SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART 52**
Justice

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MARINA BROWN,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION, KERDY BERTRAND

Defendant.

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INDEX NO. 157642/2020
MOTION DATE 09/30/2021
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33
were read on this motion to/for DISMISSAL

Plaintiff Marina Brown (plaintiff), a retired assistant principal, brings this employment discrimination action against defendants New York City Department of Education (DOE) and Kerdy Bertrand (Bertrand), the former principal. The amended complaint asserts causes of action for: (1) race and national origin discrimination pursuant to Executive Law § 296, the New York State Human Rights Law (NYSHRL), and Administrative Code of the City of New York (Administrative Code) §8-107, the New York City Human Rights Law (NYCHRL); (2) age and gender discrimination pursuant to the NYSHRL and the NYCHRL; (3) retaliation pursuant to the NYSHRL and the NYCHRL; and (4) discrimination and retaliation pursuant to the NYCHRL, based on taking medical leave.

Defendants now move to dismiss the amended complaint pursuant to CPLR 3211 (a) (5) and (7).

I. Background

The following allegations are taken from the amended complaint and are presumed true for purposes of the instant motion.

Plaintiff, who is Antiguan, was employed with the DOE for 34 years, with the last 18 years of her career spent as an assistant principal at PS/IS 109. NYSCEF doc no. 15, Amended Complaint at ¶¶ 7, 10. In May 2017, she received a doctoral degree in education. *See id.* at ¶ 10. Plaintiff was tenured and "routinely . . . received satisfactory/meets expectations – the highest ranking for tenured teachers – from the DOE." *Id.*. Prior to her last year of employment, plaintiff had never been "written-up." *See id.* at ¶ 7.

Plaintiff states that, despite her experience and qualifications, she was routinely passed over for promotion in favor of younger men who were born in the United States. *See id.* at ¶ 11. She alleges that for the 2016-2017 academic school year, she was passed over for the principal position in favor of Bertrand. *See id.* at ¶ 13. She also states that on a previous, unspecified occasion, she was passed over for the same position in favor of Bertrand's predecessor, Dwight Chase (Chase). *See id.* at ¶ 12. When Chase was hired, plaintiff "was [allegedly] told by a DOE official that the DOE wanted a man for the position." *Id.* According to plaintiff, Bertrand and Chase were both "younger male[s] born in the United States with less experience and fewer qualifications than [she]." *Id.* at ¶¶ 12, 13.

In 2016, when Bertrand became principal, plaintiff alleges that she "was still involved with a complaint of discrimination" following "unwarranted disparate treatment and improper abuse by Chase." *Id.* at ¶ 15. The amended complaint does not specify the nature of this alleged "disparate treatment and improper abuse" and is silent as to when plaintiff made the complaint and to whom. *Id.* However, plaintiff alleges that, from the outset of his tenure as principal, Bertrand, who

socialized with Chase, continued the disparate treatment begun by Chase (*see id.* at ¶ 14, 17), "relegating her to an 'office' that was essentially a converted closet." I*d.* at ¶ 14.

In the Spring of 2018, plaintiff informed Bertrand that she would be seeking other opportunities, to which he allegedly responded "that she was not going anywhere and that he expected her back at 109 in September." *Id.* at ¶ 18.

On August 27, 2018, at the commencement of the following school year, Bertrand assigned plaintiff an excessive workload, "which included not only all of her old responsibilities with new additions, but material responsibilities that had been assigned to other individuals – including all of the testing responsibilities that had been completed as the sole primary responsibility of a single individual." *Id.* at ¶ 19. The following day, "[plaintiff] had a Level 1 principal interview, a fact known to Bertrand." *Id.* at ¶ 20. "[I]n early September," after discussing the excessive workload with her union, plaintiff "filed a complaint of discrimination with the DOE's Office of Equal Opportunity & Diversity [OEOD], a complaint about which Bertrand was made aware by a member of that office." *Id.* at ¶ 21. "Thereafter, . . . the harassment [allegedly] increased and the hostile work environment got worse." *Id.* at ¶ 22.

Plaintiff had a Level II interview for the principal position on September 12, 2018. *See id.* at ¶ 23. According to plaintiff, "[a]s a matter of course within the DOE, when a long-standing assistant principal is given a Level II interview, the job/promotion is essentially a given" and "[o]nly a negative review from the Assistant Principal's then-current Principal or some other intervening bad act by the Assistant Principal would . . . derail the candidacy." *Id.* at ¶ 24. However, "[t]hat position was once again filled by a younger male candidate." *Id.* at ¶ 83. As she had committed no bad acts, plaintiff surmises that "Bertrand made good on his threats from the Spring of 2018 and ensured that [she] was not going anywhere." *Id.* at ¶ 24.

On or about September 28, 2018, plaintiff received a written notice of complaint, directing her and her union representative to meet with Bertrand on October 2, 2018 regarding "the completion of the Middle School Quality Initiative (MSQI) tests." *Id.* at ¶¶ 26, 28. The administration of the MSQI tests was one of the new responsibilities that Bertrand had assigned to plaintiff that year. Plaintiff states that, as she was given no guidance for its administration, "she had to take the time to research the proper methodology and speak with the individuals at MSQI who approved her plans for the administration of their test." *Id.*

Shortly thereafter, "in an apparent effort to undermine [her], Bertrand . . . instructed the teachers not to follow the directions of the litera[c]y coach" that plaintiff had brought to the school. *Id.* at ¶ 27 (incorrectly labeled as a duplicate ¶ 26). Then, on October 16, 2018, Bertrand placed two disciplinary letters in plaintiff's file. The first "chastised [plaintiff] for allegedly not adhering to his personal timeline for submitting her annual goals—which were in fact submitted." *Id.* The second dealt with the completion of the MSQI tests, previously discussed at the October 2, 2018 conference. Plaintiff submitted written rebuttals to both letters. *See id.* at ¶ 28.

On October 23, 2018, plaintiff was in a car accident, "which caused a significant and ongoing knee injury" and caused her to miss time from work. *Id.* at ¶ 29. Less than two weeks later, on November 5, 2018. *Id.* at ¶ 32, "Bertrand again had [plaintiff] and her union representative meet with him," claiming that "she had not submitted weekly agendas that met his criteria." *Id.* at ¶¶ 30, 32.

On November 26, 2018, Bertrand again wrote-up plaintiff. This time, he criticized the content of a presentation that she had prepared. According to plaintiff, the form and content of her presentation "had been explicitly approved and promulgated by the DOE" and "the reactions and

responses on the post-presentation questionnaire were incredibly positive." She submitted a written rebuttal. *See id.* at ¶ 31.

On December 3, 2018, Bertrand inserted two additional disciplinary letters into plainitff's file, addressing the same issue raised at the November 5, 2018 conference, claiming "that [plaintiff] had not completed necessary observations in a timely manner," which she denied. *Id.* at ¶ 32.

Plaintiff claims that she "had significantly more duties and responsibilities than were foisted upon the materially younger and less experienced assistant principal of non-Antiguan background who had not complained of discrimination." *Id.* at ¶ 34. In addition, she claims that "the other Assistant Principal—who was significantly younger than [plaintiff]; had never been an Assistant Principal before being brought into PS 109 by Bertrand; and had not complained of discrimination—was not subject to such scrutiny and was not written-up in the same manner." *Id.* at ¶ 30.

On January 14, 2019, plaintiff had a Level I interview for another principal position. Although she advanced to a Level II interview at the end of January 2019, she was denied the position. Plaintiff attributes this to "Bertrand continu[ing] to fulfill his abusive promise." *Id.* at ¶ 38.

During this time, plaintiff's knee grew increasingly painful and "even Bertrand told her she should get it checked by her doctor." *Id.* at ¶ 39. In early February 2019, she had knee surgery, which was followed by pre-approved medical leave. *See id.* at ¶ 40.

The day after returning from leave, she received a written notice "that she was required, once again, with her union representative to meet with Bertrand for a disciplinary conference . . . on March 12, 2019." *Id.* at ¶ 41. At the conference, "Bertrand asserted that [plaintiff] had been

out of work too many days even while verbally acknowledging that all of [her] absences were preapproved and medically supported." *Id.* at ¶ 42. Bertrand also allegedly stated "7 of her 25 'absences' . . . accounted for only a combined 50 minutes and were not an issue because she was never given compensation time for the extended days of Mondays and Tuesdays[,] which is mandatory for teachers and not for Assistant Principals." *Id.* Plaintiff states that she had been denied compensation for working these extended periods for three years and that, "[u]pon information and belief, the other younger Assistant Principals who were not from Antigua, were not denied compensation due and owing to them for work conducted on behalf of the DOE." *Id.* at ¶ 43.

Plaintiff states that, on March 26, 2019, unable to withstand "the harassment, retaliation and hostile work environment," she "was forced to submit notice of her intent to retire at the end of the school year." *Id.* at ¶ 44.

On May 15, 2019, Bertrand put a disciplinary letter in plaintiff's file, based on the disciplinary conference of March 12, 2019. In this letter, he allegedly claimed that "because of her medically required and approved absences . . . she had not timely completed various observations." *Id.* at ¶ 45. Plaintiff submitted a written rebuttal, asserting that she had completed all of her observations. *Id.* at ¶¶ 45, 46. On May 28, 2019, Bertrand placed another disciplinary letter in plaintiff's file, repeating his claims about the incomplete observations. *Id.* at ¶ 47.

Plaintiff also claims that Bertrand manipulated and falsified observations, including those that she prepared, to harass and improperly discipline another older female of the DOE. *See id.* at ¶¶ 35, 45, 47.

In addition, she alleges that Bertrand tried to damage her reputation by attempting to cancel the Senior Class Trip. *See id.* at ¶ 48. Bertrand's staff made the bus reservations, while plaintiff

finalized the rest of the details. *See id.* However, on the day of the trip, the buses were cancelled. According to plaintiff, she and another teacher were able to secure alternate transportation. *See id.* Bertrand allegedly commended the other teacher's efforts but ignored plaintiff's. *See id.*

On June 21, 2019, Bertrand issued plaintiff a U rating on her annual employment review. *See id.* at ¶ 51. Bertrand issued an amended review on July 7, 2019, also with a U rating. *See id.* at ¶ 52. Plaintiff claims that "Bertrand issued these reviews and the U ratings with the specific knowledge that they would preclude [her] from working in any F status position or any summer positions, as well as materially detrimentally impact any other future employment opportunities within and outside the DOE." *Id.* at ¶ 53.

On September 18, 2020, plaintiff commenced the instant action, alleging that she had been constructively discharged after being subjected to discrimination, retaliation, and a hostile work environment.

II. Analysis

As a preliminary matter, defendants urge the Court to disregard plaintiff's opposition brief, because, at 9,310 words, it exceeds the 7,000-word limit of the Uniform Rules for Trial Courts § 202.8-b. They also assert that plaintiff's opposition brief lacks the requisite certification of compliance with the word count limit. *See* 22 NYCRR 202.8-b (c). However, in the interest of justice, the Court waives the word limit and considers the merits of the parties arguments. *See* 22 NYCRR 202.1 (b); *see e.g. Hasfurter v Morris*, 75 Misc 3d 222, 230, 2022 NY Slip Op 22086 (Sup Ct, Erie County 2022) (noting that the defendant's "reliance [on 22 NYCRR 202.8-b was] a rather slender reed upon which to deny relief" to the plaintiff and that, "in any event, it [was] a defect curable *sua sponte* by the court waiving the word limit").

A. Construction of the NYSHRL as Amended

The parties appear to be unaware that, in August 2019, the NYSHRL was amended. Among the changes was a revision of the law's construction provision:

> The provisions of this article shall be construed liberally for the accomplishment of the *remedial* purposes thereof, *regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed. Exceptions to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct.* L 2019, ch 160, § 6 (new language emphasized); Executive Law § 300.

This amendment went into effect on August 12, 2019, before the commencement of the instant action and is, therefore, applicable. *See* L 2019, ch 160, §16.

Due to the recency of the amendment, case law is largely nonexistent. However—because the language added to the construction provision (Executive Law § 300) is nearly identical to the NYCHRL's construction provision, which was adopted as part of the Local Civil Rights Restoration Act of 2005 (Restoration Act) (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009] [discussing the impact of the revisions to the NYCHRL])—cases interpreting the NYCHRL provide useful guidance.

In pertinent part, the NYCHRL construction provision states as follows:

> a. The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.
>
> b. Exceptions to and exemptions from the provisions of this title shall be construed narrowly in order to maximize deterrence of discriminatory conduct. Administrative Code § 8-130 (a), (b).

The language of present-day section 8-130 (a), "the core of the [the Restoration Act]" (*Williams*, 61 AD3d at 66), was added in response to courts failing to give it distinct treatment from similarly worded state and federal laws (*see id.* at 66-68). "As a result of this revision, the

[NYCHRL] now explicitly requires an independent liberal construction analysis in all circumstances, even where state and federal civil rights laws have comparable language." *Williams*, 61 AD3d at 66. In addition, its guidance, "that the NYCHRL should be construed liberally to accomplish *its remedial purpose*," requires that "the NYCHRL [be construed] 'broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.'" *Makinen v City of New York*, 30 NY3d 81, 88 (2017) (emphasis added), quoting *Albunio v City of New York*, 16 NY3d 472, 477-478 (2011).

Prior to this amendment, the standards for recovering under the NYSHRL, which forbids many of the same practices as Title VII of the Civil Rights Act of 1964 (Title VII), had generally been the same as those for recovering under Title VII. *See Rainer N. Mittl, Opthamologist, P.C. v New York State Div. of Human Rights,* 100 NY2d 326, 330 (2003). The amendment of the NYSHRL's construction provision expressly rejects the earlier approach. As the nearly identical language of the NYCHRL has been held to require "an independent liberal construction analysis" (*Williams*, 61 AD3d at 66) that "broadly . . . favor[s] discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Makinen*, 30 NY3d at 88) [internal quotations and citation omitted]), the same treatment must now be given to the NYSHRL.

B. Statutes of Limitations

Defendants contend that plaintiff's claims against Bertrand and the DOE are partially time-barred by the three-year and the one-year statutes of limitations, respectively. They argue that because she commenced the instant action after the COVID-19-related Executive Orders tolled all statutes of limitations from March 20, 2020 to November 3, 2020, any claims arising before March 20, 2017 are time-barred as against Bertrand and any claims arising before March 20, 2019 are time-barred as against the DOE.

Plaintiff responds that her claims benefit from an additional toll on the statutes of limitations. She claims that, on March 18, 2020, she filed a complaint with the Equal Employment Opportunity Commission (EEOC), which issued a right-to-sue letter on October 20, 2020. *See* NYSCEF Doc No. 30, Plaintiff's Opposition at 12-13.[1] This, she argues, tolled the statutes of limitations, rendering any claims arising on or after March 18, 2019 timely as against the DOE and any claims arising on or after March 18, 2017 timely as against Bertrand. In addition, plaintiff argues that, to the extent her hostile work environment and retaliation claims against the DOE are based on acts predating March 18, 2019, these claims are timely under the "continuing violation doctrine," because of: (1) "the DOE's pattern and practice of passing over [plaintiff] for less qualified, younger males" (*id.* at 14) and (2) "the overall pattern of harassment and disparate treatment," as compared with the treatment of the younger, non-Antiguan assistant principal, commencing with the assignment of the excessive workload in the fall of 2018, followed by frequent write-ups, and culminating in the U rating (*id.* at 15). At the very least, plaintiff argues, events that fall outside the statutes of limitations may be used as background evidence.

Defendants reply that the continuing violation doctrine is inapplicable, even under the more generous NYCHRL, because all of the alleged discriminatory conduct consists of discrete acts.

On a CPLR 3211 (a) (5) motion to dismiss, "a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff." *Benn v Benn*, 82 AD3d 548, 548 (1st Dept 2011) (internal quotation marks and citation omitted). Upon such a showing, "the burden shift[s] to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually

[1] Plaintiff makes no mention of this EEOC filing in the amended complaint.

commenced the action or interposed the subject cause of action within the applicable limitations period." *Bailey v Peerstate Equity Fund, L.P.*, 126 AD3d 738, 740 (2d Dept 2015) (internal citations omitted). "[P]laintiff's submissions in response to the motion must be given their most favorable intendment." *Benn*, 82 AD3d at 548 (internal quotation marks and citation omitted).

Generally, the statute of limitations for claims brought under the NYSHRL and the NYCHRL is three years. *See* CPLR 214 (2); Administrative Code § 8-502 (d). However, when such claims are brought against the DOE, the applicable statute of limitations is one year. *See* Education Law § 3813 (1), (2–b); *Campbell v New York City Dept. of Educ.*, 200 AD3d 488, 488 (1st Dept 2021).

The continuing violation doctrine permits consideration "of all actions relevant to [a] claim, including those that would otherwise be time-barred," so long as such actions are part of "a single continuing pattern of unlawful conduct extending into the [limitations] period immediately preceding the filing of the complaint." *James v City of New York*, 144 AD3d 466, 467 (1st Dept 2016) (internal quotation and citation omitted).

For federal law and NYSHRL claims, the doctrine's applicability has been limited to hostile work environment claims (i.e. harassment claims). *See Williams*, 61 AD3d at 72 (discussing the impact of *National R.R. Passenger Corp. v Morgan*, 536 US 101 [2002]; *see also Sotomayor v City of New York*, 862 F Supp 2d 226, 250 (ED NY 2012), *affd* 713 F3d 163 (2d Cir 2013) (explaining that the standard for applying the continuing violation doctrine under NYSHRL is governed by *National R.R. Passenger Corp.*). The Supreme Court has explained that this is because a hostile work environment "cannot be said to occur on any particular day" and "a single act of harassment may not be actionable on its own," whereas each discrete discriminatory or

retaliatory act—"such as termination, failure to promote, denial of transfer, or refusal to hire"—"starts a new clock." *National R.R. Passenger Corp.*, 536 US at 113, 114, 115.

For NYCHRL claims, there is no such limitation on the applicability of the doctrine. Because "the Restoration Act's uniquely remedial provisions are consistent with a rule that neither penalizes workers who hesitate to bring an action at the first sign of . . . suspect[ed] . . . discriminatory trouble nor rewards [employers] that discriminate by insulating them from challenges to their unlawful conduct that continues into the limitations period," NYCHRL discrimination claims receive the benefits of the doctrine. *Williams*, 61 AD3d at 72-73; *Center for Independence of the Disabled v Metropolitan Transp. Auth.*, 184 AD3d 197, 201 (1st Dept 2020) (explaining that "the reach of the continuous violation doctrine under the NYCHRL is broader than under either federal or state law" because of the law's "mandate that it 'be construed liberally for the accomplishment of [its] uniquely broad and remedial' purposes") (internal citation omitted). "Under the NYCHRL, . . . it has long been recognized that continuing acts of discrimination within the statutory period will toll the running of the statute of limitations until such time as the discrimination ends." *Center for Independence of the Disabled*, 184 AD3d at 200-201. As Executive Law § 300 also mandates that NYSHRL "be construed liberally for the accomplishment of [its] remedial purposes," a more generous application of the doctrine is appropriate. In any event, plaintiff "is not precluded from using the prior acts as background evidence in support of a timely claim." *Jeudy v City of New York,* 142 AD3d 821, 823 (1st Dept 2016) (internal quotation and citation omitted).

Here, plaintiff's claims benefit from the series of Executive Orders that, due to the COVID-19 pandemic, tolled the time limits for the commencement of any legal action from March 20, 2020 through November 3, 2020. *See* Executive Orders (Cuomo, A.) Nos. 202.8 (9 NYCRR

8.202.8), 202.67 (9 NYCRR 8.202.67), 202.72 (9 NYCRR 8.202.72). As such, all claims arising on or after March 20, 2017 are timely as against Bertrand (*see* CPLR 214 [2]; Administrative Code § 8-502 [d]) and all claims arising on or after March 20, 2019 are timely as against the DOE (*see* Education Law § 3813 [1], [2–b]). Moreover, assuming that plaintiff's statements regarding her EEOC filing are true (*see Benn*, 82 AD3d at 548), this also tolled the limitations periods (*see E.E.O.C. v Bloomberg L.P.*, 967 F Supp 2d 816, 831 [SD NY 2013] ["(t)he limitations period (for NYSHRL and NYCHRL claims) tolls . . . during the period in which a complaint is filed with the EEOC and the issuance by the EEOC of a right-to-sue letter"]). Therefore, claims arising on or after March 18, 2017 are timely as against Bertrand and claims arising on or after March 18, 2019 are timely as against the DOE. Plaintiff makes no further attempt to rebut defendants' prima facie showing of the applicability of the statutes of limitations to her discrimination claims. Therefore, to the extent they are premised on acts outside these limitations periods, the discrimination claims are time-barred.

To the extent that plaintiff's hostile work environment and retaliation claims against the DOE are premised on the failure to promote, the claims are time-barred. The last alleged act occurred before March 18, 2019. *See* NYSCEF doc. no. 15 at ¶ 38 (alleging that plaintiff "advanced to a Level II Interview at the end of January 2019 . . . but was nonetheless denied the position"). The continuing violation doctrine is inapplicable where there are no allegations of unlawful conduct extending into the limitations period. Therefore, these claims are time-barred. *See Williams*, 61 AD3d at 81 (1st Dept 2009) (finding that the continuing violations doctrine was inapplicable, where "there [was] no connection to actionable conduct during the limitations period").

To the extent that the hostile work environment and retaliation claims against the DOE are premised on allegations of excessive workload, scrutiny and discipline, the claims are timely. Even under the pre-amendment NYSHRL, similar allegations have been deemed sufficient to state timely claims for retaliation and hostile work environment under the continuing violation doctrine.

For example, in *Ferraro v New York City Dept. of Educ.*, the trial court dismissed the NYCHRL and the NYSHRL claims of discrimination, retaliation and hostile work environment against the DOE, only to be reversed by the Appellate Division, First Department. *See* 2012 WL 11922944 (Sup Ct, NY County, Sept. 5, 2012, No. 100229-2012), *revd* 115 AD3d 497 (1st Dept 2014). Those claims were based on allegations that plaintiff had received a series of advisory letters, was summoned to a disciplinary conference, and was reassigned from teaching first grade to second grade. The motion court in *Ferraro* found that to the extent the claims were premised on the advisory letters, which had been issued more than one year prior to commencement of the action, they "[were] too remote in time to survive." *Ferraro*, 2012 WL 11922944. The First Department reversed, finding that, "it [could not] be said, as a matter of law, that these acts, if proven, were not part of a single continuing pattern of unlawful conduct extending into the one-year period immediately preceding the filing of the complaint." *Ferraro*, 115 AD3d at 497-498 (internal citation omitted); *Petit v Department of Educ. of the City of N.Y.*, 177 AD3d 402, 403-404 (1st Dept 2019) (applying the continuing violation doctrine and finding that, on a pre-answer, pre-discovery motion to dismiss, the "the complaint state[d] [timely] causes of action for discrimination, retaliation and hostile work environment in violation of the New York State and New York City Human Rights laws," where it alleged that plaintiff, who had no previous performance issues, was subjected to false accusations of misconduct by the new principal, was

moved to an inferior office and demoted based on his Haitian origin, even though some of the acts were outside the one-year limitations period).

Here, the complaint alleges that Bertrand assigned plaintiff an excessive workload at the beginning of the 2018-2019 school year and then subjected her to constant discipline for failure to timely/satisfactorily complete all of her assigned duties. It is alleged that this pattern of discipline continued until the end of the school year, with two of the disciplinary letters being placed in her personnel file within the one-year limitations period. *See* NYSCEF doc. no. 15 at ¶¶ 45, 47. In addition, the U rating was also given within the limitations period. *See id.* at ¶¶ 51, 52. Giving these allegations the benefit of every favorable inference, the alleged discriminatory conduct is sufficiently similar to be considered part of a "single continuing pattern of unlawful conduct extending into the one-year period immediately preceding the filing of the complaint." *Ferraro*, 115 AD3d at 497-498; *Sotomayor*, 862 F Supp 2d at 251) (finding that allegations of discriminatory observations, negative performance ratings, and disciplinary letters over the course of two school years rendered acts falling outside the limitations period timely for purposes of plaintiff's NYCHRL discrimination and NYSHRL hostile work environment claims against the DOE). Therefore, to the extent plaintiff's hostile work environment and retaliation claims against the DOE are premised on allegations of excessive work, scrutiny and discipline that predate March 18, 2019, the claims are timely.

However, plaintiff's constructive discharge claim against the DOE is not subject to the above analysis. The claim accrued on March 26, 2019, when plaintiff submitted her notice of retirement. *See* NYSCEF doc. no. 15 at ¶ 44; *see Clark v State of New York*, 186 Misc 2d 896, 899-900, NY Slip Op 21082 (Sup Ct, Oneida County 2001), citing *Flaherty v Metromail Corp.*, 235 F3d 133 (2d Cir 2000). None of the alleged acts of harassment that occurred after this date

may be considered in establishing the claim. *See Dhar v City of New York*, 204 AD3d 976, 977 (2d Dept 2022) (dismissing a constructive discharge claim where the allegations "pertain[ed] to events that occurred after the plaintiff resigned"). As such, there "is no connection to actionable conduct during the limitations period" to render the pre-limitations period conduct timely. *Williams*, 61 AD3d at 81. As all allegations of harassment underlying the constructive discharge claim against the DOE are time-barred, the constructive discharge claim is dismissed as against the DOE only. The constructive discharge claim survives as against Bertrand, given the applicable three-year statute of limitations.

For the foregoing reasons, defendants' motion to dismiss plaintiff's claims as time-barred is granted to the extent of dismissing all claims against Bertrand that accrued prior to March 18, 2017. The motion is also granted with respect to claims against the DOE, to the extent of dismissing (1) the NYSHRL and NYCHRL discrimination claims that are premised on acts committed *before* March 18, 2019; (2) the hostile work environment and retaliation claims that are premised on failure to promote; and (3) the constructive discharge claim.

C. Sufficiency of the Claims

"[O]n a motion to dismiss a complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true." *Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 (1st Dept 2004). The court is not permitted "to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action." *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003). "In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards," such that a plaintiff "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).

1. Discrimination, Hostile Work Environment, and Constructive Discharge under the NYSHRL and the NYCHRL (First and Second Causes of Action)

Defendants contend that plaintiff's discrimination claims must be dismissed because the complaint fails to allege actionable conduct under the NYCHRL or conduct that constitutes an adverse employment action under the NYSHRL. Concerning the hostile work environment claims, defendants contend that plaintiff's allegations of harassment are either conclusory or describe conduct that amounts to nothing more than nonactionable petty slights and trivial inconveniences, under either NYSHRL or NYCHRL. In addition, they argue that the discrimination and the hostile work environment claims fail, because the amended complaint does not allege any facts to support the conclusion that any of the work conditions about which plaintiff complains were imposed on her because of her protected status. Lastly, they argue that, because a constructive discharge claim requires a showing of even more severe conditions than a hostile work environment claim, it too must fail.

Plaintiff counters that her allegations of a disproportionate workload, the constant stream of disciplinary letters, and the U rating constitute adverse employment actions under the NYSHRL. In addition, she argues that since she alleges that the similarly situated assistant principal who was non-Antiguan and younger was not targeted in this way, this permits an inference of discriminatory animus. She also argues that the four alleged instances of failure to promote also constitute adverse employment action and that her allegations—that she was passed over in favor of younger, non-Antiguan males and that, on one occasion, she was told that the DOE was looking for a man—sufficiently allege discriminatory animus. Lastly, plaintiff argues that all of these allegations are

sufficient to state a discrimination claim under the broader scope of NYCHRL as well as to support her hostile work environment and constructive discharge claims under NYCHRL and NYSHRL.

Pre-amendment, to state a discrimination claim under the NYSHRL, a plaintiff had to allege:

> (1) that he/she [was] a member of a protected class, (2) that he/she was qualified for the position, (3) that he/she was subjected to an adverse employment action . . . , and (4) that the adverse . . . treatment occurred under circumstances giving rise to an inference of discrimination. *Harrington v City of New York*, 157 AD3d 582, 584 (1st Dept 2018) (internal citations omitted).

As with federal discrimination claims, pre-amendment, a plaintiff was required to allege an adverse employment action:

> An adverse employment action requires a materially adverse change in the terms and conditions of employment. To be "materially adverse" a change in working conditions must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." . . . "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Messinger v Girl Scouts of the U.S.A.*, 16 AD3d 314, 314-315 (1st Dept 2005) (internal citations omitted).

"'[R]eprimands and excessive scrutiny do not constitute adverse employment actions in the absence of other negative results such as a decrease in pay or being placed on probation.'" *Mejia v Roosevelt Is. Med. Assoc.*, 95 AD3d 570, 572 (1st Dept 2012), quoting *Hall v New York City Dept. of Transp.*, 701 F Supp 2d 318, 336 (ED NY 2010). However, as will be made clear below, an adverse employment action may no longer be necessary to state a discrimination claim under the NYSHRL.

The elements of a NYCHRL discrimination claim are nearly identical to those of a pre-amendment NYSHRL claim, with the exception that plaintiff need only allege that she "was treated differently or worse than other employees." *Harrington*, 157 AD3d at 584. "The text of the [NYCHRL] does not set forth a requirement that an adverse action be 'materially' adverse." *Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 202 n 4 (1st Dept 2015); Administrative

Code §8-107. As such, following the adoption of the Restoration Act, with its "require[ment] to consider a broad construction of the [NYCHRL,] . . . the [NYCHRL] does not require that a plaintiff suffer a materially adverse employment action in order to succeed in an anti-discrimination action . . . ." *O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83, 91 (1st Dept 2017); *Sotomayor*, 862 F Supp 2d at 258 (explaining that, "[i]n light of the broad purpose of the NYCHRL, unlike under state and federal law, plaintiff need not show that an employment action was materially adverse").

Just as the "materially adverse" requirement is absent from the NYCHRL, it is also absent from the text of the NYSHRL. Executive Law § 296. Therefore, applying the directive to construe NYSHRL "liberally for the accomplishment of [its] remedial purposes" (Executive Law § 300; *Matter of Scanlan v Buffalo Pub. School Sys.*, 90 NY2d 662, 676 [1997] ["(r)emedial statutes, of course, should be construed broadly so as to effectuate their purpose"]) and following the guidance of cases applying the Restoration Act, a plaintiff pursuing a discrimination claim under the NYSHRL need not show a materially adverse change "in terms, conditions or privileges of employment" (Executive Law § 296 [1] [a]).

The standard for a hostile work environment claim under the NYCHRL is the same as for a discrimination claim. Plaintiff need only allege that she was "treated less well than other employees because of her protected status." *Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 (1st Dept 2013). "[The] contention that the behavior was a petty slight or trivial inconvenience constitutes an affirmative defense, which should be raised in the defendants' answer, and does not lend itself to a pre-answer motion to dismiss." *Kaplan v New York City Dept. of Health & Mental Hygiene,* 142 AD3d 1050, 1051 (2d Dept 2016), citing *Williams*, 61 AD3d at 80. In addition,

"questions of 'severity' and 'pervasiveness' are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability." *Williams*, 61 AD3d at 76.

Prior to the 2019 amendment, to state a claim for hostile work environment under the NYSHRL, plaintiff had to allege that the complained-of conduct was "severe and pervasive." *Campbell*, 200 AD3d at 489 (internal quotation and citation omitted). However, effective October 11, 2019 (*see* L 2019, ch 160, §§ 2, 16 [b], [d]), a hostile work environment claim under the NYSHRL now mirrors that of the NYCHRL. In pertinent part, Executive Law § 296 (1) (h) states that harassment is actionable "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims." Plaintiff need only allege that she was subjected to "inferior terms, conditions or privileges of employment because of the individual's membership in one or more of the[] protected categories." Executive Law § 296 (1) (h). In addition, under the amended NYSHRL, plaintiff need not "demonstrate the existence of an individual to whom the employee's treatment must be compared" and the contention "that the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences" is now an "affirmative defense to liability." *Id.*

To state a claim for constructive discharge, plaintiff must show that defendants "deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign." *Crookendale v New York City Health & Hosps. Corp.*, 175 AD3d 1132, 1132 (1st Dept 2019) (internal quotation marks and citation omitted).

Here, the parties do not dispute that the first two elements of a NYSHRL discrimination claim are satisfied. Plaintiff is a member of a protected class based on race, national origin, age, and gender and she was qualified for her position. The amended complaint also sufficiently alleges

that plaintiff suffered adverse employment action, even under the pre-amendment NYSHRL. Plaintiff alleges that the disproportionate workload and disciplinary letters culminated in a U rating, which "preclude[s] [her] from working in any F status position or any summer positions." NYSCEF doc. no. 15 at ¶¶ 53, 63. She alleges that prior to the U-rating, she was eligible for such positions with the DOE after she retired and now she is not. *See id.* at ¶ 63. If true, this is a detrimental change.

Therefore, assuming the truth of plaintiff's allegations and giving her the benefit of every favorable inference, as the Court must do on a motion to dismiss, this is sufficient to allege an adverse employment action, even under the pre-amendment NYSHRL. *Compare Marquart v Department of Educ. of the City of N.Y.*, 2017 NY Slip Op 31363(U), **7 (Sup Ct, NY County 2017) (finding that allegations of a U rating, a heavier workload, and a denial of a transfer request, "in total, sufficiently plead[ed] an adverse action in light of plaintiff's additional claims that such rating resulted in . . . lost income and pension benefits from being barred from applying for 'per session' work" and "due to being barred from a promotion"), *and Shapiro v New York City Dept. of Educ.*, 561 F Supp 2d 413, 423 (SD NY 2008) (finding that whether U ratings constituted an adverse employment action was an issue of fact, where plaintiffs demonstrated that, among other things, they were barred from applying for "'per session' [i.e. extracurricular] paid positions" and could not "work in summer school"), *with Gaffney v City of New York*, 101 AD3d 410, 410 (1st Dept 2012) (internal quotation and citation omitted) (finding that disciplinary memos and meetings, threats of unsatisfactory ratings, and assignment of "nonsupervisory tasks ordinarily performed by teachers," did not constitute adverse employment actions, where plaintiff received a satisfactory performance rating and "none of the [alleged] reprimands resulted in any reduction in pay or privileges"); *see also Feingold v New York*, 366 F3d 138, 153 (2d Cir 2004) (finding

plaintiff established a *prima facie* case of discrimination based on two adverse employment actions, including "the assignment of a disproportionately heavy workload").

Plaintiff also sufficiently alleges adverse employment actions when she alleges that she was denied compensation for working extended periods on Mondays and Tuesdays for three years (*see* Executive Law §296 [1] [a]) and that she was repeatedly denied promotion (*see Jeudy*, 142 AD3d at 823 [finding that plaintiff sufficiently alleged an adverse employment action "by alleging that management had a standing practice of refusing to promote foreign-accented criminalists"]).

Having determined that the foregoing allegations satisfy the adverse employment action prong of a discrimination claim under the pre-amendment NYSHRL, such allegations are certainly sufficient to support a discrimination claim under the current NYSHRL and the more liberal NYCHRL. *See Williams*, 61 AD3d at 66-67 (explaining that "state or federal provisions worded similarly to [NYCHRL] . . . are viewed as a floor below which the [NYCHRL] cannot fall . . ."); *see also Vig*, 67 AD3d at 147 (noting that "it [was] likely that even if plaintiff had been found not to have stated a cause of action [for discrimination] under the [NYSHRL], he would have stated a cause of action under the [NYCHRL]"); *see e.g. Campbell*, 200 AD3d at 489 (finding that "the allegations that [the defendant] made disparaging comments about plaintiff's race on a few occasions, while issuing several write-ups and ultimately transferring her to another school, could support plaintiff's allegation that she was treated 'less well' . . . under the [NYCHRL]").

The Court now turns to the final element of plaintiff's discrimination claims, discriminatory animus. "[C]ircumstances that give rise to an inference of discrimination . . . include actions or remarks made by decisionmakers that could be viewed as reflecting a discriminatory animus and preferential treatment given to employees outside the protected class." *Mejia v Roosevelt Is. Med. Assoc.*, 31 Misc 3d 1206(A), 2011 NY Slip Op 50506(U), *4 (Sup Ct,

NY County 2011), *affd* 95 AD3d 570 (1st Dept 2012) (internal quotation and citations omitted); *Sotomayor*, 862 F Supp 2d at 254 (internal quotation and citation omitted) ("[a] showing of disparate treatment—that is, a showing that the employer treated plaintiff less favorably than a similarly situated employee outside his protected group—is a recognized method of raising an inference of discrimination for purposes of making out a *prima facie* case"). Here, concerning plaintiff's discrimination claims based on race, age and gender, plaintiff fails to allege facts that permit an inference of discriminatory animus.

Concerning race, the amended complaint merely alleges in a conclusory manner that plaintiff was subjected to discrimination based on race. *See* NYSCEF doc. no. 15 at ¶¶ 60, 65. Without any factual allegation to support this contention, this claim cannot survive. *See Thomas v Mintz*, 182 AD3d 490, 490-491 (1st Dept 2020) (dismissing race and gender discrimination claims where the complaint "[did] not allege facts that would establish that similarly situated persons who were male or were not of African American descent were treated more favorably than plaintiff was" and, "[i]nstead, . . . merely assert[ed] the legal conclusion that defendants' adverse employment actions and plaintiff's termination were due to race and gender"); *see also Barnes v Hodge*, 118 AD3d 633, 633 (1st Dept 2014) (internal quotation and citation omitted) ("conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss").

The allegations concerning age also fail to provide sufficient specificity to permit an inference of discriminatory motive. At no point does plaintiff allege her age, the age of the other older DOE employees who were allegedly also targeted by Bertrand, or the age of the other, "significantly younger" (NYSCEF doc. no. 15 at ¶ 30) assistant principal. As such the amended complaint fails to state a claim for age discrimination. *See Campbell*, 200 AD3d at 489 (finding

that plaintiff's age discrimination claims "were properly dismissed" where "[p]laintiff fail[ed] to state her age or the ages of her coworkers who she allege[d] were paid more than she"); *Massaro v Dept. of Educ. of City of N.Y.*, 121 AD3d 569, 570 (1st Dept 2014) (finding that the plaintiff's "allegations that she was 51 years old and was treated less well than younger teachers [were] insufficient to support her claims" for age discrimination and hostile work environment under the NYSHRL and the NYCHRL).

Plaintiff's gender discrimination claims also fail to allege discriminatory animus. The amended complaint alleges that: plaintiff was passed over for promotion on four occasions (amended complaint at ¶¶ 12, 13); in three instances she was passed over in favor of a younger male (*id.* at ¶¶ 11-13, 83); and that, on one of these occasions, "she was told by a DOE official that the DOE wanted a man for the position" (*id.*, ¶ 12). While these allegations support an inference of gender discrimination against the DOE, as discussed above, these claims are time-barred as against the DOE. Concerning Bertrand, while the amended complaint alleges that he was behind the last two denials of promotion, it does not allege any facts to indicate that Bertrand was motivated by considerations of gender. As such, the complaint fails to state a claim for gender discrimination against Bertrand. *See Thomas*, 182 AD3d at 490-491.

Plaintiff's failure to plead discriminatory animus is fatal to her race, age and gender discrimination claims under both NYSHRL and the NYCHRL. *See Toth v New York City Dept. of Citywide Admin. Services*, 119 AD3d 431, 431 (1st Dept 2014); *Massaro*, 121 AD3d at 570.

With respect to plaintiff's discrimination claims based on national origin, her allegations of discriminatory animus are largely sufficient to state the claim. The allegations—that she was given an excessive workload, subjected to heightened scrutiny and discipline, and, ultimately, given an unmerited U rating, while the other assistant principal at her school, who is not Antiguan,

was not (*see* NYSCEF doc. no. 15 at ¶¶ 30, 34)—are sufficient, at this preliminary stage of the litigation, to permit an inference of discrimination based on national origin (*see Mejia*, 31 Misc 3d at *4).

Notably, defendants argue that because the complaint alleges that the other assistant principal lacked plaintiff's experience, he/she is not similarly situated to plaintiff and no inference of discrimination can arise from their disparate treatment.[2] A similar argument was accepted in *Matter of McIntosh v Department of Educ. of City of N.Y.*, where, in dismissing the discrimination claims of and African-American teacher, the court noted that "[h]er allegations about the caucasian teachers also contain no indication that they were probationary like her, subject to the same standards as her, or engaged in conduct comparable to her own." 37 Misc 3d 12299(A), 2012 NY Slip Op 522319(U), *5 (Sup Ct, NY County 2012), *revd* 115 AD3d 464 (1st Dept 2014). The Appellate Division, First Department reversed, based on the "liberal pleading standards applicable to employment discrimination claims under the State and City Human Rights Law."115 AD3d at 464. So here, too, plaintiff's allegations are sufficient, at this preliminary state of the litigation, to state claims for discrimination based on national origin under the NYSHRL and the NYCHRL.

However, to the extent the national origin discrimination claims are based on the denial of compensation for working extended periods on Mondays and Tuesdays, the claims are insufficient. Plaintiff offers no facts permitting an inference of discriminatory animus. All she offers is her speculation, "[u]pon information and belief," that some unspecified "younger Assistant Principals who were not from Antigua, were not denied compensation due and owing to them for work conducted on behalf of the DOE." NYSCEF doc. no. at ¶ 43. This is insufficient to state a claim for discrimination. *See Thomas*, 182 AD3d at 490-491.

[2] The amended complaint does not specify the other assistant principal's gender.

Plaintiff's failure to plead discriminatory animus based on race, gender and age similarly defeats her hostile work environment claims under the NYCHRL and the NYSHRL. *See Massaro*, 121 AD3d at 570. However, plaintiff's hostile work environment claims—based on allegations that she was assigned a heavy workload, was scrutinized and micromanaged, and subjected to discipline, whereas the other assistant principal, who is not Antiguan, was not—are sufficient to state a claim that she was treated less well based on her national origin. This is all that is required to support a claim for hostile work environment under the NYCHRL and the recently amended NYSHRL. *See* Executive Law § 296 (1) (h); *Chin*, 106 AD3d at 445. To the extent that defendants contend that none of the alleged conduct amounts to anything beyond petty slights and trivial inconveniences, they are free to raise the issue as an affirmative defense in their answer. *See* Executive Law § 296 (1) (h); *Williams*, 61 AD3d at 80.

Except for their argument that a constructive discharge claim cannot survive if a claim for a hostile work environment fails, defendants do not offer any argument for its dismissal. Accordingly, having found that the amended complaint sufficiently alleges claims for hostile work environment, no plausible argument exists for dismissing the constructive discharge claim as against Bertrand. Moreover, whether a reasonable person in plaintiff's position would have felt compelled to resign after being assigned an excessive workload— "which included not only all of her old responsibilities with new additions," but also "the testing responsibilities that had been completed as the *sole primary responsibility of a single individual*" (NYSCEF doc. no. 15 at ¶ 19 [emphasis added])—and then being subjected to constant scrutiny and discipline about the timely completion of such work, the Court cannot say as a matter of law. As such, the claim for constructive discharge is sufficient to withstand the motion to dismiss. *See Fischer v KPMG Peat*

Marwick, 195 AD2d 222, 226 (1st Dept 1994) (stating that the issue of constructive discharge should be left to the trier of fact).

Notably, most of the alleged discriminatory conduct falls outside the one-year limitations period for claims against the DOE. However, the complaint alleges that plaintiff received two disciplinary letters and the U rating after March 18, 2019. *See* NYSCEF doc. no. 15 at ¶¶ 45, 47, 51, 52. These give rise to timely claims and plaintiff "is not precluded from using the prior acts as background evidence in support of a timely claim." *Jeudy,* 142 AD3d at 823 (internal quotation and citation omitted); *see also Petit*, 177 AD3d at 404.

For the foregoing reasons, defendants' motion to dismiss for failure to state a claim is granted to the extent of dismissing the NYCHRL and the NYSHRL discrimination and hostile work environment claims that are premised on age, gender, and race and to the extent they are premised on the allegation that plaintiff was denied compensation for working extended periods based on her national origin.

2. Retaliation under the NYSHRL and the NYCHRL (Third Cause of Action)

Defendants contend that the amended complaint fails to state a claim for retaliation, because disciplinary letters in plaintiff's personnel file and criticism of plaintiff's performance do not constitute action that would dissuade a reasonable person from making a charge of discrimination. Defendants also argue that the allegations do not demonstrate a causal connection between plaintiff's complaints of discrimination and the alleged adverse actions, because: (1) the allegations as to when plaintiff filed her complaints are too vague to establish temporal proximity and (2) the allegations that employees who did not complain were not disciplined are entirely conclusory.

Plaintiff responds that the disciplinary letters, which culminated in the U rating, support a claim for retaliation under both the NYSHRL and the NYCHRL. In addition, she argues that because a mere two weeks passed between the time of her filing with the OEOD and the first alleged act or retaliation, this demonstrates a causal connection between the protected action and the retaliatory conduct.

To state a claim for retaliation under the NYSHRL, a plaintiff must allege that "(1) he/she has engaged in a protected activity, (2) his/her employer was aware of such activity, (3) he/she suffered an adverse employment action based upon the activity, and (4) a causal connection exists between the protected activity and the adverse action." *Harrington*, 157 AD3d at 585 (internal citations omitted); Executive Law § 296 (7). "In the context of a case of unlawful retaliation, an adverse employment action is one which might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Reichman v City of New York*, 179 AD3d 1115, 1119 (2d Dept 2020) (internal quotation and citation omitted). Before the 2019 amendment, courts adopted the federal standard and held that only "'retaliation that produce[d] an injury or harm'" was actionable under the NYSHRL. *Reichman*, 179 AD3d at 1119, quoting *Burlington N. & S. F. R. Co. v White*, 548 US 53, 67 (2006); *Kelly v Howard I. Shapiro & Assoc. Consulting Engineers, P.C.*, 716 F3d 10, 14 (2d Cir 2013) (stating that "[t]he standards for evaluating . . . retaliation claims are identical under Title VII and the NYSHRL").

Under the NYCHRL, the elements of the claim are similar, "though rather than an adverse action, the plaintiff must show only that the defendant 'took an action that disadvantaged' him or her." *Harrington*, 157 AD3d at 585 (internal citations omitted). The NYCHRL does not require that "[t]he retaliation . . . result in an ultimate action . . . or in a materially adverse change," but

only that it "must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7). Moreover,

> In assessing retaliation claims that involve neither ultimate actions nor materially adverse changes in terms and conditions of employment, it is important that the assessment be made with a keen sense of workplace realities, of the fact that the 'chilling effect' of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities. *Williams*, 61 AD3d at 71.

In light of NYSHRL's recent amendment, advising the courts to interpret the law "liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws . . . have been so construed" (Executive Law § 300), the more liberal approach of NYCHRL should be applied is assessing retaliation claims (*see e.g. Root v City Univ. of New York*, 2021 WL 4352697, *8-*9 [Sup Ct, NY County, Sept. 24, 2021, No. 157151/2020] [applying the broader retaliation standard of the NYCHRL to a claim under the NYSHRL]).

Here, to the extent that the retaliation claim is premised on the disciplinary actions taken against plaintiff in her last year of employment, the amended complaint states claims for retaliation under the NYSHRL and the NYCHRL. It satisfies the first two elements by alleging that plaintiff engaged in a protected activity, when she filed a complaint of discrimination against Bertrand with the OEOD. *See* NYSCEF doc. no. 15 at ¶¶ 19, 21; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 (2004) (stating that a plaintiff engages in a protected activity when she "oppos(es) or complain(s) about unlawful discrimination") and that Bertrand was made aware of this "by a member of that office" (NYSCEF doc. no. 15 at ¶ 21).

As discussed above, because plaintiff alleges that the disciplinary letters culminated in the U rating, which prevents her from holding certain positions with the DOE, she sufficiently alleges that the retaliatory actions harmed her. This is adequate to plead an adverse action under the pre-amendment NYSHRL and disadvantageous action under the NYCHRL. *See contra Massaro*, 121

AD3d at 570 (finding no viable retaliation claim where the "plaintiff [did] not allege that her single 'U' rating, unaccompanied by any material negative employment consequences, would 'deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights'").

Finally, the allegations are also sufficient to support a causal connection between the protected activity and the adverse action. Plaintiff alleges that she filed her complaint in early September 2018 (*see* NYSCEF doc. no. 15 at ¶¶ 19, 21) and that "[t]he first written notice of complaint was created on or about September 28, 2018" (*id.* at ¶ 26). The brief passage of time, a matter of a few weeks, creates a temporal nexus between the protected activity and the adverse action, allowing for an inference of causation. *See Russell v New York Univ.*, 204 AD3d 577, 588 (1st Dept 2022) (holding that "[t]he temporal proximity between plaintiff's refusal to settle her discrimination claims and her termination some five weeks later support[ed] an inference that she was terminated in retaliation . . . "); *see also Teran v JetBlue Airways Corp.*, 132 AD3d 493, 494 (1st Dept 2015) (explaining that, because the plaintiff was constructively discharged shortly after making a formal sexual harassment complaint, this "permit[ed] an inference of a causal connection between her complaint and the constructive discharge"). Therefore, these allegations state a claim for retaliation under both the NYSHRL and the NYCHRL. *See Jeudy*, 142 AD3d at 823-824 (finding that the "complaint . . . state[d] a cause of action for retaliation under both the [NYSHRL and the NYCHRL]," where "[t]he allegations in the complaint establish[ed] that defendant's concerted campaign of excessive scrutiny follow[ed] plaintiff's" protected activity).

Notably, as with the discrimination claims, to the extent some of the alleged retaliatory acts occurred outside the one-year limitations period for claims against the DOE, plaintiff "is not

precluded from using the prior acts as background evidence in support of a timely claim" (*Jeudy*, 142 AD3d at 823 [internal quotation and citation omitted]; *see also Petit*, 177 AD3d at 404.

Lastly, to the extent that plaintiff's retaliation claims are premised on her much earlier complaint of discrimination made at some unspecified time during Chase's tenure as principal, but before the Fall of 2016, when Bertrand became principal (*see* NYSCEF doc. no. 15 at ¶ 15), they fail to state a claim. The complaint fails to provide "any details about the conduct complained of, to whom the complaint was made, or precisely when it was made." *Lum v Consolidated Edison Co. of N.Y., Inc.*, 209 AD3d 434, 435 (1st Dept 2022) (internal citation omitted). Absent such details, "the complaint fails to state a claim for retaliation." *Id.*

Accordingly, defendants' motion to dismiss for failure to state a claim is granted to the extent that the NYCHRL and the NYSHRL retaliation claims are premised on plaintiff's unspecified, pre-2016 complaint of discrimination.

3. Discrimination and Retaliation based on Taking Medical Leave in Contravention of NYCHRL (Fourth Cause of Action)

Defendants argue that plaintiff's fourth cause of action should be dismissed, because the amended complaint does not identify a protected class. In addition, they argue that, to the extent that plaintiff seeks to have the court infer a disability discrimination claim based on her knee injury, the allegations are simply too vague and conclusory to demonstrate a causal connection between the alleged acts of discrimination and the disability. Moreover, they argue, plaintiff does not allege that Bertrand ever made comments about her injured knee other than to express concern.

Plaintiff counters that her knee injury meets the NYCHRL's definition of "disability" and that her allegations of being written-up and summoned to a disciplinary meeting, immediately upon her return to work from post-surgery medical leave, permit an inference of discriminatory animus.

As a preliminary matter, while the fourth cause of action is entitled "Discrimination and Retaliation base on taking medical leave in contravention of [the NYCHRL]" (NYSCEF doc. no. 15 at 19), this appears to be a misnomer, as it is, in fact, a discrimination claim only. None of the essential elements of retaliation are present. The amended complaint does not identify any protected activity (*see Forrest*, 3 NY3d at 313) or retaliatory conduct. Instead, the claim speaks of "discrimination against Plaintiff based on her physical impairment and her taking of leave to address such impairment." NYSCEF doc. no. 15 at ¶ 96. The parties' arguments also treat this as a claim for discrimination only.

The allegations contained in the fourth cause of action give "fair notice" of a disability discrimination claim. *Petit*, 177 AD3d at 403 ("[f]air notice is all that is required to survive at the pleading stage."). The NYCHRL defines "disability" "purely in terms of impairments: 'any physical, medical, mental or psychological impairment, or a history or record of such impairment'." *Vig*, 67 AD3d at 147, quoting Administrative Code § 8-102. Here, the amended complaint alleges such an impairment, plaintiff's knee injury. *See* NYSCEF doc. no. 15 at ¶ 89. Any uncertainty as to the basis for the claim is further dispelled by the allegation of "Defendants' discrimination against Plaintiff based on her physical impairment and her taking of leave to address such impairment." *Id.* at ¶ 96.

The amended complaint also satisfies the other elements of a discrimination claim under the NYCHRL. *See Harrington*, 157 AD3d at 584. As discussed above, the allegations that plaintiff was wrongfully and repeatedly accused of failing to complete her work, culminating in the U rating (*see* NYSCEF doc. no. 15 at ¶¶ 39-42, 45, 47, 51, 52, 89-93), sufficiently allege that she was treated less well than other employees under the NYCHRL (*see Campbell*, 200 AD3d at 489; *Williams*, 61 AD3d at 66-67).

The amended complaint further contains sufficient factual allegations to permit an inference of discrimination based on her disability. It alleges that: (1) a day after returning from pre-approved medical leave, plaintiff was summoned to a disciplinary conference (*see* NYSCEF doc. no. 15 at ¶¶ 40, 41) at which "Bertrand asserted that [plaintiff] had been out of work too many days even while verbally acknowledging that all of [her] absences were pre-approved and medically supported" (*id.* at ¶ 42) and (2) in a later disciplinary letter placed in her file, Bertrand "acknowledged that [plaintiff's] absences were pre-approved and medically necessary," but "went on to baselessly assert that her absences had precluded her from completing her work in a timely manner" (*id.* at ¶ 45). Bertrand's express acknowledgement that the disciplinary action "was directly related to [her] disability," i.e. time missed due to her medically-necessary leave, is sufficient at this preliminary stage of the litigation, to permit an inference of discriminatory animus based on disability.

Therefore, the amended complaint sufficiently alleges a claim for disability discrimination under the NYCHRL. *See Vig*, 67 AD3d at 144, 146 (reversing dismissal of claims for disability discrimination under both the NYSHRL and NYCHRL based on the plaintiff's "failing to plead a causal link between his disability and his termination," where the "[p]laintiff sufficiently pleaded that he suffered a disability when he was injured" and the "[d]efendant's stated reason for terminating plaintiff was directly related to his disability.")

For these reasons, defendants' motion to dismiss for failure to state a claim is denied with respect to the fourth cause of action.

III. Conclusion

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent of dismissing:

1. as time-barred, all claims against defendant Kerdy Bertrand that accrued prior to March 18, 2017;

2. as time-barred, claims against defendant New York City Department of Education for:
   a. discrimination under the NYSHRL and the NYCHRL, to the extent such claims accrued before March 18, 2019;
   b. hostile work environment and retaliation, to the extent such claims are premised on failure to promote; and
   c. constructive discharge;

3. the first cause of action, to the extent it alleges race discrimination as well as to the extent it alleges that plaintiff was denied compensation for working extended periods based on her national origin;

4. the second cause of action in its entirety;

5. the third cause of action, to the extent it is premised on plaintiff's pre-2016 complaint of discrimination;

and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

1/12/2023
DATE

LESLIE A. STROTH, 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

157642/2020 BROWN, MARINA vs. NEW YORK CITY
Motion No. 002