UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAURA KLEINMAN,

Plaintiff,

v.

FASHION INSTITUTE OF TECHNOLOGY,

Defendant.

16 Civ. 4348 (KPF)

OPINION AND ORDER

KATHERINE POLK FAILLA, District Judge:

Plaintiff Laura Kleinman suffers from a spinal condition that limits her mobility. Since 2011, she has worked as a clinician in the Counseling Center at Defendant Fashion Institute of Technology. In 2013, Plaintiff's spinal condition worsened, and she took a five-day leave of absence from work in order to undergo medical testing. Upon returning to the Counseling Center, Plaintiff alleges, her colleagues and supervisors began to harass and discriminate against her because of her disability. And Plaintiff claims that this hostility only increased after she complained to Defendant's administration.

In June 2016, Plaintiff sued Defendant, seeking relief under several federal, state, and local statutes. About a month later, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission (the "EEOC"), claiming that Defendant had violated the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 to 12213 (the "ADA"). Plaintiff thereafter filed

an Amended Complaint, and later a Second Amended Complaint, in which she alleged that Defendant had created a hostile work environment and retaliated against her in violation of the ADA.

Defendant has moved to dismiss Plaintiff's Eighth Cause of Action (her ADA hostile work environment claim) and Ninth Cause of Action (her ADA retaliation claim) under Federal Rule of Civil Procedure 12(b)(6). Defendant argues that these two claims are unexhausted, untimely, and in any event, meritless. For the reasons that follow, the Court grants Defendant's motion.[1]

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[1] This Opinion draws on facts from two sources. The first is Plaintiff's Second Amended Complaint ("SAC" (Dkt. #33)), the operative complaint in this case. For the purposes of this Opinion, the Court assumes that the Second Amended Complaint's well-pled allegations are true. *E.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009).

The second is the Charge of Discrimination Plaintiff filed with the EEOC ("EEOC Charge" (Dkt. #37-2)). "Because a Rule 12(b)(6) motion challenges the complaint as presented by the plaintiff, taking no account of its basis in evidence, a court adjudicating such a motion may review only a narrow universe of materials," including "[i] facts stated on the face of the complaint, … [ii] documents appended to the complaint or incorporated in the complaint by reference, … [iii] matters of which judicial notice may be taken," and [iv] documents that are "'integral' to the complaint." *Goel* v. *Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016) (quoting *Concord Assocs., L.P.* v. *Entm't Props. Tr.*, 817 F.3d 46, 51 n.2 (2d Cir. 2016)). Plaintiff did not attach her Charge of Discrimination to the Second Amended Complaint. Rather, Defendant attached the Charge of Discrimination as an exhibit to the Declaration of Christopher G. Gegwich, Esq. in Support of Fashion Institute of Technology's Motion to Dismiss. (*See* Dkt. #37-2). And Defendant argues that the Court may consider the Charge of Discrimination in adjudicating Defendant's motion to dismiss because Plaintiff's Second Amended Complaint incorporates the Charge of Discrimination by reference. (Def. Br. 12 n.3 (Dkt. #38)). Plaintiff does not refute this argument; to the contrary, Plaintiff has attached her Charge of Discrimination as an exhibit to a competing declaration. (*See* Dkt. #41-1).

For two alternative reasons, the Court may consider Plaintiff's Charge of Discrimination in resolving Defendant's motion. First, the Court agrees with Defendant that the Second Amended Complaint incorporates the Charge of Discrimination by reference. *See Rose* v. *Goldman, Sachs & Co.*, 163 F. Supp. 2d 238, 243 n.2 (S.D.N.Y. 2001) (plaintiff's operative complaint incorporated charge of discrimination by reference by citing directly to charge). (*See* SAC ¶ 2 (discussing filing of Charge of Discrimination)). Second, the Charge of Discrimination is integral to Plaintiff's Second Amended Complaint. *See Boonmalert* v. *City of N.Y.*, No. 16 Civ. 4171 (KMW), 2017 WL 1378274, at *2 n.4 (S.D.N.Y. Apr. 12, 2017) (deeming plaintiff's charge of discrimination integral to plaintiff's operative complaint); *Washington* v. *Garage Mgmt. Corp.*, No. 11 Civ. 3420 (CM), 2012 WL 4336163, at *2 (S.D.N.Y. Sept. 20, 2012) (same).

BACKGROUND

A. Factual Background

The events giving rise to Plaintiff's dispute with Defendant transpired in three phases. Plaintiff's troubles began in 2013, when she returned from her five-day medical leave and encountered various obstacles in her efforts to secure tenure. They intensified in 2014 and 2015, after Plaintiff reported her peers' and superiors' mistreatment of her to Defendant's administration. And they culminated in 2015 and 2016, when Plaintiff applied for a one-year medical leave, a process that Plaintiff alleges was fraught with discrimination.

1. Plaintiff's Five-Day Medical Leave and Subsequent Tenure Process

Defendant is a "college of art and design, business[,] and technology" located in New York City. (SAC ¶ 8). In October 2011, Defendant hired Plaintiff to work as a clinician in its Counseling Center. (*Id.* at ¶ 9). Plaintiff remains employed at Defendant to this day. (*Id.* at ¶ 60).

In 2013, Plaintiff took a five-day leave of absence "in order to undergo invasive neurological testing" for her spinal condition. (SAC ¶ 11). Before

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Even when a document is integral to or incorporated by reference in a complaint, a court may consider that document only if "there is no dispute regarding its authenticity, accuracy, or relevance." *In re PetroChina Co. Sec. Litig.*, 120 F. Supp. 3d 340, 354 (S.D.N.Y. 2015), *aff'd sub nom. Klein* v. *PetroChina Co.*, 644 F. App'x 13 (2d Cir. 2016) (summary order). Such is the case here. The Charge of Discrimination is plainly relevant to the Court's resolution of Defendant's motion. And the Court is confident that the Charge of Discrimination is authentic and accurate, because *both* parties have submitted copies of the document. Accordingly, the Court will consider the Charge of Discrimination in order to evaluate the sufficiency of Plaintiff's Second Amended Complaint.

For ease of reference, the Court refers to Defendant's brief as "Def. Br.," to Plaintiff's opposition brief as "Pl. Opp." (Dkt. #40), and to Defendant's reply brief as "Def. Reply" (Dkt. #44).

taking this leave, Plaintiff "had been unanimously reappointed in five previous Tenure and Promotion [ ] rounds." (*Id.* at ¶ 13). But upon returning to work, Plaintiff encountered "increased scrutiny from her peers and colleagues," which Plaintiff interprets as a "reaction to her disability and associated medical treatment." (*Id.* at ¶ 14). And Plaintiff alleges that this hostility "reached a fever pitch in the weeks leading to her final tenure meeting." (*Id.*).

At a staff meeting in December 2013, Plaintiff's peers criticized her for not explaining clearly why she had been absent from work for five days. (SAC ¶ 15). Plaintiff then "explained her medical status in detail." (*Id.* at ¶ 16). In response, "the Chair of [Plaintiff's] Tenure and Promotion Committee [ ] openly expressed fear that" if Plaintiff were absent in the future, the Counseling Center would "'get[] stuck' with a staff member who was unable to perform her job." (*Id.*).

The harassment escalated quickly. By Plaintiff's admission, her spinal condition often causes her to arrive to work "five to 20 minutes late in the morning." (SAC ¶ 19). Plaintiff has "consistently" sought to lessen the effects of her tardiness by, for example, "working overtime" and "factoring any delays into her calendar." (*Id.*). During the weekend following the December 2013 staff meeting, a Counseling Center "staff member sent several confrontational emails critiquing [Plaintiff's] performance, particularly her purported issues with punctuality." (*Id.* at ¶ 17). And after Plaintiff received these emails, the Counseling Center's receptionist began tracking Plaintiff's "arrival times and

session lengths in order to build a record against [Plaintiff's] performance." (*Id.* at ¶ 18).

Plaintiff fared no better when it came time to prepare her tenure application. Plaintiff was given deadlines (she does not say by whom) "only to have them changed last minute." (SAC ¶ 21). And Plaintiff was "instructed to submit" documents (again, Plaintiff does not say by whom) that she later learned were not necessary for her tenure application. (*Id.*). To make matters worse, Plaintiff received no guidance during her tenure application process — unlike "her non-disabled colleague," Dr. Jen Mai Wong, who met with "advisors" "multiple times." (*Id.* at ¶¶ 22, 24).

Plaintiff came up for tenure in March 2014. (SAC ¶ 23). Although Plaintiff had never before been criticized for her work at the Counseling Center, the members of Plaintiff's Tenure and Promotion Committee criticized her job performance and "her presentation skills." (*Id.*). And although Plaintiff claims that her on-the-job performance and tenure presentation were virtually identical to Dr. Wong's, the Tenure and Promotion Committee gave Plaintiff comparatively lower marks. (*Id.* at ¶ 24). Ultimately, the Tenure and Promotion Committee recommended that Plaintiff not receive tenure. (*Id.* at ¶¶ 25-26).

Defendant's administration, however, overrode the Tenure and Promotion Committee's recommendation. (SAC ¶ 26). In May 2014, Plaintiff received tenure. (*Id.*). Since then, Plaintiff has suffered various forms of harassment at work: "[S]everal personal items have been stolen from [Plaintiff's] office and

computer desktop," and Plaintiff's "colleagues have stopped delivering messages to her from her students." (*Id.* at ¶¶ 27-28).[2]

2. Plaintiff's Report of Harassment to Defendant's Administration

On December 2, 2014, Plaintiff wrote a letter to Defendant's Acting Vice President, Kelly Brennan, "and other members of [Defendant's] administration." (SAC ¶ 29). In the letter, Plaintiff "reported the harassment and discrimination she [had] faced"; asked "that Defendant provide her with an alternate" Tenure and Promotion Committee; and requested that Defendant "educate the three members of [Plaintiff's] department" who served on Plaintiff's Tenure and Promotion Committee "about the discriminatory bias that they demonstrated in [Plaintiff's] tenure evaluation." (*Id.*).

On January 9, 2015, Plaintiff discussed her grievances with Griselda Gonzalez, Defendant's Affirmative Action Officer and Acting Director of Compliance. (SAC ¶ 30). Gonzalez said "that she would immediately email [Plaintiff] a form that would permit [an] investigation" into Plaintiff's mistreatment "to commence"; Gonzalez added that the investigation "would take six to eight weeks." (*Id.*).

Gonzalez did not send the form to Plaintiff until January 29, 2015. (SAC ¶ 30). And Defendant did not initiate its investigation into Plaintiff's claims until the middle of March 2015. (*Id.* at ¶¶ 31-32). While Plaintiff's complaints

[2] At various points in this Opinion, the Court quotes directly from the Second Amended Complaint because it does not understand precisely what time period is covered by the allegation. Plaintiff is advised that in unmooring certain of her allegations from any specific date, she may well be rendering them less plausible.

languished, Plaintiff suffered "escalating abuse": Unnamed individuals "disparag[ed] [Plaintiff] on www.healthgrades.com, tamper[ed] with her patients' appointments[,] and … ma[de] pointed remarks in meetings that were designed to be hurtful and divisive." (*Id.* at ¶ 33).

Dissatisfied with Defendant's refusal to investigate her complaints, Plaintiff retained counsel. (SAC ¶ 34). On April 1, 2015, Plaintiff's attorney wrote to Brennan to inform her that Plaintiff had hired a lawyer. (*Id.*). In response, Plaintiff alleges, "the retaliation against [Plaintiff] only escalated." (*Id.*).

On June 17, 2015, Gonzalez reported to Plaintiff that Defendant "had concluded that [Plaintiff] was unfairly treated and wrongfully evaluated." (SAC ¶ 36). Defendant, however, refused to assign an alternate Tenure and Promotion Committee to evaluate Plaintiff. (*Id.* at ¶ 37). Nor did Defendant agree "to confront and counsel the" members of Plaintiff's Tenure and Promotion Committee in order to "counsel[] [them] on their discriminatory animus." (*Id.* at ¶ 38). By Plaintiff's account, in the face of her persistent complaints, "the only countermeasure [Plaintiff] has been offered is the opportunity to continue complaining." (*Id.* at ¶ 41).

3. Plaintiff's Application for a One-Year Medical Leave

According to Plaintiff, these long-running employment issues took a toll on her health, and in August 2015, she was "forced … to take a leave of absence" from work. (SAC ¶ 45). The Second Amended Complaint does not disclose clearly how long this leave lasted, although Plaintiff refers to it as

"short-term." (*Id.* at ¶ 56). Defendant "unlawfully interfered with" this short-term leave "by, among other things, authorizing a peer of [Plaintiff's] … to contact [Plaintiff] in October 2015 to inquire about [Plaintiff's] condition and when she [would] be able to return to work." (*Id.* at ¶ 46).

That same month, Plaintiff attempted to extend her leave and "obtain approval of a one-year leave of absence." (SAC ¶ 47). Defendant's Human Resources Department directed Plaintiff to contact Defendant's Dean of Students, Dr. Shadia Sachedina, to discuss Plaintiff's request for a medical leave. (*Id.*). Plaintiff e-mailed Dr. Sachedina, but did not hear back from her until November 20, 2015. (*Id.* at ¶¶ 47-48). In her response, Dr. Sachedina "interpreted [Plaintiff's] email as a tender of her resignation and asked that [Plaintiff] send a formal resignation letter." (*Id.* at ¶ 48). That interpretation, Plaintiff claims, was "yet another effort to hinder [Plaintiff's] efforts to obtain medical leave." (*Id.*). Eric Odin and Cherese Hill-Cartagena (both of whom, the Court surmises, work for Defendant) further hindered Plaintiff's efforts by giving her "inconsistent instructions and ask[ing] for additional documentation, despite the fact that [Plaintiff] had easily satisfied the requirements for taking a one-year leave of absence outlined in her employment contract." (*Id.* at ¶ 53).

In early 2016, while Plaintiff's application for a one-year medical leave remained unresolved, several of Plaintiff's colleagues at the Counseling Center and members of Defendant's administration "attended a colleague's retirement party." (SAC ¶ 50). At the party, the Counseling Center's "former director and other members of [Defendant's] [a]dministration spoke about [Plaintiff's] leave

of absence, spread rumors that she was 'suing [Defendant],' and spoke disparagingly about [Plaintiff's] character and integrity." (*Id.* at ¶ 51). Plaintiff "came to learn that these rumors had been instigated by the Counsel[ing] Center's current Director," who was "charged with determining whether [Plaintiff's] application for leave was approved." (*Id.* at ¶¶ 51-52). Plaintiff, who did not attend the party, does not explain how or when she learned of what transpired at the party. (*See id.*).

In May 2016 — after Plaintiff "made clear" that she intended to sue Defendant — Defendant granted Plaintiff's request for a one-year medical leave. (SAC ¶ 56). In the lead-up to that decision, Plaintiff "endure[d] the specter of obtaining her own care in the 'open-market,'" a fear vivified by Plaintiff's knowledge that the Counseling Center's Director had expressed "animosity and disdain for [Plaintiff] and her protected activity." (*Id.* at ¶ 55). Plaintiff's mounting medical bills — over $1,200 per week — coupled with her "stress of not knowing whether [Defendant] would continue to provide [Plaintiff] health insurance," added to Plaintiff's concerns. (*Id.* at ¶ 57).

Plaintiff alleges that her troubles continued into her medical leave. In October 2016, members of Defendant's faculty received ballots "to vote regarding whether to ratify [Defendant's] new collective bargaining agreement with the United College Employees." (SAC ¶ 58). Plaintiff alleges that "[i]n exchange for casting their votes, faculty members were promised retroactive pay and a possible $1,000 signing bonus." (*Id.*). Defendant never sent Plaintiff

a ballot, which Plaintiff interprets as "a clear effort to further retaliate and discriminate against" her. (*Id.* at ¶ 59).[3]

B. Procedural Background

Plaintiff filed her initial Complaint in this action on June 10, 2016, naming Defendant and the State University of New York ("SUNY") as parties. (Dkt. #1). In her Complaint, Plaintiff sought relief under various federal, state, and local statutes, but not the ADA. (*Id.* at ¶¶ 46-75).

On July 19, 2016, Plaintiff filed her Charge of Discrimination with the EEOC. (SAC ¶ 2). Three aspects of Plaintiff's Charge of Discrimination merit close attention here, because they bear on Defendant's exhaustion and timeliness arguments:

First, in her Charge of Discrimination, Plaintiff claimed that Defendant had violated the ADA. (EEOC Charge 1). In a section that asked Plaintiff to indicate her Charge's "Cause of Discrimination," Plaintiff marked two boxes: (i) "Retaliation" and (ii) "Disability." (*Id.*).

Second, in an adjacent section labeled "Date Discrimination Took Place," Plaintiff wrote that the "Earliest" date of the discrimination she encountered was "December 2013," and the "Latest" was "August 2015." (EEOC Charge 1). This section also included a box labeled "Continuing Action," but Plaintiff did not select it. (*Id.*).

[3] Plaintiff does not indicate the result of the ratification vote.

Finally, Plaintiff attached to her Charge of Discrimination a forty-one-paragraph "Supplement" that mirrors the form and content of the Second Amended Complaint — with one important difference: Like the Second Amended Complaint, the Supplement to Plaintiff's Charge of Discrimination begins by cataloguing the difficulties Plaintiff faced when she returned from her five-day medical leave in 2013. (EEOC Charge 2). And the Supplement recounts the harassment and retaliation Plaintiff allegedly endured in 2014 and 2015. (*Id.* at 3-6). But the Supplement concludes with Plaintiff's allegation that one of her colleagues at Defendant's Counseling Center contacted Plaintiff during her short-term leave in October 2015. (*Id.* at 6). The Supplement contains no allegations postdating that incident.

Plaintiff received a Right to Sue Letter from the EEOC on August 24, 2016. (SAC ¶ 2). On October 19, 2016, Plaintiff filed an Amended Complaint against Defendant and SUNY, in which she alleged that Defendant had discriminated and retaliated against her in violation of the ADA. (Dkt. #24). Following a conference with the Court on November 30, 2016, Plaintiff voluntarily dismissed SUNY as a party to this suit, and filed the Second Amended Complaint against Defendant alone. (Dkt. #32, 33).

Defendant moved to dismiss Plaintiff's Second Amended Complaint on January 13, 2017. (Dkt. #36-38).[4] Plaintiff opposed the motion on February

[4] On November 30, 2016, this Court issued an order setting a briefing schedule for Defendant's motion to dismiss. (Dkt. #31). At the time, Plaintiff had yet to dismiss SUNY from this case. And in recognition of the fact that both SUNY and Defendant had expressed their intention to file separate motions to dismiss, the Court permitted Plaintiff to file a combined opposition brief of forty pages, well in excess of the twenty-five pages litigants are customarily granted under this Court's Individual Rules of

13, 2017 (Dkt. #40-41), and briefing concluded when Defendant submitted its reply on February 27, 2017 (Dkt. #44).

DISCUSSION

Defendant asserts three arguments in support of its partial motion to dismiss. First, Defendant argues that Plaintiff failed to exhaust many of the claims in her Second Amended Complaint, because she did not include those claims in her Charge of Discrimination. Second, Defendant argues that many more of Plaintiff's claims are time-barred, because they occurred more than 300 days before Plaintiff filed her Charge of Discrimination. Finally, Defendant argues that the Second Amended Complaint does not state plausible hostile work environment or retaliation claims under the ADA.

The first of these arguments fails, but the second and third succeed. Plaintiff administratively exhausted both her ADA hostile work environment and ADA retaliation claims. But the bulk of the allegations Plaintiff adduces in support of these claims are time-barred. And once the Court excises the untimely allegations from the Second Amended Complaint, it is left with a small subset of allegations that, taken together, do not plausibly support Plaintiff's hostile work environment or retaliation claims. In turn, Plaintiff's Eighth Cause of Action and Ninth Cause of Action do not survive Plaintiff's partial motion to dismiss.

Practice in Civil Cases. (*Id.*). Plaintiff dismissed SUNY from this suit on November 30, 2016 — but she nonetheless filed a forty-page brief opposing Defendant's motion to dismiss. Plaintiff's counsel plainly knew better, and the Court will expect counsel to honor both letter and spirit of all future Court orders.

A. Plaintiff Administratively Exhausted Her ADA Hostile Work Environment and ADA Retaliation Claims

1. Applicable Law

"A plaintiff must file charges with the EEOC before bringing … ADA claims in federal court." *Gomez* v. *N.Y.C. Police Dep't*, 191 F. Supp. 3d 293, 299 (S.D.N.Y. 2016) (citing 42 U.S.C. §§ 12117(a) and 20003-5(e)). The consequence of this administrative exhaustion requirement is that "[a] district court may only hear claims that are either included in [an] EEOC charge or are based on conduct which is reasonably related to conduct alleged in the EEOC charge." *Dellaporte* v. *City Univ. of N.Y.*, 998 F. Supp. 2d 214, 231 (S.D.N.Y. 2014) (quoting *Fiscina* v. *N.Y.C. Dist. Council of Carpenters,* 401 F. Supp. 2d 345, 356 (S.D.N.Y. 2005)).

"The Second Circuit has recognized three situations in which a claim may be found to be 'reasonably related'":

> [i] [W]here the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination; [ii] [W]here the complaint is one alleging retaliation by an employer against an employee for filing an EEOC charge; and [iii] [W]here the complaint alleges further incidents of discrimination carried out in precisely the same manner alleged in the EEOC charge.

Flum v. *Dep't of Educ. of the City of N.Y.*, 83 F. Supp. 3d 494, 499 (S.D.N.Y. 2015) (internal quotation marks omitted) (quoting *Terry* v. *Ashcroft,* 336 F.3d 128, 151 (2d Cir. 2003)).

Determining whether conduct alleged in a federal complaint is "reasonably related" to conduct alleged in an EEOC charge of discrimination

"requires a fact-intensive analysis." *Mathirampuzha* v. *Potter*, 548 F.3d 70, 76 (2d Cir. 2008). And in undertaking this analysis, courts consider both the factual allegations a plaintiff presented in her EEOC charge and how that plaintiff completed the preliminary informational sections of the charge. *See Littlejohn* v. *City of N.Y.*, 795 F.3d 297, 321-23 (2d Cir. 2015) (finding that sexual harassment claim in plaintiff's complaint was not reasonably related to claims in plaintiff's EEOC charge, where plaintiff did not mark charge's "box to indicate discrimination based on sex," and did not allege sexual harassment in the charge "or in her supplemental statements"); *Morales* v. *Long Island R.R. Co.*, No. 09 Civ. 8714 (HB), 2010 WL 1948606, at *4-5 (S.D.N.Y. May 14, 2010) (reaching same result regarding hostile work environment claim in plaintiff's complaint, because plaintiff "did not check the 'continuing action' box on the EEOC form," and because in his charge plaintiff "allege[d] a single discrete act of discrimination without any reference to continuing activity").

2. Analysis

Plaintiff's Supplement to her EEOC Charge of Discrimination concludes with Plaintiff's allegation that a peer from the Counseling Center contacted Plaintiff during her short-term medical leave in October 2015. But Plaintiff's Second Amended Complaint, Defendant notes, "includes alleged conduct from November 2015 through October 2016." (Def. Br. 12). And because none of this alleged conduct, Defendant contends, is "reasonably related" to the conduct Plaintiff alleged in her Charge of Discrimination, the post-October

2015 allegations in the Second Amended Complaint are unexhausted. (*Id.* at 12-14).

The Court disagrees. As a preliminary matter, the "reasonably related" analysis usually focuses on whether a plaintiff has administratively exhausted *claims*, not *allegations* underlying those claims. *See, e.g.*, *Clemmer* v. *Fordham Bedford Cmty. Servs.*, No. 14 Civ. 2343 (AT), 2015 WL 273657, at *3 (S.D.N.Y. Jan. 16, 2015) (finding that plaintiff failed to exhaust Title VII and ADEA claims, because plaintiff's administrative complaint to the New York State Division of Human Rights did not seek relief under either of those statutes); *Lang* v. *N.Y.C. Health & Hosps. Corp.*, No. 12 Civ. 5523 (WHP), 2013 WL 4774751, at *3 (S.D.N.Y. Sept. 5, 2013) (reaching same result with regard to plaintiff's ADEA claim, because plaintiff sought redress under Title VII and the ADA before the EEOC). And under this standard, Plaintiff clearly exhausted both her hostile work environment and retaliation claims. In her Charge of Discrimination, Plaintiff marked boxes indicating that the "Cause of Discrimination" for her grievance included "Retaliation" and "Disability." (EEOC Charge 1). The allegations in Plaintiff's Supplement, like the allegations in the Second Amended Complaint, align with those selections. (*See, e.g.*, *id.* at 2 ("I was subjected to discrimination on the basis of my disability and retaliation for my complaints of harassment and discriminatory animus[.]")). Put simply, in her Charge of Discrimination, Plaintiff clearly alleged that Defendant had discriminated and retaliated against her in violation of the ADA.

She thus administratively exhausted the ADA hostile work environment and ADA retaliation claims in her Second Amended Complaint.

Defendant, however, contends that "[t]he exhaustion requirement applies not only to causes of action but also to underlying factual allegations." (Def. Br. 11 (quoting *Fanelli* v. *State of N.Y.*, 51 F. Supp. 3d 219, 227 (E.D.N.Y. 2014))). Case law from this District lends some support to this argument. *See Flum*, 83 F. Supp. 3d at 499-500 (concluding that teacher's anti-discrimination claims arising out of her employment at a particular school were not "reasonably related" to the claims plaintiff raised in her EEOC charge).

But even at this allegation-specific level, Defendant's argument still fails. Nearly all of the post-October 2015 allegations in the Second Amended Complaint concern Plaintiff's efforts to secure a one-year medical leave. And as presented in the Second Amended Complaint, those allegations illustrate the harassment, discrimination, and retaliation Plaintiff faced from her co-workers as a consequence of her disability. The Second Amended Complaint's post-October 2015 allegations, in other words, concern the very same conduct that Plaintiff alleged in her Charge of Discrimination. The Court is thus confident that these post-October 2015 allegations are "reasonably related" to the allegations in Plaintiff's Charge of Discrimination, because these later-in-time allegations "would fall within the scope of the EEOC investigation which c[ould] reasonably be expected to grow out of" Plaintiff's Charge of Discrimination. *Flum*, 83 F. Supp. 3d at 499 (quoting *Terry*, 336 F.3d at 151).

B. Most of the Second Amended Complaint's Allegations Supporting Plaintiff's Hostile Work Environment and Retaliation Claims Are Time-Barred Under the ADA

1. Applicable Law

This Court has already explained that "[a]s a predicate to filing suit under the ADA, a plaintiff must first file a timely charge with the [EEOC] or a state or local agency capable of granting relief." *Clark* v. *Jewish Childcare Ass'n, Inc.*, 96 F. Supp. 3d 237, 258 (S.D.N.Y. 2015) (quoting *Flum*, 83 F. Supp. 3d at 499). In addition to the exhaustion requirement the Court addressed *supra*, there is also a timeliness requirement encoded in this administrative process: "To be timely, [an] EEOC charge must be filed within 180 days of the alleged discriminatory act or within 300 days if [a] state has local administrative mechanisms for the redress of discrimination claims." *McCray* v. *Project Renewal, Inc.*, No. 15 Civ. 8494 (VEC), 2017 WL 715010, at *3 (S.D.N.Y. Feb. 22, 2017). "In New York, 'in which there is a designated state or local agency with jurisdiction to consider discriminatory employment claims, the limitations period for filing charges with the EEOC is … 300 days.'" *Clark*, 96 F. Supp. 3d at 258 (quoting *Dawson* v. *N.Y.C. Transit Auth.,* No. 13 Civ. 6593 (GHW), 2014 WL 5343312, at *4 (S.D.N.Y. Oct. 21, 2014), *vacated on other grounds*, 624 F. App'x 763 (2d Cir. 2015) (summary order)).

Accordingly, in New York, an ADA plaintiff's "claims are barred to the extent that they are based on conduct that occurred … [more than] 300 days before she filed her EEOC charge." *Grimes-Jenkins* v. *Consol. Edison Co. of N.Y.*, No. 16 Civ. 4897 (JCF), 2017 WL 2258374, at *6, *10 (S.D.N.Y. May 22,

2017), *report and recommendation adopted*, No. 16 Civ. 4897 (AT), 2017 WL 2709747 (S.D.N.Y. June 22, 2017). This 300-day time bar operates as a "statute of limitations for … ADA … claims." *Smith* v. *Johnson*, No. 14 Civ. 3975 (KBF), 2014 WL 5410054, at *4 (S.D.N.Y. Oct. 24, 2014).

When an anti-discrimination plaintiff seeks redress for "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire," the accrual date for this 300-day limitation period is straightforward enough: "Ordinarily, '[a] discrete … discriminatory act occurred on the day that it happened." *Gomez*, 191 F. Supp. 3d at 301 (internal quotation marks omitted) (quoting *Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 110, 114 (2002)). But "under the continuing violation doctrine, a 'plaintiff may bring suit based on conduct that occurred outside of the statute of limitations period, provided that the conduct is part of specific discriminatory policies or practices.'" *Clark*, 96 F. Supp. 3d at 258 (quoting *Early* v. *Wyeth Pharm., Inc.,* 603 F. Supp. 2d 556, 571 (S.D.N.Y. 2009)).

"The Second Circuit has summarized the requirements" of the continuing violation doctrine thusly: "To trigger the continuing violation doctrine when challenging discrimination, the plaintiff 'must allege both the existence of an ongoing policy of discrimination and some non-time-barred acts taken in furtherance of that policy.'" *Volpe* v. *N.Y.C. Dep't of Educ.*, 195 F. Supp. 3d 582, 594 (S.D.N.Y. 2016) (quoting *Shomo* v. *City of N.Y.*, 579 F.3d 176, 181 (2d Cir. 2009)). Alternately, instead of alleging a discriminatory policy, an anti-discrimination plaintiff can establish a continuing violation by demonstrating

that "specific and related instances of discrimination are permitted by [her] employer to continue unremedied for so long as to amount to a discriminatory policy or practice." *Sullivan* v. *NYC Dep't of Investigation*, 163 F. Supp. 3d 89, 98 (S.D.N.Y. 2016) (internal quotation mark omitted) (quoting *Cornwell* v. *Robinson*, 23 F.3d 694, 704 (2d Cir. 1994)), *reconsideration denied sub nom. Sullivan* v. *N.Y.C. Dep't of Investigation*, No. 12 Civ. 2564 (TPG), 2016 WL 7106148 (S.D.N.Y. Dec. 6, 2016), *appeal dismissed*, No. 16-4236-cv (2d Cir. May 2, 2017). In any event, "[c]ourts in the Second Circuit have viewed continuing violation arguments with disfavor." *Lyons* v. *N.Y.*, No. 15 Civ. 3669 (NSR), 2016 WL 5339555, at *3 (S.D.N.Y. Sept. 22, 2016) (internal quotation mark omitted) (quoting *Kpaka* v. *City Univ. of N.Y.*, No. 14 Civ. 6021 (RA), 2016 WL 4154891, at *5 (S.D.N.Y. Aug. 2, 2016)). "[A]nd multiple incidents of discrimination, *even similar ones*, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation." *Id.* (internal quotation marks omitted) (quoting *Kpaka*, 2016 WL 4154891, at *5).

"[A] plaintiff may not rely on a continuing violation theory of timeliness unless she has asserted that theory in the administrative proceedings." *Fitzgerald* v. *Henderson*, 251 F.3d 345, 360 (2d Cir. 2001). Thus "a continuing violation must be 'clearly asserted both in the EEOC filing and in the complaint.'" *Carmellino* v. *Dist. 20 of N.Y.C. Dep't of Educ.*, No. 03 Civ. 5942 (PKC), 2004 WL 736988, at *13 (S.D.N.Y. Apr. 6, 2004) (quoting *Miller* v. *Int'l Tel. & Tel. Corp.*, 755 F.2d 20, 25 (2d Cir. 1985)); *see id.* (finding that plaintiff could not avail herself of continuing violation theory in federal court, because

in her EEOC charge plaintiff did not mark box indicating that "defendants' alleged discrimination was of a continuing nature," and because the allegations plaintiff made in the charge did not suggest a continuing violation).

2. Analysis

Plaintiff filed her Charge of Discrimination on July 19, 2016. (SAC ¶ 2). 300 days before that date was September 23, 2015. The bulk of the Second Amended Complaint's allegations predate September 23, 2015. (*See id.* at ¶¶ 9-45; Def. Br. 7). And *all* of these pre-September 23, 2015 allegations, Defendant contends, are untimely, because they are not subject to the continuing violation doctrine. In support of this argument, Defendant argues that Plaintiff "failed to raise with the EEOC a continuing violation theory," and therefore cannot assert that theory before this Court. (Def. Br. 10).

The Court agrees. As a preliminary matter, in her opposition brief, Plaintiff did not contest Defendant's argument that Plaintiff failed to pursue a continuing violation theory before the EEOC. (Def. Reply 2 ("Plaintiff's failure to address this argument amounts to a concession that her ADA claims arising from events prior to September 23, 2015 are untimely and should be dismissed.")). But even if Plaintiff had addressed this argument, the representations Plaintiff made in her Charge of Discrimination demonstrate that Defendant's take on this issue prevails.

As noted, the first page of Plaintiff's Charge of Discrimination contains a section titled "Date Discrimination Took Place." (EEOC Charge 1). That section contained a box that allowed Plaintiff to indicate whether she was

pursuing a "Continuing Action." (*Id.*). Plaintiff did not select that box. And this section also contained spaces for Plaintiff to indicate the "Earliest" and "Latest" dates her discrimination occurred. (*Id.*). Plaintiff wrote that her discrimination began in "December 2013" and ended in "August 2015." (*Id.*). Plaintiff, in other words, affirmatively informed the EEOC that Defendant had stopped discriminating against her in 2015.

The allegations in Plaintiff's Supplement to her Charge of Discrimination point in the same direction. The final allegation in the Supplement is Plaintiff's claim that one of her Counseling Center peers impermissibly contacted Plaintiff during her short-term medical leave in October 2015. (EEOC Charge 6). But apart from a few conclusory incantations of continued harassment, the Supplement does not suggest that Defendant discriminated against Plaintiff after that date. (*See id.* at 4 ("Since I was granted tenure, I have been consistently treated with hostility, ostracized, and subjected to abuse."); *id.* at 6 ("[T]he same conditions that I previously endured, and about which I have complained, nonetheless persist.")). Put simply, Plaintiff did not "clearly assert" a continuing violation theory in her Charge of Discrimination. *Carmellino*, 2004 WL 736988, at *13 (internal quotation mark omitted) (quoting *Miller*, 755 F.2d at 25). And accordingly, Plaintiff cannot rely on a continuing violation theory to defeat the ADA's 300-day statute of limitations in this Court.

There is another reason why Plaintiff cannot prevail on a continuing violation theory, one that dovetails with the Court's plausibility analysis in the next section of this Opinion. "To trigger the continuing violation doctrine when

challenging discrimination, the plaintiff must allege … some non-time-barred acts taken in furtherance of that policy.'" *Volpe*, 195 F. Supp. 3d at 594 (quoting *Shomo*, 579 F.3d at 181). Here, that requires Plaintiff to allege actionable conduct post-dating September 23, 2015. Plaintiff has not done so, in large part because on September 23, 2015, Plaintiff was not working at the Counseling Center: She was on a short-term medical leave. And as the Court will explain *infra*, the fact that Plaintiff was on leave during this period weakens significantly her ADA hostile work environment and retaliation claims. *See Krachenfels* v. *N. Shore Long Island Jewish Health Sys.*, No. 13 Civ. 243 (JFB), 2014 WL 3867560, at *10 (E.D.N.Y. July 29, 2014)*; Gillman* v. *Inner City Broad. Corp.*, No. 08 Civ. 8909 (LAP), 2011 WL 181732, at *1 (S.D.N.Y. Jan. 18, 2011). Because Plaintiff's *post*-September 23, 2015 allegations do not plausibly support her ADA hostile work environment or retaliation claims, they cannot serve as a hook for Plaintiff's *pre*-September 23, 2015 allegations.

In sum, Plaintiff cannot base either of her ADA claims on events that occurred before September 23, 2015. To evaluate whether Plaintiff's Eighth Cause of Action or Ninth Cause of Action survive Defendant's motion to dismiss, the Court will consider only those allegations in the Second Amended Complaint concerning events that occurred after that date.

C. Plaintiff Has Not Plausibly Alleged That Defendant Created a Hostile Work Environment or Retaliated Against Plaintiff in Violation of the ADA

The Court's conclusion that most of Plaintiff's allegations are untimely saps much of the Second Amended Complaint's strength. Carving out those

untimely allegations leaves intact the following post-September 23, 2015 allegations: (i) a Counseling Center peer contacted Plaintiff during her leave in October 2015 (SAC ¶ 46); (ii) Defendant did not expeditiously or efficiently process Plaintiff's request for a one-year leave of absence (*id.* at ¶¶ 47-49, 53-54); (iii) Plaintiff's co-workers spoke ill of Plaintiff during a colleague's retirement party in early 2016 (*id.* at ¶¶ 50-52); and (iv) in late 2016, Plaintiff did not receive a ballot to vote on Defendant's collective bargaining agreement (*id.* at ¶¶ 58-59). All of these events occurred while Plaintiff was on leave from the Counseling Center. And none of these allegations plausibly supports Plaintiff's claims that Defendant created a hostile work environment and retaliated against Plaintiff in violation of the ADA. The Court considers each claim in turn.

1. Plaintiff Has Not Plausibly Alleged That Defendant Created a Hostile Work Environment in Violation of the ADA

a. Applicable Law

"The Second Circuit has 'not yet decided whether a hostile work environment claim is cognizable under the ADA.'" *Flieger* v. *E. Suffolk BOCES*, — F. App'x —, No. 16-2556-cv, 2017 WL 2377853, at *3 (2d Cir. June 1, 2017) (summary order) (quoting *Robinson* v. *Dibble*, 613 F. App'x. 9, 12 n.2 (2d Cir. 2015) (summary order)). Nonetheless, district courts in the Second Circuit have evaluated ADA hostile work environment claims using "the Title VII standard." *Williams* v. *Rosenblatt Sec. Inc.*, No. 14 Civ. 4390 (JGK), 2016 WL 4120654, at *2 (S.D.N.Y. July 22, 2016); *accord Monterroso* v. *Sullivan & Cromwell, LLP*, 591 F. Supp. 2d 567, 584 (S.D.N.Y. 2008) ("Hostile work

environment claims under the ADA are evaluated under the same standards as hostile work environment claims under Title VII."); *see also Lee* v. *Colvin*, No. 15 Civ. 1472 (KPF), 2017 WL 486944, at *14 n.12 (S.D.N.Y. Feb. 6, 2017) ("[C]ourts in this Circuit continue to evaluate hostile work environment claims brought under the Rehabilitation Act.").

This standard is well-settled. "At the motion to dismiss stage, ... 'a plaintiff need only plead facts sufficient to support the conclusion that she was faced with harassment ... of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse.'" *Cromwell-Gibbs* v. *Staybridge Suite Times Square*, No. 16 Civ. 5169 (KPF), 2017 WL 2684063, at *4 (S.D.N.Y. June 20, 2017) (quoting *Cowan* v. *City of Mount Vernon*, No. 14 Civ. 8871 (KMK), 2017 WL 1169667, at *4 (S.D.N.Y. Mar. 28, 2017)). Accordingly, an ADA plaintiff need not "establish every element of a prima facie hostile work environment claim" to survive a motion to dismiss. *Id.* Rather, a complaint "need only give plausible support to a minimal inference of discriminatory motivation." *Littlejohn*, 795 F.3d at 311.

"As a practical matter, however, while a plaintiff need not allege specific facts establishing a prima facie case of discrimination in order to withstand a motion to dismiss, the elements of a prima facie case often provide an outline of what is necessary to render a plaintiff's claims for relief plausible." *Carter* v. *Verizon*, No. 13 Civ. 7579 (KPF), 2015 WL 247344, at *5 (S.D.N.Y. Jan. 20, 2015). A prima facie hostile work environment claim has three elements — "a

plaintiff must plead facts that would tend to show that the complained of conduct":

> [i] [I]s objectively severe or pervasive — that is, … creates an environment that a reasonable person would find hostile or abusive; [ii] creates an environment that the plaintiff subjectively perceives as hostile or abusive; and [iii] creates such an environment because of the plaintiff's sex.

Patane v. *Clark*, 508 F.3d 106, 113 (2d Cir. 2007) (internal quotation marks and citation omitted).

"In determining whether a plaintiff suffered a hostile work environment," a court "must consider the totality of the circumstances, including '[i] the frequency of the discriminatory conduct; [ii] its severity; [iii] whether it is physically threatening or humiliating, or a mere offensive utterance; and [iv] whether it unreasonably interferes with an employee's work performance.'" *Littlejohn*, 795 F.3d at 321 (quoting *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). And "[i]n evaluating whether" a complaint's allegations "suffice to find a hostile work environment, the [Second Circuit] has 'repeatedly cautioned against setting the bar too high.'" *Lewis* v. *Roosevelt Island Operating Corp.*, — F. Supp. 3d —, No. 16 Civ. 3071 (ALC), 2017 WL 1169647, at *6 (S.D.N.Y. Mar. 28, 2017) (quoting *Patane*, 508 F.3d at 113).

b. Analysis

The few timely allegations in the Second Amended Complaint do not plausibly support Plaintiff's claim that Defendant created a hostile work environment. As the Court noted *supra*, all of the post-September 23, 2015

events in the Second Amended Complaint occurred after Plaintiff went on medical leave. This means that none of Plaintiff's timely allegations concerns incidents that occurred at the Counseling Center. And in turn, the Court is hard-pressed to conclude that these allegations demonstrate that Plaintiff's "*workplace* [was] permeated with discriminatory intimidation, ridicule, and insult that [was] sufficiently severe or pervasive to alter the conditions of [Plaintiff's] employment and create an abusive working environment." *Littlejohn*, 795 F.3d at 320-21 (emphasis added) (quoting *Harris*, 510 U.S. at 21); *see Krachenfels*, 2014 WL 3867560, at *10 (alleged instance of ADA discrimination that occurred while plaintiff was on work leave "ha[d] no bearing on plaintiff's hostile work environment claim, which requires evidence of harassment in the 'workplace'"); *Gillman*, 2011 WL 181732, at *1 ("[Plaintiff's] hostile work environment claim is based on incidents that occurred largely while he was on leave, … Because there is no dispute that the alleged incidents did not take place in the 'workplace,' [Plaintiff] cannot make out a hostile work environment case.").[5]

But even if the timely allegations in the Second Amended Complaint concerned events that occurred at the Counseling Center, Plaintiff's hostile

[5] The Court recognizes that "[t]here are various ways in which a hostile environment may extend beyond the physical workplace, and thus contribute to and form part of a hostile [work] environment claim." *Greer* v. *Paulson*, 505 F.3d 1306, 1314 (D.C. Cir. 2007). And nothing in this Opinion should be read to endorse "a *per se* rule against considering incidents alleged to have occurred while an employee was physically absent from the workplace." *Id.* Plaintiff's hurdle is that even if she had been continuously employed at the Counseling Center through October 2016, *none* of the post-September 23, 2015 events alleged in the Second Amended Complaint would plausibly support her hostile work environment claim. The fact that these events occurred while Plaintiff was on leave simply buttresses that conclusion.

work environment claim would still fail. No "reasonable employee would find the conditions of her employment altered for the worse" after experiencing the post-September 23, 2015 events Plaintiff alleges in the Second Amended Complaint. *Cromwell-Gibbs*, 2017 WL 2684063, at *4 (internal quotation mark omitted) (quoting *Cowan*, 2017 WL 1169667, at *4). The Second Amended Complaint's timely allegations suggest, at worst, that Plaintiff's co-workers spoke ill of Plaintiff behind her back. But "[t]o plead a hostile work environment claim, a complaint must allege that 'a workplace is so severely permeated with discriminatory intimidation, ridicule, and insult, that the terms and conditions of [the plaintiff's] employment were thereby altered.'" *Henriquez-Ford* v. *Council of Sch. Supervisors & Administrators,* No. 14 Civ. 2496 (JPO), 2016 WL 93863, at *2 (S.D.N.Y. Jan. 7, 2016) (quoting *Desardouin* v. *City of Rochester*, 708 F.3d 102, 105 (2d Cir. 2013)). The Second Amended Complaint falls far short of this bar.

Even viewing the Second Amended Complaint's timely allegations in the light most favorable to Plaintiff, they do not state a plausible ADA hostile work environment claim. The Court accordingly dismisses Plaintiff's Eighth Cause of Action.

2. Plaintiff Has Not Plausibly Alleged That Defendant Retaliated Against Her in Violation of the ADA

a. Applicable Law

"[F]or [an ADA] retaliation claim to survive a … motion to dismiss, the plaintiff must plausibly allege that: [i] defendants discriminated or took an adverse employment action against [her], [ii] 'because' [she] has opposed any

unlawful employment practice." *Toombs* v. *N.Y.C. Hous. Auth.*, No. 16 Civ. 3352 (LTS), 2017 WL 1169649, at *5 (S.D.N.Y. Mar. 27, 2017) (quoting *Vega* v. *Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 90 (2d Cir. 2015)); *see also Shih* v. *JPMorgan Chase Bank, N.A.*, No. 10 Civ. 9020 (JGK), 2013 WL 842716, at *5 (S.D.N.Y. Mar. 7, 2013) ("The anti-retaliation provisions in Title VII, the ADEA, the ADA, and the NYSHRL contain nearly identical language and are analyzed under the same framework.").

To this first element, "[i]n the context of an ADA retaliation claim, an adverse employment action is an action that 'could well dissuade a reasonable worker from making or supporting a charge of discrimination.'" *Bien-Aime* v. *Equity Residential*, No. 15 Civ. 1485 (VEC), 2017 WL 696695, at *7 (S.D.N.Y. Feb. 22, 2017) (quoting *Ragusa* v. *Malverne Union Free Sch. Dist.*, 381 F. App'x 85, 90 (2d Cir. 2010) (summary order)). "Although 'petty slights or minor annoyances that often take place at work and that all employees experience do not constitute actionable retaliation,' … 'a materially adverse action need not affect the plaintiff's terms and conditions of employment[.]'" *Ward* v. *Shaddock*, No. 14 Civ. 7660 (KMK), 2016 WL 4371752, at *12 (S.D.N.Y. Aug. 11, 2016) (quoting *Hicks* v. *Baines,* 593 F.3d 159, 165 (2d Cir. 2010); *Klein* v. *N.Y. Univ.*, 786 F. Supp. 2d 830, 848 (S.D.N.Y. 2011)). A court assessing whether an employment action was actionably adverse must consider "context." *Grimes-Jenkins*, 2017 WL 2258374, at *10 (alterations omitted) (quoting *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 57 (2006)). Nonetheless, "the

standard is objective, examining the impact the action would have on a reasonable employee." *Id.*

And to the second element of an ADA retaliation claim, "[t]here is … an unsettled question of law in this Circuit as to whether a plaintiff must show, in order to succeed on her ADA retaliation claim, that the retaliation was a 'but-for' cause of the termination or merely a 'motivating factor.'" *Eisner* v. *Cardozo*, No. 16-872-cv, 2017 WL 1103437, at *1 (2d Cir. Mar. 24, 2017) (summary order). "But-for causation does not 'require proof that retaliation was the only cause of the employer's action, but only that the adverse action would not have occurred in the absence of the retaliatory motive. Further, the but-for causation standard does not alter the plaintiff's ability to demonstrate causation … through temporal proximity.'" *Atencio* v. *U.S. Postal Serv.*, 198 F. Supp. 3d 340, 361 n.12 (S.D.N.Y. 2016) (quoting *Vega*, 801 F.3d at 91). In contrast, under the lower "motivating factor" standard, "[i]t suffices … to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision." *Zarda* v. *Altitude Express*, 855 F.3d 76, 81 (2d Cir. 2017) (per curiam) (quoting *Univ. of Tx. Sw. Med. Ctr.* v. *Nassar*, — U.S. —, 133 S. Ct. 2517, 2523 (2013)).

b. Analysis

Plaintiff has not plausibly alleged that Defendant retaliated against her in violation of the ADA. Plaintiff protests "that she has alleged an ongoing practice of retaliation occurring over a series of days or perhaps years." (Pl.

Opp. 16-17 (internal quotation marks and citation omitted)). But in her opposition brief, Plaintiff cites just two post-September 23, 2015 "adverse actions" in support of her ADA retaliation claim: (i) Plaintiff's allegation that Defendant "repeated[ly] interfere[d] with [Plaintiff's] request for medical leave for roughly nine months, only granting her request after [Plaintiff] engaged counsel and threatened to bring suit" (Def. Br. 38); and (ii) Plaintiff's allegation that when she "began her efforts to obtain a one-year, disability-related leave of absence, just a month later the Dean of Students sought to make her resign" (*id.* at 40).

Plaintiff's characterization of these two events in her opposition papers overstates considerably the Second Amended Complaint's allegations. In the Second Amended Complaint, Plaintiff alleges that Defendant's employees "continually gave [her] inconsistent instructions and asked for additional documentation" regarding her leave request, and that these employees failed to "follow up" with Plaintiff to explain what documents she needed to submit to obtain a one-year medical leave. (SAC ¶¶ 53-54). These administrative hiccups are a far cry from Plaintiff's current position that Defendant "repeated[ly] interfere[d] with [Plaintiff's] request for medical leave." (Def. Br. 38). And the Second Amended Complaint's allegations about Dr. Sachedina suggest that she misconstrued Plaintiff's request for a year-long medical leave "as a tender of [Plaintiff's] resignation," a miscommunication that does not betray any retaliatory or discriminatory animus. (SAC ¶ 48).

More fundamentally, neither of these incidents would have "dissuade[d] a reasonable worker from making or supporting a charge of discrimination." *Bien-Aime*, 2017 WL 696695, at *7 (internal quotation mark omitted) (quoting *Ragusa*, 381 F. App'x at 90). Plaintiff's ultimately successful path to securing a one-year medical leave may have taken longer than Plaintiff wished. But the Second Amended Complaint does not plausibly suggest that the obstacles Plaintiff encountered on that path after September 23, 2015, were materially adverse. Nor does it plausibly support even a minimal inference that Plaintiff's disability was a motivating factor in Defendant's treatment of Plaintiff.

Although Plaintiff does not state as much in her brief, her Second Amended Complaint could be read to assert a retaliatory hostile work environment claim. Courts in this Circuit have recognized that "[i]n general, a retaliatory hostile work environment may indeed constitute materially adverse employment action." *Marquez* v. *City of N.Y.*, No. 14 Civ. 8185 (AJN), 2016 WL 4767577, at *13 (S.D.N.Y. Sept. 12, 2016). "[T]here is an open question as to whether a retaliatory hostile work environment claim merits a different standard than a discriminatory hostile work environment claim." *Spaulding* v. *N.Y.C. Dep't of Educ.*, No. 12 Civ. 3041 (VMS), 2015 WL 12645530, at *58 (E.D.N.Y. Feb. 19, 2015), *report and recommendation adopted*, No. 12 Civ. 3041 (KAM), 2015 WL 5560286 (E.D.N.Y. Sept. 21, 2015). This open question, distilled, is: "[W]hether to succeed on a retaliatory hostile work environment claim, the employee must demonstrate that the hostile conduct would dissuade a reasonable worker from engaging in protected activity, rather than that the

hostile conduct altered the terms and conditions of employment." *Id.* For the most part, judges in this District fall into the latter, "terms and conditions of employment" camp. *See Volpe*, 195 F. Supp. 3d at 595-96; *Villar* v. *City of N.Y.*, 135 F. Supp. 3d 105, 137 (S.D.N.Y. 2015); *Hahn* v. *Bank of Am. Inc.*, No. 12 Civ. 4151 (DF), 2014 WL 1285421, at *22 (S.D.N.Y. Mar. 31, 2014), *aff'd sub nom. Hahn* v. *Bank of Am. N.A.*, 607 F. App'x 55 (2d Cir. 2015) (summary order).

Plaintiff cannot satisfy either standard. Plaintiff's failure to make out an ADA hostile work environment claim is fatal to her ADA *retaliatory* hostile work environment claim (to the extent she is raising such a claim). At the risk of belaboring the point, all of the Second Amended Complaint's timely allegations concern events that occurred while Plaintiff was on medical leave. Consequently, those allegations undercut, rather than support, Plaintiff's claim that her work environment was hostile. And in turn, even under the more lenient standard for evaluating retaliatory hostile work environment claims, the Second Amended Complaint does not state a claim for relief. None of the post-September 23, 2015 discrimination Plaintiff allegedly suffered would have dissuaded a reasonable employee from engaging in conduct protected by the ADA.

In sum, Plaintiff has failed to allege plausibly that Defendant retaliated against her in violation of the ADA. The Court accordingly dismisses Plaintiff's Ninth Cause of Action.

CONCLUSION

For the reasons set forth above, Defendant's motion to dismiss is GRANTED. The Clerk of Court is directed to terminate the motion appearing at Docket Entry 36. The parties are ORDERED to submit a proposed Civil Case Management Plan and Scheduling Order **on or before August 4, 2017.** The parties are forewarned that the Court will be disinclined to extend discovery deadlines, once those deadlines are proposed by the parties and endorsed by the Court.

SO ORDERED.

Dated: July 14, 2017
New York, New York

Katherine Polk Failla

KATHERINE POLK FAILLA
United States District Judge