UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JUAN PABLO GARCES,

Plaintiff,

-v- No. 16-CV-2811-LTS

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.
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MEMORANDUM OPINION AND ORDER

Plaintiff Juan Pablo Garces ("Plaintiff" or "Garces"), brings this civil rights action, pursuant to The Americans with Disabilities Act, 42 U.S.C. § 12111 et seq. (the "ADA"), against Defendant The New York City Housing Authority ("Defendant" or "NYCHA"). In a one-count Amended Complaint, Plaintiff, a former NYCHA employee, alleges that he suffered unlawful discrimination on the basis of his disability, that his employer unlawfully failed to make a reasonable accommodation of his disability, and that Defendant's actions resulted in his constructive discharge. (Docket Entry No. 11.) Plaintiff seeks declaratory judgment, compensatory damages, and costs. Defendant now moves, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss all of Plaintiff's claims, for failure to exhaust administrative remedies as to the ADA constructive discharge claim, and for failure to state a claim upon which relief can be granted. (Docket Entry No. 13.)

The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331.

The Court has reviewed carefully all of the submissions of the parties. For the following reasons, the Defendant's motion is denied in its entirety.

BACKGROUND

The following summary is derived from the factual allegations in the amended complaint, which are accepted as true for purposes of the instant motion practice, and the complaint that Plaintiff filed with the New York State Division of Human Rights ("SDHR"), which is referenced in the Amended Complaint and is material to Defendant's exhaustion arguments.[1]

Plaintiff was sixty-eight years old at the time he filed the Amended Complaint in this action, and was employed by Defendant for more than twenty-five years, from February 9, 1990, until September 30, 2015. (Amended Complaint, Docket Entry No. 11, ¶ 8 ("Am. Compl.").) Since 2004, Plaintiff has suffered from a disability due to medical problems with his kidneys. (Id. ¶ 10.) In February 2006, Plaintiff had a kidney transplant that has significantly affected his immune system, and anti-rejection medication has made Plaintiff vulnerable to contracting "infections from exposure to bacteria in unsanitary environments." Id. Because of these health issues, Plaintiff, who had served as a Construction Project Manager for NYCHA

[1] Defendant's motion is accompanied by a variety of evidentiary proffers, ranging from doctors' notes to a transcript of a grievance hearing. While documents that accompany, are incorporated by reference in, or are integral to a complaint may properly be considered in connection with a motion under Federal Rule of Civil Procedure 12(b)(6), most of the documentation upon which Defendant relies is outside the proper scope of the record for this motion practice. See Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002) (holding that a "court's consideration of [a] document on a dismissal motion" turns on "a plaintiff's reliance on the terms and effects of [a] document in drafting the complaint[,]" as "mere notice or possession [of a document] is not enough"). The Court has considered Plaintiff's SDHR complaint, which is specifically referenced in Plaintiff's Amended Complaint and is annexed as Exhibit I to the Kilduff-Conlon Declaration in support of Defendant's motion. (See Kilduff-Conlon Declaration ("Kilduff-Conlon Decl."), Docket Entry No. 14, Ex. I.) The remainder of Defendant's additional proffers, which are neither incorporated by reference into nor integral to the complaint, have not been considered.

since 1996, requested and was granted a reasonable accommodation for office work at Defendant's central office, located at 90 Church Street in New York, New York, beginning October 17, 2006. (Id. ¶¶ 9, 11.) On or about October 22, 2014, Deputy Director of Construction Victor Brenner ("Brenner") assigned Plaintiff to a new position and title—"Program Specialist"—within the 90 Church Street office. (Id. ¶ 13.) That position had a higher civil service title and higher compensation associated with it. Id. After several months in the Program Specialist position, Plaintiff asked to receive the higher salary that was associated with the position; Mr. Brenner refused to increase his salary. Plaintiff then filed a grievance through his union in March 2015, and Brenner removed Plaintiff from the Program Specialist position shortly thereafter, as of March 27, 2015. (See id. ¶¶ 14-16.)

In April 2015, Brenner informed Plaintiff that he was being transferred from the 90 Church Street location to NYCHA's Upper Park Avenue Community Association ("UPACA") office, located at 125th Street and Lexington Avenue, in Upper Manhattan. (Id. ¶ 17.) Plaintiff "immediately objected" to the transfer, "explaining that due to his health condition and need for a reasonable accommodation, he could not be moved to the UPACA Harlem office as of May 11, 2015." (Id. ¶ 18.) On May 8, 2015, Plaintiff emailed Defendant's Human Resources Director and Equal Employment Opportunity office, explaining his need for a reasonable accommodation and why he would be unable to report to UPACA. Id. Plaintiff alleges that Defendant ignored this email and did not engage in an interactive process to consider Plaintiff's request for a reasonable accommodation to remain at the 90 Church Street office. Id. Plaintiff further alleges that he advised Adam Eagle, NYCHA's Deputy Director of Capital Projects and Administration, about his medical conditions in either May and/or June of 2015 "that would specifically prevent him from reporting to UPACA due to his need for reasonable

accommodation," but neither Mr. Eagle nor Defendant met with Plaintiff or tried to reasonably accommodate Plaintiff. (Id. ¶ 20.) Plaintiff alleges that he continued to object to the transfer and provide Defendant with medical notes to support his request for a reasonable accommodation. (Id. ¶ 19.) On May 26, 2015, Brenner directed Plaintiff to report to the UPACA office, "under threat of insubordination by refusing to do so." Id.

As directed, Plaintiff reported to UPACA on May 26, 2015, and "found the environment unclean and unsanitary," and was concerned that such an environment "would further aggravate his condition and substantially increase the likelihood of [contracting] infections" that could further jeopardize his kidney and overall health. (Id. ¶ 21.) After Plaintiff's first day at UPACA, he "immediately" returned to the 90 Church Street NYCHA office to speak with Capital Projects Director Patricia Zander about his need for a reasonable accommodation and transfer back to the 90 Church Street location, citing the unsanitary conditions at the UPACA location, the physical stress of the commute to UPACA due to the increased travel time, and the high subway stairs required to travel there. (Id. ¶ 22.) Ms. Zander refused to meet with Plaintiff in person, and emailed Plaintiff the following day, May 27, 2015, ordering him back to UPACA. (Id. ¶¶ 22-23.)

Plaintiff simultaneously notified his union of the unsanitary work conditions at UPACA, which were allegedly confirmed by a letter the local union president sent to NYCHA on June 3, 2015. (Id. ¶ 24.) Plaintiff alleges that Defendant did not undertake to "clean up the environment at UPACA until at least July 24, 2015, almost two months after Plaintiff was involuntarily assigned there" and that, initially, "Defendant tried to [hide] the unhealthy conditions at UPACA from the union" by intentionally "taking misleading photographs" of bathrooms. Id.

Plaintiff alleges "he was not assigned any meaningful work at the UPACA location," and that he "could do the . . . same close-out work he was assigned [at UPACA] from the 90 Church Street location;" thus, allowing him "to remain at 90 Church Street would have posed no undue hardship to the agency." (Id. ¶ 25.) Plaintiff continued to report to the UPACA location as directed, though he missed two weeks of work in June of 2015, "due to bronchial conditions, which his doctor had diagnosed as due to the toxins he was exposed to in his work environment at the UPACA location." (Id. ¶ 26.) According to Plaintiff, "[t]he new location also unreasonably extended his commuting and work time, aggravating his stress and preexisting health conditions." Id. Plaintiff further alleges that he exhausted his sick leave balance due to his "aggravated health conditions in May and June 2015," which he attributes to the "unsanitary work environment at UPACA."

On or about June 17, 2015, Plaintiff filed a complaint with the New York State Division of Human Rights ("SDHR"), "based in part on disability discrimination due to Defendant's failure to reasonably accommodate his health condition." (Id. ¶ 27.) "At about the time of filing his SDHR complaint," Plaintiff also filed his retirement papers, effective September 30, 2015, "due to the stressful conditions he has been placed under at UPACA without reasonable accommodation, causing severe aggravation of his fragile health condition." (Id. ¶ 28.) Plaintiff alleges that he "had originally planned to retire at his full retirement age after 30 years of service," and thus "lost at least ten percent of his pension and additional salary by being pressured into retiring early." (Id. ¶ 31.)

On or about September 7, 2015, Defendant returned Plaintiff to the 90 Church Street office, "but gave him no meaningful work there." (Id. ¶ 32.) The transfer occurred after

Plaintiff had filed the SDHR complaint and a separate verified petition with the New York City Office of Collective Bargaining, and after he had already submitted his retirement papers. Id.

On January 20, 2016, Plaintiff received a right to sue letter from the Equal Employment Opportunity Commission ("EEOC"). (Id. ¶ 33.) On April 15, 2016, Plaintiff commenced the instant action, and he filed the Amended Complaint on August 4, 2016.

DISCUSSION

Defendant argues that Plaintiff's action must be dismissed because he failed to exhaust his disability-based constructive discharge claim before filing suit, and because the amended complaint fails plausibly to plead causes of action for failure to reasonably accommodate Plaintiff's disability and disability-related constructive discharge.

When deciding a motion, brought pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss a complaint for failure to state a claim, the Court assumes the truth of the facts asserted in the complaint, and draws all reasonable inferences in favor of the plaintiff. See Harris v. Mills, 572 F.3d 66, 71 (2d Cir. 2009). In order 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, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556).

"In adjudicating a motion to dismiss, a court may consider only the complaint, any written instrument attached to the complaint as an exhibit, any statements or documents incorporated in it by reference, and any document upon which the complaint heavily relies."

Geron v. Seyfarth Shaw LLP (In re Thelen LLP), 736 F.3d 213, 219 (2d Cir. 2013) (citing Chambers, 282 F.3d at 152-53). As noted above, many of the additional documents that Defendant has proffered to draw into question the believability of Plaintiff's allegations fall outside the scope of material that may properly be considered on a motion to dismiss the complaint, and have therefore been disregarded for purposes of this motion practice.

Constructive Discharge Claim

Exhaustion of Administrative Remedies

In his Amended Complaint in this action, Plaintiff asserts that "by insisting Plaintiff report to an unsanitary UPACA location," Defendant "caused Plaintiff's health condition to become severely aggravated, resulting in severe physical and emotional distress to Plaintiff, and causing Plaintiff to have [to] resign prematurely from the agency, resulting in his constructive discharge." (Am. Compl. ¶ 36.) In his SDHR complaint, which was filed in June 2015, Plaintiff complained of health issues and a failure to accommodate his needs in connection with the assignment to the 125th Street location, and asserted that "My employer is clearly . . . seeking to target me to retire based on my age." (See Kilduff-Conlon Decl., Ex I, Docket Entry No. 14, at 97.) The complaint did not include any language specifically tying the disability-based complaints to the issue of pressure to retire. Defendant asserts that the Amended Complaint in this action should be dismissed because Plaintiff failed to raise his claim of disability-related constructive discharge at the administrative level.

"[A]s a general matter, the failure to exhaust administrative remedies is a precondition to bringing a Title VII claim in federal court." Francis v. City of New York, 235 F.3d 763, 768 (2d Cir. 2000) (internal citations and quotation marks omitted). "A plaintiff must

first pursue available administrative remedies and file a timely complaint with the EEOC." Deravin v. Kerik, 335 F.3d 195, 200 (2d Cir. 2003).[2] "The purpose of [the] exhaustion requirement is to give the administrative agency the opportunity to investigate, mediate, and take remedial action." Fowlkes v. Ironworkers Local 40, 790 F.3d 378, 384 (2d Cir. 2015) (internal quotation marks and citation omitted)). Claims that were not asserted before the EEOC may nonetheless, however, "be pursued in a subsequent federal court action if they are reasonably related to those that were filed with the agency[,]" and "[a] claim is considered reasonably related if the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made." Deravin, 335 F.3d at 200-01. When determining whether a claim that was not asserted at the administrative level is "reasonably related" to claims that were, courts focus "on the factual allegations made in the EEOC charge itself, describing the discriminatory conduct about which a plaintiff is grieving." Id. at 201 (internal brackets omitted). The main inquiry is whether the complaint filed with the EEOC provided the agency with "adequate notice to investigate discrimination on both bases." Id. at 202.

Plaintiff's SDHR complaint included specific allegations concerning his health conditions and asserted that the 125th Street location was "very difficult . . . to report to and [was] an unsafe working environment due to dust and other very unsanitary conditions." (Kilduff-Conlon Decl., Ex. I, at 97.) Because he raised health-related issues implicating his ability to work in the location to which he was assigned, the EEOC investigation would necessarily have

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[2] In New York, administrative complaints may be lodged in the first instance with the SDHR, which is authorized to accept complaints on behalf of the EEOC. See Nunez v. N.Y. State Dep't of Corr. & Cmty. Supervision, No. 14-CV-664- JMF, 2015 WL 4605684, at *7 (S.D.N.Y. July 31, 2015).

covered the conditions Plaintiff's Amended Complaint cites as amounting to constructive discharge. The disability-related constructive discharge issue would thus have "fall[en] within the scope of the EEOC investigation" because it could "reasonably [have been] expected to grow out of the charge" of disability discrimination. See Deravin, 335 F.3d at 200-01. Plaintiff's complaint to the SDHR also provided NYCHA with notice of Plaintiff's concern regarding perceived pressure to leave his job, as he alleged that NYCHA was seeking to "target [him] to retire." (Kilduff-Conlon Decl., Ex. I, at 97.) Plaintiff's claim for constructive discharge based on disability is reasonably related to his SDHR complaint. Defendant's motion to dismiss Plaintiff's constructive discharge claim for failure to exhaust administrative remedies is therefore denied.

Sufficiency of Disability Discrimination Allegations

Defendant argues in the alternative that Plaintiff's claim of constructive discharge based on disability should be dismissed for failure to state a plausible claim, asserting that Plaintiff's transfer to UPACA had only been temporary and noting that Plaintiff had been reassigned to 90 Church Street prior to retiring but nonetheless chose to retire. Defendant's assertions regarding the temporary nature of the assignment are supported by evidentiary proffers, as are further allegations that the conditions at the 125th Street location were not materially deficient and were remedied promptly after Plaintiff complained of them. (See Def. Opening Br. and Kilduff-Conlon Decl.) Defendant's reliance on material extraneous to the Amended Complaint to contradict or undermine Plaintiff's factual allegations is, however, misplaced. On this motion pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court determines whether the factual allegations of the Plaintiff's pleading, read in the light most

favorable to Plaintiff, are sufficient to support plausibly the cause of action asserted. See Iqbal, 556 U.S. at 678.

"'Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily. Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" Theilig v. United Tech Corp., 415 F. App'x 331, 334 (2d Cir. 2011) (quoting Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 89 (2d Cir. 1996)) (citing Terry v. Ashcroft, 336 F.3d 128, 151-52 (2d Cir. 2003)). Allegations that simply suggest difficulty or unpleasantness, or the employee's dissatisfaction with working conditions, are insufficient to frame a claim for constructive discharge. See De La Pena v. Metro. Life Ins. Co., 953 F. Supp. 2d 393, 419 (E.D.N.Y. 2013) (dismissing complaint for failure to plead an intolerable workplace). A constructive discharge claim cannot be established "simply through evidence that an employee was dissatisfied with the nature of his assignments." Stetson v. NYNEX Serv. Co., 995 F.2d 355, 360 (2d Cir. 1993).

Here, Plaintiff alleges that by "insisting [he] report to an unsanitary UPACA location," causing his "health condition to become severely aggravated, resulting in severe physical and emotional distress to [him], and causing [him] to have [to] resign prematurely from the agency," Defendant constructively discharged Plaintiff. (Am. Comp. ¶ 36.) Plaintiff further alleges that the unsanitary conditions at the UPACA office caused him to exhaust his paid sick leave time throughout May and June of 2015, as well as to miss two weeks of work in June of 2015, "due to bronchial conditions, which his doctor had diagnosed as due to the toxins he was exposed to in his work environment at the UPACA location." (Id. ¶ 26.) Further, Plaintiff

asserts, that when he returned to the 90 Church Street office on September 7, 2015, he was not given any meaningful work. (Id. ¶ 32.) Plaintiff alleges that he had repeatedly notified his supervisors, Defendant, and his union about his preexisting health conditions, as well as the unsanitary conditions at the UPACA location, throughout April and May 2015. (See Am. Compl. ¶¶ 18-24.) By pleading that the 125th Street workplace made him so ill that he was unable to work and, in fact, had to take unpaid leave, and that he was given "no meaningful work" when he was reassigned to the 90 Church Street location prior to his previously-announced retirement date, Plaintiff has framed a claim of intolerable workplace conditions that is sufficient at this pleading stage of the proceedings. Unsanitary conditions and a "substantial[] increase [in] the likelihood of" contraction of infections that would put the kidney and overall health of an employee with serious, documented ailments in significant danger (see Am. Compl. ¶ 21) and that rendered the employee unable to report to work (Id. ¶ 26), are not merely "difficult or unpleasant" working conditions. See De La Pena, 953 F. Supp. 2d at 419. Rather, Plaintiff plausibly alleges that Defendant "intentionally creat[ed] an intolerable work atmosphere" to such an extent that "a reasonable person in [Plaintiff's] shoes would have felt compelled to resign.'" See Theilig, 415 F. App'x at 334. Accordingly, Defendant's motion to dismiss for failure to state a plausible constructive discharge claim is denied.

Failure to Reasonably Accommodate

Plaintiff alleges that NYCHA violated the ADA "by discriminating against Plaintiff on the basis of his disability and failing to engage in any interactive process and/or making any attempts to reasonably accommodate his disability by insisting he report to an unhealthy environment at UPACA," that he could have performed the same work from the 90

Church Street location, and that allowing Plaintiff to continue working at the 90 Church Street location would not have posed an "undue hardship" on the agency. (See Am. Compl. ¶¶ 25, 35.) Defendant asserts that the amended complaint fails to state a legally cognizable claim of disability discrimination for failure to reasonably accommodate. Again relying principally on material extrinsic to the Amended Complaint, Defendant alleges that Defendant provided Plaintiff with reasonable accommodations of office work as requested, and that Plaintiff's doctor's notes never indicated Plaintiff needed to remain at the 90 Church Street office.

The ADA requires employers to provide reasonable accommodations for an employee with a known disability, unless the accommodation would pose an undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A). To state a plausible failure-to-accommodate claim under the ADA, the plaintiff must allege that:

> (1) plaintiff is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations.

Dooley v. JetBlue Airways Corp., 636 F. App'x 16, 18 (2d Cir. 2015) (quoting McMillan v. City of New York, 711 F.3d 120, 125–26 (2d Cir. 2013)). The only issue in dispute is whether Defendant has failed to provide Plaintiff with a reasonable accommodation. Whether an accommodation is reasonable is a "fact-specific" inquiry and must be determined "on a case-by-case basis." See Wernick v. Fed. Reserve Bank of N.Y., 91 F.3d 379, 385 (2d Cir. 1996). A reasonable accommodation "enable[s] an individual with a disability who is qualified to perform the essential functions of that position ... [or] to enjoy equal benefits and privileges of employment." 29 C.F.R. § 1630.2(o)(1)(ii), (iii). An "employer need not 'take account of the disabled individual's preferences in choosing the means of accommodation,'" and "the employer need not demonstrate that the employee's requested accommodation is impractical; rather the

employee must plausibly allege that the offered accommodation was not reasonable." Miller v. McHugh, No. 14-CV-5026 (CS), 2016 U.S. Dist. LEXIS 20474, at *14 (S.D.N.Y. Feb. 19, 2016) (quoting Fink v. N.Y.C. Dep't of Personnel, 855 F. Supp. 68, 72 (S.D.N.Y. 1994), aff'd, 53 F.3d 565, 567 (2d Cir. 1995)).

Plaintiff alleges that he informed multiple supervisors at NYCHA, including Mr. Eagle, Defendant's Deputy Director of Capital Projects and Administration, and Ms. Zander, Defendant's Capital Projects Director, as well as his union, about his health conditions, the effects of the UPACA assignment, and need for assignment to a different, more sanitary and easy-to-reach location as a reasonable accommodation. According to Plaintiff, Defendant did not take steps to remediate unsanitary conditions at the UPACA location until almost a month after he began to work there, and did not make any attempts to reasonably accommodate his disability by reassigning him to the 90 Church Street office until September 7, 2015, and did not assign him any meaningful work upon his return there. (See Am. Compl. ¶¶ 19-22, 24, 35.) Plaintiff alleges that Defendant did not attempt to offer Plaintiff any accommodation, much less a reasonable or effective one, until over three months after he first reported to UPACA, and that throughout that period, Plaintiff was subjected to working in conditions that adversely affected his health, including his bronchial systems. These allegations, whether or not Plaintiff will ultimately be able to prove them, are sufficient to state a claim that he was unable to "enjoy [the] equal benefits and privileges of employment," from the time of his transfer to the UPACA location. See 29 C.F.R. § 1630.2(o)(1)(ii), (iii). Whether or not Plaintiff will ultimately be able to prove these allegations, they are sufficient to plead his cause of action for failure to reasonably accommodate his disability.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss Plaintiff's amended complaint is denied. Plaintiff's request that the Court award him the costs of responding to Defendant's motion to dismiss is denied.

The initial pretrial conference will be held on **September 22, 2017**, at **10:45 a.m.** The parties must confer and file a joint statement in advance of the conference in accordance with the Initial Conference Order (Docket Entry No. 6).

This Memorandum Opinion and Order resolves Docket Entry No. 13.

SO ORDERED.

Dated: New York, New York
July 17, 2017

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge