Appendix A

United States Court of Appeals for the Second Circuit

Thurgood Marshall U. S. Courthouse

40 Foley Square

New York, NY 10007

ROBERT A.KATZMANN, CLERK IN COURT

CATHERINE O'HAGAN WOLF, CHIEF JUDGE

Date: July 30, 2019

DC Docket # 15-cv-4260 Docket # 18-2172cv

DC Court: SDNY (WHITE PLAINS)

DC Judge: Karas

Short Title:: Shands v. Lakeland Central School Dist.

NOTICE OF DOCUMENT RETURNED

The enclosed motion for submission of petition for rehearing en bnc, is rejected for filing because the:

( ) moving party is not counsel of record.

( ) response may not be accepted because motion has been decided.

( ) relief requested must be sought in district court in the first instance.

(x) appeal is closed, and this Court no longer has jurisdiction.

Inquires regarding this case may be directed to the undersigned

Appendix A

(212) 857-8534.

MANADATE

18-2172

Shands v. Lakeland Central School District et al.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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.

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 2nd day of July, two thousand nineteen.

Present:

DENNIS JACOBS,

DEBRA ANN LIVINGSTON,

SUSAN L. CARNEY,

Circuit Judges.

ANNETTE SHANDS

Plaintiff-Appellant,

LAKELAND CENTRAL SCHOOL DISTRICT,

DR. TAMMY COSGROVE, ASSISTANT

SUPERINTENDENT OF HUMAN RESOURCES,

*Defendants-Appellees,**

For Plaintiff-Appellant:

ANNETTE SHANDS, pro se,

Cortlandt Manor, NY.

For Defendantss-Appellees*

JAMES A. RANDAZZZZO,

(Drew W. Sumner, on the brief),

Portale Randazzo L.L.P,

White Plains, NY.

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* The Clerk of Court is respectfully requested to amend the caption as set forth above.

MANDATE ISSUED ON 07/29/2019

* * *

Appeal from a judgment of the United States District Court for the Southern District of New York (Karas, J.).

UPON DUE CONSIDERATION, IT IS HEREBBY ORDERED, ADJUDGED, AND DECREED that the order of the district court is AFFIRMED.

Annette Shands, pro se, appeals from the July 5, 2018, decision and order of the United States District Court for the Southern District of New York (Karas, J.) granting summary judgment to the Lakeland Central School District and its Assistant Superintendent of Human Resources, Dr. Tammy Cosgrove (collectively, the "Defendants"), on her discrimination claims brought under the Age Discrimination in Employment Act (:ADEA"), 29 U.S.C. § 621; the Fourteenth Amendment Equal Protection Clause: and the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 296. We review de novo the district court's grant of summary judgment, construing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in its favor, See e.g. Darnell v. Pineiro, 849 F.3d 17,22 (2d Cir. 2017), (Summary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant

is entitled to judgment as a matter of law.'" Sousa C. Marquez, 702 F.3d 124, 127 (2d Cir. 2012) (quoting Fed. R. Civ. P. 56(a)). We construe Shands's pro se submissions liberally, and interpret them "to raise the strongest arguments that they suggest." Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006) (internal quotation marks and emphasis omitted). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

* * *

Shands, an African-American woman over the age of sixty-five, filed the present action on May 26, 2015, following Defendants' failure to hire her for the position of Assistant Principal at Lakeland Copper Beech Middle School, Shands applied for the Assistant Principal position in May 2014, and was one of over 300 applicants. Pointing to her prior experience as a pastor and schoolteacher, Shands contends that the Defendants discriminated against her on the basis of her age, race, and gender in declining to recommend and hire her for the position.

All of Shands's discrimination claims proceed under the burden-shifting framework articulated in *McDonnell Douglas Corp. v.. Green*, 411 U.S. 792, 802 (1973), *see also Bucalo v. Shelter Island Union Free Sch. Dist.*, 691 F. 3d 119, 129 (2d Cir. 2012) (applying the framework to a discrimination claim brought under the ADEA); *Spiegel v. Schulmann*, 604 F 3d. 72, 80 (2d Cir. 2010) (NYSHRL); *Feingold v. New York*, 366 F .3d 138, 159 (2d Cir. 2004) (equal protection claim under § 1983). Pursuant to this framework, if the plaintiff establishes a *prima facie* case of discrimination, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse

employment action, *McDonnell Douglas*, 411 U.S. at 802. If the employer successfully makes such a showing, the burden shifts back to the plaintiff to show that the employer's nondiscriminatory reasons are a pretext for discrimination. *Id. At 804-0.* With regard to her ADEA claim, Shands has the added burden of establishing the age was the "but-for" cause of the discrimination. *See Vega v/ Hempstead Union Free Sch. Dist.*, 801 F .3d 72, 86 (2d Cir. 2015).

After reviewing the record, we condlude that the district court properly granted summary judgment to Defendants on all of Shands's discrimination claims. While Shands may have established a *prima facie* case of discrimination, Defendants sufficiently established legitimate, non-discriminatory reasons for the decision to hire their preferred candidate, Francesco Ruolo.

Specifically, they produced evidence of his years of experience as an assistant principal and knowledge of the Common Core system, a qualification for which they advertised. Shands, whose most recent employment by a school district was as a substitute teacher in 2002, has not presented evidence that the Defendants' decision not to hire her was due to discriminatory animus rather than their asserted justifications. Although Shands points to various difficulties in submitting her application, she offers no evidence that Defendants intentionally created obstacles to prevent her from filing a successful application, let alone that the did so because of her age, race, or gender. And while Shands argues that her experiences in public education and teaching more broadly are more extensive and valuable that Ruolo's, we "do not sit as a super-personnel department that reexamines an entity's business decisions." *Delacey v. Bank of Am. Corp.*, 766 F 3d 163, 169 (2d Cir. 2014) (internal quotation marks omitted), We certainly cannot

say that Shands's credentials are "so superior . . . that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over [her]." *Byrnie v. Town of Cromwell, Bd. Of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001). In sum, Shands's subjective disagreement with Defendants' assessment of her qualifications cannot sustain a claim of discrimination under the ADEA, Title VII, NYHRL,, or § 1983.

We have considered all Shands's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the discrict court is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

United States Court of Appeals, Second Circuit

s/ Catherine O'Hagan Wolfe

MANADATE

18-2172

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Present:

DENNIS JACOBS,

DEBRA ANN LIVINGSTON,

SUSAN L. CARNEY,

Circuit Judges

ANNETTE SHANDS

Plaintiff-Appellant,

LAKELAND CENTRAL SCHOOL DISTRICT,

DR. TAMMY COSGROVE, ASSISTANT

SUPERINTENDENT OF HUMAN RESOURCES,

*Defendants-Appellees,**

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* The Clerk of Court is respectfully requested to amend the caption as set forth above.

MANDATE ISSUED ON 07/29/2019

For Plaintiff-Appellant:

ANNETTE SHANDS, *pro se*,

Cortlandt Manor, NY.

For Defendants-Appellees:

JAMES A. RANDAZZO,

(Drew W. Summer, *(on the brief)*,

Portale Randazzo LLP, White Plains, NY

Appeal from a judgment of the United States District Court for the Southern District of New York *(Karas, J.)*.

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(2d Cir 2012) (quoting Fed. R. Civ. P. 56(a)). We construe Shands's pro se submissions liberally, and interpret them "to raise the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F. 3d 471, 474 (2d Cir. S006) (internal quotation marks and emphasis omitted). WE assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

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Shands, an African-American woman over the age of sixty-five, filed the present action on May 26, 2015, following Defendants' failure to hire her for the position of Assistant Principal at Lakeland Copper Beech Middle School, Shands applied for the Assistant Principal position in May 2014, and was one of over 300 applicants. Pointing to her prior experience as a pastor and schoolteacher, Shands contends that the Defendants discriminated against her on the basis of her age, race, and gender in declining to recommend and hire her for the position.

All of Shands's discrimination claims proceed under the burden-shifting framework articulated in *McDonnell Douglas Corp. v.. Green*, 411 U.S. 792, 802 (1973); *see also Bucalo v. Shelter Island Union Free Sch. Dist.*, 691 F.3d 119, 129 (2d Cir. 2012) (applying the framework to a discrimination claim brought under the ADEA); *Spiegel v. Schulmann*, 604 F.3d 72, 80 (2d Cir. 2010) (NYSHRL); *Feingold v. New York*, 366 F.3d 138, 159 (2d Cir. 2004) (equal protection claim under § 1983). Pursuant to this framework, if the plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action.

McDonnell Douglas, 411 U.S.at 802. If the employer successfully makes such a showing, the burden shifts back to the plaintiff to show that the employer's nondiscriminatory reasons are a pretext for discrimination. *Id.* At 804-05. With regard to her ADEA claim, Shands has the added burden of establishing that age was the "but-for" case of the discrimination. *See Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 86 (2d Cir. 2015).

After reviewing the record, we conclude that the district court properly granted summary judgment to Defendants on all of Shands's discrimination claims. While Shands may have established a prima facie case of discrimination, Defendants sufficiently established legitimate, non-discriminatory reasons for the decision to hire their preferred candidate, Francesco Ruolo, Specifically, they produced evidence of his years of experience as an assistant principal and knowledge of the Common Core system, a qualification for which they had advertised. Shands whose most recent employment by a school district was as a substitute teacher in 2002, has not presented evidence that the Defendants; decision not to hire her was due to discriminatory animus rather than their asserted justifications. Although Shcnds points to various difficulties she encountered in submitting her application, she offers no evidence that Defendants intentionally created obstacles to prevent her from filing a successful application, let alone that they did so because of her age, race, or gender. And while Shands argues that her experiences in public education and teaching more broadly are more extensive and valuable than Ruolo's, we "do not sit as a super-personnel department that reexamines an entity's business decisions." *Delaney v. Bank of Am. Corp.*, 766 F. 3d 163, 169 (2d Cir. 2014) (internal quotation marks omitted). We certainly cannot say that Shands's credentials are "so

superior . . . that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over [her]." *Byrnie v. Town of Cromwell, Bd. of Educ.,* 243 F.3d 93, 103 (2d Cir. 2001). In sum, Shands;s subjective disagreement with Defendants' assessment of her qualifications cannot sustain a claim of discrimination under the ADEA, Title VII, NYHRI., or § 1983.

We have considered all of Shands's' remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

United States Court of Appeals, Second Circuit

s/ Catherine O'Hagan Wolfe

Appendix C

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 22nd day of July, two thousand and nineteen,

Before: Dennis Jacobs,

Debra Ann Livingston,

Susan L. Carney,

Circuit Judges

Annette Shands,

Plaintiff-Appellant

v.

Lakeland Central School District, Dr. Tammy Cosgrove,

Assistant Superintendent of Human Resources,

Defendants-Appellees.

Appendix C

Annette Shands 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

UNITED STATES

COURT OF APPEALS

SECOND CIRCUIT

s/ Catherine O'Hagan Wolfe

18-2172

Shands v. Lakeland Central School District, *et al.*

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Present:

DENNIS JACOBS,

DEBRA ANN LIVINGSTON,

SUSAN L. CARNEY

Circuit Judges

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Plaintiff-Appellant,

v.

LAKELAND CENTRAL SCHOOL DISTRICT,

DR. TAMMY COSGROVE, ASSISTANT

SUPERINTENDENT OF HUMAN RESOURCES,

*Defendants-Appellees.**

For Plaintiff-Appellant:

ANNETTE SHANDS, *pro se*,

Cortlandt Manor, NY

For Defendants-Appellees:

JAMES A. RANDAZZO,

(Drew W. Sumner, *on the brief*),

Portale Randazzo LLP, White Plains, NY.

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emphasis omitted). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

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Shands, an African-American woman over the age of sixty-five, filed the present action on May 26, 2015, following Defendants' failure to hire her for the position of Assistant Principal at Lakeland Copper Beech Middle School, Shands applied for the Assistant Principal position in May 2014, and was one of over 300 applicants. Pointing to her prior experience as a pastor and schoolteacher, Shands contends that the Defendants discriminated against her on the basis of her age, race, and gender in declining to recommend and hire her for the position.

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cause of the discrimination. *See Vega v/ Hempstead Union Free Sch. Dist.*, 801 F .3d 72, 86 (2d Cir. 2015).

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Specifically, they produced evidence of his years of experience as an assistant principal and knowledge of the Common Core system, a qualification for which they advertised. Shands, whose most recent employment by a school district was as a substitute teacher in 2002, has not presented evidence that the Defendants' decision not to hire her was due to discriminatory animus rather than their asserted justifications. Although Shands points to various difficulties in submitting her application, she offers no evidence that Defendants intentionally created obstacles to prevent her from filing a successful application, let alone that the did so because of her age, race, or gender. And while Shands argues that her experiences in public education and teaching more broadly are more extensive and valuable that Ruolo's, we "do not sit as a super-personnel department that reexamines an entity's business decisions." *Delacey v. Bank of Am. Corp.*, 766 F 3d 163, 169 (2d Cir. 2014) (internal quotation marks omitted), We certainly cannot say that Shands's credentials are "so superior . . . that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over [her]." *Byrnie v. Town of Cromwell, Bd. Of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001). In sum, Shands's subjective disagreement with Defendants' assessment of her qualifications cannot sustain

a claim of discrimination under the ADEA, Title VII, NYHRL,, or § 1983.

We have considered all Shands's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

United States Court of Appeals, Second Circuit

"s/" Catherine O'Hagan Wolfe

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*The Clerk of Court is respectfully requested to amend the caption as set forth above.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ANNETTE SHANDS,

Plaintiff,

v.

LAKELAND CENTRAL SCHOOL

DISTRICT and DR. TAMMY COSGROVE,

Assistant Superintendent of Human Resources,

Defendants.

Appearances:

Annette Shands

Cortlandt Manor, NY

Pro se Plaintiff

James A. Randazzo, Esq.

Portale Randazzo LLP

White Plains, NY.

Counsel for Defendants

Drew W. Summer, Esq.

Morris, Duffy Alonso & Faley

New York, NY

Counsel for Defendants

KENNETH M. KARAS, District Judge:

Pro se Plaintiff Annette Shands ("Plaintiff") brought this Action against the Lakeland Central School District (the "District"), and Assistant Superintendent of Human Resources, Tammy Cosgrove ("Cosgrove") collectively, "Defendants"), alleging that Defendants failed to offer her an Assistant Principal position because of her age, race, and gender, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, the New York State Human Rights Law (NYSHRL"), N.Y. Exec. Law § 296, and the Fourteenth Amendment Equal Protection Clause, (Third Am. Compl. (Dkt. No. 54).). Before the Court is Defendants' Motion for Summary Judgment. (Not. of Mot. (Dkt. No. 83).) For the following reasons, the Motion is granted.

1.Background

A. Factual Background

The following facts are taken from Defendants' statement pursuant to Local Civil

Rule 56.1 (Defs.' Rule 56.1 Statement ("Defs.' 56.1") (Dkt. No. 86)). Plaintiff's response to that statement, (Pl.'s Resp. to Summ. J. Mot. ("Pl.'s 56.1") (Dkt. No. 90)), Plaintiff's declaration, which duplicates the disputed facts identified in Plaintiff's 56.1 statement, (Decl. of Opp'n to Summ. J. Mot. ("Pl.'s Decl.") (Dkt. No. 91)), and the admissible evidence submitted by the Parties, and are recounted in the light most favorable to Plaintiff, the non-movant.[1] The facts as described below are not in dispute, except to the extent indicated.

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[1]Local Civil Rule 56.1 (a) requires the moving party to submit a "short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." The nonmoving party, in turn, must submit "a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short[,] and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried." Local Civ. R. 56.1(b). "A pro se litigant is not excused from this rule," *"Brandever v. Port Imperial Ferry Corp.*, No, 13-CV-2813, 2014 WL 1053774, at*3 (S.D.N.Y. Mar. 13, 2014) (italics omitted), and "([i]f the opposing party . . . fails to controvert a fact set forth in the movant's Rule 56.1 statement that fact will be deemed admitted pursuant to the local rule," *Baity v. Kralik*, 51 F. Supp. 3d 414, 418 (S.D.N.Y. 2014) (internal quotation marks omitted); *see also T.Y. v. N.Y.C. Dep't Educ.*, 584 F. 3d 412, 418 (2d Cir. 2009) (same).Here, Defendants filed and served their 56.1 statement, (Defs.' 56.1), in addition to a statement notifying Plaintiff of the potential consequences of not responding to the Motion, as required by Local Rule 56.2 (Dkt. No. 87), and Plaintiff filed a response, (Pl.'s 56.1).

However, Plaintiff's response for the most part does not comply with Rule 56.1. Of the 265 separately numbered paragraphs in Defendants' 56.1 statement, (Defs.' 56.1), Plaintiff conceded that 80 of them were "undisputed," (Pl. 56.1), Of the remaining 185 paragraphs, in addition to identifying actual disputes of fact, Plaintiff (1) abstained from answering four of them, (Pl.'s 56.1 ¶¶ 247-49, 252). (2) "disputed" many of them with only semantic objections, (id..¶¶ 1-4, 11, 33, 35, 65, 67-68, 73, 86-87, 92, 100, 104, 126, 135, 145, 171-77. 205-213, 220-28, 236-44. 258). And (3) "disputed" many of them by asserting irrelevant facts that do not contradict Defendants' factual assertions, (id.. ¶¶ 5-6, 9-10, 13, 16, 24, 26, 37, 49, 53-55, 62, 64, 70-72, 75-76, 84, 93, 97-98, 105-107, 109, 112, 114, 120, 125, 131-133, 137-139, 142-143, 148, 153, 157, 162-163, 166, 168, 170, 185-186, 188-190, 192, 196-201, 203-204, 216-218, 231, 233-234, 251, 264-65). These purported disputes, which do not actually challenge the actual disputes and thus the Court will not consider them as creating disputes of fact. See Baity, 51 F. Supp. 3d at 418 ("Many of Plaintiff's purported denials—and a number of his admissions—improperly interject arguments and/or immaterial facts in response to facts asserted by Defendants, often speaking past Defendants' asserted facts without specifically controverting those same facts."); id. ("[A] number of Plaintiffs' purported denials quibble with Defendants' *Educ. Of Wappingers Cent. Sch. Dist.*, No. 07-CV-8828, 2013 WL 3929630 at *1 n.2 (S.D.N.Y. July 30, 2013) (explaining that the plaintiff's 56.1 statement violated the rule because it "improperly interjects arguments and or immaterial facts in response to facts asserted by Defendant, without specifically controverting those facts," and "[i]n other instances, . . .neither admits or denies a particular fact, but instead responds with equivocal statements"); *Goldstick v. The Hartford, Inc.*, No. 00-CV-8577, 2002 WL 1906029, at * 1 (S.D.N.Y. Aug. 19, 2002) (noting argumentative and often lengthy narrative in almost every case[,] the object of which is to 'spin' the impact of the admissions [the] plaintiff has been compelled to make"). Additionally, some of Plaintiff's statements are inconsistent. (*Compare* Pl. 56.1 ¶¶ 2, 185 (claiming that race is not relevant to this lawsuit) *with* ¶¶ 139,171, 179 alleging race discrimination).)

Moreover, in some of the instances where Plaintiff does identify Plaintiff is an African American woman over the age of sixty-five. (Defs.' 56.1¶¶ 1-2; Pl.'s Decl. ¶ 1.) Defendant Cosgrove is the Assistant Superintendent of the District. (Defs.' 56.1 ¶ 3.) Her duties include, among other things, overseeing recruitment and hiring and processing grievances. (Id. ¶5.) Cosgrove had never met or spoken to Plaintiff until after Plaintiff filed this Action (Id. ¶¶7-8, 18.)

1.Plaintiff's Interactions with the District

At some point in 2004, Plaintiff presented to the District's Board of Education to search for employment as an administrator. (*Id.* ¶ 254.) A receptionist directed Plaintiff to the Human Resources office. (*Id.* ¶ 255.) While there, Plaintiff saw a job posting for a position of Elementary School Principal on a bulletin board. (*Id.* ¶ 257.) Plaintiff spoke with District employees concerning the posting and indicated that she was interested the position. (*Id.* ¶¶ 259-60.) An employee responded that the District received too many applicants for the position and that the position would, or should have, been taken down.

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actual disputes of fact, she fails to cite the supporting portions of the record; this also could permit the Court to deem the challenged facts undisputed. See Holtz v. Rockefeller & Co., 258 F. 3d 62, 73 (2d Cir. S001) (explaining that the court is not required to search the record for genuine issues of material fact Supp. 3d at 418 (collecting cases holding that :"responses that do not point to any evidence in the record that may create a genuine issue of material fact do not function as denials, and will be deemed admissions of the stated fact." (alteration and internal quotation marks omitted)). However, in light of the Plaintiff's pro se status, the Court will consider the actual disputes identified in Plaintiff's 56.1 statement, provided they are actually support by evidence in the record. *See, e.g., Cherry v. Byram Hills Cent. Sch. Dist.*, No. 11-CV-3872, 2013 WL 2922483, at *1 (S.D.N.Y. June 14, 2013) ("[W]here a pro se plaintiff fails to submit a proper. . .Rule 56.1 statement in opposition to a summary judgment motion, the [c]ourt retains some discretion to consider the substance of the plaintiff's arguments, where actually supported by evidentiary submissions." (italics and internal quotation marks omitted)).

(*Id.* ¶ 261.) Plaintiff did not respond to the employee's statement. (*Id.* ¶ 262; see also Decl. of James A. Randazzo, Esq. ("Randazzo Decl.") (Dkt. No. 85) Ex. A. ("Pl.'s Dep.") 182.) Plaintiff was also told that she would not be hired because she was not in the database as certified for the position. (Defs.' 56.1 ¶ 263.) Plaintiff asked that a search be conducted for both her maiden name, "Annette Oliver." and her married name, "Annette Shands." (Pl.'s 56.1 ¶ 260.) As the search was being conducted, Plaintiff said, "You just passed my name," but the unidentified female employee nervously said, "oh no. That's not it." (*Id.* ¶¶ 39, 179, 260.) Plaintiff said "I am quite sure it was," and offered to bring in her certification from home, but the employee said, Oh, [n]o! We can't let you do that. It's got to be on our list." (Id. ¶ 260; see also Pl.'s Dep. 183-84 (same); Pl.'s 56.1 ¶¶ 10, 260 (noting "patterned responses" of "We only hire from our list. You are not on our list. We cannot hire you.").) Plaintiff does not remember if she submitted her resume or an application for the Elementary School Principal Position, nor does she remember discussing the job posting with anyone else from the District afterwards. (Defs.' 56.1 ¶¶ 264-65.)

In May 2014, Plaintiff applied for an Assistant Principal position at Lakeland Copper Beech Middle School ("Copper Beech"), where grades six through eight are taught. (*Id.* ¶¶14, 19-20.) Plaintiff first learned of the opportunity to apply for the position when she visited the District's Board of Education on May 16, 2014 for the purpose of seeking employment. (*Id.*¶ 21.) Plaintiff met with Jayana Davis, who is African American, (*Id.* ¶¶24-26), works in Human Resources, is supervised by Cosgrove, and is responsible for posting job openings in the District, (id. ¶¶ 9-11), for "possibly 20 minutes," (*Id.* ¶ 32). Davis had never met with, spoken with, or heard of Plaintiff before. (*Id.* ¶¶ 27-29.) Plaintiff told Davis that she was looking for employment. (*Id* ¶ 31.) Davis showed

Plaintiff a bulletin board, and together they looked at job postings. (*Id.* ¶ 33.) Plaintiff verbally expressed interest in an administrative position—specifically, the Copper Beech Assistant Principal position. (*Id.* ¶¶ 34-35.) Davis told Plaintiff that the District may be taking tht post down that same day. (*Id.* ¶ 36.) Plaintiff said she intended to give Davis and application that day, and gave her a copy of Plaintiff's resume. (*Id.* ¶¶ 37, 43, Pl.'s 56.1 ¶ 37.) Plaintiff did not give Davis any other documents. (Defs.' 56.1 ¶ 44.)

Davis searched "the New York State Ed Public Inquiry database" for Plaintiff's teacher administrator certifications. (*Id.* ¶ 38.)[2] Davis searched for "Annette Shands," which did not return any results. (*Id.* ¶ 39.) Plaintiff also requested a search he made for her maiden name, "Annette Oliver." and Davis affirmed that both of Plaintiff's names had been searched. (Pl.'s 56.1¶¶ 38-39; *see also* Davis Dep. 45-46.) Plaintiff attributes this failure to lack of training of the District's on-site employees, because Plaintiff is certified, and the District is able to find Plaintiff's credentials when she informs them of her availability to substitute teach. (Pl.'s 56.1 ¶¶ see also Letter from Plaintiff to Court (March 27, 2018) ("Compliance Letter") (Dkt. No. 88) Ex. A ("Certification"), *Id.* Ex. F ("Defs.' EEOC Opp'n) 2 ¶ 4 (admitting that Plaintiff is certified).) Plaintiff offered to bring in a copy of her certification from home, but was again told, "Oh, no! We have to have it on our list." (Pl.'s 56.1 ¶ 39; *see also id.* 40 (same).) Davis explained that Plaintiff would not be considered for the Assistant Principal position if Plaintiff was not certified. (Defs.' 56.1 ¶ 40.) Davis testified that

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[2] Plaintiff says she "was under the impression that someone other than Davis was doing the searching and that Davis was the one reporting to [Plaintiff] whatever the other person communicated to her.." (Pl.'s 56.1 ¶ 38.) This is again not a real dispute, as it does not actually contradict the fact that Davis did the search, (Randazzo Decl. Ex. D ("Davis Dep.") 42-43), and in any event is not material to deciding the instant Motion.

she advised Plaintiff to contact the New York State Department of Education because she was unable to locate Plaintiff's certifications, and provided her with their contact information, (*Id.* ¶ 41-42), but Plaintiff avers that Davis never mentioned the Department of Education, let alone provided contact information (Pl.'s 56.1 ¶¶ 41-42).[3] Plaintiff left with a copy of the job posting. (Defs.' 56.1 ¶ 45.)

2. The Copper Beech Assistant Principal Job and Plaintiff's Qualifications

Plaintiff read the Assistant Principal job posting and the qualifications the District was seeking in prospective candidates. (Defs.' 56.1 ¶ 47.) The posting stated that "New York State certification" in school administration was "required," and listed the following "qualifications":

- A dynamic, high energy leadership style with a successful background in middle school education
- A thorough understanding of the Common Core Learning Standards
- Comprehensive knowledge of middle school curriculum and instructional methodology including differentiation
- Ability to communicate effectively with excellent writing and public speaking skills

[3] Plaintiff also alleges that Davis told her she "was mistaken about [her] permanent certification and . . . was probably provisionally certified." (Pl.'s 56.1 ¶ 40.) However, in her deposition, Plaintiff testified

- Habits of administration capable of encouraging professional cooperation and (enthusiasm to meet current demands for excellence in public education

Randazzo Decl. Ex. F ("Job Posting"), *see also* Defs.' 56.1 ¶ 17 (describing the duties of the Assistant Principal).)

Plaintiff believed that as of May 2014, she had a successful background in middle school education, as listed in the first requirement. (Pl.'s Dep. 84.) She testified that this background consisted of (1) working with Copper Beech students in 2003 in conjunction with the John C. Hart Library,; (2) teaching middle school students in 1969 through 1970 at Mount Vernon High School; and (3) substitute teaching at Copper Beech. (Defs.' 56.1 ¶ 53.)[4] The first category consisted of leading a voluntary after-school program celebrating African American History during February of 2001, (id. ¶ 54), which was extended to include making presentations at Copper Beech and an elementary school in the District, (Pl.'s 56.1 ¶ 54). Plaintiff testified that this experience lasted between several weeks and a month and that Copper Beech students were enrolled in the program, but she could not remember if the program met once per week or more.

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twice that she did "not remember exactly" what Plaintiff said to Davis and what Davis said back to her. (Pl.'s Dep. 59-60.) The Court therefore declines to consider this new fact, which contradicts Plaintiff's prior deposition testimony. See Brown v. Henderson, 257 F. 3d 246, 252 (2d Cir. 2001) ("[F]actual allegations that might otherwise defeat a motion for summary judgment will not be permitted to do so when they are made for the first time in the plaintiff's affidavit opposing summary judgment and that affidavit contradictsher own prior deposition testimony.").

[4] Plaintiff contends that she also has other experience that qualified as background in middle school education: (1) her experience working as an Administrator for middle school students who were congregants in Bethel Church in Harlem for over twenty years, (2) working as an Administrative Intern at the Greenburgh Graham School in Hastings, New York, (3) working in programs at Lehman College and Mercy College; (4) writing a grant for Bethel's middle school students to be involved in a summer enrichment program; (5) being involved in Community Theater with 7-17 year olds; (6) advising Hackley middle school students of various test strategies; and (7) developing and implementing a summer program for middle school students in Newark, New Jersey's Community Action Program (CAP), (Pl.'s 56.1 ¶¶ 53-55.)

(Defs.' 56.1 ¶¶ 55-56.) The John C. Hart Library is a public library for the Yorktown community. (Id. ¶ 57.) Plaintiff did not list the after-school program on her resume, (id. ¶ 58), but she listed it on her purported cover letter dated May 16, 2014, (Pl.'s 56.1 ¶ 58.1 ¶ 58; Compliance Letter Ex. G. ("Email Application") at 6 ("Cover Letter")).[5]

Plaintiff's resume does state that she worked as a teacher at Mount Vernon High School in 1969-70. (Defs.' 56.1 ¶ 67.) Plaintiff contends that she was teaching Traphagen Middle School students who were being housed in the High School, (Pl. 56.1 ¶ 67), and that her cover letter spoke to work with middle school students "elsewhere," (*Id.* ¶ 69), but her resume did not state that she worked in the Mount Vernon Middle School. (Defs.' 56.1 ¶ 69), or that she worked with middle school students, (Randazzo Decl. Ex. E ("Resume")). As to the third category Plaintiff listed—substitute teaching—she testified that she could not recall which specific years she worked for the District, but it was sometime in the 1980s, 1990s, and 2000s, and that she was a substitute teacher at Copper Beech in the 2000s for 17 or 20 days. (Defs.' 56.1 ¶¶ 59-61.) Plaintiff could not remember which classes she taught in the 1990s and 2000s other than English (*Id.* ¶¶ 62, 64.) She also could not recall how many days she worked as a substitute teacher in the 1980's, but knows it was for more than one day. (*Id.* ¶ 63.) Plaintiff's last employment by a school district was as a substitute teacher with the District in 2001 and 2002. (*Id.*¶65.) Plaintiff did not include any of her work substitute teaching for the District on her resume, (*id.* ¶ 66), but it was

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[5] The cover letter states, in relevant part: "I have worked successfully with middle school students elsewhere and also at Copper Beech. Several years ago I supervised a number of Copper Beech: students who volunteered to participate in an African American History Month Celebration which was being sponsored by the John C. Hart Memorial Library. Then, too, having substituted at Copper beech, I might also add that staff members told me that I should come back regularly because the students like me. They were on to say that they overheard a number of students speaking favorably of me. According to staff members, the gist of what the students said was that they considered me 'strict but fair.'" (Cover Letter.)

mentioned in her cover letter. (Pl.'s 56.1 ¶ 66).

Plaintiff also believed that as of May 2014, she had a thorough understanding of the Common Core Learning Standards, as listed in the second job requirement. (Defs.' 56.1 ¶ 49.) Plaintiff had experience teaching Common Core Learning Standards (the "Standards") in summer program at Lehman College in the 1990s and substitute teaching in the District in the 2000s. (*Id.* ¶ 50.) Plaintiff contends that she was also exposed to the Standards in classes as Ball State University and Columbia University, in her early teaching, in the Search for Education, Elevation and Knowledge (SEEK) core program at Lehman College, and in the Science Technology Entry Program (STEP) at Mercy College. (Pl.'s 56.1 ¶¶ 49-50.) Plaintiff did not mention the Common Core Learning Standards on the resume she submitted to the District with her application for the Assistant Principal position. (Defs.' 56.1 ¶ 51.) Plaintiff contends that her cover letter does mention her knowledge of the Standards, and her resume lists Lehman College and Mercy College, which used the Standards. (Pl.'s 56.1 ¶ 51; Cover Letter; Resume.)[6]

According to Plaintiff's resume, her most recent position in the public education system was for seven months in 1993 as an administrative intern at the Greenburgh-Graham School District. (Defs.' 56.1 ¶ 70; *but see* Pl.'s 56.1 ¶ 70 (My most recent work with public school students has been in the role of an Associate Pastor in Harlem.").) Plaintiff testified that she "could have been considered as a Principal" and that faculty and staff referred to her as "Assistant Principal" during her internship. (Defs.' 56.1 ¶¶ 71-72.) However, Plaintiff did not hold an Assistant Principal or Principal title at any job, and

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[6] The cover letter references the Standards by stating: "Having had many opportunities to develop curricula for various groups, help individuals achieve desired standards, review, revise and evaluate programs, I have no problem understanding Common Core Learning Standards or differentiation." (Cover Letter.)

indeed listed her position with Greenburgh-Graham on her resume as an administrative intern. (*Id.* ¶¶ 73-74.)

Plaintiff does not dispute this, but contends that she has "performed the duties of an assistant principal" in a variety of the other positions discussed earlier. (Pl.'s 56.1 ¶ 72.) According to Plaintiff's resume, prior to her internship, her most most recent employment in the public education system was as an English teacher at Mount Vernon High School from 1969-70, and her most recent full-time employment with any school district was that same year. (Defs.' 56.1 ¶¶ 75-76.)[7]

Her only other employment in the public education system was as an early childhood and English as a second language teacher at Public School 48 in the Bronx from 1966 to 1969. (*Id.* ¶ 77)

Plaintiff's most recent employment included working as a consultant with Peekskill Area Healthcare, where she worked for 18 months administering diversity and sensitivity training sessions, and left in August 2013. (*Id.* ¶¶ 78-80.) During that time, Plaintiff also worked as an Associate Pastor at Bethel Church in Harlem, New York, from 1995 to 2015. (*Id.* ¶¶ 81-82.) Plaintiff testified that her duties included "community meetings," "working with young people" under the age of 16, leading grant programs, and going on trips, she generally characterized her duties as "education," because education is what changes your behavior." (*Id.* ¶¶ 83-84; see also Pl.'s 56.1 ¶ 84 (noting that

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[7] Plaintiff states that these facts are "not true" because the grant and guidelines for the STEP program at Mercy College, where she worked as an administrator from 1978-82, (see Resume), states that enrolled students were also students from public school districts, (Pl.'s 56.1 ¶¶75-76). No such grant is in the record. In any event, this fact does not create an actual dispute, because working in a program with students who are also enrolled at public schools does not mean Plaintiff was employed in the public education system. Moreover, Plaintiff's resume does not mention STEP, let alone describe it as involving public school students; rather, she lists that she worked in the "College Opportunity Program" at a college. (Resume.)

congregants were ages 'newly-born to 103 years of age").) Plaintiff's resume and cover letter do not state that she was at all involved in educating or teaching students while a pastor. (Defs.' 56...1 ¶ 85; Cover Letter.) Plaintiff's resume and cover letter also did not include some other positions, including (1) the SEEK program at Lehman College in 1993; (2) Mount Olivet Baptist Church; (3) the CAP in New Jersey in the 1970s; and (4) the Mount Vernon Board of Education in the 1960's. (Defs.' 56.1 ¶ 88; Cover Letter.)

As for the certification requirement, (see Job Posting), Plaintiff holds New York State Education Department certificates in English and as a School District Administrator, (Defs.' 56.1 ¶ 89; certification). These certificates were obtained in 1969 and 1995, respectively. (*Id.* ¶¶ 90-91.) Plaintiff completed her administrative internship as a requirement for obtaining her Administrative certification. (*Id.* ¶ 92.) Plaintiff never held a position as a School District Administrator after obtaining that certification in 1995. (*Id.* ¶ 93.)

3. Plaintiff's Application for the

Copper Beech Assistant Principal Position

The Assistant Principal job posting listed a May 23, 2014 application deadline and noted that an on-line application through www.olasjobs.org ("OLAS") was required. (Job Posting.) OLAS is an Online Application System for educator jobs, and is hosted by the Board of Cooperative Educational Services, which includes a Putnam Northern Westchester branch. (Defs' 56.1 ¶¶94-96.) On May 20, 2014, Plaintiff accessed OLAS and applied to the District for the Assistant Principal position. (*Id.* ¶ 99.) Plaintiff input the responsive information to OLAS. (*Id.* ¶ 100.) Under the "current employment information" section, Plaintiff filled in "Date Available" as July 1, 2009, (Randazzo Decl. Ex. 1 (("May 20

Application") 3.)[8]

Plaintiff's application stated that she was never appointed tenure in a public school district in New York. (Defs.' 56.1 ¶ 102.) She also indicated that she was currently employed by the District as a substitute teacher. (May 20 Application") 3.)

In fact, Plaintiff had not worked as a substitute for the District since 2002, (Defs.'56.1 ¶ 103; Compliance Letter Ex. B), but she maintains that she never removed her name from the available substitutes list, (Pl.'s 56.1 ¶ 103).

Plaintiff's application also stated that she had approximately two years of experience working with grades four through eight, which includes the grades Plaintiff considers to be "middle school." (Defs.' 56.1 ¶¶ 104-05.) This was accurate, not including summer programs. (*Id.* ¶ 106.)[9] Plaintiff did not put any information in the "Other Experience in Education" section of the application. (Id. ¶ 107.) Plaintiff also submitted references with her application, one of whom was listed as deceased. (May 20 Application 4.)

Plaintiff received a notification from OLAS that her application was successfully submitted at 7:09 pm on May 20, 2014. (Defs.' 56.1 ¶ 110; Randazzo Decl. Ex. 3.) After receiving this confirmation, Plaintiff e-mailed Cosgrove on May 20, 2014 at 8:37 pm,

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[8] Defendants contend that this was Plaintiff's available start date for the Assistant Principal job, even though she was applying in 2014. (Defs.' 56.1 ¶ 101.) Plaintiff claims that she registered her availability to coincide with the job posting's "effective date" of July 1, 2014, (Pl.'s 56.1 ¶ 101). and that she does not recall typing in this 2009 date, and this it was a mistake, probably a page from a prior application she completed in 2008, (Pl.'s Dep. 119-20). In fact, Plaintiff's OLAS account contained a letter dated November 19, 2008, addressed to Westchester County School Administrators, applying for the position of substitute teacher in the District. (Defs.' 56.1 ¶¶ 116-19; Randazzo Decl. Ex. M.) To the extent Plaintiff now contends that she never drafted this letter or filed it on OLAS, (Pl.'s 56.1¶¶ 46, 116-19), this new allegation contradicts her prior deposition testimony, (Pl.'s Dep. 158-61), and thus will not be considered.

[9] To the extent that Plaintiff now avers otherwise, her statements contradict her prior deposition testimony, (Pl.'s Dep. 123), and in any event, are irrelevant to the question of what she told Defendants, which is documented in bother versions of the OLAS application, the earlier of which is of undisputed authenticity, (May 20 Application 3)..

attaching a copy of her resume and a cover letter dated May 16, 2014. (Defs.' 56.1 ¶¶ 111-13; Email Application.)[10] Plaintiff claims she also submitted this cover letter with her OLAS application, but does not remember ever seeing it on her OLAS aaccount or taking it down. (Defs.' 56.1 ¶ 114, *see also* Pl.'s 56.1 ¶¶100, 114.)

OLAS has a record of an application bearing Plaintiff's name and information dated May 28, 2014. (Randazzo Decl. Ex. P. ("May 28 Application").) Plaintiff testified that she does not remember submitting an application on this date, (Pl.'s Dep. 138), and not contends that any such application was sent by someone else or fabricated, (Pl.'s 56.1 ¶¶ 121-24).[11] The May 28 application is largely identical to the May 20 application, except that it lists Plaintiff's available start date as July l, 2014 and contains a field concerning "Administrative Experience."

(*Compare* May 20 Application with May 28 Application; Defs.' 56.1 ¶130.) However, the "Administrative Experience" field indicates that Plaintiff has ""[n]o" such experience at the elementary, middle school, high school, or district levels. (Defs.' 56.1 ¶ 125.) Plaintiff did not list her experience administering summer programs, library programs, the Newark CAP program, or tutoring students in her own home on her resume, cover letter, or either OLAS application. (Defs.' 56.1 ¶¶ 127-128; Cover Letter.)

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[10] The copy of the resume Plaintiff emailed is slightly different than the resume she submitted on OLAS. (Compare Email Application with Resume.) Most of the differences are stylistic, including font and capitalization, but the emailed resume also lists "educational affiliations." (Email Application.)

[11] When an applicant modifies an OLAS application already submitted, this updates the application date, even if it was timely submitted. (Defs.' 56.1 ¶ 248.) Thus, it is possible that Plaintiff's application date was changed when someone updated her existing application.

4.The District's Search for and hiring of a

Copper Beech Assistant Principal

The District has a non-discrimination policy, which District employees are trained in annually, that prohibits discrimination on the basis of race, color, gender, and age, in, among other things, recruiting and appointing employees. (Defs.' 56.1 ¶¶ 131-33.) The review board tasked with evaluating applications for an Assistant Principal position in the District consists of Cosgrove, Assistant Superintendent for Curriculum and Instruction Jean Miccio ("Miccio"), and the Principal of the school seeking to fill the position, (*Id.* ¶ 135.) The review board reviews all submitted resumes and determines which applicants to call for screening interviews based on their qualifications and experiences; after conducting screening interviews, the board then determines what pool of candidates will proceed for further interviews by a committee composed of representatives from all of the collective bargaining units. (*Id.* ¶¶136-139.) A candidate needs only a single vote from a single review board member to advance to the screening interview stage. (*Id.* ¶ 167.) Members of the committee then rate the applicants, and the review board determines which applicants will proceed to the final round of interviews. (*Id.* ¶¶ 142-143.) If the remaining applicants' references are good, the finalists are interviewed by the District's superintendent, who decides which of the finalists to recommend to the School Board to appoint to the position. (*Id.* ¶¶ 145-46.) The School Board then interviews the recommended applicant and choses to appoint or not to appoint that applicant to the position. (*Id.* ¶ 147.)

Over 300 candidates applied for the Copper Beech Assistant Principal position, including Plaintiff. (*Id.* ¶148.) The review board consisted of Cosgrove, Miccio, and Robert Bergmann ("Bergmann"). (*Id.* ¶ 150.) Plaintiff's name appears on the list of applicants

considered by the review board. (*Id.* ¶ 149.) The review board maintains that it screened each candidate's application and resume. (*Id.* ¶151.) However, Plaintiff contends that her resume, cover letter, and OLAS application were not reviewed until after the District was notified of her EEOC complaint, filed on October 8, 2014, because (1) she was told she was not certified and would not be considered or hired, (2) she received an unsigned letter of denial from Human Resources denying that she was certified and confirming her application was not considered, and (3) she found "untrue statements and fabricated evidence" in the District's response to her EEOC complaint. (Pl.'s 56.1¶ 136, 148-49, 151, 167, 169, 187; Randazzo Decl. Ex. T ("EEOC Charge"); Compliance Letter Ex. D ("July 2, 2014 Letter").)[12] Yet Plaintiff also does "not dispute what actions [Defendants] say [they] took." (Pl.'s 56.1 ¶ 167.) Cosgrove testified that when she evaluates candidates for a position, "the number one thing that [she] look[s] for is the certification," and "[the] number two thing [she] look[s] for is the qualifications that [they've] put in the posting." (Defs.' 56.1 ¶ 152.) She elaborated. "Qualifications, having experience at the middle school level, that's the meat and potatoes" of a candidate's application. (*Id.* ¶ 153.) Cosgrove claims she reviewed Plaintiff's May 28, 2014 OLAS application and resume and considered her candidacy for the Assistant Principal Position. (*Id.* ¶154.) Cosgrove noted that the application did not have "the experience [they] were looking for," namely, "middle school experience."

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[12] The July 2, 2014 letter is from "The Human Resources Department" in the District. (July 2, 2014 Letter.) The letter states, in relevant part:

> Thank you for your interest in a position with Lakeland Central School District. Please be advised that our district requires teaching certification for all of our teaching positions. In oder to be considered for a teaching position with our district, current valid NYS certification and on-line application through . . . (OLAS) are required.

(*Id.* ¶¶ 155-56.) Cosgrove also testified that she sought candidates with " a successful background in middle school education," as listed on the job posting, but there was nothing on Plaintiff's resume of OLAS application suggesting she had such a background. (*Id.* ¶¶ 157-59.)[13] Plaintiff disputes these rationales, because her cover letter mentions having worked successfully with Copper Beech students, and her resume notes administrative duties as Associate Pastor and at her internship, as well as her year spent teaching at Mount Vernon High School, her tenure at Lehman College, and administering STEP at Mercy College. (Pl.'s 56.1¶¶ 155-156, 158; Resume; Cover Letter.) Cosgrove also testified that she sought candidates with "a thorough understanding of the Common Core Learning Standards," as listed in the job posting, but there was nothing on Plaintiff's resume

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> We post all of our vacancies for teachers. . . on OLAS. We encourage you to visit the online system to submit your application and resume, and to review job vacancy listings. To apply for a position online, please visit http://www.olasjobs.org/lhv/ and ensure that all information fields are completed, attach a copy of your resume as a Word file, and then apply for the specific position(s) you are seeking. Please be advised that the OLAS system is the only application method utilized by this district for certified positions. ***In the interest of fairness, we are unable to process paper applications.***
>
> If there is a vacancy posted, once the positing has closed, applicants whose qualifications most closely meet district needs will be contacted by the appropriate department or building for an interview appointment. . .
>
> Again, we sincerely thank you for your interest in the Lakeland
>
> Central School District.

(*Id.* (emphasis in original).) The letter does not reference the Assistant Principal position or any specific application Plaintiff has filed, and indeed references only teaching positions, not administrative ones. (*See id.*)

[13] The Court does not understand the basis of Plaintiff's contention that this "is arbitrary and without educational merit" and "discriminatory" by ignoring the distinction between teachers and administrators, and in any event, it is a legal conclusion that cannot create a dispute of fact. (Pl.'s 56.1 ¶157.)

showing Plaintiff possessed that understanding. (Defs. 56.1 ¶¶160-61.) Specifically, Cosgrove noted that Plaintiff had "no work experience in a school district during the time the Common Core Learning Standards were being implemented," in 2012, and Plaintiff "didn't list any training [on her resume] that she sought to bring herself up to speed with" the Standards. (Id. ¶¶ 162-164.) Plaintiff again references her cover letter and asserts that while her experience with the Standards may predate recent implementation, "that is not to say that [her] knowledge of Common Core Learning Standards is defunct." (Pl.'s 56.1 ¶ 162.)[14]

Of the more than 300 applicants for the Assistant Principal position, the review board selected approximately 20 of them to advance to the screening interview stage. (Defs.' 56.1 ¶165.) Eight of those chosen candidates were women. (*Id.* ¶168.) However, Plaintiff was not interviewed for the Assistant Principal Position. (*Id.*¶ 178.) Cosgrove and Bergmann did not recommend Plaintiff advance to the screening interview stage. (Defs.' 56.1 ¶165 to the screening interview stage, and both contend that Plaintiff's gender, race, and age were not a factor in their decisions. (Id. ¶¶169, 171-77.)[15] Cosgrove specifically decided not to recommend Plaintiff because of her lack of experience as a school administrator and lack of experience working at the middle school level. (*Id.* ¶ 170.) Cosgrove did not know who Plaintiff was when she reviewed Plaintiff's EEOC Charge of Discrimination sometime after October 6, 2014, nor did she know Plaintiff's race or age

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[14] Plaintiff alleges that she is "up to speed" on the Common Core Learning Standards because the City University of New York instituted core standards earlier than the public schools of New York. (Pl.'s 56.1¶ 163.) But, Plaintiff does not explain how this relates to her experience or how, if at all, these standards are the same as the ones used in public schools, nor does she cite any evidence in support of this claim. In any event, again, this is not in her application materials. (See May 20 Application; Resume; Cover Letter.)

[15] Because a candidate needs only one vote to receive a screening interview, and Plaintiff did not receive one, Miccio also must have not recommended Plaintiff for an interview. (Defs.' 56.1 ¶¶ 166- 67, 178.) However, no Party discusses Miccio's vote in their 56.1 statements.

prior to that date (Id. ¶¶ 180-82; see also id. ¶¶ 184-85 (stating that same for Bergmann).) Plaintiff counters that this indicates Cosgrove and Bergmann never read Plaintiff's email or her application, which lists employment date prior to 1970 and work with an African Methodist Episcopal Church. (Pl.'s 56.1 ¶¶180-82, 184.) Further, Plaintiff alleges that she was not hired for the Assistant Principal position because of her age, race and/or gender, (Defs.' 56.1 ¶ 179), and maintains that she encountered discrimination, when seeking employment as an Administrator in the District, which did not recognize her certification, but not when she announced her availability to substitute teach, (Pl.'s 56.1 ¶ 179.)

The District hired Francesco "Frank" Ruolo as Assistant Principal of Copper Beech. (Defs.' 56.1 ¶186.)[16] Upon review of his resume and application, Cosgrove concluded that Ruolo had a successful background in middle school education, based on his work experience as an Assistant Principal at a Yonkers middle school for four years and the fact that he had received tenure in that position. (*Id.* ¶¶ 187-89.) Cosgrove also concluded that Ruolo had a thorough understanding of the Common Core Learning Standards, because his resume stated that he conducted meetings to address students' strengths and weaknesses, coordinated the administration of the New York State English language arts and mathematics assessments, and trained teachers on using the assessments to drive classroom instruction, which were all "affected by changes to the Common Core." (*Id.* ¶¶190-92)[17] However, Cosgrove did not consider Ruolo's previous experience working with

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[16] Ruolo was appointed tenure as Assistant Principal on August 14, 2017, and remains in that position at Copper Beech today. (Id. ¶¶ 252-53.) Plaintiff provides no factual basis for her contention that this "is not true." (Pl.'s 56.1 ¶ 253.)

[17] Plaintiff claims to dispute this fact by asserting that "[i]t is appropriate for the Review Board to have written documentation that sets forth the basis for the selection of successful candidates and the rejection of others>" (Pl.'s 56.1 ¶ 190.) The Court will not consider this conjecture, unsupported by any evidence and irrelevant to the fact asserted in Defendants' 56.1 statement, here or in any of the numerous times Plaintiff repeats it. (See id. ¶¶192, 199-201, 203-04, 216-18, 231, 233-34.)

disabled children aged 3 to 16 as the Assistant Director of the Special Needs and Academic Center enrichment program at the Jewish Community Center of Mid-Westchester, because it did not "appear to be connected to public school at all." (*Id.* ¶¶ 249-51.)

The Review Board conducted Ruolo's screening interview on June 10, 2014, and voted unanimously to advance Ruolo to the next round of the hiring process – the interview committee stage. (*Id.* ¶¶ 193, 245). Cosgrove took notes during the interview, noting Ruolo's experience as a middle school teacher and assistant principal, which was his current position. (*Id.* ¶¶ 194-98.)

After the interview, Cosgrove believed that Ruolo "had excellent experience at the middle school level," that he demonstrated that "he was a successful middle school assistant principle already," that he "answered the questions well," that he "was very personable,: and that he "would be received well at the [interview] committee level" and "would do a good job with the committee." (*Id.* ¶¶199-203.) Cosgrove therefore recommended that Ruolo advance to the interview committee stage, and contends that age, race, and gender were not factors in that decision or her decisions to recommend that any candidate advance to the next stage in the interview process or to withhold a recommendation that any candidate advance. (*Id.* ¶¶ 204-213.)

Miccio was also present at the interview and took notes. (*Id.* ¶ 214.) Miccio believed that Ruolo "was a very strong candidate," that his "answers to [their] questions demonstrated a comprehensive knowledge of middle school administration and ways of working with middle school aged children," and that his knowledge "was based on his years of experience as an assistant principal at the middle school level and as a teacher." (*Id.* ¶¶ 215-17.) Miccio thought "Ruolo was exactly the type of candidate [they] were

looking for to fill the . . . Assistant Principal position," and recommended that Ruolo advance to the committee interview stage. (Id. ¶¶ 218-19.) Age, race, and gender were not factors in Miccio's decision to recommend Ruolo advance, nor were they factors in Miccio's decision to recommend any other candidate advance or not advance. (Id. ¶¶220-28.)

Similarly, Bergmann was present and took notes at the screening interview. (*Id.* ¶ 229.) Bergman left "with a very positive impression of . . . Ruolo," "impressed by [his] years of experience as a successful assistant principal. . . and as a teacher," finding that "Ruolo spoke passionately about building relationships with students [and that] [h]is educational philosophy especially resonated with [Bergmann] because his approach is similar to [Bergmann's]," and that "Ruolo spoke knowledgeably about the Common Core Learning Standards and how at Yonkers the administration promoted a deep level of student comprehension in each standard before advancing to the next standard." (*Id.* ¶¶ 231-33.) Bergmann was "convinced" that Ruolo "possessed the qualifications that [they] sought in a successful Assistant Principal candidate." And recommended that Ruolo advance to the committee stage. (*Id.* ¶¶ 234-35.) Age, race, and gender were not factors in that decision, nor were they factors in Bergman's decision to recommend or not recommend that other candidates advance to the next stage in the interview process. (*Id.* ¶¶ 236-244.)

B. Procedural History

Plaintiff filed the Complaint on May 26, 2015. (Compl. (Dkt. No. 2).) She was granted in forma pauperis status on June 5, 2015. (Dkt.No.3.) Plaintiff filed an Amended Complaint on June 10, and a Second Amended Complaint on June 18, 2015. (Am. Compl. (Dkt. No. 4); Second Am. Compl. (Dkt. No. 6).) The Court issued an Order of Service on

June 19, 2015. (Dkt. No. 7.)

Defendants filed pre-motion letters indicating the grounds on which they would move to dismiss on August 20 and 21, 2015. (Letter from James A. Randazzo, Esq. to Court (Aug. 20, 2015) (Dkt. No. 16); Letter from Andrew R. Jones, Esq. to Court (Aug. 21, 2015) (Dkt. No. 17).) Plaintiff opposed this request. (Letter from Plaintiff to Court (Sept. 1, 2015) (Dkt. No. 18), Aff. in Opp'n to Mot. (Dkt. No. 19); Letter from Plaintiff to Court (Sept. 9, 2015) (Dkt. No. 22).) However, Plaintiff consented dto releasing Attorney Latino as a Defendant, and the Court ordered Latino dismissed from the case with prejudice on September 9, 2015. (Dkt. No. 21, 29.) The Court held a conference on November 23, 2015. (See Dkt. (Nov. 23, 2015); see also Dkt. Nos. 35, 37, 39 (discussing whether Plaintiff could file an amended complaint).)

The Court held another conference on February 11, 2016 and adopted a briefing schedule. (See Dkt. (entry for Feb. 11. 2016); Order (Dkt. No. 43).) Defendants filed their Motion to Dismiss and accompanying documents on March 31, 2016, (Dkt. Nos. 44-46.) Plaintiff opposed the Motion to Dismiss, (Dkt. Nos. 47-48), and Defendants filed a reply, (Dkt. No. 51). On March 30, 2017, the Court issued an Opinion and Order granting in part and denying in part the Motion To Dismiss and granting Plaintiff leave to amend certain claims. (Opinion & Order (Dkt. No. 53).)

On April 14, 2017, Plaintiff filed the operative Third Amended Complaint against Defendants. (Third Am. Compl. (Dkt. No. 54).) Defendants filed an answer on May 5, 2017. (Answer (Dkt. No. 55).) The Court held a conference on June 15, 2017, and adopted a case management order. (See Dkt. (entry for June 15, 2017); Order (Dkt. No. 58).) On December 6, 2017, after discovery closed, Defendants filed a pre-motion letter indicating

the grounds on which they would move for summary judgment, (Letter from James A. Randazzo, Esq. to Court (Dec. 6, 2017) (Dkt. No. 78)), which Plaintiff opposed, (Letter from Plaintiff to Court (Dec. 7, 2017) (Dkt. No. 79); Dkt. No. 81 (same)). The Court held a conference on December 14, 2017 and adopted a briefing schedule. (See Dkt. (entry for Dec. 14, 2017); Order (Dkt. No. 80).)

Defendants filed the instant Motion for Summary Judgment and accompanying papers on February 14, 2018. (Not. of Mot; Mem. of Law in Supp. of Mot. for Summ. J. ("Defs.' Mem.") (Dkt. No. 84); Randazzo Decl; Defs' 56.1) Plaintiff filed a letter opposing the Motion with accompanying exhibits on March 27 and 28, 2018, her 56.1 Statement and Declaration on April 17, 2018, and a memorandum of law on April 25, 2018. (Compliance Letter; Pl.'s 56.1; Pl.'s Decl.; Pl.'s Mem. of Law in Opp'n to Mot. for Summ. J. ("Pl.'s Mem.") (Dkt. No. 92).) Defendants filed a reply on May 4, 2018. (Reply Mem. of Law in Supp. of Mot. for Summ. J. (Defs.' Reply") (Dkt. No. 93).)

II. Discussion

A. Standard of Review

Summary judgment is appropriate where the movant shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Psihoyus v. John Wiley & Sons, Inc.* 748 F.3d 120, 123-24 (2d Cir. 2014) (same). "In determining whether summary judgment is appropriate," a court must "construe the facts in the light most favorable to the non-moving party and . . . resolve all ambiguities and draw all reasonable inferences against the movant." *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (internal quotation marks omitted), *see also*

Wandering Dago, Inc. v. Destito, 879 F .3d 20, 30 (2d Cir. 2018) (same). "It is the movant's burden to show that no genuine factual dispute exists." *Vt. Teddy Bear Co. v. I-800 Beargram Co.*, 373 F.3d 241m 244 (2d Cir. 2004).

"However, when the burden of proof at trial would fall on the nonmoving party, it ordinarily is sufficient for the movant to point to a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim," in which case "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *CILP Assocs., L.P. v. Pricewaterhouse Coopers LLP*, 735 F.3d 114. 123 (2d Cir. 2013) (alteration and internal quotation marks omitted). Further, " [t]o survive a [summary judgment] motion . . . , [a nonmovant] need[s] to create more than a 'metaphysical' possibility that his allegations were correct, he need[s] to "come forward with specific facts showing that there is a genuine issue for trial." *Wrobel v. County of Erie*, 692, F.3d 22, 30 (2d Cir. 2012) (emphasis omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87(1986)), "and cannot rely on the mere allegations or denials contained in the pleadings," *Guardian Life Ins. Co. v. Gilmore*, 45 F. Supp. 3d 310, 322 (S.D.N.Y. 2014) (internal quotation marks omitted); *see also Wright v. Goord*, 554 F. 3d 255, 266 (2d Cir. 2009) ("When a motion for summary judgment is properly supported by documents or other evidentiary materials, the party opposing summary judgment may not merely rest on the allegations or denials of his pleading. . . ."). And, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

"On a motion for summary judgment, a fact is material if it might affect the outcome

of the suit under the governing law." *Royal Crown Day Care LIC v. Dep't of Health & Mental Hygiene*, 746 F.3d 538, 544 (2d Cir. 2014) (internal quotations marks omitted). At this stage, "[t]he role of the court is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." *Brod*, 653 F.3d at 164 (internal quotation marks omitted). Thus, a court's goal should be "to isolate and dispose of factually unsupported claims." *Geneva Pharm.Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485,495 (2d Cir. 2004) (internal quotation marks omitted) (quoting *Celotex Corp. v. Carrett*, 477 U.S. 317, 323-24 (1986)). However, a district court should consider only evidence that would be admissible at trial. *See Nora Beverages, Inc. v. Perrier Grp. of Am., Inc.*, 164 F 3d 736, 746 (2d Cir. 1998). [W]here a party relies on affidavits or deposition testimony to establish facts, the statements "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.'" *DiStiso v. Cook*, 691 F.3d 226, 230 (2d Cir. 2012) (quoting Fed. R. Civ. P. 56 (c)(4)).

Finally, the Second Circuit has instructed that when a court considers a motion for summary judgment, "special solicitude" should be afforded a pro se litigant, *see Graham v. Lewinski*, 848 F.2d 342, 344 (2d Cir. 1988), *see also Gomez v. New York City Police Dep't.* No. 15-CV-4036.2018 WL 158329, at *4 (S.D.N.Y. Mar. 27, 2018) (same), and a court should construe "the submissions of a pro se litigant . . . liberally" and interpret them "to raise the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (italics and internal quotation marks omitted). Nonetheless, "proceeding pro se does not otherwise relieve a litigant of the usual requirements of summary judgment, and a pro se party's bold assertions unsupported by evidence. . . are insufficient to overcome a motion for summary judgment." *Houston v. Teamsters Local*

210, Affiliated Health & Ins. Fund-Vacation Fringe Ben. Fund, 27 F. Supp. 3d 346, 351 (E.D.N.Y. 2014) (internal quotation marks omitted); *see also Flores v. City of New York*, No. 15-CV-2903, 2017 WL 3263147, at *2 (S.D.N.Y. July 31, 2017) (same). Indeed, "[w]hile summary judgment must be granted with caution in employment discrimination actions, . . . a plaintiff must prove more than conclusory allegations of discrimination to defeat a motion for summary judgment." *Aspilaire v. Wyeth Pharm., Inc.*, 612 F. Supp 2d 289, 302 (S.D.N.Y. 2009) (citations and internal quotation marks omitted).

B. Analysis

Plaintiff claims that Defendants violated the ADEA, the Fourteenth Amendment's Equal Protection Clause, and the NYSHRL by failing to recommend and hire her for the Assistant Principal position at Copper Beech on her age, race and gender. (*See generally* Third Am. Compl.) All of these claims are analyzed under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). *See D'Cunha v. Genovese Eckerd Corp*. 479 F. 3d 193,194-195 (2nd Cir. 20007) (per curiam) ("Claims under the ADEA are governed by the three-step burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*." (citation omitted)); *Feingold v. New York*, 366 F.3d 138, 159 (2d Cir. 2004) (explaining that the elements of an equal protection claim under § 1983 and a claim under Title VII are the same and thus the burden-shifting framework applies to both); *Kassel v. City of Middletown*, 272 F. Supp. 3d 516, 535 (S.D.N.Y. 2017) ("[T] he Second Circuit analyzes claims pursuant to NYSHRL under the familiar three-part framework set forth by the Supreme Court in *McDonnell Douglas*.").

Under McDonnell Douglas, a plaintiff bears the

> initial burden of proving by a preponderance of the evidence a prima facie case of discrimination, it is then the defendant's burden to proffer a legitimate non-discriminatory reason for its actions; the final and ultimate burden is on the plaintiff to establish that the defendant's reason is in fact pretext for unlawful discrimination.

Abrams v. Dep't of Pub. Safety, 764 F.3d 244, 251 (2d Cir. 2014). However for ADEA claims, at the third step, a plaintiff must show that the discriminatory motive "was a but for cause of" the adverse employment action, rather than merely a motivating factor. *See McCormack v. IBM*. 145 F. Supp. 3d 258, 266 (S.D.N.Y. 2015) (quoting *Gross v. FBI. Fin. Servs., Inc.*, 557 U.S. 167, 173 (2009)); see also Gorzynski v. Jet Blue Airways Corp., 596 F.3d 93, 106 (2d Cir. 2010) (same).

I. ADEA Claim[18]

The ADEA makes it "unlawful for an employer to fail or refuse to hire . . any individual. . . because of such individual's age." 29 U.S.C. § 623 (a)(1). Defendants concede that Plaintiff state a prima facie ADEA claim, but argue that they articulated legitimate, non-discriminatory reasons for not hiring Plaintiff for the Assistant Principal job, and Plaintiff failed to create a triable issue as to whether these reasons were a pretext for discrimination. (Defs.' Mem. 5-8.) The Court agrees.

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[18] This claim is only against the district, because individuals cannot be held liable for violations of the ADEA. See Knutson v. G2 FMV, LLC, No. 14-CV-1694, 2018 WL 286100, at *9 (S.D.N.Y. Jan. 3, 2018) ("The law in the Second Circuit on this question is clear....[i]ndividual supervisors may not be held personally liable under the ADEA." (internal quotation marks omitted)).

Defendants contend that they chose not to hire Plaintiff, and instead hired Ruolo, for the Assistant Principal position because he was a better qualified candidate. (*Id.*) *Specifically*, Ruolo had experience working as a middle school assistant principal, a position in which he received tenure, in the Yonkers school district, and his resume demonstrated that he coordinated the administration of state-wide assessments that incorporated changes in the Common Core Learning Standards . (Defs.' 56.1 ¶¶ 188-89, 190-92, 197-98.) Ruolo therefore advanced to the screening interview stage, where all of his interviewers thought he performed well, showing his qualifications for the job, and therefore recommended him to the next interview stage, contending that age, was not
a factor in that decision. (*Id.* ¶¶ 199-203, 205, 208, 215-20,223, 231-36, 239.) Ruolo's age is not mentioned on his application, (Randazzo Decl. Ex. U (resume); *Id.* Ex. V (OLAS application)), or in any of the interview notes, (*Id.* Exs. W. X, Y).

By contrast, no member of the review board recommended that Plaintiff advance to screening interview stage, so she was not one of the 20 out of 300 applicants that interviewed for the Assistant Principal position. (Defs.' 56.1 ¶¶ 165, 169, 174, 178.) Cosgrove and Bergmann both contend that this decision was not based on age, and indeed they were unaware of Plaintiff's age until they reviewed her EEOC Charge in October 2014. (*Id.* ¶¶173, 177, 181, 184.) After reviewing Plaintiff's application, Cosgrove determined that Plaintiff did not have "middle school experience," which she noted was "the meat and potatoes" of "the experience [they] were looking for" in a candidate, nor did she have "a successful background in middle school application." (*Id.* ¶¶ 153, 155-59.) Moreover, Cosgrove found nothing on Plaintiff's resume showing that Plaintiff had a "thorough understanding of the Common Core Learning Standards," because Plaintiff had "no work

experience in a school district during the time [they] were being implemented" in 2012, nor did she "list any training that she sought to bring herself up to speed with" the Standards. (*Id.* ¶¶ 160-64.) Indeed, Plaintiff's application accurately stated that she was never appointed tenure in a public school district in New York and had two years of experience working with middle school grades—that is, grades four through eight. (*Id.* ¶¶ 102, 104-106.) And, regardless of which OLAS application version was considered, neither lists any school administrative experience. (*See* May 20 Application; May 28 Application.)

Plaintiff has failed to show that these proffered reasons are a pretext for age discrimination under the ADEA. Although Plaintiff has cclearly identified what specific facts indicate age discrimination, the Court has construed her submissions liberally and will address each potentially relevant fact she raises.

Plaintiff's main pretext argument is that she is more qualified than Ruolo for the position. (*See* Pl.'s Mem. 5-7.) Indeed, she devotes a substantial part of her submissions to discussing the ways in which she believes she was qualified for the Assistant Principal job and why Defendants discounted the value of her experience. (E.g., Pl.'s 56.1 ¶¶ 53-54, 155-56, 162; Pl.'s Mem. 2-7.) However, even assuming Plaintiff possessed experience that she believes qualified her for the position, it is undisputed that most of that experience was not actually listed in her application materials. First, her resume did not list the experience comprising her purported background in middle school education, (see Resume; see also Defs.' 56.1 ¶ 58 9 working at John C. Hart library); *Id.* ¶ 69 (working at the Mount Vernon Middle School or with middle school students); id.¶ 66 (substituting teaching); *Id.* ¶ 85 (working as a pastor that included educating or teaching students)), her knowledge of the Common Core Learning Standards, (see *Id.*¶ 51, Pl.'s Dep. 84), any position as an

Assistant Principal or Principal at any job, (See Defs.' 56.1 ¶¶ 73-74 (listing her position with Greenburg-Graham as an administrative intern only)), any employment in the public education system after the 1969-70 school year. (see *id.* ¶¶ 75-76), or any of the other employment positions Plaintiff now identifies as relevant experience, (*see id.*¶ 88 (not listing the SEEK program, Mont Olivet Baptist Church, CAP in New Jersey, or the Mount Vernon Board of Education)). Moreover, even assuming that Defendants shouls have considered Plaintiff's emailed cover leter, (but see Job Posting (requiring an online application through OLAS); July 2, 2014 Letter (noting that OLAS "is the only application method utilized by [the] [D]istrict for certified positions" and that "[i]n the interest of fairness, [they] are unable to process paper applications")), it does not contain additional information that renders Cosgrove's proffered rationales pretextual, because it does not list experience working at a middle school or "work experience in a school district during the time [the Common Core Learning Standards]" were being implemented or "any training that [Plaintiff] sought to bring herself up to speed with" them. (Defs.' 56.1 ¶¶ 155-59, 160-64). Rather, it states only that Plaintiff "worked successfully with middle school students elsewhere and also at Copper Beech" through supervising the John C. Hart Memorial library event and substitute teaching and that she "ha[s] no problem understanding Common Core Learning Standards" because she has helped "develop curricula for various groups. (Cover Letter.)

Furthermore, to the extent that Plaintiff thinks that Defendants should not have discounted her non-school experience, she provides no evidence suggesting that this is age discrimination. *See McCormack*, 145 F. Supp. 3d at 266 (requiring the plaintiff to present facts showing that her age was a "but for cause" of adverse employment action). Indeed, Cosgrove refused to consider Ruolo's previous experience working with disabled children at

a Jewish Community Center because it did not "appear to be connected to public school at all." (Defs.' 56.1 ¶¶ 249-51.) *See Grady v. Affiliated Cent., Inc.*, 130 F 3d 553, 56.1 (2d Cir. 1997) ("The record is perhaps most remarkable for the presence of affirmative evidence . . . that older and younger trainees were in fact treated the same.""); *Venezia v. Luxoticca Retail N. Am. Inc.*, No. 12-CV-4467, 2015 WL5692146, at *10 (S.D.N.Y. Sept. 28, 2015) ("[W]ithout any evidence that Defendants treated younger employees differently, Plaintiff has failed to establish any facts that would support an inference of discrimination based on his age."), aff'd, 699 F. App'x 53 (2d Cir. 2017); *Holowecki v. Fed. Exp. Corp.*, 644 F. Supp. 2d 338, 353 (S.D.N.Y. 2009) (noting that the plaintiff identified "a handful of younger couriers" who were not terminated, but "fail[ed] to demonstrate how any of these individuals were treated differently under circumstances similar to his"), aff'd. 382 F. App'x 42 (2d Cir. 2010).

In the place of any evidence of discriminatory intent, Plaintiff posits only her disagreement with Defendants' decision to find her less qualified than another (apparently younger) candidate. However, "[w]hile [the Court] must ensure that employers do not act in a discriminatory fashion, [it] do[es] not sit as a super-personnel department that reexamines an entity's business decisions." *Delancy v. Bank of Am. Corp.* 766 F.3d 163, 169 (2d Cir. 2014) (per curiam) (internal quotation marks omitted); *see also Sassaman v. Gamache*, 566 F.3d 307, 314 (2d Cir. 2009) ("[I]t is not the role of federal courts to review the correctness of employment judgment, "[P]laintiff's credentials would have to be so superior to the credentials of the person selected for the job" –Ruolo—"that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over . . . [P]laintiff for the job in question." *Byrnie v. Town of Cromwell, Bd. Of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001) (internal l quotation marks omitted); *see also Wharff v. State Univ. of New York*,

413 F. App'x 406, 408 (2d Cir. 2011) ("Where a decision to promote one person rather than another is reasonably attributable to an honest even though partially subjective evaluation of their qualifications, no inference of discrimination can be drawn. (alterations and internal quotation marks omitted)). Plaintiff's subjective disagreement with Defendants' assessment of her qualifications does not make their decision discriminatory. *See Testa v. CareFusion*, No. 14-CV-05202, 2018 WL 1611378, at *8 (E.D.N.Y Apr. 3, 2018) ("An employee's subjective disagreement with his [or her] manager's evaluation of his [or her] [qualifications] is not a viable basis for a discrimination claim [under the ADEA]."); *Bucek v. Gallagher Bassett Servs., Inc.*, No. 16-CV-1344, 2018 WL 160-334, at *11 (S.D.N.Y. March 29, 2018) ("[The] [p] laintiff's subjective disagreement with [Defendants'] reliance on [a hiring criteria] does not make it discriminatory") (collecting cases); *Withowich v. Gonzales*, 541 F. Supp. 2d 572, 582 (S.D.N.Y. 2008) ("[The] [plaintiff's disagreement with the way in which the [employer] weighed his and [a younger candidate]'s qualifications does not create an issue of material fact."). Plaintiff cites no evidence suggesting that her age played any role in the decision not to hire her, such as comments about her (or Ruolo's) age or any evidence suggesting that only younger (and underqualified) candidates advanced in the screening interview stage. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (holding that "rejection of the defendant's proffered reasons [does not] compel [] judgment for the plaintiff," because the plaintiff "at all times bears the ultimate burden of persuasion" that the decision was intentionally discriminatory (internal quotation marks omitted)); id. at 524 ("That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of [age] is correct."). Ultimately, this is not a case in which "a reasonable jury could conclude that "Defendants" decision to hire Ruolo "was so

lacking in merit as to call into question its genuineness" merely because it did not consider Plaintiff's non-school-based or older work experience as middle school education experience *Dister v. Cont'l Grp. Inc.*, 859 F ,2d 1108, 1116 (2d Cir. 1988); *see also Davis v. State Univ. of New York*, 802, F.2d 638, 642 (2d Cir. 1986) ("[T]he reasons for hiring [another candidate] were noto so ridden with error that [the employer] could not have honestly relied upon them."). Rather, Defendants made a rational judgment that Ruolo was a better candidate than Plaintiff –and the other 299 people that applied for the Assistant Principal job—and, absent any evidence that that decision was motivated even in part because of Plaintiff's age, the Court should not substitute its own judgment for Defendants. *See Byrnie*, 243 F.3d at 103 (noting that where the younger candidate was not unqualified and the employer was not unreasonable in selecting that candidate "in light of a comparison of her paper credentials with [the plaintiff's]," the plaintiff failed to show pretext).

Construing her submissions liberally, Plaintiff also contends that Defendants' reasons were pretextual because her application materials were not actually reviewed until after the District was notified of her EEOC complaint, in October 2014. (*See* Pl.'s 56.1 ¶¶ 167, 169, 187.) While this proposition, if supported by evidence, could create a dispute of fact as to whether the reasons Defendants proffered for failing to recommend Plaintiff for a screening interview and failing to hire her were a pretext for age discrimination created amidst litigation, Plaintiff has provided no such evidence here. It is undisputed that Plaintiff's name appears on the list of applicants considered. (Defs.' 56.1 ¶ 149), and the review board and the review board reviewed each candidate['s application and resume, (id. ¶ 151; see also Pl.'s 56.1 167 (stating that Plaintiff does "not dispute what actions [Defendants] say [they] took" but she "cannot agree that [the] screening and hiring process is what it should be")).

However, Plaintiff now claims her application was not reviewed because she was told she was not certified and would not be considered or hired, citing hre experiences with the District and the July 2, 2014 letter she received from Human Resources (Pls.' 56.1 ¶136); Compliance Letter 2.) This evidence does not support Plaintiff's claim). In 2004 and 2014, Plaintiff visited the Board of Education to seek administrative employment, and was told that she was not listed on their online registry as certified; however, she maintains that her name was on the list in 2004, she is actually certified, and that the District always finds her certification for substitute teaching positions. (Defs.' 56.1 ¶¶ 39-40, 260, 263, Pl.'s 56.1¶¶ 38-39.) As an initial matter, none of these interactions was with any decisionmaker in the Assistant Principal hiring process, nor do these interactions indicate that Plaintiff's application was not considered for the position because the decisonmakers concluded she was not certified—indeed, the 2004 interaction related to an elementary school position that Plaintiff does not remember applying for (Defs.' 56.1 ¶¶ 264-65; *see also* Davis, Dep. 30 (testifying that she "had no involvement" in the hiring process for the Assistant Principal position).) At most, they show that Plaintiff was told by District employees that if she was not certified on their list, her application would not be considered for a position with the District. (Defs.' 56.1 ¶¶ 40, 263.)[19]

The July 2, 2014 letter, sent after Plaintiff applied, similarly states that "[the] [D]istrict requires teaching certification for all of [its] teaching positions." And indicates where positions are posted and where to apply on OLAS. (July 2, 2014 Letter.) However,

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[19] To the extent that Plaintiff argues that she was told she would not be hired by Davis on May 16, 2014, (Pl.'s Mem. 2), this claim is belied by the record, (Defs.' 56.1¶ 40, Davis Dep. 47, 50 (testifying that she had no knowledge of whether Plaintiff was actually certified at the time, but "told [Plaintiff] that if she was not certified, her application would not be considered"); Pl.'s Dep 59-60 (testifying that she does "not remember exactly" the contents of the conversation between Plaintiff and Davis).)

the letter does not mention the Assistant Principal position or Plaintiff's application, let alone state that Plaintiff would not be considered for the position because she was not certified. (*Id.*) Nor is there any evidence that any member of the review board or the hiring process claimed that Plaintiff's lack of certification was the reason she was not hired. Rather, as Plaintiff noted in her cover letter, (Cover Letter), and testified to at her deposition, it is possible her certification was not listed in the District's database because she was certified prior to 1991 and therefore listed on another website called Teach, (Pl.'s Dep. 75-76). Even assuming Plaintiff's application was not considered because she was incorrectly deemed not certified, there is no evidence in this record that Defendants ignored Plaintiff's certification because of her age – such as evidence suggesting Defendants knew or were told that her certification would be listed on Teach but refused to check it—and therefore this fact is insufficient to create a dispute about whether any of the reasons for not hiring Plaintiff were pretextual. *See Moore v. Kingsbrook Jewish Med. Ctr.*, No. 11-CV-3625, 2013 WL 3968748, "8 (E.D.N.Y. July 30, 2013) (noting that "personnel decisions . . . that are incorrect do nt support a federal claim unless they are tainted, at least in part, by illegal discrimination" (alteration and internal quotation marks omitted)); *see also Brown v. New York City Dep't of Educ.*, 513 F. App's. 89, 91 (2d Cir. 2013) ("Even if [the plaintiff] were correct that the DOE erred in concluding that she was ineligible for an H-1B visa . . .the record is devoid of evidence indicating that that reason was a pretext for discrimination rather than simply a good faith mistake.")[20]

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[20] Plaintiff also contends that "untrue statements and fabricated evidence" in the District's response to EEOC complaint show that her application was not reviewed until she filed that complaint. (Pl.'s 56.1 ¶ 151.) However, she does not say what those statements were, let alone how they demonstrate that her application was not reviewed. Indeed, Defendants conceded that Plaintiff was certified in their response to the EEOC complaint. (Defs.' EEOC Opp'n 2 ¶4.)

Lastly, to the extent Plaintiff infers discrimination from the fact tht the District found her certification for substitute teaching but not for administration, (e.g., Pl.'s 56.1 ¶ 179), these are different certifications, and if anything, suggest that the District does not generally discriminate on the basis of age.

Plaintiff also concedes that Cosgrove and Bergmann did not know Plaintiff's age prior to reviewing her EEOC complain, but contends that this shows they never read her email application, which lists employment dates prior to 1970. (Pl.'s 56.1 ¶ 181.) While it is certainly a reasonable inference that Defendants could have deduced Plaintiff's age from her application, this fact, without more, does not permit an inference that Defendants decided not to hire Plaintiff based on her age. See Boyer v. Riverhead Cent. Sch. Dist., No. 05-CV-54955, 2008 WL 11412042, at * 10 (E.D.N.Y. Sept. 11, 2008) (finding that the plaintiff testified "she was never asked about her age during the [job] interview," and that " [d]espite the purported subterfuge Plaintiff infers was inherent in the [interview] question about the dates of her prior positions, she has produced no evidence to support such an inference"), adopted in part, rejected in part, 2008 WL 11412043 (E.D.N.Y. Sept. 29, 2008), aff'd, 343 F. App's. 740 (2d Cir. 2009); *Shaheen v. Gonzales,* No. 05-CV-8400, 2006 WL 3164763, at *7 (S.D.N.Y. Nov. 1, 2006) (explaining that while "the law school graduation dates" listed on certain forms were "sufficient to meet his minimal burden. . . on the prima facie case, [the] plaintiff offers no direct exidence that the [defendant] decisionmakers had actual knowledge of the age discrepancy between him and [the other candidate]"), *Strycharz v. Verizon*, No. 01-CV-1050, 2002 WL 31856820, at *3 (S.D.N.Y. Dec. 19, 2002) (explaining that the plaintiff did not contest that "the management disciplinary committee who decided to fire him did not know his age"); *DeSoignies v. Credit Lyonnais*, 617 F. Supp.

707, 712 (S.D.N.Y. 1985) (noting that "the plaintiff did not show any instances of use of compilation of [the employees' dates of birth and age"] near to the time of [the] plaintiff's discharge," and "the [c]ourt d[id] not infer from [the] defendant's awareness of the age of its employees . . . that it used that information in making decisions such as the decision to terminate plaintiff"")'; cf. *Terry v. Ashcroft*, 336 F. 3d 128, 140 (2d Cir. 2003) (explaining that if handwritten notations as to the candidates' birth dates were on a memo listing the "Best Qualified" candidates at the time the employer made his decision, "a trier-of-fact could infer that [the employer] considered age").

Plaintiff mentions other facts relating to her age, but these also fail to generate a factual dispute regarding pretext. First, Plaintiff contends that a member of the Board of Education incited "ageist remarks" at a meeting on February 4, 2016), but does not state who this person was, who make the allegedly ageist remarks, or how these relate to the District 's undisputed nondiscrimination policy in hiring employees, let alone the decision to hire Plaintiff. (Pl.'s 56.1 ¶133.)[21] In any event, such "stray remarks, even if made by a decisionmaker, do not constitute sufficient evidence to make out a case of employment discrimination'" under the ADEA, *Parron v. Herbert*, No. 17-CV-3848, 2018 WL2538221, at *9 (S.D.N.Y. May 18, 2018) (alteration omitted) (quoting *Danzer v. Norden Sys., Inc*, 151 F.3d 50, 56 (2d Cir. 1996)), particularly when they are not linked in any way to the decision not to hire Plaintiff, nor provided alongside other evidence of discriminatory intent, *Testa*, 2018 WL 1611378, at *8 (noting that that "stray remarks made months before [the]

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[21] Indeed, while the School Board is involved in the final decision to appoint someone to the Assistant Principal position, the Board never reviewed Plaintiff's application because she did not advance to the interview stage; moreover, this allegation does not implicate Cosgrove, who participated only in the initial screening stage. (Defs.' 56.1 ¶¶ 145-46.)

plaintiff's termination are insufficient to demonstrate a discriminatory intent" and "[i]n light of the context and the entire record, no rational jury could infer a causal connection between the comment and [the] plaintiff's . . . termination"); see also Boyle v. McCann-Erickson, Inc., 949 F. Supp. 1095, 1101 (S.D.N.Y. 1997) (noting that "ageist statements. . . are not sufficient to satisfy [the] [p]laintiff's ultimate burden").[22]

Plaintiff also asserts that the interview committee has no diversity, because it had no "older African American wom[e]n such as [Plaintiff], but cites no evidence to this effect. (Id. ¶ 139.) Moreover, Plaintiff cites no evidence regarding the interviewers' ages. *See Esar v. JP Morgan Chase Bank N.A.*, No. 15-CV-382, 2018 WL 2075421, at *9 (E.D.N.Y. May 3, 2018) ("[The] [plaintiff's claim that there is an inference of discrimination from the fact that [the decisionmaker] is 'younger' than [the] [p]laintiff also fails because, as far as the court is aware, there is no record evidence concerning [the decisionmaker's] age." (citation omitted)). In any event, even if the review board comprised only individuals younger than Plaintiff, let alone individuals who were also not the same race and gender as her, this fact alone does not show that their proffered reasons for not hiring her are a pretext for her age. *See Esar*, 2018WL 2075421, at *9 (finding that the plaintiff failed to meet her prima facie burden just by asserting that the decisionmaker "is younger than [the] [p]laintiff"); *Thompson v. Tom Vazquez-Janitorial*, No. 05-CV-808, 2006 WL 3422664, at *3—4 (E.D.N.Y. Nov. 28, 2006) (noting that the fact that "[t]he supervisor who made the decision to terminate [the plaintiff] . . . was only three years younger than [the plaintiff]"

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[22] Plaintiff also contends that she "understand[[s] that discrimination suits have been filed against the District," but "has[s] not seen them," and fails to describe them, let alone cite to them in the record, such that they could reasonably be linked to the hiring decision at issue here. (Pl.'s 56.1¶ 143.)

did not "suggest that his termination was related to his age," and in any event, the plaintiff failed to show the supervisor's proffered reasons were pretextual); *see also McCormack*, 145 F. Supp. 3d at 266 (requiring the plaintiff to prove that age" was a but for cause" rather than merely a motivating factor); of Tremalio v. Demand Shoes, LLC, No. 12-CV-357, 2013 WL 5445258, at *8 (D. Conn. Sept. 30, 2013) (declining to draw an inference against the plaintiff where "the record d[id] not indicate the extent to which each of the three decisionmakers was involved, and the extent to which the decision was made by the significantly younger [supervisor]"); Bennett v. Solis, 729 F. Supp. 2d 54, 68 (D.D..C. 2010) (noting that the plaintiff" lack[ed] any evidence of age-based animus on the part of the decisionmaker. . . who was in her mid--60's and only a few years, younger than [the] plaintiff when she made the decision to terminate him"). Additionally, Plaintiff cites to "statistics" purportedly showing " a policy of adverse hiring of the older African American woman." (Pl.'s Mem. 7.) However, these statistics do not establish what age these employees were when they applied, who else they competed against for the position, what prior administrative experience they had, or who decided to hire them. (Compliance Letter Ex. C.) Moreover, the exhibit containing these statistics lists several employees over the age of 60. (*Id.* (listing Laura Cuddy, Steward Hanson, Marry Ellen Herzog, Raymond Morningstar, Jr. George Stone, Susan Strauss, Theresa Wilkowski, and Lorraine Yurish).) Finally, Plaintiff asserts that she was ":discriminated against because of [her] age," (Pl.'s Mem. 7), but this conclusory statement, restating her prima facie case without any evidence, is insufficient to show pretext. *See Miller v. Nat'l Ass'n of Sec. Dealers, Inc.*, 703 F. Supp. 2d 230, 248 (E.D.N.Y. 2010) ("When an employer accused of discrimination provides convincing evidence explaining its conduct, and the plaintiff's case rests on conclusory allegations such as these, it is proper for a court

to conclude that there is no genuine issue of material fact and to grant summary judgment for the employer.") *see also Brenner v. City of New York Dep't of Educ.*, 659 F. App'x 52, 54 (2d Cir. 2016) (rejecting "conclusory" argument as "insufficient to carry [the plaintiff's] step-three burden under either a but-for or motivating factor-standard").

The Court therefore grants the District's Motion for Summary Judgment on the ADEA claim.

2. Section 1983 Claim

Plaintiff also brings a § 1983 claim, alleging that Defendants violated her rights under the Equal Protection Clause of the Fourteenth Amendment by discriminating against her on the basis of her race and gender. (Third Am. Compl., Pl.'s Mem. 7-8.) Defendants argue that Plaintiff has failed to create a dispute of material fact regarding whether the proffered reasons for not hiring her were a pretext for race or gender discrimination, and in any event the district cannot be held liable under Monell. (Defs.' Mem. 8-12.)[23] The Court will address each argument in turn.

a. Pretext

Plaintiff's § 1983 claim is analyzed under the *McDonnell Douglas* burden- shifting

[23] Defendants also argue briefly that Cosgrove was not personally involved in the constitutional violation. (Defs.' Mem. 8.) However, because Cosgrove participated directly in the allegedly discriminatory hiring process—she reviewed Plaintiff's application and did not recommend her for a screening interview and did recommend Ruolo—this argument fails. See Grullon v. City of New Haven, 720 F.3d 133, 138 (2d Cir. 2013) (listing as a category of personal involvement when "the defendant participated directly in the alleged constitutional violation"). Barnes v. Ross, 926 F. Supp. 2d 499, 508 (S.D.N.Y. 2013) (holding that a plaintiff sufficiently alleged personal involvement where the defendant personally interviewed the plaintiff in connection with his allegedly discriminatory treatment). She can be liable for discrimination even if she was not involved in the ultimate decision to hire Ruolo. (Defs.' 56.1 ¶147.)

standard. *See Feingold*, 366 F. 3d at 159. Defendants concede that Plaintiff has stated a prima facie case of race and gender discrimination, but argue that they had legitimate non-discriminatory reasons for deciding not to invite Plaintiff to a screening interview and hiring Ruolo instead, and that Plaintiff has not created a fact dispute that these reasons were a pretext for discrimination. (Defs.' Mem, 9; Defs.' Reply 3.) The Court agrees.

The Court has already discussed Cosgrove's and the other review board members proffered reasons for not selecting Plaintiff for a screening interview and for recommending Ruolo for the Assistant Principal position. To create a factual dispute regarding whether these reasons were pretextual, Plaintiff may show that Defendant's proffered justifications are "false," or she "may instead rely on evidence—circumstantial or otherwise—showing that [her gender and race] w[ere]. . . motivating factor[s]" in the decision to interview, and ultimately hire. Ruolo instead of plaintiff. *Holtz v. Rockefeller & Co, Inc.*, 258 F.3d 62, 81 (2d Cir. 2001) (citations and internal quotation marks omitted)' *see also Ya-Chen Chen v. City Univ. of New York*, No. 11-CV-320, 2014 WL 1285595, at *7 (S.D.N.Y. Mar. 31, 2014) (requiring the plaintiff to produce "sufficient evidence support a rational finding that . . . more likely than not discrimination was the real reason for the employment action" (alterations and internal quotation marks omitted)), aff'd, 805 F.3d 59 (2d Cir. 2015). Although she identifies several facts she believes show discrimination, Plaintiff has not satisfied this standard.[24]

Plaintiff relies on many of the same pretext arguments she did in the ADEA context.

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[24] Plaintiff does not discuss the decisions of the interview committee, the Superintendent, or the School Board, all of whom participated in the later stages of the interview process with Ruolo but none of whom was sued here. She does contend that the Superintendent is "merely a figurehead or rubber stamp" and his decision is pre-determined by the recommendations he receives, but provides no evidence for this assertion. (Pl.'s 56.1 ¶¶ 146-47.)

First, Plaintiff argues that Defendants hired Ruolo, a male Caucasian who she believes is less qualified and less experienced than her—in other words, her prima facie case. (Pl.'s Mem. 10, Compliance Letter 3.) As in the ADEA context this is insufficient to show that Defendants' proffered reasons were a pretext for gender or race discrimination. See Bucek, 2018 WL 16093334, at *11 (Plaintiff's subjective disagreement with [Defendants'] reliance on [a hiring criteria] does not make it discriminatory."); *Nyuyen v. Dep't. of Corr. & Cmty. Servs.*, 169 F. Supp. 3d 375, 3994 (S.D.N.Y. 2016) (rejecting the plaintiff's "subjective belief that he was more qualified for the position," including that "he had greater experience, or 'more seniority,'" as insufficient to show pretext); *Concepcion v. City of New York* No. 15-CV-2156, 2016 WL 386099, at *14 (S.D.N.Y. Jan. 29, 2016) ("[P]laintiff's] subjective assessment of her own qualifications is insufficient to create a genuine factual issue as to whether the [defendant's] proffered reason for its hiring decision are pretext for discrimination."), aff'd, 693 F. App'x 31 (2d Cir. 2017); *Estrada v Lehman Bros.*, No. 99-CV-8559, 2001 WL 43605, at *5 (S.D.N.Y. Jan. 18, 2001) ("The mere fact that [the plaintiff] may disagree with his employer's actions or think that his behavior was justified does not raise an inference of pretext."); see also Smith v. Ward Leonard Elec. Co., No. 00-CV-3703, 2004 WL 1661098, at *9 (S.D.N.Y. July 23, 2004) (holding that the plaintiff could not establish pretext "on his weak prima facie case alone"). This is particularly true where Plaintiff does not argue that the criteria (Defendants relied on were discriminatory; indeed, it is undisputed that they were listed in the job posting. (See Job Posting.) *See MacBain v. Smiley Bros. Inc.*, No. 10-CV-1561, 2013 WL 621932, at *12 (N.D.N.Y. Feb. 19, 2013) (noting that the plaintiff provided no "objective evidence" showing that "she was not actually terminated according to the

neutral criteria of seniority but rather for discriminatory reasons"); *Bagdasariajn v. O'Neill*, No. 00-CV-258E, 2002 WL 1628722, at *5 (W.D.N.Y. July 17, 2002) ("As the Second Circuit Court of Appeals was held,

. . . where an employer uses objective or verifiable standards and makes selections in a nondiscriminatory fashion, he or she can decide which employee is most qualified." (alterations and internal quotation marks omitted)).

Plaintiff does not point to any other facts in the record indicating that Defendants' decision was motivated even in part by Plaintiff's gender or race. *See St. Mary's Honor Ctr.*, 509 U.S. at 511 (holding that "rejection of the defendant's proffered reasons [does not] compel [] judgment for the plaintiff," because the plaintiff "at all times bears the ultimate burden of persuasion: that the decision was intentionally discriminatory (internal quotation marks omitted)). As to race, Plaintiff avers that "to [her] knowledge[,] the instant . . .lawsuit does not mention race,: which the Court finds odd. (Pl.'s Decl. ¶ 123.) In any event, Ruolo's race is not mentioned on his application, (Randazzo Decl. Exs. U.V.), the interviewers do not mention race (or gender) in their notes from his screening interview, (id. Essc. W. X. Y); and they contend that these were not factors in choosing Ruolo or not recommending other candidates. (Defs.' 56.1 ¶¶ 206-07, 209-10, 212-13, 221-22, 224-25, 227-28, 237-38,240-41, 243-44.) Cf, Nguyen, 169 F. Supp. 3d at 389 (finding that mere discussion of race in an interview alone does not "reflect any discriminatory animus on the part of [the] interviewers"). Similarly, it is undisputed that Plaintiff"s race is not mentioned in her application materials, (Resume; May 20 Application; May 28 Application), and that Cosgrove and Bergmann did not know Plaintiff's race when they evaluated her application. (Defs.' 56.1¶¶ 180, 182,

185.)[25] *See, e.g., Pena-Barrero v. City of New York*, No. 14-CV-9550, 2017 WL 1194477, at "13 (S.D.N.Y. Mar. 30, 2017) ("[B]ecause it is undisputed that [the defendants] did not know [the] [p]laintiff was Colombian when [the] [p]laintiff worked for them, . . . statements [mentioning race or national origin] do not suffice to show that [the] [d]efendants' reasons for terminating [the] [p]laintiff were pretext for race or national origin discrimination." (citations omitted)), aff'd, 2018 WL 1181180 (2d Cir. Mar. 7, 2018). Plaintiff does argue that the interview committee had no African Americans on it, but even assuming this was supported by evidence, it is alone insufficient to show Plaintiff was not hired because of her race. See Henny v. New York State, 842 F. Supp. 2d 530, 557 (S.D.N.Y. 2012) (collecting cases holding that the mere fact that a plaintiff is of a different race than the decisionmaker is insufficient to show that the decisionmaker's conduct was motivated by racial discrimination).

As to gender, Plaintiff asserts that "[i]t is likely that a preponderance of women were qualified and . . . applied and that a preponderance of women were rejected." But provides no factual basis for this claim. (Pl.'s 56.1 ¶ 168.) Indeed, it is undisputed that of the 20 out of 300 applicants chosen to advance to the screening interview stage, eight were women. (Defs.' 56.1 ¶¶ 165,168.) "This fact alone diminished the Plaintiff['s] prospect for raising an inference of employment discrimination." Garnett-Bishop v. New York C'mty Bancorp, Inc., No. 12-CV-2285, 2017 WL 836562m at *32 (E.D.N.Y. Mar. 2, 2017) (collecting cases). Moreover, Cosgrove, one of the three members of the review committee, is female, further

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[25] Plaintiff again argues that this proves her emailed application was never read, because it mentions her work with an African Methodist Episcopal Church. (Pl.'s 56.1 ¶ 182.) The Court notes that the resume submitted with Plaintiff's OLAS application states only "Bethel Church," (Resume), while the resume Plaintiff emailed to Cosgrove says "Bethel African Methodist Episcopal Church," (Email Application). Even assuming Defendants read the emailed version, the fact that Plaintiff was an associate pastor at an African church does not guarantee she is African American, let alone indicate that Defendants considered this when deciding not to interview her. To the extent Defendants did not read her emailed application, (see Job Posting requiring online application only)), this fact also does not create an inference of discrimination.

undermining Plaintiff's gender discrimination claim. See Blasi v. New York City Bd. Of Educ., No. 00-CV-5320, 22012 WL 3307227, at *21 (E.D.N.Y. Mar. 12, 2012) ("When the decisionmaker is of the same protected category as the plaintiff, discrimination is less plausible albeit not impossible."), adapted by 2012 WL 3307346 (E.D.N.Y. Aug. 12, 2012), aff'd, 544 F. App'x 10 (2d Cir. 2013). Conversely, the fact that at least Bergmann was male does not alone mean his decision was based on Plaintiff's gender.[26] See Bueck, 2018 WL 1609334, at * 13 ("[T]his claim (Defs.' 56.1 ¶ 135.) amounts to an assertion that because a male made the decision to hire another male over a female, it was discriminatory. That is not the law."). Finally, to the extent Plaintiff again relies on the list of principals and administrators in the district since 2012 to show discrimination in hiring, the Court already explained how this document does not indicate what positions these employees applied for, who made the decisions to hire them, whether their race was known to those that hired them, who they were competing against for their position, and what their prior experience was (See Compliance Letter Ex. C.) *See Saenger v. Montefiore Med. Ctr.*, 706 F. Supp. 2d 494, 514 (S.D.N.Y. 2010) ("[V]ague claims of differential treatment alone do not suggest discrimination, unless those treated differently are similarly situated in all material respects." (internal quotation marks omitted)). Moreover, this list indicates that multiple women serve as administrators and principals in the District. (Compliance Letter Ex. C.) To the extent that Plaintiff is relying on these "statistics" to show a pattern of discrimination merely because she was told she would not be hired because she was not certified, this claim fails for the reasons explained earlier—namely that it is not supported

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[26] Jean Miccio's gender is not clear from the record.

by any evidence in the record. (Pl.'s Mem. 7-8.)[27]

Therefore, absent any evidence that Plaintiff's gender or race played any role in Defendants' decision not to hire her as the Assistant Principal, the Court will not substitute its own judgment for that of Defendants, who made a judgment that Ruolo was a better qualified candidate than any of the 299 other candidates, including Plaintiff. *See Byrnie* 243 F. 3d at 103 (noting that where the other candidate was not unqualified and the employer was not unreasonable in selecting that candidate "in light of a comparison of her paper credentials with the [the plaintiff's]," the plaintiff failed to show pretext); Newsome v. IDB Capital Corpo., No. 13-CV-6576, 2016 WL 1254393, at *22 (S.D.N.Y. Mar. 28, 2016) ("At their heart, [the] [p]laintiffs' claims reflect the disagreement with thte [d]efendants' business judgments . . . or reflect the [p]laintiffs' subjective feelings and percepetions that they were being discriminated against because of their . . . gender. Such claims are however, insufficient to establish discrimination."). The Court therefore grants Defendants' Motion for Summary Judgment on the § 199983 claims.

b. Monell Liability

The District also argues that Plaintiff;s § 1983 claims should be dismissed against it for failure to provide evidence of a policy, custom or practice thata caused the alleged constitutional violations. (Defs.' Mem. 9-12.) "Congress did not intend municipalities to be held liabale [under §1983] unless action pursuant to official municipal policy of some

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[27] Plaintiff cites a case holding that requiring applicants to "fit" or "fit [] in" is evidence of pretext, Abrams v, Dep't of Public Safety 764 F. 3d 244, 253 (2d Cir. 2014). However, she cites the evidence indicating that such statements were made by anyone employed by the District or that "fitting in" was a requirement of the Assistant Principal job. (Pl.'s Mem. 9.)

nature caused a constitutional tort." Monell v. Dep't of Social Servs., 436 U.S. 658, 691 (1978). Thus, "to prevail on a claim against a municipality under [§] 1983 based on acts of a public official, a plaintiff is required to prove: (1) actions taken under color of law; (2) deprivation of a constitutional or statutory right, (3) causation; (4) damages; and (5) that an official policy of the municipality caused the constitutional injury." *Roe v. City of Waterbury*, 542 F. 3d 31, 36 (2d Cir. 2008). In other words, a municipality may not be liable under §1983 by application of the doctrine of respondent superior." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986) (italics omitted).

A plaintiff may satisfy the "policy or custom" requirement by showing one of the following:

> (1) A formal policy officially endorsed by the municipality; (2) actions taken by government officials responsible for establishing the municipal policies that caused the particular deprivation in question; (3) a practice so consistent and widespread that, although not expressly authorized, constitutes a accustom or usage of which a supervising policy-maker must have been aware; of (4) a failure by policymakers to provide adequate training or supervision to subordinates to such an extent that it amounts to deliberate indifference to the rights of those who come into contact with the municipal employees.

Brandon v. City of N.Y., 705 F. Supp. 2d 261, 276-77 (S.D.N.Y. 2010) (citation omitted); *Patterson v. County of Oneida*, 375 F. 3d 206, 226-27 (2d Cir. 2004) (same). Moreover, a plaintiff also must establish a causal link between the nunicipality's policy, custom, or practice and the alleged constitutional injury. *See City of Okla. v. Tuttle*, 471 U.S. 808, 824 n. 8 (1985) ("The fact that a municipal 'policy' might lead to 'police misconduct' is hardly sufficient to satisfy Monell's requirement that the particular policy be the 'moving force' behind a constitutional violation. There must at least be an affirmative link between, for example,] the training inadequacies alleged, and the particular constitutional violation at issue.")

As an initial matter, without an underlying constitutional violation, the District cannot be liable under Monell. *See Segal v. City of N.Y.*, 459 F. 3d 207, 219 (2d Cir. 2006).[28] Even assuming a constitutional violation, Plaintiff fails to provide any evidence creating a dispute of fact as to a policy, custom, practice, or action by a final policymaker. Construing her submissions liberally, Plaintiff alleges that the District had a discriminatory policy of refusing to acknowledge her certification and therefore refusing to hire her when she sought employment (Compliance Lettre 2; Pl.'s Mem. 7-8.) Plaintiff does not cite any facts showing a policy of discrimination I the District's hiring process of its certification search process. Instead, she attempts to impose vicarious liability on the District for purported violations of its nondiscrimination policy. (Defs.' 56.1 ¶¶ 131-33),

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[28] To the extent Plaintiff now argues that the interactions she had with District employees in 2004 and 2014 were independent constitutional violations, these claims fail, because Plaintiff introduced no evidence that she applied for the job in 2004, and it is undisputed that Davis, a non-party, was not involved in the 2014 hiring process. (Davis Dep. 30.) See Gaffney v. Dep.t of Info. Tech. & Telecomms., 536 F. Supp. 2d 445, 469-70 (S.D.N.Y. 2008) (requiring that a plaintiff actually apply for a position and not receive an offer of employment to establish a prima facie failure to hire case).

"in direct violation of Monell," *Tyrrell v. Seaford Union Free Sch. Dist.*, 792 F. Supp. 2d 601, 632 (E.D.N.Y. 2011) (dismissing Monell claim where the "plaintiff's argument [wa]s not that [the] defendants acted pursuant to an official discriminatory policy. . . . Rather, [the] [p]laintiff's argument [wa]s that a defendant] failed to act in accordance with [the] policy"). Further, even assuming that Plaintiff's interactions with the HR employees were discriminatory, these two "isolated incidents," ten years apart, "are insufficient as a matter of law to show a [District] custom under . . . Monell." *Tuminello v. Doe*, No. 10-CV-1960, 2013 WL 1845532, at *4 (E.D.N.Y. Apr. 30, 2013) (collecting cases).

Furthermore, the only actors who allegedly violated Plaintiff's constitutional rights are the two HR employees and the members of the review board, including Cosgrove. However, none of these individuals is a final policymaker whose actions give rise to Monell liability. (Defs.' 56.1 ¶¶ 136-47 (stating that the review board only determines who to invite for interviews and who will proceed to the committee interview sage, after which the Superintendent interviews finalists and make a recommendation to the Board of Education, which may adopt the recommendation).) *See Gerordi v. Huntington Union Free Sch. Dist.*, 124 F. Supp. 3d 206, 228-29 (E.D.N.Y. 2015) (explaining that employees who screened and interviewed individuals before recommending candidates to the superintendent and the board "were not 'final policymakers' with regard to the District's decision not to hire the [p]laintiff" and there was no evidence to the record that the school board delegated its policymaking powers to these individuals); *T.E. v. Pine Bush Cent. Sch. Dist*, 58 F. Supp. 3d 332, 372-73 (S.D.N.Y. 2014) (explaining that under New York law, the Board of Education is responsible for creating rules and policies); N. Y. Educ. Law § 1709 (16) (providing that the Board of Education has authority over a

school district's hiring policies). Put differently, these District employees could not have established the purported municipal policies that violated Plaintiff's constitutional rights, and their failure to provide adequate training or supervision to subordinates cannot amount to deliberate indifference to Plaintiff's rights. *See Brandon*, 705 F. Supp. 2d at 276-77. Indeed, even assuming that Plaintiff is broadly alleging that the District itself is liable for providing deficient training to its employees in searching for certifications, Plaintiff's allegations are purely conclusory, (Pl.'s Mem. 8; Pl.'s 56.1 ¶¶ 38-39), identifying no evidence creating a dispute regarding deliberate indifference or a specific deficiency in the District's training program. *See Wray v. City of New York*, 490 F. 3d 189, 196 (2d Cir. 2007) (requiring the plaintiff to identify a "specific deficiency: in the municipality's training program); *Walker v. City of New York*, 974 F. 2d 293, 297-98 (2d Cir. 1992) (listing requirements for deliberate indifference from training under Monell); *see also Sutton v. City of Yonkers*, No, 13-CV-801, 2015 WL 590189, at *5 (S.D.N.Y. Jan. 26, 2015) ("A plaintiff's conclusory allegations of municipal liability will not defeat a motion for summary judgment on a Monell claim." (alteration and internal quotation marks omitted)), adapted by 2015 WL 876459 (S.D.N.Y. Mar. 2, 2015). Therefore, the Court grants the District's Motion for Summary Judgment on Plaintiff's § claims.

3. NYSHRL Claim

Because Plaintiff's race and gender discrimination claim under the NYSHRL is analyzed under the same framework as her § 1983 claim, it fails for the same reasons identified above. *See Kassel*, 272 F. Supp. 3d at 535(holding that NYSHRL claims are analyzed under *McConnell Douglas*); *Bermudez v. City of New York*, 783 F. Supp. 2d 560, 586-87

(S.D.N.Y. 2011) (dismissing the plaintiff's NYSHRL race and gender discrimination claims "for the same reasons that her . . . discrimination claim[s] under . . . [§1983 . . .[were] dismissed"); cf. *Geras v. Hempstead Union Free Sch. Dist.*, 149 F. Supp. 3d 300, 339 (E.D.N.Y. 2015) (holding that if NSYHRL claim survives summary judgment, so too must the parallel § 1983 claim). The Court therefore grants Defendants' Motion for Summary Judgment on this claim.[29]

III. Conclusion[30]

For the foregoing reasons, Defendant's Motion for Summary Judgment is granted. The Clerk of Court is respectfully directed to terminate the pending Motion, (Dkt. No. 83), enter judgment for Defendants, close this case, and mail a copy of this Opinion to Plaintiff, SO ORDERED.

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[29] The Court need not address Defendants' alternative argument that Plaintiff failed to satisfy the notice of claim requirement under New York Education Law § 3813(1). (Defs.' Mem. 12-13.) See Marino v. Chester Union Free Sch. Dist., 859 F. Supp. 2d 5i66, 570 (S.D.N.Y. 2012) ("Section 3813(1) of [the] New York State Education Law provides that no action may be maintained against a school district unless notice of claim was served within three months of the date on which the claim accrued."). However, the Court notes that Plaintiff's claim accrued at the latest on July 2, 2014, when Plaintiff received a letter from the District which she interpreted to say her application for the Assistant Principal position had been denied. (July 2, 2014 Letter; Pl.'s 56.1 ¶ 136.) See Nash v. Bd. of Educ. of the City of New York, No. 99-CV-961, 2018 WL 2316337, at *4 (S.D.N.Y. May 8, 2018) ("NYSHRL['s] . . .one-year statute of limitations is triggered on the date that an adverse employment determination is made and communicated to the plaintiff." (internal quotation marks omitted)); see also Petty v. City of New York, 633 F. App'x 52, 53 (2d Cir. 2016) (holding that the plaintiff's NYSHRL claim accrued when he received the final letter "informing him his employment application was rejected"). Therefore, even assuming the communications Plaintiff proffers could satisfy the notice of claim requirement, (see Pl.'s Mem. 1-2), none was filed within the three-month deadline – that is, by October 2, 2014, § 3813(1). This alone could permit the Court to dismiss Plaintiff's NYSHRL claim. See Nelson v. Mount Vernon City Sch. Dist., No. 15-CV-8276, 2017 WL 1102668, at *3 (S.D.N.Y. Mar. 23, 2017) (noting that "failure to comply is a fatal effect mandating dismissal of the action" (internal quotation marks omitted)).

[30] Plaintiff asserts that Cosgrove has been hacking into her computer and tampering with her files. (Compliance Letter 4.) This claim is not in the operative Complaint, (Third Am. Compl.), and in any event, Plaintiff does not have standing to bring criminal charges, see Salvador v. State of New York, No. 12-CV-7299, 2013 WL 12080930, at *1 (S.D.N.Y. Feb. 19, 2013) ("The Supreme Court has held that a private party does not have standing to file or prosecute a criminal case because 'a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.'" (quoting Leeke v. Timmerman, 454 U.S. 83, 86 (1981) (per curiam))); aff'd, 550 F. App'x 56 (2d Cir. 2014). Moreover, Plaintiff cites no admissible evidence to substantiate these allegations. (Compliance Letter Ex. K (listing emails in different folders on a typed word document with no authentication of explanation of context).)

DATED: July _ 5_, 2018

White Plains, New York

s/Kenneth M. Karas

Kenneth M. Karas

UNITED STATES DISTRICT JUDGE

Appendix F

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 15-CV-4260 (KMK)

OPINION & ORDER

ANNETTE SHANDS

Plaintiff

v.

LAKELAND CENTRAL SCHOOL

DISTRICT, et al.

Defendants

Appearances:

Annette Shands

Cortlandt Manor, NY

Pro Se Plaintiff

Appendix F

Denise M. Cossu, Esq.

James A. Randazzo, Esq.

Gaines, Novick, Ponzini, Cossu & Venditti, LLP

White Plains, NY

Counsel for Defendants

KENNETH M. KARAS, District Judge:

Pro se Plaintiff Annette Shands ("Plaintiff") filed the instant Action pursuant to Title VII of the Civil Rights Act ("Title VII"), 42 U.S.C. §2000e et seq., the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 et seq., the New York State Human Rights Law ("NYSHRL") N.Y. Exec. Law § 296, the New York City Human Rights Law ("NYCHRL"), and the New York State Education Law against the Lakeland Central School District ("School District"), George E. Stone ("Stone"), Tammy Cosgrove ("Cosgrove"), Mary Ellen Herzog ("Herzog"), Jim Van Develde ("Van Develde"), Jean Miccio ("Miccio"), and Raymond Morningstar ("Morningstar," and collectively, "Defendants"), alleging that Defendants discriminated against her on the basis of her age, sex, and race, and violated the Education Law by drafting a vacancy announcement in such a way that it favored certain candidates, (See generally Second Am. Compl. ("SAC") (Dkt. No.6).) Before the Court is Defendants' Motion To Dismiss the Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 44) For the reasons explained herein, Defendants' Motion is denied in part and granted in part.

I. Background

A. Factual Background

The following facts are drawn from Plaintiff's Second Amended Complaint, the documents appended thereto and the filings Plaintiff submitted in opposition to the instant Motion, and are taken as true for the purpose of resolving the Motion.

Plaintiff alleges that she is an African American over the age of 65 and is "duly qualified to be employed as an [a]dministrator within the school systems of the State of New York." (SAC ¶1.) She earned her permanent teaching certification in February 1995, (*Id.* ¶ 4, id. Ex. A.)

In May 2014, Plaintiff became aware of an Assistant Principal position with the School District. (*Id.* ¶ 5.) She went to a School District facility on May 16, 2014 and inquired about the position, but was told that the application window might be closed that day. (*Id.* ¶ 6.) Plaintiff was further told that she was not within the School District's database of persons listed as having permanent certifications and that only persons in that database would be considered for the Assistant Principal position. (*Id.* ¶ 7.) Plaintiff left the facility and applied for the position online. (*Id.* ¶ 9; id. Ex. C. at1.) Prior to submitting the application, Plaintiff verified with the New York State Department of Education that she was listed in the state's database as having permanent certification as an administrator. (*Id.* ¶ 9.)

During the application process, Plaintiff noticed that the vacancy announcement stated that a successful candidate would have a "background in middle school education." (*Id.* ¶ 10 (internal quotation marks omitted); *Id.* Ex. B.) Plaintiff alleges that this requirement "violates and effectively alters the New York State requirement for permanent certification as an administrator which accepts any teaching experience for a stated number of years

in grades Nursery./Kindergarten (N/K) through 12." (*Id.* ¶ 11.) Essentially, she contends that the School District limited the pool of candidates for the middle school Assistant Principal position to :"only those with middle school experience, thus depriving those candidates, including [her]," "with little or no middle school experience, but "with comparable administrative experience in other school settings[,]... [of] the opportunity to be employed." (*Id.* ¶¶ 13, 15.) This requirement also allegedly favors applicants younger than Plaintiff because middle school administrative certification became available only after Plaintiff earned her permanent certification. (*Id.* ¶ 16)

Plaintiff was not hired for the Assistant Principal position. According to Plaintiff, "there is absolutely no evidence to suggest that . . . [her] application or cover letter w[ere] given any consideration." (Pl.'s Aff'n in Opp'n to Defs.' Mot. ("Pl's Aff'n) 2 (Dkt. No. 47).) A "younger, less-experienced [,] and less qualified Caucasian male was" ultimately hired. (Pl's Aff'n 3; see also SAC ¶¶ 17—18.) Because she was not hired, Plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). It issued a notice of right to sue letter in February 2015. (SAC Ex. C, at 2.)

B. Procedural Background

Plaintiff filed a Complaint on May 26, 2015, (Dkt. No. 2.) On June 10, 2015, Plaintiff filed an Amended Complaint. (Dkt. No. 4.) The instant Second Amended Complaint was filed on June 18, 2015,(Dkt. No. 6.) Pursuant to a Scheduling Order, (Dkt. No. 43), Defendants filed their Motion and supporting papers on March 31, 2016, (Dkt. Nos. 44-46). Plaintiff filed opposition papers on May 12, 2016. (Dkt. Nos. 47-48.) Defendants filed a reply on June 3, 2016. (Dkt. No. 51.)

II. Discussion

A. Standard of Review

The Supreme Court has held that although a complaint "does not need detailed factual allegations" to survive a motion to dismiss, "a plaintiff's obligation to provide the 'grounds' of his [or her] 'entitlement to relief' requires more than labels and conclusions, and 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) (alteration omitted). Instead, the Supreme Court has emphasized that "[f]actual allegations must be enough to raise a right to relief above the speculative level," id., and that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," id. at 563. A plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. But if a plaintiff has "not nudged [his or her] claims across the line from conceivable to plausible, the [] complaint must be dismissed. *Id.*; see also *Ashcroft v. Iqball*, 556 U.S. 662, 679 (2009) (Determining 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. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (second alteration in original) (citation omitted) (quoting Fed. R. Civ. P. 8(a)(2))).

For purposes of Defendants' Motion, the Court is required to consider as true the factual allegations contained in the Second Amended Complaint. *See Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008) ("We review de novo a district court's dismissal of a complaint pursuant to Rule 12 (b)(6), accepting all factual allegations in the complaint

and drawing all reasonable inferences in the plaintiff's favor." (internal quotation marks and italics omitted)); *Gonzalez v. Caballero*, 572 F. Supp. 2d 463, 466 (S.D.N.Y. 2008) (same). "In adjudicating a Rule 12(b)(6) motion, a district court must confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Leonarad F. v. Isr. Disc. Bank of N.Y.*, 199 F.3d 99, 107 (2d Cir. 1999) (internal quotation marks omitted).

Because Plaintiff is proceeding *pro se*, the Court construes her "submissions liberally" and interprets them "to raise the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (internal quotation marks omitted). Furthermore, it is appropriate to consider "materials outside the complaint to the extent that they are consistent with the allegations in the complaint, " *Alsaifullah v. Furco*. No. 12-CV-2907, 2013 WL 3972514, at *4 n.3 (S.D.N.Y. Aug. 2, 2013) (internal quotation marks omitted), including "documents that a pro se litigant attaches to his opposition papers," Agu v. Rheu, No. 09-CV-4732, 2010 WL 5186839, at *4 n.6 (E.D.N.Y. Dec. 15, 2010); *see also Walker v. Schult*, 717 F.3d 119, 122 n.1 (2d Cir. 2013) (noting that a court may consider "factual allegations made by a *pro se* party in his papers opposing the motion" (italics omitted)); *Rodriquez v. Rodriquez*, No. 10-CV-891, 2013 WL 4779639, at *1 (S.D.N.Y. July 8, 2013) ("Although the [c]ourt is typically confined to the allegations contained within the four corners of the complaint, when analyzing the sufficiency of a pro se pleading, a court may consider factual allegations contained in a pro se litigant's opposition papers and other court filings." (citation and internal quotation marks omitted)).

B. Analysis

Defendants make four arguments in support of their Motion. First, they contend that Plaintiff failed to exhaust her Title VII claim. They have attached the charge Plaintiff submitted to the EEOC as evidence of her failure. (*See* Decl. of James A. Randazzo, Esq., in Supp. of Defs.' Mot. To Dismiss Ex. 2 ("EEOC Charge") (Dkt. No. 45).) Second, they argue that Plaintiff's claims against the individual Defendants must be dismissed because neither Title VII not the ADEA subjects individuals to personal liability. Third, Defendants argue that the Motion should be granted because the School District had a legitimate, nondiscriminatory reason for not hiring Plaintiff. Finally, they argue that Plaintiff's Education Law claim must be dismissed because Plaintiff did not serve the School District with a notice of claim, as is required by statute.

1.Exhaustion of Administrative Remedies

"A plaintiff may bring an employment discrimination action under Title VII or the ADEA only after filing a timely charge with the EEOC or with 'a State or local agency with authority to grant or seek relief from such practice'" *Holtz v. Rockefeller & Co.*, 258 F 3d 62, 82-83 (2d Cir. 2001) (quoting 42 U.S.C. § 2000e-5(e); see also 29 U.S.C. §§ 626(d), 633(b) (provisions containing ADEA exhaustion requirement). "Exhaustion of administrative remedies through the EEOC is an essential element of the Title VII and ADEA statutory schemes and, as such, a precondition to bringing such claims into federal court." *Legnani v. Alitalia Linee Aeree Italiane, S.P. A.*, 274 F 3d 683, 686 (2d Cir. 2001) (internal quotation marks omitted). The Second Circuit has however, recognized that "claims. . . not asserted before the EEOC may be pursued in a subsequent federal court action if they are

'reasonably related' to those that were filed with the agency." *Shah v. N.Y. State Dep't of Civil Serv.*, 168 F.3d 610, 614 (2d Cir. 1999). "A claim is considered reasonably related if the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made." *Fitzgerald v. Henderson,* 251 F 3d 345, 359-60 (2d Cir 2001) (internal quotation marks omitted). The Second Circuit has advised that the focus of the inquiry "should be on the factual allegations made in the EEOC charge itself" and whether they ""gave that agency adequate notice to investigate" the claims subsequently asserted in federal court. *Williams v. N.Y.C. Hous. Auth.*, 458 F.3d 67, 70 (2d Cir. 2006) (per curiam) (alteration and internal quotation marks omitted).[1]

"Defendants bear the burden of proving a failure to exhaust . . . ." *Kane v. St. Raymond's Roman Catholic Church*, No. 14-CV-7028, 2015 WL 4270757, at *5 (S.D.N.Y. July 13, 2015), Courts therefore generally deny motions to dismiss for failure to exhaust unless the failure "is clear from the face of the complaint." *Arnold v. Research Found for State Univ. of N.Y.*, --F. Supp. 3d--, 2016 WL 6126314, at *8 (E.D.N.Y. Oct. 20, 2016). However, on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court may consider EEOC filings because "they are public documents" and are "integral to Plaintiff's claims." *Morris v. David Lerner Assocs.*, 680 F. Supp. 2d 430, 436 (E.D.N.Y. 2010); *see also Kouakou v. Fideliscare N.Y.*, 920 F. Supp. 2d 391, 394 n.1 (S.D.N.Y. 2012) ("Because the EEOC [c]harge is part of an administrative proceeding, the [c]ourt may take judicial notice of it without converting [the] [d]efendant's motion into a motion for

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[1]The "reasonably related" exception "is essentially an allowance of loose pleading and is based on the recognition that EEOC charges frequently are filled out by employees without the benefit of counsel and that their primary purpose is to alert the EEOC to the discrimination that a plaintiff claims [s]he is suffering." Devavin v. Kerik, 335 F.3d 195, 201 (2d Cir. 2003) (alteration and internal quotation marks omitted).

summary judgment,"), ' *McLeod v. Lowe's Home Improvement*, Nos. 09-CV-834, 09-CV-835, 2010 WL 4366901, at *2 n.2 (N.D.N.Y. Oct 28, 2010) ("On [a] Fed. R. Civ. P. 12 (b) (6) motion, the [c]ourt may properly consider the EEOC charges and right-to-sue notices because they are public documents in administrative proceedings and are integral to [the] plaintiff's claims.").

Plaintiff filed a charge with the EEOC ("EEOC Charge") in October 2014 alleging that the School District discriminated against her on the basis of age (EEOC Charge 1.) She alleged that she went to a School District facility on May 16, 2014 and inquired about open positions. A woman, who "appeared to be African-American," showed her the bulletin board where open positions were posted. (Id. at 2.) Plaintiff expressed interest in an announcement for an Assistant Principal position at Copper Beech Middle School and gave the employee helping her a copy of her resume. (Id.) The employee went back to an office to determine whether Plaintiff was on the School District's list of certified teachers. (Id.) The employee was unable to locate Plaintiff on the list, rendering her ineligible for the Assistant Principal position. Plaintiff insisted that she was certified and stated that she would apply for the position anyway. (*Id.*) Plaintiff went home and called the Division of teacher Certification in the New York State Department of Education to find out whether she was listed on its website as being certified. (*Id.*) The person she spoke to allegedly told her that she was listed on the website. (Id.)

Noticeably absent from these allegations is Plaintiff's race or any indication that the School District discriminated against her because of her race. The only claim asserted in the EEOC Charge is age discrimination. (See EEOC Charge 1 (box checked for age discrimination).) "Courts in the Second Circuit have generally held that claims alleging

discrimination based upon a protected classification which are different than the protected classification asserted in administrative filings are not reasonably related." *Wilson v. Southampton Hosp.*, No. 14-CV-5884, 2015 WL 512448, at * 11 (E.D.N.Y. Aug. 28, 2015) (internal quotation marks omitted). Indeed, courts have consistently found that claims of race discrimination are not reasonably related to age discrimination claims. *See e.g., D'Amato v. Conn Bd. of Pardons & Paroles,* No. 12-CV-249, 2013 WL 617047, at *4 (D. Conn. Feb. 19, 2013) (holding that the plaintiff's Title VII claim was barred because it was not reasonably related to the age and disability discrimination claims brought before the EEOC); *Pinkard v. N.Y.C. Dep't of Educ.*, No. 11-CV-5540, 2012 WL 1592520, at *8 (S.D.N.Y. May 2, 2012) ("Courts have consistently held that discrimination claims based on age, sex, or disability are not reasonably related to claims based on race or color, and vice versa." (italics omitted)); *James v. Fed Reserve Bank of N.Y.*, No. 01-CV-1106, 2005 WL 1889859, at *5 (E.D.N.Y. Aug. 8, 2005) ("[The] [p]laintiff's race discrimination claim is not reasonably related to the disability, age, and gender discrimination charges she raised before the EEOC."), reconsideration granted, 471 F. Supp. 2d 226 (S.D.N.Y. 2007). These decisions from the idea that a plaintiff's age discrimination claim is not "expected to uncover discrimination related to race." *Kittrell v. Dep't of Citywide Admin. Servs. Div. of Pers.*, No, 10-CV-2606, 2013 WL 2395198, at * 7 (E.D.N.Y. May 31, 2013), aff'd, 561 F. App'x 30 (2d Cir. 2014). Plaintiff counters that she "exercised her liberty to broaden the charge of discrimination which was originally based on age when filed" with the EEOC, (PL's Mem. of Law in Opp'n to Defs.' Mot. ("PL's Opp'n") 7 (Dkt. No. 48)), but she has made no attempt to demonstrate how her race discrimination claim is reasonably related to the age discrimination claim brought before the EEOC. The Court thus concludes that Plaintiff's

race discrimination claim is not reasonably related to her age discrimination claim and must be dismissed for failure to exhaust administrative remedies.

It is now too late for Plaintiff to exhaust her Title VII claim. *See Roth v. Farmingdale Pub. Sch. Dist.*, No. 14-CV-6668, 2016 WL 767986, at * 6 (E.D.N.Y. Feb. 26, 2016) (explaining that plaintiffs have 300 days from the discriminatory conduct to file an administrative charge). Accordingly, Plaintiff's Title VII race discrimination claim is dismissed with prejudice. *See Best v. Duane Reade Drugs*, No. 14-CV-2648, 2014 WL 5810105, at *5 (S.D.N.Y. Nov. 6, 2014) (dismissing discrimination claim with prejudice because it was 'far too late" to exhaust administrative remedies).[2]

2. The ADEA

The ADEA provides in part that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire . . . any individual. . .because of such individual's age." 29 U.S.C. § 623 (a)(1). The statute limits the class of persons protected by this prohibition "to individuals who are at least 40 years of age." Id. § 631(a). "To establish a prima facie case [of age discrimination], a plaintiff . . . must show (1) that she was within the protected age group, (2) that she was qualified for the position, (3) that she experienced adverse employment action, and (4) that such action occurred under circumstances giving rise to an inference of

[2] In her opposition papers, Plaintiff asserts that she was discriminated against on the basis of her sex in violation of Title VII. (See Pl.'s Opp'n 3.) For substantially the same reasons stated above, this claim is dismissed with prejudice because it was not raised before the EEOC, nor is it reasonably related to the age discrimination claim that was. See Roth, 2016 WL 767986, at *6 (finding the plaintiff's sex discrimination claim was not reasonably related to his claims that he was discriminated against on the basis of his age, marital status, and arrest record).

discrimination." *Bucalo v. Shelter Island Union Free Sch. Dist.*, 691 F.3d 119, 129 (2d Cir. 2012) (internal quotation marks omitted).[3]

As to the third prima facie factor, "[i]n the context of a claim for discrimination under the ADEA, 'a plaintiff sustains an adverse employment action if he or she endures a materially adverse change in terms and conditions of employment." *Visco v. Brentwood Union Free Sch. Dist.*, 991 F. Supp. 2d 426, 436 (E.D.N.Y. 2014) (alternation and some internal quotation marks omitted) (quoting *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 238 (2d Cir 2007)). "The Second Circuit has applied this definition broadly to include discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand." *Graham v. Watertown City Sch. Dist.*, no. 10-CV-756, 2011 WL 1344149, at *6 (N.D.N.Y. Apr. 8, 2011) (internal quotation marks omitted).

As to the fourth prima facie factor, "[t]here are a variety of ways in which a plaintiff can demonstrate that the adverse employment action took place under circumstances giving rise to an inference of age discrimination." *Del Valle v. City of New York*, No. 11-CV-8148, 2013 WL 444763, at *4 (S.D.N.Y. Feb. 6, 2013). For example, an inference of age discrimination may be raised where a plaintiff "alleges that she was within the protected class, that she was rejected for a position, and that the position was filled by a person significantly younger than her."

Munoz-Nagel v. Guess, Inc., No. 12-CV-1312, 2013 WL 1809772, at *7 (S.D.N.Y. Apr. 30, 2013) ("Munoz-Nagel 1") (collecting cases). "An age discrimination plaintiff may also

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[3] Ultimately, a plaintiff bringing an ADEA claim "must prove, by a preponderance of the evidence, that age was the 'but-for cause of the challenged adverse employment action." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009),'

seek to rely on . . . comments or remarks evidencing ageist views, evidence that similarly situated younger employees are treated more favorably than older ones, or statistical evidence demonstrating a pattern of adverse employment actions taken against older employees." *Del Valle*, 2013 WL 444763, at *4 (citations omitted).

A "[p]laintiff need not make out a prima facie case at the pleading stage, and may withstand a motion to dismiss by providing a short and plain statement of the claim that shows that she is entitled to relief and that gives [the] [d]efendant fair notice of the age discrimination claim and the grounds upon which it rests." *Munoz-Nagel v. Guess, Inc.*, No. 12-CV-1312, 2013 WL 6068597, at*1 (S.D.N.Y. Nov. 15, 2013) (*"Munoz-Nagel II"*) (italics omitted); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-11 (2002) ("The prima facie case [requirements are] . . . an evidentiary standard, not a pleading requirement. . . . This Court has never indicated that the requirements for establishing a prima facie case . . . also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss."), *Kurian v. Forest Hills Hosp.*, 962 F. Supp. 2d 460, 468 (E.D.N.Y. 2 013) ("[T]he survival of a complaint in an employment discrimination case does not rest on whether it contains specific facts establishing a prima facie case . . . ." (internal quotation marks omitted)); *McManamon v. Shinseki*, No. 11-CV-7610, 2013 WL 3466863, at *6 (S.D.N.Y. July 10, 2013) ("[A]t th[e] pleading stage[, the plaintiff] is not required to demonstrate every element of a prima facie cse of age discrimination." (italics omitted)). However, "[a]lthough a plaintiff need not plead facts to establish a prima facie case of employment discrimination in order to survive a motion to dismiss," courts nevertheless "consider [] the elements of a prima facie case in determining whether there is sufficient factual matter in the complaint which, if true, give[s] [the] [d]efendant[] fair notice of [the]

[plaintiff['s] employment discrimination claims and the ground on which such claims rest." *Holmes v. Air Line Pilots Ass'n. Int'l*, 745 F. Supp. 2d 176, 195 (E.D.N.Y. 2010) (italics and internal quotation marks omitted); *see also Sommersett v. City of New York*, No. 09-CV-5916, 2011 WL 2565301, at *5 (S.D.N.Y. June 28, 2011) ("Although [the p]laintiff need not allege facts sufficient to make out a prima facie case for any of her discrimination claims in her [c]omplaint, the elements thereof provide an outline of what is necessary to render her claims for relief plausible." (italics omitted((); *Barker v. UBS AG*, No. 09-CV-2084, 2011 WL 283993, at *5 (D. Conn. Jan. 26, 2011) ("[E]ven though establishing a prima facie case of age discrimination is not necessary to survive a motion to dismiss, courts do use the standard as a guidepost when determining whether the plaintiff has provided the defendant with fair notice of her claim, as required by the Federal Rules of Civil Procedure.").

Significantly, individuals cannot be held liable for violations of the ADEA. *See, e.g., Gindi v. Bennett*, No. 15-CV-6475, 2016 WL3461233, at*3 (E.D.N.Y. June 20, 2016) ("[T] he ADEA do[es] not permit the imposition of individual liability."), reconsideration denied, 2017 WL 58833 (E.D.N.Y. Jan. 5, 2017). Therefore, Plaintiff cannot sue Defendants Stone, Cosgrove, Herzog, Van Develde, Miccio, or Morningstar under the ADEA. This claim is dismissed with prejudice insofar as it is based upon individual liability.

With respect to the viability of Plaintiff's ADEA claim against the School District, Plaintiff alleges that she is over 65 years old, that she is "duly qualified to be employed as an [a]dministrator within the school systems of the State of New York," (SAC ¶ 1), and that she applied for an Assistant Principal position with the School District, (id. ¶¶ 5,9), but was not hired for the position. Instead, the School District hired someone "younger, less-experienced[,] and less qualified." (Pl.'s Aff'n 3.) These allegations satisfy the elements of

a prima facie case. Plaintiff is a member of a protected class because she is over 40 years of age, was allegedly qualified for the position to which she applied, was not hired despite hre qualifications, and the person who was hired was allegedly younger and less qualified. The claim that the person hired was allegedly less qualified than Plaintiff is sufficient to create circumstances giving rise to an inference of discrimination. *CF. Mattera v. JP Morgan Chase Corp.*, 740 F. Supp. 2d 561, 573 (S.D.N.Y. 2010) ("The Second Circuit has continuously held that an inference of discrimination arises for purposes of ADEA defendants' summary judgment motions, when an older qualified employee is replaced by someone younger.").[4]

Defendants have made little effort to dispute that Plaintiff has pled a prima facie cae of discrimination. Instead, they argue: "Even assuming arguendo that Plaintiff has sufficiently pled a prima facie case of race or age discrimination by alleging that she was qualified for the positon and that the individual who was hired was white and younger, Plaintiff has also pl[ed] the School District's legitimate, nondiscriminatory reason for not hiring her," i.e., that she lacks a background in middle school education (Defs.' Mem. of Law in Supp. of Mot. To Dismiss ("Defs.' Mem.") 6 (Dkt. No. 46) (italics omitted).) Defendants focus on the fact that Plaintiff alleges that she has "little or no middle school experience." (SAC ¶15.) But Plaintiff's statement does not alter Plaintiff's allegation that she was qualified for the Assistant Principal position and was overlooked for that position under circumstances giving rise to an inference of discrimination. The Court's task is to

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[4] Plaintiff submitted a series of documents in opposition to Defendants' Motion. It appears that she has included the resume and application of the individual hired for the Assistant Principal position. (See Pl.'s Aff',,n ECF pages 57-64.) At this stage, the Court cannot rely on these documents to compare Plaintiff's qualifications to the qualifications of that individual, but one could question whether Plaintiff will ultimately be able to establish that Defendants discriminated against her based on this document.

determine whether Plaintiff has "provide[ed] a short and plain statement of the claim that shows that she is entitled to relief and that gives Defendant[s] fair notice of the age discrimination claim and the grounds upon which it rests." *Munoz-Nagel II*, 2013 WL 6068597, at*1 (italics omitted). Plaintiff has done all that was required to defeat Defendants' Motion. While Defendants may believe they had a valid reason for not hiring Plaintiff, and the evidence my substantiate that belief, that argument is best made in a motion for summary judgment. Accordingly, Defendants' Motion with respect to Plaintiff's ADEA claim is denied with respect to the School District.

3. Plaintiff's State Law Discrimination Claims

In opposition to Defendants' Motion, Plaintiff clarified that she is seeking relief under the NYSHRL, in addition to the ADEA and Title VII because she was discriminated against on the basis of her age, sex, and race. (See Pl.'s Opp'n 8.) Age discrimination claims brought pursuant to the NYSHRL are analyzed identically to claims under the ADEA. *See Brown v. City of New York*, No. 10-CV-3104, 2011 WL 6003921, at *6n.4 (S.D.N.Y. Nov. 30, 2011) (noting that, "[t]o the extent that [the]plaintiff [sought] to invoke the NYSHRL," the court would "analyze[] such allegations under the same . . . framework" that it used for ADEA claims (collecting cases)), aff'd, 512F. App'x 29 (2d Cir. 2013); Dixon v. Int'l Fed'n of Accountants, No. 09-CV-2839, 2010 WL 424007, at*3 (S.D.N.Y. Apr. 9, 2010) 9) (Discrimination claims under . . . [the] ADEA . . . [and the] NYSHRL . . . are analyzed identically . . ." (collecting cases)), aff'd 416 F. App'x 107 (2d Cir. 2011). Therefore, for the same reasons as stated above, Defendants' Motion is denied insofar as it seeks to dismiss Plaintiff's NYSHRL, age discrimination claim against the School District.

With respect to Plaintiff's race and sex claims, unlike Title VII, "the NYSHRL contains no requirement of exhaustion of administrative remedies." *Butler v. N.Y. Health & Racquet Club*, 768 F. Supp. 2d 516 (S.D.N.Y. 2011) (internal quotation marks omitted); *see also Lumhoo v. Home Depot USA. Inc.*, 229 F, Supp. 2d 121, 136 n. 13 (E.D.N.Y. 2002) ("Unlike Title VII, . . . there is no requirement that [the] plaintiff exhaust administrative remedies prior to commencing a claim under the NYSHRL."), Plaintiff's allegations that she was discriminated against on the basis of race and sex thus remain actionable under state law. "Because NYSHRL claims are subject to the same standard as Title VII claims," the Court will analyze Plaintiff's claims as if they were brought pursuant to Title VII. *Salazar v. Ferrara Bros. Bldg. Materials Corp.*, No. 13-CV-3038, 2015 WL 1535698, at *5 (E.D.N.Y. Apr. 6, 2015).

"The substantive standards applicable to claims of employment discrimination under Title VII . . . are . . . well established." *Vivenzie v. City of Syracuse*, 611 F.3d 98, 106 (2d Cir 2010). To state a prima facie case of discrimination, a plaintiff "must show: (1) that [s]he belonged to a protected class; (2) that [s]he was qualified for the position [s]he held; (3) that [s]he suffered an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent." *Holcomb v. Iona COll.*, 521 F.3d 130, 138 (2d Cir. 2008). As with her ADEA claim, Plaintiff need not allege a prima facie case to survive a motion to dismiss her sex and race discrimination claims. See e.g., Swierkiewicz, 534 U.S. at 508. Rather, the Second Circuit has explained that "what must be plausibly supported by facts alleged in the complaint is that the plaintiff is a member of a protected class, was qualified, suffered an adverse employment action, and has at least minimal support for the proposition that the employer was motivated by

discriminatory intent," *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015). "The facts required . . . to be alleged in the complaint need not give plausible support to the ultimate question of whether the adverse employment action was attributable to discrimination," but rather the alleged facts 'need only give plausible support to a minimal inference of discriminatory motivation" *Id.*; *see also Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 87 (2d Cir. 2015))"[A] plaintiff must allege that the employer took adverse action against her at least in part for a discriminatory reason, and she may do so by alleging facts that directly show discrimination or facts that indirectly show discrimination by giving rise to a plausible inference of discrimination."). Courts making the plausibility determination must do so "mindful of the elusive nature of intentional discrimination" and the concomitant frequency by which plaintiffs must "rely on bits and pieces of information to support an inference of discrimination, i.e., a 'mosaic' of intentional discrimination." *Vega*, 803 F.3d at 86 (italics and some internal quotation marks omitted) (quoting *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998)).

Plaintiff has plausibly pled race and sex based NYSHRL claims because she alleges she is a member of protected classes, she was qualified for the Assistant Principal position, but she was not hired for that position. Rather, the School District allegedly hired a less-qualified Caucasian male for the job. (Pl.'s Aff'n 3.) For much the same reasons that Plaintiff's ADEA claim survives Defendants' Motion, Plaintiff's NYSHRL claims also survive against the School District.

Unlike Plaintiff's federal causes of action, the NYSHRL provides for "individual liability in some circumstances.: *Anyanwu v. City of New York*, No. 10-CV-8498, 2013 WL 5193990, at *22 (S.D.N.Y. Sept. 16, 2013). "A supervisor may be subject to personal liability

under § 296(1) of the NYSHRL where such individual has been deemed an 'employer' for the purposes of the NYSHRL.: *Maher v. All. Mortg. Banking Corp.*, 650 F. Supp. 2d 249, 260 (E.D.N.Y. 2009); *see* also N.Y. Exec. Law § 296(1). A supervisor may be considered an "employer" where it is shown that he has "an ownership interest or any power to do more than carry out personnel decisions made by others," such as the power to hire and fire employees. *Pellegrini v. Sovereign Hotels, Inc.*, 740 F. Supp. 2d 344, 355 (N.D.N.Y, 2010) (internal quotation marks omitted).

Likewise, under § 296(6) of the NYSHRL, an individual defendant may be held personally liable where he aids and abets discrimination. *See* N.Y. Exec. Law 296(6) ("It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel[,] or coerce the doing of any of the acts forbidden under the article or attempt to do so"); *see also Maher*, 650 F. Supp. 2d at 260 ("An individual defendant may be personally liable for discrimination under the aid-or-abet provision of the NYSHRL."). The Second Circuit has interpreted the language of § 296(6) "to mean that a defendant who actually participates in the conduct giving rise to a discrimination claim may be personally liable as an aider and abettor." *Perks v. Town of Huntington*, 251 F. Supp. 2d 1143, 1160 (E.D.N.Y. 2003) (internal quotation marks omitted).

Plaintiff, however, has not alleged what role, if any, the individually named defendants played in the conduct about which she complains. There is thus no basis to hold any of the individually named Defendants liable as aiders and abettors under § 296(6) It may be that some Defendants possess the power to hire and fire employees, but it is not clear which Defendants possess that authority—whether it be some or all of them—or whether they exercised it in this case. Indeed, there is not even a single allegation that any of the individual Defendants participated in the conduct giving rise to this Action. They are all

named in the caption of the Complaint, but nowhere else does Plaintiff describe their role. *See Dargan v. Heath*, No. 10-CV-7360, 2011 WL 1795814, at *4 (S.D.N.Y. May 4, 2011 ("It is well-settled that where the complaint names a defendant in the caption but contains no allegations indicating how the defendant violated the law or injured the plaintiff, a motion to dismiss the complaint in regard to that defendant should be granted." (internal quotation marks omitted)). Therefore, the Court dismisses Plaintiff's NYSHRL claims aginst the individually named Defendants without prejudice.

In sum, Plaintiff's age, race, and sex based NYSHRL claims may proceed against the School District. Those claims are dismissed without prejudice insofar as they are brought against the individually named Defendants, because Plaintiff has not pled that they were personally involved in the allegedly discriminatory conduct or identified which Defendants possess the power to hire and fire.

4. Plaintiff's Other Claims

a. NYCHRL Claim

In her opposition papers, Plaintiff contends that she is seeking relief under the NYCHRL (Pl.'s Opp'n 8.) "To state a claim under the NYCHRL, [a] [p]laintiff must allege that the [d]efendant discriminated against her within the boundaries of New York City." *Robles v. Cox & Co.*, 841 F. Supp. 2d 615, 623 (E.D.N.Y> 2012) (internal quotation marks omitted); *see also Fried v. LVI Servs., Inc.*, No. 10-CV-9308, 2011 WL 4633985, at* 12 (S.D.N.Y. Oct. 4, 2011) ("The NYCHRL expressly limits the applicability of its protections to acts that occur within the boundaries of New York City."), aff'd, 500F. App'x 39 (2d Cir. 2012). Plaintiff has not and cannot allege that she was discriminated against within the

boundaries of New York City because the School District is located in Shub Oak, New York, and Plaintiff resided in Cortlandt Manor, New York. (*See* SAC ¶¶ 1, 6.) Accordingly, Plaintiff's NYCHRL claim is dismissed with prejudice as an amended pleading cannot remedy this deficiency.

b. New York Education Law Claim

Plaintiff alleges that Defendants violated the New York State Education Law by drafting the Assistant Principal vacancy announcement such that it gave preferential treatment to younger and non-minority applicants. (See id. ¶18.) Defendants argues that this cause of action musts be dismissed because Plaintiff failed to serve a notice of claim on the School District. (Defs.' Mem. 7.)

As relevant here, Education Law § 3813(1) provides:

> No action or special proceeding, for any cause whatever, . . . shall be prosecuted or maintained against any school district, board of education, . . . or maintained against any school district board of education, . . . or any officer of a school district, [or] board of education . . . unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body or said district or school within three months after the accrual of such claim.

See also Marino v. Chester Union Free Sch. Dist., 859 F Supp. 2d 566, 570 (S.D.N.Y. 2012) ("Section 3813(1) of [the] New York State Education Law provides that no action may be maintained against a school district unless notice of claim was served within three months of the date on which the claim accrued."). It is well settled in the Second Circuit "that Education Law § 3813(1) is a statutory condition precedent to a petitioner's bringing of a proceeding against a school district or board of education, and a petitioner's failure to comply is a fatal defect mandating dismissal of the action." *Carlson v. Geneva City Sch. Dist.*, 679 F. Supp. 2d 355, 366 (W.D.N.Y. 2010) (internal quotation marks omitted). It is Plaintiff's burden to plead compliance with § 3818(1)'s requirements. *See Thomas v. N.Y.C. Dep't of Educ.*, 938 F. Supp. 2d 334, 360 (E.D.N.Y. 2013) ("[Section 3813(1)] specifically requires a plaintiff to plead compliance with § 3813(1)'s notice of claim requirements.")

Plaintiff has not pled that she served the School District with a notice of claim. Accordingly, her Education Law claim is dismissed without prejudice as she may be able to allege that she did satisfy this requirement in an amended pleading. *See Birkholz v. City of New York*, No. 10-CV-4719, 2012 WL 580522, at *15 (E.D.N.Y. Feb. 22, 2012) (directing the plaintiff to file an amended complaint alleging that he "strictly complied with the requirements of New York Education Law § 3813(1)").[5]

c. 42 U.S.C. § 1983 Claim

In her opposition papers, Plaintiff insinuates that Defendants have in place a discriminatory hiring practice that goes beyond the events that occurred in May 2014.

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[5] Curiously, Defendants only make this argument with respect to Plaintiff's Education Law claim. The Court assumes that Plaintiff satisfied the notice of claim requirements with respect to her other state-law causes of action.

She contends she has been consistently discriminated against on prior occasions. (Pl.'s Opp'n 2.) When she has gone to the School District's office in the past, employees discouraged her from applying for vacant positions and informed her that her credentials were not contained in the School District's database, rendering her ineligible for the positions. (*id.*) Plaintiff notes that this discrimination occurs only when she seeks to apply for an administrative position. Whenever she inquired about substitute teaching positions, School District employees were able to locate her credentials. (*Id.* At 6-7.) Plaintiff speculates that the School District's employees adopted this practice so Plaintiff would be relegated to low-paying jobs. (*id.* At 7.) The Court construes these allegations as an attempt to bring a claim pursuant to 42 U.S.C. § 1983 against the individual Defendants for a violation of the Equal Protection Clause of the Fourteenth Amendment.[6] In order to establish individual liability under § 1983, a plaintiff must show (a) that the defendant is a 'person' acting 'under the color of state law,; and (b) that the defendant caused the plaintiff to be deprived of a federal right." *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F. 3d 107, 122 (2d Cir. 2004). "In this Circuit personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under [§] 1983."

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[6] It is possible that Plaintiff also sought to assert a § 1983 claim against the School District for this same conduct because she alludes to the fact that this conduct "indicates a discriminatory hiring policy in violation of the law." (Pl.'s Opp'n2.) "[T]o prevail on a claim against a municipality under [§] 1983 based on acts of a public official, a plaintiff is required to prove (1) actions taken under color of law; (2) deprivation of a constitutional or statutory right; (3) causation; (4) damages; and (5) that an official policy of the municipality caused the constitutional injury." *Roe v. City of Waterbury*, 542 F 3d 31m 36 (2d Cir. 2008). Plaintiff's papers, however, contain only a conclusory allegation that the School District employees were acting pursuant to an official School District policy. This claim is therefore dismissed without prejudice. See Masciotta v. Clarkstown Cent. Sch. Dist., 136 F. Supp. 3d 527, 546 (S.D.N.Y. 2015) ("[T]o survive a motion to dismiss, [a] [p]laintiff cannot, through conclusory allegations, merely assert the existence of a municipal policy or custom, but must allege facts tending to support, at least circumstantially, an inference that such a municipal policy or custom exists." (internal quotation marks omitted)); Salvatierra v. Connolly, No. 09-CV-3722, 2010 WL 5480756, at *10 (S.D.N.Y. Sept. 1, 2010) (dismissing claim against municipal agencies where the plaintiff do not allege that any policy or custom caused the deprivation of his rights), adopted by 2011 WL 9398 (S.D.N.Y. Jan. 3, 2011).

McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir. 1977). A plaintiff seeking to hold a supervisory employee liable under §1983 may satisfy the personal involvement requirement by alleging:

> (1) The defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995). It is an open issue in this Circuit as to whether all five of these factors survived the Supreme Court's decision in *Iqbal*, *see, e.g., Doe v. New York*, 97 F. Supp. 3d 5, 11-12 (E.D.N.Y. 2015), but, the Court will assume for purposes of this Opinion that all five remain valid, *see Phillip v. Schriro*, No. 12-CV-8349, 2014 WL 4184816, at *4 (S.D.N.Y. Aug. 22, 2014) ("[U]nless or until the Second Circuit or Supreme Court rule otherwise, this [c]ourt agrees with the courts

that have held that the Colon factors still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated." (internal quotation marks omitted)))0, Here, however, Plaintiff has not alleged the personal involvement of any of the individual Defendants named in this Action. She alleges only that certain unidentified School District employees discouraged her from applying for open positions and were unable to locate her teaching credentials. Without alleging tht the Defendants named herein were personally involved with this purportedly discriminatory practice, Plaintiff cannot state a claim pursuant to § 1983. *See, e.g., Walls v. Fischer*, 615 F. Supp. 2d 75, 78 (W.D.N.Y. 2009) (dismissing § 1983) claim where the plaintiff failed to alleged that the individually named defendants were personally involved in the alleged constitutional violation). Therefore, to the extent Plaintiff was attempting to raise such a claim, it is dismissed without prejudice.

III. Conclusion

In light of the foregoing analysis, the Court grants Defendants' Motion To Dismiss in part and denies it in part. Plaintiff 's ADEA and age, race, and sex based NYSHRL claims may proceed against the School District. All other claims are dismissed; some with prejudice and some without, as discussed above. Plaintiff may file a Third Amended Complaint, addressing the deficiencies outlined in this Opinion with respect to the claims that have been dismissed without prejudice, within 30 days of the date of this Opinion. Plaintiff otherwise risks dismissal of those claims with prejudice. If Plaintiff does not file an amended pleading, the School District shall file an Answer within 60 days from the date of this Opinion. The Clerk of Court is directed to terminate the

pending Motion. (Dkt. No. 44.)

SO ORDERED.

DATED: March 30, 2017

White Plains, New York

s/Kenneth M. Karas

Kenneth M. Karas

UNITED STATES DISTRICT JUDGE

Appendix G

EEOC Form 161 (11/09)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: Annette Shands
27 Winthrop Drive
Cortlandt Manor,
NY 10567

From: Boston Area Office
John F. Kennedy Fed Bldg
Government Ctr, Room 475
Boston, MA 02203

❑ On behalf of person(s) aggrieved whose identity is
CONFIDENTIAL
(29 CFR§1606.7(a))

EEOC Charge No.: 520-2014-02948

EEOC Representative: Edward J. Ostolski, Investigator

Telephone No.: (617) 565-3214

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

- ❑ The facts alleged in the charge fail to state a claim under any of the tatutes enforced by the EEOC.
- ❑ Your allegations did not involve a disability as defined by the Americans With Disabilities Act.
- ❑ The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.
- ❑ Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge
- ❑ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained established violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be considered as having been raised by this charge.
- ❑ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.
- ❑ Over (briefly state)

- NOTICE OF SUIT RIGHTS -

(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice**, or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within **2** years (**3** years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible**.

On behalf of the Commission

"s/"_____**Feng K. Ah,**_____ **FEB 26 2015**

Enclosure(s) **Feng K. Ah**

Steven M. Latino, Esq.

SHAW, PERELSON, MAY

& LAMBERT, LLP

21 Van Wagner

Road Poughkeepsie, NY 12603

LAKELAND SCHOOL DISTRICT

On Friday, May 16, 2014, I arrived at 1086 East Main Street in Shrub Oak, New York; it was after 1:30pm. Two young men were in the reception area filling out applications. I believe they were seeking maintenance positions, perhaps even summer maintenance positions.

I approached the receptionist and told her I would like to know if there were any jobs available. She called the Office of Human Resources. A young woman came to assist me. She appeared to be African-American. I asked her if there were any open positions. We walked together outside of the reception area, to the bulletin board where positions were posted. We found an announcement for an Assistant Principal at the Copper Beech Middle School. She told me that they might be closing that position today. I told her I would be interested in the position and I gave her a copy of my resume. She took it and went back to the office to speak with someone to see if I was listed in their listing of certified persons. She returned and told me she was sorry that I was not listed on their site and would not be considered for the position. I asked her had she checked under my maiden name and my married name. I was informed that she had someone to check under both names and I was not listed. I informed her that I did indeed have permanent certification and I would send or bring in a copy as proof of certification. She told me rather emphatically that if I was not listed on their site, it did not matter, for I would not be considered for the position. She said that perhaps I was mistaken and maybe I had been certified provisionally rather than permanently. I asked her to give

me a copy of the posting and said that I would apply anyway. She did give me a copy of the announcement, but indicated by her stance and demeanor that my doing so would probably be in vain.

I went home and called the Division of Teacher Certification in the New York State Department of Education to find out if I was listed on their website as being certified in the State of New York, I was told that I was. I inquired as to why I was just told that I was not listed by a school district when I went to apply for a position. I was asked if I had applied at a public school or a private school. I said it was a public school. The person on the phone responded by saying that pubic school districts in New York State should have a data base called "Teach" which would include persons who were certified prior to 2000 or 2001. He told me I was listed there as well. I inquired as to how to find myself listed without using my social security number. He informed me how to do so and I was successful in my search. However, the Lakeland Central School District employee told me that its search for my certification was not successful.

I do believe that the conversation was recorded. I also made a second call to the New York State Education department that same day. That second call in not the one above which I am referencing.

s/ Annette Oliver Shands subscribed and sworn to before me this __7__ day of Oct., 2014.

s/ Javutha Ramesh

Kavitha Ramesh

s/ Annette Oliver Shands

December 11, 2014

BY OVERNIGHT MAIL

Judy Keenan

Deputy Director

U.S.EEOC

New York District Office

33 Whitehall Street, 5th Floor

New York, NY 10004-2112

Re: STATEMENT OF POSITION IN OPPOSITION TO

THE CHARGE OF DISCRIMINATION

Annette Shands v. Lakeland Central School District

Federal Charge No. 520-2014-02948_____.

Dear Ms. Keenan:

This firm represents the Lakeland Central School District (the "District") in the above-referenced matter. We write in response to the above-referenced Charge of Discrimination (hereinafter collectively referred to as the "Charge")[1] filed by Annette Shands (the "Charging Party").[2] The District denies each and every allegation of discrimination alleged in the Charge

_____.

1. The Charge is attached as Exhibit A.

2. The information provided herein, as well as all further submissions, if any, are strictly confidential and are to be used only for the determination of the Charge. Any information and documentation so provided are not to be communicated to anyone without the prior written approval of the undersigned counsel for the District. Further, the fact that the District has asserted certain defenses herein shall not constitute a waiver of any or all of its other defenses.

Judy Keenan

Deputy Director

Annette Shands v. Lakeland CSD

Federal Charge No. 520-2014-02948

and submits the following Statement of Position as its response thereto.

RESPONDENT'S ANSWER TO THE ALLEGATIONS IN THE CHARGE

This Respondent submits this response in duplicate to the paragraphs in the "Charge" and denies any and all allegations of discrimination and retaliation:

1. Denies the allegations set forth in the unnumbered paragraph of the "Particulars" of the Charge except denies knowledge or information sufficient to form a belief as to the truth of the allegation that the Charging Party went to the District on or about May 16, 2014 and inquired about open positions, except admits that the Charging

Party did submit a paper application for the apply for a position with the District as an Assistant Principal at the Middle School and that such application was submitted prior to the May 23, 2014 posting deadline. The District further admits that it sent the Charging Party its standard letter when it receives unsolicited paper resumes, and that said letter states that applicants are required to submit an on-line application through the OLAS, and that the District, in the interest of fairness, is unable to process paper applications. The District further admits that it sent the Charging Party a letter on July 8, 2014 stating that the District had sent to her, its general response to all unsolicited paper resumes.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first paragraph of the unnumbered attachment to the Charge.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the second paragraph of the unnumbered attachment to the Charge, except admits that the Charging Party submitted her paper resume to the District in May 2014 and that the Charging Party was provided with a copy of the announcement for the Middle School Principal position, that stated that an online application was required through OLAS that had to be submitted online by May 23, 2014.

4. Denies knowledge or information efficient to form a belief as to the truth of the allegations set forth in the third paragraph of the unnumbered attachment to the Charge except admits that the Charging Party has permanent certification as a school district administrator.

Judy Keenan

Deputy Director

Annette Shands v. Lakeland CSD

Federal Charge No. 520-2014-02948

December 11, 2014

WHEREFORE, Respondent respectfully request that the Charge be dismissed in its entirety and that the Respondent is granted such other and further relief as the EEOC may deem just and proper.

STATEMENT OF MATERIAL FACTS

The Lakeland Cenral School District is a public school district located in Shrub Oak, New York (Westchester County), As a public school district, it is a governmental agency, and a public employer.

Charging Party submitted an application to work for the District in or about the middle of May 2014, presumably for the position of Assistant Principal at the Lakeland Copper Beach Middle School. However, the Charging Party attached to her resume, a cover letter for the position of Substitute Teacher, dated November 19, 2008, which is attached hereto at Exhibit B. This mistake was a careless error which was not a positive reflection on her candidacy as a potential District Administrator. Furthermore, Charging Party also erroneously listed on her OLAS on line application dated May 28, 2014, that the District was her current employer and that she held the position of substitute. This was another error that reflected negatively on her application as the Complainant does not work for the District as a substitute teacher.

Charging Party submitted her application with the On-Line Application System for Educators (OLAS). See Exhibit B attached. The job posting which Charging Party admits that she was provided with, clearly states that an online application is required at www. olasjobs.org/lhv and had to be submitted no later than May 23, 2014.[3]

Mr. Francesco A. Ruolo was selected for the position over the Charging Party based upon his experience relative to the District's established, non-discriminatory qualifications for the position.

Under qualifications, the posting for the Middle School Assistant Principal position that the Charging Party applied for clearly states the following:

- A dynamic, high energy leadership style *with a successful background in middle school education*.

- A thorough understanding of the Common Core Learning Standards.
- Comprehensive knowledge of middle school curriculum and instructional methodology including differentiation.
- Ability to communicate effectively with excellent writing and public speaking skills.

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[1]Upon information and belief the deadline to submit the online application for the potion that Charging Party applied for was extended beyond May 23, 2014 and hus, Charging Party's application was not rejected by the District even though it was submitted after May 23, 2014.

• Habits of administration capable of encouraging professional cooperation and enthusiasm to meet current demands for excellence in public education.

See exhibit B.

Charging Party's resume fails to demonstrate any experience as a middle school administrator or that she has any knowledge of Common Core Learning Standards or middle school curriculum and instructional methodology. See Exhibit C attached hereto. Charging Party's most recent experience working in a public school district consists of six months experience (January 1, 1993 to July 1, 1993, and an Administrative intern for the Greenburgh-Graham Union Free School District, a Special Act School District in Hastings on Hudson, nearly twenty year prior to the creation of the Common Core Learning Standards. Charging Party's current employment, which she has held for twenty-one years is as a member of the Ministerial Staff of the Bethel A.M.E. Church, not a public sector middle school administration or middle school curriculum writing and development.

Instead of Charging Party the District hired Francesco A. Ruolo. See Exhibit D. At the time of his application, Mr. Ruolo had a total of four years of experience as a Middle School Assistant Principal in grades 6-8 in the Yonkers Public Schools. See Exhibit D. He also served two years as an Assistant Principal for Grades 3-5 in the Yonkers Public Schools. See Exhibit D. Thus, he has six years of experience as an Assistant Principal compared to Charging Party who has no experience as an Assistant Principal in any setting. His resume demonstrates that in 2011, while serving as an

Administrator in Charge, that he "created curriculum aligned with state standards. It also establishes that as a Middle School Assistant Principal he assisted in leading a school-wide effort to become a data driven school, and evaluated teachers based on the State's new Annual Professional Performance Review (APPR). He has devised Middle School master schedules to maximize math and literacy, and coordinated the administration of New York State Assessments in Math and Science among other statewide testing. Mr. Ruolo also had eight years' experience as a public school teacher just prior to his becoming an Assistant Principal. Mr. Ruolo also has a thorough understanding of Common Core Learning Standards.

Thus, the decision to hire Mr. Ruolo over Charging Party was based upon his superior qualifications for this particular position. He possessed the specific qualifications, experience and skill set that the District was seeking in a Middle School Assistant Principal. Thus, there is no evidence at all that Charging Party's age was a factor in the decision making process for the Middle School Assistant Principal position that Charging Party was seeking with the District and Charging Party certainly has not demonstrated that but for Charging Party's age she would have been selected for the position over, Mr. Ruolo.

ARGUMENT

Charging Party Cannot Establish a Prima Facie Case of Age Discrimination.

Charging Party's age discrimination claims still fail as a matter of law. In order to establish a prima facie case of age discrimination under the NYSHRL or the ADEA, the Charging Party must show that age, was the "but-for" cause of the challenged employer decision. See Gross v. FBL, Financial Services, Inc., 129 S.Ct. 2343, 2350 (2009)(The Supreme Court of the United Sates held "[t]o establish a disparate treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the but-for cause of the employer's adverse decision. . . [and that] the plaintiff retains the burden of persuasion . . . [and] must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the but-for cause of the challenged employer decision").

In this case, Charging Party cannot establish that age was the "but for" reason for the District's decision not to hire her for the Middle School Assistant Principal position that she applied for with the District. As set forth above, the District had valid, non-discriminatory reasons for its decisions to hire Mr. Ruolo instead of the Charging Party. Mr. Ruolo was more qualified, having served six years as an assistant principal in a New York State Public School, with four of those years as a Middle School Assistant Principal. Charging Party has never worked a day as an Assistant Principal, and did not demonstrate through her resume that she had any of the experience that the District was specifically looking for in a candidate. She failed to demonstrate any experience in

the development of middle school curriculum or in Common Core Learning Standards. Indeed, Charging Party, unlike the District's chosen candidate, Mr. Ruolo, has never served as Middle School Assistant Principal or even a paid Public School District Administrator. See Exhibit B.

In addition to her lack of experience as a Middle School Administrator, as set forth above, Charging Party submitted a cover letter for a position of substitute teacher and attached that to her resume for the Middle School Assistant Principal position. Moreover, on her OLAS application, the Charging Party erroneously listed the District as her "Current Employer" even though she does not work for the District as a substitute teacher. These two errors were an indication of her lack of attention to detail and were not looked upon favorably by the District.

Thus, Charging Party's baseless conclusion that she was not hired for the position because of her age is not evidence of age discrimination. Conclusive allegations, without more, are not evidence of discrimination. *Forysth v. Federation Employment and Guidance Service*, 409 F.3d 565, 574 (2d. Cir. 2005) (Charging Party's own conclusory allegations that discrimination was present without more is not sufficient to establish a prima facie case of discrimination) citing *McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Ottaviant v. State University of N.Y. at New Paltz*, 875 F.2d 365, 370 (2d Cir. 1989). *See Heffernan v. Colonie Country Club, Inc.*, 160 A.D.2d 1062, 1063, 553 N.Y.S.2d 544, 545 (3d Dep't 1990) (holding that the plaintiff's conclusory statement that age was the determining factor in the decision to terminate his employment was insufficient to create a question of fact and defeat summary judgment). *Kelderhouse v. St. Cabrini Home*, 259 A.D.2d 938, 939, 686 N.Y.S. 2d 914, 915 (3d Dep't 1999) (holding

that Plaintiff's conclusory statements that he was replaced with someone twenty years his junior and that he "steadfastly believe[s] he was terminated because of his age" were insufficient to create a question of fact and defeat summary judgment against Plaintiff).

Accordingly, for all of the reasons, set forth herein: 1) Charging Party's admitted lack of experience as a public school administrator; (2) Charging Party's lack of experience as a middle school administrator or middle school teacher, and (3) her lack of experience with respect to Common Core, Charging Party was not selected for the position of Middle School Assistant Principal. Instead, the District hired a more qualified candidate who had six year experience as an Assistant Principal in the public school system in New York State, with four of those years of experience as a Middle school Assistant Principal. Thus, Charging Party cannot establish that the District discriminated against her on the basis of her age when it selected Francesco A. Ruolo for the position of Middle School Assistant Principal over her. Mr. Ruolo has significantly more experience working as a Middle School Assistant Principal and an Assistant Principal generally than the Charaging Party does. Thus, the Charge should be dismissed as a matter of law, as the District's reasons for not selecting her for the position of Middle School Assistant Principal were due to the District selecting an individual for the position who met their legitimate, non-discriminatory qualifications for the position and who was clearly more qualified than she was.

VERIFICATION

STATE OF NEW YORK))'

SS.:COUNTY OF WESTCHESTER)

DR. TAMMY COSGROVE, being sworn says:

1. I am the Assistant Superintendent of Human Resources of the Lakeland Central School District, a Respondent in the action herein.

2. I have read the annexed STATEMENT OF POSITION IN OPPOSITION TO THE CHARGE OF DISCRIMINAITON, filed in opposition to the Charge of Discrimination filed by Annette Shands, know the contents thereof and the same are true to my knowledge, except those matters which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief as to those matters therein not stated upon knowledge, is based upon the books, records and other documents maintained by the School District.

s/ T. Cosgrove_____ ___

Dr. TAMMY COSGROVE

Sworn to before me this__11__ day of December, 2014

s/ Andrea I. Gellen

Andrea I. Gellen, Esq.

Notary Public, State of New York

Qualified in Dutchess County

Reg. No. 02GE6298314

Expiration Date: 03/10/2013

LAKELAND CENTRAL SCHOOL DISTRICT

CENTRAL ADMINISTRATION

Educating Today for a Better Tomorrow

Dr. George E. Stone

Superintendent

Reginald E. Morningstar, Jr.

Assistant Superintendent of Business

Jean Miccio

Assistant Superintendent for Instruction

Dr. Tammy Cosgrove

Assistant Superintend for Human Resources

MaryEllen Herzog

Assistant Superintendent for Pupil Personnel

Jim Van Develde

Director of Communications

July 2, 2014

Annette Shands

27 Winthrop Drive

Cortlandt Manor, NY 10567

Dear Ms. Shands:

Thank you for your interest in a position with Lakeland Central School District. Please be advised that our district requires teaching certification for all of our teaching positions. In order to be considered for a teaching position with our district, current valid NYS certification and on-line application through the BOCES on-Line Application System (OLAS) are required.

We post all of our vacancies for teachers and teaching assistants on OLAS. We encourage you to visit the online system to submit your application and resume, and to review job vacancy listings. To apply for a position online, please visit http://www.olasjobs.org/lhv/ and ensure that all information fields are completed, attach a copy of your resume as a Word file, and then apply for the specific position(s) you are seeking. Please be advised that the OLAS system is the only application method utilized by this district for certified positions. In the interest of fairness, we are unable to process paper applications.

If there is a vacancy posted, once the posting has closed, applicants whose qualifications most closely meet district needs will be contacted by the appropriate department or building for an interview appointment. Our best wishes to you in your career endeavors.

Again, we sincerely thank you for your interest in the Lakeland Central School District.

The Human Resources Department

Lakeland Central School District

1086 East Main Street - Shrub Oak, New York 10588

Tel: 914-245-1700 – Fax; 914-245-4391

www. Lakelandschools.org

Jobs Applied Annette Oliver/Shands

From: olasadmin <olasadmin@pnwboces.org>

To: AShands AShands@aol.com

Subject: Jobs Applied Annette Oliver/Shands

Date: Tue. May 20, 2014 7:09 pm

Dear Annette Oliver/Shands,

Thank you for applying through the Lower Hudson Valley Region Online Application System for Educator(s)

The districts you have applied to will contact you if you are to be scheduled for a personal interview.

You applied to the following jobs:

Job Number: LAKV00651980056

District: Lakeland

Job Title: Assistant Principal - Middle School

Applied Date: 5/20/2014 - 7:09:07

You have chosen to allow all districts to view your application.

You have blocked Pearl River School District from viewing your application.

Please note that you can re-enter this system and upload job-specific cover letters

for each job to which you have applied. Click "Manage My Jobs."

We appreciate receiving your application and wish you success in your job search.

Sincerely,

System Administrator

The Lower Hudson Valley Region On-line Application System for Educators.

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http://www.p/nwboces.org

CONFIDENTIALITY NOTICE

This email if only for the person(s) named in the message header. Unless otherwise indicated, it contains information that is confidential, priviledged or exempt from disclosure under applicable law. If you have received it in error, please notify the sender of the error and delete the message. Thank you.

Appendix L

Application for Position of Assistant Principal at Copper Beech Middle . . .https://mail.aol.com/webmail-std/en-us/PrintMessage

From: Annette Shands ,ashands@aol.com.

To: tcosgrove ,tcosgrove@lakelandschools.org.

Subject: Application for Position of Assistant Principal at Copper Beech Middle School

Date: Tue. May 20, 2014 8:37 pm

Attachments: VITA.doc (57K). Copper_Beech.docx (17K)

Dear Dr. Cosgrove,

I write to urge you to consider my application for the position of Assistant Principal at Copper Beech Middle School. Even if your cut-off date was prior to the posted date of May 23, 2014, please know that I submitted by resume to your office on Friday, May 16, 2014. Consequently, I request that my application be accepted as timely.

Please find both a resume and a cover letter attached for your consideration. Please know that I also applied on the online application system (OLAS)

Let me thank you for your acquiescence in this matter.

Annette Oliver Shands

Appendix L

Appendix M

THE UNIVERSITY OF THE STATE OF NEW YORK

This certificate, valid for service in the public schools, is granted to the person named below who has satisfied the requirements prescribed by the State Education Department.

The State Education Department

Public School Teacher Certificate

ANNETTE R. OLIVER

27 WINTHROP DRIVE

CORTLANDT MANOR, NY 10567

Certification area: SCHOOL DISTRICT ADMINISTRATOR

*Form: PERMANENT

Certificate number:

Effective date: 02/01/95

Control number 603054951

Appendix M

Given under the authority of the State Education Department

"s/" Thomas Sobel

Commissioner of Education

over

_____.

THE UNIVERSITY OF THE STATE OF NEW YORK

The State Education Department

P E R M A N E N T C E R T I F I C A T E

This certificate, valid for service in the public schools, is granted to the person named below who has satisfied the minimum requirements prescribed by the State Education Department.

Name: ANNETTE ROSYLIN OLIVER

Certification Area ENGLISH (7-12)

Effective Date: February 1, 1969

Certification Number:

THE UNIVERSITY OF THE STATE OF NEW YORK

In witness whereof, the Education Department under its seal of Albany, New York, grants this certificate.

"s/" Vincent C. Gauzzetta

Director, Division of Teacher Education Certification

"s/" Eunice B. Nyquist

Commissioner of Education

Appendix N

THE PRESIDENT, PROFESSORS and TRUSTEES of

NEW YORK UNIVERSITY

To all persons to whom this writing may come greeting:

Be it known that we in recognition of the successful;

completion of the requisite course of study in our

School of Education, Health, Nursing and Arts Professions

by virtue of authority granted in the character of the State of New York

do confer upon

ANNETTE OLIVER SHANDS

the degree of

Doctor of Philosophy

WITH ALL THE RIGHTS, PRIVILEGES AND IMMUNITIES THEREUNTO

APPERTAINING

IN WITNESS WHEREOF, WE HAVE CAUSED THIS DIPLOMA TO BE SIGNED BY

THE

DULY AUTHORIZED OFFICERS OF THE UNIVERSITY AND SEALED WITH OUR

CORPORATE SEAL

IN THE CITY OF NEW YORK

FEBRUARY, NINETEEN HUNDRED AND SEVENTY-NINE

Appendix N

NEW YORK UNIVERSITY 1829

PERSTARE (TO PERSERVERE)

ET (AND)

PRAESTARE (TO EXCEL)

s/ John C. Sawhill, President

s/ S. Andrew Schaffer, Secretary

s/ Daniel E. Griffiths, Dean

THE TRUSTEES OF COLUMBIA UNIVERSITIY

IN THE CITY OF NEW YORK

TO ALL PERSONS TO WHOM THESE PRESENTS MAY COME GREETING:

BE IT KNOWN THAT

ANNETTE ROSYLIN OLIVER

HAVING COMPLETED THE STUDIES AND SATISFIED THE REQUIREMENTS

FOR THE DEGREE OF

MASTER OF ARTS

HAS ACCORDINGLY BEEN ADMITTED TO THAT DEGREE WITH ALL THE

RIGHTS,PRIVILEGES AND IMMUNITIES THERETO APPERTAINING

IN WITNESS WHEREOF WE HAVE CAUSED THIS DIPLOMA TO BE SIGNED

BY THE PRESIDENT OF THE UNIVERSITY AND BY

THE PRESIDENT OF TEACHERS COLLEGE AND

OUR CORPORATE SEAL TO BE HERETO AFFIXED

IN THE CITY OF NEW YORK

ON THE SEVENTEENTH DAY OF DECEMBER IN THE YEAR OF

OUR LORD ONE THOUSAND NINE HUNDRED AND SIXTY-NINE

s/ John H. Fischer

President of Teachers College

s/Andrew W. Cordier

President of Columbia University

SICILLVM COLLEGII COLVMBIA NOVI EBORACI

(The Seal of the College of Columbia of New York)

LVMINETVO VIDEBIMVS LVMEN.

(In your light we see light.)

DREW UNIVERSITY

Upon the recommendation of the faculty and on authority of the

Board of Trustees

hereby confers upon

Annette Oliver

the degree

Master of Divinity

Cum Laude

with all the rights and privileges thereunto appertaining.

In Witness whereof, we have affixed our signatures

and the seal of the University

May 20, 2000

s/ Thomas H. Kean

President of the University

s/ Lewis Andrews

Chair of the Board of Trustees

s/ Maxine C. Beach

Dean of the Theological School

s/ Eugene Myers

Secretary of the Board of Trustees

DREW UNIVERSITY INCORPORATED 1858

REVISED STATEMENT OF RELIEF AND PRIVILEGE LOG

Pay as Building Supervisor of $179,000 per annum

Pay as $179,000 from 2014 until 2026 = $2,148,000

Plus differential of $20,000 for first thirty credits beyond required credits $ 199,000

Plus differential of $20,000 for another thirty credits beyond required credits

$219,000

Yearly pay of $219,000 from 2014 until 2026 = $2.628,000

2014 – 2015.....$219,000

Plus yearly pay increment of 1.6% effective July 1, 2015

2015 – 2016.....$3,504 + $219,000 =$222,504

2016 – 2017.....$3,560 + $222,504 = $226,064

Plus yearly pay increment of 1.7% effective July 1, 2017

2017 -- 2018.....$3,843 + $226,064 = $229,907

2018 – 2019.....$3,908 + $229,907 = $233,805

2019 – 2020.....$3,974 + $233,805 = $237,779

2020 – 2021.....$4,042 + $237,779 = $241,821

2021 – 2022.....$4,110 + $241,821 = $245,931

2022 – 2023.....$4,180 + $245,931 = $250,111

2023 – 2024.....$4,251 + $250,111 = $254,362

2024 – 2025.....$4,324 + $254,362 = $258.686

2025 – 2026.....$4,397 + $258,686 = $263,083

Plus Yearly Increments Totaling.....$ 52,668

VACATION PAY

Yearly Pay + Number of School Days (182) = Per Diem Pay x Number of Vacation Days (22)

2014 – 2015.....$219,000 + 182

= Per Diem Pay of..... $1203 x 22 = $26,466

2015 – 2016 .....$222,504 +182

= per Diem Pay of .....$1222 x 22 = $26,884

2016 – 2017 .....$226,064 + 182

= Per Diem Pay of ..... $1242 x 22 = $27,324

2017 – 2018.....$229,907 + 182

= Per Diem Pay of.....$1263 x 22 = $27,790

2018 – 2019.....$233,805 + 182

= Per Diem Pay of .....$1284 x 22 = $28,262

2019 – 2020.....$237,779 + 182

= Per Diem Pay of .....$1306 x 22 = $28,742

2020 – 2021.....$241,821 + 182

= Per Diem Pay of.....$1328 x 22 = $29,231

2021 – 2022.....$245,931 + 182

= Per Diem Pay of .....$1351 x 22 = $$29.727

2022 – 2023 .....$250,111 + 182

= Per Diem Pay of.....$1374 x 22 = $30,233

2023 – 2024.....$254,362 + 182

= Per Diem Pay of.....$1397 x 22 = $30,747

2024 – 2025 .....$258,686 + 182

= Per Diem Pay of..... $1421 x 22 = $31,269

2025 – 2026.....$263,083 + 182

= Per Diem Pay of .....$1445 x 22 = $31,801

Totaling.....$348,676

Plus **$12,060**, pay for two hundred and one (201) accumulated sick days at 60.00 per day.

Plus dollar amount of $47,732.05 contributed to pension/retirement each year from 2014 – 2026 totaling **$572,784.60**

Plus accumulated health and dental benefits of **$66,000**

Plus Longevity pay **$1,400** for ten years of service

Plus dollar amount of yearly Contribution to Social Security and Medicare

Formula.....6.2% + 1.45% + 7.65% of maximum taxable amount of yearly income

7.65% x $219,000 = $16,753.50 2014

7.65% x $222,504 = $17,021.55 2015

7.65% x $226,064 = $17,293.89 2016

7.65% x $229,907 = $17,587.88 2017

7.65% x $233,805 = $17,886.08 2018

7.65% x $237,779 = $18,190.09 2019

7.65% x $241,821 = $18,499.30 2020

7.65% x $245,931 = $18,813.72 2021

7.65% x $250,111 = $19,133.49 2022

7.65% x $254,362 = $19,458.69 2023

7.65% x $258,686 = $19,789.47 2024

7.65% x $263,083 =$20,125.84 2025

Plus Social Security and Medicare Benefits Totaling..... 220,553.50

C. Pursuant to Rule 26 (1) (A) (iii):

1. Compensatory and equitable damages for loss income from 2014 – 2026. to include pay as Building Supervisor, plus pay differential for sixty plus credits beyond required amount, plus yearly increments from 2015 -- 2026, plus vacation pay, plus accumulated sick pay, plus yearly pension/retirement contributions, plus health and dental benefits, plus longevity pay, plus amounts paid into Social Security and Medicare in the amount of **$4,152,142.10 (four million, one hundred fifty-two thousand, one hundred forty-two dollars and ten cents)**.

   a. Pay from 2014 – 2026, **$ 2,628,000** comprised of initial base pay of $179,000.00 with differential of

$40,000 for sixty (60) plus credits beyond the required amount for failure to hire.

b. Plus **$52,668.00** from 2015 – 2026, for failure to promote

c. Plus **$348,676** for 264 paid vacation days

d. Plus **$12,060** earned fromsick pay from 2014 – 2026

e. Plus dollar amount of $47,732.05 contributed to pension/retirement each year from 2014-2026 totaling **$572,784.60**

f. Plus **$66,000** earned from health and dental benefits from 2014 – 2026

g. Plus Longevity Pay in the amount of **$1,400**

h. Plus dollar amount contributed to Social Security from 2014 to 2026 totaling **$220,553.50**

2. Punitive damages claimed **$250,000**

3. No damages claimed for mental anguish, distress, psychological and emotional pain and suffering

Submitted by "s/" Annette Shands Date: July 28, 2017

Annette Shands

27 Winthrop Drive

Cortlandt Manor, New York 10567

Telephone: (914) 528-3748