THE UNITED STATES SUPREME COURT

LISA GINDI *Petitioner/Moving Party*

- against-

NEW YORK CITY DEPARTMENT OF EDUCATION *Defendants/Appellees*

THOMAS BENNETT, ET AL *Defendants*

John Guyette, Zachary Shapiro

New York City Law Department-Counsel

OrianaVigliotti-

NYSUT counsel *Respondents*

APPENDIX I

Lisa Gindi
Pro Se.

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Flushing, NY 11367

John Guyette,
Zachary Shapiro

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NYSUT

52 Broadway, 9th Floor

New York, NY 10004

February 20, 2020.

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**MANDATE issued on 10/02/2019-

same as Court of Appeals Summary

Order issued on Sept 9, 2019 including

Printed upper case lettering of the word**

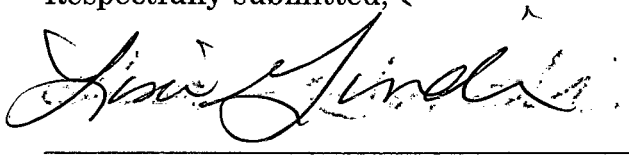
"MANDATE" in red font. across the top pf page.

MANDATE short form order

October 24, 2019. 54-55

(cont'd "Table of Contents" page 2 OF 2)

Respectfully submitted,



Lisa Gindi

Dated February 20, 2020

Lisa Gindi

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GINDI v. NEW YORK CITY DEPARTMENT OF EDUCATION

Email | Print | Comments (0)

No. 18-3057-cv.*LISA GINDI, Plaintiff-Appellant, v. NEW YORK CITY DEPARTMENT OF EDUCATION, Defendant-Appellee.*

United States Court of Appeals, Second Circuit.

September 9, 2019.

Attorney(s) appearing for the Case

LISA GINDI, pro se, Kew Garden Hills, NY., for Plaintiff-Appellant.

ZACHARY S. SHAPIRO (Jeremy W. Shweder , on the brief), of Counsel, for Zachary W. Carter ,

Corporation Counsel of the City of New York, New York, NY., for Defendant-Appellee.

PRESENT: JOHN M. WALKER, JR., RAYMOND J. LOHIER, JR., SUSAN L. CARNEY,

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SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A

PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Lisa Gindi, proceeding pro se, appeals from a judgment of the District Court (Mauskopf, J.) dismissing her employment discrimination

claims under Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). The primary issue on appeal is whether the District Court properly dismissed as untimely Gindi's claims against the New York City Department of Education (DOE).[1] We assume the parties' familiarity with the underlying facts and prior record of proceedings, to which we refer only as necessary to explain our decision to affirm.

We review de novo the dismissal of a complaint pursuant to Rule 12(b)(6), accepting the factual allegations of the complaint as true. Forest Park Pictures v. Universal Television Network, Inc., 683 F.3d 424, 429 (2d Cir. 2012). A pro se complaint must be "liberally construe[d] . . . to raise the strongest arguments it

suggests." Abbas v. Dixon, 480 F.3d 636, 639 (2d Cir. 2007). But pro se litigants are nonetheless required to comply with the ordinary rules of civil litigation. Caidor v. Onondaga Cty., 517 F.3d 601, 605 (2d Cir. 2008).

Plaintiffs asserting claims under Title VII, the ADEA, or the ADA must first file a complaint with the Equal Employment Opportunity Commission (EEOC) or an equivalent state agency within 300 days of the allegedly discriminatory action. See 29 U.S.C. § 626(d)(1); 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117(a). Although the filing deadline is subject to equitable tolling, see Zerilli-Edelglass v. N.Y.C. Transit Auth., 333 F.3d 74, 80 (2d Cir. 2003)

(Title VII and ADA); Belgrave v. Pena, 254 F.3d 384, 386 (2d Cir. 2001) (per curiam) (Title VII and ADEA), the plaintiff must show that she diligently pursued her rights and that extraordinary circumstances prevented a timely filing, see Zerilli-Edelglass, 333 F.3d at 80-81.

Gindi attached to her second amended complaint an EEOC and New York State Division of Human Rights (NYSDHR) charge dated December 2, 2015. The District Court correctly concluded that Gindi's claims of discrimination against the DOE arising out of conduct that occurred before February 5, 2015 (300 days before the date of her complaint) were untimely. Here, Gindi alleged that the DOE's discriminatory actions occurred during her employment as a teacher, which terminated in

June 2013, well outside the 300-day period. See Flaherty v. Metromail Corp., 235 F.3d 133, 137 (2d Cir. 2000) ("[T]he time for filing a claim with the EEOC [based on discharge] starts running on the date when the employee receives a definite notice of termination . . . ." (quotation marks omitted)).

Urging a contrary conclusion, Gindi argues for the first time on appeal that she attempted to communicate with the EEOC as early as 2009, but that she was prevented from filing a charge for approximately six months. In support, Gindi provides us with a letter she submitted to the EEOC dated September 16, 2015, which was not part of the district court record. Arguments presented for the first time on appeal are

generally forfeited, even in cases involving pro se litigants. See Zerilli-Edelglass, 333 F.3d at 80. But even if Gindi had properly preserved the argument, we would still agree with the District Court's conclusion that her complaint was untimely because treating the September 2015 letter as an EEOC complaint would extend the 300-day period only to November 2014, well after June 2013. In addition, Gindi's attempts to contact the EEOC fall short of the extraordinary circumstances necessary to warrant tolling of the time within which to file an actual EEOC complaint.[2]

Gindi also argues that the District Court denied her a fair hearing. We disagree. The District Court denied Gindi's motion for a pre-motion

conference as unnecessary, and Gindi has not explained why a conference was required. Relying on the Federal Rules of Civil Procedure, moreover, Gindi argues that the District Court violated Rule 60 by failing to decide the DOE's motion to dismiss within one year. This argument rests on a misunderstanding of Rule 60, which limits the time litigants have to seek relief from a prior judgment, not the time a district court has to decide a motion to dismiss. See Fed. R. Civ. P. 60(c)(1). Finally, we reject Gindi's claim of judicial bias, which rests solely on the District Court's adverse decisions. See Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 (2d Cir. 2009) (stating that adverse rulings, without more, do not provide a basis for a bias claim).

We have considered Gindi's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FootNotes

* The Clerk of Court is directed to amend the official caption as shown above.

1. Gindi's appellate brief does not address the following issues: the District Court's dismissal of her claims against other defendants; the District Court's holding that her claims against the DOE did not constitute a continuing violation; the District Court's denial of further leave to amend her complaint; or her challenges to an arbitration decision that she appeared to raise in her second amended complaint. We

therefore deem any challenges on these grounds to be abandoned. See LoSacco v. City of Middletown, 71 F.3d 88, 93 (2d Cir. 1995) ("[W]e need not manufacture claims of error for an appellant proceeding pro se . . . .").

2. To be clear, the timeliness issue concerns only the delay between the allegedly discriminatory acts by DOE and Gindi's filing of a formal complaint with the EEOC or a state agency like NYSDHR.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of September, two thousand and nineteen, Before: JOHN M. WALKER, JR., RAYMOND J. LOHIER, JR., SUSAN L. CARNEY Circuit Judges.

Lisa Gindi, Plaintiff - Appellant v. New York City Department of Education, Defendant - Appellee.

ORDER Docket No. 18-3057

Appellant having filed a petition for panel rehearing and the panel that determined the appeal having

considered the

request, IT IS HEREBY ORDERED

that the petition is

DENIED. For The Court: Catherine

O'Hagan Wolfe,

Clerk of Court 

Case 1:15-cv-06475-RRM-RER Document 4 Filed 02/01/16 Page 1 of 8 PageID #: 15

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK ----------

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LISA GINDI, Plaintiff, - against -

MR. THOMAS BENNETT et al.,

Defendants.

ROSLYNN R. MAUSKORPF,

United States District Judge.

MEMORANDUM AND ORDER

1 5-CV-6475 (RRM)

Plaintiff Lisa Gindi, proceeding pro se, filed the instant complaint alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. {"Title VII"), the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("the ADEA"), and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"). Along with her

complaint, plaintiff files a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Plaintiffs request to proceed in forma pauperis is GRANTED solely for the purpose of the instant order. Fort he reasons stated below, plaintiff is GRANTED leave to file an amended complaint within thirty (30) days of the date of this Order, or the instant action shall be dismissed for failure to state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2)(B).

BACKGROUND

Plaintiff is a former employee of the New York City Department of Education. (Compl. (Doc. No. 1) at 4.) As best as can be ascertained from the complaint, plaintiff was a tenured teacher from 1993 until sometime in 2013. (Id) Plaintiff alleges that at some point during her employment she informed her boss that she needed to take five days off of work due to her

contested divorce, that her boss hit her because she would not pass eighteen students who were failing her class, and that she was fired with no just cause in 2013. (Id)

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Plaintiff brings causes of action for failure to hire, termination of employment, failure to promote, failure to accommodate a disability, unequal terms and conditions ofemployment, and

retaliation. (Id at 3.) Plaintiff alleges defendants discriminated against her because she is a white, Jewish female, who is more than forty years of age. (Id.) Regarding her disability, plaintiff states that she has a lazy eye and suffers from stress due to her divorce. (Id.)

STANDARD OF REVIEW A district court shall dismiss an in-forma pauperis action when it is satisfied that the

action "(i) is frivolous or malicious; (ii) fails to state a claim

on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). An action is "frivolous" when either: (1) "the factual contentions are clearly baseless, such as when allegations are the product of delusion or fantasy"; or (2) "the claim is based on an indisputably meritless legal theory." Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 20 (2d Cir. 1998) (internal quotation marks omitted). It is axiomatic that pro se complaints are held to less stringent standards than pleadings drafted by attorneys. The Court is required to read the plaintiffs pro se complaint liberally and interpret it as raising the strongest arguments it suggests. Erickson v. Pardus, 551 U.S. 89 (2007); Hughes v. Rowe, 449 U.S. 5, 9 (1980); Sealed Plaintiffv. Sealed Defendant #1, 537 F.3d 185, 191-93 (2d Cir. 2008).

At the pleadings stage of the proceeding, the Court assumes the truth of "all well-pleaded, non conclusory factual allegations" in the complaint. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010). A complaint must plead sufficient facts to "state a claim to relief that is plausible on its face." Bell At/. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial 22

plausibility when the plaintiff pleads factual content that allows the court to draw the

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reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The plausibility standard does not impose an across-the-board, heightened fact pleading standard. Boykin v. KeyCorp, 521 F.3d 202, 23 213 (2d Cir. 2008). However, the plausibility standard does impose some burden to make factual allegations that support a claim for relief. As the

Iqbal court explained, it"does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678.

DISCUSSION I. The Administrative Claim

Generally, a claimant may bring suit in federal court under the ADEA, Title VII, and the ADA only after filing a timely complaint with the EEOC. Floyd v. Lord & Taylor, 96 F. App'x 792, 793 (2d Cir. 2004) (upholding dismissal of a complaint where plaintiff failed to submit any documentation showing that she had filed a complaint with the EEOC, a "prerequisite to bringing suit in federal court under Title VII, the ADEA, and the ADA"). To be deemed timely, the administrative claim must be filed with the EEOC or the state agency within 300 days of the alleged discriminatory conduct.

42 U.S.C. § 2000e-5(e); 29 U.S.C. § 626(d)(l); Kassner v. 2d Ave. Delicatessen Inc., 496 F.3d 229, 237 (2d Cir. 2007). This is true even of pro se litigants. Tanvir v. New York City Health & Hosps. Corp., 480 F. App'x 620, 621 (2d Cir. 2012).

However, the failure to file a timely complaint with the EEOC is not necessarily fatal. A plaintiff can overcome this deficiency by showing that she is entitled to equitable tolling. See Fowlkes v. Iron workers Local 40, 790 F.3d 378, 385-86 (2d Cir. 2015) (holding that exhaustion of administrative remedies is a precondition to bringing a Title VII claim, rather than a jurisdictional requirement and is subject to waiver, equitable estoppel, and equitable tolling). To

warrant equitable tolling, a plaintiff must demonstrate that extraordinary circumstances beyond her control prevented her from filing her

administrative claim. Boos v. Runyon, 201F.3d178, 185 (2d Cir. 2000). Here, plaintiffs complaint fails to 28demonstrate that she has filed a charge with the EEOC concerning her allegations of discrimination based on Title VII, age, or disability. Plaintiff additionally f~ilsto offer any basis for waiver, equitable estoppel, or equitable tolling.

II. Sufficiency of the Pleading Even if plaintiffs complaint was preceded by a timely-filed administrative complaint, it fails to allege facts sufficient to state a cause of action for employment discrimination under Title VII, the ADA, or the ADEA. a. Plaintiffs Title VII Claims

Title VII prohibits an employer from discriminating against any individual with respect to "compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(l). To establish a prima facie case of

discrimination, a plaintiff must show that: (1) she is a member of a protected class, (2) she was qualified for the position she held, and (3) she suffered an adverse employment action (4) under circumstances giving rise to an inference of discrimination. Brown v. City of Syracuse, 673 F.3d 141, 150 (2d Cir. 2012); Sethi v. Narod, 12 F. Supp. 3d 505, 522 (E.D.N.Y. 2014).

Here, the factual basis of plaintiffs Title VII complaint is unclear. Her complaint fails to allege sufficient facts to show that plaintiff suffered discrimination because of her race, color, religion, sex, or national origin. Thus, plaintiff has failed to state a claim under Title VII. Case 1:15-cv-06475-RRM-RER Document 4 Filed 02/01/16 Page 5 of 8 PageID #: 19

b. Plaintiff's ADEA Claims

The ADEA establishes that it is "unlawful for an employer ... to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions

or privileges or employment, because of such individual's age." 29 U.S.C. §623(a)(l). Inordertoestablishaprimafaciecaseof agediscrimination in violation of the ADEA, plaintiff must show that: (1) she was within the protected age group (more than 40 years old); (2) she was qualified for her position; (3) she experienced adverse employment action; and (4) such action occurred under circumstances giving rise to an inference of discrimination. Gorzynski v. Jet Blue Airways Corp., 596 F.3d 93, 107 (2d Cir. 2010) (citing Carlton v. Mystic Transp. Inc., 202 F.3d 129, 134 (2d Cir. 2000)).

In support of her ADEA age discrimination claim, plaintiff alleges that she is a member of a protected age group, but does not plead any facts to support an inference that the defendant discriminated against her because of her age. At a minimum, an ADEA claimant must inform the Court and the

defendant why she believes age discrimination existed. See Dugan v. Martin Marietta Aerospace, 760 F.2d 397, 399 (2d Cir. 1985) ("While a claim made under the ADEA need not contain every supporting detail, it must at least inform the court and the defendant generally of the reasons the plaintiff believes age discrimination has been practiced."); Gal/op- Laverpool v. 1199 SEIU United Healthcare Workers E., No. 14-CV-2879, 2014 WL 3897588, at *2 (E.D.N.Y. Aug. 8, 2014). Plaintiff simply asserts, without further elaboration, that she is more than 40 years of age. This is insufficient to state a claim under the ADEA. Case 1:15-cv-06475-RRM-RER Document 4 Filed 02/01/16 Page 6 of 8 PageID #: 20

c. Plaintiff's ADA Claims To establish a prima facie case of discrimination under the ADA, a plaintiff must show that "(l) the defendant is covered by the

ADA; (2) plaintiff suffers from or is regarded as suffering from a disability within the meaning of the ADA; (3) plaintiff was qualified to perform the essential functions of the job, with or without reasonable accommodation; and (4) plaintiff suffered an adverse employment action because of [her] disability or perceived disability." Capobianco v. City ofNew York, 422 F.3d 47, 56 (2d Cir. 2005); Ugactz v. United Parcel Serv., Inc., No. 10-CV-1247, 2013 WL 1232355, at *7 (E.D.N.Y. Mar. 26, 2013).

Here, plaintiff asserts that the nature of her disability is a lazy eye and stress due to her divorce. Although plaintiff is not required to establish discrimination at the pleading stage, she must plausibly allege a claim upon which relief can be granted. Vega v. Hempstead Union Free School. Dist., 801 F.3d 72, 86-87 (2d Cir. 2015). Even under the most liberal construction, the complaint provides no facts that could possibly connect any adverse employment action to a protected status. Thus, plaintiff has failed to state a claim under the ADA. See Ruston v. Town Bd. of

Skaneateles, 610 F.3d 55, 59 (2d Cir. 2010) ("Under Iqbal, factual allegations must be sufficient to support necessary legal conclusions," and must "plausibly suggest an entitlement to relief.").

III. Individual Liability Finally, the Court notes that plaintiff names as defendants individuals who appear to be employed by the New York City Department of Education. Title VII, the ADA, and the ADEA do not permit the imposition of liability on individuals in their individual or representative capacities. Raspardo v. Carlone, 770 F.3d 97, 113 (2d Cir. 2014) (Title VII); Guerra v. Jones, 421 F. App'x 15, 17 (2d Cir. 2011) (ADEA); Castro v. City ofNew York, 24 F. Supp. 3d 250,

259 (E.D.N.Y. 2014) (ADA). Plaintiff has failed to name her former employer as a defendant in this action and she cannot recover from its other

employees. CONCLUSION In light of plaintiffs prose status, the Court grants her thirty (30) days leave to file an

amended complaint. Plaintiff is directed that if she elects to file anamended complaint she must name her former employer as a defendant. Should plaintiff have a basis for a claim of employment 41

discrimination, she should provide facts in support of such claim and demonstrate that she has exhausted her administrative remedies by filing a claim with the EEOC. If plaintiff failed to file a claim with the EEOC or the New York State Division of Human Rights within the 300 day filing period she must detail any impediment that prevented her from timely filing. Plaintiff is further directed than any amended complaint must comply with Rule 8(a) of the Federal Rules of Civil Procedure and it must "plead enough facts to state a claim to relief that is plausible on its face."

Twombly, 550 U.S. at 570. The amended complaint must be captioned as an "Amended Complaint" and bear the same docket number as assigned to this Order. No summons shall issue at this time and all further proceedings shall be stayed for 30 days or until further order of the Court. If plaintiff fails to amend her complaint within 30 days of the date that this order is entered on the docket, the Court shall dismiss the complaint for failure to state a claim on which relief may be granted and judgment shall enter. If submitted, the amended complaint will be reviewed for compliance with this order and for sufficiency under 28 U.S.C. § 1915(e)(2)(B). The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith and therefore in forma pauperis status is denied for the purpose of any appeal.

Dated: Brooklyn, New york January 29, 2016 SO

ORDERED.

Roslynn R. :Mauskorpf

ROSLYNN R. MAUSKORPF United

States District Judge

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

LISA GINDI, Plaintiff, - against -

THOMAS BENNETT, et al.,

Defendant. ------

JUDGMENT

15-CV-6475 (RRM) (RER)

A Memorandum and Order of the undersigned having been issued this day dismissing all claims against the defendant, and further directing the Clerk of Court to enter judgment accordingly and to close the case, it is hereby

ORDERED, ADJUDGED and DECREED

that plaintiff take nothing of defendant, that all claims brought by plaintiff as against defendant are dismissed, and that this case is hereby closed.

Dated: Brooklyn, New York September 26, 2018

SO ORDERED.

Roslynn R. Mauskopf

ROSLYNN R. MAUSKOPF United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK ----------

----------X LISA GINDI,

Plaintiff,

- against - THOMAS BENNETT, et al.,

Defendant. ----------

---------X

MEMORANDUM AND ORDER

15-CV-6475 (RRM) (RER)

ROSLYNN R. MAUSKOPF, United States District Judge.

Plaintiff Lisa Gindi, *pro se*, filed the instant complaint alleging violations of Title VII of

the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"). By Order dated February 1, 2016, the Court granted Gindi's request to proceed *in forma pauperis*, pursuant to 28 U.S.C. § 1915, and granted leave to file an amended complaint. (Doc. No. 4.) On February 12, 2016, Gindi submitted an amended complaint which was reviewed for sufficiency under 28 U.S.C. § 1915(e)(2)(B). (Doc. No. 5.) By Order dated April 13, 2016, the Court granted Gindi leave to submit a second amended complaint and provided specific guidance regarding the filing of that amendment. (Doc. No. 6.)

On April 29, 2016, Gindi filed her second amended complaint. (Doc. No. 7.) By Order dated June 20, 2016, the Court dismissed all of Gindi's claims

except for those brought against the New York Department of Education ("DOE"). (Doc. No. 12.)

Subsequently, the DOE filed a motion to dismiss asserting that Gindi's claims are time barred, and in any event, are not sufficient, pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6), and a motion to strike a photograph filed by Gindi. (Doc. No. 44.) For the reasons below, the DOE's motion to dismiss is granted. The Court does not reach the motion to strike.

BACKGROUND

The Court presumes familiarity with the underlying facts of this case, as set forth in this Court's previous decisions. In brief, Gindi's second amended complaint alleges that she was employed as a teacher for many years and that her employment

was terminated because she is a woman and suffers from a mental disability. Her previous complaints also contained allegations that she was discriminated against because she is older, white, and Jewish.

STANDARD OF REVIEW

To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint need not contain "detailed factual allegations," but it must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). The plaintiff's complaint must include "enough facts to state a claim to relief

that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). The determination of whether "a complaint states a plausible claim for relief will...be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007)).

It is axiomatic that a "document filed *pro se* is to be liberally construed and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Boykin v. KeyCorp*, 521 F.3d 202, 214 (2d

Cir. 2008) (internal Case 1:15-cv-06475-RRM-RER Document 68 Filed 09/27/18 Page 3 of 9 PageID #: 963 quotation marks omitted). The Court must construe a *pro se* complaint with "special solicitude," and interpret it to raise the strongest arguments it suggests. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474–75 (2d Cir. 2006) (quoting *Ruotolo v. I.R.S.*, 28 F.3d 6, 8 (2d Cir. 1994)). Even so, "a *pro se* complaint must state a plausible claim for relief." *Hogan v. Fischer*, 738 F.3d 509, 515 (2d Cir. 2013). Moreover, a *pro se* party is "not exempt...from compliance with relevant rules of procedural and substantive law." *Triestman*, 470 F.3d at 477 (internal quotations omitted).

DISCUSSION

I. Gindi's Title VII, ADEA and ADA Claims are Time-Barred Generally, a claimant may bring suit in federal

court under the ADEA, Title VII, and the ADA only after filing a timely complaint with the EEOC. *Floyd v. Lord & Taylor*, 96 F. App'x 792, 793 (2d Cir. 2004) (upholding dismissal of a complaint where plaintiff failed to submit any documentation showing that she had filed a complaint with the EEOC, a "prerequisite to bringing suit in federal court under Title VII, the ADEA, and the ADA"). To be deemed timely, the administrative claim must be filed with the EEOC or the state agency within 300 days of the alleged discriminatory conduct. 42 U.S.C. § 2000e-5(e); 29 U.S.C. § 626(d)(l); *Kassner v. 2d Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). This is true even of *pro se* litigants. *Tanvir v. New York City Health & Hosps. Corp.*, 480 F. App'x 620, 621 (2d Cir. 2012).

Nevertheless, because the administrative exhaustion requirement is not jurisdictional, "it is

subject to equitable defenses." *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 384 (2d Cir. 2015). These doctrines should be applied "sparingly," however. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). The continuing violation doctrine allows courts to hear claims otherwise time barred when the plaintiff has experienced a "continuous practice and

policy of discrimination." *Fitzgerald v. Henderson*, 251 F.3d 345, 359 (2d Cir. 2001); *see also Lambert v. Genesee Hospital*, 10 F.3d 46, 53 (2d Cir. 1993) ("Under the continuing violation exception to the Title VII limitations period, if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of

discrimination under that policy will be timely even if they would be untimely standing alone."). However, "discrete discriminatory acts" – including "termination, failure to promote, denial of transfer, or refusal to hire" – "are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Nat'l R.R. Passenger Corp.*, 536 U.S. at 113–14.

Gindi filed a charge of discrimination with the EEOC on December 2, 2015. (Def's Ex. D (Doc. No. 45-4).) Therefore, any claims based on acts discrimination that occurred prior to February 5, 2015, 300 days earlier, are barred. Here, all of Gindi's claims of discrimination by the DOE occurred before February 5, 2015.

Gindi argues that the discrimination she suffered "was continual and ongoing," which the Court

interprets as an argument that there was a continuing violation, and therefore, her complaint was timely. (Response in Opposition. (Doc No. 46) at 12.) However, the "continuing violation" doctrine applies only to cases where there are specific discriminatory "policies or mechanisms" being employed by the defendant. *Valtchev v. City of New York*, 400 F. App'x 586, 588 (2d Cir. 2010). Multiple similar incidents of discrimination, without a policy or mechanism, do not amount to a continuing violation. *Id.*

Gindi makes no factual allegations that could be interpreted as alleging a policy or mechanism constituting a continuing violation. Instead, Gindi appears to argue that her discrimination was

"ongoing and continuous" because of a single event that occurred after

February 5, 2015. Specifically, she alleges that on March 23, 2016, New York City assistant counsel John P. Guyette aggressively shook her hand, hurting her. (Brief (Doc. No. 51) at 4.) This allegation in no way relates to a course of discriminatory conduct, nor does Gindi allege that it was motivated by discriminatory intent. Therefore, it does not save the untimeliness of her claims against the DOE.

II. Sufficiency of the Pleading

In addition to being time-barred, Gindi's second amended complaint also fails to plead sufficient facts to state a cause of action for employment discrimination under Title VII, the ADEA, or the ADA.

a. Plaintiff's Title VII Claims

Title VII prohibits an employer from discriminating against any individual with respect to "compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(l). To establish a prima facie case of discrimination, a plaintiff must show that: (1) she is a member of a protected class, (2) she was qualified for the position she held, and (3) she suffered an adverse employment action (4) under circumstances

giving rise to an inference of discrimination. *Brown v. City of Syracuse*, 673 F.3d 141, 150 (2d Cir. 2012); *Sethi v. Narod*, 12 F. Supp. 3d 505, 522 (E.D.N.Y. 2014). The plaintiff must plausibly allege facts that establish that the adverse employment action was taken because of her membership in a protected class. *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 87 (2d Cir. 2015). However, "the evidence necessary to satisfy the initial burden of establishing that an adverse employment action occurred under circumstances giving rise to an inference of discrimination is minimal." *Littlejohn v. City of New York*, 795 F.3d 297, 313 (2d Cir. 2015).

Although Gindi explains that she is a white, Jewish woman, and that she was fired, she fails to allege

circumstances that could give rise to an inference of discrimination. Gindi does allege numerous acts of what she perceived to be discrimination against her, however, the link between her membership in a protected class and the alleged discrimination is entirely conclusory. Her complaint fails to set forth sufficient facts – indeed, she fails to allege any facts – from which the Court could infer that any adverse employment action was taken because of her protected status. *See Vega*, 801 F.3d at 87; *Littlejohn*, 795 F.3d at 313.

b. Plaintiff's ADEA Claims

The ADEA establishes that it is "unlawful for an employer...to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual's age." 29

U.S.C. § 623(a)(l). In order to establish a prima facie case of age discrimination in violation of the ADEA, plaintiff must show that: (1) she was within the protected age group (more than 40 years old); (2) she was qualified for her position; (3) she experienced adverse employment action; and (4) such action occurred under circumstances giving rise to an inference of discrimination. *Gorzynski v. Jet Blue Airways Corp.*, 596 F.3d 93, 107 (2d Cir. 2010) (citing *Carlton v. Mystic Transp. Inc.*, 202 F.3d 129, 134 (2d Cir. 2000)).

In support of her ADEA age discrimination claim, Gindi alleges that she is a member of a protected age group, but does not plead any facts to support an inference that the DOE discriminated against her because of her age. At a minimum, an ADEA

claimant must inform the Court and the defendant why she believes age discrimination existed. *See Dugan v. Martin Marietta Aerospace*, 760 F.2d 397, 399 (2d Cir. 1985) ("While a claim made under the ADEA

need not contain every supporting detail, it must at least inform the court and the defendant generally of the reasons the plaintiff believes age discrimination has been practiced."); *Gallop-Laverpool v. 1199 SEIU United Healthcare Workers E.*, No. 14-CV-2879 (JG), 2014 WL 3897588, at *2 (E.D.N.Y. Aug. 8, 2014).

Although Gindi's original complaint at least

asserted that she is more than 40 years of age, which is insufficient on its own to state a claim under the ADEA, her second amended complaint fails to allege even that. With no additional facts suggesting that she suffered an adverse employment action because of her age, Gindi has failed to state claim under the ADEA.

c. Plaintiff's ADA Claims

To establish a prima facie case of discrimination under the ADA, a plaintiff must show that "(1) the defendant is covered by the ADA; (2) plaintiff suffers from or is regarded as suffering from a disability within the meaning of the ADA; (3) plaintiff was qualified to perform the essential functions of the job, with or without reasonable accommodation; and (4) plaintiff suffered an adverse employment action

because of [her] disability or perceived disability." *Capobianco v. City of New York*, 422 F.3d 47, 56 (2d Cir. 2005); *Ugactz v. United Parcel Serv.*, Inc., No. 10-CV-1247 (MKB), 2013 WL 1232355, at *7 (E.D.N.Y. Mar. 26, 2013).

Here, Gindi asserts that the nature of her disability is "PTSD, anxiety, panic, fear and nervous mood," as well as what she believes is a mistaken diagnosis of bi-polar disorder. (Sec. Amend. Comp. at 5, 9). Although the plaintiff is not required to establish discrimination at the pleading stage, she must plausibly allege a claim upon which relief can be granted. *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 86-87 (2d Cir. 2015). Even under the

most liberal construction, the complaint provides no facts that could possibly connect any adverse employment action to a protected status. Gindi does not allege that she was terminated because

of any of these disabilities, but appears to list them as harms she suffered at the hands of the defendant. Thus, Gindi has failed to state a claim under the ADA. *See Ruston v. Town Bd. of Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010) ("Under Iqbal, factual allegations must be sufficient to support necessary legal conclusions," and must "plausibly suggest an entitlement to relief.").

III. Motion to Strike

Under Rule 12(f), a court may strike from a pleading "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12. Whether to grant a motion to strike is within the district court's discretion. *E.E.O.C. v. Bay Ridge Toyota, Inc.*, 327 F. Supp. 2d 167, 170 (E.D.N.Y. 2004). "To prevail on a 12(f) motion, the moving party must demonstrate that: (1) no evidence in support of the allegations would be admissible; (2) that the allegations have no bearing on the issues in the case; and (3) that to permit the allegations to stand would result in prejudice to the movant." *Brady v. Basic Research, L.L.C.*, 101 F. Supp. 3d 217, 225 (E.D.N.Y. 2015) (internal quotations omitted).

Here, the DOE moves to strike a photograph of

Assistant Corporation Counsel John P. Guyette that Gindi included in two of her filings. (Doc. Nos. 36, 37.) The photographs each bear the same handwritten comment by Gindi accusing Guyette of injuring her hand during a handshake. Because Guyette was dismissed as a defendant, these allegations are immaterial. As such, the Court does not reach the DOE's motion.

IV. Leave to Amend

Although typically the Court allows *pro se* plaintiffs an opportunity to amend their complaints, it need not afford that opportunity where it is clear that any attempt would be futile. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (denying leave to amend a *pro se* complaint where amendment is futile). To date, Gindi has filed three versions of her complaint, Case 1:15-cv-06475-RRM-RER Document 68 Filed 09/27/18 Page 9 of 9 PageID #: 969

none of which has presented any facts giving rise to a valid claim. Furthermore, even if Gindi were to file an amendment more clearly articulating the facts underlying her allegations, her claims would still be time-barred. Therefore, granting leave to amend would be futile in this case.

CONCLUSION

For these reasons, the defendant's motion to dismiss (Doc. No. 44) is granted.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status is denied for purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

The Clerk of Court is directed to enter judgment pursuant to this Order, and to close the case. The Clerk or Court is further directed to mail a copy of this Memorandum and Order and the accompanying judgment to *pro se* plaintiff Lisa Gindi, and note the mailing on the docket.

Dated: Brooklyn, New York September 26, 2018

SO ORDERED.

Roslynn R. Mauskopf

_____ ROSLYNN

R. MAUSKOPF

United States District Judge

UNITED STATES COURT OF

APPEALS FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of October, two thousand nineteen.

Before: John M. Walker, Jr., Raymond J. Lohier, Jr., Susan L. Carney,

Circuit Judges.

Lisa Gindi,

Plaintiff - Appellant

v.

New York City Department of Education

Defendant - Appellee.

ORDER

Docket No. 18-3057

Appellant, pro se, moves to recall the mandate and for leave to amend the motion to recall the mandate.

IT IS HEREBY ORDERED that the motions are DENIED.

For the Court:

Catherine O'Hagan Wolfe, Clerk of Court