

<b>Fusco v HSBC Bank USA, N.A.</b>
2018 NY Slip Op 31748(U)
July 23, 2018
Supreme Court, New York County
Docket Number: 159546/15
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 29

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ANGELIQUE FUSCO,

Index No.: 159546/15

Plaintiff,

- against -

DECISION/ORDER

HSBC BANK USA, N.A.,

Defendant.  
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**Kalish, J.:**

In this action, plaintiff Angelique Fusco (Fusco) is suing her former employer, defendant HSBC Bank USA, N.A. (HSBC), to recover damages for alleged employment discrimination, claiming that defendant unlawfully discriminated against her on the basis of disability and retaliated against her for complaining about discrimination in violation of the New York State Human Rights Law (Executive Law §§ 296 [1] and [7]) (NYSHRL) and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] §§ 8-107 [1] and [7]) (NYCHRL). HSBC now moves pursuant to CPLR 3212 for summary judgment dismissing the complaint.<sup>1</sup> For the reasons stated herein, the motion is granted.

**BACKGROUND**

Plaintiff was employed by HSBC from June 2005 to June 1, 2011, when she left for other employment (Complaint, ¶ 14; *see* Employment Application, Ex. O to Malley Affirmation in Support of Defendant’s Motion (Malley Aff.), and again from December 2011 to January 2015,

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<sup>1</sup>The court notes that oral argument for this motion was scheduled on April 17, 2018. Neither side appeared for oral argument, however, and the motion was marked submitted without argument.

when she resigned. After she had left in June 2011, Fusco was rehired in December 2011 as a “Premier Mortgage Consultant,” (PMC) responsible for selling mortgages at HSBC branches in Manhattan, and held that position until she resigned. *See* Affidavit of Angelique Fusco (Fusco Aff.), ¶ 2; Affidavit of Marjan Moini (Moini Aff.), ¶ 5. In April or May 2013, plaintiff was assigned to work at the HSBC branch located at 96<sup>th</sup> Street and Amsterdam Avenue in Manhattan (96<sup>th</sup> St. branch). Fusco Aff., ¶ 4; Complaint, ¶ 17; Excerpt of Plaintiff’s Deposition (Pl. Dep.), Ex. D to Malley Aff., at 67. She was the only PMC assigned to the 96<sup>th</sup> St. branch. Pl. Dep. at 70. Anthony Masseria (Masseria), a Vice President - Mortgage Sales Manager for HSBC, was her direct supervisor. Affidavit of Masseria (Masseria Aff.), ¶ 7; Affidavit of David Gates (Gates Aff.), ¶ 5. Marjan Moini (Moini) was the branch manager for the 96<sup>th</sup> St. branch, as well as another branch located at 104<sup>th</sup> Street and Broadway (the Morningside branch). Pl. Dep. at 72; Moini Aff., ¶ 2; Masseria Aff., ¶ 9.

Plaintiff alleges that she is disabled, within the meaning of the NYSHRL and the NYCHRL, as a result of abdominal and back conditions. Complaint, ¶¶ 61, 82. Prior to her assignment to the 96<sup>th</sup> St. branch, plaintiff underwent surgery for abdominal pain and was out of work from March 28, 2013, to April 4, 2013. Fusco Aff., ¶ 3; Complaint, ¶ 16. In late May of 2013, plaintiff was diagnosed with a herniated disc, and was out of work on medical leave from August 22, 2013 to October 6, 2013. Complaint, ¶ 22; Fusco Aff., ¶¶ 5, 7. Plaintiff had back surgery in November 2013 and was on medical leave from November 18, 2013, to December 10, 2013. Complaint, ¶ 24; Fusco Aff., ¶ 8.

When she returned to work after back surgery, plaintiff spoke to Masseria about an accommodation for her post-surgery recovery and requested that she be allowed to start late two

days a week to permit her to go to physical therapy appointments and that she be allowed to work from home two days a week. Masseria Aff., ¶ 12; Fusco Aff., ¶ 9. Masseria granted both requests, agreeing that plaintiff could arrive at 10:00 a.m. on two days and could work from home two days a week. This arrangement was confirmed in an email exchange that plaintiff had with Moini on January 15, 2014, in which Moini stated that “[i]t would be good if [plaintiff] could spend three days at 96<sup>th</sup> Street” and asked plaintiff if she could be in at 8:15 a.m. to “do morning huddles to motivate the team.” See Email chain, Ex. 4 to Affirmation of Matthew Blit in Opposition (Blit Aff.). Plaintiff responded that she had “no problem” spending three days a week at the branch, and advised Moini that she would work Mondays, Wednesdays and Thursdays, and had physical therapy two mornings a week but could do the Thursday huddles. *Id.*; Moini Aff., ¶¶ 20-21; Fusco Aff., ¶ 9. Plaintiff later advised Moini that her physical therapy schedule always included Mondays and alternated between Wednesdays and Thursdays, so the days she could attend the morning huddles would vary. See Emails dated January 16, 2014, Ex. 4 to Blit Aff.

According to plaintiff’s testimony, she initially got along with Moini, but started having problems with Moini after she returned from surgery in late 2013 (Pl. Dep. at 67, 99), when Moini pushed her to be in the branch office more often and started redirecting leads that came into the 96<sup>th</sup> St. branch to another PMC, Sharon Trebowski (Trebowski). Trebowski worked in the Morningside branch but took over plaintiff’s responsibilities at the 96<sup>th</sup> St. branch while plaintiff was out during November and December 2013. *Id.* at 71-74; Fusco Aff., ¶ 12; Moini Aff., ¶ 18. Plaintiff also claims that despite the agreed-upon accommodation to her schedule, Moini frequently emailed her to ask where she was or if she would be in, even when plaintiff had

already informed her that she would be out. Fusco Aff., ¶ 10.

Documents submitted by both sides show that Moini emailed plaintiff on about eight occasions from February 2014 through November 2014, to ask if she would be coming in to the branch office: On Thursday, February 20, 2014, Moini wrote to ask if plaintiff would be at the branch that day; on April 15, 2014, Moini wrote to say she did not see plaintiff at the branch on the previous day, Monday, and asked plaintiff to let her know if she would be in on her scheduled days, because it was important that she participate in the morning huddles to encourage the team; on Thursday, June 19, 2014, Moini sent an email to plaintiff in the afternoon, asking if she would be in the branch that day, noting that plaintiff had said she would be late. Moini also sent emails on September 17, October 14, November 5, and November 7, 2014, asking plaintiff if she would be in. On November 14, 2014, Moini wrote to check whether plaintiff would be at the 96<sup>th</sup> St. branch the following week with her “regular schedule, Monday through Thursday.” *See* Emails, Exs. J-L, N to Malley Aff., Ex. 5 to Blit Aff. Moini acknowledged that she sent the occasional email, when she did not know or forgot whether plaintiff would be in, because she needed to know who would be present in case a customer in the bank wanted to speak to someone about a mortgage loan. Moini Aff., ¶¶ 14-15.

On May 15, 2014, plaintiff had a conversation with Masseria during a corporate messaging system “sametime chat” in which she complained about Moini. Masseria told her that Moini wanted her to be present at the branch office five days a week and to run a huddle. Plaintiff said she could not come in five days a week but agreed to work four days in the branch office while still coming in late two days due to physical therapy. *See* Sametime Chat, Ex. 6 to Blit Aff. Plaintiff’s schedule then changed to working one day a week at home and arriving

about 10:00 a.m. on two days a week.

In or around late October 2014, plaintiff asked Masseria to transfer her to another office to get away from Moini. Fusco Aff., ¶ 16; Masseria Aff., ¶ 20. She also spoke to David Gates (Gates), Head of Mortgage Originations and Sales at HSBC, to complain about Moini's request that plaintiff work five days a week in the branch office. Fusco Aff., ¶ 17; Gates Aff., ¶¶ 12-15. Masseria subsequently offered plaintiff a transfer to a branch located at Fifth Avenue and 21<sup>st</sup> Street, which plaintiff declined because it was "trailing" in its sales and she did not think it would be better for her. Masseria Aff., ¶¶ 21-22; *see* Email, dated November 3, 2014, Ex. I to Malley Aff.

Plaintiff's performance as a PMC was measured, in part, against sales goals established for each year. Masseria Aff., ¶ 14. In 2012 and 2013, the target goal for plaintiff's sales group was about \$2 million in closed loans each month. *Id.*; *see* Performance Improvement Plan (PIP), Ex. F to Malley Aff. According to Masseria, he knew that plaintiff, after she returned from medical leave in December 2013, would not be able to meet those goals because she did not have loans in her pipeline, and he waited until April 2014, four months after plaintiff returned to work, to issue the performance improvement plan to address her lagging sales. Masseria Aff., 15-16. As he described it, the PIP was not a form of discipline, but was designed to help her meet performance goals, including the targets for sales of loans. *Id.*, ¶ 16; *see* PIP, Ex. F to Malley Aff. It indicated that plaintiff needed to fund \$2 million by May 16, 2014. *Id.*

In August 2014, when her sales goals were not met, plaintiff was issued a written warning, advising her that she must show "immediate and sustained improvement." *See* Written Warning, dated August 12, 2014, Ex. G to Malley Aff. When she did not meet her goals for

August or September 2014, she was given a final written warning in October 2014. *See* Final Written Warning, dated October 27, 2014, Ex. H to Malley Aff. In 2014, plaintiff achieved about seven percent of her goals for the first two quarters, about 13 percent for the third quarter, and about 37 percent for the fourth quarter, or an average of 16 percent of her sales goal for the year. *Masseria Aff.*, ¶ 17.

On November 24, 2014, plaintiff filed a complaint with HSBC's human resources department, alleging that she was being discriminated against and harassed based on her disability and retaliated against for requesting an accommodation and taking disability leave. *See* November 24 Complaint, Ex. P to Malley Aff. She complained that Moini was harassing her with emails inquiring about her availability and was giving leads to a PMC in another branch. She complained further that Masseria denied her a transfer to another branch and gave her a final written warning in retaliation. Her complaint was investigated in December 2014 by HSBC Employee Relations Specialist Robert Seymour (Seymour), who concluded that there was no evidence of harassment or discrimination based on plaintiff's disability. *See* Affidavit of Seymour (Seymour Aff.), ¶¶ 2, 9, 10; Record of Investigation, Ex. 9 to Blit Aff.

Shortly after she filed her complaint with HSBC, on or about November 26, 2014, plaintiff went out on medical leave and did not return to work before submitting her resignation in January 2015. She applied for short-term disability in December 2014 which was denied on the basis that the medical evidence she presented did not establish that she could not perform her job. *See* Letter dated December 2, 2014, Ex. Q to Malley Aff. While she was out on leave, plaintiff was offered and accepted employment at another bank, and started there on December 29, 2014, prior to resigning from HSBC. *See* Employment Agreement, Ex. T, and Employment

Record, Ex. U to Malley Aff. Plaintiff sent her letter of resignation to Masseria on January 5, 2015, giving HSBC two weeks' notice. See Email, Ex. V to Malley Aff.

### DISCUSSION

On a motion for summary judgment, the moving party has the initial burden of demonstrating its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to show the absence of any material issues of fact. See CPLR 3212 (b); *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If such showing is made, the burden shifts to the opposing party to demonstrate, also by submitting admissible evidence, that genuine material issues of fact exist which require a trial of the action. See *Jacobsen*, 22 NY3d at 833; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562.

The evidence must be viewed in a light most favorable to the nonmoving party (see *Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978). The opposing party must show, however, “the existence of a bona fide issue raised by evidentiary facts.” *Id.*; see *IDX Capital, LLC v Phoenix Partners Group LLC*, 83 AD3d 569, 570 (1<sup>st</sup> Dept 2011), *affd* 19 NY3d 850 (2012); *Rodriguez v City of New York*, 142 AD3d 778, 788 (1<sup>st</sup> Dept 2016). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to raise a material question of fact. *Zuckerman*, 49 NY2d at 562; see *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 448 (2016).

Because direct evidence of an employer's discriminatory intent is often unavailable, courts urge caution in granting summary judgment in favor of employers in employment discrimination cases. See *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997); *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 43-44 (1<sup>st</sup> Dept 2011); *Klings v New York State Ofc. of Court Admin.*, 2010 WL 1292256, 2010 US Dist LEXIS 33434, \*14-15 (ED NY 2010). Summary judgment nonetheless remains available in discrimination cases, even under the more liberal NYCHRL, and is appropriate when "the evidence of discriminatory intent is so slight that no rational jury could find in plaintiff's favor." *Spencer v International Shoppes, Inc.*, 2010 WL 1270173, \*5, 2010 US Dist LEXIS 30912, \*16 (ED NY 2010) (internal quotation marks and citation omitted); see e.g. *Fruchtman v City of New York*, 129 AD3d 500 (1<sup>st</sup> Dept 2015); *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127-128 (1<sup>st</sup> Dept 2012); *Bennett*, 92 AD3d at 45-46; see also *Campbell v Cellco Partnership*, 860 F Supp 2d 284, 294 (SD NY 2012).

Plaintiff alleges six causes of action:

1. Discrimination based upon Disability in Violation of the NYSHRL
2. Failure to Provide a Reasonable Accommodation in violation of the NYSHRL
3. Retaliation in Violation of the NYSHRL
4. Discrimination based upon Disability in Violation of the NYCHRL
5. Failure to Provide a Reasonable Accommodation in violation of the NYCHRL
6. Retaliation in Violation of the NYCHRL

#### **NYSHRL and NYCHRL Disability Discrimination (First and Fourth Causes of Action)**

Under the NYSHRL and the NYCHRL, it is unlawful for an employer to fire or refuse to hire or otherwise discriminate against an employee in the terms and conditions of employment

because of, as pertinent here, the employee's disability. Executive Law § 296 (1) (a); Administrative Code § 8-107 (1) (a). The statutes also prohibit an employer from retaliating against an employee who has opposed or complained about unlawful discriminatory practices. Executive Law § 296 (7); Administrative Code § 8-107 (7). A "disability," under the NYSHRL, is defined as "a physical, mental or medical impairment . . . 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 Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 883-884 (2013); *Matter of Antonsen v Ward*, 77 NY2d 506, 513 (1991); *Phillips v City of New York*, 66 AD3d 170, 178 (1<sup>st</sup> Dept 2009); *Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 (1<sup>st</sup> Dept 2006). The NYCHRL defines "disability" more simply as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." Administrative Code § 8-102 (16) (a); *see Romanello*, 22 NY3d at 885; *Phillips*, 66 AD3d at 181.

Generally, employment discrimination claims brought under the NYSHRL and the NYCHRL, including disability and retaliation claims, are analyzed pursuant to the burden-shifting framework established 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.*) (Title VII). *See Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270 (2006); *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 n 3 (2004); *Melman*, 98 AD3d at 113. Under *McDonnell Douglas*, to establish a prima facie case of employment discrimination, a plaintiff must demonstrate that she is a member of a statutorily protected class, that she was qualified for the position she held, and that she was terminated or

subjected to adverse employment actions, or, under the NYCHRL, was treated less well than other employees under circumstances giving rise to an inference of discrimination. *See Stephenson*, 6 NY3d at 270; *Ferrante*, 90 NY2d at 629; *Melman*, 98 AD3d at 113-114; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 (1<sup>st</sup> Dept 2009). An employee can make a prima facie showing of disability discrimination under either statute “if the employee suffers from a statutorily defined disability and the disability caused the behavior for which the employee was terminated” or otherwise discriminated against in the terms, conditions and privileges of employment. *Jacobsen*, 22 NY3d at 834; *see Matter of McEniry v Landi*, 84 NY2d 554, 558 (1994); *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 147 (1<sup>st</sup> Dept 2009).

If the plaintiff makes the required “minimal” prima facie showing (*see Melman*, 98 AD3d at 115; *Bennett*, 92 AD3d at 35), the burden shifts to the employer to rebut the presumption of discrimination by demonstrating that there was a legitimate, nondiscriminatory reason for its employment decision. If the employer makes that showing, 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; *Melman*, 98 AD3d at 114.

Claims under the NYCHRL must “be analyzed both under the *McDonnell Douglas* framework and the somewhat different ‘mixed-motive’ framework recognized in certain federal cases.” *Melman*, 98 AD3d at 113, citing *Bennett*, 92 AD3d at 41; *see Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 72-73 (1<sup>st</sup> Dept 2017); *Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 495 (1<sup>st</sup> Dept 2014). Under a mixed-motive analysis, once the defendant demonstrates its nondiscriminatory reasons, the burden shifts back to the plaintiff to show that “unlawful discrimination was one of the motivating factors, even if it was not the sole motivating

factor, for an adverse employment decision.” *Melman*, 98 AD3d at 123; *see Bennett*, 92 AD3d at 39; *Williams*, 61 AD3d at 78 n 27.

To prevail on a motion for summary judgment seeking dismissal of an employment discrimination claim under the NYSHRL, “defendants must demonstrate either plaintiff’s failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual.” *Forrest*, 3 NY3d at 305; *see Hamburg*, 155 AD3d at 73; *Bull v Metropolitan Jewish Health Sys., Inc.*, 152 AD3d 639, 640 (2d Dept 2017). Defendants moving for summary judgment on a discrimination claim under the NYCHRL must show “that there is no evidentiary route that could allow a jury to believe that discrimination played a role in the challenged action.” *Bennett*, 92 AD3d at 40; *see Bull*, 152 AD3d at 641; *Cenzon-Decarlo v Mount Sinai Hosp.*, 101 AD3d 924, 927 (2d Dept 2012).

Notwithstanding the plaintiff’s “‘lesser burden of raising an issue as to whether the [adverse employment] action was motivated at least in part by . . . discrimination’” (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514-515 (1<sup>st</sup> Dept 2016), quoting *Melman*, 98 AD3d at 127), “a plaintiff asserting an NYCHRL claim must still establish ‘by a preponderance of the evidence that she has been treated less well than other employees’ due to protected status.” *Julius v Department of Human Resources Admin.*, 2010 WL 1253163, 2010 US Dist LEXIS 33259, \*13 (SD NY 2010), quoting *Williams*, 61 AD3d at 78. Plaintiffs must “do ‘more than cite to their mistreatment and ask the court to conclude that it must have been related to their’” protected status. *Campbell*, 860 F Supp 2d at 296 (citation omitted); *see Hamburg*, 155 AD3d at 81-82; *Dickerson v Health Mgmt. Corp. of Am.*, 21 AD3d 326, 329 (1<sup>st</sup> Dept 2005).

In this case, plaintiff argues that an inference of disability-based discrimination is raised by evidence that she was treated differently before she went out on medical leave in late 2013 and after she returned. Plaintiff's Memorandum of Law in Opposition (Pl. Memo in Opp.), at 10.<sup>2</sup> However, plaintiff presents no direct evidence of discriminatory animus, and "[t]o raise an inference of discrimination in a disparate treatment claim, a plaintiff must show that the employer treated her less favorably than a similarly situated employee outside her protected group." *Gonzalez v New York State Off. of Mental Health*, 26 Misc 3d 1227 (A), 907 NYS2d 100, 2010 NY Slip Op 50282(U), \*11 (Sup Ct, Kings County 2010) (citation omitted); see *Graham v Long Is. R.R.*, 230 F3d 34, 39 (2d Cir 2000); *Melman*, 98 AD3d at 115 n 2. No inference of discrimination arises absent evidence that a similarly situated employee outside plaintiff's protected group "benefitted from terms and conditions of employment that were denied to [plaintiff]." *Matter of Washington County v New York State Div. of Human Rights*, 7 AD3d 895, 896 (3d Dept 2004) (emphasis in original); see *Sims v Trustees of Columbia Univ. in the City of N.Y.*, 2017 WL 5006609, 2017 NY Misc LEXIS 4204, 2017 NY Slip Op 32331(U) (Sup Ct, NY County 2017); *O'Connor v Bank of N.Y.*, 2008 WL 644822, 2008 NY Misc LEXIS 8338, \*33-34, 2008 NY Slip Op 30614(U) (Sup Ct, NY County 2008).

Plaintiff has offered no evidence to show, nor has plaintiff even alleged, that other similarly situated non-disabled employees were treated differently than she was. Nor has she submitted any evidence, direct or circumstantial, to show that being placed on a performance improvement plan or given a final written warning, being denied a transfer to another branch, or

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<sup>2</sup>Plaintiff affirmatively asserts that she has not alleged any hostile work environment claim (Pl. Memo in Opp., at 9), and the court therefore need not address such claim.

not being given a lead (*see* Pl. Memo in Opp., at 10-11) were motivated, even in part, by her disability. Masseria avers, and plaintiff does not dispute, that although plaintiff's sales were lagging from the time she returned in late 2013, Masseria gave plaintiff some months after she returned to improve her performance. Masseria Aff., ¶¶ 15-16. When plaintiff's performance did not improve, and after she failed to meet sales goals throughout 2014, Masseria issued a performance improvement plan and then a final written warning, as he has done with other employees who were not meeting performance goals. Masseria Aff., ¶¶ 15-19. He also avers that, in response to plaintiff's request for a transfer, he offered her one, which she did not want. *Id.*, ¶¶ 20-22. Plaintiff does not dispute that she was not meeting performance goals or that she was offered a transfer.

To the extent that plaintiff argues that Moini discriminated against her based on her disability by redirecting leads, and her poor performance was the result of that, Moini explained, in her affidavit, that when mortgage sales leads come into a particular bank branch, they generally are directed to the PMC at that branch, but there are exceptions, such as when a customer already has an established relationship with another branch, or when a PMC is out of the office or otherwise unavailable. Moini Aff., ¶ 22. Moini also submits a list of mortgage sales leads that originated at the 96<sup>th</sup> St. branch in 2014, which shows that, out of 12 leads, six went to plaintiff, four went to Trebowski, and two went to other PMCs. *Id.*, ¶¶ 24-25, Ex. A. Moini attests, and plaintiff offers nothing to refute, that two of the leads directed to Trebowski came in in late 2013, when plaintiff was on medical leave, and two went to Trebowski because the customers had accounts at the Morningside branch where Trebowski was stationed. As such, the Court finds that HSBC has shown *prima facie* entitlement to judgment as a matter of law, and

Fusco has failed to raise a genuine issue of material fact in response.

**Reasonable Accommodation (Second and Fifth Causes of Action)**

Under the NYSHRL and the NYCHRL, an employer cannot refuse to provide a reasonable accommodation for an employee's known disability, or, under the NYCHRL, where the disability should have been known by the employer. See Executive Law § 296 (3) (a); Administrative Code § 8-107 (15) (a); *Jacobsen*, 22 NY3d at 843; *Watson v Emblem Health Servs.*, 158 AD3d 179, 182 (1<sup>st</sup> Dept 2018); *Matter of Vinikoff*, 83 AD3d at 1162; *Phillips*, 66 AD3d at 180-181. A "reasonable accommodation" under the NYSHRL is one that permits a disabled employee "to perform in a reasonable manner the activities involved in the job . . . [and] do[es] not impose an undue hardship on the business." Executive Law § 292 (21-e); 9 NYCRR § 466.11 (a) (1); see *Jacobsen*, 22 NY3d at 834; *Pimentel*, 29 AD3d at 145. The NYCHRL more simply defines "reasonable accommodation" as "such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business." Administrative Code § 8-102 (18).

As a first step in providing a reasonable accommodation, the NYSHRL and the NYCHRL require an employer to "engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested. The interactive process continues until, if possible, an accommodation reasonable to the employee and employer is reached." *Phillips*, 66 AD3d at 176; see *Jacobsen*, 97 AD3d at 431-432. Employers, however, "are not required to provide a perfect accommodation or the very accommodation most strongly preferred by the employee" (*Noll v International Bus. Machines Corp.*, 787 F3d 89, 95 [2d Cir 2015]), and a disabled employee "does not necessarily have the right to insist upon her preferred

accommodation. The issue is whether the employer has fulfilled its duty to provide a reasonable accommodation that, if accepted, would allow the employee to perform her job.” *Bielski v Green*, 674 F Supp 2d 414, 426 (WD NY 2009); *see Porter v City of New York*, 128 AD3d 448, 449 (1<sup>st</sup> Dept 2015); *Silver v City of N.Y. Dept. of Homeless Servs.*, 115 AD3d 485, 486 (1<sup>st</sup> Dept 2014); *D’Eredita v ITT Corp.*, 370 Fed Appx 139, 141 (2d Cir 2010). As the NYSHRL regulations provide, “[t]he employer has the right to select which reasonable accommodations will be provided, so long as it is effective in meeting the need.” 9 NYCRR § 466.11 (j) (6). Further, where the accommodation offered by the employer was “plainly reasonable,” summary judgment for the employer is warranted. *See Bielski*, 674 F Supp 2d at 425; *see also Wernick v Federal Reserve Bank of N. Y.*, 91 F3d 379, 385 (2d Cir 1986); *Noll*, 2013 US Dist LEXIS 136519, at \*7-8.

To establish that an employer failed to reasonably accommodate an employee’s disability, a plaintiff must show that 1) she was disabled within the meaning of the statutes; 2) the employer had notice of the disability; 3) she could perform the essential functions of her job, with or without a reasonable accommodation; and 4) the employer refused to make a reasonable accommodation. *Vinokur v Sovereign Bank*, 701 F Supp 2d 276, 293-294 (ED NY 2010); *see Romanello*, 22 NY3d at 884; *Pimentel*, 29 AD3d at 145-146; *Noel v BNY-Mellon Corp.*, 2011 WL 4633884, \*2, 2011 US Dist LEXIS 115828, \*4 (SD NY 2011), *affd* 514 Fed Appx 9 (2d Cir 2013).

For purposes of the instant motion, it is not disputed that plaintiff had a disability within the meaning of the statutes, that defendant had notice of her disability, and that she was qualified for her position. It also is not disputed that, after she returned to work following back surgery in

late 2013, plaintiff requested an accommodation from Masseria, who granted her request for a work schedule that allowed her to arrive late two days a week, so that she could go to physical therapy in the morning, and permitted her to work from home two days a week. Plaintiff accepted this accommodation, and does not claim that it was not a reasonable accommodation. *See* Pl. Memo in Opp., at 14. Moini was aware of and acknowledged that this accommodation was granted to plaintiff, and did not object to it. *See* Emails, Ex. 4 to Blit Aff. In May 2014, plaintiff's schedule was modified, when, after Masseria asked her to be present at the branch office five days a week, she insisted that she could not do that, but agreed to come in four days, while still being permitted to arrive late on two days to attend physical therapy. *See* Sametime Chat, Ex. 6 to Blit.

HSBC has made its prima facie showing that plaintiff was provided a reasonable accommodation. In opposition, plaintiff does not argue that she was not provided with a reasonable accommodation when she returned to work in December 2013, but contends that it was rendered "ineffective" by Moini's treatment of her, including email inquiries about when she would be in the branch office, and was "revoked" by Masseria when, in May 2014, he asked her to work five days a week at the branch office, which was then negotiated to four days. She also claims that her request for another accommodation, a transfer to a different branch "to get away from Ms. Moini," was promised but then denied. Pl. Memo in Opp., at 15.

Although plaintiff contends that Masseria revoked her accommodation by requesting her to work five days a week at the branch office, she was not required to do it, and agreed to work four days, while still being allowed to come in late two days. Notably, while plaintiff protested the request that she work five days at the branch office, she offered no medical reason or other

explanation why she could not work that schedule, other than stating “it would kill her.” Further, she agreed to the four-day schedule and does not claim that it was unreasonable. She also offered no medical documentation or other evidence then, or now, to show that her disability required her to work from home, and thus cannot show that defendant refused to provide a reasonable accommodation.

As to plaintiff’s allegation that Masseria failed to accommodate her disability by denying her an opportunity to transfer to another branch, it is undisputed that he did offer her a transfer, which she refused. As stated above, plaintiff is not necessarily entitled to her preferred accommodation, but only to a reasonable accommodation. *See Silver v City of N.Y. Dept. of Homeless Servs.*, 115 AD3d 485, 486 (1<sup>st</sup> Dept 2014). Plaintiff further makes no showing, or even alleges, that her disability, rather than her conflicts with Moini, required a transfer to another branch.

As to her argument that the accommodation granted to her was rendered ineffective by Moini’s inquiries about whether she was coming in to the branch office, even on days when plaintiff had informed Moini that she would be out, evidence shows that Moini made such inquiries by email on approximately eight occasions over about ten months. Moini acknowledged that she occasionally sent emails to plaintiff inquiring about her schedule, at times when she was unaware of or had forgotten a planned absence; and explained that, as branch manager, she wanted to know when PMCs would be present in order to meet the needs of customers who want to speak to a PMC in person. Moini Aff., ¶¶ 12-14. She attests that sending such inquiries to PMCs has been her practice during her time as branch manager, and she sent such inquiries to plaintiff’s predecessors as well. *Id.*, ¶ 15. Plaintiff offers no evidence that

Moini's inquiries reflected anything more than her preference, as branch manager, to have a PMC present in the bank to respond to in-person customer inquiries. Moini's inquiries, in any event, did not interfere with or otherwise change plaintiff's flexible schedule, which Moini did not control, and which plaintiff retained until she resigned.

Evidence shows that the accommodation provided by defendant was "plainly reasonable," and, as plaintiff has not raised an issue of fact as to whether that accommodation was rendered ineffective or revoked or unreasonably modified, defendant is entitled to summary judgment dismissing the failure to accommodate claim. *See Martinez v Mount Sinai Hosp.*, 670 Fed Appx 735, 735-736 (2d Cir 2016). Defendant also has demonstrated that there is no evidentiary route that would allow a jury to believe that disability discrimination played a role in its actions. *See Bull*, 152 AD3d at 641; *Bennett*, 92 AD3d at 40.

### **Retaliation (Third and Sixth Causes of Action)**

To establish a claim of unlawful retaliation under the NYSHRL and the NYCHRL, a plaintiff must show that (1) she engaged in a protected activity; (2) the employer was aware of the activity; (3) the employer took adverse action against the plaintiff, or, under the NYCHRL, the employer's actions disadvantaged plaintiff and were reasonably likely to deter a person from engaging in protected activity; and (4) a causal connection existed between the protected activity and the alleged retaliatory action. *See Forrest*, 3 NY3d at 312-313; *Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740 (2d Dept 2013); *Fletcher v The Dakota, Inc.*, 99 AD3d 43, 51-52 (1<sup>st</sup> Dept 2012); *Rozenfeld v Department of Design & Constr. of City of N.Y.*, 875 F Supp. 2d 189, 207-208 (ED NY 2012). "A causal connection can be established directly, through evidence of retaliatory animus, such as verbal or written remarks, or indirectly, by showing that the

adverse action closely followed in time the protected activity.” *Baez v New York State Ofc. of Temporary & Disability Assistance*, 2010 WL 4682809, 2010 NY Misc LEXIS 5525, \*19, 2010 NY Slip Op 33177(U) (Sup Ct, NY County 2010) (citations omitted); *see Calhoun v County of Herkimer*, 114 AD3d 1304, 1307 (4<sup>th</sup> Dept 2014); *Hicks v Baines*, 593 F3d 159, 170 (2d Cir 2010).

““[P]rotected activity” refers to action taken to protest or oppose statutorily prohibited discrimination.”” *Sharpe v MCI Communs. Servs.*, 684 F Supp 2d 394, 406 (SD NY 2010), quoting *Bryant v Verizon Communications Inc.*, 550 F Supp 2d 513, 537 (SD NY 2008); *see Forrest*, 3 NY3d at 313; *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1<sup>st</sup> Dept 2010). “[A]mbiguous complaints that do not make the employer aware of alleged discriminatory conduct’ and complaints ‘merely of unfair treatment generally’ also do not constitute protected activity.” *Reid v Macy’s N.E. at Herald Sq., N.Y. 10001 Under Federated Corp.*, 2013 WL 1808087, 2013 NY Misc LEXIS 1702, \*9-10, 2013 NY Slip Op 30829(U) (Sup Ct, NY County 2013), quoting *International Healthcare Exch., Inc. v Global Healthcare Exch., LLC*, 470 F Supp 2d 345, 357 (SD NY 2007) and *Aspilaire v Wyeth Pharms., Inc.*, 612 F Supp 2d 289, 308-309 (SD NY 2009); *see Pezhman v City of New York*, 47 AD3d 493, 494 (1<sup>st</sup> Dept 2008).

Plaintiff does not clearly identify what protected activity, prior to filing a formal complaint on November 24, 2014, and what adverse or disadvantageous actions, form the basis for her retaliation claim, but her apparent claim is that she was retaliated against by Moini’s email inquiries and directing leads to another PMC; and by Masseria’s request that she work five days a week, failure to provide her support in having two loans reviewed, and failure to transfer her to another branch. The complaint alleges that, in or around May 2014, she complained to

Masseria that Moini was denying her a reasonable accommodation by sending her emails inquiring about her schedule, expecting her to be at early meetings despite her accommodation allowing her to start at 10:00 a.m. (Complaint, ¶¶ 34-35, 50); complained to Katherine Walczak (who is not otherwise identified) that Moini was “improperly redirecting leads” (*Id.*, ¶ 31) and met with Walczak “to explain her concerns regarding her treatment after returning from surgery” (*Id.*, ¶ 36); and complained to Masseria about being placed on a PIP and issued a final written warning in October 2014. *Id.*, ¶¶ 37-38. The complaint also alleges that, in October 2014, she spoke to Gates about the “continued discrimination” and complained that she was inappropriately being told to “sit in the branch office four to five days a week.” *Id.*, ¶ 45. She also alleges that she complained to Masseria when, in or around November 2014, she learned that he had transferred a less senior and less qualified employee to a 58<sup>th</sup> Street branch (*Id.*, ¶ 47), and that, in October and November 2014, “management failed to support her in the performance of her duties, despite having promised to provide her with reasonable accommodations.” *Id.*, ¶ 52.

Even assuming, without deciding, that plaintiff’s complaints could be considered protected activity (*but see Witchard v Montefiore Med. Ctr.*, 103 AD3d 596, 596 [1<sup>st</sup> Dept 2013] [request for a reasonable accommodation is not a protected activity]) and that she was subjected to adverse or disadvantageous actions (*but see Gaffney v City of New York*, 101 AD3d 410, 410 [1<sup>st</sup> Dept 2012] [disciplinary memos, threats of unsatisfactory ratings not adverse actions]; *Mejia v Roosevelt Is. Med. Assoc.*, 95 AD3d 570 [1<sup>st</sup> Dept 2012] [reprimands and excessive scrutiny not generally considered adverse employment actions]), she cannot show a causal connection between the alleged protected activity and the alleged retaliatory acts. Most of the alleged retaliatory actions following her complaints in May 2014 and later, such as Moini’s inquiries, and

the written warnings, were a continuation of the same conduct that caused her to complain, which “does not constitute retaliation because, in that situation, there is no causal connection between the employee’s protected activity and the employer’s challenged conduct.” *Melman*, 98 AD3d at 129; *see Gaffney*, 101 AD3d at 411.

As to her complaint that she was being required to work four to five days in the branch office in retaliation for requesting an accommodation, she was not required to work five days and agreed to work four. *See also Witchard*, 103 AD3d at 596. The alleged retaliatory denial of a transfer to the 58<sup>th</sup> Street branch is completely unsupported by evidence, and, in any event, she was offered a transfer to another branch which she declined. Her claims that she was not fully supported by management, which are vague at best, also do not demonstrate an adverse or disadvantageous action sufficient to support a retaliation claim.

Plaintiff also claims that, in retaliation for filing her November 24, 2014 complaint, she was constructively discharged when defendant’s failure to reasonably accommodate her or remedy its discriminatory and retaliatory practices became intolerable. Complaint, ¶ 58. To establish a constructive discharge claim, plaintiff must “produce evidence that her employer ‘deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign.’” *Short v Deutsche Bank Sec., Inc.*, 79 AD3d 503, 504 (1<sup>st</sup> Dept 2010) (citation omitted); *see Morris v Schroder Capital Mgt. Intl.*, 7 NY3d 616, 621-622 (2006); *Polidori v Societe Generale Group*, 39 AD3d 404, 405 (1<sup>st</sup> Dept 2007); *Matter of Gold Coast Rest. Corp. v Gibson*, 67 AD3d 798, 799 (2d Dept 2009). “‘Deliberate’ is more than ‘a lack of concern’; ‘something beyond mere negligence or ineffectiveness.’” *Polidori*, 39 AD3d at 405 (citation omitted).

“‘[M]ere dissatisfaction with work assignments, unfair criticism, or working conditions that can be categorized as unpleasant, do not constitute a constructive discharge.’” *Lambert v Macy’s E., Inc.*, 34 Misc 3d 1228(A), 2010 WL 8434889, \*16, 2012 NY Misc LEXIS 6721, \*\*\*38 (Sup Ct, Kings County 2010) (citations omitted), *affd* 84 AD3d 744 (2d Dept 2011); *see Ehmann v Good Samaritan Hosp. Med. Ctr.*, 90 AD3d 985, 986 (2d Dept 2011) (formal verbal and written warnings criticizing plaintiff’s job performance and suggesting improvements did not amount to constructive discharge); *Hernandez v Central Parking Sys. of N.Y., Inc.*, 2008 NY Misc LEXIS 2228 (Sup Ct, Bronx County 2008), *affd in part and modified in part* 63 AD3d 411 (1<sup>st</sup> Dept 2009) (allegations that plaintiff was transferred to less desirable location and continued to receive harassing calls from supervisor insufficient to sustain constructive discharge claim). Here, even when the evidence is viewed in a light most favorable to plaintiff, the alleged discriminatory and retaliatory actions, and defendant’s response, fail to support a finding that defendant deliberately and intentionally made plaintiff’s working conditions so intolerable that a reasonable person would feel compelled to resign.

To the contrary, after plaintiff filed her complaint on November 24, defendant started an investigation within days, which continued while she was out on medical leave. Notwithstanding plaintiff’s dissatisfaction with defendant’s response to her complaint, an employer’s “‘ineffective or even incompetent . . . handling of the matter,’ . . . ‘does not rise to the level of deliberate action.’” *Adams v Festival Fun Parks, LLC*, 560 Fed Appx 47, 50 (2d Cir 2014), quoting *Whidbee v Garzarelli Food Specialties, Inc.*, 223 F3d 62, 74 (2d Cir 2000); *see Matter of Gold Coast Rest. Corp.*, 67 AD3d at 799; *Pugni v Reader’s Digest Assn., Inc.*, 2007 WL 1087183, \*25, 2007 US Dist LEXIS 26284, \*74-75 (SD NY 2007). Moreover, “[u]nless conditions are beyond

ordinary discrimination, a complaining employee is expected to remain on the job while seeking redress.” *Poolt v Brooks*, 38 Misc 3d 1216(A), 2013 WL 323253, \*9, 2013 NY Misc LEXIS 265, \*23 (Sup Ct, NY County 2013) (internal quotation marks and citation omitted). Plaintiff instead sought and accepted other employment while the investigation was ongoing, and tendered her resignation to defendant only after she started working at her new job. No reasonable jury thus could find that, in the days between her November 24 complaint and her medical leave starting on November 26, 2014 and subsequent resignation, defendant created an intolerable work environment for plaintiff.

### CONCLUSION

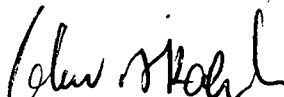
Accordingly, it is

ORDERED that the motion by defendant HSBC Bank USA, N.A. pursuant to CPLR 3212 for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly, with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs.

Dated: July 23, 2018

ENTER:



HON. ROBERT D. KAISIGH  
J.S.C.