SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING, J.S.C.** **PART** **62**

----------X

VIVIANA AYENDE,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY POLICE PENSION FUND, MATTHEW SOUTHARD, ADAM BLOOM

Defendant.

INDEX NO.	153423/2022
MOTION DATE	July 25, 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, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISS

This employment law action arises out of allegations of disability discrimination in violation of the New York City Human Rights Law (Administrative Code of City of N.Y. § 8-107) ("NYCHRL"). Plaintiff also alleges failure to accommodate, hostile work environment and negligent failure to train, supervise and discipline. Defendants, the City of New York ("City"), the New York City Police Pension Fund ("PPF"), Adam Bloom ("Bloom"), and Matthew Southard ("Southard") (collectively "defendants" or "the City") move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). Plaintiff opposes and cross-moves to amend the complaint.

BACKGROUND

Plaintiff joined the New York City Police Department in 2005. On October 23, 2018, plaintiff's supervisor instructed her to partner with another police officer that had "abandoned" her on a previous shift (proposed amended complaint, NYSCEF Doc No. 25, ¶ 45). Plaintiff was suspended for 30 days for failure to comply with an order by her superior. Following the suspension, plaintiff left a handwritten letter to her children and husband and drove to Connecticut, where she owned a home. Plaintiff states that she wrote the letter simply because she planned to relocate to Puerto Rico, but the contents contained apologies to each of her children asking them to forgive her and instructions to her husband to have the mortgage transferred into his name. She wrote that she would "say [her children's] names without stopping until [she] couldn't breathe anymore" (handwritten letter, NYSCEF Doc No. 10 at 9). Alarmed by the letter, plaintiff's husband, who is also an NYPD officer, alerted NYPD and the Danbury Police Department that his wife was missing. When plaintiff was eventually found, she was taken to Danbury Hospital where she was psychologically evaluated and released, after being kept overnight for observation. On October 25, 2018, NYPD officers took plaintiff to its medical unit, where an NYPD psychologist evaluated her. Thereafter, plaintiff was involuntarily admitted to the psychiatric unit of New York Presbyterian Columbia University Hospital for two weeks.

Once plaintiff was discharged from the hospital and her suspension was over, she was placed on restricted duty, where she performed administrative functions. She was monitored by NYPD's psychological evaluation section ("PES") and was required to meet with an NYPD psychologist monthly. Eventually, that psychologist was Southard, who was supervised by Bloom. Southard found that plaintiff suffered from an undetermined personality disorder with mixed personality traits and an unspecified anxiety disorder that made her unfit to perform the duties of

an NYPD officer (NYPD Psychological Evaluation and Endorsements, NYSCEF Doc No. 13 at 7).

On December 8, 2020, after nearly three years of restricted duty, Southard recommended that plaintiff be "surveyed" from the NYPD with a disability retirement. Being surveyed would essentially mean that plaintiff is forced to retire from the NYPD due to a disability. On April 18, 2022, the Medical Board of the Police Pension Fund concurred with Southard's recommendation, which had been endorsed by several other NYPD officials, including PES's Director, the Deputy Chief Surgeon of Psychiatry, the Commanding Officer of the Medical Division to the Chief of Personnel, the Executive Officer of the Chief of Personnel, the Chief Department Surgeon, the Police Commissioner, and the Chief of Personnel (NYSCEF Doc No. 13).

Plaintiff contends, that she is not disabled but is wrongly perceived as psychologically disabled, and, as a result, she was subjected to monthly PES meetings, placed on restricted duty and is being forced to retire. Plaintiff's complaint states, in part:

> 82. Plaintiff as a result of her restricted status began a series of transfers which were essentially the NYPD reasonably accommodating Plaintiff based on their belief that Plaintiff was disabled.
>
> 83. Plaintiff was transferred to the Manhattan Courts Section in November 2018.
>
> 84. Plaintiff worked in that command until June 2019 when she was transferred to the 40th Precinct where she worked primarily on the telephone switchboard and in the complaint room.
>
> 85. In January 2020, Plaintiff was transferred to the Firearm and Tactics Section in the Vest Unit.
>
> 86. In September 2020, Plaintiff was transferred to the Queens Warrant Section where she was assigned the wheel.
>
> 87. At each one of these assignments, Plaintiff was able to perform the essential functions of her assignments in the role she was given.

...

98. Plaintiff repeatedly stated to the Defendants herein that she could perform with accommodation, as she had for the previous three (3) years if the NYPD believed she was a danger to herself or others but in reality, she should be allowed to work full duty as there was no medical basis for believing she was suicidal at this time

(NYSCEF Doc No. 25).

Plaintiff denies that she is or ever was mentally unwell or suicidal. Plaintiff is presently still on restricted duty and is not in possession of her service weapon or badge.

DISCUSSION

A. Plaintiff's Cross-Motion to Amend

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 quotation marks and citations omitted]). "[P]laintiff need not establish the merit of its 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]).

Defendant opposes plaintiff's cross-motion to amend on the grounds that such amendment would be futile. The Court finds no prejudice to defendants here and, accordingly, grants plaintiff's cross-motion. Hereinafter, the proposed amended complaint is referred to as the "Amended Complaint"

B. Defendants' Motion to Dismiss

1. Statute of Limitations

At the outset, defendants move to dismiss portions of plaintiff's discrimination claims as barred by the statute of limitations. Actions to recover damages for alleged employment discrimination under the NYCHRL are subject to a three-year statute of limitations (*see* Administrative Code § 8-502[d]; *Kent v Papert Cos.*, 309 AD2d 234, 240 [1st Dept 2003]).

Defendants argue that since plaintiff commenced this action on April 21, 2022, her NYCHRL claims arising before April 21, 2019 are barred by the statute of limitations.

Plaintiff's contentions are two-fold. First, she argues that pursuant to the continuing violation doctrine, "[p]laintiff's factual allegations are actionable as the results of the discrimination are continual to date" (NYSCEF Doc No. 24 at 17). Second, she argues that "as a result of the Covid-19 statute of limitation tolling, "plaintiff is entitled to a 228-day addition to the statute of limitations of three (3) year set forth under New York City Human Rights Law" (NYSCEF Doc No. 25 ¶ 4).

Pursuant to the NYCHRL, a continuing violation may be found "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" (*Morgan v NYS Atty. Gen.'s Off.*, 2013 WL 491525, at *12, 2013 US Dist LEXIS 17458, *37 [SD NY, Feb. 8, 2013, No. 11 CIV 9389 PKC JLC] [internal quotation marks and citations 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" (*Cornwell v Robinson*, 23 F3d 694, 703-704 [2d Cir 1994][internal quotation marks and citation omitted]; *Center for Independence of the Disabled v Metropolitan Transp. Auth.*, 184 AD3d 197, 200-201 [1st Dept 2020] ["Under the

NYCHRL...continuing acts of discrimination within the statutory period will toll the running of the statute of limitations until such time as the discrimination ends"]).

Here, plaintiff fails to plead any instances where a continuing violation theory could be applied. While she states that the discriminatory animus towards her continues presently, neither her pleadings nor her papers point to any events that the court could construe as such. Assuming arguendo, plaintiff is referring to defendants' failure to accommodate her request to indefinitely work on a restricted capacity, "an employer's rejection of an employee's proposed accommodation ..." is a discrete act that "does not give rise to a continuing violation" (*Elmenayer v ABF Freight Sys., Inc.*, 318 F 3d 130, 134-135 [2d Cir 2003]). As such, the continuing violation doctrine is inapplicable.

Turning to plaintiff's Covid-19 tolling contention, on March 20, 2020, Governor Cuomo signed Executive Order ("EO") No. 202.8 in response to the pandemic. As relevant here, the EO "tolled" any "specific time limit for the commencement, filing, or service of any legal action ... until April 19, 2020" (9 NYCRR 8.202.8). That toll was extended through several subsequent EOs, the last of which remained in effect until November 3, 2020 (*see Murphy v Harris*, 210 AD3d 410, 411 [1st Dept 2022]).

According to the First Department in *Murphy v Harris* (*id.*) and *Matter of New York City Tr. Auth. v American Tr. Ins. Co.*, (211 AD3d 643, 643 [1st Dept 2022]), plaintiff's calculation of the statute of limitations, taking into consideration the tolling of 228 days the EOs authorized, is correct. While typically, courts calculate the expiration of statutes of limitations based upon when an action accrues, here, plaintiff computes backwards, from the date of filing suit. Since plaintiff's action was commenced on April 21, 2022, her statute of limitations period began to

run on September 5, 2018. As such, any causes of actions accruing prior to September 5, 2018, are time-barred.

Lastly, defendants' contention that plaintiff's negligent failure to train, supervise and discipline claims allege that defendants' actions were intentional, thus giving rise to a one-year statute of limitations is unsupported by the papers or pleadings.

2. Motion to Dismiss Standard

"On a motion pursuant to CPLR 3211 (a) (7) to dismiss for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Shah v Exxis, Inc.*, 138 AD3d 970, 971 [2d Dept 2016]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Rabos v R & R Bagels & Bakery, Inc.*, 100 AD3d 849, 851-852 [2d Dept 2012]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]).

In order to prevail on a defense founded on documentary evidence, pursuant to CPLR 3211 (a) (1), the documents relied upon must definitively dispose of plaintiff's claim (*See Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995]). Further, the documentary evidence must be such that it resolves all factual issues as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). To be considered "documentary," the evidentiary papers must be unambiguous and of undisputed authenticity and be "essentially undeniable" and able to support the motion on its own (*Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc.*, 120 AD3d 431, 432-433 [1st Dept 2014] *citing* David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 22). "If the documentary proof disproves an essential allegation of the complaint, dismissal, pursuant to CPLR 3211 (a) (7), is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action" (*Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 530 [2d Dept 2007]).

a. NYCHRL Employment Discrimination

NYCHRL makes it unlawful for an employer to discharge or discriminate against an individual because of a disability. It states:

> It shall be an unlawful discriminatory practice ... [f]or an employer or an employee or agent thereof, because of the actual or perceived ... 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

NYC Admin. Code 8-107 (1) (a).

Disability is defined under the NYCHRL as "any physical, medical, mental or psychological impairment, or a history or record of such impairment" (*id.* at 8-102[16][1]).

Plaintiff must state a *prima facie* cause of action for employment discrimination by pleading that: (1) they are members of a protected class; (2) they are qualified to hold the position; (3) they suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination (*see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270 [2006]; *see also Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). However, the NYCHRL is not a "general civility code," and a plaintiff must still show "that the conduct is caused by a discriminatory motive" (*see Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F 3d 102, 110 [2d Cir 2013]).

Plaintiff has sufficiently plead a *prima facie* case that she is being forcibly retired by defendants because she is perceived to be disabled; by showing that the perceived disability is a protected class pursuant to NYCHRL; that she was qualified for her position; and, that the circumstances of her forced retirement give rise to an inference of discrimination (*see Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009] ["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"] [internal citations omitted]).

While defendants submit plaintiff's medical records and her records from NYPD's psychological evaluations to show that she is not qualified for her position, these records only create questions of fact that are for a jury to decide. As such, these records do not qualify as documentary evidence to support dismissal pursuant to CPLR 3211 (a) (1) (*Amsterdam Hospitality Group,* 120 AD3d at 432 [Documentary evidence typically means "judicial records such as judgments and orders...[and] out-of-court transactions, such as contracts, deeds, wills, mortgages..." the contents of which are "essentially undeniable"] [internal citation omitted]).

b. Failure to Accommodate

To establish a *prima facie* claim for failure to accommodate under the NYCHRL, the plaintiff must show that she: (1) is a person with a disability or perceived to have a disability under the meaning of the statute; (2) an employer covered by the statute had notice of her disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations (*see Sivio v Village Care Max*, 436 F Supp 3d 778, 790 [SD NY 2020]). "Because the NYCHRL presumes all accommodations to be reasonable until proven otherwise, Defendant bears the burden of demonstrating, as an affirmative defense, that the requested accommodation was overly burdensome, or that Plaintiff could not perform the essential functions of his job even with a reasonable accommodation" (*LeBlanc v United Parcel Serv.*, 2014 WL 1407706, at *18, 2014 US Dist LEXIS 50760, *58 [SD NY Apr. 11, 2014, No. 11 CIV. 6983 KPF]; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 885 [2013], *see also Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 834-835 [2014]).

The instant matter is unique in that plaintiff claims she is not disabled and should be allowed to return to full duty, or, in the alternative, continue in her restricted duty status even though she is not disabled, but not be forced to retire. Plaintiff's amended complaint only serves to highlight the incongruity:

> 82. Plaintiff as a result of her restricted status began a series of transfers which were essentially the NYPD **reasonably accommodating Plaintiff based on their belief that Plaintiff was disabled**.
>
> ...
>
> 172. Not once during these visits have the NYPD doctors tried to actually treat Plaintiff for her **underlying disability**, spoke with her private doctor nor engaged her in cooperative dialogue as to how best to **accommodate her disability**

(NYSCEF Doc No. 25 [emphasis added]).

However, construing the complaint liberally and drawing all reasonable inferences in favor of the pleader, this court, at this early stage, finds that plaintiff has made allegations that, if true, would carry her "de minimis burden" of establishing a *prima facie* case of failure to accommodate in violation of the NYCHRL (*Exxon Shipping Co. v New York State Div. of Human Rights,* 303 AD2d 241, 241 [1st Dept 2003], *lv denied* 100 NY2d 505 [2003]). Notably, plaintiff pleads that she can carry out her duties as a police officer as she has been for the past several years and her forced retirement is defendants' refusal to accommodate her.

Defendants argue that plaintiff's monthly PES meetings conclusively prove that they engaged in a cooperative dialogue with plaintiff and that it was her refusal to participate that broke down discussions. However, at this stage, and without discovery or depositions, it is unclear exactly what occurred in those meetings and whether accommodations were ever discussed or contemplated. Accordingly, defendant's motion to dismiss the cause of action sounding in failure to accommodate is denied.

c. Hostile Work Environment

To state a claim for hostile work environment under the NYCHRL, a plaintiff must allege that she "has been treated less well than other employees because of a [protected status]" (*Williams v NYC Hous. Auth.*, 61 AD3d 62, 78 [1st Dept 2009]; *see Wolfe-Santos v NYS Gaming Commn.*, 188 AD3d 622 [1st Dept 2020]). Here, plaintiff has sufficiently alleged facts that would establish that she was subjected to a hostile work environment, including that she was threatened at many of the PES meetings that she would be "surveyed off" due to her mental health status. Accordingly, plaintiff's claim for hostile work environment stands.

d. Negligent Failure to Train, Supervise, and Discipline

Plaintiff's complaint is devoid of any factual allegations to support claims of negligent failure to train, supervise or discipline its employees with respect to discrimination. Conclusory allegations are insufficient to state a claim under the NYCHRL *(Whitfield-Ortiz v Department of Educ. of the City of N.Y.*, 116 AD3d 580 [1st Dept 2014]). Accordingly, those portions of the amended complaint are dismissed.

e. Individual Defendants

An individual employee may be held liable, under the NYCHRL, for aiding and abetting an employer's discriminatory conduct, even when the individual lacks the authority to hire or fire the plaintiff (Administrative Code § 8-107[6]; *see Feingold v State of New York*, 366 F3d 138, 158 [2d Cir 2004]). An aiding and abetting claim against an individual employee requires a plaintiff to show that the employee actually participated in the conduct giving rise to the discrimination claim (*id.* at 158-159; *see also Kato v Ishihara*, 239 FSupp2d 359, 365 [SD NY 2002]) (finding that an individual may be held liable under the NYCHRL if he or she engaged in "discriminatory acts").

Plaintiff's claim against Southard and Bloom is based on the allegation that they perpetuated a hostile work environment by labelling plaintiff as disabled and threatening to forcibly retire her.

In this case, giving the plaintiff the benefit of every favorable inference, as the court must, and considering the early stage of the proceedings, the court finds that the allegations against Southard and Bloom are sufficient to support her claim. Therefore, claims against the individual defendants may proceed.

CONCLUSION

Based upon the foregoing, it is hereby:

ORDERED that defendants' motion to dismiss is granted only to the extent that plaintiff's claims sounding in negligent failure to train, supervise and discipline are dismissed. The remaining branches of defendants' motion are denied; and it is further

ORDERED that plaintiff's cross-motion for leave to amend the complaint is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service.

8/28/2023
DATE

J. MACHELLE SWEETING, JSC

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