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Second Circuit Courts are not required to even reply to a lawful, with standing, request to review a clearly unconstitutional law. Gangster Employers, like NYCTA, will see this case as a green light to Defraud, Assault, Defame, Injure any Employee for any reason, with undeserved, and unintended secret sovereign immunity. Thus the absolute need for review and/or Reversal and Remand, back to the Magistrate Judge[16] originally assigned for Discovery and Recommendation and Report.

CONCLUSION

For the aforesaid reasons this Honorable Court should Grant this Petition for Writ of Certiorari, in the interest of Supreme Court Precedent, proper enforcement of Statue, common law and the Public Interest, the Rule of Law, Justice and Remedy.
Respectfully Submitted

__/S/_____
Brian Burke, Petitioner *Pro Se*

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of March, two thousand nineteen.

Brian Burke, Plaintiff - Appellant, v. New York City Transit Authority, Kristen M Nolan, Esq., NYCTA,

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[16] Magistrate Judge Lois Bloom.

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Post Leonard Akselrod, NYP Holdings, Inc., DBA New York, Kathianne Boniello, Defendants - Appellees, John/Jane Doe, *et al*, Defendant.

ORDER Docket No: 18-1753 Appellant, Brian Burke, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*. IT IS HEREBY ORDERED that the petition is denied. FOR THE COURT: Catherine O'Hagan Wolfe /s/, Clerk Case 18-1753, Document 82, 03/29/2019, 2528718, Page1 of 1 18-1753-cv Burke v. New York City Transit Auth. et al. UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SUMMARY ORDER RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL. At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of February, two thousand nineteen. PRESENT: RAYMOND J. LOHIER, JR.,

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SUSAN L. CARNEY, RICHARD J. SULLIVAN, Circuit Judges. . No. 18-1753-cv

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BRIAN BURKE, Plaintiff-Appellant, v. NEW YORK CITY TRANSIT AUTHORITY; KRISTEN M. NOLAN, ESQ., NYCTA; LEONARD AKSELROD; NYP HOLDINGS, INC., DBA NEW YORK POST; KATHIANNE BONIELLO, Defendants-Appellees, JOHN/JANE DOE *ET AL.*,Defendants. MANDATE ISSUED ON 04/05/2019

FOR PLAINTIFF-APPELLANT: BRIAN BURKE, *pro se*, New York, NY. FOR DEFENDANTS-APPELLEES Daniel Chiu, NEW YORK CITY TRANSIT AUTHORITY, KRISTEN M. NOLAN, NY and LEONARD AKSELROD: FOR DEFENDANTS-APPELLEES KATHIANNE BONIELLO and NYP Holdings, Inc., DBA NEW YORK POST,GEOFFREY S. BROUNELL (Robert Balin, on the brief), Davis Wright Tremaine LLP, New Appeal from a judgment of the United States District Court for the Eastern District of New York (Eric N. Vitaliano, Judge). UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED. Appellant Brian Burke, pro se, sued his former employer, the New York City Transit Authority (NYCTA), and several of its employees under various federal and state statutes and state common law. He alleged that NYCTA officials orchestrated a harassment campaign against him for being a "whistleblower" and that the New York Post and one of its reporters (collectively, the "Post Defendants")

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published a defamatory article about his lawsuit against NYCTA. The District Court (Vitaliano, J.) dismissed Burke's complaint for failure to state a claim but allowed him to amend his complaint with respect 1 to his discrimination and retaliation claims. Burke filed a second amended complaint, which the District Court also dismissed. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm. We review de novo a district court's dismissal of a complaint pursuant to Rule 12(b)(6), accepting all factual allegations as true, drawing all reasonable inferences in the plaintiff's favor, and interpreting the pleadings and briefs submitted by *pro se* litigants to raise the strongest arguments that they suggest. See *Harris v. Mills*, 572 9 F.3d 66, 71-72 (2d Cir. 2009). The complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). I. Title VII and ADA Claims A. Disparate Treatment To state a claim of disparate treatment discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2 *et seq.*, or the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., a plaintiff must allege an adverse employment action that occurred under circumstances giving rise to an inference of discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); Littlejohn v. City of New York, 795 1 F.3d 297, 311 (2d Cir. 2015). To state an ADA claim, the plaintiff must also show that he is disabled within the meaning of the ADA. *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 169 (2d Cir.

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2006). Burke alleged that he wears eyeglasses as an accommodation for his myopia and photophobia. The District Court properly dismissed Burke's disparate treatment claims arising from events in April 2014 because he failed to allege any resulting adverse employment action. See *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015). In particular, although Burke alleged that defendants Kristen Nolan and Leonard Akselrod ordered NYCTA supervisors to harass him over a two-day period, he failed to allege that he was ever disciplined or had his job responsibilities or benefits reduced because of his disability. See *Galabya v. N.Y.C. Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir.12 2000). Nor did Burke adequately allege that any harassment he suffered due to his religion constituted more than "mere inconveniences or annoyances," see *Vega*, 801 14 F.3d at 89, or materially altered the terms and conditions of his employment, see *Galabya*, 202 F.3d at 640. B. Hostile Work Environment Assuming without deciding that a hostile work environment claim is cognizable under the ADA, we do not view Burke's complaint, even when read liberally, as adequately alleging such a claim 1 arising from the same events in April 2014.1 See *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007). In any event, because an ADA hostile work environment claim would also require that Burke show that the treatment he received was "sufficiently severe or pervasive to alter the conditions of his employment," *Dollinger v. N.Y. State Ins. Fund*, 726 F. App'x 828, 831 (2d Cir. 2018) (quoting *Tolbert v. Smith*, 790 F.3d 427, 439 (2d Cir. 2015)), the claim would fail for the same reasons as his Title VII harassment claim. C.

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Retaliation We conclude that the District Court properly dismissed Burke's Title VII retaliation claims, which require "a causal relationship between [a] protected activity and the adverse employment action." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010). Burke argues that there was sufficient temporal proximity between the filing of his original federal complaint in March 2015 and his May 2016 termination. We agree with the District Court that the year-long lapse is too long to show causation under the circumstances. See *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85–86 (2d Cir. 1990). See *Dollinger v. N.Y. State Ins. Fund*, 726 F. App'x 828, 831 (2d Cir. 2018). Burke alternatively argues that he was constructively discharged in April 2015, only weeks after filing his lawsuit. We do not consider this argument because he first raised it on appeal. See *Virgilio v. City of New York*, 407 F.3d 105, 116 (2d Cir. 2005). Burke also alleges that the NYCTA 1 stole over $30,000 from him as retaliation for filing the instance case. But Burke provides no other facts—such as when the money was earned or when it went missing—supporting this "naked assertion" of retaliation. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). II. Defamation The District Court also properly dismissed Burke's defamation claims against the Post Defendants. In New York, "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, . . . or for any heading of the report which is a fair and true headnote of the statement published." N.Y. CIVIL RIGHTS LAW § 74. "For a report to be characterized as 'fair and true' within the meaning

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of the statute, thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate." *Holy Spirit Ass'n for Unification of World Christianity v. N.Y. Times* Co., 49 N.Y.2d 63, 67 (1979); see *Shulman v. Hunderfund*, 12 N.Y.3d 143, 150 (2009). And statements that are "pure opinion" are protected by the First Amendment and are not actionable as defamation. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 17 (1986). We conclude that the Post article is not defamatory substantially for the reasons set forth in the District Court's memorandum and order of September 23, 2016. III. Fair Labor Standards Act. Burke argues that the District Court ignored his claim under the Fair Labor Standards Act (FLSA). But as Burke acknowledged at oral argument, Burke did not make that claim until his second amended complaint, which the District Court allowed only for purposes of repleading his discrimination and retaliation claims. Accordingly, the District Court did not err in declining to consider this claim. Moreover, even if we were to consider Burke's FLSA claim, see *Abbas*, 480 F.3d at 639, the claim would still fail. Burke alleged that the NYCTA owes him money pursuant to an employment contract, that he was not paid for 10 hours of overtime that he worked, and that he was not properly compensated for sick time and vacation days. Given that Burke did not allege "a single workweek in which [he] worked at least 40 hours and also worked uncompensated time in excess of 40 hours," his claims in this regard are insufficient. See *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 114 14 (2d Cir.

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2013); see also *Nakahata v. New York-Presbyterian Healthcare Sys.*, 723 F.3d 15 192, 201 (2d Cir. 2013). We have considered Burke's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED. FOR THE COURT: Catherine O'Hagan Wolfe /s/, Clerk of Court FILED IN CLERK'S OFFICE UNITED STATES DISTRICT COUR, EASTERN DISTRICT OF NEW YORK, BROOKLYN OFFICE JUDGMENT I5-CV-I48I (ENV) BRIAN BURKE, Plaintiff, V. NEW YORK CITY TRANSIT AUTHORITY, et al. Defendants. A Memorandum and Order of Honorable Eric N. Vitaliano, United States District Judge, having been filed on May 18th, 2018, granting the motion to dismiss; dismissing all federal claims in their entirety with prejudice; declining to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(c)(3), over any remaining state law claims; certifying pursuant to 28 U.S.C. § 1915(a), that any appeal would not be taken in good faith; and denying *in forma pauperis* status for the purpose of any appeal. See *Coppedge v. United States*, 369 U.S. 438 (1962); it is ORDERED and ADJUDGED that the motion to dismiss is granted; that all federal claims are dismissed in their entirety with prejudice; that pursuant to 28 U.S.C. § 1367(c)(3), the Court declines to exercise supplemental jurisdiction over any remaining state law claims; that 28 U.S.C. § 1915(a), any appeal would not be taken in good faith; and that *in forma pauperis* status is denied for the purpose of any appeal. See *Coppedge v. United States*, 369 U.S. 438 (1962). Dated: Brooklyn, NY Douglas C. Palmer May

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21,2018 Clerk of Court By: /s/ Jalitza Poveda Deputy Clerk Case 1:15-cv-01481-ENV-LB Document 49 Filed 05/21/18 Page 1 of 1 Page ID #: 972 UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK BRIAN BURKE, Plaintiff, -against- NEW YORK CITY TRANSIT AUTHORITY, et al. Defendants. 1 8 2018 * ^ MEMORANDUM & ORDER 15-CV-1481 (ENV) (LB) VITALIANO, D.J. On March 20, 2015, Brian Burke, proceeding *pro se*, commenced this action against his then-employer, the New York City Transit Authority ("NYCTA"), for various alleged federal and state violations of his rights. Plaintiff amended his complaint, adding new causes of action and defendants, including NYCTA employees Kristen Nolan and Leonard Akselrod. The Court dismissed the amended complaint and granted leave to file a second amended complaint, but only with respect to his discrimination and retaliation claims. The ground of leave excluded claims that were time-barred or were otherwise precluded by the Court's Memorandum & Order. See Memorandum & Order, dated September 21,2016, ECF No. 28. On October 24,2016, plaintiff filed his second amended complaint, alleging substantially the same facts and claims as his prior complaint. See Second Amended Complaint ("SAC"), ECF No. 31. For the reasons that follow, the motion to dismiss is granted. Discussion The background facts, procedural history, and the applicable standard of review are set out in the Court's order dismissing the amended complaint and will not be repeated here needlessly. Familiarity of the parties with that decision is presumed. Case 1:15-cv-01481-ENV-LB Document

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48 Filed 05/18/18 Page 1 of 5 Page ID #: 966 Front and center on this motion is the question of whether Burke's second amended complaint adequately pleads a claim of discrimination and/or retaliation. Even with the liberal reading of his papers due a pro se pleader, plaintiff must still allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl Corp. v. Twombly*, 550 U.S. 544, 570,12 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007). A complaint that "offers labels and conclusions" or "tenders naked assertion[s] devoid of factual enhancement" is insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678,129 S. Ct 1937,1949, 173 L. Ed. 2d 868 (2009) (citation and internal quotations omitted). The additional allegations included in the second amended complaint do nothing to remedy the defects the Court diagnosed in dismissing the substantially-similar amended complaint. As explained in the Memorandum & Order, Burke had failed to plausibly allege in his amended complaint that the purported mistreatment he says he endured at NYCTA was motivated by a discriminatory or retaliatory purpose. Absent such pleadings, a prima facie case of discrimination or retaliation simply cannot survive dismissal.' See Memorandum & Order at ' As outlined in the Court's previous decision: To establish a prima facie case of discrimination. Burke must show that: (1) he is a member of a protected class, (2) he was qualified for the position he had or sought, (3) he suffered an adverse employment action, and (4) he can carry his minimal burden of showing facts reasonably suggesting an inference of discriminatory motivation....[T]o establish a prima facie case of

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retaliation, a plaintiff must show: "(1) participation in a protected activity; (2) that the defendant[s] knew of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action." Memorandum & Order at 6 (quoting *Hicks v. Baines*, 593 F.3d 159, 164 (2d Cir. 2010) (citation and internal quotations omitted); *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015)). Case 1:15-cv-01481-ENV-LB Document 48 Filed 05/18/18 Page 2 of 5 Page ID #: 967 5-8. As with his prior attempts, Burke has not pleaded any facts that would give rise to an inference of discriminatory motive, nor is it clear under what protected group Burke claims cover.^ *See Henry v. NYC Health & Hasp. Corp.*^ 18 F. Supp. 3d 396,410 (S.D.N.Y. 2014) ("[T]he discrimination must be because of [a protected characteristic]" to survive dismissal.) (quoting *Patane v. Clarke* 508 F.3d 106, 112 (2d Cir. 2007)). Likewise, with respect to his retaliation claim, Burke has still not adequately offered a nexus between the mistreatment he claims to have suffered and his self-described whistleblowing activities against NYCTA, which he purports is the cause. See *Henry*, 18 F. Supp. 3d at 412 (dismissing retaliation claim providing only conclusory assertions of retaliatory nexus). Burke, in short, provides conclusions but no facts. As defendants note, in his new paragraphs, plaintiff mainly lists additional details of mistreatment, such as the alleged withholding of owed compensation and benefits and the ultimate termination of his probationary employment (more than a year after he filed this action). See SAC at HH 86-92; Def. Br.

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at 5, 7. The pleading supposedly connecting bad effects to cause remains unchanged. The new allegations do not touch on Burke's discrimination claim, and, as a consequence, do nothing to rectify identified pleading deficiencies. Focusing on the retaliation claim, the amended segment of the second amended The second amended complaint states that Nolan and Akselrod "used their own definition of disability under ADA," presumably meaning Burke's visual impairment (he wears corrective lenses), as "pretext...to terrorize a whistleblowing enemy while performing his safety sensitive training." Allegedly, Nolan and Akselrod "ordered at least 5 Train Service Supervisors (TSS) to terrorize, harass, 'interfere with safe train operation,' assault and create the penultimate 'hostile workplace environment' within the small confines of an operating cab while train was in motion with up to 2,000 passengers." SAC at 46-47. Case 1:15-cv-01481-ENV-LB Document 48 Filed 05/18/18 Page 3 of 5 Page ID #: 968 complaint provides that "[o]ver 30 thousand dollars of earnings stolen from Petitioner as Retaliation for FILING THE INSTANT CASE!!! 11," SAC at K 88, but does not present facts explaining how sick and vacation days accumulated during a period in which Burke was not attending work, how the compensation was calculated to amount to over $30,000, or, most importantly, how this withholding was driven by a retaliatory motive. To the extent that plaintiff purports that the termination of his probationary employment is an adverse employment action for purposes of establishing a retaliation claim, the termination occurred on May 5,2016, more than a year after

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Burke filed this action and longer still since the alleged whistleblower activity. See *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 1511, 149 L. Ed. 2d 509 (2001) (finding that "temporal proximity" between employer's knowledge of protected activity and adverse employment action must be "very close" for an inference of causality); *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 86 (2d Cir. 1990) (holding that a three-and-half months lapse between complaint and adverse action did not establish causal nexus). Nonetheless, Burke does not plead any facts to suggest a link between a protected activity and his termination. The second amended complaint added no allegations indicating that Burke's self-described whistleblowing influenced any action to terminate him. At the bottom line, given the persistence of these pleading deficiencies, Burke's discrimination and retaliation claims are dismissed without leave to amend. Conclusion In line with the foregoing, the motion to dismiss is granted. Plaintiff was previously In its October 24, 2016 Memorandum & Order, the Court found a separate and additional ground for dismissal of the retaliation claim: plaintiff had not alleged any adverse employment action. The Court noted that withheld paychecks and the rudeness of colleagues did not constitute adverse employment action and Burke had not been demoted at that time. Case 1:15-cv-01481-ENV-LB Document 48 Filed 05/18/18 Page 4 of 5 PageID #: 969 granted leave to file a second amended complaint for the limited purpose of plausibly repleading his claims based on discrimination and retaliation. He has failed to do so. Given the futility of amendments, all federal

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claims are dismissed in their entirety with prejudice. The Court declines to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(c)(3), over any remaining state law claims. Although plaintiff paid the filing fee to commence this action, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith and therefore, *in forma pauperis* status is denied for purpose of an appeal. See *Coppedge v.United States*, 369 U.S. 438,444-45, 82 S. Ct. 917, 920-21, 8 L. Ed. 2d 21 (1962). 'The Clerk of Court is directed to mail a copy of the Memorandum & Order to plaintiff, to enter judgment accordingly, and to close this case. So Ordered.Dated: Brooklyn, New York May 5, 2018 ERIC N. VITALIANO United States District Judge /s/ USDJ ERIC N. VITALIANO Case 1:15-cv-01481-ENV-LB Document 48 Filed 05/18/18 Page 5 of 5 PageID #: