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**SUMMARY ORDER, U.S. COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
(MARCH 11, 2025)**

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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ADRIENNE APUZZA,

*Plaintiff-Appellant,*

v.

NYU LANGONE LONG ISLAND,

*Defendant-Appellee.*

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No. 24-493-cv

Before: GUIDO CALABRESI, DENNY CHIN,  
Sarah A.L. MERRIAM, Circuit Judges.

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**SUMMARY ORDER**

Appeal from the February 21, 2024, amended judgment of the United States District Court for the Eastern District of New York (Choudhury, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment is **AFFIRMED**.

Appellant Adrienne Apizza worked as a medical technologist for NYU Langone Long Island (“Langone”), which implemented a policy requiring employees to receive the COVID vaccine. She was informed that

failure to schedule an appointment to receive the vaccine by September 22, 2021, would result in termination of her employment. Apuzza, who did not want to receive the vaccine, contacted Langone's human resources department several times, and sent a "Notice of Discrimination and Harassment" to the Employee Relations Department. After Apuzza declined to receive the vaccine, her employment was terminated by letter she received October 1, 2021.

Apuzza brought suit against Langone alleging that it violated the Americans with Disabilities Act ("ADA") by (1) discriminating against her for refusing to comply with the COVID vaccine policy, (2) retaliating against her for the same reason, and (3) violating her medical privacy rights.<sup>1</sup> The District Court granted Langone's motion to dismiss Apuzza's amended complaint for failure to state a claim. *See Apuzza v. NYU Langone Long Island*, No. 2:22CV07519(NJC), 2023 WL 9022790 (E.D.N.Y. Dec. 29, 2023). Apuzza appealed.<sup>2</sup> We assume the parties' familiarity with the facts, the procedural history, and the issues on appeal.

"We review *de novo* the district court's dismissal for failure to state a claim, accepting all well-pleaded factual allegations as true and drawing all inferences in favor of the non-moving party." *74 Pinehurst LLC*

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<sup>1</sup> Apuzza raised several other claims in her amended complaint, including broadly challenging Langone's authority to implement a vaccine mandate. She challenges on appeal only the dismissals of the three claims identified herein.

<sup>2</sup> Apuzza filed a motion in the District Court seeking to vacate its order dismissing her complaint under Rule 60(b) of the Federal Rules of Civil Procedure. The District Court denied Apuzza's motion, and Apuzza does not appeal that denial.

*v. New York*, 59 F.4th 557, 562 (2d Cir. 2023). Because Apizza proceeds without counsel, we construe her submissions liberally, “reading such submissions to raise the strongest arguments they suggest.” *Kravitz v. Purcell*, 87 F.4th 111, 119 (2d Cir. 2023) (citation and quotation marks omitted).

For the reasons stated below, Apizza’s claims are foreclosed by this Court’s decision in *Sharikov v. Philips Medical Systems MR, Inc.*, 103 F.4th 159 (2d Cir. 2024).

### **I. Discrimination Claim**

We held in *Sharikov* that the plaintiff, who had challenged his former employer’s COVID-19 policy, had failed to allege a *prima facie* claim of discrimination under the ADA. We concluded that a plaintiff is not “regarded as being disabled” or subject to a “record of” a disability when his employer requires “*all* employees . . . to be vaccinated,” because in such circumstances, the plaintiff is “not singled out because of any perception that he had an impairment that substantially limited him as compared to others.” *Id.* at 168. We also reasoned that the “record of” theory of disability failed because “[a] record that an employee is not vaccinated does not imply that the employee has ‘a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population.’” *Id.* at 170 (quoting 29 C.F.R. § 1630.2(k)(2)).

Like the plaintiff in *Sharikov*, Apizza alleges that her employer “treats” her as having or being “prone to contracting a contagious disease.” Def.’s App’x at 16 ¶ 141. She further alleges that Langone “made a record of disability by classifying plaintiff as

an ‘untreated’ employee because she refused ‘Covid vaccines’, refused mask-wearing, and submitted to ‘PCR testing’ under duress.” *Id.* at 18 ¶ 151. These theories of disability are substantively identical to those we rejected in *Sharikov*, and they fail for the same reasons.

## **II. Retaliation Claim**

Apizza’s retaliation claim also fails under *Sharikov*. There, we held that the plaintiff “failed to plausibly allege that but for his protected activity – his complaints about [his employer’s] COVID-19 policies . . . – he would not have been fired. The allegations of the [c]omplaint instead [made] clear that [the plaintiff] was discharged because he refused to comply with the” employer’s company-wide COVID-19 policy. *Sharikov*, 103 F.4th at 170. Like the plaintiff in *Sharikov*, Apizza alleges that she “was terminated for refusing treatments, tests and inquiries” under Langone’s COVID-19 policy. Def.’s App’x at 25 ¶ 213. Apizza’s complaint makes clear that she believes she was fired because “she refused to comply with” Langone’s vaccine policy, not because of her protestations against that policy. *See Sharikov*, 103 F.4th at 171. This claim therefore likewise fails.

## **III. Medical Privacy Claim**

Finally, Apizza’s failure to adequately plead that she is “regarded as being disabled” or subject to a “record of” a disability, as defined by the ADA, is fatal to her claim that Langone violated her medical privacy rights by subjecting her to impermissible disability-related medical inquiries and examinations. *See Kosiba v. Cath. Health Sys. of Long Island, Inc.*,

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No. 23-6, 2024 WL 3024652, at \*1 n.1 (2d Cir. June 17, 2024) (summary order).

We have considered Apizza's remaining arguments and conclude they are without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe

Clerk of Court

[SEAL]

**AMENDED JUDGMENT,  
U.S. DISTRICT COURT FOR THE EASTERN  
DISTRICT OF NEW YORK  
(FEBRUARY 21, 2024)**

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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ADRIENNE APUZZA,

*Plaintiff,*

v.

NYU LANGONE LONG ISLAND,

*Defendant.*

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No. CV-22-7519 (NJC) (JMW)

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**AMENDED JUDGMENT**

A Memorandum and Order of the Honorable Nusrat J. Choudhury, United States District Judge, having been filed on December 29, 2023, granting Defendant's motion to dismiss for failure to state a claim, dismissing the Amended Complaint, finding that leave to amend is futile, denying Plaintiff's motion for summary judgment, and directing the Clerk of Court to close this case; and an Order of Honorable Nusrat Jahan Choudhury, United States District Judge, having been filed on February 16, 2024, denying *in forma pauperis* status for the purpose of any appeal, it is

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**ORDERED AND ADJUDGED** that Plaintiff Adrienne Apuzza take nothing of Defendant NYU Langone Long Island; that Defendant's motion to dismiss for failure to state a claim is granted; that the Amended Complaint is dismissed; that leave to amend is denied as futile; that Plaintiff's motion for summary judgment is denied; that this case is closed; and that in forma pauperis status is denied for the purpose of any appeal.

Brenna B. Mahoney  
Clerk of Court

By: /s/ James J. Toritto  
Deputy Clerk

Dated: February 21, 2024  
Central Islip, New York

**JUDGMENT, U.S. DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NEW YORK  
(FEBRUARY 9, 2024)**

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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ADRIENNE APUZZA,

*Plaintiff,*

v.

NYU LANGONE LONG ISLAND,

*Defendant.*

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No. CV-22-7519 (NJC) (JMW)

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**JUDGMENT**

A Memorandum and Order of the Honorable Nusrat J. Choudhury, United States District Judge, having been filed on December 29, 2023, granting Defendant's motion to dismiss for failure to state a claim, dismissing the Amended Complaint, finding that leave to amend is futile, denying Plaintiff's motion for summary judgment, and directing the Clerk of Court to close this case; it is

**ORDERED AND ADJUDGED** that Plaintiff Adrienne Apuzza take nothing of Defendant NYU Langone Long Island; that Defendant's motion to dismiss for failure to state a claim is granted; that the Amended Complaint is dismissed; that leave to amend

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is denied as futile; that Plaintiff's motion for summary judgment is denied; that this case is closed.

Brenna B. Mahoney

Clerk of Court

By: /s/ James J. Toritto

Deputy Clerk

Dated: February 21, 2024  
Central Islip, New York

**MEMORANDUM AND ORDER,  
U.S. DISTRICT COURT FOR THE EASTERN  
DISTRICT OF NEW YORK  
(DECEMBER 29, 2023)**

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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ADRIENNE APUZZA,

*Plaintiff,*

v.

NYU LANGONE LONG ISLAND,

*Defendant.*

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No. 2:22-cv-7519 (NJC) (JMW)

Before: Nusrat J. CHOUDHURY, U.S. District Judge.

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**MEMORANDUM AND ORDER  
NUSRAT J. CHOUDHURY, District Judge:**

*Pro se* Plaintiff Adrienne Apizza (“Apizza”) alleges that her former employer, Defendant NYU Langone Long Island (“NYU Langone”), discriminated and retaliated against her on the basis of an alleged disability in violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.*, when NYU Langone terminated Apizza’s employment after she refused to get vaccinated against COVID-19. Before the Court are Apizza’s Motion for Summary Judgment

under Rule 56 of the Federal Rules of Civil Procedure, ECF No. 36, and NYU Langone’s Motion to Dismiss the Amended Complaint with prejudice for failure to state a claim under Rule 12(b)(6). ECF Nos. 52, 52-1, 52-2, 52-3. For the reasons below, the Court dismisses Apuzza’s claims with prejudice, denies leave to amend as futile, and dismisses Apuzza’s Motion for Summary Judgment as moot.

## BACKGROUND

The Court takes the following facts from the Amended Complaint. Am. Compl., ECF No. 25-1.<sup>1</sup> Apuzza worked as a medical technologist for NYU Langone from September 26, 1986 through September 30, 2021. *Id.* ¶ 86. On August 16, 2021, in the middle of the COVID-19 pandemic, NYU Langone notified Apuzza of then-Governor Andrew Cuomo’s Executive Order requiring all healthcare workers employed in New York to receive their first COVID-19 vaccine dose by September 27, 2021. *Id.* ¶ 93. On September 1, 2023, NYU Langone notified Apuzza that the only exemptions from the vaccine mandate were for “pre-existing medical conditions.” *Id.* ¶¶ 94–95. On September 10, 2021, NYU Langone notified Apuzza that employees who did not have a scheduled vaccination

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<sup>1</sup> Defendant’s Motion to Dismiss provides citations to the Amended Complaint docketed at ECF No. 21-1. This Court’s April 25, 2023 Order, however, clarifies that the operative pleading is Plaintiff’s Amended Complaint, supporting affidavit, and exhibits located at ECF No. 25-1. *See* Apr. 25, 2023 Electronic Order. Both versions of the Amended Complaint are signed and dated March 28, 2023 and, so far as the Court can discern, are identical. This opinion will provide citations to the Amended Complaint docketed at ECF No. 25-1.

appointment by September 22, 2021 would be terminated. *Id.* ¶ 97.

On September 13, 2021, Apuzza scheduled a meeting with Derek Forte in NYU Langone Human Resources for September 21, 2021. *Id.* ¶ 98. Ahead of that meeting, on September 17, 2021, Apuzza sent Forte a letter titled, “Notice of Discrimination and Harassment” in which she asked why NYU Langone “discriminated against her based upon a disability they were regarding her as having.” *Id.* ¶¶ 100–101. On September 21, 2023, Apuzza met with Forte to discuss her letter. *Id.* ¶¶ 103–04. On September 24, 2021, Apuzza received an email from Forte informing her that her harassment claim was found to be unsubstantiated. *Id.* ¶ 114.

In mid-September, NYU Langone notified Apuzza “that her employment would be terminated without an approved exemption or proof of first vaccination by September 27, 2021.” *Id.* ¶ 112. On September 28, 2021, NYU Langone notified Apuzza that her employment would be terminated if, by 5:00 pm the following day, she had not received her first dose of the COVID-19 vaccine, did not have an approved or pending medical exemption, or had not filed for a religious exemption. *Id.* ¶ 116. On September 30, 2021, Apuzza went into work because she had not yet been terminated. *Id.* ¶ 118. That evening, Apuzza’s supervisor left her a voicemail terminating her employment. *Id.* ¶¶ 119–20.

On August 13, 2022, Apuzza filed a charge of employment discrimination on the basis of disability and retaliation with the EEOC. Apuzza Aff. ¶ 36, ECF No 25-1. The EEOC issued her a Notification of Right to Sue on October 20, 2022. Am. Compl. ¶ 3.

Apuzza filed this lawsuit on December 9, 2022. Compl., ECF No. 1. On April 25, 2023, the Court ordered that the Amended Complaint, supporting affidavit, and exhibits are the operative pleading. Am. Compl., ECF No. 25-1. The Amended Complaint brings two main claims: that NYU Langone violated Apuzza's rights under the ADA by (1) discriminating against her for having a disability, and (2) retaliating against her for objecting to NYU Langone's vaccine mandate. Apuzza's Amended Complaint also claims that NYU Langone violated the ADA by (1) imposing mitigation measures without individualized assessment, Am. Compl. ¶ 39; (2) failing to provide sufficient accommodations, *id.* ¶ 192; (3) requiring "medical inquiries, test and treatments," *id.* ¶ 42; and (4) violating Apuzza's right to medical privacy, *id.* ¶ 178. Apuzza further claims that NYU Langone had no legal right to impose the vaccine mandate, *id.* ¶ 80; that the vaccine mandate violated public health laws, *id.* ¶ 31; that the vaccine mandate violated "rights that form the bedrock of modern society," *id.* ¶ 79. The Court addresses each of these claims below.

On June 20, 2023, Apuzza moved for summary judgment. Pl's Mot. Summary J., ECF No. 36. NYU Langone opposed the motion on July 6, 2023 and Apuzza replied on July 24, 2023. Def's Opp'n Mot. Summary J., ECF No. 44; Pl's Reply Supp. Mot. Summary J., ECF No. 49.

On February 24, 2023 and May 9, 2023, NYU Langone requested a pre-motion conference in anticipation of filing a motion to dismiss the Amended Complaint under Rule 12(b)(6), Fed. R. Civ. P. ECF Nos. 17, 27. On July 27, 2023, this Court denied NYU Langone's request for a pre-motion conference on its

anticipated motion to dismiss and set a briefing schedule. NYU Langone's fully-briefed motion was filed on October 16, 2023. ECF No. 52.

### STANDARD OF REVIEW

This Court is required to construe pleadings “filed by *pro se* litigants liberally and interpret them to raise the strongest arguments that they suggest.” *Hunter v. McMahon*, 75 F.4th 62, 67 (2d Cir. 2023) (internal quotation marks and citation omitted). “[A] *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” *Ceara v. Deacon*, 916 F.3d 208, 213 (2d Cir. 2019) (internal quotation marks and citation omitted).

Nevertheless, to avoid dismissal, a *pro se* complaint must plead sufficient facts to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). The plausibility standard requires “more than a sheer possibility that a defendant has acted unlawfully.” *Id.*; *accord We The Patriots USA, Inc. v. Connecticut Off. of Early Childhood Dev.*, 76 F.4th 130, 144 (2d Cir. 2023). While “detailed factual allegations” are not required, “[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.” *Iqbal*, 556 U.S. at 678 (internal quotation marks and citations omitted). A complaint fails to state a claim “if it tenders naked assertions devoid of further factual

enhancement.” *Id.* (internal quotation marks, alterations, and citations omitted).

## DISCUSSION

### I. Apizza’s Disability Discrimination Claim Fails

The ADA prohibits an employer from discriminating against a qualified employee on the basis of disability. 42 U.S.C. § 12112(a). Courts apply the *McDonnell Douglas* burden-shifting framework to analyze ADA discrimination claims. *See Bey v. City of New York*, 999 F.3d 157, 165 (2d Cir. 2021). “Under that framework, the plaintiff must first establish a *prima facie* case. If she succeeds in doing so, the burden then shifts to the defendant to proffer a legitimate, nondiscriminatory reason for its actions.” *Razzano v. Remsenburg-Speonk Union Free Sch. Dist.*, No. 20-3718, 2022 WL 1715977, at \*2 (2d Cir. May 27, 2022).

To establish a *prima facie* case of disability discrimination under the ADA, a plaintiff must show that:

- (1) the employer is subject to the ADA; (2) the plaintiff is disabled within the meaning of the ADA or perceived to be so by [the plaintiff’s] employer; (3) [the plaintiff] was otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; (4) [the plaintiff] suffered an adverse employment action; and (5) the adverse action was imposed because of [the plaintiff’s] disability.

*Davis v. N.Y.C. Dep't of Educ.*, 804 F.3d 231, 235 (2d Cir. 2015). Under the ADA, a “disability” is: “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(1). Here, Apuzza alleges a qualifying disability under the “record of” and “regarded as” prongs, arguing that NYU Langone made a record of her having a physical or mental impairment that substantially limits one or more major life activities and regarded her as having an impairment, whether or not that impairment was perceived to limit or actually limited a major life activity.

There are two initial matters to address before considering the plausibility of Apuzza’s allegations. The first is which party bears the initial burden under the ADA to make out a *prima facie* case of disability discrimination. Apuzza’s Amended Complaint asserts that “the burden of proof is upon defendant to prove that it qualified for an exemption or exception to their legal duties to comply with the ADA.” Am. Compl. ¶ 136. This is incorrect. At the motion to dismiss stage, the plaintiff must plead sufficient facts to plausibly establish a *prima facie* showing of all five elements of a disability discrimination claim. *See Bey*, 999 F.3d at 165. That is the inquiry before the Court at this stage of the proceedings. The issue is not whether NYU Langone is subject to the ADA; NYU Langone does not dispute that it is subject to the statute.

The second matter is whether Apuzza alleges a present or future impairment so as to plead a qualifying disability. The Amended Complaint describes Apuzza’s

alleged impairment as NYU Langone treating her as if she had “a deadly, contagious disease, or else, a suppressed immune system that makes her prone to contracting a contagious disease that can be transmitted to others.” Am. Compl. ¶ 141. In its opening brief, NYU Langone frames Apuzza’s alleged disability as the impairment of “being at risk for developing COVID-19 in the future.” Def’s Mot. Dismiss, ECF No. 52-1 at 7. Apuzza’s opposing brief clarifies that “Plaintiff is not arguing a disability existing in the future, she claims that she is being perceived as disabled now” because the alleged impairment is “that of currently having an on-going condition of contagiousness.” Pl’s Opp’n Def’s Mot. Dismiss, ECF No. 52-2 at 5. Apuzza also clarified that she “never claimed to have been diagnosed with ‘COVID-19,’ *id.* at 10, and the Court notes that Apuzza does not allege that she ever sought an exemption under the vaccine mandate’s exemptions for people with pre-existing medical conditions.

The confusion over whether Apuzza alleges a future or present impairment appears to stem from the fact that the word “contagion” means both “disease” and “the transmission of disease from an infected person.” *See Contagion*, Miriam-Webster, <https://www.merriam-webster.com/dictionary/contagion> (last visited Dec. 28, 2023). Having an “on-going condition of contagiousness” can be understood both as a present impairment (where contagiousness is a present condition of being susceptible to illness) and future impairment (where contagiousness is a risk of future illness). Because *pro se* pleadings must be read “to raise the strongest arguments that they suggest,” this Court will consider both formulations of the impair-

ment. *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 387 (2d Cir. 2015) (internal quotation marks and citation omitted).

**A. Apuzza Fails to Allege That NYU Langone Regarded her as Having a Current Impairment**

A plaintiff is “regarded as” having a disability if they were “subjected to an action prohibited [by the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. § 12102(3)(A).

Apuzza asserts that “Plaintiff sufficiently alleged that she is disabled within the meaning of the ADA because she gave notice that she was regarded as disabled.” Pl’s Opp’n at 4 (emphasis in original). Despite this contention, the Court notes that Apuzza never sought an exemption from NYU Langone’s requirement that all healthcare workers be vaccinated despite NYU Langone alerting her as early as September 1, 2023 that exemption from the vaccine mandate was available for people with pre-existing medical conditions. Am. Compl. ¶¶ 94–95. Whether Apuzza’s alleged impairment is the (1) present “ongoing condition of contagiousness,” or the (2) future risk of developing COVID-19, Apuzza’s argument that NYU Langone “regarded her” as disabled fails because she admits that her argument is premised on the notion that NYU Langone regarded *all* of its employees as having that condition. *See, e.g.*, Am. Compl. ¶¶ 32–33 (“The policy perceives all employees as impaired and in need of treatment . . . The policy regards all ‘untreated’ employees as disabled with a

deadly contagious disease without relying upon any individualized assessment.”).

Courts around the country routinely reject arguments identical to the one Apizza makes here because it is illogical that an employer would regard *all* of their employees as disabled. *See, e.g. Johnson v. Mount Sinai Hosp. Grp., Inc.*, No. 22CV2936AMDJRC, 2023 WL 2163774, at \*5 (E.D.N.Y. Feb. 22, 2023), *motion for relief from judgment denied*, No. 22CV2936AMDJRC, 2023 WL 3159233 (E.D.N.Y. Apr. 28, 2023) (plaintiff did not plausibly allege defendant “regarded her as having an impairment, because [plaintiff’s argument] is premised on her theory that the defendant viewed every employee as disabled.”); *Mone v. New York State Unified Ct. Sys.*, No. 21 CV 6914 (DG)(LB), 2023 WL 4424093, at \*9 (E.D.N.Y. Mar. 22, 2023), *report and recommendation adopted*, No. 21CV06914DGLB, 2023 WL 4073770 (E.D.N.Y. June 20, 2023) (“That an employer requires an employee to follow generally applicable COVID-19 safety rules and enforces those policies when an employee fails to comply does not, without more, support the inference that the employer regards the employee as disabled.”); *Newell v. State Univ. of New York Westchester Cnty. Coll.*, No. 22-CV-08524 (PMH), 2023 WL 4082030, at \*4 (S.D.N.Y. June 20, 2023) (plaintiff failed to state a claim that defendant regarded her as having a disability where plaintiff “merely alleges that she was subject to the same Covid-19 protocols to which all WCC employees were subject.”); *Speaks v. Health Sys. Mgmt., Inc.*, No. 22-CV-77, 2022 WL 3448649, at \*5 (W.D.N.C. Aug. 17, 2022) (“[I]nferring that [defendant] classified [plaintiff] as impaired by requiring her to become vaccinated or seek an exemption would mean

that [defendant] considered all its employees to have an ‘impairment,’ which is of course not a plausible inference, particularly in light of the possibility of an exemption.”); *Shklyar v. CarboLine Co.*, 616 F. Supp. 3d 920, 925–26 (E.D. Mo. July 21, 2022) (“[Plaintiff’s] amended complaint show[s] that [her employer] classified [her] in the same way that it classified all of its RD&I employees. Inferring that [the employer] misclassified [plaintiff] as having a disability would therefore require inferring that [the employer] misclassified all of its RD&I employees as having a disability. Such an inference is not reasonable.”).

As to the formulation of Apizza’s argument that NYU Langone regarded Apizza as “having the ongoing condition of contagiousness,” courts in this Circuit agree that the “perception of infectiousness” is not the same as the perception that a person has an impairment triggering the ADA’s protection even where the plaintiff actually contracted COVID-19, which Apizza did not. *See, e.g., Earl v. Good Samaritan Hosp. of Suffern*, No. 20 CV 3119 (NSR), 2021 WL 4462413, at \*6 (S.D.N.Y. Sept. 28, 2021) (rejecting argument that plaintiff plausibly alleged a qualifying disability because defendant perceived plaintiff to be infectious as “wholly speculative” where plaintiff had contracted and recovered from COVID-19).

The alternative formulation of Apizza’s impairment—that NYU Langone regarded her and all other employees as at risk of developing COVID-19 in the future—also fails because the ADA does not cover future impairments. *See, e.g., D’Cunha v. Northwell Health Sys.*, No. 1:22-CV-0988 (MKV), 2023 WL 2266520, at \*5 (S.D.N.Y. Feb. 28, 2023), *aff’d sub nom. D’Cunha v. Northwell Health Sys.*, No. 23-476-CV,

2023 WL 7986441 (2d Cir. Nov. 17, 2023) (“Even if [plaintiff] *was* perceived of being at risk of developing COVID-19 *in the future*, that would not plausibly state an ADA claim.”) (emphasis in original).

In short, neither reading of Apuzza’s argument makes out a plausible claim that NYU Langone “regarded” her as having an impairment so as to trigger the ADA’s protection.

#### **B. Apuzza Fails to Allege That NYU Langone Kept a Record of her Impairment**

Apuzza next argues that she has pled a disability under the prong of the ADA that protects a person with a “record of” an impairment that substantially limits a major life activity. A plaintiff has a “record” of a disability if she “has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.” 29 C.F.R. § 1630.2(k)(1). Here, Apuzza alleges that “Defendant made a record of disability by classifying plaintiff as an ‘untreated’ employee, because she refused ‘Covid vaccines’, refused mask-wearing, and submitted to ‘PCR testing’ under duress while she opposed having her medical privacy rights violated by ‘vaccine attestation’, ‘PCR testing’, temperature taking, and health surveys.” Am. Compl. ¶ 151. Apuzza also alleges that NYU Langone’s vaccine mandate “makes a record of impairment by misclassifying all ‘untreated’ employees,” that is, employees who did not get vaccinated, “as ‘direct threats’.” *Id.* ¶ 35.

Apuzza’s argument fails for two independent reasons. First, as another court has found, making a record that a person was unvaccinated does not qual-

ify as recording them “as having an ‘impairment’ that limited one of her ‘major life activities.’” *Johnson v. Mount Sinai Hosp. Grp., Inc.*, 2023 WL 2163774, at \*3–4. As the *Johnson* court observed, “[r]ather, following New York state law, the hospital required the plaintiff and all employees to get vaccinated against COVID-19, unless they received an exemption . . . A hospital does not “misclassify” employees—who are charged with taking care of vulnerable people—merely by requiring them to be vaccinated against a potentially deadly disease.” *Id.*; *see also Mone*, No. 21 CV 6914 (DG)(LB), 2023 WL 4424093, at \*10 (“Defendant may have recorded plaintiffs as noncompliant or even unvaccinated, but that alone is insufficient to demonstrate defendant misclassified plaintiffs as having an impairment of any sort, let alone a disability as defined by the ADA.”); *Speaks*, 2022 WL 3448649, at \*5 (“[I]nferring that [defendant] classified [plaintiff] as impaired by requiring her to become vaccinated or seek an exemption would mean that [defendant] considered all its employees to have an ‘impairment,’ which is of course not a plausible inference, particularly in light of the possibility of an exemption” for qualifying employees.).

Second, Apizza fails to allege specific facts making it plausible that her impairment substantially limited one or more major life activities, as required by the statute. *See generally* Am. Compl. Therefore, Apizza fails to make the threshold showing that she was disabled under the “record of” prong of the ADA. *See, e.g., Mone*, 2023 WL 4424093, at \*10 (dismissing plaintiff’s “record of” claim where plaintiff fails to allege “any details supporting how the alleged impairments substantially limit[ed] any major life activities[.]”)

(emphasis in original) (internal quotation marks and citation omitted).

## **II. Apizza's Retaliation Claim Fails**

"To state a claim for ADA retaliation, 'a plaintiff must allege that: (1) [they] engaged in an activity protected by the ADA; (2) the employer was aware of this activity; (3) the employer took an adverse employment action against [them]; and (4) a causal connection exists between the alleged adverse action and the protected activity.'" *Robles v. Medisys Health Network, Inc.*, No. 19-CV-6651, 2020 WL 3403191, at \*11 (E.D.N.Y. June 19, 2020) (alterations omitted) (quoting *Caskey v. County of Ontario*, 560 F. App'x 57, 58 (2d Cir. 2014) (summary order)).

Here, the Amended Complaint alleges that Apizza engaged in the protected activity of "opposing [Defendant's] discriminatory 'Covid policy', pointing out the defendant's ADA violations, and by arguing that defendant was not exempt from complying with the ADA." Am. Compl. ¶ 217. The Court understands this to refer to Apizza's serving NYU Langone with the letter titled "Notice of Discrimination and Harassment" on September 17, 2021. *Id.* ¶¶ 100–101.

Even assuming that Apizza adequately alleges that she engaged in protected activity, Apizza's retaliation claim fails because she does not plead sufficient facts to plausibly allege that the protected activity, rather than NYU Langone's vaccine mandate, caused her termination. Indeed, Apizza seems to allege both that NYU Langone "decided to ignore" her protected activity, *id.* ¶ 218, and that this activity is the "only reason" for the adverse employment actions NYU Langone took against her, *id.* ¶¶ 219–20. Those

adverse employment actions were (1) segregating Apuzza with other “unvaccinated” employees who were restricted from specific entrances to the hospital; (2) making termination the consequence for noncompliance; (3) making non-compliant employees unentitled for unemployment benefits or subsidized healthcare; (4) requiring Apuzza to disclose her vaccine status; (5) requiring “prohibited medical tests, treatments and inquiries,” *id.* ¶¶ 204–9; and (6) terminating Apuzza’s employment, *id.* ¶ 213.

Apuzza fails to meet the required causation showing because NYU Langone’s vaccine mandate, requiring termination of noncompliant employees, was already in place and being implemented when Apuzza engaged in the allegedly protected activity of objecting to it. NYU Langone notified Apuzza of the vaccine mandate on August 16, 2021, nearly a full month before Apuzza served NYU Langone with her “Notice of Discrimination and Harassment” on September 17, 2021. *Id.* ¶¶ 93, 100–101. But Apuzza “cannot show a causal connection between her opposition and her termination” because “[w]hile the plaintiff’s refusal to comply with the defendant’s COVID-19 policies was clearly the basis for her termination, the defendant adopted its policies before the plaintiff objected to vaccinations and masking.” *Johnson v. Mount Sinai Hosp. Grp., Inc.*, 2023 WL 2163774 at \*7; *see also Mone*, 2023 WL 4424093, at \*12 (finding plaintiff failed to show causation where plaintiff’s opposition to defendant’s vaccine mandate occurred after the mandate was implemented); *Kosiba v. Catholic Health Sys. of Long Island, Inc.*, No. 21-CV-6416, 2022 U.S. Dist. LEXIS 209772, \*22 (E.D.N.Y. Nov. 18, 2022) (dismissing retaliation claim where alleged adverse

actions were implemented before plaintiff objected to them), *report and recommendation adopted*, No. 21-CV-6416, 2022 U.S. Dist. LEXIS 224717 (E.D.N.Y. Dec. 12, 2022).<sup>2</sup> The Amended Complaint admits as much:

“Defendant’s ‘Covid policy’ itself creates the causal connection between the imposed measures and the consequences for refusing them, including termination.” Am. Compl. ¶ 262. Because NYU Langone’s vaccine mandate requiring termination for non-compliance was already in place when Apuzza objected to it, Apuzza cannot show that her objection caused her termination. Accordingly, Apuzza’s retaliation claim fails.

### **III. Apuzza’s Additional ADA Claims Fail**

Apuzza’s additional claims also fail to state plausible violations of the ADA.

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<sup>2</sup> See also *Speaks*, 2022 WL 3448649 at \*6 (“it is not reasonable to infer that there was a causal connection between [plaintiff’s] criticism of the policy and [plaintiff’s] termination” where “the policy—which was undisputedly the grounds for [plaintiff’s] termination when she chose to remain unvaccinated—was enacted before [plaintiff] spoke up in opposition to the vaccination requirement.”); *Shklyar*, 616 F. Supp. 3d at 927–98 (not reasonable to infer a causal connection to plaintiff’s alleged protected activity where plaintiff was terminated pursuant to policies implemented before her alleged protected activity).

**A. Apizza’s “direct threat” and accommodations claims fail because Apizza has not plausibly alleged that she has a qualifying disability under the statute.**

Apizza makes two claims that both fail because she has not plausibly alleged that she has a qualifying disability under the ADA. The first claim is that NYU Langone’s vaccine mandate imposes mitigation measures “without considering an individualized medical assessment of an employee’s health,” treating all employees as “direct threat[s],” in violation of the ADA. Am. Compl. ¶¶ 39, 181.

The “direct threat” provision of the ADA is an affirmative defense to a charge of discrimination. *See* 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.2(r). Under this defense, the employer argues that the application of a requirement “that an individual shall not pose a direct threat to the health and safety of other individuals in the workplace,” 42 U.S.C. § 12113(b), is “job-related and consistent with business necessity” and “cannot be accomplished by reasonable accommodation,” 42 U.S.C. § 12113(a). Like other affirmative defenses, the “direct threat” provision only applies after a plaintiff has made out a *prima facie* showing of discrimination. “Because the plaintiff did not ‘allege facts showing that she is an individual with a disability,’ the direct threat provision is ‘inapplicable’ in this case.” *Johnson v. Maximus Servs. LLC*, No. 22CV2935AMDJRC, 2023 WL 5612826, at \*5 (E.D.N.Y. Aug. 30, 2023) (internal citations omitted).

Apizza’s second claim is that “[t]he ‘accommodations’ of religious or medical exemptions fail to meet the statutory requirements of ADA compliant accommodations as defined in 29 CFR Part 1630.2(o)

because the ‘exemptions’ offered are not job-related adjustments to the workplace environment.” Am. Compl. ¶ 192. Apuzza’s challenge to the vaccine mandate’s accommodations fails because Apuzza has not plausibly alleged that she has a qualifying disability within the meaning of the ADA. *See McBride v. BIC Consumer Prods. Mfg. Co., Inc.*, 583 F.3d 92, 97 (2d Cir. 2009) (to make out a reasonable accommodation claim, plaintiff must first show that she has a disability under the meaning of the ADA).

**B. Apuzza’s improper medical inquiries and medical privacy claims fail because inquiries about vaccine status are not prohibited under the ADA.**

Apuzza makes two claims that both rely on the incorrect theory that inquiries about vaccine status are cognizable under the ADA. The first claim is that NYU Langone’s vaccine mandate violated the ADA by “require[ing] medical inquires, tests and treatments which are intended to identify which employees remain ‘untreated’ and thus are still perceived as ‘direct threats’ because of a perceived disability/impairment.” Am. Compl. ¶ 42. Apuzza argues these inquiries violated the ADA’s prohibition on inquiries “as to whether such employee is an individual with a disability or as to the nature or severity of the disability.” *Id.* ¶ 47; 29 C.F.R. § 1630.13(b). The “medical inquiries, tests and treatments” that Apuzza challenges include COVID-19 mitigation measures, such as “wearing masks, taking ‘Covid tests’, taking ‘Covid vaccines’, quarantining, segregating, answering surveys, giving vital statistics, reporting ‘vaccine’ status, waiving medical privacy, waiving informed consent.” Am. Compl. ¶ 33 n.3. Apuzza argues that

“[n]one of the disability-related medical inquiries, tests and treatments are related to the essential job function of the employee,” *id.* ¶ 46, and that according to EEOC Guidance, “an employer must have objective evidence of a disease before it makes medical inquiries or imposes testing.” PI’s Opp’n at 10 (emphasis in original).

Apizza’s argument fails, however, because the measures she challenges are not the types of inquiries prohibited by the ADA. Courts have routinely found that the measures Apizza identifies are not prohibited by the ADA because they reveal whether a person has COVID-19, which is not a disability under the ADA. *See, e.g., Johnson v. Maximus Servs. LLC*, 2023 WL 5612826, at \*5 (dismissing claim because inquiries into plaintiff’s vaccination status could only reveal “the plaintiff’s vaccination status or a temporary Covid-19 infection, neither of which is a disability under the ADA”); *Sharikov v. Philips Med. Sys. MR, Inc.*, 659 F. Supp. 3d 264, 280 (N.D.N.Y. 2023) (“Plaintiff has not alleged facts plausibly suggesting that a vaccine attestation, an inquiry regarding whether he had contact with any infectious people, COVID-19 testing, and daily temperature screenings are inquiries or medical examinations that ‘would reveal disabilities.’”); *Friend v. AstraZeneca Pharms. LP*, No. SAG-22-03308, 2023 WL 3390820, at \*5 (D. Md. May 11, 2023) (“AstraZeneca’s inquiry about vaccination status, however, did not constitute a medical examination or an inquiry about a disability or disabling condition.”); *Jorgenson v. Conduent Transport Sol’ns, Inc.*, No. SAG-22-01648, 2023 WL 1472022, at \*5 (D. Md. Feb 2, 2023) (dismissing plaintiff’s ADA claim because defendant’s COVID-19 vaccine “attestation require-

ment did not constitute a medical examination or an inquiry about a disability"); *Chancey v. BASF Corp.*, No. 3:22-cv-34, 2022 WL 18438375, at \*4 (S.D. Tex. Dec. 29, 2022) (plaintiff's claims that his employer required him to submit to weekly COVID-19 testing, imposed distance requirements, and masking did not constitute disability-related inquiries or medical examinations).

Apuzza's second argument fails for the same reason. Apuzza argues that "Defendant's 'Covid policy' violates 29 CFR § 1630.14(c) of the ADA because it involves sharing non-job-related medical classification (e.g. 'vaccination status' and vital statistics and 'PCR' testing history) without any regard to confidentiality, including with a third party company." Am. Compl. ¶ 178. Apuzza's opposition brief also argues that requiring her to use certain entrances based on her vaccination status violated her privacy rights under the ADA. See Pl's Opp'n at 12. Regulations interpreting the ADA provide that information obtained through required medical examinations or inquiries "shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record." 29 C.F.R. § 1630.14(c)(1). Apuzza's claim fails because, as noted above, information about vaccine status is not considered a disability-related inquiry or medical examination as a matter of law. Additionally, "as discussed above, [Plaintiff] did not 'suffer from a disability within the meaning of the ADA,' so 'the ADA's non-disclosure duty was not triggered.'" *Johnson v. Maximus Servs. LLC*, 2023 WL 5612826, at \*5 (citations omitted); *see also Mendoza v. J.M. Smucker Co.*, No. 5:22-CV-02281, 2023 WL 3588280, \*7 (N.D. Ohio May 22, 2023) (finding that

employer's public segregation of employee based on her refusal to receive COVID-19 vaccine did not violate medical privacy requirements under the ADA because information regarding employee's COVID-19 vaccine status was not disability-related inquiry).

**C. The remainder of Apuzza's claims fail for lack of plausible factual support.**

Apuzza argues that "defendant has no legal duty or 'obligation' to implement the 'Emergency Regulation,'" and that "defendant had no legal duty to 'stop the spread of COVID.'" Pl's Opp'n at 2–3; *see also* Am. Compl. ¶ 80 ("how did defendant suddenly acquire a new legal authority or legal duty to treat plaintiff, its employee, for an impairment without any medical examination or diagnosis?"). Apuzza further alleges that the vaccine mandate "inherently violates public health laws," *id.* ¶ 31, and that the "policy attempts to overcome established rights that form the bedrock of modern society," *id.* ¶ 79. These arguments are irrelevant to Apuzza's discrimination or retaliation claims. *See, e.g., Librandi v. Alexion Pharms., Inc.*, No. 3:22CV1126(MPS), 2023 WL 3993741, at \*10 (D. Conn. June 14, 2023) (finding that plaintiff's assertion that her employer lacked authority to require employees to be vaccinated against COVID-19 was "irrelevant to her ADA claim"). To the extent that Apuzza advances these arguments as standalone legal claims, they fail for lack of sufficient facts and legal support. *Iqbal*, 556 U.S. at 678 (holding that a complaint fails to state a claim "if it tenders naked assertions devoid of further factual enhancement").

#### **IV. Leave to Amend Would be Futile**

Although “federal courts should ‘liberally permit pro se litigants to amend their pleadings’ . . . ‘leave to amend need not be granted when amendment would be futile.’” *Johnson v. Maximus Servs. LLC*, 2023 WL 5612826, at \*6 (citing *Terry v. Inc. Patchogue*, 826 F.3d 631, 633 (2d Cir. 2016)). Here, per this Court’s April 25, 2023 Order, Apuzza has already amended her Complaint once. *See* Am. Compl., ECF No. 25-1. Because neither Apuzza’s original Complaint nor her Amended Complaint “could possibly state a cognizable claim for relief, granting leave to amend would be unproductive.” *Johnson v. Mount Sinai Hosp. Grp., Inc.*, 2023 WL 2163774, at \*7 (citing *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993)).

#### **CONCLUSION**

For the reasons set forth above, NYU Langone’s Motion to Dismiss, ECF Nos. 52 & 52-1, is granted in its entirety. Because the Court dismisses the Amended Complaint and finds that leave to amend would be futile, Apuzza’s Motion for Summary Judgment is denied as moot. Accordingly, the Clerk of Court is directed to close this case.

Dated: Central Islip, New York  
December 29, 2023

/s/ Nusrat J. Choudhury  
United States District Judge

**STATUTORY AND REGULATORY  
PROVISIONS AND JUDICIAL RULE  
INVOLVED**

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**28 U.S.C. § 2101(C)**

**28 U.S.C. § 2101 – Supreme Court; time for  
appeal or certiorari; docketing; stay**

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

**28 U.S.C. § 1331**

**28 U.S.C. § 1331-Federal question**

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

**42 U.S.C. § 12102(1)**

**42 U.S.C. § 12102 - Definition of disability**

**(1) Disability**

The term “disability” means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment (as described in paragraph (3)).

**(3) Regarded as having such an impairment For purposes of paragraph (1)(C):**

- (A) An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

**42 U.S.C. §12112**

**42 U.S.C. § 12112 -Discrimination**

**(a) General rule**

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

**(b) Construction**

As used in subsection (a), the term “discriminate against a qualified individual on the basis of disability” includes—

- (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such

applicant or employee because of the disability of such applicant or employee;

- (3) utilizing standards, criteria, or methods of administration—
  - (A) that have the effect of discrimination on the basis of disability; or
  - (B) that perpetuate the discrimination of others who are subject to common administrative control;
- (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity;

**(d) Medical examinations and inquiries**

**(1) In general:**

The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

**(4) Examination and inquiry**

**(A) Prohibited examinations and inquiries**

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or

severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

**(B)Acceptable examinations and inquiries**

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

**42 U.S.C. § 12113**

**42 U.S.C. § 12113-Defenses**

**(a) In general**

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

**(b) Qualification standards**

The term “qualification standards” may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

**29 C.F.R. § 1630.2(g)**

**§ 1630.2 Definitions.**

**(g) Definition of “disability” —**

- (1) In general. Disability means, with respect to an individual—
  - (i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
  - (ii) A record of such an impairment; or
  - (iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both “transitory and minor.”

**29 C.F.R. § 1630.2(k)**

**§ 1630.2 Definitions.**

- (k) Has a record of such an impairment—(1) In general. An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

**29 C.F.R. § 1630.2(l)**

**§ 1630.2 Definitions.**

- (1) “Is regarded as having such an impairment.” The following principles apply under the “regarded as” prong of the definition of disability (paragraph (g)(1)(iii) of this section) above:

- (1) Except as provided in § 1630.15(f), an individual is “regarded as having such an impairment” if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

**29 C.F.R. § 1630.9(d)**

**§ 1630.9 Not making reasonable accommodation.**

- (d) An individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered qualified.

**RULES OF THE CITY OF NEW YORK  
NEW YORK CITY HEALTH CODE**

**TITLE II: CONTROL OF DISEASE**

**§ 11.23 Removal and Detention of Cases,  
Contacts and Carriers Who Are or May Be a  
Danger to Public Health; Other Orders.**

- (a) Upon determining by clear and convincing evidence that the health of others is or may be endangered by a case, contact or carrier, or suspected case, contact or carrier of a contagious disease that, in the opinion of the Commissioner, may pose an imminent and significant threat to the public health resulting in severe morbidity or high mortality, the Commissioner may order the removal and/or detention of such a person or of a group of such persons by issuing a single order, identifying such persons either by name or by a reasonably specific description of the individuals or group being detained. Such person or group of persons shall be detained in a medical facility or other appropriate facility or premises designated by the Commissioner and complying with subdivision (d) of this section.
- (b) A person or group removed or detained by order of the Commissioner pursuant to subdivision (a) of this section shall be detained for such period and in such manner as the Department may direct in accordance with this section.
- (c) Notwithstanding any inconsistent provision of this section:

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- (1) A confirmed case or a carrier who is detained pursuant to subdivision (a) of this section shall not continue to be detained after the Department determines that such person is no longer contagious.
- (2) A suspected case or suspected carrier who is detained pursuant to subdivision (a) of this section shall not continue to be detained after the Department determines, with the exercise of due diligence, that such person is not infected with or has not been exposed to such a disease, or if infected with or exposed to such a disease, no longer is or will become contagious.
- (3) A person who is detained pursuant to subdivision (a) of this section as a contact of a confirmed case or a carrier shall not continue to be detained after the Department determines that the person is not infected with the disease or that such contact no longer presents a potential danger to the health of others.
- (4) A person who is detained pursuant to subdivision (a) of this section as a contact of a suspected case shall not continue to be detained:
  - (i) after the Department determines, with the exercise of due diligence, that the suspected case was not infected with such a disease, or was not contagious at the time the contact was exposed to such individual; or

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- (ii) after the Department determines that the contact no longer presents a potential danger to the health of others.
- (d) A person who is detained pursuant to subdivision (a) of this section shall, as is appropriate to the circumstances:
  - (1) have his or her medical condition and needs assessed and addressed on a regular basis, and (2) be detained in a manner that is consistent with recognized isolation and infection control principles in order to minimize the likelihood of transmission of infection to such person and to others.
- (e) When a person or group is ordered to be detained pursuant to subdivision (a) of this section for a period not exceeding three (3) business days, such person or member of such group shall, upon request, be afforded an opportunity to be heard. If a person or group detained pursuant to subdivision (a) and this subdivision needs to be detained beyond three (3) business days, they shall be provided with an additional Commissioner's order pursuant to subdivisions (f) and (g) of this section.
- (f) When a person or group is ordered to be detained pursuant to subdivision (a) of this section for a period exceeding three (3) business days, and such person or member of such group requests release, the Commissioner shall make an application for a court order authorizing such detention within three (3) business days after such request by the end of the first business day following such Saturday, Sunday, or legal holiday, which applica-

tion shall include a request for an expedited hearing. After any such request for release, detention shall not continue for more than five (5) business days in the absence of a court order authorizing detention. Notwithstanding the foregoing provisions, in no event shall any person be detained for more than sixty (60) days without a court order authorizing such detention. The Commissioner shall seek further court review of such detention within ninety (90) days following the initial court order authorizing detention and thereafter within ninety (90) days of each subsequent court review. In any court proceeding to enforce a Commissioner's order for the removal or detention of a person or group issued pursuant to this subdivision or for review of the continued detention of a person or group, the Commissioner shall prove the particularized circumstances constituting the necessity for such detention by clear and convincing evidence.

- (g) 1. A copy of any detention order of the Commissioner issued pursuant to subdivision (a) of this section shall be given to each detained individual; however, if the order applies to a group of individuals and it is impractical to provide individual copies, it may be posted in a conspicuous place in the detention premises. Any detention order of the Commissioner issued pursuant to subdivision (a) of this section shall set forth:
  - (i) the purpose of the detention and the legal authority under which the order is issued, including the particular sections of this article or other law or regulation;

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- (ii) a description of the circumstances and/or behavior of the detained person or group constituting the basis for the issuance of the order;
- (iii) the less restrictive alternatives that were attempted and were unsuccessful and/or the less restrictive alternatives that were considered and rejected, and the reasons such alternatives were rejected;
- (iv) a notice advising the person or group being detained that they have a right to request release from detention, and including instructions on how such request shall be made;
- (v) a notice advising the person or group being detained that they have a right to be represented by legal counsel and that upon request of such person or group access to counsel will be facilitated to the extent feasible under the circumstances; and
- (vi) a notice advising the person or group being detained that they may supply the addresses and/or telephone numbers of friends and/or relatives to receive notification of the person's detention, and that the Department shall, at the detained person's request and to the extent feasible, provide notice to a reasonable number of such people that the person is being detained. (2) In addition, an order issued pursuant to

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subdivisions (a) and (f) of this section, requiring the detention of a person or group for a period exceeding three (3) business days, shall:

- (i) advise the person or group being detained that the detention shall not continue for more than five (5) business days after a request for release has been made in the absence of a court order authorizing such detention;
- (ii) advise the person or group being detained that, whether or not they request release from detention, the Commissioner must obtain a court order authorizing detention within sixty (60) days following the commencement of detention and thereafter must further seek court review of the detention within ninety (90) days of such court order and within ninety (90) days of each subsequent court review; and
- (iii) advise the person or group being detained that they have the right to request that legal counsel be provided, that upon such request counsel shall be provided if and to the extent possible under the circumstances, and that if counsel is so provided, that such counsel will be notified that the person or group has requested legal representation.

- (h) A person who is detained in a medical facility, or other appropriate facility or premises, shall not conduct himself or herself in a disorderly manner, and shall not leave or attempt to leave such facility or premises until he or she is discharged pursuant to this section.
- (i) Where necessary and feasible under the circumstances, language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided.
- (j) The provisions of this section shall not apply to the issuance of orders pursuant to 24 RCNY Health Code § 11.21.
- (k) In addition to the removal or detention orders referred to in subdivision (a) of this section, and without affecting or limiting any other authority that the Commissioner may otherwise have, the Commissioner may, in his or her discretion, issue and seek enforcement of any other orders that he or she determines are necessary or appropriate to prevent dissemination or transmission of contagious diseases or other illnesses that may pose a threat to the public health including, but not limited to, orders requiring any person or persons who are not in the custody of the Department to be excluded; to remain isolated or quarantined at home or at a premises of such person's choice that is acceptable to the Department and under such conditions and for such period as will prevent transmission of the contagious disease

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or other illness; to require the testing or medical examination of persons who may have been exposed to or infected by a contagious disease or who may have been exposed to or contaminated with dangerous amounts of radioactive materials or toxic chemicals; to require an individual who has been exposed to or infected by a contagious disease to complete an appropriate, prescribed course of treatment, preventive medication or vaccination, including directly observed therapy to treat the disease and follow infection control provisions for the disease; or to require an individual who has been contaminated with dangerous amounts of radioactive materials or toxic chemicals such that said individual may present a danger to others, to undergo decontamination procedures deemed necessary by the Department. Such person or persons shall, upon request, be afforded an opportunity to be heard, but the provisions of subdivisions (a) through (j) of this section shall not otherwise apply.

- (l) The provisions of this section shall not be construed to permit or require the forcible administration of any medication without a prior court order.