UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY SHARON WAYNE,	:	
	:	
Plaintiff,		
	:	
-v.-		OPINION AND ORDER
	:	01 Civ. 941 (GWG)
ANTHONY J. PRINCIPI, Secretary of the Department of Veterans Affairs,	:	
	:	
Defendant.	:	

GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE

Plaintiff Mary Sharon Wayne, proceeding pro se, brings this action pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e to 2000e-17, and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634, alleging that her former employer, the Department of Veterans Affairs ("VA"), discriminated against her on the basis of her age and sex and retaliated against her for engaging in protected activities. Defendant Anthony J. Principi, Secretary of the VA ("Secretary"), has moved for summary judgment pursuant to Fed. R. Civ. P. 56 on the grounds that Wayne did not meet the statutory prerequisites to suit and that the suit fails on the merits. The parties have consented to disposition of this matter by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). For the following reasons, the motion is granted.

I. BACKGROUND

The following statement of facts is taken from the uncontroverted allegations of Defendant's Rule 56.1 Statement, filed December 15, 2003 ("Def. 56.1").

In July 1999, when Wayne was 49 years old, she entered the two-year Maxillofacial Prosthetic Technician Training Program ("MPTTP") at the Bronx VA Medical Center. Def. 56.1 ¶¶ 1-3, 13-14. Only one person is accepted into the training program each year. Id. ¶ 2. At the end of Wayne's first trimester in the program (November 1999), she received evaluations which indicated that her performance was unsatisfactory. Id. ¶¶ 18-19. Eric Asher, the Director of the MPTTP and Wayne's direct supervisor, made recommendations for her improvement. Id. ¶¶ 5, 20. While Wayne's evaluations at the end of the second trimester (March 2000) were slightly better, the comments written by her supervisors reflected concerns about promptness, organization, and completion of assignments. Id. ¶ 23. Again, efforts were made to assist Wayne in addressing these issues. Id. ¶¶ 24-27.

By the end of Wayne's fourth trimester in the program (November 2000), her evaluations indicated that her performance remained substantially unsatisfactory. Id. ¶ 33. Dr. Gerald Sabol, the Chief of the Dental Service at the Bronx VA Medical Center, who has ultimate decision-making authority over the hiring and firing of MPTTP trainees, received letters from several staff members, including Asher, describing Wayne's inappropriate removal of equipment and inappropriate interactions with patients. Id. ¶¶ 6, 30-31. Dr. Sabol met face-to-face with Wayne on January 2, 2001 and provided her with a letter of "Written Counseling Regarding Your Conduct and Performance." Id. ¶ 35. This letter informed Wayne that her progress in the program had been slower than expected and that her disrespectful conduct toward Asher had to

stop. Id. Wayne was also advised in writing that to the extent she believed she may have been discriminated against, she could contact an Equal Employment Opportunity ("EEO") counselor through the VA's Office of Resolution Management ("ORM"). Id.

Wayne contacted the ORM in January 2001. Id. ¶ 52. On or about February 6, 2001, Wayne spoke to Milagros Andino, the EEO counselor assigned to her case. Id. ¶ 53. At some point in early February 2001, Wayne met with Andino to go over EEO forms and discuss Wayne's allegations. Id. ¶ 54. At this meeting, Andino told Wayne that she would begin an investigation and determine whether it was appropriate to proceed, as Wayne was a temporary employee. Id. ¶ 55; see also Letter to the Hon. Gabriel W. Gorenstein from Wayne, dated July 17, 2001 ("Wayne Letter"), at 1.

At the same time, Wayne sought the advice of Celestino P. Monclova. Def. 56.1 ¶ 56. Monclova was not an attorney, nor was he an employee of the VA during the period of Wayne's employment. Id. Monclova advised Wayne to file a lawsuit before she got fired. Id. ¶ 57.

On February 7, 2001, Wayne filed this action in federal district court. Id. ¶ 58; see Complaint, filed February 7, 2001 ("Complaint"). Monclova assisted her in drafting the complaint and filling out the necessary forms. Def. 56.1 ¶ 58. The complaint alleged that from the outset of Wayne's employment at the VA, her supervisors "consistently harassed, downgraded, [and] demeaned" her because of her sex and age. Complaint ¶ 8.3. Among other things, she alleged that Asher "sabotaged" her training by denying her "adequate practice," "actual patient cases," and the right to work in the lab unsupervised. Id. ¶¶ 8.6, 8.11. Wayne also claimed that Asher had called her "retarded," "mentally dysfunctional," "a weirdo," and a

"big joke." Id. ¶ 8.8. She alleged that another female trainee, Margie Golden, was being subjected to the "same harsh and unfair treatment." Id. ¶ 8.4.

At some point, Andino told Wayne that she needed to withdraw either the EEO complaint or the federal complaint but that she was not in a position to advise Wayne as to what she should do. Def. 56.1 ¶ 59. On February 28, 2001, Wayne withdrew her complaint from the EEO process. Id. ¶ 60. She testified that she made the decision to withdraw the complaint of her own free will and free of coercion. Id.

Meanwhile, throughout February and March 2001, Wayne was reprimanded repeatedly for continuing to work on unassigned projects, reporting to work late, and removing materials from the laboratory without permission. Id. ¶ 36. Based on such ongoing complaints and on Wayne's fifth trimester evaluations (March 2001), for which her rankings were largely "doubtful" or "unsatisfactory," Dr. Sabol decided to terminate Wayne's employment. Id. ¶¶ 37-41; Fifth Trimester Evaluations of Wayne (annexed as Ex. L to Declaration of Andrew O'Toole, filed December 15, 2003 ("O'Toole Decl.")). On April 3, 2001, Wayne was informed of this decision and that the effective date of her termination was April 18, 2001. Def. 56.1 ¶¶ 37, 39.

On April 4, 2001, the day after Wayne was informed that her employment would be terminated, she again contacted the ORM to initiate counseling with respect to her claim that her termination was in retaliation for having engaged in protected activity. Id. ¶ 61. On April 9, 2001, George T. Irvin, Sr., the assigned EEO counselor, sent Wayne information regarding the EEO process. Id. ¶¶ 61-62. Wayne then sent Irvin confirmation that she understood her rights and responsibilities. Id. ¶ 63. On May 14, 2001, Irvin sent Wayne a letter informing her that he

was closing his informal counseling on the matter she had complained of on April 4 and providing her with a "Notice of Right to File a Discrimination Complaint." Id. ¶ 64.

Wayne never filed a formal complaint of discrimination or retaliation with the Equal Employment Opportunity Commission ("EEOC"). Id. ¶ 65. The EEOC first received notice of Wayne's intent to sue under the ADEA by letter dated July 26, 2001. Id. ¶ 66.

II. APPLICABLE LEGAL PRINCIPLES

A. Law Governing Summary Judgment

Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A material issue is a "dispute[] over facts that might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. Thus, "'[a] reasonably disputed, legally essential issue is both genuine and material'" and precludes a finding of summary judgment. McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (quoting Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996)).

When determining whether a genuine issue of material fact exists, courts must resolve all ambiguities and draw all factual inferences in favor of the nonmoving party. See, e.g., Savino v. City of New York, 331 F.3d 63, 71 (2d Cir. 2003) (citing Anderson, 477 U.S. at 255); McPherson, 174 F.3d at 280. However, to survive a motion for summary judgment, the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue

for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (emphasis omitted) (quoting Fed. R. Civ. P. 56(e)). "Conclusory allegations, conjecture, and speculation . . . are insufficient to create a genuine issue of fact." Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998) (citation omitted). Thus, "[a] defendant moving for summary judgment must prevail if the plaintiff fails to come forward with enough evidence to create a genuine factual issue to be tried with respect to an element essential to its case." Allen v. Cuomo, 100 F.3d 253, 258 (2d Cir. 1996) (citing Anderson, 477 U.S. at 247-48).

Although the Second Circuit has noted that "an extra measure of caution" is needed in granting summary judgment in discrimination cases since direct evidence of discriminatory intent is rare, a finding of summary judgment is nonetheless appropriate for discrimination claims lacking a genuine issue of material fact. Holtz v. Rockefeller & Co., 258 F.3d 62, 69 (2d Cir. 2001) (citations omitted); accord Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 466 (2d Cir.) ("It is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases."), cert. denied, 534 U.S. 993 (2001); Distasio v. Perkin Elmer Corp., 157 F.3d 55, 61-62 (2d Cir. 1998). Thus, a plaintiff in an employment discrimination action must still offer "concrete evidence from which a reasonable juror could return a verdict in his favor." Anderson, 477 U.S. at 256.

B. Wayne's Response to the Secretary's Motion

In this case, Wayne does not dispute the facts contained in the Defendant's Rule 56.1 Statement. See Answer to Defendant's Request for Summary Judgment, filed January 22, 2004 ("Pl. Opp."), at 1-2. Wayne was notified in accordance with Local Civ. R. 56.2 that she was required to submit witness statements in the form of affidavits and/or documents to oppose the

Secretary's motion for summary judgment. She was further warned that if she failed to do so, the Court might accept the Secretary's assertions as true. See Notice to Pro Se Litigant Opposing Motion for Summary Judgment (annexed as Ex. A to Notice of Motion for Summary Judgment, filed December 15, 2003). Nonetheless, Wayne submitted no affidavits or documents in response to the Secretary's motion. Instead, her opposition papers consist of a brief, unsworn recounting of some aspects of her case. See generally Pl. Opp. Accordingly, the Court accepts as true the Secretary's evidence on any material issues of fact. See Local Civ. R. 56.1(c) ("All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."). In any event, Wayne's submission does not even purport to offer evidence controverting the areas of material fact on which this Opinion and Order relies.

Wayne does seek additional time to conduct discovery, suggesting that the Secretary's responses have not been complete. See Pl. Opp. at 2, 5. That request is rejected, however, because Wayne was given ample time to conduct discovery and to bring to the Court's attention any perceived deficiencies in the responses to her previous discovery requests. The Court originally set an October 18, 2002 deadline for all discovery. See Order, dated April 16, 2002, ¶ 4. In a later Order extending the discovery cutoff to January 18, 2003, the Court specifically stated that "[t]he parties are warned that any failure to respond to discovery shall not constitute cause for an additional extension unless the failure is brought to the Court's attention promptly." Order, dated August 9, 2002, at 2. A further extension of discovery, to February 20, 2003, was granted by Order dated October 2, 2002. An additional 60-day extension, to April 21, 2003, was granted on January 31, 2003. An additional 90-day extension, to July 21, 2003, was granted on

April 21, 2003. Finally, an additional 60-day extension, to September 21, 2003, was granted on July 17, 2003. At no time during this period did Wayne seek the Court's intervention to obtain additional discovery.

While Fed. R. Civ. P. 56(f) contemplates that a party opposing summary judgment may obtain a continuance to obtain discovery, that rule "applies to summary judgment motions made before discovery is concluded." McAllister v. N.Y.C. Police Dep't, 49 F. Supp. 2d 688, 696 n.5 (S.D.N.Y. 1999) (emphasis added) (citations omitted); accord Chimarev v. TD Waterhouse Investor Servs., Inc., 280 F. Supp. 2d 208, 229 n.1 (S.D.N.Y. 2003); McNerney v. Archer Daniels Midland Co., 164 F.R.D. 584, 588 (W.D.N.Y. 1995) ("Applications to extend the discovery deadline must be made prior to expiration of the deadline . . . . Rule 56(f) is not intended to circumvent discovery orders."). Because Wayne has had ample opportunity to conduct discovery and to obtain court relief with respect to any alleged insufficient responses by the Secretary, her request for additional time to conduct discovery is denied.[1]

III. DISCUSSION

A. Statutory Prerequisites to Suit

The Secretary first argues that he is entitled to summary judgment because Wayne failed to satisfy the preconditions to suit imposed under Title VII and the ADEA. See Memorandum of Law in Support of Defendant's Motion for Summary Judgment, filed December 15, 2003 ("Def.

[1]Moreover, under Fed. R. Civ. P. 56(f), "a party resisting summary judgment on the ground that it needs discovery in order to defeat the motion must submit an affidavit showing (1) what facts are sought to resist the motion and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." Gurary v. Winehouse, 190 F.3d 37, 43 (2d Cir. 1999) (internal quotation marks and citations omitted). Wayne's submission fails in virtually all of these areas.

Mem."), at 19-23. The Secretary previously moved to dismiss the complaint on this ground. See Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint, filed July 26, 2001, at 5-8.

On January 25, 2002, Judge Sidney H. Stein, who was then assigned to this matter, denied the Secretary's motion to dismiss. Order, filed January 25, 2002 ("Order"). The court determined that Wayne had in fact failed to exhaust her administrative remedies under Title VII and failed to give proper notice as required by the ADEA. Id. at 6, 8. But the court construed certain statements made by Wayne in opposing the motion to dismiss as alleging that Wayne's failure to exhaust and failure to give proper notice "were caused by her reliance on affirmative misrepresentations made by the VA." Id. at 9. Accordingly, the court held that "this constructive allegation of equitable estoppel is sufficient to withstand a Rule 12(b)(6) motion to dismiss." Id.

The exhaustion requirements under Title VII, the exhaustion and notice requirements under the ADEA, and the doctrine of equitable estoppel were fully discussed in Judge Stein's decision on the motion to dismiss. See id. at 5-9. These issues are reviewed here only in brief – principally in the context of whether there are disputed material facts precluding the grant of summary judgment in favor of the Secretary on these grounds.

1. Title VII

a. Exhaustion Requirements. Under Title VII and the applicable EEOC regulations, a federal employee who claims to have been subjected to discrimination on the basis of her sex must exhaust all available administrative remedies prior to filing suit in federal court. See Briones v. Runyon, 101 F.3d 287, 289 (2d Cir. 1996); 29 C.F.R. §§ 1614.101-.110. Specifically, within 45 days of the alleged discriminatory act, the employee must consult with an EEO

counselor. 29 C.F.R. § 1614.105(a). The counselor must inform the employee of her rights and responsibilities and, if resolution is not possible within 30 days, inform the employee of her right to file a discrimination complaint with the agency. Id. § 1614.105(b)-(d). The employee must timely file such a complaint, id. § 1614.106(b), and the agency has 180 days to investigate the claims, id. §§ 1614.106(e)(2), .108(e). The employee may file a civil action in an appropriate United States District Court only after receiving notice of a final administrative decision or after 180 days from the date she filed the administrative complaint if no final administrative decision has been reached. See id. §§ 1614.110, .407(a)-(b).

In this case, Wayne began the administrative process twice by contacting an EEO counselor through the ORM. Def. 56.1 ¶¶ 52, 61. She voluntarily withdrew her first complaint on February 28, 2001. Id. ¶ 60. As for Wayne's second complaint regarding her termination, she never filed a formal complaint with the agency even after being informed that she had to do so within 15 days of the conclusion of informal counseling. Id. ¶¶ 64-65; see 29 C.F.R. §§ 1614.105(d), .106(b). Nonetheless, she filed the complaint in this action on February 7, 2001. See Complaint. Thus, it is clear that Wayne failed to exhaust the available administrative remedies prior to filing suit and, as described in Judge Stein's prior Order, her Title VII claim must be dismissed barring the availability of equitable estoppel. See Order at 6.

b. Equitable Estoppel. Title VII's exhaustion requirements are subject to equitable doctrines such as waiver, tolling, and estoppel. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982); Briones, 101 F.3d at 290. Despite a plaintiff's failure to exhaust, the doctrine of equitable estoppel bars a defendant from raising an exhaustion or notice defense where the plaintiff shows that the defendant's affirmative misconduct caused her to bring her suit in a

defective manner. See Fields v. Merrill Lynch, Pierce, Fenner & Smith, Inc., --- F. Supp. 2d ---, 2004 WL 137538, at *3-*4 (S.D.N.Y. Jan. 27, 2004); Avillan v. Potter, 2002 WL 252479, at *3 (S.D.N.Y. Feb. 21, 2002); see also Long v. Frank, 22 F.3d 54, 59 (2d Cir. 1994) (requiring affirmative misconduct aimed at causing plaintiff to forgo her legal rights), cert. denied, 513 U.S. 1128 (1995); Cerbone v. Int'l Ladies' Garment Workers' Union, 768 F.2d 45, 50 (2d Cir. 1985) ("equitable estoppel is invoked in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused him to delay bringing his lawsuit").

Although it was previously determined that Wayne's "constructive allegation" of equitable estoppel was sufficient to withstand a motion to dismiss, see Order at 9, a different standard applies now inasmuch as the Secretary has moved for summary judgment. In the course of discovery, Wayne was deposed regarding her efforts to exhaust her claims of sex discrimination. See Def. 56.1 ¶¶ 52-66. Nothing in the record indicates that the act or statement of anyone associated with the VA caused Wayne to fail to exhaust her Title VII administrative remedies. To the contrary, the evidence shows that Dr. Sabol provided Wayne with a letter advising her that she could contact an EEO counselor through the ORM if she believed she had been subjected to discrimination. Id. ¶ 35. Wayne did so twice and an EEO counselor advised her of her rights and responsibilities each time. Id. ¶¶ 52-54, 61-63. Nonetheless, Wayne filed this suit without exhausting her claims under Title VII. Indeed, Wayne testified that she was advised to file this suit on February 7, 2001 by Monclova, an individual who was not an attorney and who was not affiliated with the VA or the Bronx VA Medical Center at that time. Id. ¶¶ 56-58. Andino's statement regarding the necessity of proceeding either with the lawsuit or by way of EEO complaint does not support a finding that the Secretary's conduct was "aimed at"

causing Wayne to forgo her legal rights. See Long, 22 F.3d at 59. Rather, Andino's statement was occasioned only by Wayne's improper and unjustified filing of an unexhausted lawsuit.

In sum, no genuine issue of material fact remains on the issue of whether Wayne is entitled to equitable relief from her failure to exhaust available administrative remedies prior to filing suit under Title VII. Because there is no evidence of conduct by the VA or any of its employees that caused Wayne to file this suit defectively, equitable estoppel does not apply. Thus, her Title VII sex discrimination claims must be dismissed.

2. The ADEA

a. Exhaustion and Notice Requirements. Under the ADEA, a federal employee who claims she has been discriminated against because of her age may proceed either through the EEOC administrative process described above or by filing suit directly in federal district court. Stevens v. Dep't of Treasury, 500 U.S. 1, 5-6 (1991) (citing 29 U.S.C. § 633a(b)-(d)). If an employee decides to file suit directly in district court, however, she must meet two prerequisites: she must provide the EEOC with notice of her intent to sue within 180 days of the alleged unlawful practice and she must then wait 30 days before filing suit. 29 U.S.C. § 633a(d); accord Stevens, 500 U.S. at 6; 29 C.F.R. § 1614.201(a). The notice requirement is designed to afford the EEOC the opportunity "to assure the elimination of any unlawful practice." 29 U.S.C. § 633a(d).

Here, at the time Wayne filed this suit on February 7, 2001, she had not provided the EEOC with notice of her intent to sue. Def. 56.1 ¶ 65. She did, however, provide that notice on July 26, 2001, id. ¶ 66 – a date within 180 days of at least some of the alleged unlawful acts.

Thus, the statute required Wayne to file her suit on or after August 25, 2001. See 29 U.S.C. § 633a(d).

Judge Stein's decision assumed that Wayne's failure to wait for the 30-day period must necessarily result in dismissal of her ADEA claims. See Order at 8. But this was not an issue that was briefed by the parties, inasmuch as briefing on the motion to dismiss occurred prior to Wayne's submitting the July 26, 2001 notice. In the meantime, Wayne's notice did comply with the 180-day limitations period with respect to some of her claims.

In the briefing on the current motion, the Secretary has not cited any case law suggesting that dismissal is the appropriate remedy where suit is filed prior to the expiration of the 30-day period. See Def. Mem. at 22-23. Nor has he advanced a legal argument that would justify dismissing the ADEA claims on that basis. Instead, he merely points to the statute's bar against filing suit prior to the expiration of the 30-day notice period and argues cursorily that the "complaint was premature ab initio, and should be dismissed." Id. at 23. It is not intuitively obvious, however, that dismissal is an appropriate remedy for this failure inasmuch as – unlike a filing that occurs after the expiration of a statute-of-limitations period – the premature filing of a complaint is easily cured by refiling the identical complaint. In instances where the applicable statute of limitations has not expired, requiring such refiling might be characterized as an exaltation of form over substance.[2]

Certainly, case law exists upon which an argument could be constructed that would justify the dismissal of Wayne's ADEA claims on this basis. See, e.g., McNeil v. United States,

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[2]The limitations period applicable to suits brought under 29 U.S.C. § 633a(d) has not been settled. See, e.g., Stevens, 500 U.S. at 8; Rossiter v. Potter, 357 F.3d 26, 27 (1st Cir. 2004). Nor has the Secretary set forth any arguments on this issue.

508 U.S. 106, 111-13 (1993) (suit under Federal Tort Claims Act must be dismissed where administrative exhaustion takes place only after suit is filed); Hallstrom v. Tillamook County, 493 U.S. 20, 31-33 (1989) (early-filed action under 42 U.S.C. § 6972(b)(1) must be dismissed). But because the Secretary has not adequately briefed the issue and because this lawsuit is easily resolvable on the merits, the Court will forgo deciding this issue.

b. Effect of July 2001 Notice. Wayne's failure to provide notice until July 26, 2001 may limit, however, the extent to which her claims may now be heard. Under the ADEA, notice must be filed with the EEOC within 180 days after "the alleged unlawful practice occurred." 29 U.S.C. § 633a(d). The Supreme Court has held that under Title VII, "discrete" discriminatory or retaliatory acts "are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). Termination is a clear example of a discrete act. Id. at 114. In contrast, hostile work environment claims are timely so long as the acts complained of "are part of the same actionable hostile work environment practice" and "any [one] act falls within the statutory time period." Id. at 120. Courts have held that these rules apply equally to claims brought under the ADEA. E.g., Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1291 (11th Cir. 2002); Bailey v. Synthes, 295 F. Supp. 2d 344, 353 (S.D.N.Y. 2003); Marinelli v. Chao, 222 F. Supp. 2d 402, 415-16 (S.D.N.Y. 2002); Coffey v. Cushman & Wakefield, Inc., 2002 WL 1610913, at *2-*3 (S.D.N.Y. July 22, 2002).

The ADEA's timing requirements are subject to equitable estoppel in appropriate circumstances. See Cerbone, 768 F.2d at 48-50; Avillan, 2002 WL 252479, at *3. But there is no evidence that Wayne's failure to provide notice to the EEOC until July 26, 2001 was caused

by any employee of the VA. The Secretary has submitted evidence, not controverted on this motion by Wayne, that Wayne was informed of her rights and responsibilities in February 2001 by Andino and in April 2001 by Irvin. Def. 56.1 ¶¶ 53-54, 62-63.

To the extent Wayne's claims are based on discrete acts of discrimination or retaliation which occurred prior to January 26, 2001 (that is, 180 days prior to July 26, 2001), these claims are not actionable. Thus, because she received notice of her termination on April 3, 2001, Def. 56.1 ¶ 39, any claims relating to her termination are actionable. Her hostile work environment claim is actionable so long as at least one act contributing to the claim occurred on or after January 26, 2001. While Wayne has provided nothing to the Court that sets forth her contentions as to when the acts constituting a hostile work environment took place, it does appear that at least one act of which she complains (Asher allegedly calling her a "weirdo") took place after that date. See Email from Wayne to Dr. Sabol, dated February 1, 2001 (annexed as Ex. AX to O'Toole Decl.). Accordingly, the Court will examine the merits of both the termination and hostile work environment claims.

B. The Merits of Wayne's ADEA Claims

1. Elements of a Discrimination or Retaliation Case

As discussed above, the Secretary is entitled to summary judgment with respect to Wayne's sex discrimination claims under Title VII. Thus, only Wayne's age discrimination and retaliation claims under the ADEA remain. The Secretary contends that Wayne cannot demonstrate that she was discriminated against because of her age or that she was retaliated against for engaging in protected activity. Def. Mem. at 26-30, 32-43. We agree.

The ADEA makes it unlawful for an employer, inter alia, "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). ADEA claims are analyzed "'under the same framework as claims brought pursuant to Title VII.'" Schnabel v. Abramson, 232 F.3d 83, 87 (2d Cir. 2000) (quoting Woroski v. Nashua Corp., 31 F.3d 105, 108 (2d Cir. 1994)). Thus, Wayne's claims of discrimination are properly analyzed under the three-part framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973).

Under this three-part framework, the plaintiff carries the initial burden of establishing a prima facie case of discrimination, id. at 802; accord St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), the elements of which are described in more detail below. If the plaintiff establishes a prima facie case, a presumption of discrimination is created and the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for the adverse employment action. McDonnell Douglas, 411 U.S. at 802; accord St. Mary's, 509 U.S. at 506-07; Burdine, 450 U.S. at 254. If the employer articulates a non-discriminatory reason for its action, the presumption of discrimination is eliminated and "the employer will be entitled to summary judgment . . . unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination." James v. N.Y. Racing Ass'n, 233 F.3d 149, 154 (2d Cir. 2000); accord McDonnell Douglas, 411 U.S. at 804; Burdine, 450 U.S. at 256. This is because "'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated . . . remains at all times with the plaintiff.'" St. Mary's, 509 U.S. at 507 (quoting Burdine, 450 U.S. at 253).

Wayne contends that she was subjected to age discrimination through her employer's creation of a hostile work environment and by her wrongful termination. Separately, she contends that her termination was motivated, at least in part, by retaliation for her having made complaints of discrimination. The McDonnell Douglas burden-shifting analysis applies equally to such claims of retaliation. See, e.g., Terry v. Ashcroft, 336 F.3d 128, 141 (2d Cir. 2003).

The Second Circuit has noted that the burden on an employment discrimination plaintiff to defeat summary judgment at the prima facie stage is de minimis. Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 94 (2d Cir.) (citing Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994)), cert. denied, 534 U.S. 951 (2001). Nonetheless, granting summary judgment in favor of a defendant in a discrimination case is appropriate where there is no genuine issue of material fact. E.g., Holtz, 258 F.3d at 69. A court must make a "determination of whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive." McLee v. Chrysler Corp., 109 F.3d 130, 135 (2d Cir. 1997) (citations omitted).

In accordance with this framework, we next consider whether Wayne has made a prima facie case either of discrimination or of retaliation. Because we conclude that she has not established a prima facie case with respect to either, it is not necessary to proceed to the remaining steps of the three-part framework and summary judgment must be entered in favor of the Secretary.

2. Discrimination

"In order to establish a prima facie case of discriminatory discharge in violation of the ADEA, a plaintiff must show that (1) at the time of discharge she was at least 40 years of age,

(2) her job performance was satisfactory, (3) she was discharged, and (4) her discharge occurred under circumstances giving rise to an inference of discrimination on the basis of age." Grady v. Affiliated Cent. Inc., 130 F.3d 553, 559 (2d Cir. 1997) (citations omitted), cert. denied, 525 U.S. 936 (1998). The ADEA also creates a cause of action based on a hostile work environment "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment," Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (internal quotation marks and citations omitted) (stating standard under Title VII). See Brennan v. Metro. Opera Ass'n, 192 F.3d 310, 318 (2d Cir. 1999) ("The analysis of the hostile working environment theory of discrimination is the same under the ADEA as it is under Title VII."). Similar to a claim of wrongful termination, to state a prima facie case based on hostile work environment the plaintiff must "demonstrate that she was subjected to the hostility because of her membership in a protected class." Id. (emphasis added).

The discriminatory motive aspect of a prima facie case with respect to termination or hostile work environment can be shown in a number of ways. See Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 91 (2d Cir. 1996) (cataloging ways discriminatory motive may be shown in the context of a termination). For example, a plaintiff could point to remarks made by decision makers which reflect a discriminatory animus. See id. Or a plaintiff could provide evidence of disparate treatment between young and old employees. See id.; see also Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (for hostile work environment claim, the critical issue is whether members of a protected group are subject to disadvantageous conditions while others outside that group are not). "Whatever evidentiary route the plaintiff chooses to follow, he

or she must always prove that the conduct at issue . . . actually constituted discrimination." Oncale, 523 U.S. at 81 (internal quotation marks omitted); see also Grillo v. N.Y.C. Transit Auth., 291 F.3d 231, 234 (2d Cir. 2002) (plaintiff must produce "at least some credible evidence" that defendant's alleged discriminatory actions were "motivated by . . . animus or ill-will" (citations omitted)).

Here, Wayne makes a number of complaints regarding her treatment. She states that she was "thwarted at every turn of the educational process" in the MPTTP program. Pl. Opp. at 1. Specifically, she states that she was not provided access to the books and other materials she needed, although other trainees (whose ages are not specified) were not treated this way. Id. She also states that she never received keys to the affiliated lab at Columbia University where she worked a couple of days a week, that the materials and equipment she was given were not appropriate, and that her evaluations were often delayed by months and even then were vague. Id. Further, she states that when a problem did exist, "there was no opportunity given to discuss, defend, or correct the problem." Id. at 2. But she provides no evidence from which a jury could find that any of the adverse treatment – be it her treatment during her term of service or her ultimate termination – was motivated by discrimination on the basis of her age.

Wayne's hostile work environment claim only survived a motion to dismiss because she had alleged similar mistreatment of other employees "over the age of forty." Order at 10-11; see Complaint ¶ 8.13. At the summary judgment stage, however, she must offer "admissible evidence [which] shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive." McLee, 109 F.3d at 135.

It is undisputed that Wayne was over 40 both when she was hired as a trainee in the MPTTP program and when she was fired from the program. Def. 56.1 ¶¶ 13, 44. It is also undisputed that she was discharged from her position prior to the expiration of the two-year term for which she was hired. Id. ¶¶ 1-2, 14, 41. But this is not sufficient evidence to support a determination that Wayne was discriminated against because of her age. Wayne has alleged no facts – much less produced any admissible evidence – that derogatory remarks were ever made about her age, that her supervisors harbored animus toward older workers generally, or that older workers were treated differently than younger workers. Wayne has asserted in sworn testimony that Margie Golden, another trainee in the MPTTP program, was subject to similar mistreatment. See id. ¶ 16. But this does nothing to advance Wayne's theory of age-based discrimination because Golden was only 34 years old when she left the program, id. ¶ 17, and thus not even subject to the protections of the ADEA. As was determined at the motion to dismiss stage, the "conduct and comments that Wayne attributes to her supervisors – allegedly giving her unfair evaluations, falsely accusing her of verbal abuse, and calling her 'retarded,' 'mentally dysfunctional,' 'a weirdo,' and a 'big joke' – are simply not ageist in nature." Order at 10 (citations omitted).

Two other incidents that Wayne adverted to in her deposition are also insufficient to establish her prima facie case. First, Wayne testified that in March 2001 during a lunchtime conversation, Asher related a story about an older woman flirting with him in a line and that he was "grossed out by that." Deposition of Mary Sharon Wayne, October 21, 2002 ("Wayne Dep.") (annexed as Ex. B to O'Toole Decl.), at 250-59. While she took this to mean that Asher was offended because the woman was older than him, Wayne also knew that Asher was married

and had a child. Id. at 257-58. She also testified that in March 2001, Asher displayed a sketch of her that he had drawn as part of a training exercise which she felt was inaccurate in that the sketch depicted her as having three chins, a long and pointy nose, wrinkles, big ears, and disheveled hair. Id. at 569-76; Def. 56.1 ¶ 47; see Sketch of Wayne by Asher (undated) (annexed as Ex. AY to O'Toole Decl.). This testimony, however, is far too thin to permit a rational trier of fact to conclude that Asher harbored animus against people older than 40 or that Wayne was terminated or otherwise subjected to discrimination because of her age. See, e.g., Abdu-Brisson, 239 F.3d at 468 ("stray remarks of a decision-maker, without more, cannot prove a case of employment discrimination").

Furthermore, the same person – Dr. Sabol – both hired and fired Wayne. Def. 56.1 ¶ 6, 12, 41. As the Second Circuit has noted, "when the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire. This is especially so when the firing has occurred only a short time after the hiring." Grady, 130 F.3d at 560 (citations omitted); accord Carlton v. Mystic Transp., Inc., 202 F.3d 129, 137-38 (2d Cir. 2000). Here, Dr. Sabol fired Wayne less than two years after he hired her. This strongly suggests that discrimination was not a motivating factor in his decision to fire Wayne. See Schnabel, 232 F.3d at 91 (that termination took place only three years after hiring was "a highly relevant factor in adjudicating a motion for summary judgment on an ADEA claim"); cf. Carlton, 202 F.3d at 137-38 (passage of seven years between hiring and firing "significantly weakens" the "same actor inference"). The inference of a non-discriminatory motive is rendered even more obvious by the fact that the person who hired and fired the plaintiff is also a member of the same protected class. Austin v.

Ford Models, Inc., 2000 WL 1752966, at *14 (S.D.N.Y. Nov. 29, 2000), aff'd, 22 Fed. Appx. 76, 2001 WL 1562070 (2d Cir. Dec. 4, 2001), cert. denied, 537 U.S. 848 (2002); see Def. 56.1 ¶ 42 (Dr. Sabol was 57 years old when he terminated Wayne).

In sum, Wayne has presented no evidence upon which a rational trier of fact could conclude that she was subjected to age-based discrimination. See, e.g., McLee, 109 F.3d at 135. Instead, she has "done little more than cite to [her] mistreatment and ask the court to conclude that it must have been related to [her age]. This is not sufficient," Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001). As Wayne has not established the discriminatory motive element of a prima facie case, we need not proceed to the second and third steps of the McDonnell Douglas analysis. Thus, summary judgment is granted in favor of the Secretary with regard to Wayne's discrimination and hostile work environment claims.

3. Retaliation

Although Wayne has not mentioned retaliation in her recent submissions, including her response to this motion, she had previously asserted that her termination was in retaliation for her being "vocal" about her "abuse and discouragement," Wayne Letter at 1. The Court will thus consider whether Wayne has put forth a prima facie case of retaliation.

In order to establish a prima facie case of retaliation under the ADEA, "a plaintiff must show by a preponderance of the evidence '(1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action.'" Slattery, 248 F.3d at 94 (quoting Holt v. KMI-Cont'l, Inc., 95 F.3d 123, 130 (2d Cir. 1996)).

In this case, Wayne has shown no causal connection between any protected activity she engaged in and her termination. The only protected activities she participated in prior to her termination were contacting the ORM and filing this lawsuit in February 2001. But Dr. Sabol – the person who actually made the decision to fire Wayne – has submitted an affidavit stating that he did not know that Wayne had contacted the ORM or filed any suit at the time he made the decision to terminate her employment. Declaration of Dr. Gerald Sabol, filed December 15, 2003, ¶ 12. Wayne has provided no evidence challenging this assertion. Indeed, she conceded in her deposition that she did not know whether Dr. Sabol or Asher knew of her contact with the EEO office. Wayne Dep. at 824. Without personal knowledge of Wayne's involvement in protected activity, Dr. Sabol's decision cannot have been in retaliation for such activity.

Nor can the temporal proximity between Wayne's protected activity (beginning with her contact with the ORM in January 2001) and her termination just three months later meet her burden. See generally Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (per curiam) (stating that "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close" and suggesting that a three- or four-month period is insufficient (internal quotation marks and citations omitted)). This is because, in instances where timing is the only basis for a claim of retaliation, no inference of retaliation arises if "gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity." Slattery, 248 F.3d at 95.

In this case it is well-documented that beginning with her first set of performance evaluations in November 1999 and continuing through all subsequent evaluations, Wayne was

made aware that her performance was unsatisfactory and needed improvement. See Def. 56.1 ¶¶ 18-33. In December 2000, her access to the affiliated lab at Columbia University was restricted because she had been reported for taking molds and supplies from the lab which were then lost or broken. Id. ¶ 50. In early January 2001, Wayne was provided with a letter of "Written Counseling Regarding Your Conduct and Performance," warning that "[y]our continuance in the program is contingent on your full compliance with the instructions and conditions received from Mr. Asher as well as the specific requirements stated in this letter." Id. ¶ 35. All of this preceded Wayne's participation in any protected activity.

In sum, Wayne has not presented evidence that would allow a rational trier of fact to conclude that her termination was causally linked either to her contacting the ORM or to her filing this suit. This is fatal to her prima facie case of retaliation under the ADEA and thus summary judgment is granted in favor of the Secretary on this claim as well.

Conclusion

For the foregoing reasons, the Secretary's motion for summary judgment is granted. The Clerk is requested to enter judgment in favor of the Secretary and to close this case.

SO ORDERED.

Dated: March 3, 2004
New York, New York

GABRIEL W. GORENSTEIN
United States Magistrate Judge

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