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E.D.N.Y.–Bklyn
17-cv-6765
Kuntz, J.

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 26th day of June, two thousand twenty.

Present:

Guido Calabresi,
Denny Chin,
Susan L. Carney,
Circuit Judges.

Palani Karupaiyan,

Plaintiff-Appellant,

v. 20-841

Department of Education, New York City,

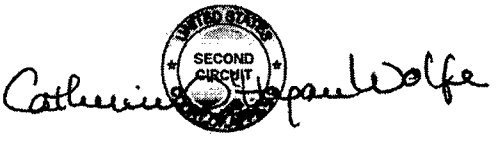
Defendant-Appellee,

Vaibhav Wakode, et al.,

Defendants.[1]

Appellant, pro se, moves to proceed in forma pauperis and to expedite the appeal. However, this Court has determined sua sponte that the notice of appeal was untimely filed. Upon due consideration, it is hereby ORDERED that the appeal is DISMISSED for lack of jurisdiction. *See* 28 U.S.C. § 2107; *Bowles v. Russell*, 551 U.S. 205, 214 (2007). It is further ORDERED that Appellant's motions are DENIED as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



[1] The Clerk's Office is directed to amend the caption as reflected above.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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PALANI KARUPAIYAN,

Plaintiff,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

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DECISION & ORDER
17-CV-6765 (WFK) (LB)

WILLIAM F. KUNTZ, II, United States District Judge:

Palani Karupaiyan ("Plaintiff"), proceeding *pro se*, brings this action against the New York City Department of Education ("Defendant" or "DOE") alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act of 1967 ("ADEA"), the Americans with Disabilities Act ("ADA"), the Genetic Information Nondiscrimination Act ("GINA"), New York State Human Rights Law, New York City Human Rights Law, and the Equal Pay Act of 1963. *See* Second Am. Compl. ("SAC"), ECF No. 21. Defendant now moves for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* ECF No. 30; ECF No. 32 ("Mem."). For the reasons discussed below, Defendant's motion is GRANTED in its entirety.

BACKGROUND

As alleged in the Second Amended Complaint, Plaintiff is a forty-seven-year-old man who identifies as South Indian and a practicing Hindu. SAC ¶¶ 2, 13.[1] Plaintiff is a naturalized citizen who was born in India. *Id.* ¶ 2. He worked as a contract employee with DOE from

[1] The Court considers only the facts as alleged in the Second Amended Complaint. To the extent Plaintiff incorporated additional facts or allegations in his opposition to the instant motion, the Court declines to consider those facts because the Court previously denied his request to amend his complaint a third time. *See infra.*

February 2016 to October 2, 2017. *Id.* ¶ 6. Plaintiff was born with Situs Inversus Totalis, a DNA level genetic disability, and he claims he also has diabetes, vision issues, and has previously had two minor heart attacks. *Id.* ¶¶ 2-3, 20.

Plaintiff identifies several events he alleges amount to discrimination. On March 28, 2017 and another unspecified date, Plaintiff alleges IT School Food Division's Team Lead, Asif Khan, ordered the transfer of two of Plaintiff's project assignments to Jamil Zohaib Ahmed. *Id.* ¶¶ 76, 79. Separately, in the second quarter of 2017, Kashif Munshi then refused to give Plaintiff the Apple Mac machine IP address in order to set up mobile development. *Id.* ¶ 78. Sometime between July and August 2017, Plaintiff alleges Nadine Brown used "discriminative words" against him and said she would "smack [him] out to India" while raising a laptop. *Id.* ¶ 84. In that same time period, Eugene Levin denied Plaintiff overtime. *Id.* ¶ 87.

On June 18, 2017, Plaintiff applied for an open position for the Certified IT Developer and Application System Analyst ("IT Developer"). *Id.* ¶ 82. Plaintiff also applied but was not interviewed for a Data Warehouse position. *Id.* ¶ 83. On August 10, 2017, Mani Krishnamurthy, Alice Carman, and others interviewed Plaintiff for the IT Developer position. *Id.* ¶¶ 27, 89. Carman later offered Plaintiff the position at an annual salary of $135,000.00. *Id.* ¶ 91. Plaintiff countered with $170,000.00 a year, arguing $135,000.00 was "unfair." *Id.* Plaintiff spoke with Krishnamurthy a few days later who told him DOE did not have the budget for his requested salary. *Id.* ¶ 92. Plaintiff also alleges on October 2, 2017, he asked Krishnamurthy why his salary offer was reduced, and he replied Plaintiff was diabetic. *Id.* ¶ 107.

In August 2017, Levin allegedly called Plaintiff a "weak person" and did not assign Plaintiff new projects. *Id.* ¶¶ 93, 97-98. Plaintiff told Levin he would continue to apply to contract jobs and it would be discrimination if DOE did not hire U.S. citizens or permanent

residents for those positions. *Id.* ¶¶ 93-94. On or around September 15, 2017, Jaysmar Bastien offered Plaintiff an annual salary of $115,000.00, claiming the salary was reduced because Plaintiff alleged discrimination in DOE only hiring foreigners for contract jobs. *Id.* ¶ 100. Four of Plaintiff's coworkers were recruited for unspecified fulltime "manager jobs" that were not publicly posted from April to October 2017. *Id.* ¶¶ 11, 81. Plaintiff applied for multiple DOE contract positions in September and October 2017 but was not interviewed for any. *Id.* ¶¶ 101, 112, 114. Other employees who were all Indian nationals were interviewed, and two received positions. *Id.* ¶ 102. Plaintiff's contract with DOE ended on October 2, 2017. *Id.* ¶ 107.

Plaintiff then commenced this action on November 20, 2017. *See* ECF No. 1. The Court dismissed Plaintiff's original complaint on December 7, 2017, and granted Plaintiff leave to file an amended complaint. *See* ECF No. 8 ("Dec. 7, 2017 Order"). Plaintiff filed an amended complaint on January 11, 2018, *see* ECF No. 12, and was granted leave to file a second amended complaint, *see* ECF No. 23; SAC. The Court denied Plaintiff's request to file a third amended complaint. *See* ECF No. 27. Plaintiff brings claims for race, color, gender, national origin, religion, age, and disability discrimination, retaliation, hostile work environment, and violation of the Equal Pay Act. *See generally* SAC.

Defendant now moves for dismissal of the Second Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* Def. Mem.

LEGAL STANDARDS

In reviewing the Complaint, the Court is mindful Plaintiff is proceeding *pro se*, and his pleadings should be held "to less stringent standards than formal pleadings drafted by lawyers." *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (internal quotation marks omitted); *accord Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009). Nevertheless, a complaint drafted by a *pro se* litigant must still

state a claim for relief and comply with the minimal pleading standards as required by the Federal Rules. *See Walker v. Schult*, 717 F.3d 119, 124 (2d Cir. 2013); *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983) (noting *pro se* status "does not exempt a party from compliance with relevant rules of procedural and substantive law").

To survive a motion to dismiss for failure to state a claim for which relief can be granted under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint must be dismissed where, as a matter of law, "the allegations in [the] complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558.

In considering a motion to dismiss, the Court must accept all of the non-movant's factual allegations as true and draw all reasonable inferences in the non-movant's favor. *Id.* at 555; *see also Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). However, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). Indeed, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to [defeat] a motion to dismiss." *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir. 2006) (internal quotation marks omitted).

DISCUSSION

Defendant argues first Plaintiff's federal claims should be dismissed as time-barred to the extent they are based on events that occurred before February 15, 2017. *See* Def. Mem. at 6-7.

Next, Defendant argues Plaintiff's Title VII, ADA, ADEA, and GINA claims are barred for failure to exhaust his administrative remedies. *See id.* at 7-8. The remaining claims, in Defendant's view, must be dismissed for failure to state a cause of action. *See id.* at 8-24.

As an initial matter, this Decision and Order addresses only the claims raised in the Second Amended Complaint. The Court denied Plaintiff's request to amend his complaint for a third time and denied Plaintiff's request to reconsider that decision. Thus, any arguments Plaintiff raises in his opposition that involve new allegations, such as the Dodd-Frank Act or Fair Labor Standards Act violations or retaliation, are barred.

For the reasons discussed below, this Court grants Defendant's motion to dismiss.

I. Failure to Exhaust Administrative Remedies

a. Title VII, ADA, and GINA Claims (Counts 1, 2, 3, 4, 5, 6, 8, 9, 10, 11)

Under Title VII, a federal litigant alleging employment discrimination must first exhaust administrative remedies by timely filing a charge with the Equal Employment Opportunity Commission ("EEOC") and obtain a right to sue letter. *See* 42 U.S.C. § 2000e–5(e); *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 686 (2d Cir. 2001) (Title VII). "Administration exhaustion is an essential element of Title VII's statutory scheme, the purpose of which is to avoid unnecessary judicial action by the federal courts by '[giving] the administration agency the opportunity to investigate, mediate, and take remedial action.'" *See Canty v. Wackenhut Corr. Corp.*, 255 F. Supp. 2d 113, 116 (E.D.N.Y. 2003) (Spatt, J.) (quoting *Stewart v. U.S. Immigration & Naturalization Service*, 762 F.3d 193, 198 (2d Cir. 1985)).

The ADA and GINA also incorporate this requirement. *See* 42 U.S.C. § 12117(a); *Agosta v. Suffolk Cty.*, 981 F. Supp. 2d 167, 172 (E.D.N.Y. 2013) (Spatt, J.) ("A district court only has jurisdiction to hear claims brought pursuant to the ADA that are . . . contained in the

EEOC charge . . . ."); *Hawkins v. Jamaica Hospital Medical Ctr.*, 16-CV-4265, 2018 WL 3134415, at *8 n.14 (E.D.N.Y. Feb. 26, 2018) (Pollak, M.J.) ("GINA claims are subject to Title VII's administrative exhaustion requirement.").

When the Court issued its December 7, 2017 Order, it advised Plaintiff he "d[id] not allege that he filed a charge with the EEOC or appropriate state agency and ha[d] not included a Right to Sue letter with this complaint." Dec. 7, 2017 Order at 5. In his Second Amended Complaint, Plaintiff attached his charge of employment discrimination filed with the EEOC, *see* ECF No. 21-1, but did not include a right to sue letter or make clear whether he received such a letter. This Court specifically ordered Plaintiff to attach to any amended complaint "a copy of the EEOC's Right to Sue letter." Dec. 7, 2017 Order at 6. Moreover, based on the letters written by Plaintiff attached to the Second Amended Complaint, he was well aware he needed to obtain the right to sue letter in order to move forward with a federal claim. *See, e.g.*, ECF No. 21-1 at 13, 15, 48 (letters written by Plaintiff to the Employment Litigation Section of the U.S. Department of Justice, noting "[t]he right to Sue letter is [a] must from DOJ"); *accord Canty*, 255 F. Supp. 2d at 117 ("[W]hile the complaint alleges that a grievance was filed with the EEOC, it does not state that [the claimant] obtained a right-to-sue letter. Thus, she has not demonstrated that she has exhausted her administrative remedies.").

Because Plaintiff did not obtain a right to sue letter, as required by law and as previously ordered by this Court, his Title VII, ADA, and GINA claims are dismissed.

b. **ADEA Claim (Count 7)**

The ADEA does not require a plaintiff to obtain a right to sue letter for purposes of administration exhaustion. *See Canty*, 255 F. Supp. 2d at 118. It does, however, require a

plaintiff to wait "until sixty days after a charge alleging unlawful discrimination has been filed with the [EEOC]" before filing a civil action. *See* 29 U.S.C. § 626(d).

Here, Plaintiff filed his federal claim on November 20, 2017 and filed his charge of discrimination on December 12, 2017. Plaintiff also checked the box on his employment discrimination form that less than 60 days had elapsed since filing his charge of age discrimination with the EEOC. *See* SAC, Ex. A at 6.

Even if the Court were to waive this requirement, Plaintiff's allegations cannot survive Rule 12(b)(6). To state a claim for relief, a plaintiff asserting an employment discrimination claim pursuant to the ADEA "must plausibly allege that adverse action was taken against her by her employer and that her age was a 'but-for' cause of the adverse action." *Marcus v. Leviton Mfg. Co., Inc.*, 661 F. App'x 29, 31-32 (2d Cir. 2016) (summary order). Defendant argues "Plaintiff fails to adequately allege that his age was the 'but-for' reason for the project reassignment and manager job promotions." Def. Mem. at 18.

Plaintiff contends Defendant's conduct violated the ADEA because the stated reasons were pretext to hide discriminatory animus. *See* SAC ¶¶ 159. Although Plaintiff lists "age" throughout the Second Amended Complaint, only two allegations in the lengthy submission reference specifically refer to age of employees. *Id.* ¶¶ 81, 98. Plaintiff makes no plausible connection between any alleged adverse action on the part of DOE and his age being the case. Plaintiff fails to allege any facts beyond mere conclusions Defendant terminated Plaintiff based on his age. Merely alleging "younger" employees were treated better without more specific information does not give rise to a minimal inference of age discrimination as required by the ADEA. *See Marcus*, 661 F. App'x at 32; *see also, e.g., Ndremizara v. Swiss Re Amer. Holding Corp.*, 93 F. Supp. 3d 301, 315-16 (S.D.N.Y. 2015) (Karas, J.) ("Plaintiff must allege *something*

that plausibly shows he was a victim of age discrimination."); *Payne v. Malemathew*, 09-CV-1634, 2011 WL 3043920, at *2 (S.D.N.Y. July 22, 2011) (Seibel, J.) (dismissing pro se complaint with ADEA claim because even reading the complaint liberally, "there is simply nothing in the [Complaint] from which one might reasonably infer that Plaintiff's termination was based on his age").

Accordingly, Defendant's motion to dismiss both federal and state age discrimination claims is granted.

II. Failure to State a Claim Upon Which Relief May Be Granted

A. State and City HRL Hostile Work Environment Claims (Count 11)

Section 3813(1) of New York Education Law provides no claim involving the right or interests of a school district may be brought against the district or its officers without first filing a written notice of claim on the governing board of the DOE within ninety days of the claim arising. A plaintiff must also plead and prove compliance with the notice of claim requirement—failure to do so may result in dismissal. *See, e.g.*, *Birkholz v. City of New York*, 10-CV-4719, 2012 WL 580522, at *15 (E.D.N.Y. Feb. 22, 2012) (Garaufis, J.); *AT&T Co. v. N.Y.C. Dep't of Human Resources*, 736 F. Supp. 496, 499 (S.D.N.Y. 1990) (Leisure, J.) (listing cases).

Here, Plaintiff does not explicitly state in his Second Amended Complaint whether he filed a notice of claim upon the governing board of the DOE. Instead, in his opposition, Plaintiff contends he filed the written notice on the Office of Equal Employment. The Notice of Claim, even if it was filed correctly, was filed on May 11, 2018—significantly more than three months after his alleged claims arising. In a letter dated September 16, 2018, Plaintiff filed a letter with the Clerk of Court including a postal service label and contending he sent the notice of claim to

the governing board of DOE. *See* ECF No. 35. But "[a]n assertion in a memorandum does not satisfy the requirements of § 3813, let alone an assertion that does not maintain the notice was timely served." *Birkholz*, 2012 WL 580522, at *15. Thus, Plaintiff's claim fails to survive the strictures of § 3813.

In any event, Plaintiff's state hostile work environment allegations fail to state a claim. To demonstrate a hostile work environment, Plaintiff must plausibly allege facts to demonstrate: (1) a workplace "with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (internal quotation marks omitted); and (2) "a specific basis . . . for imputing the conduct that created the hostile environment to the employer," *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000) (internal quotation marks omitted). As such, the conduct must be "more than episodic." *Littlejohn v. City of New York*, 795 F.3d 297, 321 (2d Cir. 2015) (Title VII, § 1981, and § 1983 case). Under the NYCHRL, a plaintiff must meet a lower bar, needing to allege only sufficient facts to show plausibly the plaintiff was "'treated less well'" because of a protected class. *Nguedi v. Fed. Res. Bank of N.Y.*, 16-CV-636, 2017 WL 5991757, at *10 (S.D.N.Y. Dec. 1, 2017) (Woods, J.) (quoting *Mihalik v. Credit Agricole Cheuvreux N. Am.*, 715 F.3d 102, 110 (2d Cir. 2013)). Plaintiff incorporates various one-off statements or allegations in his 48-page Second Amended Complaint, but these allegations in no way plausibly allege hostile work environment claims. In any event, "isolated, minor acts or occasional episodes" of discrimination do not warrant relief in this case. *Brennan v. Metro. Opera Ass'n*, 192 F.3d 310, 318 (2d Cir. 1999).

Accordingly, all Plaintiff's claims under state and city human rights laws are dismissed.

B. Equal Pay Act Claim Fails to State a Claim (Count 12)

Plaintiff also alleges discrimination under the Equal Pay Act ("EPA"). To establish discrimination under the EPA, a claimant must establish: "(i) the employer pays different wages to employees of the opposite sex; (ii) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (iii) the jobs are performed under similar working conditions." *Lavin-Mceleney v. Marist Coll.*, 239 F.3d 476, 480 (2d Cir. 2001). Plaintiff's Second Amended Complaint makes no allegations "employees of the opposite sex" were paid different wages. He appears to be displeased with the salary ranges afforded to employees contracted to work at DOE, which is not an EPA violation.

* * *

Accordingly, the claims raised in Plaintiff's Second Amended Complaint are dismissed. As noted previously, to the extent Plaintiff raises novel claims and allegations in his opposition to the instant motion, his motion to amend his complaint for a third time was denied by this Court, and his motion to reconsider that decision was denied by this Court. Plaintiff cannot circumvent a decision of this Court by packing new allegations into his opposition to the motion.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is GRANTED in their entirety, and this action is hereby dismissed. Plaintiff's request to stay this matter, *see* ECF No. 36, is DENIED. The Clerk of Court is respectfully directed to terminate the motion pending at ECF No. 30 and close this case.

SO ORDERED.

s/WFK

HON. WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

Dated: December 10, 2019
Brooklyn, New York

12a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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PALANI KARUPAIYAN,

Plaintiff,

JUDGMENT
17-CV-6765 (WFK) (LB)

v.

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.
---------- X

A Decision and Order of Honorable William F. Kuntz II, United States District Judge, having been filed on December 10, 2019, granting Defendant's motion to dismiss in its entirety; and dismissing this action; it is

ORDERED and ADJUDGED that Defendant's motion to dismiss is granted in its entirety; and that this action is dismissed.

Dated: Brooklyn, NY
December 11, 2019

Douglas C. Palmer
Clerk of Court

By: */s/Jalitza Poveda*
Deputy Clerk

13a

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 11th day of August, two thousand twenty.

Palani Karupaiyan,

Plaintiff - Appellant,

v.

Department of Education, New York City,

Defendant - Appellee,

Vaibhav Wakode, Nadine Brown, Asif Ali Khan, Bebe Kamta, Armando Taddei, Alice Carman, Jaysmar Bastien, Mani C. Krishnamurthy,

Defendants.

ORDER

Docket No: 20-841

Appellant, Palani Karupaiyan, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk