UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SCOTT P. SPECHT, Plaintiff, -against- THE CITY OF NEW YORK, THOMAS KANE, and JOHN DAVID LYNN, Defendants.	:	MEMORANDUM & ORDER 1:19-CV-6438 (ENV) (SJB)

VITALIANO, D.J.

Plaintiff Scott P. Specht originally brought this action against defendant City of New York and two of his former supervisors, Thomas Kane and John David Lynn, in Supreme Court, Kings County. Specht, who at all times relevant to this action was a fire marshal in the Bureau of Fire Investigation for the New York City Fire Department ("FDNY"), alleges that defendants (1) retaliated against him in violation of 42 U.S.C. § 1983 for exercising his First Amendment rights; (2) retaliated against him in violation of New York State Civil Service Law § 75-b on the same basis; and, in so retaliating, (3) inflicted extreme emotional distress. Because the complaint asserts claims under federal as well as state law, the action was removed from state court by defendants. 28 U.S.C. §§ 1331, 1367. Defendants now move to dismiss all claims, pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, defendants' motion is granted.

Background[1]

Specht began working for FDNY in 2003 and was promoted to the position of fire marshal in September 2014. Am. Compl. ¶ 9. Fire marshals are law enforcement officers tasked with, among other duties, investigating the causes of fires. *Id.* ¶¶ 11, 13. They possess arrest authority and are required to carry a firearm, an official badge, and identification card. *Id.*

On March 22, 2018, Specht was assigned to investigate a fire that destroyed a five-story brownstone building in Manhattan and killed one of the responding firefighters. *Id.* ¶¶ 15–16. Early in his investigation, Specht focused on two theories potentially explaining the cause of the fire. *Id.* ¶ 17. The first cause was the boiler located in the cellar of the building, which had been the subject of recent and unlicensed repairs by the building owner. *Id.* ¶¶ 18–19. The second theory as to the cause of the fire was the production of a film called "Motherless Brooklyn", which was using the building as a set at the time of the fire. *Id.* ¶¶ 20–21. Beyond causing the fire, Specht theorized, the production may have also amplified its intensity by shutting off of the sprinkler system in the building to protect movie equipment and storing various flammable materials related to the movie set. *Id.* ¶¶ 26–27.

Two days after the fire, on March 24, Specht inspected the boiler room, noted a lack of visible fire damage, and thus turned his attention to the movie production process in causing and/or aggravating the fire. *Id.* ¶¶ 35–37. Plaintiff alleges that Lynn ordered the removal of the building's sprinkler valves during the building's final physical examination, ordered others not to

[1] The facts are drawn primarily from plaintiff's amended complaint, Dkt. 22-3 ("Am. Compl."), as it is well-settled that where, as here, the plaintiff seeks to amend his complaint while a motion to dismiss is pending, the Court can consider the merits of the motion in light of the amended complaint. *See Kilpakis v. JPMorgan Chase Fin. Co., LLC*, 229 F. Supp. 3d 133, 139 (E.D.N.Y. 2017). Further, all facts alleged in plaintiff's pleadings are deemed to be true, and all reasonable inferences drawn in favor of the plaintiff. *Vietnam Ass'n of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 115 (2d Cir. 2008).

document this event, and then hid the valves in the basement of an FDNY facility. *Id.* ¶¶ 28–29. Over the course of the month following the fire, Specht eventually came to believe that the electrical and other work done inside the building by movie production personnel caused the fire. *Id.* ¶¶ 40–46. During this time, Specht communicated to his superiors, including Chief Fire Marshal Kane and Assistant Fire Marshal Lynn, that this was his primary theory as to causation. *Id.* ¶ 46.

Specht contends, however, that defendants Kane and Lynn wanted to place the blame on the boiler because of the substantial revenues that the movie production business generates for New York City and the positive publicity it brings to the City's senior officials and fire officers, including themselves. *Id.* ¶¶ 47–48. That is, if the movie production were deemed responsible for a fire that killed a firefighter, Specht asserts that the relationship between the film and television industry and the City and its officials would be significantly damaged. *Id.* ¶ 53.

Specht charges that on April 13, 2018, Kane and Lynn met with him at FDNY's headquarters in Brooklyn and ordered him to file a final investigative report indicating that the fire was caused by a flue attached to the boiler. *Id.* ¶ 54. Specht initially refused to file the report and told Kane and Lynn that the investigation was incomplete and that his primary theory was still that the movie production personnel caused the fire. *Id.* ¶¶ 55–56. Specht alleges that Kane, Lynn and others then "browbeat, insulted, abused, and threatened" him in order to coerce him to file an official report stating the boiler flue was the cause of the fire. *Id.* ¶¶ 57–58. Specht eventually acquiesced, but not for long. Two days later, Specht changed his mind and told his immediate supervisor, Supervising Fire Marshal Kanelopoulos, that he would not file the report as directed. *Id.* ¶ 59. Kanelopoulos warned him that this noncompliance was akin to committing "career suicide."

On April 30, 2018, Kane, Lynn and other FDNY officers met with Specht at FDNY headquarters, and Specht was again directed to file the report as ordered. *Id.* ¶ 61. At the end of the meeting, Kane and Lynn removed Specht from the investigation of the March 22 fire. *Id.* ¶ 64. Also at the end of the meeting, Specht reported that he was sick and would be seeing FDNY medical personnel for an evaluation. *Id.* ¶ 65. He was thereafter diagnosed with asthma and obstructive airway disease, and subsequently received a light duty assignment on May 10, 2018. *Id.* ¶¶ 72, 74. Kanelopoulos ultimately filed an investigative report identifying the boiler flue as the cause of the fire. *Id.* ¶ 67.

The next day, May 1, 2018, Specht sent an email to all fire marshals at the FDNY Bureau of Fire Investigation documenting the results of his investigation into the March 22 fire. *Id.* ¶ 69. He concluded the email with the following message: "My advice to the member[s] of the Bureau of Fire Investigation is to stay true to your methodology, your training, and yourself. Do not succumb to the great pressures that will be placed upon you by the supervisory members of this bureau. At the end of the day, it will be YOU answering to your methods under oath. More importantly, it will be YOU answering to the reflection you see in the mirror." *Id.* ¶ 70.

Specht took his concerns beyond the bounds of FDNY. On June 7, 2018, due to his belief, he says, that Kane and Lynn had abused their positions as public officers by interfering with his investigation, Specht met with and reported those concerns to officers at the New York City Department of Investigation ("DOI"). *Id.* ¶ 78. Then, on July 11, 2018, Specht opened another front by filing a Notice of Claim with the New York City Comptroller's Office, providing notice of his intent to file suit against the City, Kane, and Lynn for retaliation in connection with the investigation of the March 22 fire. *Id.* ¶ 79. Finally, on July 12, 2018, Specht met with and reported his concerns to officers at the New York County District

Attorney's Office ("DANY"). *Id.* ¶ 80. That same day, the *Daily News* published a story about Specht's Notice of Claim. *Id.* ¶ 81.

In his account, Specht tells of how the bosses turned up the heat on him. On July 20, 2018, he says, Kane and Lynn made a "bad faith" request to DOI to investigate discrepancies between the identifying report numbers Specht used in his reports and those appearing on corresponding NYPD reports. *Id.* ¶ 82.

On September 19, 2018, more than four months after he began calling attention to the investigation of the brownstone fire, Kane and Lynn ordered Specht to be placed on modified duty. *Id.* ¶ 83. Already on a light-duty assignment, Specht was now directed to discontinue investigative activity and remain at an assigned work location on an administrative schedule. *Id.* ¶ 89. He was further denied the opportunity to work overtime or otherwise alter his work hours, and ordered to turn in his firearm, badge, and identification card. *Id.* ¶ 90. Specht's supervisor, Supervising Fire Marshall Aguirrie, told him that he was modified because he "pissed off" a supervisor and because of his "lawsuit." *Id.* ¶ 84. Specht contends the latter refers to his Notice of Claim. *Id.* ¶ 85. He contends the modification became common knowledge, destroyed his career, and led him to file for retirement to avoid the continued humiliation. *Id.* ¶ 91.[2]

Specht filed this suit in state court on September 16, 2019, and defendants removed to federal court on November 14, 2019. This Court has original jurisdiction over plaintiff's federal

[2] On November 15, 2018, the Medical Board for the FDNY Pension Fund determined that Specht was disabled due to his asthma and recommended that the FDNY Pension Fund grant him disability retirement. *Id.* ¶ 92. On December 4, 2018, the FDNY Pension Fund informed Specht that its Board of Trustees was scheduled to decide on his disability retirement application. *Id.* ¶ 93. Two days later, however, Specht was notified that his application was delayed due to an "ongoing investigation." *Id.* ¶ 94. Specht contends that Kane and Lynn were behind this delay. *Id.* ¶ 95. After Specht filed the instant suit, the application was granted, and Specht is now retired.

claims under 28 U.S.C. § 1331, and can exercise supplemental jurisdiction over plaintiff's state law claims under 28 U.S.C. § 1367.

Legal Standard

Pleading rules require a plain statement of claims and do not compel a plaintiff to supply "detailed factual allegations" in support of their claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007); *see also* Fed. R. Civ. P. 8(a)(2). But the rules require "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). That is, "[a] pleading that offers 'labels and conclusions' . . . will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555); *see also In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (alteration in original) (quoting *Twombly*, 550 U.S. at 557).

To survive a Rule 12(b)(6) motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (*quoting Twombly*, 550 U.S. at 570). This "plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citation and internal quotations omitted).

Discussion

I. Section 1983 – First Amendment Retaliation Claim

Specht's claim under 42 U.S.C. § 1983 is predicated upon his allegations that that Kane, Lynn, and the City retaliated against him in violation of the First Amendment. To state *a prima facie* claim of First Amendment retaliation as a public employee, a plaintiff must show that:

(1) he engaged in constitutionally protected speech; (2) he suffered an adverse employment action; and (3) there was a sufficient causal connection between the protected speech and the adverse employment action. *See Matthews v. City of New York* ("*Matthews II*"), 779 F.3d 167, 172 (2d Cir. 2015). Plaintiff's claim stumbles at the first step of the analysis.

The inquiry into whether a public employee's speech was constitutionally protected tests two separate elements, each of which must be plausibly pleaded: (a) the subject of the employee's speech must have been a matter of public concern and (b) the employee must have spoken as a citizen rather than solely as an employee. *Jackler v. Byrne,* 658 F.3d 225, 235 (2d Cir. 2011) (citing *Garcetti v. Ceballos,* 547 U.S. at 420–22, 126 S. Ct. 1951, 1960–61, 164 L.Ed.2d 689 (2006)).

Whether speech is a matter of public concern is a question of law to be answered by the court after examining the "content, form, and context of a given statement." *Connick v. Myers,* 461 U.S. 138, 147–48 n.7, 103 S Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). "To constitute speech on a matter of public concern, an employee's expression must 'be fairly considered as relating to any matter of social, or other concern to the community.'" *Jackler,* 658 F.3d at 236 (quoting *Connick,* 461 U.S. at 146). Speech that, even if touching on an area of general importance, "*primarily concerns* an issue that is 'personal in nature and generally related to [the speaker's] own situation,'" is not on a matter of public concern. *Id.* (quoting *Ezekwo v. NYC Health & Hospitals Corp.,* 940 F.2d 775, 781 (2d Cir. 1991), *cert. denied,* 502 U.S. 1013, 112 S. Ct. 657, 116 L.Ed.2d 749 (1991)) (emphasis added). Nor does the fact that expression is public as opposed to private mean that its subject is matter a public concern. *See City of San Diego v. Roe,* 543 U.S. 77, 78, 84–85, 125 S. Ct. 521, 160 L.Ed.2d 410 (2004).

Plaintiff alleges that his protected expression includes filing a notice of claim with the City Comptroller's office and speaking with DOI and DANY regarding the alleged improper interference of higher-ups in his official law enforcement investigation of the March 22 fire. Plaintiff does not clearly delineate in his complaint whether his refusal to file the investigative report as directed or his subsequent email to his colleagues are also instances of speech for the purposes of his retaliation claim. In any event, it is clear that none of these instances of speech is on a matter of public concern, as defined by case law.[3]

At bottom, the common thread linking each instance of speech—and the purported hook giving rise to a matter of public concern—is Specht's conclusory allegation of a "cover-up", Am. Compl. ¶ 130, which he contends was a matter of public concern because it demonstrated the City's "corruption" in shifting the blame away from an "industry engaged in dangerous practices that threaten the public's safety." Dkt. 22 ("Pl's Opp'n") at 16. In a single paragraph in his amended complaint, Specht alleges that "[u]pon information and belief," defendants Kane and Lynn wanted to "deflect blame and attention away from the movie production companies involved in the production of the movie" at site of the fire. Am. Compl. ¶ 47. Specht also catalogs the number of films and television shows shot in New York City recently, as well as the substantial sums of money the film and television industry has spent in the State of New York. This is the sole support that plaintiff provides for what he claims directly motivated Kane and Lynn to coerce him into filing an investigative report listing the boiler flue, not the movie set construction, as the primary cause of the fire.

[3] As a result, the Court need not, and does not, address whether Plaintiff suffered an adverse employment action or whether there was a causal link between such action and his speech.

In the two separate meetings plaintiff had with Kane, Lynn and other FDNY officials—meetings in which all attendees allegedly pressured Specht to file the report as directed—the substance of what Kane, Lynn, and the officials otherwise said or discussed regarding their beliefs about the cause of the fire is left to the imagination. In particular, it is unclear whether their theory was implausible or merely different than the theory favored by Specht. The untethered nature of all these facts is fatal, as they fail to elevate Specht's subsequent protestations, supposedly on account of what he perceived as a "coverup", to a constitutionally protected status.

Indeed, to be protected, speech must "advance a public purpose", not merely "redress a personal grievance." *Ruotolo v. City of New York*, 514 F.3d 184, 189 (2d Cir. 2008); *see also id.* at 190 ("A public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way institutions are run." (internal quotation marks omitted)). Beyond the conclusory claims of a "coverup", there is no hint in the pleadings of how rejecting Specht's recommendation and ordering him to list the previously determined, alternate cause as the primary cause of the fire "relat[es] to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. at 146, 103 S. Ct. at 1690, 75 L.Ed.2d 708 (1983). As the Supreme Court has held, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* Similarly, "speech on a purely private matter, such as an employee's dissatisfaction with the conditions of his employment, does not pertain to a matter of public concern." *Lewis v. Cowen*, 165 F.3d 154, 164 (2d Cir. 1999).

Plaintiff primarily pegs his contrary argument to *Jackler* and *Matthews v. City of New York*, 488 Fed. Appx. 532, 533 (2d Cir. 2012) ("*Matthews I*"). But those cases involve very

different circumstances—namely, the use of potentially unconstitutional practices by police departments. In *Jackler*, the plaintiff police officer alleged that, after filing a truthful report in which he testified to witnessing his colleague use excessive force—an unconstitutional civil rights violation—he had been pressured to retract the report. 658 F.3d at 236 ("Deliberate indifference to claims of such civil rights violations—tantamount to a custom or policy sufficient to support municipal liability under § 1983—may be inferred from a municipality's lack of appropriate response to repeated complaints of such violations."). In *Matthews I*, the plaintiff police officer complained about a quota system of arrests, a practice that is, in fact, unlawful under New York law, and similarly implicates unconstitutional civil rights violations. 488 Fed. Appx. at 533 (citing N.Y. Labor Law § 215-a (McKinney 2012)). Of course, matters implicating the internal affairs of a fire department can be matters of public concern. *See, e.g.*, *Gusler v. City of Long Beach*, 823 F. Supp. 2d 98, 126 (E.D.N.Y. 2011) ("The subject of the letter [at issue] was the alleged deficiencies in recent firefighter responses in Long Beach, including allegations of misconduct, malpractice and negligence. Such behavior within the fire department would be of general interest[] and of value and concern to the public." (internal quotation marks omitted)). But, "an otherwise internal workplace issue does not become a matter of public concern simply because it occurs within a fire department." *Ratajack v. Brewster Fire Dept., Inc. of the Brewster-S.E. Jt. Fire Dist.*, 178 F. Supp. 3d 118, 157 (S.D.N.Y. 2016).

Specht fares no better in pleading the second element of a First Amendment claim, as each instance of expressive conduct was made as an employee, not a citizen. To cast his refusal to file a "false report" as citizen speech, plaintiff relies once again on *Jackler* and on *Matthews II*, but his reliance is misplaced. In *Jackler*, the operative question was whether a police officer, when exercising his "civic right to give evidence," is speaking as an employee or a citizen. 658

F.3d at 239. The Second Circuit found that the officer's testimony was indistinguishable from that of a civilian witness and held the expression—his refusal to give false testimony—to constitute speech as a citizen. *See id.* at 240. In *Matthews II* the Second Circuit, noted that the police officer's duties did not involve "formulating, implementing, or providing feedback on a policy", as he was doing with respect to the arrest quota system, and found his expression to constitute citizen speech. 779 F.3d at 174.

No "civic right to give evidence" is at issue here, nor was the content of Specht's expression outside of his duties. Filing an investigative report, Specht admits, is part of a fire marshal's job. *See Lane v. Franks*, 573 U.S. 228, 241, 134 S. Ct. 2369, 2380, 189 L.Ed.2d 312 (2014) ("The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."). As Specht further concedes, he wished to indicate in his report what he believed to be his "primary theory" of the cause of the March 22 fire. Plaintiff may not now convert the findings of this proposed investigative report into an unassailable truth and any disagreement on the part of his supervisors into a violation of his right to free speech. Similarly, with respect to Specht's internal email to his colleagues, he admits that it was sent "to document the status and results of his investigation into the fire." Am. Compl. ¶ 69. Specht's email was clearly sent "pursuant to" his "official job duties" even if it may not have been "required by, or included in, [his] job description, or in response to a request by [his employer]" because it was "part-and-parcel of his concerns about his ability to properly execute his duties." *See Weintraub v. Bd. of Educ.*, 593 F.3d 196, 203 (2d Cir. 2010) (internal quotation marks omitted).

In sum, conclusory allegations of the "cover-up" about a single incident, without more to nudge it into the arena of public concern and citizen speech, do not imbue Specht's speech

concerning the brownstone fire investigation with First Amendment protection. *See Hutter v. City of New York*, 18-CV-6421(NGG)(SJB), 2020 WL 1332152, at *4 (E.D.N.Y. Mar. 23, 2020) (finding a conclusory allegation of a "cover-up" insufficient to plead First Amendment protection). Specht's job was to investigate fires, and the complaint paints a picture of him speaking out when faced with what he saw as an incorrect conclusion being adopted by his superiors. "[T]aken together, all of these . . . facts paint a clear picture of an employee speaking out about his views regarding how best to perform his job duties, rather than of someone attempting to make a 'contribution to the civic discourse.'" *Frisenda v. Inc. Vill. of Malverne*, 775 F. Supp. 2d 486, 507 (E.D.N.Y. 2011) (quoting *Garcetti*, 547 U.S. at 422). Fire investigations, no doubt, are of extraordinary importance to the safety of those living or working in the City. But, disputes among those officials conducting investigations of a single incident cannot, merely on the speculation of one as to the motivation of others, cloak the dispute as one of constitutional dimension. Otherwise, any dispute among investigators could give rise to a constitutional claim. That is not the law. [4]

II. New York Civil Service Law § 75-b Retaliation Claim

Specht alleges that the City, Kane, and Lynn retaliated against him in violation of the state whistleblower statute, New York Civil Service Law § 75-b. As a threshold matter, before arriving at the elements of a § 75-b claim, defendants argue that Specht is precluded from bringing this retaliation claim because he did not exhaust his administrative remedies under the applicable collective bargaining agreement ("CBA"). "An employee may bring suit under section 75-b in a court of competent jurisdiction only where a collective bargaining agreement

[4] Because there is no viable First Amendment claim, and therefore no constitutional violation, the Court need not consider *Monell* liability nor any defense under qualified immunity. The § 1983 claim is dismissed in its entirety.

does not substitute its own grievance procedure for the relief encapsulated by the statute." *Munafo v. Metro. Transp. Auth.*, 00-CV-0134 (ERK), 2003 WL 21799913, at *31 (E.D.N.Y. Jan. 22, 2003); *see also* N.Y. Civ. Serv. Law § 75-b(3)(a)–(c).

Specht is unphased by this obstacle because he claims that there is no CBA between the Uniformed Firefighters' Association and the City. Defendants, in their reply, attach as an exhibit an expired agreement that they maintain is still valid. Dkt. 20-1 ("Brown Decl.") Ex. A. In determining the sufficiency of plaintiff's claim, this court may consider documents attached in the pleadings or incorporated by reference, matters of which judicial notice may be taken, and documents in plaintiff's possession or of which plaintiff had knowledge and upon which plaintiff relied in bringing suit. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). The Court deems this agreement incorporated both by reference and because plaintiff relied on, in this case, the document's non-existence in filing suit. "In addition, the Court may take judicial notice of collective bargaining agreements, which are public documents, promulgated by or binding on a government agency, and not subject to reasonable dispute." *Romero v. Metro. Transportation Auth.*, 444 F. Supp. 3d 583, 591 (S.D.N.Y. 2020), *appeal dismissed* (Aug. 4, 2020) (citing *Richardson v. New York City Bd. of Educ.*, 711 F. App'x 11, 13–14 (2d Cir. 2017)).

As for the validity of the CBA, New York law on this point is crystal clear. Though the agreement is now expired,[5] its terms remain binding in the absence of a new agreement. *See* N.Y. Civ. Serv. Law § 209-a(1)(e). As the New York Court of Appeals has explained:

> "Significantly, the section provides, not that the terms and conditions of employment shall continue, but that the terms of the "expired agreement" shall continue. We conclude that the provision extended the contract. . . . To hold

[5] The original collective bargaining agreement expired in August 2010. Brown Decl. Ex. A. at 1. Defendants also provided a copy of a Memorandum of Agreement that extended the original agreement through July 2017. *Id.* at 85.

> otherwise would mean that the State would be bound by the terms of an expired collective bargaining agreement only so long as it wished to be bound. Our construction of section 209-a(1)(e) is consistent with the underlying purposes of the Taylor Law (Civil Service Law art 14), to promote employer-employee harmony and uninterrupted service in the public sector by avoiding destructive self-help remedies. Thus, the statute denies employees the right to strike, balances that loss with a continuation of benefits provision binding on the employer after the existing contract expires, and mandates that the parties bargain in good faith to achieve a new agreement."

Ass'n of Surrogates v. State, 79 N.Y.2d 39, 45, 588 N.E.2d 51, 53 (1992) (internal citations omitted).

In New York, the short-hand, general rule is that grievance procedures in an expired collective bargaining agreement remain in effect absent an explicit sundown provision. *See City of Long Beach v. Long Beach Prof'l Fire Fighters Ass'n, Local 287*, 49 Misc. 3d 1213(A), 29 N.Y.S.3d 846 (N.Y. Sup. Ct. 2015) (grievance procedures remained in effect because, under Civil Service Law § 209–a(1)(e), "the terms contained in the expired agreement continue until a new agreement is negotiated"). New York law does, however, provide a safety valve. "[P]arties can effectively prevent certain terms of a CBA from being continued after expiration of the contract under [Civil Service Law § 209-a(1)(e)] by using language that causes the term to 'sunset' or expire at the conclusion of the CBA or at some other point in time," even though the balance of the provisions of an expired CBA would continue to control until replaced by a newly negotiated CBA. *Prof'l Staff Cong.-City Univ. of New York v. New York State Pub. Employment Relations Bd.*, 7 N.Y.3d 458, 468, 857 N.E.2d 1108, 1113 (2006). This safety valve in the Civil Service Law is of no avail to Specht, as there is no allegation, much less anything else in the record properly before the Court on this motion, to suggest that there was a sunset clause in the

grievance provisions of the expired CBA providing that those grievance procedures would not survive contract expiration.

To close the loop, the CBA and its grievance procedures it established govern the claims Specht brings here. Indeed, by their own terms, the procedures specifically identify fire marshals as individuals who may raise grievances. Brown Decl. Ex. A at 27.[6] Specht argues that "there is no provision in the CBA that governs the subject matters" of his lawsuit, Pl's Opp'n at 26, relying largely on a comparison with *Verdi v. City of New York*, 306 F. Supp. 3d 532 (S.D.N.Y. 2018), in which the court found that a plaintiff's § 75-b claim was not covered by CBA grievance procedures limited to grievances involving "a violation, misinterpretation or inequitable application of any of the provisions of [the CBA]" or "'special complaints' regarding harassment and intimidation that a principal and superintendent have failed to address." *Id.* at 550. Here, however, the relevant provision of the CBA applies more broadly, to complaints arising from "application of the provisions of this contract *or of existing policy or regulations* of the Fire Department *affecting the terms and conditions of employment*." Brown Decl. Ex. A at 21 (emphasis added).

There is no new ground to be tilled here. Manifestly, the modification of Specht's role and work schedule that led him to retire constituted the "application of . . . policies and regulations . . . affecting the terms and conditions of his employment." *Id.* This result is in harmony with numerous other decisions finding that collective bargaining agreements with New York City supplied grievance procedures that must be exhausted before § 75-b claims can be

[6] Though plaintiff is correct in stating that, according to the terms of the agreement, only a union is authorized bring a grievance before an arbitration panel in Step IV, he fails to mention that fire marshals can initiate the grievance procedure at Step I and continue appealing through Step III, *id.* at 24–25, all steps he did not take in this instance.

pursued. *See, e.g.*, *Portelos v. City of New York*, No. 12CV3141LDHVMS, 2016 WL 11469183, at *8 (E.D.N.Y. Aug. 13, 2016) ("It has long been settled that a public employer can be subject to suit for a violation of § 75-b only if the employee is not subject to a collective bargaining agreement that permits such a claim to be raised in arbitration."); *Rothbein v. City of New York*, No. 18-CV-5106 (VEC), 2019 WL 977878, at *13 (S.D.N.Y. Feb. 28, 2019) (CBA covered termination challenged under § 75-b when it contained "both (1) 'provisions preventing an employer from taking adverse personnel actions' and (2) 'a final and binding arbitration provision to resolve alleged violations of such provisions'"); *Singh v. City of New York*, 418 F. Supp. 2d 390, 403 (S.D.N.Y. 2005) (employee had no state law retaliation claim where he failed to engage in binding arbitration to resolve grievances as required by a collective bargaining agreement), *aff'd*, 524 F.3d 361 (2d Cir. 2008). The state law whistleblower claim fails.

III. Intentional Infliction of Emotional Distress Claim

Specht last alleges that defendants' retaliatory conduct toward him constituted an intentional infliction of emotional distress ("IIED"). Under New York law, a plaintiff alleging IIED must show: (1) extreme and outrageous conduct (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress, (3) a causal connection between the conduct and injury, and (4) severe emotional distress. *See Bender v. City of New York*, 78 F.3d 787, 790 (2d Cir. 1996) (citing *Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115, 121 (1993)). "The requirements of this standard are very strict, and '[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Lydeatte v. Bronx Overall Economic Dev. Corp.*, 2001 WL 180055, at *1 (S.D.N.Y. 2001) (quoting *Murphy v. American Home Prod. Corp.*, 58 N.Y.2d 293, 303 (1983)).

Instructively, New York courts are especially reluctant to allow IIED claims in the employment context and they regularly dismiss them, "except where they accompanied by allegations of sex discrimination and, more significantly, battery." *Id.* (quoting *Ahmed v. Compass Group,* 2000 WL 1072299, *10 (S.D.N.Y. August 3, 2000).

Long on conclusions but bereft of factual allegations pleading each element of this cause of action, Specht's amended complaint claims that the purported "cover-up" was extreme and outrageous and that the retaliatory conduct was directed at him for the purpose of inflicting extreme emotional distress. Plaintiff cites no legal authority in his opposition suggesting that defendants' conduct even approached the level of being "utterly intolerable in a civilized community." *Murphy,* 58 N.Y.2d at 303. Also notably absent from the complaint are any non-conclusory claims of emotional distress, let alone the "severe emotional distress" required under New York law. *Leff v. Our Lady of Mercy Acad.*, 55 N.Y.S.3d 392 (App. Div. 2017). Considering the high standard that an IIED claim must meet, Specht's claim fails.

Conclusion

For the foregoing reasons, defendants' motion to dismiss plaintiff's claims under 42 U.S.C. § 1983 and New York State Civil Service Law § 75-b, as well as for intentional infliction of emotional distress, is granted.

While leave to amend is generally freely given, *see TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014), "a district court need not grant leave to amend when doing so would be 'futile.'" *Azkour v. Bowery Residents' Comm., Inc.*, 646 F. App'x 40 (2d Cir. 2016). Notably, Specht has already provided an amended pleading in this case, Dkt. 22-3, on which this order is based. *See supra* n.1. Even after rearming his complaint with new allegations in response to the arguments made in defendants' motion to dismiss, *Specht* has nonetheless failed

to make out a legally cognizable claim. Moreover, there is not so much as a suggestion in plaintiff's amended complaint or briefing that he could give these claims the significant shot in the arm that they would require to survive a motion to dismiss directed at the resulting second amended complaint. Accordingly, leave to amend is denied and the complaint is dismissed with prejudice.

So Ordered.

Dated: Brooklyn, New York
November 30, 2020

/s/ Eric N. Vitaliano
ERIC N. VITALIANO
United States District Judge