

**APPENDIX C**  
**SUMMARY ORDER**

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 5<sup>th</sup> day of February, two thousand twenty.

PRESENT:

PIERRE N. LEVAL,  
REENA RAGGI,  
DEBRA ANN LIVINGSTON,  
*Circuit Judges.*

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Shirley Dimps,

*Plaintiff-Appellant,*

v.

19-975

Taconic Correctional Facility, New York State  
Department of Corrections and Community  
Supervision, New York State Department of  
Civil Service, and Civil Service Employees  
Association, Inc.,

*Defendants-Appellees.\**

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

**FOR PLAINTIFF-APPELLANT:**

Shirley Dimps, *pro se*, Bronx, NY.

**FOR DEFENDANTS-APPELLEES:**

Darren J. Rylewicz, Leslie C. Perrin, Civil Service Employees Association, Inc., Albany, NY (*for* Civil Service Employees Association, Inc.).

Amit R. Vora, New York State Office of the Attorney General, New York, NY (*for* Taconic Correctional Facility, New York State Department of Corrections and Community Supervision, and New York State Department of Civil Service).

- Appeal from a judgment of dismissal entered on March 27, 2019, in the United States District Court for the Southern District of New York (Nelson S. Román, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED** in part, **VACATED** in part, and **REMANDED**.

Plaintiff Shirley Dimps, proceeding *pro se*, appeals the district court's dismissal of her action against the Taconic Correctional Facility ("Taconic"), the New York State Department of Correction and Community Supervision ("DOCCS"), the New York State Department of Civil Service ("DCS") (together, the "State Defendants"), and the Civil Service Employees Association, Inc. ("CSEA"). Against the State Defendants, Dimps asserted claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 1981, the New York State Human Rights Law ("NYSHRL"), and the New York City Human Rights Law ("NYCHRL"). Against CSEA,

her labor union, Dimps asserted a breach of the duty of fair representation claim under New York's Taylor Law. *See* N.Y. Civ. Serv. Law § 209-a. Dimps also asserted breach of contract claims against all defendants. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

## I. The State Defendants

Upon *de novo* review, *see Smith v. Hogan*, 794 F.3d 249, 253 (2d Cir. 2015), we conclude that the district court correctly dismissed all claims against Taconic, the facility where Dimps worked, because DOCCS, not Taconic, was Dimps's employer, *see* N.Y. Correct. Law § 7(2). The court also correctly dismissed Dimps's ADA, ADEA, § 1981, and state-law claims against DOCCS and DCS as barred by the Eleventh Amendment. The ADA, ADEA, and § 1981 do not abrogate states' sovereign immunity, which New York has not waived as to any of these claims. *See Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (ADA); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (ADEA); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (§ 1983 and, by extension, § 1981); *Feingold v. New York*, 366 F.3d 138, 149 (2d Cir. 2004) (NYCHRL); *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 449 (2d Cir. 1999) (NYSHRL), *abrogated on other grounds*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). We further agree with the district court that Dimps's sparse and conclusory amended complaint does not state plausible Title VII claims for failure to promote, hostile work environment, and retaliation against DOCCS and DCS. *See Aulicino v. N.Y.C. Dep't of Homeless Servs.*, 580 F.3d 73, 80, 82 (2d Cir. 2009) (stating elements of failure to promote and hostile work environment claims); *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 172–73 (2d Cir. 2005) (stating elements of retaliation claim).

Nevertheless, we conclude that the district court should not have dismissed Dimps's Title VII claims against DOCCS without affording her an opportunity to file a second amended complaint. *See generally Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010) ("A *pro se* complaint should not [be] dismiss[ed] without [the Court] granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." (internal quotation marks omitted)). When Dimps's amended complaint is read together with specific facts asserted in opposition to defendants' motions to dismiss, there is at least an indication that she may be able to state a plausible Title VII claim of race discrimination in promotion against DOCCS. *See Nielsen v. Rabin*, 746 F.3d 58, 64 (2d Cir. 2014) (considering allegations raised in opposition papers in vacating denial of leave to amend); *Walker v. Schult*, 717 F.3d 119, 122 n.1 (2d Cir. 2013) ("A district court deciding a motion to dismiss may consider factual allegations made by a *pro se* party in [her] papers opposing the motion."). Specifically, her opposition filing details five occasions when she was passed over for specific promotions awarded to equally or less well-qualified candidates of other races and makes some showing that promotions at Taconic are generally awarded not to African American or Hispanic employees but, rather, to Caucasian or Indian candidates. *See Aulicino*, 580 F.3d at 80. Viewing these allegations liberally, and in light of her *pro se* status, Dimps should have been afforded a further opportunity to plead her Title VII claim of race discrimination.<sup>2</sup>

Dimps, however, should attach to any such amended complaint her August 2016 EEOC

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<sup>2</sup> Even viewed liberally, Dimps's opposition filing does not indicate that she can state valid ADA, ADEA, or § 1981 claims against individual DOCCS supervisors and, thus, there is no reason to grant leave to amend those claims. To be sure, Dimps advised the district court that she did not wish to file *any* second amended complaint. As became apparent at oral argument before this Court, this *pro se* litigant did not understand that the rules permit more than one amendment.

charge as well as any other claims subsequently raised before the EEOC, in order to demonstrate the timeliness of her Title VII claim and the requisite exhaustion of administrative remedies.

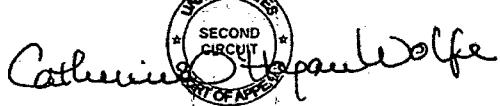
## II. CSEA

The district court dismissed Dimps's claims against CSEA for lack of subject matter jurisdiction and, in the alternative, for failure to state a claim. Further, it concluded that any amendment would be futile. On *de novo* review, we agree. Neither Dimps's amended complaint nor her other filings in the district court indicate an ability to assert valid claims against CSEA. See *Chavis*, 618 F.3d at 170.

\* \* \*

We have considered Dimps's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment to the extent it dismisses all claims against Taconic, DCS, and CSEA. We **AFFIRM** in part the judgment dismissing claims against DOCCS but **VACATE** the judgment to the extent it denied leave to amend the Title VII claims against DOCCS. As to these latter claims, we **REMAND** to the district court to allow Dimps an opportunity to amend her complaint to allege Title VII claims against DOCCS to the extent she can demonstrate that those claims were timely exhausted before the EEOC.

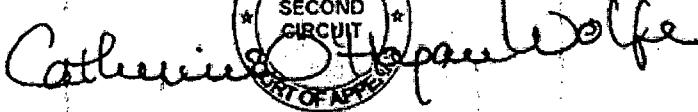
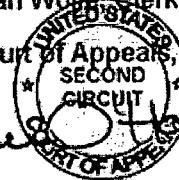
FOR THE COURT:  
Catherine O'Hagan Wolfe, Clerk of Court


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Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

**APPENDIX I**  
**ORDER FOR REHEARING/REHEARING EN BANC**

UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

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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 27<sup>th</sup> day of April, two thousand twenty.

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Shirley Dimpson,

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Taconic Correctional Facility, New York State  
Department of Corrections and Community Supervision,  
New York State Department of Civil Service, and Civil  
Service Employees Association, Inc.,

Defendants-Appellees.

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**ORDER**

Docket No: 19-975

Appellant, Shirley Dimpson, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

*Catherine O'Hagan Wolfe*



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**APPENDIX J**  
**MANDATE SUMMARY ORDER**

# MANDATE

19-975

Dimps v. Taconic Correctional Facility

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

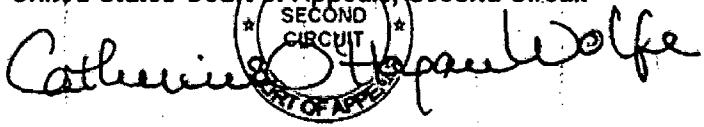
  
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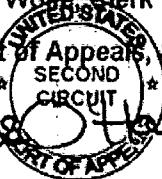


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United States Court of Appeals, Second Circuit

  
Catherine O'Hagan Wolfe



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**APPENDIX M  
OPINION & ORDER**

**3/20/2019**

U.S. DISTRICT COURT  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #: 3/20/2019  
DATE FILED: 3/20/2019

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY DIMPS,

Plaintiff,

-against-

TACONIC CORRECTIONAL FACILITY,  
NEW YORK STATE DEPARTMENT  
OF CORRECTIONS AND COMMUNITY  
SUPERVISION, NEW YORK STATE  
DEPARTMENT OF CIVIL SERVICE,  
CSEA, INC.,

Defendants.

17-cv-8806 (NSR)  
OPINION & ORDER

NELSON S. ROMÁN, District Court Judge

On or about November 13, 2017, Plaintiff Shirley Dimps commenced this *pro se* action asserting claims, *inter alia*, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (“Title VII”), 42 U.S.C. § 1981, the Age Discrimination in Employment Act (“ADEA”), Americans with Disabilities Act (“ADA”), New York State Human Rights Law (“NYSHRL”), New York City Human Rights Law (“NYCHRL”), and a breach of contract claim. Plaintiff alleges that over the past decade she has been denied promotions on the basis of race, age, and disability and was subjected to a hostile work environment and retaliated against by her employer the New York State Department of Corrections and Community Service (“DOCCS”) while employed at the Taconic Correctional Facility (“Taconic”).<sup>1</sup> Plaintiff also asserts similar claims of discrimination based on race, age and disability against New York State Department of Civil Service (“DCS”), the state agency responsible for administering the civil service promotional exams. Herein after, Defendants DOCCS, Taconic and DCS will collectively be referred to as the “Defendants.” Before the Court are Defendants’ Motion to

<sup>1</sup> Plaintiff’s initial complaint was filed on November 13, 2017. (ECF No. 1). Plaintiff subsequently filed an Amended Complaint on January 29, 2018. The Amended Complaint is deemed the operative complaint for the purposes of this motion.

Dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) (“Rule 12(b)(1)”) and 12(b)(6) (“Rule 12(b)(6)”). (ECF Nos. 26, 56 For the following reasons, Defendants’ Motion is GRANTED.

## BACKGROUND

Plaintiff is a 64 year old African American female who suffers from hearing loss. (Am. Compl. at 4, ECF No. 4.) She has been working at Taconic for over 10 years. (Am. Compl. ¶ 3) Despite suffering from hearing loss, Taconic failed to provide Plaintiff with an accommodation. (*Id.* at ¶ 1) She alleges that due to the discriminatory practices of the Defendants she has been passed over for promotions due to age, race, and disability. (*Id.* at ¶ 2-3) Prior to commencing the instant lawsuit, Plaintiff filed a complaint with the EEOC by a letter dated August 3, 2016. (See Am. Compl. 13 of 23) Plaintiff received notice of her right to sue from the EEOC on August 21, 2017. (See *id.* at 17-18 of 23).

## STANDARD OF REVIEW

### A. Rule 12(b)(6)

To withstand a motion to dismiss under Rule 12(b)(6), a complaint must contain “sufficient factual matter, accepted as true, ‘to state a claim that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* While the court must accept all of the allegations in the complaint as true, the court is not “bound to accept as true legal conclusions couched as factual allegations.” *Id.* A plaintiff “armed with nothing more than conclusions” does not unlock the doors to discovery. *Id.* Determining whether a complaint states a plausible claim for relief is a

context-specific task for the court “that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. However, the “submissions of a *pro se* litigant must be construed liberally and interpreted ‘to raise the strongest arguments that they suggest.’” *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006). In deciding a motion to dismiss, a motion “court may consider the facts as asserted within the four corners of the complaint together with the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference.” *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (internal quotation marks and citation omitted). Courts also may consider “matters of which judicial notice may be taken” and “documents either in plaintiff [’s] possession or of which plaintiff[] had knowledge and relied on in bringing suit.” *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

**B. Rule 12(b)(1)**

The standard for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is “substantively identical” to the standard for dismissal under 12(b)(6). *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 128 (2d Cir. 2003). Under Rule 12(b)(1), “a case is properly dismissed for subject matter jurisdiction... when the district court lacks the statutory or constitutional power to adjudicate it.” *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). In resolving a 12(b)(1) motion to dismiss, the court may refer to evidence outside the pleadings. *Id.* “The plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.” *Id.* In assessing whether there is subject matter jurisdiction, the Court “must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the plaintiff’s favor.” *Conyers v. Rossides*, 558 F.3d 137, 143 (2d Cir. 2009). “The party invoking federal jurisdiction bears the burden of establishing that jurisdiction exists.” *Id.*

## DISCUSSION

Defendants first argue that Taconic should be dismissed because it is not a distinct legal entity. (Mem. of Law in Support of Mot. to Dismiss Am. Compl. (“Def. Mot.”) 4, ECF No. 50) Second, the Defendants argue that Plaintiff’s Title VII claims fail to state a plausible claim upon which relief can be granted. (Def. Mot. 6-10) Finally, the Defendants argue that the Plaintiff’s non-Title VII claims, including the ADA, ADEA, 42 U.S.C. § 1981 and state law claims are barred by the Eleventh Amendment. (Def. Mot. 5-6) This Court agrees.

### I. Taconic Correctional Facility

Defendants assert that Taconic should be dismissed as a matter of law because it is not a distinct legal entity capable of being sued. (Def. Mot. 4.) In a letter seeking to add respondents to the August 2016 EEOC charge, Plaintiff herself contends that Taconic is a facility under DOCCS which is governed by DCS. (See Am. Compl. 21 of 23.) As a state correctional facility has no separate legal status from the agency that operates it, the Plaintiff herein is an employee of DOCCS who is assigned to Taconic. *See Rivera v. Goord*, 119 F. Supp. 2d 327, 336 (S.D.N.Y. 2000); *Trail v. New York State Dep’t of Corr. & Cnty. Supervision*, No. 17-CV-7273, 2018 U.S. Dist. LEXIS 131163, at \*2-\*3 (S.D.N.Y. Aug. 3, 2018) (dismissing Taconic Correctional Facility as a defendant because it is not a distinct legal entity); *Davis v. City of New York*, No. 96-CV-2998, 1998 U.S. Dist. LEXIS 668, at \*6 (S.D.N.Y. Jan. 20, 1998) (dismissing claims against a correctional facility because it is not a “suable entity”); 7 N.Y. Comp. Codes R. & Regs. § 100.82 (2019).<sup>2</sup> Accordingly, Taconic is not a proper entity subject to being sued and all claims asserted against it must be dismissed.

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<sup>2</sup> See also *Alfano v. Costello*, 294 F.3d. 365, 369 (2d Cir. 2002) (describing DOCS as a correction officer’s employer); *Eusanio v. Wende C.F.*, No. 97-cv-0023, 1997 WL 374209, at \*1 (W.D.N.Y. June 17, 1997) (dismissing an ADA complaint against a correctional facility because the plaintiff’s employer was “not [the facility] but rather DOCS”).

## II. Exhaustion

Plaintiffs asserting Title VII, ADA, or ADEA claims must first exhaust their administrative remedies by filing a complaint with the EEOC or the equivalent state agency and obtainment of a notice of right-to-sue before filing in federal court. *Williams v. N.Y. City Hous. Auth.*, 458 F.3d 67, 69 (2d Cir. 2006); 42 U.S.C. § 2000e-5(e)(1).<sup>3</sup> Exhaustion of remedies is a precondition to suit, rather than a jurisdictional requirement. *Young v. Lord & Taylor, LLC*, 937 F. Supp. 2d 346, 352 (E.D.N.Y. 2013) citing *Francis v. City of New York*, 235 F.3d 763, 768 (2d Cir.2000). Generally, a plaintiff may only pursue those claims in a district court complaint which were either included in or are “reasonably related to” the allegations contained in her EEOC charge(s). *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 83 (2d Cir. 2001). Claims “reasonably related” to the EEOC charge(s) include: (1) where the conduct complained of would fall within the “scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination”; (2) a claim “alleging retaliation by an employer against an employee for filing an EEOC charge”; and (3) where the “plaintiff alleges further incidents of discrimination carried out in precisely the same manner alleged in the EEOC charge.” *Young v. Lord & Taylor, LLC*, 937 F. Supp. at 352 citing *Butts v. City of New York Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1401 (2d Cir.1993), superseded by statute on other grounds *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir.1998) and *Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1208 (2d Cir.1993).

Claims sounding in discrimination pursuant to Title VII, ADA and ADEA are deemed timely if they are filed with the administrative agency within 300 days of an alleged unlawful

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<sup>3</sup> See also *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 686 (2d Cir. 2001) (“Under both Title VII and ADEA, a claimant may bring suit in federal court only if she has filed a timely complaint with the EEOC and obtained a right-to-sue letter.); *McInerney v. Rensselaer Polytechnic Inst.*, 505 F.3d 135, 138 (2d Cir. 2007) (stating ADA Title I incorporates various provisions from Title VII including administrative-exhaustion with the EEOC).

practice. *See AMTRAK v. Morgan*, 536 U.S. 101, 109 (2002); *Williams*, 458 F.3d at 69 (stating that a Title VII claimant must make an EEOC filing within 300 days of the alleged discriminatory conduct); *Troeger v. Ellenville Cent. Sch. Dist.*, 523 F. App'x. 848, 851 (2d Cir. 2013) ("It is undisputed that a claimant pursuing claims under the ADA must file charges with the EEOC within 300 days of the purportedly unlawful acts.); *Harris v. City of New York*, 186 F.3d 243, 247 (2d Cir. 1999) (same); 42 U.S.C. § 2000e-5(e)(1); *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237-38 (2d Cir. 2007) (A plaintiff seeking to recover under the ADEA must file a discrimination charge with a state agency within 300 days of the occurrence of the allegedly unlawful employment practice); 29 U.S.C. § 626(d)(2).

Plaintiff asserts she filed her complaint with the EEOC on August 3, 2017.<sup>4</sup> (Am. Compl. at 6.) On August 16, 2017, the EEOC issued Plaintiff notice of her right to sue. (*Id.* at 17-18 of 23) Her right to sue letter indicates that she alleged claims of discrimination under Title VII, the ADA and ADEA against Taconic. Defendants contend that the Plaintiff's August 2017 EEOC charge is untimely because her amended complaint refers to over a decade of alleged misconduct. (Def. Mot. 7.) This Court agrees.

The Court notes that Plaintiff incorrectly identified Taconic, an entity not subject to being sued, as her employer in her complaint letter to the EEOC. The EEOC's right to sue letter indicates Plaintiff made complaints against Taconic alleging discrimination in violation of the ADA, ADEA and Title VII. The EEOC documents indicate Plaintiff did not name DOCCS or

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<sup>4</sup> The Court notes that the Plaintiff did not include the August 2016 EEOC charge in her Amended Complaint which would have provided the specific claims against the Defendants. However, the right-to-sue letter indicates that the EEOC failed to find Taconic in violation of the ADA, ADEA, or Title VII. (*See* ECF. No. 4-18). Plaintiff's amended complaint also includes a letter to the EEOC dated Sept. 8, 2017 indicating that she alleged discrimination on the basis of Title VII, ADA, and ADEA. (*See* ECF. No. 4-21) Thus, liberally construing the Plaintiff's complaint and granting leniency to her *pro se* status, the Court finds that the Plaintiff alleged Title VII, ADA, and ADEA claims in her August 2016 EEOC charge.

DSC in her charge letter. In her amended complaint, Plaintiff makes multiple conclusory allegations of discrimination on the basis of race, age, and disability. Plaintiff broadly asserts that she has been passed over for promotions “for nearly/more than a decade” in favor of younger employees but fails to specify any jobs to which she applied and was rejected. (See Am. Compl. ¶ 2.) She claims that the DCS civil service exam is discriminatory and alleges that she has been a victim of the “One in Three Rule” which allows employers to promote lower-scoring individuals. (See Am. Compl. ¶ 8-10) She identifies DSC as the state authority responsible for developing and administering examinations for civil service positions. (*Id.*) She does not, however, identify DSC as her employer. She also fails to provide any other relevant facts such as which civil service exam(s) she has taken, her exam results, the positions she has applied for, whether or not she was qualified, her eligibility, or any details about the individuals that were allegedly promoted in her stead. (*Id.*)

Plaintiff alleges she made an accommodation request for her hearing loss, was denied an accommodation, and was subjected to retaliation. (Am. Compl. ¶ 1) She provides no other information supporting this claim such as when she made the request for an accommodation, the type of accommodation requested, to whom she made the request, and what if any response she received from her employer. Plaintiff’s retaliation claim for seeking an accommodation is likewise conclusory in nature, failing to provide sufficient factual support. Plaintiff does not provide any date(s), how she was retaliated against, nor does she provide facts to show a causal connection between the plaintiff’s protected activity and the adverse employment action.

Plaintiff’s failure to provide dates is problematic. Without the benefit of the dates, it is impossible to determine whether any of the claims alleged in her August 3, 2016 EEOC charge letter were timely. To the extent Plaintiff asserts claims pursuant to ADA, ADEA and Title VII

(and related claims) that accrued more than three (300) days before August 3, 2017, the Court finds that Plaintiff failed to timely exhaust her administrative remedies for said claims. Similarly, to the extent Plaintiff failed to name DOCCS as a defendant in her EEOC charge letter, the Court finds Plaintiff failed to exhaust her administrative remedies.

**A. Title VII: Failure to Promote**

In order to establish a claim for the failure to promote, a Title VII Plaintiff must demonstrate: (1) that she is a member of a protected class; (2) that she applied and was qualified for the position in question; (3) that she was rejected for the position; and (4) that the position remained open and the employer continued to seek applicants having the plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Brown v. Coach Stores*, 163 F.3d 706, 709 (2d Cir. 1998). If the plaintiff succeeds in establishing a prime facie case, the burden then shifts to the defendant "to articulate some non-discriminatory reason for the plaintiff's rejection." *McDonnell Douglas*, 411 U.S. at 802. Should the defendant carry this burden, the plaintiff has an opportunity to prove that the defendant's reasons were illegitimate and a pretext for discrimination. *Id.* at 804.

The Defendants do not argue that Plaintiff meets the first element of her claim. Plaintiff is an African American female, approximately sixty-four (64) years old and purports to suffer from hearing loss in both ears. Defendants contend that Plaintiff is unable to meet the requisite four remaining elements. (Def. Mot. 7.) Plaintiff states in conclusory fashion that she was denied unidentified promotions due to her age because of Defendants' bias toward younger employees. (See Am. Compl. ¶ 3) However, Plaintiff fails to identify any of the positions she applied for, the exams she purportedly took and passed, how she was qualified, if and when she was rejected for a position, the individuals that were promoted in her stead and their age, or whether the

position(s) remained open and Defendants continued to seek applicants having her qualifications. Thus, her allegations fail to meet the requisite elements to establish a plausible claim for failure to promote. Accordingly, Plaintiff's claim must be dismissed.

**B. Title VII: Hostile Work Environment**

In order to prevail on a hostile work environment claim, a Plaintiff must demonstrate: "(1) that the harassment was 'sufficiently severe or pervasive to alter the conditions of the' victim's employment and create an abusive working environment,' and (2) that a specific basis exists for imputing the objectionable conduct to the employer." *Alfano v. Costello*, 294 F.3d 365, 373 (2d Cir. 2005). The test is both objective and subjective. *See id.* at 374; *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993). "The misconduct must be 'severe or pervasive enough to create an objectively hostile or abusive work environment,' and the victim must also subjectively perceive that environment to be abusive." *Alfano*, 294 F.3d at 374 citing *Harris*, 510 U.S. at 21. Further, in order for incidents to be deemed pervasive, they must be more than episodic and "sufficiently continuous and concerted." *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997); *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 62 (2d Cir. 1992); *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2d Cir. 1987). Isolated acts will not meet the threshold unless the single act is "severe enough" to establish a hostile working environment. *Brennan v. Metropolitan Opera Ass'n*, 192 F.3d 310, 318 (2d Cir. 1999). Thus, "a plaintiff alleging a hostile work environment 'must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted' to have altered the conditions of her working environment." *Alfano*, 294 F.3d at 374 citing *Cruz v. Coach Stores, Inc.*, 202 F. 3d 560, 570 (2d Cir. 2002).

The Defendants assert that the Plaintiff's claim should be dismissed because she fails to allege any severe or pervasive harassment or connect any alleged harassment to her race, age, or disability. (Def. Mot. 8) This Court agrees. The Plaintiff's amended complaint is unsupported by any factual allegations giving rise to her claim. Plaintiff merely states that she has been "treated [disparately] than other similar[ly] situated employees at TCF who were not African Americans." (See Am. Compl. at ¶ 2) Accordingly, the Court finds that Plaintiff failed to sufficiently plead a plausible hostile work environment claim and it must be dismissed.

**C. Title VII: Retaliation**

In order to establish a claim for retaliation under Title VII, the Plaintiff must allege: (1) that she engaged in a protected activity; (2) that the defendant knew she engaged in a protected activity; (3) that the defendant took an adverse employment action against her; and (4) that there was a causal connection between the plaintiff's protected activity and the adverse employment action. *Jute v. Hamilton*, 420 F.3d 166, 173 (2d Cir. 2005). "The term 'protected activity' refers to action taken to protest or oppose statutorily prohibited discrimination." *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000). Section 704(a) of Title VII, which contains both an opposition and participation clause, makes it unlawful for an employer to retaliate against an individual "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *Townsend v. Benjamin Enters.*, 679 F.3d 41, 48 (2d Cir. 2012); *Littlejohn v. City of New York*, 795 F.3d 297 (2d Cir. 2015) (same); 42 U.S.C. § 2000e-3(a)). An actionable adverse employment action is "a materially significant disadvantage with respect to the terms of the plaintiff's employment." *Williams v. R.H. Donnelly, Corp.*, 368 F.3d 123, 128 (2d Cir. 2004); *see also Galabya v. New York Bd. of*

*Educ.*, 202 F.3d 636, 640 (2d Cir. 2000) (“A materially adverse change might be indicated by termination of employment, a demotion evidenced by decrease in wage or salary, a less distinguished title, a material loss of benefits... or other indices...unique to the situation).

Plaintiff broadly asserts that she faced retaliation due to her disability and accommodation request. (Am. Compl. ¶ 1) The Defendants argue that the Plaintiff has failed to identify her involvement in a protected activity or identify an individual that was part of the alleged retaliatory decision to “pass over” her for promotions. (Def. Mot. 9) Further, Defendants contend there are no facts showing a causal connection because the Plaintiff has failed to identify a time frame for these actions. (*Id.*) This Court agrees. Her claim is merely asserted in a conclusory fashion. Thus, the retaliation claim must be dismissed.

### **III. ADA: Failure to Accommodate Claim**

While the Court has already found that the Plaintiff failed to timely exhaust her ADA claim, it will nevertheless explain why the Plaintiff’s amended complaint failed to sufficiently plead a plausible claim for failure to accommodate. To establish a claim for failure to accommodate, a plaintiff must allege “(1) [s]he is disabled within the meaning of the ADA; (2) [her] employer is a covered entity; (3) [s]he could perform the essential functions of the job with an accommodation; and (4) the defendants refused to provide such an accommodation despite being on notice.” *Fox v. Costco Wholesale Corp.*, No. 17-cv-0936, 2019 U.S. App. LEXIS 6714, at \*14 (2d Cir. Mar. 6, 2019); *McBride v. BIC Consumer Prods. Mfg. Co., Inc.*, 583 F.3d 92, 96-97 (2d Cir. 2009). For an impairment to meet the definition of “disability” under the ADA two requirements must be met: the impairment must limit a major life activity and the limitation must be substantial. *Capobianco v. City of New York*, 422 F.3d 47, 56 (2d Cir. 2005); 42 U.S.C. § 12102(2)(A). The EEOC defines “major life activities” as “functions such as caring for oneself,

performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” *Id.* quoting 29 C.F.R. §1630.2(i); *see also EEOC v. J.B. Hunt Transp., Inc.*, 321 F.3d 69, 74 (2d Cir. 2003) (same). The term “essential functions,” while not defined by statute, is generally defined to mean “duties to be performed in the position in question, but not functions that are merely ‘marginal.’” *Kinneary v. City of New York*, 601 F.3d 151, 156 (2d Cir. 2010) citing *Stone v. City of Mount Vernon*, 118 F.3d 92, 97 (2d Cir. 1997).

The Plaintiff suffers from hearing loss in both ears (Am. Compl. 4) and states in a conclusory fashion that the instant lawsuit stems from Defendant’s retaliation of her accommodation request. (Am. Compl. ¶ 1) For purposes of the ADA, a disability is defined as “a physical or mental impairment that substantially limits one or more major life activities of such individual,” “a record of such an impairment;” or “being regarded as having such an impairment.” 42 U.S.C. § 12102(1)(A)-(C). Hearing loss is major life activity within the meaning of the ADA (see *Fall v. New York State United Teachers*, 289 F. App’x 419, 421 (2d Cir. 2008)), however, Plaintiff does not indicate the extent of her hearing loss. *Fall v. New York State United Teachers*, 289 F. App’x at 421 (2d Cir. 2008) (Granting of summary judgment to defendant due to plaintiff failure to proffer evidence demonstrating the extent of her hearing loss was substantial.) Her Amended complaint merely indicates she suffer from hearing loss in both ears.

Even assuming Plaintiff’s claim of a hearing loss is sufficient to the extent that the facts support a finding that her alleged disability is substantial, Plaintiff’s claims still fails. Plaintiff does not identify facts about her position, what if any accommodation she requested, whether she can perform the essential functions of her job with an accommodation and whether or not her

employer was put on notice of her disability.<sup>5</sup> Other than to state that Taconic and DOCCS discriminated against Plaintiff due to disability (hearing loss), retaliated against her in response to her request for an accommodation, the Amended Complaint is void of any facts supporting a plausible claim. Accordingly, Plaintiff's failure to accommodate claim must be dismissed.

#### **IV. ADEA: Age Discrimination Claim**

The ADEA makes it unlawful for an employer to discriminate against an individual aged 40 or older "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Tarshis v. Riese Org.*, 211 F.3d 30, 35 (2d Cir. 2000); 29 U.S.C. § 623(a)(1). In order to establish a claim under the ADEA, a plaintiff must show: (1) she was within the protected age group; (2) she was qualified for the position at issue; (3) she suffered an adverse employment decision, and (4) the decision/discharge took place under circumstances giving rise to an inference of discrimination.<sup>6</sup> *Id.*; *Austin v. Ford Models, Inc.*, 149 F.3d 148, 152 (2d Cir. 1998); *Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994). The evidence necessary to satisfy this initial burden is minimal. *Carlton v. Mystic Transp., Inc.*, 202 F. 3d 129, 134 (2d Cir. 2000).

While the Plaintiff meets the first element, she fails to satisfy the remaining pleading requirements.<sup>7</sup> The Plaintiff asserts that she was denied promotions due to her age for over a decade. (Am. Compl. ¶ 2) However, Plaintiff fails to indicate whether she passed the requisite

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<sup>5</sup> See *Fox v. Costco Wholesale Corp.*, No. 17-cv-0936, 2019 U.S. App. LEXIS 6714, at \*14 (2d Cir. Mar. 6, 2019) (dismissing Plaintiff's failure to accommodate claim because the Defendants were not put on notice that Plaintiff's neurological condition would be worsened by being transferred to a position he previously held); *Ray v. Weit*, 708 Fed. App'x. 719, 721 (2d Cir. 2017) (finding that dismissal of the Appellant's claim was proper because the accommodations she requested had nothing to do with the ability to perform the essential functions of her job).

<sup>6</sup> The *McDonnell-Douglas* burden shifting analysis (discussed in Part II. A *supra*) is "the Supreme Court's own example of facts sufficient, in the Supreme Court's own words to give rise to an inference of unlawful discrimination." *Fisher v. Vassar College*, 114 F.3d 1332, 1367, n.1 (2d Cir. 1997); *see also Byrne v. Town of Cromwell Bd. of Educ.*, 24 F.3d 93, 101 (2d Cir. 2001) (stating that a plaintiff alleging a violation of either age or sex discrimination utilizes the same *McDonnell-Douglas* burden shifting framework).

<sup>7</sup> Plaintiff is 64 years old. (See Am. Compl. at ¶ 3)

civil service exams. (Am. Compl. ¶ 9) The amended complaint lacks any specifications regarding the promotions such as what the position was, when she applied, how she was qualified, or any facts regarding the individuals that were promoted. Lastly, Plaintiff fails to assert facts, other than in conclusory fashion, that the decision not to promote was made under circumstances giving rise to an inference of discrimination. Accordingly, the Court finds that the ADEA claim must be dismissed.

**V. 42 U.S.C. § 1981**

To establish a claim under 42 U.S.C. § 1981, plaintiffs must allege: (1) that they are a member of a protected class; (2) the defendant's intent to discriminate on the basis of race and; (3) discrimination concerning one of the statutes enumerated activities. *Brown v. City of Oneonta*, 221 F.3d 329, 339 (2d Cir. 1999). Under Section 1981, only intentional racial discrimination is prohibited. *Id.*; *see also Albert v. Carovano*, 851 F.2d 561 (2d Cir. 1988) ("Essential to an allegation under Section 1981 are allegations that the defendant's acts were purposefully discriminatory and racially motivated.") (internal citations omitted). The statutes' "enumerated activities" include rights "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all the laws and proceedings for the security of persons and property." *Brown*, 221 F.3d at 339 quoting 42 U.S.C. § 1981. To survive a motion to dismiss, a plaintiff asserting a 42 U.S.C. § 1981 claim must specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of racially discriminatory intent. *Mahmud v. Kaufmann*, 496 F. Supp. 2d 266, 272–73 (S.D.N.Y. 2007); *Yusuf v. Vassar Coll.*, 35 F.3d 709, 713 (2d Cir.1994); *see also Albert v. Carovano*, 851 F.2d 561, 571–72 (2d Cir.1988). Mere naked assertions lacking facts upon which

a court would find a violation of discrimination fails to state a claim under Rule 12(b)(6). *See Martin v. N.Y. State Dep't of Mental Hygiene*, 588 F.2d 371, 372 (2d Cir.1978).

Plaintiff asserts in a conclusory fashion that Defendants discriminated against her on the basis of race by treating her disparately than similarly situated employees that were not African American. (Am. Compl. ¶ 2) However, she fails to alleged additional facts supporting an inference of intentional discrimination by Defendants. Moreover, Plaintiff fails to allege discrimination based on an enumerated activity. Accordingly, the Court finds that the Plaintiff has failed to plead a plausible claim under 42 U.S.C. § 1981 and thus must be dismissed.

## **VI. NYSHRL and NYCHRL Claims**

The Plaintiff also raises Title VII, ADA, and ADEA claims under New York State Human Rights Law, Executive Law § 296 and New York City Human Rights Law, Administrative Code § 8-107 *et seq.* (Am. Compl. ¶ 4-5) The pleading standards for employment discrimination claims raised under NYSHRL mirror the pleading requirements under Title VII, the ADA, and ADEA. *See Pucino v. Verizon Wireless Commc'ns, Inc.*, 618 F.3d 112, 117 n.2 (2d Cir. 2010) (“We review discrimination claims brought under NYSHRL according to the same standards that we apply to Title VII discrimination claims.”); *George v. Prof'l Disposables Int'l, Inc.*, No. 15-CV-03385, 2016 U.S. Dist. LEXIS 72912, at \*24 (S.D.N.Y. June 1, 2016) (“The elements of a failure to accommodate claim under the NYHRL mirror those of the ADA”); *Sutera v. Schering Corp.*, 73 F.3d 13, 16, n.2 (2d Cir. 1995) (explaining that ADEA claims under NYHRL are analyzed using the same *McDonnell Douglas* burden-shifting framework). As such, the Court need not undertake a separate analysis of Plaintiff’s state law discrimination claims as their viability is the same as her federal claims. Further, because the Court finds the Plaintiff

failed to plead plausible federal or state causes of action, her NYCHRL claim is also dismissed. Accordingly, the Court finds that the Plaintiff's state and municipal claims are dismissed.

## **VII. Breach of Contract Claim**

In order to state a breach of contract claim under New York law in federal court the plaintiff's complaint need only allege (1) the existence of an agreement; (2) adequate performance of the contract by the plaintiff, (3) breach by the defendant, and (4) damages. *See Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996); *Tagare v. NYNEX Network Sys. Co.*, 921 F. Supp. 1146, 1149 (S.D.N.Y. 1996). In her Amended Complaint, Plaintiff asserts “[t]he Breach of Contract under Pendant [Supplemental] Jurisdiction. Related claims under New York Law....<sup>8</sup> (See Am. Compl. ¶ 1) Additionally, in the prayer for relief section, she seeks a declaratory judgment that Defendants breached their “Contract of Implied Duty of Good Faith and Fair Dealing.” (Am. Compl. 6A-e), To the extent Plaintiff attempts to allege a breach of contract claim, such claim fails. Plaintiff does not allege any other facts supporting each of the elements of a contract cause of action. Plaintiff does not identify which, if any of the named Defendants breached their duty, whether there was adequate performance by Plaintiff, which acts constitute a breach, and which agreement.

## **VIII. Immunity from Non-Title VII Claims**

The Defendants assert that the State and its agencies are immune from the Plaintiff's ADA, ADEA, 42 U.S.C. § 1981, State and City Human Rights Law, and breach of contract claims. (Def. Mot. 5) Defendants do not contest that the Plaintiff's claims arise under federal law. (Reply Mem. of Law in Support of Mot. to Dismiss Am. Compl. 2, ECF No. 61)

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<sup>8</sup> The Plaintiff seems to suggest that the Court has supplemental jurisdiction over her contract claim without providing any additional facts. (See Am. Compl. ¶ 1)

The Eleventh Amendment bars claims by an individual against a state in federal court absent waiver or abrogation. *Edelman v. Jordan*, 415 U.S. 651, 673 (1964); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-52 (1976). Immunity applies to claims arising under state and federal law in the absence of a state statute explicitly waiving the states' immunity to suit in federal court. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). This immunity "extends beyond the states themselves to state agents and state instrumentalities that are, effectively, arms of the state." *Gollomp v. Spitzer*, 568 F.3d 355, 366 (2d Cir. 2009).

To determine whether Congress properly abrogated states' Eleventh Amendment Immunity, two questions are asked: (1) did Congress "unequivocally express its intent to abrogate immunity?" and (2) did Congress act pursuant to constitutional authority? *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996). Regarding the ADEA, the Supreme Court found the answer to the first question to be "yes," stating the plain language of the ADEA "clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees." *McGinty v. New York*, 251 F.3d 84, 91 (2d Cir. 2001) citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 74 (2000). However, in applying a "congruence and proportionality" test, the Court found the answer to the second question to be "no" and that states may discriminate on the basis of age if it is rationally related to a legitimate state interest because age is not a suspect class. *Id.* at 91. The following term, the Supreme Court held that Congress did not act within its constitutional authority by subjecting States to suits in federal court for money damages under the ADA.<sup>9</sup> *Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 (2001).

In regard to the NYSHRL claim, "New York has not waived its sovereign immunity from

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<sup>9</sup> The Plaintiff's amended complaint requests damages "retroactive to the start date of the unlawful practices and to otherwise render her whole for all and any losses sustained and suffered as a result of Defendants unlawful employment practices." (Am. Compl. 6A-g)

ADA, § 1981... or [New York State Human Rights Law] claims in federal court... nor has Congress abrogated state sovereign immunity from discrimination claims brought pursuant to the ADA or § 1981." *Jackson v. Battaglia*, 63 F.Supp.3d 214, 220 (N.D.N.Y. 2014) (citing collected cases). Similarly, the Court does not have jurisdiction over the NYCHRL claim because the city does not have the authority to abrogate the State's sovereign immunity and the State has not consented to suit in federal court under NYCHRL. *Feingold v. New York*, 366 F.3d 138, 149 (2d Cir. 2004).

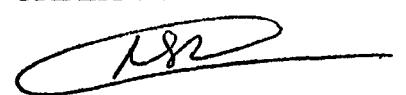
All of Plaintiff's claims have been dismissed due to Plaintiff's failure to provide facts supporting essential elements of her claims warranting a finding of plausibility. Nevertheless, the Court finds that the Defendants would be entitled to dismissal based on qualified immunity for Plaintiff's ADA, ADEA, 42 U.S.C. § 1981, state, and municipal human rights law, and breach of contract claims as against the DOCCS and DSC.

### CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is GRANTED in its entirety. All claims asserted against Defendants DOCCS, Taconic and DSC are deemed dismissed. The Clerk of the Court is respectfully directed to terminate the motions at ECF Nos. 49 and 56, to mail a copy of this Opinion to *pro se* Plaintiff, and to show proof of service on the docket.

Dated: March 20, 2019  
White Plains, New York

SO ORDERED:

  
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NELSON S. ROMÁN  
United States District Judge

**APPENDIX N  
JUDGMENT**

**3/21/2019**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY DIMPS,

Plaintiff,

-against-

TACONIC CORRECTIONAL FACILITY,  
NEW YORK STATE DEPARTMENT OF  
CORRECTIONS AND COMMUNITY  
SUPERVISION, NEW YORK STATE  
DEPARTMENT OF CIVIL SERVICE,  
CSEA, INC.,

Defendants.

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**JUDGMENT**

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion & Order dated March 20, 2019, Defendants' Motion to Dismiss is GRANTED in its entirety. All claims asserted against Defendants DOCCS, Taconic and DSC are deemed dismissed.

Dated: New York, New York  
March 21, 2019

RUBY J. KRAJICK

Clerk of Court

BY:

*kmango*

Deputy Clerk

(44)

**APPENDIX O  
OPINION & ORDER**

**3/25/2019**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY DIMPS,

Plaintiff,

-against-

TACONIC CORRECTIONAL FACILITY  
NYS DEPARTMENT OF CORRECTIONS  
AND COMMUNITY SUPERVISION, NYS  
DEPARTMENT OF CIVIL SERVICE, and CSEA, INC.,

Defendants.

17-cv-08806  
OPINION & ORDER

NELSON S. ROMÁN, United States District Judge

Plaintiff Shirley Dimp (‘Plaintiff’) commenced this action asserting claims, *inter alia*, against her union, Defendant Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (hereinafter referenced as ‘CSEA’ or ‘Defendant’), for an alleged breached of its duty of fair representation. (ECF No. 4, Am. Compl.) Plaintiff alleges that she was discriminated against by her employer, the New York State Department of Corrections and Community Supervision (“DOCCS”), and the New York State Department of Civil Service (“DCS”) while employed at the Taconic Correctional Facility (“Taconic”). Plaintiff alleges CSEA purportedly failed to fairly and in good faith represent and/or advocate on her behalf in her employment grievances. (See Am. Compl., ¶¶ 11-12.) Presently before the Court is Defendant CSEA’s motion to dismiss all claims asserted against it pursuant to Fed. R. Civ. P. §§ 12(b)(1) (“Rule 12(b)(1)”) and (6) (“Rule 12(b)(6)”). (ECF No. 22.) For the following reasons, Defendant’s motion is GRANTED.

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## PROCEDURAL HISTORY

Plaintiff commenced this action on or about November 13, 2017 asserting federal and state law claims for discrimination and hostile work environment under Title VII, 42 U.S.C. §§ 2000e to 2000e-17; 42 U.S.C. § 1981; 29 U.S.C. §§ 621-634; and 42 U.S.C. §§ 12101-12213; N.Y. Exec. Law §§ 290-297, and N.Y. City Admin. Code §§ 8-101 to 131 against Taconic. (ECF No. 1, Compl.) On January 29, 2018, Plaintiff filed an amended complaint asserting similar claims of discrimination and hostile work environment against Taconic, DOCCS and DCS,<sup>1</sup> and for unfair representation against CSEA. (See Am. Compl., ¶¶ 1-11.) Plaintiff alleges that her employer(s) failed to promote her due to her race, age and disability, failed to provide an accommodation based on a disability, retaliated against her, and harassed her and/or created a hostile work environment. (Id.) Plaintiff alleges that she filed grievances with CSEA and that the grievances were denied. (Id.)

Plaintiff's unfair representation claims are asserted pursuant to the New York Civil Service Law ("N.Y. Civ. Serv. Law") § 200, et seq. (the "Taylor Law"). Plaintiff asserts that CSEA breached its duty of fair representation when she complained of discrimination, harassment and retaliation at her place of employment, Taconic. Defendant CSEA moves to dismiss all claims against it on the basis of lack of subject matter jurisdiction, Rule 12(b)(1), and failure to state a claim upon which relief may be granted, Rule 12(b)(6).

## RELEVANT LAW

### I. Rule 12(b)(1)

A challenge to a federal court's subject matter jurisdiction is properly raised by way of a Rule 12(b)(1) motion. *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008), *aff'd*, 561 U.S. 247 (2010); *Alliance for Envt'l Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d

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<sup>1</sup> The nature of Plaintiff's claims against her employer are provided for background information only.

82, 87-88 (2d Cir. 2006). “A ‘case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it.’” *Nike, Inc. v. Already, LLC*, 663 F.3d 89, 94 (2d Cir. 2011) (citing *Markarova v. United States*, 201 F.3d 110, 113 (2d Cir 2000)). Without jurisdiction, the Court is devoid of the “power to adjudicate the merits of the case” and for that reason, a court must decide a Rule 12(b)(1) motion before any motion on the merits. *Carter v. HealthPort Tech., LLC*, 822 F.3d 47, 55 (2d Cir. 2016). “A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.” *Morrison*, 547 F.3d at 170. While a Court must accept all factual allegations in Plaintiff’s complaint as true, a jurisdictional showing must be made affirmatively; “it is not made by drawing from the pleadings inferences favorable to the party asserting it.” *Id.* When reviewing a motion to dismiss for lack of subject matter jurisdiction, the court may consider evidence outside the pleadings. See *Makarova*, 201 F.3d at 113.

Federal courts have typically exercised jurisdiction over state court claims pursuant to diversity jurisdiction (28 U.S.C. § 1332) or supplemental jurisdiction (28 U.S.C. § 1337). Diversity jurisdiction involves actions between citizens of different States, citizens of a State and citizens or subjects of a foreign state or citizens of different States and in which citizens or subjects of a foreign state are additional parties. *Coudert Bros. v. Easyfind Int'l, Inc.*, 601 F. Supp. 525, 526 (S.D.N.Y. 1985); 28 U.S.C. § 1332(a). Supplemental jurisdiction [formerly referred to as Pendent jurisdiction] is the authority of a federal court to exercise jurisdiction over a nonfederal claim between parties litigating other matters properly before the court, or the addition of an independent party when the claim against that party arises out of the same common nucleus of operative facts as the claims against the other named parties. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *Finley v. United States*, 490 U.S. 545, 548-49 (1989) (citing *United Mine Workers of*

*Am. v. Gibbs*, 383 U.S. 715 (1966)); 28 U.S.C. § 1367(a). The Court in *Mine Workers* held that “[Supplemental] jurisdiction, in the sense of judicial power, exists whenever there is a claim ‘arising under [the] Constitution, the Laws of the United States...,’ and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional ‘case.’” Id. at 725. The requisite relationship exists when the federal and nonfederal claims “derive from a common nucleus of operative fact” and are such that a plaintiff “would ordinarily be expected to try them in one judicial proceeding.” *Finley*, 490 U.S. at 548-49. A federal court may properly dismiss a claim for which it originally had supplemental jurisdiction if “the district court has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367. Federal courts have held that claims raising novel and complex questions of state law are better left for the state courts to resolve and have generally declined to exercise jurisdiction. See *Donohue v. Mangano*, 886 F. Supp. 2d 126, 148 (E.D.N.Y. 2012) citing *Seabrook v. Jacobson*, 153 F.3d 70, 71 (2d Cir. 1998).

The *Taylor Law*, formerly known as the New York State Public Employees' Fair Employment Act, was enacted to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of state government. N.Y. Civ. Serv. Law § 200. Plaintiff asserts that CSEA violated the, N.Y. Civ. Serv. Law §§ 209-a. 2(a), (b), and (c) of the *Taylor Law*. N.Y. Civ. Serv. Law § 209-a. 2(a)-(c) provides in relevant part:

It shall be an improper practice for an employee organization or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of the rights granted in section two hundred two, or to cause, or attempt to cause, a public employer to do so provided, however, that an employee organization does not interfere with, restrain or coerce public employees when it limits its services to and representation of nonmembers in accordance with this subdivision; (b) to refuse to negotiate collectively in good faith with a public employer, provided it is the duly recognized or certified representative of the employees of such employer; or (c) to breach its duty of fair representation to public employees under this article.

Plaintiff's only claim against CSEA, her labor union, is for alleged violation of the *Taylor Law* for unfair representation. N.Y. Civ. Serv. Law § 205(5)(d) provides in relevant part that the New York State Public Relations Board ("PERB") shall possess exclusive, primary, non-delegable jurisdiction over claims asserted under the *Taylor Law*. See *Ifill v. New York State Court Officers Ass'n*, 655 F. Supp. 2d 382, 392 (S.D.N.Y. 2009) citing *Zuckerman v. Bd. of Educ. of City Sch. Dist. of City of New York*, 44 N.Y.2d 336 (1978) ("[A]n improper labor practice ... is within the exclusive jurisdiction of PERB."). Accordingly, the Court lacks subject matter jurisdiction to hear Plaintiff's claim requiring dismissal.

Defendant also seek dismissal of Plaintiff's claim on the basis that the claim is barred by collateral estoppel and res judicata. Collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 (1984). The doctrine of collateral estoppel applies to quasi-judicial determinations of administrative agencies. *Id.* at 499; *Yoonessi v. State*, 289 A.D.2d 998, 999 (4th Dept. 2001).

The doctrine of res judicata, or claim preclusion, holds that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Rates Tech. Inc. v. Speakeasy, Inc.*, 685 F.3d 163, 169 (2d Cir. 2012); see also *Highlands Ctr., LLC v. Home Depot U.S.A., Inc.*, 149 A.D.3d 919, 921 (2d Dept. 2017). To substantiate the defense of res judicata, a party must show that "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the parties or those in privity with them; and (3) the claims asserted in the

subsequent action were, or could have been, raised in the prior action.” *Graham v. Select Portfolio Serv., Inc.*, 156 F. Supp. 3d 491, 509 (S.D.N.Y. 2016) (quoting *Pike v. Freeman*, 266 F.3d 78, 91 (2d Cir. 2001)). Furthermore, this Court must refer to New York State law “which has adopted a transactional approach to res judicata, barring a later claim arising out of the same factual grouping as an earlier litigated claim even if the later claim is based on different legal theories or seeks dissimilar or additional relief.” *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994).

In support of their motion, Defendant cites to *Yoonessi* to support the argument that Plaintiff’s claim is barred by res judicata. In *Yoonessi*, the claimant alleged that his union breached its duty of fair representation by failing to adequately defend him at an arbitration with his employer and by failing to pursue eight other grievances in arbitration. 289 A.D.2d at 998. The plaintiff in *Yoonessi* also filed an improper practice charge with PERB alleging breach of duty of fair representation. PERB dismissed the charge after concluding that the union did not breached its duty of fair representation. *Id.* at 1000.

Defendant asserts that Plaintiff previously filed a complaint with PERB wherein she asserted similar claims of unfair representation. Purportedly Plaintiff’s claims were ultimately dismissed on June 9, 2017. Defendant, however, fails to submit any documentation in support of its contention. Absent documentation upon which judicial notice may be taken, the Court is unable to determine the applicability of the doctrine of res judicata or issue preclusion of Plaintiff’s claim.

## II. Rule 12(b)(6)

Though the Court need not provide further analysis because Plaintiff’s complaint has been dismissed for a lack of subject matter jurisdiction, pursuant to Rule 12(b)(1), in an abundance of caution the Court will discuss the applicability of Rule 12(b)(6).

Rule 12(b)(6) provides in relevant part that a complaint may be dismissed if it fails to state a claim upon which relief can be granted. The inquiry is whether the complaint “contain[s] 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)). The Court must accept all facts set forth in the Complaint as true and draw all reasonable inferences in Plaintiff’s favor. *See, e.g., Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 124 (2d Cir. 2008). A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). “Although for the purpose of a motion to dismiss [a court] must take all of the factual allegations in the complaint as true, [it is] ‘not bound to accept as true a legal conclusion couched as a factual allegation.’” *Id.* (quoting *Twombly*, 550 U.S. at 555). A court is not required to accept as true legal conclusions, and “[t]hreadbare recitals of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 678. It is not necessary for the complaint to assert “detailed factual allegations,” but must allege “more than labels and conclusions.” *Twombly*, 550 U.S. at 555.

A *pro se* complaint is to be read liberally and held to “less stringent standards” than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see also Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (noting that “[i]t is well established that the submissions of a *pro se* litigant must be construed liberally and interpreted ‘to raise the strongest arguments that they suggest.’”) Nonetheless, “conclusory 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). In addition, even plaintiffs who are proceeding *pro se* must comply with any relevant procedural and substantive rules, and, to

survive a motion to dismiss, a *pro se* complaint, like any other complaint, must plead enough facts “to ‘state a claim to relief that is plausible on its face.’ ” *Iqbal*, 556 U.S. at 678. In other words, a plaintiff is required to amplify a claim with some factual allegations so as to allow the Court to draw the reasonable inference that the defendant is liable for the alleged conduct. *Ajaj v. Fritz*, 2011 WL 924213, at \*4 (S.D.N.Y. Mar. 16, 2011). In deciding a motion to dismiss, a motion “court may consider the facts as asserted within the four corners of the complaint together with the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference.” *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (internal quotation marks and citation omitted). Courts also may consider “matters of which judicial notice may be taken” and “documents either in plaintiff [’s] possession or of which plaintiff[] had knowledge and relied on in bringing suit.” *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

Plaintiff alleges that Defendant CSEA breached its duty of fair representation. A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); see also *Civil Serv. Bar Ass'n v. City of New York*, 64 N.Y.2d 188 (1984). Allegations that a union representative negligently gave a union member incorrect advice fails to state cause of action for breach of duty of fair representation. *Smith v. Sipe*, 67 N.Y.2d 928 (1986). A bare statement that union members were treated differently than other union members is not enough to show unfair representation. *Anderson v. AMBAC Indus., Inc.*, 48 A.D.2d 845, 845 (1975), aff'd, 40 N.Y.2d 865 (1976). A showing that a union is guilty of mistake, negligence or lack of competence does not suffice to support a claim of unfair representation. See *DeOliveira v. New York State Pub. Emp't Relations Bd.*, 133 A.D.3d 1010, 1012 (3d Dept. 2015) (citing *Braatz v. Mathison*, 180

A.D.2d 1007, 1008 (3d Dept. 1992) (internal citations omitted)). Factual allegations that the union unfairly processed the grievance, failed to investigate relevant information, and misrepresented claimant's employment records are sufficient to establish conduct on the part of the union that was arbitrary, discriminatory, or in bad faith. *Shah v. State*, 140 Misc. 2d 16, 21 (Ct. Cl. 1988).

Plaintiff's conclusory allegations lacking in any specificity falls short of demonstrating that CSEA's allegation of failure to represent was arbitrary, discriminatory, or in bad faith.

Additionally, “[a]n individual employee does [not] have an absolute right to have his grievance taken to arbitration regardless of the provision of the applicable collective bargaining agreement.” *Vaca*, 386 U.S. at 191. “A union has discretion with respect to processing grievances and is not required to pursue every grievance and avail itself of grievance level at its disposal. *Kleinmann v. Bach*, 195 A.D.2d 736, 738 (3d Dept. 1993); *Mellon v. Benker*, 186 A.D.2d 1020, 1021 (4<sup>th</sup> Dept. 1992). “Mere failure on the part of the union to process a grievance is not per se a violation of its duty of fair representation.” *Mellon*, 186 A.D.2d at 1020. CSEA has no duty to respond to Plaintiff's grievances and ensure that it proceeds through all levels of the grievance process. CSEA can handle the grievances as it sees fit, as long as there is no “fraud, deceitful action, or dishonest conduct, or evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.” *Mellon*, 186 A.D.2d at 1021 (citing *Badman v Civil Serv. Empls. Ass'n*, 91 A.D.2d 858 (4<sup>th</sup> Dept. 1982)). Therefore, Plaintiff's assertion that her grievances have been denied and not allowed to go to all levels of the grievance process is not sufficient to raise a plausible cause of action.

### **III. Proposed Amended Complaint**

In opposition to Defendant's motion to dismiss, Plaintiff appears to suggest that she wishes to amend her pleadings. In her proposed amended pleading, Plaintiff requests that the Court grant

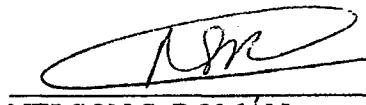
her all protections under the Fourteenth Amendment. Her proposed amended pleading, however, contains no factual allegations. (ECF No. 24.) Fed. R. Civ. P. § 15(a)(2) provides that a party shall be given leave to amend “when justice so requires.” “Leave to amend, though liberally granted, may properly be denied for: ‘ undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment [and/or] futility of amendment.’” *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d. Cir. 2008) (citing *Forman v. Davis*, 371 U.S. 178, 182 (1962)). Plaintiff’s proposed amendment would be nothing short of futile for all the reasons previously discussed. Accordingly, Plaintiff’s motion to amend her pleadings is denied.

#### CONCLUSION

For the foregoing reasons, Defendant CSEA’s Motion to Dismiss is GRANTED.<sup>2</sup> Plaintiff’s attempt to file a Second Amended Complaint is denied. By Opinion dated March 20, 2019, the Court dismissed all claims asserted against Taconic, DOCCS and DCS. (ECF No.71.) The Clerk of the Court is respectfully directed to terminate the motion at ECF No. 22, to terminate the action, and to mail a copy of this Opinion and Order to Plaintiff and to show proof on the docket of said mailing.

Dated: March 25, 2019  
White Plains, NY

SO ORDERED:

  
\_\_\_\_\_  
NELSON S. ROMAN  
United States District Judge

<sup>2</sup> Defendant raises multiple other grounds upon which Plaintiff’s operative complaint should be dismissed. For the sake of judicial economy and restraint, the Court need not address all issues raised.

**APPENDIX P**  
**SUPPLEMENTAL JUDGMENT**

**3/27/2019**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
SHIRLEY DIMPS

Plaintiff,

-against-

TACONIC CORRECTIONAL FACILITY  
NYS DEPARTMENT OF CORRECTIONS  
AND COMMUNITY SUPERVISION, NYS  
DEPARTMENT OF CIVIL SERVICE, and  
CSEA, INC.,

Defendants.

-----X

3/27/2019  
17 CIVIL 8806 (NSR)  
SUPPLEMENTAL  
JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated March 25, 2019, Defendant CSEA's motion to dismiss is granted; Plaintiff's attempt to file a Second Amended complaint is denied; by Opinion dated March 20, 2019, the Court dismissed all claims asserted against Taconic, DOCCS and DCS; accordingly, the case is closed.

Dated: New York, New York  
March 27, 2019

RUBY J. KRAJICK  
Clerk of Court  
BY: \_\_\_\_\_  
Deputy Clerk

THIS DOCUMENT WAS ENTERED  
ON THE DOCKET ON 3/27/2019

(45)

**APPENDIX Q**

**ORDER**

**2/7/2020**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

Shirley Dimpf,

Plaintiff,

-against-

TACONIC CORRECTIONAL FACILITY, NYS  
DEPARTMENT OF CORRECTIONS AND  
COMMUNITY SUPERVISION, NYS  
DEPARTMENT OF CIVIL SERVICE, AND CSEA,  
INC.,

Defendants.

17-cv-8806 (NSR)

ORDER

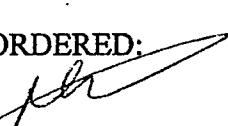
NELSON S. ROMÁN, United States District Judge

In light of the Summary Order issued by the Second Circuit on February 5, 2020 (No. 19-0975-cv), which vacated the Court's March 27, 2019 judgment (ECF No. 74) to the extent it denied Plaintiff leave to amend her Title VII claims against the New York State Department of Corrections and Community Supervision ("DOCCS"), it is hereby ORDERED that Plaintiff file, by March 23, 2020, a Second Amended Complaint that alleges Title VII claims against DOCCS. Consistent with the Second Circuit's Summary Order, the Second Amended Complaint must demonstrate the timeliness of Plaintiff's Title VII claim and the requisite exhaustion of administrative remedies.

The Clerk of the Court is respectfully directed to re-open this case. The Clerk is further directed to mail a copy of this Order to Plaintiff and to file proof of service on the docket.

Dated: February 7, 2020  
White Plains, New York

SO ORDERED:

  
NELSON S. ROMÁN  
United States District Judge

USDC NY  
DOCUMENT  
ELECTRONICALLY FILED  
2/7/2020

**Additional material  
from this filing is  
available in the  
Clerk's Office.**