UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAURIE GORBECK, Plaintiff, v. IKEA NORTH AMERICA SERVICES, LLC, IKEA DISTRIBUTION SERVICES, INC., AND IKEA U.S. HOLDINGS, INC., all d/b/a IKEA, JOHN OLSON a/k/a ROBERT OLSON, and JACQUELYN DECHAMPS, Defendants.	Civil Action No.: 18-3651-AB

BRIEF IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendants IKEA North America Services, LLC, IKEA Distribution Services, Inc., IKEA Holding US, Inc., John Olson, and Jacqueline DeChamps (collectively, "Defendants") hereby submit the following Brief in Support of their Partial Motion to Dismiss Plaintiff's First Amended Complaint (hereinafter "FAC").

I. INTRODUCTION

On August 27, 2018, Plaintiff Laurie Gorbeck ("Gorbeck" or "Plaintiff") filed a Complaint against Defendants purporting to allege ten claims. (Doc. 1). Because that pleading was inadequate, Defendants responded by filing a Partial Motion to Dismiss Plaintiff's Complaint. (Doc. 9). In response, on November 13, 2018, Gorbeck filed her FAC. (Doc. 13). The FAC alleges the same ten claims as the Complaint, but cures none of the defects present in the Complaint. Gorbeck again inadequately pleads her claims and/or has failed to exhaust her administrative remedies for: (1) sex discrimination under Title VII and the Pennsylvania Human Relations Act ("PHRA") (Counts I and II); (2) age discrimination under the Age Discrimination

in Employment Act ("ADEA") and PHRA (Counts III and IV); (3) a violation of the Equal Pay Act ("EPA") (Count VIII); and (4) retaliation under the Family and Medical Leave Act ("FMLA") (Count X). Similarly, Gorbeck's claim of retaliation under the EPA (Count IX) must be dismissed to the extent it includes claims that are time-barred.

II. FACTUAL BACKGROUND[1]

Gorbeck is a former co-worker[2] of Defendants IKEA North America Services, LLC and IKEA Distribution Services, Inc. (together, "IKEA"). She worked for IKEA North America Services, LLC as United States Human Resource Business Navigator through October 2014; in this position, her job responsibilities allegedly included "long-term strategic planning for IKEA in the field of human resources, metric benchmarking, financial modeling, benefits, and compensation levels." (Doc. 13, Am. Compl. at ¶¶ 26, 29).

From 2012 through 2013, Gorbeck was tasked with conducting an analysis on a "living wage" for IKEA co-workers. (*Id.* at ¶ 53). In 2013, Gorbeck interviewed for the position of US Country HR Manager, but Defendant Jacqueline DeChamps (under the age of 40) was ultimately selected and started in that role in February 2014. (*Id.* at ¶¶ 57-59).

Around the same time, Gorbeck was assigned a project to analyze retail store managers' pay levels in response to a complaint by a male store manager that he was underpaid. (*Id.* at ¶ 60). Gorbeck alleges that she and the IKEA consultant working with her on the project uncovered pay inequities for certain retail store managers, which she reported to IKEA. (*Id.* at ¶¶ 61, 65). A month later, Gorbeck was informed by Ms. DeChamps that her position was to be eliminated on August 31, 2014, though her position was ultimately extended through December 2014. (*Id.* at ¶¶

[1] Because under Rule 12(b)(6), a court must accept all factual allegations as true in deciding a motion to dismiss, Defendants are asserting facts as alleged in the FAC, but reserve the right to dispute these facts at a later time.

[2] IKEA refers to its employees as "co-workers."

98, 127). Thereafter, Gorbeck voluntarily applied for and successfully obtained the position of HR Business Partner – DSNA with IKEA Distribution Services, Inc. on January 5, 2015, which she alleges was a "demotion" due to the pay differential from her previous position. (*Id.* at ¶¶ 146-48).

Gorbeck Files Her First Charge of Discrimination

On June 25, 2015, Gorbeck dual-filed a Charge of Discrimination ("Charge") with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC") claiming she was discriminated against based on her sex and age. (*See* Doc. 13-1). In the Charge, Gorbeck alleged she believed her position was eliminated "because I raised the good faith belief that IKEA was in violation of the law for failing to pay women the same amount as men in equivalent positions." (*Id.* at ¶ 36). She also stated that on April 29, 2014, her counsel contacted IKEA and expressed concerns that she was being treated differently because of her age and because *she raised issues regarding pay equity*. (*Id.* at ¶ 43). Gorbeck summarized her claims by stating she was discriminated against because she was older than 40 years old and not hired for two positions she applied for, and her position was eliminated in retaliation for engaging in protected activity (raising concerns of pay equity). (*Id.* at ¶¶ 67-68). Gorbeck asserted *no* facts that her gender motivated any adverse action. Moreover, the only adverse actions Gorbeck referenced were the elimination of her position due to her *engaging in protected activity* and not receiving the positions she applied for purportedly because of her age.

Events After First Charge of Discrimination

Gorbeck alleges that around December 2015, she applied for an HR Operations position, but IKEA refused to interview her and instead selected a male who was under the age of 40. (Doc. 13, Am. Compl. at ¶¶ 157, 160-63). Almost two years later, in August 2017, Gorbeck claims she

was advised that her current position was being "eliminated" as of October 13, 2017, and on October 13, 2017, she was terminated. Three months later, on January 22, 2018, Gorbeck filed her Second Charge of Discrimination. (*See* Doc. 13-3).

Second Charge of Discrimination

Gorbeck's Second Charge of Discrimination is exclusively about the elimination of her HR Business Partner – DSNA position in August 2017 and termination on October 13, 2017. (*Id.* at ¶¶ 7-13). Indeed, the only "legal claim" Gorbeck asserted is that she was retaliated against for filing her First Charge of Discrimination and raising concerns of pay equity. (*Id.* at ¶ 17). In this Second Charge, Gorbeck does not purport to proceed on behalf of anyone other than herself. Nor does the Second Charge suggest, even obliquely, that anyone other than Gorbeck was terminated because of a protected status.

Gorbeck Takes FMLA on October 4, 2016

Gorbeck also alleges that on or about October 4, 2016, she was approved for intermittent leave under the FMLA. (Doc. 13, Am. Compl. at ¶ 167). She contends IKEA took adverse action against her because of this intermittent leave *a year later* in October 2017 by terminating her. (*Id.* at ¶¶ 268, 270).

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain "short and plain statement of the claim showing that the pleader is entitled to relief." If a complaint fails "to state a claim upon which relief can be granted," it must be dismissed. Fed. R. Civ. P. 12(b)(6). The complaint's factual allegations "must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). "Threadbare recitals of the elements of a cause of action, supported by

mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, the claim must be "plausible on its face," requiring "factual content that allows the court to draw the reasonable inference that a defendant is liable for the misconduct alleged . . . [raising] more than a sheer possibility that a defendant has acted unlawfully." *Id.*

The Third Circuit explained that to determine the sufficiency of a complaint under the standard set forth in *Iqbal* and *Twombly*:

> First, the court must tak[e] note of the elements a plaintiff must plead to state a claim. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of the truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.

Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010). To survive a motion to dismiss, a complaint "must do more than allege the plaintiff's entitlement to relief" – it must "show" such entitlement through factual allegations. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009).

IV. ARGUMENT

A. Plaintiff's Gender-Discrimination Claims Must be Dismissed Because She Failed to Exhaust Her Administrative Remedies and Cannot Establish Her Claims.

1. *Plaintiff's Gender-Discrimination Claims Must Be Dismissed Because She Failed to Exhaust Administrative Remedies.*

Gorbeck seeks to lead a gender-discrimination class action under Title VII and the PHRA[3] (Counts I & II). (Doc. 13, Am. Compl. at ¶ 179). A plaintiff alleging Title VII discrimination must comply with administrative remedies before filing an action in federal court. *Robinson v. Dalton*, 107 F.3d 1018, 1020-21 (3d Cir. 1997). Indeed, a plaintiff must file a complaint with the

[3] Courts analyze claims under Title VII and the PHRA under the same standard. *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 318-19 (3d Cir. 2008).

EEOC within 180 days (or 300 days if a state-based claim has also been filed) of the date of the last act of alleged discrimination. *Bucks v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006). Any action in federal court is limited to the claims alleged in the complaint submitted to the EEOC. *See Waiters v. Parsons*, 729 F.2d 233, 237 (3d Cir. 1984) (holding that a plaintiff exhausts a claim if "the acts alleged in the subsequent Title VII suit are fairly within the scope of the prior EEOC Complaint").

Gorbeck's Charges of Discrimination, however, are wholly devoid of any factual allegations that Defendants discriminated against Gorbeck on the basis of her *gender*. Gorbeck's 2015 Charge of Discrimination checked the boxes for "sex" and "age," but the Charge of Discrimination only claims she was discriminated against because of her age and retaliated against for raising questions regarding pay equity. (*See* Doc. 13-1, ¶¶ 43, 67-68). Gorbeck's 2018 Charge of Discrimination is exclusively about the allegedly retaliatory elimination of her position in August 2017 for participating in protected activity and never mentions her gender as a motivating factor for the adverse action. But the FAC improperly conflates Gorbeck raising gender pay disparity (not even her own) with gender discrimination. Gorbeck implicitly admits this defect when she concedes that she "cannot state whether she, *herself,* was a victim of pay equity violations." *Id.* at ¶ 84 (emphasis supplied). Because her Charges of Discrimination are devoid of any complaints of sex or gender discrimination, Gorbeck's claims of gender discrimination must be dismissed for failing to exhaust administrative remedies. Likewise, any amendment to the FAC would be futile because Gorbeck would be time barred from filing any additional claims with the EEOC and/or PHRC.

2. *Plaintiff's FAC Fails to State a Claim for Gender-Discrimination.*

Even if Gorbeck had exhausted her administrative remedies (she did not), her gender-discrimination claims must be dismissed because her FAC fails to state a claim for relief. Title VII and the PHRA make it illegal for employers to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex[.]" 42 U.S.C. § 2000e-2(a)(1). In order to overcome a motion to dismiss her gender discrimination claims, Gorbeck "has the burden of pleading sufficient factual matter that permits the reasonable inference" that Gorbeck's gender was the reason for the alleged adverse employment action. *Golod v. Bank of Am. Corp.*, 403 F. App'x. 699, 702 (3d Cir. 2010).

Here, none of the facts alleged in the Charges of Discrimination or the FAC permits this Court to infer that Gorbeck's *gender* motivated any adverse action against her. Instead, Gorbeck alleges her position was eliminated after she informed IKEA that it faced legal liability because some female store managers were not being paid the same amount as men. (Doc. 13, Am. Compl. at ¶¶ 73, 98-99). But Plaintiff admits that she cannot state whether *she* was a victim of pay equity violations due to her gender. (*Id.* at ¶ 84). These facts are insufficient for a reasonable factfinder to infer that any actions against Gorbeck were motivated by her gender. While the FAC does assert that gender was a motivating factor in the adverse actions IKEA took against her by failing to hire her to multiple positions for which she was qualified[4] and terminating her employment[5] (*id.* at ¶

[4] Gorbeck's Charge of Discrimination alleged she was discriminated against due to her *age* because she was not hired for the positions, but in her FAC she claims she was not hired because of her *gender*. *See* Doc. 13-1 at ¶ 67.

[5] Similarly, in her Charge of Discrimination, Gorbeck alleged she was terminated as a form of retaliation because she raised concerns of pay equity for women not earning as much as men in equivalent positions. *See* Doc. 13-1 at ¶ 68. There is no mention of Gorbeck's *gender* being a motivating factor in her termination.

182), this is exactly the type of conclusory allegation that the Third Circuit held no longer survive a motion to dismiss. *See Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008). Moreover, even if Gorbeck provided factual allegations to support these barebones allegations, she never raised such allegations with the EEOC, and thus has not exhausted her administrative remedies. Because Gorbeck's FAC is devoid of any facts to raise an inference of discrimination based on Gorbeck's gender, it fails to state a viable Title VII or PHRA claim. Because this deficiency is incurable, Gorbeck's claims of gender-based discrimination should be dismissed with prejudice.

B. Plaintiff's Age-Discrimination Claims Must Be Dismissed.

Gorbeck alleges her age was a motivating and determinative factor[6] in the adverse actions IKEA took against her, including the failure to hire her for multiple positions and terminating her employment twice (Counts III & IV). (Doc. 13, Am. Compl. at ¶¶ 204-05). Plaintiff, however, failed to exhaust her administrative remedies for her individual claim of termination based on age discrimination, and the positions she was rejected for are either outside the applicable statute of limitations or not sufficiently plead.

Plaintiff brought this action as a collective action pursuant to the ADEA, on behalf of herself individually and on behalf of those similarly situated. Under the ADEA, a plaintiff must establish that: (1) she is 40 years of age or older; (2) the defendant took an adverse employment action against the plaintiff; (3) she was qualified for the position at issue; and (4) she was replaced by an employee who was sufficiently younger to support an inference of discriminatory animus. *Smith v. City of Allentown*, 589 F.3d 684, 689 (3d Cir. 2009). A plaintiff seeking to bring an ADEA collective action must demonstrate with actual evidence a "factual nexus between the

[6] Of course, to advance a viable ADEA claim, Gorbeck must offer evidence that age was the "but for" cause of her termination. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177-78 (2009).

manner in which the employer's alleged policy affected her and the manner in which it affected other employees." *Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189, 193 (3d Cir. 2011), *rev'd on other grounds*, 569 U.S. 66 (2013).

Because Plaintiff filed her Charge of Discrimination on June 25, 2015, the 300-day "lookback" period for her Charge of Discrimination extends only to August 29, 2014. *See Mitchell v. MG Industries, Inc.*, 822 F. Supp. 2d 490, 495 (E.D. Pa. 2011) ("The 300–day filing requirement is analogous to a statute of limitations."). Hiring decisions related to Plaintiff predating August 29, 2014, are time-barred and cannot be litigated in this case. *See Mitchell*, 822 F. Supp. 2d at 497 n. 5; *Rupert v. PPG Ind.*, Inc., Civ. A. Nos. 07-705, 08-616, 2009 WL 501907, at *3 (W.D. Pa. Feb. 27, 2009).

Plaintiff alleges that the US Country HR Manager position she applied for went to a woman under the age of 40 (Ms. DeChamps), but also confirms that Ms. DeChamps started in that position in February 2014. (Doc. 13, Am. Compl. at ¶¶ 57, 59). This is six months outside of the applicable statute of limitations. Similarly, Gorbeck interviewed for the HR Ops position on June 23, 2014, and claims she was rejected in "August of 2014". (*Id.* at ¶¶ 121, 123). Because Gorbeck does not allege that she was rejected on or after August 29, 2014, this position is also outside of the statute of limitations. Moreover, Gorbeck never alleges that someone younger than her was selected for the HR Ops position, and thus fails to state a claim.[7] *Smith*, 589 F.3d at 689.

Importantly, Gorbeck's 2015 Charge of Discrimination is devoid of any allegations that she was *terminated* due to her *age*. Instead, it simply states she was not hired for certain positions because of her age, and she was demoted for raising concerns of pay equity disparity. (*See* Doc. 13-1, ¶¶ 67-68). The 2018 Charge of Discrimination only addresses retaliation for filing the 2015

[7] Gorbeck later alleges that a male under the age of 40 was selected for an HR Ops position by Nabeela Ixtabalan after December 2015. (Doc. 13, Am. Compl. at ¶¶ 160-63.)

Charge of Discrimination. (*See* Doc. 13-3). Because Gorbeck was not terminated until October 13, 2017, her 2018 Charge of Discrimination would have had to make the claim she was terminated because of her age. It does not. Also, the 2018 Charge of Discrimination makes no mention of the alleged "age-biased policies and practices" such as "'Organization for Growth'" as alleged in the FAC (¶ 201(d)), and therefore Gorbeck cannot allege it now. Accordingly, Gorbeck failed to exhaust her administrative remedies for a claim of termination based on age discrimination, and this is an incurable defect.

Moreover, even if Gorbeck's individual claim survived (it should not), she could not proceed on behalf of others in a collective action. This is because there is no indication in the 2018 Charge that others similarly situated to her suffered age-biased termination. The collective action device where proper, and after certification, allows those similarly situated to the plaintiff to opt in to the lawsuit as party plaintiffs. 29 U.S.C. §§ 216(b), 626(b). However, the collective action device does not dispense with the statutory prerequisite that age claims must first be administratively exhausted through the filing of a timely administrative charge. *Romero v. Allstate Ins. Co.*, Civ. A. No. 01-38994, 2017 WL 3881217, at *2 (E.D. Pa. Sept. 5, 2017) (citing *Whalen v. W.R. Grace & Co.*, 56 F.3d 504, 506 (3d Cir. 1995)). There is a judge-made exception to this rule for collective actions, known as the "single filing" or "piggybacking" rule, that allows claimants who did not file a charge to "piggyback" onto the timely charge of the original claimant. *Id.* (citing *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 385 (3d Cir. 2007)). However, the "single filing"/"piggybacking" rule applies only where the original claimant's charge itself gives notice that the alleged discrimination is class-wide, thereby exhausting the claims of others. *Id.* (citing *Whalen*, 56 F.3d at 506-07). But Gorbeck's 2018 Charge is exclusively focused on the alleged retaliation against *her* because *she* filed her Charge of Discrimination in 2015. There are no claims

in the 2018 Charge of class-wide age-biased terminations. Thus, Gorbeck's collective action claim must be dismissed.[8]

C. Plaintiff's Claim of a Violation of the Equal Pay Act Must Be Dismissed for Failure to State a Claim.

In the FAC, Gorbeck brings a claim under the EPA, alleging that she and other similarly situated female co-workers were paid less than men (Count VIII). (*See* Doc. 13, Am. Compl. at Count VIII). To establish a claim under the EPA, a plaintiff must show that the defendant paid different wages to employees of the opposite sex of the plaintiff for equal work on jobs that require "equal skill, effort, and responsibility." *Summy-Long v. Pennsylvania State Univ.*, 715 F. App'x. 179, 183 (3d Cir. 2017). This is a demanding standard; jobs are sufficiently equal only if they have the same "actual job content." *Id.*; *see also Johnson v. Fed. Exp. Corp.* 604 F. App'x. 183, 187 (3d Cir. 2015) (upholding dismissal of EPA claim where the plaintiff failed to establish she performed "equal work—work of substantially equal skill, effort and responsibility, under similar working conditions"); *Stanziale v. Jargowsky*, 200 F.3d 101, 107 (3d Cir. 2000); *Clark v. New Jersey*, Civ. A. No. 12-7763, 2017 WL 5513689, at *8 (D.N.J. Nov. 17, 2017) (ruling that the robust standards requires the plaintiff to demonstrate his case by proving "actual job content"); *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 258 (2d Cir. 2014) (holding that the EEOC failed to sufficiently allege that the female attorneys performed substantially equal work as the male attorneys).

Gorbeck has failed to plausibly plead a claim for relief. Gorbeck's *own* admission that "prior to formal discovery herein Gorbeck cannot state whether she, herself, was a victim of pay equity violations" disposes of this claim. (Doc. 13, Am. Compl. at ¶ 84). A plaintiff cannot rely

[8] Of course, a claimant who administratively exhausted their own claim by timely filing their own charge would remain free to pursue that claim in court.

on not-yet-conducted discovery to state a cause of action. *See White v. Hon Co.*, 520 F. App'x. 93, 95 (3d Cir. 2013) (holding the plaintiff could not use "discovery as a fishing expedition . . . to seek out the facts necessary to establish a legally adequate complaint"); *Ranke v. Sanofi-Synthelabo Inc.*, 436 F.3d 197, 204 (3d Cir. 2006) (court would not allow the appellant "to conduct a fishing expedition in order to find a cause of action"); *see also Silver v. Pep Boys-Manny, Moe & Jack of Del., Inc.*, Civ. A. No. 17-00018, 2018 WL 1535285, at *8 (D.N.J. Mar. 29, 2018) (dismissing claim with prejudice where the plaintiff admitted she was "unaware if she suffered any ascertainable loss" but suggested that discovery may establish her claim); *Greenberg v. Scholastic, Inc.*, Civ. A. No. 16-6353, 2018 WL 1532850, at *3 (E.D. Pa. Mar. 28, 2018) (allegation in complaint stating the plaintiff had no way of knowing the extent of the defendant's alleged wrongdoing fell "woefully short of minimal pleading requirements and Plaintiff [was] not entitled to embark upon a fishing expedition via discovery"); *Ciprich v. Luzerne Cnty.*, Civ. A. No. 15-02364, 2017 WL 3709075, at *9 (M.D. Pa. Aug. 28, 2017) ("This amounts to an argument that Plaintiff should be allowed to engage in discovery in order to find facts which may help her state a cause of action. The Court cannot allow this impermissible 'fishing expedition.'"); *Bergin v. Teamsters Local Union No. 77*, Civ. A. No. 10-2289, 2011 WL 486230, at *2 (E.D. Pa. Feb. 4, 2011) ("'[F]ishing expeditions' to seek out the facts needed to bring a legally sufficient complaint are barred by the pleading clarifications in Iqbal and Twombly."). For this reason alone, this claim must be dismissed with prejudice.

Gorbeck's failure to identify any male comparator also dooms her EPA claim. *See Tinneny v. Weilbacher*, Civ. A. No. 15-753, 2017 WL 220331, at *4 (E.D. Pa. Jan. 19, 2017) (dismissing EPA claim where "Plaintiff has not pled the existence of any similarly situated comparator"). Moreover, the FAC is completely devoid of any allegations comparing her job

duties to those of a higher-paid male. To state an EPA claim, the plaintiff must allege that he or she performed the actual job content of the comparators equally. *Summy-Long*, 715 F. App'x. at 183. If a plaintiff fails to identify how that work is equally similar – by, for example, showing how the plaintiff and the higher-paid person have the same skill level, perform the same tasks, or have the same goals – the EPA claim fails. *See id.* (dismissing EPA claim where the plaintiff failed to allege any plausible facts that female co-workers were paid more than him for doing the same work); *see also Best v. Cnty. of Northumberland*, Civ. A. No. 11-00896, 2011 WL 6003853, at *5-6 (M.D. Pa. Nov. 30, 2011) (citing *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148, 156 (3d Cir. 1985)) (dismissing EPA claim where the plaintiff failed to establish that she and male comparator shared a "common core" of tasks). Here, Gorbeck never identifies any male co-workers that performed the actual same job content as her who was paid more. While Gorbeck briefly discusses her own job duties, she neglects to discuss the job content of any male co-workers, and how those responsibilities were substantially equal to hers. Simply put, there is absolutely no basis for Gorbeck's EPA claim.

D. Plaintiff's Claims of Retaliation Under the EPA (Count IX) are Barred to the Extent They Occurred Before August 27, 2015.

The filing of a Charge of Discrimination does not toll an EPA retaliation claim. *See Velez v. QVC, Inc.*, 227 F. Supp. 2d 384, 404 (E.D. Pa. 2002) (holding under the EPA a claim must be brought within two years after a violation or three years after an alleged willful violation); *EEOC Overview* ("The filing of an EEOC charge under the EPA does not extend the time frame for going to court.") (https://www.eeoc.gov/laws/types/equalcompensation.cfm) (last accessed 11/27/18).

Gorbeck claims she was punished by IKEA and Ms. DeChamps for seeking legal counsel to redress her concerns before she even filed her formal administrative charge of discrimination on March 28, 2015. (Doc. 13, Am. Compl. at ¶ 259). This claim, however, is barred by the

applicable statute of limitations as Gorbeck filed her Complaint on August 27, 2018. While Gorbeck does not specify on what dates she claims she was also retaliated against for complaining of equal pay violations, to the extent they occurred prior to August 27, 2015, they also are barred due to the statute of limitations.

E. Plaintiff Cannot Establish an FMLA Retaliation Claim.

In the FAC, no facts are plead to support an FMLA retaliation claim (Count X). To succeed on a retaliation claim under the FMLA, a plaintiff must establish that: (1) she invoked her right to FMLA-qualifying leave; (2) she suffered an adverse employment decision; and (3) the adverse action was causally related to her invocation of rights. *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 301-02 (3d Cir. 2012). For the causal connection, the Third Circuit held "that 'the mere fact that adverse employment action occurs after [a protected activity] will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events.'" *Rooks v. Alloy Surfaces Co., Inc.*, Civ. A. No. 09-839, 2010 WL 2697304, at *2 (E.D. Pa. July 6, 2010) (quoting *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1302 (3d Cir. 1997)) (dismissing FMLA retaliation claim where the plaintiff was terminated 55 days after returning from FMLA leave, because "[d]espite Plaintiff's inclusion of various conclusory statements within her complaint, there are no other alleged facts suggesting a causal connection between her FMLA leave and discharge"). Moreover, "causation cannot be inferred from the temporal sequence of grievance followed by some event alleged to be retaliation." *Scott v. Wetzel*, Civ. A. No. 13-1149, 2013 WL 6858441, at *3 (W.D. Pa. Dec. 30, 2013) (dismissing complaint where the plaintiff did not allege "a plausible connection" between complaint and alleged retaliatory conduct). Gorbeck has failed to plead the required elements of retaliation, and thus her claim must be dismissed.

On or about October 4, 2016, Gorbeck was approved for intermittent FMLA leave. (*Id.* at ¶ 167). She alleges that after October 4, IKEA began engaging in a pattern of criticizing her and complaining about her absence from work and depriving her of information and data she required to do her job. (*Id.* at ¶¶ 170-71). Such actions, even if true (which IKEA denies), do not constitute an adverse employment decision, and Gorbeck alleges no facts to support any causal connection to her FMLA leave. *See, e.g. Fleck v. Wilmac Corp.*, Civ. A. No. 10-00562, 2012 WL 1033472, at *13 (disciplinary letter that did not alter terms and conditions of employment was not adverse action); *see also Sconfienza v. Verizon Penn. Inc.*, 307 F. App'x. 619, 621-22 (3d Cir. 2008) ("harsh words that lack real consequences" do not constitute an adverse action). Gorbeck's allegation that she was not permitted to apply for a position posted by IKEA similarly is not an adverse employment action. (*Id.* at ¶ 172, 174). Gorbeck also does not plead how the terms or conditions of the position she actually held changed in any way. *See Wright v. Providence Care Center, LLC*, Civ. A. No. 17-747, 2018 WL 1759464, at *6 (W.D. Pa. Apr. 12, 2018) (dismissing FMLA retaliation claim where the plaintiff failed to establish how "oral or written reprimands" created a "material change in the terms of conditions of employment," and the only adverse employment action – her termination – occurred a year after taking FMLA leave). Moreover, she again fails to offer any support that such an action is causally related to her FMLA leave. Such conclusory statements are in contravention of *Iqbal* and *Twombly*. Indeed, she does not even allege that whomever allegedly advised her that she could not apply for the position was even aware of her intermittent leave.

In addition, Gorbeck cannot show that any alleged adverse action was connected to her FMLA leave by relying on temporal proximity. Gorbeck received FMLA leave starting October 4, 2016; she was informed of her elimination in August 2017, and subsequently let go in October

13, 2017 – a year after taking FMLA leave. (Doc. 13, Am. Compl. at ¶ 164). This time frame – over a year between her first taking FMLA and her termination – is not unduly suggestive of causation, and thus does not help Gorbeck plead the required elements. *See Capps v. Mondelēz Global LLC*, 147 F. Supp. 3d 327, 337 (E.D. Pa. 2015) ("a twelve-month gap between the protected activity and the termination is clearly not 'unusually suggestive of a retaliatory motive'") (citing *Thomas v. Town of Hammonton*, 351 F.3d 108, 114 (3d Cir. 2003)). Simply put, there is nothing tying Gorbeck's allegations to her utilization of FMLA leave. As such, because there is no factual content that permits the Court to draw the reasonable inference that Defendants are liable for the alleged FMLA retaliation, this claim must be dismissed.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Counts I-IV, Count VIII, Count IX (to the extent it seeks claims occurring prior to August 27, 2015), and Count X.

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