MANDATE

21-891-cv
Antrobus v. New York City Health and Hospitals Corp.

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 13th day of October, two thousand twenty-three.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
BETH ROBINSON,
MARIA ARAÚJO KAHN,
Circuit Judges.

JOANNE J. ANTROBUS,

Plaintiff-Appellant,

v. 21-891

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant-Appellee,

DAVID CHEUNG, CLAUDIA CANOSA, MARIANNE I. MARCIAS, ANGELA TAYLOR, JASMIN WU,

Defendants.

For Plaintiff-Appellant: VALDI LICUL, Wigdor LLP, New York, NY.

For Defendant-Appellee: REBECCA L. VISGAITIS, Of Counsel (Richard Dearing and Jane L. Gordon, Of Counsel, *on the brief*), *for* Sylvia O. Hinds-Radix, Corporation Counsel of the City of New York, New York, NY.

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

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

Plaintiff-Appellant Joanne Antrobus ("Appellant") appeals from a judgment of the United States District Court for the Southern District of New York (Failla, *J.*) dismissing her third amended complaint (the "Complaint") in its entirety. The Complaint alleges that Defendant-Appellee New York City Health and Hospitals Corporation ("Appellee") discriminated against Appellant on the basis of her age, retaliated against her for filing complaints to that effect, created a hostile work environment, and constructively discharged her in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), the New York State Human Rights Law ("NYSHRL"), and the New York City Human Rights Law ("NYCHRL"). In a March 15, 2021 opinion and order, the district court concluded that each of Appellant's claims for age discrimination and some of her claims for retaliation were time-barred, and that her remaining, timely-pled claims were facially deficient. For the reasons set forth below, we affirm the district court's judgment. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

* * *

We review *de novo* a dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6), "accepting all factual allegations in the complaint as true and drawing all reasonable

inferences in the plaintiff's favor." *Tongue v. Sanofi*, 816 F.3d 199, 209 (2d Cir. 2016). This standard is well established. To survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Chamberlain v. City of White Plains*, 960 F.3d 100, 105 (2d Cir. 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

In "deferral" states such as New York, a plaintiff asserting claims under the ADEA must file a charge with the Equal Employment Opportunity Commission ("EEOC") within 300 days of the alleged unlawful practice. *See Hodge v. N.Y. Coll. of Podiatric Med.*, 157 F.3d 164, 166 (2d Cir. 1998). Here, Appellant alleges that she filed two complaints with the EEOC—one at some point in 2015 and another on February 19, 2019. She also asserts that she filed a complaint with Appellee's internal Equal Employment Opportunity ("EEO") office on March 29, 2016. As Appellant did not rely on her earlier EEOC complaint in the proceedings below, the district court found that any claim that accrued before April 25, 2018—300 days before the filing of the second EEOC complaint on February 19, 2019—was time-barred. We agree.

Appellant cannot now raise the argument that her 2015 EEOC complaint renders conduct that occurred in and before 2015, as well as in 2016, timely. Appellant did not raise this argument below and has therefore forfeited it. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below."); *Gindi v. N.Y.C. Dep't of Educ.*, 786 Fed. Appx. 280, 282 (2d Cir. 2019) (summary order) ("Arguments presented for the first time on appeal are generally forfeited, even in cases involving pro se litigants.").

We also agree with the district court's conclusion that Appellant has stated timely claims for retaliation following the filing of her 2019 EEOC complaint, creation of a hostile work environment, and constructive discharge. First, this Court has held that the ADEA's administrative exhaustion requirement is exempted "where the complaint is one alleging retaliation by an employer against an employee for filing an EEOC charge." *Terry v. Ashcroft*, 336 F.3d 128, 151 (2d Cir. 2003) (internal quotation marks and citation omitted). Appellant's post-February 19, 2019 retaliation claim makes such an allegation and is therefore timely. Second, Appellant's constructive discharge claim, which is predicated on Appellee's alleged retaliatory conduct after the 2019 EEOC complaint was filed, falls within the same exception to the administrative exhaustion requirement and is timely for substantially the same reason as the retaliation claim. Finally, the hostile work environment claim is timely under the continuing violation doctrine. Drawing all reasonable inferences in Appellant's favor, the Complaint plausibly alleges at least "one act contributing to the claim [that] occurred within the statutory period[,]" making this claim timely. *Patterson v. County of Oneida*, 375 F.3d 206, 220 (2d Cir. 2004).

Given that Appellant's hostile work environment claim is timely, "the entire time period of the hostile work environment may be considered by [the Court] for the purposes of determining liability." *Id.* The district court properly determined that Appellant's claims for retaliation postdating 2015 could be considered in evaluating the hostile work environment claim, but that her February 2011 retaliation claim and her failure-to-promote claims could not. The Complaint alleges a series of conduct that resulted in a hostile work environment: Appellee's initial retaliatory conduct following the complaints filed in 2015 and 2016, and Appellee's subsequent acts of retaliation after the 2019 EEOC charge was filed. While the claims for retaliation after 2015 are

allegedly part of the same "ongoing discriminatory polic[y] or practice[]," Appellant's remaining claims—for retaliation occurring in February 2011 and failure-to-promote—are not. *Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994). As stated, those claims constitute "discrete discriminatory acts" which the continuing violation doctrine renders neither timely nor capable of consideration in conjunction with Appellant's timely hostile work environment claim. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

Finally, the district court correctly held that the timely-pled claims in the Complaint are facially deficient. First, the Complaint does not assert a timely claim for age discrimination. Appellant argues that, as with her failure-to-promote claims, the allegations in the Complaint concerning her decreased workload, less favorable assignments, deprivation of information critical to her job, isolation at work, and receipt of unsolicited inquiries about her retirement should be construed as stating a claim for age discrimination. But a plain reading of the Complaint, drawing all reasonable inferences in Appellant's favor, forecloses this argument. The Complaint explicitly attributes those changes to the filing of her EEOC complaints and labels them as retaliatory acts. While the Complaint refers to a "series of incidents" in which she was "discriminated against because of [her] age[,]" the subsequent paragraph makes clear that those incidents were the occasions in which she was denied a promotion or career advancement opportunity. A-155. Thus, the Complaint does not state a plausible age discrimination claim.

Second, the only timely claim for retaliation in the Complaint—concerning unsolicited retirement inquiries after the 2019 EEOC complaint was filed—is not adequately pled. As the district court found, Appellant's failure to allege that Appellee knew that her 2019 EEOC complaint had been filed is fatal to this claim. *See Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 465 (2d Cir. 1997) ("A *prima facie* case of retaliation under the ADEA requires proof that

. . . (2) the employer was aware of the plaintiff's participation in the protected activity . . . ."). Even assuming *arguendo* the adequacy of Appellant's pleading in this regard, the claim is deficient for another reason: inquiries about retirement, at least in the manner alleged by Appellant, do not constitute an adverse employment action. To the contrary, discussions about retirement are "a normal part of workplace dialogue between a supervisor and subordinate." *Boonmalert v. City of New York*, 721 Fed. Appx. 29, 32 (2d Cir. 2018) (summary order). Those conversations, then, should not ordinarily be considered "a materially adverse change in the terms and conditions of employment." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015). Without a properly stated adverse employment action, Appellant's retaliation claim fails. *See Lively v. WAFRA Inv. Advisory Grp., Inc.*, 6 F.4th 293, 303 n.6 (2d Cir. 2021) ("To establish a prima facie case of retaliation under the ADEA, a plaintiff must show . . . (3) an adverse employment action . . . .") (internal quotation marks and citation omitted).

Third, the hostile work environment claim, which is predicated on allegations of retaliatory conduct after Appellant filed complaints about Appellee's discriminatory practices, is likewise deficient. The factual allegations that can be considered in conjunction with this claim are that: (1) Appellant received fewer assignments, had assignments taken away from her, was denied access to critical information, and was isolated by her managers after filing her 2015 and 2016 complaints; and (2) Appellant was subjected to unsolicited inquiries about her retirement after filing the 2019 complaint. These claims, viewed collectively, do not state a plausible hostile work environment claim. Appellant has failed to allege, for example, which or how many assignments were kept or taken away from her, what type of information was withheld from her, how frequent those occurrences were, and whether her resulting workload was within the scope of her job duties. Without this type of detail, the allegations in the Complaint fail to adequately

assert an alteration in "the terms and conditions of [Appellant's] employment." *Alfano v. Costello*, 294 F.3d 365, 379 (2d Cir. 2002). The addition of Appellant's retirement-related allegations does not change that conclusion. These inquiries about Appellant's retirement, which is a normal topic of conversation between an employer and an employee and are not sufficiently alleged to have "discriminatory overtones" in this case, *id.*, were not "severe . . . enough to create an objectively hostile or abusive work environment." *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001). Taken as a whole, the allegations are not such that a reasonable person in Appellant's circumstances would believe that her workplace was "so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of her employment were thereby altered." *Alfano*, 294 F.3d at 373. Accordingly, the hostile work environment claim also fails.

Finally, Appellant's failure to state a claim for hostile work environment necessarily dooms her constructive discharge claim—which is predicated on the same allegations as the hostile work environment claim—unsuccessful. *See Fincher v. Depository Tr. & Clearing Corp.*, 604 F.3d 712, 725 (2d Cir. 2010) ("[The standard for constructive discharge] is higher than the standard for establishing a hostile work environment. Because [the plaintiff-appellant] failed to establish a hostile work environment, her claim of constructive discharge also fails.") (internal citation omitted).

Accordingly, the district court properly dismissed the Complaint in its entirety for failure to state a claim upon which relief can be granted.

* * *

We have considered Appellant's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

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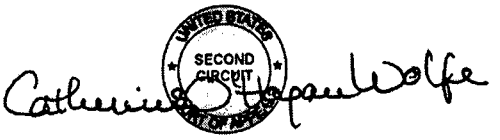

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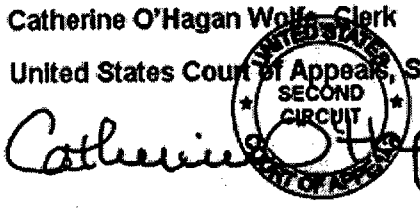

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOANNE J. ANTROBUS,

Plaintiff,

-v.-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

19 Civ. 7449 (KPF)

OPINION AND ORDER

KATHERINE POLK FAILLA, District Judge:

Plaintiff Joanne J. Antrobus worked as a paralegal for Defendant New York City Health and Hospitals Corporation ("HHC") from 2007 until her retirement in 2019. Now proceeding *pro se* and *in forma pauperis*, Plaintiff brings this action alleging violations of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 to 634 (the "ADEA"), the New York State Human Rights Law, N.Y. Exec. Law §§ 290 to 297 (the "NYSHRL"), and the New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-101 to 8-131 (the "NYCHRL"). In brief, Plaintiff claims that Defendant (i) discriminated against her on the basis of her age by denying her opportunities to pursue other positions within HHC; (ii) retaliated against her when she complained, internally and externally, about this discrimination; and (iii) created a hostile work environment that forced her to retire. Defendant now moves to dismiss Plaintiff's Third Amended Complaint (or "TAC") on the grounds that Plaintiff's claims are largely time-barred, and to the extent they are not time-barred, the claims are not viable. For the reasons discussed herein, Defendant's motion to dismiss is granted.

BACKGROUND[1]

A. Factual Background

1. Plaintiff's Initial Employment with HHC and 2011 Promotion

Plaintiff is 66 years old, and began working for Defendant as a part-time paralegal in 2007. (TAC ¶¶ 2-4). Prior to Plaintiff's employment with Defendant, she had acquired several years of similar work experience, including as a paralegal at two private law firms, and as a paralegal aide at the New York City Law Department where she worked on matters related to the Defendant. (*Id.* at ¶¶ 2-3).

In February 2011, Plaintiff applied for a full-time paralegal position with Defendant. (TAC ¶ 4). According to Plaintiff, her then-supervisor, Margaret Sherman, did not support her application for the position, even though Plaintiff had received positive performance reviews. (*Id.*). Instead, Plaintiff understood from Sherman's statements that she preferred to hire a younger person for the position and supported the application of a younger woman in the office. (*Id.*). Plaintiff was nonetheless hired for the position after appealing to Sherman's superior. (*Id.*). After assuming the full-time position, Plaintiff noticed increasing hostility from Sherman. (*Id.*). In particular, Plaintiff found Sherman unsupportive, and felt that she was actively denying Plaintiff professional opportunities, though Plaintiff has not

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[1] The facts in this Opinion are largely drawn from Plaintiff's Third Amended Complaint ("TAC" (Dkt. #30)), the well-pleaded facts of which are taken as true for the purposes of this motion. Additional facts come from Plaintiff's briefing, *see infra* Discussion Section n.5, as well as the exhibits appended to Plaintiff's Second Amended Complaint ("SAC" (Dkt. #9)).

For ease of reference, the Court refers to the parties' briefing as follows: Defendant's opening brief is referred to as "Def. Br." (Dkt. #34); Plaintiff's opposition brief as "Pl. Opp." (Dkt. #37); and Defendant's reply brief as "Def. Reply" (Dkt. #38).

alleged any specific instances in which Sherman engaged in such conduct. (*Id.* at ¶ 5).

2. Plaintiff's 2013 and 2015 Job Applications and First EEOC Complaint

In or about August 2013, Plaintiff applied for an available paralegal position in Defendant's Settlement Division. (TAC ¶ 6). Had she been hired for the position, Plaintiff would have received both a promotion and a raise. (*Id.*). The position instead was given to a younger person, whom Plaintiff viewed as less qualified. (*Id.*). Plaintiff was told that she had not been hired because the position required "Excel" skills, though Plaintiff believed herself "moderately familiar" with the Microsoft Excel program. (*Id.*). Additionally, Defendant regularly provided computer skills training to employees; however, it did not offer such training to Plaintiff when she applied for a role with the Settlement Division. (*Id.*). Plaintiff understood the reference to "Excel" to be "code" indicating a preference for a younger person. (*Id.*).

In or about November 2015, Plaintiff applied for an opening as a paralegal and claims specialist with Defendant, a position that would have entailed a promotion and a raise. (TAC ¶ 7). However, Plaintiff did not get the position, and was told that the position was given to someone with "computer savvy" — a younger person whom Plaintiff felt had less experience. (*Id.*). Plaintiff considers herself "quite capable on a computer, especially for those tasks customarily required of a paralegal." (*Id.*). Here, too, Plaintiff understood the professed interest in "computer savvy" to indicate a preference for hiring a younger person. (*Id.*).

At some point in 2015, Plaintiff filed a discrimination claim with the U.S. Equal Employment Opportunity Commission (the "EEOC") alleging that Defendant had denied her professional advancement on the basis of her age (the "First EEOC Complaint"). (TAC ¶ 8).[2] Plaintiff later inquired with the EEOC about the status of her claim, and was told that the case handler assigned to her complaint had closed her case before leaving the EEOC. (*Id.*). She also learned that Defendant had been sent a copy of her complaint. (*Id.*). After Plaintiff filed the First EEOC Complaint, she noticed a change in her interactions with her managers at work. (*Id.* at ¶ 10). Specifically, Plaintiff alleges that she began to receive fewer assignments and was denied access to information that she needed to perform her job. (*Id.*). This behavior continued throughout the remainder of her employment with Defendant. (*Id.*).

3. Plaintiff's Internal Complaints and Consideration for the 2016 Position

On March 29, 2016, Plaintiff filed an age discrimination complaint (the "EEO Complaint") with Defendant's internal equal employment opportunity office (the "EEO"). (TAC ¶ 9).[3] Plaintiff received no response, and when she later asked the EEO Officer about the status of her complaint, she was told that the EEO's investigation had determined that her claims were unfounded. (*Id.*).

Several months later, in or around September 2016, Plaintiff learned about an open paralegal position with Defendant's Intake Unit. (TAC ¶ 11).

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2 The parties have not provided a copy of the First EEOC Complaint to the Court.

3 The parties have not provided a copy of the EEO Complaint to the Court.

Before Plaintiff could apply for the position, however, it was given to a person with less experience. (*Id.*). Plaintiff asked David Cheung, the senior supervisor in charge of the open position, why she had not been given the opportunity to apply, and was told that, among other things, the position would require regular trips to and from another location to pick up legal papers. (*Id.*). Plaintiff alleges that she does not suffer from any disability or frailties that would have prevented her from making this commute. (*Id.*). She understood Cheng to be implying that she was too old for the Intake Unit position. (*Id.*).

Following these disappointments, Plaintiff had a number of conversations with Defendant's senior management in which she expressed concerns that she had been passed over for promotions because of her age. (TAC ¶ 13). Her view was that the positions she had sought were "lateral move[s]," but that she had not been given serious consideration due to her age. (*Id.* at ¶ 12). Plaintiff alleges that her managers expressed annoyance at her complaints (Pl. Opp. 4), and after these discussions, began isolating her and either taking away or depriving her of meaningful work assignments (TAC ¶ 13).

At some point, Plaintiff's caseload decreased significantly, and Plaintiff perceived that she was "consistently assigned more menial work" as compared to her younger colleagues. (Pl. Opp. 4). While Plaintiff was asked to complete the administrative task of closing her colleagues' case files, younger employees were given "choice assignments" and were only required to close their own case files. (*Id.*). Plaintiff felt "deeply uncomfortable" by what she describes as her "pariah status" in the office." (*Id.*).

4. Plaintiff's Second EEOC Complaint and Departure from HHC

On February 19, 2019, Plaintiff filed a second complaint with the EEOC, alleging that Defendant had discriminated against her by failing to consider her for positions for which she was qualified, and had retaliated against her by reducing her workload, further denying her promotions, and not upgrading her pay scale (the "Second EEOC Complaint"). (TAC ¶ 14; *see also* SAC 10). The EEOC issued Plaintiff her a right to sue letter on May 23, 2019. (TAC ¶ 14; *see also* SAC 11-12). Plaintiff alleges that, following her Second EEOC Complaint, her supervisors, as well as certain members of the Human Resources Department, began to "harass" Plaintiff about her retirement. (*Id.* at ¶ 15). Although Plaintiff had not expressed any interest in retiring imminently, she received unsolicited offers from Human Resources staff to assist her with the retirement process, and Plaintiff's manager repeatedly asked her about her anticipated retirement timing. (*Id.*). Plaintiff alleges that these interactions made her physically and emotionally ill, causing her to resign from her position on May 31, 2019. (*Id.* at ¶¶ 16-17).

B. Procedural Background

Plaintiff commenced this action with the filing of her Complaint on August 8, 2019, in which she named Defendant as well as additional individual defendants. (Dkt. #2). She quickly thereafter filed two amended complaints: the first on August 14, 2019, and the second on August 26, 2019. (Dkt. #3, 9). In Plaintiff's SAC, she named HHC as the only Defendant. (Dkt. #9). On December 3, 2019, Defendant filed a letter seeking leave to move to dismiss the case. (Dkt. #22). At a pre-motion

conference held on January 16, 2020, Plaintiff expressed interest in amending the SAC, and was granted leave to do so. (*See* Dkt. #28 (transcript)). Plaintiff's Third Amended Complaint, which she prepared with the assistance of the New York Legal Assistance Group ("NYLAG") was filed on March 20, 2020. (Dkt. #30; *see also id.* at 4 n.1). Defendant renewed its request for leave to file a motion to dismiss on April 10, 2020 (Dkt. #31), and the Court granted Defendant's application and set a briefing schedule the same day (Dkt. #32).

Defendant filed its motion to dismiss on May 11, 2020. (Dkt. #33-34). Plaintiff's opposition brief was filed on July 16, 2020 (Dkt. #37), and briefing on the motion was complete with the filing of Defendant's reply on August 5, 2020 (Dkt. #38).

DISCUSSION

Plaintiff brings claims of discrimination,[4] retaliation, hostile work environment, and constructive discharge pursuant to the ADEA, the NYSHRL, and the NYCHRL. Although Plaintiff's pleadings and allegations are not precise, construing her submissions to raise the strongest arguments they suggest, the Court understands Plaintiff to advance the following claims:[5]

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[4] Throughout this Opinion, and in keeping with the parties' submissions, the Court uses "discrimination" to refer to Plaintiff's claims of disparate treatment because of her age, as distinguished from Plaintiff's claims of a hostile work environment.

[5] Plaintiff has asked that the Court consider facts alleged in her opposition brief as if they were properly pleaded in the TAC. (Pl. Opp. 1). On a motion to dismiss, district courts will consider new factual allegations in a *pro se* plaintiff's briefing where they are consistent with the complaint. *See, e.g.*, *Braxton v. Nichols*, No. 08 Civ. 08508 (PGG), 2010 WL 1010001, at *1 (S.D.N.Y. Mar. 18, 2010); *Coakley v. 42nd Pct. Case Fee*, No. 08 Civ. 8208 (JSR), 2009 WL 3805530 at *3 (S.D.N.Y. Sept. 28, 2009). The Court will not consider allegations raised for the first time in Plaintiff's opposition brief, particularly because Plaintiff has now had three opportunities to amend her pleadings. *See Mira v. Argus Media*, No. 15 Civ.

i. Plaintiff alleges discrimination and retaliation beginning in 2011, when her supervisor did not support her application for a full-time position, and became hostile and unsupportive upon Plaintiff's promotion by her senior supervisor. (TAC ¶¶ 4-5).

ii. Plaintiff alleges discrimination arising from her unsuccessful applications for two different paralegal positions with Defendant in August 2013 and November 2015, which positions were given to younger people. (*Id.* at ¶¶ 6-7).

iii. Plaintiff alleges retaliation following the filing of her first EEOC Complaint in 2015, and her EEO Complaint in March 2016, when she began to receive fewer assignments and was denied access to information. (*Id.* at ¶¶ 8-10)

iv. Plaintiff alleges discrimination by Defendant in September 2016, when she was not given an opportunity to apply for an open paralegal position, and was told by the senior supervisor in charge of the position that it would require trips to and from another location to pick up legal papers. (*Id.* at ¶ 11).

v. Plaintiff alleges retaliation following informal conversations with senior management in which she expressed concerns that she had been passed over for promotions because of her age. (*Id.* at ¶ 13). After these conversations, Plaintiff's managers began isolating her and either taking away or depriving her of meaningful work assignments, and Plaintiff was left with work that was more menial than that given to her younger colleagues. (*See id.*; *see also* Pl. Opp. 4).

9999 (RJS), 2017 WL 1184302, at *3 (S.D.N.Y. Mar. 29, 2017); *Pandozy* v. *Segan*, 518 F. Supp. 2d 550, 554 n.1 (S.D.N.Y. 2007), *aff'd*, 340 F. App'x 723 (2d Cir. 2009) (summary order).

Moreover, prior to Plaintiff's third amendment of her complaint, the Court discussed with Plaintiff the distinctions between and among her discrimination, retaliation, and hostile work environment claims, and advised that Plaintiff amend her pleadings to distinguish among these claims. (*See* Dkt. #28 at 30:3-35:24, 49:4-10 (transcript)). The Court's understanding of Plaintiff's claims thus stems from her subsequently-filed TAC, prepared with the assistance of NYLAG, and the Court will not interpret Plaintiff's opposition briefing to further revise her theories of discrimination, retaliation, and hostile work environment

vi. Plaintiff alleges retaliation, constructive discharge, and a hostile work environment arising from Defendant's conduct following the filing of her Second EEOC Complaint on February 19, 2019. (TAC ¶¶ 14-15). Plaintiff alleges that she was subjected to harassment about her retirement, which made her physically and emotionally ill, and caused her to resign from her position on May 31, 2019. (*Id.* at ¶¶ 16-17).

Defendant's motion to dismiss asserts that Plaintiff's claims are largely untimely, and that any timely claims fail to state a claim for relief under Federal Rule of Civil Procedure 12(b)(6). For the reasons discussed below, the Court grants Defendant's motion.

A. Applicable Law

1. Motions to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)

Defendant seeks dismissal of Plaintiff's claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). A complaint that contains only "naked assertions" or "a formulaic recitation of the elements of a cause of action" does not suffice. *Twombly*, 550 U.S. at 555.

In ruling on Rule 12(b)(6) determinations, courts "may consider any written instrument attached to the complaint, statements or documents

incorporated into the complaint by reference ... and documents possessed by or known to the plaintiff and upon which [he] relied in bringing the suit." *ATSI Commc'ns, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007); *see generally Goel* v. *Bunge, Ltd.*, 820 F.3d 554, 558-60 (2d Cir. 2016) (discussing documents that may properly be considered in resolving a motion to dismiss). The Court accepts as true all well-pleaded factual allegations in the complaint. *See Iqbal*, 556 U.S. at 678.

2. Discrimination and Retaliation Claims Under the ADEA

"With respect to an individual over the age of 40, the ADEA makes it unlawful for an employer to 'discriminate against the individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual's age.'" *Davis-Garett* v. *Urban Outfitters, Inc.*, 921 F.3d 30, 41 (2d Cir. 2019) (quoting 29 U.S.C. §§ 623(a)(1), 631(a)) (internal quotation marks and brackets omitted)). This prohibition "encompass[es] 'requiring people to work in a discriminatorily hostile or abusive environment.'" *Id.* (quoting *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). The ADEA further provides that "[i]t shall be unlawful for an employer to discriminate against any of his employees ... 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).

Age discrimination and retaliation claims under the ADEA require consideration of the familiar burden-shifting framework set forth in

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792, 802-04 (1973). *See Littlejohn* v. *City of New York*, 795 F.3d 297, 307-08 (2d Cir. 2015) (citing *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000)); *see also Alexander* v. *N.Y.C. Dep't of Educ.*, No. 19 Civ. 7023 (AJN), 2020 WL 7027509, at *3, 9 (S.D.N.Y. Nov. 30, 2020) (discussing burden-shifting under the ADEA). Discrimination and retaliation complaints are subject to a "lowered standard of review" at the motion to dismiss stage. *Ingrassia* v. *Health & Hosp. Corp.*, 130 F. Supp. 3d 709, 719 (E.D.N.Y. 2015). A plaintiff is not obligated "to plead a *prima facie* case of discrimination as contemplated by the *McDonnell Douglas* framework." *Vega* v. *Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 84 (2d Cir. 2015). However, she must still provide "a short and plain statement of the claim that shows that [she is] entitled to relief and that gives the defendants fair notice of [her] claims of age discrimination and the grounds upon which those claims rest." *Kassner* v. *2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 238 (2d Cir. 2007).

3. The Court's Review of *Pro Se* Submissions

Generally speaking, courts are directed to "afford ... a special solicitude" to *pro se* litigants, and, in this regard, to construe their pleadings and motion papers liberally. *Tracy* v. *Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010). Under this directive, the Court is to read Plaintiff's "submissions to raise the strongest arguments they suggest." *McLeod* v. *Jewish Guild for the Blind*, 864 F.3d 154, 156 (2d Cir. 2017) (quoting *Bertin* v. *United States*, 478 F.3d 489, 491 (2d Cir. 2007) (internal quotation marks omitted)). Arguably, such an obligation would "apply with particular force" in this case, "because [Plaintiff] alleges that [Defendant] violated her 'civil rights.'"

Crawley v. *Macy's Retail Holdings, Inc.*, No. 15 Civ. 2228 (KPF), 2016 WL 6993777, at *4 (S.D.N.Y. Nov. 29, 2016) (quoting *Jackson* v. *N.Y. State Dep't of Labor*, 709 F. Supp. 2d 218, 224 (S.D.N.Y. 2010)).

The Court notes that Plaintiff secured the services of NYLAG in preparing her TAC. In two prior opinions, the Court has declined to afford special solicitude to *pro se* plaintiffs whose submissions were prepared with NYLAG's assistance. *See Littlejohn* v. *Consol. Edison Co. of N.Y., Inc.*, No. 18 Civ. 6336 (KPF), 2019 WL 3219454, at *1 n.1 (S.D.N.Y. July 17, 2019); *Price* v. *City of New York*, No. 15 Civ. 5871 (KPF), 2018 WL 3117507, at *5 n.5 (S.D.N.Y. June 25, 2018). However, the Court acknowledges that an argument can be made that "[i]f pro se litigants who receive limited assistance from NYLAG lose all protections afforded to them, NYLAG faces a catch-22: providing less than full representation will harm litigants by eliminating the special care otherwise afforded." *Campa* v. *Entergy Nuclear Operations, Inc.*, No. 17 Civ. 792 (KMK), 2019 WL 4221560, at *8 (S.D.N.Y. Sept. 5, 2019) (quoting from plaintiff's sur-reply submission). Like the court in *Campa*, this Court does not need to resolve that conflict in this Opinion, because Plaintiff's claims fail even when read with special solicitude.

B. Analysis

1. Certain of Plaintiff's ADEA Claims Are Time-Barred

A plaintiff who wishes to commence an action alleging violations of the ADEA must first file an EEOC discrimination charge within 300 days of the date of the alleged unlawful practice. *See Tewksbury* v. *Ottoway Newspapers*, 192 F.3d 322, 328-29 (2d Cir. 1999); *Harris* v. *City of New York*, 186 F.3d 243, 247-48 (2d Cir. 1999). Any claim not filed within this

that violation, even conduct that occurred outside the limitations period." *Id.*

The Second Circuit has "cautioned ... that while this theory may apply to 'cases involving specific discriminatory policies or mechanisms, ... multiple incidents of discrimination, *even similar ones*, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation.'" *Hongyan Lu* v. *Chase Inv. Serv. Corp.*, 412 F. App'x 413, 416 (2d Cir. 2011) (summary order) (emphasis in *Hongyan Lu*) (citing *Lambert* v. *Genesee Hosp.*, 10 F.3d 46, 53 (2d Cir. 1993)). Such "[d]iscrete incidents of discrimination that are not part of a discriminatory policy or practice ... cannot be continuing violations." *Corona Realty Holding*, 382 F. App'x at 72; *see also Lucente*, 980 F.3d at 309 ("The continuing violation doctrine thus applies not to discrete unlawful acts, even where those discrete acts are part of 'serial violations,' but to claims that by their nature accrue only after the plaintiff has been subjected to some threshold amount of mistreatment." (quoting *Morgan*, 536 U.S. at 114-15)). In other words, the continuing violation doctrine does not apply to "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire[, which] are easy to identify." *Morgan*, 536 U.S. at 114.[6] Thus, Plaintiff's constructive discharge claim, alleged for the first time in her opposition brief (*see* Pl. Opp. 2), may not be used to bring in otherwise time-barred conduct under the continuing violation doctrine; though the claim is itself timely,

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6 Though Plaintiff's claims that she was either not supported, not considered, or not promoted for certain positions are entirely time-barred, as they accrued well before April 25, 2018 (*see* TAC ¶¶ 4, 6-7, 11), the Court observes that even were any of these claims timely, the continuing violation doctrine would not apply.

timeframe is barred as untimely. *See Staten* v. *City of New York*, No. 14 Civ. 4307 (ER), 2015 WL 4461688, at *8 (S.D.N.Y. July 20, 2015) (quoting *Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 109 (2002)).

Plaintiff filed her Second EEOC Complaint, which in turn led to the issuance of her right to sue letter, on February 19, 2019. (TAC ¶ 14). Therefore, any claims that accrued before April 25, 2018 — 300 days before February 19, 2019 — should be time-barred. The bar encompasses Plaintiff's allegations regarding Defendant's failure either to support her applications or to consider her for various positions (*see id.* at ¶¶ 4, 6-7, 11), as well as Plaintiff's claims of retaliation immediately following her 2015 and 2016 EEOC and EEO Complaints (*see id.* at ¶¶ 8-10).

Plaintiff argues that her claims are timely pursuant to the "continuing violation" doctrine. (Pl. Opp. 1-3). "The 'continuing violation doctrine' is an 'exception to the normal knew-or-should-have-known accrual date' if there is 'evidence of an ongoing discriminatory policy or practice.'" *Corona Realty Holding, LLC* v. *Town of N. Hempstead*, 382 F. App'x 70, 72 (2d Cir. 2010) (summary order) (quoting *Harris*, 186 F.3d at 248); *accord Lucente* v. *Cty. of Suffolk*, 980 F.3d 284, 309 (2d Cir. 2020). "[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 employer 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). Where such a continuing violation is shown, "the plaintiff is entitled to bring suit challenging all conduct that was a part of

constructive discharge is a discrete act that does not render the alleged conduct that came before it timely. *See Francois* v. *N.Y.C. Dep't of Educ.*, No. 19 Civ. 11119 (ER), 2021 WL 603226, at *5 (S.D.N.Y. Feb. 16, 2021) ("Completed acts that occur a single time, like termination through discharge or resignation, are precise examples of activities that do not involve the sort of ongoing policy or mechanism that the continuing violation doctrine demands.").[7]

The continuing doctrine also does not permit the Court to consider Plaintiff's untimely retaliation claims. *See, e.g.*, *Valtchev* v. *City of New York*, 400 F. App'x 586, 589 (2d Cir. 2010) (summary order) (observing that "discrete instances of retaliatory action" do not "trigger" the continuing violation doctrine). Such claims include Plaintiff's allegations that: (i) in 2011, her supervisor failed to support her and actively denied her professional opportunities (TAC ¶ 5); and (ii) after she filed her First EEOC Complaint and her EEO Complaint in 2015 and 2016, respectively, and expressed concerns to senior management that she was denied promotions because of her age, Defendant retaliated against her by isolating her, excluding her from work assignments and refusing to share information that she needed to do her job (*id.* at ¶¶ 8-10 13). As pleaded, such conduct is

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7 While the phrase "constructive discharge" was not employed in the TAC, the allegations that Plaintiff was harassed following the filing of her Second EEOC Complaint, and that this harassment made her physically and emotionally ill to the point where she resigned, are sufficient to "encompass" a theory of constructive discharge. (TAC ¶¶ 15-17). *See Fitzgerald* v. *Henderson*, 251 F.3d 345, 367 (2d Cir. 2001) (finding that plaintiff's allegations were "ample to encompass a theory of constructive discharge" even where plaintiff did not expressly reference the phrase "constructive discharge" in her complaint). The Court thus will consider Plaintiff's contructive discharge claim, and will not dismiss this claim merely on the theory that it is outside the scope of Plaintiff's pleadings. *See id.*

more akin to "'a series of discrete individual wrongs rather than a single and indivisible course of wrongful action.'" *Francois*, 2021 WL 603226, at *5 (quoting *Davidson* v. *LaGrange Fire Dist.*, No. 08 Civ. 3036 (VB), 2012 WL 2866248, at *10 (S.D.N.Y. June 19, 2012)). For this reason, courts in this Circuit have found allegations of "unfavorable job assignments" to be discrete acts rather than continuous violations. *See, e.g.*, *Gaston* v. *N.Y.C. Med. Exam'r*, 432 F. Supp. 2d 321, 328 (S.D.N.Y. 2006); *see also Kassner*, 496 F.3d at 239 ("As we have stated previously, a completed act such as a discontinuance of a particular job assignment is not of a continuing nature."). And such discrete acts "cannot be brought within [the limitations period], even when undertaken pursuant to a general policy that results in other discrete acts occurring within the limitations period." *Chin* v. *Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 157 (2d Cir. 2012). Plaintiff's allegations of retaliation pre-dating April 25, 2018, are accordingly time-barred.

Separate from her claims of disparate treatment, Plaintiff alleges that she was subjected to a hostile work environment by Defendant (TAC ¶ 16), and argues from this fact that the "entire time period of the hostile environment may be considered ... for the purposes of determining liability" (Pl. Opp. 2-3 (citing *Morgan*, 536 U.S. at 117)).[8] But a plaintiff may not

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[8] In support of the Court's application of the continuing violation doctrine to her hostile work environment claim, Plaintiff argues that she has alleged a "continuous pattern" of discriminatory behavior. (Pl. Opp. 2). In *National Railroad Passenger Corporation* v. *Morgan*, 536 U.S. 101 (2002), the Supreme Court expressly refrained from ruling on whether the continuing violation exception could be applied to "pattern-or-practice" claims, 536 U.S. at 115 n.9, leaving open the question of whether the doctrine applies to such claims. *See Gaston* v. *N.Y.C. Med. Exam'r*, 432 F. Supp. 2d 321, 328, n.1 (S.D.N.Y. 2006); *see also E.E.O.C.* v. *Bloomberg L.P.*, 751 F. Supp. 2d 628, 647-48 (S.D.N.Y. 2010). "Pattern-or-practice" claims involve multiple incidents of discrimination against individuals in a particular protected class arising from a discriminatory policy or mechanism. *See Gaston*, 432 F. Supp. 2d at 328, n.1. Plaintiff has not alleged such a claim here. As in other cases where

"circumvent the limitations period by merely recasting [her] unexhausted discrete claims ... as a hostile work environment claim." *Iazzetti* v. *Town of Tuxedo*, No. 18 Civ. 6200 (NSR), 2020 WL 4340872, at *6 (S.D.N.Y. July 27, 2020). At the outset, the Court observes that, as discussed further below, even Plaintiff's timely allegations are insufficient to state a plausible hostile work environment claim. And "[t]o bring a claim within the continuing violation exception, a plaintiff must at the very least allege that one act of discrimination in furtherance of the ongoing policy occurred within the limitations period." *Patterson* v. *Cty. of Oneida*, 375 F.3d 206, 220 (2d Cir. 2004); *accord Davis-Garett*, 921 F.3d at 42 ("A charge alleging a hostile work environment claim ... will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice *and at least one act falls within the time period.*" (alterations and emphasis in *Davis-Garett*) (quoting *Morgan*, 536 U.S. at 122)).

But there is a deeper problem with Plaintiff's pleadings: Stripped of its conclusory assertions, the TAC does not allege any acts of discrimination that are not time-barred. Indeed, Plaintiff's most recent non-conclusory allegation of discrimination — that Defendant failed to consider her for an open position in September 2016 — is roughly 18 months outside the limitations period. (*See* TAC ¶ 11). However, Plaintiff has put forth timely allegations of retaliation, which include:

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courts have rejected similar attempts to frame allegations as a pattern or practice, Plaintiff "seeks to link together a series of decisions under [this] label," but "that does not change the fact that each decision constituting the pattern or practice is discrete." *Bloomberg L.P.*, 751 F. Supp. 2d at 647-48 (quoting *E.E.O.C.* v. *Freeman*, No. 09 Civ. 2573 (RWT), 2010 WL 1728847, at *6 (S.D.N.Y. Apr. 27, 2010) (internal quotations marks and alterations omitted)).

i. Following Plaintiff's First EEOC Complaint in 2015 and her EEO Complaint in 2016, her "interactions with various HHC managers" "chang[ed]," such that she began to receive fewer assignments and was denied access to information that she needed to do her job, which retaliatory acts continued throughout her entire period of employment. (*Id.* at ¶¶ 8-10).

ii. Following Plaintiff's Second EEOC Complaint in February 2019, Plaintiff's supervisors and certain Human Resources staff began to "harass" her about her retirement. (*Id.* at ¶ 15).[9]

In order to establish that the continuing violation doctrine applies, and that "the time-barred evidence regarding non-discrete acts ... [is] admissible to prove a hostile work environment claim," Plaintiff must plead that her time-barred allegations "constitute[] non-discrete acts that are sufficiently related to the acts that occurred within the limitations period." *Sooroojballie* v. *Port Auth. of N.Y. & N.J.*, 816 F. App'x 536, 542 (2d Cir. 2020) (summary order). With the one exception outlined below, the Court concludes that she has not.

Plaintiff fails to plead that the majority of her otherwise time-barred claims are "sufficiently related" to her timely retaliation claims. *First*, the Court observes that the retaliatory conduct alleged by Plaintiff was precipitated by a series of complaints that began at some point in 2015. (*See* TAC ¶ 10). Accordingly, any pre-2015 conduct is not "part of the same

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[9] Plaintiff also alleges that after her discussions with senior management regarding her view that she had been denied "professional advancement" because of her age, her managers began to isolate her and deprive her of meaningful work assignments. (TAC ¶ 13; *see also* Pl. Opp. 4). However, Plaintiff does not provide the time frames in which either those conversations or the ensuing retaliation occurred, and the Court is thus unable to determine whether these allegations are timely.

unlawful employment practice" as the alleged retaliation that followed Plaintiff's complaints beginning in 2015. *See Morgan*, 536 U.S. at 122.

Second, as to Plaintiff's allegations that Defendant failed to promote her or consider her for open positions (*see* TAC ¶¶ 7, 11), Plaintiff has not alleged any overlap, let alone any connection, between the decisionmakers who failed to consider her for those positions, and the individuals involved in her later experiences of retaliation. Plaintiff's failure to promote allegations thus remain "discrete" claims, as Plaintiff has not alleged the requisite connection to her claims of retaliation. *See Mohamed* v. *N.Y. Univ.*, No. 14 Civ. 8373 (GBD) (MHD), 2015 WL 5307391, at *3-4 (S.D.N.Y. Sept. 10, 2015) (declining to apply continuing violation doctrine to failure-to-promote allegation, where complaint did "not provide an adequate basis to determine whether the promotion decision [was] connected to Plaintiff's timely allegations"); *cf. Szuszkiewicz* v. *JPMorgan Chase Bank*, 12 F. Supp. 3d 330, 338-39 (E.D.N.Y. 2014) ("Discrete incidents of discrimination that are unrelated to the hostile work environment, such as ... failure to promote, denial of transfer, or refusal to hire ... cannot supply the hook to bring an otherwise untimely hostile work environment claim into the 300 day time period." (internal quotation marks and citation omitted)).

Third, turning to Plaintiff's allegations of retaliation beginning in 2015, the Court finds that such allegations are not time-barred. Reading Plaintiff's TAC generously, the Court understands Plaintiff to allege that Defendant began retaliating against her following her First EEOC Complaint in 2015; that this conduct created a hostile work environment; and that it continued until her constructive discharge in 2019. (TAC ¶¶ 10, 13, 15-16). District

courts in this Circuit have found that "allegations of discriminatory conduct including language akin to 'throughout her employment' are properly included in hostile work environment claims." *See Langford* v. *Int'l Union of Operating Eng'rs, Local 30*, 765 F. Supp. 2d 486, 498 (S.D.N.Y. 2011) (collecting cases). Further, courts in this Circuit have recognized a hostile work environment "as a cognizable retaliatory act." *Volpe* v. *N.Y.C. Dep't of Educ.*, 195 F. Supp. 3d 582, 595 (S.D.N.Y. 2016) (citing *Sclafani* v. *PC Richard & Son*, 668 F. Supp. 2d 423, 438-39 (E.D.N.Y. 2009)). Because Plaintiff has alleged continuing acts of retaliation that occurred within the 300-day period, her claim of a retaliatory hostile work environment is not time-barred. *See Alvarado* v. *Mount Pleasant Cottage Sch. Dist.*, 404 F. Supp. 3d 763, 779-80 (S.D.N.Y. 2019); *Harewood* v. *N.Y.C. Dep't of Educ.*, No. 18 Civ. 5487 (KPF) (KHP), 2019 WL 3042486, at *4 (S.D.N.Y. May 8, 2019).

In sum, when assessing Plaintiff's ADEA claims, the Court will consider as timely Plaintiff's allegations of conduct on or post-dating April 25, 2018. Additionally, the Court will consider retaliatory conduct beginning in 2015, but only for the purposes of evaluating Plaintiff's hostile work environment claim. *See Alvarado*, 404 F. Supp. 3d at 780 n.8.[10] More

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[10] The Court recognizes that Plaintiff has not pleaded the timing of her conversations with senior management in which she raised concerns that she had been denied advancement opportunities, nor has she pleaded specific instances of retaliation following those conversations. (*See* TAC ¶ 13). Given the policy in the Second Circuit of "liberally construing *pro se* submissions," *see Triestman* v. *Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006), the Court will infer from the narrative of the TAC that such conversations followed the First EEOC Complaint, and indeed may have been prompted by the alleged failure to consider Plaintiff for an open position in September 2016. (*See id.* at ¶¶ 11-13). Construing the TAC to raise the strongest arguments it suggests, the Court will thus consider Plaintiff's allegations of retaliation following her conversations with senior management as timely for the purposes of assessing the plausibility of her hostile work environment claim.

broadly, the Court will consider Plaintiff's other allegations of discrimination and retaliation, even if untimely, where relevant to assessing a timely claim. *See Davis-Garett*, 921 F.3d at 42 ("E]ven with respect to a claim of discrete discriminatory or retaliatory acts, expiration of the limitations period does not bar an employee from using the prior acts as background evidence in support of a timely claim.").

2. Plaintiff's Timely ADEA Claims Are Dismissed for Failure to State a Claim

Having determined which of Plaintiff's claims it may consider as timely, the Court proceeds to address the merits of those claims, which include allegations of discrimination, retaliation, hostile work environment, and constructive discharge under the ADEA. As detailed herein, the Court ultimately finds that the TAC fails to state an ADEA claim for which relief can be granted.

a. The Court Dismisses Plaintiff's ADEA Discrimination Claim

To begin, Plaintiff alleges that Defendant discriminated against her based on her age in violation of the ADEA. A *prima facie* claim of discrimination in the form of disparate treatment under the ADEA is established when a plaintiff "demonstrate[s] membership in a protected class, qualification for their position, an adverse employment action, and circumstances that support an inference of age discrimination." *Boonmalert* v. *City of New York*, 721 F. App'x 29, 32 (2d Cir. 2018) (summary order) (quoting *Kassner*, 496 F.3d at 238 (internal quotation marks omitted)). An adverse employment action is "a materially adverse change in the terms and conditions of employment," *Kessler* v. *Westchester Cty. Dep't of Soc. Servs.*,

461 F.3d 199, 207 (2d Cir. 2006) (quoting *Williams* v. *R.H. Donnelley, Corp.*, 368 F.3d 123, 128 (2d Cir. 2004)), which "must be more disruptive than a mere inconvenience or an alteration of job responsibilities[,]" *id.* (internal quotation marks omitted) (quoting *Galabya* v. *N.Y.C. Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000)).

At the motion to dismiss stage, a plaintiff need only plausibly allege: "[i] that adverse action was taken against her by her employer, and [ii] that her age was the but-for cause of the adverse action." *Downey* v. *Adloox Inc.*, 238 F. Supp. 3d 514, 519 (S.D.N.Y. 2017) (internal quotation marks omitted) (quoting *Marcus* v. *Leviton Mfg. Co.*, 661 F. App'x 29, 31-32 (2d Cir. 2016) (summary order)); *accord Smith* v. *Bronx Cmty. Coll. Ass'n*, No. 16 Civ. 3779 (JMF), 2017 WL 727546, at *1 (S.D.N.Y. Feb. 23, 2017). What is more, at the motion to dismiss stage, a plaintiff "need not give plausible support to the ultimate question of whether the adverse employment action" of which she complains "was attributable to discrimination." *Littlejohn*, 795 F.3d at 311. Instead, to pass muster under Rule 12(b)(6), a "plaintiff must plead facts that give 'plausible support to a minimal inference' of the requisite discriminatory causality." *Leviton Mfg. Co.*, 661 F. App'x at 32 (quoting *Littlejohn*, 795 F.3d at 310-11). And this burden requires a plaintiff to "supply sufficient factual material, and not just legal conclusions, t[hat] push the misconduct alleged in the pleading beyond the realm of the 'conceivable' to the 'plausible.'" *Id.* (citing *Vega*, 801 F.3d at 84).

Defendant argues that Plaintiff's discrimination claims must be dismissed for failure to allege any timely adverse action as required at the motion to dismiss stage. (Def. Br. 13). In response, Plaintiff argues that she

has alleged a number of adverse actions, including that she was passed over for professional advancement opportunities in favor of younger and less qualified colleagues, given less meaningful assignments, and pressured to retire before she was ready. (Pl. Opp. 3-4). The Court agrees with Defendant that Plaintiff has not alleged a timely discrimination claim under the ADEA.

First, as explained above, Plaintiff's allegations that she was not considered for certain open positions are time-barred, as they predate April 25, 2018. *Second*, as to Plaintiff's allegations that there were changes to her caseload and assignments, and inquiries made about her retirement (*see* TAC ¶¶ 8-9, 13, 15), the Court concludes that these allegations are more properly considered in connection with Plaintiff's retaliation and hostile work environment claims. This conclusion stems from the Court's reading of the TAC, which does not allege that Plaintiff's assignment changes and retirement inquiries were made with any discriminatory intent, but rather alleges that they were made in retaliation for Plaintiff's complaints to the EEOC, the EEO, and senior management. (*See id.*). *See Jagmohan* v. *Long Island R.R. Co.*, No. 12 Civ. 3146 (JFB) (SIL), 2014 WL 4417745, at *10 (E.D.N.Y. Sept. 8, 2014) ("Plaintiff's focus on retaliation for protected activity is not probative of whether defendants acted with *discriminatory* intent." (emphasis in original)), *aff'd*, 622 F. App'x 61 (2d Cir. 2015) (summary order); *Bonfiglio* v. *N.Y. Presbyterian Hosp. Weill Cornell Med. Ctr.*, No. 10 Civ. 4939 (SAS), 2011 WL 2436706, at *3 (S.D.N.Y. June 16, 2011) (observing that "a retaliation claim is 'separate and distinct' [from a discrimination claim] because it alleges adverse actions taken by

employers in response to a plaintiff's 'statutorily protected activity' such as filing a claim of discrimination" (citations omitted)).[11] The Court will thus consider Plaintiff's timely allegations of changes in her assignments and inquiries about her retirement when it turns to Plaintiff's retaliation and hostile work environment claims, rather than as putative adverse employment actions for an ADEA discrimination claim.[12] As Plaintiff has failed to allege any timely adverse action, as required at this stage, her ADEA discrimination claim is accordingly dismissed.

b. The Court Dismisses Plaintiff's ADEA Hostile Work *Environment* Claim

Plaintiff next brings a hostile work environment claim under the ADEA. In support, Plaintiff alleges that, following the filing of her Second EEOC Complaint, she was subjected to a hostile work environment by

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11 As mentioned previously, the Court will accept allegations pleaded in Plaintiff's opposition briefing to the extent consistent with the TAC. *See Braxton*, 2010 WL 1010001, at *1; *Coakley*, 2009 WL 3095529 at *3.

12 Moreover, even had Plaintiff properly alleged that Defendant's changes in her assignments and inquiries about her retirement were made either in part or entirely with discriminatory intent, such allegations would be insufficient to establish an adverse employment action for the purposes of an ADEA discrimination claim. Plaintiff's reduction in meaningful assignments, as alleged, is not an adverse employment action, as Plaintiff has not alleged that this "change in duties ... result[ed] in a change in responsibilities so significant as to constitute a setback to [her] career." *Bowen-Hooks* v. *City of New York*, 13 F. Supp. 3d 179, 213 (E.D.N.Y. 2014); *see also Dietrich* v. *City of New York*, No. 18 Civ. 7544 (CM), 2019 WL 2236585, at *7 (S.D.N.Y. May 16, 2019); *Rodriguez* v. *Coca Cola Refreshments USA, Inc.*, No. 12 Civ. 234 (BMC), 2013 WL 5230037, at *3 (E.D.N.Y. Sept. 16, 2013) ("[A]ssignments that are part of an employee's normal responsibilities are not adverse employment actions where ... the rate of pay and benefits remains the same." (internal quotation marks omitted)). And as alleged, unsolicited inquiries about Plaintiff's retirement are similarly insufficient to establish an adverse employment action. *See Boonmalert* v. *City of New York*, 721 F. App'x 29, 32 (2d Cir. 2018) (summary order) (finding that "discussions about retirement, which are a normal part of workplace dialogue between a supervisor and subordinate" do not constitute an adverse employment action); *Hamilton* v. *Mount Sinai Hosp.*, 528 F. Supp. 2d 431, 447 (S.D.N.Y. 2007) (noting that "discussion of retirement is common in offices, even between supervisors and employees, and is typically unrelated to age discrimination"), *aff'd*, 331 F. App'x 874 (2d Cir. 2009) (summary order).

Defendant, which included harassment about the timing of her retirement. (TAC ¶¶ 15-16). Reading the TAC generously, the Court understands Plaintiff to allege that this conduct was in retaliation for Plaintiff's repeated internal and external complaints about Defendant's discriminatory hiring decisions that had denied her opportunities for professional advancement. (*Id.* at ¶ 16). In Plaintiff's opposition brief, she alleges that this hostile work environment encompassed a broader five-to-six-year period that preceded her retirement in May 2019. (Pl. Opp. 2). As explained above, pursuant to the continuing violation doctrine, the Court will consider any retaliatory conduct beginning in 2015 when determining the plausibility of Plaintiff's hostile work environment claim, as well as Plaintiff's allegations of conduct on or after April 25, 2018.

To plead a hostile work environment claim under the ADEA, a plaintiff must demonstrate that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently pervasive to alter the conditions of the victim's employment." *Kassner,* 496 F.3d at 240 (internal quotation marks and citation omitted). This standard has both objective and subjective components: "the conduct complained of must be severe or pervasive enough that a reasonable person would find it hostile or abusive, and the victim must subjectively perceive the work environment to be abusive." *Lebowitz* v. *N.Y.C. Dep't of Educ.*, 407 F. Supp. 3d 158, 181 (E.D.N.Y. 2017) (quoting *Littlejohn*, 795 F.3d at 121 (internal quotation marks omitted)). At the pleading stage, "a plaintiff need only plead facts sufficient to support the conclusion that she was faced with harassment of such quality or quantity that a reasonable employee would find the

conditions of her employment altered for the worse." *Patane* v. *Clark*, 508 F.3d 106, 113 (2d Cir. 2007) (internal quotation marks, alterations, and citation omitted). To determine whether an incident or series of incidents is "sufficiently severe or pervasive to alter the conditions" of a plaintiff's work environment, a district court "must consider the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Boonmalert*, 721 F. App'x at 33 (quoting *Littlejohn*, 795 F.3d at 320-21 (internal quotation marks omitted)).

Defendant argues that Plaintiff has failed to state an ADEA hostile work environment claim because (i) she does not plausibly allege that adverse conduct occurred because of her age, and (ii) she fails to allege facts suggesting "severe and pervasive conduct." (Def. Br. 17-18). Plaintiff does not directly respond to Defendant's arguments that her hostile work environment claim should be dismissed on the merits, but in her arguments as to the timeliness of this claim, she asserts that she has alleged "a continuous pattern of discriminatory behavior related to her age, which occurred regularly and episodically[.]" (Pl. Opp. 2-3).

As previously discussed, much of the conduct Plaintiff alleges in support of her hostile work environment claim is time-barred. The timely allegations the Court considers pertain to: (i) retaliatory conduct that followed Plaintiff's First EEOC Complaint in 2015, her EEO complaint in 2016, and her other informal complaints to senior management, specifically that Plaintiff received fewer assignments, was isolated, and was denied

access to information that she needed to perform her job (TAC ¶¶ 10, 13); and (ii) harassment regarding the timing of Plaintiff's retirement that followed her Second EEOC Complaint (*id.* at ¶ 15). These allegations are insufficient to support a hostile work environment claim.

First, Plaintiff alleges that following her First EEOC Complaint and her internal complaints, she received "fewer assignments," that assignments were "taken away" from her, that she was "denied" access to information she needed to do her job, and that she was isolated by her senior managers. (TAC ¶¶ 10, 13). In her opposition brief, she expands on these allegations, claiming that her caseload "decreased significantly to the point where she had little to do, while other younger colleagues were given choice assignments and kept occupied." (Pl. Opp. 4). Even assuming that these actions were taken with a retaliatory motive, they are insufficient to establish "the kind of severity and pervasiveness that can amount to an actionable hostile work environment claim." *Alexander*, 2020 WL 7027509, at *8. Courts have found that similar allegations fall short of altering the conditions of employment. *See, e.g., id.* (holding that allegations that included (i) plaintiff had been removed from a leadership program while another teacher was allowed to remain in it, (ii) plaintiff's duties and responsibilities were reassigned, and (iii) plaintiff was given an excessive workload compared to other teachers, were insufficient to support hostile work environment claim); *Lenart* v. *Coach, Inc.*, 131 F. Supp. 3d 61, 67 (S.D.N.Y. 2015) (finding that allegations regarding other employees' favorable treatment could not sustain a plausible hostile work environment claim); *see also Fleming* v. *MaxMara USA, Inc.*, 371 F. App'x 115, 119 (2d

Cir. 2010) (summary order) (determining that no hostile work environment existed where "defendants wrongly excluded [plaintiff] from meetings, excessively criticized her work, refused to answer work-related questions, arbitrarily imposed duties outside of her responsibilities, threw books, and sent rude emails to her"). Assessing Plaintiff's allegations cumulatively, the Court finds that she has not pleaded the sort of work conditions that could plausibly be deemed "sufficiently pervasive to alter the conditions of [her] employment." *Kassner,* 496 F.3d at 240 (citation and internal quotation marks omitted).

Plaintiff's allegations of retaliation following her First EEOC Complaint and internal complaints suffer from an additional flaw, which is that she has failed to allege that Defendant's conduct was "sufficiently continuous and concerted" such that it could be found "pervasive." *Alfano* v. *Costello,* 294 F.3d 365, 380 (2d Cir. 2002) (citation and internal quotation marks omitted). While Plaintiff references retaliatory conduct in general terms, she does not identify or describe any specific instances of such conduct, or provide the Court with any indication as to its frequency. Without such allegations, the Court is unable to determine that Defendant's conduct, taken together, adds enough to the "totality of the circumstances" to create a hostile work environment. *See Moore* v. *Verizon,* No. 13 Civ. 6467 (RJS), 2016 WL 825001, at *13 n.9 (S.D.N.Y. Feb. 5, 2016) (finding that a statement that a supervisor was negative towards older workers and aimed suspension and disciplinary actions toward such workers, without any specific allegations of such conduct, was "wholly conclusory and insufficient to establish a hostile work environment claim" (internal citation and

quotation marks omitted)); *cf. Alfano*, 294 F.3d at 380 (reversing district court's judgment on the pleadings on hostile work environment claim where plaintiff alleged incidents that were "too few, too separate in time, and too mild ... to create an abusive working environment"). Plaintiff's vague pleadings are insufficient to allege a pervasively hostile work environment "permeated with discriminatory intimidation, ridicule, and insult." *See Moore*, 2016 WL 825001, at *13 (quoting *Littlejohn*, 795 F.3d at 320-21).

Second, Plaintiff alleges that after she filed her Second EEOC Complaint, both her supervisors and certain members of Defendant's Human Resources Department began to "harass" Plaintiff about her retirement; she received unsolicited offers from Human Resources staff to assist her with the retirement process, and her manager repeatedly asked her about her anticipated retirement timing. (TAC ¶ 15). These allegations suffer from flaws similar to those just discussed with respect to Plaintiff's earlier retaliation claims. Plaintiff again fails to allege any specific instances of this alleged harassment, let alone their frequency. This is fatal for the purpose of her hostile work environment claim, where "the precise frequency of such comments is of great importance." *See Almontaser* v. *N.Y.C. Dep't of Educ.*, No. 13 Civ. 5621 (ILG) (VMS), 2014 WL 3110019, at *8 (E.D.N.Y. July 8, 2014). In determining when comments are sufficiently frequent for these purposes, courts have found that "[d]isparaging remarks made daily clearly constitute an actionable hostile work environment" while "comments made only weekly may not." *Id.* (collecting cases); *see also Wu* v. *Metro-N. Commuter R.R. Commuter R.R. Co.*, No. 14 Civ. 7015 (LTS) (FM), 2016 WL 5793971, at *17 (S.D.N.Y. Aug. 4, 2016) (determining that "stray remarks"

regarding retirement "do not rise to the level of demonstrating that a hostile work environment existed"). Here, Plaintiff's allegations with respect to retaliation for filing her Second EEOC Complaint — *i.e.*, that she was asked about her retirement date and received offers to assist with the retirement process — are closer to "stray remarks" than to daily disparaging comments. *See Boonmalert*, 721 F. App'x at 34 (holding that "[d]iscussions of retirement and a one-time preparation of retirement paper d[i]d not suffice" to survive a motion to dismiss); *Almontaser*, 2014 WL 3110019, at *1, 8 (finding that plaintiff's allegation that defendants made "frequent" remarks that he was "too old" and asked when he was going to retire was "simply too vague" to support a hostile work environment claim); *Mazur* v. *N.Y.C. Dep't of Educ.*, 53 F. Supp. 3d 618, 635 (S.D.N.Y. 2014) ("[C]omments or questions about retirement, without more, do not create a hostile work environment."), *aff'd*, 621 F. App'x 88 (2d Cir. 2015) (summary order).

Given the lack of specificity in Plaintiff's allegations, the Court cannot find that her work environment was objectively hostile. The Court instead must find that Plaintiff has not alleged sufficiently severe and pervasive conduct to sustain a hostile work environment claim under the ADEA, and as a result, her claim must fail.

c. The Court Dismisses Plaintiff's ADEA Retaliation Claim

Plaintiff also brings a retaliation claim under the ADEA. The allegations underpinning this claim have been previously discussed in connection with Plaintiff's hostile work environment claim — though, as explained above, the Court may only consider post-April 2018 conduct when

determining the plausibility of Plaintiff's retaliation claim. In brief, Plaintiff alleges that Defendant retaliated *against her following* her First EEOC Complaint in 2015 and her subsequent internal complaints, and that she experienced further retaliation in response to her Second EEOC Complaint. (TAC ¶¶ 10, 13, 15).

To state a claim for retaliation under the ADEA, a plaintiff must show: "[i] participation in a protected activity known to the defendant; [ii] an employment action disadvantaging *the plaintiff; and [iii]* a causal connection between the protected activity and the adverse employment action." *Boonmalert*, 721 F. App'x at 33 (quoting *Feingold* v. *New York*, 366 F.3d 138, 156 (2d Cir. 2004) (internal quotation *marks omitted*)). "The Supreme Court and Second Circuit have defined 'adverse action' for the purposes of a retaliation claim broadly." *Cerni* v. *J.P. Morgan Sec. LLC*, 208 F. Supp. 3d 533, 539 (S.D.N.Y. 2016). A plaintiff *need only* "show that a reasonable employee would have found the challenged action materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge *of discrimination*." *Id.* at 539 (quoting *Kessler*, 461 F.3d at 207 (internal quotation marks omitted)); *accord Davis-Garett*, 921 F.3d at 43-44. Proof of causation, in turn, "may be shown either '[i] 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 [ii] directly, through evidence *of retaliatory animus* directed against the plaintiff by the defendant.'" *Meyer* v. *Shulkin*, 722 F. App'x 26, 28 (2d Cir.

2018) (summary order) (quoting *Hicks* v. *Baines*, 593 F.3d 159, 170 (2d Cir. 2010) (internal quotation marks omitted)).

Defendant does not dispute that Plaintiff engaged in protected activity. (*See* Def. Br. 18-21). It instead challenges other elements of her retaliation claim, arguing that: (i) Plaintiff has not established the necessary causal connection between any protected activity and the ensuing retaliation, and (ii) she has not alleged that Defendant had knowledge of her Second EEOC Complaint. (Def. Br. 19-20). Plaintiff does not directly respond to these arguments, but notes that her supervisors began to treat her differently "within several months" of her First EEOC Complaint and her internal EEO Complaint, including by "expressing annoyance" at her complaints, isolating her, "mostly ignoring her[,] and depriving her of meaningful assignments which would allow her to continue to advance professionally." (Pl. Opp. 4). She alleges that she felt "deeply uncomfortable" by what she describes as her "pariah status" in the office." (*Id.*).

With particular respect to Plaintiff's First EEOC Complaint, EEO Complaint, and other internal complaints, the Court agrees with Defendant that Plaintiff has failed to establish the requisite causal connection for a claim of retaliation. Plaintiff has not alleged any direct evidence of retaliatory animus, but has instead asserted that after she began making complaints about her age discrimination concerns, her managers treated her differently than they had previously. (TAC ¶¶ 10, 13, 15). While indirect proof of causation may be established by the temporal proximity between the protected activity and the adverse employment action, *see Mohan* v. *City of New York*, No. 17 Civ. 3820 (KPF), 2018 WL 3711821, at *9 (S.D.N.Y. Aug.

3, 2018), Plaintiff does not provide sufficient detail to establish such temporal proximity. In her opposition brief, Plaintiff alleges that she began experiencing differential treatment "within several months after her first complaint with the EEOC and filed internal complaints." (Pl. Opp. 4). Given that Plaintiff filed her First EEOC Complaint in 2015, and her EEO Complaint in March 2016, this allegation does not provide the Court with sufficient clarity on the timeline of Defendant's retaliatory conduct.

If anything, the timeline is further muddied by Plaintiff's allegations that she experienced certain retaliatory conduct following conversations with senior management, as Plaintiff does not allege either the dates of those conversations or the retaliatory actions that followed. *See Anand* v. *N.Y. State Dep't of Tax'n & Fin.*, No. 10 Civ. 5142 (SJF) (WDW) 2012 WL 2357720, at *6 (E.D.N.Y. June 18, 2012) (finding that where plaintiff had provided neither the dates of his protected activities nor adverse actions, the district court could not determine "whether there was a genuine temporal proximity between them").[13] And the Court cannot ignore Plaintiff's failure to allege sufficient temporal proximity where "there is a dearth of supporting facts to bolster [her] claims of retaliatory motives." *Siclari* v. *N.Y.C. Dep't of Educ.*, No. 19 Civ. 7611 (AJN), 2020 WL 7028870, at *9 (S.D.N.Y. Nov. 30, 2020)

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13 Moreover, even were the Court able to accept Plaintiff's allegation that Defendant's retaliatory conduct occurred within "several months" of her various complaints, "district courts within the Second Circuit have consistently held that the passage of two to three months between the protected activity and the adverse employment action does not allow for an inference of causation." *Murray* v. *Visiting Nurse Servs. of N.Y.*, 528 F. Supp. 2d 257, 275 (S.D.N.Y. 2007) (collecting cases); *see also Ragin* v. *E. Ramapo Cent. Sch. Dist.*, No. 05 Civ. 6496 (PGG), 2010 WL 1326779, at *24 (S.D.N.Y. Mar. 31, 2010) ("[M]any courts in this circuit have held that periods of two months or more defeat an inference of causation."); *Hussein* v. *Hotel Emps. & Rest. Union, Local 6*, No. 98 Civ. 9017 (SAS), 2002 WL 10441, at *2 (S.D.N.Y. Jan. 3, 2002) (finding that where purported protected activities occurred many months or years prior to the adverse action, there was no retaliatory nexus).

(observing that in cases where courts have found that larger gaps between the protected activity and the first alleged retaliatory action were not "inherently prohibitively remote," there were other "other supporting factual allegations" that influenced the causation analysis). The Court thus finds that Plaintiff has failed to establish the necessary causal connection to sustain a retaliation claim as to Defendant's conduct following her initial complaints.

Plaintiff's allegation of retaliatory conduct following her Second EEOC Complaint fails for a different reason. As to this claim, the timeline is somewhat clearer: at some point following Plaintiff's February 19, 2019 submission of her Second EEOC Complaint, Defendant allegedly began to "harass" her with inquiries about the timing of her retirement, which harassment lasted until her May 31, 2019 resignation. (TAC ¶¶ 14-16). However, in its motion to dismiss, Defendant argues that Plaintiff has failed to allege that it had any knowledge of her Second EEOC Complaint. (Def. Br. 20-21). While Plaintiff alleges that, with respect to her First EEOC Complaint submitted in 2015, she was informed that Defendant had been sent a copy of that complaint (TAC ¶ 8), she does not make any similar allegation that would permit the Court to infer Defendant's knowledge of her Second EEOC Complaint (*see id.* at ¶ 16). Such an allegation is necessary to establish a plausible ADEA retaliation claim. *See Barrer-Cohen* v. *Greenburgh Cent. Sch. Dist.*, No. 18 Civ. 1847 (NSR), 2019 WL 3456679, at *6 (S.D.N.Y. July 30, 2019) ("[C]ourts have held employers cannot retaliate for conduct of which they are unaware.").

The Court observes that Plaintiff's right to sue letter, appended to her SAC, indicates that a copy of the letter may have been sent to Defendant at or about the time of its issuance. (*See* SAC 11-12). However, without more, the right to sue letter does not establish knowledge of Plaintiff's Second EEOC Complaint by those involved in perpetuating the allegedly retaliatory conduct. *See McManamon* v. *Shinseki*, No. 11 Civ. 7610 (PAE), 2013 WL 3466863, at *10 (S.D.N.Y. July 10, 2013) ("A complaint that makes only general statements that the defendant retaliated against the plaintiff but does not supply factual detail describing ... which employees were aware of any protected activity or were actually involved in retaliatory conduct [] is insufficient to withstand a motion to dismiss."); *Saidin* v. *N.Y.C. Dep't of Educ.*, 498 F. Supp. 2d 683, 688 (S.D.N.Y. 2007) (finding plaintiff's pleadings insufficient where he failed to allege which official had knowledge of his EEOC charge and who "actually engaged in the claimed retaliation"). And even had Plaintiff sufficiently alleged Defendant's knowledge of her Second EEOC Complaint, her retaliation claim would nonetheless fail because the alleged retaliatory conduct — unsolicited inquiries about her retirement — does not constitute an adverse action. *See Nakis* v. *Potter*, 422 F. Supp. 2d 398, 419-21 (S.D.N.Y. 2006); *Lorans* v. *Crew*, No. 98 Civ. 3419 (TPG), 2000 WL 1196745, at *4 (S.D.N.Y. Aug. 23, 2000). It is thus insufficient to sustain a retaliation claim under the ADEA.

d. The Court Dismisses Plaintiff's Constructive Discharge Claim

Though Plaintiff does not expressly allege a constructive discharge claim in her TAC, as discussed *supra*, she puts forth allegations that

"encompass" a theory of constructive discharge. *See Fitzgerald* v. *Henderson*, 251 F.3d 345, 367 (2d Cir. 2001). Specifically, she alleges that following the filing of her Second EEOC Complaint, both her supervisors and certain Human Resources staff began to "harass" her about her retirement, and that this harassment made her physically and emotionally ill to the point where she resigned from her position with Defendant. (TAC ¶¶ 15-16). Further, Plaintiff clarifies in her opposition brief that she intends to put forth a constructive discharge claim, alleging that Defendant created "demoralizing conditions" by isolating her and "improperly frustrating her path to professional development." (Pl. Opp. 2). The Court will accordingly consider whether Plaintiff has sufficiently pleaded such a claim under the ADEA.

To establish a constructive discharge under the ADEA, a plaintiff must show that the employer "deliberately made [her] working conditions so intolerable that [she] was forced into an involuntary resignation." *Stetson* v. *NYNex Serv. Co.*, 995 F.2d 355, 360 (2d Cir. 1993) (quoting *Pena* v. *Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983) (alterations and internal quotation marks omitted)). Working conditions are intolerable when, "viewed as a whole, they are 'so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" *Terry* v. *Ashcroft*, 336 F.3d 128, 152 (2d Cir. 2003) (quoting *Chertkova* v. *Conn. Gen. Life Ins. Co.*, 92 F.3d 81, 89 (2d Cir. 1996)). This is a "demanding standard," as "[c]onstructive discharge cases 'present a worse case harassment scenario, harassment ratcheted up to the breaking point.'" *Spires* v. *MetLife Grp., Inc.*, No. 18 Civ. 4464 (RA), 2019 WL 4464393, at *9

(S.D.N.Y. Sept. 18, 2019) (alteration in *Spires*) (quoting *Copantitla* v. *Fiskardo Estiatorio, Inc.*, 788 F. Supp. 2d 253, 301 (S.D.N.Y. 2011)).

Defendant argues that Plaintiff's failure to state a hostile work environment claim necessarily means that she has failed to allege a constructive discharge claim. (Def. Reply 11, 13). The Court agrees that Plaintiff's allegations of retaliatory conduct by Defendant are insufficient to sustain a constructive discharge claim under either theory.

The Court understands Plaintiff's allegations in her opposition brief that Defendant created "demoralizing conditions" by "improperly frustrating her path to professional development" (Pl. Opp. 2), to refer to the allegations in the TAC that her managers began isolating her (TAC ¶ 13), depriving her of meaningful work assignments (*id.*), and subjecting her to unsolicited inquiries about her retirement (*id.* at ¶ 15).[14] Courts have found that similar allegations of "dissatisfaction with job assignments" are "simply insufficient to establish the sort of intolerable working conditions necessary to a constructive discharge claim[]." *Pfizenmayer* v. *Hicksville Pub. Schs.*, No. 15 Civ. 6987 (SJF) (SIL), 2017 WL 5468319, at *9 (E.D.N.Y. Jan. 24, 2017) (quoting *Gerardi* v. *Huntington Union Free Sch. Dist.*, 124 F. Supp. 3d 206, 224 (E.D.N.Y. 2015) (internal quotation marks omitted)) (collecting cases); *see also Gerardi*, 124 F. Supp. 3d at 224 ("[E]xclusion from meetings, disagreement over work place duties, and squabbles with colleagues —

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[14] To the extent Plaintiff is referring to Defendant's alleged failure to consider her for certain positions, "denial of promotion by itself, even for discriminatory reasons, 'does not constitute an intolerable work atmosphere amounting to a constructive discharge.'" *Spires* v. *MetLife Grp., Inc.*, No. 18 Civ. 4464 (RA), 2019 WL 4464393, at *9 (S.D.N.Y. Sept. 18, 2019) (quoting *Loucar* v. *Boston Mkt. Corp.*, 294 F. Supp. 2d 472, 482 (S.D.N.Y. 2003)) (collecting cases).

'largely amount to the sort of routine disagreements with supervisors or mild criticisms that are simply insufficient to establish ... intolerable working conditions[.]'" (quoting *Miller* v. *Praxair, Inc.*, 408 F. App'x 408, 410 (2d Cir 2010) (summary order)). Plaintiff has not distinguished her allegations from the types of routine disagreements that fail to establish intolerable working conditions.

And while Plaintiff alleges that she became "physically and emotionally ill" from her treatment by Defendant, such that she ultimately resigned (TAC ¶ 16), she has not established that her ill health resulted from "deliberately created working conditions that were 'so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign[.]'" *Spence* v. *Md. Cas. Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993) (quoting *Pena*, 702 F.2d at 325); *see id.* ("[T]he fact that an employee develops stress-related ill health from the demands of his voluntarily undertaken position or from criticisms of his performance, and as a result determines that health considerations mandate his resignation, does not normally amount to a constructive discharge by the employer."). Plaintiff's pleadings are devoid of the specific allegations necessary to find that her alleged ill health was caused by deliberately created working conditions, let alone allegations that suggest that Defendant had made Plaintiff's employment intolerable. *Cf. Rosen* v. *N.Y.C. Dep't of Educ.*, No. 18 Civ. 6670 (AT), 2019 WL 4039958, at *7 (S.D.N.Y. Aug. 27, 2019) (finding that plaintiff had plausibly stated a claim for constructive discharge where she alleged that she was threatened with termination, required to perform "burdensome" tasks, escorted from her office by security guards on multiple

occasions, subjected to comments suggesting that she should retire, and where she further alleged a pattern of behavior toward older teachers). Rather, Plaintiff's vague allegations of dissatisfaction with assignments and unsolicited inquiries about her retirement "fall far short of what an objectively reasonable person would consider discriminatory or pervasive enough to force her to resign." *Gerardi*, 124 F. Supp. 3d at 224 (observing that plaintiff had been neither subjected to an "onslaught of unfounded criticism coupled with the threat of immediate termination," nor "a variety of misogynist comments" (citations and internal quotation marks omitted)). For these reasons, the Court finds that Plaintiff's ADEA constructive discharge claim fails as a matter of law.

3. The Court Declines to Exercise Supplemental Jurisdiction over Plaintiff's NYSHRL and NYCHRL Claims

Federal district courts have supplemental jurisdiction over state-law claims "that are so related to" federal claims "that they form part of the same case or controversy." 28 U.S.C. § 1367(a). Such jurisdiction, however, is "discretionary," *City of Chicago* v. *Int'l Coll. of Surgeons*, 522 U.S. 156, 173 (1997), and a district court "may decline to exercise supplemental jurisdiction over a claim" if it "has dismissed all claims over which it has original jurisdiction," 28 U.S.C. § 1367(c). Having dismissed Plaintiff's ADEA claims in their entirety, the Court will decline to exercise supplemental jurisdiction over Plaintiff's NYSHRL and NYCHRL claims. *See Shi* v. *N.Y. Dep't of State*, 393 F. Supp. 3d 329, 343 (S.D.N.Y. 2019) ("In the usual case in which all federal-law claims are eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction over

the remaining state-law claims." (internal alterations omitted) (citing *Kolari* v. *N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006))); *see also* *Modesto* v. *Figueroa*, No. 15 Civ. 495 (RA), 2016 WL 299033, at *3 (S.D.N.Y. Jan. 25, 2016) (declining supplemental jurisdiction over NYCHRL claim after dismissing federal claims); *Morant* v. *Physicians Affiliate Grp. of N.Y., P.C.*, No. 14 Civ. 67 (TPG), 2014 WL 3964153, at *2 (S.D.N.Y. Aug. 13, 2014) (declining supplemental jurisdiction over NYSHRL and NYCHRL claims after dismissing federal claim). Accordingly, the Court dismisses Plaintiff's NYSHRL and NYCHRL claims without prejudice to their potential refiling in state court.

4. The Court Denies Plaintiff Leave to Amend

"Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that a court 'should freely give leave [to amend] when justice so requires.'" *Gorman* v. *Covidien Sales, LLC*, No. 13 Civ. 6486 (KPF), 2014 WL 7404071, at *2 (S.D.N.Y. Dec. 31, 2014) (quoting Fed. R. Civ. P. 15(a)(2)). Consistent with this liberal amendment policy, "'[t]he rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith.'" *Id.* (alteration in *Gorman*) (quoting *Block* v. *First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993)). That being said, "it remains 'proper to deny leave to replead where ... amendment would be futile.'" *Id.* (quoting *Hunt* v. *All. N. Am. Gov't Income Tr., Inc.*, 159 F.3d 723, 728 (2d Cir. 1998)).[15]

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15 Similarly, the Court recognizes that while a *pro se* complaint "should not be dismissed without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated," *Shomo* v. *City of New York*, 579 F.3d 176, 183 (2d Cir. 2009) (alterations and citation omitted),

In her opposition brief, Plaintiff requests that the Court grant her leave to amend to address any deficiencies identified by the Court in its consideration of Defendant's motion. (Pl. Opp. 5). Defendant opposes such a request. (Def. Reply 14-15). Plaintiff has now thrice amended her complaint, most recently with the benefit of both a pre-motion letter from Defendant and a conference with the Court. (*See* Dkt. #22 (pre-motion letter), Dkt. #28 (transcript)). *Cf. Nat'l Credit Union Admin. Bd.* v. *U.S. Bank Nat'l Ass'n*, 898 F.3d 243, 257-58 (2d Cir. 2018) ("When a plaintiff was aware of the deficiencies in his complaint when he first amended, he clearly has no right to a second amendment even if the proposed second amended complaint in fact cures the defects of the first. Simply put, a busy district court need not allow itself to be imposed upon by the presentation of theories seriatim." (alteration, footnote, and internal quotation marks omitted)); *Binn* v. *Bernstein*, No. 19 Civ. 6122 (GHW) (SLC), 2020 WL 4550312, at *34 (S.D.N.Y. July 13, 2020) ("To grant Plaintiffs leave to amend would be allowing them a 'third bite at the apple,' which courts in this district routinely deny." (collecting cases)), *report and recommendation adopted*, No. 19 Civ. 6122 (GHW) (SLC), 2020 WL 4547167 (S.D.N.Y. Aug. 6, 2020). Plaintiff has failed to cure the defects of her prior pleadings. As such, Plaintiff's request to file a fourth amended complaint is DENIED.

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leave to replead need not be granted where — as here — it would be "futile," *Cuoco* v. *Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

CONCLUSION

For the reasons set forth above, Plaintiff's ADEA claims are dismissed with prejudice. Plaintiff's remaining NYSHRL and NYCHRL are dismissed without prejudice. The Clerk of Court is directed to terminate all pending motions, adjourn all remaining dates, and close this case. The Clerk of Court is further directed to mail a copy of this Opinion to Plaintiff.

SO ORDERED.

Dated: March 15, 2021
New York, New York

Katherine Polk Failla

KATHERINE POLK FAILLA
United States District Judge

21-0891-cv

United States Court of Appeals

for the

Second Circuit

JOANNE J. ANTROBUS,

Plaintiff-Appellant,

– v. –

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant-Appellee,

DAVID CHEUNG, CLAUDIA CANOSA, MARIANNE I. MARCIAS, ANGELA TAYLOR, JASMIN WU,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

PRELIMINARY STATEMENT

Plaintiff-Appellant Joanne Antrobus ("Antrobus") worked as a paralegal for Defendant-Appellee New York City Health and Hospitals Corporation ("HHC") from 2007 to 2019. Beginning in or about 2013, when Antrobus was approximately 58 years old, HHC began refusing to promote Antrobus in favor of younger, less-qualified colleagues. HHC denied Antrobus promotions in 2013, 2015 and 2016 based on ageist stereotypes that she did not have the necessary computer skills or that she was physically incapable of regular travel to a nearby office. Moreover, HHC denied her professional development opportunities, such as meaningful work assignments and training. Towards the end of Antrobus's employment, HHC gave her little to no work and began to badger her about retirement, even though Antrobus had no immediate plans to do so. Understanding that she had no future at HHC, that the organization wanted her out, and feeling physically and emotionally ill from the treatment, Antrobus was forced to retire prematurely. HHC's actions violated federal and local age discrimination laws.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 because Antrobus brought a colorable claim arising under federal law. Specifically, Antrobus alleged age discrimination and retaliation

in violation of the Age Discrimination in Employment Act ("ADEA") 29 U.S.C.A. § 621 et seq.[1]

On March 15, 2021, the district court (Failla, J.) granted HHC's motion to dismiss Antrobus's ADEA claims and declined to exercise supplemental jurisdiction over Antrobus's remaining local law claims. Antrobus v. New York City Health & Hosps. Corp., No. 19 Civ. 7449 (KPF), 2021 WL 964438 (S.D.N.Y. Mar. 15, 2021). The district court found that Antrobus's ADEA discrimination and retaliation claims that accrued before April 25, 2018, were time barred. Id. at *9. Additionally, the district court held that those portions of Antrobus's ADEA claims it deemed timely failed to plausibly allege discrimination, retaliation, hostile work environment or constructive discharge. Id. at *10-16.

On April 6, 2021, Antrobus filed a timely Notice of Appeal. A-260.[2] This Court, therefore, has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because this is an appeal of a final decision and judgment of the district court. By Order dated October 7, 2022, this Court appointed Valdi Licul as pro bono counsel.

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[1] Antrobus further alleged that HHC's unlawful conduct violated the New York State Human Rights Law ("NYSHRL"), New York Executive Law §§ 290 et seq.; and the New York City Human Rights Law ("NYCHRL"), New York Administrative Code §§ 8-101 et seq.

[2] "A_" refers to pages of the Appendix.

ISSUES PRESENTED

(1) Whether the district court erred in concluding that Antrobus's ADEA claims based on acts that occurred before April 25, 2018, were time-barred even though Antrobus filed an EEOC charge in 2015 but never received a right-to-sue letter or other written response.

(2) Whether the district court erred in concluding that Antrobus's allegations about her reduced workload, worse assignments, denial of training and retirement inquiries pertained only to her ADEA retaliation claims and failed to state an ADEA discrimination claim.

(3) Whether the district court erred in concluding that Antrobus failed to state an ADEA constructive discharge claim.

STATEMENT OF THE CASE

I. BACKGROUND

Antrobus was born in 1953. A-69. In 2001, she joined the New York City Law Department as a paralegal aid assigned to work on matters for HHC. A-154. In 2007, Antrobus moved in-house to the HHC Law Department. Id.

In 2011, Antrobus, who had been a part-time employee, applied for a full-time position with HHC. Id. Antrobus "had received good performance reviews" and was fully qualified for the position. Id. However, her then supervisor did not support Antrobus's application. Rather, the supervisor "made it clear that she preferred to

hire a younger person in the full-time role" and "advocated for a younger" candidate. Id. Antrobus was nevertheless able to get the position "by appealing directly" to her supervisor's boss. Id. Thereafter, the supervisor "continued to undermine [Antrobus's] professional career by withdrawing all support and actively denying [Antrobus] promotions and professional development opportunities." Id.

II. THE 2013 AND 2015 PROMOTIONS

In or about August 2013, Antrobus applied for a paralegal position in HHC's Settlement Division, which "would have meant a promotion and a raise." Id. Although Antrobus "had all of the material skills and experience for the position," id., HHC awarded the position to a "younger person . . . who was considerably less qualified." Id. Antrobus was told that HHC "needed someone who could use" Microsoft Excel ("Excel"). Id. In fact, Antrobus was "moderately familiar" with the program and the skills necessary for the position "were not particularly complex." Id. Moreover, while HHC "provided training in computer skills" to other employees, it did not do so for Antrobus. Id. Antrobus believed that the Excel "reference . . . was really a code word for preferring a younger person." Id.

In or about September 2015, Antrobus applied for another open position as a "paralegal and claims specialist." Id. Once again, Antrobus had "all of the material skills and experience required for the position." Id. And once again, HHC awarded the job to a "younger person who had less experience." Id. Antrobus was told that

HHC was looking for someone with "computer savvy." Id. In fact, Antrobus had "used computers for years" and was "quite capable on a computer, especially for those tasks customarily required of a paralegal." Id. Yet again, Antrobus "was open to being trained" but was "never given the option." Id. Antrobus believed that HHC's "computer savvy" explanation "was a subliminal message that hiring managers had a preference for a younger person." Id.

III. THE FIRST EEOC COMPLAINT

In 2015, Antrobus filed a complaint with the EEOC (the "First EEOC Complaint"), alleging that she "had been denied professional advancement based solely on [her] age." Id. After "some time," Antrobus contacted the EEOC to learn the "status of [her] complaint." Id. She was told that "the person who handled [her] case had left" and "closed" the case. Id. Thereafter, Antrobus believed she suffered retaliation. She received "fewer assignments and was denied access to information that [she] needed to do [her] job." Id.

IV. THE 2016 PROMOTION

In or about September 2016, Antrobus became aware of an open position with the "intake unit of HHC legal" that she wanted to pursue. A-155. However, she "was not given the opportunity to apply." Id. HHC awarded the position to a "less experience person." Id. When Antrobus asked a manager why she was not given the opportunity to apply, she was told that the manager "wanted someone who could

go over to 125 Worth Street on a regular basis to pick up legal papers." Id. The manager "had no reason to believe" that Antrobus could not perform this task. Id. She does "not suffer from any disability or frailties that would have prevented [her] from making regular trips." Id. Once "[a]gain, the implication was that [Antrobus] was too old and they wanted a younger person." Id. Indeed, the entire "series of incidents taken together demonstrate[ed] that [Antrobus] was discriminated against because of [her] age." Id.

V. INTERNAL COMPLAINTS

Antrobus also complained internally about discrimination. On March 29, 2016, she filed a complaint with HHC's internal equal employment opportunity office. A-154. When she did not get a response and followed up, she was told that HHC's "investigation" deemed her concerns "unfounded." Id. Moreover, "[o]n a number of occasions," Antrobus told "senior management" that she "had been passed over for advancement because of [her] age" and that, "[a]fter raising this issue, [her] managers began to treat [her] differently by isolating [her], including by either taking away or depriving [her] of meaningful work assignments." A-155.

VI. THE SECOND EEOC COMPLAINT

On February 19, 2019, Antrobus filed another EEOC charge (the "Second EEOC Complaint"), alleging "discrimination and retaliation by HHC through their

ongoing actions because of my age." Id.; see A-69. On May 23, 2019, the EEOC issued Antrobus a "right to sue letter." A-155; see A-70.

VII. THE TERMINATION OF ANTROBUS'S EMPLOYMENT

Thereafter, HHC tried to "force" Antrobus to "resign." She began to receive "unsolicited inquiries" from HHC's Human Resources department ("HR") "offering to assist Antrobus with the process of retirement." A-155. Moreover, Antrobus's manager "repeatedly asked [her] about [her] timing regarding retirement, even though [Antrobus] did not express any imminent desire to retire." Id. The culmination of these events "made [Antrobus] physically and emotionally ill" such that, on May 31, 2019, Antrobus "did finally hand in [her] resignation." Id. Antrobus was "forced" to retire prematurely. Id.

VIII. PROCEDURAL HISTORY

On August 8, 2019, Antrobus filed an action in the Southern District of New York alleging discrimination and retaliation in violation the ADEA and the NYSHRL, A-11-21, which she subsequently amended several times to also include, inter alia, a claim under the NYCHRL. A-22-30 (Amended Complaint); A-60-71 (Second Amended Complaint); A-154-55 (Third Amended Complaint).

On March 15, 2021, the district court granted HHC's motion to dismiss. A-218-59. First, in relevant part, the district court deemed Antrobus's ADEA discrimination claims that accrued before April 25, 2018 – 300 days before Antrobus

filed her Second EEOC Complaint – time barred, including that HHC denied Antrobus promotions in 2015 and 2016. Second, the district court analyzed Antrobus's claims concerning "changes to her caseload and assignments, and inquiries made about her retirement" only in relation to Antrobus's "retaliation and hostile work environment claims." Antrobus, 2021 WL 964438, at *10. It refused to consider these as acts of discrimination because, according to the court, Antrobus's pleadings did not "allege that [these] assignment changes and retirement inquiries were made with any discriminatory intent, but rather alleges that they were made in retaliation for Plaintiff's complaints to the EEOC, the EEO, and senior management." Id. Moreover, the district court found that, even if Antrobus did contend these acts were discriminatory, her "reduction in meaningful assignments" and "unsolicited inquiries about [her] retirement" were not adverse employment actions. Id. at *10 n. 12. Third, the district court dismissed Antrobus's constructive discharge claim because, in the court's view, Antrobus failed to allege sufficient facts to show that she was forced to resign. Id. at *15-16. Finally, the district court declined to exercise jurisdiction over Antrobus's parallel claims that HHC violated the NYSHRL and NYCHRL. Id. at *16.

SUMMARY OF ARGUMENT

The district court's dismissal of Antrobus's action was erroneous. First, because Antrobus filed her First EEOC Complaint in 2015 alleging that she was

denied professional advancement because of her age, any adverse actions included in the charge (denial of 2015 promotion and other professional advancement opportunities such as meaningful work and necessary training) or reasonably related to the charge (including the denial of 2016 promotion) were timely. That Antrobus did not receive a right-to-sue letter does not matter. The ADEA and its accompanying regulations do not require an aggrieved employee to receive EEOC authorization to file suit. She need only wait 60 days after the EEOC filing to bring an action in court, which Antrobus did.

Second, Antrobus sufficiently alleged that the other, non-promotion related adverse actions she experienced, such as denial of important work assignments and training, were materially adverse employment actions taken because of her age. Antrobus sufficiently alleged that these acts deprived her of the necessary professional development opportunities to advance at HHC. For instance, Antrobus was not provided with the requisite assignments or the training to prove that she could advance within the organization. Moreover, Antrobus sufficiently alleged that these actions were taken against her because of her age, including that HHC (1) consistently passed her over for less qualified younger colleagues; (2) made ageist assumptions about Antrobus's abilities, such as that she did not have or could not learn necessary computer skills, and that she did not have the physical capability to travel to a nearby office; and (3) persistently asked Antrobus about retirement even

though Antrobus did not have immediate plans to do so. And, while Antrobus also attributed these adverse acts to retaliation, her submissions to the court made clear that these actions were also discriminatory.

Finally, Antrobus sufficiently alleged that she was constructively discharged. The adverse actions described above, including that for a significant period of time before her retirement she was given little to no work and badgered about retiring, would have convinced a reasonable person that she no longer had any prospect of career advancement, and her employer wanted her out.

ARGUMENT

I. THE MOTION TO DISMISS STANDARD

This Court reviews *de novo* a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Littlejohn v. City of New York, 795 F.3d 297, 306 (2d Cir. 2015).

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." 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. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)

(internal citations omitted). The standard is one of "flexible plausibility," "requiring a pleader to amplify her complaint with sufficient factual allegations to 'nudge [her] claims across the line from conceivable to plausible.'" Chepak v. Metro. Hosp., 555 Fed.Appx. 74, 76 (2d Cir. 2014) (quoting Twombly, 550 U.S. at 570).

When reviewing a motion to dismiss, a court must "assume [the] veracity" of the allegations set forth, draw all "reasonable inference[s]" in the plaintiff's favor, and use its "judicial experience and common sense" to conduct a "context-specific" analysis of the complaint. Ashcroft, 556 U.S. at 678-79. The plaintiff is not required to plead "specific evidence" explaining precisely how the defendant's conduct was unlawful, Arista Records, LLC v. Doe 3, 604 F3d 110, 119-21 (2d Cir. 2010), but only facts sufficient to give the defendant "fair notice of what the . . . claim is and the grounds upon which it rests." Twombly, 550 U.S. at 555 (internal citations omitted).

Further, courts must afford "special solicitude" to pro se litigants, Tracy v. Freshwater, 623 F.3d 90, 101 (2d Cir. 2010), and construe their "submissions to raise the strongest arguments they suggest." McLeod v. Jewish Guild for the Blind, 864 F.3d 154, 156 (2d Cir 2017) (quoting Bertin v. United States, 478 F.3d 489, 491 (2d Cir. 2007)).[3]

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[3] The district court "note[d]" that some courts in this Circuit have "declined to afford special solicitude to pro se plaintiffs whose submissions were prepared with [the] assistance" of the New York Legal Assistance Group ("NYLAG"). Antrobus,

II. THE STATUTE OF LIMITATIONS

The district court dismissed as time-barred "any claims that accrued before April 25, 2018 – 300 days before February 19, 2019" – the date Antrobus filed her Second EEOC Complaint. Antrobus, 2021 WL 964438, at *6. This was an error because Antrobus's federal claims were timely as of the beginning of 2015 – 300 days from the filing of her First EEOC Complaint.

"Before bringing an ADEA suit, plaintiffs must file a charge with the EEOC" within 300 days of the adverse employment action. Hodge v. New York College of Podiatric Medicine, 157 F.3d 164, 166 (2d Cir. 1998); 29 U.S.C. § 626(d).[4] However, unlike discrimination claims under Title VII, 42 U.S.C.A. § 2000e et seq., for example, "there is no provision in the ADEA that requires a claimant to receive [a right-to-sue] letter before commencing action under the ADEA." Francis v. Elmsford School Dist., 442 F.3d 123, 127 (2d Cir. 2006); see McPherson v. New York City Dept. of Educ., 457 F.3d 211, 215 (2d Cir. 2006) (same). In other words,

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2021 WL 964438, at * 6. It also acknowledged the such a rule would place NYLAG in a "catch-22" because, "by providing less than full representation," the organization could "harm litigants be eliminating the special care otherwise afforded." Id. (quoting Campa v. Entergy Nuclear Operations, Inc., No. 17 Civ. 792 (KMK), 2019 WL 4221560, at *8 (S.D.N.Y. Sept. 5, 2019)). Ultimately, the district court stated that it did "not need to resolve the conflict" because it would review Antrobus's submissions "with special solicitude." Id. at *6.

[4] The 300-day (rather than 180-day) limitations period applies in New York because it is a "deferral state" that has its "own age discrimination remedial agency." Hodge, 157 F.3d at 166.

the statute "does not condition the individual's right to sue upon the agency taking any action." Federal Exp. Corp. v. Holowecki, 552 U.S. 389, 404 (2008). Rather, she may sue beginning "60 days after a charge alleging unlawful discrimination has been filed with the" EEOC. 29 U.S.C. § 626(d). Her time to sue expires 90 days after the EEOC has "notif[ied]" the plaintiff that her charge has been "dismissed or the proceedings . . . are otherwise terminated." 29 U.S.C. § 626(e); see Hodge, 157 F.3d at 166 ("ADEA plaintiffs may file suit in court at any time from 60 days after filing the EEOC charge until 90 days after plaintiff receives notice from the EEOC that the EEOC proceedings are terminated.").

The type of notice that starts the plaintiff's 90-day clock is specifically prescribed by applicable regulations. The EEOC "will issue a Notice of Dismissal or Termination," which "shall include,"

> (1) A copy of the charge;
>
> (2) Notification that the charge has been dismissed or the Commission's proceedings have otherwise been terminated; and
>
> (3) Notification that the aggrieved person's right to file a civil action against the respondent on the subject charge under the ADEA will expire 90 days after receipt of such notice.

29 C.F.R. §§ 1626.17(a), (c).

Once again, the ADEA "differ[s] in some respects from" its sister statutes Title VII, the Americans with Disabilities Act, 42 U.S.C. § 12101, *et. seq.* ("ADA"), and the Genetic Information Nondiscrimination Act, 42 U.S.C. §2000ff, *et. seq.*

("GINA"). Holowecki, 552 U.S. at 393. As explained above, in ADEA cases the EEOC is required to issue a "Notice of Dismissal or Termination" notifying the employee that the processing of her charge has terminated and that her 90-day clock has started. In Title VII, ADA and GINA cases, the EEOC issues a "notice of right to sue," 29 C.F.R. § 1601.28, which is similar to the "Notice of Dismissal or Termination," except that the "notice of right to sue" must also include "[a]uthorization to the aggrieved person to bring a civil action under Title VII, the ADA, or GINA pursuant to 706(f)(1) of Title VII, section 107 of the ADA, or section 207 of GINA within 90 days from receipt of such authorization." 29 C.F.R. § 1601.28(e)(1). No such "authorization" is required under the ADEA.[5]

Here, there is no dispute that Antrobus filed her First EEOC Complaint sometime in 2015 alleging that she "had been denied professional advancement based solely on [her] age." A-154.[6] Thus, any adverse acts that occurred within 300

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[5] Where the employee alleges discrimination based on age and some other protected characteristic, the EEOC is directed to issue both a "Notice of Dismissal or Termination" and a "Notice of right to Sue." 29 C.F.R. § 1626.17(a)(2).

[6] The district court correctly observed that the parties did not provide the court with a copy of the First EEOC Complaint. Antrobus, 2021 WL 9644338, at *2 n. 2. However, an employee need not produce a copy of her EEOC charge as a prerequisite to suit; she can establish exhaustion through other means, such as her own testimony. At the pleading stage, she need only make the requisite allegation, which the court must accept as true. See Holowecki v. Federal Exp. Corp., 440 F.3d 558, 565 (2d Cir. 2006) ("[w]hen deciding whether plaintiffs satisfy the ADEA's time limit requirements, we accept all of the plaintiff's factual allegations as true"); Nash v. Bd. of Educ. of the City of New York, No. 99 Civ. 9611 (NRB), 2016 WL

days of that filing, including that Antrobus was denied a promotion to "paralegal and claims specialist," A-154, and that she was denied training, are timely. Moreover, any adverse acts that occurred after the filing, such as that HHC denied her a promotion in September 2016 under similar circumstances, A-155, would also be timely. See Jimenez v. City of New York, 605 F.Supp.2d 485, 499–500 (S.D.N.Y. Mar. 19, 2009) (lost promotions not mentioned in EEOC charge deemed exhausted because they "were carried out in precisely the same manner as the claims alleged in the EEOC charge") (quoting Butts v. N.Y.C. Dep't of Hous. Pres. And Dev., 990 F.2w 1397, 1401-02 (2d Cir. 1993)). So long as Antrobus waited 60 days after filing the First EEOC Complaint to bring suit (which she did), her claims were both timely and exhausted, and should have been permitted to proceed.[7]

5867449, at *84 (S.D.N.Y. Sept. 22, 2016) ("a court will not usually dismiss a claim for failure to timely file an EEOC charge unless such failure is apparent from the face of the complaint") (quoting Kane v. St. Raymond's Roman Catholic Church, No. 14 Civ. 7028 (AJN), 2015 WL 4270757, at *5 (S.D.N.Y. July 13, 2015)).

[7] The precise date Antrobus filed her First EEOC Complaint is unclear other than it happened in 2015. A-154 ("In 2015 I lodged a discrimination claim with the EEOC alleging that I had been denied advancement based solely on my age."). Sequentially, however, the First EEOC Complaint appears to have been filed after "[o]n or about November 2015," id., when Antrobus "was passed over for the position" of claims specialist, id., and the end of 2015. Accordingly, the 2015 denial of promotion claim is timely under federal law. And while Antrobus's claim that she was denied a promotion in August 2013 is time-barred under federal law, it is nonetheless timely under state and city laws, which have a three-year limitations period, N.Y.C. Admin. Code § 8–502(d), N.Y. C.P.L.R. 214 (2), that is tolled upon the filing of an EEOC charge. Anderson v. Yarp Restaurant, Inc., No. 94 Civ. 7543, 1996 WL 271891, at *2 (S.D.N.Y. May 21, 1996).

Here, the district court ignored entirely Antrobus's First EEOC Complaint, considering only the timing of Antrobus's Second EEOC Complaint. Antrobus, 2021 WL 964438, at *6-9. Perhaps the district court disregarded the initial charge because Antrobus (1) received a "right to sue letter"[8] only for the later charge and therefore, in the court's view, had not exhausted her administrative remedies with respect to the prior charge, id. at *6, or (2) did not file suit within 90 days of being notified "that the case handler assigned to her complaint had closed her case before leaving the EEOC." Id. at *2. Regardless, neither rationale warranted dismissal.

As explained above, Antrobus was not required to receive a "right to sue notice" to pursue her age claims. And even if she was, oral notice from the EEOC would not have sufficed since it was not accompanied by "[a] copy of the charge" and did not provide "[n]otification" that Antrobus's "right to file a civil action . . . will expire 90 days after receipt of such notice." 29 C.R.F. § 1626.17(c)(1), (3); see Francis, 442 F.3d at 127-28 ("improper notice does not "trigger[] the 90-day period").[9]

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[8] Understandably, courts "frequently" refer to written EEOC notices terminating a charge as "right-to-sue letter" or "notice of right to sue," without distinguishing between ADEA and, for instance, Title VII claims. Francis, 442 F.3d at 126.

[9] In Francis, the plaintiff received written notice from the New York State Division of Human Rights ("SDHR") that it was terminating its investigation of the employee's age and race claims because "there is NO PROBABLE CAUSE to believe that [the employer] engaged in or is engaging in the unlawful discriminatory

To be sure, the ADEA does not define how the EEOC must "notify the person aggrieved" that her charge has been "dismissed" or "otherwise terminated by the Commission." 29 U.S.C. § 626(e) (emphasis added). But that does not matter. "The [EEOC] has statutory authority to issue regulations; and when an agency invokes its authority to issue regulations, which then interpret ambiguous statutory terms, the court defers to its reasonable interpretations." Holowecki, 552 U.S. at 395. Here, the EEOC pursuant to its statutory authority reasonably defined the proper method of notice. 29 C.F.R. §§ 1626.17(a), (c).

Moreover, there can be little doubt that the EEOC's prescribed method of notice – written documentation that the charge has been dismissed or terminated with notice that the employee has 90 days to file suit in court – is both consistent with the statute and reasonable. It provides certainty as to the status of a charge while also ensuring that aggrieved employees, most of whom are unrepresented, see Holowecki, 552 U.S. at 402 ("it appears pro se filing may be the rule, not the exception"), do not unwittingly forfeit their rights. Id. at 407 (recognizing that the EEOC "will take all efforts to ensure that affected parties will receive the full benefits and protections of the law"). There may, of course, be other reasonable

practice complained of." 442 F.3d at 125. This court held that such written notice was insufficient to trigger the 90-day limitations period because, inter alia, the written notice "did not state that Francis could seek EEOC review of her claim of age discrimination." Id. at 127. Here, the information Antrobus received from the EEOC failed to put her on notice that any additional review was available.

methods of providing notice. However, "[w]here ambiguities in statutory analysis and application are presented, the agency may choose among reasonable alternatives." Id. at 403.

Finally, that the EEOC "closed [Antrobus's] case," A-154, but did not provide her with proper notice to trigger the start of the 90-day limitations period cannot bar her from suing. To rule otherwise "would be to hold individuals accountable for the failings of the agency." Holowecki, 440 F.3d at 567.

For these reasons, the district erred in dismissing "any claims that accrued before April 25, 2018 – 300 days before February 19, 2019" – the date Antrobus filed her Second EEOC Complaint. Antrobus, 2021 WL 964438, at *6. Any adverse actions that occurred after the beginning of 2015 should have been deemed timely.

III. DISPARATE TREATMENT

The district court analyzed Antrobus's allegations concerning "changes to her caseload and assignments, and inquiries made about her retirement" only in relation to Antrobus's "retaliation and hostile work environment claims." Id. at *10. It refused to consider these as acts of discrimination because, according to the court, Antrobus's pleadings did not "allege that [these] assignment changes and retirement inquiries were made with any discriminatory intent, but rather alleges that they were made in retaliation for Plaintiff's complaints to the EEOC, the EEO, and senior management." Id. Further, in a footnote, the district court found that, even if

Antrobus did contend these acts were discriminatory, her "reduction in meaningful assignments" and "unsolicited inquiries about [her] retirement" were not adverse employment actions. Id. at *10 n. 12. This, too, was an error.

The ADEA makes it unlawful for an employer to take an adverse action against an employee because of her age. Gross v. FBL Financial Svcs., Inc., 557 U.S. 167 (2009). Age claims are often analyzed under the "familiar burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973)."[10] Antrobus, 2021 WL 964438, at *5. At the pleading stage, however, a plaintiff is "not required to plead a prima facie case of discrimination as contemplated by the McDonnell Douglas framework." Vega, 801 F.3d at 84. Nor is she even required to "give plausible support to the ultimate question of whether

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[10] Absent direct evidence of discrimination,

> a plaintiff must first establish a prima facie case of discrimination by showing that: (1) she is a member of a protected class; (2) she is qualified for her position; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination. Once a plaintiff has established a prima facie case, a presumption arises that more likely than not the adverse conduct was based on the consideration of impermissible factors. The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the disparate treatment. If the employer articulates such a reason for its actions, the burden shifts back to the plaintiff to prove that the employer's reason was in fact pretext for discrimination.

Vega v. Hempstead Union Free School Dist., 801 F.3d 72, 83 (2d Cir. 2015) (internal quotations and citations omitted).

the adverse employment action was attributable discrimination." Littlejohn, 795 F.3d at 311. She "need only give plausible support to a minimal inference of discriminatory motivation." Id. Antrobus met this "minimal burden." Id. at 85.

First, Antrobus sufficiently alleged that she suffered adverse employment actions in addition to the denial of promotions.[11] "A plaintiff sustains an adverse employment action if he or she endures a materially adverse change in the terms and conditions of employment." Vega, 801 F.3d at 85 (quoting Galabaya v. N.Y.C. Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000)). "Examples of materially adverse changes include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to the particular situation." Id. (quoting Terry v. Aschcroft, 336 F.3d 128, 138 (2d Cir. 2000)). By contrast, an action is not adverse where it amounts to "a mere inconvenience or an alteration of job responsibilities." Id. at 85.

Here, Antrobus alleged that after she became a full-time employee her supervisor "continued to undermine [her] professional career by withdrawing all support and actively denying [her] promotional and professional development

[11] It is uncontested that Antrobus suffered an adverse employment action each time she was denied a promotion. As explained above, the district court dismissed Antrobus's promotion claims because it deemed them time barred. Antrobus, 2021 WL 964438, at *10.

opportunities." A-154. For example, HHC denied Antrobus "computer skills training" that it "regularly provided" others. Id.; see id. ("I was also open to being trained in any unfamiliar skills I did not have, but I was never given the option."). Managers gave Antrobus "fewer assignments," id., and treated her differently by "either taking away or depriving [her] of meaningful work assignments." A-155. They also "denied [her] access to information that [she] needed to do [her] job," A-154, such that she was unable "to get her job done." Id. Viewing these allegations in the light most favorable to Antrobus, Ashcroft, 556 U.S. at 678-79, and with the "special solicitude" afforded pro se litigants, Antrobus, 2021 WL 964438, at *6, it was certainly plausible that these actions were "material adverse change[s] in the terms and conditions of [Antrobus's] employment." Vega, 801 F.3d at 85.

The district court nonetheless reasoned that Antrobus's "reduction in meaningful assignments . . . is not an adverse employment action, as Plaintiff has not alleged that this 'change in duties . . . result[ed] in a change in responsibilities so significant as to constitute a setback to [her] career.'" Antrobus, 2021 WL 964438, at *10 n. 12 (quoting Bowen-Hooks v. City of New York, 13 F. Supp. 3d 179, 213 (E.D.N.Y. 2014)). But that is exactly what Antrobus alleged – that HHC's failure to provide her with training and meaningful work assignments deprived her of the necessary "professional development opportunities" to advance her career. A-154. Indeed, as Antrobus tells it, managers relied on Antrobus's perceived lack of

computer skills to deny her promotions. A-154; see Nakis v. Potter, No. 01 Civ. 10047 (HBP), 2004 WL 2903718, at *20 (S.D.N.Y. Dec. 15, 2004) ("deprivation of training . . . and assignment to menial 'make work' tasks" were adverse employment actions because they affected "plaintiff's opportunities for professional growth and career advancement"); see also Kassner v. 2d Avenue Delicatessen Inc., 496 F.3d 229, 240 (2d Cir. 2007) (plaintiff's "claims of age discrimination based on certain changes in her work station and work shift assignments, although limited, are sufficient to withstand a motion to dismiss").[12]

Second, Antrobus plausibly alleged that these adverse actions were taken because of her age. According to Antrobus, she was repeatedly denied promotions in favor of younger colleagues. In 2013 and 2015, HHC awarded the promotions to "younger" employees who were "considerably less qualifi[ed]" or "had less experience." A-154. In 2016, HHC awarded the position to a "less experienced"

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[12] Bowen-Hooks and Rodriguez v. Coca Cola Refreshments USA, Inc., No. 12 Civ. 234 (BMC), WL 5230037, at *3 (E.D.N.Y. Sept. 16, 2013), both cited by the district court, were dismissed on summary judgment – not at the pleading stage – where the plaintiff must do more than merely allege facts that make her claim plausible. She must present admissible "evidence on which the jury could reasonably find for plaintiff." Bowen-Hooks, 13 F. Supp. 3d at 201 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). By contrast, in Dietrich v. City of New York, No. 18 Civ. 7544 (CM), 2019 WL 2236585, at *7 (S.D.N.Y. May 16, 2019), also cited by the district court, the court denied a motion to dismiss because the plaintiff alleged, as Antrobus did here, that he had been assigned "diminished responsibilities" that had "a negative impact on [her] promotion opportunities."

employee because "they wanted a younger person." A-155. Indeed, in 2011, Antrobus was almost denied a full-time position despite her qualifications and "good performance reviews" because her manager made "statements" that "made it clear that she [the manager] preferred to hire a younger person in the full-time role." A-154.

Antrobus was also denied advancement based on common stereotypes of older workers. For instance, HHC suggested that Antrobus lacked "computer savvy" and could not "use" Excel. Id.; see Giugliano v. FS2 Cap. Partners, LLC, No. 14 Civ. 7240, 2015 WL 5124796, at *3 (E.D.N.Y. Sept. 1, 2015) (denying motion to dismiss age discrimination claim where company manager denigrated plaintiff's ability to operate technological devices). In fact, Antrobus "used computers for years and consider[ed] [her]self quite capable on a computer especially for those tasks customarily required of a paralegal." A-154. She was also "moderately familiar with EXCEL and the EXCEL tasks required for the position were not particularly complex." Id. Moreover, Antrobus was "open to being trained in any unfamiliar computer skills [she] did not have, but . . . was never given that option." Id. In other words, HHC perceived Antrobus as not only lacking technology skills, but also as being unable to learn them.

In addition, Antrobus's manager explained that Antrobus was not given an opportunity to apply for the 2016 position because "he wanted someone who could

go over to 125 Worth Street on a regular basis to pick up legal papers." A-155. But there "was no reason to believe that [Antrobus] could not make the trip," as she does not "suffer from any disability or frailties that would have prevented her" from performing this task. Id. "Again, the implication was that [Antrobus] was too old and they wanted a younger person." Id.; see Teachey v. Equinox Holdings Inc., No. 18 Civ. 10740 (LJL), 2022 WL 1125279, at *11 (S.D.N.Y. Apr. 14, 2022) (finding comments that the plaintiff was "too old" for his job probative of discriminatory intent).

Finally, Antrobus "received unsolicited inquiries from HR" and "inquiries" from her manager about retirement "even though [she] did not express any imminent desire to retire." A-155; see Hausdorf v. N.Y.C. Dep't of Educ., No. 17 Civ. 2115, 2018 WL 1871945, at *8 (S.D.N.Y. Jan. 25, 2018) ("comments from plaintiff's employer about plaintiff's retirement and other actions that were designed to force plaintiff into retirement"); Nakis v. Potter, 422 F.Supp.2d 398, 404 (S.D.N.Y. Mar. 31, 2006) ("you have the age. Why don't you get out," and asking why employee would not retire). These allegations are more than sufficient to make it plausible that Antrobus experienced adverse employment actions because of her age.

These statements and assumptions about Antrobus's technical skills, ability to learn new technology, mobility and retirement cannot be disregarded as mere "stray remarks." Antrobus, 2021 WL 964438, at *12. Congress enacted the ADEA to

battle "inaccurate and stigmatizing stereotypes" about older workers' "productivity and competence." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). Naturally, then, comments by managers reinforcing negative stereotypes can be critical in ferreting out discrimination. "The relevance of discrimination-related remarks does not depend on their offensiveness, but rather on their tendency to show that the decision-maker was motivated by assumptions or attitudes relating to the protected class." Tomassi v. Insignia Fin. Grp., Inc.. 478 F.3d 111, 116 (2d Cir. 2007) abrogated on other grounds, Gross 557 U.S. at 167. "The more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory behavior, the more probative the remark will be." Id. at 115. Importantly, a plaintiff "need not show that the [decision-maker] declared that the [adverse action] was tied to the [employee's age]. . . . Statements showing an employer's . . . bias" are sufficient. Tolbert v. Smith, 790 F.3d 427, 438 (2d Cir. 2015). Here, managers' comments, combined with their actions in treating Antrobus less favorably than her younger colleagues and seeking her retirement, established the requisite plausible discriminatory intent.

In the district court's view, however, Antrobus did "not allege that [her] assignment changes and retirement inquiries were made with any discriminatory intent, but rather . . . that they were made in retaliation for [her] complaints to the EEOC, the EEO and senior management." Antrobus, 2021 WL 964438, at *10. But

this is too narrow a reading of the pleadings. While Antrobus certainly alleged that the denial of assignments occurred after she complained of discrimination and in retaliation for those complaints, she hardly abandoned her allegation that the denial of "professional development opportunities" was also due to her age. A-154. After setting forth in some detail how she was denied promotions, training opportunities and work assignments, she expressly states that "[t]his series of incidents taken together demonstrate that I was discriminated against because of my age," A-155 (emphasis added), and that HHC's "discriminatory predisposition repeatedly and improperly disqualified me from professional advancement based solely in my age." Id.

Moreover, any shred of doubt about the scope of Antrobus's age discrimination claim is put to rest in her opposition to the motion to dismiss. A-192-201. Antrobus makes clear that the adverse actions alleged in her pleadings, including "repeatedly being excluded from meaningful work assignments," A-193, were "motivated by a poorly disguised preference for younger workers." Id. She further argues that "she suffered disparate treatment when she was intentionally given less meaningful assignments than her younger colleagues." A-194.[13]

[13] It is simply not plausible to read the pleadings as alleging that HHC acted with "discriminatory intent" when it denied Antrobus promotions, Antrobus, 2021 WL 964438, at *10, but not when it denied her other "professional development opportunities," A-154, such as meaningful assignments and training.

In short, Antrobus plausibly alleged that the denial of meaningful assignments and training were adverse actions based on her age.

IV. CONSTRUCTIVE DISCHARGE

The district court also erroneously dismissed Antrobus's constructive discharge claim. Antrobus, 2021 WL 964438, at **15-16.

"Constructive discharge of an employee occurs when an employer, rather than directly discharging the individual, intentionally creates an intolerable work atmosphere that forces the employee to quit involuntarily." Chertkova v. Conn. Gen. Life. Ins. Co., 92 F.3d 81, 89 (2d Cir. 1996). Importantly, "[b]ecause a reasonable person encounters life's circumstances cumulatively and not individually," a court may not consider each of the factors that caused the employee's departure separately. Id. at 90. Rather, it must analyze the "cumulative" effect of the adverse actions. Id.; see Interdonato v. Bae Systems, Inc., 16 Fed.Appx. 25, 28 (2d Cir. 2001) (court must consider "the totality of [the employer's] actions and inactions"). Accordingly, a constructive discharge can "occur via a combination of a reduction in workload, a change in responsibilities, the absence of advancement opportunities, and being subjected to embarrassing or humiliating treatment." Ibrahim v. Fid. Brokerage Servs., LLC, No. 19 Civ. 3821 (VEC), 2020 WL 107104, at *8 (S.D.N.Y. Jan. 9, 2020) (citing Halbrook v. Reichhold Chemicals, Inc., 735 F. Supp. 121, 126 (S.D.N.Y. Apr. 16, 1990)). At the pleading stage, the employee is only required to

allege sufficient facts to make it plausible that "a reasonable person in the employee's shoes would have felt compelled to resign." Green v. Town of East Haven, 952 F.3d 394, 407 (2d Cir. 2020) (quoting Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 161 (2d Cir. 1998)); see Halbrook, 735 F. Supp. at 125 ("Because the standard for constructive discharge requires a determination of how a reasonable person would behave in the employees shoes, the issue of whether a constructive discharge has occurred should generally be left to the trier of fact.") (internal quotations and citations omitted).

Here, Antrobus's experience bore all indicia of a constructive discharge. She was repeatedly denied promotions, meaningful assignments, training and information necessary to perform her job. A-154-55. Contrary to the district court's characterization, Antrobus did not merely make "vague allegations of dissatisfaction with assignments," Antrobus, 2021 WL 964438, at *15, she alleged that she was given "menial work" and for a year before her departure she was given "no work." A-64.[14] She also had to work under the humiliating ageist assumptions that she either did not have the requisite technology skills or could not learn them, A-155, and that she was not even capable of retrieving papers from another office. Id. These work conditions made her "physically and emotionally ill." A-155. And finally, she

[14] See A-15 ("I get maybe one piece of work per month/or none"); A-64 ("my supervisors . . . reduced my work load by only giving me maybe one [assignment] a month or sometimes 2 or 3 per month or none at all this pass 3 ½ years").

had to endure persistent retirement inquiries, over her objection, immediately before her constructive dismissal. Id. These allegations, in their "totality," Interdonato, 16 Fed.Appx. at 28, could certainly lead a reasonable employee to conclude that, because of her age, she no longer had any opportunity for advancement and her employer wanted her gone. As a result, she was compelled to retire.[15]

[15] Almost all the constructive discharge cases relied on by the district court were decided at the summary judgment stage or later. Miller v. Praxair, Inc., 408 Fed. App'x 408 (2d Cir. 2010) (summary judgment); Fitzgerald v. Henderson, 251 F.3d 345 (2d Cir. 2007) (summary judgment); Terry, 336 F.3d at 134 (summary judgment); Chertkova, 92 F.3d at 84 (summary judgment); Spence v. Maryland Cas. Co., 995 F.2d 1147 (2d Cir. 1993) (summary judgment); Stetson v. NYNex Serv. Co., 995 F.2d 355 (2d Cir. 1993) (summary judgment); Pena v. Brattleboro Retreat, 702 F.2d 322 (2d Cir. 1983) (judgment notwithstanding the verdict); Gerardi v. Huntington Union Free Sch. Dist., 124 F. Supp. 3d 206 (E.D.N.Y. Aug. 25, 2015) (summary judgment); Copantila v. Fiskardo Estiatorio, Inc., 788 F. Supp. 2d 253 (S.D.N.Y. May 27, 2011) (summary judgment). The two cases where the court dismissed constructive discharge claims on the pleadings are clearly distinguishable. Spires v. MetLife Grp., Inc., No. 18 Civ. 4464 (RA), 2019 WL 4464393 (S.D.N.Y. Sept. 18, 2019) ("denial of promotion by itself" in sufficient); Pfizenmayer v. Hicksville Pub. Schs., No. 15 Civ. 6987 (SJF)(SIL), 2017 WL 5468319, at *9 (E.D.N.Y. Jan. 24, 2017)) ("[t]he acts of which plaintiff complains occurred sporadically for only a short period of time, i.e, approximately five (5) weeks . . . and more than three (3) months elapsed between the last allegedly discriminatory or retaliatory act . . . and the date plaintiff retired").

CONCLUSION

For the forgoing reasons, Antrobus respectfully requests that this Court vacate the judgement of the district court and remand for further proceedings.

Respectfully Submitted,

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