

**Nelson v New York City Tr. Auth.**

2019 NY Slip Op 30693(U)

March 11, 2019

Supreme Court, New York County

Docket Number: 160417/13

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 2

\_\_\_\_\_  
KE'ANDREA NELSON,

Plaintiff,

- against -

NEW YORK CITY TRANSIT AUTHORITY and  
MTA BUS COMPANY,

Defendants.

**DECISION/ORDER**

Ind. No. 160417/13

Mot. Seq. No. 002

\_\_\_\_\_  
**HON. KATHRYN E. FREED, J.S.C.**

The following documents, filed with NYSCEF, have been considered in determining this motion: 34-82.

In this employment discrimination action, plaintiff Ke'Andrea Nelson (Nelson) alleges she was subjected to a hostile work environment and disparate treatment based on her race, gender, and disability, and was retaliated against for complaining about discrimination, in violation of the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] §§ 8-107 [1] and [7]) (NYCHRL). Defendants New York City Transit Authority (NYCTA) and MTA Bus Company (MTA Bus) move for partial summary judgment dismissing certain claims of discriminatory and retaliatory "disciplinary and other employment actions." See Defendant's Memorandum of Law in Support of Motion for Partial Summary Judgment (Def. Memo), at 2.

**FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff Nelson, an African-American woman diagnosed with bipolar disorder, was hired by MTA Bus as a bus operator in July 2008 and, after completing training, was assigned to the LaGuardia Bus Depot (LaGuardia Depot) in Queens. Plaintiff is a member of the Transit Workers Union, Local 100 (TWU or the Union). NYCTA and MTA Bus (collectively, MTA Bus) are public benefit corporations operating transportation facilities in New York City. MTA Bus was created in 2005 to operate bus routes formerly run by private companies (Finnegan Dep., Ex. C to Efron Affirmation in Support of Motion [Efron Aff.], at 13-14), and operates the LaGuardia Depot.

At all times relevant to the complaint, Chris Tortora (Tortora) was General Superintendent of Transportation at the LaGuardia Depot, and supervised all the dispatchers and bus operators. He reported to the Assistant General Manager who, for some of the relevant period, was Jacqueline Bruce (Bruce). Robert Finnegan (Finnegan) is Senior Director of Labor Relations for MTA Bus, and has held that position since January 2012. Finnegan Dep at 7-8.

Plaintiff attests that from the time she started working at the LaGuardia Depot, she was discriminated against because of her race, gender, and disability, by being treated less well than other employees and subjected to ongoing offensive race-, gender-

, and disability-based comments and conduct of supervisors and co-workers, which created a hostile work environment. See Nelson Affidavit in Opposition to Motion (Nelson Aff.), ¶¶ 2-4, 11-22. Plaintiff made repeated complaints about the discriminatory treatment, including numerous written complaints to Tortora and other managers, to Labor Relations and EEO offices, and to the Union, beginning in May and June 2011 and continuing into 2016. See e.g. Complaints, Exs. B, D, F-K, Q, X to Nelson Aff.; Tortora Dep., Ex. B to Efron Aff., at 77-78, 80, 81. In February 2012, she also commenced a lawsuit in federal court in New York, which was later withdrawn so that she could bring the instant action. Nelson Aff., ¶ 47; see Complaint, Ex. L to Nelson Aff.

Plaintiff was diagnosed with bipolar disorder prior to her employment with MTA Bus, and notified MTA Bus of her condition, which is treated with medication, in August 2010, in connection with a request for leave under the Family and Medical Leave Act (FMLA). See FMLA Application, Ex. F to Efron Aff.<sup>1</sup> After she submitted her FMLA application, plaintiff was sent for a medical examination, and was permitted to continue working as a bus operator as long as she took her medication. See Letter dated Aug. 18, 2010, Ex. G; Nelson Dep., Ex. A, at 244.

Pursuant to applicable law and regulations (see Vehicle and

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<sup>1</sup>Subsequent cites to exhibits attached to the Efron Affirmation will be identified simply as Ex. \_\_\_.

Traffic Law § 509-g; 15 NYCRR §§ 6.1 et seq.), MTA Bus bus operators are required to undergo a medical examination every other year to determine whether they are fit to drive a bus. See Finnegan Dep. at 30. In April 2011, MTA Bus, pursuant to a Memorandum of Understanding, agreed that the medical services provided to its employees, including medical assessment and evaluation services, would be provided by the NYCTA. See Memorandum of Understanding, Ex. J. MTA Bus subsequently adopted the medical standards used by the NYCTA to evaluate employees' medical eligibility to work or return to work, which were stricter than those previously used by MTA Bus. Finnegan Dep. at 28. The NYCTA medical standards provide, among other things, that bipolar disorder, whether treated or untreated, as well as some other conditions, disqualified employees from four public safety sensitive positions, including bus operator. See NYCTA Medical Standards 1998, Ex. K. The medical standards further provide that bipolar disorder, when treated, is acceptable for other titles. *Id.*

In February 2012, following the adoption of the NYCTA medical standards, plaintiff, after a medical examination which initially appeared to have cleared her to return to work, was found to be medically unqualified for her position as a bus operator based on her bipolar disorder. See Request for Medical Examination of Employee, Ex. I; Nelson Aff., ¶ 48; Tortora Dep.

at 185-187. Plaintiff was reassigned to work as a cleaner/helper in February 2012, and continued to work at the LaGuardia Depot. She attests that she continued to experience discrimination and a hostile work environment, and continued to complain about the discriminatory treatment. Nelson Aff., ¶¶ 53-55, 57-59.

The Union challenged MTA Bus's authority to unilaterally implement the new medical standards without union involvement, and challenged the impact on current employees previously diagnosed with bipolar disorder or other disqualifying conditions who were reclassified. See Arbitration Award dated May 21, 2013, Ex. L, at 3. An arbitrator, after a hearing, found that MTA Bus was so authorized. He also directed that current employees affected by the change could be reassigned to cleaner/helper positions but were to retain their bus operator salaries. *Id.* at 5-6.

Finnegan testified at his deposition that, after the new medical standards were implemented, the NYCTA medical evaluation centers (MACs) informed MTA Bus which employees were disqualified based on medical conditions. Finnegan Dep. at 30. He testified that employees other than plaintiff also were medically disqualified from the bus operator position following the adoption of the NYCTA medical standards, as a result of bipolar disorder or other conditions, and had to be similarly accommodated. *Id.* at 30, 33. Plaintiff, while recognizing that

the arbitration decision meant that MTA Bus could reassign her, claims that her removal from the bus operator position in February 2012 was retaliation for filing a lawsuit weeks earlier. Nelson Aff., ¶¶ 49-51.

On or about November 6 or 7, 2012, plaintiff was charged with "insubordination" and "dereliction of duty," and given a 20-day suspension, based on an incident the previous day when she was allegedly away from her assigned outdoor post and refused to leave the premises when told to by Bruce. See Disciplinary Action Report, Ex. N. Plaintiff disputed the allegations and appealed the Step I decision to suspend her. *Id.* Plaintiff also submitted a written complaint in connection with the incident and Bruce's "abuse of power, favoritism, discrimination," asserting that she was being singled out and harassed by Bruce for doing things that other employees were not reprimanded for, and stating that Bruce wrongly accused her of lying. See Memorandum dated November 5, 2012, Ex. M.

In early January 2013, plaintiff was charged with disciplinary violations for two separate incidents occurring on December 26 and 28, 2012. On January 2, 2013, plaintiff was charged with "gross misconduct" following allegations by a co-worker that, on December 26, 2012, she told other employees at the LaGuardia Depot that she would "take 12 drivers out with her." See Memo from Jerry Greenhaus, Ex. O; Disciplinary Action

Report, Ex. P. In addition, she was charged with insubordination for reporting to the LaGuardia Depot on December 28, 2012, when she had been directed to report to the College Point Depot. *Id.* On or about December 26, 2012, an "Access Control Alert" was posted in several places at the LaGuardia Depot, with a photo showing plaintiff, stating she was not allowed on the property. Tortora Dep. at 177-179. Tortora testified at his deposition that he did not recall either incident and may not have been at work, and had no knowledge of plaintiff being directed not to report to the LaGuardia Depot at that time. *Id.* at 170-172.

At a Step I hearing on January 3, 2013, at which Bruce was the hearing officer, the charges against plaintiff for both the December 26 and December 28 incidents were sustained, as was the penalty of dismissal. Disciplinary Action Report, Ex. P. She was, Tortora testified, removed from service that day, January 3, 2013, a decision he made after conferring with Bruce. Tortora Dep at 173, 175. According to Tortora, the charges and penalty of dismissal were upheld at a Step II hearing, and plaintiff then appealed the Step II decision. *Id.*

An arbitration hearing was held on the charges related to the November 2012 incident and the December 26, 2012 incident on February 6 and March 21, 2013. By decision dated April 16, 2013, the arbitrator found, with respect to the November 2012 incident, that plaintiff was not derelict in her duty but was insubordinate

in that she did not "initially comply" with Bruce's order to go home. He also found, as to the December 26, 2012 charges, that she made the remark, which was inappropriate but had no violent intent. The arbitrator found that a ten-day suspension, not dismissal, was the appropriate penalty. See Arbitration Award, Ex. Q.

Another arbitration hearing was held on December 6, 2013, to address plaintiff's failure to respond to a February 6, 2013 charge that she appeared at the Baisley Park Depot despite the fact that she was prohibited from being there. See Disciplinary Hearing Implementation Notification, Ex. R; Arbitration Award, dated January 6, 2014, Ex. S; Nelson Dep. at 23-24. The arbitrator found that she must have known she was not allowed on the property, but her purpose there, to pick up some papers, was benign, and dismissal for the offense was not warranted. *Id.*

While the above arbitration decisions were pending, plaintiff was out of work on medical leave as a result of injuries sustained in March 2013 when she was hit by a bus at the Baisley Park Depot, where she was then working. Nelson Aff., ¶ 71; see Workers' Compensation Medical Form, Ex. T. Plaintiff remained on medical leave during 2014 and 2015, and, pursuant to MTA Bus policy, was administratively terminated, effective March 16, 2014, after being out of work for 52 weeks. See 12-Month Termination Notification, Ex. U.

By letter dated August 27, 2015, plaintiff requested reinstatement to her position, as permitted by an "Impasse Award" between the Union and MTA Bus. Reinstatement Request, Ex. V; see Opinion and Award, Ex. AA. Finnegan denied plaintiff's request on the basis that it was untimely because she had not applied for reinstatement within one year of the termination of her employment. Letter, Ex. W. In response, the Union wrote to Finnegan, pointing out that the language of the Impasse Award provided that an application may be made within one year of the termination of the disability, which plaintiff had done. Letter dated October 15, 2015, Ex. X. Finnegan responded to the Union by reiterating that plaintiff's request was untimely, and did not otherwise address the language of the Impasse Award highlighted by the Union. See Letter dated November 4, 2015, Ex. V to Nelson Aff.

The Union grieved the denial of plaintiff's application and requested a hearing, which was scheduled for December 16, 2015. On the day of the scheduled hearing, the grievance was settled when Finnegan acknowledged that the Union's reading of the language of the Impasse Award was correct. Finnegan testified at his deposition that he had responded to the Union's October 12, 2015 letter without speaking to anyone about it and, when asked at his deposition why he accepted the Union's interpretation of the Impasse Award on the date of the hearing but not before,

Finnegan explained only that he had interpreted it differently and thought the Union was wrong but, he conceded, it was correct and he was wrong. Finnegan Dep. at 72, 74.

Plaintiff returned to work on or about January 17, 2016, after receiving training for the cleaner/helper position. She asserts that she again was retaliated against and harassed because she had complained about discrimination, and she submitted a detailed written complaint alleging harassment on or about January 20, 2016. Nelson Aff., ¶¶ 77-79; see Memorandum, Ex. X to Nelson Aff. Days later, she was dismissed and charged with being insubordinate and disrespectful to two superintendents, after she allegedly cursed at them when she was given instructions and told she had not cleaned enough buses. An arbitration hearing was held on February 25, 2016, and March 21, 2016, and the arbitrator issued a decision on April 13, 2016, finding that plaintiff was "intemperate" and "should have acted better," but that any curse words she uttered were not clearly directed at the superintendents, and more likely were generally expressing frustration. See Arbitration Award, Ex. Y. While finding that plaintiff was disrespectful, the arbitrator found that none of plaintiff's actions constituted a dismissible offense. He determined that MTA Bus did not have just cause to dismiss plaintiff and ordered her reinstated to a different bus depot. *Id.*

Plaintiff returned to work in late April 2016, but left in June 2016 for health reasons and remained on workers' compensation leave.

### LEGAL STANDARDS

On a motion for summary judgment, the moving party has the initial burden of showing 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); *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If such showing is made, the opposing party must show, also by producing evidentiary proof in admissible form, that genuine material issues of fact exist which warrant denial of the motion and require a trial of the action. See *Jacobsen*, 22 NY3d at 833; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). The evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied "where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is even arguable." *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1<sup>st</sup> Dept 2013), citing *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968); see *Rotuba Extruders v Ceppos*, 46 NY2d

223, 231 (1978).

In employment discrimination cases, because direct evidence of an employer's discriminatory intent is rarely available, courts also "must be especially chary in handing out summary judgment." *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 43-44 (1<sup>st</sup> Dept 2011) (citation omitted); see *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997). "[A]ffidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Sibilla v Follett Corp.*, 2012 WL 1077655, \*5, 2012 US Dist LEXIS 46255, \*13-14 (ED NY 2012), quoting *Gallo v Prudential Residential Servs., Ltd. Partnership*, 22 F3d 1219, 1224 (2d Cir.1994). Further, it "is not the court's function on a motion for summary judgment to assess credibility." *Ferrante*, 90 NY2d at 631; see *Asabor*, 102 AD3d at 527.

#### **New York City Human Rights Law**

Under the NYCHRL, it is unlawful for an employer to fire or otherwise discriminate against an employee in the terms, conditions or privileges of employment because of, as relevant here, the employee's race, gender, or actual or perceived disability. Administrative Code § 8-107 (1) (a). The NYCHRL also prohibits an employer from retaliating against an employee who has complained about unlawful discriminatory practices.

Administrative Code § 8-107 (7).

Intended to be more protective than its state and federal counterparts, the NYCHRL explicitly requires that its provisions be liberally construed to accomplish the "uniquely broad and remedial purposes" of eliminating and preventing discrimination in New York City. Administrative Code § 8-130; see *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 885 (2013); *Albunio v City of New York*, 16 NY3d 472, 477-478 (2011); *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 (1<sup>st</sup> Dept 2009). All provisions of the NYCHRL accordingly must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Albunio*, 16 NY3d at 477-478; see *Chauca v Abraham*, 30 NY3d 325, 333 (2017); *Romanello*, 22 NY3d at 885; see generally *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 108-109 (2d Cir 2013).

Sexual harassment resulting in a hostile or abusive work environment is one "'species of sex- or gender-based discrimination'" prohibited by the NYCHRL. *Suri v Grey Global Group, Inc.*, 164 AD3d 108, 114 (1<sup>st</sup> Dept 2018), quoting *Williams*, 61 AD3d at 75. Hostile work environment discrimination claims similarly may arise from harassment based on race, disability, or other protected categories. See e.g. *Sims v Trustees of Columbia Univ. in the City of N.Y.*, 168 AD3d 622 (1<sup>st</sup> Dept 2019) (race-based hostile work environment claim); *Buchwald v Silverman Shin*

& *Byrne PLLC*, 149 AD3d 560 (1<sup>st</sup> Dept 2017) (hostile work environment claim based on perceived disability); *Nelson v HSBC Bank USA*, 87 AD3d 995, 999 (2d Dept 2011) (claim based on race); see also *Camoia v City of New York*, 2018 WL 5077893, 2018 US Dist LEXIS 120184, \*48 (ED NY 2018) (“[t]he NYCHRL does not differentiate between discrimination and hostile work environment claims.” [citation omitted]).

To establish liability for a hostile work environment under the NYCHRL, a plaintiff need not prove that the harassment was “severe or pervasive,” the standard applied in cases brought under Title VII and other federal and state anti-discrimination laws, but, instead, must show conduct that was “more than what a reasonable victim of discrimination would consider ‘petty slights and trivial inconveniences.’” *Williams*, 61 AD3d at 80; see *Gonzalez v EVG, Inc.*, 123 AD3d 486, 487-488 (1<sup>st</sup> Dept 2014); *Hernandez v Kaisman*, 103 AD3d 106, 114-115 (1<sup>st</sup> Dept 2012); *Nelson*, 87 AD3d at 999. The critical question in hostile work environment claims brought under the NYCHRL, as it is in other terms and conditions cases, is whether plaintiff “has been treated less well than other employees” because of her membership in a protected class. *Williams*, 61 AD3d at 78; see *Suri*, 164 AD3d at 114.

With respect to retaliation claims, the NYCHRL prohibits retaliation “in any manner” against an employee who complains

about, or otherwise opposes, discrimination in the workplace. Administrative Code § 8-107 (7). To demonstrate a retaliation claim under the NYCHRL, a plaintiff must show that she or he engaged in a protected activity known to the employer, that is, that plaintiff opposed or complained about unlawful discrimination; plaintiff was subjected to an "adverse or disadvantageous" employment action; and a causal connection existed between the protected activity and the alleged retaliatory action. See *Harrington v City of New York*, 157 AD3d 582, 585 (1<sup>st</sup> Dept 2018); *Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18, 25 (1<sup>st</sup> Dept 2014); *Fletcher v The Dakota, Inc.*, 99 AD3d 43, 51-52 (1<sup>st</sup> Dept 2012). "A causal connection can be established either directly, through evidence of retaliatory animus, such as verbal or written comments, or indirectly, by showing that the employer's action closely followed in time the protected activity or that similarly situated persons were treated differently." *Rubin v Napoli Bern Ripka Shkolnik, LLP*, 2018 WL 5619731, 2018 NY Misc LEXIS 4959, 2018 NY Slip Op 32766(U) (Sup Ct, NY County Oct. 29, 2018) (citations omitted); see *Dotson v J.C. Penney Co., Inc.*, 159 AD3d 1512, 1514 (4<sup>th</sup> Dept 2018); *Russell v New York Univ.*, 739 Fed Appx 28, 33 (2d Cir 2018).

The retaliation provisions of the NYCHRL, like its other provisions, are broadly interpreted, and "no challenged conduct

may be deemed nonretaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was, in the words of the statute, 'reasonably likely to deter a person from engaging in protected activity.'" *Williams*, 61 AD3d at 71; see *Albunio*, 16 NY3d at 477-478; *Verdi v City of New York*, 306 F Supp 3d 532, 546-547 (SD NY 2018). "This determination should take into account workplace realities, the claim's context, and that juries are 'generally best suited to evaluate the impact of retaliatory conduct.'" *Id.* at 547, quoting *Williams*, 61 AD3d at 71.

Claims brought under the NYCHRL, including retaliation claims, generally must be analyzed under both the burden-shifting framework established in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) and "the somewhat different 'mixed-motive' framework recognized in certain federal cases." *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 (1<sup>st</sup> Dept 2012); but see *Suri*, 164 AD3d at 117 (burden-shifting analysis does not apply to hostile work-environment claims) . "A plaintiff may prove her case if she 'proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision.'" *Watson v Emblem Health Servs.*, 158 AD3d 179, 182-183 (1<sup>st</sup> Dept 2018), quoting *Melman*, 98 AD3d at 127. Similarly, in NYCHRL retaliation cases, it is not necessary to show that retaliation was the sole motive for the adverse

employment action. See *Melman*, 98 AD3d at 127.

To prevail on a motion for summary judgment, defendants must show that, "based on the evidence before the court and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under any of the evidentiary routes—*McDonnell Douglas*, mixed motive, 'direct' evidence, or some combination thereof." *Bennett*, 92 AD3d at 45; see *Watson*, 158 AD3d at 183 (1<sup>st</sup> Dept 2018); *Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 73 (1<sup>st</sup> Dept 2017); *Hudson v Merrill Lynch & Co.*, 138 AD3d 511, 514 (1<sup>st</sup> Dept 2016); *Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740-741 (2d Dept 2013). "If the plaintiff responds with some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete" (*Bennett*, 92 AD3d at 45; see *Sandiford v City of New York Dept. of Educ.*, 94 AD3d 593, 595 [1<sup>st</sup> Dept 2012]), or "if there is any evidence in the record from any source from which a reasonable inference [of discrimination or retaliation] could be drawn in favor of the nonmoving party, summary judgment is improper." *Suri*, 164 AD3d at 116 (citation omitted).

### **DISCUSSION**

At the outset, defendants expressly assert that they are not seeking summary judgment on plaintiff's hostile work environment claim, recognizing that controlling precedent "emphasizes the

greater protections afforded to plaintiffs under the City HRL" (*O'Halloran*, 154 AD3d at 91) and that, in appropriate circumstances, even a single comment may create a hostile work environment. See Def. Memo at 1-2; see also *Hernandez v Kaisman*, 103 AD3d 106, 115 (1<sup>st</sup> Dept 2012); *Gorokhovsky v New York City Hous. Auth.*, 552 Fed Appx 100, 102 (2d Cir 2014). On this motion, therefore, they do not dispute or even address most of plaintiff's allegations underlying her claims that she was subjected to offensive and abusive comments and conduct, treated differently based on race, gender, and/or disability, and retaliated against for complaining about discrimination.

Defendants argue, however, that they are entitled to partial summary judgment because "several claims that disciplinary and other employment actions were motivated by unlawful considerations . . . are devoid of any evidentiary support." Def. Memo at 2. Specifically, defendants seek dismissal of plaintiff's discrimination and retaliation claims to the extent that they are based on certain events described earlier: her removal in February 2012 from her position as a bus operator, following MTA Bus's adoption of NYCTA's medical standards prohibiting employees with bipolar disorder from working as a bus driver; charges of insubordination, dereliction of duty and gross misconduct brought against plaintiff related to incidents in November 2012 and December 2012; disciplinary charges brought

against her in 2013 for unauthorized entry into an MTA Bus depot during a time when she was suspended; disciplinary charges brought against her in January 2016 for insubordination and using profanity; and the denial of her August 2015 application for reinstatement following an extended medical leave.

With respect to the removal of plaintiff from the bus operator position in February 2012, defendants have shown that her removal was based on the then newly adopted medical standards disqualifying employees with bipolar disorder from certain safety sensitive positions, including the position of bus operator. Plaintiff does not dispute that the revised medical standards, upheld after a challenge by the Union, required her removal, and does not, in this action, challenge the medical standards as unlawful. See *Matter of MTA Bus Co. v New York State Div. of Human Rights*, 150 AD3d 512 (1<sup>st</sup> Dept 2017) (state human rights division should not have reached issue of whether standards were discriminatory where not raised by petitioner). She also presents no evidence that the standards were applied differently to her than to other similarly situated employees and does not dispute that, as Finnegan testified, other employees were removed as a result of the implementation of stricter medical standards. Her claim that the timing of her removal was retaliatory because it occurred just weeks after she filed a lawsuit alleging discrimination does not, under the circumstances here, raise an

issue of fact.

As to the other claims defendants seek to dismiss, including claims based on disciplinary charges and penalties against plaintiff for incidents occurring in November and December 2012, in 2013, and in January 2016, defendants have not eliminated triable issues of fact as to whether their motivation for bringing the disciplinary charges and seeking penalties, including termination, was in any part discriminatory or retaliatory. Plaintiff testified that, once she started complaining about discrimination, she was singled out, by Bruce and others, and charged with disciplinary violations when other employees were not cited for similar conduct.

No issues of discriminatory treatment or retaliation were raised or addressed at the several arbitration hearings on various disciplinary charges against plaintiff. Notwithstanding the arbitrator's findings that plaintiff, in some instances, had behaved inappropriately and was subject to disciplinary action, the arbitrator also repeatedly found that plaintiff's offenses did not warrant the penalties sought by MTA Bus. The arbitrator's findings, do not, therefore, resolve issues of fact as to MTA Bus's motives in bringing disciplinary charges and seeking termination of plaintiff's employment.

Similarly, issues of fact remain as to whether MTA Bus's motivation in denying her application for reinstatement was

retaliatory. There is no indication that Finnegan consulted with anyone before he denied the application on the basis that it was untimely under the Impasse Award and, when the Union pointed out to him that the language of the Impasse Award clearly contradicted his interpretation, he continued to deny plaintiff's request, requiring plaintiff to seek a hearing to resolve the dispute. Only at the time of the hearing, more than four months later, did Finnegan acknowledge that the Union's interpretation of the Impasse Award was correct. Under the circumstances, Finnegan's continued refusal to consider plaintiff's request until the hearing, his explanation that he continued to believe that his interpretation was correct even after the Union informed him otherwise, and his subsequent concession that the Union's interpretation was correct, give rise to credibility questions as to his motivation for denying or delaying plaintiff's reinstatement. See *Greenberg v New York Tr. Auth.*, 336 F. Supp 2d 225, 247 (ED NY 2004) (delay in reinstating an employee may constitute a discriminatory adverse action).

Therefore, in light of the foregoing, it is:

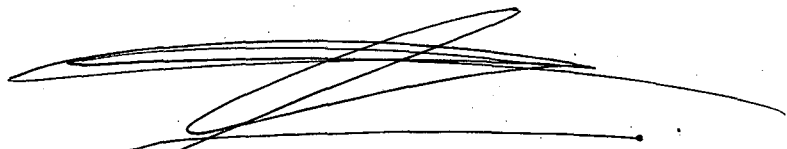
ORDERED that defendants' motion is granted in part and denied in part and it is further

ORDERED that the motion is granted solely to the extent that discrimination and/or retaliation claims based on plaintiff's disqualification from the bus operator position in February 2012 are dismissed; and it is further

ORDERED that the motion otherwise is denied.

Dated: March 11, 2019

ENTER:

A handwritten signature in black ink, appearing to read 'Kathryn E. Freed', is written over a horizontal line. The signature is somewhat stylized and overlaps the line.

HON. KATHRYN E. FREED, J.S.C.