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SHORT FORM ORDER

INDEX No. 11-32478

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 1-29-13
ADJ. DATE 3-21-13
Mot. Seq. # 002 - MG; CASEDISP

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THOMAS RUSSELL,

Plaintiff,

- against -

TOWN OF BROOKHAVEN, TOWN OF BROOKHAVEN DEPARTMENT OF PUBLIC SAFETY, DIVISION OF ANIMAL CONTROL, CHARLES MCGINLEY, in his professional and personal capacity, LOUIS CORDEIRO, in his professional and personal capacity, and DORI SCHOFIELD, in her professional and personal capacity,

Defendants.

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Upon the following papers numbered 1 to 9 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 6; Replying Affidavits and supporting papers ___; Other memoranda of law 5, 7, 8 - 9; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this renewed motion by the defendants for an order pursuant to CPLR 3211 (a) (7) dismissing the complaint against them is granted.

By order of the undersigned dated December 31, 2012, the defendants' prior request for an order dismissing the complaint for failure to state a cause of action was denied without prejudice to renewal upon proper papers, including a copy of the complaint.

Now, having submitted a copy of the plaintiff's complaint, the defendants renew their request for an order dismissing the complaint.

6-11-13

The plaintiff was formerly employed by the defendant Town of Brookhaven Department of Public Safety, Division of Animal Control Department) as an Animal Control Officer 1 (ACO). The Department is a political subdivision of the defendant Town of Brookhaven (Town). It appears that the defendant Charles McGinley (McGinley) is retired from his employment as a supervisor at the Department, that the defendant Louis Cordeiro (Cordeiro) is retired from his employment as an assistant supervisor at the Department, and that the defendant Dori Schofield (Schofield) is the current director of the Department (collectively, the individual defendants).

In his complaint, the plaintiff sets forth four causes of action. In the first cause of action, the plaintiff alleges that the defendants discriminated against him on the basis of disability and created a hostile work environment in violation of the New York State Human Rights Law (HRL). The second and third causes of action respectively allege that the defendants retaliated against him in violation of the HRL based on his complaints about, among other things, unsafe working conditions, and that they aided and abetted each other in their violation of the HRL. In his fourth cause of action, the plaintiff seeks to recover damages for intentional infliction of emotional distress.

New York Executive Law § 296 [1] prohibits discrimination by an employer, and also prohibits the employer from retaliating against an employee for opposing any practices forbidden under the Human Rights Law. Section 297 (9) of the Human Rights Law states: "Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction ... unless such person has filed a complaint hereunder ... with any local commission on human rights." There is no indication that the plaintiff filed a complaint with the local human rights commission. "The standards for recovery under section 296 of the Executive Law are in accord with Federal Standards under Title VII of the Civil Rights Act of 1962 (42 USC 2000e *et seq.*)" (***Ferrante v American Lung Assn.***, 90 NY2d 623, 629, 665 NYS2d 25 [1997]; *see also* ***Matter of Aurecchione v New York State Div. of Human Rights***, 98 NY2d 21, 744 NYS2d 349 [2002]; ***Matter of Argyle Realty Assoc. v New York State Div. of Human Rights***, 65 AD3d 273, 882 NYS2d 458 [2d Dept 2009]). On a claim of discrimination, plaintiff has the initial burden of establishing a prima facie case of discrimination (*id.*). While this burden is "de minimus" (***Sogg v American Airlines,*** 193 AD2d 153, 162, 603 NYS2d 21 [1st Dept 1993], *lv dismissed* 83 NY2d 846, 612 NYS2d 106 [1994], *lv denied* 83 NY2d 754, 612 NYS2d 109 [1994]), plaintiff must present more than "conclusory allegations of discrimination" and provide "'concrete particulars' to substantiate the claim" (***Muszak v Sears, Roebuck & Co.***, 63 FSupp2d 292 [WDNY 1999], quoting ***Meiri v Dacon***, 759 F2d 989 [2d Cir 1985], *cert. denied* 474 US 829, 106 SCt 91 [1985]).

The defendants now move for an order dismissing the complaint against them on the grounds that it fails to state a cause of action. Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43

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[1] Executive Law §§ 290 - 301 comprise Article 15 of the Executive Law, and is known as the Human Rights Law.

NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v Martinez***, *supra*; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]; ***Thomas McGee v City of Rensselaer***, 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi et al,*** 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

In the complaint, the plaintiff alleges the following facts: that his work in capturing and subduing dangerous animals resulted in personal injuries, that he was issued minimal safety equipment by the Department, and that he stated to his supervisors on numerous occasions that insufficient safety equipment threatened the safety of the ACOs in the Department. On or about April 2008, he sent a letter to the Town Board and the Town Safety Commission about the safety issues at the Department, and requesting that ACOs be given "tasers" to subdue dogs. Thereafter, he was warned "by a union representative" that if he continued to pursue the safety issue that he might lose his job, and McGinley sabotaged his request for "tasers." In the Winter of 2008/2009, he "made the [Department] and the Town aware that the animal shelter had insufficient heat and, as a result, dogs ... were freezing to death." He made additional complaints about "improper out of title work" and overcrowding at the animal shelter to his supervisors, which were ignored. The individual defendants terminated part-time employees who complained about the Department, made working conditions so unbearable that employees would quit their job, terminated "junior ACOs in order to mask the wrongful termination of a targeted employee, and "use[d] these incidents to threaten ACOs, including [the plaintiff], with similar retaliatory conduct." In addition, McGinley refused to allow the ACOs to use a tranquilizer rifle at the Department, and followed up on his threats against ACOs, including the plaintiff, by "changing employees schedules ... intentionally placing ACOs in situations where injury was certain; and forcing employees to ... [perform] euthanasia on dogs, [clean] kennels, and [perform] dispatcher responsibilities." On Monday, July 26, 2010, he witnessed "the gruesome mauling of a restrained pit bull" by another pit bull at the kennel. Thereafter, he experienced severe anxiety, fear, and "sleep paralysis and severe night sweats." On Wednesday, July 28, 2010, a call came into the Department about a pit bull running loose in a park. He told his supervisor that he was unable to "do this anymore," and that "something happened to him on July 26th." He then filled out leave of absence forms and turned them in to the Department. Shortly thereafter, he applied for, and was granted, workers compensation benefits based on Post Traumatic Stress Disorder (PTSD). The determination was appealed by the Town and Department, and members of the Town and Department mocked his diagnosis of PTSD on web sites such as Craigslist.

Human Rights Law (Executive Law) 296 (1) (a) states: "It shall be an unlawful discriminatory practice...[f]or an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge

from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Here, the complaint fails to state a cause of action for discrimination as the plaintiff does not allege facts which indicate that he is a member of a "protected class" under the statute (***Forrest v Jewish Guild for the Blind***, 3 NY3d 295, 786 NYS2d 382 [2004]; ***Ferrante v American Lung Assn.***, 90 NY2d 623, 665 NYS2d 25 [1997]; ***Suriel v. Dominican Republic Educ. and Mentoring Project, Inc.***, 85 AD3d 1464, 926 NYS2d 198 [3d Dept 2011]; ***Lambert v Macy's East, Inc.***, 84 AD3d 744, 922 NYS2d 210 [2d Dept 2011]). In addition, the plaintiff does not allege facts which indicate that he received disparate treatment from that of his fellow ACOs/employees in the terms, conditions or privileges of his employment, or otherwise raise an inference of discrimination (*see* ***Ferrante v American Lung Assn.***, *supra*; ***Alvarado v Hotel Salisbury, Inc.***, 38 AD3d 398, 833 NYS2d 25 [1st Dept 2007]; ***Dickerson v Health Mgt. Corp. of Am.***, 21 AD3d 326, 800 NYS2d 391 [1st Dept 2005]; ***Matter of Washington County v New York State Div. of Human Rights***, 7 AD3d 895, 776 NYS2d 650 [3d Dept 2004]).

A hostile work environment exists "'[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' "(***Forrest v Jewish Guild for the Blind***, 3 NY3d 295, 310, 786 NYS2d 382 [2004], quoting ***Harris v Forklift Sys.***, 510 US 17, 21, 114 SCt 367, 126 LEd2d 295 [1993]; *see* ***Vitale v Rosina Food Prods.***, 283 AD2d 141, 143, 727 NYS2d 215 [4th Dept 2001]). To recover against an employer for the discriminatory acts of its employee, the plaintiff must demonstrate that the employer became a party to such conduct by encouraging, condoning, or approving it (*see* ***Matter of State Div. of Human Rights [Greene] v St. Elizabeth's Hosp.***, 66 NY2d 684, 687, 496 NYS2d 411[1985]; ***Matter of Totem Taxi v New York State Human Rights Appeal Bd.***, 65 NY2d 300, 305, 491 NYS2d 293 [1985]), or otherwise failed to take immediate action on a complaint (***Priore v The New York Yankees***, 307 AD2d 67, 761 NYS2d 608 [1st Dept 2003]). Here, the complaint fails to set forth specific allegations against the Department or its supervisory personnel which give rise to a cause of action under the HRL or that supervisory personnel in the Town were informed of any alleged discriminatory actions against the plaintiff, and that said supervisors took no action to remedy the situation.

Absent allegations indicating violations of the HRL, or any practices forbidden thereunder, the plaintiff cannot allege causes of action for retaliation based upon, or the aiding and abetting of, those putative violations (*see generally* ***Forrest v Jewish Guild for the Blind***, *supra*; ***Suriel v. Dominican Republic Educ. and Mentoring Project, Inc.***, *supra*; ***Fletcher v Dakota, Inc.***, 99 AD3d 43, 948 NYS2d 263 [1st Dept 2012]). In addition, the complaint fails to set forth allegations sufficient to state a cause of action against the individual defendants. An individual cannot be held to have aided and abetted his or her own actions (*see* Executive Law § 296 [6]; ***Goldin v Engineers Country Club***, 54 AD3d 658, 864 NYS2d 43 [2d Dept 2008]; ***Strauss v New York State Dept. of Educ.***, 26 AD3d 67, 805 NYS2d 704 [3d Dept 2005]).

Moreover, the plaintiff has failed to allege facts indicating that the defendants took any adverse employment actions against him based upon his disability. It is well settled that an employer has the right to oppose the application of an employee for workers compensation benefits (***Grovesteen v New York State Pub. Empls. Fedn., AFL-CIO***, 83 AD3d 1332, 921 NYS2d 700 [3d Dept 2011]; *see*

generally ***Singh v Sukhram***, 56 AD3d 187, 866 NYS2d 267 [2d Dept 2008]; ***Alfred Weissman Real Estate v Big V Supermarkets***, 268 AD2d 101, 707 NYS2d 647 [2d Dept 2000]). In addition, the plaintiff's allegations indicate that his complaints were made, and the actions by his supervisors were taken, before he became disabled. Accordingly, the Court finds that the plaintiff has failed to allege facts establishing that any of the first three causes of action exist.

Turning to the plaintiff's fourth and final cause of action, a claim for intentional infliction of emotional distress "predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society" (***Freihofer v Hearst Corp.***, 65 NY2d 135, 490 NYS2d 735 [1985]). The conduct alleged by plaintiff against the defendants is that they mis-treated their subordinates. This conduct does not rise to the level of atrocity or outrageousness necessary to sustain a claim of this nature (*see* ***Howell v New York Post Co.***, 81 NY2d 115, 596 NYS2d 350 [1993]). The plaintiff's complaint fails to allege sufficient facts to demonstrate that defendants' conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . . and [was] utterly intolerable in a civilized community" (***Murphy v American Home Prods. Corp.***, 58 NY2d 293, 461 NYS2d 232 [1983], quoting Restatement [Second] of Torts § 46, Comment d; *see* ***Marmelstein v Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue***, 11 NY3d 15, 862 NYS2d 311 [2008]; ***Baumann v Hanover Community Bank***, 100 AD3d 814, 957 NYS2d 111 [2d Dept 2012]). Thus, the Court finds that the complaint fails to state a cause of action for intentional infliction of emotional distress.

In opposition to the defendants' motion, the plaintiff submits the affirmation of his attorney and a memorandum of law. Said affirmation does not contain any factual allegations. In the memorandum of law submitted on his behalf, the plaintiff argues that he has a cause of action for retaliation pursuant to Civil Service Law 75-b, that a notice of claim is not required in this matter, and that the defendants condoned and participated in discriminatory acts against him. He requests leave to serve a late notice of claim herein, and to amend his complaint to "better reflect the actual claims that exist in the body of the document." Initially, the Court notes that the plaintiff has failed to address the arguments proffered by the defendants in their motion and, thus, has conceded that he does not have causes of action for violations of the HRL or intentional infliction of emotional distress (*see* ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; ***Welden v Rivera***, 301 AD2d 934, 754 NYS2d 698 (3d Dept 2003]; ***Hajderlli v Wiljohn 59 LLC***, 24 Misc3d 1242A, 2009 NY Slip Op 51849U [Sup Ct, Bronx County 2009]).

Also, the plaintiff has failed to move or cross move for leave to serve an amended complaint in this matter. It is undisputed that the plaintiff's time to amend his complaint as of right has expired. CPLR 3025 (b), entitled "Amendments and supplemental pleadings by leave," provides in pertinent part that: "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties ... Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Here, the plaintiff has merely requested leave to amend his complaint in his memorandum of law. Regardless, the plaintiff has failed to include a proposed amended complaint with his request to replead or amend his pleading, nor has an affidavit of facts from a person with knowledge been offered setting forth additional transactions

or occurrences in support of the request. Although leave to amend a complaint should be freely granted pursuant to CPLR 3025 (b), it is necessary to show that the proposed amendment has merit and states a cause of action (*see* ***Corman v LaFountain***, 38 AD3d 706, 835 NYS2d 201 [2d Dept 2007]; ***Ferdinand v Crecca & Blair***, 5 AD3d 538, 774 NYS2d 714 [2d Dept 2004]; ***Mohan v Hollander***, 303 AD2d 473, 756 NYS2d 615 [2d Dept 2003]). Here, plaintiff has not shown the court how he intends to amend or supplement his complaint, thus he cannot show that it has merit or states a cause of action. Accordingly, his request for leave to amend his answer is denied.

Turning to the plaintiff's argument that he has a cause of action for retaliation, Civil Service Law 75-b, entitled "Retaliatory action by public employers," provides in pertinent part:

> 2. (a) A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action.

It is undisputed, and the plaintiff so acknowledges, that the plaintiff was terminated from his employment with the Town pursuant to Civil Service Law 71 on or about July 30, 2011. That is, more than one year after his leave of absence from work began. Civil Service Law 71 permits a municipality to terminate the employment of an employee after one year's leave of absence has been afforded to that employee (*see eg.* ***Matter of Allen v Howe***, 84 NY2d 665, 621 NYS2d 287 [1994]). Where a public employer has a separate and independent basis for action taken, a finding of "adverse personnel action" pursuant to Civil Service Law 75-b cannot be sustained (*see generally* ***Matter of Brey v Board of Educ. of Jeffersonville-Youngsville Cent. School Dist.***, 245 AD2d 613, 664 NYS2d 496 [3d Dept 1997]; ***Rigle v County of Onondaga***, 267 AD2d 1088, 701 NYS2d 222 [4th Dept 1999]; ***Roens v New York City Tr. Auth.***, 202 AD2d 274, 609 NYS2d 6 [1st Dept 1994]). In addition, the safety concerns raised by the plaintiff did not create a substantial and specific danger to public health or safety, as would grant him protection under the statute (*see* ***Palmer v Niagara Frontier Transp. Auth.***, 56 AD3d 1245, 867 NYS2d 318 [4 Dept 2008]).

In addition, it is undisputed that the plaintiff failed to serve a notice of claim regarding his allegations against the Town and the Department. Said failure warrants dismissal of his causes of action against said defendants for their alleged violation of the HRL, as the plaintiff seeks only to vindicate his individual interest, in the form of money damages, for the alleged invasion of his personal rights (***Nostrom v County of Suffolk***, 100 AD3d 974, 954 NYS2d 611 [2d Dept 2012]; ***Zarate v Nassau County Med. Ctr.***, 9 AD3d 427, 781 NYS2d 39 [2d Dept 2004]; ***Picciano v Nassau County Civ. Serv. Commn***, 290 AD2d 164, 736 NYS2d 55 [2d Dept 2001]).

Moreover, the plaintiff is under the same disability regarding any putative Civil Service Law 75-b claim as he is regarding his Human Rights Law causes of action. As alleged in his verified complaint, the facts supporting any Civil Service Law 75–b cause of action would be deemed to seek to vindicate only his individual interests. Thus, that cause of action would be foreclosed because the plaintiff failed to file a notice of claim (***Thomas v City of Oneonta***, 90 AD3d 1135, 934 NYS2d 249 [3d Dept 2011]; ***Rigle v County of Onondaga***, 267 AD2d 1088, 701 NYS2d 222 [4th Dept 1999]; ***Roens v New York City Tr. Auth.***, 202 AD2d 274, 609 NYS2d 6 [1st Dept 1994]).

Regardless, the plaintiff requests leave to serve a late notice of claim herein. Such a determination lies within the sound discretion of the court (*see* General Municipal Law § 50-e[5]; ***Matter of Lodati v City of New York***, 303 AD2d 406, 755 NYS2d 853 [2d Dept 2003]; ***Matter of Valestil v City of New York***, 295 AD2d 619, 744 NYS2d 701 [2d Dept], *lv denied* 98 NY2d 615, 751 NYS2d 169 [2002]). In determining whether to grant leave to serve a late notice of claim, a court must consider certain factors, including, among other things, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (*see* General Municipal Law § 50-e [5]; ***Nairne v New York City Health & Hosps. Corp.***, 303 AD2d 409, 755 NYS2d 855 [2d Dept 2003]; ***Perre v Town of Poughkeepsie***, 300 AD2d 379, 752 NYS2d 68 [2d Dept 2002]; ***Matter of Valestil v City of New York***, *supra*; ***Matter of Brown v County of Westchester***, 293 AD2d 748, 741 NYS2d 281 [2d Dept 2002]).

Here, the plaintiff has not indicated whether his request to serve a late notice of claim relates to the causes of action dismissed herein, or the cause of action he alleges that he has for retaliation pursuant to Civil Service Law 75-b. In light of said dismissal, the latter issue is addressed herein. As noted above, the plaintiff acknowledges that he was terminated from his employment on or about July 30, 2011. A review of the computer records maintained by the Court reveals that this action was commenced by the filing of a summons and complaint on October 17, 2011. Assuming for the sake of argument that the complaint was served on the same day that it was filed, it appears that the Town and the Department were unaware of the facts constituting the Civil Service Law 75-b claim within 90 days from its accrual.

The plaintiff, here, fails to demonstrate a reasonable excuse for its failure to timely serve a notice of claim (*see* ***State Farm Mut. Auto. Ins. Co. v New York City Tr. Auth.***, 35 AD3d 718, 828 NYS2d 416 [2d Dept 2006]; ***Hardayal v City of New York***, 281 AD2d 593, 722 NYS2d 176 [2d Dept 2001]). Moreover, the plaintiff fails to establish that the Town acquired actual knowledge of the essential facts constituting the claim within 90 days of the incident or a reasonable time thereafter (*see* General Municipal Law § 50-e [5]; ***State Farm Mut. Auto. Ins. Co. v New York City Tr. Auth.***, *supra*). Indeed, the plaintiff has submitted no admissible proof in support of such a finding (*see* ***Matter of National Grange Mut. Ins. Co. v Town of Eastchester***, 48 AD3d 467, 851 NYS2d 632 [2d Dept 2008]; ***State Farm Mut. Auto. Ins. Co. v New York City Tr. Auth.***, *supra*; ***Matter of Lebron v City of New York***, 293 AD2d 473, 739 NYS2d 641 [2d Dept 2002]; ***Olivera v City of New York***, 270 AD2d 5, 704 NYS2d 42 [1st Dept 2000]; ***Matter of Amin v City of New York***, 243 AD2d 467, 663 NYS2d 93 [2d Dept 1997]; *cf.* ***Rabanar v City of Yonkers***, 290 AD2d 428, 736 NYS2d 93 [2d Dept 2002]; *compare* ***Matter of***

Anderson v City of New York, 288 AD2d 310, 733 NYS2d 622 [2d Dept 2001]; ***Wolf v State of New York***, 140 AD2d 692, 529 NYS2d 22 [2d Dept 1988]; *see also* ***Caselli v City of New York***, 105 AD2d 251, 718 NYS2d 4 [2d Dept 1984]). Accordingly, the application for leave to file a late notice of claim is denied.

The plaintiff's remaining contentions are without merit. Accordingly, the defendants' motion to dismiss the complaint for failure to state a cause of action is granted.

Dated: June 7, 2013

W. Gerard Asher
J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION