Sedhom v SUNY Downstate Med. Ctr.
2018 NY Slip Op 33210(U)
December 13, 2018
Supreme Court, New York County
Docket Number: 155837/2017
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT D. KALISH** **PART** **IAS MOTION 29EFM**

Justice

----------X

LAILA SEDHOM,

Plaintiff,

- V -

SUNY DOWNSTATE MEDICAL CENTER, DAISY CRUZ-RICHMAN, MARIA SILAS and TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA D/B/A TIAA F/K/A TIAA - CREF

Defendants.

----------X

INDEX NO. 155837/2017

MOTION DATE 10/11/2018

MOTION SEQ. NO. 003, 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 34, 35, 36, 37, 38, 39, 41, 42, 44, 45
were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 58
were read on this motion to/for DISMISSAL.

Upon the foregoing documents and after hearing oral argument, it is ORDERED that the instant motion (Seq. 003) by Defendants SUNY Downstate Medical Center, Daisy Cruz-Richman and Maria Silas (collectively, "SUNY Defendants") to dismiss the complaint, pursuant to CPLR 3211 (a) (2) and (a) (7), is granted in part and denied in part for the reasons stated herein, and the motion (Seq. 004) by Defendant Teachers Insurance and Annuity Association of America d/b/a TIAA f/k/a ("TIAA") to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (7) and (10)[1], is granted for the reasons stated herein:

BACKGROUND

Plaintiff Laila Sedhom alleges that she has been working for Defendant SUNY Downstate Medical Center ("SUNY Downstate") for over 36 years. (First Am. Complaint ["FAC"] ¶ 12.) Plaintiff alleges that she earned tenure in 1987, and that she became a full professor in 1995. (Id.)

[1] As discussed *infra*, this Court grants TIAA's motion pursuant to CPLR 3211 (a) (7). Accordingly, this Court does not address TIAA's arguments pursuant to CPLR 3211 (a) (1) and (10).

Plaintiff further alleges that in the fall of 1995, she "was selected to become the Acting Associate Dean for Graduate Programs in the College of Nursing at SUNY Downstate ("Associate Dean") in addition to her teaching position." (Id. ¶ 15.) Plaintiff alleges that she "continued as Associate Dean and Professor until she opted to retire effective December 31, 2010." (Id. ¶ 16.)

Plaintiff further alleges that SUNY Downstate "called [her] out of retirement to resume her duties as Associate Dean and Professor only a few months later, in March 2011[,]" and that at the time SUNY Downstate stated that her "appointment as professor was temporary, and that her position as Associate Dean was to be held on a 50% part-time basis." (Id. ¶ 17.)

According to Plaintiff, however, "SUNY Downstate was unable to hire a candidate for the full-time Associate Dean position, so [Defendant Daisy] Cruz-Richman [, Dean of the College of Nursing at SUNY Downstate,] implored SUNY Downstate to rehire Dr. Sedhom, and it did so, on a full-time basis, effective August 1, 2011." (Id. ¶ 17.)

Plaintiff further alleges that she and Defendant Daisy Cruz-Richman are the two tenured faculty members at SUNY Downstate, and that until "January 2017, Ms. Cruz-Richman consistently referred to Dr. Sedhom as a tenured member of the faculty at SUNY Downstate on her official communications, both internally and externally." (Id. ¶ 21.)

Plaintiff further alleges that she is over 40 years old and that her husband is disabled. Plaintiff further alleges that the SUNY Defendants "at all relevant times have been aware of the nature and extent of Dr. Sedhom's caregiving activities and her role as the sole wage earner in her household." (Id. ¶¶ 24-26.)

Plaintiff states that in January 2017, "without cause or warning, SUNY Downstate informed Dr. Sedhom that it considered her a temporary employee and that her position as Associate Dean would be posted as an open position for which Dr. Sedhom was ineligible to apply." (Id. ¶ 32.) Plaintiff alleges that SUNY Downstate informed her that "she would be terminated immediately upon its retention of a new Associate Dean." (Id. ¶ 37.)

Plaintiff further states that on May 25, 2017, Ms. Cruz-Richman "sent a memorandum to Dr. Sedhom informing her that she was required to submit a self-

evaluation form" even though "tenured faculty at SUNY Downstate are not required to complete self-evaluations." (Id. ¶¶ 35-36.)

Plaintiff further states that SUNY Downstate created a hostile work environment wherein, for example: Defendant Maria Silas – an employee in the Human Resources Department at SUNY Downstate – "demanded Dr. Sedhom to disclose her age and demanded to know why she still was working"; and non-party "Judith Dorsey, Vice President of Human Resources for SUNY Downstate, scolded Dr. Sedhom for the length of her employment at SUNY Downstate." (Id. ¶ 38.)

Plaintiff further alleges that "Ms. Cruz-Richman has been disrespectful toward Dr. Sedhom on a regular basis, among other things by shouting at her; by refusing to acknowledge her presence; and by wrongfully and irresponsibly avoiding interactions with her at work." (Id. ¶ 40.) Plaintiff further alleges that "Ms. Silas repeatedly disrespected Dr. Sedhom by speaking to her in a condescending manner, treating her differently than other similarly situated employees of SUNY Downstate, and advising her that she is too old to work 'here.'" (Id. ¶ 42.)

Plaintiff alleges that "Ms. Cruz-Richman has humiliated Dr. Sedhom on multiple occasions. On June 22, 2017, Ms. Cruz-Richman sent a letter to all SUNY Downstate faculty and staff falsely stating that Dr. Sedhom had a "temporary appointment" and informing them of her termination. Ms. Cruz-Richman sent a similar letter with the same falsehoods to all SUNY Downstate students." (Id. ¶ 47.) Plaintiff further alleges that "Ms. Cruz-Richman, in order to further humiliate Dr. Sedhom, appointed a faculty member with less accomplished credentials than Dr. Sedhom to replace her while SUNY Downstate searches for a different Associate Dean of Graduate Programs." (Id. ¶ 48.)

Plaintiff further alleges that she "participated in the SUNY Optional Retirement Program (ORP) retirement plan offered by SUNY Downstate as part of her employment. The SUNY ORP was and is administered by [Defendant] TIAA." (Id. ¶ 49.)

Plaintiff alleges that as part of her participation in ORP, she received contributions from her employer SUNY Downstate "beginning in 2011 when she was rehired as a full-time Professor and Associate Dean of Graduate Programs, and continuing until her wrongful termination on July 7, 2017." (Id. ¶52.)

Plaintiff alleges that on "September 1, 2017, Defendants seized $136,865.13 in funds from [her] SUNY ORP account, representing employer contributions plus interest, without notice or explanation." (Id. ¶ 53.)

According to Plaintiff, "[i]n a letter provided to Dr. Sedhom, dated September 6, 2017 and received September 15, 2017, after the funds had been seized, SUNY Downstate refers to the 2010 NYS Retirement Incentive (Bill S07909, Chapter 105) for the proposition that individuals who return to employment by the State of New York after retirement forfeits employer contributions." (Id. ¶ 56.)

Based on the foregoing alleged facts, Plaintiff asserts the following 16 causes of action:

(1) Discrimination in violation of the New York State Human Rights Law (NYSHRL) as against SUNY Defendants;
(2) Aiding and Abetting in violation of NYSHRL as against SUNY Defendants;
(3) Discrimination in Violation of New York City Human Rights Law (NYCHRL) as against SUNY Defendants;
(4) Aiding and Abetting in violation of NYCHRL as against SUNY Defendants;
(5) Hostile Work Environment as against SUNY Defendants
(6) Breach of Contract as against SUNY Downstate;
(7) Breach of Implied Covenant of Good Faith and Fair Dealing as against SUNY Downstate;
(8) Wrongful Termination as against SUNY Defendants;
(9) Intentional Infliction of Emotional Distress as against SUNY Defendants;
(10) Negligent Infliction of Emotional Distress as against SUNY Defendants;
(11) Fraudulent Misrepresentation as against SUNY Defendants;
(12) Injurious Falsehood as against SUNY Defendants;
(13) Discrimination in violation of the American with Disabilities Act (ADA) as against SUNY Defendants;
(14) Discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA) as against SUNY Defendants;
(15) Violation of due process under the New York State Constitution against Defendants SUNY Downstate, TIAA and Silas;
(16) Violation of due process under the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983 as against Defendants SUNY Downstate, TIAA and Silas

SUNY Defendants now bring a motion (Seq. 003) to dismiss the complaint, pursuant to CPLR 3211 (a) (2) and (7) arguing:

- First, that the sixth through twelfth causes of action can only be brought against SUNY Downstate in the Court of Claims; and,
- Second, that Plaintiff fails to sufficiently allege facts to state entitlement to relief for the remaining causes of action.

Defendant TIAA also brings a motion (Seq. 004) to dismiss the fifteenth and sixteenth causes of action as against them, pursuant to CPLR (a) (1), (7) and (10), arguing:

- First, that TIAA is not a state actor and therefore is not subject to liability for the violation of Plaintiff's due process rights;
- Second, that even if TIAA were a state actor, Plaintiff had no property interest in the monies removed from her retirement account and therefore Plaintiff was not entitled to any form of due process; and,
- Third, that even if Plaintiff has alleged sufficient facts to state a claim for due procession violations against Defendant TIAA, Plaintiff's fifteenth and sixteenth causes of action should still be dismissed because "Plaintiff has failed to name indispensable parties pursuant to CPLR §1001(a), namely the SUNY ORP and its administrator, the State University of New York Board of Trustees, and/or the State Comptroller." (TIAA Memo in Supp. re Seq. 004 at 7.)

The parties appeared for oral argument on August 8, 2018. During the argument, the parties resolved portions of the instant motion by SUNY Defendants (Seq. 003) as follows:

- The branch of the first cause of action for discrimination in violation of NYSHRL based Plaintiff's caregiver status would be dismissed (Oral Arg. Tr. at 14:18-16:13);
- The six through twelfth causes of action against SUNY Defendants would be removed and transferred to the Court of Claims pursuant to CPLR 325 (a) (id. at 22:08-24:02); and
- The thirteenth and fourteenth causes of action would be dismissed (id. at 24:03-26:12).

Thereafter, at a status conference on December 11, 2018, the parties agreed to resolve the branch of SUNY Defendants' motion to dismiss the fifteenth and sixteenth causes of action by transferring said causes of action to the Court of Claims pursuant to CPLR 325 (a).

The Court now discusses remaining portions of the motion by SUNY Defendants (Seq. 003) and the motion by TIAA (Seq. 004).

DISCUSSION

CPLR § 3211(a) (2) requires a court to dismiss a cause of action where "the court has not jurisdiction of the subject matter of the cause of action." As previously mentioned, the parties have agreed to transfer those causes of action to the Court of Claims which SUNY Defendants sought to dismiss pursuant CPLR 3211 (a) (2). As such, this Court only considers whether the remaining causes of action the should be dismissed for failure to state a claim.

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, "'the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201-02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008].) Thus, "'a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law.'" (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006].) "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].)

I. The Court Grants in Part and Denies in Part the Branch of SUNY Defendants' Motion Seeking to Dismiss the First Cause of Action for Violation of NYSHRL by SUNY Defendants

Plaintiff alleges a first cause of action for violation of New York State Human Rights Law (NYSHRL) on the ground that "the SUNY Defendants discriminated against Dr. Sedhom on the basis of her age and caregiver status in

violation of the New York State Human Rights Law ("NYSHRL") by denying her the same terms and conditions of employment available to others based on her age and caregiver status, including but not limited to falsely claiming that she is an at-will temporary employee and threatening to terminate her at any time; by wrongfully terminating her; and by subjecting her to a hostile work environment." (FAC ¶ 61.)

In moving to dismiss this cause of action, SUNY Defendants admit that Plaintiff may bring them before this state's Supreme Court based on an alleged violation of NYSHRL. (Memo in Supp. at 18; *see also Koerner v State*, 62 NY2d 442, 449 [1984] [finding that regarding NYSHRL, "the Legislature has provided implicit consent that the State be sued in a forum other than the Court of Claims"].) However, SUNY Defendants argue that Plaintiff fails to allege sufficient facts to state a claim for discrimination pursuant to NYSHRL based on age and caregiver status and that this Court should thus dismiss said claim pursuant to CPLR 3211 (a) (7).

A. Caregiver Status

At oral argument, Plaintiff's counsel agreed that Plaintiff's cause of action for disability-caregiver discrimination in violation of New York State Human Rights Law should be dismissed. (Oral Arg. Tr. at 14:18-16:13; *see also Lugo v St. Nicholas Assoc.*, 2 Misc 3d 212, 218 [Sup Ct, NY County 2003] [Friedman, J.], affd, 18 AD3d 341 [1st Dept 2005]; *Bartman v Shenker*, 5 Misc 3d 856, 860 [Sup Ct, NY County 2004] [Heitler, J.]; *Abdel-Khalek v Ernst & Young, L.L.P.*, 15 NDLR P 100 [SDNY Apr. 7, 1999] ["Rather, unlike the ADA, this statute says nothing about disability association discrimination and gives no indication that it was intended to provide a cause of action for disability association discrimination."].)

As such, the Court dismisses the branch of Plaintiff's first cause of action for violation of NYSHRL based on Plaintiff's caregiver status.

B. Age

1. Defendant SUNY Downstate

To support a prima facie case of age discrimination under NYSHRL, a plaintiff must demonstrate:

> "(1) that [s]he is a member of the class protected by the statute; (2) that [s]he was actively or constructively discharged; (3) that [s]he was qualified to hold the position from which [s]he was terminated; and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination."

(*Ferrante v Am. Lung Ass'n*, 90 NY2d 623, 629 [1997].) Here Plaintiff alleges: (1) she was over 40; (2) that she was terminated from employment; (3) that she was qualified to hold the position of Associate Dean and full-time professor, as she held that those positions for decades and was called back from retirement to perform those roles; and (4) that individuals – including a Vice President within SUNY Downstate's Human Resources Department – spoke disparagingly about Plaintiff's age and the length of time she worked for SUNY Downstate and that she experienced constant animosity (albeit without reference to her age) from Defendant Cruz-Richman who would ultimately terminate her employment.

SUNY Defendants argue that the "only allegations even referring to age are stray remarks from functionaries in the Human Resources Department who are not alleged to have had—and did not in fact have—any non-ministerial role in the decision to terminate plaintiff." (Memo in Supp at 19, citing *Serdans v New York and Presbyt. Hosp.*, 112 AD3d 449, 450 [1st Dept 2013].) SUNY Defendants cite *Serdans v New York and Presbyt. Hosp.*, (112 AD3d 449, 450 [1st Dept 2013]) in support of this argument. However, *Serdans* was a motion for summary judgment, where the plaintiff had the benefit of discovery.

Here, it is important to keep in mind:

> "The standards relating to burden and order of proof in employment discrimination cases brought under the Human Rights Law are the same as those established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, 93 S.Ct. 1817, 1824–25, 36 L.Ed.2d 668 and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252–53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 for cases brought pursuant to Title VII of the Civil Rights Act of 1964."

(*Sogg v Am. Airlines, Inc.*, 193 AD2d 153, 155–56 [1st Dept 1993].) Accordingly, the United States Supreme Court has held that complaints in employment discrimination actions need only satisfy simple notice pleading requirements, reasoning that "[t]his simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to

dispose of unmeritorious claims." (*Swierkiewicz v Sorema* N. A., 534 US 506, 512, 122 S Ct 992, 998, 152 L Ed 2d 1 [2002]; *see also Vig v New York Hairspray Co.*, L.P., 67 AD3d 140, 145 [1st Dept 2009] [holding that "employment discrimination cases are themselves generally reviewed under notice pleading standards" and the complaint need "only give 'fair notice' of the nature of the claim and its grounds"]; *Miloscia v B.R. Guest Holdings LLC*, 33 Misc 3d 466, 472 [Sup Ct, NY County 2011] [Stallman, J.] ["Courts further urge caution in granting summary judgment in employment discrimination cases, as direct evidence of intentional discrimination is rarely available."], affd in part, mod in part, 94 AD3d 563 [1st Dept 2012]; [*Ferrante v Am. Lung Ass'n*, 90 NY2d 623, 631 [1997] ["We have stated that discrimination is rarely so obvious or its practices so overt that recognition of it is instant and conclusive, it being accomplished usually by devious and subtle means."].)

As such, it would be premature to declare that the indicia of discrimination that Plaintiff alleges were merely stray remarks without affording Plaintiff the opportunity to discover whether the supposed stray remarks were part of a culture of age-based animus. Moreover, on a motion for summary judgment, pursuant to the *McDonnell-Douglass* standard,[2] Defendant will have the opportunity to argue that the alleged discriminatory comments were merely stray remarks and Defendant will also be able to offer a non-discriminatory explanation for Plaintiff's termination.

Accordingly, the Court finds that Plaintiff has sufficiently pled her first cause of action as against SUNY Downstate for age discrimination in violation of NYSHRL.

2. Defendant Silas

"A corporate employee, though he has a title as an officer and is the manager or supervisor of a corporate division, is not individually subject to suit with respect to discrimination based on age or sex under New York's Human Rights Law (Executive Law, art. 15) or its Labor Law (§ 194) or under the Federal Age Discrimination in Employment Act (29 U.S.C. § 623) or Equal Pay Act (29 U.S.C. § 206, subd. [d]) if he is not shown to have any

[2] Under the *McDonnell Douglass* burden-shifting standard, an employee must first establish a prima facie case of discrimination. The burden then shifts to the employer to give a legitimate, non-discriminatory reason for its actions. If the employer does so, the burden then shifts back to the plaintiff to show that the employer's explanation is a pretext for discrimination or retaliation. (*Kirkland v Cablevision Sys.*, 760 F3d 223, 225 [2d Cir 2014].)

> ownership interest or any power to do more than carry out personnel decisions made by others."

(*Patrowich v Chem. Bank*, 63 NY2d 541, 542 [1984]; *see also Priore v New York Yankees*, 307 AD2d 67, 74 [1st Dept 2003] ["In order to find a fellow employee jointly liable for an employer's discriminatory practice, that co-employee must be found to possess the power to do more than simply carry out personnel decisions made by others."].)

SUNY Defendants argue that Defednant Silas "is a functionary in the Human Resources Department. She is not alleged to have—and does not have—any power to make employment decisions and cannot be liable as a primary violator." (Memo in Supp. at 20.)

However, the Complaint does allege that "Ms. Silas repeatedly threatened Dr. Sedhom's job and livelihood, even threatening to confiscate her retirement monies." (FAC ¶ 71.) Further the Complaint alleges "[u]pon information and belief, TIAA acts at the direction of orders from Ms. Silas and SUNY Downstate in the administration of ORP individual accounts." (Id. ¶ 51.)

It is not for the Court, at this early stage, to determine what Silas's role was and whether or not, as a matter of law, she may have undertaken any adverse employment actions against Plaintiff with a discriminatory motive. That determination must await the completion of discovery.

Accordingly, the Court finds that Plaintiff has sufficiently pled her first cause of action as against Defendant Silas for age discrimination in violation of NYSHRL.

3. Defendant Cruz-Richman

SUNY Defendants do not dispute that Defendant Cruz Richman is alleged to have engaged in the primary discriminatory conduct at issue. In addition, Plaintiff alleges that Defendant Cruz-Richman expressed various hostilities to her on a regular basis and that employees in Human Resources working under Defendant Cruz-Richman spoke disparagingly towards Plaintiff about her age and the length of her employment at SUNY Downstate. Under these factual allegations and on this motion to dismiss, Plaintiff is entitled to the reasonable inference that in directly expressing their age-based animus to Plaintiff, these employees were taking their cue from their boss, Defendant Cruz-Richman.

Accordingly, the Court finds that Plaintiff has sufficiently pled her first cause of action as against Defendant Cruz-Richman for age discrimination in violation of NYSHRL.

II. The Second Cause of Action for Aiding and Abetting in Violation of NYSHRL by the SUNY Defendants is Dismissed

Plaintiff alleges that "[t]he SUNY Defendants knowingly and recklessly aided and abetted the unlawful discrimination against Dr. Sedhom in violation of the NYSHRL."

SUNY Defendants correctly point out that "there can be no liability for aiding and abetting one's own allegedly discriminatory conduct." (Memo in Supp. at 20, citing *Hardwick v Auriemma*, 116 AD3d 465, 468 [1st Dept 2014].) *Hardwick* is instructive here. The First Department there dismissed the aiding and abetting causes of action against two individual defendants because it found that one of the individual defendant's actions were alleged to "give rise to the discrimination claim" and further reasoned that "[i]n any event, the civil tort alleged against Auriemma and Tooley is blurred and indistinguishable from the dismissed Human Rights Law claims against them." (Id.)

Here, Plaintiff has alleged specific actions by both Defendants Silas and Cruz-Richman that can be imputed onto Defendant SUNY Downstate and that in themselves gave rise to the NYSHRL violations.

As such, this Court dismisses the NYSHRL aiding and abetting violations against all SUNY Defendants.

III. The Third Cause of Action for Discrimination in Violation of New York City Human Rights Law is Dismissed as Against SUNY Downstate and Dismissal is Denied in Part and Granted in Part as Against Defendants Daisy Cruz-Richman and Defendant Silas

Plaintiff alleges a third cause of action for violation of New York City Human Rights Law (NYCHRL) on the ground that "the SUNY Defendants discriminated against Dr. Sedhom on the basis of her age and caregiver status in violation of the [NYCHRL] by denying her, based on her age and caregiver status, the same terms and conditions of employment available to other employees, including but not limited to falsely claiming that she is an at-will temporary

employee and threatening to terminate her at any time; wrongfully terminating her; and by subjecting her to a hostile work environment." (FAC ¶ 67.)

A. Defendant SUNY Downstate

As an instrumentality of the State, SUNY Downstate is not subject to the provisions of the New York City Human Rights Law. (*Jattan v Queens Coll. of City Univ. of New York*, 64 AD3d 540, 542 [2d Dept 2009].) As such, this cause of action against SUNY Downstate for violation of NYCHRL must be dismissed.

B. Defendants Cruz-Richman and Silas

The parties agree that Plaintiff is not barred from asserting NYCHRL violation claims against the individual defendants Cruz-Richman and Silas even though their mutual employer SUNY Downstate is not subject to liability for potentially violating NYCHRL. (Memo in Supp. at 18 ["[T]his Court can hear NYSHRL claims against SUNY, and NYSHRL and NYCHRL claims against individual defendants."; Memo in Opp. at 11 ["Even if NYCHRL claims did not apply to SUNY Downstate, they do apply to the individual SUNY Defendants."]; Oral Arg. Tr. at 9:14-17 [counsel for SUNY Defendants admitting that sovereign immunity only bar NYCHRL claims against SUNY Downstate, not Cruz-Richman and Silas]; *see also Shao v City Univ. of New York*, 124 Fair Empl Prac Cas (BNA) 1726 [SDNY 2014] [allowing NYCHRL claims to proceed against individual defendants notwithstanding dismissal of said claims against employer defendant on sovereign immunity grounds].)

1. Age Discrimination

As such, having already determined that Plaintiff sufficiently alleges facts to support causes of action for age discrimination against all SUNY Defendants pursuant to NYSHRL, this Court finds that Plaintiff adequately alleges facts to sustain claims for age discrimination against the individual defendants pursuant to NYCHRL's more liberal standard. (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]; New York City, N.Y., Code § 8-130 ["The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed."].)

2. Caregiver Status

Unlike NYSHRL, NYCHRL directly prohibits discriminating against an employee based on her "caregiver status." (New York City, N.Y., Code § 8-107 [30] [g] [1] [a].)

SUNY Defendants move to dismiss Plaintiff's causes of action alleging caregiver discrimination, arguing that the First Amended Complaint does not contain "a single factual allegation plausibly suggesting that any of these things happened because of her caregiver status." (Memo in Supp. at 17.)

The Court agrees that—unlike Plaintiff's references to episodes suggestive of age-based animus—the complaint does not set forth any factual allegations suggesting an animus toward Plaintiff based on her caregiver status. Neither has Plaintiff specifically alleged that she requested a reasonable accommodation based on her caregiver status and was not given such accommodation. The complaint is completely devoid of any factual allegations—except for conclusory assertions—that Plaintiff's care give-giver status had any negative impact on her employment status. (*See Askin v Dept. of Educ. of City of New York*, 110 AD3d 621, 622 [1st Dept 2013] [affirming dismissal of age discrimination claim where the plaintiff did not make "any concrete factual allegation in support of that claim, other than that she was 54 years old and was treated adversely under the State law or less well under the City HRL"].)

Indeed, although the complaint states that SUNY Defendants have been "fully aware" of Plaintiff's caregiver status "at all relevant times," the complaint does not state when Plaintiff's husband's disability began or when Plaintiff's caregiver status was brought to the attention of the SUNY Defendants. As such, the Court cannot even look to the proximity of SUNY Defendants becoming aware of Plaintiff's caregiver status and the adverse employment action to raise a reasonable inference of discrimination. (*See e.g. La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918, 921 [2d Dept 2015] ["The close temporal proximity between the plaintiff's protected activity and the adverse employment action is sufficient to demonstrate the necessary causal nexus."].)

Accordingly, the branch of this third cause of action alleging that Defendants Cruz-Richman and Silas discriminated against Plaintiff based on her care-giver status is dismissed.

IV. Plaintiffs' Fourth Cause of Action for Aiding and Abetting Violations of NYCHRL is Dismissed

"In general, an individual defendant who actually participates in the conduct of an employer giving rise to the discrimination claim may be an aider and abettor, even when the individual lacks the authority to hire or fire the plaintiff." (*Miloscia v B.R. Guest Holdings LLC*, 33 Misc 3d 466, 478 [Sup Ct, NY County 2011] [Stallman, J.], affd in part, mod in part, 94 AD3d 563 [1st Dept 2012].) "An aiding and abetting claim against an individual employee depends on employer liability, however, and, where no violation of the Human Rights Law by another party has been established, individuals cannot be held liable for aiding and abetting their own violations of the Human Rights Law." (Id.)

Here, as a preliminary matter, there can be no NYCHRL liability for Plaintiff's employer, SUNY Downstate. In addition, the Court has already found that Plaintiff has alleged sufficient facts to state a cause of action for NYCHRL discrimination by Defendants Cruz-Richman and Silas. As such, given that there is no employer liability and that the individual defendants cannot aid and abet their own violations, this Court dismisses Plaintiff's Fourth Cause of Action for Aiding and Abetting Violations of NYCHRL.

V. Plaintiff's Fifth Cause of Action for Hostile Work Environment is Dismissed in Part

Plaintiff alleges a fifth cause of action for "Hostile Work Environment" asserting that:

- "Ms. Cruz-Richman has discussed this matter with other employees at SUNY Downstate, causing Dr. Sedhom embarrassment and humiliation";
- "Dr. Sedhom has faced the threat of unlawful and unjust termination every day at work, causing her mental anguish and emotional distress";
- "Ms. Silas repeatedly threatened Dr. Sedhom's job and livelihood, even threatening to confiscate her retirement monies"; and
- "As a direct result of the SUNY Defendants' actions, Dr. Sedhom's health has declined, she has been unable to eat or sleep, and has been anxious upon

> arriving at the SUNY Downstate workplace, consistently in fear of the continuing rude and humiliating acts with which she is confronted."

(FAC 74-79.)

A hostile work environment exists "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 295, 310 [2004] [internal quotation marks and emendation omitted.)

> "Whether an environment is hostile or abusive ***can be determined only by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance***. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment—one that a reasonable person would find to be so."

(Id. at. 310–11 [internal quotation marks, citations and emendation omitted; emphasis added.)

Here, as previously stated, Plaintiff has alleged that she was frequently the subject of general hostilities from Defendants Cruz-Richman and Silas and that other employees expressed hostility to Plaintiff about her age and the time that she had been working at SUNY Downstate. (*See Godino v Premier Salons, Ltd.*, 140 AD3d 1118, 1120 [2d Dept 2016] [affirming denial of dismissal of hostile work environment claim, where the complaint alleged that the plaintiff's "coworkers, managers, and supervisors frequently ridiculed and harassed her because of her age by stating that she was 'too old' and that she 'should retire'"].)

SUNY Defendants argue that the Fifth Cause of Action for a hostile work environment must be dismissed because at worst the first amended complaint only alleges "[s]poradic insults, and general rude behavior," which is insufficient to sustain a claim for hostile work environment.

However, all of the cases SUNY Defendants cite in support of dismissing the hostile work environment cause of action involve motions for summary judgment and Article 78 challenges to NYS Division of Human Rights determinations: i.e. after a factual record was developed. Here, there has not been an opportunity to develop a factual record from which the Court could determine whether a hostile work environment exists after "***looking at all the circumstances***." (*See also Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009] [holding that "employment discrimination cases are themselves generally reviewed under notice pleading standards" and the complaint need "only give 'fair notice' of the nature of the claim and its grounds"].)

Accordingly, the Court finds that Plaintiff has adequately alleged a claim for hostile work environment against the SUNY Defendants based on age discrimination in violation of NYSHRL.

VI. The Sixth through Twelfth Causes of Action Are Transferred to the Court of Claims.

SUNY Defendants seek to dismiss the sixth through twelfth causes of action, pursuant to CPLR 3211 (a) (2), on the grounds that this Court lacks jurisdiction of the subject matter. During oral argument, the parties agreed to dispose of this branch of SUNY Defendants' motion by transferring the sixth through twelfth causes of action to the Court of Claims. (Oral Arg. Tr. at 22:08-24:02.)[3] Accordingly, the sixth through twelfth causes of action are hereby transferred to the Court of Claims pursuant to CPLR 325 (a).

VII. Plaintiff's Thirteenth and Fourteenth Causes of Action for Violation of the Americans with Disabilities Act (ADA) for Violation of the Age Discrimination in Employment Act of 1967 (ADEA) against All SUNY Defendants Are Dismissed

During oral argument Plaintiff conceded that there was no valid basis for her to bring claims against the SUNY Defendants under the ADA and ADEA. (Oral

[3] During this portion of the oral argument, counsel for SUNY Defendants remarked that the Court may transfer those causes of action "[s]ubject to the Court of Claims determining for itself whether it is going to take it after you transfer it, so that is out of our hands." (Oral Arg. At 22:08-24:02.) This Court agrees that the decision now rests with the Court of Claims regarding whether to accept the transferred causes of action. (*See generally Comical Entertainment Corp. v City Univ. of New York*, 26 Misc 3d 531, 533 [Sup Ct, NY County 2009] [James, J.].)

Arg. Tr. at 24:03-26:12.) Accordingly, these thirteenth and fourteenth causes of action are hereby dismissed.

VIII. Plaintiff's Fifteenth and Sixteenth Causes of Action for Violation of Due Process Under the New York State Constitution and the United States Constitution Against SUNY Downstate, TIAA and Silas are Dismissed as Against TIAA and Otherwise Transferred to the Court of Claims.

Plaintiff alleges a fifteenth and sixteenth cause of action for "violation of due process" under the New York State Constitution and the United States Constitution against SUNY Downstate, TIAA and Silas. In support of this cause of action, Plaintiff alleges:

- The Due Process Clause of the New York State Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." N.Y. Constitution, Art. 1, Para. 6; The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that a state shall not "deprive any person of life, liberty, or property, without due process of law."

- "Dr. Sedhom had and has a protected property interest in her employer contributions to her [SUNY Optional Retirement Program ("ORP")] account."

- "TIAA, SUNY Downstate and Ms. Silas failed to provide Dr. Sedhom with notice or a hearing prior to the seizure of employer contributions from her ORP retirement account."

- "As a result of Defendants' actions, Dr. Sedhom's property interest in her employer contributions to her retirement account was terminated without prior notice or an opportunity to be heard."

- "TIAA, SUNY Downstate and Ms. Silas have directly and intentionally deprived Dr. Sedhom of her constitutionally protected property interest without due process of law, either pre- or post-deprivation."

- "As a direct and proximate result of Defendants' violation of due process, Dr. Sedhom has suffered and continues to suffer economic harm pursuant to the law, and may demand return of the monies as well as damages."

(FAC ¶¶ 143-158.)

The aforesaid allegations relate to $136,865.13 in contributions which were "reclaimed" from Plaintiff's retirement around September 2017. (See Memo in Supp., Ex. A [September 6, 2017 Reclamation Letter].) At the time of seizure and to this day, SUNY Defendants have asserted that these contributions were made to Plaintiff's account in error and that they were therefore entitled reclaim them.

Re Seq. 003: Motion by SUNY Defendants

In a status conference with the parties before the Court on December 11, 2018, the parties agreed that the fifteenth and sixteenth causes of action, as against SUNY Defendants, should be transferred to the Court of Claims. (*See also McNeil v U.S. Dept. of Hous. and Urban Dev.*, 293 F Supp 300, 301 [SDNY 1968] [holding that "citizens may sue it for claims arising out of the appropriation of real or personal property … provided they sue in accordance with the Court of Claims Act."].) Accordingly, the fifteenth and sixteenth causes of action as against SUNY Defendants are hereby transferred to the Court of Claims pursuant to CPLR 325 (a).

Re Seq. 004: Motion by TIAA

TIAA argues that the fifteenth and sixteenth causes of action for due process violations can only be maintained against it if it is deemed to be a state actor. TIAA further argues that it was acting as an "investment provider" and a "bookkeeper", and that Defendant TIAA was one of five other companies approved by SUNY's Board of Trustees to provide to provide annuity contracts as a funding mechanism under the SUNY ORP to SUNY ORP participants. (Oral Argument at 42:22-48:16.) As such, TIAA argues that this was not enough to make it a state actor. TIAA further argues that Plaintiff has no property interest in her contributions and that, even if she did, the action cannot proceed without bringing in the New York State Comptroller who is an indispensable party to the action.

Plaintiff argues in opposition that TIAA was acting "at the behest of the State" and that "they do what the State tells them to do even if they think it's wrong." (Id.) As such, Plaintiff argues that TIAA is a state actor. Plaintiff further argues that she has a property interest in the contributions and that the Comptroller is not an indispensable party to the action.

As a general matter, violation of due process claims are generally brought against government entities—not private entities like Defendant TIAA. However, "a nominally private entity" may be treated "as a state actor when it is controlled by an agency of the State, when it has been delegated a public function by the State, when it is entwined with governmental policies, or when government is entwined in its management or control." (*Brentwood Academy v Tennessee Secondary School Athletic Ass'n*, 531 US 288, 296 [2001].)

For example, in *Brentwood* the United States Supreme Court found that the subject Tennessee Secondary School Athletic Association (Association) was a state actor based on the following facts:

> "In sum, to the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms. Only the 16% minority of private school memberships prevents this entwinement of the Association and the public school system from being total and their identities totally indistinguishable.
>
> To complement the entwinement of public school officials with the Association from the bottom up, the State of Tennessee has provided for entwinement from top down. State Board members are assigned ex officio to serve as members of the board of control and legislative council, and the Association's ministerial employees are treated as state employees to the extent of being eligible for membership in the state retirement system."

(*Brentwood Academy*, 531 US at 299-300 [2001].)

Here, Plaintiff has failed to allege anything more than that TIAA served as an investment provider and administrator for Plaintiff's retirement contributions, and there are no allegations in the complaint that TIAA's business management, operations or personnel were entwined with a state agency.[4]

[4] As this Court finds that the complaint fails to sufficiently allege that TIAA is a state actor, this Court need not address TIAA's argument that the Comptroller is an indispensable party or that Plaintiff lacks a

Accordingly, TIAA's motion is granted pursuant to CPLR 3211 (a) (7), and the fifteenth and sixteenth cause of action are dismissed as against TIAA in their entirety.

---

property interest in the contributions seized from her retirement account. However, the Court notes that SUNY Defendants have taken the position that the Comptroller is **not** an indispensable party to this case and that "the Court can provide complete relief to the parties now before it." (SUNY Defendants Letter [NYSCEF Document No. 63] at 1.)

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Defendant Teachers Insurance and Annuity Association d/b/a TIAA f/k/a TIAA-CREF ("TIAA") to dismiss the complaint (Seq. 004) herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion (Seq. 003) of Defendants SUNY Downstate Medical Center, Daisy Cruz-Richman and Maria Silas (collectively, "SUNY Defendants) to dismiss the complaint is granted in part and denied in part; and it is further

ORDERED that Plaintiff's first cause of action for discrimination in violation of New York State Human Rights Law ("NYSHRL") is dismissed to the extent that Plaintiff alleges claims for discrimination based on her caregiver status, and that the branch of SUNY Defendants' motion seeking dismissal of this cause of action is otherwise denied; and it is further

ORDERED that Plaintiff's second cause of action for aiding and abetting unlawful discrimination in violation of NYSHRL is dismissed; and it is further

ORDERED that Plaintiff's third cause of action for discrimination in violation of New York City Human Rights Law ("NYCHRL") is dismissed in its entirety as against SUNY Downstate and is dismissed as against Defendants Cruz-Richman and Silas to the extent it alleges discrimination based on Plaintiff's care-giver status, and the branch of SUNY Defendants' motion seeking to dismiss this cause of action is otherwise denied; and it is further

ORDERED that Plaintiff's fourth cause of action for aiding and abetting in violation of NYCHRL is dismissed in its entirety; and it is further

ORDERED that that the branch of SUNY Defendants' motion to dismiss Plaintiff's fifth cause of action for hostile work environment is denied; and it is further

ORDERED that Plaintiffs' sixth through twelfth and the fifteenth through sixteenth causes of action are transferred to the Court of Claims without prejudice to any of the defenses or claims raised by the parties hereto and the Clerk is directed to transfer a copy of the file to the Court of Claims upon the presentation of a copy of this Order with notice of entry and the payment of appropriate fees, if any; and it is further

ORDERED that Plaintiff's thirteenth and fourteenth causes of action are dismissed in their entirety; and it is further ordered

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal of Defendant TIAA and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that, within twenty (20) days of the date of the filing of this order, counsel for Defendant TIAA shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

12/13/2018
DATE

HON. ROBERT D. KALISH
J.S.C.

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