2012 WL 3536461
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Harry M. STOKES, Plaintiff,

v.

CITY OF MOUNT VERNON, NEW YORK; J. Yuhanna Edwards, individually and in his official capacity; Nichelle A. Johnson, individually and in her official capacity; Maureen Walker, individually and in her official capacity; Karen Watts, individually and in her official capacity; Diane Munro–Morris; individually and in her official capacity; and Roberta Apuzzo, individually and in her official capacity, Defendants.

No. 11 CV 7675(VB).
|
Aug. 14, 2012.

MEMORANDUM DECISION

BRICCETTI, District Judge.

***1** Plaintiff Harry M. Stokes brings this action against defendants City of Mount Vernon, J. Yuhanna Edwards, Nichelle A. Johnson, Maureen Walker, Karen Watts, Diane Munro–Morris, and Roberta Apuzzo pursuant to 42 U.S.C. § 1983 for violations of his First Amendment right to freedom of speech and his Fourteenth Amendment rights to procedural and substantive due process.

Pending before the Court are defendants' motions to dismiss (Docs .2, 27, 31), which, for the following reasons, are DENIED in part and GRANTED in part. Defendants' motions are granted insofar as (1) plaintiff's First Amendment claims against Mount Vernon, Walker, and Edwards are dismissed, and (2) plaintiff's claims against the individual defendants in their official capacities are dismissed. Otherwise, defendants' motions to dismiss are denied.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

BACKGROUND

For purposes of ruling on the motion to dismiss, the Court accepts all factual allegations of the amended complaint as true.

Plaintiff alleges defendants caused his constructive discharge as Inspector General of the City of Mount Vernon, New York, in retaliation for reports plaintiff published exposing public malfeasance.

In January 2008, Mount Vernon's Mayor, Clinton Young, Jr., established the Office of Inspector General ("OIG"), and the Mount Vernon City Charter was amended to reflect the creation of the OIG. According to the City Charter, the Inspector General is empowered, upon receiving complaints from any source, or upon his or her own initiative, to investigate allegations of corruption, fraud, criminal activity, or abuse by any Mount Vernon official or employee. The Inspector General may prepare and make public written reports of the investigations.

Pursuant to the City Charter, Art. VI–B, § 69–g, the Mayor has the authority to remove the Inspector General for cause upon fourteen days written notice. Further, the Inspector General serves a definite term, until the term of the Mayor by whom he was appointed expires or until a successor Inspector General is appointed. In 2008, Mayor Young appointed plaintiff Inspector General.

I. *Plaintiff's Investigation of Mount Vernon's PILOT Program*
In March 2007, the Mount Vernon City Council commenced an investigation of the Mount Vernon's Payments in Lieu of Taxes ("PILOT") program, which was administered by the city's Industrial Development Agency ("IDA"). Maureen Walker, Mount Vernon's Comptroller at the time, served as the IDA's treasurer and chief financial officer.

In April 2008, the City Council president requested that plaintiff review and report on transcripts from the PILOT program hearing. On July 3, 2008, plaintiff completed his

review of the evidence and testimony presented at the hearing and published a final report of his findings, which was made available to the public as well as to the Mayor, Comptroller, and City Council.

The July 3 report states (1) the PILOT program as administered by the IDA is not in compliance with New York law; (2) the IDA's internal and financial controls are inappropriate, arbitrary, and inadequate; (3) certain key documents appeared non-existent, lost, or secreted; and (4) the IDA's independent auditor failed to employ the correct standard in conducting the annual audit and failed to include all of the legally required supplemental schedules. The July 3 report also made eleven recommendations for improving the PILOT program.

***2** Plaintiff claims Walker took personal exception to the July 3 report and embarked on a campaign to attack plaintiff's motivations, qualifications, and integrity.

II. *Plaintiff's Investigation of Walker*

According to the amended complaint, the City Council retained an independent law firm to assist in its investigation of the PILOT program. At a hearing before the Mount Vernon Board of Estimate, on October 1, 2008, the law firm charged Walker with abuse of authority for failing to pay invoices submitted by the firm and approved by the City Council. In response to the law firm's allegations, plaintiff initiated an official investigation as to whether Walker had abused her power in denying payments to the law firm. Plaintiff claims that in the course of the ensuing investigation, he uncovered other improprieties committed by Walker.

Plaintiff's January 13, 2009, report on the results of his investigation of Walker states (1) Walker "has been consistently delinquent in filing state mandated financial reports pertaining to PILOT projects"; (2) the detailed supplemental schedules do not support filed audited financial statements; and (3) unexplained discrepancies in excess of $300,000 exist in PILOT financial statements. The January 13 report also states there is reason to believe Walker's failure to pay the law firm was part of an ongoing pattern and practice to interrupt an ongoing investigation by the City Council and force the law firm to withdraw its representation for non-payment.

Plaintiff distributed copies of the January 13 report to Walker, the Mayor, and the City Council. Because he made certain findings that implicated potential criminal wrongdoing, he provided a copy of the report to law enforcement authorities and the United States Attorney for the Southern District of New York.

III. *Walker's Call for Plaintiff's Removal*

Walker hired two law firms to rebut plaintiff's finding in the July 3 and January 13 reports. A response dated March 9, 2009, prepared by the law firms consisted of various attacks on plaintiff's qualifications, experience, competence, and motivations. On March 10, Walker held a press conference and called for plaintiff's removal as Inspector General.

IV. *Plaintiff's Investigation of Walker's Ethics Violations*

According to the amended complaint, in August 2009, plaintiff received various complaints from individuals alleging Walker was working another job, teaching at Iona College, during the Mount Vernon government's regular business hours. In response to these complaints, plaintiff initiated an investigation to determine if Walker was teaching at Iona College during the hours for which she was being compensated as a full-time employee of Mount Vernon. If true, Walker's conduct would violate Section 24–3(D) of the City Charter, which forbids full-time officers from engaging directly or indirectly in any other trade, business, occupations, or profession during Mount Vernon's regular working hours.

***3** On November 30, 2009, plaintiff forwarded the City Council an interim report of his investigation. The interim report stated Walker had been teaching classes at Iona College from 2001–2009, and 90% of those classes were held during Mount Vernon's regular working hours. Walker previously had acknowledged she taught at Iona College, but asserted her classes were held primarily in the evening. Plaintiff's November 30 interim report states that during the nine years Walker had taught at Iona College, Mount Vernon had paid her over $100,000 for the hours she was to have been performing governmental duties when, in actuality, she was teaching at Iona. The interim report recommended a hearing be conducted by the City Council on Walker's alleged violation of Section 24–3(D).

V. *Passage of Local Law Abolishing the OIG*

According to plaintiff, Walker's political allies—defendants J. Yuhanna Edwards, an incumbent City Council member, and Karen Watts, Diane Munro–Morris, and Robert Apuzzo, who were running as first term council members—ran a unified campaign during the November 2009 election and

were all elected to City Council. Plaintiff claims that before the City Council could hold hearings on Walker's alleged ethics violation, Walker and the other individual defendants passed a law abolishing the OIG.

The Board of Estimate consists of three members: the president of the City Council, the Comptroller, and the Mayor. In January 2010, the Board of Estimate consisted of Edwards, as City Council President, Walker, and Young. On January 19, 2010, Edwards and Walker voted for a resolution abolishing the OIG. Young objected to the resolution, and the Mount Vernon Corporation Counsel advised Edwards and Walker that the Board of Estimate was not the proper forum to entertain this resolution. Accordingly, Edwards and Walker withdrew the resolution.

Subsequently, the individual defendants passed, through the City Council, Local Law 1–2010, which repealed the Inspector General enabling statute and abolished the OIG. On April 23, 2010, the Mount Vernon City Clerk filed the local law with the New York Secretary of State.

Plaintiff claims the filed copy was not certified by the Mount Vernon Corporation Counsel pursuant to N.Y. Mun. Home Rule Law § 27. Defendant Nichelle Johnson, a legislative assistant to the City Council, signed the copy of the law submitted to the Secretary of State. Plaintiff claims the local law abolishing the OIG also violated N.Y. Mun. Home Rule Law § 23 because the City Council passed the law without holding a referendum. Plaintiff further claims the law violates the City Charter, which mandates that an appointed officer may be removed only by the officer that made the appointment.

VI. *New York Supreme Court's Injunction Against Local Law 1–2010*

On May 7, 2010, in Westchester County Supreme Court, the Mount Vernon Corporation Counsel filed an order to show cause seeking to enjoin the City Council from (1) acting on any legislation unconstitutionally and illegally abolishing the OIG; (2) passing legislation relating to the 2010 budget or the City Charter insofar as these implicate the Mayor's executive powers, offices, and departments, including the OIG; and (3) signing, certifying, or appearing on behalf of the Corporation Counsel in any manner whatsoever. On May 10, The Honorable Joan B. Lefkowitz granted a temporary restraining order enjoining the City Council from taking any of the above actions.

***4** On June 15, 2010, the Board of Estimate passed a resolution reducing the Inspector General's salary to $1. Walker and Edwards voted in favor of the resolution and Young dissented. Watts threatened to remove the City Clerk from office if he refused to certify the resolution.

Also on June 15, the city's Corporation Counsel filed a motion for a temporary restraining order nullifying the resolution. On June 18, Justice Lefkowitz signed the temporary restraining order invalidating the Board of Estimate's resolution.

On August 24, 2010, Justice Lefkowitz entered a final order declaring invalid the City Council's legislation abolishing the OIG, affirming that any effort to abolish the OIG requires a referendum, and granting plaintiff's motion for a permanent injunction. The City Council appealed Justice Lefkowitz's order and on August 9, 2011, the Appellate Division, Second Department, affirmed the order.

VII. *efendants' Failure to Reimburse Plaintiff for Training Expenses*

Plaintiff claims defendants failed to reimburse him for his expenditures incurred while attending a training seminar in October 2010 despite the availability of funds in the 2010 budget that were allocated for and available to cover the costs of tuition and expenses for the seminar.

VIII. *The Proposed Mount Vernon Budget for 2011*

On December 17, 2010, the City Council and Board of Estimate amended Young's proposed budget for the fiscal year 2011 and reduced the Inspector General's salary from $110,000 to $35,000. The budget did not reduce the salary, $55,000, for the Inspector General's secretary. Plaintiff claims defendants reduced his salary to force him to quit.

Upon receipt of his first reduced paycheck, in January 2011, plaintiff advised Young and the Corporation Counsel the reduction in his salary constituted a constructive discharge and requested their assistance in restoring his previous salary. Young and the Corporation Counsel failed to take any action on plaintiff's behalf and on July 27, 2011, plaintiff tendered a letter of resignation to Young.

Plaintiff claims that he was constructively discharged in violation of the City Charter, which authorizes only the Mayor to remove the Inspector General from office, in retaliation for exposing Walker's alleged wrongdoing and to

prevent plaintiff from assisting the federal government in investigating Walker's potential criminal conduct.

DISCUSSION

The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Ryder Energy Distrib. v. Merrill Lynch Commodities, Inc.,* 748 F.2d 774, 779 (2d Cir.1984) (internal quotation marks omitted). In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court evaluates the sufficiency of the complaint under the "twopronged approach" suggested by the Supreme Court in *Ashcroft v. Iqbal. See* 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). First, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the assumption of truth and are thus not sufficient to withstand a motion to dismiss. *Id.* at 678; *Hayden v. Paterson,* 594 F.3d 150, 161 (2d Cir.2010). Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Ashcroft v. Iqbal,* 556 U.S. at 679.

***5** To survive a Rule 12(b)(6) motion to dismiss, the allegations in the complaint must meet a standard of "plausibility." *Ashcroft v. Iqbal,* 556 U.S. at 678; *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 564, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

I. *First Amendment Retaliation*

The First Amendment prohibits government officials from subjecting an individual to retaliatory actions for exercising one's free speech rights under the First Amendment. *Holley v. Cnty. of Orange,* 625 F.Supp.2d 131, 140 (S.D.N.Y.2009). "To prevail on a First Amendment retaliation claim, a public employee must establish: '(1) that the speech at issue was protected, (2) that he suffered an adverse employment action, and (3) that there was a causal connection between the protected speech and the adverse employment action.' " *Diesel v. Town of Lewisboro,* 232 F.3d 92, 107 (2d Cir.2000) (quoting *Blum v. Schlegel,* 18 F.3d 1005, 1010 (2d Cir.1994)).

A. *First Amendment Protection*

Defendants argue plaintiff's speech—his reports exposing Walker's alleged wrongdoing—was not constitutionally protected because the reports were prepared and distributed pursuant to plaintiff's official duties as Inspector General.

"[W]hen 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 v. Ceballos,* 547 U.S. 410, 421, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). "To determine whether or not a plaintiff's speech is protected, a court must begin by asking 'whether the employee spoke as a citizen on a matter of public concern.' If the court determines that the plaintiff either did not speak as a citizen or did not speak on a matter of public concern, 'the employee has no First Amendment cause of action based on his or her employer's reaction to the speech.' " *Sousa v. Roque,* 578 F.3d 164, 170 (2d Cir.2009) (citations omitted).

Here, there is no question plaintiff was not acting as a citizen when performing his duties as Inspector General. According to the City Charter, the Inspector General is empowered to investigate allegations of corruption, fraud, criminal activity, or abuse by any Mount Vernon official or employee and make public written reports of the investigations. Plaintiff's July 3, 2008, report on the PILOT program's noncompliance, and his January 13, 2009, and November 30, 2009, reports on Walker's alleged wrongdoing were all issued pursuant to plaintiff's investigation of the PILOT program and Walker, which he conducted in his capacity as Inspector General. Therefore, "[w]hen he went to work and performed the tasks he was paid to perform, [plaintiff] acted as a government employee." *Garcetti v. Ceballos,* 547 U.S. at 422.

***6** Plaintiff argues that even though his reports were issued pursuant to his official duties as Inspector General the retaliation arose not from his employer, but from defendants who were merely other governmental actors. Plaintiff claims the OIG is situated squarely within the executive branch and his appointment and removal was at the sole discretion of the Mayor. As members of the City Council, defendants were part of the legislative branch of the Mount Vernon government and attempted to circumvent the City Charter by constructively discharging plaintiff.

Plaintiff cites several cases arising outside the Second Circuit in support of his position. *See Leverington v. City of Colorado Springs,* 643 F.3d 719, 731 (10th Cir.2011) (finding *Garcetti* does not apply when defendants do "not claim to have had any authority to make any employment decisions on behalf of [plaintiff's government employer] with respect to [plaintiff]"); *Lewis v. Mills,* 2009 WL 3669745, at *5 (C.D.Ill. Nov.3, 2009) ("The Court concludes that the government's needs *as an employer* should not insulate the actions of state actors who do not have an employment relationship with a public employee asserting a First Amendment violation."); *Leavey v. City of Detroit,* 719 F.Supp.2d 804, 812 (E.D.Mich.2010) ("This Court agrees with Plaintiff that the holding of *Garcetti* should not be applied in analyzing a First Amendment claim against a non-employer.").

According to the City Charter, plaintiff was appointed, and may be removed by, the Mayor; however, plaintiff, as Inspector General, was employed by Mount Vernon. Therefore, *Garcetti* applies to plaintiff's First Amendment retaliation claim against Mount Vernon, and that claim is dismissed.

Furthermore, defendants Walker and Edwards were members of the Board of Estimate. The City Charter states the Board of Estimate is charged with fixing the Inspector General's annual salary. The Court finds the City Charter therefore provides Walker and Edwards some authority to make employment decisions on behalf of the city with respect to plaintiff. See *Leverington v. City of Colorado Springs,* 643 F.3d at 731. Accordingly, *Garcetti* also bars plaintiff's First Amendment retaliation claim against Walker and Edwards.

Defendants Johnson, Watts, Munro–Morris, and Apuzzo do not have employment authority over plaintiff. However, they argue plaintiff is attempting to graft an additional requirement onto the *Garcetti* analysis, when the threshold inquiry is simply whether plaintiff was speaking as a citizen or pursuant to his official duties as a public employee. As support defendants cite two cases. *See Caraccilo v. Vill. of Seneca Falls,* 582 F.Supp.2d 390, 405 (W.D.N.Y.2008) ("Under *Garcetti,* a court faced with the question of whether a public employee's speech is protected must first ask whether the employee spoke as a citizen on a matter of public concern. If the answer is "no," then no First Amendment claim arises, and that ends the matter."); *Brady v. Cty. of Suffolk,* 657 F.Supp.2d 331, 342 (E.D.N.Y.2009) (same). The cases cited by defendants for this proposition constitute non-controlling authority, just as plaintiff's supporting cases do. And defendants have not persuasively argued why the employer/employee distinction articulated in *Leverington, Lewis,* and *Leavey* should not apply in this case. The cases cited by defendants do not address this distinction.

***7** Moreover, the principle underlying the employer/employee distinction makes sense. The rationale for the *Garcetti* rule is that restricting speech owing its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. *Lewis v. Mills,* 2009 WL 3669745, at *4. The individual defendants do not point out any hiring, firing, or employment authority they have over plaintiff. In fact, as Justice Lefkowitz and the Second Department found, defendants' attempts to "abolish, transfer, or curtail the power" of the Inspector General were invalid.[1] Therefore, the rationale underlying *Garcetti* is inapplicable and the Court cannot conclude that plaintiff's speech is not protected simply because the speech at issue may have occurred in the context of plaintiff's official job duties. *See Leverington v. City of Colorado Springs,* 643 F.3d at 731. Thus, *Garcetti* does not bar plaintiff's claims against Johnson, Watts, Munro–Morris, and Apuzzo.

B. *Adverse Employment Action*

Plaintiff claims he was constructively discharged when defendants passed the budget reducing the Inspector General's salary from $110,000 to $35,000. A constructive discharge occurs when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced to involuntarily resign. *Pena v. Brattleboro Retreat,* 702 F.2d 322, 325 (2d Cir.1983). A severe reduction in pay may constitute a constructive discharge. *See Pa. State Police v. Suders,* 542 U.S. 129, 134, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004) (holding constructive discharge may be shown "if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions"); *Bertuzzi v. Chase Manhattan Bank,* 1999 WL 759997, at *4 (S.D.N.Y. Sept.24, 1999) ("[A] reduction in salary, or, by analogy, reduced raises and failure to pay bonuses, accompanied by other factors, can be evidence of intolerable working conditions.").

The individual defendants argue this action is not attributable to them, as Young allegedly ratified the budget. However, the individual defendants cite no law in support of their argument. The individual defendants, other than Walker, were members of the City Council, who passed the budget reducing plaintiff's salary. Therefore, the reduction of plaintiff's salary is certainly attributable to them. Walker does not contest that the reduction of plaintiff's salary constitutes a constructive discharge.

Mount Vernon argues plaintiff's resignation does not constitute a constructive discharge because too much time passed between the salary reduction and his resignation. If a plaintiff does not resign within a reasonable time period after the alleged retaliation, he may not have constructively discharged. *See, e.g., Landrau–Romero v. Banco Popular De Puerto Rico,* 212 F.3d 607, 613 (1st Cir.2000). Here, plaintiff received his first reduced paycheck in January 2011 and resigned in July 2011. Mount Vernon points to several non-binding cases, including *Landrau–Romero,* that find resignation after periods of five to seven months are too late after the offensive conduct to be labeled a constructive discharge.

***8** Plaintiff maintains he attempted to resolve the dispute internally. The complaint alleges on January 18, 2011, plaintiff requested Corporation Counsel bring an action to enforce the August 24, 2010, court order, and ninety days passed without a response. If plaintiff was actually trying to resolve the dispute out of court during this time, then, at this stage, the Court finds plaintiff resigned within a reasonable amount of time of his constructive discharge.

C. *Causal Connection*

Defendants argue plaintiff cannot establish a causal connection between his speech and his alleged constructive discharge because too much time passed between plaintiff's reports and his reduced salary and resignation. "[T]he causal connection must be sufficient to warrant the inference that the protected speech was a substantial motivating factor in the adverse employment action." *Cotarelo v. Vill. of Sleepy Hollow Police Dep't,* 460 F.3d 247, 251 (2d Cir.2006) (internal quotations omitted). A plaintiff may not rely on conclusory assertions of retaliatory motive to satisfy the causal link. *Cobb v. Pozzi,* 363 F.3d 89, 108 (2d Cir.2004). "A plaintiff can establish the causal connection between protected expression and an adverse employment determination indirectly 'by showing that the protected activity was followed by adverse treatment in employment, or directly by evidence of retaliatory animus.' " *Id.* (quoting *Morris v. Lindau,* 196 F.3d 102, 110 (2d Cir.1999)).

Defendants argue plaintiff cannot establish the temporal proximity necessary to show an indirect causal connection between his protected speech and constructive discharge because his retaliation claim is based on reports issued on July 3, 2008, January 13, 2009, and November 30, 2009, and his salary reduction occurred thirteen months later, on December 17, 2010, and his resignation occurred twenty months later, on July 27, 2011. Defendants cite *Hollander v. American Cyanamid Co.,* 895 F.2d 80, 85 (2d Cir.1990), for the proposition that even a three month period between plaintiff's protected activity and defendants' alleged retaliatory conduct is insufficient to establish the requisite causal connection. However, the Second Circuit "has not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action." *Gorman–Bakos v. Cornell Co-op Extension of Schenectady Cty.,* 252 F.3d 545, 554 (2d Cir.2001).

Thirteen months may push the outer limit, but the Court finds it sufficient to suggest a causal relationship here. Defendants overlook their alleged conduct and resulting events, as detailed in the complaint, occurring between the filing of the reports and the reduction of plaintiff's salary including: the January 19, 2010, vote for a resolution abolishing the OIG; the passage of Local Law 1–2010 on April 23, 2010, abolishing the OIG; the resulting state litigation, which culminated in an August 24, 2010, court order declaring invalid the legislation abolishing the OIG; and the failure to reimburse plaintiff for his expenditures incurred while attending a training seminar in October 2010. Given the continuing nature of defendants' actions, commencing shortly after plaintiff's issuance of the reports, plaintiff has adequately pleaded facts supporting a plausible inference of causal connection between his constructive discharge and his protected speech. *See, e.g., Chan v. NYU Downtown Hosp.,* 2004 WL 213024, at *3 (S.D.N.Y. Feb.3, 2004) ("Even though an alleged act of retaliation may be separated by a significant gap in time from the date [of plaintiff's protected activity], evidence of an intervening pattern of antagonism between [plaintiff] and [defendants] could support an inference that an alleged retaliatory act that was taken against the [plaintiff] was causally related to her complaint of discrimination.").

***9** Therefore, the motions to dismiss plaintiff's First Amendment claim are granted as to Mount Vernon, Walker, and Edwards and denied as to defendants Johnson, Watts, MunroMorris, and Apuzzo.

II. *Procedural Due Process*

Plaintiff claims defendants denied him procedural due process by terminating his employment without a pre-deprivation hearing. To sustain a Section 1983 claim based on an alleged violation of due process, a plaintiff must show (1) he possesses a liberty or property interest protected by the Constitution or federal statutes, and (2) he was deprived of that liberty or property interest without due process. *Ciambriello v. Cnty. of Nassau,* 292 F.3d 307, 313 (2d Cir.2002). Defendants argue plaintiff does not have a cognizable property interest in his position as Inspector General.

"[O]nly where a plaintiff can demonstrate that state law confers 'a legitimate claim of entitlement' to a particular position will a property interest in that position arise." *Velez v. Levy,* 401 F.3d 75, 85 (2d Cir.2005). In *Velez,* the Second Circuit held a plaintiff had no "constitutionally cognizable property interest in her employment as an elected official." *Id.* at 85–87. Plaintiff argues that he was not elected, but appointed, and while elected officials enjoy no cognizable property interest in their positions, unelected public officials do.

Plaintiff cites several cases finding unelected public officials have a property interest in their positions. *See, e.g., Looney v. Town of Marlborough,* 2011 WL 3290202, at *7 (D.Conn. July 30, 2011) ("[I]t is undisputed that [plaintiff] had a property interest in continued employment as [an appointed] Building Official until the expiration of his four-year term in August 2010."); *Canning v. Butcher,* 582 F.Supp. 1497, 1498–99 (D.Conn.1984) (finding the New Haven City Charter created a cognizable property interest on behalf of an unelected police official). Defendants do not provide law to the contrary. And the Supreme Court has held, in the area of public employment, "a public college professor dismissed from an office held under tenure provisions, and college professors and staff members dismissed during the terms of their contracts, have interests in continued employment that are safeguarded by due process." *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 576–77, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Further, the Second Circuit in *Velez,* limits its holding to elected public officials.

Therefore, the Court finds plaintiff had a cognizable property interest in his unelected position as Inspector General.[2]

Defendants argue plaintiff had an adequate post-deprivation hearing available to him. "Due process requires only that a hearing be held at a meaningful time and in a meaningful manner. Where a pre-deprivation hearing is impractical and a post-deprivation hearing is meaningful, the State satisfies its constitutional obligations by providing the latter." *Giglio v. Dunn,* 732 F.2d 1133, 1135 (2d Cir.1984) (citing *Parratt v. Taylor,* 451 U.S. 527, 540, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)). "A coerced resignation does not involve a showing of cause; it is simply the submission by an employee to pressure exerted by a superior. For this reason, it is hard to visualize what sort of prior hearing the Constitution would require the employer to conduct. If there is no factual dispute between the employer and the employee, a hearing is meaningless. When an employee resigns, the only possible dispute is whether the resignation was voluntary or involuntary, and this cannot be determined in advance." *Id.* (citing *Codd v. Velger,* 429 U.S. 624, 627, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977)). Therefore, a pre-deprivation hearing here was not available or necessary.

***10** In this case, although plaintiff could have commenced a N.Y. C.P.L.R. Article 78 proceeding after defendants reduced his salary, "[a] CPLR article 78 proceeding is not the proper vehicle to review the validity of legislative action" such as the adoption of an annual budget. *Mohr v. Greenan,* 10 Misc.3d 610, 803 N.Y.S.2d 876, 878 (Sup.Ct.2005). Here, plaintiff's salary reduction was accomplished by the City Council's passage of the annual budget. Therefore, plaintiff could not actually have commenced an Article 78 proceeding.

Having not been provided an adequate post-deprivation hearing, defendants' motions to dismiss plaintiff's procedural due process claim are denied.

III. *Substantive Due Process*

To assert a substantive due process claim, plaintiff must plead: (1) "a constitutionally cognizable property interest is at stake," and (2) defendants' "alleged [actions] were arbitrary, conscious-shocking, or oppressive in the constitutional sense, not simply incorrect or illadvised." *Ferran v. Town of Nassau,* 471 F.3d 363, 369–71 (2d Cir.2006) (internal quotation marks omitted). As detailed above, plaintiff has adequately set forth a cognizable property interest in his continued employment as Inspector General.

"For state action to be taken in violation of the requirements of substantive due process, the denial must have occurred under circumstances warranting the labels 'arbitrary' and 'outrageous.' " *Natale v. Town of Ridgefield,* 170 F.3d 258, 262 (2d Cir.1999). At this stage, plaintiff has adequately pleaded a substantive due process claim. According to the complaint, defendants arbitrarily engaged in continuous attempts to remove plaintiff from office and abolish the OIG. The attempts led to mayoral intervention and lawsuits commenced by Corporation Counsel. Defendants' actions eventually contravened a court order. Even though defendants claim they were legitimately exercising their discretion to set the city's annual budgets, viewed in light of the foregoing circumstances the Court concludes that plaintiff has adequately alleged defendants' actions were arbitrary and outrageous. Thus, plaintiff has stated a substantive due process claim.

IV. *Immunity*

For the same reasons stated in the Court's substantive due process analysis, defendants are not entitled to qualified immunity. A qualified immunity defense is established where "(a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law." *Tierney v. Davidson,* 133 F.3d 189, 196 (2d Cir.1998). The complaint has set forth facts indicating defendants' actions ran the risk of violating the law. Defendants were enjoined from attempting to abolish the OIG on May 7, 2010, and defendants' further attempts to abolish the OIG were struck down on August 24, 2010. The reduction of plaintiff's salary through yet another governmental mechanism may readily be seen as a way unlawfully to circumvent these court orders. It was not objectively reasonable for defendants to believe the reduction of plaintiff's salary was lawful. Therefore, defendants are not entitled to qualified immunity.

***11** Defendants argue Walker and Edwards, as members of the Board of Estimate, are entitled to absolute immunity. State and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities. *Bogan v. Scott–Harris,* 523 U.S. 44, 49, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998). According the City Charter, the Board of Estimate is charged with fixing the Inspector General's salary. Defendants argue Walker and Edwards acted in their legislative capacities when adopting the annual budget estimate that reduced the Inspector General's salary.

However, the test for determining whether an act is legislative "turns on the nature of the act, rather than on the motive or intent of the official performing it." *Harhay v. Town of Ellington Bd. of Educ.,* 323 F.3d 206, 210 (2d Cir.2003) (internal quotations omitted). Here, the reduction of plaintiff's salary is more akin to an administrative act. Therefore, Walker and Edwards are "not entitled to absolute legislative immunity because [their] acts were not quintessentially legislative, but rather were part of a process by which an employment situation regarding a single individual was resolved." *Id.* at 211.

V. *Suit Against Defendants in Their Individual Capacities*

Plaintiff sues defendants in both their official and individual capacities. Defendants argue plaintiff's claims against defendants in their individual capacities are duplicative of his official-capacity claims and therefore should be dismissed. In *Hafer v. Melo,* 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991), the Court identified two kinds of suits in which government officials are named as defendants. *Ortiz v. Court Officers of Westchester Cty.,* 1996 WL 531877, at *4 (S.D.N.Y. Sept.19, 1996). "The first kind, official-capacity suits, 'generally represent only another way of pleading an action against an entity of which an officer is an agent .' " *Id.* (quoting *Kentucky v. Graham,* 472 U.S. 159, 165, 105 S.Ct. 2545, 86 L.Ed.2d 112 (1985)). A municipal entity can only be liable under Section 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). "The second kind, personal-capacity suits, seek to impose individual liability for actions taken by a government officer under color of state law." *Ortiz v. Court Officers of Westchester Cty.,* 1996 WL 531877, at *4.

Here, plaintiff has stated claims for first amendment and due process violations against defendants in both their official and individual capacities. As to the claims against defendants in their official capacities, "it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy." *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480,

106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (citing *Owen v. City of Independence,* 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (holding a city could be held liable when the city council passed a resolution firing plaintiff without a pre-termination hearing)). As set forth in the amended complaint, defendants, through the City Council, passed the 2011 budget and reduced plaintiff's salary, forcing plaintiff's resignation. Such a legislative action constitutes official policy of the city and therefore plaintiff has stated a claim against Mount Vernon and defendants in their official capacities.

***12** However, "[b]ased upon the understanding that it is duplicative to name both a government entity and the entity's employees in their official capacity, courts have routinely dismissed corresponding claims against individuals named in their official capacity as redundant and an inefficient use of judicial resources." *Castanza v. Town of Brookhaven,* 700 F.Supp.2d 277, 284 (E.D.N.Y.2010) (internal quotations omitted). Because the city of Mount Vernon is named in the amended complaint, the claims against defendants, in their official capacities, are dismissed as duplicative and redundant. Moreover, as set forth above, plaintiff has failed to state a claim for first amendment retaliation against Mount Vernon. Therefore, plaintiff's *Monell* claim against Mount Vernon only encompasses the city's alleged due process violations.

As to the claims against defendants in their individual capacities, to establish personal liability in a Section 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. *Hafer v. Melo,* 502 U.S. at 25. Here, according to the amended complaint, defendants attempted unlawfully several times to oust plaintiff as Inspector General and abolish the OIG in retaliation for his exercise of free speech. Plaintiff claims defendants once again knowingly misused their official positions and authority to constructively discharge him. Plaintiff has plausibly alleged defendants, acting under color of state law, caused the deprivation of plaintiff's federal rights and therefore plaintiff has stated claims for first amendment and due process violations against defendants in their individual capacities.[3]

CONCLUSION

Defendants' motions to dismiss the complaint are DENIED in part and GRANTED in part. Defendants' motions are granted insofar as (1) plaintiff's First Amendment claims against Mount Vernon, Walker, and Edwards are dismissed, and (2) plaintiff's claims against the individual defendants in their official capacities are dismissed. Otherwise, defendants' motions to dismiss are denied.

The Clerk is instructed to terminate the motions. (Docs.2, 27, 31).

SO ORDERED:

All Citations

Not Reported in F.Supp.2d, 2012 WL 3536461

Footnotes

1 *See Jackson v. Broad. Music, Inc.,* 2006 WL 250524, at *7 (S.D.N.Y. Feb.1, 2006) ("[T]he court may take judicial notice of public records and of admissions in pleadings and other documents in the public record filed by a party in other judicial proceedings." (internal quotations omitted)).

2 The Court rejects defendants' argument that plaintiff has no property interest in his position because he was an at-will employee. According to the City Charter, Art. VI–B, § 69–g, the Inspector General may be removed *for cause* upon fourteen days written notice. A public employee who has a right not to be fired without "just cause" has a property interest in his employment that qualifies for the protections of procedural due process. *Horvath v. Westport Library Ass'n,* 362 F.3d 147, 151 (2d Cir.2004). To the extent defendants claim Section 69–g is invalid because it was not subject to a referendum, the Court notes this provision has not been legally challenged and existed unimpaired throughout plaintiff's tenure.

3 Defendants move to dismiss the amended complaint pursuant to Fed.R.Civ.P. 12(b)(7) for failure to join the Board of Estimate as an indispensable party under Rule 19. However, as detailed above, plaintiff has stated a *Monell* claim against the city of Mount Vernon and claims against defendants in their individual capacities. The Board of Estimate is neither necessary nor indispensable to the Court's analysis of plaintiff's claim.

2012 WL 3536461

End of Document