UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHELLE ORTIZ,

Plaintiff,

- against -

METROPOLITAN TRANSPORTATION AUTHORITY et al.,

Defendants.

13-CV-1033 (VSB)

MEMORANDUM & ORDER

Appearances:

Alan Edward Wolin
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Jericho, New York
Counsel for Plaintiff

Helene Rachel Hechtkopf
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Counsel for Defendants

VERNON S. BRODERICK, United States District Judge:

Defendants' Motion is granted in its entirety because Plaintiff failed to state a claim of discrimination, retaliation, or hostile work environment under Title VII, Section 1981, Section 1983, the NYSHRL, and the NYCHRL. Before the Court is the Motion of Defendants Metropolitan Transportation Authority ("MTA") Police Department ("MTAPD"), John D'Agostino, Swaren Jatindranath, John Berlingieri, Karen Taylor, Rosalie Grascia, Gary Hoysradt, Gilbert Machado, Elizabeth Broderick, John Lester, Michael Pizzo, Mary O'Brien, Hank Loeffel, Diane Nash, Robert Terrett, and Joseph Martelli for summary judgment and to dismiss Plaintiff Michelle Ortiz's Amended Complaint. (Doc. 26.) Plaintiff alleges that Defendants discriminated against her and created a hostile work environment on the basis of her

gender, race, color, and national origin throughout the course of her employment and retaliated against her for her protected activities in violation of federal, state and local anti-discrimination statutes: Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000 *et seq.*), the New York State Human Rights Law ("NYSHRL") codified at New York State Executive Law §§ 296 and 297 *et seq.*, the New York City Human Rights Law ("NYCHRL") Administrative Code § 8-107 *et seq.*, 42 U.S.C. § 1981, and 42 U.S.C. § 1983. (*See* Doc. 27 at 1.) For the reasons set forth below, the Court GRANTS Defendants' Motion.

I. Background

A. *Facts*

The following facts are uncontested, unless otherwise noted. Plaintiff Michelle Ortiz considers herself to be a black Hispanic female. (Pl. 56.1 ¶ 4.)[1] Plaintiff applied to be a MTA police officer in 2005. (*Id.* ¶ 10.) Plaintiff asserts that Defendant Sergeant Karen Taylor, Supervisor of the Applicant Processing Division, tried to prevent Plaintiff from being hired because she is a Hispanic female. (*Id.* ¶¶ 7, 13.) Plaintiff was hired by the MTA in 2006 as a police officer and started at the police academy with the rest of her recruit class. (*Id.* ¶¶ 1, 20, 24.) Plaintiff is currently employed as a MTA police officer. (*Id.* ¶ 2.)

1. Plaintiff's Claims Related to Domestic Violence

Plaintiff was in a relationship with Demetrius Long, a New York City Police Department Captain, from 2004 until the end of 2008. (*Id.* ¶ 29.) On one occasion, Long appeared at Penn Station, where Plaintiff was working, and asked to speak with her. (*Id.* ¶ 30.) Plaintiff told her field officer, Officer Ridell, that she did not want to speak to Long because the relationship was abusive. (*Id.* ¶ 31.) Officer Ridell refused to allow Long to speak with Plaintiff, and asked

[1] "Pl. 56.1" refers to the Plaintiff's Response to Defendants' Local Rule 56.1 Statement. (Doc. 32.)

supervision to tell Long to leave. (*Id.* ¶ 32.) Officer Ridell informed Sergeant Kinnehan of the incident. (*Id.* ¶ 31.)

On October 6, 2006, Long arrived at Plaintiff's field training location and requested to speak with her. Plaintiff was not yet on duty. Lieutenant Pedoty, who was on duty, called Plaintiff on her cell phone, and Plaintiff told Pedoty that she did not want to speak with Long because they had broken up. Pedoty told Long that Plaintiff said that she did not want Long to have any contact with her or to visit her place of employment. (*Id.* ¶¶ 37-38.) That same day Plaintiff sent a memo to the internal affairs department explaining that she had been in a verbally abusive relationship with Long, and requested that Long not be permitted to make contact with her at any time. (Hechtkopf Decl. Ex. 15, at MTA-001333.)[2]

On October 10, 2006, Lieutenant Pontorno, of the MTAPD's Internal Affairs Bureau, received a phone call from a woman alleging, among other things, that Plaintiff damaged Long's vehicle. (Pl. 56.1 ¶ 40.) As a result, Lieutenant Pontorno conducted an investigation and interviewed Plaintiff, at which time Plaintiff admitted to slashing Long's car tires. (*Id.* ¶ 41.) Plaintiff contends that rather than providing her with "[g]uidance as to what to do" about the domestic violence, the MTAPD extended her probation period by one year. (Pl. 56.1 ¶¶ 35, 36.) However, on December 1, 2006, Plaintiff signed a trial waiver concerning disciplinary charges related to her slashing the tires on Long's car, in which she agreed to waive her right to proceed to trial and instead entered into an agreement providing, among other things, that: (1) she did not contest the disciplinary charges and understood that the penalty of termination was being stayed; (2) she agreed to a one-year extension of her employment probation; and (3) she acknowledged

[2] "Hechtkopf Decl." refers to the Declaration of Helene R. Hechtkopf in Support of Defendants' Motion to Dismiss and for Summary Judgment. (Doc. 29.)

that the disciplinary charges and penalty would be made part of her permanent Department and Personnel Records. (Hechtkopf Decl. Ex. 20.)

2. Plaintiff's Working Relationship With Sergeant Jatindranath

Plaintiff asserts that Defendant Sergeant Swaren Jatindranath, Plaintiff's supervisor from 2007 until 2009, "did not like female officers and . . . believed he could bully female officers." (Pl. 56.1 ¶¶ 48-49.) Plaintiff claims that because of her gender, Defendant Jatindranath: (1) needlessly supervised her during car stops; (2) checked on her whereabouts when she was on a parking garage post; (3) embarrassed her during a roll call by accusing her of not properly covering for her male partner; and (4) called her by her first, rather than last, name. (*See id.* ¶¶ 51-53.) Plaintiff testified that Defendant Jatindranath did not bully other men or black female officers who graduated with him or field-trained him. (*Id.* ¶ 54.) Defendant Jatindranath never took any disciplinary action against Plaintiff. (*Id.* ¶ 56.)

3. Plaintiff's Training

Plaintiff claims that she did not receive High Intensity Drug Trafficking Area ("HIDTA") or personal radiation detector training, which Caucasian and male officers were offered. (*Id.* ¶¶ 57, 61, 63.) However, from 2007 to 2011, Plaintiff attended the following training sessions: fraudulent documents training; CPR/AED training; first responder training; Connecticut review training; and at least two HIDTA trainings. (*Id.* ¶¶ 60-61.)

4. Plaintiff's Application to the K-9 Unit

Plaintiff applied, but was rejected from, MTAPD's K-9 unit in 2009—which she claims was because she is a Hispanic female. (*Id.* at ¶ 65.) During Plaintiff's interview, Defendant Inspector Joseph Martelli, the interviewing officer, stated that he did not care about Plaintiff's "emotional issues" and wanted to make sure that the MTAPD would not waste its time training

Plaintiff. (*Id.* ¶ 67.) In accordance with the standard interview questions, Defendant Martelli asked Plaintiff what she would do if her canine "partner" did not get along with her family. (*Id.* ¶¶ 67-68.) Defendant Martelli recommended that Plaintiff not be selected for the K-9 unit because he felt that: "the Officer needs more time in Patrol in order to enhance her skills[.] [T]his was seen in the responses to the situational questions, also the living arrangements raise questions to the well being [sic] for the canine (multi family home – shared access to yard w/ kennel)." (*Id.* ¶ 72.) He also noted Plaintiff's extended probation and her commanding officer's remarks that Plaintiff had below average attendance and activity records. (*Id.* ¶¶ 73-74.)

5. Incident at 125th Street Station

In January 2010, Plaintiff and other officers discovered an improvised explosive device while working at the 125th Street Station. (Hechtkopf Decl. Ex. 3, ¶ 52.) Although Plaintiff and the other male policers involved were nominated for an award, they did not receive one because the supervisor submitted a request for the wrong type of award. (*See* Pl. 56.1 ¶¶ 80-81; Hechtkopf Decl. Ex. 27.) According to Plaintiff, this was "definitely personal to [her]" and not because she is female. (Pl. 56.1 ¶ 78.)

6. Incident at Grand Central Terminal

On January 21, 2011, Plaintiff injured her right thumb while apprehending a suspect at Grand Central Terminal. (Hechtkopf Decl. Ex. 3, ¶ 54.) Plaintiff previously filed a separate action against the MTA concerning this injury, where she alleged that her supervisors were negligent. (Pl. 56.1 ¶ 83.) Judge George B. Daniels of this District granted the MTA's motion for summary judgment and dismissed the case. (*Id.* ¶ 84.) Plaintiff now claims that during this incident her supervisors intentionally did not take appropriate action because she is a Hispanic female. (*Id.* ¶ 85.) Specifically, "[Defendant] Sergeant Rosalie Grascia 'failed to take

appropriate police action to assist [P]laintiff,' and [Defendant] Lieutenant [Diane] Nash 'failed to take any investigative or disciplinary action against defendant Grascia concerning her failure to take appropriate action.'" (*Id.* ¶ 87.)

7. Plaintiff's Return to Work on Restricted Duty

With regard to the injury Plaintiff sustained on January 21, 2011, Plaintiff also claims that the MTAPD improperly convinced her orthopedic surgeon, Dr. Weiland, to have Plaintiff return to work earlier than was medically justified. (*Id.* ¶ 91.) Plaintiff remained out of the office on medical leave until April 2011. (Hechtkopf Decl. Ex. 3, ¶ 55.) On April 5, 2011, Dr. Olshanetskiy of the MTA, in accordance with the MTAPD's regular practice, contacted Dr. Weiland to determine whether Plaintiff could return to work on restricted duty. (Hechtkopf Decl. Ex. 30, at Plaintiff-000007; Pl. 56.1 ¶ 93.) Dr. Olshanetskiy informed Dr. Weiland that the MTA could provide Plaintiff with work assignments that would not interfere with the healing of her injury. (Hechtkopf Decl. Ex. 30, at Plaintiff-000007.) Dr. Olshanetskiy also stated that based upon Plaintiff's collective bargaining agreement, Dr. Weiland and the MTA would have to appear before an arbitrator if Plaintiff continued to remain out of work completely. (*Id.*) Dr. Weiland then determined that there was no medical reason to keep Plaintiff from returning to work on restricted duty. (*See id.*)

When Plaintiff returned to work, she was assigned to restricted duty at the Chiefs' Office at 347 Madison Avenue. (Pl. 56.1 ¶ 94.) Plaintiff claims that she was constantly scrutinized because she had to inform her supervisors when she arrived and departed. (*Id.* ¶ 100.) Plaintiff also stated that Defendant Lieutenant Hank Loeffel yelled at her and told her to go through the chain of command when she asked a question about a type of accrued vacation time. (*Id.* ¶ 102.) Plaintiff asserts that she was subject to this treatment because she is a Hispanic female.

(Hechtkopf Decl. Ex. 3, ¶ 56.) Plaintiff ultimately requested, and the MTA granted, a change to Plaintiff's tour of duty because she had difficulty arriving to work on time. (Pl. 56.1 ¶ 101.)

8. Incident at 5 Lincoln

Plaintiff returned to full duty on August 25, 2011, (Hechtkopf Decl. Ex. 3, ¶ 57), and was assigned to the 5 Lincoln post in Grand Central Terminal. (Pl. 56.1 at ¶ 106.) Plaintiff claims she was assigned to 5 Lincoln, a hazardous post, because of her race and as retaliation for filing a complaint against Defendant Nash and Defendant Grascia regarding her January 21, 2011 injury. (*Id.* ¶¶ 104-06.) Defendant Nash testified that she considered 5 Lincoln to be a good post and that there are other posts in Grand Central Terminal that were very active. (*Id.* ¶ 109.) Defendant Sergeant Gary Hoysradt also testified that he did not consider 5 Lincoln to be one of the more "high crime" posts at Grand Central Terminal. (*Id.* ¶ 110.)

On December 3, 2011, while Plaintiff was assigned to 5 Lincoln, she was injured while making an arrest. (*Id.* ¶¶ 114-18.) Plaintiff claims that Defendant Nash and Defendant Grascia refused to call an ambulance or otherwise assist her with her injury, which was against MTAPD policy. (*Id.* ¶ 119.) Plaintiff ultimately requested an ambulance for herself and received medical treatment. (*See id.* ¶ 120, 129.)

Plaintiff claims that Defendant Nash's and Defendant Grascia's actions were motivated by discrimination because if she had "been a Caucasian officer, they would have called an ambulance for" her. (*Id.* ¶ 134.) However, Plaintiff also asserts that Defendant Nash refused to render her aid in retaliation because Plaintiff filed a complaint against Defendant Nash, (*id.* ¶ 131), and Defendant Grascia refused to render her aid because he was "upset" with her for not filing a complaint against an officer who had been spreading rumors about Defendant Hoysradt. (*Id.* ¶ 132.)

9. Additional Claims of Discrimination

Plaintiff also alleges other acts of discrimination against the MTAPD. Those acts include the following: (1) "on October 18, 2011, Sergeant Lester took a picture of a Black male perpetrator and made a derogatory remark in [Plaintiff]'s presence," (*id.* ¶ 136); (2) "on October 23, 2011, Sergeant Machado told [Plaintiff] that she was on the 'shit list,'" (*id.* ¶ 138); (3) Defendant Sergeant Michael Pizzo told "other officers that [Plaintiff] was [Defendant] Hoysradt's girlfriend," (*id.* at ¶ 140); (4) "[Defendant] Grascia called [Plaintiff] a 'bitch' or a 'black bitch,'" (*id.* ¶ 146); (5) Defendant Hoysradt stared "[Plaintiff] down in a harassing and intimidating manner," (*id.* ¶ 177); (6) Plaintiff was forced to report to the Medical Control Unit rather than her personal doctor's appointment on March 23, 2012 and February 4, 2013, (*id.* ¶¶ 162, 165); (7) on March 29, 2012, Plaintiff was forced to report to the Medical Control Unit although she was cleared for duty, (Hechtkopf Decl. Ex. 3, ¶ 68); (8) Captain See forced Plaintiff to take vacation time for her medical appointments on March 9, 2012 and April 26, 2012 to retaliate against her, (Pl. 56.1 ¶ 160); and (9) on July 5, 2012, Plaintiff was forced to cancel a mutual day[3] and return to work while she was on vacation,[4] (*id.* ¶ 148).

B. *Procedural History*

Plaintiff filed a Notice of Claim with the MTA related to her claims of gender, race, color, and national origin discrimination as well as hostile work environment on January 13, 2012. (Hechtkopf Decl. Ex. 35.) On January 20, 2012, Plaintiff initiated Equal Employment Opportunity procedures, and filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). (Pl. 56.1 ¶ 179.)

[3] A mutual day is a form of trading one vacation day with another officer. (*Id.* ¶ 149.)

[4] Since the July 5, 2012 incident, the MTA has denied Plaintiff only one compensation day request while all other vacation day requests have been approved. (*Id.* ¶ 153-59.)

Plaintiff filed the initial Complaint in this action on February 14, 2013. (*Id.* ¶ 181.) The case was initially assigned to Judge Deborah A. Batts, but was reassigned to Judge Paul G. Gardephe on February 20, 2013.[5] (Doc. 2.) On March 25, 2013, Plaintiff filed a second Notice of Claim, which alleged various incidents of retaliation by the MTA and Plaintiff's supervisors. (*Id.* ¶ 182.) On March 27, 2013, Plaintiff filed a second Charge of Discrimination with the EEOC, related to her discrimination, hostile work environment, and retaliation claims. (*See id.* ¶ 183.) Defendants answered the initial complaint on April 15, 2013. (Doc. 6.)

Plaintiff then filed an Amended Complaint in this action, adding her additional retaliation claims, on October 10, 2013. (Doc. 17.) Defendants answered the Amended Complaint on October 31, 2013. (Doc. 18.) Defendants moved for summary judgment and to dismiss the claims asserted against them in Plaintiff's Amended Complaint on February 14, 2014, (Doc. 26), Plaintiff opposed Defendants' Motion on April 15, 2014, (Doc. 33), and Defendants submitted their Reply on May 2, 2014, (Doc. 34).

II. Legal Standard

Summary judgment is appropriate when "the parties' submissions show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Fay v. Oxford Health Plan*, 287 F.3d 96, 103 (2d Cir. 2002); *see* Fed. R. Civ. P. 56(a). "[T]he dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

On a motion for summary judgment, the moving party bears the initial burden of

[5] The case was reassigned to me on February 10, 2014.

establishing that no genuine factual dispute exists, and, if satisfied, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial," *id.* at 256, and to present such evidence that would allow a jury to find in his favor, *see Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000). Under Rule Rule 56.1(a) of the Local Rules of the United States District Court for the Southern and Eastern Districts of New York ("Local Civil Rule") the moving party must submit a "short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." Local Civil Rule 56.1(a).

To defeat a summary judgment motion, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials . . . ." Fed. R. Civ. P. 56(c)(1). As such, Local Civil Rule 56.1 requires a party opposing a motion for summary judgment to include in its response a statement containing "a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party" followed by citation to admissible evidence. Local Civil Rule 56.1(b), (d).

In the event that "a party fails . . . to properly address another party's assertion of fact as required by Rule 56(c), the court may," among other things, "consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." Fed. R. Civ.

P. 56(e)(2), (3); Local Civil Rule 56.1(c).

In considering a summary judgment motion, the Court must "view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor, and may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party." *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir. 1995) (internal citations and quotation marks omitted); *see also Matsushita*, 475 U.S. at 587. "[I]f there is any evidence in the record that could reasonably support a jury's verdict for the non moving party," summary judgment must not be granted. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d Cir. 2002).

However, courts must exercise "an extra measure of caution" in determining whether to grant summary judgment in employment discrimination cases "because direct evidence of discriminatory intent is rare and such intent often must be inferred from circumstantial evidence . . . ." *Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 603 (2d Cir. 2006) (internal quotation marks omitted). Nevertheless, "a plaintiff must provide more than conclusory allegations to resist a motion for summary judgment." *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008). The ultimate inquiry is "whether the evidence can reasonably support a verdict in plaintiff's favor." *James v. N.Y. Racing Ass'n*, 233 F.3d 149, 157 (2d Cir. 2000).

III. Discussion

A. *Title VII Claims*[6]

1. Statute of Limitations

In New York, a discrete unlawful employment practice is only actionable under Title VII

[6] Plaintiff's Title VII claims against the individual Defendants are dismissed because Title VII does not provide for individual liability. *Mandell v. Cnty. of Suffolk*, 316 F.3d 368, 377 (2d Cir. 2003) (affirming dismissal of Title VII claims against supervisor "because under Title VII individual supervisors are not subject to liability"). Plaintiff does not dispute that dismissal of the individual Defendants is appropriate.

if a plaintiff first files a charge with the EEOC within 300 days of the discriminatory act. 42 U.S.C. § 2000e–5(e)(1); *Pikulin v. City Univ. of N.Y.*, 176 F.3d 598, 599-600 (2d Cir. 1999) ("An employment discrimination claim must be filed with the EEOC within 300 days of the alleged discrimination in a state, like New York, with a fair employment agency."). "Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Consequently, a claim based upon a discrete act is time barred if not filed within the 300-day time limit, irrespective of whether other acts of discrimination occurred within the statutory time period. *Id.* at 110-11.

Plaintiff, having filed her EEOC charge on January 20, 2012, (*see* Pl. 56.1 ¶ 180), is barred by Title VII from bringing discrimination or retaliation claims based upon conduct that occurred before March 26, 2011, unless the continuing violation exception to Title VII applies. Plaintiff contends that these claims fall under the continuing violation exception because they "constitute defendants' policy or practice." (Pl. Opp. 15.)[7] Plaintiff's contention, however, is not supported by the evidence and is misplaced.

Under the continuing violation exception, "if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone." *Lu v. Chase Inv. Serv. Corp.*, 412 F. App'x 413, 416 (2d Cir. 2011) (summary order) (internal quotation marks omitted). However, as Defendants correctly point out, (Def. Mem. 11; Def. Reply 4-5),[8] the following incidents are discrete acts

[7] "Pl. Opp." refers to the Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss/Summary Judgment. (Doc. 33.)

[8] "Def. Mem." refers to the Memorandum of Law in Support of Defendants' Motion for Summary Judgment and to Dismiss. (Doc. 27.) "Def. Reply" refers to the Reply Memorandum of Law in Support of Defendants' Motion for

and all occurred prior to March 26, 2011: (1) the process of MTAPD hiring Plaintiff; (2) the extension of Plaintiff's probation; (3) Defendant Jatindranath's supervision of Plaintiff; (4) the denials of Plaintiff's requests for training; (5) Plaintiff's rejection from the K-9 unit; (6) Plaintiff's failure to receive an award; and (7) the Grand Central Terminal incident. *See Nat'l R.R. Passenger Corp.*, 536 U.S. at 114 ("Discrete acts [include] termination, failure to promote, denial of transfer, or refusal to hire . . . ."); *Dellaporte v. City Univ. of N.Y.*, 12-CV-7043, 2014 WL 684764, at *7 (S.D.N.Y. Feb. 21, 2014) ("The continuing violation exception does not apply because each denial of overtime, training, and change in duties are considered individual discrete acts against plaintiff.") (internal quotation marks and alterations omitted).

Acts, such as these, that are committed by different individuals and have no clear relationship to one another do not constitute a continuing violation. *Allah v. City of N.Y. Dep't of Parks & Recreation*, 47 F. App'x 45, 48 (2d Cir. 2002) (summary order) (plaintiff who alleges "different types of actions that were committed by different supervisors and that bear no clear relationship to each other or to the only acts within the 300-day period . . . does not allege a continuing violation."). And it is well established that "multiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation." *Valtchev v. City of New York*, 400 F. App'x 586, 588–89 (2d Cir. 2010) (summary order) (internal quotation marks omitted); *Bembry v. Darrow*, 7 F. App'x 33, 36 (2d Cir. 2001) (summary order) (same).

Plaintiff claims that "the unremedied pattern of incidents that were perpetrated against plaintiff were specifically related and were allowed to continue, unremedied, for a long period of time so as to constitute defendants' policy or practice." (Pl. Opp. 15.) This conclusory statement

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Summary Judgment and to Dismiss. (Doc. 34.)

is insufficient as a matter of law to support a claim of continuing violation. In short, Plaintiff fails to identify any ongoing discriminatory policy or practice that relate to the seven incidents described above, nor has she even attempted to factually tie the incidents together. *But see Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir.1994) (affirming finding of continuing violation based upon discriminatory personnel policies). Therefore, the continuing violation exception does not apply, and her allegations relating to conduct before March 26, 2011 are not actionable as discrimination or retaliation claims under Title VII.

Conversely, "[h]ostile [work] environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Nat'l R.R. Passenger Corp.*, 536 U.S. at 115 (internal citation omitted). Therefore, "consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period." *Id.* at 105. Since the Amended Complaint contains several allegations of behavior that created a hostile work environment after March 26, 2011, (*see* Hechtkopf Decl. Ex. 3, ¶¶ 136, 138, 148), I will also consider whether the conduct cited outside of the statutory time period contributed to a hostile work environment.

2. Discrimination Claims

a. Standard

Plaintiff fails to identify any direct evidence in the record of discriminatory animus.[9]

[9] The Second Circuit has recognized that "direct evidence" is essentially a "smoking gun" demonstrating that a plaintiff's firing was discriminatory and is generally unavailable in employment discrimination cases. *Holtz v.*

Therefore, I review Plaintiff's employment discrimination claim under the three-step, burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973). A plaintiff first bears the burden of establishing a prima facie case of discrimination by showing: (1) membership in a protected class; (2) that she performed her duties satisfactorily; (3) that she suffered an adverse employment action, and (4) that the adverse employment action occurred under circumstances that give rise to an inference of discrimination on the basis of her protected status. *See McDonnell Douglas*, 411 U.S. at 802.

If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to provide evidence that the adverse action was based upon a "legitimate, nondiscriminatory reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993) (internal quotation marks omitted). If the defendant articulates a nondiscriminatory explanation for the adverse employment action, "the burden shifts back to the plaintiff to demonstrate by competent evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Patterson v. County of Oneida*, 375 F.3d 206, 221 (2d Cir. 2004) (internal quotation marks omitted).

b. Adverse Action[10]

Plaintiff has failed to identify sufficient evidence in the record demonstrating that she suffered an adverse employment action relating to her intentional 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." *Joseph v. Leavitt*, 465 F.3d 87, 90 (2d Cir. 2006) (internal quotation marks omitted). "To be 'materially adverse' a change in working conditions

Rockefeller & Co., 258 F.3d 62, 76 (2d Cir. 2001). Here, I find no such evidence in the record.

[10] Plaintiff's membership in a protected class and the satisfactory performance of her duties have not been directly challenged in Defendants' Motion, so I begin my analysis with the issue of adverse employment action.

must be more disruptive than a mere inconvenience or an alteration of job responsibilities"; rather, it must "radical[ly] change . . . the nature of work." *Galabya v. N.Y. City Bd. of Educ.*, 202 F.3d 636, 640-41 (2d Cir. 2000) (internal quotation marks 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." *Id.* at 640 (internal quotation marks and alteration omitted).

Plaintiff alleges the following adverse employment actions: (1) she did not receive training, (Pl. 56.1 ¶ 57); (2) she was unduly scrutinized, (*id.* ¶ 100); (3) she was forced to report to the Medical Control Unit rather than her personal doctor appointment, (*id.* ¶ 162-65); (4) the MTAPD forced her to return to work earlier than medically justified, (*id.* ¶ 91); (5) her vacation day was cancelled, (*id.* ¶ 148); (6) she was forced to take vacation time for her medical appointments, (Hechtkopf Decl. Ex. 3, ¶ 66); (7) she was assigned to a hazardous post, (*id.* ¶ 104-06); and (8) she did not receive an award, (*id.* ¶ 76, 78). Other than providing the conclusory statement that "[t]he actions cited by plaintiff sufficiently constitute adverse employment actions," (Pl. Opp. 9), Plaintiff has made no effort to explain how or why the actions cited caused a materially adverse change to her working conditions, nor has she attempted to align the alleged adverse actions with case law to establish their bona fides as adverse employment actions. I will address each of the alleged adverse actions in turn.

i. *Training*

Plaintiff's allegation that she did not receive training that other male and Caucasian employees were offered, (*see* Pl. 56.1 ¶ 57), does not constitute an adverse employment action. Denial of training can constitute an adverse action if it bears on a plaintiff's opportunity for

professional growth or directly on plaintiff's compensation. *Hill v. Rayboy-Brauestein*, 467 F. Supp. 2d 336, 352 (S.D.N.Y. 2006). "When an employee cannot show material harm from a denial of training, such as a failure to promote or a loss of career advancement opportunities, there is no adverse employment action." *Id.*

Here, there is scant evidence that Plaintiff was ever denied training. Rather, the record shows that Plaintiff attended training. (Hechtkopf Decl. Ex. 22, at MTA-000618) (Plaintiff "will be attending the Fraudulent Document Training on 12/13-14/11.").[11] Although Plaintiff testified that an officer *could* receive a letter of instruction or be placed in an absent without leave status for failure to receive certain training, she provided no proof that her lack of training actually did have a negative impact on her career. (*See* Hechtkopf Decl. Ex. 6, at 186.) Accordingly, Plaintiff's alleged lack of training does not constitute an adverse employment action.

ii. *Undue Scrutiny*

Plaintiff's allegation that she was subject to undue scrutiny and micro-management does not constitute an adverse employment action. (*See* Pl. 56.1 ¶ 100.) Plaintiff alleges that she was constantly scrutinized because she had to inform her supervisors when she went to lunch and when she departed for, and arrived from, her physical therapy sessions. (*Id.* ¶ 100.) "[Plaintiff] has produced no evidence that she received scrutiny in excess of other employees other than her own perception that she was treated differently. Excessive scrutiny, without more, does not constitute an adverse employment action." *Hill*, 467 F. Supp. 2d at 355 (internal citation

[11] Plaintiff also received or was assigned to attend numerous training opportunities from 2007-2010: (1) CPR/AED training, (Hechtkopf Decl. Ex. 22, at MTA-00619); (2) First Responder training, (*id.* at MTA-000620); (3) Connecticut Review training, (*id.* at MTA-000621); (4) Radiation Detector training, (*id.* at MTA-000622); (5) Introduction to Incident Command System, I-100 for Schools training, (*id.* at Plaintiff-000095); (6) HIDTA Graffiti Identification and Deciphering training, (*id.* at Plaintiff-000096); (7) HIDTA Car Stops/Hidden Compartments training, (*id.* at Plaintiff-000097); (8) Identifying Deceptive Behavior training, (*id.* at Plaintiff-000098); and (9) Interview and Interrogation training, (*id.* at Plaintiff-000099).

omitted); *accord Mabry v. Neighborhood Defender Serv.*, 769 F. Supp. 2d 381, 393 (S.D.N.Y. 2011). Therefore, Plaintiff has failed to demonstrate that any alleged scrutiny by her supervisors constitutes an adverse employment action.[12]

iii. *Leave Usage*

Plaintiff's claims concerning her leave usage do not constitute adverse employment actions. Plaintiff has not shown that she suffered any materially adverse consequence from any actions taken with regard to her leave usage, including Captain See's cancellation of her mutual day. (*See id.* ¶ 148.) "In general, the denial of vacation time does not generally rise to the level of an adverse employment action." *E.E.O.C. v. Bloomberg L.P.*, 967 F. Supp. 2d 816, 893 (S.D.N.Y. 2013) (internal quotation marks omitted). Here, Plaintiff admits that she was told in advance of her going on vacation that the officer with whom she had traded vacation days was sick and could not cover for her on July 5, 2012. (*Id.* ¶ 150.) She also admits that she could have stayed on leave and not had to travel back from her vacation had she taken a vacation day rather than a mutual day, but refused to do so because "it would have inconvenienced her." (*Id.* ¶ 152.) Moreover, the MTA has denied Plaintiff only one compensation day request, and that request was ultimately approved, (Pl. 56.1 ¶ 153-59). *See E.E.O.C.*, 967 F. Supp. 2d at 893 (noting that a "denial of a single vacation request, without any indication that there was an absolute prohibition against plaintiff taking any vacation time, is not a material adverse employment action.") (internal quotation marks omitted). And all of Plaintiff's other vacation day requests have been approved. (Pl. 56.1 ¶ 153.)

In addition, Plaintiff's claim that she was forced to take vacation time for her medical

[12] I note that Plaintiff ultimately requested, and the MTA granted, a change to Plaintiff's tour of duty because she had difficulty arriving to work on time. (Pl. 56.1 ¶ 101.) Therefore, although Plaintiff has not demonstrated that she was subjected to undue scrutiny and micro-management, it does appear from the record that her supervisors were justified in inquiring about her whereabouts.

appointments, (Hechtkopf Decl. Ex. 3, ¶ 66), does not allege a materially adverse change in the terms of her employment, particularly when she was paid for the time that she remained out of the office. *See Guy v. MTA N.Y. City Transit*, 10-CV-1998, 2012 WL 4472112, at *6 (E.D.N.Y. Aug. 6, 2012) ("requiring plaintiff to use paid vacation to observe the Sabbath does not amount to an adverse action"), *report and recommendation adopted* 2012 WL 4472098, (E.D.N.Y. Sept. 26, 2012).

Similarly, Plaintiff's claims that the MTAPD required her to report to the Medical Control Unit, and in one instance changed her work status from sick to injured, (Pl. 56.1 ¶ 162-65), do not allege any materially adverse change in the terms and conditions of her employment. Plaintiff does not argue that she was not paid or that any work privileges were withheld as a result of reporting to the Medical Control Unit. *See Honey v. Cnty. of Rockland*, 200 F. Supp. 2d 311, 321 (S.D.N.Y. 2002) (finding no material change in employment conditions where plaintiff was asked to undergo medical examination because plaintiff was not fired, her pay was not docked, and no work privileges were withheld.) In fact, when an employee's work status is changed from duty sick to duty injured, the employee receives pay under Workers' Compensation. (*See* Hechtkopf Decl. Ex. 8, at 43.)

Finally, requiring an employee to report for duty, where her physician indicated that there was "no medical reason" to keep the employee from returning to restricted duty, (Pl. 56.1 ¶ 92), does not constitute an adverse action. *See Wagner v. Cnty. of Nassau*, 11-CV-1613, 2014 WL 3489747, at *9 (E.D.N.Y. July 11, 2014) ("Requiring doctors' notes to return from sick leave is not an adverse employment action . . . ."). While Plaintiff apparently prefers to take leave as she wishes, she has not shown that the MTAPD's actions concerning her leave usage were anything more than a mere inconvenience. Nor has she shown that the MTAPD singled her out with

regard to the application of leave policies. Accordingly, she has not demonstrated that any of these actions constitute an adverse employment action.

iv. *Work Assignment*

Plaintiff's allegation that she was assigned to 5 Lincoln, a hazardous post, does not constitute an adverse employment action. (*See* Pl. 56.1 ¶ 57.) "[I]n order for a plaintiff to sustain her claim that a change in work duties amounts to an adverse employment action, she must show a material change in her work duties. A plaintiff can make such a showing by demonstrating that the new assignment was materially less prestigious, materially less suited to his skills and expertise, or materially less conducive to career advancement." *See Bowen-Hooks v. City of New York*, 10-CV-5947, 2014 WL 1330941, at *19 (E.D.N.Y. Mar. 31, 2014) (internal quotation marks omitted). This Plaintiff has failed to do.

Plaintiff testified that 5 Lincoln was among the pool of MTAPD posts to which officers were assigned. (*See* Hechtkopf Decl. Ex. 6, at 292-98.) Plaintiff also testified that other officers were assigned to 5 Lincoln as Plaintiff's partner, including Enrique Rivera, a male police officer. (*See* Hechtkopf Decl. Ex. 6, at 295, 300.) Plaintiff provided no evidence that police officers assigned to 5 Lincoln received lesser pay or that such an assignment was "materially less prestigious" or harmful to Plaintiff's professional advancement. While assignment to 5 Lincoln may have been undesirable in Plaintiff's view, it is not an adverse employment action. *See Smalls v. Allstate Ins. Co.*, 396 F.Supp.2d 364, 371 (S. D. N. Y. 2005) ("receiving unfavorable schedules or work assignments do not rise to the level of adverse employment actions") (internal quotation marks and alteration omitted).

v. *Non-monetary Award*

Plaintiff's allegation that she should have received a non-monetary award for discovering

an improvised explosive device, (Pl. 56.1 ¶¶ 76, 78), does not constitute an adverse employment action. Plaintiff asserts that the award could have made her "more marketable" and "looks good in [her] personnel file." (*Id.* ¶ 78.) The denial of such an award could theoretically negatively impact Plaintiff's professional growth or opportunities. *See Beyer v. Cnty. of Nassau*, 524 F.3d 160, 165 (2d Cir. 2008) (finding that the denial of a transfer may constitute an adverse employment action where there is evidence that the "sought for position is materially more advantageous than the employee's current position, whether because of prestige, modernity, training opportunity, job security, or some other objective indicator of desirability"). However, since Plaintiff has provided no other evidence, aside from her subjective belief, that this particular award actually carried with it the possibility of material enhancement to a MTAPD police officer's resume, I do not find that the denial of this award is an adverse employment action. *See Beyer*, 524 F.3d at 164. ("[W]e require a plaintiff to proffer objective indicia of material disadvantage; subjective, personal disappointment is not enough.") (internal quotation marks and alteration omitted).

Even assuming, *arguendo*, that the denial of this award qualified as an adverse employment action, Plaintiff failed to demonstrate the remaining elements of her prima facie case of employment discrimination. Plaintiff concedes that her failure to receive the award was not related to her gender. (Pl. 56.1 ¶ 78.) She also does not dispute that she, along with fourteen male officers, were actually nominated for the award. (*Id.* ¶¶ 80, 81; Hechtkopf Decl. Ex. 27, at MTA-000584). The MTAPD asserts that Plaintiff did not receive this award because this type of award is not given to officers when multiple units were involved. (Pl. 56.1 ¶ 82.) Aside from Plaintiff's speculation that she did not receive the award because the MTAPD does not like her, Plaintiff has provided no proof that she was not given this award because of her protected status.

(*Id.* ¶ 78.) Consequently, Plaintiff failed to establish a prima facie case of employment discrimination under Title VII and her claim is dismissed.

3. Retaliation Claims

In order to establish a prima facie case of retaliation, a plaintiff must show: (1) her engagement in a protected activity; (2) defendants' awareness of that activity; (3) an adverse action; and (4) a causal connection between the protected activity and the adverse action. *See Holtz*, 258 F.3d at 79. I address these elements below.

a. Protected Activity

A plaintiff engages in protected activity "even when the underlying conduct complained of was not in fact unlawful so long as he can establish that he possessed a good faith, reasonable belief that the underlying challenged actions of the employer violated [the] law," *see Treglia v. Town of Manlius*, 313 F.3d 713, 719 (2d Cir. 2002) (internal quotation marks omitted), and the complaint is "sufficiently pointed to be reasonably understood as a complaint of discrimination," *McManamon v. Shinseki*, No. 11-CV-7610, 2013 WL 3466863, at *11 (S.D.N.Y. July 10, 2013) (internal quotation marks omitted). "The reasonableness of the plaintiff's belief is to be assessed in light of the totality of the circumstances." *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998).

It is not disputed that Plaintiff engaged in protected activity on two occasions, by filing: (1) a Notice of Claim alleging claims of discrimination and hostile work environment against the MTA on January 13, 2012, (Pl. 56.1 ¶ 179); and (2) a Notice of Claim alleging a claim of retaliation against the MTA on March 25, 2013, (*id.* ¶ 182). However, Plaintiff's three other complaints make no mention of discrimination and are therefore not protected activities under Title VII.

Following the December 3, 2011 incident at 5 Lincoln, Plaintiff sent an email to Chief Ziegler entitled "Retaliation complaint," in which she alleged that Defendant Nash and Defendant Hoysradt retaliated against her by failing to assist her with her hand injury. (*See* Hechtkopf Decl. Ex. 39.) Plaintiff admits that the December 3rd email does not contain a complaint of discrimination. (Pl. 56.1 ¶ 133.) Although she testified that she believes Defendant Nash retaliated against her because she previously filed a complaint against him on August 12, 2011, (*id.* ¶ 131), this complaint raised an allegation of negligence, not discrimination under Title VII, (*see* Hechtkopf Decl. Ex. 6, at 139; *id.* Ex. 28.) Similarly, Plaintiff does not claim that Defendant Hoysradt's retaliation against her was discriminatory; rather, "he was upset with her because she refused to file a complaint . . . against another officer who had been spreading rumors about [Defendant] Hoysradt." (*Id.* ¶ 132.)

"Title VII does not protect employees from retaliation for opposing misbehavior of co-workers or supervisors that is unrelated to discrimination on account of one of the protected classes . . . ." *Kamrowski v. Morrison Mgmt. Specialist*, No. 05-CV-9234, 2010 WL 3932354, at *20 (S.D.N.Y. Sept. 29, 2010). Accordingly, I limit my review of Plaintiff's retaliation claim to whether she suffered any adverse actions based upon her discrimination complaints filed with the MTA on January 13, 2012 and/or March 25, 2013.

b. Adverse Action

Although Plaintiff recites at length the legal standards that apply to a retaliation claim, she provides little guidance as to what adverse actions she suffered because of her protected activity. (*See* Pl. Opp. at 12 ("Under these circumstances, the long litany of which plaintiff speaks was sufficient under the pleading requirement to be applied herein.").) However, in accordance with my obligation to view the evidence in the light most favorable to Plaintiff, the

nonmoving party, *see Allen*, 64 F.3d at 79, I will assume that Plaintiff asserts that the adverse employment actions described above were also in retaliation for her claims of discrimination.

"Title VII's anti-discrimination and anti-retaliation provisions are not coterminous; anti-retaliation protection is broader and extends beyond workplace-related or employment-related retaliatory acts and harm." *Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010) (internal quotation marks omitted). "Although many of the events described by Plaintiff do not constitute adverse employment actions for Plaintiff's intentional discrimination claim, they may still be considered [materially adverse] in the context of her retaliation claim." *See Rayboy-Brauestein*, 467 F. Supp. at 362-63 (citing *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006)). "To constitute an adverse action for a retaliation claim, the allegedly retaliatory action . . . must be the type of action that would 'dissuade a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 363 (quoting *White*, 548 U.S. at 57).

The alleged adverse actions that follow Plaintiff's January 13, 2012 and March 25, 2013 Notices of Claim are as follows: (1) Captain See forced Plaintiff to take vacation time for her medical appointments on March 9, 2012 and April 26, 2012, (Pl. 56.1 ¶ 160); (2) Defendant D'Agostino forced Plaintiff to cancel her personal doctor's appointment and report to the Medical Control Unit on March 23, 2012, (*id.* ¶ 162); (3) Plaintiff was forced to go to the Medical Control Unit to be cleared to work on March 29, 2012, (*id.* ¶ 164)[13]; (4) Captain See forced Plaintiff to cancel her vacation on July 5, 2012, (*id.* ¶ 148-53); (5) on September 24, 2012 Plaintiff requested a day off that Defendant Jatindranath ultimately approved, (*see id.* ¶ 154-59); and (6) Lieutenant Deshensky forced Plaintiff to cancel her personal doctor's appointment and

[13] Plaintiff could not provide a specific name of the person who retaliated against her with regard to this incident. (Hechtkopf Decl. Ex. 6 at 391.)

report to the Medical Control Unit on February 4, 2013, (*Id.* ¶ 165).

Plaintiff has not articulated why reporting to the Medical Control Unit on March 29, 2012 would somehow dissuade her from seeking redress from the EEOC. Nor has she explained what negative consequence occurred relating to her September 24th time off request that was ultimately approved. Accordingly, I do not find that these two actions are materially adverse. However, I do find that the denial or docking of vacation time, as well as the cancellation of a personal doctor's appointment, could dissuade a reasonable worker from asserting a discrimination claim and are therefore adverse actions under Title VII's anti-retaliation provision. *See Kercado-Clymer v. City of Amsterdam*, 370 F. App'x 238, 242 (2d Cir. 2010) (summary order) ("A reasonable trier of fact could find that the . . . loss of accrued vacation . . . could . . . dissuade a reasonable worker from making or supporting a charge of discrimination."). Accordingly, the denial or docking of vacation time and the cancellation of Plaintiff's doctor's appointments constitute adverse actions in connection with her retaliation claim.

c. Awareness of Protected Activity

The surviving adverse actions related to Plaintiff's retaliation claim were allegedly carried out by Captain See on March 9, 2012, April 26, 2012, and July 5, 2012; Defendant D'Agostino on March 23, 2012; and Lieutenant Deshensky on February 4, 2013.[14]

On January 18, 2012 Plaintiff's first Notice of Claim was served on the MTA and on certain individuals, but not on Captain See, Defendant D'Agostino, or Lieutenant Deshensky. (Hechtkopf Decl. Ex. 35.) Then, on March 25, 2013, Plaintiff's second Notice of Claim was served upon the MTA and, among others, Defendant D'Agostino, Captain See, and Lieutenant Deshensky, and R.N. Rae. (Hechtkopf Decl. Ex. 37.)

[14] Captain See and Lieutenant Deshensky are not individual Defendants in the instant action.

Plaintiff provides no evidence that Captain See, Defendant D'Agostino, or Lieutenant Deshensky were aware of her protected activity at the time of the various adverse actions. They were not named in the January 18, 2012 Notice of Claim, and the March 25, 2013 Notice of Claim was served after the surviving adverse actions.

Although Plaintiff asserts that Captain See is friends with Defendant Hoysradt and Captain Berlingieri, who were both served with the January 18, 2012 Notice of Claim, any such relationship in and of itself has no bearing on whether Captain See was in fact aware of Plaintiff's protected activity. Since Plaintiff has provided no proof that these individuals were aware of her protected activity at the time of the alleged adverse actions, she has failed to demonstrate a prima facie case of retaliation, and Defendants' Motion for Summary Judgment is granted.

4. Hostile Work Environment Claims

To state a claim for hostile work environment, Plaintiff must first demonstrate that the complained of conduct: "(1) is objectively severe or pervasive; (2) creates an environment that the plaintiff herself subjectively perceives as hostile or abusive; and (3) creates such an environment because of the plaintiff's [protected status]." *See Goins v. Bridgeport Hosp.*, 555 F. App'x 70, 71-72 (2d Cir. 2014) (summary order). In determining whether a work environment is objectively hostile or abusive, courts must review the totality of the circumstances, evaluating such factors as: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 547 (2d Cir. 2010) (internal quotation marks and emphasis omitted). "The Second Circuit has held that '[i]solated instances of harassment ordinarily do not rise' to the level of 'objective [ ]

hostil[ity]'; rather, a plaintiff must demonstrate either a single incident that was 'extraordinarily severe' or a series of incidents that were 'sufficiently continuous and concerted.'" *Kouakou v. Fideliscare N.Y.*, 920 F. Supp. 2d 391, 402 (S.D.N.Y. 2012) (alteration in original) (quoting *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000)). In addition, "[f]or racist comments, slurs, and jokes to constitute a hostile work environment, there must be more than a few isolated incidents of racial enmity, meaning that instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments." *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997) (internal quotation marks, citations and alteration omitted); *see also Khan v. Abercrombie & Fitch, Inc.*, 35 F. Supp. 2d 272, 277 (E.D.N.Y. 1999), (granting summary judgment because single use of the phrase "black bitch" does not give rise to a claim of hostile work environment) *aff'd sub nom. Khan v. Abercrombie & Fitch*, 201 F.3d 431 (2d Cir. 1999).

As Defendants point out, for the vast majority of the MTAPD's complained of conduct Plaintiff fails to allege any connection to her gender, race, or national origin.[15] (Def. Mem. 21.) Plaintiff makes only three allegations of conduct that mentions her gender, race, or national origin: (1) Sergeant Lester made reference to a black male perpetrator and said that Plaintiff's "hair looks like his," (Pl. 56.1 ¶ 136); (2) Defendant Pizzo told other officers that Plaintiff was Defendant Hoysradt's girlfriend and portrayed her as Defendant Hoysradt's snitch, (*id.* ¶ 140); and (3) Defendant Grascia called Plaintiff a "bitch" or a "black bitch," (*id.* ¶ 146). I find that these incidents are isolated, minor and episodic, and none of them is so "extraordinarily severe" to establish the kind of pervasive harassment necessary to establish a claim of hostile work environment. *See Schwapp*, 118 F.3d at 110; *Khan*, 35 F. Supp. 2d at 277. Accordingly,

[15] I have considered whether the conduct cited outside of the statutory time period contributed to a hostile work environment and find that it does not. These additional incidents were minor and do not allege any connection to Plaintiff's protected status.

Plaintiff's hostile work environment claim is dismissed.

B. *Section 1981 and Section 1983 Claims*

"[D]iscrimination may be actionable under [section] 1983 as a violation of equal protection. Accordingly, section 1983 and the Equal Protection Clause protect public employees from various forms of discrimination, including hostile work environment and disparate treatment . . . ." *Demoret v. Zegarelli*, 451 F.3d 140, 149 (2d Cir. 2006). Similarly, "Section 1981 provides a cause of action for race-based employment discrimination . . . ." *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 (2d Cir. 2000). "Most of the core substantive standards that apply to claims of discriminatory conduct in violation of Title VII are also applicable to claims of discrimination in employment in violation of [section] 1981 or the Equal Protection Clause . . . ." *Patterson*, 375 F.3d at 225. Likewise, the standards applicable to a claim alleged to constitute hostile work environment are also applicable to employment claims under section 1981 and section 1983. *Id.*

The main differences are that: (1) under section 1981 and section 1983 individuals may be held liable and (2) the 300-day period applicable to Title VII claims does not apply. *See id.* at 225-26. Instead, "[t]he statute of limitations for a [section] 1983 claim arising in New York is three years; [and] the statute of limitations for a [section] 1981 claim is four years." *Lawson v. Rochester City Sch. Dist.*, 446 F. App'x 327, 328 (2d Cir. 2011) (summary order) (internal citations omitted). Plaintiff filed her initial Complaint in this action on February 14, 2013. (Doc. 1.) Accordingly, I will review whether either Defendant Jatindranath's supervision of Plaintiff in 2009 or Plaintiff's rejection from the K-9 unit violates section 1981.[16]

[16] These allegations are time barred under section 1983. Aside from the allegations discussed in connection with Plaintiff's Title VII claim, there are no additional allegations for me to review relating to Plaintiff's section 1983 claim, and her claims under section 1983 fail for the same reasons explained in connection with her Title VII claims. *See supra* Part III.A.2-A.4.

Section 1981 protects only against race based employment discrimination. It "does not prohibit discrimination on the basis of gender . . . ." *Anderson v. Conboy*, 156 F.3d 167, 170 (2d Cir. 1998). Consequently, Plaintiff's allegation that Defendant Jatindranath "bullied" her because he did not like female officers, (Pl. 56.1 ¶¶ 48-54), does not fall within the ambit of section 1981 and is dismissed. Similarly, Plaintiff's claim that she was rejected from the K-9 unit on the basis of her gender is also dismissed because it falls outside of the purview of section 1981.

Although Plaintiff alleges that she was rejected from the K-9 unit on the basis of her race, she provides no evidence that her race was considered or discussed in connection with her K-9 application. (*Id.* ¶¶ 66-74.) Since Plaintiff has not shown this requisite element of a prima facie case, that she suffered an adverse action *because of* her race, her claim is dismissed. Plaintiff's remaining claims of race and gender discrimination, retaliation, and hostile work environment fail under section 1981 for the same reasons explained in connection with her Title VII claims. *See supra* Part III.A.2-A.4.

C. *New York State and City Law Claims*

"The statute of limitations for actions under both the NYSHRL and NYCHRL is three years." *Lugo v. City of New York*, 518 F. App'x 28, 29 (2d Cir. 2013). However, the statute of limitations is tolled from the time that an EEO complaint is filed until a right to sue letter is received. *See Bloomberg L.P.*, 967 F. Supp. 2d at 831. Plaintiff filed her EEO complaint on January 20, 2012, (Pl. 56.1 ¶ 180), and received her right to sue letter on November 20, 2012, (Am. Compl. ¶ 180). Accordingly, Plaintiff's claims relating to conduct that occurred prior to April 15, 2009 are time-barred. As with Plaintiff's section 1981 claim, I also review whether

Defendant Jatindranath's supervision of Plaintiff in 2009 or Plaintiff's rejection from the K-9 unit violates the NYSHRL or NYSCHRL.

"The standards for liability under [the NYSHRL and NYCHRL] are the same as those under the equivalent federal antidiscrimination laws." *Ferraro v. Kellwood Co.*, 440 F.3d 96, 99 (2d Cir. 2006). Plaintiff concedes that Defendant Jatindranath did not bully other black female officers. (*Id.* ¶ 54.) Accordingly, she has failed to show any connection between Defendant Jatindranath's treatment and her protected status.

As described above, Plaintiff draws no connection between her race and rejection from the K-9 unit. *See supra* Part III.B. Plaintiff believes that she was rejected from the K-9 unit on the basis of her gender because Defendant Martelli made comments and asked questions that contained female "innuendos." (Pl. 56.1 ¶ 67.) However, the K-9 unit's standard interview evaluation form includes situational questions concerning the canine's ability to get along with an applicant's family. (Hechtkopf Decl. Ex. 26.) Moreover, Defendant Martelli explained that he did not recommend Plaintiff for the position for a number of reasons, including his concern for the well-being of the canine, as well as Plaintiff's lack of skills, below average attendance record, and extended probationary period. (Pl. 56.1 ¶¶ 72-74.) Finally, Plaintiff admits that she never inquired into why she was not selected for the position. (*Id.* ¶ 75.) Accordingly, I find that Plaintiff failed to show that the MTA did not select her for the K-9 unit because of her gender.

Plaintiff's remaining claims of race and gender discrimination, retaliation, and hostile work environment fail under the NYSHRL and NYSCHRL for the same reasons articulated in

connection with her Title VII claims. *See supra* Part III.A.2-A.4. Accordingly, Defendants' Motion is granted as to Plaintiff's NYSHRL and NYSCHRL claims.

IV. Conclusion

For the foregoing reasons, Defendants' Motion for Summary Judgment is GRANTED in its entirety, and Plaintiff's claims of discrimination, retaliation, and hostile work environment under Title VII, Section 1981, Section 1983, NYSHRL, and NYSCHRL are DISMISSED with prejudice. The Clerk of the Court is respectfully requested to terminate the pending motion, (Doc. 26).

SO ORDERED.

Dated: September 30, 2014
New York, New York

Vernon S. Broderick
United States District Judge