UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARY JO C.,

Plaintiff,

-against-

NEW YORK STATE AND LOCAL RETIREMENT SYSTEM, CENTRAL ISLIP PUBLIC LIBRARY,

Defendants.

----------X

NOTICE OF MOTION TO DISMISS

CV-09-5635 (SJF)(ARL)

PLEASE TAKE NOTICE that upon the Complaint of plaintiff, dated December 23, 2009, and the accompanying Memorandum of Law, the Central Islip Public Library shall move this Court before the Honorable Sandra J. Feuerstein, United States District Court Judge, United States District Court, Eastern District of New York, 100 Federal Plaza, Central Islip, New York, on the ___ day of _____, 2010, for an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the Complaint based on Plaintiff's failure to state a claim upon which relief can be granted and for such further relief as may be proper.

Dated: Uniondale, New York
May 28, 2010

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MARY JO C.,

Plaintiff,

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NEW YORK STATE AND LOCAL RETIREMENT SYSTEM, CENTRAL ISLIP PUBLIC LIBRARY,

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CV-09 5635 (SJF)(ARL)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT CENTRAL ISLIP PUBLIC LIBRARY'S MOTION TO DISMISS

Respectfully Submitted,

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PRELIMINARY STATEMENT

Defendant, Central Islip Public Library (the "Library" or "Central Islip Library") respectfully submits this memorandum of law in support of its motion to dismiss the Complaint pursuant to Fed. R. Civ. Proc. 12(b)(6).

Plaintiff, Mary Jo. C., ("Plaintiff"), alleges that she is a disabled person who was formerly employed by the Central Islip Public Library (the "Library" or "Central Islip Library") until on or about November 12, 2006. Plaintiff brings the instant action against the Central Islip Library and New York State and Local Retirement System ("State Defendant") pursuant to Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 *et seq.*, ("Title II"). Plaintiff also asserts claims against the Library pursuant to New York State Executive Law § 296. Plaintiff claims that the Library failed to provide her with a requested reasonable accommodation by refusing to file a disability retirement application on her behalf and by denying her request to reclassify the termination of her employment as a leave of absence.

Plaintiff filed a disability retirement application, however, she failed to do so within the statutory time period prescribed by New York State law. Accordingly, the State Defendant denied Plaintiff's application for disability retirement benefits due to her failure to timely file the application. Plaintiff contends that the State Defendant should have waived the statutory deadline as a reasonable accommodation under Title II of the ADA, and she seeks a declaration to this effect. Plaintiff further requests an injunction directing the State Defendant to waive the statutory deadline. As against the Central Islip Library, Plaintiff seeks declarations declaring that the Library violated Title II of the ADA and New York State Executive Law by failing to provide her with the requested accommodations. Notably, Plaintiff "seeks damages from the Central Islip Public Library if, and only if, this Court determines that waiving the filing deadline

at this time would constitute an undue burden for the New York State and Local Retirement System." See, Comp. at Preliminary Statement. As discussed below, Plaintiff's claims against the Central Islip Library should be dismissed in their entirety due to Plaintiff's failure to state a claim.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, alleges that she has suffered from mental illness since adolescence and has worked intermittently as a librarian from 1986 through 2006. Comp. at ¶¶ 12-13. Most recently, Plaintiff was employed by the Central Islip Library until her termination in November 2006. Id. at ¶¶ 15-16. Plaintiff's last day of work at the Library was on or about November 12, 2006. Id. at ¶ 17. One year later, Plaintiff, a member of the State Defendant, filed an application for disability retirement benefits. Id. at ¶¶ 14, 30. The State Defendant denied Plaintiff's application based upon her failure to comply with Retirement and Social Security Law ("RSSL") § 605(b)(2). Id. at ¶ 31. Under that statutory provision, an application for disability retirement benefits must be filed "within three months from the last date the member was being paid on the payroll . . ." RSSL § 605(b)(2); see also, Comp. at ¶ 11. Plaintiff concedes that she did not file her application within the statutory three month period. Id. at ¶ 30.

Plaintiff alleges that because of her mental illness, she failed to recognize that state law required her to file her retirement benefits application within three months of her last day of employment. Id. at ¶ 20. Nevertheless, during this three month period, Plaintiff alleges that her brother, Harry C., attempted to take steps to assist her in obtaining benefits. Id. at ¶ 21. After allegedly speaking with the State Defendant's Disability Retirement Director, Harry C. contacted the Library and asked it to file for disability retirement benefits on behalf of Plaintiff, or alternatively, to reclassify her termination to an unpaid leave of absence. Id. at ¶¶ 21-23, 25, 27-28. The Library denied both of these requests. Id. at ¶¶ 26, 29.

Plaintiff administratively appealed the State Defendant's decision denying her application. Id. at ¶ 35. Following a hearing, the hearing officer affirmed the State Defendant's decision, stating that there is no provision under the RSSL or under the regulations for extending the statutory filing deadline. Id. at ¶¶ 37-38.

On or about December 23, 2009, more than three years after the termination of her employment with the Library, Plaintiff commenced the instant lawsuit against the State Defendant and the Central Islip Library. Plaintiff's Complaint asserts two causes of action against the Library pursuant to Title II of the ADA and two identical causes of action under New York State Executive Law. Id. at ¶¶ 46, 48, 50, 52. In this regard, Plaintiff claims that the Library failed to provide Plaintiff with a requested reasonable accommodation by: 1) refusing to reclassify the termination of her employment with the Library as a leave of absence; and 2) refusing to file a disability retirement application on behalf of Plaintiff because she allegedly lacked the ability to file the application on her own behalf. Id.

Plaintiff seeks a declaration that the Library violated both Title II of the ADA and New York Executive Law § 296 by failing to provide the aforementioned reasonable accommodations. Id. at Wherefore Clause, (B)-(E). With respect to the State Defendant, Plaintiff seeks a declaration that the agency violated Title II of the ADA by failing to provide a reasonable accommodation in the form of a waiver of the statutory filing deadline. See id. at ¶44; Wherefore Clause, (A). Plaintiff also seeks injunctive relief directing the State Defendant to waive State law. Id. at Wherefore Clause, (F). In the event the Court determines that providing Plaintiff with the requested accommodation of a waiver of the filing requirements will create an undue burden for the State Defendant, or otherwise fundamentally alter the nature of the program

operated by the State Defendant, Plaintiff requests damages in an amount to be determined, from the Library for attorney's fees, costs and disbursements. Id. at Wherefore Clause, (G) – (I).

As demonstrated below, Plaintiff's Complaint as against the Library must be dismissed due to the fact that the Complaint fails as a matter of law to state a claim under Title II of the ADA. Likewise, the Complaint fails to state a claim for relief pursuant to New York Executive Law § 296.

THE STANDARD FOR REVIEW

The court should grant a Rule 12(b)(6) motion when the Complaint fails to plead enough facts to state a claim for relief that is plausible on its face. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). Pursuant to the Supreme Court's decision in Twombly, the court must apply a standard of plausibility guided by two working principles. Id.; see also, Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

First, although "a court must accept as true all of the allegations contained in a complaint," that concept "is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. Second, a complaint will only survive a motion to dismiss that states a plausible claim for relief and "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950.

Accordingly, a court considering a motion to dismiss can begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. Id. Although legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. Id.; see also, Scherman v. N. Y. Banking Dep't, 2010 U.S. Dist. LEXIS 26288 at *8 (S.D.N.Y. 2010).

ARGUMENT

PLAINTIFF'S CLAIMS AGAINST CENTRAL ISLIP LIBRARY SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(b)(6) BECAUSE PLAINTIFF FAILS TO STATE ANY CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Plaintiff Fails To State A Claim Under Title II Of The ADA As She Has Not Been Denied A Benefit Offered To The Public

Plaintiff's Complaint against Central Islip Library asserts causes of action pursuant to Title of the ADA. Title II of the ADA provides in part:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

Under Title II of the ADA, a plaintiff must demonstrate that: (1) he or she is a qualified individual with a disability; (2) he or she is being excluded from participation in, or being denied the benefits of some service, program, or activity by reason of his or her disability; and (3) the entity which provides the service, program, or activity is a public entity. Clarkson v. Coughlin, 898 F. Supp. 1019, 1037 (S.D.N.Y. 1995); Henrietta D. v. Giuliani, 1996 U.S. Dist. LEXIS 22373 (E.D.N.Y. 1996).

For the purposes of this motion, and construing the allegations in the Complaint in a light most favorable to the Plaintiff, the Library concedes that Plaintiff satisfies the first element of Title II, in that she qualifies as an individual with a disability within the meaning of the ADA. The Central Islip Library also agrees that the Library is a public entity that provides services, programs and activities to the public, thus satisfying the third requirement of the Act.

However, Plaintiff fails to allege sufficient facts to demonstrate that the benefit to which she was allegedly entitled, was a service, program or activity that the Library provides to the public. Therefore, Plaintiff fails to satisfy the second requirement of Title II. Indeed, Plaintiff's

Complaint is completely devoid of a single allegation that the benefit to which she was denied was a benefit that the Library offers to its patrons.

Plaintiff's Complaint asserts causes of action against the Library for its alleged refusal to: 1) file a disability retirement application on Plaintiff's behalf; and 2) agree to classify Plaintiff's termination as a leave of absence. Comp. at ¶¶ 46, 48. Clearly these are not "services, programs or activities" that the Library offers to the public.[1] On the contrary, the benefits that Plaintiff claims were denied by the Library, by their very nature, arise out of her prior employment with the Library, not her use or enjoyment of the Library as a member of the public. Indeed, the only way that Plaintiff would be arguably entitled to receive the requested accommodations is through her employment with the Library. It would simply be illogical for a member of the public (who did not otherwise have an employment relationship with the Library) to request that their termination be classified as a leave of absence.

Likewise, the Library does not fill out disability retirement applications for the public at large. Plaintiff's Complaint even acknowledges that her entitlement to this accommodation is related to her employment.

> 10. Under New York Law, an application for disability retirement benefits can be made by an ***employee*** who is eligible for retirement benefits or ***the head of the department at which the employee is employed***. N.Y.Ret. & S.S. Law § 605(a).
>
> 11. Any application for disability retirement benefits must be made within three months from the last date of ***employment***. N.Y.Ret. & S.S. Law § 605(b)(2).

See, Comp. at ¶¶ 10-11 (*emphasis added*).

[1] Congress did not define "services, programs or activities" in the context of Title II. In such instances, courts "generally interpret [a] term by employing the ordinary, contemporary and common meaning of the words that Congress used." Zimmerman v. Oregon Dep't of Justice, 170 F.2d 1169, 1174 (9th Cir. 1999). The plain meaning of "activity" is a "natural or normal function or operation." See, Webster's Third New International Dictionary (1993).

Plaintiff fails to plead that she was entitled to the requested accommodations as a result of her use or enjoyment of the public services that the Library provides to its patrons. Critically, Plaintiff does not, and cannot, show that the benefits that she sought are benefits or services that the Library provides to members of the public. Indeed, Plaintiff's alleged entitlement to such benefits can only be asserted in her capacity as a prior employee. In sum, Plaintiff was not excluded from, or denied, any public benefits by the Library by reason of her disability. Accordingly, Plaintiff does not make a *prima facia* case under Title II of the ADA.

B. Plaintiff's Title II Claim Should Be Dismissed Because Title I Deals Exclusively With Employment Discrimination Under The ADA

Plaintiff fails to state a claim pursuant to Title II of the ADA because Title I is the exclusive remedy for a claim of disability discrimination in employment under the ADA. See, Scherman v. N. Y. Banking Dep't, 2010 U.S. Dist. LEXIS 26288 (S.D.N.Y. 2010) (*Title II does not apply to employment discrimination*); Fleming v. State Univ. of N.Y., 502 F. Supp. 2d 324, 333 (E.D.N.Y. 2007) (*dismissing plaintiff's Title II claims as the structure and terms of the ADA make clear that Congress expressed its intent to combat employment through Title I of the ADA – not Title II*); see also, Syken v. State of N. Y. Executive Dep't, Div. of Hous. & Cmty. Renewal, 2003 U.S. Dist. LEXIS 5358 (S.D.N.Y. 2003). Moreover, while the Supreme Court has not expressly decided this issue, it has noted that Title I of the ADA "expressly deals" with claims of employment discrimination. See, Bd. Of Trs. Of Univ. of Ala. V. Garrett, 531 U.S. 356 at 360, n.1 (2001).

An examination of the structure of the ADA demonstrates Congress' intent for Title II not to apply to employment claims. First, Title I of the ADA is the only title in the Act that specifically addresses employment. Title I is entitled "Employment" and expressly prohibits discrimination based on disability with regard to all "terms, conditions, and privileges of

employment". 42 U.S.C. § 12112; 12111(2), (5), (7); see also Fleming at 333. Whereas, Title II of the ADA is entitled "Public Service" and lacks any employment provisions. See, 42 U.S.C. § 12132. The Supreme Court has observed that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion". Syken at *22 (quoting Garrett, 531 U.S. at 360, n. 1). Congress' failure to make any mention of employment in Title II is presumed to be an intentional exclusion. See, Scherman at *30.

Second, Title I and Title II provide different definitions for a "qualified individual". Title I defines a "qualified Individual" as an individual "who . . . can perform the essential functions of the employment position . . ." 42 U.S.C. § 12111(8). However, Title II defines it on the basis of an individual's ability to receive services or participate in programs or activities. Id. at § 12132.

Likewise, definitions of the entities subject to Titles I and II differ. Title I prohibits discrimination by a "covered entity," defined as "an employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. §§ 12112, 12111. In contrast, Title II prohibits discrimination by a "public entity," defined as "any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation...." Id. at §§ 12132, 12131. Notably, Title II does not include any definition relevant to employers, as in Title I. See, Cormier v. City of Meriden, 2004 U.S. Dist. LEXIS 21104 (D. Conn. 2004). Moreover, if employment discrimination claims were allowed to be brought under Title II, Title I would become redundant as applied to public employees. See, Scherman at *31; Filush v. Town of Weston, 266 F. Supp. 322, 330 (D. Conn. 2003).

Third, procedural requirements of Title I would be eviscerated by the application of Title II to employment discrimination. Fleming, 502 F. Supp 2d at 333. For example, Title I requires a plaintiff to exhaust their administrative remedies prior to filing a federal action. 42 U.S.C. § 12117(a). Title II does not, and instead incorporates provisions from the Rehabilitation Act. 42 U.S.C. § 12133; see also, Syken at *9 & n. 11. Therefore, allowing a plaintiff to bring an employment discrimination suit under Title II permits him or her to bypass the administrative exhaustion requirement of Title I. See, id.; see also Fleming at 331. At no time did Plaintiff file an administrative charge with the Equal Employment Opportunity Commission ("EEOC") pursuant to Title I.[2]

In New York State, a claim pursuant to the ADA is time barred if a plaintiff does not file a charge of discrimination with the EEOC within three hundred (300) days after the alleged unlawful employment practice.[3] See, 42 U.S.C. § 12117. The U.S. Supreme Court has stated that by setting this filling deadline, "Congress clearly intended to encourage the prompt processing of all charges of discrimination." Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 630 (2007) (*internal quotation marks and brackets omitted*). Indeed, this filing deadline serves to protect employers from the burden of defending claims arising from employment related decisions that have long since passed. Id. As it has been more than three years since the termination of Plaintiff's employment with the Library, and more than three years have elapsed since the Library allegedly denied her requests for accommodations, the deadline for her to file an administrative charge has long expired. If Title II were applied to employment

[2] Nor did she file an administrative complaint with the New York State Division of Human Rights.

[3] A charge of discrimination must be filed with the EEOC within 180 days of the alleged discriminatory act unless "the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice," in which case the claimant has 300 days from the alleged discriminatory act in which to file a charge with the EEOC. 42 U.S.C. § 2000e-5(e)(1).

discrimination, it would effectively nullify Title I's statutory limitations and permit Plaintiff to bypass the administrative requirements set forth by Congress.

Fourth, Congress delegated regulatory authority for Title I and Title II to different agencies. In this regard, the EEOC has authority to regulate and carry out Title I. See, 42 U.S.C. § 12116. However, Title II gave the Attorney General authority to issue regulations. Id. at § 12134(a). If both titles of the Act were to apply to employment discrimination, it would be possible for state and local governments to be subject to conflicting regulations. See, Syken at *9; see also, Scherman at *33.

Accordingly, the language and structure of the ADA clearly expresses Congress' intent that employment discrimination claims be brought under Title I of the ADA and not under Title II. Therefore, as Plaintiff has failed to exhaust her administrative remedies and has not otherwise asserted a claim under Title I of the ADA, her Title II claims fail as a matter of law.

C. Plaintiff Fails To State A Claim Under New York Executive Law § 296

For the reasons set forth in *Point I A supra*, Plaintiff's claims under New York Executive Law likewise fail. See, Rodal v. Anesthesia Group of Onondaga, P.C., 369 F.3d 113, 117, n.1 (2d Cir. 2004) (*New York State disability discrimination claims are governed by the same legal standards as federal ADA claims*); Parker v. Columbia Pictures Indus., 204 F.3d 326, 332, n.1 (2d Cir. 2000); Matter of Doe, 194 Misc.2d 774; 754 N.Y.S.2d 846 (N.Y. County 2003); see also Camarillo v. Carrols Corporation, 518 F.3d 153, 158 (2d Cir. 2008) (*scope of disability provisions under New York Executive Law § 296 (2)(a) are similar to those of the ADA*).[4]

[4] Notably, Plaintiff's Complaint fails to specify the provision of New York Executive Law § 296 under which she asserts a claim against the Library. Moreover, the state claim is completely omitted from the "Relevant Statutory And Administrative Schemes" section of the Complaint. See, Comp. at ¶¶ 6-11. Plaintiff characterizes her Executive Law claim as a "Pendent State Claim". See, Comp. at Fourth Cause of Action. Based on Plaintiff's own characterization of her alleged state claim and the Title II claim that she asserts, a review of New York Executive Law § 296 reveals that Section 2(a) most closely resembles her asserted causes of action.

Accordingly, Plaintiff's pendent state law claims as against the Central Islip Library cannot stand as a matter of law.

CONCLUSION

For all the reasons set forth above, this Court should grant defendant Central Islip Public Library's motion in its entirety, and dismiss Plaintiff's Complaint as against Central Islip Public Library, along with such other and further relief as this Court may deem just and proper.

Dated: May 28, 2010
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Respectfully submitted,

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It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any ***place of public accommodation***, resort or amusement, because of the race, creed, color, national origin, sexual orientation, military status, sex, or ***disability*** or marital status of any person, directly or indirectly, ***to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof***. . .

See, New York Executive Law § 296 (2)(a).

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARY JO C.

Plaintiff,

-against-

NEW YORK STATE AND LOCAL RETIREMENT SYSTEM, CENTRAL ISLIP PUBLIC LIBRARY,

CV-09-5635 (SJF)(ARL)

Defendants.

----------x

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARY JO C.

Plaintiff,

-against-

NEW YORK STATE AND LOCAL RETIREMENT SYSTEM, CENTRAL ISLIP PUBLIC LIBRARY,

CV-09-5635 (SJF)(ARL)

Defendants.

----------X

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

PRELIMINARY STATEMENT

For many years, plaintiff Mary Jo C. struggled with mental illness but was able to work as a librarian for a number of local libraries on Long Island. However, when her illness reached a point where she could no longer work, state law gave her 90 days to file for the disability retirement benefits to which she was entitled - or forever lose them. The strict nature of New York law has created what one court has called an "obvious injustice" for hard-working people who suffered from mental illness. See Matter of Callace v. New York State Employees' Retirement System, 140 A.D. 2d 756, 758 (3d Dep't 1988). The New York Legislature has never saw fit to correct this injustice.

However, Congress has created a remedy for this situation. When Congress passed the Americans with Disabilities Act ("ADA"), and the Department of Justice promulgated regulations to Title II, they required state and local governments to provide to disabled individuals reasonable accommodations in their

procedures, policies and practices unless such accommodation required an undue hardship. See infra at 4. As a result, plaintiff Mary Jo C. has sought an accommodation in the form of a waiver of the 90-day requirement for filing for disability retirement benefits.

In this lawsuit, the plaintiff seeks injunctive relief against defendant New York State and Local Retirement System ("NYSLRS") that would require NYSLRS to waive the 90-day filing period. The plaintiff also asserts a claim for damages against defendant Central Islip Public Library ("CIPL"). A family member of the plaintiff sought a reasonable accommodation on behalf of Mary Jo C. in the form of CIPL filing for disability retirement benefits on behalf of Mary Jo C. because she lacked the ability to file within the 90-day period. Although state law authorized this conduct, CIPL refused. The plaintiff seeks damages against CIPL only if for some reason, this Court believes that Mary Jo C. is not entitled to injunctive relief against NYSLRS.

In this memorandum of law, the plaintiff will first establish that the plaintiff has standing to prosecute this action. The injury-in-fact suffered by Mary Jo C. was not her failure to receive disability retirement benefits but the failure to obtain a reasonable accommodation to which she is entitled. Next this memorandum will detail that the Eleventh Amendment does not protect states against claims for injunctive relief under the ADA, and even if it did, Congress validly abrogated New York's Eleventh Amendment immunity to this claim.

Next, this memorandum of law will establish that the waiving of the 90-day period for filing for disability retirement benefits constitutes a reasonable accommodation. An accommodation is reasonable as long as it does not create an undue hardship. Courts have recognized that exceptions to practices required, or authorized, by state laws will often constitute a reasonable accommodation. This is particularly true in a case such as this when the plaintiff does not seek an alteration to any substantive standards governing eligibility but an exception to procedural barriers that create little impact on the overall state program in question.

Next, this memorandum will establish that Title II of the ADA protects disabled individuals from unlawful discrimination in the employment setting. While courts have disagreed whether both Title I and Title II governs employment discrimination claims against state and local governments, the more well-reasoned decisions hold that both Title I and Title II protect disabled individuals in the employment setting. Finally, this memorandum will detail that it is irrelevant that defendant CIPL did not provide a service to Mary Jo C. that it provided to non-disabled individuals and a request for a reasonable accommodation was made to CIPL on behalf of Mary Jo C. [1]

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[1] The plaintiff agrees with defendant CIPL that the standards governing discrimination under New York Executive Law § 296 do not differ from standards under the ADA. The one exception is the definition of "disability" which is not an issue on this motion. Obviously, because the plaintiff believes that she has set forth a valid claim of discrimination under Title II, this Court should not dismiss her supplemental state law claim.

RELEVANT STATUTORY AND ADMINISTRATIVE SCHEMES

If a state or local government employee is physically or mentally incapacitated for the performance of gainful employment and is so incapacitated that he ought to be retired, she is entitled to disability retirement benefits. N.Y. Ret. & S.S. Law § 605(c). The employee must file a disability retirement application within three months of the employee's last day on the payroll. N.Y. Ret. & S.S. Law § 605(b)(2).

Under Title II of the ADA, a public entity includes any local government, and any department, instrumentality or agency of a local government. 42 U.S.C. § 12131(1). Under Title II, a public entity shall not exclude from participation, or deny benefits of the services, programs or activities operated by the entity, to a qualified individual with a disability by reason of such disability. 42 U.S.C. § 12132. A "qualified individual with a disability" includes an individual with a disability who, with reasonable modifications to rules, policies or practices, meets the essential eligibility requirements for the receipt of services, or participation in the programs provided by the public entity. 42 U.S.C. § 12131(2). A public entity must make reasonable modifications in policies, practices and procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that the modification would fundamentally alter the nature of the activity. 28 C.F.R. § 35.130(b)(7).

STATEMENT OF FACTS

Mary Jo C. is a 57 year-old individual who has suffered from mental illness since adolescence. Complaint ("Compl."), ¶ 12. Notwithstanding her illness, Mary Jo C. worked intermittently as a librarian for various libraries on Long Island between 1986 and November 2006. Compl., ¶ 13. In January, 1988, Mary Jo C. became a member of the New York State and Local Retirement System ("NYSLRS"). Compl., ¶ 14.

Defendant Central Islip Public Library last employed the plaintiff. Compl., ¶ 15. However, as a result of behaviors that were symptomatic of her mental illness, the Central Islip Public Library fired Mary Jo C. in November 2006. Compl., ¶ 17.

Because Mary Jo C. suffered from mental illness, she would have been eligible for disability retirement benefits if she made a timely application. Compl., ¶ 18. Under New York law, Mary Jo C. had three months to file an application for retirement benefits from her last day of work. Compl., ¶ 19. However, because of mental illness from which she suffered, Mary Jo C. failed to recognize that state law required her to file her retirement benefits application within three months of her last day of employment. Compl., ¶ 20.

During this three-month period in which an application could have been filed for disability benefits, Mary Jo's brother, Harry C., attempted to take steps to assist Mary Jo C. in obtaining benefits to which she was entitled. Compl., ¶ 21. Harry C. spoke to NYSLRS Disability Retirement Director, Theresa Shumway. Compl., ¶ 22. Ms. Shumway, notified Harry C. that the Central

Islip Public Library could file an application for disability retirement benefits on behalf of Mary Jo C. Compl., ¶ 23. Hence, NYSLRS has interpreted New York Retirement and Social Security Law § 605(a) to permit an employer to file for retirement benefits for an individual no longer working for it but who was last employed by the employer within the three month period in which an application for disability retirement benefits could be made. Compl., ¶ 24.

As a result of his conversation with Ms. Shumway, on February 11, 2007, Harry C. asked the Central Islip Public Library to file for retirement benefits on behalf of Mary Jo C. Compl., ¶ 25. The Central Islip Public Library denied the request to file disability benefits on behalf of Mary Jo C. Compl., ¶ 26. In response, Harry C. then requested in the alternative that the Central Islip Public Library reclassify her termination as an unpaid leave of absence. Compl., ¶ 27. If the Central Islip Public Library reclassified her termination as an unpaid leave of absence, Mary Jo C. would have been able to file for disability retirement benefits once her clinical condition improved and she recognized the necessity of applying for the disability benefits. Compl., ¶ 28. The Central Islip Public Library also denied the request by Harry C. to reclassify her termination to an unpaid leave of absence. Compl., ¶ 29.

In November, 2007, Mary Jo C.'s clinical condition improved and she applied for disability retirement benefits. Compl., ¶ 30. Defendant NYSLRS denied the application on the ground that Mary Jo C. failed to comply with the requirement under New York

State Law that she did not file her application within three months of her last day of employment. Compl., ¶ 31.

In July, 2008, Mary Jo C. requested an accommodation under the Americans with Disabilities Act from NYSLRS in the form of a waiver of the filing deadline. Compl., ¶ 32. Ultimately, this request was denied. Compl., ¶¶ 34-39.

STANDARDS GOVERNING A MOTION TO DISMISS

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to `state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) quoting Bell Atlantic Corp. v. Twombley, 550 U.S. 544, 570 (2007). On the Rule 12(b)(6) part of the defendants' motion, not only must a court assume as true all factual allegations in the complaint, it must also draw all reasonable inferences in favor of the plaintiff. Harris v. Mills, 572 F.3d 66, 71 (2d Cir. 2009). The court must confine its consideration to facts on the face of the complaint, in documents attached to the complaint or matters of which judicial notice may be taken. Olson v. State of New York, 2005 U.S. Dist. LEXIS 44929 * 10 (E.D.N.Y. Mar.9, 2005). On a motion to dismiss that challenges the jurisdiction of the court, while a court must assume as true all material allegations in the complaint, it will not draw inferences in favor of the party asserting jurisdiction. Press v. State Univ. of N.Y. Stony Brook, 388 F. Supp.2d 127, 130 (E.D.N.Y. 2005).

ARGUMENTS

I. THIS COURT DOES NOT LACK SUBJECT MATTER JURISDICTION OVER THIS ACTION.

A. The Plaintiff Satisfies the Article III Requirements.

As defendant NYSLRS correctly sets forth, Article III requires a plaintiff in federal court to establish (1) an "injury in fact," which means an invasion of a legally protected interest, (2) a causal connection between the actual injury and the defendant's conduct, and (3) that a favorable decision will likely redress the injury. See, e.g., Fulton v. Goord, 591 F.3d 37, 41 (2d Cir. 2009). The failure to receive a reasonable accommodation under the ADA to which one is entitled constitutes and "injury in fact." Id., at 42.[2]

A plaintiff establishes the necessary causal connection when she sets forth an intermediate link between the challenged governmental action and the plaintiff's injury. Pac. Capital Bank, N.A. v. Conn., 542 F.3d 341, 350 (2d Cir. 2008); Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills, 2010 WL 1270211 *8 (S.D.N.Y. Mar. 31, 2010). It strains credulity to assert no adequate causal connection exists when a plaintiff seeks a reasonable accommodation and the government denies the request. Nevertheless, defendant NYSLRS tries. It argues that the only injury suffered by the plaintiff consists of a failure to receive disability retirement benefits, which was caused by her own conduct. State Defendant's Memorandum of Law in Support Of Its Motion to Dismiss the Compliant ("State Def. Memo.") at 6.

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[2] The plaintiff will address the merits of her reasonable accommodation claim against defendant NYSLRS in section II infra.

However, because a court gauges standing by the specific statutory claims that a plaintiff presents, Fulton, 591 F.3d at 41, when a plaintiff seeks a reasonable accommodation that would broaden one's rights that state law provides, the failure to receive the reasonable accommodation - and not the harm suffered as a result of limitations set forth by state law - constitutes the injury in fact. Id. at 42. Obviously, if this Court finds that the plaintiff is entitled to a reasonable accommodation, it can issue injunctive relief.[3]

B. The Eleventh Amendment does not Bar the Plaintiff's Claim for Injunctive Relief.

The Supreme Court has stated that even though the Eleventh Amendment bars some actions under the ADA for damages, private individuals can seek to remedy unlawful discrimination "in actions for injunctive relief under Ex Parte Young. 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908)." Bd. of Trs. Of Univ. of Ala. v. Garrett, 531 U.S. 356, 374, n.9 (2001). Accordingly, the Second Circuit has held that the Eleventh Amendment does not bar claims for injunctive relief against a state official in his official capacity. See Henrietta D. v. Bloomberg, 331 F.3d 261, 289 (2d Cir. 2003); cert. denied, 541 U.S. 936 (2004); Harris, 572 F.3d at 72. Hence, the plaintiff requests leave to file an amended complaint naming the Comptroller as the head of NYSLRS as a defendant in his official capacity, or find, for the reasons

[3] In its argument on redressability, defendant NYSLRS argues that this Court lacks authority to grant relief. The plaintiff believes that this contention is best addressed in section II infra, which addresses the merits of the plaintiff's reasonable accommodation claim and not whether a favorable decision will redress the plaintiff's injury.

below, that Congress validly waived the state's Eleventh Amendment immunity.

It is well settled that the ADA abrogates Eleventh Amendment immunities. "A state shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202. This statement reflects the "unequivocal expression of Congress's intent to abrogate state sovereign immunity." United States v. Georgia, 546 U.S. 151, 154 (2006). Whether such abrogation was valid requires the following three-part analysis:

> (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

Georgia, 546 U.S. at 159. The plaintiff will address the first criteria in section II infra but concedes that a failure to provide a reasonable accommodation does not violate the Fourteenth Amendment.

When determining whether abrogation is nevertheless valid, this Court must assess whether Title II exhibits "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Garrett, 541 U.S. at 365 (internal quotes omitted). In passing Title II, Congress sought to enforce the provisions of the Fourteenth Amendment, Tennessee v. Lane, 504 U.S. 509, 523 (2004), including the substantive component of the Due Process Clause. Bolmer v. Oliveira, 595

F.3d 134, 147 (2d Cir. 2010). In doing so, Congress sought to remedy "pervasive unequal treatment in the administration of state services and programs." Lane, 541 U.S. at 524. In passing a prohibition against discrimination by the states, which has been interpreted by the Department of Justice to require the provision of reasonable accommodations to state practices, see 28 C.F.R. § 35.130(b)(7), Congress sought to enforce, inter alia, the right to contract and engage in the common occupations of life, which are part of the fundamental right of liberty that the Due Process Clause protects. See Meyer v. Nebraska, 262 U.S. 390, 399 (1923). This exclusion from state services in general, and the opportunity to receive benefits to which a disabled person is contractually entitled in particular, can be evinced by state court lamenting the failure to the State Legislature to take steps to ensure that mentally disabled individuals receive disability retirement benefits to which they are entitled. See Matter of Callace, 140 A.D. 2d at 757-58.

II. PLAINTIFF'S REQUEST FOR AN ACCOMMODATION IN THE FORM OF A WAIVER OF THE STATUTORY TIME REQUIREMENT TO FILE FOR HER DISABILITY RETIREMENT BENEFITS CONSTITUTES A REASONABLE ACCOMMODATION UNDER THE ADA.

When analyzing a claim under the ADA, courts must broadly construe the meaning of the term "reasonable accommodation" in order to reflect Congressional intent: that the ADA constitutes a clear and comprehensive national mandate for the elimination of discrimination on the basis of disability. PGA Tour Inc. v. Martin, 532 U.S. 661, 675 (2001). For this reason, an accommodation which accords a "preference" to an individual with a disability - such that it would cause the disabled worker to

violate a rule that others are required to follow, "cannot, in and of itself, automatically show that the accommodation is not `reasonable.'" U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 398 (2002) (emphasis in original). Indeed, the reasonable accommodation provisions of the ADA will sometimes create an "affirmative obligation" on the part of a covered entity to provide disabled individuals with special, preferential treatment. Borkowski v. Valley Cent. School Dist., 63 F.3d 131, 143 (2d Cir. 1995).[4]

However, notwithstanding the above cited authority, defendant NYSLRS insists that the plaintiff's requested accommodation is not reasonable because it would require NYSLRS to violate procedures set forth in New York Retirement and Social Security Law § 605. See State Def. Memo. at 10. In essence, the defendant seeks to treat plaintiff's application for disability retirement benefits pursuant to New York Retirement and Social Security Law § 605, equally, as that submitted by any one of its other employees. However, it is well settled that when a covered entity, acting under its facially neutral rule or law, treats disabled and nondisabled employees equally, the covered entity may be guilty of violating the ADA nonetheless. See Borkowski, 63 F.3d at 143; Barnett, 535 U.S. at 397, 398 (holding that if an accommodation which violates a disability neutral rule is beyond the Act's potential reach, the "reasonable accommodation" provision could not accomplish its intended effect); PGA Tour,

[4] Although Borkowski involved claims under section 504 of the Rehabilitation Act, the same reasonableness test governs claims under both the ADA and the Rehabilitation Act. See Staron v. McDonald's Corp., 51 F.3d 353, 355-56 (2d Cir. 1995).

Inc., 532 U.S. at 690 (failure to modify facially neutral golf rule for a disabled golfer with a mobility impairment constituted a violation of the ADA for failure to provide reasonable accommodation).

Accordingly, as detailed below, numerous courts have ruled that the duty to provide a reasonable accommodation under the ADA sometimes entails an obligation to act in contravention of a state statute. Most instructive to the present case is McGary v. City of Portland, 386 F.3d 1259 (9th Cir. 2004), in which the Ninth Circuit confronted a petition by a disabled plaintiff who also sought, as a reasonable accommodation under the ADA, an extension or waiver of the time requirement imposed on him within which to comply with defendant city's nuisance laws. The court held that the disabled plaintiff stated an adequate claim under the ADA, when he alleged that the defendant city failed to provide him with a reasonable accommodation in the form of an extension of the time requirement within which to comply with the nuisance abatement ordinance. Id., at 1269.

Similarly, the Second Circuit has recognized that the reasonable accommodation requirement of the ADA, Rehabilitation Act and Fair Housing Act requires municipalities to waive its zoning laws:

> Returning to the example of the zoning ordinance prohibiting elevators, a proper reasonable accommodation claim might assert that the zoning authority should have waived or modified its rule against elevators in residential dwellings.

Reg'l Econ. Comty. Action Program v. City of Middletown ("RECAP"), 294 F.3d 35, 53 (2d Cir. 2002). Hence, courts have

consistently held that an accommodation is reasonable even when it compels a municipality to take action that contravenes existing zoning laws. See, e.g., Oxford House, Inc. v. Town of Babylon, 819 F.Supp. 1179, 1185 (E.D.N.Y. 1993) (requiring modification of the definition of a "family" under town code); Tsombanidis v. City of West Haven, 180 F.Supp.2d 262, 292-93 (D. Conn. 2001) (reasonable accommodation requirement required the defendant city to act in contravention of the City's zoning laws by permitting the plaintiff to operate a group home in a single family residential district); Oxford House, Inc. v. Township of Cherry Hill, 799 F.Supp. 450, 463 (D.N.J. 1992) (holding that defendant's refusal to waive the single family requirement constituted a failure to provide reasonable accommodation).[5] These cases highlight the fallacy of defendant NYSLRS' argument that the plaintiff is asking this Court to judicially amend state law. State Def. Memo. at 6. All other litigants would remain subject to the existing provisions of governing state law.

Despite this well settled law, defendant NYSLRS cites Herschaft v. N.Y. Board of Elections, 2001 U.S. Dist. LEXIS 11801, *18-19 (E.D.N.Y. Aug. 9, 2001), aff'd. 37 Fed. Appx. 17 (2d Cir. 2002), cert. denied, 537 U.S. 825 (2002), to support its argument that whenever an accommodation in the form of a waiver of a time frame in a particular application process results in violating an otherwise constitutional state statute, it is not

[5] While both Oxford House cases involved accommodations sought pursuant to Fair Housing Act, the reasonable accommodation provision of the FHA is the same as the reasonable accommodation requirement in the Rehabilitation Act, see Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334 (2d Cir. 1995), which is the same standard that governs ADA claims. See supra at 12, n.4.

"reasonable" within the meaning of the ADA. See State Def. Memo. at 11. However, Herschaft involved a disabled plaintiff seeking a waiver of the statutory time requirement to submit signatures that would enable the plaintiff to run for elective office. Herschaft, at *18-19. The court denied plaintiff's request in significant part because it would fundamentally alter the election process. Id., at *19-20. A significant difference exists between altering an election and granting additional time to an individual to file an application for disability retirement benefits. Delaying an election can interfere with an orderly voting process by, inter alia, impacting on the ability of the Board of Elections to adequately assess the validity of signatures that the plaintiff candidate submitted to place his name on the ballet. No such broad impact results by granting the plaintiff additional time to file for disability retirement benefits.[6]

Accordingly, little question exists that an accommodation that violates a state law does not necessarily render the accommodation unreasonable. Reconciliation of the authority cited by the plaintiff and defendant leads to the unmistakable conclusion that an accommodation is reasonable if it does not create an undue hardship. See Borkowski, 63 F.3d at 138; Pascuiti v. New York Yankees, 87 F. Supp.2d 221, 223 (S.D.N.Y.

[6] Admittedly, a portion of Herschaft rested on the conclusion that a proposed violation of a state law is not reasonable. To the extent the court relied on this principle for its holding, it cannot be considered sound analysis in light of RECAP. Furthermore, the plaintiff in Herschaft proceeded pro se. Hence, the court may not have had the benefit of authority detailed in this memorandum when reaching its decision.

1999); Mohamed v. Marriott Int'l., Inc. 905 F. Supp. 141, 153 (S.D.N.Y. 1995).[7] The burden rests with a defendant to establish that the proposed accommodation will create undue hardship. See Borkowski, 63 F.3d at 139; Pascuiti, 87 F. Supp.2d at 223; Mohamed, 905 F. Supp. at 153. Particularly because a court decides a Rule 12(b)(6) in the absence of a factual record, a determination of undue hardship is one that cannot generally be made on a motion to dismiss. Cf. Lyons v. Legal Aid Soc., 68 F.3d 1512, 1517 (2d Cir. 1995).

Indeed, the Department of Justice, which has been charged with promulgating regulations pursuant to the ADA, recognizes that the duty to provide reasonable accommodations may very well require state and local government to modify its eligibility procedures for government benefits:

> ILLUSTRATION 2: A county general relief program provides emergency food, shelter, and cash grants to individuals who can demonstrate their eligibility. The application process, however, is extremely lengthy and complex. When many individuals with mental disabilities apply for benefits, they are unable to complete the application process successfully. As a result, they are effectively denied benefits to which they are otherwise entitled. In this case, the county has an obligation to make reasonable

[7] One theoretical difference between the plaintiff's Title II claim and either a Title I claim, or a claim under Rehabilitation Act, is that Title I requires a defendant to establish that an accommodation creates an undue hardship, Borkowski, 63 F.3d at 148, while a Title II claim requires a defendant to establish that an otherwise reasonable accommodation will fundamentally alter the program impacted by the accommodation. See Olmstead v. L.C. by Zimring, 527 U.S. 581, 603 (1999) (citing 28 C.F.R. § 35.130(b)(7)). It remains unclear the degree to which the undue hardship and fundamental alteration defenses are interchangeable. See Disability Advocates Inc., v. Paterson, 653 F. Supp. 2d 184, 301, n.890 (E.D.N.Y. 2009) (rejecting notion that reasonable accommodation defense is distinct from fundamental alteration defense); McGary, 386 F.3d at 1269, n.7 (no significant difference between analysis of fundamental alteration defense and defenses under Rehabilitation Act).

> modifications to its application process to ensure that otherwise eligible individuals are not denied needed benefits. Modifications to the relief program might include simplifying the application process or providing applicants who have mental disabilities with individualized assistance to complete the process.

Americans with Disabilities Act: Title II Technical Assistance Manual § II -36100, General Illustration 2 (1993). The modification of a benefits application process neither creates an undue hardship nor fundamentally alters the application process because even if defendant NYSLRS granted Mary Jo C. a waiver of the 90-day filing period requirement to file for disability retirement benefits, the application process would remain unaltered; the plaintiff would have to satisfy all substantive criteria for benefits.

Accordingly, the Justice Department illustration details the difference between the accommodation that the plaintiff seeks and the accommodation sought by the plaintiffs in the authority cited by defendant NYSLRS: the accommodation that the plaintiff seeks will not alter any substantive criteria established by state law while the plaintiffs in the cases cited by NYSLRS sought to alter substantive criteria. See Harris, 572 F.3d at 74 (rejection of accommodation claim that would have required state to weaken its licensing qualifications for physicians); Pottgen v. Missouri High School Activities Ass'n., 40 F.3d 969, 930 (8th Cir. 1994) (waiving of age limit for participation in school sports); Aughe v. Shalala, 885 F. Supp. 1428, 1432-33(W.D. Wash. 1995)(waiving age limitation for receipt of benefits). As the Second Circuit stated in Harris, "Title II of the ADA requires no . . .

diminishment of otherwise applicable standards." 572 F.3d at 74 (emphasis added).

This is significant because when a party does not seek to alter governing substantive criteria, the party is making an assertion that she is "otherwise qualified" but simply lacked the ability to comply with the required manner set forth under state law to obtain the benefits to which the individual is otherwise entitled. Under such a circumstance, it cannot be said that altering the process for obtaining benefits will create an undue hardship.[8]

Accordingly, the attempt by NYSLRS to characterize the permissible time period for filing as a "condition precedent" as opposed to a statute of limitations is a distinction without any meaningful difference. Characterizing the filing requirement as a "condition precedent" as opposed to a statute of limitation has meant only that tolling provisions under state law for such reason of mental illness will not provide additional time for an otherwise eligible individual to file for benefits. See Matter of Callace, 140 A.D. 2d at 757-58; Hudak v. State of New York

[8] Accordingly, the dicta in Felix v. New York City Transit Auth., 324 F.3d 102, 107 (2d Cir. 2003), in which the court stated that the ADA does not "authorize a preference for disabled people generally," and similar language in Harris, must be reconciled with Barnett by recognizing that from a substantive perspective, a state need not treat an individual differently because such different treatment may result in a benefit provided to an individual who is not otherwise qualified for the particular benefit in question, or opportunities provided to individuals who are not otherwise qualified to receive them. On the other hand, the ADA may require different treatment when the proposed accommodation results in access to a program by someone who is shut out from the program in the absence of an accommodation, but who otherwise meets all eligibility criteria as to result in no diminution of state standards. This means that the accommodation does not create any undue hardship for the state.

Policemen's and Firemen's Retirement System, 106 Misc.2d 540, 541 (Sup. Ct. Albany Cty. 1980). This distinction does not alter the substantive criteria for benefits in any way.

Indeed, the Second Circuit's analysis in Wright v. Giuliani, 230 F.3d 543 (2d Cir. 2000) supports this substantive/procedural distinction. In Wright, the court recognized that the ADA generally does not require substantive modifications to program standards and benefits. 230 F.3d at 547-48. Rather, the Court concluded that the ADA requires "meaningful access" to existing benefits. Id. In this case, the plaintiff seeks meaningful access to the application process that will entitle her to a determination of eligibility for disability retirement benefits that she never received because her disability prevented her from making a timely application.

III. TITLE II OF THE ADA COVERS DISCRIMINATION CLAIMS AGAINST STATE AND LOCAL GOVERNMENTS BY EMPLOYEES.

Whether or not Title II protects individuals from discriminatory conduct by state and local governments in the employment setting has resulted in a split of authority at both the circuit court level and at the district court level within the Second Circuit. Compare Bledsoe v. Palm Beach County Cty. Soil & Water Conservation Dist., 133 F.3d 816, 820-23 (11th Cir. 1998) (Title II governs employment by state and local governments); Transport Workers Union v. New York City Transit Authority, 342 F. Supp.2d 160, 171-75 (S.D.N.Y. 2004)(same) with Zimmerman v. Oregon Dept. of Justice, 170 F.3d 1169, 1173-1178 (9th Cir. 1999) (Title II does not govern employment by government); Scherman v. New York State Banking Department, 2010

U.S. Dist. LEXIS 26288 (S.D.N.Y. Mar.10, 2010); (same) Fleming v. State University of New York, 502 F. Supp.2d 324 332-34 (E.D.N.Y. 2007) (same).

As detailed below, the view of the courts finding employment coverage within Title II appears to be the wiser choice. The language in Title II "is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context." Innovative Health Systems, Inc. v. City of While Plains, 117 F.3d 37, 45 (2d Cir. 1997). Furthermore, the Attorney General has promulgated regulations implementing Title II that incorporates a prohibition on employment discrimination; these regulations are entitled to deference. Transport Workers Union, 342 F.Supp.2d at 174-75. In addition, the legislative history of Title II details that Congress intended that Title II prohibit the same conduct prohibited by Titles I and III. Bledsoe, 133 F.3d at 821.

On the other hand, the courts in Scherman and Fleming found that the Attorney General was not entitled to deference because the language of the statute is clear and unambiguous. Scherman, 2010 U.S. Dist. LEXIS 26288 at *29; Fleming, 502 F. Supp.2d at 333-34. One cannot reasonably say Title II is unambiguous regarding exclusion of employment from coverage. The statute states as follows: "no qualified individual with a disability shall, by reason of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Certainly, it is far from clear that Congress sought to exclude employment as

employment can be considered an activity of government. In addition, the second clause of the statute appears to bar all forms of discrimination, including those that do not involve services, programs or activities.

Likewise, the courts in Scherman and Fleming further relied on Supreme Court precedent that holds that where Congress has included particular language in one part of a statute and omits it in another, Congress sought to limit the language to the particular section where it appears. Scherman, 2010 U.S. Dist. LEXIS 26288 at *30; Fleming, 502 F. Supp.2d at 334. Hence, these courts concluded that Congress sought to combat employment solely through Title I.

This also appears to constitute a tenuous conclusion. In passing Title I and Title III, Congress specifically delineated forms of discrimination prohibited by these titles. On the other hand, Title II simply contains broad prohibitions without specifying particulars. Would a court state that because Title III outlaws specific forms of discrimination in places of public accommodation and Title II does not, places of public accommodation operated by local governments are exempt? To illustrate, would Title III cover the actions of Madison Square Garden, a private entity, but not cover Yankee Stadium because New York City operates this ballpark? This is hardly likely. See Pascuiti, 87 F. Supp. 2d at 222-26 (Title II claim against New York City because of alleged discrimination at Yankee Stadium).

The other reasons offered by the court in Scherman to conclude that Title II does not govern employment claims against the state also lack merit. The court first stated finding that Title II authorized employment claims would render Title I redundant. Scherman, 2010 U.S. Dist. LEXIS 26288 at * 31. This is a wrong conclusion. Congress sought to prohibit discrimination by employers and state and local governments. The existence of overlap covering state and local employers does not mean that Title I as a whole is redundant.

Nor does the absence of an exhaustion requirement in Title II render inoperative the exhaustion requirement of Title I. See Scherman, 2010 U.S. Dist. LEXIS 26288 at * 32. In passing the ADA, Congress sought to provide a remedy for Fourteenth Amendment violations. See Garrett, 531 U.S. at 365; Lane, 509 U.S. at 516-17. In providing a remedy beyond the scope of the Fourteenth Amendment in that Title I prohibited discrimination by private parties, Congress could have reasonably concluded that it wanted to protect private employers by requiring Title I litigants to exhaust an administrative process while believing that it was unnecessary to provide similar protections to government employers under Title II.

Finally, the court in Scherman also justified its holding on the ground that state governments could be subject to conflicting regulations because Congress gave the Equal Employment Opportunity Commission ("EEOC") enforcement authority for Title I violations and the Department of Justice enforcement authority over Title II claims. This does not mean that Congress intended

to exclude employment from Title II coverage. Rather, it might well mean that Congress believed that the EEOC was the most appropriate governmental agency to enforce employment discrimination while the Department of Justice was the most appropriate agency to enforce all other forms of discrimination. Furthermore, Congress could have reasonably concluded that government agencies with expertise in enforcing anti-discrimination laws would not issue conflicting interpretations and in the unlikely situation that they did, rules of statutory construction would be applied to resolve any conflicts.

IV. THE CENTRAL ISLIP PUBLIC LIBRARY FAILED TO PROVIDE A REASONABLE ACCOMMODATION IN THE FORM OF A REQUEST TO FILE FOR RETIREMENT BENEFITS ON BEHALF OF MARY JO C.

As defendant Central Islip Public Library recognizes, Title II of the ADA provides that

> No quali0066ied individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. However, from this, defendant Library argues that the plaintiff must allege that she was denied a service, or participation in a program or activity that the Library provides to the public. Memorandum of Law in Support of Defendant Central Islip Public Library's Motion to Dismiss at 6. However, the plaintiff alleges that defendant Library violated the other clause of 42 U.S.C. § 12132 by asserting that she was subjected to discrimination because the Library failed to provide a reasonable accommodation as required by 28 C.F.R. § 35.130(b)(7). Defendant Library cannot seriously dispute that the ADA prohibits

many forms of discrimination. See 28 C.F.R. § 35.130(b)(1)-(8) and (d); see also 42 U.S.C. § 12112(b) and 12182(b)(2)(A) (detailing various conduct that constitutes discrimination under Titles I and III of ADA). Because a plaintiff may not meet one criteria needed to set forth a cause of action under one anti-discrimination provision does not mean that the plaintiff cannot meet different criteria. In this case the plaintiff relies on 28 C.F.R. § 35.130(b)(7) as a basis for her claim, which requires state and local governments to provide reasonable accommodations.

When making a request for a reasonable accommodation, an individual need not communicate specific language in which he expressly seeks an "accommodation" under the ADA. See Barnett v. U.S. Air, 228 F.3d 1105, 1112 (9th Cir. 2000) (en banc) rev'd. on other grounds, 535 U.S. 391 (2002); Gonsalves v. J.F. Fredricks Tool Co., 964 F. Supp. 616, 623 (D. Conn.1997); Schmidt v. Safeway Inc., 864 F.Supp. 991, 997 (D.Or. 1994). Rather, under the ADA, an individual merely has to communicate to the covered entity that an accommodation is being sought for a protected disabled individual who requires assistance. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, http://www.eeoc.gov/policy/docs/accommodation.html#N_19. Accordingly, when the plaintiff's brother requested the assistance of the Library in filing for disability retirement benefits because Mary Jo C. lacked the capacity to do so because

of her mental illness, see Compl., ¶¶ 23-26, he made a valid request for an accommodation under the ADA.

CONCLUSION

For the reasons given in this memorandum of law, this Court should deny the motions to dismiss made by defendants NYSLRS and CIPL.

Dated: Central Islip, New York
July 13, 2010

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

MARY JO C.,

Plaintiff,

-against-

DOCKET NO.:
CV-09-5635
(SJF/ARL)

NEW YORK STATE AND LOCAL RETIREMENT SYSTEM, CENTRAL ISLIP PUBLIC LIBRARY,

Defendants.

----------X

STATE DEFENDANT'S REPLY MEMORANDUM
IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
MARY JO C.,

Plaintiff,

-against-

DOCKET NO.:
CV-09-5635
(SJF/ARL)

NEW YORK STATE AND LOCAL RETIREMENT SYSTEM, CENTRAL ISLIP PUBLIC LIBRARY,

Defendants.
----------X

STATE DEFENDANT'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

Preliminary Statement

This memorandum of law is submitted on behalf of the State Defendant[1] in reply to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss, dated July 13, 2010 ("Plaintiff's Opp.").[2]

As discussed below, Plaintiff has not established that she has standing to bring this action. Although she argues in opposition that her injury was caused by the State Defendant's failure to accommodate her, this case simply does not present a reasonable accommodation claim. Nor can this Court provide her with the relief she seeks, in effect, a federal judicial modification of a State statute. Likewise, Plaintiff has not shown that she has a plausible ADA cause of action. Regardless of how Plaintiff characterizes her

[1] Terms not otherwise defined herein shall have the meanings ascribed to them in the State Defendant's Memorandum of Law in Support of its Motion to Dismiss the Complaint, dated April 20, 2010 ("State's Memo").

[2] This reply memorandum responds to Points I and II of Plaintiff's Opp., which are the only points relevant to the arguments raised by the State Defendant. Points III and IV of the Plaintiff's Opp. address arguments raised by the CI Library.

claim, what she seeks is a new benefit that is not available to anyone else, i.e., an exemption from a statutory precondition that applies to all other applicants seeking disability retirement benefits. Because the ADA does not mandate the provision of new benefits, Plaintiff's claim fails as a matter of law.

POINT I

THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS ACTION

A. The Eleventh Amendment Bars Plaintiff's Claims

Plaintiff does not dispute that ADA Title II claims seeking equitable relief cannot be brought against a State agency by virtue of Eleventh Amendment immunity. She also recognizes that in order to apply the Ex Parte Young exception to Eleventh Amendment immunity, her claim for injunctive relief can only be brought against a State official in his official capacity. See Plaintiff's Opp., p.9. No State official has been named as a defendant in this case, and therefore, the Ex Parte Young exception is not applicable. See, e.g., Antkies v. N.Y.S. Dep't of Motor Vehicles, 2006 WL 721364, *2 (E.D.N.Y. 2006) (dismissing ADA claim seeking injunctive relief against State agency).

Plaintiff proposes an amendment of her Complaint to comply with Ex Parte Young such that she would name as a defendant the Comptroller in his official capacity. This would be a futile act. An amendment is futile if it could not withstand a motion to dismiss under FRCP 12(b)(6). See Lucente v. IBM Corp., 310 F.3d 243, 258 (2d Cir. 2002). Here, regardless of whether Plaintiff names the State agency or the Comptroller, her Complaint cannot survive a dismissal motion because she lacks standing (see Point I, B, infra) and because she has not stated a viable cause of action (see Point II, infra).

B. Plaintiff Has Failed To Show That She Has Standing

A plaintiff can bring a private right of action under the ADA Title II only if she demonstrates that she was discriminated against because of her disability. See 42 U.S.C. §12132; Henrietta D. v. Bloomberg, 331 F.3d 261, 278 (2d Cir. 2003), cert. denied, 541 U.S. 936 (2004). Here, there are no factual allegations in the Complaint tending to show that Plaintiff was treated in an adverse manner because of her disability. What Plaintiff alleges is that she did not realize that she had to file within the statutory three-month period that is applied to all applicants for such benefits, and as a result, she missed the filing deadline. Complaint, ¶¶20, 30, and 31.[3] In opposition, Plaintiff does not dispute that the State Defendant denied her application because she missed the filing deadline. Plaintiff's Opp., pp.6-7. Any injury that she suffered, therefore, is directly attributed to her own inaction.

Plaintiff argues that the State Defendant failed to accommodate her by waiving the statutory filing period. To support this proposition, Plaintiff cites to two Second Circuit decisions and a Southern District of New York decision. Plaintiff's Opp., p.8 (citing Fulton v. Goord, 591 F.3d 37 (2d Cir. 2009); Pac. Capital Bank, N.A. v. Conn., 542 F.3d 341 (2d Cir. 2008); Mosdos Chofetz Chaim, Inc. v. Village of West Hills, 2010 WL 1270211 (S.D.N.Y. 2010)). None of these cases, however, addresses a situation like the instant one, wherein a plaintiff expects a State agency to waive a statute with which it is obligated to comply. Fulton dealt with a request to modify the New York State

[3] Plaintiff does not explain why her brother, who is alleged to have been assisting her in the filing process, see Complaint, ¶¶21-23, 25-29, could not have filed a timely application on her behalf, or taken other steps, such as seeking the appointment of a guardian, to ensure that her application was filed within the statutory period.

Department of Corrections' inmate visitor program, which the State agency clearly had discretion to do. 591 F.3d at 44, n.3 (recognizing that the State agency likely had "commonplace practices" in place such that plaintiff could visit her inmate husband). Pac. Capital involved a challenge to the constitutionality of a State statute that regulated the granting of certain loans, and it addressed the issue of whether the statute was preempted by federal law. 542 F.3d at 344-47. Mosdos Chofetz involved a challenge to zoning regulations that allegedly barred the operation of a religious site. 2010 WL 1270211 at *7-*10.

Here, there is no challenge to the constitutionality of RSSL §605, nor has Plaintiff argued preemption, demonstrating that Plaintiff's reliance on Pac. Capital is misplaced. Moreover, unlike the defendants in Fulton and Mosdos Chofetz, the State Defendant in the instant case lacks discretion to grant Plaintiff the modification she seeks. The State Defendant has no discretion to carve out individual exemptions to a statute that the legislative branch enacted. Once Plaintiff missed the filing deadline, there was no action that the State Defendant could have taken to permit her to file. The waiver that she seeks is simply not relief that the State Defendant could have granted to her.

Likewise, the relief that Plaintiff seeks from this Court is not relief that it can grant. Plaintiff's opposition is devoid of any authority to support the proposition that a federal court can modify a State statute for one individual. This is hardly surprising given that the State legislature is charged with amending State statutes. See New York State Const., Art. 3, §1 ("[t]he legislative power of this state shall be vested in the senate and assembly"); see also Doe v. Pataki, 481 F.3d 69, 78 (2d Cir. 2007) (recognizing the State's "normal authority to amend its statutes"). The cases that Plaintiff cites to

"support" the proposition that this Court has the ability to redress her injury are distinguishable. See Plaintiff's Opp., pp.13-14. Those cases addressed local ordinances, regulations and practices, and involved situations in which the defendants had discretion to vary the same. See Point II, infra. None of cases relied upon by Plaintiff called for a federal court to create an individual exemption from an enactment of a State Legislature. Plaintiff is in the wrong forum. Her request for a statutory amendment can only be made to the State's legislative branch.

POINT II

PLAINTIFF HAS NOT STATED A PLAUSIBLE CAUSE OF ACTION UNDER TITLE II OF THE ADA

Under State law, disability retirement benefits are available only to those employees who are disabled. See RSSL §605 (c); Bracero v. McCall, 279 A.D.2d 755, 756 (3d Dep't 2001) (entitlement to disability retirement benefits is dependent upon a finding that the member was "physically or mentally incapacitated for the performance of gainful employment"). In order to take advantage of these benefits, strict compliance with the statutory scheme is required. See State's Memo, pp. 5-6. Plaintiff does not dispute that all applicants who fail to file for disability retirement benefits within the statutory period are treated the same way - their claims are denied. She nonetheless argues in opposition that she is entitled under the ADA to a waiver of this statutory deadline. By seeking this waiver based on her individual disability, Plaintiff is seeking a new benefit that is not available to anyone else. The Second Circuit, however, has repeatedly held that the disability discrimination statutes do not require the provision of such a benefit. See Rodriguez v. City of New York, 197 F.3d 611, 618-19 (2d Cir. 1999), cert. denied, 531

U.S. 864 (2000); see also Wright v. Giuliani, 230 F.3d 543, 548 (2d Cir. 2000); Doe v. Pfrommer, 148 F.3d 73, 83-84 (2d Cir. 1998).

In Rodriguez, mentally disabled Medicaid recipients claimed that New York's Medicaid program violated the ADA and the Rehabilitation Act because it did not include safety monitoring in its personal care services, and that such services should have been provided to the mentally disabled as a reasonable accommodation. 197 F.3d at 617-19. The Second Circuit rejected this argument, finding that the services provided to the mentally disabled were no different from those provided to the physically disabled; neither group was provided with this benefit. Id. at 618. Thus, held the Court, "New York cannot have unlawfully discriminated against [plaintiffs] by denying a benefit it provides to no one." Id. Here, the State Defendant does not and cannot provide Plaintiff with a waiver because it is not a benefit that it provides to anyone.

Likewise, Wright and Pfrommer make clear that the ADA does not require a State agency to provide additional or different substantive benefits. Wright, 230 F.3d at 548 (the ADA does not require "that substantively different services be provided to the disabled, no matter how great their need for the services may be." Instead, the ADA only requires that entities make "reasonable accommodations to enable meaningful access to such services as may be provided, whether such services are adequate or not"); Pfrommer, 148 F.3d at 83-84 (rejecting ADA and Rehabilitation Act claims by disabled plaintiff who sought, *inter alia*, a job coach, because what plaintiff was challenging was not illegal discrimination against the disabled, but the substance of the services provided to him). Regardless of how Plaintiff characterizes her request, what she is asking for in this case is a different and new benefit that no one else is entitled to, that is, the waiver of

a statutory precondition to the receipt of disability retirement benefits. Under the Second Circuit precedent cited above, failure to provide her with this benefit does not violate the ADA, and a dismissal based on failure to state a cause of action is appropriate. See, e.g., Shaw v. New York State Dep't of Correctional Services, 2010 WL 2143672, *3 (S.D.N.Y. 2010) (allegation that Dep't of Corrections refused to create an educational program tailored to inmates with dyslexia failed to state a claim under the ADA or Rehabilitation Act).

In opposition, Plaintiff claims that she is not seeking to alter a substantive requirement of a State statute, but is instead seeking a modification of a procedural requirement, akin to a statute of limitations. Plaintiff's Opp., pp. 17-19. This argument, however, was specifically rejected by the very cases that Plaintiff cites, Callace v. New York State Employees' Retirement System, 140 A.D.2d 756 (3d Dep't 1988) and Hudak v. State of New York Policemen's and Firemen's Retirement System, 106 Misc.2d 540 (S.Ct. Albany Co. 1980), both of which held that the filing deadlines under the RSSL were "condition precedents" to the existence of the right to disability benefits. Callace, 140 A.D.2d at 757; Hudak, 106 Misc. 2d at 541. Given the latter, Plaintiff is not seeking the waiver of a procedural requirement that bars access to services provided by the State Defendant, but of a substantive law that defines who is eligible to receive disability retirement benefits. The ADA, however, is not available to alter eligibility requirements for the receipt of disability benefits. 42 U.S.C. §12201(e). Plaintiff's opposition does not address the latter statute.

Plaintiff has not shown that her request, for a waiver of the statutory filing period, constitutes a reasonable accommodation. Notably lacking from Plaintiff's opposition are

any cases wherein a court held that the ADA's reasonable accommodation provision mandated a defendant to waive a statutory requirement. Instead, Plaintiff cites to cases that are readily distinguishable, such as those involving zoning ordinances which prohibited groups of non-family members from living in the same dwelling in an area zoned for single family occupancy. Plaintiff's Opp., pp. 13-14 (citing Reg'l Econ. Comty. Action Program, Inc. v. City of Middletown, 294 F.3d 35 (2d Cir.) ("RECAP"), cert. denied, 537 U.S. 813 (2002); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179 (E.D.N.Y. 1993); Tsombanidis v. City of West Haven, 180 F. Supp.2d 262 (D. Conn. 2001), aff'd in part and reversed in part, 352 F.3d 565 (2d Cir. 2003); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450 (D.N.J. 1992)). In those cases, established procedures were in place whereby the municipality which enacted the ordinance had the discretion to waive or modify it by, for example, granting special use permits, see, e.g., RECAP, 294 F.3d at 43, or variances, see, e.g., Oxford House, 799 F. Supp. at 462.

Equally distinguishable is the Ninth Circuit case relied upon by Plaintiff, McGary v. City of Portland, 386 F.3d 1259 (9th Cir. 2004). Plaintiff's Opp., p. 13. In McGary, the disabled plaintiff requested a modification to a compliance period contained in the city's nuisance abatement program in order to allow him additional time within which to remove trash from his property. Id. at 1264-68. The allotted compliance period was not contained in a State law; the city officials presumably had the discretion to extend that period; and, unlike the instant case, compliance with the filing period was not a condition to the receipt of benefits.

Plaintiff's reliance on U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002), PGA Tour Inc. v. Martin, 532 U.S. 661 (2001), and Borkowski v. Valley Cent. School Dist., 63 F.3d 131 (2d Cir. 1995), is also misplaced. See Plaintiff's Opp., pp.11-13. Barnett arose in the context of an employment discrimination claim, and addressed the issue of whether the ADA required an employer to assign a disabled employee to a job if the assignment violated the employer's seniority rules. 535 U.S. at 395-97. The Court held that such an assignment ordinarily would not be reasonable, but that the plaintiff could show the existence of "special circumstances" which could change the result. Id. at 403-06. PGA Tour arose under ADA Title III and involved a requested modification to the golf association's rule banning the use of golf carts in certain tournaments. 532 U.S. at 669. Borkowski addressed the inapposite issue of whether an employer was required to provide a teacher's aide as a reasonable accommodation to plaintiff under the Rehabilitation Act. 63 F.3d at 133-34. None of these cases would support the finding that it is reasonable to require the State Defendant to alter an eligibility requirement contained in a disability statute.

Finally, Plaintiff's attempt to distinguish Harris v. Mills, 572 F.3d 66 (2d Cir. 2009) and Herschaft v. New York Board of Elections, 2001 WL 940923 (E.D.N.Y. 2001), aff'd on other grounds, 37 Fed. Appx. 17 (2d Cir.), cert. denied, 537 U.S. 825 (2002), cited in the State's Memo at pp. 10-11, is unpersuasive. See Plaintiff's Opp., pp. 14-15 and 17. Harris makes clear that the ADA does not require a covered entity to ignore or relax governing standards, 572 F.3d at 74, which is exactly what the Plaintiff is asking for in the instant case. Herschaft is also on all fours with the instant case because there, like here, the court specifically addressed the issue of whether an accommodation was

reasonable where it required a defendant to ignore a statutory filing deadline that the defendant had no discretion to waive. 2001 WL 940923 at *6. The Herschaft court found that it was unreasonable. Id. Plaintiff claims that this finding is not sound in light of RECAP, Plaintiff's Opp., p.15, n.6, but as discussed above, RECAP is completely inapposite. This Court should likewise conclude that Plaintiff's request for an accommodation is unreasonable as a matter of law.

Conclusion

For the reasons set forth herein and in the State's Memo, the State Defendant's motion to dismiss should be granted.

Dated: August 3, 2010
Hauppauge, New York

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STATE OF NEW YORK)
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LINDA MILLER, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and is employed in the office of ANDREW M. CUOMO, Attorney General of the State of New York, Attorney for State Defendant. On August 12, 2010 she served a copy of the enclosed Reply Memorandum of Law in Further Support of its Motion to Dismiss upon the following named person(s):

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the addresses designated by said persons for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

LINDA MILLER

Sworn to before me this
12th day of August, 2010

PATRICIA M. HINGERTON
Assistant Attorney General

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

MARY JO C.,

Plaintiff,

-against-

NEW YORK STATE AND LOCAL RETIREMENT SYSTEM, CENTRAL ISLIP PUBLIC LIBRARY,

Defendants.

----------X

CV-09 5635 (SJF)(ARL)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT CENTRAL ISLIP PUBLIC LIBRARY'S MOTION TO DISMISS

Respectfully Submitted,

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PRELIMINARY STATEMENT

Defendant, Central Islip Public Library (the "Library" or "Central Islip Library") respectfully submits this memorandum of law in reply to the opposition papers submitted by Plaintiff, and in further support of Central Islip Library's motion to dismiss the Complaint pursuant to Fed. R. Civ. Proc. 12(b)(6). For the reasons set forth herein, the Library's motion should be granted dismissing Plaintiff's Complaint, *in toto* and, moreover, this Court's dismissal should be with prejudice.

Critically, in her opposition, Plaintiff fails to refute the core challenges raised by the Central Islip Library in its motion to dismiss. Specifically, Plaintiff ignores recent well reasoned case law and instead relies on outdated decisions to support her tenuous position. Moreover, Plaintiff's arguments constitute nothing more than a desperate attempt to survive the instant motion to dismiss and disguise her failure to properly and timely assert employment discrimination claims under Title I of the ADA. Plaintiff's claims clearly relate to her prior employment with the Library, therefore, she should not be permitted to bypass the administrative requirements of Title I. As set forth in the Library's original motion papers and as will be elaborated further herein, Plaintiff's claims against the Central Islip Library should be dismissed in their entirety due to Plaintiff's failure to state a claim.

ARGUMENT

POINT 1

PLAINTIFF FAILS TO REFUTE THE FACT THAT SHE HAS NOT BEEN DENIED ACCESS TO PUBLIC SERVICES

Title II of the ADA proscribes discrimination against disabled individuals with respect to access to ***public services***. *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 84-85 (2d Cir. 2004). In order to establish a prima facia case under Title II, Plaintiff must demonstrate that: (1) she is a qualified individual with a disability;[1] (2) she is being excluded from participation in, or being denied the benefits of some service, program, or activity by reason of her disability; and (3) the entity which provides the service, program, or activity is a public entity. *Powell at* 84-85; *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1037 (S.D.N.Y. 1995); *Henrietta D. v. Giuliani*, 1996 U.S. Dist. LEXIS 22373 (E.D.N.Y. 1996). Plaintiff's claims fail as a matter of law as she is unable to demonstrate that she has been excluded from participation in or has been denied the benefits of a service or program provided by the Library.

Plaintiff's opposition fails to refute the clear fact that Plaintiff has not been denied access to a service program or activity offered by the Central Islip Library. In fact, in her opposition, Plaintiff acknowledges that she does not meet this requirement. *See*, Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss dated July 13, 2010 ("Plaintiff's MOL") at p. 24 ("[b]ecause a plaintiff may not meet one criteria needed to set forth a cause of action under one anti-discrimination provision does not mean that the plaintiff cannot meet different criteria.").

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[1] A qualified individual with a disability is defined as a disabled person who, whether or not given an accommodation, "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). By its very nature, the definition imposed by Title II of the ADA requires that, to assert a claim for relief, a plaintiff must be otherwise entitled to participate in services or programs provided by a public entity. Plaintiff fails to meet this requirement.

Instead, of address this deficiency, Plaintiff relies on a Department of Justice Regulation, 28 C.F.R. § 35.130(b)(7), which requires state and local governments to provide reasonable accommodations. *Id.* Critically, Plaintiff's misguided argument fails to account for the fact that pursuant to Title II, "disabled individuals are entitled to receive 'reasonable accommodations' that permit them to have access to and take a meaningful part in ***public services*** and ***public accommodations***." *Falchenberg v. N.Y. State Dep't of Educ.*, 2009 U.S. App. LEXIS 12213 at **3 (2d Cir. 2009) *citing Powell at* 85 (emphasis added). Without further explanation or analysis, Plaintiff fails to connect her request for a reasonable accommodation to a benefit or service offered by the Library to the public.

As fully set forth in the Central Islip Library's moving papers, Plaintiff does not demonstrate that her requested accommodations, consisting of requests that the Library: 1) file a disability retirement application on Plaintiff's behalf; and 2) agree to classify Plaintiff's termination as a leave of absence, are "services, programs or activities" that the Library offers to the public. On the contrary, the accommodations that Plaintiff claims were denied by the Library, by their very nature, relate to her prior employment with the Library, not her use or enjoyment of the Library as a member of the public.[2] Accordingly, Plaintiff fails to make a *prima facia* case under Title II of the ADA.

POINT II

TITLE I DEALS EXCLUSIVELY WITH EMPLOYMENT DISCRIMINATION UNDER THE ADA

Plaintiff does not refute the fact that she did not file an administrative complaint with the Equal Employment Opportunity Commission or any State or local agency, which is a requirement for her to bring a claim for employment discrimination under Title I of the ADA.

[2] As set forth in Point II *infra*, Plaintiff cannot maintain employment claims under Title II of the ADA.

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Instead, Plaintiff brings her claim under Title II of the ADA, likely because, unlike Title I, Title II does not require that she exhaust any administrative remedies. A close examination of the language and structure of the ADA, as fully set forth in the Library's underlying motion papers, reveals Congress' intent that employment discrimination claims be brought under Title I of the ADA and not under Title II. *See, Central Islip Public Library's Memorandum of Law dated May 27, 2010, ("CIPL MOL")* at Point B. Therefore, as Plaintiff has failed to exhaust her administrative remedies and has not otherwise asserted a claim under Title I of the ADA, her Title II claims fail as a matter of law.

In response to this argument, Plaintiff's opposition discusses the split of authority at the circuit and district court levels and relies simply on the proposition that "the view of the courts finding employment coverage within Title II appears to be the wiser choice." *Plaintiff MOL* at pp. 19-20. Relying on little more than conclusory language, Plaintiff fails to refute the arguments propounded by Library in its underlying motion to dismiss and seemingly this counts the recent well reasoned decisions of this Court and other courts within the Second Circuit.

Critically, less than two months ago, this Court held that, "[a]lthough district courts in this Circuit have split on the issue, the Court agrees with ***well-reasoned*** precedent that ***Title I is the exclusive remedy for employment discrimination claims***, even if the employer is a public entity." *See, Emmons v. City Univ. of N.Y.*, 2010 U.S. Dist. LEXIS 54140 (E.D.N.Y. June 1, 2010) (emphasis added), *citing Scherman v. N.Y. State Banking Dep't*, 2010 U.S. Dist. LEXIS 26288, at *22-*34 (S.D.N.Y. 2010); *Chiesa v. N.Y. State Dep't of Labor*, 638 F. Supp. 2d 316, 321 (N.D.N.Y. 2009); *Fleming v. State Univ. of N.Y.*, 502 F. Supp. 2d 324, 333 (E.D.N.Y. 2007); *see also, Brown v. Conn.*, 2010 U.S. Dist LEXIS (D. Conn., May 26, 2010) (recently holding that Title II of the ADA does not apply to employment actions, which must be brought under Title I).

Notably, Plaintiff fails to mention the recent *Emmons* or *Brown* decisions in her opposition papers.

As recently discussed by the *Brown* court, the Second Circuit has not yet decided whether claims of discrimination in employment are cognizable under Title II of the ADA. *See, Brown at 53, citing Mullen v. Rieckhoff*, 189 F.3d 461, 1999 WL 568040 (2d Cir. 1999) (summary order). District courts within the Second Circuit have decided both ways on this issue. However, as noted in *Brown*, the Supreme Court case of *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001), appears to be an informal dividing line – in the years before (and the year immediately after) *Garrett*, district courts in the Second Circuit tended to permit employment discrimination claims under Title II to proceed. *See, e.g., Winokur v. Office of Court Admin.*, 190 F. Supp. 2d 444 (E.D.N.Y. 2002); *Simms v. City of New York*, 160 F. Supp. 2d 398 (E.D.N.Y. 2002); *Worthington v. City of New Haven*, 1999 U.S. Dist. LEXIS 16104, (D. Conn. 1999); *Magee v. Nassau County Med. Ctr.*, 27 F. Supp. 2d 154 (E.D.N.Y. 1998); *Hernandez v. City of Hartford*, 959 F. Supp. 125, 133 (D. Conn. 1997); *Rome v. MTA/New York City Transit*, 1997 U.S. Dist. LEXIS 23436, (E.D.N.Y. 1997); *Graboski v. Guiliani*, 937 F. Supp. 258 (S.D.N.Y. 1996); *Finley v. Giacobbe*, 827 F. Supp. 215 (S.D.N.Y. 1993).

Although the *Garrett* Court initially granted certiorari on the constitutionality of Titles I and II of the ADA, in a footnote it dismissed the Title II portion of the writ as improvidently granted because the briefs did not sufficiently address:

> [T]he question [of] whether Title II of the ADA, dealing with the 'services, programs, or activities of a public entity,' 42 U.S.C. § 12132, is available for claims of employment discrimination when Title I of the ADA expressly deals with that subject. *See, e.g., Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) ("[W]here Congress includes particular language

> in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)).

Garrett, 531 U.S. at 360 n. 1.

Notably, following the *Garrett* Court's citation to *Russello,* many district courts in this Circuit have read the decision as an indication that the Supreme Court would not have permitted employment discrimination claims to proceed under Title II. *Brown* at 55. Indeed, many of these courts have explicitly adopted the reasoning of the Ninth Circuit decision in *Zimmerman v. Oregon Department of Justice*, 170 F.3d 1169, 1173 (9th Cir. 1999), holding that "Congress unambiguously expressed its intent for Title II not to apply to employment." *See, e.g., Fleming at 333*; *Scherman*, 2010 U.S. Dist. LEXIS 26288 (Title II does not apply to employment discrimination); *Cormier v. City of Meriden*, 2004 U.S. Dist. LEXIS 21104, at *4 (D. Conn. 2004) ("[T]he Court is persuaded that the overall context of Title II compels the conclusion that employment discrimination claims are not cognizable under that provision."); *Ayantola v. Community Technical Colleges of Connecticut Board of Trustees*, 2007 U.S. Dist. LEXIS 23547 (D. Conn. 2007); *Syken v. N.Y. Exec. Dep't, Div. of Hous. & Comm. Renewal,* 2003 U.S. Dist. LEXIS 5358, (S.D.N.Y. 2003) ("Title II does not apply to employment discrimination claims."); *Sworn v. W. N.Y. Children's Psychiatric Ctr.*, 269 F. Supp. 2d 152, 157 (S.D.N.Y. 2003) ("[P]laintiff should not be permitted to circumvent the holding of *Garrett*, which immunizes states from employment discrimination claims brought pursuant to Title I of the ADA, by commencing suit under Title II, a subchapter which lacks any of the procedural protections afforded employers under Title I."); *Filush v. Town of Weston*, 266 F. Supp. 2d 322, 330 (D. Conn. 2003) ("Congress did not intend for Title II to apply to employment.").

In support of her proposition that Title II applies to employment discrimination claims, Plaintiff essentially defers to a Department of Justice regulation interpreting Title II as prohibiting employment discrimination by public entities and characterizes Title II as a "catch all" provision intended to encompass all claims of discrimination. *See,* Plaintiff's MOL at p. 20.

The Supreme Court has provided a two-step process when faced with an administrative agency's interpretation of a statute, for reviewing the agency's construction of the statute. *See, e.g., Chevron U.S.A. Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44, (1984). The first step is to determine whether Congressional intent is clear. *Id.* at 842. "If the intent of Congress is clear, that is then end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If Congressional intent is ambiguous, the second step is to determine if the agency's regulations are "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

As set forth in the Central Islip Library's moving papers, the language and structure of the ADA demonstrates Congress' clear intent for Title II not to apply to employment claims. *See, CIPL MOL* at Point B; *see also, Scherman* at *29-*34. Plaintiff simply discounts the well reasoned arguments propounded by the courts in this district regarding Congress' clear intent that Title II does not apply to claims of employment discrimination.

In sum, Plaintiff fails to refute the following facts:

- Title I of the ADA is the only title in the Act that specifically addresses employment. Title II does not include any definition relevant to employers, as in Title I. *See, Cormier*, 2004 U.S. Dist. LEXIS 21104. Congress' failure to make any mention of employment in Title II is presumed to be an intentional exclusion. *Scherman* at *30.

- Title I is entitled "Employment" and expressly prohibits discrimination based on disability with regard to all "terms, conditions, and privileges of employment". 42 U.S.C. § 12112; 12111(2), (5), (7). Whereas, Title II of the ADA is entitled "Public Service" and lacks any employment provisions. *See*, 42 U.S.C. § 12132.

- Title I and Title II provide different definitions for a "qualified individual". Title I defines a "qualified Individual" as an individual "who . . . can perform the essential functions of the ***employment*** position . . ." 42 U.S.C. § 12111(8) (emphasis added). Title II defines it on the basis of an individual's ability to receive services or participate in programs or activities. *Id.* at § 12132.

- Definitions of the entities subject to Titles I and II differ. Title I prohibits discrimination by a "covered entity," defined as "an ***employer, employment agency, labor organization, or joint labor-management committee.***" 42 U.S.C. §§ 12112, 12111 (emphasis added). In contrast, Title II prohibits discrimination by a "public entity," defined as "any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation...." *Id.* at §§ 12132, 12131.

- Application of Title II to employment discrimination claims would render Title I redundant as applied to public employees. *See, Scherman* at *31; *Filush* at 330.

- The procedural protections afforded employers under Title I would be eviscerated by the application of Title II to employment discrimination. *Fleming*, at 333. Allowing a plaintiff to bring an employment discrimination suit under Title II permits him or her to bypass the administrative exhaustion requirement of Title I and the applicable deadlines.[3] If Title II were applied to employment discrimination it would effectively nullify Title I's statutory limitations.

- Congress delegated regulatory authority for Title I and Title II to different agencies. If both titles of the Act were to apply to employment discrimination, state and local governments would likely be subject to conflicting regulations. *See, Syken* at *9; *see also, Scherman* at *33.

As set forth herein and in the holdings of recently reported decisions by this Court and courts in this district, the language and structure of the ADA clearly expresses Congress' intent that employment discrimination claims be brought under Title I of the ADA and not under Title

[3] In New York State, a claim pursuant to the ADA is time barred if a plaintiff does not file a charge of discrimination with the EEOC within three hundred (300) days after the alleged unlawful employment practice. *See*, 42 U.S.C. § 12117. There can be no doubt that this filling deadline encourages the prompt processing of all charges of discrimination and protects employers from the burden of defending claims arising from employment related decisions that have long since passed. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630 (2007). Notably, Plaintiff did not file the within complaint until more than three years following the termination of her employment with the Library and the Library's alleged denial of her requests for accommodations, therefore, Plaintiff's deadline to file an administrative charge has long expired.

II. Therefore, as Plaintiff has failed to exhaust her administrative remedies and has not otherwise asserted a claim under Title I of the ADA, her Title II claims fail as a matter of law.

POINT III

PLAINTIFF FAILS TO STATE A CLAIM UNDER NEW YORK LAW

New York State disability discrimination claims are governed by the same legal standards as federal ADA claims. Plaintiff does not dispute this proposition. *See Plaintiff MOL* at p. 3 fn. 1. For the reasons set forth herein, Plaintiff's claims under New York Executive Law fail. Accordingly, Plaintiff's pendent state law claims as against the Central Islip Library must be dismissed in their entirety.

CONCLUSION

For the reasons set forth herein and in Central Islip Public Library's Memorandum of Law in Support of its Motion to Dismiss it is respectfully requested that Central Islip Library's motion be granted in its entirety with such other and further relief as this Court deems just and proper.

Dated: Uniondale, New York
August 23, 2010

Respectfully submitted,

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