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 6th day of May, two thousand twenty-one.

Rimma Kunik,

Plaintiff - Appellant,

v.

New York City Department of Education, Principal Kaye Houlihan, Assistant Principal Dorish Munoz Fuentes,

Defendants - Appellees.

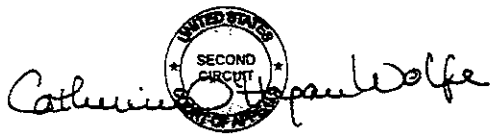
ORDER

Docket No: 20-741

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

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



20-741-cv
Kunik v. N.Y.C. Dep't of Educ.

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 15th day of January, two thousand twenty-one.

PRESENT:

GUIDO CALABRESI,
REENA RAGGI,
DENNY CHIN,
Circuit Judges.

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RIMMA KUNIK,

Plaintiff-Appellant,

v. 20-741-cv

NEW YORK CITY DEPARTMENT OF EDUCATION,
PRINCIPAL KAYE HOULIHAN,
ASSISTANT PRINCIPAL DORISH MUNOZ FUENTES,
Defendants-Appellees.[*]

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

FOR PLAINTIFF-APPELLANT: Rimma Kunik, *pro se*, Pearl River, New York.

FOR DEFENDANTS-APPELLEES: Elizabeth I. Freeman, Jeremy W. Shweder, *for* James E. Johnson, Corporation Counsel of the City of New York, New York, New York.

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

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court entered on January 31, 2020, is **AFFIRMED**.

Plaintiff-appellant Rimma Kunik, a retired high school teacher proceeding pro se, appeals from the district court's dismissal of her claims of employment discrimination and retaliation brought against defendants-appellees New York City Department of Education ("DOE"), Kaye Houlihan, and Dorish Munoz Fuentes (collectively, "defendants") pursuant to 42 U.S.C. § 1983 and state law. Kunik specifically challenged the district court's (1) September 29, 2017 dismissal of certain claims for failure to state a claim or as time-barred, and (2) January 31, 2020 award of summary judgment to defendants on her remaining claims. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I. Certain Claims Are Waived

We "liberally construe pleadings and briefs submitted by pro se litigants, reading such submissions to raise the strongest arguments they suggest." *McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 156 (2d Cir. 2017) (internal quotation marks omitted). Despite affording pro se litigants "some latitude in meeting the rules governing litigation," we "normally will not[ ] decide issues that a party fails to raise in his or her appellate brief." *Moates v. Barkley*, 147 F.3d 207, 209 (2d Cir. 1998); *see also Terry v. Inc. Village of Patchogue*, 826 F.3d 631, 632–33 (2d Cir. 2016) ("Although we accord filings from pro se litigants a high degree of solicitude, even a litigant representing [herself] is obliged to set out identifiable arguments in [her] principal brief." (internal quotation marks omitted)).

Kunik has waived any challenge to the district court's dismissal of her retaliation, procedural due process, New York State Human Rights Law ("NYSHRL"), and New York City Human Rights Law ("NYCHRL") claims by not raising any arguments concerning these claims in her principal brief to this Court. Her inquiry about the NYSHRL and NYCHRL claims in her reply brief, even if construed as an argument challenging dismissal, is insufficient to preserve those claims for appeal because we generally do not consider arguments raised for the first time in a reply brief, and nothing in the record before us warrants a departure from that rule. *See JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005). Kunik

has also waived her claims against DOE by not challenging the district court's ruling on municipal liability.

II. Certain Claims Are Time-Barred

The district court properly dismissed Kunik's claims based on discriminatory actions taken prior to December 18, 2012 as time-barred. In New York, "a plaintiff asserting a claim of discrimination under § 1983 must file suit within three years of the adverse employment action." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 79 (2d Cir. 2015). Here, Kunik filed her complaint on December 18, 2015. Accordingly, to the extent her § 1983 claims rely on alleged adverse employment actions that occurred prior to December 18, 2012, those claims are time-barred.

The district court also correctly determined that Kunik did not allege a "continuing violation" that would allow time-barred claims to be considered timely. *See Patterson v. Cnty. of Oneida, N.Y.*, 375 F.3d 206, 220 (2d Cir. 2004) (noting that this exception does not apply to "*discrete* acts of discrimination . . . that occur outside the statutory time period" (emphasis in original)). The discriminatory acts alleged to have occurred prior to this date were discrete acts, such as performance reviews or work assignment matters.

III. Certain Claims Are Not Facially Plausible

We review de novo the dismissal of a complaint pursuant to Rule 12(b)(6). *See Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 429 (2d Cir.

2012). The complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

To establish a hostile work environment claim under § 1983, a plaintiff must show that the workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of [her] employment and create[s] an abusive working environment." *Littlejohn v. City of New York*, 795 F.3d 297, 320–21 (2d Cir. 2015) (internal quotation marks omitted). The plaintiff must establish not only that she subjectively perceived her work environment to be abusive, but also that "a reasonable person would find it hostile or abusive." *Id.* at 321 (internal quotation marks omitted). To be actionable under the Equal Protection Clause, moreover, a plaintiff must show that the abusive conduct occurred *because of* her membership in a protected class. *Id.* at 320. "Where an alleged constructive discharge stems from an alleged hostile work environment, a plaintiff must show working conditions so intolerable that a reasonable person would have felt compelled to resign." *Fincher v. Depository Tr. & Clearing Corp.*, 604 F.3d 712, 725 (2d Cir. 2010) (internal quotation marks omitted). The standard for such a constructive discharge is "higher than the standard for establishing a hostile work environment." *Id.*

The district court correctly determined that Kunik's amended complaint failed to state a claim for hostile work environment or constructive discharge because, drawing all reasonable inferences in her favor, it did not plausibly allege that her work environment was "permeated" with discrimination based on her age and religion, *Littlejohn*, 795 F.3d at 320, or that a reasonable person would have felt "compelled to resign" based on such discriminatory hostility, *Fincher*, 604 F.3d at 725. Kunik did not allege any overt discrimination based on her age or religion, much less any facts showing that "discriminatory intimidation, ridicule, and insult" was "sufficiently severe or pervasive" to alter the conditions of her employment or created an abusive working environment. *Littlejohn*, 795 F.3d at 320–21. While she did allege "religious discrimination and/or age discrimination" based on defendants' "demeanor," App'x at 320, her allegations of implicit discrimination were speculative and conclusory.

IV. Certain Claims Do Not Present An Issue Of Fact For Trial

This Court reviews a grant of summary judgment de novo, "resolv[ing] all ambiguities and draw[ing] all inferences against the moving party." *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 127 (2d Cir. 2013) (per curiam). "Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Doninger v. Niehoff*, 642 F.3d 334, 344 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). A party cannot defeat a motion for summary judgment

with "conclusory allegations or unsubstantiated speculation." *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 428 (2d Cir. 2001).

Employment discrimination claims brought under § 1983 and the Equal Protection Clause are analyzed under the three-step *McDonnell Douglas* framework. *See Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 123 (2d Cir. 2004) (*citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). First, the plaintiff must establish a *prima facie* case of discrimination by showing that (1) she is a member of a protected class; (2) she is qualified for her position; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination. *See Vega*, 801 F.3d at 83. Once an employee has demonstrated a prima facie case, "[t]he burden then shifts to the employer to 'articulate some legitimate, nondiscriminatory reason' for the disparate treatment." *Id.* (quoting *McDonnell Douglas Corp.*, 411 U.S. at 802). "If the employer articulates such a reason for its actions, the burden shifts back to the plaintiff to prove that the employer's reason was in fact pretext for discrimination." *Id.* (internal quotation marks omitted). "A plaintiff sustains an adverse employment action if he or she endures a materially adverse change in the terms and conditions of employment." *Id.* at 85 (internal quotation marks omitted). The change must be "more disruptive than . . . an alteration of job responsibilities," and may consist of "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly

diminished material responsibilities." *Shultz v. Congregation Shearith Israel of City of New York*, 867 F.3d 298, 304 (2d Cir. 2017) (internal citations and quotation marks omitted).

On appeal, Kunik contends only that she was subject to an adverse employment action because her unsatisfactory performance review prevented her from being able to teach summer school and obtain other optional "per-session" work for additional income. She does not challenge the district court's other conclusions as to alleged adverse employment actions.

The district court correctly determined that her unsatisfactory performance review did not result in an adverse employment action as a matter of law for several reasons. First, the record is clear that Kunik had not applied for any position teaching summer school or other per-session work in 2013, the year she alleged she was prevented from doing so by her poor performance review; in fact, she had missed the deadline to apply before she received the rating. Moreover, DOE payroll records showed that she had not taught summer school since 2003. An "unsatisfactory" performance review is not an adverse employment action where it does not affect a person's "compensation, benefits, or job title." *Fairbrother v. Morrison*, 412 F.3d 39, 56-57 (2d Cir. 2005), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

Second, even if Kunik had been denied the opportunity to earn income through teaching summer school or other per-session work, a reasonable jury could not

conclude that the denial of this additional work constituted "a material loss of benefits." *Shultz*, 867 F.3d at 304. Kunik testified that this work was "outside [her] permanent employment" and something she had to apply for. Kunik Deposition Tr. at 8–10, *Kunik v. New York City Dep't of Educ.*, No. 15-cv-9512 (S.D.N.Y. Jan. 18, 2019), ECF No. 63-2. Moreover, she was not earning income from per-session work at the time she received the "Unsatisfactory" rating, and she did not provide evidence that she suffered any other form of demotion or "material loss of benefits" as a result of that rating. *Shultz*, 867 F.3d at 304 (internal quotation marks omitted). Hence, the district court correctly granted summary judgment on this basis. *See Collins v. N.Y.C. Transit Auth.*, 305 F.3d 113, 118 (2d Cir. 2002).

In addition, Kunik also failed to present sufficient evidence to permit a reasonable jury to find that any adverse action was motivated by discrimination or retaliation. She testified that defendants never commented on her age or religion, and she presented no evidence to support her speculative allegations that defendants harbored implicit bias towards her based on her age or religion. *See Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 456 (2d Cir. 1999) ("[feelings and perceptions] of being discriminated against [are] not evidence of discrimination"). Moreover, although the record does contain evidence that Kunik was treated differently from other teachers in her department -- for example, she was given an "Unsatisfactory" performance review -- she

did not present evidence from which a reasonable jury could find the disparate treatment was motivated at least in part by her age or religion.

* * *

We have reviewed Kunik's remaining arguments on appeal and conclude they are without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RIMMA KUNIK,

Plaintiff,

- against -

NEW YORK CITY DEPARTMENT OF EDUCATION, PRINCIPAL KAYE HOULIHAN, AND ASSISTANT PRINCIPAL DORISH MUNOZ FUENTES,

Defendants.

15-CV-9512 (VSB)

OPINION & ORDER

Appearances:

Steven I. Lewbel
Melito & Adolfsen P.C.
New York, New York
Counsel for Plaintiff

John P. Guyette
for Zachary W. Carter
Corporation Counsel, City of New York
New York, New York
Counsel for Defendants

VERNON S. BRODERICK, United States District Judge:

Before me is the motion of Kaye Houlihan and Dorish Munoz Fuentes (the "Defendants") for summary judgment dismissing Plaintiff Rimma Kunik's amended complaint, (Doc. 30), which asserts claims of retaliation, religious discrimination, age discrimination, hostile work environment, constructive discharge, procedural due process, and municipal liability pursuant to Title 42 United States Code, Section 1983. Plaintiff also brings retaliation and religious discrimination claims under the New York State Human Rights Law, N.Y. Exec.

Law §§ 290 *et seq.* ("NYSHRL") and the New York City Human Rights Law, N.Y. City Admin. Code §§ 8-101 *et seq.* ("NYCHRL").

In a Memorandum & Order filed on September 27, 2017, I dismissed Plaintiff's § 1983 claims for retaliation, hostile work environment, constructive discharge, procedural due process, and municipal liability, and dismissed as time barred Plaintiff's § 1983 claims to the extent they accrued prior to December 18, 2012. I also dismissed Plaintiff's NYSHRL and NYCHRL claims as time-barred. (Doc 34, at 9–11). With regard to the incidents that occurred prior to December 18, 2019, I held that the incidents were primarily a series of discrete events which did not constitute a continuing violation, and were, therefore, barred from consideration as untimely. (*Id.*) Plaintiff's claims for religious and age discrimination pursuant to § 1983 after December 18, 2012, were not dismissed, and are the only claims that remain in the case.

Because I find that Plaintiff has failed to establish a prima facie case of age or religious discrimination under § 1983, Defendants' motion for summary judgment is GRANTED.

I. Background

A. *Parties*

As of the date of the filing of the Amended Complaint, Kunik was a 69-year-old female, native of Russia, and an observant member of the Jewish faith. (Defs.' Fact Statement ¶ 1.)[1] Kunik was employed by the Department of Education at Fort Hamilton High School ("FHHS") from 1994 until her departure in 2014, and became a Department of Education tenured teacher in 1995. (Defs.' Fact Statement ¶ 2; Pl.'s Fact Statement ¶¶ 106-107.)[2] She was licensed to teach English as a Second Language ("ESL") and English grades 7 through 12. (Defs.' Fact Statement

[1] "Defs.' Fact Statement" refers to Defendants' Local Rule 56.1 Statement of Material Facts with Plaintiff's responses. (Doc. 69-1.)

[2] "Pl.'s Fact Statement" refers to Plaintiff's Local Rule 56.1 Statement of Material Facts. (Doc. 69-2)

¶ 3; Pl.'s Fact Statement ¶ 110.)

From 2003 to 2013, Defendant Fuentes was the Assistant Principal of the Foreign Languages and ESL Department of FHHS (the "ESL Department"). (Pl.'s Fact Statement ¶ 241.) From 2012 until Kunik's departure, Defendant Houlihan was the Principal of FHHS. (Pl.'s Fact Statement ¶ 188.)

B. *Plaintiff's Allegations*[3]

After working at FHHS since 1994, Plaintiff experienced discriminatory behavior from her supervisors in the 2012-2013 and 2013-2014 school years. In the spring semester of 2013, Kunik was assigned a challenging schedule, "forcing her to literally resort to no more than 5 hours of sleep daily for the whole spring semester . . . in order to comply with her contractual obligations." (Am. Compl. ¶ 28.) Thereafter, in a report dated April 9, 2013, Defendant Fuentes described Kunik as "confrontational." (Ernst Decl. Ex. M at 6.)[4] A week later, on April 16, 2013, Kunik raised the problems she was having with Defendant Fuentes to Defendant Houlihan. (Am. Compl. ¶ 26.) Defendant Houlihan ignored Kunik's complaints. (*Id.* ¶ 26.) Kunik received an "unsatisfactory" rating for the 2012-2013 school year, and a "developing" rating for the 2013-2014 school year. (Defs.' Fact Statement ¶¶ 72, 88.) The unsatisfactory rating prohibited Kunik from teaching summer school, and prevented her from working for per-session pay. (Defs.' Fact Statement ¶¶ 137, 139.)

During the 2013-2014 school year, Kunik was not chosen for a professional development seminar. (Defs.' Fact Statement. ¶ 119.) During the 2013-2014 school year, Defendant

[3] Because I dismissed Plaintiff's claims prior to December 18, 2012, as time-barred, I only consider Plaintiff's allegations after that time. (*See* Doc. 34).

[4] "Ernst Decl." refers to the Declaration of Leo T. Ernst in Support of Defendants' motion for summary judgment and its supporting exhibits (Doc. 36).

Houlihan observed Kunik on six occasions. (Defs.' Fact Statement ¶ 75.) In connection with these observations, Kunik filed at least five APPR requests[5] that claimed that the observation reports were not accurate, but Defendant Houlihan refused to accept Kunik's arguments, nor did she adjust the ratings. (Am. Compl. ¶ 50; Defs.' Fact Statement ¶ 72.)

In September 2014, Defendant Houlihan gave permission to Kunik to provide Houlihan with "artifacts"—additional information about observations—that were originally due in April, by October 1, 2014. (Defs.' Fact Statement ¶¶ 133-136; Pl.'s Fact Statement ¶¶ 166-169.) However, during the few days in which Kunik had to submit the artifacts, two of the days fell on Rosh-ha-Shana, the Jewish New Year, and the day after Rosh-ha-Shana was the Sabbath. (Pl.'s Fact Statement ¶ 167.) Therefore, Kunik could not submit the artifacts on those days, and she asked Defendant Houlihan for an extension based on Kunik's religious observances. (*Id.* ¶ 167-168) On September 28, Houlihan reiterated that the artifacts were due on October 1. (Defs.' Fact Statement ¶¶ 133-136; Pl.'s Fact Statement ¶¶ 166-169.)

Throughout the 2013-2014 school year, Kunik alleges that other teachers in the ESL Department were given better schedules than she was given. (Defs.' Fact Statement ¶¶ 105.) Specifically, Kunik was assigned five advanced preparation classes, which required more work than basic or intermediate preparation classes, while other younger and non-Jewish teachers in the ESL Department received either fewer advanced preparation classes or basic and intermediate preparation classes. (Am. Compl. ¶ 46.)

Kunik resigned from her post on December 9, 2014. (Defs.' Fact Statement ¶ 4.) Because she resigned in her twenty-first year of tenured employment, Kunik lost certain benefits

[5] "APPR request" is not defined in the amended complaint; however, based upon the context I believe it refers to an APPR Resolution Assistance Request, a form used by a teacher if she is "concerned about possible procedural violations related to any part of [her] Annual Professional Performance Review." *See United Federation of Teachers*, http://www.uft.org/teaching/concerns-about-evaluation-system-or-your-rating (last visited Dec. 2, 2019).

that she would have received had she completed an additional year. (Am. Compl. ¶ 54.) She also lost the opportunity to contribute additional funds to her annuity account. (*Id.* ¶ 56.) During her final years at FHHS, Kunik suffered from high blood pressure, a recurrence of her ulcer, bowel problems, a thyroid malfunction, and emotional distress—injuries that she attributes to the treatment she was subjected to by Defendants. (Pl.'s Fact Statement ¶¶ 171-175.)

II. Procedural History

Plaintiff initiated this action by filing a complaint on December 18, 2015. (Doc. 5.) After a number of issues arose with Plaintiff's service of the complaint, the parties appeared before me on July 13, 2016, to discuss the matter. (*See* Docs. 7, 10, 12, 14, 19, 21.) By order dated July 14, 2016, I granted Plaintiff an extension of time to effectuate proper service on all Defendants, and the parties were directed to meet and confer on or before September 12, 2016, regarding purported deficiencies in the complaint. (Doc. 21.) I also directed the parties to submit a proposed briefing schedule if Defendants intended to file a motion to dismiss. (*Id.*) Pursuant to that order, the parties notified me that Plaintiff would file an amended complaint and advised me of their agreed upon schedule for the filing of Defendants' motion to dismiss. (*See* Doc. 24.) On September 12, 2016, Plaintiff filed her Verified Amended Complaint ("Amended Complaint"). (Doc. 23.) Defendants filed their motion to dismiss and memorandum of law on November 10, 2016, (Docs. 30–31), Plaintiff filed her opposition papers on December 12, 2016, (Doc. 32), and Defendants filed their reply on December 23, 2016, (Doc. 33).

On September 27, 2017, I issued a Memorandum & Opinion on Defendants' motion to dismiss. (Doc. 34). I dismissed Plaintiff's retaliation, hostile work environment, constructive discharge, procedural due process, and municipal liability claims pursuant to § 1983. I also dismissed Plaintiff's claims pursuant to the NYSHRL and the NYCHRL as time-barred.

Furthermore, I dismissed Plaintiff's claims to the extent they accrued prior to December 18, 2012, as time-barred. (Doc. 34 at 9). I held that these incidents were primarily a series of discrete events which did not constitute a continuing violation, and were, therefore, barred from consideration by this court. (*Id.*) Plaintiff's claims for religious and age discrimination pursuant to § 1983 after December 18, 2012, were not dismissed.

On October 23, 2017, I entered a Case Management Plan. (Doc. 37). On June 4, 2018, I referred the case to Magistrate Judge Henry B. Pitman for general pre-trial matters, including scheduling, discovery, non-dispositive pre-trial motions, and settlement.[6] On December 12, 2018, Defendants submitted a letter informing me of their intent to move for summary judgment, and setting a briefing schedule, which I adopted on December 14, 2019. (Doc. 59). Defendants filed their motion for summary judgment on January 18, 2019, (Doc. 62), along with a memorandum of law, (Doc. 64), a Statement of Undisputed Material Facts pursuant to Local Rule 56.1, (Doc. 67), and a Declaration of Leo T. Ernst in support with exhibits, (Doc. 63). On February 1, 2019, Plaintiff sought an extension of time to file her opposition to Defendants' motion, which I granted. (Doc. 66). In opposition to the motion, Plaintiff submitted a memorandum of law with responses to Defendants' Statement of Undisputed Facts, a Supplemental Plaintiff's Counter Statement of Undisputed Facts, (Docs. 69, 69-1, 69-2), and a Declaration of Steven I. Lewbel with exhibits (Doc. 68). Defendants filed a memorandum of law in reply on April 2, 2019. (Doc. 71)

III. Legal Standard

Summary judgment is appropriate when "the parties' submissions show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of

[6] On October 3, 2019, the case was reassigned to Magistrate Judge Sarah L. Cave.

law." *Fay v. Oxford Health Plan*, 287 F.3d 96, 103 (2d Cir. 2002); *see* Fed. R. Civ. P. 56(a). "[T]he dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law," and "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Id.*

On a motion for summary judgment, the moving party bears the initial burden of establishing that no genuine factual dispute exists, and, if satisfied, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial," *id.* at 256, and to present such evidence that would allow a jury to find in his favor, *see Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000).

To defeat a summary judgment motion, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials . . . ." Fed. R. Civ. P. 56(c)(1). As such, Local Civil Rule 56.1 requires a party opposing a motion for summary judgment to include in its response a statement containing "a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party" followed by citation to admissible evidence. Local Civil Rule 56.1(b), (d).

In the event that "a party fails . . . to properly address another party's assertion of fact as required by Rule 56(c), the court may," among other things, "consider the fact undisputed for

purposes of the motion" or "grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." Fed. R. Civ. P. 56(e)(2), (3); Local Civil Rule 56.1(c). When a party fails to file a counter statement under Local Civil Rule 56.1, I have discretion to accept the uncontroverted assertions of the party moving for summary judgment as true, but I "may [also] in [my] discretion opt to 'conduct an assiduous review of the record' even where one of the parties has failed to file such a statement." *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 73 (2d Cir. 2001) (quoting *Monahan v. N.Y.C. Dep't of Corr.*, 214 F.3d 275, 292 (2d Cir. 2000)).

IV. Discussion

Defendants' first argument in support of summary judgment—that Plaintiff has failed to properly allege an age discrimination claim in the complaint—is without merit. While acknowledging that in my decision on Defendants' motion to dismiss I found that Plaintiff "'br[ought], as part of her first cause of action, a claim for age discrimination in violation of the Equal Protection Clause pursuant to § 1983,'" Defendants state they "respectfully disagree." (Defs.' Mem. 5–6). It appears that Defendants are asking me to reconsider my prior ruling. The time for filing a motion for reconsideration has long since passed. In any event, as noted in my decision, Plaintiff has sufficiently alleged an age discrimination claim under §1983, (Doc. 34, at 20), and Defendants have not made a compelling argument for and I see no reason to revisit that decision. Therefore, I need not address further Defendants' arguments to dismiss the action for failure to state a claim for age discrimination.

Defendant next argues that in the absence of an ADEA claim, Plaintiff's age discrimination claim under § 1983 fails. As I stated in my decision on Defendants' motion to dismiss, (Doc. 34, at 20), and as Defendants acknowledge, (Defs.' Mem. 7), it is an open

question in this Circuit whether age discrimination is an appropriate basis for a § 1983 cause of action, especially in the absence of an ADEA cause of action, *see, e.g.*, *Piccone v. Town of Webster*, 511 F. App'x 63, 63 n.1 (2d Cir. 2013) (summary order) ("It is an open question in our circuit whether the ADEA preempts age discrimination claims under Section 1983."); *Shein v. New York City Dep't of Educ.*, No. 15CV4236 (DLC), 2016 WL 676458, at *6 n.3 (collecting cases). However, I need not attempt to resolve this legal issue because, as I explain below, Plaintiff has failed to make out a *prima* facie case of age or religious discrimination on her § 1983 claims. For the same reason, I also need not address Defendants' qualified immunity defense.

The basic facts of the case are not disputed by the parties. What is disputed is whether the facts support Plaintiff's claims for age and religious discrimination. I find that they do not.

A. *Applicable Law*

In order to establish a § 1983 claim for age or religious discrimination, a plaintiff must demonstrate that (1) the defendant acted unlawfully under color of state law; and (2) the plaintiff suffered a denial of her federal constitutional or statutory rights as a result of defendant's unlawful action. *Annis v. Cty. of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998). In order to survive a motion for summary judgment on a discrimination claim brought pursuant to § 1983, a plaintiff must satisfy the three-part burden-shifting analysis articulated by the Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). As delineated by the Second Circuit in *Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 767 (2002), that three-part burden shifting analysis requires that:

> [A] plaintiff must first establish a prima facie case of discrimination by showing that (1) he is a member of a protected class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances

> giving rise to an inference of discrimination based on his membership in the protected class. If the plaintiff succeeds, a presumption of discrimination arises and the burden shifts to the defendant to proffer some legitimate, nondiscriminatory reason for the adverse decision or action. If the defendant proffers such a reason, the presumption of discrimination created by the prima facie case drops out of the analysis, and the defendant will be entitled to summary judgment unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination. The plaintiff must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination.

Id. (citations, quotations marks, and alterations omitted).

B. *Application*

1. Member of a Protected Class

The record establishes that Plaintiff is a member of a protected class, as the parties stipulate that she is a 69-year-old Jewish female, satisfying the first prong of the analysis for both age and religious discrimination. (Defs.' Fact Statement ¶ 1).

2. Qualified to Perform the Job

The record also establishes that Plaintiff was qualified for the job she was performing. In *Slattery v. Swiss Reinsurance America Corp.*, the court explained that to satisfy the second prong of the *McDonnell* analysis "all that is required is that the plaintiff establish basic eligibility for the position at issue, and not the greater showing that he satisfies the employer." 248 F.3d 87, 92 (2d Cir. 2001). In *Slattery*, the Second Circuit found that the District Court erred in determining that because Defendant was dissatisfied with Plaintiff's performance that Plaintiff had not established the second element of a prima facie claim. *Id.* Instead, the court affirmed the holding in *Owens v. New York City Housing Authority*, in which the court held that all plaintiff must show is that she "possesses the basic skills necessary for performance of [the] job." 934 F.2d 405, 406 (2d Cir. 1991).[7] As in *Slattery*, although Defendants did put in evidence of

[7] In light of the holdings in *Owens* and *Slattery*, I do not adopt the contrary opinion articulated in *Thornley v.*

dissatisfaction with Plaintiff's performance, there is no basis for me to conclude that Kunik lacked the basic skills necessary to perform the job she had been performing for 20 years.[8]

3. Adverse Employment Action

Plaintiff's claim, however, fails on the third prong of the *McDonnell* test as she did not put in sufficient evidence to create an issue of fact that she was subject to an adverse employment action. For this third prong, "a plaintiff sustains an adverse employment action if he or she endures a materially 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. N.Y.C. Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000)). "An adverse employment action is one which is more disruptive than a mere inconvenience or an alteration of job responsibilities." *Id.* (citation omitted). "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.* (citation omitted). The Second Circuit has held that "the assignment of 'a disproportionately heavy workload' can constitute an adverse employment action." *Id.* (quoting *Feingold v. New York*, 366 F.3d 138, 152–53 (2d Cir. 2004)).

Plaintiff claims that she experienced an adverse employment action by an increase in her course load, including an English literature course she claims she was unqualified to teach, the inability to teach summer school, and the inability to submit "artifacts" to combat her unsatisfactory rating after their submission date. I will take each of these claims in turn.

Penton-Publ'g, 104 F.3d 26, 29 (2d. Cir. 1997), *abrogated by Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 92 (2d Cir. 2001).

[8] I note that Plaintiff was not fired, and although she received unsatisfactory performance reviews, she received grades of "effective" in many categories and "developing" in others in the lessons observed during the 2013-2014 school year. (Defs.' Fact Statement ¶¶ 77-88.)

First, Plaintiff's argument that her increased course load is an adverse employment action fails because "[s]cheduling and assignment issues involving course loads are generally not considered materially adverse employment actions." *Dimitracopoulos v. City of New York*, 26 F. Supp. 3d 200, 213 (E.D.N.Y 2014) (citing *Aspilaire v. Wyeth Pharms., Inc.*, 612 F. Supp 2d 289, 304 (S.D.N.Y 2009)); *see Smalls v. Allstate Ins. Co.*, 396 F. Supp. 2d 364, 371 (S.D.N.Y. 2005) ("receiving unfavorable schedules or work assignments . . . do not rise to the level of adverse employment actions"). However, if the change is "so burdensome as to constitute a departure from normal academic practice" it may be actionable. *Dimitracopoulos*, 26 F. Supp. 3d at 213. Plaintiff fails to cite evidence in the record to establish, or create an issue of fact, that her workload was so burdensome as to constitute a departure from normal academic practice. Plaintiff's course load was also not greater than that of her peers. (Doc. 63-2 Ernst Decl. Ex. B at 88:21-89:8, Doc. 68-16 Lewbel Decl. Ex. M-2.) Plaintiff taught five classes, as did every other full-time teacher. (*Id.*) The fact that Plaintiff's classes included Regents classes is not a departure from normal academic practice, is consistent with her level of experience, and is not actionable.

Second, Plaintiff's assignment to teach some English courses in addition to English as a Second Language is also not an adverse employment action. "In order to constitute an adverse employment action, it is not enough that defendants[] gave plaintiff a subjectively less preferred teaching assignment; the assignment must be 'materially less prestigious, materially less suited to h[er] skills and expertise, or materially less conducive to career advancement.'" *Sotomayor v. City of New York*, 862 F. Supp. 2d 226, 255 (E.D.N.Y. 2012) (quoting *Galabya*, 202 F.3d at 641). Although it is clear that Plaintiff did not want to teach English, the assignment itself does not constitute an adverse employment action. Teaching English is not materially less

prestigious, nor was it materially less suited to Plaintiff's expertise as Plaintiff was licensed to teach English in the City of New York. (Lewbel Decl. Ex. M-1.) Although Plaintiff maintains that she "was not qualified to teach the English subject because [she] had not completed the required probation to teach English in the New York City Public Schools," she has not produced evidence of that beyond her self-serving deposition testimony, (Pl. Opp. 17),[9] or explained how this fact made her unqualified to teach English.[10] Plaintiff has, however, produced a letter she wrote to Defendant Houlihan which states that despite her objections she was willing to try teaching the English class, and apologized for her behavior in objecting to the assignment. (Ernst Decl. Ex. H, "I want to apologize for leaving your office earlier today in such an emotional way. I am sorry about it. . . . My husband and I discussed the situation with my schedule, and because the proof of the pudding is in the eating, we decided that I should try to do it."). In this letter Plaintiff does not mention that she believed she was not qualified to teach English and does not mention probation, instead she states her view that the decision to have her teach English was "unfair" and suggests that a less qualified/strong teacher than herself should teach English. Specifically, Plaintiff states in the letter that

> This does not change my opinion that your decision was unfair to me. Ms. Izzo and Ms. Fuentes have never and will never act in the interests of children. Neither are they people to trust or rely on, as you are still to discover for yourself. I am writing to you about it because Indians say, "Ask the oldest woman. She is not afraid to speak the truth." As a result, this decision dictated to you by these two individuals was also incorrect strategically because ESL students need *a stronger teacher* than students from the mainstream who, at least, have the ability to express themselves, whereas it presents the greatest problem for ESL students. Thus, for many of those ESL students I am a real chance to jump over the block that ELA Regents is to

[9] "Pl. Opp." refers to the Memorandum of Law of Plaintiff Rimma Kunik in Opposition to the Motion for Summary Judgment of Defendants New York City Department of Education, Principal Kaye Houlihan and Assistant Principal Dorish Munoz Fuentes. (Doc. 69).

[10] Moreover, Plaintiff does not explain what the requirement of probation to teach English in the New York City Public Schools actually means or how her failure to have completed probation meant that she was not qualified.

them. (*Id.* (emphasis added).)

In the face of contemporaneous evidence in Plaintiff's own words, her self-serving comments from her deposition after the filing of this lawsuit cannot create an issue of fact concerning whether or not she was subjected to an adverse employment action. *See Jeffreys v. City of New York*, 426 F.3d 549, 555 (2d. Cir. 2005) (finding that "the District Court did not err in granting defendants' motion for summary judgment on the basis that Jeffreys's [deposition] testimony—which was largely unsubstantiated by any other direct evidence—was 'so replete with inconsistencies and improbabilities' that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in his complaint"); *Khudan v. Lee*, No. 12-cv-8147 (RJS), 2016 WL 4735364, at *5 (S.D.N.Y. Sept. 8, 2016) (finding that "Plaintiff's 'self-serving' and 'incomplete' testimony . . . is insufficient to create a *genuine* dispute of fact"); *see also Johnson v. MetLife Bank, N.A.*, 883 F. Supp. 2d 542, 550-51 (3d Cir. 2012) (acknowledging the precedent that conclusory, self-serving deposition testimony is insufficient to withstand a motion for summary judgment, but noting that the court must assess whether the testimony, when juxtaposed with the other evidence, is sufficient for a rational factfinder to credit the deposition testimony, despite its self-serving nature); *but see Hill v. Tangherlini*, 724 F.3d 965, 967 (7th Cir. 2013) (finding that "[d]eposition testimony, affidavits, responses to interrogatories, and other written statements by their nature are self-serving" and that the self-serving nature "must not be used to denigrate perfectly admissible evidence through which a party tries to present its side of the story at summary judgment."). Plaintiff also maintains that she was the only ESL teacher asked to teach English, yet she has no knowledge concerning whether any other ESL teacher had a license to teach English in New York City.

Third, Plaintiff argues that receiving unsatisfactory ratings precluded her from teaching

summer school and per session programs, and that she was not invited to a teaching workshop. These arguments are specious. Plaintiff admits that over her twenty-year career she only taught summer school at most three times before the summer of 2013. (Lewbel Decl. Ex. B at 52-53). According to DOE's pay roll records Plaintiff had only taught summer school once since 2001. (Ernst Decl. Ex. GG ¶ 7). Moreover, Plaintiff was not even eligible to teach summer school by the time she received her unsatisfactory rating since the deadline to apply to teach summer school was two months before she received her unsatisfactory rating. (Ernst Decl. Ex. GG ¶ 12). In any event, Plaintiff's failure to apply for summer school belies her contention that she was precluded from doing so due to her unsatisfactory rating.

Regarding the workshop, Kunik admits that she did not apply or request to attend the workshop, that she was not aware of its existence until after it was complete, and that she did not lose salary or benefits from not attending. (Defs.' Fact Statement ¶¶ 120-122). Plaintiff also does not deny that one of the attendees of the workshop was between the ages of 55-60, which contradicts her claim for age discrimination. (*Id.* ¶ 124). This does not constitute "a material loss of benefits." *Vega*, 801 F.3d at 85.

Finally, Kunik argues that she suffered an adverse employment action when Houlihan only gave her a short extension to submit "artifacts" objecting to her unsatisfactory rating while Kunik was observing the Jewish High Holidays and the Sabbath. This argument falls short as well. First, the artifacts were supposed to be submitted in April, and Kunik admits that she had them ready to submit, and even went to Ms. Houlihan's office to submit them in April, only to find the Principal's office empty and the Assistant Principal's office locked. Defs.' Fact Statement ¶¶ 127-129). Second, although Kunik was notified of her extension by email on days during which she could not check her email for religious reasons, on September 29, 2014, after

the High Holidays and sabbath concluded, Houlihan agreed to accept the artifacts on October 1, 2014. (*Id.* at ¶¶ 133-137). This gave Kunik additional time to submit the same artifacts that she was prepared to submit in April. This does not constitute an adverse employment action.

4. Inference of Discrimination

Even if Plaintiff had suffered an adverse employment action, she failed to demonstrate that Defendants harbored any bias, or that their actions were in any way related to such bias so as to establish an issue of fact. For the fourth element, an inference of discriminatory intent "can arise from circumstances including, but not limited to, 'the employer's criticism of the plaintiff's performance in ethnically degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's discharge.'" *Littlejohn v. City of New York*, 795 F.3d 297,312 (2d Cir. 2015) (quoting *Leibowitz v. Cornell Univ.*, 584 F.3d 487, 502 (2d Cir. 2009)).

In assessing the probative value of discriminatory remarks in a § 1983 analysis, the Second Circuit explains that "[t]he more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory behavior, the more probative that remark will be." *Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111, 115–16 (2d Cir. 2007). In addition "[t]he relevance of discrimination-related remarks does not depend on their offensiveness, but rather on their tendency to show that the decision-maker was motivated by assumptions or attitudes relating to the protected class." *Id.*

Here, Plaintiff fails to identify any evidence of remarks made in ethnically degrading terms, negative comments about others in her protected classes, or any evidence to show discriminatory intent or disparate treatment based on her age or religion. Plaintiff's amended

complaint alleges that she was spoken to in antisemitic tones and that Defendants' demeanor showed discrimination. These allegations, however, are conclusory, and not borne out by the statements or behaviors identified by Kunik.

In fact, Plaintiff concedes that no one, including Houlihan and Fuentes, ever made any comments about her age or religion. (Defs.' Fact Statement ¶ 89). Plaintiff's only support for her claim is her own perception of the manner in which Defendants spoke to her. In her deposition Plaintiff explains that Houlihan "displayed a very hateful attitude towards [Plaintiff] with her eyes" and that "anti-Semitism lives in people and finds a way out." (Pl.'s Fact Statement ¶¶ 90-91). Furthermore, Plaintiff concluded that Fuentes was antisemitic because "there was no reason for her to treat me the way she was treating me," and because Fuentes allegedly lied about her, and "historically anti-Semitism strives on lies." (Defs.' Fact Statement ¶¶ 92-93). Nothing about Houlihan's or Fuentes's remarks were discriminatory, nor did they evince a discriminatory attitude towards a certain class. *See Hong Lui v. Queens Library Found., Inc.*, Civil Action No. 14-7311, 2017 WL 4217121, at *9 (E.D.N.Y. Sept. 20, 2017) (finding that Plaintiff's "subjective interpretation" of Defendant's comment is insufficient "to support that this comment was directed at her race/national origin" (citing *Haynes v. Capital One Bank*, No. 14–CV–6551 (CBA), 2015 WL 2213726, *2 (E.D.N.Y. May 8, 2015) (ambiguous remark insufficient to support inference of discrimination)).; *see also O'Neill-Marino v. Omni Hotels Mgmt. Corp.*, No. 99 Civ. 3793, 2001 WL 210360, at *7 (S.D.N.Y. Mar. 2, 2001) (holding that plaintiff's "attempts to cast a sinister light" on Defendants' comments by "pull[ing] out several soundbytes to suit her purposes, when those statements are viewed in context, one cannot reasonably conclude" that defendant was attempting to discriminate was insufficient for a discrimination claim).

Plaintiff also fails to put forward evidence to establish an inference of discriminatory intent by showing disparate treatment. To establish an inference if discriminatory intent through disparate treatment, a plaintiff must allege that "she was similarly situated in all material respects to the individuals with whom she seeks to compare herself." *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 230 (2d Cir. 2014) (quoting *Graham*, 230 F.3d at 39). "An employee is similarly situated to co-employees if they were (1) subject to the same performance evaluation and discipline standards and (2) engaged in comparable conduct." *Abdul-Hakeem v. Parkinson*, 523 F. App'x 19, 21 (2d. Cir 2013) (summary order) (quoting *Ruiz v. Cnty. of Rockland*, 609 F.3d 486, 493–94 (2d Cir. 2010)). In *Abdul-Hakeem*, the Second Circuit affirmed the District Court's determination "that although plaintiff had 'identified seven alleged comparators,'" she provided "no factual support that a single alleged comparator performed similar job functions, was subjected to the same disciplinary standards, engaged in similar conduct, or was treated more favorably [than her][sic]." *Id.* (quoting *Abdul–Hakeem v. Parkinson,* No. 3:10cv747 (JBA), 2012 WL 234003, at *5 (D. Conn. Jan. 25, 2012)).

Plaintiff has not provided sufficient evidence to show that the comparators were similarly situated in all material respects, subject to the same evaluation and disciplinary standards, and engaged in comparable conduct. Instead, Plaintiff merely asserts that comparators did not have the same class load as she did, were not the same age as she was, and received different evaluation grades. For example, Plaintiff writes that "Argyri Apostolou's teaching schedule . . . did not include teaching four periods of Transitional ESL classes and one period Regents preparation class," (Pl.'s Fact Statement ¶ 35), or "Maria Jimenez's teaching schedule . . . did not include teaching any English (hereinafter "ELA") classes," (*Id.* ¶ 38).

This information, gathered from Defendants' responses to Plaintiff's requests to admit,

does not give a full picture of each comparator's qualifications, or workload, and are insufficient to show that the comparators were similarly situated in all material respects. First, the evidence provided does not demonstrate the comparators' qualifications, including whether they were licensed to teach English. Second, it does not provide the complete schedules and workloads for the comparators. Without knowing each comparator's qualifications to teach the courses, or the teaching schedules for the semesters at issue, I cannot conclude that the comparators were similarly situated to Plaintiff. In addition, Plaintiff has failed to show that even if the comparators were similarly situated, that they engaged in comparable conduct, but were treated in a disparate way. As such, Plaintiff has failed to show an inference of discriminatory intent by Defendants' by use of comparators.

V. Conclusion

For the reasons stated above, it is hereby ordered that Defendants' motion for summary judgment is GRANTED. The Clerk of Court is respectfully directed to terminate the pending motion (Doc. 62), and close this case.

SO ORDERED.

Dated: January 29, 2020
New York, New York

Vernon S. Broderick
United States District Judge

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