

16-2542

McGuirk v. Swiss Re Fin. Servs. Corp.

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

MICHELLE L. MCGUIRK, No. 16-2542-cv
Plaintiff-Appellant,

v. Filed: Oct. 26, 2017

SWISS RE FINANCIAL SERVICES, CORP.,
SWISS REINSURANCE AMERICA CORP.,
SWISS RE FINANCIAL PRODUCTS CORP.,
WALTER B. KIELHOLZ, DAVID J. BLUMBER,
CHRISTIAN MUMENTHALER, CHARLOTTE
GUBLER, KANWARDEEP AHLUWALIA, DAVID
GODFREY, ERIKA OZER, JOHN DOES,
Defendants-Appellees,

SUMMARY ORDER

**RULINGS BY SUMMARY ORDER DO NOT HAVE
PRECEDENTIAL EFFECT. CITATION TO A
SUMMARY ORDER FILED ON OR AFTER
JANUARY 1, 2007, IS PERMITTED AND IS
GOVERNED BY FEDERAL RULE OF APPELLATE
PROCEDURE 32.1 AND THIS COURT'S LOCAL
RULE 32.1.1. WHEN CITING A SUMMARY
ORDER IN A DOCUMENT FILED WITH THIS
COURT, A PARTY MUST CITE EITHER THE**

FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 26th day of October, two thousand seventeen.

Present: ROSEMARY S. POOLER, DEBRA ANN LIVINGSTON, *Circuit Judges*. GEOFFREY W. CRAWFORD,¹ *District Judge*.

Appearing for Appellant: Michelle L. McGuirk, Pro Se, New York, N.Y.

Appearing for Appellees: Christopher H. Lowe, Seyfarth Shaw LLP, New York, N.Y.

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

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

¹ Judge Geoffrey W. Crawford, United States District Court for the District of Vermont, sitting by designation.

Michelle L. McGuirk, proceeding pro se, appeals from the June 17, 2016 memorandum decision and order dismissing her complaint raising employment discrimination and related claims. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review de novo the district court's grant of a motion to dismiss for failure to state a claim, "accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff." *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016). The complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Except as discussed below, we affirm for largely the reasons stated in the district court's opinion. For the most part, McGuirk's claims are either time barred or precluded by the finding of the New York State Division of Human Rights that there was no discrimination. *See McGuirk v. New York State Div. of Human Rights*, 139 A.D.3d 570 (1st Dep't 2016). She otherwise failed to plead plausible claims.

We agree with McGuirk that she properly pled a hostile work environment claim, but affirm the district court's dismissal because she failed to properly exhaust that claim before the New York State Division of Human Rights. *See Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993) (we may

affirm “on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely”). Exhaustion of administrative remedies is a precondition to bringing suit in federal court, though not a jurisdictional requirement. *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 384 (2d Cir. 2015). McGuirk’s complaint before the Division of Human Rights did not raise her hostile work environment claim. No equitable defense to the failure to exhaust applies. Since McGuirk exhausted other claims, she was not prevented from raising the hostile work environment claim. The hostile work environment claim was not reasonably related to the other claims, so the agency did not have a basis to investigate McGuirk’s allegations. *See Williams v. New York City Hous. Auth.*, 458 F.3d 67, 70 (2d Cir. 2006) (“The central question is whether the complaint filed with the [agency] gave that agency adequate notice to investigate [the unexhausted claims].” (internal quotation marks omitted)).

We have considered the remainder of McGuirk’s arguments and find them to be without merit. Accordingly, the judgment of the district court is hereby AFFIRMED. McGuirk’s motion to remand is DENIED.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk

s/ Catherine O’Hagan Wolfe

United States Court of Appeals

Second Circuit

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MICHELLE L. MCGUIRK, No.14 **CIVIL** 9516 (CM)
Plaintiff,

JUDGMENT

- against -

Date Filed: June 20, 2016

SWISS RE FINANCIAL SERVICES, CORP.,
SWISS REINSURANCE AMERICA CORP.,
SWISS RE FINANCIAL PRODUCTS CORP.,
WALTER B. KIELHOLZ, DAVID J. BLUMER,
CHRISTIAN MUMENTHALER, CHARLOTTE
GUBLER, KANWARDEEP AHLUWALIA, DAVID
GODFREY, ERIKA OZER, AND JOHN DOES,
Defendants.

Defendants having moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), and the matter having come before the Honorable Colleen McMahon, United States District Judge, and the Court, on June 17, 2016, having rendered its Memorandum Decision and Order and as all of Plaintiff's claims must be dismissed and there is no basis for allowing her leave to replead any of them, the Court is dismissing the complaint with prejudice. There is no need to discuss other bases for dismissing particular causes of action – for example, her Title VII, ADEA and ADA claims would have to be dismissed against the corporate Defendants other than her actual employer, Swiss Re Financial Services Corp., and against the individual

Defendants, because claims under these statutes lie only against her actual “employer,” and directing the Clerk of the Court to reopen this administratively closed case, to docket the decision granting the Defendants’ motion to dismiss, to enter judgment in favor of Defendants dismissing the complaint with prejudice, to remove the motion at Docket No. 13 from the Court’s list of pending motions, and to close the file, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court’s Memorandum Decision and Order dated June 17, 2016, as all of Plaintiff’s claims must be dismissed and there is no basis for allowing her leave to replead any of them, the complaint is dismissed with prejudice. There is no need to discuss other bases for dismissing particular causes of action – for example, her Title VII, ADEA and ADA claims would have to be dismissed against the corporate Defendants other than her actual employer, Swiss Re Financial Services Corp., and against the individual Defendants, because claims under these statutes lie only against her actual “employer.” Judgment is entered in favor of Defendants dismissing the complaint with prejudice.

Dated: New York, New York

June 20, 2016

RUBY J. KRAJICK
Clerk of Court

BY: s/ Kmango
Deputy Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MICHELLE L. MCGUIRK, No. 14 Civ. 9516 (CM)
Plaintiff,
-against- Date Filed: June 17, 2016

SWISS RE FINANCIAL SERVICES, CORP.,
SWISS REINSURANCE AMERICA CORP.,
SWISS RE FINANCIAL PRODUCTS CORP.,
WALTER B. KIELHOLZ, DAVID J. BLUMER,
CHRISTIAN MUMENTHALER, CHARLOTTE
GUBLER, KANWARDEEP AHLUWALIA, DAVID
GODFREY, ERIKA OZER, AND JOHN DOES,
Defendants.

**MEMORANDUM DECISION AND ORDER
GRANTING MOTION TO DISMISS**

McMahon, J.:

On November 28, 2014, *pro se* Plaintiff Michelle L. McGuirk brought an action against her former employer, related companies and a number of her fellow employees. She asserted violations of various federal statutes, including the Fair Labor Standards Act (FLSA), 29 U.S.C.A. § 201 *et seq*; Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e; the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C.A. § 623; the Americans with Disabilities Act, 42 U.S.C.A. § 12112; the Family and

Medical Leave Act (FMLA), 29 U.S.C.A. § 2601 *et seq.*; the Equal Pay Act of 1963 (EPA), 29 U.S.C.A. § 206(d); and the Violence Against Women Act (VAWA), 42 U.S.C.A. §13891 – as well as The New York City Human Rights Law (NYCHR), New York City Administrative Code § 8-101 *et seq.* The complaint contains a “kitchen sink” list of alleged bases for discrimination against plaintiff during her seven years as a highly paid executive at Swiss Re Financial Services Corp. Specifically, Plaintiff alleges that Defendants unlawfully discriminated against her on the basis of Plaintiff’s age, sex, pregnancy, actual or perceived disability and marital or family status – literally from the day she was hired in September 2003 until she was fired in July 2010 after subjecting a male supervisor to repeated unwanted sexual advances for a year and ignoring a formal warning to stop her inappropriate behavior. Plaintiff also alleges that her employer subjected her to genetic testing and mishandled the results of those tests.

Currently before this Court is Defendants’ Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons below, Defendants’ motion is granted in full, and her claims are dismissed with prejudice.

BACKGROUND

I. Statement of Facts

Plaintiff Michelle McGuirk is a former employee of Swiss Re Financial Services Corporation, a global business of direct insurance, reinsurance and other

forms of risk transfer. Swiss Re Financial Services Corporation and Swiss Reinsurance America Corporation are subsidiaries of Swiss Reinsurance Company and Swiss Re Ltd (together as "Defendants").

The complaint alleges that Plaintiff was hired by Swiss Re Financial Services Corporation in September 2003 as a Vice President in Credit and Financial Market Risk Management in the company's New York City office. By March 2005, she had been promoted to Senior Vice President, and she became the Head of Credit Risk Management for Asset Management and Insurance in September 2005. Plaintiff remained in the Risk Management department until she was fired on July 7, 2010, although she claims she was demoted or had job duties taken from her in 2007, 2009 and 2010. (Compl. at ¶¶ 69, 89, 105).

Plaintiff alleges that she was subject to a stream of indignities throughout her employment at Swiss Re. The problems allegedly began before Plaintiff was hired in 2003, when she allegedly was forced to undergo genetic testing (*Id.* at ¶ 46), and continued after the birth of her first child in May 2004, when Defendants refused to provide a facility other than a restroom where Plaintiff could express breast milk. (*Id.* at ¶¶ 50-51.) After Plaintiff's promotion to Head of Credit Risk Management in 2005, she allegedly was required to work "unconscionable hours" that stretched until 2:00 AM. (*Id.* at ¶ 54.) When Plaintiff returned to work in 2008 after the birth of her second child, Defendants allegedly decreased

Plaintiff's authority, prevented her from attending meetings and cut her bonus by 40%. (*Id.* at ¶¶ 78-80.)

Plaintiff also contends that in January 2005, Defendants promoted a male executive with less experience in credit risk than she to the position of Chief Risk Officer, two levels of seniority above Plaintiff's position. (*Id.* at ¶¶ 58-59.) Throughout her tenure, she claims that males with less experience continued to receive preferential treatment in terms of opportunities for promotion, bonuses and preferable hours. (*Id.* at ¶¶ 59, 63, 66-68, 70-71, 84, 89, 91, 96-97, 100, 103-4.)

In 2007, Plaintiff was allegedly demoted without cause and was forced to report to a male with less experience. (*Id.* at ¶ 69).

In August 2008, Plaintiff claims to have complained to the Human Resources Department about being subjected to a hostile work environment, but was ignored. (*Id.* at ¶¶ 81-82.) In 2009, Plaintiff again complained that male co-workers were given preferential treatment (*Id.* at ¶ 93.) Plaintiff claims that she was demoted and had duties taken away from her in 2009, after making these reports. (*Id.* at ¶¶ 89-90, 94-95, 100, 102-103.) She also received an "unfair performance evaluation with gender-based non-standard non-objective criteria" in 2009 (*Id.* at ¶ 98) – although her salary was raised to \$295,000 at the end of that year. (Defs' Mem. of Law ISO Its Mot. to Dismiss Pl.'s Compl. (Dkt. No. 14) ("Defs.' Br.") Exh. B at ¶ 24.)

Plaintiff alleges that, on June 14, 2010, Defendants demanded that she either quit or accept yet another demotion. (Compl. at 105-6.) When she refused to do either, Defendants accused Plaintiff of sexually harassing Kanwardeep Ahluwalia, an executive two levels her senior. (*Id.* 107.) Plaintiff denied the accusation, but was fired, without severance, make-wholes or a prorated bonus, after what she describes as a perfunctory investigation on July 7, 2010. (*Id.* at 107-113.)

Plaintiff filed a lengthy charge, asserting discrimination on the basis of gender, age and marital status with the New York State Division of Human Rights (NYSDHR) on December 14, 2010. She also contended that she had been a victim of retaliation. As New York is a dual filing state, her complaint was also deemed filed with the Equal Employment Opportunity Commission (EEOC), alleging corresponding violations of federal law “as applicable.” (See Defs.’ Br. Ex. A, “Notarization of the Complaint”). The EEOC deferred to the NYSDHR, which handled the complaint administratively.

II. Defendants’ Side of the Story

On a pre-answer motion to dismiss in federal court, the well-pled facts of a complaint are ordinarily presumed true. This is not, however, a case in which the court is unaware of Defendants’ position, or where it is necessary to accept everything Plaintiff says as true. The New York State Division of Human Rights did not simply dismiss plaintiff’s claim for administrative convenience. It conducted an investigation into the

charges, made a preliminary determination of probable cause, and held a two-day hearing before an Administrative Law Judge, at which Plaintiff was represented by counsel for the Division. The ALJ issued detailed findings of fact, which were signed off on by the Commissioner and independently adopted by the EEOC in respect of plaintiff's claims under federal law. And the Appellate Division, First Department has recently and unanimously affirmed the NYSDHR decision.

So, herewith, as the late Paul Harvey would have said, is "the other side of the story," as found by Administrative Law Judge Robert J. Tuosto following the NYSDHR hearing:

Plaintiff was hired in August 2003 as a Vice President/Senior Credit Risk Manager. (Ex B at 4). Defendant had six "bands" of employees, and in her capacity as Vice President in Credit Risk Management she was a "C"-band employee. (Defs.' Br. Ex. C at 7.)

At the time she was hired, Plaintiff received and agreed to abide by Defendants' Nondiscrimination and Sexual harassment Policy and Code of Conduct, which prohibits any sexual harassment of fellow employees. (*Id.* at 5.)

Plaintiff's total compensation for 2008 was \$265,000. (*Id.* at 9.) In July 2009, Swiss Re's organizational chart reflected that she was the head of the Insurance subunit of the Credit Risk Management Division, in which capacity she oversaw two subordinates. Her immediate supervisor

of Brad Weisberg; her second-level supervisor was Kanwardeep Ahluwalia, who is based in London with an office in New York. (*Id.* ¶¶ 10-11).

On an unspecified date in autumn of 2009, Weisberg directed Plaintiff's subordinates to begin reporting to him. Swiss Re was concerned about Plaintiff's management style. Her year-end 2009 review described her as "successful," but Weisberg commented that she had been "unsuccessful managing her small insurance team in terms of getting them to deliver high quality business results on a timely and efficient basis. The problem centered in the communication among the team, which was ineffective at best..." (*Id.* ¶ 22.) Despite this criticism, Plaintiff's total compensation for 2009 was \$295,000. (*Id.* ¶ 24.) Eventually, her subordinates were directed to report to another woman, Kristin Reifsnyder, who was older than Plaintiff, and whom the ALJ specifically found was an appropriate comparator to Plaintiff. (*Id.* ¶¶ 23, 8.)

Ahluwalia testified at the hearing. The ALJ found him to be a credible witness as he described a disturbing pattern of harassment by Plaintiff, which began in summer of 2009, sometime after Plaintiff told him she was getting a divorce. Ahluwalia reported Plaintiff's unwelcome flirtatious behavior to the company's Human Resources Department. (*Id.* at ¶¶ 14-15.) Subsequent to this report, in December 2009, Plaintiff (who was in an emotional state), asked to speak to Ahluwalia outside the office. She met him in his hotel bar and told him that she wanted to have a relationship with him. Ahluwalia left the bar immediately. When he returned to the

hotel several hours later Plaintiff was still sitting in the bar; Ahluwalia was so concerned about her that he called a car service to make sure she got safely home. (*Id.* at ¶ 17-19.) He reported the incident to Human Resources the following day. (*Id.* at ¶ 20).

Ahluwalia's problems with Plaintiff persisted. In April 2010, Ahluwalia reported to Human Resources that Plaintiff had called him late at night and asked him to go dancing. (*Id.* at ¶ 25.) Nicole Frosch, Respondent's Vice President for Human Resources, initiated an investigation. Ahluwalia indicated discomfort with Plaintiff's advances; he wanted them to stop. Frosch met with Plaintiff and told her to "stop having any contact" with Ahluwalia. (*Id.*)

Despite this warning, and although Ahluwalia had not told Plaintiff where he would be staying on a trip to New York, Plaintiff showed up uninvited in the lobby of his hotel on June 17, 2010 at 10:00 p.m., carrying a bottle of champagne with a bow, a t-shirt and two birthday cards. (*Id.* at ¶ 26.) One of the cards contained the legend "Choose one prize!" in Plaintiff's handwriting, and five "doors" hiding "prizes" – one of those "prizes" was a massage. The other card contained an uncompleted "cryptic name-game" that Plaintiff wrote specifically for Ahluwalia. (*Id.*) Not surprisingly, Ahluwalia found the cards "completely and utterly inappropriate." (*Id.* at ¶¶ 26-7.) Plaintiff also told Ahluwalia that his marriage was "not a real marriage," which made him "extremely uncomfortable." (*Id.* at ¶ 29.)

On June 18, Ahluwalia sent Plaintiff an email telling her how "uncomfortable I feel about your

approaches to me. Your appearance at my hotel last night was unwelcome and clearly inappropriate. I see no reason why this often repeated message is being ignored. It is really quite upsetting for me.” (*Id.* at ¶ 30). Ahluwalia testified, and the ALJ specifically found, that he had been telling Plaintiff for months that her approaches toward him were unwelcome (*Id.* at ¶ 31), and that her work relationship with her supervisor had become “highly unprofessional.” (*Id.* at ¶ 34) The ALJ specifically did not credit Plaintiff’s testimony that Ahluwalia never told her that her approaches were unwelcome. (*Id.* at ¶ 36.)

As soon as Ahluwalia reported this latest visitation from Plaintiff to Frosch, a new investigation began. Frosch directed Plaintiff for a second time to have no contact with Ahluwalia. (*Id.* at ¶ 38.) As part of the investigation, Frosch interviewed Plaintiff, who said during the interview that she loved Ahluwalia “with all [her] heart and soul.” The ALJ specifically credited this testimony and found that this statement was made. (*Id.* at ¶ 40.) Frosch concluded that Complainant had romantic feelings for Ahluwalia. (*Id.* at ¶ 42.)

At the conclusion of this interview, Plaintiff was given an opportunity to resign immediately. When she refused, Plaintiff was placed on a two week paid suspension, pending completion of the investigation. (*Id.* at ¶ 40.) On June 28, while on leave, Plaintiff informed Frosch that the birthday card was intended as a “joke;” she was given another chance to resign but refused. (*Id.* at ¶ 43.)

On July 7, 2010, at the conclusion of the investigation, Swiss Re fired Plaintiff for violating Defendants' Code of Conduct, specifically its policy against sexual harassment. (*Id.* at ¶ 44.) Her total compensation through the date of her termination was \$185,000. (*Id.* at ¶ 48.) She was ineligible for severance under the terms of Swiss Re's severance pay plan, because her employment had been terminated for misconduct. (*Id.* at ¶ 50.)

The harassment did not end when her employment did; on October 5, 2010, Mr. Ahluwalia reported that he had received phone calls "all day" from Plaintiff. (*Id.* at ¶ 51.)

The ALJ found, as a matter of fact, that plaintiff was not fired based on her work performance, her age, or her gender. (*Id.* at ¶¶ 45, 47.)

The ALJ also found, as a matter of fact, that Plaintiff never complained to Frosch about unlawful discrimination on the basis of her age or gender. (*Id.* at ¶ 46.) This finding of fact was, of course, fatal to Plaintiff's allegations of retaliation.¹

Based on these extensive findings of fact, the ALJ reached the following conclusions of law:

1. Plaintiff's complaints about various discrete acts concerning work assignments and duties and compensation, occurring from the time she was

¹ The ALJ did not so state explicitly, but this finding of fact can be fairly inferred because he dismissed the complaint in its entirety; he could not have done so if Plaintiff had actually engaged in protected activity.

hired in August 2003 until December 2009, did not constitute a “continuing violation” as a matter of law and so did not create a “hostile work environment” as a matter of law. As a result, Plaintiff’s failure to file an administrative complaint about those actions in a timely manner were fatal to any claims relating to allegations of “differential treatment on the basis of protected class memberships...which occurred from the time of Complainants hire until December, 2009 must be dismissed as time-barred.”(*Id.* at ¶ 10-12.) The ALJ specifically found that “ no proof in the record that the acts alleged rise to the level constituting a policy or practice on the part of Respondent, or that specific and related instances of discrimination were permitted to continue unremedied....”

2. It was appropriate for the ALJ to consider any acts that took place in the seven month period between December 2009 and the termination of plaintiff’s employment in July 2010. (*Id.* at ¶ 12.)
3. **The only reason for Swiss Re’s decision to fire Plaintiff was her actions toward Ahluwalia, which violated the company’s Code of Conduct. (*Id.* (emphasis added).)**
4. The only person among all purported comparators listed by Plaintiff who actually was in a position comparable to Plaintiff was Reifsnyder. Since Reifsnyder was both a woman and older than Plaintiff, Plaintiff’s claim for discrimination in compensation based on her age and gender was dismissed. (*Id.* at ¶ 8).

On June 3, 2014, the Acting Commissioner of the NYSDHR, Helen Dian Foster, adopted and issued the ALJ's Findings of Fact and Conclusion of Law and Plaintiff's administrative complaint was dismissed on the merits. (*Id.* at 2). Plaintiff took an appeal from that ruling; Justice Schlesinger of the New York State Supreme Court referred the appeal to the Appellate Division: First Department. On May 19, 2016, a First Department panel unanimously confirmed the ALJ's award. (Dkt. No. 108-1.) In addition to confirming the award generally, the First Department specifically held that Plaintiff did not demonstrate that she was fired for any discriminatory reason, while Swiss Re did show, via admissible evidence, that it had "legitimate, independent and nondiscriminatory reasons" to fire McGuirk. The Appellate Division also specifically held that McGuirk had failed to establish that the administrative hearing was in any way unfair.

Wholly independently, the EEOC adopted the ALJ's findings and conclusions, and issued a "no probable cause" determination on Plaintiff's corresponding federal claims, on August 27, 2014. It issued a right to sue letter on the same date. (Defs.' Br. Ex. D.) This lawsuit followed.

The parties concluded their briefing on Swiss Re's motion to dismiss some time ago. However, the case was administratively closed because of the lengthy period that the appeal was pending in the First Department. By letter dated May 23, 2016, Swiss Re advised the court of the Appellate Division's decision. (Docket # 108 and Document 108-1 attached thereto). I therefore direct the Clerk of Court to reopen this

case and file the following decision disposing of the pending motion.

DISCUSSION

I. Standards of Governing Law

When a party moves to dismiss a complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim on which relief may be granted, a court must first determine if the complaint contains “sufficient factual matter,” which, if accepted as true, states a claim that is “plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Threadbare recitals of the elements of a clause” or “labels or conclusions” do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where “the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct,” a complaint is insufficient under Fed.R.Civ.P. 8(a) because it fails to “show...that the pleader is entitled to relief.” *Id.* at 679.

When evaluating a motion to dismiss, the court may evaluate “Documents that are attached to the complaint or incorporated in it by reference.” *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007). These are deemed “part of the pleading.” *Id.* In addition, a court may consider matters of which judicial notice may be taken and documents that are “integral” to the pleading. *Derbaremdiker v. Applebee’s Int’l. Inc.*, 12 CIV 1058, 2012 U.S. Dist. LEXIS 138596, at *11 (E.D.N.Y. Sept. 26, 2012), *aff’d* 519 Fed. App’x. 77 (2d Cir. 2013).

Because the plaintiff is proceeding *pro se*, “the Court construes the complaint liberally, interpret[ing] it to raise the strongest argument it suggests.” *Braxton v. Nichols*, No. 8 Civ. 08568, 2010 WL 1010001, at *1 (S.D.N.Y. Mar. 18, 2010.). However, the court is not obliged to accept as true “conclusions of law or unwarranted deductions of fact.” *First Nationwide Bank v. Gelt Funding Corp.*, F.3d 763, 771 (2d Cir. 1994).

II. Principles of Law Applicable to Plaintiff's Case

Although Defendants did not choose to brief their motion on a claim-by-claim basis, that proves the easiest and clearest way to deal with the complaint. However, before diving into a claim-by-claim analysis of the 21 different claims alleged by the Pro Se complaint, several principles of law applicable to multiple claims should be discussed. These include former adjudication (*res judicata* and collateral estoppel); election of remedies (insofar as it concerns plaintiff's claims under the New York City Human Rights Law) and the statute of limitations (including the doctrines of continuing violation, hostile work environment and equitable tolling).

A. Principles of Former Adjudication

Defendants argue that Plaintiff is precluded from maintaining all of her claims arising under Title VII, ADEA and ADA, as well as relitigating all issues raised in connection with those claims, under the doctrines of collateral estoppel and *res judicata*.

Collateral estoppel, or issue preclusion, applies to issues of fact that were fully and fairly litigated in a

different proceeding. There are two requirements for the invocation of the doctrine of collateral estoppel under New York law: (1) "there must be an identity of issue which has necessarily been decided in the prior action and is decisive in the present action" and (2) "there must have been a full and fair opportunity to contest the decision now said to be controlling." *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 71, (1969). When there has been a final determination on the merits of an issue and the party against whom issue preclusion is sought had a full and fair opportunity to contest that same issue in some earlier controversy, she will not be permitted to litigate it again. *Johnson v. Watkins*, 101 F.3d 792, 794 (2d Cir. 1996).

Res judicata, or claim preclusion, bars a plaintiff from relitigating a claim that she asserted in a previous action when (1) the previous action involved an adjudication on the merits; (2) the previous action involved the same parties or those in privity with them; and (3) the claims asserted in the subsequent action (i.e., in this case) were or could have been asserted in the prior action. *EDP Medical Computer Systems, Inc. v. U.S.*, 480 F.3d.621, 625 (2d Cir. 2007). The "could have been" aspect of the test bars claims "involving the same transaction or connected series of transactions" as long as they "could have been raised" in the prior action. *Gertsakis v. U.S. Equal Opportunity Employment Commission*, 11 Civ. 5830, 2013 WL 1148924 at *6 (S.D.N.Y. Mar. 20, 2013).

In this instance, the prior proceeding was not a lawsuit, but a state administrative proceeding.

Pursuant to the Full Faith and Credit statute, 28 U.S.C. § 1738, federal courts are required to “give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.” *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 467 (1982). Thus, when a state court confirms an NYSDHR no probable cause finding, Section 1738 precludes federal litigation based on the facts determined by the NYSDHR. *U.S. v. East River Housing Corp.*, No. 13 Civ. 8650, 2015 WL872160 at *13 (S.D.N.Y. Mar. 2, 2015).

Once a state administrative determination has been reviewed and endorsed by a court of law, issue and claim preclusion arising out of that proceeding are determined in the same manner as would have been the case had the prior proceeding been a lawsuit: (1) if the claim (in the case of res judicata) or issue (in the case of collateral estoppel) was actually litigated in the prior proceeding or could have been litigated there, and (2) if the plaintiff had a full and fair opportunity to litigate that claim or issue, she will be precluded from relitigating it in a federal court. *Kremer*, 456 U.S. at 467.

It is well-settled, however, that Section 1738 and full faith and credit do not extend to the findings of unreviewed state administrative decisions – at least, when Congress clearly indicated that it does not. *Kosakow v. New Rochelle Radiology Assoc.*, 274 F.3d 706, 728 (2d Cir. 2001). In *Kremer*, the Court held that, “Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determination

by state agencies also should not preclude such review even if such decision were to be afforded preclusive effect in a State's own courts." 456 U.S. at 470 n.7. In connection with Title VII claims (and ADEA or ADA claim), Congress specifically indicated that unreviewed administrative agency findings were reviewed and endorsed by a state court, they did not bar a trial de novo. *Univ. of Tenn. v. Elliot*, 478 U.S. 788, 795-96 (1986); *Jones v. New York City Housing Auth.*, 94 Civ. 3364, 1995 WL 736916, at *1-2 (S.D.N.Y. 1995).

In *Kremer*, the Supreme Court explicitly held that due process considerations (a full and fair opportunity to litigate) were met in a case like this one, where the NYSDHR held a hearing, and the results of that hearing were reviewed and affirmed by a court. 456 U.S. at 467. The Second Circuit recognizes that the dismissal of discrimination or retaliation claims arising under the New York State Human Rights Law, following a full hearing by an administrative law judge, whose findings have been reviewed and upheld by a court, bars relitigation of corresponding claims under federal antidiscrimination laws. *Yan Yam Koo v. Dep't of Buildings of City of N.Y.*, 218 Fed. Appx. 97, 98-99 (2d Cir. 2007).

In *Kosakow*, by contrast, the Second Circuit held that collateral estoppel would not apply to an unreviewed NYSDHR "no probable cause" decision that was reached after an "investigation" of unspecified scope but without a "hearing" at which witnesses were called and cross examination was afforded. *Kosakow, supra.*, 274 F.3d at 736. Courts in

this Circuit recognize that the New York State Human Rights Law “contemplates judicial review of DHR determinations as part of an aggrieved party’s full and fair opportunity.” *East River Housing Corp.*, 2015 WL872160 at *26. However, a party does not need to take advantage of that judicial review; even after a full hearing, she can forego it and relitigate all aspects of her discrimination claims in a federal court, with the findings of the administrative agency nothing more than evidence that is entitled to “substantial” – but not determinative – weight. Thus, under New York law, collateral estoppel does not attach by virtue of an unreviewed NYSDHR decision alone. *Vargas*, 2008 WL261090 at *4.

McGuirk brought this lawsuit after losing at the NYSDHR. Her loss followed, not just an investigation, but a full hearing, at which her position was represented by counsel for the agency, witnesses were called, cross examination was afforded and exhibits were introduced. The ALJ issued a comprehensive decision making numerous findings of fact and rejecting McGuirk’s claims, both on the facts and on the law.

McGuirk elected to file a timely appeal of the ALJ’s decision. The State Supreme Court (Schlesinger, J.), as permitted by state law, bumped the matter immediately to the Appellate Division: First Department. The appeal was *sub judice* at the time Plaintiff filed this lawsuit; that appeal has now concluded in favor of Swiss Re, with both Plaintiff’s merit-based arguments and her procedural challenge to the proceedings before the NYSDHR rejected unanimously.

The First Department's ruling constitutes a state court judgment reviewing the findings and conclusions of the administrative agency. The agency both performed an investigation and held a hearing. No less an authority than the United States Supreme Court has recognized that the combination of a full hearing before the NYSDHR followed by judicial review constitutes a full and fair opportunity to litigate consistent with the Due Process Clause. Therefore, the ALJ's findings and conclusions are entitled to such preclusive effect as they would be given by the courts of the State of New York. *Kremer*, 456 U.S. at 466.

Because former adjudication applies only to claims and issues that were actually litigated, or that could have been litigated, in the state administrative proceeding, it is important to be quite clear (as Defendants are not in their moving brief) about what was actually litigated before the NYSDHR.

The ALJ made numerous findings of fact, most of which relate to Plaintiff's claim that she was fired on the basis of her gender, age, disability and marital status, as well as in retaliation for her 2008 and 2009 complaints about being subjected to discrimination and a hostile work environment. The ALJ's extensive findings of fact in that regard are set out above.

The ALJ further found that all of plaintiff's claims relating to action between August 2003 and December 2009 relating working assignment, transfer of responsibility, and compensation, were time barred, because (1) they were not continuing violations, but discrete acts; and (2) they were not

timely brought. That ruling is of limited preclusionary value, as the statute of limitations is different under the NYSHRL and the various federal statutes on which plaintiff rests her claims in the Complaint.

However, as for claims from and after December 14, 2009 (which were the only claims that the ALJ determined on the merits), he reached, and the NYSDHR adopted, the following findings:

1. From December 2009 forward, Plaintiff was not discriminated against in terms of pay on the basis of her age and gender. The ALJ conclude that the male and younger comparators proffered by Plaintiff were not in fact comparable to her, and concluded that the only real comparator about whom Plaintiff offered evidence, Kristin Reifsnyder, was both a woman and older than Plaintiff, so the fact that she was paid more than Plaintiff did not indicate either age or gender bias on the part of Swiss Re. (Defs.' Br. Ex. C at 13.)
2. Plaintiff was fired because of her sexual harassment of Ahluwalia, and not because of any prohibited factor: "Nothing in the record suggests that this decision was motivated by unlawful discrimination." (*Id.* at 13.)
3. There was no credible evidence that Plaintiff ever complained to Frosch about unlawful discrimination on the basis of age or gender. (*Id.* at ¶ 46.)

2. Election of Remedies

New York's Human Rights Law contains an election-of-remedies provision that requires a plaintiff to choose between an administrative remedy and a judicial one." *Stanley v. Guardian Sec. Servs., Inc.*, 800 F. Supp. 2d 550, 555-56 (S.D.N.Y. 2011) (citing N.Y. Exec. Law § 297(9)). "The election-of-remedies provision applies to actions in federal court as well as state court." *York v. Assoc. of Bar of City of N.Y.*, 286 F.3d 122, 127 (2d Cir. 2002). Consequently, "if a litigant files a discrimination complaint with the [State Division], [he] may not bring a subsequent judicial action based on the same incident." *Id.* (quotations omitted). Instead, the dissatisfied litigant must appeal the decision of the State Division to the State Supreme Court. *See* N.Y. Exec. Law § 298.

There are only two exceptions to this jurisdictional bar: Complaints filed with the NYSDHR but dismissed for administrative convenience, and complaints filed with the NYSDHR by the EEOC, rather than by the plaintiff, can be adjudicated in a court of law despite the election-of-remedies rule. *Williams v. Skyline Auto. Inc.*, No. 11-cv-8318 (KBF), 2012 WL 1965334, at *3 (S.D.N.Y. May 24, 2012).

Here, Plaintiff does not assert any claims under the New York State Human Rights Law, so there is no need to dismiss any state law claims under the election of remedies doctrine. However, she does assert five claims under the New York City Human Rights Law (NYCHRL), N.Y.C. Admin. Code § 8-502.

Plaintiff's choice to file with the NYSDHR bars her assertion of any claims that were actually litigated before the NYSDHR, because the NYCHRL "contains an election-of-remedies clause analogous to that of the NYSHRL, barring claims when a plaintiff has filed a complaint with the city commission on human rights *or with the state division of human rights* with respect to such alleged unlawful discriminatory practice or act of discriminatory harassment." *McPherson v. Plaza Athenae, NYC*, No. 12-cv-0785 (AJN), 2012 WL 3865154, at *4 (S.D.N.Y. Sept. 4, 2012) (citing N.Y.C. Admin. Code § 8-502(a)).

2. The Statute of Limitations

Plaintiff has asserted 21 separate claims. The statutes of limitations differ for the various claims. Herewith the rules that will be applied:

(a) For claim arising under Title VII, ADEA and the ADA: the plaintiff must exhaust administrative remedies by filing a claim with either the EEOC or (as plaintiff did) the NYSDHR within 300 days of the occurrence of each discrete act of discrimination. When the administrative proceeding concludes and the plaintiff obtains a right to sue letter, she has 90 days from the receipt of that letter to file her lawsuit on those exhausted claims in federal court.

For purposes of a pay discrimination claim under Title VII (on the basis of gender), the Lily Ledbetter Fair Pay Act Act, Pub.L. No. 111-2, 42 USCA § 2000e-5, provides that a new discrete claim accrues with the receipt of each paycheck. The Ledbetter Act

does not convert pay discrimination into a "continuing violation."

Which brings us to the subject of continuing violations.

If a plaintiff has experienced a "continuing practice and policy of discrimination ...the commencement of the statute of limitations may be delayed until the last discriminatory act in furtherance of it." *Miller v. Int'l Tel. and Tel. Corp.*, 755 F.2d 20, 25 (2d Cir. 1985). "If a continuing violation is shown, a plaintiff is entitled to have a court consider all relevant actions allegedly taken pursuant to the employer's discriminatory policy or practice, including those that would otherwise be time barred." *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996).

While the continuing violation doctrine is traditionally recognized in Title VII complaints, it has generally been applied to other statutes protecting against discrimination. The doctrine applies to claims brought under Title VII, ADEA and the ADA.

Discrete acts of discrimination, including "termination, failure to promote, denial of transfer or refusal to hire," as well as disparate pay, denials of accommodation and performance evaluations, are not considered to be "continuing violations", even if a plaintiff has experienced more than one of them over a period of time. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, (2002); *Baker v. CSX Transp. Inc.*, 546 F.Supp.2d 90, 95-97 (W.D.N.Y.

2008). The Court in *Morgan*, 536 U.S. 101 at 110, held that each discrete discriminatory act “starts a new clock for filing charges alleging that act” and that the act “‘occurred’ on the day it ‘happened’”. The existence of past acts and the employee’s prior knowledge of their occurrence, however, does not bar employees from filing the charges about related acts as long as the charges are timely filed. *Id.* at 113. In contrast to discrete acts, a continuing violation can be filed so long as part of the alleged conduct falls within the appropriate statute of limitations. *Id.* at 118. Therefore, a plaintiff must file her lawsuit or administrative charge (as the case may be) as to each such discrete act within the relevant period of limitations.

A claim of hostile work environment under Title VII is generally considered to be a continuing violation. *Morgan*, 536 U.S. 101, 115-116. However, hostile work environment is a term of art: it applies to the circumstances where a party is subjected to “discriminatory intimidation, ridicule, and insult” that is “sufficiently severe or pervasive to alter the circumstances of the victim’s employment and create an abusive working environment” because of race, gender, age, or membership in some other protected class. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). A series of acts constituting pay discrimination, failure to promote, demotion, and the like, do not, taken together, constitute a “hostile work environment.” And that is what Plaintiff here alleges. She does not allege that she was subjected to either sexual harassment or to a continuing barrage of gender- or age-based ridicule and harassment that made it difficult to do her job (and indeed, Swiss Re’s

defense against her claim of discrimination is that McGuirk herself is the person who was engaged in sexually harassing behavior – a defense that was sustained by the NYSDHR). As a result, McGuirk cannot rely on the hostile work environment doctrine to extend the statute of limitations on her various discrimination claims.

“As a general rule, courts in the Second Circuit have viewed continuing violation arguments with disfavor.” *Bernstein v. The MONY Group, Inc.*, 228 F.Supp.2d 415, 418 (S.D.N.Y. 2002), see e.g. *Fitzgerald v. Henderson*, 251 F.3d 345, 375 (2d Cir. 2001); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 (2d Cir. 1998); *Francis v. City of New York*, 235 F.3d 763, 767-68 & n. 2 (2d Cir. 2000). In this case, Plaintiff faces the additional hurdle that the ALJ ruled, in connection with her analogous claims under the NYSDHR, that she had failed to establish that the acts alleged rose to the level of “constituting a policy or practice on the part of [Defendants], or that specific and related instances of discrimination were permitted to continue unremedied over an extended period of time.” (Defs.’ Br. Ex. C at 12). In sum, she was not subjected to a “continuing violation.” (*Id.*) Her claims were a series of discrete acts of alleged discrimination, each of which was subject to its own individual statute of limitations.

(b) For claims arising under the Fair Labor Standards Act, the Equal Pay Act, and the Family and Medical Leave Act: A plaintiff does not need to exhaust administrative remedies in order to bring a claim under any of these federal statutes in a court of law. By the same token, a plaintiff cannot defer

filing such claims until she has finished exhausting related claims under Title VII, ADEA or the ADA. All claims under these statutes must be brought by filing a complaint in a court of law within two years of the act constituting the violation. For the FLSA, EPA, and FMLA, claims asserting a wilful violation must be brought within three years of the act constituting a violation. The operative date is the date the complaint is filed; the fact that an administrative proceeding arising out of the same or similar facts is pending is of no relevance and does not toll the statute.

The continuing violation doctrine does not apply to claims brought under the FLSA, the Equal Pay Act, or FMLA. *Acosta v. Yale Club of N.Y. City*, No. 94 Civ. 888, 1995 WL 600873, at *3 (S.D.N.Y. Oct. 12 1995) (rejecting application of “continuing violation” theory to FLSA claims because the FLSA does not permit challenges to violations occurring in pay periods outside the normal limitations period); *Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 119 (2d Cir. 1997) (holding that payment of unequal compensation under the EPA does not constitute a continuing violation as it is “fundamentally unlike other claims of ongoing discriminatory treatment because it involves a series of discrete individual wrongs”); *Smith v. Westchester Cnty.*, 769 F.Supp.2d 448, 463 n. 14 (S.D.N.Y. 2011) (“the weight of authority leans decidedly against” applying the continuing violation doctrine to FMLA claims).

(c) Section 1981 of the Civil Rights Act of 1867: a plaintiff must assert a claim under Section 1981

within four years of the date of the occurrence of the violation.

(d) Equitable Tolling: The equitable tolling doctrine effectively suspends the running of the relevant statute of limitations if a party is unable to protect his rights.

Equitable tolling is only appropriate in “rare and exceptional circumstance[s],” such as when a party “is prevented in some extraordinary way from exercising his rights.” *Smith v. McGinnis*, 208 F.3d 13, 16 (2d Cir. 2000); *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996). In determining if equitable tolling should apply, the court should consider whether the plaintiff has acted with reasonable diligence during the time period he seeks to have tolled and has proved with competent evidence that extraordinary circumstances justify application of the doctrine. *Zerilli-Edelglass v. New York City Transit Authority*, 333 F.3d 74, 80-81 (2d Cir. 2003).

Equitable tolling applies to claims brought under the FLSA, the Equal Pay Act, and FMLA as well as to claims under Title VII, ADEA, the ADA, and the NYCHRL. See *Yahraes v. Restaurant Associates Events Corp.*, No. 10-Cv-935, 2011 WL 844963 at *3 (S.D.N.Y. Mar. 8, 2011) (finding equitable tolling warranted in the case of FLSA claims); *Zimmelman v. Teachers’ Ret. Sys. of City of N.Y.*, No. 08 civ. 6958, 2010 WL 2034436 at *4 (S.D.N.Y. May 20, 2010), (discussing equitable tolling in terms of Equal Pay Act); *Bunce v. N.Y. Power Authority*, No. 13-cv-57A, 2015 WL 3398151 (equitable tolling may be applicable for FMLA claims); *Harrison v. Potter*, 323

F.Supp.2d 593, 600 (S.D.N.Y. 2004) (Title VII action survives when there is a basis to apply equitable tolling); *Grinnell v. General Elec. Co.*, 907 F.Supp. 544 , (N.D.N.Y. 1995), (equitable tolling may apply to ADEA claims); *Celestine v. Cold Crest Care Center*, 495 F.Supp.2d 428 (S.D.N.Y. 2007) (holding that equitable tolling for ADA claims warranted); *Apionishev v. Columbia University*, No. 09 Civ. 6471, 2011 WL 1197637 at *4 (S.D.N.Y., Mar. 25, 2011) (equitable tolling is permitted for NYCHRL claims).

Here, Plaintiff claims that, “there is cause to toll claims for deteriorated state of [her] health from multiple disease, treatment and side effects, prohibiting a reasonable person from seeking recourse.” (Affirm. in Opp’n to Mot. to Dismiss (Dkt. No. 49) (“Pl.’s Opp’s”) at 3.)

While illness may constitute an exceptional circumstance, that is true only if the party seeking tolling was so incapacitated by her illness that she could not take action to protect her rights during the period she seeks to toll. A party seeking to toll the statutes of limitations because of illness must provide the court with a “particularized description of how her condition adversely affected her capacity to function generally or in relationship to the pursuit of her rights.” *Zerilli-Edelglass*, 333 F.3d 74, 80-81 (2d Cir. 2003). A plaintiff seeking equitable tolling must demonstrate that her disability severely impaired her ability to meet her filing deadline, and where, as here, different deadlines are applicable to different claims, the evidence must support a finding of severe disability at each deadline and continuing thereafter.

Plaintiff McGuirk offers not a scintilla of evidence to demonstrate that any illness or disability exercising her rights. None of the materials submitted with Plaintiff's Federal Complaint or in connection with the Motion to Dismiss demonstrates that Plaintiff was so ill that the "harm" affected her ability to comply with any deadline applicable to her claims (some of which passed as early as 2005 or 2006). During the early years when her alleged claims were accruing (2003-2009), Plaintiff was holding down an executive/administrative job at a major international reinsurance company. She was going to work regularly, supervising employees, and performing well enough to earn regular raises. She was making a quarter of a million dollars or more year after year. She was anything but incapacitated. There is no evidence in the record that Plaintiff regularly missed work due to illness or disability during these years; and as Swiss Re is not an eleemosynary institution, it is impossible to conclude that Plaintiff could perform her high-functioning job (and raise two children at the same time) while being incapable of filing a charge with the EEOC/NYSDHR or a complaint in this or some other court.

Since her termination, Plaintiff has been diligently pursuing her claims of discrimination. She filed her charge with NYSDHR and litigated it vigorously between December 2010 (when she filed Exhibit A, a voluminous pleading supported with extensive detail) and August 2014 (when she filed an appeal from the ALJ's adverse determination after hearing). Filing and appealing the case before the NYSDHR required Plaintiff to "relive the memories of the alleged discriminatory treatment" in an

adversarial setting. *Tsai v. Rockefeller Univ.*, 137 F. Supp. 2d 276, 282-3 (S.D.N.Y. 2001). While Plaintiff may have been distraught by this process, she was anything but incapacitated. Indeed, more than once during the hearing, she insisted that the proceedings were not “too emotionally burdensome” and could go forward (Pl.’s Opp’n Ex. 25, at 42-43, 46).

During these same four years, Plaintiff also litigated an action against her landlord in New York State Court. (Decl. of Christopher H. Lowe (Dkt. No. 56) (“Lowe Reply Decl.”) Ex. B; NYSDHR Complaint.) When a party is engaged in litigation in other contexts, there is no basis to toll the statute of limitations for illness or disability in a case involving employment discrimination and related claims. *See Lloret v. Lockwood Green Eng’rs, Inc.*, No. 97-CV-5750, 1998 WL 142326, at *4 (S.D.N.Y. Mar. 27, 1998) (“deep depression” did not merit equitable tolling where plaintiff was “not so affected that he was unable to take care of his legal affairs, as evidenced by his filing of his bankruptcy claim”).

In short, Plaintiff has not demonstrated, either by her own actions or with competent medical evidence, that she was incapable of taking care of legal affairs relating to her employment during all or any identifiable portion of the eleven year period prior to the filing of this lawsuit. There is no basis for any equitable toll. All of Plaintiff’s 21 claims are subject to their respective statutes of limitations.

With these principles in mind, we turn to the claims asserted.

III. Plaintiff Has Failed To State a Claim on Any of Her 21 Causes of Action, So Her Complaint Must Be Dismissed In Its Entirety

A. First Cause of Action

Plaintiff's First Cause of Action asserts a violation of Fair Labor Standards Act, 29 U.S.C.A. § 207(r)(1)(B), which provides that an employer must provide a "place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." Plaintiff claims that she was denied a place other than a bathroom to express milk following the birth of her children in 2004 and 2008.

There are two problems with Plaintiff's claim.

First, the law on which McGuirk relies had not yet been passed in 2004 or 2008. It became effective on Mar. 23, 2010. Therefore, assuming she was required to express milk in the bathroom after the birth of her children, Swiss Re did not violate any law then on the books by forcing her to do so.

Second, as discussed above, claims under the FLSA (which do not have to be exhausted) must be brought in court within two years from the date of the violation, or three years from the date of a willful violation. 29 U.S.C. § 255. Any claim Plaintiff might have had back in 2004 expired in 2007; and claims arising after she returned to work in 2008 ceased to be viable no later than 2011 or possibly early 2012 (depending on how long Plaintiff was expressing breast milk).

Plaintiff's First Cause of Action is dismissed.

B. Second Cause of Action

In her Second Cause of Action, Plaintiff asserts a violation of Title VII in that Defendants removed Plaintiff's job duties and granted male co-workers higher benefits and pay following the births of Plaintiff's children in 2004 and 2008.

This claim is obviously time-barred. The actions of which Plaintiff complains are discrete acts that were allegedly taken by her employer after the births of her two children. As soon as Swiss Re removed Plaintiff's job duties or denied her the same pay and benefits given to men after she returned to work from her maternity leaves, Plaintiff was required to exhaust administrative remedies by filing a charge with the EEOC. For the reasons outlined above, there is no excuse for her not having timely filed a charge back in 2005 (at the latest – Plaintiff does not say in what month her child was born or in what month she returned to work or in what month her duties and pay were altered) or in 2009 (ditto). She does not assert a continuing violation, and she has not come close to establishing that she would have been entitled to equitable tolling during those time periods. Indeed, Plaintiff asserts that she was working very long hours after the birth of her first child; while she may not have had much in the way of spare time, she was plainly capable of filing an EEOC charge.

To the extent she alleges pay differential based on her status as a woman or mother, there is no need to

try to salvage Plaintiff's claim by construing it as falling under the Equal Pay Act – both because Plaintiff has asserted a separate claim under Title VII (see *infra.*, pages 28-29) and because any such claim is time-barred (*id.*).

The Second Cause of Action is dismissed.

C. Third Cause of Action

Plaintiff's Third Cause of Action alleges that Defendants violated Title VII by retaliating against Plaintiff when she returned from maternity leave in 2008 by denying her a position equivalent to her former job in terms of pay, benefits, and working conditions after Plaintiff reported disparate treatment.

Again, this claim is barred due to Plaintiff's failure to exhaust her administrative remedies in a timely manner.

Plaintiff alleges no facts tending to establish that anyone at Swiss Re said anything to her following her return to work that would have indicated a desire to retaliate against her for complaining about employment discrimination, so her inference that the change in her job duties (which she dates to 2006 (see Compl. at ¶¶ 63-64)) or pay and benefits would have had to follow hard on her complaint about workplace conditions. It is well settled in this Circuit that a claim of retaliation only lies when the adverse action experienced by a plaintiff was temporally proximate to her complaint – and temporal proximity means that the adverse action occurred within a few months of the complaint. *Woodworth v. Shinseki*, 447

Fed. Appx. 255, 257-58 (2d Cir. 2011). Plaintiff returned to work following her second maternity leave in March 2008. (Compl. at ¶ 75). She alleges that she complained in August 2008, reporting a “hostile work environment...[and] junior male employees who failed to meet minimum job standards, put the firm at risk and lacked work ethic.” (*Id.* at ¶¶ 81-82). Plaintiff then alleges that between September 2008 and February 2010, she was not allowed to complete training or travel for meetings (*Id.* at ¶ 84); that she was prevented from applying to higher positions (*Id.* at ¶ 87); and that her authority was denied (*Id.*).

Plaintiff could and should have filed an EEOC charge alleging retaliation due to the birth of her child sometime in 2009. She certainly did not have until December 2010 to complain about adverse action that took place following her return to work in 2008.

Another federal statute, the Family Medical Leave Act (FMLA), requires an employer to restore to any employee following such a leave “the position of employment held by the employee when the leave commenced” or “an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment” 29 U.S.C.A. § 2614(a)(1). To the extent that this cause of action can or should be construed as a claim for FMLA retaliation, it is time-barred because Plaintiff had to sue on the claim within two years following her return to work under conditions that differed from those she experienced before taking FMLA leave.

For all these reasons, the Third cause of Action must be dismissed.

D. Fourth Cause of Action

Plaintiff's Fourth Cause of Action asserts a claim for retaliation in reliance on "Title VII under FMLA." Basically, Plaintiff claims that Defendants retaliated against her by not giving her a merit pay raise after she complained about discrimination against her in 2008. As Plaintiff is proceeding *pro se*, I will analyze the claim under both Title VII and FMLA.

Under Title VII, Plaintiff's claim is plainly time-barred. She complains about not receiving a pay raise in 2008. Any assertion that this constituted retaliation under Title VII had to be exhausted, and Plaintiff's charge had to be filed no later than 300 days after she did not get the raise. Assuming that date to be December 31, 2008, her charge had to be filed by October 27, 2009. Plaintiff did not file a charge until December 17, 2010 – more than a year too late.

As for her claim of retaliation under FMLA, Plaintiff was not required to exhaust administrative remedies, but she had to file her complaint in court within two years from the date of the last alleged discriminatory act – which in this case was the refusal to give her a merit pay raise – in order to assert her claim timely. 29 U.S.C. § 2617(c)(2). In the case of willful violations, claims will be dismissed if they are filed three years after the alleged incident. While a separate claim accrues each time an aggrieved employee received a paycheck reflecting

discriminatory wages, *see Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 118 (2d Cir. 1997), Plaintiff received her last paycheck when she was fired on or about July 7, 2010. Giving her the benefit of the doubt, her claim had to be asserted, by filing a lawsuit, no later than July of 2013. This lawsuit was not filed until November 26, 2014 – about 16 months too late. *Redman v. New York State Correctional Services*, No. 10 CV 5368, 2011 WL 5119574 (Oct. 12, 2011) (dismissing FMLA claim as time-barred when filed four years after termination).

Plaintiff's Fourth Cause of Action is dismissed.

E. Fifth Cause of Action

Plaintiff's Fifth Cause of Action asserts a violation of FLSA because Defendant failed to pay her overtime, and set different terms and conditions for males in regard to overtime from 2005 until her firing in 2010.

Again, there are two problems with Plaintiff's claim for relief.

First, Plaintiff is not eligible for overtime. The FLSA guarantees minimum overtime compensation for hours worked in excess of 40 hours per week, 29 U.S.C.A. § 207, but not to employees who made as much as Plaintiff did. If an employee is a "highly compensated employee," then the provisions of § 207 do not apply. 29 U.S.C.A. § 213(a)(1); 29 C.F.R. § 541.61. McGuirk was paid an annual salary of \$265,000 in 2004 and \$295,000 in 2009. (Def.'s Br. Ex. B ¶¶ 9,24.) An employee whose compensation exceeds \$100,000 a year is deemed exempt from the

protections of the FLSA's overtime provisions. 29 C.F.R. § 541.601.²

Second, even if Plaintiff were eligible for overtime, the FLSA, like Title VII, has a two year period for the statute of limitations, three years in the case of willful violations. 29 U.S.C. § 255(a). Thus, as a general rule, claims alleging conduct that occurred more than two (or three) years prior to the claimant's initiation of the suit are dismissed as time-barred. *Wang v. Palmisano*, 51 F.Supp.3d 521 (S.D.N.Y. 2014) (granting motion to dismiss when FLSA claim filed five years later). As Plaintiff was fired by Swiss Re on July 7, 2010, she would have had to file any claims under the FLSA in a court of law by July 7, 2013 at the latest – even viewing the facts in the light most favorable to her and giving her the benefit of the three-year willful violations window.³

Therefore, Plaintiff's Fifth Cause of Action is dismissed.

² Plaintiff undoubtedly qualifies for the executive, administrative or professional exceptions as well. In order to meet the criteria for the "administrative" exemption, for example, the employee must be compensated on a salaried basis (as Plaintiff was) and her primary duties require the "exercise of discretion." 29 C.F.R. § 541.200(a). Plaintiff affirmatively pleads that she "exercised good judgment, technical expertise and unique knowledge of structural terms to identify credit risk" and "report[ed] directly" to the Head of Credit & Financial Management. (Cplt. at ¶¶ 47-8). Because she qualifies as a highly compensated employee by any possible definition, however, it is not necessary to go further.

³ Even then, most of her claims would be time-barred, because each failure to pay overtime is a separately-accruing claim.

F. Sixth Cause of Action

Plaintiff's Sixth Cause of Action asserts a violation of the Equal Pay Act. Plaintiff claims that, starting in 2006, she received lesser compensation and benefits that comparable men due to her gender.

The Equal Pay Act, 29 U.S.C. § 206(d)(1), prohibits an employer from discriminating "between employees on the basis of sex by paying wages...at a rate less than the rate at which he pays wages to employees of the opposite sex...for equal work on jobs...which are performed under similar working conditions." Like the FLSA and FMLA, the EPA has a two-year statute of limitations (three years in the case of willful violations). 29 U.S.C. § 255(a). And, like pay-related claims brought under the FLSA, FMLA and Title VII (since the Ledbetter Act), a separate claim accrues each time an aggrieved employee received a paycheck reflecting discriminatory wages. *Pollis*, 132 F.3d at 118. Put otherwise, Plaintiff does not assert a continuing violation, but a series of discrete violations.

Plaintiff did not file her complaint in this court until November 20, 2014 – more than four years after she received her last paycheck from Swiss Re, in July 2010. For the reasons discussed above, her claim is not subject to equitable tolling. It is, therefore, barred by the statute of limitations.

Plaintiff's Sixth Cause of Action is dismissed.

G. Seventh Cause of Action

Plaintiff asserts, in her Seventh Cause of Action, that Defendants violated the Equal Pay Act by (1) retaliating against Plaintiff in that they removed certain authority from her in 2006, when she complained about pay disparities between herself and male employees, and (2) retaliated against her again, and for the same reason, when she was fired in 2010.

Plaintiff's claim relating to the removal of authority in 2006 is time-barred, for the same reason as the claims asserted in the Third Cause of Action – retaliation by removing duties is a discrete act, not a continuing one; Plaintiff failed to exhaust administrative remedies within 300 days of that date on which her duties were removed; therefore, her claim is time-barred. The ALJ so held with respect to Plaintiff's state law claims about these incidents.

As for her claim of retaliatory discharge in 2010, plaintiff is collaterally estopped to relitigate the ALJ's judicially-confirmed factual finding that she was fired due to her own misconduct, and not for any other reason. Plaintiff had a full and fair opportunity to litigate the basis for her discharge in the administrative hearing, and the administrative findings have been judicially reviewed and confirmed. *Kremer*, 456 U.S. at 467.

The Seventh Cause of Action is dismissed.

H. Eighth Cause of Action

In her Eighth Cause of Action, Plaintiff asserts that she was denied benefits, wages, and

opportunities for promotion on account of her age. She is not more specific.

Denial of benefits, wages, or opportunities for promotion are discrete acts. To the extent that Plaintiff seeks redress for any such actions that occurred more than 300 days prior to the filing of her charge on November 28, 2010 – which is to say, prior to February 1, 2010 – her claim is time-barred for failure to file a timely administrative charge.

To the extent that Plaintiff alleges a timely age discrimination claim for denial of wages or benefits or opportunities for promotion during the months between February 1, 2010 and the date of her dismissal on July 7, 2010, her claim is nonetheless foreclosed because the ALJ specifically found, as a matter of fact, that during the period beginning December 14, 2009 (the period of timely claims under the NYSHRL) and ending with her termination, there was no evidence of age discrimination in pay, since the only valid comparator about whom she introduced evidence, Kristin Reifsnyder, was older than McGuirk (as well as female), and was not outside of the protected group.

The Eighth Cause of Action is dismissed.

I. Ninth Cause of Action

Plaintiff's Ninth Cause of Action asserts a violation of the Age Discrimination in Employment Act on the ground that she was forced to take a demotion or quit on account of her age. Specifically, Plaintiff claims that on June 14, 2010, she was "forced into a surprise meeting and threatened by a

gang of Ahluwalia and Weisberg with Frosch by phone and told to quit or take the demotion to V.P.” (Compl. at ¶ 106.)

This claim is not time-barred and was in fact exhausted. Nonetheless, it cannot be adjudicated here.

Under the ADEA, it is unlawful for an employer to “discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s age...” 29 U.S.C. § 623(a)(1). This clause has been interpreted as prohibiting disparate treatment on the basis of age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993).

At the pleading stage of an ADEA claim, a plaintiff is not required to set forth allegations sufficient to make a prima facie case of employment discrimination. *Swierkiewicz v. Sonoma N.A.*, 534 U.S. 506, 510 (2002). Yet ADEA claims, no less than other claims, are subject to *Twombly/Iqbal* pleading requirements. Plaintiff must plead some facts tending to render her claim plausible. While a claim under the ADEA need not include every detail, it must inform the court and the defendant of the reasons the plaintiff believes that she was the victim of age discrimination. *Dugan v. Martin Marietta Aerospace*, 760 F.2d 397, 399 (2d Cir. 1985).

Plaintiff’s complaint contains not a single fact tending to show that the “threat” she alleges was made on account of her age. While her complaint is

rife with statements alleging that Defendants privileged “males with less authority” (*see* Compl. at ¶¶ 59-60, 63, 66-68, 70-71, 80, 82, 84, 93, 98, 100, 103), not a single fact is alleged that would support an inference that these actions – taken (probably on different dates (*see* Defs.’ Br. Ex. C, Findings of Fact, *passim*), during the period when she lost her job – were motivated by Plaintiff’s age. She merely states, in conclusory fashion, that “Defendants['] acts toward Plaintiff show age a motivating factor in [their] decision-making and a determinative influence to deny privileges of employment...to an older female.” (Compl. at ¶ 180.) A complaint consisting of only bald conclusory assertions, and setting forth no facts upon which a court could find a violation, fails to state a claim under Rule 12(b)(6). *See Giacco v. City of New York*, No. 04 civ. 3652, 2005 WL95733, at *5 (S.D.N.Y. Jan. 19, 2005); *Valle v. YMCA of Greater New York*, No. 05 civ. 5318, 2006 WL2571946, at *6 (S.D.N.Y. Jul. 6, 2006).

The question then becomes whether to dismiss this claim with leave to replead. The answer is no, because Plaintiff is barred, under principles of former adjudication, from relitigating the events of June 2010.

There is no question that what Plaintiff characterizes as a “threat” occurred – the ALJ found that Plaintiff was offered not one but two opportunities to resign in June 2010, during the investigation into her behavior *vis a vis* Ahluwalia, and was placed on leave with pay because she refused that offer. But the ALJ specifically found that what happened to Plaintiff, culminating in the

loss of her job, was motivated by Plaintiff's serious misconduct – not by any forbidden factor – and that finding has now been upheld after judicial review. Plaintiff does not get a second bite at this particulate apple. Leave to amend would be futile.

Accordingly, Plaintiff's Ninth Cause of Action is dismissed with prejudice and without leave to amend.

J. Tenth Cause of Action

Plaintiff's Tenth Cause of Action asserts a violation of Title VII under the Lily Ledbetter Fair Pay Act of 2009. Plaintiff claims that Defendants paid higher bonuses to males with less experience than it paid Plaintiff from the time of her hire in 2003 until her termination in 2010. This claim is by its terms limited to bonuses.

Plaintiff's claim is a claim for pay discrimination on the basis of gender under Title VII – a separate and distinct basis for alleging discrimination in compensation from the Equal Pay Act (although the claims are mirror image claims). The Ledbetter Act does not provide Plaintiff with a separate cause of action; rather, it provides that a new claim of unequal compensation under Title VII accrues with each unequal paycheck, rather than having the claim accrue only when the first unequal paycheck is received. 42 USCA § 2000e-5; *see also* Civil Rights Act of 1964 § 706(e), 42 U.S.C.A. § 2000e-5(e); *Zimmerman v. Teachers' Ret. Sys. of City of New York*, No. 08 cv 6958, 2010 WL 1172769, *9-10 (S.D.N.Y. Mar. 8, 2010). The point of the Ledbetter

Act was to overturn prior law – specifically *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), where the Supreme Court held that an employer's decision with respect to determining pay is a discrete act of discrimination, and the relevant statute of limitations begins to run when this act first occurs. The Ledbetter Act amended 42 U.S.C. § 2000e-5(e), which now deems each paycheck issued under a discriminatory pay structure subject to an independent, actionable act, and applies retroactively to “all claims of discrimination in compensation under Title VII...that are pending on or after [May 28, 2007].” *See* Lily Ledbetter Fair Pay Act of 2009, Pub. L No. 111-2, § 3, 123 Stat. 5, 6-7; *see also* 42 USCA § 2000e-5.

As New York State has not chosen to follow the Ledbetter Law. (Defs.' Br. Ex. C. at 10-11). Nothing in the ALJ's decision addresses limitations issues relating to this claim. (*Id.*)

Plaintiff has exhausted this claim administratively. Therefore, to the extent that any bonuses to which Plaintiff might have been entitled during the 300 day period prior to the filing of her SDHR charge was diminished on account of her gender, Plaintiff has asserted a potentially viable claim. It cannot be dismissed as untimely.

However, any claims relating to bonuses to which Plaintiff became entitled prior to 300 days before the filing of her charge are time-barred, because each bonus payment represents a discrete act. This leaves us with any bonus paid to Plaintiff from and after

February 1, 2010, which is 300 days prior to the filing of her charge.

This claim does not withstand a motion to dismiss under *Twombly-Iqbal*. It pleads no fact tending to show that any bonuses were paid to anyone between February 1, 2010 and her discharge on July 7, 2010.

Furthermore, the findings made by ALJ Tuosto and adopted by the Commissioner bar Plaintiff from re-litigating the bonus issue: “Any attempt to infer unlawful discrimination by way of greater compensation...must fail.” (Defs.’ Br. Exh. B at 13.) A bonus falls within the ambit of compensation, and Plaintiff complained about differential compensation. However, the ALJ concluded that the only individual who was in fact “similarly situated” to her was Kristin Reifsnyder, who was not a “male” with “less experience” than Plaintiff, but a woman older than she. (*Id.* at ¶¶ 8, 49.)

Plaintiff may argue that she did not actively litigate the discrete issue of bonuses before the ALJ; and indeed, there is no evidence in the administrative record that she offered specific evidence on the issue of bonuses. But if she failed to argue differential bonuses on the basis of a forbidden factor before the ALJ, she is nonetheless precluded from raising it now. Any such claim is comprehended in her NYSDHR charge, which alleges differences in “compensation” on the basis of gender and age. Compensation includes bonuses as well as salary. This is a claim that could have been litigated before the ALJ. Under New York law, preclusive effect is given to prior decisions based on what was or could

have been litigated. *Schwartz v. Public Administrator*, 24 N.Y. 2d 65 (1969). If Plaintiff failed (or refused) to offer evidence specifically related to bonuses – which is indubitably a form of “compensation” – she missed her chance.

Plaintiff's Tenth Cause of Action is dismissed.

K. Eleventh and Twelfth Causes of Action

Plaintiff's Eleventh Cause of Action asserts a violation of the Americans With Disabilities Act. Plaintiff alleges that Defendants denied her benefits, wages, and opportunities for promotion on account of her disability, and treated Plaintiff differently after learning of her disability by excluding her from executive meetings, training, and travel. Her Twelfth Cause of Action pleads that she suffered retaliation, in the form of being threatened with termination, after making a request for some unspecified “reasonable accommodation” in 2010. The nature of Plaintiff's “disability” is not specified.

To plead a Title I claim under the ADA, a plaintiff must allege that (1) the defendant is subject to the ADA; (2) the plaintiff is “disabled” within the meaning of the statute or perceived to be so by her employer; (3) she was otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and (4) she was subject to an adverse employment action because of her disability. *Padilla v. New York State Dept. of Labor*, No. 09 Civ. 5291, 2010 WL3835182, at *3 (S.D.N.Y. Sept. 13, 2010). A “disabled individual” is defined as having “(A) a physical or mental impairment that

substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) is regarded as having such an impairment.” 42 U.S.C. § 12102(1).

Here, the Complaint barely alludes to Plaintiff's purported disability, and while she states in conclusory fashion that “Plaintiff has a ‘disability’ as a physical, mental or medical impairment or condition which substantially limits one of her major life activities, with record of such condition(s) and others consider it an impairment” (Compl. ¶ 193), she fails to tell the reader what that disability is. Such allegations fall short of adequately pleading a “disability” within the meaning of the ADA. *See Padilla*, 2010 WL3835182, at *4. Thus Plaintiff's ADA discrimination and retaliation claims must be dismissed under Fed. R. Civ. P. 12(b)(6) and *Twombly/Iqbal*, because she fails to state a claim on which relief could be granted.

There is no basis to grant Plaintiff leave to amend, however, because she failed to exhaust her administrative remedies in respect of any ADA claim, and it is now too late to do so.

“A district court only has jurisdiction to hear Title VII claims that either are included in an EEOC charge or are based on conduct subsequent to to EEOC charge which is ‘reasonably related’ to that alleged in the EEOC charge.” *Butts v. New York Dep’t of Hous. Preservation and Dev.*, 990 F.2d 1397, 1401 (2d Cir. 1993); *see also, Stewart v. INS*, 762 F.2d 193, 198 (2d Cir. 1985). This limitation applies to ADA claims, which are subject to the same

exhaustion requirements as Title VII claims. *Gallegos v. NYC Health & Hosp. Corp.*, No. 98 Civ. 0435, 1998 WL726025 (S.D.N.Y. Oct. 14, 1998). An employee who believes she was discriminated against on the basis of an actual or perceived disability must file a complaint with the EEOC or a corresponding state agency within 300 days of the alleged acts. Failure to comply with the exhaustion requirement requires dismissal of an ADA claim.

Plaintiff's lengthy and comprehensive NYSDHR complaint (Defs.' Br. Ex. A) alleges discrimination based on sex and age, as well as retaliation. But she made no mention of discrimination based on disability. The page legended "Basis of Discrimination" contains a list of types of discrimination; on that page Plaintiff checked boxes for age, marital status, sex, and retaliation, but not disability. (*Id.* at 4.) In her extensive description of the factual basis for her charge, Plaintiff identified numerous instances of alleged discrimination, but linked none of them to any disability. For example, Plaintiff claimed that she was demoted and denied wages and bonuses on account of her sex, age and gender (*see id.* at 7, 11, 13-15); that she was the victim of retaliation for complaining about this treatment (*see id.* at 7-11); and that she was exposed to unbearable conditions and harassed (*see id.* at 5, 11). None of her allegations, whether of discrimination, retaliation, or harassment, identifies or otherwise refers to any disability. Plaintiff herself admits as much in the complaint filed with this court; describing her NYSDHR complaint, she states that is, "assert[ed] Defendant...engaged in unlawful patterns and practices of discrimination on the basis

of her sex (pregnancy/gender), age and marital status and retaliation for reporting such acts.” (Compl. ¶ 31.)

Because Plaintiff failed to allege discrimination or retaliation on account of her disability, this court may adjudicate her newly-asserted ADA claims only if they are “reasonably related” to the allegations of age and gender-based discrimination for which Plaintiff sought administrative review. *Butts*, 990 F.2d at 1401. Otherwise, the Eleventh and Twelfth Cause of Action must be dismissed for failure to exhaust administrative remedies.

The court in *Butts* described three types of “reasonably related” claims: (1) those where the conduct complained of would fall within the “scope of the EEOC investigation which can be reasonably expected to grow out of the charge of discrimination;” (2) those alleging retaliation perpetrated by an employer because she filed the very EEOC charge at issue; (3) those alleging continuing incidents of discrimination that were carried out on the same basis as the discrimination alleged in the EEOC charge. *Id.* at 1403.

In this case, the second exception is inapplicable; as Plaintiff was fired before she filed her EEOC charge, she could not possibly allege that her former employer discriminated against her in the workplace because she filed the charge that is Exhibit A. For the same reason, the third exception is inapplicable; Plaintiff cannot, and so does not, allege that Swiss Re committed identical acts of discrimination during the administrative exhaustion period. Plaintiff’s

claims are all predicated on alleged acts that occurred prior to her filing the charge.

Thus, the pertinent inquiry is whether Plaintiff's ADA claim can invoke the so-called "loose pleading" requirement of the first exception. She cannot.

Courts in the Second Circuit have generally applied this exception when the plaintiff alleges specific facts in her EEOC complaint that may suggest multiple forms of discrimination, so that the agency receives adequate notice to investigate discrimination on both bases. See, *Deravin v. Kerik*, 335 F.3d 195 (2d Cir. 2003) (alleged preferred treatment on account of national origin gave rise to allegations of potential race discrimination); *Williams v. N.Y.C.H.A.*, 458 F.3d 57 (2d Cir. 2006) (sex discrimination claim found to be reasonably related to retaliation claim since the plaintiff claimed that "an alleged sexual harasser was reinstalled as her boss; she was the only woman in her station; she had previously alleged gender discrimination in state court; she was given an 'impossible' assignment never given to men"); *Ximines v. George Wingate High Sch.*, 516 F.3d 156 (2d Cir. 2008) (teacher's ADEA claim that she was passed over for promotion was reasonably related to other age-related claims asserted). However, "Where the facts in the original EEOC charge do not sufficiently apprise the EEOC that another type of discrimination claim lurks in the background, courts have held that the second claim is not reasonably related to the first." *Alonzo v. Chase Manhattan Bank, N.A.*, 25 F.Supp. 2d 455, 458 (S.D.N.Y. 1998).

In this case, Plaintiff's claim of disability discrimination is not reasonably related to her claims of other forms of discrimination, because nothing in her complaint could reasonably have put the agency on notice that it should be looking into possible disability discrimination. The purpose of requiring administrative exhaustion is to provide the administrative agency the opportunity to investigate and take remedial action to provide for settlement, *Herzog v. McLane Northeast, Inc.*, 999 F. Supp. 274, 276 (N.D.N.Y. 1998), as well as to give the Defendant fair and timely notice of the nature of the charge(s) against which it may eventually have to defend itself in court. *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 150 n. 3 (1984). Plaintiff's NYSDHR complaint provided the EEOC with no indication whatsoever that she even suffered from a disability, or that her employer perceived that she was disabled. She also did not identify any instance when she sought any sort of accommodation to allow her to work despite a disability, in 2010 or at any other time. She thus gave the NYSDHR and Swiss Re absolutely no basis to imagine that it should inquire into the possibility of disability discrimination, or retaliation therefor. Not surprisingly, the work "disability" does not appear even once in the ALJ's lengthy and comprehensive decision – even though that decision discusses at length the events in Plaintiff's workplace during 2010, the year in which she now alleges she was the victim of retaliation because of a purported failure to provide reasonable accommodation.

The fact that Plaintiff filed some sort of charge does not give the agency or the employer the

requisite notice. Disability is a basis entirely distinct from the age, marital and gender-based factors that Plaintiff cited in her administrative charge. The fact that she complained of discrimination and retaliation on these bases does not, without more, give the agency notice of this entirely different form of alleged discrimination. *Herzog*, 999 F. Supp. 274 at 276.

Thus, Plaintiff's Eleventh and Twelfth Causes of Action are dismissed for failure to exhaust administrative remedies.

L. Thirteenth Cause of Action

In this claim Plaintiff alleges a violation of Title VII because Defendants purportedly applied a discriminatory compensation system and denied Plaintiff opportunities for promotion in 2006 based on her gender and pregnancy. For the reasons stated above in connection with the Second, Third, and Tenth causes of action (which this claim essentially mirrors), it is time-barred.

The Thirteenth Cause of Action is dismissed.

M. Fourteenth Cause of Action

Plaintiff's Fourteenth Cause of Action asserts a violation of FLSA and the "Civil Rights Act" because Plaintiff was subjected to a "pattern of discrimination" based on results of genetic tests she was required to take in August 2003 and March 2007.

Plaintiff does not identify any section of the FLSA that might be violated by discrimination after

genetic testing, and the Court has not found any mention of genetic testing in the statute. However, as with Plaintiff's other asserted FLSA claims, this one is time barred because Plaintiff did not bring suit prior to July 2013, three years after her termination and the last possible date on which she could have suffered from this form of "discrimination."

No citation is provided for the "Civil Rights Act," either. Plaintiff specifically cites Title VII and other amendments to the Civil Rights Act of 1964 when she means to invoke them, so the Court was inclined, at first, to the view that this claim did not arise under Title VII (but see below). Nor can the Court adjudicate this claims as arising under the "Civil Rights Act," the one passed in 1867. Plaintiff cannot possibly be alleging any claim under 42 U.S.C. § 1983, because the Defendants are private actors, so the requirement of "state action" is not met. And while 42 U.S.C. § 1981 provides a separate and independent remedy for employment discrimination from Title VII, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465-66 (1975), Plaintiff cannot avail herself of that remedy because: (1) Plaintiff does not allege that she is a member of a racial minority, which is the first element of discrimination in violation of Section 1981, see *Mian v. Donaldson, Lufkin & Jenrette Securities Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993); and because (2) she did not file her complaint with this Court until November 28, 2014, more than four years after she lost her job at Swiss Re. Section 1981 claims must be filed within the four year statute of limitations. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382-83 (2004).

Construing the complaint liberally to raise its strongest possible argument, Plaintiff may be trying to plead a claim of employment discrimination arising under Title II of the Genetic Information Nondisclosure Act, 42 U.S.C.A. § 2000ff-1. This form of discrimination has been incorporated into Title VII, 42 U.S.C.A. § 2000ff-6(a)(1).

However, as discussed in connection with Plaintiff's ADA claims, a prerequisite to filing suit under Title VII is filing a timely charge with the EEOC. The GINA incorporates this requirement. 42 U.S.C. § 2000ff-6(a)(1). Thus, a plaintiff alleging genetic discrimination in employment under GINA must also first file a timely charge alleging this form of discrimination with the EEOC. *Yajaira Bezares C. v. The Donna Karan Company Store LLC*, Nos. 13 Civ. 8560, 13 Civ.9123, 2014 WL2134600 at *5 (S.D.N.Y. May 21, 2014). Plaintiff did not mention genetic discrimination in her NYSDHR complaint; and as was true of her ADA claims, no such claim can be fairly inferred from her allegations of age, gender and marital/family status discrimination. Additionally, the claim as pleaded refers to testing done in 2003 and 2007, which means Plaintiff should have filed her administrative charge relating to this form of discrimination well before November of 2010, when she first filed with NYSDHR.

Therefore, Plaintiff failed to exhaust administrative remedies and her claim is barred by limitations. The Fourteenth Cause of Action must be dismissed.

N. Fifteenth Cause of Action

In her Fifteenth Cause of Action, Plaintiff claims that Defendants violated Title VII by encouraging acts constituting a hostile work environment after Plaintiff reported unlawful employment practices in 2004 and 2008.

Hostile work environment claims are different in kind from discrete acts, occurring over a series of days to constitute an “unlawful employment practice.” § 2000e-5(e)(1). To determine whether Plaintiff has alleged a sufficient hostile work environment claim, the Court must review the totality of evidence; Title VII does not establish a “general civility code” for the workplace. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). Furthermore, the perspective from which we can assess the evidence is that of a “reasonable person in the plaintiff’s positions, considering all the circumstances [as well as] the social context in which the particular behavior occurs and is experienced by its target.” *Id.* Teasing, offhand comments, or isolated incidents of offensive conduct will not support a claim of discriminatory harassment. *Petrosino v. Bell Atlantic*, 385 F.3d 210, 223 (2d Cir. 2004). Thus, to defeat Defendants’ motion to dismiss, Plaintiff must allege facts tending to show that her workplace was “permeated with ‘discriminatory intimidation, ridicule, and insult,’ that was sufficiently severe or pervasive to alter the conditions of [her] employment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. at 21 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)).

Assuming that Plaintiff's allegations are accurate, they do not rise to the level of a hostile work environment. She does not allege that she was subjected to ridicule or sexist comments, either from superiors or from co-workers. She does not contend that she was intimidated to the point where her job performance was affected. By Plaintiff's own admission, she "exercised good judgment, technical expertise and unique knowledge of structural terms to identify credit risk, giving high value to her work" around the time of her first birth, and made "factual achievements" after her second. (Compl. at ¶¶ 48, 98.) Furthermore, Plaintiff received two positive performance evaluations from Defendants during the times she alleged a hostile work environment. (Compl. at ¶ 65; Defs.' Br. Ex. C at ¶ 22.) She simply has not alleged facts that are sufficiently severe and pervasive to support her claim of harassment.

Hostile work environment is by its very nature a continuing violation. *Nat'l R.R. Corp. v. Morgan*, 536 U.S. 101, at 105. However, what Plaintiff here complains is not a continuing violation, but rather discrete acts of discrimination and alleged retaliation. She specifically adverts to being retaliated against for complaining about a hostile work environment in two long-ago years – the years in which she gave birth and then returned to work. This claim is redundant; it is no different than the Fourth Cause of Action, which has already been dismissed as time-barred. Plaintiff cannot salvage a barred retaliation claim by saying that the retaliation took the form of a hostile work environment.

Finally, I note that hostile work environment is defined identically under Title VII and the NYSHRL, CITE. Plaintiff litigated the “hostile work environment” issue before the ALJ, who dismissed the allegation out of hand because there was no proof in the record, “that the acts rise to the level of constituting a policy or practice on the part of Respondent, or that specific and related instances of discrimination were permitted to continue unremediated over an extended period of time.” (Defs.’ Br. Ex. C at 12.) She cannot relitigate the issue now.

The Fifteenth Cause of Action is dismissed.

O. NYCHRL Claims: Sixteenth, Seventeenth, Eighteenth, Nineteenth and Twentieth Causes of Action

Finally, Plaintiff pleads five causes of action that assert violations of the New York City Human Rights Law.

Plaintiff’s Sixteenth Cause of Action asserts a violation of NYCHRL because Defendants applied a discriminatory compensation scheme and denied her equal opportunities for promotion on account of her sex and pregnancies.

Plaintiff’s Seventeenth Cause of Action asserts a violation of NYCHRL because Defendants applied a discriminatory compensation scheme that rewarded younger employees and fired Plaintiff when she was over forty in 2010.

Plaintiff's Eighteenth Cause of Action asserts a violation of NYCHRL because Defendants denied benefits, wages, and opportunities for promotion to Plaintiff on account of her marital status from January 2008 until her firing.

Plaintiff's Nineteenth Cause of Action asserts a violation of NYCHRL because Defendants applied a discriminatory compensation scheme on account of the results of a genetic test Plaintiff took in 2007.

Plaintiff's Twentieth Cause of Action asserts a violation of NYCHRL because Defendants took actions, in the form of "egregious conduct and threats" after Plaintiff reported unlawful employment practices ten years ago, in 2004.

There are numerous reasons why these claims must be dismissed.

First, as discussed prior, New York City's Human Rights Law is subject to the same "election of remedies" rule as any claims she might have filed under the New York State Human Rights Law. Therefore, the fact that Plaintiff filed a complaint with the NYSDHR, and that the agency dismissed those claims on the merits and not for administrative convenience, bars her from pursuing cognate claims under the City's law. N.Y.C. Admin. Code § 8-502(a); *McPherson v. Plaza Athenee NYC*, 12 civ. 785, 2012 WL 3865154, at *4 (S.D.N.Y. Sept. 4, 2012). Except for the claim of discrimination on the basis of genetic testing, very single one of Plaintiff's NYCHRL claims was asserted as part of her NYSDHR charge. So every single one of them must

be dismissed, simply because the SDHR chose to investigate and adjudicate those claims. Furthermore, because the Appellate Division has confirmed the ALJ's dismissal of all of Plaintiff's state law claims, she is precluded by principles of former adjudication from relitigating those issues in reliance on New York City's Human Rights Law.

Second, claims under NYCHRL are subject to a three-year statute of limitations. *Bermudez v. City of New York*, 783 F.Supp.2d 560, 575 (S.D.N.Y. 2011); N.Y.C. Admin. Code § 8-502(d). All of Plaintiff's claims are, accordingly, time-barred, because she commenced this action on November 28, 2014 – more than three years after she was fired from Swiss Re. Some of her claims – for example, complaining of discrimination based on complaints she made in 2004 – were barred far earlier. The same considerations that bar Plaintiff from relying on equitable tolling apply to her NYCHRL claims as well. *Bermudez*, 783 F. Supp. 2d 560 at 574 (citing *Lu v. Chase Inv. Services Corp.*, 2009 WL 4670922, at *7 (E.D.N.Y. Dec. 9, 2009)).

Finally, the NYCHRL, unlike the NYSHRL, does not include “predisposing genetic characteristics” as a protected category. *Peterson v. City of New York*, 36 Misc. 3d 1225(A) (Sup. Ct. Queens CO. 2012). Plaintiff's Nineteenth Cause of Action must be dismissed since there is no “Genetic Discrimination” claim under the NYCRL.

For all these reasons, Plaintiff's Sixteenth, Seventeenth, Eighteenth, Nineteenth, and Twentieth Causes of Action are dismissed.⁴

P. Twenty-First Cause of Action

Finally, Plaintiff's Twenty-First Cause of Action asserts a violation of Violence Against Women Act, because Defendants made "humiliating, disparaging and threatening remarks" to Plaintiff based on Plaintiff's gender in June 2010.

As Plaintiff cannot bring suit under VAWA, this claim, too, is dismissed.

The VAWA, which was signed into law in 1994, provides that, "All persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). In order to enforce the right, § 13981(c) originally provided that any person who "commits a crime of violence motivated by gender...shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages."

However, in *U.S. v. Morrison*, 529 U.S. 598 (2000), the Supreme Court invalidated this provision, concluding that private conduct is beyond the scope of the Fourteenth Amendment and that gender-

⁴ Were these claims not dismissable for non-merits based reasons, the court would decline to exercise supplemental jurisdiction over them and would remit Plaintiff to the New York State Supreme Court, since she has no viable claim under any federal law.

based violence is “truly local.” There is, therefore, no private right of action under VAWA.

Plaintiff relies on *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir. 1999) in support of her contention that VAWA permits a private right of action. The Fourth Circuit in *Brzonkala*, however, struck down VAWA’s civil rights provision on constitutional grounds, holding that Title III of VAWA was an unconstitutional exercise of Congress’ power under the Commerce Clause and the Fourteenth Amendment. “The Supreme Court has never upheld such legislation...Appellants do not contend otherwise, nor do they really even contend seriously that the Court should do so.” *Id.* at 852. The Supreme Court agreed: “Congress’s effort in § 13891 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment.” *U.S. v. Morrison*, 529 U.S. 598, at 628. Since *Morrison*, the VAWA no longer provides a private right of action. *See e.g. Esposito v. New York*, 453 Fed. Appx. 37, 2011 WL 5190035, at *2 (2d Cir. Nov. 2, 2011) *Calderon v. Yale University*, 75 Fed. Appx. 35, 2003 WL 22121011, at *1 (2d Cir. Sept. 15, 2003); *Spinelli v. Secretary of Dept. of Labor*, No. 99-CV-8163, 2006 WL 2990482, at *8 (E.D.N.Y. Oct. 19, 2006).

Furthermore, even if *Morrison* were not the law of the land, Plaintiff’s claim under VAWA would fail. VAWA was enacted to prevent “*crimes of violence* motivated by gender.” 42 U.S.C. § 13981. A “crime[] of violence motivated by gender” is defined in 18 U.S.C.A. § 16 as “an offense that has as an element

the use, attempted use, or threatened use of physical force against the person or property of another.” Plaintiff does not allege that she was the victim of a “crime of violence;” she says that hurtful remarks were made to and about her. (Compl. ¶ 307.) While such remarks may be hurtful, even reprehensible, words alone do not rise to the level of a “crime of violence.”

Plaintiff's Twenty-First Cause of Action is dismissed.

CONCLUSION

As all of Plaintiff's claims must be dismissed and there is no basis for allowing her to replead any of them, the complaint is dismissed with prejudice. There is no need to discuss other bases for dismissing particular causes of action – for example, her Title VII, ADEA and ADA claims would have to be dismissed against the corporate defendants other than her actual employer, Swiss Re Financial Services Corp., and against the individual defendants, because claims under these statutes lie only against her actual “employer.”

The Clerk of the Court is directed to reopen this administratively closed case, to docket this decision granting the Defendants' motion to dismiss, to enter judgment in favor of defendants dismissing the complaint with prejudice, to remove the motion at Docket No. 13 from the Court's list of pending motions, and to close the file.

App. 69

Dated: June 17, 2016

s/ Colleen McMahon
U.S.D.J.

BY ECF TO ALL COUNSEL

BY FIRST CLASS MAIL TO PLAINTIFF PRO SE

Copies mailed/faxed/handed to counsel on 6/17/16

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MICHELLE L. MCGUIRK,

No. 14 **CIVIL** 9516 (CM)

Plaintiff,

ORDER

-against-

Date Filed: Sept. 9, 2015

SWISS RE FINANCIAL SERVICES, CORP., *et al.*

Defendant.

**ORDER ADMINISTRATIVELY CLOSING
DEFENDANTS' MOTION TO DISMISS**

McMahon, J.:

The outcome of Defendants Swiss Re Financial Services Corp., Swiss Reinsurance America Corp., Swiss Re Financial Products Corp., and Erika Ozer's Motion to Dismiss (Docket #13) is dependent on the determination of the Appellate Division, First Department, in a case pending before it entitled, *McGuirk v. NYS Division of Human Rights*, Index No. 100809/2014. Because I do not know when the First Department will issue an opinion, I am administratively closing this motion.

App. 71

The parties should advise the Court when the First Department reaches a decision and the motion will be reopened.

The Clerk of Court is directed to administratively close Docket #13 and remove it from the Court's list of pending motions.

Dated: Sept. 9, 2015

s/ Colleen McMahon
U.S.D.J.

BY ECF TO ALL COUNSEL

Copies mailed/faxed/handed to counsel on 9/9/15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHELLE L. MCGUIRK,

No. 14 CIVIL 9516 (CM)

Plaintiff,

v.

**MOTION TO EXTEND
TIME TO SERVE**

Date Filed: Mar. 28, 2015

SWISS RE FINANCIAL SERVICES, CORP.,
SWISS REINSURANCE AMERICA CORP.,
SWISS RE FINANCIAL PRODUCTS CORP.,

Defendants

WALTER B. KIELHOLZ, DAVID J. BLUMER,
CHRISTIAN MUMENTHALER, CHARLOTTE
GUBLER, KANWARDEEP AHLUWALIA, DAVID
GODFREY, ERIKA OZER, and JOHN DOES,

Individual Defendants,

Pursuant to **Fed.R.Civ.Pr. 6(b)** and **Local Rule 6.1**, I, Michelle L. McGuirk, Plaintiff, respectfully seek a *text-only Order* to extend the period of time in which to serve the Summons and Complaint by thirty (30) days to April 27, 2015 or such longer period as the Court deems appropriate. Such relief is necessary if this Court fails to accept proof of service on Individual Defendants, all of whom are domiciled in foreign jurisdictions, except E. Ozer. I filed a Motion to Acknowledge Service on January 21, 2015

before a Preliminary Conference to compel Defendants' answer to Complaint, with a Motion for Default Judgment filed January 29, 2015 (with defects and notice cured within the extended period). The relevant points for relief are:

1. This request is made prior to midnight on March 28, 2015, the last day per Fed.R.Civ.Pr. 6(a)(4)(A), one-hundred twenty days (120) after Complaint filing.

2. There are no prior requests for relief. A prior motion to extend time to oppose a Motion to Dismiss was denied, but with leave to file by March 9, 2015.

3. Counsel for certain Defendants is served per Fed.R.Civ.Pr. 5 and have not consented. Counsel's Opposition to Motion for Default Judgment filed February 17, 2014 denied effective service of W. Kielholz, C. Gubler and D. Godfrey.

4. The requested extension will affect no pre-set scheduled dates except time for notice of default judgments on certain Individual Defendants and will defer dates on a Civil Case Management Plan (revised) that I filed March 17, 2015.

5. An Affirmation supports the motion, and identifies precedent cases. No Memorandum of Law is submitted herewith but can be completed with added time.

6. This request may be deemed moot for three (3) Individual Defendants named in ¶3 above if the Court deems service of Summons and Complaint effective. Since counsel has not claimed ineffective service on David J. Blumer, Christian Mumenthaler or Kanwardeep Ahluwalia, service is presumed effective.

7. Request is made in good faith and not for undue delay of proceedings.

WHEREFORE, I respectfully request this Court issue an Order to extend the time to effect service of Summons and Complaint by thirty (30) days from March 28, 2015 to April 27, 2015; and in its discretion, direct service per Fed.R.Civ.Pr. 4(f)(3): i) by N.Y.S. Department of Financial Services under its Memo of Understanding with Switzerland or ii) via BlackRock, Inc. as Blumer's New York-based employer.

STATE OF NEW YORK
COUNTY OF NEW YORK

Dated: March 28th, 2015

s/ Michelle L. McGuirk
Plaintiff, Self-Represented
P.O. Box 369, New York, NY
10113-369

[p.1-2 of 13]

Received SDNY Pro Se Office: Apr. 1, 2015

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Michelle L. McGuirk, No. 14 **CIVIL** 9516(CM)(HBP)

v.

MEMO ENDORSED

Date Filed: June 23, 2015

Swiss Re Financial Servs. Corp. et al.

ENDORSEMENT

Because it appears that defendants Kielholz, Gubler and Godfrey reside outside the United States (see Opposition to Plaintiff's Motion for Default Judgment against Walter Kielholz, Charlotte Gubler and David Godfrey (Docket Item 87) at 1), the 120-day time limit for the completion of service is inapplicable. Fed.R.Civ.P. 6(m) (last sentence) (Rule 6(m)'s time limit for service inapplicable to service in a foreign country). Thus, it appears that plaintiff does not need the relief that she seeks. Nevertheless, out of an abundance of caution, plaintiff is granted until July 28, 2015 or the time period provided by the Federal Rules of Civil Procedure, whichever is longer, to complete service on Kielholz, Gubler and Godfrey.

Dated: New York, New York
June 22, 2015

App. 76

SO ORDERED s/ Henry Pitman
HENRY PITMAN
United States Magistrate Judge

Copies transmitted to:
Ms. Michelle L. McGuirk
P.O. Box 369
New York, New York 10113-369

Christopher H. Lowe, Esq.
Tara M. Conroy, Esq.
Seyfarth Shaw LLP
620 Eighth Avenue
New York, New York 10018-1405

[p. 13 of 13]

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

MICHELLE L. MCGUIRK, Docket No. 16-2542

Plaintiff-Appellant,

v.

ORDER

Date Filed: Dec. 20, 2017

SWISS RE FINANCIAL SERVICES, CORP.,
SWISS REINSURANCE AMERICA CORP.,
SWISS RE FINANCIAL PRODUCTS CORP.,
WALTER B. KIELHOLZ, DAVID J. BLUMBER,
CHRISTIAN MUMENTHALER, CHARLOTTE
GUBLER, KANWARDEEP AHLUWALIA, DAVID
GODFREY, ERIKA OZER, JOHN DOES,
Defendants-Appellees.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of December, two thousand seventeen.

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

App. 78

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

s/ Catherine O'Hagan Wolfe
United States Court of Appeals
Second Circuit