Hogue v Board of Educ. of the City Sch. Dist. of the City of N.Y.
2019 NY Slip Op 33530(U)
December 2, 2019
Supreme Court, New York County
Docket Number: 150393/2019
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** IAS MOTION 52EFM

Justice

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CHANTISE HOGUE,

Plaintiff,

- v -

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, A/K/A THE NEW YORK CITY DEPARTMENT OF EDUCATION, DAVID FANNING, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS PRINCIPAL OF THE A.P. RANDOLPH HIGH SCHOOL

Defendant.

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INDEX NO. 150393/2019

MOTION DATE 10/02/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISSAL.

Plaintiff, Chantise Hogue, a teacher at A.P. Randolph High School (the School), asserts that she was subjected to a hostile work environment and to discrimination based on her race.[1] Defendants, The Board of Education of the City of New York School District of the City of New York a/k/a The New York City Department of Education (DOE) and David Fanning (Fanning), the principal at the School, move to dismiss. Defendants allege that plaintiff's service of the Notice of Claim is outside of the statute of limitations (Education Law § 3813), that documentary evidence refutes the allegations in the complaint as a matter of law (CPLR § 3211 [a] [1]), and that the complaint does not state a viable claim (CPLR § 3211 [a] [7]). Plaintiff opposes the motion and cross-moves for leave to amend the complaint. The court resolves the motion and cross motion below.[2]

[1] Plaintiff's notice of claim also asserted gender-based discrimination (*see* NYSCEF Doc. No. 13 [Notice of Claim]), but this is not part of the original or the proposed amended complaint.
[2] The Court would like to thank Beth Herstein, Esq., for her assistance in this matter.

Factual Allegations and Procedural History

According to the complaint's allegations, which the court accepts as true for the purposes of this motion (*see Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618, 621-622 [1st Dept 2018] [*Alden*]), plaintiff, an African-American female, has over 13 years of experience in education. She has worked for DOE since 2005 (NYSCEF Doc. No. 28 [50-h Tr], page 7 lines 6-8). In the fall of 2011, plaintiff started her job at the School, as a history coordinator and the "College for Every Student" liaison. When she was hired, Henry Rubio served as the School's principal. She contends that she was successful, well-liked, and well-respected during this period. However, that same year, Fanning, a Caucasian, replaced Rubio as principal, and plaintiff's circumstances changed. Plaintiff "saw a marked decline in her work environment" and she became "the victim of horrendous discrimination" (NYSCEF Doc. No. 26 [Complaint] ¶ 24). Moreover, Fanning disparaged the minority students at the School, claiming they would never be successful and referring to them as "ghetto" (*id.* ¶ 25).

In the 2013-2014 school year, plaintiff became a dean at the school, investigating and resolving disputes among the students under her supervision. There are approximately five deans who serve for four-year terms (NYSCEF Doc. No. 28 [50h Tr] pp 13-15). Rhona Pekoh (Pekoh), the assistant principal, was plaintiff's immediate supervisor. Plaintiff states that initially, unlike her non-African-American colleagues, she did not have an office. Ultimately, she had to share an office with the only other African-American dean, while the other deans had private offices. Plaintiff recounts other problems, such as lack of supplies, lack of a phone, and the eventual offer of a substandard office, and she states that she was not included in group meetings where the other deans received updates about cases and issues. Plaintiff alleges her exclusion from the meetings also was detrimental to her career.

Plaintiff's situation worsened in the 2014-2015 school year. In particular, she was assigned to preside over the "save room" for suspended students for four straight periods, followed by a one-period break and a fifth period in the save room. During the following school year, plaintiff covered the save room for only three periods, she presided over the room during its busiest period, when the school conducted sweeps for students who were in the halls without permission and placed these students in the save room.

Furthermore, plaintiff contends, Fanning and Pekoh referred to her as the School's "token 'angry black woman'" (NYSCEF Doc. No. 26 [Complaint] ¶ 54). She states that Fanning and Pekoh told her they assigned her problems that involved the School's most troubled students because students found her, "the angry black woman", intimidating. Their disparaging treatment of plaintiff, including this type of comment, continued despite her complaints.

Plaintiff's most serious problems began during the 2017-2018 school year. Fanning assigned her one teaching class for the term. Based on this, she believed that her deanship would be renewed. Before the school year commenced, plaintiff received messages telling her to contact Fanning. It appears that she did not respond until she returned to school on September 5, 2017. On that date, however, plaintiff met with Fanning, who told her that he had removed her as dean and demoted her to a teacher's position. Plaintiff, who remains a teacher at the School (NYSCEF Doc. No 28 [50h Hearing Tr, p 8 line 23), states that since this time, "Defendants have continued to target [her]" (NYSCEF Doc. No. 26 [Complaint] ¶ 64). Among other things, Fanning has diminished her role at the School even more, taking away one of her courses and thus reducing her salary.

Plaintiff filed the notice of claim upon all defendants around October 2, 2017. The notice of claim alleged race and gender discrimination as well as retaliatory action as a result of her

complaints about the discriminatory treatment. Plaintiff filed her summons with notice on January 15, 2019, and on March 8, 2019, after defendants demanded the complaint, filed her complaint. In addition to her allegations against Fanning, Hogue contends that DOE is liable "because [Fanning's] acts were taken in accordance with . . . DOE's custom and/or practice of discriminating and/or selectively treating individuals" on such a widespread basis that DOE had constructively consented (*id.* ¶ 65). She asserts causes of action based on race discrimination under the State and City Human Rights Laws (SHRL and CHRL, respectively), including discriminatory treatment and a hostile work environment, and adverse treatment in retaliation to her complaints about the discrimination, under the same laws. On May 14, 2019, defendants filed a demand for service of the complaint upon Fanning. The following day, they filed this pre-answer motion.

Parties' Arguments

In their motion, defendants first argue that the notice of claim was untimely as to most of her allegations of discrimination under Education Law § 3813 (1), which sets forth a three-month limitations period.[3] They state that absent a timely notice of claim, a plaintiff cannot commence a discrimination action against co-defendant DOE under either the SHRL or the CHRL (citing, inter alia, *Sangermano v Board of Coop. Educ. Servs. of Nassau County*, 290 AD2d 498 [2d Dept 2002], *lv dismissed*, 99 NY2d 531 [2002]; *Cavanaugh v Board of Educ.*, 296 AD2d 369 [2d Dept 2002]). Although plaintiff learned of her demotion on September 5, 2017 and filed her notice of claim on October 2, 2017, defendants contend that the remainder of the challenged behavior occurred before July 2017. Defendants argue that plaintiff has not alleged that they

[3] Education Law § 3813 (2) states that the three-month period set forth in General Municipal Law § 50-e applies.

"engage[d] in continuous discriminatory acts," but instead her assertions, if true, only show that they engaged in discriminatory actions "over a period of time" (*Lehrman v New York City Dept. of Educ.*, 51 Misc 3d 1229 [A], *2, 2016 NY Slip Op 50878 [U]). Therefore, they state, these allegations cannot be considered as part of a continuing violation and only plaintiff's argument about her demotion was timely. Defendants also rely on the one-year statute of limitations set forth in Education Law § 3813 (2-b), as well as *Matter of Amorosi v South Colonie Independent Sch. Dist.* (9 NY3d 367 [2007]) for their contention that, at least in part, the discrimination claims in the complaint are untimely.

In addition, defendants state that the hostile work environment claim in the complaint fails because plaintiff did not assert it in her notice of claim. Defendants further point out that it is too late for plaintiff to seek leave to file a late notice of claim under Education Law § 3813 (2-a), as the one-year limitations period in Education Law § 3813 (2-b) bars any such application. Further, they contend, the limitations period in Education Law § 3813 (2-b) also applies to plaintiff's discrimination claim against Fanning (citing *Amorosi*, 9 NY3d at 371). Even if the complaint were timely, defendants allege, the complaint does not state a viable cause of action for discrimination or for retaliation, which they state are the only two challenges that plaintiff set forth in the notice of claim. As for discrimination, they note that a prima facie showing under the State Human Rights Law requires allegations that the plaintiff is part of a protected class, that she was qualified for her job, that there was an adverse employment action against her, and that the circumstances of the adverse action raised an inference of discrimination (citing *Ruiz v County of Rockland*, 609 F3d 486, 491-92 [2d Cir 2010] [summary judgment motion]). Defendants acknowledge that the City Human Rights Law has a more liberal standard than the State law (citing *Mihalik v Credit Agricole Cheuvreax N. Am., Inc.*, 715 F3d 102, 108-109 [2d

Cir 2013] [summary judgment motion]), but stress that neither law can sustain a claim based on lack of civility and instead must show that at least some discriminatory intent existed (citing *Mihalik*, 715 F3d at 110 [evaluating summary judgment motion]).

Here, defendants argue, plaintiff has not alleged an adverse action. Instead, plaintiff's salary was the same whether she was a dean or a teacher. In this respect, defendants allege that this case is similar to *Gaffney v. City of New York* (101 AD3d 410, 410 [1st Dept 2012], *lv denied* 21 NY3d 858 [2013]), where the assistant dean, with no change in title or salary, performed some "nonsupervisory tasks ordinarily performed by teachers." As a result of this and other factors such as the assistant dean's positive work reviews and the retention of the other indicia of her job, the First Department affirmed the trial court's order, which had granted summary judgment on behalf of the defendants.

Moreover, defendants state that plaintiff cannot show that she was returned to her teaching post because of any discriminatory intent. Defendants submit a copy of a job posting which indicates that dean position was for a four-year term, and defendants note that the posting does not discuss the possibility of renewal. Thus, they contend, plaintiff cannot show an expectation of renewal. Among other cases, defendants cite *Askin v Department of Educ. of the City of N.Y.* (110 AD3d 621 [1st Dept 2013]), in which the First Department affirmed the trial court's CPLR 3211 dismissal of the plaintiff's age discrimination claim because, although she showed an adverse employment action and she was in the protected category, she asserted no facts other than her age to show discriminatory intent. Defendants state that here, too, plaintiff does little more than make the conclusory assertion that she was in a protected category and suffered an allegedly adverse action. Absent more, defendants state, plaintiff has not shown discriminatory animus and dismissal of the claim is proper under both the State and City Human

Rights Laws (citing *Toth v New York City Dept. of Citywide Admin. Servs.*, 119 AD3d 431, 431 [1st Dept 2014], *lv denied*, 24 NY3d 908 [2014]; *Bermudez v City of New York*, 783 F Supp 2d 560, 581 [SD NY 2011] [summary judgment granted in part where plaintiff did "not allege that she was terminated, that she was demoted, or that her salary or benefits were decreased because she is Puerto Rican"]).

Defendants also contend that plaintiff has not alleged a causal connection between Fanning and Pekoh's alleged discriminatory comments and her purported demotion. Instead, they claim, plaintiff merely recites Fanning and Pekoh's statements that she is an "angry black woman" and the students were "ghetto," without any attempt to draw a connection to her demotion. Moreover, she does not specifically state that her demotion was motivated by racial animus. Accordingly, defendants argue that plaintiff has not established a claim (citing *Breitstein v Michael C. Fina Co.*, 156 AD3d 536, 537 [1st Dept 2017] [granting summary judgment]). Citing another summary judgment motion, defendants further argue that the claims must be dismissed under CPLR § 3211 because Fanning also appointed plaintiff to her position as dean (citing *Dickerson v Health Mgt. Corp. of Amer.*, 21 AD3d 326, 329 [1st Dept 2005] [in reversing denial of summary judgment, court noted that where the hirer is also the firer, there is a strong inference that the firer did not have discriminatory intent]).

Defendants' next argument is that plaintiff does not set forth the necessary elements of a claim for retaliation. The four elements of a claim under the SHRL are: plaintiff engaged in a protected activity, defendants knew she was engaged in the activity, there was an adverse employment action, and there was a connection between the adverse action and the protected conduct (citing Executive Law § 296 [1] [a]). The City law broadens the protection in that the conduct need not result in "'an ultimate action with respect to employment'" as long as the

action is "'reasonably likely to deter a person from engaging in protected activity'" (*Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 739-740 [2d Dept 2013] [quoting Administrative Code of the City of New York § 8-107 (7)] [in context of summary judgment motion]). Defendants argue that plaintiff does not show that her demotion was the result of her complaints about her placement in the save room – or about her office situation and lack of supplies.

In response, plaintiff both opposes the motion and cross-moves to amend the complaint. Plaintiff initially argues that her notice of claim was timely under General Municipal Law § 50-e and Education Law § 3813 (1). She submits affidavits of service which show that she served defendants on September 29, 2017 and October 2, 2017 (NYSCEF Doc. No. 27). As her demotion occurred in September 2017, plaintiff states, she is well within the statutory limitations period.[4]

Also, according to plaintiff, her allegation is that the discrimination commenced once she was named a dean in 2013 and it continued until her demotion. In particular, she cites to the derogatory remarks directed to her, which mentioned her race, and she emphasizes the fact that the assignments she received as well as the reduction in class assignments reduced her compensation and wages and limited her opportunities for advancement going forward. Plaintiff argues that defendants improperly treat each discriminatory act as distinct, but that she has successfully pled that their actions were part of a continuing violation. Quoting *Fitzgerald v Henderson* (251 F3d 345, 359 [2d Cir 2001], *cert. denied sub. nom. Potter v Fitzgerald*, 536 US 922 [2002]), plaintiff contends that her allegations show that Fanning permitted "specific and related instances of discrimination . . . to continue unremedied for so long as to amount to a

[4] The court notes that defendants do not argue that her notice of claim and complaint are untimely as to the decision not to renew plaintiff's position as dean. Instead, they challenge that portion of the complaint based on its purported failure to state a cause of action under CPLR § 3211 (a) (7).

discriminatory policy or practice" (*see Matter of Lozada v Elmont Hook & Ladder Co. No. 1*, 151 AD3d 860, 862 [2d Dept 2017]).

Even if the actions prior to the demotion were untimely, plaintiff alleges that they still would be relevant. She quotes the following language in the United States Supreme Court case of *National R.R. Passenger Corp. v. Morgan* (536 US 101, 113 [2002] [*Morgan*] [emphasis added]):

> The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. *Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim.*

(*see Khalil v State of New York*, 17 Misc 3d 777, 782 [Sup Ct, NY County 2007] [plaintiff could "refer to these time-barred acts to support his timely claims"]). Thus, plaintiff states, the history of mistreatment lends credence to her allegation about the discriminatory impetus behind her demotion.

In addition to her opposition to the motion, plaintiff cross-moves for leave to amend the complaint to add claims under 42 USC § 1983 and further support the allegations in her complaint. Plaintiff states that the equities favor the granting of her cross motion. She states that under the federal law, a three-year statute of limitations applies, thus salvaging her allegations of discrimination. She notes that CPLR § 3025 (b) freely allows the amendment of pleadings absent prejudice or surprise to the opponent, palpable insufficiency, or lack of merit, and states that no surprise or prejudice exists here as the claims are essentially the same and defendants also have had the benefit of a 50-h hearing (citing, inter alia, *Finkelstein v Lincoln Natl. Corp.*, 107 AD3d 759, 761 [2d Dept 2013]; *see LDIR, LLC v DB Structured Prods., Inc.*, 172 AD3d 1, 4 [1st Dept 2019]). Plaintiff asserts that because of the early stage of the litigation, defendants will have

ample time to conduct discovery. The additional allegations merely amplify her statements regarding Fanning's comments and behavior and add the comparable federal claim. Further, she states, she has not unduly delayed her request, operated in bad faith, or suggested an amendment that would not survive a motion to dismiss.

Further, she argues that the proposed amended complaint militates in favor of granting her cross-motion because the complaint, as amended, successfully opposes defendants' CPLR § 3211 motion. She stresses the extremely liberal construction courts afford to a plaintiff's pleading in the context of a CPLR § 3211 (a) (7) motion (citing, inter alia, *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 [2017]). She notes that the question is whether the complaint contains a cause of action, not whether it states one and not whether the plaintiff ultimately will prevail (citing *Guggenheimer v Ginzberg*, 43 NY2d 268 [1977]). As long as the court can infer a cause of action when it reviews the complaint, dismissal is not appropriate.

Specifically, plaintiff argues that in this CPLR § 3211 (a) (7) motion, where the burden on her is "de minimis" (quoting *Quarantino v Tiffany & Co.*, 71 F3d 58, 65 [2d Cir 1995] [summary judgment motion]; *accord Brathwaite v Frankel*, 98 AD3d 444, 445 [1st Dept 2012] [CPLR § 3211 motion), she has alleged enough to support the proposed amended complaint. Plaintiff notes that defendants challenge her claims that she suffered an adverse employment action and that the action was discriminatory. Plaintiff states that the list of adverse actions is not as restricted as defendants suggest and can include changes that a reasonable employee would consider to be negative. Plaintiff notes that even though her salary was not reduced by the challenged action, this is not dispositive, and here, she alleges that she endured several unfavorable assignments which were adverse in nature. Her job change was from her position as

dean to the less prestigious position as teacher, she states, that can be considered adverse. Additionally, plaintiff contends, she formerly taught a college course, and the removal of this course from her job resulted in a loss of compensation.

Further, she states that she has alleged facts which raise a possible inference of a discriminatory motive. Plaintiff notes that a flexible standard applies "that can be satisfied differently in differing factual scenarios" (*Ellis v Century 21 Dept. Stores*, 975 F Supp 2d 244, 270 [ED NY 2013] [internal quotation marks and citation omitted] [in context of summary judgment motion]). Among other things, an inference of discrimination may arise where the employer criticizes plaintiff's work "in ethnically degrading terms," makes "invidious comments" about others in the protected class or treats those who are not in the protected class more favorably (*Littlejohn v City of New York*, 795 F3d 297, 312 [2d Cir 2015]). According to plaintiff, she has satisfied the pleading requirement under the SHRL by her allegations that Fanning referred to her as a token angry black woman, that the Caucasian deans received more favorable treatment, and that Fanning isolated and ostracized her when, among other things, he excluded her from staff meetings. Moreover, she states, her hostile work environment claim alleges that the environment was hostile due to her race, and this supports her discrimination allegation. As the standard under the CHRL merely requires a showing of "differential treatment . . . because of a discriminatory intent" (*Pryor v Jaffe & Asher,* LLP, 992 F Supp 2d 252, 257 [SD NY 2014] [internal quotation marks and citation omitted]), even by means of a single comment, plaintiff states that her case easily states a claim under the City law.

Plaintiff also alleges that she has set forth a prima facie case for retaliation under the Federal and the State human rights laws, because the complaint alleges that plaintiff engaged in a protected activity of which Fanning had knowledge – that is, plaintiff protested that Fanning and

Pekoh made disparaging and racially charged comments about her and treated her less favorably than Caucasians – and that plaintiff suffered an adverse action which was causally connected to her protests. Plaintiff states that her allegations satisfy the more liberal pleading requirements for retaliation under the CHRL, which does not require that the complaint allege a "materially adverse action" as long as it asserts that the conduct of her employer, Fanning, was "reasonably likely to deter a person from engaging in protected activity" (quoting *David v Metropolitan Transp. Auth.*, US DC, SD NY, No. 07 Civ. 3561 [DAB], Batts, J., 2012] [in summary judgment ruling] [internal quotation marks and citations omitted]). Plaintiff notes that her "informal protests of discriminatory employment practices," including her complaints to Fanning and Pekoh, were protected activities (quoting *Risco v McHugh*, 868 F Supp 2d 75, 110 [SD NY 2012] [internal quotation marks and citation omitted] [summary judgment ruling]). Further, because there rarely is direct proof of retaliation, plaintiff states, the complaint's contention that the adverse action came after plaintiff engaged in the protected activity is sufficient at this preliminary phase. Here, plaintiff claims, it is enough that, according to the complaint, she suffered from worsening discrimination and adverse treatment following her protected activities.

Finally, plaintiff urges that her proposed amended complaint states a viable claim for hostile work environment based on the above allegations and their allegedly continuing nature. In reply, defendants argue that plaintiff has not shown a continuing violation. They note that in *Morgan*, the United States Supreme Court found that discrimination claims arising from untimely discrete acts are time-barred even if there is a connection to other discrete and timely acts. They claim that this mandates that the court view plaintiff's allegations of discrimination as discrete and dismiss, as untimely, all allegations prior to the decision not to renew her deanship. According to defendants, plaintiff ignored their argument that the majority of her claims against

Fanning are time-barred. They state that a three-year statute of limitations applies (citing *Amorosi*, 9 NY3d at 371), and that plaintiff has abandoned the discrimination claims that accrued prior to January 15, 2016.

Further, defendants note that plaintiff does not address their allegation that she did not assert a hostile work environment claim in her notice of claim. Defendants also argue that plaintiff has not shown a continuous practice, which is necessary for a hostile work environment claim. According to defendants, both the original and proposed amended complaint do not allege that plaintiff was subjected to discriminatory acts or to a hostile work environment during the 2016-2017 school year, and on this basis defendants state that plaintiff's continuing violation argument fails with respect to all her claims. For the same reasons, defendants seek dismissal of plaintiff's claims against the DOE.

Additionally, defendants reiterate that the complaint does not satisfy the pleading requirement for retaliation. They assert that the original complaint does not allege that plaintiff neither formally nor informally complained to Fanning or Pekoh about the purported discrimination. Therefore, defendants continue, the original complaint does not show the causal link necessary for a retaliation cause of action. Defendants state that plaintiff implicitly concedes as much by seeking to amend the complaint to remedy the problem. Defendants assert that, for the same reason, plaintiff's original discrimination claims must fail.

Moreover, defendants argue that the court must deny the cross-motion to amend the complaint because the proposed amended complaint is also deficient. Defendants state that if proposed amended complaints would not survive a motion to dismiss for failure to state a claim, courts regularly deny such motions on the basis of futility. They state that the proposed amended complaint does not remedy defendants' argument that plaintiff's change in position was not a

demotion and therefore was not an adverse action, and they argue that to a large extent plaintiff has not responded to their position. Even if this were not the case, defendants argue, the proposed amended complaint does not show an adverse action. Additionally, defendants claim that the complaint does not raise an inference that the action was motivated by a discriminatory intent because there is a one-year gap between the last asserted discriminatory act and her purported demotion. Defendants state that plaintiff's assertion of discriminatory intent is conclusory (citing *Akhtab v BCBG Max Azria Group Inc.*, 2012 NY Slip Op 31041 [U], *7 [Sup Ct, NY County 2012]). They reiterate that there is a strong inference that Fanning's failure to renew plaintiff's contract as dean was not discriminatory because Fanning also hired her for the position.

Analysis

Courts liberally grant leave to amend where it does not cause prejudice or surprise to the opposing party (*O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83, 86 [1st Dept 2017] [adding sexual orientation discrimination claim to complaint alleging sex and disability discrimination]). Moreover, "[o]n a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [*MBIA*]). When it considers a pre-answer motion to dismiss, courts "accords the plaintiff every possible favorable inference" (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]), and denies the motion if under "any reasonable view of the stated facts, plaintiff would be entitled to recovery" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [internal quotation marks and citations omitted]). The decision is left to the trial

court's "sound discretion" (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks and citation omitted]).

In the case at hand, defendants do not allege that at this early stage in the litigation – where they have not filed an answer or conducted any discovery– they will be prejudiced by the amendment. Therefore, although defendants continue to argue the merits of the original and the proposed amended complaint in their reply, the court shall consider the parties' arguments in light of the proposed amended complaint. If the complaint, as amended, sets forth valid claims, the court shall grant the cross-motion. It would be inefficient to consider the sufficiency of the original complaint, and then consider the sufficiency of the proposed amended complaint.

Next, the court rejects defendants' position that the notice of claim does not assert a claim for hostile work environment and that, therefore, the cause of action must be dismissed (*see Dipoumbi v New York City Police Dept.*, 150 AD3d 467, 468 [1st Dept 2017] [affirming dismissal of claims on this basis]). "A notice of claim is sufficient if it includes information that enables a municipal agency to investigate and evaluate the merits of a claim" (*Bennett v New York City Tr. Auth.*, 4 AD3d 265, 266 [1st Dept 2004], *affd.* 3 NY3d 745 [2004]). The notice must substantially rather than literally comply with its requirements (*Castro v City of New York*, 141 AD3d 456, 459 [1st Dept 2016] [municipal law does not demand "literal nicety or exactness"] [internal quotation marks and citation omitted]). Here, the notice describes the claim as "based upon the Respondents['s] violations of Claimant's statutory and constitutional rights by means of unlawful race discrimination, . . . and retaliation" (NYSCEF Doc. No. 13 [Notice of Claim]). In the section entitled "Date, Time, and Manner in which the Claims Arose," the notice refers twice to the hostile work environment: first, when it states that after Fanning became principal, plaintiff "saw a marked decline in her work environment" which was related to his

"horrendous discrimination"; and second, when it states that plaintiff's "work environment continued to worsen" during the 2014/2015 school year" (*id.*). Defendants' argument is based on a reading of the first sentence of the notice rather than on the entire document and, as such, lacks merit.

Defendants expressly state in their memorandum in support of their motion that, although they believe plaintiff's hostile work environment argument lacks merit, they do not move to dismiss that claim "except to the extent that they are barred against the DOE for failure to file a timely notice of claim" (NYSCEF Doc. No. 14 [Mem in Support of Motion, *4 n 2; *see id.*, *14 n 6). Moreover, they do not raise any arguments in their initial motion papers about the timeliness of plaintiff's hostile work environment claim under the statute of limitations or its sufficiency as a matter of law. Plaintiff does argue these issues in her memorandum in support of her opposition and cross-motion, and defendants are within their rights to respond (*see EPF Intl. Ltd. v Lacey Fashions Inc.*, 170 AD3d 575, 575 [1st Dept 2019]). However, defendants do not cross-move for dismissal of the claim based on its untimeliness or failure to state a claim. Therefore, the court does not consider these issues as before this court (*see id.* [new arguments or legal theories would have been improper]; *Lee v Law Offs. of Kim & Bae, P.C.*, 161 AD3d 964, 966 [2d Dept 2018] [court declined to consider request in reply papers for "relief that was dramatically unlike the relief sought in (party's) original motion"]).

Furthermore, even if the court reached these issues it would deny the application to dismiss. As defendants presumably are aware, as they did not challenge the cause of action in their pre-answer motion, these arguments are more appropriate in a summary judgment motion or at trial before the factfinder. Plaintiff has alleged that Fanning repeatedly called her an angry black woman, referred to minority students as inferior and "ghetto" on a regular basis, regularly

gave her bad save room assignments, and provided her with inferior office space and equipment, all on the basis of her race. "[I]t cannot be said, as a matter of law, that the facts alleged by plaintiff, if proven, would not constitute . . . a hostile work environment" (*Ferraro v New York City Dept. of Educ.*, 115 AD3d 497, 497 [1st Dept 2014]). Moreover, if proven, plaintiff may be able to show "a single continuing pattern of unlawful conduct extending into the one-year period immediately preceding the filing of the complaint" (*id.* at 497-498; *see Petit v Department of Educ. Of the City of New York*, -- AD3d --, 2019 NY Slip Op 07990, **1-2 [1st Dept 2019]). The court also notes that plaintiff's burden is even lower with respect to the CHRL allegations (*see Makinen v City of New York*, 30 NY3d 81, 92-93 [2017]).

Defendants' argument that the complaint does not allege a continuing violation because of the absence of claims relating to the 2016-2017 school year also lacks merit. The proposed amended complaint raises an inference that the environment was hostile on an ongoing basis, even during the 2016-2017 school year. For example, the proposed amended complaint intimates that she remained in the windowless office which had no outlets and no phone even after the 2014-2015 school year (*see* NYSCEF Doc. No. 29 [Proposed Amended Complaint] ¶¶ 38-42). Prior to that, there was a period during which the only other African-American dean was forced to share her office with plaintiff. Further, she states that all the Caucasian deans had their own, adequate offices and did not have to share them with other deans. The pleadings also state that plaintiff "was frequently left out of updates on the students and ongoing cases," as a result of which it was more difficult to do her work effectively (*id.* ¶ 43). There is no indication that this practice stopped at the end of the 2014-2015 school year. The complaint states that plaintiff's save room schedule was modified in the fall of 2015 but remained difficult. The implication of plaintiff's contentions is that this alleged mistreatment was connected to her race. Finally,

plaintiff states that "nothing was ever done to address Fanning's behavior" – that is, his repeated derogatory references about her and the minority students – "and, to this day, he continues to engage in such discriminatory actions towards Plaintiff" (*id.* ¶ 57). Although the complaint is not artfully worded and should have clarified that the hostile conditions existed in the 2016-2017 school year, the liberal standard for evaluating a complaint in response to a pre-answer motion requires this court to accept all favorable inferences (*see Chanko*, 27 NY3d at 52; *see also Suri v Grey Global Group, Inc.*, 164 AD3d 108, 115 [1st Dept 2018] [court must consider plaintiff's cause of action "holistically"]).

The court now turns to defendants' argument that the continuing violation doctrine does not apply to plaintiff's discrimination claim. Defendants rely on *Appleton v City of New York* (2019 NY Slip Op 30627 [U], *18 [Sup Ct, NY County 2019]), for the proposition that all contentions of discrimination that predate July 2, 2017 – that is, all claims other than the failure to reappoint plaintiff to her deanship – are untimely. In their reply papers, they amplify this argument by referring to *Morgan*, upon which plaintiff relied for another proposition. In *Morgan*, the United States Supreme Court distinguished between racial, age, national origin, and other discrimination claims and claims of a hostile work environment. With respect to the discrimination,

> discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act.

(*Morgan*, 536 US at 113). The Court rejected the argument that serial violations trigger the continuing violation doctrine whenever the "discriminatory and retaliatory acts . . . are plausibly or sufficiently related to that act" (*id.* at 114). Instead, "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment

practice (*id.* [quotation marks omitted]). Defendants correctly note that with respect to plaintiff's discrimination claim, only the failure to renew her appointment as dean is timely (*see Marino v City of New York*, 167 AD3d 554, 554 [1st Dept 2018]). However, as plaintiff notes, "the statute of limitations does not bar an employee from using the prior acts as background evidence in support of a timely claim" (*Philpott v State of New York*, 252 F Supp 3d 313, 318 [SD NY 2017] [internal quotation marks and citation omitted]).

The statute of limitations argument does not apply to plaintiff's cause of action for retaliation. Defendants do not dispute that plaintiff's notice of claim and complaint were timely on this issue. Instead, defendants argue that plaintiff has not alleged a prima facie case of retaliation. Defendant is correct that the original complaint is insufficient, as it neither states that plaintiff engaged in protected activity nor draws a causal connection between any such activity and the failure to renew her contract as dean. However, again applying the liberal standard of review, the proposed amended complaint cures these deficiencies. Contrary to defendants' statement, plaintiff's proposed amended complaint indicates that she spoke to her superiors about more than just her work assignments. For example, at paragraphs 55 and 56 of the proposed amended complaint (NYSCEF Doc. No. 29), plaintiff asserts that she complained to Ms. Foster-Ba, another assistant principal, that Fanning used racially charged language in her presence, and that he mistreated plaintiff as well as minority individuals on the faculty and in the student body.

In support of their allegations, defendants cite several cases which are not applicable. *Gaffney v City of New York* (101 AD3d 410 [1st Dept 2012], *lv denied* 21 NY3d 858 [2013]) and *Hanna v New York Hotel Trades Council & Hotel Assn. of N.Y. City Health Ctr., Inc.* (18 Misc 3d 436 [Sup Ct, NY County 2007]) both involve summary judgment motions, in which the plaintiffs carried evidentiary burdens. Here, on the other hand, plaintiff merely has to allege facts

which, if true, may give rise to an inference of retaliation. "The plaintiff cannot reasonably be required to allege more facts in the complaint than the plaintiff would need to defeat a motion for summary judgment" (*Littlejohn*, 795 F3d at 311). In several of the summary judgment cases to which the parties cite, the courts ultimately found triable issues. Defendants also argue that because Fanning, who refused to reappoint plaintiff as dean, is also the individual who hired her for the position, there is "a strong *inference* . . . that discrimination was not a determining factor for the adverse action" (*Dickerson*, 21 AD3d at 329). Here, too, defendants speak of an evidentiary burden, not one which exists at this preliminary stage.

Defendants analogize this case to *Akhtab* (2012 NY Slip Op 31041 [U] at *7), in which the court dismissed a retaliation claim under CPLR § 3211, finding no inference of retaliation based on race or national origin where the complaint did not identify the plaintiff's country of origin and "only incidentally refer[red] to plaintiff as African-American." Here, as described earlier, the proposed amended complaint states that Fanning made pejorative comments about plaintiff which mentioned her race and also spoke contemptuously about the minority students at the school. In addition, she frequently mentions her race, describes Fanning as a Caucasian, and states that she was treated less favorably than her Caucasian counterparts.

According to defendants, plaintiff did not address their argument that the change in job title was not a demotion and that, therefore, she waived the claim. However, plaintiff discusses defendants' challenge at length in her opposition papers (*see* NYSCEF Doc. No. 24, **11-12). Defendants additionally state that because plaintiff's salary was unchanged, she did not suffer an adverse action. The court disagrees. The list of potential adverse changes in employment that the court sets forth in *Hanna* is not exclusive or prescriptive. Instead, the court states that an adverse work action "*might be* indicated by . . . a decrease in wage or salary" and adds that "a less

distinguished title, . . . significantly diminished material responsibilities, or other indices . . . unique to a particular situation" might be considered to be adverse (*Hanna*, 18 Misc 3d at 442 [emphasis supplied]). However, as plaintiff points out, an adverse action is one "of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse" (*Signer v Tuffey*, 66 Fed Appx 232, 235 [2d Cir 2003] [internal quotation marks and citation omitted]). In fact, "a less distinguished title" or "significantly diminished material responsibilities" may comprise a material adverse change (*Messinger v Girl Scouts of the U.S.A.*, 16 AD3d 314, 315 [1st Dept 2005]). The reasonableness of plaintiff's perception of whether she was changed to a "less distinguished" job title is an issue of fact, and thus is not resolvable on a pre-answer motion to dismiss.

Defendants do not assert any arguments specifically directed to plaintiffs' federal claims or her claims against the DOE. Instead, they rely on their substantive arguments that the State and City claims must fail. Therefore, the court does not dismiss the federal claims or those against the DOE at this time. Further, the court does not consider defendants' numerous arguments which touch upon the merits or the reasonableness of plaintiff's claims. These go to the strength of her contentions, not whether the complaint states any claims. "Whether [such causes of action] will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [her] claims, of course, plays no part in the determination of a prediscovery CPLR [§] 3211 motion to dismiss" (*Brown v First Student, Inc.*, 167 AD3d 1455, 1456 [4th Dept 2018], *lv denied*, 170 AD3d 1620 [4th Dept 2019]).

For the reasons above, therefore, it is

ORDERED that the plaintiff's cross-motion for leave to amend the complaint is granted, in part, as follows: leave is granted to amend the first cause of action as insofar as it is based on

the failure to renew her deanship and on the existence of a hostile work environment and is otherwise denied as to the first cause of action; and it is further

ORDERED that the cross-motion is granted as to the second cause of action; and it is further

ORDERED that to this extent the proposed amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that the motion to dismiss is granted as to those portions of plaintiff's first cause of action in the proposed amended complaint, except as it relates to the failure to renew her deanship and to hostile work environment, and is otherwise denied; and it is further

ORDERED that the defendant shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 106, 80 Centre Street, on February 26, 2020, at 2:00 PM.

12/2/2019
DATE

LYLE E. FRANK, J.S.C.
HON. LYLE E. FRANK J.S.C.

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