SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12

Justice

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CAROLYN GERSHENSON,

Plaintiff,

- v -

LOCAL 52, I.A.T.S.E, JOHN FORD, MATTHEW ROPER, RICHARD FELLEGARA,

Defendants.

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INDEX NO. 151180/2021

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12-19 were read on this motion to dismiss.

Defendants move pursuant to CPLR 3211(a)(1), (7), and (8) for an order dismissing the complaint in its entirety. Plaintiff opposes

I. COMPLAINT (NYSCEF 1)

Plaintiff, an African-American woman, is a registered nurse and member of defendant Local 52, I.A.T.S.E (Local 52), a labor organization. She alleges that it and three white male members, defendants Ford, Roper, and Fellegara, committed several discriminatory acts against her. They denied Local 52 membership to her son, instead assigning the best and most lucrative jobs to Roper's and Fellegara's friends, most if not all of whom were not African-American. They undermined her power and authority after she was elected to Local 52's executive board in 2019 and initiated a retaliatory investigation of her based on unfounded claims of discrimination. She alleges that Fellegara physically attacked her, that Roper circulated false, defamatory, and racist attacks against her, that other members, including at least one other executive board member, taunted her with racist and white supremacist memes and social media posts, and that

Local 52 failed to discipline them.

Based on the foregoing, plaintiff asserts causes of action against defendants for discrimination, retaliation, and disparate impact in violation of the New York Executive Law (NYSHRL) and the New York City Human Right Law (NYCHRL).

II. PERSONAL JURISDICTION OVER INDIVIDUAL DEFENDANTS

A. Contentions

Defendants contend that the court lacks personal jurisdiction over Fellegara and Roper, as the pertinent affidavits of service do not reflect that the process server attempted to determine their places of business before resorting to nail and mail service. (NYSCEF 13).

In opposition, plaintiff argues that service was proper, as defendants do not challenge that Fellegara and Roper were served at their respective abodes, and her process server was not obliged to determine their place of business before nailing and mailing. (NYSCEF 18).

B. Analysis

Pursuant to CPLR 308(4), if a person cannot be served by personal, in-hand delivery or by delivery to a person of suitable age and discretion, the person may be served by affixing the pleadings to the person's actual dwelling place or usual place of abode and mailing them to his last known residence.

Absent any contention that plaintiff failed to serve Fellegara and Roper at their usual places of abode, defendants fail to demonstrate that the service was improper. The process server was not obliged to determine Fellegara and Roper's place of business in order for his efforts to deemed duly diligent. (*Brafman & Assoc., P.C. v Balkany*, 190 AD3d 453 [1st Dept 2021]; *Farias v Simon*, 73 AD3d 569 [1st Dept 2010]).

III. STATUTE OF LIMITATIONS

A. Contentions

Defendants contend that many of plaintiff's claims are time-barred. (NYSCEF 13).

In opposition, plaintiff denies that any of her causes of action are based on events that preceded the applicable limitations periods and asserts that she clearly sets forth the time periods for each of her causes of action. She also observes that the pertinent limitation periods were tolled by executive orders related to COVID-19. (NYSCEF 18).

In reply, defendants argue that while plaintiff's allegations of conduct relating to her role as an executive board member arguably fall within the applicable limitations periods, other alleged conduct is insufficiently specified and thus, it cannot be determined when it occurred. (NYSCEF 19).

B. Analysis

"To dismiss a cause of action . . . on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired." (*Campone v Panos*, 142 AD3d 1126, 1127 [2d Dept 2016]). "If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period." (*Id.*).

To the extent that plaintiff asserts causes of action based on conduct subsequent to her 2019 election to the executive board, they inarguably fall within the three-year limitations period. (New York City Administrative Code § 8-502[d]; CPLR 214[2]). While plaintiff alleges in her complaint that some of the conduct relating to defendants' allegedly discriminatory job

distributions occurred "between 2004 and 2020," she claims to have discovered that the practice was discriminatory in 2019. (*Consolidated Edison Co. of New York v New York State Div. of Human Rights on Complaint of Easton*, 77 NY2d 411, 419 [1997] [statute of limitations for human rights law claims begins to run from time complainant learns of discriminatory act]; NY PJI Div 9, I Intro 1.F [2022] [limitations period commenced when claimant discovered discriminatory treatment]). Thus, plaintiff's claims are not time-barred.

IV. STANDING

A. Contentions

Defendants argue that plaintiff lacks standing to assert claims on behalf of her son who was not a minor at the time of the alleged discriminatory incident, or on behalf of other unnamed African-Americans who were allegedly subject to discriminatory job assignments. (NYSCEF 13).

In opposition, plaintiff denies having asserted claims on behalf of her son or persons other than herself. (NYSCEF 18).

B. Analysis

To the extent that the complaint reflects an effort by plaintiff to assert a claim on behalf of her son or third parties, those causes of action are severed and dismissed.

VI. FAILURE TO STATE A CLAIM

A. Contentions

1. Defendants (NYSCEF 13)

Defendants contend that all of plaintiff's claims should be dismissed as they are not pleaded with the requisite specificity, absent dates for many of the events in issue and that she fails to allege which claims are brought in her capacity as a purported union member, employee,

or officer, or which are brought against Local 52 as a union, employer, or employment agency. Her causes of action brought under NYCHRL, they assert, are unsupported by allegations that such conduct occurred in, or had an impact in, New York City and that plaintiff's causes of action for employment discrimination fail because she was not an employee of Local 52 as a matter of law. Moreover, even had she been, they maintain that she fails to plead that she suffered an adverse employment action, or that such action occurred because of her race or under circumstances giving rise to an inference of discrimination. Her retaliation claims are said to fail absent a causal connection between an activity and an adverse employment action or an allegation that she was engaged in a protected activity. Defendants also argue that plaintiff's disparate impact claims fail, as she does not specify a practice or policy that created disparate results or that individuals outside of her protected class were treated more favorably.

According to defendants, plaintiff's causes of action against Local 52 in its capacity as an employment agency are legally insufficient absent facts that would warrant its treatment as such, and her claims against it in its capacity as a union fail absent an alleged breach of its duty to her of fair representation and because she did not exhaust her administrative remedies. (NYSCEF 15). As against all of the individual defendants, defendants assert that plaintiff fails to state a claim absent a basis for liability for acts committed as union representatives or for holding them directly or indirectly liable.

2. Plaintiff's opposition (NYSCEF 18)

Plaintiff maintains that her complaint is sufficiently specific and that her claims arise from two separate relationships with Local 52, one as an executive board member and the other in relationship to the union as an employment agency. She denies a need to establish an employer-employee relationship to maintain her claims against Local 52, as it is a "labor

organization" within the meaning of NYCHRL and NYSHRL, although she alleges that she was an employee of it, having been paid a salary by it for her services as an executive board member.

While plaintiff concedes having failed to state explicitly in her complaint that her causes of action arose in New York City, she argues that it is evident, offering her affidavit in which she attests that Local 52 is headquartered in New York City and that most of the work for which the union refers members is performed there. (NYSCEF 17). She, moreover, denies a need to plead, *prima facie*, each and every element of her employment discrimination claims, and asserts that having pleaded that she suffered an adverse employment action under circumstances giving rise to an inference of discrimination and causation, she sufficiently states a cause of action for employment discrimination.

Plaintiff argues that she sufficiently pleads retaliation, having alleged instances where she opposed discrimination and having clearly set forth the requisite temporal proximity. She observes that in her supporting affidavit, she alleges that she ran for the executive board on an "anti-discrimination" plank (NYSCEF 17), and that she sufficiently pleads disparate impact by alleging that black members were given inferior assignments, and thus paid less than their white counterparts, and that when she was elected to the executive board she was stripped of duties and responsibilities enjoyed by white board members.

According to plaintiff, her claims of discrimination in her capacity as a union member are not pre-empted by the duty of fair representation under federal law absent a conflict with the NYCHRL or NYSHRL and she maintains that she exhausted the internal dispute procedures under the union constitution and bylaws. She argues that the individual defendants can be sued in their capacity as employees or agents of Local 52 under Administrative Code § 8-107.1(c), and for "aiding and abetting" under the NYSHRL.

Additionally, plaintiff claims that defendants' frivolous arguments based on false representations of law and fact in support of their motion warrant sanctions.

3. Defendants' reply (NYSCEF 19).

Defendants argue that plaintiff fails to set forth a *prima facie* case of employment discrimination, asserting that her retaliation claims fail as many of her alleged protected activities occurred after the alleged adverse actions. They also contend that she fails to demonstrate the discriminatory intent necessary to support a disparate impact claim, and that she is not similarly situated to Roper and Fellegara as she was not on the board when they were. Rather, to establish her NYCHRL and NYSHRL causes of action, defendants assert, she must, and fails to, prove a breach of the duty of fair representation against Local 52, and her claims against the individual defendants are insufficiently supported. They deny having misrepresented the law and facts in their motion and otherwise reiterate their previous arguments.

B. Analysis

1. CPLR 3211(a)(7)

"A party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that . . . the pleading fails to state a cause of action . . ." (CPLR 3211[a][7]). When evaluating such a motion, the court must determine whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Thus, "the court must accept the facts as alleged in the complaint as true, according plaintiffs the benefit of every possible favorable inference . . ." (*JFK Holding Co., LLC v City of New York*, 68 AD3d 477 [1st Dept 2009] [internal quotation omitted]), although "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss" (*Barnes*

v Hodge, 118 AD3d 633 [1st Dept 2014]; *see also Jones v Voskresenskaya*, 125 AD3d 532, 534 [1st Dept 2015] [allegations that are "vague, speculative and unsupported by any facts" cannot sustain cause of action]).

On such a motion, the reviewing court is also required to "determine only whether the acts as alleged fit within any cognizable legal theory" and "the [motion] must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it." (*Butler v Magnet Sports & Entm't Lounge, Inc.*, 135 AD3d 680, 680-81 [2d Dept 2016]).

2. NYCHRL jurisdictional requirement

The NYCHRL applies only to acts occurring within the boundaries of New York City (*Shah v Wilco Systems, Inc.*, 27 AD3d 169 [1st Dept 2005]), or impacting therein (*Hoffman v Parade Publications*, 15 NY3d 285, 289 [2010]). As plaintiff's affidavit sufficiently clarifies that all acts forming the basis for her complaint occurred within New York City, the NYCHRL is applicable.

3. Plaintiff's relationship with Local 52

Under the Human Rights Law, the determination of whether a party is considered an employer requires the consideration of four factors, "(1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant's conduct." (*Griffin v Serva, Inc.*, 29 NY3d 174, 186 [2017] [internal citations omitted]). "The really essential element of the relationship is the right of control, that is, the right of one person, the master, to order and control another, the servant, in the performance of work by the latter." (*Id.*; *Fernandes v Jadah Carroll, LLC*, 189 AD3d 587 [1st Dept 2020] [control over conduct of another, including payment of wages and power of dismissal, is the

essential element of being an employer]). In *Matter of Nallan v Motion Picture Studio Mechs. Union, Local No. 52*, the plaintiff was an executive board member of Local 52, the same entity that is a defendant here. He asserted a workers compensation claim against it, and as the union had paid him a minimal stipend as compensation for his services, as there was no employment agreement, and as the union did not control his activities, the Court found that he was not an employee of Local 52. (40 NY2d 1042 [1976]; *see e.g. Garmer v China Natural Gas, Inc.*, 71 AD3d 825, 826-827 [2d Dept 2010], *lv denied*, 15 NY3d 703 [2010] [allegations insufficient to establish that independent member of company's board of directors was an employee under state whistleblower statute]; *Zurich Am. Life Ins. Co. v Nagel*, 571 F Supp3d 168, 184 [SD NY 2021] [board member not an employee under NYCHRL and NYSHRL where company did not supervise his work, pay his wages, or control day-to-day job duties]).

Here, plaintiff was elected to her position, rather than selected by Local 52, although she was paid a wage, rather than a stipend, for her services on the executive board. Additionally, she alleges that Local 52 exercised a control over her by preventing her from exercising her the functions of her position. As the right of control is considered the key element of the employer-employee relationship, plaintiff may assert claims as an employee of Local 52.

Both the NYCHRL and NYSHRL define an employment agency as "any person undertaking to procure employees or opportunities to work." (Administrative Code § 8-102; Executive Law, § 292.2). As defendants do not dispute plaintiff's contention that Local 52 procures opportunities to work for its members, Local 52 constitutes an employment agency under the NYCHRL and NYSHRL, and plaintiff may assert claims against them in that capacity.

While defendants do not dispute that Local 52 is also a labor organization under the NYCHRL and NYSHRL, they deny that plaintiff may advance claims against them as a labor

organization absent allegations that they breached their duty of fair representation to her pursuant to the National Labor Relations Act (NLRA) and exhausted her administrative remedies. As the duty of fair representation imposed under the federal NLRA does not preempt the NYSHRL absent a conflict between the two, plaintiff is not precluded. (*Figueroa v Foster*, 864 F3d 222, 235-236 [2d Cir 2017]; *Skelton v Int'l Union of Operating Eng'rs Local 14-14B, AFL-CIO*, 2019 WL 4784763, *5 [SD NY 2019] [applying same rule to NYCHRL]). Plaintiff does not advance claims based on a violation of the Local 52 constitution or bylaws, and neither document expressly requires that internal remedies be exhausted before seeking judicial intervention. Thus, plaintiff may maintain her NYCHRL and NYSHRL claims against Local 52 in its capacity as a labor organization.

4. Claims against individual defendants

While, in general, individual defendants cannot be held liable for acts committed in their capacity as union representatives, even if those acts were not authorized by the union membership (*Duane Reade, Inc. v Local 338 Retail, Wholesale, Dept. Store Union, UFCW, AFL-CIO*, 17 AD3d 277 [1st Dept 2005]), Administrative Code § 8-107 explicitly imposes liability on individual employees and agents of labor organizations for discriminatory acts (*see Doe v Bloomberg, L.P.*, 36 NY3d 450 [2021] ["individuals may incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct"]), and Executive Law § 296 imposes liability on individuals for aiding and abetting discriminatory acts (*Kouri v Eataly N.Y. LLC*, 199 AD3d 416 [1st Dept 2021]). As plaintiff alleges individual discriminatory acts by each individual defendant, both directly and as an aider and abettor, there is sufficient basis to sustain claims against them.

5. Employment discrimination

In determining whether the facts alleged in the complaint and inferences arising therefrom state a cause of action for employment discrimination, plaintiff's allegations must be construed in her favor, especially given her reliance on the NYSHRL and NYCHRL. (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140 [1st Dept 2009] [employment discrimination cases require only notice pleading; plaintiff need not plead specific facts establishing *prima facie* case of discrimination]). The provisions of the NYCHRL are to be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v City of New York*, 16 NY3d 472, 478 [2011]), and with due regard for fulfilling the law's remedial goals (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 [1st Dept 2011], *lv denied* 18 NY3d 811[2012]; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009], *lv denied* 13 NY3d 702). Moreover, the NYCHRL is "to be more broadly interpreted than similarly-worded federal or State antidiscrimination provisions." (*Singh v Covenant Aviation Sec., LLC*, 131 AD3d 1158, 1161 [2d Dept 2015]; *Bennett*, 92 AD3d at 34).

A cause of action for employment discrimination under NYCHRL and NYSHRL is set forth, *prima facie*, when it is shown that (1) the plaintiff is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]; *Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]).

Here, it is undisputed that plaintiff is a member of a protected class and that she was qualified to hold her position. To plead circumstances giving rise to an inference of

discrimination, plaintiff must plead facts sufficient to support such an inference beyond conclusory allegations of bias. (*Wolfe-Santos v NYS Gaming Commission*, 188 AD3d 622 [1st Dept 2020]; *Askin v Dept. of Educ. Of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The cause of action may be supported by allegations of the disparate treatment of similarly situated employees. (*Brown v City of New York*, 188 AD3d 518, 519 [1st Dept 2020]; *Whitfield-Ortiz*, 116 AD3d at 581).

Plaintiff alleges disparate treatment, both as to defendants' job distribution policy and the stripping of her duties and responsibilities when elected to the executive board. Thus, plaintiff sufficiently pleads this element.

For an employment action to be adverse, the plaintiff must demonstrate that it affected a change in the terms and conditions of employment "more disruptive than a mere inconvenience or an alteration of job responsibilities" such as "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished material responsibilities" (*Forrest*, 3 NY3d at 306 [internal quotations omitted]; *cf. Okocha v City of New York*, 122 AD3d 550 [1st Dept 2014] [upholding summary dismissal of employment discrimination claim based on defendant's failure to promote plaintiff, and subjecting him to investigation based on substantiated allegations of misconduct]). Under the NYCHRL, such action need not be "materially adverse." (*Golsten-Green v City of New York*, 184 AD3d 24 [2d Dept 2020]).

Here, as plaintiff alleges that she was denied preferable, more lucrative job assignments due to her race, and that she was stripped of her duties and responsibilities upon her election to the executive board, she sufficiently alleges adverse employment actions under the NYCHRL and NYSHRL, and thus states a cause of action for employment discrimination.

6. Retaliation

Pursuant to Administrative Code § 8-107(7), as pertinent here, "[i]t shall be an unlawful discriminatory practice … to retaliate or discriminate in any manner against any person because such person has … opposed any practice forbidden under this chapter." Executive Law § 296(7) contains a similarly worded provision. To state a claim of retaliation under the NYCHRL and NYSHRL, plaintiff must allege that she was engaged in a protected activity, that her employer was aware of such activity, that she suffered an adverse employment action, and that there exists a causal connection between the protective activity and the adverse action. (*Forrest*, 3 NY3d at 313).

Protected activities under NYCHRL are actions taken in opposition or as a complaint about unlawful discrimination. (*Forrest*, 3 NY3d at 313; *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 [1st Dept 2010]). The action need not be explicit (*Albunio*, 16 NY3d at 479 [jury could determine that plaintiff opposed discrimination although "she did not say in so many words that (candidate) was a discrimination victim"]) nor need it satisfy any formality (*Spiegler v Israel Discount Bank of New York*, 2003 WL 21488040 [S D N Y 2003]; *see Fletcher v Dakota, Inc.*, 99 AD3d 43, 52 [plaintiff's comment to board member complaining that discussion about applicants' ethnicity and religion inappropriate as protected activity]). Generalized, ambiguous or isolated complaints which do not clearly identify discrimination do not constitute protected activity. (*Breitstein v Michael C. Fina Co.*, 156 AD3d 536, 537 [1st Dept 2017] [isolated complaint about defendant's general conduct not protected activity]; *Gonzalez v EVG, Inc.* 123 AD3d 486, 487 [1st Dept 2014] [complaint about general harassment not protected activity absent mention that she was discriminated against based on sex]).

A causal connection between a protected activity and a negative employment outcome

may be reasonably inferred from the passing of a brief period of time between the two. (*Harrington v City of New York*, 157 AD3d 582, 586 [1st Dept 2018]). And, although there is no bright line rule, absent additional facts, a gap of five months or greater has been held to be too long to establish causation based on temporal proximity alone. (*Matter of Parris v New York City Dept. of Educ.*, 111 AD3d 528 [1st Dept 2013], *lv denied* 23 NY3d 903 [2014]). The relevant period is measured from when the employer became aware of it, not from when the protected activity occurred. (*Dotson v J.C. Penney Co., Inc.*, 159 AD3d 1512, 1514 [4th Dept 2018]; *Matter of Parris*, 111 AD3d at 529).

Here, plaintiff alleges that she filed a discrimination complaint against Roper and Fellegara shortly after her election to the executive board, and that her duties and responsibilities were stripped "immediately after" her election to the board. Thus, it is unclear whether she filed the discrimination complaint before or after her duties were stripped from her. Having, however, attested that she ran for the executive board on an "anti-discrimination" plank, which constitutes protected activity, under the liberal pleading standards of the NYCHRL, plaintiff states a cause of action for retaliation.

7. Disparate impact

A claim of unlawful discrimination based on disparate impact is sufficiently established when the plaintiff demonstrates that the defendant had a policy or practice that results in a disparate impact to the detriment of a protected group. (NYCHRL § 8-107; *People v New York City Transit Auth.*, 59 NY2d 343, 348-349 [1983]; *Mete v New York State Office of Mental Retardation & Developmental Disabilities*, 21 AD3d 288, 296 [1st Dept 2005]).

It is undisputed that plaintiff, due to her race, falls within a protected group under both the NYCHRL and NYSHRL. At issue is only whether she alleges a facially neutral policy

resulting in a disparate impact on African Americans. For a policy to be unlawful under a disparate impact theory, it must be neutral on its face and in terms of intent. (*New York City Transit Auth.*, 59 NY2d at 348-349).

Here, plaintiff alleges that defendants' job assignment policy, while facially neutral and without discriminatory intent, disparately impacted African-Americans, assigning the best and most lucrative jobs to Roper's and Fellegara's mostly white friends. Plaintiff does not allege any discriminatory motive for the policy. Thus, plaintiff states a cause of action for discrimination based on disparate impact.

8. Sanctions

I decline to sanction defendants.

VII. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted to the extent that plaintiff's claims on behalf of third parties are severed and dismissed, and otherwise denied; and it is further

ORDERED, that defendants file an answer responding to plaintiff's complaint within 30 days of the date of this order.

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7/28/2022
DATE

BARBARA JAFFE, 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