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 18th day of January, two thousand nineteen.

Leslie Moore Mira,

Plaintiff - Appellant,

v.

Argus Media, John Demopoulos, Ian Michael Stewart, Miles Weigel,

Defendants - Appellees.

ORDER

Docket No: 17-1929

Appellant, Leslie Moore Mira, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The

panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

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 of September, two thousand eighteen.

Present: Denny Chin,

Raymond J. Lohier, Jr.,

Circuit Judges,

John F. Keenan,

District Judge.[1]

Leslie Moore Mira, *Plaintiff-Appellant,*

v. 17-1929

Argus Media, et al., *Defendants-Appellees.*

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[1] Judge John F. Keenan, of the United States District Court for the Southern District of New York, sitting by designation.

Appellant, pro se, moves for appointment of counsel. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

LESLIE MOORE MIRA, *Plaintiff*,

-v-

ARGUS MEDIA, et al., *Defendants*.

No. 15-cv-9990 (RJS)

ORDER

RICHARD J. SULLIVAN, District Judge:

Now before the Court is Plaintiff's request for leave to amend her complaint. (Doc. No. 69) For the reasons set forth below, Plaintiff's motion is denied.

I. BACKGROUND[2]

On December 22, 2015, *pro se* Plaintiff Leslie Moore Mira ("Mira") commenced suit against Defendants Argus Media ("Argus") and

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[2] In deciding this request, the Court has considered Plaintiff's Proposed Amended Complaint (Doc. No. 69 ("PAC")), Plaintiff's letter in support of amendment (Doc. No. 69), Defendants' response letter in opposition (Doc. No. 70).

Argus employees John Demopoulos ("Demopoulos"), Ian Michael Stewart ("Stewart"), and Miles Weigel ("Weigel"), alleging violations of Title VII, the New York State Human Rights Law ("NYSHRL"), and the New York City Human Rights Law ("NYCHRL"). (Doc. No. 2) Defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) on August 29, 2016 (Doc. No. 46), and the motion was fully briefed on October 11, 2016 (Doc. No. 59). On March 29, 2017, the Court granted Defendants' motion to dismiss the complaint. (Doc. No. 67.) Because Mira's opposition brief included a cursory request for leave to amend in the event of dismissal, but did not attach a proposed amended complaint or explain how she planned to cure the defects of the original complaint (Doc. No. 58 at 2), the Court instructed Mira to submit a letter and proposed amended complaint by April 19, 2017 if she still wished to request leave to amend (Doc. No. 67 at 21). The Court admonished Mira, however, that asserting further conclusory claims about "sexual and gender animus" and vague and speculative connections between prosaic workplace events and Mira's private life would be insufficient to cure the defects of the original complaint. (*Id.*)

On April 19, 2017, Mira submitted a letter and proposed amended complaint that once again asserts claims under Title VII, the NYSHRL, and the NYCHRL, and also adds claims under 42 U.S.C.

§§ 1981 and 1985(3). (Doc. No. 69.) Defendants submitted a response letter on April 24, 2017, opposing Mira's request for leave to file the proposed amended complaint. (Doc. No. 70.)

II. LEGAL STANDARD

Rule 15(a)(2) of the Federal Rules of Civil Procedure requires that the Court "freely give leave [to amend] when justice so requires." Nonetheless, "it is within the sound discretion of the district court to grant or deny leave to amend." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). Thus, "[l]eave to amend, though liberally granted, may properly be denied for: undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2007) (citation and quotation marks omitted). The futility of an

amendment is assessed under the standard for a Rule 12(b)(6) motion to dismiss. See *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002) (citation omitted) ("An amendment to a pleading will be futile if a proposed claim could not withstand a motion to dismiss pursuant to Rule 12(b)(6)."). Thus, as it would on a motion to dismiss, the Court must accept as true all factual allegations contained in a proposed amended complaint and draw all reasonable inferences in favor of the plaintiff. See *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). However, that tenet "is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, a proposed amended complaint that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

III. DISCUSSION

A. Title VII

The proposed amended complaint asserts the same three Title VII claims against Argus as did the original complaint: (1) a claim for employment discrimination on the basis of national origin and sex; (2) a hostile work

environment claim; and (3) a claim for employer retaliation. Because the Court's previous order set out at length the elements that must be plausibly supported by factual allegations for each of these claims, the Court assumes the parties' familiarity with those elements and addresses only those that are pertinent here. Most importantly, a plaintiff asserting any of these claims must show a causal connection between the alleged adverse action and her protected characteristic—she must show that she was terminated or subjected to a hostile work environment *because of* her sex or national origin, or that she was retaliated against *because* she opposed unlawful treatment. Although at the pleading stage a plaintiff need only assert facts that give "plausible support to a minimal inference of discriminatory motivation," *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015), claims under Title VII are nonetheless futile "where a plaintiff fails 'to plead any facts that would create an inference that any adverse action taken by any defendant was based upon [a protected characteristic of the plaintiff].'" *Williams v. Time Warner Inc.*, 09-cv-2962 (RJS), 2010 WL 846970, at *3 (S.D.N.Y. Mar. 3, 2010) (quoting *Patane v. Clark*, 508 F.3d 106, 112 (2d Cir. 2007) (per curiam)). In

addition, a hostile work environment claim must be supported by facts that tend to show that the complained-of conduct was "*objectively* severe or pervasive," *Patane*, 508 F.3d at 113 (emphasis added), and a claim for retaliation must rest on facts showing that the plaintiff engaged in a protected activity that was known to the defendant, *id.* at 115. Because the Court finds that the proposed amended complaint fails to allege facts that meet even the minimal requirements applicable here, Mira's request to amend her complaint to assert these Title VII claims is denied on the ground of futility.

First, the proposed complaint does not remedy the original complaint's failure to allege facts that tend to show a causal connection between Mira's alleged treatment and her protected characteristics. Instead, it once again recites isolated comments and actions by Mira's coworkers, assumes that those comments and actions must have been veiled references to Mira's private life, which she believes is under surveillance, and asserts in conclusory fashion that the alleged comments, actions, and surveillance resulted from "discriminatory animus"—precisely what the Court warned would be insufficient to cure the defects of the

original complaint. The proposed amended complaint alleges no new facts that come close to suggesting that Mira was terminated *because* she is a woman or is Mexican-American. Nor do any of the new allegations tend to show that Mira was subjected to a hostile work environment *because of* her protected characteristics. For example, the proposed complaint states, conclusorily, that Defendants "harassed [Mira] on the basis of her gender" by "accessing images of her" and "eavesdropp[ing] on her." (PAC ¶ 7.) In a similar vein, it asserts that Defendants "discriminated against [Mira] on the basis of her [national origin]" because a co-worker once "voiced concern" about a racially insensitive joke made by Stewart out of Mira's hearing, another coworker once "praised" an unidentified professional contact as a "good Irish-American," and Weigel "fixated" on whether Mira had visited a penitentiary museum, which Mira took as an indirect jab at her naturalized citizenship. (See PAC ¶¶ 8–9; *see also id.* ¶¶ 9–10 (assuming that e-verify poster must be allusion to Mira's naturalized citizenship and repeating allegations from original complaint about "photographic activity" aimed at Mira's window by unknown person).) Nor, in turn, does the proposed amended

complaint add any new facts to support the claim that Mira was fired in retaliation for engaging in activity protected by Title VII. As before, there are no allegations that Mira's employer criticized her performance in ethnically degrading or sexist terms, no facts indicating that male or non-Mexican-American employees were more favorably treated at Argus, and no suggestion that the sequence of events leading to Mira's termination smacked of sexism or national-origin discrimination. See *Littlejohn*, 795 F.3d at 312 (enumerating the kinds of allegations that may suffice to state a Title VII claim). Altogether, the proposed amended complaint fails to state facts that show any linkage between Mira's status as a Mexican-American woman and her alleged treatment at work.

The proposed amended complaint also falls short when it comes to the objectivity requirement of the hostile work environment claim and the defendant-knowledge requirement of the retaliation claim. As was the case with the original complaint, the proposed amended complaint simply does not assert facts tending to show that Mira's "workplace [was] permeated with discriminatory intimidation, ridicule, and

insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Littlejohn*, 795 F.3d at 320–21 (quoting *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993)). Isolated jokes in bad taste, "framing" Mira for not holding the door open for Stewart, allusions to Mira's fish oil and kale chips, and supposed references to embarrassing videos that Mira believes her previous employer (not Argus) posted on social media do not constitute incidents that are "sufficiently continuous and concerted in order to be deemed pervasive." *Id.*; see also *Petrosino v. Bell Atl.*, 385 F.3d 210, 223 (2d Cir. 2004) ("Simple teasing, offhand comments, or isolated incidents of offensive conduct (unless extremely serious) will not support a claim of discriminatory harassment."). And the proposed amended complaint adds no new facts that tend to support Mira's claim that Argus knew about, and retaliated against Mira for, her Title VII complaint to her previous emmployer, Platts; instead, it once again moves from the assertion that Argus "has a documented collaborative [business] relationship with Platts" to the unsubstantiated conclusion that Argus was "[i]nspired by Platts" in its alleged treatment of Mira. (PAC at 3.) See, e.g., *Payne*

v. Malemathew, No. 09-cv-1634 (CS), 2011 WL 3043920, at *4 (S.D.N.Y. July 22, 2011) (dismissing retaliation claim where, among other things, plaintiff alleged no facts indicating that employer knew of employee's engagement in protected activity).

In sum, the proposed amended complaint's factual allegations—like those in the original complaint—are not enough to raise Mira's right to relief under Title VII above the speculative level, and they fail to "nudge[]" her claims "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The Court accordingly denies Mira's request for leave to amend as to her Title VII claims.

B. 42 U.S.C. § 1981

Mira's proposed amended complaint asserts new claims under Section 1981, presumably to cure a defect of the original complaint, which asserted Title VII claims against the three individual Defendants in this case. Although the Second Circuit has held that Title VII does not provide for individual liability, see *Wrighten v. Glowski*, 232 F.3d 119, 120 (2d Cir. 2000) (per curiam), individuals may be held liable under Section 1981, which "outlaws discrimination with respect to the enjoyment of

benefits, privileges, terms, and conditions of a contractual relationship, such as employment." *Patterson v. Cty. of Oneida*, N.Y., 375 F.3d 206, 224 (2d Cir. 2004). Nevertheless, "[t]he same core substantive standards that apply to claims of discriminatory conduct in violation of Title VII are also applicable to claims of discrimination in employment in violation of [Section] 1981." *Wiercinski v. Mangia 57, Inc.*, 787 F.3d 106, 113 (2d Cir. 2015). Moreover, "a plaintiff must demonstrate 'some affirmative link to causally connect the [individual defendant] with the discriminatory action.'" *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 75 (2d Cir. 2000).

As against the individual Defendants, however, Mira's allegations suffer from all the same deficiencies just discussed in connection with her Title VII claims against Argus: in brief, the proposed amended complaint fails to show that Mira was terminated, subjected to a hostile environment, or retaliated against *because of* her protected characteristics or her participation in a protected activity. Indeed, a number of the allegations in the new complaint do not even pertain to the individual Defendants named here—Stewart, Demopoulos, and Weigel—and

so do not support Mira's Section 1981 claims. (See, e.g., PAC ¶ 16 (recounting comment about Mira's being "watched" by colleague Louise Burke and jokes about Burger King and Dora the Explorer by colleague Stefka Illieva); *id.* ¶ 10 (reporting "photographic activity" aimed at Mira's apartment by unknown person).) Other allegations *do* concern Stewart, Demopoulos, and Weigel, but have nothing to do with discriminatory treatment of Mira on the basis of her sex or national origin. (See, e.g., PAC ¶ 8 (reporting another coworker's overheard comment to Weigel about a "good Irish-American"); *id.* ¶ 9 (assuming Weigel's question about whether Mira had visited a penitentiary museum was an "attempt to criminalize her"); *id.* ¶ 16 (seemingly odd comments by Stewart about "kale chips" and "fish oil"); *id.* (social media posting by Stewart about Mira's hiccup).) The few scattered allegations that even approach national origin- or sex-related topics have no apparent connection with Mira's eventual termination in May of 2014. (See, e.g., PAC ¶ 8 (second-hand information about racial joke told by Stewart at an office party in December of 2013); *id.* ¶ 17 (Stewart greeting Mira in a "highly sexualized tone of voice" in September of 2013); *id.* (overheard comment by Demopoulos

about another employee's ancestors "kicking out" Mexicans in September of 2013).) In sum, the proposed amended complaint comes nowhere close to alleging facts sufficient to make out claims for individual liability under Section 1981 against Stewart, Demopoulos, or Weigel. The Court therefore also denies as futile Mira's request for leave to amend her complaint to add those claims.

C. 42 U.S.C. § 1985(3)

Mira's proposed amended complaint also adds a claim under 42 U.S.C. § 1985(3), which prohibits conspiracies to deprive people of their civil rights. "The four elements of a § 1985(3) claim are (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States." *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087–88 (2d Cir. 1993). Additionally, "the conspiracy must also be motivated by 'some racial or perhaps otherwise class-based,

invidious discriminatory animus behind the conspirators' action.'" *Id.* at 1088.

Construed liberally, the new complaint alleges that Platts, Mira's former employer and not a defendant here, conspired with Argus to violate Mira's rights under Title VII. But the wholly conclusory allegations of conspiracy lack any factual basis and would not survive a motion to dismiss. The proposed amended complaint moves from the banal observation that Argus and Platts have a "collaborative" business relationship—both are in the oil price reporting industry—to the entirely unsupported claim that Argus conspired with and "aided and abetted" Platts in a scheme to discriminate and retaliate against Mira. (PAC at 3; *id.* ¶¶ 3, 6.) Furthermore, Mira fails to plead any facts showing that the alleged conspiracy was motivated by "class-based, invidious discriminatory animus." *Mian*, 7 F.3d 1088. Accordingly, the Court once again denies as futile Mira's request for leave to amend to add her conspiracy claim.

D. State and City Law Claims

Having found that none of the proposed amended complaint's federal-law claims would survive a motion to dismiss, the Court declines

to grant leave to amend with respect to Mira's state-and city-law claims. The Court would have only supplemental jurisdiction over those claims—the parties here are not completely diverse, so there is no basis for diversity jurisdiction—and, as discussed in the Court's previous order, the Second Circuit has instructed that in most cases where all federal claims have been dismissed before trial, "the balance of factors to be considered under the [supplemental] jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305 (2d Cir. 2003) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1998)); see also *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("[I]f the federal law claims are dismissed before trial...the state claims should be dismissed as well."); 28 U.S.C § 1367(c)(3) ("[A] district court[] may decline to exercise supplemental jurisdiction over a claim...if...the district court has dismissed all claims over which it has original jurisdiction."). Accordingly, because the Court would decline to exercise jurisdiction over the state- and city-law claims after dismissing the federal-law claims, it would

be futile for Mira to amend her complaint to assert those claims.

IV. CONCLUSION

For the reasons stated above, IT IS HEREBY ORDERED THAT Plaintiff's request for leave to amend her complaint is DENIED. The Clerk of Court is respectfully directed to close this case. SO ORDERED.

Dated: May 16, 2017

New York, New York

RICHARD J. SULLIVAN

United State District Judge