Nadolecki v. William Floyd Union Free Sch. Distirct

United States District Court for the Eastern District of New York

July 6, 2016, Decided; July 6, 2016, Filed

CV 15-2915 (JMA)(AYS)

Reporter
2016 U.S. Dist. LEXIS 88399

MATTHEW NADOLECKI, Plaintiff, -against- WILLIAM FLOYD UNION FREE SCHOOL DISTIRCT, WILLIAM FLOYD UNION FREE SCHOOL DISTRICT BOARD OF EDUCATION, Defendants.

Subsequent History: Adopted by, Complaint dismissed at *Nadolecki v. William Floyd Union Free Sch. Dist., 2016 U.S. Dist. LEXIS 124221 (E.D.N.Y., Sept. 13, 2016)*

Core Terms

teacher, alleges, sexual orientation, motion to dismiss, official duty, special education, complaints, teaching, hostile environment, special education program, retaliation, curriculum, equal protection claim, plaintiff's claim, assault, posting, rights, math, special education teacher, sexual harassment, investigate, harassment, complains, channels, hostile, report and recommendation, cause of action, services, speaking, special education student

Counsel: **[*1]** For Matthew Nadolecki, Plaintiff: Steven A. Morelli, LEAD ATTORNEY, The Law Offices of Steven A. Morelli, P.C., Garden City, NY.

For William Floyd Union Free School District, William Floyd Union Free School District Board of Education, Defendants: Howard Marc Miller, LEAD ATTORNEY, Jessica C. Moller, Bond, Schoeneck & King PLLC, Garden City, NY.

Judges: Anne Y. Shields, United States Magistrate Judge.

Opinion by: Anne Y. Shields

Opinion

REPORT AND RECOMMENDATION

SHIELDS, Magistrate Judge:

Plaintiff Matthew Nadolecki ("Plaintiff") is a special education teacher formerly employed on a non-tenured basis by Defendant William Floyd School District (the "District"). He brings this lawsuit against the District and its Board of Education alleging three separate claims pursuant to *42 U.S.C. §1983* ("*Section 1983*"). See Amended Complaint appearing as Docket Entry ("DE 13"). First, Plaintiff alleges retaliation for the exercise of his *First Amendment* rights. Plaintiff's second and third causes of action claim disparate and wrongful treatment allegedly motivated by Plaintiff's sexual orientation and gender as a gay man. Specifically, the second claim alleges a violation of Plaintiff's *Fourteenth Amendment* Equal Protection rights on the ground that Defendants intentionally disregarded Plaintiff's **[*2]** complaint for sexual harassment which led to a second incident of such harassment, and that Defendants "routinely favored other similarly situated employees." DE 13 ¶ 97. Plaintiff's final *Section 1983* claim also alleges an Equal Protection violation, stating that Plaintiff was subject to a hostile environment on the basis of his sexual orientation.

Presently before this Court, upon referral by the Honorable Joan M. Azrack, for Report and Recommendation, is Defendants' motion to dismiss. See DE 15 (motion to dismiss) and Order Referring Motion dated April 12, 2016. For the reason set forth below, this Court respectfully recommends that the motion to dismiss be granted.[1]

FACTUAL BACKGROUND

[1] There are currently pending proceedings to change Plaintiff's counsel. See DE 20; orders dated June 23, 29 and 30, 2016. This motion was fully briefed, ripe for adjudication, and referred to this Court for Report and Recommendation prior to such proceedings. Accordingly, those proceedings have no effect on the Court's ability to rule herein.

The facts set forth below are drawn from Plaintiff's Amended Complaint. As required in the context of this motion to dismiss, the factual allegations therein, though disputed **[*3]** by Defendants, are accepted to be true for purposes of this motion. All reasonable inferences are drawn therefrom in favor of the Plaintiff.

I. Plaintiff's Employment and Job Responsibilities at the District

Plaintiff states, and this Court assumes, that he is a highly qualified special education teacher who holds a Bachelor of Arts degree, two Masters' degrees, and several specialized teaching certificates. He began working as a special education math teacher at the District in 2010. In addition to being employed as a special education teacher, Plaintiff was a "Case Manager." DE 13 ¶ 2. In this latter capacity, Plaintiff was responsible for "creating, monitoring and evaluating" Individualized Education Plans ("IEP's") for special education students. DE 13 ¶ 2.

II. Factual Allegations as to Plaintiff's Concerns and Complaints Regarding Administration of the District Special Education Program

A. Plaintiff's Concerns Regarding IEP Goals and the Math Curriculum

Plaintiff's Amended Complaint contains general and specific allegations regarding shortfalls in the administration of the District's special education program. He states that special education teachers in the District were not being **[*4]** given adequate time in which to administer tests necessary to properly evaluate students and their individual needs. As a result, student IEP's were being prepared on the basis of inadequate information. Consequently, IEP's were not tailored, as required by law, to meet the individual needs of students. Plaintiff also states that his review of IEP's revealed that certain students were not receiving proper accommodations and/or services called for therein. DE 13 ¶ 4. Plaintiff's complaint contains specific references to students, other than his own, who did not receive required therapies and were not placed in appropriate learning environments.

As to his field of teaching, Plaintiff states that he came to realize irregularities with respect to the math curriculum that he was instructed to teach to his special education students. Plaintiff claims that the content of that curriculum (which was tied to the New York State assessment test), was too challenging for his students. Indeed, he describes the requirement that he teach to the state assessment standards as attempting to "teach his students to 'run when they couldn't even crawl.'" DE 13 ¶ 26. According to Plaintiff, the poor performance **[*5]** of special education students on the New York State math assessment test resulted in his school being labeled as "In Need of Improvement." DE 13 ¶ 29.

Plaintiff sums up his concerns regarding the District's special education programs as discovering that "things weren't running the way they should" within his school and the District, as described below.

B. Plaintiff Expresses Concerns to District Administration

In or around September of 2011, Plaintiff contacted Mr. Ravi Seeram, the District Assistant Director of Special Education ("Seeram") to express his concerns regarding the District's administration of the special education program and, in particular, the concerns referred to above. DE 13 ¶ 40. Seeram referred Plaintiff to Ms. Jeanne Love ("Love"), chair of his school's Committee on Special Education (the "CSE"). Plaintiff contacted Love, who is alleged to have told Plaintiff that teaching above student capabilities was a violation of their civil rights and "borderline criminal." DE 13 ¶ 41. Love is also alleged to have told Plaintiff not to teach the curriculum if he felt that his students lacked the proper foundation to learn the material. DE 13 at ¶ 42. Shortly thereafter, Plaintiff **[*6]** addressed his concerns that students were being deprived of an appropriate education to Mr. Ed Plaia, his school principal ("Plaia"). Plaia is stated to have told Plaintiff to "teach to the test." DE 13 ¶ 44.

C. Plaintiff Expresses Concerns at Meetings of a Union Committee

As a District employee, Plaintiff was a member of the William Floyd Teachers Association, a local union within the New York United Federal of Teachers (the "Union"). In or around December of 2011, the Union created a committee to address concerns regarding the District's special education program (the "Committee"). DE 13 ¶ 47. Plaintiff was an active participant at Committee meetings, expressing his concerns regarding a variety of issues regarding the administration of the District's special education program, and its provision of services to students. Plaintiff's complaint refers, inter alia, to the District's failure to properly administer reading services with respect to a particular student referred to as "CM." According to the Plaintiff, his review of CM's IEP revealed that she was not receiving the specialized reading program to which she was entitled. DE 13 ¶ 53. Plaintiff also voiced concerns about other students **[*7]** who were receiving neither proper reading services nor

integration within co-taught special education classes. Additionally, Plaintiff complained about the curriculum that he taught, i.e., the special education math curriculum. See generally DE 13 at ¶¶ 53-60. Plaintiff states that he was approached at a Union meeting by a more senior District special education teacher who warned Plaintiff that the District Superintendent had representatives at Union meetings who were reporting back to the District. DE 13 ¶ 61. Plaintiff was warned to "be careful" of what he said. DE 13 ¶ 61.

D. Plaintiff's Formal Observation

On January 30, 2012, Seeram conducted a formal observation of Plaintiff's teaching in his classroom. Plaintiff alleges that his post-observation meeting was held in an unusual location, where his discussions could be overheard by Plaia. DE 13 at ¶ 63-64. Seeram rated Plaintiff's teaching ability as "Requires Improvement." DE 13 ¶ 66.

E. Plaintiff Voices Concerns at the District "Meet the Superintendent" Day

In or around February of 2012, shortly after Plaintiff's formal observation, the District Held a "Meet the Superintendent" day at Plaintiff's school, an event where teachers and **[*8]** administrators were encouraged to discuss concerns regarding their school with Dr. Paul Casciano, the District Superintendent ("Casciano"). DE 13 ¶ 67. As in his earlier discussions with school administrators, Plaintiff raised issues regarding administration of the District's special education program with Casciano. He also discussed with Casciano concerns regarding budget cuts, and the effects thereof on the ability to properly instruct special education students. Plaia is alleged to have overheard Plaintiff voicing his concerns to Casciano. DE 13 ¶ 72. Plaintiff alleges that after the "Meet the Superintendent" event, a fellow teacher told Plaintiff that he "should have known better than to go to that meeting," notifying him that other teachers who had previously voiced concerns at that event "were disciplined for voicing their concerns, and often pushed out of the District." DE 13 ¶ 73.

F. Plaintiff's February 2012 Informal Observation

On February 12, 2012, Plaintiff was informally observed, during what he refers to as an "impromptu" observation, by Plaia. DE 13 ¶ 74. The next day, Plaia held a post-observation meeting with Plaintiff, during which Plaia is alleged to have told Plaintiff **[*9]** that his lesson plan was "overly positive," and that the evaluation was positive. DE 13 ¶ 76. Plaia is also alleged to have expressed concern as to the rigor of the material. DE 13 ¶ 76. In addition to discussing the lesson, Plaia is alleged to have commented that he did not like what Plaintiff said to Seeram, that Plaintiff was "asking too many questions around here," and that Plaintiff was "too smart for his own good." DE 13 ¶ 78.

III. Allegations Regarding Sexual Orientation Discrimination

Plaintiff is a homosexual male. DE 13 ¶ 83. In addition to the facts set forth above, Plaintiff's Amended Complaint contains factual allegations in support of a claim of sexual orientation discrimination in violation of the *Equal Protection Clause of the Constitution*, as follows.

A. First Incident of Harassment by a Student and Plaintiff's Complaint

In December of 2011, a student at Plaintiff's school posted a picture taken of Plaintiff at the school on his Facebook page. The picture bore the caption "gayest teacher ever." DE 13 ¶ 82. Offended by the posting, Plaintiff complained to Assistant Principal Robert King, and, on December 23, 2011, filed a formal sexual harassment complaint with the District. DE 13 ¶¶ 83-84. While Plaintiff believes **[*10]** that the student who posted the picture was suspended for four days, he also alleges that the District failed to conduct a proper investigation of his complaint, to prevent future harassment in accord with its sexual harassment policies and procedures. DE 13 ¶¶ 85-87.

B. Second Incident of Harassment by a Student

Plaintiff alleges that the District's failure to properly investigate his complaint of sexual harassment led to a second such incident. DE 13 ¶ 88. That incident is alleged to have taken place in or around March of 2012 in the school cafeteria. DE 13 ¶ 88. As to that incident, Plaintiff alleges that a student harassed and taunted him "by pointing her finger at him and laughing out loud." DE 13 ¶ 88. Plaintiff alleges that he was later physically assaulted by the student in the school lobby in front of other students. DE 13 ¶ 88. The incident is alleged to have been captured by school video surveillance cameras. DE 13 ¶ 88.

Plaintiff alleges that the District's failure to investigate his claim of sexual harassment was based, in part, on his union activities and exercise of speech (as described above), as well as upon his sexual orientation and the making of a complaint of harassment. **[*11]** DE 13 ¶¶ 90-91. He also complains that the failure to investigate his claim created a hostile working environment. DE 13 ¶ 92.

IV. Plaintiff's Termination

On April 16, 2012, Plaia hand delivered a letter from the Superintendent to Plaintiff informing him that his termination would be recommended to the Board. DE 13 ¶ 80. On May 22, 2012, a date described by Plaintiff as "shortly after Plaintiff's participation in union meetings, his formal and informal observations, and after his physical attack," the District voted to terminate his employment. DE 13 ¶ 93. The last day Plaintiff worked at the District was June 30, 2012. DE 13 ¶ 94.

V. The Complaint

As noted, Plaintiff's complaint sets forth three causes of action alleging federal civil rights claims pursuant to *Section 1983*.

The first *Section 1983* cause of action alleges retaliation for the exercise of Plaintiff's *First Amendment* right to speech. In this claim, Plaintiff states that he engaged in speech protected by the *First Amendment* when he complained to the District about the administration of the special education program. Plaintiff's second and third causes of action allege *Section 1983* claims based upon a claimed violation of Plaintiff's *Fourteenth Amendment* right to Equal Protection. The second claim alleges sexual **[*12]** orientation discrimination, and the third alleges a hostile working environment. Both claims reference Plaintiff's status as a homosexual male. The discrimination claim alleges that Defendants discriminated against Plaintiff on the basis of his sexual orientation and gender as a gay man and that it "routinely favored other similarly situated employees in violation of his equal protection rights under the *Fourteenth Amendment*." DE 13 ¶ 97. The claim of hostile environment similarly claims that Plaintiff was subject "to a hostile environment on the basis of his sexual orientation in violation of his equal protection rights under the *Fourteenth Amendment*." DE 13 ¶ 98.

V. The Motion to Dismiss

As noted, Defendants move to dismiss. Defendants seek dismissal of the *First Amendment* retaliation claim on the ground that speech forming the basis of Plaintiff's claim is not protected by the *First Amendment*. Defendants seek dismissal of the Equal Protection claims on the grounds that such claims are time-barred and, in any event, fail to state plausible claims for relief. The Court now turns to discuss the legal principles applicable to the motion, and to the disposition thereof.

DISCUSSION

I. Legal Principles: Standards Applicable on Motions to Dismiss

A. Rule 12(b)(6)

To survive **[*13]** a *Rule 12(b)(6)* motion to dismiss, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*); see also *Arista Records, LLC v. Doe 3, 604 F.3d 110, 119-20 (2d Cir. 2010)*. Facial plausibility is established by pleading factual content sufficient to allow a court to reasonably infer the defendant's liability. *Twombly, 550 U.S. at 556*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 663*. Nor is a pleading that offers nothing more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action," sufficient. *Id. at 678* (quoting *Twombly, 550 U.S. at 555*).

The issue in the context of this motion to dismiss is not whether Plaintiff has established a prima facie case as to his claims, but whether he pleads facts in plausible support of the elements thereof. The elements of the prima facie case are considered because they "provide [a helpful] outline of what is necessary to render [a plaintiff's] claims for relief plausible." *Friel v. County of Nassau, 947 F. Supp.2d 239, 251 (E.D.N.Y. 2013)* (quoting *Sommersett v. City of New York, 2011 U.S. Dist. LEXIS 71357, 2011 WL 2565301, at *5 (S.D.N.Y. June 28, 2011)*.

II. *First Amendment* Claim

A. Retaliation for Exercise of Protected Speech

Plaintiff claims that Defendants retaliated against him for speaking out on issues regarding special education, as set forth above.

i. Legal Principles

Legal standards **[*14]** to apply to a claim of retaliation for engaging in speech protected by the *First Amendment* depend upon the nature of the speaker and the circumstances under which the speech occurred. *Howard v. City of New York, 602 F. App'x. 545, 548 (2d Cir. Mar. 4, 2015)*; *Williams v. Town of Greenburgh, 535 F.3d 71, 76 (2d Cir. 2008)* (elements of *First Amendment* retaliation claim depend upon the "factual context"); *Schoolcraft v. City of New York, 103 F. Supp. 3d 465, 507 (S.D.N.Y. 2015)*.

To establish a prima facie *First Amendment* retaliation

claim, Plaintiff here must show: (1) that he engaged in constitutionally protected speech by speaking both as a citizen and, on a matter of public concern; (2) that he suffered an adverse employment action; and (3) that his speech was a substantial or motivating factor in the adverse employment action. *Ruotolo v. City of New York, 514 F.3d 184, 188-189 (2d Cir. 2008)*. Dispositive of this motion is the issue of whether Plaintiff spoke "as a citizen." *Garcetti v. Ceballos, 547 U.S. 410, 422, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)*.

B. Disposition of the *First Amendment* Claim

In Garcetti, the Supreme Court held that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for *First Amendment* purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti, 547 U.S. at 421*. "This is the case even when the subject of an employee's speech is a matter of public concern." *Looney v. Black, 702 F.3d 701, 710 (2d Cir. 2012)* (quoting *Ross v. Breslin, 693 F.3d 300, 305 (2d Cir. 2012))*; see also *Ricioppo v. Cty. of Suffolk, 2009 U.S. Dist. LEXIS 18979, 2009 WL 577727 at *15 (E.D.N.Y. Mar. 4, 2009)*.

The Supreme Court defines "statements made pursuant to [an employee's] official duties" as "speech that owes its existence **[*15]** to a public employee's professional responsibilities." *Garcetti, 547 U.S. at 421*. Such speech is not, as a matter of law, protected by the *First Amendment*. See, e.g., *Looney, 702 F.3d at 712* (holding that the plaintiff's speech was unprotected because he alleged that he "spoke on the[ ] issues because he was in an official position that required, or at least allowed, him to do so"); *Ross, 693 F.3d at 308* (holding that speech was not protected . . . because it "owed its existence" to the plaintiff's official duties); *Weintraub v. Bd. of Educ. of the city Sch. Dist. Of the City of New York, 593 F.3d 196, 203 (2d Cir. 2010)* (holding that speech was not protected where it was "part-and-parcel" of the plaintiff's employment responsibilities). Phrased differently, the "central issue after Garcetti" is "the perspective of the speaker—whether the public employee is speaking as a citizen." *Weintraub, 593 F.3d at 204*.

The Supreme Court has instructed that the inquiry as to what constitutes an employee's "official duties" is a "practical one" and that "an employee's written job description is neither necessary nor sufficient" to show what is within the scope of those duties. *Garcetti, at 424-25*. Thus, determining whether a public employee spoke "pursuant to" official duties "'is not susceptible to a bright line rule.'" *Looney, 702 F.3d at 711* (quoting *Ross, 693 F.3d at 306*). The inquiry, which is "largely a question of law for the **[*16]** court." *Jackler v. Byrne, 658 F.3d 225, 237 (2d Cir. 2011)*. The court must examine "the nature of the plaintiff's job responsibilities, the nature of the speech, the relationship between the two" as well as other factors, including whether the speech at issue was also conveyed to the public. *Ross, 693 F.3d at 306*.

While determinations regarding the nature of speech are not often made in the context of motions to dismiss and often must await summary judgment, there are certainly cases where both the parameters of the plaintiff's duties, and the speech forming the basis of the complaint are so clear as to make the issue of whether speech is protected amenable to a motion to dismiss. E.g., *Anglisano v. New York City Dep't. of Educ., 2015 U.S. Dist. LEXIS 136259, 2015 WL 5821786 *6 (E.D.N.Y. Sept. 30, 2015)* (granting defendant's motion to dismiss teacher's claims of *First Amendment* retaliation). As described below, this is such a case.

Plaintiff's concerns, as set forth in great detail in his Amended Complaint, were all pursuant to his official duties as a teacher. Thus, as described above, he made complaints regarding the reading program, integration of classes, the math curriculum, special accommodations and services having to do with student IEPs, and the effects that scheduling cuts would have on his math class. DE 13 at ¶¶ 32, 40-41, 43, 50-52, 55, 56, 59, 60, 65, 68, 69, 71, 72, 77. **[*17]** All of these concerns are "quintessentially those of a teacher." *Felton v. Katonah Lewisboro Sch. Dist., 2009 U.S. Dist. LEXIS 64660, 2009 WL 2223853, at *5 (S.D.N.Y. July 27, 2009)*.

Courts have dismissed strikingly similar cases, holding that special education and special needs teachers that made comparable statements did so pursuant to their official duties. See *White v. City of New York, 2014 U.S. Dist. LEXIS 123255, 2014 WL 4357466, at *10-11 (S.D.N.Y. Sept. 3, 2014)* (plaintiff's complaints concerned problems with service providers' work with her students); *Stahura-Uhl v. Iroquois Cent. Sch. Dist., 836 F. Supp. 2d 132, 135 (W.D.N.Y. Dec. 19, 2011)* (plaintiff complained about problems with IEPs and improper integration of students in her class of special education students); *Felton, 2009 U.S. Dist. LEXIS 64660, 2009 WL 2223853, at *5* (plaintiffs' statements were about "the appropriateness of the curriculum, the inadequacy of their student profiles, and the safety implications (both as to them and as to their students) of those inadequate student profiles"); *Rodriguez v. Int'l*

*Leadership Charter Sch., 2009 U.S. Dist. LEXIS 26487, 2009 WL 860622, at *4 (S.D.N.Y Mar. 30, 2009)* (plaintiff complained that her students' special needs were not being met).

Importantly, Plaintiff used channels of communication only available to him in his official capacity as a teacher. He addressed his concerns with the Committee on Special Education Chairperson, the Committee formed by the Union, the Assistant Special Education Director, the Superintendent, and the Principal. DE 13 at ¶¶ 32, 40, 41, 43, 50, 65, 68, 72, 77. Courts have held that when teachers raise concerns up the chain **[*18]** of command, or through channels only available to those working in the school as Plaintiff did, they do not speak as citizens. See *Weintraub, 593 F.3d at 204* (holding that a plaintiff was not speaking as a citizen when he used a "form or channel of discourse [not] available to non-employee citizens"); *Stahura-Uhl, 836 F. Supp. 2d at 140* (holding that "it is clear that complaints that do follow 'established institutional channels'" or that are "made to supervisors" are not protected under the *First Amendment*); *Felton, 2009 U.S. Dist. LEXIS 64660, 2009 WL 2223853, at *5* (holding that a special education teacher and aide who "addressed [their concerns] to their direct supervisors" did so pursuant to their official duties); *Rodriguez, 2009 U.S. Dist. LEXIS 26487, 2009 WL 860622, at *3* (citing *Woodlock v. Orange Ulster B.O.C.E.S., 281 F. App'x 66, 68 (2d Cir. 2008))* (holding that "teachers . . . are speaking pursuant to their professional duties, when they complain to superiors on behalf of their students").

Plaintiff contends that the concerns he raised to Union members and special education committee members, as well as on his own time with the superintendent, should be protected, as these complaints were all made "outside the chain of command." Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Plaintiff's Mem.") DE 17 at 9. However, these complaints were still all made through "official communications," *Garcetti, 547 U.S. at 423*, and "established **[*19]** institutional channels." *Stahura-Uhl, 836 F. Supp. 2d at 140*. Plaintiff made complaints at Union meetings which only teachers were invited to. DE 13 at ¶¶ 48-49. Plaintiff also only raised his concerns to Love after being directed to do so by Seeram. DE 13 at ¶ 40. Even though Plaintiff may have raised his concerns with the superintendent on his own time, he did so at an event that involved "[s]chool [a]dministration and [t]eachers" and was therefore a path of communication only accessible to Plaintiff due to his position as a teacher. DE 13 at ¶ 67.

Further, even if Plaintiff's communications were not made through official channels, or up the chain of command, courts have dismissed similar claims so long as the teachers were talking about the educational needs of the students they teach. See *Stahura-Uhl, 836 F. Supp. 2d at 142* (holding that a plaintiff who complains outside "institutional grievance channels . . . is not automatically protected" under the *First Amendment* and that a teacher's "complaints to co-workers and parents cannot be reasonably categorized as falling outside her official duties"); *Rodriguez, 2009 U.S. Dist. LEXIS 26487, 2009 WL 860622, at *4* (holding that a special education teacher complaining "to the Department of Education that [her students' educational needs] were not being met," did so "in an official capacity, not as a private citizen," **[*20]** because she had a "professional duty to attend to her students' educational needs").

The cases upon which Plaintiff relies in opposition to this motion are not binding and, in any event, distinguishable and do not therefore require denial of the present motion. While the court in *Kelly v. Huntington Union Free Sch. Dist., 675 F. Supp. 2d 283, 294 (E.D.N.Y. 2009)* recognized that speech regarding the quality of an educational program "can be a matter of public concern," that case does not mandate a finding that Plaintiff's speech here was protected as that of a private citizen. Indeed, in Kelly, "there [was] no allegation in the Amended Complaint with respect to plaintiffs' job descriptions or the specific circumstances of plaintiffs' complaints." *Id, at 293*. Here, in contrast, Plaintiff's official duties, as a teacher and Case Manager, involved teaching special education math—with four of the classes he taught containing both regular and special education students—and developing and monitoring IEPs. DE 13 at ¶¶ 1-2, 22-23. Therefore, unlike in Kelly, this court has the "further detail" to hold that Plaintiff's complaints were made pursuant to his official duties. *Kelly, 675 F. Supp. 2d at 293*.

Further, in Kelly, plaintiffs' complaints pertained to the possible elimination of their positions and the actions **[*21]** of a colleague who had "improperly authorized a mass mailing to support a Board of Education candidate, endangered students' safety by preventing plaintiffs from chaperoning a field trip on a boat, and improperly tutored students prior to their taking an exam." *Id. at 294-95*. Plaintiff's complaints here pertained solely to the special education program. In Kelly, the improper "conduct and character of teachers and principals at a public school . . . reasonably qualifies as a matter that concerns the

community" and statements about such topics would not necessarily be made pursuant to a teacher's official duties. *Id. at 294* (quoting *Fierro v. City of New York, 591 F. Supp. 2d 431, 443 (S.D.N.Y. 2008)*, rev'd on other grounds by *Fierro v. City of New York, 341 F. App'x 696 (2d Cir. 2009)*). However, statements about the adequacy of the curriculum and services provided within one's own class and program, when made by a teacher, are undoubtedly made pursuant to one's official duties.

Sassone v. Quartararo, 598 F. Supp. 2d 459, 462 (S.D.N.Y. 2009), also relied upon by Plaintiff, is readily distinguishable. In Sassone, the plaintiff teachers were retaliated against for complaining about the conduct of their coworkers, which included using degrading nicknames for autistic children and improper sexual conduct towards each other and the students, which the coworkers were later arrested for. *Sassone, 598 F. Supp. 2d at 462*. As is the **[*22]** case with *Kelly*, this case is distinguishable because it involved complaints about the improper conduct of coworkers, including allegations of criminal conduct, matters outside of the narrow scope of Plaintiff's complaint here which clearly addresses only matters regarding the teaching of the special education curriculum. Likewise, in *McLaughlin v. Pezzolla, 2010 U.S. Dist. LEXIS 232, 2010 WL 56051, at *1 (N.D.N.Y. 2010)*, a case involving summary judgment and not a motion to dismiss, the plaintiff was not a teacher but an employee of a Consumer Advocacy Board that worked with the Office of Mental Retardation and Developmental Disabilities. *McLaughlin, 2010 U.S. Dist. LEXIS 232, 2010 WL 56051, at *1*. Although the plaintiff complained about "abusive and neglectful acts, systemic cover-up, and Medicaid fraud," the court held that only the Medicaid fraud complaint was not made pursuant to her official duties. *2010 U.S. Dist. LEXIS 232, [WL] at *2*. Plaintiff complained of no overarching fraud at the school.

For the foregoing reasons, Defendants' Motion to Dismiss Plaintiff's *First Amendment* claim is granted.

III. Equal Protection Claims

A. Legal Principles

i. Elements of the Claims

A *Section 1983* claim has two essential elements: (1) the defendant acted under color of state law; and (2) as a result of the defendant's actions, the plaintiff suffered a denial of his federal statutory rights, or his **[*23]** constitutional rights or privileges. See *Quinn v. Nassau Cty. Police Dep't, 53 F. Supp. 2d 347, 354 (E.D.N.Y. 1999)*; see also *Eagleston v. Guido, 41 F.3d 865, 872 (2d Cir. 1994)*. Plaintiff's equal protection claims assert a violation of the *Fourteenth Amendment* which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. amend. XIV, §1*. This is "essentially a direction that all persons similarly situated should be treated alike." *Lovell v. Comsewogue Sch. Dist., 214 F. Supp. 2d 319, 321 (E.D.N.Y. 2002)* (citing *City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)* (citation omitted). An equal protection claim may be stated by alleging facts in support of a plausible claim that plaintiff was treated differently than others similarly situated, and that such treatment was motivated by an intent to discriminate on the basis of an impermissible consideration. *Romero v. City of New York, 839 F. Supp. 2d 588, 621 (E.D.N.Y. 2012)*. Such impermissible considerations include disparate treatment based upon sexual orientation. See *Lovell, 214 F. Supp. 2d at 323* (noting cases including sexual orientation among class of "impermissible considerations" to be considered in context of equal protection claim).

ii. Statute of Limitations

It is well-settled that the statute of limitations applicable to Plaintiff's equal protection claims, however cast, is three years. *Patterson v. Cty of Oneida, 375 F.3d 206, 225 (2d Cir. 2004)*; *Fierro v. New York City Dep't. of Educ., 994 F. Supp.2d 581, 586 (S.D.N.Y. 2014)*. The three year time period begins to run "when the plaintiff 'knows or has reason to know' of the harm." *Eagleston, 41 F.3d at 871 (2d Cir. 1994)* (quoting *Cullen v. Margiotta, 811 F.2d 698, 725 (2d Cir. 1987)*); *Fierro, 994 F. Supp.2d at 585*; see *Shomo v. City of New York, 579 F.3d 176, 181 (2d Cir. 2009)*.

B. Disposition of the Equal Protection **[*24]** Claims

1. Claims Based Upon an Alleged Failure to Act Are Time-Barred

Plaintiff's equal protection claims, which allege a failure to follow district policy and a hostile environment, both arise out of: (1) a student's offensive Facebook posting, (2) the Defendants' alleged subsequent failure to take proper remedial action according to its policy and (3) an alleged consequent hostile environment. The posting took place in December 2011, when the picture with the caption "gayest teacher ever" was uploaded to Facebook. The physical assault, which is alleged to have been a result of the District's failure to properly investigate Plaintiff's claim, took place in March of 2012.

DE 13 ¶¶ 84-88. This lawsuit was commenced more than three years after either act, in May of 2015. Plaintiff's claims are plainly time-barred.

In an effort to circumvent the statute of limitations Plaintiff argues for application of the "continuing violation" doctrine. Plaintiff's Mem. DE 17 at 10. That doctrine is an "exception to the normal knew-or-should-have-known accrual date." *Harris v. City of New York, 186 F.3d 243, 248 (2d Cir.1999)*. Under the continuing violation doctrine, if a plaintiff has endured a "continuous practice and policy of discrimination . . . the commencement **[*25]** of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it." *Chandrapaul v. City Univ. of New York, 2016 U.S. Dist. LEXIS 52961, 2016 WL 1611468, at *13 (E.D.N.Y. Apr. 20, 2016)* (quoting *Fitzgerald v. Henderson, 251 F.3d 345, 359 (2d Cir. 2001)*.

While the continuing violation doctrine can be a viable under certain circumstances, it has no application where, as here, there is simply no continuing violation. Here, Plaintiff complains of two discrete events, the 2011 posting and the March 2012 assault. The failure to investigate — which is the basis for Plaintiff's equal protection claim — must have occurred prior to the assault. Even assuming that the assault constituted Plaintiff's injury (and not the 2011 Facebook posting) that assault took place in excess of three years prior to commencement of this lawsuit. Accordingly, this matter, commenced in excess of the three year statute of limitations, is time barred. See *Chandrapaul, 2016 U.S. Dist. LEXIS 52961, 2016 WL 1611468, at 13* (plaintiff may not rely on a theory of continued violation where the plaintiff's claims of discrimination are based on discrete events separated by a span of more than two years, rather than a singular ongoing violation).

2. Even If Not Time-Barred Plaintiff's Hostile Environment Claim Fails to State a Claim

Construing Plaintiff's Amended Complaint in his favor might allow a hostile environment **[*26]** claim to be timely on the ground that an unlawful environment continued to exist after the March 2012 physical assault. Since Plaintiff's was advised of his termination on May 22, 2012, and his last day of employment by the District was June 30, 2012, harassment taking place during the approximately 30 day period prior to his termination might be actionable. The facts in Plaintiff's Amended Complaint however, belie the plausibility of any such claim and do not rise to the level required to state a claim of a hostile environment based upon Plaintiff's sexual orientation.

The law is clear. A claim of a hostile working environment must be supported by facts in plausible support of the existence of both an objectively and subjectively hostile environment. Thus, the misconduct alleged must be severe or pervasive enough to create an objectively hostile or abusive work environment, and the victim must also subjectively perceive that environment to be abusive. *Joseph v. HDMJ Rest., Inc., 970 F. Supp. 2d 131, 145 (E.D.N.Y. 2013)*; see *Terry v. Ashcroft, 336 F.3d 128, 148 (2d Cir. 2003)*.

When considering whether a Plaintiff sufficiently alleges a hostile environment, courts consider, inter alia, the regularity of the discriminatory conduct, its severity, and whether it unreasonably interferes, humiliates, or threatens **[*27]** an employee's work performance. *Joseph, 970 F. Supp. 2d at 145*. Generally, occurrences must be more than episodic; they must be sufficiently continuous in order to be deemed pervasive. Id. Here, the events complained of by Plaintiff do not rise to that stringent standard. At most, Plaintiff complains of two separate incidents: (1) the posting of the online photograph by a student and (2) a student's physical assault. Plaintiff alleged that Defendant failed to properly investigate the first incident, which then led to the second incident. However, even if it were determined that the Defendant engaged in misconduct by failing to investigate the first incident, the misconduct did not occur with enough regularity as to render the school a hostile work environment.

Moreover, Plaintiff alleges no fact to support his claim that any Defendant subjected him to a hostile environment based upon his sexual orientation. At best, he can allege only a plausible inference that Defendants knew that Plaintiff was a homosexual male. The only conduct aimed at Plaintiff's sexual orientation was engaged in by a student — who was promptly suspended — and not by any Defendant. Indeed, Plaintiff's claims as to adverse treatment are overwhelmingly **[*28]** factually linked only to his alleged speech and criticism of administration of the special education program, and not as a result of his sexual orientation. The particular factual pleading in support of the now-dismissed *First Amendment* claim undercuts any belated claim that Plaintiff was subject to disparate treatment or a hostile environment based upon his sexual orientation.

Finally, the Court rejects the notion that, under the facts here, Defendants' failure to take reasonable measures to protect him against further sexual harassment constitutes a hostile work environment. As stated in

Plaintiff's own complaint, the student engaging in the offensive conduct aimed toward Plaintiff was suspended. Moreover, courts have uniformly rejected the notion that a failure remediate adequately sexual harassment itself constitutes an act that may contribute to a hostile work environment claim. *Chan v. New York City Transit Auth., 2004 U.S. Dist. LEXIS 16370, 2004 WL 1812818, at *5 (E.D.N.Y. July 19, 2004)*; see *Fincher v. Depository Trust and Clearing Corp., 604 F.3d 712, 724 (2d Cir. 2010)*; *Rogers v. Fashion Inst. of Tech., 2016 U.S. Dist. LEXIS 30498, 2016 WL 889590, at *7 (S.D.N.Y. Feb. 26, 2016)* (granting motion to dismiss); *Richardson v. Suffolk Bus Corp., 2010 U.S. Dist. LEXIS 62508, 2010 WL 2606266, at *9 (E.D.N.Y. June 22, 2010)* (granting motion to dismiss).

CONCLUSION

For the foregoing reasons, this Court respectfully recommends that Defendants' Motion to Dismiss for failure to state a claim, appearing as Docket Entry No. 15 herein, be granted in its entirety.

OBJECTIONS

A copy of this Report and Recommendation **[*29]** is being provided to all counsel via ECF. Any written objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of filing of this report. *28 U.S.C. § 636(b)(1)*; *Fed. R. Civ. P. 6(a)*, *72(b)*. Any requests for an extension of time for filing objections must be directed to the District Judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. Failure to file objections within fourteen (14) days will preclude further review of this report and recommendation either by the District Court or Court of Appeals. *Thomas v. Arn, 474 U.S. 140, 145, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)* ("[A] party shall file objections with the district court or else waive right to appeal."); *Caidor v. Onondaga Cty., 517 F.3d 601, 604 (2d Cir. 2008)* ("[F]ailure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision.") (quoting *Small v. Sec'y of Health and Human Servs., 892 F.2d 15, 16 (2d Cir. 1989)*).

Dated: Central Islip, New York

July 6, 2016

/s/ Anne Y. Shields

Anne Y. Shields

United States Magistrate Judge

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