No. 21-

IN THE

Supreme Court of the United States

YACAIRA REYES,

Petitioner,

v.

WESTCHESTER COUNTY HEALTH CARE CORPORATION, D/B/A WESTCHESTER MEDICAL CENTER, KRISTINA SCHRULL-VALIENTE, LISA PANTON, TIM MURPHY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Courts below erred in holding the election of remedies and New York City impact doctrines barred Plaintiff's NYSHRL and NYCHRL claims, respectively.

2) Whether the Courts below erred in holding the incidents predating January 4, 2018, were time-barred with respect to Plaintiff's discrimination and retaliation claims.

3) Whether the Courts below erred in holding Plaintiff failed to allege a plausible claim for discrimination.

4) Whether the Courts below erred in holding Plaintiff failed to allege a plausible claim for hostile work environment.

5) Whether the Courts below erred in holding Plaintiff failed to allege a plausible claim for retaliation.

PARTIES TO THE CASE AND RELATED PROCEEDINGS

The parties to this proceeding are listed on the front cover.

Related cases to this proceeding are as follows:

Yacaira Reyes v. Westchester County Healthcare Corporation, d/b/a Westchester County Medical Center, Kristina Schrull-Valiente, Lisa Panton, Tim Murphy, No. 21-04010, United States Court of Appeals for the Second Circuit. Summary Order issued on October 25, 2021.

Yacaira Reyes v. Westchester County Healthcare Corporation, d/b/a Westchester County Medical Center, Kristina Schrull-Valiente, Lisa Panton, Tim Murphy, No.: 19-cv-08916(PMH), United States District Court, Southern District of New York. Judgment issued on January 29, 2021.

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N.Y.C. CHARTER AND ADMINISTRATIVE CODE

FEDERAL RULES AND REGULATIONS

OPINIONS BELOW

Yacaira Reyes v. Westchester County Healthcare Corporation, et al., 2021 U.S. App. LEXIS 31915, 2021 WL 4944285 (2nd Cir. 2021). The United States Court of Appeals, The Second Circuit issued a summary Order affirming the decision below on the grounds that Plaintiff failed to state a claim upon which relief can be granted. See Appendix A (1a-11a).

Yacaira Reyes v. Westchester County Healthcare Corporation, et al., No.: 2021 U.S. Dist. LEXIS 18659, 2021 WL 310945 (S.D.N.Y. 2021). The District Court issued a decision and Order granting Defendants' motion to dismiss Plaintiff's Complaint, finding that Plaintiff, a nurse, alleged discrimination and retaliation in violation of local, state, and federal law due to her Hispanic origin and her pregnancy, her New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-101 et seq., claims failed because the law applied only to acts occurring within the city's boundaries and the alleged discrimination occurred outside the city; [2] - her Title VII claims were exhausted as they were reasonably related to the claims in her charge; and [3] - Plaintiff failed to state a Title VII claim based on a negative performance review resulting in a raise denial. See Appendix B (12a-45a).

JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of New York properly exercised jurisdiction in this case pursuant to 28 U.S.C. §§ 1331 and 1367. The Complaint alleged violations of Title VII of the Civil Rights Act of 1964 ("TitleVII"), 42 U.S.C. § 2000 *et seq.*, the New

York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 296 *et seq*., and the New York City Human Rights Law ("NYCHRL"), New York City Admin. Code § 8-101 *et seq*. Therefore, the District Court had original jurisdiction over the claims arising under federal law and supplemental jurisdiction over the claims arising under state and local law, since the violations of state and local law arose out of the same nucleus of operative fact as the violations of federal law.

The United States Court of Appeals, Second Circuit properly exercised jurisdiction under 28 U.S.C. § 1291 since the appeal was taken from a final decision of the United States District Court for the Southern District of New York, Honorable Philip M. Halpern presiding, granting the Defendants - Appellees' Westchester County Health Care Corporation d/b/a Westchester Medical Center ("WMC"), Kristina Schrull-Valiente ("Schrull-Valiente"), Lisa Panton ("Panton"), and Tim Murphy ("Murphy;" and collectively "Defendants"), motion to dismiss, dated January 29, 2021. The Plaintiff-Appellant Yacaira Reyes ("Plaintiff"), timely commenced an appeal by filing a Notice of Appeal with the Southern District of New York on February 19, 2021, within the thirty day period specified by Federal Rule of Appellate Procedure 4(a)(1)(A). Said Appeal was denied and the decision and Order of the District Court was affirmed via Summary Order issued by the Court on October 25, 2021.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

This Petition for Writ of Certiori to the United States Supreme Court is timely filed pursuant to the rules of the Court and the honorable Court has jurisdiction in this matter.

CONSTITUTIONAL PROVISIONS INVOLVED

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

U.S. Const. Art. III sec. 1.

(a) Time to Serve a Responsive Pleading.

(1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) United States and Its Agencies, Officers, or Employees Sued in an Official Capacity. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) United States Officers or Employees Sued in an Individual Capacity. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) Effect of a Motion. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) Right to Join. A motion under this rule may be joined with any other motion allowed by this rule.

(2) Limitation on Further Motions. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) When Some Are Waived. A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) When to Raise Others. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Fed. Rules Civ. Pr. R. 12.

STATEMENT OF THE CASE

This is an action seeking monetary damages for retaliation, unlawful discrimination, and hostile work environment on the basis of national origin and pregnancy of Plaintiff by Defendants in violation of Title VII, NYSHRL, and NYCHRL. On January 29, 2021, the United States District Court for the Southern District of

New York, District Judge Philip M. Halpern presiding, granted Defendants' motion to dismiss the Complaint in its entirety on the basis of failure tostate a claim upon which relief can be granted. On October 25, 3021, the United States Court of Appeals, Second Circuit, Circuit Judges Dennis Jacobs, Stephen J. Menashi, and District Judge John P. Cronin presiding, summarily affirmed the Order of the District Court.

STATEMENT OF FACTS

Plaintiff-Appellant's ("Plaintiff's") Complaint alleges the following. Plaintiff has been employed with Defendant-Appellees ("Defendants") since 2011 as a Respiratory Therapist ("RT"). (A-9); and she has always done her job diligently and adequately and has never had any disciplinary proceedings brought against her. (A-9).

Throughout Plaintiff's employment with Defendants she has been subjected to severe discrimination and a hostile work environment on the basis of her nationalorigin and sex. For example, on or about July 19, 2016, Plaintiff was working an overnight shift with no breaks. At the end of the shift (approximately 7:00 a.m.), Plaintiff was rushed to the hospital with severe stomach inflammation and was diagnosed with diverticulitis. The doctors informed Plaintiff that the damage was irreversible and was caused by stress and going long periods of time without food. (A-10). On or about August 28, 2017, Plaintiff informed her shift supervisor, Tim Murphy, that she was pregnant. (A-10). Shortly thereafter, Plaintiff began to be treated differently by Defendants and subjected to discrimination. (A-10).

On or about September 7, 2017, without any prior warning, Plaintiff was transferred from the night shift duty that she had worked continuously for 6 years, to the day shift duty. (A-10). Plaintiff was specifically informed by her doctor that she should not have any sudden changes in her schedule because her pregnancy was considered high risk. (A-10). No other similarly situated therapists who had worked the night shift were suddenly switched into the day shift during their pregnancies. (A-10). Plaintiff complained to her supervisor regarding these sudden changes in her schedule as well as complained of the fact that the changes in schedule would be damaging to herself and her pregnancy. (A-10). Plaintiff informed her union representative of the shift change the day that Plaintiff herself became aware of it and, on September 15, 2017, filed a complaint with the National Labor Relations Board ("NLRB"). (A-10). On or about September 19, 2018, the arbitrator determined that Defendants had violated the terms of the Collective Bargaining Agreement ("CBA") when they transferred Plaintiff from the night to the day shift. (A-11).

On or about September 27, 2017, Plaintiff was called by a nurse to assess a patient. Plaintiff noticed that the patient's saturation was low because of a heavy chair that was blocking the machine. Plaintiff asked for help moving this heavy chair because she was pregnant. No help whatsoever was provided to Plaintiff. (A-11). On or about October 5, 2017, Plaintiff followed up with Paoloa Gomez regarding several complaints that Plaintiff had made regarding the way she is treated while at work. Ms. Gomez informed Plaintiff that Defendants knew of Plaintiff's complaints and told her not to worry, however, to date Plaintiff has not received any response from her complaints. (A-11).

On or about October 6, 2017, Plaintiff was relieving two (2) "day-shift" Respiratory Therapists ("RTs") for 12 pediatric intensive care patients. Plaintiff began administering care to one patient when two more emergencies emerged as well involving two additional patients. (A-11). Plaintiff asked her manager, Crissy Young, for assistance and to assign some other RTs to these patients who were in need of immediate care. (A-11). Despite Ms. Young knowing Plaintiff's abilities and having first-hand knowledge of Plaintiff performing well in various emergencysituations, Ms. Young asked Plaintiff disdainfully whether or not she would be able to handle children. (A-11); and Supervisor Young knew that Plaintiff was pregnantat the time of this incident. (A-11).

This discrimination continued and on or about October 6, 2017, Plaintiff suggested to a nurse that they fix a patient's position in bed. The nurse told Plaintiffto "shut-up and make the change." Plaintiff immediately contacted Defendant Kristina Schrull-Valiente regarding this incident.

On or about October 27, 2017, Plaintiff received a copy of her schedule for November and noticed that none of her days off which she had requested were granted to her. Plaintiff immediately called the employee in charge of scheduling and made him aware that her current schedule conflicted with her doctor's appointments. Plaintiff was told that Defendant Kristina Schrull-Valiente made Plaintiff's schedule and "I think you know why." (A-12). On or about October 28, 2017, Plaintiff contacted Ms. Schrull-Valiente regarding her schedule. However, Ms. Schrull-Valiente said that she would do what she could but made no attempt toresolve Plaintiff's scheduling issues. (A-12).

On or about November 10, 2017, Plaintiff was in the CTAT Lab, an area of the hospital that contains chemicals that pregnant women should not be near, and theCT scan room, another area in which pregnant women are not supposed to be. (A- 12). Plaintiff was told by John Cornell, ("Cornell") a day shift manager, and Kristina Schrull-Valiente, Plaintiff's supervisor (and a decision-maker as to scheduling and evaluations) that as long as she wore a protective vest, she could remain in the room. Plaintiff informed Cornell that even though the vest was available, Plaintiff was told by the attendant in the room that she (Plaintiff) should leave because Plaintiff was pregnant. (A-13). However Cornell told Plaintiff that the patient was still Plaintiff'sresponsibility and Plaintiff must not leave the room. (A-13).

On or about March 9, 2018, through March 12, 2018, Despite Plaintiff's pregnancy, Plaintiff's supervisors directed her to move and carry heavy tanks. (A-13). Plaintiff was directed to move each of these tanks over a thick carpet, every 2 hours for each of her patients in the ICU (i.e., approximately 6 times per day). (A-13). The aforementioned tanks are 5 feet tall and weigh approximately 100 pounds.(A-13). Plaintiff informed her manager that because she was pregnant she was unable to move these tanks by herself. Plaintiff reiterated to her manager that her pregnancy was high risk and she should avoid strenuous physical activity. (A-13). Plaintiff's supervisor, Lisa Panton, responded to Plaintiff, "because you're pregnant,you can't do your job?" (A-13).

On or about March 12, 2018, Plaintiff began to feel ill. (A-13). A day later, on or about March 13, 2018, Plaintiff was instructed by her OB/GYN doctor to go to Columbia

Presbyterian Hospital. (A-14). On or about March 15, 2018, Plaintiff gave birth, prematurely, to a 3.5-pound child. Plaintiff's child requires specialized care as a result of her premature birth. (A-14). A year earlier, on or about March 1,2017, Plaintiff had suffered a miscarriage. (A-14).

Plaintiff proceeded to go on maternity leave and on or about October 2, 2018 she returned to Defendant, Westchester Medical Center. Whereupon, Plaintiff was asked to take re-orientation training. (A-14). Employees of Defendant, WestchesterMedical Center, are only required to take re-orientation training if they are on leavefor over a year; Plaintiff was only on leave for approximately six (6) months. (A- 14). Defendants knew that sending Plaintiff for such training would cause her co- workers to be wary of her skills and abilities. (A-14). Other female employees returning from maternity leave after less than a year were not required to take re- orientation training including Agagta Maczuga, Sheena Chirackel, Kavith Vidyaasagar, and Debbie Clement. (A-14).

Shortly after Plaintiff's return to work, on or about October 6, 2018, Plaintiff'ssupervisor, Tim Murphy, told Plaintiff that he couldn't understand her and that she was difficult to understand because of her accent. Yet, in Plaintiff's six (6) years ofemployment with Defendants, no one had ever had an issue understanding Plaintiff. (A-14). Kristina Schrull-Valiente would also make racist comments regarding Plaintiff as well as mock her accent to other co-workers. (A-15). Plaintiff did complain to Human Resources representative, Jeff Jefferson, about Ms. Schrull-Valiente and the racist comments that she was making. However, no investigation of this matter was ever conducted by Defendant. (A-15).

On October 31, 2018, Plaintiff filed an administrative charge with the NYSDHR alleging discrimination/ retaliation in violation of New York Human Rights Law. (NYSDHR Compl. p. 1). This NYSDHRL charge did not cover any discriminatory acts that occurred after March 11, 2018. (NYSDHR Compl. p. 3).

On or about November 18, 2018, Plaintiff was on lunch break and was speaking on her phone in Spanish. One of the RT's, Faith Ricciotti, told Plaintiff totake her call outside. (A-15). On or about September 9, 2019, Tim Murphy informedPlaintiff that she cannot make personal calls in the lounge during lunch breaks or speak in Spanish there. (A-16). No other employees were asked to refrain from speaking on the phone even though they were speaking languages other than Englishincluding Albanian, Russian, and Indian, and have never had any supervisor or manager tell them to stop. (A-15-16).

On or about January 26, 2018, Plaintiff received an unfavorable performance evaluation by a day shift manager, John Cornell, which resulted in the denial of a merit-based increase that Plaintiff would have been entitled to. (A-15). Plaintiff wasworking the night shift at the time the day shift manager crafted his evaluation of Plaintiff. (A-15).

Whenever Plaintiff receives assignments, Plaintiff is "floated" to different units in the hospital, while therapists with the same skillset have steady work assignments. (A-16). These therapists include the following employees of Defendant WMC: Leslie Kovacs, Santa Hamilton, Debbie Clement, and Anthony Stohl. (A-16). One example of this discrimination occurred, on or about October 20,

2018. Plaintiff was contacted by Lisa Panton, Plaintiff's supervisor, informing Plaintiff that she had an opioid assignment. However, on that day, Plaintiff's assignments did not reflect this, thereby causing Plaintiff to have to switch assignments at the very last minute. (A-16).

Furthermore, another example of Plaintiff's assignments changing drastically occurred on or about August 21, 2019. Kristina Schull-Valiente scheduled Plaintiff to work every Friday even though Plaintiff generally only worked every other weekend. (A-16). Similarly situated co-workers have every other Friday off or no Fridays at all.

A district court's decision made pursuant to Rule 12(b)(6) and an Appellate Court's decision and Order affirming the lower Court's Decision are reviewed *de novo* and will be affirmed only if "'it appears beyond doubt that the Appellant can prove no set of facts in support of [her] claim[s] which would entitle [her] to relief.'" *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001) *as amended* (Apr. 20, 2001) (quoting *Tarshis v. Riese Org.*, 211 F.3d 30, 35 (2d Cir. 2000) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957))). "In making this assessment, [the Court] must accept as true all of the factual allegations set out in Appellant's complaint, draw inferences from those allegations in the light most favorable to Appellant, and construe the complaint liberally." *Id.* (internal quotations omitted).

Similarly, on appeal from dismissal under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, this Court reviews the lower Courts' "factual findings for clear error and its legal conclusions de novo." *CBF Indústria*

de Gusa S/A v. AMCI Holdings, Inc., 850 F.3d 58, 77 (2d Cir. 2017) (internal citations omitted). This Court must "accept as true all material allegations [in] the complaint" and "construe the complaint in favor of the complaining party." *Id.* (internal citations omitted).

Courts have underscored "the care exercised in this Circuit to avoid hastily dismissing complaints of civil rights violations." *Id.* (citing *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995)).

ARGUMENT

I

THE LOWER COURTS ERRED IN HOLDING PLAINTIFF'S NYSHRL AND NYCHRL CLAIMS WERE BARRED ON PROCEDURAL GROUNDS.

The Election of Remedies Doctrine Does Not Bar Plaintiff'sNYSHRL Claims.

The election of remedies doctrine may preclude a plaintiff from pursuing their discrimination claims for lack of subject matter jurisdiction in a court of law when the same claims were brought and dismissed before a local administrative agency. Exec. Law §297(9); *DuBois v. Macy's Retail Holdings Inc.*, 533 F. App'x 40, 41 (2d Cir. 2013). However, "the election of remedies doctrine is neither final nor irrevocable." *EEOC v. Rotary Corp.*, 164 F. Supp. 2d 306, 309 (N.D.N.Y. 2001). Thus, the doctrine will only bar subsequent court proceedings when the local administrative agency determination was based on "substantially the same facts". *Wiercinski v. Mangia 57,*

Inc., No. 11 Civ. 7835, 2012 U.S. Dist. LEXIS 86631, *2-3 (S.D.N.Y. June 20, 2012); *see also Fleury v. NYC Transit Auth.*, 2005 WL 3453816(2d Cir. 2005).

Here, Plaintiff's complaint with NYSDHR does not include any allegations of discrimination beyond March 11, 2018. (A-66). Therefore, the NYSDHR based its determination without considering allegations of adverse employment actions.

As will be detailed in Points III, IV, and V, *infra*, every single one of these adverse actions and protected activities is dispositive and crucial.

Thus, there are far too many substantial differences between the NYSDHR charge and the instant Complaint for the election of remedies doctrine to preclude Plaintiff's NYSHRL claims. *Fleury*, 2005 WL 3453816.

Plaintiff's NYCHRL Claims Are Not Barred For Lack Of "Impact" Within New York City.

The lower Courts (erroneously) held that Plaintiff failed to state valid NYCHRL claims because Plaintiff's workplace at issue is located outside New York City. (A-109). Plaintiff respectfully submits that the lower Courts misinterpreted the relevant case law. The NYCHRL applies "only to discriminatory conduct that occurs within the limits of New York City". *Vuong v. New York Life Ins. Co.*, 360 F. App'x 218, 221 (2d Cir. 2010)). But, "to determine the location of the discrimination under the NYCHRL, courts look to the location of the impact of the offensive conduct." *Robles v. Cox &Co.*, 841 F.Supp.2d 615, 623 (E.D.N.Y. 2012); *Curto v. Med. World Commc'ns, Inc.*, 388 F.Supp.2d 101, 109 (E.D.N.Y. 2005).

Here, Plaintiff was a resident of New York City, and, thus, Plaintiff suffered from the "impact" of her discrimination in her home in New York City; this impact included, *inter alia*, providing specialized care for her prematurely-born child, suffering from permanent diverticulitis, suffering from irreversible stomach damage, and suffering from a miscarriage. (A-10, A-13-14, A-16). Thus, Plaintiff was sufficiently impacted in New York City to bring an NYCHRL claim. *See Chen-Oster v. Goldman, Sachs & Co.* 251 F.Supp.3d 579, 594 (S.D.N.Y. 2017).

Accordingly, the lower Courts erred in holding Plaintiff's NYSHRL and NYSCHRL are barred on procedural grounds.

II

THE LOWER COURTS ERRED IN HOLDING PLAINTIFF'S MISTREATMENT PREDATING JANUARY 4, 2018, IS TIME-BARREDWITH RESPECT TO HER DISCRIMINATION AND RETALIATION CLAIMS.

Generally, as to Title VII claims, allegations of discrimination that occur morethan 300 days before filing an administrative complaint are time-barred. *Staten v. City of New York*, 726 F. App'x 40, 43 (2d Cir. 2018). However, under the "continuing violation exception," when "a Title VII plaintiff files an [administrativecomplaint] that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone." *Chin v. Port*

Auth. Of New York & New Jersey, 685 F.3d 135, 155-56 (2d Cir. 2012); *Cornwell v.Robinson*, 23 F.3d 694, 703-04 (2d Cir. 1994). Thus, only "discrete acts" not part ofthe same "continuing pattern or practice" of discrimination as those timely alleged can be time-barred. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 115 n. 9 (2002); *Moultri v. VIP Health Care 10 Services*, 2009 US Dist. LEXIS 22413 (EDNY 2009).

Here, the lower Courts inappropriately decided this issue at the pleading stage: whether a certain act is "discrete" or part of a pattern and practice of discriminationdepends on the circumstances of the case and should not be decided on a motion to dismiss before discovery. *See EEOC v. UPS, Inc.*, 2017 WL 9482105, at *15 (E.D.N.Y. Mar. 9, 2017); *see also Mosdos Chofetz Chaim, Inc. v. RBS Citizens*, NA., 14 F.Supp.3d 191, 209 (S.D.N.Y. 2014); *Goodwine v. City of New York*, No. 15 Civ. 2868 (JMF), 2016 U.S. Dist. LEXIS 67794, 2016 WL 3017398, at *5 (S.D.N.Y. May 23, 2016)/

Second, the lower Courts omitted several discriminatory incidents in its analysis. As alleged in Plaintiff's Complaint, there were twelve (12) instances of discrimination betweenJuly 19, 2016, and November 10, 2017.

Third, in *Dash v. Bd. of Educ.*, 238 F.Supp.3d 375, 388-89 (E.D.N.Y. 2017), five crude remarks or gestures related to gender with time gaps of 16, 16, 16, and 6months were held sufficiently continuous to establish an ongoing pattern of discrimination. Here, the "crude remarks" made were far more continuous than the time gaps held sufficient in *Dash*. The discriminatory instances were

repetitive as well as ongoing and fall under the continuing violation exception. *See Dash,* 238 F.Supp.3d at 388-89.; *see also Hussain v. Long Island R. Co.*, No. 00-CV-4207, 2002 U.S. Dist. LEXIS 17807, 2002 WL 31108195, at *5 (S.D.N.Y. Sept. 20, 2002).

In *Russo v. New York Presbyterian Hosp.*, 972 F.Supp.2d 429 (E.D.N.Y. 2013), yelling at a plaintiffwas a discrete act when it was at the plaintiff for almost killing a patient in the operating room. 972 F.Supp.2d at 445. By contrast, Plaintiff's verbal abuse was unjustified and linked to her pregnancy.

In *Kaur v. New York City Health & Hosps. Corp.*, 688 F.Supp.2d 317, 330 (S.D.N.Y. 2010), comments that Indians "sell their daughters," "eat cows," and "never tell the truth," were discrete because they were made by coworkers—not supervisors—and were not temporally proximate to many other discriminatory acts. 688 F.Supp.2d at 327-28. By contrast, Schrull-Valiente and Young were Plaintiff'ssupervisors, and their verbal abuse occurred within weeks, days, or minutes of eleven (11) other related, discriminatory instances. (A-10-12).

In *Bain v. Highgate Hotels*, LP, No. 08-CV-3263, 2009 WL 10705912, at *7(E.D.N.Y. July 7, 2009), there was no pattern of discrimination because the discriminatory acts "occurred over a lengthy period of time (eight years), [and] under different supervisors who [the] plaintiff himself allege[d] had different motives". Likewise, in *Benjamin v. Brookhaven Sci. Assocs.*, LLC, 387 F.Supp.2d 146, 153 (E.D.N.Y. 2005), a difficult assignment and a failure to promote were discrete because more than six (6) years elapsed between the two events. Here, all twelve (12) of

Defendants' discriminatory acts before January 4, 2018, occurred within fifteen (15) months of each other, 11 of the 12 actsoccurred within two months of each other, and five occurred on the same day. (A- 10-12). Moreover, Plaintiff never alleged that her supervisors had different motives to mistreat her. Thus, *Russo*, *Kaur*, *Bain*, and *Benjamin* are distinguishable.

Thus, the lower Courts' holding that Plaintiff's pre-January 4, 2018 allegations were time-barred with respect to her retaliation and discrimination claims, is incompatible with the facts alleged and the relevant case law.

III

THE LOWER COURTS ERRONEOUSLY HELD APPELLANT FAILEDTO ALLEGE A PLAUSIBLE DISCRIMINATION CLAIM.

To plead a *prima facie* claim of discrimination under Title VII, Plaintiff mustallege: (1) she was a member of a protected group, (2) she was qualified for her position, (3) she suffered an adverse employment action, and (4) the adverseemployment actions occurred under circumstances giving rise to an inference of discriminatory animus. *Feingold v. State of New York*, 336 F.3d 138, 152 (2d Cir. 2004). This burden is "minimal." *See, e.g., Scaria v. Rubin*, 117 F.3d 652, 654 (2d Cir. 1997); *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001). Furthermore, "[c]laims brought under the NYSHRL are analyzed identically to thosebrought under Title VII, and therefore the outcome of an employment discriminationclaim made pursuant to the NYSHRL is the same as it is under . . .Title VII." *Valerio*

v. City of New York, 18-cv-11130, 2020 U.S. Dist. LEXIS 11443, at *16 (S.D.N.Y. Jan 21, 2020) (internal citations omitted).

Although NYCHRL claims are subject to a similar standard as NYSHRL claims, "courts must analyze NYCHRL claims separately and independently from any federal and state law claims" and must construe them "broadly in favor of discrimination [of] plaintiffs, to the extent that such a construction is reasonably possible." *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013). To bring a discrimination claim under NYCHRL, Plaintiff need only show that she was "treated less well than other employees" due to her protected status. *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 78 (1st Dep't 2009); *Mauro v. New York City Dep't of Educ.*, No. 19-CIV-4372 GBD-KHP, 2020 WL 3869206, at *3 (S.D.N.Y. July 9, 2020).

Here, it is undisputed that as a pregnant woman whose national origin was from the Dominican Republic, Plaintiff was a member of two protected classes, andwell qualified for her position.

Adverse Employment Action

Adverse employment action is a "materially adverse change in the terms of condition of employment." *Fairbrother v. Morrison*, 412 F.3d 39, 56 (2d Cir. 2005). *Inter alia*, adverse employment action can entail: exclusion from meetings (*Preda v. Nissho Iwai American Corp.*, 128 F.3d 789 (2d Cir. 1997)); downgraded job duties/ responsibilities (*Preda*, 128 F.3d at 789); receiving worse assignments than those received in the past (*Treglia v.*

Town of Manlius, 313 F.3d 713 (2d Cir. 2002); negative performance evaluations (*Campbell v. New York City Transit Auth.*, 93 F.Supp.3d 148, 168 (E.D.N.Y. 2015)); reprimands (*Lawson v. Homenuk*, 710 F. App'x 460 (2d Cir. 2017)); verbal abuse (*Brennan v. City of White Plains*, 67 F.Supp.2d 362, 374 (S.D.N.Y. 1999); *Solomon v. Southampton Sch. Union Free Sch.Dist.*, 2011 U.S. Dist. Ct. Motions LEXIS 34538); diminished opportunities for professional growth/career advancement (*Nakis v. Potter*, 422 F.Supp.2d 398, 420 (S.D.N.Y. 2006); *Little v. National Broadcasting Co., Inc.*, 210 F.Supp.2d 330 (S.D.N.Y., 2002)); diminished job security (*Little*, 210 F.Supp.2d at 330); and unfavorable transfers (*Cruz v. New York City Human Resources Admin. D.S.S.*, 82 F.3d 16, 21 (2d Cir. 1996). Further, even if some actions are not individually material enough to be adverse, they may be aggregated with other actions and collectively constitute adverse employment action(s). *Bernheim v. Litt*, 79 F.3d 318(2d Cir. 1996).

The lower Courts correctly identified that Plaintiff's negative performance review received in January 2018 qualified as an adverse employment action. (A- 116); (A-15); *Campbell*, 93 F.Supp.3d 148, at 168. However, the Courts overlooked numerous other adverse employment actions.

First, as discussed in Point II, *supra*, the Courts ignored twelve (12) adverse actions that predate January 4, 2018, even though such actions should not be time-barred. *See, e.g., Bernheim*, 79 F.3d at 318.

Second, even if the pre-January 4, 2018, events were time-barred — and they were not — the lower Courts still disregarded these adverse employment actions

that occurred after January 4, 2018. Despite notifying Defendants that Plaintiff's high-risk pregnancy required avoiding sudden changes in her schedule, Defendants repeatedly and drastically changed Plaintiff's schedule and assignments and subjected her to overstrenuous rasks—sometimes within minutes. (A-10, A-15-16).

Defendants subjected Plaintiff to verbal abuse from supervisors. Defendants also wrongfully assigned Plaintiff to an unnecessary re-orientation training program, diminishing Plaintiff's "opportunities for professional growth and career advancement." *Nakis*, 422 F.Supp.2d 398, at 420.

Thus, Plaintiff was subjected to numerous material adverse employment actions other than her negative performance review after January 4, 2018 or, at thevery least, Plaintiff was collectively subject to some additional adverse action(s) other than her negative performance review after all of the above-described actions are aggregated. *See Bernheim*, 79 F.3d at 318.

Finally, the lower Courts relied on distinguishable cases to determine Plaintiff only suffered one adverse employment action. (A-116). In *Lebowitz v. New York City Dep't of Educ.*, 407 F.Supp.3d 158, 176 (E.D.N.Y. 2017l), some references to an accent alone did not establish adverse employment action. However, when, like here, the references to an accent are accompanied by numerous other discriminatory actions, all such actions can be aggregated to collectively constitute adverse employment action. *See Bernheim*, 79 F.3d at 318.

In *Brown v. CSX Transp. Inc.*, 155 F.Supp.3d 265, 271 (W.D.N.Y. 2016), theWestern District Court held that

requiring a plaintiff to attend a training session "required for over one hundred other employees" with similar leaves of absence was not adverse employment action. In *Collazo v. Cty. of Suffolk*, 163 F.Supp.3d 27, 43 (E.D.N.Y. 2016), forcing an employee to make coffee was not materially adverse action because it was not a "disproportionately heavy workload". However, the court acknowledged that such a workload (like here) would constitute adverse employment action. Likewise, the *Collazo* court acknowledged that prohibiting speaking in Spanish, would be adverse employment action if the plaintiff endured other adverse action as a result of speaking Spanish. 163 F.Supp.3d 43.

In *Levitant v. City of New York Human Res. Admin.*, 914 F.Supp.2d 281, 303 (E.D.N.Y. 2012), not allowing a plaintiff to make "excessive, disruptive personal calls" in the office was not adverse employment action even though Plaintiff spokein Spanish when making these calls. *See Id.*, at F.Supp.2d 304 n.15. By contrast, Plaintiff here was told not to speak in Spanish in the lounge during a lunch break:where personal calls were supposed to be made and were not disruptive. (A-15-16). In *Guzman v. City of New York*, No. 06-CV-5832, 2010 WL 4174622, at *13, 15 (E.D.N.Y. Sept. 30, 2010), the district court held that failing to assign a more favorable schedule than the plaintiff had ever possessed did not constitute adverse employment action. By contrast, Indeed, the *Guzman* court held that giving the pregnant plaintiff an assignment that the defendants knew was inappropriate for pregnancy was an adverse employment action. *Id.*, LEXIS 104885, at *42-45.

In *Figueroa v. New York City Health & Hosps. Corp.*, No. 03-CV-9589, 2007WL 2274253, at *4 (S.D.N.Y. Aug. 7,

2007), the district court held it was not adverse employment action to require an employee responsible for food prep to "put Jello into little cups" and give the employee days off on less preferable holidays. Such trifles are far less material than Defendants here requiring a pregnant woman to perform physically hazardous and damaging tasks and work schedules, ultimately causing a premature birth.

Lastly, in *Reckard v. Cty. of Westchester*, 351 F.Supp.2d 157, 161 (S.D.N.Y.2004), requiring one overtime shift was not materially adverse because the shift did not have any detrimental impact on the plaintiff's health. By contrast, Plaintiff's overtime shift hospitalized her for severe stomach inflammation, causing irreversible damage. (A-10).

Discriminatory animus can be established when a plaintiff has adduced evidence from which it can reasonably be inferred that plaintiff's status in a protected class "played a motivating role in, or contributed to, the employer's decision" to take a particular employment action. *Renz v. Grey Advertising, Inc.*, 135 F.3d 217, 222 (2d Cir. 1997); *Stratton v. Dept. for the Aging for the City of New York*, 132 F.3d 217, 222 (2d Cir. 1997). It is critical to highlight that Plaintiff's status in a protected class need not be the only factor considered in the employment actions and merely just a contributing factor. *Owen v. Thermatool Corporation*, 155 F.3d 137, 139 (2d Cir. 1998); *Maresco v. Evans Chemetics*, 964 F.2d 106, 110 (2d Cir. 1992). Direct evidence of a discriminatory motive in an employment action is difficult to find because those who discriminate deliberately try to conceal their discriminatory intent. *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). Discriminatory intent will rarely be

demonstrated by "smoking gun" proof, rather, in most discrimination cases direct evidence of the employer's motivation is unavailable. *Dister v. Continental Group. Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988): *Maresco v. Evans Chemetics*, 964 F.2d 106, 110 (2d Cir. 1992).

The most common way to show discriminatory motive is to allege that preferential treatment was given to employees outside the protected class. *Abdu Brinson v. Delta Airlines Inc.*, 239 F.2d 456, 468 (2d Cir. 2001); *Mandel v. County of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003). Responding to an employment situation in a manner that deviates from the ordinary policy of the employer may also evidence an unlawful motive. *Lander v. Hodel*, 197 U.S. Dist. LEXIS 11476 (D.C. Cir 1986). Remarks made by decision-makers that could be viewed as reflecting a discriminatory animus also can be used to demonstrate discriminatory intent. *Ostrowski v. Atlantic Mut. Ins Co.*, 968 F.2d 171, 182 (2d Cir. 1992); *see also Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006). Courts must consider the working environment as a whole. *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000).

Plaintiff has alleged sufficient facts to raise a reasonable inference of sex discrimination based on Plaintiff's pregnancy. Plaintiff's allegations are sufficient to show that Defendants discriminated against Plaintiff on the basis of her pregnancy (as well as her national origin). *See Kerzer v. Kingly Mfg.*, 156 F.3d 396, 399 (2d Cir. 1998); *Quaratino v. Tiffany & Co.*, 71 F.3d 58 (2d Cir. 1995).

In *Lenzi v Systemax*, Inc., 944 F.3d 97, 108 (2d Cir 2019), a plaintiff's mistreatment occurring within 28 days after informing her supervisor she was pregnant was

enough to infer discriminatory animus. Here, Plaintiff told her supervisor she was pregnant on August 28, 2017, Therefore, under the Court's recent decision in *Lenzi*, Plaintiff pleads sufficient facts to infer discriminatory animus of her pregnancy. *See also Hill v. Dale Elecs. Corp.*, 2004 U.S. Dist. LEXIS25522, at *9 (S.D.N.Y. Dec. 14, 2004).

Plaintiff's allegations also give rise to an inference of national origin discrimination. Other non-Hispanic women returning from maternity leave after less than a year were not forced to take re-orientation training. Plaintiff also complained about the discriminatory comments made to her to Human Resources, but no investigation of this matter was ever conducted. Another of Plaintiff's co-workers also prevented her from speaking on the phone in Spanish in the lounge. *See Velasquez v. Goldwater Mem. Hosp.*, 88 F.Supp.2d 257, 263 (S.D.N.Y. 2000).

Furthermore, whenever Plaintiff receives assignments, Plaintiff gets floated to different units in the hospital while non-Hispanic therapists with the same skillset have steady work assignments. Plaintiff was assigned to work every Friday, though other, similarly situated, non-Hispanic co-workers have off every other Friday or work no Fridays at all. These allegations are more than enough to give rise to an inference of national origin discrimination. *See Leibowitz v. Cornell Univ.*, 584 F.3d 487 (2d Cir. 2009); *see also James v. New York Racing Assn.*, 233 F.3d 149, 153-154 (2d Cir. 2000). Thus, Plaintiff alleges sufficient facts to show Plaintiff was treated "less well than other employees" due to her sex and national origin pursuant to NYCHRL. *Williams*, 61 A.D.3d at 78. As such, the lower Courts erred in dismissing Plaintiff's discrimination claims.

IV

THE LOWER COURTS ERRONEOUSLY HELD APPELLANT FAILEDTO ALLEGE A PLAUSIBLE HOSTILE WORK ENVIRONMENT CLAIM.

Hostile work environment claims under New York law are analyzed based onthe standards developed in the Title VII context. *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170 (2d Cir. 1996). Therefore, under the NYSHRL and NYCHRL, "a work environment will be considered hostile if a reasonable person would have found it to be so and if the plaintiff subjectively so perceived it." *Brenna v. Metropolitan Opera Assn.*, 192 F.3d 310, 318 (2d Cir. 1999). When evaluating a claim for hostile work environment, courts must consider whether "the workplace is permeated withdiscriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the condition of the victim's employment." Plaintiff must also establish a specific basis for imputing the conduct that created the work environmentto the employer. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993). When a supervisor participates in the conduct creating a hostile work environment, liability may be imputed to the employer. *Mack v. Otis Elevator Co.*, 326 F.3d 116, 123 (2dCir. 2003).

Determining whether workplace harassment was severe or pervasive enoughto be actionable depends on the totality of the circumstances. *Cruz v. Coach Stores, Inc.*, 202 F.3d 62, 69 (2d Cir. 2000). A single incident may be enough. *Whidbee v. Gazarelli Food Specialties, Inc.*, 223 F.3d 62, 69 (2d Cir. 2000). Furthermore, a single act can constitute a hostile work environment if it creates a "transformation of the plaintiff'sworkplace." *Feingold v.*

New York, 366 F.3d 138, 150 (2d Cir. 2004). Additionally, "the fact that the law requires harassment to be severe or pervasive before it can be actionable does not mean that employers are free from liability in all but the most egregious of cases." *Torres v. Pisano*, 116 F.3d 625, 632 (2d Cir. 1997). Individual occurrences underlying hostile work environment claims should not be viewed "in isolation" or "in piecemeal fashion." *Morgan*, 536 U.S. at 116. Rather, "[h]ostile work environment claims are evaluated by looking at all of the circumstances, which may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 at 23. Offensive remarks or behavior do not need to be directed at individuals of the plaintiff's protected class for such remarks and behavior to support a claim for hostile work environment. *Cruz*, 202 at 570. Moreover, under the NYCHRL, Plaintiff need not allege severe or pervasive conduct, Plaintiff need only allege behavior that is "worse than petty slights and trivial inconveniences." *Adams v. City of New York*, 837 F.Supp.2d 108, 128 (E.D.N.Y. 2011).

In this case, the Complaint alleges that Defendants subjected Plaintiff to frequent humiliating and offensive utterances, pertaining to her pregnancy and national origin. Defendants also forced Plaintiff to perform physically damaging tasks in successful efforts to harm Plaintiff and her pregnancy.

In *Colas v. City of Univ. of N.Y.*, No. 17-CV-4825 (NGG) (JO), 2019 U.S. Dist. LEXIS 80279, at *16 (E.D.N.Y. May 7, 2019), "insulting comments, mocking behavior," "unprecedented and unwarranted . . .meetings regarding

Plaintiff's work performance," and "negatively discussing Plaintiff's pregnancy and her work performance to other co-workers" was insufficiently severe or pervasive. However, unlike here, the defendants in *Colas* did not force the plaintiff to perform physically damaging tasks to herself and her pregnancy. (A-11-13). In *Richard v. N.Y.C. Dep't of Educ.*, No. 16-CV-957 (MKB), 2017 U.S. Dist. LEXIS 50748 (E.D.N.Y. Mar. 31, 2017), comments regarding the plaintiff's accent and one isolated comment referring to another African-American employee were insufficient to state a hostilework environment claim. In contrast, while Plaintiff's supervisors mocked her accent (A-14-15), Plaintiff's supervisors also made numerous discriminatory comments specifically referring to Plaintiff. (A-12-15). Finally, in *Sattar v. Johnson*, 129 F.Supp.3d 123, 142-44 (S.D.N.Y. 2015), five instances of harassmentwere episodic rather than continuous because they occurred sporadically over thirteen years. By contrast, Plaintiff alleges an abundant twenty instances ofharassment occurring over only three years.

Thus, the district court erred in holding Plaintiff failed to state a claim forhostile work environment.

V

THE LOWER COURTS ERRONEOUSLY HELD THAT PLAINTIFF FAILEDTO ALLEGE A PLAUSIBLE RETALIATION CLAIM.

For Plaintiff to state a prima facie claim for retaliation she must allege that she engaged in protected activity, Defendants knew of that protected activity, Defendants took adverse employment action against Plaintiff, and

there is a causal connection between the protected activity and the adverse action. This burden is *deminimis*. *Duplan v. City of New York*, 888 F.3d 612 (2d. Cir. 2018). In fact, the burden "is so minimal that some courts simply assume the existence of a prima facie case." *Ramos v. Marriot*, 134 F.Supp.2d 328, 338 (S.D.N.Y. 2001). Moreover, the Court must consider the alleged retaliatory actions collectively to determine whether such acts might have dissuaded a reasonable worker from making a charge of discrimination. *See Laudadio v. Johanns*, 677 F.Supp.2d 590 (E.D.N.Y. 2010). Further, the NYCHRL has an even more lenient standard requiring a separate analysis that does not require adverse employment action. *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013). The lower Courts erroneously held that Plaintiff only alleged one protected activity, one adverse employment action, and no causal connection.

"Protected activity" is any action taken to "oppose statutorily prohibited discrimination." *Wimes v. Health*, 157 Fed. App'x 327, 328 (2d Cir. 2005). A complaint is protected even if the conduct complained of was not "actually prohibited" under the law, if "the plaintiff has a 'good faith belief that such conduct was prohibited." *Ellis v. Century 21*, 975 F.Supp.2d 244, 280 (E.D.N.Y. 2013). Thus, "when an employee communicates to her employer a belief that the employer has engaged in a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity.'" *Russell v. Cnty. Of Nassau*, 696 F.Supp.2d 213, 237 (E.D.N.Y. 2010) (emphasis added) (internal quotations omitted). Protected activity "can be formal or informal, including complaints to managers or officers of an employer." *In re Goldberg*, 487 B.R. 112 (Bankr.

E.D.N.Y. 2013) (citing S*umner v. United States Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990). None of the incidents alleged in the Complaint are time-barred under the statute of limitations. However, even if they were, the statute of limitations does not limit the relevance of evidence from before that date if it bears on the reasons for or other relevant circumstances leading to Defendants' timely retaliatory acts against Plaintiff. *Petrosino v. Bell Atlantic*, 385 F.3d 210, 220 (2d Cir. 2004). Thus, even assuming, *arguendo*, that incidents before January 4, 2018 were time-barred, protected activity that resulted in retaliation after January 4, 2018, would still be actionable.

Here, the lower Courts acknowledged that Plaintiff engaged in protected activity when she complained to Human Resources of Schrull-Valiente's racist comments. (A-121; A-15). However, Plaintiff has alleged numerous other protected activities. *Fraticelli v. Good Samaritan Hosp.*, No. 11 CV 3376 (VB), 2012 U.S. Dist. LEXIS 135794, at *16 (S.D.N.Y. July 23, 2012); *Dunaway v. MPCC Corp.*, No. 12-cv-7609 (NSR), 2015 U.S. Dist. LEXIS 94022, at *30 (S.D.N.Y. July 16, 2015); *Domenech v. N.Y.C. Emples. Ret. Sys.*, No. 15-CV-2521 (ILG) (PK), 2016 U.S. Dist. LEXIS 61175, at *8 (E.D.N.Y. May 9, 2016); *Tu Ying Chen v. Suffolk Cty. Cmty. Coll.*, No. 14-cv-1597 (JMA) (SIL), 2017 U.S. Dist. LEXIS 51965, at *47 (E.D.N.Y. Mar. 31, 2017).

In *Lenzi*, 944 F.3d 97, at 112-13, the Court found that an employee's email complaining of low compensation without explicitly accusing her employer of discrimination was protected activity. Thus, Plaintiff's complaint to her supervisor on September 7, 2017 (and NLRB complaint on September 15, 2018) that Defendants knew drastic

schedule changes were dangerous to Plaintiff's pregnancy yet still issued them to Plaintiff, was protected activity. (A-11). *See also, Nelson v. Chattahoochee Valley Hosp. Soc.*, 731 F.Supp.2d 1217 (M.D. Ala. 2010). Likewise, under *Lenzi*, Plaintiff's October 5, 2017, follow-up with supervisor Gomez regarding Plaintiff's mistreatment at work, and Plaintiff's complaint to supervisor Schrull-Valiente about verbal abuse from another employee on October 6, 2017, were also protected activities. (A-11).

Further, a pregnant employee's request for aid or accommodations based on her pregnancy is a protected activity. *See Farmer v. Shake Shack Enterprises, LLC*, 473 F.Supp.3d 309, 331 (SDNY 2020). Hence, Plaintiff engaged in protected activity while pregnant.

Title VII's and the NYSHRL's anti-discrimination and anti-retaliation provisions "are not coterminous;" Title VII's and the NYSHRL's anti-retaliation protection is broader and "extends beyond workplace-related or employment-related retaliatory acts and harm." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006). Thus, Plaintiff must only allege conduct that "is harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Ramirez v. Michael Cetta Inc.*, No. 19-CV-986, 2020 WL 5819551, at *20 (S.D.N.Y. Sept. 30, 2020). Further, Plaintiff need not prove any adverse employment action; instead, she must prove something happened that was reasonably likely to deter a person from engaging in protected activity. *Springs v. City of New York*, No. 19 CIV. 11555(AKH), 2020 WL 3488893, at *5 (S.D.N.Y. June 26, 2020); *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013).

Here, the lower Courts acknowledged that Plaintiff's negative performance review in January 2018 was an adverse employment action. (A-121; A-15); *See Parikh v. New York City Transit Auth.*, 681 F.Supp.2d 371, 381 (S.D.N.Y. 2010). However, the lower Courts disregarded numerous other adverse employment actions:

DAMAGING ASSIGNMENTS AND SCHEDULING THATDEFENDANTS KNEW WOULD BE HARMFUL TO PLAINTIFF'S HIGH-RISK PREGNANCY.

Plaintiff respectfully refers the Court to the Statement of Facts herein.

DISCRIMINATORY VERBAL ABUSE.

Plaintiff respectfully refers the Court to the Statement of Facts herein. S*ee Brennan*, 67 F.Supp.2d at 374 (verbal abuse can constitute adverse employment action).

SELECTIVE ENFORCEMENT OF THE RULES.

Plaintiff respectfully refers the Court to the Statement of Facts herein. *See Flynn v. N.Y. State Div. of Parole*, 620 F.Supp.2d 463, 498 (S.D.N.Y. 2009).

These incidents constituted adverse employment actions under the stricter discrimination standard. Thus, these incidentscertainly constitute adverse employment actions under the more lenient retaliation standard (*Ramirez*, WL 5819551, at *20), and certainly constituted conduct reasonably likely to deter protected activity under the NYCHRL (*Springs*, WL 3488893, at *5). Therefore,

in addition to Plaintiff's negative employment evaluation Plaintiff has pled, *inter alia*, fifteen (15) actionable acts of discriminationoccurring between September 7, 2017, and September 9, 2019.

Close temporal proximity between a plaintiff's protected activity and an employer's adverse employment action is sufficient to establish the requisite causal connection between a protected activity and retaliatory action. *Clark County SchoolDistrict v. Breeden*, 532 U.S. 268, 273 (2001). An eleven (11) month lag between protected activity and any alleged adverse action is sufficient to infer temporal proximity. *See, e.g., Cronin v. St. Lawrence*, 2009 U.S. Dist. LEXIS 68320, 2009 WL 2391861, at *5 (S.D.N.Y. Aug. 5, 2009); *Bernhardt v. Interbank of N.Y.*, 18 F.Supp.2d 218, 226 (E.D.N.Y. 1998). Moreover, courts are especially lenient on finding causal connections for motions to dismiss. *See Batyreva v. N.Y.C. Dep't of Educ.*, 2008 U.S. Dist. LEXIS 125375, at *33 (S.D.N.Y. Aug. 12, 2008).

Plaintiff's protected activity is described herein in POINT V-A., *supra*,

Plaintiff's suffered adverse employment action described in POINT V-B., *supra*, occurred throughout and around the same period, often the same day and moments after a protected action. (A-10-15). Even the longest gap between a specified protected activity and a specified adverse act is less than nine months: two months more temporally proximate thanthe eleven months held sufficient in *Cronin*, LEXIS 68320 and *Bernhardt*, 18 F. Supp. 2d at 226.

Given the temporal proximity between the dates we have, and, given the additional dates that can be determined upon discovery, Plaintiff has sufficiently pled a causal connection between Plaintiff's protected activity and Defendants' adverse actions. "*See Robinson v. S.E. Pennsylvania Transportation Authority*, 982 F.2d 892, 894 (3d Cir. 1993).

Even assuming, *arguendo*, that the only protected activity was Plaintiff's complaint to Human Resources of supervisor Schrull-Valiente's racist comments (A-121; A-15), and that the only adverse employment action was Plaintiff's negativeperformance review in January 2018 (A-121; A-15), Plaintiff's retaliation claim should still have survived Defendants' motion to dismiss: While the district court noted that the date of Plaintiff's complaint to Human Resources is unknown, whether that date is temporally proximate to January 2018 is a "set of facts" that "Appellant can prove" "in support of [her] claim[s] which would entitle her to relief." *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001).

Thus, the district court erred in holding that Plaintiff failed to state a valid claim of retaliation.

CONCLUSION

Based on the foregoing, it is respectfully requested that this Court grant the instant Petition for Writ of Certiorari and grant Appellant such other and further relief as this Court may deem justand proper.

Dated: New York, New York
January 23, 2022

Respectfully submitted

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 25, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

October 25, 2021, Decided

No. 21-0410

YACAIRA REYES,

Plaintiff-Appellant,

v.

WESTCHESTER COUNTY HEALTH CARE CORPORATION, D/B/A WESTCHESTER MEDICAL CENTER, KRISTINA SCHRULL-VALIENTE, LISA PANTON, TIM MURPHY,

Defendants-Appellees.

PRESENT: Dennis Jacobs, Steven J. Menashi, Circuit Judges, John P. Cronan, District Judge.[*]

SUMMARY ORDER

Appeal from an order of the United States District Court for the Southern District of New York. (Halpern, J.).

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[*] Judge John P. Cronan of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

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

Plaintiff-Appellant Yacaira Reyes appeals from the dismissal of her complaint entered on January 29, 2021, by the U.S. District Court for the Southern District of New York (Halpern, J.). This appeal concerns Reyes's claims of discrimination and retaliation in violation of state and federal law by her employer and supervisors. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I

Reyes has been employed by Defendant-Appellee Westchester Medical Center of Valhalla, New York, as a respiratory therapist since 2011.[1] She was supervised by Defendants-Appellees Kristian Schrull-Valiente, Lisa Panton, and Tim Murphy. In August 2017, Reyes informed her supervisor that she was pregnant. Shortly afterwards, Reyes's work schedule was changed from the night shift to the day shift, prompting her to file a charge with the National Labor Relations Board ("NLRB") on September 15, 2017. On September 19, 2018, the NLRB arbitrator determined that the schedule change violated the collective bargaining agreement.

1. Because the district court granted a motion to dismiss, for purposes of this appeal we accept all factual allegations in Reyes's complaint as true and draw all reasonable inferences in her favor. *See Sewell v. Bernardin*, 795 F.3d 337, 339 (2d Cir. 2015).

Appendix A

Reyes alleges multiple incidents between September 2017 and September 2019 in which, among other things, her accent was mocked, she was refused accommodations for her pregnancy, and she was given a poor performance evaluation that denied her a merit-based increase. She filed a charge with the New York State Division of Human Rights ("NYSDHR") on October 31, 2018, alleging retaliation for her NLRB complaint and discrimination on the basis of sex and national origin, in violation of the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 297. In her charge, Reyes acknowledged that "[b]y filing this complaint, I understand that I am also filing my employment complaint with the United States Equal Employment Opportunity Commission" and she authorized the NYSDHR to "accept this complaint on behalf of" the EEOC. App'x 87; *see also Govia v. Century 21, Inc.*, 140 F. Supp. 2d 323, 325 n.1 (S.D.N.Y. 2001) ("[P]ursuant to provisions of a Work Sharing Agreement in effect between the [NYSDHR] and the EEOC, the cross-filing is deemed to have constructively occurred whenever a New York complainant files with either agency."). The NYSDHR dismissed her complaint for lack of probable cause in April 2019.

In September 2019, Reyes filed her complaint in the district court, alleging retaliation, discrimination based on national origin and sex, and a hostile work environment. She brought these claims under the NYSHRL, the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-101 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* The incidents she alleges in the complaint include those in her NYSDHR

charge as well as other events that were not in that charge. The defendants moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

The district court granted the defendants' motion. First, the district court held that Reyes's NYSDHR charge was a jurisdictional bar to bringing her NYSHRL claims in court. Next, the district court dismissed Reyes's NYCHRL claims because the alleged unlawful conduct occurred outside of New York City. Finally, the district court held that Reyes failed to state a claim for relief under Title VII. This appeal followed.

II

"We review *de novo* a district court's dismissal of a complaint for failure to state a claim upon which relief can be granted." *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 61 (2d Cir. 2010). Likewise, we review *de novo* a district court's dismissal of a complaint for lack of subject matter jurisdiction. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32 (2d Cir. 2010).

A

Reyes contends that the district court erred because it dismissed her claims of retaliation, discrimination, and hostile work environment under the NYSHRL for lack of subject matter jurisdiction under the election-of-remedies doctrine because she had previously filed a NYSDHR complaint. While we agree that the court does have jurisdiction over some of her NYSHRL claims, we

affirm the dismissal on the ground that Reyes failed to state a claim for relief.

The district court erred in dismissing the NYSHRL claims for lack of subject matter jurisdiction under the election-of-remedies doctrine. This determination turns on whether the NYSDHR complaint and her instant complaint are materially the same; a person claiming unlawful discrimination under the NYSHRL may bring a suit in court "unless such person had filed a complaint hereunder or with any local commission on human rights." N.Y. Exec. Law § 297(9). "The resolution of the meaning of § 297(9) is an issue of state law for whose resolution we look to the interpretive rulings of New York courts." *Moodie v. Fed. Reserve Bank of N.Y.*, 58 F.3d 879, 884 (2d Cir. 1995). And "we consider the language of the state intermediate appellate courts to be helpful indicators of how the state's highest court would rule." *DiBella v. Hopkins*, 403 F.3d 102, 112 (2d Cir. 2005).

"The filing of a complaint with the Division precludes the commencement of an action in court based on the same incident, or based on the same discriminatory grievance, and which seeks the same relief as that sought in the complaint." *James v. Coughlin*, 124 A.D.2d 728, 508 N.Y.S.2d 231, 232 (N.Y. App. Div. 2d Dep't 1986) (citations omitted). Applying that rule, the doctrine of election of remedies does not bar all of Reyes's NYSHRL claims. First, she alleges a hostile work environment here, which she did not do with the NYSDHR. Second, for her retaliation and discrimination claims, Reyes alleges a sufficient quantity and severity of incidents that occurred

after her NYSDHR complaint. These could constitute separate claims of discrimination and retaliation from those claims that arose before the NYSDHR complaint. We therefore have subject matter jurisdiction to consider her new claim of a hostile work environment and her claims based upon incidents not raised in her NYSDHR complaint.

However, we affirm the dismissal based on Reyes's failure to state a claim under the NYSHRL. Although the district court did not reach this question, "we may affirm an appealed decision on any ground which finds support in the record." *Sudler v. City of New York*, 689 F.3d 159, 178 (2d Cir. 2012) (internal quotation marks omitted). Discrimination claims under the NYSHRL are largely subject to the same analysis we apply under Title VII. *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 226 (2d Cir. 2014). To defeat a motion to dismiss, "a plaintiff must plausibly allege that (1) the employer took adverse action against [her], and (2) [her] race, color, religion, sex, or national origin was a motivating factor in the employment decision." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 87 (2d Cir. 2015). An adverse action must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Id.* at 85 (quoting *Terry v. Ashcroft*, 336 F.3d 128, 138 (2d Cir. 2003)).

For those incidents that could rise to the level of an adverse action, Reyes has failed plausibly to allege that her sex or national origin was a motivating factor. While Reyes complains of her employer's failure to accommodate her pregnancy, she did not allege that her employer was

more willing to accommodate other employees who were similarly physically limited. *Cf. Legg v. Ulster County*, 820 F.3d 67, 74 (2d Cir. 2016) (noting that the failure to accommodate could amount to discrimination if accommodations were provided "to other employees who were similar in their ability or inability to work"). As to the changes to her schedule, Reyes's conclusory assertions of animus cannot survive the motion to dismiss. *Moy v. Perez*, 712 F. App'x 38, 39 (2d Cir. 2017).

Additionally, Reyes fails to state a claim for retaliation. To survive a motion to dismiss here, a plaintiff "must plausibly allege that: (1) defendants discriminated—or took an adverse employment action—against [her], (2) because [she] has opposed any unlawful employment practice." *Duplan v. City of New York*, 888 F.3d 612, 625 (2d Cir. 2018) (quoting *Vega*, 801 F.3d at 90). "Petty slights or minor annoyances that often take place at work and that all employees experience do not constitute actionable retaliation." *Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010) (alteration and internal quotation marks omitted). Reyes fails plausibly to allege that any of the incidents that could rise to the level of actionable retaliation were caused by her protected activity. She alleges that her negative performance review was "solely based" on the NLRB arbitration decision, but the arbitration decision was issued *after* the performance review. Moreover, while we doubt that Reyes plausibly alleged that the schedule change requiring her to work on Fridays was an adverse employment action given her failure to allege any especial hardship, in any event it occurred eleven months after the NLRB arbitration ended. *See Sealy v. State Univ.*

of N.Y., 834 F. App'x 611, 614 (2d Cir. 2020) (holding that four months "is simply too long of a gap to give rise to an inference of retaliation without some other evidence of retaliatory animus"); *Agosto v. N.Y.C. Dep't of Educ.*, 982 F.3d 86, 104 (2d Cir. 2020) ("[A] gap of more than several months is typically too long by itself to survive summary judgment.") (internal quotation marks omitted).

Finally, Reyes's allegation of a hostile work environment fails. A plaintiff making such a claim must "plead facts that would tend to show that the complained of conduct: (1) is objectively severe or pervasive—that is, creates an environment that a reasonable person would find hostile or abusive; (2) creates an environment that the plaintiff subjectively perceives as hostile or abusive; and (3) creates such an environment because of the plaintiff's" protected characteristic. *Patane v. Clark*, 508 F.3d 106, 113 (2d Cir. 2007) (alteration and internal quotation marks omitted). In determining whether a work environment is hostile, we consider the totality of the circumstances, which includes: "(1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is threatening and humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance." *Id.* (internal quotation marks omitted). As the district court concluded in reviewing the hostile work environment claim under Title VII, Reyes alleges "a collection of vignettes that she found objectionable." App'x 118. "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 75

(2d Cir. 2001) (alteration omitted) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)). The "vignettes" Reyes provides are insufficient to state a claim for a hostile work environment.

Therefore, while the district court erred in dismissing the entirety of Reyes's NYSHRL for lack of subject matter jurisdiction, we affirm the dismissal on the ground that the complaint failed to state a claim.

B

The New York City Human Rights Law is contained within the New York City Administrative Code. N.Y.C. Admin. Code § 8-107. According to N.Y.C. Admin. Code § 2-201, "the boundaries, jurisdictions and powers of the city are for all purposes of local administration and government hereby declared to be coextensive with the territory" of the five boroughs. Thus, "[u]nder both New York State law and the New York City Administrative Code, applicability of the NYCHRL is limited to acts occurring within the boundaries of New York City." *Shah v. Wilco Sys., Inc.*, 27 A.D.3d 169, 806 N.Y.S.2d 553, 558 (N.Y. App. Div. 1st Dep't 2005). Because the alleged incidents underlying Reyes's NYCHRL claims did not take place in New York City, we affirm the district court's dismissal of those claims.

C

Reyes also brings discrimination, hostile work environment, and retaliation claims under Title VII.

First, she must pass a timeliness bar. Title VII provides that, in these circumstances, a charge "shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). That requirement bars plaintiffs from bringing claims that accrued prior to the 300-day mark unless the plaintiff alleges a continuing violation. "Under Title VII's continuing violation doctrine, if a plaintiff has experienced a continuous practice and policy of discrimination, the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it." *Washington v. County of Rockland*, 373 F.3d 310, 317 (2d Cir. 2004) (alteration and internal quotation marks omitted). A continuing violation is "composed of a series of separate acts that collectively constitute one unlawful employment practice." *Id.* at 318 (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)). Here, Reyes filed a charge with the EEOC when she filed her NYSHDR charge on October 31, 2018. App'x 66. Because Reyes's hostile work environment claim alleges a continuing violation, *see McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 75 (2d Cir. 2010), she may pursue that claim based on events preceding January 4, 2018. However, she may not pursue her discrimination and retaliation claims based on events before that date.

We agree with the district court that Reyes has failed to state a claim under Title VII. We analyze Title VII claims under the same standards as we do NYSHRL claims, so most of Reyes's Title VII claims fail for the same reasons as stated above. *See Schiano v. Quality Payroll*

Sys., Inc., 445 F.3d 597, 609 (2d Cir. 2006); *Szewczyk v. Saakian*, 774 Fed. Appx. 37, 38 (2d Cir. 2019). There remain those Title VII claims that we could not consider under the NYSHRL because of the election-of-remedies doctrine—namely, her allegations that her supervisors required her to move heavy tanks, that she was sent to re-orientation training, that her supervisor said he could not understand her because of her accent, and that her accent was mocked in the workplace. But, as before, Reyes fails to state a claim that the failure to accommodate her was discriminatory. *Cf. Legg*, 820 F.3d at 74. And to allege discrimination or retaliation, she must assert something more than a "mere inconvenience" to establish discrimination, *Vega*, 801 F.3d at 89, and more than "simple lack of good manners" to establish retaliation, *Collymore v. City of New York*, 767 F. App'x 42, 46 (2d Cir. 2019) (quoting *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)). Because she has not done so, we affirm the district court's dismissal of her Title VII claims.

* * *

We have considered all of Reyes's remaining arguments. Finding those arguments to be without merit, we **AFFIRM** the judgment of the district court.

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

/s/_____

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JANUARY 29, 2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19-CV-08916 (PMH)

YACAIRA REYES,

Plaintiff,

-against-

WESTCHESTER COUNTY HEALTH CARE CORPORATION D/B/A WESTCHESTER MEDICAL CENTER, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

PHILIP M. HALPERN, United States District Judge:

Plaintiff Yacaira Reyes ("Plaintiff") brings this employment discrimination action against her employer and supervisors, Westchester County Health Care Corporation d/b/a Westchester Medical Center ("WMC"), Kristina Schrull-Valiente ("Schrull-Valiente"), Lisa Panton ("Panton"), and Tim Murphy ("Murphy," and collectively, "Defendants"). Plaintiff brings nine claims for relief, spread equally across three statutory

regimes, against one or more Defendants. Specifically, Plaintiff asserts three claims for relief each—one for discrimination, one for hostile work environment, and one for retaliation—under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000 *et seq.*, the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 296 *et seq.*, and the New York City Human Rights Law ("NYCHRL"), New York City Admin. Code § 8-101 *et seq.*

Plaintiff filed this action on September 25, 2019. (Doc. 1, "Compl."). Defendants moved to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on March 6, 2020. (Doc. 28; Doc. 29, "Def. Br."). Plaintiff opposed the motion (Doc. 32, "Opp. Br."), and it was briefed fully with the filing of Defendants' reply on August 3, 2020 (Doc. 31, "Reply").[1]

For the reasons set forth below, Defendants' motion to dismiss is GRANTED.

BACKGROUND

Plaintiff, a female "of Dominican Republic descent," had been a respiratory therapist for over a decade before joining the staff at WMC as one in 2011. (Compl. ¶¶ 9-10, 16-17). During her tenure, she performed the duties associated with "her job diligently and adequately," and was "never" subjected to disciplinary proceedings. (*Id.* ¶ 18). The allegations underpinning this action and its dual

1. This matter was reassigned to me, after Defendants served the motion to dismiss, on April 6, 2020.

theories of pregnancy and national origin discrimination are outlined below.

I. Incident Occurring in 2016

On July 19, 2016, toward the end of an overnight shift that Plaintiff had worked nonstop, she was "rushed to the hospital with severe inflammation of her stomach and was diagnosed with diverticulitis. The doctors informed Plaintiff that the damage[] was irreversible and . . .caused by stress and going long periods of time without food." (*Id.* ¶ 20).

II. Incidents Occurring in 2017

On March 1, 2017, Plaintiff suffered a miscarriage; she maintains that the loss was caused by "Defendants' continuing and pervasive abuse, discrimination, and hostile work environment." (*Id.* ¶¶ 72-73). On August 28, 2017, Plaintiff informed one of her supervisors, Murphy, that she was pregnant. (*Id.* ¶ 21). Approximately one week later, on September 7, 2017—notwithstanding that Plaintiff had spent her entire WMC career working the nightshift—Plaintiff learned that she had been reassigned to the dayshift. (*Id.* ¶ 23). Plaintiff complained to an unspecified supervisor that, according her physician, sudden changes to Plaintiff's schedule could be "damaging to herself and her pregnancy," due to the fact that "her pregnancy was considered high risk." (*Id.* ¶¶ 24, 26). Indeed, no «other similarly situated therapists» working the nightshift were «switched into the day shift during their pregnancies.» (*Id.* ¶ 25). Plaintiff informed her union

representative of the shift change the day that Plaintiff herself became aware of it and, on September 15, 2017, filed a complaint with the National Labor Relations Board ("NLRB"). (*Id.* ¶¶ 27-28).

Roughly two weeks after filing the NLRB proceeding, on September 27, 2017, an unidentified nurse asked Plaintiff to perform "an assessment of a patient." (*Id.* ¶ 31). During that evaluation, Plaintiff observed "that the patient's saturation was low because of a heavy chair that was blocking the machine." (*Id.*). Plaintiff "asked help moving the chair because she was pregnant. No help was provided, and Plaintiff had to move the chair by herself." (*Id.*). A little more than one week later, on October 5, 2017, Plaintiff spoke with an individual named Paoloa Gomez ("Gomez") "regarding several complaints that Plaintiff had made regarding the way she was treated while at work" and was advised that "Defendants" were aware of the unspecified complaints. (*Id.* ¶ 32).

During her shift on October 6, 2017, as "Plaintiff began administering care to one patient" in the pediatric ICU, two other "emergencies started as well." (*Id.* ¶ 33). Plaintiff asked a manager, Crissy Young ("Young"), to call other respiratory therapists for backup; Young, aware that Plaintiff was pregnant, responded by speculating "disdainfully whether or not [Plaintiff] would be able to handle children." (*Id.* ¶¶ 34-36). Sometime that same day, Plaintiff «suggested to a nurse that they fix a patient›s position in bed,» and that unidentified nurse told her to «shut-up and make the change." (*Id.* ¶ 37). Plaintiff contacted Schrull-Valiente about that interaction, and the

latter wondered aloud, "Why you[,] Yacaira? I have been in this place 17 years and no one has told me to shut up." (*Id.*). By the time Schrull-Valiente arrived to view the patient in question, "there was nothing wrong;" Plaintiff asked why Schrull-Valiente waited so long to respond, and the latter "yell[ed] at Plaintiff and ridicule[d] her" explaining that she not "a mind reader" and did not respond faster because Plaintiff had not asked her to do so. (*Id.*).

Later that month, on October 27, 2017, Plaintiff was provided a copy of the work schedule for November 2017 and learned that she had not been granted the days off that she requested. (*Id.* ¶ 38). Plaintiff contacted the employee "in charge of scheduling" and explained that the November schedule "conflicted with her doctor's appointments;" the response from that unidentified employee was that Schrull-Valiente had "made Plaintiff's schedule and 'I think you know why.'" (*Id.*). Plaintiff contacted Schrull-Valiente about the November schedule the following day and the latter assured Plaintiff that "she would do what she could but upon information and belief, made no attempt to resolve Plaintiff's scheduling issues." (*Id.* ¶ 39).

Exactly two weeks later, on November 10, 2017, Plaintiff was working "in the CTAT Lab" and "the CT scan room," areas which Plaintiff maintains are dangerous for pregnant women. (*Id.* ¶ 41). Schrull-Valiente and John Cornell ("Cornell"), another supervisor, advised Plaintiff "that as long as she wore a protective vest, she could" perform her duties in the CTAT Lab and CT scan room. (*Id.* ¶ 42). Plaintiff protested, insisting that an unidentified

"attendant" instructed her to leave because she was pregnant; nevertheless, "despite the attendant's concern," Cornell directed Plaintiff to "remain in the room" with her patient. (*Id.* ¶¶ 42-43).

III. Incidents Occurring in 2018

On January 26, 2018, Plaintiff received a negative performance evaluation from Cornell, which, in turn, "resulted in the denial of a merit-based increase" to which Plaintiff would otherwise have been entitled. (*Id.* ¶ 66). Cornell, however, was the dayshift manager and, at that time, "[u]pon information and belief, Plaintiff was working" the nightshift at the time the evaluation was issued. (*Id.* ¶ 67). Plaintiff maintains that "this negative performance evaluation was solely based upon the arbitration decision of September 19, 2017[2] which had determined that Defendants violated the [Collective Bargaining Agreement ("CBA")] by making drastic changes to Plaintiff's schedule." (*Id.* ¶ 68).

From March 9, 2018 through March 12, 2018, Plaintiff was forced to move "heavy tanks" despite the fact that she was pregnant. (*Id.* ¶ 44). These tanks stood approximately five feet tall, weighed approximately one hundred pounds, and had to be moved "over a thick carpet, every two hours for each" ICU patient to whom Plaintiff was assigned. (*Id.* ¶¶ 45-46). Plaintiff complained that her pregnancy prevented her from moving the tanks on her

2. As discussed *infra*, the Arbitration Award was issued on September 19, 2018.

own; her supervisor, Panton, responded, "[B]ecause you're pregnant, you can't do your job?" (*Id.* ¶¶ 47, 49). Plaintiff took ill on March 12, 2018, and, on March 15, 2018, gave birth prematurely. (*Id.* ¶¶ 51, 53).

Although Plaintiff does not allege when she began her maternity leave, she asserts that it ended when she returned to work at WMC on October 2, 2018 and was asked to undergo "reorientation training." (*Id.* ¶ 54). According to Plaintiff, such training is only required when an employee returns from a leave lasting more than one year; indeed, at least four other women who had taken maternity leave shorter than one year were not required to participate in re-orientation training. (*Id.* ¶¶ 55, 58-59). Despite the fact that Plaintiff had been on "on leave for approximately [six] months," Defendants forced her to attend the "training in order to discriminate [against] and ridicule her" and invite coworkers' speculation that Plaintiff lacked the necessary "skills and abilities." (*Id.* ¶¶ 55, 56-57). Upon her return, «Defendants» mocked Plaintiff›s accent and, on October 6, 2018, Murphy told Plaintiff «that he couldn›t understand her and that she was difficult to understand because of her accent,» something Murphy had not done in the six years they worked together up to that point. (*Id.* ¶¶ 61-62). Toward the end of the month, on October 20, 2018, Plaintiff was "floated" to a different unit when Panton reassigned Plaintiff "at the very last minute" while other therapists had "steady" assignments. (*Id.* ¶¶ 69-71).

The final identifiable incident from 2018 occurred during Plaintiff's lunchbreak on November 18, 2018 when,

while conversing in Spanish on her mobile phone, another respiratory therapist interrupted her and "told Plaintiff to take her call outside." (*Id.* ¶ 65). Plaintiff alleges also that, at some point, she complained to "Human Resources" about unspecified "racist comments" Schrull-Valiente made, but that no investigation was performed. (*Id.* ¶¶ 63-64).

IV. Incidents Occurring in 2019

Plaintiff identifies three incidents in 2019. First, on July 13, 2019, Plaintiff's "assignment was changed from ED to CTICU," coverage to which Plaintiff "had not been assigned in quite some time." (*Id.* ¶ 74). Second, on August 21, 2019, Schrull-Valiente "scheduled Plaintiff to work every Friday even though Plaintiff generally only worked every other weekend." (*Id.* ¶ 75). As to this incident, Plaintiff asserts that "similarly situated co-workers have every other Friday off or no Fridays at all . . .." (*Id.* ¶ 76). Finally, on September 9, 2019, while speaking on her mobile phone in Spanish, "Murphy informed Plaintiff that she cannot make personal calls in the lounge or speak Spanish in there," despite the fact that other unspecified individuals were permitted to make personal calls in a variety of languages without consequence. (*Id.* ¶ 77).

V. Arbitration and Proceedings Before the New York State Division of Human Rights

Against the bevy of these allegations, Plaintiff initiated two separate proceedings. The first began on September 15, 2017 when Plaintiff complained about the decision to

change her schedule from nightshifts to dayshifts. (*Id.* ¶¶ 28-29). An arbitration hearing was held on June 19, 2018, and the arbitrator issued the Arbitration Award on September 19, 2018. (*Id.* ¶ 30; Doc. 30-2, Schudroff Decl. Ex. B, "Arb. Award" at 2).[3] Although the arbitrator referenced Plaintiff's testimony about "pregnancy-based discrimination" and "discrimination based upon . . . national origin/race," the arbitrator determined that the reassignment "was contemplated long before" Plaintiff informed anybody of her pregnancy and that the record did not "support a finding that" comments about Plaintiff's national origin or race were ever made. (Arb. Award at 9-10). The question was "one of pure contract application" and led to the conclusion that WMC violated the CBA by failing to follow certain procedures before transferring Plaintiff to the dayshift. (*Id.* at 10, 12). The arbitrator directed WMC to comply with the terms of the CBA. (*Id.* at 12-13).

Plaintiff initiated a separate proceeding before the New York State Division of Human Rights ("NYSDHR") and the United States Equal Employment Opportunity Commission ("EEOC") by filing an administrative complaint ("NYSDHR Charge") on October 31, 2018. (Compl. ¶ 4; Doc. 30-3, Schudroff Decl. Ex. C, "NYSDHR Compl."). Plaintiff, in that proceeding, complained that WMC violated the Americans with Disabilities Act ("ADA") and the NYSHRL by subjecting her to discrimination because of her "national origin, pregnancy-

3. The Court's decision to consider documents outside the four corners of the Complaint is addressed *infra*. References to documents correspond to the pagination generated on ECF.

related condition, [and] race/color," and because she "opposed discrimination/retaliation." (NYSDHR Compl. at 2). Following an investigation, the NYSDHR dismissed the administrative complaint by a written Determination and Order ("NYSDHR D&O") on April 16, 2019. (Compl. ¶ 5; Doc. 30-4, Schudroff Decl. Ex. D, "NYSDHR Det."). In that written determination, the NYSDHR concluded in pertinent part:

> The evidence adduced from the investigation does not support [Plaintiff's] assertion that [WMC] engaged in unlawful discriminatory practices against [Plaintiff] because she is Hispanic, Dominican, and was pregnant. Specifically, there is insufficient evidence of a nexus between [WMC's] conduct and [Plaintiff's] national origin, pregnancy, sex, and race.

(NYSDHR Det. at 2). The EEOC followed suit and, on July 1, 2019, the EEOC issued a Right to Sue Letter advising that it "adopted the findings of the state or local fair employment practices agency that investigated this charge." (Compl. ¶ 6; Doc. 1-1, Compl. Ex. 1, "Right to Sue Ltr.").

STANDARD OF REVIEW

I. Federal Rule of Civil Procedure 12(b)(1)

"Federal courts are courts of limited jurisdiction, and Rule 12(b)(1) requires dismissal of an action 'when the

district court lacks the statutory of constitutional power to adjudicate it.'" *Schwartz v. Hitrons Sols., Inc.*, 397 F. Supp. 3d 357, 364 (S.D.N.Y. 2019) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). "The party invoking the Court's jurisdiction bears the burden of establishing jurisdiction exists." *Hettler v. Entergy Enters.*, 15 F. Supp. 3d 447, 450 (S.D.N.Y. 2014) (citing *Conyers v. Rossides*, 558 F.3d 137, 143 (2d Cir. 2009)). When deciding a motion to dismiss under Rule 12(b)(1) at the pleadings stage, "the Court 'must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor.'" *Id.* (quoting *Conyers*, 558 F.3d at 143); *see also Doe v. Trump Corp.*, 385 F. Supp. 3d 265, 274 (S.D.N.Y. 2019).

When "the defendant moves for dismissal under Rule 12(b)(1) . . .as well as on other grounds, the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." *Saint-Amour v. Richmond Org., Inc.*, 388 F. Supp. 3d 277, 286 (S.D.N.Y. 2019) (quoting *United States ex rel. Monaghan v. N.Y. City Dep't of Hous. Pres. & Dev.*, No. 09-CV-6547, 2012 U.S. Dist. LEXIS 130884, 2012 WL 4017338, at *3 (S.D.N.Y. Sept. 10, 2012)).

II. Federal Rule of Civil Procedure 12(b)(6)

A Rule 12(b)(6) motion enables a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion

to dismiss, 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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim is plausible on its face "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.* (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). The factual allegations pled "must be enough to raise a right to relief above the speculative level . . .." *Twombly*, 550 U.S. at 555.

"When there are well-ple[d] factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. Thus, the Court must "take all well-ple[d] factual allegations as true, and all reasonable inferences are drawn and viewed in a light most favorable to the plaintiff[]." *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996). The presumption of truth, however, "'is inapplicable to legal conclusions,' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678 (alteration in original)). Therefore, a plaintiff must provide "more than labels and conclusions" to show entitlement to relief. *Twombly*, 550 U.S. at 555.

Appendix B

III. Documents Considered

On a motion under Rule 12(b)(1), "a district court . . .may refer to evidence outside the pleadings." *Makarova*, 201 F.3d at 113. Indeed, on such a motion, the Court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue," along with "matters of which judicial notice may be taken." *Malloy v. Pompeo*, No. 18-CV-4756, 2020 U.S. Dist. LEXIS 171557, 2020 WL 5603793, at *8 (S.D.N.Y. Sept. 18, 2020) (internal quotation marks omitted). Notably, "[c]ourts routinely take judicial notice of filings and determinations in EEOC investigations." *Id.* (internal quotation marks omitted). Similarly, on a Rule 12(b)(6) motion, "the Court is entitled to consider facts alleged in the complaint and documents attached to it or incorporated in it by reference, documents 'integral' to the complaint and relied upon in it, and facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence." *Heckman v. Town of Hempstead*, 568 F. App'x 41, 43 (2d Cir. 2014); *see also Manley v. Utzinger*, No. 10-CV-2210, 2011 U.S. Dist. LEXIS 79509, 2011 WL 2947008, at *1 n.1 (S.D.N.Y. July 21, 2011) ("The Court may consider . . .documents incorporated into the complaint by reference, and documents possessed by or known to the plaintiff and upon which plaintiff relied in bringing the suit."). Still, even if a document is not incorporated by reference into the complaint, the Court may consider a document "where the complaint 'relies heavily upon its terms and effect,' thereby rendering the document 'integral' to the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (quoting *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006)).

Appendix B

Without opposition, in addition to the Complaint herein, Defendants filed three extraneous documents to support their motion: (1) a copy of the September 19, 2018 Arbitration Award (Arb. Award); (2) a copy of the NYSDHR Charge (NYSDHR Compl.); and (3) a copy of the NYSDHR D&O (NYSDHR Det.). The Court considers these three documents because: (1) they are integral to, and referred to within, the Complaint; or (2) are public records of which the Court may take judicial notice. (*See* Compl. ¶¶ 4-6, 28-30).

ANALYSIS

I. NYSHRL Claims

The Court, as guided by precedent, considers first Defendants' argument as to lack of subject-matter jurisdiction. Defendants insist that Plaintiff's claims for discrimination, hostile work environment, and retaliation against all Defendants under the NYSHRL (Compl. ¶¶ 84-90, 100-103, 113-16) must be dismissed for lack of subject-matter jurisdiction. The predicate for such dismissal is the operation of the election of remedies doctrine. (Def. Br. at 9-12).

The NYSHRL provides, in pertinent part:

> Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction . . . *unless* such person had filed a complaint hereunder or with any local

> commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, *provided that*, where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed . . . .

N.Y. Exec. Law § 297(9) (emphases added). This provision "precludes a plaintiff from pursuing his discrimination claims in a court of law when the same claims were previously brought before a local administrative agency." *DuBois v. Macy's Retail Holdings, Inc.*, 533 F. App'x 40, 41 (2d Cir. 2013); *see also Guardino v. Vill. of Scarsdale Police Dep't*, 815 F. Supp. 2d 643, 646 (S.D.N.Y. Sept. 6, 2011) (noting that when the NYSDHR "has issued a finding of no probable cause . . . plaintiff's claims . . . are barred by the law['s] election of remedies provisions," and that this "bar is jurisdictional" (alterations in original, internal quotation marks omitted)). Preclusion "is not limited to the precise claims brought in the administrative proceeding," and "[i]f substantially the same facts are involved, then the . . .election of remedies will bar any subsequent court proceedings. The facts need not be perfectly identical, and merely adding some additional facts and/or re-labeling the claim will not prevent the application of the doctrine of election of remedies." *Wiercinski v. Mangia 57, Inc.*, No. 09-CV-4413, 2010 U.S. Dist. LEXIS 66498, 2010 WL 2681168, at *2 (E.D.N.Y. July 2, 2010) (internal quotation

marks omitted); *see also Williams v. City of New York*, 916 F. Supp. 2d 517, 521-22 (S.D.N.Y. 2013).

Plaintiff concedes explicitly that "an aggrieved party may either choose to have her claims of discrimination heard in full before an administrative agency, such as the [NYSDHR], or she may alternatively choose to litigate her claims in a court of law," but insists that the law prevents her merely "from *simultaneously seeking relief* in two forums *at the same time* . . . ." (Opp. Br. at 7-8 (emphasis in original)). The case law cited for this theory—the most recent of which is more than two decades old—does not support the argument. *See Sprott v. New York City Hous. Auth.*, No. 94-CV-3818, 1999 U.S. Dist. LEXIS 19224, 1999 WL 1206678, *2-3 (S.D.N.Y. Dec. 16, 1999) (dismissing claims based on statute of limitations grounds but acknowledging that the NYSDHR complaint was dismissed for "administrative convenience"); *Weiler v. Nat'l Multiple Sclerosis Soc'y*, No. 79-CV-5856, 1980 U.S. Dist. LEXIS 10284, 1980 WL 104, at *3 (S.D.N.Y. Feb. 27, 1980) ("An aggrieved person may seek relief either in an appropriate court or by complaint to the [NYSDHR], but not both."); *Jainchill v. New York State Human Rights Appeal Bd.*, 83 A.D.2d 665, 442 N.Y.S.2d 595 (App. Div. 1981) (concluding that the plaintiff's decision to challenge a determination before the Civil Service Commission did not preclude later filing a complaint with the NYSDHR); *Moran v. Simpson*, 80 Misc. 2d 437, 362 N.Y.S.2d 666 (Sup. Ct. 1974) (granting summary judgment for defendant because, although defendant's prior complaint to the NYSDHR had been dismissed, plaintiff's decision to sue the defendant was retaliatory and, itself, a violation of the NYSDHR).

Plaintiff elected her remedy and filed an action with the NYSDHR which was, in turn, dismissed on the merits. (Compl. ¶¶ 4-5; NYSDHR Compl.; NYSDHR Det.). Consequently, given the substantial relationship[4] between the allegations in the Complaint and the NYSDHR Charge, the NYSHRL claims are dismissed under Rule 12(b)(1).

II. NYCHRL Claims

Turning to issues within the realm of Rule 12(b)(6), the Court concludes that Plaintiff's claims for discrimination, hostile work environment, and retaliation against all Defendants under the NYCHRL (Compl. ¶¶ 91-95, 104-07, 117-20) cannot survive. The *New York City* Human Rights Law applies only "to acts that occur within the boundaries of New York City." *Fried v. LVI Servs.*, No. 10-CV-9308, 2011 U.S. Dist. LEXIS 115839, 2011 WL 4633985, at *12 (S.D.N.Y. Oct. 4, 2011), *aff'd*, 500 F. App'x 39 (2d Cir. 2012); *see also Vuong v. N.Y. Life Ins. Co.*, 360 F. App'x 218, 221 (2d Cir. 2010) (noting that NYCHRL applies "only to discriminatory conduct that occurs within the limits of New York City"); *Shands v. Lakeland Cent. Sch. Dist.*, No. 15-CV-4260, 2017 U.S. Dist. LEXIS 47981, 2017 WL 1194699, at *9 (S.D.N.Y. Mar. 30, 2017) (explaining that NYCHRL claims require that "[a] [p]laintiff . . . allege that the [d]efendant discriminated against her within the boundaries of New York City" (quoting *Robles v. Cox*

4. Notably, Plaintiff does not counter Defendants' argument that any factual differences between the Complaint and the NYSDHR Charge are immaterial to applying the election of remedies doctrine. (*Compare* Def. Br. at 10-12, *with* Opp. Br. at 7-8).

& Co., 841 F. Supp. 2d 615, 623 (E.D.N.Y. 2012) (ellipses added)); *Kearse v. ATC Healthcare Servs.*, No. 12-CV-233, 2013 U.S. Dist. LEXIS 53453, 2013 WL 1496951, at *2 (S.D.N.Y. Apr. 8, 2013) (concluding that, were plaintiff a New York City resident, that fact "would be irrelevant to the impact analysis, which confines the protections of the NYCHRL to those who are meant to be protected—those who work in the city" (internal quotation marks omitted)).

There is no connection between Plaintiff's allegations and New York City; Plaintiff is a Rockland County resident and experienced the alleged discrimination while working at WMC in Westchester County. (Compl. ¶¶ 8, 10-11). Consequently, the discrimination, hostile work environment, and retaliation claims based on the NYCHRL are dismissed.[5]

III. Title VII Claims

Generally, Title VII's objective is to ensure "that the workplace [is] an environment free of discrimination . . . ." *Ricci v. DeStefano*, 557 U.S. 557, 580, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009). The Pregnancy Discrimination Act, which Plaintiff references in her Complaint but not in her opposition brief, "makes clear that Title VII's prohibition

5. Plaintiff's failure to oppose Defendants' argument on this point concedes tacitly the argument and provides a separate, independent basis to dismiss the NYCHRL claims. *See Ventillo v. Falco*, No. 19-CV-3664, 2020 U.S. Dist. LEXIS 239540, 2020 WL 7496294, at *12 (S.D.N.Y. Dec. 18, 2020) (noting that the plaintiff's failure to respond to the defendant's argument, by itself, warranted dismissal of the claim for relief).

against sex discrimination applies to discrimination based on pregnancy." *Singh v. Knuckles, Komosinski & Manfro, LLP*, No. 18-CV-3213, 2020 U.S. Dist. LEXIS 213796, 2020 WL 6712383, at *8 (S.D.N.Y. Nov. 16, 2020) (quoting *Young v. UPS*, 575 U.S. 206, 135 S. Ct. 1338, 1344-45, 191 L. Ed. 2d 279 (2015)). Plaintiff advances the three remaining claims of discrimination, hostile work environment, and retaliation—based upon her pregnancy/sex and national origin—under this regime and against WMC only. (Compl. ¶¶ 78-83, 96-99, 108-12). WMC offers a variety of specific arguments as to why these Title VII claims for relief must be dismissed. (*See* Def. Br. at 12-25). The Court addresses these arguments *seriatim*.

A. Administrative Exhaustion

Before Plaintiff can bring Title VII claims against WMC in this forum, she is required to exhaust her administrative remedies before the EEOC; the parties agree on this principle. (*See* Def. Br. at 13; Opp. Br. at 8). However, WMC argues that the Court should not reach the substance of the Title VII claims because the NYSDHR Charge referenced only the ADA, thereby preventing Plaintiff from exhausting her Title VII claims for relief. (Def. Br. at 13-14).

"[I]t is well-settled that merely checking a box, or failing to check a box[,] does not necessarily control the scope of" the EEOC Charge. *Jones v. New York City Dep't of Educ.*, 286 F. Supp. 3d 442, 448 (E.D.N.Y. 2018) (quoting *Cooper v. Xerox Corp.*, 994 F. Supp. 429, 436 (W.D.N.Y. 1998)). Rather, the analysis asks whether claims

not submitted to the EEOC are "reasonably related" to those that *were* alleged. *Lester v. Mount Pleasant Cottage Sch. Union Free Sch. Dist.*, No. 19-CV-5247, 2020 U.S. Dist. LEXIS 116726, 2020 WL 3618969, at *5 (S.D.N.Y. July 2, 2020). Claims "are reasonably related: '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) where the complaint is one alleging retaliation by an employer against an employee for filing an EEOC charge; and 3) where the complaint alleges further incidents of discrimination carried out in precisely the same manner alleged in the EEOC charge.'" *Chidume v. Greenburgh-North Castle Union Free Sch. Dist.*, No. 18-CV-1790, 2020 U.S. Dist. LEXIS 78720, 2020 WL 2131771, at *5 (S.D.N.Y. May 4, 2020) (quoting *Terry v. Ashcroft*, 336 F.3d 128, 151 (2d Cir. 2003)).

Here, Plaintiff specified in her NYSDHR Charge that the WMC had violated the ADA and she checked boxes indicating that she was discriminated against because of her "National Origin" and "Sex," with respect to being Hispanic and pregnant, respectively, and "Retaliation." (NYSHDR Compl. at 2, 4). Although Plaintiff did not state explicitly her reliance upon, and the NYSDHR D&O did not reference, Title VII, the NYSDHR Charge speaks to incidents of discrimination based on pregnancy as well as Plaintiff's "Dominican" heritage. (*See* NYSDHR Compl. at 7-10; NYSDHR Det. at 2-3). Upon review, the Court concludes that Plaintiff's Title VII claims are reasonably related to the ADA claims advanced before the NYSDHR and EEOC in that they would fall within the scope of the

resulting administrative investigation. As such, Plaintiff is not prohibited from pursuing her Title VII claims here. *See Rodriguez v. Int'l Leadership Charter Sch.*, No. 08-CV-1012, 2009 U.S. Dist. LEXIS 26487, 2009 WL 860622, at *4 (S.D.N.Y. Mar. 30, 2009) (finding that the plaintiff's "ADA claim is reasonably related to the Title VII charge she filed with the EEOC," despite the fact that the plaintiff left "the box for an ADA claim . . .unchecked").

B. Timeliness

"Where a state, such as New York, authorizes an agency to address charges of employment discrimination, such charges must be filed within 300 days after the alleged unlawful employment practice occurred." *Roache v. Long Is. R.R.*, 487 F. Supp. 3d 154, 2020 U.S. Dist. LEXIS 171149, 2020 WL 5594640, at *7 (E.D.N.Y. Sept. 17, 2020) (internal quotation marks omitted); *see also* 42 U.S.C. § 2000e-5(e)(1). "Claims outside this window are time-barred, except when the claims are part of a continuing violation; otherwise time-barred claims may proceed when separate acts 'collectively constitute one unlawful employment practice.'" *Staten v. City of New York*, 726 F. App'x 40, 43 (2d Cir. 2018) (quoting *Washington v. Cty. of Rockland*, 373 F.3d 310, 318 (2d Cir. 2004)). Relying on these parameters, WMC argues that any incidents occurring before January 4, 2018 (*i.e.*, three hundred days before Plaintiff filed the NYSDHR Charge) are time-barred and should not be considered. (Def. Br. at 13-14). Plaintiff, conceding tacitly WMC's calculation, insists that conduct predating January 4, 2018 is actionable under the continuing violation doctrine. (Opp. Br. at 9-10).

"It has been the law of this Circuit that under the continuing violation exception to the Title VII limitations period, if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone." *Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135, 155-56 (2d Cir. 2012) (alterations and internal quotation marks omitted); *see also Cornwell v. Robinson*, 23 F.3d 694, 703-04 (2d Cir. 1994). However, "the continuing violation doctrine does not apply to discrete unlawful acts, even if the discrete acts were undertaken 'pursuant to a general policy that results in other discrete acts occurring within the limitations period.'" *Rowe v. New York State Dep't of Taxation & Fin.*, 786 F. App'x 302, 304 (2d Cir. 2019) (quoting *Chin*, 685 F.3d at 157). In the latter case, "each discrete discriminatory act 'starts a new clock for filing charges alleging that act.'" *Kennedy v. Bernhardt*, No. 18-CV-647, 2020 U.S. Dist. LEXIS 237674, 2020 WL 7399050, at *4 (W.D.N.Y. Dec. 16, 2020) (quoting *Taylor v. City of New York*, 207 F. Supp. 3d 293, 301 (S.D.N.Y. 2016)). Applying this "doctrine is heavily disfavored in the Second Circuit, and courts have been loath to apply it absent a showing of compelling circumstances." *Id.* (internal quotation marks omitted).

Before January 4, 2018, Plaintiff was: (1) reassigned to the dayshift and denied requested leave (Compl. ¶ 23-24, 38-39); (2) forced to move a chair without help and remain in an area she believed dangerous to pregnant women (*id.* ¶¶ 31, 41-43); (3) berated by Schrull-Valiente (*id.* ¶ 37);

and (4) questioned by Young as to whether she could handle parenthood (*id.* ¶ 35).[6] These incidents are discrete acts and do not support application of the continuing violation doctrine. *See Russo v. New York Presbyterian Hosp.*, 972 F. Supp. 2d 429, 445 (E.D.N.Y. 2013) (yelling at employee was a discrete act); *Kaur v. New York City Health & Hosps. Corp.*, 688 F. Supp. 2d 317, 330 (S.D.N.Y. 2010) (supervisors' and coworkers' comments that they "don't want foreigners here" and that Indians "sell their daughters," "eat cows," and "never tell the truth" were discrete acts); *Bain v. Highgate Hotels, LP*, No. 08-CV-3263, 2009 U.S. Dist. LEXIS 150377, 2009 WL 10705912, at *7 (E.D.N.Y. July 7, 2009) (concluding that "a series of discrete acts consisting of specific failures to assign [plaintiff] to the early shift . . .a particular denial of a requested vacation date, or an assignment of an onerous task on some occasions" did "not support invocation of the continuing violation doctrine"); *Benjamin v. Brookhaven Sci. Assocs., LLC*, 387 F. Supp. 2d 146, 153 (E.D.N.Y. 2005) (noting that "undesirable work transfers, and denial of preferred job assignments are considered discrete acts").

While the continuing violation doctrine is inapplicable to this case, this conclusion does not prevent the Court from considering pre-January 4, 2018 events in the context of Plaintiff's Title VII hostile work environment claim. Unlike a claim for discrimination or retaliation, a claim for hostile work environment, by its "very nature involves repeated conduct," and, as such, "cannot be said

6. The Court includes neither Plaintiff's 2016 hospitalization nor her 2017 miscarriage, as they are alleged products, not acts, of discrimination. (Compl. ¶¶ 20, 72-73).

to occur on any particular day." *Richard v. N.Y. City Dep't of Educ.*, No. 16-CV-957, 2017 U.S. Dist. LEXIS 50748, 2017 WL 1232498, at *14 (E.D.N.Y. Mar. 31, 2017) (quoting *McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 75 (2d Cir. 2010)). This means that "so long as an act contributing to that hostile environment takes place within the statutory time period," otherwise time-barred incidents may be considered. *Id.* Similarly, while not actionable, the Court is permitted to consider allegations beyond the statute of limitations for the purpose of providing context and background. *See generally Santucci v. Levine*, No. 17-CV-10204, 2021 U.S. Dist. LEXIS 3956, 2021 WL 76337, at *3-4 (S.D.N.Y. Jan. 8, 2021).

Consequently, as the incidents predating January 4, 2018 are discrete acts, they are not actionable independently and are time-barred with respect to Plaintiff's discrimination and retaliation claims for relief.[7]

C. Discrimination Claim

"To establish a *prima facie* case of discrimination under Title VII . . .a plaintiff must allege that '(1) she is a member of a protected class; (2) she is qualified for the

7. Defendants argued in a footnote that incidents occurring after the Right to Sue Letter was issued were also beyond this Court's jurisdiction (Def. Br. at 14, n.6) and noted in reply that Plaintiff did not dispute the argument (Reply at 3). The Court will not address the argument because "it is well-established that the Court need not consider arguments made only in footnotes." *Youngs v. Comm'r of Soc. Sec.*, No. 18-CV-119, 2019 U.S. Dist. LEXIS 117129, 2019 WL 3083045, at *5 n.6 (W.D.N.Y. July 15, 2019).

position held; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination.'" *Malloy*, 2020 U.S. Dist. LEXIS 171557, 2020 WL 5603793, at *15 (quoting *Rosen v. New York City Dep't of Educ.*, No. 18-CV-6670, 2019 U.S. Dist. LEXIS 145380, 2019 WL 4039958, at *6 (S.D.N.Y. Aug. 27, 2019)). WMC argues that Plaintiff has not pled facts supporting the third or fourth elements of this claim. (Def. Br. at 15-17). The Court agrees.

An adverse employment action exists when "[a] plaintiff . . . endures a material adverse change in the terms and conditions of employment." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015) (quoting *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000)). To qualify as an adverse employment action, the act must be "more disruptive than a mere inconvenience of an alteration of job responsibilities." *Id.* (quoting *Terry*, 336 F.3d at 138). "Examples of materially adverse changes include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." *Id.* at 85 (quoting *Terry*, 336 F.3d at 138). However, "without more, an employer's criticisms or negative evaluations of an employee's performance do not constitute actionable adverse employment action, nor do everyday workplace grievances, disappointments, and setbacks." *Belton v. Borg & Ide Imaging, P.C.*, F. Supp. 3d , 2021 U.S. Dist. LEXIS 5964, 2021 WL 98392, at *4 (W.D.N.Y. Jan. 12, 2021) (internal citations and quotation

marks omitted). Upon review, only one of Plaintiff's actionable allegations qualifies as an adverse employment action.

The negative performance review Plaintiff received in January 2018 prevented her from securing a pay raise to which Plaintiff otherwise would have been entitled (Compl. ¶¶ 66-68); this qualifies an adverse employment action. *Campbell v. New York City Transit Auth.*, 93 F. Supp. 3d 148, 168 (E.D.N.Y. 2015) (explaining that negative performance evaluations "are adverse employment actions only if they affect ultimate employment decisions such as promotion, wages, or termination" (internal quotation marks omitted)). However, beyond that, Plaintiff's post-January 2018 incidents consist of: (1) moving heavy tanks on her own and being asked if the pregnancy prevented her from doing her job (Compl. ¶¶ 44-49); (2) receiving reassignments (*id.* ¶¶ 69-71, 74-75); (3) being directed not to take personal calls or speak Spanish (*id.* ¶¶ 65, 77); (4) a supervisor›s comment that her accent made her difficult to understand (*id.* ¶¶ 61-62); and (5) being forced to undergo retraining (*id.* ¶¶ 54-59). None of these other incidents state plausibly an adverse employment action such that Plaintiff experienced a "material adverse change in the terms and conditions of employment." *See, e.g., Lebowitz v. New York City Dep't of Educ.*, 407 F. Supp. 3d 158, 176 (E.D.N.Y. 2017); *Brown v. CSX Transp. Inc.*, 155 F. Supp. 3d 265, 271 (W.D.N.Y. 2016); *Collazo v. Cty. of Suffolk*, 163 F. Supp. 3d 27, 43 (E.D.N.Y. 2016); *Levitant v. City of New York Human Res. Admin.*, 914 F. Supp. 2d 281, 303 (E.D.N.Y. 2012); *Guzman v. City of New York*, No. 06-CV-5832, 2010 U.S. Dist. LEXIS 104885, 2010 WL 4174622,

at *13, 15 (E.D.N.Y. Sept. 30, 2010); *Figueroa v. N.Y. City Health & Hosps. Corp.*, No. 03-CV-9589, 2007 U.S. Dist. LEXIS 58342, 2007 WL 2274253, at *4 (S.D.N.Y. Aug. 7, 2007); *Reckard v. Cty. of Westchester*, 351 F. Supp. 2d 157, 161 (S.D.N.Y. 2004).

With respect to the fourth element of a Title VII discrimination claim, "[a] plaintiff can meet that burden through direct evidence of intent to discriminate or by indirectly showing circumstances giving rise to an inference of discrimination." *Jeanty v. Newburgh Beacon Bus Corp.*, No. 17-CV-9175, 2018 U.S. Dist. LEXIS 197248, 2018 WL 6047832, at *6 (S.D.N.Y. Nov. 19, 2018) (quoting *Vega*, 801 F.3d at 87). Although "[n]o one particular type of proof is required to [allege]" that an adverse employment action "occurred under circumstances giving rise to an inference of discrimination," *Boza-Meade v. Rochester Hous. Auth.*, 170 F. Supp. 3d 535, 553-54 (W.D.N.Y. 2016) (quoting *Moore v. Kingsbrook Jewish Med. Ctr.*, No. 11-CV-3625, 2013 U.S. Dist. LEXIS 107111, 2013 WL 3968748, at *6 (E.D.N.Y. July 30, 2013) (first alteration added)), "[n]aked assertions of . . .discrimination without any specific factual allegation of a causal link between the defendants' conduct and the plaintiff's protected characteristics are too conclusory to withstand a motion to dismiss." *Ellis v. N.Y. City Dep't of Educ.*, No. 19-CV-1441, 2020 U.S. Dist. LEXIS 42446, 2020 WL 1166056, at *3 (S.D.N.Y. Mar. 11, 2020) (quoting *Sanders-Peay v. N.Y. City Dep't of Educ.*, No. 14-CV-4534, 2014 U.S. Dist. LEXIS 161506, 2014 WL 6473507, at *8 (E.D.N.Y. Nov. 18, 2014) (alterations in original)). Here, Plaintiff pled affirmatively that the lone actionable adverse employment action—the January

2018 performance evaluation—"was solely based upon the arbitration decision . . .which had determined that Defendants violated the CBA by making drastic changes to Plaintiff's schedule." (Compl. ¶ 68; *see also* Opp. Br. at 6). Phrased a different way, Plaintiff attempted to link the negative performance review to the Arbitration Award issued nine months after the performance review, not her membership in a protected class.

As a result of the foregoing, the Title VII discrimination claim is dismissed because Plaintiff pled only one adverse employment action and failed to plead facts linking that decision to her membership in a protected class.

D. Hostile Work Environment Claim

To state a hostile work environment claim under the Title VII, Plaintiff must allege: "[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. 2002) (quoting *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997) (alterations in original)); *see also Fox v. Costco Wholesale Corp.*, 918 F.3d 65, 74 (2d Cir. 2019) (outlining the same elements under the ADA); *Daly v. Westchester Cty. Bd. of Legislators*, No. 19-CV-4642, 2021 U.S. Dist. LEXIS 12336, 2021 WL 229672, at *9 (S.D.N.Y. Jan. 22, 2021) (noting the same elements under the Rehabilitation Act). The offensive conduct must be linked to the "protected characteristic." *Rivera v. Bd. of Educ.*, No. 19-CV-11624,

2020 U.S. Dist. LEXIS 239633, 2020 WL 7496282, at *9 (S.D.N.Y. Dec. 21, 2020) (internal quotation marks omitted). While a single incident may suffice, "[a]s a general rule, incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." *Alfano*, 294 F.3d at 374 (internal quotation marks omitted). The test requires both that the conduct "create[s] an objectively hostile or abusive work environment, and that the victim . . . subjectively perceive[d] that environment to be abusive." *Id.* (internal quotation marks omitted). WMC argues that this claim must be dismissed because Plaintiff has not pled a pervasively hostile environment. (Def. Br. at 18-21). The Court agrees.

Plaintiff has not described an objectively hostile workplace; rather, at most, she described a collection of vignettes that she found objectionable. Indeed, instead of alleging that her working conditions were altered in some way, Plaintiff pled affirmatively that she "has always done her job diligently and adequately and has never had any disciplinary proceedings brought against her." (Compl. ¶ 18). Looking to the totality of the circumstances, the incidents were episodic and do not suggest a work environment that was so permeated with harassment as to alter the terms of her employment.[8] *See, e.g., Colas v. City of Univ. of New York*, No. 14-CV-4825, 2019 U.S. Dist.

8. Defendants argue also that Plaintiff never connected the offensive treatment to pregnancy. (Def. Br. at 19). As the Court concludes that Plaintiff failed to plead an objectively hostile work environment on either theory of discrimination (*i.e.*, national origin or pregnancy), it need not and does not reach this argument.

LEXIS 80279, 2019 WL 2028701, at *5-6 (E.D.N.Y. May 7, 2019); *Richard*, 2017 U.S. Dist. LEXIS 50748, 2017 WL 1232498, at *14-15; *Sattar v. Johnson*, 129 F. Supp. 3d 123, 142-44 (S.D.N.Y. 2015).

As Plaintiff failed to plead an objectively hostile work environment, this claim is dismissed.

E. Retaliation Claim

The final claim for consideration is one for Title VII retaliation. In order to state this claim, Plaintiff must allege: "1) participation in a protected activity; 2) the defendant's knowledge of the protected activity; 3) an adverse employment action; and 4) a causal connection between the protected activity and the adverse employment action." *Roache*, 2020 U.S. Dist. LEXIS 171149, 2020 WL 5594640, at *11 (quoting *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 844 (2d Cir. 2013)). WMC insists that this claim must be dismissed because Plaintiff fails to plead a protected activity, an adverse employment action, or a causal link between them. (Def. Br. at 21-25). The Court agrees.

For purposes of a Title VII retaliation claim, "[a] plaintiff engages in 'protected activity' when she (1) opposes employment practices prohibited under Title VII; (2) makes a charge of discrimination; or (3) participates in an investigation, proceeding or hearing arising under Title VII." *Ramirez v. Michael Cetta Inc.*, No. 19-CV-986, 2020 U.S. Dist. LEXIS 180619, 2020 WL 5819551, at *19 (S.D.N.Y. Sept. 30, 2020) (quoting *Bundschuh v. Inn on*

the Lake Hudson Hotels, LLC, 914 F. Supp. 2d 395, 405 (W.D.N.Y. 2012)). The question is whether the employer "understood, or could reasonably have understood, that the plaintiff's opposition was directed at conduct prohibited by Title VII." *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998). "Although particular words such as 'discrimination' are certainly not required to put an employer on notice of a protected complaint, neither are they sufficient to do so if nothing in the substance of the complaint suggests that the complained-of activity is, in fact, unlawfully discriminatory." *Kelly v. Howard I. Shapiro & Assocs. Consulting Eng'rs, P.C.*, 716 F.3d 10, 17 (2d Cir. 2013).

Plaintiff insists that she engaged in a protected activity when she complained of discrimination on various occasions. (Opp. Br. at 21). Assuming they would be actionable, the bulk of the incidents cited are dispensed with easily: (1) disagreeing with Cornell about the safety of working in the CTAT Lab and CT scan room (Compl. ¶¶ 41-43); (2) asking Young for backup in caring for ICU patients (*id.* ¶¶ 33-36); (3) complaining to Gomez generally about «the way she is treated . . .at work» (*id.* ¶ 32); (4) informing Panton about the risk of Plaintiff moving heaving tanks (*id.* ¶¶ 44-49); and (5) notifying Schrull-Valiente about being told to "shut up" and scheduling issues (*id.* ¶¶ 37, 39). None of these interactions would have reasonably led WMC to understand that Plaintiff was opposing discrimination prohibited by Title VII and, as such, do not state a protected activity. *See Sharpe v. MCI Commc'ns Servs., Inc.*, 684 F. Supp. 2d 394, 406 (S.D.N.Y. 2010) (granting summary judgment on Title

VII retaliation claim and noting that "[t]he onus is on the speaker to clarify to the employer that he is complaining of unfair treatment due to his membership in a protected class and that he is not complaining of unfair treatment generally." (internal quotation marks omitted)).

There are two other incidents Plaintiff says constitute protected activity. First, Plaintiff cites her complaint to the NLRB and the "arbitration proceeding." (Opp. Br. at 21). Upon review of the Complaint, it does not appear that the activity would have put WMC on notice that Plaintiff was making a protected complaint. (*See* Compl. ¶¶ 23-30). Plaintiff complained to her supervisor that a shift change would "be damaging to herself and her pregnancy," but did not claim the shift change was the product of discrimination. (*See id.*). Indeed, in her recitation of the claim for relief, Plaintiff insists that WMC "retaliated against [her] for her complaint to the NLRB and subsequent proceeding in which it was revealed that Defendants violated the CBA." (*Id.* ¶ 110). Likewise, although the Arbitration Award references allegations of discriminatory conduct (*see* Arb. Award at 9-10), it is not clear as to when these allegations were pressed or how they developed. Granting Plaintiff every inference on this record, she has not pled plausibly that WMC could have reasonably understood the NLRB proceeding to protest discrimination. *See, e.g., Martel v. New Eng. Home Care, Inc.*, No. 09-CV-1412, 2014 U.S. Dist. LEXIS 99245, 2014 WL 3687738, at *14 (D. Conn. July 22, 2014) (noting that "vague and ambiguous" complaints that "do not sufficiently articulate the nature of harassment do not constitute a protected activity" (internal quotation marks omitted)); *Sharpe*, 684 F. Supp. 2d at 406 (S.D.N.Y. 2010).

As for the only other claimed protected activity—complaining, at some point, to Human Resources that Schrull-Valiente had made unspecified "racist comments" (Compl. ¶ 64)—Plaintiff does not tie that activity to the only adverse employment action[9] pled (*i.e.*, the negative performance review). (Compl. ¶¶ 66-68). Even if the Court stretched the allegations to connect these two facts, Plaintiff's causation argument relies solely on temporal proximity. (Opp. Br. at 24-25). Having failed to specify when Plaintiff complained to Human Resources, the Court cannot infer a connection based on temporal proximity. *Ahmad v. White Plains City Sch. Dist.*, No. 18-CV-3416, 2020 U.S. Dist. LEXIS 176318, 2020 WL 5720753, at *8 (S.D.N.Y. Sept. 24, 2020).

In light of the foregoing, the Court concludes that Plaintiff pled only one protected activity and, with respect to that protected activity, failed to establish causation between it and any adverse employment action. As such, the Title VII retaliation claim for relief is dismissed.

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9. The definition of "adverse employment action" differs between Title VII discrimination and retaliation claims. As to the latter, the element considers whether "it is harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Ramirez*, 2020 U.S. Dist. LEXIS 180619, 2020 WL 5819551, at *20 (internal quotation marks omitted, alterations in original). Despite the more relaxed standard on this claim, the Court's conclusions regarding adverse employment actions under Title VII discrimination apply to the retaliation claim as well.

Appendix B

CONCLUSION

Based upon the foregoing, Defendants' motion to dismiss is GRANTED. The Clerk of the Court is respectfully directed to terminate the motion sequence pending at Doc. 28 and to close this case.

SO ORDERED:

Dated: New York, New York
January 29, 2021

/s/ Philip M. Halpern
PHILIP M. HALPERN
United States District Judge