Hyacinthe v City of New York
2021 NY Slip Op 30443(U)
February 17, 2021
Supreme Court, New York County
Docket Number: 151812/2020
Judge: Lyle E. Frank

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** IAS MOTION 52EFM

Justice

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ERNST HYACINTHE,

Plaintiff,

- v -

CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK

Defendant.

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INDEX NO. 151812/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for DISMISSAL.

This action arises out of plaintiff Officer Ernst Hyacinthe's claims that defendants the City of New York and the Police Department of the City of New York (NYPD) (collectively, defendants) subjected him to discrimination and retaliation on account of his disability, in violation of the New York City Human Rights Law (NYCHRL). Defendants move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint. For the reasons set forth below, defendants' motion is granted in part and denied in part.[1]

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff commenced his employment with the NYPD in 2005 and was assigned as a patrol officer to Precinct 30, located at 451 West 151st Street, New York, New York. The complaint sets forth that plaintiff "has a disability and perceived disability pursuant to the

[1]The Court would like to thank Beth Pocius, Esq. for her assistance in this matter.

NYCHRL and the NYSHRL (New York State Human Rights Law)." NYSCEF Doc. No. 1, Complaint, ¶ 5.[2] Plaintiff has herniated and bulging disks in his neck and back and suffers from PTSD. In mid-February 2019, plaintiff was "unable to work the street with full gear (about 35 pounds) due to his back and neck." *Id.*, ¶ 9. He subsequently requested an "accommodation to be placed closer to home (long commutes put stress on his back) and assigned desk duties." *Id.*, ¶ 8. However, defendants allegedly failed to engage in an interactive process with plaintiff and completely denied his request for a reasonable accommodation. He claims, "[u]pon information and belief, there were desk duty positions available." *Id.*, ¶ 10. On March 19, 2019, plaintiff was constructively terminated, as he was purportedly compelled to resign or retire because of defendants' failure to accommodate his disability.

In the first cause of action, plaintiff alleges that defendants discriminated against him on the basis of his disability in violation of the NYCHRL, resulting in his constructive discharge. The second cause of action alleges that defendants retaliated against plaintiff "due to the Vulcan lawsuit[3] that is still pending in Court resulting in Plaintiff constructive discharge [sic] and being damaged including compensatory damages for lost wages and pain and suffering." *Id.*, ¶ 15. In the third cause of action, plaintiff alleges that defendants failed to engage in an interactive process to accommodate his disability, in violation of the NYCHRL.

Defendants' Motion and Plaintiff's Opposition

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[2] Besides stating that defendants are employers as defined under the NYSHRL and NYCHRL, this is the only reference to the NYSHRL in the entire complaint. The causes of action are grounded in alleged violations of the NYCHRL and plaintiff does not discuss the NYSHRL in his opposition papers. As a result, any potential NYSHRL claims need not be addressed as the Court deems no such claims have been asserted.

[3] Plaintiff does not provide any details about this lawsuit.

According to defendants, the complaint must be dismissed on the grounds that plaintiff fails to state a cause of action based in part on informal admissions. Defendants explain that plaintiff retired on March 19, 2019 on a vested retirement.[4] However, prior to that date, the Police Commissioner directed that plaintiff be examined by the Medical Board of the Police Pension Fund (Medical Board) to see if he was eligible for ordinary disability retirement (ODR) or line-of-duty accident disability retirement (ADR). Police officers who are disabled may apply for either ODR or ADR, with ADR benefits being the larger amount. *See* Administrative Code § 13-251; Administrative Code § 13-252. The Medical Board is charged with determining whether the applicant is injured and whether this disability prevents the applicant from performing his duties. *See Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]. If the applicant is deemed disabled, the Medical Board makes a recommendation to the Board of Trustees whether the disability was the result of a natural and proximate line-of-duty accident. This step only occurs if the Medical Board finds that the applicant is disabled. After reviewing plaintiff's medical record three times, the Medical Board ultimately denied both the ODR and APR applications.

On February 14, 2020, plaintiff brought an article 78 petition challenging these determinations. *See* NYSCEF Doc. No. 5, *Matter of Hyacinthe v Shea*, Sup Ct, NY County, index No. 1516501/2020, Petition. In these judicial records, the Medical Board noted that, in 2007, plaintiff was involved in a "[service-connected motor vehicle] accident on September 15, 2007, injuring his lower back, neck and left [leg]." *Id.* at exhibit A, examination of member of the service, ¶ 2. On January 29, 2008, plaintiff was placed on restricted duty after an

[4] Defendants explain that plaintiff's pension vested after five years. However, he will not receive it until the earliest date he could have retired, had it not been for his injuries.

examination showed degenerative joint disease of the cervical spine. On September 16, 2014, plaintiff was placed on limited capacity. On March 6, 2015, plaintiff was "involved in [a service-connected motor vehicle] accident injuring his lower back. . . . The diagnosis was lower back pain and lumbosacral strain. He was treated and discharged." *Id.*, ¶ 12. After being evaluated on May 14, 2015, plaintiff was placed on full duty. In March 2016 plaintiff complained of "ongoing lower back pain since his injury he sustained on March 6, 2015." *Id.*, ¶ 14. After subsequent evaluations, plaintiff was continued on full duty.

On October 13, 2016, after being evaluated by Dr. Henry, an NYPD orthopedic surgeon, plaintiff was placed on limited capacity. After additional evaluations, including one performed by Dr. Mikelis recommending that plaintiff "refrain from any activity that exacerbates his symptoms such as heavy lifting, bending and carrying," plaintiff was placed on restricted duty. *Id.*, ¶ 25.

Plaintiff had been on restricted duty since December 1, 2016 until he was examined by the Medical Board on July 10, 2018. After performing an examination and reviewing the record, the Medical Board concluded that "there are no significant orthopedic findings precluding the officer from performing the full duties of a New York City Police Officer." *Id.*, ¶ 42. After receiving additional information and reviewing the record twice more, the Medical Board still denied the ODR and ADR applications. It stated that the Medical Board "does not find this retired officer disabled on the basis of a lumbar spine derangement." *Id.*, exhibit C, ¶ 10. On October 15, 2019, the Board of Trustees adopted the Medical Board's findings and finalized these denials.

In light of the facts as presented in the petition, defendants argue that, contrary to plaintiff's contention, they did engage with plaintiff in an interactive process and accommodated

him over the span of several years with limited capacity and restricted duty assignments. Although plaintiff was seeking a desk duty position near his residence, he does not allege that this position was available. Further, defendants maintain that they are not required to accommodate plaintiff's request based on a preference or a create a new position for plaintiff. Further, according to defendants, by way of his petition, plaintiff has effectively conceded that he is not capable of performing the duties of a police officer and "therefore, there exists no reasonable accommodation which could have enabled him to perform the duties of the position." NYSCEF Doc. No. 6, defendants' memorandum of law in support at 9.

In addition, defendants argue that plaintiff purportedly fails to establish how defendants perceived him as disabled. Regardless, according to defendants, plaintiff fails to allege facts establishing that he was treated less favorably than another employee based on a disability or a perceived disability.

With respect to plaintiff's retaliation claim, defendants state that plaintiff fails to identify the "Vulcan" lawsuit or state that he participated in this lawsuit. Further, he does not set forth any retaliatory conduct. Defendants add that a request for an accommodation is not considered a protected activity under the NYCHRL.

Lastly, defendants argue that all claims against the NYPD must be dismissed as the NYPD is an agency of the City of New York and is not a suable entity.

In opposition, plaintiff states that he has herniated and bulging disks in his neck and back and has sleep apnea. His physical disabilities are visible in that he has difficulty walking up and down stairs and needs a cane. Plaintiff "submitted a comprehensive record of [his] impairment via doctor's notes and reports and was regarded as having such an impairment via formal notice

and because [his] disability is visible." NSYCEF Doc. No. 11, plaintiff's aff, ¶ 12. In addition to his physical disabilities, plaintiff suffers from PTSD, anxiety and has panic attacks.

Plaintiff submitted an affidavit asserting that his supervisors discriminated against him on the basis of his disability. He states the following, in relevant part:

"For example, on or about the end of 2018 or the beginning of 2019, I felt very ill and I called out sick and went to the NYPD medical office in Queens. Lieutenant Valenti told me that if I called sick again, I was going to be suspended and I will get my gun taken away. He also told me that my injuries were not from any in line of duty accident and that I was making everything up."

"On about March 2018, I was targeted by Sergeant Agusanta who micromanaged me while I was on a tech room and constantly asked me for time checks unlike other officers who did not suffer from any disability."

Id., ¶¶ 14, 15.

Plaintiff alleges that, in mid-February 2019 he requested an accommodation to be closer to home because a long commute would put stress on his back. Plaintiff requested to be assigned desk duties and states the following, "I followed the normal procedures including submitting physician reports, however I was ignored, and the NYPD did not engage in the interactive process of trying to accommodate my request, they did not even respond to me." *Id.*, ¶ 16. After submitting this request, he was "threatened by my superiors who told me that if they saw me with my cane I will be suspended." *Id.*, ¶ 17. Plaintiff was then assigned to patrol seven hours a day. He states, "I had to be on my feet all day and this was extremely painful to my neck and back. In addition, it exacerbated my issues with incontinence." *Id.*, ¶ 18. According to plaintiff, his supervisors "had other officers" watching him during his shift. *Id.*

Plaintiff believes that there were desk duty positions available. He continues that, "[u]pon information and belief, there were positions available as telephone operator, administrative positions, positions in the 124 room of the precinct where people can take reports

and complaints, positions in the payroll section, etc." *Id.*, ¶ 20. Despite plaintiff's attempt to follow up with accommodation requests, defendants still allegedly failed to engage in an interactive process.

Regarding retaliation, plaintiff also pleaded that he is a plaintiff in the Vulcan lawsuit, which is a lawsuit against defendants. As a result, plaintiff has purportedly engaged in protected activity and defendants retaliated against him by taking adverse actions against him after the filing of the lawsuit.

In his memorandum of law in opposition, plaintiff conceded that the NYPD must be withdrawn as a party from this action.

DISCUSSION

I. Dismissal

On a motion to dismiss pursuant to CPLR 3211 (a) (7), "the facts as alleged in the complaint [are] accepted as true, the plaintiff is [given] the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." *Mendelovitz v Cohen,* 37 AD3d 670, 671 [2d Dept 2007]. "A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted only if the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Fontanetta v John Doe 1*, 73 AD3d 78, 83-84 [2d Dept 2010] (internal quotation marks and citations omitted). It is well settled that a plaintiff may submit an affidavit in opposition to a 3211 motion "to remedy defects in the complaint, and the allegations contained therein, like the allegations contained in the complaint, are deemed to be true for purposes of the motion." *Anderson v Pinn*, 185 AD3d 534, 535 [2d Dept 2020]. However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration."

Silverman v Nicholson, 110 AD3d 1054, 1055 [2d Dept 2013] (internal quotation marks and citation omitted).

II. NYPD is Dismissed from Action

At the outset, as noted by defendants and conceded by plaintiff, the NYPD is a non-suable agency as it is an agency of the City of New York. *See e.g. Troy v City of New York*, 160 AD3d 410, 411 [1st Dept 2018] (internal citations omitted) ("Furthermore, defendant New York City Police Department should be dismissed from the action on the independent ground that it is a non-suable agency of the City"); *see also* New York City Charter § 396.

Accordingly, the branch of defendants' motion seeking to dismiss all claims against the NYPD is granted.

III. NYCHRL

Pursuant to the NYCHRL it is an unlawful discriminatory practice for an employer to: refuse to hire or employ, fire, or discriminate against an individual in the terms, conditions or privileges of employment because of the individual's actual or perceived disability. Administrative Code § 8-107 (1) (a). Disability is broadly defined as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." Administrative Code § 8-102 (16).

To establish a prima case of disability discrimination under the NYCHRL, plaintiff must allege that he is a member of a protected class, that he was qualified for his position, that he suffered an adverse employment action and that the action occurred under circumstances giving rise to an inference of discrimination. *See Brathwaite v Frankel*, 98 AD3d 444, 445 [1st Dept 2012]; *see also Hosking v Memorial Sloan-Kettering Cancer Ctr.,* 186 AD3d 58, 61 [1st Dept

2020] (internal quotation marks and citations omitted) ("An employee states a prima case of discrimination under [the NYCHRL] if the employee suffers from a statutorily defined disability and the disability caused the behavior for which the employee suffered an adverse employment action"). "In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards . . . . [I]t has been held that a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds." *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009] (internal citation omitted).

Failure to Provide Reasonable Accommodation

Under the NYCHRL, failure to provide reasonable accommodation to an employee's known disability is a form of discrimination. *See* Administrative Code § 8-107 (15) (a) (In relevant part, it is an unlawful discriminatory practice for an employer "not to provide a reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job . . .."). The NYCHRL defines a reasonable accommodation as one that "can be made that shall not cause undue hardship in the conduct of the covered entity's business. The covered entity shall have the burden of proving undue hardship." *See* Administrative Code § 8-102 (18); *see also* Administrative Code § 8-107 (15) (b).

To state a prima facie case of a failure to accommodate under the NYCHRL, the plaintiff must allege facts to suggest that: "(1) plaintiff was disabled within the meaning of the statutes; (2) the employer had notice of the disability; (3) plaintiff could perform the essential functions of his or her job, with a reasonable accommodation; and (4) the employer refused to make

a reasonable accommodation." *Miloscia v B.R. Guest Holdings LLC*, 33 Misc 3d 466, 474 (Sup Ct, NY County 2011), *affd in part, mod in part*, 94 AD3d 563 [1st Dept 2012].

Defendants argue that plaintiff fails to establish that he is disabled under the NYCHRL. However, as noted, the police commissioner directed the Medical Board to examine plaintiff to determine whether he would be considered for either ODR or ADR. Further, the record, as presented by defendants themselves in connection with plaintiff's article 78 petition, contains an extensive history of plaintiff's herniated disks in his neck and back. Accordingly, for purposes of this motion, plaintiff has sufficiently plead that he was disabled and that defendants had notice of this disability.

Under the NYCHRL, "the first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested." *Phillips v City of New York*, 66 AD3d 170, 176 [1st Dept 2009]. However, as set forth below, plaintiff has sufficiently pled that defendants failed to "engage[] in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested, as required under the [NYCHRL]." *Miloscia v B.R. Guest Holdings LLC*, 94 AD3d at 564 (internal quotation marks and citation omitted).

Plaintiff's states that his back and neck pain prevented him from working on the street and carrying his gear as a patrol officer. In February 2019, plaintiff requested an accommodation and submitted the appropriate paperwork, including physician reports. He believes he is capable of working as a police officer assigned to desk duties. However,

defendants failed to respond to his request, even after he attempted to follow up. As a result, plaintiff was subsequently compelled to retire from working as a patrol officer.[5]

Here, accepting the truth of plaintiff's allegations and resolving all inferences in his favor, plaintiff has adequately pled that defendants failed to accommodate his disability in violation of the NYCHRL. *See e.g., D'Amico v City of New York,* 159 AD3d 558, 558 [1st Dept 2018] (internal citation omitted) ("plaintiff has adequately pleaded claims for disability discrimination under a theory of failure to accommodate . . .. Notably, there is no indication that following plaintiff's request for light duty, defendants entered into an interactive dialogue with him in an attempt to reach some reasonable accommodation"); *see also Benitez v City of New York*, ___AD3d___, 2021 NY Slip Op 00617, *6 [1st Dept 2021] (internal quotation marks and citation omitted) ("The [antidiscrimination] statutes recognize the employer's failure [to reasonably accommodate a worker's disability as soon as it is aware of the condition] to be particularly invidious because it forces the worker either to quit his or her job in order to preserve the worker's health or else to continue working without adequate protective measures and then succumb to a debilitating impairment").

Defendants claim that they are not required to accommodate a specific request or create a new position. Furthermore, plaintiff allegedly only speculates that desk positions were available. However, it is not plaintiff's burden to demonstrate the availability of an accommodation. On the other hand, "the City HRL places the burden on the employer to show the unavailability of

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[5] In his memorandum of law, plaintiff claims that he was compelled to retire because defendants failed to accommodate his disability. He does not allege that defendants constructively discharged him by "deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign." *Crookendale v New York City Health & Hosps. Corp.,* 175 AD3d 1132, 1132 [1st Dept 2019] (internal quotation marks and citation omitted).

any safe and reasonable accommodation and to show that any proposed accommodation would place an undue hardship on its business." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 835 [2014]. As defendants have not yet submitted an answer, the availability of a reasonable accommodation is not something that can be addressed on this pre-answer motion to dismiss. *See e.g. Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 885 [2013] (internal quotation marks and citation omitted) (While the NYCHRL "provides employers an affirmative defense if the employee cannot, with reasonable accommodation, satisfy the essential requisites of the job," the employer has the pleading obligation in its affirmative defense).

Defendants argue that plaintiff has already conceded, by way of his article 78 petition, that he is not capable of performing the duties of a police officer. However, defendants have not shown that this documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law." *Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014] (internal quotation marks and citation omitted). Plaintiff herein does not argue that he was medically able to perform the job of a patrol officer and concedes that he cannot carry the required equipment or stand on his feet for long periods of time. However, he claims that, after he filled out the appropriate paperwork in February 2019, defendants never engaged in a good faith interactive process to explore accommodating plaintiff's disability. "Engagement in an individualized interactive process is itself an accommodation, and, generally, the failure to so engage is a violation of the state and city statutes." *Miloscia v B.R. Guest Holdings LLC*, 33 Misc 3d at 474.

Defendants maintain that, as noted in the article 78 petition, there have been several times where they have accommodated plaintiff's disability by providing limited capacity and restricted duty assignments. Nonetheless, courts have held that a rejection of a proposed accommodation

is a discrete act. *Elmenayer v ABF Freight Sys., Inc.*, 318 F3d 130, 134-135 (2d Cir 2003). "Each discrete discriminatory act starts a new clock for filing charges alleging that act" and each discrete act [of failing to accommodate] "constitutes a separate actionable 'unlawful employment practice.'" *National R.R. Passenger Corp. v Morgan*, 536 US 101, 114 (2002). As a result, the previous requests and accommodations are not relevant for the plaintiff's instant allegation that, in response to his most recent request in mid-February 2019, defendants did not engage in the interactive process.

Disparate Treatment

Plaintiff alleges that defendants discriminated against him in violation of the NYCHRL by treating him differently than officers who did not suffer from any disability. Specifically, plaintiff alleges that after he called out sick, his supervisors accused him of lying about his injuries, micromanaged him, and threatened to suspend him and take away his gun. At the time plaintiff made his accommodation request, his supervisor allegedly threatened to suspend him if he used his cane. Despite knowing that plaintiff needed a cane, his supervisor assigned him to a post where he was required to stand for seven hours and asked other officers to watch him.

Under the NYCHRL, the focus is on "unequal treatment based on [a protected characteristic] . . .." *Williams v New York City Housing Auth.*, 61 AD3d 62, 79 [1st Dept 2009]. "Thus, even assuming that a plaintiff could not prove that she[/he] was dismissed for a discriminatory reason, she[/he] could still recover for other differential treatment based on her[/his] [disability]." *Suri v Grey Global Group, Inc.*, 164 AD3d 108, 120 [1st Dept 2018] (internal citation omitted). Accordingly, to establish a discrimination claim under the NYCHRL, plaintiff has to prove by a "preponderance of the evidence that she[/he] has been treated less well

than other employees because of her[/his] [protected characteristic]." *Williams v New York City Housing Auth.*, 61 AD3d at 78.

As set forth above, plaintiff has alleged that his supervisors made comments about his disability and has also asserted that defendants' actions were motivated by a discriminatory animus. *Compare Llanos v City of New York,* 129 AD3d 620, 620 [1st Dept 2015] ("Plaintiff has not made any factual allegations that she was adversely treated under circumstances giving rise to an inference of discrimination, as required to state a claim for discrimination under the New York State and City Human Rights Laws"). Given the liberal pleading standards, the court finds that plaintiff has sufficiently alleged that he was treated less well than other employees because of his disability. *See e.g. Boncimino v N.Y. State Unified Court Sys.,* 2018 WL 2225004, *10, 2018 US Dist LEXIS 82024, *30 (SD NY 2018) (internal quotation marks and citation omitted) (Court held that at the motion to dismiss stage, "name-calling, posting of pictures, and mocking alleged in the Amended Complaint create a plausible claim for discrimination under the NYCHRL"); *see also EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005] ("Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss").

A plaintiff may sufficiently allege a violation of the NYCHRL by an employer's failure to engage in the required individualized process to accommodate and also separately allege causes of action for disability discrimination. *See e.g. Phillips v City of New York*, 66 AD3d at 178 ("Separate and apart from the City's failure to engage in an individualized interactive process in evaluating plaintiff's request for accommodation, plaintiff has sufficiently pleaded causes of action for disability discrimination under both statutes"). Accordingly, at this stage,

defendants' motion is denied with respect to plaintiff's failure to accommodate and discrimination claims.

IV. Retaliation

Under the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. "The retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7). For plaintiff to successfully plead a claim for retaliation under the NYCHRL, he must demonstrate that: "(1) [he] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged him; and (3) a causal connection exists between the protected activity and the adverse action." *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]. Protected activity under the NYCHRL refers to "opposing or complaining about unlawful discrimination." *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 [1st Dept 2010] (internal quotation marks and citations omitted).

If the plaintiff sets forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating nondiscriminatory reasons for its employment actions. *Delrio v City of New York*, 91 AD3d 900, 901 [2d Dept 2012]. If the employer meets this burden, plaintiff has the obligation to show that the reasons proffered by the employer were pretextual. *Id.*

Plaintiff's retaliation claim has two components. First, plaintiff claims that, after he requested an accommodation in February 2019 due to his disabilities, defendants retaliated against him by accusing him of lying about his injuries, by prohibiting him from using his cane, and by threatening him with suspensions, among other things. Even assuming, without deciding,

that these actions are adverse, plaintiff cannot adequately plead a claim because requesting an accommodation is not considered a protected activity for purposes of a NYCHRL retaliation claim. *See e.g., D'Amico v City of New York,* 159 AD3d 558, 558-559 [1st Dept 2018] (citation omitted) ("Neither plaintiff's request for a reasonable accommodation nor his filing of an internal workers' compensation claim constitutes protected activities for purposes of the State and City [Human Rights Laws]").[6]

Next, plaintiff alleges that he is a plaintiff in the Vulcan lawsuit, an alleged lawsuit against defendants. After he filed this lawsuit, defendants retaliated against him, in the manner as set forth above. Plaintiff does not state when the lawsuit was filed or whether it was brought to oppose defendants' discriminatory practices. "Notwithstanding the broad pleading standard, bare legal conclusions with no factual specificity do not suffice to withstand a motion to dismiss." *Mid-Hudson Val. Fed. Credit Union v Quartararo & Lois, LLC,* 155 AD3d 1218, 1219 [3d Dept 2017], *affd* 31 NY3d 1090, 1091 [2018]. As a result, plaintiff cannot establish the first element in a prima facie case of retaliation under the NYCHRL because he did not allege that he engaged in a protected activity by protesting discriminatory conduct. *Breitstein v Michael C. Fina, Co,* 156 AD3d 536, 537 [1st Dept 2017] ("In support of his retaliation claim, plaintiff failed to demonstrate that he engaged in a protected activity").

Accordingly, defendants are granted dismissal of the cause of action grounded in retaliation for failure to state a claim.

CONCLUSION

[6] The NYCHRL has been subsequently amended to prohibit retaliation against an individual who requested a reasonable accommodation. However, this amendment took effect in November 2019 and is not retroactive.

Accordingly, it is

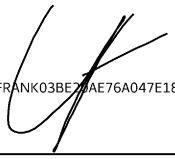
ORDERED that defendants the City of New York and the Police Department of the City of New York's motion to dismiss plaintiff's complaint is granted to the extent that the cause of action for retaliation under the NYCHRL is dismissed; and it is further

ORDERED that defendants motion is granted to the extent that the complaint is hereby severed and dismissed in its entirety as against the Police Department of the City of New York, and the Clerk is directed to enter judgment accordingly in favor of the Police Department of the City of New York; and it is further

ORDERED that the remainder of defendants' motion to dismiss is denied; and it is further

ORDERED that the remaining claims for violations of the NYCHRL, which include the failure to accommodate and unequal treatment, are severed and shall continue; and it is further

ORDERED that the City of New York serve and file its answer to the complaint within 20 days after service of a copy of this order with notice of entry.



2/17/2021
DATE

LYLE E. FRANK, J.S.C.

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