SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **05RCP**

Justice

----------X

DANIELLE WRIGHT,

Plaintiff,

- v -

CITY OF NEW YORK, ROMMELLE CHIN, JOHN SANTUCCI

Defendants.

----------X

INDEX NO. 156870/2021

MOTION DATE 04/19/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion to DISMISS.

Upon the foregoing papers, defendants' motion to dismiss the complaint pursuant to CPLR §3211(a)(7) is granted as to plaintiff's claims for retaliation and negligent training, supervision, and discipline and is otherwise denied. Plaintiff's cross-motion to amend her complaint is granted.

Plaintiff commenced this action on July 22, 2021, asserting claims under Executive Law §296 (also known as the New York State Human Rights Law or "NYSHRL") and New York City Administrative Code §8-107 (also known as the New York City Human Rights Law or "NYCHRL") for disability discrimination, failure to accommodate, hostile work environment, and retaliation as well as common law claims for negligent training, supervision, and discipline.

Plaintiff is a police officer in the New York City Police Department ("NYPD"), a position she has held since 2004 (NYSCEF Doc. No. 11 [Am. Compl. at ¶10]). Defendant Chin is a Lieutenant in the NYPD and defendant Santucci is a Deputy Chief Surgeon in the NYPD (Id. at ¶¶8-9).

In August 2017, plaintiff was diagnosed with multiple sclerosis ("MS") (Id. at ¶19). Following her diagnosis, plaintiff was placed on sick leave from August 2017 through July 2018 (Id. at ¶23). She was treated by an NYPD doctor, Dr. Reilly, in April, May, and June 2018 (Id. at ¶28). In July 2018, plaintiff returned to work on restricted duty at the NYPD Medical Division where she was assigned desk duty (Id. at ¶38). At some point thereafter, Dr. Reilly told plaintiff that "he wanted to survey Plaintiff off of the job" which plaintiff alleges means that he wanted to "recommend that [she] be removed from [her] position" and sent to be evaluated by the NYPD Medical Board regarding whether her removal was "in the line of duty or [due to] ordinary disability" (Id. at ¶¶28-30). Plaintiff alleges that since July 2018, she "has lived in constant fear of termination related to her illness" and that she "signed the survey but wrote 'do not agree' next to her signature" (Id. at ¶¶36-46). The complaint is silent with respect to what happened thereafter in connection with the survey.

In August 2018, "plaintiff got pregnant" and went on maternity leave from November 2018 until January 2019 (Id. at ¶¶51-52). In April 2019, she returned to work on restricted duty (Id. at ¶53). Upon her return, her requests to have her gun and shield returned were initially denied (Id. at ¶¶54-63).

In March 2020, plaintiff applied for an accommodation due to COVID-19, which was ultimately approved[1] (Id. at ¶¶64, 67). Plaintiff returned to work in June 2020 (Id. at ¶68). Plaintiff alleges that, as retaliation for seeking this accommodation, defendant Lieutenant Romelle Chin made her report to the Police Academy for training and then repeatedly assigned her to twelve-hour tours on riot duty during the Black Lives Matter protests to which other similarly situated

[1] Plaintiff's complaint does not specify the accommodation that plaintiff requested. The City infers, reasonably, that the accommodation requested by plaintiff was for time off from work (Id. at ¶ 49).

officers were not assigned (Id. at ¶¶70-71). Plaintiff alleges that at some point during this period, she overheard Chin tell other NYPD officers that plaintiff "should just accept her MS diagnosis and … be home with her daughter" (Id. at ¶79). On July 15, 2020, plaintiff confronted Chin about what she had overheard, and Chin apologized (Id. at ¶¶94, 97-98). Following this conversation with Chin, plaintiff was assigned to sixteen-hour tours of duty at Occupy City Hall, in contravention of the NYPD's "policy and practice to assign these assignments on a rotational basis" (Id. at ¶¶104-105). On or about July 2020, plaintiff filed a complaint with the "Office of Equal Employment" alleging disability discrimination[2] (Id. at ¶90).

On November 9, 2020, plaintiff met with the NYPD Medical Division and presented a doctor's note requesting that she be placed on limited duty due to her MS (Id. at ¶119). This request was denied and plaintiff was directed to report to her current assignment (Id. at ¶119-121). In response, plaintiff was "forced" to go on sick leave to avoid the assignment (Id. at ¶124).

On January 18, 2021, plaintiff reported sick with COVID-19 symptoms and was out sick from January 18, 2021 to February 12, 2021 and from February 15, 2021 to February 19, 2021 (Id. at ¶¶126-127). Plaintiff contends that, in retaliation, defendants refused to "consolidate" these sick days despite being related to the same illness (COVID-19), instead marking her as "chronic" sick, thereby adversely affecting "her ability for upward mobility within the NYPD" through promotion to detective or to specialized units as well as her access to overtime (Id. at ¶¶128-130, 198-199)

On March 3, 2021, plaintiff went to the Medical Division for a follow up with defendant District Surgeon Santucci (Id. at ¶131). At that time, Dr. Santucci ignored plaintiff's request for

[2] It is not clear whether this "Office of Equal Employment" refers to the Equal Employment Opportunity Commission, the Office of Equal Employment Opportunity or some other entity.

accommodation and told her, among other things: "If you go sick again, I will fast track your survey and survey you off this job for anything, immediately!" (Id. at ¶¶132-134).

On or about March 11, 2021, while traveling from the NYPD Community Center in the 75th Precinct in Brooklyn to the Medical Division in Staten Island, plaintiff was injured in an automobile collision (Id. at ¶¶149-150). Thereafter, plaintiff's line of duty injury request in connection with this incident was denied, forcing her to take more sick time (Id. at ¶¶153-155).

On March 22, 2021, plaintiff spoke with the Integrity Control Officer of the NYPD Medical Division and informed the Integrity Control Officer that Dr. Santucci was "inappropriate, rude, and very unprofessional" (Id. at ¶160). In response, the Integrity Control Officer advised plaintiff "that she had to notify the Office of Equal Employment" (Id. at ¶161).

Plaintiff returned to limited duty on April 2, 2021 (Id. at ¶166-167). On April 5, 2021, plaintiff still had severe pain and "went sick" again (Id. at ¶170). On May 11, 2021, plaintiff's gun and ID card were returned to her (Id. at ¶188). On or about May 17, 2021, plaintiff was transferred to the 62nd Precinct in Brooklyn (Id. at ¶190). On June 10, 2021, plaintiff was directed to appear for an internal NYPD interview regarding allegations that plaintiff was abusing sick time, was out of residence during sick time, and was misusing the computer (Id. at ¶¶152-153).

Defendants now move for an order dismissing the complaint, pursuant to CPLR §3211(a)(5) and (7). Plaintiff opposes and cross-moves to amend her complaint to: (1) withdraw her NYSHRL claims; and (2) plead additional facts relevant to her disability discrimination claim under the NYCHRL.

DISCUSSION

The Court first addresses plaintiff's cross-motion to amend her complaint. Generally, "[l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly

from the delay" (Murray v City of New York, 51 AD3d 502, 503 [1st Dept 2008] [internal quotations and citations omitted]). "[P]laintiff need not establish the merit of [her] proposed new allegations but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit..." (MBIA Ins. Corp. v Greystone & Co. Inc., 74 AD3d 499, 500 [1st Dept 2010] [internal citations omitted]). The Court discerns no prejudice to defendants here and, accordingly, grants plaintiff's cross-motion.

The Court now turns to Defendants' motion to dismiss the Amended Complaint. That branch of defendants' motion to dismiss the complaint, pursuant to CPLR §3211(a)(5), as barred by the applicable three-year statute of limitations (CPLR §214[2]), is denied. In her opposition papers, plaintiff maintains, and defendants do not dispute, that her claims arise out of events after July 2018.

As to the remaining branches of the motion, the Court finds as follows.

"When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference. The ultimate question is whether, accepting the allegations and affording these inferences, plaintiff can succeed upon any reasonable view of the facts stated" (Doe v Bloomberg, L.P., 36 NY3d 450, 454 [2021] [internal citations and quotations omitted]). Claims arising under the NYCHRL, which must be reviewed with "an independent liberal construction analysis in all circumstances… targeted to understanding and fulfilling … the City HRL's uniquely broad and remedial purposes" (Williams v NYCHA, 61 AD3d 62, 6627 [1st Dept 2009] [internal citations and quotations omitted]) and should be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (Albunio v City of New York, 16 NY3d 472, 477-478 [2011]).

Disability Discrimination Claim

That branch of defendants' motion to dismiss plaintiff's disability discrimination claim is denied. To state a claim of disability discrimination under the NYCHRL, plaintiff must allege that: (1) she is a member of a protected class, (2) she was qualified for her position, (3) she adversely or differently treated based on her disability in a way that disadvantaged her and (4) this action occurred under circumstances giving rise to an inference of discrimination (See e.g., Hosking v Mem. Sloan-Kettering Cancer Ctr., 186 AD3d 58, 62 [1st Dept 2020]; see also Harrington v City of New York, 157 AD3d 582 [1st Dept 2018]). In this case, the parties dispute only the last two elements, i.e., whether plaintiff has sufficiently alleged that she was treated differently, due to her disability, in a way that disadvantaged her and that such treatment occurred under circumstances giving rise to an inference of discrimination.

Plaintiff has sufficiently stated a claim for disability discrimination. Her allegations that she was assigned to undesirable shifts in contravention of her seniority, denied promotion and access to overtime, and transferred to a different precinct are sufficient to allege treatment in a way that disadvantaged her (See Santiago-Mendez v City of New York, 136 AD3d 428 [1st Dept 2016] [denial of promotion to Detective 2nd Grade "adequately alleges an adverse employment action"]; James v City of New York, 144 AD3d 466 [1st Dept 2016] [allegations that plaintiff was "written up, twice suspended, and ultimately demoted [satisfied] the third element of disadvantageous treatment"]).

Moreover, plaintiff's allegations concerning Chin's statements regarding her MS diagnosis are sufficient to suggest that these adverse acts were taken under circumstances giving rise to an inference of discrimination (See Campbell v New York City Dept. of Educ., 200 AD3d 488 [1st Dept 2021] ["allegations that O'Donnell made disparaging comments about plaintiff's race on a

few occasions, while issuing several write-ups and ultimately transferring her to another school, could support plaintiff's allegation that she was treated 'less well,' at least in part due to discriminatory reasons, under the City HRL"]; see also Santiago-Mendez v City of New York, 136 AD3d 428, 429 [1st Dept 2016] [inference of discrimination established through allegations "that Captain Kelly told a Hispanic male detective that he 'should go back to landscaping' and that she was shut out of meetings because she was not part of the "Boys' Club"]).

Failure to Accommodate Claim

That branch of defendants' motion to dismiss plaintiff's failure to accommodate claim is also denied. The elements of a claim for failure to accommodate under the NYCHRL are that: (1) plaintiff has a disability under the relevant statute; (2) the employer had notice of plaintiff's disability; (3) with reasonable accommodations, plaintiff could have performed the essential functions of his job; and (4) the employer refused to make such accommodations (See Miloscia v B.R. Guest Holdings LLC, 33 Misc3d 466 [Sup Ct, New York County, 2011]; Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881, 885 [2013]).

Here, plaintiff's disability is not in dispute. Plaintiff has also alleged that she notified defendants of her disability and requested accommodation, submitting at least one note from her doctor recommending that she be placed on limited duty. To the extent defendants, in opposition, suggest that a more formal request is required, the Court disagrees (See Cascalenda v City of New York, 2021 NY Slip Op 30936[U], 5 [Sup Ct, New York County 2021] ["The NYPD has an affirmative obligation to accommodate an officer's needs when it is aware of the officer's disability"]).

In addition, plaintiff alleges that an assignment to a non-patrol position would best allow her to perform with her MS diagnosis without the repeated stress and strain of being full duty, per

her doctor's recommendation. In opposition, the City notes that the complaint also states that plaintiff is currently able to perform the essential functions of her full-duty job without reasonable accommodation (NYSCEF Doc. No. 11 [Am. Compl. at ¶¶84, 145, 227]), and argues that this completely undermines plaintiff's failure to accommodate claim. The Court recognizes the discrepancy, however, viewing the complaint in the light most favorable to plaintiff, the Court finds that this element has been sufficiently pled for purposes of this motion. Finally, plaintiff has sufficiently alleged that defendants failed to accommodate her request for limited duty. Accordingly, defendants' motion to dismiss plaintiff's failure to accommodate claim is denied.

Hostile Work Environment Claim

The City's motion to dismiss plaintiff's hostile work environment claim is also denied. Under the NYCHRL, a hostile work environment claim requires that plaintiff allege he or she was treated "less well than other employees" because of the relevant characteristic (Reichman v City of New York, 179 AD3d 1115, 1118 [2d Dept 2020] [internal citations omitted], lv to appeal denied, 36 NY3d 904 [2021]). This treatment must exceed "what a reasonable victim of discrimination would consider petty slights and trivial inconveniences" (Id.).

In this case, plaintiff satisfies this standard by pleading allegations of continual threats to survey her off the job as well Chin's statements that she should leave the NYPD (See Sims v Trustees of Columbia Univ., 168 AD3d 622, 623 [1st Dept 2019] [comments by plaintiff's supervisor that plaintiff was "too old for the job," that he worked like he "just came back from surgery," and that he had "too many worker's comp cases and ... should resign" raised issues of fact as to whether plaintiff was subjected to a hostile work environment under NYCHRL]).

Retaliation Claim

That branch of defendants' motion to dismiss plaintiff's retaliation claim is granted. To establish a claim of unlawful retaliation under the NYCHRL, a plaintiff must show that: (1) she engaged in a protected activity; (2) the employer was aware of the activity; (3) the employer acted in a manner reasonably likely to deter plaintiff from engaging in protected activity; and (4) a causal connection existed between the protected activity and the alleged retaliatory action (Thomas v Mintz, 60 Misc 3d 1218(A) [Sup Ct, NY County 2018], affd as mod, 182 AD3d 490 [1st Dept 2020]). "Protected activity" in this context refers to "actions taken to protest or oppose statutorily prohibited discrimination" (Id.). Notably, a request for a reasonable accommodation does not constitutes a protected activity under the NYCHRL (D'Amico v City of New York, 159 AD3d 558, 558-59 [1st Dept 2018]).

Plaintiff asserts she engaged in protected activity when she: (1) refused to sign her survey in July 2018; and (2) filed complaints with the Office of Equal Employment in July 2020 and March 2021. However, plaintiff's July 2018 refusal to sign her survey did not convey that she was discriminated against unlawfully and therefore does not constitute protected activity under the City HRL (See Crookendale v New York City Health and Hosps. Corp., 175 AD3d 1132, 1132-33 [1st Dept 2019] ["vague, informal complaints" to supervisor's superior and Equal Employment Opportunity office did not constitute protected activity under City HRL as they were insufficient to convey to others that plaintiff was discriminated against unlawfully]). Neither does plaintiff's March 2021 complaint to the Office of Equal Employment—as reported by the Integrity Control Officer—constitute protected activity, because plaintiff does not allege that she complained to that Integrity Control Officer of any discrimination but rather that Dr. Santucci acted in a manner that was "inappropriate, rude, and very unprofessional" (Id.; see also Pezhman v City of New York, 47

AD3d 493, 494 [1st Dept 2008] ["Filing a grievance complaining of conduct other than unlawful discrimination is not a protected activity subject to a retaliation claim under the State and City Human Rights Laws"]).

Accordingly, the only protected activity set forth in the complaint is plaintiff's July 2020 complaint to the Office of Equal Employment. Plaintiff's retaliation claim still fails, however, as she has not alleged a causal link between this July 2020 complaint and the retaliatory conduct in question. "A causal connection may be established either indirectly, by showing that the adverse closely followed in time the protected activity, or directly, through evidence of retaliatory animus, such as verbal or written remarks" (Thomas v Mintz, 60 Misc 3d 1218(A) [Sup Ct, NY County 2018] [internal citations and quotations omitted], affd as mod, 182 AD3d 490 [1st Dept 2020]). All of the retaliatory acts alleged—defendants' denial of plaintiff's line of duty injury in March 2021, defendants' refusal to consolidate plaintiff's sick leave and instead designating her as "chronic sick" in early 2021, and defendants transfer of plaintiff to the 62nd Precinct in May 2021—are too distant in time from the July 2020 complaint to establish a causal link based solely on temporal proximity (See e.g., Bantamoi v St. Barnabas Hosp., 146 AD3d 420, 420-21 [1st Dept 2017] [five month time period between plaintiff's protected activity and defendant's referral of plaintiff for psychiatric evaluation and her placement on a medical leave of absence not sufficient temporal proximity to establish causal connection]). Moreover, plaintiff has not alleged any other facts that could directly establish a retaliatory animus (Cf. Harrington v City of New York, 157 AD3d 582 [1st Dept 2018]). Accordingly, this claim must be dismissed.

Negligent Training, Supervision and Discipline

Defendants' motion to dismiss plaintiff's claims for negligent training, supervision, and discipline is granted. An essential element of all of these claims is that the City knew or should

have known of its employees' propensity for discriminatory conduct alleged (See Sheila C. v Povich, 11 AD3d 120, 129-30 [1st Dept 2004] [negligent hiring and retention]; N. X. v. Cabrini Med. Ctr., 280 AD2d 34, 42 [1st Dept 2001], aff'd as mod., 97 NY2d 247 [2002] [negligent supervision]; Dobroshi v. Bank of America, N.A., 65 AD3d 882, 885 [1st Dept 2009] [negligent training]). The complaint provides no factual allegations in this regard and therefore, these claims are dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted in part, to the extent that plaintiff's claims for retaliation and for negligent training, supervision, and discipline are dismissed, and is otherwise denied; and it is further

ORDERED that plaintiff's cross-motion to amend the complaint is granted; and it is further

ORDERED that the amended complaint shall be deemed served upon service of this order with notice of entry; and it is further

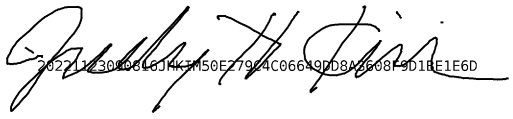
ORDERED that the City of New York shall serve and file its answer to the amended complaint within twenty days after service of a copy of this order with notice of entry; and it is further

ORDERED that within twenty days from the date of this decision and order, counsel for defendants shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Room 119) who are directed to mark their records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



11/23/2022
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE