THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

ZACHARY W. CARTER
Corporation Counsel

KRISTEN MCINTOSH
Assistant Corporation Counsel
Labor and Employment Law Division
Phone: (212) 356-2445
Fax: (212) 356-2089
E-mail: kmcintos@law.nyc.gov

September 16, 2015

By ECF
Honorable John G. Koeltl
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: John Leftridge v. New York City Department of Education and Sandra Philip
15 CV 3460 (JGK)(FM)

Dear Judge Koeltl:

I am an Assistant Corporation Counsel in the office of Zachary W. Carter, Corporation Counsel of the City of New York, attorney for Defendants in the above referenced action. Pursuant to this Court's Individual Rules, I write to respectfully request a pre-motion conference to seek leave to move for dismissal of the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b). Defendant Philip's response to the Amended Complaint is currently due on September 21, 2015 while the response for the New York City Department of Education's ("DOE") is due October 9, 2015. Defendants also request an extension of time to answer or otherwise respond to the Amended Complaint until after the requested pre-motion conference. This is Defendants' first request for such an extension.

Plaintiff, a DOE teacher, commenced this action pro se pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-e, et seq. ("Title VII") and the New York City Human Rights Law ("CHRL"). Plaintiff alleges that Defendants discriminated against him on the basis of his race (African-American) and gender by: (1) initiating disciplinary proceedings against him pursuant to New York Education Law § 3020-a ("3020-a") for allowing a student to leave the school unsupervised; (2) issuing him an "N" rating; (3) not allowing his United Federation of Teachers ("UFT") representative to speak at a meeting; (4) failing to take action when students called Plaintiff gay slurs; and (5) being "slow" to respond to fights in the classroom. (See ECF Dkt. No. 8 at pp. 3, 9, ¶¶ 1, 3, 10, 12).

In July 2014, Plaintiff filed a joint charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the New York State Division of Human Rights ("SDHR") regarding the 3020-a proceedings and the "N" rating. Although neither the Complaint nor the Amended Complaint acknowledges it, Defendants note that the SDHR determined there was no probable cause to believe that DOE discriminated against Plaintiff. The EEOC issued Plaintiff a Notice of Dismissal and Right to Sue on March 2, 2015. The EEOC also noted that it had adopted the findings of the local agency that investigated plaintiff's allegations. See Right to Sue Letter, attached to ECF Dkt. No. 8 at p. 10. Plaintiff now claims Defendants have since retaliated against him by: (1) not transferring him to a different school under a different principal; (2) issuing false disciplinary letters; and (3) undermining his teaching. Additionally, though Plaintiff does not explicitly invoke the Americans with Disabilities Act, 42 U.S.C. §§ 12112, et seq, ("ADA"), Plaintiff also alleges that Defendants failed to reasonably accommodate him after he suffered a lower back injury on April 20, 2015. (See ECF Dkt. No. 8 at pp. 2-3).

For the reasons outlined below, Defendants seek permission to file a motion to dismiss all claims raised in Plaintiff's Amended Complaint.

A. Plaintiff Failed to Comply with the Notice of Claim Requirement for his CHRL Claims.

It is well settled that claims of employment discrimination against the DOE require a notice of claim to be served within three months of the claim's accrual. See N.Y. CLS Educ. §3813(1); Moore v. City of New York, 2010 U.S. Dist. LEXIS 19183 (S.D.N.Y. 2010). Plaintiff failed to timely serve a notice of claim for his racial and gender discrimination claims, and instead served an untimely one without leave of court. This notice of claim was thus a nullity. See Plaza v. New York City Health and Hospitals Corp., 97 A.D.3d 466 (1st Dep't 2012) ("We have repeatedly held that service of a late notice of claim without leave of court is a nullity."). Furthermore, Plaintiff failed to serve any notice of claim regarding his claims of disability discrimination. Consequently, all of Plaintiff's CHRL claims must be dismissed.

B. Plaintiff's CHRL Claims are Barred by the Election of Remedies Doctrine

The election of remedies doctrine of the CHRL precludes a plaintiff from pursuing a claim of discrimination that was previously brought before a local administrative agency. See N.Y.C. Admin. Code § 8-502; see also DuBois v. Macy's Retail Holdings, Inc., 533 Fed. Appx. 40, 41 (2d Cir. 2013). Here, Plaintiff filed a complaint with the SDHR alleging that the DOE discriminated against him based on his sex by initiating 3020-a proceedings against him and issuing him an "N" rating. On January 12, 2015, the SDHR issued a decision dismissing Plaintiff's complaint and finding there was no probable cause to believe the DOE discriminated against him. Accordingly, Plaintiff cannot pursue the same claims in the instant case under the CHRL. As such, these claims must be dismissed.

C. Plaintiff Failed to Allege Facts Sufficient to Demonstrate Facially Plausible Discrimination Claims Pursuant to Title VII and CHRL.

Plaintiff has failed to plead sufficient "facts to state a claim for relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp v. Twombly, 550 U.S. 544, 557 (2007)). In Title VII discrimination actions a plaintiff must show: (1) he was within the protected class; (2) he was qualified for the position; (3) he experienced an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. See Humphries v. City University of New York, 2013 U.S. Dist. LEXIS 169086 at *18-19 (S.D.N.Y. Nov. 26, 2013) (citing Bucalo v. Shelter Island Union Free Sch. Dist., 691 F.3d 119, 129 (2d Cir. 2012)). The "sine qua non of a . . . discriminatory action claim under Title VII is that the discrimination must be because of" the employee's protected characteristic. Id. (citing Patane v. Clark, 508 F.3d 106, 112 (2d Cir. 2007)) (emphasis in the original). As such, courts should dismiss Title VII discrimination claims where the plaintiff fails "to plead any facts that would create an inference that any adverse action taken by any defendant was based upon" the plaintiff's protected characteristic. Humphries at *19-20 (S.D.N.Y. Nov. 26, 2013) (quoting Patane at 112).

Plaintiff claims that he was and is being discriminated against because he is an African-American male. The Amended Complaint, however, fails to allege that he suffered any adverse employment action, much less one that was motivated by discriminatory animus. See Galabaya v. N.Y.C. Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000). An adverse employment action is a "materially adverse change in the terms and conditions of employment." Weeks v. New York State (Div. of Parole), 273 F.3d 76, 85 (2d Cir. 2001) (quoting Galabya at 640). "To be materially adverse, a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" Sanders v. New York City Human Resources Administration, 361 F.3d 749, 755 (2d Cir. 2004) (quoting Terry v. Ashcroft, 336 F.2d 128, 138 (2d Cir. 2003)). None of the actions alleged in the complaint materially changed the terms and conditions of Plaintiff's employment. The only alleged actions that arguably impacted the terms of Plaintiff's employment are the initiation of 3020-a proceedings, which ultimately terminated in Plaintiff's favor, and the subsequent "N" rating, which means Plaintiff was not able to be evaluated. Neither of these is sufficient to be considered "materially adverse." See Joseph v. Leavitt, 465 F.3d 87, 91 (2d Cir. 2006) ("[t]he application of the [employer's] disciplinary policies to [the employee], without more, does not constitute adverse employment action); Washington v. County of Rockland, 211 F. Supp. 2d 507, 514 (S.D.N.Y. 2002) ("The Second Circuit has held that an employee is not 'adversely affected' by disciplinary charges in the workplace unless the charges are decided against him."). See also Castro v. New York City Bd. Of Educ. Personnel Dir., 1998 U.S. Dist. LEXIS 2863 at *21 (S.D.N.Y. 1998) ("Negative evaluations . . . that are unattended by a demotion, diminution of wages, or other tangible loss do not materially alter employment conditions."). To the extent plaintiff would argue that his alleged loss of per session work constituted an adverse employment action, Defendants assert that Plaintiff was not eligible for per session work while he was investigated in connection with the disciplinary charges. As such, the Second Circuit's holding in Leavitt precludes plaintiff from credibly contending, under these facts, that the alleged loss of such work constituted an adverse employment action.

Moreover, even if plaintiff could point to an adverse employment action, the Amended Complaint fails to plead any facts showing a nexus between Plaintiff's protected class and actions alleged to have been taken by DOE. Following Iqbal, supra, courts in this Circuit have granted motions to dismiss where the plaintiff has pled his claim in a conclusory form without sufficient supporting factual allegations, and the Second Circuit has consistently affirmed such holdings. See, e.g., Thompson v. ABVI Goodwill Services, 531 Fed. Appx. 160, 161-62 (2d Cir. 2013) ("we agree with the district court that several of [plaintiff's] factual allegations are conclusory, including [plaintiff's] allegations as to [an individual defendant's] motives in making certain comments"); Coleman v. BrokersXpress, LLC, 375 Fed. Appx. 136, 137 (2d Cir. 2010) ("Our independent review of the record confirms that the district court properly dismissed the complaint, as [plaintiff] failed to allege facts sufficient to render plausible his conclusory allegations" of discrimination). Here, the Amended Complaint contains nothing more than conclusory allegations that DOE discriminated against Plaintiff based on his race and gender, and therefore Plaintiff's discrimination claims must be dismissed.

D. Plaintiff Failed to Allege Facts Sufficient to Demonstrate Facially Plausible Retaliation Claims Pursuant to Title VII and CHRL.

To state a retaliation claim under Title VII, "a plaintiff must plead facts that would tend to show that: (1) he participated in a protected activity known to the defendant; (2) the defendant took an employment action disadvantaging him; and (3) there exists a causal connection between the protected activity and the adverse action." Abrams v. Dep't of Pub. Safety, 764 F.3d 244, 257 (2d Cir. 2014). Under the CHRL, a plaintiff must show "that [he] took an action opposing [his] employer's discrimination, and that, as a result, the employer engaged in conduct that was reasonably likely to deter a person from engaging in such action." Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 112 (2d Cir. 2013) (internal citations omitted). Here, Plaintiff alleges DOE retaliated against him for filing a charge of discrimination with the EEOC and the SHDR. Not only does the Amended Complaint fail to allege adverse employment actions after the filing of that charge, but it also fails to offer a single, non-conclusory factual allegation that connects, in even the most tenuous sense, the filing to Plaintiff's claims of alleged retaliation. See Gilford v. City of New York, 2004 U.S. Dist. LEXIS 13150 at *17 (S.D.N.Y. July 13, 2004) (holding that the plaintiff must show a causal link between the protected activity and alleged retaliation); see also EEOC v. Bloomberg L.P., 967 F. Supp. 2d 816, 862 (S.D.N.Y. 2013) ("[T]he NYCHRL['s] ... broader standard [for retaliation] does not absolve [plaintiff] from putting forth evidence tending to show a causal connection between [his] action[s] opposing [defendants'] alleged discrimination and the alleged adverse actions."). As such, Plaintiff's retaliation claims must be dismissed.

E. Plaintiff Failed to Allege Facts Sufficient to Demonstrate Facially Plausible Disability Discrimination Claims.

Even if the Amended Complaint could be construed to set forth a claim of disability discrimination under the ADA, such claim should be dismissed. To state a plausible claim for failing to make reasonable accommodations under the ADA, an employee must show that: (1) he 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, the employee could perform the essential functions of the job at issue; and (4) the employer has refused to

make such accommodations. Noll v. IBM, 787 F.3d 89, 94 (2d Cir. 2015). However, the employee must establish that he requested an accommodation. Thorner-Green v. New York City Department of Corrections, 207 F. Supp. 2d 11, 14-15 (S.D.N.Y. 2002). Here, the Amended Complaint is silent as to what accommodations Plaintiff allegedly needed after his injury, when he requested such accommodations and what, if any, response Defendants gave him. As such, Plaintiff's claim for failing to reasonably accommodate his disability must be dismissed.

For the reasons stated above, Defendants request a pre-motion conference concerning Defendants' proposed Motion to Dismiss Plaintiff's Amended Complaint in its entirety. Pursuant to Your Honor's individual rules and practices, Defendants request that this letter stay their obligation to answer or otherwise respond to the Amended Complaint.

We thank the Court for its consideration of this request.

Respectfully submitted,

/s/

Kristen McIntosh
Assistant Corporation Counsel

By Mail

cc: John Leftridge
Plaintiff, *pro se*
435 Jefferson Ave. #4
Brooklyn, NY 11211