UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WAZI ULLAH,

Plaintiff,

-against-

NYC DEPARTMENT OF EDUCATION, CORPORATION COUNSEL, GENERAL COUNSEL, MARITZA RODRIGUEZ, and DAPHNE SANCHEZ-ALDAMA,

Defendants.

MEMORANDUM DECISION
AND ORDER
11 Civ. 3868 (GBD)(MHD)

GEORGE B. DANIELS, District Judge:

Pro se Plaintiff and New York City public-school teacher Wazi Ullah brings this action under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12112 *et seq.*, the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law §§ 290-97, and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin Code §§ 8-101 *et seq.* (*See* Am. Compl. at 1 (ECF No. 12)). Plaintiff alleges that Defendants discriminated against him on the basis of his race, color, gender, religion, national origin and disabilities.[1] His claims are based primarily on disciplinary actions taken against him by his supervisors at public school 98 between 2008 and 2010, as well as Defendants' alleged failure to reasonably accommodate his diabetic condition. Defendants have moved for summary judgment pursuant to Federal Rule of Civil Procedure 56, asserting that aspects of Plaintiff's claims are time-barred by the applicable statute of limitations, Plaintiff failed to establish a *prima facie* case for discrimination, and even if Plaintiff did

[1] Plaintiff lists as his disability or perceived disability: "diabetic, anemic, depressed, mental health problem etc." (Am. Compl. at 3).

establish a *prima facie* case, Defendants had legitimate non-discriminatory reasons for their conduct toward Plaintiff. (*See* Defs. Mem. (ECF No. 46)).

Before this Court is Magistrate Judge Dolinger's May 6, 2014 Report and Recommendation ("Report" (ECF No. 55)), in which he recommended that this Court grant Defendants' Motion for Summary Judgment with respect to all claims except for Plaintiff's ADA claim that Defendants failed to reasonably accommodate his disability. This Court adopts the Report.[2] Defendant's motion is GRANTED dismissing all claims except Plaintiff's failure to accommodate claim under the ADA.[3]

I. LEGAL STANDARD

The Court may accept, reject, or modify, in whole or in part, the findings and recommendations set forth within the Report. *See* 28 U.S.C. § 636(b)(1)(C). When parties object to the Report, the Court must review *de novo* those portions of the Report to which objections are made. *Id.* The Court may also receive further evidence or recommit the matter to the magistrate judge with instructions. *See* Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(c). The Court need not conduct a *de novo* hearing on the matter. *See United States v. Raddatz*, 447 U.S. 667, 675-76 (1980). Rather, "[i]t is sufficient that the district court 'arrive at its own, independent conclusions about those portions of the magistrate's report to which objection is made.'" *Nelson v. Smith*, 618 F. Supp. 1186, 1189-90 (S.D.N.Y. 2005) (quoting *Hernandez v.*

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[2] The relevant procedural and factual background is included in greater detail in the Report.

[3] Plaintiff has filed a letter request for the Court to appoint counsel. (ECF No. 54). Plaintiff could benefit from counsel to assist in settlement or trial. Plaintiff's application is granted to the extent that the Court will request that a pro bono attorney volunteer to represent Plaintiff. A court has no authority to "appoint" counsel, but instead, may only "request" that an attorney volunteer to represent a litigant. *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 301–310 (1989). There are no funds to retain counsel in civil cases, and the Court relies on volunteers. Due to a scarcity of volunteer attorneys, a lengthy period of time may pass before counsel volunteers to represent Plaintiff. Nevertheless, the litigation will progress at a normal pace. If an attorney volunteers, the attorney will contact Plaintiff directly. There is no guarantee, however, that a volunteer attorney will decide to take the case, and Plaintiff should be prepared to proceed with the case *pro se*. If an attorney offers to take the case, it is entirely Plaintiff's decision whether to retain that attorney or not.

Estelle, 711 F.2d 619, 620 (5th Cir. 1983)). When the parties make no objections to the Report, the Court may adopt the Report if "there is no clear error on the face of the record." *Adee Motor Cars, LLC v. Amato*, 388 F. Supp. 2d 250, 253 (S.D.N.Y. 2005) (citation omitted).

The objections of parties appearing *pro se* are "generally accorded leniency" and should be construed "to raise the strongest arguments that they suggest."[4] *Milano v. Astrue*, No. 05 Civ. 6527, 2008 WL 4410131, at *24 (S.D.N.Y. Sept. 26, 2008) (internal quotation marks omitted). "Nonetheless, even a *pro se* party's objections to a Report and Recommendation must be specific and clearly aimed at particular findings in the Magistrate's proposal." *See Pinkney v. Progressive Home Health Servs.*, No. 06 Civ. 5023, 2008 WL 2811816, at *1 (S.D.N.Y. July 21, 2008).

Plaintiff's objection to the Report reads: "I think all claims supported by evidences [sic] have not been evaluated and analyzed." (Pl. Objs. (ECF No. 57)). This conclusory and generalized objection does not trigger *de novo* review. *See McDonaugh v. Astrue*, 672 F. Supp. 2d 542, 547 (S.D.N.Y. 2009); *Pinkney*, 2008 WL 2811816, at *1 (internal quotation marks omitted). Defendants filed timely objections arguing that the Report erred in failing to grant summary judgment with respect to all of Plaintiff's ADA claims. (*See* Defs. Objs. at 5-7 (ECF No. 56)). Defendants' objections are appropriately specific, and the Court therefore reviews *de novo* Plaintiff's ADA claim that his diabetic condition was not reasonably accommodated.

II. STATUTE OF LIMITATIONS

The Report correctly held that certain of Plaintiff's Title VII and ADA claims are time-barred by the 300 day statute of limitations. *See* 42 U.S.C. § 2000e-5(e)(1). Plaintiff triggered

[4] This Court agrees with the Report's conclusion that, due to Plaintiff's *pro se* status and the thin nature of the existing record, it is appropriate to review the full factual record despite Plaintiff's failure to submit a statement in compliance with Local Civil Rule 56.1. (Report at 17).

the statute of limitations by filing his Intake Questionnaire on February 2, 2010, thereby precluding his Title VII and ADA claims against the Department of Education with respect to the denial of Plaintiff's parking permit from September 2008 to April 2009. (*See* Report at 21).

III. TITLE VII, ADA, NYSHRL, AND NYCHRL DISCRIMINATION CLAIMS

Discrimination claims brought under Title VII, the ADA, and the NYSHRL are analyzed under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[5] The Report correctly found that Plaintiff's federal and state discrimination claims do not satisfy the first requirement of the *McDonnell Douglas* test because Plaintiff fails to establish a *prima facie* case of discrimination. To establish a *prima facie* case, Plaintiff must show "that (1) he is a member of a protected class; (2) he was qualified for the position he held; (3) he suffered an adverse employment action; and (4) the adverse action took place under circumstances giving rise to the inference of discrimination." *Ruiz v. Cnty. of Rockland*, 609 F.3d 486, 492 (2d Cir. 2010). Plaintiff adequately demonstrated that he is a member of a protected class who was qualified for the position he held. (*See* Report at 2, 28-29). However, all but one action taken against Plaintiff were too trivial to constitute adverse employment actions.[6] (*Id.* at 36). Finally, Plaintiff was unable to provide evidence from which a reasonable trier of fact could conclude that the actions taken against him were motivated by discriminatory animus.[7] (*Id.* at 50).

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[5] Under the *McDonnell Douglas* test, the plaintiff has the initial burden to state a *prima facie* case of discrimination. *See McDonnell Douglas Corp.*, 411 U.S. at 802. The burden then shifts to the defendant to articulate a legitimate non-discriminatory reason for its actions. *Id.* If successful, the burden shifts back to the plaintiff to prove that the legitimate reasons offered by the defendant were not its true reasons, but served only as a pretext for discrimination. *Id.*

[6] Only the refusal to include Plaintiff in the Individualized Education Program, apparently resulting in $300 of lost earnings per week, could qualify as an adverse employment action. (Report at 36-37).

[7] Plaintiff alleges no facts that indicate discriminatory animus on the basis of race, color, gender, religion, national origin or disability. The only impetus for Defendants' adverse employment actions, as alleged by Plaintiff, was retaliation for Plaintiff's comments and proposals regarding school management during the School Leadership Team meetings. (*Id.* at 48). To the extent Plaintiff alleges that he suffered retaliation in violation of the First

The Report analyzed Plaintiff's NYCHRL claims separately. *See Singh v. Covenant Aviation Sec., LLC*, 39 Misc.3d 1203(a), at *3 (Sup. Ct. Kings Cnty. 2013) ("[A NYCHRL] discrimination claim is analyzed under both the McDonnell Douglas test, as well as the broader 'mixed motive' test which inquires into whether discrimination was a motivating factor in the adverse employment decision."). This Court agrees with the Report that Plaintiff failed to establish a *prima facie* case for discrimination under the NYCHRL for the same reasons he failed to establish a *prima facie* case under Title VII, the ADA, and the NYSHRL. (Report at 51-53). Defendants' Motion for Summary Judgment is granted as to Plaintiff's Title VII, ADA, NYSHRL, and NYCHRL discrimination claims.

IV. ADA CLAIM OF FAILURE TO ACCOMMODATE

On September 24, 2008, Plaintiff left his class in the care of at least one paraprofessional while he used the restroom.[8] (*See* Pl. Dep. Ex. "A" at 184:22-25, 185:1-4 (ECF No. 44-1)).[9] Soon thereafter, Plaintiff's principal sent him a letter stating that he violated school policy by leaving his classroom unattended by a teacher. (Ex. "L" (ECF No. 44-12)). Plaintiff responded by letter stating that he is a diabetic, his need to use the restroom was an emergency, and he was unable to find another teacher to cover in time. (*See* Ex. "M" (ECF No. 44-13)). In August of 2009, Plaintiff requested an accommodation from the Department of Education that would allow him to briefly leave his classroom in the care of his paraprofessional while he used the restroom. (Pl. Dep., Ex. "A" at 185:24-25). On October 8, 2009, the Department of Education denied his

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Amendment for speech that he engaged in as part of the School Leadership Team, the Report correctly found that such speech is not protected. (*Id.* at 49); *see also Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

[8] During his deposition, Plaintiff seemed to testify that he left his classroom in the care of one paraprofessional. (Pl. Dep., Ex. "A" at 184:22-25, 185:1-4). The principal's letter stated that Plaintiff left his class in the care of two paraprofessionals. (Ex. "L" (ECF No. 44-12)).

[9] All citations to "Ex." are references to exhibits annexed to the Declaration of Assistant Corporation Counsel Adam E. Collyer, dated September 9, 2013.

request on the grounds that the school's existing policy was sufficient to meet his needs. (Ex. "N" (ECF No. 44-14)).

A. Legal Standard

In light of Defendants' timely objections, this Court conducts a *de novo* review of Plaintiff's claim that his disability was not reasonably accommodated under the ADA. Summary judgment is appropriate when evidence presented demonstrates that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of establishing the absence of any material factual dispute. *See Celotex Corp. v. Catret*, 477 U.S. 317, 323 (1986). To defeat a motion for summary judgment, the nonmoving party must raise a genuine issue of material fact by citing to admissible evidence that supports each claim on which summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986); Fed. R. Civ. P. 56(a), (c). This Court is required to "resolve all ambiguities and draw all inferences in favor of the party against whom judgment is sought." *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 312 (2d Cir. 1997).

To make a *prima facie* case for failure to reasonably accommodate under the ADA, a plaintiff must show that (1) he is a person with a disability, (2) the defendant had notice of his disability, (3) he could perform the essential functions of his job with reasonable accommodations, and (4) the defendant refused to make such accommodations. *See McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 97 (2d Cir. 2009). Once the plaintiff has made a *prima facie* case, the burden of persuasion shifts to the defendant, who must convince the factfinder that the plaintiff's proposed accommodation would cause the defendant to suffer an undue hardship. *See Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995). An

undue hardship means the proposed accommodation is unreasonable in light of "the costs that the [defendant] is asked to assume, but also the benefits . . . that will result." *Borkowski*, 63 F.3d at 139.

Defendants' argument to defeat Plaintiff's claim seems to be twofold. First, Defendants argue that the school's existing policy already provides a reasonable accommodation. Second, Defendants seem to argue that Plaintiff's proposed accommodation would impose an undue hardship on Defendants by endangering students in Plaintiff's classroom.[10] (*See* Defs. Objs. at 7; Defs. Mem. at 19).

B. Reasonable Accommodation

An issue of material fact exists as to what is the school's existing policy, and whether it offers a reasonable accommodation. In response to the September 24, 2008 incident, Plaintiff's principal wrote Plaintiff a letter explaining in part:

> I entered your room and found that your students had been left with two paraprofessionals and no teacher in charge . . . I asked if you were aware that students cannot be left alone in the classroom under the supervision of paraprofessionals, and you replied that you were aware, but: "It was an emergency and, at any rate, I was only gone two minutes." However, I had remained in the classroom until your return, and you were absent from the room a full five minutes. *I explained again that students couldn't be left without the supervision of a teacher.* In case of an emergency there were two teachers next door who should have been alerted and they were not.

(Ex. "L" at 1 (emphasis added)).[11]

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[10] "The[] behavioral management needs [of Plaintiff's students] require that multiple education professionals, including those with training in techniques specifically designed for managing these types of behavioral issues, be present and supervising students at all times." (*See* Defs. Objs. at 6).

[11] Defendants' objections to the Report characterize the school's policy as follows: "In the Accommodation Letter, defendants inform plaintiff that PS 98 has a policy in effect for teachers to notify 'out of classroom personnel,' and does not specifically require that another teacher supervise his class before using the restroom." (Defs. Objs. at 6 (emphasis in original)). This statement contradicts the policy as it was communicated to Plaintiff according to the record. (*See* Ex. "L", Ex. "N"). Moreover, this statement contradicts the policy as stated later in Defendants' same objections: "Leaving plaintiff's class unsupervised by a certified special education teacher for any length of time would be unreasonable and irrational, and would be tantamount to the DOE abandoning the notion that it acts in loco parentis for these children in the classroom." (Defs. Objs. at 6-7 (emphasis in original);

In response to Plaintiff's August 2009 request for an accommodation, the Department of Education explained the school's policy as follows:

> This is to advise you that based on your request for a Medical Accommodation, it is the determination of the H.R. Connect Administration that your request is denied. Your school already has a policy in effect for teachers to contact out of classroom personnel to *cover* when they need to use the restroom.

(Ex. "N" (emphasis added)). If the policy requires teacher supervision, the question then is whether requiring Plaintiff to find a teacher to supervise his classroom while he uses the restroom, regardless of the number of paraprofessionals in the room and the brevity of Plaintiff's absence, reasonably accommodates his sudden need to use the restroom as a result of his diabetes.

Plaintiff argues that the existing policy fails to reasonably accommodate his disability because the teachers that Plaintiff tried to notify or ask to cover for him on September 24, 2008 were busy with other things and could not be reached. (*See* Ex. "M" ("On September 24, 2008 I didn't see any teacher around me. I am a diabetic patient with high blood pressure. I couldn't hold it for a second. I could have urinated in the classroom."); *see also* Pl. Opp. Mem. ¶ 4 (ECF No. 49) ("[R]egarding denied medical accommodation, [Defendants] argue that they have [an] existing system to find other teachers for replacement but in reality most of the teachers were never available when I needed them.")). If, in practice, the existing policy failed to accommodate Plaintiff, the alleged reasonableness of Defendants' accommodation is further called into question. Moreover, "the issue of whether an accommodation is reasonable is normally a question of fact, unsuited for a determination on Summary Judgment." *Scalera v.*

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see also Defs. Mem. at 19 ("Plaintiff is allowed to use the restroom any time it is necessary, so long as the children in his classroom are being supervised *by a licensed teacher*.") (emphasis added)).

Electrograph Systems, Inc., 848 F. Supp. 2d 352, 367 (E.D.N.Y. 2012) (citing *Canales-Jacobs v. N.Y. State Office of Ct. Admin.*, 640 F. Supp. 2d 482, 500 (S.D.N.Y. 2009)).

C. Undue Hardship

Even if Plaintiff has established a *prima facie* case demonstrating that there is a "plausible accommodation, the costs of which, facially, do not clearly exceed its benefits," the Defendants may prevail by showing that the requested accommodation would be unduly burdensome. *See Borkowski*, 63 F.3d at 138. Plaintiff requested an accommodation that would allow him to leave his classroom with his paraprofessional while he used the restroom. (*See* Pl. Dep., Ex. "A" at 185:24-25, 186:1-4). Defendants argue that "[l]eaving [P]laintiff's class unsupervised by a certified special education teacher for any length of time would be unreasonable and irrational." (Defs. Objs. at 6-7).[12] Defendants rely primarily on the fact that there have been behavioral incidents involving Plaintiff's students to argue that the students need constant, uninterrupted teacher supervision.[13] (Defs. Objs. at 6). Nonetheless, the Report found that "[D]efendants have offered no explanation as to why it would be unreasonable to allow [P]laintiff to leave his class supervised briefly by a non-teacher employee, such as a paraprofessional, while [P]laintiff visits the restroom." (Report at 55).

Defendants have failed to demonstrate that there is no triable dispute that they provided a

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[12] Defendants cite to certain of the United Federation of Teachers' requirements to support their assertion that for Plaintiff to leave his 12:1:1 class in the care of a paraprofessional would be irrational and impose an undue hardship. (*See* Defs. Objs. at 6). The United Federation of Teachers website provides information as to the general staffing and enrollment of special classes for the sake of classroom instruction. However, the website provides no information from which one could conclude that Plaintiff's brief absence was unduly burdensome or even violated union policy. *See* United Federation of Teachers, *Special Classes – Special Class Maximum Sizes and Staffing Ratios*, *available at* http://www.uft.org/teaching/special-classes#staffing (last visited on July 16, 2014).

[13] Defendants' objections state that the Report recognizes that "plaintiff's classroom experience is replete with incidents of violent outbursts from students even in situations where 'plaintiff left his class in the care of three other adults.'" (Defs. Objs. at 6 (quoting Report at 56 n.12)). However, the Report explains "that an accommodation for medical necessity need not imply that plaintiff should be free to leave his classroom at will for other reasons." (*See* Report at 56 n.12).

reasonable accommodation, or that Plaintiff's requested accommodation would impose an undue hardship. Summary Judgment is therefore inappropriate as to this claim.

V. CONCLUSION

Defendants' Motion for Summary Judgment is DENIED as to Plaintiff's ADA claim of failure to accommodate, and is GRANTED dismissing Plaintiff's other claims. This matter is recommitted to Magistrate Judge Dolinger for further proceedings.

The Clerk of the Court is instructed to close the motion at ECF No. 43.

Dated: New York, New York
August 8, 2014

SO ORDERED:

GEORGE B. DANIELS
United States District Judge