclusory fashion, that he was subject to discrimination because he was placed in the ATR despite having seniority over other counselors who were not excessed. Plaintiff provides the court with no relevant information about this claim, except to assert that the school's principal "targeted" plaintiff because she falsely believes that he is a Voodoo priest who practices Voodoo. As the Court held in *DuBois v Brookdale Univ. Hosp. & Med. Ctr.* (29 AD3d

731, 732 [2d Dept 2006]) (internal citations omitted), "even accepting the allegations of the complaint as true, and giving her every favorable inference to be drawn therefrom, the plaintiff failed to state a prima facie case of illegal discrimination. Rather, her allegations were merely conclusory."

Accordingly, plaintiff's failure to establish a discriminatory animus is "fatal" to his discrimination claims under the NYSHRL and NYCHRL. *Whitfield-Ortiz v Department of Educ. of the City of N.Y.*, 116 AD3d 580, 581 (1st Dept 2014) (Plaintiff's NYCHRL claim fails because it does not "contain any factual allegations demonstrating that similarly situated individuals who did not share plaintiff's protected characteristics were treated more favorably than plaintiff"); *see also Massaro v Department of Educ. of the City of N.Y.*, 121 AD3d 569, 570 (1st Dept 2014) (internal citations omitted) ("[Plaintiff's] allegations that she was 51 years old and was treated less well than younger teachers are insufficient to support her claims").

Accordingly, the DOE's motion to dismiss the discrimination claims under the NYSHRL and NYCHRL is granted.

IV. Plaintiff's Claims for Retaliation

Under both the NYSHRL and the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Executive Law § 296 (7); Administrative Code § 8-107 (7). Under the broader interpretation of the NYCHRL, "[t]he retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7).

For plaintiff to successfully plead a claim for retaliation under the NYSHRL or NYCHRL, he must demonstrate that:"(1) [he] has engaged in protected activity, (2) [his] employer was aware that [he] participated in such activity, (3) [he] suffered an adverse employment action based upon [his] activity, and (4) there is a causal connection between the protected activity and the adverse action." *Forrest v Jewish Guild for the Blind*, 3 NY3d at 313; *see also Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012). "Protected activity" refers to "actions taken to protest or oppose statutorily prohibited discrimination." *Aspilaire v Wyeth Pharmaceuticals, Inc.*, 612 F Supp 2d 289, 308 (SD NY 2009); *see also Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dept 2010) (internal quotation marks and citations omitted) (referring to protected activity under the NYCHRL as "opposing or complaining about unlawful discrimination").

Plaintiff alleges that his union filed an unidentified complaint, and that a complaint was filed with the OEO after he was placed in an uninhabitable office. Plaintiff then contends that he was retaliated against for filing these complaints, by being excessed.

However, in the present case, plaintiff cannot set forth a claim for retaliation under either the NYSHRL or the NYCHRL, because there is no indication that these complaints constituted protected activity. Plaintiff has not indicated what discriminatory conduct he was protesting when he complained about his office conditions. "[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).

Even assuming, arguendo, that plaintiff was opposing discriminatory practices, as explained above, he cannot demonstrate that he suffered an adverse action by being placed in the ATR.

Moreover, plaintiff cannot establish any connection between his complaints and his placement in the ATR. As noted, plaintiff was excessed because he was the least senior counselor in the school. Plaintiff has not provided anything, other than speculation, as to the alternative discriminatory reason for this placement. *See e.g. Whitfield-Ortiz v Department of Educ. of the City of N.Y.*, 116 AD3d at 581 (retaliation claims dismissed when plaintiff did not provide "any facts regarding when the alleged retaliatory incidents occurred or how those incidents were causally connected to any protected activity").

Accordingly, plaintiff's retaliation claims fail as a matter of law.

V. NYSHRL/NYCHRL Hostile Work Environment

Under the NYSHRL, a hostile work environment is present when "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Forrest v Jewish Guild for the Blind*, 3 NY3d at 310 (internal quotation marks and citation omitted). "It is axiomatic that the plaintiff also must show that the hostile conduct occurred because of a protected characteristic." *Tolbert v Smith*, 790 F3d 427, 439 (2d Cir 2015).

Although the pleading standard is more permissive under the NYCHRL, plaintiff must still adequately plead that the "conduct is caused at least in part by discriminatory or retaliatory

motives . . . ." *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 113 (2d Cir 2013); *see also Llanos v City of New York*, 129 AD3d 620, 620 (1st Dept 2015) ("Plaintiff has not made any factual allegations that she was adversely treated under circumstances giving rise to an inference of discrimination, as required to state a claim for discrimination under the New York State and City Human Rights Laws"). In addition, conduct that consists of "petty slights or trivial inconveniences . . . do[es] not suffice to support a [NYCHRL] hostile work environment claim." *Buchwald v Silverman Shin & Byrne PLLC*, 149 AD3d 560, 560 (1st Dept 2017) (internal quotation marks and citation omitted).

Plaintiff's hostile work environment claims are premised on his allegations that he was assigned to an unfit office in March 2015, despite the availability of other offices. Plaintiff states that, although he complained that being in the office was making him feel ill, Vinitskaya refused to move him.

As discussed, plaintiff's allegations relating to his hostile work environment claims are time-barred as they took place prior to July 1, 2015.

Nonetheless, even if the court were to consider these allegations, plaintiff's hostile work environment claims are not viable, because plaintiff has failed to demonstrate that his office placement was due to discrimination on the part of the DOE. Plaintiff returned to school after being on leave and was assigned to an available office. Although plaintiff speculates that there were alternative offices available, and that he was more senior than others who had more desirable offices, he provides no more than conclusory allegations that he was placed in an unfit office as a result of the DOE's bias. *See e.g. Whitfield-Ortiz v Department of Educ. of the City of*

N.Y., 116 AD3d at 581 ("Plaintiff also failed to adequately plead discriminatory animus, which is fatal to . . . hostile environment claims. . . . The complaint's conclusory allegations of a hostile work environment are insufficient to state a claim under either the State of City HRL").

VI. Cross Motion to Amend

"Leave to amend a pleading shall be freely given absent prejudice or surprise resulting directly from the delay unless the proposed amendment is palpably insufficient or patently devoid of merit." *Capezzano Constr. Corp. v Weinberger*, 150 AD3d 811, 811 (2d Dept 2017) (internal quotation marks and citations omitted); *see* CPLR 3025 (b); *see also Sharon Ava & Co. v Olympic Tower Assoc.*, 259 AD2d 315, 316 (1st Dept 1999) (While amendment of a pleading should ordinarily be free granted . . ., it may be denied where the proposed amended cause is plainly lacking in merit") (citation omitted).

Plaintiff seeks to file a second amended complaint to include an alternative cause of action under Title VII. Plaintiff states that the underlying facts of the case and theories of recovery remain the same. "[C]ontrary to the defendant's contention, the federal causes of action asserted in the amended complaint relate back to the original complaint and were thus timely." *Rodriguez v Dickard Widder Indus.*, 150 AD3d 1169, 1172 (2d Dept 2017); *see* CPLR 203 (f).

Nonetheless, as a result of this decision, all of plaintiff's NYCHRL and NYSHRL claims are dismissed. The standards for evaluating discrimination, hostile work environment and retaliation claims are identical under Title VII and the NYSHRL. *See e.g. Kelly v Howard I. Shapiro & Assoc. Consulting Engrs., P.C.*, 716 F3d 10, 14 (2d Cir 2013) ("[t]he standards for evaluating hostile work environment and retaliation claims are identical under Title VII and

NYSHRL"); *see also Maher v Alliance Mtge. Banking Corp.*, 650 F Supp 2d 249, 259 (ED NY 2009) (The standard for proof for discrimination and retaliation claims brought pursuant to NYSHRL is the same for claims brought under Title VII).

Accordingly, as any proposed Title VII claims would also be "plainly lacking in merit," the cross motion to amend is denied. *Sharon Ava & Co. v Olympic Tower Assocs*, 259 AD2d at 316.

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant The Department of Education of the City of New York to dismiss the complaint herein is granted, and the complaint is dismissed in its entirety, without costs and disbursements; and it is further

ORDERED that Stevenson Petit's cross motion for leave to file a second amended complaint is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

Dated: December 1, 2017
New York, New York

ENTER:

DEC 0 1 2017

HON. W. FRANC PERRY, III
J.S.C.