

**Smallen v New York Univ.**

2009 NY Slip Op 31491(U)

July 8, 2009

Supreme Court, New York County

Docket Number: 106564/06

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 106564/2006

**SMALLEN, WENDY**

vs.

**NEW YORK UNIVERSITY**

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 01/05/09

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

**ORDERED** that the motion (sequence number 001) of defendant New York University for summary judgment is granted with respect to the retaliation claim (second cause of action), except as to plaintiff's allegations of verbal abuse subsequent to her April 11, 2005 discrimination complaint, and is otherwise denied; and it is further

**ORDERED** that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

**FILED**

JUL 09 2009

COUNTY CLERK'S OFFICE

NEW YORK

Dated: 7/8/09

*[Signature]*

J.S.C.

**HON. CAROL EDMEAD**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

-----X  
WENDY SMALLEN,

Plaintiff,

-against-

NEW YORK UNIVERSITY AND  
DOE CORPORATIONS 1-5,

Defendants.

-----X  
HON. CAROL R. EDMEAD, J.S.C.

Index No. 1000006  
**FILED**  
JUL 09 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**MEMORANDUM DECISION**

Plaintiff Wendy Smallen, a former manager in defendant New York University's School of Medicine (SOM) General Accounting Department and a breast cancer patient, claims that her supervisors demoted her and subjected her to a hostile work environment in violation of the Administrative Code of the City of New York § 8-107, *et seq.* (the New York City Human Rights Law). The complaint alleges two causes of action for discrimination based upon a perceived disability, and retaliation for complaining of discriminatory conduct. Defendant now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

**BACKGROUND<sup>1</sup>**

Plaintiff is Hired as Manager of General Accounting

In June 2002, plaintiff was hired as the Manager of General Accounting at SOM. As Manager of General Accounting, plaintiff supervised a staff of eight employees, and was responsible for producing financial statements and the monthly financial package. The monthly

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<sup>1</sup>The facts are taken from the complaint, depositions, and documentary evidence filed by the parties.

financial package was a 26-page document distributed to SOM's senior executives and Board of Trustees, and included a balance sheet, a statement of activities, and other schedules. Plaintiff reported directly to Mona Schnitzler, the Director of Financial Reporting. According to plaintiff, Schnitzler consistently praised her work until she was diagnosed with cancer (Plaintiff Aff., ¶ 13, Exh. G).

#### Schnitzer's Alleged Discriminatory Comments After Her Diagnosis

On July 17, 2003, plaintiff was diagnosed with Stage 3A breast cancer. It was later determined that plaintiff had a large cancerous tumor in her left breast. When plaintiff returned to work the following week, plaintiff told Schnitzler that she expected to continue to work while undergoing treatment. Plaintiff claims that Schnitzler, who became visibly unhappy that plaintiff wished to work through her treatment, made statements such as, "You will be throwing up at work," "You won't be able to make it here," "My mother had lung cancer and basically laid down and died," "You are going to be sick and throwing up in the office," "I highly doubt you will be able to continue to work, Wendy," "I don't know if you can continue to perform," and "You are not going to be coming to work" (*id.*, ¶ 17; Plaintiff Dep., at 209-210, 226, 227, 229, 230, 370, 419-420). Plaintiff ultimately treated her breast cancer with chemotherapy followed by a double mastectomy, ovary removal, and post-surgical radiation treatments.

Plaintiff claims that during her cancer treatment, Schnitzler made it clear that she did not want her around because she had breast cancer. For instance, when plaintiff wore a wig following her chemotherapy treatments, Schnitzler told her, "Get that thing fixed!" if she touched her wig (Plaintiff Aff., ¶ 19; Plaintiff Dep., at 228). Plaintiff also asked Schnitzler if she could

wear a scarf instead of a wig, to which Schnitzler replied, "I think not," without giving any reason (Plaintiff Aff., ¶ 19; Plaintiff Dep., at 430). When Schnitzler saw a pink breast cancer awareness ribbon on plaintiff's desk, Schnitzler stated, "I always give to those pink boobies" (Plaintiff Aff., ¶ 19; Plaintiff Dep., at 638). During the period when plaintiff was undergoing chemotherapy, Schnitzler repeatedly told plaintiff that she was "shriveling down to a skelcton," "looked terrible," and to "go home" (Plaintiff Aff., ¶ 19; Plaintiff Dep., at 228, 229, 425).

Plaintiff avers, however, that she looked "pretty good" under the circumstances (*id.*). When Schnitzler saw plaintiff taking nutritional supplements, which plaintiff was taking to mitigate the effects of chemotherapy, Schnitzler gave plaintiff dirty looks and looks of disgust (Plaintiff Aff., ¶ 19; Plaintiff Dep., at 230, 424, 427, 428). Plaintiff alleges that when she requested time to receive intravenous Vitamin C twice a week before surgery, Schnitzler said, "I think not," and that she needed for plaintiff to be there so the work could get done (Plaintiff Aff., ¶ 19; Plaintiff Dep., at 434). On other occasions when plaintiff told Schnitzler that she had a doctor's appointment during the workday, Schnitzler would make a face at plaintiff, and would yell and scream at plaintiff, either in Schnitzler's office or publicly (Plaintiff Aff., ¶ 19; Plaintiff Dep., at 435). Plaintiff also asserts that Schnitzler gave her the "silent treatment" and stopped having daily meetings with her, and that conversations were conducted in the doorway to plaintiff's office as quickly as possible (Plaintiff Aff., ¶ 19; Plaintiff Dep., at 430). At other times when plaintiff entered Schnitzler's office, Schnitzler pretended to be busy and ignored plaintiff (Plaintiff Aff., ¶ 19; Plaintiff Dep., at 431).

### Caracappa is Hired as Controller of SOM

On May 12, 2004, Fran Caracappa was named Controller of SOM, making her Schnitzler's (and thus plaintiff's) supervisor. Thereafter, plaintiff followed her doctors' advice to have her ovaries removed. On July 26, 2004, plaintiff called Schnitzler to tell her that she had to delay her return to work. During that conversation, Schnitzler told plaintiff that her delayed return "clearly was a problem," and said that she would have to cancel her planned two-week vacation in August because of plaintiff (Plaintiff Aff., ¶ 26). Rather than researching surgeons, plaintiff chose the first gynecologist and surgeon that were recommended to her, because she was fearful for her job (*id.*). Plaintiff returned to work on September 7, 2004.

### Plaintiff Is Accused of Poor Work Performance

At some point in September of 2004, Caracappa asked plaintiff to be responsible for ensuring that the needs of the Housing Department were met (*id.*, ¶ 33). This task entailed processing rent bills and security deposits of medical students and staff (*id.*). The parties dispute the events that occurred during a meeting in which Caracappa asked plaintiff to take on this responsibility. Plaintiff avers that she was concerned that she would be required to supervise a difficult employee, Minu Mathew, who Schnitzler had previously determined was to be fired. Plaintiff states that she raised her concerns with both Caracappa and Schnitzler, but Caracappa's only response was that "[she could] go now" (*id.*, ¶ 34). In an e-mail dated September 23, 2004, plaintiff stated that "[a]s I am the 5<sup>th</sup> person to inherit the supervision over the housing functions as others have failed or otherwise been relieved of the housing supervisory function, it must be recognized that I obviously have to do something different in order to make this work otherwise

I'm being set up for a failure" (Plaintiff Aff., Exh. N). However, according to defendant, plaintiff initially refused to take on the Housing assignment, and said that Caracappa could fire her on the spot if she wanted to (Caracappa Aff., ¶ 12).

Plaintiff avers that, thereafter, Caracappa berated her as "incompetent" without justification, just to humiliate her (Plaintiff Aff., ¶ 38). When plaintiff attempted to speak with Caracappa in person, she told plaintiff to go away and to just answer her e-mails (*id.*). On November 23, 2004, after plaintiff submitted the monthly financial package to Caracappa for review, plaintiff received an e-mail from Caracappa, which stated that "some of the variance %s were off. Were these checked?" (*id.*, Exh. P). Plaintiff avers that the numbers that she submitted were correct (*id.*, ¶ 44). However, plaintiff responded in an e-mail that "Anne, Mona and I checked the variance %, perhaps one or two errors got through that were incorrect" (*id.*, Exh. P). A week later, Caracappa asked plaintiff why there was a mistake in an October financial statement (*id.*, Exh. Q). Plaintiff replied to her e-mail that she had reviewed every schedule, but stated "Obviously I won't get the 'I'm Perfect' metal!" (*sic*) (*id.*). The following month, in December 2004, Caracappa sent an e-mail to plaintiff, stating that an October balance sheet did not tie (meaning that the numbers in the financial package did not match up), and that this was "very sloppy" and that she did not expect this from a manager (*id.*, Exh. R). Plaintiff replied that when she returned from vacation, she was told that there was nothing that could be done to the financial package, and that Schnitzler was taking care of it (*id.*).

#### SOM Hires a Second Manager to Manage General Accounting

In January 2005, plaintiff took another short-term disability leave to undergo surgery on

both breasts. According to Caracappa, she decided to add a second manager to the General Accounting Department so that one manager would be responsible for the statement of activities and the other would be responsible for the balance sheet (Caracappa Aff., ¶ 20).<sup>2</sup> On January 25, 2005, Schnitzler called plaintiff at home to inform her that SOM was hiring a new manager. Plaintiff's notes of that conversation reflect that the second manager would be "[s]plitting the work w[ith plaintiff]," and that both managers would "report to Mona" in the "same" capacity (Plaintiff Dep., at 100; Plaintiff Aff., Exh. T). Her notes state that the new manager would be working on the balance sheet, and that plaintiff would be working on the statement of activities (Plaintiff Aff., Exh. T). The reasons for the change were that the Department was "overwhelmed with work," the trustees and Geraghty (the Chief Financial Officer of SOM) wanted more balance sheet analysis, the "monthly pack errors" had to be eliminated, and that the "financials [would] be much worse from Jan[uary] til year end!" (*id.*). On January 28, 2005, plaintiff received a copy of the posting for the new manager position, titled Manager of Financial Reporting, which listed the manager's duties as including "preparation and review of the monthly financial reporting package and the daily, ongoing supervision of the General Accounting Department" (*id.*, Exh. U). Plaintiff believed that when she returned to work the following Monday, that she would be fired (*id.*, ¶ 50). When plaintiff returned to work, Schnitzler allegedly ignored plaintiff and told her that she did not know what was going on, and that it was Caracappa's decision (*id.*, ¶ 52).

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<sup>2</sup>At Caracappa's deposition, she stated that the reasons for the restructuring were: "[it was] more of a quality issue as opposed to a quantity [of work] issue" (Caracappa Dep., at 239). She stated that she was looking for more "in-depth analysis" (*id.* at 240).

### Plaintiff Receives a Negative Performance Review and Change in Responsibilities

In a performance review dated February 25, 2005<sup>3</sup>, Schnitzler wrote, among other things, that:

“The primary job responsibility of this position is the preparation, review and organization of the monthly financial statement package. Given the collaborative nature of this responsibility, a positive, professional attitude coupled with a spirit of teamwork is a necessary skill for anyone holding this position. The manager needs to be willing to do whatever it takes to produce accurate and timely financial statements.

Wendy’s performance in this role has been less than satisfactory. She demonstrates a defensive attitude when any aspect of her work is questioned, rather than an eagerness and willingness to implement corrective action. Rather, effort is expended trying to explain how someone else prevented her from completing the task of reviewing the statements. While evident in both verbal and written (e-mail) communications, this is exacerbated through an argumentative and ‘flippant’ tone. This is unacceptable.

When told about errors, Wendy demonstrates a lack of concern through her verbal comments, as well as a failure to take ownership of the problem. This cycle of errors in the financial statements is repeated every month, demonstrating a lack of willingness to fix the root cause of the problems and [*sic*] well as a lack of prioritization. Errors include numerical, incorrect dates in the headings and an unclear narrative with regard to the difference between fiscal and calendar years.

The manager needs to be constantly vigilant, walking around frequently to make sure that staff productivity is high, and that time is not being wasted on extended lunch or other personal matters.

Wendy has been put directly in charge of the Housing function in General Accounting. She initially refused to do so and stated that we could fire her over it. Two days later, she agreed to do the job . . . .”

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<sup>3</sup> The performance review was for the period December 2004 through December 2005, although it was dated February 25, 2005 (Plaintiff Aff., Exh. V). Plaintiff avers that she was out on vacation and disability during December 2004 and January 2005, respectively (Plaintiff Aff., ¶ 55).

(*id.*, Exh. V).<sup>4</sup> Schnitzler stated in conclusion that “Wendy does not convey confidence and a mastery of our accounting systems. This lack of confidence and lack of initiative has required a change in her responsibilities” (*id.*). On the final page of the performance review, Schnitzler stated that:

“As Manager of Accounting Operations, Wendy will now report to both the Director of Financial Reporting and the Manager of Financial Reporting (TBD). The position responsibilities and goals are outlined below

- Review of tuition income schedule and budget analysis monthly.
- Work with FGP on the monthly Summary Variance schedule to provide detail queries and assistance with internal revenue and expense accounts.
- Work with FGP on the monthly Affiliation Revenue schedules to provide detail queries.
- Review the schedules related to operating gifts and net assets released and provide variance analysis.
- Review auxiliary and other income, including all related journals entries before posting and provide variance analysis.
- Review Royalty income, including all related journals entries before posting and provide variance analysis.
- Institutional and OPM expense review, including explanations for all variances from budget, month to month and year to year variances
- Responsible for the review and reconciliation of all internal revenues and expenses at month end.
- Responsible for the daily management and review of the Housing function – processes related to monthly billing, monthly recording of revenue, security deposit account reconciliation.
- Develop a monthly report package for housing which will include a monthly accounts receivable reconciliation.”

(*id.*).

Caracappa testified at her deposition that she edited the review, and “softened”

Schnitzler’s language to indicate that plaintiff’s work for the Housing department had been a

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<sup>4</sup>In the comments section of the review, plaintiff received a “2” out of 5 – meaning frequently falls below expectations – in the categories of communication, judgment, initiative, and planning/organization (Plaintiff Aff., Exh. V).

“positive success” (Caracappa Dep., at 187-188).

In response to her performance review, plaintiff wrote a rebuttal, in which she complained that she was being blamed for the mistakes of other employees, and that she felt that she was being demoted (Plaintiff Aff., Exh. JJ). Plaintiff stated that:

“I understand that due to my cancer diagnosis, management has had to deal with absences due to my illness but I would expect a medical institution such as NYU to have a better understanding and compassion and that I would not be targeted with the verbal harassment that I have been subject to in recent months. I know that my illness has not impaired my capabilities, attitude, respect, professionalism or my confidence in my abilities to perform as the Manager of General Accounting.”

(*id.*).

According to plaintiff, after the performance review, she became an “expendable, glorified proof-reader” with only a few hours of junior accounting work to do per month (*id.*, ¶ 60; Plaintiff Dep., at 224, 225). She claims that none of her former staff reported to her, and that she simply reviewed supporting schedules prepared by the staff for accuracy, and used that information to create the monthly financial package (Plaintiff Aff., ¶¶ 60, 61; Plaintiff Dep., at 109-110).

On March 21, 2005, Schnitzler asked plaintiff to acquaint Elizabeth Cazull, who had been hired as the Manager of Financial Reporting, with departmental operations (Plaintiff, Exh. KK). When plaintiff met with Cazull, Cazull allegedly told plaintiff that she was very uncomfortable with the situation, and that it had nothing to do with plaintiff or her work performance, and they just wanted someone in the job all the time since plaintiff was always out sick (*id.*, ¶ 74; Plaintiff Dep., at 641-642). A few days later, on March 24, 2005, plaintiff met with Schnitzler regarding a change of hours for a staff member (Plaintiff Aff., ¶ 75). According to plaintiff, Schnitzler

became enraged during that meeting, and started to yell at plaintiff, “This one wants those hours. This one wants these hours. You want these hours. You can’t have cancer forever! You can’t be sick forever!” while slapping her hands on the desk very loudly (*id.*; Plaintiff Dep., at 461-462). The next day, Schnitzler, apparently feeling remorse, allegedly told plaintiff that she was being unfairly blamed for the errors in the monthly financial packages, and that Caracappa would stop at nothing to get her out (Plaintiff Aff., ¶ 76). Plaintiff claims that Schnitzler said, “[Defendant] wants you out. Fran wants you out no matter what” (*id.*; Plaintiff Dep., at 645). Additionally, Schnitzler allegedly said that “Don’t think that Elizabeth [Cazull] coming in over you is going to insulate you from Fran getting what she wants!” (Plaintiff Aff., ¶ 76; Plaintiff Dep., at 501). When plaintiff asked Schnitzler why this was going on, Schnitzler allegedly replied, “Because you have breast cancer” and said, “Wendy, do you want to leave on your terms or theirs?” (Plaintiff Dep., at 504).

On Friday, April 8, 2005, plaintiff was told to vacate her office because Cazull was going to be moving into it the following Monday (Plaintiff Aff., ¶ 79; Plaintiff Dep., at 336, 343). Plaintiff was given a small, windowless office, which was located on the other side of the floor from General Accounting (Plaintiff Aff., ¶ 79). According to plaintiff, the office had mold and water leaks, and flooded twice in May and June of 2005 (Plaintiff Dep., at 343; Plaintiff Aff., Exh. B).

#### Plaintiff’s Allegations of Retaliation and Resignation

Plaintiff then drafted a letter which she sent to Richard Crater, the Chief Financial Officer of NYU Medical Center on April 11, 2005, in which she stated that she had been demoted and

did not manage any staff anymore (Plaintiff Aff., ¶ 84, Exh. LL). She stated in that letter that Caracappa and Schnitzler wrongfully believed that she was disabled, even though she could perform her job as well as she had always done (*id.*). Plaintiff later e-mailed the same letter to Crater (*id.*, Exh. MM). Thereafter, plaintiff learned that Crater wished to have a meeting with Caracappa and Jim Geraghty, the Chief Financial Officer of SOM, to address plaintiff's complaints (*id.*, ¶ 86). Plaintiff claims that she felt uncomfortable attending a meeting with Caracappa present, and therefore did not attend a meeting scheduled for April 21, 2005, informing Caracappa's assistant that she was not feeling well (*id.*, ¶ 86, Exh. OO). Later, plaintiff retained an attorney, who sent a letter to Crater dated April 18, 2005, requesting a meeting to discuss her complaints of discrimination (*id.*, Exh. PP).

Plaintiff claims that she suffered retaliation as a result of her complaint to Crater. According to plaintiff, after she wrote her letter to Crater, Schnitzler gave her the "invisible treatment" (Plaintiff Aff., ¶ 94; Plaintiff Dep., at 478-479). However, plaintiff also avers that after she hired a lawyer, Schnitzler referred to her as "incompetent," a "breast-less woman," and "booby-less" (Plaintiff Aff., ¶ 94; Plaintiff Dep., at 484). Plaintiff further claims that, on July 7, 2005, both Caracappa and Schnitzler informed her that her doctor's appointments were "disruptive" (Plaintiff Aff., ¶ 99, Exh. RR).

At the end of July 2005, Schnitzler informed plaintiff that she and Caracappa wanted to meet with her to discuss her "goals" (*id.*, ¶ 100). Plaintiff claims that the meeting actually took place on August 4, 2005, after her attorney met with defendant's lawyer on July 26, 2005 (*id.*). Plaintiff testified at her deposition that, prior to that meeting, she was "hopeful" that she would get her job back (Plaintiff Dep., at 605-606). At that meeting, Caracappa gave plaintiff a

memorandum dated July 22, 2005, entitled "Performance Concerns and Improvements" (Plaintiff Aff., Exh. C). In that memorandum, Schnitzler wrote that it was a "good time to discuss [plaintiff's] functions since it appears there may be a misunderstanding about your duties and our expectations" (*id.*). That document stated that plaintiff was responsible for "everything that [a]ffects the Statement of Activities" (*id.*). According to plaintiff, although she had already been considering resigning from her position<sup>5</sup>, this memorandum was the "straw that broke the camel's back" (*id.*, ¶ 108). After the meeting concluded, plaintiff handed Caracappa a resignation letter, effective that same day (*id.*, Exh. D).<sup>6</sup> Plaintiff asserts that she resigned because there was no future left for her there (*id.*, ¶ 102). Plaintiff avers that after she resigned, defendant further retaliated against her by opposing her application for unemployment benefits (*id.*, ¶ 111). However, an administrative law judge found that plaintiff voluntarily separated from her employment with good cause (*id.*, Exh. VV).

### DISCUSSION

It is well settled that summary judgment is proper where there are no issues of fact for

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<sup>5</sup>Plaintiff's therapist, Susan Gunser, MS, wrote, in a letter dated July 28, 2005, that it was her "opinion that [plaintiff's] position at NYU Medical School continues to be deleterious to her mental health and that remaining in that environment is not advisable" (Plaintiff Aff., Exh. SS). Additionally, plaintiff's oncologist, Leon C. Landau, MD, stated, in letters dated June 14 and July 27, 2005, that "[plaintiff's] recent stressful work environment is adversely affecting her physical health that she and I have worked very hard this past year to maintain. It is important that she maintain optimum physical health in order to avoid a cancer recurrence" (*id.*, Exh. TT, UU).

<sup>6</sup>In her resignation letter, plaintiff stated, among other things, that she just "learned that [Caracappa] will require [her] to remain in a position, which . . . constitutes a humiliating demotion when compared to [her] prior position," "[Caracappa] continue[s] to require that [plaintiff] train [her] replacement," and that it was clear to her that "[defendant] will continue to criticize [her] performance for no justifiable reason" (Plaintiff Aff., Exh. D).

trial (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The movant on a motion for summary judgment must “make a prima facie showing of entitlement to judgment as a matter of law, [by] tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made a *prima facie* showing, the burden shifts to the motion’s opposing party to lay bare its evidentiary proof and present a genuine, triable issue of fact (*id.*). In deciding a motion for summary judgment, the court is required to view the evidence in the light most favorable to the non-moving party, and must accord that party the benefit of every reasonable inference that can be drawn from the evidence (*Haymon v Pettit*, 9 NY3d 324, 327 n [2007], *rearg denied* 10 NY3d 745 [2008]).

A. Perceived Disability Discrimination (First Cause of Action)

The New York City Human Rights Law declares it an unlawful practice for an employer to discharge an individual from employment or to discriminate in “compensation or in terms, conditions or privileges of employment” on the basis of disability or perceived disability (Administrative Code § 8-107 [1] [a]). As noted by the Appellate Division, First Department in the *Williams v New York City Hous. Auth.* (61 AD3d 62, 66 [1st Dept 2009]), after amendments by the Local Civil Rights Restoration Act of 2005, the law is to “be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those with provisions comparably-worded to provisions of this title, have been so construed” (Administrative Code § 8-130; *see also Jordan v Bates Adv. Holdings, Inc.*, 11 Misc 3d 764, 771 [Sup Ct, NY County

2006] [noting that state and federal law “should merely serve as a base for the New York City Human Rights Law, not its ceiling”]; *see generally* Craig Guran, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 Fordham Urb LJ 255, 281-282 [2006]).

Although there are differences between the federal, state, and City discrimination laws, the burden-shifting standards for analyzing a claim of discrimination pursuant to the New York City Human Rights Law are the same as under state and federal law (*see McGrath v Toys “R” Us, Inc.*, 3 NY3d 421, 429 [2004] [“we have held that federal burden-shifting standards apply to claims brought under the state and local Human Rights Laws”]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 n 3 [2004] [“the human rights provisions of the New York City Administrative Code mirror the provisions of the Executive Law and should therefore be analyzed according to the same standards”]; *see also Jordan*, 11 Misc 3d at 771).

In cases where there is no direct evidence of discrimination, the *McDonnell Douglas* burden-shifting framework applies (*see McDonnell Douglas Corp. v Green*, 411 US 792 [1973]). Both parties agree that this analysis applies to this case. *First*, the plaintiff must establish, by a preponderance of the evidence, a *prima facie* case of discrimination. To establish a *prima facie* case, the plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified for the position; (3) suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination (*see id.* at 802). The plaintiff’s burden of establishing a *prima facie* case is minimal (*Mandell v County of Suffolk*, 316 F3d 368, 378 [2d Cir 2003]).

*Second*, if the plaintiff proves a *prima facie* case, the burden shifts to the defendant to

articulate some “legitimate, nondiscriminatory reason” for the adverse employment action taken (*Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270 [2006]). *Third*, if the defendant produces such evidence, the plaintiff must then show that the proffered reason was merely a pretext for discrimination by demonstrating “both that the reason was false, and that discrimination was the real reason” (*Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 123 [1st Dept 2007], quoting *St. Mary’s Honor Ctr. v Hicks*, 509 US 502, 515 [1993]). However, “a plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated” (*Reeves v Sanderson Plumbing Prods., Inc.*, 530 US 133, 148 [2000]).

In moving for summary judgment, defendant does not dispute the first, second or fourth elements of plaintiff’s *prima facie* case, but rather contends that plaintiff cannot establish that she suffered an adverse employment action. Additionally, defendant contends that it had legitimate, nondiscriminatory reasons for its actions.

1. *Prima Facie Case*

Defendant contends that plaintiff was not demoted as a result of Caracappa’s decision to split plaintiff’s position into two management level positions – Manager of Accounting Operations and Manager of Financial Reporting. According to defendant, plaintiff maintained the same salary, job grade, and benefits after this decision, and remained a manager. Defendant argues that the February 25, 2005 performance review conclusively shows that plaintiff had a supervisory role after the job split. Plaintiff’s claims of discrimination due to unfair criticisms,

an office move, and embarrassing comments about her appearance also cannot constitute an adverse employment action. Moreover, as argued by defendant, plaintiff's resignation does not constitute a constructive discharge, since plaintiff was only dissatisfied with her assignments. In addition, defendant contends that: (1) plaintiff's work stress is insufficient to justify her resignation; (2) there is no evidence that plaintiff's supervisors intentionally acted to aggravate her stress; (3) there is no evidence that job-related stress can cause a recurrence of breast cancer; and (4) the timing of the events contradicts plaintiff's claim that she was forced to resign.

Plaintiff contends that she can establish an adverse action because she experienced a hostile work environment as a result of Schnitzler's demeaning comments. She also argues that she was demoted as a result of the February 25, 2005 performance review. Plaintiff maintains that she became an "expendable proofreader" with only a few hours of accounting work per month thereafter. Additionally, according to plaintiff, she was given a filthy, moldy office that was situated a great distance from the General Accounting Department. Finally, plaintiff contends that she was constructively discharged and forced to resign as a result of her supervisors' actions and demotion.

An "adverse employment action" requires a "materially adverse change" in the terms and conditions of employment (*Sanders v New York City Human Resources Admin.*, 361 F3d 749, 755 [2d Cir 2004]).

"To be materially adverse, a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. Examples of such a change include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation"

(*id.* [internal quotation marks and citation omitted]).

An adverse employment action can be established by a hostile work environment (*see National R.R. Passenger Corp. v Morgan*, 536 US 101, 115-116 [2002]).<sup>7</sup> Defendant contends that plaintiff cannot establish that SOM was “so severely permeated with discriminatory intimidation, ridicule and insult” such that the terms and conditions of her employment were thereby altered. However, this is the standard for recovery under the Executive Law and Title VII (*see Forrest*, 3 NY3d at 310). In *Williams* (61 AD3d at 66), the First Department ruled that, following the Local Civil Rights Restoration Act of 2005, “[f]or [City] HRL liability . . . the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender. At the summary judgment stage, judgment should normally be denied to a defendant if there exist triable issues of fact as to whether such conduct occurred” (*see also Farrugia v North Shore Univ. Hosp.*, 13 Misc 3d 740, 748-749 [Sup Ct, NY County 2006] [“Under the City’s law, liability should be determined by the existence of unequal treatment, and questions of severity and frequency reserved for consideration of damages”]).<sup>8</sup> A defendant, however, may establish entitlement to summary judgment if it proves that the conduct consists of mere “petty slights and trivial inconveniences” (*Williams*, 61 AD3d

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<sup>7</sup>Plaintiff does not assert a separate cause of action for hostile work environment. Indeed, plaintiff only contends, in opposition to summary judgment, that a hostile work environment may be sufficient to establish an adverse employment action.

<sup>8</sup>Plaintiff brought the instant action in 2006. The Local Civil Rights Restoration Act became effective in 2005. The current liberalized standards apply to actions commenced after this date (*see Barnum v New York City Tr. Auth.*, — AD3d —, 878 NYS2d 454, 456 [2d Dept 2009]).

at 80).

Here, plaintiff asserts that, after she was diagnosed with breast cancer, Schnitzler made numerous statements evidencing her belief that plaintiff would be unable to work because she had breast cancer (Plaintiff Aff., ¶ 17). After plaintiff came back to work, Schnitzler allegedly said that she was “incompetent,” a “breast-less woman,” and “booby-less” (*id.*, ¶ 94; Plaintiff Dep., at 484). According to plaintiff, Schnitzler admitted that plaintiff was being unfairly criticized “[because she had] breast cancer” (Plaintiff Dep., at 504). Viewing these statements in the light most favorable to plaintiff, there are issues of fact as to whether plaintiff was treated differently because of a perceived disability (*see Williams*, 61 AD3d at 78). Indeed, it cannot be said, as a matter of law, that these statements amount to nothing more than “petty slights or trivial inconveniences” (*id.* at 80).

While defendant contends that it is entitled to assert the *Faragher/Ellerth* affirmative defense established in Title VII cases, that defense does not apply here, since plaintiff only asserts a claim under the City law and the harassment was perpetrated by plaintiff’s supervisors. In *Faragher v City of Boca Raton* (524 US 775 [1998]) and *Burlington Indus., Inc. v Ellerth* (524 US 742 [1998]), the U.S. Supreme Court held that, in cases in which a hostile work environment has not resulted in a “tangible employment action,” such as a demotion, a cut in pay, or a termination, a defendant may raise an affirmative defense “to liability or damages” by showing by a preponderance of the evidence “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise” (*Ellerth*, 524 US at 765; *Faragher*, 524 US at 807).

Administrative Code § 8-107 (13) (b) provides as follows:

“An employer shall be liable for an unlawful discriminatory practice based upon conduct of an employee or agent which is in violation of subdivision one or two of this section only where:

- (1) the employee or agent exercised managerial or supervisory responsibility;
- (2) the employer knew of the employee’s or agent’s discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee’s or agent’s discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility;
- (3) the employer should have known of the employee’s or agent’s discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.”

Section 8-107 (13) (d) and (c) state that, “[w]here liability of an employer has been established pursuant to this section and is based solely on the conduct of an employee, agent, or independent contractor, the employer shall be permitted to plead and prove” certain factors similar to *Faragher/Ellerth*<sup>9</sup> “in determining an employer’s liability under *subparagraph three of paragraph b of this subdivision*” (emphasis supplied). Applying the maxim of statutory construction *expressio unius est exclusio alterius* (see *Weingarten v Board of Trustees of N.Y. City Teachers’ Retirement Sys.*, 98 NY2d 575, 583 [2002]), neither Administrative Code § 8-107 (13) (e) nor the *Faragher/Ellerth* defense is available for claims brought pursuant to Administrative Code § 8-107 (13) (b) (1) (see *Williams*, 61 AD3d at 69 n 9, citing *Okayama v Kintetsu World Express (U.S.A.) Inc.*, 2008 WL 2556257, 2008 NY Misc LEXIS 7401 [Sup Ct,

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<sup>9</sup>These factors include that the employer had: “(1) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors . . . ; and (2) A record of no, or relatively few, prior incidents of discriminatory conduct by such an employee, agent or person employed as an independent contractor or other employees, agents or persons employed as independent contractors” (Administrative Code § 8-107 [13] [d]).

NY County 2008] [Administrative Code § 8-107 [13] [b] precludes the availability of the federal *Faragher* affirmative defense where the conduct of those exercising managerial or supervisory authority is at issue]).

A negative work evaluation may also constitute an adverse employment action if it negatively affects the terms and conditions of employment (*see Sanders*, 361 F3d at 756; *Browne v City Univ. of New York*, 419 F Supp 2d 315, 332 [ED NY 2005], *affd* 202 Fed Appx 523 [2d Cir 2006] ["A negative evaluation alone, absent some accompanying adverse result such as demotion, diminution of wages, or other tangible loss, does not constitute an adverse employment action"]).

Although plaintiff maintained the same salary and benefits and remained a manager, there is an issue of fact as to whether plaintiff was given "significantly diminished material responsibilities" as a result of her February 25, 2005 performance review. The performance review states that "[t]he manager's position in this department requires managing a group of individuals with varying skills and commitment levels," and describes as part of the manager's duties the need to be "constantly vigilant, walking around frequently to make sure that staff productivity is high" (Plaintiff Aff., Exh. V). However, the review continues on, stating that, due to plaintiff's poor performance, her responsibilities had to be changed (*id.*). The responsibilities outlined in the performance review are arguably less desirable. And, plaintiff asserts that after the performance review, rather than supervising staff, she only reviewed schedules prepared by her former staff, and incorporated them into the monthly financial package (Plaintiff Dep., at 109-110).

In view of these issues of fact, the court need not determine whether plaintiff's claims of

constructive discharge or an office change constitute adverse employment actions.

2. *Pretext for Discrimination*

Because plaintiff has made out a *prima facie* case of discrimination, the burden shifts to defendant to articulate legitimate, nondiscriminatory reasons for its actions. Defendant contends that Caracappa had legitimate, nondiscriminatory reasons for changing plaintiff's responsibilities. Specifically, Caracappa states that she decided to restructure the department in January 2005 so the monthly financial package could be prepared more quickly and accurately (Caracappa Aff., ¶¶ 19-22). Caracappa decided to have one manager responsible for the statement of activities and another responsible for the balance sheet (*id.*, ¶ 20). Plaintiff was to be in charge of the statement of activities (*id.*, ¶ 23). According to defendant, the reasons for Caracappa's criticisms of plaintiff are documented in e-mails in which she directed plaintiff to pay more attention to detail (Caracappa Aff., ¶¶ 15-18, Exhs. 4, 5, 7). Defendant's articulated reasons are sufficient to meet its burden of production (*see Silva v Peninsula Hotel*, 509 F Supp 2d 364, 385 [SD NY 2007] [noting that poor work performance is a legitimate, nondiscriminatory reason for discharge]; *Robinson v Time Warner, Inc.*, 92 F Supp 2d 318, 331 [SD NY 2000] [employer satisfied its burden of production of legitimate, nondiscriminatory reason for plaintiff's demotion by providing evidence that it was made for efficiency and profitability]).

In order to defeat summary judgment, plaintiff must present sufficient evidence to infer that the employer was motivated in whole or in part by discrimination (*see Grady v Affiliated Cent., Inc.*, 130 F3d 553, 560 [2d Cir 1997], *cert denied* 525 US 936 [1998]). Plaintiff argues that the record contains ample evidence from which a jury could find that defendant was

motivated by discriminatory bias. Specifically, plaintiff contends that Schnitzler evidenced discriminatory animus by stating that, “I highly doubt you will be able to continue to work, Wendy,” “You won’t be able to make it here,” “I don’t know if you can continue to perform,” and by calling plaintiff a “breast-less woman” and “booby-less” (Plaintiff Aff., ¶¶ 17, 94; Plaintiff Dep., at 484). Schnitzler also allegedly acknowledged to plaintiff that she had been blamed for mistakes because she had breast cancer (Plaintiff Dep., at 501, 504). Plaintiff also points out that Caracappa evidenced animus against plaintiff by complaining that her appointments were “disruptive” in early July 2005, just one month before plaintiff resigned (Plaintiff Aff., ¶ 99). Additionally, plaintiff relies on Cazull’s statement, made while plaintiff was training Cazull, that the restructuring of the department had nothing to do with plaintiff or her work performance, that they just needed someone always there, and that plaintiff was sick and always out (Plaintiff Dep., at 641-642).

Plaintiff further states that defendant’s complaints about her performance are not genuine. First, she was praised by Schnitzler prior to her cancer diagnosis, and Crater testified that it was rare for him to find errors in plaintiff’s work (Crater Dep., at 35-36). Second, the February 25, 2005 performance review only reviewed three months, during much of which plaintiff was out of the office. Moreover, plaintiff maintains that defendant’s witnesses have offered inconsistent versions as to who made the decision to issue the performance review (Caracappa Dep., at 180, 185-188; Schnitzler Dep., at 261; Sanchez Dep., at 19). According to plaintiff, it is “ludicrous” to divide responsibility for the statement of activities and balance sheet between two managers since these documents are “intricately intertwined and flow into one another.” The review never mentioned that the statement of activities was one of plaintiff’s job responsibilities.

Plaintiff's disagreements with her supervisors' perceptions of her work performance, without more, are insufficient to demonstrate that defendant's stated reasons are a pretext for discrimination (*see Brown v Time, Inc.*, 1997 WL 231143, \*12, 1997 US Dist LEXIS 6227, \*37 [SD NY 1997] ["An employee's disagreement with the employer's perceptions of his job performance does not satisfy his burden of showing that the employer's proffered justification was a pretext for discrimination"]) [internal quotation marks and citation omitted]). And, a change in the evaluation of plaintiff's performance cannot by itself give rise to an inference of pretext. In *Brown*, the court noted that "such an inference is even less permissible when a new supervisor is appointed, who is entitled to set his own standards and agenda" (*id.*). In the instant case, Caracappa was appointed the Controller of SOM in July 2004, and demanded a higher quality work product than her predecessor (Caracappa Aff., ¶ 9; Caracappa Dep., at 84-86; Alexander Aff., ¶ 3).

Although plaintiff contends that pretext may be inferred from conflicting explanations about who made the decision to issue the February 25, 2005 performance review (*see Equal Employment Opportunity Commn. v Ethan Allen, Inc.*, 44 F3d 116, 120 [2d Cir 1994] [a juror could reasonably view an employer's changing explanations as "pretextual, developed over time to counter the evidence suggesting age discrimination"]), the record does not support that claim.<sup>10</sup> Nor is there any evidence that dividing responsibility for the statement of activities and balance

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<sup>10</sup>Schnitzler testified at her deposition that she prepared the performance review in conjunction with Caracappa, and believed that she typed it (Schnitzler Dep., at 261). Caracappa states that Schnitzler created the review, and that Schnitzler asked her to review it (Caracappa Dep., at 180, 185-186; Caracappa Aff., ¶ 24). Nancy Sanchez of the Human Resources Department testified that she recommended that Caracappa give plaintiff a performance review (Sanchez Dep., at 19).

sheet is “implausible, absurd, or unwise” (*DeMarco v Holy Cross High School*, 4 F3d 166, 171 [2d Cir 1993]; *see also Stratton v Department for the Aging for City of New York*, 132 F3d 869, 879 n 6 [2d Cir 1997] [“Actions taken by an employer that disadvantage an employee for no logical reason constitute strong evidence of an intent to discriminate”]). “A business decision need not be good or even wise. It simply has to be nondiscriminatory” (*Dister v Continental Group, Inc.*, 859 F2d 1108, 1116 [2d Cir 1988] [internal quotation marks and citation omitted]).

However, discriminatory comments made by a decision-maker or non-decision-maker who had influence over the decision process may raise an issue of fact as to pretext (*see Owens v New York City Hous. Auth.*, 934 F2d 405, 410 [2d Cir], *cert denied* 502 US 964 [1991] [statements made by individuals with “substantial influence” over plaintiff’s employment raise genuine issue of fact on issue of pretext]; *Ryduchowski v Port Auth. of N.Y. & N.J.*, 1998 WL 812633, \*10, 1998 US Dist LEXIS 18558, \*30 [ED NY 1998] [genuine issue of fact as to whether employer’s proffered reason was pretextual where inference could be drawn that someone with a discriminatory motive influenced the decision maker]).

The court concludes that plaintiff has raised an issue of fact as to whether defendant’s stated reason to change her responsibilities was pretextual. Significantly, Schnitzler told plaintiff that she had been unfairly criticized for errors in the monthly financial packages because she had breast cancer, and called plaintiff “incompetent,” a “breast-less woman” and “booby-less,” within weeks of the decision to change her job responsibilities (Plaintiff Aff., ¶¶ 76, 94; Plaintiff Dep., at 484, 501, 504). Schnitzler also repeatedly said, after plaintiff’s diagnosis, that she believed that plaintiff would be unable to work because she had breast cancer (Plaintiff Aff., ¶ 17). Based upon these statements, a jury could conclude that plaintiff’s supervisors wrongfully believed that

she was unable to perform her job responsibilities because she had breast cancer and had related treatments. The evidence is sufficient to support an inference that Schnitzler had considerable influence in the decision to change plaintiff's responsibilities (*see Weber v Parfums Givenchy, Inc.*, 49 F Supp 2d 343, 346 [SD NY 1999] [genuine issues of fact as to whether employer's proffered reasons for terminating employee were pretextual, in light of business manager's discriminatory comments about plaintiff's age]). To be sure, the February 25, 2005 performance review was prepared by Schnitzler, and was edited by Caracappa (Plaintiff Aff., Exh. V; Caracappa Dep., at 180, 187-188; Schnitzler Dep., at 261). Accordingly, defendant's motion for summary judgment dismissing plaintiff's claim of discrimination is denied.

B. Retaliation (Second Cause of Action)

The New York City Human Rights Law provides that it is unlawful for an employer to retaliate "*in any manner* against any person because such person has . . . opposed any practice forbidden under this chapter" (Administrative Code § 8-107 [7] [emphasis supplied]). At a minimum, "the retaliatory or discriminatory act or acts complained of must be *reasonably likely to deter a person from engaging in protected activity*" (*id.* [emphasis supplied]).<sup>11</sup> To establish a *prima facie* claim of retaliation, the plaintiff must demonstrate that "(1) he participated in a protected activity known to the defendant; (2) the defendant took an employment action that

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<sup>11</sup>Defendant notes that, in Title VII cases, the U.S. Supreme Court in *Burlington Northern & Santa Fe Ry. v White* (548 US 53, 68 [2006]), established the standard for actionable retaliation as it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" (internal quotation marks and citation omitted). Defendant argues that this standard is "virtually identical" to the standard in section 8-107. However, as noted by the First Department in *Williams, White* still spoke in terms of a "material" change, which is inconsistent with the language of the City law (*Williams*, 61 AD3d at 70 n 12).

disadvantaged the plaintiff; and (3) that a causal connection exists between the protected activity and the adverse employment action” (*Farrugia*, 13 Misc 3d at 752). The *McDonnell-Douglas* burden-shifting analysis also applies to a claim of retaliation (*Pilgrim v McGraw-Hill Cos., Inc.*, 599 F Supp 2d 462, 469 [SD NY 2009]).

Defendant argues that plaintiff’s retaliation claim should be dismissed because her allegations that she was unfairly criticized, given different assignments, and constructively discharged, do not constitute adverse employment actions. Defendant also contends that defendant’s failure to investigate her complaint and opposition to her application for unemployment benefits do not meet the definition of an adverse employment action. Additionally, defendant contends that there is no evidence supporting a causal connection between that conduct and plaintiff’s e-mail complaint. Finally, defendant argues that there is no evidence that defendant’s reasons were pretextual.

In opposition, plaintiff contends that, contrary to defendant’s position, she engaged in three protected activities: (1) she complained of discrimination to Crater in a letter dated April 11, 2005; (2) she retained counsel, who then sent a letter to Crater dated April 18, 2005; and (3) her counsel met with defendant’s counsel on July 26, 2005. Plaintiff argues that, after she complained to Crater, Crater’s response was to “concoct” a story with Jim Geraghty, the CFO, and Caracappa, and to “gang up” on plaintiff in a meeting. She urges that her failure to attend the meeting was, therefore, reasonable. According to plaintiff, Schnitzler treated her as if she were invisible, and also called her a “breast-less woman” and “booby-less,” after she made her complaint of discrimination. Plaintiff contends that she was then issued the “Performance Concerns and Improvements” memo, which confirmed that defendant would never restore her

original position. She argues that she has established causation because the memo was issued on August 4, 2005, just days after her attorneys met with defendant's counsel.

In *Williams* (61 AD3d at 71), the First Department noted that, in considering retaliation claims involving neither ultimate actions nor materially adverse changes in the terms or conditions of employment,

“[I]t is important that the assessment be made with a keen sense of workplace realities, of the fact that the ‘chilling effect’ of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities. Accordingly, the language of the City HRL does not permit any type of challenged conduct to be categorically rejected as nonactionable. On the contrary, no challenged conduct may be deemed nonretaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was, in the words of the statute, ‘reasonably likely to deter a person from engaging in protected activity.’”

The court notes that defendant's motion does not address plaintiff's allegations of verbal abuse, including her claims that she was called a “breast-less woman” and “booby-less,” subsequent to her April 11, 2005 complaint of discrimination. Viewing the evidence in the light most favorable to plaintiff, a jury could certainly conclude that receiving unfair criticisms and treatment, and being the subject of discriminatory comments, would deter a person from engaging in a protected activity.

Nonetheless, with respect to criticism in the July 22, 2005 memorandum, while causation can be established indirectly by showing that the protected activity was closely followed by the adverse action (*see Cifra v General Elec. Co.*, 252 F3d 205, 217 [2d Cir 2001]), “[w]here timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity an inference of retaliation does not arise” (*Slattery v Swiss Reins. Am. Corp.*, 248 F3d 87, 95 [2d Cir], *cert denied* 534 US 951 [2001]).

Here, timing is the only basis for plaintiff's claim of retaliation. Yet, the criticisms of plaintiff began many months before the July 22, 2005 memorandum. In the February 25, 2005 performance review, plaintiff was criticized for demonstrating a "defensive attitude when any aspect of her work is questioned," "an argumentative and 'flippant' tone," and "a lack of concern [about errors] through her verbal comments, as well as a failure to take ownership of the problem," and was scolded because "[t]his cycle of errors in the financial statements is repeated every month" (Plaintiff Aff., Exh. V). Therefore, plaintiff fails to establish a *prima facie* case of retaliation with respect to unfair criticisms in the July 22, 2005 memorandum.

With regard to plaintiff's claim that defendant failed to investigate her discrimination complaint, plaintiff has failed to raise an issue of fact as to pretext. Defendant asserts that SOM responded to her complaint, and that she refused to participate in the investigation process (Parauda Aff., ¶¶ 10-12; Crater Dep., at 147). Plaintiff has not identified any evidence that defendant's stated reasons for conducting the investigation or ending the investigation were false or pretextual.

As for plaintiff's claim that defendant retaliated against her by opposing her application for unemployment benefits, the court notes that "a retaliation claim may not be properly used as a vehicle to prevent an employer from exercising his legal rights and engaging in legal advocacy" (*Whalley v Reliance Group Holdings, Inc.*, 2001 WL 55726, \*12, 2001 US Dist LEXIS 427, \* 34 [SD NY 2001]). Plaintiff has offered no evidence that defendant's proffered reason for opposing her application, i.e., that she resigned, was false, or that it opposed the application for a retaliatory motive.

In summary, plaintiff has a valid claim of retaliation only to the extent that it is premised

on verbal abuse following her April 11, 2005 complaint of discrimination.

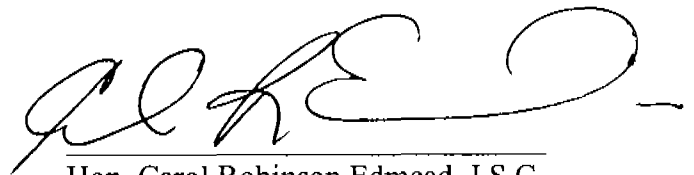
**CONCLUSION AND ORDER**

Based upon the foregoing, it is

**ORDERED** that the motion (sequence number 001) of defendant New York University for summary judgment is granted with respect to the retaliation claim (second cause of action), except as to plaintiff's allegations of verbal abuse subsequent to her April 11, 2005 discrimination complaint, and is otherwise denied.

Dated: July 8, 2009

ENTER:



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDM EAD**

**FILED**  
JUL 09 2009  
COUNTY CLERK'S OFFICE  
NEW YORK