To be Argued by:
MICHAEL Y. HAWRYLCHAK
(Time Requested: 30 Minutes)

CTQ-2020-00002

Court of Appeals

of the

State of New York

BROOKLYN CENTER FOR PSYCHOTHERAPY, INC.,

Appellant,

– against –

PHILADELPHIA INDEMNITY INSURANCE CO.,

Respondent.

ON APPEAL FROM THE QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN DOCKET NO. 19-2266

REPLY BRIEF FOR APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR § 500.1(f), Appellant Brooklyn Center for Psychotherapy, Inc. states that it has no corporate parent, subsidiary, or affiliate.

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INTRODUCTION

Claims for disability discrimination by nonintentional failure to accommodate are covered under the insurance policy at issue in this case, (*see* Appellant's Br. 8–24,) and the *Goldman* Complaint contained allegations sufficient to support such a nonintentional failure-to-accommodate claim. (*See* Appellant's Br. 25–37.) That is all that is necessary to establish coverage here.

In its opening brief, Brooklyn Center noted that the capacious view of intentionality that PIIC has relied on throughout this litigation is both at odds with New York caselaw and would have deleterious effects on insurance coverage in New York. Rather than address the broad implications of its theory, PIIC spends much of its brief arguing against positions Brooklyn Center has not advanced and reducing Brooklyn Center's arguments to caricature.

Fanni Goldman contacted Brooklyn Center seeking services for her son. She alleges that Brooklyn Center told her it would not provide an ASL interpreter. She sued for disability discrimination, based in part on Brooklyn Center's alleged failure to provide a reasonable accommodation. Brooklyn Center requested insurance defense but was denied because, PIIC contends, Brooklyn Center's decision not to provide an ASL interpreter was not negligently made, but rather was consistent with Brooklyn Center's policy and, therefore, intentional. The Second Circuit has asked this court to decide, whether, under New York law, an insurer must defend against

a claim based on such a decision not to provide a requested accommodation. While the *Goldman* Complaint gilds this claim with various allegations of nefarious motives, copiously reiterated by PIIC in its brief, at its core, the *Goldman* Complaint is centered around a simple decision by Brooklyn Center not to provide one form of disability accommodation.

Brooklyn Center refers this Court to its opening brief for a full statement of its position and responds below to specific points raised in PIIC's opposition.

ARGUMENT

POINT I

A COMPLAINT ALLEGING DISABILITY DISCRIMINATION BY FAILURE TO ACCOMMODATE IS A COVERED OCCURRENCE.

A. The Second Circuit sought guidance on whether failure-to-accommodate claims are eligible for insurance coverage.

The Second Circuit asked this Court to answer the following question:

> Must a general liability insurance carrier defend an insured in an action alleging discrimination under a failure-to-accommodate theory?

A016. The reason for the Second Circuit's question is clear. Brooklyn Center has argued that failure-to-accommodate claims, like disparate impact claims, but *unlike* disparate treatment claims, are covered under standard policy language and New York law. A015–16. PIIC, by contrast, has argued that disability discrimination by failure to accommodate is categorically excluded from coverage because the harm

in such cases flows directly from an intentional act. A016. This is an open question under New York caselaw.

Caselaw is clear that insurance coverage ultimately depends on whether "the allegations within the four corners of the underlying complaint potentially give rise to a covered claim." *Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 175 (1997). But here the Second Circuit was stymied by the antecedent question of whether insurers must *ever* cover allegations amounting to a failure-to-accommodate claim. Despite consistently arguing for an interpretation of intentionality that would exclude all failure-to-accommodate claims — as well as all disparate impact claims — from insurance coverage, PIIC now urges this Court to confine its review narrowly to the allegations in the *Goldman* Complaint, even while it continues to invoke the same broad theory against coverage.

PIIC criticizes the Second Circuit as "misguidedly focused on the theories of liability that were asserted" in the *Goldman* Complaint. Respondent's Br. 13. But in the context of this litigation, the Second Circuit's focus makes perfect sense. In PIIC's brief in support of its motion to dismiss in the federal District Court, PIIC sought to focus the court's attention on the *Goldman* Complaint's theory of liability, although it completely ignored the possibility of a failure-to-accommodate theory: "Liability predicated on allegations of discrimination may either be presented through a theory of disparate treatment or disparate impact. The various allegations

of discrimination and civil rights violations contained within the Goldman Complaint are inherently allegations of disparate treatment, rather than disparate impact." A420.

Brooklyn Center, in its opposition brief, argued that the *Goldman* Complaint was best read as alleging discrimination by failure to accommodate and explained the contours of a failure-to-accommodate claim. A448–49. In reply, PIIC doubled down on its insistence that disability discrimination could be proven only by disparate treatment or disparate impact theories: "[t]here are two varieties of discrimination claims — disparate treatment and disparate impact." A490. PIIC also admonished that "[c]ourts must carefully distinguish these theories and, reviewing the Goldman Complaint in its entirety, no supportable claim for disparate impact exists," and that "[w]here no reasonable understanding of Ms. Goldman's allegations may be predicated upon a theory of disparate impact, they must be understood as allegations of uncovered disparate treatment."[1]

[1] For reasons that are hard to understand, PIIC appears unwilling to concede that failure-to-accommodate exists as a distinct theory of liability. PIIC refers to failure-to-accommodate as a theory "which [Brooklyn Center] *argues* is distinct from the other two theories," (Respondent's Br. 37 (emphasis added),) and admits only that there is "some truth" to Brooklyn Center's "assertion[]" that "'failure-to-accommodate' is a separate and distinct type of discrimination that also does not require proof of intent." Respondent's Br. 2–3. This "assertion" is not some fringe idea concocted by Brooklyn Center — it is black letter disability discrimination law. *See Brooklyn Ctr. for Psychotherapy, Inc. v. Philadelphia Indem. Ins. Co.*, 955 F.3d 305, 311 (2d Cir. 2020).

Unlike PIIC, the District Court recognized that disability discrimination could be proved by a failure-to-accommodate theory, in addition to disparate treatment and disparate impact. The District Court, however, held that the acts of having a policy concerning disability accommodations and applying that policy to deny a particular request for accommodation, were the type of *intentional* acts that remove the *Goldman* Complaint from insurance coverage: "Each claimed action — the explicit refusal to give Ms. Goldman accommodation and the policy against offering interpretation services — was expected or intended by the insured." A499.

But this reasoning would deny insurance coverage to *all* failure-to-accommodate claims, which invariably involve a decision not to provide a particular accommodation, as well as *all* disparate impact claims, which definitionally involve the *intentional* adoption and application of a facially neutral policy. It is in this context that the Second Circuit needed to determine whether the sort of intentional actions that necessarily underlie a failure-to-accommodate claim are such that they categorically exclude such claims from insurance coverage. Finding no answer in New York caselaw, the Second Circuit certified the question to this Court.

This Court is obviously free to reframe the certified question as it sees fit, but the Second Circuit did not seek this Court's guidance just to answer a fact-specific question about allegations in the particular complaint at issue here, but rather to answer an open question of New York law about the coverage of failure-to-

accommodate claims generally. Brooklyn Center submits that once this Court resolves that such claims *can* be covered, it will be clear that the allegations in the *Goldman* Complaint are sufficient to give rise to such a covered claim.

B. Failure-to-accommodate claims are analogous to Disparate Impact claims.

Brooklyn Center has never argued that the *Goldman* Complaint alleges discrimination by a disparate impact theory. Despite this, PIIC continues to argue as if it has, stating that "Ms. Goldman *never alleged* that Brooklyn Center had a facially-neutral policy" (Respondent's Br. 4); that Brooklyn Center's policy "could never be considered 'facially neutral'" (Respondent's Br. 37); and that "Ms. Goldman was not complaining about facially neutral practices" (Respondent's Br. 40). All of this is irrelevant to a failure-to-accommodate claim, which is not about facial neutrality but rather the reasonableness of the requested accommodation.

What Brooklyn Center has consistently argued is that disparate impact claims are in important ways *analogous* to failure-to-accommodate claims, and they are illustrative of the meaning of intentionality in the context of insurance coverage. Consider a textbook disparate impact case: An employer adopts a policy of hiring only persons who have earned a college degree. A person without a college degree applies for a job and is "flatly refused" employment on the basis of the policy. If it turns out that the college degree requirement has a disparate impact on a group

defined by some protected characteristic and the applicant was a member of that disadvantaged group, the employer may be liable for disparate impact discrimination.

Even though the harm to the applicant causally results from two intentional acts by the employer — the adoption of a policy and the application of that policy to reject the job seeker — New York's Superintendent of Insurance explicitly declared that such claims are not barred by public policy because "the discriminatory result does not directly proceed from specific discriminatory acts against individuals." Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994). The only New York court to address the insurance coverage of disparate impact claims similarly held that claims for disparate impact are covered even where "[i]t is undisputed that [the insurer's] policy does not provide insurance coverage for intentional acts of discrimination." *Am. Mgmt. Ass'n v. Atl. Mut. Ins. Co.*, 168 Misc. 2d 971, 976 (Sup. Ct. N.Y. Cty.), *aff'd*, 234 A.D.2d 112 (1st Dep't 1996). Even though the immediate harm to the hypothetical applicant — denial of employment — was necessarily intended, the legal wrong — denial of employment on a disparate basis — was unintentional.

Failure-to-accommodate claims are in all relevant respects analogous. As with disparate impact, a policy adopted at one time without discriminatory intent — here, whether to provide a particular disability accommodation — might result in

legal liability when applied at a later time. As with disparate impact, the intentional act resulting in harm — here, not providing a requested accommodation — is distinct from the legal wrong — a resultant inability to access services that could reasonably have been avoided.

PIIC argues that the Superintendent's Circular Letter "was intended only to promote insurance coverage for facially neutral employment practices," and because "Ms. Goldman's claim was not grounded upon statistics or numerical profiles . . . it could never be covered by insurance." Respondent's Br. 38. This is flatly wrong. The Circular Letter is not limited solely to disparate impact claims, but also expressly endorses coverage of vicarious liability for an employees' discriminatory acts. Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994). The Superintendent was explicit that the basis for its position with respect to vicarious liability was "identical" to that for disparate impact: "the lack of intentional conduct on the employer's part." *Id.* This reasoning applies equally to failure to accommodate which similarly requires no discriminatory intent.

C. Insurance coverage is barred only for intentionally wrongful acts.

PIIC parodies Brooklyn Center's argument as claiming "that flatly refusing to serve deaf people is not an 'indisputably wrongful act' because it is not as though

Brooklyn Center molested a child." Respondent's Br. 21.[2] This bears little resemblance to Brooklyn Center's actual argument, which sought to reconcile two lines of New York cases concerning the definition of intentionality for purposes of insurance coverage. Brooklyn Center interpreted these cases to hold that coverage is barred only for intentionally *wrongful* acts and argued that failing to provide an ASL interpreter is not inherently wrongful. *See* Appellant's Br. 11–12.

It may be helpful to consider two hypotheticals. First, suppose a person with a disability enters a place of business and requests an *unreasonable* accommodation. Perhaps the accommodation is wholly unnecessary to provide access to the business's services or perhaps it would be prohibitively expensive to provide or would fundamentally alter the nature of the services offered. The business owner denies the requested accommodation. Has the business owner engaged in intentional discrimination? Clearly not. To hold otherwise would make a mockery of the reasonable limits on the obligation to provide accommodations. This is so even though the business owner has *intentionally* denied a person with a disability an accommodation relating to that disability, because the action was not *intentionally wrongful*.

[2] PIIC also unhelpfully summarizes Brooklyn's Center's position as "purposeful discrimination can be accidental." Respondent's Br. 2.

Consider now a second hypothetical. In this case a person with a disability requests an accommodation that the business owner believes to be unreasonable. The owner denies the requested accommodation on the basis of that belief. But the owner is mistaken — perhaps about how necessary the accommodation was or perhaps about how expensive or burdensome it would be to provide — and, in light of all relevant circumstances, the accommodation request was in fact reasonable. In this case, has the owner engaged in intentional discrimination? Here, the owner's state of mind is exactly the same as in the first scenario. Perhaps the owner was negligent in failing to appreciate the reasonableness of the request, but the owner did not intend to deny an accommodation to which that person was legally entitled.

PIIC argues that Brooklyn Center's position is foreclosed by the fortuity doctrine,[3] (Respondent's Br. 24,) which provides that "insurance is not available for losses that the policyholder knows of, planned, intended, or is aware are substantially certain to occur." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Stroh Companies, Inc.*, 265 F.3d 97, 106 (2d Cir. 2001). But PIIC completely ignores Brooklyn Center's discussion of the substantial gap between a decision not to provide a particular accommodation and any resulting legal harm. Appellant's Br. 19–22. PIIC also makes no attempt to grapple with this Court's teaching that "it is not legally

[3] Although PIIC says it is describing the *known loss* doctrine, it instead quotes the Second Circuit's description of the *fortuity* doctrine, rather than its discussion of the known loss doctrine which is irrelevant to this case.

impossible to find accidental results flowing from intentional causes," and that even "[c]alculated risks can result in accidents." *McGroarty v. Great Am. Ins. Co.*, 36 N.Y.2d 358, 363–64 (1975).

POINT II

ALLEGATIONS IN THE *GOLDMAN* COMPLAINT SUPPORT A CLAIM FOR NONINTENTIONAL DISCRIMINATION BY FAILURE TO ACCOMMODATE.

A. Brooklyn Center need only show that allegations in the *Goldman* Complaint could arguably give rise to a covered claim.

Contrary to PIIC's assertion that Brooklyn Center wants this Court to "depart from its well-established precedent," (Respondent's Br. 3,) "change the law in this jurisdiction," (Respondent's Br. 31,) and "wip[e] out the well-established law of this State," (Respondent's Br. 40,) by basing insurance coverage solely on the legal theory alleged, rather than the allegations in the complaint, Brooklyn Center argued extensively in its opening brief that "the Goldman Complaint *contains allegations more than sufficient* to state a claim for nonintentional discrimination based on a failure-to-accommodate theory." Appellant's Br. 27 (emphasis added).

But the legal theory is far from irrelevant. As PIIC itself stated, "where the facts as pleaded cannot sustain *a covered cause of action*, then there is no duty to defend." Respondent's Br. 28 (emphasis altered). A court does not consider factual

allegations in a vacuum, but rather in the context of the legal theories under which those allegations allow the plaintiff to proceed.

Nor does Brooklyn Center argue that "whenever there is a claimed failure-to-accommodate it must be defended against by the insurer regardless of the factual allegations." Respondent's Br. 17. Rather, Brooklyn Center acknowledged that there is no duty to defend "where a cause of action that does not require intent is pleaded in such a way that intentional wrongdoing is necessarily part of the case." Appellant's Br. 33.

PIIC cites *Atlantic Mutual Insurance Co. v. Terk Technologies Corp.*, 309 A.D.2d 22, 32 (1st Dep't 2003), for the proposition that there is no duty to defend a cause of action that can be proved without intent where "all of the factual allegations of the complaint are premised on intentional, 'knowing' conduct." Respondent's Br. 25–26. But PIIC does not consider the facts of *Terk Technologies*. There, the insured was alleged to have produced counterfeit decorative compact disc holders in counterfeit packaging bearing the original designer's name and logo and the legend "Made in Denmark" despite the fact that they were manufactured in New York. *Terk Techs.*, 309 A.D.2d at 25. Even though the trademark infringement claim required no proof of intent, the court held that "it is impossible to envision how Terk could have unknowingly, and unintentionally, approached a local manufacturer to produce a cheaper, low-quality knock-off of the CD 25; marketed the counterfeit product in

packaging indicating it was a genuine Larsen creation manufactured in Denmark, both blatantly false; and then fraudulently misled Larsen when he inquired as to poor sales." *Id.* at 32. Indeed, on the basis of those allegations, there was literally no way that the plaintiff could prevail on a claim for which the insurer would be liable, and thus no duty to defend.

The same is not true here. It is very easy to envision how Brooklyn Center could have decided not to provide an ASL interpreter without knowing or intending that it would result in Goldman's inability to access services. And, as Brooklyn Center noted in its opening brief, "even if Brooklyn Center were to successfully refute all evidence of discriminatory intent, or even if the plaintiff were to simply fail to put on any evidence of discriminatory intent, Brooklyn Center could nevertheless have been held liable if a jury found that its policies insufficiently accommodated the needs of the hearing impaired. Brooklyn Center's need to defend against a nonintentional failure-to-accommodate claim triggered PIIC's duty to defend." Appellant's Br. 33.

PIIC criticizes Brooklyn Center for citing cases from other jurisdictions. Respondent's Br. 29. Brooklyn Center did so for the simple reason that only one New York case[4] has ever addressed the issue of insurance defense coverage of a

[4] That case is *American Management Association v. Atlantic Mutual Insurance Co.*, 168 Misc. 2d 971, 974, 979 (Sup. Ct. N.Y. Cty.), aff'd, 234 A.D.2d 112 (1st Dep't 1996), which required an insurer to defend against a complaint claiming both disparate treatment and disparate impact

complaint alleging discrimination that could be proved by both intentional and nonintentional theories. It is therefore instructive to look at how other jurisdictions have answered this question.

In its opening brief, Brooklyn Center cited *Solo Cup Co. v. Federal Insurance Co.*, 619 F.2d 1178, 1185 (7th Cir. 1980), as an example of a case in which an insurer was required to defend against a complaint alleging intentional discrimination because the general language of the complaint could "contain a potential disparate impact claim" and "disparate impact liability does not require proof of discriminatory motive." *See* Appellant's Br. 30. PIIC counters that *Solo Cup* is irrelevant because the court "stated that the well-settled law of Illinois was that an insurer's duty to defend extended to causes of action or theories of recovery." Respondent's Br. 29.

PIIC is flatly wrong about both *Solo Cup* and Illinois Law. In fact, the well-settled principle cited by *Solo Cup* is simply the familiar idea that an insurer must defend if the complaint alleges a single covered claim, even if it also alleges non-covered claims. *See Solo Cup*, 619 F.2d at 1183 (citing *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187 (1976). Indeed, in *Maryland Casualty*, the two sentences immediately preceding the sentence quoted in *Solo Cup* and relied on by PIIC state

discrimination, even though the complaint alleged that the employer had engaged in "willful discrimination."

that "[i]n determining whether the insurer owes a duty to the insured to defend an action brought against him, it is the general rule that the allegations of the complaint determine the duty. If the complaint alleges facts within the coverage of the policy or potentially within the coverage of the policy the duty to defend has been established." *Maryland Casualty*, 64 Ill. 2d, at 193. Illinois law is no different from New York in this respect. *Solo Cup* held that a nonintentional discrimination claim "could have been proved under the allegations of the underlying complaint," even though it also "included allegations of intentional discrimination." *Solo Cup*, 619 F.2d at 1182, 1187.

PIIC similarly suggests that Brooklyn Center's reliance on *Ron Tonkin Chevrolet Co. v. Continental Insurance Co.*, 126 Or. App. 712, 716 (1994), is undermined by *Ledford v. Gutoski*, 319 Or. 397, 400 (1994), which held that "the insurer may still have a duty to defend if certain allegations of the complaint, without amendment, could impose liability for conduct covered by the policy." Notably, PIIC's quote from *Ledford* begins mid-sentence and omits the phrase "[e]ven if the complaint alleges some conduct outside the coverage of the policy." *Id.* In other words, under this standard, even if the *Goldman* Complaint alleges intentional discrimination, insurance defense is still required if *other* allegations — such as those itemized on pages 27–29 of Brooklyn Center's opening brief — could support a nonintentional theory.

B. The *Goldman* Complaint must be read in light of applicable pleading standards.

Under the pleading rules applicable in federal court where the *Goldman* Complaint was filed, there is no requirement that the allegations in a complaint be internally consistent. Rather, "A party may state as many separate claims or defenses as it has, regardless of consistency." Fed. R. Civ. P. 8(d)(3). Nor is there any requirement that different legal theories be set out separately. *See* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."). *See also Henry v. Daytop Vill., Inc.*, 42 F.3d 89, 95 (2d Cir. 1994) ("[A] plaintiff may plead two or more statements of a claim, even within the same count, regardless of consistency"; "[t]he inconsistency may lie either in the statement of the facts or in the legal theories adopted"; and "[t]he flexibility afforded by Rule 8(e)(2) is especially appropriate in civil rights cases, in which complex inquiries into the parties' intent may sometimes justify raising multiple, inconsistent claims."); 5 Wright, Miller & Kane, Fed. Prac. & Proc. Civ. § 1283 (3d ed.) ("Under Federal Rule 8(d)(2) a party may include inconsistent allegations in a pleading's statement of facts.").

PIIC also criticizes Brooklyn Center for failing to quote paragraph 30 of the *Goldman* Complaint, which alleges that Brooklyn Center "intentionally discriminated" against Ms. Goldman. Respondent's Br. 2, 3. But Brooklyn Center

has never denied that the *Goldman* Complaint contains allegations of intentional discrimination. What Brooklyn Center argues is that although the *Goldman* Complaint contains allegations that support a claim for intentional discrimination, it also contains allegations sufficient to support a claim for nonintentional discrimination by failure-to-accommodate.[5] That this nonintentional theory is inconsistent with certain allegations in the complaint is irrelevant.

PIIC suggests that recognizing a viable nonintentional theory in the *Goldman* Complaint would render "the majority of the allegations" superfluous. Respondent's Br. 36. This is pure hyperbole. A review of the Goldman Complaint reveals that the overwhelming majority of the 75 paragraphs of allegations, including a majority of the first 30 paragraphs preceding the statutory counts, are equally supportive of either theory of liability. But more to the point, it is irrelevant even if it were true. Insurance defense coverage does not depend on the majority of allegations in a complaint. It turns solely on the question of whether there are enough allegations in the complaint to support a single covered claim. "[I]f any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action. It is immaterial that the complaint against the insured asserts additional

[5] And strictly speaking, for purposes of insurance coverage, the *Goldman* Complaint is judged under a standard more lenient than that of a motion to dismiss because "a policy protects against poorly or incompletely pleaded cases as well as those artfully drafted." *Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 670 (1981).

claims which fall outside the policy's general coverage." *Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co.*, 16 N.Y.3d 257, 264–65 (2011) (internal quotation marks and citations omitted).

C. The allegations in the *Goldman* Complaint support a claim for discrimination by failure to accommodate.

At its core, the *Goldman* Complaint is about an alleged failure to accommodate a disability. The central story told by the complaint is that Brooklyn Center refused to provide Ms. Goldman an ASL interpreter and as a result Goldman was denied access to services. A041–45. As is often done, the Complaint is loaded up with allegations intended to paint the defendant in the most negative light: for example, that Brooklyn Center's employee was rude, dismissive, and disrespectful; that Brooklyn Center refuses to serve deaf individuals; and that Brooklyn Center intentionally discriminated against Goldman. But the core incident at the heart of the complaint is the alleged decision not to provide an ASL interpreter. PIIC has asserted that the gravamen of the *Goldman* Complaint is intentional discrimination, (Respondent's Br. 4,) but what PIIC regards as the gravamen might also be described as window dressing.

In its opening brief, Brooklyn Center laid out a number of allegations from the *Goldman* Complaint that, taken together, amount to a claim for nonintentional disability discrimination by failure to accommodate. Appellant's Br. 27–29. PIIC

seeks to downplay these allegations by asserting that "Brooklyn Center relies on three of the thirty factual allegations," (Respondent's Br. 3–4,) or that Brooklyn Center focuses solely on one allegation "while ignoring the remaining twenty-nine paragraphs of allegations." (Respondent's Br. 17.) Neither is accurate. Rather, Brooklyn Center identified more than a dozen allegations that are collectively sufficient to give rise to a claim for nonintentional discrimination by failure to accommodate.[6]

PIIC argues that Brooklyn Center's argument fails because "[n]one of these allegations speak of negligence or nonintentional discrimination." Respondent's Br. 18. The problem with PIIC's argument is that a claim for discrimination by failure-to-accommodate need not plead negligence or lack of intent or any state of mind at all. Rather, "a failure-to-accommodate case gives rise to a form of strict liability, a proof scheme in which motive and intent are irrelevant." *Ragan v. Jeffboat, LLC*, 149 F. Supp. 2d 1053, 1063 (S.D. Ind. 2001). *See also Danielle-Diserafino v. Dist. Sch. Bd. of Collier Cty., Fla.*, No. 2:15-CV-569-FTM-29CM, 2016 WL 4247633, at *4 (M.D. Fla. Aug. 11, 2016) ("A failure to accommodate is akin to a strict liability claim in that "[a]n employer's failure to reasonably accommodate a disabled

[6] Many other allegations in the complaint are also consistent in whole or in large part with a nonintentional failure-to-accommodate claim, including at least ¶¶ 5–10, 12, 15, 17, 19–20, and 26–28 in the initial statement of facts, as well as *all* of the allegations within the four statutory counts.

individual is itself discrimination."); *Drasek v. Burwell*, 121 F. Supp. 3d 143, 155 (D.D.C. 2015) ("The failure of an employer to provide a reasonable accommodation for an employee's disability is, essentially, a strict liability violation, because refusal to provide a reasonable accommodation when one is requested violates the Rehabilitation Act regardless of whether the employer harbors animus or otherwise intends to discriminate against the employee."). Having pleaded a failure to accommodate theory, the plaintiff is entitled to proceed without demonstrating discriminatory intent. The only question is whether, under the *Goldman* Complaint, Ms. Goldman could have prevailed on a failure-to-accommodate claim even if Brooklyn Center had proven a lack of discriminatory intent. The answer is indisputably yes.

D. Brooklyn Center does not rely on extrinsic facts known to the insurer.

PIIC argues that it is "significant that Brooklyn Center never provided additional facts or circumstances that might change PIIC's coverage position." (Respondent's Br. 32.) Brooklyn Center has never argued that any such extrinsic facts were needed to establish coverage. Rather, Brooklyn Center has consistently argued that PIIC's obligation to provide insurance defense is apparent on the face of

the *Goldman* Complaint. As such, Brooklyn Center had no obligation to raise any such extrinsic facts to PIIC's attention.[7]

But despite arguing that its obligations are defined by the allegations in the *Goldman* Complaint, PIIC attempts to excuse itself from its duty to defend by citing to deposition testimony later given in the case and the jury charge at trial. Respondent's Br. 11–12, 33. This is utterly irrelevant. The insurance defense obligation was incurred when Brooklyn Center informed PIIC that it had been served with the *Goldman* Complaint. Whether PIIC had a duty to defend is determined based on the claims Brooklyn Center was facing at the time, not how they subsequently developed during litigation. "It is well established that a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered." *Fitzpatrick v. Am. Honda Motor Co.*, 78 N.Y.2d 61, 63 (1991). It was clear from the face of the *Goldman* Complaint that Brooklyn Center needed to be prepared to defend against being held

[7] PIIC's original disclaimer, after quoting various policy provisions, stated only that "[t]here are no allegations of bodily injury, property damage, or personal injury caused by an occurrence as defined under the policy," and gave no further explanation of the decision to deny coverage. A400. Brooklyn Center understood this to be denying that the *Goldman* Complaint alleged any "bodily injury" and responded accordingly. *See* A403–06. It was only PIIC's second letter that clarified that it was denying that the *Goldman* Complaint alleged "an occurrence." A409.

liable for a failure to accommodate Ms. Goldman's disability even in the absence of any discriminatory intent.

E. PIIC's position invites opportunistic pleading to deny insurance defense coverage.

Finally, PIIC does not address the practical considerations raised by Brooklyn Center. (Appellant's Br. 35–37.) Why would a plaintiff alleging intentional discrimination also allege a failure to accommodate? The obvious reason is to allow that plaintiff to prevail even if discriminatory intent cannot be proven. If a plaintiff is content to prove discriminatory intent, then a failure-to-accommodate theory adds nothing to his or her case aside from additional elements to prove. A defendant faced with a failure-to-accommodate theory knows that it must be prepared to defend against liability even in the absence of any discriminatory intent.

PIIC's position creates a roadmap for a plaintiff seeking to deny a defendant access to otherwise available insurance defense coverage. Simply dress up an otherwise nonintentional claim with allegations sounding in intentionality or animus. The insurer can point to these to deny coverage, and, because these allegations are not elements of the actual legal claim, the plaintiff can press forward without ever needing to prove them. This Court should not let insurers so easily evade their duty to defend.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative. A complaint adequately alleging discrimination under a nonintentional failure-to-accommodate theory is a covered "occurrence" under New York law and must be defended by a general liability insurance carrier.

Dated: September 8, 2020
Albany, New York

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: September 8, 2020

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ADDENDUM

2016 WL 4247633
United States District Court, M.D. Florida,
Fort Myers Division.

Gigi DANIELLE-DISERAFINO, Plaintiff,

v.

DISTRICT SCHOOL BOARD OF COLLIER COUNTY, FLORIDA, Defendant.

Case No: 2:15-cv-569-FtM-29CM
|
Signed 08/11/2016

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OPINION AND ORDER

JOHN E. STEELE, SENIOR UNITED STATES DISTRICT JUDGE

***1** This matter comes before the Court on Defendant's Motion to Dismiss Plaintiff's Complaint or for a More Definite Statement (Doc. #8) filed on January 26, 2016. Plaintiff filed a Response in Opposition (Doc. #15) on March 14, 2016. For the reasons stated below, Defendant's Motion is granted in part and denied in part.

I.

Plaintiff Gigi Danielle-DiSerafino has sued her former employer, the District School Board of Collier County, Florida (Defendant), for alleged violations of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12102 et seq., and of Fla. Stat. § 440.205 – the anti-retaliation provision of Florida's Workers' Compensation Law. Her Complaint (Doc. #1), filed on September 21, 2015, alleges that she suffered a head injury on January 4, 2005, while participating in an obstacle course at work, which caused cognitive impairment, fibromyalgia, and repetitive upper-body motion disorders. (Id. ¶ 11.) Plaintiff, who worked as a teacher, claims she repeatedly asked Defendant for certain accommodations, including specific planning periods and a less stressful classroom environment and size. (Id. ¶¶ 15, 16.) Defendant, however, "failed to seriously address [those] requests and pleas for assistance and failed to reasonably accommodate her disability." (Id. ¶ 17.) Plaintiff claims that the "accumulation of unbearable conditions" – including a visit by Defendant's attorney to her doctor – resulted in her constructive discharge on March 21, 2014. (Id. ¶¶ 33, 34.) After a five-year investigation, the Equal Employment Opportunities Commission (EEOC) issued Plaintiff a right to sue letter on June 30, 2015. (Id. ¶ 27). This lawsuit followed.

Defendant now moves to dismiss Plaintiff's Complaint or, in the alternative, for a more definite statement. As to Plaintiff's ADA claim, Defendant contends Plaintiff failed to adequately plead i) that she exhausted her administrative remedies prior to filing suit, and ii) the elements of that claim. Defendant argues that Plaintiff's retaliation claim should be dismissed because the statute of limitations has passed, and because the facts pled in support of that cause of action do not support a causal connection between her 2005 workers' compensation claim and her alleged constructive discharge nine years later.

II.

Federal Rule of Civil Procedure 8(a) requires a complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In evaluating a Rule 12(b)(6) motion seeking to dismiss a complaint for failing to comply with Rule 8(a), the Court must accept as true all factual allegations in the complaint and "construe them in the light most favorable to the plaintiff." Baloco ex rel. Tapia v. Drummond Co., 640 F.3d 1338, 1345 (11th Cir. 2011). However, mere "[l]egal conclusions without adequate factual support are entitled to no assumption of truth." Mamani v. Berzain, 654 F.3d 1148, 1153 (11th Cir. 2011) (citations omitted).

To avoid dismissal under Rule 12(b)(6), the complaint must contain sufficient factual allegations to "raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). To do so requires "enough facts to state a claim to relief that is plausible on its face." Id. at 570. This plausibility pleading obligation demands "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 555 (citation omitted); see also Ashcroft v. Iqbal, 556 U.S.

662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); Chaparro v. Carnival Corp., 693 F.3d 1333, 1337 (11th Cir. 2012) ("Factual allegations that are merely consistent with a defendant's liability fall short of being facially plausible." (citation omitted)). Instead, the complaint must contain enough factual allegations as to the material elements of each claim to raise the plausible inference that those elements are satisfied, or, in layman's terms, that the plaintiff has suffered a redressable harm for which the defendant may be liable.

III.

A. The Failure to Accommodate Claim (Count I)

***2** The Complaint asserts a claim under Title I of the ADA for disability discrimination, specifically, Defendant's failure to reasonably accommodate Plaintiff's disability in the workplace. Defendant contends that Plaintiff's ADA claim should be dismissed because the Complaint fails to i) adequately allege that she exhausted her administrative remedies prior to filing suit, and ii) state a prima facie case for disability discrimination. The Court will consider these arguments in turn.

(1) Exhaustion of Administrative Remedies

"Generally, [an ADA] plaintiff must allege in the complaint filed in his lawsuit that he has met the prerequisites o[f] a valid and timely-filed EEOC charge." Rizo v. Ala. Dep't of Human Res., 228 Fed.Appx. 832, 836 (11th Cir. 2007) (per curiam) (citing Jackson v. Seaboard Coast Line R.R. Co., 678 F.2d 992, 1010 (11th Cir. 1982)). It suffices to "allege generally that all conditions precedent have occurred or been performed." Fed. R. Civ. P. 9(c).

Plaintiff satisfied her pleading burden by alleging that she received a right to sue letter from the EEOC on June 30, 2015 – less than 90 days prior the date her suit was filed – and that "[a]ll conditions precedent to filing this suit has [sic] occurred." (Doc. #1, ¶¶ 27, 28); Myers v. Cent. Fla. Invs., Inc., 592 F.3d 1201, 1224 (11th Cir. 2010); see also Rodrigues v. SCM I Invs., LLC, No. 2:15-CV-128-FTM-29CM, 2015 WL 6704296, at *3 (M.D. Fla. Nov. 2, 2015). Accordingly, even if it turns out that Plaintiff did not file a timely or valid charge of discrimination with the EEOC – as Defendant's Motion to Dismiss insinuates – dismissal of Plaintiff's ADA claim on exhaustion-of-administrative-remedies grounds is not warranted at this stage. Cf. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) ("[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.").

(2) Pleading Sufficiency of the ADA Claim

Under Title I of the ADA, "[a]n employer "discriminate[s] against a qualified individual on the basis of disability" by, inter alia, "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an...employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A). Thus:

> To state a prima facie claim for failure to accommodate under the ADA, a plaintiff must show that: (1) he is disabled; (2) he is a qualified individual, meaning able to perform the essential functions of the job; and (3) he was discriminated against because of his disability by way of the defendant's failure to provide a reasonable accommodation.

Russell v. City of Tampa, No. 15-14946, ___ Fed.Appx. ____, 2016 WL 3181385, at *2 (11th Cir. June 8, 2016) (per curiam) (citing Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001)).

Defendant argues that dismissal of Plaintiff's ADA claim is warranted because the Complaint does not adequately allege these three elements. Specifically, Defendant contends that Plaintiff did not: 1) plead facts to support her "conclusory allegation" that she has a disability affecting major life activities; 2) allege that she is a "qualified individual"; and 3) provide facts linking her condition with the discriminatory treatment she allegedly received. The Court disagrees. Accepting as true the facts alleged in the Complaint, and drawing "all reasonable inferences derived from those facts" in Plaintiff's favor, as the Court must, Tennyson v. ASCAP, 477 Fed.Appx. 608, 609 n.2 (11th Cir. 2012) (per curiam) (quotation omitted), the Court finds the ADA claim adequately pled.

(a) Plaintiff Adequately Alleges She Is "Disabled"

***3** An individual is "disabled" within the meaning of the ADA if she has "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." Id. § 12102(2)(A).

The Complaint alleges that, after Plaintiff's workplace accident, she began to suffer from several impairments, including "cognitive impairment, fibromyalgia, and repetitive motion disorders of the upper body." (Doc. #1, ¶ 11.) As a result, Plaintiff "is in near constant pain[and] suffers from severe sound sensitivity." (Id. ¶ 20.) From these allegations, the Court may draw the reasonable inference that Plaintiff has impairments that affect major life activities, including thinking, hearing, lifting, bending, and walking.[1] See Weixel v. Bd. of Educ. of N.Y., 287 F.3d 138, 146-48 (2d Cir. 2002) (reversing district court's holding that complaint alleging chronic fatigue syndrome and fibromyalgia did not adequately plead disability element); see also Araya-Ramirez v. Office of the Courts Admin., No. CIV. 14-1619 DRD, 2015 WL 5098499, at *8 (D.P.R. Aug. 31, 2015) ("[I]t is uncontested that individuals diagnosed with Fibromyalgia suffer, in the majority of circumstances, a physical impairment [impacting major life activities]..., including sleeping and concentration."). The Complaint thus sufficiently alleges that Plaintiff is "disabled" under the ADA.[2]

(b) Plaintiff Adequately Alleges She Is a "Qualified Individual"

A "qualified individual" for purposes of the ADA is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). "The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1630.2(n)(1). "If the individual is unable to perform an essential function of his job, even with an accommodation, he is, by definition, not a 'qualified individual' and, therefore, not covered under the ADA." Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1256 (11th Cir. 2007) (citation omitted). Consequently, stating a claim under the ADA requires a plaintiff to allege sufficient facts from which the Court may reasonably infer that she was able to perform her essential employment functions, or that she could have performed those functions with "reasonable accommodation."

By alleging that she had worked for Defendant since 1997 and continued to do so for more than nine years after her accident, Plaintiff has done just that. From her approximately seventeen years of employment, the Court may plausibly infer that, at the time of her alleged constructive discharge, she was able to perform the essential functions of her job as a teacher.[3] See Johnson v. SecTek, Inc., No. CIV.A. ELH-13-3798, 2015 WL 502963, at *11 (D. Md. Feb. 4, 2015) ("[P]laintiff is not required to use words stating that she is a 'qualified individual,' as defendant urges. Nor, at the pleading stage, does plaintiff need to define the essential functions of her position."); see also Blackburn v. Trustees of Guilford Tech. Cmty. Coll., 822 F. Supp. 2d 539, 551 (M.D.N.C. 2011) (plaintiff not required to specifically plead the "essential functions" of the job). Accordingly, Plaintiff has adequately pled she is a "qualified individual" under the ADA.

(c) Plaintiff Adequately Alleges Defendant Failed to Accommodate Her Disability

***4** In order to satisfy the pleading burden with respect to the third element of a failure to accommodate claim, the Complaint must allege facts from which the Court may infer that a reasonable accommodation existed and was denied to the plaintiff, and that providing that accommodation would not have imposed an undue hardship on the employer. See 42 U.S.C. § 12112(b)(5)(A). A failure to accommodate is akin to a strict liability claim in that "[a]n employer's failure to reasonably accommodate a disabled individual **is itself discrimination**, and the plaintiff does not bear the additional burden of having to show that the employer acted in a discriminatory manner toward its disabled employees."[4] Palmer v. McDonald, 624 Fed.Appx. 699, 706 (11th Cir. 2015) (per curiam) (emphasis added) (citing Holly, 492 F.3d at 1262).

The Complaint alleges what the ADA requires. Plaintiff claims she "asked repeatedly that her schedule be changed to allow for a less stressful classroom environment and size, particularly as an ESOL teacher," and also "requested specific planning periods and a classroom change." (Doc. #1, ¶¶ 15-16.) Not only did Defendant refuse to provide most

of the accommodations requested, (id. ¶ 23),[5] the school principal "failed to show up for scheduled meetings to discuss accommodations." (Id. ¶ 21.) Moreover, "Defendant routinely accommodated the schedules of other teachers, so Defendant could have accommodated [her]." (Id. ¶ 22.)

Defendant nevertheless claims dismissal of the ADA claim is warranted because Plaintiff pleads no facts connecting "her condition and any accommodation requests allegedly denied by the District." (Doc. #8, p. 10.) In other words, Defendant argues that Plaintiff has failed to allege her employment would have been less debilitating, had Defendant provided the accommodations.[6]

It is certainly true that, to *prevail* on a workplace failure to accommodate claim under the ADA, the accommodations requested must have been sought for the purpose of alleviating the workplace effect of the impairment. Tesh v. U.S. Postal Serv., 349 F.3d 1270, 1276 (10th Cir. 2003) (affirming judgment as a matter of law in defendant's favor on failure to accommodate claim where the accommodation sought (a daytime shift) was "unrelated to the [plaintiff's] knee disability"); Wood v. Crown Redi-Mix, Inc., 339 F.3d 682, 687 (8th Cir. 2003) ("[T]here must be a causal connection between the major life activity that is limited and the accommodation sought."). But regardless of whether the Court finds tenuous the connection between the "less stressful" accommodations Plaintiff sought and her alleged impairments, Defendant has provided no authority supporting the contention that dismissal is appropriate where a Complaint does not connect the accommodations requested to the impairment.

In sum, though the Complaint's factual allegations are rather lean, the facts pled are sufficient to state a claim against Defendant for failure to accommodate under Title I of the ADA.[7]

B. The Workers' Compensation Retaliation Claim (Count II)

Plaintiff also seeks to hold Defendant liable for violating Fla. Stat. § 440.205,[8] which states that "[n]o employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law." Defendant moves for dismissal of this claim, arguing i) it is barred under the applicable statute of limitations, and ii) Plaintiff has not adequately pled one of the elements of the claim.

(1) Statute of Limitations Affirmative Defense

***5** The expiration of the relevant statute of limitations is an affirmative defense around which a plaintiff is not required to plead. La Grasta v. First Union Sec., Inc., 358 F.3d 840, 845 (11th Cir. 2004). Consequently, dismissal of a cause of action because the defendant claims the statute of limitations has run is not warranted unless "it is apparent from the face of the complaint that the claim is time-barred." Id. (citations omitted).

Here, that is not apparent. Under Florida law, an employee must bring a claim for workers' compensation retaliation within four years of the occurrence of the alleged retaliatory conduct. Scott v. Otis Elevator Co., 524 So. 2d 642, 643 (Fla. 1988). Although true that some of the alleged violative behavior occurred more than four years before Plaintiff filed her Complaint on September 15, 2015, the Complaint also alleges incidents occurring during the four years prior to filing.[9] (Doc. #1, ¶¶ 33(a), (e), (k), (m).) Indeed, the date of Plaintiff's alleged constructive discharge is March 21, 2014. (Id. ¶ 34.)

(2) Failure to State a Claim Under Fla. Stat. § 440.205

A plaintiff alleging a violation of Fla. Stat. § 440.205 must adequately plead that: (1) she engaged in protected activity, such as filing a claim for workers' compensation; 2) she was subjected to an adverse employment action prohibited by the statute; and 3) there exists "a causal connection" between the protected activity and the adverse action. Andrews v. Direct Mail Exp., Inc., 1 So. 3d 1192, 1193 (Fla. DCA 5th 2009); Russell v. KSL Hotel Corp., 887 So. 2d 372, 379 (Fla. DCA 3d 2004). Defendant argues that dismissal of Plaintiff's retaliation claim is appropriate because her Complaint is devoid of facts showing a causal connection between the protected workers' compensation activity in which she engaged (which Defendant claims was the singular act of signing her workers' compensation documents on January 4, 2005) and the adverse actions she claims she suffered years later.

It is unclear whether the only "protected activity" alleged is the January 4, 2005 document signing.[10] Without a better understanding of the evolution of Plaintiff's workers' compensation claim, the Court cannot evaluate whether

Defendant's argument has merit. On this point only, Defendant's request for a more definite statement is granted.[11] Accordingly, within **fourteen (14) days** of the date of this Order, Plaintiff shall file an Amended Complaint clearly setting forth the protected activity forming the basis for her state-law retaliation claim and any relevant dates associated therewith.

***6** Accordingly, it is hereby

ORDERED:

1. Defendant's Motion to Dismiss Plaintiff's Complaint or for a More Definite Statement (Doc. #8) is **granted in part and denied in part**. As to Count I, the Motion is **denied**. As to Count II, the Court **grants in part** the Motion for a More Definite Statement and **denies as moot** the Motion to Dismiss.

2. Within **fourteen (14) days** of the date of this Order, Plaintiff shall file an Amended Complaint clearly setting forth the protected workers' compensation activity that forms the basis for Count II and any relevant associated dates.

DONE and ORDERED at Fort Myers, Florida, this 11th day of August, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 4247633, 2016 A.D. Cases 260,244

Footnotes

1 Defendant argues that Plaintiff has alleged only that she was "diagnosed" with these conditions and there exists a distinction between a "diagnosis" and an "impairment" for purposes of stating a claim under the ADA. (Doc. #8, pp. 8-9.) If there is indeed any such distinction (a point on which the Court is not convinced), it is one without a difference here. The allegations in the Complaint permit the Court to reasonably infer that Plaintiff *suffers from impairments* that substantially limit major life activities.

2 The Complaint also adequately alleges that Defendant knew of Plaintiff's impairments. (Doc. #1, ¶¶ 14, 15, 18, 19.)

3 In fact, Defendant's Motion to Dismiss acknowledges that Plaintiff "remained employed by the District as a teacher for nearly a decade following her injury, all the while performing her job duties as a teacher." (Doc. #8, p. 5.)

4 Consequently, unlike an ADA retaliation claim, a failure to accommodate claim requires no allegations connecting the denial of accommodations to any adverse employment actions suffered.

5 She did receive a room change in 2011. (Doc. #1, ¶ 33.)

6 The Complaint does allege that the accommodations Plaintiff requested would have been "less stressful to her." (Id. ¶ 16.)

7 Defendant's bare assertion that it cannot respond in good faith to Plaintiff's ADA allegations is not well-taken. The request for a more definite statement as to Count I is therefore denied.

8 The Court presumes that the Complaint's citation to Section 440.204, which does not exist, is a scrivenor's error.

9 The Complaint also claims that the retaliatory actions alleged "should be subject to the continuing torts doctrine." (Doc. #1, ¶ 36.) This doctrine is recognized under Florida law and "permits a plaintiff to sue on an otherwise time-barred claim when additional violations of the law occur within the statutory period." Crossman v. Asset Acceptance, L.L.C., No. 5:14-CV-115-OC-10, 2014 WL 2612031, at *3 n.4 (M.D. Fla. June 11, 2014) (citing Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1221 (11th Cir. 2001)). It is not clear, however, whether any court has applied the doctrine to a claim brought under Fla. Stat. § 440.205.

10 The Complaint alleges that "Defendant chose to transport Plaintiff to school to sign [the workers' compensation] documents" on January 4, 2005, (Doc. #1, ¶ 31), which seems to imply that Plaintiff was successful in claiming workers' compensation, and that Defendant never frustrated her efforts to do so. However, the Complaint also states that there "has been no final resolution of Plaintiff's worker's compensation claim," (id. ¶ 35), and that "District officials advised other teachers not to assist [her] in her duties as she requested help due to her injury, because she was in a worker's compensation lawsuit." (Id. ¶ 33(f)).

11 Defendant claims that it is not clear "which employment-related actions Plaintiff is relying upon as the basis for her claim," (Doc. #8, p. 12), but it seems apparent to the Court that she is relying on the several actions listed in paragraphs 33 and 34.

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