

**Boliak v Reilly**

2017 NY Slip Op 32010(U)

September 22, 2017

Supreme Court, New York County

Docket Number: 153941/2016

Judge: Erika M. Edwards

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

LAWRENCE BOLIAK, MAUREEN SMITH and  
THOMAS RODES,

Index No.: 153941/2016

Plaintiffs,

DECISION/ORDER

-against-

Motion Sequences 001 and 002

FATHER MICHAEL P. REILLY, ROBERT  
RICHARD, GREG MANOS, ST. JOSEPH BY THE  
SEA HIGH SCHOOL, CARDINAL TIMOTHY  
DOLAN and the ARCHDIOCESE OF NEW YORK,

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion/Cross-Motion and Affidavits/ Affirmations/Memos of Law annexed	1-3
Opposition Affidavits/Affirmations and Memo of Law annexed	4-8
Reply Affidavits/Affirmations/Memos of Law annexed	9-11

*ERIKA M. EDWARDS, J.S.C.:*

Plaintiffs Lawrence Boliak (“Boliak”), Maureen Smith (“Smith”) and Thomas Rodes (“Rodes”) brought this action against one or more Defendants Father Michael P. Reilly (“Father Reilly”), Robert Richard (“Richard”), Greg Manos (“Manos”), St. Joseph by the Sea High School (“School”), Cardinal Timothy Dolan (“Cardinal Dolan”) and Archdiocese of New York (“Archdiocese”) for claims involving age discrimination, gender discrimination (Smith), including hostile work environment, retaliation, defamation (Boliak) and aiding and abetting.

There are three pre-answer motions pending before this court. These motions are hereby consolidated for disposition. Defendant Father Reilly moves to dismiss Plaintiffs’ First Amended Complaint based on failure to state a cause of action and documentary evidence under motion sequence 001. Plaintiffs cross-move for leave to file a Second Amended Complaint to add St. Joseph by the Sea Board of Trustees (“Board”) and its chairman, Dr. Theodore Strange (“Dr. Strange”), as Defendants, to withdraw Plaintiffs’ claims of discrimination under New York State law and rely solely upon New York City law, to withdraw their claims of intentional infliction of emotional distress and to clarify and add additional facts to support their claims.

The remaining defendants, Richard, Manos, School, Cardinal Dolan and Archdiocese, move under motion sequence 002 to dismiss all claims against Cardinal Dolan; to dismiss the Fifth and Sixth Causes of Action for aiding and abetting under New York City law and defamation regarding Boliak against Archdiocese; and to dismiss the Sixth Cause of Action against the School, Richard and Manos. Notably, Defendants Manos and Richard did not move to dismiss Plaintiffs' First, Second or Third Causes of Action against them. However, since the substance of these claims were addressed by both sides, the court considers dismissal of these claims as well. All Defendants opposed Plaintiffs' cross-motion to amend and Plaintiffs opposed Defendants' motions to dismiss.

For the reasons set forth herein, the court grants both motions to dismiss Plaintiffs' First Amended Complaint and dismisses Plaintiffs' First Amended Complaint against all Defendants. Additionally, the court denies Plaintiffs' cross-motion for leave to file their proposed Second Amended Complaint. As such, this matter is dismissed.

### BACKGROUND

Plaintiffs Boliak, Smith and Rodes and Defendants Father Reilly, Richard and Manos all work at Defendant School. The School is a Catholic High School located in Staten Island within the confines of the area serviced by Defendant Archdiocese and led by Defendant Cardinal Dolan. At the time when the First Amended Complaint was filed, Boliak was a 68-year-old guidance counselor, who was formerly a teacher and a principal; Smith was a 56-year-old female teacher; Rodes was a 60-year-old teacher; Father Reilly was the principal; Richard was a vice principal and Manos was a dean.

Plaintiffs allege in substance that Father Reilly, Richard and Manos discriminated against Plaintiffs based on their age, created a hostile work environment and retaliated against Plaintiffs. Plaintiff Smith alleges that they also discriminated against her based on her gender, created a hostile work environment and retaliated against her. Plaintiffs allege that Father Reilly made several insulting and vulgar remarks against women, older teachers, homosexuals, African-Americans, men whom he believed were not "manly" enough and those who were seriously ill and struggling with impaired physical mobility. Plaintiffs also allege that Boliak was obsessed with getting rid of older teachers.

Boliak's defamation claims against all Defendants allege that Father Reilly, in the presence of Richard and Manos, shouted loudly that Boliak was a pedophile. This statement occurred during a meeting with Boliak about an incident where Boliak was accused of pulling down the shorts of a former student who was visiting the school when the student was about to engage in a physical altercation with Defendant Manos. Boliak alleges that Father Reilly yelled the false accusation so loudly that he was overheard by students and staff. Boliak further alleges that Defendant Manos said he was going to make sure that everyone in the building knew of Boliak's inappropriate sexual behavior. Manos allegedly published this accusation to the School staff in a memo which stated that Boliak should never be allowed to be around children. Boliak also asserts that Manos wrote the memo with the consent and/or direction of Father Reilly and Richard and they repeated it to the Archdiocese and Cardinal Dolan with the malicious intent to get rid of Boliak for opposing their discriminatory behavior. Boliak also alleges that he was defamed by a subsequent memo from the Archdiocese which was published to the Archdiocese

staff and the High School's administrators, staff and students indicating that Boliak should be removed from his position and excluded from any contact with minors. Subsequently, Defendants Father Reilly, Richard and Manos removed Boliak from his office and forced him to work at a desk in a public hallway, which had the effect of repeating and publishing the accusation that he was a pedophile. All Plaintiffs claim that Defendants High School, Archdiocese and Cardinal Dolan are vicariously responsible for and aided and abetted the other Defendants' discriminatory, retaliatory and defamatory behavior.

## DISCUSSION

### A. Defendants' Motions to Dismiss-Plaintiffs' First Amended Complaint

When considering Defendants' motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), 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 (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint, but the court should not consider whether the plaintiff has simply stated a cause of action, but rather whether the plaintiff actually has one (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1<sup>st</sup> Dept 2009]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457 [1<sup>st</sup> Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

Dismissal is warranted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (CPLR 3211[a][1]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Dismissal is proper where the documents relied upon definitively disposed of a plaintiff's claim (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 634 NYS2d 62, 63 [1995]).

In applying these standards to the facts of our case, the court grants Defendants' motions to dismiss Plaintiffs' First Amended Complaint for failure to state a cause of action and finds that Plaintiffs' proposed claims set forth in its Second Amended Complaint continue to fail to state a cause of action against Defendants and are unsupported by sufficient evidentiary facts to substantiate the new or enhanced allegations set forth in the proposed amendment.

In Plaintiffs' First Amended Complaint, Causes of Action One through Five and Eight pertain to Plaintiffs' gender and age discrimination, hostile work environment and retaliation claims and the Sixth and Seventh Causes of Action relate to Plaintiff Boliak's defamation claims.

#### 1) Discrimination and Retaliation Under NYCHRL and NYSHRL

In the First Cause of Action of Plaintiffs' First Amended Complaint, Plaintiff Smith alleges that Father Reilly, Richard and Manos created a hostile work environment because of their course, sexist and demeaning language on an ongoing basis directed against women, pursuant to both New York State and New York City Human Rights Laws ("NYSHRL" and "NYCHRL," respectively). In their Second Cause of Action, all three Plaintiffs allege that these

three Defendants discriminated against them because of their age and they created a hostile work environment against them as older teachers. In their Third Cause of Action, all three Plaintiffs allege that these three Defendants retaliated against Plaintiffs through unwarranted downgrading of Plaintiffs' evaluations and expressed hostility to Plaintiffs which made it more difficult for Plaintiffs to perform their duties. Plaintiffs' Fourth and Fifth Causes of Action allege that Defendants Archdiocese and Cardinal Dolan are responsible for the three other Defendants' discriminatory and retaliatory behavior as their supervisors and as aiders and abettors under the City Law. Plaintiffs' Eighth Cause of Action alleges that Defendants Manos and Richard aided and abetted the other Defendants' violation of City Law for their discriminatory and retaliatory conduct which caused Plaintiffs to suffer emotional distress and other damages.

Under NYSHRL and NYCHRL it is unlawful for an employer to fire or refuse to hire or employ, or otherwise to discriminate in compensation or in the terms, conditions or privileges of employment, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status (*see* Executive Law § 296 [1][a]; Administrative Code § 8-107 [1][a]).

The statutes also prohibit an employer from retaliating against an employee who has opposed or complained of unlawful discriminatory practices (*see* Executive Law § 296 [7]; Administrative Code § 8-107 [7]; 42 USC § 2000e-3 [a]). To establish a successful claim for unlawful retaliation, a plaintiff must show that 1) plaintiff engaged in a protected activity, 2) plaintiff's employer was aware that plaintiff participated in such activity, 3) plaintiff suffered an adverse employment action based upon plaintiff's activity and 4) there was a causal connection between the protected activity and the adverse action.

The standards for recovery under NYSHRL and NYCHRL are both analyzed pursuant to the burden-shifting framework established in *McDonnell Douglas Corp. v Green* (411 U.S. 792 [1973]; *see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of the AFL-CIO*, 6 NY3d 265, 270 [2006]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Under *McDonnell Douglas*, the plaintiff has the initial burden to establish a prima facie case of discrimination. To meet that burden, plaintiff must show that he or she is a member of a protected class, was qualified for the position held, was terminated from employment or suffered another adverse employment action, and the termination or other adverse action occurred under circumstances giving rise to an inference of discrimination (*see Stephenson*, 6 NY3d at 270, citing *Ferrante v American Lung Ass'n*, 90 NY2d 623, 629 [1997]; *Forrest*, 3 NY3d at 305; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 [1st Dept 2009]).

If plaintiff makes this prima facie showing, then the burden shifts to the employer to rebut the presumption of discrimination by demonstrating that there was a legitimate and non-discriminatory, reason for its employment decision. If the employer articulates a legitimate, non-discriminatory basis for its decision, then the burden shifts back to the plaintiff "to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination" (*Ferrante*, 90 NY2d at 629-630; *see Texas Dept. of Community Affairs v Burdine*, 450 U.S. 248, 253, [1981]).

While NYCHRL must be construed more liberally than NYSHRL, claims under NYCHRL must be independently analyzed (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st

Dept 2009]; *Bennett v Health Mgt. Sys.*, 92 AD3d 29, 34). Courts have continued to apply the analytical framework set forth in *McDonnell Douglas* to NYCHRL claims (see *Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740-741 [2d Dept 2013]; *Gordon v Kadet*, 95 AD3d 606, 606-607 [1st Dept 2012]; *Koester v New York Blood Ctr.*, 55 AD3d 447, 448 [1st Dept 2008]).

A plaintiff may prevail "in an action under the NYCHRL if he or she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision, or that the action was 'more likely than not based in whole or in part on discrimination" (*Melman*, 98 AD3d at 127, quoting *Aulicino v New York City Dept. of Homeless Servs.*, 580 F3d 73, 80 [2d Cir 2009]).

In the instant matter, the court grants dismissal of Plaintiffs' First, Second, Third, Fourth, Fifth and Eighth Causes of Action and finds that Plaintiffs failed to establish a prima facie case for these claims against any defendant. Additionally, Plaintiffs failed to establish each element of these claims and each claim fails to state a cause of action.

Plaintiffs' First Cause of Action for gender discrimination against Smith under NYCHRL and NYSHRL must be dismissed because Smith failed to sufficiently allege that her employer otherwise discriminated against her because of her gender in the terms, conditions or privileges of her employment. Smith also failed to demonstrate that there was an adverse employment action, that one occurred under circumstances giving rise to an inference of discrimination, that any unlawful discrimination was one of the motivating factors for such an adverse employment decision or that it was more likely than not based in whole or in part on discrimination, or that she suffered any disparate treatment because she was a woman. For example, Smith failed to allege that she was fired, demoted, that she received an unwarranted downgraded evaluation, or that she suffered any adverse employment action. She also failed to allege that she was treated less favorably because of her gender or that there was any link between her negative treatment and her gender. Additionally, her allegations related to Father Reilly's alleged motives, statements against women and obsessions are conclusory and too general to sustain this action.

Plaintiffs' Second Cause of Action for age discrimination based on NYCHRL against Defendants Father Reilly, Richard and Manos are dismissed because Plaintiffs failed to sufficiently allege that their employer otherwise discriminated against them because of their age in the terms, conditions or privileges of their employment or that they suffered any disparate treatment because of their age. Again, Plaintiff Smith failed to allege any adverse employment action; that one occurred under circumstances giving rise to an inference of discrimination; or that unlawful discrimination was one of the motivating factors for an adverse employment decision. Although Plaintiffs Boliak and Rodes alleged that they received unwarranted downgraded evaluations and Plaintiff Rodes alleged that he lost pension benefits promised by Father Reilly when he agreed to become a dean and that Father Reilly took away 59 of his earned sick days, they failed to sufficiently demonstrate that Defendants were responsible for such actions, that any adverse employment actions were linked to their age, or that they were treated less favorably because of their age. Additionally, Father Reilly's alleged statements about wanting to get rid of older teachers, his alleged insensitive remarks about older, sick teachers and the allegations that he was aware that Plaintiffs were over 55 are all conclusory and insufficient to sustain this claim.

In their Third Cause of Action, Plaintiffs allege that all Defendants retaliated against them for their protests against the discriminatory language and behavior of all Defendants and that all Defendants were responsible for downgrading Plaintiffs' evaluations, expressing hostility toward Plaintiffs, which made it more difficult for Plaintiffs to perform their duties, and for the defamatory statements and actions against Boliak. This claim fails as to Plaintiff Smith because she failed to sufficiently allege that she was engaged in a protected activity as she was not present at the meeting with the superintendent. The allegations that all Plaintiffs complained about Defendants' discrimination was too general, conclusory and lacked sufficient details regarding the specifics of the complaints which are required to sustain this action. Plaintiffs also failed to sufficiently allege that any of the defendants, except arguably the Archdiocese, was aware of the substance of their complaints, that any of their alleged adverse employment activities were because of their protected activity, or that there was any connection between the protected activity and the adverse action.

Although Plaintiffs' retaliation claims were directed against all Defendants, Plaintiffs only mentioned allegations against Father Reilly and Manos regarding the alleged defamatory statements and, as will be discussed below, failed to sufficiently allege that such statements were defamatory. Plaintiffs also failed to sufficiently allege that any adverse action was made in retaliation to any of their complaints or protected activities, or that such actions were motivated to any degree by age or gender discrimination. As mentioned above, Smith failed to allege any adverse employment action and they all failed to link any retaliatory actions to their age discrimination claims. Additionally, Father Reilly provided evidence that Rodes' disputes about the pension and sick days occurred in 2010, which was prior to any alleged protected activity. Furthermore, Plaintiffs' allegations of other attempts that they made to get Father Reilly, Manos and Richard to change their behavior are too general and conclusory and fail to sufficiently allege the substance, nature and timing of such alleged complaints or protected conduct.

Plaintiffs' Fourth and Fifth Causes of Action regarding the Archdiocese and Cardinal Dolan's vicarious responsibility for Father Reilly's, Richard's and Manos' discriminatory and retaliatory actions as their supervisors and as aiders and abettors under City Law are insufficient to state a cause of action for either claim. As discussed above, Plaintiffs' claims for discrimination and retaliation based on gender or age against any Defendant are dismissed because they fail to state a cause of action. Therefore, the Archdiocese and Cardinal Dolan cannot be held liable for aiding and abetting such conduct (*Forrest*, 3 NY3d at 314). Additionally, Plaintiffs failed to provide factual allegations to support their conclusory and unsupported claims that the Archdiocese and Cardinal Dolan were responsible for supervising Father Reilly, Richard and Manos, or that Cardinal Dolan did anything in his individual capacity to knowingly assist, solicit, encourage or participate in the actions of the other Defendants. Additionally, there were no allegations that Cardinal Dolan was even aware of the alleged discriminatory and retaliatory behavior. Although Plaintiffs attempted to explain which claims were filed against which Defendants in their proposed Second Amended Complaint, in their First Amended Complaint Plaintiffs alleged that all Defendants engaged in unlawful retaliation. Therefore, the Archdiocese and Cardinal Dolan cannot be held liable for aiding and abetting their own conduct (*Hardwick v Auriemma*, 116 AD3d 465, 468 [1<sup>st</sup> Dept 2014]).

Plaintiffs' Eighth Cause of Action alleges that Richard and Manos aided and abetted the other Defendants' discriminatory and retaliatory conduct which caused Plaintiffs to suffer emotional distress and other damages. As discussed above, Plaintiffs' underlying claims fail to state a cause of action, so Richard and Manos cannot be held liable for aiding and abetting their own discriminatory and retaliatory conduct. As such, this claim also fails.

The claims against Defendant School must be dismissed because there are barely any facts mentioning the School and no allegations specifically attributing liability to the School.

Therefore, the court dismisses Plaintiffs' First through Fifth and Eighth Causes of Action in Plaintiffs' First Amended Complaint against Defendants.

## 2) Defamation

Plaintiffs' Sixth Cause of Action involves Boliak's claim of defamation per se and alleges that all Defendants maliciously made a per se defamatory statement accusing Boliak of being a pedophile with knowledge of their falsity or with reckless disregard of whether it was true or false, in a grossly irresponsible manner. Plaintiffs' Seventh Cause of Action alleges that Manos and Richard aided and abetted the other Defendants' alleged public statements about Boliak and their subsequent actions in removing him from the office to the public hallway, which constituted intentional infliction of emotional harm.

To recover for defamation, a plaintiff must prove that defendant made "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Epifani v Johnson*, 65 AD3d 224, 233 [2009] [internal quotations and citations omitted]). The complaint must set forth the particular words allegedly constituting defamation, the time, place and manner in which the false statement was made, and specify to whom it was made (CPLR 3016[a]; *id.*; *Dillon v City of New York*, 261 AD2d 34, 38 [1999]). A defamatory statement is libelous per se "if the statement tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society (*Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 637 [2007] [internal quotations and citations omitted]).

"In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction (*Dillon*, 261 AD2d at 38 [citations omitted]). Certain statements are not actionable, like expressions of opinions, loose, figurative or hyperbolic statements, even if deprecating the plaintiff, or an employer's assessment of an employee's job performance (*id.*; *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 380 [1977] [internal quotations and citations omitted]). Certainly, truth is a complete defense to defamation (*Rinaldi*, 42 NY2d at 380). Whether a particular statement constitutes fact or opinion is a question of law (*id.* at 381).



Based on the allegations set forth in Plaintiffs' First Amended Complaint, Plaintiffs' Sixth and Seventh Causes of Action fail to state a claim and lack the required specificity. Plaintiffs' defamation per se claim, which is really only asserted by Boliak, is based on Father Reilly's alleged statement that Boliak was a pedophile, Defendant Manos' memo stating that Boliak should never be around children, the accusation being repeated by the three defendants to the Archdiocese and Cardinal Dolan, the Archdiocese's subsequent memo that Boliak should be removed from his position and excluded from being around minors and the actions of Father Reilly, Manos and Richard removing Boliak from his office and placing him in the hallway.

Boliak's claim regarding Father Reilly's statement fails because it lacks particularity and it does not demonstrate that it was published to a third party or that it was defamatory per se based on its context. The surrounding facts indicate that Father Reilly asked Boliak if he was a pedophile three times in a rhetorical and loud manner which was overheard by others outside of the office. This is much different than telling a third party that Boliak is a pedophile. Boliak failed to demonstrate that Father Reilly intended to publish the statement to others and that the manner in which the statement was overheard rose to the level of publication.

Boliak's claim that Manos' statement was defamatory per se fails because Manos never used the term pedophile in his statement, it cannot be inferred that he accused Boliak of being a pedophile from the context of the statement and the statement was Manos' opinion which is privileged. Furthermore, Plaintiffs' allegations that such memo was made with Father Reilly's and Richard's consent and/or direction are conclusory and unsupported by the facts. Additionally, the allegation that Manos published the memo to other staff members is too general and fails to specify the manner and details of the publication.

Plaintiffs' claims that Father Reilly, Manos and Richard repeated the accusations to the Archdiocese and Cardinal Dolan and the Archdiocese's subsequent memo lack particularity as they are devoid of any facts setting forth the details of such statements. It is unclear what specific accusations each defendant made to the Archdiocese and Cardinal Dolan, when and in what manner they were made. In terms of the subsequent memo, Plaintiffs did not set forth the date, time and manner of the memo, including who wrote it, to whom it was published, the context of the accusation or any other facts necessary to support this claim.

Plaintiffs' allegations that Defendants Richard and Manos are liable for aiding and abetting the other Defendants in their defamatory statements by removing Boliak from his office to the hallway fails because the court already determined that Boliak's defamation claim failed to state a cause of action. Therefore, Manos and Richard cannot be held liable for aiding and abetting such conduct. Also, it is unclear which Defendants they aided or abetted and for which conduct. Additionally, Richard and Manos were included in the Defendants who allegedly accused Boliak of being a pedophile since Plaintiffs' Sixth Cause of Action was asserted against all Defendants. Therefore, Richard and Manos cannot be held liable for aiding and abetting their own defamatory actions. Additionally, Plaintiffs failed to sufficiently allege what each Defendant did to remove Boliak from his office and make him sit in the hallway so there are no facts to support this claim. Furthermore, based on this alleged conduct, it cannot be inferred that Father Reilly, Richard or Manos further accused Boliak of being a pedophile, nor that such actions were defamatory.

Therefore, all of the claims in Plaintiffs' First Amended Complaint fail to state a cause of action and the court grants dismissal of Plaintiffs' First Amended Complaint.

B. Plaintiffs' Cross-Motion for Leave to File a Second Amended Complaint

Pursuant to CPLR 3025(b), the court has discretion to grant leave to amend pleadings at any time and such leave shall be freely given upon such terms as may be just, including the granting of costs and continuances (CPLR 3025[b]; *Fahey v County of Ontario*, 44 NY2d 934 [1978]). Such leave to amend shall be freely given as a matter of discretion in the absence of prejudice or surprise, unless it is palpably insufficient or patently devoid of merit (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). However, "to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated" so "a motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354-355 [1st Dept 2005]). However, the movant must include the proposed amended or supplemental pleadings clearly showing the changes or additions to be made to the pleadings (CPLR 3015[b]). The purpose of CPLR 3025 is to permit Plaintiffs to amend their theory of recovery to comply with new facts as they unfold throughout the case, not to permit them "to alter [their] representation of material facts to best suit [their] theory of recovery and thereby overcome defenses raised in opposition" *Bogoni v Friedlander*, 197 AD2d 281, 292 [1st Dept 1994]).

This is Plaintiffs' third attempt to hold Defendants liable for discrimination, retaliation and defamation. Plaintiffs' Second Amended Complaint includes Plaintiffs' First Cause of Action for Plaintiff Smith's claim for gender discrimination and hostile work environment under NYCHRL, Plaintiffs' Second Cause of Action for Plaintiffs' claims for age discrimination and hostile work environment under NYCHRL and their Third Cause of Action for retaliation against Defendants Father Reilly, Manos and Richard. Plaintiff's Fourth Cause of Action adds Defendant High School and the new Defendants, Board and Dr. Strange, to claims against Defendants Archdiocese and Cardinal Dolan regarding their liability in their official capacities as employers and/or supervisors for the acts of discrimination, hostile work environment and retaliation. Plaintiffs' Fifth Cause of Action for aiding and abetting Defendants Father Reilly's, Manos' and Richard's discriminatory and retaliatory behavior under City Law is now brought against the new Defendants, Board and Dr. Strange, as well as Defendants Archdiocese and Cardinal Dolan. Plaintiffs' Sixth Cause of Action is against Manos and Richard under City Law for aiding and abetting Father Reilly in his acts of discrimination and retaliation; Plaintiffs' Seventh Cause of Action is for Boliak's defamation against Father Reilly and Manos

The following are some of the most obvious differences in the two amended complaints: 1) Smith's First Cause of Action for gender discrimination is no longer brought pursuant to the NYSHRL; 2) Plaintiffs' Third Cause of Action for retaliation is limited to Father Reilly, Manos and Richard and is no longer brought against all Defendants; 3) Smith adds new allegations that she also received an unwarranted downgraded evaluation, her class schedule was changed and claims of continuing retaliation against her since the filing of the previous complaints; 4) it also removes allegations of Rodes' pension credits; 5) Plaintiffs' Fourth Cause of Action includes new allegations that the expanded list of Defendants were all aware of some of the complaints

about Father Reilly's language and behavior since at least 2011, but they failed to take any action to investigate or curb his behavior to protect the staff members who complained about him from retaliation; 6) new facts were added in the factual section regarding Plaintiffs' Fifth Cause of Action; 7) Plaintiffs' Sixth Cause of Action against Manos and Richard for aiding and abetting Father Reilly's discriminatory and retaliatory acts is different than their Seventh and Eighth Causes of Action in their First Amended Complaint because the new version does not limit their actions to any of the Defendants' public statements about Boliak or removal of Boliak from his office to the hallway, but generalizes the allegations to aiding and abetting all acts of discrimination and retaliation set forth in their 26 page complaint; 8) Boliak limited his defamation claim to Father Reilly and Manos, thus abandoning his claim against the other defendants; 9) Boliak also limited his defamation claim to Father Reilly's oral comment and Manos' written report (no longer referred to as a memo) and he does not rely on the Archdiocese's subsequent memo; 10) Boliak added damages that he suffered because of the defamatory statements and withdrew his claim for intentional infliction of emotional distress; and 11) Plaintiffs added a myriad of new or altered allegations in the factual portion of the complaint which changed their theory of recovery for various claims.

Normally, the court grants plaintiffs' motions for leave to file amended complaints, since such permission is freely given. However, upon review of the merits of Plaintiffs' proposed Second Amended Complaint, each claim is palpably insufficient and continues to fail to state a cause of action. Plaintiffs' amendments are clearly made in direct response to the arguments made by Defendants in support of Defendants' motions to dismiss (*Bogoni*, 197 AD2d at 292). Only Smith alleges new facts which occurred subsequent to the filing of the previous complaints.

Additionally, the vast majority of Plaintiffs' additional or altered allegations are unsupported by affidavits of merit or admissible evidentiary proof. Although Plaintiffs submitted affidavits to support their cross-motion, they mainly address the downgraded evaluations and do not address the other new and altered factual allegations. The court does not consider Plaintiffs' subsequent affidavits submitted with their Reply as these affidavits constitute new evidence which is not permitted on Reply. Therefore, the court is limited to relying on the affidavits and evidence submitted in support of Plaintiffs' cross-motion or provided in opposition to Defendants' motions to dismiss.

Additionally, Plaintiffs failed to clearly show the changes or additions to be made to each claim and argue that the proposed amendments merely include additional facts to clarify which claims are asserted against which Defendants, to eliminate two claims and to add the Board and Dr. Strange as defendants. Upon review of the proposed amendments, there are numerous new and altered factual allegations, which should have been known to Plaintiffs prior to the filing of the previous pleadings, and some are inconsistent with the allegations set forth in the previous pleadings. Although the court does not agree with Defendants' arguments pertaining to Plaintiff Boliak's alleged substantial inconsistencies in his statements regarding the shorts incident, most of the proposed amendments include substantially different versions of Plaintiffs' allegations against Defendants with no evidentiary support which are not mere expansions of the previous factual allegations set forth in their First Amended Complaint.

Additionally, even if the court accepted the new allegations as being supported by evidentiary proof, then Plaintiffs' defamation claims regarding Boliak continue to fail for most of the reasons set forth above and they continue to lack the required specificity. Father Reilly's

statement includes mere questions and are not defamatory per se and Plaintiffs still fail to establish publication. Manos' memo is still privileged opinion, not defamatory per se and it cannot be inferred that he was accusing Boliak of being a pedophile. The additional allegations to attribute Manos' memo to Father Reilly are conclusory and unsupported by facts and the allegation that he placed the memo in Boliak's personnel file is insufficient to sustain this claim. Furthermore, the allegations of Boliak's removal from his office to the hallway still fail to save these claims because Boliak failed to demonstrate the link to his age discrimination claim or his protected activity.

Additionally, Smith continues to fail to sufficiently allege all of the required elements of gender or age discrimination, hostile work environment or retaliation and Rodes failed to do so based on his age. Although Boliak alleged additional facts to support his claim that he was treated less favorably than others similarly situated because of his age, such allegations are insufficient to revive these claims.

The new allegations regarding Plaintiffs' previous attempts to oppose Father Reilly's, Manos' and Richard's discriminatory conduct are conclusory and unsupported by sufficient details regarding the nature and substance of their complaints. Some of the alleged retaliation still appears to predate the meeting between Manos, Richard and the Superintendent and Smith's claims of continued discrimination and retaliation are insufficient to withstand dismissal of her claims.

Plaintiffs' claims that Father Reilly was obsessed with getting rid of older teachers and women are general, conclusory and they fail to demonstrate that he took any adverse employment action against Plaintiffs or anyone else because they were older or a woman.

Furthermore, the proposed claims against the Board and Dr. Strange fail because Plaintiffs underlying claims fail and the allegations that the new defendants are liable for such conduct are unsupported by the facts.

### CONCLUSION

Although Plaintiffs' main allegations may demonstrate that Father Reilly has made numerous crude, vulgar, insensitive and prejudiced remarks against all types of people and that he may not always demonstrate the morals and principles aligned with such a well-respected Catholic institution, the law does not impose liability upon him based on the allegations set forth in Plaintiffs' complaints. After three attempts, Plaintiffs continue to fail to sufficiently allege that Father Reilly or any of the other defendants took any adverse employment action against them because they were older staff members, because Plaintiff Smith was a woman or because they complained about Father Reilly's alleged discriminatory or defamatory behavior. Additionally, Plaintiffs failed to sufficiently allege that they were treated less favorably than others similarly situated who were younger or men. Therefore, this court has no choice, but to dismiss this case.

Based on the reasons set forth above, the court grants Defendants' motions to dismiss and Plaintiffs' First Amended Complaint is dismissed as against all Defendants. The court denies Plaintiffs' cross-motion for leave to file their Second Amended Complaint. Therefore, this matter is dismissed.

As such, it is hereby

**ORDERED** that as to motion sequence number 001, the court grants Defendant Father Michael P. Reilly's motion to dismiss Plaintiffs Lawrence Boliak's, Maureen Smith's and Thomas Rodes' First Amended Complaint against him; and it is hereby

**ORDERED** that as to motion sequence number 002, the court grants Defendants Robert Richard's, Greg Manos', St. Joseph By the Sea High School's, Cardinal Timothy Dolan's and the Archdiocese of New York's motion to dismiss all claims against Cardinal Dolan, Plaintiffs' Fifth and Sixth Causes of Action against the Archdiocese and the Sixth Cause of Action against Defendants Robert Richard, Greg Manos and St. Joseph By the Sea High School; and it is hereby

**ORDERED** that the court dismisses Plaintiffs Lawrence Boliak's, Maureen Smith's and Thomas Rodes' First Amended Complaint against all Defendants; and it is further

**ORDERED** that the court denies Plaintiffs' Lawrence Boliak's, Maureen Smith's and Thomas Rodes' cross-motion for leave to file their proposed Second Amended Complaint against any of the proposed Defendants; and it is further

**ORDERED** that the court denies all requested relief not expressly granted herein.

Date: September 22, 2017



HON. ERIKA M. EDWARDS