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.

REPORT & RECOMMENDATION

11 Civ. 3868 (GBD) (MHD)

5/6/14

To the Honorable George B. Daniels, U.S.D.J.:

Pro se plaintiff and New York City public-school teacher Wazi Ullah commenced this case asserting that defendants had violated his rights under Title VII of the Civil Rights Act ("Title VII"), 42 U.S.C. §§ 2000e et seq., the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12112 et seq., the New York State Human Rights Law ("SHRL"), N.Y. Exec. Law §§ 290-297, and the New York City Human Rights Law ("CHRL"), N.Y.C. Admin Code §§ 8-101 et seq. As a Bangladeshi Muslim who suffers from diabetes, plaintiff alleges that defendants discriminated against him on the basis of his race, color, gender, religion, national origin, and disability. He premises his claims primarily on disciplinary actions taken against him by his supervisors at Public School 98

("PS 98") between 2008 and 2010, as well as defendants' alleged failure to adequately accommodate his diabetic condition.

Following an earlier motion to dismiss, the remaining defendants -- the New York City Department of Education ("DOE"), Principal Maritza Rodriguez, and Assistant Principal Daphne Sanchez-Aldama -- have moved for summary judgment on all of plaintiff's remaining claims.

For the reasons that follow, we recommend that defendants' motion be granted in part and denied in part.

BACKGROUND

Plaintiff is a Bangladeshi Muslim male of about 59 years of age (Compl. Ex. 2(a)), and has worked for the DOE as a certified teacher since 2004. (Collyer Decl. Ex. A at 61). Since 2008, he has also held professional licenses that qualify him to work as a School Building Leader (i.e. a principal) and a School District Leader (i.e. a superintendent). (See Pl.'s Opp'n Exs. 2f-g).

Plaintiff began working as a special education teacher at PS 98 in the Fall of 2005, teaching third, fourth, and fifth grade students in a 12:1:1 setting -- that is, with approximately twelve

students overseen by one teacher and one paraprofessional. (Collyer Decl. Ex. A at 75-76). For his first three years of service at PS 98 (school years 2005-2006, 2006-2007, and 2007-2008), plaintiff received satisfactory ratings ("S-ratings") from his supervisors on his annual professional performance reviews. (Pl.'s Opp'n Exs. 2b-d; Collyer Decl. Exs. B, C). His 2006-2007 and 2007-2008 S-ratings were given to him by defendant Principal Rodriguez. (Pl.'s Opp'n Exs. 2c-d; Collyer Decl. Exs. B, C). Plaintiff also generally received satisfactory ratings from his direct supervisor, defendant Assistant Principal Sanchez-Aldama, following her formal observations of his lessons. (See, e.g., Collyer Decl. Ex. A at 88 & 90, Ex. D). In 2008, plaintiff became a tenured teacher. (Id. Ex. A at 82).

At the start of the 2008-2009 school year, plaintiff was elected chairperson of the School Leadership Team.[1] (Pl.'s Opp'n

[1] According to the DOE, the School Leadership Team "is the primary vehicle for developing school-based educational policies and ensuring that resources are aligned to implement those policies." NYC Dep't of Educ. "School Leadership Teams Foundation" at 5, available at http://www.learndoe.org/face/recording-teams/. The Team also "assists in the evaluation and assessment of the school's educational programs and their [e]ffect on student achievement." Id. The chairperson of the School Leadership Team is "responsible for scheduling meetings, ensuring that team members have the information necessary to guide their planning, and focusing the team on educational issues of importance to the school." Id. at 10.

Ex. 7a). That same year, however, it appears that problems began to arise with plaintiff's performance reviews. Over the course of the 2008-2009 school year, Ms. Sanchez-Aldama conducted two formal observations of plaintiff's Literacy class, on April 3, 2009 and June 5, 2009, and on both occasions she rated his lesson as "unsatisfactory." (Collyer Decl. Exs. I, J). She critiqued the lack of clarity and adequate focus of the lessons' teaching objectives (see id. Ex. I at 3, Ex. J at 3), and indicated that plaintiff had failed to enforce classroom rules consistently, had allowed minor disruptions to escalate, had failed to implement behavior-modification plans for his students, and had allowed the lesson to be too long and meandering. (Id. Ex. J at 3).

Over the course of the 2008-2009 school year, Ms. Sanchez-Aldama also met several times with plaintiff and his union representative to formally discuss problems that she had identified with his classroom management. At one meeting, on October 6, 2008, Ms. Sanchez-Aldama reprimanded plaintiff for having left his class in the care of two paraprofessionals, with no teacher present, on September 24, 2008, while he had gone to the restroom. (Collyer Decl. Ex. L, Ex. A at 185). Plaintiff indicated that on that occasion he had tried and been unable to locate another teacher to watch his class and, in light of his diabetic condition and high blood pressure, had no choice other

than to leave the class in the care of the paraprofessionals. (Id. at Ex. M at 1).

It appears that about one year later, in August 2009, plaintiff filed a request with the DOE for a medical accommodation to allow him to use the restroom, apparently in light of his increased need to urinate due to his diabetic condition. (See Collyer Decl. Ex. A at 185-86). That request was denied on October 8, 2009 on the ground that PS 98 "already has a policy in effect for teachers to contact out of classroom personnel to cover when they need to use the restroom." (Collyer Decl. Ex. M at 2). Plaintiff later testified at his deposition that "although the policy [was in] effect, [the] policy did not work… Nobody comes in time." (Id. Ex. A at 186).

On February 13, 2009, Ms. Sanchez-Aldama held another meeting with plaintiff "to discuss classroom procedures," in light of her "concern that the number and seriousness of discipline issues in [plaintiff's] classroom [was] escalating." (Collyer Decl. Ex. F at 1). Plaintiff apparently agreed with Ms. Sanchez-Aldama that such issues were escalating, but he attributed the problem primarily to a lack of adequate support from her and other school administrators. (See Collyer Decl. Ex. H).

Plaintiff again met with Assistant Principal Sanchez-Aldama on March 9, 2009. (Collyer Decl. Ex. G). As recounted in Ms. Sanchez-Aladma's letter to plaintiff memorializing that meeting, on the afternoon of February 25, 2009 plaintiff had rushed to the school's main office and had summoned her to his classroom because a student was "'out of control… out of her seat, cursing, [had thrown] her desk… [and] kept kicking'" people. (Id. (quoting plaintiff)). When asked why he had left his classroom overseen by another teacher, plaintiff apparently rejected the suggestion that he had needed help from administrators in dealing with the student and had replied "'I am capable of handling any situation in my class. I wanted Ms. Sanchez or Ms. Rodriguez to see the mess.'" (Id. (quoting plaintiff)). In her letter, Ms. Sanchez-Aldama advised plaintiff,

> Leaving your classroom under the circumstances you described shows a serious lapse in judgment. You chose to leave the room while one of your students was in the middle of a crisis and exhibiting violent and erratic behavior, even though there were three adults other than yourself in the room who could have gone looking for an administrator. If the child was, as you described, still out of control when you left the classroom, then you chose to leave your other students in a potentially dangerous situation… Leaving the room in order to find an administrator so that you could show 'the mess' that [the student's] outburst had created was, at best, a very poor decision... In regards to the behaviors that precipitated [the student's] outburst, the behavior plans you finally submitted on March 13, 2009, did not address any preventative modifications to the class

environment that would minimize the environmental triggers.

(Id. at 2).

During the months of March and April 2009, plaintiff filed at least eight formal grievances with Principal Rodriguez, complaining about baseless letters to his file and supervision of his work in excess of the supervision received by his colleagues. (Pl.'s Ex. 15). Each of these grievances was denied by Principal Rodriguez for being either factually unfounded or non-cognizable under the teachers'-union contract. (See id.).

At the close of the 2008-2009 school year, Principal Rodriguez gave plaintiff an Unsatisfactory rating ("U-rating") on his annual professional performance review. (Collyer Decl. Ex. K). Plaintiff appealed his U-rating through the DOE (id. Ex. A 187), but the appeal was denied on November 13, 2009. (Id. Ex. L).

It appears that problems continued over the course of the following 2009-2010 school year. Principal Rodriguez conducted approximately four or five informal observations of plaintiff's class (Collyer Decl. Ex. A at 144), and, although the record is rather ambiguous on this point, it appears that plaintiff may have

received a second U-rating at the close of the 2009-2010 school year. (See id. at 186-87; Pl.'s Opp'n Ex. 13b).

From October 15, 2010 to September 12, 2012 plaintiff was granted a medical leave of absence, apparently due to his depression. (See Collyer Decl. Ex. A at 161; Pl.'s Opp'n at 7). During that period, he filed the current lawsuit.

It is unclear what events may have followed, but it appears that plaintiff returned to work in the 2012-2013 school year and that he continued to receive negative performance reviews. (See Pl.'s Opp'n Ex. 13b). In 2013, the DOE brought charges against plaintiff "for incompetent and inefficient service, neglect of duty, failure to follow procedures and carry out normal duties and misconduct during the 2009-2010 and 2012-2013 school years." (Id.).

PROCEDURAL HISTORY

On or about February 2, 2010, plaintiff submitted an Intake Questionnaire to the Equal Employment Opportunity Commission ("EEOC") setting forth complaints against defendants Rodriguez and Sanchez-Aldama. He claimed that he had been subjected to discrimination on the basis of his race, sex, age, disability,

national origin, and religion, as well as retaliation, and complained about frequent supervisory visitations to his classroom and letters to his file. (Pl.'s Opp'n Ex. 1; Collyer letter to Ct. dated Apr. 14, 2014 at DOE145). Plaintiff submitted a formal Charge of Discrimination document to the EEOC on or about March 17, 2010 asserting the same claims. (Am. Compl. Ex. 2a-b). Plaintiff set forth a number of complaints on the Charge of Discrimination form, including that (1) he had received supervision, including formal and informal observations of his lessons, "greatly in excess of [his] coworkers"; (2) he had been given a "wrongful unsatisfactory rating in [his] June 2009 performance review"; (3) he had been denied his request for a "non-disabled paraprofessional aide" who could better assist him in chasing after children who might leave the classroom without permission; (4) he had been denied his request for vacation days, despite other teachers being granted time off; (5) he had not been commended over the morning announcements, as had his peers, for having earned professional certifications; (6) he had been denied a medical accommodation to allow him to leave the classroom "when necessary due to [his] disability"; (7) he had been denied a parking permit from September 2008 to April 2009 that he had previously had "due to [his] disability"; (8) he had been excluded from teaching in the IEP After School Program, reportedly costing him "over $300 a week in addition income"; and (9) he had been denied his request to move

his preparation period to the end of the school day "as (due to [his] disability) [he] ha[s] recurring doctors' appointments" at that time. (Am. Compl. Ex. 2). On March 21, 2011 the EEOC issued him a Notice of Right to Sue letter. (Id. 4 & Ex. 3).

Plaintiff filed suit in this court on May 23, 2011 and subsequently amended his complaint on August 2, 2011. He named as defendants the DOE, the Corporation Counsel of New York City, the General Counsel of the DOE, Ms. Rodriguez, and Ms. Sanchez-Aldama. The amended complaint asserts claims under Title VII, the ADA, the SHRL, and the CHRL for discrimination based on plaintiff's race, color, gender, religion, national origin, and disabilities.[2] (Am. Compl. 1-3). Plaintiff alleges in his amended complaint that defendants failed to accommodate his diabetes, subjected him to unequal terms and conditions of employment, and engaged in unlawful retaliation. (Id. at 2-3 & Ex. 1).[3] Plaintiff attached to the

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

[3] Aside from an apparent claim for First Amendment retaliation, which we address below in footnote 11, we note that there is absolutely nothing in the record or the amended complaint that could form the basis for a retaliation claim under any of the anti-discrimination statutes. We therefore do not address that claim (nor do defendants), other than to note that it was asserted by checking the appropriate box on a ready-made complaint form for pro se litigants. (Am. Compl. 3).

amended complaint his EEOC "Charge of Discrimination" form and Notice of Right to Sue. (Id. at Exs. 2-3).

Defendants filed a motion to dismiss on October 31, 2011, and on September 27, 2012 the court granted the motion in part and denied it in part. (Mem. & Order dated Sept. 27, 2012 [docket no. 36]). Specifically, the court dismissed all of plaintiff's claims against the Corporation Counsel and the General Counsel of the DOE, his SHRL and CHRL claims against the DOE, and his Title VII and ADA claims against defendants Rodriguez and Sanchez-Aldama. (Id. at 6). The court denied defendants' motion to dismiss plaintiff's Title VII and ADA claims against the DOE and his SHRL and CHRL claims against defendants Rodriguez and Sanchez-Aldama. (Id. at 7).

The remaining defendants now move for summary judgment on all of plaintiff's surviving claims.

ANALYSIS

I. Summary Judgment Criteria

The court may enter summary judgment only if it concludes that there is no genuine dispute as to the material facts and that,

based on the undisputed facts, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c); see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Feingold v. New York, 366 F.3d 138, 148 (2d Cir. 2004). "An issue of fact is 'material' for these purposes if it 'might affect the outcome of the suit under the governing law [while] [a]n issue of fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Shade v. Hous. Auth. of the City of New Haven, 251 F.3d 307, 314 (2d Cir. 2001) (quoting Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 (1986)). It is axiomatic that the responsibility of the court in deciding a summary-judgment motion "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986); see, e.g., Anderson, 477 U.S. at 255; Howley v. Town of Stratford, 217 F.3d 141, 150-51 (2d Cir. 2000).

The party moving for summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the "pleadings, the discovery and disclosure materials on file, and any affidavits" that demonstrate the absence of a genuine issue of material fact. Fed. R. Civ. Pro. 56(c); see, e.g., Celotex, 477 U.S. at 323; Koch v. Town of Brattleboro, 287

F.3d 162, 165 (2d Cir. 2002). If the non-moving party has the burden of proof on a specific issue, the movant may satisfy its initial burden by demonstrating the absence of evidence in support of an essential element of the non-moving party's claim. See, e.g., Celotex, 477 U.S. at 322-23, 325; PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002); Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995). If the movant would have the burden of proof on a targeted claim or issue, it must proffer admissible evidence that, if not contradicted, would suffice to demonstrate that it is entitled to judgment on that claim or issue. See, e.g., Giannullo v. City of New York, 322 F.3d 139, 140-41 (2d Cir. 2003).

If the movant fails to meet its initial burden, the motion will fail even if the opponent does not submit any evidentiary materials to establish a genuine factual issue for trial. See, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 160 (1970); Giannullo, 322 F.3d at 140-41. If the moving party carries its initial burden, the opposing party must then shoulder the burden of demonstrating a genuine issue of material fact on any such challenged element of its claim or defense. See, e.g., Beard v. Banks, 548 U.S. 521, 529 (2006); Celotex, 477 U.S. at 323-24; Santos v. Murdock, 243 F.3d 681, 683 (2d Cir. 2001). In doing so, the opposing party may not rest "merely on allegations or denials"

of the factual assertions of the movant, Fed. R. Civ. Pro. 56(e); see also, e.g., Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 59-60 (2d Cir. 2004), nor may it rely on its pleadings or on merely conclusory factual allegations. See, e.g., Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000). It must also "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); see also Woodman v. WWOR-TV, Inc., 411 F.3d 69, 75 (2d Cir. 2005). Rather, it must present specific evidence in support of its contention that there is a genuine dispute as to the material facts. See, e.g., Celotex, 477 U.S. at 324; Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998); Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 526 (2d Cir. 1994).

Finally, even if the court does not grant summary judgment co-extensive with the relief sought by either movant, it may provide partial relief. That relief may be as limited as a declaration that one or more material facts are "not genuinely in dispute" and that those facts are deemed "established in the case." Fed. R. Civ. Pro. 56(g); see, e.g., ISC Holding AG v. Nobel Biocare Fin. AG, 688 F.3d 98, 125 (2d Cir. 2012)(Straub, C.J., dissenting); Berbich v. 42d Precinct, __ F. Supp. 2d __, 2013 WL 5510764, *5 (S.D.N.Y. Sept. 27, 2013).

II. Defendants' Motion

Defendants argue in their motion that plaintiff's Title-VII and ADA claims that arose more than 300 days prior to the date that plaintiff filed his charge of discrimination with the EEOC are time-barred. (Defs.' Mem. of Law 5). They also argue that plaintiff has failed to make out a prima facie case of discrimination under Title VII, the ADA, or the SHRL. (Id. at 6-13). They further argue that, even if plaintiff could make out a prima facie case of discrimination, they had legitimate, non-discriminatory reasons for their conduct toward him. (See id. at 14-15). Moreover, defendants insist that plaintiff has failed to point to evidence that might suggest that their proffered explanation is mere pretext for discriminatory conduct. (Id. at 15). Defendants similarly argue that plaintiff's CHRL claim should be dismissed because he has failed to adduce "'some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete.'" (Id. at 16-17 (quoting Bennett v. Health Mgt. Syst. Inc., 92 A.D.3d 29, 45, 936 N.Y.S.2d 112, 124 (1st Dep't 2011)). Lastly, defendants argue that plaintiff's ADA claim for failure to accommodate his diabetes should be dismissed because there already was an accommodation in place and the additional accommodation that he seeks is unreasonable. (Id. at 18-20).

We address each of these arguments more or less in order. However, before reaching the merits of defendants' motion, we address the argument, raised in defendants' reply, that the facts asserted in their Rule 56.1 Statement should be deemed admitted in light of plaintiff's failure to comply with Local Civil Rule 56.1. (Defs.' Reply 3-4).

a. Plaintiff's Failure to Comply with Local Rule 56.1

Pursuant to S.D.N.Y. Civil Rule 56.1(a), a party moving for summary judgment is required to include with its papers "a short separate statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." The rule goes on to provide:

> Each statement by the movant... must be followed by citation to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c).

S.D.N.Y. Civil Rule 56.1(d).

Failure to comply with these requirements -- which apply equally to the party opposing a summary-judgment motion -- may have dispositive consequences for the litigant. Rule 56.1(a) specifies that if a movant does not provide a Rule 56.1 Statement, that omission "may constitute grounds for denial of the motion."

Equally, if an opposing party fails to "specifically controvert[]" any factual contention in the movant's Rule 56.1 Statement, that factual contention "will be deemed to be admitted for purposes of the motion." S.D.N.Y. Civil Rule 56.1(c).

The Second Circuit has indicated that "[a] district court has broad discretion to determine whether to overlook a party's failure to comply with" Local Rule 56.1. Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 73 (2d Cir. 2001). Thus, while a court "'is not required to consider what the parties fail to point out'" in the Local 56.1 Statement, it may, in its discretion, opt to "'conduct an assiduous review of the record in an effort to weigh the propriety of granting a summary judgment motion." Id. (citing cases).

Defendants argue in their reply that the entirety of their Rule 56.1 Statement should be deemed to be admitted in light of plaintiff's failure to submit a comparable statement in compliance with Local Civil Rule 56.1. (Defs.' Reply 3-4). While it is certainly within the court's discretion to do that, we conclude that in this case it is more appropriate to review the full factual record, given plaintiff's pro se status and the relatively thin nature of the record before us. See, e.g., Sease v. Phillips, 2008 WL 2901966, *1 n.1 (S.D.N.Y. July 24, 2008). Thus, to the extent

that plaintiff has objected to defendants' factual assertions and cited to contradictory evidence, we have taken those objections into consideration.

b. Statute of Limitations

There is no dispute that the limitations period under Title VII and the ADA for claims filed with a state agency is 300 days from the alleged wrongful act. 42 U.S.C. § 2000e-5(e)(1); see, e.g., Patterson v. County of Oneida, 375 F.3d 206, 220 (2d Cir. 2004) (Title VII); EEOC v. Deloitte & Touche, LLP, 2000 WL 1024700, *4 (S.D.N.Y. July 25, 2000) (ADA).

As evidence of the date of plaintiff's initial filing with the EEOC, defendants cite to an EEOC form labeled "Charge of Discrimination," that plaintiff filed with the EEOC on or about March 17, 2010. (Defs.' 56.1 Statement ¶ 52; Am. Compl. Ex. 2(b)). In opposition, plaintiff proffers a different EEOC form, labeled "Intake Questionnaire," which he filed with the agency on February 2, 2010. (Pl.'s Reply Ex. 1).

Regardless of the respective titles of the forms, several courts have held that an EEOC "Intake Questionnaire" may be construed as an official charge of discrimination that serves to

trigger the statute of limitations, if the submission clearly "evinces an intent to 'activate the administrative process.'" Price v. City of New York, 797 F. Supp. 2d 219, 227-28 (E.D.N.Y. 2011) (paraphrasing Fed. Express Corp. v. Holowecki, 552 U.S. 389, 413 (2008)); see, e.g., Sandvik v. Sears Holding/Sears Home Improvement Products, Inc., 2014 WL 24225, *7 n.9 (E.D.N.Y. Jan. 2, 2014); Harris v. NYU Langone Med. Ctr., 2013 WL 5425336, *2 (S.D.N.Y. Sept. 27, 2013); Jallow v. Office of Court Admin., 2012 WL 4044894, *7-*8 (S.D.N.Y. Sept. 4, 2012). To constitute a charge, the written submission must identify the parties and describe the alleged discriminatory acts. Int'l Healthcare Exch., Inc. v. Global Healthcare Exch., LLC, 470 F. Supp. 2d 345, 354 (S.D.N.Y. 2007) (citing 29 C.F.R. § 1601.12(b)).

In his opposition, plaintiff attaches only the first page of his "Intake Questionnaire" (Pl.'s Reply Ex. 1); however, at the court's request, defense counsel has provided a complete copy of the form that was submitted to the EEOC. (Collyer Letter to Ct. dated Apr. 14, 2014). The form names the individual defendants (as well as non-party Mr. R. Aponte) and complains about frequent classroom visitation, letters to his file, and a failure to accommodate plaintiff's diabetic condition. (Id.). Page 4 of the EEOC's Intake Questionnaire specifically notifies complainants of the consequences of failing to file a charge of discrimination

within the statute of limitations and states, in bold, "If you would like more information before filing a charge or you have concerns about EEOC's notifying the employer, union, or employment agency about your charge, you may wish to check Box 1. If you want to file a charge, you should check Box 2." Plaintiff checked Box 2, which states "I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above. I understand that the EEOC must give the employer, union, or employment agency that I accuse of discrimination information about the charge, including my name. I also understand that the EEOC can only accept charges of job discrimination based on race, color, religion, sex, national origin, disability, age, genetic information, or retaliation for opposing discrimination."

Based on the information that plaintiff included on the Intake Questionnaire, we conclude that he set forth the minimum substantive requirements of a charge and made clear his intent that the EEOC should undertake an investigation on his behalf. We therefore conclude that, for limitations purposes, the Intake Questionnaire served as plaintiff's charge, see Harris, 2013 WL 5425336 at *2 ("Plaintiff checked the box stating: 'I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above.' That language, added to the EEOC's standard intake form after Holowecki, serves as strong

evidence of a plaintiff's request that the EEOC pursue remedial action, as does other information on the face of the Intake Questionnaire, such as Plaintiff's detailed descriptions of Defendant's allegedly discriminatory conduct."), which was later supplemented by his filing of the "Charge of Discrimination" form. See 29 C.F.R. § 1601.12 ("A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received."). We therefore conclude that the statute of limitations was triggered by the filing of plaintiff's Intake Questionnaire on February 2, 2010.

Since plaintiff filed with the EEOC on February 2, 2010 (Pl.'s Reply Ex. 1; Collyer Letter to Ct. dated Apr. 14, 2014 (EEOC Intake Questionnaire)), the limitations cut-off date for his Title VII and ADA claims is April 8, 2009. Of the claims articulated by plaintiff, the only ones that are clearly time-barred by that date are his Title VII and ADA claims against the DOE concerning the denial of a parking permit between September 2008 and April 2009.

c. Defendants' Attack on Plaintiff's Federal and State Discrimination Claims

Discrimination claims arising under Title VII, the ADA, and New York's SHRL are all analyzed under the burden-shifting framework first set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See, e.g., Benson v. Otis Elevator Co., 2014 WL 657942, *1 (2d Cir. Feb. 21, 2014) (discussing the SHRL); Bucalo v. Shelter Island Union Free Sch. Dist., 691 F.3d 119, 128 (2d Cir. 2012) (discussing Title VII); Heyman v. Queens Vill. Comm. for Mental Health for Jamaica Cmty. Adolescent Program, Inc., 198 F.3d 68, 72 (2d Cir. 1999) (discussing the ADA); Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 52 (2d Cir. 1998) (discussing the ADA); Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 326 n.3, 786 N.Y.S.2d 382, 1006 n.3 (2004) (comparing SHRL analysis to Title VII analysis).

"The purpose of the McDonnell Douglas burden-shifting framework is to 'progressively... sharpen the inquiry into the elusive factual question of intentional discrimination.'" Bucalo, 691 F.3d at 128 (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n. 8 (1981)). The Supreme Court explained the analysis as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Burdine, 450 U.S. at 252-53 (quoting McDonnell Douglas Corp., 411 U.S. at 802); see United States v. City of New York, 717 F.3d 72, 84 (2d Cir. 2013).

To establish a prima facie case, the plaintiff must show "that (1) he is a member of a protected class; (2) he was qualified for the position he held[4]; (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); Alford v. Turbine Airfoil Coating & Repair, LLC, 2014 WL 1516336, *6 (S.D.N.Y. Apr. 17, 2014); Mercedes v. AVA Pork Products, Inc., 2014 WL 1369611, *5 (E.D.N.Y. Apr. 8, 2014). The burden of establishing a prima

[4] As we discuss below, this element has at times been articulated in terms of whether a plaintiff's is "competent to perform the job or is performing his duties satisfactorily." See, e.g., Mario v. P & C Food Markets, Inc., 313 F.3d 758, 767 (2d Cir. 2002); Spiegel v. Schulmann, 604 F.3d 72, 80 (2d Cir. 2010).

facie case in the first instance is "'not onerous'; indeed, it is 'minimal,' or 'slight.'" City of New York, 717 F.3d at 84 (2d Cir. 2013) (quoting Burdine, 450 U.S. at 253; St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); and Wanamaker v. Columbian Rope Co., 108 F.3d 462, 465 (2d Cir. 1997)).

"'Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee,'" Bucalo, 691 F.3d at 128 (quoting Burdine, 450 U.S. at 254), shifting the burden to the defendant to rebut the presumption by proffering a legitimate, non-discriminatory basis for its conduct toward the plaintiff. See City of New York, 717 F.3d at 84. "If the defendant satisfies its burden of production, then 'the presumption raised by the prima facie case is rebutted and drops from the case'" and "the plaintiff then has 'the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision' -- a burden that 'merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.'" Bucalo, 691 F.3d at 129 (quoting Hicks, 509 U.S. at 507 and Burdine, 450 U.S. at 256).

Here, defendants argue that plaintiff has failed to establish three of the essential elements of a prima facie case for discrimination. Specifically, they argue that he is unable to

demonstrate that he performed his job duties satisfactorily, that he suffered an adverse employment action, and that there is evidence suggesting that any such adverse action was motivated by discriminatory animus. (Defs.' Mem. of Law 6-13). Defendants also argue that their treatment of plaintiff was motivated by non-discriminatory considerations -- that plaintiff's classroom management and teaching style were unsatisfactory and that there were not enough parking permits to go to all staff. (See id. at 14-15). Lastly, defendants argue that plaintiff has failed to rebut their non-discriminatory rationales and thus cannot defeat summary judgment. (Defs.' Reply 5-8).

Plaintiff disputes defendants' contention that he is not qualified for his teaching position (Pl.'s Opp'n at 2 & Ex. 2), and he lists a series of alleged adverse employment actions against him. (Id. at 4; see id. 13-15 & Ex. 13b). He argues that these actions were taken against him by defendants Rodriguez and Sanchez-Aldama because they "took my actions during SLT (school leadership team) meetings personally and started retaliating." (Id. at 2).

1. Plaintiff's Prima Facie Case

i. Satisfactory Job Performance & Qualification for the Position

Defendants cite to several cases in support of the notion that plaintiff must show "satisfactory performance" in order to make out a prima facie case of discrimination. (Defs.' Mem. of Law 6 (citing McDonnell Douglas Corp., 411 U.S. at 802-04; Mario, 313 F.3d at 767; Spiegel, 604 F.3d at 80). Based on that understanding, defendants argue that "Plaintiff has had a lengthy history of performance problems and misconduct during his assignment at PS 98," and thus is unable to demonstrate that he was satisfactorily performing his job duties for purposes of making out his prima facie case. (Defs.' Mem. of Law 6-9). This argument fundamentally misapprehends the law in this circuit concerning this element of a plaintiff's prima facie burden.

The Second Circuit specifically addressed this issue in Slattery v. Swiss Reinsurance America, 248 F.3d 87 (2d Cir. 2001). See also Donnelly v. Greenburgh Cent. Sch. Dist. No. 7, 691 F.3d 134, 147 (2d Cir. 2012); Kaboggozamusoke v. Rye Town Hilton Hotel, 370 F. App'x 246, 248 n.1 (2d Cir. 2010). Reviewing the district court's grant of summary judgment dismissing Mr. Slattery's age-discrimination claim under the Age Discrimination in Employment

Act (which the Circuit specifically indicated is analyzed under the same McDonnell Douglas standard as the federal discrimination claims at issue in this case, Slattery, 248 F.3d at 91),[5] the Circuit held that the district court had "overstated the requirements for a prima facie case" when it required that the plaintiff show "'he was performing his duties satisfactorily'" as the second element of his prima facie showing. 248 F.3d at 91. Although the Circuit acknowledged that some of its prior opinions had used language referring to a plaintiff's satisfactory job performance, it made clear that "in doing so we have not, of course, raised the standard set by the Supreme Court for what suffices to show qualification." Id. The Court explained that "a mere variation in terminology between 'qualified for the position' and 'performing… satisfactorily' would not be significant so long as, in substance, all that is required is that the plaintiff establish basic eligibility for the position at issue, and not the greater showing that he satisfies the employer." Id. at 91-92. The Court further explained:

> [P]laintiff must show only that he 'possesses the basic skills necessary for performance of [the] job.'… As a result, especially where discharge is at issue and the

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[5] But see Gross v. FBL Financial Servs., Inc., 557 U.S. 167, 173-75 (2009) (distinguishing the burden-shifting framework for mixed-motive-discrimination claims under the ADEA and Title VII).

> employer has already hired the employee, the inference of minimal qualification is not difficult to draw.

Id. at 92 (quoting Owens v. New York City Housing Auth., 934 F.2d 405, 409 (2d Cir. 1991)); see Ruiz, 609 F.3d at 492 ("the inquiry should focus on the plaintiff's competence and whether he 'possesses the basic skills necessary for performance of [the] job'") (quoting Thornley v. Penton Publishing, Inc., 104 F.3d 26, 30 (2d Cir. 1997)); Karim v. Dep't of Educ. of the City of New York, 2011 WL 809568, *6 (E.D.N.Y. Mar. 2, 2011).[6]

In this case, plaintiff had been working as a licensed public school teacher for approximately six years prior to the start of this case. He also holds certificates qualifying him to work as a school-building leader and a school-district leader. (Pl.'s Opp'n

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[6] An employer's subjective expectations may be relevant to a plaintiff's prima facie showing in terms of defining the specific job responsibilities that an employee must be able to perform in order to qualify for a particular position. See Thornley, 104 F.3d at 29 (employer "is not compelled to submit the reasonableness of its employment criteria to the assessment of either judge or jury"). However, as we have noted, to make out a prima facie case, the employee need only show that he or she is minimally qualified to perform those specified job duties, not that in doing so he or she has satisfied the employer's subjective expectations -- an issue that is more appropriately assessed when considering the employer's proffered justification for its disputed treatment of the plaintiff. See, e.g., Slattery, 248 F.3d at 92-92; Karim, 2011 WL 809568 at *6; accord Ruiz, 609 F.3d at 493 (employee misconduct may be relevant to showing a legitimate, non-discriminatory reason for termination, even though not relevant to plaintiff's prima facie case).

Ex. 2f, 2g). He became tenured on December 1, 2007 (Pl.'s Opp'n Ex. 2e), and for a period of four years, from 2005 to 2008, he routinely received S-ratings on his annual performance reviews. (Id. at Exs. 2a-d). Based on that record, we conclude that plaintiff was sufficiently qualified for his job to satisfy the second element of his prima facie burden.

ii. Adverse Employment Action

Defendants next argue that plaintiff has failed to allege and cannot prove any materially adverse employment actions. (Defs.' Mem. of Law 9-12). We agree that, with one exception, defendant's arguments are well taken.

In the discrimination context, "[a]n adverse employment action is a 'materially adverse change in the terms and conditions of employment,' which can include 'termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished material responsibilities,' among other possibilities." Adams v. Festival Fun Parks, LLC, 2014 WL 1099215, *2 (2d Cir. Mar. 21, 2014) (quoting Sanders v. N.Y.C. Human Res. Admin., 361 F.3d 749, 755 (2d Cir. 2004)); see Marthirampuzha v. Potter, 548 F.3d 70, 78 (2d Cir. 2008).

In this case, plaintiff cites a litany of actions taken against him. In the amended complaint, he complains of (1) excess supervision (Am. Comp. Ex. 2); (2) a "wrongful unsatisfactory rating in [his] June 2009 performance review" (id.); (3) denial of his request for a "non-disabled paraprofessional aide" (id.); (4) denial of vacation time (id.); (5) a failure to commend him over the morning announcements for achievements comparable to peers who did receive commendation (id.); (6) temporary denial of a parking permit (id.); (7) refusal to include plaintiff in the IEP After School Program, apparently resulting in about $300 in lost earnings per week (id.); (8) refusal to move plaintiff's preparatory period to the end of the school day to better accommodate his doctors' appointments at that time (id.); (9) placement of disruptive students in his class who purportedly should have been in home-instruction programs (id. at Ex. 1); (10) placement of non-special-education students in his special education class (id.); and (11) exclusion of his class's photo from the 2008 graduation materials. (Id.). In his opposition to defendants' motion, plaintiff also asserts, without elaboration, that defendants "Rodriguez and Sanchez jointly tried to frame me in charges of corporal punishment with the mission to eliminate me from the NYCDOE but failed miserably due to the lack of substantial evidence." (Pl.'s Opp'n 4; see id. 13-15). In addition, plaintiff presents evidence indicating that sometime in 2013 the DOE filed

disciplinary charges action against him, under Education Law § 3020-a, based on his "incompetent and inefficient service, neglect of duty, failure to follow procedures and carry out normal duties and misconduct during the 2009-2010 and 2012-2013 school years." (Id. at Ex. 13b).[7]

It is clear that several of plaintiff's complaints are, on their face, too trivial to amount to adverse employment actions. Specifically, defendants' purported failure to commend plaintiff during the morning announcements despite commending other teachers for achievements comparable to plaintiff's, their failure to include a photo of his class for the 2008 graduation, and their temporary revocation of his parking pass when other teachers were able to retain theirs do not amount to adverse employment actions for purposes of making out a discrimination claim. See, e.g., Sethi v. Narod, 2014 WL 1343069, *19 (E.D.N.Y. Apr. 2, 2014) ("Plaintiff's lack of a welcome email and business cards are trivial matters that do not qualify as adverse employment

[7] Defendants argue that plaintiff's reference in his opposition to the 2013 Specifications against him for incompetent service "is not alleged in the amended complaint, and should be treated as a separate matter." (Defs.' Reply 8 n.3). In addition, they argue that because plaintiff concedes that he has remained on the payroll pending the DOE's § 3020-a action against him, "he cannot be said to have suffered an adverse employment action because he has not suffered any tangible loss." (Id.).

actions."); Neratko v. Frank, 31 F. Supp. 2d 270, 285 (W.D.N.Y. 1998) (occasionally assisting female employees in lifting things but not similarly assisting male employees "represents the kind of de minimis matter that does not constitute an adverse employment action under Title VII"); see also Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (noting in the retaliation context that "'personality conflicts at work that generate antipathy' and '"snubbing" by supervisors and co-workers" are not actionable'"); Tepperwien v. Entergy Nuclear Operations, Inc., 663 F.3d 556, 571 (2d Cir. 2011) (same); Pierre v. Napolitano, 958 F. Supp. 2d 461, 481 (S.D.N.Y. 2013) ("plaintiff's temporarily being denied the use of the Ford Explorer [his preferred assigned vehicle] is too trivial a matter to constitute an adverse employment action" in the retaliation context); Ruggieri v. Harrington, 146 F. Supp. 2d 202, 217 (E.D.N.Y. 2001) (difficulty renewing parking permit not actionable in retaliation context).[8]

[8] An adverse employment action is more broadly defined in the Title VII retaliation context than in the discrimination context. See Kessler v. Westchester Cnty. Dep't of Soc. Servs., 461 F.3d 199, 207-09 (2d Cir. 2006) (discussing Burlington N. & Santa Fe Ry. Co., 548 U.S. at 66); Watson v. Geithner, 2013 WL 5441748, *5 (S.D.N.Y. Sept. 27, 2013). It follows that if an action is insufficient to constitute an adverse employment action under the more lenient retaliation standard, it is also insufficient to do so for purposes of establishing a discrimination claim.

Plaintiff also asserts several claims premised on the denial of his preferred working conditions. Thus, he complains that he was inconvenienced by the age and limited agility of the paraprofessional assigned to work in his classroom, as well as by the fact that his preparatory period was not scheduled at the time he desired at the end of the school day. He also complains about the assignment of troublesome and non-special-education students to his special-education class. None of these complaints constitutes an actionable ground for a discrimination claim. See, e.g., Albuja v. Nat'l Broad. Co. Universal, Inc., 851 F. Supp. 2d 599, 608 (S.D.N.Y. 2012) ("Where the change in schedule does not occasion a reduction in wages or job responsibilities, unfavorable schedules are a 'mere inconvenience' and not an adverse employment action."); Weisbecker v. Sayville Union Free Sch. Dist., 890 F. Supp. 2d 215, 233 (E.D.N.Y. 2012) (being assigned a student with challenging developmental needs and not having a classroom aide assigned for an adequate amount of time are not adverse employment actions); Klein v. New York Univ., 786 F. Supp. 2d 830, 847 (S.D.N.Y. 2011) (plaintiff's "course assignments and the composition of her classes cannot be considered adverse employment actions" absent a showing that they impacted her compensation or other benefits); Antonmarchi v. Consol. Edison Co. of New York, Inc., 2008 WL 4444609, *15 (S.D.N.Y. Sept. 29, 2008), aff'd, 514 F. App'x 33 (2d Cir. 2013) (undesirable work schedule not an

adverse employment action as measured by more lenient test applied in retaliation context); Browne v. City Univ. of New York, 419 F. Supp. 2d 315, 333 (E.D.N.Y. 2005), aff'd sub nom. Browne v. Queen's Coll. City Univ. of New York, 202 F. App'x 523 (2d Cir. 2006) (holding in the retaliation context that "assignment of a heavier teaching load to plaintiff for the Spring 2000 semester does not constitute an adverse employment action"); Morrison v. Potter, 363 F. Supp. 2d 586, 591 (S.D.N.Y. 2005) (change in teacher's responsibilities was not adverse action where new duties were consistent with plaintiff's prior experience and not unsuited to plaintiff's skills).

Plaintiff's complaint that defendants denied his request for vacation time when his mother was terminally ill (see Pl.'s Opp'n ¶ 12) is also insufficient to constitute an adverse employment action, however insensitive such conduct may have been. First, plaintiff "has not demonstrated that []he was unequivocally entitled to take vacation days," Boyd v. Presbyterian Hosp. in City of New York, 160 F. Supp. 2d 522, 537-38 (S.D.N.Y. 2001), nor has he adduced any admissible evidence that he was in fact denied a vacation request, but rather relies only on unsworn allegations in his amended complaint and opposition memorandum. See Giannullo, 322 F.3d at 142 (2d Cir. 2003) ("memorandum of law… is not evidence at all"); Balestriere PLLC v. CMA Trading, Inc., 2014 WL 929813,

*12 (S.D.N.Y. Mar. 7, 2014) ("allegations in a pleading do not themselves suffice as evidence for the purpose of a summary-judgment motion"). In any event, "'the denial of a single vacation request, without any indication that there was an absolute prohibition against plaintiff taking any vacation time, is not a material adverse employment action.'" Chukwuka v. City of New York, 795 F. Supp. 2d 256, 261 (S.D.N.Y. 2011), aff'd, 513 F. App'x 34 (2d Cir. 2013) (quoting Roff v. Low Surgical & Med. Supply, Inc., 2004 WL 5544995, *4 (E.D.N.Y. May 11, 2004)); see Nidzon v. Konica Minolta Bus. Solutions, USA, Inc., 752 F. Supp. 2d 336, 350 (S.D.N.Y. 2010); Baptiste v. Cushman & Wakefield, 2007 WL 747796, *9 n.4 (S.D.N.Y. Mar. 7, 2007); Hunter v. St. Francis Hosp., 281 F. Supp. 2d 534, 544 (E.D.N.Y. 2003). Since plaintiff has not alleged, much less proffered evidence, that he was absolutely prohibited from taking vacation time, he has failed to establish that the one-time denial of his vacation request was an adverse employment action.

Plaintiff alludes in very cursory fashion in his opposition to allegedly false charges against him of corporal punishment. That issue was not raised in plaintiff's amended complaint and, for that reason alone, the court need not address it on the merits. Lyman v. CSX Transp., Inc., 364 F. App'x 699, 701 (2d Cir. 2010). What is more, plaintiff fails to provide any explanation or

evidence that might shed light on the nature of the charges against him, their purported basis, or his asserted innocence. As such, his suggestion that the charges of corporal punishment can serve to demonstrate an adverse action against him is unavailing. Cf. Anderson, 477 U.S. at 252 (1986) ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to withstand summary judgment]; there must be evidence on which the jury could reasonably find for the plaintiff.").

Having concluded that most of plaintiff's allegations of adverse actions or job conditions cannot amount to the required adverse employment action under Title VII, we note that he does allege one such action that defendants fail to demonstrate should be rejected as a matter of law. Plaintiff asserts that he was barred from teaching in the IEP After School Program, resulting in lost earnings of approximately $300 per week, and such a claim could potentially constitute an adverse employment action. See Shapiro v. N.Y.C. Dep't of Educ., 561 F. Supp. 2d 413, 428 (S.D.N.Y. 2008) ("Plaintiff… has created a genuine issue of material fact as to whether she suffered an adverse employment action because she was removed from an after-school assignment teaching English and the position was given to a teacher 30 years younger."); Mayfield v. Hart Cnty. Sch. Dist., 2006 WL 1652299, *4

(M.D. Ga. June 9, 2006) ("loss of the after school and summer school programs" is an adverse employment action). Compare Ruggieri, 146 F. Supp. 2d at 217 (stating, in retaliation context, that plaintiff who experienced no change in salary "suffered no adverse employment action as a result of being denied the occasion… to teach certain summer courses that she wanted to teach, opportunities to which she was not absolutely entitled simply based on her status as a tenured professor.").

The difficulty with the defendants' attempt to challenge this action as amounting to an adverse employment action is that they failed to pursue such an argument in their original moving papers. Indeed, in those papers they failed to mention this allegation at all, much less point to anything in the record that might show that the alleged denial of admission to the IEP program did not occur or did not amount to an adverse employment action. Rather, they mention it for the first time in their reply papers, in which they cite Brown v. City of Syracuse, 673 F.3d 141, 151 (2d Cir. 2012), for the proposition that the loss of the possible opportunity for future extra pay is insufficient to trigger Title VII liability. (Defs.' Reply 7).

The short answer is that arguments raised for the first time in summary-judgment reply papers are generally not properly

presented for the court's consideration, since they effectively prevent the other side from responding to the new material. See, e.g., Colon v. City of New York, 2014 WL 1338730, *8-*9 (E.D.N.Y. Apr. 2, 2014); Jackler v. Byrne, 708 F. Supp. 2d 319, 325 n.6 (S.D.N.Y. 2010), vacated on other grounds, 658 F.3d 225 (2d Cir. 2011); Playboy Enterprises, Inc. v. Dumas, 960 F. Supp. 710, 721 n.7 (S.D.N.Y. 1997) (citing cases), aff'd, 159 F.3d 1347 (2d Cir. 1998). Although the court has some discretion to waive that general rule, see Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G., 215 F.3d 219, 226-27 (2d Cir. 2000), we decline to do so here since defendants were on notice of plaintiff's allegation about denial of access to the IEP After School Program before filing their motion -- indeed, it is referred to in the amended complaint (Am. Compl. Ex. 2b) -- and, in any event, given the lack of clarity on the issue, as we discuss below, as well as plaintiff's pro se status, there is no compelling need to shoehorn the issue into the court's Rule 56 assessment. Compare Ruggiero v. Warner-Lambert Co., 424 F.3d 249, 252 n.3 & n.4 (2d Cir. 2005).

As for the merits of defendants' argument, we find their reliance on Brown, 673 F.3d at 151, to be misplaced. In that case, the plaintiff police officer was subjected to a disciplinary investigation after he rented a hotel room for an underage girl and failed to report her whereabouts, even after her mother had

been looking for her. Id. at 145. The Second Circuit rejected the plaintiff's claim that his suspension with pay and his attendant loss of overtime pay were adverse employment actions, finding that the employer had not exceeded its authority in disciplining Brown, and that plaintiff's resultant loss of potential overtime earnings was not adverse. Id. at 150-51.

Citing Brown, defendants argue that Mr. Ullah's loss of the ability to earn "potential extra pay" because of his U-rating should not be regarded as a material change in the terms and conditions of his employment. (Defs.' Reply 7). That argument is unconvincing. In this case, plaintiff was not suspended or under disciplinary investigation at the time he was allegedly excluded from teaching in the IEP After School Program (see Am. Compl. at Ex. 2b), and we have been unable to find any caselaw applying Brown's reasoning outside such a context. See, e.g., Walia v. Napolitano, 2013 WL 6231175, *7 (E.D.N.Y. Dec. 2, 2013); Awolesi v. Shinseki, 2013 WL 489646, *7 (W.D.N.Y. Feb. 7, 2013); Jeter v. N.Y.C. Dep't of Educ. of City of New York, 2012 WL 2885140, *11 (E.D.N.Y. July 13, 2012); Rozenfeld v. Dep't of Design & Const. of City of New York, 875 F. Supp. 2d 189, 203 (E.D.N.Y. 2012), aff'd, 522 F. App'x 46 (2d Cir. 2013). Furthermore, the plaintiff in Brown did not dispute the underlying basis for the disciplinary investigation against him, but rather argued that he had been

subjected to disparate disciplinary measures as compared to his similarly-situated co-workers. See id. at 151. In stark contrast, the plaintiff in this case disputes the legitimacy of the unsatisfactory rating that he received and he cites the loss of potential earnings from the after-school program as evidence that the negative ratings that he received did in fact amount to an adverse employment action. In essence, defendants' reliance on Brown places the cart before the horse by presuming the validity of plaintiff's U-rating and the alleged loss of earnings that flowed from that rating. While defendants' assertion that plaintiff deserved the negative ratings that he received may serve as a legitimate, non-discriminatory justification for their actions against him, it is not relevant to the question of whether plaintiff has demonstrated an adverse employment action as a component of his prima facie case.

Although plaintiff has not offered any probative evidence that he actually was excluded from teaching in the program or that such exclusion in fact resulted in lost income -- he proffers a single earning statement from April 2010 issued by "Innovative Educational Programs LLC" and otherwise relies on conclusory allegations set forth in an exhibit to the amended complaint and in his opposition papers (Am. Compl. Ex. 2b; Pl.'s Opp'n ¶ 21 & Ex 14(a)) -- he was not placed on notice by defendants' motion papers

monitoring may cause an employee embarrassment or anxiety, such intangible consequences are not materially adverse alterations of employment conditions").

We note that U-ratings in the New York City public school system may, in some circumstances, be considered adverse since the consequences flowing from such a rating may include

> (a) being removed from 'per session' (i.e. extracurricular) paid positions; (b) being barred from applying for per session positions for five years; (c) inability to work in summer school; (d) lost income, including inability to move up a salary step; (e) reduced pension benefits; (f) inability to transfer within the school district; and (g) damaged professional reputations and careers.

Shapiro, 561 F. Supp. 2d at 423; see also Carmellino v. Dist. 20 of N.Y.C. Dep't of Educ., 2006 WL 2583019, *28 (S.D.N.Y. Sept. 6, 2006); accord NYC Board of Educ. Division of Human Resources, "New York Public Schools: Rating Pedagogical Staff Members" 9-10, available at http://www.uft.org/files/attachments/rating-pedagogical-staff-members.pdf ("[r]eceipt of an Unsatisfactory rating has serious implications. Unsatisfactory performance is a compelling reason for recommending the Discontinuance of Probationary Service or the Denial of Certification of Completion of Probation and for filing charges against tenured employees. It may also impact on an employee's ability to obtain additional

licenses… Employees who have not reached their maximum salary also suffer the loss of annual salary increments… Substitute teachers (regular or per-diem) are additionally affected because their receipt of an Unsatisfactory rating is considered sufficient grounds for removal from a position.").[9]

Nonetheless, courts that have considered whether a U-rating for teachers in the New York City school system amounts to an adverse employment action for purposes of assessing Title VII or SHRL discrimination claims have uniformly held that they do not, except where the plaintiff has proffered evidence that he has actually suffered negative consequences directly flowing from those ratings. See White v. N.Y.C. Dep't of Educ., 2014 WL 1273770, *13 (S.D.N.Y. Mar. 28, 2014) (summary judgment warranted due to lack of admissible evidence indicating that U-rating had hindered plaintiff's procurement of a permanent teaching position); Sotomayor, 862 F. Supp. 2d at 254-55; Taylor v. N.Y.C. Dep't of

[9] In the Fall of 2013, the DOE revised its teacher-evaluation system to replace (in most cases) the satisfactory/unsatisfactory assessment that we discuss herein with a new system that grades teachers as "highly effective," "effective," "developing" or "ineffective." See, e.g., Al Baker, "Bumpy Start for Teacher Evaluation in New York Schools," New York Times, A22 (Dec. 23, 2013); "Teacher Evaluation," United Federation of Teachers, available at http://www.uft.org/our-rights/teacher-evaluation; "Advance Overview," NYC Dep't of Educ., available at http://schools.nyc.gov/Offices/advance/About+Advance/default.htm.

Educ., 2012 WL 5989874, *7 (E.D.N.Y. Nov. 30, 2012) (U-rating "could potentially qualify as adverse employment action[]" but plaintiff failed to adequately plead negative consequences directly flowing from that rating); Dressler v. N.Y.C. Dep't of Educ., 2012 WL 1038600, *7 (S.D.N.Y. Mar. 29, 2012) ("evidence that Plaintiff's 2009-2010 U rating precluded him from the opportunity of participating in Per Session Home Instruction Employment program is sufficient to establish a basis on which a reasonable trier of fact could find a material adverse change"); Solomon v. Southampton Union Free Sch. Dist., 2011 WL 3877078, *9 (E.D.N.Y. Sept. 1, 2011), aff'd, 504 F. App'x 60 (2d Cir. 2012) ("plaintiff has failed to provide any evidence that her negative evaluation affected her employment in any way, and therefore it is not an adverse employment action"); Shapiro, 561 F. Supp. 2d at 423 (summary judgment denied where plaintiffs adduced evidence of consequences flowing from U-ratings); Carmellino, 2006 WL 2583019 at *28 (plaintiff's indication of potential adverse consequences were insufficient to establish a prima facie claim absent evidence that plaintiffs actually suffered such consequences flowing from a U-rating); Valentine v. Standard & Poor's, 50 F. Supp. 2d 262, 283-84 (S.D.N.Y. 1999), aff'd, 205 F.3d 1327 (2d Cir. 2000).

In this case, plaintiff has presented evidence indicating that, based in part on the U-rating that he received for the 2009-

2010 school year, the DOE initiated § 3020-a disciplinary proceedings against him in 2013. (See Pl.'s Opp'n Ex. 13(b)). In the reply, defendants argue that

> this is not alleged in the Amended Complaint, and should be treated as a separate matter. Further, as plaintiff himself notes that he is 'very much on payroll and being paid on a regular basis,' he cannot be said to have suffered an adverse employment action because he has not suffered any tangible loss."

(Defs.' Reply 8 n.3 (quoting Pl.'s Opp'n ¶ 19)).

We agree that since plaintiff did not mention the § 3020-a disciplinary proceeding in his amended complaint and has not made any effort to amend his pleading, that proceeding should not be considered in this case as a stand-alone basis for finding an adverse employment action. In so concluding, we note that plaintiff will not be barred from filing a separate suit premised on events, such as the § 3020-a proceeding, which arose after the amended complaint was filed in this case. Curtis v. Citibank, N.A., 226 F.3d 133, 139 (2d Cir. 2000). Furthermore, since the Specifications sheet for the § 3020-a proceeding states that the proceeding is premised on plaintiff's conduct in the 2009-2010 and 2012-2013 school years, it does not appear that it is a direct consequence flowing from the negative reviews and the U-rating that plaintiff received for the 2008-2009 school year, which form the overwhelming

basis of this case.[10] In addition, the doctrine of prudential ripeness weighs in favor of postponing adjudication of the issue since it appears that the § 3020-a proceeding may not yet be concluded. See New York Civil Liberties Union v. Grandeau, 528 F.3d 122, 132-35 (2d Cir. 2008) (applying two-step inquiry evaluating (1) whether claims are fit for judicial review or would benefit from any further factual development and (2) the hardship to the parties of withholding consideration); Simmonds v. I.N.S., 326 F.3d 351, 359 (2d Cir. 2003).

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[10] In any event, while there is caselaw to suggest that the mere initiation of a § 3020-a proceeding or other disciplinary investigation may amount to an adverse action in the retaliation context, see Weber v. City of New York, 2013 WL 5416868, * 26 (E.D.N.Y. Sept. 29, 2013); Grennan v. Nassau Cnty., 2007 WL 952067, *10 (E.D.N.Y. Mar. 29, 2007), that is not the case in the discrimination context. Indeed, courts have routinely held that the reasonable prosecution of disciplinary proceedings are not adverse, even if such proceedings are accompanied by other negative consequences such as lost overtime pay and suspension. Brown, 673 F.3d at 150; Joseph v. Leavitt, 465 F.3d 87, 92 n.1 (2d Cir. 2006); Levitant v. City of New York Human Res. Admin., 914 F. Supp. 2d 281, 299 (E.D.N.Y. 2012), aff'd, 2014 WL 866480 (2d Cir. Mar. 6, 2014). It follows that the mere initiation of a § 3020-a proceeding -- which is the only action for which plaintiff has proffered evidence -- is insufficient to amount to an adverse action, absent evidence that the proceeding is somehow unreasonable or procedurally flawed. See Levitant, 914 F. Supp. 2d at 299. As such, we conclude that, based on the current record, plaintiff would be unable to show that the consequences flowing from his negative performance reviews for even the 2009-2010 and 2012-2013 school years amounted to adverse actions. See Rozenfeld, 875 F. Supp. 2d at 204 (declining to find an adverse action where "[d]efendants simply instructed Plaintiff to appear for an investigatory interview. They did not impose disciplinary measures or penalties").

In sum, we conclude that plaintiff has failed to demonstrate a triable dispute as to the presence of an adverse employment action except with respect to the alleged denial to him of admission to the IEP After School Program.

iii. Nexus Between Adverse Employment Action and Discriminatory Animus

Defendants next argue that plaintiff has failed to proffer any evidence from which a reasonable factfinder could infer that a purportedly adverse employment action against the plaintiff was motivated by discriminatory animus based on his membership in a protected class. We agree.

"It is axiomatic that mistreatment at work... is actionable under Title VII only when it occurs because of an employee's... protected characteristic." Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001). Thus, to make out a prima facie case under Title VII, the ADA, or the SHRL, a plaintiff must point to evidence that would support an inference that the defendants' conduct against the plaintiff was motivated by discriminatory animus. See Mandell v. Cnty. of Suffolk, 316 F.3d 368, 378 (2d Cir. 2003) (Title VII and SHRL); Johnson v. City of New York, 326 F. Supp. 2d 364, 368 (E.D.N.Y. 2004) (ADA). "'No one particular type of proof is required to show that [the adverse employment action] occurred

under circumstances giving rise to an inference of discrimination,'" Joseph v. Owens & Minor Distribution, Inc., 2014 WL 1199578, *7 (E.D.N.Y. Mar. 24, 2014) (quoting Moore v. Kingsbrook Jewish Med. Ctr., 2013 WL 3968748, *6 (E.D.N.Y. July 30, 2013)), and such an inference "can be drawn from circumstances such as: 'the employer's criticism of the plaintiff's performance in ethnically degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's adverse employment action.'" Id. (quoting Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 468 (2d Cir. 2001)).

Plaintiff stated in his deposition that "the only reason [Ms. Rodriguez] retaliated, discriminated, [was] because [during the School Leadership Team meetings] I brought out the points up of mismanagement of budget, transparency in allocation of parking permit, discipline of the student." (Collyer Decl. Ex. A at 110). He further alleges that he and other members of the School Leadership Team "were proposing to the committee to introduce new methods for missed preps, receiving mails, parking permits and discipline of students for the best interest of everyone in the school. The administrators didn't like the new suggestions and started retaliation by issuing baseless disciplinary letters to

me." (Compl. Ex. 1(a)).[11] Notably, none of these claims even remotely suggests that defendants' conduct was motivated by

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[11] Defendants argue in a footnote that, to the extent that plaintiff is alleging that he suffered retaliation in violation of the First Amendment for speech that he engaged in as a member of the School Leadership Team, such speech is not constitutionally protected. (Id. at 8 n.4). That is correct.

"Speech by a public employee is protected by the First Amendment only when the employee is speaking 'as a citizen... on a matter of public concern.'" Ross v. Breslin, 693 F.3d 300, 305 (2d Cir. 2012) (quoting Piscottano v. Murphy, 511 F.3d 247, 269-70 (2d Cir. 2007)). Thus, "when 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." Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

Plaintiff specifically argues that his "disagreements with Rodriguez in SLT meetings on the issues of mismanagement of budget, missed preps of the teachers, low morale of the teachers and staff, student discipline problems, transparency in allocation of parking permits etc." triggered retaliation against him. (Pl.'s Opp'n 3). Such speech was clearly "'pursuant to' his official duties because it was 'part-and-parcel of his concerns' about his ability to 'properly execute his duties,' as a public school teacher" and chairman of the School Leadership Team. Weintraub v. Bd. of Educ. of City Sch. Dist. of City of New York, 593 F.3d 196, 203 (2d Cir. 2010) (quoting Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007)). In addition, we note that plaintiff was appointed to the School Leadership Team to represent the teacher and paraprofessional constituencies of the school (Pl.'s Opp'n Ex. 7e), and plaintiff was apparently eligible to earn additional income for his involvement in the work of the School Leadership Team. NYC Dep't of Educ. "School Leadership Teams Foundation" at 15, available at http://www.learndoe.org/ face/recording-teams/ ("SLT members are eligible to receive an annual $300 remuneration for their service, provided they complete at least 30 hours of service on the SLT and attend a mandatory training session."). In view of these considerations, we conclude that plaintiff's speech was rendered in his official capacity as a public-school teacher and was not protected by the First Amendment.

discrimination toward plaintiff's race, color, gender, religion, national origin, or disability.

Plaintiff relies solely on his own speculation and conclusory statements about defendants' discriminatory motivations, but he offers no evidence that might indicate that any of the defendants' actions against him were motivated by discriminatory animus. Sethi, 2014 WL 1343069 at *21 (a plaintiff's "mere subjective belief that he was discriminated against... does not sustain a... discrimination claim") (quoting Moore, 2013 WL 3968748 at *6); Schupbach v. Shinseki, 905 F. Supp. 2d 422, 432 (E.D.N.Y. 2012); Gue v. Suleiman, 2012 WL 4473283, *8 (S.D.N.Y. Sept. 27, 2012).

In sum, we conclude that plaintiff has failed to set forth a prima facie case of discrimination because he is unable to point to evidence from which a reasonable trier of fact could conclude that any of defendants' conduct of which he complains was motivated by discriminatory animus.

2. Defendants' Non-Discriminatory Justification of Their Conduct

Defendants argue that even if plaintiff were able to make out a prima facie case of discrimination, their conduct toward him was motivated by legitimate and entirely non-discriminatory

considerations. Specifically, they assert that they imposed the increased oversight and authored negative performance reviews because, in their judgment, his classroom management and teaching were unsatisfactory. (See Defs.' Mem. of Law 14). They also argue that plaintiff was temporarily denied a parking permit during the 2008-2009 school year because, following a City-wide reduction in permits for municipal workers, there simply were not enough permits to go around to all of the staff. (Id. at 15).

The record provides support for both of these proffered explanations, and plaintiff is unable to point to evidence that might suggest that they are merely pretextual. See Chukwurah v. Stop & Shop Supermarket Co. LLC, 354 F. App'x 492, 495 (2d Cir. 2009).

In view of the foregoing considerations, plaintiff's Title VII, ADA and SHRL discrimination claims should each be dismissed.

d. Defendants' Attack on Plaintiff's Discrimination Claims Under the CHRL

"We analyze claims under the NYCHRL 'separately and independently from any federal and state law claims,' and construe the NYCHRL 'broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.' An

employer 'is entitled to summary judgment [under the NYCHRL] only if the record establishes as a matter of law that 'discrimination play[ed] no role" in its actions.'" Benson, 2014 WL 657942 at *1 (quoting Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 109 (2d Cir. 2013) (alterations in original).

Under the CHRL, "a 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." Singh v. Covenant Aviation Sec., LLC, 39 Misc. 3d 1203(A), 969 N.Y.S.2d 806 (Sup. Ct. Kings Cnty. 2013). "Under the mixed motive analysis, if the defendant sets forth non-discriminatory reasons, the plaintiff must demonstrate a triable issue of fact as to whether discrimination was one of the motivating factors for the adverse employment action." Id.

In challenging plaintiff's CHRL claim, defendants argue that, for reasons substantially similar to those discussed above, plaintiff has failed to establish a prima facie case of discrimination and, moreover, has failed to put forward "some evidence that at least one of the reasons proffered by defendant[s] is false, misleading, or incomplete." (Defs.' Mem. of Law 16 (quoting Bennett, 92 A.D.3d at 45).

As we have previously indicated, there is absolutely no evidence in the record from which a factfinder could reasonably conclude that discrimination played any motivating role in defendants' conduct toward plaintiff. Accordingly, defendants' motion to dismiss his CHRL claim should be granted.

e. Defendants' Attack on Plaintiff's ADA Claim of Failure to Accommodate

In addition to his discrimination claims, plaintiff alleges that defendants failed to accommodate his diabetic condition. (See Am. Compl. 2; Pl.'s Opp'n Mem. ¶ 4). It appears that the crux of plaintiff's complaint is that he was not granted permission to go to the restroom without first securing another licensed teacher to supervise his class. (See Pl.'s Opp'n Mem. ¶ 4).

"To establish a prima facie case of discrimination based on failure to accommodate, [plaintiff] must establish that (1) []he is a person with a disability; (2) Defendants had notice of h[is] disability; (3) Plaintiff could perform the essential functions of h[is] job with reasonable accommodation; and (4) Defendants refused to make such accommodations." Young v. Ltd. Brands, 2013 WL 5434149, *7 (S.D.N.Y. Sept. 25, 2013). "If a plaintiff suggests plausible accommodations, the burden of proof shifts to the defendant to demonstrate that such accommodations would present

undue hardships and would therefore be unreasonable." McMillan v. City of New York, 711 F.3d 120, 128 (2d Cir. 2013); Jackan v. New York State Dep't of Labor, 205 F.3d 562, 566 (2d Cir. 2000).

Defendants apparently do not dispute that plaintiff has made out a prima facie case of discrimination. They do not contest that his diabetes constitutes an eligible disability under the ADA, and they concede that plaintiff notified them of his diabetic condition by at least October 2008. (Defs.' Mem. of Law 18). They further acknowledge that in August 2009 plaintiff requested a medical accommodation from the DOE, seeking permission to be able to leave his classroom to use the restroom. (Id.). Defendants argue, however, that the school's extant policy of allowing teachers to go to the restroom if they can find another teacher to cover for them is a sufficient accommodation. (Id.). They also argue that it would be unreasonable to allow plaintiff to leave his class at will, even absent a stand-in teacher, since doing so could be dangerous for his young students. (Id. at 18-19). Plaintiff argues in response that the existing policy does not work and that he has been unable to locate teachers who will take his place when necessary. (Pl.'s Opp'n Mem. ¶ 4).

Plaintiff testified in his deposition that although the school did have a policy of permitting teachers to go to the

bathroom if they can find a replacement teacher, "[the] policy did not work," explaining that he "called up teachers to come and replace me, and nobody came. Nobody comes in time." (Collyer Decl. Ex. A at 186). In light of such evidence, a reasonable trier of fact could conclude that there was not in fact a sufficient reasonable accommodation for plaintiff's needs, despite defendants' assertion to the contrary.

Moreover, a trier of fact could potentially find that there were reasonable alternative approaches available. While it is clear that the school district is legally responsible for the students in its care, see Tesoriero v. Syosset Cent. Sch. Dist., 382 F. Supp. 2d 387, 402 (E.D.N.Y. 2005), and while we agree that it would be unreasonable to leave students completely unsupervised, defendants have offered no explanation as to why it would be unreasonable to allow plaintiff to leave his class supervised briefly by a non-teacher employee, such as a paraprofessional, while plaintiff visits the restroom. We note, for example, that plaintiff left his class to go to the restroom on September 24, 2008 -- an action for which he was reprimanded-- and apparently left two paraprofessionals to oversee his students during his relatively short absence. Nevertheless, defendants' argument assumes that, absent a stand-in teacher, plaintiff's students would inevitably be left completely unsupervised while he

goes to the restroom. (Defs.' Mem. of Law 19). That clearly need not be the case, since plaintiff's 12:1:1 classroom arrangement makes a paraprofessional immediately available to supervise students.[12] Because defendants have offered no explanation as to why students may only be supervised by licensed teachers and not paraprofessionals -- even for brief periods -- we conclude that they have failed to carry their burden to demonstrate beyond triable dispute that plaintiff's requested accommodation is unreasonable. We therefore recommend that defendants' motion be denied with respect to plaintiff's ADA claim for failure to reasonably accommodate his disability.

CONCLUSION

For the reasons discussed, we recommend that defendants' motion for summary judgment be granted in part and denied in part. Specifically, we recommend that summary judgment be granted in

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[12] We note that an accommodation for medical necessity need not imply that plaintiff should be free to leave his classroom at will for other reasons. For example, we see a valid basis for distinguishing between the events on September 24, 2008, when plaintiff briefly left his class in the care of two paraprofessionals to go to the restroom, from events that occurred on February 25, 2009, when plaintiff left his class in the care of three other adults, while a student was in the midst of a violent tantrum, so that he could search out a school administrator. (Compare Collyer Decl. Ex. M at 1 with id. at Ex. G).

favor of defendants on all claims except plaintiff's ADA claim for failure to provide a reasonable medical accommodation.

Pursuant to Rule 72 of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies to be delivered to the chambers of the Honorable George B. Daniels, Room 1310, 500 Pearl Street, New York, New York, 10007-1312, and to the undersigned, Room 1670, 500 Pearl Street, New York, New York, 10007-1312. Failure to file timely objections may constitute a waiver of those objections, both in the District Court and on later appeal to the United States Court of Appeals. See 28 U.S.C. § 636 (b)(1); Fed. R. Civ. Pro. 72, 6(a), 6(e); Thomas v. Arn, 474 U.S. 140 (1985); DeLeon v. Strack, 234 F.3d 84, 86 (2d. Cir. 2000) (citing Small v. Sec'y. of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989)).

Dated: New York, New York
May 6, 2014

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE

Copies of the foregoing Report & Recommendation have been mailed today to:

Mr. Wazi Ullah
2425 Second Avenue
Apartment 4C
New York, NY 10035

Adam E. Collyer, Esq.
New York City Law Department
100 Church Street
Room 2-305
New York, NY 10007