UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MONIKA AZAB, Plaintiff, v. GREAT NECK UNION FREE SCHOOL DISTRICT, *et al.*, Defendants.	:	**DECISION & ORDER** 17-CV-6044 (WFK)

WILLIAM F. KUNTZ, II, United States District Judge: By Complaint filed on October 20, 2017, Plaintiff Monika Azab ("Plaintiff") brings this action against her former employer Great Neck Union Free School District (the "District") as well as the Board of Education of the Great Neck Union Free School District (collectively, the "Institutional Defendants") and Teresa Prendergast, in her official capacity as Superintendent of the District (collectively with the Institutional Defendants, the "Defendants") alleging Defendants discriminated against her on the basis of her gender and age. Plaintiff alleges Defendants' actions violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, ("Title VII"); 42 U.S.C. § 1983 ("section 1983"); 42 U.S.C. § 1985 ("section 1985"); 42 U.S.C. § 1986 ("section 1986"); New York State Human Rights Laws, N.Y. Exec. Law § 296 ("NYSHRL"); and the Age Discrimination in Employment Act, 29 U.S.C. § 623 ("ADEA"). Defendants move for summary judgment on all of Plaintiff's claims. For the reasons stated below, the Court GRANTS Defendants' motion for summary judgment in its entirety.

BACKGROUND

The Court finds the following facts from the parties' Local Rule 56.1 Statements, declarations, deposition testimony, and other evidence submitted in support of the motion, to be undisputed or construed in the light most favorable to Plaintiff, the non-moving party. Where facts in a party's Rule 56.1 Statement are supported by citations to evidence and denied by conclusory statements without citations to conflicting evidence, the Court finds such facts to be true. E.D.N.Y. Local Rules 56.1(c)–(d).

A. Plaintiff's Position as Cleaner-Attendant

Plaintiff began working for the District as a full-time Cleaning-Attendant in June 2007. Defs.' Statement of Facts ¶ 1, ECF No. 28-84 ("Def. St."). The District employed Plaintiff as a

Cleaner-Attendant until June 30, 2016. *Id.* ¶ 3. Plaintiff was fifty years old when she was hired for the position. *Id.* ¶ 2. The title of Cleaner-Attendant is not a competitive civil service title and, as such, an applicant is not required to take the Civil Service Exam before being hired. *Id.* ¶¶ 18–19. As a Cleaner-Attendant, Plaintiff was compensated at the same rate as individuals employed by the District as Custodians. *Id.* ¶ 5. District Custodian is a competitive civil service title, which requires passage of the Civil Service Exam before being hired. *Id.* ¶¶ 8–9. Custodian job duties include cleaning, making repairs to the heating system and furniture, and replacing locks. *Id.* ¶ 14. All four Cleaner-Attendants employed by the District were women. *Id.* ¶¶ 21, 51.

In addition to Cleaner-Attendants and Custodians, the District also employed individuals as Cleaners. *Id.* ¶ 27–28. The position of Cleaner pays less than Custodian or Cleaner-Attendant. *Id.* ¶¶ 31–32. Cleaner is not a competitive civil service title and applicants are not required to take the Civil Service Exam to be hired. *Id.* ¶ 26. Cleaner-Attendants hired after July 1, 2009 were paid commensurate with Cleaners. *Id.* ¶ 25.

The District, as part of a collective bargaining agreement negotiated an increase in the number of Cleaners it was permitted to employ from fourteen to twenty. *Id.* ¶ 30. As a result, the District began a policy of replacing Custodians who retired, resigned, or were terminated with Cleaners. *Id.* ¶ 31. Each Custodian position replaced by a Cleaner resulted in $9,000.00 in savings for the District. *Id.* ¶ 32.[1]

B. Elimination of the Cleaner-Attendant Position and Rehiring of Cleaners

The District's 2016–2017 expenditures were projected to be approximately $3,000,000.00 higher than anticipated revenue sources. *Id.* ¶ 54. As a component of the

[1] Plaintiff objects to this statement of fact, Pl.'s Rule 56 Counter-Statement ¶ 32, ECF No. 29-1 ("Pl. Counter-St.") but makes only a conclusory objection and fail to cite to contrary evidence in the record.

resulting budget cuts, the District recommended elimination of the Cleaner-Attendant title. *Id.* ¶ 56; Pl. Counter-St. ¶ 56. In February 2016, the District informed all four Cleaner-Attendants it was eliminating the title of Cleaner-Attendant at the end of the 2015–2016 school year. Def. St. ¶ 60. Elimination of the Cleaner-Attendant title resulted in savings of $300,539.00 to the District. *Id.* ¶¶ 56, 61.

On March 14, 2016, Mr. Jose Sanchez resigned from his position as Cleaner. *Id.* ¶ 159. On April 28, 2016, Mr. James Labas resigned from his position as Custodian. *Id.* ¶ 172. The District subsequently sought to hire two Cleaners. *Id.* ¶¶ 161, 174. The District posted announcements it was seeking to fill vacancies in the Cleaner position. *Id.* ¶¶ 160, 173. Plaintiff saw announcements for both open positions but did not apply. *Id.* ¶¶ 162–63, 175–76. On April 11, 2016 the District hired Ms. Anne Decoteau, one of the four Cleaner-Attendants, for a Cleaner position. *Id.* ¶ 167. On June 15, 2016, the District hired Ms. Madeline, one of the four Cleaner-Attendants, for the other Cleaner position. *Id.* ¶¶ 180–81. Effective June 24, 2016, Ms. Cindy Weber resigned from her position as Cleaner-Attendant. *Id.* ¶ 158.

Plaintiff was laid off effective July 1, 2016. *Id.* ¶ 189. On or about July 7, 2016, Plaintiff received a formal notice of the School Board's decision to abolish the Cleaner-Attendant title. *Id.* ¶ 190. Plaintiff filed a notice of claim with Defendants on July 12, 2016. Pl. Counter-Statement ¶ 195.

C. Allegations of Discrimination and Relevant Statistics

Plaintiff has not alleged, or submitted evidence, any individuals made discriminatory statements regarding her age or gender. Def. St. ¶¶ 200–01, 210–18. Plaintiff does not argue she was discriminated against during the course of her employment. *Id.* ¶¶ 203, 205. However, Plaintiff proffers statistics, which purport to show the elimination of the Cleaner-Attendant job title was discriminatory.

Plaintiff submits the abolishment of the Cleaner-Attendant position eliminated 100% of the female positions within the Custodians, Cleaners, and Cleaner-Attendants. Pl.'s Mem. in Opp'n to Mot. for Summ. J. at 8, ECF No. 29 ("Opp'n Mem."). Further, she submits "the all-male Custodian and Cleaner positions had zero of the male positions abolished." *Id.*

As of October 5, 2016, the District employed approximately 1,040 women and 363 men. Def. St. ¶ 140. Including Plaintiff, the District laid off twelve employees. *Id.* ¶ 141. Ten of the employees laid off were women and two were men. *Id.* ¶ 142. The two men who were laid off represented 0.55% of the men employed by the District, while the ten women represented 0.96% of the women employed by the District. *Id.* ¶¶ 143–45. Nine of the employees were under the age of forty at the time they were laid off. *Id.* ¶ 146.

PROCEDURAL HISTORY

Plaintiff filed suit against Defendants on October 20, 2017. Compl., ECF No. 1. Defendants now move for summary judgment on all claims arguing they are entitled to judgment as a matter of law, asserting there are no genuine disputes regarding any material facts in this case. For the reasons stated below, the Court grants Defendants' motion in its entirety.

LEGAL STANDARD

Summary judgment is appropriate where the "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue of fact is genuine if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' A fact is material if it 'might affect the outcome of the suit under the governing law.'" *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 248 (1986)). In deciding a motion for summary judgment, the Court must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (quoting *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004)). The movant has the burden of showing the absence of a disputed issue of material fact, after which the burden shifts to the nonmoving party to present specific evidence showing a genuine dispute. *See Brown v. Eli Lilly & Co.*, 654 F.3d 347, 358 (2d Cir. 2011).

DISCUSSION

Plaintiff brings both disparate treatment and disparate impact claims of discrimination based on her gender and age. Plaintiff's claims under Title VII, ADEA, section 1983, and NYSHRL are analyzed under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Duckett v. Foxx*, 672 F. App'x 45, 46 (2d Cir. 2016) (Title VII and ADEA); *Ruiz v. Cty. of Rockland*, 609 F.3d 486, 491 (2d Cir. 2010) (section 1983); *Tebbenhoff v. Elec. Data Sys. Corp.*, 244 F. App'x 382, 383 (2d Cir. 2007) (NYSHRL).

I. Disparate Treatment Under Title VII, ADEA, Section 1983, and NYSHRL

Disparate treatment cases allege the most axiomatic form of discrimination, unequal treatment of individuals on the basis of a protected class. To bring a disparate treatment claim under the *McDonnell Douglas* framework, "a plaintiff must first establish a prima facie case of discrimination by showing that (1) he is a member of a protected class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class." *Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 767 (2d Cir. 2002); *see also Boonmalert v. City of New York*, 721 F. App'x 29, 32 (2d Cir. 2018). "If the plaintiff succeeds, a presumption of discrimination

arises and the burden shifts to the defendant to proffer some legitimate, nondiscriminatory reason for the adverse decision or action. If the defendant proffers such a reason, the presumption of discrimination created by the prima facie case drops out of the analysis, and the defendant will be entitled to summary judgment [] unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination." *Mario*, 313 F.3d at 767 (internal citation and quotation omitted); *see also Boonmalert*, 721 F. App'x at 32.

A. Plaintiff's Prima Facie Case for Disparate Treatment

Defendants do not contest Plaintiff has established the first three elements of a prima facie case but argue "Plaintiff cannot satisfy the fourth element of her claim." Defs.' Mem. for Summ. J. at 14, ECF No. 28-85 ("Def. Mem."). Plaintiff does not allege any individuals made discriminatory statements regarding her age or gender, nor that she was discriminated against during the course of her employment. Def. St. ¶¶ 200–01, 203, 205, 210–18. However, Plaintiff contends her layoff occurred under circumstances giving rise to an inference of discrimination "because none of the similarly-situated male Cleaners and Custodians had their job titles abolished, while the all-female Cleaner-Attendant position was abolished." Opp'n Mem. at 7. As the four abolished Cleaner-Attendant positions were exclusively staffed by women, Def. St. ¶ 21, and as the Second Circuit has "characterized the evidence necessary to satisfy this initial burden as 'minimal,'" the Court concludes Plaintiff has met her burden to establish the fourth element of her prima facie case for disparate treatment discrimination on the basis of her gender. *Zimmermann v. Assocs. First Capital Corp.*, 251 F.3d 376, 381 (2d Cir. 2001). However, Plaintiff presents no argument nor evidence she was subject to disparate treatment based on her age. Accordingly, the Court grants Defendants' motion for summary judgement with respect to Plaintiff's disparate treatment claims on the basis of age.

B. Plaintiff Has Failed to Adduce Evidence Which Reasonably Supports a Finding of Discrimination

Defendants have proffered the legitimate and non-discriminatory reason of cost-savings, as the motive for abolishing the Cleaner-Attendant positions. Def. Mem. at 16–20; Def. St. ¶ 61 (elimination of the position would result in $300,539.00 in savings). Plaintiff argues "there remains a triable issue of fact as to the validity of the claimed budgetary savings from the elimination of the four Cleaner-Attendant positions." Opp'n Mem. at 9. The Court disagrees. By failing to object with citation to conflicting evidence in her counterstatement, Plaintiff conceded Defendants were to realize $300,539.00 in savings. Pl. Counter-Statement ¶ 56; *see also* E.D.N.Y. Local Rules 56.1(c)–(d). Plaintiff's confusion appears to result from misunderstanding that Defendants hired the two Cleaner-Attendants to fill *open* positions as Cleaners, and did not create *new* Cleaner positions. Def. St. ¶ 45. Moreover, even if the Court found Plaintiff's objection to the Statement of Material Facts valid, which it does not, Defendants have also submitted admissible evidence the District's actions reduced its expenditures by approximately $2.5 million. Aff. of John Powell, ¶ 9, ECF No. 28-82.

The burden thus returns to Plaintiff to "point to evidence that reasonably supports a finding of prohibited discrimination" on the basis of her gender. *Mario*, 313 F.3d at 767. Plaintiff is unable to meet this burden. Plaintiff's primary evidence of discrimination is the fact the four abolished Cleaner-Attendant positions were held exclusively by women. Opp'n Mem. at 8; *see* Def. St. ¶ 21. She argues the abolishment of the Cleaner-Attendant title eliminated "100% of the female positions for the Custodians, Cleaners, and Cleaner-Attendant employees." Opp'n Mem. at 8. However, Plaintiff does not provide any citation to the record to support the claim the Cleaner-Attendant positions were the only "female positions" within the relevant

department at the District. Indeed, undisputed evidence shows women were employed as Cleaners. Def. St. ¶ 28, 159–185.

Plaintiff's reliance on the deposition of Assistant Superintendent John Powell is similarly misplaced. During his deposition, Mr. Powell stated Defendants' Director of Facilities, Mr. Cavallaro, recommended elimination of the Cleaner-Attendant as "[h]e felt the duties of the Cleaner Attendant could be handled by the existing custodial staff in the building during the hours that they are assigned to work." Dep. of John Powell, 30:12–16, Ex. J to Decl. of Maurizio Savoiardo, ECF No. 28-11. Plaintiff asks the Court to conclude, on the basis of Mr. Cavallaro's statements "he had a long seated intent to get rid of the women cleaning staff." Opp'n Mem. at 10. As the Court must only "draw all *reasonable* inferences against the movant," it declines to reach such a conclusion. *Brod*, 653 F.3d at 164 (emphasis added). Moreover, Defendants' actions in hiring two female Cleaner-Attendants as Cleaners, substantially undercuts Plaintiff's claim of disparate treatment on the basis of gender. Def. St. ¶¶ 167, 180–81; *see also Springer v. City of N.Y.*, 01-CV-4392, 2006 WL 526028, at *5 (E.D.N.Y. Mar. 3, 2006) (Trager, J.) ("The hiring of a black carpenter for the position plaintiff sought severely undercuts any claim of racial animus . . . .").

Accordingly, the Court grants Defendants' motion for summary judgement with respect to Plaintiff's disparate treatment claims on the basis of gender.

II. Disparate Impact Under Title VII and ADEA

Disparate impact claims "are attacks on the systemic results of employment practices." *Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984). "[D]isparate impact claims are concerned with whether employment policies or practices that are neutral on their face and were not intended to discriminate have nevertheless had a disparate effect on the protected group."

Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147, 160 (2d Cir. 2001). Disparate impact claims are available under Title VII, 42 U.S.C. § 2000e-2(k)(1)(A)(i), as well as the ADEA, *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005). Cases brought under the two statutes have different requirements, as the Supreme Court's holding in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) applies to ADEA claims but Title VII claims are governed by the Civil Rights Act of 1991. *Smith*, 544 U.S. at 240. Additionally, the ADEA "significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age.'" *Id.* at 233 (quoting 29 U.S.C. § 623(f)(1)).

Like disparate treatment claims, disparate impact claims involve three stages of proof. First, a plaintiff must make a prima facie showing of disparate impact. "To make this showing a plaintiff must (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two." *Robinson*, 267 F.3d at 160. This is usually done through statistical proof. *See id.* "If the plaintiffs succeed in their prima facie showing, the burden of persuasion then shifts to the employer" to challenge the plaintiffs' statistical proof or "demonstrate that the challenged practice or policy is 'job related for the position in question and consistent with business necessity.'" *Id.* at 161 (quoting 42 U.S.C. § 2000e–2(k)(1)(A)(i)). If the defendant succeeds in showing a business necessity for the policy, "the burden of persuasion shifts back to the plaintiffs to establish the availability of an alternative policy or practice that would also satisfy the asserted business necessity, but would do so without producing the disparate effect." *Id.*

Here, Plaintiff has alleged Defendants' facially neutral "policy of eliminating the Cleaner-Attendant position which resulted in 100% of the female Cleaner-Attendant positions

being abolished" had a disparate impact on Plaintiff in violation of Title VII and the ADEA. Opp'n Mem. at 11–12.

When "gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof," *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977), so long as "they raise [] an inference of causation," *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 995 (1988). "There is no minimum statistical threshold requiring a mandatory finding that a plaintiff has demonstrated a violation of Title VII," rather, "[c]ourts should take a 'case-by-case approach' in judging the significance or substantiality of disparities, one that considers not only statistics but also all the surrounding facts and circumstances." *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1376 (2d Cir. 1991). The Second Circuit has suggested "'a statistically significant disparity of two standard deviations,' which (in a normal distribution) requires statistical significance at approximately the 5–percent level" as one potential benchmark. *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 153 (2d Cir. 2012) (quoting *Smith v. Xerox Corp.*, 196 F.3d. 358, 365 (2d Cir. 1999)).

However, a failure to show statistical significance is not fatal to a plaintiff's case, as "in cases involving small or marginal samples, other indicia raising an inference of discrimination must be examined" by the district court. *Waisome*, 948 F.2d at 1379. With small sample sizes, which make statistical analysis unavailing, a plaintiff must provide expert testimony or other evidence to tip the scales in favor of a finding of disparate impact. *Pietras v. Bd. of Fire Comm'rs of Farmingville Fire Dist.*, 180 F.3d 468, 475 (2d Cir. 1999). The district court must also consider whether the magnitude of the discrepancy is sufficiently large to constitute a violation. *Waisome*, 948 F.2d at 1376–77; *see also Chin*, 685 F.3d at 153.

To establish a prima facie case of disparate impact discrimination, Plaintiff relies on a single statistic: 100% of the Cleaner-Attendants were woman and 100% of the Cleaner-Attendant positions were eliminated, "compared to the 0% abolishment of the all-male Custodian and Cleaner positions."[2] Opp'n Mem. at 14. This is insufficient to make a prima facie case for gender discrimination under Title VII. Plaintiff has not submitted any expert opinion nor statistical analysis in support of her opposition.

Moreover, even if Plaintiff had submitted expert analysis showing the layoffs were statistically significant, the data presented by Plaintiff is of "limited magnitude." *Waisome*, 948 F.2d at 1376. In *Waisome*, the Second Circuit affirmed the district court's use of a contrafactual "positing that if two additional black candidates passed the written examination the disparity would no longer be of statistical importance." *Id.* Here, the Court need not engage in such a contrafactual, as two of the four individuals included in Plaintiff's data were in fact kept on by the District.

Of the four Cleaner-Attendants employed by the District, only one, Plaintiff, was laid off. Def. St. ¶¶ 106, 150–51, 158–83. Two Cleaner-Attendants applied for and were hired by the District, over multiple male applicants, as Cleaners. *Id.* ¶¶ 167, 180. The third chose to retire. *Id.* ¶ 158. Even drawing Plaintiff's requested inference, that the third Cleaner-Attendant would not have chosen to retire but-for the impending layoffs, Plaintiff cannot make out a prima facie case on the basis of her submitted statistics. Opp'n Mem. at 15. Plaintiff may not conflate the elimination of the *position* of Cleaner-Attendant with the elimination of the *people* employed therein.

[2] The Court notes, Defendants have presented unopposed evidence at least one woman was employed in the Cleaner position prior to the hiring of Ms. Gonzalez and Ms. Decoteau. Def. St. ¶ 28 (citing Dep. of Alfredo Cavallaro, 46:13–47:4, Ex. I to Decl. of Maurizio Savoiardo ECF No. 28-10).

Plaintiff's minute sample size of two, coupled with a total lack of expert or anecdotal evidence or any other indicia of discrimination, fails to support a prima facie case for gender discrimination. Additionally, Plaintiff has submitted no evidence, statistical or otherwise, to support a prima facie case of age discrimination. *See* Def. St. ¶ 146 (nine of the twelve employees subject to Defendants' layoffs were below the age of forty). Accordingly, the Court grants Defendants' motion for summary judgement with respect to Plaintiff's disparate impact claims on the basis of gender and age.

III. Plaintiff's Remaining Claims

Plaintiff also brings a claim under section 1983, alleging "Defendants have made it a policy and practice to only hire female employees to the position of Cleaning Attendant, while requiring the female Cleaning Attendants to perform the same job responsibilities as the male Custodians." Compl. at 7. However, the evidence in the record is inapposite to Plaintiff's allegation, as women were hired for positions other than Cleaner-Attendant and the job responsibilities of Custodians were more expansive than those of Cleaner-Attendants. Def. St. ¶¶ 14, 27, 28, 167, 180. Plaintiff makes no argument in support of this allegation with citations to the record. Therefore, the Court grants Defendants' summary judgment with respect to Plaintiff's municipal liability claim under section 1983.

Similarly, Plaintiff's allegation "Defendants each engaged in a conspiracy for the purpose of depriving the Plaintiff and other female employees the equal protections of the laws," under section 1985 fails. Plaintiff has adduced no evidence whatsoever in support of this position and the Court finds summary judgment appropriate on this claim. For identical reasons, the Court grants summary judgment with regard to Plaintiff's claim under section 1986.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment, ECF No. 28, is GRANTED as to all claims. The Clerk of Court is respectfully directed to terminate all pending motions and close this case.

SO ORDERED.

s/ WFK

HON. WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

Dated: October 2, 2020
Brooklyn, New York