No. 22-___

IN THE

Supreme Court of the United States

YVONNE T. MASSARO,

Petitioner,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Following *Burlington Northern & Santa Fe Railway v. White*, this Court held that employers are liable for retaliation under the ADEA for conduct that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." 548 U.S. 53 (2006). However, this Court has not addressed how *Burlington Northern* applies to retaliatory hostile work environment claims. The Circuit Courts have examined such claims under two different liability standards—either *Burlington Northern* (3rd, 5th, and 11th Circuits), or the more stringent severe and pervasive standard (1st, 6th, 9th, and D.C. Circuits) applicable to claims of discrimination, not retaliation.

The question presented is:

1. Whether the *Burlington Northern* standard, which this Court has held governs retaliation claims under the ADEA, applies equally to ADEA claims of retaliatory harassment claims.

The Court in *Gross v. FBL Financial Services* held that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action, and the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. 557 U.S. 167 (2009)

The question presented is:

2. Whether ADEA retaliation claims require Plaintiff to show, by a preponderance of the evidence, but-for causation or whether the ADEA retali-

ation claims are to be decided under the "motivating factor" test, and in applying the appropriate test, what weight of direct and indirect evidence is required for a Plaintiff to meet that burden of proof**.**

After *National Railroad Passenger Corporation v. Morgan*, regarding a continuing violation, the Circuits have taken various approaches to determine what constitutes a discrete and non-discrete act in employment discrimination cases. 536 U.S. 101, 113 (2002). Also, the Circuits have taken different approaches regarding the requirement of a pattern or practice and what constitutes a pattern and practice.

The question presented is:

3. Whether a policy and practice are required in proving a continuing violation and should the Court continue the distinction between discrete and non-discrete acts and if so how are they defined.

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The summary order of the United States Court of Appeals for the Second Circuit is unreported (App. 1a-7a). The Court of Appeals June 2, 2022, Summary Order affirmed January 19, 2021, District Court's summary judgment order (App. 10a-25a).

JURISDICTION

On June 2, 2022, the United States Court of Appeals for the Second Circuit affirmed the summary judgment granted by the District Court. (App. 1a-7a). This petition is being filed within ninety days of the decision of the United States Court of Appeals for the Second Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Age Discrimination in Employment Act (ADEA) of 1967 (App. 54a-94a), 29 U.S.C. § 621 et seq. Federal Rules of Civil Procedure 56 (App. 50a-53a).

STATEMENT OF THE CASE

A. Factual Background.

Massaro, 61 years old, was a tenured art teacher with the New York City Department of Education ("Board") from 1993 to 2016. (R[1]33 ¶10). In 2011, Massaro filed a lawsuit against the Board alleging age-based discrimination under the ADEA. Massaro's lawsuit concluded on October 24, 2014.

Massaro filed an EEOC charge in August 2016 and commenced this action in 2017, alleging that as a result of the 2011 lawsuit and the EEOC charge, the Board discriminated against her based on her age and

[1] R denotes the Record below.

retaliated against her from August 2013 through September 2016, both in violation of the ADEA. (App. 10a-11a)

A brief summary of the retaliatory conduct included deliberately assigning her to a classroom that was cold in the winter, hot in the summer, and lacked windows; scheduling her classes for open enrollment; assigning her an excessive number of disruptive students while blocking students with high GPAs from her classes; and refusing to allow her to teach advanced courses, giving her outdated equipment, and imposing a lab fee only for her class. (R368-R369 ¶52)

Massaro further alleged that the Board subjected her to what the District Court characterized as "discrete instances" of retaliation over that same period. In 2012 Massaro received an "Unsatisfactory" annual rating, along with other negative notations in her personnel file. In July 2013, Massaro's Principal initiated an investigation into her for allegedly using corporal punishment on a student who was not in her class. During the 2013-14 school year, she was required to teach four back-to-back classes in different classrooms without adequate time to prepare or use the restroom between sessions amounting to four continuous hours of teaching without a break. By the Board's own admission, this violated the collective bargaining agreement and was not corrected until the middle of the school year in January 2014. In the 2015-16 school year, she was assigned larger classes than her colleagues, and students with behavioral issues were added to her class. In January 2016, her students' work was removed from bulletin boards and furniture was removed from her classroom. *Id.* (R370 ¶61).

On April 15, 2016, Massaro was observed by Principal Barge while Massaro was on crutches with an ACL tear and meniscus tears in her knee. She was dumbfounded when the Principal criticized, "[Massaro] did not walk around enough." (R370 ¶63).

On May 3, 2016, Ms. Massaro had knee surgery due to an on-the-job accident on March 28, 2016. On May 25, 2016, Massaro returned to work on crutches in significant pain and finished the semester. She was in pain every day, and working in a darkroom with crutches was difficult. Her leave request was denied by the Principal, forcing her to go to work in great pain contrary to her own physician's advice. (R370-R371 ¶65-67).

In April 2016, her students were not able to use computers and the Principal gave her a biased formal observation. In May 2016, the Principal refused to give her a video of a workplace injury. And in June 2016, the Assistant Principal refused to allow her to use a printer. Massaro retired in 2016. (R371 ¶68).

B. The Proceeding Below.

Massaro previously commenced her first lawsuit (protected activity) against the Board, alleging age discrimination and retaliation. Massaro's first lawsuit concluded on October 23, 2014. (App. 36a)

Following the retaliatory treatment described above, Massaro commenced a second lawsuit against the Board. The Board moved to dismiss on March 15, 2018 and the District Court granted the motion and dismissed the action on September 11, 2018, and an appeal ensued. (App. 35a-49a). The Second Circuit reinstated the retaliation claim in which Massaro alleged that she was retaliated against during her employment due to her protected activity. (App. 26a-

34a). Subsequently, the Board moved for summary judgment which was partially granted on January 19, 2021. (App. 10a-25a). On February 3, 2021, pursuant to a stipulation and order, the remaining claim was dismissed. (App. 8a-9a). Massaro filed a notice of appeal on February 9, 2021 to the United States Court of Appeals for the Second Circuit and the Court issued its decision on June 2, 2022. (App. 1a-7a).

1. The District Court Decision Granting the Motion to Dismiss.

The District Court held, regarding causation, that the law is unsettled as to whether the Court's decision in *Gross v. FBL Financial Services, Inc*., requires "but-for" causation only for ADEA claims of disparate treatment, leaving ADEA retaliation claims to be decided under the more relaxed "motivating factor" test. 557 U.S. 167, 180 (2009); *citing Fried v. LVI Servs., Inc*., 500 F. App'x 39, 41-42 (2d Cir. 2012) (summary order) (declining to reach the issue of whether the "but-for test or the motivating factor analysis" applies to ADEA retaliation claims because the record was insufficient to satisfy either standard). The District Court held that it did not need to reach that issue because a twenty-two-month gap between the protected activity and alleged retaliatory action is too large to show a causal link, particularly when Massaro relied on temporal proximity alone. *Citing Dhar v. City of New York*, 655 F. App'x 864, 866 (2d Cir. 2016) (summary order) (holding that a ten-month gap between a complaint and a retaliatory act was too attenuated to support causation at the motion to dismiss stage when the plaintiff relied on temporal proximity alone.

It should be noted that the Massaro's lawsuit against the Board (protected activity) did not conclude

until October 23, 2014 and the retaliation continued in 2014-2015 and 2015-2016 school years. (App. 36a)

2. The Initial Second Circuit Decision.

In Massaro's lawsuit against the Board, the Second Circuit reinstated the retaliation claim and held the following on the issue of causation:

"Although DOE correctly notes that Massaro's EEOC charge sets August 2013 as the "earliest" "date[] discrimination to[ok] place," the three-month gap between May 2013, when the 2011 lawsuit was dismissed, and August 2013 would not preclude temporal proximity. In the context of a school calendar, judicial "experience and common sense," *Irrera*, 859 F.3d at 198 (quoting *Iqbal*, 556 US at 679), permit the Court to recognize that May to August is summer break. In that context, it is plausible that August 2013, the start of a new semester, was the school personnel's earliest opportunity to retaliate against Massaro following the dismissal of her 2011 lawsuit. Whether Massaro's allegations can survive a motion for summary judgment or a trial remains to be determined upon remand. "We rule only that the retaliation allegations, taken together, are sufficiently plausible to survive a motion to dismiss." (App. 34a)

3. The District Court Summary Judgment Decision.

The District Court held that conduct before October 8, 2015 (300 days before the filing of the EEOC charge) was time-barred because the Court held that there was no continuing violation. The Court also held that the conduct was not the result of a discriminatory policy or mechanism.

Regarding the conduct after October 8, 2015, the Court held that it was actionable (adverse employment action) because a reasonable jury could conclude that the complained of actions, in aggregate, "could well dissuade a reasonable worker from making or supporting a charge of discrimination." The Court also held that the motivating factor standard does not apply and that instead, the "but for" standard applies in ADEA retaliation cases. (App. 21a)

Concerning the second lawsuit and allegedly retaliatory conduct, all of which occurred while the Board still employed Ms. Massaro it held that she did not meet her burden to show a prima facie case of causation under either the "but-for" or "motivating factor" tests and thus dismissed the retaliation claim. (App. 21a)

The District Court further held that the period between the protected activity and actionable retaliatory conduct was too long (the appeal was dismissed on October 23, 2014), and Massaro did not identify any other evidence from which a reasonable jury could infer causation. (omitting the continuing retaliatory conduct in the 2014-2015 school year) Thus, the District Court held that Massaro failed to meet her burden on this aspect of her prima facie case and granted summary judgment on the retaliation claim for conduct occurring between October 8, 2015, and her July 2016 retirement. (App. 25a)

4. The Second Circuit Decision Affirming the Summary Judgment.

The Second Circuit held regarding a continuing violation that Massaro's evidence is comprised of discrete acts that do not make up a series of violations within the meaning of the continuing violation. The

Second Circuit further stated that Massaro failed to provide evidence supporting her contention that her employer's actions against her were a series of repeated retaliatory practices. It held that, instead, Massaro describes an unpleasant work environment and multiple one-off actions, but nothing that would reach the level of an ongoing retaliatory practice such that we should consider her time-barred conduct. (App. 5a-6a)

The Second Circuit further held that even assuming the District Court erred in failing to consider time-barred evidence as background evidence, Massaro has not shown temporal proximity. *Citing Morgan*, 536 U.S. at 113. It applied the standard that when the plaintiff relies on temporal proximity alone, "the temporal proximity must be very close."

The Second Circuit continued, determining that the conduct Massaro describes as occurring in retaliation for her first lawsuit transpired over the course of numerous school years. It held that this time frame is insufficient to demonstrate temporal proximity, in which it previously stated is generally insufficient to establish causation "after about three months." Lastly, the Second Circuit affirmed that the District Court also properly found that "the overwhelming record evidence shows that fellow teachers worked under similar conditions as Plaintiff, including comparable schedules, class sizes and compositions, and access to educational resources." (App. 6a)

REASONS FOR GRANTING THE PETITION

I. There is a conflict among the Circuits regarding the standard to apply in a retaliatory hostile work environment claim under the ADEA.

The ADEA provides that "[i]t shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." 29 U.S.C. § 623(d). This antiretaliation provision is "nearly identical" to its analogue in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). *Kessler v. Westchester Cnty. Dep't of Soc. Servs.*, 461 F.3d 199, 205 (2d Cir. 2006); see generally *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (observing that "the substantive provisions of the ADEA 'were derived in haec verba from Title VII'") (quoting in part *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)). As such, "the same standards and burdens apply to claims under both statutes." *Kessler*, 461 F.3d at 205 (citing *Terry v. Ashcroft*, 336 F.3d 128, 141 (2d Cir. 2003)).

Accordingly, in order for allegedly retaliatory conduct to be actionable under Title VII or the ADEA, it must be materially adverse to the plaintiff—i.e., it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 207 (quoting *Burlington N.*, 548 U.S. at 68). This standard is broader than the adverse action standard governing discrimination claims generally under these statutes. See *id.* at 208 (discussing *Burlington Northern*). This is because "limit[ing] [the antiretaliation provision's

scope of coverage] to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the antiretaliation provision's primary purpose, namely, '[m]aintaining unfettered access to statutory remedial mechanisms.'" *Burlington N.*, 548 U.S. at 64 (quoting in part *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)); see also *Kessler*, 461 F.3d at 208 (same). "Thus," the Court concluded, "purpose reinforces what language already indicates, namely, that the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Burlington N.*, 548 U.S. at 64; see also *Kessler,* 461 F.3d at 208 (same).

The Circuit Courts that have directly addressed the question have agreed that the *Burlington Northern* materially-adverse-action standard applies to retaliatory hostile work environment claims. See, e.g., *Monaghan v. Worldpay U.S., Inc.*, 955 F.3d 855, 857 (11th Cir. 2020) (per curiam); *Donaldson v. CDB Inc.*, 335 F. App'x 494, 507 (5th Cir. 2009) (unpubl.); *Moore v. City of Phila.*, 461 F.3d 331, 341 (3d Cir. 2006). The Commission has also adopted this approach to retaliatory harassment claims, recognizing that "[r]etaliatory harassing conduct can be challenged under the Burlington Northern standard even if it is not severe or pervasive enough to alter the terms and conditions of employment." *EEOC Enforcement Guidance on Retaliation and Related Issues,* No. 915.004, at II.B.3 (August 25, 2016) ("Retaliation Guidance") (citations omitted), *available at* https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues (last visited May 28, 2021). "If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe

or pervasive to create a hostile work environment, there would be actionable retaliation." *Id*.

Notwithstanding *Burlington Northern*, other Circuit Courts have continued to require plaintiffs alleging retaliatory harassment to show the conduct was "severe or pervasive." See, e.g., *Haughton v. Brennan*, 695 F. App'x 321, 321 (9th Cir. 2017) (unpubl.); *Frazier v. Richland Pub. Health*, 685 F. App'x 443, 450 (6th Cir. 2017) (unpubl.); *Boss v. Castro*, 816 F.3d 910, 920-21 (7th Cir. 2016); *Baird v. Gotbaum*, 792 F.3d 166, 168-69 (D.C. Cir. 2015); *Maldonato-Catala v. Mun. of Naranjito*, 876 F.3d 1, 10 & n.11 (1st Cir. 2015). In taking this approach, however, these courts have simply relied on pre-*Burlington Northern* standards without assessing the impact of *Burlington Northern* on their analysis. See, e.g., *Haughton*, 695 F. App'x at 321 (relying on *Ray v. Henderson*, 217 F.3d 1234, 1240, 1245 (9th Cir. 2000), in affirming summary judgment on the plaintiff's "retaliatory hostile work environment claim because [she] failed to raise a genuine dispute of material fact as to whether she was subjected to conduct that was severe or pervasive enough to alter the conditions of her employment"); *Frazier*, 685 F. App'x at 450 (describing *Morris v. Oldham Cnty. Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000), as requiring the plaintiff to show "she was subjected to severe or pervasive retaliatory harassment by a supervisor"). See *Pistello v. Bd. of Educ. of Canastota Cent. Sch. Dist*., 808 F. App'x 19, 24 (2d Cir. 2020) (summary order) (concluding that the plaintiff "failed to show that the School District's actions were severe or pervasive enough to support a claim of retaliatory hostile work environment"); *Duplan v. City of New York*, 888 F.3d 612, 627 (2d Cir. 2018) (applying severe-or-pervasive standard to Title VII retaliatory harassment claim and concluding the plaintiff's allegations "failed

to meet that high bar," without considering Burlington Northern).

We urge this Court to make the reasoning in the *Burlington* explicit by so holding here that it is not a severe and pervasive standard but the standard of whether it might have dissuaded a reasonable worker from making or supporting a charge of discrimination and grant the petition.

II. The Causation Standard for ADEA Retaliation Claims Needs to Be Clarified.

This case presents the open question that exists following *Gross* and *Nassar*, as to whether ADEA retaliation claims also require "but-for" causation, or whether the they are decided under the more relaxed 'motivating factor' test. *Gross v. FBL Financial* Services, 557 U.S. 167 (2009); *Univ. of Tex Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338 (2013).

This Court in *Gross* did not address whether a plaintiff is required to meet the "but-for" standard for ADEA retaliation claims because *Gross* was a disparate treatment case. 557 U.S. 167 (2009). In holding that a plaintiff asserting disparate treatment claims under the ADEA must meet the "but for" standard at trial, the Court focused on the language of the 1991 amendments to Title VII, 42 U.S.C. § 2000e-2(m), that specified that in establishing "an unlawful employment practice" (not defined as retaliation), the "motivating factor" standard is utilized. *Compare* 42 U.S.C. § 2000e-2(a) to 42 U.S.C. § 2000e-3(a). The Court noted that the ADEA had a similar definition which included the phrase "because of" as Title VII's pre-1991 amendment. *Compare* 29 U.S.C. § 623(a)(1) with 42 U.S.C. § 2000e-2(a). The Court concluded that because Congress did not amend the ADEA to include

the motivating factor language, it demonstrated the congressional intent to hold a plaintiff to a higher standard ("but for") at trial under the ADEA. *Gross's* holding was limited only to applying the "but-for" causation standard to Title VII's discrimination provision and did not extend to other employment claims.

In 2013, the Court answered one of the open questions following *Gross* by holding in *Nassar* that *Gross's* "but-for" applied to Title VII's prohibition against retaliation. *Univ. of Tex Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)

However, the Court has since demonstrated that the Court will not apply a "but for" causation standard for all federal employment laws. In *Babb*, the Court evaluated the ADEA's federal-sector provision, which provides that "personnel actions' affecting individuals aged 40 and older "shall be made free from any discrimination based on age." *Babb v. Wilkie*, 139 S. Ct. 2775 (2019)

The Court has not applied this analysis to ADEA's prohibition on retaliation, leaving Circuit courts to create different standards for plaintiffs in retaliation cases. Circuit courts that have applied *Gross's* "but-for" standard, but in doing so Circuits have expressed the lack of clarity over the application of that standard and whether the *McDonnell Douglas* framework applies to ADEA retaliation claims. *Miller v. Metro Ford Auto. Sales, Inc.,* 519 F. App'x 850, 853 (5th Cir. 2013) ("Although the United States Supreme Court has not definitely resolved whether the *McDonnell Douglas* framework is applicable to the ADEA. . ."); *Heisler v. Nationwide Mut. Ins. Co.*, 931 F.3d 786, 794-95 (8th Cir. 2019) ("it is unclear whether *McDonnell Douglas* technically applies to the ADEA because the ADEA

has a "but for" causation standard rather than the mixed motives standard under other statutes)

Lastly, under the "but-for" standard Circuits have split on a plaintiff's ability to meet the standard solely through indirect evidence, and specifically temporal proximity. *Miller v. Metro Ford Auto. Sales, Inc.,* 519 F. App'x 850, 853 (5th Cir. 2013)("temporal proximity alone is insufficient"); *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007)('A plaintiff can establish causation by showing a "very close" temporal proximity between the statutorily protected activity and the adverse action"); *Richardson v. New York State Dep't of Corr. Serv.*, 180 F.3d 426, 446-47 (2d Cir.1999) ("there is no bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and allegedly retaliatory action")

In the instant matter, and in the absence of controlling authority, Massaro should only have been required to establish that an issue of fact existed regarding whether her protected activity, her prior lawsuit, was a motivating factor and the subsequent retaliatory treatment. The motivating factor test, not the heightened standard established in *Gross*, is the appropriate test to be applied in retaliation cases. Congress did not amend the definition of retaliation in either Title VII or the ADEA *Compare* 29 U.S.C. § 623(d) with 42 U.S.C. § 2000e-2(a). Thus, given the almost identical language of both Title VII and the ADEA as it relates to claims of retaliation, and because *Gross* and the Title VII amends only applied to claims of discrimination, the motivating factor test should be applied to claims of retaliation under the ADEA.

On the issue of causation in this matter, the District Court specifically noted that "the law is unsettled" in this Court "as to whether the Supreme Court's decision in *Gross v. FBL Fin[ancial] Serv[ices], Inc.*, 557 U.S. 167, 180 (2009), requires but-for causation only for ADEA claims of disparate treatment, leaving ADEA retaliation claims to be decided under the more relaxed 'motivating factor' test." *Id.* at 10. The District Court recognized that, after *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), in which this Court held that Title VII retaliation claims are subject to a but-for causation standard, that the Second Circuit had applied *Nassar* in a "non-binding decision" to require but-for causation in an ADEA retaliation case. *Id.* (citing *Ninying v. N.Y.C. Fire Dep't*, 807 F. App'x 112, 115 (2d Cir. 2020) (summary order)).

At issue on appeal to the Second Circuit was whether a causal connection existed between Massaro's previous employment discrimination and retaliation lawsuit against the Department of Education of the City of New York. The District Court granted summary judgment holding that there was no causal connection between her previous case, which concluded on October 23, 2014, and the retaliatory actions claimed in the 2015-2016 school year, which commenced in September 2015.

The causal connection analysis is further confounded by the Court's remarks in *Gross* that it had not definitely decided whether *McDonnell Douglas* burden-shifting framework applied in Title VII cases was appropriate under the ADEA. The Second Circuit has continued to apply *McDonnell Douglas* to the ADEA, despite the questions as to whether it is appropriate, absent post-*Gross* authority to the contrary. *Gross*;

Gorzynski v. JetBlue Airways Corp., 596 F.3d 93 (2d Cir. 2010)

Beyond the question of which standard applies to retaliation claims under the ADEA, the analysis of retaliatory animus, through direct evidence or indirectly by demonstrating that the adverse employment action followed quickly on the heels of the protected activity or through other evidence such as disparate treatment of fellow employees, is plagued by a lack of a clearly delineated standard. *Gordon v. N.Y.C. Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000)

First, the Second Circuit has explicitly stated the lack of guidance and a clear standard for analysis of temporal proximity and its application to retaliation cases has created confusion. In the recent case of *Dr. Joseph Irrera v. University of Rochester*, the Second Circuit reversed and reinstated *Irrera*'s retaliation claim by setting forth there is no bright-line rule to show a causal connection. 859 F.3d 196 (2nd Cir. 2017). *See also Richardson v. New York State Dep't of Corr. Serv.*, 180 F.3d 426, 446-47 (2d Cir.1999). The Second Circuit explained that this Court provided scant guidance for drawing that elusive line and that judges should rely on their experience, common sense, and to consider the context in which a claim is made. In the *Irrera* case, there was "more than a two-year temporal relationship between *Irrera's* alleged protected activity in February 2012, and the defendants' alleged denial of a paid internship and/or provision of negative references in or after May 2014", which the District Court had held insufficient to suggest a causal relationship given the time that elapsed. As such, the Second Circuit accordingly mandated reversal of that decision. *Id.* Indeed, the Second Circuit reinforced the idea that there is no bright line to define the outer

limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and allegedly retaliatory action. See *Richardson v. New York State Dep't of Corr. Serv.,* 180 F.3d 426, 446-47 (2d Cir.1999).

Despite these holdings, in this matter, the Second Circuit failed to look at the entirety of the circumstances, and instead reverted to this Court's holding that, when the plaintiff relies on temporal proximity alone, "the temporal proximity must be very close." *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001). It held that the, "conduct Massaro describes as occurring in retaliation for her 2011 lawsuit transpired over the course of numerous school years" and "[t]his is insufficient to demonstrate temporal proximity, which we have stated is generally insufficient to establish causation 'after about three months." *Berrie v. Bd. of Educ. of Port Chester-Rye Union Free Sch. Dist.*, 750 F. App'x 41, 49 (2d Cir. 2018).

Here the Second Circuit erred in holding that there was no causal connection between Massaro's protected activity and the alleged retaliatory actions by holding Plaintiff's first lawsuit was too remote in time from October 23, 2014, (the end of the Massaro I case), and the retaliatory conduct in the 2015-2016 school year. However, the Second Circuit and District Court should have examined the context in which this claim was made. As the Second Circuit has noted, " [c]ontext matters" in this analysis, and something that might be a "petty slight" to one person might "matter enormously" to another in the context of a retaliation claim, which "covers a broader range of conduct than does the adverse action standard for claims of [substantive] discrimination. *Vega Hempstead Union*

Free Sch. Dist., 801 F.3d 72, 90 (2d Cir. 2015) (quoting *Burlington*, 548 U.S. at 69)

In the context of a retaliation claim, even if the Court did not find a continuing violation, it should have at the very least taken into consideration all past relevant information to establish that there was a causal connection. As per the *Morgan* case, these facts should have been considered.

In the case at hand, acts of alleged retaliatory harassment fell within the limitations period and outside the limitation period. Accordingly, the District Court should have examined Massaro's retaliatory harassment claim to include all the non-discrete acts and discrete acts of retaliatory harassment from 2012 to October 2015 as background evidence on the question of liability and regarding the issue of a causal connection.

Without any clear guidance on the issue from this Court, the Second Circuit did not opine on whether the District Court's refusal to consider any "time-barred" discrete acts, rather than assessing whether, at a minimum, these acts could serve as relevant evidence to establish a causal connection, was an error of law. *Morgan*, supra at 536 U.S. at 113; *Petrosino v. Bell Atl.*, 385 F.3d 210, 220 (2d Cir. 2004). Here even if it was held that was no continuing violation, at the very least, all the facts presented should have been considered as relevant background history to establish that there was a causal connection.

Finally, many Courts have used artificial deadlines such as in this case citing three months. Using an artificial deadline, potentially increases the chances of retaliation when an employer knows that after three months it becomes able to retaliate against an employee.

III. The Continuing Violation Doctrine and the Conflict Among the Circuits.

A. There is a conflict among the Circuits as to what constitutes a discrete and non-discrete act, and such a distinction is not practical.

The First Circuit referred to the continuing violation doctrine as "the most muddled area in all of employment discrimination law." *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 53 (1st Cir. 1999) (*citing* 2 *B. Lindemann & P. Grossman, Employment Discrimination Law* (3d Ed.1996) 1351), cert. denied, 528 U.S. 1161 (2000). However, as this Court noted in *Morgan*, "none [of the approaches] are compelled by the text of the statute." In *Morgan*, the Court looked to the prior precedents to support the Court's ruling that discrete acts of discrimination and retaliation must be filed within the statutory period or be time-barred. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101,111 (2002).

Likewise, in terms of "accrual of claims" in *Morgan*, in footnote 7, that "[t]here may be circumstances where it will be difficult to determine when the time period [for each act] should begin to run." The Court did not, however, discuss how to deal with this issue of accrual of a discrimination action. Clarification on this issue is warranted as there is no clear indication of when the time starts to run in the context of the continuing violation doctrine. This Court commented that an issue may arise as to whether the limitations period begins to run when the injury occurs, as opposed to when the injury should have reasonably been discovered.

In *Morgan,* the Court stated that "termination, failure to promote, denial of transfer, or refusal to hire" are easily identifiable discrete acts instantaneously actionable. *Morgan*, 536 U.S. at 114. However, the Circuit Courts have expanded the list of what can constitute a discrete act; thus, different approaches are applied to the continuing violation doctrine.

With the utmost respect, it is also unworkable in the practical application of the rule. For example, if an employee is suspended for one day without pay, that is considered a discrete act starting the statute of limitations. The same analysis would apply to discrete acts that the Circuits have held, such as a transfer, a single unfavorable evaluation, and a disciplinary letter. However, one would not typically file EEOC charges and commence a lawsuit regarding any of those actions.

Regarding the list of discrete acts, the First Circuit has held that moving plaintiff to a smaller office and transferring her from one supervisor to another who did not assign her any work constituted discrete acts. *Rivera v. P.R. Aqueduct & Sewers Auth*., 331 F.3d 183, 186-89 (1st Cir. 2003). Similarly, a negative performance evaluation, transfer to another area, and letter of warning also constitute discrete acts. *Miller v. N.H. Dep't. of Corr*., 296 F.3d 18, 21-22 (1st Cir. 2002); see also *Malone v. Lockheed Martin Corp*., 610 F.3d 16, 20-22 (1st Cir. 2010)

However, an unsatisfactory rating is not an adverse employment action under the ADEA. *Leibowtiz v. New York City Department of Education*, 407 F. Supp 3d 158, 171 (EDNY 2017). In addition, a transfer is not considered an adverse employment action in New York but is still regarded as a discrete act under the continuing doctrine theory with other courts.

Humphries v. City of New York, 146 AD3rd 427 (1st Dept 2017).

B. There is a conflict among the Circuits as to whether a pattern and practice regarding a continuing violation are required, and what is a pattern and practice is unclear.

In this case, the Second Circuit held that Massaro did not show a "pattern" of retaliation despite the many acts directed at Massaro on an ongoing continuous basis. However, in *Morgan*, this Court noted in footnote 9 that "[w]e have no occasion here to consider the timely filing question concerning 'pattern-or-practice' claims brought by private litigants as none are at issue here." *Morgan Id.* Thus, Massaro contended that she did not need to show a pattern or practice of the Board under *Morgan,* but only in her case. The Second Circuit expanded the requirements of what could be a discrete act and further required that a plaintiff must show the employer engaged in a common discriminatory policy even though *Morgan* did not require this. Allegations of 'separate instances of alleged unlawful conduct, occurring at different times and under different circumstances, without a non-conclusory factual connection — rather than a common policy under which all the actions were carried out' — are insufficient to invoke the continuing violation doctrine.") (*quoting Jackson v. New York State*, 523 Fed. Appx. 67, 69 (2d Cir. 2013)); *Hills v. Praxair, Inc.*, 2012 U.S. Dist. LEXIS 74125, 2012 WL 1935207, at *11 (W.D.N.Y. May 29, 2012) ("The fact that these incidents occurred not once, but several times, is not enough to trigger application of the continuing violation doctrine. . . . To establish the kind of pattern or practice Plaintiff is alleging, he would instead need to

present multiple incidents of discrimination against individuals in a particular protected class and show that these were the result of some policy or mechanism.")

The Ninth Circuit took a different approach and required a plaintiff to show a policy of discrimination when he is not alleging individual discrimination acts in order to utilize the continuing violation doctrine, rather than requiring a plaintiff to allege individual discriminatory acts and to show a policy of discrimination. In *Gutowsky,* the Ninth Circuit examined a claim of employment discrimination. The Court explicitly recognized that "[a] plaintiff in a Title VII action who alleges a policy or practice of systematic discrimination, as opposed to alleging only individual discriminatory acts, may in certain circumstances utilize the continuing violation doctrine." *Gutowsky v. County of Placer*, 108 F.3d 256 (9th Cir. 1997). Thus, the Ninth Circuit recognized that an action based on individual, discrete acts does not fall under the continuing violation doctrine.

The Third and Fifth Circuit also did not require plaintiff to show the employer engaged in a common discriminatory policy, but rather that the plaintiff's individual harassment was "more than the occurrence of isolated or sporadic acts of intentional discrimination" to trigger the continuing violation doctrine. The Third Circuit held in *Gadson v. City of Wilmington Fire Dep't*, that under the theory of continuing violations, "[a] plaintiff may pursue a Title VII claim for discriminatory conduct that began prior to the filing period if he can demonstrate that the act is part of an ongoing practice or pattern of discrimination of the defendant." 478 F. Supp. 2d 635 (3d Cir. 2007). To establish that a claim falls within the continuing violations theory, the plaintiff must do two things. First, he must demonstrate that at least one act

occurred within the filing period. Next, the plaintiff must establish that the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern. *Id.* The Third Circuit further stated that it found the Fifth Circuit's approach, providing a non-exhaustive list of factors, to be helpful. "Following the [Fifth Circuit], the inquiry into the existence of a continuing violation would consider: (I) subject matter -- whether the violations constitute the same type of discrimination; (ii) frequency; and (iii) permanence -- whether the nature of the violations should trigger the employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate *Id.*. (*quoting Martin v. Nannie & Newborns, Inc*., 3 F.3d 1410, 1415 (10th Cir. 1993) (*citing Berry v. Bd. of Supervisors of LSU*, 715 F.2d 971, 981 (5th Cir. 1983))).

Once the plaintiff has alleged sufficient facts to support use of the continuing violation theory the 300-day filing period becomes irrelevant -- as long as at least one violation has occurred within that 300 days." *Id.* "[D]iscrete discriminatory acts are not actionable if time barred, [however,] even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act." *AMTRAK v. Morgan*, 536 U.S. 101, 113 (2002).

In the case at hand, the Second Circuit Court of Appeals held that Massaro's evidence was comprised of discrete acts that did not make up a series of violations within the meaning of the continuing violation act. According to the Second Circuit, Massaro

failed to provide any evidence that would support her contention that her employer's actions against her were a series of repeated retaliatory practices despite the many acts set forth in the record. Instead, the Second Circuit stated that Massaro described an unpleasant work environment, multiple one-off actions, but nothing that would reach the level of an ongoing retaliatory practice such that should consider her time-barred conduct. (5a-6a). The Second Circuit then affirmed the District Court's decision to divide Massaro's retaliatory harassment claim into "time-barred" and "non-time-barred" conduct, stating categorically that "[a]ny allegedly retaliatory conduct occurring prior to October 8, 2015, is barred by the statute of limitations, unless Plaintiff can establish a continuing violation for conduct before that date." The Second Circuit Court then affirmed the Southern District's refusal to consider any "time-barred" discrete acts rather than assessing whether, at a minimum, these acts could serve as background evidence for the retaliatory harassment claim. *See id.* at 6-7; *Morgan*, 536 U.S. at 113; *Petrosino*, 385 F.3d at 220. This was an error.

Under *Morgan*, the Second Circuit should have defined Massaro's retaliatory harassment claim to include all the non-discrete acts of retaliatory harassment from 2012 to 2016, with any time-barred alleged retaliatory discrete acts available, at the very least, as background evidence on the question of liability.

In the case at hand, the Second Circuit erred in affirming the District Court's analysis of the timeliness of Massaro's retaliatory harassment claim under the "continuing violation doctrine". The court divided Massaro's retaliatory harassment claim into "time-barred" and "non-time-barred" conduct, stating categorically that "[a]ny allegedly retaliatory conduct

occurring prior to October 8, 2015, was barred by the statute of limitations, unless Plaintiff can establish a continuing violation for conduct before that date. The court further subdivided the alleged retaliatory conduct into categories of "repeated conduct that occurs over time" and "discrete acts." It then refused to consider any "time-barred" discrete acts, rather than assessing whether, at a minimum, these acts could serve as background evidence for the retaliatory harassment claim. *See id.* at 6-7; *Morgan*, 536 U.S. at 113; *Petrosino*, 385 F.3d at 220. In the decision, the Second Circuit failed to identify which were discrete vs. non discrete acts and instead just stated most of it was discrete acts.

The Court should revisit the issue of this artificial distinction, since other than a termination, the distinction fails to address what constitutes a discrete act vs. a non-discrete act. The Second Circuit should, at the very least, have defined Massaro's retaliatory harassment claim to include all the non-discrete acts of retaliatory harassment from 2012 to 2016, with any time-barred alleged retaliatory discrete acts available as background evidence on the question of retaliatory animus. This was an error of law.

In the present case, the actions taken by the DOE in retaliation against Massaro have been continuing in nature, as far back as 2011 arising in retaliation for her protected activity (her first lawsuit that was concluded on October 23, 2014) through the 2012-2013, 2013-2014, 2014-2015, and 2015-2016 school years. Massaro established a continuing violation based on her employer's "inaction" in addressing retaliation against her alone.

The application of the continuing violation doctrine requirements, including the scope of what constitutes

a discrete act, and the policy and practice, requires clarification by from Court and thus the petition should be granted.

IV. The record evidence reflects material issues of fact and thus the summary judgment should have been denied.

The Second Circuit erred in holding that the "overwhelming record evidence shows that fellow teachers worked under similar conditions as Plaintiff." There were material issues of fact in the record.

The record shows that Massaro was treated less favorably than others with no EEO activity. (R363-R364 ¶34-35). For example, Ms. Massaro was given four one-hour consecutive periods in different classrooms to teach, violating the Collective Bargaining Agreement. She could not use the bathroom within a five-minute window between classes without being late. She identified other teachers that did not have any protected activity were treated more favorably than Massaro: in that, they received more favorable schedules than her and thus were provided time in their schedules to use a restroom. (R364 ¶36). The Board's allegation others were treated similarly because, allegedly, some teachers taught two consecutive classes, however, Massaro was forced to teach four classes; thus, this is not similar treatment.

Further, to the extent that the District Court stated that Massaro did not pinpoint evidence of her assertions of preferential treatment, the District Court also erred. Massaro submitted a detailed declaration and there was no evidence of protected activity other than Massaro.

The record also shows that contrary to the Board's assertions, Massaro was not provided with adequate

supplies. Massaro was approved for a $1,000 budget to buy supplies (2014-2015 year), and the following year, this amount was reduced significantly to $156.75 for the 2015-2016 school year. (R202-R203).

Additionally, the record shows that Massaro was deliberately assigned a windowless room that was often excessively cold in the winter and extremely hot in summer, with an AC unit not working in the warmer months. In photography classes with chemicals being used, Massaro was not given a room with windows to allow for ventilation with fresh air. This was done from 2012 to the date of her constructive termination in July 2016. Massaro identified other teachers who had not engaged in protected activity that were given more desirable classrooms. (R365 ¶39)

In the 2015-2016 school year, Massaro was deliberately assigned too many students for a small room and too many students for a darkroom with ten enlargers. In addition, Massaro was given an excessive number of special education students, which she was not equipped to handle because they are higher needs students. She needed extra care when the class is an equipment class with 30 students or more. Massaro requested paraprofessional support, but this was denied (R366 ¶40).

Furthermore, the number of special education students assigned to Massaro was excessive for a photography class. It was challenging and stressful to have this many students in an overcrowded, large class with no desktop computers and fragile equipment. Often, disruptive students were deliberately placed in photography without requesting the course.

The charts below show that Massaro was assigned a large percentage of special education students in her

classrooms while these other teachers were not given the same percentage of students. Assigning so many special education students is unfair to both the special education students that require more attention and the general education students who receive less attention. Thus, the Board cannot argue that she was treated similarly to these other teachers (R158-R165).

2014-2015 School Year- Average Percentage of IEP Students Per Class		
Teacher	**Term 1**	**Term 2**
Y. Massaro	23	19
S. Kontarinis	2	1.5
A. Galker	9	N/A
C. Rosado	10	7
S. Holcomb	4	9

(R158-R165)

2015-2016 School Year- Average Percentage of IEP Students Per Class		
Teacher	**Term 1**	**Term 2**
Y. Massaro	25	19
S. Kontarinis	6.5	3
C. Rosado	9	8
S. Holcomb	11	7

(R158-R165)

Further, Massaro's photography class was not a list class which meant it was open to anyone in the school. Other art teachers, who had not engaged in protected activity, had preferential treatment and were assigned

"List classes", whereby the teacher selects the students from a pool and can prevent disruptive students from getting into the class. Massaro's classes were therefore large and had students with serious behavioral problems. This occurred from 2012 to the date of her constructive termination in June 2016. (R367 ¶43).

Massaro had four classes with about 140 photo students, who shared just three laptops and ten cameras. It was not possible to teach photography properly. The groups were large, containing a higher percentage of special education students that made it difficult to monitor. (R367 ¶44). By May 2014, Massaro did not have access to the 412-computer room.

There was no advanced class for photography that Massaro could teach. Students who took Advanced photography were placed in the Photo 1 class. By contrast, the new teacher Scott Magin had an Advanced Class with 12 students for Advanced New Media. Massaro had to teach using the beginner and advanced lessons every day because the advanced students already saw her old lessons. Massaro asked for an advanced class, but every year but the Assistant Principal refused to offer the course. As a result, Massaro had to write new lessons and modify her beginner photo 1 lesson to keep the advanced students engaged. This occurred from 2012 until the date of her constructive termination in June 2016.

In semester 1 of the school year 2014-2015, Magin's digital video class had 23 students and only 1 IEP student and full access to new computers in room 412. Massaro had many years of seniority over Magin, yet she had no priority due to her protected activity. (R368 ¶49)

Further, students with high GPAs, including advanced art students that were going to major in photography in college, were blocked from taking photography with Massaro. This occurred from 2012 to the date of her constructive termination in June 2016. (R368 ¶50).

Furthermore, the course selection sheet states the photography class has a "required lab fee (approximately $100) SLR camera". No other class had a lab fee. Again, this shows she was not treated similarly.

Massaro also bought digital cameras on eBay because A.P. Kontarinis did not provide money or equipment for the photography classes. By contrast, A.P. Kontarinis' students used new Canon digital professional cameras (R369 ¶54). Massaro also requested one working Apple desktop for her class to share and was given broken computers in 2012 and more obsolete computers in March 2014, which A.P. Kontarinis said, "were indeed obsolete." A.P. Kontarinis also sabotaged her photography class by delaying film and chemical orders. (R369 ¶55-56). Massaro's students suffered from this delay. Massaro's students were also denied an education in Photoshop, a standard skill on a resume, and were denied equal access to a high-end professional printer necessary to print, showcase their work and enter art shows. (R369 ¶57-58)

In 2015, Massaro was told that she had to pay $700 for ink or not be able to use the printer. After Massaro refused, the ink was removed from the Epson printer, and in June 2015, the printer was moved to another classroom. She had no access to use the computer room and printer. She did not have photography work for the 2015 art calendar or art show. (R369-R370 ¶59). This did not happen to other teachers.

On January 25, 2016, A.P. Kontarinis observed Massaro's Art class, 8th period, on the last day of semester. On January 26, 2016, Massaro was emailed to change bulletin boards while she was out having surgery. A.P. Kontarinis removed only Massaro's students' work from all three bulletin boards. Other bulletin boards remained intact. On January 28, 2016, Massaro's furniture was removed from her art classroom. While still out sick, she received a second email to "clean out all student work on computers" in the computer lab by Monday. (R370 ¶60-62). No other teacher experienced this treatment under these circumstances.

As another example, on April 15, 2016, Massaro was observed by Principal Barge while she was on crutches with an ACL tear and meniscus tears in her knee. She was dumbfounded when the Principal criticized that, "(Massaro) did not walk around enough." Principal Barge wrote Massaro's observation report on June 17, after her June 17 post-observation meeting. She received a biased Formal Observation report from Spy Kontarinis on June 22, 2016. (R370 ¶63). This again was overlooked.

In April 2016, Digital Art was added to the course selection for Semester 1 of 2016, taught by Ms. DuSauzay. Two teachers would use the Apple computer room, which meant Massaro could not use the computers, even though her photo students used digital cameras. (R370 ¶64).

On May 3, 2016, Massaro had knee surgery due to an on-the-job accident on March 28, 2016. On May 3, 2016, Massaro asked Mr. Barge for a copy of the video of her accident in the hall to use it for her line of duty injury claim (LODI). Mr. Barge emailed: "you would have to subpoena the video to receive a copy" of the video of her injury at work. Massaro did not have the power to subpoena the footage. Her LODI claim was

denied even though she had a work-related injury. (R370 ¶65). On May 25, 2016, Massaro was compelled to return to work on crutches in significant pain against the advice of her own physician and finished the semester because her leave time was denied. Her job requires mostly standing. She was in pain every day, and it was difficult working in a darkroom with crutches. (R371 ¶66-67). No other teacher was forced to return to work under these circumstances. On June 28, 2016, after working in a substantial amount of pain every day, Massaro submitted her retirement papers since she had no choice but to resign given the ongoing harassment. (R371 ¶69)

The record evidence shows that Massaro was treated differently than her counterparts who did not have any protected activity (retaliation). At the very least, the record evidence reflects material issues of fact and thus the summary judgment should have been denied.

For all these reasons, the Second Circuit erred in holding that Massaro merely presented a list of discrete acts that did not make up a series of violations within the meaning of the continuing violation act. At the very least, the Second Circuit should have considered the untimely events as background evidence mandated by *Morgan*. The failure of the Second Circuit to do so was an error of law, and the application of the continuing violation doctrine requirements, including the scope of what constitutes a discrete act, and the policy and practice, requires clarification by from Court.

For the foregoing reasons, given the conflict among the Circuit Courts regarding the standard to apply in retaliatory harassment claims, the but for or motivating factor standard concerning causation and the discrete versus non-discrete acts and policy and practice

application of the continuing violation doctrine, the Court should grant this petition

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the petition and any other relief that is just and equitable.

Respectfully submitted,

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August 31, 2022

APPENDIX

APPENDIX A

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 2nd day of June, two thousand twenty-two.

Present: DENNIS JACOBS,
ROSEMARY S. POOLER,
STEVEN J. MENASHI,

Circuit Judges.

21-266-cv

YVONNE T. MASSARO,

Plaintiff-Appellant,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendants-Appellees.

Appearing for Appellant:

Natalia Kapitonova, Stewart Lee Karlin Law Group, P.C. (Stewart Lee Karlin, *on the brief*), New York, N.Y.

Appearing for Appellee:

Julia Steiner, Assistant Corporation Counsel (Richard P. Dearing, Scott Shorr, *on the brief*), *for* Georgia M. Pestana, Corporation Counsel of the City of New York, New York, N.Y.

Appearing for the Equal Employment Opportunity Commission as *amicus curiae* in support of Appellant:

James M. Tucker, Office of General Counsel, (Jennifer S. Goldstein, Associate General Counsel, Elizabeth E. Theran, Assistant General Counsel, *on the brief*), *for* Gwendolyn Young Reams, Acting General Counsel, Washington, D.C.

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

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the opinion and order of said District Court be and it hereby is AFFIRMED.

Yvonne T. Massaro appeals from the January 19, 2021 opinion and order of the United States District Court for the Southern District of New York (Schofield, *J.*), granting in part defendants' motion for summary judgment on Massaro's claim that defendants retaliated against her in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. ("ADEA"). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

We review a district court's grant of summary judgment de novo. *Mauro v. S. New England Telecomms., Inc.*, 208 F.3d 384, 386 (2d Cir. 2000). In reviewing a grant of summary judgment, the court must draw all available inferences in favor of the non-moving party. *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 61 (2d Cir. 1998). To present a prima facie case of retaliation under the ADEA, a plaintiff must show evidence sufficient to permit a rational trier of fact to find: (1) that she engaged in protected activity under the ADEA, (2) that the employer was aware of this activity, (3) that the employer took adverse action against the plaintiff, and (4) that a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the adverse employment action. *Kessler v. Westchester Cnty. Dep't of Soc. Servs.*, 461 F.3d 199, 205-06 (2d Cir. 2006) (citation omitted).

A retaliation claim under the ADEA follows the burden-shifting approach set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Gorzynski v.*

JetBlue Airways Corp., 596 F.3d 93, 110 (2d Cir. 2010). Under the *McDonnell Douglas* framework, the plaintiff bears the initial burden of establishing a prima facie case of retaliation. *Id*. at 106. Once the plaintiff does so, the burden shifts to the defendant to articulate "some legitimate, nondiscriminatory reason" for the adverse action. *Id.* If the defendant is able to provide a reason, "the plaintiff can no longer rely on the prima facie case, but may still prevail if she can show that the employer's determination was in fact the result of [retaliation]." *Id*.

The parties do not dispute that the first two elements of the prima facie case are met here. Instead, the parties dispute (1) whether some of the events described are time-barred; (2) whether the DOE's conduct was materially adverse; and (3) whether the causation element is met.

The district court held that because the ADEA has a 300-day statute of limitations that runs from the date of the alleged unlawful employment practice, and Massaro filed her EEOC complaint on August 3, 2016, "[a]ny allegedly retaliatory conduct occurring prior to October 8, 2015, is barred by the statute of limitations, unless Plaintiff can establish a continuing violation for conduct before that date." *Massaro v. Bd. of Ed*., 17 Civ. 8191 (LGS), 2021 WL 184364, at *3 (S.D.N.Y. Jan. 19, 2021). The district court held that Massaro failed to establish a continuing violation, stating that plaintiff only alleged discrete acts that were not the result of a retaliatory policy. *Id.*

The continuing violation doctrine states that "a plaintiff may bring claims for discriminatory acts that would have been barred by the statute of limitations as long as an act contributing to that [discrimination] took place within the statutory time period." *Papelino*

v. Albany Coll. of Pharmacy of Union Univ., 633 F.3d 81, 91 (2d Cir. 2011) (internal quotation marks, alterations, and citation omitted). Therefore, "a continuing violation may be found where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the [defendant] to continue unremedied for so long as to amount to a discriminatory policy or practice." *Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994). The doctrine applies to claims "composed of a series of separate acts that collectively constitute one unlawful employment practice." *Washington v. Cnty. of Rockland*, 373 F.3d 310, 318 (2d Cir. 2004) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 (2002)). The continuing violation doctrine thus applies not to discrete unlawful acts, even where those discrete acts are part of a "serial violation[]," but to claims that by their nature accrue only after the plaintiff has been subjected to some threshold amount of mistreatment. *Morgan*, 536 U.S. at 114-15. Accordingly, where the continuing violation doctrine applies, the limitations period begins to run when the defendant has "engaged in enough activity to make out an actionable . . . claim." *Id.* at 117. A claim will be timely, however, if the plaintiff "allege[s] . . . some non-time-barred acts" contributing to the alleged violation. *Harris*, 186 F.3d at 250.

Massaro's evidence is comprised of discrete acts that do not make up a series of violations within the meaning of the continuing violation act. Massaro fails to provide any evidence that would support her contention that her employer's actions against her were a series of repeated retaliatory practices. Instead, Massaro describes an unpleasant work environment, multiple one-off actions, but nothing that would reach the level

of an ongoing retaliatory practice such that we should consider her time-barred conduct.

Finally, as the district court held, Massaro failed to allege causation. Causation can be established either directly through evidence of retaliatory animus or indirectly by demonstrating that the adverse employment action followed quickly on the heels of the protected activity or through other evidence such as disparate treatment of fellow employees. *Gordon v. N.Y.C. Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000). Massaro concedes that she cannot show direct evidence of retaliatory animus, but her efforts to show indirect causation fail as well.

Even assuming the district court erred in failing to consider time-barred evidence as background evidence, *Morgan*, 536 U.S. at 113, Massaro has not shown temporal proximity. When the plaintiff relies on temporal proximity alone, "the temporal proximity must be very close." *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (internal quotation marks omitted). The conduct Massaro describes as occurring in retaliation for her 2011 lawsuit transpired over the course of numerous school years. This is insufficient to demonstrate temporal proximity, which we have stated is generally insufficient to establish causation "after about three months." *Berrie v. Bd. of Educ. of Port Chester-Rye Union Free Sch. Dist.*, 750 F. App'x 41, 49 (2d Cir. 2018) (citing *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990)). The district court also properly found that "the overwhelming record evidence shows that fellow teachers worked under similar conditions as Plaintiff, including comparable schedules, class sizes and compositions, and access to educational resources." *Massaro*, 2021 WL 184364, at *5.

We have considered the remainder of Massaro's arguments and find them to be without merit. Accordingly, the order of the district court hereby is AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk
[Seal Catherine O'Hagan Wolfe]

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17-CV-8191 (LGS)(KNF)

YVONNE MASSARO,

Plaintiff,

vs.

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Defendant

IT IS HEREBY STIPULATED AND AGREED by and between the parties, through their respective undersigned counsel, pursuant to Federal Rules of Civil Procedure Rule 15 and 41(a)(l), that Plaintiff's remaining claim under that ADEA that "Defendant's review of her substitute teaching application on or after September 16, 2016, was in retaliation to her EEOC charge," is dismissed with prejudice with each party to bear its own costs and fees but without prejudice to Plaintiff's right to appeal the remaining claims that were previously dismissed by the Court in Summary Judgment Decision and Order Dkt No. 75.

Dated: New York, New York
February 2, 2021

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Dominique Saint-Fort, Esq.

SO ORDERED. The Clerk of Court is respectfully directed to close the case.

Dated: February 3, 2021
New York, New York

/s/ Lorna G. Schofield
Lorna G. Schofield
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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17 Civ. 8191 (LGS)

YVONNE MASSARO,

Plaintiff,

Against

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, *et al.*,

Defendants.

OPINION & ORDER

LORNA G. SCHOFIELD, District Judge:

Defendant the Board of Education of the City School District of the City of New York (also known and doing business as The Department of Education of the City of New York) moves for summary judgment on Plaintiff Yvonne Massaro's claims that Defendant retaliated against her in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq. ("ADEA"). For the reasons stated below, the motion is granted in part and denied in part.

I. BACKGROUND

Plaintiff is an art teacher employed by Defendant from 1989 to July 2016. In 2011, Plaintiff filed a lawsuit against Defendant alleging age-based discrimination under the ADEA. The suit was dismissed in May 2013. Plaintiff filed an EEOC charge in August 2016. She

then filed this action in 2017, alleging that as a result of the 2011 lawsuit and the EEOC charge, Defendant discriminated against her based on her age and retaliated against her from August 2013 through September 2016, both in violation of the ADEA. Defendant moved to dismiss for failure to state a claim. The Court granted Defendant's motion to dismiss. On appeal, the Second Circuit affirmed the dismissal of the discrimination claim and remanded for consideration of Plaintiff's retaliation claim, holding that although Plaintiff's alleged retaliatory harms were minor in isolation, in aggregate they were sufficient to survive a motion to dismiss. Defendant now moves for summary judgment on that claim.

II. STANDARD

Summary judgment is appropriate where the record establishes that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact exists if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 113 (2d Cir. 2017) (quoting *Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 248 (1986)). In evaluating a motion for summary judgment, a court must "construe[] the evidence in the light most favorable to the nonmoving party and draw[] all reasonable inferences and resolv[e] all ambiguities in its favor." *Wagner v. Chiari & Ilecki, LLP*, 973 F.3d 154, 164 (2d Cir. 2020) (internal quotation marks omitted). When the movant properly supports its motion with evidentiary materials, the opposing party must establish a genuine issue of fact by "citing to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(1)(A). "[A] party may not rely on mere

speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Fed. Trade Comm'n v. Moses*, 913 F.3d 297, 305 (2d Cir. 2019) (internal quotation marks omitted). "Only admissible evidence need be considered by the trial court in ruling on a motion for summary judgment." *Porter v. Quarantillo*, 722 F.3d 94, 97 (2d Cir. 2013); *accord Starr Indem. & Liab. Co. v. Brightstar Corp.*, 388 F. Supp. 3d 304, 323 (S.D.N.Y. 2019), *aff'd*, 828 F. App'x 84 (2d Cir. 2020) (summary order).

A retaliation claim under the ADEA follows the burden-shifting approach set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010); *accord Peddy v. L'Oreal USA, Inc.*, No. 18 Civ. 7499, 2020 WL 4003587, at *17 (S.D.N.Y. July 15, 2020). Under that framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *Gorzynski*, 596 F.3d at 106. If the plaintiff does so, the burden shifts to the defendant to articulate "some legitimate, nondiscriminatory reason" for the adverse employment action. *Id.* Once such a reason is provided, "the plaintiff can no longer rely on the prima facie case, but may still prevail if she can show that the employer's action was in fact the result of discrimination." *Id*.

III. DISCUSSION

A. Plaintiff's Prima Facie Case

To establish a prima facie case of retaliation under the ADEA, "a plaintiff must adduce evidence sufficient to permit a rational trier of fact to find (1) that [s]he engaged in protected participation or opposition under . . . the ADEA[ ], (2) that the employer was aware of this activity, (3) that the employer took adverse action

against the plaintiff, and (4) that a causal connection exists between the protected activity and the adverse action . . . ." *Kessler v. Westchester Cty. Dep't of Soc. Servs.*, 461 F.3d 199, 205 (2d Cir. 2006) (internal quotation marks and citations omitted); *accord Ninying v. N.Y.C. Fire Dep't*, 807 F. App'x 112, 115 (2d Cir. 2020) (summary order).

1. Plaintiff's Protected Activity and Defendant's Awareness

Plaintiff claims that her 2011 discrimination lawsuit against Defendant and her August 3, 2016, EEOC charge of discrimination constitute protected activity of which Defendant was aware. Defendant concedes that the 2011 lawsuit was protected activity of which it was aware, and that the EEOC charge constitutes protected activity.

As to Defendant's awareness of the August 3, 2016, EEOC charge, the only harmful conduct Plaintiff identifies that might have been influenced by that charge is Defendant's review of its denial of her substitute teaching license in September 2016. The parties do not dispute that in August 2016, Plaintiff applied for a substitute teaching license from Defendant, and on August 18, 2016, her application was denied due to an "Unsatisfactory" rating she received in 2012. On September 12, 2016, Plaintiff requested a review of her application, and on September 19, 2016, Defendant asked that she complete additional forms. Plaintiff ultimately never received her substitute license, though the parties dispute whether that non-receipt was because (1) Plaintiff never submitted the requested forms or (2) Defendant did not take further action on the review petition. The parties agree that Defendant did not receive notice of the EEOC charge until September 16, 2016, and that Defendant's review of

Plaintiff's application following that date is the only complained-of conduct that could support a claim of retaliation for the EEOC charge.

2. Materially Adverse Actions

Plaintiff reiterates the same retaliatory actions as alleged in the Complaint. Plaintiff first identifies conduct that ran continuously from 2012 to 2016: that (1) she was deliberately assigned to a classroom that was too cold in the winter and too hot in the summer and lacked windows; (2) her classes were always scheduled for open enrollment, whereas other teachers could select students from a pool of applicants to avoid disruptive students; (3) she was assigned an excessive number of disruptive students, but students with high GPAs were blocked from taking her class; and (4) Assistant Principal Kontarinis refused to allow Plaintiff to teach advanced courses, gave her outdated equipment and imposed a lab fee only for her class.

Plaintiff also identifies discrete instances of allegedly retaliatory conduct: that (1) in 2012, she received an "Unsatisfactory" rating, received notations in her personnel file for an intruder who was not her student and for failing to address a puddle from a leaky bottle, and was labeled "excessively absent" (on a rating sheet that contained "many attendance errors") because she took 20 days off for jury duty; (2) in the 2014-2015 school year, she was assigned a difficult schedule that required her to teach four back-to-back classes in different classrooms without adequate time to prepare or use the restroom between sessions; (3) in the 2015-2016 school year, she was assigned larger classes than her colleagues, and students with behavioral issues were added to her class when enrollment was low; (4) in January 2016, her students' work was removed from bulletin boards and furniture was removed from

her classroom; (5) in April 2016, a new course list was instituted which resulted in Plaintiff's students not being able to use computers, and Principal Barge gave her a biased formal observation; (6) in May 2016, Principal Barge refused to give Plaintiff a video of a workplace injury she had suffered and told her to obtain a subpoena for it; (7) in June 2016, Assistant Principal Kontarinis refused to allow Plaintiff to use a printer, and it was moved to another teacher's classroom; and (8) in July 2013, Plaintiff was investigated for allegedly using corporal punishment on a student who was not in her class.

i. Time-Barred Conduct

Plaintiff filed her EEOC complaint on August 3, 2016, shortly after her retirement. The ADEA has a 300-day statute of limitations that runs from the date of the alleged unlawful employment practice. *See* 29 U.S.C. § 626(d)(1)(B); *see also Brodsky v. City Univ. of New York*, 56 F.3d 8, 10 (2d Cir. 1995); *Lopez v. N.Y.C. Dep't of Educ.*, No. 17 Civ. 9205, 2020 WL 4340947, at *4 (S.D.N.Y. July 28, 2020). Any allegedly retaliatory conduct occurring prior to October 8, 2015, is barred by the statute of limitations, unless Plaintiff can establish a continuing violation for conduct before that date.

"The continuing violation doctrine provides that [w]hen a plaintiff experiences a continuous practice and policy [that violates his or her rights], . . . the commencement of the statute of limitations period may be delayed until the last violation." *Flores v. United States*, 885 F.3d 119, 121 (2d Cir. 2018) (alterations in original) (internal quotation marks omitted). "To qualify as continuing, the claimed actions must not be discrete acts, but repeated conduct that occurs over a series of days or perhaps years."

Zoulas v. N.Y.C. Dep't of Educ., 400 F. Supp. 3d 25, 49 (S.D.N.Y. 2019); *see also Staten v. City of New York*, 726 F. App'x 40, 43 (2d Cir. 2018) (summary order) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)). "[M]ultiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation." *Lambert v. Genesee Hosp.*, 10 F.3d 46, 53 (2d Cir. 1993) (*abrogated on other grounds by Kasten v. Saint–Gobain Performance Plastics Corp.*, 563 U.S. 1, 5–6 (2011)); *accord James v. Van Blarcum*, 782 Fed App'x 83, 84 (2d Cir 2019) (summary order); *Zoulas*, 400 F. Supp. 3d at 50.

In the context of ADEA claims by schoolteachers like Plaintiff, examples of discrete acts "include disciplining, negative performance reviews, termination, failure to promote, and denial of a preferred job position." *Zoulas*, 400 F. Supp. 3d at 50. "The continuing violation doctrine is heavily disfavored in the Second Circuit and courts have been loath to apply it absent a showing of compelling circumstances." *Siclari v. N.Y.C. Dep't of Educ.*, No. 19 Civ. 7611, 2020 WL 7028870, at *4 (S.D.N.Y. Nov. 30, 2020); *accord Quadrozzi Concrete Corp. v. City of New York*, No. 03 Civ. 1905, 2004 WL 2222164, at *8 (S.D.N.Y. Sept. 30, 2004), *aff'd*, 149 F. App'x 17 (2d Cir. 2005) (summary order).

Claims based on discrete acts that occurred before October 8, 2015, are barred by the statute of limitations, and such acts are not eligible for consideration as a continuing violation. Those include: (1) the 2012 "Unsatisfactory" rating and disciplinary actions; (2) the 2013 investigation for corporal punishment; and (3) the back-to-back class scheduling in the 2014- 2015 school year, all of which occurred prior to October 8, 2015.

The remaining conduct that commenced before the limitations cutoff allegedly occurred continuously from 2012 to 2016 -- i.e., assignment to an intemperate and windowless classroom, open enrollment, assignment of disruptive students, refusal to allow Plaintiff to teach advanced courses and the requirement that her courses have lab fees and use outdated equipment. The parties dispute the factual accuracy of these allegations and whether they constitute discrete acts. But Plaintiff does not identify any evidence showing that this conduct was the result of a "discriminatory policy or mechanism," as is required to establish a continuing violation. *Lambert*, 10 F.3d at 53. Although all factual disputes must be construed in the light most favorable to Plaintiff as the non-moving party, to make a prima facie case of ADEA retaliation, and thus overcome summary judgment, Plaintiff may not "rely on mere speculation or conjecture as to the true nature of the facts," *Moses*, 913 F.3d at 305, but "unlike on a motion to dismiss . . . must actually point to record evidence creating a genuine dispute as to the specific facts alleged." *Vega v. Semple*, 963 F.3d 259, 274 n.67 (2d Cir. 2020). Plaintiff provides a declaration that reiterates the allegations in her complaint, as well as responses to Defendant's Rule 56 statement that do the same. Neither identifies any evidence from which a reasonable jury could conclude that Defendant's conduct falling outside the limitations period resulted from a discriminatory policy or mechanism. Summary judgment is granted for Defendant to the extent Plaintiff's retaliation claim rests on conduct that occurred before October 8, 2015.

In response, Plaintiff cites precedent stating that hostile work environment claims by necessity involve repeated conduct. That is true but beside the point, as Plaintiff provides no evidence supporting the inference

that the repeated conduct complained of was part of any discriminatory practice. Instead, as with her complaint and declaration, Plaintiff lists the objectionable conduct alongside the bare conclusion that it was retaliatory. Plaintiff also notes that the Second Circuit held that her complained-of conduct could, in aggregate, plausibly support a claim of retaliation at the motion to dismiss stage. That holding does not bear on the question of whether Plaintiff has demonstrated a fact issue as to a continuing violation that precludes summary judgment for Defendant as to conduct barred by the statute of limitations.

ii. Non-Time-Barred Conduct

For purposes of an ADEA retaliation claim, a material adverse action is one that "could well have dissuaded a reasonable employee in [plaintiff's] position from complaining of unlawful discrimination." *Davis-Garett v. Urban Outfitters, Inc.*, 921 F.3d 30, 44 (2d Cir. 2019) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)). "[T]he broadness of this definition means that 'the scope of [the] anti-retaliation provision is broader than that of its discriminatory action provision.'" *Cerni v. J.P. Morgan Sec. LLC*, 208 F. Supp. 3d 533, 539 (S.D.N.Y. 2016) (quoting *Patane v. Clark*, 508 F.3d 106, 116 (2d Cir. 2007)). As the Second Circuit has explained, there are no bright-line rules as to what amounts to a materially adverse action so courts must "pore over each case to determine whether the challenged [ ] action reaches the level of adverse," recognizing that "not every unpleasant matter short of [discharge or demotion]" qualifies. *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997); *accord Salahuddin v. N.Y.C. Dep't of Educ.*, No. 15 Civ. 6712, 2017 WL 3724287, at *3 (S.D.N.Y. Aug. 28, 2017).

Plaintiff provides record evidence of certain non-time-barred conduct: the classroom temperature issues and lack of windows, assignment of disruptive students and rejection of those with high GPAs, open enrollment scheduling, large class sizes, denial of equipment, denial of requests to teach advanced classes, imposition of lab fees, removal of work from bulletin boards, a biased formal observation, denial of access to video of her workplace injury and denial of her substitute teaching license application.[1] Defendant contests the accuracy of some, but not all, of this evidence, pointing to countervailing record evidence showing that: (1) Plaintiff was provided adequate technology and supplies; (2) her class was not always open enrollment; (3) her class schedule and sizes were comparable to similarly-situated colleagues; (4) she was assigned a similar number of disruptive or special needs students as her colleagues; (5) student work was removed from all bulletin boards in the school; and (6) she never submitted all documentation required for her substitute teaching license application. Because a reasonable jury evaluating the conflicting evidence could conclude that this conduct occurred and that it could dissuade a reasonable employee in Plaintiff's position from complaining of unlawful discrimination, summary judgment cannot be granted to Defendant on this basis.

Defendant argues that these complained-of actions do not meet the standard for an adverse employment action as they amount to "petty slights or minor annoyances." As the Second Circuit has noted, "[c]ontext matters" in this analysis, and something that might be

[1] The non-time-barred conduct identified in the record does not include all harmful conduct alleged in Plaintiff's complaint and moving papers. This opinion addresses only the conduct supported by record evidence. *See* Fed. R. Civ. P. 56(c)(1).

a "petty slight" to one person might "matter enormously" to another in the context of a retaliation claim, which "covers a broader range of conduct than does the adverse action standard for claims of [substantive] discrimination." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 90 (2d Cir. 2015) (quoting *Burlington*, 548 U.S. at 69). Because a reasonable jury could conclude that the complained of actions, in aggregate, "could well dissuade a reasonable worker from making or supporting a charge of discrimination," summary judgment for Defendant on this basis is improper. *Id.*

3. Causation

Regarding causation, the law is unsettled as to whether the Supreme Court's decision in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009), requires but-for causation only for ADEA claims of disparate treatment, leaving ADEA retaliation claims to be decided under the more relaxed "motivating factor" test. *See Fried v. LVI Servs., Inc.*, 500 F. App'x 39, 41–42 (2d Cir. 2012) (summary order) (declining to reach the issue of whether the "but-for test or the motivating factor analysis" applies to ADEA retaliation claims because the record was insufficient to satisfy either standard). Since *Fried*, the Supreme Court has held that but-for causation applies to retaliation claims under Title VII, *see Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2534 (2013), and the Second Circuit and numerous courts in this District in nonbinding decisions have applied *Nassar* to conclude that ADEA retaliation plaintiffs must establish "but-for" causation in a prima facie case. *See, e.g.*, *Ninying,* 807 F. App'x at 115 ("the ADEA or Title VII, both . . . required [plaintiff] to allege that his protected activity was the but-for cause of the adverse employment action"); *Torre v. Charter Commc'ns, Inc.*, No. 19

Civ. 5708, 2020 WL 5982684, at *6 (S.D.N.Y. Oct. 8, 2020).

Plaintiff attempts to establish causal links between the complained-of activity and her (1) 2011 lawsuit and (2) 2016 EEOC charge. With respect to the 2011 lawsuit and allegedly retaliatory conduct, all of which occurred while she was still employed by Defendant, Plaintiff has not met her burden to show a prima facie case of causation under either the "but-for" or "motivating factor" tests. Due to the short amount of time between Plaintiff's filing of the EEOC charge after her retirement and Defendant's alleged denial of her substitute teaching license application, a reasonable jury could conclude that the EEOC charge was a but-for cause of or motivating factor in Defendant's non-issuance of that license.

i. Retaliation for the 2011 Lawsuit

In an ADEA retaliation case, "[c]ausation can be established either directly through evidence of retaliatory animus or indirectly by demonstrating that the adverse employment action followed quickly on the heels of the protected activity or through other evidence such as disparate treatment of fellow employees." *Dickens v. Hudson Sheraton Corp., LLC*, 167 F. Supp. 3d 499, 522 (S.D.N.Y. 2016), *aff'd*, 689 F. App'x 670 (2d Cir. 2017) (*citing Kercado–Clymer v. City of Amsterdam*, 370 Fed. App'x 238, 242–43 (2d Cir. 2010) (summary order)). All of the non-time-barred conduct that Plaintiff contends was in retaliation for the 2011 lawsuit occurred between the limitations date of October 8, 2015, and Plaintiff's retirement in July 2016. Plaintiff has provided no direct evidence of retaliatory animus underlying that conduct. Nor has Plaintiff adduced any evidence from which a reasonable juror could conclude that her fellow employees received disparate treatment.

Although Plaintiff states, without reference to the record, that she was treated differently from her coworkers, the overwhelming record evidence shows that fellow teachers worked under similar conditions as Plaintiff, including comparable schedules, class sizes and compositions, and access to educational resources.

Nor does the amount of time that passed between the 2011 lawsuit and the complained-of conduct make out a prima facie case of causation. "A plaintiff can indirectly establish a causal connection to support a discrimination or retaliation claim by showing that the protected activity was closely followed in time by the adverse employment action." *Gorzynski*, 596 F.3d at 110 (internal quotation marks and alterations omitted); *accord Wein v. N.Y.C. Dep't of Educ.*, No. 18 Civ. 11141, 2020 WL 4903997, at *20 (S.D.N.Y. Aug. 19, 2020). Plaintiff's lawsuit was filed in 2011, dismissed by the state trial court in May 2013 and dismissed on appeal on October 23, 2014. *See Massaro v. Dep't of Educ. of New York*, 993 N.Y.S.2d 905 (1st Dep't 2014). The non-time-barred conduct runs from October 8, 2015, through Plaintiff's retirement in July 2016.

Although there is no bright line to determine when the gap between protected activity and retaliatory action is too attenuated, when the plaintiff relies on temporal proximity alone, "the temporal proximity must be very close." *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (internal quotation marks omitted); *accord Barrer-Cohen v. Greenburgh Cent. Sch. Dist.*, No. 18 Civ. 1847, 2019 WL 3456679, at *6 (S.D.N.Y. July 30, 2019). District courts in this circuit have held that a "temporal gap of more than a few months will generally be insufficient to raise a plausible inference of causation without more." *Ray v. N.Y. State Ins. Fund*, No. 16 Civ. 2895, 2018 WL

3475467, at *11 (S.D.N.Y. July 18, 2018) (collecting cases). "'Temporal proximity alone' between the plaintiff's protected activity and the alleged retaliatory action 'is generally insufficient' to establish causation 'after about three months.'" *Rettino v. N.Y.C. Dep't of Educ.*, No. 19 Civ. 5326, 2020 WL 4735299, at *3 (S.D.N.Y. Aug. 14, 2020) (quoting *Berrie v. Bd. of Educ. of Port Chester-Rye Union Free Sch. Dist.*, 750 F. App'x 41, 49 (2d Cir. 2018) (summary order) (citing *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990))). The period between the protected activity and actionable retaliatory conduct in this case is much longer, and Plaintiff does not identify any other evidence from which a reasonable jury could infer causation. Because Plaintiff fails to meet her burden on this aspect of her prima facie case, summary judgment is granted for Defendant on Plaintiff's retaliation claim for conduct occurring between October 8, 2015, and her July 2016 retirement.

ii. The 2016 EEOC Charge

Plaintiff also claims Defendant retaliated against her for her EEOC charge by denying her application for a substitute teaching license. As with the conduct allegedly motivated by the 2011 lawsuit, Plaintiff identifies no direct evidence of retaliatory animus or disparate treatment by Defendant in relation to the license application.

Unlike Plaintiff's other complained-of conduct, some of Defendant's activity with respect to the application closely followed notice of the EEOC charge on September 16, 2021. The parties agree that pursuant to its review of Plaintiff's application to serve as a substitute teacher, Defendant sent an email to Plaintiff on September 19, 2016, stating that Plaintiff needed to complete additional forms and submit them

through Defendant's online portal. Defendant claims that Plaintiff never completed these forms, thus resulting in an incomplete application upon which Defendant could not act. Plaintiff stated in her deposition that she did not complete those forms shortly after Defendant states they were sent because she did not receive them, but that she visited Defendant's premises to check on the status of her application and was told she would not receive a substitute teaching license. Her affidavit clarifies this testimony, noting that she later received the email and submitted the requested forms, and was again told on a second visit to Defendant's premises that she would not receive a license. Genuine issues of material fact exist as to whether: (1) Plaintiff submitted those forms; (2) Defendant did not issue a license due to their absence; and (3) Defendant explicitly told Plaintiff that her license application had been denied, instead of declining to act on it. If Defendant in fact denied the substitute teaching license, then, drawing all inferences in Plaintiff's favor, a jury could conclude that the decision was due to or motivated by retaliatory animus arising from the immediately preceding EEOC charge. Plaintiff has met her prima facie burden on causation for Defendant's review of her substitute teaching license application on or after September 16, 2016.

B. Non-Discriminatory Reasons for Defendant's Action and Pretext

Plaintiff has made a prima facie case of retaliation under the ADEA only for Defendant's review of her substitute teaching application following notice of the EEOC charge on September 16, 2016. The burden shifts to Defendant to provide a "legitimate, nondiscriminatory reason" for its action, after which Plaintiff

"can no longer rely on the prima facie case, but may still prevail if she can show that the employer's action was in fact the result of discrimination." *Gorzynski*, 596 F.3d at 106. Defendant has provided a nondiscriminatory justification, noting an email supporting its claim that it did not take further action on Plaintiff's substitute teaching application because Plaintiff never provided the necessary forms. Plaintiff's countervailing testimony is that Defendant twice told her that her application was denied, both before and after she submitted the requested forms. Because a reasonable jury could accept Plaintiff's testimony to conclude that Defendant's stated nondiscriminatory justification for its denial of the substitute teaching was pretextual, summary judgment for Defendant is improper on this basis.

IV. CONCLUSION

For the reasons stated above, Defendant's motion for summary judgment is denied as to Plaintiff's claim that Defendant's review of her substitute teaching application on or after September 16, 2016, was in retaliation to her EEOC charge. Defendant's motion for summary judgment is otherwise granted. The Clerk of Court is respectfully directed to close Docket Number 59.

Dated: January 19, 2021
New York, New York

/s/ Lorna G. Schofield
Lorna G. Schofield
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of May, two thousand nineteen.

PRESENT:

JON O. NEWMAN,
DENNIS JACOBS,
CHRISTOPHER F. DRONEY,

Circuit Judges.

No. 18-2980-cv

YVONNE MASSARO,

Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT:

NATALIA KAPITONOVA, (Stewart Lee Karlin, *on the brief*), Stewart Lee Karlin Law Group, P.C., New York, NY

FOR DEFENDANTS-APPELLEES:

JULIE STEINER, Asst. Corp. Counsel, (Richard P. Dearing, Scott Shorr, Asst. Corp. Counsel, *on the brief*), *for* Zachary W. Carter, Corp. Counsel of the City of New York, New York, NY

Appeal from a judgment of the District Court for the Southern District of New York (Lorna G. Schofield, District Judge), dismissing a complaint alleging age discrimination and retaliation.

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment is affirmed in part, reversed in part, and remanded.

Yvonne Massaro, a former public school teacher, appeals from a judgment of the District Court for the Southern District of New York (Lorna G. Schofield,

District Judge) dismissing under Fed. R. Civ. P. 12(b)(6) her complaint against the New York City Department of Education ("DOE"). She alleged that school personnel violated the Age Discrimination in Employment Act ("ADEA") by discriminating against her on the basis of her age and retaliating against her for bringing an earlier age-discrimination lawsuit. The District Court ruled that Massaro had failed to exhaust her age-discrimination claim and that the allegedly retaliatory actions were not temporally proximate enough to the earlier lawsuit to permit an inference of a causal connection. We assume the parties' familiarity with the facts and procedures of this litigation and recount only matters necessary for disposition of this appeal.

On DOE's motion to dismiss, "all factual allegations in the complaint are accepted as true and all inferences are drawn in [Massaro's] favor." *Littlejohn v. City of New York*, 795 F.3d 297, 306 (2d Cir. 2015). Massaro was a teacher at the Edward R. Murrow High School, a New York City public school, from 1993 until her retirement in 2016, teaching photography there starting in 2009. After her first suit against DOE was dismissed, *Massaro v. Department of Education of City of New York*, No. 08 CIV. 10678 LTS FM, 2011 WL 2207556 (S.D.N.Y. June 3, 2011), *aff'd*, 481 F. App'x 653 (2d Cir. 2012), she filed a second lawsuit against DOE on December 19, 2011 ("2011 lawsuit"), which is the suit underlying the retaliation claim at issue on this appeal.[1] The 2011 lawsuit, after amendment of the complaint, alleged, among other things, age discrimination and retaliation for filing the first lawsuit.

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[1] The District Court dates the initiation of the 2011 lawsuit to October 2011, but according to the state court docket it was filed in December. *See* Complaint, *Massaro v. Department of Education*, No. 0114214/2011 (N.Y. Sup. Ct. Dec. 19, 2011).

A state court dismissed that second lawsuit, and the Appellate Division affirmed. *Massaro v. Department of Education of City of New York*, 993 N.Y.S.2d 905 (N.Y. App. Div., 1st Dep't 2014).

In the pending lawsuit, Massaro alleges that, beginning in 2012, while the 2011 lawsuit was pending, she was the subject of a campaign of harassment by the head of her school's fine arts program, and the school's new principal. She alleges the following conditions and actions to which she, but not other teachers, was subjected:

- her classes were overcrowded;
- she was assigned a disproportionately high number of students with serious behavioral and developmental problems;
- she was assigned to classrooms with no temperature control, which were excessively cold in winter and extremely hot in summer;
- beginning in 2014, she was assigned a teaching schedule of four consecutive one-hour classes, leaving her no time between periods to prepare for class or use the bathroom;
- two infractions were recorded in Massaro's Þle that were not attributable to her, and she was improperly deemed to have been "excessively absent" based on absences she incurred while she was serving on grand jury duty.

Massaro named several teachers who were not subjected to each of the negative conditions listed above, along with their ages, which ranged from late 20s to about 50.

Massaro filed a charge of discrimination with the EEOC in August 2016. The EEOC charge consisted of

a one-page completed form and a seven-page narrative addendum. On the form, Massaro checked a box indicating that her claim was based on "retaliation"; another box marked "age" was left blank.

In the pending action, removed to federal court, Massaro claims that she was subjected to age discrimination and that she was retaliated against for pursuing the 2011 lawsuit. The District Court granted DOE's motion to dismiss. *Massaro v. Department of Education of City of New York*, No. 17 CIV. 8191 (LGS), 2018 WL 4333989 (S.D.N.Y. Sept. 11, 2018). The District Court concluded that Massaro had failed to exhaust her age-discrimination claim because it was not asserted in the EEOC charge nor was it reasonably related to the allegations of retaliation that were asserted in the charge, including the addendum. *Id*. at *3. On the retaliation claim, the District Court concluded that Massaro was precluded by res judicata from claiming retaliation on the basis of any adverse actions that occurred prior to the dismissal of the 2011 lawsuit in May of 2013, and that the adverse actions alleged to have taken place after the dismissal were too temporally remote from the initiation of that lawsuit in 2011 to show a cognizable retaliatory motive. *Id*.

This Court conducts a *de novo* review of a dismissal for failure to state a claim. *See Littlejohn*, 795 F.3d at 306.

1. *Age discrimination*. In her EEOC charge, Massaro checked a box indicating that the alleged discrimination was based on "retaliation"; a separate box for indicating discrimination based on "age" was left blank. However, no party contends, and the District Court did not find, that this omission is dispositive. It is not. *See Williams v. New York City Housing Authority*, 458 F.3d 67, 70-71 (2d Cir. 2006). What

Massaro relies on are the facts alleged in her addendum to the EEOC charge. However, the addendum makes no reference to age discrimination; it merely states Massaro's age. This did not give the EEOC adequate notice that Massaro had made a claim of age discrimination. *See Williams*, 458 F.3d at 70. Because Massaro failed to exhaust her age-discrimination claim, the District Court's ruling dismissing it is affirmed.

2. *Retaliation*. "[F]or a retaliation claim to survive a . . . motion to dismiss, the plaintiff must plausibly allege that: (1) defendants discriminated — or took an adverse employment action — against [her], (2) 'because' [s]he has opposed any unlawful employment practice." *Vega v. Hempstead Union Free School District*, 801 F.3d 72, 90 (2d Cir. 2015) (Title VII context).[2] In deciding whether an allegation is plausible, "judges [are] to rely on their 'experience and common sense,' and to consider the context in which a claim is made." *Irrera v. Humpherys*, 859 F.3d 196, 198 (2d Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). As with all retaliation claims, a plaintiff must show that adverse action was taken because of protected activity. *See Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223 (2d Cir. 2001) (retaliation claim under Americans With Disabilities Act) ("ADA").

An employee engages in protected activity that might give rise to a retaliation claim when she "participate[s]

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[2] ADEA claims are analyzed under the same framework as claims under Title VII and the ADA. *See Kopchik v. Town of East Fishkill, New York*, 759 F. App'x 31, 35 (2d Cir. 2018) (applying Title VII) (citing *Schnabel v. Abramson*, 232 F.3d 83, 87 (2d Cir. 2000)); *Palumbo v. St. Vincent's Medical Center*, 4 F. App'x 99, 102 (2d Cir. 2001) (applying ADA).

in any manner in . . . litigation under [the ADEA]." 29 U.S.C. § 623(d).

An adverse employment action, in the context of a retaliation claim, "is any action that 'could well dissuade a reasonable worker from making or supporting a charge of discrimination.'" *Vega*, 801 F.3d at 90 (quoting *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006)). "Context matters" in this analysis: something might be a "petty slight" to one person but "matter enormously" to another, such that it could "deter a reasonable employee from complaining about discrimination." *Id.* (quoting *Burlington Northern*, 548 U.S. at 69). "This . . . covers a broader range of conduct than does the adverse-action standard for claims of [substantive] discrimination," *id.*, which are limited to "discriminatory actions that affect the terms and conditions of employment," *id.* (quoting *Burlington Northern*, 548 U.S. at 64).

As for causation, a causal connection can be shown "indirectly, by showing that the protected activity was followed closely by discriminatory treatment." *Littlejohn*, 795 F.3d at 319 (quoting *Gordon v. New York City Board of Education*, 232 F.3d 111, 117 (2d Cir. 2000)).

The District Court deemed Massaro's protected activity to have occurred only when her second lawsuit was filed in December 2011 and declined to consider any litigation events that occurred during the pendency of that lawsuit, prior to its dismissal in May 2013. However, this Court has previously measured the occurrence of a protected activity from mid-litigation events, such as notifications to appear for a deposition or as a witness. S*ee Richardson v. New York State Department of Correctional Service*, 180 F.3d 426, 446-47 (2d Cir. 1999), *abrogated on other grounds by Burlington Northern*, 548 U.S. at 53; *Treglia v. Town*

of Manlius, 313 F.3d 713, 720-21 (2d Cir. 2002) (in ADA context, specifically rejecting employer's argument that the protected activity occurred only upon employee's filing of administrative charges); *see also Infantolino v. Joint Industry Board of Electrical Industry*, 582 F. Supp.2d 351, 359 (E.D.N.Y. 2008).

As for retaliation, Massaro alleged several actions that "*could* well dissuade a reasonable worker from making or supporting a charge of discrimination." *Vega*, 801 F.3d at 91 (quoting *Burlington Northern*, 548 U.S. at 57) (emphasis in *Vega*). Although some of the conditions she complains of, considered individually, might reasonably be tolerated by many teachers, the allegation of their combination, alleged to have been imposed only on her, suffices to survive a motion to dismiss.

With respect to causation, the District Court erred in applying res judicata to preclude consideration of the adverse actions that occurred during the pendency of the 2011 lawsuit. "[W]hen the second action concerns a transaction occurring after the commencement of the prior litigation, claim preclusion generally does not come into play." *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 400 F.3d 139, 141 (2d Cir. 2005) (holding that res judicata does not bar employee's Title VII retaliatory discharge action) (internal quotation marks omitted).

Although DOE correctly notes that Massaro's EEOC charge sets August 2013 as the "earliest" "date[] discrimination to[ok] place," the three-month gap between May 2013, when the 2011 lawsuit was dismissed, and August 2013 would not preclude temporal proximity. In the context of a school calendar, judicial "experience and common sense," *Irrera,* 859 F.3d at 198 (quoting *Iqbal*, 556 U.S. at 679), permit the Court to recognize

that May to August is summer break. In that context, it is plausible that August 2013, the start of a new semester, was the school personnel's earliest opportunity to retaliate against Massaro following the dismissal of her 2011 lawsuit.

Whether Massaro's allegations can survive a motion for summary judgment or a trial remains to be determined upon remand. We rule only that the retaliation allegations, taken together, are sufficiently plausible to survive a motion to dismiss.

Affirmed as to dismissal of age discrimination claim, reversed and remanded as to retaliation claim.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
[Seal Catherine O'Hagan Wolfe]

A true Copy
Catherine O'Hagan Wolfe Clark
United States Court of Appeals, Second Circuit
[Seal Catherine O'Hagan Wolfe]

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed: 9/11/2018]

17 Civ. 8191 (LGS)

YVONNE MASSARO,

Plaintiff,

-against-

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK

Defendant.

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

Plaintiff Yvonne Massaro brings this action against The Department of Education of the City of New York ("DoE"), alleging violations under 29 U.S.C. § 623 of the Age Discrimination in Employment Act (the "ADEA"). Defendant moves to dismiss the Amended Complaint ("Complaint") under Federal Rule of Civil Procedure 12(b)(6). For the reasons stated below, Defendant's motion is granted.

I. BACKGROUND

The following is based on allegations in the Complaint, documents attached to or integral to the Complaint and facts of which courts are permitted to take judicial notice. *See Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016). For purposes of this motion,

all factual allegations in the Complaint are assumed to be true. *See Raymond Loubier Irrevocable Tr. v. Loubier*, 858 F.3d 719, 725 (2d Cir. 2017).

Yvonne Massaro was employed as an art teacher by the DoE from 1993 until her retirement on June 28, 2016, at age 55. During her tenure, she filed two lawsuits, one in 2008 and another in 2011, against the DoE alleging discrimination. She filed the second of these in October 2011, in the Supreme Court of the State of New York ("*Massaro I*"), alleging, among other things, that Defendant had discriminated and retaliated against her on the basis of age and for bringing the 2008 action. The lawsuit was dismissed on May 10, 2013, and the Appellate Division of the Supreme Court of New York affirmed the dismissal on October 23, 2014. *Massaro v. Dep't of Educ. of New York*, 993 N.Y.S.2d 905 (1st Dep't 2014).[1]

The Complaint in the instant case alleges that former Principal Anthony R. Lodico, Principal Allen Barge and Assistant Principal Spy Kontarinis retaliated against Plaintiff for filing the 2008 and 2011 lawsuits and discriminated against her based on her age. The Complaint alleges that the discriminatory and retaliatory conduct were continuing from August 2013 to Plaintiff's retirement in July 2016.

In 2012, Plaintiff received an "Unsatisfactory" rating, received notations in her personnel file for an intruder that was not her student and for failing to

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[1] Federal courts may take judicial notice of state court proceedings. *See, e.g. United States v. Miller*, 626 F.3d 682, 687 n.3 (2d Cir. 2010) (taking judicial notice of a Vermont Supreme Court decision); *see also Manta Indus., Ltd. v. TD Bank, Nat'l Ass'n*, No. 17 Civ. 2495, 2018 WL 2084167, at *6 (S.D.N.Y. Mar. 29, 2018).

address "a puddle from a leaky bottle." During that year, she was also labeled "excessively absent" as a result of taking 20 days off for jury duty, and her rating sheet contained "many attendance errors."

The Complaint also alleges that the following retaliatory acts recurred from 2012 until the date of Plaintiff's retired in 2016. Since 2012, Plaintiff was deliberately assigned to a classroom that was too cold in the winter and too hot in the summer. Plaintiff's classes were always scheduled for open enrollment, whereas other teachers could select students from a pool of applicants to avoid disruptive students. Plaintiff was assigned an excessive number of disruptive students, but students with high GPAs were blocked from taking her class. Assistant Principal Kontarinis refused to allow Plaintiff to teach advanced courses, and Plaintiff had to use obsolete equipment to teach. Students were required to pay a lab fee to take Plaintiff's class, but not other classes. These incidents allegedly began in 2012 and continued until Plaintiff retired in 2016.

The Complaint also alleges instances of discriminatory conduct in particular school years. During the 2014-2015 school year, Plaintiff was assigned a difficult schedule that required her to teach four back-to-back classes in different classrooms without adequate time to prepare or use the restroom between sessions. During the 2015-2016 school year, Plaintiff was assigned larger classes than her colleagues, and students with behavioral issues were added to her class when enrollment was low. As a result of her large classes, Plaintiff's classroom was always cramped. In January 2016, Assistant Principal Kontarinis singled out Plaintiff's art class for observation and removed her students' work from bulletin boards. During the same month,

Plaintiff's furniture was removed from her classroom. In April 2016, a new course list was instituted which resulted in Plaintiff's students not being able to use computers. On May 3, 2016, Principal Barge refused to give Plaintiff a video of a workplace injury she had suffered and told her to obtain a subpoena for it. Assistant Principal Kontarinis refused to allow Plaintiff to use a printer, and in June 2016, it was moved to another teacher's classroom. Just before her retirement, Plaintiff was investigated for allegedly using corporal punishment on a student who was not in her class. The Complaint alleges that Plaintiff was forced to retire on June 28, 2016 at age 55, as a result of ongoing harassment.

After her retirement, Plaintiff filed an EEOC complaint on August 2, 2016. In the section of the EEOC charge form that asks the complainant to identify the type of discrimination, she checked the box labeled "retaliation" (but not "age"). In the accompanying addendum, Plaintiff elaborated on the mistreatment she had suffered and alleged that she endured "harassment, stress and retaliation" as a result of filing two lawsuits against the DoE alleging discrimination.

II. LEGAL STANDARD

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). It is not enough for a plaintiff to allege facts that are consistent with liability; the complaint

must "nudge[]" claims "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. "To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). On a Rule 12(b)(6) motion, "all factual allegations in the complaint are accepted as true and all inferences are drawn in the plaintiff's favor." *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 59 (2d Cir. 2016) (internal quotation marks omitted).

In considering a motion to dismiss, courts may look to documents referenced in the complaint, documents that the plaintiff relied on in bringing suit and matters of which judicial notice may be taken. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). When assessing whether a plaintiff has exhausted her administrative remedies at the motion to dismiss stage, courts can rely on EEOC filings to adjudicate the motion, even when they are not attached to the complaint, because plaintiffs rely on these documents to satisfy the ADEA's administrative exhaustion requirements. *See Holowecki v. Fed. Express Corp.*, 440 F.3d 558, 565 (2d Cir. 2006); *accord Atencio v. U.S. Postal Serv.*, No. 14 Civ. 7929, 2015 WL 7308664, at *4 (S.D.N.Y. Nov. 19, 2015).

Similarly, "[a] court may consider a *res judicata* defense on a Rule 12(b)(6) motion to dismiss when the court's inquiry is limited to the plaintiff's complaint, documents attached or incorporated therein, and materials appropriate for judicial notice." *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 498 (2d Cir. 2014); *accord Conopco, Inc. v. Roll Int'l*, 231 F.3d 82, 86 (2d Cir. 2000).

III. DISCUSSION

The Complaint asserts two claims: (1) Plaintiff suffered a hostile work environment and constructive discharge as a result of age discrimination by her superiors and, (2) after filing *Massaro I*, Plaintiff suffered a retaliatory hostile work environment that eventually led to her retaliatory constructive discharge. The age discrimination claims are dismissed because Plaintiff failed to exhaust her administrative remedies. The retaliation claims are dismissed because the Complaint fails to plausibly allege a causal link between Plaintiff's protected activity and the allegedly retaliatory actions.

A. Plaintiff's Age Discrimination Claims

Plaintiff's age discrimination claims are dismissed for failure to exhaust administrative remedies. A plaintiff must exhaust her administrative remedies before bringing an ADEA claim in court. *Legnani v. Alitalia Linee Aeree Italiane, S.P.A*, 274 F.3d 683, 686 (2d Cir. 2001); *accord Jerry Hodges v. Jefferson B. Sessions, III*, No. 17 Civ. 4273, 2018 WL 4232918, at *2 (S.D.N.Y. Sept. 5, 2018). Claims not raised with the EEOC can be raised in a subsequent court action when they are "reasonably related" to the claims filed with the agency. *Id.* A claim is reasonably related if it "would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made" before the agency. *Id.* (quoting *Deravin v. Kerik*, 335 F.3d 195, 200–01 (2d Cir. 2003)).

Here, Plaintiff identified "retaliation" and not "age" as the basis for her EEOC complaint, but argues that the facts contained in her EEOC addendum are reasonably related to her claim of age discrimination in this case. "[T]he relationship between a retaliation

claim in an EEOC complaint and a subsequently-articulated [age] discrimination claim is not one based on a *per se* rule," but is one "intimately connected to the facts asserted in the EEOC complaint." *Williams v. New York City Hous. Auth.*, 458 F.3d 67, 71 (2d Cir. 2006). Recognizing that "retaliation and discrimination represent very different theories of liability," *id.* at 71 (internal quotation marks omitted), the "central question is whether the complaint filed with the EEOC gave that agency adequate notice to investigate discrimination on both bases," *id.* at 70 (internal quotation marks omitted).

Aside from stating twice that she is 55 years old, Plaintiff's EEOC complaint does not mention age at all, let alone age-based discrimination. Although Plaintiff's EEOC complaint is replete with instances of general mistreatment, the EEOC complaint does not allege that this mistreatment was based on age. Instead, consistent with her stated charge of retaliation, Plaintiff's EEOC addendum alleges that she suffered this mistreatment "as a result of claiming [she had] been discriminated against by filing two lawsuits." In these circumstances, Plaintiff's EEOC complaint did not give the EEOC adequate notice to investigate claims of age-based discrimination. Indeed, the Notice of Discrimination that the EEOC sent to the DoE identifies Title VII of the Civil Rights Act as the relevant law giving rise to the charge, and not the ADEA. As Plaintiff failed to exhaust her administrative remedies with respect to her age discrimination claims, they are dismissed. *See, e.g.*, *Bascom v. Brooklyn Hosp.*, No. 15 Civ. 2256, 2018 WL 1135651, at *4 (E.D.N.Y. Feb. 28, 2018) (holding that race discrimination claim was not reasonably related to an EEOC complaint alleging retaliation when it made "no mention of race at all, but alleges that defendant is

retaliating against plaintiff 'for having filed complaints'"); *Gonzaga v. Rudin Mgmt. Co.*, No. 15 Civ. 10139, 2016 WL 3962659, at *6–7 (S.D.N.Y. July 20, 2016) (dismissing the plaintiff's age discrimination claim for failure to exhaust administrative remedies when the plaintiff's EEOC complaint mentioned only one age-related incident, which was clearly time-barred).

B. Plaintiff's Retaliation Claims

Plaintiff's retaliatory hostile work environment claim and retaliatory constructive discharge claim are dismissed because the Complaint fails to plead sufficient facts to show a plausible causal connection between Plaintiff's protected activity and the allegedly retaliatory actions. The alleged retaliatory incidents from 2013 to 2016 are too remote in time from the filing of the Massaro Complaint in 2011 to support an inference of discriminatory animus; and the incidents that occurred in 2012 cannot form the basis for a retaliation claim here because of the doctrine of *res judicata*.

A claim of retaliation under the ADEA must plausibly allege that "(1) [the plaintiff] engaged in protected activity; (2) the employer was aware of that activity; (3) the employee suffered a materially adverse action; and (4) there was a causal connection between the protected activity and the adverse action." *See Kelly v. Howard I. Shapiro & Assocs. Consulting Eng'rs, P.C.*, 716 F.3d 10, 14 (2d Cir. 2013) (stating the requirements for a prima facie case of retaliation under Title VII); *Bucalo v. Shelter Island Union Free Sch. Dist.*, 691 F.3d 119, 129 (2d Cir. 2012) (holding that the same standards apply to claims of retaliation under Title VII and the ADEA); *see also Duplan v. City of New York*, 888 F.3d 612, 625 (2d Cir. 2018) (a sufficient Title VII claim of retaliation "must plausibly allege

that: (1) defendants discriminated -- or took an adverse employment action -- against him, (2) because he has opposed any unlawful employment practice.").

1. Causation

Regarding causation, the law is unsettled as to whether the Supreme Court's decision in *Gross v. FBL Financial Services, Inc*., 557 U.S. 167, 180 (2009), requires but-for causation only for ADEA claims of disparate treatment, leaving ADEA retaliation claims to be decided under the more relaxed "motivating factor" test. *See Fried v. LVI Servs., Inc.*, 500 F. App'x 39, 41–42 (2d Cir. 2012) (summary order) (declining to reach the issue of whether the "but-for test or the motivating factor analysis" applies to ADEA retaliation claims because the record was insufficient to satisfy either standard). In this case, it is unnecessary to resolve this issue as Plaintiff's Complaint fails to allege facts that would show causation even under the more lenient motivating factor test.

A causal connection in retaliation claims can be demonstrated either "(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant." Gordon v. N.Y.C. Bd. of Educ., 232 F.3d 111, 117 (2d Cir. 2000) (Title VII retaliation claim); *accord Pierre v. Napolitano*, 958 F. Supp. 2d 461, 482 (S.D.N.Y. 2013) (ADEA retaliation claim). "A complaint of retaliation that is 'wholly conclusory' can be dismissed on the pleadings alone." *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996); *accord Blalock v. Jacobsen*, No. 13 Civ. 8332, 2014 WL 5324326, at *6 (S.D.N.Y. Oct. 20, 2014).

Here Plaintiff alleges that Defendants engaged in a campaign of harassment, ultimately forcing her resignation, on account of her 2008 and 2011 lawsuits. The Complaint alleges retaliation only in a conclusory fashion but does not allege facts sufficient to show a causal link between Plaintiff's filing of *Massaro I* (the protected activity) and the subsequent allegedly retaliatory actions taken against Plaintiff.

The Complaint offers no direct evidence of retaliatory animus directed towards Plaintiff. The Complaint also contains no indirect evidence, such as allegations of retaliatory conduct directed at other employees who filed lawsuits against the DoE; or allegations of specific adverse actions directed at Plaintiff that closely followed the filing of *Massaro I,* with specific dates identifying when the first retaliatory action commenced. The Complaint alleges that Plaintiff "endured a retaliatory hostile work environment . . . as a result of claiming she has been discriminated against" and that the retaliation took place "from August 2013 to [the] date of her retirement in July 2016." This allegation is insufficient as a matter of law to infer retaliatory animus from temporal proximity.

Although there is no bright line to determine when the gap between protected activity and retaliatory action is too attenuated, when the plaintiff relies on temporal proximity alone, the cases "uniformly hold that the temporal proximity must be very close." *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (internal quotation marks omitted); *accord Carter v. Verizon*, No. 13 Civ. 7579, 2015 WL 247344, at *14 (S.D.N.Y. Jan. 20, 2015). An adverse action that occurs within days of a protected activity is likely sufficiently close to infer causation, but several months is not. *Compare Littlejohn*,795 F.3d at 319–20 ("Littlejohn's

allegations that the demotion occurred within days after her complaints of discrimination are sufficient to plausibly support an indirect inference of causation.") *with Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85–86 (2d Cir. 1990) (holding that the "lack of evidence demonstrating a causal nexus between [plaintiff's] age discrimination complaint and any subsequent action taken towards him" precluded his claim where the only evidence of causation was a three-and-a-half-month lapse between complaint and adverse action). District courts in this circuit have held that a "temporal gap of more than a few months will generally be insufficient to raise a plausible inference of causation without more." *Ray v. N.Y. State Ins. Fund*, No. 16 Civ. 2895, 2018 WL 3475467, at *11 (S.D.N.Y. July 18, 2018) (collecting cases).

Plaintiff filed *Massaro I* in October 2011, and the Complaint alleges that the retaliation began in August 2013. This twenty-two month gap between the protected activity and alleged retaliatory action is too large to show a causal link, particularly when Plaintiff relies on temporal proximity alone. *See Dhar v. City of New York*, 655 F. App'x 864, 866 (2d Cir. 2016) (summary order) (holding that a ten-month gap between a complaint and a retaliatory act was too attenuated to support causation at the motion to dismiss stage when the plaintiff relied on temporal proximity alone).

The Complaint as a whole contains examples of conduct that occurred "from 2012 to the date of [Plaintiff's] constructive termination."[2] However, these

[2] As these acts are alleged to be a part of an alleged continuing violation of harassment they are not outside the statute of limitations and may be considered. Otherwise time-barred claims may proceed when separate acts "collectively constitute one unlawful employment practice." *Washington v. County of Rockland*,

are not within the period of claimed retaliation, perhaps in recognition of the principle of *res judicata*, discussed below. Even if incidents of retaliation during 2012 were pertinent, the Complaint's allegations are "too vague in nature and non-specific" about time to provide a basis for analyzing temporal proximity. *See Carter*, 2015 WL 247344, at *15 (granting a motion to dismiss when the plaintiff's complaint did not identify specific dates as to when retaliatory actions commenced). The earliest retaliatory action for which the Complaint provides a specific date -- the Unsatisfactory Rating -- occurred in June 2012, eight months after *Massaro I* was filed. When relying on temporal proximity alone, an eight-month gap between the protected activity and the retaliatory conduct is too great to establish causation. *See id.* at *15 (A seven month gap between a complaint and a retaliatory act "is not close enough in time . . . to give rise to any plausible causal inference.").

2. *Res Judicata*

Even if the Complaint offered specific examples of retaliatory actions earlier in 2012, *res judicata* precludes Plaintiff from relying on incidents before May 10, 2013, when *Massaro I* was dismissed. Under the Full Faith and Credit Act, 28 U.S.C. § 1738, a federal court must apply New York *res judicata* law to New York state court judgments. *See AmBase Corp. v. City Investing Co. Liquidating Tr.*, 326 F.3d 63, 72 (2d Cir. 2003). Under New York Law, the doctrine of "[*r*]es *judicata* gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to

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373 F.3d 310, 318 (2d Cir. 2004) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 (2002)); *accord Staten v. City of New York*, 726 F. App'x 40, 43 (2d Cir. 2018) (summary order).

an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein." *Ferris v. Cuevas*, 118 F.3d 122, 126 (2d Cir. 1997) (internal quotation marks omitted) (quoting *Watts v. Swiss Bank Corp.*, 265 N.E.2d 739, 743 (N.Y. 1970)); *accord Ortega v. Arnold & Marie Schwartz Hall of Dental Sciences*, No. 13 Civ. 9155, 2016 WL 1117585, at *4 (S.D.N.Y. Mar. 21, 2016) (applying New York law). "[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 96 N.E.3d 737, 751 (N.Y. 2018) (internal quotation marks omitted). To determine whether two acts stem from the same transaction, courts look to "whether the [underlying] facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Xiao Yang Chen v. Fischer*, 843 N.E.2d 723, 725 (N.Y. 2005) (internal quotation marks omitted); *accord Specialized Realty Servs., LLC v. Maikisch*, 999 N.Y.S.2d 430, 432 (2d Dep't 2014).

Plaintiff's second amended complaint in *Massaro I*, the last-filed complaint in that action, contains facts similar to the 2012 factual allegations in Plaintiff's current Complaint. Specifically, the *Massaro I* complaint states that between 2006 to 2012, Plaintiff's superiors forced her to work in unsanitary classroom conditions, filed a letter in her personnel file for excessive absences, gave her inadequate access to teaching materials, did not allow Plaintiff to teach new classes, and assigned Plaintiff larger classes with many disruptive students. The *Massaro I* complaint

also alleges that in 2012, Plaintiff received an Unsatisfactory rating and was falsely accused of not timely reporting a chemical spill.

These facts are identical to, or arise out of the same series of transactions as, the 2012 allegations in Plaintiff's current Complaint. The unsatisfactory rating and chemical spill incident in *Massaro I* are pleaded again in the Complaint in this case, but the doctrine of res judicata precludes Plaintiff from reasserting those claims here. *See, e.g.*, *Bayer v. City of New York*, 983 N.Y.S.2d 61, 64 (2d Dep't. 2014) (res judicata precluded the plaintiff's claims when he asserted many of the same instances of age discrimination that underpinned his prior litigation in his current action).

The remaining 2012 incidents alleged in the Complaint are not specifically mentioned in *Massaro I*, but they arise from the same series of transactions that formed the basis for the prior action. Like the facts alleged in *Massaro I*, the 2012 incidents here relate to Plaintiff's employment as a teacher, involve the same actors (Plaintiff and Assistant Principal Kontarinis), and are similar in kind to the adverse actions Plaintiff alleges she suffered in *Massaro I*. The Complaint here alleges that in 2012, Plaintiff suffered from poor classroom conditions, faulty attendance records, inadequate teaching equipment, disruptive students, and inadequate advanced art courses. The 2012 incidents in Plaintiff's Complaint are precluded on res judicata grounds because they arise from the same underlying series of transactions as *Massaro I*. *See Gropper v. 200 Fifth Owner LLC*, 58 N.Y.S.3d 42, 43 (1st Dep't 2017) (barring the plaintiff's claim on res judicata grounds when the allegations of disability discrimination in the new action merely consisted of

additional instances of conduct previously asserted in a prior lawsuit); *Reininger v. New York City Transit Auth.*, No. 11 Civ. 7245, 2016 WL 10566629, at *7 (S.D.N.Y. Dec. 22, 2016) (barring the plaintiff's claim when her current and prior legal actions mention the same types of workplace mistreatment the plaintiff suffered at the hands of the same supervisors).

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is GRANTED.

The Clerk of Court is respectfully directed to close the motion at Docket Number 22 and close the case.

Dated: September 11, 2018
New York, New York

/s/ Lorna G. Schofield
Lorna G. Schofield
United States District Judge

APPENDIX F

Rule 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) TIME TO FILE A MOTION; FORMAT.

(1) *Time to File.* Unless the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(2) *Format: Parties' Statements of Fact*.

(A) *Movant's Statement*. In addition to the points and authorities required by Rule 12-I(d)(2), the movant must file a statement of the material facts that the movant contends are not genuinely disputed. Each material fact must be stated in a separate numbered paragraph.

(B) *Opponent's Statement*. A party opposing the motion must file a statement of the material facts that the opponent contends are genuinely disputed. The disputed material facts must be stated in separate numbered paragraphs that correspond to the extent possible with the numbering of the paragraphs in the movant's statement.

(c) PROCEDURES.

(1) *Supporting Factual Positions*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) 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; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

COMMENT TO 2017 AMENDMENTS

This rule is identical to *Federal Rule of Civil Procedure 56*, as amended in 2010, except that 1) a reference to local district court rules is omitted from the language in subsection (b)(1) and 2) subsection (b)(2), which is unique to the Superior Court rule, requires parties to submit statements of material facts with each material fact stated in a separate, numbered paragraph (a requirement previously found in Rule 12-I(k)). In 2010, the federal rule underwent substantial revisions in order to improve the procedures for presenting and deciding summary judgment motions, but the standard for granting summary judgment remained unchanged. Parties and counsel should refer to the Federal Rules of Civil Procedure Advisory Committee Notes for a detailed explanation of these amendments.

COMMENT

Identical to *Federal Rule of Civil Procedure 56* except for the provision in paragraphs (a) and (b) of Rule 56 that the time period for filing the motion shall be set by Court order. For further requirements with respect to summary judgment procedure, see Rule 12-I(k).

APPENDIX G

29 U.S.C. Ch. 14.
Age Discrimination in Employment
From Title 29. Labor
Chapter 14. Age Discrimination in Employment

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Pub. L. 90–202, §2, Dec. 15, 1967, 81 Stat. 602.)

§ 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

(Pub. L. 90–202, §3, Dec. 15, 1967, 81 Stat. 602.)

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees 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 age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or

otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10,

title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub. L. 101–239, title VI, §6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a

limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the endof any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the appli-

cation of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m).

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section

1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(10) SPECIAL RULES RELATING TO AGE.—

(A) COMPARISON TO SIMILARLY SITUATED YOUNGER INDIVIDUAL.—

(i) IN GENERAL.—A plan shall not be treated as failing to meet the requirements of paragraph (1) if a participant's accrued benefit, as determined as of any date under the terms of the plan, would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant.

(ii) SIMILARLY SITUATED.—For purposes of this subparagraph, a participant is similarly situated to any other individual if such participant is identical to such other individual in every respect (including period of service, compensation, position, date of hire, work history, and any other respect) except for age.

(iii) DISREGARD OF SUBSIDIZED EARLY RETIREMENT BENEFITS.—In determining the accrued benefit as of any date for purposes of this clause, the subsidized portion of any early retirement benefit or retirement-type subsidy shall be disregarded.

(iv) ACCRUED BENEFIT.—For purposes of this subparagraph, the accrued benefit may, under the terms of the plan, be expressed as an annuity payable at normal retirement age, the balance of a hypothetical account, or the current value of the accumulated percentage of the employee's final average compensation.

(B) APPLICABLE DEFINED BENEFIT PLANS.—

(i) INTEREST CREDITS.—

(I) IN GENERAL.—An applicable defined benefit plan shall be treated as failing to meet the requirements of paragraph (1) unless the terms of the plan provide that any interest credit (or an equivalent amount) for any plan year shall be at a rate which is not greater than a market rate of return. A plan shall not be treated as failing to meet the requirements of this subclause merely because the plan provides for a reasonable minimum guaranteed rate of return or for a rate of return that is equal to the greater of a fixed or variable rate of return.

(II) PRESERVATION OF CAPITAL.—An interest credit (or an equivalent amount) of less than zero shall in no event result in the account balance or similar amount being less than the aggregate amount of contributions credited to the account.

(III) MARKET RATE OF RETURN.—The Secretary of the Treasury may provide by regulation for rules governing the calculation of a market rate of return for purposes of subclause (I) and for permissible methods of crediting interest to the account (including fixed or variable interest rates) resulting in effective rates of return

meeting the requirements of subclause (I). In the case of a governmental plan (as defined in the first sentence of section 414(d) of title 26), a rate of return or a method of crediting interest established pursuant to any provision of Federal, State, or local law (including any administrative rule or policy adopted in accordance with any such law) shall be treated as a market rate of return for purposes of subclause (I) and a permissible method of crediting interest for purposes of meeting the requirements of subclause (I), except that this sentence shall only apply to a rate of return or method of crediting interest if such rate or method does not violate any other requirement of this chapter.

(ii) SPECIAL RULE FOR PLAN CONVERSIONS.—If, after June 29, 2005, an applicable plan amendment is adopted, the plan shall be treated as failing to meet the requirements of paragraph (1)(H) unless the requirements of clause (iii) are met with respect to each individual who was a participant in the plan immediately before the adoption of the amendment.

(iii) RATE OF BENEFIT ACCRUAL.—Subject to clause (iv), the requirements of this clause are met with respect to any participant if the accrued benefit of the participant under the terms of the plan as in effect after the amendment is not less than the sum of—

(I) the participant's accrued benefit for years of service before the effective date of the amendment, determined under the terms of the plan as in effect before the amendment, plus

(II) the participant's accrued benefit for years of service after the effective date of the amendment, determined under the terms of the plan as in effect after the amendment.

(iv) SPECIAL RULES FOR EARLY RETIREMENT SUBSIDIES.—For purposes of clause (iii)(I), the plan shall credit the accumulation account or similar amount with the amount of any early retirement benefit or retirement-type subsidy for the plan year in which the participant retires if, as of such time, the participant has met the age, years of service, and other requirements under the plan for entitlement to such benefit or subsidy.

(v) APPLICABLE PLAN AMENDMENT.—For purposes of this subparagraph—

(I) IN GENERAL.—The term "applicable plan amendment" means an amendment to a defined benefit plan which has the effect of converting the plan to an applicable defined benefit plan.

(II) SPECIAL RULE FOR COORDINATED BENEFITS.—If the benefits of 2 or more defined benefit plans established or maintained by an employer are coordinated in such a manner as to have the effect of the adoption of an amendment described in subclause (I), the sponsor of the defined benefit plan or plans providing for such coordination shall be treated as having adopted such a plan amendment as of the date such coordination begins.

(III) MULTIPLE AMENDMENTS.—The Secretary of the Treasury shall issue regulations to prevent the avoidance of the purposes of this subparagraph through the use of 2 or more plan amendments rather than a single amendment.

(IV) APPLICABLE DEFINED BENEFIT PLAN.—For purposes of this subparagraph, the term "applicable defined benefit plan" has the meaning given such term by section 1053(f)(3) of this title.

(vi) TERMINATION REQUIREMENTS.—An applicable defined benefit plan shall not be treated as meeting the requirements of clause (i) unless the plan provides that, upon the termination of the plan—

(I) if the interest credit rate (or an equivalent amount) under the plan is a variable rate, the rate of interest used to determine accrued benefits under the plan shall be equal to the average of the rates of interest used under the plan during the 5-year period ending on the termination date, and

(II) the interest rate and mortality table used to determine the amount of any benefit under the plan payable in the form of an annuity payable at normal retirement age shall be the rate and table specified under the plan for such purpose as of the termination date, except that if such interest rate is a variable rate, the interest rate shall be determined under the rules of subclause (I).

(C) CERTAIN OFFSETS PERMITTED.—A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides offsets against benefits under the plan to the extent such offsets are allowable in applying the requirements of section 401(a) of title 26.

(D) PERMITTED DISPARITIES IN PLAN CONTRIBUTIONS OR BENEFITS.—A plan shall not be treated as failing to meet the requirements of paragraph (1)

solely because the plan provides a disparity in contributions or benefits with respect to which the requirements of section 401(l) of title 26 are met.

(E) INDEXING PERMITTED.—

(i) IN GENERAL.—A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides for indexing of accrued benefits under the plan.

(ii) PROTECTION AGAINST LOSS.—Except in the case of any benefit provided in the form of a variable annuity, clause (i) shall not apply with respect to any indexing which results in an accrued benefit less than the accrued benefit determined without regard to such indexing.

(iii) INDEXING.—For purposes of this subparagraph, the term "indexing" means, in connection with an accrued benefit, the periodic adjustment of the accrued benefit by means of the application of a recognized investment index or methodology.

(F) EARLY RETIREMENT BENEFIT OR RETIREMENT-TYPE SUBSIDY.—For purposes of this paragraph, the terms "early retirement benefit" and "retirement-type subsidy" have the meaning given such terms in section 1054(g)(2)(A) of this title.2

(G) BENEFIT ACCRUED TO DATE.—For purposes of this paragraph, any reference to the accrued benefit shall be a reference to such benefit accrued to date.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire

or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 2 if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or (B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B)—

(1)(A) It shall not be a violation of subsection (a), (b), (c), or (e) solely because—

(i) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(ii) a defined benefit plan (as defined in section 1002(35) of this title) provides for—

(I) payments that constitute the subsidized portion of an early retirement benefit; or

(II) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(B) A voluntary early retirement incentive plan that—

(i) is maintained by—

(I) a local educational agency (as defined in section 7801 of title 20), or

(II) an education association which principally represents employees of 1 or more agencies described in subclause (I) and which is described in section 501(c)(5) or (6) of title 26 and exempt from taxation under section 501(a) of title 26, and

(ii) makes payments or supplements described in subclauses (I) and (II) of subparagraph (A)(ii) in coordination with a defined benefit plan (as so defined) maintained by an eligible employer described in section 457(e)(1)(A) of title 26 or by an education association described in clause (i)(II),

shall be treated solely for purposes of subparagraph (A)(ii) as if it were a part of the defined benefit plan with respect to such payments or supplements. Payments or supplements under such a voluntary early retirement incentive plan shall not constitute severance pay for purposes of paragraph (2).

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A) (i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be

reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of title 26) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(B), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 1001 of title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if—

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

(Pub. L. 90–202, §4, Dec. 15, 1967, 81 Stat. 603; Pub. L. 95–256, §2(a), Apr. 6, 1978, 92 Stat. 189; Pub. L. 97–248, title I, §116(a), Sept. 3, 1982, 96 Stat. 353; Pub. L. 98–369, div. B, title III, §2301(b), July 18, 1984, 98 Stat. 1063; Pub. L. 98–459, title VIII, §802(b), Oct. 9, 1984, 98 Stat. 1792; Pub. L. 99–272, title IX, §9201(b)(1), (3), Apr. 7, 1986, 100 Stat. 171; Pub. L. 99–509, title IX, §9201, Oct. 21, 1986, 100 Stat. 1973; Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 99–592, §§2(a), (b), 3(a), Oct. 31, 1986, 100 Stat. 3342; Pub. L. 101–239, title VI, §6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233; Pub. L. 101–433, title I, §103, Oct. 16, 1990, 104 Stat. 978; Pub. L. 101–521, Nov. 5, 1990, 104 Stat. 2287; Pub. L. 104–208, div. A, title I, §101(a) [title I, §119[1(b)]], Sept. 30, 1996, 110 Stat. 3009, 3009-23; Pub. L. 105–244, title IX, §941(a), (b), Oct. 7, 1998, 112 Stat. 1834, 1835; Pub. L. 109–280, title VII, §701(c), title XI, §1104(a)(2), Aug. 17, 2006, 120 Stat. 988, 1058; Pub. L. 110–458, title I, §123(a), Dec. 23, 2008, 122 Stat. 5114; Pub. L. 114–95, title IX, §9215(e), Dec. 10, 2015, 129 Stat. 2166.)

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other

arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include—

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

(Pub. L. 90–202, §5, Dec. 15, 1967, 81 Stat. 604; Pub. L. 95–256, §6, Apr. 6, 1978, 92 Stat. 192.)

§ 625. Administration

The Secretary shall have the power—

(a) Delegation of functions; appointment of personnel; technical assistance

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

(Pub. L. 90–202, §6, Dec. 15, 1967, 81 Stat. 604.)

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as

a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter,

regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion; unlawful practice

(1) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(A) within 180 days after the alleged unlawful practice occurred; or

(B) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

(2) Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this chapter, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is

paid, resulting in whole or in part from such a decision or other practice.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an

action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

(Pub. L. 90–202, §7, Dec. 15, 1967, 81 Stat. 604; Pub. L. 95–256, §4(a), (b)(1), (c)(1), Apr. 6, 1978, 92 Stat. 190, 191; 1978 Reorg. Plan No. 1, §2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub. L. 101–433, title II, §201, Oct. 16, 1990, 104 Stat. 983; Pub. L. 102–166, title I, §115, Nov. 21, 1991, 105 Stat. 1079; Pub. L. 111–2, §4, Jan. 29, 2009, 123 Stat. 6.)

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

(Pub. L. 90–202, §8, Dec. 15, 1967, 81 Stat. 605; 1978 Reorg. Plan No. 1, §2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

(Pub. L. 90–202, §9, Dec. 15, 1967, 81 Stat. 605; 1978 Reorg. Plan No. 1, §2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: Provided, however, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

(Pub. L. 90–202, §10, Dec. 15, 1967, 81 Stat. 605; 1978 Reorg. Plan No. 1, §2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which

exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent

employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in

which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

(Pub. L. 90–202, §11, Dec. 15, 1967, 81 Stat. 605; Pub. L. 93–259, §28(a)(1)–(4), Apr. 8, 1974, 88 Stat. 74; Pub.

L. 98–459, title VIII, §802(a), Oct. 9, 1984, 98 Stat. 1792; Pub. L. 99–592, §4, Oct. 31, 1986, 100 Stat. 3343; Pub. L. 101–433, title I, §102, Oct. 16, 1990, 104 Stat. 978.)

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contribu-

tions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(Pub. L. 90–202, §12, Dec. 15, 1967, 81 Stat. 607; Pub. L. 95–256, §3(a), (b)(3), Apr. 6, 1978, 92 Stat. 189, 190; 1978 Reorg. Plan No. 1, §2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub. L. 98–459, title VIII, §802(c)(1), Oct. 9, 1984, 98 Stat. 1792; Pub. L. 99–272, title IX, §9201(b)(2), Apr. 7, 1986, 100 Stat. 171; Pub. L. 99–592, §§2(c), 6(a), Oct. 31, 1986, 100 Stat. 3342, 3344; Pub. L. 101–239, title VI, §6202(b)(3)(C)(ii), Dec. 19, 1989, 103 Stat. 2233.)

§ 632. Omitted

§ 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be

brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

(Pub. L. 90–202, §14, Dec. 15, 1967, 81 Stat. 607.)

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office,

the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all

persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of sections 626(d)(3) and 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

(Pub. L. 90–202, §15, as added Pub. L. 93–259, §28(b)(2), Apr. 8, 1974, 88 Stat. 74; amended Pub. L. 95–256, §5(a), (e), Apr. 6, 1978, 92 Stat. 191; 1978 Reorg. Plan No. 1, eff. Jan. 1, 1979, §2, 43 F.R. 19807, 92 Stat.

3781; Pub. L. 104–1, title II, §201(c)(2), Jan. 23, 1995, 109 Stat. 8; Pub. L. 105–220, title III, §341(b), Aug. 7, 1998, 112 Stat. 1092; Pub. L. 108–271, §8(b), July 7, 2004, 118 Stat. 814; Pub. L. 109–435, title VI, §604(f), Dec. 20, 2006, 120 Stat. 3242; Pub. L. 111–2, §5(c)(3), Jan. 29, 2009, 123 Stat. 7; Pub. L. 113–235, div. H, title I, §1301(b), Dec. 16, 2014, 128 Stat. 2537.)

§ 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.

(Pub. L. 90–202, §17, formerly §16, Dec. 15, 1967, 81 Stat. 608; renumbered and amended Pub. L. 93–259, §28(a)(5), (b)(1), Apr. 8, 1974, 88 Stat. 74; Pub. L. 95–256, §7, Apr. 6, 1978, 92 Stat. 193.)