

Gray v SMBC Capital Mkts., Inc.

2025 NY Slip Op 33811(U)

October 7, 2025

Supreme Court, New York County

Docket Number: Index No. 156852/2020

Judge: Paul A. Goetz

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

-----X

JOAN GRAY,

Plaintiff,

- v -

SMBC CAPITAL MARKETS, INC.,

Defendant.

-----X

INDEX NO. 156852/2020
MOTION DATE 02/11/2025
MOTION SEQ. NO. 013

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 013) 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 414, 415, 416, 417

were read on this motion to/for JUDGMENT - SUMMARY.

In this employment discrimination action, defendant SMBC Capital Markets Inc. (SMBC) moves pursuant to CPLR § 3212 for summary judgment dismissing plaintiff’s amended complaint, which states causes of action for: (i) discrimination based on age, (ii) discrimination based on disability, and (iii) retaliation, all in violation of the New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL).

BACKGROUND

Plaintiff, who was fifty-six years old at the time she filed her original complaint in 2020 (NYSCEF Doc No 1), was hired by defendant as an accounting analyst in January of 1990 (NYSCEF Doc No 42 ¶ 9). From around 1995 through July 2016, Larry Weissblum was plaintiff’s manager (NYSCEF Doc No 364 ¶ 17). During this time, Weissblum did not raise any concerns with plaintiff’s performance, and she generally received positive performance reviews (*id.* ¶ 18). However, Weissblum’s manager, Augustus Moore, allegedly “realized that Weissblum

was performing many of the tasks for which Gray should have been responsible, including initiating improvements to SMBC’s proprietary PRISM system,” the company’s system for tracking and monitoring its financial trades (*id.* ¶ 19).

In 2016, Weissblum left SMBC, and Paul Stolbof¹ became plaintiff’s manager (*id.* ¶ 22; NYSCEF Doc No 42 ¶ 11). By that time, plaintiff was the head of the settlements department, which handled transactions in which “[a] mistake . . . could easily result in a problem valued in the millions of dollars” (*id.* ¶ 16). Defendant alleges that the settlements department “was one of several departments Stolbof was tasked with overhauling, updating and bringing to industry standards” (*id.* ¶ 34).

Plaintiff alleges “[i]t was immediately apparent upon Mr. Stolbof’s arrival that his objective was to cull older employees from the ranks at Defendant SMBC,” as evidenced by his comments that “people have been here too long,” there was “no value added” by older employees, he thinks of plaintiff as “legacy baggage,” “old people should be out,” and “the firm is too generous with the pension” (NYSCEF Doc No 42 ¶ 12). Plaintiff does not specify the dates or context in which these comments were made. However, Amy Chung, one of plaintiff’s direct reports, testified that she had “heard [Stolbof] use the word ‘dinosaur’ to describe . . . staff members that had been at the firm [] about over 20 years, which would include” plaintiff (NYSCEF Doc No 374, p. 76), and that his “comments [about plaintiff] were specific to how long she had been at the firm” (*id.*, pp. 82-83). Chung also observed Stolbof “express[] his frustrations” by yelling at plaintiff, and “frequent[ly]” saw plaintiff “visibly upset” by these interactions (*id.*, pp. 41-44).

¹ Defendant represents that Stolbof is six years older than plaintiff (NYSCEF Doc No 363, p. 21).

“When Mr. Stolbof gave Plaintiff her first interim performance evaluation four months into his management of Plaintiff in November of 2016, Plaintiff was ‘On Track’ and [he] identified no major issues with Ms. Gray’s performance” (NYSCEF Doc No 42 ¶ 13). Plaintiff alleges that Stolbof was nevertheless “decidedly hostile” towards her (*id.* ¶ 14). In March of 2017, Stolbof wrote plaintiff’s annual performance review for 2016, indicating that she had “gaps” in her performance (*id.* ¶ 17; NYSCEF Doc No 364 ¶ 46 [“At this time, SMBC rated employee performance as ‘Exceeds,’ ‘Meets,’ or ‘Gaps’”]). Stolbof wrote, *inter alia*:

“Joan and I have spoken many times about my disappointment in her team’s performance [which] is at a very low standard. Many operational errors are made on a daily basis. The costs of these errors can be measured in actual expenses to the firm [and] reputational damage . . . Even though [plaintiff] is aware of [these issues], she has not implemented effective mitigating controls . . .

I have a big concern given the management structure of the team which I believe contributes to these problems. This is a production team that is composed of very junior staff and therefore requires a close level of management supervision. To address some of these issues, [] Joan has agreed to work 5 days a week² . . .

I will continue to support Joan and her team in making changes and improvements to the processes and the systems. However, the results must substantially improve . . .”

(NYSCEF Doc No 341 [the 2016 review]).

Plaintiff alleges that “Stolbof’s behavior became steadily more hostile toward Plaintiff,” including making “unreasonable demands, [giving] unjustifiable criticisms of her work, and blam[ing] Plaintiff and her team for mistakes made by others” (NYSCEF Doc No 42 ¶ 19). Plaintiff alleges that as a result of Stolbof’s “poor treatment” of plaintiff, she “began to suffer

² Plaintiff alleges that “[f]or sixteen (16) years, Plaintiff achieved success for the company and accolades for her performance while working a four-day work week” (NYSCEF Doc No 42 ¶ 16).

from increasingly intense daily headaches,” “began seeing a therapist,” and “broke down in tears . . . [o]n one occasion in February of 2018 [when] Stolbof exploded at Plaintiff” (*id.* ¶ 23).

“In April of 2018, Plaintiff complained to Human Resources representative Robin Milberg [] about” Stolbof, but she did not follow up on or investigate her claims (*id.* ¶¶ 24-25).

“On April 30, 2018, Plaintiff received her second performance review by Mr. Stolbof for 2017” (*id.* ¶ 26). Stolbof again gave plaintiff a “gaps” rating, writing:

“As I have stated throughout this review, I am disappointed in Joan’s performance. Her knowledge base is very narrow and she does not have a deep understanding of the products . . .

We have been able to make some progress - Joan is now full time and we have added some experienced staff but the underlying challenges and inefficiencies due to the archaic nature of the processes still exists . . .

I acknowledge that Joan is trying to support this shift in approach as the status quo is far from adequate. However, she does not have the overall breadth of experience to identify and determine the changes needed to fix the current broken processes.”

(NYSCEF Doc No 342 [the 2017 review]).

On May 15, 2018, plaintiff met with Moore (who became Stolbof’s manager when he replaced Weissblum) and told him “she was disappointed that he had signed off on the [2017] review and that Mr. Stolbof had an agenda to get rid of her because she had complained about Stolbof’s age discrimination” (NYSCEF Doc No 42 ¶ 32). At Moore’s suggestion, she met again with Milberg and “told her about Mr. Stolbof’s retaliatory performance review and that [he] had an agenda to get rid of older employees” (*id.* ¶¶ 32-33).

On June 21, 2018, plaintiff attended a meeting with Milberg and Stolbof, during which Stolbof “announced that Plaintiff and her team were being transferred to Defendant’s office

located [in] White Plains, New York [] starting in November 2018” (*id.* ¶ 34). In a separate meeting in June of 2018, “Plaintiff requested a meeting with Mr. Moore to discuss the retaliation and discrimination she was experiencing[,] [and in] this meeting, Mr. Moore informed Plaintiff that her and her team were being transferred because ‘it [was] not working with’” Stolbof (*id.* ¶ 35).

On July 20, 2018, plaintiff sent a follow-up email to Moore in which she stated that their most recent conversation “left [her] feeling very distraught of moving to an unknown position”; she believed “removing [her] from [her] position [was] retaliation” for complaining to human resources; she felt Stolbof “targeted [her] due to [her] age [and being] obsolete, outdated and a dinosaur”; and her health and well-being “has been extremely impacted” (*id.* ¶ 36; NYSCEF Doc No 348). Plaintiff further stated: “I agree that this is not working with [Stolbof] and for me and the current working environment cannot continue . . . I can walk away tomorrow if I get the package below” (NYSCEF Doc No 348 [outlining plaintiff’s proposed terms, including two years of full salary and bonuses]). Defendant states that “[u]pon receipt of this demand, SMBC attempted in good faith to negotiate a reasonable separation package with Gray,” but “Gray ultimately refused SMBC’s offer” (NYSCEF Doc No 364 ¶¶ 75-76).

“On July 23, 2018, Cara Friedlander and Scott Diamond from [SMBC’s] Legal Department [] met with [plaintiff] to discuss her complaints” (NYSCEF Doc No 42 ¶ 37). Three days later, Friedlander and Diamond found the complaints to be unsubstantiated (*id.* ¶ 38).

Plaintiff alleges that her “health continued to decline” and her “psychiatrist recommended that Plaintiff take a leave of absence from work due to the severity of her anxiety disorder,” so she went on medical leave on August 22, 2018 (*id.* ¶¶ 39-40). While plaintiff was on leave,

Chung, who “is significantly younger than Plaintiff,” assumed her role as interim head of the settlements department (*id.* ¶¶ 42-43; NYSCEF Doc No 364 ¶ 77).

When plaintiff returned to work on January 2, 2019, her department had been relocated to the White Plains office (*id.* ¶¶ 41-42). “Each person in Plaintiff’s department who was transferred to White Plains was given [] benefits to accommodate the move,” including being allowed to work two days per week from home and reimbursement up to \$500 per month for commuting costs (*id.* ¶ 45). Plaintiff, however, did not receive these benefits (*id.* ¶ 46). Plaintiff also alleges that upon her return, “in lieu of her normal responsibilities that had been taken over by [] Chung, Plaintiff [was given a] ‘bogus’” project to work on (NYSCEF Doc No 372 ¶ 114).

Separately, plaintiff requested as an accommodation that she be permitted to work four days per week from the White Plains office and one day a week from either the NYC or Jersey City office so that she could attend weekly doctor’s appointments (NYSCEF Doc No 42 ¶ 60). Though defendant “originally reject[ed] Plaintiff’s request”—with Stolbof asking in an email to human resources if they could “get a second opinion” as to whether such accommodation was necessary—it ultimately granted the request (*id.* ¶¶ 60-61).

In April of 2019, plaintiff received her 2018 performance review, again receiving a “gaps” rating (*id.* ¶ 50). Stolbof wrote:

“Since Joan’s return in January 2019, I have seen more of an effort on her part to address prior gaps. Maria and Amy ran the day to day operations of the department [] successfully [] while Joan was out. I expect Joan to lead the more strategic efforts required to remediate the many control issues and manual processes that have been in place for years. . .

Since Joan’s return, we have been meeting weekly where I have provided guidance to Joan so that she can work towards improving her gap areas. She has been developing and presenting her remediation plans [] and I have been clear about my expectations

of her ongoing performance. . . As a senior member of the management team, she should manage the group more independently with less oversight from myself.”

(NYSCEF Doc No 347 [the 2018 review]).³

On September 4, 2019, plaintiff was terminated (NYSCEF Doc No 42 ¶ 51). Defendant alleges that this decision was communicated by Stolbof but made by Moore (NYSCEF Doc No 364 ¶¶ 93-98). Upon plaintiff’s termination, Chung assumed her position (*id.* ¶ 99).

DISCUSSION

Standard on the Motion

“It is well settled that ‘the proponent of a summary judgment motion 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’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

“The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility” (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010])

³ In email communications between Stolbof and Moore before finalizing the 2018 review, Moore asked if “it would be appropriate to include the fact that much of Amy’s work was done in Joan’s absence from the office with no apparent guidance from her,” to which Stolbof replied: “Removed per advice [from] HR” (NYSCEF Doc No 406).

[internal citations omitted]). The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

Discrimination Under NYSHRL & NYCHRL

NYSHRL § 296 and NYCHRL § 8-107(1) prohibit employers from discriminating against an employee based on age or disability. “The standards for establishing unlawful discrimination under the NYSHRL previously were the same as those governing title VII cases” (*Wright v White Plains Hosp. Med. Ctr.*, 237 AD3d 1143, 1144 [2nd Dept, Apr 23, 2025]), whereas the NYCHRL “require[d] an independent liberal construction analysis” to fulfill its “‘uniquely broad remedial’ purposes, which [went] beyond those of counterpart state or federal civil rights laws” (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]). “In 2019, however, the New York State Legislature amended the NYSHRL, . . . [and as] a result of the amendment, the NYSHRL now aligns with the [more liberal] standards of the” NYCHRL (*Wright*, 237 AD3d at 1144-45; *Syeed v Bloomberg L.P.*, 41 NY3d 446, 451 [2024] [“Both statutes have provisions directing that they be liberally construed to accomplish the remedial purposes that they serve”]).

To support a discrimination claim under NYSHRL or NYCHRL, a plaintiff “must establish that (1) she [] is a member of a protected class, (2) she [] was qualified to hold the position, (3) she [] suffered an adverse employment action” (under State HRL) or “was subject to an unfavorable employment change or treated less well than other employees” (under City HRL),

“and (4) the adverse action [or different treatment] occurred under circumstances giving rise to an inference of discrimination” (*Currid v City of New York*, 2025 NY Slip Op 04702, *2 [2nd Dept, Aug 20, 2025] [internal quotation marks and citations omitted]). “To establish entitlement to summary judgment in a case alleging discrimination, the defendants must demonstrate either the plaintiff’s inability to establish every element of intentional discrimination, or, having offered a legitimate, nondiscriminatory reason for the challenged action, the absence of a material issue of fact as to whether that reason was pretextual” (*Reichman v City of New York*, 144 AD3d 781, 782 [2nd Dept 2016]).

Plaintiff’s Causes of Action

Plaintiff alleges that “she is a member of [] protected class[es] due to her age and disability”; she was qualified for her position, which she held for many years, receiving positive performance reviews; and “she suffered adverse employment actions, including, but not limited to, (a) unfair and discriminatory criticism and abuse; (b) changing her work schedule, (c) disparate treatment such as denial of location transfer benefits given to all other employees, (d) removal of job duties after she returned from disability leave, an effective demotion; and (e) termination after which her job was permanently given to a much younger woman” (NYSCEF Doc No 370, pp. 10-11).

Defendant argues that plaintiff’s causes of action fail because defendant had a legitimate, non-discriminatory reason for terminating plaintiff’s employment (i.e., her “continued poor performance”) and that her performance issues pre-dated her complaints to human resources and medical leave (NYSCEF Doc No 363, pp. 15-16). Defendant asserts that it is mere “speculation and conjecture” to allege “that her age somehow played a role in the performance concerns Stolbof brought to her attention,” and in any case, it was Moore, not Stolbof, who made the

decision to terminate plaintiff's employment (*id.*, pp. 17-18). Additionally, defendant asserts that plaintiff's "job title and compensation remained the same when she rejoined her team in White Plains"; "management's decisions regarding Gray's in-office presence and eligibility for commuting expenses were based on legitimate business considerations"; and only the NYSHRL should apply to Gray's White Plains-related claims, not the NYCHRL" (*id.*, pp. 19-20).

Plaintiff asserts that "Stolbof and Moore worked together, sometimes with the help of the HR and Legal Departments, to falsely accuse Plaintiff of poor performance, subject her to a hostile and toxic workplace, [] retaliate against her when she complained," and replace her with Chung, plaintiff's "much younger subordinate" (NYSCEF Doc No 370, p. 12-14). Plaintiff further asserts that it was Stolbof who personally fired her, but "Moore's discrimination and retaliation has been reflected in every biased and unfair performance review he approved and participated in since Stolbof was hired," and though "Moore knew about Stolbof's ageist comments . . . he would not lift a finger to protect Plaintiff" or investigate her complaints (*id.*). Plaintiff also notes that "Moore admits that he was unaware of any 'gaps' in Plaintiff's performance for 26 years" and she "was not terminated until after she made repeated oral and written complaints" about discriminatory and retaliatory conduct (*id.*, p. 19). She asserts that defendant's stated reasons for terminating her are pretextual as evidenced by: "(1) Plaintiff's 26 years of excellent performance with no 'gaps'; (2) a long period of documented problems with the PRISM system over which Plaintiff had no control but for which Stolbof criticized her; and (3) proof that the errors Stolbof attributed to Plaintiff were caused by others" (*id.*, pp. 20-21).

i. Age Discrimination

Defendant submits documentation of Stolbof's dissatisfaction with plaintiff's performance, which defendant asserts is its legitimate, nondiscriminatory reason for giving her

“gaps” ratings for three consecutive years and eventually terminating her employment (the adverse employment actions). The burden thus shifts to plaintiff to “show that the proffered reason was merely a pretext for discrimination by demonstrating ‘both that the reason was false, and that the discrimination was the real reason’” (*Dickerson v Health Mgmt. Corp. of Am.*, 21 AD3d 326, 328 [1st Dept 2005] [emphasis in original], quoting *St. Mary’s Honor Ctr. v Hicks*, 509 US 502, 515 [1993]). Importantly, “[t]he issue is not whether defendants acted with good cause, but whether their business decisions would not have been made but for a discriminatory motive” (*Ioelle v Alden Press, Inc.*, 145 AD2d 29, 36 [1st Dept 1989] [“Plaintiff cannot meet [her] burden of proving ‘pretext’ simply by refuting or questioning the defendants’ articulated reason”] [internal quotation marks and citation omitted]).

Here, “defendant submitted proof establishing that the expectations of plaintiff’s work changed in [2016] with a new incoming [manager], and that [Moore,] who [also] provided feedback on plaintiff’s performance stated that plaintiff was not meeting those expectations” (*Sicola v Cushman & Wakefield, Inc.*, 210 AD3d 449, 449 [1st Dept 2022]). As such, though plaintiff always received positive feedback from her former manager, the change in her performance reviews and termination after Stolbof took over does not raise an inference of discrimination or retaliation (*id.* [“the subjective nature of the executives’ feedback by itself, [did not] create pretext”] [internal quotation marks omitted]). Even taking plaintiff’s allegations as true that she was unfairly blamed for “problems with the PRISM system over which Plaintiff had no control” and for “errors . . . caused by others” (NYSCEF Doc No 370), “the question is not whether the [adverse] decision was correct or wise, but whether the reason for the decision was a pretext for discrimination” (*Grella v St. Francis Hosp.*, 149 AD3d 1046, 1048 [2nd Dept 2017];

Ioelle, 145 AD2d at 36 [“Plaintiff does not raise a jury issue merely by showing that the employer’s decision was arbitrary or unsupported by the facts”]).

In sum, while plaintiff alleges that she suffered adverse employment actions, “she does not make any concrete factual allegation” indicating “that defendant[’s] actions were *motivated* by [disability or] age-related bias” as opposed to defendant’s stated reasoning (*Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013] [emphasis provided]). Additionally, though plaintiff was replaced by Chung, who is 20 years younger than plaintiff, Chung “had worked for SMBC for over 12 years by this point” and, as plaintiff’s direct report, “became head of the department” in her absence and therefore was familiar with the work required by the position (NYSCEF Doc No 363, p. 11 n.7). Moreover, as defendant notes, Stolbof and Moore are in the same protected class as plaintiff, which, “although not dispositive, . . . weakens any inference that the decision to fire plaintiff was based on [her] age” (*Mathews v Atria Huntington*, 499 F Supp 2d 258, 267 [EDNY 2007]). Since plaintiff does not adequately rebut defendants’ stated reason for taking the adverse employment actions, her claim that defendants discriminated against her based on age in violation of the NYSHRL fails.

Plaintiff has, however, raised an issue of fact as to whether she was “treated less well than other employees on the basis of” her age for the purposes of the NYCHRL (*Currid*, 2025 NY Slip Op 04702 at *2). Plaintiff alleges that Stolbof made numerous disparaging comments about SMBC’s older employees (*e.g.*, NYSCEF Doc No 374, pp. 75-76 [Chung testifying that “[w]hen [Stolbof] used the word ‘dinosaur’ to describe people, he was always referencing staff members that had been at the firm [for] over [about] 20 years, which would include” plaintiff]; NYSCEF Doc No 357, p. 169 [plaintiff testifying Stolbof stated frequently that “people have been here too long” and that she was “one of the persons there the longest”]) and plaintiff in

particular (NYSCEF Doc No 357, pp. 175-177 [plaintiff testifying that a coworker told her that Stolbof referred to plaintiff as “legacy baggage”]). Plaintiff further alleges that Stolbof was particularly hostile towards her (NYSCEF Doc No 374, pp. 40-45 [Chung testifying that she witnessed Stolbof “being angry and raising his voice at fellow employees” on multiple occasions, but that this was more pronounced and “frequent” with plaintiff]) and that he treated younger employees more favorably (NYSCEF Doc No 357, pp. 177 [plaintiff testifying that Stolbof allowed Chung to work from home and “promoted [her] to [plaintiff’s] position” in spite of an important “error that her group made [] under her management”]). These factual disputes—defendant’s claimed dissatisfaction with plaintiff’s work performance and plaintiff’s evidence of defendant’s hostility towards her based on her age—create an issue of fact as to whether plaintiff was treated less well than other employees based on her age.

Accordingly, the part of defendant’s motion for summary judgment seeking dismissal of plaintiff’s first cause of action for age discrimination will be granted to the extent that plaintiff alleges a violation of the NYSHRL and denied to the extent that plaintiff alleges a violation of the NYCHRL.

ii. Disability Discrimination

Plaintiff alleges that defendant discriminated against plaintiff on the basis of her disability, as evidenced by defendant’s initial refusal of plaintiff’s request “to start back to work at 4 days per week” (noting that Stolbof asked human resources if they could “get a second opinion” as to whether such an accommodation was necessary), its denial of her request to work from home two days per week as her coworkers did, and “refusing to give her any of the commuting expenses or pay increases” that her coworkers received (NYSCEF Doc No 370, p. 18). Defendant opines that plaintiff does not appear to make a failure-to-accommodate claim,

and in any event, plaintiff's request for accommodation was granted (NYSCEF Doc No 363, p. 3). As to the benefits offered to other employees, defendant asserts that their refusal of same to plaintiff was legitimate because "Stolbof viewed Gray's role as different than her team, given her role as a manager, and he expected that Gray would be in the office five days per week," and that plaintiff "was not eligible to receive the commuting expenses because of her poor performance level" (*id.*, p. 12).

In opposition, plaintiff reiterates the evidence of disability discrimination but fails to rebut defendant's arguments (NYSCEF Doc No 370, p. 18). Nor does plaintiff offer evidence of director-level employees who were permitted to work remotely twice a week, or employees who had received a "gaps" rating who were afforded commuter benefits (*Etienne v MTA N.Y. City Tr. Auth.*, 223 AD3d 612, 612 [1st Dept 2024] ["plaintiff failed to demonstrate that she and her colleague were similarly situated in all material respects"] [internal quotation marks omitted]). Since plaintiff's "colleagues were not similarly situated to [her] and their [performance] was not comparable, . . . plaintiff failed to raise a triable issue of fact as to whether the reason proffered by the defendant was merely pretextual" (*Averbeck v Culinary Inst. of Am.*, 180 AD3d 862, 863 [2nd Dept 2020]).

Accordingly, the part of defendant's motion for summary judgment seeking dismissal of plaintiff's second cause of action for disability discrimination in violation of the NYSHRL and NYCHRL will be granted.

iii. Retaliation

"[A] plaintiff alleging retaliation in violation of NYSHRL must show that (1) [] she engaged in a protected activity by opposing conduct prohibited thereunder; (2) the defendant was aware of that activity; (3) [] she suffered an adverse action based upon [] her activity; and (4)

there was a causal connection between the protected activity and the adverse action” (*Reichman v City of New York*, 179 AD3d 1115, 1119 [2nd Dept 2020]). Under the NYCHRL, a plaintiff need not demonstrate that she suffered an adverse action, but that “her employer engaged in conduct which was reasonably likely to deter a person from engaging in that protected activity” (*Sanderson-Burgess v City of New York*, 173 AD3d 1233, 1236 [2nd Dept 2019]). “[W]here a defendant on a summary judgment motion has produced evidence that justifies its allegedly retaliatory conduct on permissible grounds, . . . the plaintiff must either [produce] evidence that the reasons put forth by the defendant were merely a pretext, or show that . . . the defendant was motivated at least in part by an impermissible motive” (*Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 741 [2nd Dept 2013])

Plaintiff alleges that she engaged in protected activities by “complain[ing] about Mr. Stolbof’s age discrimination and retaliation on multiple occasions to Defendant’s Human Resources personnel, legal personnel, and upper management” (NYSCEF Doc No 42 ¶ 75) and by going on medical leave due to her disability (*id.* ¶ 86). She alleges that “in retaliation for engaging in [these] protected activit[ies], Defendant demoted Plaintiff, transferred Plaintiff to White Plains, [denied her] benefits that every person in her department received,” gave her a “bogus” work assignment, gave her performance reviews with gaps ratings, and ultimately terminated plaintiff (*id.* ¶¶ 87-89).

Defendant argues that plaintiff’s retaliation claims fail because the issues with her performance arose before she made any complaint about age discrimination or went on medical leave, and her “underperform[ance] remained consistent” throughout this time (NYSCEF Doc No 363, pp. 16, 20). Regarding the White Plains move, defendant asserts that plaintiff’s job title and compensation remained the same; though Chung took on plaintiff’s responsibilities while

plaintiff was on leave, Stolbof worked to transition those responsibilities back to plaintiff upon her return; and again, they had legitimate reasons for not giving her the same benefits as her coworkers (*id.*, pp. 19-20). In opposition, plaintiff notes that she worked for defendant for 26 years but was only terminated after she made repeated complaints about Stolbof and Moore (NYSCEF Doc No 370, p. 19). She asserts that “[t]he evidence is clear that Stolbof and Moore worked together, sometimes with the help of the HR and Legal Departments, to falsely accuse Plaintiff of poor performance, subject her to a hostile and toxic workplace, and to retaliate against her when she complained[,] including scheming together to terminate her employment” (*id.*, p. 12).

Plaintiff fails to show that the performance evaluations were retaliatory based on complaints about Stolbof or Moore. Plaintiff received the 2016 review, which first gave her a gaps rating, in March of 2017 (NYSCEF Doc 372 ¶ 17; NYSCEF Doc No 341); and the 2017 review—while not delivered to plaintiff until April 30, 2018 (NYSCEF Doc No 42 ¶ 26)—appears to have been prepared in March of 2018 (NYSCEF Doc No 342 [“Date for submittal to HR: 01-MAR-2018”]). Plaintiff alleges that she first complained of age discrimination on April 4, 2018 (NYSCEF Doc 372 ¶ 41), after these performance reviews were prepared, and therefore the complaints could not have influenced the evaluations. The 2018 review, though given after plaintiff made complaints, tracks with the prior evaluations and therefore does not raise an inference of retaliation.

Plaintiff does not rebut defendant’s argument that plaintiff’s title and pay remained the same once she returned to work. Nor does plaintiff argue that the decision to move her team to White Plains was retaliatory. Plaintiff does argue, however, that defendants retaliated against her in denying her the benefits her team received and in terminating her employment. However, as

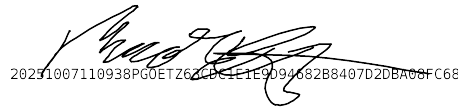
explained *supra*, defendant has offered legitimate reasons for these decisions, which plaintiff failed to show was mere pretext for retaliation.

Accordingly, the part of defendant’s motion for summary judgment seeking dismissal of plaintiff’s third cause of action for retaliation in violation of the NYSHRL and NYCHRL will be granted.

CONCLUSION

Based on the foregoing, it is

ORDERED that defendants’ motion for summary judgment is denied to the extent that it seeks dismissal of plaintiff’s first cause of action for discrimination on the basis of age in violation of the NYCHRL; and is otherwise granted.


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<u>10/7/2025</u> DATE			<u>PAUL A. GOETZ, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
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