SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH **PART** 52
Justice

Index Number : 158989/2013
BRAY, FELICIA
vs
NEW YORK CITY DEPARTMENT OF
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1-2

Answering Affidavits — Exhibits _____ **No(s).** 3

Replying Affidavits _____ **No(s).** 4-5

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: March 21, 2018

_____, J.S.C.
HON. ALEXANDER M. TISCH

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☒ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

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FELICIA BRAY,

Plaintiff,

Index No.: 158989/2013

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

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ALEXANDER M. TISCH, J.:

This action arises out of plaintiff Felicia Bray's claims that she was subject to a hostile work environment and retaliated against, in violation of the New York City Human Rights Law (NYCHRL), while working for defendant New York City Department of Education (DOE). The DOE moves pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff cross-moves, for an order holding that the two notices of claim are timely and sufficient, and that the DOE is precluded from raising these issues at trial.

BACKGROUND AND FACTUAL ALLEGATIONS

In 1998, plaintiff commenced her employment with the DOE as a school aide. Shortly thereafter, plaintiff became a certified teacher and eventually, in September 2008, became employed as an assistant principal for administration at the Manhattan Center for Science and Math, a high school located in New York, New York. Plaintiff's responsibilities included, among other things, managing school funds and budgets, and supervising teachers. The record indicates that plaintiff was originally appointed on an

interim basis and did not become a probationary assistant principal until October 20, 2008.[1]

Plaintiff alleges that, between June 2008 and July 2009, she was subject to a hostile work environment based on gender. According to plaintiff, Jose Jimenez (Jimenez), the principal of the school, sexually harassed her by repeatedly propositioning her for sex. On July 15, 2009, Jimenez allegedly also sexually assaulted plaintiff by inappropriate touching and getting too close to her. When plaintiff rebuffed his advances and complained about his behavior to various New York agencies, Jimenez retaliated against plaintiff by terminating her.

Hostile Work Environment Claims

Plaintiff's sexual harassment allegations are as follows, in pertinent part:

- On October 15, 2008, after a meeting, plaintiff and Jimenez went to a restaurant near the school. Jimenez allegedly touched plaintiff's hand and told her that he liked her. Plaintiff told Jimenez that she was uncomfortable and wanted to leave. Shortly thereafter, while Jimenez and plaintiff were in his office, Jimenez came up to plaintiff from behind and allegedly grabbed plaintiff's breasts for at least two minutes while she tried to wrestle him off. Plaintiff claims that, although she screamed for Jimenez to stop, he only did so when the custodian knocked on the door. Plaintiff claims that she was unable to go into work for a couple of days after the incident as a result of "disgust, humiliation and fear."[2] Declaration of Felicia Bray dated March 17, 2013, ¶ 22.[3]

- On November 26, 2008, Jimenez purportedly drove up behind plaintiff in the school parking lot, honked the horn and screamed that plaintiff should drive and follow his car. Plaintiff ignored this request and drove to her destination.

- In the spring of 2009, Jimenez asked plaintiff and another male teacher to meet him in the school health office. When they arrived, Jimenez asked plaintiff to open up a drawer and, when she did, found an "anatomically correct condom education model." *Id.*, ¶ 28. Plaintiff believed that this was harassment, in Jimenez's "typically weird" fashion. *Id.*

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[1] In an interim position, plaintiff could be terminated at any time. Although it takes five years to become eligible for tenure as an assistant principal, when plaintiff became a probationary assistant principal, she received additional protection and protocols, including union representation.

[2] Shortly after the incident, Jimenez and a review panel formally interviewed and hired plaintiff for the probationary position of assistant principal.

[3] Plaintiff reaffirmed this declaration via an affidavit dated May 7, 2017.

- On May 8, 2009, at a gala attended by several coworkers, Jimenez allegedly asked plaintiff if he could drive to her house first before the event so that they could drive to the gala together. Plaintiff said no. At the gala, Jimenez was "drunk [and belligerent]," and demanded that plaintiff not leave the gala but stay with him. *Id.*, ¶ 30. Plaintiff believes that, after rebuffing Jimenez's advances, he retaliated against her by moving her office into a more isolated area.

- On or about July 15, 2009, as plaintiff was walking in the hallway, Jimenez leaned in, "sniffed" plaintiff and laughed. *Id.*, ¶ 32. "His head was on my neck. This sexually predatory man, who I had told repeatedly to leave me alone, did not have permission to do that." *Id.* Plaintiff advised Jimenez that, if he did not stop harassing her she would report him. Jimenez allegedly asked plaintiff not to file a complaint and that, if she complied, he would give her a forward-dated satisfactory review.

Plaintiff's Complaints and Alleged Retaliation

In July 2009, plaintiff informally reported the allegations of sexual harassment with her union, DOE's human resources and the special commissioner of investigation for the DOE.[4]

Plaintiff claims that, after Jimenez learned of these complaints, he issued a disciplinary warning to plaintiff regarding the way she collected and stored approximately $37,000 in payments for the senior class graduation activities and yearbook from June 17-19, 2009.[5]

Plaintiff received the disciplinary warning pursuant to a letter dated September 3, 2009. The letter advised plaintiff that, although had she deposited the money in the school safe, she did not, in accordance with protocol, take the money within one day to the bank. The letter advised plaintiff that the funds needed to be handled as mandated by the Chancellor's Regulations, and that this type of violation could lead to an unsatisfactory rating and termination.

On September 3, 2009, plaintiff filed a complaint with the DOE's Office of Equal Opportunity (OEO), alleging that Jimenez sexually harassed her. On September 4, 2009, the OEO's office informed

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[4] For example, an email in the record indicates that, by July 28, 2009, plaintiff had contacted the special commissioner about the alleged harassment. *See* DOE's exhibit R at 1.

[5] Jimenez's affidavit states that he met with plaintiff in June 2009 to discuss this incident. He further adds that, "[a]lthough I had concerns about [plaintiff's] performance, I gave [plaintiff] a Satisfactory rating for the 2008-2009 school year. This was an overgenerous rating." DOE's exhibit U, Jimenez aff, ¶ 11.

Jimenez about this complaint and asked to speak with him.

On September 13, 2009, plaintiff filed a complaint with the New York City Commission on Human Rights (NYCCHR), alleging that Jimenez subjected her to sexual harassment and then retaliated against her as a result of her filing a complaint with the OEO. Specifically, plaintiff claimed that, after she filed the complaint, she received several written disciplinary warnings from Jimenez and that, prior to this, she had never received any disciplinary warnings.

On October 5, 2009, a letter was placed in petitioner's file. Among other things, the letter advised petitioner that she was acting in an insubordinate manner on September 24, 2009, when she ignored Jimenez's directive to address a lunch issue in the cafeteria. The letter stated that petitioner argued with Jimenez about the issue and acted in an unprofessional manner. The letter concluded by informing petitioner that, if she continued with such negative conduct, she might receive an unsatisfactory rating and termination.

On October 13, 2009, plaintiff filed a notice of claim against the DOE alleging negligence, negligent supervision, negligent hiring and retention, and that the DOE's negligence created a hostile work environment. When asked to explain the "time when, the place where and the manner in which the claim arose," plaintiff described the incident on July 15, 2009 and claimed that Jimenez sexually assaulted her by inappropriately touching, getting too close and sniffing her. DOE's exhibit G at 2.

On December 1, 2009, plaintiff received another disciplinary letter in her file from Jimenez. In the letter, Jimenez states that plaintiff failed to "(1) provide updated balance sheets for school accounts; (2) secure school funds; and (3) monitor health compliance mandates for students' tuberculosis vaccinations." Exhibit V at 1. Jimenez continued that plaintiff failed to provide him with the requested balance sheets. He noted that, because plaintiff failed to secure the funds in the school store, two hundred dollars were stolen. Jimenez further stated that plaintiff's failure to supervise resulted in the second year of noncompliance with the tuberculosis vaccination.

On December 11, 2009, plaintiff received a letter from the DOE, informing her that she was being terminated as a result of professional misconduct and insubordination as documented by the letters in her file. Jimenez used the letters dated October 5, 2009 and December 1, 2009 to support his decision to discontinue plaintiff's probation.[6] Plaintiff believes that this termination occurred shortly after the DOE received the NYCCHR complaint.

After receiving the notice of termination, plaintiff submitted documentation to the DOE's superintendent, informing the superintendent about the sexual harassment and retaliation claims. Nonetheless, pursuant to a letter dated January 27, 2010, the superintendent advised plaintiff that she was reaffirming plaintiff's discontinuance of probationary service as an assistant principal.

On March 4, 2010, plaintiff updated and served a second notice of claim on the DOE, alleging that she was retaliated against for lodging a complaint against Jimenez. In June 2010, plaintiff filed a charge of discrimination with the United States Equal Employment Opportunity Commission (EEOC).

In August 2010, plaintiff amended her claim with the NYCCHR to include a claim for retaliation. The amendment stated that the DOE discriminated against her by sexually harassing and retaliating against her, in violation of the federal and state human rights laws. She alleged that, shortly after the DOE received the Sept 13, 2009 complaint, she was demoted from assistant principal to teacher and, as a result, her salary was reduced.

Plaintiff subsequently withdrew her claim with the NYCCHR. She then requested a right to sue letter from the EEOC. On August 17, 2011, plaintiff received a right to sue letter from the EEOC, which noted that plaintiff wished to pursue the matter in federal court.

The Federal Action

On November 4, 2011, plaintiff commenced an action in the United States District Court for the Southern District of New York, alleging that the DOE violated Title VII, the NYSHRL and the

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[6] Prior to December 2009, plaintiff had always received satisfactory ratings.

NYCHRL, when it subjected plaintiff to a hostile work environment on the basis of gender and retaliated against her when she complained about the discriminatory conduct. The DOE moved for summary judgment dismissing plaintiff's claims.

On July 10, 2013, US District Court Judge Denise Cote (Cote) issued a decision and order dismissing the Title VII claims, as untimely.[7] Despite dismissal on that ground, the court noted that the DOE is not absolved from Jimenez's behavior, and, considering the circumstances, "would be vicariously liable for Jimenez's creation of a hostile work environment." *Bray v New York City Dept. of Educ.*, 2013 US Dist Lexis 97109, *17, 2013 WL 3481532, *6 (SD NY 2013). This hostile work environment consisted of repeated harassment over the course of months. The court further opined and explained how plaintiff "had submitted evidence to avoid summary judgment on her retaliation claim." *Id.* Nevertheless, the court ultimately dismissed the Title VII claims, as untimely, and declined to exercise supplemental jurisdiction on the NYSHRL and NYCHRL claims.

The Instant Action

After the federal action was dismissed, plaintiff brought the instant complaint alleging discrimination and retaliation in violation of the NYCHRL.[8] In the first cause of action, plaintiff claims that she was subject to sexual harassment that resulted in a hostile work environment, in violation of the NYCHRL. Plaintiff's second cause of action alleges that the DOE retaliated against plaintiff, in violation of the NYCHRL.

In the motion for summary judgment, the DOE argues that plaintiff's claim for hostile work environment should be barred, as plaintiff did not file a timely notice of claim. Plaintiff's first notice of claim was filed on October 13, 2009. The DOE maintains that, as many of plaintiff's allegations of

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[7] The Court held that plaintiff presumably had received her right to sue letter from the EEOC on September 6, 2010, and that the time to file suit expired on December 6, 2010. As plaintiff did not file suit until November 4, 2011, her Title VII claim was untimely.

[8] Plaintiff did not allege violations of the NYSHRL.

harassment occurred in 2008, they are untimely. The DOE argues that the lateness of plaintiff's notice of claim would substantially prejudice the ability of the DOE to perform an investigation.

In addition, according to the DOE, the only timely allegation of harassment would be the July 15, 2009 incident, where Jimenez is alleged to have "sniffed" plaintiff. However, as plaintiff stated in the notice of claim that she was sexually assaulted, not sexually harassed, this incident could not serve to notify the DOE of a hostile work environment.

The DOE maintains that, even if the "sniffing" allegation could suffice for notice of a hostile work environment, it would not be an actionable claim, as it is not based on gender and is no more than a petty slight or trivial inconvenience.

With respect to plaintiff's claim for retaliation, the DOE argues that plaintiff cannot demonstrate a causal connection between plaintiff's protected activity and the allegedly retaliatory actions.[9] The DOE continues that it had legitimate and nondiscriminatory reasons for plaintiff's termination, as her termination was the culmination of continual problems with job performance. Plaintiff's negative performance had initially been documented in June 2009, prior to any of her July 2009 complaints with the DOE and prior to the time when Jimenez became aware of any complaints.

In opposition, plaintiff argues that a notice of claim is not required for a complaint alleging violations of the NYCHRL. In any event, plaintiff states that her July 15, 2009 notice of claim is timely. She continues that, as her claim is timely under the continuing violation doctrine, all of the other instances of sexual harassment that occurred prior to this episode are timely.

Plaintiff argues that the notice of claim sufficiently provided the DOE with the information required to conduct an investigation. In addition, even if the other events leading up the July 15, 2009 episode were not explicitly listed on the notice of claim, plaintiff argues that they were contained in

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[9] In its memo of law, the DOE addresses additional claims of retaliation that plaintiff had alleged in the federal action. However, as these allegations are not included in the instant complaint and not addressed by plaintiff, the court will not address them at this time.

complaints that would be the functional equivalent of a notice of claim. For example, as early as July 2009, the DOE was in receipt of internal complaints alleging verbal abuse, assaults and intimidation. Plaintiff further filed a complaint with the DOE's special investigator in August 2009, and, in September 2009, filed complaints with the NYCCHR and the OEO.

For the above reasons, plaintiff argues that her cross motion was brought as a way to preclude the DOE from arguing that they did not receive timely or sufficient notice of plaintiff's harassment and retaliation claims.[10]

Plaintiff further believes that, in light of Judge Cote's decision in the federal action, the DOE's motion for summary judgment should be denied based on "issue preclusion, collateral estoppel and res judicata." *Id.*, ¶ 26. As Judge Cote made factual findings regarding a hostile work environment and retaliation in the federal decision, these findings should not be relitigated.

Notwithstanding Judge Cote's decision, plaintiff argues that the DOE's motion should be denied because she was subject to a continuing course of non-consensual conduct, thereby creating a hostile work environment.

Plaintiff believes that she was retaliated against because, soon after she rebuffed Jimenez's advances and complained about his behavior, he placed disciplinary letters in her file and recommended discontinuing her probationary service. Plaintiff states that, in September 2009, she participated in a protected activity known to the DOE by filing administrative complaints with the OEO and the NYCCHR. Plaintiff then sustained an adverse action when, in December 2009, the DOE terminated her from her position as assistant principal. As a result of her termination and resulting demotion, plaintiff sustained damages, including a reduced salary. In addition, plaintiff claims that, instead of qualifying for

[10] According to plaintiff, the DOE "failed to reveal all of the documentation that it received from plaintiff that went to at least three of their own offices in or about July and August 2009 . . . ." Pasik affirmation, ¶ 20.

tenure in 2013, as a result of the retaliation, she will not qualify until 2016.[11]

Plaintiff notes that she received a satisfactory rating for the 2008-2009 school year. This school year included June 2009, despite Jimenez's allegation that he counseled plaintiff regarding the school funds and the need to deposit them promptly in the bank.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

II. Notice of Claim

Pursuant to Education Law § 3813 (1), prior to maintaining an action against the DOE, a plaintiff must file a notice of claim within three months of the accrual of the claim. *See e.g. Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 547 (1983) ("Satisfaction of these [notice of claim]

[11] Plaintiff states that she has been employed as an assistant principal at a different school since 2011.

requirements is a condition precedent to bringing an action against a school district or a board of education . . ."). Therefore, a claimant seeking to commence an action against the DOE for violations of the NYCHRL must serve a notice of claim on the DOE within three months of the claim arising. *United States v New York City Dept. of Educ.*, 2017 US Dist Lexis 45816, *7, 2017 WL 1169653, *2 (SD NY 2017); *see also Munro v Ossining Union Free School Dist.*, 55 AD3d 697, 698 (2d Dept 2008) (claimant seeking to commence an action against a school district for violations of the Human Rights Law must file a notice of claim within three months of the claim's accrual). "Compliance with this requirement is a condition precedent to suit and must be pleaded in the complaint." *Id.*

The Appellate Division, First Department, has carved out an exception to the notice of claim requirement only when the relief sought is equitable in nature. *See e.g. Rose v New York City Health & Hosps. Corp.*, 122 AD3d 76, 83 (1st Dept 2014) ("In a line . . . of cases subject to the broad notice provision of Education Law § 3813 (1), this Department has held that a claimant seeking only equitable relief need not file a notice of claim"). Here, however, plaintiff is seeking economic damages as a result of sustaining physical, psychological and economic damages, "in an amount that exceeds the jurisdictional limitations of all lower Courts . . . ." Contrary to plaintiff's contention, the complaint requires a notice of claim. *See e.g. Pinder v City of New York*, 49 AD3d 280, 281 (1st Dept 2008) ("Dismissal of the Executive Law § 296 claim was also proper because plaintiff did not file a notice of claim within three months of her termination").

Here, it is undisputed that plaintiff filed a notice of claim regarding the July 15, 2009 incident on October 13, 2009. This notice of claim was timely, because it was within three months of the July 15, 2009 claim's accrual.

"The essential elements to be included in the notice [of claim] are the nature of the claim, the time when, the place where and the manner in which the claim arose." *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d at 547. Here, plaintiff's October 13, 2009 notice of claim informed the

DOE that plaintiff was demanding money damages as a result of, among other things, being subject to a hostile work environment. Plaintiff included the essential elements of the claim and provided details of the July 15, 2009 incident. As a result, the notice of claim "sufficiently informed" the DOE about the nature of the claim. *Id.* (internal quotation marks and citation omitted).[12]

Continuing Violation Doctrine

The DOE argues that plaintiff's claims for sexual harassment are barred, as all of the alleged conduct, other than the July 15, 2009 incident, occurred more than three months before the notice of claim was filed.

Although plaintiff is required to file a notice of claim within 3 months after accrual of the claim, a "continuing violation exception" applies to hostile work environment claims. This is because a hostile work environment is not merely comprised of several discrete acts, but of a "series of separate acts that collectively constitute an unlawful discriminatory practice." *Matter of Lozada v Elmont Hook & Ladder Co. No. 1*, 151 AD3d 860, 861 (2d Dept 2017). Therefore, a claim for hostile work environment will not be time-barred if all of the acts complained of are part of the same unlawful practice, and at least one discriminatory act falls within the statute of limitations. *Id.* at 861, 862 (internal quotation marks and citation omitted)("[T]he statute of limitations requires that only one sexually harassing act demonstrating the challenged work environment occur within [the statutory period] and that once that is shown, a court . . . may consider the entire time period of the hostile environment in determining liability").

The DOE argues that plaintiff's allegations prior to July 15, 2009 do not meet the threshold for a continuing violation. According to the DOE, the July 15, 2009 incident is a discrete and isolated act,

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[12] It is puzzling that the DOE would argue that there was no notice of hostile work environment, given that the notice of claim specifically states that plaintiff was subject to a hostile work environment, and that it was only notified of sexual assault, but not sexual harassment. Moreover, the DOE could hardly claim prejudice, as it is undisputed that, in addition to the notice of claim, it received several internal complaints containing plaintiff's allegations of sexual harassment.

and bears no relationship to the other allegedly discriminatory acts. In any event, according to the DOE, the only other allegation that was sexual in nature occurred on October 15, 2008, which was too far removed from the only timely allegation.

The DOE's arguments are without merit. Jimenez began the alleged harassment by propositioning plaintiff, and when his advances were rejected, he engaged in other harassing behavior. Even if the July 15, 2009 incident, in and of itself, were not actionable, this display "collectively constitute[d]" an unlawful employment practice.[13] *Id.*, 151 AD3d at 861. Taking all of the allegedly harassing conduct as a whole, "[t]his last comment also demonstrated discriminatory conduct within the limitations period sufficiently similar to the conduct without the limitations period to justify the conclusion that both were part of a single discriminatory practice." *Sier v Jacobs Persinger & Parker*, 276 AD2d 401, 401 (1st Dept 2000).

Accordingly, as the statute of limitations on the notice of claim did not begin to run until the last discriminatory act, the court finds that plaintiff's allegations that comprise her hostile work environment claim are not barred.

III. NYCHRL Hostile Work Environment

Pursuant to the NYCHRL, Administrative Code § 8-107 (1) (a), it is an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's gender. The provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts. *Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 (1st Dept 2016).

"Under the NYCHRL, there are not separate standards for discrimination and harassment

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[13] Of course, there are instances where "a single comment that objectifies women being made in circumstances where that comment would, for example, signal views about the role of women in the workplace and be actionable." *Hernandez v Kaisman*, 103 AD3d 106, 115 (1st Dept 2012) (internal quotation marks and citation omitted).

claims." *Johnson v Strive E. Harlem Empl. Group*, 990 F Supp 2d 435, 445 (SD NY 2014) (internal quotation marks and citation omitted). To establish a hostile work environment claim under the NYCHRL, "the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 (1st Dept 2009). Despite the broader application of the NYCHRL, conduct that consists of "petty slights or trivial inconveniences . . . do[es] not suffice to support a hostile work environment claim." *Buchwald v Silverman Shin & Byrne PLLC*, 149 AD3d 560, 560 (1st Dept 2017) (citation omitted).

In the present case, viewed in the light most favorable to plaintiff, she has raised a triable issue of fact that Jimenez treated her less well than other employees due to her gender. In addition, the alleged conduct, including some form of sexual solicitation, could reasonably be interpreted as being more than "petty slights or trivial inconveniences." *Id.*; *see also Hernandez v Kaisman* (103 AD3d at 115) ("Because, at the very least, defendant's conduct can be characterized as having subjected plaintiffs to 'differential treatment,' the broad remedial purposes of the City HRL would be countermanded by dismissal of the claim").

Accordingly, the DOE's motion for summary judgment dismissing the hostile work environment claim under the NYCHRL is denied.

IV. NYCHRL Retaliation

Under the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Administrative Code § 8-107 (7). Under the broader interpretation of the NYCHRL, "[t]he retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7). For plaintiff to successfully plead a claim for retaliation under the NYCHRL, she must demonstrate that: "(1) [she] participated in a protected activity known to [the DOE];

(2) [the DOE] took an action that disadvantaged [her]; and (3) a causal connection exists between the protected activity and the adverse action." *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012). Protected activity under the NYCHRL refers to "opposing or complaining about unlawful discrimination." *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dept 2010) (internal quotation marks and citations omitted). "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 314-315 (1st Dept 2005) (internal quotation marks and citations omitted).

Here, without making any credibility determinations, plaintiff has raised a triable issue of fact that there was a causal connection between her protected activity and the adverse action. In July 2009, plaintiff specifically opposed discriminatory practices by filing complaints with the DOE and several other agencies, alleging that she was being sexually harassed by her supervisor. Although it is unclear if Jimenez was informally informed of these July 2009 complaints, he formally received notice of them on September 4, 2009.

Shortly thereafter, on October 5, 2009, a disciplinary letter was placed in her file regarding an alleged incident that took place on September 24, 2009. Subsequently, on December 1, 2009, Jimenez placed another disciplinary letter in plaintiff's file. Finally, on December 11, 2009, Jimenez filed a report recommending that plaintiff be discontinued, or terminated, from her probationary position as assistant principal.

Plaintiff was ultimately removed from her position and reassigned to a teaching position with a lower salary. Although plaintiff eventually received a reappointment to an assistant principal position, she claims to have lost three years in the tenure process.

In light of the above, plaintiff has raised a triable issue of fact that, shortly after complaining

about sexual harassment, Jimenez became aware of these complaints and engaged in retaliatory conduct. Accordingly, the DOE's motion for summary judgment on the retaliation cause of action is denied.

Collateral Estoppel

Plaintiff argues that the DOE's motion should be denied based on collateral estoppel, res judicata and issue preclusion. "Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . , whether or not the tribunals or causes of action are the same. The issue must have been material to the first action or proceeding and essential to the decision rendered therein." *BDO Seidman LLP v Strategic Resources Corp.*, 70 AD3d 556, 560 (1st Dept 2010) (internal quotation marks and citation omitted).

In brief, as set forth in the facts, Judge Cote found that plaintiff's Title VII claims were untimely, thereby extinguishing those causes of action. Although the Court addressed plaintiff's claims for hostile work environment and retaliation, this discussion was not "essential to the decision rendered." *Id.* Accordingly, collateral estoppel does not apply to bar the DOE's current motion.[14]

V. Cross Motion

Plaintiff is seeking an order "that all issues as to the timeliness and sufficiency of the notices of claim and/or defendant being on timely and sufficient notice of plaintiff's claims, should be decided in plaintiff's favor . . . ." Plaintiff's notice of cross motion. The DOE argues that the cross motion is "merely opposition" to the summary judgment motion and that there is no legal basis for the relief requested. DOE's reply memo of law at 22.

Plaintiff's cross motion is denied. The nature of the requested relief is unclear and appears to be a general opposition to the DOE's summary judgment motion. In any event, all of the issues raised regarding the timeliness and sufficiency of the two notices of claim were necessarily addressed and

[14] In any event, as triable issues of fact remain, the DOE's motion for summary judgment is denied.

determined in deciding the instant motion for summary judgment.

Accordingly, it is ORDERED that defendant New York City Department of Education's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that plaintiff Felicia Bray's cross motion is denied.

The parties are reminded of their next appearance in the early settlement conference part on March 27, 2018 at 9:30 AM.

Dated: March 21, 2018

ENTER:

A.J.S.C.

HON. ALEXANDER M. TISCH