At an IAS Term, Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of August, 2023.

P R E S E N T:

HON. GINA ABADI,
Justice.

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JEFFREY LAX, SUSAN ARANOFF, RINA YARMISH, MICHAEL GOLDSTEIN and MICHELLE DAVIDOWITZ,

Plaintiffs,

-against-

Index No.: 504682/2021

Mot. Seq. Nos. 2, 3, 4 & 5

THE CITY UNIVERSITY OF NEW YORK, THE PROFESSIONAL STAFF CONGRESS, THE NEW CAUCUS OF THE PROFESSIONAL STAFF CONGRESS, MICHAEL SPEAR, MARGARET FEELEY, DOMINIC WETZEL, EMILY SCHNEE, BARBARA BOWEN, MATTHEW GARTNER, ANTHONY ALESSANDRINI, ELIZABETH DILL, KATHERINE PEREA, LIBBY GARLAND, and PATRICK LLOYD,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	13-18 28-31 34-36 40-43 45-46
Opposing Affidavits (Affirmations)	23-25, 39, 50, 56-57
Affidavits/ Affirmations in Reply	60
CUNY's Memorandum of Law	19
CUNY's Reply Memorandum of Law	26
The Union defendants' Memorandum of Law	32
The Union defendants' Reply Memorandum of Law	53
Feeley and Spear's Memorandum of Law	37
Feeley and Spear's Reply Memorandum of Law	55

Upon the foregoing papers, in this action by plaintiffs Jeffrey Lax (Lax), Susan Aranoff (Aranoff), Rina Yarmish (Yarmish), Michael Goldstein (Goldstein), and Michelle Davidowitz (Davidowitz) (collectively, plaintiffs) alleging a first cause of action for hostile work environment discrimination on the basis of religion in violation of the New York State Human Rights Law, Executive Law § 290 et seq. (the NYSHRL), a second cause of action for retaliation in violation of the NYSHRL, a third cause of action for hostile work environment discrimination on the basis of religion in violation of the New York City Human Rights Law, Administrative Code of the City of New York § 8-107 (the NYCHRL), a fourth cause of action for retaliation in violation of the NYCHRL, and a fifth cause of action by Lax against defendants Emily Schnee (Schnee), Dominic Wetzel (Wetzel), Matthew Gartner (Gartner), Anthony Alessandrini (Alessandrini), and Libby Garland (Garland) for assault and false imprisonment, defendant the City University of New York (CUNY) moves, under motion sequence number two, for an order, pursuant to CPLR 3211 (a) (7), dismissing, with prejudice, the claims asserted against it in plaintiffs' complaint.

Defendants Professional Staff Congress (the Union) and Barbara Bowen (Bowen) (collectively, the Union defendants) move, under motion sequence number three, for an order, pursuant to CPLR 3211 (a) (7), dismissing plaintiffs' complaint in its entirety, with prejudice, as against them.

Defendants Margaret Feeley (Feeley) and Michael Spear (Spear) move, under motion sequence number four, for an order, pursuant to CPLR 3211 (a) (7), dismissing, with prejudice, the claims asserted against them in plaintiffs' complaint.

Defendants Alessandrini, Elizabeth Dill, Garland, Gartner, Kate Perea, Schnee, and Wetzel (collectively, the Professor defendants) move, by order to show cause, under motion sequence number five, for an order: (1) declaring that they are entitled to representation by Corporation Counsel; (2) disqualifying Corporation Counsel from representing them due to a conflict of interest; (3) directing Corporation Counsel and New York City to pay the reasonable legal fees of their attorneys of choice, namely, Remy Green, Esq. (Green) and Jonathan Wallace, Esq. (Wallace); and (4) in the alternative, if the court should determine that no conflict of interest exists, directing Corporation Counsel to permit attendance at its meeting(s) with them by Green and Wallace.[1]

Facts and Procedural Background

Plaintiffs are observant Jewish professors at Kingsborough Community College (Kingsborough), which is part of CUNY. The Union is the labor union for the faculty. Defendant the New Caucus of the Professional Staff Congress (New Caucus) is a political party of the Union. Bowen was the president of the Union and was a member of the governing board of the New Caucus. Spear was a professor at Kingsborough, an officer of the Union, and an officer of the New Caucus. Feeley was a professor at Kingsborough, an

[1] Insofar as the Professor defendants, in their order to show cause, under motion sequence number five, sought an order extending their time to answer the complaint or otherwise move herein until 30 days after this motion is decided, this was resolved by a stipulation, filed on February 28, 2022, between the Professor defendants and plaintiffs, wherein it was agreed that the time for the Professor defendants to answer the complaint would be adjourned on consent to a date 30 days after the e-filing by any party hereto of a notice of entry of an order issued by the court resolving the Professor defendants' motion (NYSCEF Doc No. 48).

officer of the Union, and a member of the New Caucus. The Professor defendants were professors at Kingsborough and members of the New Caucus.

Plaintiffs allege that they and other observant Jewish faculty and staff members at Kingsborough have faced pervasive, anti-religious discrimination from a particular segment of fellow faculty members who are the leaders of a faculty group called the Progressive Faculty Caucus of Kingsborough Community College (PFC) (which is not a named defendant herein) and are also members of the New Caucus. The PFC was formed in late 2016 or early 2017 with the purpose of advancing various progressive initiatives on Kingsborough's campus. The New Caucus closely coordinated with the PFC. Spear is a leader of the PFC. Plaintiffs claim that the New Caucus members collaborated with the PFC members to dominate campus elections and call for the removal of observant Jewish faculty members, administrators, department chairs, and others at Kingsborough. Plaintiffs allege that each of the defendants actually participated in, and aided and abetted, the conduct giving rise to their discrimination and retaliation claims.

Plaintiffs assert, among numerous alleged acts of discriminatory conduct, that the PFC denied entry to every observant Jewish applicant, including Lax; that the PFC and the New Caucus members lobbied against Lax and other observant Jewish candidates running in campus elections; that the PFC members called for the removal of observant Jewish faculty members, including Lax; that the PFC organized an anti-discrimination event for a Friday night (the Friday Night Event), with the purpose of excluding Sabbath-observant Jewish members, including Lax; that the Union leaders applied pressure to Kingsborough's chief diversity officer, Victoria Ajibade (Ajibade), to suppress the investigation of the

Friday Night Event; that Lax was "badgered" at a Union event by five PFC members, including two Union officials; that on ratemyprofessor.com, one student wrote that Gartner, a Kingsborough professor, had told the student "[you] should have gone to a Jewish School" when the student requested to take off two days in order to observe Jewish holidays; that the PFC and the New Caucus members wrote in a communist newspaper regarding their "struggle" against a "network of Zionists" among the faculty at Kingsborough," and made similar comments in a publicly distributed campus survey; that an internal PFC email mentioned the need to "bring violence to the Zionists on campus"; that anti-Semitic flyers were distributed on the Kingsborough campus; that a portrait of Goldstein's father was defaced; that nails were found in Lax and Goldstein's car tires; and that the PFC members called for plaintiffs' removal from their jobs at Kingsborough.

Plaintiff filed this action on February 26, 2021. On May 24, 2021, CUNY filed motion sequence number two (NYSCEF Doc No. 13). On October 12, 2021, the Union defendants filed motion sequence number three (NYSCEF Doc No. 28). On December 6, 2021, Feeley and Spear filed motion sequence number four (NYSCEF Doc No. 34). On February 10, 2022 the Professor defendants filed motion sequence number five (NYSCEF Doc No. 40). While this action has been pending since February 26, 2021, due to the filing of these motions, no answers have yet been interposed and no discovery has taken place. Oral argument of these four motions was held before the court on June 14, 2023.

Motion Sequence Number Two

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction," and a court must "accept the

facts as alleged in a complaint as true, accord [the] plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Simkin v Blank*, 19 NY3d 46, 52 [2012]; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). "[T]he court must assume that [the complaint's] allegations are true . . ., and must deem the complaint to allege whatever can be inferred from its statements by fair and reasonable intendment, however imperfectly, informally or illogically facts may be stated therein" (*Barrows v Rozansky*, 111 AD2d 105, 107 [1st Dept 1985] [internal quotation marks omitted]).

"[A] motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (*East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009], *affd* 16 NY3d 775 [2011], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc.*, 5 NY3d at 19).

Plaintiffs allege that CUNY has engaged in employment discrimination against them based on the fact that they are Orthodox Jews and it has retaliated against them for opposing these discriminatory practices. "[The] NYSHRL and [the] NYCHRL prohibit employment discrimination on the basis of religion and [prohibit] retaliation against an employee for opposing discriminatory practices" (*Reichman v City of New York*, 179 AD3d

1115, 1116 [2d Dept 2020], *lv denied* 36 NY3d 904 [2021]; *see also* Executive Law § 296 [1], [7]; Administrative Code of City of NY § 8-107 [1], [7]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; *Sanderson-Burgess v City of New York*, 173 AD3d 1233, 1234 [2d Dept 2019]; *La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918, 920 [2d Dept 2015]; *Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 739 [2d Dept 2013]).

CUNY argues that plaintiffs' allegations focus predominantly on purported discriminatory and retaliatory conduct by the PFC, the New Caucus, and their members, and that such conduct by the PFC, the New Caucus, and their members do not involve it and may not be imputed to it. CUNY contends that plaintiffs do not allege that it, as a separate entity from the PFC and the New Caucus, engaged in any affirmative discriminatory conduct on its own part, or that it exercised supervision or control over the PFC or the New Caucus. CUNY claims that it is not responsible for the alleged discrimination against plaintiffs by a faculty group, i.e., the PFC, or the political party composed of certain members of the faculty, i.e., the New Caucus. CUNY maintains that plaintiffs lump all of their disparate allegations together in an attempt to hold it responsible for the alleged actions of the other defendants.

An employer, such as CUNY, however, can be held liable for an employee's discriminatory act where "the employer became a party to it by encouraging, condoning, or approving it" (*Matter of Totem Taxi v New York State Human Rights Appeal Bd.*, 65 NY2d 300, 305 [1985], *rearg denied* 65 NY2d 1054 [1985]). Employer liability exists where the employer, after learning of harassing and/or discriminatory conduct of an

employee, does nothing about it (*see Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 53 [4th Dept 1996], *lv denied* 89 NY2d 809 [1997]; *Goering v NYNEX Info. Resources Co.*, 209 AD2d 834, 834-835 [3d Dept 1994]). "Condonation, which may sufficiently implicate an employer in the discriminatory acts of its employee to constitute a basis for employer liability under the Human Rights Law, contemplates a knowing, after-the-fact forgiveness or acceptance of an offense" (*Matter of State Div. of Human Rights v St. Elizabeth's Hosp.*, 66 NY2d 684, 687 [1985]). "An employer's calculated inaction in response to discriminatory conduct may, as readily as affirmative conduct, indicate condonation" (*id.*). Plaintiffs' complaint alleges that CUNY took no steps to curtail the discriminatory conduct against Orthodox Jews at Kingsborough (NYSCEF Doc No. 15 at paragraph 111).

CUNY contends that it took corrective action because it retained outside counsel, Jackson Lewis P.C. (Jackson Lewis), to investigate plaintiffs' allegations of religious discrimination. However, a review of the investigation by Jackson Lewis shows that it is rife with flaws which indicate a lack of good faith, and is self-contradictory.

Specifically, the June 17, 2020 Jackson Lewis report, in its own findings, states that "Lax's claims that he was discriminated against and/or subjected to a hostile work environment based upon his religion *can be substantiated* in part by a preponderance of the credible evidence" (NYSCEF Doc No. 17 at 7 [emphasis added]). This finding is repeated as to Yarmish (*id.* at 9). The Jackson Lewis report stated that "a preponderance of the credible evidence suggests the Friday night meeting was scheduled to exclude Lax and Lax's religious beliefs were considered when the meeting was scheduled," and that

"[t]here is some evidence that at least some of the Respondents also wanted to exclude Yarmish" (*id.*). The Jackson Lewis report also stated that the "fact that can be established to support an inference of religious discrimination is that a meeting was scheduled to be held by the PFC on a Friday night because it was known Lax would be unable to attend such meeting due to his observance of the Sabbath beginning at nightfall on Fridays," and that "Lax was treated 'differently or less favorably because of his . . . religion.'" The Jackson Lewis report, despite this finding, attempts to rationalize that the exclusion of Lax and Yarmish from the event scheduled on Friday night, which Orthodox Jews could not attend due to the observance of the Sabbath, was not done out of religious animus, but simply utilized Lax and Yarmish's religious commitments as a means to prevent them from attending.

This analysis is flawed since the utilization of an individual's religious beliefs and practices to limit their inclusion is the very definition of religious discrimination. Moreover, the Jackson Lewis report found that Goldstein and Aranoff's claims that they were discriminated against and/or subjected to a hostile work environment based on their religion could not be substantiated by a preponderance of the credible evidence does not make sense since there is no reason why such an exclusion would be discriminatory as against Lax and Yarmish, but not as against Goldstein and Aranoff, when they all share the same religious practice and observance of the Sabbath, and the specific intent to schedule an event on the Sabbath to exclude Jewish individuals would apply as to all such Jews who would have otherwise been able to attend.

The Jackson Lewis report also blithely accepted the excuses from the PFC as to the exclusion of plaintiffs from their organization, stating generally that the PFC did not allow department chairs or administrators to be members. Plaintiffs assert that this excuse is pretextual and is utterly undermined by the membership of department chairs and/or administrators in the PFC, as will be borne out by discovery. Plaintiffs further assert that the reason given for the exclusion of Aranoff was that she was an associate of Lax. However, Feeley admitted, in her interview with Jackson Lewis, that it was "not viable to exclude people just because they knew Lax" and that the PFC ultimately allowed another member of the business department who was an associate of Lax, namely, Morris Didia, to join, and only excluded Aranoff, an Orthodox Jew, on the basis of her relationship with Lax (*id.* at 65-66).

In addition, Jackson Lewis, in its report, discussed an interview with Scott Cally (Cally), a professor of theater and a former member of the PFC, in which he detailed a conversation with Wetzel, wherein Wetzel questioned him "aggressively about whether he was Jewish" (*id.* at 68). Cally stated, during this interview, that he believed that Wetzel was "definitely anti-Christian and anti-Judaism," and that when asked whether he believes the PFC harbored any discriminatory animus against anyone based upon a protected characteristic, he stated that "the PFC thinks the Jews are controlling the campus" (*id.* at 69, 71). Cally further stated that "the discrimination comes when a person is observant, not because a person is a specific religion," and that "[e]xcept Islam. . .You are not allowed in the PFC if you are known or suspected to be a practicing Christian or Jew" (*id.* at 71).

The Jackson Lewis report also set forth testimony from witness Rick Repetti (Repetti), a professor of philosophy and a member of the PFC. Repetti's testimony included the statement that "Wetzel believes, based upon his personality, that observant Jewish people are 'conservative and would not be a good fit for the PFC'" (*id.* at 73). Repetti also stated that Wetzel asked him, "do you think we can schedule the meeting on Friday to prevent Lax from coming?" (*id.*).

Despite its own findings and the evidence discussed above, Jackson Lewis sent a letters to Lax, Aranoff, and Yarmish, each dated September 2, 2020, purportedly documenting its conclusions (NYSCEF Doc No. 25). Jackson Lewis, in these letters, stated that it had concluded that the credible evidence does not support the allegation that the respondents discriminated against them or subjected them to a hostile work environment on the basis of their religion. Significantly, this finding is entirely at odds with Jackson Lewis' conclusions in its report that "Lax's, Yarmish's, Goldstein's, and Aranoff's allegations that [r]espondents discriminated against them based upon their religion can be substantiated in part," that "Lax's observance of the Jewish Sabbath was at least part of the reason for the PFC to schedule a meeting on a Friday night," and that "[t]his decision could have had the effect of excluding other Jewish people from the meeting" (NYSCEF Doc No. 17 at 89). It is also inconsistent with Jackson Lewis' finding that Lax and Yarmish's claims that they were "discriminated against and/or subjected to a hostile work environment based upon [their] religion can be substantiated in part by a preponderance of the credible evidence (*id.* at 7, 9). Plaintiffs assert that they did not discover the actual findings in the Jackson Lewis report until the filing of a Freedom of Information Law

request yielded the report. Plaintiffs note that the Jackson Lewis report had been sent directly to CUNY and that CUNY was thus aware of what was contained in the Jackson Lewis report. Plaintiffs contend that the letters sent by Jackson Lewis to them were made entirely in bad faith and designed by CUNY to whitewash the matter.

"Where, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, 'the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate'" (*Sposato v Paboojian*, 110 AD3d 979, 979-980 [2d Dept 2013], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). CUNY has not shown that it took any corrective action as a result of the Jackson Lewis report or that no corrective action was necessary. Rather, there is a significant dispute regarding CUNY's inaction in response to alleged discriminatory conduct and its condonation of the alleged discriminatory conduct. Thus, the mere fact that CUNY hired Jackson Lewis does not absolve it of liability or warrant dismissal of plaintiffs' complaint against it.

Moreover, as plaintiffs point out, the findings of Jackson Lewis, as set forth in the September 2, 2020 letters, are starkly contradicted by a Letter of Determination, dated February 11, 2021, issued by the United States Equal Employment Opportunity Commission (the EEOC), which found that Lax and other observant Jewish faculty were

discriminated against and subjected to retaliation on account of their religion (NYSCEF Doc No. 8). Specifically, the EEOC's determination provided that:

> "The Commission's investigation reveals that Charging Party and other similarly situated individuals were discriminated and retaliated against because of their religion; including, that Respondent rejected Charging Party and other similarly situated individuals' membership of the Professional the Progressive Faculty Caucus of Kingsborough Community College. In addition, witness testimony corroborates that Respondent failed to take corrective action despite the numerous complaints it received in connection with religious discrimination. Based on the above, Respondent's asserted defenses do not withstand scrutiny and the Commission has determined that there is reasonable cause to believe that Respondent has discriminated and retaliated against Charging Party and other similarly situated individuals on the account of religion and that it failed to take immediate corrective action creating a hostile working environment, all in violation of Title VII of the Civil Rights Act 1964, as amended."

Thus, the Letter of Determination of the EEOC explicitly found that plaintiffs were subject to discrimination and retaliation on account of their religion and that CUNY was complicit in this discrimination and retaliation by its failure to take corrective action. CUNY argues, however, that the EEOC determination has no preclusive effect and does not bind a court in any subsequent litigation. This argument is unavailing. It has been held that as a general rule, "EEOC determinations and findings of fact, although not binding on the trier of fact, are admissible as evidence in civil proceedings as probative of a claim of employment discrimination" (*McClure v Mexia Independent School Dist.*, 750 F2d 396, 400 [5th Cir 1985], *rehearing denied* 755 F2d 173 [5th Cir 1985]; *see also DeCorte v Jordan*, 497 F3d 433, 440 [5th Cir 2007], *rehearing denied* 253 Fed Appx 466 [5th Cir 2007]). The Second Circuit has held that the question of whether to admit EEOC or state-agency findings rests in the sound discretion of the court (*Paolitto v John Brown E. & C.,*

Inc., 151 F3d 60, 65 [2d Cir 1998]). Thus, the court, in the context of this motion to dismiss, can consider that this EEOC determination runs counter to CUNY's claim that it took corrective action and did not condone discrimination.

CUNY argues that the EEOC makes no effort to differentiate between CUNY and the PFC and the Union, which are composed of university employees. The EEOC, however, refers to the respondent as "an employer within the meaning of the Title VII of the Civil Rights," and CUNY is plaintiffs' employer. As plaintiffs' employer, CUNY was the one charged with taking corrective action, and thus, it is apparent that the EEOC was referring to CUNY when it stated that the respondent "failed to take corrective action" in response to complaints of discrimination, thereby creating a hostile work environment.

CUNY further argues that the EEOC's determination is relevant only to Lax's claims in this case and not to the claims of any other plaintiff because the "Charging Party" is Lax, rather than a collective group of plaintiffs. This argument must be rejected since the EEOC determination specifically finds that "[r]espondent has discriminated and retaliated against Charging Party *and other similarly situated individuals* on the account of religion and that it failed to take immediate corrective action creating a hostile working environment" (emphasis added). The other plaintiffs are similarly situated individuals since they are also Orthodox Jews who were subjected to the same conduct as Lax.

Furthermore, plaintiffs allege that CUNY exacerbated the discrimination suffered by them through its own course of conduct. As set forth in plaintiffs' complaint, wide-ranging complaints of religious discrimination against observant Jews were filed against the PFC Leadership with Kingsborough chief diversity officer Ajibade in or around March

2018. Plaintiffs specifically allege that Union leaders, including Bowen, the president of the Union, applied pressure to Ajibade to suppress the investigation of the Friday Night Event, which included Bowen threatening Ajibade and demanding that she decline to investigate. In fact, as asserted by plaintiffs, the Union filed a professional misconduct complaint against Ajibade in order to prevent her from fulfilling her duty to investigate the complaints of anti-Semitism on campus. Plaintiffs note that during a witness interview that Ajibade conducted with Lax on July 12, 2018, Ajibade revealed that the PFC, through the Union, had "registered a complaint of misconduct against [her] anonymously," and was intimidating her to end the investigation (NYSCEF Doc No. 15 at paragraph 114). It is undisputed that within weeks of receiving these threats, Ajibade left Kingsborough under suspicious circumstances and CUNY neglected to hire a new chief diversity officer for approximately one year.

CUNY's failure to replace the chief diversity officer, Ajibade, who departed under suspicious circumstances after being threatened due to an investigation into allegations of discrimination, is sufficient to allege chilling conduct by CUNY and adequately indicates a lack of willingness by CUNY to investigate claims of discrimination. Such allegations, at this early stage of the action, support plaintiffs' claims as directed against CUNY.

Thus, the court finds that plaintiffs adequately allege that they were discriminated against because of their religion and that CUNY, in response to the alleged discriminatory conduct, failed to take corrective action, thereby creating a hostile working environment. Since it is alleged that CUNY failed to act (which is supported by the EEOC determination) and the Jackson Lewis report is far from conclusive on this issue, this may be deemed as

readily discriminatory as affirmative conduct, and indicates condonation (*see Matter of State Div. of Human Rights*, 66 NY2d at 687; *Matter of Father Belle Community Ctr.*, 221 AD2d at 53; *Goering*, 209 AD2d at 834-835). Furthermore, CUNY's own conduct in not replacing the chief diversity officer supports plaintiffs' claims. Therefore, CUNY's attempt to absolve itself from liability on this motion to dismiss by arguing that it has no responsibility for the discriminatory conduct of others must be rejected.

CUNY further argues that plaintiffs have failed to plead facts showing that there was any conduct by it rising to the level of a hostile work environment. "A plaintiff claiming a hostile work environment animated by discrimination in violation of the NYSHRL must show that 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 and create an abusive working environment" (*Reichman*, 179 AD3d at 1118; *see also Forrest*, 3 NY3d at 310). "To determine whether a hostile work environment exists, a court must consider all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interfered with an employee's work performance" (*Reichman*, 179 AD3d at 1118; *see also Raspardo v Carlone*, 770 F3d 97, 114 [2d Cir 2014]; *Terry v Ashcroft*, 336 F3d 128, 148 [2d Cir 2003]; *La Marca-Pagano*, 129 AD3d at 919-920). "[T]he claim will not succeed if the offending actions are no more than petty slights or trivial inconveniences" (*Franco v Hyatt Corp.*, 189 AD3d 569, 570 [1st Dept 2020]; *see also Henry v Ground*, 2022 NY Slip Op 31859[U], *19-20 [Sup Ct, NY County 2022]).

The NYCHRL is broader than the NYSHRL, and provides that "a plaintiff claiming a hostile work environment need only demonstrate that he or she was treated 'less well than other employees' because of the relevant characteristic" protected by the NYCHRL, such as race, religion, or gender (*Bilitch v New York City Health & Hosps. Corp.*, 194 AD3d 999, 1003 [2d Dept 2021]; *see also Reichman*, 179 AD3d at 1118; *see also Nelson v HSBC Bank USA*, 87 AD3d 995, 999 [2d Dept 2011]; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]). "The conduct alleged must, however, exceed 'what a reasonable victim of discrimination would consider petty slights and trivial inconveniences'" (*Bilitch*, 194 AD3d at 1003, quoting *Williams*, 61 AD3d at 80; *see also Reichman*, 179 AD3d at 1118), and "'mere personality conflicts' will not suffice to establish a hostile work environment'" (*Bilitch*, 194 AD3d at 1003, quoting *Forrest*, 3 NY3d at 309; *see also Reichman*, 179 AD3d at 1118).

CUNY contends that plaintiffs' hostile work environment claims fail to state viable causes of action and must be dismissed because the allegations in plaintiffs' complaint describe "petty slights and trivial inconveniences." Such contention must be rejected. "A contention that the behavior was a petty slight or trivial inconvenience constitutes an affirmative defense . . . which should be raised in the defendants' answer and does not lend itself to a pre-answer motion to dismiss" (*Kassapian v City of New York*, 155 AD3d 851, 853 [2d Dept 2017]; *see also Kaplan v New York City Dept. of Health & Mental Hygiene*, 142 AD3d 1050, 1051 [2d Dept 2016]). Thus, on this pre-answer motion to dismiss, dismissal of plaintiffs' hostile work environment claims under the NYSHRL and the NYCHRL on this basis is premature and must be denied.

Moreover, contrary to CUNY's assertion, the allegations of plaintiffs' complaint sufficiently plead that the discriminatory conduct was sufficiently severe or pervasive so as to permeate the workplace and alter the conditions of their employment (*see Dillon v Ned Mgt., Inc.*, 85 F Supp 3d 639, 663 [ED NY 2015]; *La Marca-Pagano*, 129 AD3d at 920), and that plaintiffs were treated less well than other employees on the basis of their religion (*see Bilitch*, 194 AD3d at 1003; *Reichman*, 179 AD3d at 1118). Thus, at this juncture, plaintiffs have made sufficient allegations as to this disputed issue, particularly in view of the EEOC's determination, which warrant denial of CUNY's motion in this respect.

Turning to plaintiffs' causes of action alleging unlawful retaliation, NYSHRL § 296 (7) states that "[it] shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article." "A plaintiff alleging retaliation in violation of the NYSHRL must show that (1) he or she engaged in a protected activity by opposing conduct prohibited thereunder; (2) the defendant was aware of that activity; (3) he or she suffered an adverse action based upon his or her activity; and (4) there was a causal connection between the protected activity and the adverse action" (*Bilitch*, 194 AD3d at 1004; *see also Keceli v Yonkers Racing Corp.*, 155 AD3d 1014, 1016 [2d Dept 2017]; *La Marca-Pagano*, 129 AD3d at 920). "In the context of a case of unlawful retaliation, an adverse employment action is one which might have dissuaded a reasonable worker from making or supporting a charge of discrimination" (*Keceli*, 155 AD3d at 1016; *see also Reichman*, 179 AD3d at 1119). "The antiretaliation provision

protects an individual not from all retaliation, but from retaliation that produces an injury or harm" (*Burlington Northern & Santa Fe Railway Co. v White*, 548 US 53, 67 [2006]; *see also Reichman*, 179 AD3d at 1119). However, "[a]lleged acts of retaliation must be evaluated both separately and in the aggregate, as even trivial acts may take on greater significance when they are viewed as part of a larger course of conduct" (*Tepperwien v Entergy Nuclear Operations, Inc.*, 663 F3d 556, 568 [2d Cir 2011]).

"The NYCHRL offers retaliation victims, like discrimination victims, broader protection than its NYSHRL counterpart" (*Bilitch*, 194 AD3d at 1004; *see also Reichman*, 179 AD3d at 1119; *Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740 [2d Dept 2013]). "'[T]o make out an unlawful retaliation claim under the NYCHRL, a plaintiff must show that (1) he or she engaged in a protected activity as that term is defined under the NYCHRL, (2) his or her employer was aware that he or she participated in such activity, (3) his or her employer engaged in conduct which was reasonably likely to deter a person from engaging in that protected activity, and (4) there is a causal connection between the protected activity and the alleged retaliatory conduct'" (*Bilitch*, 194 AD3d at 1004, quoting *Sanderson-Burgess v City of New York*, 173 AD3d 1233, 1235-1236 [2d Dept 2019], quoting *Brightman*, 108 AD3d at 740).

Under the NYCHRL, "the employer's conduct need not be materially adverse to the plaintiff, but merely 'reasonably likely to deter a person from engaging in protected activity'" (Administrative Code § 8-107 [7]; *see also Collins v Indart-Etienne*, 59 Misc 3d 1026, 1049 [Sup Ct, Kings County 2018]). Thus, "a plaintiff need not establish that the alleged retaliation or discrimination resulted in a materially adverse change in the terms

and conditions of employment so long as the plaintiff can show that the retaliatory or discriminatory act was reasonably likely to deter a person from engaging in protected activity" (*Brightman*, 108 AD3d at 739 [internal quotation marks omitted]).

Here, plaintiffs allege that in November 2020, a measure was proposed to be added to the College Governance, which provided that "[m]embers of faculty review committees will not vote on candidates under consideration by their committee if the review committee member has brought legal action or other formal complaints or adjudicatory procedures (excluding mandatory complaint referrals) against said candidate." Notably, this proposed amendment was not concerned with preventing the alleged perpetrator, who legal action or a formal complaint or adjudicatory procedure was brought against, from voting, but, rather, only was concerned with removing, disqualifying, and penalizing the victim. While this proposal was ultimately denied, plaintiffs assert that the effect of this proposal was to chill and suppress faculty members who wished to complain of discrimination on the Kingsborough campus based on the fact that it was submitted for a formal vote by Kingsborough President Claudia Schrader, who had rejected complaints about the legality of this proposal by multiple individuals. Thus, it is alleged that this proposal was reasonably likely to deter a person from engaging in protected activity.

In addition, on February 23, 2021, plaintiffs allege that Kingsborough President Schrader retaliated against Lax in a humiliating fashion by circulating vile quotes from a faculty survey to the entire Kingsborough campus which named Lax as the main cause of the lack of collegiality on campus, specifically because Lax had filed discrimination claims. PFC members were quoted in this faculty survey's responses as asserting that

Lax's lawsuit based on religious discrimination was somehow the root of the problem on campus, and also hurled anti-Semitic tropes at Lax and Yarmish, which accused Zionist department chairs of causing oppression on campus. President Schrader, without redacting Lax's name from these quotes, circulated these comments to the entire Kingsborough campus despite the obvious negative impact they would have on Lax's social, emotional, and career standing on the Kingsborough campus.

Additionally, as discussed above, CUNY failed to replace the chief diversity officer, Ajibade, for over one year, after her suspicious departure. This supports plaintiffs' claim that CUNY effectively suppressed and foiled any ongoing discrimination investigations and had a chilling effect on the filing of submission of discrimination complaints, which is a protected activity. By this action of CUNY, plaintiffs' right to complain about discrimination during this time was taken from them and they were discouraged from filing any discrimination complaints. Since CUNY, based on the investigation by Jackson Lewis, was aware of discrimination complaints made by Jewish faculty members, its failure to replace the chief diversity officer constitutes an adverse action which limited the ability for further complaints to be brought and investigated. CUNY merely argues that plaintiffs could have made a complaint to some other CUNY officer, other than the chief diversity officer, but fails to assert that there is any other CUNY officer who is charged with or has the authority to investigate a discrimination complaint. Indeed, plaintiffs' complaint alleges that "[a]ppeals directly to Kingsborough President Claudia Schrader . . . to address the discriminatory practices on campus were ignored" (NYSCEF Doc No. 15 at ¶ 124).

CUNY's argument that Aranoff, Davidowitz, and Yarmish have not identified a single retaliatory action to which they were personally subjected is rejected. Aranoff, Davidowitz, and Yarmish were subjected to the same conduct reasonably likely to deter a person from engaging in protected activity as Lax. CUNY argues that even if Gartner's November 2020 proposal may have been directed as against Goldstein, it was too remote in time from his filing of a NYSDHR complaint in November 2018 to constitute retaliation. This argument is unavailing since plaintiffs claim that this proposal was to chill future complaints of discrimination from being filed.

Thus, plaintiffs have adequately alleged conduct by CUNY which might have dissuaded a reasonable worker from making or supporting a charge of discrimination so as to make out an unlawful retaliation claim. Consequently, CUNY's motion for dismissal on this basis must be denied.

CUNY also argues that Goldstein's claims are barred by the election of remedies doctrine because his claims arise from the same underlying facts and conduct as his earlier New York State Division of Human Rights (NYSDHR) complaint, which he filed on November 30, 2018, charging CUNY with an unlawful discriminatory practice relating to employment because of creed in violation of the NYSHRL (Executive Law article 15) (NYSCEF Doc No. 16). In relevant part, the NYSHRL states that a cause of action may be brought in any court of appropriate jurisdiction "unless such person had filed a complaint hereunder or with any local commission on human rights . . ." (Executive Law § 297(9). Thus, "Executive Law § 297 (9) provides that an aggrieved person elects his or her remedy for unlawful discrimination by either filing a complaint with [the NY]SDHR

or commencing an action in court based upon such discriminatory conduct" (*Matter of Baust v New York State Div. of Human Rights*, 70 AD3d 1107, 1108 [3d Dept 2010], *lv denied* 15 NY3d 710 [2010]; *see also Matter of Whitney v State Human Rights Appeal Bd.*, 105 AD2d 991, 992 [3d Dept 1984]).

The NYCHRL contains a parallel provision to the NYSHRL, i.e., Administrative Code of the City of New York § 8-502 (a), which provides that "[a]ny person claiming to have been aggrieved by an unlawful discriminatory practice . . . shall have a cause of action in any court of competent jurisdiction . . . unless such person has filed a complaint with the city commission on human rights or the state division of human rights with respect to such unlawful discriminatory practice" (*see Coppedge v New York City Sales Inc.*, 10 CV 6349 BSJ JLC, 2011 WL 4343268, *2 [SD NY Sept. 8, 2011]). "Pursuant to the election of remedies doctrine, the filing of a complaint with the [NYSDHR] . . . precludes the commencement of an action in the Supreme Court asserting the same discriminatory acts" under the NYSHRL or the NYCHRL (*Vetro v Hampton Bays Union Free Sch. Dist.*, 148 AD3d 963, 964 [2d Dept 2017], *lv denied* 30 NY3d 907 [2017]; *see also* Executive Law § 297 [9]; Administrative Code § 8-502 [a]; *Luckie v Northern Adult Day Health Care Ctr.*, 161 AD3d 845, 846 [2d Dept 2018]; *Rodriguez v Dickard Widder Indus.*, 150 AD3d 1169, 1171 [2d Dept 2017]; *Wrenn v Verizon*, 106 AD3d 995, 995-996 [2d Dept 2013]; *Ehrlich v Kantor*, 213 AD2d 447, 447 [2d Dept 1995]; *Craig-Oriol v Mount Sinai Hosp.*, 201 AD2d 449, 450 [2d Dept 1994], *lv denied* 85 NY2d 804 [1995]).

The facts of the court action and the NYSDHR or NYCDHR administrative proceeding need not be perfectly identical, and merely adding some additional facts and/or

re-labeling the claim will not prevent the application of the doctrine of election of remedies, where "[t]he allegations at bar are based upon a series of events that transpired within the exact same time period" (*Benjamin v New York City Dept. of Health*, 17 Misc 3d 1122[A], 2007 NY Slip Op 52118[U], *5 [Sup Ct, NY County 2007], *affd* 57 AD3d 403 [1st Dept 2008]; *see also Bhagalia v State of New York*, 228 AD2d 882, 882-883 [3d Dept 1996]; *Spoon v American Agriculturalist*, 103 AD2d 929, 930 [3d Dept 1984]; *Low v Gibbs & Hill*, 92 AD2d 467, 468 [1st Dept 1983]). Where, however, "'a distinction can be made between the relief sought in a petition to [the NYSDHR] and that claimed in court, the aggrieved individual is not necessarily viewed as having brought a single discriminatory grievance in two different forums so as to brand the first [action or] proceeding as a binding election of remedies'" (*Matter of Baust*, 70 AD3d at 1108, quoting *Goosley v Binghamton City School Dist. Bd. of Educ.*, 101 AD2d 942, 943 [3d Dept 1984]).

Here, the NYSDHR determined that there was no probable cause to believe that CUNY engaged in or was engaging in the unlawful discriminatory practice complained of by Goldstein. The incidents alleged by Goldstein, in his NYSDHR complaint, as creating a hostile environment for him included:

> "the defacement of his father's photograph outside his office with [the] words 'F*** Trump. Kill the Zionist Entity'; the distribution of flyers with pictures of [Goldstein's] posts on Facebook labeling him [an] 'extreme racist, sexist and anti-Muslim'; the [placing of] nails on the passenger's side tire and scratches on the hood of his car; and alleged exclusion from a PFC-sponsored event to solicit complaints of discrimination by holding the event on a Friday, which is the Jewish Shabbat, and placing Professor Patrick Lloyd, another PFC leader in the Food Service Committee, which is chaired by [Goldstein]" (NYSCEF Doc No. 16).

Goldstein also alleged, in his NYSDHR complaint, that CUNY failed to act on his complaints to Kingsborough's Public Safety, the interim Kingsborough President, and Kingsborough's chief diversity officer, and to take the necessary steps to remediate this hostile work environment (*id.*). Goldstein further alleged that CUNY "failed to follow its own anti-harassment policy and procedure [and failed] to prosecute false claims against him when one Professor Katia Perea accused him of racism and sought his dismissal" (*id.*).

The NYSDHR, while dismissing Goldstein's complaint, noted that Goldstein had the right to appeal its determination in court and the right to request a review by the EEOC of this action since his charge was also filed under Title VII of the Civil Rights Act of 1964. Goldstein did not appeal this determination in court or request a review by the EEOC. However, the EEOC, as discussed above, upon reviewing Lax and other similarly situated individuals claims (which would include Goldstein), found that these complainants were discriminated and retaliated against because of their religion (NYSCEF Doc No. 24).

Here, to the extent that Goldstein's causes of action under the NYSHRL and the NYCHRL in the complaint in the instant action contain the same allegations by Goldstein which took place prior to November 30, 2018 and were alleged in the NYSDHR complaint, they are barred by Goldstein's election of an administrative remedy and he cannot assert these same claims under the NYSHRL and the NYCHRL in this plenary action (*see* Executive Law § 297 [9]; *Rodriguez*, 150 AD3d at 1171; *Wrenn*, 106 AD3d at 995-996; *Bhagalia*, 228 AD2d at 882-883; *Craig-Oriol*, 201 AD2d at 450). However, CUNY's argument that the claims which arose subsequent to Goldstein's NYSDHR complaint or

which were never addressed by the NYSDHR are barred by the election of remedies doctrine merely because they arose out of religious discrimination is devoid of merit.

The claims brought against CUNY in this action include an incident on December 2, 2019, in which vile "anti-Semitic flyers were distributed on campus accusing religious Jews of bathing in urine and feces and being purposeful vectors of disease, among other obscenities" (NYSCEF Doc No. 15 at paragraph 123). This later claimed act could not have been considered by the NYSDHR because it took place only after Goldstein filed his NYSDHR complaint.

The claims alleged in the complaint in the instant action also concern events not addressed in the NYSDHR complaint, namely, Goldstein's denial of membership in the PFC based on religion and the continuing harassment, discrimination, and hostile work environment which have plagued the Kingsborough Community College campus since the November 30, 2018 NYSDHR complaint and which are alleged to persist to date. The NYSDHR also did not address Goldstein's claims of retaliation, which includes Gartner's proposal (which is discussed above) in November 2020, which CUNY acknowledges may have been brought with Goldstein as the target of this proposal as a result of Goldstein's filing of his NYSDHR complaint (NYSCEF Doc No. 15 at paragraph 125).

These claims which were not considered by the NYSDHR are not barred by the doctrine of election of remedies, and this doctrine is not a reason to dismiss such claims (*see Matter of Baust*, 70 AD3d at 1108; *Benjamin*, 2007 NY Slip Op 52118[U], *6).

Consequently, Goldstein's claims in this action are dismissed solely to the extent that they reiterate the same claims alleged in his NYSDHR complaint.[2]

Motion Sequence Number Three

The Union defendants argue that plaintiffs do not allege that the Union authorized, was responsible for, ratified, or condoned the conduct of the PFC, the New Caucus, or individual faculty members' misconduct. However, paragraph 111 of plaintiffs' complaint specifically alleges that despite the widespread display of anti-Semitic discrimination on the Kingsborough campus, neither CUNY nor the Union took any steps to curtail such prejudice and actually "actively attempted to suppress the investigatory process" (NYSCEF Doc No. 30). Paragraph 114 of plaintiffs' complaint alleges that the "Union leaders, including Bowen, the president of the Union, applied pressure to Ajibade to suppress the investigation of the Friday Night Event matter, including Bowen demanding and threatening Ajibade to decline to investigate" (*id.*). The Union defendants do not dispute that they may be held liable for Bowen's acts, who was acting in her capacity as the Union's president. Paragraph 114 of plaintiffs' complaint also alleges that the Union filed a professional misconduct complaint against Ajibade "in order to prevent her from fulfilling her duty to investigate the complaints of anti-Semitism on campus" (*id.*). Paragraph 105 of plaintiffs' complaint alleges that with the advisory support of Union

[2]The court also notes that pursuant to CPLR 3002 (a), "[w]here causes of action exist against several persons, the commencement or maintenance of an action against one, or the recovery against one of a judgment which is unsatisfied, shall not be deemed an election of remedies which bars an action against the others." In the instant action, Goldstein's claims that are brought against parties not included in his November 30, 2018 complaint filed with the NYSDHR are not barred by the election of remedies doctrine.

leaders, PFC members have "called for the removal of Observant Jewish faculty members, administrators, department chairs, and others at Kingsborough," including Lax, Aranoff, Yarmish, and others, "based on various pretexts that are in reality due to the religious ideology and/or practice of those individuals" (*id.*).

Paragraphs 137 and 150 of plaintiffs' complaint allege that after plaintiffs "were subjected to discriminatory conduct on the basis of religion and complained about it, CUNY failed to take immediate and appropriate corrective action or exercise reasonable diligence to correct the discriminatory conduct, and the Union and New Caucus, through its leaders and members, aided the discrimination and actively suppressed Ajibade's investigation in its preliminary stages, thereby subjecting [p]laintiffs to a hostile work environment on the basis of their religion" in violation of the NYSHRL and the NYCHRL (*id.*). Paragraphs 144 and 157 of plaintiffs' complaint allege that the Union defendants retaliated against them for their good faith complaint in opposition to a discriminatory practice, thereby "subjecting them to conduct that would dissuade a reasonable employee from making or supporting a similar complaint of discrimination" (*id.*).

The Union defendants further argue that plaintiffs' hostile work environment claim against them must be dismissed because such claims can only be made against an employer. They contend that this is because hostile work environment claims are derived from statutory language prohibiting an employer from discriminating with respect to "terms, conditions, or privileges of employment," with no parallel obligation on labor organizations.

Executive Law § 296 (1) (c), however, provides that "[i]t shall be an unlawful discriminatory practice . . . [f]or a labor organization, because of the . . . creed . . . of any individual, . . . to discriminate in any way against any of its members or against any employer or any individual employed by an employer." Administrative Code § 8-107 (c) is the parallel provision to Executive Law § 296 (1) (c) under the NYCHRL. "Thus the plain language of the[se] statute[s] suggest[] that unions may be liable for any discrimination, including a claim of hostile work environment" (*Dowd v United Steelworkers of Am., Local No. 286*, 253 F3d 1093, 1102 [8th Cir 2001] [citing 42 USC § 2000e-2 (c) (1)], the equivalent statute under Title VII]; *see also Scott v City of New York Dept. of Correction*, 641 F Supp 2d 211, 223-224 [SD NY 2009], *affd sub nom. Scott v New York City Dept. of Correction*, 445 Fed Appx 389 [2d Cir 2011] [citing to 42 USC § 2000e-2 (c) (1), Executive Law § 296 (1) (c), and Administrative Code § 8-107(c)] as regulating labor unions with respect to hostile environment claims and noting that "[t]he city and state law claims are normally evaluated based on the same analysis that is used for Title VII claims"]). While Executive Law § 296 (1) (c), and Administrative Code § 8-107(c) contain "no reference to 'terms [and] conditions' of employment, [they] bar[] any kind of 'discrimination' by a union, and thus as a logical matter bar[] discrimination in the terms and conditions of union membership" (*Scott*, 641 F Supp 2d at 224).

It has been held that "a union is liable under Title VII [or Executive Law § 296 (1) (c), and Administrative Code § 8-107 (c)] for situations in which the union is responsible for creating a hostile [work] environment for a union member because of the member's race or sex" or religion (*id.* at 225; *see also Dowd*, 253 F3d at 1103 [allowing Title VII

hostile work environment claim against a union where "there was evidence that at least one union steward participated in the harassment, that others stood silently by as it occurred, and that the union's president exhibited discriminatory animus"]). Thus, the Union defendants' argument that only employers, and not unions, can be liable for a hostile work environment, is rejected.

The Union defendants argue that plaintiffs have not adequately pleaded that the Union defendants condoned the conduct of those union members of the PFC or others who allegedly discriminated against plaintiffs. Contrary to the Union defendants' argument, plaintiffs' complaint contains sufficient allegations that the Union was aware of the discrimination against Orthodox Jews, "aided the discrimination," and actively supported it by suppressing the investigatory process (NYSCEF Doc No. 30 at paragraph 137). Such allegations, at this early pre-answer stage of this action, are adequate to withstand the Union defendants' motion to dismiss plaintiffs' claims of a hostile work environment as asserted against them (*see* Executive Law § 296 [1] [c], and Administrative Code § 8-107 [c]).

The Union defendants further argue that plaintiffs do not adequately allege a claim for retaliation. As noted above, however, "an adverse employment action is one which might have dissuaded a reasonable worker from making or supporting a charge of discrimination" (*Bilitch*, 194 AD3d at 1004). While the Union defendants claim that plaintiffs do not allege that they took such actions, plaintiffs' complaint, in fact (as noted above), specifically alleges, in paragraph 114, that the Union defendants "applied pressure to Ajibade to suppress the investigation of the Friday Night Event," that Bowen threatened

Ajibade and demanded that she "decline to investigate the Friday Night Event matter," and that "the Union filed a Professional Misconduct complaint against Ajibade in order to prevent her from fulfilling her duty to investigate the complaints of anti-Semitism on campus" (NYSCEF Doc No. 30). Since plaintiffs allege that Ajibade was subjected to pressure and intimidation by the Union which ultimately forced her to leave her job, and this may be found to be sufficient to deter another individual from engaging in the same potential investigation as to religious discrimination that Ajibade sought to conduct and to deter others from making discriminatory complaints seeking investigation, this constitutes sufficient allegations of retaliation. Consequently, the Union defendants' motion must be denied in its entirety.

Motion Sequence Number Four

Feeley and Spear state that plaintiffs' complaint is completely devoid of allegations that they employed plaintiffs. They assert that plaintiffs do not and cannot allege that they directly supervised them, had any power to order and control the performance of their work, had the authority to hire, fire, or pay plaintiffs, or that they have any ownership interest in CUNY or Kingsborough. They argue that based on the facts alleged, they are merely plaintiffs' co-employees and cannot be individually liable under the NYSHRL or the NYCHRL.

This argument lacks merit. Plaintiffs' complaint alleges that Feeley and Spear "actually participated in, and aided and abetted, the conduct giving rise to the discrimination and harassment claims set forth herein" (NYSCEF Doc No. 36 at paragraphs 15 and 18). Executive Law § 296 (6) provides that "[i]t shall be an unlawful discriminatory

practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so." "[A] defendant who actually participates in the conduct giving rise to a discrimination claim may be held personally liable as an aider and abettor under the NYHRL, even if that defendant has neither an ownership interest nor the power to hire and fire" (*Perks v Town of Huntington*, 251 F Supp 2d 1143, 1160 [ED NY 2003] [internal quotation marks omitted]; *see also Feingold v New York*, 366 F3d 138, 158 [2d Cir 2004]). Furthermore, "a defendant may incur aider and abettor liability in connection with a primary violation of another employee, not just that of the employer" (*International Healthcare Exchange, Inc. v Global Healthcare Exchange, LLC*, 470 F Supp 2d 345, 363 [SD NY 2007]). Moreover, a defendant can be held liable for aiding and abetting discriminatory behavior by an employer "even where his [or her] conduct serves as the sole predicate for the employer's liability" (*Maher v Alliance Mortgage Banking Corp.*, 650 F Supp 2d 249, 262 [ED NY 2009]). "The same standards of analysis used to evaluate aiding and abetting claims under the NYSHRL apply to such claims under the NYCHRL because the language of the two laws is virtually identical" (*Feingold*, 366 F3d at 158 [internal quotation marks omitted]; *see also* Administrative Code § 8-107 [6]). Thus, Feeley and Spear may be held liable for aiding and abetting their employers' discriminatory behavior under the NYSHRL and the NYCHRL even though they are not employers.

Feeley and Spear argue that there is no predicate for their liability under an aiding and abetting theory if CUNY's motion to dismiss is granted. However, as discussed above, the court has denied CUNY's motion to dismiss, and, thus, such a predicate exists.

Feeley and Spear further point out that "[a]iding and abetting liability [under the NYSHRL and the NYCHRL] requires that the aider and abettor share the intent or purpose of the principal actor, and there can be no partnership in an act where there is no community of purpose" (*Hughes v Twenty-First Century Fox, Inc.*, 304 F Supp 3d 429, 451 [SD NY 2018] [internal quotation marks omitted] [under the NYSHRL]; *Estatico v Department of Educ. of City of N.Y.*, 2014 NY Slip Op 33611[U], *5 [Sup Ct, NY County 2014) [internal quotation marks omitted] [under the NYCHRL]). Feeley and Spear note that under an aiding and abetting theory, plaintiffs are required to allege that they "bore the requisite discriminatory intent, and that [they] 'compel[led] or coerce[d]' the alleged discriminatory employment decisions [or retaliatory actions]" (*Schindler v Plaza Constr. LLC*, 154 AD3d 495, 496 [1st Dept 2017], quoting Administrative Code § 8-107 [6]). Spear and Feeley argue that plaintiffs have failed to allege that they were motivated by discriminatory animus on the basis of plaintiffs' religion so as to render them liable under an aiding and abetting theory of liability.

Plaintiffs' complaint, however, alleges that Spear is a leader of the PFC (NYSCEF Doc No. 36 at paragraph 98). Plaintiffs' complaint further alleges that in September 2017, plaintiffs contacted Spear, as a PFC leader, requesting entry into the PFC, and "[i]n a clear and recognizable pattern of discrimination, . . . [p]laintiffs and every other Observant Jewish applicant to the PFC were denied entry" (*id.* at paragraphs 98-99). Plaintiffs' complaint asserts that "there are no Observant Jewish members of the PFC, and no other applicants were denied acceptance to the PFC" (*id.* at paragraph 99).

Plaintiffs' complaint also alleges that in 2018, the PFC decided to hold an anti-discrimination event on a Friday night with the specific purpose of excluding Observant Jews who, as the PFC leaders well knew, would not be able to attend due to their observance of the Jewish Sabbath (*id.* at paragraph 101). By their own admission, the PFC also excluded anti-religious discrimination from their list of issues to be discussed at this event (*id.* at paragraph 103).

Since Spear is a leader of the PFC, and the PFC can only act through its leaders and has the alleged discriminatory intent of, and makes the alleged discriminatory decisions of its leaders, this permits an inference, at the very least, that Spear was involved in the decision to schedule the Friday Night Event at a time when Observant Jews could not participate, that he was involved in denying Observant Jews entry into the PFC, and that he participated, or was at least aware of and condoned, the other frequent PFC discriminatory acts listed in plaintiffs' complaint (*see Ahmad v New York City Health and Hosps. Corp.*, 20 CIV 675 [PAE], 2021 WL 1225875, *15 [SD NY Mar. 31, 2021]). Notably, plaintiffs' complaint alleges that after an anti-Semitism investigation against the PFC by the chief diversity officer was suppressed, it was Spear who "bragged that the investigation had been 'taken care of' and that the PFC had 'nothing to worry about'" (NYSCEF Doc No. 36 at paragraph 114). Thus, plaintiffs' complaint adequately alleges that Spear bore the requisite discriminatory intent, and participated in the alleged discriminatory conduct.

As to Feeley, plaintiffs allege that she was a member of the New Caucus (NYSCEF Doc No. 36 at paragraph 17). Plaintiffs also allege that in May 2018, Feeley filed with

Ajibade a complaint of harassment against Lax, "whom she had never spoken to nor met because, she admitted, she was bothered that he was documenting claims based on religious discrimination" (*id.* at paragraph 127). Plaintiffs assert that there is an inference that Feeley was one of the discriminators about which they had complained to Ajibade and which Lax had been documenting. Plaintiffs allege that with the financial and advisory support of New Caucus leaders, PFC members have called for the removal of Observant Jewish Faculty members, administrators, department chairs, and others at Kingsborough, including Lax, Aranoff, and Yarmish (*id.* at paragraph 105), and that "PFC and New Caucus members also complained in a publicly distributed campus survey that 'Zionist faculty" engender 'oppression' and control the campus" (*id.*). Plaintiffs also allege that "PFC and New Caucus members also complained in a publicly distributed campus survey that 'Zionist faculty' engender 'oppression' and control the campus (*id.*), that "PFC and New Caucus members regularly . . . lobbied . . . against any candidates that were Observant Jews" (*id.* at paragraph 116), and that there were threats by PFC and New Caucus members to "bring violence to the Zionists" on Kingsborough's campus, which were followed by nails being placed in Goldstein and Lax's car tires (*id.* at paragraph 110). At this early stage of the action, where no depositions have yet been held, these factual allegations are sufficient for the court to draw a reasonable inference that Feeley, as a New Caucus member, had a discriminatory animus and participated in, and aided and abetted, the conduct giving rise to the discrimination and harassment claims asserted (*id.* at paragraphs 17, 18) (*see Ahmad*, 20 CIV 675 [PAE], 2021 WL 1225875, *15).

Thus, the court finds that the allegations in plaintiffs' complaint are sufficient to withstand Feeley and Spear's motion to dismiss. Consequently, Feeley and Spear's motion must be denied.

Motion Sequence Number Five

Wallace and Green are the Professor defendants' privately retained counsel, who are currently representing them in this action and have been their counsel for several years. The Professor defendants, who, as noted above, consist of seven Kingsborough professors, seek to continue to be represented by Wallace and Green in this action, but to have the City pay their legal fees. The Professor defendants state that they are entitled to be defended and indemnified in this action under General Municipal Law § 50-k (2), which provides that the City will indemnify and the Corporation Counsel will defend a City employee "acting within the scope of his [or her] public employment and in the discharge of his [or her] duties and . . . not in violation of any rule or regulation of his [or her] agency at the time the alleged act or omission occurred." With respect to indemnity, Education Law § 6205 (2) (e) similarly provides as follows:

> "The city of New York shall indemnify and save harmless employees of the community colleges of the city university in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim, provided that the act or omission from which such judgment or settlement arose, occurred while the employee was acting within the scope of his public employment or duties; the duty to indemnify and save harmless prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee."

In asserting that the City should pay the legal fees of their privately retained counsel, they rely upon Education Law § 6205 (2) (c), which provides as follows:

> "[An employee of a junior college] shall be entitled to be represented by the city of New York provided, however, that the employee shall be entitled to representation by private counsel of his [or her] choice in any civil judicial proceeding *whenever the corporation counsel of the city of New York determines based upon his [or her] investigation and review of the facts and circumstances of the case that representation by the corporation counsel would be inappropriate, or whenever a court of competent jurisdiction, upon appropriate motion or by a special proceeding, determines that a conflict of interest exists* and that the employee is entitled to be represented by private counsel of his choice. The corporation counsel shall notify the employee in writing of such determination that the employee is entitled to be represented by private counsel. The corporation counsel may require, as a condition to payment of the fees and expenses of such representation, that appropriate groups of such employees be represented by the same counsel. If the employee or group of employees is entitled to representation by private counsel under the provisions of this subdivision, the corporation counsel shall so certify to the comptroller of the city of New York. Reasonable attorneys' fees and litigation expenses shall be paid by the city of New York to such private counsel from time to time during the pendency of the civil action or proceeding subject to certification that the employee is entitled to representation under the terms and conditions of this subdivision by the board of trustees of the city university and upon the audit and warrant of the comptroller. Any dispute with respect to representation of multiple employees by a single counsel or the amount of litigation expenses or the reasonableness of attorneys' fees shall be resolved by the court upon motion or by way of a special proceeding" (emphasis added).

Here, Corporation Counsel and Patterson Belknap Webb & Tyler LLP (Patterson Belknap), through Corporation Counsel's Public Service Program, are representing CUNY. The Professor defendants argue that a conflict of interest between them and CUNY exists so as to require that Corporation Counsel be disqualified from representing them. They contend that based on this claimed conflict of interest, the City should be required to pay their private counsel's reasonable attorney's fees and litigation expenses pursuant to Education Law § 6205 (2) (c).

The City opposes the Professor defendants' motion. Maxwell D. Leighton, Esq. (Leighton), an assistant corporation counsel, states that Corporation Counsel takes very seriously its obligations under the law, as well as under the canons of professional and ethical responsibility, to evaluate any possible conflicts that may attend the undertaking of representation of a defendant, including those individuals who may be entitled to representation under Education Law § 6205. He explains that under Education Law § 6205, the Office of the Corporation Counsel makes an eligibility determination after an employee has requested representation. He sets forth that prior to meeting with an individual defendant requesting representation, the Office of the Corporation Counsel always conducts a preliminary conflict analysis, and, where any potential conflict is deemed to possibly exist, the representation interview is conducted by attorneys in a different unit or division who have no involvement in the matter for which representation is being sought (a clean team). He further sets forth that where representation is denied or a conflict is found, the clean team is permanently both electronically and physically screened from the matter.

Leighton asserts that based on the Office of the Corporation Counsel's investigation and review of the facts and circumstances of this action, it determined, pursuant to Education Law § 6205 (2) (c), that the representation by it of the Professor defendants would be appropriate and that no conflict of interest exists between the Professor defendants and CUNY, Kingsborough, or Feeley and Spear (who are also being represented by the City) that would affect its ability to represent the Professor defendants. Leighton contends that there is no basis to disqualify Corporation Counsel from

representing the Professor defendants and that they, therefore, have no entitlement to be represented by private counsel paid for by the City.

By a letter dated January 21, 2022 (NYSCEF Doc No. 57), Leighton informed Green and Wallace that based upon the Office of Corporation Counsel's investigation and review of the facts and circumstances of the case, it was determined that no actual or apparent conflict of interest exists between the individual defendants and Kingsborough and CUNY that would preclude representation of the Professor defendants by Corporation Counsel pursuant to Education Law § 6205. The Professor defendants dispute this determination.

The Professor defendants contend that Corporation Counsel has a conflict of interest based on CUNY and Kingsborough's allegedly prior adverse actions against them, which, they claim, must have been advised or approved by Corporation Counsel. They claim that CUNY and Kingsborough have a persistent and ongoing pattern of pointing fingers at them to clear themselves of liability. To support this claim, they assert that Corporation Counsel should have stated, in their Memorandum of Law in support of CUNY's motion to dismiss, that the PFC was engaging in First Amendment-protected freedom of association, and that Gartner's "proposed measure" was an appropriate provision. They argue that they simply do not trust Corporation Counsel to defend their interests, and that the court should direct that they be allowed, at the City's expense, to retain counsel that they trust, namely, Wallace and Green.

However, since Education Law § 6205 entitles community college employees to both representation and indemnification, where an employee has been deemed eligible for

representation, that entitlement aligns the interests of both the municipal and individual defendants (*see Galloway v Nassau County*, 569 F Supp 3d 143, 149 [ED NY 2021], *affd sub nom. Galloway v County of Nassau*, 589 F Supp 3d 271 [ED NY 2022]; *Coggins v County of Nassau*, 615 F Supp 2d 11, 33 [ED NY 2009]). Contrary to the Professor defendants' assertions, the motion to dismiss filed by CUNY does not attempt to shift responsibility and liability for the employment discrimination alleged by plaintiffs upon the Professor defendants. Rather, CUNY's Memorandum of Law in support of dismissal of plaintiffs' claims expressly asserts that, "even if the PFC, New Caucus and Union members' alleged conduct were imputable to CUNY, it does not rise to the level of a hostile work environment (NYSCEF Doc No. 19 at 22). CUNY's Memorandum further argues that plaintiffs have failed to state a claim for retaliation (*id.* at 25).

Notably, Feeley and Spear, who are also Kingsborough professors and are being represented by the City through Patterson Belknap, filed a motion to dismiss for failure to state a cause of action, raising similar arguments as raised by CUNY. There is nothing within the litigation strategy of Patterson Belknap, as set forth in the motions to dismiss filed by CUNY and Feeley and Spear, which supports the Professor defendants' claim that these parties' filings create a conflict of interest.

The Professor defendants further contend that, if this action is not dismissed and they file an answer to plaintiffs' complaint, Corporation Counsel has a conflict of interest due to the Professor defendant's intention, on the advice of Wallace and Green, to file a cross claim against CUNY and Kingsborough containing a cause of action for First Amendment retaliation. They point to a December 18, 2019 letter (to which they received

no response), in which Wallace and Green requested a meeting with CUNY and Kingsborough for the Professor defendants regarding their seeking of "guarantees of academic freedoms at Kingsborough" and of an alleged "First Amendment chill," which they claimed was occurring due to CUNY and Kingsborough's investigation and inquiry by Jackson Lewis into their alleged acts of discrimination (NYSCEF Doc No. 42). They assert that since Corporation Counsel cannot simultaneously represent them, as the cross claimants, and Kingsborough, this constitutes a conflict of interest.

However, this claimed prospect of litigation, arising out of alleged events occurring back in 2019, does not create a conflict of interest sufficient to disqualify Corporation Counsel or Patterson Belknap from representing the Professor defendants. The thrust of this claimed conflict entirely arises from the internal investigation performed by Jackson Lewis, an independent firm retained by Kingsborough in 2019 to probe the substance of claims made against, among others, the Professor defendants. Jackson Lewis' final report concluded that no wrongdoing occurred, and thus did not implicate the Professor defendants in any wrongdoing.

Moreover, to find a conflict of interest based on a potential cross claim based on events that occurred in 2019 but which to date has never been interposed, so as to require the City to pay the legal fees of the Professor defendants' privately retained counsel, would create a precedent that is ripe for abuse. Under this scenario, anytime a defendant wished to hire his or her own private counsel and wanted to have the City pay for it pursuant to Education Law § 6205 (2) (c), he or she could raise a cross claim against the City. Indeed, the fact that the Professor defendants assert that they would only assert this cross claim

against CUNY and Kingsborough if this action is not dismissed smacks of gamesmanship. Furthermore, such potential cross claims are irrelevant to the claims in this action and would result in the City being required to pay the attorneys' fees and costs for the very counsel who, simultaneously, would be advancing cross claims against CUNY and Kingsborough.

The Professor defendants request a hearing on conflict of interest, pursuant to *Dunton v County of Suffolk* (729 F2d 903 [2d Cir 1984], *amended* 748 F2d 69 [2d Cir 1984]). This request is rejected. In *Dunton* (729 F2d at 907), the Second Circuit discussed that since the United States Supreme Court's decision in *Monell v Department of Social Services* (436 US 658 [1978]), a municipality could be held liable under 42 USC § 1983 for employees' actions taken pursuant to municipal policy. The Second Circuit, in *Dunton* (729 F2d at 907), explained that an attorney should disqualify himself or herself if there is an "imminent threat of a serious conflict" of interest, such as when a municipal employee seeks to "partially or completely avoid liability by showing that he [or she] was acting within the scope of his [or her] official duties," while the municipality attempts to "avoid liability by showing that the employee was not acting within the scope of his [or her] official duties, because his [or her] unofficial actions would not be pursuant to municipal policy." When both of these arguments are advanced by the same attorney representing both parties, an imminent threat of a serious conflict arises (*id.*).

Here, the Professor defendants do not assert a *Monell* claim against the City, nor is there an "imminent" conflict that the court can identify (*see Angelet v New York City Tr. Auth.*, 11-CV-1492 FB CLP, 2014 WL 2573389, *2 [ED NY June 7, 2014]; *Diaz v New*

York City Tr. Auth., 11-CV-3728 FB LB, 2014 WL 2600172, *1 [ED NY June 5, 2014]). In fact, the Professor defendants state that Corporation Counsel "has made no claim, nor do [they] expect it to," that "the alleged acts are anything but within the scope of their employment" (NYSCEF Doc No. 41 at 3). There is thus no basis for a *Dunton* hearing to be held before the court.

Thus, the court finds that the asserted conflict of interest is wholly without basis, and, therefore, that the Professor defendants are not entitled to an order disqualifying the Corporation Counsel from representing them or directing that private counsel be paid for by the City of New York. Consequently, the Professor defendants' motion must be denied in this respect.

The Professor defendants, in their motion, request, in the alternative, an order directing Corporation Counsel to permit Green and Wallace to attend their meetings with it. Leighton, in his January 21, 2022 letter (NYSCEF Doc No. 57), had informed Green and Wallace that in order to proceed with the representation process and to confirm that the Professor defendants are entitled to be represented by the Office of the Corporation Counsel, such office must conduct interviews of each individual Professor defendant, and that such interviews would be conducted by the New York City Law Department. Leighton requested that Green and Wallace consent to the Office of the Corporation Counsel contacting the Professor defendants to schedule these interviews and to thereafter meet with them, outside their presence. Green and Wallace refused to consent to this, and insist that they be present during these meetings.

These meetings, however, as contended by Corporation Counsel, are protected by the attorney-client privilege, with such privilege held by the institutional or corporate client, i.e., CUNY (*see Upjohn Co. v United States*, 449 US 383, 390 [1981]). "As a general rule, disclosure of attorney-client communication to a third party or communications with an attorney in the presence of a third party, not an agent or employee of counsel, vitiates the confidentiality required for asserting the privilege" (*Delta Fin. Corp. v Morrison*, 13 Misc 3d 441, 444-45 [Sup Ct, Nassau County 2006]). Thus, here, the presence of a third party, such as Green or Wallace, at a representation meeting, would vitiate the assertion of the attorney-client privilege by CUNY and Kingsborough, as well as the privilege for Feeley and Spear, the other named professors who Corporation Counsel has deemed eligible for representation and who, along with CUNY and Kingsborough, are being jointly represented by Patterson Belknap. Thus, Green and Wallace's alternative request for an order directing the Office of the Corporation Counsel to permit their attendance at its representation meetings, must be denied.

Conclusion

Accordingly, CUNY's motion to dismiss, under motion sequence number two, is granted solely to the extent that Goldstein's claims, insofar as they reiterate the same claims previously alleged by him in his NYSDHR complaint, are dismissed based on the election of remedies doctrine; CUNY's motion to dismiss is otherwise denied in all respects.

The Union defendants' motion to dismiss, under motion sequence number three, is denied.

Feeley and Spear's motion to dismiss, under motion sequence number four, is denied.

The Professor defendants' motion, under motion sequence number five, for an order declaring that Corporation Counsel is disqualified from representing them due to a conflict of interest and directing Corporation Counsel and the City to pay the reasonable legal fees of their attorneys Green and Wallace, is denied, and it is declared that no such conflict of interest exists and that Corporation Counsel and the City are not required to pay the attorneys' fees charged to the Professor defendants by Green and Wallace. The Professor defendants' motion, in the alternative, for an order directing Corporation Counsel to permit attendance at its meetings with them by Green and Wallace is also denied.

Any issue raised and not addressed in this decision and order is denied.

This constitutes the decision and order of the court.

ENTER:

HON. GINA ABADI
J.S.C.

HON. GINA ABADI
J.S.C.