

**Greenidge v City of New York**

2023 NY Slip Op 33506(U)

October 10, 2023

Supreme Court, New York County

Docket Number: Index No. 155062/2022

Judge: Judy H. Kim

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

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

*Justice*

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RODNEY GREENIDGE,

Plaintiff,

- v -

CITY OF NEW YORK, SALIA DETORE, JOHN SANTUCCI,

Defendants.

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**INDEX NO.** 155062/2022

**MOTION DATE** 12/06/2022

**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

were read on this motion for DISMISSAL.

Upon the foregoing papers, defendants' motion to dismiss the complaint pursuant to CPLR §3211(a)(7) is granted in part.

Plaintiff commenced this action on June 15, 2022, asserting claims under New York City Administrative Code §8-107 (also known as the New York City Human Rights Law or "NYCHRL") for employment discrimination (based on race and disability), failure to accommodate, hostile work environment, and retaliation<sup>1</sup> as well as common law claims for negligent supervision, training, and discipline.

Plaintiff's complaint alleges as follows:

Plaintiff is a police officer in the New York City Police Department ("NYPD"), a position he has held since 2003. Upon graduating from the NYPD's Police Academy, plaintiff was assigned

<sup>1</sup> To the extent plaintiff also seeks punitive damages, pursuant to Administrative Code §8-502, for defendants' violations of the NYCHRL, the Court observes that Administrative Code §8-502 does not "waive the City's immunity to punitive damages liability" (*Krohn v New York City Police Dept.*, 2 NY3d 329, 335 [2004])

to the 75th Precinct. On October 16, 2020, plaintiff injured his right wrist and suffered a hernia in the line of duty. Plaintiff was out of work on medical leave for two-and-a-half weeks following this injury. Plaintiff subsequently went to the NYPD's Medical Division for an appointment with defendant District Surgeon John Santucci and presented him with a note—presumably from plaintiff's personal physician—stating that plaintiff needed more time to recover from his wrist fracture and was not yet fit to return for work. Santucci ignored this note and placed plaintiff back on full duty, beginning on November 11, 2020. Rather than return to full duty, plaintiff called out sick on that date and continued to call out sick for an unspecified amount of time thereafter. Plaintiff asserts that his partner, a white officer, was “put out” on medical leave by the medical division until December 7, 2020 (though the date his partner went out on medical leave is not provided).

Plaintiff met with Santucci again on November 16, 2020, and Santucci told plaintiff that he would be forced to “go chronic”—i.e., be marked as a chronic abuser of sick leave—if he continued to call out of work (Id. at ¶29). Santucci also refused plaintiff's request to be transferred to an NYPD orthopedic doctor (defendant Salia Detore). Plaintiff saw his personal orthopedic doctor on December 1, 2020, who told plaintiff that he was “totally disabled and needed more time to properly heal from his injury” (Id. at ¶41)

On December 1, 2020, plaintiff was transferred from the 75th Precinct to the NYPD's Medical Division. Plaintiff had hernia surgery on December 7, 2020. At some (unspecified) date after this surgery, plaintiff filed a “complaint of discrimination” against Santucci with the Office of Equal Employment Opportunity (Id. at ¶¶45-46]). At some point after this complaint was made, plaintiff was transferred back to the 75th Precinct. Plaintiff alleges that Santucci bragged about

effecting this transfer, noting that he was “sending [p]laintiff back to work with a cast on his hand” (Id. at ¶49).

From December 2020 until the present date, plaintiff has been forced to see Santucci on monthly basis and at each doctor’s appointment it is insinuated that Plaintiff is faking his injury and is repeatedly threatened with being “surveyed” off of the job, i.e., forced to retire based on his disability. Plaintiff alleges he was told on December 2, 2021, that such survey proceedings have been initiated. He further alleges that on June 2, 2022, he met with NYPD District Surgeon Dr. Patetsios, who informed him that he was disabled, and that the NYPD would be initiating survey proceedings against plaintiff to force him off the job. Any such survey has not yet occurred, though plaintiff “lives in constant fear” of this possibility (Id. at ¶68).

Plaintiff has also been seen by Detore on at least four occasions between January 21, 2021 and May 5, 2022, who has also told plaintiff he is not injured and directed that plaintiff be sent to Psychological Services or return to full duty. Plaintiff asserts, baldly, that such a referral is “a common retaliatory tactic used against officers who speak out about unlawful NYPD practices or complain about discrimination within the Department” (Id. at ¶76). Whether plaintiff has actually undergone such an evaluation is not stated.

Plaintiff maintains that, during this period, defendants could have accommodated him by allowing him to work at the Fleet Services Unit or work on restricted duty at various offices of the NYPD, including its Detective Bureau, Headquarters, Court Sections, Fleet Services, Quartermaster, Firearm and Tactics Section, Queens Warrant Section, any of the Public Service Areas Viper Units, Manhattan Courts Section, Police Academy, Medical Division or the telephone switchboard operator as well as other assignments within each of the 77 NYPD Precincts, 12 Transit Districts and 9 Public Service Areas.

Plaintiff alleges that these NYPD doctors are improperly trained insofar as they are inadequately educated about the Americans with Disabilities Act, New York State Executive Laws or New York City Human Rights law. He asserts that, had they received proper training on these laws, they would have acknowledged his disability and granted him the accommodation sought.

Finally, plaintiff asserts that, as a result of the foregoing, he has been denied promotions, within the NYPD and has suffered a resulting economic loss as well as emotional distress.

Defendants now move, pursuant to CPLR §3211(a)(7), to dismiss the complaint. Plaintiff opposes, arguing that, under the notice pleading standard applicable to his NYCHRL claims he has alleged sufficient facts to state each of his claims.

### DISCUSSION

“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, in particular, must be reviewed with “an independent liberal construction analysis in all circumstances ... targeted to understanding and fulfilling ... the [NYCHRL’s] uniquely broad and remedial purposes” (Williams v New York City Hous. Auth., 61 AD3d 62, 66 [1st Dept 2009] [internal citations and quotations omitted]) and must 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]). Employment discrimination claims under the NYCHRL, in particular, are reviewed under a notice pleading standard, in which “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 [1st Dept 2009] [internal citations and quotations omitted]).

*Employment Discrimination Based on Disability*

In light of the foregoing, defendants’ motion to dismiss plaintiff’s employment discrimination claim based on disability is denied. To state such a claim, plaintiff must allege that: (1) he is a member of a protected class, (2) he was qualified for his position, (3) he was adversely or differently treated based on his disability in a way that disadvantaged him 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]). The parties’ dispute only the last two of these requirements.

The City argues, and the Court agrees, that plaintiff’s allegations that he may lose his job, and suffer lost wages are hypothetical and therefore are insufficient to allege an adverse or disadvantageous act against him. Neither do the complaint’s allegations that NYPD doctors concluded that plaintiff is medically capable of returning to work and recommended that he do so suggest disadvantageous treatment (See Aykac v City of New York, 2022 NY Slip Op 33639[U], 20 [Sup Ct, NY County 2022] [“The NYPD’s medical determinations, whether ‘correct’ or not, cannot constitute a basis for the plaintiff’s claim that he was discriminated against on the basis of disability”]; see also Pesantez v the City of New York, 2023 NY Slip Op 32249[U], 7 [Sup Ct, NY County 2023]). Ultimately, however, plaintiff’s allegations that he was denied promotion and transferred to a different precinct based on his assertions of disability are sufficient, at this juncture, to state that he was treated in a way that disadvantaged him (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”]). Moreover, plaintiff’s allegations that the individual defendants’ consistently threatened to “survey” him out of the NYPD based on his claimed injury are sufficient to support an inference of discrimination based on disability<sup>2</sup> (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”]).

*Employment Discrimination Based on Race*

Defendants’ motion to dismiss plaintiff’s claim of employment discrimination based on his race is also denied. Although, as the City notes, the complaint never indicates plaintiff’s race, its allegation that he was discriminated by race as demonstrated by the fact that his partner, who is white, was granted time on medical leave not afforded to plaintiff is, taking all reasonable inferences for plaintiff, sufficient to allege that plaintiff is not white. In his opposition to this motion, plaintiff’s counsel clarifies that plaintiff is African American (NYSCEF Doc. No. 10 [Memo. of Law. in Opp. at p. 20]).

The City’s argument that plaintiff has not alleged facts to support an inference of discriminatory animus based on his race fails. At this juncture, affording the complaint all reasonable inferences and mindful of the generous notice pleading standard to be applied, the Court concludes that plaintiff’s identification of a specific comparator in the form of his partner is sufficient, at this juncture, to meet his burden on this point (See e.g., Pelepelin v City of New York,

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<sup>2</sup> The Court reads the complaint as asserting contradictory facts insofar as plaintiff claims that the individual defendants both asserted that he was not injured and threatened to “survey” him out of the NYPD based on his injury. On the instant motion, the Court resolves these discrepancies in favor of plaintiff.

189 AD3d 450, 452 [1st Dept 2020] [plaintiff “amply met” pleading burden in pleading failure to promote claim by “naming as a comparator a specific individual whose details can be particularly verified during discovery”]).

*Vicarious Liability (Administrative Code §8-107[13][b])*

Defendants’ motion to dismiss plaintiff’s claim under NYCHRL § 8-107(13)(b) is granted. That statute provides for an employer’s vicarious liability for unlawful discriminatory conduct of an employee or agent where: (1) that employee or agent “exercised managerial or supervisory authority” over the plaintiff, and (2) the employer either knew of such conduct and either acquiesced in or failed to take immediate and appropriate corrective action or should have known of the discriminatory conduct but “failed to exercise reasonable diligence” to prevent it (Hunter v Barnes & Noble, Inc., 2023 NY Slip Op 30638[U] [Sup Ct, NY County 2023]). Here, there is no allegation that the NYPD doctors exercised such managerial or supervisory responsibility over plaintiff. Plaintiff’s allegation that these doctors are of higher rank than plaintiff within the NYPD is insufficient to satisfy this requirement.

*Failure to Accommodate*

Defendants’ motion to dismiss plaintiff’s failure to accommodate claim is denied. To plead a claim for failure to accommodate under the NYCHRL, plaintiff must allege that: (1) he has a disability under the relevant statute; (2) his employer had notice of his disability; (3) with reasonable accommodations, plaintiff could have performed the essential functions of his job; and (4) plaintiff’s employer refused to make such accommodations (See e.g., Miloscia v B.R. Guest Holdings LLC, 33 Misc3d 466 [Sup Ct, New York County, 2011]). The City asserts that the complaint fails to satisfy the last requirement, insofar as it alleges that Santucci placed plaintiff on restricted duty (NYSCEF Doc. No. 1 [Compl. at ¶37]) and that “defendants from 2021 onward

have been able to accommodate [p]laintiff by allowing him to work at the Fleet Services Unit. In that role [p]laintiff was able to fulfill the essential functions of that assignment [sic]” (Id. at ¶¶104-105 [emphasis added]). Although the City’s interpretation of this statement is reasonable, the Court reads these allegations—in light of the following paragraphs of the complaint, which list other parts of the NYPD where plaintiff could currently work with his alleged disability—to state only that plaintiff could have worked at the Fleet Services Unit and not that he currently works there. To the extent the complaint is ambiguous on this point the Court must, on this motion, resolve such ambiguity in favor of plaintiff.

#### *Hostile Work Environment*

The City’s motion to dismiss plaintiff’s hostile work environment claim is denied. Under the NYCHRL, a hostile work environment claim requires that plaintiff allege he 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.).

The Court agrees with defendants that plaintiff’s allegations that the individual defendants’ assertions that he was faking his injuries are expressions of the doctors’ medical determination and “whether ‘correct’ or not, cannot constitute a basis for the plaintiff’s claim that he was discriminated against on the basis of disability” (Aykac v City of New York, 2022 NY Slip Op 33639[U], 19 [Sup Ct, NY County 2022]; see also Pesantez v City of New York, 2023 NY Slip Op 32249[U], 6 [Sup Ct, NY County 2023]). However, plaintiff’s allegations that these doctors threatened to survey plaintiff off the job if he did not return to work, in the face of his alleged inability to perform such work, is sufficient to state a hostile work environment claim (See

Pesantez v the City of New York, 2023 NY Slip Op 32249[U], 7 [Sup Ct, NY County 2023] citing Leopold v Baccarat, Inc., 174 F3d 261, 268 [2d Cir 1999]; see also 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 a question of fact as to whether plaintiff was subjected to a hostile work environment under NYCHRL]).

### *Retaliation*

Defendants' motion to dismiss plaintiff's retaliation claim is granted. To establish a claim of unlawful retaliation under the NYCHRL, plaintiff must show that: (1) he 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 constitute a protected activity under the NYCHRL (D'Amico v City of New York, 159 AD3d 558, 558-59 [1st Dept 2018]).

Here, while plaintiff asserts he engaged in protected activity when he filed a complaint of discrimination against Santucci, his retaliation claim fails insofar as he has not alleged any facts which could establish a causal link between this EEOC complaint and the retaliatory conduct alleged (i.e., plaintiff's transfer back to the 75th Precinct and referral Psychological Services for evaluation). "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]) but plaintiff fails to state the substance of his complaint, when such a complaint was made, or when the subsequent transfer occurred. These omissions mandate the dismissal of her retaliation claims (See e.g., Whitfield-Ortiz v Dept. of Educ. of City of New York, 116 AD3d 580, 581 [1st Dept 2014] [retaliation claims properly dismissed where plaintiff “did not state the substance of her alleged complaints, to whom she allegedly complained, or when such complaints were made” and “failed to plead any facts regarding when the alleged retaliatory incidents occurred or how those incidents were causally connected to any protected activity”]).

*Negligent Training, Supervision, and Discipline*

Finally, defendants’ motion to dismiss plaintiff’s claims for negligent training, supervision, and discipline of Santucci and Detore is granted. The complaint includes no factual allegations that these individual defendants were acting outside the scope of their employment and, in fact, entirely supporting the contrary view. This failure is fatal to these claims (McCabe v Cent. Park Aesthetic & Laser, 77 Misc 3d 1219(A) [Sup Ct, NY County 2022] [internal citations omitted]).

In light of the foregoing, it is

**ORDERED** that defendants’ motion to dismiss is granted in part, to the extent that plaintiff’s claims for retaliation, vicarious liability, and negligent supervision, training, and discipline, and punitive damages (i.e., counts three, four, five, six, and seven of plaintiff’s complaint) are hereby dismissed; and it is further

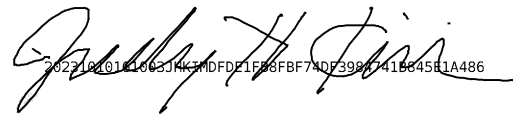
**ORDERED** that the defendants’ motion is otherwise denied; and it is further

**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 “Efiling” page on this court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.



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10/10/2023

DATE

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

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: