SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **46M**

Justice

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LINDA WILLIAMS,

Plaintiff,

- v -

MEMORIAL SLOAN-KETTERING CANCER CENTER,

Defendant.

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INDEX NO. 159216/2016

MOTION DATE 06/30/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Plaintiff Linda Williams brings this action against her employer, defendant Memorial Sloan-Kettering Cancer Center, for alleged employment discrimination based on age and race and for retaliation in violation of the New York City Human Rights Law (Administrative Code of City of NY § 8-101 et seq.) (NYCHRL), Title VII of the Civil Rights Act of 1964 (42 USC § 2000e et seq.) (Title VII), and the Age Discrimination in Employment Act (29 USC § 621 et seq.) (ADEA). Defendant now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Factual Background

Plaintiff was born in 1957 (NY St Cts Elec Filing [NYSCEF] Doc No. 56, Martin affirmation, exhibit C, plaintiff tr at 9) and identifies as African-American (NYSCEF Doc No. 54, Martin affirmation, exhibit A, ¶ 3). Plaintiff is a high school graduate (NYSCEF Doc No. 60, Martin affirmation, exhibit G). Plaintiff took classes at Fordham University between 2013 and 2015 but did not receive a degree (NYSCEF Doc No. 56 at 21; NYSCEF Doc No. 85, plaintiff aff, exhibit F).

Defendant is a not-for profit corporation organized under New York law and maintains its principal place of business in this state (NYSCEF Doc No. 55, Martin affirmation, exhibit B, ¶ 2).

Since June 2005, defendant has employed plaintiff as a physician office assistant (POA), first as a POA2 before being promoted to a POA3 (NYSCEF Doc No. 54, ¶ 5; NYSCEF Doc No. 56 at 42-43). Between 2013 and 2016, plaintiff applied for 28 jobs in different departments within defendant, including positions as a POA; an administrative secretary; a care advisor; a patient access coordinator; a medical secretary; an executive secretary; an administrative assistant; and a physician office specialist[1] (NYSCEF Doc No. 65, Amanda Sinclair [Sinclair] aff, exhibit D). Although plaintiff received interviews for some of the positions for which she applied (NYSCEF Doc No. 56 at 101, 146, 162-163, 172-173, 225, 230, and 274-275), plaintiff was not hired for any of them. Instead, plaintiff alleges that she was "passed over for younger and/or non-African-Americans with less qualifications" (NYSCEF Doc No. 54, ¶ 10).

At her deposition, plaintiff testified, "I feel, basically, I was passed over predominantly because of age," though "I'm not ruling out race" (NYSCEF Doc No. 56 at 80). Plaintiff stated that "[b]ased on the resumes that were submitted to me by … the defendant" (*id.* at 81) and her interactions with those who were hired (*id.* at 251-253), plaintiff believed her age and race played a significant factor in defendant's hiring decisions because the applicants who ultimately were hired were younger than her (*id.* at 84 and 250). Plaintiff testified repeatedly that she did not know the total number of applicants for each position, the identities of those interviewed, the identities of those who were ultimately hired, their ages, their races, their qualifications, or their performance ratings if they were internal candidates (*id.* at 97-99, 102-104, 109-111, 117-118, 125-127, 131-132, 137-139, 143, 151-152, 164-165, 173-174, 190-191, 197-198, 207-210, 216-218, 222-223,

[1] Plaintiff avers that she applied for 27 positions (NYSCEF Doc No. 79, plaintiff aff, ¶ 4).

227-228, 234-236, 245-246, 247-248, 258, 264, 268, 290-291, 297, and 300-301). Plaintiff testified that, for many of the postings, she was unaware of the identities, races or ages of the recruiter from defendant's Talent Acquisition Group (TAG) or the hiring manager, who made the final hiring decision, from the various services or departments (*id.* at 99, 102-104, 111, 144-145, 192, 202, 207, 211-212, 219, 221-222, 241, 245, 292, and 297). When asked if she believed the recruiters, hiring managers, or the physicians she interviewed with harbored any age- or race-related animus or whether any of them were aware of her complaints about discrimination, plaintiff repeatedly responded, "I couldn't say," "[n]ot that I can say definitely" or "[n]ot that I can – I'm aware of" or other similar responses (*id.* at 99-100, 104-105, 111-112, 132-134, 145, 160, 165-167, 176-178, 193, 202-203, 212, 219, 223-224, 228-229, 237, 241, 248, 264-265, and 299). However, plaintiff believed that Nina Galasso (Galasso), a recruiter, held an age-related animus because Galasso's name appeared on several rejection notices plaintiff had received (*id.* at 175-176). Plaintiff stated that other recruiters in the Talent Acquisition Group, who were all "young adults" (*id.* at 158), held an age-related animus because plaintiff "didn't get the job" (*id.* at 155), and they were aware of her age based on her resume (*id.* at 157). Plaintiff identified Dr. David Jones as the only person who made a comment possibly related to race (*id.* at 178). During plaintiff's interview for a POA position with Dr. Jones, Dr. Jones allegedly said, "I don't care if the person selected is green" (*id.* at 170 and 178).

After several of the positions were filled, plaintiff visited the different services or departments and learned that the persons who had been hired were "young adults" who were not Black (*id.* at 118, 127-128, 139, 143, 198-200, 208-209, 217, 233, 247). Plaintiff added that she learned of the other applicants' qualifications only after she commenced this action (*id.* at 283-

284), and later created a spreadsheet listing the names, educational backgrounds, employment histories and estimated ages of 16 successful applicants (*id.* at 285).

Plaintiff testified that she had interviewed with Dimitrios Phillips (Phillips), with whom plaintiff worked alongside, for an administrative secretary position (*id*. at 230-231). Plaintiff stated that she had no reason to believe Phillips harbored any age- or race-related bias (*id*. at 237). Plaintiff, though, also testified that she had complained about discrimination to Philips, but could not state when they had that discussion (*id*. at 238). Phillips allegedly advised plaintiff to "get out" of the department of medicine because "there's a rumor going around that [plaintiff is] difficult to manage" (*id*. at 239-240). Plaintiff expressed that she had no reason to believe that Phillips' knowledge of plaintiff's complaint about discrimination had an adverse effect on her application for the position (*id*. at 240). Plaintiff also interviewed with Tatiana Gelfand (Gelfand) for the same position (*id*. at 231 and 240-241). Plaintiff stated that Gelfand knew of plaintiff's concerns about discrimination, but Gelfand was not aware of those concerns "during that period of time" (*id*. at 241).

Plaintiff testified that she met with HR Generalist Amanda Lombard (Lombard) to express her concerns "primarily [about] age discrimination, not ruling out race, and the number of times that I applied for the patient access coordinator [position]" (*id*. at 274). Lombard recommended plaintiff to Christine Boscoco (Boscoco), a manager, for a position and scheduled a "fake" interview to "hush me up," but Boscoco did not appear (*id*. at 274-275). Plaintiff stated that she believed she was the only person interviewed (*id*. at 279), and that "when someone in HR or the chief of a service recommends you for a position, the applicant gets the position" (*id*. at 280). Plaintiff was not hired for the position.

Sinclair, defendant's current Director of Employee Relations (NYSCEF Doc No. 61, Sinclair aff, ¶¶ 1-2), testified that plaintiff told her she believed she had not been selected for several positions because of her age (NYSCEF Doc No. 57, affirmation, exhibit D, Sinclair tr at 22). Sinclair stated that in response to plaintiff's complaints, two or three of which had been sent by email, Sinclair with met plaintiff and assured her that candidates were not selected based on their biographical information (*id.* at 23). Sinclair directed plaintiff to online resources such as interview preparation guides, offered to review plaintiff's resume, and offered to conduct a mock interview (*id.* at 23-24). Sinclair also spoke to one of plaintiff's second level manager and suggested that plaintiff's managers "be more cognizant and aware of how the supervisors were interacting with [plaintiff]" (*id.* at 24). Sinclair was not aware of any other investigation into plaintiff's complaints (*id.* at 25).

Susan Hynson (Hynson), defendant's Director of Talent Acquisition, testified that once a recruiter receives information about a potential posting, the recruiter will reach out to the department's hiring manager to discuss the position and to create a job posting (NYSCEF Doc No. 58, affirmation, exhibit E, Hynson tr at 17). External candidates are interviewed by the recruiter first before moving on to the hiring manager (*id.*). Hyson explained that there are different hiring panels created for each position at defendant, with the hiring manager and a peer or more senior hiring manager involved in the interviewing process (*id.*). Hyson recalled having met plaintiff once for interview coaching (*id.* at 19). Hynson testified that plaintiff had mentioned her age as the reason why she wasn't being hired (*id.* at 31). Hynson explained that she had never seen or reviewed any of plaintiff's complaints, and none of the 7 people Hynson supervised in the Talent Acquisition group discussed plaintiff's complaints of age discrimination with Hynson (*id.*). Hynson testified that she had no knowledge regarding any of Williams' applications (*id.* at 31-31).

Plaintiff filed a complaint with the Equal Employment Opportunity Commission, (EEOC), and the EEOC later issued a notice of right to sue letter (NYSCEF Doc No., ¶¶ 74 and 79). Plaintiff commenced this action on November 1, 2016 by filing a summons and complaint asserting the following three causes of action: (1) age and race discrimination and retaliation in violation of the NYCHRL; (2) race discrimination and retaliation in violation of Title VII; and (3) age discrimination and retaliation under the ADEA.[2] Defendant now moves for summary judgment.

The Parties' Contentions

Defendant argues that summary judgment is warranted on three grounds. Defendant first contends that plaintiff cannot establish a prima facie case of age or race discrimination because she can only speculate that she was treated differently. Next, defendant submits that it has proffered legitimate business reasons for plaintiff's non-selection, namely plaintiff's experience and skills were weaker than other candidates. Last, defendant posits that plaintiff's retaliation claims fails because she cannot show that the recruiters and hiring managers were aware of her complaints of age or race discrimination.

In support, defendant tenders an affidavit from Sinclair; copies of defendant's EEO Policy and Diversity Policy, its Policy Against Harassment and Discrimination, and its Conduct of Employees Policy; a chart detailing the birth year and race of each recruiter, hiring manager and successful applicant for each position plaintiff applied for between 2013 and 2016, and the reasons why plaintiff was not selected for each position; resumes for the successful candidates; copies of job postings for the relevant positions; job descriptions for a POA2 and POA3; and plaintiff's performance appraisals. Sinclair avers that a "Not Considered" notation "can have numerous

[2] Plaintiff in her opposition discusses the changes to Executive Law § 300, in effect as of August 12, 2019 (*see* L 2019, ch 160, § 6). Plaintiff, however, did not plead a cause of action for age- or race-based employment discrimination or retaliation under the New York State Human Rights Law (Executive Law § 296 et seq.) in her complaint.

meanings, including that the applicant's application, was not reviewed" (NYSCEF Doc No. 61, ¶ 12). Sinclair further avers that the recruiters, hiring managers, and successful applicants are of varying ages, are racially diverse, and include persons who share the same protected characteristics as plaintiff (*id.*, ¶ 13). Defendant's chart reflects that plaintiff was not selected for many of the positions because she lacked skills and experience for the position or her skills and experience were considered weaker than those of other applicants (NYSCEF Doc No. 67, Sinclair aff, exhibit F at 1).

Plaintiff counters that a simple review of the resumes of the successful applicants is sufficient to raise a triable issue of fact on the age discrimination claims. In addition, plaintiff contends that many of those hired were not Black and had less experience working at defendant than plaintiff.

Discussion

It is well settled that a party moving for summary judgment under CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [citation omitted]). If the moving party meets its prima facie burden, the opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024] [internal quotation marks and citation omitted]). If the movant fails to meet its prima facie burden, the motion must be denied without regard to the sufficiency of the opposing papers (*Pullman v Silverman*, 28 NY3d 1060, 1063 [2016]).

A. The Age and Race Discrimination Claims

Title VII makes it unlawful for an employer "to fail or refuse to hire … or otherwise to discriminate against any individual with respect to [that individual's] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (42 USC § 2000e-2 [a] [1]). Under the ADEA, it is an unlawful for an employer "to fail or refuse to hire … or otherwise discriminate against any individual with respect to [that individual's] compensation, terms, conditions, or privileges of employment, because of such individual's age" (29 USC § 623 [a] [1]). Similarly, the NYCHRL makes it unlawful for an employer "to refuse to hire or employ" a person or to discriminate against any "person in compensation or in terms, conditions or privileges of employment" because of that person's "actual or perceived" age or race (Administrative Code § 8-107 [1] [a] [2], [3]).

Discrimination claims brought under Title VII and the ADEA are evaluated under the burden-shifting framework articulated in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]; *see also Carr v New York City Transit Auth*., 76 F4th 172, 177 [2d Cir 2023]; *Chefalas v Taylor Clark Architects*, 283 AD2d 174, 175 [1st Dept 2001]). "[T]o establish a prima facie case of discriminatory failure to promote in violation of Title VII or the ADEA, a plaintiff must show that (1) he [or she] is a member of a protected class, (2) he [or she] was qualified for the promotion for which he applied, (3) he [or she] was denied the promotion, and (4) the denial occurred under circumstances giving rise to an inference of discrimination on a basis forbidden by Title VII or the ADEA" (*Duckett v Foxx*, 672 Fed Appx 45, 47 [2d Cir 2016]). If the plaintiff satisfies this prima facie burden, the burden shifts to the defendant employer to "present[ ] a legitimate, non-discriminatory reason for its actions" (*id.*). If the defendant carries its burden, the plaintiff, in response, must "present evidence that the employer's reason is mere pretext" for discrimination

(*id.*; *see also Rinaldi v Mills*, 2022 WL 17480081, *1, 2022 US App LEXIS 33636, *2 [2d Cir 2022] [stating that the plaintiff on an ADEA claim must establish that age was the "but for" cause of the adverse action]).

Because the NYCHRL must be construed "broadly in favor of discrimination plaintiffs" (*Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]), NYCHRL claims must be analyzed separately from any federal claims for discrimination (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]; *see also Mihalik v Credit Agricole Cheureux N. Am., Inc.*, 715 F3d 102, 109 [2d Cir 2013]). To state a cause of action for employment discrimination under the NYCHRL, the plaintiff must show that the plaintiff is a member of protected class, was qualified for the position, "was treated differently or worse than other employees," and that such "different treatment occurred under circumstances giving rise to an inference of discrimination" (*Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]). NYCHRL claims are analyzed under the *McDonnell Douglas* evidentiary framework and the mixed motive framework (*Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 72-73 [1st Dept 2017]). The mixed motive framework shares the first two steps with the *McDonnell Douglas* framework (*id.* at 73) but imposes a lesser burden upon the plaintiff on the third (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 [1st Dept 2012]). On the third step, the plaintiff must produce evidence of pretext (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 40 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012) or show that "'unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for [the] adverse employment decision'" (*Hamburg*, 155 AD3d at 73, quoting *Melman*, 98 AD3d at 127). Stated another way, the plaintiff must have "been treated less well than other employees because of [a protected characteristic]" (*Williams*, 61 AD3d at 78). Summary judgment dismissing an NYCHRL claim may be granted to

the defendant where, "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). The plaintiff may defeat the motion by producing evidence showing that the defendant's reason was false, misleading, or incomplete (*id.*) or the defendant "was 'motivated at least in part by … discrimination'" (*Melman*, 98 AD3d at 127 [citation omitted]).

In viewing the evidence in the light most favorable to plaintiff as the non-moving party, as this court must (*Vega*, 18 NY3d at 503), defendant has failed to eliminate all questions of material fact, and thus, it has failed to demonstrate its entitlement to summary judgment on the age and race discrimination claims. "'The plaintiff's burden of establishing a *prima facie* case in a discrimination suit is *de minimis*'" (*Green v Town of E. Haven*, 952 F3d 394, 404 [2d Cir 2020] [citation omitted]; *see also Bennett*, 92 AD3d at 36-37). Contrary to defendant's assertion, plaintiff has satisfied this minimal burden (*see Miller v News Am.*, 162 AD3d 422, 422 [1st Dept 2018]). Plaintiff is a member of a protected class (*see Campbell v New York City Dept. of Educ.*, 200 AD3d 488, 489 [1st Dept 2021] [plaintiff, who identified as African-American, is a member of a protected class]; 29 USC § 631 [a] ["The prohibitions in this Act shall be limited to individuals who are at least 40 years of age"]; Administrative Code § 8-107 [1] [a] [prohibiting discrimination based on "actual or perceived" race or age]). It appears that plaintiff was minimally qualified for several of the posted positions (*see Clawson v City of Albany Dept. of Fire & Emergency*, 2024 WL 1044531, *2, 2024 US App LEXIS 5759, *4 [2d Cir, Mar. 11, 2024]; *Slattery v Swiss Reins. Am. Corp.*, 248 F3d 87, 92 [2d Cir 2001], *cert denied* 534 US 951 [2001] [stating that all that is required on the second *McDonnell Douglas* prong is "basic eligibility for the position at issue"]). Thirteen of the 27 job postings identified a bachelor's degree as a "preferred" qualification (NYSCEF Doc No. 67

at 4, 8, 12, 20, 23, 27-29, 31, 33-34, and 38-39). A high school diploma or a bachelor's degree was a requirement on 10 postings (*id.* at 2, 3, 6, 10, 14, 16, 18, 22, 32 and 37), although two such postings indicated that a bachelor's degree was "preferred" (*id.* at 10 and 16). Three postings did not indicate a minimum education qualification (*id.* at 13, 30 and 41). Only one posting listed a high school diploma as a minimum requirement (*id.* at 25). Plaintiff received her high school diploma in 1975 (NYSCEF Doc No. 60). Several postings indicated that those with at least one year of experience as a POA were preferred (*id.* at 2, 3, 6-7, 14, 27, 32, 37, and 41). By 2013, plaintiff had been employed as a POA for eight years, and plaintiff's resume stated that she was skilled in several word processing and other computer programs (NYSCEF Doc No. 60). A failure to promote can constitute an adverse employment action (*see National R.R. Passenger Corp. v Morgan*, 536 US 101, 114 [2002]). Finally, plaintiff has alleged that defendant hired applicants outside her protected class for each position (*see Clawson*, 2024 WL 1044531, *2, 2024 US App LEXIS 5759, *4-5 [finding that "Clawson's allegation that he was 'replace[d] … with an individual outside [his] protected class' is sufficient to raise an inference of discrimination at the initial *prima facie* stage"]; *see also Melman*, 98 AD3d at 115; *but see De Jesus-Hall v New York Unified Ct. Sys.*, 856 Fed Appx 328, 330 [2d Cir 2021]).

Defendant contends that it has proffered legitimate, nondiscriminatory reasons for refusing to hire plaintiff for any of the positions she had applied for. Generally, a court "must respect an employer's unfettered discretion to choose among qualified candidates" (*Flowers v Connecticut Light & Power Co.*, 774 Fed Appx. 33, 35 [2d Cir 2019], *cert denied* 140 S Ct 521 [2019] [citation omitted]). Here, a chart submitted with Sinclair's affidavit lists "Lack of Skills Experience," "Skills Weaker than Others," "Experience Weaker than Others," and "Not Considered" as the reasons why plaintiff was not selected for each position (NYSCEF Doc No. 65). Although Sinclair

avers that the chart is a "true and correct copy" (NYSCEF Doc No. 61, ¶ 13), Sinclair does not explain who created the chart, when the chart was created, or identify the source of the information in the chart (*see DeFreitas v Bronx Lebanon Hosp. Ctr.*, 168 AD3d 541, 541 [1st Dept 2019] [source of information on a chart not disclosed]). Sinclair is not named as either a recruiter or a hiring manager on the chart. More importantly, absent from defendant's motion is an affidavit or other testimonial or documentary evidence from those recruiters, hiring managers or physicians directly involved in making those decisions attesting to the circumstances why plaintiff was not considered or why her skills or experience were considered weaker than those of other candidates (*compare Peddy v L'Oréal USA, Inc.*, 2020 WL 4003587, *15-16, 2020 US Dist LEXIS 124221, *42-49 [SD NY, July 15, 2020, No. 18-CV-7499 (RA)], *affd* 848 Fed Appx 25 [2d Cir 2021] [granting summary judgment on an ADEA claim based on testimony from those directly involved in the hiring process and other admissible evidence demonstrating why defendant selected other candidates over plaintiff to fill the positions]; *Jimenez v City of New York*, 605 F Supp 2d 485, 522 [SD NY 2009] ["In every instance the person who made the actual hiring decision testified that the applicant who was chosen had credentials superior to plaintiff's and explained why"]). Thus, defendant has not sustained its burden of proffering legitimate, nondiscriminatory reasons to rebut plaintiff's prima facie case and show that plaintiff's age and race played no part in its decisions.

Defendant also contends that, based on plaintiff's testimony, plaintiff can only speculate that she was treated differently. To be sure, speculation on whether discrimination was a motivating factor for an employer's actions is insufficient to defeat a motion for summary judgment under the NYCHRL (*Ellison v Chartis Claims, Inc.*, 178 AD3d 665, 669 [2d Dept 2019], *lv dismissed* 35 NY3d 997 [2020]). Likewise, "[a] plaintiff's 'feelings and perceptions of being discriminated against are not evidence of discrimination'" (*Basso v Earthlink, Inc.*, 157 AD3d 428,

430 [1st Dept 2018], quoting *Bickerstaff v Vassar Coll.*, 196 F3d 435, 456 [2d Cir 1999], *cert denied* 530 US 1242 [2000]). Nor is the general assertion that a plaintiff had more work experience than other applicants sufficient (*see Rodriguez v County of Nassau*, 830 Fed Appx 335, 339 [2d Cir 2020]; *Patel v City of New York*, 699 Fed Appx 67, 69 [2d Cir 2017] ["[g]reater experience cannot alone establish that a candidate's qualifications are so superior to another's that an employer's hiring decision may be found to have been discriminatory"]). However, as is the case here, a defendant cannot carry its burden on summary judgment simply by pointing to gaps in the plaintiff's proof (*Powell v City of New York*, 218 AD3d 1, 4 [1st Dept 2023]), and "must affirmatively demonstrate the merit of its claim or defense" (*Peskin v New York City Tr. Auth.*, 304 AD2d 634, 634 [2d Dept 2003] [internal quotation marks and citation omitted] [denying summary judgment on an age discrimination claim based on the defendant's failure of proof]). Consequently, the branch of defendant's motion for summary judgment dismissing the age and/or race discrimination claims under Title VII, the ADEA and the NYCHRL is denied without regard to the sufficiency of plaintiff's opposition.

B. Retaliation

"Title VII prohibits employers from retaliating 'against any … employee[ ] … because [that individual] has opposed any practice' made unlawful by Title VII" (*Ya-Chen v City Univ. of N.Y.*, 805 F3d 59, 70 [2d Cir 2015], quoting 42 USC § 2000e-3 [a]). The ADEA makes it "unlawful for an employer to discriminate against any … employee[ ] … because such individual … has opposed any practice made unlawful by this section" (29 USC § 623 [d]). The NYCHRL also makes it unlawful for an employer to retaliate against an employee for "oppos[ing] any practice forbidden under this chapter" (Administrative Code § 8-107 [7]).

Retaliation claims brought under Title VII and the ADEA are analyzed under the *McDonnell Douglas* framework (*Carr*, 76 F4th at 178). To establish a prima facie case of retaliation under Title VII or the ADEA, the plaintiff must demonstrate: "'(1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action'" (*Russell v New York Univ.*, 739 Fed Appx 28, 32 [2d Cir 2018] [citation omitted]). The defendant, in response, must produce a legitimate, nonretaliatory reason for its action (*id.*). The plaintiff must then show that the defendant's proffered reason was "mere pretext, and that the employer's 'desire to retaliate' was the real 'but-for cause of the challenged employment action'" (*id.* [citation omitted]).

In contrast to Title VII and the ADEA, a retaliation claim under the NYCHRL is analyzed under the *McDonnell Douglas* and mixed motive frameworks (*Reichman v City of New York*, 179 AD3d 1115, 1119-1120 [2d Dept 2020], *lv denied* 36 NY3d 904 [2021]). The elements for a prima facie case for retaliation under the NYCHRL are similar to those for a prima facie case for retaliation under Title VII and the ADEA[3] (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]). The defendant may rebut the plaintiff's prima facie showing by tendering a legitimate, nonretaliatory reason for its action (*Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740-741 [2d Dept 2013]). The plaintiff, in response, must demonstrate that the defendant's proffered reason was a mere pretext for retaliation (*id.*). Unlike Title VII and ADEA retaliation claims, a plaintiff need not demonstrate "but for" causation under the NYCHRL (*see Lively v Wafra Inv. Advisory Group, Inc.*, 211 AD3d 432, 432 [1st Dept 2022]). It is sufficient to show

[3] Under the NYCHRL, an employer's retaliatory action need not result in a materially adverse change to the terms and conditions of the plaintiff's employment. Instead, an employer's action "must be reasonably likely to deter a person from engaging in protected activity" (Administrative Code § 8-107 [7]).

that "the defendant was motivated at least in part by an impermissible motive" (*Brightman*, 108 AD3d at 741). A defendant establishes its entitlement to summary judgment on a retaliation claim by demonstrating that "the plaintiff cannot make out a prima facie claim of retaliation or, having offered legitimate, nonretaliatory reasons for the challenged actions, that there exists no triable issue of fact as to whether the defendant's explanations were pretextual" (*id.* at 740-741; *see also Melie v EVCI/TCI College Admin*., 374 Fed Appx 150, 153 [2d Cir 2010] [granting summary judgment where the plaintiff could not establish a prima facie case of retaliation under Title VII]).

Applying these precepts, defendant has failed to demonstrate its entitlement to summary judgment. Complaining about discrimination constitutes a protected activity (*Madrigal v Montefiore Med. Ctr*., 191 AD3d 407, 409 [1st Dept 2021]; *Zeng v New York City Hous. Auth*., 2023 WL 4553416, *5, 2023 US App LEXIS 18035, *14 [2d Cir, July 17, 2023]; *Rivera v Greater Hudson Valley Health Sys. (Now Known As Garnet Health)*, 2023 WL 2588308, *17, 2023 US Dist LEXIS 47875, *50 [SD NY, Mar. 21, 2023, No. 21-cv-1324 (NSR)]). Plaintiff testified that she had complained to Phillips and Lombard about discrimination.

As to the second element of plaintiff's prima facie case, defendant contends that plaintiff has adduced no evidence to show that the recruiters and hiring managers were aware of her prior complaints of discrimination, and therefore, plaintiff cannot establish a prima facie case of retaliation under Title VII, the ADEA and the NYCHRL. Defendant points to numerous instances during plaintiff's deposition where she answered "I couldn't say" in response to whether she had reason to believe the recruiters and hiring managers or the physicians with whom she interviewed were aware of her complaints about discrimination. However, plaintiff's knowledge with respect to what the recruiters and hiring managers were (or were not) aware of is not dispositive. Critically, defendant has not produced an affidavit, testimonial or documentary evidence from any

of the recruiters, hiring managers or physicians directly involved in reviewing plaintiff's applications to demonstrate that none of them were aware of plaintiff's prior complaints of discrimination. Thus, defendant is merely pointing to gaps in plaintiff's proof, which is insufficient to sustain its burden on summary judgment (*see Powell*, 218 AD3d at 4). Furthermore, as discussed above, defendant has not produced sufficient proof demonstrating that it had legitimate, nonretaliatory reasons for its actions or sufficient evidence to show that defendant was not motivated, even in part, by an improper motive.

Accordingly, it is

ORDERED that the motion of defendant Memorial Sloan-Kettering Cancer Center for summary judgment dismissing the complaint is denied.

6/12/2024
DATE

RICHARD G. LATIN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE