

Rajnarain v RIPCO Real Estate Corp.

2013 NY Slip Op 33264(U)

November 27, 2013

Supreme Court, New York County

Docket Number: 100680/10

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: How Joan A. Middle
Justice

PART 11

Index Number : 100680/2010
RAJNARAIN, RESHMEE
vs.
RIPCO REAL ESTATE
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the
attached Memorandum Decision + Order.

FILED
DEC 18 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: November 27, 2013
~~October 23, 2013~~

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
RESHMEE RAJNARAIN,

Plaintiff,

-against-

RIPCO REAL ESTATE CORP. and
ANDREW MENDEL,

Defendants.

FILED

Index No. 100680/10

DEC 18 2013

**NEW YORK
COUNTY CLERKS OFFICE**

-----X

JOAN A. MADDEN:

In this action seeking damages for alleged employment discrimination based on disability, defendants RIPCO Real Estate Corp. (RIPCO) and Andrew Mandell s/h/a Andrew Mendel ("Mandell")¹, move, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint. Plaintiff Reshmee Rajnarain opposes the motion and cross-moves, pursuant to CPLR 3025(b), for leave to serve an amended complaint.

Background

The material facts in this case are largely undisputed. Plaintiff commenced work as an administrative assistant at RIPCO in 2006. Mandell was, at all relevant times, RIPCO's managing director. In 2008, plaintiff developed breast cancer and underwent four lumpectomies, followed by a double mastectomy; subsequently and until approximately June 2009, she underwent chemotherapy, during which time she was allowed to work reduced hours. In June 2009, plaintiff had reconstructive surgery and was

¹Mandell's name is incorrectly spelled in the caption.

given time off with pay. In or about July 2009, plaintiff began to take tamoxifen, and, in December 2009, she began taking antidepressants to counter the depression that is a possible side effect of tamoxifen. During the time that plaintiff took off for her medical treatments for cancer, RIPCO paid plaintiff her full salary, and did not ask her to return early from her surgery-related absences, and did not request that she perform any work during those absences.

RIPCO does not provide medical insurance to its employees. Instead, it offers an advance of up to \$5,000 against the employee's year-end bonus, which advance is intended to pay for the employee's own health insurance premiums. RIPCO did not deduct the advances that plaintiff took from her year-end bonuses, and in 2009, when there were no bonuses, it did not seek to recoup the advance that it had given plaintiff.

In December 2009, plaintiff requested and, after some delay, was granted two days off for cancer-related reconstructive surgery in January 2010. On January 4, 2010, or approximately two weeks before the planned reconstructive surgery, plaintiff was terminated at a meeting with Mandell and nonparty Richard Skolnick, a RIPCO broker.

Following her termination, plaintiff commenced this action. The complaint contains the following six causes of action; (1) and (4), disability discrimination, in violation of, respectively, the New York State Human Rights Law, Executive Law § 296 (NYSHRL) and the New York City Human Rights Law,

Administrative Code of City of New York, § 8-1-1, et seq. (NYCHRL); (2) and (5), refusal to provide reasonable accommodation, in violation of, respectively, NYSHRL and NYCHRL; and (3) and (6), aiding and abetting discrimination, in violation of, respectively, NYSHRL and NYCHRL.

Following the completion of discovery and the filing of plaintiff's note of issue, defendants made this motion for summary judgment, arguing that there is no evidence that RIPCO failed to accommodate plaintiff for her disability; that it did not discriminate against plaintiff; that it had numerous non-pretextual business reasons for terminating her employment, and that plaintiff cannot show her termination of employment was discriminatory, particularly as the record shows plaintiff did not have cancer at the time of her termination and plaintiff admitted that the management at RIPCO supported her throughout her illness.

In opposition, plaintiff argues that she has stated a prima facie case for discrimination and, to the extent defendants have shown non-discriminatory reasons for her termination, she has met her burden of showing that discrimination plausibly played a role in her termination. In particular, plaintiff argues that defendants were adverse to her request for two days off for reconstructive surgery and that Andrea Dupont, a Chief Administrative Officer of RIPCO, who was charged with overseeing administrative assistants and handling human resources matters, and RIPCO's co-founder and partner Peter Ripka ("Ripka") knew

plaintiff was depressed. Plaintiff further argues that defendants had an obligation to engage in an interactive process with her regarding her depression.

Plaintiff also cross moves to amend the complaint. Plaintiff's proposed amended complaint includes no new allegations of fact, but it lists 10 additional causes of action, to wit, (7) and (8), hostile environment in violation of the NYSHRL and the NYCHRL, (9) and (10), gender discrimination in violation of both statutes, (11) and (12), allegations of discrimination against plaintiff "because of lawful occupation," (13) and (14), "blacklisting" in violation of both statutes, and (15) and (16), retaliation in violation of both statutes.

Discussion

It is well settled that to prevail on a motion for summary judgment, the movant must establish its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to demonstrate the absence of any material issues of fact. See CPLR 3212 (b); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *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 v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such proof has been offered, 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.

Under both the NYSHRL and the NYCHRL, it is an unlawful discriminatory practice for an employer, because of an individual's disability, to refuse to hire or to discharge such individual, or otherwise to discriminate against such individual in the terms, conditions and privileges of employment. Executive Law § 296 (1) (a); Admin. Code § 8-107 (1) (a).

To establish a case of disability discrimination, a plaintiff must show that he or she suffers from a disability, and the disability caused the behavior for which he or she was terminated. *Matter of McEniry v Landi*, 84 NY2d 554, 558 (1994); see *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 146 (1st Dept 2009). The term "disability" is defined, under the NYSHRL, as "a physical, mental or medical impairment ... which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques ... [and] which, upon the provision of reasonable accommodations, do[es] not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held." Executive Law § 292 (21); see *Phillips v City of New York*, 66 AD3d 170, 178 (1st Dept 2009); *Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 (1st Dept 2006). The NYCHRL defines "disability" as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." Admin. Code § 8-102 (16) (a); see *Phillips*, 66 AD3d at 181.

Failure to provide a reasonable accommodation to an

employee's known disability is a form of discrimination under both the NYSHRL and the NYCHRL. See Executive Law § 296 (3) (a); Admin. Code § 8-107 (15) (a); see generally *Vinokur v Sovereign Bank*, 701 F Supp 2d 276 (ED NY 2010); *Phillips v City of New York*, 61 AD3d 170, *supra*. "Reasonable accommodation," as defined by the NYSHRL, means actions which permit a disabled employee "to perform in a reasonable manner the activities involved in the job . . . and include, but are not limited to . . . job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business." Executive Law § 292 (21-e).

Under both the NYSHRL and the NYCHRL, the court's analysis is initially guided by the burden-shifting framework set forth in *McDonnell Douglas Corp. v Green*, 411 US 792, 802-803 (1973). That is, if the plaintiff has made a prima facie case of discrimination, the defendant must show a legitimate, business reason for its actions, the burden then shifting to the plaintiff to show that at least some of the reasons proffered by the defendant are pretextual.

In 2005, the New York City Council enacted the Local Civil Rights Restoration Act of 2005 ("LCRRA"), which is intended

to clarify the scope of New York City's Human Rights Laws. It is the sense of the Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law. In particular, through the passage of this local law, the Council seeks to underscore that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes. Interpretations of New York state or federal statutes

with similar wording may be used to aid in interpretation of New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.

Local Law No. 85 of 2005, section 1. To carry out that purpose, the "Construction" section of the law was amended to provide that "[t]he provisions of this title shall 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 laws with provisions comparably-worded to provisions of this title, have been so construed." NYC Admin Code §8-130 (as amended by Local Law No. 85 of 2005, §7).²

In *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 35-36 (1st Dept 2011), taking into account the LCRRA, the Appellate Division, First Department held that in actions seeking relief under the NYCHRL, a motion for summary judgment must be analyzed both under the *McDonnell Douglas* framework and the somewhat different "mixed motive" framework provided under certain federal cases. Recognizing that the *McDonnell Douglas* framework was never intended to be rigid or mechanistic, but, rather, is an orderly way to evaluate evidence (*id.*, at 36 n 5), the First Department instructed that when a defendant has offered evidence of a nondiscriminatory basis for its actions, "a court should

²Prior to the 2005 amendment, section 8-130 provided that "[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."

ordinarily avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out in the first place." *Id.* at 45; see *Farfara v St. John's Univ.*, 94 AD3d 695, 697 (2d Dept 2012). Instead, the court should "proceed directly to looking at the evidence as a whole" to determine if it raises triable issues of fact as to whether defendant's non-discriminatory reason for its actions was a pretext for unlawful discrimination. *Bennett*, 92 AD3d at 45. see also *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 (1st Dept 2012).

The court will first address the motion under the *McDonnell Douglas* framework. Under this framework, as applied in New York, a plaintiff alleging employment discrimination in violation of the NYSHRL and the NYCHRL, has the initial burden of showing that : (1) she is a member of a protected class; (2) she was qualified for her position; and (3) she suffered an adverse employment action in circumstances giving rise to an inference of discrimination. See *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004) (NYSHRL); *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 35-36 (1st Dept 2011) (NYCHRL); see also *Brathwaite v Frankel*, 98 AD3d 444, 445 (1st Dept 2012) (deciding case under NYCHRL, but citing *Forrest*).

"The burden then shifts to the employer to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision.

In order to nevertheless succeed on [her] claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason. Moreover, the burden of persuasion of the ultimate issue of discrimination always remains with the plaintiff[]" *Melman v Montefiore Med. Ctr.*, 98 AD3d at 114-115, quoting, *Stephenson v Hotel Amplest. & Rest. Amplest. Union Local 100 of AFL-CIO*, 6 NY3d 265, 271 [2006] (internal citations and quotations omitted). That being said, however, "the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom'" can also be considered in determining whether defendant's explanation is pretextual. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133, 143 (2000) (quoting *Texas Department of Community Affairs v. Burdine*, 450 US 248 [1981]). Furthermore, appellate case law emphasizes that trial courts should be particularly cautious in deciding whether to award summary judgment to the defendant in an discrimination cases, since the employer's intent is often at issue and careful scrutiny may reveal circumstantial evidence supporting an inference of discrimination. See *Belfi v. Prendergast*, 191 F3d 129 (2nd Cir 1999); *Chertkova v. Connecticut General Life Insurance Co*, 92 F3d 81, 87 (2nd Cir 1996); *Gallo v. Prudential Residential Services, LP*, 22 F3d 1219, 1224 (2nd Cir 1994).

With respect to the prima facie showing, defendants do not dispute that plaintiff suffered from depression from cancer and

that she was, therefore, a member of a protected class. Likewise, to the extent plaintiff's claims are based on her cancer diagnosis, there is no dispute that cancer constitutes a disability under NYSHRL and NYCHRL. *see e.g. Phillips v City of New York*, 66 AD3d 170. Nor do they dispute that, for purposes of a prima facie case, she was qualified for her position. Under these circumstances, plaintiff has made a prima facie showing of discrimination based on evidence that she was terminated shortly after she sought her final reconstructive surgery and based on her depression.

In response, defendants have met their burden of producing evidence showing a non-pretextual legitimate business reason for her termination. In this connection, Ripka states in his affidavit that he decided to terminate plaintiff during a meeting with Mandell on January 3, 2010, and that the factors considered were plaintiff's "mediocre work performance," "extremely negative office attitude," lack of loyalty to RIPCO, and a concern that plaintiff would share confidential information with a former RIPCO employee, Stephanie Tasy ("Tasy"), a close friend of plaintiff who resigned from RIPCO to go to a competing real estate firm³. See Affidavit of Peter Ripka, at ¶'s 7-10.

Mandell states in his affidavit that RIPCO initially hired plaintiff to support brokers servicing commercial properties in Manhattan. However, since her performance was not up to par so

³The court notes that defendants provide no evidence that plaintiff shared, or intended to share, confidential information with Tasy.

that prior to her cancer diagnosis, plaintiff was transferred to work with broker's working in outer boroughs where she worked with Richard Senior ("Senior") and Miles Mahoney ("Mahoney") to perform more junior level work. See Affidavit of Andrew Mandell, ¶ 3. Both Senior and Mahoney state that plaintiff's performance was mediocre and inefficient; and that she took too many personal calls at work; and that was not proficient in some mapping and other computer programs. Affidavit of Richard Senior, ¶'s 3, 4; Affidavit of Miles Mahoney, ¶'s 3, 4).

With respect to plaintiff's attitude, Dupont testified that several brokers reported to her that plaintiff and Tasy stood by each others' desks complaining loudly about their jobs at RIPCO, and, that plaintiff was warned several times during the fall of 2009 regarding her attitude. See Affidavit of Andrea Dupont at ¶ 19. Dupont testified plaintiff's attitude "was very negative and affected the whole work environment." (Dupont Dep., at 29). Dupont stated plaintiff told her in or around October 2009, that she would be leaving RIPCO soon to get another job with higher pay and benefits. Dupont Affidavit, ¶23. She made similar comments to several co-workers, including plaintiff's supervisor Richard Senior, one of the outer borough brokers. See Plaintiff Dep., at 291-292.

The burden thus shifts to plaintiff to prove that the legitimate reasons proffered by the defendants were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason

for her termination.

Taking into account that courts consider evidence used by plaintiffs to establish their prima facie showing of discrimination to determine if a defendant's explanation is pretextual, (*Reeves v. Sanderson Plumbing Products, Inc.*, 530 US at 143), the court finds plaintiff has met her burden as inferences can be drawn from the temporal relationship between plaintiff's termination and plaintiff's continuing treatment for cancer. Plaintiff's treatment includes taking the cancer drug tamoxifen, which she informed Dupont was causing her to be depressed, and her request for time off for reconstructive surgery.⁴ Plaintiff Dep., at 449. In this connection, plaintiff testified that she believes she was fired from RIPCO because she was sick and that Dupont was "really upset" when she asked for the last reconstructive surgery and felt like "what if this cancer comes back...just to be on the safe side, I don't every want to deal with what I dealt with... so let's just get rid of her." *Id.*, at 306. She further testified that Dupont and Mandell previously told that her absences had caused a lot of workload in the office for the other administrative staff. *Id.*, at 198. In addition, plaintiff testified that although she was given six months off for reconstructive surgery in June 2009, Dupont was

⁴While Ripka and Mandell deny that they knew about the surgery (Ripka Affidavit, ¶11., Mandell Aff, ¶ 6), plaintiff testified that she believed that they did since she would not be given time off for surgery without their approval. Deposition of Plaintiff, at 509. In addition, plaintiff testified that she told Senior that she was depressed.

not supportive about the surgery and asked plaintiff if she could postpone it. *Id.*, at 195-196.

As for reasons for her termination, according to plaintiff, Mandell told that she was being fired because she did not seem "happy enough" at RIPCO, and that now that Tasy was gone the company wanted to "start fresh." *Id.*, at 318-320. Notably, the specific reasons defendants rely upon as the basis for terminating plaintiff were not discussed at the meeting at which plaintiff was terminated. Based on the foregoing evidence plaintiff has satisfied her burden of showing that a triable issue of fact exists as to whether the business reasons given for her termination were pretextual.

The court reaches the same conclusion under the "mixed motive" analysis applicable to the plaintiff's claim under NYCHRL. Specifically, the court finds that looking at the evidence as a whole, the record raises triable issues of fact as to whether plaintiff was terminated for reasons related to her disability.⁵ *Bennett*, 92 AD3d at 45.

⁵However, plaintiff's reliance on performance evaluations of other administrative employees to argue that her termination was pre-textual is unavailing. It is well established that a discrimination plaintiff may use only similarly situated employees as a basis for comparison. *Weighted v. Filum*, 258 AD2d 286, 286 (1st Dept 1999). "The individuals being compared must be similarly situated in all material respects." *Shah v. Wilcox Sys., Inc.*, 27 AD3d 169, 177 (1st Dept 2005)...While their circumstances do not have to be identical, there should be a reasonably close resemblance of facts and circumstances. What is key is that they be similar in significant respects" *Shah v. Wilcox Sys., Inc.*, 27 AD2d 169, 177 1st Dept 2005) (internal citations and quotations omitted). Here, plaintiff has not made this showing and the employees she uses as a basis for comparison, while other administrative assistants, are otherwise not similar to plaintiff in terms of

Moreover, Mandell's participation in plaintiff's firing, and his status as a managing partner at RIPCO, provide a potential basis for his aider and abettor liability under Executive Law Section 296(6) and/or NYCHRL Section 8-107(6) in the event that it is determined that plaintiff's firing constitutes a violation of the NYSHRL and/or the NYCHRL. *Feingold v. New York*, 366 F3d at 158; *Sanchez v. Brown, Harris, Stevens*, 234 A.D.2d 170 (1st Dep't 1996); *Miloscia v. B.R. Guest Holdings LLC*, 33 Misc.3d 466, 479-480 (Sup. Ct. N.Y. Co. 2011).

On the other hand, plaintiff's claims that defendants refused to provide her with reasonable accommodation fail as she has not identified any reasonable accommodation that she either requested or the need for which should have been apparent, that was denied to her. *See generally Phillips v City of New York*, 66 AD3d at 181. In this connection, while plaintiff asserts that she was depressed from taking the cancer drug tamoxifen, and that she mentioned to Dupont in 2009 that she was taking the drug, there is no evidence that plaintiff sought an accommodation for her depression. In addition, it cannot be said on this record that the need for an accommodation was apparent particularly, as indicated above, plaintiff testified that her work performance was not affected by her depression.

Accordingly, defendants are entitled to summary judgment dismissing the claims based on the alleged refusal by defendants to provide a reasonable accommodation for her disability.

conduct or circumstances of employment.

As for the cross motion to amend, plaintiff does not explain her three-year delay in alleging the new claims, see *Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290, 293 (1st Dept 2004), especially as the proposed amended complaint alleges no new facts.

In any event, the proposed new claims are without merit. First, plaintiff has not made a showing that the hostile work environment claim is viable. Discrimination by virtue of a hostile work environment is created when "the work place is permeated with discrimination, intimidation, ridicule, and insult that is sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment." *Id* at 310 (quoting *Harris v. Forklift Systems, Inc.*, 510 US 17, 21 [1993]). To establish a prima facie case of a hostile work environment, plaintiff must show that: 1) she is a member of a protected class; 2) she was subjected to unwelcome conduct or speech that was based on her membership in that class; 3) the conduct or speech was sufficiently severe or pervasive to create a hostile work environment; and 4) defendant is liable for such conduct or speech. See *id* at 310-313; *Scott v. Memorial Sloan-Kettering Cancer Center*, 190 FSupp2d 590, 598-599 (SDNY 2002).

"Proving the existence of a hostile work environment involves showing both 'objective and subjective elements: the misconduct shown must be severe or pervasive enough to create an objectively hostile or abusive work environment, and the victim

must also subjectively perceive that environment to be abusive.'" *Feingold v. State of New York*, 366 F3d 138, 150 (2nd Cir 2004) (quoting *Alfano v. Costello*, 294 F3d 365, 374 [2nd Cir 2002] and *Harris v. Forklift Systems, Inc.*, *supra* at 21); accord *Forrest v. Jewish Guild for the Blind*, 3 NY3d 295,311 (2004). The factors considered include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with [the] employee's work performance." *Feingold v. State of New York*, *supra* at 150 (quoting *Harris v. Forklift Systems, Inc.*, *supra* at 23); accord *Forrest v. Jewish Guild for the Blind*, *supra* at 310-311. Although a "mild, isolated incident does not make a work environment hostile, the test is whether 'the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse.'" *Feingold v. State of New York*, *supra* at 150 (quoting *Terry v. Ashcroft*, 336 F3d 128, 148 [2nd Cir 2003]).

In support of her hostile work environment claim, which does not specify whether it is based on her disability or her gender or some other protected class, plaintiff relies on her testimony that as administrative assistant she was not allowed to be friendly with other members of the staff and the atmosphere was one in which the administrative staff was made to feel inferior to the brokers. Plaintiff Dep., at 101-102. In this connection, she testified that the administrative staff was told that they

needed to "babysit the boys" referring to the brokers, and that this was "very offensive." *Id.*, at 102. However, plaintiff also testified that male brokers from the outer boroughs, such as her supervisor, Richard Senior, were also treated badly. *Id.*, at 106.

In addition, plaintiff relies on her testimony with regard to defendant Mandell, who she stated would "treat her like crap" and give her "unnecessary work" including directing her to "make a copy" when copy machine was next to him and he knows how to make a copy. *Id.*, at 97. Plaintiff further testified that he threw a chair once and cursed and screamed and frightened her, but she admitted that the conduct was not directed at her and that Mandell apologized to her. *Id.*, at 98-99. She also relies on her testimony that Mahoney, made her uncomfortable when he got "a little bit physical with her..patting her on the back and giving me massages." However, she testified that when she complained about his behavior he stopped touching her but remained friendly and she described him as "a nice guy" who was being "too nice" and her overall relationship with him as "a good one." *Id.*, at 179-180.

While the court does not condone the conduct described by plaintiff in the above testimony regarding her work environment at RIPCO, the record is insufficient to support a hostile work environment claim predicated on her disability since none of the conduct appears to be related to her disability, nor does plaintiff appear to claim that this is the case.

Next, to the extent plaintiff alleges that there was a sex-

based hostile work environment, she "must demonstrate that the conduct occurred because of her sex'." *Mass v Equinox Fitness Club*, 2009 WL 4255560, *1, 2009 US App LEXIS 26047, *3 (2d Cir 2009), quoting *Alfano v Costello*, 294 F3d 365, 374 (2d Cir 2002), citing *Brown v Henderson*, 257 F3d 246, 252 (2d Cir 2001). Here, plaintiff has not met this burden. First, by her own admission, male outer borough brokers were also treated badly. Likewise, while unacceptable and potentially intimidating behavior, plaintiff has not shown that the incident when Mandell lost his temper and threw a chair was based on her sex, particularly as plaintiff admits that his conduct was not directed at her. As for the unwanted touching by Mahoney, while such conduct is offensive and patently inappropriate for the work place, since Mahoney's conduct stopped shortly after plaintiff complained about it, and plaintiff acknowledged that her relationship with Mahoney remained friendly, it cannot be said that Mahoney's conduct alone, even if based on plaintiff's sex, was, as required by precedent, "severe and pervasive enough to create an objectively hostile or abusive work environment" which plaintiff "subjectively perceive[d]...as abusive." *Feingold, supra*, at 150.

To the extent the proposed amended complaint seeks to assert claims of sex discrimination, plaintiff has failed to state a legally sufficient basis for such claim, absent any allegations or evidence that she was discriminated against based on her sex. Next, there is no cause of action for "blacklisting." Plaintiff testified at her deposition that, after she was terminated and

subsequently obtained a sales license, she called a broker at RIPCOC whom she liked, and suggested that they co-broker a particular listing, only to be told that someone at RIPCOC had barred him from working with her. Plaintiff Dep., at 516-517. Presumably, plaintiff's proposed "blacklisting" claim is intended to allege tortious interference with prospective economic advantage. However, she does not show, or allege, any use of unlawful or otherwise wrongful means on defendants' part, an essential element of such a claim. See generally *Vitro S.A.B. de C.V. v Aurelius Capital Mgt., L.P.* 99 AD3d 564, 565 (1st Dept 2012). The proposed causes of action alleging retaliation likewise fail as the complaint does not allege any protected activity on plaintiff's part for which her termination might constitute retaliation. See generally *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 528 (1st Dept 2013).

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendants RIPCOC Real Estate Corp. and Andrew Mandell is granted to the extent of dismissing the second and fifth causes of action, which allege that defendants failed to provide her with reasonable accommodation for her disability under the NYSHRL and the NYCHRL, respectively, and is otherwise denied; and it is further

ORDERED that plaintiff Reshmee Rajnarain's cross motion for leave to serve an amended complaint is denied; and it is further

ORDERED that the parties shall proceed to mediation.

Dated: November 27, 2013

DEC 18 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

[Signature]
C.S.C.