S.D.N.Y. – N.Y.C.
23-cv-7558
Swain, C.J.

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 27th day of June, two thousand twenty-four.

Present:

Denny Chin,
Richard J. Sullivan,
Beth Robinson,
Circuit Judges.

Jose A. Rodriguez,

Plaintiff-Appellant,

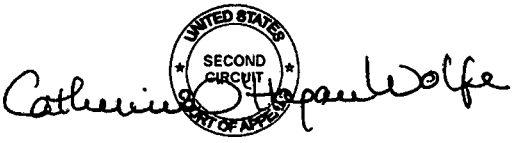
v. 24-256

Hogar, Inc., et al.,

Defendants-Appellees.

Appellant, pro se, moves for leave to proceed in forma pauperis and damages. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE RODRIGUEZ,

Plaintiff,

-against-

HOGAR, INC.; WILLIAM MARTINEZ; NORIS COLON; KRISTEN SOSA,

Defendants.

1:23-CV-7558 (LTS)

ORDER OF DISMISSAL

LAURA TAYLOR SWAIN, Chief United States District Judge:

By order dated October 27, 2023, the Court granted Plaintiff, who appears *pro se* and proceeds *in forma pauperis* ("IFP"), 60 days' leave to file an amended complaint with respect to his claims of employment discrimination and retaliation under the Age Discrimination in Employment Act of 1967 ("ADEA") and Title I of the Americans with Disabilities Act ("ADA") of 1990. The Court warned Plaintiff that if he failed to comply with that order within the time allowed, and could not show good cause to excuse such failure, the Court would dismiss this action; the Court would dismiss Plaintiff's claims under the ADEA and the ADA for failure to state a claim on which relief may be granted, and would decline to consider, under its supplemental jurisdiction, Plaintiff's claims under state law.

On November 14, 2023, Plaintiff filed an amended complaint in response to the Court's October 27, 2023 order. In his amended complaint, Plaintiff purports to assert claims of employment discrimination and retaliation under 42 U.S.C. § 1981, the ADEA, and the Rehabilitation Act of 1973, and he seeks damages. In his amended complaint, Plaintiff names as defendants: (1) Hogar, Inc. ("Hogar"), his former employer; (2) William Martinez, a Hogar Program Director; (3) Noris Colon, Hogar's Chief Executive Officer; and (4) Kristen Sosa, Plaintiff's former Hogar supervisor. The Court construes Plaintiff's amended complaint as

asserting claims of employment discrimination and retaliation under the ADEA, the Rehabilitation Act, Title I of the ADA, and the New York State and City Human Rights Laws ("NYSHRL" & "NYCHRL"). The Court also construes Plaintiff's amended complaint as asserting claims under the Family and Medical Leave Act of 1993 ("FMLA").[1] For the reasons set forth below, the Court dismisses this action.

STANDARD OF REVIEW

The Court must dismiss an IFP complaint, or any portion of the complaint, that is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); *see Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998). The Court must also dismiss a complaint when the Court lacks subject matter jurisdiction of the claims raised. *See* Fed. R. Civ. P. 12(h)(3).

While the law mandates dismissal on any of these grounds, the Court is obliged to construe *pro se* pleadings liberally, *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009), and interpret them to raise the "strongest [claims] that they *suggest*," *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (internal quotation marks and citations omitted, emphasis in original). But the "special solicitude" in *pro se* cases, *id.* at 475 (citation omitted), has its limits – to state a claim, *pro se* pleadings still must comply with Rule 8 of the Federal Rules of Civil Procedure, which requires a complaint to make a short and plain statement showing that the pleader is entitled to relief.

[1] Because Plaintiff makes no allegations as to race discrimination with respect to an employment contract or any other contract, the Court does not construe his amended complaint as asserting claims under Section 1981. *See* 42 U.S.C. § 1981(a), (b); *Rivers v. Rodway Express, Inc.*, 511 U.S. 298, 304 (1994).

Rule 8 requires a complaint to include enough facts to state a claim for relief "that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible if the plaintiff pleads enough factual detail to allow the Court to draw the inference that the defendant is liable for the alleged misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In reviewing the complaint, the Court must accept all well-pleaded factual allegations as true. *Id.* But it does not have to accept as true "[t]hreadbare recitals of the elements of a cause of action," which are essentially just legal conclusions. *Id.* (citing *Twombly*, 550 U.S. at 555). After separating legal conclusions from well-pleaded factual allegations, the Court must determine whether those facts make it plausible – not merely possible – that the pleader is entitled to relief. *Id.* at 679.

BACKGROUND

The facts alleged in Plaintiff's amended complaint largely duplicate the facts alleged in his original complaint. For that reason, the Court refers to its October 27, 2023 order for a summary of the facts alleged.

DISCUSSION

A. Claims of employment discrimination under the ADEA

In its October 27, 2023 order, the Court granted Plaintiff leave to replead his claims of age-based employment discrimination under the ADEA against his former employer, Defendant Hogar. After informing Plaintiff of the pleading requirements to state a claim of employment discrimination under the ADEA, and noting that Plaintiff had not satisfied those requirements in his original complaint, the Court directed him, in his amended complaint, to "state his age at the time of the alleged adverse employment actions, and allege facts showing that, but for his age, he would not have experienced th[e] alleged adverse employment actions." (ECF 4, at 5.) While, in his amended complaint, Plaintiff has revealed what his age was at the time of the alleged adverse

employment actions, and that it was more than 40 years of age, he alleges no facts showing that, but for his age, he would not have experienced the alleged adverse employment actions. The Court therefore dismisses Plaintiff's claims of employment discrimination under the ADEA against Defendant Hogar for failure to state a claim on which relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii).

B. Claims of employment discrimination under Title I of the ADA and the Rehabilitation Act

In its October 27, 2023 order, the Court also granted Plaintiff leave to replead his claims of disability-based employment discrimination under Title I of the ADA against Defendant Hogar. The Court informed Plaintiff of the pleading requirements to state a claim of employment discrimination under Title I of the ADA; they are the same for such a claim under the Rehabilitation Act, *see Davis v. N.Y.C. Dep't of Educ.*, 804 F.3d 231, 235 (2d Cir. 2015); *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1515 (2d Cir. 1995); *Rubin v. N.Y.C. Bd. of Educ.*, No. 20-CV-10208 (LGS), 2023 WL 2344731, at *4 (S.D.N.Y. Mar. 3, 2023) – even the "but for" causation requirement is the same for both types of actions, *Natofsky v. City of New York*, 921 F.3d 337, 345-49 (2d Cir. 2019).[2] The Court further assumed, for the purpose of that order, "that his allegations regarding [Defendant] Colon's perception of him as having a mental health condition and his allegations about suffering from coronavirus symptoms are sufficient to establish that, at the time of his Hogar employment, he suffered from a disability that is a protected characteristic under the ADA." (ECF 4, at 6.) The Court held, however, that Plaintiff had not alleged facts sufficient to state a claim under Title I of the ADA. Specifically, the Court held that he had not

[2] With respect to claims of employment discrimination under the Rehabilitation Act, however, there is an additional requirement that the employer either be a federal executive agency, the United States Postal Service ("USPS"), or receive federal funding. *See Lyons*, 68 F.3d at 1514-15 (quoting 29 U.S.C. § 794(a)).

alleged facts "showing that [Defendant] Hogar [had] imposed an adverse employment action on him because of any disability; he ha[d] not alleged that, but for [Defendant] Colon's perception of [him] as having a mental health condition and/or his suffering from coronavirus symptoms, [Defendant] Hogar would not have discriminated against him." (*Id.*) The Court, however, granted Plaintiff leave to file an amended complaint to allege facts to state a claim of employment discrimination under Title I of the ADA.

With respect to Plaintiff's amended complaint, for the purpose of this order, the Court again assumes that his allegations regarding Defendant Colon's perception of him as having a mental health condition and about suffering from coronavirus symptoms are sufficient to establish that, at the time of his Hogar employment, Plaintiff suffered from a disability that is a protected characteristic under the ADA and under the Rehabilitation Act.[3] The Court will even assume, for the purpose of this order, that Defendant Hogar receives federal funding and that, therefore, its employees enjoy the protections of the Rehabilitation Act. Plaintiff's amended complaint, like his original complaint, however, fails to state a claim of employment discrimination under either Title I of the ADA or the Rehabilitation Act because it does not show that Defendant Hogar imposed an adverse employment action on Plaintiff because of a disability he either suffered from or was perceived as suffering from during his Hogar employment. Specifically, Plaintiff fails to allege facts showing that, but for his disability (one he was perceived as suffering from or one he actually suffered from), including a perception of, or his actually suffering from, a mental health condition and/or coronavirus symptoms, Defendant Hogar would not have discriminated against him. The Court therefore dismisses Plaintiff's clams

[3] The Rehabilitation Act adopts the ADA's definition of "disability" by reference. *See* 42 U.S.C. § 12102(1) (definition of disability under the ADA); 29 U.S.C. § 705(20)(B) (Rehabilitation Act's incorporation of the ADA's definition of "disability" by reference).

of employment discrimination under Title I of the ADA and the Rehabilitation Act against Defendant Hogar for failure to state a claim on which relief may be granted. *See* § 1915(e)(2)(B)(ii).

C. Claims of retaliation under the ADEA, the ADA, and the Rehabilitation Act

The Court further granted Plaintiff, in its October 27, 2023 order, leave to replead his claims of retaliation against Defendant Hogar under the ADEA and the ADA. As with Plaintiff's claims of employment discrimination discussed above, the Court recounted the pleading requirements for his claims of retaliation under the ADEA and the ADA. The pleading requirements for claims of retaliation under the ADA are the same as those for claims of retaliation under the Rehabilitation Act, *see Treglia v. Town of Manlinus*, 313 F.3d 713, 719 (2d Cir. 2002); *Conway v. Healthfirst Inc.*, No. 21-CV-6512 (RA), 2023 WL 5747616, at *5 (S.D.N.Y. Sept. 6. 2023), but with the additional requirement that, to state a claim of retaliation under the Rehabilitation Act, the plaintiff must show that his employer is/was either a federal executive agency, the USPS, or receives federal funding, *see* 29 U.S.C. § 794(a); *Daly v. Westchester Cnty. Bd. of Legislators*, No. 19-CV-4642 (PMH), 2023 WL 4896801, at *4, 7-8 (S.D.N.Y. Aug. 1, 2023), *appeal pending*, No. 23-1220 (2d Cir.). The Court held that, with respect to his claims of retaliation under the ADEA and under the ADA brought in his original complaint, Plaintiff had failed to allege facts showing that "he suffered an adverse employment action because he opposed an unlawful employment practice or otherwise participated in protected activity with regard to his claims of employment discrimination under either the ADEA or the ADA." (ECF 4, at 8.) The Court granted Plaintiff leave to file an amended complaint to allege facts sufficient to state a claim of retaliation under either of those statutes.

Even allowing for the possibility that Defendant Hogar receives federal funding, granting its employees protection under the Rehabilitation Act, Plaintiff, in his amended complaint, does

not allege facts showing that he suffered an adverse employment action because he opposed an unlawful employment practice or otherwise participated in protected activity with regard to his claims of employment discrimination under either the ADEA, the ADA, or the Rehabilitation Act. Accordingly, the Court dismisses Plaintiff's claims of retaliation under those statutes for failure to state a claim on which relief may be granted. *See* § 1915(e)(2)(B)(ii).

D. Claims under the FMLA

In his amended complaint, Plaintiff includes claims arising from his allegations that Defendant Martinez threatened him with termination, and that he was ultimately terminated, because, though he was a probationary employee, he took sick leave as a result of suffering from coronavirus symptoms. The Court understands these claims to be brought under the FMLA. The FMLA provides that eligible employees are "entitled to a total of 12 workweeks of leave during any 12-month period" for any one of several reasons enumerated in that statute. 29 U.S.C. § 2612(a)(1). The FMLA covers, among other things, leave that is necessary "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." § 2612(a)(1)(D). It also includes leave "[d]uring the period beginning on the date the Emergency Family and Medical Leave Expansion Act t[ook] effect, and ending on December 31, 2020, because of a qualifying need related to a public health emergency in accordance with section [29 U.S.C. § 2620]" (referred to as "public health emergency FMLA leave"). 29 U.S.C. § 2612(a)(1)(F).[4]

[4] FMLA leave that was permitted under this provision was limited to leave that an employee would have taken because he or she was:

> unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

Generally, a plaintiff may assert two varieties of claims under the FMLA, claims of interference and claims of retaliation:

> In a general sense, an employee brings an "interference" claim when h[is] employer has prevented or otherwise impeded the employee's ability to exercise rights under the FMLA. "Retaliation" claims, on the other hand, involve an employee actually exercising h[is] rights or opposing perceived unlawful conduct under the FMLA and then being subjected to some adverse employment action by the employer. The two types of claims serve as ex ante and ex post protections for employees who seek to avail themselves of rights granted by the FMLA.

Woods v. START Treatment & Recovery Ctrs., Inc., 864 F.3d 158, 166 (2d Cir. 2017) (citations omitted).

As discussed in the Court's October 27, 2023 order, claims of employment discrimination and retaliation under the ADEA and the ADA cannot be brought against an employer's individual employees. (ECF 4, at 4-7.) The same is true with regard to claims of employment discrimination and retaliation under the Rehabilitation Act. *See Davis v. The Power of Auth. of the State of New York*, No. 19-CV-0792 (KMK), 2022 WL 309200, at *20 (S.D.N.Y. Feb. 2, 2022), *aff'd*, No. 22-488, 2023 WL 3064705 (2d Cir. Apr. 25, 2023) (summary order), *pet. for cert. filed*, No. 23-5783 (Aug. 8, 2023). Yet, "[a]n individual may be held liable under the FMLA . . . if [he or] she . . . [fits its definition of] an 'employer,' which is defined as encompassing 'any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.'" *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 422 (2d Cir. 2016) (quoting 29 U.S.C. § 2611(4)(A)(ii)(I) and citing 29 C.F.R. § 825.104(d)). Thus, the Court understands Plaintiff's complaint as asserting claims under the FMLA against Defendant Hogar, as well as against the individual defendants.

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29 U.S.C. § 2620(a)(2)(A). The term "public health emergency" was defined, for the purpose of this provision, as "an emergency with respect to COVID-19 declared by a Federal, State, or local authority." 29 U.S.C. § 2620(a)(2)(B).

Under the FMLA, an eligible employee is generally defined as "an employee who has been employed – (i) for at least 12 months by the employer with respect to whom leave is requested under [the FMLA]; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A). With regard to FMLA public health emergency leave, however, an eligible employee is defined as "an employee who has been employed for at least 30 calendar days by the employer with respect to whom leave is requested under section 2612(a)(1)(F) of this title." 29 U.S.C. § 2620(a)(1)(A)(i); *see* 29 U.S.C. § 2612(a)(1)(F). As to claims of interference and retaliation under the FMLA, a plaintiff must allege that he is an eligible employee. *See Graziadio*, 817 F.3d at 424 (interference); *Arroyo-Horne v. City of New York*, 831 F. App'x 536, 539 (2d Cir. 2020) (summary order) ("A threshold issue for both FMLA interference claims and FMLA retaliation claims is whether an employee is eligible under the statute to claim its protections."); *Anderson v. NYC Health & Hosps. (Coney Island Hosp.)*, No. 18-CV-3056, 2019 WL 1765221, at *3 (E.D.N.Y. Apr. 22, 2019) (interference and retaliation).

Plaintiff has not alleged facts showing that, for the purpose of his general claims under the FMLA – those arising from his seeking and taking leave "[b]ecause of a serious health condition that ma[de] [him] unable to perform the functions of [his] position," 29 U.S.C. § 2612(a)(1)(D), namely, his coronavirus symptoms – he was an eligible employee while employed by Defendant Hogar. In both his original and amended complaints, Plaintiff alleges that he began his Hogar employment on May 3, 2022, and was terminated on June 1 or 3, 2022; at most, he alleges that he worked for Defendant Hogar for 31 days. (ECF 1, at 9, 11; ECF 5, at 6, 7.) Thus, Plaintiff had not worked for Defendant Hogar for at least 12 months, and therefore,

with respect to his general claims under the FMLA, he was not an eligible employee while employed by Defendant Hogar.

To the extent that Plaintiff asserts claims under the FMLA arising from his attempts to seek and take public health emergency FMLA leave, the Court must also dismiss those claims. While Plaintiff does allege that he worked for Defendant Hogar for more than 30 days, which would normally make him an eligible employee for the purpose of public health emergency FMLA leave, the applicable provisions apply to leave sought or taken during a period that ended on December 31, 2020, *see* §§ 2612(a)(1)(F), 2620(a)(1)(A)(i), which was before May 3, 2022, when Plaintiff alleges he began his Hogar employment. Because Plaintiff was not a Hogar employee eligible for public health emergency FMLA leave, he was not entitled to take public health emergency FMLA leave, and he was not denied leave benefits to which he was entitled under the FMLA. He does not, therefore, state a claim of interference with regard to public health emergency FMLA leave. *See Graziadio*, 817 F.3d at 424 (elements of a claim of interference under the FMLA). In addition, because Plaintiff does not allege that he exercised rights protected under the FMLA – as discussed above, he did not have a right to seek or take public health emergency FMLA leave – he also fails to state a claim of retaliation with regard to public health emergency FMLA leave. *See Potenza v. City of New York*, 365 F.3d 165, 168 (2d Cir. 2004) (elements of a claim of retaliation under the FMLA). Accordingly, the Court dismisses Plaintiff's claims under the FMLA for failure to state a claim on which relief may be granted. *See* § 1915(e)(2)(B)(ii).

E. Claims under state law

A federal district court may decline to exercise supplemental jurisdiction of claims under state law when it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Generally, "when the federal-law claims have dropped out of the lawsuit in its

early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) (footnote omitted). Having dismissed those of Plaintiff's claims of which the Court has original jurisdiction (Plaintiff's claims under federal law), the Court declines to exercise its supplemental jurisdiction of any of his claims under state law that remain, including any claims of employment discrimination and retaliation under the NYSHRL and the NYCHRL. *See Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) ("Subsection (c) of § 1367 'confirms the discretionary nature of supplemental jurisdiction by enumerating the circumstances in which district courts can refuse its exercise.'" (quoting *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 173 (1997))).

F. Leave to amend is denied

District courts generally grant a *pro se* plaintiff leave to amend a complaint to cure its defects, but leave to amend may be denied if: (1) the plaintiff has already been given an opportunity to amend, but has failed to cure the complaint's deficiencies; or (2) his claims would be futile. *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008); *see Hill v. Curcione*, 657 F.3d 116, 123-24 (2d Cir. 2011). Because the defects in Plaintiff's amended complaint cannot be cured with a further amendment, the Court declines to grant Plaintiff another opportunity to amend.

CONCLUSION

The Court dismisses this action. The Court dismisses Plaintiff's claims under federal law for failure to state a claim on which relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii). The Court declines to consider, under its supplemental jurisdiction, Plaintiff's claims under state law. *See* 28 U.S.C. § 1367(c)(3).

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore IFP status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

The Court directs the Clerk of Court to enter a judgment dismissing this action for the reasons set forth in this order.

SO ORDERED.

Dated: January 3, 2024
New York, New York

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
Chief United States District Judge

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 11th day of July, two thousand twenty-four,

Present: Denny Chin,
Richard J. Sullivan,
Beth Robinson,
Circuit Judges.

Jose A. Rodriguez,

Plaintiff - Appellant,

v.

Hogar, Inc., William Martinez, Noris Colon, Kristen Sosa,

Defendants - Appellees.

ORDER
Docket No. 24-256

Appellant filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court