UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DAVID GARHARTT,

Plaintiff,

v. **1:16-cv-1259 (NAM/DJS)**

COUNTY OF SCHENECTADY,

Defendant.

Appearances:

Giovanna A. D'Orazio, Esq.
D'Orazio Peterson LLP
125 High Rock Avenue
Saratoga Springs, NY 12866
Attorney for Plaintiff

Patrick J. Saccocio, Esq.
Parisi, Coan & Saccocio, PLLC
376 Broadway, 2nd Floor
Schenectady, NY 12305
Attorney for Defendant

Hon. Norman A. Mordue, Senior U.S. District Court Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff David Garhartt brings this action alleging discrimination and retaliation claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, the Uniformed Services Employment and Reemployment Act ("USERRA"), 38 U.S.C. § 4301, *et seq.*, New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.*, and Section 125 of New York State Workers' Compensation Law ("NYSWCL"), N.Y. Workers' Comp. Law § 125. (Dkt. No. 1). Now pending before the Court is Defendant's motion for partial summary judgment

(Dkt. No. 20), and Plaintiff's opposition. (Dkt. No. 23). For the reasons that follow, Defendant's motion is denied.

II. BACKGROUND[1]

Plaintiff was a corrections officer employed by Defendant, and formerly a United States Marine in active service from approximately January 27, 1988 to January 26, 1992. (SMF, ¶ 1). Plaintiff claims that he suffers from post-traumatic stress disorder ("PTSD") related to his military service. (*Id.*, ¶ 2). Plaintiff manages his PTSD with medication and therapy at the Veterans Administration ("VA"), from whom he receives disability benefits. (Dkt. No. 1, ¶ 9). Plaintiff alleges that in or around April 2015, after a financial dispute with his ex-girlfriend, she informed Defendant about his disability, and Defendant immediately placed him on paid administrative leave. (*Id.*, ¶¶ 13-14). Defendant also questioned him about it and required him to attend two psychiatric evaluations. (SMF, ¶ 3; *see also* Dkt. No. 23-4). Plaintiff alleges that, at the psychiatric evaluation, Defendant's evaluator "specifically took [p]laintiff's receipt of benefits from the VA [veterans hospital] related to his PTSD into consideration when he concluded that [p]laintiff was not fit to perform his duties." (SMF, ¶ 4). Plaintiff alleges that on or about June 23, 2015, he made a formal complaint to David McGraw, Defendant's Director of Human Resources, alleging that he was discriminated against in violation of the ADA, NYSHRL, and USERRA. (*Id.*, ¶ 5).

On July 21, 2015, Defendant determined, pursuant to Section 72 of the New York State Civil Service Law, that Defendant was "unable to perform the duties of the position of

[1] The facts stated herein are largely drawn from Defendant's Statement of Material Facts ("SMF") (Dkt. No. 20-3, pp. 5-6), which itself is mostly a recitation of the allegations in the Complaint. (Dkt. No. 1). As such, Plaintiff does not specifically dispute any of these facts. (*See* Dkt. No. 23-7). The Court has also referenced additional allegations in the Complaint and facts in documents submitted by Plaintiff. (*See* Dkt. Nos. 23-1 through 23-5).

Corrections Officer in the Schenectady County Jail because he suffers from a non-work related disability," specifically a "psychiatric disability." (Dkt. No. 23-4). Defendant requested that Plaintiff undergo another psychiatric evaluation and placed him on an unpaid involuntary leave of absence. (*Id.*). On November 12, 2015, following a negative finding from the evaluation, Defendant continued Plaintiff's leave of absence. (Dkt. No. 23-5). The notice letter stated that Plaintiff could file a written objection to the determination within 10 days, which would trigger a hearing within 30 days. (*Id.*). Plaintiff decided not to appeal the determination. (SMF, ¶ 9).

Plaintiff alleges that Defendant effectively terminated his employment by placing him on unpaid involuntary leave and did so "based upon his PTSD and his receipt of disability benefits from the VA." (Dkt. No. 1, ¶¶ 23-24). Plaintiff also alleges that he was terminated "because of his military service." (*Id.*, ¶ 52). Further, Plaintiff alleges that while employed by Defendant he was subjected to derogatory comments regarding his PTSD. (SMF, ¶ 7).

On December 18, 2015, Plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination and retaliation in violation of the ADA by Defendant. (Dkt. No. 23-1). On August 15, 2016, the EEOC determined "that there is reasonable cause to believe that Respondent has discriminated against Charging Party because he is disabled; because he was regarded as disabled; and in retaliation for making a complaint of employment discrimination, in violation of the ADA." (Dkt. No. 23-2). On October 18, 2016, the United States Department of Justice issued Plaintiff a right to sue notice. (Dkt. No. 23-3). Plaintiff commenced this action on October 19, 2016. (Dkt. No. 1).

III. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(a), summary judgment may be granted only if all the submissions taken together "show that there is no genuine issue as to any material fact and

that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. A fact is "material" if it "might affect the outcome of the suit under the governing law," and is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248; *see also Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005) (citing *Anderson*). The movant may meet this burden by showing that the nonmoving party has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322; *see also Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 256 (2d Cir. 2013) (summary judgment appropriate where the non-moving party fails to "come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on an essential element of a claim") (internal quotation marks omitted).

If the moving party meets this burden, the nonmoving party must "set out specific facts showing a genuine issue for trial." *Anderson*, 477 U.S. at 248, 250; *see also Celotex*, 477 U.S. at 323-24; *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). "When ruling on a summary judgment motion, the district court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir. 2003). Still, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and cannot rely on "mere speculation or conjecture as to the true nature of the facts to overcome a

motion for summary judgment." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir.1986) (quoting *Quarles v. Gen. Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985)).

IV. DISCUSSION

Defendant seeks summary judgment on the following claims alleged by Plaintiff: 1) discrimination in violation of the ADA (Count 1); 2) retaliation in violation of the ADA (Count 2); and 3) discrimination in violation of the USERRA (Count 3).[2]

a. ADA Claims

Defendant argues that Plaintiff's claims under the ADA should be dismissed for failure to exhaust his administrative remedies. (Dkt. No. 20-3, p. 7). Specifically, Defendant contends that Plaintiff failed to pursue an administrative remedy available under Section 72 of the Civil Service Law, which provides a process whereby an employee placed on leave due to disability may appeal the determination. (*Id.*, pp. 8-9). In response, Plaintiff asserts, among other things, that "the availability of a state administrative process has no bearing on whether the plaintiff has a federal employment discrimination or retaliation claim." (Dkt. No. 23-8, p. 10).

In general, "plaintiffs must exhaust administrative remedies before seeking redress in federal court." *Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir. 1997). "[T]he long-settled rule of judicial administration [is] that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938). "The purpose of this exhaustion requirement is to give the administrative agency the opportunity to investigate, mediate, and take remedial action." *Fowlkes v. Ironworkers Loc. 40*, 790 F.3d 378, 384 (2d Cir. 2015) (quoting *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712 (2d Cir. 1998) (discussing Title VII claims).

[2] Defendant also originally sought summary judgment on Plaintiff's claim for discrimination under NYSWCL (Count 7), but has withdrawn the motion as to this claim. (*See* Dkt. No. 27-1, p. 9).

The ADA specifically prescribes that the administrative remedy for discrimination and retaliation claims is to file a charge with the EEOC. *See* 42 U.S.C. § 12117(a) (referring to remedies and procedures set forth in 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2008e-8, and 2009e-9); 42 U.S.C. § 12203(c). Thus, in order to bring such an ADA claim, a plaintiff "must exhaust all administrative remedies by filing an EEOC charge within 300 days of the alleged discriminatory [or retaliatory] conduct." *Roy v. Buffalo Philharmonic Orchestra*, 684 F. App'x 22, 23 (2d Cir. 2017) (citing *Tewksbury v. Ottaway Newspapers*, 192 F.3d 322, 325 (2d Cir. 1999)); *see also Hamzik v. Off. for People with Developmental Disabilities*, 859 F. Supp. 2d 265, 277 (N.D.N.Y. 2012) ("Before commencing an action in federal court alleging violations of . . . the ADA, a plaintiff must first file a timely charge with the EEOC.").

Here, it is undisputed that Plaintiff filed a timely charge with the EEOC alleging discrimination and retaliation in violation of the ADA by Defendant, and that the EEOC issued a right to sue notice. (Dkt. Nos. 23-1, 23-3). Nonetheless, Defendant argues that Plaintiff was required to also exhaust the appeal process available under Section 72 of the Civil Service Law, which he admittedly failed to do. (SMF, ¶ 9). However, Defendant does not point to any authority for imposing this additional requirement, and the Court has found none.[3] By the express

[3] In the context of Title VII claims, one court rejected the argument that county employees were required to exhaust administrative remedies with the county civil service commission or under New York Civil Service Law, noting the statutory exhaustion requirements in 42 U.S.C. § 2000e-5 (i.e. the EEOC charge and notice also applicable to ADA discrimination and retaliation claims) and concluding that "[n]o further exhaustion of administrative remedies is required by the statute, nor can any such exhaustion requirement be judicially grafted on to the statute." *Am. Fedn. of State, County and Mun. Employees, AFL-CIO (AFSCME) v. Nassau County*, 609 F. Supp. 695, 702 (E.D.N.Y. 1985).

The principal case relied on by Defendant, *Wilkie v. Golub Corp.*, No. 11 Civ. 1086, 2013 WL 5354531, 2013 U.S. Dist. LEXIS 136099 (N.D.N.Y. Sept. 24, 2013), is distinguishable in important respects. There, the court held that the truck driver plaintiff was required to pursue an appeal process established by the United States Department of Transportation in order to exhaust his administrative remedies before bringing an ADA discrimination claim. 2013 WL 5354531, at *3, 2013 U.S. Dist. LEXIS 136099, at *8. Thus, unlike this case, there was a *federal* administrative remedy which Congress had clearly intended to govern the plaintiff's claim regarding his physical fitness to drive. *Id.* Moreover, Plaintiff's claim in this case is not simply that he was mentally fit to perform his duties as a corrections officer, which he could

terms of the ADA, Plaintiff has exhausted the prescribed administrative remedy for discrimination and retaliation claims, and there is no basis for going beyond the statute.

Moreover, it is well-established that exhaustion is not required where the available remedy provides "no genuine opportunity for adequate relief." *Guitard v. U.S. Sec. of Navy*, 967 F.2d 737, 741 (2d Cir. 1992) (citation omitted). Defendant argues that "the State, through Civ. Serv. Law § 72 provides an extensive administrative procedure to protect plaintiff's rights." (Dkt. No. 20-3, p. 8). However, the Section 72 appeal process only allows an employee to challenge a leave decision based on his mental or physical fitness. In that process, an employee has 10 days "to object to the imposition of the proposed leave of absence and to request a hearing." N.Y. Civ. Serv. Law § 72(1). Following such a request, the "appointing authority" must "afford the employee a hearing within thirty days." *Id.* The hearing officer then issues a report and recommendation to the appointing authority, which must make a final determination of an employee's contest of a notice of leave within 75 days. *Id.* An employee placed on leave then has one year to apply for a medical examination and will be reinstated if the medical officer determines he is physically and mentally fit to perform his duties. N.Y. Civ. Serv. Law § 72(2). The employee may also appeal the decision "to the state or municipal civil service commission having jurisdiction over his or her position," which must afford the employee an opportunity to be heard and then issue a final determination. N.Y. Civ. Serv. Law § 72(3). Finally, the employee may seek further review in an Article 78 proceeding. *Id.*

Section 72 of the Civil Service Law makes no mention of protecting any federal statutory rights under the ADA, nor does the process afford an opportunity to challenge an adverse employment action on the basis of disability discrimination or retaliation. The focus of the

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have sought to prove in the Section 72 process, but also that he was discriminated against based on his disability *and* retaliated against for reporting that discrimination.

process is squarely on the mental and physical fitness of the employee, with safeguards to protect the *due process* rights of the employee. *See Sheeran v. New York State Dept. of Transp.*, 958 N.E.2d 1197, 1199 (N.Y. 2011) (noting purpose of the statute "to afford tenured civil servant employees with procedural protections prior to involuntary separation from service"). Thus, the review body in the Section 72 process is not in a position to investigate, mediate, and take remedial action regarding alleged discrimination and retaliation, unlike the EEOC, an agency with responsibility and expertise in such matters. *See* 42 U.S.C. § 2000e-5(a)–(b).

In sum, the Court finds that under the circumstances, Plaintiff was not required to exhaust the Section 72 appeal process before asserting his ADA claims for discrimination and retaliation in this action. Accordingly, Defendant's motion for summary judgment on those claims must be denied.

b. USERRA Claim

Next, Defendant argues that Plaintiff's claim under the USERRA fails to raise a triable issue of fact. (Dkt. No. 20-3, p. 9). Section 4311(a) of the USERRA states that:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. § 4311(a). An employer engages in a prohibited act under Section 4311(a) "if the person's membership . . . is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership." 38 U.S.C. §

4311(c)(1). "Military status is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that consideration." *Mock v. City of Rome*, 910 F. Supp. 2d 429, 431 (N.D.N.Y. 2012) (quoting *Woodard v. N.Y. Health and Hosps. Corp.*, 554 F. Supp. 2d 329, 348 (E.D.N.Y. 2008)).

Defendant contends that Plaintiff's allegations, even if true, do not support a USERRA discrimination claim because he alleges discrimination as a result of a "military-related disability," rather than his military service. (Dkt. No. 20-3, p. 10). Thus, Defendant's argument is really that Plaintiff fails to state a claim as a matter of law. In response, Plaintiff asserts that he has "pleaded that Defendant took adverse action against him based upon his receipt of VA benefits (regardless of whether or not he had a disability) and his military service." (Dkt. No. 23-8, p. 14). Plaintiff also submits that "summary judgment is premature pursuant to Fed. R. Civ. P. 56(d)" because he "has not had the opportunity to depose Defendant's witnesses and decision makers, or the psychological evaluators, with respect to the circumstances of Plaintiff's placement on involuntary leave, how they viewed his receipt of VA benefits and how they viewed his past military service, among other things." (*Id.*, pp. 19-20).

As an initial matter, accepting Plaintiff's allegations as true, the Court cannot conclude that Plaintiff fails to state a claim as a matter of law. He has pleaded that Defendant placed him on an involuntary leave of absence—thus taking an adverse employment action against him—based upon his receipt of VA benefits *and* his military service. These allegations are sufficient to bring his discrimination claim within Section 4311(a) of the USERRA. That is not to say the claim will necessarily survive summary judgment on a properly developed factual record. However, as Plaintiff points out, discovery is still underway and may yield evidence as to whether or not Plaintiff's military service was a motivating factor in Defendant's decision. Indeed,

Plaintiff has submitted a declaration pursuant to Rule 56(d) of the Federal Rules of Civil Procedure advising that depositions (including those of Defendant's employees and decision-makers) have not yet begun in this case. (Dkt. No. 23). Thus, Defendant's motion is also premature, and Plaintiff has made a sufficient showing under Rule 56(d) that he requires discovery to oppose it.

Accordingly, Defendant's motion for summary judgment on Plaintiff's USERRA claim is denied without prejudice to renew following the completion of discovery.[4] *See In re Dana Corp.*, 574 F.3d 129, 149 (2d Cir. 2009) ("[A] party against which summary judgment is sought must be afforded a reasonable opportunity to elicit information within the control of his adversaries.") (internal quotations and citation omitted); *Hellstrom v. U.S. Dept. of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000) ("Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery."); *Meloff v. New York Life Ins. Co.*, 51 F.3d 372, 374 (2d Cir. 1995) (reversing "premature" grant of summary judgment in an employment discrimination case where the plaintiff had insufficient opportunity "to explore the motivations and reasons for terminating her employment"); *U.S. v. E. River Hous. Corp.*, 90 F. Supp. 3d 118, 160–61 (S.D.N.Y. 2015) (denying motion for partial summary judgment "on the basis that discovery in this case is ongoing"); *Crystalline H2O, Inc. v. Orminski*, 105 F. Supp. 2d 3, 9–10 (N.D.N.Y. 2000) (denying summary judgment motion as premature when discovery had not yet commenced).

[4] At this stage, the Court need not address Defendant's argument that discrimination due to a "military-related disability" does not fall within Section 4311(a) of the USERRA because Plaintiff has made a sufficient showing under Rule 56(d) to allow discovery to go forward, which may clarify the factual basis for Plaintiff's claim.

V. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Defendant's Motion for Partial Summary Judgment (Dkt. No. 20) is **DENIED.**

IT IS SO ORDERED.

Date: October 17, 2017
Syracuse, New York

Norman A. Mordue
Senior U.S. District Judge