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**UNITED STATES COURT OF APPEALS**
**FOR THE**
**SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of March, two thousand twenty-two.

Before: Michael H. Park,
William J. Nardini,
Steven J. Menashi,
*Circuit Judges*,

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Bernice Curry-Malcolm,

Plaintiff - Appellant,

v.

Rochester City School District,
Rochester City School District
Board of Education,

Defendants - Appellees.

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**ORDER**

Docket No. 20-2808

Appellant seeks a stay of the Court's mandate pending filing and disposition of a petition for a writ of *certiorari*.

IT IS HEREBY ORDERED that the motion to stay the mandate is DENIED.

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

[SEAL]

/s/ Catherine O'Hagan Wolfe

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

**Scott S. Harris**
Clerk of the Court
(202) 979-3011

March 2, 2022

Clerk
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: Bernice Curry-Malcolm
v. Rochester City School District, et al.
Application No. 21A464
(Your No. 20-2808)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Sotomayor, who on March 2, 2022, extended the time to and including May 5, 2022.

This letter has been sent to those designated on the attached notification list.

Sincerely,

**Scott S. Harris**, Clerk

by /s/ Claude Alde

Claude Alde
Case Analyst

## APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

*To the Honorable Sonia Sotomayor, Associate Justice for the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Second Circuit*:

In accordance with Rule 13.5 of the United States Supreme Court Rules, Bernice Curry-Malcolm, appearing before the Court as an unrepresented *pro se* litigant, who was the *pro se* plaintiff and then appellant in the proceedings below, makes respectful request for a sixty -day extension of time, up to and including, Monday, May 9, 202, within which to file her petition for writ of certiorari in this case. Curry-Malcolm's petition for writ of certiorari is currently due March 7, 2022. In support of this application, *pro se* Applicant states:

1. Rule 2.11 of the Code of Conduct and as pursuant to 28 U.S.C. §455 and Cannon 3C(1) of the Code of United State Judges, does the Fifth and Fourteenth Amendments rights to due process and equal protection attached to a judge's conduct of prejudice and bias against a pro se litigant calls into question the constitutionality of judicial impartiality as a significant element of justice, and should this Court overrule its standing in Rippo vs. Baker?

2. Would a reasonable person and/or disinterested person, with knowledge of the relevant facts, believe that the judge or justice has

created an "appearance of partiality and whether the involuntary recusal standard is still good law where it impedes and hinders the pro se litigant civil and constitutional rights under the Fifth and Fourteenth Amendments?

3. This Court ruled that "Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable", should this Court overrule its standing in Rippo v. Baker and allow for the judges to create a judiciary system of bias and prejudices against *pro se* litigant by blocking access to a constitutional and fundamental civil right offered to all people?

4. Whether parties represented by counsel are 100% entitled to dismissal even where they are not entitled just because the other party was a layperson *pro se* litigant, and was it congressional intent for the layperson *pro se* litigants that are unrepresented to have less voice, individual rights, and access to the judicial system than those represented by counsel?

5. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., New York State Human Rights Law Section 296, 42 U.S.C. § 1981, 42 U.S.C. § 1983, prohibits discrimination, whether an employer's continuing wrongful conduct and actions in an employment discrimination case precludes the Appellant from bringing subsequent actions against the

employer, and when, where, how, and under what circumstances of law whether state or federal that prohibits unlawful discrimination and under which anti-retaliation statutes and other similar statutes, regulations, and the constitution is it acceptable to discriminate, including under the ADEA, against an employee based on upon "previous similar conduct" by the employer?

6. Whether it was congressional intent to allow employers to skirt the constitution and human rights laws where the employer defends, condones, participates in and chooses the same "similar conduct" method of unlawful discriminatory and retaliatory and/or performed by the employer, its employees, officers and/or agents on different days and occurring at different times, by the same and/or different actors, and subsequent to the first, second, third . . . , and so on in violation of Title VII, ADEA, New York State Human Rights Law, 42 U.S.C. § 1981, 42 U.S.C. § 1983?

7. Whether an Appellant claims, are barred by issue preclusion where the Appellant could not have known, could have been aware of the employers continuing wrong in an employment discrimination case where there was no discovery in any other of the actions, and where there was substantial material evidence in the sole and exclusive possession of the employer, and whether the *pro se* litigant was entitled to discovery prior to dismissal of the complaint. Should this Court overrule Degan v. United States, 517 U.S. 820 (1996),

Tagath, 710 F. 2d at 95, and rule that fundamental to one's ability to litigate is "not" the ability to obtain discovery of the opposing party's evidence, thereby removing a necessary tool to effective litigant as afforded to those represented by counsel?

8. Whether in the *pro se* litigant case, there was an unduly high pleading standard applied when held that the proposed complaint failed to state a cause of action against the defendants, and where the Appeals court ruling was in direct conflict with a prior panel ruling on the Court? Does the complaint satisfy the pleading requirement under Rule 8(a)(2), when it contains sufficient factual matters, accepted as true, to state a claim of relief that is plausible on its face in an employment discrimination case (*Ashcroft v. Iqbal, Swierkiewicz v.,Sorema, McDonnell Douglas v. Green*)?

9. The ADEA prohibits age-based discrimination, whether *pro se* litigant established a *prima facie* case of discrimination and retaliation based on her age?

10. Whether pro se litigant established an employer-employee relationship contractual when the plaintiff-appellant factually stated that she was employed under an employment contact with the Rochester City School District and there was a binding employment contract, and the school district breached the employment contract. Whether appellant established breach of contract?

11. The Court of Appeals stance on appellant's claims of continuing wrong and continuing violation of unlawful discrimination and retaliation against her by her employer, including post-employment discrimination and retaliation, contradicts this Court ruling in *Lucky Brabd Dungaress, Inc., v. Marcel Fashions* (2020).

12. Does the pro se appellant establish a prima facie case of discrimination and retaliation under Title VII, the ADEA, and New York Human Rights Law where she meets all the prongs and where an employer offered reasons for taking the discriminatory and retaliatory actions are false and pretextual to discrimination?

13. The Second Circuit overreached in its affirmation when it exceeded in its jurisdiction by pre se ruling on a remand by another panel within the Court and in regard to ruling on issues not before the court in the instant appeal, in direct contradiction

14. The Court of Appeals' *sua sponte* dismissal of the complaint was an abuse of discretion and is in conflict with this Court and other circuits.

The United States Court of Appeals for the Second Circuit's Summary Order and Judgment was entered on December 6, 2021 (Appendix A "App. A" hereto), affirming the dismissal of Applicant's discrimination and retaliation complaint. Curry-Malcolm filed a timely

motion to stay the mandate on December 20, 2021. That motion is pending.

Under Rule 13.5, a Supreme Court Justice may extend the time for seeking certiorari for up to sixty additional days.

The Supreme Court has certiorari jurisdiction over this case under 28 U.S.C. § 1254(1).

**Reasons for Granting An Extension of Time**

1. *Pro se* Applicant's need for additional time is heightened by the fact that she appears *pro se* and currently appears as *pro se* on other matters that are currently pending before the United States Court of Appeals for the Second Circuit, and before the New York State Court of Appeals.

2. Applicant requests an additional thirty days to properly prepare and file her petition for writ of certiorari.

3. Applicant's need for additional time is also heightened by the extraordinary circumstances of the passing of a loved one. Applicant makes prayerful and respectful request that she is granted the additional time.

4. Thus, granting an additional thirty-days will ensure that these important issues to be raised are properly, rather than hurriedly, presented to the Court.

5. Curry-Malcolm's cases raises substantial questions that warrants review by this Court. New

York State Human Rights Law Executive prohibits discrimination based on race (Black/African American), color (Black/African American), age (Applicant was fifty-eight years of age when the discriminatory acts against her began) and/or sex (female, excludes sexual harassment and sexual violence), and/or gender (female), and retaliation and prohibits retaliation while engaging in a protected activity. This case presents issues of national importance concerning employment discrimination and post-employment retaliation.

**WHEREFORE**, In light of the circumstances presented and passing of Applicant's aunt, preparing an adequate petition for writ of certiorari will require an extension of time, affording good cause for a sixty-day extension to and including May 9, 2022.

Dated: February 25, 2022

Respectfully Submitted,

/s/ Bernice Curry-Malcolm
Bernice Curry-Malcolm,
*pro se*

COPY TO:

Rochester City School District
Attn: Alison K. L. Moyer, Counsel for the Respondent
Rochester City School District
131 West Broad Street
Rochester, New York 14614
(585) 262-8412
(via U.S. Postal Service Priority Mail)

20-2808-cv
Curry-Malcolm v. Rochester

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of December, two thousand twenty-one.**

**PRESENT:**

**MICHAEL H. PARK,**
**WILLIAM J. NARDINI,**
**STEVEN J. MENASHI,**
***Circuit Judges.***

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**Bernice Curry-Malcolm,**

***Plaintiff-Appellant,***

**v.** **20-2808**

**Rochester City School District,**
**Rochester City School District Board of Education,**

***Defendants-Appellees.***

---

**FOR PLAINTIFF-APPELLANT:**
Bernice Curry-Malcolm, *pro se*, West Henrietta, NY.

**FOR DEFENDANTS-APPELLEES:**
Alison K.L. Moyer, Steven G. Carling, Acting General Counsel, Rochester City School District Department of Law, Rochester, NY.

Appeal from a July 24, 2020 order of the United States District Court for the Western District of New York (Larimer, *J.*).

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

Appellant Bernice Curry-Malcolm ("Malcolm"), proceeding *pro se*, appeals the district court's order denying her leave to file a proposed complaint. In 2017 and 2018, Malcolm filed three complaints initiating lawsuits against her employer, the Rochester City School District ("RCSD"), and other defendants, which the district court designated *Malcolm I*, *II*, and *III*. The district court dismissed these suits for failure to state a claim[1] and imposed a leave-to-file sanction against Malcolm in *Malcolm I*. Notwithstanding that sanction, Malcolm moved for leave to file a complaint against RCSD and the Board of Education of RCSD, alleging claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 *et seq.* ("Title VII"), the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), 42 U.S.C. §§ 1981 and 1983, and New York state law, for race, age, and sex-based disparate treatment, hostile work environment, retaliation, breach of contract, and wrongful termination. After the district court denied Malcolm's motion, which it designated *Malcolm IV*, this Court vacated the leave-to-file sanction and remanded to permit Malcolm leave to amend some claims in *Malcolm I* and *III*. The district court consolidated the remanded proceedings, reimposed the

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[1] *Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester*, 388 F. Supp. 3d 242 (W.D.N.Y. 2019), *aff'd in part, vacated in part, remanded*, 831 F. App'x 1 (2d Cir. 2020) (*Malcolm I*); *Malcolm v. Rochester City Sch. Dist.*, 388 F. Supp. 3d 257 (W.D.N.Y. 2019), *aff'd*, 828 F. App'x 810 (2d Cir. 2020) (*Malcolm II*); *Curry-Malcolm v. Rochester City Sch. Dist.*, 389 F. Supp. 3d 189 (W.D.N.Y. 2019), *aff'd in part, vacated in part, remanded*, 835 F. App'x 623 (2d Cir. 2020) (*Malcolm III*).

leave-to-file sanction, and dismissed Malcolm's second amended complaint in that action for failure to state a claim (*Malcolm V*). Malcolm's appeal from that decision is pending in this Court. Before us is Malcolm's appeal of the district court's decision denying her motion for leave to file a proposed complaint in *Malcolm IV*. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Malcolm makes three arguments on appeal. *First*, "[t]he district court abused its discretion by improperly imposing a prefiling sanction against [Malcolm] without affording her the opportunity to be heard." Appellant's Br. at 47. *Second*, her proposed complaint includes sufficient allegations to state plausible claims. *See id.* at 47–71. *Third*, Judge Larimer is biased against Malcolm and "should be removed by this Court from any further matters regarding [Malcolm]." *Id.* at 76. We address each argument in turn.

*First*, Malcolm's challenge to the leave-to-file sanction that was in place at the time of the district court's decision is moot because this Court has already vacated that sanction. *See Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester*, 831 F. App'x 1, 6 (2d Cir. 2020) (vacating sanction); *United States v. Quattrone*, 402 F.3d 304, 308 (2d Cir. 2005) (explaining that appeal must be dismissed as moot "if an event occurs during the course of the proceedings or on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party" (internal quotation marks omitted)).

Malcolm's challenge to the district court's denial of leave to file her proposed complaint, however, presents a live controversy because the prior panel did not mention, much less vacate, the district court's order denying leave to file the proposed *Malcolm IV* complaint. *See generally Malcolm*, 831 F. App'x at 1–6; *see also British Int'l Ins. Co. v. Seguros La Republica, S.A.*, 354 F.3d 120, 123 (2d Cir. 2003) (holding that an appeal is not moot where the litigant "retains some interest in the case, so that a decision in [her] favor will inure to [her] benefit" (internal quotation marks omitted)).

*Second*, Malcolm argues that the district court improperly denied her motion for leave to file a proposed complaint because she "sufficiently alleges" claims in the proposed complaint. *See, e.g.*, Appellant's Br. at 48. Appellees counter that even if that were true, the Court should still affirm the district court's dismissal of the suit because all of the claims asserted in the proposed complaint are barred by the doctrine of claim preclusion. *See* Appellees' Br. at 20. Malcolm disagrees and contends that her claims are not barred by claim preclusion because they are based on events that postdate the other actions, but she does not point to any specific allegations supporting this argument. *See* Reply Br. at 16.

We review the denial of leave to file, which has the practical effect of a *sua sponte* dismissal, *de novo*. *See Malcolm v. Honeoye Falls Lima Cent. Sch. Dist.*, 517 F. App'x 11, 12 (2d Cir. 2013). Moreover, "we may affirm on any ground for which there is a record sufficient to permit conclusions of law, including grounds not relied

upon by the district court." *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 157–58 (2d Cir. 2015) (internal quotation marks omitted).

We affirm here because the claims raised in the proposed complaint are barred by the doctrine of claim preclusion. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) (recognizing that courts may raise claim preclusion *sua sponte*). Under that doctrine, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Claim preclusion thus applies where "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Monahan v. N.Y.C. Dept. of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000).

Those requirements are satisfied here. First, the district court's dismissals for failure to state a claim in *Malcolm I*, *II*, *III*, and *V* were judgments on the merits. *See Moitie*, 452 U.S. at 399 n.3 ("[A] dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits." (internal quotation marks omitted)). Second, Malcolm was a party to the prior litigation. Third, Malcolm asserted the same claims arising out of the same events in the prior cases.

In her proposed complaint, Malcolm asserts employment discrimination claims in violation of Title VII, the ADEA, New York State Human Rights Law ("NYSHRL"), 42 U.S.C. §§ 1983 and 1988, the New York State Constitution's equal protection clause, as well as claims for breach of contract, wrongful termination, and violation of "education law," all premised on alleged harassment of Malcolm by a supervisor, a performance review, RCSD's failure to investigate Malcolm's discrimination complaints, and Malcolm's layoff. *See generally* App'x 305.

In *Malcolm I*, *II*, and *III*, Malcolm asserted the same employment discrimination claims in violation of Title VII, the ADEA, NYSHRL, 42 U.S.C. §§ 1983 and 1988, the New York State Constitution's equal protection clause, and breach of contract—all premised on the same factual allegations. *See Malcolm*, 831 F. App'x at 3–5; *Curry-Malcolm v. Rochester City Sch. Dist.*, 835 F. App'x 623, 626 & n.4 (2d Cir. 2020); *Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester*, 2021 WL 4867006, at *3–6, 8 (W.D.N.Y. Oct. 19, 2021).

To the extent that Malcolm attempts to assert different claims in the proposed complaint—including wrongful termination in violation of a collective bargaining agreement and violation of "education law"—those claims are also precluded because they are rooted in the same series of events as the prior complaints. *See United States v. Tohono O'Odham Nation*, 563 U.S. 307, 316 (2011) ("The now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action depends on

factual overlap, barring claims arising from the same transaction." (internal quotation marks omitted)).

And although the proposed complaint differs from the prior complaints by naming the Board of Education as a defendant, the proposed complaint contains only one vague and conclusory allegation against the Board of Education, which is not sufficient to state a claim. *See* App'x 309 ("The School District, its employees, officers, managers, supervisors, directors, chiefs, superintendent of schools and board of education members and agents would join in, engage and participate with [Malcolm's supervisor] in her unlawful harassment, discrimination, and retaliation against Plaintiff."). The complaint otherwise does not distinguish between the defendants and appears to rely on privity to assert claims against the Board of Education. All such claims are precluded. *See Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d Cir. 1995) (explaining that privity exists where the newly named defendant was "known by [the] plaintiff at the time of the first suit" and "has a sufficiently close relationship to the original defendant to justify preclusion"). The claims in Malcolm's proposed complaint are thus precluded, so we affirm the district court's denial of leave to file the proposed complaint.

*Third*, Malcolm argues that Judge Larimer must recuse from "any further matters regarding [Malcolm]" due to judicial bias. Appellant's Br. at 76. This claim is meritless. The record does not reflect "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555

(1994); *see id.* ("[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge."); *Chen v. Chen Qualified Settlement Fund*, 552 F.3d 218, 227 (2d Cir. 2009) (holding that "adverse rulings, without more, will rarely suffice to provide a reasonable basis for" a bias claim).

We have considered the remainder of Malcolm's arguments and find them to be without merit. Accordingly, we **AFFIRM** the order of the district court.

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

[SEAL]

/s/ Catherine O'Hagan Wolfe

**MANDATE**

20-2808-cv
Curry-Malcolm v. Rochester

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**PRESENT:**

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**WILLIAM J. NARDINI,**
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We review the denial of leave to file, which has the practical effect of a *sua sponte* dismissal, *de novo*. *See Malcolm v. Honeoye Falls Lima Cent. Sch. Dist.*, 517 F. App'x 11, 12 (2d Cir. 2013). Moreover, "we may affirm on any ground for which there is a record sufficient to permit conclusions of law, including grounds not relied

upon by the district court." *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F. 3d 144, 157–58 (2d Cir. 2015) (internal quotation marks omitted).

We affirm here because the claims raised in the proposed complaint are barred by the doctrine of claim preclusion. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) (recognizing that courts may raise claim preclusion *sua sponte*). Under that doctrine, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Claim preclusion thus applies where "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Monahan v. N.Y.C. Dept. of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000).

Those requirements are satisfied here. First, the district court's dismissals for failure to state a claim in *Malcolm I*, *II*, *III*, and *V* were judgments on the merits. *See Moitie*, 452 U.S. at 399 n.3 ("[A] dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits." (internal quotation marks omitted)). Second, Malcolm was a party to the prior litigation. Third, Malcolm asserted the same claims arising out of the same events in the prior cases.

In her proposed complaint, Malcolm asserts employment discrimination claims in violation of Title VII, the ADEA, New York State Human Rights Law ("NYSHRL"), 42 U.S.C. §§ 1983 and 1988, the New York State Constitution's equal protection clause, as well as claims for breach of contract, wrongful termination, and violation of "education law," all premised on alleged harassment of Malcolm by a supervisor, a performance review, RCSD's failure to investigate Malcolm's discrimination complaints, and Malcolm's layoff. *See generally* App'x 305.

In *Malcolm I*, *II*, and *III*, Malcolm asserted the same employment discrimination claims in violation of Title VII, the ADEA, NYSHRL, 42 U.S.C. §§ 1983 and 1988, the New York State Constitution's equal protection clause, and breach of contract—all premised on the same factual allegations. *See Malcolm*, 831 F. App'x at 3–5; *Curry-Malcolm v. Rochester City Sch. Dist.*, 835 F. App'x 623, 626 & n.4 (2d Cir. 2020); *Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester*, 2021 WL 4867006, at *3–6, 8 (W.D.N.Y. Oct. 19, 2021).

To the extent that Malcolm attempts to assert different claims in the proposed complaint—including wrongful termination in violation of a collective bargaining agreement and violation of "education law"—those claims are also precluded because they are rooted in the same series of events as the prior complaints. *See United States v. Tohono O'Odham Nation*, 563 U.S. 307, 316 (2011) ("The now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action depends on

factual overlap, barring claims arising from the same transaction." (internal quotation marks omitted)).

And although the proposed complaint differs from the prior complaints by naming the Board of Education as a defendant, the proposed complaint contains only one vague and conclusory allegation against the Board of Education, which is not sufficient to state a claim. *See* App'x 309 ("The School District, its employees, officers, managers, supervisors, directors, chiefs, superintendent of schools and board of education members and agents would join in, engage and participate with [Malcolm's supervisor] in her unlawful harassment, discrimination, and retaliation against Plaintiff."). The complaint otherwise does not distinguish between the defendants and appears to rely on privity to assert claims against the Board of Education. All such claims are precluded. *See Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d Cir. 1995) (explaining that privity exists where the newly named defendant was "known by [the] plaintiff at the time of the first suit" and "has a sufficiently close relationship to the original defendant to justify preclusion"). The claims in Malcolm's proposed complaint are thus precluded, so we affirm the district court's denial of leave to file the proposed complaint.

*Third*, Malcolm argues that Judge Larimer must recuse from "any further matters regarding [Malcolm]" due to judicial bias. Appellant's Br. at 76. This claim is meritless. The record does not reflect "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555

(1994); *see id.* ("[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge."); *Chen v. Chen Qualified Settlement Fund*, 552 F.3d 218, 227 (2d Cir. 2009) (holding that "adverse rulings, without more, will rarely suffice to provide a reasonable basis for" a bias claim).

We have considered the remainder of Malcolm's arguments and find them to be without merit. Accordingly, we **AFFIRM** the order of the district court.

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

[SEAL]

/s/ Catherine O'Hagan Wolfe

**THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NEW YORK**

IN RE: DECISION AND ORDER

BERNICE CURRY-MALCOLM 20-CR-6537L

**TEXT ORDER** The Clerk of the Court is hereby directed to convert this miscellaneous civil case to a civil case and to assign the matter to United States District Judge David G. Larimer. Once the civil action has been opened, the Clerk of the Court is directed to close this miscellaneous civil case. Signed by Hon. David G. Larimer on 7/24/2020. (KAH).

–CLERK TO FOLLOW UP– (Entered: 07/24/2020).

Remark: 20–MC–6006–DGL converted to 20–CV–6537–DGL. (JHF) (Entered: 07/24/2020).

**DECISION AND ORDER** The Court finds that plaintiff's proposed Complaint fails to state a claim against the defendants, and that granting leave to file to commence a new action would thus be futile. Plaintiff's motion for leave to proceed with a new action against the defendants is denied, and the Clerk is directed to close the case. Signed by Hon. David G. Larimer on 7/24/2020. (KAH).

–CLERK TO FOLLOW UP– (Entered: 07/24/2020).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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|---|---|
| IN RE: | DECISION AND ORDER |
| BERNICE CURRY-MALCOLM | 20-CR-6537L |
| | (Filed Jul. 24, 2020) |

Once again this Court confronts a proposed Complaint by Bernice Curry-Malcolm ("plaintiff"). In a prior Decision concerning plaintiff's previous lawsuits against the Rochester City School District (the "District") and related employees, I described plaintiff as a "demonstrable, abusive litigant." *Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester* ("*Malcolm I*"), 17-CV-6878; 388 F. Supp. 3d 242, 242 (W.D.N.Y. 2019). This Court further noted that plaintiff has created a "cottage industry of litigation" against school districts that have hired her. *Id.*, 388 F. Supp. 3d 242 at 248.

Plaintiff was initially employed by the District from 2015 through the end of the 2016-17 school year. (Proposed Complaint, Dkt. #1-4 at ¶19). She has previously brought at least three lawsuits against various District entities and employees arising out of that period of employment, alleging discrimination in violation of state and federal anti-discrimination statutes, as well as miscellaneous claims sounding in contract. All of these actions have been dismissed. *See Malcolm I*, 17-CV-6878 (complaint dismissed and filing injunction issued); *Malcolm v. Rochester City Sch. Dist. et al.*, ("*Malcolm II*"), 17-CV-6873 (complaint dismissed);

*Curry-Malcolm v. Rochester City Sch. Dist. et al.*, ("*Malcolm III*"), 18-CV-6450 (complaint dismissed).

After identifying "a pattern of frivolous and baseless litigation" by plaintiff against the District and related parties, the Court in *Malcolm I* permanently enjoined plaintiff from commencing further *pro se* actions arising out of her employment against the District, its employees, and/or the Association of Supervisors and Administrators of Rochester, without first obtaining leave of court. *Malcolm I*, 388 F. Supp. 3d 242 at 256-57 (W.D.N.Y. 2019).

Regrettably, this was not the first occasion in which the Court found it necessary to impose sanctions against plaintiff. Prior to plaintiff's employment with the District, she was employed by the Honeoye Falls-Lima Central School District and repeatedly pursued baseless, frivolous litigation against that district as well. On September 14, 2010, this Court issued identical sanctions related to plaintiff's flurry of duplicative federal and state litigation against the Honeoye Falls-Lima Central School District. *See Malcolm v. Bd. of Educ. of Honeoye Falls-Lima Central Sch. Dist.*, 737 F. Supp. 2d 117 (W.D.N.Y. 2010), *aff'd*, 506 Fed. Appx. 65 (2d Cir. 2012).

Plaintiff now moves (Dkt. #1), *pro se*, for leave of court to commence yet another action against the District and its Board of Education, and has submitted a proposed Complaint (Dkt. #2). With the plaintiff's lengthy history of abusive, frivolous and duplicative

litigation as background, the Court has reviewed plaintiff's submissions and the proposed Complaint.

Under the appropriate legal standard, I find that, once again, plaintiff has failed to state claims upon which relief may be granted, and therefore her motion for leave to file a new action is in all respects denied.

## FACTUAL AND PROCEDURAL BACKGROUND

According to the proposed Complaint, plaintiff properly exhausted her administrative remedies, dually filing administrative charges with the New York State Division of Human Rights ("NYSDHR") and/or Equal Employment Opportunity Commission on or about March 16, 2017 and March 30, 2017. Plaintiff's administrative charges primarily alleged that: (1) the District had wrongfully refused to sufficiently investigate internal complaints of discrimination lodged by plaintiff; and (2) the District eliminated plaintiff's Case Administrator of Special Education ("CASE") position in retaliation for her internal discrimination complaints. These charges, representing two out of five administrative charges made by plaintiff relative to her District employment, were still unresolved at the time the Court issued its decisions in *Malcolm I, Malcolm II*, and *Malcolm III*.

The NYSDHR found probable cause and recommended the matter for a public hearing. After the hearing, an Administrative Law Judge ("ALJ") issued a Recommended Decision finding that the evidence and

testimony concerning the charges did not support plaintiff's claims of discrimination or retaliation, and recommending their dismissal. The EEOC adopted those findings, dismissed the charges, and issued plaintiff a Right to Sue letter on December 4, 2019, which plaintiff alleges she received on December 7, 2019. (Dkt. #1-4 at ¶¶15-16). Plaintiff filed the instant motion for leave on or about March 3, 2020, within the applicable 90-day period for commencing an action.

The proposed Complaint alleges that beginning in 2015, plaintiff was employed by the District as a full-time CASE. The District's elimination of twenty-two CASE employees, including plaintiff, was the focus of the three prior actions commenced by plaintiff against the District. *See Malcolm I*, 388 F. Supp. 3d 242. Plaintiff claims that she was thereafter subjected to a discriminatory hostile work environment, harassment, and retaliation by the defendants, culminating in the retaliatory termination of her employment on or about July 1, 2017. She seeks leave of court to commence an action setting forth the following claims: (1) unlawful discrimination based on race, color, age and gender in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e-2 et seq.; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 et seq.; and New York Human Rights Law; (2) wrongful termination in violation of N.Y. Educ. Law 3020A; (3) denial of equal protection in violation of the United States Constitution and the New York State Constitution; and (4) breach of contract.

In assessing whether plaintiff's motion for leave to file the proposed Complaint (Dkt. #1) should be granted, the Court considers whether the proposed Complaint (Dkt. #1-4), viewed in the light most favorable to plaintiff and construing all inferences in her favor, states any claims upon which relief may be granted.

## DISCUSSION

### I. First, Fourth and Sixth Causes of Action: Discrimination in Violation of Title VII and the Equal Protection Clauses of the United States and New York State Constitutions[1]

#### A. Race-Based Discrimination

Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or

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[1] Plaintiff's Title VII claims (First Cause of Action) are duplicative of her Equal Protection claims under the New York and United States Constitutions (Fourth and Sixth Causes of Action). It is well settled in this Circuit that "the analytical framework of a workplace equal protection claim parallels that of a discrimination claim under Title VII." *Cunningham v. N.Y. State DOL*, 326 Fed. App. 617, 620 (2d Cir. 2009) (unpublished opinion). Thus where, as here, they are asserted together, "the two must stand or fall together." *Feingold v. New York*, 366 F.3d 138, 159 (2d Cir. 2004). *See also Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 53 n.3 (2d Cir. 2007) ("the Equal Protection Clauses of the federal and New York Constitutions are coextensive"); *Weber v. City of New York* 973 F. Supp. 2d 227, 274 (E.D.N.Y. 2013) (same).

The Court observes that in setting forth the basis for her New York Constitutional claim, plaintiff includes an allegation that

otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1). Stating a claim of discrimination in violation of Title VII thus requires the plaintiff to allege two elements: "(1) [that] the employer took adverse employment action against [the plaintiff]; and (2) [that plaintiff's] 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, 85 (2d Cir. 2015) (emphasizing that at the pleadings stage of an employment discrimination case, a plaintiff has the "minimal burden" of alleging facts "suggesting an inference of discriminatory

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the defendants engaged in a "pattern and practice of discrimination, harassment and retaliation" in violation of Title VII . . . " (Dkt. #1-1 at ¶256). To state a claim for "pattern and practice" discrimination, a plaintiff must plausibly allege that her employer engaged in widespread acts of intentional discrimination against a class of individuals, rather than isolated incidents against a single person. Plaintiff's proposed Complaint contains no such allegations, and the Court presumes that the plaintiff's use of "pattern and practice" language in the proposed Complaint was coincidental. To the extent the plaintiff intended to state such a claim, however, the proposed Complaint contains no allegations suggesting that intentional discrimination was the defendant's "standard operating procedure" and affected a class of employees, rather than plaintiff alone. *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 158 (2d Cir. 2001) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977)). As such, the proposed Complaint fails to state a plausible claim concerning a "pattern and practice" of unlawful discriminatory conduct.

motivation") (quoting *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015)).

An adverse employment action occurs when an employee "endures a materially adverse change in the terms and conditions of employment." *Vega*, 801 F.3d 72 at 85 (quoting *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000)). An adverse employment action is "more disruptive than a mere inconvenience or an alteration of job responsibilities," *Galabya*, 202 F.3d 636 at 640, and includes (but is not limited to) such acts as discharge or demotion, denial of a promotion, addition of responsibilities, involuntary transfer to an inferior position, and denial of benefits. *See Little v. NBC*, 210 F. Supp. 2d 330, 377 (S.D.N.Y. 2002).

Plaintiff alleges that she suffered from the following adverse employment actions: (1) the District, allegedly in violation of its own policies, failed to adequately investigate her December 26, 2016 internal complaint of race-based harassment against her supervisor, Teresa Root ("Root"), as well as a subsequent March 3, 2017 internal discrimination complaint; and (2) Root authored an unfavorable performance evaluation in or around spring 2016, rating plaintiff's performance as "developing." (Dkt. #1-4 at ¶175).

With respect to plaintiff's claim that the District failed to adequately investigate her internal complaints of discrimination, courts in this Circuit have consistently concluded that an employer's failure to investigate a plaintiff's complaint of discrimination does

not constitute an adverse employment action for purposes of a disparate treatment claim. *See Bianchi v. Rochester City Sch. Dist.*, 2019 U.S. Dist. LEXIS 168991 at *23 (W.D.N.Y. 2019) ("a number of Courts in this Circuit have held that an employer's failure to investigate an employee's complaint does not amount to an adverse employment action"); *Day v. City of New York*, 2015 U.S. Dist. LEXIS 161206 at *24 (S.D.N.Y. 2015) (collecting cases, and finding that an allegation that the employer failed to follow its own internal policies when it failed to investigate plaintiff's discrimination complaint did not allege an adverse employment action).

I find no basis to disturb this precedent, particularly given that plaintiff makes no claim that the District's allegedly insufficient investigations altered the terms and conditions of her employment in any way. I therefore conclude that plaintiff's contention that the District failed to properly investigate her internal discrimination complaints does not plausibly allege an adverse employment action.

With respect to plaintiff's allegation that Root's assignment of a "developing" rating in her spring 2016 performance evaluation was adverse, it is well settled that "a negative performance review, without any showing of a negative ramification, cannot constitute an adverse employment action." *Natofsky v. City of New York*, 921 F.3d 337, 352 (2d Cir. 2019). Although plaintiff alleged in her administrative charge that a rating of "developing" was a "barrier to tenure," plaintiff has not alleged that she was eligible for tenure but

was denied it because of the "developing" rating, that she was counseled or disciplined because of the evaluation, or that it otherwise altered her compensation, benefits, job title, or any other terms and conditions of her employment. As such, plaintiff has failed to plausibly state that the performance evaluation was an adverse employment action.

The proposed Complaint thus fails to state a claim for disparate treatment under Title VII.

### B. Hostile Work Environment

"An employer violates Title VII when the 'workplace is permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . so long as there is a basis for imputing the conduct that created the hostile environment to the employer.'" *Rasmy v. Marriott Int'l Inc.*, 952 F.3d 379, 387 (2d Cir. 2020) (quoting *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 546 (2d Cir. 2010)).

"To plead a hostile work environment claim, a plaintiff must plead facts that describe conduct which: (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." *Maines v. Last Chance Funding, Inc.*, 2018 U.S. Dist. LEXIS 162073 at

*26 (E.D.N.Y. 2018) (quoting *Placide-Eugene v. Visiting Nurse Serv. of New York*, 2013 U.S. Dist. LEXIS 76240 at *34 (E.D.N.Y. 2013)). Furthermore, "[a]s a general rule, incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive. Isolated acts, unless very serious, do not meet the threshold of severity or pervasiveness." *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002) (citations and internal quotation marks omitted).

Here, plaintiff claims in conclusory fashion that she was subjected to ongoing race-based harassment by Root, and by coworker Kariann Kittelberger ("Kittelberger").[2] While plaintiff contends that Root subjected

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[2] Plaintiff's complaint also makes reference to Kittelberger, a Caucasian CASE who was allegedly younger than plaintiff, having been promoted on or about February 17, 2017 to the position of Acting (or Interim) Director of NorthSTAR, a District-run mental health education program. Plaintiff avers that a month later, on March 16, 2017, the Board of Education voted to make Kittelberger the Director of NorthSTAR. Plaintiff claims that: "[p]laintiff should have been given the opportunity to serve as the Acting Director [and Director] of NorthSTAR." (Dkt. #1-1 at ¶196, ¶218; Dkt. #1-1 Exhibits, March 30, 2017 NYSDHR charge, at ¶12). Plaintiff's March 30, 2017 NYSDHR charge adds that at some point prior to Kittelberger's promotion to Director, plaintiff "made the District aware that [plaintiff] would move up in the position of Director for NorthSTAR." (Dkt. #1-1 Exhibits, March 30, 2017 NYSDHR charge, at ¶21). To the extent that plaintiff intended these allegations to state a claim for discriminatory or retaliatory failure to promote, plaintiff has failed to state such a claim, as she has not alleged that she was qualified to be, or ever applied to be (or alternatively, was precluded by defendants from applying to be), the Acting Director or Director of NorthSTAR. *See generally Grimes v. Sil*, 2020 U.S. Dist. LEXIS 54290 at *18 (E.D.N.Y. 2020) (to state a claim for discriminatory failure to promote, plaintiff

her to "relentless . . . pursuit" and that Kittelberger had a "vendetta" against her, she makes no allegations concerning any specific comments or offensive conduct by Root, and as to Kittelberger, alleges only that Kittelberger "dislike[d]" plaintiff, and told Root and another supervisor that she felt "hostile towards" plaintiff. (Dkt. #1-4 at ¶36, ¶66; Dkt. #1-4 Exhibits, March 30, 2017 NYSDHR charge, at ¶13).

These allegations do not plausibly describe a hostile work environment. Plaintiff does not identify any offensive, disparaging or insulting comments or interactions whatsoever, let alone a continuous or pervasive pattern of such incidents, which were motivated by or relating to plaintiff's race (or, more broadly, related to her membership in any protected class). She makes no allegation that any of Root's or Kittelberger's conduct, whatever it might have been, is attributable to the District.

While plaintiff does allege that Root gave her an unfair performance review, and that the District failed to thoroughly investigate plaintiff's internal discrimination claims, such allegations are "insufficient as a matter of law to state a hostile work environment claim." *Haggood v. Rubin & Rothman, LLC*, 2014 U.S. Dist. LEXIS 161674 at *48 (E.D.N.Y. 2014) (claims that employer reprimanded plaintiffs, failed to investigate

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must allege that she applied for a specific position and was rejected therefrom, and must sufficiently describe the duties of the position to permit the inference that she was qualified for it); *Gupta v. City of Bridgeport*, 2015 U.S. Dist. LEXIS 33907 at *21 (D. Conn. 2015) (same).

their discrimination complaints, and engaged in excessive scrutiny, even if adequate to demonstrate disparate treatment, are insufficient to state a hostile work environment claim).

In short, plaintiff's hostile work environment claim is comprised solely of "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," which are insufficient to state a claim. *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009).

## II. Second Cause of Action: Age-Based Disparate Treatment

In order to state a prima facie claim of age-based discrimination in violation of the ADEA, a plaintiff must allege that: (1) she is a member of a protected class (e.g., over the age of forty); (2) her job performance was satisfactory; (3) she suffered adverse employment action; and (4) the circumstances surrounding that action permit an inference of discrimination based on age. *See Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 559 (2d Cir. 1997).

Here, plaintiff contends that she is over the age of forty and was performing her job as a CASE satisfactorily. She further asserts, in conclusory fashion, that certain younger employees (including a group of fifteen individuals identified by name, and some by racial background and age, with the latter identified as Caucasian and African-American men and women between the ages of thirty-four and thirty-six) were

treated more "favorab[ly]" than she was by the District. (Dkt. #1-4 at ¶¶175-176).

These allegations, which do not specify in what ways the other employees were treated differently, explain how they were similarly-situated to plaintiff, or identify the adverse employment action to which plaintiff was subjected to which the others were not, are simply too vague to state a plausible claim of age-based discrimination. *See e.g.*, *Vaigasi v. Solow Mgmt. Corp.*, 2017 U.S. Dist. LEXIS 37338 at *15 (S.D.N.Y. 2017) (a vague assertion that an employee was "treated less well than [younger] individuals" is "legally insufficient" to state a claim for age-based discrimination); *Saenger v. Montefiore Med. Ctr.*, 706 F. Supp. 2d 494, 514 (S.D.N.Y. 2010) ("vague claims of differential treatment alone do not suggest discrimination, unless those treated differently are 'similarly situated in all material respects' ") (quoting *Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 64 (2d Cir. 1997)).

As such, the proposed Complaint fails to state a claim for disparate treatment under the ADEA.

### III. First and Second Causes of Action: Retaliation in Violation of Title VII and the ADEA

Plaintiff also alleges that the District's elimination of her CASE position was undertaken in retaliation for her engagement in protected activity.[3]

Generally, in order to state a claim of retaliation in violation of Title VII or the ADEA, a plaintiff must "give plausible support to the reduced prima facie requirements" of: (1) participation in protected activity; (2) the employer's awareness of that activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action. *Febrianti v. Starwood Worldwide*, 2016 U.S. Dist. LEXIS 15285 at *9 (S.D.N.Y. 2016) (quoting *Littlejohn*, 795 F.3d 297 at 318)). *See also Ninying v. N.Y. City Fire Dep't*, 2020 U.S. App. LEXIS 12232 at *5 (2d Cir.2020) (unpublished opinion).

As in prior *Malcolm* litigation, the proposed Complaint focuses on the District's elimination of the probationary CASE positions, which effectively laid off the twenty-two persons in that position, including

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[3] Plaintiff also indicates in the proposed Complaint (Dkt #2 at ¶¶36-39), as she did in her March 30, 2017 NYSDHR charge, that she believes that the District retaliated against her for filing the December 26, 2016 internal complaint by declining to adequately investigate it. It is well-settled, however, that an employer's failure to investigate a discrimination complaint generally cannot be considered an adverse employment action taken in retaliation for the filing of *the same discrimination complaint. See Fincher v. Depository Trust & Clearing Corp.*, 604 F.3d 712, 721 (2d Cir. 2010).

plaintiff. Plaintiff now makes the startling claim that the elimination of all twenty-two probationary CASE positions was the result of a vendetta directed solely toward her. Plaintiff asserts, without any supporting facts, that the District's asserted reason for eliminating the positions (budgetary concerns) was a mere pretext, and that the loss of 21 other persons' jobs was simply "collateral damage" from the District's attempt to retaliate against plaintiff for having complained about discrimination. This is pure conjecture. Plaintiff's narcissistic belief that all things revolve around her cannot support a viable cause of action for retaliation.

Plaintiff also alleges in the proposed Complaint that all of the other laid-off CASEs – except for her – were assisted to find other positions. (Dkt. #1-4 at ¶¶158-163). However, this Court has previously discussed this claim in *Malcolm I*, where the Court determined that plaintiff had been placed on a preferred eligibility list for recall, and was in fact recalled by the District in or around November 2017, and accepted a position with the same salary and benefits as her former probationary CASE position. *Malcolm I*, 388 F. Supp. 3d 242 at 250. Nor was the recall the District's first attempt to re-employ plaintiff: plaintiff concedes in her March 30, 2017 NYSDHR charge, which is attached to the proposed Complaint and explicitly incorporated therein, that soon after the probationary CASE layoffs were announced, the District offered plaintiff a contract for a full-time teaching position, which she refused because she considered it to be a demotion. (Dkt.

#1-4 Exhibits, March 30, 2017 NYSDHR charge, at ¶¶34, 43, 47, 50).

The proposed Complaint thus alleges that plaintiff engaged in protected activity of which the District would have been aware (the filing of two internal discrimination complaints and an EEOC charge), and was subjected to an adverse employment action (the decision to lay off all persons in plaintiff's position). With respect to circumstances implying a causal connection, plaintiff relies solely upon the temporal proximity between her December 26, 2016 and March 3, 2017 internal discrimination complaints and her March 16, 2017 administrative charge, and the proposal and/or adoption of a 2017-2018 District budget that eliminated all probationary CASEs.

It is well settled that "[a]t the pleading stage, '[a] retaliatory purpose can be shown indirectly by timing: protected action and the employer's adverse employment action may in itself be sufficient to establish the requisite causal connection between a protected activity and retaliatory action.'" *Rivera v. JP Morgan Chase*, 2020 U.S. App. LEXIS 17114 at *6 (2d Cir. 2020) (unpublished opinion, vacating district court's dismissal of retaliatory termination claim where plaintiff's employment was terminated within 1-2 months of his engagement in protected activity) (quoting *Vega*, 801 F.3d 72 at 90).

Here, the Court's analysis of temporal proximity is complicated by the fact that the proposed Complaint does not identify precisely when, or by whom, the

District budget proposing elimination of probationary CASEs for 2017-2018 was crafted, and when the Board of Education voted to adopt it. Plaintiff alleges only that the Superintendent presented the proposed budget to the Board of Education on or about March 21, 2017, and that she read a news article about it a day or two later. As such, it is entirely possible that some or all of plaintiff's protected activities either fall outside the 1-2 month window generally accepted in this Circuit for reliance on temporal proximity to support an inference of retaliation, or even that some of plaintiff's protected activity took place *after* the pertinent budgetary decisions had already been made.

Nonetheless, assuming *arguendo* that one or more of plaintiff's protected activities occurred during the requisite window of time, temporal proximity is the sole foundation upon plaintiff's claim that her layoff occurred under circumstances suggesting retaliation rests, and that foundation is irreparably compromised by plaintiff's other factual allegations.

First, the value of temporal proximity is diminished by the fact that school district staffing needs are evaluated annually from early spring (with the proposed budget for the 2017-2018 school year having been prepared on or before March 21, 2017, according to plaintiff), with adjustments continuing throughout the summer and into the fall (when plaintiff was recalled), thus bringing most protected activities within the 2-month window, simply by coincidence. *See generally Ferrara v. Maturo*, 2019 U.S. Dist. LEXIS 144456 at *20 (D. Conn. 2019).

Second, the fact that plaintiff's position was eliminated – by her own account – as part of a layoff that included the more than twenty other individuals with plaintiff's same job title, none of whom were alleged to have engaged in protected activity, completely undercuts the plausibility of plaintiff's retaliation claim.

Finally, not only did the layoff apply to all probationary CASEs equally, but all of the affected employees (plaintiff included) were thereafter assisted by the District to find other positions, with plaintiff initially declining a full-time teaching position, and later accepting a recall position with the District in or around November 2017. *Malcolm III*, 18-CV-6450 (Dkt. #1 at ¶21). These allegations undermine any suggestion of a causal connection between plaintiff's protected activity and the elimination of the probationary CASE positions.

In short, the Court finds that while "temporal proximity, without more," may be sufficient to suggest an inference of discrimination for purposes of a claim for retaliatory termination, "temporal proximity, with less" – that is, vague allegations of potential temporal proximity, eroded by a plaintiff's own factual allegations that suggest coincidental timing, describe an adverse employment action which equally affected dozens of employees who didn't engage in protected activity, and indicate that plaintiff's employer subsequently made multiple attempts to reemploy her, and ultimately did re-hire her in a position with equal pay and benfits – is insufficient to "nudge [plaintiff's] claims across the line from conceivable to plausible."

*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). *See also Febrianti*, 2016 U. S. Dist. LEXIS 15285 at *15-*17 (dismissing retaliation claim as wholly conclusory where plaintiff points to no circumstantial evidence of retaliation such as disparate treatment of employees who didn't engage in protected conduct, relies solely on temporal proximity, and sets forth "uniformly vague allegations about the events surrounding [her protected activity and the adverse employment action that followed, which] in no way suggest that the temporal proximity . . . is anything but coincidence").

The proposed Complaint thus fails to state a plausible claim of retaliatory termination.

## IV. Fifth Cause of Action: Wrongful Termination in Violation of N.Y. Educ. Law

To the extent plaintiff claims that her termination also violated N.Y. Educ. Law §3020-a, that claim was previously dismissed in *Malcolm III*, because "this statute covers tenured teachers, and plaintiff, by her own admission, was [an untenured] probationary employee." *Malcolm III*, 389 F. Supp. 3d 189 at 198. Here, plaintiff again concedes that she was an untenured probationary CASE. (Dkt. #1-4 at ¶¶194-195). As such, and furthermore by operation of res judicata, plaintiff fails to state a claim for wrongful termination in violation of N.Y. Educ. Law §3020-a.

### V. Fifth Cause of Action: Breach of Contract

Plaintiff's Fifth Cause of Action also alleges a breach of contract claim, arising from the alleged collective bargaining agreement between the District and plaintiff's union. This claim was previously dismissed in both *Malcolm II* and *Malcolm III* as insufficiently stated, based on the fact that the collective bargaining agreement "would not be covered by a breach of contract action," and plaintiff's failure to plead any contract, such as an employment contract, between herself and the District. *Malcolm II*, 388 F. Supp. 3d 257 at 264; *Malcolm III*, 389 F. Supp. 3d 189 at 198. It fails for the same reasons, and on the basis of res judicata, here.

## CONCLUSION

For the reasons set forth above, the Court finds that plaintiff's proposed Complaint fails to state a claim against the defendants, and that granting leave to file to commence a new action would thus be futile.

Plaintiff's motion for leave to proceed with a new action against the defendants (Dkt. #1) is denied, and the Clerk is directed to close the case.

IT IS SO ORDERED.

/s/ David G. Larimer
DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
July 24, 2020.

## Constitutional, Statutory, and Regulatory Provisions Involved

U.S. Const. amend V

U. S. Const. amend XIV, § 1

**The New York State Constitution** provides in pertinent part:

ARTICLE I, BILL OF RIGHTS
**Section 11: [Equal protection of laws; discrimination in civil rights prohibited]**

§ 11. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001.)

**NY Code – Article 15: HUMAN RIGHTS LAW, SECTION 296** provides in pertinent part:

§ 290. Purposes of article.

1. This article shall be known as the "Human Rights Law".

2. It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights.

3. The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A division in the executive department is hereby created to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; to encourage and promote the development and execution by all persons within the state of such state programs; to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in educational institutions, in public services, in housing accommodations, in commercial space and in credit transactions and to take other actions against discrimination as herein provided; and the division established hereunder is hereby given general jurisdiction and power for such purposes.

§ 296. Unlawful discriminatory practices.

(1) It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

(b) For an employment agency to discriminate against any individual because of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.

(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

(6) It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.

(7) It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

**42 U.S. Code § 2000e** provides in pertinent part:

1. Definitions

For the purposes of this subchapter—

**(a)** The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(c) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees.

**42 U.S. CODE § 2000E–2 – UNLAWFUL EMPLOYMENT PRACTICES**

(a) Employer practices

It shall be an unlawful employment practice for an employer—

to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

**42 U.S. CODE § 2000E–3 – OTHER UNLAWFUL EMPLOYMENT PRACTICES** provides in pertinent part:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on—the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against

any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

### Title VII of the Civil Rights Act of 1964

Prohibits discrimination by employers against an individual on the basis of the individual's race, color, religion, sex (including pregnancy) and national origin. Title VII prohibits discrimination in connection with the hiring and discharge of an employee and "with respect to his compensation, terms, conditions or privileges of employment. Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex.

### CIVIL RIGHTS—TITLE VII—DISPARATE TREATMENT

Title VII prohibits intentional discrimination based on race, color, religion, sex, or national origin and prohibits both "disparate treatment" and "disparate impact" discrimination. Title VII prohibits employers from treating applicants or employees differently because of their membership in a protected class.

Protected classes identified by state and/or federal law include:

Age – A person 40 years of age or older.

Color – Regarding the complexion or varying shades of a person's skin.

Race – A local geographic or global human population distinguished as more or less distinct group by genetically transmitted immutable characteristics (such as skin color, hair texture and certain facial features); any group of people united or classified together on the basis of common history, nationality, or geographical distribution; mankind as a whole. All people are allowed for the purposes of Title VII of 1964 Civil Rights Act to claim genealogy to one or more race and are, therefore, readily covered under this category.

Title VII prohibits sex discrimination in employment. Specifically, Title VII makes it illegal for an employer:

"1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, or privileges of employment, because of such individual's . . . sex . . . ; or

"2) to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect [the individual's] status as an employee, because of such individual's . . . sex. . . ." Title VII also prohibits sex discrimination in on-the-job and apprenticeship programs, retaliation against an

employee for opposing a discriminatory employment practice, and sexually stereotyped advertisements for employment positions.

Title VII prohibits employers from treating applicants or employees differently because of their membership in a protected class.

Title VII prohibits the employer from using a facially neutral employment practice that has an unjustified adverse impact on members of a protected class.

**42 U.S.C. §1981**

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

**42 U.S.C. §1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or

other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**Fifth Amendment To The United States Constitution**

In part, No person shall be deprived of life, liberty, or property, without due process of law.

**Fourteenth Amendment To The United States Constitution**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.