SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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GERALDO MARTINEZ,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSIT AUTHORITY,

Defendants.

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Index No.: 159986/2018

Mot. Seq. 1

The following e-filed documents, listed by NYSCEF document number 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 17, 18 were read on this motion to dismiss.

LISA A. SOKOLOFF, J.:

This action arises out of plaintiff Geraldo Martinez's claims that defendants New York City Transit Authority and Metropolitan Transit Authority[1] (collectively, defendants) subjected him to discrimination and retaliation on account of his disability, in violation of the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL). He further alleges that defendants failed to reasonably accommodate his disability and that they violated his federal civil rights. Defendants move, pursuant to CPLR 3211 (a) (5) and (7), for an order partially dismissing the complaint. Defendants seek to dismiss the NYSHRL and NYCHRL claims predicated on alleged events which occurred prior to October 29, 2015 as barred by the statute of limitations. In addition, defendants seek to dismiss the cause of action grounded in federal law, for failure to state a cause of action based on alleged disability. For the reasons set forth below, defendants' motion is granted in part and denied in part.

[1] Defendants note that the correct name for this defendant is Metropolitan Transportation Authority.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff commenced his employment with defendants in 1992 as a bus operator. "[B]eginning on September 11, 2001, the Plaintiff was a first responder at Ground Zero because he was dispatched to Ground Zero by the defendants." NYSCEF Doc. No. 22, Amended Complaint, ¶ 7. Plaintiff alleges that he developed "various debilitating medical conditions including incontinence, prostate cancer and side effects and disabilities that resulted from his cancer treatments," and that he experienced incontinence as a result. *Id.* He continued that, at various times, he had to request that defendants provide him with reasonable accommodations as result of this condition.

According to plaintiff, shortly after September 2001 and continuing up until he was terminated in April 2016, defendants discriminated against him on the basis of his disability. Plaintiff claims that he was "routinely harassed by his supervisors until his termination because of the frequency of his bathroom use necessitated by his condition." *Id.*, ¶ 8. Specifically, his dispatchers and "Hillary Tomlinson from labor relations," harassed him and denied him accommodations. *Id.*, ¶ 12. Further, the harassment "constituted a continuous course of conduct. *Id.*, ¶ 9.

"At all relevant times," plaintiff advised defendants that he was being discriminated against in the form of harassment and a lack of accommodation. *Id.*, ¶ 11. However, defendants failed to remedy the situation.

Plaintiff believed that defendants, by their actions, intended to force plaintiff to resign. For instance, he was suspended on at least two unspecified dates. Without referencing a particular date or conversation, plaintiff also claims that he was denied a schedule that accommodated his routine medical screenings and that defendants did not enforce plaintiff's right to a handicapped parking spot.

Plaintiff explains that, in June 2014, he called out sick to work as a result of his disability. In response, defendants suspended plaintiff and commenced a disciplinary action against him. Plaintiff claims, without providing more details, that this was done in retaliation for his complaining about defendants' prior discriminatory acts.

On September 24, 2014, while on the job as a bus operator, a 350-pound passenger became stuck on a ramp. Plaintiff alleges that his supervisor ordered plaintiff to move the passenger himself, even after plaintiff advised his supervisor that he could not safely do so as a result of his disabilities. As a result of following his supervisor's instructions, plaintiff sustained injuries requiring him to take medical leave.

After being out on medical leave for one year, defendants informed plaintiff that he would be terminated from his employment. Plaintiff applied for reclassification pursuant to defendants' procedures.[2] However, he was only found medically capable for performing the sole position of Transit Property Protection Agent (TPPA). He stated that the requirements to perform the duties of TPPA were "onerous." *Id.*, ¶ 19.

In September 2015, plaintiff was subsequently denied reclassification for this position, as he did not have the requirements to perform the job. Defendants advised plaintiff that he could

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[2] Defendants explain that they were following the procedures set forth in the Civil Service Law, specifically Civil Service Law § 71, which states the following, in relevant part:

> Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, he or she shall be entitled to a leave of absence for at least one year, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position. . .. Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his or her former position, he or she shall be reinstated to his or her former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he or she was eligible for transfer.

not be reclassified into any other position. Plaintiff believes that he was capable of performing other positions, including that of a "Cleaner." However, defendants "never engaged in an interactive process" to accommodate plaintiff's disability. *Id.*, ¶ 21. He further alleges that the "reclassification process was a sham." *Id.*, ¶ 22. Plaintiff claims that defendants "failed to reasonably accommodate Plaintiff's disabilities after September, 2015." *Id.*, ¶ 24. Defendants terminated plaintiff's employment in April 2016.

Instant Action and Defendants' Motion

Pursuant to an oral argument held on September 19, 2019, this court granted plaintiff's cross motion to file an amended complaint. The amended complaint sets forth four causes of action.[3] In the first and second causes of action, plaintiff alleges that defendants' actions, as set forth in the amended complaint, constituted unlawful discrimination on the basis of a disability, in violation of the NYSHRL and the NYCHRL.

In the third cause of action, grounded in retaliation, plaintiff alleges that he was retaliated against, in violation of the NYSHRL and the NYCHRL. Amended complaint, *Id.*, ¶ 23. He states that defendants "continuously harassed and retaliated against" him since he developed his disabilities related to September 11, 2001. He explains that defendants "sought to deny that any of the Plaintiff's disabilities were related to his service at Ground Zero." *Id.*, ¶ 25. Plaintiff further states that he has filed numerous internal complaints and that he also filed complaints with the EEOC and the NYSHRC alleging unlawful discrimination. "The acts of the defendants constituted unlawful retaliation for his consistent assertion of disability discrimination and demand for accommodation both through internal complaints to the Defendants and through the EEOC and the NYSHRC." *Id.*, ¶ 36. Specifically, defendants allegedly failed to reasonably accommodate his disabilities after he sought to return to employment after taking one year of

[3] Incorrectly labeled as first, second, fifth and sixth causes of action.

medical leave. He claims, "[t]he failure of the Defendant to reassign the Plaintiff constitutes an act of retaliation against the Plaintiff for his assertion of his rights under the NYSHRL and NYCHRL." *Id.*, ¶ 26.

In the fourth cause of action, constitutional claims, plaintiff alleged that defendants intentionally discriminated against him on the basis of his disability in violation of 41 USC § 1981 and 42 USC § 1983. Plaintiff also asserts that he has been "vocal in asserting that he was a first responder, who was injured as a result of his work at the Ground Zero site." *Id.*, ¶ 27. However, defendants retaliated against him on the basis of his "First Amendment right of free speech ...." *Id.*, ¶ 40.

Procedural History

Plaintiff commenced this action against defendants by filing a complaint on October 29, 2018. Defendants stated that they "are not moving at this time to dismiss all claims set forth in the complaint. Instead, Defendants move at this time solely to dismiss Plaintiff's time-barred claims under New York State and New York City law as well as his claims under federal law." NYSCEF Doc. No. 5, defendants' memorandum of law at 2.

Defendants stated that claims brought pursuant to the NYSHRL and the NYCHRL, as well as claims brought under 42 USC § 1983 are subject to a three-year statute of limitations. According to defendants, the continuing violation doctrine is not applicable here because "[l]eaving aside conclusory allegations of 'continuous' harassment, the only facts asserted in the complaint relate to discrete instances of alleged discrimination, only the most recent of which even arguably occurred during the three-year limitation period." *Id.* at 5. As a result, any claims that allegedly occurred between September 11, 2011 and October 29, 2015 must be dismissed as time-barred.

In opposition to the motion for partial dismissal, plaintiff only addressed defendants' arguments with respect to the continuing violations doctrine. Plaintiff also cross-moved,

pursuant to CPLR 3020 (b) to amend his complaint so that he could clarify his arguments. He stated that he developed various health ailments after defendants assigned him to work at Ground Zero. He continued "that his work for the defendant at Ground Zero, and the history of retaliation for the Plaintiff asserting his September 11, 2011 health related conditions, amount to a policy or mechanism to deny that September 11, 2011 injuries existed, forming collectively, one unlawful employment practice." NYSCEF Doc. No. 17, Steiner affirmation in opposition, 4.

During oral argument held on September 19, 2019, plaintiff conceded that he was not opposing defendants' partial motion to dismiss with respect to claims asserted under the federal statutes. Plaintiff addressed the issue of untimely claims. He stated that, after being out on disability, defendants only found him "medically able" for the job of "Property Protection Officer." He continued that plaintiff "was never afforded the opportunity of the interactive process." Transcript of oral argument held on September 19, 2019 at 5. Counsel alleged that, throughout the period of his employment, plaintiff was targeted and discriminated against due to his September 11th related illnesses. "And that continued up until the time that he didn't work on a daily basis." *Id.* at 6. Counsel summarized "that when [plaintiff] was not permitted to return, that was brought part and parcel of the continuous course of pervasive discrimination against him because he had been ill due to his September 11th related illnesses." *Id.* The matter was adjourned, allowing plaintiff to submit an amended complaint. The court provided a date by which defendants were to supplement their responses.

Amended Complaint

In brief, for the most part, plaintiff's amended complaint only differed from the original complaint in that plaintiff provided allegations related to his retaliation claims. Plaintiff supplemented his "constitutional claims" cause of action to include the allegation that he was retaliated against based upon his assertion of his First Amendment right of free speech.

In addition to what was argued in their original partial dismissal motion, defendants now argue that all NYSHRL and NYCHRL claims should be dismissed as barred by the statute of limitations. According to defendants, "Plaintiff does not allege that his termination was the result of discrimination or retaliation." Memorandum of law at 2. They argue that the last discrete act of failing to reclassify plaintiff in September 2015 falls outside of the statute of limitations. As a result, as all of the allegations are based on discrete acts allegedly occurring outside the three-year statute of limitations, the amended complaint should be dismissed.

Defendants informally requested to dismiss the entire amended complaint. In support of this request, they do not discuss the elements of the NYSHRL or NYCHRL claims, but state, in one sentence, that plaintiff does not allege any facts to support these claims. Defendants further argue that plaintiff's claim alleging a violation of a First Amendment right fails because plaintiff does not allege that he engaged in protected speech or that any adverse action was taken against him based on protected speech.

Oral Argument Held December 19, 2019

The parties again appeared for oral argument on December 19, 2019. At that time, defendants argued that the amended complaint also failed to establish that the untimely claims could be considered part of a continuing violation. Defendants informally requested dismissal of the entire amended complaint. They added that plaintiff was allegedly terminated pursuant to a "Section 71 termination, which was based on an absence wholly unrelated to the alleged injuries from 9/11 from being a first responder." Transcript of oral argument held on December 19, 2019 at 4. According to defendants, plaintiff had been protected by the Civil Service Law. He went out on medical leave for a year and then was medically unable to perform the job of bus operator, the job that he was hired for. After going through the reclassification process, he did not qualify for another job. Defendants stated that they "acted entirely in accordance with civil service law," when they terminated plaintiff after being out on medical leave for a year after he

could not perform the functions of the job that he was hired for. *Id.* at 11. They noted that his medical qualifications were considered as part of the reclassification process.

In opposition, plaintiff argued that defendants fail on a "global basis" to "engage in an interactive dialogue with its employees . . . and discuss reasonable accommodations." *Id.* at 7. Plaintiff claimed that he would have been eligible to be a Cleaner, but there was no interactive dialogue. He stated, "he was entitled to a reasonable accommodation for his disabilities. He was supposedly entitled to be reassigned." *Id.* at 6-7. However, as with other employees, he was only provided with one or two specific avenues for reassignment, that were ultimately unrealistic. Plaintiff conceded that he did not specify a time or date for any of his complaints, but argued that he set forth "ample pleading to engage in discovery."

DISCUSSION

I. Dismissal

On a motion to dismiss pursuant to CPLR 3211 (a) (7), "the facts as alleged in the complaint [are] accepted as true, the plaintiff is [given] the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." *Mendelovitz v Cohen,* 37 AD3d 670, 671 (2d Dept 2007). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted). "In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards . . . . [I]t has been held that a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds." *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (1st Dept 2009) (internal citation omitted).

II. NYSHRL and NYCHRL

Pursuant to the NYSHRL and NYCHRL, as stated in Executive Law § 296 (1) (a) and Administrative Code § 8-107 (1) (a), it is an unlawful discriminatory practice for an employer to: refuse to hire or employ, fire, or discriminate against an individual in the terms, conditions or privileges of employment because of the individual's disability. Disability is defined in the NYSHRL as a "physical, mental or medical impairment . . . which prevents the exercise of a normal bodily function . . . [and] which, upon the provision of reasonable accommodations, do[es] not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held." Executive Law § 292 (21). Under the NYCHRL, disability is more broadly defined as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." Administrative Code § 8-102 (16) (a).

To establish a case of disability discrimination under both the NYSHRL and NYCHRL, the plaintiff "must demonstrate that he or she suffered from a disability and that the disability caused the behavior for which he or she was terminated." *Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 (1st Dept 2006). Under both the NYSHRL and the NYCHRL, the court applies the burden shifting analysis developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), where the plaintiff has the initial burden to establish a prima facie case of discrimination. *Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 305 (2004). This analysis requires plaintiff to set forth that he is a member of a protected class, was qualified for the position, was actively or constructively discharged, and that the discharge occurred under circumstances giving rise to an inference of discrimination. *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 (1997).

The provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts. *Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 (1st Dept 2016). For example, under the NYCHRL, "differential treatment may be actionable even where the treatment does not result in an employee's discharge." *Suri v Grey Global Group, Inc.*, 164

AD3d 108, 120 (1st Dept 2018); *see also Chin v New York City Hous. Auth.*, 106 AD3d 443, 444 (1st Dept 2013) (internal citations omitted) ("[N]one of this alleged conduct on defendant's part either constituted an adverse action, under the [NYSHRL], or disadvantaged plaintiff, under the [NYCHRL]").

Failure to Provide Reasonable Accommodation

Under both the NYSHRL and NYCHRL, failure to provide reasonable accommodation to an employee's known disability is a form of discrimination. *See* Executive Law § 296 (3) (a) (An employer may not "refuse to provide reasonable accommodations to the known disabilities . . . of an employee"); *see also* Administrative Code § 8-107 (15) (a) (In relevant part, it is an unlawful discriminatory practice for an employer "not to provide a reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job . . .").

Under the NYSHRL, "reasonable accommodation" is defined as actions taken by employer which "permit an employee . . . with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held . . . provided, however that such actions do not impose an undue hardship on the business." Executive Law § 292 [21-e]. Plaintiff "has the burden of establishing that [he] proposed a reasonable accommodation and that the defendant refused to make such accommodation." *Pimentel v Citibank, N.A.*, 29 AD3d 141, 148 (1st Dept 2006).

The NYCHRL defines a reasonable accommodation as one that "can be made that shall not cause undue hardship in the conduct of the covered entity's business. The covered entity shall have the burden of proving undue hardship." Administrative Code § 8-102 (18); *see also* Administrative Code § 8-107 (15) (b). While the NYCHRL "provides employers an affirmative defense if the employee cannot, with reasonable accommodation, satisfy the essential requisites of the job," the employer has the pleading obligation in its affirmative defense. *Romanello v*

Intesa Sanpaolo, S.p.A., 22 NY3d 881, 885 (2013) (internal quotation marks and citation omitted).

To state a *prima facie* case of a failure to accommodate under the NYSHRL and NYCHRL, the plaintiff must allege facts to suggest that: "(1) the employee has a disability under the relevant statute, (2) an employer covered by the statute had notice of [his] disability, (3) with reasonable accommodations, [he] could perform the essential functions of [his] job, and (4) [his] employer refused to make such accommodations." *Urena v Swiss Post Solutions. Inc.*, 2016 US Dist LEXIS 128856, *2 (SD NY 2016).

Under both the NYSHRL and the NYCHRL, "the first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested." *Phillips v City of New York*, 66 AD3d 170, 176 (1st Dept 2009).

III. Statute of Limitations

"On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on the ground that the complaint is barred by the applicable statute of limitations, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 (2d Dept 2016). Actions to recover damages for alleged discrimination under the NYSHRL and the NYCHRL are subject to a three-year statute of limitations. *See* CPLR 214 (2); Administrative Code of the City of New York § 8-502 (d). At the outset, defendants state that any NYSHRL and NYCHRL claims predicated on incidents occurring prior to October 29, 2015 must be dismissed as time-barred. However, plaintiff argues that a "continuing violation exception" should apply to the claims pre-dating October 2015, as they are all "part and parcel of the continuous course" of harassment and discrimination.

Although plaintiff's claims are subject to a three-year statute of limitations, the "continuing violation doctrine" allows a limited exception to the limitations period "where there

is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." *Schapiro v New York City Dept of Health*, 25 Fed Appx 57, 60 (2d Cir 2001) (internal quotation marks and citation omitted). Under the continuing violation doctrine, "the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it." *Id.* (internal quotation marks and citations omitted). In addition to the application in the context of a hostile work environment, courts have generally limited the application of the doctrine "to situations where a specific discriminatory policy or mechanism has been alleged." *Gross v NBC*, 232 F Supp 2d 58, 68 (SD NY 2002).

NYSHRL

The standard for applying the continuing-violation doctrine to claims under Title VII and NYSHRL is governed by *National R.R. Passenger Corp. v Morgan*, 536 US 101, 117 (2002). *Sotomayor v City of New York*, 862 F Supp 2d 226, 250 (ED NY 2012), *affd* 713 F3d 163 (2d Cir 2013). The Court in *National R.R. Passenger Corp. v Morgan* limited the application of the continuous violation doctrine and held that it did not apply to discrete time-barred acts. It held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act." *National R.R. Passenger Corp. v Morgan*, 536 US at 113. However, the Court held that the doctrine was available to hostile work environment claims. In contrast to discrete acts, hostile work environment claims, by their nature, "involves repeated conduct. . .. The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years. . . ." *National R.R. Passenger Corp. v Morgan*, 536 US at 115.

NYCHRL

"New York state courts have since held that the more generous, continuing violations doctrine continues to apply to claims [brought under the NYCHRL]." *Sotomayor v City of New York* (862 F Supp 2d at 250). For purposes of determining a continuing violation under the NYCHRL, "[o]therwise time-barred discrete acts can be considered timely where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." *Id.* (internal quotation marks and citations omitted); *see also Center for Independence of the Disabled v Metropolitan Transp. Auth.*, 184 AD3d 197, 200-201 (1st Dept 2020) ("Under the NYCHRL, however, it has long been recognized that continuing acts of discrimination within the statutory period will toll the running of the statute of limitations until such time as the discrimination ends").

In essence, plaintiff states that he became disabled as a result of being assigned to Ground Zero. Starting shortly after September 2001 and until he was terminated in April 2016, defendants discriminated against him, by targeting and harassing him in an effort to force him to resign. His claims are as follows:

Without providing specific dates, plaintiff states that he was suspended on two occasions, that defendants purposely denied plaintiff's request for a schedule accommodation and that defendants failed to enforce his right to a handicapped parking spot. In June 2014, plaintiff states that he was subject to disciplinary action and that it was motivated by defendants' discriminatory and retaliatory animus. In September 2014, plaintiff needed to go out on medical leave as a result of following his supervisor's instructions to lift a heavy passenger. In August 2015, after being out on medical leave for one year, pursuant to defendants' policies, plaintiff was advised that he would be terminated. Although he applied for reclassification, he was only found medically capable for one position, and did not reclassify for this position, or for any others. Plaintiff was denied reclassification in September 2015 and was terminated in April

2016. On its face, the only timely pleaded allegations are defendants' unspecified failure to accommodate plaintiff's disability after being denied reclassification and plaintiff's termination on April 2016.

Plaintiff herein does not provide a memorandum of law and provides little support for his position. His cause of action grounded in unlawful discrimination seems to allege various theories for liability, including the allegation that defendants discriminated against him based on his disability in violation of the NYSHRL and the NYCHRL and, as will addressed below, that defendants failed to reasonably accommodate him, also in violation of the NYSHRL and the NYCHRL. Specifically, plaintiff alleges that he was disabled, that he was qualified for his position until he was terminated, that he suffered adverse employment actions such as being unfairly disciplined and harassed and that these actions were taken in an effort to force him to resign, and that his discharge or other adverse actions occurred under circumstances giving rise to an inference of discrimination.

"Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *National R.R. Passenger Corp. v Morgan*, 536 US at 114. In addition, courts have held that a rejection of a proposed accommodation is also a discrete act that "does not give rise to a continuing violation." *Elmenayer v ABF Freight Sys., Inc.*, 318 F3d 130, 134-135 (2d Cir 2003). Similarly, the allegedly unfair disciplinary actions are discrete acts that do not trigger the continuing violations policy exception. *See e.g. Henry-Offor v City Univ. of N.Y.*, 2012 US Dist LEXIS 84817, *10 (SD NY 2012) ("demotion in job title, reductions in responsibility, unwarranted criticism, and failure to provide attribution for specific work performed - are paradigmatic examples of discrete acts"). Accordingly, here, plaintiff's untimely allegations are considered discrete discriminatory acts that cannot form the basis of an invidious employment

discrimination claim under the NYSHRL. *See National R.R. Passenger Corp. v Morgan*, 536 US at 115. ("All prior discrete discriminatory acts are untimely filed and no longer actionable").

While not explicitly stating that he was subject to a hostile work environment, plaintiff broadly alleges that his claims are "based upon a continuous course of conduct relating to the plaintiff's September 11, 2001 related disabilities." Nevertheless, plaintiff has not adequately pled how the discrimination and harassment he experienced while at the workplace until September 2014 could be related to any timely allegations occurring after October 29, 2015, while out on medical leave. For example, he alleges, without providing any specifics, that his supervisors harassed him based on the frequency of his bathroom use resulting from his medical condition. He claims that he suffered from this harassment until he was terminated. However, plaintiff had not been at the job site since his medical leave in June 2014. "[T]his discontinuity is fatal to [plaintiff's] 'continuing violation' argument." *Quinn v Green Tree Credit Corp.*, 159 F3d 759, 766 (2d Cir 1998).

Plaintiff has also failed to allege a "proof of specific ongoing discriminatory practices or policies . . . ." *Id.* at 766 (internal quotation marks and citation omitted). Plaintiff claims that defendants sought to deny that he became injured as a result of working at Ground Zero. Aside from plaintiff's conclusory allegations, he has failed to set forth a discriminatory policy. *See e.g. Lugo v City of New York*, 518 Fed Appx 28, 29 (2d Cir 2013) ("Lugo has not presented evidence from which it could be concluded that there was a policy or practice of discrimination or even that the events he points to are connected in any way").

Courts have held that, "even under the [NYSHRL], a plaintiff is not precluded from using the prior acts as background evidence in support of a timely claim." *Jeudy v City of New York*, 142 AD3d 821, 823 (1st Dept 2016) (internal quotation marks and citations omitted). Accordingly, although plaintiff fails to connect this alleged history of mistreatment to any timely claims of discrimination, he may refer to them in support of a timely claim.

With respect to the NYCHRL, assuming, without deciding, that plaintiff suffered adverse actions while he was at the workplace, these actions ceased by September 2014, when he went out on medical leave. In addition, any requests for accommodations while he was situated at the workplace would be different than the ones made pursuant to the reclassification provisions of the Civil Service Law. Accordingly, even under the NYCHRL, these separate and unrelated discrete acts of discrimination alleged over several years, cannot form the basis of one timely continuing violation. *See e.g. Grimes-Jenkins v Consolidated Edison Co. of N.Y.*, 2017 WL 2258374, *9, 2017 US Dist LEXIS 77710, *22-23 (SD NY 2017) (Court found allegations untimely and not actionable under the NYCHRL as continuing violations, even though "some individuals involved in timely allegations are also involved in untimely allegations," as "the incidents are sporadic, and the plaintiff fails to connect the timely and untimely allegations in any meaningful way"); *see also Jones v City of New York*, 2020 US Dist LEXIS 3745, *13 (SD NY 2020) (internal quotation marks and citation omitted) ("Although Plaintiff's September 2016 request for a reasonable accommodation is timely, Plaintiff's September 2014 request occurred at a different time and under different circumstances, with no common policy linking the two").

Accordingly, the continuing violation doctrine does not apply to plaintiff's untimely allegations that defendants harassed and subjected him to adverse treatment while at the workplace on account of his disability, in violation of the NYSHRL and NYCHRL.

Failure to Accommodate

Plaintiff was out on medical leave for one year and was unable to return to work as a bus operator during that time. Pursuant to the procedures set forth in the Civil Service Law, he received a termination notice after this one-year period. Also pursuant to the Civil Service Law, plaintiff was able to apply for reclassification to another position. Plaintiff did so, but was medically qualified for only one position. Notwithstanding the fact that he was found to be medically qualified, plaintiff did not get reclassified into this position, as it allegedly had

extremely restrictive requirements. As a result, plaintiff alleges that the reclassification process was a sham. He does not argue that he was medically able to perform the job he was hired for (bus operator). However, he claims that, even after he was medically qualified for a less physically demanding position, defendants never engaged in a good faith interactive process to explore accommodating plaintiff's disability. The amended complaint states that defendants failed to reasonably accommodate his disabilities after September 2015, when he was denied reclassification.

Here, accepting the truth of plaintiff's allegations and resolving all inferences in his favor, the amended complaint "alleges facts, which, if proved, would constitute a continuing discrimination if the situation persisted without correction." *Mendoza v State Div. of Human Rights*, 74 AD2d 508, 509-510 (1st Dept 1980). "Engagement in an individualized interactive process is itself an accommodation, and, generally, the failure to so engage is a violation of the state and city statutes." *Miloscia v B.R. Guest Holdings LLC*, 33 Misc 3d 466, 474 (Sup Ct, NY County 2011), *affd in part, mod in part*, 94 AD3d 563 (1st Dept 2012).

As previously discussed, being denied a reclassification is considered a discrete act. However, at the motion to dismiss stage, courts have applied the doctrine to untimely allegations of failure to accommodate where defendants allegedly "continuously failed to act (including some discriminatory decision arrived at within the statute of limitations) in furtherance of a continuing discriminatory policy." *Harris v City of New York*, 186 F3d 243, 250 (2d Cir 1999). For example, the Court in *Bloom v New York City Bd. of Educ. Teachers' Retirement Sys.* (2003 WL 1740528, 2003 US Dist LEXIS 5290 [SD NY 2003]) denied the motion to dismiss as premature, where the plaintiff alleged a continuing violation and set forth at least one timely allegedly adverse employment action. The Court held the following, in relevant part:

> plaintiff alleges discrimination in the form of a failure to act -- failure to accommodate her disability and failure to pay her line-of-duty injury pay -- that may have been a one-time discriminatory decision or a continuous failure to act. Since plaintiff has alleged the

> existence of a policy or practice amounting to a continuing violation and has alleged at least one act that is not time barred -- the notification of her termination on December 10, 1997 -- it would be premature at this stage to conclude that plaintiff can prove no set of facts which would entitle her to relief.

Id. at *10.

Similarly, here, plaintiff alleges a situation where defendants discriminated against him by denying his reclassification in September 2015, and then continuously failed to accommodate him after he was out on medical leave.

Moreover, at this stage, plaintiff has alleged an ongoing discriminatory policy or practice. In contrast to the generalized claims for disability discrimination that were premised on discrete and unrelated acts, plaintiff identifies a specific discriminatory policy or mechanism in his claims for failure to accommodate. The instant amended complaint alleges that the policy itself surrounding the reclassification should be unlawful, as it was too restrictive to permit a reasonable accommodation for an employee's disability. In essence, the reclassification process is purportedly a "sham," not only for plaintiff, but for other disabled employees as well.

"[W]here a continuing violation can be shown, the plaintiff is entitled to bring suit challenging all conduct that was a part of that violation, even conduct that occurred outside the limitations period." *Schapiro v New York City Dept of Health*, 25 Fed Appx at 60 (internal quotation marks and citations omitted). Accordingly, plaintiff may avail himself of the continuing violation doctrine with respect to the untimely allegations related to the claim that defendants failed to accommodate him after he went out on medical leave; namely, plaintiff's attempts at reclassification and subsequent failure to be able to return to the workplace.

IV. Requested Relief

In defendants' initial motion papers, they seek to dismiss the NYSHRL and NYCHRL claims to the extent such claims are predicated on defendants' alleged actions that occurred prior to October 29, 2015. In their memorandum of law submitted in opposition to plaintiff's

amended complaint, they informally request to dismiss the entire amended complaint as being barred by the statute of limitations and also for failure to state a claim. According to defendants, "[p]laintiff does not allege that his termination was the result of discrimination or retaliation." Memorandum of law at 9. As a result, all of the allegations are based on untimely discrete acts.

As a result of this decision, defendants are not liable to the extent that plaintiff was allegedly harassed and subject to adverse treatment while at the workplace. However, for purposes of a motion to dismiss under CPLR 3211 (a) (5), defendants have failed to establish that the claims alleging discrimination under the NYSHRL and NYCHRL are completely barred by the statute of limitations. As stated, failure to accommodate is a form of disability discrimination and plaintiff alleged timely events linked to his failure to accommodate, including the discrete act of termination. Although the amended complaint may not explicitly state that the termination was discriminatory, it was the culmination of not being able to be accommodated after being out on medical leave, which plaintiff believed to be discriminatory.

Furthermore, a plaintiff may sufficiently allege violations of the NYSHRL and NYCHRL by an employer's failure to engage in the required individualized process to accommodate and also separately allege causes of action for disability discrimination. *See e.g. Phillips v City of New York*, 66 AD3d at 178 ("Separate and apart from the City's failure to engage in an individualized interactive process in evaluating plaintiff's request for accommodation, plaintiff has sufficiently pleaded causes of action for disability discrimination under both statutes"). As a result, in the context of proving a prima facie disability discrimination claim, assuming, without deciding, that plaintiff's discharge gave rise to an inference of discrimination, plaintiff would then be obliged to prove that he was qualified to hold his job. Part of this obligation includes the discussion of, among other things, reasonable accommodations, including possible reassignment. *See e.g. Gill v Maul*, 61 AD3d 1159, 1160-1161 (3d Dept 2009). At this juncture, it is not necessary to delineate between the claims.

As defendants did not withdraw the initial motion seeking partial dismissal and moved for dismissal based on sufficiency of the pleadings, the court declines to address this request. *See e.g. USAA Fed. Sav. Bank v Calvin,* 145 AD3d 704, 706 (2d Dept 2016) (Grounds for relief were not properly in front of the court where the party "expressly requested relief that was dramatically unlike the relief sought in her original motion"). Nonetheless, even if the court were to address the pleadings, defendants' motion for failure to state a claim would be denied.

"[T]o succeed on a CPLR 3211 (a) (7) motion to dismiss, the moving party must convince the court that nothing the plaintiff can reasonably be expected to prove would help; that the plaintiff just doesn't have a claim." *Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC,* 149 AD3d 127, 136 (1st Dept 2017) (internal quotation marks and citations omitted). Furthermore, "the pleading will be deemed to allege whatever may be implied from its statements by reasonable intention." *Id.* at 135.

Although not well articulated nor set forth in a separate cause of action, plaintiff has sufficiently pled that defendants failed to "engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested, as required under the [NYSHRL and NYCHRL]." *Miloscia v B.R. Guest Holdings LLC*, 94 AD3d at 564 (internal quotation marks and citation omitted). In support of their motion to dismiss, defendants do not address the elements of NYSHRL or NYCHRL claims, including the one for failure to accommodate. In addition, as defendants have not yet submitted an answer where they may plead reasonable accommodation as an affirmative defense, under the NYCHRL, the availability of a reasonable accommodation is not something that can be addressed on a pre-answer motion to dismiss.[4]

[4] Similarly, while a reclassification to a different position may be a reasonable accommodation, under the NYSHRL, plaintiff ultimately has the burden to demonstrate that this position was available and that he was qualified.

V. Retaliation

Under both the NYSHRL and the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Executive Law § 296 (7); Administrative Code § 8-107 (7). Under the broader interpretation of the NYCHRL, "[t]he retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7).

When analyzing claims for retaliation, courts apply the burden shifting test as set forth in *McDonnell Douglas Corp. v Green* (411 US at 802), which places the "initial burden" for establishing a prima facie case of retaliation on the plaintiff. For a plaintiff to successfully make out a prima facie claim of retaliation under the NYSHRL, he must demonstrate that: "(1) he has engaged in a protected activity, (2) his employer was aware of such activity, (3) he suffered an adverse employment action based upon the activity, and (4) a causal connection exists between the protected activity and the adverse action." *Harrington v City of New York*, 157 AD3d 582, 585 (1st Dept 2018). Under the NYCHRL, instead of demonstrating that he suffered from an adverse action, plaintiff need only "show only that the defendant took an action that disadvantaged him." *Id.* (internal quotation marks and citations omitted).

"The term protected activity refers to action taken to protest or oppose statutorily prohibited discrimination." *Sharpe v MCI Communs. Servs.*, 684 F Supp 2d 394, 406 (SD NY 2010) (internal quotation marks and citations omitted); *see also Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dept 2010) (internal citation omitted) (referring to protected activity under the NYCHRL as "'opposing or complaining about unlawful discrimination'").

Plaintiff alleges that he filed a series of complaints internally and with external agencies alleging discrimination and that defendants retaliated against him for filing these complaints. Plaintiff continues that the failure to reassign him constituted an act of retaliation against him for

asserting his rights under the NYSHRL and NYCHRL. Here, plaintiff has not even attempted to set forth that he engaged in any timely acts with respect to his retaliation claim. In any event, requests for reassignment cannot support a timely retaliation claim, as requesting an accommodation is not considered protected activity for purposes of a retaliation claim. *See e.g., D'Amico v City of New York,* 159 AD3d 558, 558-559 (1st Dept 2018) ("Neither plaintiff's request for a reasonable accommodation nor his filing of an internal workers' compensation claim constitutes protected activities for purposes of the State and City [Human Rights Laws]").[5]

While the EEOC and other internal complaints are presumably protected activity, they are time barred, as they were made prior to when plaintiff went out on medical leave in 2014. In any event, any complaints made prior to his taking medical leave are too attenuated to support a retaliation claim against defendants for incidents occurring after October 29, 2015. *See e.g. Herrington v Metro-North Commuter R.R. Co.*, 118 AD3d 544, 545 (1st Dept 2014) ("The initial protected activity alleged by plaintiff - her late-2008 complaint about offensive comments . . . is far too removed from defendant's alleged post-2009 (non-time-barred) actions to establish the requisite causal nexus between the protected activity and the adverse action").

Plaintiff further alleges defendants sought to deny that any of his illnesses manifested as a result of working at Ground Zero and that defendants "continuously retaliated" against him since September 11, 2001. However, "plaintiff has failed to demonstrate that these discrete acts of retaliation are part of a retaliatory policy or practice." *Crosland v City of New York*, 140 F Supp 2d 300, 308 (SD NY 2001), *affd Crosland v Safir*, 54 Fed Appx (2d Cir 2002).

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[5] The NYCHRL has been subsequently amended to prohibit retaliation against an individual who requested a reasonable accommodation. However, this amendment took effect in November 2019 and is not retroactive.

The continuing violation doctrine cannot save plaintiff's untimely retaliation claims predicated on events taking place prior to October 29, 2015. As plaintiff does not allege any timely allegations to support a claim for retaliation, the third cause of action, alleging retaliation in violation of the NYSHRL and NYCHRL is dismissed as time-barred.

VI. Federal Claims

Defendants move to dismiss plaintiff's fourth cause of action, grounded in constitutional violations, for failure to state a claim. During oral argument held on September 19, 2019, plaintiff conceded that he was not opposing defendants' motion to dismiss with respect to the initial claims brought under the federal statutes, which include the allegations that defendants violated 42 USC § 1981 and 42 USC § 1983 by intentionally discriminating against him on the basis of his disability. Plaintiff again did not oppose defendants' most recent submissions. Irrespective of whether plaintiff met the pleading standards, as plaintiff did not oppose defendants' motion with respect to this fourth cause of action, he has abandoned it. *See e.g. Cassell v City of New York*, 159 AD3d 603, 603 (1st Dept 2018) ("Plaintiff's claim of municipal liability under 42 USC § 1983 is abandoned because, in the motion court, he did not oppose the City's argument that the complaint had failed to state a section 1983 claim"); *see also Hanig v Yorktown Cent. Sch. Dist.*, 384 F Supp 2d 710, 723 (SD NY 2005) ("[B]ecause plaintiff did not address defendant's motion to dismiss with regard to this claim, it is deemed abandoned and is hereby dismissed").

In the amended complaint, as part of the fourth cause of action, plaintiff alleges that defendants retaliated against him based upon his assertion of his First Amendment right of free speech. He states that, "[a]t all times since the development of his illness," he was vocal in asserting that he was a first responder who was injured due to his work at the Ground Zero site.

Amended complaint, ¶ 27. He continues that, at all times, he was retaliated against for asserting this First Amendment right to free speech.

"To state a claim for First Amendment retaliation under § 1983, a plaintiff must allege that: (1) his speech was constitutionally protected, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and the adverse employment determination against him." *Brunell v Clinton County*, 334 Fed Appx 367, 370 (2d Cir 2009) (internal quotation marks and citation omitted). Plaintiff does not state when the speech was made or to whom. "Notwithstanding the broad pleading standard, bare legal conclusions with no factual specificity do not suffice to withstand a motion to dismiss." *Mid-Hudson Val. Fed. Credit Union v Quartararo & Lois, LLC,* 155 AD3d 1218, 1219 (3d Dept 2017), *affd* 31 NY3d 1090, 1091 (2018). As a result, the undated and broadly asserted claims in the amended complaint are not actionable. Accordingly, defendants are granted dismissal of the fourth cause of action in its entirety, for failure to state a claim.

CONCLUSION

Accordingly, it is

ORDERED that defendants' partial motion to dismiss is granted to the extent that the claims in the amended complaint predicated on events occurring prior to October 29, 2015 are dismissed as barred by the statute of limitations, except, as set forth in the decision, the claims related to the reclassification process shall remain; and it is further

ORDERED that the cause of action for retaliation in violation of the NYSHRL and the NYCHRL is dismissed as barred by the statute of limitations; and it is further

ORDERED that the cause of action alleging constitutional claims is dismissed for failure to state a claim; and it is further

ORDERED that defendants' motion is otherwise denied; and it is

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that defendants serve and file their answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED That this matter is hereby referred to Hon. Suzanne Adams for a conference.

Dated: September 15, 2020

ENTER: _____
HON. LISA A. SOKOLOFF A.J.S.C.