

<b>Burgess v NYU Hosps. Ctr.</b>
2018 NY Slip Op 31680(U)
March 27, 2018
Supreme Court, New York County
Docket Number: 152085/15
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

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TATIANA BURGESS,

Plaintiffs,

-against-

**DECISION/ORDER**  
Index No.: 152085/15  
Mot. Seq. 002

NYU HOSPITALS CENTER,

Defendants.

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**HON. CAROL R. EDMOND, J.S.C.:**

In a case involving allegations of discrimination related to a perceived disability, defendant NYU Hospitals Center (NYU), moves for summary judgment dismissing plaintiff Tatiana Burgess’s Complaint.

**BACKGROUND**

In November 2013, plaintiff was hired by NYU as a nurse practitioner in the Division of Pain Medicine (the pain service). Plaintiff was the first nurse practitioner to be hired into this division, and prior to her hiring the pain service was staffed by doctors and registered nurses, or “RNs.” One critical difference between nurse practitioners and registered nurses, from the perspective of pain medicine, is that nurse practitioners can prescribe medicine. As a result, there was no established template for plaintiff’s orientation when she was hired (*see* plaintiff’s Ex F).

Prior to her firing, plaintiff received four written performance evaluations, all of which gave her “Satisfactory” marks, which is the highest rating possible on NYU’s performance evaluation forms. On an “Ongoing Professional Practice Evaluation” dated February 2, 2014, Dr. Seteven Calvino (Calvino), the head of the pain service at the time, gave plaintiff the highest marks possible for “Clinical Competence, Communication/Collaboration/Handoff,” “Age Specific Competencies,” and “Cultural Competence.”

The following month, on March 18, 2014, Calvino and Maria T. Brillant (Brillant), a director of “Advanced Practices Nurses” at NYU, signed off on plaintiff’s “3 Month Evaluation,” which gave plaintiff highest marks in the categories of “Patient Care,” “Medical Knowledge,” “Practice-Based Learning,” “Interpersonal & Communication Skills,” “Professionalism,” “Systems Based Practice,” “Technical/Clinical Skills & Judgment,” “Work(ing) within Scope of Practice.” A space was left blank beneath a prompt to “Recommend Improvement in following.” Similarly, a space was left blank and a box unchecked next to the following prompt: “Practitioner has practice trends necessitating focused review. Explain performance issue requiring focused review.”

On May 9, 2014, Calvino signed another “Ongoing Professional Practice Evaluation,” once again placing in the top performance category for each area of evaluation. That same month, Calvino and Carolyn Wray-Williams (Wray-Williams) signed plaintiff’s “6 Month Evaluation,” which mirrored the 3-month evaluation in giving Burgess top marks in each category and declining to highlight any possible areas of improvement, and declining to place plaintiff on focused review.

The same month as the second ongoing evaluation and the 6-month evaluation, May 2014, plaintiff alleges that she had a conversation with her supervisor, Jean Ake (Ake), which “drastically” changed the conditions of her employment (plaintiff aff, ¶2).

#### **Alleged Conversation Between Plaintiff and Ake Regarding Bilateral Mastectomy**

Shortly before plaintiff started as a nurse practitioner with NYU, plaintiff’s twin sister died from breast cancer. Plaintiff’s mother also died of breast cancer. Accordingly, plaintiff had concerns about her own possible predisposition to breast cancer, and, after joining NYU, began seeing NYU’s Dr. Amber Guth (Guth), a surgical oncologist, specializing in breast surgery.

Guth did a number of diagnostic tests on plaintiff, culminating in a surgical fine-needle biopsy, which was conducted on April 14, 2014, and a core biopsy, which was performed on April 25, 2018. Plaintiff alleges that the core biopsy “became complicated” and that she “received general anaesthesia” (plaintiff’s aff, ¶ 28-29). As the complication required her to stay overnight at the hospital, plaintiff notified Ake that she would have to take off on Monday, April 26, 2014. Ake accommodated the request. That Monday morning after plaintiff’s core biopsy, Calvino encountered plaintiff as a patient, and, responding to Calvino’s inquiry, informed him about the biopsy (*id.* at 29; plaintiff’s tr at 132-133).

Soon after the core biopsy, after consulting with Guth, plaintiff decided to have a prophylactic bilateral mastectomy to reduce her risk of breast cancer (plaintiff’s tr, ¶ 30). Plaintiff also consulted with a plastic surgeon who works with Guth regarding a breast reconstruction surgery. Plaintiff planned to have the mastectomy and reconstruction at the end of 2014, and she planned to request 3 weeks off from work to have and recover from the procedures (*id.*).

After making this decision, plaintiff alleges that she encountered Ake, on a morning in May 2014, as plaintiff was leaving work from her night shift and Ake was coming in for her day shift. Plaintiff alleges that she told Ake she had been meaning to discuss a pressing issue with her (*id.*, ¶ 32). Plaintiff disclosed her plan to take off three weeks to have the bilateral mastectomy (*id.*, plaintiff’s tr at 144-145). Ake asked if she would also have reconstructive surgery, and plaintiff affirmed (*id.*). Plaintiff testified that Ake responded by making warnings about the surgery and suggesting that plaintiff would lose her position if she went ahead with the surgery:

“And she said: ‘You should do some research because you won’t look the same or feel the same.’ And I guess, by the expression on my face, she could see that I was taken [a]back by that comment, and she said: ‘All I’m saying is you should do the research.’ And then she said: ‘Well, there will be other positions for you

when you return.’ And I was puzzled, so I said: ‘Other positions? Why would there be other positions?’ I’ll come back to the pain service. She said: ‘Well, you won’t be able to lift or push.’ ... I said: ‘Well, I don’t lift or push anyway.’ I said: ‘The nurses do that.’ I said: ‘Well, if it’s going to be a problem, I’m willing to wait ‘til the other NP’s come to the service – nurse practitioners come to the service – and are acclimated, and then I’ll only be out for three weeks.’”

(plaintiff’s tr at 145-146).

Plaintiff testified further that, after she assured Ake that she would only be out three weeks, Ake doubted this estimate, apparently because of a misapprehension on her part that plaintiff had breast cancer:

“And then she said: ‘It won’t be three weeks because you’ll need chemo.’ And I told her: ‘But I don’t need chemo. And then she began to tell me a story. She said that ... when she was a clinical nurse manager she had a nurse who had breast cancer and the nurse was out for months and months because she needed chemo and radiation. And I told her again: ‘But I don’t need chemo.’ And then I went to say: ‘Well, it’s only going to be three weeks.’ And she said to me: ‘Well, you have an important decision to make, it’s either your job or your life. And, before I could respond, she walked away, and I stood there stunned.’”

(*id.* at 146).

When asked about whether she had this conversation in the lobby of the hospital about plaintiff’s intent to have a bilateral mastectomy, Ake testified that she could not recall having the conversation (Ake tr at 44). However, plaintiff testified that she was so taken aback and confused by Ake’s comments that, instead of going home after the conversation, she immediately went to speak to Delfino in person (plaintiff’s aff, ¶ 36; plaintiff’s tr at 147). Delfino confirmed that plaintiff approached him one morning at the hospital to speak about her medical issues (Delefino tr at 37-38). Plaintiff also spoke to Delfino by phone in May 2014 about the incident with Ake. Plaintiff testified that she asked Delfino to verify what Ake had told her: “If I go out for the three weeks, will I not be allowed to return to the service?” (plaintiff’s tr at 192). Delfino allegedly responded that it was “up to Ake, she’s your supervisor” (*id.*; see also Delfino tr at 43). Delfino’s

testified that Ake also spoke to him about plaintiff's health issues: "She called me and said that she had a meeting with [Wray-Williams] and at that meeting there was a discussion about [plaintiff's] potential health. I said to her what I told [plaintiff], this is a nursing decision. If there's involvement, it's got to come under nursing, not under the physician" (Delfino at 43).

### **Plaintiff's Firing**

Plaintiff was called to a meeting with Ake and Wray-Williams on August 24, 2015. At the meeting, plaintiff testified that Ake and Wray-Williams discussed incidents relating to her job performance, and her interactions with other NYU employees, particularly nurses on the obstetrics floor; plaintiff defended herself, saying that she had only carried out pain service policies as they were articulated to her (plaintiff's tr at 339). Additionally, plaintiff testified that she recalled Wray-Williams "telling me that nobody likes me. And she said: 'You really seem surprised by that' ... she said that more than once" (*id.* at 336). Wray-Williams told her she was not passing her probation, despite the fact that plaintiff's probationary period had ended months earlier, after 6 months of employment (*id.* at 337). Then Wray-Williams asked for her identification, and plaintiff gave her the I.D. as well as her work phone (*id.*). After plaintiff left the office, she realized she was wearing a hospital issue jacket, and, as she hesitated, considering whether to return it, the door to the office was slightly ajar, and she could hear Wray-Williams and Ake laughing (*id.*).

Ake then sent plaintiff a termination letter dated August 26, 2014, stating that plaintiff was terminated effective August 25, 2014, and that the termination was the "result of non-satisfactory probation." On August 27, 2014, Wray-Williams emailed Ake to say that plaintiff's file looked "clean":

"After reviewing [plaintiff's] file, we need to add some documentation of the times you met with her to discuss issues, PSI's, etc. As it stands currently, her file

looks clean. Also, now that this is a termination and not a resignation, we should include a summary of her issues. I will email Dr. Zou for a new practice [practice evaluation] form. The 3 and 6 months evaluations had everything as satisfactory. Give me a call if you want to discuss further.”

Nearly a month after plaintiff was fired, Dr. Shengping Zou (Zou), another doctor in the pain service, signed a 9-month review of plaintiff’s performance. The document, dated September 18, 2014, once again gave plaintiff top marks for “Patient Care,” Medical Knowledge,” Practice-Based Learning,” “Interpersonal & Communication Skills,” “Professionalism,” Systems Based Practice,” Technical/Clinical Skills & Judgment,” and “Working within Scope of Practice.” Despite the fact that plaintiff had already been fired, Zou checked a box for “Current privileges are continued without change.” While Zou left a blank after “Unsatisfactory,” he checked the box for “Recommend improvement in following,” and wrote that plaintiff needs to “gain more confidence working independently.”

None of the incidents referenced at plaintiff’s firing are mentioned in this performance review. While these incidents are not mentioned in any plaintiff’s performance review, before or after her firing, the court summarizes them below, as they are the non-discriminatory bases NYU proffers for the termination of plaintiff’s employment.

#### **The May 14, 2014 Incident**

Plaintiff was called by a physician’s assistant for a pain consult on a patient with sciatica in the Observation Unit of the hospital. Plaintiff, who had never handled a patient who was not admitted to the hospital, called the attending doctor, who directed her not to see the patient, “saying that the pain service only handled admitted patients and we could not bill for services in the observation room” (plaintiff aff, ¶ 46). Plaintiff relayed this message to the physician’s assistant. A nurse, Anna Silva, wrote an email to Regina Presa, NYU’s Care Manager of Urgent Care, to relay the episode between plaintiff and the physician’s assistant, which asked for a

clarification on the policy question of whether pain services could see patients in the Observation Unit. Eventually, Zou and Delfino clarified that the actual policy of pain services was to see all patients in the hospital, including the Observation Unit. The attending doctor who had advised her differently later apologized to plaintiff (plaintiff aff, ¶ 47).<sup>1</sup> While Ake and Brillant spoke to plaintiff about this incident, no mention of it was made on the 6-month evaluation, which was dated two weeks after the incident.

### **The August 2, 2014 Incident**

A Patient Safety Incident (PSI), dated August 3, 2014 was filled out by an obstetric nurse regarding plaintiff's response to a consult request with the pain service for a patient who had recently given birth. After describing some injuries caused by labor, the nurse wrote the following about the incident, which had taken place on August 2, 2014:

Called pain service for consult to be rudely told she wouldn't talk to RN – MD had to put in a consult order. Resident immediately put in order, but still after 2 hours pt had not been seen by pain service. Pain service called but told RN she wouldn't come until the MD called her despite the consult order. Resident called her and explained she felt the patient need to be seen immediately and given IV PCA.<sup>2</sup> Patient seen but MD was rude to patient and staff. MD gave IV Tylenol and refused to give [patient] additional pain meds because she has [blood pressure] 90/50, which has been the patient's baseline BP and is asymptomatic. Patient remains in pain and won't move ... Patient, family and staff frustrated with delay and attitude with pain service and attitude and lack of resolution of pain issues"

Ake emailed Wray-Williams to discuss her meeting with plaintiff about the incident.

After reviewing plaintiff's response to the complaints, Ake notes that "I did review MD orders for consults are secondary to patient needs, and Tatiana expressed that she always puts patients first, but felt that she was responsible to obtain an order. I directed her to remind them, but that is

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<sup>1</sup> There is also a factual dispute between the parties as to whether plaintiff recommended giving the patient Motrin and suggested that the patient might have "pain seeking behavior."

<sup>2</sup> PCA refers to a Patient-Controlled Analgesia.

really secondary to the work of the team.” Plaintiff explains the incident as having been based partly on her observance of pain service policy and partly on a disagreement or miscommunication about the patient’s pain level:

“On August 2, a nurse from the [obstetrics and gynaecology] unit contacted me and said she wanted to initiate a consult ... I asked who requested the consult, since only a doctor, nurse practitioner or physician assistant could initiate a consultation. Further, it would have been a HIPAA violation to review the chart of someone who was not a patient of the pain service. The nurse said the provider did not request it, so I asked her to have the provider call me. When I did not hear back, I followed up and was able to speak with the doctor, who told me she was requesting the consult. It was a short period of time between my initial call with the nurse and my conversation with the doctor. I then saw the patient and had a pleasant interaction with her and her husband. She was having mild to moderate pain and was not able to move after having a baby, which was remarkable, so I recommended a CT scan and ortho consult. The PSI [did not] accurately describe the events that actually occurred ... [f]or example, no one ever told me that the patient had ‘intractable pain’ .... Additionally, the resident did not call me, as the PSI reports, and the doctor I spoke to did not say that the patient needed to be seen ‘immediately.’”

(plaintiff’s aff, ¶ 54).

### **The August 20, 2014 Incident**

This incident also involves the obstetric nurse and a post-labor patient. Plaintiffs states that:

On August 20, 2014, I received a call from a nurse at the post-labor unit, saying that a patient’s epidural catheter had fallen out. I had never been trained to insert or reinsert an epidural catheter, which is something the doctors do. I asked if the patient had pain. She said the patient was all right. I told her that I was in the middle of a report with [a] doctor and that I would be upstairs shortly, and we hung up. She called back and said that if I did not come right away, she needed to have my name. I told her to hold and I spoke with Dr Yardira, the fellow who was giving the report. I asked Dr. Yardira if he could speak to her, and he did. Soon after, Dr. Yardira was finished with the report and I looked up the patient’s records on both the acute care list and the pharmacy list, since Dr. Yardira told me that he had rotated with the team that day and did not recall seeing this patient. I could tell from these lists that the patient had not been seen by the service, which was significant. I conveyed this information to Dr. Yardira and he decided to come see the patient with me, and we both examined her. The patient, who had already given birth and was no longer in labor, did not have pain, had feeling in

her legs, the catheter site was clean, dry and intact, and the patient appeared to be doing quite well. The patient was not in acute distress, nor had anyone ever communicated that she was. There was no need to reinsert the catheter. The nurse who had called me, however, came to the room and started speaking with me in a very inappropriate tone in front of the patient and her family. I was very upset about the way she spoke to me within earshot about the patient and later complained about her to Dr. Yardira and Dr. Zhao, as well as others. In response to my complaint, the nurse wrote an email dated August 21 giving her version of events.

(Plaintiff's aff, ¶¶ 59-63).

The nurse wrote that the patient's catheter dislodged while trying to get out of bed to go to the bathroom and that she called and explained to plaintiff what had happened, and requested that plaintiff evaluate the patient. Then, the nurse states:

"[plaintiff] stated that she was [signing] off and she could not evaluate the patient now. I asked her what I should do or who I should call to see the patient. [Plaintiff] stated 'I will get there when I get there.'<sup>3</sup> I explained [to plaintiff] again that part of the EPCA catheter was in and part was hanging out and that I thought the patient should be seen asap and I asked who I was talking to. [Plaintiff] did not want to tell me her name and hung up the phone ... As I was going to patient room [plaintiff] was coming out. I approached her and I asked why she would not tell me her name and why she hung up on me and I stated that [i]t was very unprofessional ..."

This email was forwarded to Delfino on August 22, 2014, with a note from an NYU employee stating: "As with every complain[t] there are 2 sides of a story. Who can I ask to follow up with [plaintiff]? Plaintiff's meeting with Ake and Wray-Williams, in which she was told that she "was not passing probation," was two days later, August 24, 2018.

### **NYU's Motion**

Plaintiff filed her complaint on March 3, 2015, alleging two causes of action against NYU. First, the complaint alleges that NYU is liable to her for compensatory and punitive damages for violating the New York City Human Rights Law (the City's HRL) proscription

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<sup>3</sup> Plaintiff denies saying this (plaintiff aff, ¶ 63).

against discriminating against an employee for a perceived disability. Second, the complaint alleges that NYU is liable for compensatory and punitive damages for retaliating against her for complaining about the alleged discrimination. NYU argues that it is entitled to summary judgment dismissing the complaint because plaintiff fails to make a *prima facie* showing of entitlement to judgment for either its discrimination or its retaliation claims.

### DISCUSSION

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the “cause of action . . . has no merit” (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1<sup>st</sup> Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Madeline D’Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1<sup>st</sup> Dept 2012] citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D’Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1<sup>st</sup> Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi*, 105 AD3d 493, 963 NYS2d 97 [1<sup>st</sup> Dept 2013]). The

opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist,” and the “issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1<sup>st</sup> Dept 1984]; see also, *Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1<sup>st</sup> Dept 2012]).

### **Plaintiff’s Claim for Discrimination Under the City’s HRL**

Historically, the City’s HRL was interpreted as coextensive with state and federal civil rights laws. However, in 2005, City Council passed the Local Civil Rights Restoration Act of 2005, which revised the City’s HRL to ensure that it would “be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York civil rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed” (Administrative Code § 8-130). In *Williams v New York City Housing Authority*, the First Department summarized the import of these changes:

“the Restoration Act notified courts that (a) they had to be aware that some provisions of the City HRL were textually distinct from its State and federal counterparts, (b) all provisions of the City HRL required independent construction to accomplish the law’s uniquely broad purposes and (c) cases that had failed to respect these differences were being legislatively overruled”

(61 AD3d 62, 68).

As to discrimination related to a perceived disability, the City’s HRL provides:

“It shall be an unlawful discriminatory practice: For an employer or an employee agent thereof, because of the actual or perceived . . . disability . . . to discharge from employment such person; or to discriminate against such person in compensation or in terms, conditions or privileges of employment”

(New York City Administrative Code, § 8-107 [1] [a]).

To establish a perceived disability claim under the City's HRL, a plaintiff must demonstrate "by a preponderance of the evidence that she has been treated less well than other employees because of her [disability]" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 [1st Dept 2009]). While *Williams* dealt specifically with a gender discrimination claim, gender and perceived disability discrimination are coequal under section 8-107 (1) (a) of the City's HRL, so the "less well" standard articulated in *Williams* applies to plaintiff's allegations.

The Second Circuit Court of Appeals, surveying New York caselaw evaluating workplace discrimination claims under the City's HRL after the Restoration Act, sketched the guidelines to be considered when applying this test:

"(1) NYCHRL claims must be analyzed separately and independently from federal and state discrimination claims; (2) the totality of the circumstances must be considered because the overall context in which [the challenged conduct occurs] cannot be ignored"; (3) the federal severe or pervasive standard of liability no longer applies to NYCHRL claims, and the severity or pervasiveness of conduct is relevant only to the scope of damages; (4) the NYCHRL is not a general civility code, and a defendant is not liable if the plaintiff fails to prove the conduct is caused at least in part by discriminatory or retaliatory motives, or if the defendant proves the conduct was nothing more than petty slights or trivial inconveniences; (5) while courts may still dismiss truly insubstantial cases, even a single comment may be actionable in the proper context, (6) summary judgment is still appropriate in NYCHRL cases, but only if the record establishes as a matter of law that a reasonable jury could not find the employer liable under any theory"

(*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 113 [2d Cir 2013]

[reversing the trial court's dismissal of plaintiff's gender discrimination and retaliation claims under the City's HRL] [quotation marks and citation omitted]).

The Court of Appeals, with specific reference to disability discrimination claims, has specifically acknowledged that the City's HRL provides protections greater than those available under parallel discrimination laws (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]). Jacobsen noted that "because the City HRL provides broader protections against

disability discrimination than the State HRL, the City HRL unquestionably forecloses summary judgment where the employer has not engaged in a good faith interactive process regarding a specifically requested accommodation” (*id.* at 837-838). Moreover, summary judgment must be denied as there is a question of fact as to whether “discrimination was one of the motivating factors” for NYU’s firing of plaintiff (*Melman v Montefiore Medical Center*, 98 AD3d 107, 127 [1st Dept 2012] [internal quotation marks and citation omitted]).

Initially, NYU argues that plaintiff’s complaint must be dismissed because plaintiff does not have a disability or a perceived disability. However, plaintiff’s testimony, in May 2014, that Ake told her that she would be out for longer than 3-weeks with a double mastectomy because she would need chemotherapy shows that there is a question of fact as to whether Ake believed that plaintiff had cancer. The City HRL defines a disability as “any physical, medical, mental or psychological impairment” (Administrative Code § 8-102 [16] [a] [1]). The First Department has held that breast cancer is a disability under the City’s HRL (*see Phillips v City of New York*, 66 AD3d 170, 184 [1st Dept 2009]; *see also Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 837-838). Thus, there is a question of fact as to whether Ake perceived to plaintiff to have a disability. Moreover, under the broad definition of disability under the City’s HRL, there is a question of fact as to whether Ake perceived a bilateral mastectomy procedure, by itself, to be a physical impairment constituting a disability.

Next, NYU argues that Ake’s alleged comments suggesting that plaintiff would lose her position if she underwent the bilateral mastectomy procedure should not be considered because Ake did not play a role in plaintiff’s termination and that the decision was made by Wray-Williams and Brilliant. However, there is sufficient evidence to raise an issue of fact as to whether Ake played a role in plaintiff’s termination. Such evidence includes: Delfino’s deferral

of questions regarding the double mastectomy and its relation to her employment status to Ake, Ake's participation in August 24, 2014 meeting in which she was effectively fired, Ake's signature on plaintiff's termination letter, and subsequent emails in which Ake discussed terminating plaintiff.

Those subsequent emails show that Ake intended to discuss with plaintiff whether she would agree to resign or whether NYU would terminate her. On August 25, 2014, Ake wrote to Wray-Williams that "I will be calling Tatiana after my 4pm meeting to discuss termination/resignation. I will let you know the outcome." On August 27, 2014, Wray-Williams wrote to Ake, asking, if "[s]he refused to resign?" Indeed, these emails suggest not only that NYU preferred that plaintiff resign, but also that Ake played a role in her firing.

Under the "less-well" test articulated by *Williams*, there is a question of fact as to whether plaintiff was treated less well because of her perceived disability. That is, Ake's alleged comments to plaintiff in May 2014 create an issue of fact as to whether Ake preferred to terminate plaintiff's employment to dealing with possible staffing issues caused by her perceived disability.

The First Department has also suggested that the federal *McDonnell Douglas* "burden-shifting approach" is useful in supplementing the "less well" test in evaluating discrimination claims under the City's HRL (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34-45 [1st Dept 2011], citing *McDonnell Douglas Corp. v Green*, 411 US 792 [1972]). The *McDonnell Douglas* approach:

"initially requires only that the plaintiff make a prima facie showing of membership in a protected class and that an adverse employment action has been taken against [her]. The adverse action must have occurred under circumstances giving rise to an inference of discrimination. Once that minimal showing is made, the burden shifts to the defendant to articulate through competent evidence nondiscriminatory reasons that actually motivated defendant at the time of the

action. If that burden is successfully shouldered then plaintiff must show those reasons to be false or pretextual”

(Bennett, 92 AD3d at 35 [internal quotation marks and citation omitted]).

Here, the *McDonnell Douglas* approach requires the denial of NYU’s motion. Initially, plaintiff makes a *prima facie* showing of perceived disability discrimination under the City’s HRL by raising a question of fact as to whether her firing was motivated, at least in part, by discrimination against a perceived disability. Then, the burden shifts to NYU, which makes a showing that they fired plaintiff for non-discriminatory reasons, namely poor job performance, as typified by the incidents on May 14, 2014, August 2, 2014, and August 20, 2014. Then the burden shifts back to the plaintiff, which she shoulders by raising a question of fact that NYU’s proffered non-discriminatory reasons were pretextual. Plaintiff does so by submitting, among other things, her positive performance reviews, as well as her termination letter, which suggested that she had not passed her probationary period, when that period had apparently ended three months before her firing. Thus, as there is a question of fact as to whether discrimination against a perceived disability played a role in plaintiff’s firing, the branch of NYU’s motion seeking dismissal of plaintiff’s discrimination claim must be denied.

#### **Plaintiff’s Claim for Retaliation Under the City’s HRL**

As to retaliation, section 8-107 (7) of the City’s HRL prohibits employers from “retaliate[ing] or discriminat[ing] in any manner because such a person ... has opposed any practice forbidden under this chapter. The Restoration Act amended the City HRL to further specify what retaliation under the City’s HRL:

“The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, ... or in a materially adverse change in the terms and conditions of employment, ... provided however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity”

(Restoration Act § 3 [amending the City's HRL § 8-107 [7]).

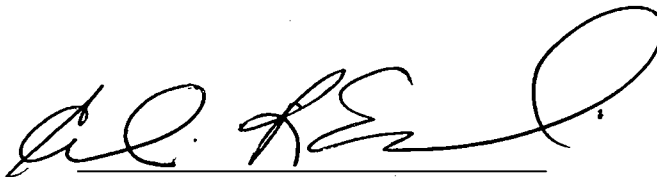
Here, NYU moves for summary judgment dismissing plaintiff's claim for retaliation and plaintiff fails to address her retaliation claim in her opposition papers. Thus, plaintiff has abandoned her claim for retaliation, and the branch of NYU's motion seeking dismissal of this claim must be granted (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address a claim indicates an intention to abandon it as a basis of liability]).

### CONCLUSION

Accordingly, it is

ORDERED that defendant NYU Hospital's motion for summary judgment is granted only to the extent that plaintiff's cause of action for retaliation is dismissed.

Dated: March 27, 2018



Hon. Carol Robinson Edmead, J.S.C

**HON. CAROL R. EDMead**  
J.S.C.