UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOSHUA ZUCKERMAN,

Plaintiff, Case No:

- 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 ("Zuckerman" or "plaintiff"), by his counsel, Law Office of Kevin Mintzer, P.C., complaining of defendants Eric Gonzalez ("Gonzalez"), Maritza Mejia-Ming ("Mejia-Ming"), Nicole Chavis ("Chavis"), Gregory Thomas ("Thomas"), and John Does 1-3, each in their individual capacities (collectively, "defendants"), alleges as follows:

NATURE OF CLAIMS

1. The Kings County District Attorney's Office ("Brooklyn DA") purports to hold an "unwavering commitment to keeping Brooklyn safe and strengthening community trust by ensuring fairness and equal justice for all."[1] The Brooklyn DA failed to live up to that commitment, however, when on December 16, 2021, defendants unlawfully terminated plaintiff Joshua Zuckerman, an assistant district attorney ("ADA"), because he questioned the sufficiency of the Brooklyn DA's COVID-19 protocols and whether the Brooklyn DA was following the protocols it did have in place.

[1] http://www.brooklynda.org/ (last accessed June 7, 2022).

2. In a meeting one day before defendants fired him, Zuckerman expressed questions and concerns to defendants Nicole Chavis and Gregory Thomas about the Brooklyn DA's failure to properly communicate with staff who worked on the 15th floor of its office about ten people who had called out sick or tested positive for COVID-19 in the week before. In response, Thomas insisted that no one had gotten COVID-19 in the office and that the cleaning staff thoroughly cleaned the offices using cleaning agents that killed COVID-19. These statements were unverifiable and belied plaintiff's own experiences and observations working at the Brooklyn DA.

3. Zuckerman was shocked at Thomas' reactions to his reasonable questions and concerns about workplace safety during the peak of the Omicron wave of the pandemic in New York City. After the meeting, plaintiff reached out to approximately 30 ADAs who worked at the Brooklyn DA. In a group text exchange, Zuckerman warned them to stay away from the 15th floor where he, and others, feared there was a COVID-19 outbreak.

4. The next day, without notice, warning, or explanation, human resources informed plaintiff that the Brooklyn DA was terminating his employment, effective immediately.

5. At the time of his termination, Zuckerman was a felony ADA in the domestic violence bureau ("DVB"). Plaintiff performed his job well and had recently received a promotion. Defendants fired plaintiff on December 16, 2021, because he had spoken out about the DA's inadequate COVID-19 protocols the day before in an effort to keep his coworkers, elderly domestic violence victims who visited the office, and the broader community safe during a pandemic that has taken the lives of millions of people worldwide.

6. By retaliating against plaintiff for his speech on a matter of public concern, defendants violated plaintiff's rights under the First Amendment, as enforced through 42 U.S.C § 1983 ("Section 1983"), as well as the New York State Constitution.

7. Plaintiff seeks injunctive and declaratory relief, compensatory and punitive damages, and other appropriate legal equitable relief.

PARTIES, JURISDICTION, AND VENUE

8. Plaintiff Joshua Zuckerman is a 30-year-old man and a resident of the state of New York.

9. Defendant Eric Gonzalez is the Kings County District Attorney in Brooklyn, New York, having been elected to office in 2017 and 2021. At all relevant times, Gonzalez' actions described within were taken under color of state law.

10. Defendant Maritza Mejia-Ming is the Chief of Staff to Gonzalez. At all relevant times, Mejia-Ming's actions described within were taken under color of state law.

11. Defendant Nicole Chavis is the Deputy Chief of Staff to Gonzalez. At all relevant times, Chavis' actions described within were taken under color of state law.

12. Defendant Gregory A. Thomas is the Senior Executive for Law Enforcement Operations at Kings County District Attorney's Office and serves as a senior advisor to Gonzalez. At all relevant times, Thomas' actions described within were taken under color of state law.

13. Upon information and belief, Defendants John Does 1-3 are employees of the Kings County District Attorney's Office and participated in the decision to terminate plaintiff's employment with the Kings County District Attorney's Office. At all relevant times, the Doe Defendants' actions described within were taken under color of state law.

14. This Court has federal jurisdiction over plaintiff's Section 1983 claim pursuant to 28 U.S.C. §§ 1331 & 1343 and supplemental jurisdiction over plaintiff's state law claim pursuant to 28 U.S.C. § 1367.

15. This court is an appropriate venue for this action pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to plaintiff's claims occurred in the Eastern District of New York.

FACTUAL ALLEGATIONS

Plaintiff's Background and Employment with the Brooklyn DA

16. Plaintiff Joshua Zuckerman earned his bachelor's degree in history and international relations from the University of Pennsylvania in 2014. In May of 2018, plaintiff received his law degree from Georgetown School of Law.

17. While in law school, Zuckerman held several internships and externships and served as a research assistant to multiple professors. In or around the summer of 2017, the Brooklyn DA hired Zuckerman as a summer intern in the conviction review unit.

18. While an intern at the Brooklyn DA, Zuckerman's supervising attorneys provided him positive feedback about his performance. As a result, in or around October or November of 2017, the Brooklyn DA offered Zuckerman a job as an ADA contingent upon his completion of law school and admission to the New York Bar.

19. On October 23, 2018, the New York Bar notified plaintiff that he had passed the Bar exam. This also happened to be plaintiff's first day of work as an ADA.

20. The Brooklyn DA initially assigned plaintiff to work in the early case assessment bureau. In June of 2019, it transferred plaintiff to the domestic violence bureau ("DVB").

The COVID-19 Pandemic Begins

21. In January 2020, the first known case of COVID-19 was reported in the United States. By March 2020, the World Health Organization declared COVID-19 a global pandemic and the president declared a national emergency.

22. The following month, the Governor of New York issued several executive orders in response to the pandemic, including that all non-essential businesses close, and that those businesses deemed essential limit the number of employees in the business at any given time.

23. Consistent with the Governor's directives, by April 2020, the Brooklyn DA's office instituted a policy requiring that staff members work from home if they could perform their duties remotely. Because Zuckerman's position at the time did not require him to be in the office, he began working from home.

24. Around the same time, the Brooklyn DA formed a COVID-19 committee comprised of Mejia-Ming, Chavis, and Thomas. When an employee of the Brooklyn DA contracted COVID-19, the employee was instructed to reach out to the committee so committee members could institute contract tracing procedures.

25. The policies of the Brooklyn DA's office only required the committee to notify people who had been in contact with someone with COVID-19 for more than 15 minutes and who had been within 6 feet of the person with COVID-19.

Brooklyn DA Transfers Plaintiff to the Grand Jury Unit in the DVB

26. In November 2020, the Brooklyn DA transferred Zuckerman to the grand jury unit in the DVB, where he sought indictments in domestic violence cases, including cases involving elder abuse. In that position, Zuckerman reported to ADA Sandra Roberts ("Roberts"), head of the

grand jury DVB. Due to the nature of his new position, the Brooklyn DA required plaintiff to be in the office more regularly.

27. On February 26, 2021, plaintiff tested positive for COVID-19. For over a week, plaintiff suffered from a high fever, chills, and cognitive impairment. For months thereafter plaintiff also intermittently experienced difficulty in concentrating, reading, and comprehending, a collection of symptoms sometimes referred to as "brain fog."

28. Pursuant to public health guidelines and Brooklyn DA policies, plaintiff quarantined at home for 10 days and informed the COVID-19 committee of his positive status.

29. In August 2021, the Brooklyn DA promoted plaintiff to felony assistant prosecutor in the DVB. The felony unit of the DVB was overseen by Michelle Kaminsky ("Kaminsky"). While working in the felony unit of the DVB, plaintiff reported to Mark Pagliuco ("Pagliuco") and Kori Meadow ("Meadow").

30. On information and belief, ADAs are typically not promoted to felony assistant prosecutors until they have at least one year of experience in the grand jury indictment unit.

Multiple Brooklyn DA Staff Call out Sick

31. Between December 10, 2021, and December 15, 2021, Evelina Rene ("Rene"), a supervisor in the misdemeanor unit of the DVB, informed all DVB staff via email that eight ADAs were out of the office. Since Zuckerman began working for the Brooklyn DA, it had been standard practice for supervisors in the DVB to inform all DVB staff daily via email who was out of the office that day.

32. In response to Rene's emails, colleagues of Zuckerman informed him that at least three of the eight individuals were out of the office because they tested positive for COVID-19. These colleagues also told Zuckerman that a felony ADA in the DVB was out sick with COVID-

19 and another felony ADA was in quarantine from exposure. At the time, approximately 55 people worked in person at the Brooklyn DA's office in the DVB.

33. Despite several staff members of the DVB testing positive for COVID-19, the Brooklyn DA did not communicate with DVB staff about whether they needed to quarantine or whether other steps needed to be taken to prevent an outbreak in the office. As a result, plaintiff and his colleagues feared that they would contract COVID-19 in the office and questioned whether it was safe for them to continue coming into the office. When plaintiff or his colleagues expressed these concerns to their supervisors, their supervisors told them they had no information to give them.

34. On information and belief, the Brooklyn DA also failed to inform approximately 20-30 other people who shared the floor with the DVB that several members of DVB staff had tested positive for COVID-19 or called out sick.

Plaintiff Speaks Out About COVID-19 Safety and is Fired

35. To address the concerns of the DVB staff, on or about December 15, 2021, Chavis and Thomas held an in-person meeting with approximately 25 staff in the DVB, including plaintiff, about COVID-19 protocols. In that meeting, Chavis and Thomas made several false statements about COVID-19 in the workplace, including:

a. Falsely claiming no one had ever gotten COVID-19 from the office.

b. Falsely claiming that the office was regularly cleaned and the offices of staff who had contracted COVID-19 were disinfected.

c. Falsely claiming that the Brooklyn DA promptly contract traced and informed individuals when they had been exposed to COVID-19.

36. During the meeting, in response to Chavis' and Thomas' false statements, plaintiff stated that for the past week many people on the 15th floor were living in fear knowing that several people were out sick, without communication from the Brooklyn DA's office about whether they should quarantine or take other measures to protect their health. Plaintiff also requested that the Brooklyn DA send an alert to staff on the same floor (not just the same bureau) when someone on that floor called out sick or tested positive for COVID-19. Plaintiff reasoned that it was important to inform everyone on the floor because when he had COVID-19, he was unable to recall everyone with whom he had contact due to symptoms that affected his cognition. Plaintiff made these statements because he was concerned for himself, his coworkers, and victims who came to the Brooklyn DA's office seeking assistance, particularly elder abuse victims who were more vulnerable to contracting severe cases of COVID-19. 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.

37. Later that day at approximately 4:30 pm, Mejia-Ming emailed a memo to all DVB staff. The memo stated that there were no "cluster of cases and no outbreaks" on the 15th floor, that "full contract tracing was completed" and that "COVID information received from anyone other than the COVID response team is not information – it's gossip."

38. Plaintiff did not see or read Mejia-Ming's memo until approximately 7:00 pm or 8:00 pm that evening.

39. Concerned about the Brooklyn DA's reaction to its staff's concerns regarding a deadly virus, and concerned for the safety of his fellow colleagues, victims who visited the DA's office, and the larger Brooklyn community, at approximately 6:30 pm, plaintiff sent the following text message in a group text that was comprised of approximately 30 Brooklyn ADAs who started

in the office during the same year as plaintiff: "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 dealing with a real outbreak and our meeting with Gregory Thomas today was less than reassuring."

40. The next day, plaintiff went to work as usual. At approximately 10:30 am, Kaminsky and Meadow separately reached out to plaintiff and informed him that he needed to go to human resources immediately.

41. Upon receiving the instruction from Kaminsky and Meadow, plaintiff went to HR and was met by Deputy Director of Employee Services, Jacqueline Duarte ("Duarte"). Duarte escorted plaintiff into a conference room where another person with whom plaintiff was unfamiliar was sitting. Thereafter, Duarte informed plaintiff that he was terminated effective immediately. When plaintiff asked why he was being terminated, Duarte responded that she was "not privy to that information." Duarte then gave plaintiff a letter that noted that his employment was terminated effective immediately but provided no reason for the termination.

42. After being notified that he was fired, plaintiff asked Kaminsky if she knew why he had been fired. Kaminsky told him she had no idea but that it was certainly not performance-related.

43. When plaintiff told Pagliuco that he had been terminated, Pagliuco thought plaintiff was kidding. When Pagliuco realized that plaintiff was serious, he expressed shock and said that plaintiff was a great ADA.

44. On or about December 17, 2021, in response to plaintiff's termination, Rob Walsh, a supervising ADA in the Trial Division of the Brooklyn DA, warned another ADA who had inquired about plaintiff's termination to be careful what she put in writing. Walsh suggested, in substance, that plaintiff had been terminated because of his text messages.

45. On December 18, 2021, plaintiff's former supervisor, Sandra Roberts, who was then the Deputy Bureau Chief in the Early Case Assessment Bureau, texted plaintiff and said that she was shocked and appalled that he had been terminated and said that she would gladly provide him a reference letter for jobs in the future.

46. Throughout his employment with the Brooklyn DA, plaintiff had never been written up for poor performance. Plaintiff had performed his job well.

47. On information and belief, Chavis, Mejia-Ming, Thomas, and one or more John Does 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 Brooklyn DA's office.

48. On information and belief, as the Kings County District Attorney, Gonzalez is responsible for the hiring and firing of all assistant district attorneys at the Brooklyn DA and he accepted the recommendation to terminate Zuckerman's employment.

FIRST CAUSE OF ACTION
First Amendment Retaliation Under Section 1983
(All defendants)

49. Plaintiff repeats and realleges paragraphs 1-48 as if fully set forth herein.

50. Plaintiff's statements about COVID-19 and the Brooklyn DA's office were matters of public concern.

51. In speaking about the COVID-19 pandemic and the Brooklyn DA's office, Zuckerman spoke as a citizen, not an employee. Zuckerman did not have any job duties related to COVID-19 policies or protocols in the Brooklyn DA's office.

52. Plaintiff's statements on December 15, 2021, concerning COVID-19 and the Brooklyn DA's office were protected speech under the First Amendment to the Constitution of the United States.

53. By the acts and practices described above, including terminating plaintiff's employment because of plaintiff's protected First Amendment speech, defendants have violated plaintiff's rights under the First Amendment to the United States Constitution and 42 U.S.C. § 1983.

54. Defendants engaged in these practices with malice and reckless indifference to plaintiff's federally protected rights.

55. Plaintiff is now suffering and will continue to suffer irreparable injury and monetary damages for mental anguish and humiliation as a result of defendants' unlawful acts.

SECOND CAUSE OF ACTION
New York State Constitution
(All defendants)

56. Plaintiff repeats and realleges paragraphs 1-55 as if fully set forth herein.

57. Plaintiff's statements about COVID-19 and the Brooklyn DA's office were matters of public concern.

58. In speaking about the COVID-19 pandemic and the Brooklyn DA's office, Zuckerman spoke as a citizen, not an employee. Zuckerman did not have any job duties related to COVID-19 policies or protocols in the Brooklyn DA's office.

59. Plaintiff's statements on December 15, 2021, concerning COVID-19 and the Brooklyn DA's office were protected speech under Article I, Section 8 of the New York State Constitution.

60. By the acts and practices described above, including terminating plaintiff's employment because of plaintiff's protected speech and expression regarding matters of public health, defendants have violated plaintiff's rights under Article I, Section 8 of the New York State Constitution.

61. Plaintiff is now suffering and will continue to suffer irreparable injury and monetary damages for mental anguish and humiliation as a result of defendants' unlawful acts.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court enter an award:

(a) declaring the acts and practices complained of herein a violation of Section 1983, the First Amendment, and the New York State Constitution;

(b) directing defendants to take such affirmative action as is necessary to ensure that the effects of these unlawful employment practices are eliminated and do not continue to affect plaintiff's employment opportunities;

(c) directing defendants to place plaintiff in the position he would be in but for defendants' retaliatory treatment of him, and to make him whole for all earnings he would have received but for defendants' unlawful actions;

(d) awarding plaintiff compensatory damages for his mental anguish, emotional distress, and humiliation;

(e) directing defendants to pay plaintiff punitive damages;

(f) awarding plaintiff pre-judgment and post-judgment interest, as well as reasonable attorneys' fees and the cost of this action; and

(g) awarding such other and further relief as the Court deems necessary and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, plaintiff demands a jury trial.

Dated: New York, New York
June 8, 2022

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No. 22 CV 3384 (CBA)(RER)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOSHUA ZUCKERMAN,

Plaintiff,

-against-

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

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT

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UNITED STATES DISTRICT COURT
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Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

PRELIMINARY STATEMENT

Plaintiff, Joshua Zukerman, a former Assistant District Attorney ("ADA") in the Kings County District Attorney's Office ("KCDAO"), brings the instant action pursuant to the First Amendment of the United States Constitution via 42 U.S.C. § 1983 and the New York State Constitution, asserting claims of retaliation. *See* ECF Dkt. No. 1 ¶¶ 2, 19, 41, 49-55. Specifically, Plaintiff alleges that he was terminated following comments he made to colleagues regarding KCDAO's COVID-19 policies, including contact tracing and transparency about positive COVID-19 cases. *See id.* ¶¶ 3, 35-39, 41.

As set forth more fully below, Plaintiff's claims should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Plaintiff's First Amendment retaliation claim fails as his "speech" is not related to a matter of public concern and thus is not speech protected by the First Amendment. As such, the Complaint should be dismissed.

STATEMENT OF FACTS[1]

Plaintiff, Joshua Zukerman, is a former Assistant District Attorney ("ADA") in the Kings County District Attorney's Office ("KCDAO"). *See* ECF Dkt. No. 1 ¶¶ 1 and 19. During the summer of 2017, Plaintiff interned with KCDAO, and thereafter was offered a position as an ADA upon graduation, which Plaintiff accepted. *See id.* ¶¶ 1719. Plaintiff commenced his employment with KCDAO on October 23, 2018. *See id.* ¶ 19. Plaintiff was initially assigned to the Early Case Assessment Bureau and, in June 2019, was transferred to the Domestic Violence Bureau ("DVB"). *See id.* ¶ 20. In November 2020, Plaintiff was transferred to the Grand Jury Unit within the DVB. *See id.* ¶ 26. He contends that in August 2021, he was promoted to Felony Assistant Prosecutor in the DVB. *See id.* ¶ 29.

In December 2021, Plaintiff asserts he was informed that multiple people assigned to DVB had called out sick due to positive COVID-19 test results. *See id.* ¶¶ 31-34. In particular, Plaintiff alleges to have received an email between December 10, 2021 and December 15, 2021 from Evelina Rene, a supervisor in DVB, stating that eight ADA's were out of the office. *See id.* ¶ 31. Plaintiff does not allege, however, that the email stated the eight ADA's were absent due to a COVID-19 infection or close contact with a person who tested positive for COVID-19. Plaintiff alleges that in response to the email, certain unidentified "colleagues" – not including Rene – informed him that three of the eight individuals were absent due to positive COVID-19 test results, and two other individuals, only one of whom was assigned to DVB, were also absent due to COVID-19. *See id.* ¶ 32. He alleges that the KCDAO did not communicate with DVB about the need to quarantine or steps necessary to prevent an office outbreak. *See id.*

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[1] For the purposes of this motion only, the well-pleaded allegations of fact in the Complaint are deemed to be true.

¶ 33. Plaintiff alleges that these presumptions caused concern amongst him and his colleagues, and his supervisors had no information to provide in response to these concerns. *See id.* "Upon information and belief," Plaintiff contends that, during some undisclosed time frame, approximately 20-30 other people who shared the floor with DVB were absent due to positive COVID-19 tests or otherwise "called out sick." *Id.* ¶ *34.*

In response to the COVID-19 pandemic, KCDAO formed a COVID-19 Committee, consisting of Defendants Maritza Mejia-Ming, Chief of Staff to Kings County District Attorney Eric Gonzalez ("DA Gonzalez "), Nicole Chavis, Deputy Chief of Staff to DA Gonzalez, and Gregory Thomas, KCDAO Senior Executive for Law Enforcement Operations. *See id.* ¶¶ 10-12, 24. When a KCDAO employee contracted COVID-19, employees were to contact the committee to institute contact tracing procedures. *See id.* ¶ 24. Plaintiff contends that the KCDAO policy requires such notification only when an employee had been in contact with someone with COVID-19 for more than 15 minutes and had been within 6 feet of that person. *See id.* ¶ 25.

To address to the specific concerns by DVB staff, Defendants Chavis and Thomas held a meeting on December 15, 2021 with 25 staff members in DVB about COVID protocols. *See id.* ¶¶ 10-12, 24, 35. Plaintiff alleges that during this meeting several false statements were made, including that: (1) "no one had ever gotten COVID-19 from the office"; (2) "the office was regularly cleaned and the offices of staff who had contracted COVID-19 were disinfected"; and (3) the office "promptly contract [sic.] traced and informed individuals when they had been exposed to COVID-19." *Id.* ¶ 35. During the meeting Plaintiff alleges he stated that many people in DVB were out sick, but DVB staff were not informed by KCDAO if they should quarantine, and requested that KCDAO send an alert to staff on the same floor when someone calls out sick or tested positive for COVID-19, rather than just those assigned to same bureau.

See id. ¶ 36. Plaintiff alleges that he made these statements due to concern for himself, his coworkers, and victims who visit KCDAO seeking assistance. *See id.* In response, Plaintiff alleges that "Chavis and Thomas continued asserting that no one contracted COVID-19 in the office and that the office was properly cleaned." *Id.*

Later that day, Plaintiff alleges that Mejia-Ming emailed a memo to DVB staff stating that there were no cluster of cases and no outbreaks on the 15th Floor, that full contact tracing had been completed, and that COVID-19 information received from anyone other than the COVID-19 committee is gossip, rather than information. *See id.* ¶ 37. Plaintiff claims to have not seen this email until approximately 7 or 8 p.m. that evening. *See id.* ¶ 38. Prior to seeing Mejia-Ming's email, Plaintiff alleges that he sent the following text message to 30 ADAs in his class year: "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 dealing [sic.] with a real outbreak and our meeting with Gregory Thomas today was less than reassuring." *Id.* ¶ 39.

Plaintiff claims that the following day at 10:30 a.m., his two supervisors separately reached out to him and told him to report to Human Resources, and when he arrived to Human Resources he met with Deputy Director of Employee Services, Jacqueline Duarte, and was informed he was terminated effective immediately. *See id.* ¶ 40-41. Upon asking why he was being terminated, Duarte allegedly told Plaintiff that she "was not privy to that information." *Id.* ¶ 41. Plaintiff alleges that his supervisors informed him that his termination was not performance related and claims that he was never written up for poor performance. *See id.* 42-43, 45-46. Plaintiff contends that on December 17, 2021, Rob Walsh, a supervising ADA in the Trial Division, "warned another ADA who had inquired about plaintiff's termination to be careful what she put in writing." *Id.* ¶ 44.

ARGUMENT

A. Standard on a Motion to Dismiss

To survive a Rule 12(b)(6) motion to dismiss, plaintiff must plead facts adequate "to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In *Iqbal*, the Supreme Court explained the plausibility standard by stating that, where a complaint pleads facts that are merely consistent with a defendant's liability "without some further factual enhancement[,] it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* at 697, *quoting Twombly*, 550 U.S. at 557). That is, the facts set forth in the complaint "must be enough to raise a right to relief above the speculative level," and a party's "obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions." *Twombly*, 550 U.S. at 555 (internal quotation marks and citation omitted). A complaint fails to state a claim "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 555 U.S. at 679. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id., quoting Twombly*, 550 U.S. at 557. Determining plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* "Unless a plaintiff's well-pleaded allegations of fact have 'nudged [his] claims across the line from conceivable to plausible, [the plaintiff's] complaint must be dismissed.'" In applying this standard, the Court accepts as true all well-pleaded factual allegations, but does not credit "mere conclusory statements" or "threadbare recitals of the elements for a cause of action." *Iqbal*, 556 U.S. at 662, *citing Twombly*, 550 U.S. at 555). Although the Court must accept the factual allegations of a complaint as true, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.*

POINT I

PLAINTIFF'S SECTION 1983 CLAIMS SHOULD BE DISMISSED AGAINST DEFENDANTS GONZALEZ, MEJIA-MING, THOMAS AND CHAVIS FOR LACK OF PERSONAL INVOLVEMENT

Plaintiff's complaint fails to plausibly plead personal involvement of any of the individually-named defendants sufficient to support a claim under § 1983. Rather, Plaintiff's complaint contends that he made a statement at the December 15, 2021 COVID meeting – notably outside of the presence of two individually-named defendants – and less than 24-hours later, wholly upon information and belief, high-level executives in KCDAO made a recommendation for his termination. These wholly conclusory allegations are clearly insufficient to establish personal involvement.

"A central component of a § 1983 claim is Defendant's personal involvement in the alleged constitutional violation." *Constant v. Annucci*, No. 16 CV 3985 (NSR), 2018 U.S. Dist. LEXIS 58318, *8-10 (S.D.N.Y. Apr. 5, 2018), citing *Grullon v. City of New Haven*, 720 F.3d 133, 138 (2d Cir. 2013) ("It is well settled that, in order to establish a defendant's individual liability in a suit brought under § 1983, a plaintiff must show, *inter alia*, the defendant's personal involvement in the alleged constitutional deprivation"). Where a plaintiff "seek[s] to impose individual liability upon a government officer for actions taken under color of state law," such an individual may not be held liable for damages for constitutional violations simply because he or she held a high position of authority. *Corbett v. Annucci*, No. 16 CV 4492 (NSR), 2018 U.S. Dist. LEXIS 24291, at *13 (S.D.N.Y. Feb. 13, 2018), citing *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991); *Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996). Rather, "a plaintiff must establish a given defendant's personal involvement in the claimed violation in

order to hold that defendant liable in his individual capacity." *Constant*, 2018 U.S. Dist. LEXIS 58318, *9. The personal involvement of a supervisory defendant, as relevant here, may be shown by evidence that:

> (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, [or] (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts . . .

Id., citing *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995).

Plaintiff makes no such showing with respect to any of the individually-named Defendants. Specifically, Plaintiff's allegations regarding DA Gonzalez and Mejia-Ming essentially assert liability against them because of their positions of seniority. The only allegation Plaintiff asserts regarding DA Gonzalez, made without support and "upon information and belief," is that DA Gonzalez "is responsible for the hiring and firing of all [ADAs] at [KCDAO] and he accepted the recommendation to terminate [Plaintiff's] employment." ECF Dkt. No. 1, ¶ 48. Such allegations made upon information and belief, must be supported by a statement of fact. See Perez v. Westchester Foreign Autos, Inc., No. 11 CV 6091 (ER), 2013 U.S. Dist. LEXIS 35808, *13 (S.D.N.Y. Feb. 28, 2013) (allegations pleaded upon information and belief "must be accompanied by a statement of the facts upon which the belief is founded"). Plaintiff fails to support this allegation with any statement of fact. Similarly, with respect to Mejia-Ming, Plaintiff states only that following the December 15, 2021 meeting on KCDAO COVID-19 protocols, where approximately 25 DVB staff were present, she sent an email to all DVB staff stating that there was no COVID-19 cluster or outbreak on the 15th Floor. *See id.* ¶ 37. Neither DA Gonzalez nor Mejia-Ming were present for Plaintiff's alleged speech during the December 15, 2021 meeting. Further, Plaintiff makes no allegation that Mejia-Ming was even

informed of his alleged statements during the meeting. These bare and conclusory allegations hardly support personal involvement for §1983 purposes.

Moreover, Plaintiff's only allegations related to Thomas and Chavis are that they conducted the meeting to address KCDAO COVID-19 protocols and that, after Plaintiff voiced his concerns about perceived insufficiencies in the protocols, they stated that no one had contracted COVID-19 in the office and the office was properly cleaned. *See id.* ¶ 37. Plaintiff then alleges without any support and again, wholly upon information and belief, that Chavis, Mejia-Ming, and Thomas immediately went to DA Gonzalez to request Plaintiff's termination. This incredible unsupported conclusion is hardly sufficient to support personal involvement for purposes of §1983 liability. Further, Plaintiff makes no allegation that any of the individually-named Defendants – all high level executives within KCDAO – were made aware of the text message Plaintiff sent to his KCDAO classmates only hours before his termination. Plaintiff's failure to allege that the individually-named Defendants were even made aware of this alleged "speech" clearly demonstrates a lack of personal involvement.

These slim unsupported allegations against the individual 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." *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008); *accord Colon v. City of N.Y.*, No. 19 CV 10435 (PGG) (SLC), 2021 U.S. Dist. LEXIS 8931, at *60-61 (S.D.N.Y. Jan. 15, 2021) (citing cases). For the foregoing reasons, all claims against defendants Gonzalez, Chavis, Thomas and Mejia-Ming, must be dismissed, as Plaintiff has failed to plausibly plead that they participated in any alleged constitutional deprivations.

POINT II

PLAINTIFF'S FIRST AMENDMENT RETALIATION CLAIMS FAILS

A. Plaintiff Fails to State a Claim of First Amendment Retaliation

Plaintiff's First Amendment retaliation claim hinges on his allegations that he was terminated for: (1) raising concerns about KCDAO's COVID-19 protocols at the December 15, 2021 meeting and (2) a text message Plaintiff sent to his KCDAO classmates. Plaintiff's claim fails because he does not adequately plead a cause of action for First Amendment retaliation that he spoke on a matter of public concern.

A plaintiff asserting a First Amendment retaliation claim must plausibly allege that: "(1) [the] speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against him; and (3) there was a causal connection between this adverse action and the protected speech." *Fierro v. City of New York*, No. 20 CV 9966 (GHW), 2022 U.S. Dist. LEXIS 24549, *13 (S.D.N.Y. Feb. 10, 2022), citing *Matthews v. City of New York*, 779 F.3d 167, 172 (2d Cir. 2015). A public employee's speech is only protected to the extent that the employee is speaking as citizen on matters of public concern. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Thus, "public employees cannot state a claim for First Amendment retaliation unless (among other requirements) they speak as citizens on matters of public importance." *Fierro*, 2022 U.S. Dist. LEXIS 24549, at *13, quoting *Castine v. Zurlo*, 756 F.3d 171, 177 n.5 (2d Cir. 2014). In other words, unless the employee speaks as a citizen, the speech at issue is unprotected "even when the subject of an employee's speech is a matter of public concern." *Ross v. Breslin*, 693 F.3d 300, 305 (2d Cir. 2012).

To determine whether speech addresses a matter of public concern, courts examine the "content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). When that examination reveals speech that can be "fairly considered as relating to [a] matter of political, social, or other concern to the community," it is speech on a matter of public concern. *See id.* at 146. However, where an

employee's speech is specific to his or her personal work experience, it is not considered a matter of public concern even if the topic relates to an issue the public, generally, may be concerned about. *See Walker v. New York City Transit Auth.*, No. 99 CV 2227 (DC), 2001 U.S. Dist. LEXIS 14569, at *33 (S.D.N.Y. Sept. 19, 2001) (rejecting the argument that all complaints relating to race or gender discrimination implicate matters of public concern).

Here, Plaintiff allegedly raising concerns regarding KCDAO's COVID-19 policies and procedures to (1) the COVID Committee during the December 15, 2021 meeting and (2) a group of his co-workers via text message, is not speech on a matter of public concern, but is rather specific to Plaintiff's own personal experience. Where the speech or conduct at issue is intended to redress personal grievances, such as an employee's dissatisfaction with working conditions or salary, such speech or conduct does not address matters of public concern and is, therefore, not protected. *See Connick*, 461 U.S. 138, 148 (1983) (employee's questionnaire distributed to her co-workers and addressing her transfer not a matter of public concern). While the fact that COVID-19 impacted the entire world and thus is generally a concern for the public, Plaintiff's dissatisfaction with KCDAO's contact tracing policies and practices within its office, and more specifically on Plaintiff's floor within the office, is not a matter of public concern. *See e.g. Ruotolo v. City of New York*, 514 F.3d 184, 189-90 (2d Cir. 2008) (police officer's lawsuit alleging that he had been retaliated against for a report alerting superiors to environmental hazard at his precinct was not speech on matter of public concern).

Plaintiff's attempt to couch his specific concerns about KCDAO's COVID-19 policies as affecting the larger public by noting that elderly domestic violence victims visit the office (*see* ECF Dkt. No. 1, ¶¶ 5, 36), is similarly insufficient to establish a First Amendment retaliation claim. "The mere fact that . . . [a public employee's] comments could be construed broadly to implicate matters of public concern," does not itself create speech on matters of public

concern. *Ezekwo v. New York City Health & Hosp. Corp.*, 940 F.2d 775, 781 (2d. Cir. 1991). Moreover, the "speech" at issue – Plaintiff's specific comments allegedly made at the December 15, 2021 meeting and his text message to his colleagues – make no mention of non-employees of KDCAO or the general public being affected by KCDAO's COVID-19 policies. *See* ECF Dkt. No. 1, ¶¶ 35-36 39. While Plaintiff states that his motivation for making such statements was due, in part, to concern for elderly domestic violence victims visiting the office, Plaintiff's actual statements did not raise any such concerns and thus cannot be considered part of the speech for which Plaintiff contends he was retaliated against for making.

Most significantly, Plaintiff's alleged speech sought to change internal policies of KCDAO regarding its response to COVID-19, which has been held by this Court to not be a matter of a public concern. Specifically, during the December 15, 2021 meeting, Plaintiff contends that he challenged Chavis and Thomas on the KCDAO's COVID-19 policies, and suggested certain changes to the policy, including alerting everyone on the floor when a person tested positive for COVID-19, rather than only alerting those the individual reported to have come in contact with or those in their bureau. This is a specific internal policy change that Plaintiff requested which is not a matter of public concern. This case is similar to the circumstance faced by this Court in *Adams v. Ellis*, No. 09 CV 1329 (PKC), 2012 U.S. Dist. LEXIS 29621, *30 (S.D.N.Y. Mar. 1, 2012). There, the plaintiff alleged First Amendment retaliation for speaking out about her dissatisfaction with the New York State Division of Parole's policies requiring parole officers to collect supervision fees and certain paperwork demands. This Court held that Plaintiff "complained about the policies and practices that affected her as a DOP employee." *Id.* at *32. Thus, this Court determined that the plaintiff's speech was not on a matter of public concern. Similarly, here, Plaintiff's concerns were not about the COVID-19 pandemic generally, but the internal policies that KCDAO had in place

about contact tracing. *See Montero v. City of Yonkers, N.Y.*, 890 F.3d 386, 399 (2d Cir. 2018) ("[S]peech that principally focuses on an issue that is personal in nature and generally related to the speaker's own situation, or that is calculated to redress personal grievances — even if touching on a matter of general purpose — does not qualify for First Amendment protection.") (quoting *Jackler v. Byrne*, 658 F.3d 225, 235 (2d Cir. 2011)).

As such, Plaintiff's claims are distinguishable from those cases where the Court held that a workplace health and safety issue rose to a matter of public concern. *Cf. Munafo v. Metropolitan Trans. Auth.*, 285 F.3d 201, 211-12 (2d Cir. 2002) (plaintiff's speech found to be on a matter of public concern where he lodged a series of complaints about what he perceived to be safety problems in Track Department operations); *Gangadeen v. City Of New York*, 654 F. Supp. 2d 169, 187 (S.D.N.Y. 2009) (plaintiffs' speech found to be on a matter of public concern where they complained about hazardous fumes in the workplace."). Central to the evaluation of the legal issue of whether Plaintiff's speech is afforded First Amendment protection is obviously the speech itself. Plaintiff's specific speech at the December 15, 2021 meeting was a change to KCDAO's COIVID-19 policy on contact tracing. That the speech relates to COVID-19, a virus the general public is concerned about, does not alter the true nature of Plaintiff's speech – a complaint about an internal policy. Thus, as in *Adams*, Plaintiff's complaint about an internal KCDAO policies is not speech on a matter of public concern as it impacted his own personal circumstance. Such speech is not afforded First Amendment protection. Thus, because Plaintiff's speech does not relate to a matter of public concern, his First Amendment retaliation claim fails.

Finally, Plaintiff fails to plausibly plead that his termination was causally connected to his speech in the text message, as any allegation of knowledge of this message by decisionmakers is wholly lacking in the Complaint. "[I]t is only intuitive that for protected

conduct to be a substantial or motivating factor in a decision, the decisionmakers must be aware of the protected conduct." *See Wrobel v. County of Erie*, 692 F.3d 22, 32 (2012). Plaintiff makes no allegation that any of the individually-named Defendants were sent, informed of, or otherwise aware of the alleged text message. Plaintiff states only that he sent the message to 30 ADAs who started in the office the same year as him. These individuals are not his supervisors, nor were they decisionmakers in his termination. *See Kuczinski v. City of New York*, No. 17 CV 7741 (JGK), 2020 U.S. Dist. LEXIS 125958 *15 (S.D.N.Y. July 16, 2020) (dismissing Plaintiff's First Amendment retaliation claim where "[t]here [was] no evidence, either direct or circumstantial, that the individual defendants in this case were aware of the plaintiff's alleged protected speech."); *Wu v. Metro-North Commuter R.R.*, No. 14 CV 7015, 2015 U.S. Dist. LEXIS 126882, at *17 (S.D.N.Y. Sept. 22, 2015) ("[The] [p]laintiff has not pleaded any facts that would suggest that [the] [d]efendant [ ] even had any knowledge of these complaints, rendering baseless any inference that he might have been motivated to retaliate for them.").

In fact, the evidence offered by the defendants demonstrates that the defendants had no knowledge that the plaintiff had spoken with the Bronx PIU when the plaintiff was removed from his post and then terminated in May 2017.

POINT III

THE INDIVIDUAL DEFENDANTS ARE QUALIFIEDLY IMMUNE FROM SUIT

Under qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A violated right is "clearly established" if "it would be clear to a reasonable officer [in the position of the defendant] that his

conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). "This inquiry turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (internal quotation marks omitted).

In the instant case, all of the individual defendants are entitled to qualified immunity under Section 1983. As shown above, the actions of Defendants did not violate any constitutional right and cannot give rise to any liability. *See Liu v. New York City Police Dep't*, 216 A.D.2d 67, 68 (1st Dep't 1995)("A government official performing a discretionary function is entitled to qualified immunity providing his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). Thus, qualified immunity shields the individual defendants and all constitutional claims must be dismissed as against them.

POINT IV

PLAINTIFF'S CLAIM UNDER THE NEW YORK STATE CONSTITUTION MUST BE DISMISSED

Plaintiff's claim under the New York State Constitution must also be dismissed. "New York courts will only imply a private right of action under the state constitution where no alternative remedy is available to the plaintiff." *Felmine v. City of New York*, No. 9 CV 3768 (CBA) (JO), 2012 U.S. Dist. LEXIS 77299 (E.D.N.Y. June 4, 2012) (emphasis added); *Flores v. City of Mount Vernon*, 41 F. Supp. 2d 439, 446-47 (S.D.N.Y. 1999). "[I]it is a common view among District Courts in this Circuit that there is no right of action under the New York State Constitution for claims that can be brought under § 1983." *Raymond v. City of New York*, No. 15 CV 6885 (LTS), 2017 U.S. Dist. LEXIS 31742, at *25 (S.D.N.Y. Mar. 6, 2017), quoting *Dava v. City of New York*, 2016 U.S. Dist. LEXIS 115639, at *30-31 (S.D.N.Y. Aug. 29, 2016). As

Plaintiff has advanced a claim in this action under § 1983, he clearly has no right of action under the New York State Constitution.

CONCLUSION

For the foregoing reasons, the Court should dismiss the complaint in its entirety and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
October 14, 2022

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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

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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. Defendants are Not Entitled to Qualified Immunity

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

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOSHUA ZUCKERMAN,

Plaintiff,

-versus-

ERIC GONZALEZ, ET AL.,

Defendants.

----------x

22-CV-3384(CBA)

United States Courthouse
Brooklyn, New York

December 15, 2022
2:00 p.m.

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE CAROL B. AMON
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

(In open court.)

THE COURTROOM DEPUTY: All Rise. Zuckerman versus Gonzalez et al, 22-CV-3384, on for oral argument on defendant's motion to dismiss.

I'll ask counsel to please state your names, beginning with counsel for defendants.

MS. SAINT-FORT: Good afternoon. Dominique Saint-Fort for the New York Law Department for defendants.

THE COURT: Good afternoon.

MS. KOISTINEN: Good afternoon, your Honor. Laura Koistinen. I represent the plaintiff Joshua Zuckerman. Along with me is co-counsel Kevin Mintzer.

THE COURT: Good afternoon. Everyone can be seated. You can argue seated using the microphones because that's the best set up we have for being able to hear you.

Ms. Saint-Fort, you're moving to dismiss?

MS. SAINT-FORT: Yes, your Honor.

THE COURT: I read the motion papers here, but how do you viably distinguish this case from no Munafo versus the Metropolitan Transit Authority?

MS. SAINT-FORT: Yes, your Honor. There, and in the line of cases similar to it, where an individual is complaining about a safety risk in their workplace that is an objective risk, that differs from the issues here with the speech particularly made by plaintiff.

Here plaintiff is not complaining -- excuse me, plaintiff's speech that was made during the December 15, 2021 meeting that was called to address the COVID policies within the Brooklyn DA's office. His specific speech was about the level of contact tracing that the Brooklyn DA was engaging in, not whether it was engaging in conduct that would protect individuals from contracting COVID in and of itself.

The DA's office was engaging in contact tracing. They were notifying individuals who had been in contact with --

THE COURT: That I think probably is a disputed issue of fact, isn't it? I don't know that -- basically what he was saying is, look, all of these people have got COVID, they are saying everybody is fine, they are not fine, they are not tracing, they are not doing the tracing.

He also was concerned about other people coming into the office, the fact that they had elderly people that sometimes came into the office.

MS. SAINT-FORT: Your Honor, plaintiff acknowledges that contact tracing was being done and certain individuals were being informed, but not the level he believed they should be.

So his speech sought to change the policy of the DA's office, to increase the number of individuals who were being informed; not that individuals weren't being informed at

all.

In fact, he specifically references a number of e-mails that were sent out by senior staff members in the domestic violence bureau on a regular basis notifying them of individuals who are out of the office and who are out sick. He references his own experience with having contracted COVID and informing the office of individuals he had been in contact with.

I don't believe it's disputed that the DA's office was engaging in contact tracing. Rather, plaintiff seems to suggest that the number of individuals who are informed to should be increased. In particular he's stating that the individuals who had come in contact with a person potentially were being notified, but everyone on the floor with an individual who had a COVID positive result should be notified of that positive result, whether or not the individual with the positive result identified them as someone that they had contact with.

He's trying to change the internal policy of the DA's office regarding who is contacted. That differs from Munafo, cited by plaintiff, where there is an objective safety risk that is not being essentially addressed by the employer. Here the DA's office is addressing it; plaintiff just wants the policy to be changed. That's personal to his work experience. A personal grievance is not protected speech

under the First Amendment for public employees.

THE COURT: Thank you.

Do you want to respond to that?

MS. KOISTINEN: Yes, your Honor.

We do disagree about this issue. No where in plaintiff's complaint does he concede that contact tracing was being done. In fact, I would direct the Court to paragraph 36 of plaintiff's complaint. As alleged in that paragraph, plaintiff stated to defendants Chavez and Thomas in a meeting that included other co-workers, that for the past week many people were out sick and that people on the 15th floor were living in fear because they had not received communication from the District Attorney's Office about what they should do and what steps needed to be taken to protect them and their health.

Additionally, your Honor, the fact that plaintiff -- we disagree that plaintiff was merely talking about policy issues here. But even if he were, the mere fact that he's wanting to have the policy changed does not mean that he's not speaking out about a matter of public concern.

If you turn to, as plaintiff noted on page 13 of his opposition brief, the Second Circuit has found in the Goldener in case that speech can be protected when it's regarding a policy. And this is a case that defendants did not address in their reply brief. I believe we also cited several other

district court cases that support this conclusion as well.

As your Honor mentioned, plaintiff also noted that part of the reason why he was speaking out about this issue is because he was concerned about members of the community who were coming into the District Attorney's office, in particular elder abuse victims who were particularly prone to getting a bad case of COVID.

Despite defendants' attempts to say that his motivation doesn't matter; in fact, the Sarratt case in the Second Circuit has held that it is a relevant consideration when determining whether a plaintiff's speech is a matter of public concern.

THE COURT: Thank you. I've read your papers, both side's papers, and you've addressed the questions I had this morning. I'm prepared to issue an oral ruling on this.

The defendants here move to dismiss the plaintiff's claims brought pursuant to the First Amendment of the United States Constitution and New York State constitution.

The plaintiff Zuckerman alleges he was terminated from his position as an Assistant District Attorney at the Kings County District Attorney's Office in retaliation for comments he made in a meeting and via text message on December 15 of 2021, expressing that many people were living in fear of contracting COVID-19 in the office and criticized the COVID-19 safety policies.

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint that fails to state a claim upon which relief can be granted. To avoid dismissal, a plaintiff must state a claim that is plausible on its face by alleging sufficient facts for the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. That's a very well known case of Ashcroft vs. Iqbal 556 U.S. 662, 678 in 2009.

Although the Court will not credit mere conclusory statements or threadbare recitals of the elements of a cause of action, it must accept as true all material factual allegations alleged in the complaint and draw all reasonable inferences in the plaintiff's favor. See Johnson vs. Priceline.com Inc. 711 F.3d 271, 275, Second Circuit 2013.

The plaintiff Zuckerman has alleged sufficient material facts to state a plausible First Amendment retaliation claim under Section 1983. A plaintiff asserting a First Amendment retaliation claim must establish, first, that his speech or conduct was protected by the First Amendment. Second, that the defendant took an adverse action against him. And third, there was a causal connection between the adverse action and the protected speech. Matthews vs. City of New York, 779 F.3d 167, 172, Second Circuit 2015.

Under the first prong, a public employee's speech is entitled constitutional protection if he's speaking as a

citizen on a matter of public concern. Connick vs. Myers, 461 U.S. 138, 145 to 148, 1983.

Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social or other concern of a community or when it is the subject of legitimate news interest that is a subject of journal interest and a valuating concern to the public. Lane vs. Frank 573 U.S. 228, 241, 2014.

To make this determination, courts look to the content form and context of the speech. In Munafo vs. Metropolitan Transportation Authority, the Second Circuit recognized that safety in the workplace is a matter of public concern, 285 F.3rd 201, 211, 212, Second Circuit 2002. In that case, the plaintiff worked for the public transit authority and complained about unsafe conditions, such as workers being forced to work in proximity to live rails and welders being forced to work without respirators. The Second Circuit opined that the MTA's argument that the plaintiff's complaint about workplace safety constituted mere personal grievance, boarding on the frivolous.

Since Munafo, courts within the Second Circuit have repeatedly recognized that complaints about work-place safety relate to matters of public concern. For example, I cite Reynolds vs. The Village of Chittenango, 2020 Westlaw 1322509, at note three, a Northern District of New York decision of

March 20, 2020. Within that case it sites a number of other cases.

In this court's view Mr. Zuckerman's speech, as set forth in the complaint, is analogous to the speech in those cases. He alleges that he spoke in response to false statements made by the members of the COVID-19 committee. He expressed his and others employee's fears of contracting COVID-19 in the office. That he criticized the office's inadequate contract tracing policy. He spoke out of concern for himself, his co-workers, and members of the public who visit the DA's Office.

He also alleges that he sent a text message to 30-plus ADAs warning them about COVID-19 conditions in the office and the lack of responsiveness from leaders.

Similar to the speech in Munafo and similar cases, plaintiff's statements about safety conditions and policies related to the pandemic in the DA's office is of, to quote, "social or other concern to the community and subject of general interest in evaluating concern to the public." Lane 573 U.S. at 241.

The defendant's attempts to frame Mr. Zuckerman's statement as constituting purely personal grievance pertaining to an internal policy of no concern to the public, are not persuasive; nor are the cases to which they attempt to analogize it.

I also considered all arguments raised in the briefs and find that none warrant dismissal of his claims.

In particular, plaintiff has plausibly alleged that the defendants Chavis, Thomas Mejia-Ming and Gonzalez were personally involved in the alleged retaliatory termination, as required for Section 1983 claim. See Grullon vs. City of New Haven 720 F.3d 133, 138 to 139, Second Circuit 2013.

Among other relevant facts, Chavis and Thomas are alleged to have attended the December 15, 2021, meeting. Mejia Ming is alleged to have been their co-committee member and sent an e-mail in response to comments made by Mr. Zuckerman in the meeting. And District Attorney Gonzalez is alleged to have had the sole statutory responsibility for hiring and firing ADAs.

The plaintiff also plausibly alleged that his statements were causally connected to his termination, given that he was terminated the day after making the statements without explanation and with no history of performance issue. While it is, of course, possible that discovery may shed a different light on these allegations, plaintiff has stated sufficient material facts to survive the motion to dismiss.

Nor have defendant shown their entitled to qualified immunity. Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known. That's Harlow vs. Fitzgerald, 457 U.S. 888, 818, 1982.

It is clearly established that public employees have a First Amendment right to be free from retaliation for speech on matters of public concern. See Reuland vs. Hynes 460 F.3d 409, 419 to 420, Second Circuit 2006. And Munafo and subsequent cases have established that speech about workplace safety relates to a matter of public concern.

Defendants have provided no convincing argument that the right the plaintiff is alleging was violated is not one that was clearly established at the time of the violation.

As a final matter, I will also address New York State constitutional claim.

It is true that some courts in this circuit have held there is no right of action under the New York State constitution for claims that can be brought under Section 1983. See for example, Raymond vs. City of New York, 2017 Westlaw 892350, a decision of the Southern District of New York on March 6, 2017.

It is also not entirely clear whether the standards of a First Amendment retaliation claim are identical to or broader than a claim brought pursuant to Article I, Section 8 of the New York State constitution. See Avery vs. DiFiore, 2019 Westlaw 3564570, Southern District of New York, August 6,

2019.

What is clear is that there is a significant factual overlap between the federal state claims being alleged; and therefore, any potential discovery as well. And while Mr. Zuckerman's Section 1983 claim is being allowed to proceed for the time being, if that claim is ever defeated he may have to rely on an argument that there is a cognizable state constitutional claim; that's without addressing the validity of the state constitutional claim or the specific standard that might apply. In the interest of efficiency, I decline to dismiss that claim at this time.

In conclusion, the defendant's present motion to dismiss is denied in its entirety.

Having resolved the motion to dismiss, let me ask, have the parties had any settlement discussions in this case at all?

MS. KOISTINEN: We have briefly, your Honor. But they obviously haven't resulted in any --

THE COURT: What are the plaintiff's damages?

MS. KOISTINEN: The plaintiff's damages are relatively minimal because he found work relatively quickly after being dismissed. However, the main part of his damages relate to his emotional distress and the fact that he wants to get back into public service. And so having a dismissal from a Government agency, it's not helpful if he would want to go

work for the Government in the future.

THE COURT: We can go off the record to discuss settlement. Is there any objection to me hearing that?

MS. KOISTINEN: No objection.

MS. SAINT-FORT: No objection.

(Discussion held off the record.)

THE COURT: The next conference will be a settlement. It will be February 9 at 2:00 p.m. Thank you.

MS. KOISTINEN: Thank you.

MS. SAINT-FORT: Thank you.

(Whereupon, the matter was concluded.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Rivka Teich
Rivka Teich, CSR RPR RMR FCRR
Official Court Reporter
Eastern District of New York