UNITED STATES DISTRIC COURT
EASTERN DISTRICT OF NEW YORK
- x

JOSHUA ZUCKERMAN,

Plaintiff,

Case No: 22 Civ. 3384 (CBA) (RER)

- against -

ERIC GONZALEZ, MARITZA MEJIA-MING.
NICOLE CHAVIS, GREGORY THOMAS, and
JOHN DOES 1-3, each in their individual capacities,

Defendants.
- x

PLAINTIFF JOSHUA ZUCKERMAN'S MEMORANDUM OF LAW
IN OPPOSTION TO DEFENDANTS' MOTION TO DISMISS

LAW OFFICE OF KEVIN MINTZER, P.C.
Kevin Mintzer
Laura L. Koistinen
1350 Broadway, Suite 1410
New York, New York 10018
T: 646-843-8180
F: 646-478-9768
km@mintzerfirm.com

Attorneys for Plaintiff Joshua Zuckerman

TABLE OF CONTENTS

Table of Authorities ii

PRELIMINARY STATEMENT 1

FACTS 3

ARGUMENT 6

I. Defendants' Motion Does Not Comply with the Standards for a Motion to Dismiss 6

II. The Complaint Plausibly Alleges that Each Defendant was Personally Involved in Plaintiff's Termination 7

III. Plaintiff's Speech Regarded Matters of Public Concern 11

IV. Defendants are Not Entitled to Qualified Immunity 16

V. Plaintiff's New York State Constitution Claim Should Not be Dismissed 17

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Adams v. Ellis,
09 Civ. 1329, 2012 WL 693568 (S.D.N.Y. March 2, 2012) 14

Arista Records, LLC v. Doe 3,
604 F.3d 110 (2d Cir. 2010) 6, 10

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 6

Avery v. DiFiore,
18 Civ. 9150, 2019 WL 3564470 (S.D.N.Y. 2019)....................17

Barnett v. Mount Vernon Police Dep't,
523 F. App'x 811 (2d Cir. 2013)....................16

Barzilay v. City of New York,
20 Civ. 4452, 2022 WL 2657169 (S.D.N.Y July 8, 2022) 12-14

Bernstein v. City of New York,
No. 06 Civ. 895, 2007 WL 1573910 (S.D.N.Y. May 24, 2007) 16

Boykin v. KeyCorp,
521 F.3d 202 (2d Cir. 2008) 10

Brandon v. Kinter,
938 F.3d 21(2d Cir. 2019) 15

Calabro v. Nassau University Medical Center,
424 F. Supp 2d 465 (E.D.N.Y Mar. 26, 2006) 12

Constant v. Annucci,
16 Civ. 3985, 2018 WL 919832 (S.D.N.Y. Apr. 5, 2018) 10

Davis v. Kelly,
160 F.3d 917 (2d Cir. 1998) 9

Erickson v. Pardus,
551 U.S. 89 (2007) 7

Freidus v. Barclays Bank PLC,
734 F.3d 132 (2d Cir. 2013) 6

Gangadeen v. City Of New York,
654 F. Supp. 2d 169 (S.D.N.Y. 2009) 12

Golodner v. Berliner,
770 F.3d 196 (2d Cir. 2014) 13

Gorman-Bakos v. Cornell Co-Op Extension of Schenactady Cnty.,
252 F. 3d 545 (2d Cir. 2001) 16

Gross v. City of Albany,
14 Civ. 0736, 2015 WL 5708445 (N.D.N.Y. Sept. 29, 2015)...7

Hayes v. Dahlke,
976 F.3d 259 (2d. Cir. 2020) 15

Immuno A.G. v. J.Moor-Jankowski, 7
7 N.Y. 2d 235, 249 (1991)..17

Jean-Laurent v. Lawrence,
12 Civ. 1502, 2014 WL 1282309 (S.D.N.Y Mar. 28, 2014)...7

Johnson v. Ganim,
342 F.3d 105 (2d Cir. 2003) 13

Kotler v. Boley,
21-1630, 2022 WL 4589678 (2d. Cir. 2022)..15

Kuczinski v. City of New York,
352 F. Supp. 3d 314 (S.D.N.Y. 2019) 17

Lane v. Franks,
573 U.S. 228 (2014) 11

Littlejohn v. City of New York,
795 F.3d 297 (2d Cir. 2015) 15

McClain v. Pfizer, Inc.,
06 Civ. 1795, 2011 WL 2533670 (D. Conn. June 27, 2011)..12

Munafo v. Metropolitan Trans. Auth.,
285 F.3d 201 (2d Cir. 2002) 11, 17

O'Neill v. Oakgrove Const., Inc.,
71 N.Y.2d 521(1987)..…………………………………...……………………17

Reuland v. Hynes,
460 F.3d 409 (2d Cir. 2006) 16

Reynolds v. Vill. of Chittenango,
19 Civ. 416, 2020 WL 1322509 (N.D.N.Y. Mar. 20, 2020) 12

Ruotolo v. City of New York,
514 F.3d 184 (2d Cir. 2008) 15

Salvana v. New York State Dep't of Corr. and Community Supervision,
21 Civ. 00735, 2022 WL 3226348 (N.D.N.Y. Aug. 10, 2022) 13

Scheiner v. New York City Health and Hospitals,
152 F.Supp.2d 487 (S.D.N.Y. 2001) 12, 14

Shara v. Maine-Endwell Central School District,
46 F.4th 77 (2d Cir. 2022) 13

Sousa v. Roque,
578 F.3d 164 (2d Cir. 2009) 14

Stajic v. City of New York,
No. 16 Civ. 1258, 2018 WL 4636829 (S.D.N.Y. Sept. 27, 2018) 18

Weslowski v. Zugibe,
91 N.Y.S.3d 114 (2d Dep't 2018) 17

Williams v. Koenigsmann,
03 Civ. 5267, 2004 WL 315279 (S.D.N.Y. Feb. 18, 2004) 7

STATUTE

N.Y. County Law § 702(1) 9

RULES

Fed. R. Civ. P. 12(b)(6) 6, 7

Fed. R. Civ. P. 26(a)(1)(A)(i) 11

Fed. R. Civ. P. 8(a)(2) 6, 7

PRELIMINARY STATEMENT

For over three years, Plaintiff Joshua Zuckerman served the Brooklyn community as an Assistant District Attorney ("ADA") in the Kings County District Attorneys' office ("KCDA"). Throughout that time, Zuckerman performed his job well, receiving positive performance evaluations from his supervisors and promotions from the KCDA. In August 2021, the KCDA promoted plaintiff to felony assistant prosecutor even though plaintiff had less experience than was typically required. But several months later, plaintiff's promising prosecutorial career ended when he expressed concerns about the spread of COVID-19 in the KCDA's office and the agency's inadequate response. At a December 15, 2021, meeting led by defendants Nicole Chavis and Gregory Thomas—both KCDA managers and members of a COVID-19 committee tasked with contact tracing in the office—Zuckerman challenged their false claims that no one had ever gotten COVID-19 at the office, that the office was regularly cleaned, and that the KCDA promptly contact traced when new cases were reported. Plaintiff said that because of the KCDA's poor communication, he and his co-workers lived in fear and were unsure how they should protect themselves. Plaintiff also offered suggestions on how the KCDA could improve its policies to better protect individuals from contracting COVID-19 in the office.

Hours later, defendant Maritza Mejia-Ming—also a member of the COVID-19 committee and the District Attorney's Chief of Staff—addressed plaintiff's speech in an email she sent to plaintiff and other KCDA staff. Mejia-Ming asserted there was "no cluster of cases in the office" and that "COVID information received from anyone other than the COVID response team is not information – it's gossip." Having not yet read Mejia-Ming's email, later that day, plaintiff sent a text message to about 30 ADAs warning them to stay off the 15th floor of the KCDA office where there was a suspected COVID-19 outbreak. The very next day, without warning or explanation,

KCDA's human resources notified plaintiff that he had been terminated effective immediately. Plaintiff's supervisors later expressed shock and disbelief at this decision, and a supervising ADA said to a colleague, in substance, that plaintiff had been fired because of his text message. In terminating plaintiff's employment for his speech about the KCDA's COVID-19 practices and unsafe workplace conditions, defendants retaliated against him in violation of the First Amendment, as enforced through 42 U.S.C. § 1983, as well as the free speech clause of the New York Constitution.

Defendants move to dismiss on several grounds, but their arguments are misguided and, at times, appear to be directed to a different case entirely.[1] Def. Mem. 13, 14. First, defendants assert that Zuckerman has not pleaded sufficient facts to establish that defendants were personally involved in his termination. But defendants simply ignore the allegations from which a fact finder could conclude that three of the defendants—Chavis, Thomas, and Mejia-Ming—were personally involved in the events immediately preceding plaintiff's firing, and that they recommended plaintiff's dismissal to defendant Eric Gonzalez, who as the District Attorney is the only person authorized by law to fire plaintiff. The Complaint thus more than plausibly alleges that each of the defendants were personally involved in the violation of plaintiff's First Amendment rights.

Defendants next argue that plaintiff's speech about defendants' inadequate COVID-19 protocols and a potential outbreak of the disease in the KCDA's office was not a matter of public concern. But Zuckerman's statements about a public agency's response to a deadly pandemic and the safety of KCDA's office related to matters of intense public concern. Indeed, defendants'

---

[1] Citations to Defendants' Memorandum of Law in Support of their Motion to Dismiss the Amended Complaint are referred to as "Def Mem. __." As plaintiff has not filed an Amended Complaint, plaintiff assumes that the title of defendant's Memorandum of Law is meant to refer to the Complaint.

argument is foreclosed by controlling Second Circuit precedent, which recognizes that an employee's complaints about health and safety in the workplace are matters of public concern and thus protected speech under the First Amendment. For the same reasons, defendants' perfunctory assertion that they are entitled to qualified immunity is incorrect: plaintiff's right not to be retaliated against by a public employer for speaking out about workplace health and safety has long been clearly established.

Finally, defendants argue that plaintiff may not bring a cause of action under the New York Constitution when an alternative remedy is available to plaintiff under Section 1983. But New York courts have recognized that the New York Constitution provides broader protection for free speech than the First Amendment, and thus plaintiff's state constitutional claim is not derivative of his federal cause of action. Moreover, federal courts have routinely allowed related federal and New York constitutional claims to proceed in the same action.

Accordingly, for the reasons explained below, defendants' motion to dismiss should be denied in its entirety.

FACTS

Plaintiff is a former Assistant District Attorney ("ADA") for the Kings County District Attorney ("KCDA") and a 2018 graduate of Georgetown law school. Complaint ("Compl.") ¶¶ 16, 19. Zuckerman was an intern for the KCDA while in law school and, after graduation, he accepted a full-time position with the office. *Id.* ¶¶ 16-19. Plaintiff began his career as an ADA in the early case assessment bureau and, in June 2019, he transferred to the domestic violence bureau ("DVB"). *Id.* ¶ 20. After the COVID-19 pandemic began in March 2020, Zuckerman worked mainly from home. *Id.* ¶ 23. When plaintiff transferred to the grand jury unit of the DVB in November 2020, his duties required that he work from the KCDA's office. *Id.* ¶ 26. In late-February 2021, plaintiff

tested positive for COVID-19. For over a week, he suffered from a high fever, chills, and cognitive impairment. For months after, plaintiff also intermittently had trouble concentrating, reading, and comprehending. *Id.* ¶ 27.

In August 2021, the KCDA promoted Zuckerman to felony assistant prosecutor in the DVB despite plaintiff having less experience than was typically required. *Id.* ¶¶ 29-30. In mid-December 2021, at the outset of the COVID-19 Omicron variant outbreak in New York City, multiple members of the DVB called out of work. *Id.* ¶ 31. Plaintiff soon learned that at least three of these individuals tested positive for COVID-19 and another member of the bureau was quarantined due to COVID-19 exposure. *Id.* ¶ 32. Despite these circumstances, the KCDA did not communicate with DVB staff about whether they needed to quarantine or take other steps to prevent an outbreak in the office. As a result, plaintiff and his colleagues feared that they would contract COVID-19 in the office. But when they questioned their supervisors about whether it was safe to continue to come to the office, they received no answers. *Id.* ¶ 33.

On December 15, 2021, defendants Nicole Chavis and Gregory Thomas—who were, respectively, the Deputy Chief of Staff to District Attorney Eric Gonzalez and the KCDA's Senior Executive for Law Enforcement Operations—held an in-person meeting about COVID-19 protocols with about 25 staff of the DVB, including plaintiff. *Id.* ¶ 33. Chavis and Thomas were both members of the KCDA COVID-19 committee tasked with implementing contact tracing. *Id.* In that meeting, Chavis and Thomas made several statements about COVID-19 in the workplace that Zuckerman believed to be false, including erroneously claiming no one had ever gotten COVID-19 from the KCDA's office, that the offices were regularly cleaned, and that the KCDA promptly contact traced and informed individuals when they had been exposed to COVID-19. *Id.* During the meeting, in response to these false statements, Zuckerman stated that for the past week

many people on the 15th floor were living in fear knowing that several people were out sick, and there had been no communication from the KCDA about whether they should quarantine or take other measures to protect their health. Plaintiff requested that the KCDA send an alert to staff on the same floor when someone on that floor called out sick or tested positive for COVID-19, rather than just individuals who were in the same working unit as the person who called out sick. Plaintiff reasoned that it was important to inform everyone on the floor because when he had COVID-19, he could not recall everyone with whom he had contact due to symptoms that affected his cognition. *Id*. ¶ 36

Plaintiff made these statements because he was concerned for himself, his coworkers, and crime victims who came to the KCDA's office seeking assistance, particularly elder abuse victims who were more vulnerable to COVID-19. *Id*. After plaintiff spoke, Chavis and Thomas continued asserting that no one had contracted COVID-19 in the office and that the office was properly cleaned. *Id*. Later that day, defendant Maritza Mejia-Ming—chief of staff to Gonzalez and also a member of the COVID-19 committee—sent an email to KCDA staff, which said there were no "clusters of cases and no outbreaks" on the 15th floor where the DVB unit was located, that full contact tracing was completed and that "covid information received from anyone other than the COVID response team is not information – it's gossip." *Id*. ¶ 37. Having not yet seen Mejia-Ming's email, later that evening, concerned for the safety of his colleagues and victims who visited the KCDA's office, plaintiff sent the following text message in a group text that included around 30 Brooklyn ADAs: "Hey guys, try to aviod [sic] floor 15[.] 4 ppl have covid 10 in total called out sick[.] Not sure what is going on but we might [be] dealing with a real outbreak and our meeting with Gregory Thomas today was less than reassuring." *Id*. ¶¶ 38-39

The next day, Zuckerman was summoned to KCDA's human resources department and fired, without warning, notice, or explanation. *Id.* ¶ 41. Plaintiff's supervisors later told him that they were surprised by his dismissal, particularly because he had performed his job well. *Id.* ¶¶ 42-43. On December 17, 2021, supervising ADA Rob Walsh, informed another ADA, in substance, that plaintiff had been terminated because of his text message. *Id.* ¶ 44. Plaintiff has alleged that Chavis, Thomas, Mejia-Ming, as well as unknown John Does, recommended his dismissal because of his statements about COVID-19 safety, and that District Attorney Gonzalez accepted that recommendation.

ARGUMENT

I. Defendants' Motion Does Not Comply with the Standards for a Motion to Dismiss

Federal Rule of Civil Procedure 8(a) requires a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." To satisfy this standard, a complaint need only "contain 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Freidus v. Barclays Bank PLC*, 734 F.3d 132, 137 (2d Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). Still, a complaint need not include "specific evidence" or "detailed factual allegations." *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 119-20 (2d Cir. 2010). Moreover, when considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in plaintiff's favor. *See Freidus*, 734 F.3d at 137.

Defendants' motion fails to apply these standards. Defendants ignore facts in the Complaint and fail to draw reasonable inferences in plaintiff's favor. Defendants also dismiss detailed factual allegations as "conclusory," Def. Mem. 6, 8, which is improper. *See Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (reinstating Section 1983 claim that was erroneously dismissed as "conclusory"). Applying the correct standards of Fed. R. Civ. P. 8(a)(2) and 12(b)(6), plaintiff's Complaint more than establishes the plausibility of his First Amendment and state law retaliation claims.

II. The Complaint Plausibly Alleges that Each Defendant was Personally Involved in Plaintiff's Termination

Defendants contend that plaintiff's Section 1983 claim should be dismissed because plaintiff has not pleaded that defendants were personally involved in his termination. Def. Mem. 6-8. Not so. The Complaint alleges that Chavis, Thomas and Mejia-Ming, recommended plaintiff's termination to the Kings County District Attorney Eric Gonzalez because of plaintiff's statements on December 15, 2021, concerning COVID-19 in the workplace. Compl. ¶ 47. These allegations are sufficient at the motion-to-dismiss stage, before discovery has been conducted, to show that each defendant was personally involved in the deprivation of plaintiff's constitutional rights. *See Gross v. City of Albany*, 14 Civ. 0736, 2015 WL 5708445, *5 (N.D.N.Y. Sept. 29, 2015) (finding allegations made on information and belief about the personal participation of defendants sufficient to survive a pre-discovery motion to dismiss); *Jean-Laurent v. Lawrence*, 12 Civ. 1502, 2014 WL 1282309, (S.D.N.Y Mar. 28, 2014) (At the motion to dismiss stage "the question is whether [the plaintiff] has plausibly alleged [his] personal involvement, not whether he made detailed allegations in support of each element of his claim. Reasonable inferences are permissible to bridge the gaps in a plaintiff's allegations. The purpose of discovery is to fill in those gaps."); *Williams v. Koenigsmann*, 03 Civ. 5267, 2004 WL 315279, at *5 (S.D.N.Y. Feb. 18, 2004),

(holding that it would be premature to dismiss defendants based solely on the pleadings because "the personal involvement of the [defendants], or lack thereof, is a matter to be explored in discovery.").

The Complaint also alleges the following facts to support a finding that Chavis, Thomas, and Mejia-Ming were personally involved in plaintiff's termination. Chavis and Thomas were both present at the December 15, 2021, meeting where plaintiff complained that the KCDA had failed to adequately address the spread of COVID-19 in the workplace. *Id.* ¶ 35. During the meeting, Chavis and Thomas made several false statements about COVID-19 in the workplace including, that no one had gotten COVID-19 from the office, that the offices were regularly cleaned, and that the DA promptly contact traced and informed individuals when they had been exposed to COVID-19. ¶ 35. In response, plaintiff told Chavis and Thomas that he and his coworkers were living in fear of contracting COVID-19 because several people had called out sick and the KCDA had failed to communicate what steps needed to be taken to protect their health. Plaintiff also stated that the KCDA should inform everyone working on the same floor as a person who exhibited symptoms of COVID-19, instead of only informing employees working in the same unit as the individual. Plaintiff reasoned that when he had COVID-19, he could not remember everyone with whom he had contact due to symptoms that affected his cognition. *Id.* ¶ 36. As members of the COVID-19 committee, Compl. ¶ 24, plaintiff's speech directly criticized their work. Chavis and Thomas thus had motive to recommend that Gonzalez terminate Zuckerman's employment, which occurred the next day. *Id.* ¶¶ 40-42.

Like Chavis and Thomas, Mejia-Ming is also a member of the COVID-19 task force. Compl. ¶ 24. It is thus reasonable to infer that Chavis and Thomas informed her about Zuckerman's statements criticizing the KCDA's COVID-19 practices at the December 15, 2021, meeting. This

inference is even more plausible because only hours after plaintiff complained about the KCDA's COVID-19 protocols, Mejia-Ming emailed DVM staff, including plaintiff, purporting to address the very concerns plaintiff raised at the December 15 meeting. In that email, Mejia-Ming stated that there were no "clusters of cases and no outbreaks" on the 15th floor, that full contact tracing was completed and that "covid information received from anyone other than the COVID response team is not information – it's gossip." *Id*. ¶ 37. A factfinder could infer from these circumstances that Mejia-Ming's email was sent as a rebuke to plaintiff's comments at the December 15 meeting, and that she was involved in plaintiff's termination the next day. *Id*. ¶¶ 40-42

As to defendant Gonzalez, the Complaint alleges that "as the Kings County District Attorney, Gonzalez is responsible for the hiring and firing of all assistant district attorneys at the KCDA and he accepted the recommendation to terminate Zuckerman's employment." *Id*. ¶ 48. At this early stage, this is a sufficient allegation of personal involvement. *See Davis v. Kelly*, 160 F.3d 917, 922 (2d Cir. 1998) (where a plaintiff has pleaded that a high-level official was involved in the constitutional violation of that plaintiff, it is premature to dismiss the defendant at the motion to dismiss stage where discovery has not yet been shared). Indeed, an inference of personal involvement by Gonzalez is especially justified because, as the District Attorney, he is the only person with statutory authority to hire and fire ADAs such as Zuckerman. *See* N.Y. County Law § 702(1). Thus, in the absence of conclusive proof otherwise, there should be a presumption that Gonzalez *must* have been personally involved in plaintiff's dismissal.

Rather than address the facts alleged, defendants fault plaintiff for pleading certain allegations about their personal involvement in his termination on information and belief. Def. Mem. 7. But the Second Circuit has held that pleading facts on information and belief is appropriate "where the facts are peculiarly within the possession and control of the defendant or

where the belief is based on factual information that makes the inference of culpability plausible[.]" *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (internal citations omitted); *see also Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008) (reversing district court dismissal where plaintiff pleaded facts "on information and belief" that were in the possession of defendant).[2] Here, information concerning defendants' knowledge of plaintiff's protected speech and their involvement in his termination is squarely within their possession. In any event, as discussed above, the Complaint contains sufficient facts about defendants' personal involvement in the events right before plaintiff's dismissal to plausibly show that they participated in the decision to terminate his employment. It would be manifestly unjust, and contrary to precedent, if plaintiff could not proceed on his claims only because his employer did not directly tell him who fired him, and instead hid the decision behind functionaries in KCDA's human resources department.

Moreover, this case is not like *Constant v. Annucci*, 16 Civ. 3985, 2018 WL 919832, *7 (S.D.N.Y. Apr. 5, 2018), as defendants assert. In *Constant,* defendant only referred to the high-ranking official defendant in the complaint's caption, the plaintiff made *no* factual allegation about that defendant anywhere else in the complaint. Here, as described above, the Complaint alleges facts related to each defendants' personal involvement. And the principal high-ranking defendant involved here—District Attorney Gonzalez—is alleged to be personally involved because he is the only person authorized by law to terminate plaintiff's employment as an ADA. Thus, plaintiff has

---

[2] Defendants purport to quote from *Boykin*, 521 F.3d at 515, for the proposition that plaintiff's allegations against defendants "fail to state a claim [because] plaintiff does not support them with a statement of facts that create a plausible inference of their truth." Def. Mem. 8. But *Boykin* contains no such statement. Defendants have, at best, mistakenly attributed language to a Second Circuit decision that the court never adopted. As described above, *Boykin* supports plaintiff's argument that he has properly pleaded facts on information and belief.

properly pleaded the personal involvement of all defendants, and defendants' motion to dismiss on this basis should be denied.

Finally, should the Court determine that further allegations are necessary to establish the personal involvement of any of the defendants, plaintiff respectfully requests leave to replead based on information that he is in the process of obtaining in discovery, which the Court has declined to stay. For example, defendants' initial disclosures under Fed. R. Civ. P. 26(a)(1)(A)(i) have identified defendants Mejia-Ming, Chavis and Thomas as the *only* three individuals with knowledge relevant to the defense of this action, a circumstance which strongly suggests that (at least) those three defendants were personally involved in plaintiff's dismissal.

III. Plaintiff's Speech Regarded Matters of Public Concern

Defendants next assert that plaintiff's retaliation claim should be dismissed because plaintiff's speech about COVID-19 safety in KCDA's office did not address matters of public concern and was thus not protected by the First Amendment. Def. Mem 8-13. Defendants' argument is meritless.

"Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Lane v. Franks*, 573 U.S. 228, 241 (2014) (internal quotation omitted). "The inquiry turns on the content, form, and context of the speech." *Id.* (internal quotation omitted). The Second Circuit has held that speech about workplace safety relates to a matter of public concern. *See Munafo v. Metropolitan Trans. Auth.*, 285 F.3d 201, 211-12 (2d Cir. 2002). In *Munafo*, the plaintiff, a transit worker, complained about track workers being forced to operate in unlawful proximity to live rails, welders being forced to work without respirators, and drivers being assigned

vehicles with faulty brakes. The Circuit held that these statements related to matters of public concern, and that the employer's argument that they were mere "personal grievances"—the same argument made by defendants here, Def. Mem. 10, 12—"border[ed] on the frivolous." *Id.* at 212.

Following *Munafo,* courts within the Second Circuit have repeatedly recognized that statements about workplace safety relate to matters of public concern. *See, e.g., Barzilay v. City of New York*, 20 Civ. 4452, 2022 WL 2657169, *16-18 (S.D.N.Y July 8, 2022) (statements concerning the working conditions of plaintiff, a frontline worker, including those about his own experience providing care during the COVID-19 pandemic, "touches right at the heart of difficulties…faced by public services in response to the COVID-19 surge in New York City" and thus, implicated matters of public concern); *Reynolds v. Vill. of Chittenango*, 19 Civ. 416, 2020 WL 1322509, at *3 (N.D.N.Y. Mar. 20, 2020) (plaintiff, a former police officer, raised a matter of public concern when he complained about his allegedly defective patrol car because his speech related to "hazardous workplace conditions"); *McClain v. Pfizer, Inc.*, 06 Civ. 1795, 2011 WL 2533670, at *2 (D. Conn. June 27, 2011) (plaintiff's complaint's about an odor in her laboratory and the placement of desks near laboratory benches related to safety in the workplace and thus were a matter of public concern); *Gangadeen v. City Of New York*, 654 F. Supp. 2d 169, 187 (S.D.N.Y. 2009) (plaintiff's "allegations of hazardous fumes making employees nauseous and causing breathing problems raise potential safety issues that are of public concern"); *Calabro v. Nassau University Medical Center*, 424 F. Supp 2d 465, (E.D.N.Y Mar. 26, 2006) (plaintiff's complaints about the safety of defendant's loading docks at a county hospital were a "matter of concern for every member of the public who may be a patient there"); *Scheiner v. New York City Health and Hospitals*, 152 F.Supp.2d 487, 496 (S.D.N.Y. 2001) (plaintiff's complaints regarding

the ventilation system and the general inadequacy of defendant's hospital facilities addressed matters of public concern).[3]

Defendants attempt to distinguish these cases by arguing Zuckerman's speech was not protected by the First Amendment because it merely addressed his "personal grievances" and how KCDA's COVID-19 policies could be improved. But the fact that plaintiff spoke about an internal policy does not mean that his speech did not address a matter of public concern. *See Golodner v. Berliner*, 770 F.3d 196, 205 (2d Cir. 2014) (plaintiff's speech related to the arrest policies of defendant implicated a matter of public concern and was thus protected by the First Amendment); *Salvana v. New York State Dep't of Corr. and Community Supervision*, 21 Civ. 00735, 2022 WL 3226348 (N.D.N.Y. Aug. 10, 2022) (plaintiff spoke on a matter of public concern when he complained that defendant's policy as written would lead to litigation and ethical complaints). Moreover, that Zuckerman did not want to contract COVID-19 (again), and thus had a personal interest in the KCDA's COVID-19 policies being changed, does not mean that his speech was not protected by the First Amendment. The law simply does not "h[o]ld [plaintiffs] to [such] herculean standards of purity of thought and speech." *Johnson v. Ganim*, 342 F.3d 105, 114 (2d Cir. 2003); *see also Barzilay*, 2022 WL 2657169, *18 (recognizing that "statements regarding a plaintiff's employment can also constitute statements on a matter of public concern where the public health

---

[3] Although not cited by defendants, the Court may also consider *Shara v. Maine-Endwell Central School District*, 46 F.4th 77 (2d Cir. 2022), in which a divided panel of the Second Circuit held that plaintiff, a bus driver, was not speaking on a matter of public concern when he complained about the frequency of reporting bus inspections. *Id.* 86-88. The court reasoned that plaintiff's speech merely reflected "disagreements about technical protocols for reporting bus inspections" and not about the safety of the buses themselves. *Id.* at 86. Thus, unlike this case, *Shara* found that the plaintiff's speech did *not* raise a concern about health and safety in the workplace. The majority in *Shara* did not overrule—or even cite—*Munafo*. Thus, *Munafo's* holding that complaints about workplace safety relate to matters of public concern remains good law and, as explained above, requires that defendants' argument be rejected.

and welfare are implicated in the subject of the speech."); *Scheiner*, 152 F.Supp.2d at 493 (holding that plaintiff's speech, while perhaps motivated for personal reasons, was still protected because it implicated public health, safety, and the administration of public resources).

Regardless, Zuckerman's speech did not simply refer to KCDA's policies. At the DVB meeting on December 15, 2021, plaintiff said to Chavis and Thomas that he and his colleagues were living in fear of getting sick at work. Given the critical roles that assistant district attorneys play in the functioning of the criminal justice system in Brooklyn, this speech necessarily involved the public's interest in keeping those frontline workers safe. *See Barzilay*, 2022 WL 2657169, at *16. Defendants likewise fail to acknowledge the significance of Zuckerman's text messages to about 30 ADAs warning of an apparent COVID-19 outbreak on the 15th floor of the KCDA's office, which plaintiff communicated intending to protect his coworkers, elderly domestic violence victims and other members of the community who visit the KCDA's office. Contrary to defendants' assertion that plaintiff was speaking simply to address his "personal grievances," a warning to his co-workers shows that plaintiff was necessarily acting to ensure the health and safety of others and was addressing matters of public concern. *See Sousa v. Roque*, 578 F.3d 164, 175 (2d Cir. 2009) (recognizing that "motive may surely be one factor" in determining whether plaintiff's speech addressed his own personal grievances or a matter of public concern).

Defendants' reliance on *Adams v. Ellis*, No. 09 Civ. 1329, 2012 WL 693568 (S.D.N.Y. March 2, 2012) is misplaced. The relevant speech by the plaintiff in *Adams* did not implicate any political, social, or other concern to the community because it only involved plaintiff's dissatisfaction with defendant's new policy requiring her and other parole board officers to collect fees from their parolees, which resulted in more paperwork. In contrast, here, it is hard to conceive of speech that is more a matter of public concern than statements made during a deadly pandemic

about the health and safety of employees who are essential to the operations of the criminal justice system in Brooklyn. Similarly distinguishable is *Ruotolo v. City of New York,* 514 F.3d 184 (2d Cir. 2008), cited by defendant, which held that a private lawsuit alleging retaliation was not a matter of public concern because the plaintiff sought to address purely personal grievances *in the suit*. *Id.* at 189-90. The question of whether the plaintiff's pre-suit statements about environmental hazards related to matters of public concern was not before the court. Here, Zuckerman does not claim that he was retaliated against because he filed a private lawsuit; he alleges he was fired for his speech about the spread of COVID-19 in the workplace of a critical public agency.

Finally, defendants assert that there is no causal connection between plaintiff's December 15, 2021, text message and his termination. But that text message is only one part of plaintiff's protected speech. Indeed, defendants ignore plaintiff's allegation that his December 15, 2021, speech at the COVID-19 meeting was *also* protected by the First Amendment. Taken as a whole, the temporal proximity between all of plaintiff's speech on December 15, 2021, and the timing of his termination on December 16, 2021, provides a solid causal connection between his protected speech and his termination. *See Kotler v. Boley*, 21-1630, 2022 WL 4589678, *3 (2d. Cir. 2022) (holding that the one day that passed between the plaintiff's protected activity and defendant's retaliatory action is sufficient to establish causation); *Brandon v. Kinter*, 938 F.3d 21, 40 (2d Cir. 2019) ("One way a plaintiff can establish a causal connection is by showing that protected activity was close in time to the adverse action.") (internal cites and quotations omitted); *Hayes v. Dahlke*, 976 F.3d 259, 273 (2d. Cir. 2020) (in a First Amendment retaliation case, holding that one month in time between the protected speech and adverse action was sufficient to establish an inference of causation); *Littlejohn v. City of New York*, 795 F.3d 297, 319 (2d Cir. 2015) (finding a causal relationship existed between plaintiff's protected activity and the adverse employment action when

they occurred days apart); *Gorman-Bakos v. Cornell Co-Op Extension of Schenactady Cnty.*, 252 F. 3d 545, 554 (2d Cir. 2001) (causation in an employment discrimination case can be established by showing that the protected activity was followed closely in time by the adverse action). Drawing all reasonable inferences in favor of plaintiff, moreover, a factfinder could conclude that one or more of the approximately 30 ADAs who were on the text chain informed defendants about plaintiff's text message. This inference is also supported by a supervising ADA's suggestion to another ADA, one day after plaintiff was fired, that plaintiff had been terminated because of his text message. Compl. ¶ 44. Plaintiff has thus more than plausibly alleged that his speech related to matters of public concern and was causally connected to defendants' termination of his employment.

IV. <u>Defendants are Not Entitled to Qualified Immunity</u>

Defendants are also not entitled to dismissal on the grounds of qualified immunity. To begin, defendants' argument is misplaced because the Second Circuit has observed that a determination of qualified immunity can rarely be made in the context of a motion to dismiss. *See Barnett v. Mount Vernon Police Dep't*, 523 F. App'x 811, 813 (2d Cir. 2013); *see also Bernstein v. City of New York*, 06 Civ. 895, 2007 WL 1573910 (S.D.N.Y. May 24, 2007) (recognizing that "it is generally premature to address the defense of qualified immunity in a motion to dismiss") (internal citations omitted). And even if defendants could raise the issue at this stage, their argument lacks merit. For the reasons discussed above, as a public employee, plaintiff had a clearly established First Amendment right "to be free from retaliation for speech on matters of public concern." *Reuland v. Hynes*, 460 F.3d 409, 419 (2d Cir. 2006). Moreover, a reasonable public official would have known that the right extended to plaintiff's speech about health and safety in

the workplace. *See Munfao*, 285 F.3d at 212. Thus, defendants' motion to dismiss based on qualified immunity should be rejected.

V. Plaintiff's New York State Constitution Claim Should Not be Dismissed

Finally, defendants maintain that plaintiff cannot bring a claim for retaliation under the New York State Constitution while also pursuing a First Amendment claim under Section 1983. Here, too, defendants are wrong.

Article I, Section 8 of the New York Constitution states, in relevant part: "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The New York Court of Appeals has recognized that this provision affords broader free speech protections than the First Amendment. *Immuno A.G. v. J.Moor-Jankowski,* 77 N.Y. 2d 235, 249 (1991); *see also O'Neill v. Oakgrove Const., Inc.*, 71 N.Y.2d 521, 528 n. 3 (1987); *Weslowski v. Zugibe*, 91 N.Y.S.3d 114, 118 (2d Dep't 2018). Thus, if this Court were to hold, either now or at a later stage, that plaintiff's speech was not protected under the First Amendment or that defendants were entitled to qualified immunity as to that issue, plaintiff should have the opportunity to argue that his state constitutional claim was still cognizable. For example, *in Avery v. DiFiore*, 18 Civ. 9150, 2019 WL 3564470 (S.D.N.Y. 2019), the court held that the plaintiff had not sufficiently alleged the elements of a First Amendment retaliation claim, but in view of the broader protections for free speech under the New York Constitution, the court dismissed plaintiff's state constitution claim without prejudice to refile that claim in state court. *Id.* at *5.

Moreover, contrary to defendants' argument, parallel claims under Section 1983 and the New York Constitution are routinely heard in the same action. *See, e.g.*, *Kuczinski v. City of New York*, 352 F. Supp. 3d 314, 321 (S.D.N.Y. 2019); *Stajic v. City of New York*, No. 16 Civ. 1258,

2018 WL 4636829, at *14 (S.D.N.Y. Sept. 27, 2018). While some district courts have held that free speech claims under the New York Constitution may be dismissed if the claims may also be brought under Section 1983, defendants have not cited any New York cases that so hold, and plaintiff is not aware of any such decisions. Moreover, given the potential for plaintiff to argue that state constitutional speech protections are broader than those under the First Amendment, the determination of whether plaintiff's state claim is duplicative of his federal claim should be made, if at all, only after the Court has held that plaintiff's federal claim may be submitted to a jury. Plaintiff's claim under Article I, Section 8 of the New York State Constitution should not be dismissed.

CONCLUSION

For all these reasons, defendants' motion to dismiss should be denied

Dated: New York, New York
November 14, 2022

LAW OFFICE OF KEVIN MINTZER, P.C.

By: */s/Laura Koistinen*

Kevin Mintzer
Laura Koistinen
1350 Broadway, Suite 1410
New York, New York 10018
Tel: (646) 843-8180
Fax: (646) 478-9768
km@mintzerfirm.com
llk@mintzerfirm.com
Attorneys for Plaintiff Joshua Zuckerman

.