UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERNARD GALLO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 1:22-cv-01092-APM**
	)	
WASHINGTON NATIONALS BASEBALL CLUB, LLC,	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL DISMISSAL

Defendant, the Washington Nationals Baseball Club, LLC, by counsel and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, respectfully submits this Memorandum in Support of Defendant's Motion for Partial Dismissal.

INTRODUCTION

At the heart of Plaintiff's Complaint is a relatively straightforward employment discrimination claim. Plaintiff alleges that his employer's mandatory COVID-19 vaccination policy interfered with his religious beliefs, that he requested a religious accommodation, that his request was denied, and that he was subsequently discharged. The termination of his employment, Plaintiff alleges, violated Title VII of the Civil Rights Act. Unfortunately, Plaintiff has attempted to expand his core complaint into something much broader, throwing in various causes of action that are deficient as a matter of law. For the reasons set forth herein, these add-on claims are legally insufficient and fail to state cognizable claims for relief.

Grouped by underlying claims rather than specific counts, Plaintiff has essentially alleged three causes of action:

1. ***Religious Discrimination in the Form of an Alleged Failure to Accommodate Religious Beliefs or Practices.*** Plaintiff's claim for failure to accommodate his religious beliefs is asserted under both the District of Columbia Human Rights Act (Complaint Count I, ¶¶ 51, 53, 55, 56, 57), and Title VII of the Civil Rights Act (Complaint Count II). Although the claim is without merit based on the facts, Defendant does not seek dismissal of this claim pursuant to Rule 12(b)(6).

2. ***Disability Discrimination Based on an Alleged 'Perceived Disability.'*** Plaintiff also alleges that Defendant discriminated against him in violation of the DCHRA and the Americans with Disabilities Act because it "regarded" Plaintiff as disabled. Count I, ¶ 56; Count III, ¶¶ 74-77.

3. ***Retaliation Based on Plaintiff's Alleged Exercise of his Rights Under the ADA, Title VII, and the DCHRA.*** Finally, Plaintiff alleges that his discharge was carried out in retaliation for a variety of alleged protected activities, including: (i) his alleged exercise of his right to seek a religious accommodation (Count I, ¶ 58; Count II ¶ 68); (ii) his alleged exercise of his opposition to practices alleged to be discriminatory under the ADA (Count IV). In other words, Plaintiff's retaliation claim is alleged to arise under both religious discrimination and disability discrimination rationales, and under all three statutes – the DCHRA, Title VII, and the ADA.

For the reasons set forth below, Plaintiff's disability discrimination claims should be dismissed because he has failed to plead facts showing that Defendant regarded him as disabled or that that such alleged perception was a factor in his discharge. Plaintiff's retaliation claims, regardless of statute or theory, should also be dismissed because the facts alleged in the Complaint establish that there is no causal connection between the alleged protected activity and the discharge decision. If Defendant's motion is granted, only Plaintiff's failure to accommodate claim will remain intact. This claim is asserted in Count I under the DCHRA and in Count II under Title VII.

SUMMARY OF MATERIAL FACTUAL ALLEGATIONS

Plaintiff was employed by the Washington Nationals Baseball Club (the "Nationals") from November 2012 through September 2021 in the position of Scout, Area Supervisor.

Complaint ¶¶ 6, 13, 45. On August 12, 2021, in response to the COVID-19 pandemic, the Nationals announced a mandatory COVID-19 Vaccination Policy, pursuant to which nearly all Nationals employees were required to become vaccinated against COVID-19. *Id.* at ¶¶ 17-20, Ex. A.[1] The policy advised employees that they were entitled to request disability or religious accommodations if they believed they were entitled to them. *Id.* at ¶ 16, Ex. A. Plaintiff exercised this right and requested a religious accommodation on August 12, 2021. *Id.* at ¶¶ 22-24, Ex. B. Following an interactive process that involved Plaintiff's discussions with the Nationals Human Resources Department and legal counsel, as well as written questions and answers, the Nationals denied Plaintiff's request for an accommodation on August 27, 2021, explaining, in part: "[I]n in light of the fact that a fully approved vaccine is now available, and given the nature of your position, duties, and essential functions, your continued performance of your duties without being vaccinated will pose an unacceptable risk to the health and safety of Company employees (including you), customers, visitors, and others with whom you are required to interact in connection with your job duties." *Id.* at ¶¶ 25, 27, Ex. D.

Consistent with the written COVID-19 Vaccination Policy, the Nationals informed Plaintiff on August 27, 2021, that, unless he provided proof of vaccination as required by the policy, he would be placed on unpaid leave for two weeks beginning September 1, 2021, and terminated thereafter. *Id.* at ¶¶ 29, 33, 35, Ex. D. On September 1, 2021, the Nationals advised Plaintiff in writing that his two-week period of unpaid leave would begin that day and that his discharge would be effective September 15, 2021. *Id.* at ¶ 35, Ex. E. Beginning on September

[1] Plaintiff has attached numerous documents to his Complaint. Pursuant to D.C. Circuit precedent, District Courts considering motions to dismiss under FRCP 12(b)(6) "may consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, or documents upon which the plaintiff's complaint necessarily relies." *Judicial Watch, Inc. v. FBI*, 2020 U.S. Dist. LEXIS 166906 *6-7 (D.D.C., Sept. 11, 2020) (citing *Busby v. Capital One, N.A.*, 932 F. Supp. 2d 114, 134 (D.D.C. 2013)).

6, 2021, Plaintiff's attorney engaged in various correspondence with the Nationals' General Counsel concerning the decision, and during this period Plaintiff's counsel argued for the first time that Plaintiff was entitled to a medical accommodation in addition to his previously requested religious accommodation. *Id.* at ¶¶ 37-45, Ex. F. In response to this information, the Nationals requested additional information and were provided a medical note from Plaintiff's healthcare provider that explained Plaintiff had previously contracted COVID-19 and had recovered with no complications. *Id.* at Ex. H. Nevertheless, Plaintiff's termination became effective on the previously identified date – September 15, 2021. *Id.* at ¶ 45.

LEGAL STANDARD

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Wood v. Moss*, 572 U.S. 744, 757-58 (2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim is facially plausible when the plaintiff pleads factual content that is more than "'merely consistent with' a defendant's liability," and "allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)); *see also Singletary v. Howard Univ.*, 939 F.3d 287, 295 (D.C. Cir. 2019). Although "detailed factual allegations" are not required to withstand a Rule 12(b)(6) motion, a complaint must offer "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action" in order "to provide the 'grounds' of . . . 'entitle[ment] to relief,'" *Twombly*, 550 U.S. at 555 (alteration in original) (quoting *Conley v. Gibson*, 355 U.S. 41, 46-47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)), and "nudge[ ] [the] claims across the line from conceivable to plausible." *Id.* at 570.

In considering a motion to dismiss, courts must "treat the complaint's factual allegations as true and must grant the plaintiff[] the benefit of all inferences that can be derived from the facts alleged." *Xia v. Tillerson*, 865 F.3d 643, 649 (D.C. Cir. 2017). The Court need not, however, "accept inferences that are unsupported by the facts set out in the complaint." *Kareem v. Haspel*, 986 F.3d 859, 866 (D.C. Cir. 2021). Nor must the court accept "legal conclusions cast in the form of factual allegations." *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 272 (D.C. Cir. 2018).

ARGUMENT

I. PLAINTIFF'S CLAIMS FOR DISCRIMINATION ON THE BASIS OF A 'PERCEIVED DISABILITY' SHOULD BE DISMISSED

In Counts I and III, Plaintiff purports to set forth claims for disability discrimination under both the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (Count III) and the District of Columbia Human Rights Act, D.C. Code § 2-1401, *et seq*. (Count I).

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The DCHRA contains nearly identical prohibitions. D.C. Code § 2-1402.11(a).[2] The two basic elements of a disability discrimination claim are: (i) the plaintiff suffered an adverse employment action; and (ii) the adverse employment action was taken "because of" the plaintiff's "disability." *Adeyemi v. District of Columbia*, 525 F.3d 1222, 1226 (D.C. Cir. 2008); *see also Welch v. Skorton*, 299 F.

[2] In light of the similarities between the ADA and the DCHRA, courts in this Circuit look to ADA decisions for guidance when applying the DCHRA. *See Ball v. George Wash. Univ.*, 2019 U.S. Dist. LEXIS 55636 *22 (D.D.C., Mar. 31, 2019).

Supp. 3d 102, 111 (D.D.C. 2018).[3] Therefore, to state a claim for discrimination on the basis of a disability, a plaintiff must plead facts sufficient to show that: (i) he has a "disability" as defined in the statute; and (ii) that the disability was the factor that caused the employer to take the adverse action. *Giles v. Transit Emples. Fed. Credit Union*, 794 F.3d 1, 5 (D.C. Cir. 2015); *Dave v. Lanier*, 681 F. Supp. 2d 68, 74 (D.D.C. 2010). Plaintiff's Complaint fails to plead facts sufficient to show either of these elements.

A. Plaintiff has not Alleged Facts Sufficient to Show that the Nationals Regarded him as Disabled.

An individual will be considered "disabled" under the ADA if the individual:

(i) has a physical or mental impairment that substantially limits one or more major life activities;

(ii) has a record of such an impairment; or

(iii) is regarded by the employer as having such an impairment.

42 U.S.C. § 12102(1); *see also* D.C. Code § 2-1401.02 (5A). Plaintiff does not allege that he suffers from a "physical or mental impairment" that "substantially limits" one or more of his "major life activities," nor does he allege that he has a "record of such an impairment." Instead, Plaintiff's discrimination claim is based entirely on the theory that the Nationals "regarded him" as disabled and terminated his employment for that reason. Complaint ¶¶ 41, 57; 71-81. "An

[3] In addition to prohibiting disparate treatment on the basis of an employee's disability, the ADA also requires employers to provide reasonable accommodations to otherwise qualified individuals with disabilities. *See* 42 U.S.C. § 12112(b)(5)(A) (reasonable accommodation); § 12112(a) (discrimination); *see also Waggel v. George Wash. Univ.*, 957 F.3d 1364, 1371 (D.C. Cir. 2020). The reasonable accommodation requirements of the ADA protect only those employees who are actually disabled by virtue of a "physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1). Employees who claim ADA protection because they "regarded as" having an impairment are not entitled to reasonable accommodations. 29 C.F.R. § 1630.2(o)(4) ("A covered entity . . . is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong [of the definition of 'disability"].'). In this case, Plaintiff has alleged that the Nationals "regarded" him as having a disability, but he has not alleged that he actually has an impairment within the meaning of the statute. Accordingly, the reasonable accommodation provisions of the ADA are not at issue in this litigation.

individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3). The ADA expressly provides that this clause does not apply "to impairments that are transitory and minor," that is, to impairments "with an actual or expected duration of 6 months or less." *Id.*

In his Complaint, Plaintiff has not alleged that the Nationals believed him to have any kind of "impairment" at all. Instead, he has alleged that the Nationals "regarded him" as "disabled" simply because he told them that he had contracted COVID-19 at some time in the past. Complaint ¶ 39, Ex. G.[4] It is already well-established, however, that the mere fact of having contracted COVID-19 is not, by itself, an "impairment" within the meaning of the ADA. Instead, COVID-19 may qualify as a disability only if the employee's symptoms are sufficiently long-lasting and sufficiently severe to constitute an "impairment that substantially limits one or more major life activities" of the individual. *See* EEOC Guidance, *"What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws"*, § N.6 (a person does not have a disability as a result of COVID-19 if "the actual or perceived impairment is objectively both transitory (lasting or expected to last six months or less) and minor");[5] *see also Baum v. Dunmire Prop. Mgmt.,* 2022 U.S. Dist. LEXIS 54555 *11 (D. Col., Mar. 25, 2022);

[4] In the event Plaintiff suggests that he is "disabled" solely by virtue of being unvaccinated (*see* Complaint ¶ 77), his claim must be rejected out of hand. To suggest that the mere state of being unvaccinated is a "physical or mental impairment" within the scope of 42 U.S.C. § 12102(1) is patently absurd. Such a conclusion would mean that every unvaccinated person in the United States is now "disabled" under the ADA.

[5] The EEOC Guidance document may be found at the URL: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

Cupi v. Carle Bromenn Med. Ctr., 2022 U.S. Dist. LEXIS 7562, *8-9 (C.D. Ill., Jan. 14, 2022); *Champion v. Mannington Mills, Inc.*, 538 F. Supp. 3d 1344, 1348 (M.D. Ga. 2021).

Despite this clear standard, Plaintiff has alleged no facts that suggest he suffered any long-term or serious consequences as a result of his bout with COVID-19, nor has he alleged any facts that suggest that any such symptoms were continuing at the time the Nationals rolled out its vaccination policy, placed him on leave, and terminated his employment. Indeed, Plaintiff's counsel's email explains in exhausting detail that Plaintiff is **not** disabled, that he suffered **no** long-term consequences from his infection, that his prior infection gave him superior immunity and so he was **not** infectious, and so on. *See* Complaint Ex. F. Plaintiff has also attached a letter from his healthcare provider that confirms that Plaintiff fully recovered without any long-term effects of the virus. *See* Complaint Ex. H (confirming that Plaintiff "has indeed already had COVID-19 and has recovered without any sequela"). In other words, Plaintiff's own allegations establish that his bout with COVID-19 was precisely the type of "transitory and minor" condition insufficient to prove that his employer "regarded him as" disabled under the ADA or the DCHRA.

Similarly, Plaintiff has failed to allege any act or statement by the Nationals that suggests the Nationals believed Plaintiff suffered from an impairment of any kind. In fact, Plaintiff's Complaint and its attachments establish that the National did **not** regard Plaintiff as disabled. In correspondence between Plaintiff's counsel and Betsy Philpott, the Nationals Vice President and General Counsel, between September 6, 2021, and September 11, 2021:

(i) Plaintiff's counsel, for the first time – and **after** Plaintiff had already been placed on unpaid leave and given his termination date – requested that Plaintiff be granted a medical accommodation "because he has already had COVID-19 and therefore has the protective antibodies in his system." Complaint Ex. F, Limandri Email dated 9/6/2021.

(ii) In response, Ms. Philpott stated Plaintiff is not entitled to an accommodation in the form of a medical exemption because Plaintiff's alleged prior exposure to COVID-19 "does not qualify as a disability under the Americans with Disabilities Act." Complaint Ex. F, Philpott Email dated 9/9/2021.

On this issue, Ms. Philpott was indisputably correct for the reasons noted above – Plaintiff suffers from no impairment, and the Nationals did not believe that he did. In short, the mere fact that Plaintiff's attorney advised the Nationals that Plaintiff had at some prior point been infected with COVID-19 and that he has had no continuing adverse effects from the exposure does not raise a plausible inference that the Nationals "regarded" Plaintiff as "disabled."[6]

B. Plaintiff has Failed to Plead Facts that show that his Alleged 'Perceived Disability' was the Factor that Caused the Nationals to Terminate him.

Even if the Nationals "regarded" Plaintiff as disabled because of his prior COVID-19 infection, Plaintiff's allegations prove that this alleged perception was not a factor in the decision to discharge him.[7] As noted above, the central focus in the ADA's "regarded as" analysis is whether the employer took adverse action "because of" the perceived impairment. 42 U.S.C. §

[6] Plaintiff may not save his claim by pointing to the conclusory allegations scattered throughout Count III concerning assumptions the Nationals must have made about COVID-19 or the team's alleged "pressure" that he get vaccinated. Conclusory allegations on this issue "are not afforded any presumption of truth." *Douglas v. D.C. Hous. Auth.*, 981 F. Supp. 2d 78, 87-88 (D.D.C. 2013); *cf. Easaw v. Newport*, 253 F. Supp.3d 22, 31 n.4 (D.D.C. May 12, 2017) ("Stating simply 'I was turned down for a job because of my race' is precisely the kind of conclusory allegation that is patently incompatible with *Twombly* and *Iqbal*'s pleading requirements."). In *Douglas*, for example, the plaintiff, suing for disability discrimination under the "regarded as" clause, alleged specifically that her employer's human resources director asked her if she had seen a "mental health professional" and mused that a "medical condition" might be triggering the employee's problematic behavior. The Court held that even this specific allegation was "not enough to suggest that the employee is regarded as mentally disabled." *Id.* In the case before the Court, Plaintiff has not alleged a single act or statement on the part of the Nationals that suggests the Nationals perceived him to be disabled.

[7] Whether the ADA incorporates Title VII's motivating-factor standard or a stricter but-for causation standard remains "an open question" in the D.C. Circuit. *See Haughton v. District of Columbia*, 819 Fed. Appx. 1, 2 (D.C. Cir., 2020). The causation standard used is immaterial on these pleadings, however, because Plaintiff has failed to allege **any** facts that plausibly suggest his previous bout with COVID-19 was a factor in the Nationals' decision-making process at all, inasmuch as the information in question was disclosed to the Nationals **after** Plaintiff he was placed on leave and his termination date identified, as the argument in this section demonstrates.

12102(3) ("An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter **because of** an actual or perceived physical or mental impairment . . . ") (emphasis added). According to the Complaint and its exhibits, however, the Nationals' discharge decision was made well **before** Plaintiff notified the Nationals that he had contracted COVID-19 at some point in the past. Plaintiff's Complaint sets out the timeline specifically:

(i) The Nationals announced the COVID-19 Vaccination Policy on August 12, 2021. Complaint ¶ 16-19. On that day, the Nationals informed employees, including Plaintiff, that they would be required to provide proof that they had received a single-dose vaccine, or the first dose of a two-dose vaccine, by August 26, 2021. Complaint ¶ 17; Exs. A, B.

(ii) The Nationals policy stated expressly that employees who failed to produce proof of vaccination by August 26, 2021, would be placed on an unpaid leave of absence for two weeks. Complaint ¶ 21; Ex. A (email from A. Gottlieb dated 8/12/2021). The policy also stated that "[e]mployees who fail to provide proof of their fully vaccinated status in accordance with the attached timeline **will be discharged from employment**." Complaint ¶ 21; Ex. A (COVID-19 Vaccination Policy) (emphasis added).

(iii) Plaintiff was notified specifically that he would be "**separated from employment**" if he did not receive the vaccine, unless a religious or disability-related accommodation was approved. Complaint ¶ 21; Ex. A (email from A. Gottlieb dated 8/12/2021).

(iv) Plaintiff did not get vaccinated. Instead, on August 12, 2021, he requested an accommodation. Complaint ¶¶ 22-26; Ex. B.

(v) On August 27, 2021, the Nationals denied Plaintiff's request for a religious accommodation. In the written notice, Ms. Philpott advised Plaintiff expressly that: (i) the Nationals had extended his vaccination deadline to August 31, 2021; and (ii) in the event he failed to begin his vaccination regimen by September 14, 2021, his employment "**will be terminated**" as a result. Complaint ¶¶ 27, 29, 33; Ex. D (Email from B. Philpott dated 8/27/2021) (emphasis added).

(vi) Five days later, by letter dated September 1, 2021, Bob Frost, the Nationals' Senior Vice President and Chief People Officer, notified Plaintiff in writing that because he had failed to provide proof of his vaccination status by the August 31 deadline, his two-week period of unpaid leave was commencing that day. Mr. Frost also informed Plaintiff expressly: "If you do not provide proof of receiving your first shot by the end of the two-week unpaid administrative leave period,

your employment will be terminated effective September 15, 2021 for failure to comply with the Company's policy." Complaint ¶ 35; Ex. E (emphasis added).

(vii) As required by the policy, and as stated in writing on at least four prior occasions during the previous month, Plaintiff's employment was terminated effective September 15, 2021. Complaint ¶ 45.

In light of this timeline, specifically alleged in the Complaint, Plaintiff's claim – that the Nationals were motivated to terminate him because it "regarded him" as disabled after learning that Plaintiff had previously contracted COVID-19 – is utterly implausible. Plaintiff's allegations and the documentary record he has submitted prove conclusively that the Nationals made the decision to discharge him **before** it learned that he had previously been infected with COVID-19. Indeed, per the Complaint: The Nationals informed Plaintiff at least **four times** – twice on August 12, once on August 27, and once on September 1 – that he would be terminated if he did not receive the vaccine or an approved accommodation. On the latter two occasions, the Nationals informed him that his termination would be effective on September 15, 2021, following a two-week period of unpaid leave. Plaintiff admits that it was not until September 6, 2021 – five days after he had been placed on unpaid leave pending termination – that he informed the Nationals, for the first time, that he had previously been infected with COVID-19. Complaint ¶¶ 37, 39. The documents Plaintiff has attached to his Complaint prove this allegation. *See, e.g.,* Complaint Ex. F (Plaintiff's counsel raised the question of a medical accommodation for the first time on September 6, 2021, acknowledging that "this is information that you did not have at the time of the denial of his previous request for an exemption," and Ms. Philpott confirmed on September 9, 2021, that Plaintiff had not previously raised this issue).

Because the Nationals had no knowledge of Plaintiff's prior COVID-19 infection at the time it implemented the COVID-19 Vaccination Policy, provided the policy to Plaintiff, and placed Plaintiff on unpaid leave pending termination, Plaintiff cannot prove that the Nationals'

discharge decision was made "because of" this later-acquired information. *See Klotzbach-Piper v. AMTRAK*, 2021 U.S. Dist. LEXIS 167401 *26 (D.D.C., Sept. 3, 2021) ("An employer cannot discriminate against an employee based on a disability if it is not aware of the disability."); *McKnight-Nero v. Walmart, Inc.*, 2021 U.S. Dist. LEXIS 30923 *14-15 (D.D.C., Feb. 19, 2021) (Mehta, J.) (holding in ADA Title III action that "a defendant cannot act 'because of [a] disability' if she is 'entirely unaware that such a disability exist[s]'") (citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 54 n.7 (2003)); *see also Lewis v. Exelon Corp.*, 2022 U.S. Dist. LEXIS 88735 *6-7 (D.D.C., May 17, 2022) (plaintiff failed to allege that defendant knew of his disability at the time of the adverse action).

For these reasons, Plaintiff's disability discrimination claims (pled under the DCHRA in Count I and under the ADA in Count III) should be dismissed.

II. PLAINTIFF'S RETALIATION CLAIMS SHOULD BE DISMISSED, REGARDLESS OF THE THEORY OR STATUTE ASSERTED

Plaintiff's retaliation claims should also be dismissed. To prove a claim of unlawful retaliation, a plaintiff must show that: (i) he engaged in protected activity; (ii) he suffered a materially adverse employment action; and (iii) there is a causal link between the protected activity and the adverse employment action. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61-68 (2006); *Woodruff v. Peters*, 482 F.3d 521, 529 (D.C. Cir. 2007). The third element is not satisfied unless plaintiff alleges facts giving rise to an inference that "the desire to retaliate was the but-for cause of the challenged employment action." *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013); *see also Walker v. Children's Nat'l Med. Ctr.*, 236 F. Supp. 3d 136, 144 (D.D.C. 2017).

To assess the legal sufficiency of Plaintiff's retaliation claim, one must evaluate the conduct that Plaintiff alleges to be his "protected activity" and the employment action he

contends is the "adverse action" giving rise to the claim. In this case, Plaintiff alleges that the Nationals retaliated against him because he "objected to the abridgment of his right to exercise his religious beliefs and objected to Defendant's unlawful discrimination." Complaint ¶ 58; *see also* Complaint ¶¶ 68, 84. Plaintiff describes his "objection" as being put forth by his attorney in his correspondence with Ms. Philpott between September 6, 2021, and September 16, 2021. *See* Complaint ¶¶ 37-45, Ex. F. Plaintiff alleges that the alleged retaliatory acts consisted of the Nationals' decisions to place him on unpaid leave and terminate his employment. Complaint ¶¶ 58, 68, 85, 86. Thus, Plaintiff's retaliation claim is alleged to arise under all three statutes cited – the DCHRA (Complaint ¶ 58); Title VII (Complaint ¶ 68); and the ADA (Complaint ¶ 84).

Regardless of the legal theory or its statutory origin, Plaintiff has failed to allege facts that create a plausible inference of a causal connection between his alleged protected activity and the adverse employment actions.

First, as explained in detail above, the Nationals notified Plaintiff that he would be suspended and terminated at least four times before Plaintiff's attorney raised objections to the Nationals' decision. Moreover, the Nationals advised Plaintiff in writing on September 1, 2021, that if he failed to provide proof of the first dose of his vaccination by September 14, 2021, "your employment will be terminated effective September 15, 2021 . . . ." Complaint ¶ 35; Ex. E. In other words, the termination decision had been made, and it could be undone only if Plaintiff became vaccinated in accordance with the published policy. It is axiomatic that there can be no causal connection between protected activity and an adverse employment action when the latter precedes the former. *Massaquoi v. District of Columbia*, 285 F. Supp. 3d 82, 88 (D.D.C. 2018); *Wilson v. Mabus*, 65 F. Supp. 3d 127, 133 (D.D.C. 2014).

Second, if Plaintiff's theory is that the Nationals terminated him simply because he requested a religious accommodation, the claim is not plausible under the *Iqbal/Twombly* standard. One overriding fact is clear from Plaintiff's allegations: Once the Nationals announced the COVID-19 Vaccination Policy, the team followed the policy in every respect. The Nationals announced the vaccine mandate on August 12, 2021, informed employees they could seek religious or disability-related accommodations, and made it abundantly clear that unvaccinated employees who were not granted accommodations would be placed on two weeks of unpaid leave and then discharged. Complaint ¶¶ 16-20, Ex. A. This framework, and the consequences of remaining unvaccinated without an approved accommodation, were announced **before** Plaintiff submitted his request for an accommodation. Insofar as Plaintiff is concerned, the Nationals followed the policy to the letter. The Nationals provided him: (i) a copy of the policy; (ii) a follow-up email explaining how it applied to him; (iii) written notice dated August 27, 2021, that his accommodation request had been denied; and (iv) a letter dated September 1, 2021, advising him that he would be discharged effective September 15, 2021. Complaint ¶¶ 21, 27, 29, 33, 35, Exs. D, E. On these facts, Plaintiff cannot plausibly advance the theory that the Nationals terminated him solely because he requested an accommodation. *See, e.g., Von Drasek v. Burwell*, 121 F. Supp. 3d 143, 162-163 (D.D.C. 2015) (employee cannot prove that protected activity was but-for cause of termination when the employer was already planning to terminate the employee and had begun the removal process at the time the protected activity took place).

Finally, in paragraphs 46, 58, and 67, Plaintiff flirts with a comparator analysis, alleging that he was terminated near the end of his contract when two other employees were permitted to work through the end of their contracts before being discharged. To rely on the comparator theory, "all of the relevant aspects" of the alleged comparator's employment must be "nearly

identical" to those of the plaintiff. *Burley v. AMTRAK,* 801 F.3d 290, 301 (D.C. Cir., 2015) (citing *Holbrook v. Reno*, 196 F.3d 255, 261 (D.C. Cir. 1999)). In cases involving discipline or discharge, a plaintiff "must demonstrate that [he] and the allegedly similarly situated . . . employee were charged with offenses of comparable seriousness." *Id; see also Panarello v. Bernhardt*, 2021 U.S. Dist. LEXIS 4485 *16 (D.D.C., Jan. 11, 2021) ("Factors that bear on whether someone is an appropriate comparator include the similarity of the plaintiff's and the putative comparator's jobs and job duties, whether they were disciplined by the same supervisor, and, in cases involving discipline, the similarity of their offenses."). In his Complaint, Plaintiff has not only failed to plead facts that suggest the two referenced employees were similarly situated, but he has also affirmatively pleaded facts demonstrating that they are not. Plaintiff expressly alleges that these two employees were let go because of "poor performance," reasons he admits were "**unrelated to the vaccination mandate**." Complaint ¶¶ 46, 67 (emphasis added). Thus, the transgressions alleged – failure to comply with the vaccine mandate in the case of Plaintiff, and poor job performance in the case of the other two employees referenced – are distinct and do not give rise to an inference of differing treatment among similarly situated employees. *See Burley, Panarello, supra*.

For these reasons, Plaintiff has not pled facts sufficient to show that his protected activity was the "but-for" cause of his discharge on September 15, 2021.

Wherefore, Defendant respectfully requests that its motion be granted and that Plaintiff's claims for disability discrimination and retaliation be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2022, I filed the foregoing Memorandum in Support of Defendant's Motion for Partial Dismissal with the Court's electronic filing system, which will automatically provide notice to all counsel of record. In addition, I served a copy on Plaintiff's counsel by email:

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