UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JUDITH A. CUTTLER,

Plaintiff,

- against -

FRIED, FRANK, HARRIS, SHRIVER AND JACOBSON, LLP,

Defendant.
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10 Civ. 296 (DAB)
MEMORANDUM & ORDER

DEBORAH A. BATTS, United States District Judge.

This matter is now before the Court on Defendants' Motion for Summary Judgment and on Plaintiff's Cross-Motion Pursuant to Fed. R. Civ. P. 56(d). For reasons that follow, Plaintiff's Motion is DENIED, Defendant's Motion is GRANTED, and the Complaint is DISMISSED in its entirety and on the merits.

I. BACKGROUND

Plaintiff Judith Cuttler brings this action against her former employer, Defendant Fried, Frank, Harris, Shriver and Jacobson, LLP ("Defendant" or the "Firm") for discrimination, disparate treatment, and retaliation based on her age, gender, and disability, in violation of the Age Discrimination in Employment Act of 1967 (the "ADEA"), as amended, 29 U.S.C. § 621 et seq.1; of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"); of the Americans with Disabilities Act of 1990, as codified and amended

at 42 U.S.C. §§ 12112-12117 (the "ADA"); of the Family Medical Leave Act of 1993, 29 U.S.C. § 2601; and of the New York State and New York City Human Rights Laws ("NYSHRL" and "NYCHRL").

The following facts are undisputed except where noted. Familiarity with the facts is assumed, and the facts are laid out here only as necessary for resolution of the Motions before the Court.

Plaintiff, a 60-year-old woman, was terminated from her employment as a "floater" secretary by Defendant on August 18, 2008. (Cuttler Decl ¶ 2). As a "floater" secretary, Plaintiff provided coverage for absent permanent secretaries rather than being assigned permanently to work with any particular attorney or group of attorneys. (Cuttler Dep. 16-18, 130-31.) On August 18, 2008, the entire floater secretary position was eliminated and all floater secretaries were terminated without regard for job performance. (Alcott Dep. 23-24, 42, 47, 48-9, 59, 90; Cuttler Dep. pp. 36-7, 60; Alcott Decl. Ex. Q.) Since then, in the event of a secretary's absence, coverage has been provided by the other secretaries working in the absent secretary's "cluster." (Cuttler Dep. 36-37, 60; Alcott Dep. 23-4, 42, 47, 58, 111-12.)

The August 18, 2008 firings were part of a reduction in force (the "RIF") which Defendant argues it decided to undertake

because a global economic downturn in 2008 substantially decreased the Firm's workload. (Def. 56.1 ¶¶ 13-14.) Plaintiff argues that "there was no urgent economic reason" for the RIF, citing as evidence the fact that Defendant promoted five associates to partner at around the same time. (Pl. 56.1 ¶¶ 13-14.) Plaintiff testified repeatedly, however, that there was inadequate work at the Firm to keep all secretaries busy throughout their shifts prior to the RIF. (E.g. Cuttler Dep. pp. 69-72, 73, 74-6, 136.)

Nineteen members of the secretarial staff of Defendant's New York office were eliminated as part of the RIF,[1] (Def. 56.1 ¶ 16), including nine secretaries designated as "floaters," one of whom was Plaintiff (Def. 56.1 ¶¶ 24-25; Pl. 56.1 ¶¶ 24-25). Plaintiff speculates, but has no evidence, that Defendant over the course of years prior to the RIF moved employees the Firm deemed undesirable into the floater secretary position so that it could later terminate their employment in violation of applicable anti-discrimination laws.

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[1]Plaintiff disputes that nineteen secretaries were laid off, apparently because Counsel for Plaintiff twice characterized the number of secretaries laid off as "eighteen" or as "eighteen or nineteen" while deposing a witness who had previously testified that nineteen secretaries had been fired but who did not correct Counsel's misstatement. (See Pl. 56.1 ¶ 16; Alcott Dep. pp. 116, 121.)

II. DISCUSSION

A. Plaintiff's Cross-Motion Pursuant to Fed. R. Civ. P. 56(d)

In response to Defendant's Motion for Summary Judgment, Plaintiff has filed a cross-motion pursuant to Federal Rule of Civil Procedure 56(d). Plaintiff, by her Motion, seeks to use the expert report and deposition testimony of expert witness Dr. Marc R. Killingsworth in her opposition to Defendant's Motion for Summary Judgment and further seeks permission to use Killingsworth as an expert witness at trial.[2]

Federal Rule of Civil Procedure 56(d) provides as follows:

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
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> (1) give an opportunity to properly support or address the fact;
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> (2) consider the fact undisputed for purposes of the motion;
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> (3) grant summary judgment if the motion and supporting materials - including the facts considered undisputed - show that the movant is entitled to it; or

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[2]Killingsworth's report and testimony are based on discovery taken in another lawsuit involving the same RIF, in which Defendant is represented by the same counsel. Plaintiff contends that Killingsworth's opinion is based on documents that were exchanged in both lawsuits. The Report was not produced to Defendant, and Killingsworth was not deposed, prior to the Court-ordered deadline for the exchange of expert discovery in this matter.

(4) issue any other appropriate order.

Fed. R. Civ. P. 56(d). Generally, a party resisting summary judgment on the ground that it needs discovery in order to defeat the motion must show by affidavit "(1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." Miller v. Wolpoff & Abramson, LLP, 321 F.3d 292, 303 (2d Cir. 2003) (alteration in original) (citations omitted).

Here, Plaintiff argues that Killingsworth's testimony and report create a genuine issue of material fact by showing that there exists a statistically significant discrepancy between the ages of employees at the Firm who were retained and the ages of employees who were terminated during the August 2008 RIF. Plaintiff contends that the expert report therefore gives rise to an inference of discrimination and assists Plaintiff in stating a prima facie case that age discrimination occurred, as well as assisting her in rebutting Defendant's showing of a legitimate reason for the challenged employment action.

Plaintiff has failed to show that she is entitled to relief under Fed. R. Civ. P. 56(d). Specifically, Killingsworth's report and declaration would not, if considered, create a genuine

issue of material fact. Killingsworth's testimony, to the extent it assists Plaintiff at all, is useful only in establishing a prima facie case. The existence of statistical disparities between the individuals who were chosen for termination and those who were not, without more, would be insufficient to rebut Defendant's showing of a legitimate, non-discriminatory reason for terminating Plaintiff's employment.

Nor does Plaintiff explain why she was unable to obtain an expert report before the close of expert discovery in this matter. When Plaintiff's first request to extend discovery was denied, on March 24, 2011, she still had over a month in which to submit an expert report before the April 29, 2011 deadline for expert discovery, but she failed to do so. Moreover, Plaintiff's third request for an extension of the discovery deadlines, which was made by letter dated May 25, 2011, well after the deadline for expert discovery had passed, specifically requested leave to notice expert discovery of "an expert statistician who will opine on the age disparity of those terminated by the reduction in force." (Docket #22.) Plaintiff's request to take untimely expert discovery was denied then, and such discovery will not be considered now. Plaintiff's Cross-Motion is DENIED.

B. Legal Standard for Summary Judgment

A district court should grant summary judgment when there is "no genuine issue as to any material fact," and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see also Allianz Ins. Co. v. Lerner, 416 F.3d 109, 113 (2d Cir. 2008). Summary judgment is appropriate only when, after drawing all reasonable inferences in favor of a non-movant, no reasonable trier of fact could find in favor of that party. Terry v. Ashcroft, 336 F.3d 128, 137 (2d Cir. 2003). Despite this deference, a non-movant cannot defeat a motion for summary judgment merely through conclusory statements or allegations. See Davis v. State of New York, 316 F.3d 93, 100 (2d Cir. 2002).

In assessing whether summary judgment should be granted, "[t]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Jeffreys v. City of New York, 426 F.3d 549, 554 (2d Cir. 2005) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). The non-movant may not rely upon speculation and/or conjecture to overcome a motion for summary judgment. Instead, when the moving party has documented particular facts in the record, "the opposing party must come forward with specific

evidence demonstrating the existence of a genuine dispute of material fact." FDIC v. Great Am. Ins. Co., 607 F.3d 288, 292 (2d Cir. 2010) (citing Anderson, 477 U.S. at 249). While a court must always "resolv[e] ambiguities and draw [ ] reasonable inferences against the moving party," Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986) (citing Anderson, 477 U.S. at 252), the non-movant may not rely upon "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." Id. at 12. Instead, when the moving party has documented particular facts in the record, "the opposing party must 'set forth specific facts showing that there is a genuine issue for trial.'" Williams v. Smith, 781 F.2d 319, 323 (2d Cir. 1986) (quoting Fed. R. Civ. P. 56(e)). Establishing the existence of genuine disputes of material fact requires going beyond the allegations of the pleadings, as the moment has arrived "'to put up or shut up.'" Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (citation omitted). Thus, unsupported allegations in the pleadings cannot create a material issue of fact. Id.

The substantive law governing the case will identify those facts that are material and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 37 (2d Cir. 1994).

C. Timeliness of Claims

Discrimination claims brought under Title VII, the ADA, and the ADEA must be filed with the Equal Employment Opportunity Commission (the "EEOC") within 300 days of the alleged discriminatory act. See 42 U.S.C. § 200e-5(e)(1); 42 U.S.C. § 12117(a); Petrosino v. Bell Atlantic, 385 F.3d 210, 219 (2d Cir. 2004). Plaintiff filed her EEOC Charge on June 5, 2009, and is thus barred from recovering under federal law for any discrete acts of discrimination which occurred before August 9, 2008. Plaintiff may therefore recover under federal law only for acts connected with her discharge, as she has identified no other timely instances of alleged discrimination.

Claims brought under the NYSHRL and NYCHRL are subject to a three-year statute of limitations, which is tolled for the period between the filing of an EEOC charge and the issuance by the EEOC of a right-to-sue letter. Wilson v. New York City Police Dept.,

2011 WL 1215735, *4 (S.D.N.Y. Mar. 25, 2011). Here, Plaintiff filed her EEOC Charge on June 5, 2009. The EEOC issued a Dismissal and Notice of Right to Sue 69 days later, on August 13, 2009. Plaintiff filed this action on January 14, 2010, and is thus time barred from pursuing under the NYSHRL and NYCHRL any claims which accrued prior to November 6, 2006.

D. Plaintiff's Sex and Age Discrimination Claims

1. McDonnell Douglas Burden-Shifting Analysis

All of Plaintiff's discrimination claims are subject to the burden-shifting analysis laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under McDonnell Douglas, a plaintiff bears the initial burden of establishing a prima facie case of discrimination through direct or circumstantial evidence. Windham v. Time Warner, Inc., 275 F.3d 179, 187 (2d Cir. 2001). The burden is minimal. (Id.) In general, in order to make out a prime facie case, a plaintiff must demonstrate: 1) that she is a member of a protected class; 2) that she was qualified for the position held; 3) that she suffered an adverse employment action; and that 4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. Holcomb v. Iona College, 521 F.3d 130, 138 (2d Cir. 2008). A plaintiff may raise such an inference

by showing that the employer subjected her to disparate treatment, that is, treated her less favorably than a similarly situated employee outside of the protected group. Int'l Broth. of Teamsters v. U.S., 431 U.S. 324, 335 (1977).

A plaintiff who makes out a prima facie case establishes a presumption of discrimination, at which point the burden of production shifts to the defendant. Woodman v. WWOR-TV, Inc., 411 F.3d 69, 76 (2d Cir. 2005). To meet its burden, the defendant must articulate a "legitimate, nondiscriminatory reason" for the challenged conduct. Texas Dept. of C'mty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). "If such a reason is provided, the plaintiff may no longer rely on the presumption raised by the prima facie case but may still prevail by showing, without the benefit of the presumption, that a reasonable jury could conclude that the employer's [challenged conduct] was in fact the result of discrimination." Ghent v. Moore, 324 F.App'x. 55, 56 (2d Cir. 2009) (citing Holcomb v. Iona College, 521 F.3d 130, 141 (2d Cir. 2008).

2. Discrimination Under Title VII

Title VII makes it an unlawful employment practice "for an employer ... to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of

employment, because of," inter alia, "such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). The familiar McDonnell Douglas three-part burden-shifting framework governs the evaluation of discrimination claims brought under Title VII. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Leibowitz v. Cornell Univ., 584 F.3d 487 (2d Cir. 2009) (applying three-step analysis to a claim under 42 U.S.C. § 2000e et seq.). To state a prima facie case for sex discrimination in violation of Title VII, Plaintiff must show that: (1) she is a member of a protected class; (2) she is qualified for her position; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination. See McDonnell Douglas, 411 U.S. at 802.

Here, there is no dispute that Plaintiff is a member of a protected class, was qualified for her position as floater secretary, and suffered an adverse employment action when she was terminated from that position. At issue is whether the circumstances under which she was terminated give rise to an inference of discrimination.

Plaintiff argues that the fact that no male employee was terminated during the RIF gives rise to an inference of discriminatory intent. However, Plaintiff has not identified a

single similarly-situated male employee who was not terminated, and indeed the record shows that there were no male floater secretaries at the Firm at the time of the RIF or for some time prior to the RIF. Nor does Plaintiff's identification of three males who were retained in non-floating positions in word processing and desktop publishing support an inference of discrimination, especially since the vast majority of female secretaries who held non-floating positions were similarly not terminated during the RIF.

Because Plaintiff has not stated a prima facie case of sex discrimination in violation of Title VII, Defendant's Motion for Summary Judgment is GRANTED on Plaintiff's Title VII claim.

3. Discrimination Under the ADEA[3]

The Age Discrimination in Employment Act of 1967 ("ADEA") protects workers who are "at least 40 years of age" by making it unlawful for an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions,

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[3]Plaintiff attempts to raise for the first time a disparate impact claim under the ADEA, the NYSHRA, and the NYCHRA in her opposition to Defendant's Motion for Summary Judgment. (See Pl. Mem. Opp. at 11.) That claim, which does not appear on the face of the Amended Complaint, is not before the Court and will not be considered.

or privileges of employment, because of such individual's age." 29 U.S.C. §§ 631(a), 623(a)(1). ADEA discrimination claims are analyzed under the familiar McDonnell Douglas three-step burden-shifting analysis. To establish a prima facie case of age discrimination, a plaintiff must show that (1) she was within a protected age group; (2) she was qualified for the position; (3) she was subject to an adverse employment decision; and (4) the challenged employment action took place under circumstances giving rise to an inference of discrimination. Byrnie v. Town of Cromwell Bd. of Educ., 243 F.3d 93, 101 (2d Cir. 2001)

Here, Plaintiff has demonstrated that she is within a protected age group, being over 40 years of age; that she was qualified for her position; and that she was subject to termination. At issue is whether her termination took place under circumstances which give rise to an inference of discriminatory intent.

As an initial matter, the Court notes that every floater secretary working at the Firm's New York office was terminated as part of the RIF, including two secretaries who were in their thirties, and that there was no disparate treatment on the basis of age among floater secretaries. Accordingly, nothing on the face of Plaintiff's termination as a floater secretary implies discriminatory intent.

Plaintiff first argues that an inference of discrimination should be drawn on the basis that Kathleen Alcott, the director of the secretarial department at the Firm, was solely responsible for determining what secretaries would be terminated and higher-level management was not involved in making individual selections or in her decision to discontinue the entire floater secretary function at the Firm. However, Plaintiff cites no cases supporting her argument that an inference of discrimination is appropriate whenever a lone supervisor determines how a department is to be restructured. Especially in light of the fact that Alcott herself is a 57-year-old woman, Alcott's role as sole decision-maker is an insufficient basis for the Court to infer that Alcott discriminated on the basis of sex and age when planning the restructuring of the secretarial department as part of the RIF.

Plaintiff next argues that the inclusion of ages and dates of birth among the data on a list of secretarial employees who had been selected for termination constitutes a "smoking gun" showing discriminatory intent. Though Plaintiff characterizes Alcott's handwritten notes on that document as "age-related," Plaintiff does not explain what meaning she ascribes to the cryptic notations, none of which corresponds in any obvious way to the ages of the secretaries selected for termination, the ages

of the secretarial staff as a whole, or the ratio of that portion of either population which was over 40 years old to that which was younger than 40 years old. Furthermore, Plaintiff does not dispute Alcott's testimony that the document in question was created by the human resources department after Alcott had made her initial determinations. It is similarly undisputed that the document includes information (such as a given employee's history of documented performance issues) which was of no relevance whatsoever with regard to the fate of the floater secretaries, all of whom were terminated without regard for whether they had previously been disciplined. The document is thus of little evidentiary value in showing that Alcott considered employees' ages when she decided to eliminate the floater function in the secretarial department, and the document is not a "smoking gun" giving rise to an inference of discrimination.

Plaintiff next argues that a genuine issue of fact exists concerning whether Defendant played "a game of musical chairs" in the months and years before the RIF in order to place older employees in the floater secretary pool so that they could be eliminated. As evidence for this theory, Plaintiff offers little more than her own unsupported speculation, which is insufficient as a matter of law to establish the existence of a genuine dispute of material fact. Moreover, even if Plaintiff were able

to identify facts showing that Defendant purposely moved older individuals into the floater secretary position prior to the wholesale elimination of that position, Plaintiff cannot show that she herself was fired as a result of that manipulation. To the contrary, Plaintiff testified that she remained a floater by choice throughout her career with the Firm specifically because she enjoyed the scheduling freedom that position provided as compared with regular secretarial assignments.[4] (Cuttler Dep. pp. 30, 31-2, 128-29.) Because she remained a floater secretary by her own choice, Plaintiff cannot now show that her own firing when the floater secretary position was eliminated resulted from a scheme to move older, female, or disabled persons into the floater secretary position in order to eliminate them from the workforce at the Firm.

Because Plaintiff has not stated a prima facie case for discrimination on the basis of age, and because Plaintiff cannot in any event show that Defendant's stated non-discriminatory reasons for the elimination of Plaintiff's position at the Firm

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[4]Though Plaintiff at one time worked a one-day weekly job share position in addition to her work as a floater, it is undisputed that her job share position was eliminated more than a year before the RIF because the secretary for whom Plaintiff provided coverage on Wednesdays moved to another assignment, where she no longer required coverage on her day off. (Cuttler Dep. 212-24, 215.) Plaintiff does not allege that she sought a non-floating secretarial position with the Firm any time after she began working as a "flexi" secretary in 1988.

are pretextual, summary judgment for Defendant is GRANTED on Plaintiff's age discrimination claim.

4. Discrimination under the ADA

The Americans with Disabilities Act of 1990 provides, in relevant part, that "no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms conditions, and privileges of employment." 42 U.S.C. § 12112(a). Failing to reasonably accommodate an employee's disability is a type of discrimination, 42 U.S.C. § 12112(b)(5)(A), and retaliation is prohibited, see Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173 (2d Cir. 2005).

Claims alleging disability discrimination in violation of the ADA are subject to the burden-shifting analysis originally established by the Supreme Court in McDonnell Douglas. Farina v. Branford Bd. of Educ., Slip Op., 2011 WL 5607603, *2 (2d Cir. 2011). To establish a prima facie case for disability discrimination based on a failure to accommodate, a plaintiff must show that she is a person with a disability within the meaning of that term as used in the ADA; (2) her employer is covered by the statute and had notice of her disability; (3) with

reasonable accommodation, she could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations. Id. at *3 (citation and quotation marks omitted). "The plaintiff bears the burdens of both production and persuasion as to the existence of some accommodation that would allow her to perform the essential functions of her employment, including the existence of a vacant position for which she is qualified." McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92, 97 (2d Cir. 2009). Summary judgment is appropriate where a plaintiff fails to identify a facially reasonable accommodation that the defendant refused to provide. Kennedy v. Dresser Rand Co., 193 F.3d 120, 122 (2d Cir. 1999).

Plaintiff has failed to state a prima facie case for discrimination in violation of the ADA. Though it is undisputed that Plaintiff was in fact at some point diagnosed with Attention Deficit Disorder ("ADD"), Plaintiff testified that she never provided Defendant with any documentation of her ADD diagnosis during her employment with the Firm. (Cuttler Dep. at 110.) Nor is there any dispute that Defendant provided Plaintiff with special individualized training in communication skills, computer skills, and study skills, at her request, in an effort to accommodate her disability. (Cuttler Dep. pp. 170-71; Alcott Decl Ex. I.) Plaintiff's October 2007 performance review, which

notes her improved job performance, suggests that the additional training provided by Defendant was in fact helpful to Plaintiff. (See Alcott Decl. Ex. C.) In light of the undisputed facts showing that Plaintiff failed to document a disability and that Defendant nevertheless provided her with appropriate accommodations, Plaintiff's argument that she requested and should have received an additional or alternative accommodation in the form of enhanced feedback from each of the attorneys with whom she worked fails as a matter of law.

Summary judgment for Defendant is GRANTED on Plaintiff's ADA claim.

5. Discrimination under the NYSHRL and NYCHRL

The NYSHRL and NYCHRL provide that it is unlawful "[f]or an employer . . . because of an individual's . . . race, creed, color, [or] national origin . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment." N.Y. Exec. Law § 296(1)(a); N.Y. City Admin. Code § 8-107(1)(a). Claims brought under the NYSHRL and the NYCHRL, like those brought under Title VII and Sections 1981 and 1983, are evaluated on summary judgment under the McDonnell Douglas

burden-shifting analysis.[5] Bennett v. Health Management Sys., Inc., 936 N.Y.S.2d 112 (N.Y. App. Div., 1st Dept., Dec. 20, 2011); Dawson v. Bumble & Bumble, 398 F.3d 211, 216-17 (2d Cir. 2005).

Plaintiff's state and local law claims for age, sex, and disability discrimination arising from her termination fail for the same reasons as do her federal claims.

Plaintiff alleges one discrimination claim which is timely under the NYSHRL and NYCHRL but for which she is time-barred from recovering under federal law: that her November 13, 2006 disciplinary warning and her December 2006 and October 2007 performance evaluations were the result of a pattern of discrimination against her on the basis of her sex and perceived disability. Specifically, Plaintiff alleges that she received

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[5]The McDonnell Douglas framework continues to apply to claims brought under the NYCHRL even after passage of the New York City Local Civil Rights Restoration Act, which "was enacted to ensure the liberal construction of the [NYCHRL] by requiring that *all* provisions . . . be construed broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." Bennett, 936 N.Y.S.2d at 115 (citations and internal quotation marks omitted). Accordingly, a court analyzing an NYCHRL discrimination claim must be particularly mindful that the plaintiff's burden in stating a prima facie case is de minimus and that a defendant, on a motion for summary judgment, "bears the burden of showing that, based on the evidence before the court and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under any of the evidentiary routes: under the McDonnell Douglas test, or as one of a number of mixed motives, by direct or circumstantial evidence." Id. at 117-21.

negative reviews when she violated facially neutral workplace rules and regulations which forbade employees from doing personal work and making excessive personal telephone calls during work hours, and that she would not have faced discipline for the same conduct if she were not a female or was not perceived as suffering from ADD.

As an initial matter, Plaintiff has not opposed Defendants' arguments for summary judgment on Plaintiff's discriminatory discipline claim, which would alone be sufficient reason to deem Plaintiff to have forfeited this claim. Moreover, Plaintiff admits that she engaged in the conduct for which she was disciplined, though she argues that she did so because her ADD required her to remain constantly busy and prevented her from functioning well in an environment in which she had insufficient work to do.

Unfortunately for Plaintiff, the NYSHRL and NYCHRL do not require Defendant to excuse her admitted workplace misconduct as an accommodation of her disability. "Well-established precedent demonstrates that the New York State Human Rights Law does not immunize disabled employees from discipline or discharge for incidents of misconduct in the workplace." Hazen v. Hill Betts & Nash, LLP, 936 N.Y.S.2d 164, 171 (N.Y. App. Div. 1 Dept. Jan. 5, 2012) (quotation marks and citations omitted). Even if Plaintiff

is correct that some male employees avoided discipline for similar misconduct, there is no dispute that Plaintiff engaged in the conduct which formed the basis of the warning and negative performance reviews she believes were motivated by bias, and Defendant was not required to excused Plaintiff's misconduct merely because she alleges that her disability contributed to it.

Summary judgment for Defendant is GRANTED on Plaintiff's discrimination claims under the NYSHRL and NYCHRL.

E. Plaintiff's Retaliation Claims

Plaintiff alleges that Defendant terminated her in retaliation for having taken a leave of absence under the Family Medical Leave Act of 1993 and for having complained about being perceived as having ADD.

1. Retaliation for Complaining About Perceived Disability

Plaintiff has not opposed Defendant's Motion for Summary Judgment on her claim that Defendant retaliated against her for complaining about being perceived as disabled. Accordingly, Defendant's Motion is GRANTED on that claim. Anyan v. N.Y. Life Ins. Co., 192 F.Supp.2d 228, 237 (S.D.N.Y. 2002) (Chin, J.), aff'd 68 F.App'x 260 (2d Cir. 2003).

2. Retaliation for Taking FMLA Leave

"In order to make out a prima facie case [of retaliation under the FMLA], [a plaintiff] must establish that: 1) [s]he exercised rights protected under the FMLA; 2) [s]he was qualified for [her] position; 3) [s]he suffered an adverse employment action; and 4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent." Potenza v. City of N.Y., 365 F.3d 165, 168 (2d Cir. 2004).

There is no dispute that Plaintiff has met the first three elements of a prima facie case of retaliation under the FMLA: she was on FMLA leave from February 2007 until June 14, 2007; she was qualified for her position; and her employment was eventually terminated. However, Plaintiff fails to show that the circumstances surrounding her termination support an inference of retaliatory intent or that her termination was causally linked to her taking FMLA leave. Of the eighteen other secretaries terminated as part of the RIF, none appear to have taken FMLA leave,[6] so the fact that Plaintiff had done so does not give rise to an inference that the leave she had taken was the reason for her termination more than a year later. Indeed, former floater

[6]Doreen Minogue, the only other secretary terminated as part of the RIF whose termination Plaintiff alleges was precipitated by an FMLA leave, in fact took a personal leave and not an FMLA leave. (Alcott Decl. Ex. M.)

secretary Kathleen Filandro took FMLA leave at the same time as Plaintiff but was not terminated as part of the RIF. (Frobuccino Decl. ¶¶ 3-4; Cuttler Dep. pp. 209-10.) Nor did Plaintiff's termination closely follow on the heels of her leave, such that suspicious timing might give rise to an inference of retaliatory motive.

Because Plaintiff has not stated a prima facie case for retaliation under the FMLA, Defendant's Motion for Summary Judgment is GRANTED on Plaintiff's FMLA retaliation claim.

III. CONCLUSION

The Court, having considered in full the arguments raised by the Parties, Plaintiff's Cross-Motion is DENIED and Defendant's Motion for Summary Judgment is GRANTED in its entirety.

The Clerk of Court is directed to enter judgment for Defendant and to close the docket in this matter.

SO ORDERED

DATED: New York, New York

March 23, 2012

Deborah A. Batts

DEBORAH A. BATTS
United States District Judge