UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ROSEMARIE GOMEZ,

Plaintiff,

-against-

STONYBROOK UNIVERSITY, STONYBROOK UNIVERSITY HOSPITAL, GARY DASARO, STEVEN WEISMAN, LUIS deONIS, JO ARKIN, and THALIA ANTHONY (sued in their individual and official capacities pursuant to N.Y. Executive Law §§ 290 et seq.),

Defendants.
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REPORT AND RECOMMENDATION
CV 14-7219 (SJF)(GRB)

GARY R. BROWN, United States Magistrate Judge:

Plaintiff Rosemarie Gomez commenced this action against defendants Stonybrook University, Stonybrook University Hospital (collectively "SBU"), Gary Dasaro, Steven Weisman, Luis deOnis, Jo Arkin, and Thalia Anthony (collectively "Individual Defendants") on December 11, 2014. Compl., Docket Entry ("DE") 1. On April 27, 2015, defendants filed a motion to dismiss under Federal Rules of Civil Procedure ("Rules") 12(b)(1) and 12(b)(6), now pending before the Court. DE 21-23. The Honorable Sandra J. Feuerstein referred the instant motion to the undersigned for report and recommendation on June 24, 2015. Order Referring Mot. dated June 24, 2015. For the reasons stated herein, the undersigned respectfully recommends that the motion to dismiss be GRANTED in part, and DENIED in part.

FACTUAL BACKGROUND

As an initial matter, the complaint does not list each cause of action under separate headings, rendering the claims somewhat murky. *See generally* Compl. Of course, while

headings for each cause of action "would be the better practice," their absence does not provide a basis to dismiss claims under Rule 8. *See Burford v. McDonald's Corp.*, 321 F. Supp. 2d 358, 365 (D. Conn. 2004) (declining to strike the Title VII retaliation claim where the plaintiff failed to separate that claim from the Title VII hostile work environment claim under separate headings (citing Fed. R. Civ. P. 8(a)(2), 8(e)(1))). The undersigned relies on the Preliminary Statement of the complaint to help identify the causes of action. *See* Compl. 1-2.

Plaintiff brings causes of action against (1) SBU for ethnicity discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 et seq. ("Title VII"), (2) SBU for retaliation under Title VII, (3) all defendants for ethnicity discrimination under New York Executive Law § 296 et seq. ("NYSHRL"),[1] (4) all defendants for retaliation under NYSHRL, and (5) all defendants for negligence under New York state law. Compl. 1-2; *see also* Pl.'s Br. 1. Plaintiff seeks compensatory and emotional damages against all defendants; punitive damages against SBU; equitable and injunctive relief against all defendants, and attorney's fees and costs. Compl. 21-22.[2]

Plaintiff, a Latina, was employed by SBU since April 2006 in the Hospital Purchasing Department. Compl. ¶¶ 7-8. Based upon plaintiff's job performance, she received a raise and promotion from a Support Staff Member to an Administrative Assistant and an Office Coordinator. *Id.* at ¶¶ 42-45.

[1] Several amendments to the New York Executive Law aimed at addressing gender inequality in the workplace took effect January 19, 2016. However, the amendments do not apply to the instant matter. Signed Bills, OFFICE OF NEW YORK GOVERNOR ANDREW CUOMO, Oct. 21, 2015, https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Chapters102115.pdf (addressing pay equity between men and women, sexual harassment, sex discrimination, family status discrimination, domestic violence victims, human trafficking, pregnancy discrimination, among others).

[2] Plaintiff alleges in a conclusory fashion that she had faced a "hostile work environment." Compl. ¶¶ 69, 146, 159. However, it appears that plaintiff makes no claim under Title VII hostile work environment, and defendant makes no motion to dismiss such a claim. *Id.*; Pl.'s Br; *see also* Defs.' Br., DE 21-1.

In or about 2010, plaintiff confronted a co-worker Karen Thomas, a similarly-situated black woman, about misusing the bottled water supply in plaintiff's area. *Id.* at ¶¶ 46-48. After this incident, Thomas made an allegation of racial bias against plaintiff. *Id.* at ¶ 50. Plaintiff's car was also repeatedly vandalized, which plaintiff attributes to Thomas. *Id.* at ¶¶ 51-52. In or about 2011, Thomas allegedly attempted to trip plaintiff in an aisle at work. *Id.* at ¶ 53. Plaintiff reported the tripping incident to Dasaro—the Director of Hospital Purchasing, direct supervisor of plaintiff, and a non-Hispanic male—who failed to address the issue. *Id.* at ¶¶ 54-55. Plaintiff also alleges that, upon information and belief, Dasaro knew that Thomas vandalized plaintiff's car, but took no action. *Id.* at ¶¶ 59, 68, 70. Plaintiff alleges that Dasaro favored Thomas based on plaintiff's ethnicity. *Id.* at ¶¶ 56-57.

Dasaro informed Weisman—the Senior Hospital Associate Director for Administration at SBU—about the vandalism of plaintiff's car, who similarly failed to act. *Id.* at ¶¶ 17, 71.

In or about January 2013, plaintiff's car was vandalized again. *Id.* at ¶ 74. Plaintiff requested that SBU install security cameras to prevent further vandalism. *Id.* at ¶ 75. Plaintiff pursued the installation of security cameras, and SBU finally installed the camera in the front parking lot in October 2013. *Id.* at ¶ 94.

Plaintiff also asked SBU to move her to an area where she would not encounter Thomas at work. *Id.* at ¶¶ 76. Plaintiff discussed the option of transfer with Dasaro, Weisman, and deOnis, a Human Resources Officer, *id.* at ¶¶ 23-24, who were all non-Hispanic men. *Id.* at ¶ 78. Dasaro told plaintiff she could move to another area, but she could not return to her former position; Weisman suggested that plaintiff could transfer to a file room, a demoted position; and deOnis told plaintiff he would look for a position for her to transfer, but he never did. *Id.* at ¶¶ 79, 81, 87. Plaintiff alleges that Dasaro, Weisman, and deOnis's failure to transfer plaintiff was

because of her ethnicity. *Id.* at ¶¶ 80, 84, 92, 108. Ultimately, plaintiff alleges that SBU did not transfer her to another area where she would not have contact with Thomas. *Id.* at ¶ 77.

In September 2013, a non-Hispanic female employee had money stolen out of her purse at SBU, and plaintiff was instructed to draft an email to staff regarding the incident. *Id.* at ¶¶ 98-99. Dasaro read her draft, and asked her to redo the email with stronger, more direct language. *Id.* at ¶ 99. Dasaro addressed the theft with the employees at the next staff meeting. *Id.* at ¶ 100. Dasaro, however, never addressed the repeated vandalism to plaintiff's car with staff, even though at this point the car was vandalized more than seven times. *Id.* at ¶¶ 86, 101, 102. Plaintiff alleges that Dasaro did not take plaintiff's complaints about her work conditions seriously because of her ethnicity, but that he acted regarding other similarly-situated non-Hispanic employees. *Id.* at ¶¶ 96, 97.

On October 31, 2013, plaintiff met deOnis about a transfer, but he had not done any research into the matter. *Id.* at ¶¶ 106-07. At this meeting, plaintiff discussed the vandalism and her desire to transfer, and her wish to file a formal complaint of discrimination. *Id.* at ¶¶ 112-14. DeOnis attempted to dissuade plaintiff from filing a complaint of discrimination. *Id.* at ¶ 115. DeOnis did nothing to assist plaintiff, which plaintiff alleges was because of ethnicity discrimination, and in retaliation from her desire to file a formal complaint of discrimination. *Id.* ¶¶ 108, 116-118.

In April 2014, the video camera installed in the front lot caught someone keying plaintiff's car. *Id.* at ¶ 119. When police viewed the footage, they informed plaintiff that there was sufficient evidence to question Thomas, but they could not arrest her without witnesses. *Id.*

at ¶ 120. Plaintiff was wary of having the police question Thomas since SBU was not supportive of her, and she was afraid of inciting attacks from Thomas. *Id.*at ¶ 121.[3]

Plaintiff then repeatedly tried to reach out to deOnis about transferring to a different position. *Id.* at ¶¶ 122-126. After finally meeting with deOnis in June 2014, deOnis told plaintiff that he would get back to her about transferring, which he never did. *Id.* at ¶¶ 128-29.

Plaintiff then placed phone calls to Arkin and Anthony—who were Labor Relations Officers at SBU during the relevant period, *id.* at ¶¶ 29-40—to file a formal complaint of discrimination. *Id.* at ¶¶ 136-37. Arkin and Anthony first told plaintiff that she could not file a formal complaint of discrimination because they do not address issues of vandalism; then they told her they were passing off the issue to deOnis. *Id.* at ¶¶ 137-39. Plaintiff alleges that Arkin and Anthony's assertion was merely a pretext, attributing their inaction to discrimination and retaliation. *Id.* at ¶ 141.

Plaintiff alleged she incurred thousands of dollars in property damage from the vandalism of her car. *Id.* at ¶ 146. Plaintiff alleges she has suffered emotional distress, having to seek medical attention due to stress and anxiety she experienced at work. *Id.* at ¶¶ 146-47. She alleges that her fibromyalgia has flared up because of the stress she experienced at work. *Id.* at ¶ 148. Plaintiff continues to feel threatened by Thomas, needing to be escorted to the restroom at work for fear of being assaulted by Thomas. *Id.* at ¶¶ 149-52.

On August 25, 2014, plaintiff timely filed a written charge asserting discrimination based on ethnicity with the Equal Employment Opportunity Commission ("EEOC"). *Id.* at ¶ 166. The EEOC issued a Notice of Right to Sue, and plaintiff then timely filed this action. *Id.* at ¶ 167.

[3] The complaint does not reveal whether the police questioned Thomas regarding the vandalism, though it suggests that the police uncharacteristically acceded to plaintiff's desire that they not investigate. Compl. ¶¶ 120-21. Indeed, it remains unclear, taking all of the allegations as true, whether Thomas is, in fact, responsible for the vandalism.

The complaint sets forth each Individual Defendant's job title, that they each had the "authority to hire, fire and discipline employees at SBU," and that they each "had the power to do more than carry out personnel decisions made by others." *Id.* at ¶¶ 11-13 (Dasaro); ¶¶ 17-19 (Weisman); ¶¶ 23-25 (deOnis); ¶¶ 29-31 (Arkin); ¶¶ 35-37 (Anthony); *see also id.* at ¶ 108 (alleging deOnis had responsibility to try to transfer plaintiff to where it would be safe to work).

The complaint also alleges that each Individual Defendant "aided, abetted, incited, compelled and/or coerced the acts against Plaintiff"; "is named in his official and individual capacity because he knew or should have known his and SBU's ongoing willful and malicious actions against Plaintiff violated NYEL"; "personally participated in the conduct giving rise to Plaintiff's discrimination claims." *Id.* at ¶¶ 14-16 (Dasaro); ¶¶ 19-22 (Weisman); ¶¶ 26-28 (deOnis); ¶¶ 32-34 (Arkin); ¶¶ 38-40 (Anthony). Finally, Plaintiff alleges SBU had knowledge of the alleged ethnic discrimination and retaliation, but did not take any action. *Id.* at ¶¶ 132-34, 150-51, 155, 163.

LEGAL STANDARDS

Employment discrimination cases under Title VII are subject to the three-stage, burden-shifting framework set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 82-83 (2d Cir. 2015). However, the Second Circuit has held "[a]t the pleadings stage of the litigation, [plaintiff is] not required to plead a *prima facie* case of discrimination as contemplated by the *McDonnell Douglas* framework." *Id.* at 84. Rather, "[u]nder *Iqbal* and *Twombly* . . . in an employment discrimination case, a plaintiff must plausibly allege that (1) the employer took adverse action against him and (2) his race, color, religion, sex, or national origin was the motivating factor in the employment decision." *Id.*

at 86 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

The Second Circuit has set forth the following principles to determine "plausibility" under *Iqbal* and *Twombly* in the context of employment discrimination cases:

> First, as the Supreme Court explained in *Iqbal*, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678, 129 S. Ct. 1937. While "detailed factual allegations" are not required, "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955. At the same time, the court must assume the factual allegations in the complaint to be true, "even if [they are] doubtful in fact," *id.*, and a complaint may not be dismissed "based on a judge's disbelief of a complaint's factual allegations," *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L.Ed.2d 338 (1989); *see also Iqbal*, 556 U.S. at 679, 129 S. Ct. 1937 ("When there are well-pleaded factual allegations, a court should assume their veracity. . . .").
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> Second, in making the plausibility determination, the court is to "draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679, 129 S. Ct. 1937. Of course, the court must proceed at all times in a fair and deliberative fashion, alert to any unconscious bias that could affect decisionmaking . . . . In making the plausibility determination, the court must be mindful of the "elusive" nature of intentional discrimination. *See Burdine*, 450 U.S. at 255 n. 8, 101 S. Ct. 1089. As we have recognized, "clever men may easily conceal their motivations." *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1043 (2d Cir.1979) (internal quotation marks omitted). Because discrimination claims implicate an employer's usually unstated intent and state of mind, *see Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.1985), rarely is there "direct, smoking gun, evidence of discrimination," *Richards v. N.Y.C. Bd. of Educ.*, 668 F. Supp. 259, 265 (S.D.N.Y.1987), *aff'd*, 842 F.2d 1288 (2d Cir.1988). Instead, plaintiffs usually must rely on "bits and pieces" of information to support an inference of discrimination, *i.e.*, a "mosaic" of intentional discrimination. *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir.1998), *abrogated in part on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998). Again, as we made clear in *Littlejohn*, at the initial stage of a litigation, the plaintiff's burden is "minimal"—he need only plausibly allege facts that provide "at least minimal support for the proposition that the employer was motivated by discriminatory intent." 795 F.3d at 311, 2015 WL 4604250, at *8.
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> Finally, courts must remember that "[t]he plausibility standard is not akin to a 'probability requirement.'" *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937; *accord Twombly*, 550 U.S. at 556, 127 S. Ct. 1955 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage...."); *Littlejohn*, 795 F.3d at 310, 2015 WL 4604250, at *7. On a motion to dismiss, the question is not whether a plaintiff is *likely* to prevail, but whether the well-pleaded factual allegations *plausibly* give rise to an inference of unlawful discrimination, *i.e.*, whether plaintiffs allege enough

> to "nudge[ ] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570, 127 S. Ct. 1955; *see Iqbal*, 556 U.S. at 678–80, 129 S. Ct. 1937.

Id. at 86-87; *see also Thomson v. Odyssey House, Inc.*, No. 14-CV-3857 (MKB), 2015 WL 5561209, at *5 (E.D.N.Y. Sept. 21, 2015) ("a plaintiff need only plead facts to give 'plausible support' to plaintiff's 'minimal' initial burden").

In reviewing a motion to dismiss under Rule 12(b)(6) in employment discrimination and retaliation cases, this Court has taken judicial notice of plaintiff's EEOC Charge, such as here, when it is incorporated by reference in the complaint. *Marcus v. Leviton Mfg. Co., Inc.*, No. 15-CV-656 (SJF)(GRB), 2016 WL 74415, *1 n.1 (E.D.N.Y. Jan. 6, 2016); *Dasrath v. Stony Brook Univ. Med. Ctr.*, 965 F. Supp. 2d 261, 267-68 (E.D.N.Y. 2013).

DISCUSSION

1. Title VII and NYSHRL Claims Against SBU

a. Ethnicity Discrimination under Title VII and NYSHRL

As a precondition for filing a Title VII claim in federal court, but not for claims under NYSHRL, a plaintiff must pursue administrative remedies by filing a complaint with the Equal Employment Opportunity Commission ("EEOC") or an equivalent state agency. *Littlejohn v. City of New York*, 795 F.3d 297, 321 (2d Cir. 2015); *Garnett-Bishop v. New York Comm. Bancorp, Inc.*, No. 12-CV-2285 (ADS)(ARL), 2014 WL 5822628, at *23 (E.D.N.Y. Nov. 6, 2014); *Dasrath*, 965 F. Supp. 2d at 268. Defendants do not dispute that plaintiff pursued her ethnicity discrimination claim with the EEOC, which satisfies the administrative remedies prerequisite. EEOC Charge & Aff., DE 21-2.

Discrimination claims under Title VII and NYSHRL are analyzed under the same standard. *Thompson v. Odyssey House*, No. 14-CV-3857 (MKB), 2015 WL 5561209, at *14

(E.D.N.Y. Sept. 21, 2015); *see also Garnett-Bishop*, 2014 WL 5822628, at *23. Therefore, the undersigned treats the Title VII and NYSHRL employment discrimination claim against SBU together.

"[T]o defeat a motion to dismiss . . . in a Title VII discrimination case, a plaintiff must plausibly allege that (1) the employer took adverse action against him, and (2) his race, color, religion, sex, or national origin was a motivating factor in the employment decision." *Vega*, 801 F.3d at 87.

Defendant argues that "[p]laintiff's claims are not adverse employment actions" under the employment discrimination claim, relying on a case that holds that failure to investigate workplace complaints, in particular, complaints about vandalism, do not rise to the level of an adverse employment action. Defs.' Br. 11 (citing *Nguyen v. McHugh*, 65 F. Supp. 3d 873, 894 (N.D. Cal. 2014)). Plaintiff argues that she suffered "several adverse employment actions," viz. "continuously having her car vandalized and being subjected to repeated violence while at work, . . . being subjected to intimidation and harassment in the workplace, . . . being threatened that if she transferred to another area she would suffer demotion . . . , and not being protected from the repeated workplace violence she experienced." Pl.'s Br. 9 (citing Compl. ¶¶ 51-109).[4]

Under an employment discrimination claim, "[a] plaintiff sustains an adverse employment action if he or she endures a materially adverse change in the terms and conditions of employment." *Vega*, 801 F.3d at 85. "An adverse employment action is one which is more disruptive than a mere inconvenience or an alteration of job responsibilities. *Id.*; *see also Cotterell v. Gilmore*, 64 F. Supp. 3d 406, 425 (E.D.N.Y. 2014) (holding material adverse changes involve "the effect of changing 'the total circumstance of [the employee's] working

[4] Notably, while the complaint suggests that plaintiff was "continually subjected to workplace violence and intimidation," Compl. ¶ 160, the only incident of violence alleged is an attempt to trip the plaintiff. *Id.* at ¶ 53.

environment . . . to become unreasonably inferior and adverse when compared to a typical or normal, not ideal or model, workplace." (citing *Phillips v. Bowen*, 278 F.3d 103, 117 (2d Cir. 2002), *aff'd*, 112 F. App'x. 761 (2d Cir. 2004)). Several examples of materially adverse changes include, "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, . . . a disproportionately heavy workload," *Vega*, 801 F.3d at 85 (citations omitted), the failure to promote, and the loss of career advancement, *Cotterell*, 64 F. Supp. 3d 423. Materially adverse changes can also arise from "other indices unique to a particular situation." *Vega*, 801 F.3d at 85; *see also Cotterell*, 64 F. Supp. 3d at 422 ("[T]here is no exhaustive list of what constitutes an adverse employment action.") (citing *Little v. NBC*, 210 F. Supp. 2d 330, 384 (S.D.N.Y. 2002)).

By contrast, many actions by an employer do not rise to the level of adverse employment actions. In *Cotterell v. Gilmore*, Judge Spatt held, at the summary judgment phase, that a denial of professional training opportunities, excessive scrutiny by supervisors, unsatisfactory marks given to plaintiff, the failure to meet with plaintiff for evaluations, a search of plaintiff's desk, and a notice of discipline, without more, did not amount to adverse employment actions under similar claims of 42 U.S.C. §§ 1981, 1983, and NYSHRL. 64 F. Supp. 3d at 422-25 (citing *Beyer*, 524 F.3d at 163).[5]

Furthermore, the Second Circuit has also held that "[a] denial of a transfer may also constitute an adverse employment action," but the transfer denial must have "created a materially

[5] The court considered each action against the employee individually, and did not reach the question of whether the aggregation of acts could qualify as an "adverse employment action." *Cotterell*, 64 F. Supp. 3d at 431. Similarly, such a question need not be reached here as plaintiff, even assuming, *arguendo*, the aggregation of acts against the plaintiff, such acts do not show the requisite "materially significant disadvantage in the working conditions of the aggrieved employee." *Beyer*, 524 F.3d at 164-65.

significant disadvantage in the working conditions of the aggrieved employee," such as a change in "prestige, modernity, training opportunity, job security, or some other indicator of desirability." *Beyer v. Cnty. of Nassau*, 524 F.3d 160, 164-65 (2d Cir. 2008).

Whether plaintiff suffered an adverse employment action is a close question. While the complaint fails to allege that plaintiff has endured types of events that commonly constitute material adverse changes—termination, demotion, change in job title, change in job responsibilities, etc.—rather, plaintiff has alleged that SBU denied her a transfer. Compl. ¶¶ 76-77 (plaintiff requested transfer from SBU, which SBU "neglected to do"); ¶ 79 (Dasaro indicating that a transfer would not allow her to return to previous position); ¶ 81 (Weisman suggesting that transfer would result in demotion to the file room); ¶¶ 87, 106-07, 122-29 (deOnis repeatedly represented that he would respond to plaintiff's request for transfer, but took no action); ¶ 150 ("SBU continues to dismiss Plaintiff's complaints and concerns in willful discrimination due to her Hispanic ethnicity. . . .").

Plaintiff alleges that as a result of the denial of transfer, she faced damages from the vandalism to her car, flared-up fibromyalgia, and she has been put in fear from Karen Thomas such that she needs to be escorted to the restroom. Compl. ¶¶ 146-52. However, none of the actions against the plaintiff—taken individually or in the aggregate—demonstrate that she suffered "a materially significant disadvantage in the working conditions of the aggrieved employee," such as a change in "prestige, modernity, training opportunity, job security, or some other indicator of desirability." *Beyer*, 524 F.3d at 164-65.

Furthermore, SBU's failure to investigate workplace vandalism similarly does not amount to adverse employment action. This case is analogous to *Nguyen v. McHugh*, a case from the Northern District of California, relied upon by defendants. Defs.' Br. 11 (citing *Nguyen*

v. McHugh, 65 F. Supp. 3d 873 (N.D. Cal. 2014)). There, the court applied the Ninth Circuit's standard for adverse employment actions, a standard similar to the one in the Second Circuit. *Id.* at 892 ((citing *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000) (holding that adverse employment actions include "termination, dissemination of negative employment reference, issuance of undeserved negative performance review, and refusal to consider for promotion," but not the "mere ostracism in the workplace")). The court held, "[w]ithout more, merely failing to investigate workplace complaints does not rise to a level of an adverse employment action." *Id.* at 894 ((citing *McEnroe v. Microsoft Corp.*, No. CV-09-5053-LRS, 2010 WL 4806864, at *5 (E.D. Wash. Nov. 18, 2010) ("A 'failure to investigate' is not an adverse employment action for purposes of a discrimination claim."); *Collins v. Potter*, No. 09 CV 0824 MMA (CAB), 2010 WL 5376221, at *6 (S.D. Cal. Dec. 22, 2010) (finding that failure to investigate a complaint of vandalism is not an adverse employment action)).

In sum, accepting all factual allegations in the complaint as true and drawing inferences in plaintiff's favor, plaintiff has failed to allege that she endured an adverse employment action as required to set forth claims of discrimination under Title VII and NYSHRL. As such, the undersigned respectfully recommends that the motion to dismiss the Title VII and NYSHRL ethnic discrimination claims against SBU be granted.

b. Retaliation Under Title VII and NYSHRL

i. Exhaustion of Administrative Remedies Under Title VII

Defendants argue that plaintiff failed to exhaust her administrative remedies as to her Title VII retaliation claim because she did not check the "retaliation" box in the EEOC charge, and the supporting affidavit shows that she did not engage in any protected activity. Defs.' Br.

14. Plaintiff fails to address the administrative remedies requirement, though she argues conclusorily that the retaliation claims against all defendants should not be dismissed. Pl.'s Br. 10-11. Because it is unclear whether plaintiff abandoned this argument, the undersigned proceeds with the exhaustion analysis.

"Before bringing a Title VII suit in federal court, an individual must first present 'the claims forming the basis of such a suit . . . in a complaint to the EEOC or the equivalent state agency." *Littlejohn*, 795 F.3d at 322; *see also Marcus*, 2016 WL 74415, at *5 n.3; *Dasrath*, 965 F. Supp. 2d at 269.[6] Claims that were not raised in an EEOC charge may nevertheless be brought in federal court "if they are 'reasonably related' to the claim filed with the agency," which is satisfied "if the conduct complained of would fall within the scope of the EEOC investigation which can be reasonably be expected to grow out of the charge that was made." *Littlejohn*, 795 F.3d at 322.

The focus in that determination depends "on the factual allegations made in the [EEOC] charge itself." *Id.* If, for example, the EEOC charge only specifies one type of discrimination, but the factual allegations "suggest [two] forms of discrimination," "the agency receives adequate notice to investigate discrimination on both bases," and "the claims are reasonably related to each other." *Id.*[7] Here, the factual allegations from the EEOC charge are reasonably related to the claim filed with the EEOC because the same facts are alleged in the complaint. *See*

[6] "[T]he exhaustion of administrative remedies 'is a precondition to bringing a Title VII claim in federal court, rather than a jurisdictional requirement.'" *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 385 (2d Cir. 2015). Moreover, "unlike Title VII claims, NYSHRL claims do not contain an administrative exhaustion requirement." *Garnett-Bishop*, 2014 WL 5822628, at *23.

[7] The justification for the "reasonably related: exception is because 'EEOC charges are frequently filled out by employees without the benefit of counsel,' who are entitled to less stringent pleading standards drafted by lawyers." *Littlejohn*, 795 F.3d at 322. Here, while it is far from clear whether the EEOC Charge and the supporting affidavit were completed with assistance from counsel, it is worthy to note that the public notary for the EEOC Charge and the supporting affidavit is plaintiff's counsel in the instant matter. EEOC Charge & Aff.

EEOC Charge & Aff. 4, 5. The question remains, then, as to whether the facts give rise to a retaliation claim.

ii. Standard for Retaliation Under Title VII and NYSHRL

Retaliation claims are analyzed under the same standard for NYSHRL and Title VII. *Garnett-Bishop*, 2014 WL 5822628, at *23; *see also Orlando v. BNP Paribas North Am., Inc.*, No. 14 Civ. 4102 (AJP), 2015 WL 6387531, at *14 (S.D.N.Y. Oct. 22, 2015). To successfully plead a retaliation claim under Title VII and NYSHRL, plaintiff must plausibly allege, "(1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse action; and (4) a causal connection between the protected activity and the adverse employment action." *Littlejohn*, 795 F.3d at 316; *see also Vega*, 801 F.3d at 90. "As with [the] analysis of the disparate treatment claim, the allegations in the complaint need only give plausible support to the reduced prima facie requirements that arise under *McDonnell Douglas* in the initial phase of a Title VII litigation." *Littlejohn*, 795 F.3d at 316.

Two activities qualify as "protected activities": where an employer retaliates against plaintiff because (1) "she 'opposed any practice' made unlawful by Title VII," or (2) "she made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under Title VII." *Id.* Under the first protected activity, the Supreme Court has held "'[w]hen an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes employee's *opposition* to the activity." *Crawford v. Metropolitan Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 276 (2009).[8]

[8] The second protected activity is implicated only where the employer's retaliation stems from plaintiff's "participation in formal EEOC proceedings," *Littlejohn*, 795 F.3d at 316, and since plaintiff made no allegation that

The Second Circuit has held "implicit in the requirement that the employer have been aware of the protected activity is the requirement that it understood, or could reasonably have understood, that the plaintiff's [complaint] was directed at *conduct prohibited by Title VII.*" *Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 107-08 (2d Cir. 2011) (holding that where complaints are generalized, employer "could not reasonably have understood that [plaintiff] was complaining of 'conduct prohibited by Title VII.'"); *Eliacin v. Cty. of Broome*, 488 F. App'x 504, 505 (2d Cir. 2012) (applying the holding to a case involving a motion to dismiss).[9]

An "adverse employment action" for the purposes of retaliation (as distinct from discrimination), "is any action that 'could well dissuade a reasonable worker from making or supporting a charge of discrimination.'" *Vega*, 801 F.3d at 90; *see also Harper v. Brooklyn Children's Ctr.*, No. 12-CV-4545 (SJF)(GRB), 2014 WL 1154056, at *2 (E.D.N.Y. Mar. 20, 2014). As the Second Circuit explained,

> This definition covers a broader range of conduct than does the adverse-action standard for claims of discrimination under Title VII: "[T]he antiretaliation provision, unlike the substantive [discrimination] provision, is not limited to discriminatory actions that affect the terms and conditions of employment."

SBU retaliated against her because of the EEOC proceedings, the second protected activity is not implicated here. *See generally* Compl.

[9] The Second Circuit has also held,

> Informal complaints to management as to discrimination on a basis prohibited by Title VII are protected activity. *See e.g.*, *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir.2000). In addition, such complaints are protected activity "even when the underlying conduct complained of *was not in fact unlawful* 'so long as [the plaintiff] can establish that he possessed a good faith, reasonable belief that the underlying challenged actions of the employer violated [the] law.'" *Treglia v. Town of Manlius*, 313 F.3d 713, 719 (2d Cir.2002) (quoting *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 159 (2d Cir.1999)) (emphasis ours).

Amin v. Akzo Nobel Chemicals, Inc., 282 F. App'x 958, 961 (2d Cir. 2008).

Id. (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006)). The Supreme Court has explained,

> Context matters. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.

Id. (citing *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 69). "Given the broad statutory text and the variety of workplace contexts in which retaliation may occur, Title VII's antiretaliation provision is simply not reducible to a comprehensive set of clear rules. We emphasize, however, that "the provision's standard for judging harm must be objective . . . ." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175 (2011).

Causation "can be shown indirectly by timing: protected activity followed closely in time by adverse employment action." *Id.* (citing *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010) (holding that "five months is not too long to find the causal relationship")). Temporal proximity "is measured from the date of the employer's knowledge of [the] protected activity." *Harper*, 2014 WL 1154056, at *4.[10]

iii. Application

First, both the EEOC charge and the complaint allege that plaintiff engaged in protected activity. Plaintiff complained about or opposed ethnic discrimination against her, to defendants deOnis, Arkin, and Anthony. EEOC Charge & Aff. 4, 5; Compl. ¶¶ 114-127, 139-42. Such a

[10] Unlike Title VII discrimination, retaliation must be a "but for" cause of the employer's adverse employment action. *Vega*, 801 F.3d at 90.

communication to SBU that SBU has engaged in ethnic discrimination against her constitutes an employee's opposition to that activity. *See Crawford*, 555 U.S. at 851.

Second, based upon the allegations in the EEOC charge and the complaint, SBU was made aware of the protected activity through defendants deOnis, Arkin, and Anthony, and SBU reasonably should have understood that plaintiff's complaint to SBU was aimed at ethnic discrimination prohibited under Title VII. *Cf. Rojas*, 660 F.3d at 107-08. Furthermore, "such complaints are protected activity 'even when the underlying conduct complained of *was not in fact unlawful* 'so long as [the plaintiff] can establish that he possessed a good faith, reasonable belief that the underlying challenged actions of the employer violated [the] law.'" *Amin*, 282 F. App'x at 961.

Third, deOnis, Arkin, and Anthony took adverse employment actions by dissuading plaintiff from making or supporting a charge of ethnic discrimination. EEOC Charge & Aff. 4-5; Compl. ¶¶ 118, 123, 127, 128, 136, 141, 162. Plaintiff attempted to contact Labor Relations several times to file a formal complaint, however, Arkin and Anthony from Labor Relations refused to take her calls or answer her emails. Compl. ¶ 136. Plaintiff also specifically requested to file a formal complaint of discrimination, and Arkin and Anthony advised her that she could not do so. *Id.* at ¶ 139. When plaintiff was finally able to speak with Arkin and Anthony on the phone, they passed the issue to deOnis. *Id.* at ¶ 137. Furthermore, deOnis failed to transfer plaintiff despite his repeated assurances that he would inquire after plaintiff expressed her desire to file a complaint of discrimination. Compl. ¶¶ 116-27.

Plaintiff states the same in the EEOC Charge and Affidavit. EEOC Charge & Aff. 4 ("I told [deOnis] I wanted to file a formal complaint of discrimination and retaliation with Labor Relations and he advised me I didn't have to because he was going to take care of the situation

by relocating me. He never contacted me with any offers of relation."); *id.* at 5 ("Labor Relations refused to answer my calls and emails asking to meet with them to file a formal complaint . . . When I told Arkin and Anthony that I was asking Labor Relations to get involved because I wanted to file a formal complaint of discrimination and retaliation I was told that I could not."). Finally, in the EEOC Charge and Affidavit, plaintiff states her "evaluation is currently two to three years overdue and I have been assigned increased duties without an increase in pay. This has not happened to my non-Hispanic co-workers." *Id.* at 5.

Given the Supreme Court's directive that "context matters" in evaluating an adverse employment action, and the "minimal burden" that is required by *Littlejohn* and *Vega* at this early juncture, the refusal by SBU through Arkin, Anthony, and deOnis to act on plaintiff's behalf, along with plaintiff's overdue evaluation and her increased workload, taken together, "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Vega*, 801 F.3d at 91.

Last, plaintiff successfully pleaded causation as the adverse employment actions—deOnis, Arkin, and Anthony's attempt to dissuade the plaintiff from bringing her discrimination complaint— immediately followed her protected activity—plaintiff's communications to deOnis, Arkin, and Anthony of her desire to file a discrimination complaint. EEOC Charge & Aff. 4-5; Compl. ¶¶ 118, 123, 127, 128, 141, 162.

In sum, the factual allegations from the EEOC charge are reasonably related to her ethnic discrimination claim filed with the EEOC, and the complaint successfully alleges retaliation claims under Title VII and NYSHRL against SBU. Therefore, the undersigned respectfully recommends that defendants' motion to dismiss retaliation claims under Title VII and NYSHRL against SBU be denied.

2. NYSHRL Claims against Individual Defendants

Plaintiff brings claims of ethnic discrimination and retaliation claims under NYSHRL, but not under Title VII, against the Individual Defendants. Compl. 1-2; *see also Garnett-Bishop*, 2014 WL 5822628, at *16 (holding that Title VII "do[es] not provide for individual liability; rather, only against the employer"). Under NYSHRL, however, an individual can only be subject to liability if she qualifies as an "employer" under New York Executive Law § 296(1)(a), or as an "aider or abettor" under New York Executive Law § 296(6). *Garnett-Bishop*, 2014 WL 5822628, at *17.

Defendant disputes whether the Individual Defendants can qualify as "employers" or "aiders and abettors" under New York Executive Law. Defs.' Br. 16. Plaintiff fails to respond to this argument, but generally argues that the ethnic discrimination and retaliation claims should not be dismissed. *See generally* Pl.'s Br.

a. Employers

"An individual qualifies as an 'employer' when that individual has 'an ownership interest in the relevant organization or the power to do more than carry out personnel decisions made by others." *Id.*; *see also Dasrath*, 965 F. Supp. 2d at 271. For an individual to have "the power to do more than carry out personnel decisions made by others," plaintiff must plead that individual defendants "had the power to independently carry out personnel decisions regarding him, such as his rate of pay, schedule or termination." *Dasrath*, 965 F. Supp. 2d at 272 (holding plaintiff did not plausibly allege that the individual defendants were "employers" because plaintiff merely alleged that the individual defendants had "the power to supervise plaintiff in his daily duties and to evaluate performance," but not "the power to independently carry out personnel decisions

regarding him, such as his rate of pay, schedule or termination"); *see also Garnett-Bishop*, 2014 WL 5822628, at *19 (holding plaintiff did not plausibly allege the individual defendants were "employers" because plaintiff did not describe the "nature of [individual defendants'] position, nor do any of their allegations against him suggest he had any role in personnel decisions").

Unlike *Dasrath* and *Garnett-Bishop*, plaintiff has plausibly alleged that each Individual Defendant has the power to do more than carry out personnel decisions made by others. The complaint alleges that each defendant had the "authority to hire, fire and discipline employees at SBU," and "had the power to do more than carry out personnel decisions made by others." Compl. ¶¶ 11-13 (Dasaro is the Director of Hospital Purchasing); ¶¶ 17-19 (Weisman is the Senior Hospital Associate Director for Administration); ¶¶ 23-25 (deOnis is a Human Resources Officer); ¶¶ 29-31 (Arkin is a Labor Relations Officer); ¶¶ 35-37 (Anthony is a Labor Relations Officer). Accepting these factual allegations as true, plaintiffs have plausibly alleged that each Individual Defendant is an "employer" under New York Executive Law § 296(1)(a). Therefore, plaintiff can proceed in her NYSHRL claims against the Individual Defendants.[11]

[11] Because the Individual Defendants qualify as "employers" under New York Executive Law, the Court need not conduct the analysis of whether they qualify as "aiders and abettors." In any event, the Individual Defendants would not qualify as aiders and abettors. In *Dasrath*, this Court held that the amended complaint did not adequately plead "aiding and abetting" where it failed to set forth the basis of "the conduct by the individual defendant that allegedly constituted aiding and abetting"; rather, the amended complaint stated "against each individual defendant . . . in a conclusory fashion, that the conduct constituted aiding and abetting discrimination." 965 F. Supp. 2d at 275. Here, like *Dasrath*, the complaint alleges in a conclusory fashion that each Individual Defendant "aided, abetted, incited, compelled and/or coerced the acts against Plaintiff"; "is named in his official and individual capacity because he knew or should have known his and SBU's ongoing willful and malicious actions against Plaintiff violated NYEL"; "personally participated in the conduct giving rise to Plaintiff's discrimination claims." Compl. ¶¶ 14-16 (Dasaro); ¶¶ 19-22 (Weisman); ¶¶ 26-28 (deOnis); ¶¶ 32-34 (Arkin); ¶¶ 38-40 (Anthony). Plaintiff failed to set forth the underlying conduct for aiding and abetting. For those reasons, the complaint fails to plausibly allege that the Individual Defendants qualify as "aiders and abettors" under New York Executive Law § 296(6).

b. Ethnicity Discrimination Claims against the Individual Defendants

Ethnic discrimination claims brought under Title VII and NYSHRL are analyzed under the same framework, and therefore, the same standard applies. *Thompson*, 2015 WL 5561209, at *14; *see also Garnett-Bishop*, 2014 WL 5822628, at *23.

"[T]o defeat a motion to dismiss . . . in a Title VII discrimination case, a plaintiff must plausibly allege that (1) the employer took adverse action against him, and (2) his race, color, religion, sex, or national origin was a motivating factor in the employment decision." *Vega*, 801 F.3d at 87.

Because plaintiff has failed to plausibly allege that she endured an adverse employment action for the purposes of the discrimination claim, the analysis of whether plaintiff alleges an ethnic discrimination claim under NYSHRL against the Individual Defendants mimics the analysis of Title VII and NYSHRL ethnic discrimination claims against SBU. Therefore, the undersigned respectfully recommends that the motion to dismiss the NYSHRL ethnic discrimination claims against the Individual Defendants be granted.

c. Retaliation Claims Against Individual Defendants

Retaliation claims are analyzed under the same standard for NYSHRL and Title VII. *Garnett-Bishop*, 2014 WL 5822628, at *23; *see also Orlando*, 2015 WL 6387531, at *14. Accordingly, the framework for Title VII retaliation set forth above applies here.

To successfully plead a retaliation claim under Title VII and NYSHRL, plaintiff must plausibly allege, "(1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse action; and (4) a causal connection between the protected

activity and the adverse employment action." *Littlejohn*, 795 F.3d at 316; *see also Vega*, 801 F.3d at 90.

The complaint alleges that she engaged in protected activity as to defendants deOnis, Arkin, and Anthony. Pl.'s Br. 11 (citing Compl. ¶¶ 114, 136, 139, 141). It also alleges that defendants deOnis, Arkin, and Anthony then took adverse employment actions by dissuading plaintiff from filing a discrimination complaint. Compl. ¶¶ 116-27 (deOnis repeatedly failed to transfer plaintiff), ¶¶ 136-37 (Arkin and Anthony ignoring plaintiff's phone calls, telling her she cannot file a complaint of discrimination, and passing off her complaint to deOnis); EEOC Charge & Aff. 4-5 (stating that deOnis never considered her transfer, Labor Relations refused to answer her calls, and increased workload). Causation is demonstrated by the allegations that the adverse employment actions immediately followed plaintiff's protected activity.

While plaintiff successfully pled NYSHRL retaliation claims as to defendants deOnis, Arkin, and Anthony, no such allegations were made as to defendants Dasaro and Weisman. *See generally* Compl. As such, the undersigned respectfully recommends that the NYSHRL retaliation claims against Dasaro and Weisman be dismissed, but the motion be denied against the other Individual Defendants.

3. Negligence Claims

a. Eleventh Amendment Immunity

Defendant argues that the Court lacks subject matter jurisdiction under the Eleventh Amendment over the plaintiff's negligence claims under New York law against SBU and the Individual Defendants in their official capacity. Defs.' Br. 8-10. Plaintiff argues that Eleventh Amendment immunity as to SBU and Individual Defendants in their official capacity "bars

recovery of 'retroactive monetary relief against a state, [though] it does not shield against claims seeking 'prospective injunctive relief.'" Pl.'s Br. 6 (citing *Hutto v. Finney*, 437 U.S. 678, 690 (1978)).[12]

The Eleventh Amendment states "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Dasrath*, 965 F. Supp. 2d at 270 (quoting *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 236 (2d Cir. 2006)). "The Eleventh Amendment . . . confirm[s] the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III's jurisdictional grant." *Bryant v. Steele*, 25 F. Supp. 3d 233, 241 (E.D.N.Y. 2014) (quoting *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011)); *see also Dasrath*, 965 F. Supp. 2d at 270. "The Eleventh Amendment has been interpreted as also barring suits in federal court against a state brought by that state's own citizens," and "state governments may not be sued in federal courts unless they have waived their Eleventh Amendment immunity." *Dasrath*, 965 F. Supp. 2d at 270 (quoting *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 151 (2d Cir. 2013)). Accordingly, "[a] claim that is barred by a state's sovereign

[12] Plaintiffs also argue "the Eleventh Amendment generally does not bar suits against officials in their individual capacity." Pl.'s Br. 6. Defendants do not dispute this argument. Defs.' Reply Br. 3 ("Defendants never claimed that the Eleventh Amendment has any relevance to individual capacity claims, whether arising under federal or state law.").

Furthermore, plaintiff argues that even if the Eleventh Amendment were to bar plaintiff's negligence claims for lack of subject matter jurisdiction, the Court could exercise supplemental jurisdiction since that doctrine lies "in the considerations of judicial economy, convenience and fairness to litigants." Pl.'s Br. 7. However, this argument fails because it is well settled that "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment," including where jurisdiction is "ancillary and supplemental." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 & n.31 (1984). Therefore, if the Eleventh Amendment applies here, supplemental jurisdiction cannot save plaintiff's negligence claims against SBU and the Individual Defendants in their official capacity.

immunity must be dismissed pursuant to the Eleventh Amendment for lack of subject matter jurisdiction." *Bryant*, 25 F. Supp. 3d at 241.

i. SBU

Eleventh Amendment immunity also extends to "a State when sued as a defendant in its own name, and also as here to 'state agents and state instrumentalities' . . . when 'the state is the real, substantial party in interest.'" *Id.* at 241-42 (quoting *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)); *see also Dasrath*, 965 F. Supp. 2d at 270-71 (quoting *Mary Jo C.*, 707 F.3d at 151-52). Courts have held that defendants SBU qualify as "state agent and state instrumentalities" to which the Eleventh Amendment immunity applies. *Bryant*, 25 F. Supp. 3d at 242; *Dasrath*, 965 F. Supp. 2d at 271.

Plaintiff argues that her negligence claims against SBU are not barred because she is seeking prospective injunctive relief, not retroactive monetary relief. Pl.'s Br. 6. Plaintiff relies on the doctrine founded in *Ex Parte Young*, 209 U.S. 123 (1908), wherein the Supreme Court held that a suit challenging the constitutionality of a state official's action is not one against the State. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 102. In such cases, "when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief." *Id.* at 102-03 (citing *Edelman v. Jordan*, 415 U.S. 651 (1974)).

However, the *Young* doctrine does not apply here because defendants SBU are not state officials. As such, the Eleventh Amendment bars plaintiff's negligence claims against SBU regardless of the relief sought. *Bryant*, 25 F. Supp. 3d at 242 ((citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (noting that the Supreme Court has "often made it clear that the

relief sought by a plaintiff suing a State is irrelevant to the question of whether the suit is barred by the Eleventh Amendment."). Therefore, the undersigned respectfully recommends that the negligence claims against SBU be dismissed.

ii. Individual Defendants in Their Official Capacity

Plaintiff also seeks to recover prospective injunctive relief under the *Young* doctrine against the Individual Defendants in their official capacities pursuant to state law negligence claims. Pl.'s Br. 6.

In *Pennhurst State School & Hospital v. Halderman*, the Supreme Court held that the Eleventh Amendment prohibited courts from ordering state officials to conform their conduct to state law. 465 U.S. at 96-123. The Court explained that *Edelman v. Jordan*'s distinction between prospective injunctive relief and retroactive monetary relief was created to fulfill *Young*'s underlying purpose of vindicating the supreme authority of federal law while preserving an important degree of the state's constitutional immunity. *Id.* at 105-06. As the Court held,

> This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated *state* law. In such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.

Pennhurst State Sch. & Hosp., 465 U.S. at 106.

Because plaintiff cannot seek to recover prospective injunctive relief against the Individual Defendants in their official capacities pursuant to state law negligence claims, the undersigned respectfully recommends that the claim be dismissed.

b. Negligence Claims Against the Individual Defendants in Their Individual Capacity

The parties dispute whether plaintiff's negligence claims under New York state law against the Individual Defendants in their individual capacity should be dismissed. Defs.' Br. 21-22 (citing *Daniel v. T&M Prot. Res., Inc.*, 992 F. Supp. 2d 302, 315-16 (S.D.N.Y. 2014); *Baguer v. Spanish Broad. Sys., Inc.*, No. 04 Civ. 8393 (KMK), 2007 WL 2780390, at *4 (S.D.N.Y. Sept. 20, 2007); Pl.'s Br. 12-16.

In *Daniel v. T&M Protection Resources, Inc.*, the court dismissed plaintiff's common law negligence claim against plaintiff's employers, holding that "allegations of employment discrimination cannot be transmuted into tort claims sounding in negligence." 992 F. Supp. 2d 302, 315-16 (S.D.N.Y. 2014). There, plaintiff alleged that the employers "failed to protect [plaintiff] from [a co-worker]'s harassment and then retaliated against him," which was "no different from his employment discrimination claims under Title VII, NYSHRL, and NYCHRL." *Id.* at 315. The court then held "the allegations of federal, state, and city anti-discrimination laws are not torts under New York law." *Id.* at 315-16 (citing *Baguer*, 2007 WL 2780390, at *4; *Tranor v. Metro. Transp. Auth.*, 414 F. Supp. 2d 297, 303 (S.D.N.Y. 2005)).

The facts here are similar to that in *Daniel.* Plaintiff alleges that the Individual Defendants failed to protect the plaintiff from co-worker Thomas's harassment, and upon reporting the ethnic discrimination to SBU through deOnis, Arkin, and Anthony, retaliated against her. *See, e.g.*, Pl.'s Br. 14 ((("as an employee being subject to workplace violence from a co-worker, Plaintiff justifiably relied on Defendant to take steps to protect her from harm." (citing Compl. ¶¶ 61, 72, 88, 90, 111)). This is essentially no different from plaintiff's claims under Title VII and NYSHRL. Therefore, the undersigned respectfully recommends that the

state law negligence claims against Individual Defendants in their individual capacity be dismissed.

4. Punitive Damages

Plaintiff seeks punitive damages under Title VII against SBU. Compl. 21. Defendants move to dismiss punitive damages in plaintiff's prayer for relief. Defs.' Br. 16.

As an initial matter, courts have dismissed punitive damages at the motion to dismiss stage. *See Leblanc v. United Parcel Serv., Inc.*, No. 2:95-CV-68, 1996 WL 192011, at *6 (D. Vt. Apr. 2, 1996). Under Title VII,

> complaining party may recover punitive damages under this section against a respondent **(other than a government, government agency or political subdivision)** if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b)(1) (2016) (emphasis added); *see also Ettinger v. State Univ. of New York State Coll. of Optometry*, No. 95 CIV. 9893 (RWS), 1998 WL 91089, at *7 (S.D.N.Y. Mar. 2, 1998) (citing 42 U.S.C. § 1981a(b)(1) (1994)).

In the Eleventh Amendment context, this Court has held that "the State University of New York, of which the [Stony Brook University] Medical Center is a part, has been held to be 'an integral part of the government of the State.'" *Dasrath*, 965 F. Supp. 2d at 271; *see also Bryant*, 25 F. Supp. 3d at 242. In *Ettinger v. State University of New York*, the court held that because the State University of New York ("SUNY") is deemed a governmental entity under Eleventh Amendment immunity, SUNY similarly qualifies as a governmental entity under § 1981a, and thus, § 1981a bars the imposition of punitive damages for plaintiff's Title VII claims. 1998 WL 91089, at *7-9. Because SUNY, of which defendants SBU is a part, is a governmental

entity under § 1981a, the undersigned respectfully recommends that plaintiff's prayer for punitive damages under Title VII against SBU be dismissed.

CONCLUSION

Based on the foregoing, the undersigned respectfully recommends the motion to dismiss (1) the ethnicity discrimination claims under Title VII and NYSHRL against SBU be GRANTED; (2) the retaliation claims under Title VII and NYSHRL against SBU be DENIED; (3) the ethnicity discrimination claims under NYSHRL against the Individual Defendants be GRANTED; (4) the retaliation claims under NYSHRL against the Individual Defendants be GRANTED as to defendants Dasaro and Weisman, but otherwise DENIED; (5) the negligence claims against all defendants be GRANTED; (6) the prayer for punitive damages under Title VII against SBU be GRANTED.

OBJECTIONS

A copy of this Report and Recommendation is being electronically filed with the representatives of each party. Any written objections to the Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this report. 28 U.S.C. § 636(b)(1) (2006 & Supp. V 2011); Fed. R. Civ. P. 6(a), 72(b). Any requests for an extension of time for filing objections must be directed to the district judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. **Failure to file objections within fourteen (14) days will preclude further review of this report and recommendation either by the District Court or the Court of Appeals.** *Thomas v. Arn*, 474 U.S. 140, 145 (1985) ("[A] party shall file objections with the district court or else waive right to appeal.");

Caidor v. Onondaga Cnty., 517 F.3d 601, 604 (2d Cir. 2008) ("[F]ailure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision.").

Dated: Central Islip, New York
January 28, 2016

/s/ Gary R. Brown
GARY R. BROWN
United States Magistrate Judge