Ramos v Metro-North Commuter R.R.
2020 NY Slip Op 31061(U)
April 3, 2020
Supreme Court, New York County
Docket Number: 153742/18
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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ANDREA RAMOS,

Plaintiff,

-against-

METRO-NORTH COMMUTER RAILROAD, METROPOLITAN TRANSPORTATION AUTHORITY, JOSEPH STREANY, JUSTIN VONASHEK and GARY MARTENS,

Defendants.

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Index No. 153742/18
Motion Sequence 01

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

In this employment discrimination action, defendants Metro-North Commuter Railroad (Metro-North), Metropolitan Transportation Authority (MTA), Joseph Streany, Justin Vonashek and Gary Martens (collectively, Defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint in its entirety. For the reasons set forth below, Defendants' motion is granted in part and denied in part.

BACKGROUND

This case arises from Plaintiff Andrea Ramos's (Plaintiff or Ms. Ramos) alleged wrongful termination as a Metro-North accident investigator. Plaintiff claims that Defendants engaged in discriminatory and retaliatory conduct against her based upon her race, age, gender and disability, and created a hostile work environment, all in violation of the New York City Human Rights Law (NYCHRL) and the New York State Human Rights Law (NYSHRL).[1] Pursuant to her April 23, 2018 complaint, Plaintiff's causes of action sound in discrimination, hostile work environment, and retaliation.

[1] NY Executive Law §296(1); NYC Administrative Code §8-107.

Defendants move for summary judgment dismissing the complaint, asserting that Plaintiff was fired because she violated an important Metro-North policy requiring employees in her position to disclose their use of certain medications. Defendants also assert that Plaintiff's complaints about her alleged hostile treatment do not rise to the level of an "adverse employment action" under the NYCHRL and NYSHRL, save her termination, which again was justified by her violation of Metro-North's prescription drug reporting requirement.

Hostile Work Environment

Plaintiff began her Metro-North career in July 2006 in the Operations Department. In July 2015 she applied for the newly created position of Accident Investigator in the Office of System Safety. She was told about the requirements for the position, including the 24/7 availability, by defendant Joseph Streany, who at that time was the department lead for hiring Accident Investigators. He claims to have selected Plaintiff to be interviewed and chose her for the job.[2]

After a string of accidents in 2013 and 2014, Metro-North created the Accident Investigator position to enhance the safety of the railroad and prevent future accidents (Streany Aff. ¶ 2). The Accident Investigator's primary responsibilities are "conducting on-site investigation[s] of critical incidents," determining "initiating causes" and "contributing factors," and recommending "corrective actions required to eliminate or reduce the potential for future accidents." (Def. Ex.12). Accident Investigators must also be able to timely respond to accident scenes (Streany Aff. ¶8):

> To guarantee that Accident Investigators are available to respond in the event of an emergency, I keep track of the investigators' workloads, meetings and other obligations. Generally, I select which Accident Investigator will report to the scene based on a variety of factors, including geographical proximity, workload, the type of incident, particular expertise of each Accident Investigator, and schedules. If an Accident Investigator notifies me that they will be unavailable to work at a given time, I remove them from the pool of potential responders considered for responding to an accident during that time period. Without such advance notice, it is assumed that all Investigators are active and available to be called to report to an accident site at any time.

[2] September 27, 2019 Affidavit of Joseph Streany (Streany Aff.)

Mr. Streany asserts that he discussed the requirements of the position with Plaintiff during her interview and specifically reiterated that the position required on-call shifts, weekends, call-ins, emergency response, and other non-traditional scheduling. Plaintiff was offered the position and began working as an Accident Investigator on April 15, 2015 (Streany Aff. ¶ 3). According to Plaintiff,[3] she began experiencing discrimination almost immediately when she was excluded from social activities at a National Transportation Safety Board conference (Ramos Aff. ¶8). After that she noticed that the bulk of investigations were being assigned to white, male colleagues. In January 2016, things improved when defendant Justin Vonashek[4] became Vice President of the Office of System Safety. *Id*. Thereafter, Metro-North named Plaintiff co-chair of the Health and Well-Being Initiative (Healthy4U), an employee mental health group proposed by Plaintiff in 2013. *Id*.

However, things quickly began to deteriorate again. As one example, in February 2016, Plaintiff underwent foot surgery which resulted in the need for her to take leave under the Family and Medical Leave Act. While on leave she requested permission to come to the office just to attend department meetings and training programs necessary for her professional certifications. Mr. Streany allegedly denied these requests. When Plaintiff returned from leave, she found that her desk had been moved next to Mr. Vonashek's administrative assistant. She also felt ignored by her colleagues. During a department meeting in July 2016, Mr. Vonashek shared that there would be a posting for another Investigator position. Investigator Rich Ferlauto responded "[N]o need to hire anyone, Josh and I can handle all the investigations, and split the salary." The Plaintiff addressed Mr. Vonashek after the meeting regarding this outburst and Mr. Vonashek replied that he did not

[3] Ms. Ramos was deposed on February 20, 2019 and March 6, 2019. Her deposition transcripts are submitted as Defendants' exhibits 3 and 4 (Ramos Dep). Plaintiff has also submitted an affidavit from Ms. Ramos in opposition to Defendants' motion (Plaintiff's exhibit 3, "Ramos Aff.").

[4] See September 26, 2019 Affidavit of Justin Vonashek (Vonashek Aff.), ¶6-7; see also Mr. Vonashek's March 15, 2019 deposition transcript, Defendant's Exhibit 7 (Vonashek Dep.), pp. 147-48.

hear it (Ramos Aff. ¶31).

In August 2016, MTA's Director of Hazard Analysis, Steve Chayt, commented to the Plaintiff in front of four co-workers that "just because she has worked in transportation for 20+ years, did not mean she knew anything about safety." (*Id*. at ¶32). In September 2016, Plaintiff was allegedly told that she would be relocated to the Mott Haven and Highbridge facilities and that she would have to find her own workspace. Plaintiff found this strange since safety department employees had never occupied office space at either of these facilities.

Plaintiff's ADA Request and Performance Improvement Plan

In November 2016 Plaintiff was told that she would have to drive a company-issued vehicle to and from work, and that she allegedly would also have to pay E-Z Pass charges and annual taxes for usage of the car. Mr. Streany testified that he requested the allocation of take-home vehicles for each investigator because the job required a 24/7 response (Streany Dep. p. 95). This same sentiment was expressed by Mr. Vonashek, who averred that Metro-North assigned vehicles to Accident Investigators to ensure that they could get to incident scenes quickly (Vonashek Aff. ¶ 7):

> Metro-North allocates a company vehicle to each Accident Investigator to ensure they can reach any incident, at any location within Metro-North territory, at any time and without delay—even in the event of mass transit service interruptions or problems with their personal vehicles. The assigned company vehicle is maintained by Metro-North and is marked with the Metro-North logo so it is readily identifiable and Metro-North personnel can be permitted near the scene of the accident or incident. The company vehicle is equipped with all necessary tools to facilitate emergency handling at the scene of the accident. Accident Investigators are required to maintain a valid driver's license and to have the company vehicle readily accessible on a 24/7 basis.

Defendants contend that all Accident Investigators were mandated to use a company vehicle and that Metro-North was responsive to any issues that arose. In this regard, in December 2016, Plaintiff contacted Metro-North's ADA Accommodations Unit to request exemption from this requirement on the basis that excessive driving exacerbated a pre-existing back disability. Things became worse for Plaintiff when, in mid-December 2016, she was in a car accident on her way to

work. Shaken from the accident, she took the train home and then took several sick days (Ramos Aff. ¶42).

In or about January 2017 Plaintiff set up a meeting with Mr. Vonashek and Ms. Velez from Human Resources to discuss her ADA accommodation request. During that meeting Mr. Vonashek allegedly denied her request, stating: "No!", "Just do what you are told to do and all will be good," "Your problem is you are worrying about what other people are doing, just worry about yourself," and "Don't you have FMLA? So, use it!" (Ramos Aff. ¶ 54). Defendants assert that they were responsive to Plaintiff's accommodation requests. For example, defendant Gary Martens,[5] who handled the Metro-North's ADA Accommodations requests, provided Plaintiff with Reasonable Accommodation Request forms and contacted his colleague in Metro North's Employee Relations unit regarding the company's toll reimbursement policy for company take-home vehicles[6] (Martens Dep. pp. 130-1). Despite receiving the blank Reasonable Accommodation Request form on December 8, 2016, Plaintiff returned the completed form on January 4, 2017, and did not supply supporting medical documentation to evaluate her request until February 9, 2017 (Defendants' Exs. 34-37).

Defendants also claim that Plaintiff was not meeting job expectations. For example, she was instructed to use the company vehicle assigned to a colleague while he was on vacation and to work out of an alternate field office to ensure coverage for two days.[7] However, a check of the vehicle's GPS report found that it was never moved (Streany Aff. §10). Also, Plaintiff allegedly refused to drive the company vehicle to and from work each day. According to Mr. Streany (Streany Aff. §9):

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[5] Mr. Martens was deposed on March 20, 2019 and April 23, 2019. His deposition transcripts were submitted as Defendants' exhibits 8 and 9 (Martens Dep.).

[6] December 8, 2016 email from Mr. Martens to Plaintiff is annexed to Defendants' moving papers as exhibit 35; Plaintiff's December 29, 2016 completed Reasonable Accommodation Request Form is annexed to Defendants' moving papers as exhibit 36.

[7] May 10, 2016 email exchange between Mr. Streany and Plaintiff is submitted as Defendants' exhibit 25.

> [Plaintiff] immediately disregarded my instructions. She took the vehicle home that day and left it parked at her residence until November 29. I had to remind her repeatedly, on multiple occasions during the following weeks and months, that driving the vehicle to and from home every day was a crucial part of her job requirements— and one that Mr. Vonashek took very seriously—because it ensured that she could reach incident sites reliably.

On December 28, 2016 Plaintiff was placed on a Performance Improvement Plan (PIP) by Mr. Streany and Mayela Velez of Metro-North's human resources department. The PIP included several areas of concern, including timely reporting, following directions, and taking the company vehicle daily. In terms of reporting, Defendants assert that more than half of Plaintiff's final reports were submitted in an untimely manner. According to Mr. Streany this rate was much higher than that of other Investigators (Streany Aff. §14). The "following directions" area of improvement concerned an October 28, 2016 incident in which Plaintiff allegedly failed to investigate a stop signal violation at the Highbridge yard (Streany Aff. §13):

> After telling me that she would head to the scene of the incident, Ramos instead went to Grand Central where she obtained second-hand information about the incident and emailed it to me as evidence of her investigation. It was only after I spoke to managers in the Transportation Department that I learned that Ramos never made it to the incident scene to investigate the accident herself, as per Accident Investigator duties. Ramos then filed both her preliminary and final reports late.

Plaintiff responded to each alleged area of concern in writing. She claims that her incident reports were late because, unlike other investigators, she was not given basic needs like a workspace or a laptop (Ramos Dep. p. 262). As for the October 2016 investigation at the Highbridge Yard, her PIP meeting was the first time she became aware that Mr. Streany had taken issue with her conduct. In fact, she claims to have had a performance evaluation in November 2016, a month before the PIP meeting, and that no issue regarding the Highbridge Yard investigation was raised. Plaintiff also took issue with Defendants' complaint about her not driving to work each day, noting that there was no written MTA policy which required assigned cars to be driven home daily (Ramos Aff. ¶47-49).

Mr. Streany and Ms. Velez met with Plaintiff weekly over the following months to review her ongoing performance goals as set out in the PIP (Streany Aff. §16). Mr. Streany testified that Plaintiff seemed unclear about certain of the PIP expectations (Streany Dep. p. 77-78):

Q. After the first PIP was over, did you give her a second PIP? . . . Did you write another PIP after the first PIP?

A. Mayela and I decided that we needed to be a little bit more defined and put a little bit more information into the second PIP, because it very much seemed like the first one wasn't understood by everyone, particularly Andrea.

Q. Like, what are you thinking of when you say that? . . .

A. A good example would be when she was instructed not to participate in an extracurricular committee, and then she did, when she was told not to.

Mr. Streany issued an updated PIP with very specifics details about Plaintiff's basic job duties (Streany Aff. §17; see also Defendants' Ex. 33). This second PIP extended her probation period for another 90 days. Plaintiff was also notified that she would no longer be allowed to participate in Healthy4U (*id*. at ¶ 55). Curiously, while the second PIP specified that Plaintiff was to comply with all company directives, she was advised that she had not violated any specific directive since her first PIP went into effect. For this reason, it was unclear to Plaintiff why her PIP was being extended as opposed to simply being revised for the duration of the 90-day probation period.

In or about February 2017, Metro-North amended its policy so that employees using company cars could use a corporate EZ-pass, eliminating what had been a financial hardship on the Plaintiff and dramatically reducing her commute time by allowing her to take a shorter route (Martens Dep. p. 131; see also Defendants' Ex. 24). While Plaintiff was content with the new policy, she claims that as retaliation she was once again forced to relocate, this time to White Plains (*id.* at ¶ 66-67).

EEOC Complaint and Termination

Believing her treatment was discriminatory in nature, on March 6, 2017 Plaintiff filed a claim of discrimination and retaliation with the Equal Employment Opportunity Commission

(EEOC). Defendants were notified of the EEOC complaint on March 15, 2017. One day earlier, on March 14, 2017, Mr. Martens drafted a letter denying Plaintiff's accommodation request to be exempted from being required to drive to work (Defendants' Ex. 43; Martens Dep. pp. 247-8). The letter explained the risk that Plaintiff's request posed: "We were unwilling to accept the down time where [Plaintiff] would not be able to respond if, God forbid, something happened" (Martens Dep. p. 248). The letter was never sent because Plaintiff was subsequently terminated for violating Defendants' prescription drug reporting policy (*id.* at 183). In this regard, on March 16, 2017, Plaintiff was contacted at 2:15AM to investigate a derailment near New Haven, Connecticut. She got dressed but realized she had taken a muscle relaxer for her back before going to bed. Plaintiff called her colleague and told him it would not be safe for her to drive. Plaintiff then received a call from Mr. Streany advising that she had been taken out of service until further notice and she was not to drive the company vehicle. Mr. Streany recalled the incident (Streany Aff. §18-9, 21):[8]

> On March 16, 2017, in the aftermath of Winter Storm Stella, Ramos was on call as required in the normal course of her job duties. The only other Accident Investigator at the time, now Chief Investigator Richard Ferlauto, had recently finished a long shift to address service issues caused by the storm which required him to stay at a hotel in White Plains overnight. At or around 2:03AM, Streany learned from Operations Control Center about a train derailment that occurred near the New Haven Yard and called Ferlauto to relay this information. Given Ferlauto's shift from the previous night and Ramos being geographically closer to the site, Streany and Ferlauto decided to assign Ramos to the accident and Ferlauto called her with the assignment. She accepted the assignment and Ferlauto emailed the Investigations team at 2:31AM confirming that she would be heading out shortly to respond. Roughly 40-45 minutes later, Ramos called Ferlauto back and said that she could not drive because she had taken pain medication earlier that evening and was feeling lightheaded. At 3:18AM, Ramos sent Ferlauto an email, copying Vonashek and Streany, writing "[n]ot able to leave yet due to pain meds I took prior to going to bed." Streany then called Ramos to confirm the facts and concluded "that she may have been unfit for duty." He directed her not to respond to the incident, relieved her of her duties and referred the matter to HR for further handling, including for any disciplinary action for violation of the Prescription Reporting Obligations.

Plaintiff was directed to bring her medications to Metro-North's Occupational Health Services (OHS) office and submit to a physical exam. She provided OHS with the three prescriptions she

[8] *See also* Ferlauto Aff. §§7, 10; Defendants' Ex. 45-7.

[8]

was taking: Flexeril (muscle relaxant), Ranitidine (acid reflux), and meloxicam (anti-inflammatory). On March 24, 2017, Plaintiff received a call from Metro-North's HR Department advising her that she was terminated but could not disclose the reasons for her termination (Ramos Aff. ¶ 80-81, 86).

Defendants assert that Plaintiff was aware of the responsibilities inherent in the Accident Investigator position and its "Safety Sensitive Employee" (SSE) designation. SSEs are employees "who perform service in job titles which the Company has determined involve tasks so fraught with risks of injury that even a momentary lapse of attention can have disastrous or irremediable consequences to the employee or others"[9] (Policy, § IV.3). The Accident Investigator title provides that it is "subject to toxicological testing" (Defendants' Ex.12, p.3). Those SSEs who fail to comply with company procedures are "subject to discipline, up to and including dismissal" (Policy § II.6.a.4).

Metro-North's medication use policy is contained in the Prescription and Over-the-Counter Medication for Safety Sensitive Employees pamphlet, which Defendants allege was available to all employees[10] (Policy § II.6.a.1). The pamphlet includes a sample listing of common prescription drugs with adverse side effects, including Flexeril. Rule G of Metro-North's Operating Rules provides "Employees are prohibited from reporting for service, going on duty or remaining on duty while under the influence of any prescription of over-the-counter drug or medication that can adversely affect their alertness, coordination, reaction, response or safety."[11] Defendants' Ex. 16, p. 10. Rule G also requires that employees have authorization "prior to performing service while taking any drug or medication that is labeled with a warning related to adverse effects in any of the above areas." *Id.*

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[9] The Metro-North Alcohol and Substance Abuse Policy is Defendants' exhibit 14 (Policy).

[10] The Metro-North Prescription and Over-the-Counter Medication for Safety Sensitive Employees pamphlet is Defendants' exhibit 15 (Ex. 15).

[11] The Metro-North Operating Rules, effective February 27, 2011 are Defendants' exhibit 16 (Ex. 16).

Plaintiff prepared materials for and lectured other employees on Metro-North's reporting requirements for SSEs during a June 1, 2016 "Safety Focus Day", a quarterly event on safety-related issues (Defendants' Exs. 17-20). She also interviewed for the position of Assistant Director of Random Drug and Alcohol Testing which required an understanding of the Policy (Defendants' Exs. 22-23).

Expert Reports

Plaintiff submits the affidavit of Barry Strauch, PhD, a transportation safety investigator with three decades of experience with the National Transportation Safety Board.[12] In relevant part, Dr. Strauch avers (Strauch Report, ¶¶ 11, 17, 19, 23, 29, 54):

> [Defendants state] that at the time of the March 16, 2017, incident in question, "[Plaintiff] had not previously reported that she was taking this medication . . . In point of fact, in support of her November 8, 2016, application for Family and Medical Leave Act (FMLA) time off, her treating physician clearly indicated she was taking prescribed medication.
>
> The absence of . . . policies also allowed Mr. Streany to dispatch investigators to accidents based on his personal biases, again regardless of what he may have stated under oath. [Plaintiff] testified that she had never been launched in the middle of the night . . . an experience that would be consistent with a commuter railroad where the overwhelming majority of operations are conducted during work hours . . . Yet the one time he dispatched her late at night was to an accident site . . . at a considerable distance from her residence and . . . further from the site than that of another investigator.
>
> Unbeknownst to [Plaintiff] … Metro-North separated FMLA application processing from employee oversight and, as a result, her supervisors may have been unaware that her FMLA application indicated that she had been prescribed medication in response to back pain. Because FMLA Metro-North applications were reviewed by its own personnel, [Plaintiff] had every right to believe that her application for FMLA complied with the Railroad requirement.
>
> Undeniably, accident investigators should complete their reports in a timely manner. However, including this as a separate domain on the two PIPs given to [Plaintiff] implies that [she] was unique among Metro-North investigators . . . This was not the case. Despite documentation of [similar] tardiness by other investigators…[none were] issued a PIP.
>
> The first requirement [of Plaintiff's second PIP] altered [her] work schedule by moving it 30 minutes later than the schedule she had worked, with no justification for the change provided, and no allowance for her input on the change . . . this action of shifting her work hours to be more impacted by rush hour traffic than it had been with her previous schedule, one that had been acceptable to Metro North for well over a year, could only be explained as Mr. Streany using the PIP against her and not to assist her in improving her performance.

[12] NYSCEF Doc. 124 (Strauch Report).

[Dr. Strauch then concludes (*id*. at ¶ 54)

> [Mr. Streany's] multiple changing and misleading justifications for requiring [Plaintiff] to use a company vehicle and his manifest implementation of PIPs against her support the belief that he tried to make her work experience with Metro-North as difficult as possible in the hope that she would leave. Certainly, requiring that she … use a vehicle to commute to work, when she had no record of arriving late to an accident site and it was unnecessary for…performance of her job, suggests that he was discriminating against her in mandating it. Combined with his arbitrary extension … of the December PIP in violation of its documented interval and his unilateral alteration of both her work schedule and work location are consistent with this pattern of behavior further supporting evidence that he engaged in discriminatory behavior . . .

In opposition, Plaintiff also submits the affidavit of a human resources expert, Marylou Ponzi Kay,[13] who reached similar conclusions regarding Mr. Streany's conduct in this case. In relevant part, she observed/concludes as follows (Kay Report, ¶¶ 6, 21):

> Accident investigators were expected to be able to arrive at the scene of an accident in order to investigate within a reasonable timeframe . . . There was never any mention that the investigator would be required to drive a company car to the site.
>
> Given the totality of the circumstances, and based upon my professional experience, training, and formal education, I believe Ms. Ramos, an African-American, female, and disabled employee, who was certainly qualified to hold her Investigator position, suffered adverse employment actions at the hands of her employer, Metro-North, under circumstances giving rise to an inference of discrimination; these actions include, first, the discriminatory, hostile environment faced by Ms. Ramos, which was permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive as to alter the conditions [of] her employment and create an abusive working environment, and where she was treated less well than other employees due to her status as a black, female and disabled employee, in ways rising above petty slights and inconveniences; second, Metro North's failure to engage in a good faith interactive process in considering a reasonable accommodation request by Ms. Ramos; and finally, her discriminatory termination.

ARGUMENTS

Defendants move for summary judgment dismissing the complaint, proffering the following arguments: (1) Plaintiff's complaints do not concern adverse employment actions; (2) There is no evidence upon which a jury could infer that Plaintiff's termination was discriminatory; (3) To the contrary, Defendants had a legitimate, non-discriminatory reason for terminating her; (4) Defendants' requirement that Plaintiff use a company vehicle did not constitute a denial of a

[13] NYSCEF Doc. 125 (Kay Report).

reasonable accommodation; (5) There is no evidence to support Plaintiff's retaliation claim since she was fired after violating Metro-North's prescription drug policy; (6) Plaintiff fails to state a hostile work environment claim; and (7) Plaintiff cannot sustain a claim against any of the individual defendants or defendant MTA.

In opposition, Plaintiff argues that: (1) Her termination followed a long period of being subjected to a hostile work environment, including the two unjustified Performance Improvement Plans; (2) She was denied a reasonable accommodation from an arbitrary job requirement; (3) She was terminated under false pretext of violating Metro-North's prescription reporting obligations.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

Both the NYSHRL and NYCHRL prohibit an employer from firing or discriminating against an individual because of the individual's age, race, creed, color, national origin, gender or

disability (see NY Executive Law §296(1); NYC Administrative Code §8-107). Both statutes require liberal construction of their provisions to accomplish the remedial purposes of prohibiting discrimination. *See* Executive Law §300; Administrative Code §8-130; *see also Binghamton GHS Employees Fed. Credit Union v State Div. of Human Rights*, 77 NY2d 12, 18 (1990); *Williams v New York City Hous. Auth*., 61 AD3d 62, 65-66 (1st Dept 2009), *lv denied* 13 NY3d 702 (2009).

The NYSHRL defines "disability" broadly 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 also Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (1st Dept 2009) ("the State HRL accords greater disability protection than the Americans with Disabilities Act (ADA), and … the City HRL provides even broader protections still"); *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 883-4 (2013); *Antonsen v Ward*, 77 N.Y.2d 506, 571 (1991); *Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 (1st Dept 2006).

In evaluating causes of action under both the NYSHRL and the NYCHRL, New York courts apply the burden-shifting analysis developed in *McDonnell Douglas Corp. v Green*, 411 US 792, 802 (1973) and clarified by the First Department in *Bennett v Health Mgt. Sys., Inc*., 92 AD3d 29 (1st Dept 2011). Both the *McDonnell Douglas* test and *Bennett's* "Mixed-Motive" test place the initial burden on the plaintiff to establish a prima facie case of discrimination. To meet this burden, Plaintiff is required to show that: (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she suffered adverse employment action; and (4) she suffered the adverse action under circumstances giving rise to an inference of discrimination. *Id*; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29 (1st Dept 2011).

Next, if the Plaintiff makes such a showing, the burden shifts to the Defendant to show that there was a legitimate, non-discriminatory reason for its termination decision. *McDonnell Douglas*,

411 US at 802-803; *Bennett*, 92 AD3d at 36. If the Defendant satisfies its burden the Plaintiff must "either counter the defendant's evidence by producing pretext evidence . . . or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination." *Bennett*, 92 AD3d at 39. In other words, "the court should turn to the question of whether the defendant has sufficiently met its initial burden as the moving party of showing that there is no evidentiary route that could allow a jury to believe that discrimination played a role in the challenged action." *Id*. at 40.

The *McDonnell Douglas* framework and the "mixed-motive" framework are the same in terms of the first two prongs. It is only after an employer meets its burden do these tests diverge. *See Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 73 (1st Dept 2017). Under *McDonnell Douglas*, the burden shifts to the plaintiff to produce evidence tending to "prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004). By contrast, under the mixed motive analysis, the plaintiff must come forward with evidence from which it could be found that "unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision." *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 (1st Dept 2012). As a practical matter, the mixed-motive standard "imposes a lesser burden on a plaintiff opposing" a summary judgment motion (*Hamburg*, 155 AD3d a 73) because the plaintiff can defeat the motion by coming forward either with evidence that the employer's "stated reasons were false and that discrimination was the real reason" (*Forrest*, 3 NY3d at 305) or that "discrimination was one of the motivating factors for the defendant's conduct" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 n.27 [2009], *lv denied* 13 NY3d 702 [2009]).

Discrimination

Plaintiff has met her *prima facie* burden by showing that she is a member of a protected class, that she was qualified to hold the position of Accident Investigator, and that she suffered an adverse employment action when she was terminated under circumstances that give rise to an inference of discrimination. In turn, Defendants have set forth a legitimate, nondiscriminatory reason for terminating Plaintiff's employment, namely her violation of Metro-North's Prescription Reporting Obligations policy. See *Skinner v Railway Labor Executives Association*, 489 US 602, 621 (1989) (governmental interest in ensuring the safety of traveling public and of the employees themselves justifies prohibiting employees from using alcohol or drugs while subject to being called for duty). The burden then shifts back to Plaintiff to prove that the reason proffered by Defendants for terminating Plaintiff was merely a pretext for discrimination. *McDonnell Douglas*, 411 US at 802-3.

In this regard, while Plaintiff's submissions may establish that she was not sufficiently supported or valued by her employer, given her alleged violation of Metro-North prescription medication policy, it cannot be concluded that her termination was solely a pretext for discrimination.

Under the mixed-motive analysis, the Court must also consider whether discrimination was *one of* the motivating factors for Defendants' actions. *Melman*, 98 AD3d at 127. Here, the court finds that there are questions of fact as to whether Plaintiff was the subject of disability discrimination and whether this was one of the motivating factors in Metro-North's decision to terminate her. In reaching this decision, the court has considered several factors. First, to the extent Defendants claim that they were unaware Plaintiff was using prescription medication, there is a question of fact as to whether they had actual or imputed knowledge based upon her disclosure that she was taking pain medication in her FMLA application. To be sure, her application did not list

Flexeril, but Defendants could have followed-up with Plaintiff on this issue. Second, there is no evidence in the record that Metro-North had a policy requiring investigators to drive company cars to and from work. In fact, Mr. Streany testified that he did not believe there was a such a policy.

Mr. Streany also testified that none of the accident investigators used a company car for at least 18-months after Plaintiff was first hired as an investigator (Streany Dep. pp 215, 221, 224-25):

Q. Did you tell her when she took the job, she would have to have a take-home vehicle? . . .

A. I believe she asked during the interview and we had told her at the time that vehicles were ordered for all of the investigators and that when they became available, they would be assigned.

* * * *

Q. If a take-home car was mandatory as part of Andrea's job duty, why was she allowed to work for eighteen months without a take-home car.

A. Had no car to give her.

Q. Why was that not in her job description that she would be required to have a take-home car?

A. What was in her job description would be available 34/7 and virtually everyone welcomes the fact that they have a company vehicle afforded to them so they can respond and perform the job.

* * * *

Q. Does the company have a standing policy as to who must have a take-home vehicle?

A. I don't believe there was a Metro-North policy.

Q. Was there a policy in 2016 as to who had a take-home vehicle?

A. I don't believe it was a policy then.

Mr. Streany's claim that it was important for Plaintiff to use the company vehicle because it contained certain equipment necessary for investigations (winter clothes, measuring devices, safety equipment, fire extinguishers (Streany Dep. p. 250) is also belied by Plaintiff's expert. According to Mr. Strauch (Strauch Report ¶¶ 49-50):

> Accident investigators have neither the training, nor the knowledge, nor the skills to extinguish fires in accident sites, either alone or teaming with fire fighters…In all likelihood, the extinguisher was provided to fight a fire in the [] company-provided vehicle.
>
> Metro-North accident investigators, because they are based in the same region as the accident locations, also have little need to bring additional weather-related gear because of geographic distances between their home base and the accident sites, despite Mr. Streany's testimony.

> They would wear cold-weather clothing in the winter, irrespective of whether they were responding to an accident or not. Finally, equipment that investigators do need to bring to accident sites, such as cameras, measuring equipment . . . have, over time, gotten smaller rather than larger. Ms. Ramos testified that she was able to carry her investigative gear in a backpack to accident sites.

Perhaps most importantly, Metro-North's claim that it never denied Plaintiff a reasonable accommodation ignores the requirement to first engage with her about her request. Under both the NYSHRL and the NYCHRL, "the first step in providing a reasonable accommodation is 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 v City of New York*, 66 AD3d 170, 176 (1st Dept 2009); *see also Vangas v Montefiore Med. Ctr.*, 6 F. Supp. 3d 400, 420 (quoting *Lovejoy-Wilson v NOCO Motor Fuel, Inc.*, 263 F.3d 208, 218-19 [2d Cir. 2001]:

> An interactive process may involve a "meeting with the employee who requests an accommodation, requesting information about the condition and what limitations the employee has, asking the employee what he or she specifically wants, showing some sign of having considered the employee's request, and offering and discussing available alternatives when the request is too burdensome."

While Plaintiff still bears the burden of proving the existence of a reasonable accommodation that would have enabled the employee to perform the essential functions of the job, "in all but the most extreme cases, the lack of a good faith interactive process forecloses summary judgment in favor of the employer." *Jacobsen*, 22 NY3d at 838. Here, there is no evidence that Metro-North even met with the Plaintiff regarding her accommodation request, much less engaged in an interactive process with her towards the goal of reaching an agreement (see Kay Report, ¶ 20). This is particularly troubling given that *all* the investigators, not just the Plaintiff, were able to perform their essential job functions for 18 months prior to being assigned company cars. That Metro-North would not even consider discussing Plaintiff's accommodation under these

circumstances raises a triable issue of fact whether their actions constituted disability discrimination.

Hostile Work Environment

The NYSHRL and the NYCHRL evaluate hostile work environment claims differently. Under the NYSHRL, a hostile work environment is found where "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment [internal quotation marks and citation omitted]." *Forrest*, 3 NY3d 295 at 310. "Whether a workplace may be viewed as hostile or abusive – from both a reasonable person's standpoint as well as from the victim's subjective perspective – can be determined only by considering the totality of the circumstances." *Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 51 (4th Dept 1996). These circumstances include "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance [internal quotation marks and citation omitted]." *Forrest*, 3 NY3d 295 at 310-11. Generally, isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment: only pervasive conduct is actionable. *Father Belle Community Ctr.*, 221 AD2d 44 at 51. In contrast, the NYCHRL is less stringent in its requirements, requiring only that a Plaintiff demonstrate that she was treated "less well" than other employees, but more than "petty slights and grievances. *Williams v New York City Hous. Auth.*, 61 AD3d 62, 79 (1st Dept 2009). Under the NYCHRL, it is the employer that carries the burden of proving the conduct's triviality. *See Mihalki v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 111 (2nd Cir. 2013).

Several of Plaintiff's complaints about the comments made by her colleagues and supervisors could be considered by some as trivial in nature. The court certainly does not condone

this conduct and is mindful of Plaintiff's described discomfort due to certain statements and actions. However, these are not enough to establish that she was subject to a "severe or pervasive" hostile work environment under the NYSHRL. *See Grovesteen v New York State Pub. Employees Fed'n, AFC-CIO*, 83 AD3d 1332, 1333 (3d Dept 2011) (plaintiff being denied office space, made to cover assignments in other regions, required to conduct excessive training sessions, subjected to disparaging comments, and denied support from her supervisors did not constitute hostile work environment under NYSHRL); *Chin v New York City Hous. Au*th., 106 AD3d 443, 444 (1st Dept 2013) (plaintiff's assertion that she was variously yelled at, subjected to the occasional offensive remark, required to perform undesirable clerical tasks, denied family and medical leave, overworked, subjected to excessive scrutiny, and transferred to an undesirable office not enough to constitute severe and pervasive conduct under the NYSHRL); *Hernandez v Kaisman*, 103 AD3d 106, 109 (1st Dept 2012) (conduct not severe or pervasive under the NYSHRL even though, among other things, plaintiff's supervisor sent a number of sexually suggestive emails, told plaintiff that she should get breast implants, and pointed out to plaintiff that he liked her underwear); *Alfano v Costello*, 294 F3d 365 (2d Cir 2002) (reversing verdict in favor of plaintiff based on five incidents when she was told she ate carrots and other food "seductively," carrots were placed in her presence arranged to mimic male genitalia, and a vulgar cartoon was left in plaintiff's mailbox).

However, there is a question of fact as to whether Defendants' conduct exceeds what a reasonable person would consider mere "petty slights and trivial inconveniences" as required by the NYCHRL since there is evidence Plaintiff was treated differently from her colleagues in several materials respects. For example, her office was moved several times, each time farther away from her home, and there is evidence that no arrangements were made by her supervisors for basic equipment or even office space. There is also testimony that although other investigators were late in handing in their accident reports, only the Plaintiff was given a PIP. When her PIP was revised,

Mr. Streany testified that this was done not because of Plaintiff's conduct during her probation period, but because the original PIP was vague (Streany Dep. p. 77). However, Plaintiff's work schedule was pushed back 30 minutes, even though she had previously advised her supervisors of the need to start her day earlier to make her afternoon physical therapy appointments. No justification was offered for this change. And instead of receiving credit for the time she already operated under the first PIP – 56 days – her probation period was extended for another 90 days. These actions appear to have been punitive in nature. Since a jury could find that this alleged unequal treatment was related to her disability, Plaintiff's hostile work environment claim under the NYCHRL should proceed to trial.

Accordingly, Defendants' motion for summary judgment dismissing the hostile work environment claims is granted in part and denied in part.

Retaliation

To establish a prima facie case of retaliation under the NYSHRL, Plaintiff must show that she was (1) engaged in a protected activity; (2) Defendants were aware of that activity; (3) she experienced an adverse action; (4) there was a causal connection between the activity and the action. *Forrest,* 3 NY3d 295 at 313. Procedurally, The NYCHRL standard is essentially the same. *Brightman v Prison Health Serv., Inc*., 108 AD3d 739, 740 (2d Dept 2013). "Protected activity" refers to "actions taken to protest or oppose statutorily prohibited discrimination." *Aspilaire v Wyeth Pharmaceuticals, Inc*., 612 F. Supp. 2d 289, 308 (SDNY 2009). Requesting an accommodation does not qualify as a protected activity (*Witchard v Montefiore Med. Ctr*., 103 AD3d 596, 596 [1st Dept 2013]) but filing a discrimination claim with the EEOC does.

Defendants argue that Plaintiff's retaliation claim is merely based upon the fact that she was terminated about 10 days after they received notice of her EEOC complaint. To be sure, some courts have held that temporal proximity alone cannot establish causation between protected

activity and the adverse action. *Forrest*, 3 NY3d at 313 (plaintiff cannot avoid summary judgment "by merely pointing to the inference of causality resulting from the sequence in time of the events"); *see also Feliciano v. Alpha Sector, Inc*., 2002 US Dist. LEXIS 12631, *35 (SDNY July 12, 2012) ("the mere fact that the incidents of which [a plaintiff] complains occurred after…grievances were filed does not create an issue of fact as to causality"). On the other hand, the causal connection needed for proof of a retaliation claim "can be established indirectly by showing that the protected activity was closely followed in time by the adverse action." *Cifra v GE*, 252 F.3d 205, 217 (2d Cir. 2001); *see also Feingold v New York*, 366 F.3d 138, 156-157 (2d Cir. 2004). In other words, causality can be established where the temporal proximity between the protected activity and the adverse employment is very close. *See Clark Cty School Dist. v Breeden*, 532 US 268, 273 (2001); *La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918, 921 (2d Dept 2015); *Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18, 25 (1st Dept 2014).

While this court does not minimize the fact that Plaintiff clearly violated Metro-North's prescription drug policy, it also cannot ignore the proximity between Plaintiff's protected activity and her termination. Plaintiff filed her EEOC claim on March 6, 2017. Mr. Martens drafted a letter denying Plaintiff's accommodation request on March 14, 2017. Metro-North became aware of Plaintiff's EEOC claim on March 15, 2017. The incident leading to Plaintiff's termination took place on March 16, 2017. That same day, Mr. Streany relieved Plaintiff from her duties and referred the matter to HR, and Plaintiff was terminated on March 24, 2017. Given the close temporal proximity between these events, the court believes that a question of fact exists as to whether Plaintiff was terminated because she violated Metro-North policy or whether her termination was in retaliation for filing her EEOC claim.

MTA and Individual Defendants

All of Plaintiff's claims against the MTA and the individual defendants are dismissed. Plaintiff was employed by Metro-North, not the MTA, and Metro-North was solely responsible for terminating Plaintiff's employment. Nor can the individual defendants bear liability. Individual liability can only be established under the NYSHRL and NYCHRL when an employee has an "ownership interest or any power to do more than carry out personnel decisions made by others" *Patrowich v Chem. Bank*, 63 NY2d 541, 543-44 (1984). No such showing has been made here.

CONCLUSION

In light the foregoing, it is hereby

ORDERED that Defendants' motion for summary judgment is granted in part and denied in part; and it further

ORDERED that Plaintiff's claims against defendants MTA, Joseph Streany, Justin Vonashek and Gary Martens are severed and dismissed; and it is further

ORDERED that Plaintiff's hostile work environment claim under the New York State Human Rights Law is severed and dismissed; and it is further

ORDERED the Defendants' motion is otherwise denied.

The court will schedule a pre-trial conference for a later date.

The Clerk of the Court is directed to mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: April 3, 2020

SHERRY KLEIN HEITLER, J.S.C.

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