SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **05M**

Justice

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AKIYA DAVID

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 156939/2023

MOTION DATE 11/13/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 24, 25, 27, 28, 29

were read on this motion to/ DISMISS.

With the instant motion, Defendant the City of New York (the "City") moves, pursuant to CPLR § 3211(a)(7), to dismiss Plaintiff Akiya David's ("Plaintiff") complaint for failure to state a cause of action. The City also reasons that Plaintiff should have commenced this lawsuit pursuant to Article 78 of the CPLR ("Article 78") rather than as a plenary action.

Plaintiff opposes the City's motion, and cross moves to amend her complaint. For the reasons stated herein, the City's motion is denied, and Plaintiff's cross motion is granted.

BACKGROUND AND ARGUMENTS

Plaintiff is employed with the New York City Police Department ("NYPD") as a detective. It is alleged that Plaintiff suffers from tachycardia (*see* Complaint at ¶ 4). On an unspecified date, Plaintiff alleges that she requested a reasonable accommodation and that it was denied (*id*. at ¶ 8). On or about June 2, 2021, Plaintiff alleges that an accommodation request for limited duty was granted (*id*. at ¶ 9). Plaintiff remained on limited duty until August 2, 2021, when she returned to full duty (*id*. at ¶ 10). While on limited duty, Plaintiff asserts she was continually assigned cases and her limited duty accommodation prevented her from performing all the necessary tasks (*id*. at ¶ 15). Plaintiff alleges that she frequently requested assistance with new assignments but was ignored or only received assistance after protest (*id*. at ¶ 16). Also, Plaintiff alleges that she could not complete assignments in a timely fashion, which resulted in a "needs to improve" evaluation (*id*. at ¶ 17). Following her return to full duty, Plaintiff alleges that the NYPD referred her to submit to a psychological Fitness-for-Duty Evaluation ("FFDE") (*id*. ¶ 12). This psychological evaluation was held in September 2021 (*id*. at ¶ 12).

Plaintiff commenced this action against the City on July 10, 2023, alleging that the City discriminated against Plaintiff based upon her disability in violation of the New York City Human Rights Law, New York City Administrative Code §§ 8-107, 8-502(a) ("NYCHRL"). Plaintiff

alleges the City denied a reasonable accommodation request and that by and through the City's policy and practices, Plaintiff has been discriminated against and subject to a hostile work environment based on her disability Plaintiff further contends that the City retaliated against her by subjecting her to full-duty assignments despite being granted a limited duty accommodation. The City now moves to dismiss Plaintiff's complaint.

In support of its motion, the City first submits that Plaintiff should have brought this action under Article 78 rather than as a plenary action. In the alterative, the City argues that: (1) Plaintiff has not sufficiently pleaded a cause of action for failure to accommodate; (2) Plaintiff did not suffer adverse employment action or discriminatory animus; (3) Plaintiff's hostile work environment claim does not allege that the acts were motivated by Plaintiff's disability; and (4) Plaintiff has not alleged a causal connection between her placement on limited duty and referral for a psychiatric evaluation.

In opposition, Plaintiff contends that the City's motion to dismiss should be denied. Plaintiff argues that her complaint, when accepted as true, states a claim upon which relief can be granted. Specifically, Plaintiff alleges that the City retaliated against her for her lawful request for an accommodation by subjecting her to pervasive and unwarranted psychological examinations, denying her assistance with her caseload, issuing an unwarranted "needs to improve" evaluation, and assigning her a higher than normal caseload. Collectively, Plaintiff argues that these actions were allegedly designed to frustrate, obfuscate, and hinder Plaintiff's future requests for accommodation.

Furthermore, Plaintiff requests leave to amend the complaint to address any deficiencies argued by the City.

DISCUSSION

City's Motion to Dismiss

On a motion to dismiss brought under CPLR § 3211 (a) (7), the court must "accept the facts as 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" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]) and "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). Employment discrimination case are generally reviewed under notice pleading standards, 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, 145 [1st Dept 2009][internal quotations omitted]).

To state a discrimination claim under the NYCHRL, a plaintiff must allege that: (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination (*Harrington v. City of New York*, 157 AD3d 582 [1st Dept 2018]). While the "burden of establishing a prima facie case of discrimination is 'not onerous,'" (*Bennett v. Health Mgt. Sys. Inc.*, 92 AD3d 29, 35 [1st Dept 2011] *quoting Tex. Dept. of Cmty. Affairs v. Burdine*, 450 US 248 [1981]), failing to plead discriminatory animus of the defendant is fatal to a discrimination claim under the NYCHRL (*Toth v. N.Y. City Dept. of Citywide Admin. Servs.*, 119 AD3d 431, 431 [1st Dept 2014]). The plaintiff must, at a minimum, demonstrate that the circumstances surrounding the adverse employment action give rise to an inference of discrimination (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Under the NYCHRL, the plaintiff must show that "[s]he was treated differently from others in a way that was more than trivial, insubstantial, or petty" (*Armstrong v. Metro. Trans. Auth.,* 2014 U.S. Dist. LEXIS 121159 [S.D.N.Y. Aug.28, 2014]). A plaintiff can adduce facts sufficient to plead discriminatory animus by showing that similarly situated comparators were treated differently (*Whitfield-Ortiz v. Department of Educ. of City of New York*, 116 A.D3d 580 [1st Dept 2014]). As of August 12, 2019, for conduct that occurred as of the amendment, claims under the NYSHRL and the NYCHRL are to be analyzed under the same standard. In terms of an adverse employment action, plaintiff must plead events that were more than petty slights and trivial inconveniences (*Alshami v. City of University of New York*, 162 NYS3d 720 [1st Dept 2022]).

To state a hostile work environment claim under the NYCHRL, a plaintiff must show that he was "subjected to inferior terms, conditions, or privileges of employment because of the individual's membership in one or more protected categories" (*Golston-Green v. City of N.Y.*, 184 AD3d 24, 41-43 [2d Dept 2020]).

Finally, to make out a prima facie case of retaliation under the NYCHRL, a plaintiff is required to show that "(1) [she] participated in a protected activity known to defendant[ ]; (2) defendant[ ] took an action that disadvantaged [her]; and (3) a causal connection exists between the protected activity and the adverse action" (*Cadet-Legros v. New York University Hosp. Center*, 135 AD3d 196 [1st Dept 2015]).

Here, Plaintiff has sufficiently alleged that, as a uniformed officer of the NYPD, it was unlawful for the City to subject her to an invasive psychological examination following her return from a disability accommodation. This accommodation was entirely unrelated to her mental state. Plaintiff further contends that the City retaliated against her for receiving this accommodation and sought to discourage her from requesting future accommodations. Thus, although Plaintiff was eventually granted an accommodation following an initial denial, she alleges that she was subsequently assigned a full slate of work far exceeding what was appropriate for her accommodated status. Then, as punishment, she had to endure an invasive psychological examination following her return from a disability accommodation. Consequently, Plaintiff

adequately pleads that the City's purported accommodation was, in effect, no accommodation at all and was discriminatory in nature.

Notably, no justification has been provided for subjecting Plaintiff to a psychological examination. Plaintiff asserts that the examination was intended to convey a clear message: she should refrain from seeking future accommodations. This assertion is supported by the timing of the examination and the way Plaintiff alleges that she was "tricked" into attending it. Furthermore, Plaintiff alleges that she was routinely assigned tasks far exceeding normal expectations and was denied assistance, a request typically granted to officers without accommodations. Thus, under the applicable standard, Plaintiff has sufficiently pleaded a "disadvantageous" action to support her claims of discrimination and retaliation.

In addition, the court is unpersuaded by the City's suggestion that Plaintiff was not engaged in a protected activity as the protected activity here encompasses not only the request for accommodation but also the actual utilization of the accommodation. According to Plaintiff, the City under false pretenses sent Plaintiff to a psychological evaluation within two weeks of her accommodation period ending.

Similarly, Plaintiff adequately alleges a retaliatory animus by highlighting how the City coerced her into appearing for the psychological examination. Specifically, Plaintiff claims she was misled into believing she was attending a "training" session rather than a psychological examination. Plaintiff also states that she was ordered to this false "training session" shortly after returning from her disability accommodation. This sequence of events draws a direct line from her accommodation to the psychological examination. The combination of the City's purported actions, the timing of the examination, and the lack of any other evidence justifying such an examination satisfies the requirement for direct evidence of a retaliatory action in violation of the NYCHRL. The same conduct also evinces a hostile work environment when the allegations are read in a light most favorable to Plaintiff. Indeed, Plaintiff sufficiently asserts that the City subjected her to a heightened and inferior caseload as a result of her request for an accommodation based on her disability.

Additionally, Plaintiff's pleadings establish a causal connection based solely on temporal proximity, with the protected activity and the retaliatory action occurring within one month of each other. Therefore, when construing the Plaintiff's complaint in the light most favorable to her, the court finds that the Plaintiff has pleaded sufficient facts to survive the City's motion to dismiss. Accordingly, the City's motion to dismiss is denied.

Article 78

It is well settled that a plaintiff alleging a discriminatory practice by a public employer may choose to proceed with such allegations either under an Article 78 proceeding or through a plenary action. In *Koener v. State of New York*, 62 NY2d 442 (1984), the Court of Appeals affirmed that a plaintiff has the right to choose whether to challenge an administrative decision via Article 78 or through a plenary action (*see also Mentor v. Dept. of Educ. of N.Y.*, 66 NYS3d 654 [Sup. Ct., New York Cnty 2017]). This court acknowledges that there are instances where an Article 78 proceeding may be the exclusive avenue for relief (*see Goolsby v. City of New York*, 207 NYS3d

874 [Sup. Ct., New York Cnty 2024]). However, in the present case, Plaintiff's allegations are based on claims of discrimination and retaliation, which are not subject to administrative determination.

Furthermore, Plaintiff is not challenging the initial granting of light duty, which was the determination made by the City. Rather, Plaintiff is contesting the events that followed the granting of the accommodation. Additionally, although Plaintiff initiated this action as a violation of the NYCHRL, Plaintiff is seeking to amend the complaint to include violations of the New York State Human Rights Law (NYSHRL). This amendment would make the holdings in *Koener* and *Mentor* irrefutably applicable to this case.

Accordingly, the court denies the City's motion to dismiss Plaintiff's complaint on the grounds that Plaintiff should have commenced an Article 78 proceeding rather than a plenary action.

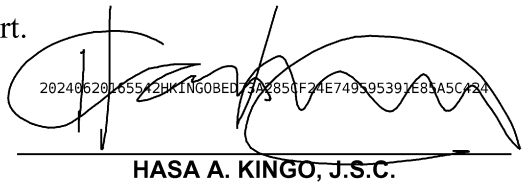
Cross-Motion to Amend the Complaint

Plaintiff seeks leave of the court to amend her complaint to add additional facts that plead with greater detail her discrimination claims, which the court grants. The City argues the amendment is futile. The court notes that permitting Plaintiff to amend her complaint does not prejudice the City. A party may amend a pleading at any time by leave of court and leave shall be freely given upon terms as may be just (CPLR § 3025[b]).

Based on the foregoing, it is hereby

ORDERED that the City's motion is denied and Plaintiff's cross motion to amend her complaint is granted. Plaintiff is permitted to file and serve the proposed amended complaint annexed as Ex. 2 to her cross motion within 30 days of this order. Plaintiff shall serve a copy of this order with notice of entry upon the City within 30 days of its filing on NYSCEF.

This constitutes the decision and order of the court.



6/20/2024
DATE

HASA A. KINGO, J.S.C.

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