STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

KEITH LILLY,

Plaintiff,

v. Index No. 155539/2024

THE STATE OF NEW YORK and EDWARD GIBBS,

Defendants.

DEFENDANT ASSEMBLYMEMBER EDWARD GIBBS' MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS

Respectfully submitted,

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Defendant Assemblymember Edward Gibbs ("Gibbs"), respectfully submits this Memorandum of Law in support of his motion to dismiss ("Motion") Plaintiff Keith Lilly's ("Lilly's" or "Plaintiff's") Complaint (Doc. No. 1).[1]

PRELIMINARY STATEMENT

Plaintiff Lilly asserts causes of action that allege Assemblymember Gibbs engaged in: (1) disability discrimination in violation of the New York State Human Rights Law ("NYSHRL"); (2) aiding, abetting, inciting, compelling, and coercing disability discrimination in violation of the NYSHRL; (3) disability discrimination in violation of the New York City Human Rights Law ("NYCHRL"); (4) aiding, abetting, inciting, compelling, and coercing disability discrimination in violation of the NYCHRL; (5) failure to engage in a cooperative dialogue in violation of the NYCHRL; and (6) violation of the Family and Medical Leave Act ("FMLA"). Each of these causes of action fails.

As an initial matter, Lilly claims Assemblymember Gibbs' actions and omissions alleged in the Complaint arose in his individual capacity. Not so. Rather, all the Complaint's allegations about Gibbs pertain solely to his official conduct as a New York State Assemblymember. As such, he cannot be held liable in this action, because those allegations lie within the broad scope of Gibbs' sovereign immunity.

Regardless of the application of sovereign immunity, moreover, Lilly's Complaint does not state any viable causes of action against Gibbs for alleged disability discrimination, aiding or abetting the same, or for any FMLA violation. And even if the Complaint's causes of action could withstand this Motion (which they cannot), this Court does not have jurisdiction over claims for money damages alleging violations of the

[1] "Doc. No." and any associated page citations refer to the document and page numbers assigned by the NYSCEF docket for this action.

NYCHRL. Finally, to the extent this Court denies dismissal of the Complaint, Assemblymember Gibbs moves to strike paragraph 56 of the Complaint, because its allegations are prejudicial, scandalous, and unnecessary.

SUMMARY OF ALLEGED FACTS

Assemblymember Gibbs was elected in or around July 2022, to represent East Harlem in the New York State Assembly (the "Assembly"). Doc. No. 1, ¶¶ 2, 3, 15. On or after August 1, 2022, Lilly began employment with the Assembly as Gibbs' Senior Advisor. Doc. No. 1, ¶ 26. In this role, Lilly's primary duties included, but were not limited to, meeting with Gibbs' constituents in the community. Doc. No. 1, ¶ 28.

On or about July 21, 2023, Lilly notified Gibbs that he would be absent from work for an indefinite period as he sought medical treatment. Doc. No. 1, ¶ 43. On or about July 24, 2023, Gibbs and others on his staff visited Lilly in the hospital. Doc. No. 1, ¶ 44. During that visit, Lilly repeated that he was likely to be absent from work for an indefinite time. Doc. No. 1, ¶¶ 45-46. Notably, however, Gibbs does not allege he requested any specific accommodation, or that he specified any particular length of time that he expected to be absent from work.

Lilly's employment was terminated on July 28, 2023. Doc. No. 1, ¶ 49. He alleges his termination violated the NYSHRL and NYCHRL, and that Gibbs "fail[ed] to accommodate his disability." Doc. No. 1, ¶¶ 72, 78. Lilly also asserts Gibbs failed to engage in a cooperative dialogue to accommodate that alleged disability pursuant to the NYCHRL. Doc. No. 1, ¶ 84. Confusingly, while Lilly claims Gibbs himself engaged in the alleged discrimination, Lilly also purports that Gibbs aided, abetted, incited, compelled, and coerced discrimination against Lilly (without identifying who else allegedly discriminated

against him). Doc. No. 1, ¶¶ 75, 81. Finally, Lilly alleges that Gibbs, along with the State of New York (the "State"), terminated Lilly's employment in order to interfere with Lilly's ability to take FMLA leave. Doc. No. 1, ¶¶ 86-88. Plaintiff seeks both declaratory and money damages, as well as reinstatement to his former position as Gibbs' Senior Advisor. Doc. No. 1, p. 13.

Simply put, the Complaint only alleges that Gibbs' conduct and omissions concern Lilly's termination, *i.e.*, Gibbs' discretionary staffing decision in his role as a member of the Assembly. Doc. No. 1, ¶¶ 49, 72-88.

ARGUMENT

This Court should dismiss Lilly's Complaint against Gibbs pursuant to New York Civil Practice Law Rules ("CPLR") 3211(a)(7), because it fails to state a cause of action. The sole question for the Court on a CPLR 3211(a)(7) motion to dismiss is, pursuant to its evaluation of "the four corners of the pleading," "whether the facts as alleged in the complaint fit within any cognizable legal theory[.]" *W. & S. Life Ins. Co. v. U.S. Bank Nat'l Ass'n*, 209 A.D.3d 6, 10 (1st Dep't 2022) (citing, *inter alia*, *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994)). Specifically, the Complaint must contain "[s]tatements … sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action." CPLR 3013.

Ordinarily, the plaintiff's "allegations must be given liberal construction and the facts as alleged" in the Complaint must be "accepted as true[.]" *W. & S. Life Ins. Co.*, 209 A.D.3d at 10 (citing *Leon*, 84 N.Y.2d at 87-88). The Complaint "'cannot be vague and conclusory,'" however, and "'[b]are legal conclusions and factual claims which are flatly

contradicted by the record are not presumed to be true[.]'" *Consolidated Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76, 86 (1st Dep't 2022) (quoting *Phillips v. Trommel Constr.*, 101 A.D.3d 1097, 1098 (2d Dep't 2012); *Parola, Gross & Marino, P.C. v. Susskind*, 43 A.D.3d 1020, 1021-22 (2d Dep't 2007)). *Accord*, *Godfrey v. Spano*, 13 N.Y.3d 358 (2009); *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 (1999). In addition, the Court need not assume facts that are not alleged. *Massaro v. Dep't of Educ. of City of N.Y.*, 2013 WL 2142259, at *4 (Sup. Ct. N.Y. County May 7, 2013) (dismissing plaintiff's age discrimination in employment causes of action). In view of these standards, the Complaint should be dismissed in its entirety, because it fails to state any cause of action for the reasons that follow.

POINT I

AS AN INSTRUMENTALITY OF THE STATE, ASSEMBLYMEMBER GIBBS IS ENTITLED TO SOVEREIGN IMMUNITY FOR CAUSES OF ACTION CLAIMED TO ARISE UNDER THE NYSHRL, NYCHRL, OR FMLA

A. The Complaint alleges Gibbs's actions were solely related to his official actions as a member of the Assembly

Lilly's Complaint alleges Gibbs discriminated against him by way of two specific staffing decisions: (1) allegedly determining whether Lilly could perform the essential functions of his job with or without an accommodation, and (2) allegedly terminating Lilly's employment. Both of these assertions claim acts taken in Gibbs' official capacity as Lilly's alleged supervisor.

Officers of state government acting in their official capacity are "instrumentalities" of the State and therefore are immune to suit under the State's sovereign immunity. *Emengo v. State*, 2015 WL 5915286, at *3 (Sup. Ct. N.Y. County Oct. 9, 2015) (noting "the State's immunity extends to agencies and officers of the State engaged in carrying on the State's governmental functions") (citing *Glassman v. Glassman*, 309 N.Y. 436,

440 (1956)), *aff'd as mod. on other grounds*, 143 A.D.3d 508 (1st Dep't 2016). Further, it is "well established that the defense of sovereign immunity may not be evaded by the simple device of suing officers in their individual capacity." *John v. Hoag*, 131 Misc. 2d 458, 463 (Sup. Ct. Cattaraugus County 1986). "[W]hether a given suit is against the State or an individual defendant is not determined solely by the parties named but instead depends also on the nature of the litigation, the relief sought, and the way in which it affects the state[.]" *N.Y. State Thruway Auth. v. Hurd*, 29 A.D.2d 157, 158-59 (3d Dep't 1968).

"[A]s a matter of public policy, defendants cannot be held individually liable where they are acting in their official capacity; that is, 'doing the employer's work, no matter how irregularly or without regard of instructions[.]'" *Emengo*, 2015 WL 13828373, at *3 (citations omitted). Although Lilly categorically asserts he brings his causes of action against Gibbs in Gibbs' individual capacity (Doc. No. 1, p. 2), the substance of the Complaint's actual allegations controls whether the alleged conduct was taken in Gibbs's individual capacity or his official capacity. *Gore v. Kuhlman*, 217 A.D.2d 890, 891 (3d Dep't 1995) (explaining a Court must look at the "specific actions alleged by plaintiff concerning disciplinary action, plaintiff's requests for leave and other similar matters" to determine whether the actions alleged were official acts). Indeed, "absolute immunity still exists for public employees 'performing discretionary functions, involving the exercise of reasoned judgment which could typically produce different acceptable results even where the State has generally waived its sovereign immunity.'" *Palmer v. Cook*, 65 Misc. 3d 374, 385 (Sup. Ct. Queens County 2019) (quoting *Emengo*, 2015 WL 13828373, at *7).

In this action, Gibbs' alleged discriminatory acts relate to his staffing decisions, including his alleged termination of Lilly's employment. Doc. No. 1, ¶¶ 48-51,

64, 68-90. Hiring, supervising, setting the conditions of employment, and terminating staff members are discretionary actions that members of the Assembly take as part of their official role. Exhibit B to Affirmation of Craig R. Bucki, Esq., dated August 16, 2024, at ¶ 5[2] (in which the Assembly confirmed in a recently-filed verified petition in State Supreme Court that "[m]embers of the Assembly have the discretion to choose their staff for their Assembly offices and are considered the appointing authority with respect to such staff."); *see also People v. Ohrenstein*, 77 N.Y.2d 38, 47 (1990) (noting "statutes [authorizing salaries of legislative staff members] permitted the individual legislator to appoint staff members, to determine the terms and conditions of their employment and to assign duties and the hours of work as the legislator deemed necessary to fulfill the broad range of legislative duties").

In fact, courts routinely invoke the doctrine of sovereign immunity to dismiss allegations of discrimination in response to discretionary staffing decisions made by supervisors employed by the State. *See*, *e.g.*, *Cavanaugh v. Doherty*, 243 A.D.2d 92, 101 (3d Dep't 1998) (dismissing State employee's cause of action against her supervisor for *prima facie* tort, because the defendant, in his role as the Director of Public Relations for the Department of Correctional Services, "was acting within the ambit of his official duties" when he terminated the employee); *Ajoku v. N.Y. State Off. of Temp. Disability Assistance*, 2020 WL 886160, at *4 (Sup. Ct. N.Y. County Feb. 20, 2020), *aff'd as mod. on other grounds*, 198 A.D.3d 437 (1st Dep't 2021) (dismissing NYCHRL claims against individual defendants based on allegedly discriminatory termination on the basis of sovereign immunity, because

[2] On a motion to dismiss, "[i]t is well established that [this] court may take judicial notice of undisputed court records and files," whether its own or relating to proceedings in other courts. *All. Network, Inc. v. Sidley Austin LLP*, 43 Misc. 3d 848, 852 n.1 (Sup. Ct. N.Y. County 2014) (citing, *inter alia*, *Matter of Khatibi v. Weill*, 8 A.D.3d 485, 485-86 (2d Dep't 2004)). *Accord*, *MJD Constr., Inc. v. Woodstock Lawn & Home Maint.*, 299 A.D.2d 459, 459 (2d Dep't 2002).

"the complaint [was] devoid of any acts outside the individual defendant's official roles of hiring, supervising and terminating plaintiff").

Lilly's erroneous assertion that he sues Gibbs in Gibbs' individual capacity is inaccurate, and the Complaint must be evaluated for what it is: alleging nothing more than Gibbs' appropriate exercise of discretion in his official capacity. For that reason, Gibbs is entitled to sovereign immunity, and the Complaint against him fails.

B. As an instrumentality of the State, and acting in his official capacity, Assemblymember Gibbs cannot be liable under the NYSHRL

"[T]he State, its agencies and employees" are only subject to the NYSHRL for actions that require "adherence to a governing rule or standard with a compulsory result." *Palmer*, 65 Misc. 3d at 385. That said, "absolute immunity still exists for public employees 'performing discretionary functions, involving the exercise of reasoned judgment which could typically produce different acceptable results even where the State has generally waived its sovereign immunity.'" *Id.* (quoting *Emengo*, 2015 WL 13828373, at *7). *Accord, Banigo v. Bd. of Educ. of Roosevelt Union Free Sch. Dist.*, 39 Misc. 3d 1048, 1051-52 (Sup. Ct. Nassau County 2013) (citing *Tango v. Tulevech*, 61 N.Y.2d 34, 40 (1983)). "Additionally, individuals may not be held liable when they are acting within the scope of their duties." *Palmer*, 65 Misc. 3d at 385.

In this action, Lilly alleges only that Gibbs failed to accommodate his alleged disability, and terminated him allegedly in a discriminatory manner. Doc. No. 1, ¶¶ 48-51, 64, 68-90. Plaintiff has not alleged (nor can he) that Gibbs was completing a ministerial task when he purportedly made these decisions. In fact, as explained *supra*, staffing decisions are necessarily discretionary in nature and subject to absolute immunity. *See*, *e.g. Banigo*, 65 Misc. 3d at 1052 (dismissing NYSHRL claims against school district superintendent

because he was immune from liability under the State's sovereign immunity when he exercised discretionary authority to terminate certain employees).

Accordingly, Plaintiff's Second and Third Causes of Action against Gibbs must be dismissed, because Gibbs is entitled to sovereign immunity for causes of action arising under the NYSHRL concerning his exercise of discretionary authority, such as staffing decisions.

C. As an instrumentality of the State, acting in his official capacity, Assemblymember Gibbs cannot be liable under the NYCHRL

Plaintiff's Fourth, Fifth, and Sixth Causes of Action arise under the NYCHRL. Doc. No. 1, ¶¶ 77-85. Again, as explained *supra*, Gibbs's discretionary decision-making relating to his staffing needs is an act within his official capacity, and Gibbs is entitled to immunity from suit for those NYCHRL causes of action.

Plaintiff does not claim (nor can he) that the State, the Assembly or Assemblymember Gibbs waived the State's sovereign immunity. *See Leiman v. New York*, 2000 WL 1364365, at *7 (S.D.N.Y. Sept. 21, 2000) ("only a person who is authorized to do so under state law may waive a state's sovereign immunity"), *aff'd*, 9 Fed. App'x 37 (2d Cir. 2001); *Breen v. Mortg. Comm'n of State of N.Y.*, 285 N.Y. 425, 429 (1941) (the State "may be sued only as it has consented to be sued"); *Pauchogue Land Corp. v. Long Island State Park Comm'n*, 243 N.Y. 15, 23 (1926) ("the State may not be sued without its consent").

In addition, when it enacted the NYCHRL, New York City did not (and still does not) have the authority to waive the State's or the State's officers' sovereign immunity. *Jattan v. Queens Coll. of City Univ. of N.Y.*, 64 A.D.3d 540, 542 (2d Dep't 2009) (citations omitted). *Accord, Ajoku*, 2020 WL 886160, at *4 (dismissing discrimination causes of action under the NYCHRL on the basis of sovereign immunity, because "the complaint [was]

devoid of any acts outside the individual defendant's official roles of hiring, supervising and terminating plaintiff"); *Miller v. City Univ. of N.Y.*, 2019 WL 8109942, at *5 (Sup. Ct. N.Y. County Sept. 26, 2019) (denying motion to amend complaint to include NYCHRL cause of action against State instrumentality and individual defendant, and dismissing NYCHRL causes of action against existing individual defendants because they were absolutely immune from suit under the NYCHRL); *Khalil v. State*, 17 Misc. 3d 777, 786 (Sup. Ct. N.Y. County 2007) (noting "the City of New York is not empowered to waive the State's immunity").

Again, the allegations in the Complaint relate solely to Gibbs' alleged staffing decisions made in his official role as a member of the Assembly. Because neither the State of New York nor Gibbs has consented to suit under the NYCHRL, and New York City did not have the authority to waive the State's or its officers' sovereign immunity, Gibbs remains immune from suits alleging violations of the NYCHRL, and the Complaint's Fourth, Fifth, and Sixth Causes of Action should be dismissed for that reason.

D. As an instrumentality of the State, acting in his official capacity, Assemblymember Gibbs cannot be liable under the FMLA[3]

Lilly also alleges that Gibbs terminated Lilly in order to interfere with Lilly's ability to take protected FMLA leave. Doc. No. 1 ¶¶ 86-90. Again, as explained *supra*, Gibbs's staffing decision-making was an exercise of discretion within his official capacity. As such, he is immune from liability under the FMLA.

States have retained Eleventh Amendment sovereign immunity for claims seeking monetary damages under 29 U.S.C. § 2612(a)(1)(D). *Coleman v. Ct. of Appeals of*

[3] Lilly also has not claimed (nor can he) that he was entitled to FMLA leave — a prerequisite to a cause of action alleging interference with his alleged FMLA rights. *See infra* at Point II(D).

Md., 566 U.S. 30, 43-44 (2012). That said, the Supreme Court carved out a narrow exception to sovereign immunity under Ex parte *Young*, 209 U.S. 123 (1908). Pursuant to that exception, "a plaintiff may sue a state official acting in his official capacity — notwithstanding the Eleventh Amendment — for prospective, injunctive relief from violations of federal law." *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 95 (2d Cir. 2007) (internal quotations and citation omitted). The Ex parte *Young* exception "rests on the premise — less delicately called a 'fiction' … — that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011) (internal citation omitted). Before applying this exception, however, a court is "'specifically required by *Ex parte Young* to examine whether there exists an ongoing violation of federal law.'" *Pierre v. N.Y. State Dep't of Corr. Servs.*, 2009 WL 1583475, at *18 (S.D.N.Y. June 1, 2009) (quoting *State Emps. Bargaining Agent Coal.*, 494 F.3d at 96). "Where a plaintiff alleges 'only discrete acts of past discrimination and retaliation,' merely characterizing the request for relief as prospective will not suffice to invoke the *Ex parte Young* doctrine." *De Figueroa v. New York*, 403 F. Supp. 3d 133, 151-52 (E.D.N.Y. 2019) (quoting, in part, *Pierre*, 2009 WL 1583475).

Here, Lilly's Complaint asserts a discrete act of past alleged discrimination and does not fall under the Ex parte *Young* exception to sovereign immunity. Specifically, Lilly alleges he was terminated effective July 28, 2023. Doc. No. 1, ¶ 49. He has not alleged, however, that there is any ongoing violation or deprivation of his rights under the FMLA. *See* Doc. No. 1, *generally*. Moreover, Lilly does not seek prospective injunctive relief. Instead, he requests a declaratory judgment, reinstatement to his former position as

Senior Advisor to Assemblymember Gibbs, monetary damages, attorneys' fees, and punitive damages. Doc. No. 1, p. 13. Hence, the Complaint does not set forth causes of action that would satisfy the Ex parte *Young* exception, and Gibbs is entitled to sovereign immunity from this suit.

Further, although not specifically pled, Lilly's claim that Gibbs interfered with his ability to take FMLA leave under 29 U.S.C. § 2615(a)(1) appears to purport interference with the FMLA's "self-care" provision, because it relates to Lilly's own alleged "serious health condition that makes [him] unable to perform the functions" of his position. 29 U.S.C. § 2612(a)(1)(D). On this point, States have retained Eleventh Amendment sovereign immunity for claims seeking monetary damages under the "self-care" provision of the FMLA. *Coleman*, 556 U.S. 30 (2012).

In view of Gibbs' sovereign immunity, Lilly's Seventh Cause of Action should be dismissed.

POINT II

EVEN ASSUMING, *ARGUENDO*, GIBBS IS NOT ENTITLED TO SOVEREIGN IMMUNITY, PLAINTIFF HAS STILL FAILED TO STATE A CAUSE OF ACTION

A. Plaintiff Lilly failed to state a cause of action under the NYSHRL and NYCHRL for failure to accommodate[4]

Lilly alleges Gibbs failed to accommodate his disability. The only accommodation he claims to have requested, however, was an indefinite leave. Doc. No. 1, ¶¶ 57-59.

[4] NYSHRL "disability discrimination claims are governed by the same legal standards as federal [Americans with Disabilities Act ('ADA')] claims." *I.M. by L.M. v. City of New York*, 178 A.D.3d 126, 135 (1st Dep't 2019) (citations omitted). "The same standards used to evaluate claims under the ADA also apply to cases involving the New York State Human Rights Law ("NYSHRL") and NYCHRL." *Goolsby v. City of New York*, 83 Misc. 3d 445, 453 (Sup. Ct. N.Y. County 2024).

"[I]t is clear that a proponent of a [NYSHRL] claim has the burden of establishing that [he] proposed a reasonable accommodation and that the defendant refused to make such accommodation." *Pimentel v. Citibank, N.A.*, 29 A.D.3d 141, 148 (1st Dep't 2006). At the time Lilly was terminated, he was not seeking "an accommodation of his disability, but was effectively seeking an indefinite leave of absence. Such a leave simply cannot be a reasonable means of accommodation, and termination as a result of indefinitely continuing absence does not subject the employer to ADA liability." *Donofrio v. N.Y. Times*, 2001 WL 1663314, at *7 (S.D.N.Y. Aug. 24, 2001), *adopted by* 2002 WL 230820 (S.D.N.Y. Feb. 14, 2022).

On this point, the ADA and NYSHRL do not require an employer to grant an employee an indefinite leave of absence. *See Vangas v. Montefiore Med. Ctr.*, 823 F.3d 174, 181-82 (2d Cir. 2016) (holding that request for indefinite leave of absence is not a reasonable accommodation under NYSHRL); *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 9 (2d Cir. 1999) (finding employer was not required to grant the plaintiff "an indefinite leave of absence" in "the absence of any indication... that ... he expected to be able to return"); *Stamey v. NYP Holdings, Inc.*, 358 F. Supp. 2d 317, 324 (S.D.N.Y. 2005) (noting "[t]he ADA does not require an employer to grant an employee an indefinite leave of absence"). *Accord, Nowak v. St. Rita High Sch.*, 142 F.3d 999, 1004 (7th Cir. 1998); *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 757 (5th Cir. 1996); *Myers v. Hose*, 50 F.3d 278, 280 (4th Cir. 1995); *Dansler-Hill v. Rochester Inst. of Tech.*, 764 F. Supp. 2d 577, 583 (W.D.N.Y. 2011); *Wisneski v. Nassau Health Care Corp.*, 296 F. Supp. 2d 367, 374 (E.D.N.Y. 2003).

Also, for an accommodation to be reasonable, the employee must demonstrate it would allow him to perform the essential functions of his job at or around the time it is sought. *Graves v. Finch Pruyn & Co.*, 353 F. App'x 558, 560 (2d Cir. 2009).

In this action, Lilly has failed to demonstrate how taking indefinite leave would have enabled him to perform the essential functions of his job. Further, he has not alleged that, had he been given additional time off from work, he would have been able to recover. *See Perkins v. U.S. Dep't of Treasury*, 2022 WL 19772, at *13 (S.D.N.Y. Jan. 3, 2022) ("Plaintiff has failed to allege how taking sick leave would have enabled her to perform the essential functions of her job once she returned.") (citations omitted); *Manns v. United Airlines*, 2016 WL 6826761, at *9 (E.D.N.Y. Nov. 17, 2016) ("[Plaintiff] has still failed to provide any medical evidence that [a fixed period of leave] would allow him to perform the essential functions of his position. He has offered no medical testimony or reports to support his assertion that had he been given additional time off from work he would have been able to recover.").

Inasmuch as Lilly even requested an accommodation, it was an open-ended, indefinite leave of absence with no guarantee that it would actually enable him to return eventually to work and perform his essential job functions. On this point, "[a]n employer cannot reasonably be expected to hold a job open for an employee without some indication that the employee is likely to return and some idea of when that is likely to happen." *McNamara v. Tourneau*, *Inc.*, 496 F. Supp. 2d 366, 377 (S.D.N.Y. 2007) (citing *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 338 (2d Cir. 2000)), *aff'd*, 326 Fed. App'x 68 (2d Cir. 2009). *Accord*, *Brown v. Pension Bds.*, 488 F. Supp. 2d 395, 407 (S.D.N.Y. 2007) (noting the

ADA does not require an employer to give an employee "an open-ended, indefinite leave of absence with no guarantee that it would actually enable him to eventually return to work").

Here, Lilly has not alleged a timeline for his return to work. Therefore, he provided Gibbs no specific timeframe when he could resume his duties, nor was there any guarantee that he would be able to do so at any point in the future. Simply put, honoring his request for an indefinite leave of absence would far surpass what the ADA and NYSHRL require. *Alston v. Microsoft Corp.*, 851 F. Supp. 2d 725, 733 (S.D.N.Y. 2012) (noting "[t]he U.S. Court of Appeals for the Second Circuit has explained that where there is no indication of when an employee will return, an employer has no obligation to grant an employee an indefinite leave of absence" (internal citations and quotation marks omitted)); *Stamey*, 358 F. Supp. 2d at 327 (holding a request for additional leave was unreasonable where the plaintiff "presented no evidence concerning when he would or could return to work" and the evidence was undisputed that "plaintiff was unable to work [and] that his doctors were unable to tell him when he could return to work"); *Cousins v. Howell Corp.*, 113 F. Supp. 2d 262, 271 (D. Conn. 2000) (holding a request for additional leave was unreasonable, absent evidence the defendant "had any indication of when plaintiff would be returning to work").

Accordingly, Lilly's Second and Fourth Causes of Action alleging Gibbs failed to accommodate Lilly's disability should be dismissed.

B. Lilly failed to state a cause of action under the NYSHRL and the NYCHRL for discrimination based on disability

Lilly also has vaguely asserted he suffered discriminated based on his disability when he was terminated. Yet he has failed adequately to plead a case of discrimination under the NYSHRL or the NYCHRL.

To plead a case of discrimination under the NYSHRL, Lilly needed to assert: (1) he is subject to the NYSHRL; (2) he was disabled within the meaning of the NYSHRL; (3) he was otherwise qualified to perform the essential functions of his job, with or without a reasonable accommodation; and (4) he suffered an adverse employment action on the basis of disability. *See Giordano v. City of New York*, 274 F.3d 740, 747 (2d Cir. 2001); *see also Natofsky v. City of New York*, 921 F.3d 337, 348 (2d Cir. 2019) (holding an ADA complainant must prove "the discrimination was the but-for cause of any adverse employment action"). A plaintiff's subjective belief of discrimination is not sufficient to support the inference that an employer discriminated against him based on his alleged disability. *See Meyer v. State of N.Y. Off. of Mental Health*, 174 F. Supp. 3d 673, 689 (E.D.N.Y. 2016) ("[A p]laintiff's mere subjective belief that he was discriminated against ... does not sustain a ... discrimination claim." (citation and internal quotation marks omitted)), *aff'd*, 679 Fed. App'x 89 (2d Cir. 2017). *Accord, Sethi v. Narod*, 12 F. Supp. 3d 505, 536 (E.D.N.Y. 2014).

In this action, Lilly has failed to plead he was disabled within the meaning of the NYSHRL. In fact, he has not even identified what disability he allegedly has. In addition, Lilly failed to state that he would be able to perform the essential functions of his job with or without an accommodation.[5] Instead, Lilly alleges in conclusory fashion that he sustained discrimination based on a disability, but fails to allege his disability was the but-for cause of his termination. Because he failed to plead the requisite elements of disability discrimination under the NYSHRL and NYCHRL, Lilly's Second and Fourth Causes of Action should be dismissed.

[5] As explained *supra*, Lilly's only potentially alleged request for an accommodation was his request for an indefinite leave of absence, which is no accommodation at all.

C. Lilly failed to state a cause of action for aiding, abetting, inciting, compelling, and coercing disability discrimination in violation of the NYSHRL and NYCHRL

Lilly alleges that Gibbs "aided, abetted, incited, compelled, and coerced discrimination against Lilly on the basis of his disability in violation" of the NYSHRL and NYCHRL. Doc. No. 1, ¶¶ 75, 81. Lilly, however, has failed to identify any other person who allegedly discriminated against him, and therefore his aiding and abetting causes of action fail.

"[A]n individual cannot aid and abet his or her own violation of the Human Rights Law. Since it is alleged that [defendant's] own actions give rise to the discrimination claim, he cannot also be held liable for aiding and abetting." *Hardwick v. Auriemma*, 116 A.D.3d 465, 468 (1st Dep't 2014) (citation omitted). *Accord, McIntosh v. City of New York*, 2023 WL 4753854, at *5-*6 (Sup. Ct. Kings County July 10, 2023) (dismissing NYCHRL aiding and abetting causes of action); *Krause v. Lancer & Loader Grp., LLC*, 40 Misc. 3d 385, 399 (Sup. Ct. N.Y. County 2013) (dismissing NYSHRL and NYCHRL aiding and abetting causes of action). Here, Gibbs cannot have aided, abetted, incited, compelled, or coerced discrimination against Lilly when no one else is alleged to have taken an action that discriminated against Lilly. For this additional reason, Plaintiff's Third and Fifth Causes of Action should be dismissed.

D. Lilly failed to state a cause of action for a violation of the FMLA

Lilly has alleged that Gibbs "terminated Lilly's employment so as to interfere with, restrain, or deny Lilly the exercise his federally protected rights in violation of the FMLA, 29 U.S.C. §2615(a)(1)." Doc. No. 1, ¶ 87. Lilly, however, has not established (and cannot establish) that he was eligible for FMLA-protected leave at the time of his termination and, therefore, has failed to state a cause of action.

"To state a prima facie claim for interference under the FMLA, a plaintiff must allege the following: (1) that she is an eligible employee under the FMLA; (2) that the defendant is an employer as defined by the FMLA; (3) that she was entitled to take leave under the FMLA; (4) that she gave notice to the defendant of her intention to take leave; and (5) that she was denied to which she was entitled under the FMLA." *Condon v. Dormitory Auth. of State of N.Y.*, 2019 WL 1259569, at *4 (N.D.N.Y. Mar. 19, 2019) (citations and internal quotation marks omitted). To be eligible for leave under the FMLA, an employee must be "employed for at least 12 months by the employer" **and** must have worked "at least 1,250 hours ... with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A)(i)-(ii).

Failure to plead either that the employee was employed for 12 months, or that the employee had worked at least 1,250 hours in the previous 12-month period is fatal to a cause of action under the FMLA. *Blumstein-Torrella v. N.Y. City Dep't of Educ.*, 2023 WL 5097873, at *4 (S.D.N.Y. Aug. 9, 2023) (dismissing complaint when employee failed to allege she had worked 1,250 hours in the 12-month period prior to request for FMLA leave); *Condon*, 2019 WL 1259569, at *4 (dismissing complaint by an employee who had only been employed for 49 weeks by the employer and, therefore, was not eligible for FMLA leave). *Accord*, *Woldeselassie v. Am. Eagle Airlines/Am. Airlines*, 2015 WL 456679, at *11 (S.D.N.Y. Feb. 2, 2015), *aff'd sub nom. Woldeselassie v. Am. Eagle Airlines, Inc.*, 647 Fed. App'x 21 (2d Cir. 2016) (granting summary judgment to the defendant on an FMLA claim, because the evidence demonstrated the plaintiff had worked fewer than the required 1,250 hours); *Williams v. N.Y. City Health & Hosps. Corp.*, 2012 WL 5506128, at *5 (S.D.N.Y. Nov. 13, 2012) (same).

In this action, Lilly has conceded that he had not been employed for 12 months by either the State or Assemblymember Gibbs. Doc. No. 1, ¶ 61. As such, he was not eligible for FMLA leave, and his Seventh Cause of Action must be dismissed on this basis alone. 29 U.S.C. § 2611(2)(A)(i). Additionally, nowhere in the Complaint has Lilly alleged that he worked 1,250 hours in the previous 12-month period to render him eligible for FMLA leave, and Lilly's Seventh Cause of Action should be dismissed for this additional reason. Doc. No. 1, *generally*; 29 U.S.C. § 2611(2)(A)(ii); *Blumstein-Torrella*, 2023 WL 5097873, at *4.

POINT III

PLAINTIFF LILLY'S CAUSES OF ACTION SEEKING MONEY DAMAGES UNDER THE NYCHRL MUST BE BROUGHT IN THE COURT OF CLAIMS

To the extent this Court does not dismiss all of Lilly's causes of action alleging violations of the NYCHRL under either the doctrine of sovereign immunity or for failure to state a cause of action, those causes of action should be dismissed regardless pursuant to CPLR 3211(a)(2), because they could be properly brought only in the New York Court of Claims.

It is well-settled that the Court of Claims has exclusive jurisdiction over claims for money damages against the State and its agencies, departments and employees acting in their official capacity in the exercise of governmental functions. N.Y. Const. art. VI, § 9; N.Y. Ct. Cl. Act §§ 8, 9(2); *Morell v. Balasubramanian*, 70 N.Y.2d 297, 300 (1987); *Matter of Peterson v. N.Y. City Dep't of Envtl. Prot.*, 66 A.D.3d 1027, 1028-1029 (2d Dep't 2009). As explained in Point I, *supra*, Gibbs' staffing decisions are discretionary acts taken within his official capacity as a member of the Assembly. Causes of action alleging violations of the NYCHRL by a defendant in his official capacity on behalf of the State can

only be brought or adjudicated in the Court of Claims. *Borawski v. Abulafia*, 2012 WL 3104394, at *3 (Sup. Ct. Queens County Aug. 1, 2012), *aff'd as mod. on other grounds*, 117 A.D.3d 662 (2d Dep't 2014) (dismissing cause of action alleging wrongful termination of employment in violation of the NYCHRL, because it arose from the defendant's conduct in his official capacity as a State employee).

Accordingly, this Court does not have jurisdiction over Plaintiff's Fourth and Fifth Causes of Action, and they should be dismissed on this additional basis.

POINT IV

SHOULD THE COURT DECLINE TO DISMISS THE ENTIRE COMPLAINT, LILLY'S ALLEGATIONS IN PARAGRAPH 56 SHOULD BE STRICKEN, BECAUSE THEY ARE PREJUDICIAL AND UNNECESSARY

CPLR 3024(b) provides that a "party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." Hence, in evaluating a motion to strike, the Court inquires whether the purportedly scandalous or prejudicial allegations are "necessary to establish any element of plaintiff's causes of action[.]" *Ganieva v. Black*, 216 A.D.3d 424, 425 (1st Dep't 2023). Such allegations that "are irrelevant" to the plaintiff's causes of action "should be struck[.]" *Soumayah v. Minnelli*, 41 A.D.3d 390, 393 (1st Dep't 2007); *accord*, *Irving v. Four Seasons Nursing & Rehab. Ctr.*, 121 A.D.3d 1046, 1048 (2d Dep't 2014).

Lilly's allegations in paragraph 56 of the Complaint are entirely unnecessary for establishing any of his causes of action, all of which fail notwithstanding. Rather, paragraph 56 improperly seeks to characterize Gibbs' mental impressions, and lies beyond the scope of Lilly's personal knowledge. It serves no purpose other than to prejudice Gibbs

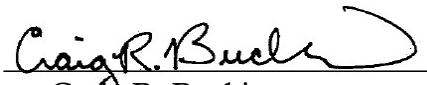
in the view of his constituents and the public. Inasmuch as the Court should decline to dismiss the entire Complaint, paragraph 56 should be stricken.

CONCLUSION

For all the foregoing reasons, the Complaint against Assemblymember Edward Gibbs should be dismissed in its entirety. In the event it is not dismissed, the allegations set forth in paragraph 56 of the Complaint should be stricken.

Dated: Buffalo, New York
August 16, 2024

PHILLIPS LYTLE LLP

By: 

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CERTIFICATE OF COMPLIANCE WITH UNIFORM RULE 202.8-b

This memorandum of law complies with Uniform Rule 202.8-b (22 N.Y.C.R.R. § 202.8-b) because it contains 5,916 words, excluding the caption, table of contents, table of authorities, and signature block. This word count was generated by the word-processing system used to prepare this document.

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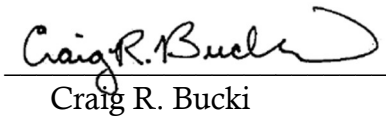
By: 

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