UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOUNIR SEMAAN NAJJAR,

Plaintiff,

-v-

WALTER J. MIRECKI, et al.,

Defendants.

---

11 Civ. 5138 (KBF)

MEMORANDUM DECISION & ORDER

KATHERINE B. FORREST, District Judge:

Plaintiff pro se Mounir Semaan Najjar lost his job as a Custodial Assistant in a New York City high school in March 2011, following budget cuts imposed by defendant New York City Department of Education ("DOE") and implemented by Najjar's employer, defendant Walter Mirecki. Najjar filed this action later that year, alleging that his termination – shortly following his return to work after treatment for a heart condition – was the result of age and disability discrimination.

Defendants DOE and Mirecki have moved for summary judgment as to all causes of action. They present evidence that plaintiff's termination was the result of budget cuts and a provision in a collective bargaining agreement dictating that the employee with the least seniority be the first to be fired.

As plaintiff raises a triable issue as to only his causes of action for disability discrimination under the Americans with Disabilities Act ("ADA"), New York State Human Rights Law ("NYSHRL"), and New York City Human Rights Law

("NYCHRL"), and for age discrimination under the NYCHRL, defendants' motion is GRANTED IN PART and DENIED IN PART.

I. FACTUAL BACKGROUND

The facts recited below are undisputed unless otherwise indicated.

a. Custodial Budget and Plaintiff's Employment

Plaintiff was hired as a Custodial Assistant at Washington Irving High School in Manhattan in September 2005. (Def.'s Local R. 56.1 Stmt. ("Def.'s 56.1") ¶¶ 13-14, ECF No. 53.) Under the DOE's "Indirect System of Custodial Operation", the DOE was not plaintiff's employer. (Id. ¶ 2.) Rather, the DOE hired a "Custodian Engineer" in each school and allocated a budget for that person to hire employees, including Custodial Assistants such as plaintiff. (Id. ¶¶ 2, 3, 5.) The employer of record for Custodial Assistants is thus the Custodial Engineer and not the DOE. (Id. ¶ 6.) The Custodial Engineers' union and plaintiff's union[1] were parties to a collective bargaining agreement (the "CBA"), which set the terms of employment for Custodial Assistants. (Id. ¶ 8.) Among these is a requirement that any budget-related layoffs occur in the reverse order of seniority. (Id. ¶ 40.) The DOE is not a party to the CBA. (Id. ¶ 7.)

Defendant Mirecki took the position of Custodial Engineer at Washington Irving in November 2009, and thus became the employer of approximately fifteen individuals working in the building, including plaintiff. (Id. ¶ 9.) One of Mirecki's employees, Vincent Prendi, was plaintiff's immediate supervisor. (Id. ¶ 12.)

[1] Local 94, IUOE ("Local 94"), an affiliate of Service Employees International Union Local 32BJ.

Mirecki received a monthly allotment of approximately $40,000 in "day money" from the DOE to operate Washington Irving and pay his employees. (Id. ¶ 30.) The "day money" included approximately $15,000 per month to pay the salaries of the individuals serving as the building's "fire watch", a position mandated by the New York City Fire Department in schools with out-of-Code fire detection systems. (Id. ¶ 43.) Mireki received an additional monthly allotment (the "activities funding") ranging from $20,000 to $25,000 to support activities in the building that were not considered "regular school functions." (Id. ¶¶ 31-33.)

b. Budget Cuts

In September 2010, Washington Irving's administrators cut the activities funding to $6,000 - $11,000 per month – a reduction of over 50 percent. (Id. ¶ 33.) Plaintiff was aware of these cuts but argues that much of the deficit in Mirecki's budget was owing to Mirecki's employment of a "college kid" in the summer of 2010 and payment of overtime to other employees in the fall of 2010. (Id. ¶ 35; Pl.'s Dep. at 156-58.) The activities funding did not return to pre-September 2010 levels at any time prior to Mirecki's August 2011 departure from Washington Irving. (Defs.' 56.1 ¶¶ 34, 43.)

As a result of the cut in activities funding, Mirecki laid off his three most junior employees in November 2010. (Id. ¶ 36.) All three of the terminated employees were younger than 40. (Id. ¶ 39.) Plaintiff was the employee with the next-lowest seniority. (Id. ¶ 45.)

In January 2011, the DOE gradually cut the portion of the "day money" budget that included the required "fire watch" funds, from an average of $15,000 per month to an average of $5,000 per month. (Id. ¶ 43.) In sum, Mirecki's total payroll budget decreased from $60,000 per month from December 2009 – December 2010, to $45,000 per month from December 2010 through April 2011, to $35,000 per month by the end of Mirecki's employment in August 2011. (Id. ¶ 57.)

Mirecki terminated plaintiff on March 8, 2011, effective April 15 of that year. (Id. ¶ 49.) In his termination letter, Mirecki stated that the "[f]ailure of funding to return to pre-September 2010 levels has made it necessary to make staff reductions". (Id. ¶ 49.) Mirecki did not hire any additional personnel prior to his own departure in August 2011, nor did he recall plaintiff pursuant to a provision in the CBA requiring that, within six months of the layoff, "reemployment shall be offered to employees previously laid off in inverse order of their layoff" should any job openings occur. (Id. ¶¶ 58-60.)

c. Plaintiff's Medical Conditions

Plaintiff asserts he was terminated as the result of disability and age discrimination. The basis for his disability discrimination claim is the heart attack he suffered in December 2010, while he was on leave recuperating from a broken wrist he sustained that October. (Id. ¶ 22.) Plaintiff's physicians would not give him medical clearance to return to work until he had recovered from the heart attack. (Id. ¶ 23.) Plaintiff called Mirecki in January 2011 to state his desire to return to work; Mirecki responded that plaintiff could return once he had provided

documentation demonstrating his ability to return to work at full capacity with no restrictions. (Id. ¶ 25.) Plaintiff provided this documentation and returned to work in February 2011, one month before his termination. (Id. ¶ 26.)

Plaintiff alleges that, prior to his return to work, Mirecki told him "no restrictions, my hand [had to be] 100% good, who has a heart attack is good for paper work only, this job is for juniors not seniors and I don't want Mr. Najjar to get hurt on the stairs." (Pl.'s Dep. at 136, 158.) He testified that his supervisor, Prendi, pushed him to leave and told him in the employee locker room in February 2011 that, "I'm going to die on the stairs, the job is hard, the boss is tough" and that he was "only good for paper work." (Pl.'s Dep. at 138.)

Plaintiff specifically admitted that Mirecki never stated that his layoff was due to his age or medical conditions. (Defs.' 56.1 ¶ 50; Pl.'s Aff. in Opp. to Mot. for Summ. J. ("Pl.'s Aff.") at 3, ECF No. 61.)

d. Procedural History

Plaintiff commenced this action pro se on July 14, 2011, asserting claims against Mirecki, Prendi, and the DOE. (Compl., ECF No. 2.) Plaintiff's complaint alleged age and disability discrimination, as well as unspecified Title VII violations, in connection with his termination in May 2011. By its Order of November 27, 2012, the Court granted Prendi's motion to dismiss all claims against him on the grounds that he was not plaintiff's employer as a matter of law and thus could not be held liable for the alleged discrimination. (ECF No. 2.) In his Second Amended Complaint, plaintiff no longer asserts any claims that would be cognizable under

Title VII (i.e., for discrimination or retaliation on account of his race, color, gender, religion, or national origin). (See Second Am. Compl., ECF No. 10.) Thus, the only remaining claims are those asserted against the DOE and Mirecki for age and disability discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq, Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12112-12117, the New York State Human Rights Law ("NYSHRL") and New York City Human Rights Law ("NYCHRL").

II. STANDARD OF REVIEW

Summary judgment may not be granted unless all of the submissions taken together "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In making that determination, the court must "construe all evidence in the light most favorable to the nonmoving party, drawing all inferences and resolving all ambiguities in its favor." Dickerson v. Napolitano, 604 F.3d 732. 740 (2d Cir. 2010).

Once the moving party has asserted facts showing that the non-movant's claims cannot be sustained, the opposing party must set out specific facts showing a genuine issue for trial and cannot rely merely on allegations or denials contained in the pleadings. Fed. RR. Civ. P. 56(c),(e); see also Wright v. Goord. 554 F.3d 255, 266 (2d Cir. 2009). "A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," as "[m]ere

conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist." Hicks v. Baines, 539 F.3d 159, 166 (2d Cir.2010) (citations omitted). Only disputes over material facts—i.e., "facts that might affect the outcome of the suit under the governing law"—will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (stating that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts").

Summary judgment is equally appropriate in actions alleging employment discrimination as in other types of cases. Abdu–Brisson v. Delta Air Lines, 239 F.3d 456, 466 (2d Cir. 2001), cert. denied, 534 U.S. 993, 122 S.Ct. 460, 151 L.Ed.2d 378 (2001); McLee v. Chrysler Corp., 109 F.3d 130, 135 (2d Cir. 1997). In a discrimination action, the Court must examine the record as a whole and decide whether plaintiff could satisfy his "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against him." E.g., Schnabel v. Abramson, 232 F.3d 83, 90 (2d Cir. 2000) (internal quotation marks omitted).

III. DISCUSSION

Liberally construing pro se plaintiff's complaint, his remaining claims assert (1) age discrimination in violation of the ADEA, the NYSHRL, and NYCHRL and (2) disability discrimination in violation of the ADA, the NYSHRL, and NYCHRL. The DOE and Mirecki are the only remaining defendants.

a. Claims against the DOE

As an initial matter, the DOE is not a proper party. Only wrongful termination claims against an employer are cognizable under the ADEA, ADA, and NYSHRL. See United States v. Brennan, 650 F.3d 65, 73 (2d Cir. 2011). The NYCHRL also includes "employees or agents" of the employer as covered parties, at least where those parties directly take adverse action against the employee. See N.Y.C. Code § 8-107(a)(making it unlawful "[f]or an employer or an employee or agent thereof, because of the actual or perceived age . . . [or] disability . . . status of any person, to . . . bar or to discharge from employment such person . . . .")

Under the City's "Indirect System of Custodial Supervision," Mirecki – not the DOE – was plaintiff's employer. See Brennan, 650 F.3d at 72; Guilfuchi v. Casey, 12 CIV. 4569 DLC, 2012 WL 6150879, at *1 (S.D.N.Y. Dec. 11, 2012)("[I]t is well established that individuals hired by a custodian engineer are employees of the engineer and not of the DOE.") The DOE contracted with Mirecki, and the CBA covering plaintiff included only plaintiff's union and that of the Custodial Engineers as parties. Plaintiff makes no allegation and submits no evidence that the DOE was an agent of Mirecki.

Plaintiff cites a September 27, 2011, Order of this Court as evidence that the DOE was his employer, but that Order does not raise a triable issue. (See Order, Sept. 27, 2011, ECF No. 5.) The Order directed plaintiff to file an amended complaint adding the DOE as a party, describing the DOE as his "employer", but did not make any formal factual finding. Rather, the Order was issued prior to

defendants' answer in which they raised the defense – and have since submitted evidence – that the DOE is not plaintiff's contractual employer. The Court thus grants summary judgment to the DOE since it is not a proper defendant to this action.

b. Discrimination Claims

Plaintiff's remaining claims assert his termination was the result of age and disability discrimination by Mirecki. The age discrimination claims arise under the ADEA, the NYSHRL, and the NYCHRL.[2] The disability discrimination claims arise under the ADA, the NYSHRL and the NYCHRL.

i. McDonnell-Douglas Standard

All of these claims are evaluated pursuant to the burden-shifting analysis articulated by McDonnell–Douglas Corp. v. Green, 411 U.S. 792 (1973); see Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 105-06 (2d Cir. 2010)(McDonnell-Douglas applies to NYSHRL discrimination claims); Holowecki v. Federal Exp. Corp., 382 Fed. Appx. 42, 45 n. 2 (2d Cir. 2010) (same for ADEA claims); Fall v. New York State United Teachers, 289 Fed. Appx. 419, 422 (2d Cir. 2008)(same for disability claims under ADA and NYSHRL); McBride v. BIC Consumer Products Mfg. Co., Inc., 583 F.3d 92, 96 (2d Cir. 2009)(same for ADA claims); Melman v. Montefiore Med. Ctr., 98 A.D.3d 107, 112-13 (N.Y. App. Div. 1st Dep't 2012). Under

[2] "The ADEA makes it unlawful for an 'employer' to 'discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." Colon v. Trump Intern. Hotel & Tower, No. 10 Civ. 4794, 2011 WL 6092299, at *4 (S.D.N.Y. Dec. 10, 2011) (quoting 29 U.S.C. § 623(a)). "The NYSHRL and NYCHRL each contain a similar prohibition." Id. (citing N.Y. Exec. Law § 296(a) (McKinney 2010); N.Y .C. Admin. Code § 8–107(a) (West 2011)).

McDonnell–Douglas, plaintiff must first establish a prima facie case of discrimination by showing, (1) that he was within a protected group; (2) that he was qualified for his position; (3) that he suffered an adverse employment action; and (4) that "such action occurred under circumstances giving rise to an inference of employment discrimination." Gorzynski, 596 F.3d at 107. As to the disability claim, plaintiff must demonstrate the third prong by presenting evidence that "he was otherwise qualified to perform the essential functions of his position, with or without reasonable accommodation." See Reeves v. Johnson World Servs., Inc., 140 F.3d 144, 149-50 (2d Cir. 1998).

If plaintiff establishes a prima facie case, defendants then bear the burden to "articulate some legitimate, nondiscriminatory reason for the [adverse act]." Leibowitz v. Cornell Univ., 584 F.3d 487, 499 (2d Cir. 2009) (internal quotation marks omitted). Defendants' burden is "one of production, not persuasion." Reeves v. Sanderson Plumbing Prods., 520 U.S. 133, 142 (2000).

Should defendants satisfy that requirement, plaintiff must then proffer sufficient evidence to raise a triable issue of fact as to whether defendants' "legitimate, nondiscriminatory reason" was merely pretextual. See id. at 143. Otherwise, defendants will be entitled to summary judgment.

ii. Analysis

The Court finds that plaintiff raises a triable issue as to the prima facie case of age and disability discrimination with respect to all claims, but he only raises a

triable issue of pretext as to the ADA, NYSHRL, and NYCHRL disability discrimination claims and the NYCHRL age discrimination claim.

1. Prima Facie Case

Defendants do not dispute that the first three elements of the prima facie case are satisfied – Najjar was a member of age and disability-protected groups, his termination constituted an adverse employment action, and, once he had recovered from his heart and wrist conditions, he was qualified to work with or without accommodations. Defendants argue that plaintiff fails to raise a triable issue as to the fourth element – that his termination occurred under circumstances giving rise to an inference of employment discrimination. The Court disagrees.

It is well-established in this Circuit that "the stray remarks of a decision-maker, without more, cannot prove a claim of employment discrimination". Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 468 (2d Cir. 2001)(quoting Danzer v. Norden Systems, Inc., 151 F.3d 50, 56 (2d Cir.1998). Only where "other indicia of discrimination are properly presented, the remarks can no longer be deemed 'stray,' and the jury has a right to conclude that they bear a more ominous significance." Id. (quoting Woroski v. Nashua Corp., 31 F.3d 105, 109-110 (2d Cir.1994)).

In Fried v. LVI Servs., Inc., 500 Fed. App'x 39 (2d Cir. 2012), the Second Circuit reiterated "four non-dispositive factors appropriately considered in deciding what weight to accord isolated remarks suggestive of discriminatory bias: '(1) who made the remark (i.e., a decision-maker, a supervisor, or a low-level co-worker); (2) when the remark was made in relation to the employment decision at issue; (3) the

content of the remark (i.e., whether a reasonable juror could view the remark as discriminatory); and (4) the context in which the remark was made (i.e., whether it was related to the decision-making process).'" Id. at 41 (quoting Henry v. Wyeth Pharmaceuticals, 616 F.3d 134 (2d Cir.2010)).

Here, plaintiff testified that Mirecki made at least two negative comments regarding plaintiff's advanced age and his heart condition in close proximity to his termination. Both comments occurred between October 2010, when plaintiff suffered the wrist injury, and February 2011, when he returned to work full time: first, that Mirecki told plaintiff "this job is for juniors not seniors" and, second, that plaintiff's heart attack made him "good for paperwork only". In addition, plaintiff alleges that his supervisor, Prendi, "pushed [him] to leave [his] job" upon his return in January 2011 and said "[you're] going to die on the stairs, the job is hard, the boss is tough" and that "you're only good for paper work." (Pl.'s Aff. at 2.) Plaintiff alleges that Prendi made comments to this effect both in the locker room at work and over the telephone. (Id.) He also avers that no such comments were ever made before he broke his wrist and suffered a heart attack. (Id.) However, plaintiff admits Mirecki never told him directly that his termination was in any way related to his age or disability status. (See Pl.'s Aff. at 3.)

Applying the Fried framework to plaintiff's de minimus burden to make out a prima facie case of discrimination, a reasonable jury could conclude that the comments by Mirecki and Prendi give rise to an inference of age and disability discrimination. The "job is for juniors", "good for paperwork only", and "die on the

stairs" comments directly connected plaintiff's age and heart condition to doubts about his ability to do his job. Further, a reasonable jury could find that Mirecki's admonition that plaintiff only return to work if he was medically cleared with "no conditions" raises a triable inference of disability discrimination. In addition, the comments are attributable to figures of authority – plaintiff's employer and his direct supervisor. Finally, the comments are alleged to have been uttered in close proximity to plaintiff's termination. Even if, as defendants suggest, the comments were made innocuously rather than with animus, that is for the jury to determine. Plaintiff thus raises a triable issue as to the prima facie case.[3]

iii. ADEA and NYSHRL Age Discrimination Claims

Though he raises a triable issue as to the prima facie case, plaintiff fails to do so with respect to the ADEA and NYSHRL age discrimination claims – both of which require him to raise a triable issue that age was the singular, but-for cause of his termination.

Under McDonnell-Douglas, once plaintiff has made out a prima facie case, defendants must articulate a legitimate, age- and disability-neutral justification for the termination. Here, Mirecki states that the DOE budget cuts in October 2010 and January 2011 necessitated a layoff and that the CBA required the least senior employee – plaintiff – to be selected.

[3] The Court does not read plaintiff's complaint to assert a hostile work environment claim – the complaint focuses on his termination, not any pervasive environment of discrimination. In any event, "offhand comments, or isolated incidents of offensive conduct" – such as the comments plaintiff alleges were made by Prendi and Mirecki – "will not support a claim of discriminatory harassment." See Petrosino v. Bell Atl., 385 F.3d 210, 223 (2d Cir. 2004).

The burden then shifts back to plaintiff to prove that the budget cuts were merely pretexts for discrimination. For the ADEA and NYSHRL age discrimination claims, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009), makes clear that in order to withstand summary judgment, plaintiff must raise a triable issue that age was the "but for" reason for the adverse employment action. See Gorzynski, 596 F.3d at 106 ("but-for" standard applies to NYSHRL age discrimination claims).

Plaintiff fails to raise a triable issue that age was the but-for cause of his termination, as is required for the ADEA and NYSHRL age claims under Gross. Plaintiff's case is much like that of the plaintiff in Fried. There, the Second Circuit affirmed a grant of summary judgment for the defendant-employer where, despite age-related comments to plaintiff by defendant's CEO six weeks prior to plaintiff's termination, "overwhelming documentary evidence" of non-discriminatory motivation made "it nevertheless . . . insufficient to permit reasonable jury to conclude that 'but for' defendants' age bias, [plaintiff] would not have been terminated." Fried, 500 Fed. Appx. at 41.

Here, plaintiff relies upon the comments by Mirecki and Prendi, but those isolated comments must be read in a context with the evidence that supports non-discriminatory motivations for the termination: namely, the indisputable cuts to Mirecki's budget,[4] his termination of three employees who were not members of the

[4] Plaintiff attempts to cast doubt as to whether the budget cuts necessitated a layoff, but the Court finds that the budgetary evidence is clear and one-sided. Mirecki's budget decreased an average of $25,000 per month from September 2010 through March 2011. (See Defs.' 56.1 ¶¶ 28-30, 35.) He did not hire any additional employees after three younger, non-disabled workers were terminated in fall 2010 and plaintiff was terminated in April 2011. Plaintiff may be correct that Mirecki could have

protected class, the CBA seniority provisions, and the fact that Mirecki did not replace plaintiff with any other employees prior to his own retirement. On that record, plaintiff has not raised a triable issue that age was the "but-for" cause of his termination.

iv. ADA. NYSHRL Disability, and NYCHRL Claims

However, the Gross "but-for" standard does not apply to the ADA, NYSHRL disability discrimination, or the NYCHRL age and disability discrimination claims. With respect to the ADA claim, Second Circuit precedent prior to Gross held that plaintiff may raise a triable issue of pretext based on a "mixed-motive" theory – e.g., that disability discrimination was a "motivating factor" of plaintiff's termination. See Doe v. Deer Mountain Day Camp, Inc., 682 F. Supp. 2d 324, 343 (S.D.N.Y. 2010)(quoting Parker v. Columbia Pictures Indus., 204 F.3d 326, 336–37 (2d Cir.2000))(applying mixed-motive standard to ADA claim). While Gross casts doubt as to the viability of mixed motive analysis in ADA cases, on the facts here at issue the Court will not extend Gross absent guidance from the Second Circuit.[5] As the

---

more wisely used his overtime and staffing budgets prior to September 2010, but Mirecki's lack of foresight does not indicate a discriminatory motive – to the contrary, it demonstrates that plaintiff acknowledges that a lack of funds motivated his termination.

[5] Whether Gross applies to ADA claims is an open question in this Circuit. See Widomski v. State Univ. of New York (SUNY) at Orange, No. 09 Civ. 7517 (KMK), 2013 WL 1155439, at *10 n.9 (S.D.N.Y. Mar. 20, 2013)(comparing post-Gross cases applying mixed motive analysis with those rejecting it and concluding the "burden of persuasion is not entirely clear"). The lack of clarity stems from the fact that the language of the ADEA and ADA is parallel – both statues require a plaintiff to show the adverse employment action occurred "because of" the protected characteristic. Compare 42 U.S.C. § 12112 (ADA defines discrimination on the basis of disability as, inter alia, "limiting, segregating, or classifying a[n] . . . employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such . . . employee.") with 29 U.S.C. § 623(a)(1) (ADEA states "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual . . . because of such individual's age."). That the Supreme Court in Gross interpreted the terms "because of" in the ADEA to require a showing of "but-for" causation could

interpretation of the NYSHRL disability discrimination claim parallels that of the ADA, the mixed motive analysis is viable for that claim as well. See, e.g., DiLauria v. Town of Harrison, 64 F. App'x 267, 270 (2d Cir. 2003)(noting "plaintiff could proceed with a 'mixed motive' claim under the New York Human Rights Law").

In addition, the NYCHRL embraces a mixed motive analysis for claims of both disability and age discrimination. See Nelson v HSBC Bank USA, 87 A.D.3d 995 (N.Y. App. Div. 2d Dep't 2011)(noting NYCHRL claims must be evaluated independently of any federal antidiscrimination statutes, even those with parallel language); Weiss v. JPMorgan Chase & Co., No. 06 Civ. 4402, 2010 WL 114248, at *3–*4 (S.D.N.Y. Jan. 13, 2010)(mixed motive analysis applies to NYCHRL claims); Melman v Montefiore Medical Center, 98 A.D.3d 107 (N.Y. App. Div. 1st Dep't 2012)(same).

Plaintiff raises a triable issue as to pretext based on a mixed-motive theory. While Mirecki presented evidence of budget cuts and the CBA seniority provision as factors motivating plaintiff's termination, the comments regarding plaintiff's age and medical conditions raise a triable issue as to whether discrimination was a motivating factor of his discharge. In addition, the fact of budget cuts does not conclusively establish that Mirecki could not have allocated his funds differently to avoid terminating plaintiff. Though a reasonable jury could not conclude that the

---

indicate a similar textual reading of the ADA. Further, the Supreme Court continues to engage in textual interpretation of antidiscrimination statutes to expand the "but-for" standard – most recently in the context of Title VII retaliation claims. See Univ. of Texas Sw. Med. Ctr. v. Nassar, No. 12-484, 2013 WL 3155234 (U.S. June 24, 2013). Despite these parallels, no Second Circuit case has applied Gross to ADA claims, and, on these facts, the Court will not do so sua sponte.

budget cuts were purely pretextual, it could reasonably conclude that the budget cuts were a convenient coincidence that occurred concurrent to improper age or disability discrimination by Mirecki. Thus, plaintiff's ADA, NYSHRL disability, and NYCHRL age and disability claims shall proceed.

CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART. Specifically, the DOE is not a proper party and is entitled to summary judgment as to all claims. Mirecki is entitled to summary judgment as to the ADEA and NYSHRL causes of action insofar as they allege age discrimination. Plaintiff's ADA, NYSHRL disability, and NYCHRL age and disability claims against Mirecki shall proceed to trial.

The parties shall appear for a status conference on Friday, August 30, 2013, at 10:00 a.m. to discuss pretrial submissions. The joint pretrial order and accompanying materials are due Tuesday, September 17, 2013, at 5:00 p.m. The parties shall appear for a final pretrial conference on Tuesday, September 24, 2013, at 1:00 p.m. Trial shall commence September 30, 2013.

The Court notes that it denied plaintiff's motion to appoint pro bono counsel (ECF No. 44) with leave to renew should this matter go to trial. If plaintiff chooses to renew that motion he shall do so not later than August 1, 2013.

The Clerk of Court is hereby directed to close the motion at ECF No. 52 and to terminate the New York City Department of Education as a defendant in this matter.

SO ORDERED.

Dated: New York, New York
July 2, 2013

KATHERINE B. FORREST
United States District Judge

CC:

Mounir Semaan Najjar
Plaintiff Pro Se
3616 Corlear Avenue
2nd Floor
Bronx, NY 10463