APPENDIX A

In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM, 2018

ARGUED: SEPTEMBER 21, 2018
DECIDED: APRIL 18, 2019

No. 17-2757

RICHARD NATOFSKY,
Plaintiff-Appellant,

v.

THE CITY OF NEW YORK, SUSAN POGODA, SHAHEEN ULON, MARK PETERS, and JOHN and JANE DOE, said names being fictitious, the persons intended being those who aided and abetted the unlawful conduct of the named defendants,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of New York,
No. 14 Civ. 5498 – Naomi Reice Buchwald, *Judge.*

Before: WALKER, CHIN, *Circuit Judges*, and Keenan, *District Judge.**

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* Judge John F. Keenan, of the United States District Court for the Southern District of New York, sitting by designation.

Plaintiff-Appellant Richard Natofsky appeals from a judgment of the United States District Court for the Southern District of New York (Naomi R. Buchwald, *Judge*) granting summary judgment to Defendants-Appellees the City of New York and certain of its employees (jointly, "Defendants"). Natofsky, who suffers from a hearing disability, brought this action alleging violations of Section 504 of Rehabilitation Act of 1973 (the "Rehabilitation Act"), codified at 29 U.S.C. § 794(a)-(d), and state and city law. Natofsky claims that, during his tenure working for the New York City Department of Investigation (the "DOI"), he experienced several adverse employment actions because of his hearing disability, including his eventual demotion. He also claims that the DOI failed to accommodate his disability and retaliated against him. The district court held that no reasonable jury could conclude that Natofsky had experienced any adverse employment action "solely by reason of" his disability and further held that Natofsky failed to establish a failure-to-accommodate or retaliation claim. We hold that a plaintiff alleging an employment discrimination claim under Section 504 of the Rehabilitation Act must show that the plaintiff's disability was a but-for cause of the employer's action, not the sole cause. We conclude, however, that Natofsky failed to demonstrate that the adverse employment decisions he experienced would not have been made but for his disability. Accordingly, the district court's award of summary judgment to Defendants is **AFFIRMED**.

Judge Chin dissents in a separate opinion.

FOR PLAINTIFF-APPELLANT:	WILLIAM W. COWLES (Samuel O. Maduegbuna, *on the brief*), Maduegbuna Cooper LLP, New York, New York.
FOR DEFENDANTS-APPELLEES:	MELANIE T. WEST, Assistant Corporation Counsel (Richard Dearing, Claude S. Platton, Of Counsel, *on the brief*), *for* Zachary W. Carter, Corporation Counsel of the City of New York, New York, New York.

Keenan, *District Judge*:

Plaintiff Richard Natofsky appeals from a judgment of the United States District Court for the Southern District of New York granting summary judgment to Defendants (Buchwald, *J.*). Natofsky served as the Director of Budget and Human Resources at the New York City Department of Investigation (the "DOI") from December 2012 until March 2014, when he was demoted. He resigned from the DOI in June 2014. Natofsky, who suffers from a hearing disability, brought this action against the City of New York and three former high-ranking employees at the DOI alleging violations of Section 504 of Rehabilitation Act of 1973 (the "Rehabilitation Act"), codified at 29 U.S.C. § 794(a)-(d), and state and city law. Natofsky claims

that, during his tenure at the DOI, he experienced several adverse employment actions because of his hearing disability, including his demotion. He also claims that the DOI failed to accommodate his disability and retaliated against him.

The district court held that no reasonable jury could conclude that Natofsky had experienced any adverse employment action "solely by reason of" his disability and further held that Natofsky failed to establish a failure-to-accommodate or retaliation claim. Accordingly, the district court granted summary judgment in favor of Defendants.

We hold that a plaintiff alleging an employment discrimination claim under Section 504 of the Rehabilitation Act must show that the plaintiff's disability was a but-for cause of the employer's action, not the sole cause. We conclude, however, that Natofsky failed to demonstrate that the adverse employment decisions he experienced would not have been made but for his disability. Thus, the district court's award of summary judgment to Defendants is **AFFIRMED**, albeit on different grounds.

BACKGROUND

The facts are summarized as follows:

A. Natofsky's Disability

Natofsky suffered nerve damage as an infant, leaving him with a lasting and severe hearing

impairment. He wears hearing aids and, to fully understand what someone is saying, has to focus intently on the speaker and read lips. He also speaks imperfectly and more slowly than the average person.

B. The DOI Hires Natofsky

The DOI hired Natofsky in December 2012 as the Director of Human Resources and Budget with a starting salary of $125,000. His direct supervisor was Shaheen Ulon, the then Deputy Commissioner for Administration. When the DOI hired Natofsky, Rose Gill Hearn was the Commissioner of the DOI.

In November 2013, Bill de Blasio was elected mayor of New York City. Shortly before the de Blasio administration came into office, Natofsky received two awards: one for "going above and beyond" in his job performance and one for a good record of performance. On December 31, 2013, Natofsky also received a memo from Hearn informing him that the DOI was increasing his salary by $4,000 for good performance.

At the end of 2013, as a result of the mayoral transition, Hearn left the DOI. In February 2014, Mark Peters assumed the role of Commissioner. He appointed Susan Pogoda as the DOI's Chief of Staff and Deputy Commissioner for Agency Operations. Natofsky's supervisor, Ulon, remained in place.

C. Ulon's Treatment of Natofsky

Natofsky testified that when he started at the DOI, he informed Ulon that he had a severe hearing impairment and, consequently, might have trouble hearing her. He also told her that she would have to face him when speaking and that background noise made hearing more difficult for him.

Although the first three months of Natofsky's employment passed without significant incident, in or about March 2013, Ulon asked Natofsky to follow up on e-mails more quickly. Natofsky replied that he could not respond to emails as promptly as Ulon wanted because he had to put "extraordinary effort into listening" to a speaker during meetings and, thus, could not multitask while listening in meetings. He also suggested that "if someone has an extremely urgent or time sensitive issue, he or she contact [a secretary] so that she can alert me." Ulon and Natofsky had no further discussions on the topic.

In June 2013, Ulon requested that Natofsky arrive at work between 9:00 a.m. and 10:00 a.m., as opposed to between 8:00 a.m. and 8:30 a.m., which was when Natofsky usually arrived. She also requested he submit fewer leave requests, although the requests could be for longer periods of time. Natofsky contacted Hearn to object to Ulon's requests; he explained that an early arrival allowed him to catch up on emails that he could not respond to while in meetings, and that Ulon was not understanding of his hearing needs. Hearn organized a meeting with Ulon and Natofsky to discuss

Natofsky's concerns, after which Ulon withdrew her demands.

On March 10, 2014, after Hearn's resignation and during Peters's and Pogoda's tenures, Ulon wrote Natofsky a counseling memorandum addressing his performance deficiencies. She asked him "to carefully review and edit the work of [his] staff on routine HR assignments, including the new employee welcome letters and job postings" as there had been "numerous, repeated grammatical/typographical and other errors on this type of correspondence."

In April 2014, Pogoda informed Ulon that the DOI was eliminating Ulon's position. Pogoda offered Ulon a job with a reduced salary in the newly created New York Police Department Office of the Inspector General, but Ulon declined and resigned on May 1, 2014.

On her last day, Ulon provided Natofsky with a written evaluation of his work performance from January 2, 2012 to December 31, 2013. She rated his overall performance a two out of five and gave him a "needs improvement" rating in seven of fourteen categories. She stated, among other complaints, that "tasks have not been completed in a timely manner" and "[e]mail responsiveness needs improvement." On May 8, 2014, Natofsky appealed his evaluation to Pogoda, which she denied on September 11, 2014.

D. Pogoda and Peters's Treatment of Natofsky

Pogoda met Natofsky for the first time on February 21, 2014. According to Natofsky, Pogoda kept staring at his ears and observing him while he spoke. Natofsky testified that, on or about March 6, 2014, he told Pogoda about his hearing disability and that, in response, she shook her head and rolled her eyes at him. Natofsky further testified that throughout March and April 2014, Pogoda was noticeably impatient when speaking to him and told him that he needed to speak more clearly and quickly.

In March 2014, Peters had at least one meeting with Pogoda, Ulon, and Natofsky in which Peters asked about the number of additional people he could hire based on the budget. Ulon and Natofsky did not know the answer, prompting Peters to express his frustration with them to Pogoda. On March 5, 2014, Pogoda emailed a DOI Associate Commissioner that "Shaheen [Ulon] and Richard [Natofsky] are clueless."

In May 2014, Pogoda wrote Natofsky informing him that he would be demoted to Associate Staff Analyst, and that his salary would be decreased to $68,466. Natofsky's position was temporarily assumed by two non-disabled employees: Edgardo Rivera, the new Assistant Commissioner for Administration, and Shayvonne Nathaniel, the new Director of Administration for the Office of the Inspector General. Peters testified that he made the decision to demote Natofsky, although he discussed it with Pogoda.

E. Retaliation and Natofsky's Resignation

Natofsky wrote an email to both Peters and Pogoda on May 28, 2014, protesting their decision to demote him. On June 6, 2014, Pogoda informed Natofsky that he would be moved from his private office to a cubicle. The cubicle was in a high-traffic, high-volume area, and had been used previously by Natofsky's secretary. Natofsky alerted Rivera to the loud volume, and Natofsky was subsequently moved to a different location.

On June 18, 2014, Natofsky appealed his demotion to the Deputy Commissioner for Administration in the Department of Citywide Administrative Services (the "DCAS"), stating that he "was given no justifiable reason as to why [his] salary was so drastically cut," and that his demotion was "illegitimate and contrary to law." On June 23, 2014, DCAS wrote to Rivera regarding Natofsky's nearly fifty percent pay cut: "In general, managers should not lose more than 20% of their salary when they are reassigned to a lower managerial level or to their permanent leave line." However, DCAS noted that a twenty percent cut from $125,000 – Natofsky's prior salary – would result in a salary above the maximum allowed for an Associate Staff Analyst, Natofsky's new position. DCAS thus ordered Natofsky's salary be raised from $68,466 to $88,649 – the maximum permitted for Natofsky's new title. Natofsky's salary was readjusted one month later.

In December 2014, Natofsky resigned from the DOI and began working as an Operations and Budget

Administrator at the New York City Department of Transportation with a salary of $100,437.

F. The District Court's Decision

Natofsky filed the complaint in this action on July 22, 2014, alleging that the City of New York, Pogoda, Ulon, and Peters violated the Rehabilitation Act by discriminating against Natofsky on the basis of his disability, by failing to accommodate his hearing impairment, and by retaliating against him when he complained about their discriminatory actions. He brought similar claims under state and local law, although he also premised those claims on age discrimination.

Following discovery, Defendants moved for summary judgment, which, on August 8, 2017, the district court granted. Addressing Natofsky's employment discrimination claims, the district court held that (1) Ulon's request that Natofsky adjust his work hours and vacation time was not an adverse employment action; (2) Natofsky failed to show that Ulon gave her negative performance review "solely because of Natofsky's disability," (3) Natofsky failed to demonstrate that Peters demoted Natofsky for any discriminatory reason, and (4) Pogoda's purported discriminatory animus could not be imputed to Peters. The district court also held that Natofsky had failed to establish a failure-to-accommodate or retaliation claim under the Rehabilitation Act. The district court declined to exercise supplemental jurisdiction over Natofsky's state and city law claims as it had dismissed all of the claims

over which it had original jurisdiction. This appeal followed.

DISCUSSION

I. MOTION TO SUPPLEMENT THE RECORD

As a preliminary matter, Natofsky has moved pursuant to Federal Rule of Appellate Procedure 10(e)(2) to supplement the record to include deposition testimony that he failed to present to the district court. Specifically, he seeks to include additional transcript pages from Pogoda's and Peters's depositions in an attempt to show that Pogoda, along with Peters, had the authority to demote Natofsky. Rule 10(e)(2) only permits a party to supplement the record when that party omitted material evidence "by error or accident." Fed. R. App. P. 10(e)(2). As we have previously stated, "Rule 10(e) is not a device for presenting evidence to this Court that was not before the trial judge." *Eng v. New York Hosp.*, 199 F.3d 1322 (2d Cir. 1999). Natofsky admits that he did not omit the deposition testimony he now seeks to include because of error or mistake. Thus, his motion to supplement the record must be denied. Defendants' cross-motion to strike Natofsky's supplementary materials and the portions of his brief that refer to those materials is granted.

II. MERITS

A. Legal Standard

Natofsky contests the district court's award of summary judgment to Defendants. We review *de novo* a grant of summary judgment, "construing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in his favor." *McElwee v. Cty. of Orange*, 700 F.3d 635, 640 (2d Cir. 2012). A moving party is entitled to summary judgment where the record reveals "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Employment Discrimination Claims

1. The Rehabilitation Act's Causation Standard for Employment Discrimination Claims

The district court dismissed Natofsky's employment discrimination claims, in part, because Natofsky could not demonstrate that impermissible bias was "the *sole* reason" for any of the adverse employment actions he experienced. *Natofsky v. City of New York*, No. 14 CIV. 5498 (NRB), 2017 WL 3670037, at *12 (S.D.N.Y. Aug. 8, 2017). On appeal, Natofsky argues that the district court erred in relying on a sole-cause standard because the Rehabilitation Act makes a distinction between employment discrimination claims, which

require courts to adopt the more lenient causation standard used in the Americans with Disabilities Act ("the ADA"), and other types of discrimination claims.

The Rehabilitation Act provides that no individual shall be subject to discrimination in any program or activity receiving federal financial assistance "*solely by reason* of her or his disability." 29 U.S.C. § 794(a) (emphasis added). This language differs from the ADA, which makes it unlawful for an employer to discriminate against an individual "*on the basis of* disability." 42 U.S.C. § 12112(a) (emphasis added). Although the two acts appear to have different causation standards, Congress amended the Rehabilitation Act in 1992 to add a provision which states that "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination . . . shall be the standards applied under title I of the Americans with Disabilities Act of 1990." 29 U.S.C. § 794(d).

Whether § 794(d) requires courts to use the ADA's causation standard for claims alleging employment discrimination under the Rehabilitation Act is an issue of first impression in this Circuit. The two principal cases cited by Defendants are not dispositive. In *Sedor v. Frank*, we affirmed the dismissal of a plaintiff's Rehabilitation Act employment discrimination claim because the plaintiff failed to show that his disability was "the only cause of the discharge-triggering conduct." 42 F.3d 741, 746 (2d Cir. 1994). In *Borkowski v. Valley Central School District*, we also accepted the premise that to avoid summary judgment a plaintiff must

"introduce evidence sufficient to permit a factfinder to conclude that she was denied tenure solely because of her disabilities." 63 F.3d 131, 143 (2d Cir. 1995). In both *Sedor* and *Borkowski*, however, the parties accepted that a plaintiff had to demonstrate that any adverse employment action was taken "solely" because of the plaintiff's disability. Neither party raised, and this Circuit never addressed, the issue of whether § 794(d) altered the causation standard for employment discrimination claims brought under the Rehabilitation Act.

We now hold that when a plaintiff alleges an employment discrimination claim under the Rehabilitation Act, the causation standard that applies is the same one that would govern a complaint alleging employment discrimination under the ADA. The text of the statute, § 794(d), requires applying the ADA causation standard to employment discrimination claims asserted under the Rehabilitation Act. It is an established canon of construction that a specific provision "controls over one of more general application." *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991). Subsection 794(d) is, in our opinion, more specific than § 794(a) and, therefore, displaces the causation standard expressed in § 794(a) in the employment discrimination context. In other words, § 794(a) establishes a general causation standard that applies to most discrimination claims brought under the Rehabilitation Act, *see e.g.*, *Reg'l Econ. Cmty. Action Program v. City of Middletown*, 294 F.3d 35 (2d Cir. 2002) (applying the "solely by reason of" causation language to a housing

discrimination case), *superseded by statute on other grounds*, ADA Amendments of 2008, Pub. L. No. 110-325, 122 Stat. 3553, but § 749(d) removes employment discrimination claims from the application of § 794(a)'s general causation standard and mandates the application of the ADA's causation standard.[1]

The other cases cited by Defendants in defense of their position do not persuade us that our reading of the statute should be otherwise. *Parker v. Columbia Pictures Industries* was an employment discrimination case brought under the ADA, and any discussion of the Rehabilitation Act was *dicta*. 204 F.3d 326, 337 (2d Cir. 2000). *Henrietta D. v. Bloomberg* was a case based on

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[1] We recognize that our reading of these two provisions conflicts with the Fifth Circuit's holding that § 794(d) does not modify § 794(a)'s causation standard in the employment discrimination context. *See Soledad v. U.S. Dep't of Treasury*, 304 F.3d 500, 505 (5th Cir. 2002). In *Soledad*, the Fifth Circuit found the text of § 794(a) to be more specific than the text of § 794(d). *Id.* As stated above, we disagree with this conclusion because § 794(d) states the causation standard that applies to the general universe of Rehabilitation Act discrimination cases, and § 794(d), which came later in time, speaks specifically to the causation standard that applies in *employment* discrimination cases brought under the Rehabilitation Act. The Fifth Circuit also found dispositive the fact that Congress "chose not to repeal the 'solely by reason of' language of § 794(a) when it amended the statute," thereby indicating that "Congress did not intend to adopt the ADA standard of causation with the § 794(d) amendment." *Id.* This reasoning is unpersuasive. Establishing § 794(d) as a carve-out for employment discrimination claims would not require Congress to amend the language of § 794(a)'s general causation standard because that standard continues to govern all discrimination claims brought under the Rehabilitation Act except employment discrimination claims.

the defendants' failure to provide plaintiffs with public benefits, not an employment discrimination case. 331 F.3d 261, 272 (2d Cir. 2003). Thus, any discussion of differences between the ADA and Rehabilitation Act in that case is irrelevant here. In *Doe v. Board of Education of Fallsburgh Central School District*, we stated that the Rehabilitation Act does not permit mixed-motive suits. 63 F. App'x 46, 48 (2d Cir. 2003). This is not the same as stating that the causation standard of the Rehabilitation Act for employment discrimination claims is a "solely by reason of" standard. Finally, Defendants rely on *Lewis v. Humboldt Acquisition Corp.*, but the argument addressed there was whether the ADA imported the "solely" causation standard from § 794(a). 681 F.3d 312, 315 (6th Cir. 2012) (en banc). The Sixth Circuit declined to hold that "because of" under the ADA meant a plaintiff must show that his disability was the "sole" cause of the adverse employment action. *Id.* This is an entirely different question than whether the Rehabilitation Act contains a carve-out for employment discrimination claims pursuant to § 794(d) and renders *Lewis* irrelevant to the instant issue.

2. The ADA's Causation Standard for Employment Discrimination Claims

Having concluded that the Rehabilitation Act incorporates the ADA's causation standard for employment discrimination claims, we must now clarify the ADA's causation standard. Title I of the ADA prohibits employers from "discriminat[ing] against a qualified

individual *on the basis of* disability in regard to . . . the hiring, advancement, or discharge of employees." 42 U.S.C. § 12112(a) (emphasis added). Historically, this Circuit has applied a "mixed-motive" test to ADA claims, "under which disability [need only be] one motivating factor in [the employer's] adverse employment action but [need not be] its sole but-for cause." *Parker*, 204 F.3d at 336. When we decided *Parker*, the ADA proscribed discriminatory acts that were engaged in "because of" a disability, instead of "on the basis of." *See* 42 U.S.C. § 12112(a) (1991).

Natofsky argues that, because the Rehabilitation Act incorporates the ADA's causation standard for employment discrimination claims, the district court erred by not applying a mixed-motive standard to his discrimination claims in accordance with *Parker*. Natofsky argues that he presented sufficient evidence for a factfinder to conclude that his disability was a "motivating factor" in the adverse employment actions taken against him. Accordingly, he argues, the district court's decision must be reversed.

Defendants argue that if the Rehabilitation Act does indeed incorporate by reference the ADA's causation standard, then the standard to be applied to Natofsky's employment discrimination claims must be that "but for" the disability, the adverse action would not have been taken. According to Defendants, the Supreme Court decisions *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), effectively overrule this Circuit's decision in

Parker. Defendants argue that Natofsky has failed to demonstrate that his disability was a but-for cause of any adverse employment action taken against him, and that the district court's decision must be affirmed. For the following reasons, we agree with Defendants.

The "mixed-motive" test originates from Title VII, which prohibits employment discrimination "because of" an individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). In 1989, the Supreme Court in *Price Waterhouse v. Hopkins* read the prohibition against acting "because of" a discriminatory motive to mean that an employer cannot take any illegal criterion into account. 490 U.S. 228, 240 (1989). Thus, a defendant would be liable under Title VII if a plaintiff could demonstrate that discrimination was a motivating factor in the defendant's adverse employment action. *Id.* at 244. A defendant, however, could avoid all liability if it could prove it would have taken the same action regardless of any impermissible consideration. *Id.*

In 1991, Congress amended Title VII and determined that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added). Congress disagreed that an employer could avoid all liability by proving it would still have taken the same adverse action in the absence of discriminatory motivation. Instead, where an employer could demonstrate that it would

have taken the adverse action even in the absence of discriminatory motivation, Congress denied the plaintiff damages and limited the plaintiff's remedies to "declaratory relief, injunctive relief . . . , and attorney's fees and costs." 42 U.S.C. § 2000e-5(g)(2)(B). Even though *Price Waterhouse* and the subsequent 1991 Congressional amendments dealt only with Title VII, the majority of circuit courts, including this one, held that the mixed-motive burden-shifting framework applied equally to other anti-discrimination statutes that employed the "because of" causation language, including, prior to 2008, the ADA. *See Parker*, 204 F.3d at 336–37.

In 2009, the Supreme Court in *Gross* addressed whether Title VII's "motivating factor" standard applied outside of the Title VII context to claims brought under the Age Discrimination in Employment Act (the "ADEA"), which prohibits employers from "discriminat[ing] against any individual . . . because of such individual's age." 27 U.S.C. § 623(a)(1); *see also Gross*, 557 U.S. at 174. The Court held that it did not because "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Gross*, 557 U.S. at 174. Furthermore, the Court found that Congress must have omitted the language intentionally because, at the time it added §§ 2000e-2(m) and 2000e-5(g)(2)(B) to Title VII, "Congress . . . contemporaneously amended the ADEA in several ways." *Id.* Examining the text of the ADEA, the Court concluded that the words "because of" mean "that age was the

'reason' that the employer decided to act." *Id.* at 176. Thus, the Court held that a plaintiff must prove that age was the but-for cause of the employer's adverse decision – not just a motivating factor. *Id.*

In *Nassar*, the Supreme Court revisited the principle defined in *Gross*: that the text of an anti-discrimination statute must expressly provide for a "motivating factor" test before that test can be applied. The Court held that even though Title VII permits mixed-motive causation for claims based on the personal characteristics of race, color, religion, sex, or national origin (*i.e.*, "status-based" discrimination), it does not permit mixed-motive causation for retaliation-based claims. *Nassar*, 570 U.S. at 360. The Court based its holding on the text and structure of Title VII. *Id*. It noted that § 2000e-2(m), which contains the mixed-motive causation provision, "mentions just the . . . status-based [factors]; and . . . omits the final two, which deal with retaliation." *Id.*; *see also* 42 U.S.C. § 2000e-2(m). It also noted that "Congress inserted [the 'mixed-motive' test] within the section of the statute that deals only with [the status-based factors], not the section that deals with retaliation claims or one of the sections that apply to all claims of unlawful employment practices." *Id.* Because, according to the Court, Title VII has a "detailed structure," the Court could conclude that Congress knew how to word the mixed-motive provision to encompass the anti-retaliation section and intentionally chose not to do so. *Id.* As a result, Title VII retaliation "must be proved according to traditional principles of but-for causation,

not the lessened causation test stated in § 2000e-2(m)." *Id.*

Gross and *Nassar* dictate our decision here. The ADA does not include a set of provisions like Title VII's § 2000e-2(m) (permitting a plaintiff to prove employment discrimination by showing that discrimination was a "motivating factor" in the adverse decision) and § 2000e-5(g)(2)(B) (limiting the remedies available to plaintiffs who can show that discrimination was a "motivating factor" but not a but-for cause of the adverse decision). There is no express instruction from Congress in the ADA that the "motivating factor" test applies. Moreover, when Congress added § 2000e-2(m) to Title VII, it "contemporaneously amended" the ADA but did not amend it to include a "motivating factor" test. *See* Pub. L. No. 102-166, §§ 109, 315; *see also Gross*, 557 U.S. at 174. We, therefore, join the conclusion reached by the Fourth, Sixth, and Seventh Circuits that the ADA requires a plaintiff alleging a claim of employment discrimination to prove that discrimination was the but-for cause of any adverse employment action. *See Gentry v. E. W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 228, 235–36 (4th Cir. 2016); *Lewis*, 681 F.3d at 321; *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 963–64 (7th Cir. 2010).

Natofsky argues that *Gross* does not determine the outcome of this case because, unlike the ADEA, the ADA indirectly incorporates Title VII's mixed-motive standard by reference in its "Enforcement" provision, which states:

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of [Title VII] shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter. . . .

42 U.S.C. § 12117(a). Notably absent from this provision, however, is § 2000e-2(m), which establishes Title VII's mixed-motive test. *See Gentry*, 816 F.3d at 234 ("However, while [42 U.S.C. § 12117(a)] incorporates Title VII's 'Enforcement provisions' in § 2000e–5, it does not incorporate the 'Unlawful employment practices' in § 2000e–2, including § 2000e–2(m), which establishes mixed motive employment practices as unlawful.").

Natofsky points out that the ADA incorporates § 2000e-5(g)(2)(B), which cross-references § 2000e-2(m). This cross-cross-reference, however, cannot be used to create new substantive liability under the ADA as section 2000e-5(g)(2)(B) deals exclusively with the remedies available to plaintiffs who have first proven a violation under § 2000e-2(m), *i.e.*, a violation based on individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(m). Section 2000e-2(m) makes no mention of disability. An ADA plaintiff will never be able to invoke § 2000e-5(g)(2)(B) because, as the Fourth and Sixth Circuits have explained, an ADA plaintiff can only invoke Title VII's enforcement provisions after first "alleg[ing] a violation of the ADA itself

– a violation of '*this* chapter.'" *Gentry*, 816 F.3d at 235 (quoting 42 § U.S.C. 12117(a)); *Lewis*, 681 F.3d at 319–20. As stated above, the ADA's text does not mention that a violation occurs when discrimination is the "motivating factor" in an employer's decision.

Natofsky argues that our interpretation renders the ADA's incorporation of § 2000e-5 superfluous. This is not so. The majority of the other provisions in § 2000e-5 clearly apply to the ADA. *See Lewis*, 681 F.3d at 320 ("[2000e-5] contains more than a dozen other provisions detailing procedures that remain applicable under the ADA.") By incorporating § 2000e-5, which contains all of Title VII's "Enforcement provisions," into the ADA, we can assume that Congress was aware that some of those provisions would apply only to Title VII cases. *See id.* ("In incorporating a wide range of Title VII enforcement procedures and remedies into the ADA, it is hardly surprising that some of those provisions . . . apply by their terms only to Title VII cases.").

Having determined that the ADA does not incorporate Title VII's mixed-motive standard, the remaining question is what precisely "on the basis of disability" means. 42 U.S.C. § 12112(a). In *Gross*, the Court held that "because of" – the language used in the ADA prior to the 2008 amendments – meant "by reason of: on account of" and required a showing of but-for causation. *Gross*, 557 U.S. at 176 (quoting 1 Webster's Third New Int'l Dictionary 194 (1966)). The Court cited to a prior case, *Safeco Insurance Co. of America v. Burr*, which stated that "[i]n common talk, the phrase 'based on' indicates a but-for causal

relationship." *Gross*, 557 U.S. at 176 (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63, 64 n.14 (2007)). We find no reason to hold that there is any meaningful difference between "on the basis of," "because of," or "based on," which would require courts to use a causation standard other than "but-for." We conclude that "on the basis of" in the ADA requires a but-for causation standard.

Further, nothing in the legislative history of the ADA indicates that "on the basis of" was supposed to lower the causation standard for employment discrimination claims below the traditional but-for standard. The ADA originally prohibited discrimination "against a qualified individual with a disability because of the disability of such individual." Pub. L. No. 101-336, § 102 (1990). The ADA Amendments Act of 2008 changed this language, prohibiting discrimination "against a qualified individual on the basis of disability." Pub. L. No. 110-325, § 5 (2008). Legislative history suggests that Congress intended this change to return the "ADA's focus" to "where it should be – the question of whether the discrimination occurred, not whether the person with a disability is eligible in the first place." 154 Cong. Rec. S9626 (Sept. 26, 2008) (statement of Sen. Reid) (2008); *see also* 154 Cong. Rec. S8840-01 (Sept. 16, 2008) (Senate Statement of Managers) ("[L]ower court cases have too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims. . . ."). Thus, as stated by the Fourth Circuit, "[t]he legislative history suggests the language

was changed to decrease the emphasis on whether a person is disabled, not to lower the causation standard." *Gentry*, 816 F.3d at 236.

3. Application of ADA's But-For Causation Standard to Natofsky's Claims

Natofsky bases his employment discrimination claims on Pogoda and Peters's decision to demote him, and Ulon's conduct when she was his immediate supervisor. Natofsky has failed to demonstrate that discrimination based on his disability was the but-for cause of any of these actions.

a. Demotion Claim

Natofsky claims that his demotion was caused by unlawful discrimination based on his hearing disability. The core of his claim is that Pogoda, not Peters, demoted him with discriminatory intent.

In his statement of material facts in opposition to Defendants' motion for summary judgment, Natofsky admitted that Peters, not Pogoda, executed his demotion.[2] Natofsky argues, however, that the City may still be held liable for Peters's act because Pogoda's

[2] On appeal, Natofsky tries to argue that Pogoda was the ultimate decision-maker and points to deposition testimony that could possibly suggest as much. Natofsky, however, never presented that testimony to the district court. Because we have denied Natofsky's motion to supplement the record, we may not rely on that testimony now.

discriminatory intent can be imputed to Peters through a "Cat's Paw" theory of liability.

i. Cat's Paw

Under a Cat's Paw theory of liability, a discriminatory motive may be imputed to a final decision-maker if the decision-maker's adverse employment action was proximately caused by a subordinate who had a discriminatory motive "and intended to bring about the adverse employment action." *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 272 (2d Cir. 2016) (quoting *Cook v. IPC Int'l Corp.*, 673 F.3d 625, 628 (7th Cir. 2012)). Natofsky argues that Pogoda's animus towards Natofsky's disability was the proximate cause of Peters's decision to demote Natofsky.

The Supreme Court and this Circuit have permitted plaintiffs to use a Cat's Paw theory of liability in anti-discrimination statutes requiring the more lenient mixed-motive causation standard. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011); *Vasquez*, 835 F.3d at 272–73. Neither the Supreme Court nor this Circuit, however, has addressed whether the same theory would apply to statutes requiring plaintiffs to demonstrate that discriminatory intent was the but-for cause of an adverse employment action. The district court held that Cat's Paw liability does not apply to Rehabilitation Act cases under the assumption that the stricter "solely" causation standard applies. *Natofsky*, 2017 WL 3670037, at *12.

While the question of whether Cat's Paw liability applies outside of the mixed-motive context is an important one, we decline to decide it now. Defendants never responded on appeal to Natofsky's application of Cat's Paw liability to the Rehabilitation Act, and, as a consequence, Defendants have waived any objection to proceeding under this theory. We will therefore assume that Natofsky can pursue a Cat's Paw theory and, thus, any discriminatory intent harbored by Pogoda can be imputed to Peters.

ii. Liability

Even assuming Pogoda's discriminatory intent can be imputed to Peters, Natofsky failed to present the district court with evidence from which a reasonable factfinder could conclude that, but for his hearing disability, Natofsky would not have been demoted. There was ample evidence that Pogoda and Peters had reason to (and did) think that Natofsky's performance was deficient and demoted him on that basis. First, Pogoda noted in March 2014 her view that Natofsky was "clueless." Second, that same month, Natofsky failed to provide Peters with information regarding staffing and budgeting at the DOI, two areas under Natofsky's purview. Third, there was a new administration in office that was restructuring the department in which Natofsky worked. Defendants presented evidence that other employees had been asked to leave or were transferred from their positions, including Natofsky's immediate supervisor, Ulon. We conclude that "construing the evidence in the light most favorable" to Natofsky and

"drawing all reasonable inferences in his favor," no reasonable juror could conclude that Natofsky would have retained his position but for his disability. *McElwee*, 700 F.3d at 640 (2d Cir. 2012).

We also note that, drawing all inferences in Natofsky's favor, no reasonable factfinder could conclude that the explanation of poor performance proffered by Pogoda and Peters was pretextual. Pogoda's March 2014 email calling Natofsky "clueless," Ulon's negative performance review on or about May 1, 2014, and Natofsky's failure to answer Peters's staffing and budgetary inquiries are contemporaneous evidence of Natofsky's poor performance. That a prior administration had praised Natofsky's work is not enough to establish that the new administration could not have concluded that he was underperforming. *See Viola v. Philips Med. Sys. of N. Am.*, 42 F.3d 712, 717–18 (2d Cir. 1994) (concluding that a first-time negative performance review, although given on the eve of dismissal, was not suspect).

b. Claims Based on Ulon's Conduct

Natofsky also argues that Ulon's denial of his preferred work hours and vacation time, as well as the negative performance review she gave him, constitute adverse employment actions, and that those actions would not have occurred but for Ulon's discriminatory intent. For the reasons set forth below, we agree with the district court's decision to grant summary judgment to Defendants on these claims.

First, fatal to Natofsky's claims is his failure to provide evidence of Ulon's discriminatory intent. Natofsky points to Ulon's complaints about his timeliness in responding to emails as evidence of discriminatory intent. He attributes any delay in responding to emails a result of his inability to reply to emails during meetings, which he was unable to do because of his hearing disability. Natofsky, however, points to no evidence that Ulon's critique of his email responsiveness was based specifically on Natofsky's failure to respond to emails during meetings, as opposed to a more general critique of his timeliness in responding to emails. Therefore, criticism of his email practices provides no basis to conclude that Ulon had discriminatory intent.

Second, Ulon's initial demands that Natofsky change his work hours and vacation time did not adversely affect him because she dropped her demands after meeting with Hearn and Natofsky. Furthermore, it is unlikely that these workplace changes, had they even occurred, would count as actionable adverse actions. *See Davis v. New York City Dep't of Educ.*, 804 F.3d 231, 235 (2d Cir. 2015) (for an employer's action to be "materially adverse with respect to the terms and conditions of employment," it must be "more disruptive than a mere inconvenience or an alteration of job responsibilities" (internal quotation marks omitted)); *see e.g.*, *Kaur v. New York City Health & Hosps. Corp.*, 688 F. Supp. 2d 317, 332 (S.D.N.Y. 2010) ("[D]enial of vacation time and alteration of Plaintiff's lunch schedule, taken alone, do not rise to the level of an adverse employment action.").

Finally, Natofsky's argument regarding Ulon's negative performance review cannot survive summary judgment because, as stated above, there is no evidence of Ulon's discriminatory intent. In addition, there is no evidence that either Pogoda or Peters relied upon Ulon's review in deciding to demote Natofsky, and a negative performance review, without any showing of a negative ramification, cannot constitute an adverse employment action. *Fairbrother v. Morrison*, 412 F.3d 39, 56–57 (2d Cir. 2005) (surveying cases and concluding that a negative performance evaluation cannot be considered an adverse employment action without evidence that the evaluation "altered . . . compensation, benefits, or job title"), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

C. Failure-to-Accommodate Claim

Natofsky argues that Defendants are liable for violating the Rehabilitation Act because they failed to accommodate his hearing disability. Specifically, Natofsky argues that the DOI failed to accommodate his request to have a secretary alert him to urgent emails during meetings. We affirm the district court's judgment against Natofsky on this claim.

To establish a *prima facie* case of discrimination based on an employer's failure to accommodate a disability, under either the ADA or the Rehabilitation Act, a plaintiff must demonstrate that "(1) [the plaintiff] is a person with a disability under the meaning of [the

statute in question]; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations." *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 97 (2d Cir. 2009) (internal quotation marks omitted); *see also Lyons v. Legal Aid Soc.*, 68 F.3d 1512, 1515 (2d Cir. 1995) (stating that the elements needed to demonstrate a failure-to-accommodate claim under either the ADA or the Rehabilitation Act are the same). In addition, a plaintiff must show "the *connections* between (1) the failure to accommodate a disability, (2) the performance deficiencies, and (3) the adverse employment action." *Parker v. Sony Pictures Entm't, Inc.*, 260 F.3d 100, 108 (2d Cir. 2001) (emphasis in original).

Natofsky has failed to provide evidence from which a reasonable juror could conclude that (1) the DOI's failure to accommodate his disability by providing secretarial alerts while he was in meetings resulted in the negative performance review he received from Ulon, or (2) Ulon's negative performance review ultimately resulted in Natofsky's demotion. As previously stated, there is no evidence that Ulon was referring to Natofsky's inability to respond to emails during meetings in her performance review. Nor as noted earlier is there any evidence that Pogoda or Peters considered Ulon's review when they decided to demote Natofsky. Accordingly, we find that the district court correctly granted summary judgment for Defendants on this claim.

D. Retaliation Claim

Natofsky asks us to vacate the district court's dismissal of his retaliation claims. He argues that (1) Ulon retaliated against him for his complaints to Hearn, (2) he was demoted in retaliation for appealing Ulon's negative performance review, and (3) the DOI subjected him to a slew of retaliatory actions – including moving him to a noisy cubicle and delaying his salary adjustment – after he contested his demotion. We agree with the district court that Natofsky failed to provide sufficient support for any claim for retaliation under the Rehabilitation Act.

"[T]he elements of a retaliation claim under either [the Rehabilitation Act] or the ADA are (i) a plaintiff was engaged in protected activity; (ii) the alleged retaliator knew that plaintiff was involved in protected activity; (iii) an adverse decision or course of action was taken against plaintiff; and (iv) a causal connection exists between the protected activity and the adverse action." *Weixel v. Bd. of Educ. of City of New York*, 287 F.3d 138, 148 (2d Cir. 2002) (internal quotations omitted). "A causal connection in retaliation claims can be shown either '(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant.' " *Littlejohn v. City of New York*, 795 F.3d 297, 319 (2d Cir. 2015) (quoting *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000)).

Natofsky's first claim of retaliation is against Ulon. He argues that Ulon wrote the March 10, 2014 counseling memo and May 1, 2014 negative performance review in retaliation for Natofsky's decision to complain about Ulon to Hearn. He argues that the protected activity – the decision to speak to Hearn – was followed closely by Ulon's adverse employment actions. This argument, however, must fail because Ulon's actions occurred in 2014, almost a year after the meeting with Hearn – too long a period of time for a jury to be able to infer a causal connection. *See Harrison v. U.S. Postal Serv.*, 450 F. App'x 38, 41 (2d Cir. 2011) (concluding a period of "several months" between when a plaintiff engaged in a protected activity and when he suffered an adverse employment action was too long to support the inference of a causal connection). Natofsky argues that Ulon stalled in retaliating against him because she was waiting until Hearn left the DOI. Natofsky, however, provides no evidence for this assertion, and, therefore, summary judgment was appropriate for his claim of retaliation based on Ulon's conduct.

Natofsky next argues that Pogoda and Peters retaliated against him for his decision to appeal Ulon's negative performance review on May 8, 2014 by demoting him. This claim fails for two reasons. First, appealing a negative performance review is not a protected activity that can give rise to a retaliation claim. "Protected activity" is "action taken to protest or oppose statutorily prohibited discrimination." *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000), *superseded on other grounds by* N.Y.C. Local L. No. 85. The record

shows that Natofsky was not protesting discrimination in his appeal but offering a defense of why he may have been slow in responding to emails. Second, the record reveals that the decision to reorganize the department and demote Natofsky was made in March or April 2014, in advance of Ulon's performance review and Natofsky's decision to appeal that review. Thus, Natofsky's demotion could not have been in retaliation for his appeal of Ulon's performance review. The district court properly awarded Defendants summary judgment on this claim.

Natofsky's final retaliation claim relating to the challenges he made to his demotion cannot survive summary judgment because those challenges also do not constitute protected activity. Natofsky challenged his demotion first by sending the May 28, 2014 email to Peters and Pogoda, and then by appealing to DCAS on June 18, 2014. Neither gave any specific indication that Natofsky was protesting discrimination. Natofsky's May 28, 2014 email and DCAS appeal stated that his demotion was "illegitimate and contrary to law." This statement is too general to indicate that Natofsky was protesting his demotion as discriminatory and, therefore, cannot sustain a retaliation claim. *Lucio v. New York City Dep't of Educ.*, 575 F. App'x 3, 6 (2d Cir. 2014) ("While it is unnecessary for an individual to specifically invoke the word discrimination when complaining in order to alert her employer to her protected activity, there must be some basis to conclude that the employer was aware that the plaintiff engaged in protected activity."). Thus, we affirm the district court's

grant of summary judgment on Natofsky's retaliation claims.

CONCLUSION

Accordingly, for the reasons set forth above, the judgment of the district court is **AFFIRMED**. The motion to supplement the record on appeal is hereby **DENIED**, and the cross-motion to strike supplementary materials and any reference to those materials in Natofsky's brief is **GRANTED**.

CHIN, *Circuit Judge*, dissenting:

The district court granted summary judgment dismissing plaintiff-appellant Richard Natofky's claims on the basis that a reasonable jury could not find that his disability was a but-for cause of the employer's actions. The majority affirms. While I agree that a but-for causation standard applies to the retaliation claim, I believe that the discrimination and failure-to-accommodate claims brought under the Rehabilitation Act are governed by the same standard that the courts have uniformly applied for more than two decades – the motivating-factor standard. Accordingly, I concur in the dismissal of the retaliation claim, but I dissent from the dismissal of the discrimination and failure-to-accommodate claims.

I agree with the majority that the Rehabilitation Act incorporates the causation standard of the

Americans with Disabilities Act (the "ADA"). The issue is whether the ADA continues to use a motivating-factor standard, even in light of the 2008 Amendments to the ADA and the Supreme Court's decisions in *Gross v. FBL Fin. Servs., Inc*., 557 U.S. 167 (2009), and *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). I respectfully disagree with the majority's conclusion that a but-for standard now governs ADA and Rehabilitation Act claims.

First, the reasoning in *Gross* does not apply to ADA claims. In *Gross*, the Supreme Court analyzed which causation standard governs claims under the Age Discrimination in Employment Act (the "ADEA") – not claims under the ADA. The Court cautioned that "we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" *Gross*, 557 U.S. at 174 (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)). The Court then noted that Title VII did not control its construction of the ADEA because "Title VII is materially different with respect to the relevant burden of persuasion." *Id.* at 173. Importantly, the ADA incorporates the powers, remedies, and procedures of Title VII, *see* 42 U.S.C. § 12117(a) (incorporating "[t]he powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9"), whereas the ADEA incorporates the powers, remedies, and procedures of the Fair Labor Standards Act, *see* 29 U.S.C. § 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for

subsection (a) thereof), and 217 of this title, and subsection (c) of this section."). Hence, different rules apply to the ADA and Rehabilitation Act than to the ADEA.

Moreover, in *Gross*, the Supreme Court held that ADEA claims are governed by the but-for standard – not the motivating-factor standard – because (1) the Court had "never held" that Title VII's motivating-factor standard applies to ADEA claims, and (2) "Congress neglected to add such a [motivating-factor] provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways." *Id.* at 174-75.

These rationales do not apply to the ADA. The motivating-factor standard has governed ADA claims for more than two decades. *See*, *e.g.*, *Parker v. Columbia Pictures Indus*., 204 F.3d 326, 337 (2d Cir. 2000); *Pedigo v. P.A.M. Transp., Inc*., 60 F.3d 1300, 1301 (8th Cir. 1995). Furthermore, when Congress amended Title VII in 1991 to include the motivating-factor language, *see* Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 107, 109, 105 Stat. 1071, 1076-78 (1991), it incorporated the motivating-factor language into the ADA, as the ADA explicitly refers to and adopts the enforcement provisions of Title VII, including § 2000e-5, *see* 42 U.S.C. § 12117(a). We, therefore, cannot draw the same inference from Congress's actions as the Supreme Court did in *Gross* for the ADEA. *See also Lewis v. Humboldt Acquisition Corp*., 681 F.3d 312, 324 (6th Cir. 2012) (Clay, J., dissenting) (explaining why the rationale of *Gross*

does not apply to the ADA); *id.* at 326 (Stranch, J., dissenting) (providing context for the enactment of the ADA and the Civil Rights Act of 1991 and arguing that the motivating-factor standard applies). *But see Gentry v. E. W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 228, 234-35 (4th Cir. 2016) (applying the rationale from *Gross* to the ADA); *Lewis*, 681 F.3d at 318-19 (en banc) (same); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010) (same).

Second, the 2008 Amendments show that Congress wanted to retain, not eliminate, the motivating-factor standard. The primary purpose of the 2008 Amendments was to "reinstat[e] a broad scope of protection to be available under the ADA" because several Supreme Court cases had narrowed that scope of protection. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 122 Stat. 3553, 3554 (2008). It is not clear, then, why, as the majority suggests, the 2008 Amendments would warrant deviating from the motivating-factor standard we, and our sister circuits, applied for years before the amendments. *See*, *e.g.*, *Head v. Glacier Nw. Inc.*, 413 F.3d 1053, 1065 (9th Cir. 2005); *Parker*, 204 F.3d at 337; *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999); *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1033-34 (7th Cir. 1999); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1076 (11th Cir. 1996); *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996); *Buchanan v. City of San Antonio*, 85 F.3d 196, 200 (5th Cir. 1996); *Pedigo*, 60 F.3d at 1301.

Moreover, Congress knew that courts applied the motivating-factor standard in evaluating ADA claims.

It could have changed the ADA's causation standard with the 2008 Amendments, but it did not do so. "[W]e have recognized that Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that Congress at least acquiesces in, and apparently affirms, that interpretation." *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988) (internal quotation marks and alteration omitted). The fact that Congress amended the ADA to reject an interpretation of the ADA that was not aligned with Congress's intent demonstrates that it likely would have done so for the ADA's causation standard if the courts, in applying the motivating-factor standard, were applying the wrong standard. Its decision not to amend the ADA indicates its at least implicit acceptance of the motivating-factor standard.

Third, the language of the ADA confirms that the motivating-factor standard still applies. While the ADA does not explicitly incorporate § 2000e-2, it does incorporate § 2000e-5, and § 2000e-5(g)(2)(B) specifically refers to the motivating factor standard. *See* 42 U.S.C. § 12117(a).[1] If we interpret the ADA to apply the

[1] In relevant part, § 2000e-5(g)(2)(B) provides that where an individual proves a violation of § 2000e-2(m) ("an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice"), the relief is limited if the "respondent demonstrates that the respondent would have taken the same action in the absence of the motivating factor." *But see Lewis*, 681 F.3d at 320 (explaining that "§ 2000e-5 does not direct judges to apply the substantive motivating factor standard from § 2000e-2(m); it permits them only to provide a remedy

but-for standard of causation, that provision would be rendered irrelevant and superfluous. *See*, *e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) ("The Court is obliged to give effect, if possible, to every word Congress used." (internal quotation marks omitted)); *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (internal quotation marks omitted)). *But see Lewis*, 681 F.3d at 319-20 (concluding that "the ADA's incorporation of § 2000e-5 [is not] meaningless" because it contains "dozens of other provisions . . . that remain applicable under the ADA"). Moreover, there is nothing to indicate that Congress chose not to incorporate § 2000e-2 into the ADA with the intent that the stricter causation standard would apply. Indeed, if that had been its intent, it would have omitted § 2000e-5(g)(2)(B), and it surely would have explained why it was making such a significant change. *See also id.* at 325 (Clay, J., dissenting) (explaining why a but-for standard imposes a greater burden on individuals than Congress intended).

Finally, the ADA's legislative history makes clear that Congress intended claims under the ADA to continue to have the same causation standard as claims under Title VII. When Congress enacted the ADA, it intended for the ADA's remedies to "parallel" Title VII's

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for plaintiffs who prove a violation under section 2000e-2(m)," which "says nothing about disability status" (internal quotation marks and alterations omitted)).

remedies because "[t]he remedies should remain the same, for minorities, for women, and for persons with disabilities. No more. No less." 136 Cong. Rec. H2615 (daily ed. May 22, 1990) (statement of Rep. Edwards). A House Report explained that "if the powers, remedies and procedures change in [T]itle VII of the 1964 Act, they will change identically under the ADA for persons with disabilities." H.R. Rep. No. 101-485, pt. 3, at 48 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 471. Therefore, "[b]y retaining the cross-reference to [T]itle VII, the Committee's intent [wa]s that the remedies of [T]itle VII, currently and *as amended in the future*, will be applicable to persons with disabilities." *Id.* (emphasis added); *see also Lewis*, 681 F.3d at 322-23 (Clay, J., dissenting) (explaining why the ADA's legislative history supports applying a motivating-factor standard).

For those reasons, I believe the ADA's causation standard continues to be the motivating-factor standard. Because the Rehabilitation Act incorporates the ADA's causation standard, the motivating-factor standard applies to Natofsky's claims. Under the motivating-factor standard, Natofsky "must show only that disability played a motivating role" in defendants' decision to take adverse employment action; Natofsky "need not demonstrate that disability was the sole cause of the adverse employment action." *Parker*, 204 F.3d at 337.

Here, Natofsky has put forth evidence that Pogoda and Ulon were at least motivated in part by Natofsky's disability. First, Natofsky presented evidence that

Pogoda – whose discriminatory intent can be imputed to Peters, *see Vasquez v. Empress Ambulance Serv., Inc*., 835 F.3d 267, 272-73 (2d Cir. 2016) (applying cat's paw theory of liability to a claim evaluated under the mixed-motive causation standard) – fixated on the physical markers of his hearing disability, shook her head in disgust and rolled her eyes after Natofsky told her about his hearing disability, demanded he speak faster, and otherwise ridiculed him for his speech. Second, as evidence of Ulon's discriminatory animus, Natofsky presented evidence of two conversations during which his disability was discussed: his exchange with Ulon about email responsiveness and Hearn's conversation with Ulon regarding Natofsky's hours and vacation request. There was other evidence as well, including inexplicably harsh treatment: when new management came in, Natofsky quickly fell from a highly compensated, highly-evaluated supervisor to a poorly-evaluated generalist making just over half his prior salary and confined to what had been his former assistant's cubicle. "[C]onstruing the evidence in the light most favorable" to Natofsky and "drawing all reasonable inferences in his favor," a reasonable juror could conclude that Natofsky's disability was a motivating factor in the adverse employment actions against him and that the reasons stated by Pogoda, Peters, and Ulon were pretextual. *McElwee v. Cty. of Orange*, 700 F.3d 635, 640 (2d Cir. 2012).

Accordingly, I would vacate the district court's award of summary judgment dismissing Natofsky's discrimination and failure-to-accommodate claims and

remand for those claims to be considered under the correct legal standard, and I respectfully dissent to that extent.

APPENDIX B

United States District Court for
the Southern District of New York

**Natofsky v. City of New York,
2017 U.S. Dist. LEXIS 127289**

August 8, 2017, Decided

Counsel: For Richard Natofsky, Plaintiff: Samuel Okwudili Maduegbuna, LEAD ATTORNEY, William W. Cowles, II, Maduegbuna Cooper LLP, New York, NY.

For The City Of New York: Susan Pogoda, Shaheen Ulon, Mark Peters, John and Jane Doe, said names being fictitious, the persons intended being those who aided and abetted the unlawful conduct of the named defendants, Defendants: Maxwell Douglas Leighton, LEAD ATTORNEY, New York City Law Department, New York, NY; Lawrence John Profeta, New York City Office Of Corporation Counsel, New York, NY.

Judges: NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

Opinion by: NAOMI REICE BUCHWALD

Opinion

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Plaintiff Richard Natofsky brings this action against defendants City of New York, Susan Pogoda, Shaheen

Ulon, Mark Peters, and unidentified John and Jane Does alleging claims of discrimination and retaliation in violation of the Rehabilitation Act, 29 U.S.C. § 701 et seq., the New York Human Rights Law ("NYHRL"), N.Y. Exec. Law § 290 et seq., and the New York City Human Rights Law ("NYCHRL"), New York City Administrative Code § 8-101 et seq. Plaintiff alleges that the defendants, who were his employer and superiors, discriminated against him on the bases of age and disability and retaliated against him for engaging in activity protected by law. The defendants brought a motion for summary judgment on all of plaintiff's claims. For the reasons stated below, the defendants' motion is granted as to the Rehabilitation Act claims. The Court declines to exercise pendent jurisdiction over the NYHRL and NYCHRL claims and dismisses them without prejudice to their re-filing in state court.

I. BACKGROUND

The following facts are taken from the parties' Local Rule 56.1 Statements. Because we do not address Natofsky's state and city law age discrimination claims in this opinion, the facts pertinent to those allegations are omitted from our recital.

Plaintiff Natofsky has a severe hearing impairment due to nerve damage that he suffered as an infant. Defs.' 56.1 Stmt. ¶ 2 (ECF No. 45); Pl.'s 56.1 Stmt. ¶ 171 (ECF No. 50). Although Natofsky wears hearing aids, they do not fully compensate for the hearing loss; Natofsky must also focus intently on a person who is

speaking in order to read lips. Pl.'s 56.1 Stmt. ¶¶ 173, 176. In addition, Natofsky speaks imperfectly and more slowly than the average person. Pl.'s 56.1 Stmt. ¶ 175.

From December 2012 until December 2014, Natofsky was employed by the New York City Department of Investigation ("DOI"). Defs.' 56.1 Stmt. ¶ 1. At the beginning of his tenure at DOI, Natofsky's title was Director of Human Resources and Budget and his salary was $125,000 per year. Defs.' 56.1 Stmt. ¶ 21. Natofsky reported to defendant Shaheen Ulon, Deputy Commissioner of Administration. Defs.' 56.1 Stmt. ¶ 23. The head of DOI, Commissioner Rose Gill Hearn, served under then-Mayor Michael Bloomberg. Defs.' 56.1 Stmt. ¶ 34.

In December 2012, Natofsky first informed Ulon that he had a severe hearing impairment and consequently might have trouble hearing her; that she had to face him when speaking; and that background noise would make hearing more difficult for him. Pl.'s 56.1 Stmt. ¶ 26.

The first three months of Natofsky's employment appear to have passed without much incident. However, sometime in or about March 2013, Ulon asked Natofsky to "follow up on e-mails more quickly" because Natofsky "didn't respond as quickly as the issues needed to be addressed." Defs.' 56.1 Stmt. ¶ 28. In response, on March 25, 2013, Natofsky wrote an email to Ulon titled "Followup: March 22 Discussion," which said in part:

I would also like to give you a better understanding of my hearing loss. I have a severe hearing loss that equates to an 85% loss of hearing in both ears. I am dependant [sic] on my hearing aids to hear, but my hearing with the hearing aids it [sic] is not the same as that of a person with normal hearing. Hearing does not come naturally to me even with the usage of hearing aids. Hearing is something I have to focus on and actually "do", contrary to others with normal hearing. Therefore, I am not able to listen and do something else, such as writing or reading emails. When I am listening to someone speak, I need to concentrate and at times I read a person's lips. Even so, there will be occasions that I miss something or may hear something incorrectly. I put an extraordinary effort into listening and cannot multi task while I am doing that.

As for responding to Executive Staff emails immediately, I believe that all my emails are responded to in a timely manner. They are answered as soon as I am able to and unless there are extenuating circumstances, the emails are answered before the end of a day. I realize that everyone believes his or her issue is the priority. I suggest that if someone has an extremely urgent or time sensitive issue, he or she contact [secretary] Phyllis so that she can alert me. If some of the emails I send to others were answered in a timelier manner, it would make my job easier. Sometimes I have to wait for days for a response and need to send follow up emails. I am often waiting for information necessary for me to complete

> something and this slows down the processing of work assignments.

Leighton Decl. Ex. D (ECF No. 43). After this email, Ulon and Natofsky had no further discussion of the topic. Pl.'s 56.1 Stmt. ¶ 28(c).

In June 2013, Ulon made two additional requests of Natofsky. First, she asked Natofsky to arrive at work between 9:00 a.m. and 10:00 a.m., rather than between 8:00 a.m. and 8:30 a.m. as was his practice. Defs.' 56.1 Stmt. ¶ 29. Second, after Natofsky requested specific dates in the summer to take his annual leave, Ulon asked Natofsky to "submit leave requests that are longer in length, but occur less frequently." Defs.' 56.1 Stmt. ¶ 32. Upset by these requests, Natofsky contacted Commissioner Gill Hearn. Pl.'s 56.1 Stmt. ¶ 31(e); Defs.' 56.1 Stmt. ¶ 34. Natofsky explained to Gill Hearn that his early arrival to work allowed him to catch up on emails that he could not respond to while in meetings, and that Ulon did not understand his "special needs in terms of hearing." Pl.'s 56.1 Stmt. ¶ 34. Gill Hearn then met with Ulon to discuss the requests. Defs.' 56.1 Stmt. ¶¶ 35, 38. The parties dispute whether Gill Hearn and Ulon discussed Natofsky's disability at this meeting. Defs.' 56.1 Stmt. ¶ 36; Pl.'s 56.1 Stmt. ¶ 36. Defendants do assert that Gill Hearn and Ulon discussed Ulon's concerns with Natofsky's work performance, and plaintiff neither disputes this assertion nor offers evidence to the contrary. Defs.' 56.1 Stmt. ¶ 37; Pl.'s 56.1 Stmt. ¶ 37. In any event, it is undisputed that after the meeting between Gill Hearn and Ulon, Ulon permitted Natofsky to continue arriving to

work at his usual time and to take his leave as requested. Defs.' 56.1 Stmt. ¶ 38; Pl.'s 56.1 Stmt. ¶ 38.

In November 2013, Bill de Blasio was elected as the new mayor of New York City.[1]

In December 2013, Natofsky received two awards at a departmental ceremony. Pl.'s 56.1 Stmt. ¶ 46. The first award, which was given to three people that year at DOI, was for going above and beyond in the recipient's job performance. Pl.'s 56.1 Stmt. ¶ 46(b). Gill Hearn gave Natofsky this award. Defs.' 56.1 Stmt. ¶ 160. The second award, which was given to most of DOI's 200 employees, was for a good record of performance. Pl.'s 56.1 Stmt. ¶ 46(c). On December 31, 2013, Gill Hearn wrote a memorandum to Natofsky titled "Salary Increase," which said, "It is with pleasure that I inform you that effective Monday, January 6, 2014 that you have been given a salary increase of $4,000 in recognition of your fine performance of tasks related to Budget and Human Resources. Your new base salary will be $129,000 per annum greatly appreciate your commitment and dedication to DOI." Leighton Decl. Ex. W at EMAIL002040.

At the end of 2013, with the mayoral transition from Michael Bloomberg to Bill de Blasio, Gill Hearn

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[1] Michael Barbaro & David W. Chen, De Blasio Is Elected New York City Mayor in Landslide, N.Y. Times, Nov. 5, 2013, http://www.nytimes.com/2013/11/06/nyregion/de-blasio-is-elected-new-york-city-mayor.html; see Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute"); Fed. R. Evid. 201(c)(1) ("The court may take judicial notice on its own").

left her job as DOI's Commissioner. Defs.' 56.1 Stmt. ¶ 47. Effective January 1, 2014, Victor Olds became DOI's "Interim or Acting Commissioner." Defs.' 56.1 Stmt. ¶ 48. In late February 2014, Olds was replaced by the new Commissioner of DOI, defendant Mark Peters. Defs.' 56.1 Stmt. ¶ 49. Peters appointed defendant Susan Pogoda as DOI's Chief of Staff and Deputy Commissioner for Agency Operations. Defs.' 56.1 Stmt. ¶ 52. During this time, Natofsky retained his title as Director of Human Resources and Budget and continued to report to Ulon.

Upon their arrival at DOI, Peters tasked Pogoda with assessing whether certain units within DOI should be reorganized. Defs.' 56.1 Stmt. ¶¶ 62, 64. While the timeline is not clear, around this time Pogoda met with Ulon to discuss all of Ulon's direct reports, including Natofsky. Defs.' 56.1 Stmt. ¶ 68.[2] According to Ulon's uncontroverted testimony, Pogoda "expressed some concern and said that she would be moving various people around and making some structural changes." Defs.' 56.1 Stmt. ¶ 70. As to Natofsky's combined position of Director of Human Resources and Budget, Peters and Pogoda developed the view that it would be more appropriate for the departmental areas to be split and headed by separate individuals because of the need for "checks and balances. Budget handles the money, HR handles the hiring of people." Defs.' 56.1 Stmt. ¶¶ 77-78.

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[2] Plaintiff disputes this fact but does not provide any relevant contradictory evidence. See Pl.'s 56.1 Stmt. ¶ 68.

On February 21, 2014, Pogoda met Natofsky for the first time during which, according to Natofsky, Pogoda kept staring at his ears and carefully observing him when he spoke. Pl.'s 56.1 Stmt. ¶ 68(a), 179. The next day, a Saturday, Pogoda sent Ulon an email titled "Richard Natofsky" and asked for his resume along with the resume of the new Director of Fiscal Services. Pl.'s 56.1 Stmt. ¶ 68(b). Natofsky alleges that on or about March 6, 2014, he told Pogoda of his hearing disability and that in response Pogoda "shook her head in disgust and rolled her eyes." Pl.'s 56.1 Stmt. ¶¶ 185-86, 200. Natofsky further alleges that throughout March and April, Pogoda told Natofsky that he needed to speak more quickly and clearly, and that she was impatient with him when he was speaking. Pl.'s 56.1 Stmt. ¶ 203.

Sometime in March 2014, Commissioner Peters had at least one meeting with Pogoda, Ulon, and Natofsky in which Peters requested information on the number of additional people he could hire based on the current budget. Defs.' 56.1 Stmt. ¶¶ 67, 72; Pl.'s 56.1 Stmt. ¶¶ 67, 72. After Ulon and Natofsky were unable to provide the requested information during the meeting (or meetings), Peters expressed his frustration with them to Pogoda. Defs.' 56.1 Stmt. ¶ 72. Natofsky asserts that he was eventually able to provide Peters with the requested information. Pl.'s 56.1 Stmt. ¶ 74. On March 3, 2014, Pogoda wrote in an email to a DOI Associate Commissioner, regarding an unrelated issue, that "Shaheen [Ulon] and Richard [Natofsky] are clueless." Defs.' 56.1 Stmt. ¶ 73.

On March 10, 2014, Ulon wrote to Natofsky a memorandum regarding some performance deficiencies (the "Counseling Memorandum"). She wrote: "As a follow-up to our conversation today and on previous occasions, please be sure to carefully review and edit the work of your staff on routine HR assignments, including the new employee welcome letters and job postings. There have been numerous, repeated grammatical /typographical and other errors on this type of correspondence. As HR Director, you must take the responsibility for the work of your staff. Taking responsibility for the work of your staff entails performing a careful review of the documents before they are distributed to other DOI staff for review." Defs.' 56.1 Stmt. ¶ 71.

On March 27, 2014, Pogoda expressed to Ulon her concern that there existed few written policies and procedures and that the forms that were typically used in the department were outdated, incorrect, and confusing. Defs.' 56.1 Stmt. ¶ 75.

On April 2, 2014, Pogoda allegedly told Natofsky that he had nothing to worry about at DOI, that he would be able to "spread his wings" once Ulon was gone, that Ulon's performance evaluations were "flaky," that Ulon needed to take responsibility for her own actions, and that Natofsky would keep his position and salary. Pl.'s 56.1 Stmt. ¶¶ 212-13. Pogoda denies making these statements. Pl.'s 56.1 Stmt. ¶¶ 214-15, 217-19.

In April 2014, Pogoda met with Ulon and told Ulon that the "commissioner only wanted two deputies at that point, a first deputy and a deputy commissioner

for agency operations. Since Ms. Ulon was a deputy commissioner, that role now in the reorganization would not be available, however, there was a role in the newly created NYPD IG [New York Police Department Inspector General] that needed a director to liaison with DOI." Defs.' 56.1 Stmt. ¶ 81. Rather than accept the other position, Ulon resigned from DOI effective May 1, 2014. Defs.' 56.1 Stmt. ¶¶ 79, 84.

On May 1, 2014 – Ulon's last day – Ulon provided Natofsky with a formal written evaluation of his work from January 1, 2013 to December 31, 2013 (the "Performance Evaluation"). Defs.' 56.1 Stmt. ¶ 39. Ulon rated Natofsky's 2013 overall performance a two out of five (qualitatively called "Needs Improvement"). Defs.' 56.1 Stmt. ¶ 42; Leighton Decl. Ex. H. Of the 14 categories of evaluation, Ulon rated Natofsky three out of five ("Fully Meets Requirements") in seven categories and two out of five ("Needs Improvement") in seven categories.[3] Id. For each of the seven categories rated "Needs Improvement," Ulon wrote a short explanation. See Leighton Decl. Ex. H. Under the category "Other Managerial Accountabilities," Ulon wrote:

> HR and Budget tasks have not been completed in a timely manner, which has prompted regular follow-up from the inquiring individual or entity – Deputy Commission for Administration, DOI staff, OMB, DCAS, etc.

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[3] Two other categories were considered "Not Applicable" to Natofsky. Leighton Decl. Ex. H.

> Email responsiveness needs improvement. This has been pointed out by myself and other members of the Executive Staff that haven't receive [sic] timely responses to emails.
>
> Deference to supervisor and ability to take direction – Richard has questioned my direction on a number of occasions, and this has been pointed out by other Executive Staff members.

Id. at 4.

On May 8, 2014, Natofsky appealed his performance evaluation to Pogoda. Leighton Decl. Ex. V. Natofsky opened the Evaluation Appeal with the following arguments:

> I strongly feel that the performance evaluation prepared by Shaheen Ulon depicts an inaccurate and unfair assessment of my work performance. I am supporting this statement by providing information and correspondence herein this [sic] memorandum and attached.
>
> The performance evaluation is based on a job description that was never given to me. It along with my evaluation was presented to me by Shaheen Ulon during her last hour of employment with the Department of Investigation (DOI) on May 1, 2014. As per Citywide protocol, this information should be presented to all employees during the first month or so of their employ with the Department of Investigation (DOI) and/or at the beginning of the evaluation period. Furthermore, the tasks and expectations must be agreed upon between a supervisor

> and subordinate before proceeding further. Shaheen Ulon was fully aware of this requirement as I discussed it with her numerous times. The only job description in my possession relates to the Human Resources/Director position (job posting) of which I applied for [sic]. Lastly, the performance evaluation lacks substantiation pertaining to the criticisms. The departure of Shaheen Ulon has hindered and violated my ability and legal right to have a meaningful appeal. . . .

Id. Natofsky then launched into a list of his accomplishments and a line-by-line rebuttal of the Performance Evaluation. On the third page of the rebuttal, in response to the comment in the Performance Evaluation that "Email responsiveness needs improvement," Natofsky wrote:

> The only person who pointed out needed [sic] improvement with my e-mail response was Shaheen Ulon. One attached email correspondence denotes that I have a severe hearing loss which hinders my ability to immediately respond to emails during meetings and face to face discussions. Furthermore, many of Shaheen Ulon's emails were redundant thereby asking for responses which were previously provided.

Id.

Sometime in the spring of 2014, and after discussion with Pogoda, Peters made the decision to reassign Natofsky from his position. Peters testified, "The decision was ultimately mine. . . . Susan [Pogoda] certainly

discussed it with me before the decision was made and I approved it and so it was certainly my decision." Defs.' 56.1 Stmt. ¶ 109. Natofsky admits that the decision was Peters's. Pl.'s 56.1 Stmt. ¶ 109. By letter dated May 20, 2014, Pogoda wrote to Natofsky:

> The Human Resources and Budget Units are being reorganized. As such, effective today, May 20, 2014 you will serve in your competitive civil service title of Associate Staff Analyst at a salary of $68,466 per annum in the Human Resources Unit of the Administrative Division. Your office title will be Human Resources Generalist.

Leighton Decl. Ex. S. The parties dispute how to characterize this event: plaintiff calls it a "demotion," while the defendants call it a "reassignment." As plaintiff is the non-movant, we will use the term "demotion" for purposes of this opinion.

On May 28, 2014, Natofsky wrote in an email to Peters and Pogoda:

> I totally disagree with the rationale for the decision to demote me, change my title and drastically reduce my salary. By all accounts it is illegitimate and contrary to law. . . . Without accepting this unjustified change in my employment status, and bearing in mind the strategic role the Director, Human Resources and Budget play [sic] within our agency, I am asking that you clarify and provide guidance to me regarding my interim functions.

Leighton Decl. Ex. T. In a response email Pogoda wrote, "As per the May 20, 2014 letter and our discussion on May 23rd, 2014 you were returned to your competitive civil service title of Associate Staff Analyst due to an ongoing reorganization of the Human Resources and Budget Units." Id. The new Assistant Commissioner of Administration, Edgardo Rivera, temporarily assumed Natofsky's former budget functions, and the new Director of Administration for the Office of the Inspector General for the New York Police Department, Shayvonne Nathaniel, temporarily assumed Natofsky's former human resources functions. Defs.' 56.1 Stmt. ¶¶ 85, 117, 120, 121. DOI eventually hired a new Director of Budget and Director of Human Resources. Defs.' 56.1 Stmt. ¶¶ 120, 122.

On June 6, 2014, Pogoda informed Natofsky that he would be moved from his private office to a cubicle. Maduegbuna Decl. Ex. 37 (ECF No. 49). On June 16, 2014, Natofsky replied that he needed assistance in moving his items because he was "currently under a doctor's care" and had "physical restrictions which include lifting and carrying." Id. The parties do not offer evidence showing whether Natofsky received the assistance. Natofsky was moved to a cubicle on or about June 20, 2014. Id. The cubicle was in a high-traffic, high-volume area, and the cubicle had been previously used by his former secretary. Pl.'s 56.1 Stmt. ¶¶ 259-60. When Natofsky advised Rivera of the noise and congestion of the cubicle, Natofsky was moved to a different cubicle location. Defs.' 56.1 Stmt. ¶ 146.

On June 17, 2014, Natofsky complained to Rivera that he suddenly began receiving paper checks instead of direct deposit. Pl.'s 56.1 Stmt. ¶ 272.

On June 18, 2014, Natofsky appealed his "demotion and reduction of salary" to the New York City Department of Citywide Administrative Services ("DCAS"). Leighton Decl. Ex. W. In that appeal he wrote:

> I write to appeal my demotion and reduction of my salary . . . in violation of the New York City Personnel Services Bulletin, Article 3, Section 320-R (Mayor's Personnel Order No. 78/9), relating to demotion of managers (attached). . . .
>
> I was given no justifiable reason as to why my salary was so drastically cut and I was demoted. There was no justifiable reason for these actions. . . . The available evidence strongly indicates that I was so singled out and treated based on a number of unlawful considerations.
>
> By all accounts the decision to single me out and treat me in this manner is illegitimate and contrary to law. I have made this known to Susan Pogoda and DOI Commissioner Peters and have stated in writing that I totally disagree with the rationale for the decision to demote me, change my title and drastically reduce my salary as it is unlawful. Despite my protest, they have refused to change their minds and have maintained their unlawful position. . . .

> When you look into this matter, you will find that the procedure that was put in place by DCAS and the City of New York to deal with just this type of situation was not followed by Susan Pogoda, Commissioner Peters and other DOI officials.
>
> I am therefore respectfully requesting that the almost 50% pay cut and my demotion be rescinded retroactively based upon DOI's failure to follow the required procedure in the Personnel Services Bulletin (copy attached) and I be reinstated to my previous managerial position.

Leighton Decl. Ex. W. Natofsky did not send a copy of the appeal to DOI. Defs.' 56.1 Stmt. ¶ 129; Pl.'s 56.1 Stmt. ¶ 129.

On June 23, 2014, DCAS wrote to Rivera, copying Pogoda and others, "In general, managers should not lose more than 20% of their salary when they are reassigned to a lower managerial level or to their permanent leave line. However, in Mr. Natofsky's case, a 20% reduction from $129,000 would result in a salary above the maximum for Associate Staff Analyst, his permanent title. Therefore, the salary reduction% needs to be increased so that he is paid no more than the maximum, which is $88,649. Please correct his salary from $68,466 to $88,649." Leighton Decl. Ex. X. DCAS informed Natofsky on June 27, 2014 that his salary would be adjusted accordingly. Defs.' 56.1 Stmt. ¶ 132. Although a salary adjustment typically takes 24 hours to process, Pl.'s 56.1 Stmt. ¶ 266, one month passed

before Natofsky's salary was adjusted in the system, Defs.' 56.1 Stmt. ¶ 137.

On June 29 and 30, 2014, Pogoda questioned Natofsky regarding an incident in which an employee's personnel file went missing and was found in an unlocked drawer in Natofsky's work area. Defs.' 56.1 Stmt. ¶ 147; Leighton Decl. Ex. DD.

On July 22, 2014, Natofsky filed the instant lawsuit. On the same day, Pogoda and Rivera instructed Natofsky to include the title of "Human Resources Generalist" in his email signature. Pl.'s 56.1 Stmt. ¶ 274. On July 23, 2014, Natofsky's salary was adjusted in the system, on which date Natofsky also received a lump sum payment of back pay. Defs.' 56.1 Stmt. ¶¶ 137-38.

On September 11, 2014, Pogoda denied Natofsky's appeal of Ulon's May 1, 2014 Performance Evaluation. Pl.'s 56.1 Stmt. ¶ 281.

On September 2, 2014, Natofsky informed Nathaniel and another employee that, according to his union, he was entitled to longevity pay of $5,414. Pl.'s 56.1 Stmt. ¶ 282. Receiving no response, he had to follow up on this request on October 1, 2014, and November 7, 2014. Pl.'s 56.1 Stmt. ¶¶ 283-85.

Natofsky left DOI in December 2014. Defs.' 56.1 Stmt. ¶ 168. He returned to the agency at which he was formerly employed, the New York City Department of Transportation, as an Operations and Budget Administrator with a salary of $100,437. Id.

On December 10, 2015, Natofsky emailed an employee at DOI stating that, according to his union, he was entitled to retroactive pay for some of his time at DOI. Pl.'s 56.1 Stmt. ¶ 293. Rivera denied the retroactive pay on January 8, 2016. Pl.'s 56.1 Stmt. ¶ 295. After a representative of Natofsky's union explained to DOI why the request should have been granted, Rivera provided the retroactive pay. Pl.'s 56.1 Stmt. ¶¶ 298-99.

Natofsky asserts the following claims: (1) a Rehabilitation Act claim against the City for disability discrimination; (2) a Rehabilitation Act claim against the City for retaliation; (3) a NYHRL claim against all defendants for disability discrimination; (4) a NYCHRL claim against all defendants for disability discrimination; (5) a NYHRL claim against all defendants for age discrimination; (6) a NYCHRL claim against all defendants for age discrimination; (7) a NYHRL claim against all defendants for retaliation; and (8) a NYCHRL claim against all defendants for retaliation.[4]

II. DISCUSSION

A. Standard for Summary Judgment

Summary judgment is granted where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is material

[4] Plaintiff dismissed with prejudice a claim against the City brought under the Employee Retirement Income Security Act of 1974, 20 U.S.C. §§ 1001, et seq.

when it might affect the outcome of the suit under governing law," and "[a]n issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007) (internal quotation marks and citations omitted). "In assessing the record to determine whether there is a genuine issue to be tried, we are required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 101 (2d Cir. 2010). Furthermore, "[t]he moving party bears the initial burden of demonstrating 'the absence of a genuine issue of material fact.'" F.D.I.C. v. Great Am. Ins. Co., 607 F.3d 288, 292 (2d Cir. 2010) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

Although "a workplace discrimination case . . . usually require[s] an exploration into an employer's true motivation and intent for making a particular employment decision," McMunn v. Mem'l Sloan-Kettering Cancer Ctr., No. 97 Civ. 5857 (NRB), 2000 U.S. Dist. LEXIS 13335, 2000 WL 1341398, at *2 (S.D.N.Y. Sept. 15, 2000), "summary judgment may be proper even in workplace discrimination cases . . . because 'the salutary purposes of summary judgment – avoiding protracted, expensive and harassing trials – apply no less to discrimination cases than to other areas of litigation,'" Campbell v. Cellco P'ship, 860 F. Supp. 2d 284, 294 (S.D.N.Y. 2012) (quoting Hongyan Lu v. Chase Inv. Servs. Corp., 412 F. App'x 413, 415 (2d Cir. 2011)). A

plaintiff must produce evidence that rises above the level of conclusory allegations to defeat a motion for summary judgment, and it is the court's responsibility to "distinguish between evidence that allows for a reasonable inference of discrimination and evidence that gives rise to mere speculation and conjecture." Bickerstaff v. Vassar Coll., 196 F.3d 435, 448 (2d Cir. 1999).

B. Disability Discrimination Claims under the Rehabilitation Act

The Rehabilitation Act states: "No otherwise qualified individual . . . shall, *solely* by reason of her or his disability, be . . . subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794(a) (emphasis added). This statutory language differentiates the Rehabilitation Act from other discrimination-related federal statutes in that it requires "proof that discrimination was *solely* due to an individual's disability. . . ." Itzhaki v. Port Auth. of N.Y. & N.J., No. 15 Civ. 7093 (JMF), 2017 U.S. Dist. LEXIS 6394, 2017 WL 213808, at *3 (S.D.N.Y. Jan. 17, 2017) (internal quotation marks omitted). We also note that plaintiff asserts Rehabilitation Act claims only against the City, as "claims under the Rehabilitation Act may not be brought against individuals, either in their personal or official capacity. . . ." Harris v. Mills, 478 F. Supp. 2d 544, 547-48 (S.D.N.Y. 2007), aff'd, 572 F.3d 66 (2d Cir. 2009).

A plaintiff may defeat a defendant's motion for summary judgment in two ways. Either he may present

"direct evidence of discrimination – a 'smoking gun' attesting to a discriminatory intent," or he may proceed under the *McDonnell Douglas* burden-shifting framework. Holtz v. Rockefeller & Co., 258 F.3d 62, 76 (2d Cir. 2001) (internal quotation marks omitted and alteration incorporated). Here, plaintiff proceeds under the latter. Under either approach, however, the "ultimate issue" is whether the plaintiff has met his burden of proving that the adverse employment decision was motivated by "an 'impermissible reason,' i.e., that there was discriminatory intent." Weisbecker v. Sayville Union Free Sch. Dist., 890 F. Supp. 2d 215, 231-32 (E.D.N.Y. 2012); see also Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities, 115 F.3d 116, 119 (2d Cir. 1997).

Under the *McDonnell Douglas* framework, "[a] plaintiff must establish a *prima facie* case; the employer must offer through the introduction of admissible evidence a legitimate nondiscriminatory reason for the [adverse employment action]; and the plaintiff must then produce evidence and carry the burden of persuasion that the proffered reason is a pretext." McBride v. BIC Consumer Prod. Mfg. Co., 583 F.3d 92, 96 (2d Cir. 2009) (internal quotation marks omitted).

Plaintiff alleges two theories of disability discrimination. First, plaintiff alleges that he experienced disparate treatment due to his disability. Second, plaintiff alleges that DOI failed to accommodate his disability. We address each of these theories in turn.

1. Disparate Treatment Claims

To make out a *prima facie* case, a plaintiff must show by a preponderance of the evidence that "(1) plaintiff's employer is subject to the Rehabilitation Act; (2) plaintiff was disabled within the meaning of the Rehabilitation Act; (3) plaintiff was otherwise qualified to perform the essential functions of [his] job, with or without reasonable accommodation; and (4) plaintiff suffered an adverse employment action because of [his] disability." Quadir v. N.Y. State Dep't of Labor, No. 13 Civ. 3327 (JPO), 2016 U.S. Dist. LEXIS 84632, 2016 WL 3633406, at *5 (S.D.N.Y. June 29, 2016) (internal quotation marks omitted and alterations incorporated), aff'd, No. 16-2617, 691 Fed. Appx. 674, 2017 U.S. App. LEXIS 9755, 2017 WL 2399584 (2d Cir. June 2, 2017). "The requirements to establish a *prima facie* case are minimal, and a plaintiff's burden is therefore not onerous." Bucalo v. Shelter Island Union Free Sch. Dist., 691 F.3d 119, 128 (2d Cir. 2012) (internal quotation marks and citations omitted).

At the second stage in the *McDonnell Douglas* framework, the defendants bear the "burden of producing evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason." Id. at 128-29 (internal quotation marks omitted). "This burden is one of production, not persuasion." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). "If the defendant satisfies its burden of production, then the presumption raised by the *prima facie* case is rebutted and drops from the case." Bucalo, 691 F.3d at

120 (internal quotation marks omitted). Once the presumption is rebutted, the "sole remaining issue [is] discrimination *vel non*." Reeves, 530 U.S. at 143.

At the final stage, "the plaintiff must . . . come forward with evidence that the defendant's proffered, non-discriminatory reason is a mere pretext for actual discrimination. The plaintiff must produce not simply some evidence, but sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the defendant were false, and that more likely than not discrimination was the real reason for the employment action." Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000) (internal quotation marks and citations omitted). "The plaintiff retains the burden of persuasion." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

According to Natofsky, he experienced the following adverse employment actions: his requested vacation dates were initially denied; he was asked to arrive to work at a later time than he preferred; he received a negative performance evaluation; he was demoted; and he experienced a salary cut.

a. Vacation Requests and Work Hours

"An adverse employment action is one which is more disruptive than a mere inconvenience or an alteration of job responsibilities. Examples of materially adverse changes include termination of employment, a demotion evidenced by a decrease in wage or salary, a

less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." Terry v. Ashcroft, 336 F.3d 128, 138 (2d Cir. 2003) (internal quotation marks and citation omitted); see also Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 89 (2d Cir. 2015).

Natofsky plainly did not suffer adverse employment actions when Ulon initially denied his vacation requests or when she asked him to arrive at work at her preferred time. After a discussion with Gill Hearn, Ulon ultimately granted Natofsky's vacation requests and permitted him to continue arriving to work at his preferred time. See Defs.' 56.1 Stmt. ¶ 38 ("Following her discussion with then-Commissioner Gill Hearn, Ms. Ulon granted plaintiff's leave request and, as well, permitted him to continue to arrive at work at 8:00 a.m."); Pl.'s 56.1 Stmt. ¶ 38 ("Admitted."). Natofsky makes no allegation that in the interim he missed an opportunity to take his vacation as requested or that he arrived at work at Ulon's preferred time. Therefore, he did not experience any "adverse change in the terms and conditions of employment," Bowen-Hooks v. City of N.Y., 13 F. Supp. 3d 179, 211 (E.D.N.Y. 2014), material or otherwise, and he has failed to make a *prima facie* case as to these actions.[5]

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[5] Even if he were forced to change his vacation or work schedule, a "denial of vacation time and alteration of Plaintiff's [] schedule . . . do not rise to the level of an adverse employment action." Kaur v. N.Y. City Health & Hosps. Corp., 688 F. Supp. 2d 317, 332 (S.D.N.Y. 2010).

b. Performance Evaluation

Natofsky next alleges a claim based upon his negative Performance Action. "[N]egative evaluations alone, without any accompanying adverse consequences, such as a demotion, diminution of wages, or other tangible loss, do not constitute adverse employment actions." Walder v. White Plains Bd. of Educ., 738 F. Supp. 2d 483, 499 (S.D.N.Y. 2010). Defendants argue that the Performance Evaluation is not an adverse employment action because it did not affect Peters's demotion decision. Defs.' Mem. of Law at 11 (ECF No. 44). Natofsky's only response is to argue that the Performance Evaluation "could have influenced" the demotion decision because the final decision to demote Natofsky was made "sometime in April" 2014, and Ulon sent to Pogoda a draft of the Performance Evaluation on April 25, 2014. Pl.'s Opp'n at 5 (ECF No. 52); see Maduegbuna Decl. Ex. 16. Importantly, Natofsky never alleges that Peters saw the Performance Evaluation. Natofsky further never suggests why Peters would have been influenced by an evaluation written by Ulon, who herself was let go during the reorganization. It is difficult to say under these circumstances that the Performance Evaluation was "accompanied by" a demotion. Without deciding this issue, we will proceed to evaluate Natofsky's *prima facie* case regarding the Performance Evaluation.

Natofsky's *prima facie* case is as follows. In March 2013, Ulon criticized Natofsky for his response time on emails. The day after that discussion, Natofsky wrote to Ulon that because of his disability, he could not multitask on email during meetings. Natofsky proposed

that in lieu of multitasking, his secretary could inform him of anything urgent that arose during meetings; there is no evidence that this proposal was agreed to or acted upon. Over a year later, Natofsky received a negative performance review at least in part because his "[e]mail responsiveness needs improvement." Other than an inference drawn from the words "email responsiveness," there is no evidence that Ulon was referring to the narrow email-responsiveness-in-meetings issue which relates to Natofsky's hearing disability, rather than a broader issue relating to the general timeliness of Natofsky's emails.[6] There is furthermore no other evidence from which to draw an inference that the Performance Evaluation was negative *solely* because of Natofsky's disability. If Natofsky has made out a *prima facie* case on the Performance Evaluation, he has done so just barely.

Assuming, without deciding, that Natofsky has made a *prima facie* case, the defendants have met their

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[6] We observe that Natofsky's March 25, 2013 email itself could be read to draw a distinction between a narrow email-responsiveness-in-meetings issue and a broader email responsiveness issue. Compare Leighton Decl. Ex. D ("I suggest that if someone has an extremely urgent or time sensitive issue, he or she contact Phyllis so that she can alert me."), with id. ("As for responding to Executive Staff emails immediately, I believe that all my emails are responded to in a timely manner. They are answered as soon as I am able to and unless there are extenuating circumstances, the emails are answered before the end of a day."). The statement "the emails are answered before the end of a day" furthermore could be read as an acknowledgment that it would be fair to criticize Natofsky if he failed to answer emails within a day.

burden of production at the second stage. "The court is not to pass judgment on the soundness or credibility of the reasons offered by defendants, so long as the reasons given are 'clear and specific.'" Schwartz v. York Coll., 06 Civ. 6754 (RRM)(LB), 2011 U.S. Dist. LEXIS 93495, 2011 WL 3667740 (E.D.N.Y. Aug. 22, 2011) (quoting Mandell v. Cnty. of Suffolk, 316 F.3d 368, 381 (2d Cir. 2003)). Defendants produce documentary and testimonial evidence that Natofsky was in fact a poor performer, Defs.' 56.1 Stmt. ¶¶ 37, 45, 71, 102-04, 106, 107, which is a sufficient nondiscriminatory reason for the negative Performance Evaluation. See Auguste v. N.Y. Presbyterian Med. Ctr., 593 F. Supp. 2d 659, 666 (S.D.N.Y. 2009) ("[P]oor work performance has often been recognized as a legitimate, non-discriminatory reason" for an employment action).

At the final stage, Natofsky offers a multitude of assertions regarding pretext. However, he has failed to provide sufficient evidence from which a reasonable jury could find that "poor work performance" is, more likely than not, a pretext for an adverse action that was taken solely due to discrimination.

Natofsky exerts a great deal of effort re-litigating the Performance Evaluation. First, he offers arguments as to why the defendants should not have considered his performance poor.[7] Natofsky fails to appreciate

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[7] See, e.g., Pl.'s Opp'n at 7 ("Ulon's claim [in the evaluation] that Natofsky was 'untimely' when performing budget and human resource functions is undermined by her email admission to Pogoda that Natofsky's units were understaffed."); id. at 19 (in response to the testimony of a co-worker, Shameka Boyer, that

that regardless of the actual quality of his performance, "[t]he mere fact that plaintiff may disagree with his employer's actions or think that his behavior was justified does not raise an inference of pretext." Melman v. Montefiore Med. Ctr., 98 A.D.3d 107, 121, 946 N.Y.S.2d 27 (1st Dep't 2012) (internal quotation marks omitted and alterations incorporated). In other words, "[i]t matters not whether the employer's stated reason for the challenged action was a good reason, a bad reason, or a petty one. What matters is that the employer's stated reason for the action was nondiscriminatory." Id. (internal quotation marks omitted and alterations incorporated).

Second, Natofsky asserts that Ulon "violated DOI policy by not giving Natofsky Tasks & Standards, despite his requests, and then improperly evaluating Natofsky based on Tasks & Standards he had never seen or agreed to." Pl.'s Opp'n at 8. However, doing so does not support an inference that he was discriminated against solely because of his disability. "[A]n employer's alleged failure to follow termination procedures d[oes] not support a discrimination claim in the absence of evidence showing that the procedure was applied differently to protected and non-protected employees." Forte v. Liquidnet Holdings, Inc., No. 14 Civ. 2185 (AT), 2015 U.S. Dist. LEXIS 136474, 2015 WL

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she "did not believe that Mr. Natofsky understood or valued my time because he would ask the same question of several members of my team," Defs.' 56.1 Stmt. ¶ 103, Natofsky argues, "Boyer exaggerated the number of calls and claimed they were unprofessional but had no idea what the calls were about.").

5820976, at *10 (S.D.N.Y. Sept. 30, 2015) (Offing [sic] Stanojev v. Ebasco Servs., Inc., 643 F.2d 914, 923 (2d Cir. 1981)), aff'd, 675 Fed. Appx. 21, 2017 WL 104316 (2d Cir. Jan. 10, 2017). Relatedly, Natofsky's assertion that Ulon failed to raise the email responsiveness issue between March 2013 and May 2014 or "raise her other criticisms with Natofsky before issuing his evaluation," Pl.'s Opp'n at 7, do not demonstrate pretext. See Forte, 2015 U.S. Dist. LEXIS 136474, 2015 WL 5820976, at *10 ("[E]ven assuming Defendants failed to provide progressive discipline, Plaintiff has not shown that such failure demonstrates pretext with respect to Defendants' motivation for discharging Plaintiff."). We further note that the record shows – that Ulon did raise criticisms with Natofsky before the May 2014 evaluation – e.g., in the March 2014 Counseling Memorandum. Leighton Decl. Ex. L.

Other assertions of pretext also fail. One assertion, that "Pogoda told Natofsky that Ulon's evaluations were flaky and would be rejected," Pl.'s Opp'n at 7, is conclusory and unintelligible. Another assertion in Natofsky's opposition brief, that "Gill Hearn instructed Ulon not to target Natofsky," is wholly unsupported by the evidence to which Natofsky cites.[8] See Vt.

[8] Plaintiff cites to Paragraphs 35 and 36 of his 56.1 Statement for support. However, Paragraphs 35 and 36 merely say: "35. Admitted, except that Gill Hearn requested to meet with Ulon after Natofsky expressed his concerns to Gill Hearn. 36. Disputed. Ulon and Gill Hearn discussed Plaintiff's hearing disability during their meeting. Gill Hearn called the meeting and brought the issue of Plaintiff's hearing disability up and explained that he

Teddy Bear Co., Inc. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004) (the Court "must be satisfied that the citation to the evidence in the record supports the assertion"). Finally, Natofsky asserts that pretext is established by his receipt of two awards and a merit pay increase from Gill Hearn at the end of 2013. But "differences between supervisors' reviews of an employee's performance are generally insufficient to demonstrate pretext." Forte, 2015 U.S. Dist. LEXIS 136474, 2015 WL 5820976, at *11. They would only suffice "when paired with other evidence demonstrating a discriminatory motive," id., and the evidence proffered – including the evidence in support of Natofsky's *prima facie* case – simply does not rise to that level.

We have examined the entire record together, see Schnabel v. Abramson, 232 F.3d 83, 90 (2d Cir. 2000), and concluded Natofsky has fallen far short of raising a triable issue that Ulon issued a negative Performance Evaluation motivated solely by disability discrimination.

c. Demotion and Salary Cut

On May 20, 2014, Natofsky received a letter Stating that he had been demoted and his salary cut accordingly. His original job position was ultimately broken out into two positions and filled by two non-disabled employees. Natofsky has met his burden at the first stage of the *McDonnell Douglas* framework

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had hearing issues and focusing issues and Gill Hearn told Ulon that she wanted her to be aware of these issues."

because "the mere fact that a plaintiff was replaced by someone outside the protected class will suffice for the required inference of discrimination at the *prima facie* stage. . . ." Zimmermann v. Assocs. First Capital Corp., 251 F.3d 376, 381 (2d Cir. 2001).

In response, defendants produce evidence that Natofsky was reassigned as part of a wider reorganization under a new mayoral administration, see, e.g., Defs.' 56.1 Stmt. ¶ 154, pursuant to which Ulon, too, would have been reassigned had she not decided to leave. Furthermore, defendants produce evidence that Peters and Pogoda were frustrated by Natofsky's performance. See, e.g., Defs.' 56.1 Stmt. ¶¶ 72-78. It is "undoubtedly true" that a reorganization constitutes a legitimate non-discriminatory reason for an employment decision, Maresco v. Evans Chemetics, Div. of W.R. Grace & Co., 964 F.2d 106, 111 (2d Cir. 1992), as does "poor work performance," Auguste, 593 F. Supp. 2d at 666. Therefore, defendants have met their burden of production at the second stage.

Natofsky fails to meet his burden of persuasion at the third stage for the simple reason that *Peters* was the one to demote Natofsky, Pl.'s 56.1 Stmt. ¶ 109, and there is no evidence whatsoever that Peters did so for discriminatory reasons. All that Natofsky offers in that regard is an allegation that Peters knew of Natofsky's disability. Pl.'s 56.1 Stmt. ¶¶ 193-95. Plaintiff "has done little more than cite to his alleged mistreatment and ask the court to conclude that it must have been related to his [disability]. This is not sufficient." Grillo v. N.Y. City Transit Auth., 291 F.3d 231, 235 (2d Cir.

2002) (internal quotation marks omitted and alterations incorporated).

In an effort to establish pretext, Natofsky argues that Peters and Pogoda manufactured the justification of poor performance only after litigation began. Pl.'s Opp'n at 15-16. Natofsky mainly argues that his performance was in fact excellent and that criticisms thereto were not asserted until after he sued. See Pl.'s Opp'n at 16. This argument is refuted by contemporaneous documentary evidence of Pogoda's frustrations with Natofsky, see Defs.' 56.1 Stmt. ¶¶ 73-76, and testimonial evidence of Peters's frustrations with Natofsky, see Defs.' 56.1 Stmt. ¶¶ 72, 78,[9] and further weakened by the fact that the defendants had no legal duty to inform Natofsky of their criticisms of his work. Additionally, Natofsky offers no evidence to rebut the defendants' other nondiscriminatory rationale, which is that DOI underwent a reorganization.

Natofsky further relies on allegations regarding *Pogoda's* supposed fixation on the physical markers of Natofsky's disability, which Natofsky alleges shows her discriminatory animus. Even if this were sufficient, Natofsky concedes that Pogoda was not the one who decided to demote Natofsky. See Defs.' 56.1 Stmt. ¶ 109; Pl.'s 56.1 Stmt. ¶ 109. While Natofsky offers no argument as to why Pogoda's alleged discriminatory intent should be imputed to Peters, the Court *sua*

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[9] Ulon's Counseling Memorandum and negative Performance Evaluation also broadly support the proposition that Natofsky's performance issues preceded his lawsuit.

sponte has considered two and rejected them. First, while Bickerstaff v. Vassar College, 196 F.3d 435 (2d Cir. 1999), stated that "the impermissible bias of a single individual . . . may taint the ultimate employment decision in violation of Title VII . . . even absent evidence of illegitimate bias on the part of the ultimate decision maker," id. at 450, we conclude that this statement does not apply to Rehabilitation Act cases. The Second Circuit's language was limited to Title VII, and this Court has not found any case applying Bickerstaff to the Rehabilitation Act. What is more, the Supreme Court has since drawn a clear distinction between cases brought under Title VII – which by its text permits a mixed-motives analysis – and cases brought under other statutes with stricter language, which require a but-for analysis. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009). The Rehabilitation Act falls under the latter category. Gross and Bickerstaff thus fit neatly together: while the bias of a non-decisionmaker may be an actionable "motivating factor" under Title VII, it is not by itself enough under the Rehabilitation Act, which requires impermissible bias to be the *sole* reason for the adverse employment action. Therefore, Bickerstaff has no application here.

Second, we conclude that there exists no "cat's paw" liability in this case. "Cat's paw" liability "refers to a situation in which an employee is fired or subjected to some other adverse employment action by a supervisor who himself has no discriminatory motive, but who has been manipulated by a subordinate who

does have such a motive and intended to bring about the adverse employment action. . . ." Vasquez v. Empress Ambulance Serv., Inc., 835 F.3d 267, 272 (2d Cir. 2016). Yet "an employer who, non-negligently and in good faith, relies on a false and malign report of an employee who acted out of unlawful animus cannot, under this 'cat's paw' theory, be held accountable for or said to have been 'motivated' by the employee's animus." Id. at 275. Vasquez, too, was a Title VII case, and we doubt that cat's paw liability could be extended into the Rehabilitation Act context for the reasons described above. But even if it could, and even if Pogoda could be said to have acted out of unlawful animus, Natofsky presents no evidence that Peters acted out of anything but good faith in making his demotion decision. See Defs.' 56.1 Stmt. ¶ 78 ("I had been frustrated with his performance. I had expressed that frustration to Susan Pogoda. In addition, we were doing significant reorganization of the agency. . . ."). Therefore, cat's paw liability does not attach here.

For these reasons, Natofsky has failed to raise a triable issue that his demotion and attendant salary cut were solely motivated by disability discrimination as required under the Rehabilitation Act.

2. Failure to Accommodate Claim

Natofsky further alleges that the defendants failed to accommodate his disability. "An employee suing for failure to make reasonable accommodations must establish four elements to make a *prima facie*

case: that (1) the plaintiff is a person with a disability under the meaning of the Act; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, the plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations." Quadir, 2016 U.S. Dist. LEXIS 84632, 2016 WL 3633406, at *2 (internal quotation marks omitted and alterations incorporated). Natofsky must also "establish the requisite causal connection between [the employer's] alleged failure to accommodate [his] disability and an adverse employment action." Cusack v. News Am. Mktg. In-Store, Inc., 371 F. App'x 157, 158 (2d Cir. 2010) (citing Parker v. Sony Pictures Entm't, Inc., 260 F.3d 100, 108 (2d Cir. 2001)); see Parker, 260 F.3d at 108 (noting that this element is "frequently left unstated" because of the way that failure-to-accommodate claims are typically defended, but that it is an element nonetheless). Finally, as with disparate treatment claims, a failure-to-accommodate claim based on a negative performance evaluation can succeed only if the evaluation results in an adverse employment action, see Weber v. City of N.Y., 973 F. Supp. 2d 227, 261-62 (E.D.N.Y. 2013) (collecting cases), and, under the Rehabilitation Act, only if the plaintiff's disability is the sole reason for the action, see Cheung v. Donahoe, No. 11 Civ. 0122 (ENV), 2016 U.S. Dist. LEXIS 84683, 2016 WL 3640683, at *7 n.12 (E.D.N.Y. June 29, 2016) (citing Sedor v. Frank, 42 F.3d 741, 746 (2d Cir. 1994)).

Natofsky's failure-to-accommodate claim pertains to his proposal that, in lieu of multi-tasking on email

during a meeting, his secretary could notify him of any urgent matters. Pl.'s Opp'n at 10-12. Natofsky argues that the defendants' silence on the matter and failure to act on the proposal led to the adverse employment action of a "lower . . . evaluation score." Pl.'s Opp'n at 12. A claim premised on Natofsky receiving a lower score than he otherwise would have received is insufficient as a matter of law. It already strains credulity that Ulon was referring to the email-responsiveness-in-meetings issue in the Performance Evaluation. It is pure conjecture that the two out of five score under "Other Managerial Accountabilities" would have been different absent the email-responsiveness issue. See Leighton Decl. Ex. H at 762 (other reasons for this score were that "HR and Budget tasks have not been completed in a timely manner" and Natofsky had trouble with "[d]eference to supervisor and ability to take direction"). There is finally no evidence from which to infer that the score – lowered or not – was at all causally connected to Peters's demotion decision or that Peters even knew about it, let alone that it was the sole reason for Natofsky's demotion. "[I]t is simply not true, we want to emphasize, that if a litigant presents an overload of irrelevant or nonprobative facts, somehow the irrelevances will add up to relevant evidence of discriminatory intent. They do not; zero plus zero is zero." Tepperwien v. Entergy Nuclear Operations, Inc., 663 F.3d 556, 572 (2d Cir. 2011) (quoting Gorence v. Eagle Food Ctrs., Inc., 242 F.3d 759, 763 (7th Cir. 2001)).

C. Retaliation Claims under the Rehabilitation Act

"To make out a *prima facie* case of retaliation, an employee must show that the employee was engaged in protected activity; that the employer was aware of that activity; that the employee suffered adverse employment decisions; and that there was a causal connection between the protected activity and the adverse employment action." Collins v. N.Y. City Transit Auth., 305 F.3d 113, 118 (2d Cir. 2002) (internal quotation marks and citation omitted). Natofsky alleges that he experienced retaliation for opposing discrimination in his June 2013 complaint to Gill Hearn, the May 8, 2014 Evaluation Appeal, the May 28, 2014 email, and the June 18, 2014 DCAS appeal.

1. June 2013 Complaint

First, Natofsky argues that Ulon's March 2014 Counseling Memorandum and May 2014 Performance Evaluation constituted retaliation for his June 2013 complaint to Gill Hearn regarding Natofsky's preferred vacation schedule and work arrival time. Pl.'s Opp'n at 9-10. There is no evidence whatsoever that these events, 9 to 11 months apart, are connected, and we reject Natofsky's arguments to the contrary as entirely speculative. Had Ulon (Natofsky's direct supervisor) wished to retaliate against Natofsky for the June 2013 complaint, she had plenty of opportunities to do so before then.

2. Evaluation Appeal

Natofsky next alleges that he engaged in protected activity when he submitted his May 8, 2014 letter to Pogoda appealing the Performance Evaluation (the "Evaluation Appeal"). Pl.'s Opp'n at 21; see Leighton Decl. Ex. V.

Assuming for the purposes of this opinion that the Evaluation Appeal was a protected activity,[10] we reject the alleged retaliatory actions as insufficiently material, separately or in the aggregate, and as lacking a but-for causal connection. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) ("[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

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[10] It is doubtful that the Evaluation Appeal was a protected activity. In the Evaluation Appeal, Natofsky challenged the procedural irregularities and the merits of the evaluation as recounted in Section I of this opinion. Natofsky's assertions therein can be summarized as follows: (1) the Performance Evaluation was inaccurate and unsubstantiated; (2) the Performance Evaluation was based on standards not made known to Natofsky beforehand in violation of protocol; and (3) Ulon's departure impaired Natofsky's ability to mount an appeal. Nowhere did Natofsky contend, explicitly or implicitly, that Ulon issued a negative Performance Evaluation because of discrimination. Natofsky mentioned his hearing loss not as evidence of any discrimination but only as an explanation for why Ulon's criticism of his email response time was unwarranted. See Risco v. McHugh, 868 F. Supp. 2d 75, 111 (S.D.N.Y. 2012) (a plaintiff's request to discuss an employer's remark about the plaintiff's disability is not protected activity).

(internal quotation marks and citations omitted)); Hicks v. Baines, 593 F.3d 159, 165 (2d Cir. 2010) ("[T]he alleged acts of retaliation need to be considered both separately and in the aggregate, as even minor acts of retaliation can be sufficiently substantial in gross as to be actionable." (internal quotation marks omitted)); Palmquist v. Shinseki, 689 F.3d 66, 74 (1st Cir. 2012) ("[T]he Rehabilitation Act . . . requires retaliation to be the but-for cause of an adverse employment action in order for the plaintiff to obtain a remedy.").

Natofsky alleges a host of retaliatory actions. Pl.'s Opp'n at 22-24. He alleges that because of the Evaluation Appeal, (1) on May 20, 2014, he was demoted; (2) on June 6, 2014, Pogoda notified him that he would be reassigned from his private office to a noisy cubicle (and effected that reassignment on June 20, 2014); (3) DOI delayed for a month the salary adjustment to which he was entitled, when evidence suggests that the adjustment could have been made in 24 hours; (4) on September 11, 2014, Pogoda denied the Evaluation Appeal; (5) DOI delayed a union payment initially requested on September 2, 2014; (6) on June 17, 2014, DOI cancelled his direct deposit and gave him paper checks; (7) DOI "demand[ed] for months until he left DOI that Natofsky provide constant explanations about DOI policies and procedures under unreasonable time constraints, under threat of insubordination and false claims about the location of personnel files," Pl.'s Opp'n at 23-24; and (8) on July 22, 2014, Pogoda

and Rivera asked him to put his title of "Human Resources Generalist" in his email signature.[11]

Allegations (6), (7), and (8) do not approach the standard for materiality, either standing alone or aggregated with any other conduct. These allegations are non-actionable "petty slights or minor annoyances that often take place at work," in the nature of "personality conflicts at work that generate antipathy and snubbing by supervisors and co-workers," Burlington, 548 U.S. at 68 (internal quotation marks and citations omitted). They fail to rise to the level of, e.g., "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." Terry, 336 F.3d at 138.

As for the first five allegations, there is simply no evidence that the Evaluation Appeal was the but-for cause of any of the actions. See Zann Kwan v. Andalex Grp. LLC, 737 F.3d 834, 846 (2d Cir. 2013) ("'but-for' causation . . . require[s] proof that . . . the adverse action would not have occurred in the absence of the retaliatory motive"). Defendants proffer the following

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[11] Natofsky also asserts the following allegations that we do not consider. First, he asserts that on or about June 16, 2014, DOI "conspir[ed]" to deny his requests for assistance in lifting heavy objects, Pl.'s Opp'n at 24, but Natofsky provides no evidence that he was actually denied the assistance. Second, he asserts that DOI delayed another union payment that he requested on December 10, 2015. The request occurred over a year and a half after the Evaluation Appeal and a year after he left DOI; the lack of temporal proximity dooms any attempt at a *prima facie* case.

legitimate, non-discriminatory reasons for the actions: (1) Natofsky was demoted because he was a poor performer and because DOI reorganized under a new administration as discussed *supra*; (2) the transfer to a cubicle was due to Natofsky's removal from his post as Director of Human Resources and Budget, Defs.' Mem. of Law at 23; Defs.' 56.1 Stmt. ¶ 145; (3) the delay in the salary adjustment was because of confusion in the new administration regarding how to process a payroll adjustment, Defs.' 56.1 Stmt. ¶¶ 133-37; (4) the negative evaluation was upheld due to Natofsky's poor performance as discussed *supra*; and (5) the delay in the union payments occurred because DOI staff was "very busy," Pl.'s 56.1 Stmt. ¶ 284. Plaintiff simply has no evidence that the actions would not have occurred in the absence of a retaliatory motive. "The temporal proximity of events may give rise to an inference of retaliation for the purposes of establishing a *prima facie* case of retaliation . . . , but without more, such temporal proximity is insufficient to satisfy [plaintiff's] burden to bring forward some evidence of pretext." El Sayed v. Hilton Hotels Corp., 627 F.3d 931, 933 (2d Cir. 2010). Plaintiff's conclusory statement that "the above actions reveal retaliatory motives," Pl.'s Opp'n at 24, is insufficient *ipse dixit*.

3. May 28 Email and June 18 DCAS Appeal

Natofsky finally alleges that he engaged in protected activity in (1) a May 28, 2014 email in which he stated, regarding his demotion and salary cut, "By all

accounts it is illegitimate and contrary to law," and (2) in his June 18, 2014 DCAS appeal, as recounted in Section I of this opinion *supra*. Defendants argue that these are not "protected activities," meaning "actions taken to protest or oppose statutorily prohibited discrimination." Aspilaire v. Wyeth Pharm., Inc., 612 F. Supp. 2d 289, 308 (S.D.N.Y. 2009). We agree.

Natofsky's complaints that his demotion and salary cut were "contrary to law" are too general to give rise to a retaliation claim under the Rehabilitation Act.[12] "While it is unnecessary for an individual to specifically invoke the word discrimination," Lucio v. N.Y. City Dep't of Educ., 575 Fed. Appx. 3, 6 (2d Cir. 2014), the complaint must be made in "sufficiently specific terms so that the employer is put on notice that the plaintiff believes he or she is being discriminated against on the basis of the protected status," St. Juste v. Metro Plus Health Plan, 8 F. Supp. 3d 287, 323 (E.D.N.Y. 2014) (internal quotation marks omitted and alteration incorporated). Here, Natofsky asserts to the Court that it is "obvious" that his phrase "contrary to law" meant disability discrimination because he is "an openly disabled employee." Pl.'s Opp'n at 21. Not only does this bare assertion plainly fail the relevant standard, but it is especially insufficient in this case where Natofsky has also challenged the legality of the same actions as constituting age discrimination and/or violations of the New York City Personnel Services Bulletin. "[A]mbiguous complaints that do not make the

[12] We note, however, that the salary cut was in fact improper.

employer aware of alleged discriminatory misconduct do not constitute protected activity." Int'l Healthcare Exch., Inc. v. Global Healthcare Exch., LLC, 470 F. Supp. 2d 345, 357 (S.D.N.Y. 2007).

Accordingly, Natofsky has failed to state any retaliation claim under the Rehabilitation Act.

D. NYHRL and NYCHRL Claims

"The district courts may decline to exercise supplemental jurisdiction over a claim . . . if the district court has dismissed all claims over which the district court has original jurisdiction." 28 U.S.C. § 1367(c)(3). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." Pension Ben. Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 727 (2d Cir. 2013) (citations and internal quotation marks omitted). Here, we decline to exercise supplemental jurisdiction over the state and city law claims. In particular, we note that unlike in many employment discrimination cases brought under other federal statutes, we did not address the NYHRL claims in conjunction with the Rehabilitation Act claims because of uncertainty in the case law as to the overlap between the standards. See, e.g., Powell v. Delta Airlines, 145 F. Supp. 3d 189, 200 n.6 (E.D.N.Y. 2015) (collecting

cases). The state court is best suited to consider that question.

III. CONCLUSION

For the foregoing reasons, we grant the defendants' motion for summary judgment as to the Rehabilitation Act claims in full. We dismiss the NYHRL and NYCHRL claims without prejudice to their re-filing in state court. This Memorandum and Order resolves the motion pending at ECF No. 42.

SO ORDERED.

Dated: New York, New York

August 8, 2017

/s/ Naomi Reice Buchwald
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

APPENDIX C

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 9th day of July, two thousand nineteen.

Richard Natofsky,

Plaintiff - Appellant,

v.

The City of New York, Susan Pogoda, Shaheen Ulon, Mark Peters, John/Jane Doe, said names being fictitious, the persons intended being those who aided and abetted the unlawful conduct of the named defendants,

Defendants - Appellees.

ORDER

Docket No: 17-2757

Appellant, Richard Natofsky, 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, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe