No. 25-___

IN THE

Supreme Court of the United States

AMY RAE,

Petitioner,

v.

WOBURN PUBLIC SCHOOLS, CITY OF WOBURN, MATTHEW CROWLEY, AND CARL NELSON,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In assessing the timeliness of employment claims, the U.S. Supreme Court case of *National Railroad Passenger Corp. (Amtrak) v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)(hereinafter "*Morgan*") distinguished between (i) "discrete acts" that are each independently actionable on their own and (ii) acts that are not independently actionable but that collectively comprise a single "unlawful employment practice." Petitioner Amy Rae (hereinafter "Rae") alleges a pattern of conduct that includes independently actionable "discrete acts" (e.g., denial of promotion) and many acts that in isolation are not independently actionable, including incidents of yelling and mocking. Was it an error of law for the Appeals Court to say that her retaliatory harassment claim was no more than an "attempt to amalgamate a series of discrete acts" into a single claim?

Under *Morgan*, independently actionable discrete acts can be part of the basis for a hostile work environment claim as long as they are part of the same pattern as the acts that are not independently actionable. Rae's retaliatory harassment claim is based on a pattern of conduct that includes both independently actionable acts (such as denial of promotion) and acts that are not independently actionable (such as insulting speech). Was it an error of law for the Appeals Court to say that Rae's harassment claims were only an amalgamation of discrete acts "disguised" as a "single retaliatory harassment claim"?

Morgan held that a hostile work environment claim will not be time-barred if (i) all acts that constitute the claim are part of the same unlawful employment practice and (ii) at least one of the acts falls within the statute of limitations period. *Morgan* explicitly rejected the view that, in addition to requirements (i) and (ii), the Rae must also show (iii) "it would have been unreasonable to expect the Rae to sue before the statute ran on such conduct." *Morgan*, 536 U.S. at 117-18. Here, all acts that constitute Rae's retaliatory harassment claim (i) are part of the same unlawful employment practice and (ii) at least one of the acts falls within the statute of limitations period. Was it an error of law for the Appeals Court to hold that Rae's claims were time-barred because she perceived herself to be subject to unlawful harassment before the start of the statute of limitations period?

Morgan held that each component act of a hostile work environment claim need not be "actionable on its own," and that all the component acts must be considered together when evaluating the claim. Was it an error of law for the Appeals Court to dismiss Rae's harassment claim on the ground that two of the component acts did not on their own constitute "objectively severe or pervasive harassment," while affirmatively refusing to include in its analysis any of the many other component acts occurring over a period of years?

Morgan requires courts to make an individualized assessment of whether separate incidents are sufficiently related to one another to constitute a single unlawful employment practice, considering the totality of the circumstances, and taking into account such factors as the time, location,

perpetrator(s) involved, and any intervening events separating different acts. No single factor is determinative. Was it an error of law for the Appeals Court to hold that "a claimant must show at a bare minimum a series of discriminatory acts that emanate from the same discriminatory animus" to establish they are part of the same hostile work environment? Was it an error of law for the Appeals Court to hold that Rae had not proved all the component acts were sufficiently related because some of the alleged acts were harassment for advocating for students and others were retaliation for complaining about the harassment?

RELATED PROCEEDINGS

Rae v. Woburn Public Schools, et al. No. 18-cv- 649 (D. Mass. 2023)

Rae v. Woburn Public Schools, et al. No. 19-10169 (1st Cir. 2024)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Amy Rae respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a-14a) is reported at. The district court's opinion and order (Pet. App. 15a-27a) is available at.

JURISDICTION

The court of appeals entered its judgment on August 22, 2024. Pet. App. 1a. The court denied a timely petition for rehearing on October 23, 2024. *Id.* 29a. The Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

The case of *National Railroad Passenger Corp. (Amtrak) v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)(hereinafter "*Morgan*") redefined the concept of a "continuing violation" for employment retaliation claims. *Morgan* divided actions of retaliation into claims based on discrete adverse acts and hostile work environment claims. Discrete acts, in and of themselves, must be brought within the proper statute of limitations to be actionable. In contrast, *Morgan* defined hostile work environment claims as a compilation of a series of separate acts that collectively constitute one "unlawful employment practice." This distinction led to the result that independently actionable acts of discrimination must be filed within the statute of limitations to be actionable, whereas hostile work environment claims can include acts outside the period if they are part of the same unlawful practice. With hostile work environment claims, provided that there is an "anchoring act" that falls within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability. *Morgan* neatly balanced the need for timely filing with the recognition that the impact of a hostile work environment builds over time.

If individually actionable acts are sufficiently related to the hostile work environment claim, then those acts can be considered part of the hostile work environment claim even if they fall outside the statute of limitations period. Furthermore, untimely acts may be used as background evidence supporting the retaliation claim.

However, when the Appeals Court was confronted with this issue in the Rae case, it failed to follow clear the precedent of this Court and of the First Circuit cases. its own analysis of the issue. First, the Appeals Court held that a hostile work environment claim itself becomes a discrete act and the statute of limitations on the hostile work environment claim begins to run when the plaintiff knows she is in a hostile work environment or knows she is being retaliated against which *Morgan* explicitly rejected.

Second, the Appeals Court held that as soon as one discrete act is identified, that act must be "disaggregated" from the hostile work environment claim and from the other discrete acts that are part of the same claim. If those discrete acts fall outside the statute of limitations, they must be eliminated completely from the analysis. Moreover, the First Circuit found that background evidence of retaliation that occurred outside the SOL period cannot be used to show that the overall pattern of behavior was severe or pervasive if the events within the SOL are not severe or pervasive on their own. The acts that had been "disaggregated" were not allowed to be used as background evidence in determining whether a pattern of harassment is severe or pervasive. this determination. Again, this is contrary to the holding of *Morgan*.

Petitioner is asking this Honorable Court to find that the Appeals Court's ruling is contrary to established law that all the circuit courts and the Supreme Court agree on. This Court should grant certiorari, reject the Appeals Court's outlier approach, and ensure uniformity to this recurring and important question of federal law.

STATEMENT OF THE CASE

A. Legal background

This case arises under the Americans with Disabilities Act and the Rehabilitation Act which prohibit retaliatory harassment. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) – June 10, 2002 – made a distinction between "discrete acts" of retaliation and hostile work environment claims: The court distinguished between (1) "discrete acts" (acts that are actionable each on its own) and (2) separate acts/isolated acts that are not independently actionable but that collectively comprise a single "unlawful employment practice" (hostile work environment). The statute of limitations rules are different for each.

In particular, "a charge alleging a hostile work environment claim . . . will not be time barred so long as [1] all acts which constitute the claim are part of the same unlawful employment practice and [2] at least one act falls within the time period." *Morgan*, 536 U.S. at 122.. However, a discrete act that falls outside the statute of limitations is time-barred and therefore not actionable. *Id.*

The *Morgan* case fundamentally altered the way courts should treat claims for continuing violations. Before *Morgan*, most circuits held—as the First Circuit is now holding in this case—that hostile work environment claims accrue when a reasonable person would have perceived a hostile work environment. But *Morgan* overruled this precedent. *See, e.g., Boyer v. Cordant Techs., Inc.*, 316 F.3d 1137, 1139 (10th Cir. 2003) (overturning a district court holding that a continuing violation claim fails "if the Rae knew, or through the exercise of reasonable diligence

would have known, she was being discriminated against at the time the earlier events occurred" because *Morgan* was decided when this holding was on appeal, and *Morgan* implicitly overturned this holding).

Morgan holds that a hostile work environment can be proven with acts and behaviors that occur outside of the statute of limitations so long as they are part of the same pattern of events that occurred within the statute of limitations. Discriminatory acts that are not individually actionable may be aggregated to make out a hostile work environment claim and such acts "can occur at any time so long as they are linked in a pattern of actions which continues into the applicable limitations period." *O'Connor v. City of Newark*, 440 F.3d 125, 127 (3d Cir. 2006) (citing *Morgan*, 536 U.S. at 105) (explaining courts may consider the "entire scope of a hostile work environment claim . . . so long as any act contributing to that hostile environment takes place within the statutory time period").

B. The present controversy

Petitioner Amy Rae has been a nurse for the Woburn Public School system since 2009. She has been a strong advocate for students with disabilities, with a particular emphasis on students with diabetes.

Respondent Woburn Public Schools is a state and federally funded school system in Massachusetts which is subject to both the ADA and the Rehabilitation Act. Respondent Carl Nelson is the

principal of the Kennedy Middle School in the Woburn Public School system. Respondent Crowley is the Superintendent of the Woburn Public School system. Petitioner Rae was supervised directly by Respondent Nelson as her principal and Respondent Crowley as Superintendent of Woburn Public Schools.

Ms. Rae complained to her supervisors that the Woburn Schools lacked a policy for treating and accommodating students with diabetes. This set into motion a series of retaliatory events and behaviors conducted against Ms. Rae by both Respondents Nelson and Crowley. Ms. Rae sought various avenues of relief. Each time, she was promised that the situation would improve. However, Ms. Rae was let down each time. She continued working for the school and speaking out against the mistreatment she received. *Id.*

Ms. Rae filed a complaint with the Massachusetts Commission Against Discrimination on April 10, 2022, alleging that she had been retaliated against and subjected to a hostile work environment. Her claims consisted of the years-long treatment she had endured which included being subjected to some discrete acts (e.g. denial of promotion and discipline) and some retaliatory behaviors (e.g. bullying, ridicule, abusive language). Ms. Rae's claims were based on violations of both federal law (e.g. the ADA and Rehabilitation Act) and state law (e.g. M.G.L. c. 151B) which all prohibit discriminatory retaliation. Ms. Rae later removed

her complaint from the Commission and filed it in the District Court for the District of Massachusetts.

Respondents moved to dismiss, arguing that Ms. Rae's claims were barred by the statute of limitations. The District Court granted the motion to dismiss. However, in its decision, the District Court applied the Massachusetts standard assessing the timeliness of Rae's claims, including Rae's federal claims. However, Massachusetts law and federal law are inconsistent with each other – Massachusetts law still considers the statute of limitations to run on hostile work environment claims once the Rae is aware of the hostile behavior – a concept that had been expressly rejected in federal law under *Morgan*. In addition, the District Court erroneously excluded all events in the complaint from its analysis except the two that were timely and concluded that the two timely acts did not rise to the level of creating a hostile work environment.

The First Circuit affirmed. It recognized that the District Court was incorrect when it applied Massachusetts law to the federal law claims. However, it affirmed the decision purportedly on different grounds but in substance on the same grounds. The First Circuit did not view the hostile work environment claim as one continuous act. Instead, the First Circuit separated each alleged act from the other and sought to determine if each action fell within the statute of limitations. Each event was viewed in a vacuum. The Appeals Court "disaggregated" the actions in the complaint and found the acts were not part of the same pattern

because some of the acts were motivated by one animus (harassment) and other were motivated by another animus (retaliation) without considering whether the acts were performed by the same person, or any other relevant circumstances. It found that the two acts that were within the statute of limitations were not sufficient in and of themselves to meet the severe or pervasive standard necessary for hostile work environment claims without taking into account the entire pattern of conduct. The Appeals Court also incorrectly found that there Rae could not bring a hostile work environment claim because Rae failed to show how the hostile work

environment impacted her performance.

The First Circuit denied Ms. Rae's petition for rehearing en banc. Pet. App..

REASONS FOR GRANTING THE PETITION

This case satisfies all of this Court's traditional certiorari criteria. The First Circuit has fundamentally misapplied the *Morgan* holding in this case. Without intervention, the First Circuit may continue to misapply the *Morgan* standard. Viable hostile work environment claims will be wrongly dismissed. It is important to ensure that the principles articulated in *Morgan* are being fairly and equally applied and that the anti-discrimination laws are afforded their due respect and full reach. In addition, the First Circuit's conflation of state law standards with federal law violates the Supremacy Clause of the U.S. Constitution.

I. The First Circuit's decision misapplies the holding in *Morgan* and upsets settled practice.

a. The Appeals Court incorrectly applied the discovery rule to hostile work environment claims.

The Appeals Court says that by December 2012, Rae's retaliation claim "had accrued" (constituted a "discrete act" under *Morgan*) because she had hired an attorney and experienced "extreme distress" and thought Nelson was retaliating against her (pp. 30, 33).

Aside from one incident of discipline, what was happening to Rae in 2011 and 2012 was mocking,

verbal harassment, and bullying, including Nelson calling DCF on a family and telling the family Rae did it—in other words, these are part of a HWE claim. They are not independently actionable "discrete acts" under *Morgan.* So, under *Morgan*, they did not "accrue" in 2012. The HWE claims that includes these acts continues to accrue with each new act comprising part of the HWE.

Similarly, citing *Dressler v. Daniel*, 315 F.3d 75 (1st Cir. 2003),), the Appeals Court says "another retaliation claim accrued" in September 2018, when she wrote about perceiving a hostile work environment.

"On September 8, 2018, Rae wrote to a WPS School Committee member 'describing the hostile work environment' she perceived. By this point in 2018, another retaliation claim accrued, but Rae did not act on it. *See Dressler*, 315 F.3d at 79 (describing a discrete retaliation claim as time barred where the plaintiff 'perceived a hostile work environment' but did not file timely administrative charges)" (p. 33).

All cases that the Rae court relies on (concern acts that meet *Morgan*'s definition of a "discrete act." They do not apply to determinations of the timeliness of hostile work environment claims.

The discrete acts identified by the court in *Miller v. New Hampshire Dep't of Corr.*, 296 F.3d 18 (1st Cir. 2002)—decided the month after *Morgan*—were denial of a promotion opportunity and discipline (reassigned to less desirable post, given formal letter of warning and performance evaluation). These are all "discrete acts" under *Morgan*.

The discrete acts in *Shervin v. Partners Healthcare Sys., Inc.*, 804 F.3d 23, 33 (1st Cir. 2015), were negative performance evaluations, denial of training opportunities, non-renewal of her contract. Again, these are all "discrete acts" under *Morgan*.

The discrete act in *Dressler v. Daniel*, 315 F.3d 75 (1st Cir. 2003), was not just the plaintiff's perception of a hostile work environment, but her perception of a HWE "that resulted in her termination." *Dressler*, 315 F.3d at 79.

None of these cases holds that just knowing you are in a hostile work environment converts a hostile work environment into a "discrete act" that starts the statute of limitations clock. These cases concern the accrual of acts that meet the *Morgan* definition of "discrete acts."

The Appeals Court's attempt to "crystallize" hostile work environment claims to determine the when the statute of limitations begins to run is based on its erroneous application of the "discovery rule." The discovery rule is a rule governing the timeliness of claims of "discrete acts" of discrimination or retaliation. It does not apply to hostile work environment claims.

As articulated in the case of *Shervin v. Partners Healthcare Sys.*, 804 F.3d 23 (1st Cir. 2015), the discovery rule states that a cause of action for a discrete act accrues when (a) the act occurs and (b) the employee knows of the act:

"Under both federal and state law, a cause of action for discrimination or retaliation accrues when

it has a crystallized and tangible effect on the employee and the employee has notice of both the act and its invidious etiology." Shervin, 804 F.3d at 33.

The Appeals Court quoted this passage and applied it to both discrete acts and hostile work environment claims:

"Our case law, however, provided that a retaliation claim accrues as a discrete act of discrimination 'when it has a crystallized and tangible effect on the employee and the employee has notice of both the act and its invidious etiology'" (p. 23) (citing Shervin)

The Appeals Court's words admit that Shervin is talking about "discrete acts" under *Morgan,* but the Rae court applies these words to Rae's hostile work environment claims, which Shervin never did.

The Appeals Court says *Morgan* "left open" the question of "identifying the date on which a Title VII claim accrues" (p. 23). However, the passage in question relied upon by the Appeals Court concerns when a claim for a "discrete act"—not a hostile work environment claim—accrues:

"There may be circumstances where it will be difficult to determine when the time period should begin to run. One issue that may arise in such circumstances is whether the time begins to run

when the injury occurs as opposed to when the injury reasonably should have been discovered. But this case presents no occasion to resolve that issue." *Morgan*, 536 U.S. at 115 n.7.

The trial court decision underlying *Morgan* relied on *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996), abrogated by *Morgan,* 536 U.S. 101, for the proposition that, w/r/t continuing violations under Title VII, a "Rae may not base her (in some cases his) suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the Rae to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." The Ninth Circuit overruled on this ground, and the *Morgan* court affirmed the Ninth Circuit on this point.

The Appeals Court admits, "The *Morgan* Court . . . declined to impose a lack-of-knowledge or reasonableness requirement for the federal continuing violations doctrine." (p. 25, n.4). However, despite this admission, the Appeals Court did in fact impose a knowledge requirement to Rae's hostile work environment claim. In addition, the Appeals Court made the determination of Rae's knowledge at the motion to dismiss stage, before any evidence had been discovered.

The Appeals Court cites *Marrero v. Goya of P.R., Inc*., 304 F.3d 7, 18 (1st Cir. 2002) for the proposition

that "the Supreme Court [in *Morgan*] *explicitly rejected the view* . . . that 'the Rae may not base a suit on individual acts that occurred outside the statute of limitations period unless it would have been unreasonable to expect the Rae to sue before the statute ran on such conduct'" (p. 25, n.4).

However, unexplainedly the Appeals Court holds just the opposite – that Ms. Rae's hostile work environment claim accrued when she had knowledge that she was experiencing a hostile work environment. This is a clear error of law.

b. The fact that Rae's case includes both discrete acts and non-discrete acts does not preclude a hostile work environment claim.

Morgan does not directly address whether untimely discrete acts of discrimination may be considered in conjunction with a hostile work environment claim. *See Royal v. Potter*, 416 F. Supp. 2d 442, 448 (S.D. W. Va. 2006) ("The *Morgan* decision does not expressly address . . . whether discrete acts of discrimination falling outside the relevant time period may be considered in holding the defendant vicariously liable for hostile work environment."). There is a split among the circuit courts as to how to treat untimely discrete acts in hostile work environment claims. *See Equal Emp't Opportunity Comm'n v. Jackson Nat'l Life Ins. Co.*, Civil Action No. 16-cv-02472-PAB-SKC, p. 15-18 (D. Colo. Sep. 13, 2018) and cases cited within.

Some courts have held that untimely discrete acts of discrimination can never be considered as part of a

hostile work environment claim, whereas other courts have held just the opposite. *Id.* For example, the DC circuit has found that so long as all other requirements are met, discrete acts can form the basis of a hostile work environment. *Baird v. Gotbaum*, 662 F.3d 1246, 1252 (D.C. Cir. 2011) (holding that discrete acts of discrimination may comprise a hostile work environment claim as long as they "collectively meet the independent requirements of that claim and [are] adequately connected to each other as opposed to being an array of unrelated discriminatory or retaliatory acts" and finding "no authority for the idea that particular acts cannot as a matter of law simultaneously support different types of Title VII claims" (internal quotation marks omitted)).

The Colorado District Court in *EEOC v. Jackson* was persuaded that the interpretation of the D.C. Circuit is the most convincing. *EEOC v. Jackson National Life Insurance Company*, 1:16-cv-02472, (D. Colo.). The Colorado Court held that *Morgan* does not "categorically bar consideration of discrete acts of discrimination falling outside the limitations period in conjunction with Raes' hostile work environment claims." *Id.* Rather, the Colorado Court argued that the relevant analysis is whether the untimely acts "are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period." *Id.* (quoting *Hansen v. SkyWest Airlines*, 844 F.3d 914, 923 (10th Cir. 2016) (quoting *Morgan*, 536 U.S. at 120). The New Mexico District Court, for example,

echoes this interpretation. *Huntsberger v. City of Yerington*, 2015 U.S. Dist. LEXIS 2783, 2015 WL 112802, at *5 (D. Nev. 2015)("The Court is perplexed how Defendants have purported to extract a rule from this case that any acts that would be time barred under Title VII if brought as discrete acts of discrimination cannot be included as part of a hostile work environment claim. The case quite clearly stands for the opposite proposition.").

The First Circuit recognizes that discrete acts "are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Campbell v. BankBoston, N.A.*, 327 F.3d 1, 11 (1st Cir. 2003) (citation omitted). However, for hostile work environment claims, "all 'component acts' of the claim that occurred outside of the limitations period may be considered." *Franchina v. City of Providence*, 881 F.3d 32, 47 (1st Cir. 2018); *see also Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121, 130 (1st Cir. 2009).*

In the case at bar, Rae is not suing for discrete acts of discrimination. Rather, her complaint establishes a hostile work environment claim that is comprised of a long pattern of retaliatory behavior stemming from the same animus. In other words, Rae is not suing on the discrete acts themselves and is not alleging actionable claims based on these acts. Instead, Rae claims amount to "an aggregation of

hostile acts extending over a period of time" which can be viewed as one single act. *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 18 (1st Cir. 2002) quoting *Havercombe v. Dep't of Educ.*, 250 F.3d 1, 6 (1st Cir. 2001). Therefore, the Appeals Court was incorrect in disaggregating the claim into component parts and holding that the first discrete act stopped the clock.

c. The timely acts are sufficient to anchor the untimely acts because they are related to the earlier harassment and stem from the same animus

Rae only needs to show one timely act of harassment to anchor untimely conduct under the continuing violation theory for hostile work environment claims. *Tobin v. Liberty Mut. Ins. Co.*, 553 F.3d 121 (1st Cir. 2009). All the acts need to be similar and/or must stem from the same discriminatory animus. *Noviello v. City of Boston*, 398 F.3d 76 (2005).

Several acts of harassment occurred within the statute of limitations. These acts include Nelson's holding of an unfounded disciplinary meeting about the t-shirt which the union confirmed was retaliatory in nature; Nelson's unnecessarily paging Rae seven times over the school-wide intercom when he knew Rae had a cell phone; Nelson's telling Rae that he did not want to be in the same room with her; and Nelson's reading an email to a group of staff which described Rae's emotional distress. Moreover, the acts occurred repetitively over the course of several years and were perpetrated by the same person.

Despite the overwhelming evidence, the Appeals Court held that the later, timely harassment could not possibly be motivated by retaliation. However, the complaint weaves together a continuous story of how Rae was retaliated against over a several year period for speaking out about disabled students and the harassment she was facing.

Certainly, the retaliatory motive involved in the earlier harassment makes it more likely that the motive for the later harassment was retaliatory. Courts acknowledge that sometimes an improper motive "poisons" later interactions, such that the entire set of communications can be seen as tainted by discrimination. For example, in *Lipsett*, 864 F.2d at 911, friction arose between the Rae and her co-workers due to Rae's frustration with her co-workers' sexist attitudes and actions. This friction later led to a "personality conflict" that got "out of hand." *Id.* Then the Rae was fired because of this personality conflict that affected the work environment. *Id.* The Court held that where the later conflict had its origins in discrimination, the employer was liable for firing the employee based on the poisoned relationship. *Id.*

Moreover, as Judge Posner acknowledged, "a number of weak proofs can add up to a strong proof," even if some of the pieces of evidence are not meaningful in themselves. *Sylvester v. SOS Children's Villages of Illinois, Inc.*, 453 F.3d 900, 903 (7th Cir. 2006). The litany of events in this case should be seen as a mosaic – a totality – which supports the inference of an unlawful motive as they point in a consistent direction. *Id.*

Considered in the light most favorable to the Rae, Rae has presented sufficient evidence which shows that her relationship with the administration was poisoned by their reaction to her protected conduct, and that this hostility continued into the timely filing period, using the untimely acts as evidence to support the timely acts. The assumption that the motives are unrelated amounts to improper fact-finding.

Moreover, the Appeals Court should have considered all of the evidence, both timely and untimely, when deciding whether the environment was severe or pervasive and not limited itself to only timely acts. *See, e.g.*, *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 227 (4th Cir. 2016) "[B]y circumscribing its analysis to just one comment without reviewing the totality of the circumstances, the district court committed reversible error in its grant of summary judgment[.]").

d. The Appeals Court failed to determine whether the acts comprising the hostile work environment claim were sufficiently related to one another.

All circuits apply a fact-intensive, totality-of-the-circumstances analysis to determine if different acts) are part of the same pattern—i.e., are sufficiently related—to constitute a single hostile work environment claim. *See, e.g., Noviello v. City of Bos.*, 398 F.3d 76, 86 (1st Cir. 2005) (asking whether anchoring event "substantially relates" to earlier incidents and "substantially contribute[d[to the continuation of a hostile work environment");

McGullam v. Cedar Graphics, Inc., 609 F.3d 70, 77 (2d Cir. 2010) (looking at whether incidents are "sufficiently related"); *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 222 (4th Cir. 2016) ("In determining whether an actionable hostile work environment claim exists, we look to 'all the circumstances.'") (citing *Morgan*, 535 U.S. at 116-17); *Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 800 (11th Cir.), *opinion amended on reh'g*, 850 F.2d 1549 (11th Cir. 1988) (noting court must examine whether there is "a substantial nexus between the acts" comprising the hostile work environment claim).

In determining whether to include untimely acts as part of a hostile work environment claim, the court must consider whether the acts are sufficiently related to one another. See, e.g., *Isaacs v. Hill's Pet Nutrition, Inc.*, 485 F.3d 383, 385-87 (7th Cir. 2007)., One test is to see if the acts were of a similar nature and/or performed by the same person. *Mandel v. M & Q Packaging Corp.*, No. 11-3913, 2013 WL 141890 (3d Cir. Jan. 14, 2013); see also *Rowe v. Hussmann Corp.*, 381 F.3d 775, 781 (8th Cir. 2004) ("In the present case, it was the same harasser … . committing the same harassing acts both before and after August 12, 1999; ….and there is no evidence of any 'intervening action,' *Morgan,* 536 U.S. at 118, [], by [the employer] that can fairly be said to have caused the later acts of sexual harassment to be unrelated to [the earlier ones]. Accordingly, we conclude as a matter of law that the acts before and after the limitations period were so similar in nature,

frequency, and severity that they must be considered to be part and parcel of the hostile work environment that constituted the unlawful employment practice that gave rise to this action."); Relevant factors include whether the acts are similar in character, involve the same perpetrator(s), happen in the same environment, whether earlier acts contribute to later ones, whether a reasonable employee would see the acts as related. *See, e.g., Nicholson v. City of Peoria*, 860 F.3d 520 (7th Cir. 2017) (considering whether incidents were linked by the same general subject matter and whether they cumulatively contributed to a hostile environment); *Villar v. City of New York*, 135 F. Supp. 3d 105, 132 (S.D.N.Y. 2015) ("Here, the similarity in perpetrator, unit assignment, and type of conduct make clear that the acts committed in the first period and the second period are part of the same actionable hostile work environment practice.").

The Appeals Court never engaged in this determination and failed to consider the totality of the circumstances, instead concluding that Rae' complaint "alleges several distinct forms of protected activity." This was a misinterpretation of *Morgan*.

II. This Court must correct the Appeals Court errors to preserve the Morgan holding and ensure consistent legal interpretation.

The First Circuit has now set a precedent that is

contrary to the holding in *Morgan* and is likely to be repeated in both the First and other Circuit Courts. As a result, Raes with viable hostile work environment claims will be unjustly denied relief, based upon principles that *Morgan* specifically rejected. It is critically important to ensure the effective application of the *Morgan* decision so that Raes are afforded all rights that flow from the *Morgan* decision.

The holding of *Morgan* should not be diluted by this decision of the First Circuit. Morgan explicitly rejected many of the propositions made by the Appeals Court here for a reason. The failure of the Appeals Court to follow Morgan means that the Morgan decision is not being afforded its full weight.

IV. First Circuit should not be allowed to supersede federal law with Massachusetts law

Article VI, Clause 2, of the Constitution establishes that federal laws, and treaties are the "supreme Law of the Land." The Supremacy Clause ensures that when there is a conflict between federal and state law, federal law will prevail. It also means that state courts must uphold federal laws and treaties, even if state laws or constitutions provide otherwise. The Supremacy Clause is crucial in maintaining a unified legal system across the country, preventing states from undermining federal authority or creating conflicting regulations.

Rae's federal claims are based in part on a hostile work environment. As noted above, *Morgan*

defined a hostile work environment as a series of separate acts which constitute one unlawful employment practice. *Morgan*, 536 U.S. at 103.For hostile work environment claims brought under federal law, acts well outside the statutory period can form the basis for employer liability so long as a related act fell within the limitations period. *Id.* The First Circuit has acknowledged this holding. *See, e.g.*, *Maldonado-Cátala v. Municipality of Naranjito,* 876 F.3d 1, 9 (1st Cir. 2017) (quoting *Tobin v. Liberty Mut. Ins. Co.*, 553 F.3d 121, 130 (1st Cir. 2009)); see also *Quality Cleaning Prods. R.C., Inc. v. SCA Tissue N. Am., LLC*, 794 F.3d 200, 205 (1st Cir. 2015) (observing that, "[a]s long as a related act falls within the limitations period, the doctrine allows a lawsuit to be delayed in cases --such as hostile work environment claims -- in which a course of 'repeated conduct' is necessary before 'a series of wrongful acts blossoms into an injury on which suit can be brought'" (quoting *Ayala v. Shinseki*, 780 F.3d 52, 57 (1st Cir. 2015)).

Discrimination claims brought pursuant to Massachusetts state law M.G.L. c. 151B must be filed with the Massachusetts Commission Against Discrimination within 300 days of the last act that occurred. Any actions that occurred before the 300 days are outside the statute of limitations and are usually barred.

Under Massachusetts law, the requirements for

showing a continuing violation in a harassment case are more stringent than under federal law. The Massachusetts standard still relies upon the discovery rule and is articulated as follows:

"[A] plaintiff who demonstrates a pattern of … harassment that creates a hostile work environment and that includes conduct within the six-month statute of limitations, may claim the benefit of the continuing violation doctrine and seek damages for conduct that occurred outside the limitations period, *unless the Rae knew or reasonably should have known that her work situation was pervasively hostile and unlikely to improve, and, thus, a reasonable person in her position would have filed a complaint with the MCAD before the statute ran on that conduct.* (emphasis added). *Cuddyer v. Stop & Shop Supermarket Co.*, 434 Mass. 521, 539; 750 N.E.2d 928, 941 (2001).

This is the standard that Morgan explicitly rejected. Although the Appeals Court chastised the District Court for conflating the Massachusetts standard with the federal standard, the Appeals Court nevertheless applied the discovery rule to Rae's claims. Thus, the Appeals Court has not given proper deference to federal law and instead has given deference to state law rather than federal law, thus violating the Constitution's

Supremacy Clause. In essence, by applying state law standards to federal law, the Appeals Court has undermined the fundamental principle guaranteed in the Supremacy Clause. In so doing, the Appeals Court has reincarnated principles that federal law had previously rejected. The Massachusetts standard makes it more difficult for a Rae to prevail on a hostile work environment claim. Thus, the purpose of *Morgan* is being frustrated and has resulted in a denial of rights to the Petitioner Rae.

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Date: 1/20/2025 Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED SATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

AMY RAE,

Plaintiff,

v.

WOBURN PUBLIC SCHOOLS, CITY OF * WOBURN, MATTHEW CROWLEY, individually, and CARL NELSON, individually, *

*Defendants. *

Civil Action No. 22-cv-11961-ADB *

MEMORANDUM & ORDER

BURROUGHS, D.J.

I. BACKGROUND

I. *BACKGROUND*

Plaintiff Amy Rae filed suit against Defendants Woburn Public Schools, the City of Woburn, Superintendent Matthew Crowley, and Principal Carl Nelson (collectively, "Defendants") bringing counts for retaliatory harassment pursuant to the Rehabilitation Act (Count I) and under the Americans with Disabilities Act (Count II), violation of Mass. Gen. Laws ch. 151B (Count III), and intentional infliction of emotional distress (Count IV). Before the Court is Defendants' motion to dismiss Plaintiff's complaint.[1] For the following reasons Defendants' motion to dismiss, [ECF No. 9], is GRANTED.

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[1] The Court has already denied Plaintiff's motion for a preliminary injunction, see [ECF Nos. 15, 30], in which Rae sought an order mandating that she be separated from Principal Nelson and that Assistant Principal Kevin Battle act as her supervisor during the pendency of the case.

A. Factual Allegations[2]

The following relevant facts are taken primarily from the complaint, which the Court assumes to be true when considering a motion to dismiss. Ruivo v. Wells Fargo Bank, N.A., 766 F.3d 87, 90 (1st Cir. 2014).

Plaintiff claims that in the course of her employment as a nurse in the Woburn Public Schools she "has been the subject of an ongoing campaign of bullying, harassment, intimidation and retaliation because she advocated for disabled students with special education needs and because she spoke out about major deficiencies in the special education program." [ECF No. 1 ("Compl.") ¶ 8]. The "main aggressor" was Defendant Nelson, who is the Principal of Kennedy Middle School, where Plaintiff works. [Id. ¶¶ 5, 11, 10].

Plaintiff has been with the Woburn Public Schools ("WPS") since 2005. [Compl. ¶ 11].

In October 2011, the Massachusetts Department of Elementary and Secondary Education ("DESE") Executive Office of Health and Human Services published guidelines for Massachusetts school districts on managing students with diabetes and "encouraged all schools to create policies in

accordance with the guidelines." [Id. ¶ 12]. Plaintiff "realized that WPS lacked a comprehensive policy and began advocating for the implementation of a diabetes policy." [Id.]. In response, Nelson insisted that students with disabilities "should not be treated any differently than other students" or receive accommodations or services related to their conditions. [Id.]. Nelson referred to diabetic students as "lazy," and "complained that they used their medical condition to get out of work." [Id. ¶ 13]. Additionally, he often "refused to [sic]

students' Section 504 plan, which denied students of needed services." [Id.].

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[2] The factual recitation is detailed given the statute of limitations analysis that is required as well as the intentional infliction of emotional distress claim. That being said, the Court omits certain incidents that are not relevant to either of these issues and fall out outside of the limitations period as determined by the Court.

Plaintiff "began speaking out to members of the administration" about her belief that student needs were not being met. [Compl. ¶ 14]. Nelson then "started harassing [her] in an attempt to discourage her advocacy." [Id. ¶ 15]. This harassment included Nelson standing over Plaintiff when she sat at her desk, yelling and demeaning her. [Id.]. On one occasion, when Plaintiff asked Nelson about annual staff training on EpiPen administration and diabetes management, Nelson had "an explosive reaction" which included him yelling and berating her. [Id. ¶ 16]. Nelson further "tried to intimidate her into discontinuing these necessary trainings."

[Id.]. In addition, one special education teacher told Plaintiff that she should "beware" because Nelson "has it sort of . . . in for you." [Id. ¶ 17]. Also in 2011, when WPS had an "unusually large number of students with diabetes but no official diabetes policy, Plaintiff asked Nurse Leader Marcia Skeffington to hire additional staff. [Compl. ¶ 18]. No additional staff member was hired and Skeffington "mocked" and "scolded" Plaintiff for "rocking the boat" by asking for more money. [Id.]. Nelson and Crowley knew about Skeffington's comments.

Skeffington, at some point, told Nelson that Plaintiff had erred in one of the reports she prepared. Skeffington knew it was "only a scrivener's error" but, because Skeffington reported the error to Nelson, Nelson disciplined Plaintiff for it. [Compl. ¶ 20]. In December 2011, Plaintiff contacted her union president about a grievance, which the union tried, but failed, to resolve. [Id. ¶ 21].

Plaintiff alleges that "[t]he bullying continued," which prompted her to contact Superintendent Mark Donovan on March 17, 2012 for help. [Compl. ¶ 22]. Donovan "sided against the disciplinary action," but nothing changed with the bullying. [Id.].

In May 2012, the union president drafted a proposed agreement to be signed by Plaintiff and the administration "to put an end to the bullying," but Donovan never signed it. [Compl. ¶ 23]. In August 2012, Plaintiff hired an attorney who began corresponding with the administration to seek a resolution, but again, nothing changed and Skeffington and Nelson "continued to harass and berate" Plaintiff. [Id. ¶¶ 24–25].

During November and December 2012, an issue arose involving a diabetic student who refused "to cooperate in self-care." [Compl. ¶ 26]. Plaintiff tried to help the student but was "thwarted by [] Nelson." [Id.]. "Instead of allowing [Plaintiff] to handle the medical situation, []

Nelson retaliated against the student by filing a complaint against the student's family with the Department of Child Welfare . . . ." [Id.]. The child's parents thought Plaintiff had filed the complaint, and responded by "verbally attacking her." [Id. ¶ 27]. Nelson did not defend Plaintiff or "t[ake] responsibility for his actions." [Id.]. This caused Plaintiff "extreme distress" because, in her view, she was being used as a "fall guy" for the district's "misdeeds." [Id.]. At that time, Plaintiff "went back to her

attorney but was so distraught and feared further retaliation" that she instructed the attorney not to take further action. [Id. ¶ 28]. A month or two later, in February 2013, after the bullying got worse, Plaintiff changed her mind and told her attorney to re-engage with the district. [Id. ¶ 29].

Also in February 2013, a diabetic student was struggling to manage his condition and Nelson made the student "sit in the guidance office unsupervised for four weeks as the district decided about a new placement for the student." [Compl. ¶ 30]. Plaintiff, who was concerned that the student's rights were being violated, as he had refused tutoring and was therefore not receiving an appropriate education, contacted the chair of the special education department, which angered Nelson, "and his harassment intensified." [Id.]. Nelson thereafter required the student to be accompanied by a special education paraprofessional when he went to the nurse's office. [Id. ¶ 32]. The paraprofessionals resented having to accompany the student and took this frustration out on Plaintiff, yelling at her and complaining that she was causing them to miss their lunch time. [Id.]. Nelson never stopped the harassment. [Id.].

At some point between February and April 2013, Plaintiff contacted Ann Sheetz, the Massachusetts Department of Public Health Director of School Health Services to report that Nelson was "refusing to add additional medical related services for diabetic students" who could not control their conditions. [Compl. ¶ 33]. Sheetz told Plaintiff that WPS was "failing in its standard of care for students with advanced medical needs . . . ." [Id. ¶ 34]. In response,

Plaintiff "sent a formal request to the administration for additional nursing hours to be assigned to assist her with the care, education, and medical tasks needed to care for students with special medical needs." [Id. ¶ 35].

On April 1, 2013, Plaintiff attended a meeting with Nelson and her union president, regarding her "current working conditions" where she was berated and dismissed. [Compl. ¶ 36]. She was not allowed to have legal counsel present. [Id.]. Afterwards, Superintendent Donovan reprimanded her via email. [Id. ¶ 37].

Plaintiff told her primary care physician, Dr. Dickenson, that Nelson's actions were intimidating and causing her anxiety and that she was having bouts of depression and not sleeping well. [Compl. ¶ 38]. He recommended that she see a social worker to help her address her "internal struggles with workplace hostility." [Id.]. He also wrote a letter to the administration

expressing concern about Plaintiff having health problems as a result of working in a hostile environment. [Id.]. According to Plaintiff, the administration dismissed the letter.[Id.].

At a later point in either 2014 or early 2015, Nelson "purposefully mischaracterized two school-sponsored field trips as not being sponsored by the school so he could deny medically disabled students access to these field trips." [Compl. ¶ 42]. He was overheard by a fellow teacher saying that he had "pulled a fast one" and did not have to provide a "useless nurse" on the field trip. [Id. ¶ 43]. He also was overheard telling jokes about Plaintiff, "insinuating shewas excessively vigilant and rigid about student safety." [Id. ¶ 44]. Upon hearing this, Plaintiff was "outraged" and filed a formal complaint with the nurse leader and the union. [Id. ¶ 45]. In the complaint she alleged that Nelson was "abusing his power and overriding her medical decisions." [Id.]. Her concerns were again not acted on and "the bullying and hostile work environment continued unabated." [Id. ¶ 47].

On October 5, 2015, Plaintiff sent a letter to the union titled "No More Bullying I Want a Transfer," but she was not transferred. [Compl. ¶¶ 52–53]. Thereafter, she became distraught and started to have anxiety episodes during the day. [Id. ¶ 54].

During the summer of 2016, Plaintiff applied for an open Nurse Leader position, but was not selected for the position. [Compl. ¶ 55]. After she was passed over for this job, Nelson's behavior escalated in that he would get angry more quickly. [Id. ¶ 56]. He berated Plaintiff in front of other staff, entered her office unannounced, and stood over her and yelled, all of which frightened Plaintiff. [Id. ¶¶ 56–57].

At a later point in 2016, Plaintiff told Nelson that she planned to send an email to parents who had not satisfied their children's vaccination requirements to inform them of their obligation to have their children vaccinated. [Compl. ¶ 60]. Nelson refused to send the email, but Plaintiff nonetheless took it upon herself to draft and send the email. [Id. ¶ 61]. In response, Nelson sent Plaintiff an email scheduling a meeting for September 8, 2016. [Id. ¶ 63]. Around this same time, Plaintiff filed a complaint about the continuing lack of an official diabetes policy. [Id. ¶62]. Upon receiving Nelson's email about the meeting, Plaintiff reached out to the union about filing a grievance regarding the meeting, even before it occurred. [Id. ¶¶ 65–66].

On October 7, 2016, Plaintiff was formally disciplined for sending the vaccine email to parents and suspended by Nelson for a day without pay. [Compl. ¶ 68]. Later in October, Nelson sent "an almost identical letter" regarding vaccination requirements to parents." [Id. 71].Following the

suspension, Plaintiff was "increasingly afraid" of Nelson, and began experiencing emotional distress and continued having trouble sleeping. [Compl. ¶ 74]. She again reached out to the union for help, which offered emotional support. [Id. ¶ 76]. In or around the week of October 20, 2016, she contacted union grievance officer, Brian Gilbertie, and the Massachusetts Teacher's Association ("MTA") to complain about the discipline she had received. [Id. ¶ 77]. In an email from Gilbertie to the MTA, he stated that he believed that Plaintiff's suspension was unfair. [Id.]. The MTA confirmed that Nelson had violated Mass. Gen. Laws ch. 42D by not allowing Plaintiff to have legal counsel before the decision was implemented. [Id. ¶ 78]. Plaintiff then sent Nelson a "formal rebuttal letter" on October 29, 2016, which was ignored. [Id. ¶ 79].

The situation continued to deteriorate, and on March 29, 2017, union leaders and Plaintiff requested a meeting with school committee member Joe Demers and newly appointed Superintendent Matthew Crowley to discuss the situation. [Compl. ¶ 80]. During the meeting, held on April 4, 2017, Plaintiff "provided her 2016 formal complaint," noted the district's ongoing "failure to fund nursing services for diabetic students" and voiced her opinion that the students were being denied a free and appropriate public education ("FAPE"). [Id. ¶ 81].

Nothing came of the meeting. [Id.].

In April 2017, Nelson "belittled" her during an Individualized Education Plan ("IEP") meeting in front of a special education staff member after she requested protections and helped draft the IEP for a student with chronic health issues. [Compl. ¶ 83].

On June 2, 2017, Plaintiff filed a grievance with the union regarding her concerns about how she had been treated, but nothing came of it. [Compl. ¶ 86]. On June 4, 2017, Nelson again "belittled" Plaintiff, this time in front of a student. [Id. ¶ 87].

Over a year later, on September 8, 2018, Plaintiff sent two letters to school committee member Demers describing all she had been through, but Demers failed to take action for several months until, on December 28, 2018, he emailed Plaintiff that the district had hired a human resources director and that Plaintiff could file a complaint with them. [Compl. ¶¶ 89–90].

Plaintiff "was not convinced that the HR office could help her" and retained another lawyer to represent her in July 2019. [Id. ¶ 91].

On September 17, 2019, after a woman picking up a student "became abusive" with Plaintiff, she called Nelson "to defuse the situation," [Compl. ¶ 92], but he allowed the woman to continue to "berate" Plaintiff and also verbally "attack[ed]" her himself. [Id. ¶¶ 94–95].

Weeks later, Nelson again berated Plaintiff and "falsely accused [her] of having stolen a sweatshirt that she had given to a student." [Compl. ¶ 97]. The incident caused Plaintiff "great distress . . . ." [Id.].

In November 2019,[3] Plaintiff filed a formal complaint with the HR department. [Compl.¶ 98]. On the same day that Plaintiff was scheduled to meet with the HR Director, Nelson summoned her to a disciplinary hearing about an unrelated parent complaint. [Id. ¶ 99]. Nelson ultimately canceled the hearing but the experience nonetheless caused Plaintiff distress and "placed her in a constant state of fear that she could face discipline on a whim, with no justification." [Id. ¶ 101].

With regard to the HR complaint, Plaintiff requested that the investigator be someone with "no local ties" so that they would be "unbiased" and someone to whom she could "speak freely . . . ." [Compl. ¶ 102]. The district said that were looking for an external investigator, but instead hired Kate Clark, an attorney from a Boston law firm, who was already serving as legal counsel to the district. [Id. ¶ 104]. Plaintiff alleges that Clark conducted a "sham investigation" and "did not allow Plaintiff to present evidence or witnesses in her defense." [Id. ¶ 105]. The investigation determined that Plaintiff's claims could not be substantiated. [Id. ¶ 106]. Plaintiff requested a copy of the report, but was never provided it. [Id. ¶ 107].

In June 2020,[4] after the school district closed in March because of Covid, Plaintiff and the union president reached out to the HR director to request a meeting regarding the investigation into Plaintiff's complaint. [Compl. ¶ 109]. The meeting with the HR director did not resolve the situation, so the union president drafted a letter to Superintendent Crowley expressing the union's concerns about the investigation. [Id. ¶ 110].

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[3] For reasons set forth more fully below, the Court finds that for the retaliation, rehabilitation and intentional infliction of emotional distress claims, only events that occurred on or after November 17, 2019 are within the limitations period.

[4] The Court further notes, for reasons set forth below, only events that occurred on or after June 14, 2021 are within the limitations period for the Chapter 151B claim.

Between March and June 2021, Plaintiff and the union "worked toward a partial resolution," with the union drafting a letter to Crowley and the assistant superintendent that included an agreement that Plaintiff would no longer have to report to Nelson and that Assistant Principal Kevin Battle would be her "primary evaluator[.]" [Compl. ¶ 113; ECF No. 1-1 at 80]. Crowley refused to sign the agreement, but said that he "agree[d] with [her] primary evaluator being switched to Mr. Kevin Battle[,]" but that he "c[ould not] agree to the other terms that you listed in your draft agreement." [ECF No. 1-1 at 80]. The computer program used for the review process documented that Nelson participated in Plaintiff's yearly review. [Compl. ¶ 115].

Approximately a year later, on April 10, 2022, Plaintiff filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD"), which named Crowley and Nelson as responsible for retaliation and a hostile work environment. [Compl. ¶ 116].

On May 11, 2022, Nelson asked Plaintiff to attend a meeting with him on May 16, 2022 "to discuss a student's t-shirt." [Compl ¶ 117; ECF No. 1-1 at 84]. Plaintiff had union president Barbara Locke accompany her to the meeting. [Compl. ¶ 119]. The meeting concerned a student who "needed a replacement t-shirt" and had taken one from the donation pile in the nurse's office that bore a reference to alcohol. [Id. ¶¶ 120–21]. Nelson blamed Plaintiff for the incident, but no discipline resulted. [Id. ¶¶ 123–24].

On September 28, 2022, Plaintiff went to her car to search for her inhaler and left a note on her door stating she would be right back. [Compl. ¶ 130]. She could not find the inhaler, and stayed in the car, trying to figure out how to get one. [Id. ¶ 131]. When she tried to re-enter the school, her ID card would not work, leaving her effectively locked out, which required her to use her cell phone to call the front desk to regain entry. [Id. ¶ 132]. While she was out of the building, Nelson "paged Plaintiff seven times over the school's internal public address system," which Plaintiff did not hear because she was outside. [Id. ¶ 133]. When Plaintiff got back inside, Nelson met her with a "very angry response" and asked her why she did not respond to the pages. [Id. ¶ 135]. Although she explained the situation, he nonetheless berated her in front of her colleagues at the front desk. [Id.]. Because Nelson had paged her so many times,throughout the day, other employees asked her what had happened, which caused Plaintiff to feel that she had to tell them that she had a medical problem and was trying to get her inhaler. [Id. ¶137].

Nelson later "summoned [Plaintiff] to a disciplinary hearing and advised her to have union representation." [Compl. ¶ 138]. The hearing took place on October 5, 2022, and was attended, among others, union representatives, Assistant Principal Kevin Battle, Plaintiff, and Nelson. [Id. ¶ 139]. Nelson scolded Plaintiff and asked her why she took so long outside the building. [Id. ¶ 140]. During the meeting, Nelson "angrily raised his voice," "repeatedly interrupted Plaintiff," and, at one point, said "I don't want to be in a room with you." [Id. ¶ 141].

Nelson also read aloud a "confidential email" Plaintiff had sent to him explaining what had happened, her medical issue, "and the severe emotional distress his actions had caused her." [Id.¶ 142].

B. Procedural Background

Plaintiff filed her complaint on November 17, 2022. [Compl.]. Defendants moved to dismiss her complaint on December 12, 2022, [ECF No. 9], and Plaintiff filed an opposition on December 23, 2022, [ECF No. 14].

II. *MOTION TO DISMISS*

A. Legal Standard

On a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must accept as true all well-pled facts, analyze those facts in the light most favorable to the plaintiffs, and draw all reasonable inferences from those facts in favor of the plaintiffs. U.S. ex rel. Hutcheson v. Blackstone Med., Inc., 647 F.3d 377,,383 (1st Cir. 2011). Additionally, "a court may not look beyond the facts alleged in the complaint, documents incorporated by reference therein and facts susceptible to judicial notice." MIT Fed. Credit Union v. Cordisco, 470 F. Supp. 3d 81, 84 (D. Mass. 2020) (citing Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011).

A complaint "must provide 'a short and plain statement of the claim showing that the pleader is entitled to relief[,]'" Cardigan Mountain Sch. v. N.H. Ins. Co., 787 F.3d 82, 84 (1st

Cir. 2015) (quoting Fed. R. Civ. P. 8(a)(2)), and must "set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory[,]" Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988).

Although detailed factual allegations are not required, a complaint must set forth "more than labels and conclusions," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007), and

"[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice[,]" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Rather, a complaint

"must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570).

B. Analysis

In her complaint, Plaintiff brings the following claims: (1) retaliatory harassment pursuant to The Rehabilitation Act, 29 U.S.C. § 702 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. 126 § 12101 *et seq.* against Woburn Public Schools and the City of Woburn (Counts I and II); (2) violation of Mass. Gen. Laws ch. 151B against all Defendants (Count III); and (3) intentional infliction of emotional distress against Crowley and Nelson (Count IV).

Defendants respond, in part, that Plaintiff's complaint cannot survive a 12(b)(6) motion because the majority of her claims are untimely, and, she has failed to adequately allege claims for retaliation, violation of Chapter 151B, or intentional infliction of emotional distress.

Before proceeding with its analysis, the Court must first determine what allegations are timely and thus properly considered when assessing her claims.

1. Claims for Retaliation Under the ADA and Rehabilitation Act

The Court begins with Plaintiff's claim brought pursuant to Title II of the ADA and Section 504 of the Rehabilitation Act. Both claims are subject to a three-year statute of limitations. Cunningham v. Potter, 2009 WL 10694441, at *2 (D. Mass. June 18, 2009) (citing Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 118 (1st Cir. 2003)) (further citation omitted); Crevier v. Town of Spencer, 600 F. Supp. 2d 242, 258 (D. Mass. 2008) (citing 42 U.S.C. § 2000e(e) and Mass. Gen. Laws ch. 151B, §9). Plaintiff's complaint was filed on November 17, 2022, so events prior to November 17, 2019 would be time barred pursuant to the statute of limitations. Plaintiff, however, argues that all the allegations in her complaint are timely through application of the continuing violation theory.

The continuing violation "doctrine permits a person to seek damages for alleged discrimination occurring outside the usual statute of limitations period if the alleged events are part of an ongoing pattern of discrimination, and there is a discrete violation within the statute of limitations period to anchor the earlier claims." Diaz v. Jiten Hotel Mgmt., Inc., 671 F.3d 78, 85

(1st Cir. 2012) (quoting Pelletier v. Town of Somerset, 939 N.E.2d 717, 731 (2010)). To recover for discriminatory acts that occurred outside of the statute of limitations period, a plaintiff must demonstrate that: (1) at least one discriminatory act occurred within the statute of limitations period; "(2) the alleged timely act or acts had a substantial relationship to the alleged untimely act or acts; and (3) any discriminatory acts that occurred outside of the statute of

limitations period did not trigger [the plaintiff's] awareness and duty to assert her rights." Id. As characterized by the Massachusetts Supreme Judicial Court, the continuing violation doctrine permits a plaintiff to seek damages for violations outside the statute of limitations, "unless the plaintiff knew or reasonably should have known that her work situation was pervasively hostile and unlikely to improve, and, thus, a reasonable person in her position would have filed a complaint . . . ." Cuddyer v. Stop & Shop Supermarket Co., 750 N.E.2d 928, 941–42 (Mass. 2001).

For the purposes of this discussion, the Court assumes without deciding that one of the alleged acts that occurred within the statute of limitations period qualifies as discriminatory and is substantially related to alleged acts outside the statute of limitations. This leaves the question whether any of the discriminatory acts that occurred outside of the statute of limitations period should have triggered Plaintiff's awareness and corresponding duty to assert her rights. Here, the Court easily concludes that the continuing violation theory does not save any of Plaintiff's allegations that are outside the statute of limitations. As early as 2011 and 2012, Plaintiff was sufficiently on notice of what she described as bullying and harassing behavior as evidenced by the fact that she filed complaints with her union and hired a lawyer to represent her with respect to her concerns about the conduct of her supervisors, including Nelson. Her complaint also describes numerous instances over the next several years that Plaintiff viewed as involving discriminatory or harassing behavior, and admits that these alleged violations prompted her to file complaints with the union and the school committee, and to hire a lawyer to represent her in connection with these complaints. [Compl. ¶ 21 (Plaintiff filed grievance in December 2011 regarding bullying and harassment); id. ¶ 24 (Plaintiff hired attorney in August 2012 to help see resolution with district regarding how Plaintiff was treated); id. ¶ 29 (Plaintiff directed her attorney to engage in further negotiations with district in February 2013); id. ¶¶ 44–45 (Plaintiff filed formal complaint with union in late 2014 or early 2015 regarding Nelson's behavior); id. ¶77 (Plaintiff contacted union in October 2016 to complain about allegedly unfair discipline); id. 86 (Plaintiff filed grievance with union on June 2, 2017 regarding Nelson's alleged harassment); id. ¶ 89 (Plaintiff sent letters to school committee member in September 2018 describing alleged harassment)].

Because Plaintiff knew or reasonably should have known that her work situation was pervasively hostile and unlikely to improve, she was sufficiently on notice of the need to assert her rights which precludes reliance on the continuing violation theory to make the earlier alleged violations timely.[5] The Court's analysis is therefore constrained to the events that occurred on or

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[5] At oral argument on the motion for a preliminary injunction, Plaintiff raised the issue of the relevant statutes of limitations being equitably tolled based on representations by the school district that led her to believe that her concerns were being addressed and thereby discouraged her from pursuing legal action within the limitations periods. In general, courts have recognized only a few circumstances in which equitable tolling may be warranted. More specifically, "First Circuit law permits equitable tolling only where the employer has actively misled the employee." Thomas v. Eastman Kodak Co., 183 F.3d 38, 53 (1st Cir. 1999). Further, the active deception must concern the discrimination or retaliation that is the subject of the employment claim. See Mercado v. Ritz-Carlton San Juan Hotel, 410 F.3d 41, 47 (1st Cir. 2005) ("equitable modification is appropriate only where the employer actively misled the employee concerning the reasons for the discharge") (quoting Earnhardt v. Puerto Rico, 691 F.2d 69, 71 (1st Cir. 1982)).

Here, there is nothing in the record that shows active misrepresentation by the school district or establishes that it deceived her about the basis for an alleged employment practice. The record reflects a series of long standing, but largely unresolved disputes, between Plaintiff and Defendants, but falls well short of establishing that Plaintiff was actively misled. It further reflects that Plaintiff was not under the illusion that her problems were being remedied. See e.g., [Compl. ¶ 22 (". . . on March 17, 2012, [Plaintiff] reached out to Superintendent Mark Donovan for help. He sided against the disciplinary action [against her]. However, bullying continued on many fronts."); id. ¶ 24 ("[Plaintiff] hired an attorney [] in August of 2012, who began corresponding with the district to seek a resolution. Superintendent Mark Donovan kept putting off the attorney and made promises that were never fulfilled."); id. ¶ 29 ("However, the bullying got worse, so in February of 2013, [Plaintiff]'s lawyer began communicating again with the district. Unfortunately, after months of correspondence, no solution was reached."); id. ¶¶ 89–91 (after two letters to Woburn School Committee member Joe Demers and weeks of inaction, Mr. Demers sent an email to Plaintiff informing her that the district had just hired a human resources ("HR") director and that Plaintiff should lodge her complaint with the newly appointed director, but Plaintiff "was not convinced that the HR office could help her, so in July 2019, she and her husband hired a lawyer to represent her")].

Finally, there were additional instances where it was made clear to Plaintiff that her issues were not going to be handled to her satisfaction. See e.g., [Compl. ¶¶ 36–37 (at the April 1, 2013 meeting [with Superintendent Donovan, the union president, and Nelson], Plaintiff was "berated and dismissed in front of the union president Joe Curran and Defendant Nelson. Instead of getting the help that she desperately needed, [Plaintiff] received a reprimanding email from Superintendent Donovan after the meeting in an attempt to silence her from speaking out in the future"); id. ¶ 40 (in October 2014, Plaintiff and the new nurse leader met with Superintendent Donovan and explained the deficiencies, the needs of the students, and a request for a formal diabetes policy, the superintendent "refused to offer any help or to remedy the situation"); id. ¶ 81 (during a meeting that included Plaintiff, union representatives, a school committee member, and Crowley, Plaintiff shared her 2016 formal complaint and reiterated that the district was failing to fund nursing services for diabetic students, that the number of diabetic children in the district was increasing, and that these students were being denied a free and appropriate public education, and Crowley responded that those issues "had nothing to do with him, and left the meeting" and other administrators "refused to acknowledge and investigate the state and federal law violations [Plaintiff identified]")].

after November 17, 2019. Those events include: (1) Nelson emailing Plaintiff on November 20, 2019 asking her to attend a meeting about a parent complaint, [Compl. ¶¶ 98–99; ECF No. 1-1 at 64]; (2) Nelson participating in Plaintiff's 2021 yearly review, [Compl. ¶¶ 114–15]; (3) Plaintiff being asked to attend a meeting regarding a student's t-shirt, after which she was not subject todiscipline, [id. ¶¶ 117, 123–24]; (4) Nelson paging her over the public announcement system, [id.¶ 133]; and (5) Plaintiff attending a disciplinary hearing on October 5, 2022 during which Nelson raised his voice, said he did not want to be in a room with Plaintiff, and read aloud an email she had sent him, [id. ¶¶ 141–42].[6]

With these incidents in mind, the Court turns to whether Plaintiff's complaint sets forth allegations sufficient to survive a motion to dismiss pursuant to 12(b)(6). Section 504 of the Rehabilitation Act provides that "no otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. § 794(a). To make out a claim for retaliation under Section 504 of the Rehabilitation Act or the ADA, "a plaintiff must show that (1) he or she engaged in protected conduct, (2) he or

she was subjected to an adverse action by the defendant, and (3) there was a causal connection between the protected conduct and the adverse action."

D.B. ex rel. Elizabeth B. v. Esposito, 675 F.3d 26, 41 (1st Cir. 2012) (citing Carreras v. Sajo, García & Partners, 596 F.3d 25, 35 (1st Cir. 2010); Reinhardt v. Albuquerque Pub. Schs. Bd. Of Educ., 595 F.3d 1126, 1131 (10th Cir. 2010); Quiles–Quiles v. Henderson, 439 F.3d 1, 8 (1st Cir.2006)); see also Crevier, 600 F. Supp. 2d at 259.

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[6] Plaintiff asserts in her papers that the district's decision to select Kate Clark, an attorney who was already representing Woburn Public Schools, to investigate Plaintiff's complaint filed in November 2019 qualifies as an adverse action. The Court disagrees. To qualify as an adverse action an employer "must either (1) take something of consequence from the employee, say, by discharging or demoting her, reducing her salary, or divesting her of significant responsibilities or (2) withhold from the employee an accoutrement of the employment relationship, say, by failing to follow a customary practice of considering her for a promotion after a particular period of service." Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (internal citation omitted). Not choosing Plaintiff's preferred investigator does not come close to meeting this definition. Therefore, the Court does not include this alleged "adverse action" when deciding whether Plaintiff has stated a claim under the ADA, Rehabilitation Act, or Chapter 151B. Even if the Court did consider this decision by Woburn Public Schools, it would have no appreciable effect on the Court's ultimate conclusion.

The general thrust of Plaintiff's claims is that Nelson and the school district retaliated against her for advocating on behalf of students with diabetes and other medical issues. The Court assumes without deciding that advocacy on behalf of such students is protected conduct under both the ADA and the Rehabilitation Act. The next question, then, is whether she was subjected to an adverse action by the defendant. For a retaliatory employment action to be adverse, "the employer must either (1) take something of consequence from the employee, say, by discharging or demoting her, reducing her salary, or divesting her of significant responsibilities or (2) withhold from the employee an accouterment of the employment relationship, say, by failing to follow a customary practice of considering her for a promotion after a particular period of service." Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (internal citation omitted); see also Dixon v. Int'l Bhd. of Police Officers, 504 F.3d 73, 81 (1st Cir. 2007) (stating that in the context of a retaliation claim, an "adverse action" is one "that could well dissuade a reasonable worker from making or supporting a charge of discrimination[]" (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 56 (2006)). There is a strong argument that the allegations in the complaint as detailed above that occurred within the statute of

limitations, which largely involved meetings regarding possible discipline, do not constitute adverse actions. Nonetheless, for present purposes, the Court will also assume without deciding that these actions qualify as adverse actions.

The Court turns to the third element, which is whether there is a causal connection between the adverse action and Plaintiff's protected conduct. Here, the Court finds that no such connection exists between Plaintiff's advocacy on behalf of students with diabetes or other health issues and any of the asserted adverse actions allegedly taken against Plaintiff. The disciplinary hearings that Plaintiff was required to attend within the statute of limitations involved a parent complaint, a t-shirt that a student obtained from the nurse's office, and another instance where Plaintiff did not respond to a page over the school's public announcement system because she was outside. The other alleged adverse event was the fact that Nelson participated in her 2021 yearly review despite Crowley telling her that her primary evaluator would by Kevin Battle. None of these instances are causally related to Plaintiff's advocacy on behalf of students with disabilities, and therefore Plaintiff has failed to make out a prima facie case of retaliation under either the ADA or the Rehabilitation Act.

2. Chapter 151B Claim

As with the ADA and Rehabilitation Act claims, the Court begins its analysis of the Chapter 151B claim with the issue of timeliness before turning to the sufficiency of the complaint.

Chapter 151B requires employees "to exhaust the administrative process before filing a civil suit in court and failure to do so normally precludes the filing of that claim." Posada v. ACP Facility Servs., Inc., 389 F. Supp. 3d 149, 158 (D. Mass. 2019) (citing Everett v. 357 Corp., n904 N.E.2d 733, 746–47 (2009)). The administrative charge must "set forth the particulars" of the plaintiff's claim. Pelletier v. Town of Somerset, 939 N.E.2d 717, 726 (Mass. 2010) (quoting of Mass. Gen. Laws ch. 151B, § 5). One exception to this exhaustion requirement is the "scope of the investigation" rule, which provides that

a claim that is not explicitly stated in the administrative complaint may be asserted in the subsequent [civil action] so long as it is based on the acts of discrimination that the MCAD investigation could reasonably be expected to uncover Id. at 727 (internal citation omitted).

"An investigation could reasonably be expected to uncover claims that '1) allege the same type of discrimination and 2) are based on the same type of conduct as the administrative charge.'" Rucker v. Harvard T.H. Chan Sch. of Public Health, 021 WL 735809, at *2 (D. Mass. Feb. 25, 2021) (quoting Perch v. City of Quincy, 204 F. Supp.130, 133 (D. Mass. 2002)). Here, Plaintiff filed a complaint with the MCAD on April 10, 2022, naming Crowley and Nelson as the persons responsible for retaliating against her and creating a hostile work environment. [Compl. ¶ 116]. The Court therefore assumes that Plaintiff has sufficiently exhausted her Chapter 151B claim.

Defendants nonetheless argue that many of the allegations Plaintiff relies on in bringing her Chapter 151B claim are untimely. Under Chapter 151B, "a plaintiff must file an administrative charge with the MCAD . . . within 300 days of the occurrence of the alleged harassing or discriminatory events." White v. DaVita, Inc., 2013 WL 65409, at *6 (D. Mass Jan. 3, 2013) (citing Mass. Gen. Laws ch. 151B, § 5). Plaintiff filed her MCAD complaint on April 10, 2022, therefore, for the events underlying her claims to fall within the statute of limitations, they must have occurred on or after June 14, 2021.

Plaintiff, again, argues that the continuing violation theory operates to save her allegations regarding earlier events. However, for the same reasons set forth above, the Court disagrees as Plaintiff repeatedly stated, in her complaint, that the actions of Crowley, Nelson, and the school district, generally, caused her to, among other things, hire an attorney and reach out repeatedly to her union to file a variety of grievances and complaints. Therefore, the Court will use the June 14, 2021 cut-off date in assessing her Chapter 151B claims.

The events that occurred on or after June 14, 2021 include: (1) Nelson participating in Plaintiff's 2021 yearly review, [Compl. ¶¶ 114–15; ECF No. 1-1 at 82]; (2) Plaintiff being required to attend a meeting to discuss a student's t-shirt that referenced alcohol, which the student had taken from the nurse's office, [Compl. ¶¶ 117, 120–22; ECF No. 1-1 at 84–89]; (3) Nelson paging her seven times over the PA system while she was outside the school building, [Compl. ¶ 133]; and (4) Plaintiff being required to attend a meeting to discuss why she was outside when Nelson was trying to contact her, during which Nelson stated that he did not want to be in a room with her and read aloud an email Plaintiff had sent him that contained information about her medical condition, [id. ¶¶ 139–42].[7]

Having identified the timely allegations, the Court turns to whether Plaintiff's claim can survive a 12(b)(6) motion for failure to state a claim. Liberally construed, Plaintiff brings claims for retaliation and a hostile work environment pursuant to Chapter 151B.

To state a claim for retaliation under 151B, a plaintiff must plead a prima facie case consisting of three elements: that the plaintiff (1) engaged in protected activity; (2) suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action. Psy–Ed Corp. v. Klein, 947 N.E.2d 520, 530 (Mass. 2011).

For the same reasons discussed above, the Court finds that Plaintiff cannot state a claim for retaliation because she has not pled a causal connection between the timely allegations of adverse action and any protected activity.

To make out a claim for a hostile work environment the plaintiff must show that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive

working environment." Noviello v. City of Boston, 398 F.3d 76, 84 (1st Cir. 2005) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). For alleged conduct to be actionable, "it must rise to 'some level of substantiality,' such that it materially altered the conditions of [Plaintiff's] employment." Gudava v. Ne. Hosp. Corp., 440 F. Supp. 3d 49, 59 (D. Mass. 2020)(quoting Noviello, 398 F.3d at 92). "The alleged harassment must also be both 'objectively and subjectively offensive,' such that a reasonable person would perceive [the alleged harasser's] conduct as hostile or abusive, and that [Plaintiff] in fact did perceive [the alleged harasser's] conduct to be so." Id. at 59–60 (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998)). Here, based on the pleadings and at the motion to dismiss stage, the subjective element is not in dispute.

With respect to the objective component, a court must "mull the totality of the circumstances," looking at factors such as frequency and severity, whether the conduct was physically threatening or humiliating, and whether it unreasonably interfered with the performance of the employee. Noviello, 398 F.3d at 92.

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[7] In other words, the events relevant to evaluating the Chapter 151B claim include nearly the same events relevant to the Retaliation claim, with the exception of Nelson emailing Plaintiff on November 20, 2019 asking her to attend a meeting about a parent complaint, [Compl. ¶¶ 98–99; ECF No. 1-1 at 64], which falls outside the limitations period for the 151B claim and within it for the Retaliation claim.

Limiting its inquiry to the timely allegations, the Court is skeptical that the conduct at issue was so severe and pervasive as to create an actionably hostile work environment.

However, even if it did, Plaintiff's claim fails because her allegations regarding these events do not establish a causal link between her protected activity on behalf of disabled students and the claimed harassment. Rather, a claim related to any alleged harassment that could even be plausibly connected to her advocacy on behalf of students is long since time barred.

Accordingly, Plaintiff has failed to establish a prima facie case of retaliation or a hostile work environment and her Chapter 151B claim is properly dismissed.

3. Intentional Infliction of Emotional Distress

Plaintiff's fourth count alleges intentional infliction of emotional distress as to Crowley and Nelson. [Compl. ¶¶ 174–78]. As with the previously discussed claims, the Court begins by assessing which, if any, allegations are timely.

The statute of limitations for intentional infliction of emotional distress is three years Mass. Gen. Laws ch. 260, § 2A. The Court therefore looks to allegations of improper or illegal behavior that occurred on or after November 17, 2019, the same timeframe applicable to Plaintiff's ADA and Rehabilitation Act claims. As such, the Court's analysis is again limited to the same behavior identified in that prior discussion, which include: (1) Nelson emailing Plaintiff on November 20, 2019 asking her to attend a meeting about a parent complaint, [Compl. ¶¶ 98– 99; ECF No. 1-1 at 64]; (2) Nelson participating in Plaintiff's 2021 yearly review, [id. ¶¶ 114– 15]; (3) Plaintiff being asked to attend a meeting regarding a student's t-shirt, after which she was not subject to discipline, [id. ¶¶ 117, 123–24]; (4) Nelson paging her over the public announcement system, [id. ¶ 133]; and (5) Plaintiff attending a disciplinary hearing on October 5, 2022 during which Nelson raised his voice, said he did not want to be in a room with Plaintiff, and read aloud an email she had sent him, [Id. ¶¶ 139, 141–42].

A prima facie case of intentional infliction of emotional distress, requires a plaintiff to show

(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous, was beyond all possible bounds of decency and was utterly intolerable in a civilized community; (3) that the actions of the defendant were the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe and of a nature that no reasonable man could be expected to endure it. Agis v. Howard Johnson Co., 355 N.E.2d 315, 318–19 (Mass. 1976) (internal quotation marks and citations omitted). "The standard for making a claim of intentional infliction of emotional distress is very high . . . ." Doyle v. Hasbro, Inc., 103 F.3d 186, 195 (1st Cir. 1996). "It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so." Robinson v. Carney, No. 09-11491-RGS, 2010 WL 183760, at *3 (D. Mass. Jan. 20, 2010).

"Conduct is extreme and outrageous only if it is 'beyond all bounds of decency and . . . utterly intolerable in a civilized community.'" Eissa v. Ledvance LLC, No. 21-cv-11515, 2022 WL 3446037, at *6 (D. Mass. Aug. 17, 2022) (quoting Sena v. Commonwealth, 629 N.E.2d 986, 99(Mass. 1994)).

Here, the Court concludes that the timely allegations do not give rise to a claim for intentional infliction of emotional distress. The most damning allegation for purposes of this claim is that Nelson stated in a meeting with Plaintiff that he did not want to be in a room with her and read aloud an email that discussed her medical issue. While certainly objectionable, this behavior cannot be described as beyond all possible bounds of decency. C.f., Brown v. Nutter, McClennen & Fish, 696 N.E.2d 953, 957 (Mass. App. Ct. 1998) (finding that an employer bcompelling his legal secretary "by the threat of suicide and the display of tears to forge and then notarize a mortgage note on [the employer's] own home" for personal gain "was beyond all possible bounds of decency and was utterly intolerable in a civilized community"). The Court therefore will GRANT Defendants' motion to dismiss Plaintiff's claim for intentional infliction of emotional distress.

III. *CONCLUSION*

For the foregoing reasons, Defendants' motion to dismiss, [ECF No. 9], is GRANTED.

SO ORDERED.

May 5, 2023

/s/ Allison D. Burroughs

ALLISON D. BURROUGHS

May 5, 2023

/s/ Allison D. Burroughs ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE

APPENDIX B

United States Court of Appeals

For the First Circuit

No. 23-1432

AMY RAE,

Plaintiff, Appellant, v.

WOBURN PUBLIC SCHOOLS; CITY OF WOBURN;

MATTHEW CROWLEY,

individually; CARL NELSON, individually, Defendants,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Allison D. Burroughs, U.S. District Judge]

Before

Montecalvo, Lynch, and Rikelman, Circuit Judges.

Laurel J. Francoeur, with whom Francoeur Law Office was on brief, for appellant.

Alexandra Milan Gill, with whom Douglas I. Louison and Louison, Costello, Condon & Pfaff, LLP were on brief, for appellees.

August 22, 2024

MONTECALVO, Circuit Judge.

Plaintiff-appellant Amy Rae is a school nurse who alleged that she was subject to retaliatory harassment while employed by defendant-appellee Woburn Public Schools ("WPS"). Rae specifically maintained that WPS's retaliation stemmed from her advocacy on behalf of students with disabilities and complaints she made to WPS regarding her own mistreatment. Although the alleged retaliation had been ongoing for over a decade, Rae first filed suit against WPS in November 2022 and raised four claims: (1) retaliatory harassment under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"); (2) retaliatory harassment under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 ("ADA"); (3) employment discrimination in violation of Massachusetts's antidiscrimination statute, Mass. Gen. Laws ch. 151B, § 4 ("Chapter 151B"); and (4) intentional infliction of emotional distress.

On May 5, 2023, the district court dismissed the entirety of Rae's complaint, agreeing with WPS that Rae had failed to state any claims for which relief could be granted. For the reasons explained below, we agree with the district court that Rae cannot rely on the continuing violations doctrine to save her untimely discrimination claims, albeit on different grounds. We also affirm the district court's dismissal of Rae's timely state and federal discrimination claims, but we reach this conclusion for other reasons.

I. *Background*

For purposes of summarizing the background underlying Rae's lawsuit against WPS, "we accept the well-pleaded facts as true, viewing factual allegations in the light most favorable" to Rae.[1] Rederford v. U.S. Airways, Inc., 589 F.3d 30, 35 (1st Cir. 2009).

Since 2005, Rae has been a school nurse with WPS and was most recently employed at Kennedy Middle School ("Kennedy"). Rae alleges that defendant-appellee Carl Nelson, the Kennedy Principal, "has a disdain for students with disabilities[,] whom he considers weak and not deserving of special attention or funding." As such, when Rae requested additional resources to assist students with disabilities, she contends that "Nelson began to intimidate her, insisting students with disabilities 'should not be treated any differently than other students' and should not receive accommodations or services related to their conditions."

Beginning in October 2011, Rae expressed concerns that WPS lacked policies for treating students with diabetes and "began advocating for a diabetes policy to be implemented." Meanwhile, Nelson described students with diabetes as "lazy" and denied

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[1] Rae's complaint organizes her allegations into certain categories of conduct, but it does not include specific dates for many instances of the hostile treatment she allegedly experienced. We make reasonable inferences to discuss the allegations as chronologically as possible, while construing ambiguities in Rae's favor

accommodations for these students to receive necessary services. Nelson's lack of responsiveness led Rae to elevate her concerns to other WPS administrators; and, in turn, Nelson "started harassing [Rae] in an attempt to discourage her advocacy" by "yell[ing] and demean[ing] her" at work.

Rae also accused Nelson of "conspir[ing] with" her Nurse Leader supervisor, Marcia Skeffington, to "engage[] in a coordinated effort to harass" her. In 2011, when Rae approached Skeffington about WPS's failure to implement policies for students with diabetes and the need for additional support given WPS's "unusually large number of students with diabetes," Skeffington "mocked []Rae and scolded her for 'rocking the boat' by asking for more money." Around the same time, Skeffington informed Nelson that Rae had made a minor "scrivener's error" in a report Rae had prepared. Rae alleges that Skeffington made this frivolous complaint with the ulterior motive of providing Nelson an opportunity to unfairly discipline her. In December 2011, Rae complained about this discipline to her union but did not receive redress.

In 2012, Rae took further action against Nelson and Skeffington's "bullying," including contacting WPS Superintendent Mark Donovan and Rae's union for assistance. In May 2012, Rae's union reached an agreement with WPS administration "to put an end to the bullying" and "avoid litigation," but Donovan did not execute the agreement. By August 2012, Rae had hired an attorney to aid in resolving these issues, but Donovan avoided meeting with Rae's attorney "and made promises that were never fulfilled."

Rae alleges that in late 2012 and into 2013, "the bullying got worse," citing an incident where Nelson "thwarted" Rae's attempts to assist a student with diabetes who was refusing to engage in self-care treatment. Specifically, Nelson filed a child welfare complaint against the student's parents, leading the parents to "verbally attack[]" Rae because they mistakenly believed that she had filed the complaint. Rather than defending Rae or accepting responsibility, Nelson allowed Rae to be the "'fall guy' for the district's misdeeds."

Similarly, in February 2013, Rae contacted the chair of the special education department at Kennedy to accuse Nelson of violating Section 504 by neglecting to accommodate a student with diabetes. Nelson was "angered . . . and his harassment intensified" because of Rae's report, and Rae alleges that he took steps to ensure the paraprofessionals with whom she interacted would also "resent[]" and "harass[]" her.

In April 2013, Donovan called a meeting with Rae, Nelson, and Rae's union president after Rae requested that WPS hire a part-time nurse to assist in caring for students with special medical needs. At that meeting, Donovan "berated and dismissed" her, and later sent a "reprimanding email . . . in an attempt to silence her from speaking out in the future."

Following this meeting, Rae sought help from her primary care physician, explaining that she was experiencing anxiety, sleeplessness, and depression caused by her work situation. Rae's physician wrote a letter to WPS administration regarding Rae's health issues, but WPS did not take any corrective action.

At some point in 2014, Nelson "purposefully mischaracterized two school-sponsored field trips" as not affiliated with the school to deny accommodations for students with disabilities and to avoid bringing school nurses like Rae on these trips. Nelson also purportedly made "harmful jokes about []Rae, insinuating [that] she was excessively vigilant and rigid about student safety."

In March 2015, Rae documented Nelson's actions on this field trip and other harassment she experienced in a formal complaint filed with her new Nurse Leader supervisor and the union. Despite this complaint, the harassment persisted. Rae continued to raise grievances through her union, and her union representative eventually advised her to transfer out of Kennedy, as "Nelson was engaging in behavior that was designed to rattle her and to make her quit." In October 2015, Rae wrote a letter to her union outlining the harassment she had experienced and requesting a transfer from Kennedy. WPS denied Rae's transfer request.

On July 26, 2016, Rae wrote an email to defendant-appellee Matthew Crowley, the new WPS Superintendent, regarding Kennedy's continued failure to implement a diabetes protocol. Shortly before sending this email, Rae had interviewed for a Nurse Leader promotion for which she was qualified and had seniority, but she was later denied the position.

One month later, on August 25, 2016, Nelson emailed Rae instructing her to report to his office on the first day of school in September 2016 for a disciplinary meeting. Nelson's email did not reference Rae's July 26 email to Crowley or her attempts to transfer, but he instead stated that the meeting was "to discuss a letter that [Rae] sent out to parents using [Nelson's] name." Rae acknowledged sending a letter to fifty-four parents regarding vaccination requirements after Nelson refused to do so, but she insisted that she notified Nelson before sending the letter.

Before the September 2016 disciplinary meeting, Rae corresponded with her union and filed a grievance to note that this discipline was retaliation for her email to Crowley on July 26. On October 7, 2016, Nelson formally disciplined Rae by suspending her without pay for one day of work because she had sent the letter without his permission. Rae contends that Nelson used the letter as a pretext to discipline her for her July 26 email to Crowley, a theory supported by union representatives who called her suspension "not a fair decision" and suggested that Nelson used "incredibly slimy" tactics to discipline Rae without providing her the opportunity for counsel. A few weeks after her suspension, on October 29, 2016, Rae wrote to Nelson to formally contest the discipline, but Nelson did not respond.

In April 2017, while accompanied by union representatives, Rae met with Crowley to discuss her concerns related to students with diabetes raised in her July 26, 2016 email. Crowley rejected Rae's contentions that WPS had violated Section 504 by failing to accommodate these students and walked out of the meeting. That same month, Rae was involved in developing an individualized education plan ("IEP") for a student with chronic health issues that required Rae to meet with Nelson. During these IEP meetings, Nelson "belittled []Rae in front of the special education staff" when she asked that the IEP incorporate issues related to the student's medical condition. Nelson also "verbally dismissed and berated" Rae when she advocated on behalf of the student who was being bullied because of his condition.

On June 2, 2017, Rae filed a sixteen-page grievance with her union, but the union did not pursue the grievance out of worry that Rae would experience further retaliation from Nelson. Two days after she filed the grievance, "Nelson belittled and berated []Rae in front of a student."

On September 8, 2018, Rae wrote two letters to Joe Demers, a WPS School Committee member, "describing the hostile work environment" she was experiencing at Kennedy. In December 2018, Demers informed Rae that WPS had newly hired a human resources ("HR") director who would handle Rae's complaints. Rae was skeptical of the new HR director's ability to remedy her situation, so she hired a lawyer in July 2019 to correspond with the school district. But in September 2019, Nelson "continued to attack []Rae" when she was involved in an incident with a sick student and an angry woman who did not have authority to pick up the student from school. A few weeks later, Nelson falsely accused Rae of stealing a sweatshirt she had given to a student.

On November 20, 2019, Rae filed a formal complaint with WPS's new HR department. On the same day, Nelson emailed Rae to meet with her regarding "an alleged parent complaint." Nelson later cancelled the meeting without explanation, but Rae was distressed by the prospect of being disciplined unfairly again.

Soon after, rather than hiring an independent investigator, the HR department appointed WPS's legal counsel to investigate Rae's complaint and permitted Crowley to "tailor[]" the investigation "in [WPS's] favor." WPS also did not allow Rae to testify or present witnesses. And, after several months, Crowley

informed Rae that her allegations were unsubstantiated in March 2020. When her complaint was deemed unsubstantiated, Rae and her union requested to meet with the HR department and Crowley regarding the investigation, but WPS declined the meeting.

In June 2021, Rae's union presented Crowley with a "partial resolution" of Rae's complaint that would allow her to avoid reporting to Nelson. Crowley refused to sign the resolution but agreed that Nelson would no longer conduct Rae's annual reviews. Despite this, Nelson was listed as Rae's performance reviewer in October 2021.

On April 10, 2022, Rae filed a formal complaint with the Massachusetts Commission Against Discrimination ("MCAD"). One month later, on May 11, 2022, Nelson instructed Rae to report for a disciplinary meeting regarding "a shirt [Rae] let a student borrow." Nelson provided only vague details about the meeting and did not confirm whether Rae should secure union representation. During the meeting, Nelson accused Rae of giving a student a shirt that "contained a reference to alcohol," which led a teacher to report the issue to Nelson. By Rae's account, the student independently took the shirt from the "donation pile" in the nurse's office and Rae did not know that the shirt had inappropriate content.

Rae further explained that other students had worn shirts with alcohol references without incident. While Rae was not disciplined, Rae's "union president believed the meeting was unnecessary and called it retaliatory," and Rae felt that Nelson intended to "further upset [her] fragile state of mind."

On August 1, 2022, Rae's union president sent a letter to the WPS School Committee on Rae's behalf to point out WPS's failure to "stop the known harassment and retaliation against employees." The WPS School Committee did not respond to the letter and referred the issue to WPS's legal counsel. Approximately two months later, on September 28, 2022, another incident occurred when Rae left her office to use her inhaler in her car while a student was waiting to check his blood sugar levels. The student was not experiencing a medical emergency, and another administrator was able to fully assist him while Rae was away. Although Rae left notes on her office door and desk to indicate that she would return shortly, Nelson "paged []Rae seven times using the school's internal public address system, which []Rae could not hear because she was locked outside the building."

When Rae returned, Nelson immediately "berated" her for missing the pages, and Rae construed Nelson's excessive paging as an attempt to publicly embarrass her. One hour later, Nelson notified Rae that he was initiating disciplinary proceedings and advised her to obtain union representation. During the disciplinary meeting on October 5, 2022, Nelson "scolded" Rae for briefly leaving school, repeatedly demanded that she justify her absence, and interrupted her as she tried to explain the circumstances. Nelson also read aloud a "confidential email" Rae sent to him disclosing "her medical issue and the severe emotional distress his actions had caused her."

On November 17, 2022, Rae filed suit against WPS, claiming that WPS employees had engaged in retaliatory harassment in violation of state and federal law, and that WPS's conduct constituted intentional infliction of emotional distress. WPS moved to dismiss the entirety of Rae's complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) on December 12, 2022. The district court granted WPS's motion to dismiss on May 5, 2023, agreeing with WPS that Rae had failed to plausibly demonstrate her entitlement to relief on any claim. Rae then filed this timely appeal challenging the dismissal of only her ADA, Section 504, and Chapter 151B claims.

II. *Discussion*

This court reviews de novo a district court's dismissal of a plaintiff's complaint under Rule 12(b)(6). Rodríguez-Vives v. P.R. Firefighters Corps of P.R., 743 F.3d 278, 283 (1st Cir. 2014).

To assess whether a complaint can withstand a Rule 12(b)(6) motion, we "must accept as true all well-pleaded facts 'indulging all reasonable inferences in [Appellant's] favor.'" Fantini v. Salem State Coll., 557 F.3d 22, 26 (1st Cir. 2009) (alteration in original) (quoting Nisselson v. Lernout, 469 F.3d 143, 150 (1st Cir. 2006)). Our federal pleading standard "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp.v. Twombly, 550 U.S. 544, 555 (2007). Accordingly, we "will not accept a complainant's unsupported conclusions or interpretations of law." Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 971 (1st Cir. 1993). But "[b]ecause a dismissal terminates an action at the earliest stages of litigation without a developed factual basis for decision, we must carefully balance the rule of simplified civil pleading against our need for more than conclusory allegations." Id.

Rae points to three main errors in the district court's decision dismissing her complaint. First, Rae contends that the district court wrongly held that the continuing violations doctrine did not apply to her retaliatory harassment claims. Second, she insists that the district court made factual determinations that are inappropriate at the motion to dismiss phase. Third, and relatedly, Rae argues that the district court improperly required her to satisfy the more stringent requirements of a prima facie case of retaliatory harassment instead of the relaxed plausibility pleading standard.

We begin by laying some foundation on the timeliness of Rae's claims, the elements of a retaliation claim, and the intertwined issues of accrual of employment discrimination claims and the continuing violations doctrine. We then take Rae's arguments in turn and explain why Rae cannot rely on the continuing violations doctrine to save her untimely accrued claims. Lastly, we conclude that the district court correctly dismissed Rae's timely ADA, Section 504, and Chapter 151B claims.

A. Timeliness of Rae's Claims

Rae alleges that, over an eleven-year span, she engaged in multiple protected activities and, as a direct result of her protected activities, she suffered various forms of retaliation. But she did not begin the process of filing suit by initiating MCAD proceedings until April 10, 2022. We briefly highlight the administrative filing requirements as they relate to the timeliness of Rae's claims and clarify the operative statutes of limitations.

For employment discrimination claims arising under Chapter 151B, plaintiffs must file administrative charges before going to court.[2] Dunn v. Langevin, 211 N.E.3d 1059, 1062 (Mass. 2023). In particular, Chapter 151B requires plaintiffs to file charges with MCAD within 300 days of experiencing the adverse action alleged. Mass. Gen. Laws ch. 151B, § 5.

[2] Section 504 "does not require [administrative] exhaustion" because the Rehabilitation Act "derives its procedural requirements from Title VI, which does not have an exhaustion requirement." Brennan v. King, 139 F.3d 258, 268 n.12 (1st Cir. 1998). Title II of the ADA incorporates by reference the procedural provisions of Section 504, meaning it likewise does not include an administrative exhaustion requirement. See 42 U.S.C § 12133.

Chapter 151B does not mandate that a plaintiff await receipt of a right-to-sue letter from MCAD or completion of the MCAD investigation before they file suit. A plaintiff may proceed to court if they have not received a response from MCAD after ninety days of filing their MCAD charge. Id. §§ 5, 9. In all events, a Chapter 151B claim must be filed in court within three years of the adverse employment action. Id. § 9.

Here, it is unclear whether Rae obtained a right-to-sue letter from MCAD before initiating the present case, what claims she included in her administrative charge before MCAD, and whether she amended her MCAD charge to include conduct that occurred after she initially filed her charge in April 2022. Because WPS has not challenged Rae's compliance with any administrative exhaustion requirements and we may consider events that "occurred after the plaintiff's filing of her MCAD complaint" in the interest of judicial efficiency, Cuddyer v. Stop & Shop Supermarket Co., 750 N.E.2d 928, 935 n.8 (Mass. 2001), any potential administrative exhaustion arguments that WPS could have raised are waived.

As to the time periods for potentially actionable conduct, the district court applied a three-year limitations period to Rae's ADA and Section 504 claims. Accordingly, it assessed whether events that occurred after November 17, 2019 -- three years prior to the filing of Rae's civil suit on November 17, 2022 -- could be actionable for Rae's federal claims. In determining that Rae's federal claims were subject to a three-year statute of limitations period, the district court impliedly made two key assumptions. First, the district court seemed to assume that Title II of the ADA was applicable to Rae's ADA claim. Cf. Barker v. Riverside Cnty. Off. of Educ., 584 F.3d 821, 827-28 (9th Cir. 2009) (holding that the plaintiff had standing to sue under Title II of the ADA for the retaliation she experienced after "opposing her school's special education policies that allegedly violated the ADA"). Second, because Title II of the ADA and Section 504 do not incorporate their own statutes of limitations,[3] the district court defaulted to a three-year limitations period borrowed from the forum state's statute of limitations for Chapter 151B claims. See Nieves-Márquez v. Puerto Rico, 353 F.3d 108, 118 (1st Cir. 2003).

For Rae's Chapter 151B claim, the district court relied on the 300-day limitations period contained in Chapter 151B, § 5. As such, the district court evaluated whether events after June 14, 2021 -- 300 days before Rae filed her MCAD charge on April 10, 2022 -- constituted actionable conduct under Chapter 151B. Neither party challenges the district court's reliance on a three-year statute of limitations for Rae's federal claims and the 300-day

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[3] Both statutes were also enacted before 28 U.S.C. § 1658 -- the statute providing a catch-all four-year statute of limitations for federal laws enacted after December 1, 1990. See Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 371 (2004). period for Rae's Chapter 151B claim. We agree that the district court's underlying assumptions were reasonable and adopt the same limitations periods for our review. Having confirmed the pertinent time frames for assessing actionable conduct under these statutes, we proceed to outlining the elements of a retaliatory harassment claim.

B. Elements of Retaliatory Harassment

Retaliation claims under the ADA, Section 504, and Chapter 151B are analyzed under the same three-element framework: (1) the plaintiff engaged in protected conduct; (2) the plaintiff experienced an adverse employment action; and (3) there was a causal connection between the protected conduct and the adverse employment action. See Quiles-Quiles v. Henderson, 439 F.3d 1, 8 (1st Cir. 2006) (elements of retaliation under Section 504); Colón-Fontánez v. Mun. of San Juan, 660 F.3d 17, 36 (1st Cir. 2011) (elements of retaliation under the ADA); Sullivan v. Raytheon Co., 262 F.3d 41, 48 (1st Cir. 2001) (elements of retaliation under Chapter 151B). With these basic elements in mind, we walk through the particulars of each one.

First, beginning with the protected activity element, advocating on behalf of people with disabilities -- including protecting students' right "to be free from disability-based discrimination" -- "plainly constitutes protected conduct" under the ADA and Section 504. D.B. ex rel. Elizabeth B. v. Esposito, 675 F.3d 26, 41 (1st Cir. 2012) (collecting cases). While it does not appear that the Massachusetts Supreme Judicial

Court ("SJC") has addressed advocacy on behalf of people with disabilities as protected conduct under Chapter 151B, the statute contains a broad anti-retaliation clause that generally parallels federal protections. See Mass. Gen. Laws ch. 151B, § 4(4); see also Murray v. Warren Pumps, LLC, 821 F.3d 77, 87 (1st Cir. 2016) (treating Chapter 151B's anti-retaliation provision as an "analog" to the ADA's anti-retaliation provision and analyzing identical elements under both laws).

In addition, reporting discriminatory conduct to the employer's HR department or an administrative agency like MCAD constitutes protected activity. See Mariani-Colón v. Dep't of Homeland Sec. ex rel. Chertoff, 511 F.3d 216, 223 (1st Cir. 2007);Xiaoyan Tang v. Citizens Bank, N.A., 821 F.3d 206, 220 (1st Cir. 2016); Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 50 N.E.3d 778, 802 (Mass. 2016). Short of raising formal complaints, "informally opposing an employment activity that might violate" antidiscrimination statutes "broadly" captures other

types of protected activity. Ray v. Ropes & Gray LLP, 799 F.3d 99, 108 (1st Cir. 2015) ("Protected opposition activity includes responding to an employer's inquiries about inappropriate behavior, writing letters protesting an employer's allegedly unlawful actions, or picketing and boycotting an employer.")WPS does not contest that Rae's advocacy on behalf of students with disabilities constitutes protected activity under all three statutes, and the district court "assum[ed] without deciding that advocacy on behalf of such students is protected conduct." On the other hand, WPS insists that Rae's complaints regarding the alleged hostile work environment were made "on her own behalf," and thus do not constitute protected conduct. In WPS's view, because Rae relies on her student-oriented advocacy as the primary form of protected activity, her retaliation claims must solely center around adverse action stemming from such advocacy. But this argument ignores the obvious fact that retaliation is a

forbidden practice under all three statutes, and thus, complaining about retaliation is itself protected conduct. Cf. Alvarado v. Donahoe, 687 F.3d 453, 463 (1st Cir. 2012) ("[F]ederal anti-retaliation provisions generally prohibit conduct taken in retaliation for any protected activity, not just a plaintiff's initial protected action."). As will become clear, we assume that Rae's complaint plausibly alleged that she engaged in several protected activities between 2011 and 2022 -- not limited to her advocacy on behalf of students with disabilities.

Second, "[a]n adverse action is one that might well dissuade a reasonable person from making or supporting a charge of discrimination." D.B., 675 F.3d at 41; see also Burlington N. &Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006). In general," 'demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees' may constitute adverse employment action, subject to the facts of a particular case." Colón-Fontánez, 660 F.3d at 37 (quoting Hernández–Torres v. Intercont'l Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998)). Of particular relevance here, "a hostile work environment, tolerated by the employer, is cognizable as a retaliatory adverse employment action" if the harassment is "sufficiently severe or pervasive." Noviello v. City of Boston, 398 F.3d 76, 89 (1st Cir. 2005).

Although Rae's complaint alleges multiple adverse actions -- including unwarranted discipline, refusal to transfer, denial of promotion, and a hostile work environment -- the district court largely focused on whether Rae plausibly alleged that the harassment she suffered constituted a hostile work environment. Moreover, the district court held that Rae could not invoke the continuing violations doctrine to rely on allegations of conduct outside of the 300-day period for her Chapter 151B claim or the three-year window for

her federal claims to plausibly establish a hostile work environment. And it noted that it was "skeptical" that Rae's timely allegations from within these respective time frames could constitute severe or pervasive harassment.

Lastly, a retaliation claim under all three statutes requires a plaintiff to demonstrate that their protected activity was the but-for cause of the adverse action they suffered. Palmquist v. Shinseki, 689 F.3d 66, 74 (1st Cir. 2012); Edwards v. Commonwealth, 174 N.E.3d 1153, 1168 (Mass. 2021). "One way of showing causation is by establishing that the employer's knowledge of the protected activity was close in time to the employer's adverse action." Wyatt v. City of Boston, 35 F.3d 13, 16 (1st Cir. 1994). Moreover, "harassment itself" may "offer[] circumstantial evidence of causation." Noviello, 398 F.3d at 86. Relying solely on conduct from within the 300-day and three-year time frames, the district court held that Rae's complaint failed to plausibly demonstrate that her protected activity was the but-for cause of the adverse action.

Here, the appropriate time period for actionable conduct is closely linked to the adverse action and causation elements of Rae's retaliatory harassment claim. But before returning to the complications surrounding these two elements, we detour to discuss two key issues underlying Rae's appeal: the accrual of employment discrimination claims and the continuing violations doctrine.

C. Accrual of Employment Discrimination Claims and the Continuing Violations Doctrine

The date on which an employment discrimination claim accrues dictates the start of the limitations period for filing an administrative charge. Thomas v. Eastman Kodak Co., 183 F.3d 38,48 (1st Cir. 1999). In simplest terms, "an employer action only triggers the running of the statute of limitations" -- indicating that an employment discrimination claim has accrued -- "if that action has concrete, negative consequences for an employee, and the employee is aware or should have been aware of those consequences." Id. at 49.

The continuing violations doctrine intersects with the accrual of employment discrimination claims, but it presents somewhat different inquiries. In National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), the Supreme Court addressed the questions of "[w]hat constitutes an 'unlawful employment practice' and when . . . that practice [has] 'occurred'" under Title VII "for both discrete discriminatory acts and hostile work environment claims." Id. at 110. As examples of discrete acts, the Court listed adverse employment actions "such as termination, failure to promote, denial of transfer, or refusal to hire." Id. at 114. The Court then emphasized that "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" Id. Moreover, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges," and "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act." Id. at 113.

But the Court made clear that "[h]ostile environment claims are different in kind from discrete acts" because "[t]heir very nature involves repeated conduct." Id. at 115. Consequently, the existence of a hostile work environment -- as a unique type of adverse employment action -- "cannot be said to occur on any particular day." Id. Instead, a hostile work environment "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." Id. The Court thus held that, under the continuing violations doctrine, "[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." Id. at 122. Importantly, the Court rejected the practice of some circuits, including ours, that limited application of the continuing violations doctrine to circumstances where "it would have been unreasonable to expect the plaintiff to sue before the statute ran on such conduct." Id. at 117–18.

But the Morgan Court ultimately "left open" the question of "identifying the date on which a Title VII claim accrues." Miller v. N.H. Dep't of Corr., 296 F.3d 18, 22 (1st Cir. 2002). Our case law, however, provides that a retaliation claim accrues as a discrete act of discrimination "when it has a crystallized and tangible effect on the employee and the employee has notice of both the act and its invidious etiology." Shervin v. Partners Healthcare Sys., Inc., 804 F.3d 23, 34 (1st Cir. 2015).

D. Time-Barred Discrete Acts of Retaliation

1. Rae's Invocation of the Continuing Violations Doctrine

Here, Rae attempts to amalgamate a series of discrete acts of retaliation into one sweeping retaliatory harassment claim to invoke the continuing violations doctrine. But the continuing violations analysis requires disaggregating each discrete act of alleged retaliation before assessing whether the continuing violations doctrine is applicable. After engaging in this disaggregation (and for different reasons than the district court), we hold that Rae cannot rely on the continuing violations doctrine to rescue her time-barred claims.[4]

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[4] In addition, as Rae points out, in determining that the continuing violations doctrine could not be applied to Rae's retaliatory harassment claims under both state and federal law, the district court relied solely on cases interpreting the continuing violations doctrine under Massachusetts law. This was incorrect, as the Massachusetts standard is meaningfully different from the federal standard on continuing violations.

The SJC has adopted the pre-Morgan standard for the continuing violations doctrine for Chapter 151B claims. Under Massachusetts law, "a continuing violation claim will fail if the plaintiff was, or should have been, aware that she was being unlawfully discriminated against while the earlier acts, now untimely, were taking place." Cuddyer, 750 N.E.2d at 938. The Morgan Court, however, declined to impose a lack-of-knowledge or reasonableness requirement for the federal continuing violations doctrine. 536 U.S. at 117–18 ("It is precisely because the entire hostile work environment encompasses a single unlawful employment practice that we do not hold, as have some of the Circuits, that the plaintiff may not [rely on the continuing violations doctrine] unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on such conduct."); see also Marrero v.

Where "discre[te] acts of alleged retaliation fall outside the filing period," such "acts are time[-]barred." Dressler v. Daniel, 315 F.3d 75, 79 (1st Cir. 2003). The Morgan Court made clear that "each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" 536 U.S. at 114. And if "prior discrete discriminatory acts are untimely filed," they are "no longer actionable." Id. at 115. The continuing violations doctrine does not alter this rule. Nor does framing discrete claims as non-discrete components of a single retaliatory harassment claim -- especially where, as in Rae's case, such a "claim" spans eleven years -- entitle the plaintiff to invoke the continuing violations doctrine.

Put differently, the continuing violations doctrine indisputably serves as "an equitable means of ensuring that meritorious discrimination claims are not pretermitted because the

Goya of P.R., Inc., 304 F.3d 7, 18 (1st Cir. 2002) (recognizing that "the Supreme Court [in Morgan] explicitly rejected the view -- advanced by [the employer] here -- that 'the plaintiff may not base a suit on individual acts that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on such conduct'" (quoting Morgan, 536 U.S. at 117–18)). Moreover, post-Morgan, the SJC has commented that the Massachusetts standard is "phrased differently" than the version approved in Morgan, and as is permissible, it has continued applying the lack-of-knowledge requirement for continuing violations alleged under Chapter 151B. Clifton v. Mass. Bay Transp. Auth., 839 N.E.2d 314, 320 n.8 (Mass. 2005).

claimant needed to experience a pattern of repeated acts before [they] could be expected to realize that the individual acts were discriminatory in nature." Loubriel v. Fondo del Seguro del

Estado, 694 F.3d 139, 144 (1st Cir. 2012). But "related discrete acts" cannot be combined "into a single unlawful practice for the purposes of timely filing." Morgan, 536 U.S. at 111. In fact, the Morgan Court reversed the Ninth Circuit's approach to "appl[ying] the continuing violations doctrine to what it termed 'serial violations.'" Id. at 114. Even where "one [discrete] act falls within the charge filing period," the Court held that the continuing violations doctrine could not be applied to allow "discriminatory and retaliatory acts that are plausibly or sufficiently related to that [timely] act [to] also be considered for the purposes of liability." Id.; see also Thornton v. United Parcel Serv., Inc., 587 F.3d 27, 33 (1st Cir. 2009) ("As to serial violations, the Supreme Court has reiterated that 'discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.'" (quoting Morgan, 536 U.S. at 113)).

In her reply, Rae is adamant that she "is not suing for discrete acts of retaliation" because she has brought "a hostile work environment claim that is comprised of a long pattern of retaliatory behavior stemming from the same animus." Rae's argument elides two important issues. First, we have never held that a plaintiff's allegations of retaliatory harassment eliminate our obligation to evaluate whether the allegations include discrete discriminatory acts that are time barred. Retaliation can take many forms and harassment is just one type of retaliation. See Marrero, 304 F.3d at 26; Noviello, 398 F.3d at 87

("[R]etaliation is a distinct and independent act of discrimination, motivated by a discrete intention to punish a person who has rocked the boat by complaining about an unlawful employment practice.").

As already noted, the Morgan Court contemplated that

"each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice'" with its own statute of limitations period. 536 U.S. at 114. Accordingly, we have held that "[u]nder both federal and state law, a cause of action for discrimination or retaliation accrues when it has a crystallized and tangible effect on the employee and the employee has notice of both the act and its invidious etiology." Shervin, 804 F.3d at 33 (emphasis added). So, even where a plaintiff alleges a pattern of retaliatory conduct (here, in the form of a hostile work environment), discrete retaliation claims can still accrue and may become time barred.

Second, while Rae views the harassment she suffered as being driven by generalized retaliatory motives, the continuing violations doctrine requires more. "[I]n order to invoke [the continuing violations]

doctrine, a claimant must show at a bare minimum a series of discriminatory acts that emanate from the same discriminatory animus." Noviello, 398 F.3d at 87 (emphasis added). Here, Rae's complaint reflects that she engaged in several types of protected activities for different purposes over an eleven-year period. And at a high level, Rae's advocacy on behalf of students with disabilities beginning in 2011 can be construed as the catalyst for this extensive series of retaliation-related events. But the disparate forms of Rae's protected activities, which were taken for varying purposes for over a decade, make it necessary to determine whether WPS's numerous adverse actions stemmed from the same animus.[5]

Consequently, raising a retaliatory harassment claim alone does not automatically entitle a plaintiff to rely on the continuing violations doctrine. In particular, a plaintiff may not disguise discrete acts of retaliation as a single retaliatory harassment claim comprised of temporally distant conduct, multiple

[5] Of course, where a plaintiff alleges that they suffered harassment because of a protected trait such as race or sex, establishing that the employer's conduct was motivated by the same discriminatory animus -- even if the harassment occurred over a very long timespan -- can be a more feasible task. Cf. Morgan, 536 U.S. at 120 (applying continuing violations doctrine where "managers made racial jokes, performed racially derogatory acts, made negative comments regarding the capacity of [Black employees] to be supervisors, and used various racial epithets" and holding that this misconduct was clearly driven by the same discriminatory animus).

forms of protected activity undertaken for various purposes, and several discrete adverse actions. Under other circumstances, however, a plaintiff alleging retaliatory harassment may be able to rely on the continuing violations doctrine. Likewise, we do not foreclose applying the continuing violations doctrine to "a claim involv[ing] a pattern of conduct which includes a discrete act that may itself be actionable," with the caveat that "the continuing violation doctrine is arguably more accommodating under Massachusetts law than under federal law" in such cases. Shervin, 804 F.3d at 37 n.7. But as cataloged in detail below, Rae's complaint alleges a series of discrete retaliation claims that cannot be saved by the continuing violations doctrine.

2. *Serial Discrete Acts of Retaliation Are Time Barred*

Rae alleges that she first engaged in protected activity by advocating for students with disabilities in October 2011. And soon thereafter, Nelson "began to intimidate her" through harassing behavior. Furthermore, Nelson "conspired" with Rae's co-worker to punish Rae for her advocacy and tolerated this co-worker harassment. By December 2011, Rae had suffered "unfounded discipline" that she maintains was a result of Nelson's "coordinated effort to harass [her]." "[A] reprimand may constitute an adverse action," Bhatti v. Trs. of Bos. Univ., 659 F.3d 64, 73 (1st Cir. 2011), and severe or pervasive harassment "by co-workers or supervisors" is also adverse action, Marrero, 304 F.3d at 26. But somewhat paradoxically, in the light most favorable to Rae, we assume she did not intend to plead that these acts were sufficient to satisfy the adverse action element of her retaliation claim, which would have triggered the earliest possible statute of limitations on a retaliation claim.

Even so, by approximately December 2012, Rae alleges that she "feared further retaliation" after she hired an attorney to negotiate with WPS, was unsuccessful in resolving the alleged harassment through her attorney, and experienced "extreme distress" when she was "used as a 'fall guy'" for Nelson's misconduct. At this point, by Rae's own acknowledgement, Rae's retaliation claim stemming from her October 2011 advocacy[6] had accrued. See Miller, 296 F.3d at 22 (holding that the plaintiff's retaliation claim accrued where he explicitly noted that he felt "abused and retaliated against"); Shervin, 804 F.3d at 33 (explaining that the plaintiff's "knowledge of the probation and its immediate, tangible effects, together with her loudly bruited belief that the probation decision was a form of disparate discipline motivated by gender discrimination, is all that was

[6] We note without deciding that, in this same time period, Rae engaged in other activities that could constitute protected conduct, such as hiring a lawyer to challenge the retaliatory harassment she perceived. See Kinzer v. Whole Foods Mkt., Inc., 99 F.4th 105, 115 (1st Cir. 2024) (emphasizing that protected conduct is construed "broadly" and can include a wide array of activities).

needed for her cause of action to accrue and the limitations clock to begin to tick"). Under Morgan, by failing to file administrative charges and a lawsuit to recover on this completed, discrete act of retaliation, Rae has forfeited her right to recover on it. See 536 U.S. at 113.

Likewise, Rae engaged in multiple forms of protected activity between February 2013 and October 2015, including advocating for students with disabilities and filing at least two formal complaints that raised concerns about WPS's treatment of students with disabilities and the harassment she was suffering. Rae documented numerous ways in which Nelson's harassment negatively "interfer[ed]" with her job duties and work environment, caused her emotional distress, and left her feeling compelled to request a transfer to escape Nelson's supervision. At some point after October 2015, WPS denied Rae's request to transfer. And WPS later refused to promote Rae to a Nurse Leader position for which she had seniority and was qualified in the summer of 2016.

After being denied the transfer and promotion -- which plainly constituted adverse employment actions -- Rae continued to engage in protected activities and WPS repeatedly took adverse action against her. And by our count, Rae's complaint alleges at least two additional completed, discrete acts of retaliation between mid-2016 and late-2019.

For instance, on July 26, 2016, Rae "filed an official complaint" with Crowley, her Nurse Leader supervisor, and other WPS staff regarding WPS's failure to implement an appropriate diabetes protocol. One month later, under what Rae perceived to be improper pretenses, Nelson initiated disciplinary proceedings against her. As a result, Rae was formally suspended without pay, which she explicitly described as "an act of retaliation against [her]" for sending her July 26 email calling out WPS's failure "to comply with state and federal laws that protect the civil rights of students with disabilities, and [Nelson's] ongoing attempts to intimidate [her] in order to silence [her] from coming forward." Most generously to Rae, WPS's latest (and indisputably adverse) act of imposing a pretextual suspension -- based on what Rae herself believed were retaliatory motives -- triggered the running of a statute of limitations on a second retaliation claim in October 2016. Again, Rae did not file timely charges or a civil suit to recover on this discrete retaliation claim.

Next, between April and June 2017, Rae engaged in several forms of protected conduct. In April 2017, Rae complained to Crowley regarding WPS's "failure to fund nursing services for diabetic students" and insisted that "these students were being denied a free and appropriate public education" in violation of federal law. Around the same time, Rae participated in drafting an IEP on behalf of a student with disabilities and urged Nelson to adopt specific accommodations to prevent the student from being bullied. And in June 2017, Rae filed a grievance with her union to complain about her mistreatment.

All the while, and well into 2018, Nelson continued to "belittle[] and berate[]" Rae at work, causing Rae even greater "emotional distress." For example, during meetings regarding the student's IEP, Nelson "belittled []Rae in front of the special education staff" and "verbally dismissed and berated" her when she brought up concerns about the student being bullied.

On September 8, 2018, Rae wrote to a WPS School Committee member "describing the hostile work environment" she perceived. By this point in 2018, another retaliation claim accrued, but Rae did not act on it. See Dressler, 315 F.3d at 79 (describing a discrete retaliation claim as time barred where the plaintiff "perceived a hostile work environment" but did not file timely administrative charges).

In July 2019, Rae reengaged counsel to address her concerns with WPS. Approximately two months later, in September 2019, Nelson allowed a woman who was not authorized to pick up a sick student to verbally abuse Rae, and he also "[b]erat[ed] and embarrass[ed]" Rae. Then, a few weeks later, Nelson "falsely accused" Rae of stealing a sweatshirt that she had given to a student, again causing Rae "great distress." Rae took this incident to be "another attempt [by Nelson] to embarrass and harass" her.

On November 20, 2019, Rae filed a formal complaint with the WPS HR department, citing several examples of "bullying and retaliation" that she classified as "retaliation for [her] recent reports of unfair and unlawful conduct" that "substantially disrupt[ed] [her] work as a school nurse and ma[d]e [her] feel afraid and unsafe." From Rae's own account, Nelson's retaliatory behavior in response to her protected activity led her to believe that she was suffering from a hostile work environment. While Rae's November 2019 HR complaint was based on Nelson's more "recent" conduct, Rae explicitly noted that she was suffering from a hostile work environment since at least fall 2018. Consequently, as previously discussed, Rae cannot avoid the conclusion that a time-barred retaliatory harassment claim accrued by late 2018.

For largely the same reasons discussed above, the continuing violations doctrine cannot be applied to Rae's Chapter 151B claims. Under Massachusetts law, a plaintiff cannot invoke the continuing violations doctrine where "the employer's actions (or inactions) were sufficient either to make the [plaintiff] aware of the discrimination, or to enable [them] to form a reasonable belief thereof." Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against Discrimination, 808 N.E.2d 257, 269 (Mass. 2004).

Rae contends that the district court wrongly "speculate[d]" about her "state of mind" when it concluded that she "knew or reasonably should have known that her work situation was pervasively hostile and unlikely to improve." But Rae's pleadings repeatedly highlight her belief that she was the victim of retaliatory harassment. Rae explicitly described her suspension without pay in October 2016 as "an act of retaliation against [her]." And in September 2018, citing the unlawfulness of retaliatory harassment under Massachusetts law, Rae wrote that she wanted to present "evidence . . . to address the wide spread [sic] retaliation that occurred against [her] that warranted legal action." Consequently, the district court did not need to "speculate" about Rae's mindset when Rae, in her own words, made clear that she believed she was suffering from discrimination. And the district court correctly concluded that Rae could not invoke the continuing violations doctrine under Massachusetts law.

E. Actionable Conduct for Rae's ADA, Section 504, and Chapter 151B Claims

This brings us to the window for actionable conduct under Title II of the ADA and Section 504's three-year statute of limitations, beginning on November 17, 2019.

The district court considered Rae's advocacy on behalf of students with disabilities as the sole protected activity for any timely retaliation claim. It then "assume[d] without deciding" that Rae had suffered adverse action within the three-year time frame. But the district court dismissed Rae's retaliation claim after concluding there was no causal connection between the adverse action and Rae's advocacy on behalf of students with disabilities. Likewise, for Rae's Chapter 151B claim, the district court held that Rae had failed to demonstrate "a causal connection between the timely allegations of adverse action and any protected activity."[7]

At times, Rae's complaint alleges that her advocacy on behalf of students with disabilities was the sole cause of appellees' retaliatory conduct. But at other points, Rae suggests that other forms of protected activity motivated appellees' retaliation. Taking the allegations of the complaint in the light most favorable to Rae, as we must, and in line with our prior discussion, we conclude that her complaint alleges several distinct forms of protected activity within an eleven-year span.

For instance, Rae alleges that on or about November 20, 2019, she engaged in protected activity by filing a complaint with the WPS HR department regarding Nelson's retaliatory harassment.

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[7] The district court appears to have construed Rae's complaint as alleging a separate hostile work environment claim under Chapter 151B. Regardless of whether Rae intended to raise a standalone hostile work environment claim, the district court correctly relied on the same "severe or pervasive" harassment standard applicable to the adverse employment action element of a retaliatory harassment claim. See Noviello, 398 F.3d at 89.

Rae alleges that, on the same day, Nelson "retaliated and intimidated her" by ordering her to report for a disciplinary hearing that he later cancelled without reason.

Although this incident may have been quite close in time to Rae's protected activity, it is not clear from Rae's complaint or supporting documentation when she filed her HR complaint or whether Nelson was actually seeking to discipline her.[8] Relatedly, Rae does not allege whether or how Nelson would have known about her HR complaint before he sent the email; she merely noted, in a separate email sent on November 20, 2019, to a third party that "perhaps [Nelson] heard [she was] going to a scheduled Human Resources meeting today." Moreover, Nelson's email does not appear to reference disciplinary proceedings at all -- it simply requests that Rae "stop by at the beginning of 6th period to discuss an email [he] received from a parent." Rae apparently took this to mean that she was being disciplined, and she noted in her response to Nelson that she would be requesting union representation.

Rae maintains that Nelson's unexplained cancellation evinces his malintent. But her failure to plausibly allege the exact timing of events and Nelson's purported knowledge of her

[8] Rae alleges that she filed her HR complaint "[o]n or about November 20, 2019." The corresponding exhibit is addressed to the HR department and dated November 20, 2019, but it is not an email or other document with an automatic timestamp. Meanwhile, Rae attached Nelson's email from November 20, 2019, showing 9:42am as the sent time.

protected activity make it impossible to evaluate this conclusory allegation. So, while we make all reasonable inferences in Rae's favor, we cannot do so on this key causation issue, and must conclude that Nelson's email alone does not constitute retaliatory conduct.

Rae then appears to allege that WPS conducted a "sham investigation" of her HR complaint and the investigator later "demean[ed]" her when she "requested a meeting about the

shoddy and biased investigation" in June 2020. We agree with the district court that these allegations do not plausibly establish that Rae suffered an adverse employment action. Similarly, Rae alleges that in October 2021, Nelson purportedly violated an agreement with Rae's union prohibiting him from conducting her annual performance reviews. But she does not suggest that these reviews were unwarrantedly negative or otherwise affected her working conditions. Nonetheless, as events that underly her timely retaliatory harassment claim, we do not wholly cast them aside yet.

Problematically, however, Rae does not allege that WPS engaged in any other misconduct in the two-year span following her protected activity in November 2019. Indeed, even by the start of the time frame for her Chapter 151B claims beginning on June 14, 2021, Rae does not allege that she engaged in any protected activity or suffered any adverse action. Although we can infer that Rae's work at WPS was substantially altered due to COVID-19, these sparse allegations do not make out a retaliatory harassment claim based on her protected activity of filing the HR complaint in November 2019.

Regardless, Rae engaged in additional protected activity on April 10, 2022 by filing her MCAD complaint, naming Crowley and Nelson "as the persons responsible for the retaliation" she experienced. One month later, on May 11, 2022, Rae alleged that Nelson "summoned [her] to a disciplinary hearing" regarding a t-shirt containing a reference to alcohol that a student had taken from a donation pile without Rae's knowledge. Although Rae was not formally disciplined, she maintained that the meeting was unjustified and retaliatory.

The next retaliatory event that Rae alleges occurred on September 28, 2022, where Nelson repeatedly paged her over the public announcement system while she was locked out of the building after leaving briefly to use her inhaler. One week later, Nelson held a disciplinary hearing to address Rae's unauthorized absence. While Rae does not indicate whether WPS took disciplinary action, she claims that Nelson's pretextual discipline caused her "severe emotional distress" and "humiliation."

The district court suggested that, based on the limited number of timely retaliatory acts alleged, the harassment was likely not severe or pervasive enough to constitute retaliatory harassment. Alternatively, it held that Rae's allegations of timely events "do not establish a causal link between her protected activity on behalf of [students with disabilities] and the claimed harassment."

Even if, as Rae contends, the district court erred in holding that she failed to sufficiently plead causation, we nonetheless affirm on grounds that Rae has not plausibly alleged that she suffered severe or pervasive harassment. As already noted, Rae engaged in protected activity other than her advocacy on behalf of students with disabilities, including filing her MCAD complaint in April 2022. So, construing the allegations in the light most favorable to Rae, the district court should have assessed whether she had plausibly alleged that her more recent protected activity of filing her MCAD complaint was the but-for cause of the retaliatory conduct she suffered.

In this vein, we have cautioned district courts against "treat[ing] the prima facie case, 'a flexible evidentiary standard,' as a 'rigid pleading standard,' requiring [the plaintiff] to establish each prong of the prima facie case to survive a motion to dismiss." Garayalde-Rijos v. Mun. of Carolina, 747 F.3d 15, 24 (1st Cir. 2014) (citation omitted) (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002)). Rather, "[t]he question at this stage of the case is not 'the likelihood that a causal connection will prove out as fact.'" Román-Oliveras v. P.R. Elec. Power Auth., 655 F.3d 43, 50 (1st Cir. 2011) (quoting Sepúlveda–Villarini v. Dep't of Educ. of P.R., 628 F.3d 25, 30 (1st Cir. 2010)). And of course, "[n]one of this is to deny the wisdom of the old maxim that after the fact does not necessarily mean caused by the fact." Sepúlveda–Villarini, 628 F.3d at 30. But even though "it is possible that other, undisclosed facts may explain the sequence better[,] [s]uch a possibility does not negate plausibility, however; it is simply a reminder that plausibility of allegations may not be matched by adequacy of evidence." Id.

Moreover, despite Rae's inability to rely on the continuing violations doctrine to rescue her time-barred claims, "evidence of events that fall outside the statute of limitations may still be admitted as relevant background evidence to show that discriminatory animus motivated the acts that occurred within the statute of limitations." Malone v. Lockheed Martin Corp., 610 F.3d 16, 22 (1st Cir. 2010); see also Morgan, 536 U.S. at 113 (explaining that, even where discrete acts are time barred, a plaintiff may still "us[e] the prior acts as background evidence in support of a timely claim"); Pelletier v. Town of Somerset, 939 N.E.2d 717, 731 n.33 (Mass. 2010) ("If the plaintiff does not meet the continuing violation standard, the plaintiff may still use events that occurred prior to the [Chapter 151B] limitation period as background evidence of [a] hostile work environment, but may not recover damages for time-barred events.").A district court errs where it "fail[s] to evaluate the cumulative effect of the factual allegations." Ocasio-Hernándezv. Fortuño-Burset, 640 F.3d 1, 14 (1st Cir. 2011). Here,

accepting all of the allegations as true, Rae's complaint plausibly spelled out an acrimonious history of retaliatory conduct based on her advocacy on behalf of students with disabilities and her opposition to the retaliation she perceived. In particular, Rae's complaint suggests that her protests centering around Nelson's inappropriate behavior -- whether towards her or students with disabilities -- led Nelson to target her for retaliatory treatment. While additional evidence may undermine Rae's ability to succeed on the merits, the district court erred by "demand[ing] more than plausibility" at the pleadings phase. Sepúlveda–Villarini, 628 F.3d at 29. Taken as a whole, Rae's complaint sufficiently suggested that the timely adverse actions alleged were undertaken with retaliatory motives, such that her retaliatory harassment claims should not have been dismissed for failure to sufficiently plead causation.

But Rae falters when it comes to alleging that the harassment she experienced after filing her MCAD complaint plausibly rose to the level of severe or pervasive harassment necessary to sustain a claim of retaliatory harassment. One month after filing her MCAD complaint, Rae attended a disciplinary hearing when Nelson learned that a student obtained a t-shirt containing an alcohol reference from Rae's office, but she was not subject to any formal reprimand. And six months after filing her MCAD complaint, Nelson "created a false emergency" and subjected Rae to another disciplinary hearing when she left the building to use her inhaler. While we accept Rae's allegations that these events were personally humiliating and she subjectively experienced emotional distress, Rae has not pointed to any case law suggesting that these two incidents alone plausibly constituted objectively severe or pervasive harassment.[9]

At the motion to dismiss phase in particular, "[s]ubject to some policing at the outer bounds," the issue of whether

[9] We have affirmed dismissal at the summary judgment phase where the harassment was more severe or pervasive than the misconduct that Rae alleges here. See, e.g., Lee-Crespo v. Schering-Plough Del Caribe, Inc., 354 F.3d 34, 37-43, 46-47 (1st Cir. 2003) (holding that the incidents alleged were not severe or pervasive enough to constitute a hostile work environment where the plaintiff's manager warned the plaintiff not to bring any "problems" to the manager's boss, repeatedly made inappropriate remarks about the plaintiff's appearance, accused the plaintiff of having a negative attitude and threatened to reassign her to a new sales territory, and imposed requirements on the plaintiff for taking sick leave from work that went against company policy); Alvarado v. Donahoe, 687 F.3d 453, 462 (1st Cir. 2012) (holding on summary judgment that the plaintiff failed to establish a hostile work environment claim because the employer's actions did not constitute "severe or pervasive adverse conduct" where supervisors repeatedly made "taunting and mocking comments [that] were both callous and objectionable" about the plaintiff's psychiatric condition); Ponte v. Steelcase Inc., 741 F.3d 310, 314, 320-21 (1st Cir. 2014) (affirming entry of summary judgment against the plaintiff's hostile work environment claims that involved her supervisor's "unwelcome arm around her shoulder as he insisted on driving her alone back to her hotel after work" on two occasions and insinuating that the plaintiff "owed" him for hiring her).

harassment was severe or pervasive "is commonly one of degree -- both as to severity and pervasiveness -- to be resolved by the trier of fact." Gorski v. N.H. Dep't of Corr., 290 F.3d 466, 474 (1st Cir. 2002); see also Noviello, 398 F.3d at 94 (explaining that "no pat formula exists for determining with certainty whether the sum of harassing workplace incidents rises to the level of an actionable hostile work environment," and "[s]uch a determination requires the trier of fact to assess the matter on a case-by-case basis, weighing the totality of the circumstances"); cf. Billings v. Town of Grafton, 515 F.3d 39, 49 (1st Cir. 2008) (explaining that, even at summary judgment, cases providing "instructive examples of actionable sexual harassment,

. . . do not suggest that harassing conduct of a different kind or lesser degree will necessarily fall short of that standard").

But the Supreme Court has made clear that "a wholly conclusory statement of claim" cannot "survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." Twombly, 550 U.S. at 561 (alteration in original) (citation omitted). Moreover, "[t]o clear the plausibility hurdle, a complaint must contain 'enough fact[s] to raise a reasonable expectation that discovery will reveal evidence' sufficient to flesh out a viable claim." Butler v. Balolia, 736 3d 609, 617–18 (1st Cir. 2013) (second alteration in original) (quoting Twombly, 550 U.S. at 556).

Taking Rae's allegations of these two incidents as true, and even assuming that discovery would yield sufficient evidence to prove those allegations, what Rae lacks here is a "viable claim." In the context of severe or pervasive harassment, "isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'" to support a retaliatory harassment claim. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). Furthermore, Rae has not sufficiently alleged how the t-shirt and inhaler incidents affected her work performance. See Ayala-Sepúlveda v. Mun. of San Germán, 671 F.3d 24, 31 (1st Cir. 2012) (upholding grant of summary judgment against the plaintiff on a hostile work environment claim where "there is no evidence on the record that [the plaintiff's] work performance suffered as a result of his anxiety" stemming from his employer's adverse actions); Bhatti, 659 F.3d at 74 (affirming grant of summary judgment against the plaintiff on a hostile work environment claim in part because she "pointed to no effect whatsoever on her work performance").

And while Rae contends that her complaint alleges "a litany of harassing conduct over a long period of time," for reasons discussed above, only two timely incidents of retaliatory harassment stemming from filing her MCAD complaint remain. Rae has not pointed us to any case law -- nor have we independently identified any substantive support -- suggesting that these two incidents alone can plausibly satisfy the severe or pervasive harassment standard. Therefore, Rae's timely retaliatory harassment claims must be dismissed on this ground.

III. *Conclusion*

For the foregoing reasons, the district court's decision dismissing Rae's complaint is **affirmed.**

APPENDIX C

United States Court of Appeals

For the First Circuit

No. 23-1432

AMY RAE,

Plaintiff - Appellant, v.

WOBURN PUBLIC SCHOOLS; CITY OF WOBURN; MATTHEW CROWLEY, individually; CARL NELSON, individually, Defendants - Appellees.

Before Barron, Chief Judge

Lynch, Kayatta, Gelpí, Montecalvo, Rikelman, and Aframe Circuit Judges.

ORDER OF COURT

Entered: October 23, 2024

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Anastasia Dubrovsky, Clerk

cc:

Laurel Francoeur Douglas I. Louison Alexandra Milan Gill

CERTIFICATION

I hereby certify that the within Petition for a Writ of Certiorari complies with the word limitations set forth in Rule 33 (1)(h) in that the applicable portions contain 5414 words.

Signed under the pains and penalties of perjury this day of January, 2025.

/s/ Laurel J. Francoeur
Laurel J Francoeur