UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LORRAINE WETZEL, Plaintiff, -against- TOWN OF ORANGETOWN, et al., Defendants.	06 Civ. 6117 (LAP) 08 Civ. 196 (LAP) MEMORANDUM & ORDER

LORETTA A. PRESKA, Chief United States District Judge:

On May 2, 2014 Defendants filed a motion for summary judgment pursuant to Rule 56 in these two related cases [06 Civ. 6117 dkt. no. 112; 08 Civ. 196 dkt. no. 87]. Under a previously issued scheduling order, dated April 22, 2014 [dkt. no. 109[1]], Plaintiff was required to serve and file her opposition papers no later than June 2, 2014. On June 16, 2014 this Court issued an order [dkt. no. 122] noting that it still had not received opposition papers and instructing Plaintiff to file such papers no later than June 30, 2014. That order also indicated that "[f]ailure to file papers may result in Judgment." On July 7, 2014, Plaintiff still had not filed any opposition papers, and the Court accordingly issued an order [dkt. no. 124] precluding her from filing any opposition papers and taking Defendants' motion under consideration. As of the filing of the present

[1] Unless otherwise specified, all docket numbers in this Memorandum & Order refer to the docket for 06 Civ. 6117.

Memorandum & Order, Plaintiff's counsel still has not submitted any opposition papers or contacted the Court regarding this case. The Court thus considers Defendants' unopposed summary judgment motion.

I. FACTS

The following facts are taken from Defendants' Local Rule 56.1 Statement of Undisputed Facts ("Def. Rule 56.1 Statement") [dkt. no. 169], which is well supported by citations to admissible evidence from the record and which Plaintiff is deemed to have admitted by virtue of her failure to respond. See Jackson v. Federal Express, 766 F.3d 189, 194 (2d Cir. 2014) ("[A] non-response [to a Rule 56.1 statement] runs the risk of unresponded-to statements of undisputed facts proffered by the movant being deemed admitted."); Jones v. Lamont, No. 05 Civ. 8126, 2008 WL 2152130, at *1 (S.D.N.Y. May 22, 2008), aff'd, 379 Fed. Appx. 58 (2d Cir. 2010).

Plaintiff is currently a police lieutenant in the Orangetown Police Department ("OPD"), which is a subdivision of Defendant the Town of Orangetown (the "Town"). (Def. Rule 56.1 Statement ¶ 1.) Her present claims arise out of a series of events that took place between 2003 and 2007. In 2003 Plaintiff, who at the time was a sergeant, filed a federal lawsuit for gender discrimination against OPD and her supervisor, Defendant Chief Kevin Nulty ("Chief Nulty"), based

on the selection of a male candidate to fill a lieutenant position for which Plaintiff also applied.[2] (Id. ¶ 25.)

In December 2003 Plaintiff applied for another lieutenant position, for which three other candidates - Donald Butterworth ("Butterworth"), James Brown ("Brown"), and Joseph Holahan ("Holahan") - were eligible. (Id. ¶ 6.) An Interview Committee consisting of Chief Nulty, Captain Terrence Sullivan, Detective-Lieutenant McAndrew, and the Town's Personnel Administrator, Eileen Schlag, interviewed all four candidates. (Id. ¶ 11-13.) The Committee then met with each of OPD's Patrol Lieutenants, who evaluated the candidates and ranked the order in which they believed each should be promoted. (Id. ¶¶ 14-15.) Following this process, the Committee unanimously ranked Butterworth first and Brown second. (Id. ¶ 17.) They then recommended Butterworth to Defendant Town Board of Orangetown (the "Town Board"), which followed that recommendation after conducting a round table interview with each candidate and reviewing each candidate's resume and cover letter. (Id. ¶¶ 18-21.)

A. Incidents Resulting in Disciplinary Action

Several months later, two episodes occurred that resulted in the filing of disciplinary charges against Plaintiff and other officers. First, on July 4, 2004, OPD officers were

[2] That suit proceeded to trial in 2013, after which a jury returned a verdict in favor of Defendants on all claims. (Id. ¶ 27.)

alerted that an emotionally disturbed young woman had taken a five-year-old child without permission. (Id. ¶¶ 28-30.) After several hours, the young woman and child were found in a bar in New York City, where the young woman was arrested for various crimes. (Id. ¶¶ 31-33.) During the incident, Plaintiff was on duty as a road supervisor but failed to respond to calls and failed to supervise her subordinates. (Id. ¶ 34.)

Second, on July 7, 2004, OPD officers were dispatched to a house where a man named Frank Dowd ("Dowd") was attempting to break into the home of his girlfriend, Nicole Colandrea ("Colandrea"). (Id. ¶ 35.) After arresting Dowd, OPD officers escorted him to OPD headquarters and placed him in the booking room, where Officer Thomas Holihan ("Officer Holihan") was responsible for monitoring Dowd. (Id. ¶¶ 36, 38.) Officer Holihan failed to do so, and Dowd was consequently able to access a phone and make several harassing phone calls to Colondrea from the booking room. (Id. ¶¶ 37-39.) Plaintiff was the only supervisor at headquarters during this time and was responsible for her subordinates' actions. (Id. ¶ 40.)

Later that night, Plaintiff received a call from Colondrea reporting that she had received multiple harassing and abusive telephone calls from Dowd since his arrest. (Id. ¶¶ 41-42.) Plaintiff responded by transferring Colondrea's call to the booking room, where Dowd picked up the phone and further

harassed Colondrea. (Id. ¶¶ 43-44) Plaintiff never called the booking room to inquire how Dowd was able to make harassing phone calls while in OPD custody. (Id. ¶ 45.)

On July 14, 2004, Plaintiff amended her complaint in the 2003 federal litigation to include a discrimination claim based on the 2004 promotion. (Id. ¶ 25.) Shortly thereafter, an outside investigator conducted an investigation of the July 4, 2004 incident. (Id. ¶ 46.) That investigation resulted in a report noting that Plaintiff failed to supervise her subordinate officers properly. (Id. ¶¶ 47-48.) Based on that report, Chief Nulty brought disciplinary charges against Plaintiff and five other involved officers on September 3, 2004. (Id. ¶¶ 49-51) Similarly, after receiving notification of a complaint regarding the July 7, 2004 incident, Lieutenant Robert Zimmerman conducted an investigation and concluded that Plaintiff did not properly monitor Dowd's detention. (Id. ¶ 52.) Consequently, Chief Nulty brought disciplinary charges against Plaintiff and Officer Holihan on September 7, 2004. (Id. ¶¶ 53-55.)

B. 2005 Promotion of Brown

In January 2005, another lieutenant position became available, for which the only eligible candidates were Plaintiff, Brown, and Holihan. (Id. ¶¶ 56-57.) Because all three were candidates for the 2004 promotion, Captain Nulty chose to rely on the interviews, materials, and rankings from

that previous selection process to fill the new position. (Id. ¶¶ 61-62.) Brown had already been unanimously ranked above the other two candidates, and the Interview Committee recommended him to the Town Board. (Id. ¶¶ 63-64, 67.) After interviewing each candidate and reviewing each candidate's test scores and resumes, the Town Board concluded based on the material presented to it that Brown was best suited for the position and accordingly promoted him to lieutenant. (Id. ¶¶ 66, 68.) During this process, the Town Board and Chief Nulty were unaware of any candidate's political affiliation. (Id. ¶ 69.)

C. Sick Checks and Independent Medical Evaluation

Around the same time, Plaintiff suffered from a medical condition that required surgery. In December of 2004 and January of 2005, her OB-GYN wrote notes explaining that she would be on total disability until February 26, 2005. (Id. ¶¶ 87-88.) In response, Chief Nulty informed Plaintiff that her doctor provided insufficient information to clear her absence and noted that pursuant to the Collective Bargaining Agreement between the Town and the Police Benevolent Association, he had the right to order Plaintiff to attend an Independent Medical Examination ("IME"). (Id. ¶¶ 89-91.) Before doing so, however, Chief Nulty offered Plaintiff the opportunity to have her doctor clarify the reason for her total disability. (Id. ¶ 92.) A short time later, Plaintiff's doctor informed the Town that

Plaintiff underwent surgery on January 18, 2005 and could return to full duty on March 28, 2005. (Id. ¶ 98.) In response, the town's doctor indicated that Plaintiff's anticipated return was three weeks later than he would expect and advised that an IME was the only way to determine whether Plaintiff could return to light duty. (Id. ¶¶ 102-05) As has been required for many other OPD officers after extended absences, Plaintiff was scheduled for an IME to confirm if and when she could return to work. (Id. ¶¶ 106-10, 112.) On March 2, 2005, Plaintiff wrote to Chief Nulty objecting to the IME, and on March 3, 3005 Chief Nulty responded by cancelling it. (Id. ¶¶ 115-17.)

While Plaintiff was out on sick leave, an officer of equal or greater rank called her pursuant to OPD policy during her regularly scheduled shifts to ensure that she was at her residence and to ask if OPD could assist her. (Id. ¶¶ 72-78.) In her March 2, 2005 letter, Plaintiff complained to Chief Nulty about receiving sick check phone calls. (Id. ¶ 79.) In response, Chief Nulty ordered that all sick checks on Plaintiff cease immediately. (Id. ¶ 81.) Subsequently, all absent officers except Plaintiff were sick checked. (Id. ¶ 82-83.)

E. 2006 Promotion of Plaintiff

Late in 2005, another lieutenant position became available for which Plaintiff and two other male candidates were eligible. (Id. ¶ 118.) In January 2006, Chief Nulty recommended that

Plaintiff be selected, and the Town Board promoted her to the rank of lieutenant because she was deemed the best individual for the position. (Id. ¶¶ 118-20.)

F. Disciplinary Hearing

A few months after Plaintiff's promotion, the Town entered into settlement negotiations with the officers involved in the July 4, 2004 and July 7, 2004 disciplinary incidents. By July 2006, all of the officers involved, except Plaintiff, settled the charges against them. (Id. ¶¶ 133-34, 138.) The Town offered Plaintiff two separate settlement proposals, both of which mirrored the offer made to the only other sergeant involved in either incident. (Id. ¶¶ 138-45.) Plaintiff rejected both offers, and on July 11, 2006 the OPD proceeded with a disciplinary hearing concerning the charges arising out of the July 7, 2004 incident. (Id. ¶¶ 140, 155.)

Without consulting Chief Nulty, the Town Board appointed Joseph Wooley ("Wooley") to serve as the hearing officer. (Id. ¶¶ 153-34.) The hearing lasted nine days over the course of several months. (Id. ¶¶ 155-58.) The Town called one witness and took a single day to present its case, while Plaintiff, who was represented by counsel, called several witnesses in her defense over eight subsequent days. (Id. ¶¶ 156, 160.) On June 11, 2007, Wooley issued a Report & Recommendation to the Town Board finding Plaintiff guilty of most of the charges and

recommending a twenty day suspension. (Id. ¶ 158.) After reviewing the entire record and hearing five-minute statements from Plaintiff's attorney and the Town's attorney, the Board accepted the Report & Recommendation but reduced the suspension to ten days. (Id. ¶¶ 159-61.)

After several years without a hearing, Chief Nulty withdrew the charges regarding the July 4, 2004 incident and issued a letter of counseling. (Id. ¶ 163-67.) Plaintiff attended the requisite counseling session and listened to recordings of the July 4, 2004 incident. (Id. ¶ 168.)

G. Plaintiff's 2006 and 2008 Complaints

Plaintiff filed two separate complaints with this Court bringing a number of claims arising out of the above events. (See Am. Compl. [dkt. no. 8] dated July 9, 2007 ("2006 Compl."); Compl. [dkt. no. 1, 08 Civ. 196] dated Jan. 9, 2008 ("2008 Compl.")) The only remaining defendants are the Town, the Town Board, and Chief Nulty.[3] As to those three defendants, Plaintiff's remaining claims are: (1) federal and state gender discrimination claims based on the 2005 promotion of Brown, sick checks, the IME, and the disciplinary process (2006 Compl. First

[3] All other defendants, as well as Plaintiff's Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Claims in the 2006 Complaint and her Second, Third, and Fourth Claims in the 2008 Complaint have already been dismissed by previous orders. (See Opinion & Order [dkt. no. 33] dated Mar. 2, 2010; Opinion & Order [dkt. no. 11, 08 Civ. 196] dated Apr. 12, 2010; Order [dkt. no 84] dated July 17, 2013.)

& Third Claims; 2008 Compl. First Claim); (2) federal and state retaliation claims based on the 2005 promotion, sick checks, the IME, and the disciplinary process (2006 Compl. Second & Third Claims; 2008 Compl. Sixth Claim); (3) federal and state political affiliation discrimination claims based on the 2005 promotion, sick checks, the IME, and the disciplinary process (2006 Compl. First & Third Claims); (4) a request for declaratory judgment that the Rockland County Police Act is unconstitutional and that Defendants violated the New York State Constitution (2008 Compl. Fifth & Eighth Claims); and (5) a claim under N.Y.S. Civil Service Law § 75-b based on the Wooley's refusal to permit Plaintiff to raise retaliation defense at her disciplinary hearing (2008 Compl. Seventh Claim).

II. LEGAL STANDARD

A party is entitled to summary judgment only "if 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 . . . ." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)) (internal quotation mark omitted). A fact is material if it "might affect the outcome of the suit under the governing law . . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the

nonmoving party." Id. The moving party bears the burden of showing the absence of any genuine dispute of material fact, and the Court shall "resolve all ambiguities and draw all reasonable inferences in the non-movant's favor." Vermont Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004).

Pursuant to Rule 56, even if a non-moving party fails to oppose a motion for summary judgment, the Court may not enter default judgment. See Jackson, 766 F.3d at 194. Rather, if the non-moving party "chooses the perilous path of failing to submit a response to a summary judgment motion," then "the district court may not grant the motion without first examining the moving party's submission to determine if it has met its burden of demonstrating that no material fact remains for trial." Amaker v. Foley, 274 F.3d 677, 681 (2d Cir. 2001). Where "a defendant-movant submits an evidentiary proffer sufficient to defeat a claim," however, "a plaintiff who bears the burden of proof cannot win without proffering evidence sufficient to allow a trier of fact to find in its favor on each fact material to its claim(s)." Jackson, 766 F.3d at 195 n.3 (citing Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 84 (2d Cir. 2004)).

III. DISCUSSION

A. Gender Discrimination Claims

Plaintiff frames her discrimination claims under Title VII, 42 U.S.C. § 1983, the Equal Protection Clause, and the New York

State Human Rights Law ("NYSHRL"). (See 2006 Compl. First & Third Claims; 2008 Compl. First Claim.) Each triggers the same three-step burden-shifting analysis, and the Court accordingly considers these claims together. See Demoret v. Zegarelli, 451 F.3d 140, 153 (2d Cir. 2006). First, Plaintiff bears the burden of production to establish a prima facie discrimination case "by demonstrating that (1) she is a member of a protected class; (2) her job performance was satisfactory; (3) she suffered adverse employment action; and (4) the action occurred under conditions giving rise to an inference of discrimination." Id. at 151 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Second, once Plaintiff establishes a prima facie case, the burden shifts to Defendants, who must articulate a legitimate nondiscriminatory justification for the employment action. Id. (citing McDonnell Douglas, 411 U.S. at 802-04). Third, once Defendants proffer this reason, the burden shifts back to Plaintiff, who must show that the justification is a pretext. Id. (citing McDonnell Douglas, 411 U.S. at 804).

Plaintiff raises her discrimination claims regarding the 2005 promotion, sick checks, the IME, and the disciplinary process. Turning first to the promotion, the record provides sufficient evidence to raise a prima facie claim of gender discrimination. Plaintiff is a woman, and there is ample evidence in the record, such as her eventual promotion to

lieutenant, that she performed her job satisfactorily. (See, e.g., Def. Rule 56.1 Statement ¶¶ 7, 118-21; id. Ex. QQ at 12, 16, 39, 58.) Furthermore, Plaintiff suffered adverse employment action when she was not promoted in 2005, and the context of that action - which included consecutive promotions awarded to men with fewer years of experience than Plaintiff in a department that had never promoted a woman to the rank of lieutenant - raises a reasonable inference of gender discrimination. (See id. ¶¶ 7-9, 18, 21, 67-68; id. Ex. GG at 2.) See Demoret, 451 F.3d at 151-52. The burden thus shifts to Defendants, who easily meet it by raising clear evidence of their legitimate nondiscriminatory explanation that based on his individual performance, interviews, questionnaire, and evaluations from department leadership, Brown was indeed the best qualified candidate for the 2005 position. (See Def. Rule 56.1 Statement ¶¶ 58-60, 63-69.) See Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 103 (2d Cir. 2001) ("[T]he court must respect the employer's unfettered discretion to choose among qualified candidates." (quoting Fischbach v. D.C. Dep't of Corr., 86 F.3d 1180, 1183 (D.C. Cir. 1996)) (internal quotation marks omitted)). Plaintiff does nothing to combat this explanation, nor does the record raise any genuine issue of material fact to suggest that the touting of Brown's qualifications "served to mask unlawful discrimination." Id.

Second, the record cannot support a prima facie claim of discrimination based on the sick checks or the IME because neither constitutes an adverse employment action. The Court of Appeals for the Second Circuit has made clear that an adverse employment action must be "a materially adverse change in the terms and conditions of employment," which is "more disruptive than a mere inconvenience or an alteration of job responsibilities." Sanders v. N.Y. City Human Res. Admin., 361 F.3d 749, 755 (2d Cir. 2004) (quoting Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999); Terry v. Ashcroft, 336 F.3d 128, 138 (2d Cir. 2003)) (internal quotation marks omitted). The sick checks, which were conducted in accordance with department policy and ceased as soon as Plaintiff complained, constitute at most a "mere inconvenience," as they were unaccompanied by any significant change in Plaintiff's terms and conditions of employment. Id. Similarly, the scheduling of an IME, which was ultimately cancelled, did not reflect a serious change in Plaintiff's employment conditions sufficient to satisfy the adverse action prong of a prima facie discrimination case. See Reckard v. Cnty. of Westchester, 351 F. Supp. 2d 157, 161 (S.D.N.Y. 2004); Pilman v. N.Y. City Hous. Auth., No. 94 Civ. 7655, 2000 WL 34292929, at *7 (S.D.N.Y. Sept. 26, 2000) ("Undergoing a medical examination

does not in and of itself meet the standard for adverse employment action.").

Third, the filing of, hearing on, and punishment for disciplinary charges against Plaintiff do not raise a prima facie discrimination claim. With regard to the initial preferment of charges, the record reveals no circumstances raising an inference of discrimination. The male and female employees involved in both incidents all received similar charges, and there is no evidence to suggest that Plaintiff was charged any differently from colleagues of comparable rank. (See Def. Rule 56.1 Statement ¶¶ 49-51, 53-54.) See Testagrose v. N.Y. City Hous. Auth., 369 Fed. Appx. 231, 232 (2d Cir. 2010) ("[A]ll of the comparators were, like [Plaintiff], brought up on disciplinary charges. In other words, they were treated exactly the same as [Plaintiff]. Therefore, having produced no evidence of discrimination, [Plaintiff] failed to establish a prima facie claim of gender discrimination."). Although Plaintiff was the only employee to take her charges to a hearing, she and her peers were offered similar settlements, and nothing in the record demonstrates that the hearing was conducted in an unfair or discriminatory manner. (See id. ¶¶ 140-45.) Rather, Plaintiff had ample opportunity to present a lengthy defense with the vigorous assistance of counsel before a hearing officer who took pains to evaluate the entire record and produce a

comprehensive Report & Recommendation to the Town Board. (See id. ¶¶ 153-58; id. Ex. QQ.)

As for Plaintiff's punishment, there is no evidence in the record that it was disproportionate when compared with comparable infractions by male officers who elected not to settle disciplinary charges. Even if Plaintiff's punishment did give rise to a prima facie inference of discrimination, however, Defendants have raised the legitimate nondiscriminatory explanation that Plaintiff's behavior during the July 7, 2004 incident was inappropriate and merited the consequences imposed by the Town Board. See Self v. Dept. of Educ. of the City of N.Y., 844 F. Supp. 2d 428, 436 (S.D.N.Y. 2012). The record is rife with evidence - including direct testimony from Plaintiff's own witnesses - that Plaintiff utterly failed to supervise her subordinate officer and ignored the ongoing harassment of a domestic violence victim by a suspect in custody from within her own station, all in violation of several General Orders governing the conduct of OPD officers. (See Def. Rule 56.1 Statement ¶¶ 153-58; id. Ex. QQ.) Plaintiff's refusal to acknowledge her poor performance or to accept responsibility for her actions further justified the imposition of the punishment that the Town Board issued, which was more lenient than the hearing officer recommended. (See id. ¶¶ 158-61; id. Ex. QQ at 58-59.) There is nothing in the record to mitigate this

conclusion or to suggest that Defendants' explanation is in fact a pretext for gender discrimination. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) ("[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." (emphasis omitted)). Accordingly, Defendants are entitled to summary judgment on all of Plaintiff's discrimination claims.

B. Retaliation Claims

Plaintiff brings her retaliation claims under Title VII, 42 U.S.C. § 1983, the Equal Protection Clause, and the NYSHRL. (See 2006 Compl. Second & Third Claims; 2008 Compl. Sixth Claim.) Again, all four call for the same three-step burden shifting analysis. See Lewis v. City of Norwalk, 562 Fed. Appx. 25, 29 & n.5 (2d Cir. 2014) (Title VII, 1983, and Equal Protection Clause); Kleehammer v. Monroe Cnty., 583 Fed. Appx. 18, 21 (2d Cir. 2014) (Title VII and NYSHRL). First, Plaintiff "must establish a prima facie case of retaliation by showing (1) participation in a protected activity; (2) the defendant's knowledge of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action."[4] Kwan v. Andalex

[4] Although it remains unclear whether the NYSHRL applies the but-for causation standard set out by the Supreme Court in Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013), this Court "need not (cont'd on next page)

Grp. LLC, 737 F.3d 834, 844 (2d Cir. 2013) (quoting Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173 (2d Cir. 2005)) (internal quotation marks omitted). Second, if Plaintiff establishes a prima facie case, then "the burden shifts to the employer to articulate some legitimate, non-retaliatory reason for the employment action." Id. at 845. Third, once Defendants proffer such a reason, Plaintiff must demonstrate that the "non-retaliatory reason is a mere pretext for retaliation." Id.

As with her discrimination claims, Plaintiff brings her retaliation claims based on the 2005 promotion, the sick checks, the IME, and the disciplinary process, all of which she alleges occurred in retaliation for her 2003 federal lawsuit. First, with regard to the 2005 promotion, the causation prong of the prima facie case is somewhat tenuous on this record. Although Plaintiff engaged in a protected activity of which Defendants were aware by bringing her 2003 federal suit and amending that complaint in 2004, she was denied a promotion approximately six months after filing her 2004 amended complaint. See Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 110 (2d Cir. 2010) ("Though this Court has not drawn a bright line defining, for the purposes of a prima facie case, the outer limits beyond which a temporal relationship is too attenuated to establish

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(cont'd from previous page) reach the issue because [Plaintiff] failed to satisfy even the lesser standard" of the remaining prongs of her retaliation claims. Kleehammer, 583 Fed. Appx. at 21.

causation, we have previously held that five months is not too long to find the causal relationship."). Moreover, there is little to suggest that gender discrimination was a but-for cause of the adverse action sufficient to meet the causation requirement recently clarified by the Supreme Court. See Univ. of Texas Sw. Med. Ctr., 133 S. Ct. at 2533. Regardless, as discussed above, Defendants have articulated the legitimate non-retaliatory explanation that Brown was the best qualified candidate for the 2005 promotion, and the record reveals nothing to suggest that this explanation is a pretext for discrimination. See Byrnie, 243 F.3d at 103.

Second, as detailed above, sick checks and scheduling an IME do not constitute adverse employment actions sufficient to present a prima facie retaliation claim. See Reckard, 351 F. Supp. 2d at 161; Pilman, 2000 WL 34292929, at *7.

Third, the preferment of, hearing on, and punishment for disciplinary charges appear to raise a prima facie case of retaliation. Plaintiff amended her complaint on July 14, 2004. The Defendants, as parties to that suit, were undoubtedly aware of that protected activity, and the discipline process constituted an adverse employment action. Moreover, the investigations that resulted in the charges began shortly after Plaintiff amended her complaint, and the charges were preferred less than two months later. See Gorzynski, 596 F.3d at 110.

Although the hearing and punishment took place much later, they could arguably constitute a continuation of the initial charges. Nevertheless, as explained above, Defendants have articulated a legitimate non-retaliatory explanation for all three actions; namely, that Plaintiff's behavior violated OPD General Orders and warranted consequences. See Rios v. Dept. of Educ., 351 Fed. Appx. 503, 505 (2d Cir. 2009); Davies v. N.Y. City Dept. of Educ., No. 10 Civ. 5981, 2013 WL 1245444, at *7 (S.D.N.Y. Mar. 27, 2013). The record reveals nothing to suggest that this explanation is a pretext for discrimination.

Accordingly, there are no genuine issues of material fact as to Plaintiff's retaliation claims, and Defendants are entitled to summary judgment on them.

C. Political Non-Affiliation Claims

Plaintiff alleges that Defendants discriminated against her on the basis of her political non-affiliation in violation of the First Amendment and the NYSHRL. (See 2006 Compl. First & Third Claims.) As a preliminary matter, the NYSHRL does not contemplate a cause of action based on political affiliation discrimination, and Plaintiff's state law claim on that basis is accordingly dismissed. See 18 Exec. Law § 296(1)(a),(e) (prohibiting employers from discriminating only on the basis of "age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic

characteristics, marital status, or domestic victim status" with no mention of political affiliation).

With regard to Plaintiff's federal claim, the First Amendment prohibits public employers from taking adverse action against a non-policymaking employee "for political reasons . . . ." Cotarelo v. Village of Sleepy Hollow Police Dep't, 460 F.3d 247, 253 (2d Cir. 2006). In order to succeed on such a claim, Plaintiff must prove (1) that she "engaged in constitutionally protected conduct, and (2) that such conduct was a substantial or motivating factor leading to" adverse employment action. Id. (quoting Vezzetti v. Pellegrini, 22 F.3d 483, 487 (2d Cir. 1994)) (internal quotation mark omitted). If Plaintiff makes such a showing, then Defendants bear the burden of demonstrating that the adverse action would have been taken "even in the absence of the protected conduct." Vezzetti, 22 F.3d at 487. "[A]ffiliating oneself with a political party or faction" constitutes protected conduct under the First Amendment. Camacho v. Brandon, 317 F.3d 153, 160 (2d Cir. 2003). Likewise, political non-affiliation constitutes protected conduct for which an employer may not take adverse employment action. See Branti v. Finkel, 445 U.S. 507, 517 (1980).

Here, Plaintiff has not suggested that she was discriminated or retaliated against on the basis of her decision not to affiliate with a particular political party. Rather, she

relies on her non-membership in an Irish-American social group as the basis for her First Amendment claim. (See 2006 Compl. ¶ 422.) Such a scenario does not fall within the ambit of political affiliation claims, especially when the record reveals no evidence that this group participated in any political activity or reflected any protected political views. Even if non-membership in such a group were protected conduct under the First Amendment, however, the record reveals no indication that Defendants were aware of Plaintiff's non-affiliation, not to mention any evidence that her non-affiliation had any impact on the 2005 promotion, the sick checks, the IME, or the disciplinary charges, hearing, and punishment. See Savage v. Gorski, 850 F.2d 64, 68 (2d Cir. 1988); Largo v. Vacco, 977 F. Supp. 268, 272 (S.D.N.Y. 1997). To the contrary, Defendants have submitted affidavits declaring that they had no knowledge of Plaintiff's political affiliation or non-affiliation, and the record offers nothing to contradict those sworn statements. (See Def. Rule 56.1 Statement ¶ 69; Aff. of Kevin A. Nulty, dated May 2, 2014 ¶ 3; Aff. of Thom Kleiner, dated May 1, 2014 ¶ 8.) As such, Defendants are entitled to summary judgment on Plaintiff's political non-affiliation claims.

D. Declaratory Judgment

Under the Declaratory Judgment Act, 28 U.S.C. § 2201, a district court has "discretion to determine whether it will

exert jurisdiction over a proposed declaratory action." Dow Jones & Co. v. Harrods Ltd., 364 F.3d 357, 359 (2d Cir. 2003). The Court of Appeals for the Second Circuit has clarified that in exercising this discretion, courts should consider "(1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; and (2) whether a judgment would finalize the controversy and offer relief from uncertainty." Id. Declaratory judgment is meant to offer prospective relief and is inappropriate "where only past acts are involved." Nat'l Union Fire Ins. Co. v. Int'l Wire Grp., No. 02 Civ. 10338, 2003 WL 21277114, at *5 (S.D.N.Y. June 2, 2003).

Plaintiff makes two requests for declaratory judgment. First, she asks this Court to declare that the Rockland County Police Act (the "RCPA") is unconstitutional both facially and as applied to her. (See 2008 Compl. Fifth Claim.) Although Plaintiff has not clarified what specific aspects of the RCPA she challenges, sections of the statute governed the processes for the 2005 promotion and the disciplinary hearing, and Plaintiff presumably seeks declaratory judgment with respect to those specific provisions. (See Def. Rule 56.1 Statement ¶¶ 65, 146; id. Ex. P §§ 4, 7.) This Court has already concluded that neither the 2005 promotion nor the disciplinary hearing violated Plaintiff's Equal Protection or First Amendment rights, and the

record contains nothing to surpass the even higher hurdle of a facial challenge to the RCPA's promotion or disciplinary hearing provisions. See United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Accordingly, there is no uncertainty regarding the constitutionality of the RCPA on this record, and the Court declines to grant declaratory relief with regard to this claim.

Second, Plaintiff seeks declaratory judgment that Defendants have violated the provisions of the New York Constitution that guarantee due process and equal protection of the law. (See 2008 Compl. Eighth Claim.) Once again, Plaintiff has not specified what actions allegedly violate these provisions, though it appears from the context of her Complaints that she intends to challenge the 2005 promotion of Brown, the sick checks, the IME, and the disciplinary charges, hearing, and punishment. Plaintiff's only elucidation of this claim comes from a single paragraph in her 2008 Complaint, which focuses generally on Defendants' past actions and contains no allegations of any ongoing controversy. (See id. ¶ 269.) Because "declaratory judgment is inappropriate when the alleged wrong has already been committed," this Court declines to grant

declaratory judgment with respect to Plaintiff's New York Constitution claim, which focuses solely on Defendants' past conduct. Lojan v. Crumbsie, No. 12 Civ. 320, 2013 WL 411356, at *5 (S.D.N.Y. Feb. 1, 2013); see also Nat'l Union Fire Ins. Co., 2003 WL 21277114, at *5.

E. N.Y. Civil Service Law

Plaintiff's only remaining cause of action alleges that Defendants violated New York Civil Service Law § 75-b by preventing her from raising a retaliation defense during her disciplinary hearing. (See 2008 Compl. Seventh Claim.) Under New York Civil Service Law § 75-b, an employee may raise retaliation as a defense at her disciplinary hearing if she previously reported "improper governmental action," which may include discrimination, and reasonably believes that the present disciplinary action would not have been brought absent that same report. N.Y. Civ. Serv. L. § 75-b. Nevertheless, "[w]here, as here, the employer presents evidence of specific incidents of inappropriate conduct which are found to demonstrate a separate and independent basis for the action taken, a defense under Civil Service Law § 75-b cannot be sustained." Crossman-Battisti v. Traficanti, 651 N.Y.S.2d 698, 700 (N.Y. App. Div. 3d Dept. 1997). In such a situation, an employee is not entitled to raise a retaliation defense, and a hearing officer is not required to permit it. See id. This Court has already

concluded that the record raises ample evidence of specific instances of Plaintiff's misconduct during the July 7, 2004 incident. Because the record contains nothing to indicate that Plaintiff's "disciplinary proceeding [was] based solely on the employer's unlawful retaliatory action," Defendants are entitled to summary judgment on her 75-b claim. Id.

IV. CONCLUSION

Having reviewed the entire record, the Court concludes that Defendants have met their burden of demonstrating that no genuine issue of material fact exists concerning any of Plaintiff's remaining claims. For the foregoing reasons, Defendants' motion for summary judgment [06 Civ. 6117 dkt. no. 112; 08 Civ. 196 dkt. no. 87] is GRANTED in its entirety. The Clerk of the Court shall mark both of these actions CLOSED and all pending motions DENIED as moot.

SO ORDERED:

Dated: New York, New York
February 9, 2015

Loretta A. Preska

LORETTA A. PRESKA
Chief United States District Judge