[* 1]

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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 603958/2004

CLARK, WILLIAM W.

VS

BETH ISRAEL MEDICAL CENTER

Sequence Number : 007

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	6
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision, Order & Judgment

FILED

JAN 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: January 11, 2011

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 11

WILLIAM W. CLARK, as Administrator of the Goods, Chattels, and Credits of BEVERLY CLARK, deceased,

Plaintiff,

- against -

BETH ISRAEL MEDICAL CENTER, and CONTINUUM HEALTH PARTNERS, INC.,

Defendants.

Index No.: 603958/04

DECISION/ORDER

MADDEN, JOAN A., J.:

In this action, arising out of defendants' termination of Beverly Clark's employment, William W. Clark, as Administrator of the Goods, Chattels, and Credits of Beverly Clark (plaintiff), now deceased, sues to recover damages for disability-based employment discrimination and for defamation. Defendants Beth Israel Medical Center and Continuum Health Partners, Inc. (collectively Beth Israel) move for summary judgment dismissing the complaint.[1]

BACKGROUND

Plaintiff Beverly Clark (Clark) was employed by defendants for about 35 years, from 1970 until she was terminated from her

[1]Plaintiff commenced the instant action in November 2004, asserting causes of action for defamation and violation of constitutional rights, discrimination based on perceived disability, breach of a collective bargaining agreement, slander, and intentional infliction of emotional distress. By prior orders dated August 8, 2005, and December 19, 2005, the court granted defendants' motion to dismiss to the extent of dismissing all claims except the discrimination and defamation claims. Defendants now seek dismissal of the remaining claims.

[* 3].

position as a secretary in Beth Israel's Methadone Maintenance Treatment Program (MMTP), on May 27, 2004. On or about April 8, 2004, shortly after she returned from an approximately four-month medical leave, plaintiff was involved in an argument with her supervisor, Brenda Davis (Davis). At her deposition, Davis testified that, on the morning that plaintiff returned to work, she was behaving disrespectfully and aggressively toward her, speaking loudly and cursing at her, and accusing Davis of things that did not make sense (Davis Dep. at 23-24, 43-45, 86-91). According to Davis, plaintiff was not acting the way she ordinarily did; she had never before been disrespectful and had always been pleasant (*id.* at 24, 86-87, 88). In response to plaintiff's behavior, Davis called Millie Gonzalez-Haig (Gonzalez-Haig), an MMTP administrator handling human resources matters, who advised Davis to suspend plaintiff for the day (*id.* at 65-67). Gonzalez-Haig testified that, on the same day that plaintiff was suspended, she came to Beth Israel's administrative offices, and met with Gonzalez-Haig and Marie Marciano, assistant administrator of the MMTP (Gonzalez-Haig Dep. at 32, 36-38). Gonzalez-Haig described plaintiff as upset, bouncing from topic to topic, and gesturing and raising her voice (*id.* at 39). Gonzalez-Haig remembered nothing that she or Marciano or Clark said (*id.* at 41), but she recalled that plaintiff said something like "maybe I need to be on medication" and "maybe I'm psychotic"

(*id.* at 43-44).

After meeting with plaintiff, Gonzalez-Haig telephoned Dr. Jason Pachman, a physician at Beth Israel's Employee Health Services (*id.* at 45-47), to discuss plaintiff's behavior, and was told to put in writing what she had observed (*id.* at 48). She wrote an e-mail to Dr. Pachman, describing plaintiff's behavior as erratic, impulsive, paranoid and thought disoriented (*id.* at 58-59; E-mail dated April 8, 2004, Ex. G to Roer Aff. in Support of Defendants' Motion), and then referred plaintiff to Dr. Pachman for an evaluation. According to Gonzalez-Haig, she had no further involvement with plaintiff after she referred her to Dr. Pachman (Gonzalez-Haig Dep. at 54).

Dr. Pachman met with plaintiff the next day for about 20 minutes, and he found that plaintiff appeared to have "normal mood" and "appropriate affect," and was "cooperative," but he noted that her speech was "circumferential and tangential at times" (Pachman Dep. at 26, 37, 53; Progress Notes, Ex. 11 to Parker Aff. in Opp.). Based on plaintiff's speech, and on reports of her inappropriate behavior with her supervisor, and to "err on the side of caution," Dr. Pachman determined that plaintiff was not fit for duty and referred her to a psychiatrist (Pachman Dep. at 62-63). Dr. Pachman's notes state that she may select her own psychiatrist, and that he then would need to speak to the psychiatrist (*id.* at 53; Progress Notes, Ex. 11 to Parker

Aff. in Opp.). He subsequently received a call from Dr. Bergman, a private psychiatrist who had seen plaintiff, and who, at Dr. Pachman's request, sent a letter stating that plaintiff was not a danger to herself or others and was fit for work (Pachman Dep. at 54-56; Progress Notes; Bergman letter, Ex. I to Roer Aff. in Support). Dr. Pachman apparently was not satisfied with Dr. Bergman's letter, although he sought no further information from him at the time (Pachman Dep. at 77).

On or about May 4, 2004, Beth Israel sent a notice to plaintiff that a medical evaluation was scheduled for her on May 10, as requested by Dr. Pachman. *See* Memo, Ex. J to Roer Aff. in Support. By letter dated May 21, 2004, plaintiff was notified that she would not be permitted to return to work unless she appeared for an independent medical examination, and that, as she did not appear for the examination on May 10, another examination was scheduled for May 24. The notice warned her that failure to cooperate would result in disciplinary action. *See* Letter dated May 21, 2004, Ex. J to Roer Aff. in Support. Subsequently, another letter was sent to plaintiff, notifying her that, because she failed to appear for the medical examination scheduled for May 24, her employment with Beth Israel was terminated. *See* Letter dated May 27, 2004, Ex. K to Roer Aff. in Support.

Plaintiff's union timely grieved her dismissal, and following defendants' rejection of the grievance, the union

demanded arbitration, pursuant to the collective bargaining agreement. A hearing was held on September 16, 2005, and a decision was issued on October 6, 2005, finding that defendants did not have just cause to terminate plaintiff, but directing plaintiff to attend an independent medical examination, or be deemed dismissed. *See* Arbitration Award, Ex. C to Roer Aff. in Support.

DISCUSSION

Collateral Estoppel / Res Judicata

At the outset, defendants move for summary judgment on the grounds of collateral estoppel and res judicata, based on the arbitration decision dated October 6, 2005. Plaintiff contends that defendants have waived these defenses pursuant to CPLR 3211 (e).

CPLR 3211 (e) expressly provides that certain enumerated defenses, including defenses based upon the doctrines of collateral estoppel and res judicata, are waived unless asserted in an answer to the complaint or raised in a pre-answer motion to dismiss. *See Mayers v D'Agostino*, 58 NY2d 696, 698 (1982); *Paterno v Carroll*, 75 AD3d 625, 628 (2d Dept 2010); *Ouyang v Jeng*, 260 AD2d 618, 619 (2d Dept 1999); *see also Dougherty v City of Rye*, 63 NY2d 989, 991-992 (1984) (statute of limitations and lack of standing defenses). Here, defendants failed to raise the affirmative defenses of collateral estoppel and res judicata in

their answer or in a pre-answer motion to dismiss. Although defendants posit that they could not have raised the arbitration decision as a basis for the defense of res judicata or collateral estoppel in the original answer, dated September 1, 2005, because the arbitration was not held until October 2005, defendants subsequently served an amended answer in March 2006, which also does not assert any affirmative defenses based on the arbitration decision.[2] Nor have defendants at any time sought leave to further amend their answer to add the affirmative defenses of res judicata and collateral estoppel. *See Mayers*, 58 NY2d at 698; *Dawson v Riverbay Corp.*, 26 Misc 3d 143(A), 2010 NY Slip Op 50389(U) (App Term, 1st Dept 2010).

Moreover, while "[u]se of an unpleaded defense in a summary judgment motion is not prohibited as long as the opposing party is not taken by surprise and does not suffer prejudice thereby" (*Rosario v City of New York*, 261 AD2d 380, 380 [2d Dept 1999]; *see Rogoff v San Juan Racing Assn.*, 77 AD2d 831, 832 [1st Dept 1980], *affd* 54 NY2d 883 [1981]), the majority of such cases, including those on which defendants rely, involve defenses that

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[2]Defendants failed to annex a copy of their answer to the moving papers, as required by CPLR 3212 (b), which can provide a basis for denial of their motion. *See Wider v Heller*, 24 AD3d 433 (2d Dept 2005). However, as plaintiff has submitted copies of the answer and amended answer, the court, relying on the pleadings submitted by plaintiff, will overlook the technical defect and consider the motion. *See Pandian v New York Health & Hosps. Corp.*, 54 AD3d 590, 591 (1st Dept 2008); *Welch v Hauck*, 18 AD3d 1096, 1098 (3d Dept 2005).

[* 8].

are not subject to the requirements of CPLR 3211 (e). *Compare e.g. Alpha GmbH & Co. Schiffsbesitz KG v BIP Indus. Co.*, 25 AD3d 344 (1st Dept 2006) (unpleaded defense of fraudulent concealment permitted to be asserted in summary judgment motion); *Bank of N. Y. v River Terrace Assoc., LLC*, 23 AD3d 308 (1st Dept 2005) (election of remedies defense not waived); *Rosario*, 261 AD2d 380, *supra* (improper party defense not waived), *with Paterno*, 75 AD3d at 628 (res judicata defense waived); *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624 (2d Dept 2009) (lack of standing defense waived); *Buckeye Retirement Co., L.L.C. v Lee*, 41 AD3d 183, 187 (1st Dept 2007) (personal jurisdiction and statute of limitations defenses waived); *but see Rogoff*, 77 AD2d at 832 (statute of frauds defense not waived where issue was explored in discovery).

In any event, contrary to defendants' contentions, the doctrines of res judicata and collateral estoppel do not bar plaintiff's discrimination and defamation claims. Under the doctrine of res judicata, or claim preclusion, a final judgment on the merits of a claim "bars future actions between the same parties on the 'same cause of action.'" *Matter of Reilly v Reid*, 45 NY2d 24, 27 (1978) (internal citation omitted); *see City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 127-128 (2007); *Matter of Hunter*, 4 NY3d 260, 269 (2005).

"As a general rule, 'once a claim is brought to a final

conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.'" *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 (1999), quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 (1981); *see Xiao Yang Chen v Fischer*, 6 NY3d 94, 100 (2005). "'*Res judicata* is designed to provide finality in the resolution of disputes,' recognizing that '[c]onsiderations of judicial economy as well as fairness to the parties mandate, at some point, an end to litigation.'" *Matter of Hunter*, 4 NY3d at 269-270, quoting *Matter of Reilly*, 45 NY2d at 28; *see also Chen*, 6 NY3d at 100; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 (1984).

However, "claim preclusion is tempered by recognition that two or more different and distinct claims or causes of action may often arise out of a course of dealing between the same parties ... [and a] party's choice to litigate two such claims or causes of action separately does not bar his assertion of the second claim or cause of action." *Matter of Reilly*, 45 NY2d at 28-29. Thus, "[i]n properly seeking to deny a litigant two 'days in court,' courts must be careful not to deprive him of one." *Id.* at 28.

"The doctrine of collateral estoppel, a narrower species of *res judicata*, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or

proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." *Ryan*, 62 NY2d at 500. "This doctrine applies only 'if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action.'" *Welsbach Elec. Corp.*, 9 NY3d at 128, quoting *Parker*, 93 NY2d at 349. "'[C]ollateral estoppel effect will only be given to matters "actually litigated and determined" in a prior action' or proceeding." *DiLauria v Town of Harrison*, 32 AD3d 490, 491 (2d Dept 2006), quoting *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456 (1985); *see Parker*, 93 NY2d at 349-350; *McGee v J. Dunn Constr. Corp.*, 54 AD3d 1009 (2d Dept 2008).

While "[t]he doctrines of res judicata and collateral estoppel are applicable to arbitration awards" (*Waverly Mews Corp. v Waverly Stores Assoc.*, 294 AD2d 130, 132 [1st Dept 2002]), "[a]n action cannot be precluded by arbitration and award if the arbitrator did not reach the question which is the subject matter of the action." *Independent Assn. of Plastic & Fibre Workers, Local No. 1 v Spaulding Fibre Co.*, 90 AD2d 972, 972 (4th Dept 1982); *see Rembrandt Indus., Inc. v Hodges Intl., Inc.*, 38 NY2d 502, 504 (1976). Courts have repeatedly found that, unless an agreement, including a collective bargaining agreement, explicitly provides for arbitration of statutory claims, such

claims, including claims brought under Executive Law § 296, are not precluded by arbitration awards. *See Crespo v 160 W. End Ave. Owners Corp.*, 253 AD2d 28, 32-33 (1st Dept 1999).

In this case, the arbitrator did not reach the question of whether defendants had engaged in discriminatory or defamatory conduct and there has been no final judgment on the merits of those claims. The issue in the arbitration was whether defendants had just cause to discharge plaintiff on May 27, 2004. Notably, while the arbitrator found that plaintiff's failure to submit to a medical examination was insubordination, he also found that defendants did not have just cause for terminating plaintiff's employment. *See* Arbitration Award, Ex. C to Roer Aff. in Support.

Nor do defendants contend that the collective bargaining agreement required that plaintiff's discrimination or defamation claim be arbitrated. *See Crespo*, 253 AD2d at 32-33. Under these circumstances, res judicata and collateral estoppel do not bar plaintiff's claims. *See DiLauria*, 32 AD3d at 491-492 (prior Article 78 upholding dismissal of police officer for misconduct did not bar discrimination action); *Uryevick v Pepcom Indus., Inc.*, 155 AD2d 450 (2d Dept 1989) (arbitration decision finding just cause for termination based on disobedience of supervisor's order did not bar discrimination action); *Matter of Rourke v New York State Dept. of Correctional Servs.*, 201 AD2d 179 (3d Dept

1994) (arbitration finding that plaintiff disobeyed order to comply with hair-length policy did not preclude action challenging requirement); *Chiara v Town of New Castle*, 61 AD3d 915, 916 (2d Dept 2009) (arbitration finding of misconduct bars relitigation of that finding but does not bar discrimination claim); *Cooks v New York City Tr. Auth.*, 289 AD2d 278, 279 (2d Dept 2001) (same); *DuBois v Brookdale Univ. Hosp. & Med. Ctr.*, 6 Misc 3d 1023 (A), *13 n 9, 2004 NY Slip Op 51819 (Sup Ct, Kings County 2004), *affd* 29 AD3d 731 (2d Dept 2006) (same).

Disability discrimination

Turning to the merits of plaintiff's claims, plaintiff alleges that defendants discriminated against her, in violation of the New York State Human Rights Law (NYSHRL) (Executive Law § 296) and the Americans with Disabilities Act (ADA) (42 USC §§ 12112-12117), by terminating her employment based on perceived mental disability. Defendants argue that they are entitled to summary judgment dismissing the discrimination claim because they had a legitimate, nondiscriminatory reason for terminating plaintiff's employment, that is, her refusal to submit to a psychiatric examination as directed by Beth Israel.

It is well settled that to prevail on a motion for summary judgment, the movant must make a prima facie showing of its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the

absence of any material issues of fact. *See* CPLR 3212 (b); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad*, 64 NY2d at 853. Once such showing has been made, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." *Zuckerman*, 49 NY2d at 562. In reviewing a motion for summary judgment, the evidence must be viewed in a light most favorable to the nonmoving party (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact, or where the issue is "arguable." *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Both the NYSHRL and the ADA prohibit an employer from discriminating against an employee because of a disability, including a perceived disability. *See* Executive Law §§ 296 (1), 292 (21); 42 USC § 12102 (1) (C), (3); *Ashker v International Bus. Machs. Corp.*, 168 AD2d 724, 726 (3d Dept 1990); *Doe v Roe, Inc.*, 160 AD2d 255, 256 (1st Dept 1990); *Walker v Consolidated Edison Co. of N.Y., Inc.*, 2002 WL 31385830, *4 n 1, 2002 US Dist LEXIS 20112, *11 n 1 (SD NY 2002). Disability discrimination

claims under the NYSHRL and the ADA, like other employment discrimination claims brought under the NYSHRL, are analyzed pursuant to the burden-shifting framework established by the United States Supreme Court in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) for cases brought pursuant to Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*). *See Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 n 3 (2004); *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 (1997); *Primmer v CBS Studios, Inc.*, 667 F Supp 2d 248, 256 (SD NY 2009).

Under *McDonnell Douglas*, the plaintiff has the initial burden of establishing a prima facie case of discrimination, that is, that she was a member of a protected class, and that she was discharged from a position for which she was qualified, under circumstances giving rise to an inference of discrimination. 411 US at 802; *see Ferrante*, 90 NY2d at 629; *Cuccia v Martinez & Ritorto, P.C.*, 61 AD3d 609, 610 (1st Dept 2009). Plaintiff's burden at this stage has been described as "de minimus." *See Farrugia v North Shore Univ. Hosp.*, 13 Misc 3d 740, 750-751 (Sup Ct, NY County 2008); *Howley v Town of Stratford*, 217 F3d 141, 150 (2d Cir 2000); *Primmer*, 667 F Supp 2d at 256. The burden then shifts to the employer to rebut the presumption of discrimination by demonstrating through admissible evidence that there was a legitimate and nondiscriminatory reason for its employment decision. If that showing is made, the burden shifts back to the

plaintiff to prove that the employer's reason was a pretext for discrimination. *See Ferrante*, 90 NY2d at 629-630.

Here, plaintiff has met her de minimus burden of establishing a prima facie case, by showing that she was regarded as having a mental impairment, and that she was terminated under circumstances giving rise to an inference that it was as a result of the perceived disability. Contrary to defendants' argument, the arbitrator's finding that they properly sent plaintiff for an independent medical examination to determine whether she was fit for duty, does not end the inquiry for purposes of plaintiff's discrimination claims. The arbitrator neither addressed the issue of the propriety of requiring a medical examination under the ADA, nor did he find that plaintiff's failure to comply with defendants' order justified termination.

Under the ADA, an employer "may 'not require a medical examination ... [or inquire] of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity' (42 USC § 12112 (d)(4)(A)." *Shannon v Verizon New York Inc.*, 2009 WL 1765010, *3, 2009 US Dist LEXIS 45160, *8-9 (ND NY 2009). "[A]n employer must show that the asserted business necessity is 'vital to the business' ... and that 'the request is no broader or more intrusive than necessary.'" *Rivera v Smith*,

2009 WL 124968, *4, 2009 US Dist LEXIS 3523, *12 (SD NY 2009), *affd* 375 Fed Appx 117 (2d Cir 2010) (internal citations omitted). Further, a determination of whether a fitness for duty examination is appropriate requires careful review of the underlying facts. *See Rosenquist v Ottaway Newspapers, Inc.*, 90 Fed Appx 564 (2d Cir), *cert denied* 541 US 1043 (2004).

While it is undisputed that plaintiff had an altercation with her supervisor, witnesses' testimony is not consistent as to the chronology and nature of the altercation. Although Gonzalez-Haig stated in an e-mail to Dr. Pachman on April 8, 2004, the date of the alleged incident, that plaintiff had been aggressive and angry toward her supervisor since returning to work on March 31, 2004, Davis testified that the altercation occurred on the same date that plaintiff returned to work from a medical leave (Davis Dep. at 47). Gonzalez-Haig also stated that, on April 7, plaintiff's supervisor informed plaintiff that she was being issued a "discipline," although Davis stated that she prepared no written disciplinary notice (Davis Aff., Ex. F to Roer Aff. in Support). According to Davis, the altercation started when plaintiff accused Davis of improperly trying to get medical information about plaintiff, and after she suspended plaintiff for the day, plaintiff stopped at Davis's office on her way out, called Davis names, threw a pen at her, and slammed the door hard (Davis Dep. at 69). Davis testified that plaintiff was angry,

and was not acting normally (*id.* at 86-87), as she had never before been disrespectful (*id.* at 24), and had not previously used profanity (*id.* at 88).

Further, Gonzalez-Haig stated that plaintiff's behavior with her supervisor was erratic, impulsive, paranoid and thought disordered, but Davis testified that she did not describe plaintiff as erratic or impulsive or thought disordered (*id.* at 89-90); nor did Davis state that plaintiff would harm her (*id.* at 91). Gonzalez-Haig testified that when she met with plaintiff, plaintiff was upset, but not threatening, and plaintiff jumped from topic to topic, although Gonzalez-Haig did not remember anything that plaintiff said (Gonzalez-Haig Dep at 39-41). Dr. Pachman's personal observations were that plaintiff was cooperative, and her mood and affect were normal and appropriate. He further noted that the disagreement was likely based on personality differences.

Although Dr. Pachman referred plaintiff for a psychological evaluation, he noted that plaintiff could select her own doctor. Two psychiatrists who evaluated plaintiff subsequently submitted reports stating that she was fit for duty. As defendants also acknowledge, the alleged behavior of plaintiff, who was employed by Beth Israel for 35 years without any prior disciplinary record or any psychological issues, was uncharacteristic.

Thus, the evidence is not conclusive that requiring

plaintiff to be examined by a doctor other than one of her choosing was "vital" or "no more intrusive than necessary," but even assuming that defendants can show a "business necessity" for requiring the examination, viewing the evidence in a light most favorable to plaintiff, as the court must, triable issues of fact remain as to whether the dismissal of plaintiff based on her failure to obey the order to report for a medical examination was motivated by discriminatory animus.

To the extent that plaintiff seeks to assert a claim, raised for the first time in opposition to the instant motion, that defendants failed to reasonably accommodate her perceived disability, plaintiff has not sufficiently alleged a failure to accommodate claim. Although there is some dispute as to whether an employee who is perceived or regarded as disabled is entitled to a reasonable accommodation under the ADA or NYSHRL (*see Cameron v Community Aid for Retarded Children, Inc.*, 335 F3d 60, 63-64 [2d Cir 2003]), at least one New York federal court has found that employers are obligated to engage in an interactive process to explore reasonable accommodations for employees who are perceived as disabled. *See Jacques v DiMarzio, Inc.*, 200 F Supp 2d 151, 166, 170 (ED NY 2002), *affd* 386 F3d 192 (2d Cir 2004).

In this case, however, even assuming that an employee who is perceived as disabled is entitled to a reasonable accommodation,

plaintiff neither alleges that she requested an accommodation, nor does she offer any authority to support a finding that a request to be examined by a particular doctor falls within the statutory definition of a reasonable accommodation. A reasonable accommodation generally means "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which" a job is usually performed (29 CFR § 1630.2 [o] [1] [ii]), or other actions "which permit an employee ... to perform in a reasonable manner the activities involved in the job" (Executive Law § 292 [21-e]), including such accommodations as job restructuring, modified work schedules, reassignments, equipment and support services. *Id.* That different doctors may have different opinions as to an employee's medical condition or fitness does not render the choice of a particular doctor a "modification or adjustment" or other action that would enable plaintiff to perform the functions of her job.

Defamation

Plaintiff's defamation claim is based on comments made by Gonzalez-Haig in an e-mail sent to Dr. Pachman, on April 8, 2004, "to document the interactions with Ms. Clark that have led us to believe that she is in need of an assessment," in which she described plaintiff's behavior as "irractic (sic), impulsive, paranoid and thought disoriented." E-mail, Ex. G to Roer Aff. in Support. Defendants argue that Gonzalez-Haig's statements cannot

support a defamation claim because they were accurate statements of fact, were not published to a third person, constituted constitutionally protected opinion, and were privileged.

Defendants have not eliminated issues of fact as to the truth of these statements, and have not shown that the statements are protected opinion, as this court has previously found, noting that the average reader would consider such statements to be factual. Further, defendants do not show that the statements were not published; "it is clear that a false and malicious utterance by one employee to another can be actionable." *Loughry v Lincoln First Bank*, 67 NY2d 369, 377 (1986).

As to whether the statements were privileged, under some circumstances, an otherwise defamatory statement may be protected by a qualified privilege when it is made by one person to another about a subject in which both have an interest, or with respect to which both have a duty. *See Foster v Churchill*, 87 NY2d 744, 751 (1996); *Liberman v Gelstein*, 80 NY2d 429, 437 (1992); *Shapiro v Health Ins. Plan of Greater N.Y.*, 7 NY2d 56, 60 (1959). This "common interest" privilege applies to statements made "about an employee in an employment context." *Dillon v City of New York*, 261 AD2d 34, 40 (1st Dept 1999); *see e.g. Loughry v Lincoln First Bank*, 67 NY2d 369, *supra*; *Kasachkoff v City of New York*, 107 AD2d 130 (1st Dept 1985), *affd* 68 NY2d 654 (1986); *Present v Avon Prods., Inc.*, 253 AD2d 183, 187 (1st Dept 1999); *Matter of Levine*

v Board of Educ. of City of N.Y., 186 AD2d 743 (2d Dept 1992).

The defense of qualified privilege may be defeated by demonstrating that a defendant spoke with malice, that is, "where the motivation for making such statements was spite or ill will (common-law malice) or where the statements [were] made with [a] high degree of awareness of their probable falsity (constitutional malice)." *Foster*, 87 NY2d at 752 (internal quotation marks and citation omitted); *see Liberman*, 80 NY2d at 349-350. "In order to satisfy the malice requirement, plaintiff must demonstrate that the communication involved is consistent with a desire to injure the targeted individual to justify submitting the question of malice to the jury." *Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 259 (1st Dept 1995). Malice "may be inferred from a defendant's use of expressions beyond those necessary for the purpose of the privileged communication, or from a statement that is 'so extravagant in its denunciation or so vituperative in its character' as to warrant an inference of malice." *Id.* at 259-260 (internal citations omitted); *see Ashcroft v Hammond*, 197 NY 488, 496 (1910); *cf. Kasachkoff*, 107 AD2d at 136.

Plaintiff does not dispute that Gonzalez-Haig's e-mails to Dr. Pachman were covered by a common-interest privilege, but she argues that there are triable issues of fact with respect to the existence of actual malice, raised by the character of the

statements themselves. In her statements to Dr. Pachman, Gonzalez-Haig described plaintiff as "paranoid and thought disordered," as well as aggressive, angry, and physically threatening, and she wrote that, due to plaintiff's alleged behavior, plaintiff's supervisor was told not to leave the building alone, and to take a cab home.

Considering this evidence, as well as the issues of fact, found above, as to whether defendants had a discriminatory motive in dismissing plaintiff, the court finds that there are triable issues as to whether Gonzalez-Haig's statements, if false, were "so extravagant" or "so vituperative" as to have been made solely to harm plaintiff. *See Pezhman v City of New York*, 29 AD3d 164, 168-169 (1st Dept 2006); *Herlihy*, 214 AD2d at 259-260; *Watson v McClelland*, 168 AD2d 389, 390-391 (1st Dept 1990); *Misek-Falkoff v Keller*, 153 AD2d 841 (2d Dept 1989); *Vacca v General Elec. Credit Corp.*, 88 AD2d 740 (3d Dept 1982).

Accordingly, for the reasons stated above, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on February 24, 2011 at 4:00 pm, in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: January 11, 2011

FILED

JAN 14 2011

NEW YORK
COUNTY CLERK'S OFFICE