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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 25

STRICKLAND JOSEPH

INDEX NO. 100080/06

MOTION DATE 4/8/09

- v -

MOTION SEQ. NO. 001

VERIZON NEW YORK INC. et al.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
JUN 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The instant motion and cross motion are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the part of defendants Verizon New York Inc. and Kenneth Wade's motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's claim of discrimination based on race is granted, and this claim is severed and dismissed; and it is further

ORDERED that the part of defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's claim for breach of contract is granted as to defendant Wade only, and this claim is severed and dismissed as to defendant Wade only, and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion, pursuant to CPLR 3212, for partial summary judgment in his favor on his claims for failure to accommodate and retaliation is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

ORDERED that the remainder of the action shall continue.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/23/09

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

STRICKLAND JOSEPH,

Index No.: 100080/06

Plaintiff,

-against-

VERIZON NEW YORK INC. and KENNETH WADE, Individually and in his official capacity,

Defendants.

----------x

Edmead, J.:

Strickland Joseph (plaintiff), a former field technician at defendant Verizon New York Inc. (Verizon), brought this action for damages based on disability and race discrimination and retaliation in violation of the New York City Human Rights Law (City HRL), and for breach of contract based on the provisions of a settlement agreement of a prior federal action filed by plaintiff against Verizon's predecessor-in-interest, Bell Atlantic, Inc. (Bell Atlantic).

Defendants Verizon and Kenneth Wade (Wade) (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint in its entirety.

Plaintiff cross-moves, pursuant to CPLR 3212, for partial summary judgment in his favor on his claims for failure to accommodate and retaliation.

BACKGROUND

Plaintiff is a disabled 47-year-old African-American male. Plaintiff worked for defendant Verizon and its predecessors (together, Verizon) from June 9, 1980, until he was terminated by Verizon on or about October 19, 2004. From 1980 to 1989, plaintiff worked in a variety of positions, including phone center representative and business representative, which involved selling services to potential clients, as well as handling complaints from existing clients. In or

about 1989, plaintiff passed the required examinations to become a field technician. As a field technician, plaintiff installed new telephone lines and repaired existing telephone lines.

Throughout his employment with Verizon, plaintiff acted as a union shop steward, wherein he actively advocated for the advancement of union employees and was an outspoken critic of Verizon's treatment of its injured and disabled workers. Plaintiff alleges that Verizon and his supervisors were aware that plaintiff regularly complained about Verizon's treatment of its injured and disabled workers, particularly those workers who were African-American, at the monthly safety and union meetings.

In the early 1990's, plaintiff began working as a technician out of Verizon's Laurelton Garage (the garage) in Jamaica, New York, where he was primarily given repair and installation assignments to be performed at the New York City Housing Projects (the projects) located in Far Rockaway, Queens (the Far Rockaway projects).

After a few years of working as a technician, in approximately 1993 or 1994, plaintiff began experiencing hip and lower back pain. Beginning in February of 1993, plaintiff's then treating physician, Dr. Kostas Veliskakis (Dr. Velis), advised that plaintiff should work with certain medical restrictions, submitting medical documentation to Verizon requesting that plaintiff no longer be required to do any significant climbing, bending or heavy lifting. As a result, plaintiff began to be utilized as a light duty technician.

Plaintiff testified that Verizon accommodates light duty technicians in a variety of ways. Notably, these technicians are usually assigned repair work, rather than installation work, because it typically does not involve running new wiring or installing new jacks, requiring less time on the hands and knees and less bending and squatting.

Plaintiff also explained that Verizon accommodates light duty technicians by assigning them to work at buildings located in the various projects, rather than at residential homes or smaller apartment buildings, as project buildings have elevator service and easier access to the telephone facilities. The project areas are referred to as two-man areas, because, as they are known to have a higher rate of crime, they require that the technician have an escort to accompany him for safety reasons. Plaintiff maintained that having an escort is beneficial to a light duty technician, for if he needs to squat or bend in order to do his assignment, the escort can step in and perform these tasks under his direction.

In addition, technicians on light duty, like plaintiff, might also be asked to serve in the escort position itself. Finally, disabled employees are sometimes accommodated by being assigned sedentary duty or clerical work in one of the garages. Plaintiff testified that Verizon accommodated his medical restrictions by primarily assigning him to repair work, with an escort, often in the Far Rockaway projects.

In April of 1995, approximately two years after plaintiff first began experiencing hip and back pain, plaintiff received a diagnosis of degenerative hip disease. On June 16, 1995, plaintiff underwent a hip replacement. As a result of his hip replacement surgery, when plaintiff returned to work, he was again placed on light duty with the same restriction as prior to his surgery, i.e., that he could not engage in activities which required heavy lifting, squatting, bending or climbing. At this time, defendant Verizon continued to accommodate plaintiff by primarily assigning him light duty jobs, which often included repair work, with an escort, in the Far Rockaway projects and in various private apartment buildings or complexes.

According to plaintiff, even though he was working with medical restrictions, he

continued to perform his duties in such an exemplary manner that, in January of 1997, he obtained admittance to Verizon's prestigious Telecommunications Technical Assistance (TTA) program. Plaintiff explained that TTA's were referred to as "super tech[s]," because they possessed superior technical knowledge and skill, handling additional responsibilities and the more difficult assignments in the field (Plaintiff's Notice of Cross Motion, Exhibit 3, Joseph Deposition, at 52).

While in the TTA program, in addition to working in the field four times a week on light duty, plaintiff attended technical training courses at Queensborough Community College, as well as Queens College. In June of 2001, plaintiff received an associate's degree in Telecommunication Technology from Queensborough Community College and a bachelor's degree, with a dual major in political science and African studies, from Queens College.

In or about 1999, plaintiff claims that he began to experience disability and racial discrimination while at work. For example, in April of 1999, plaintiff and a number of other non-Caucasian light duty technicians were removed from the TTA program with no explanation.

Thereafter, in or about April of 2000, plaintiff commenced an action against his employer at the time, Bell Atlantic, in the United States District Court, Southern District of New York. Specifically, in this action, plaintiff alleged that, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, the Civil Rights Act of 1991, The Americans With Disabilities Act of 1990, the New York State Human Rights Law (HRL) and the City HRL, Bell Atlantic had discriminated against him based on his disability and his race. In addition, plaintiff alleged that he had been retaliated against for having complained about said discrimination.

In or about November 2000, in a settlement agreement (the 2000 Agreement), Bell Atlantic agreed that, not only would it not retaliate against plaintiff for filing the court action, plaintiff would be allowed to continue in the TTA program with his medical restrictions, which at the time included no heavy lifting, carrying, squatting, bending or climbing poles or ladders. For the next two years, from approximately November of 2000 until December of 2002, plaintiff, now reinstated to the TTA program, was accommodated by being assigned repair work in the Far Rockaway projects and in other two-man areas with elevators and easy parking. Importantly, plaintiff was provided with an escort on a daily basis. As a result, during this period of time, plaintiff was able to maintain good evaluations.

In or about January of 2003, defendant Wade became plaintiff's new supervisor. At this time, plaintiff was one of the more senior technicians working at the garage, and he was the most senior technician on light duty being supervised by Wade. At about this time, plaintiff reported to Dr. Velis that his hip pain was getting worse. In early April 2003, Dr. Velis requested that plaintiff be given sedentary duty for a period of time. Verizon and Wade accommodated this request by assigning plaintiff paperwork in the garage for approximately three weeks.

Plaintiff maintains that, after Wade became his supervisor, management's attitudes towards African-American technicians and workers on light or sedentary duty changed dramatically for the worse. In his affidavit, plaintiff stated that Wade changed his job responsibilities, requiring him to perform more strenuous work than before. In addition, plaintiff was no longer assigned to two-man areas with an escort. In fact, escort area assignments were given to technicians without disabilities and who had less seniority than plaintiff. When plaintiff complained to Wade about the situation, Wade told him that if he could not perform the assigned

work, he should go home. However, as his productivity levels were being monitored and scrutinized, plaintiff felt pressure to perform his work assignments, even when they caused him pain.

Plaintiff stated that he also complained to the second line supervisor, Don Di Paoli (Di Paoli), the adminstrative director at the garage, Patricia Durecko (Durecko), and various officials of the Communication Workers of American (the Union), about being asked to perform more strenuous work than his medical restrictions called for, in violation of the City HRL, as well as the 2000 Agreement. Plaintiff asserted that Wade's conduct was made known to Verizon through Di Paoli and his other managers. Plaintiff also alleged that he was subjected to a higher level of scrutiny during this time, which was not experienced by other non-black, non-disabled employees, and which led to him being unfairly written up and suspended without pay for minor infractions.

Plaintiff maintains that, as a result of being asked to perform more strenuous activities than his accommodations called for, plaintiff's physical condition was caused to deteriorate. Due to increased pain in his hip and groin area, a symptom that his replacement hip was deteriorating, during the period from approximately March 21, 2003 through November 24, 2003, it was necessary for plaintiff to take five extended sick leaves. Plaintiff contends that, each time he returned to work following a leave of absence, defendant Wade continued to assign him strenuous physical work which was beyond his medical restrictions, and, each time, he complained to Wade, his managers and his Union officials.

On or about October 31, 2003, following his latest short-term disability sick leave, plaintiff returned to work with a letter from Dr. Velis, which stated that plaintiff could return to

work if given light duty assignments to accommodate his medical restrictions. These restrictions included no heavy lifting, bending, climbing or prolonged standing. In order to accommodate plaintiff, plaintiff was assigned to work as an escort.

It should be noted that, as the coordination of its various benefits and processes is complicated, Verizon utilizes MetLife Disability of Metropolitan Life Insurance Company (MetLife), an outside vendor, to review employee medical information and advise Verizon as to which resources are appropriate for the various employees in need of accommodation due to their medical restrictions.

Upon plaintiff's return to work in October of 2003, Durecko contacted MetLife to inquire as to what work plaintiff was capable of doing with the restrictions as set forth by Dr. Velis. In addition, on November 2, 2003, Cathy Grollimund (Grollimund), a specialist with the Verizon Workforce Intervention Team, also called MetLife, advising it that, as plaintiff's restrictions, as set forth by Dr. Velis were "vague," MetLife needed to contact Wade or Durecko to explain what work plaintiff could perform. MetLife then reviewed Dr. Velis's letter, and on November 4, 2003, MetLife denied plaintiff's restrictions on the ground that it did not have the medical information necessary to support them.

On November 7, 2003, Di Paoli telephoned MetLife and argued that plaintiff's medical restrictions prevented him from performing the job of an escort, now claiming that the job required plaintiff to "climb stairs, climb in and out of a van, and stand and walk sometimes 1-2 blocks," a job description which somewhat differed from the previous designation of "escort" as light duty (Plaintiff's Notice of Cross Motion, Exhibit 38, Diary Review-Report, at 12). Di Paoli also informed MetLife that plaintiff had been working with accommodations for a long time and

that he had "sued the ER in the past" (*id.*). As a result of this conversation, MetLife contacted Dr. Velis in order to once again clarify plaintiff's medical restrictions. On November 19, 2003, Dr. Velis wrote MetLife a letter which stated that plaintiff could return to work with the following restrictions:

> Mr. Joseph is able to climb in and out of the van. Stair climbing is restricted and he is not able to lift or carry weights because of pain to his hip. The patient is able to stand for thirty minutes. Patient is on restricted functional activity with increased pain in the left hip which will require revision surgery in a few weeks

(Plaintiff's Notice of Motion, Exhibit 40, November 19, 2003 Letter from Dr. Velis, Exhibit 40). Accordingly, MetLife then approved plaintiff's return to work with the above-described medical restrictions.

On November 24, 2003, at the direction of Di Paoli, Durecko called MetLife to again inquire as to whether plaintiff's restrictions allowed him to perform escort work. Durecko now described escort work to MetLife as requiring substantial stair climbing and standing for over 30 minutes, a job description which now substantially differed from the previous designation of the job. Based upon Di Paoli and Durecko's new descriptions of the escort job, now requiring increased stair climbing and standing, MetLife reversed its prior determination that plaintiff was able to return to work with his medical restrictions, and concluded that plaintiff was unable to perform the job of an escort. That day, plaintiff was informed by his managers that they could no longer accommodate his restrictions, and that he could only return to work when his medical status changed.

When plaintiff showed up for work on November 26, 2003, Di Paoli sent a fascimile to MetLife which suggested that MetLife obtain specific instructions from Dr. Velis as to what

plaintiff could do in terms of climbing stairs, standing and lifting. When Dr. Velis repeated the same restrictions as before, Di Paoli reiterated to MetLife that an escort needs to be able to climb stairs. MetLife then concluded again that plaintiff could not perform work as an escort.

Prohibited from returning to work, plaintiff was granted sickness disability benefits, effective October 17, 2003. Pursuant to Verizon's disability policy, plaintiff's benefits extended to October 18, 2004, as, under the terms of Verizon's short-term disability benefits, plaintiff was eligible for a maximum of 52 weeks of paid benefits.

It should be noted that, on November 25, 2003, plaintiff was informed by his doctor that his hip had deteriorated to the point that it needed to be replaced, and on December 26, 2003, plaintiff underwent surgery for the removal of his deteriorated left hip. On January 16, 2004, plaintiff underwent a second surgery for a total left hip replacement. Plaintiff explained that these surgeries were a result of the removal of his accommodations by defendants.

On or about August 26, 2004, plaintiff's doctor notified Verizon's disability insurance carrier that plaintiff could return to work with substantially the same restrictions as in the past. On or about August 31, 2004, in a letter, plaintiff was informed by Durecko that Verizon could no longer accommodate his medical restrictions, and that, if he did not return to work without restrictions on October 18, 2004, the day after his short-term disability payments expired, he would be terminated.

As plaintiff was unable to return to work without said medical restrictions, plaintiff was terminated from Verizon on October 19, 2004. Although plaintiff was found to not be eligible for long-term disability benefits, he was awarded disability retirement benefits of $1,733.93 per month accruing as of the date of his termination, representing a loss to plaintiff of approximately

$3,773.00 per month in base compensation.

It is plaintiff's contention that he intended to work for defendant Verizon until he was at least 65 years of age, and that, as a direct and proximate consequence of defendants' failure to accommodate his disability, racial discrimination, retaliatory conduct and breach of the 2000 Agreement, he has suffered a loss of income, pension benefits and other forms of compensation, including past and future salary increases, overtime and bonuses. In addition, plaintiff asserts that he has suffered emotional distress, suffering, mental anguish and other non-pecuniary losses, as well as his last years of productive employment, as a result of defendants' conduct.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

I. PLAINTIFF'S CLAIMS OF DISABILITY AND RACIAL DISCRIMINATION

Plaintiff sues under the Administrative Code of the City of New York (Administrative

Code) § 8-107 (1) (a), alleging discriminatory treatment based upon his disability and race. The New York State (*see* Executive Law § 296 [1] [a]) and New York City laws are in accord with the federal standards under Title VII of the Civil Rights Act of 1964 (42 USC § 2000; *Matter of Aurecchione v New York State Division of Human Rights*, 98 NY2d 21, 25-26 [2002]).

The three-step framework established by the Supreme Court in *McDonnell Douglas Corporation v Green* (411 US 792 [1973]) for cases alleging violations of Title VII of the Civil Rights Act of 1964 is relevant here. First, the plaintiff employee must make out a *prima facie* showing of discrimination. Second, once the plaintiff has satisfied his burden, defendant must articulate a clear nondiscriminatory reason for the termination or other action. Third, the employee must show that the defendant's proferred reasons are pretextual (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 316-317 [2004]).

In the recent case of *Williams v New York City Housing Authority* (61 AD3d 62, 65 [1st Dept 2009]), the Appellate Division, First Department, made it clear that the City HRL is to be interpreted more broadly than its state and federal counterparts, in the wake of the Local Civil Rights Restoration Act of 2005, "which mandates that courts be sensitive to the distinctive language, purposes, and method of analysis required by the City Human Rights Law ... requiring an analysis more stringent than that called for under either Title VII or the State HRL."

> [T]he Restoration Act notified courts that (a) they had to be aware that some provisions of the City HRL were textually distinct from its State and Federal counterparts, (b) *all* provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes and (c) cases that had failed to respect these differences were being legislatively overruled

(*id.* at 67-68).

Administrative Code § 8-107 [1] [a] states, in pertinent part:

> 1. Employment. It shall be an unlawful discriminatory practice:
>
> (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race ... disability ... status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

"A person alleging racial or other discrimination does not have to prove discrimination by direct evidence. It is sufficient if he or she proves the case by circumstantial evidence" (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 326). This is because "[i]t is not often that an employer will use overt methods to discriminate" (*id.* at 321). "[T]he record must therefore be examined as a whole in order to ascertain whether, in light of all the circumstances, the evidence supports a finding of such intent" (*Sogg v American Airlines, Inc.*, 193 AD2d 153, 160 [1st Dept 1993]).

A. Plaintiff's claim of discrimination based upon his disability

Contrary to defendants' argument, plaintiff has established a *prima facie* case of disability discrimination. "To sustain allegations of disability discrimination under the Human Rights Law, plaintiff [is] required to demonstrate that he suffers from a disability, he was discharged, he was qualified to hold the position, and the discharge occurred under circumstances giving rise to an inference of discrimination based on his disability" (*Engelman v Girl Scouts-Indian Hills Council, Inc.*, 16 AD3d 961, 962 [3d Dept 2005]).

Here, the facts of this case reveal, and it is not disputed, that plaintiff suffers from a disability, that he was discharged from his job at Verizon, and that he was qualified to hold the positions of technician and escort under their original job descriptions. Thus, the issue to be determined is whether plaintiff's discharge occurred under circumstances giving rise to an

inference of discrimination based on his disability.

In this case, at the very least, the changes in the description of the essential duties of an escort, made at a time when MetLife was being asked to determine whether plaintiff was able to perform the job of an escort with his medical restrictions, gives rise to an inference of discrimination (*see Engelman v Girl Scouts-Indian Hills Council, Inc.*, 16 AD3d at 962 [the job description change and discussions among the board of directors regarding plaintiff's employment gave rise to an inference of discrimination]).

As plaintiff has established a *prima facie* case of disability discrimination, defendants must "rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision" (*see Ferrante v American Lung Association*, 90 NY2d 623, 629 [1997]). "[I]f defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff, then the presumption raised by the prima facie case is rebutted and 'drops from the case'" (*id.*, quoting *St. Mary's Honor Center v Hicks*, 509 US 502, 507 [1993]). "Despite the absence of presumption, plaintiff is still entitled to prove that the legitimate reasons profferred by defendant were merely a pretext for discrimination" (*id.* at 629-630).

Defendants argue that it lawfully terminated plaintiff, because he could not perform the essential functions of a technician or escort's job, and because he had exhausted his 52 weeks of paid short-term disability leave (*see Pimentel v Citibank, N.A.*, 29 AD3d 141, 146 [1st Dept 2006] [where customer contact was an essential function of her financial analyst position, plaintiff failed to demonstrate a prima facie case of employment discrimination based upon the defendant's alleged failure to reasonably accommodate her stress-related disability by

transferring her to a less stressful position that did not require customer contact]).

However, evidence in the record indicates that, with substantially the same medical restrictions, as long as he was being accommodated, plaintiff had been able to carry out the duties of technician and escort for many years. It was only after defendant Wade became plaintiff's supervisor that plaintiff was assigned to jobs that were difficult for him to perform with his medical restrictions, such as installation work or work in non-two-man areas.

Most importantly, evidence in the record suggests that plaintiff's supervisors altered the description of the essential functions of the escort job in a way that deemed plaintiff no longer able to perform the position due to his medical restrictions. Credibility issues raised by plaintiff regarding defendants' true motive for said alterations are sufficient to create an issue of fact as to whether his termination was based upon nondiscriminatory reasons (*see Ferrrante v American Lung Association*, 90 NY2d at 627 [where plaintiff undermined the credibility of the memorandum that served as the basis for most of defendant's legitimate reasons for his termination, Court found defendant's reasons for plaintiff's termination merely a pretext]). Accordingly, defendants are not entitled to summary judgment dismissing plaintiff's claim for discrimination based upon his disability.

B. Plaintiff's claim of discrimination based upon his race

"A plaintiff alleging racial discrimination in employment has the initial burden of establishing a prima facie case. To meet this burden, plaintiff must demonstrate that (1) he is a member of a protected class, (2) he was qualified for the position, (3) he was terminated from employment or suffered an adverse employment action, and (4) the termination or other adverse action occurred giving rise to an inference of discrimination" (*Dickerson v Health Management*

Corporation of America, 21 AD3d 326, 328 [1st Dept 2005]; *Forrest v Jewish Guild for the Blind*, 3 NY3d at 305).

Plaintiff has not articulated a *prima facie* case of race-based discrimination in this case. Initially, it should be noted that, although plaintiff puts forth, and Wade admits, that Wade sometimes used certain racially charged comments in some social situations, plaintiff has failed to demonstrate any causal relationship between these racial epithets and his termination (*see Forrest v Jewish Guild for the Blind*, 3 NY3d at 311-312). In fact, plaintiff stated in his affidavit that he had never witnessed defendant Wade using racial slurs with other managers or technicians, and, because of work conduct rules, an instance of the use of such a slur would have been highly unusual. As such, the remarks to which plaintiff refers are not probative of an intent to discriminate (*see Mete v New York State Office of Mental Retardation and Developmental Disabilities*, 21 AD3d 288, 294 [1st Dept 2005]), and these remarks themselves, or in combination with any other evidence, fail to raise an issue of fact as to whether plaintiff's termination was attributable to defendants' discriminatory motive (*see Hickey v Erste Bank*, 39 AD3d 263, 264 [1st Dept 2007] [complained-of remarks failed to raise an issue of fact as to whether plaintiff's termination was a result of discriminatory motive]).

"The relevance of discrimination-related remarks does not depend on their offensiveness, but rather on their tendency to show that the decision-maker was motivated by assumptions or attitudes related to the protected class" (*Tomassi v Insignia Financial Group, Inc.*, 478 F3d 111, 116 [2d Cir 2007]). "The more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory behavior, the more probative that remark will be" (*id.* at 115). "The more remote and oblique the remarks are in relation to the employer's

adverse action, the less they prove that the action was motivated by discrimination" (*id.*).

In support of his contention that defendants discriminated against him based upon his race, plaintiff also puts forth the affidavits of a number of his former co-workers, wherein they attest to the allegedly discriminatory treatment suffered by plaintiff by defendants. In addition, in these affidavits, defendant's co-workers described instances where they believe that they were discriminated against by defendants based upon their race.

While it is true that plaintiff's co-workers' personal experiences of discrimination "lack probative value, because they fail to assert facts from which personal knowledge of the reasons for the plaintiff's termination may be inferred" (*Dickerson v Health Management Corporation of America*, 21 AD3d at 328-329]), their affidavits also include first-hand observations of discrimination levied against plaintiff at the hands of defendants. Most notably, these co-workers attest that, after Wade became plaintiff's supervisor, plaintiff's former light-duty assignments in the projects were given to other Caucasian employees who did not have medical restrictions.

Plaintiff also asserts that, in addition to defendants' suspicious alteration of the escort job description, defendant Wade subjected plaintiff to heightened scrutiny. To this effect, plaintiff asserts that Wade tracked his whereabouts through a Global Positioning Satellite system, and that no other long-term technicians were ever followed by their site managers. Plaintiff also alleged that his managers routinely made notes about him and wrote him up for many minor infractions. Importantly, in contrast to his prior evaluations before Wade became his supervisor, plaintiff's performance reviews by Wade were negative in nature.

While the facts of this case may support an inference of discrimination against plaintiff based on his disability, as discussed previously, we find that the evidence, taken as a whole, is

not sufficient to give rise to an inference of discrimination based upon plaintiff's race (*see Sogg v American Airlines, Inc.*, 193 AD2d at 162). Thus, defendants are entitled to summary judgment dismissing plaintiff's claim of discrimination based upon his race.

II. PLAINTIFF'S CLAIM OF RETALIATION

Plaintiff asserts that defendants retaliated against him for bringing the prior action for discrimination against Verizon's predecessor, Bell Atlantic, resulting, among other things, in his eventual termination. "Under both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices" (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 313; Executive Law § 296 [7]; Administrative Code § 8-107 [7]). In order to make out a retaliation claim, plaintiff must show that (1) he has engaged in protected activity, (2) his employer was aware that he participated in such activity, (3) he suffered an adverse employment action based upon the protected activity, and (4) there is a causal connection between the protected activity and the adverse action (*id.* at 312-313).

Here, evidence in the record demonstrates that plaintiff engaged in a protected activity, that is, bringing an action against his employer claiming unlawful discrimination, and that plaintiff suffered an adverse employment action in that he was eventually terminated from his employment. In addition, it is not disputed that defendant Verizon was aware of the protected activity. However, although plaintiff maintains that Wade admitted in his deposition testimony that he was aware of plaintiff's prior action, the pages to which plaintiff cites in support of this assertion are curiously missing from the record, creating an issue of fact as to whether defendant Wade was aware of the protected activity.

It should be noted that, "[i]n 1991, the anti-retaliation provision of the City HRL

(Administrative Code § 8-107 [7]) - which had been identical to the State HRL provision - was amended in pertinent part to proscribe retaliation '*in any manner*'" (*Williams v New York City Housing Authority*, 61 AD3d at 69-70, quoting Local Law § 39 [1991], § 1).

> To accomplish the purpose of giving force to the earlier proscription on retaliation 'in any manner,' the Restoration Act of 2005 amended § 8-107 (7) to emphasize that '[t]he retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment ... or in a materially adverse change in the terms and conditions of employment ... however, ... the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity

(*id.* at 70-71).

Turning back to plaintiff's retaliation claim, under the broader construction of the City HRL, it is certainly possible for defendants' actions to be deemed retaliatory. For example, someone might be deterred from bringing an action if to do so would result in behavior on the part of his employers which might affect his ability to continue to be able to carry out his duties with his medical restrictions. To this effect, when, at a time when MetLife was being asked to make a determination as to whether plaintiff could carry out the duties of an escort with his medical restrictions, defendants advised MetLife that plaintiff had been on light duty for a long time, and that he had sued the company in the past. This behavior, on the part of defendants, could very well have resulted in a determination by MetLife that plaintiff could no longer carry out his duties as an escort with his medical restrictions.

In addition, even if defendants are deemed to have shown legitimate, nondiscriminatory reasons for their actions, plaintiff has successfully raised an issue of fact as to whether those articulated reasons were merely a pretext, as discussed prior. Thus, as issues of fact exist regarding plaintiff's retaliation claim, defendants are not entitled to summary judgment

dismissing plaintiff's claim for retaliation, and plaintiff is not entitled to partial summary judgment in his favor on his retaliation claim against defendants.

III. PLAINTIFF'S CLAIM OF FAILURE TO ACCOMMODATE

"It is well established that the statutory duty of a New York Employer under New York's Human Rights Law is to 'provide reasonable accommodations to the known disabilities of an employee ... in connection with a job or occupation sought or held'" (*Pimentel v Citibank, N.A.*, 29 AD3d at 145 citing Executive Law § 296 [3] [a]). The City HRL requires that an employer "shall make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job" (*id.* at 145, citing Administrative Code § 8-107 [15] [a]).

"Once plaintiff establishe[s] that he [is] qualified to perform the essential functions of the position with or without accommodations, the burden shifts to defendants to show that no reasonable accommodation is possible" (*id.*). "The provision does not require an employer to find another job for the employee or to create the job, or to reassign if no position is open," or to provide the employee with the accommodation that he or she "prefers" (*id.* at 148).

However, "disability discrimination statutes, whether federal or state, envision employer and employee engaged in an interactive process in arriving at a reasonable accommodation for a disabled employee" (*id.* at 149). The employer has a responsibility to investigate and determine the feasibility of an employee's request for accommodation, and if it fails to do so, and instead terminates the employee based on exhaustion of leave, it is deemed to have discriminated against the employee within the meaning of the law (*id.; Parker v Columbia Pictures Industries*, 204 F3d 326, 338 [2d Cir 2000]).

The proponent of an HRL claim has the burden of establishing not only that he proposed

a reasonable accommodation and that the defendant refused to make such accommodation, but that a vacant funded position existed that plaintiff was qualified to fill (*Pimentel v Citibank, N.A.*, 29 AD3d at 147-148; *Gill v Maul*, 61 AD3d 1159 [3d Dept 2009]).

Here, contrary to defendants' contentions, plaintiff has demonstrated that defendants failed to reasonably accommodate plaintiff's disabilities in violation of Administrative Code § 8-107 (15) (a) (*compare Nande v JP Morgan Chase & Company*, 57 AD3d 318, 318 [1st Dept 2008] [ample evidence that defendants provided plaintiff with various accommodations to assist him with his debilitating back injury]).

As set forth by defendants, Verizon utilizes a variety of resources to accommodate employees dealing with various medical issues that affect their ability to perform their work productively. These resources include being assigned light-duty assignments, when the employee is unable to perform the full range of functions required by his job due to medical restrictions, job transfers, paid short-term disability leaves, long-term disability leaves and disability pensions. As defendants assert, during the last 11 years of plaintiff's employment, plaintiff took advantage of most of the aforementioned resources.

However, as plaintiff contends, although it is true that defendants accommodated his medical restrictions in the past, once Wade became his supervisor, plaintiff was no longer primarily assigned to buildings in the projects and/or other two-man areas, which had elevators and required an escort. In fact, many of plaintiff's assignments under Wade were for installation work and/or outside two-man areas. As a result, plaintiff maintains that he wasted a lot of time on the phone with the dispatcher in an attempt to get his work assignments changed to accommodate his medical restrictions. Notably, even defendants concede that plaintiff was only

accommodated on 114 days of a standard 250-day work year.

Moreover, as plaintiff asserts, even at his worst, he was able to perform work as an escort when assigned to project buildings, because these buildings have elevators and no stairs leading into the buildings. Additionally, when project buildings are attached, the adjacent building's elevator can be utilized in the event that one of the building's elevators is out of service. It should be noted that plaintiff explained that, if it was necessary for him to stand for more than 30 minutes, or if he was in pain, he could simply sit down in the customer's home while the technician worked, sit in his truck, or sit on a folding stool.

In addition, Wade's testimony, that he did not assign plaintiff work in the projects because plaintiff could not walk from the sidewalk into the building or exit the truck, is belied by plaintiff's medical records. Importantly, plaintiff puts forth testimonial and documentary evidence that raises questions as to whether the escort work that he requested was, in fact, available, yet assigned to other technicians with less seniority.

As plaintiff asserts, defendants also failed to accommodate him by failing to properly implement Verizon's own Health Impairment Committee (HIC) policy, which states that the company must investigate the possibility of providing reasonable accommodations to employees with long-term or permanent impairments.

Pursuant to the HIC policy, if the HIC determines that no reasonable accommodation can be made at the work site, management at the site must have a meeting with the employee to explain the HIC process, and obtain the employee's signature on a required form. After the forms are completed, a 90-day job search to find an appropriate lateral position within the employee's geographical area is required. This search entails providing the employee with job

vacancy announcements weekly over the 90 days, as well as giving the employee priority over other employees applying for the same position. If the employee does not find a job within the 90-day time period, the case is reviewed by the HIC. At this time, the HIC may return the case to the garage to handle. At this time, the garage managers can either accommodate the employee, place the employee in a job that he can perform without restrictions, or submit the case to Verizon's Claims Committee for benefit consideration.

Here, there is no indication in the record that any meetings were ever held, or that plaintiff's signature on the form, which incorrectly noted that plaintiff was only capable of performing sedentary work, was ever obtained. A review of the record also indicates that, with the exception of being provided with a few job vacancy announcements, the HIC policy was never properly administered on plaintiff's behalf.

Defendants maintain that, in August of 2004, plaintiff's medical provider, Dr. Michael Maynard (Dr. Maynard), advised MetLife, in writing, that plaintiff could no longer perform the job of a technician, and that he would be more suited to "a clerical or sedentary occupation" (Defendants' Notice of Motion, Exhibit 36, Dr. Michael Maynard's Letter of August 26, 2004). As Verizon did not have any openings for sedentary work in the garage to assign to plaintiff at that time, plaintiff was placed in the HIC preferential job search program in the Fall of 2004.

However, a closer look at Dr. Maynard's letter reveals that, while Dr. Maynard suggested that plaintiff would be more suited to clerical or sedentary work, he did not rule out the possibility that, with reasonable accommodation, plaintiff could continue to work as an escort, as it was defined before Wade became plaintiff's supervisor. Specifically, Dr. Maynard wrote:

> Regarding the above patient, it is my opinion that he is not qualified to perform any heavy labor. This is a young man, who is now status post revision of his left

> total hip replacement and it is clear to me that if he continues in heavy labor, that he will inevitably destroy his new revision hip.
>
> Therefore, in my medical opinion, he should avoid impact loading. He should avoid carrying. He should avoid extremes of motion, including those required to negotiate ladders and stairs and would be much more suited to a clerical or sedentary occupation. The reason behind this, is that his young age, age 44, makes it likely that even with normal, everyday activities, non-strenuous activities, that he will require further revision surgery at some time later in life and we should avoid speeding up the process by restricting the level of activity that he is required to perform

(Defendants' Notice of Motion, Exhibit 36, Dr. Maynard's Letter, dated August 26, 2004).

Defendants also maintain that defendant Wade cannot be held liable for failing to accommodate plaintiff, because Verizon's dispatch office, and not Wade, was responsible for assigning plaintiff his work. However, Wade testified that, as the Far Rockaway and Belle Harbor gang manager, he was responsible for filling out and sending a computer-generated "load sheet" with the names of all the technicians on it to the dispatch center on a daily basis (Plaintiff's Notice of Cross Motion, Exhibit 9, Wade Deposition, at 383). To that effect, Wade was responsible for making notations on this sheet which identified which technicians were to be given "light duty," "sedentary duty" or "escort" work , as well as which technicians were out "sick," so as to alert the dispatcher to what kind of work could be assigned to the individuals (*id.* at 394-396). For example, if the word "escort" appeared next to a technician's name, dispatch would assign him to a two-man area which required an escort. Importantly, a review of the load sheets for May to August of the year 2003 reveal that the word "escort," which had been preprinted next to plaintiff's name, was crossed off.

In addition, defendants contend that they cannot be held liable for failing to provide plaintiff with an accommodation, because he failed to adequately explain the extent and limits of

his restrictions (*see Pimentel v Citibank, N.A.*, 29 AD3d at 148). However, a review of the record in this case indicates that ample evidence exists detailing the extent and limits of plaintiff's medical restrictions.

Thus, as issues of fact exist as to whether defendants failed to reasonably accommodate plaintiff's medical restrictions under the circumstances of this case, defendants are not entitled to summary judgment dismissing plaintiff's claim for failure to accommodate, and plaintiff is not entitled to partial summary judgment in his favor on his failure to accommodate claim.

IV. WHETHER DEFENDANTS BREACHED THE 2000 AGREEMENT

Initially, it should be noted that, in the 2000 Agreement, it was agreed that Bell Atlantic would not retaliate against plaintiff for filing the subject court action. Specifically, the 2000 Agreement provided, in pertinent part:

> This Agreement and the settlement it represents do not constitute an admission by Bell Atlantic of any violation of any federal, state or local law or any duty whatsoever, whether based in statute, common law, or otherwise, and the Parties agree that no violation has occurred.
>
> * * *
>
> In consideration of the payments and provisions described above and for other good and valuable consideration, Mr. Joseph will accept the benefits herein provided in full and complete satisfaction of any and all rights ... that he has or may have against Bell Atlantic and Mr. Ferrara as of the date of this Agreement ... This paragraph shall not limit Mr. Joseph from instituting legal action for the sole purpose of enforcing this Agreement ... Bell Atlantic expressly agrees that it will not retaliate against Mr. Joseph for the filing of claims in the Action against Bell Atlantic and Mr. Ferrara.
>
> (Plaintiff's Notice of Cross Motion, Exhibit 18, 2000 Agreement).

Here, Di Paolo's comments to MetLife that plaintiff had been working with accommodations for a long time, and that he had sued the company in the past, at a time when MetLife was being asked to make a determination as to whether plaintiff could carry out the

duties of an escort with his medical restrictions, create an issue of fact as to whether Verizon retaliated against plaintiff, in violation of the terms of the 2000 Agreement. Thus, defendant Verizon is not entitled to summary judgment dismissing plaintiff's breach of the settlement agreement claim.

However, as defendant Wade was not a party to the 2000 Agreement, he cannot be held in breach of the same (*see Bri-Den Construction Company v Kapell & Kostow Architects, P.C.*, 56 AD3d 355, 355 [1st Dept 2008]). Thus, defendant Wade is entitled to summary judgment dismissing plaintiff's claim for breach of the 2000 Agreement as against him.

V. WHETHER PLAINTIFF'S CLAIM AND EVIDENCE BEFORE THE SOCIAL SECURITY ADMINISTRATION (SSA) THAT HE WAS "PERMANENTLY DISABLED" BAR THIS LAWSUIT

On May 24, 2006, in connection with plaintiff's appeal of the SSA's initial denial of Social Security Disability Insurance (SSDI) benefits to plaintiff, plaintiff stated on his "Reconsideration Disability Report" that his "former employer concluded that I am [permanently] disabled" (Plaintiff's Notice of Cross Motion, Exhibit 58, Plaintiff's Reconsideration Disability Report). Plaintiff also stated that he has "decreased mobility and increased pain while standing, sitting and walking," that he could no longer "stand, sit or walk for prolonged periods," and that these symptoms are "exacerbated by cold or inclement weather" (*id.*).

On June 26, 2006, the SSA awarded SSDI benefits to plaintiff based on plaintiff's impairments, the fact that he could no longer perform his past relevant work as of November 1, 2003, and, that given his highly specialized training and experience, there were no jobs available in significant numbers in the national economy that he could be expected to perform.

"The United States Supreme Court has held that applying for and receiving SSDI benefits does not automatically preclude a disability discrimination claim" (*Engelman v Girl Scouts-Indian Hills Council, Inc.*, 16 AD3d at 963]). "Instead, plaintiff is required to explain any inconsistency between an SSDI application which presumably indicates an inability to work with a claim that he was able to perform the essential functions of his former position, at least with reasonable accommodations" (*id.*).

"[W]hen the SSA determines whether an individual is disabled for SSDI purposes, it does *not* take the possibility of "reasonable accommodation" into account, nor need an applicant refer to the possibility of reasonable accommodation when she applies for SSDI" (*Cleveland v Policy Management Systems Corporaton*, 526 US 795 [1999]). As a result, a suit wherein the plaintiff is claiming that he can perform his job with reasonable accommodations "may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) without it" (*id.* [where employee sued former employer for wrongful termination under Americans With Disabilities Act (ADA), Court found that employee's claims for SSDI benefits and for ADA damages did not inherently conflict, as the ADA defines a qualified individual to include a disabled person who can perform the essential functions of his job with reasonable accommodations]).

Here, plaintiff can show that he was considered disabled by his employer because he is unable to perform certain lifting, bending and standing functions, but that he is capable of performing various job duties with reasonable accommodations regarding those limited functions, such as working as an escort (*see Engelman v Girl Scouts-Indian Hills Council, Inc.*, 16 AD3d at 963). Thus, plaintiff's claim and evidence presented before the SSA does not

preclude his disability discrimination and failure to accommodate claims.

Although defendants failed to include their answer to plaintiff's complaint in their papers, as required by CPLR 3212 (b), the court has access to these documents, and therefore, will not deny defendants' motion on this ground. Defendants counsel should, in the future, make an effort to conform to the CPLR.

In addition to asserting that defendant Wade is individually liable as an employer, employee and/or agent of Verizon under Administrative Code § 8-107 (1) (a), plaintiff now also maintains that Wade is individually liable as an aider and abetter of the unlawful discrimination, pursuant to Administrative Code § 8-107 (6), because he directed and participated in the conduct giving rise to plaintiff's discrimination and retaliation claims. However, as plaintiff did not assert such a claim in his pleadings, the court will not address said claim herein.

CONCLUSION AND ORDER

For the foregoing reasons, it hereby

ORDERED that the part of defendants Verizon New York Inc. and Kenneth Wade's motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's claim of discrimination based on race is granted, and this claim is severed and dismissed; and it is further

ORDERED that the part of defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's claim for breach of contract is granted as to defendant Wade only, and this claim is severed and dismissed as to defendant Wade only, and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion, pursuant to CPLR 3212, for partial summary judgment in his favor on his claims for failure to accommodate and retaliation is denied; and it is

further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

ORDERED that the remainder of the action shall continue.

DATED: June 23, 2009

ENTER:

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD