D'Angelo v City of New York
2018 NY Slip Op 33292(U)
December 19, 2018
Supreme Court, New York County
Docket Number: 150011/2018
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52
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MARY D'ANGELO,

Plaintiff,

-against-

CITY OF NEW YORK, FIRE DEPARTMENT OF THE CITY OF NEW YORK, JAMES P. BOOTH, Chief of EMS Operations of the Fire Department of the City of New York, and ROBERT COLON, EMS Division Chief of the EMS Operations of the Fire Department of the City of New York

Defendants.
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DECISION & ORDER

Index No.: 150011/2018

ALEXANDER M. TISCH, J.:

This action arises out of plaintiff Mary D'Angelo's claims that she was subject to discrimination, retaliation and a hostile work environment in violation of the New York City Human Rights Law (NYCHRL). Defendants City of New York, Fire Department of the City of New York (FDNY), James P. Booth (Booth), Chief of EMS Operations of the FDNY, and Robert Colon (Colon), EMS Division Chief of the EMS Operations of the FDNY (collectively, defendants) move, pursuant to CPLR 3211 (a) (5) and (7), for an order partially dismissing the complaint. Defendants seek to dismiss the claims predicated on alleged events which occurred prior to December 29, 2014, as barred by the statute of limitations and the election of remedies doctrine. In addition, defendants seek to dismiss the cause of action grounded in retaliation, and also request that defendant Booth be dismissed from the action. For the reasons set forth below, defendants' motion is granted in its entirety.

BACKGROUND AND FACTUAL ALLEGATIONS

In 2003, plaintiff commenced her employment with defendants as an emergency medical

technician in the Emergency Medical Service (EMS) Operations Unit of the FDNY. After completing the paramedic program in 2006, plaintiff continued to work for defendants as a paramedic. Plaintiff is female, and is of Chinese-Caucasian descent. Plaintiff resigned on August 1, 2016, claiming that she was constructively terminated due to defendants' discriminatory conduct. Plaintiff alleges that defendants subjected her to disparate treatment and a hostile work environment, on the basis of her "race and ethnic background (mixed race, of Chinese-Caucasian descent), gender (female) and perceived disability (purportedly 'crazy' or mentally impaired)." First Amended Complaint (Amended Complaint), ¶ 2. She believes that, throughout the course of her employment, she was subjected to "harassment, intimidation ridicule, physical violence and retaliation," and that she was expected "to meet performance standards not required of other employees." *Id.*, ¶ 15.

Disparate Treatment and Hostile Work Environment Claims:

Plaintiff alleges that she was treated less well than other employees, due to her gender, race, and perceived disability. Some of the allegations include, in pertinent part:

- In 2011, derogatory pictures were taped to the ambulance assigned to plaintiff. Also in 2011 and 2012, employees allegedly made disparaging references to plaintiff after she filed an EEO complaint. For example, employees called her the "EEO Queen." *Id.*, ¶ 19. On unspecified dates, other employees referred to plaintiff as "crazy Mary," accused her of having breast implants, mocked her Chinese heritage, and screamed profanities." *Id.*, ¶ 21. In 2013, one employee called plaintiff a "crazy f-ing whore," in front of a supervisor. In November 2014, an employee told plaintiff that a supervisor "authorized him to stab her in the neck with an IM Valium, purportedly to address her alleged mental imbalance or to allegedly deal with 'crazy Mary' a label they often used to refer to Plaintiff." *Id.*, ¶ 35.

- Plaintiff alleges that she was subjected to physical violence at the workplace. For example, in 2012, plaintiff's cubby was vandalized. She states that her cubby was vandalized again in July 2015, when she "returned to work to find her cubby re-labeled and her gear removed." *Id.*, ¶ 32. On an unspecified date, an employee pushed plaintiff through the garage door in front of supervisors, but no supervisor addressed this incident. In August 2015, paramedic Rosas (Rosas) purportedly "deliberately struck Plaintiff in her face with a dirty oxygen bag." *Id.*, ¶ 38. In June 2016, Rosas allegedly "physically pushed Plaintiff's bag as she entered the locker room," and "attempted to physically strike Plaintiff." *Id.*, ¶ ¶ 41, 43. Although plaintiff reported these incidents to her supervisors, no disciplinary action was taken. In July 2016, plaintiff was assigned to work in a "filthy,

marginally air conditioned vehicle, which was mixed with car exhaust, while there were new, clean and properly stocked vehicles sitting in the garage." *Id.*, ¶ 46.

- Plaintiff alleges that her supervisors were aware of and condoned the other employees' discriminatory conduct. For instance, in October 2009, Colon advised plaintiff that she was "to blame for any workplace issues she encountered." *Id.*, ¶ 24. In 2010, Colon "threatened to lodge disciplinary charges against Plaintiff, when she objected to an entry he made on her performance evaluation." *Id.*, ¶ 26. Despite her request, plaintiff did not receive any assistance from other supervisors to address Colon's conduct towards her. In 2016, Colon allegedly failed to take disciplinary action against Rosas.

Plaintiff continues that, as her health had deteriorated and she feared for her safety, she was forced to resign from her position in August 2016.

According to plaintiff, defendants retaliated against her after she made complaints about their discriminatory practices and conduct. For example, although plaintiff reported the incidents with Rosas to her supervisors, no disciplinary actions were taken. Plaintiff believes that, due to the lack of disciplinary action taken against her, Rosas "felt free to engage in further acts of intimidation and workplace violence." *Id.*, ¶ 41. She claims that, in 2016, when Colon became the Chief of the station to which she was assigned, he "seized that opportunity to further discriminate and retaliate against Plaintiff, by failing and neglecting to take any steps to address physical violence another employee inflicted on Plaintiff." *Id.*, ¶ 28. Plaintiff believes that Colon was retaliating against her for her prior complaints of discriminatory treatment.

The Instant Action

After plaintiff felt compelled to resign due to the intolerable work conditions, she filed this complaint on December 29, 2017, and filed an amended complaint shortly thereafter. In the first through third causes of action, plaintiff claims that she was subject to disparate treatment, based on her race, ethnic background, gender and perceived disability. She also alleges that, in violation of the NYCHRL, defendants forced her to work in a hostile work environment. Plaintiff is seeking punitive damages. Plaintiff's fourth cause of action alleges that defendants retaliated against her, in violation of the

NYCHRL, after she complained about their discriminatory practices. In the fifth cause of action, plaintiff states that, in violation of the NYCHRL, defendants constructively discharged her.

In its motion for partial dismissal, defendants argue that any claims predicated on alleged incidents that took place prior to December 29, 2014 must be dismissed as they are time barred by the three year statute of limitations. In addition, defendants note that plaintiff's claims should also be dismissed based on the election of remedies doctrine, as plaintiff has filed prior complaints with the U.S. Equal Employment Opportunity Commission (EEOC) and the New York State Division of Human Rights (NYSDHR). To begin, in January 2009, plaintiff submitted a charge of discrimination to the EEOC alleging that defendants discriminated against her on the basis of sex and disability and also that they retaliated against her after filing an internal complaint of discrimination 2008 with the FDNY. In sum, the EEOC charge alleged that another employee harassed plaintiff on the basis of sex and disability and that plaintiff's supervisors failed to respond, despite being alerted to the situation. In October 2009, the EEOC dismissed plaintiff's charge and issued a right to sue letter.

Plaintiff submitted a complaint to the NYSDHR in March 2011, alleging that the FDNY retaliated against her after she submitted an internal EEO complaint in 2008 with the FDNY. Plaintiff set forth several instances, where she was purportedly retaliated against by defendants. Some of the incidents, which were listed from A to TT, include, in relevant part:

- In November 2008 an employee "used his side body attempting to mow me down," and a month later, another employee "slammed my chair into the desk . . . ." NYSDHR Complaint, ¶ A.
- In April 2009, Colon "threatened I was being brought up on disciplinary charges re: conduct unbecoming relating to incident 4/14/09 and stated my problem would not become his." *Id.*, ¶ J.
- In 2009, another employee circulated a petition, signed by other employees, "attacking my character and performance." *Id.*, ¶ K.
- In August 2009, another employee "slapped my hand away from the O2 bag. I addressed her inappropriate touch." *Id.*,¶ S.
- In August 2009, two employees "submitted statements in an attempt to continue the humiliation and harassment." *Id.*, ¶ T.

- In October 2009, Colon stated that she was the "problem since seven members did not want to work with me." Plaintiff continues that she was unable to respond to Colon's comments and was "strongly advised . . . to monitor how I interacted with the Captain." *Id.*, ¶ X.
- In January 2010, another employee screamed profanity at her in front of a supervisor and "Lt. F. Curatola filed an EEO on my behalf . . . ." *Id.*, ¶ AA.
- In May 2010, "Lt. Flores approached an EMT at station 22 and stated 'watch her' she involves people she shouldn't. Lt. Flores made reference to EEO." *Id.*, ¶ LL.
- In September 2010, plaintiff reported damage to her "driver's side mirror of my personal vehicle." *Id.*, ¶ PP.
- In December 2010, "Paramedic Polunin has repeatedly submitted employee statements devaluing me personally and attempting to damage me professionally. . . In spite of her retaliatory tactics, I have done my job to the best of my ability. It has however caused me great emotional distress to work in a hostile environment on an almost daily basis. . . . Supervision is aware of the unproductive, hostile work environment . . . Polunin is in a position to continue the harassment." *Id.*, ¶ TT.

In September 2011 the NYSDHR issued its determination and order after investigation and found no support for the "allegations that complainant has been subject to unlawful discrimination due to engagement in activity under the Human Rights Law." NYSDHR Determination at 1. The determination described many of the incidents above, noting the following, in relevant part:

> "There does not emerge a pattern of discriminatory conduct against complainant in her years of employment more than one year prior to the filing of the instant matter, but rather a well-documented record of respondent's investigation of complainant's internal and external complaints, substantiated on the occasion when it was found so warranted.
>
> * * *
>
> "Disciplinary charges were brought against complainant . . . . Complainant wants the CCU complaint over turned, but provides no basis for an inference that the charges were motivated by a discriminatory animus.
>
> * * *
>
> "Complainant refers to unspecified 'disrespect by supervision and few select coworkers' and 'innuendo and gossip' continuing during the period encompassed by the statute of limitations, but does not particularize circumstances in which it can be seen that she endures a workplace so severely and pervasively permeated with discriminatory insult and ridicule

> as required in order to establish claims of hostile environment under discrimination law, as judicially interpreted and binding the Division.
>
> * * *
>
> "Respondent articulates legitimate, nondiscriminatory administrative reasons, there being suggested in the record neither demonstrable indicia of pretext nor otherwise unworthiness of credence, for such decisions as may have been adverse to complainant's employment interest. . . . The Division's investigation does not substantiate a causal nexus between any timely alleged and materially adverse action against the status of complainant's employment and her engagement in activity protected under the Human Rights Law."

Id. at 2-3.

As a result of the above NYSDHR determination, defendants argue that any instant claims that arise from the same facts and circumstances alleged in the March 2011 NYSDHR complaint and the 2009 EEOC charge are precluded by the election of remedies doctrine. Defendants further allege that, although the NYSDHR complaint alleged only retaliation, any discrimination claims stemming from the same course of conduct should also be barred. In addition, defendants claim that the election of remedies also precludes the same claims as against the individual defendants. Further, defendants contend that the complaint fails to state a claim against Booth, as he is only referenced once in the amended complaint as the Chief of a particular unit in the FDNY.

With respect to plaintiff's retaliation claims, defendants maintain that plaintiff is unable to plead a claim for retaliation based on the filing of the agency complaints, as she cannot demonstrate a causal connection between the protected activity and adverse action. As the agency complaints were filed in 2011 and 2009, any alleged adverse action is too far attenuated in time to support a retaliation claim.

In opposition, plaintiff argues that the election of remedies doctrine does not bar plaintiff's claims, as the instant ones are either different from ones alleged in the prior complaints or are based on incidents occurring after March 2011. In addition, plaintiff asserts that her claims pre-dating December 29, 2014 should not be barred by the three year statute of limitations. According to plaintiff, based on

the continuing violations doctrine, the statute of limitations should be tolled until August 1, 2016, the date when plaintiff was constructively terminated.

With respect to retaliation, plaintiff states that she has sufficiently pled that she was retaliated against after she filed both internal and agency complaints. She claims that, after she complained about discriminatory practices, defendants disparaged her. For example, in 2012, one supervisor stated that he did not want plaintiff working in his station. Furthermore, although Colon's retaliatory conduct occurred several years after her NYSDHR complaint, this was the first opportunity he was given to retaliate against her.

Plaintiff asserts that Booth is her employer and the chief of the unit that subjected plaintiff to the discriminatory treatment. As a result, he is alleged to have participated in the discriminatory conduct, failed to address plaintiff's complaints about discriminatory treatment, and should not be dismissed from the complaint. Plaintiff reiterates that Booth is not an aider and abettor, but also a perpetrator of the discriminatory conduct.

DISCUSSION

Dismissal

On a motion to dismiss pursuant to CPLR 3211 (a) (7), "the facts as alleged in the complaint [are] accepted as true, the plaintiff is [given] the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." *Mendelovitz v Cohen,* 37 AD3d 670, 671 (2d Dept 2007). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted). "In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards . . . . [I]t has been held that a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the

nature of the claim and its grounds." *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (1st Dept 2009) (internal citation omitted).

Election of Remedies

Defendants move to dismiss plaintiff's complaint based on the election of remedies doctrine. "[B]y the terms of the statute and code, respectively, the NYHRL and CHRL claims, once brought before the [New York State Department of Human Rights], may not be brought again as a plenary action in another court." *York v Association of the Bar of the City of New York*, 286 F3d 122, 127 (2d Cir 2002); *See* Administrative Code § 8-502 (a). "Pursuant to the election of remedies doctrine, the filing of a complaint with [the Division] precludes the commencement of an action in the Supreme Court asserting the same discriminatory acts." *Luckie v Northern Adult Day Health Care Ctr.*, 161 AD3d 845, 846 (2d Dept 2018) (internal quotation marks and citations omitted).

Here, the election of remedies now bars plaintiff's claims in the instant complaint pre-dating March 2011, as they are based on the "same allegedly discriminatory conduct asserted in the proceedings before the Division." *Id.* at 846. For example, in both the instant and the NYSDHR complaint, plaintiff alleges that she was retaliated against after filing complaints about the defendants' discriminatory conduct. She further claims that supervisors condoned the behavior, noting in both complaints that, in 2009, she was advised to monitor how she interacted with Colon. Both complaints also allege that other employees had screamed profanities at her in front of supervisors and that she had filed an EEO complaint about a hostile work environment. In the NYSDHR complaint, plaintiff had alleged that she had been subjected to violent acts by co-workers, stating that, in 2009 another employee slapped her hand away from the oxygen bag and that in 2010 there had been damage to her personal vehicle. In the instant action, plaintiff claims that, on unspecified dates, employees vandalized her property and attacked her. In both complaints, she claims that other employees refer to her as "crazy Mary" and continue to mention plaintiff's propensity for filing EEO complaints.

The NYSDHR conducted an investigation into plaintiff's allegations and found that there was no probable cause "to believe that [defendants] ha[d] engaged in or [are] engaging in the unlawful discriminatory practice complained of." Determination at 1. Although, unlike here, the NYSDHR complaint plaintiff did not specifically assert a claim for disparate treatment or hostile work environment, "the instant claims are based on the same continuing allegedly discriminatory underlying conduct asserted in the Commission proceedings, and thus the statutory election of remedies applies." *Benjamin v New York City Dept. of Health*, 57 AD3d 403, 404 (1st Dept 2008).

In conclusion, the amended complaint sets forth several allegations based on incidents occurring prior to March 2011. As these claims stem from the same discriminatory acts presented to the NYSDHR, they are barred and dismissed by the election of remedies.

Furthermore, plaintiff also cannot pursue the claims pre-dating March 2011 as against Booth and Colon, despite the fact that they were not named as defendants in the NYSDHR complaint. *See e.g. Hirsch v Morgan Stanley & Co.*, 239 AD2d 466, 468 (2d Dept 1997) (After plaintiff filed a complaint with the NYSDHR "against the corporate defendant, she could not commence an action in the court, arising out of the same facts, against an additional defendant who was not named in the administrative complaint or referred to in the administrative determination").

The court notes that plaintiff's complaint references several undated and vague allegations. For example, plaintiff states that a co-worker pushed her through the door, while supervisors witnessed the incident and did not respond. There is no date provided for this allegation, nor is there any indication that the alleged disturbances were directed at plaintiff as a the result of a discriminatory animus. In another instance, plaintiff generally alleges that she was required to meet performance standards not required of other employees. At a later point in her complaint, plaintiff then references the incident in 2010 where she objected to an entry made on her performance evaluation. However, this incident occurred in 2010, was addressed by the NYSDHR, and is precluded by the election of remedies. The

undated and broadly asserted claims in the amended complaint are not actionable, as, "[n]otwithstanding the broad pleading standard, bare legal conclusions with no factual specificity do not suffice to withstand a motion to dismiss." *Mid-Hudson Val. Fed. Credit Union v Quartararo & Lois, LLC,* 155 AD3d 1218, 1219 (3d Dept 2017), *affd* 31 NY3d 1090, 1091 (2018).

Statute of Limitations

"On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on the ground that the complaint is barred by the applicable statute of limitations, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 (2d Dept 2016). Actions to recover damages for alleged discrimination under the NYCHRL are subject to a three-year statute of limitations. Administrative Code § 8-502 (d). Defendants state that any claims predicated on incidents occurring prior to December 29, 2014 must be dismissed as time-barred. However, plaintiff argues that a "continuing violation exception" should apply to the claims pre-dating December 2014, as the incidents in the complaint describe an ongoing discriminatory pattern or practice.

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

The election of remedies effectively bars plaintiff's claims stemming from incidents occurring prior to March 2011. The remaining claims that took place after March 2011 and before December

2014, include the following:

- On an unspecified date in 2011, one supervisor made a "disparaging" reference about plaintiff filing an EEO complaint.
- On an unspecified date in 2011, derogatory pictures were taped to the visor of the ambulance assigned to plaintiff.
- On an unspecified date in 2012, one supervisor stated that he did not want plaintiff working in his station. In September 2012, plaintiff returned to work to "find her gear removed from her cubby, her name tag ripped off and her gear discarded in the corner." Amended complaint, ¶ 31.
- In 2013, an unidentified employee called plaintiff a "crazy f-ing whore," in front of a supervisor. *Id.*, ¶ 34.
- In November 2014, an unidentified employee told plaintiff that a supervisor had "authorized him to stab her in the neck with an IM Valium, purportedly to address her alleged mental imbalance or to allegedly deal with 'crazy Mary' label they often used to refer to Plaintiff." *Id.*, ¶ 35.

Between 2011 and 2014, plaintiff only identifies vague and sporadic incidents of harassment, perpetrated by unidentified and different employees. As noted, the only timely allegations include the physical confrontations with Rosas in 2015 and 2016, and being forced to work in a filthy ambulance in 2016. While plaintiff states that she is female, Chinese-Caucasian and perceived to be mentally disabled, she gives no indication of a relationship between these protected characteristics and any of the actions taken. Taking all of the harassing conduct as a whole, plaintiff has not adequately pled how the untimely conduct, such as a derogatory picture in 2011, is related to the timely claim of purportedly being subject to a hostile work environment by Rosas's actions. *See e.g. Grimes-Jenkins v Consolidated Edison Co. of N.Y.*, 2017 WL 2258374, *9, 2017 US Dist LEXIS 77710, *22-23 (SD NY 2017) (Court found allegations untimely and not actionable under the NYCHRL as continuing violations, even though "some individuals involved in timely allegations are also involved in untimely allegations," as "the incidents are sporadic, and the plaintiff fails to connect the timely and untimely allegations in any meaningful way"); *See also Wellington v Spencer-Edwards*, 2017 US Dist LEXIS 162788, *28 (SD NY 2017) (internal quotation marks and citations omitted) (Incidents do not "amount to a discriminatory policy or practice because they involved different individuals. . . . [one defendant] allegedly mistreated

Plaintiff at the termination hearings, where [other defendants] allegedly discriminated against Plaintiff when they fired her"); *compare Sier v Jacobs Persinger & Parker*, 276 AD2d 401, 401 (1st Dept 2000) ("[t]his last comment also demonstrated discriminatory conduct within the limitations period sufficiently similar to the conduct without the limitations period to justify the conclusion that both were part of a single discriminatory practice").

Thus, plaintiff's claims prior to December 29, 2014 are time-barred, as she failed to establish how these isolated incidents, which took place outside of the limitations period, "collectively constitute[d] an unlawful discriminatory practice." *Matter of Lozada*, 151 AD3d at 861.

Accordingly, the portion of defendants' motion seeking dismissal of claims predicated on events taking place prior to December 29, 2014 is granted.

<u>NYCHRL Retaliation</u>

Under the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Administrative Code § 8-107 (7). Under the broader interpretation of the NYCHRL, "[t]he retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7). For plaintiff to successfully plead a claim for retaliation under the NYCHRL, she must demonstrate that: "(1) [she] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [her]; and (3) a causal connection exists between the protected activity and the adverse action." *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012).

Protected activity under the NYCHRL refers to "opposing or complaining about unlawful discrimination." *Brook v Overseas Media, Inc.,* 69 AD3d 444, 445 (1st Dept 2010) (internal quotation marks and citations omitted); *see also Pezhman v City of New York*, 47 AD3d 493, 494 (1st Dept 2008) ("[C]omplaining of conduct other than unlawful discrimination is not a protected activity subject to a

retaliation claim under the State and City Human Rights Laws").

Plaintiff claims that defendants "took retaliatory actions against Plaintiff, because of her complaints of the discriminatory conduct and discriminatory practices in which Defendants engaged." Amended complaint, ¶ 67. To begin, any complaints allegedly made by plaintiff prior to December 29, 2014 are barred as untimely, as they are outside of the three year statute of limitations. In addition, the two agency complaints of discrimination, with the last one made in 2011, are far too attenuated to support a retaliation claim against defendants for incidents occurring after 2014. This includes plaintiff's claim that Colon retaliated against her in 2016 for complaints she had filed in 2009 and 2010. *See e.g. Herrington v Metro-North Commuter R.R. Co.*, 118 AD3d 544, 545 (1st Dept 2014) ("The initial protected activity alleged by plaintiff - her late-2008 complaint about offensive comments . . . is far too removed from defendant's alleged post-2009 (non-time-barred) actions to establish the requisite causal nexus between the protected activity and the adverse action").

With respect to the remaining timely claims, plaintiff cannot establish the first element in a prima facie case of retaliation under the NYCHRL because she did not engage in protected activity. *Breitstein v Michael C. Fina, Co.*, 156 AD3d 536, 537 (1st Dept 2017) ("In support of his retaliation claim, plaintiff failed to demonstrate that he engaged in a protected activity").

According to plaintiff, among other things, in 2015 and 2016, Rosas deliberately struck plaintiff in the face with a dirty oxygen bag. Citing the FDNY's Workplace Violence Prevention Policy, plaintiff states that she complained to Colon, as well as other defendants, that Rosas engaged in workplace violence, but her supervisors did not properly address the incidents. Evidently, Colon engaged in retaliatory conduct by failing to take any disciplinary action against Rosas and then defendants assigned her to a filthy ambulance, subsequently leading to her constructive termination on August 1, 2016.

However, plaintiff has not indicated what discriminatory conduct she was protesting when she complained about the other employee's behavior. Plaintiff's complaints, seemingly referring to a

general hostility in the workplace, did not "constitute protected activity," as plaintiff never asserted to anyone that she suffered from this mistreatment, as a result of a protected characteristic. *Fruchtman v City of New York*, 129 AD3d 500, 501 (1st Dept 2015); *see also International Healthcare Exch., Inc. v Global Healthcare Exch.*, LLC, 470 F Supp 2d 345, 357 (SD NY 2007) (internal quotation marks and citations omitted) ("ambiguous complaints that do not make the employer aware of alleged discriminatory conduct do not constitute protected activity. The complaint must put the employer on notice that . . . discrimination is occurring").[1]

Accordingly, defendants are granted dismissal of the fourth cause of action alleging retaliation under the NYCHRL.

Defendant Booth

Pursuant to Administrative Code § 8-107 (1) (a), it is an unlawful discriminatory practice for an "employer or an employee or agent thereof" to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's actual or perceived race, gender or disability. Despite being named on the caption and defined in the complaint, there are no specific allegations pertaining to Booth and his purported participation in the discriminatory actions. Nonetheless, plaintiff argues that he participated in the discriminatory conduct along with the other defendants.[2] Plaintiff references many different supervisors in her complaint and does not differentiate Booth from them, nor distinguish him from any other defendants in the complaint. Accordingly, the amended complaint is

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[1] Nonetheless, even if plaintiff was opposing discriminatory practices, plaintiff's retaliation claim is speculative. Plaintiff does not plead any facts addressing the causal connection between her timely complaints and any alleged adverse actions taken against her. Morever, while plaintiff claims that she complained to defendants, including the New York City Department of Investigation, about the 2016 incidents with Rosas, she does not identify if any supervisors were even aware of these complaints.

[2] Administrative Code § 8-107 (6) provides that an individual employee may be held liable for aiding and abetting discriminatory conduct. Regardless, plaintiff maintains that she is not asserting a claim for aiding and abetting. She explains that Booth, as a potential supervisor, did not aid and abet any discriminatory conduct, but that he actually participated in such conduct.

dismissed as against Booth, as it failed to give him "notice of the transactions and occurrences alleged to give rise to liability on his part." *Stewart Tit. Ins. Co. v Liberty Tit. Agency, LLC,* 83 AD3d 532, 533 (1st Dept 2011) (citations omitted); *see also* CPLR 3013.[3]

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is

ORDERED that defendants' motion for partial dismissal is granted in its entirety; and it further

ORDERED that claims predicated on events which occurred prior to December 29, 2014 are precluded by the statute of limitations and plaintiff's prior election of remedies; and it is further

ORDERED that the the fourth cause of action for retaliation under the NYCHRL is dismissed[4]; and it is further

ORDERED that the complaint is dismissed in its entirety as against James P. Booth, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the remaining claims shall continue; and it is further

ORDERED that a conference will be held on April 3, 2019 in Room 103 of 80 Centre Street at 2:00 p.m.

Dated: December 19, 2018

ENTER:

A.J.S.C.

HON. ALEXANDER M. TISCH

[3] Despite the notice pleading standard in employment discrimination cases, CPLR 3013 still requires that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Again, there are no facts in the complaint addressing Booth's conduct.

[4] At this time, defendants are not seeking dismissal of timely allegations contained in the first, second, third and fifth causes of actions.