*To Be Argued By:*
ELISE M. BLOOM
*Time Requested:15 Minutes*

CTQ-2023-00001
U.S. Court of Appeals for the Second Circuit Docket No. 22-1251-cv

# Court of Appeals

*of the*

# State of New York

NAFEESA SYEED,

*Plaintiff-Appellant,*

– against –

BLOOMBERG L.P.,

*Defendant-Respondent.*

## BRIEF FOR DEFENDANT-RESPONDENT


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# DISCLOSURE STATEMENT

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120. RTS Realtime Systems India Private Limited

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## PRELIMINARY STATEMENT

This Court held more than a decade ago that the New York State Human Rights Law ("NYSHRL") and New York City Human Rights Law ("NYCHRL") cover claims of discrimination only against those who live, work, or are physically present in New York City or State. (*Hoffman v. Parade Publications*, 15 NY3d 285 [2010]). The Court phrased its holding as a requirement that the plaintiff demonstrate that she "felt the impact" of the employment decision in New York State or City. Over the 13 years since that decision, New York appellate courts have repeatedly confirmed this physical presence requirement. The State and City legislatures also have accepted *Hoffman*'s interpretation: each statute has been amended ***more than 40 times*** since 2010, but none of those amendments sought to revise *Hoffman*'s impact test.

Plaintiff Nafeesa Syeed does not allege that she has ever lived, worked, set foot in, or even communicated with anyone in New York State at any relevant time. All of the interactions about which she complains were with supervisors based in Washington, D.C., where she was working for Bloomberg L.P. ("BLP" or the "Company"). Yet she claims the protection of the NYSHRL and NYCHRL for her failure-to-promote claims against BLP because she alleges that she applied for jobs that would have been located in New York City.

Syeed's argument before this Court rests entirely on the notion that an out-of-state individual who applies unsuccessfully for a promotion to New York City does not feel the impact of that decision where she lives or already works for the same employer, but rather in the City – even if she has never set foot in any of the five boroughs. Syeed will not acknowledge that this invention would undo *Hoffman*, characterizing her view as merely a "broad interpretation," but her argument ignores *Hoffman*'s statutory basis, its unambiguous text, its reasoning, and its aim to create a rule that is "relatively simple for courts to apply and litigants to follow." (15 NY3d at 291). Her argument also ignores the reasoning of nearly every case that has examined *Hoffman*'s test in any detail, none of which Syeed accounts for or even acknowledges in her brief. This Court should answer the certified question "No."

## QUESTION PRESENTED FOR REVIEW

This Court accepted for review the following question certified by the United States Court of Appeals for the Second Circuit:

> Whether a nonresident plaintiff not yet employed in New York City or State satisfies the impact requirement of the New York City Human Rights Law or the New York State Human Rights Law if the plaintiff pleads and later proves that an employer deprived the plaintiff of a New York City- or State-based job opportunity on discriminatory grounds.

## STATEMENT OF FACTS

BLP hired Syeed in October 2014 as a reporter in the Dubai News Bureau, where she produced news stories and features "from within the United Arab Emirates." (A-15 ¶¶ 56, 57). In 2015, she married and sought an internal transfer

from Dubai to either the Washington, D.C. Bureau or the New York Bureau because of her husband's job location. (A-16-17 ¶ 61). BLP offered Syeed the opportunity to transfer to the D.C. Bureau and she began working in Washington, D.C. on March 20, 2016. (A-17-18 ¶ 66).

As recounted in her brief to this Court and in her Second Amended Complaint (the "SAC"), Syeed accuses BLP's Washington, D.C. management of several instances of gender discrimination, in pay and otherwise. (Brief of Appellant ("App. Br.") at 5-6, citing A-19-20 ¶¶ 70-75). Syeed does not contend that any of that alleged conduct occurred in New York State or City or that any of the decisions about which she complains were made by anyone in New York.

Syeed also claims that in March 2018, while working in Washington, D.C., she expressed "interest" to her local supervisor in a United Nations reporter position based in New York, but that this position ultimately was filled by a male reporter who allegedly needed to move to a position based in the United States, as BLP had permitted Syeed to do a few years earlier. (A-22 ¶ 79; A-23 n.15). The SAC does not allege that Syeed ever actually applied for this position, nor that she ever spoke to or otherwise communicated with anyone in New York about it. She claims that she later asked two of her Washington, D.C.-based supervisors why she had not been considered for the position, and that one responded (falsely, in her view) that she had never expressed interest in covering foreign policy matters. (A-22-23 ¶ 82). She

claims that both D.C. supervisors "reprimanded" her for failing "to advocate for herself." (A-22-24 ¶¶ 82-83).

Syeed also alleges that she applied for an editor position and "various" other unidentified positions in the New York Bureau that she learned about from her Washington, D.C. supervisor. (A-22-23 ¶¶ 81-82). She does not allege that these positions ever were filled, nor, if they were, the sex, race, or relative qualifications of the individuals who filled them.

Syeed alleges that on June 6, 2018, she complained to the Head of Human Resources in Washington, D.C. about Company "culture," specifically referring to conversations she purportedly had with her Washington, D.C. managers. (A-25-26 ¶ 87). Two days later, on June 8, 2018, Syeed resigned from her employment in the D.C. Bureau. The SAC characterizes her resignation as a constructive discharge, but she has since abandoned that claim. (A-26 ¶¶ 88, 90).

## PROCEDURAL HISTORY

### A. Syeed Sues BLP, Asserting Multiple Claims under the NYSHRL and NYCHRL.

More than two years later Syeed, by then a California resident, commenced this putative class action lawsuit in New York Supreme Court on August 9, 2020, and filed an Amended Complaint two days later. (*See* A-53; A-114-115). BLP removed the case to federal court pursuant to the Class Action Fairness Act of 2005 and then moved to dismiss the Amended Complaint on October 9, 2020. (*See* A-53;

A-114-115). More than a month later, on November 13, 2020, Syeed, joined by a second plaintiff, filed the SAC. (A-1-43; A-53; A-115).

While much of the SAC is filled with irrelevant allegations recycled from other lawsuits filed by Syeed's counsel and of which Syeed has no personal knowledge, Syeed asserted individual claims of constructive discharge; discrimination in promotions and compensation; and a hostile work environment, all under the NYSHRL and NYCHRL, and also asserted the promotion and compensation claims on behalf of a putative class. (A-34-38).[1]

### B. The District Court Dismisses Syeed's NYSHRL and NYCHRL Claims.

On January 15, 2021, the Company filed a motion to dismiss the SAC pursuant to Fed. R. Civ. P. 12(b)(6). (A-54). On October 25, 2021, the Honorable Gregory H. Woods issued a 46-page Memorandum Opinion and Order granting the Company's motion in full as to Syeed's claims. (A-44-89).

As relevant here, the district court held that under *Hoffman*, to state a claim under the NYCHRL and NYSHRL, "the impact of the employment action must be felt *by the plaintiff* in NYC" or New York State. (A-58, quoting *Vangas v Montefiore*

[1] While the SAC also suggested that Syeed was alleging claims under Title VII of the Civil Rights Act of 1964 (*see* A-32-34), Syeed subsequently disavowed those claims and represented to the district court that she only sought to assert claims under the NYSHRL and NYCHRL. (A-57 n.2). She also abandoned her claim of constructive discharge, choosing not to appeal the district court's dismissal of those claims, leaving her failure-to-promote claim as the only remaining issue.

*Med. Ctr*., 823 F3d 174, 183 [2d Cir. 2016] [original emphasis]). The district court explained that Syeed "cannot show that Defendant's failure to promote her impacted her in New York" because she "was living and working in Washington D.C." when she allegedly was denied promotions and "at no point did she live or work in New York State or City." (A-58-59). The court held that Syeed's sole reliance on allegations "that she applied for, and was denied, certain New York-based positions" was not enough, finding them "insufficient to plead that Defendant's discrimination had an impact on Plaintiff in New York." (A-59, 64).

The district court went on to consider three other federal district court decisions on which Syeed relied,[2] finding them "contrary to the holdings in *Hoffman*, *Vangas*, and other binding New York State precedent." The court reviewed in detail the holdings in *Hoffman*, *Vangas*, and by several other New York appellate courts, all of which consistently held that "the NYCHRL and NYSHRL are targeted to protect individuals who live or work in New York City and State."[3] The district court found the federal decisions on which Syeed relied unfaithful to that "binding

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[2] *Scalercio-Isenberg v Morgan Stanley Servs. Grp., Inc.*, 2019 WL 6916099 (SD NY Dec. 19, 2019, No. 19 Civ. 6034 [JPO]); *Chau v Donovan*, 357 F Supp 3d 276 (SD NY 2019); and *Anderson v HotelsAB, LLC*, 2015 WL 5008771 (SD NY Aug. 24, 2015, No. 15 Civ. 712 [LTS]).

[3] A-60; *see* A-60-61, reviewing *Pakniat v Moor*, 192 AD3d 596, 597 (1st Dept 2021), *leave to appeal denied* 37 NY3d 917 (2022); *Wolf v Imus*, 170 AD3d 563, 564 (1st Dept 2019); *Hardwick v Auriemma*, 116 AD3d 465, 467 (1st Dept 2014); *Benham v eCommission Sols., LLC*, 118 AD3d 605, 606 (1st Dept 2014).

case law." (A-61). The court first noted that two of the three decisions, *Scalercio-Isenberg* and *Chau*, included no reasoning of their own but merely relied on the third case, *Anderson*. Finding *Anderson* to offer only a "shaky foundation" for Syeed's claim, the district court noted that it suffered from "numerous issues," including its reliance on pre-*Hoffman* case law, and, more fundamentally, its rejection of "the central tenet proclaimed in *Hoffman*" that the NYCHRL and NYSHRL were intended "to protect only individuals who work 'in the city,' and 'within the state,' and who feel the impact of the discrimination 'in' the City or State." (A-61-63, citing *Hoffman*, 15 NY3d at 289-90). The district court accordingly refused to follow *Anderson*, electing to "stay[ ] within the clear lines drawn by New York State's highest court in *Hoffman*." (A-63).

Syeed subsequently filed a motion for the entry of judgment pursuant to Rule 54(b). (A-90). The district court granted her motion and judgment was entered against Syeed on May 10, 2022. (A-90; A-110). Syeed filed a notice of appeal to the U.S. Court of Appeals for the Second Circuit, in which she appealed only the district court's dismissal of her failure-to-promote claims under the NYCHRL and NYSHRL. (A-116).

### C. The Second Circuit Issues the Certification Order.

On January 23, 2023, the Second Circuit certified the following question to this Court:

> Whether a nonresident plaintiff not yet employed in New York City or State satisfies the impact requirement of the New York City Human Rights Law or the New York State Human Rights Law if the plaintiff pleads and later proves that an employer deprived the plaintiff of a New York City- or State-based job opportunity on discriminatory grounds.

(A-125-126.) The Second Circuit expressly authorized this Court to "modify the certified question as it sees fit." (A-126.)

The Second Circuit recognized that this Court held in *Hoffman* that the "NYCHRL and NYSHRL were intended to protect persons who inhabit or are persons within New York City and State, respectively" only and a non-resident plaintiff must "plead and prove that the alleged discriminatory conduct had an impact within those respective boundaries," but opined that *Hoffman* and other cases do not provide "clear guidance" on the application of this standard in the context of "failure-to-hire or failure to-promote cases."[4] (A-117-123, citing and quoting 15 NY3d at 285, 289, 291).

The Second Circuit noted that certain portions of *Hoffman* discussing the statutory intent of the NYCHRL and NYSHRL seem to indicate that nonresidents can satisfy the impact requirement only if they currently work in New York City or

[4] Like *Hoffman* and the other state court cases cited by the Second Circuit, the instant case also does not involve claims for failure to hire. Here, Syeed sues the same company who employed her in Washington, D.C. and would have employed her in New York – and thus had a remedy for her failure-to-promote claim in Washington, D.C., where she lived and worked.

State (A-119, citing and quoting 15 NY3d at 291), but perceived that a different portion of *Hoffman* seems to leave open the possibility that a non-resident plaintiff who is not "employed in" the City or State of New York can state a claim if the alleged discrimination somehow nevertheless had an impact in those locations. (A-119-120, citing 5 NY3d at 291). The Second Circuit also observed that the *Hoffman* Court had based its conclusions about statutory intent on Section 8-101 and 8-104 of the NYCHRL stating that the law applied only to "inhabitants" and "persons *in the city of New York*," (*see* A-118 n.3, quoting N.Y.C. Administrative Code §§ 8-101, 8-104), but that N.Y.C. Administrative Code § 8-104 "has been repealed." (*id.*).[5]

This Court accepted certification on February 9, 2023. (A-127).

## ARGUMENT

### I. *Hoffman* Precludes Syeed's Claims.

#### A. *Hoffman* Unambiguously Prohibits Claims by Individuals Who Were Neither Living nor Working nor Physically Present in New York.

The plaintiff in *Hoffman* worked in Georgia for a New York employer, and he brought claims under the NYCHRL and NYSHRL after the employer closed the Georgia office and terminated his employment. The Court began its analysis with

[5] As explained below, the City Council removed this language because it also appeared in the City Charter and so was duplicative; it made no substantive change.

the statutory language of the NYCHRL, noting first that it affords "its protections . . . only to those who inhabit or are 'persons in' the City of New York." (15 NY3d at 289). The Court then acknowledged disagreement in other courts about the statute's territorial reach "where the alleged discriminatory conduct is" – as here – "against a nonresident who does not work in New York City." (*id*. at 290). Rejecting decisions applying the NYCHRL "regardless of where the plaintiff works," the Court instead followed those cases holding that the statute applies to nonresidents only where the "impact *on the plaintiff*" was felt within the City. (*id*.) [emphasis added]. The Court pointed out that this interpretation did not wholly exclude nonresidents from the NYCHRL's ambit but did "narrow[ ] the class of nonresident plaintiffs who may invoke its protection" to "nonresidents who work in the city." (*id*.).[6] Turning to the NYSHRL, the Court cited similar language and held that that statute's "obvious intent" is "to protect 'inhabitants' and persons 'within' the state." (*id.* at 291). The Court held that the NYSHRL primarily protects "those who work in New York," and through its "'extraterritorial' provision," those New York residents who suffer discriminatory practices committed outside the state. (*id.* at 291-92).

[6] The Court thus made clear that NYCHRL jurisdiction would not extend to a claim by a nonresident who did ***not*** work in the city.

Syeed, as an inhabitant of the District of Columbia who neither lived nor worked in New York State or New York City – and apparently never has, certainly not at any relevant time – plainly did not suffer an impact within those jurisdictions, as *Hoffman* requires.[7] She was never an "inhabitant," nor did she "work in the city" or the State, nor does she allege she even paid a visit here in the course of applying for any New York position. Syeed twists *Hoffman*'s holding and reasoning beyond any recognition to insist that when an out-of-state employee is denied a promotion to a New York job, the plaintiff does not feel the impact "at [the] pre-existing workplace" but rather "at the location of the employment that was discriminatorily denied." (App. Br. at 2-3). That simply makes no sense as an understanding of *Hoffman* or, for that matter, plain English. A plaintiff simply cannot feel the impact of a decision in a locale where she neither lives nor works, nor has even visited while applying for a position. Rather, Syeed felt the impact of the decision in Washington, D.C., where she had to continue to work in a job that she claims she wanted less than the New York positions – and where she could have sued BLP over the denial. (*See* D.C. Code §§ 2-1401-1404).

[7] Indeed, Syeed does not even allege that she communicated with anyone in New York; the SAC recounts only conversations about transfer or promotion with her local D.C. supervisor.

As the district court noted, other New York appellate courts have consistently applied *Hoffman*'s holding without difficulty: it "turns primarily on [the nonresident plaintiff's] physical location at the time of the alleged discriminatory acts." (*Wolf*, 170 AD3d at 564; *Benham*, 118 AD3d at 606 [same]).[8] Thus, in *Hardwick*, which Syeed unaccountably cites as if it supports her position (App. Br. at 13), the plaintiff lived in New York State and was employed by a New York City-based employer, but the court dismissed her claims because the alleged discrimination occurred – and thus the plaintiff felt the impact of those acts – in London, where she was on temporary assignment at the time. (116 AD3d at 467). Similarly, in *Benham*, it made no difference that the plaintiff filed New York State nonresident tax returns; what mattered was that "the alleged conduct occurred while plaintiff was physically situated outside of New York." (118 AD3d at 606). Federal courts agree, apart from

[8] *See also Jarusauskaite v Almod Diamonds*, *Ltd*., 198 AD3d 458, 459 (1st Dept 2021) (ordering dismissal of NYCHRL and NYSHRL claims because "[d]efendants' alleged conduct occurred while plaintiff was 'physically situated outside of New York' and did not have 'any impact on the terms, conditions or extent of her employment . . . within the boundaries of New York'") (quoting *Benham*, 118 AD3d at 606 and *Hardwick*, 116 AD3d at 467, and citing *Wolf,* 170 AD3d at 564 and *Shah v Wilco Sys., Inc.*, 27 AD3d 169, 176 [1st Dept 2005]). In *Shah*, a pre-*Hoffman* case, the First Department reversed a denial of summary judgment to a New-York-City-based employer on NYCHRL claims brought by a former employee who lived in New Jersey and whose employment was terminated while on assignment to a client site in New Jersey, because "the NYCHRL would not apply since its impact on her occurred in New Jersey, not within the five boroughs." (27 AD3d at 176).

*Anderson* and the two cases that follow it without analysis. For example, in *Shiber v Centerview Partners LLC* (2022 WL 1173433, at *1 [SD NY Apr. 20, 2022, No. 21 Civ. 3469 (ER)]), the plaintiff alleged that she was hired for a New York position but was temporarily required to work from her New Jersey home because of the COVID-19 pandemic. Centerview terminated her employment, and she alleged disability discrimination. (*id.* at *2). The court dismissed her NYCHRL claim because she felt no impact from the termination in New York City, even though she alleged she had been hired to work in New York City and would have worked there once the pandemic abated. (*id.* at *3-4). And in *Ann Wang v Government Employees Insurance Co.* (2016 WL 11469653, at *7 [ED NY Mar. 31, 2016, No. 15 Civ. 1773 (JS)]), the plaintiff lived and worked in Long Island. As relevant here, she alleged she was denied a promotion to a position that would have required her to work in state and federal courts located in New York City. (*id*.). The court nevertheless dismissed her NYCHRL claim for failure to allege that she felt the impact of the decision in the City. (*id*.) Syeed here similarly alleges a discriminatory failure to promote her to a position that would have required work in New York City, but she was living and working in Washington, D.C. and could not have felt the impact of the decision in New York City.

Syeed does not trouble to distinguish or even acknowledge any of these decisions, even though the district court discussed them all. Nor does she cite a

single New York state decision adopting her upside-down characterization, in which a plaintiff can feel the impact of an employment decision in a place where she neither lives nor works and where she was not physically present at any relevant time.

The Second Circuit noted that *Hoffman* concludes by pointing out that the plaintiff there was "neither a resident of, nor employed in, the City or State of New York," and then goes on to say, "Nor does Hoffman state a claim . . . [of] any impact in either of those locations." (A-119-20, citing 15 NY3d at 292). The Second Circuit suggested that that construction may imply that a plaintiff who lives and works outside the State or City might nevertheless be able to show some impact. (A-120). The *Hoffman* Court did not elaborate on its meaning, but the simple "nor" will not bear the weight that Syeed puts on it – that anyone seeking employment in New York or a transfer there satisfies the impact test. Surely if the *Hoffman* Court had intended such a sweeping exception, which would wipe away all of the preceding paragraphs about the limitation of the statutes to those who work or reside in the City or State, it would have said so more explicitly.

To the extent the *Hoffman* Court meant anything at all by the "nor," it is far more plausible that the Court referred to the possibility that an individual may live and work outside the jurisdictions but be subjected to discriminatory conduct while physically present in New York City or State. For example, in the inverse of the *Hardwick* facts, an individual who lived and worked outside the jurisdictions but

was discriminated against while temporarily assigned to work within New York City would satisfy the impact test because, again, as *Wolf* and *Benham* explain, the impact test examines "physical location at the time of the alleged discriminatory acts." (*Wolf*, 170 AD3d at 564; *Benham*, 118 AD3d at 606). That view of the "nor" hews to the Court's intent to create a rule that is "relatively simple for courts to apply and litigants to follow." (*Hoffman*, 15 NY3d at 291).

That also is exactly the holding of *Kraiem v JonesTrading Institutional Services LLC* (492 F Supp 3d 184 [SD NY 2020]), on which Syeed inexplicably relies. (App. Br. at 13). There the court held that a plaintiff who lived and worked in London but who alleged she was harassed and retaliated against during a one-week business trip to New York City satisfied the impact test with respect to those specific allegations that arose during that week. (*id*. at 198-99). Notably, the court dismissed the plaintiff's separate claims concerning alleged harassment by New-York-based actors while the plaintiff was in London and "negative effects on her future career prospects in New York." (*id*.).

Application of *Hoffman* to hiring, transfer, or promotion cases thus requires no exegesis. A straightforward reading makes plain that one who does not live or work in the State or City, and who is not at any relevant time physically present in either jurisdiction, falls outside the class of persons that these statutes protect.

### B. The Cases on Which Syeed Relies Misapply *Hoffman*.

Lacking any New York state authority to support her argument, Syeed relies here on the same three federal district court cases that the trial court carefully dissected and rejected. (*See* App. Br. at 11-13; A-61-64). At the outset, as the district court here recognized, two of the three cases merely follow the third without any independent analysis. (A-61). Only that third case, *Anderson*, offers any reasoning to assess.

Applying the NYCHRL, *Anderson* briefly cites *Hoffman* but makes no effort to address its limitation of the impact test to those who live or work in New York. Nor does it even acknowledge the statutory references to "inhabitants" and "persons in the city of New York" on which *Hoffman* based its holding. In fact, *Anderson* rejects, without explanation, a limitation of the law to "the physical locations where the plaintiff experienced [discrimination]" in favor of what the court called a "practical substantive consideration" of how the failure to hire affected the plaintiff's prospects of future employment in the city. (2015 WL 5008771, at *3). As the district court here noted, *Anderson* also relied on a case that in turn relied exclusively on pre-*Hoffman* precedent. The decision is thus wholly unmoored from the statutes it applies and from *Hoffman*'s interpretation of them.

Further, *Anderson*'s reasoning has since been rejected not only by the Second Circuit but in repeated First Department decisions. In *Vangas*, noting *Hoffman*'s

limitation of the NYCHRL and NYSHRL to those who live and work in New York, the Second Circuit cautioned against applications of the impact test that would "broaden the [NYCHRL] impermissibly beyond those 'who work in the city.'" (*Vangas*, 823 F3d at 183, quoting *Hoffman*, 15 NY3d at 290). Similarly, the First Department in *Pakniat*, *Wolf*, *Hardwick*, and *Benham*, all decided since *Anderson*, repeatedly emphasizes that *Hoffman* ties the impact test to physical presence, which *Anderson* expressly refused in favor of its own invented and ill-defined "practical substantive consideration." This single isolated decision of a federal trial court, now at odds with multiple New York appellate courts on a principle of New York law, offers no basis to reinvent the impact test in the face of *Hoffman*'s plain language and the otherwise unified understanding of it that has prevailed since it was decided.

## II. *Hoffman* Was Correctly Decided and Remains the Correct Interpretation of the NYCHRL and NYSHRL.

Because *Hoffman* unambiguously precludes Syeed's claims, as shown in Part I, above, Syeed can only prevail if the Court were to revisit the impact test that *Hoffman* adopted. The *Hoffman* Court's determination is entitled to considerable deference under "the eminently desirable and essential doctrine of stare decisis." (*Palladino v CNY Centro, Inc*., 23 NY3d 140, 150 [2014]; *see also People v Hobson*, 39 NY2d 479, 489 [1976]). As the Court explained in *Hobson*:

> Precedents involving statutory interpretation are entitled to great stability. After all, in such cases courts are interpreting legislative intention and a sequential contradiction is a grossly arrogated

> legislative power. Moreover, if the precedent or precedents have 'misinterpreted' the legislative intention, the Legislature's competency to correct the 'misinterpretation' is readily at hand.

(39 NY2d at 489 [citations omitted]). For these reasons, precedent involving statutory interpretation cannot be disturbed without an "extraordinary and compelling justification." (*In re State Farm Mut. Auto. Ins. Co. v Fitzgerald*, 25 NY3d 799, 819 [2015]).

Unable to articulate any reason, let alone an "extraordinary and compelling justification," to revise *Hoffman*'s holding, Syeed instead purports to advocate only for a "broad interpretation" of the decision. (App. Br. at 2). In fact, her "interpretation" would fundamentally change *Hoffman*'s holding and reasoning, and should be rejected on stare decisis grounds alone. Even if the Court were inclined to reexamine *Hoffman*, moreover, the decision follows the statutory language; has the tacit acceptance of the State and City legislatures, which have not amended the statutes to address the impact test in the 13 years since, despite more than 40 amendments to each statute on other topics, and thus does not "'misinterpret[ ]" the legislative intention"; and draws reasonable, sensible interpretive lines. There is no occasion either to "interpret" or reexamine the decision.[9]

[9] Stare decisis applies with particular force to precedents of long standing "that the legislature has never sought to 'correct.'" (*Grady v Chenango Valley Cent. Sch. Dist.*, -- NY3d --, 2023 N.Y. Slip Op. 02142, at *2 [Apr. 27, 2023]; *see also Palladino*, 23 NY3d at 151, 153 [declining to revisit precedent that legislature had declined to clarify or correct, even though, as the dissent characterized it, the

### A. *Hoffman* and Its Progeny Faithfully Implement the Statutory Language.

Statutory interpretation begins with the language of the statute. (*See, e.g.*, *Majewski v Broadalbin-Perth Cent. Sch. Dist*., 91 NY2d 577, 583 [1998] ["the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof"]). Courts also presume that the legislature does not intend a law to have force or operation beyond its territory, unless such intention is clearly and expressly stated. (*See, e.g.*, *Goshen v Mut. Life Ins. Co. of New York,* 286 A.D.2d 229, 230 [1st Dept 2001]), *affd* 98 NY2d 314 [2002]).

#### 1. Neither Statute Expresses any Extraterritorial Intent.

Neither the NYCHRL nor the NYSHRL expresses any such intent. To the contrary, as *Hoffman* recognized, both statutes indicate that they are intended only to cover those present in New York City and State. The NYCHRL expressly declares that "prejudice, intolerance, bigotry, and discrimination . . . threaten the rights and proper privileges of [the City's] ***inhabitants***," and

> [i]n the city of New York, with its great cosmopolitan population, there is no greater danger to the health, morals, safety and welfare of the city and ***its inhabitants*** than the existence of [prejudice and discrimination].

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majority "devote[d] as much space to detailing criticisms of [the precedent] as to defending it"]; *Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419-20 [2006] ["we do not lightly depart from our precedents, particularly those involving contractual rights or statutory interpretation"; Court noted that the public had long relied on the precedent "and the Legislature has not seen fit to alter this rule"]).

(N.Y.C. Administrative Code § 8-101 [emphasis added]). The New York City Council also created the New York City Commission on Human Rights (the "City Commission") (*id.*) with a mandate that includes "foster[ing] mutual understanding and respect among all ***persons in the city.***" (Charter of City of N.Y. § 904 [emphasis added]). The duties of the City Commission include, among other things, developing "techniques for achieving harmonious intergroup relations ***within the city***." (Charter of City of N.Y. § 905(a) [emphasis added]). (*See also* General Municipal Law § 239-s [recognizing the City Commission's jurisdiction as to "matters within the city of New York" to be concurrent with its State counterpart]). Section 2-201 of the N.Y.C. Administrative Code "defin[es] the territory of [New York City] as constituting the five boroughs, and declar[es] that the 'jurisdictions and powers of the city are for all purposes of local administration and government . . . co-extensive with the territory . . . described.'" (*Hoffman*, 15 NY3d at 291, quoting N.Y.C. Administrative Code § 2-201).

The NYSHRL similarly makes clear that the statute does not extend to nonresidents working outside of the State of New York. The State Legislature explicitly invoked "the police power of [New York State] for the protection of the public welfare, health and peace ***of the people of this state***." (Executive Law § 290-2 [emphasis added]). The Legislature further declared that the State of New York:

> has the responsibility to act to assure that every individual ***within this state*** is afforded an equal opportunity to enjoy a full and productive life

> and that the failure to provide such equal opportunity . . . not only threatens the rights and proper privileges of ***its inhabitants*** but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and ***its inhabitants***.

(Executive Law § 290-3 [emphasis added]).

Further, as *Hoffman* recognized, the NYSHRL's "extraterritorial" provision extends the NYSHRL protections to New York residents who experience discriminatory acts outside of New York State, and further provides for liability against a New York resident or domestic corporation that discriminates against a New York resident outside of New York. (Executive Law § 298-a[1], [2]). While the enactment of this provision demonstrates the clear legislative intent to expand the NYSHRL's protections extraterritorially for New York residents, the Legislature "plainly has not extended such protections to nonresidents" working outside of New York. (*Hoffman*, 15 NY3d at 292).

### 2. The New York City Council's Transposition of Some NYCHRL Provisions Is Irrelevant.

Syeed has nothing to say about these clear statutory limitations. Nor does she offer any other provision of either statute indicating an intent to protect individuals who live and work outside these jurisdictions. Instead, she merely notes that two of the NYCHRL provisions on which *Hoffman* relied, N.Y.C. Administrative Code §§8-104, 8-105, were "transposed to the New York City Charter." (App. Br. at 16 n.1). Syeed concedes that these changes "do[ ] not appear to significantly affect the

present analysis," because the language functionally remains the same. (App. Br. at 16). Yet she also contends, without any elaboration, that the change "emphasize[s]" that the impact test is not concerned with "the physical location of a nonresident plaintiff." (*id.*).

Syeed is wrong. The repeal of §§ 8-104 and 8-105 has nothing to do with the inquiry before this Court because (as she admits) those provisions were repealed only because they duplicated the City Charter. In a Committee Report to Local Law No. 63, the City Council explained that the repeal of both provisions was a "structural" amendment to

> consolidate several provisions of the HRL that are duplicated in both the Charter and the Administrative Code, making Charter sections 903 through 906 the primary location for such provisions and repealing the duplicative sections 8-103 through 8-106 of the Administrative Code. This consolidation would ensure that the Charter and Administrative Code provisions do not diverge over time.

(N.Y.C. Council Committee Report of the Governmental Affairs Division, Dec. 18, 2017, p.4 [*see* Respondent's Rule 500.1(h) Cited Materials]).[10] Specifically, the City Council stated that § 8-104 was duplicative of § 904 of the Charter, and that § 8-105 was duplicative of § 905 of the Charter.

[10] The Administrative Code contains the codified local laws of New York City, while the Charter forms the legal basis for the operation of the City, *i.e.* establishing the form of government and setting up the legislative, executive, and judicial branches of the City government.

Sections 904 and 905 of the Charter are effectively identical to the language on which *Hoffman* relied. Charter § 904 states, in relevant part, that the Commission on Human Rights' functions include "[t]o foster mutual understanding and respect ***among all persons in the city***" [emphasis added]. And Charter § 905 states that the Commission's powers and duties include "developing courses of instruction, for presentation to city employees and in public and private schools, public libraries, museums and other suitable places, on techniques for achieving harmonious intergroup relations ***within the city***" [emphasis added]. These provisions are in all material respects the same language that the *Hoffman* Court relied on; the words "in the city of New York" or "within the city of New York" have now merely been simplified to "in the city" or "within the city."

There is no indication in the legislative history nor in any other authority to suggest that the repeal of these provisions had anything to do with an abrogation of *Hoffman* or an extension of NYCHRL coverage to individuals who live and work outside of the City, and Syeed offers no reason to think that these administrative changes should be read to have intended any substantive change.

**B. The State and City Legislatures Have Accepted *Hoffman*.**

Since *Hoffman* was decided 13 years ago, neither the State nor City legislature has taken any action to amend either the NYSHRL or NYCHRL in response. Certainly, if either legislature had wanted to override this Court's decision, they

could have explicitly done so. As this Court observed in *Hobson*, if a decision "'misinterpret[s]' the legislative intention, the Legislature's competency to correct the 'misinterpretation' is readily at hand." (39 NY2d at 489).

Neither legislature has done so, even though ***each statute has been amended more than 40 times*** in the last 13 years.[11] The lack of any legislative action in response to *Hoffman* over more than a decade indicates both legislatures' acceptance of its interpretation. As the Court said in *Desrosiers v Perry Ellis Menswear, LLC* (30 NY3d 488 [2017]):

> it is a recognized principle that where a statute has been interpreted by the courts, the continued use of the same language by the Legislature subsequent to the judicial interpretation is indicative that the legislative intent has been correctly ascertained.

[11] For amendments to the NYCHRL, see *Amendments to NYC Human Rights Law,* https://www.nyc.gov/site/cchr/law/amendments.page (last visited May 24, 2023); for the NYSHRL, see S. 5000-B (2010); A. 1470-B (2010); S. 68004 (2010); A. 10771 (2010); S. 2812-C (2011); A. 9820-A (2012); A. 8201-A (2014); A. 5788 (2014); A. 136-A (2015); S. 1314-A (2015); S. 2 (2016); S. 3 (2016); S. 4 (2016); S. 8 (2016); A. 3009C (2017); S. 7507-C (2018); A. 7178 (2018); A. 4204 (2019); A. 2006-C (2019); S. 6209-C (2019); A. 3425 (2019); A. 8054 (2019); A. 8421 (2019); S. 6594 (2019); S. 1040 (2019); S. 1505-C (2019); A. 5975 (2019); S. 1047 (2019); A. 7331 (2020); S. 6569 (2020); S. 7105 (2021); S. 6886 (2021); A. 7390 (2021); S. 867 (2021); A-8149-A (2021); S. 5064 (2021); A. 2483-B (2021); S. 7773 (2022); A. 6328-A (2022); S. 749 (2022); S-8417-B (2022); S. 5870 (2022); A. 2035-B (2022); S. 3437-C (2022); A. 5913-A (2023). Copies of the NYSHRL amendments have been included in Respondent's Rule 500.1(h) Cited Materials.

(*id.* at 497, quoting *In re Knight–Ridder Broad. v Greenberg*, 70 NY2d 151, 157 [1987]).[12] The *Desrosiers* Court went on to note that legislative inaction "carries more weight where the legislature has amended the statute after the judicial interpretation" without disturbing it, or when the judicial interpretation "stems from a decision of this Court or 'unanimous judgment of the intermediate appellate courts.'" (30 NY3d at 497). Here, all of these criteria are satisfied: the Legislature and the City Council have amended their respective statutes dozens of times without altering *Hoffman*'s interpretation; *Hoffman* was a decision of this Court; and the intermediate appellate courts have unanimously adopted the same rule. Considering all of these factors, the legislatures' long silences speak as persuasively as *Hoffman* itself to say that the statutes extend only to those who live and work in New York, or are discriminated against while physically present here.

### C. The NYCHRL's Liberal Construction Requirement Provides No Basis to Contravene Its Plain Terms.

With no textual basis in the NYCHRL for her position, no support from *Hoffman*, and no authoritative case law support, Syeed closes by seeking refuge in the law's provision that it is to be "construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof . . . ." (N.Y.C. Administrative Code

[12] *See also Hammelburger v Foursome Inn Corp.*, 54 NY2d 580, 588 (1981) ("Ascertainment of the legislative intent behind enactment of [a statute] . . . requires consideration of the decisional law background . . ., of which it may be presumed the Legislature was aware and, to the extent it left it unchanged, that it accepted.").

§ 8-130). She ignores that the NYCHRL included that provision in 2010, when *Hoffman* was decided, yet this Court nevertheless "narrow[ed] the class of nonresident plaintiffs who may invoke its protection." (15 NY3d at 290).

In any case, Syeed cites no authority to suggest that this provision or the other similar sections on which she relies[13] mandate any change in the territorial scope of the law, or broaden the law to cover nonresidents whom *Hoffman* held were excluded. This Court and others have made clear that even considering the liberal construction requirement, the NYCHRL "still must be interpreted based on its plain meaning." (*Makinen v City of N.Y.*, 30 NY3d 81, 88 [2017]; *see also LeBlanc v United Parcel Serv.*, 2014 WL 1407706, at *13 [SD NY Apr. 11, 2014, No. 11 Civ. 6983 (KPF)] ["The standard under the NYCHRL is liberal, but not boundless . . . ."]).

The 2016 revision to which Syeed points makes clear that the law shall "be liberally and independently construed" in a manner "that is maximally protective of civil rights in all circumstances," and that "exceptions to and exemptions from" the NYCHRL shall be narrowly construed. (N.Y.C. Local Law No. 35 § 1 [Mar. 28, 2016]). But the provisions limiting coverage under the law to "those who inhabit or are 'persons in' the City of New York" survived these amendments and are neither

[13] *See* App. Br. at 14-15, citing N.Y.C. Local Law No. 35 of 2016 and N.Y.C. Administrative Code §§ 8-130(b), (c).

exceptions to nor exemptions from the law. (*See generally Hoffman*, 15 NY3d at 289-90 [surveying NYCHRL provisions referring to territorial scope]). Interpreting the statute liberally cannot mean overriding its express terms.

The 2016 amendments further identified three cases "that have correctly understood and analyzed the liberal construction requirement," (N.Y.C. Local Law No. 35 § 2(c) [Mar. 28, 2016]), but those three decisions have nothing to do with the impact test and do not even cite *Hoffman*, even though two of the opinions were issued shortly after *Hoffman* was decided. Instead, all three of the cases cited in the 2016 amendment address how various substantive provisions of the NYCHRL should be interpreted.[14]

The 2016 amendments and their legislative history nowhere indicate that the New York City Council intended to override *Hoffman*. Had the City Council intended to expand the scope of the persons protected under the NYCHRL to include individuals who never worked within the City, it could have legislated to that end and amended the provisions that the *Hoffman* court relied on in holding that the

[14] *See Albunio v City of N.Y.*, 16 NY3d 472, 473 (2011) (noting that the anti-retaliation provision had to be construed "broadly in favor of discrimination plaintiffs"); *Bennett v Health Mgmt. Sys., Inc.*, 92 AD3d 29 (1st Dept 2011) (addressing the burden shifting analysis to be applied to NYCHRL claims); *Williams v N.Y.C. Hous. Auth.*, 61 AD3d 62 (1st Dept 2009) (holding that discrimination claims alleged under the NYCHRL must be independently analyzed in light of the law's broad remedial purpose, even where state and federal laws have comparable language).

NYCHRL, by its plain language, does not apply to non-residents who do not work in the City. It did not do so.

Syeed accordingly has not established that the liberal interpretation to be applied to the NYCHRL in any way affects which individuals receive coverage under the law. (*Cf. Davila v Lang*, 343 F Supp 3d 254, 282 [SD NY 2018] [dismissing NYCHRL claims because plaintiff was not an employee of the defendant, holding "[e]ven under the NYCHRL's broad and liberal standard, Plaintiff's discrimination claims fail because . . . he is not an employee of [defendant]."]; *Arzu v Spandrel Prop. Servs., Inc.*, 100 AD3d 462, 462-63 [1st Dept 2013] [compelling arbitration of plaintiff's NYCHRL claims as plaintiff's employment was subject to a mandatory arbitration provision; "A liberal construction of claims under the New York City Human Rights Law does not mean that such claims cannot be subject to arbitration where a plaintiff has agreed to arbitrate such a statutory claim."]).

**D. *Hoffman*'s Reasonable Rule Produces Coherent Results.**

Syeed derides *Hoffman*'s holding as "arbitrar[y]" (App. Br. at 3), but the line it draws – the same line drawn by the statutes it interprets – makes eminent good sense. It is entirely reasonable for the State and City legislatures to want to prohibit discrimination against those within its territories, and not to extend that protection

to individuals like Syeed who live and work in other jurisdictions and were not discriminated against while present in the City or State.

That interpretation of the statutes also draws a reasonable line between the application of New York law and the law of other states. Each state decides for itself what protections to offer its inhabitants, or those who work or are discriminated against in the state, and the possibility that another state's law might not cover a particular act of discrimination does not mean that New York should step in. Again, the Legislature's and City Council's acceptance of the *Hoffman* rule, even though it "narrow[ed] the class of nonresident plaintiffs who may invoke [the statutes'] protection" (15 NY3d at 290), indicates agreement that nonresidents who live and work elsewhere should seek protection of the laws in those other jurisdictions.

Here, for example, the *Hoffman* rule did not leave Syeed without a remedy: because this case involves a transfer or promotion within the same employer, Syeed had a remedy against BLP for her various complaints – including not only her non-selection for New York positions, but the alleged hostile environment and pay discrimination she claims she endured in Washington, D.C. The District of Columbia prohibits discrimination under its own law, the D.C. Human Rights Act. (*See* D.C. Code §§ 2-1401-1404). That she chose not to pursue it was her own decision, not the product of any limitation in New York law.

Syeed similarly argues that Hoffman's holding leads to "perverse results," because jurisdiction over a failure-to-hire claim by a nonresident who works for a different employer in New York will depend on whether that job continues through the interview process for the new one. (App. Br. at 3). First, this case does not involve failure-to-hire claims, and there was no discontinuity in Syeed's employment; she raises only hypothetical questions that are not before the Court. Second, and more importantly, a nonresident who no longer works in New York at the time of a discriminatory act does not feel the impact of that decision in New York, as *Hoffman* correctly recognized.

This Court explained in *Hoffman* that statutory interpretations like those Syeed advances here would "expand[ ] NYCHRL protections to nonresidents who have, at most, tangential contacts with the city." (15 NY3d at 291). "Tangential" aptly describes individuals like Syeed, who bring NYCHRL claims without ever having worked in New York City, and apparently had ***no contact with the City whatsoever***. Under Syeed's expansive view, any nonresident employee would be able to invoke the protection of New York City's laws, even though the individual lives and works in a foreign jurisdiction, with its own unique regulations and procedures relating to employment.

There is no reason that New York courts should adjudicate claims involving routine personnel decisions brought by non-residents who work in a different state

and have no physical connection to this forum. Limited judicial resources would be expended and New York law would encroach on the sovereignty of foreign jurisdictions that have their own interest in regulating employment relationships that are based in those jurisdictions.

## CONCLUSION

For the reasons stated herein, Respondent respectfully requests that the Court answer the certified question in the negative.

Respectfully submitted,

BLOOMBERG L.P.

By its attorneys,

Dated: June 8, 2023
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**NEW YORK STATE COURT OF APPEALS**
**CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: June 8, 2023

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# Addendum

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United States District Court,
S.D. New York.

Karen ANDERSON, Plaintiff,
v.
HOTELSAB, LLC, Andre Balazs Properties a/k/a the Beach House LLC, and Andre Balazs, Defendants.

No. 15CV712–LTS–JLC.
|
Signed Aug. 24, 2015.

*MEMORANDUM OPINION AND ORDER*

LAURA TAYLOR SWAIN, District Judge.

***1** Plaintiff Karen Anderson ("Plaintiff") brings this action against Defendants HotelsAB, LLC, Andre Balazs Properties a/k/a The Beach House LLC (collectively referred to in the Complaint as the "Company"), and Andre Balazs, ("Balazs" and, collectively, "Defendants") [1], alleging that Defendants engaged in discriminatory employment practices in violation of the New York City Human Rights Law ("NYCHRL"), codified at N.Y.C. Admin. Code §§ 8–101 et *seq.* Plaintiff asserts, and Defendants do not dispute, that the Court has jurisdiction of this action pursuant to 28 U.S.C. § 1332(a). [2]

1 Defendant Andre Balazs has not yet been served with the Summons and Complaint in this action, and therefore is not a party to this motion.

2 *See* Complaint ("Compl.") ¶ 3. Plaintiff has not alleged what type of business entity Defendant Andre Balazs Properties is, has not identified the citizenship of that entity or of the members of the LLC, and has simply alleged that she resides in Connecticut and that Defendants have their "corporate headquarters and principal place of business" in New York.

Defendants move, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted. For the reasons stated below, Defendants' motion is denied.

*BACKGROUND* [3]

3 The facts recited herein are drawn from the Complaint filed in this action and, for the purposes of the instant motion practice, are assumed to be true. (*See* Docket Entry No. 1.)

Defendant HotelsAB is a luxury hotel operator that maintains its corporate headquarters in New York City. (Compl.¶ 9.) Defendant Andre Balazs Properties a/k/a The Beach House LLC is a New York luxury hotel operator that maintains its corporate headquarters in New York City. (*Id.* ¶ 10.) Defendant Andre Balazs is the owner and operator of HotelsAB, LLC and Andre Balazs Properties. (*Id.* ¶ 11.) Plaintiff appears to assert that Defendants HotelsAB and Andre Balazs Properties jointly own and operate the Sunset Beach Hotel, which is located in Shelter Island, Long Island. (*See id.* ¶¶ 9, 10.) At all relevant times, Defendants have operated as a single, integrated enterprise, a single employer, or as joint employers. (*Id.* ¶ 12.) Defendants share common ownership, premises, directors and officers and financial control, and are operationally interrelated and interdependent upon one another. (*Id.* ¶ 13.) Defendants also share common management and control over labor relations and personnel policies and practices. (*Id.*)

In or about July 2014, Plaintiff applied for a position as a controller with the defendant Company. (*See id.* ¶¶ 8, 14.) The position would have required Plaintiff to work at the Sunset Beach Hotel on Shelter Island from May through September (five months), and at the Company's corporate office in Manhattan from October through April (seven months), each year. (Compl.¶ 15.) On July 25, 2014, Plaintiff was contacted by a recruiter with respect to the controller position. (*Id.* ¶ 14.) Plaintiff interviewed over the telephone with the recruiter and several officers of the Company. (*Id.* ¶ 16.) On August 11, 2014, Plaintiff interviewed in person with the Los Angeles and London-based CFOs of the Company. (*Id.* ¶ 18.) They requested that she meet with Defendant Balazs that day as the final step of the interview. [4] (*Id.* ¶ 19.)

4 In her Opposition to Defendants' Motion To Dismiss ("Pl.Memo"), Plaintiff states that she interviewed in person for the controller position at the Company's Sunset Beach Hotel property on Shelter Island. (Pl. Memo at p. 1.)

Plaintiff alleges that Defendant Balazs initiated her interview by stating, "you are a crazy person," and thereafter proceeded to ask her several personal questions. (*Id.* ¶ 20.) When Defendant Balazs asked Plaintiff what her ideal job would be, Plaintiff stated that she would like to run a restaurant or nursing home. (*Id.* ¶ 22.) Defendant Balazs allegedly responded by asking, "do you know how schizophrenic you sound? Did you hear yourself?" (*Id.*) Plaintiff then explained that she would like to open a nursing home because she had a disabled son who lived independently in Maine and received nursing care. (*Id.* ¶¶ 22–23.) At that point, Defendant Balazs ended the interview and stated that Plaintiff could never work for him because her disabled son would prevent her from being able to devote adequate time to her work. (*Id.* ¶ 24.) Plaintiff attempted to explain that caring for her son had never interfered with her work performance, but Defendant Balazs stated that he was no longer interested in her candidacy for the position. (*Id.* ¶ 25.) After the interview, Plaintiff sent two emails to one of the CFOs with whom she had interviewed, reiterating that her son's care would not interfere with her professional responsibilities should she be offered the position. (*Id.* ¶¶ 26–27.) Defendants never contacted Plaintiff following the interview to inform Plaintiff that she would not be hired. (*Id.* ¶ 28.)

***2** On January 30, 2015, Plaintiff filed this suit, [5] alleging that Defendants discriminated against her in violation of the NYCHRL by refusing to hire her because of her relationship with her disabled son. [6] (Compl.¶ 35.)

5 Plaintiff has also filed a Charge of Discrimination with the Equal Employment Opportunity Commission, alleging violations of the Americans with Disabilities Act. Plaintiff intends to seek leave to amend her Complaint to add an ADA cause of action upon receipt of a right-to-sue letter from the EEOC. (Compl.¶ 5–6.)

6 N.Y.C. Admin. Code § 8–107(20) states that "[t]he provisions of this section set forth as unlawful discriminatory practices shall be construed to prohibit such discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation or alienage or citizenship status of a person *with whom such person has a known relationship or association"* (emphasis supplied).

*DISCUSSION*

To survive a Rule 12(b)(6) motion to dismiss a complaint for failure to state a claim, a complaint must contain sufficient factual matter, accepted as true, to " 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. Although the Court must accept all of the factual allegations contained in the complaint as true, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* In order to survive a motion to dismiss, the complaint must state a plausible claim for relief. *Id.* at 679. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

To state a claim under the NYCHRL, "a plaintiff must allege that he was discriminated against by the defendant within New York City." *Salvatore v. KLM Royal Dutch Airlines,* No. 98CV2450–LAP, 1999 WL 796172, at *16 (S.D.N.Y. Sept. 30, 1999). Courts have consistently held that the plaintiff must "plead and prove that the alleged discriminatory conduct had an impact in New York." *See Hoffman v. Parade Publications,* 15 N.Y.3d 285, 291 (2010). To determine where the alleged discriminatory conduct occurred, "courts have looked to the location of the impact of the offensive conduct." *Salvatore,* 1999 WL 796172, at *16; *see also Regan v.. Benchmark Co. LLC,* No. 11CV4511–CM, 2012 WL 692056, at *13–14 (S.D.N.Y. Mar. 1, 2012) (finding that defendants' discriminatory conduct had an impact in New York City because all aspects of plaintiff's employment connected her to the company's New York City office, even after she was transferred to an office outside the city). Furthermore, "it is the site of impact, not the place of origination, that determines where discriminatory acts occur." *Int'l Healthcare Exch., Inc. v. Global Healthcare Exch., LLC,* 470 F.Supp.2d 345, 362 (S.D.N.Y.2007).

Where the discriminatory conduct occurs outside the geographical bounds of New York City, courts have found

that the impact requirement is satisfied if the plaintiff alleges that the conduct has affected the terms and conditions of plaintiff's employment within the city. *See, e.g.,* *Regan,* 2012 WL 692056, at *13–14; *Chin v. CH2M Hill Companies, Ltd.,* No. 12CV4010–HB, 2012 WL 4473293, at *3 (S.D.N.Y. Sept. 28, 2012) (finding that defendants "failed to show that there is no possibility that there was an impact in New York," since the impact of defendants' alleged conduct may have been felt in New York City); *Int'l Healthcare Exch.,* 470 F.Supp.2d at 362–63 (at summary judgment stage, finding that defendants' alleged retaliatory termination, which occurred during a business trip in Paris, affected plaintiff's employment in New York City, and therefore could form the basis of an NYCHRL cause of action).

***3** Defendants move to dismiss Plaintiff's claim on the basis that Plaintiff has failed to show that any alleged discriminatory conduct had an impact within New York City, arguing that Plaintiff allegedly faced discrimination only on Shelter Island, where she was interviewed and where Defendant Balazs allegedly made the discriminatory statements and hiring decision. Defendants rely on the two-prong test discussed in *Robles v. Cox & Co.,* 841 F.Supp.2d 615 (E.D.N.Y.2012) in support of their argument. In *Robles,* the Court stated that the " 'impact' of discriminatory conduct occurs 'within' New York City for purposes of the NYCHRL 'either when the initial discriminatory act (for example, a termination) occurs in New York [City] or when the original experience of injury, which occurs at the employee's workplace, is in New York [City].' " *Robles,* 841 F.Supp.2d at 624 (E.D.N.Y.2012) (quoting *Rylott–Rooney v. Alitalia Linee Aeree Italiane Societa Per Azioni,* 549 F.Supp.2d 549, 554 (S.D.N.Y.2008)). Defendants argue that both the alleged "initial discriminatory act" and "original experience of injury" occurred in Suffolk County, where Shelter Island is located, and not New York City, thus foreclosing Plaintiff's NYCHRL action. (Memorandum of Law in Support of Defendants' Motion to Dismiss ("Def.Memo") at p. 4.)

Defendants misconstrue *Robles* in applying it to the instant case. The *Robles* court cited the two-prong test for the purpose of establishing that a plaintiff's residence is irrelevant to establishing territorial jurisdiction under the NYCHRL; the court did not elaborate on application of that test and did not otherwise limit the "impact" of an allegedly discriminatory act to such a narrow set of circumstances. Defendants' strictly literal reading of *Robles,* as well as Defendants' argument that the impact of an allegedly discriminatory failure-to-hire occurs only at the time of the act, [7] would narrow the impact analysis of a NYCHRL violation to consideration solely of the physical locations where the plaintiff experienced "the initial discriminatory act" and "the original experience of the injury," as opposed to a practical substantive consideration of how and where the injury actually affected the plaintiff with respect to her employment. *See, e.g.,* *Regan,* 2012 WL 692056, at *14.

[7] Defendants cite *Mingguo Cho v. City of New York,* No. 11CV1658–PACMHD, 2012 WL 4364492 (S.D.N.Y. Sept. 25, 2012), in support of this contention. However, *Mingguo Cho* dealt with a procedural requirement under the statute of limitations for filing an ADEA claim with the EEOC. Defendants' reliance on this case as controlling authority with respect to the impact analysis in Plaintiff's failure-to-hire claim pursuant to the NYCHRL is therefore unpersuasive.

Because courts have consistently emphasized that the location of the impact of the offensive conduct is the location where the plaintiff feels the impact of a violation of the NYCHRL on his or her employment, a similar analysis must be applied to Plaintiff's failure to hire claim, premised on the factual allegations that she has presented. Although the alleged discriminatory conduct here (Defendant Balazs' decision not to hire Plaintiff) occurred outside the geographical bounds of New York City, Plaintiff's Complaint sufficiently alleges that Defendants' conduct had an impact with respect to her prospective employment responsibilities in New York City. Plaintiff has alleged that she would have worked in New York for a period of seven months and that the requirements of the controller position would have required her to do so each year. (Compl.¶ 15.) Reading this allegation together with allegations regarding the corporate headquarters of the Company (*id.* ¶¶ 9–10), the Court can reasonably infer that Plaintiff's employment responsibilities would have brought her within the boundaries of New York City.

***4** Defendants argue that, because the job for which Plaintiff was rejected would not have required her to shift the locus of her employment to New York City until several months after she commenced work on Long Island, Plaintiff's claim of an impact in New York City is overly speculative. While it is true that Plaintiff could have resigned or been fired before the time set for transition to New York City, Defendants' argument would cabin unduly the remedial purposes of the NYCHRL,

  

which was amended in 2005 to broaden its protections "because the provisions of the City HRL had been 'construed too narrowly to ensure protection of the civil rights of all persons covered by the law.' " *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 66 (1st Dep't 2009) (quoting Local Law No. 85 [2005] of City of New York § 1). *See also St. Jean v. United Parcel Serv. Gen. Serv. Co.*, 509 F. App'x 90, 90–91 (2d Cir.2013) (summary order) (" '[I]t is beyond dispute that the City HRL now explicitly requires an independent liberal construction analysis in all circumstances, an analysis that must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's uniquely broad and remedial purposes, which go beyond those of counterpart state or federal civil rights laws.' ") (quoting *Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 34 (1st Dep't 2011)). Defendants' interpretation of the NYCHRL would deny protection against hiring discrimination to anyone who did not actually cross the employer's threshold in New York. Such a reading is inconsistent with the letter and spirit of the law, and the Court rejects it. According to the Complaint, Plaintiff interviewed for, and was denied, a position that included duties in a New York City workplace. Her rejection from the position denied her the opportunity to work in New York City, thus providing the necessary New York City workplace nexus for her claim of a NYCHRL-covered injury. The Court thus finds Plaintiff's allegations sufficient to satisfy the impact requirement of the NYCHRL and that she has successfully stated a claim under the statute.

*CONCLUSION*

For the foregoing reasons, Defendants' motion to dismiss Plaintiff's Complaint is denied.

This Memorandum Opinion and Order resolves Docket Entry No. 6. The initial pretrial conference in this matter is scheduled for **Friday, October 30, 2015, at 10:15 a.m.**

SO ORDERED.

**All Citations**

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United States District Court, E.D. New York.

ANN WANG, Plaintiff,
v.
GOVERNMENT EMPLOYEES INSURANCE COMPANY, Defendant.

15-CV-1773 (JS)(ARL)
|
Signed 03/31/2016

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MEMORANDUM & ORDER

Joanna Seybert, U.S.D.J.

***1** Ann Wang ("Plaintiff"), an attorney for Government Employees Insurance Company ("GEICO"), brings various claims for discrimination, retaliation, harassment, unequal wages, and intentional and negligent infliction of emotional distress. Currently pending before the Court is GEICO's motion to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). (Docket Entry 10.) For the following reasons, GEICO's motion is GRANTED.

BACKGROUND [1]

[1] The facts alleged in the Complaint are presumed to be true for the purposes of this Memorandum and Order. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 572, 127 S. Ct. 1955, 1975, 167 L.Ed. 2d 929 (2007) ("[A] judge ruling on a defendant's motion to dismiss a complaint must accept as true all of the factual allegations contained in the complaint." (internal quotation marks and citation omitted) ).

I. Factual Background

Plaintiff, an Asian-American female, has worked as an attorney at GEICO for over ten years. (Compl., Docket Entry 1, ¶¶ 2-3, 12.) GEICO is an insurance provider to over thirteen million customers in the United States. [2] Plaintiff resides on Long Island, New York and has worked at one of GEICO's Long Island offices since June 2010. (Compl. ¶¶ 1, 3.)

[2] GEICO, https://www.geico.com/information/aboutinsurance/auto/geico-business-model/ (lasted visited Mar. 31, 2016).

The Complaint alleges that "GEICO has engaged in a widespread, deep-rooted racially discriminatory employment practice of paying [Plaintiff] and other minority female employees less than it pays Caucasian and male employees." (Compl. ¶ 38.) Despite her "exemplary record and superior qualifications," Plaintiff alleges that GEICO denied her promotions and bypassed her for preferred work assignments. (Compl. ¶¶ 11, 17.) Particularly, Plaintiff claims that she "repeatedly expressed to her supervisors and colleagues her desire to be promoted to a more senior level attorney" but did not receive the promotion. (Compl. ¶ 16.)

Based on this alleged discrimination, Plaintiff filed an internal complaint on May 5, 2014 and a charge with the Equal Employment Opportunity Commission (the "EEOC Charge") on August 12, 2014. (Compl. ¶ 10.) "Before, during and after the internal complaint and EEOC Charge," GEICO treated Plaintiff like a "traitor." (Compl. ¶ 29.) Specifically, GEICO supervisors criticized Plaintiff's work, placed her under close scrutiny, and gave her negative performance reviews. (See, e.g., Compl. ¶¶ 30-31, 35.)

II. Procedural History

This lawsuit followed on April 1, 2015. (See Compl.) Plaintiff asserts claims under Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e, et seq. ("Title VII"); the New York State Human Rights Law, N.Y. Exec. Law §§ 290 et seq. ("NYSHRL"); the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 et seq. ("NYCHRL"); section 1981 of the Civil Rights Law, 42 U.S.C. § 1981 ("Section 1981"); the Equal Pay Act, 29 U.S.C. § 206, et seq. ("EPA"); the Lily Ledbetter Fair Pay Act, 42 U.S.C.

§ 2000e-5 ("FPA"); and theories of both intentional infliction of emotional distress ("IIED") and negligent infliction of emotional distress ("NIED").

***2** GEICO moves to dismiss the Complaint. (Docket Entry 10.) GEICO first argues that many of Plaintiff's allegations are time-barred under the statute of limitations applicable to each claim. (Def.'s Br., Docket Entry 12, at 5-8.) GEICO further argues that Plaintiff has failed to plausibly allege each claim. (Def.'s Br. at 8-24.) Plaintiff rejects both of these arguments, asserting that her claims are timely and adequately pleaded. (See Pl.'s Br., Docket Entry 18.)

## DISCUSSION

As an initial matter, Plaintiff impermissibly makes several new allegations in her brief, so the Court will not consider them.[3] See Friedl v. City of N.Y., 210 F.3d 79, 83-84 (2d Cir. 2000) (concluding that a district court errs when it "relies on factual allegations contained in legal briefs or memoranda"). Moreover, Plaintiff repeatedly requests the need for discovery, (Pl.'s Br. at 10, 16-17), even though she asserted that she and her attorneys "have thoroughly investigated the facts of this matter." (Pl.'s Br. at 1.) But the Court notes that "a plaintiff whose 'complaint is deficient under Rule 8 ... is not entitled to discovery.' " S. Cherry Street, LLC v. Hennessee Grp. LLC, 573 F.3d 98, 114 (2d Cir. 2009) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 686, 129 S. Ct. 1937, 1954, 173 L.Ed. 2d 868 (2009) (ellipsis in original) ).

3 (Compare Pl.'s Br. at 3 with Compl. ¶ 40; compare Pl.'s Br. at 3, 17 with Compl. ¶ 32.)

### I. Legal Standard

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570, 127 S. Ct. at 1974. A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949. Although the Court must accept all allegations in the Amended Complaint as true, this tenet is "inapplicable to legal conclusions." Id. Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (citation omitted). Ultimately, the Court's plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679, 129 S. Ct. at 1950.

In deciding a motion to dismiss, the Court is generally confined to "the allegations contained within the four corners of [the] complaint." Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 71 (2d Cir. 1998). However, the Court may consider "any written instrument attached to [the complaint] as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are integral to the complaint." Sira v. Morton, 380 F.3d 57, 67 (2d Cir. 2004) (internal quotation marks and citations omitted); see also Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002) (observing that a document is "integral" if the complaint "relies heavily upon its terms and effect") (internal quotation marks and citation omitted); accord Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001) (noting that the EEOC complaints are an "integral part of [the] pleadings"); Muhammad v. N.Y. City Trans. Auth., 450 F. Supp. 2d 198, 204-05 (E.D.N.Y. 2006) (An "EEOC charge and the [state] agency's determination are both public records, of which this Court may take judicial notice.") (citing Moll v. Telesector Res. Grp., Inc., No. 04-CV-0805, 2005 WL 2405999, at *4 (W.D.N.Y. Sept. 29, 2005) ).

***3** The Court, moreover, make take judicial notice of the location of any GEICO offices based on Google Maps. Tutor Time Learning Ctrs., LLC v. KOG Indus., Inc., No. 12-CV-4129, 2012 WL 5497943, at *5 n.4 (E.D.N.Y. Nov. 13, 2012) (allowing courts to take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned") (citing FED. R. EVID. 201(b) ); Maynard v. Harrah's Entm't, Inc., No. 09-CV-3128, 2010 WL 1930263, at *5 n.6 (E.D.N.Y. May 11, 2010). In light of the above, the Court will consider both the EEOC Charge and a map showing the location of the GEICO offices in Long Island, New York. (See Mahler Decl. Ex. D, Docket Entry 11-1, at 18.)[4]

4 For the purposes of this Memorandum and Order, the Court will use the page numbers generated by

the Electronic Case Filing System when referring to the parties' exhibits.

II. Timeliness of Claims

GEICO first argues that several claims are limited to specific time periods because Plaintiff failed to comply with the applicable statute of limitations. However, as the Complaint lacks specific details on the timing of the events at issue, the Court finds that it is premature to consider whether certain portions of the claims are time-barred.

III. Disparate Treatment

Discrimination claims are generally analyzed under the burden-shifting framework established by the Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668 (1973).[5] See Littlejohn v. City of N.Y., 795 F.3d 297, 312 (2d Cir. 2015) (citing Ruiz v. Cty. of Rockland, 609 F.3d 486, 491 (2d Cir. 2010) ). Under this framework, the plaintiff bears the initial burden of demonstrating a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824. The defendant then bears the burden of establishing a "legitimate, non-discriminatory reason" for its actions. Id. If the defendant makes such a showing, the burden shifts back to the plaintiff to establish that the defendant's explanation is merely pretextual. Id.

5 Discrimination claims brought under Title VII, NYSHRL, and Section 1981 are analytically similar, and thus, the Court will consider them simultaneously. See Bowen-Hooks v. City of N.Y., 13 F. Supp. 3d 179, 209-10 (E.D.N.Y. 2014).

At the pleadings stage, however, a plaintiff need not plead a prima facie case of discrimination. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510, 122 S. Ct. 992, 997, 152 L.Ed. 2d 1 (2002) (finding that the McDonnell Douglas framework only applied at the summary judgment phase because it is "an evidentiary standard, not a pleading requirement"); Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 84 (2d Cir. 2015). Rather, a complaint need only contain " 'a short and plain statement of the claim showing that the pleader is entitled to relief.' " Swierkiewicz, 534 U.S. at 512, 122 S. Ct. at 998 (quoting FED R. CIV. P. 8(a)(2) ); accord Rodriguez v. Verizon Telecom, No. 13-CV-6969, 2014 WL 6807834, at *3 (S.D.N.Y. Dec. 3, 2014) (noting that courts still consider the prima facie elements of a discrimination claim to determine whether the complaint sufficiently provides the defendant with fair notice) (citation omitted).

Here, Plaintiff has not adequately pleaded her discrimination claims. For a discrimination claim to survive a motion to dismiss, a plaintiff must plausibly allege that: "(1) the employer took adverse action against him and (2) his race, color, religion, sex, or national origin was a motivating factor in the employment decision." Vega, 801 F.3d at 86; see also Galabya v. N.Y. City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (noting that "[a] materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities," and so on (internal quotation marks and citation omitted) ).

***4** Simply put, Plaintiff has not plausibly alleged that she was paid less than similarly situated non-Asian or female employees. Instead, the Complaint contains only oblique references to pay disparities. (See, e.g., Compl. ¶ 28 ("[Plaintiff] knows of at least one White female attorney at her same level making more money than her.").) Without more, Plaintiff fails to "nudge[ ] [her] claims across the line from conceivable to plausible." Twombly, 550 U.S. at 570, 127 S. Ct. at 1974.

Plaintiff has also failed to plausibly allege that GEICO discriminated against herself by failing to promote her. Plaintiff claims that she "repeatedly expressed to her supervisors and colleagues her desire to be promoted to a more senior level attorney," and despite her "exemplary record and superior qualifications," Plaintiff did not receive the promotion. (Compl. ¶¶ 16-17.) But ignoring this desire, on its face, does not necessarily mean that GEICO took an adverse action against Plaintiff. Separately, the Court notes that these allegations conflict with the EEOC Charge, in which Plaintiff states that "[h]aving put [her] head down for a decade and having given everything to [GEICO] waiting for appropriate recognition, [Plaintiff] decided to apply for the [supervisory attorney] position on October 21, 2013." (EEOC Charge, Mahler Decl. Ex. A, Docket Entry 11-1, at 9, ¶ 10.) In other words, Plaintiff did not apply to be promoted to supervisory attorney until she spent ten years with GEICO.

On that basis, the Court will disregard the allegations in the Complaint that Plaintiff expressed a repeated desire to be promoted. See Poindexter v. EMI Record Grp., Inc., No. 11-CV-0559, 2012 WL 1027639, at *2 (S.D.N.Y. Mar. 27, 2012) ("If a document relied on in the complaint contradicts allegations in the complaint, the document, not the allegations, control, and the court need not accept the allegations in the complaint as true.").

Nor does Plaintiff elaborate on what her "superior qualifications" are or even discuss her "exemplary record" in further detail. Instead, Plaintiff argues that she "has been passed over by at least three White male attorneys who have equal or less experience to herself." (Comp. ¶ 28.) And the EEOC Charge states, flatly and with little support, that Plaintiff "had one of the strongest litigations records of those who applied [for the supervisory position]." (EEOC Charge at 10, ¶ 17.) These scant details do not satisfy the standard under Rule 8. [6]

6 Moreover, Plaintiff concedes that she needs to conduct discovery to unearth "internal promotional policies ... that might have prevented Plaintiff from actively seeking a promotion." (Pl.'s Br. at 10 (emphasis added).) Plaintiff further states that "discovery is necessary to investigate preferential treatment of White male attorneys ... and whether those individuals made more than an expression of a future goal when compared to the Plaintiff." (Pl.'s Br. at 10.)

Plaintiff has also failed to plausibly allege claims based on race and national origin. Absent from the Complaint are any allegations that GEICO employees made racial or national origin-related comments that suggested a discriminatory intent. For instance, the EEOC Charge indicates that forty individuals applied for the supervisory position that Plaintiff did not receive. (EEOC Charge at 9, ¶ 15.) Five candidates were selected—four were Caucasian and one African-American. [7] (Compl. ¶¶ 23, 26.) Plaintiff alleges that two of the five selected attorneys had less experience than her. (Compl. ¶ 24.) Even if seniority was a factor, at least three of the attorneys had more experience than Plaintiff. But more importantly, there are no facts alleged that Plaintiff was passed over because of her race or national origin. (EEOC at 9, ¶ 16); cf. De La Peña v. Metro. Life Ins. Co., 953 F. Supp. 2d 393, 413 (E.D.N.Y. 2013) ("The fact that the Plaintiff was the only Filipino in his office is not sufficient to connect the Defendants' actions and behavior to a discriminatory intent."), aff'd, 552 Fed.Appx. 98 (2d Cir. 2014). Plaintiff also fails to identify any specific qualifications for the job or the race and national origin for the entire applicant pool. According to Plaintiff, she "also discovered in a second round of interviews for the same position, every applicant was interviewed and all available positions were filled with Caucasian attorneys." (Compl. ¶ 27 (emphasis in original).) But Plaintiff does not clarify whether she applied for the second round of interviews or identify the gender of each applicant.

7 Plaintiff downplays this diversity by referring to the African-American attorney as a "token minority." (Compl. ¶ 26.)

***5** Although her burden is minimal at the pleadings stage, Plaintiff must still provide " 'a short and plain statement of the claim showing that the pleader is entitled to relief.' " Swierkiewicz, 534 U.S. at 512, 122 S. Ct. at 998 (quoting Fed R. Civ. P. 8(a)(2) ). She has failed to do so. Thus, Plaintiff's discrimination claims under Title VII, NYSHRL, and Section 1981 are DISMISSED WITHOUT PREJUDICE.

IV. Hostile Work Environment

Plaintiff has failed to plausibly allege a claim for a hostile work environment. "When determining whether a hostile work environment exists, the standards under Title VII and the NYHRL are identical." Dais v. Lane Bryant, Inc., 168 F. Supp. 2d 62, 75 (S.D.N.Y. 2001) (citation omitted). To plead a claim for hostile work environment, a plaintiff must produce evidence that the alleged conduct " '(1) is objectively severe or pervasive—that is, creates an environment that a reasonable person would find hostile or abusive; (2) creates an environment that the plaintiff subjectively perceives as hostile or abusive; and (3) creates such an environment because of the plaintiff's sex,' " or another protected characteristic. See Conklin v. Cty. of Suffolk, 859 F. Supp. 2d 415, 425 (E.D.N.Y. 2012) (quoting Patane v. Clark, 508 F.3d 106, 113 (2d Cir. 2007) ). In considering these elements, courts must evaluate the totality of the circumstances, including " 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " Kaytor v. Elec. Boat Corp., 609 F.3d 537, 547 (2d Cir. 2010) (alterations

omitted) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 369, 126 L.Ed. 2d 295 (1993) ); see also Moll v. Telesector Res. Grp., Inc., 760 F.3d 198, 203 (2d Cir. 2014) (including "facially [sex-]neutral incidents" in the totality of the circumstances analysis "so long as a reasonable fact-finder could conclude that they were, in fact, based on sex" (alteration in original; internal quotation marks and citation omitted) ). The conduct must be "sufficiently continuous and concerted," and a few isolated incidents will not suffice. See Alfano v. Costello, 294 F.3d 365, 374 (2d Cir. 2002) (internal quotation marks and citation omitted). But see Feingold v. New York, 366 F.3d 138, 150 (2d Cir. 2004) ("[A] single act can create a hostile work environment if it in fact 'work[s] a transformation of the plaintiff's workplace.' ") (quoting Alfano, 294 F.3d at 374 (second alteration in original) ).

As the Second Circuit recognized, "the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers" is not actionable. Redd v. N.Y. Div. of Parole, 678 F.3d 166, 177 (2d Cir. 2012) (quotation marks and citation omitted). Rather, a court is more likely to find a hostile work environment when there is evidence of sexual assaults, unwanted physical contact, obscene language, unwelcome sexual solicitations. See id.

Here, the Complaint does not show that Plaintiff suffered a hostile work environment. See Compl. ¶¶ 43-44, 51-55, 66, 74, 76, 89.) Essentially, Plaintiff asserts that GEICO supervisors placed her under surveillance, criticized her work, and brandished her as a "traitor." (See, e.g., Compl. ¶¶ 29-31, 35.) The Complaint goes on to allege that a GEICO manager "tried to charge her for sick time" when she was involved in a car accident. (Compl. ¶ 32; EEOC Charge at 10, ¶ 22.) Plaintiff's allegations are too general to show a hostile work environment. Indeed, nowhere in the Complaint does Plaintiff describe instances of racial slurs, lewd remarks, or sexual discussions. Thus, Plaintiff's hostile work environment claim is DISMISSED WITHOUT PREJUDICE.

V. Retaliation

***6** Plaintiff has also failed to plausibly allege that GEICO engaged in retaliatory conduct against her. For a retaliation claim to survive a motion to dismiss, a plaintiff must allege facts showing that: "(1) defendants discriminated—or took an adverse employment action—against him, (2) because he has opposed any unlawful employment practice." Vega, 801 F.3d at 90 (internal quotation marks and citation omitted). Moreover, a plaintiff's "complaints must be sufficiently specific to make it clear that the employee is complaining about conduct prohibited by Title VII. Generalized complaints about a supervisor's treatment are insufficient." Risco v. McHugh, 868 F. Supp. 2d 75, 110 (S.D.N.Y. 2012) (citing Rojas v. Roman Catholic Diocese of Rochester, 660 F.3d 98, 108 (2d Cir. 2011) ).

The Complaint, as it currently stands, contains no specific facts demonstrating any retaliation taken on behalf of GEICO or its employees. Instead, Plaintiff alleges that after she filed an internal complaint and an EEOC charge, "Plaintiff's manager started to monitor her whereabouts much more stringently" and "started to criticize her on paperwork and written work." (Compl. ¶¶ 30, 35.) But the Complaint does not indicate how these performance reviews created negative consequences for Plaintiff. See Stoddard v. Eastman Kodak Co., 309 Fed.Appx. 475, 480 (affirming the district court's dismissal of a retaliation claim where the plaintiff alleged, in part, that "she was subjected to closer scrutiny by her boss"). Further, Plaintiff acknowledges that GEICO treated Plaintiff like a "traitor" even before the internal complaint and EEOC Charge were filed. (Compl. ¶ 29.) All in all, these allegations, even drawn in Plaintiff's favor, do not meet the minimal burden required under Swierkiewicz. 534 U.S. at 512, 122 S. Ct. at 998 (citing Fed R. Civ. P. 8(a)(2) ). [8] Thus, Plaintiff's retaliation claims under Title VII and the NYSHRL are DISMISSED WITHOUT PREJUDICE.

8 Plaintiff, again, requires discovery to support her retaliation claim. (See, e.g., Pl.'s Br. at 16 ("Plaintiff deserves an opportunity to engage in discovery to check the metadata and time of creation of these negative evaluations and adverse actions....").)

VI. Equal Pay Act

The EPA prohibits employers from discriminating against employees on the basis of gender "by paying higher wages to employees of the opposite sex for 'equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.' " Belfi v. Prendergast, 191 F.3d 129, 135 (2d Cir. 1999) (quoting 29 U.S.C. § 206(d)(1) ). To establish a claim for discrimination under the EPA,

Plaintiff must prove that " 'i) the employer pays different wages to employees of the opposite sex; ii) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and iii) the jobs are performed under similar working conditions.' " Id. (quoting Tomka v. Seiler Corp., 66 F.3d 1295, 1310 (2d Cir. 1995) ). In making out a prima facie case, Plaintiff "must show that the two positions are substantially equal," not "merely comparable." Tomka, 66 F.3d at (2d Cir. 1995) (internal quotation marks and citations omitted). [9]

9 Similar to the burden-shifting analysis under Title VII, once Plaintiffs make out a prima facie case of discrimination under the Equal Pay Act, the burden then shifts to Defendants to demonstrate that the wage disparity is based on: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." Belfi, 191 F.3d at 136 (quoting 29 U.S.C. § 206(d)(1) ).

***7** Taking her Complaint in the most charitable light, Plaintiff has failed to plausibly allege disparities in pay based on sex. Plaintiff broadly states that "GEICO has engaged in a widespread, deep-rooted racially discriminatory employment practice of paying [her] and other minority female employees less than it pays Caucasian and male employees" although Plaintiff, for instance, has "comparable responsibilities and more seniority, work experience and/or do the same or better quality work." (Compl. ¶ 38.) First, "the EPA, true to its name, only prohibits the payment of unequal wages to employees on the basis of sex," not on the basis of race. See Emmons v. City Univ. of N.Y., 715 F. Supp. 2d 394, 413 (E.D.N.Y. 2010) (internal quotation marks and citations omitted). Even still, Plaintiff is required to do more than offer conclusory allegations. The Complaint does not provide sufficient facts to establish a reasonable inference that her work responsibilities were substantially similar to her male colleagues. Plaintiff, rather, makes conclusory allegations that male attorneys receive "preferred and/or special assignments" without discussing the qualifications of either male or female attorneys. (Compl. ¶ 11); see also Aguilar v. N.Y. Convention Ctr. Operating Corp., 174 F. Supp. 2d 49, 55 (S.D.N.Y. 2001) ("The fact that male employees are offered more work than female employees may well constitute a violation of any number of federal and state employment discrimination statutes, but it simply cannot form the basis of an Equal Pay Act claim."). Further, Plaintiff acknowledges that three individuals decided which applicants would receive the supervisory attorney position and two of those decision makers were women. (EEOC Charge at 9, ¶ 15); see also Fosen v. The New York Times, No. 03-CV-3785, 2006 WL 2927611, at *5 (S.D.N.Y. Oct. 11, 2006) ("Any inference of discrimination was also critically undermined by the fact that the supervisors responsible for Plaintiff's termination and transfer were both women....") Thus, Plaintiff's EPA claim is DISMISSED WITHOUT PREJUDICE.

VII. Lily Ledbetter Fair Pay Act

Plaintiff's argument under the FPA is easily dispatched. As the Second Circuit made clear, "[t]he Lily Ledbetter Fair Pay Act does not provide a separate theory of recovery, but instead establishes background rules for timing and damages in equal pay claims brought under other statutes." Talwar v. Staten Island Univ. Hosp., 610 Fed.Appx. 28, 30 n.2 (2d Cir. 2015). Thus, Plaintiff's FPA claim is DISMISSED WITH PREJUDICE.

VIII. New York City Human Rights Law

Based on the current iteration of the Complaint, the Court finds that Plaintiff cannot assert claims under the NYCHRL. Plaintiff both lives and works in Long Island, New York. (Compl. ¶¶ 1, 3.) Nevertheless, Plaintiff contends that if she received the supervisory attorney position, she would have handled cases in "New York City Civil Courts and District Courts." (Wang Decl., Docket Entry 18-1, ¶ 8.) "To state a claim under the NYCHRL, the Plaintiff must allege that the Defendant discriminated against her within the boundaries of New York City." Robles v. Cox and Cox, Inc., 841 F. Supp. 2d 615, 623 (E.D.N.Y. 2012) (internal quotation marks and citations omitted). Although the alleged conduct here occurred on Long Island, (Compl. ¶¶ 1, 3), " 'courts look to the location of the impact of the offensive conduct.' " Robles, 841 F. Supp. 2d at 623 (quoting Curto v. Med. World Commc'ns, Inc., 388 F. Supp. 2d 101, 109 (E.D.N.Y. 2005) ).

First, the Complaint fails to indicate how the impact of GEICO's alleged conduct was felt in New York City. Allegedly, GEICO supervisors harassed Plaintiff and retaliated against her on Long Island. (Compl. ¶¶ 29-32, 35); see also Hoffman v. Parade Publ'ns, 15 N.Y.3d 285, 291, 933 N.E.2d 744, 747, 907 N.Y.S.2d 145 (2010) (confining the NYCHRL "to those who are meant to be protected—

those who work in the city"); Fried v. LVI Servs., Inc., 500 Fed.Appx. 39, 42 (2d Cir. 2012) (affirming the district court's grant of summary judgment on an NYCHRL claim when the plaintiff lived and worked in Connecticut even though he "frequently communicated with [defendant's] New York headquarters and attended meetings in New York City"). Second, even if the impact of GEICO's conduct did reach New York City, Plaintiff has failed to plausibly allege that GEICO discriminated and retaliated against her, as discussed above. Thus, Plaintiff's NYCHRL claims are DISMISSED WITHOUT PREJUDICE.

IX. Intentional Infliction of Emotional Distress ("IIED")

Plaintiff has also failed to plausibly allege an IIED claim. To prevail on an IIED claim, Plaintiff must show that: "(1) that the actor intended to inflict emotional distress, or knew or should have known that emotional distress was the likely result of its conduct, (2) that the conduct was extreme and outrageous, (3) that the defendant's conduct was the cause of the plaintiff's distress, and (4) that the emotional distress sustained by the plaintiff was severe." Duse v. Int'l Bus. Machines Corp., 252 F.3d 151, 156 (2d Cir. 2001). In making that showing, Plaintiff must overcome a significant hurdle: The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." See Sheila C. v. Povich, 11 A.D.3d 120, 130-31, 781 N.Y.S.2d 342, 351 (1st Dep't 2004) (internal quotation marks and citations omitted); Bender v. City of N.Y., 78 F.3d 787, 790 (2d Cir. 1996) ("New York sets a high threshold for conduct that is 'extreme and outrageous' enough to constitute intentional infliction of emotional distress.") (citations omitted). "Such extreme and outrageous conduct must be clearly alleged ...," Sheila C., 11 A.D.3d at 131 (emphasis added), and nowhere in the Complaint does Plaintiff assert allegations of that magnitude. Thus, Plaintiff's IIED claim is DISMISSED WITHOUT PREJUDICE.

X. Negligent Infliction of Emotional Distress ("NIED")

***8** Plaintiff's NIED claim is preempted by the exclusivity provision of the Workers' Compensation Law. N.Y. Workers' Comp. Law § 11 (McKinney 2009). Plaintiff, relying on Zaltz v. Wells Fargo Home Mortgage, contests this conclusion, arguing that an exception applies to this exclusivity rule because "plaintiff's NIED claims [are] intertwined with her IIED claim." (Pl.'s Br. at 23.) But nothing in Zaltz stands for that proposition. No. 08-CV-11225, 2010 WL 3026536, at *4 (S.D.N.Y. Aug. 2, 2010). Rather, the United States District Court for the Southern District of New York observed that intentional torts, such as an IIED claim, fall outside of the Workers' Compensation Law. Id. ("Since it seems that the asserted claims are intentional torts, they fall within an exception to the general exclusivity of the Workers' Compensation Law.") Thus, Plaintiff's NIED claim is DISMISSED WITH PREJUDICE.

XI. Leave to Replead

The Court's usual practice is to allow a plaintiff leave to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2); Hayden v. Cnty. of Nassau, 180 F.3d 42, 53 (2d Cir. 1999) (citing Ronzani v. Sanofi S.A., 889 F.2d 195, 198 (2d Cir. 1990) ); see also Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."). Plaintiff is permitted to replead to cure the deficiencies in her Complaint and incorporate the newly made allegations from her opposition papers.

CONCLUSION

Defendant's motion to dismiss the Complaint (Docket Entry 10) is GRANTED. Plaintiff's claims under the Lily Ledbetter Fair Pay Act and for negligent infliction of emotional distress are DISMISSED WITH PREJUDICE. Plaintiff's remaining claims against Defendant are DISMISSED WITHOUT PREJUDICE and with leave to replead in a manner consistent with this Court's opinion. If Plaintiff wishes to file an Amended Complaint, she must do so within thirty (30) days of the date of this Memorandum and Order. If Plaintiff fails to do so, her claims will be dismissed with prejudice, and the case will be closed.

SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2016 WL 11469653

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2023 WL 3102723

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.

Kevin GRADY, Appellant,
v.
CHENANGO VALLEY CENTRAL SCHOOL DISTRICT et al., Respondents.
Joanne Secky, &c., Appellant,
v.
New Paltz Central School District et al., Respondents.

No. 23, No. 24
|
Decided April 27, 2023

**Synopsis**

**Background:** In one case, the mother of a high school student, individually and on behalf of the student, brought action against the student's basketball coach and school district to recover for a shoulder injury the student sustained during a drill that was part of basketball practice. The Supreme Court, Ulster County, Christopher Cahill, J., denied summary judgment to the school district and the coach, and they appealed. The Supreme Court, Appellate Division, 195 A.D.3d 1347, 151 N.Y.S.3d 202, reversed. Leave to appeal was granted. In a second case, a high school student who was on the school's varsity baseball team sued his baseball coaches and school district to recover for a serious injury to his eye which he incurred when he was struck in the face by a baseball during a fast-moving, intricate drill. The Supreme Court, Broome County, Ferris D. Lebous, J., granted summary judgment to the coaches and school district, and the student appealed. The Supreme Court, Appellate Division, 190 A.D.3d 1218, 141 N.Y.S.3d 513, affirmed. Appeal was taken.

**Holdings:** The Court of Appeals, Garcia, J., held that:

[1] primary assumption of risk doctrine applied to preclude action to recover for injury sustained during basketball practice, but

[2] triable questions of fact existed so as to preclude summary judgment on student's suit to recover for eye injury sustained during baseball practice.

Affirmed in part and reversed in part.

Rivera, J., filed opinion concurring in part and dissenting in part.

Singas, J., filed opinion concurring in part and dissenting in part.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

West Headnotes (11)

[1] **Negligence** Sports, games and recreation
**Public Amusement and Entertainment** Assumption of Risk

The primary assumption of risk doctrine is based on the premise that one who takes part in a sport accepts the dangers that inhere in it so far as they are obvious and necessary.

[2] **Death** Defenses
**Negligence** Effect of comparative negligence

Application of the assumption of risk doctrine must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation that the Legislature has deemed applicable to any action to recover damages for personal injury, injury to property, or wrongful death. N.Y. CPLR § 1411.

[3] **Negligence** Assumption of Risk
**Negligence** Relation to contributory negligence

Assumption of risk is not a defense to the abandoned contributory negligence equation, but rather, the doctrine defines the standard of care

  

under which a defendant's duty is defined and circumscribed, because assumption of risk in this form is really a principle of no duty, or no negligence and so denies the existence of any underlying cause of action.

[4] **Negligence** Primary assumption of risk

Primary assumption of the risk applies when a consenting participant in a qualified activity is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks.

[5] **Negligence** Knowledge of danger

It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results.

[6] **Negligence** Sports, games and recreation

**Public Amusement and Entertainment** Assumption of Risk

Under the assumption of risk doctrine a participant in an athletic or recreative activity is not deemed to have assumed risks that are concealed or unreasonably enhanced.

[7] **Courts** Previous Decisions as Controlling or as Precedents

Even under the most flexible version of the doctrine of stare decisis, prior decisions should not be overruled unless a compelling justification exists for such a drastic step.

[8] **Courts** Previous Decisions as Controlling or as Precedents

The stare decisis doctrine does not permit overturning precedent merely because "it's time."

[9] **Education** Basketball

The primary assumption of risk doctrine applied to preclude action brought by mother of a high school student to recover for a shoulder injury the student sustained during basketball practice when, as part of a drill in which players competed to retrieve a rebound, another player collided with student, causing him to fall into the retracted bleachers that were stationed near the court; student's injury was one inherent in the sport of basketball and so he assumed the risk of the injury he sustained, and the drill did not unreasonably increase the risk of injury beyond that inherent in the sport of basketball.

[10] **Summary Judgment** Torts

Although the assumption of risk to be implied from participation in a sport with awareness of the risk is generally a question of fact for a jury, dismissal of a complaint as a matter of law on a motion for summary judgment is warranted when on the evidentiary materials before the court no fact issue remains for decision by the trier of fact.

[11] **Education** Trial

**Summary Judgment** Torts

Triable questions of fact regarding whether drill conducted during high school varsity team practice, in which baseballs from two parts of infield were thrown to two players in same area by first base, who were separated by relatively small seven-by-seven-foot screen, was unique and created dangerous condition over and above the usual dangers inherent in baseball, and whether student's awareness of risks inherent in both the game of baseball and practices encompassed the risks in the drill, precluded summary judgment, based on primary assumption of risk doctrine, in student's suit against his coaches and school district to recover for serious injury to his eye caused when an errant ball, intended for another player, bypassed that player and the protective screen and hit him in his face.

  

**Attorneys and Law Firms**

Case No. 23:

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Giancarlo Facciponte, for respondents.

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Case No. 24:

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**OPINION**

GARCIA, J.:

***1** Since the enactment of the comparative fault regime of CPLR article 14 in 1975, this Court has retained a form of the primary assumption of risk doctrine, applicable only in a narrow set of circumstances, in recognition of the fact that "athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks" (*Trupia v. Lake George Cent. School Dist.*, 14 N.Y.3d 392, 395, 901 N.Y.S.2d 127, 927 N.E.2d 547 [2010]). Both plaintiffs here seek to recover for injuries sustained during organized sports practices for high school athletic teams, and appeal from orders granting defendants' motions for summary judgment. Application of this well-established assumption of risk doctrine to these two cases produces different outcomes: in *Secky*, we affirm the order of the Appellate Division granting summary judgment, and in *Grady*, we reverse because material questions of fact remain.

I.

**[1]** The primary assumption of risk doctrine, [1] as articulated by Judge Cardozo, is based on the premise that " '[o]ne who takes part in ... a sport accepts the dangers that inhere in it so far as they are obvious and necessary' " (*Morgan v. State of N.Y.*, 90 N.Y.2d 471, 482-483, 662 N.Y.S.2d 421, 685 N.E.2d 202 [1997], quoting *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 482-483, 166 N.E. 173 [1929]). Enactment of a comparative negligence standard in 1975, however, required this Court to reexamine the "fit," or "continued viability," of this long-standing common law assumption of risk doctrine (*see Morgan*, 90 N.Y.2d at 483, 662 N.Y.S.2d 421, 685 N.E.2d 202). The relevant statute provides that "[i]n any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages" (CPLR 1411). Though we have acknowledged that the assumption of risk doctrine may not "sit comfortably" within the landscape of comparative fault, it remains in full force in the limited context of athletic and recreative activities (*Trupia*, 14 N.Y.3d at 395, 901 N.Y.S.2d 127, 927 N.E.2d 547).

1 "[A]s the term [assumption of risk] applies to sporting events it involves what commentators call 'primary' assumption of risk" (*Turcotte v. Fell*, 68 N.Y.2d 432, 438, 510 N.Y.S.2d 49, 502 N.E.2d 964 [1986]).

**[2]** **[3]** Our justification for retaining the doctrine in these circumstances is clear: because "athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks," we have "employed the notion that these risks may be voluntarily assumed to preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise" (*id.* at 395, 901 N.Y.S.2d 127, 927 N.E.2d 547; *see Custodi v. Town of Amherst*, 20 N.Y.3d 83, 87, 957 N.Y.S.2d 268, 980 N.E.2d 933 [2012] [continued application of the assumption of risk doctrine "fosters these socially beneficial activities by shielding coparticipants, activity sponsors or venue owners from 'potentially crushing liability' "], quoting *Bukowski v. Clarkson Univ.*, 19 N.Y.3d 353, 358, 948 N.Y.S.2d 568, 971 N.E.2d 849 [2012]). At the same time, we are mindful that "application [of the assumption of risk doctrine] must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation that the Legislature has deemed applicable to '*any* action to recover

  

damages for personal injury, injury to property, or wrongful death' " (*Trupia*, 14 N.Y.3d at 395-396, 901 N.Y.S.2d 127, 927 N.E.2d 547, quoting CPLR 1411 [emphasis in original]). Accordingly, assumption of risk in this context "is no longer treated as a defense to the abandoned contributory negligence equation" (*Morgan*, 90 N.Y.2d at 485, 662 N.Y.S.2d 421, 685 N.E.2d 202). Rather, the doctrine defines "the standard of care under which a defendant's duty is defined and circumscribed 'because assumption of risk in this form is really a *principle of no duty,* or no negligence and so *denies the existence of any underlying cause of action*' " (*id.*, quoting Prosser and Keeton, Torts § 68 at 496-497 [5th ed 1984]; *see Trupia*, 14 N.Y.3d at 395, 901 N.Y.S.2d 127, 927 N.E.2d 547 [doctrine "limit(s) duty through consent —indeed it has been described as a 'principle of no duty' rather than an absolute defense based upon a plaintiff's culpable conduct"]).

***2** **[4]** **[5]** **[6]** In these limited circumstances, "primary assumption of the risk applies when a consenting participant in a qualified activity 'is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks' " (*Custodi*, 20 N.Y.3d at 88, 957 N.Y.S.2d 268, 980 N.E.2d 933, quoting *Bukowski*, 19 N.Y.3d at 356, 948 N.Y.S.2d 568, 971 N.E.2d 849; *see Turcotte v. Fell*, 68 N.Y.2d 432, 439, 510 N.Y.S.2d 49, 502 N.E.2d 964 [1986] [where "the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty"]). Moreover, "[i]t is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results" (*Maddox v. City of New York*, 66 N.Y.2d 270, 278, 496 N.Y.S.2d 726, 487 N.E.2d 553 [1985]). A participant is not, however, deemed to have assumed "risks that are concealed or unreasonably enhanced" (*Custodi*, 20 N.Y.3d at 88, 957 N.Y.S.2d 268, 980 N.E.2d 933; *see Bukowski*, 19 N.Y.3d at 356, 948 N.Y.S.2d 568, 971 N.E.2d 849). The two cases we consider here provide an opportunity to apply these principles in the context of two quite different organized practice drills for high school athletic teams.

**[7]** **[8]** We reject the dissent's entreaty to abandon decades of applicable precedent that has been so frequently, and so recently, reaffirmed (*see Turcotte*, 68 N.Y.2d 432, 510 N.Y.S.2d 49, 502 N.E.2d 964 [reaffirming approach in 1986]; *Benitez*, 73 N.Y.2d 650, 657, 543 N.Y.S.2d 29, 541 N.E.2d 29 [1989] [same in 1989]; *Morgan*, 90 N.Y.2d 471, 662 N.Y.S.2d 421, 685 N.E.2d 202 [same in 1997]; *Trevett v. City of Little Falls*, 6 N.Y.3d 884, 885, 816 N.Y.S.2d 738, 849 N.E.2d 961 [2006] [same in 2006]; *Trupia*, 14 N.Y.3d 392, 901 N.Y.S.2d 127, 927 N.E.2d 547 [same in 2010]; *Bukowski*, 19 N.Y.3d 353, 948 N.Y.S.2d 568, 971 N.E.2d 849 [same in 2012]). "Even under the most flexible version of the doctrine [of stare decisis], prior decisions should not be overruled unless a 'compelling justification' exists for such a drastic step" (*State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 25 N.Y.3d 799, 819, 16 N.Y.S.3d 796, 38 N.E.3d 325 [2015]); *see also Palladino v. CNY Centro, Inc.*, 23 N.Y.3d 140, 151, 989 N.Y.S.2d 438, 12 N.E.3d 436 [2014] [considering "the Legislature's competency to correct [judicial] misinterpretation" as a factor in favor of adhering to precedent]). Our stare decisis doctrine does not permit overturning precedent merely because "it's time" (dissenting op at ——). [2] Nothing more than the dissent's unsupported assertion that "the policy concerns that animated the Court's jurisprudence have proven unfounded" and references to "experience [that] teaches us that a policy driving our case law is unjustified"—without explanation of what that experience is—are provided to meet this significant burden (dissenting op at ——, —— n. 12). [3] Instead of providing a "compelling justification," the dissent summarily characterizes nearly 50 years of precedent as a misinterpretation of CPLR 1411 (dissenting op at ——)—albeit one that the legislature has never sought to "correct."

2 The dissenting opinion's reliance on the experience of other jurisdictions is less than compelling, since only two of eight cited cases involve circumstances in which this Court would apply the assumption of risk doctrine to bar recovery. Moreover, the dissenting opinion provides no support for its claim that the experience of other jurisdictions allowing for liability under these circumstances has shown that "the fear of 'potentially crushing liability' on school athletics has no basis in reality" (dissenting op at ——). The record before us is bereft of evidence that states opting to allow for liability in similar circumstances have not seen any cuts to

  

scholastic sports budgets or even a chilling effect on employment in athletics in decades (dissenting op at —— n. 11), nor do we know what sorts of other limitations on liability and damages those states may impose.

3 By comparison, the cases cited in the dissenting opinion as instances where the Court has "correct[ed] our mistaken interpretations of statutes" provide useful examples of the detailed analysis and compelling justification that must drive a decision to abandon decades of precedent (dissenting op at —— n. 12).

II.

**[9]** In *Secky v. New Paltz Central School District*, the primary assumption of risk doctrine applies, and we affirm the Appellate Division order granting defendants' motion for summary judgment. Plaintiff, who had played basketball at the highest amateur student level, was injured during a drill in which the players competed to retrieve a rebound. Plaintiff's coach had explained that the boundary lines of the court would not apply during the drill and that only major fouls would be called. At the time of the drill, bleachers stationed near the court were retracted. Plaintiff was injured when, pursuing a loose ball from the top of the key towards the bleachers, another player collided with him, causing plaintiff to fall into the bleachers and sustain an injury to his right shoulder. Plaintiff, through his mother, sued the coach and the school district, and defendants moved for summary judgment.

***3** Supreme Court denied defendant's motion because of conflicting expert testimony, and the Appellate Division reversed (195 A.D.3d 1347, 151 N.Y.S.3d 202 [3d Dept. 2021]). The Appellate Division majority held that elimination of the boundary lines during the drill "did not unreasonably increase the inherent risks of the drill or playing basketball," and so plaintiff did not satisfy his burden on summary judgment (*id.* at 1349, 151 N.Y.S.3d 202). One Justice dissented, asserting that "whether the elimination of boundaries and the relaxation of foul calls unreasonably enhanced the risk of the drill in this situation is ... a question of fact to be determined by a jury" (*id.* at 1350, 151 N.Y.S.3d 202).

**[10]** We now affirm because plaintiff's injury is one inherent in the sport of basketball and so he assumed the risk of the injury he sustained. We have, in fact, previously held that "the risk of collision [with an open and obvious item near a basketball court] was inherent in playing on that court" and so plaintiff had assumed the risk of that injury (*Trevett*, 6 N.Y.3d at 885, 816 N.Y.S.2d 738, 849 N.E.2d 961). "[A]lthough the assumption of risk to be implied from participation in a sport with awareness of the risk is generally a question of fact for a jury, dismissal of a complaint as a matter of law is warranted when on the evidentiary materials before the court no fact issue remains for decision by the trier of fact" (*Maddox*, 66 N.Y.2d at 279, 496 N.Y.S.2d 726, 487 N.E.2d 553). Here, no such fact issue remains. The drill assigned to plaintiff and his teammates did not unreasonably increase the risk of injury beyond that inherent in the sport of basketball, and the Appellate Division properly granted defendants' motion for summary judgment.

III.

**[11]** In *Grady v. Chenango Valley Central School District*, by contrast, material issues of fact remain to be resolved by a jury. Plaintiff, a senior on the Chenango Valley High School varsity baseball team, was injured during his participation in a fast-moving, intricate drill. The drill involved two coaches hitting balls to players stationed in the infield, with one coach hitting to the third baseman, who would then throw to first base, while another coach hit to the shortstop, who would throw to the second baseman who would, in turn, throw to a player at "short first base," positioned a few feet from regulation first base. Because the drill required baseballs from two parts of the infield to be thrown to two players in the same area by first base, the coaches had positioned a protective screen, measuring seven by seven, between the regulation first baseman and the short first baseman. Plaintiff, in the group of players assigned to first base, was injured when an errant ball, intended for the short first baseman, bypassed the short first baseman and the protective screen and hit him on the right side of his face, causing serious injury to his eye including significant vision loss. Plaintiffs sued his coaches and the school district, and defendants moved for summary judgment.

Supreme Court granted defendants' motion for summary judgment, finding that plaintiff was aware of the drill's risks and his "awareness here was specifically related to this activity, the multiple ball drill which he had played on previous occasions and his specific awareness of errant throws immediately prior to this accident." Accordingly, the

court concluded that "plaintiff has failed to prove that he was faced with a risk that was unassumed, concealed or unreasonably increased and has failed to raise a triable issue of fact."

The Appellate Division affirmed, holding that "the evidence showed that plaintiff was an experienced baseball player who knew of the risks, appreciated their nature and voluntarily assumed them, defendants demonstrated their prima facie entitlement to summary judgment under the primary assumption of risk doctrine," and "plaintiff failed to raise a triable question of fact" in response (190 A.D.3d 1218, 1220-1221, 141 N.Y.S.3d 513 [3d Dept. 2021]). The majority concluded that "[h]aving more than one ball in play may not be an inherent risk in a traditional baseball game, but the record indicates that it is a risk inherent in baseball team practices" and that the small screen did not make the drill unreasonably dangerous because of plaintiff's "testimony unequivocally establishing that he did not rely upon the screen for safety but, rather, thought that the drill was unsafe even in the presence of the screen" (*id.* at 1220, 141 N.Y.S.3d 513). One Justice dissented on the basis that a question of fact existed regarding the adequacy of the protective screen, while another Justice dissented because "a jury should be permitted to make the determination as to whether the drill was sufficiently related to the sport of baseball and whether it posed an unreasonable risk of harm" (*id.* at 1221-1228, 141 N.Y.S.3d 513). We now reverse.

***4** Defendants have not shown that, as a matter of law, plaintiff's injury was sustained as a result of the inherent risk of baseball, or even due to "suboptimal playing conditions" (*Bukowski*, 19 N.Y.3d at 357, 948 N.Y.S.2d 568, 971 N.E.2d 849). Instead, plaintiff has raised triable questions of fact regarding whether the drill, as conducted here and with the use of the seven-by-seven-foot screen, "was unique and created a dangerous condition over and above the usual dangers that are inherent" in baseball (*Owen v R.J.S. Safety Equip., Inc.*, 79 N.Y.2d 967, 970, 582 N.Y.S.2d 998, 591 N.E.2d 1184 [1992]), and whether plaintiff's awareness of the risks inherent in both the game of baseball and the practices that are a necessary part of participation in organized sports encompassed the risks arising from involvement in the drill performed here. Under these unique circumstances, because of the way this drill, with multiple balls in play directed to the same part of the field and with only a relatively small protective screen positioned in front of the first baseman, was conducted, we cannot say that, as a matter of law, the conditions of play were "as safe as they appear[ed] to be" (*Turcotte*, 68 N.Y.2d at 439, 510 N.Y.S.2d 49, 502 N.E.2d 964). While "[t]he line to be drawn and applied in this case is close, ... plaintiffs have the better of it" (*Morgan*, 90 N.Y.2d at 488, 662 N.Y.S.2d 421, 685 N.E.2d 202). Errant balls may be an inherent risk of playing baseball, but a jury should be permitted to determine whether plaintiff's injury was the result of such an inherent risk, or whether "the risks [were] concealed or unreasonably enhanced" by the complexity of the drill performed with use of a small protective screen (*Custodi*, 20 N.Y.3d at 88, 957 N.Y.S.2d 268, 980 N.E.2d 933; *see* *Bukowski*, 19 N.Y.3d at 356, 948 N.Y.S.2d 568, 971 N.E.2d 849).

* * *

Accordingly, in *Secky*, the order of the Appellate Division should be affirmed, with costs. In *Grady*, the order of the Appellate Division should be reversed, with costs, and defendants' motion for summary judgment denied.

RIVERA, J. (concurring in Grady and dissenting in Secky):
It's time we correct the errors of the past and abandon the implied assumption of risk doctrine that the Court has retained despite the Legislature's unequivocal abolition of contributory negligence and assumption of risk as complete defenses. New York is a comparative fault jurisdiction. Under that tort rule, the question of a defendant's liability should be submitted to the trier of fact with an appropriate charge on comparative culpability so that any damage award may be assigned based on each party's fault, in accordance with CPLR Article 14-A. Therefore, the Appellate Division orders in the respective appeals before us should be reversed and the cases decided at trial because the defendants' liability cannot be resolved on summary judgment. Although the majority reaches the correct outcome in *Grady*, it does so by applying several of the Court's prior holdings that misinterpreted CPLR 1411's plain text and thereby diminished the statute's intended purpose. Under CPLR 1411, assumption of risk is a basis to reduce the plaintiff's damage award, not to bar relief from injuries caused by a defendant's tortious conduct.

  

I.

In 1975, the Legislature adopted a comparative fault regime, expressly abolishing "contributory negligence and assumption of risk as absolute defenses" (*Trupia v. Lake George Cent. School Dist.*, 14 N.Y.3d 392, 394, 901 N.Y.S.2d 127, 927 N.E.2d 547 [2010]). Specifically, CPLR 1411 provides that

> "[i]n any action to recover damages for personal injury, injury to property, or wrongful death, *the culpable conduct attributable to the claimant* or to the decedent, *including contributory negligence or assumption of risk, shall not bar recovery*, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages" ([emphasis added]).

In accordance with our established rules of interpretation, we are bound to "ascertain and give effect to the intention of the Legislature" (McKinney's Cons Laws of NY, Book 1, Statutes § 92 [a], at 177), and the best evidence of that intent is the text as written, giving it its plain meaning (*People v. Cahill*, 2 N.Y.3d 14, 117, 777 N.Y.S.2d 332, 809 N.E.2d 561 [2003] [citing *Riley v. County of Broome*, 95 N.Y.2d 455, 463, 719 N.Y.S.2d 623, 742 N.E.2d 98 (2000)]; *see also People v. Galindo*, 38 N.Y.3d 199, 203, 171 N.Y.S.3d 865, 191 N.E.3d 1136 [2022]). On its face, the text sounds the death knell of contributory negligence and assumption of risk's per se rule disallowing recovery by a plaintiff who shared some percentage of negligence in causing the underlying harm (*see Arbegast v. Board of Educ. of S. New Berlin Cent. School*, 65 N.Y.2d 161, 165, 490 N.Y.S.2d 751, 480 N.E.2d 365 [1985]; *Fitzpatrick v. International Ry. Co.*, 252 N.Y. 127, 134, 169 N.E. 112 [1929] ["(T)he slightest contributory negligence upon the part of the plaintiff, no matter how or by whom it may be proven, bars recovery, establishes that there is and was no cause of action, no right to damages"]).

***5** Indeed, legislative history reveals a shared intent among all three branches of the government to abolish assumption of risk as an absolute bar to recovery—whether conceived as a measure of the defendant's duty or as a defense to a breach of that duty. In the mid-1970s, members of the judiciary familiar with the assumption of risk doctrine first proposed in a Judicial Conference Report the enactment of CPLR 1411 as part of a broader legislative package and commented on the tendency of the doctrine's emerging 'no-duty' rationale to devolve into a de facto bar to recovery. The report observed that "[o]n occasion, a New York court has taken the position that assumption of risk is not a mere defense to an action for negligence, but actually negates any duty owed by the defendant to the plaintiff," and cautioned that endorsement of "[s]uch an analysis would bar plaintiff's recovery as a matter of law, thereby undermining the purpose of this article—to permit partial recovery in cases in which the conduct of each party is culpable" (13th Ann Rep of Jud Conf on CPLR, reprinted in 1975 McKinney's Session Laws of NY at 1477, 1485). Thus, the Conference "expected that the courts will treat assumption of risk as a form of culpable conduct under this article" when applying the comparative negligence regime it proposed (*id.*).[1] As the report further noted, the Legislature employed the term "culpable conduct" rather than "negligent conduct," thus indicating its intent to have juries consider the conduct even of defendants who had acted reasonably (*id.*).

[1] At the time, commentators had a similar expectation (*see* 1B Warren's NY Negligence § 2.03, at 1028 [rev 2d ed 1980]).

The legislative branch agreed and abolished assumption of risk as a bar to recovery. The Assembly Sponsor of the legislation that included CPLR 1411 explained:

> "[T]he bill would equate the defenses of contributory negligence and assumption of risk under the rubric of 'culpable conduct.' This is consistent with the position taken by the New York courts (*McFarlan v. City of Niagara Falls*, 247 N.Y. 340, 349 [160 N.E. 391] [1928]). Unless assumption of risk is so treated, it would negate any duty owed by defendant to plaintiff (*see McEvoy v. City of New York*, 266 App Div 445, 447 [42 N.Y.S.2d 746] [2d Dept. 1943], *affd* 292 N.Y. 654 [55 N.E.2d 517] [1944]), thus undermining the purpose of the proposed bill, which is to permit partial recovery in cases in which the conduct of each party is culpable" (Sponsor's Mem, Bill Jacket, L 1975, ch 69 at 7; *accord* Mem of Jud Conf on CPLR, Bill Jacket, L 1975, ch 69 at 18; *see also* 13th Ann Rep of Jud Conf on CPLR, reprinted in 1975 McKinney's Session Laws of NY at 1477, 1484 [noting that this interpretation of the provision 'is consistent with the result reached in

the vast majority of states that have adopted some form of comparative negligence' "]).

Finally, in a memorandum to the Governor regarding the legislation, the Attorney General expressed in plainest terms that "[t]he bill abrogates the common law rules of contributory negligence and assumption of risk and establishes a rule of so-called 'pure' comparative negligence" (Mem of Attorney General, Bill Jacket, L 1975, ch 69 at 20).

II.

A.

Shortly after the Legislature passed CPLR 1411, the Court, despite the statute's plain text and legislative history, breathed life into the old contributory negligence tort regime by resurrecting a vestigial form of implied assumption of risk labeled "primary" assumption of risk, resulting in a retention of the common-law distinction between implied and express assumption of risk. Under that framework, a plaintiff who is aware of and assumes the risks of an activity through their voluntary participation implicitly relieves a defendant of any duty of care to the plaintiff, while a plaintiff who expressly assumes a known risk—by, for example, contractually waiving liability—renders the defendant not liable for a breach of the duty of care (*see* *Arbegast*, 65 N.Y.2d at 165-166, 490 N.Y.S.2d 751, 480 N.E.2d 365). Put another way, a defendant owes no duty to a plaintiff who, through their participation, has implicitly assumed the risk of the activity whereas a defendant is absolved of liability for a breach of their duty of care when a plaintiff expressly assumes the risks. [2]

2 A defendant moving for summary judgment on this basis need not first "establish[ ] their own exercise of reasonable care" (*Maddox v. City of New York*, 66 N.Y.2d 270, 276, 496 N.Y.S.2d 726, 487 N.E.2d 553 [1985]).

For policy reasons, the Court has limited the doctrine to participants in professional and recreational sports (*see* *Trupia*, 14 N.Y.3d at 395, 901 N.Y.S.2d 127, 927 N.E.2d 547). "[T]he assumption of risk to be implied from participation in a sport with awareness of the risk is generally a question of fact for the jury" and "dismissal of a complaint as a matter of law is warranted when on the evidentiary materials before the court no fact issue remains for decision by the trier of fact" (*Maddox*, 66 N.Y.2d at 279, 496 N.Y.S.2d 726, 487 N.E.2d 553). And while the Court has acknowledged the "no-duty" conceptualization of "primary" assumption of risk, the Court has nonetheless imposed on defendants a modified, albeit narrow, duty of care. Specifically, a defendant has "a duty to exercise care to make the conditions as safe as they appear to be" (*Custodi v. Town of Amherst*, 20 N.Y.3d 83, 88, 957 N.Y.S.2d 268, 980 N.E.2d 933 [2012]). The Court has also cabined the scope of potential risks assumed by plaintiffs such that "participants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced" (*id.*).

***6** As I discuss, and as plaintiff Grady contends, CPLR 1411 does not lend itself to this interpretation and we should no longer continue to hold that it does. [3] Moreover, because the doctrine leads to results at times difficult to harmonize, and the policy concerns that animated the Court's jurisprudence have proven unfounded, it is time to abolish the last remnant of the contributory fault era embodied in this vestigial "primary" assumption of risk doctrine.

3 Contrary to the view of my dissenting colleague, Judge Singas (*see* dissenting op at ——), Grady's challenge to the Court's prior interpretation of CPLR 1411 is properly before us. Lower courts are bound to follow our rulings since, as the high Court of New York State, we are the only tribunal empowered to overrule our precedents (*see* *New York Civ. Liberties Union v. New York City Police Dept.*, 148 A.D.3d 642, 644, 50 N.Y.S.3d 365 [1st Dept. 2017], *affd* 32 N.Y.3d 556, 94 N.Y.S.3d 185, 118 N.E.3d 847 [2018] ["(W)e cannot overrule ... Court of Appeals decisions ... and are obligated to reverse based on this controlling precedent]). Such a claim is therefore the *ne plus ultra* of "contentions which could not have been so obviated or cured below" and may be raised before us for the first time (*Telaro v. Telaro*, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920, 255 N.E.2d 158 [1969]).

B.

The Court has elected to overrule prior precedent "only when there is a compelling justification for doing so" (*People v. Lopez,* 16 N.Y.3d 375, 384 n. 5, 923 N.Y.S.2d 377, 947 N.E.2d 1155 [2011], including when departure from stare decisis yields sounder jurisprudence (*People v. Peque*, 22 N.Y.3d 168, 194, 980 N.Y.S.2d 280, 3 N.E.3d 617 [2013]; *see also People v. Hogan*, 26 N.Y.3d 779, 791, 28 N.Y.S.3d 1, 48 N.E.3d 58 [2016] [Rivera, J., dissenting] ["Stare decisis is not meant to fit the Court like a straightjacket and to prevent mistakes from being rectified"]). Adherence to precedent is unjustified when: (1) the prior holding "leads to an unworkable rule, or ... creates more questions than it resolves" (*People v. Taylor*, 9 N.Y.3d 129, 149, 848 N.Y.S.2d 554, 878 N.E.2d 969 [2007]); (2) it " 'colli[des] with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience' " (*People v. Hobson,* 39 N.Y.2d 479, 487, 384 N.Y.S.2d 419, 348 N.E.2d 894 (1976), quoting *Helvering v. Hallock,* 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 [1940]); (3) subsequent controlling pronouncements have thrown the precedent into doubt so that it "no longer serves the ends of justice or withstands the cold light of logic and experience" (*Policano v. Herbert*, 7 N.Y.3d 588, 604, 825 N.Y.S.2d 678, 859 N.E.2d 484 [2006] [internal quotation marks omitted]; *see also People v. Reome*, 15 N.Y.3d 188, 194, 906 N.Y.S.2d 788, 933 N.E.2d 186 [2010]), or, more generally, (4) the precedent has simply been undermined by "the 'lessons of experience and the force of better reasoning' " (*People v. Bing,* 76 N.Y.2d 331, 338, 559 N.Y.S.2d 474, 558 N.E.2d 1011 (1990), quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-408, 52 S.Ct. 443, 76 L.Ed. 815 [1932, Brandeis, J., dissenting]) such that the prevailing rule has ossified into an "archaic and obsolete doctrine which has lost its touch with reality" (*Hobson*, 39 N.Y.2d at 487, 384 N.Y.S.2d 419, 348 N.E.2d 894).

Critically, where "[l]egislative correction is confined[,] ... [t]ort cases, but especially personal injury cases, offer another example where courts will, if necessary, more readily re-examine established precedent to achieve the ends of justice in a more modern context" (*id.* at 489, 384 N.Y.S.2d 419, 348 N.E.2d 894). Such follows from the broader principle that "[s]tare decisis does not compel us to follow blindly a court-created rule ... once we are persuaded that reason and a right sense of justice recommend its change" (*Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 363, 328 N.Y.S.2d 398, 278 N.E.2d 619 [1972]). Such change is plainly called for here.

C.

A review of the Court's seminal decisions on assumption of risk confirms that the Court has misapplied CPLR 1411 by retaining a bar to recovery in contravention of the text and the legislature's intent that fact finders apportion liability commensurate with the culpability of each party's conduct. In *Arbegast*, the Court read CPLR 1411 as "requir[ing] diminishment of damages in the case of an implied assumption of risk" (65 N.Y.2d at 170, 490 N.Y.S.2d 751, 480 N.E.2d 365). *Arbegast* involved a student teacher who was injured during a donkey basketball game when she fell off the animal at a fund-raising event for the high school's senior class (*id.* at 162-163, 490 N.Y.S.2d 751, 480 N.E.2d 365).[4] The Court reasoned that CPLR 1411 compares "blameworthy" conduct rather than negligence and thus focuses on "[c]omparative causation" (*id.* at 168, 490 N.Y.S.2d 751, 480 N.E.2d 365). The Court further noted that CPLR 1411 did not define "assumption of risk" and read the term as "requir[ing] diminishment of damages in the case of an implied assumption of risk but, except as public policy proscribes an agreement limiting liability, does not foreclose a complete defense that by express consent of the injured party no duty exists and, therefore, no recovery may be had" (*id.* at 170, 490 N.Y.S.2d 751, 480 N.E.2d 365). Because the plaintiff conceded she was informed before the games began that "participants are at their own risk[,]" she was not entitled to a jury instruction on comparative negligence based on implied assumption of the risk (*id.* at 171, 490 N.Y.S.2d 751, 480 N.E.2d 365). Thus, *Arbegast* dealt only with an "express consent by the plaintiff that no duty exists" which is "a complete defense" (*id.* at 170, 490 N.Y.S.2d 751, 480 N.E.2d 365).

4 The game is as a basketball game with two teams of four players who "must be astride" atop donkeys

"in order to shoot, pass, or play defense" (*see* Katie Thomas, *Donkey Basketball Holds on Despite Criticism*, NY Times, Apr. 17, 2009, *available at* https://www.nytimes.com/2009/04/18/sports/othersports/18donkey.html [retrieved Apr. 3, 2023]). Although the game resulted in injury to the plaintiff, it was no fun for the donkey who had to bear her weight as she commanded it around the "court."

***7** A few months later, the Court applied these principles in *Maddox v. City of New York*, which, unlike the plaintiff's express assumption of risk in *Arbegast*, involved an implied assumption of risk based on a plaintiff's knowledge of the inherent risks associated with their conduct (66 N.Y.2d 270, 496 N.Y.S.2d 726, 487 N.E.2d 553 [1985]). There, Elliot Maddox, a professional baseball player for the New York Yankees, sued several defendants—including the City (which owned Shea Stadium), the lessee Metropolitan Baseball Club, Inc., and the stadium's general contractor, architect, and consulting engineer—alleging that the stadium's negligently-designed drainage system caused his left foot to slip as his right foot became stuck in a mud puddle, resulting in a career-ending knee injury (*id.* at 275, 496 N.Y.S.2d 726, 487 N.E.2d 553). The Court concluded that the defendants were entitled to summary judgment because Maddox had conceded that he continued playing in the game "with the knowledge and appreciation of the risk" that caused his injury (*id.* at 276, 496 N.Y.S.2d 726, 487 N.E.2d 553). In reaching this determination, the Court explained that the assumption of the risk doctrine "requires not only knowledge of the injury-causing defect but also appreciation of the resultant risk," which "is not to be determined in a vacuum" (*id.* at 278, 496 N.Y.S.2d 726, 487 N.E.2d 553 [cleaned up]). "[R]ather," the Court continued, that risk must be "assessed against the background of the skill and experience of the particular plaintiff and in that assessment a higher degree of awareness will be imputed to a professional than to one with less than professional experience in the particular sport" (*id.* [cleaned up]).[5] In adopting this approach, the Court joined several other state courts which had "redefined" the doctrine "to allow the notion of assumption of risk to remain a viable defense even with the advent of modern comparative fault concepts" (Alexander J. Drago, *Assumption of Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases*, 12 Fordham Intell Prop Media & Ent LJ 583 [2002]).[6]

5 The Court acknowledged that the injuries giving rise to *Maddox* occurred before CPLR 1411's passage and that it was thus "at liberty to modify the common-law rules of assumption of risk" but "decline[d] to take that step" (66 N.Y.2d at 277, 496 N.Y.S.2d 726, 487 N.E.2d 553).

6 The Legislature adopted comparative fault at a time when detractors opposed this legislative tort reform. As one commentator observed in 1963, certain "lobby and pressure groups" with economic interests in maintaining contributory negligence regimes "[we]re active and successful in preventing bills incorporating comparative negligence principles from obtaining full legislative consideration" (Cornelius J. Peck, *The Role of the Courts and Legislature in the Reform of Tort Law, 48 Minn L Rev 265, 305 [1963]; see also id. at n 180 [collecting examples of failed comparative-negligence legislation])*. Even some jurists offered reasons for opposing comparative fault (*see e.g.* *Vincent v. Pabst Brewing Co.*, 47 Wis 2d 120, 129, 177 N.W.2d 513, 517 [1970] [expressing concern that "pure comparative negligence would render defendants the insurers of any who chose to commence an action"]; *see also* *Alvis v. Ribar*, 85 Ill 2d 1, 41, 52 Ill.Dec. 23, 421 N.E.2d 886, 904 [1981] [Ryan, J., dissenting] ["Under pure comparative negligence, as adopted by the majority, the injured plaintiff will have the best of both worlds. (They) will be able to recover for (their) injuries without fault and at the same time not be limited in the amount (they) may recover"]). CPLR 1411 reflects our State's rejection of these alarmist views.

The following year in *Turcotte v. Fell*, the Court definitively adopted the "no duty" rationale in another implied consent case (68 N.Y.2d 432, 438, 510 N.Y.S.2d 49, 502 N.E.2d 964 [1986]). Unlike Christy Arbegast, but like Elliot Maddox, the plaintiff in *Turcotte* was a successful professional athlete. Ronald Turcotte had a 17-year career as a jockey, best known for riding Secretariat to the Triple Crown victory in 1973 (*see* 68 N.Y.2d at 435, 510 N.Y.S.2d 49, 502 N.E.2d 964). Five years later during a race at New

  

York's Belmont Park, he suffered a devastating injury when, after being clipped by another jockey he was thrown from his horse. The injury rendered him a paraplegic and ended his racing career (*id.* at 435-436, 510 N.Y.S.2d 49, 502 N.E.2d 964). The Court explained that, because CPLR 1411 abolished assumption of risk as an absolute defense, "it ha[d] become necessary and quite proper, when measuring a defendant's duty to a plaintiff to consider the risks assumed by the plaintiff" because assumption of risk "is simply a confusing way of stating certain no-duty rules" (*id.* at 438, 510 N.Y.S.2d 49, 502 N.E.2d 964 [internal quotation marks omitted]). As applied to sporting events, the defendant thus has "a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" (*id.* at 439, 510 N.Y.S.2d 49, 502 N.E.2d 964). In analyzing "the nature and scope of [the] plaintiff's consent," the Court noted that "[i]t would be a rare thing indeed, if the election of a professional athlete to participate in a sport at which he makes his living could be said to be involuntary" (*id.*). The Court noted that "while the courts ha[d] traditionally exercised great restraint in the belief that 'the law should not place unreasonable burdens on the free and vigorous participation in sports', they ha[d] recognized that organized, athletic competition does not exist in a vacuum" and that "[s]ome 'of the restraints of civilization must accompany every athlete onto the playing field' " (*id.*, citing *Nabozny v. Barnhill,* 31 Ill.App. 3d 212, 214-215, 334 N.E.2d 258, 260 [Ill. App. Ct. 1975]). "Manifestly," the Court went on to say, "a professional athlete is more aware of the dangers of the activity, and presumably more willing to accept them in exchange for a salary, than is an amateur" (*id.*).

***8** Applying these principles, the Court explained that Turcotte was a professional jockey who knew horse racing was a dangerous activity, involving thoroughbreds that "weigh[ ] half a ton and can reach speeds of 40 miles per hour or more" and that "[j]ockeys weighing between 100 and 120 pounds, attempt to control" the horse while maximizing speed to win (*id.*). Indeed, the plaintiff testified that during a race a horse could lawfully run outside their lane and may come within inches of other speeding horses, bumping one another (*id.*). "Such dangers[,]" the Court concluded, [we]re inherent in the sport" and since the plaintiff "recognized as such[,] ... he consented to relieve defendant" of liability (*id.* at 441, 510 N.Y.S.2d 49, 502 N.E.2d 964).

However, the Court drastically expanded this limited carveout for professional athletes to bar recovery for a 19-year-old student football player only three years later in *Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 543 N.Y.S.2d 29, 541 N.E.2d 29 (1989). Plaintiff Sixto Benitez broke his neck during a varsity game. The record established that the plaintiff was playing a "Division A" team even though the coach felt this was unsafe because his "players were fatigued" and he "did not have the personnel to rest [plaintiff] Benitez[,] and was aware that injuries are most likely to occur when players are tired" (*id.* at 654-655, 543 N.Y.S.2d 29, 541 N.E.2d 29). Nevertheless, the coach "did not unilaterally cancel the game because he feared it might cost him his job" (*id.*). The plaintiff testified that he was fatigued when he was injured but did not tell the coach (*id.*). He also had motives to play, namely several pending football scholarship offers (*see id.*). To justify applying the rule to this student player, the Court adopted a type of sliding-scale assessment of physical skill and sports knowledge: "a high school athlete, even an outstanding one, does not assume all the risks of a professional sportsperson, neither does a 19-year-old senior star football player and college scholarship prospect fall within the extra protected class of those warranting strict parental duties of supervision" (*id.* at 657-658, 543 N.Y.S.2d 29, 541 N.E.2d 29). [7]

7 While the Court appears to have responded in part to the trial court's jury instruction that the defendants were required to exercise "the same level of care 'as a parent of ordinary prudence would exercise under the same circumstances[,]' " the Court set a line to be affirmed the jury's finding that the plaintiff had only been 30% at fault based on its conclusion that the plaintiff's evidence made a prima facie showing that the defendants were negligent in their "duty to supervise the activities of the students in its charge" (*Benitez v. New York City Bd. of Educ.*, 141 A.D.2d 457, 459, 530 N.Y.S.2d 825 [1st Dept. 1988]). Specifically, the Appellate Division reasoned:

> "The evidence here indicates that defendants unreasonably enhanced or increased the risk of

> plaintiff being injured by playing him in a game between mismatched teams and by playing him for virtually the entire game, while he was tired, because there was no adequate substitute for him. While plaintiff was a voluntary participant in the game, never having complained of being tired, the law does recognize, especially in student-teacher relationships, that a degree of indirect compulsion exists, nonetheless. The rationale is that the student is understandably reluctant to refuse to participate for fear of the negative impact such refusal might have on his or her grade or standing. Such reasoning applies here. Plaintiff was " 'one of the best football players to come out of GW' "; he had a " 'drawer full' " of letters from colleges. In such circumstances, it is not at all surprising nor legally fatal to his cause that plaintiff had not asked to be taken out of the game.
>
> Our analysis of the record reveals sufficient competent evidence which, if accepted, makes out a prima facie case that defendants were negligent in permitting plaintiff to play in a game in which his team was greatly outmatched and in circumstances in which the likelihood of his being injured was significantly enhanced. The question of plaintiff's own negligence was, of course, submitted to the jury, which assessed it at 30%.
>
> Defendant's dire forecast that a finding of liability here will open the floodgates and lead inevitably to the total collapse of the Board of Education's interscholastic sports program is somewhat overstated, to say the least. This is an unusual case, one in which the very incident which occurred was predicted" (*id.* at 459-460, 530 N.Y.S.2d 825 [internal quotation marks omitted]).

***9** Notably, the Court stated that "[p]layers who voluntarily join in extracurricular interscholastic sports assume the risks to which their roles expose them but not risks which are unreasonably increased or concealed" (*id.* at 658, 543 N.Y.S.2d 29, 541 N.E.2d 29 [internal quotation marks omitted]). In other words, the Court subjected the plaintiff student to the same standard it had applied to professional athletes. Under that standard, the Court concluded that the defendant had not increased or concealed the risk, which instead was "[w]ithin the breadth and scope of [the plaintiff's] consent and participation" (*id.* at 659, 543 N.Y.S.2d 29, 541 N.E.2d 29). Thus, the "plaintiff put himself at risk in the circumstances of this case for the injuries he ultimately suffered" (*id.*). Eliding the context in which the plaintiff's action arose, the Court opined that the injury "in sum, was a luckless accident arising from the vigorous voluntary participation in competitive interscholastic athletics" (*id.*). But plainly nothing about the plaintiff's presence and play on the field that day was "luckless" or an "accident" (*id.*). Rather, school officials made a choice to pit these students in a close-contact game, against better-prepared, physically-dominant players, despite knowing the high risk of serious injury to plaintiff and his teammates.

In *Morgan v. State of New York*, the Court decided four appeals—*Morgan*, *Beck*, *Chimerine*, and *Siegel*—and again drew no legally significant distinction among professional, amateur and recreational sports participants (90 N.Y.2d 471, 662 N.Y.S.2d 421, 685 N.E.2d 202 [1997]). *Morgan* involved "an amateur bobsledder who had competed in the Olympic Games and had been bobsledding at [the site of the injury] for over 10 years prior to the accident" (*id.* at 480, 662 N.Y.S.2d 421, 685 N.E.2d 202). *Beck* involved a 30-year-old orange belt who had been training for over a year at the karate school where the injury occurred (*id.* at 481, 662 N.Y.S.2d 421, 685 N.E.2d 202). *Chimerine* was a relative novice to martial arts, having been injured during her fourth class at the defendants' school (*id.* at 481, 662 N.Y.S.2d 421, 685 N.E.2d 202). In all three cases, the Court concluded that the plaintiffs assumed the risk of the respective sports in which they participated (*see* *id.* at 486-489, 662 N.Y.S.2d 421, 685 N.E.2d 202). In contrast, the Court determined that the plaintiff in *Siegel*—a 60-year-old tennis player who tripped over a torn net bisecting the court—had not assumed the risk even though he was aware of the problem for over two years (*id.* at 482, 662 N.Y.S.2d 421, 685 N.E.2d 202). As the Court explained, "[r]elieving an owner or operator of a sporting venue from liability for inherent risk of engaging in a sport is justified when a consenting participant is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks" (*id.* at 484, 662 N.Y.S.2d 421, 685 N.E.2d 202). Even though plaintiff Siegel was

well aware of the torn net, the Court concluded that "a torn or allegedly damaged or dangerous net is by its nature not automatically an inherent risk of a sport as a matter of law for summary judgment purposes" but "may qualify as and constitute an allegedly negligent condition occurring in the ordinary course of any property's maintenance and may implicate typical comparative negligence principles" (*id.* at 488, 662 N.Y.S.2d 421, 685 N.E.2d 202). But the very fact of the net's placement as a divider of indoor courts illustrates the inherent risk of the indoor version of tennis.

Despite its earlier no-duty assumption of risk rhetoric, the Court repeated the established standard that "for purposes of determining the extent of the threshold duty of care, knowledge plays a role but inherency is the sine qua non" (*id.*, citing *Maddox*, 66 N.Y.2d at 270, 496 N.Y.S.2d 726, 487 N.E.2d 553; *Turcotte*, 68 N.Y.2d at 443, 510 N.Y.S.2d 49, 502 N.E.2d 964; *Scaduto v. State of New York*, 56 N.Y.2d 762, 452 N.Y.S.2d 21, 437 N.E.2d 281 [1982], *affg* 86 A.D.2d 682, 446 N.Y.S.2d 529). The Court reaffirmed that defendants carry a duty because "participants will not be deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risks" (*id.* at 485, 662 N.Y.S.2d 421, 685 N.E.2d 202 [internal citations omitted]).

In *Bukowski v. Clarkson Univ.*, the Court acknowledged "the injury risks attendant to participation in organized sports" (19 N.Y.3d 353, 355, 948 N.Y.S.2d 568, 971 N.E.2d 849 [2012]), and concluded that a college student baseball player assumed the risk of being hit by a line drive inherent in an indoor practice without the use of a protective L-screen (*see id.* at 356-358, 948 N.Y.S.2d 568, 971 N.E.2d 849).[8] Rather than treating the lack of a protective net as an "unreasonably increased risk" of the practice, the Court concluded that the "experienced and knowledgeable baseball player" assumed the inherent risk of playing without the protective screen, as well as the "less than optimal" indoor lighting (*id.* at 357, 948 N.Y.S.2d 568, 971 N.E.2d 849). This conclusion is difficult to reconcile with the Court's analysis of the torn net in *Siegel* when, in both cases, the plaintiff was aware of the enhanced risks that the relevant playing conditions presented.

8 As the Court noted in *Bukowski*, "[a]n L-screen is a net strung on a thin, metal frame shaped like a block L that protects pitchers from balls that are batted back at them" (19 N.Y.3d at 358 n. *, 948 N.Y.S.2d 568, 971 N.E.2d 849).

***10** Any semblance of a unifying principle disappeared in *Custodi*, which involved a plaintiff rollerblading in her neighborhood who fell when her skate struck the elevated edge between the defendant's property and the drainage culvert on the street (20 N.Y.3d at 86, 957 N.Y.S.2d 268, 980 N.E.2d 933). The Court acknowledged that "[a] person who engages in [a sports] activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and from such participation" and that "[t]he duty owed in these situations is a duty to exercise care to make the conditions as safe as they appear to be" (*id.* at 88, 957 N.Y.S.2d 268, 980 N.E.2d 933 [internal quotation marks omitted). Nevertheless, the Court concluded that assumption of the risk is "limited to sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues" (*id.* at 89, 957 N.Y.S.2d 268, 980 N.E.2d 933). The plaintiff was not skating in such a venue or a sponsored competition and therefore the doctrine did not bar her potential recovery for damages. The Court explained that extending the doctrine to cases involving streets and sidewalks "would create an unwarranted diminution of the general duty of landowners—both public and private—to maintain their premises in a reasonably safe condition" (*id.*). Again, the Court made a policy choice which cannot be squared with the express language of CPLR 1411 or the legislative intent to apply comparative negligence to all personal injury actions. Moreover, there is no compelling basis for excluding sports venue owners from the general rule that property owners are liable for their negligence. Certainly the owners of Madison Square Garden or the Barclays Center, or for that matter University at Buffalo, can more easily afford insurance than Town of Amherst residential home owners defendants Peter and Susan Muffoletto (*see id.* at 86, 957 N.Y.S.2d 268, 980 N.E.2d 933).[9]

9 Judge Singas quotes this language out of context to support a completely different point that, unlike

> the owners of these professional sports facilities, "many youth programs, especially those serving disadvantaged children, may not be so fortunate" as to be in a position to purchase insurance (dissenting op at ——). Even if that were true, the Court's retention of this doctrine ensures that such children—already burdened with the economically and socially destructive consequences of poverty —who suffer debilitating injuries while engaged in organized sports will remain barred from recovering and be left to fend for themselves (*see e.g.* *Benitez*, 73 N.Y.2d at 654-655, 659, 543 N.Y.S.2d 29, 541 N.E.2d 29).

D.

As this discussion reveals, the Court has constructed a strange judicial artifice that assumption of risk limits the defendant's duty to a plaintiff based on the plaintiff's consent to participate in inherently-risky conduct. Practically, however, the Court has treated assumption of risk as a "principle of no duty" (*Trupia*, 14 N.Y.3d at 395, 901 N.Y.S.2d 127, 927 N.E.2d 547), making passing reference to the event sponsor or venue owner's minimal duty of care to the participants. The Court's approach is irreconcilable with the statutory language and the intended goal of providing a path to recovery for plaintiffs partially responsible for their injury (*see* *Hobson*, 39 N.Y.2d at 487, 489, 384 N.Y.S.2d 419, 348 N.E.2d 894). As this Court candidly acknowledged in *Trupia*:

> "The reality [ ] is that the effect of the doctrine's application is often not different from that which would have obtained by resort to the complete defenses purportedly abandoned with the advent of comparative causation—culpable conduct on the part of a defendant causally related to a plaintiff's harm is rendered nonactionable by reason of culpable conduct on the plaintiff's part that does not entirely account for the complained of harm. While it may be theoretically satisfying to view such conduct by a plaintiff as signifying consent, in most contexts this is a highly artificial construct and all that is actually involved is a result-oriented application of a complete bar to recovery. Such a renaissance of contributory negligence replete with all its common-law potency is precisely what the comparative negligence statute was enacted to avoid" (*Trupia*, 14 N.Y.3d at 395, 901 N.Y.S.2d 127, 927 N.E.2d 547).

Aside from the ends justifying the rule, members of the Court have acknowledged that the carve-out for sports activities poses its own challenges. As observed by Judge Smith in his *Trupia* concurrence, the majority's commentary on the implied assumption of risk doctrine "invite[d] a number of questions[,]" including "What exactly is 'athletic or recreative' activity?" (*id.* at 397, 901 N.Y.S.2d 127, 927 N.E.2d 547 [Smith, J., concurring]). *Trupia*, Judge Smith noted, involved a child who was injured after sliding down the banister of a school staircase and though he agreed that "[a]ssumption of risk [could not] possibly be a defense because it is absurd to say that a 12-year-old boy 'assumed the risk' that his teachers would fail to supervise him[,]" he also pointedly asked: (1) why the plaintiff's "chosen activity" was not "recreative" when "[h]e was obviously doing it for fun[;]" (2) why "sliding down a banister (supposing it to be done by an adult with a taste for such amusement) of less social value than sliding down a ski slope or bobsled run[;]" and (3) why, if the athletic and recreative activities recognized in prior cases were "more socially valuable than the former[,] ... the banister slider, who chose the less desirable form of amusement, [is] in a *better* position to recover damages than the skier or bobsledder" (*id.* [emphasis added]).

***11** Notwithstanding these flaws in reasoning and application, the Court has justified its retention of the doctrine based on its "utility in 'facilitat[ing] free and vigorous participation in athletic activities' " which, the Court determined, "possess enormous social value" (*id.*, quoting *Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 657, 543 N.Y.S.2d 29, 541 N.E.2d 29 [1989] [alterations in original]). The Court has further specified that the doctrine "shields college athletics from potentially crushing liability" (*Bukowski*, 19 N.Y.3d at 358, 948 N.Y.S.2d 568, 971 N.E.2d 849).

Given CPLR 1411's enactment, such value-laden concerns are " 'matters for the judgment of the Legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance' " (*Montgomery v. Daniels*, 38 N.Y.2d 41, 53, 378 N.Y.S.2d 1, 340 N.E.2d 444 [1975], quoting *Chicago, B. & Q.R. Co. v. McGuire*, 219 U.S. 549, 569, 31 S.Ct. 259, 55 L.Ed. 328 [1911]). In other words, "the province of the courts does not extend to the

wisdom, necessity or motivation of legislation" (*Ball v. State of New York*, 41 N.Y.2d 617, 625, 394 N.Y.S.2d 597, 363 N.E.2d 323 [1977]). The Court's task then—as it is now—was to apply CPLR 1411 "as it is written by the Legislature, not as the [C]ourt may think it should or would have been written if the Legislature had envisaged all the problems and complications which might arise" (*Parochial Bus Sys., Inc. v. Board of Educ. of City of New York*, 60 N.Y.2d 539, 548-49, 470 N.Y.S.2d 564, 458 N.E.2d 1241 [1983]).

Indeed, for just this reason legal commentators have been sharply critical of the Court's policy-driven retention of the doctrine in the face of CPLR 1411 (*e.g.* Danielle Clout, Note, *Assumption of Risk in New York: The Time Has Come to Pull the Plug on This Vexatious Doctrine*, 86 St John's L Rev 1051, 1063-1071 [2012] [criticizing the Court's shifting justifications for retaining assumption of risk and undermining CPLR 1411]; Drago, 12 Fordham Intell Prop Media & Ent LJ at 583 [observing that "[t]he distinction between" assumption of risk and contributory negligence, "once largely irrelevant because both completely barred recovery, has been redefined to allow the notion of assumption of risk to remain a viable defense even with the advent of modern comparative fault concepts"]; Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 Ga L Rev 601, 671-672 [1992] [noting that, "(b)y 1980," assumption of risk "seemed just about extinct: courts disapproved of explicit contractual disclaimers of liability, and courts were inclined to " 'merge' " implied assumption of risk into comparative negligence" and bemoaning this Court's continued invocation of "the concept of assumption of risk to completely deny the defendant's liability"]).

In addition to the Court's interpretive rules meant to restrain the Court from acting in contravention of the legislative will, the Court's 'enormous social value' standard for application of the doctrine is difficult to justify on its own terms, and therefore no longer "withstands the cold light of logic and experience"—assuming it ever did (*Policano*, 7 N.Y.3d at 604, 825 N.Y.S.2d 678, 859 N.E.2d 484). Many socially beneficial nonathletic activities carry inherent risks of injury —for example, operating a motor vehicle—and lawsuits for injuries arising from these activities are evaluated under our comparative fault regime. Further, even if it is logical to hold that a commercially-paid professional athlete has the insight and knowledge born from experience to fully appreciate and voluntarily assume the inherent risks in a sport, it is quite another matter to bar student and amateur athletes, and people enjoying recreational activity from all tort recovery. The Court's policy concern that sporting opportunities will evaporate does not explain the bar to recovery against a for-profit martial arts school in *Morgan*, 90 N.Y.2d at 487, 662 N.Y.S.2d 421, 685 N.E.2d 202. Nor, on the flip side, does it explain exempting the residential property owner from injuries incurred by a rollerblader in *Custodi*, 20 N.Y.3d at 83, 957 N.Y.S.2d 268, 980 N.E.2d 933. Yet, under those, and the other precedents summarized above, a racecar driver headed to the Riverhead Raceway on Long Island to compete in a race may sue for injuries suffered on the road during the drive to the track, but would be barred from recovering against the track owner for negligently maintaining the venue as soon as their wheels touch the racetrack. Surely, the Legislature did not intend such absurd outcomes when it passed CPLR 1411 (*see Lubonty v. U.S. Bank N.A.*, 34 N.Y.3d 250, 255, 116 N.Y.S.3d 642, 139 N.E.3d 1222 [2019] ["We must ... interpret a statute so as to avoid an unreasonable or absurd application of the law"] [internal quotation marks omitted]).

***12** While opportunities for children and adults to engage in physical activities and team athletics is beneficial for participants and has tremendous social value, other jurisdictions with comparative negligence laws have abolished assumption of risk as a complete defense without seeing an end to youth sports or youth leagues (*see e.g. World Fresh Markets, LLC v. Palermo*, 74 V.I. 455, 469, 2021 WL 568528 [2021]; *Rountree v. Boise Baseball, LLC*, 154 Idaho 167, 174, 296 P.3d 373, 380 [2013]; *Ouachita Wilderness Inst., Inc. v. Mergen*, 329 Ark. 405, 417, 947 S.W.2d 780, 786 [1997]; *Auckenthaler v. Grundmeyer*, 110 Nev. 682, 686, 877 P.2d 1039, 1041-1042 [1994]; *Blair v. Mount Hood Meadows Dev. Corp.*, 291 Or. 293, 297-298, 630 P.2d 827, 829-830 [1981]; *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 517 [Tex. 1978]; *Lyons v. Redding Const. Co.*, 83 Wash.2d 86, 95, 515 P.2d 821, 826 [1973]; *Leavitt v. Gillaspie*, 443 P.2d 61, 68 [Alaska 1968]; *see also Horton v. American Tobacco Co.*, 667 So.2d 1289, 1293 [Miss. 1995] [noting that assumption of risk was "subsumed in (Mississippi's) comparative fault doctrine"]). [10] As this list shows, the fear of "potentially crushing liability" on school athletics has no basis in reality (*Bukowski*, 19 N.Y.3d at 358, 948 N.Y.S.2d 568, 971 N.E.2d 849). [11] Moreover,

under CPLR 1411's pure comparative fault regime, the trier of fact remains free to consider the risks inherent in the sport when assigning damages based on each party's culpable conduct (*see* CPLR 1411). Thus, liable defendants are not automatically subject to 100 percent of the damages suffered. [12]

10 Equal access to these opportunities has historically been denied to girls and women but, with the passage of Title IX, they now participate in these rewarding activities once reserved only for boys and men (*see* *McCormick ex rel. McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 286-288 [2d Cir. 2004]). No doubt, we all benefit from this sea change in the law and athletics (*see* Alexa Phillippou, *LSU's Morris, SC's Beal, Amihere Declare for 2023 WNBA Draft*, ESPN, Apr. 4, 2023, *available at* https://www.espn.com/wnba/story/_/id/36069258/lsu-morris-sc-beal-amihere-declare2023-wnba-draft [retrieved Apr. 4, 2023]; Remy Tumin, *N.C.A.A. Women's Tournament Shatters Ratings Record in Final*, NY Times, Apr. 3, 2023, *available at* https://www.nytimes.com/2023/04/03/sports/ncaabasketball/lsu-iowa-womens-tournament-ratings-record.html [retrieved Apr. 4, 2023]).

11 The majority posits a lack of data showing "that states opting to allow for liability in similar circumstances have not seen any cuts to scholastic sports budgets or even a chilling effect on employment in athletics in decades" as a basis for defending our continued upkeep of the implied assumption of risk doctrine (majority op at —— n. 2). This is no response to the fact that robust opportunities for professional and recreational sports exist in our sister jurisdictions that have adopted comparative fault. Tellingly, the majority points to no data *confirming* the policy concerns repeated throughout our case law. Most importantly, the legislative history surrounding CPLR 1411 contains no such data. Indeed, one would think that if there were some evidence that pure comparative fault would reduce athletic opportunities in New York the Legislature or, at the very least, the authors of the Judicial Conference Report would have referenced it if they intended to retain assumption of risk in this arena. Instead, the legislative history is silent on the matter. In light of this, I see no basis to reaffirm in these appeals what the Court has recently acknowledged is a "result-oriented application of a complete bar to recovery" (*Trupia*, 14 N.Y.3d at 395, 901 N.Y.S.2d 127, 927 N.E.2d 547).

12 The majority's observations that "decades of applicable precedent" has reaffirmed the doctrine and that the Legislature "has never sought to correct" the Court's purported misreading of CPLR 1411 is no basis for the Court to ignore its obligation to interpret the law in accordance with applicable rules and principles (majority op at ——, ——). In the past, we have not hesitated to correct our mistaken interpretations of statutes when we have found "the reasons for adopting what we think the correct interpretation of the statute to be more compelling than the reasons for adhering to a mistaken one" (*People v. Rudolph*, 21 N.Y.3d 497, 502, 974 N.Y.S.2d 885, 997 N.E.2d 457 [2013], *overruling* *People v. McGowen*, 42 N.Y.2d 905, 397 N.Y.S.2d 993, 366 N.E.2d 1347 [1977]; *see also* *id.* at n. *, *citing* *Reome*, 15 N.Y.3d at 188, 906 N.Y.S.2d 788, 933 N.E.2d 186, *overruling* *People v. Hudson*, 51 N.Y.2d 233, 433 N.Y.S.2d 1004, 414 N.E.2d 385 [1980]; *Matter of Hyde*, 15 N.Y.3d 179, 906 N.Y.S.2d 796, 933 N.E.2d 194 [2010], *overruling* *Matter of Dillon*, 28 N.Y.2d 597, 319 N.Y.S.2d 850, 268 N.E.2d 646 [1971]; *People v. Feingold*, 7 N.Y.3d 288, 819 N.Y.S.2d 691, 852 N.E.2d 1163 [2006], *overruling* *People v. Register*, 60 N.Y.2d 270, 469 N.Y.S.2d 599, 457 N.E.2d 704 [1983]; *Lusenskas v. Axelrod*, 81 N.Y.2d 300, 598 N.Y.S.2d 166, 614 N.E.2d 729 [1993], *overruling* *Brown v. Poritzky*, 30 N.Y.2d 289, 332 N.Y.S.2d 872, 283 N.E.2d 751 [1972]; *People v. Levy*, 15 N.Y.2d 159, 256 N.Y.S.2d 793, 204 N.E.2d 842 [1965], *overruling* *People v. Florio*, 301 N.Y. 46, 92 N.E.2d 881 [1950]).

> Moreover, when, as here, experience teaches us that a policy driving our case law is unjustified and the corresponding doctrine we have adopted has proven itself unworkable, we have a responsibility to change course, regardless of how much time has passed or whether the Legislature has acted.

***13** Here, plaintiff Grady lost eyesight as a result of an errant baseball thrown toward him during a complex, multi-ball drill that included less-experienced junior varsity players. Plaintiff Secky was driven into unpadded bleachers, causing an injury to his shoulder that required surgery during his participation in a rebounding basketball drill that the coach testified featured elimination of some boundary lines and the athletic director described as "wall to wall" and "bleacher to bleacher" (i.e., containing *no* boundary lines). [13] In each case, I would reverse the Appellate Division's orders, deny the respective defendants' motions for summary judgment, and remit for trials before fact finders properly-instructed on comparative fault. [14]

13 Both cases also involve, to differing degrees, classic battles of the experts which, as I have previously cautioned, are particularly unfit for summary judgment given that questions about each expert's methods and conclusions go to their weight, a determination reserved for the finder of fact (*see* *Nemeth v. Brenntag N. Am.*, 38 N.Y.3d 336, 364-365, 173 N.Y.S.3d 511, 194 N.E.3d 266 [2022] [Rivera, J., dissenting]).

14 The typical content of such instruction is familiar to both the Bench and Bar. Indeed, the New York pattern jury instruction on comparative fault states, in relevant part:

> "If ... you find that the plaintiff ... was negligent and that (their) negligence was a substantial factor in bringing about (the accident, injury, [*or other appropriate characterization of the event*]), you must then apportion the fault between the plaintiff (decedent) and the defendant [*and, where appropriate, AB, a third person*].
>
> "Weighing all the facts and circumstances, you must consider the total fault, that is, the fault of both the plaintiff ... and the defendant ... and determine what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal one hundred percent" (N.Y. Pattern Jury Instr.—Civil 2:36).

III.

New York courts need not continue applying this "limited vestige of the assumption of risk doctrine" (*Custodi*, 20 N.Y.3d at 87, 957 N.Y.S.2d 268, 980 N.E.2d 933). Even if the doctrine was somewhat defensible as applied to professional athletes who earn a living assuming risks inherent in a for-profit sporting event, the Court has unwisely expanded the reach of the doctrine to student athletes and recreational sports participants. In so doing, the Court strayed from the foundation of the "primary assumption of risk" rhetoric and tolerated what is, in practice, a complete defense to tortious harm. The way out of this unworkable, results-driven morass is to completely abolish the doctrine and restore the pure comparative fault regime the Legislature intended to establish in 1975 (*Taylor*, 9 N.Y.3d at 149, 848 N.Y.S.2d 554, 878 N.E.2d 969; *Hobson*, 39 N.Y.2d at 489, 384 N.Y.S.2d 419, 348 N.E.2d 894).

The same tools the Court used to create this policy-based judicial protectionism for athletics (*see* *Turcotte*, 68 N.Y.2d at 437-439, 510 N.Y.S.2d 49, 502 N.E.2d 964) supply us with the means to finally effectuate the Legislature's intent to end contributory negligence and assumption of risk (*see* CPLR 1411). The Court has long emphasized that the common law "must be held no further abrogated than the clear import of the language used in the statutes absolutely requires" (*Bertles v. Nunan,* 92 N.Y. 152 [1883]; McKinney's Cons Laws of NY, Book 1, Statutes § 153 ["A change in long established rules of law is not deemed to have been intended by the Legislature in the absence of a clear manifestation of such intent"]). [15] Section 1411 easily meets this threshold, as its text and history evince a clear, definite legislative intent to dispense entirely with the assumption of risk doctrine in favor of pure comparative fault (*cf.* *Xiang Fu He v. Troon Management, Inc.*, 34 N.Y.3d 167, 171-172, 114 N.Y.S.3d 14, 137 N.E.3d 469 (2019) [statute assigning responsibility of clearing icy sidewalks to property owners displaced common-law rule assigning it to the City because the statute's text "could not be clearer"]).

15

> The Court in *Arbegast* purported to heed this maxim, observing that the common law "distinguished between express and implied assumption of risk" and reasoning that, since "[t]he Legislature is presumed to be aware of the decisional and statut[ory] law in existence at the time of an enactment" and "[n]either article 14-A nor its legislative history defines 'assumption of risk[,]' " the Legislature did not abrogate this distinction when it passed CPLR 1411 (65 N.Y.2d at 169-170, 490 N.Y.S.2d 751, 480 N.E.2d 365). That conclusion was wrong. Given the Legislature's cognizance of the existing law, had the Legislature intended to retain the distinction between express and implied assumption of risk, it would have said so explicitly. Instead, the Legislature referred to "assumption of risk" without any qualifiers (CPLR 1411).

***14** Justice Frankfurter cautioned that "[t]he phrase 'assumption of risk' is an excellent illustration of the extent to which uncritical use of words bedevils the law" (*Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 68, 63 S.Ct. 444, 87 L.Ed. 610 [1943]). We need not continue engaging in "deft legal maneuvering" (*Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 26, 39 N.Y.S.3d 89, 61 N.E.3d 488 [2016] [internal quotation marks omitted]) to artificially preserve this doctrine. Rather than continue rendering outcome-driven decisions based on the remnants of a doctrine the Legislature discarded decades ago, we should, as the Legislature intended, abandon the implied assumption of risk doctrine altogether and finally allow the trier of fact to apportion liability amongst culpable parties.

SINGAS, J. (dissenting in Grady and concurring in Secky): The majority accurately articulates the well-settled principles governing these cases in section I of its opinion. I note that no party preserved an argument that this Court should disregard this jurisprudence, including proffering any explanation for why stare decisis should not apply here (*see Bingham v. New York City Tr. Auth.*, 99 N.Y.2d 355, 359, 756 N.Y.S.2d 129, 786 N.E.2d 28 [2003] ["in making and shaping the common law—having in mind the doctrine of stare decisis and the value of stability in the law—this Court best serves the litigants and the law by limiting its review to issues that have first been presented to and carefully considered by" the courts below]). The majority also correctly applies our sound law to the facts of *Secky* in section II. I join those sections of the opinion. I dissent in part, however, because the majority misapplies our precedent to the circumstances presented in *Grady* in section III.

The plaintiff in *Grady* was injured when he was hit in the face with a baseball during a high school baseball practice. The majority mistakenly concludes that a jury should determine whether this harm resulted from "an inherent risk" of baseball (majority op at ——). A trial is unnecessary, however, because we have repeatedly made clear that being hit with a mis-thrown ball while playing baseball is a textbook example of a risk "commonly encountered or 'inherent' " in the sport (*Bukowski v. Clarkson Univ.*, 19 N.Y.3d 353, 356, 948 N.Y.S.2d 568, 971 N.E.2d 849 [2012]; *see Morgan v. State of New York*, 90 N.Y.2d 471, 484, 662 N.Y.S.2d 421, 685 N.E.2d 202 [1997]; *see also* majority op at —— ["Errant balls may be an inherent risk of playing baseball"]). Indeed, as Chief Judge Cardozo explained, even baseball spectators assume the risk of being hit by waywardly thrown balls (*see Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 482, 166 N.E. 173 [1929]).

Defendants' evidence demonstrated that plaintiff "accepted personal responsibility" for his injury because it stemmed from an inherent risk of playing baseball—being hit by a mis-thrown ball (*Morgan*, 90 N.Y.2d at 484, 662 N.Y.S.2d 421, 685 N.E.2d 202; *see Bukowski*, 19 N.Y.3d at 356, 948 N.Y.S.2d 568, 971 N.E.2d 849). Further, contrary to the majority's conclusion, the practice drill was as safe as it appeared. No concealed risks existed inasmuch as plaintiff admitted that he thought the drill was unsafe but participated anyway. Also, the drill did not "unreasonably enhance[ ]" the risks to plaintiff beyond those players typically encounter (*Custodi v. Town of Amherst*, 20 N.Y.3d 83, 88, 957 N.Y.S.2d 268, 980 N.E.2d 933 [2012]). The use of multiple balls at a baseball practice is prevalent and inherent to such training sessions. Similarly, use of a protective screen is commonplace at baseball practices. The protective screen here, measuring seven feet high by seven feet wide, certainly was tall and wide enough to provide protection for plaintiff even though it failed to stop the ball that caused his injury. As the Appellate Division stated, "plaintiff was an experienced baseball player who knew of the risks, appreciated their

  

nature[,] and voluntarily assumed them" (190 A.D.3d 1218, 1220, 141 N.Y.S.3d 513 [3d Dept. 2021] [internal quotation marks omitted]). Plaintiff failed to raise a triable issue of fact in response to defendants' showing and, thus, the courts below correctly granted defendants summary judgment.

***15** Plaintiff's injury resulted from "a luckless accident arising from [his] vigorous voluntary participation in competitive interscholastic athletics" (*Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 659, 543 N.Y.S.2d 29, 541 N.E.2d 29 [1989]; *see* *Bukowski*, 19 N.Y.3d at 358, 948 N.Y.S.2d 568, 971 N.E.2d 849). Despite the unfortunate facts of this case, our precedent requires that we affirm the Appellate Division order.

My colleagues' contrary conclusion misapplies (or advocates abandoning) our precedent, potentially opening the door to liability for, among others, child athlete coparticipants, along with community centers and religious institutions that host athletic programs, volunteer coaches, and other people that spend their time creating opportunities for children to participate in athletic and other recreative activities. While owners of professional sports facilities like Citi Field, UBS Arena, and Highmark Stadium "can ... easily afford insurance" (Rivera, J., dissenting op at ——), many youth programs, especially those serving disadvantaged children, may not be so fortunate.

Chief Judge Wilson and Judges Cannataro and Troutman concur. Judge Rivera concurs in result in an opinion. Judge Singas dissents in an opinion. Judge Halligan took no part.

Chief Judge Wilson and Judges Cannataro and Troutman concur, Judge Singas in a concurring opinion. Judge Rivera dissents in an opinion. Judge Halligan took no part.
Order reversed, with costs, and defendants' motion for summary judgment denied.

Order affirmed, with costs.

**All Citations**

--- N.E.3d ----, 2023 WL 3102723, 2023 N.Y. Slip Op. 02142

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2014 WL 1407706
United States District Court,
S.D. New York.

Richard LeBLANC, Plaintiff,
v.
UNITED PARCEL SERVICE, Defendant.

No. 11 Civ. 6983(KPF).
|
Signed April 11, 2014.

*OPINION AND ORDER*

KATHERINE POLK FAILLA, District Judge.

***1** Richard LeBlanc was terminated from his employment at United Parcel Service ("UPS") in April 2011 after two incidents in which he admitted to conduct that was violative of UPS company policies. LeBlanc then brought this lawsuit against UPS, claiming that the proffered reasons for his termination were pretextual; that he was disabled during the relevant time period; and that he had suffered discrimination, retaliation, and an unlawful failure to provide reasonable accommodation for his disability, all in violation of the New York City Human Rights Law, N.Y. City Admin. Code §§ 8–101 to 8–131 (the "NYCHRL"). UPS has moved for summary judgment on all claims. That motion is granted in part and denied in part.

## BACKGROUND [1]

[1] Rule 56.1 of the Local Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York (the "Local Rules") requires a party moving for summary judgment to submit a "separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." Local Rule 56.1(a). The movant's asserted facts are deemed to be admitted unless specifically controverted by the statement served by the opposing party. Local Rule 56.1(c). The facts in this Opinion are drawn from Defendant's Rule 56.1 Statement ("Def.56.1"); Plaintiff's responses thereto ("Pl. 56.1 Response"); Plaintiff's affidavit of October 4, 2013 ("LeBlanc Aff ."") (Dkt.# 48); the declaration of Christine Rowan (Dkt.# 44); the declaration of Walker G. Harman and the exhibits thereto (Dkt.# 50), including the affidavit of Dennis Quinn (Harman Decl., Ex. C); and the affirmation of Heather Weine Brochin and exhibits thereto (Dkt.# 45). For convenience, citations to a deposition transcript will be referred to as "[Name] Tr." Defendant's supporting memorandum is referred to in this Opinion as "Def. Br."; Plaintiff's opposition memorandum as "Pl. Opp."; and Defendant's reply memorandum as "Def. Reply."

### A. Factual Background

#### 1. Plaintiff's Employment at UPS from 1991 to 2007

Plaintiff Richard LeBlanc was hired by Defendant UPS as a Helper in or about April 1991. (Am.Compl.¶ 6). Shortly thereafter, Plaintiff was promoted to a full-time Package Car Driver, a position he held for approximately 10 years. (Def. 56.1 ¶ 2).

In February 2001, Plaintiff was promoted to the position of On–Road Supervisor, a position that required him to obtain and maintain a card from the Department of Transportation (the "DOT") that indicated that Plaintiff was medically fit to drive a commercial motor vehicle. (Def. 56.1 ¶ 3; LeBlanc Tr. 23:24–25:7). In his role as On–Road Supervisor, Plaintiff worked approximately 13 to 14 hours a day, beginning at around 6:00 a.m. each day, and spent about 90 percent of his time on the road. (Def. 56.1 ¶ 4; LeBlanc Tr. 16:22–25, 23:21–23). In this capacity, Plaintiff was posted to the UPS facility in Elmsford, New York, and later was transferred to the facility located on Brush Avenue in the Bronx, New York. (Def. 56.1 ¶ 5; LeBlanc Tr. 17:6–15). The Brush Avenue facility was approximately one hour and ten minutes from Plaintiff's home in Newtown, Connecticut, which resulted in an approximately two-hour daily commute. (Def. 56.1 ¶ 5; LeBlanc Tr. 19:16–22, 120:5–7).

#### 2. Plaintiff's Employment at UPS from 2007 through Early 2008

In May 2007, Plaintiff suffered a sudden heart attack and, as a result, took a two-month leave of absence from his employment with Defendant. (Def. 56.1 ¶ 6; LeBlanc Tr. 32:22–33:21). In August 2007, following his leave of absence, Plaintiff returned to his position as On–Road Supervisor at the Brush Avenue facility. (Def. 56.1 ¶ 7;

  

LeBlanc Tr. 37:8–20). Plaintiff continued his role as On–Road Supervisor at the Brush Avenue facility until approximately May 2008, at which time Plaintiff was transferred to the position of Preload and Dispatch Supervisor ("PDS"). (Def. 56.1 ¶ 11; Pl. 56.1 Response ¶ 11; LeBlanc Tr. 37:21–24, 38:4–21). Plaintiff's position as a PDS did not require him to be on the road, but instead required him to unload packages and dispatch other UPS drivers. (LeBlanc Tr. 41:17–23, 47:23–48:3). This position required that Plaintiff work from approximately 1:00 a.m. to 1:00 p.m., or approximately 12 hours a day. (*Id.* at 38:4–17, 46:18–23, 49:3–5).

**a. Plaintiff's Requests for Accommodation**

***2** As detailed in this section, Plaintiff claims that on numerous occasions between 2008 and 2011, he asked Defendant to transfer him to a facility closer to his home, so that, in light of his heart attack, he would have more time to exercise, and would not be subjected to a stressful, two-hour commute. Defendant has no record of Plaintiff having made such requests. (Rowan Decl. ¶ 5).

**i. The 2008 Request to Yvonne Quinones**

On February 12, 2008, Plaintiff received a letter from his treating physician, Dr. Harvey Kramer, that stated in relevant part:

> To whom it may concern:
>
> This 44–year–old gentleman had a myocardial infarction (heart attack) in May 2007. He is having some chest pain at this point. His cholesterol is not adequately controlled and his weight remains a problem. Because of his long commute to work in the Bronx, he does not have time to exercise.
>
> I have strongly recommended that he be transferred to a job with your company closer to his home here in Newtown, Connecticut. This would help him better maintain his health and be a long-term better employee for UPS with fewer days of absenteeism due to health problems. He would be able to exercise if he saved some time on his commute to work.
>
> I hope you will consider this recommendation.

(Brochin Aff., Ex. E).

Shortly after receiving this letter, in the spring of 2008, Plaintiff provided it to a UPS Human Resources Manager, Yvonne Quinones. Plaintiff initially testified that he did so after he was transferred to PDS, because the transfer to the night shift impacted his sleep patterns and caused him stress. (LeBlanc Tr. 115:17–116:25, 119:8). When it was pointed out to him that his transfer to PDS occurred in May 2008, several months after the date of the letter, Plaintiff reversed himself and stated that he provided the letter to Quinones while he was still an On–Road Supervisor and that he experienced stress because of that job. (*Id* . at 125:18–126:6). Plaintiff testified that he told Quinones that he wished to transfer to UPS's Connecticut facilities in Danbury or Watertown, in either a pre-load or a sort position. (*Id.* at 130:2–14).

Quinones informed Plaintiff after receiving the doctor's letter that she would give the letter to the relevant division manager. (LeBlanc Tr. 128:6–15). Quinones did not instruct Plaintiff to file a transfer request or any other documentation formally requesting a transfer to another facility, and Plaintiff did not do so. (*Id.* at 129:3–10). Plaintiff followed up with Quinones regarding the status of his transfer request approximately one week after the initial request and again approximately four weeks later. (*Id.* at 130:15–18). After "nothing happened," Plaintiff again followed up with Quinones, and she informed Plaintiff that there were no vacant positions available due to a company-wide hiring freeze. (*Id.* at 130:2–14, 131:17–132:7).

**ii. The 2009 Requests to Rita Turcios**

***3** According to Plaintiff, in March 2009, with no progress evident on the transfer request he had made approximately one year earlier, Plaintiff approached Rita Turcios, another Human Resources Manager at UPS, about his desire to transfer, and provided her with a copy of the doctor's letter. (LeBlanc Tr. 132:15–133:10). Dennis Quinn, Plaintiff's supervisor at the time, was aware of this request. (Quinn Aff. ¶¶ 5–6). Plaintiff overheard Quinn tell Turcios to "[s]ee what you can do. Get him a little closer." (LeBlanc Tr. 134:23–135:6). Plaintiff testified that he spoke with Turcios three or four times about his desire to transfer to a UPS facility closer to his home in Connecticut. (*Id.* at 135:7–9; *see also id.* at 138:5–17 (acknowledging the absence of any written documentation of his interactions with Turcios)). Turcios did not explain how to apply for a transfer, and did not follow up with Plaintiff regarding his request. (*Id.* at 136:12–137:5).

**iii. The 2010 Requests to Mike Feroni and Roberta Ellis**

  

In or about February 2010, approximately one year after his conversations with Turcios and two years after his conversations with Quinones, Plaintiff spoke with a UPS Division Manager, Mike Feroni. (LeBlanc Tr. 142:17–143:5).[2] Plaintiff asked Feroni if he knew anyone in the Danbury facility who could help Plaintiff transfer to that location; Plaintiff conveyed that the reason he wished to transfer was to be closer to home because of his heart condition. (*Id.* at 144:12–21, 145:5–12; *see also* Quinn Aff. ¶¶ 7–8).[3] At or around this same time, Plaintiff spoke with Roberta Ellis, a UPS Human Resources supervisor, about his request to transfer to a facility closer to his home. (LeBlanc Tr. 167:2–168:12). Again, nothing happened with respect to Plaintiff's request.

2 Feroni's name is spelled differently throughout Plaintiff's opposition papers. (*See, e.g.,* LeBlanc Tr. 144 ("Feroni"); Pl. Opp. 22 ("Ferony"); Quinn Aff. ¶¶ 5–6 ("Feroney")).

3 Plaintiff also recalled speaking with Feroni about his condition in or about the fall of 2007, after Plaintiff returned from medical leave. (LeBlanc Tr. 163:17–164:18). In those discussions, the two men spoke of, among other things, Plaintiff's desire for a transfer because of the stress of his job as an On–Road Supervisor. Plaintiff recalled that, as a result of those conversations, Feroni helped move Plaintiff to PDS in order to shorten his work day. (*Id.* at 163:21–164:14). Plaintiff does not claim in opposing the instant motion that the transfer was an accommodation for his medical condition, but he in fact claims that the transfer was a "demotion" evidencing discrimination on the part of UPS. (LeBlanc Aff. ¶¶ 19, 21).

**iv. The 2011 Requests to Pat Sheppard and a UPS Regional Representative**

At some point in 2011, Plaintiff asked Pat Sheppard, a Division Manager, for his help to transfer to a facility closer to his home. (LeBlanc Tr. 147:12–148:3). Plaintiff asked Sheppard if he could help him move closer to home because of his heart condition. (*Id.* at 147:25–148:6). Plaintiff also sought assistance from an unnamed UPS regional representative who worked in the Danbury area and was visiting the Brush Avenue facility for an inspection. When the representative returned to the facility a week or two later, he indicated to Plaintiff that he was "still looking," ostensibly for a new position for Plaintiff. (*Id.* at 151:20–153:10). Yet again, nothing happened with respect to Plaintiff's request.

Plaintiff testified that all of these individuals were aware that his request to transfer closer to his home stemmed from his heart condition. (LeBlanc Tr. 150:13–21). Defendant has no record of receiving any paperwork from Plaintiff relating to his requests for medical accommodation, and Plaintiff conceded that no written requests attended these oral transfer requests. (Rowan Decl. ¶ 5; LeBlanc Tr. 146:14–16, 168:8–10). Plaintiff contends, however, that it was UPS's obligation to "direct[ him] to take any further action other than to wait for a response." (LeBlanc Aff. ¶ 16; *see also id.* at ¶ 29 ("[A]t no point did anyone even imply that I was required to take additional steps to request a transfer.")). Indeed, at his deposition, Plaintiff testified that each of the individuals to whom he made an unsuccessful transfer request—including Yvonne Quinones, Rita Turcios, Dennis Quinn, Mike Michalak, and Roberta Ellis—had discriminated against him by "not lead[ing him] to the right process for the information [he] needed." (LeBlanc Tr. 275:20–21; *see generally id.* at 268:4–277:2 (amplifying claim)).

**b. Plaintiff's Transfer to PDS**

***4** While the Court is appropriately reluctant to wade into factual disputes in the context of a summary judgment motion, it is compelled to do so with respect to several issues as to which Plaintiff has presented markedly contradictory evidence, including the issue of Plaintiff's transfer to PDS. In his affidavit, Plaintiff contends that: (i) he was "demoted to night shifts at PDS"; (ii) the alleged demotion was a "retaliatory action [that] was taken because of my medical condition and my legitimate and good faith requests for accommodation"; (iii) the transfer to PDS was not "in response to any request for accommodation," nor did it "accommodate[ ] any request." (LeBlanc Aff. ¶¶ 19, 21). These are very serious allegations, and the Court takes them very seriously. Precisely for this reason, the Court is troubled that Plaintiff testified to nothing of the sort at his deposition.

When first asked about the move to PDS, Plaintiff testified simply, "That's where they put me." (LeBlanc Tr. 38:21). Plaintiff recalled the decision being made by Division Manager Mike Feroni; while Plaintiff recalled no explanation being given, he acknowledged that it was "typical for UPS supervisors to be moved around." (*Id.* at 45:7–8; *see also id.* at 18:22–23 (testifying that UPS "just move[d] supervisors wherever they need them")). Plaintiff also acknowledged that the PDS position was a "full-time operations supervisor job,"

  

as had been his prior position of On–Road Supervisor, and that his compensation remained the same. (*Id.* at 45:17–22, 48:14–15). Moreover, Plaintiff acknowledged that he never sought a transfer back to On–Road Supervisor at the Brush Avenue facility, because he enjoyed working at PDS. (*Id.* at 49:11–50:6).

Later on in his deposition, however, Plaintiff suggested that his transfer to PDS was in fact a recognition of lingering medical issues Plaintiff had upon his return to UPS, inasmuch as it was the product of discussions with Mike Feroni concerning the stress of Plaintiff's job as an On–Road Supervisor:

> A. Quite a few times. Me and Mike [Feroni] ... talked a lot.
>
> Q. When you had these conversations, were you suggesting that it would be better for you and you would be happier if you moved closer to home?
>
> A. And it would help my health.
>
> Q. So you specifically talked about your health?
>
> A. Yes.
>
> * * *
>
> Q. During [the approximately four-week period when Plaintiff returned from medical leave and was supervised by Feroni], did you have any conversations with [Feroni] about a transfer?
>
> A. Yes.
>
> Q. You did?
>
> A. Yes.
>
> Q. Tell me your conversations.
>
> A. *It was just that, you know, it was very stressful. That working so many hours, 5 hours a day on car. And that's when he got me to work the preload [PDS].*
>
> Q. So after you told him that you were working a lot of hours on car, he moved you to [PDS]?
>
> A. Yes.
>
> Q. To shorten your day a little bit?
>
> ***5** A. (The witness nods head.)
>
> Q. You have to speak.
>
> A. Yes.

(LeBlanc Tr. 161:25–164:14 (emphasis added)). And, in fact, Plaintiff's transfer from On–Road Supervisor to PDS shortened his work day by two hours. (*Id.* at 121:19–122:4).

**c. Plaintiff's DOT Card**

The parties do not dispute that Plaintiff's DOT card expired in 2007 and was not renewed. (LeBlanc Tr. 38:22–39:14). Plaintiff claimed that his DOT card expired in 2007, after his heart attack, at a time when he was on medication "for his platelets" that caused lightheadedness; as a result, he could not renew the card. (*Id.* at 8:22–48:16). Plaintiff testified, however, that he stopped taking the medication that that impaired his driving ability before he was transferred to PDS. (*Id.* at 80:20–81:7, 232:23–233:22). Thus, Plaintiff testified that he allowed his DOT card to remain expired after May 2008 because he did not need it for his job at PDS, and not because he was on medication that would have prevented him from renewing the card. (*Id.* at 80:20–81:7).

In this litigation, Plaintiff claims that his alleged demotion to PDS was a product of his failure to renew the card, which he claims was "directly related to [his] medical condition and about which my supervisor, Division Manager Mike Michalak, complained frequently." (LeBlanc Aff. ¶ 20). However, that "direct relation" was not borne out by Plaintiff's testimony. According to Plaintiff, Michalak's request did not come until three weeks prior to Plaintiff's termination in April 2011. (LeBlanc Tr. 299:15–300:12). Thus, instead of being unable to renew his DOT card because of medical reasons, Plaintiff failed to renew his DOT card because he "didn't have the chance by the time" Michalak asked him. (*Id.* at 299:13–14).

**3. Plaintiff's Termination from UPS**

Defendant UPS is, and was during the relevant period, required by law to comply with various safety obligations set forth by the Occupational Safety and Health Administration ("OSHA"). (Def. 56.1 ¶¶ 25–26). During the course of his employment, Plaintiff was responsible for training those employees whom he supervised regarding their compliance with these regulations. (LeBlanc Tr. 85:9–11). In 2011, Plaintiff conducted a hazardous materials training for approximately 87 employees. Each employee was required

  

to sign in and attend the training session, watch a video, and answer a series of multiplechoice questions about the video. (*Id.* at 85:22–87:25).

In March 2011, Defendant's Brush Avenue facility was audited by an outside consultant to ensure that Defendant was in compliance with its mandated safety obligations. (Def. 56.1 ¶ 25). Thereafter, auditors approached Daniel Minesinger, a UPS manager, with concerns that some of the training rosters submitted to the auditors had been falsified. (Minesinger Tr. 44:1–45:1). Minesinger expressed these concerns to Jim Fitzgerald, the director of security for UPS's North Atlantic District, who then launched an investigation of the Brush Avenue facility. (*Id.* at 44:2–46:9).

***6** In the course of his investigation, Fitzgerald uncovered evidence that: (i) a manager had contacted his drivers and informed them that they (the drivers) did not have to speak to the auditors, but rather could simply punch out and go home; (ii) various managers had conducted improper training procedures; (iii) managers had falsified training documents; (iv) managers had failed to require certain employees to verify that they had completed the training; and (v) certain employees had abandoned numerous packages at a United States Post Office. (Minesinger Tr. 48:20–49:19). Fitzgerald provided Minesinger with the names of management employees, including Plaintiff, who were suspected of wrongdoing. (*Id.* at 52:5–13, 54:3–14).

Following Fitzgerald's internal investigation and corresponding recommendations, Defendant determined that Plaintiff had falsified training documents submitted in connection with the outside audit. (Minesinger Tr. 67:7–13). When questioned shortly thereafter, Plaintiff admitted to an employee in UPS's Loss Prevention Department that he had falsified the training records by signing the names and filling out the multiple-choice examinations for approximately eight to ten employees. (LeBlanc Tr. 90:5–23). Plaintiff also admitted that he had attempted to make the handwriting on all of these forged records slightly different in order to make them appear more authentic. (*Id.* at 93:16–19). On March 30, 2011, Plaintiff signed a written statement acknowledging that he forged the training records. (Brochin Aff., Ex. H). [4] Plaintiff further acknowledged at his deposition that the falsification of these records was inconsistent with UPS's integrity policy and codes of conduct. (LeBlanc Tr. 91:5–10).

[4] Plaintiff's written statement to Defendant states:

> I Richard LeBlanc fals[ified] the hazmat[ ] sign-[in] sheets and test because [the auditor] was coming and they were overdue. I signed the[ir] names and did the test. This was the first time that I had done this. I planned on doing them over this week but have been on the belt because we [have] been really crazy. [No] one knew I did this I took it upon myself to do it.

(Brochin Aff., Ex. H).

In or around March 2011, Plaintiff was implicated in, and admitted to, a second violation of UPS company policy. As part of his employment as a PDS, Plaintiff was responsible for addressing, sorting, and arranging for the transport of certain United States Postal Service ("USPS") packages to nearby post offices for delivery. (LeBlanc Tr. 53:3–54:22). Over the course of several weeks, Plaintiff left literally dozens of USPS packages on the street next to a post office mailbox in the middle of the night. (*Id.* at 60:21–63:19). Plaintiff initially suggested during his deposition that his supervisors wanted him to "get rid" of the USPS packages, but then acknowledged that he had never been instructed by anyone at UPS to abandon the USPS packages in the manner that he employed. (*Id.* at 65:8–14, 68:2–10).

On one such occasion, on March 16, 2011, Plaintiff left a number of USPS packages by a mailbox in the Bronx; shortly thereafter, a local newspaper published an article detailing the event. (Brochin Aff., Ex. J). Plaintiff was subsequently questioned by UPS's Loss Prevention Department and admitted to leaving the USPS packages unattended alongside of a post office mailbox. (LeBlanc Tr. 74:10–23). On March 30, 2011, Plaintiff signed a written statement admitting that he had abandoned the USPS packages. (Brochin Aff., Ex. I).

***7** Plaintiff was terminated from UPS on April 20, 2011, approximately three weeks after he admitted to the falsification of the training documents and the overnight abandonment of the USPS packages. (LeBlanc Tr. 106:21–107:14, 175:9–13). Plaintiff was informed by his supervisors that the reason for his termination was dishonesty. (*Id.* at 107:12–14). [5]

[5] Plaintiff attempts to create a material issue of fact by alleging that Defendant's witnesses gave divergent reasons for Plaintiff's termination. In particular, Plaintiff argues that Defendant's Rule 30(b)(6) witness, Beverly Riddick, stated that Plaintiff was terminated only because he

  

> abandoned the USPS packages, while a different witness, Daniel Minesinger, cited the falsification of documents as the reason. (Pl.Opp.11). A review of the deposition transcripts, however, demonstrates no such contradiction. While Riddick testified to her recollection of meetings in which the USPS incident was discussed, the testimony cited by Plaintiff concerned the appropriate classification for Plaintiff's termination in Defendant's computer system, and she made clear that she did not recall the precise reason for Plaintiff's termination, except that it involved Plaintiff's misconduct. (*Compare* Riddick Tr. 42:20–43:12, *with id.* at 92:9–13). In any event, the mere fact that Defendant's 30(b)(6) witness testified to only one of Defendant's legitimate, non-retaliatory reasons would not suffice to defeat an otherwise appropriate motion for summary judgment. Minesinger, the person responsible for Plaintiff's ultimate termination, consistently testified that Plaintiff was terminated for violations of Defendant's integrity policies, which included *both* the falsification of documents and the abandoned USPS packages. (Minesinger Tr. 48:18–49:17, 97:6–12, 122:2–10).

Plaintiff subsequently sought review of his termination through Defendant's Employee Dispute Resolution process ("EDR"). (LeBlanc Tr. 174:9–18). Plaintiff elected to pursue peer review, in which a panel of three UPS employees hears both sides of a story and issues a non-binding recommendation. (Minesinger Tr. 98:12–18). In his peer review request form, Plaintiff described his work-related issue as "[s]igning of forms were done and lost packages." (LeBlanc Tr. 185:17–18). Significantly for purposes of the present motion, Plaintiff did not include any allegations of disability discrimination, nor did he mention any requests to transfer to a different facility. (*Id.* at 186:6–187:11).

Following Plaintiff's peer review hearing, the panel recommended that Plaintiff be reinstated to his previous position. (Minesinger Tr. 100:13–16). Defendant rejected the peer review panel's recommendation to reinstate Plaintiff and upheld his termination. (*Id.* at 102:24–103:20). Minesinger testified that the recommendation was rejected because UPS believed that the facts presented by Plaintiff to the peer review panel differed dramatically from those uncovered during the disciplinary investigation. (*Id.* at 102:24–103:11).

**B. The Instant Litigation**

**1. Procedural History**

Plaintiff initiated this action on October 5, 2011. (Dkt.# 1). The case was reassigned to the undersigned on June 19, 2013. (Dkt.# 36). Pursuant to the briefing schedule endorsed by the Honorable J. Paul Oetken, the District Judge then assigned to the case (Dkt.# 16), and as modified by this Court (Dkt.# 41), Defendant moved for summary judgment on September 13, 2013 (Dkt.# 42). Plaintiff filed his opposition on October 5, 2013 (Dkt.# 49), and the motion was fully briefed as of the filing of Defendant's reply on October 18, 2013 (Dkt.# 51).

**2. Plaintiff's Allegations Under the NYCHRL**

Plaintiff alleges a disability based on his May 2007 heart attack, which disability resulted in a one-week hospitalization and a six-week leave of absence from UPS. (LeBlanc Tr. 32:17–33:23). In particular, Plaintiff alleges that he was subjected to discrimination from various supervisors and Human Resources personnel at UPS, who were aware of his heart attack and subsequent medical concerns and yet undertook no efforts to accommodate his requests for a transfer to a facility closer to his home, and in fact demoted him before terminating his employment. (*See, e.g.,* Pl. Opp. 6, 8; LeBlanc Tr. 276:9–12). Alternatively, Plaintiff alleges discrimination in the form of disparate treatment, i.e., that other, similarly situated employees who did not request transfers for medical reasons were treated more favorably than Plaintiff. (Pl. Opp. 12–14; LeBlanc Tr. 253:13–254:6).

***8** Plaintiff also asserts that Defendant failed to provide Plaintiff with any reasonable accommodations for his disability. (Pl.Opp.14–17). Here, Plaintiff alleges that over the course of nearly three years, he repeatedly made requests to be transferred to a facility closer to his home to accommodate his heart condition by shortening his work day. Plaintiff asserts that he repeatedly provided copies of the February 2008 doctor's letter in conjunction with his request to be transferred, beginning in approximately February or March 2008, but that Defendants failed to accommodate him, and similarly failed to engage in an "interactive process" to determine whether a reasonable accommodation was possible. (Pl. Opp. 15; LeBlanc Tr. 115:17–20).

Finally, Plaintiff advances a claim of retaliation, alleging that he was fired in retaliation for his heart condition and related requests to be moved to a different facility. (Pl. Opp. 17–22; LeBlanc Tr. 206:9–25, 289:19–290:2). Plaintiff reiterates

the allegations of discriminatory conduct discussed above and recasts them as further evidence of his retaliation claim. [6]

6 Plaintiff asserted a hostile work environment claim in the Amended Complaint. (Am.Compl.¶ 47). The parties have advised the Court, however, that Plaintiff has withdrawn this claim. (Def. Br. 6 n. 7; *see* Brochin Aff., Ex. K (letter to Court withdrawing claim)).

## DISCUSSION

### A. Applicable Law

#### 1. Summary Judgment Generally

Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted only if all the submissions taken together "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *See* *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1986). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex,* 477 U.S. at 323. A fact is "material" if it "might affect the outcome of the suit under the governing law," and is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248. The movant may discharge this burden by showing that the nonmoving party has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322; *see also* *Selevan v. N.Y. Thruway Auth.,* 711 F.3d 253, 256 (2d Cir.2013) (finding summary judgment appropriate where the non-moving party fails to "come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on an essential element of a claim" (internal quotation marks omitted)).

If the moving party meets this burden, the nonmoving party must "set out specific facts showing a genuine issue for trial" using affidavits or otherwise, and cannot rely on the "mere allegations or denials" contained in the pleadings. *Anderson,* 477 U.S. at 248, 250; *see also* *Celotex,* 477 U.S. at 323–24; *Wright v. Goord,* 554 F.3d 255, 266 (2d Cir.2009). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986) (internal quotation marks omitted), and cannot rely on "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," *Knight v. U.S. Fire Ins. Co.,* 804 F.2d 9, 12 (2d Cir.1986) (quoting *Quarles v. General Motors Corp.,* 758 F.2d 839, 840 (2d Cir.(1985)).

#### 2. Reviewing the Evidence in Summary Judgment Motions

***9** On a motion for summary judgment, a court "should not weigh evidence or assess the credibility of witnesses." *Hayes v. N.Y.C. Dep't of Corr.,* 84 F.3d 614, 619 (2d Cir.1996) (citing *United States v. Rem,* 38 F.3d 634, 644 (2d Cir.1994)). However, the Second Circuit has recognized that, "in the rare circumstance where the plaintiff relies almost exclusively on his own testimony, much of which is contradictory and incomplete, it will be impossible for a district court to determine whether the jury could reasonably find for the plaintiff, and thus whether there are any genuine issues of material fact, without making some assessment of the plaintiff's account." *Jeffreys v. City of New York,* 426 F.3d 549, 554 (2d Cir.2005) (internal quotation marks and citations omitted).

Likewise, in *Rojas v. Roman Catholic Diocese of Rochester,* the Second Circuit affirmed the district court's decision to grant defendant's motion for summary judgment. 660 F.3d 98 (2d Cir.2011) (per curiam), *cert. denied,* 132 S.Ct. 1744 (2012). In *Rojas,* evidence submitted by plaintiff in opposition to the motion directly contradicted factual allegations made in her pleadings. 660 F.3d at 103–06. The Court determined that the district court did not err when, after the plaintiff failed to explain her inconsistent remarks, it granted summary judgment on the basis that no reasonable jury could credit the plaintiff's latter, inconsistent allegations. *See* *id.* at 106.

Relatedly, "[i]t is well settled in [the Second Circuit] that a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment." *Mack v. United States,* 814 F.2d 120, 124–

25 (2d Cir.1987) (citing, *inter alia,* *Perma R & D Co. v. Singer Co.,* 410 F.2d 572, 578 (2d Cir.1969)); *accord* *Brown v. Henderson,* 257 F.3d 246, 252 (2d Cir.2001) ("[F]actual allegations that might otherwise defeat a motion for summary judgment will not be permitted to do so when they are made for the first time in the plaintiff's affidavit opposing summary judgment and that affidavit contradicts [his] own prior deposition testimony." (internal citations omitted)), *quoted in* *Ramos v. Baldor Specialty Foods, Inc.,* 687 F.3d 554, 556 n. 2 (2d Cir.2013). Such a rule serves to prevent a party from creating, *post hoc,* a triable issue of fact, thus defeating a motion for summary judgment. *Mack,* 814 F.2d at 124–25.

Some courts have suggested, however, that this principle will not bar an affidavit when "an issue was not fully explored in the deposition, or the deponent[']s responses were ambiguous." *Giliani v. GNOC Corp.,* No. 04 Civ. 2935(ILG), 2006 WL 1120602, at *3 (E.D.N.Y. Apr. 26, 2006) (citing *Palazzo v. Corio,* 232 F.3d 38, 43 (2d Cir.2000)). Similarly, courts have found that "where a party's conflicting affidavit statements are corroborated by other evidence, the affidavit may be admissible, since the concern that the affidavit is a 'sham' is alleviated." *Id.*

**3. Summary Judgment in Employment Discrimination Cases**

***10** The Second Circuit "has repeatedly emphasized the need for caution about granting summary judgment to an employer in a discrimination case where ... the merits turn on a dispute as to the employer's intent." *Gorzynski v. JetBlue Airways Corp.,* 596 F.3d 93, 101 (2d Cir.2010) (internal quotation marks and citation omitted). "Because direct evidence of an employer's discriminatory intent will rarely be found, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Schwapp v. Town of Avon,* 118 F.3d 106, 110 (2d Cir.1997) (internal quotation marks and citations omitted). "Even in the discrimination context, however, a plaintiff must provide more than conclusory allegations to resist a motion for summary judgment, and show more than 'some metaphysical doubt as to the material facts.' " *Gorzynski,* 596 F.3d at 101 (internal citations omitted).

**B. Analysis**

**1. Certain of Plaintiff's Claims Are Barred by the Statute of Limitations**

Defendant argues that Plaintiff's claims under the NYCHRL for conduct occurring before October 5, 2008, are time-barred. (Def.Br.24). Plaintiff does not respond to this argument. As Defendant correctly identifies, the statute of limitations under the NYCHRL is three years from the date that the claim accrues. *Quinn v. Green Tree Credit Corp.,* 159 F.3d 759, 765 (2d Cir.1998) ( "[Plaintiff's] cause of action under New York's Human Rights Law is governed by a three-year statute of limitations, measured from the filing of the action in court." (internal citations omitted)), *abrogated in part by* *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U .S. 101 (2002) (limiting the strict application of the statutory period to "discrete" acts of harassment). Plaintiff's initial request to Quinones for an accommodation and submission of the February 2008 letter occurred no later than March 2008; Plaintiff's transfer to PDS occurred in May 2008. Therefore, any of Plaintiff's claims that stem from his complaint to Quinones or his transfer to PDF are time-barred because they fall outside the statute of limitations.

This Court heeds the Supreme Court's admonition that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire ... constitute[ ] a separate actionable 'unlawful employment practice.' " *Nat'l R.R. Passenger Corp,* 536 U.S. at 114. As a practical matter, this means that Plaintiff cannot claim discrimination or retaliation relating to his transfer to PDS. His claims regarding Defendant's refusal to transfer him are analyzed somewhat differently, however. The separate allegations accompanying Plaintiff's claims are identical in substance, but each constitutes a separate denial of transfer and, as such, a discrete allegation of an unlawful employment action. Therefore, even though Plaintiff's initial transfer request to Quinones in 2008 falls outside the applicable statute of limitations, he made identical complaints to other UPS representatives that fall within the statute of limitations.

**2. Plaintiff Has Failed to Establish a Prima Facie Case of Disability Discrimination Related to His Termination**

**a. Analyzing Discrimination Claims Under the NYCHRL**

***11** The more significant problem facing Plaintiff's claims is his failure to identify evidence sufficient to create a material

issue of fact as to whether his termination was the result of any discrimination based on any disability he may have suffered. [7]

[7] Defendant suggests in reply that Plaintiff was not disabled in 2011, when he was terminated. (Def. Reply 3 n. 2). The Court notes that Plaintiff has presented evidence of his hospitalization in 2011. (*See, e.g.,* LeBlanc Aff. ¶ 46). It will therefore accept, for purposes of resolving this motion, that Plaintiff has established that he had a qualifying disability in 2011, or, at least, that Defendant has not demonstrated the absence of a genuine issue of material fact concerning the existence of a disability in 2011.

The NYCHRL provides in pertinent part that:

> [i]t shall be an unlawful discriminatory practice [f]or an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

N.Y. City Admin. Code § 8–107(1)(a). "Disability," in turn, is defined as "any physical, medical, mental or psychological impairment, or a history or record of such impairment," *id.* § 8–102(16)(a), including "an impairment of any system of the body; including, but not limited to ... the cardiovascular system," *id.* § 8–102(16)(b)(1).

For years, courts interpreted the NYCHRL as being coextensive with the corresponding federal and state law under both Title VII of the Civil Rights Act of 1964 and the New York State Human Rights Law ("NYSHRL"). *Loeffler v. Staten Island Univ. Hosp.,* 582 F.3d 268, 278 (2d Cir.2009). However, in 2005, the New York City Council rejected this similarity and "amended the City HRL in a variety of ways, including by confirming the legislative intent to abolish 'parallelism' between the City HRL and federal and state anti-discrimination law. *Id.* (quoting The Local Civil Rights Restoration Act of 2005 (the "Restoration Act"), N.Y.C. Local Law No. 85 (2005)). The Second Circuit has recognized that "[i]n amending the NYCHRL, the City Council expressed the view that the NYCHRL had been 'construed too narrowly' and therefore 'underscore[d] that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes.' " *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.,* 715 F.3d 102, 109 (2d Cir.2013) (quoting Restoration Act § 1). [8]

[8] In *Mihalik,* the Court held that federal courts reviewing claims made under the NYCHRL should consider the following factors: (i) NYCHRL claims should be analyzed separately and independently from federal and state discrimination claims; (ii) the court should consider the "totality of the circumstances" and the overall context in which the conduct occurred; (iii) the court should no longer apply the "severe or pervasive" standard of liability to NYCHRL claims; (iv) the court should not allow the NYCHRL to act as a general civility code; (v) the court can still properly dismiss meritless discrimination claims under the NYCHRL, but should consider that even a single comment can be actionable under this law; (vi) summary judgment is still proper in NYCHRL cases if the record demonstrates that no reasonable trier of fact could find in the plaintiff's favor. 715 F.3d at 112–13. The Court's analysis is guided by these principles.

Plaintiff's discrimination claims reflect a trend of bringing claims exclusively under the more liberal NYCHRL, but not its statutory counterparts, Title VII, the Americans with Disabilities Act ("ADA"), and the NYSHRL. [9] But "[w]hile the NYCHRL is indeed reviewed 'independently from and more liberally than' federal or state discrimination claims, it still requires a showing of some evidence from which discrimination can be inferred." *Ben–Levy v. Bloomberg L.P.,* 518 F. App'x 17, 19–20 (2d Cir.2013) (summary order) (quoting *Loeffler,* 582 F.3d at 278); *accord Lugo v. City of New York,* 518 F. App'x 18, 30 (2d Cir.2013) (summary order); *see generally* *Mihalik,* 715 F.3d at 113 ("[A] defendant

is not liable if the plaintiff fails to prove the conduct is caused at least in part by discriminatory ... motives, or if the defendant proves the conduct was nothing more than 'petty slights or trivial inconveniences.' " (quoting *Williams v. New York City Hous. Auth.,* 872 N.Y.S.2d 27, 41 (1st Dep't 2009))); *cf. Matter of McEniry v. Landi,* 84 N.Y.2d 554, 558 (1994) ("A complainant states a prima facie case of discrimination if the individual suffers from a disability and the disability caused the behavior for which the individual was terminated.").

9 Plaintiff does not allege any causes of action based in federal law. Plaintiff is a resident of Connecticut, and Defendant is an Ohio corporation that maintains its principal place of business in Georgia. As such, the Court has jurisdiction over this case on the basis of diversity of citizenship under 28 U.S.C. § 1332, and because the amount in controversy requirement is satisfied. (*See* Am. Compl. ¶ 9).

***12** For purposes of summary judgment, "in analyzing whether a plaintiff has raised a triable issue of fact as to whether [his] termination was motivated by discriminatory animus under the NYCHRL, the courts have continued to employ the familiar burden-shifting analysis of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)." *Kerman–Mastour v. Fin. Indus. Regulatory Auth., Inc.,* 814 F.Supp.2d 355, 366 (S.D.N.Y.2011) (internal citations omitted). The salient difference is that "[w]hile the *McDonnell Douglas* burden-shifting framework still applies, at the final step the plaintiff has a 'lesser burden of raising an issue as to whether the action was motivated at least in part by discrimination or, stated otherwise, was more likely than not based in whole or in part on discrimination.' " *White v. Pacifica Found.,* No. 11 Civ. 2192(PGG), 2013 WL 5288851, at * 12 (S.D.N.Y. Sept. 19, 2013) (quoting *Melman v. Montefiore Med. Ctr.,* 946 N.Y.S.2d 27, 41 (1st Dep't 2012)); *see also Mihalik,* 715 F.3d at 110 n. 8 ("While it is unclear whether *McDonnell Douglas* continues to apply to NYCHRL claims and, if so, to what extent it applies, the question is also less important because the NYCHRL simplified the discrimination inquiry: the plaintiff need only show that [his] employer treated [him] *less well,* at least in part for a discriminatory reason. The employer may present evidence of its legitimate, non-discriminatory motives to show the conduct was not caused by discrimination, but it is entitled to summary judgment on this basis *only if the record establishes as a matter of law that 'discrimination play[ed] no role' in its actions."* (emphases added) (internal citation omitted)).

**b. Plaintiff Has Not Established a Prima Facie Case of Disability Discrimination Related to His Termination**

Under the familiar *McDonnell Douglas* framework, "a plaintiff 'bears the burden of establishing a prima facie case of discrimination,' which includes demonstrating that 'he suffered an adverse employment action ... under circumstances giving rise to an inference of discriminatory intent." ' *Maraschiello v. City of Buffalo Police Dep't,* 709 F.3d 87, 92 (2d Cir.2013) (quoting *Mathirampuzha v. Potter,* 548 F.3d 70, 78 (2d Cir.2008)). " 'Once the prima facie case has been shown, the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action.' " *Id.* (quoting *United States v. Brennan,* 650 F.3d 65, 93 (2d Cir.2011)). To establish a prima facie case in the instant litigation, Plaintiff must show that (i) he is a member of a protected class; (ii) he was qualified for the position he held; (iii) he suffered an adverse employment action; and (iv) the adverse action took place under circumstances giving rise to an inference of discrimination. *See, e.g., Reynolds v. Barrett,* 685 F.3d 193, 202 (2d Cir.2012); *Ruiz v. Cnty. of Rockland,* 609 F.3d 486, 491–92 (2d Cir.2010).

***13** The Court finds for purposes of this analysis that Plaintiff is a member of a protected class, and that he was qualified for the position he held. The parties dispute the particular adverse action or actions Plaintiff claims to have suffered. That is, both parties agree that Plaintiff's termination could suffice as an adverse action. (Def. Br. 8–9; Pl. Opp. 6; *see also* Am. Compl. ¶¶ 35–45). However, for the first time in his opposition to Defendant's motion, Plaintiff advances a second adverse employment action, namely, his "demotion" from On–Road Supervisor to PDS. (Pl.Opp.6). Such a claim is not only improperly raised for the first time on summary judgment, but more importantly is timebarred, as discussed *supra,* and will not be considered by the Court. *See Maharishi Hardy Blechman Ltd. v. Abercrombie & Fitch Co.,* 292 F.Supp.2d 535, 544 (S.D.N.Y.2003) ("A summary judgment opposition brief is not a substitute for a timely motion to amend the complaint ."). [10]

10 While the Court may not consider the transfer to PDS as an adverse employment event, it does consider the circumstances of the transfer as "background evidence" in determining whether Plaintiff has identified evidence of discriminatory animus. The Second Circuit has concluded that so long as at least "one alleged adverse employment action ... occurred within the applicable filing period[,] ... evidence of an earlier alleged retaliatory act may constitute relevant 'background evidence in support of [that] timely claim.' " *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 176 (2d Cir.2005) (quoting and altering *Nat'l R.R. Passenger Corp.*, 536 U.S. at 113); *see also* *Petrosino v. Bell Atl.*, 385 F.3d 210, 220 (2d Cir.2004) (allowing background evidence "to assess liability on the timely alleged act").

The parties also dispute the remaining factor: whether the adverse action occurred under circumstances giving rise to an inference of discrimination. (Def. Br. 9; Pl. Opp. 7–9). An inference of discrimination may be discerned from a variety of circumstances, including, "the employer's continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill [the] position"; the employer's "invidious comments about others in the employee's protected group"; and "the more favorable treatment of employees not in the protected group." *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir.1994) (internal citations omitted).

The standard under the NYCHRL is liberal, but not boundless, and it does not extend to encompass Plaintiff's claims of disability discrimination related to his termination. The only evidence of discriminatory animus to which Plaintiff points is the argument that Plaintiff was "demoted to a PDS without ever requesting it—changing his sleep pattern and further harming his health." (Pl.Opp.Br.7). As a threshold matter, there is nothing in the record, nor in Plaintiff's brief, to suggest that the transfer to PDS was a demotion. As a PDS and as an On–Road Supervisor, Plaintiff was considered a full-time operations supervisor and he was paid the same salary. (LeBlanc Tr. 45:17–22, 48:14–15). *See generally* *Galabya v. N.Y.C. Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir.2000) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly material responsibilities or other indices ... unique to a particular situation." (internal quotation marks and citation omitted)). Furthermore, Plaintiff testified that it was typical for supervisors to be transferred to different positions and different locations. (LeBlanc Tr. 45:7–13; *see also id.* at 18:22–23 (testifying that UPS "just move[d] supervisors wherever they need them")).

***14** Critically, Plaintiff's own testimony negates his claim that his transfer to PDS was a demotion. Plaintiff initially testified that he was transferred to PDS because "that's where they put me"; he later revised the narrative, admitting that the transfer was the product of conversations with Mike Feroni shortly after Plaintiff returned to work from his medical leave, during which Plaintiff told Feroni that his long hours were stressful and harmful to his health. (LeBlanc Tr. 163:21–164:14; *see also id.* at 164:7–14 ("Q. So after you told [Feroni] that you were working a lot of hours on car, he moved you to [PDS]? A. Yes. Q. To shorten your day a little bit? ... A. Yes.")). Having acknowledged that the transfer was made in response to his request, and given the other circumstances of the transfer, Plaintiff can demonstrate neither demotion nor discriminatory animus.

Even if the Court were to consider the allegations of discriminatory intent that are sprinkled throughout Plaintiff's sworn statements, but that are not actually relied upon by Plaintiff in his brief, it could not find a genuine issue of material fact. Plaintiff attempts, for instance, to impute discriminatory animus to the fact that on several occasions his division manager, Mike Michalak, complained that Plaintiff's DOT card had expired, which expiration occurred "as a direct result of his medication and medical condition." (LeBlanc Aff. ¶ 47). Yet again, Plaintiff's contentions are undercut by his own testimony. At his deposition, Plaintiff repeatedly testified that he made no effort to renew his DOT card after its expiration because he did not need it for his job at PDS. (*See, e.g.*, LeBlanc Tr. 38:22–42:10). More importantly, Plaintiff testified that Michalak's requests that he renew his DOT card were made three weeks prior to Plaintiff's termination, at a time when no medical issue precluded Plaintiff from obtaining the card. (*Id.* at 299:13–300:6). Instead, Plaintiff acknowledged, he had simply been busy with other things. (*Id.* at 299:13–14).

Plaintiff testified that no one at UPS ever said anything to him bespeaking an intent to harass or discriminate against him. (LeBlanc Tr. 276:5–8). The record evidence bears out this point. Ultimately, Plaintiff is unable to establish a prima facie

  

case of discrimination because he puts forth no evidence from which a reasonable trier of fact could find that his termination was motivated by discriminatory intent.

**c. Defendant Has Proffered Legitimate, Non–Discriminatory Reasons for Terminating Plaintiff**

Even assuming, *arguendo,* that Plaintiff had established his prima facie case, Defendant proffers two legitimate, non-retaliatory reasons for Plaintiff's termination: (i) Plaintiff falsified mandated hazardous material training records, and (ii) Plaintiff failed to deliver USPS packages on several occasions, instead abandoning them by a mailbox in the middle of the night. (Def.Br.10–15). While attempting in his affidavit to minimize his behavior, Plaintiff does not dispute that he forged his co-worker's signatures on documents concerning the hazardous materials training, or that he violated company policy by placing USPS packages outside of a mailbox late at night. In fact, Plaintiff readily admitted that these actions violated Defendant's integrity policy. (LeBlanc Tr. 91:5–10). [11]

11 The seriousness with which UPS treated Plaintiff's abandonment of USPS packages in the middle of the night was almost certainly enhanced by the fact that a local newspaper published a story detailing the "mysterious" abandoned packages on March 24, 2011. (Brochin Aff., Ex. J; LeBlanc Tr. 68:11–17, 73:10–12).

In connection with the instant motion, Plaintiff avers that he was directed to jettison the USPS packages by his supervisor, Dennis Flood. (LeBlanc Aff. ¶ 38; Pl. 56.1 Response ¶ 35). This revisionist history is patently incredible in the face of Plaintiff's detailed deposition testimony that his supervisors wanted him to remove the packages from the Brush Avenue facility, but were in no way aware that he was dumping them by a local mailbox in the middle of the night. (*See, e.g.,* LeBlanc Tr. 59:23–60:1, 64:12–65:14, 67:23–68:14).

***15** Defendant has demonstrated legitimate, non-discriminatory reasons for Plaintiff's termination. *See, e.g., Pacenza v. IBM Corp.,* No. 04 Civ. 5831(PGG), 2009 WL 890060, at *12 (S.D.N.Y. Apr. 2, 2009) (finding that discharge of plaintiff for violating company "internet usage and harassment policies" was a legitimate, non-discriminatory reason for termination); *Brown v. The Pension Boards,* 488 F.Supp.2d 395, 406 (S.D.N.Y.2007) ( ' "Certainly, an employer is entitled to discharge an employee who fails to follow company rules.... ' " (internal citation omitted)). The burden now shifts back to Plaintiff to demonstrate that Defendant's legitimate, non-retaliatory reason for terminating Plaintiff was actually a pretext for discrimination. *See* *Brightman v. Prison Health Serv., Inc.,* 970 N.Y.S.2d 789, 792 (2d Dep't 2013) ("The plaintiff must either counter the defendant's evidence by producing evidence that the reasons put forth by the defendant were merely a pretext, or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by an impermissible motive." (internal citations omitted)).

**d. Plaintiff Is Unable to Establish that Defendant's Proffered Reasons for Termination Are a Pretext for Discrimination**

Once the employer has proffered its nondiscriminatory reason, the plaintiff raising a claim under the NYCHRL retains the " 'lesser burden of raising an issue as to whether the action was motivated at least in part by discrimination or, stated otherwise, was more likely than not based in whole or in part on discrimination.' " *White,* 2013 WL 5288851, at *12 (quoting *Melman,* 946 N.Y.S.2d at 41). "A plaintiff may satisfy his or her burden at the pretext stage by showing that similarly situated employees outside the protected class received more favorable treatment than the plaintiff did." *Anderson v. Hertz Corp.,* 507 F.Supp.2d 320, 327 (S.D.N.Y.2007) (citing *Graham v. Long Island R.R.,* 230 F.3d 34, 39 (2d Cir.2000)). Such comparators must be "similarly situated in all material respects." *Shumway v. United Parcel Serv ., Inc.,* 118 F.3d 60, 64 (2d Cir.1997) (citing *Mitchell v. Toledo Hosp.,* 964 F.2d 577, 583 (6th Cir.1992)).

"What constitutes 'all material respects' ... varies somewhat from case to case and ... must be judged based on [i] whether the plaintiff and those he maintains were similarly situated were subject to the same workplace standards and [ii] whether the conduct for which the employer imposed discipline was of comparable seriousness. In other words there should be an 'objectively identifiable basis for comparability.' " *Conway v. Microsoft Corp.,* 414 F.Supp.2d 450, 459–60 (S.D.N.Y.2006) (citing *Graham,* 230 F.3d at 40 (internal citations omitted)). "Finally, while the determination of whether two employees are similarly situated is normally a question of fact for the jury, this 'rule is not, however,

an absolute. A court can properly grant summary judgment where no reasonable jury could find the similarly situated prong met.' " *Spiegler v. Israel Disc. Bank of New York,* No. 01 Civ. 6364(WK), 2003 WL 21983018, at *2 (S.D.N.Y. Aug. 19, 2003) (internal citations omitted).

***16** Here, Plaintiff argues that Defendant's proffered reasons for his termination were pretextual because other employees who were caught violating company policy as a result of the audit were not terminated for their disciplinary infractions. (Pl.Opp.12–14). Plaintiff's argument falls short because, simply put, Plaintiff is—and admits to being—not similarly situated to any of the other individuals implicated in the audit infractions. Preliminarily, Plaintiff admits to being unaware of whether any of the other disciplined employees suffered from any medical condition or disability. (LeBlanc Tr. 263:2–10).

More importantly, Plaintiff's offenses were qualitatively different than those of his putative comparators: Plaintiff not only forged training materials, but also repeatedly dumped dozens of USPS packages next to a mailbox in the middle of the night. A review of Plaintiff's testimony in this regard is instructive. First, Plaintiff alleges that John Argiento, a co-worker, was similarly situated to Plaintiff because Argiento "did something wrong." (LeBlanc Tr. 255:14). Specifically, Argiento was supposed to show a subordinate a safety video, but did not, so Argiento instructed the subordinate to sign a form saying that he had watched that video. (*Id.* at 254:8–255:14). Argiento lost his stock options for the year as a result. (*Id.*). However, Plaintiff conceded that Argiento did not forge the employee's signature; the employee took the test himself; and Argiento did not leave any packages by a mailbox in violation of UPS regulations. (*Id.*). For these reasons, Plaintiff concedes that Argiento "didn't do exactly the same thing as" Plaintiff did. (*Id.*). [12]

12 Plaintiff alleges that Donna Mannuzza, another co-worker, also forged an employee's signature on a test, but concedes that he does not have first-hand knowledge of Mannuzza's behavior, and only heard about it second-hand through John Argiento. (LeBlanc Tr. 255:15–257:2). Accordingly, his testimony in this regard is inadmissible hearsay and the Court disregards it. Nonetheless, even if it were admissible, Plaintiff conceded that Mannuzza did not forge the signatures of more than one employee, or leave packages by a mailbox in the middle of the night, and for these reasons, Plaintiff conceded that Mannuzza "did something different than" Plaintiff. (*Id.* at 255:15–257:2).

Second, Plaintiff alleges that three other co-workers, Dave Colantonio, Louie Santana, and an unnamed manager, were similarly situated because each, too, did something "wrong." (LeBlanc Tr. 259:24). Specifically, they told their subordinate drivers to punch out without coming in the building, so as to avoid being questioned by the safety auditor. (*Id.* at 257:3–260:2). Colantonio and Santana were not reprimanded, but the unnamed manager was demoted. (*Id.* at 261:20–24). However, none of the three forged the signatures of any employees, nor left packages by a mailbox in the middle of the night. (*Id.*). Accordingly, Plaintiff concedes that what they did was different from what he did. (*Id.*).

Third and last, Plaintiff alleges that his co-worker Keith Russell was similarly situated because he also did something wrong. (LeBlanc Tr. 260:9–261:13). Russell improperly scanned certain packages, when they should have instead been left in the building. (*Id.*). Russell too lost his stock options for the year. (*Id* .). As Plaintiff himself concedes, his combined violations are objectively more serious than his counterparts, and, as such, there is not an objectively identifiable basis for comparability.

Furthermore, to the extent that Plaintiff's burdens under *McDonnell Douglas* are altered by the Restoration Act, Plaintiff cannot even satisfy the reduced burden under the NYCHRL of showing that he was treated "less well" than his counterparts in part because of a discriminatory intent. *See* *Mihalik,* 715 F.3d at 110–12. In *Mihalik,* the Court noted that even though the Plaintiff's burden in demonstrating discrimination is less than under federal law, the "plaintiff still bears the burden of showing that the conduct is caused by a discriminatory motive." *Id.* at 110. Plaintiff makes no such showing here. Even considering, as the Court must, the "totality of the circumstances," there is simply no indication that Plaintiff's termination was motivated by anything other than his disciplinary infractions. This finding is bolstered by the fact that, according to Plaintiff, Defendant was on notice of his disability beginning in 2008 and continued to give Plaintiff positive performance reviews and annual salary increases. (Harman Decl., Ex. J). It was only after Plaintiff's company policy violations were uncovered that he was terminated.

***17** In short, Plaintiff has failed to establish that his termination was mere pretext; that similarly situated

employees were treated differently; or that discrimination played any role in his termination. *Mihalik* makes clear that summary judgment is warranted in Defendant's favor under the NYCHRL "only if the record establishes as a matter of law that 'discrimination play[ed] no role' in [Defendant's] actions." 715 F.3d 110 n. 8, 113 (internal citations omitted). This is such a case, and Defendants are entitled to summary judgment on Plaintiff's disability discrimination claim.

**3. Material Issues of Fact Preclude Summary Judgment on Plaintiff's Failure to Accommodate Claim**

While the Amended Complaint contained extensive factual allegations related to Defendant's failure to accommodate Plaintiff's disability, it did not specifically allege a failure to accommodate cause of action. (*See* Am. Compl. ¶ ¶ 11–26, 47). A party generally may not "assert a cause of action for the first time in response to a summary judgment motion," but a complaint may include allegations sufficient to put a defendant on notice that the plaintiff intended to allege a certain claim. *Greenidge v. Allstate Ins. Co.,* 312 F.Supp.2d 430, 436–37 (S.D.N.Y.2004) (internal citations omitted); *Ragusa v. Malverne Union Free Sch. Dist.,* 381 F. App'x 85, 89 (2d Cir.2010) (summary order) (finding that a complaint provided sufficient notice of a retaliation claim); *Tse v. New York Univ.,* No. 10 Civ. 7207(DAB), 2013 WL 5288848, at *9–10 (S.D.N.Y. Sept. 19, 2013) (finding that a complaint provided sufficient notice of failure to accommodate and discrimination claims). Defendant clearly had notice that Plaintiff intended to assert a failure to accommodate claim: it moved for summary judgment on that claim, and included extensive briefing to that effect. (*See* Def. Br. 16–20; Def. Reply 7–8). Accordingly, the Court finds Plaintiff to have properly alleged a failure to accommodate claim, and proceeds with the analysis.

A claim for failure to accommodate is a type of disability discrimination that can properly be raised under the NYCHRL. *See Tse,* 2013 WL 5288848, at *10. Again, the more liberal framework enunciated in *Mihalik* applies to Plaintiff's claim. *See Weber v. City of New York,* No. 11 Civ. 5083(MKB), 2013 WL 5416868, at *24 (E.D.N.Y. Sept. 29, 2013). Under the NYCHRL, "[a] plaintiff states a prima facie failure to accommodate claim by demonstrating that [i] plaintiff is a person with a disability under the meaning of the [statute]; [ii] an employer covered by the statute had notice of his disability; [iii] with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and [iv] the employer has refused to make such accommodations." *McMillan v. City of New York,* 711 F.3d 120, 125–26 (2d Cir.2013).

The NYCHRL defines "reasonable accommodation" as "such accommodation that *can* be made that shall not cause undue hardship in the conduct of the [employer's] business. The [employer] shall have the burden of proving undue hardship." NYCHRL § 8–102(18) (emphasis added). Put somewhat differently, under the NYCHRL, "there are no accommodations that may be 'unreasonable' if they do not cause undue hardship." *Phillips v. City of New York,* 884 N.Y.S.2d 369, 378 (1st Dep't 2009). Again, the Court accepts for purposes of analysis that Plaintiff has made the requisite showing that he was disabled under the NYCHRL and that Defendant had notice of the disability.

***18** Defendant first argues that Plaintiff's claim fails because he did not follow its procedures for requesting an accommodation. (Def.Br.16–17). [13] However, under the NYCHRL, once an employee requests an accommodation from his employer, it becomes the employer's duty, not the employee's, to engage in an "interactive process" aimed at reaching a reasonable accommodation. *See* 9 NYCRR § 466.11(j)(4) ("*[t]he employer has a duty to move forward* to consider accommodation once the need for accommodation is known or requested" (emphasis added)). [14] Thus, upon receiving notice from Plaintiff of his disability and of his numerous concomitant requests for accommodation, it was Defendant's obligation, not Plaintiff's, to follow up on that request and move it forward. *See* Background Sec. A(2)(a); Quinn Aff. ¶¶ 5–9. There is no evidence this was done; in fact, Defendant has no record of any of Plaintiff's requests. (Rowan Decl. ¶ 5). The Court finds that, accepting Plaintiff's testimony as true, Defendant was on notice of Plaintiff's disability and requests for accommodation.

13 The case cited by Defendant in support of its argument that a plaintiff must follow the proper procedures for requesting an accommodation is factually inapposite. (*See* Def. Br. 16). In that case, the plaintiff failed to show that she was disabled, or to tie her accommodation requests to any claimed disability; Plaintiff has done both. *See Bresloff–Hernandez v. Horn,* No. 05 Civ. 0384(JGK), 2007 WL 2789500, at *10 (S.D.N.Y. Sept. 25, 2007) ("Without more definite notice

from the plaintiff, namely, *some indication of a an disability and how the disability relates to the request for an accommodation,* the defendant was unable to participate in the interactive process that the ADA envisions. Therefore, the plaintiff never notified the DOC properly of the plaintiff's request for a reasonable accommodation for an alleged disability." (emphasis added)).

14 Following the Second Department's decision in *Phillips,* several courts in New York State and in this Circuit found that, unlike the ADA, an employer's failure to engage in an "interactive process" constituted an independent violation of the NYCHRL. *See* *Phillips,* 884 N.Y.S.2d 369 (concluding that, under the NYSHRL and the NYCHRL, "the first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested," and that "failure to consider the accommodation ... is a violation of [the NYCHRL]"); *see also Morse v. JetBlue Airways Corp.,* 941 F.Supp.2d 274, 302 n. 16 (E.D . N.Y.2013) ("Unlike the ADA, under the NYSHRL and the NYCHRL, an employer's failure to engage in the interactive process is, by itself, a violation of the law." (citing *Phillips* )); *Vangas v.. Montefiore Med. Ctr.,* No. 11 Civ. 6722(ER), 2014 WL 1100153, at *16–17 (S.D.N.Y. Mar. 20, 2014) (same); *Martin v. United Parcel Serv. of Am., Inc.,* 961 N.Y.S.2d 663 (4th Dep't 2013) (holding that the trial court "properly determined that defendant failed to eliminate all triable issues of fact," including "whether defendant engaged in an interactive process to ascertain plaintiff's needs and whether a reasonable accommodation was possible"); *cf.* *McBride v. BIC Consumer Prods. Mfg. Co., Inc.,* 583 F.3d 92, 100–01 (2d Cir.2009) (holding that under the ADA," failure to engage in an interactive process does not form the basis of a disability discrimination claim in the absence of evidence that a reasonable accommodation was possible.").

Notably, however, the New York Court of Appeals has recently limited *Phillips,* in holding that that an employer's failure to engage in an interactive process is not a *per se* violation of the NYCHRL, but is nonetheless an important consideration when evaluating a failure to accommodate claim. *See Jacobson v. New York Health & Hosp. Corp.,* ——N.E.3d ——, N.Y. Slip Op. 02098 (Ct.App. Mar. 27, 2014) (under the NYCHRL, "the employer does not automatically fail to establish the affirmative defense premised on the lack of any reasonable accommodation solely because it did not participate in an interactive process, though that failure poses a formidable obstacle to the employer's attempt to prove that no reasonable accommodation existed for the employee's disability"). As discussed above, because there are material issues of fact as to whether Defendant engaged in an "interactive process," the Court is unable to determine whether a reasonable accommodation existed for Plaintiff, and as a result, summary judgment is inappropriate.

Under the NYCHRL, once an employer is made aware of an employee's disability, it is obligated to engage in an "interactive process" with the employee in order to arrive at a reasonable accommodation. "The 'interactive process' requirement requires the employer to 'investigate an employee's request for accommodation and determine its feasibility.' " *Vangas,* 2014 WL 1100153, at 16 (citing *Phillips,* 884 N.Y.S.2d 369; *Lovejoy–Wilson v. NOCO Motor Fuel, Inc.,* 263 F.3d 208, 218–19 (2d Cir.2001) (the interactive process may include "meeting with the employee who requests an accommodation, requesting information about the condition and what limitations the employee has, asking the employee what he or she specifically wants, showing some sign of having considered the employee's request, and offering and discussing available alternatives when the request is too burdensome." (internal quotation marks, brackets, and citation omitted)).

There are material issues of fact as to whether Defendant in fact engaged in an "interactive process" in order to determine whether it was possible to accommodate Plaintiff's disability. Plaintiff testified that he requested an accommodation on no less than a dozen separate occasions, but Defendant made no effort to engage him in an "interactive process" at any time. (*See* Pl. Opp. 15). Conversely, the record indicates that at least some of Defendant's employees "worked on" or "looked into" Plaintiff's request; in addition, Defendant argues that it afforded Plaintiff a "de facto" accommodation by transferring him to a position that required approximately two fewer hours of work per day. (*See* Def. Br. 19–20; *but*

*see* Pl. Opp. 15 (arguing that Defendant "made no effort to engage Mr. LeBlanc to determine his needs and provide him with accommodation in view of his disability")).

Because the NYCHRL presumes all accommodations to be reasonable until proven otherwise, Defendant bears the burden of demonstrating, as an affirmative defense, that the requested accommodation was overly burdensome, or that Plaintiff could not perform the essential functions of his job even with a reasonable accommodation. *See* N.Y. City Admin. Code § 8–102(18) ("The [employer] shall have the burden of proving undue hardship."); *Phillips,* 884 N.Y.S.2d at 378 ("the employer, not the employee, has the 'pleading obligation' to prove that the employee 'could not, with reasonable accommodation, satisfy the essential requisites of the job' "; further recognizing the New York City Council's "legislative policy choice to deem all accommodations reasonable except for those a defendant proves constitute an undue hardship"). Defendant has failed to put forth any evidence to discharge its burdens, particularly because it has put forth no evidence that it engaged in an attempt to find a reasonable accommodation, as discussed *infra.*

***19** Defendant instead argues that because Plaintiff has failed to demonstrate that a vacant position existed, it is entitled to summary judgment on his failure to accommodate claim. (*See* Def. Br. 17–18; Def. Reply 8). However, Plaintiff bears no such initial burden under the NYCHRL, and the cases Defendant cites for this proposition either arise under the ADA or are factually inapposite. (*See, e.g.,* Def. Reply 8 (citing to *Hart v. New York Univ. Hosp. Ctr.,* No. 09 Civ. 5159(RWS), 2011 WL 4755368, at *5 (S.D.N.Y. Oct. 7, 2011), *aff'd sub nom. Hart v. New York Univ. Hosp. Ctr.,* 510 F. App'x 22 (2d Cir.2013) (summary order) (citing to cases applying only the ADA standard); *Brice v. State Dep't of Health,* 901 N.Y.S.2d 898 (1st Dep't 2009) (finding, in case where defendant first proved that it engaged in an "interactive process" to address plaintiff's request for a reasonable accommodation, that plaintiff had failed to demonstrate that a vacant position existed)).

In short, Defendant's apparent failure to engage in an interactive process leaves a hole in this record concerning whether such process could have yielded a substantive, reasonable accommodation for Plaintiff's disability. Accordingly, the Court finds that material issues of fact preclude summary judgment on Plaintiff's failure to accommodate claim.

**4. Plaintiff Cannot Establish a Prima Facie Case of Retaliation Under the NYCHRL**

Plaintiff also advances a claim of retaliation. After passage of the Restoration Act, retaliation claims under the NYCHRL cover a broader range of conduct than their state and federal counterparts. "[T]o prevail on a retaliation claim under the NYCHRL, the plaintiff must show that [he] took an action opposing [his] employer's discrimination, and that, as a result, the employer engaged in conduct that was reasonably likely to deter a person from engaging in such action." *Mihalik,* 715 F.3d at 112 (internal citations omitted). The Second Circuit has instructed, however, that "the NYCHRL is not a general civility code, and a defendant is not liable if the plaintiff fails to prove the conduct is caused at least in part by ... retaliatory motives, of if the defendant proves the conduct was nothing more than 'petty slights or trivial inconveniences.' " *Id.* at 113 (quoting *Williams,* 872 N.Y.S.2d at 41).

Plaintiff has failed to raise a genuine issue of material fact that Defendant engaged in any conduct that was reasonably likely to deter an employee from complaining against discrimination. For purposes of this analysis, the Court will assume, without deciding, that Plaintiff's repeated requests for a transfer amount to "an action opposing ... discrimination." His evidence of retaliation, however, consists solely of the facts that (i) Plaintiff had a heart attack; (ii) Plaintiff requested numerous times over a period of years to be transferred to another facility; and (iii) Plaintiff was subsequently fired. (LeBlanc Tr. 206:17–19). Plaintiff does not, and, it would seem, cannot, proffer evidence of a causal nexus between his requests for transfer and Defendant's decision to terminate. In fact, the record is devoid of any evidence that these were anything other than factually distinct instances wholly unrelated to one another. As such, even were the Court to paint the factual scenario with the broadest brush possible, there is no genuine issue of material fact as to whether Defendant terminated Plaintiff because of Plaintiff's requests to transfer to a different facility because of his disability.

***20** To the extent that this Court should continue, after *Mihalik,* to consider the Title VII standard for retaliation claims, it must conclude that Plaintiff's claims fail under that analysis as well. "To establish a prima facie case of retaliation under Title VII, a plaintiff must show '[i] that [he] was engaged in protected activity by opposing a practice made unlawful by [statute]; [ii] that the employer was aware

of that activity; [iii] that [he] suffered adverse employment action; and [iv] that there was a causal connection between the protected activity and the adverse action.' " *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 79 (2d Cir.2001) (quoting *Galdieri–Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir.1998)).

As noted, even if Plaintiff's persistent requests to be transferred were deemed a protected activity, Plaintiff has not shown that his termination was in any way related to his complaints over the course of three years prior to his termination. The lack of temporal proximity between the protected activity and the alleged retaliatory conduct underscores the absence of any causal connection. *See Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (noting that to establish a prima facie case, the temporal proximity must be "very close" to be sufficient evidence of causality between "an employer's knowledge of protected activity and an adverse employment action"); *Burkybile v. Bd. of Educ. of Hastings–On–Hudson Union Free Sch. Dist.*, 411 F.3d 306, 314 (2d Cir.2005) (the passage of more than a year defeated a showing of causation). Plaintiff's termination occurred approximately three years after his first transfer request and several months after his last transfer request. This time lapse refutes any inference of causation.

Plaintiff himself highlights that he received positive performance reviews throughout his employment "until three weeks before he was fired." (Pl.Opp.20). It is no coincidence that Plaintiff's wrongful conduct was discovered at approximately the same time, and this convergence of facts leads to the irrefutable inference that Plaintiff's termination had nothing to do with his disability and everything to do with his violations of Defendant's policies. (Minesinger Tr. 120:18–121:3). Plaintiff has failed to raise any factual issue as to a retaliatory motive. Defendant, therefore, cannot be liable to Plaintiff for violating the NYCHRL's anti-retaliation provision. Accordingly, Defendant's motion for summary judgment as to Plaintiff's claim for retaliation under the NYCHRL is granted.

**5. Plaintiff Cannot Establish a Hostile Work Environment Claim Under the NYCHRL**

Finally, Plaintiff has advanced, but has elected not to pursue, his hostile work environment claim. The Court could simply deem those claims abandoned, and grant summary judgment in favor of Defendant. *See Bronx Chrysler Plymouth, Inc. v. Chrysler Corp.*, 212 F.Supp.2d 233, 249 (S.D.N.Y.2002) (dismissing claim as abandoned because non-movant "ma[d]e no argument in support of th[e] claim at all" in its summary judgment opposition papers). However, because the claim has not been formally dismissed, the Court will consider this portion of Defendant's summary judgment motion as unopposed. (*See* Def. Br. 25 (requesting "that the Court grant its motion for summary judgment and dismiss the Complaint with prejudice in its entirety")).

***21** "[I]n considering a motion for summary judgment, [the court] must review the motion, even if unopposed, and determine from what it has before it whether the moving party is entitled to summary judgment as a matter of law." *Vermont Teddy Bear Co., Inc. v. 1–800 Beargram Co.*, 373 F.3d 241, 246 (2d Cir.2004) (quoting *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 416 (4th Cir.1993)). Hostile work environment claims under the NYCHRL are governed by a "more permissive" standard for liability. *Brown v.. City of New York*, No. 11 Civ. 2915(PAE), 2013 WL 3789091, at *18 (S.D.N.Y. July 19, 2013). The alleged conduct need not be "severe and pervasive"; rather, "the plaintiff need only demonstrate 'by a preponderance of the evidence that [he] has been treated less well than other employees because of [his] gender.' " *Mihalik*, 715 F.3d at 110 (quoting *Williams*, 872 N.Y.S.2d at 38); *see also Urquhart v. Metro. Transp. Auth.*, No. 07 Civ. 3561(DAB), 2013 WL 5462280, at *11 (S.D.N.Y. Sept. 25, 2013) ("In determining whether a claim of hostile work environment survives summary judgment under the NYCHRL, the relevant consideration is whether there is a triable issue of fact as to whether the plaintiff has been treated less well than other employees because of his protected status." (internal quotation marks and citation omitted)); *see also Tse*, 2013 WL 5288848, at *15 (holding that "[h]ostile work environment claims brought pursuant to the NYCHRL are analyzed under the same provision as discrimination claims. With hostile work environment claims, the NYCHRL does not require either materially adverse employment actions or severe and pervasive conduct. Rather, to prevail, a plaintiff must prove by a preponderance of the evidence that [he] has been treated less well than other employees because of [his] protected status." (internal quotation marks and citations omitted)).

A review of the record indicates that there is no triable issue of fact as to whether Plaintiff was treated less well than other employees due to his protected status. To the contrary, at his deposition Plaintiff testified as follows:

> Q. It also says in here you suffered a hostile work environment. I understand your lawyer's objection but I'm asking you from a lay perspective, what do you feel was hostile about your work environment?
>
> A. I don't know what you're asking.
>
> Q. Did you experience any conduct that you felt was unwelcome?
>
> A. No.
>
> Q. Did you ever have any comments that were made to you that you felt were inappropriate while at UPS?
>
> A. No.
>
> Q. Did you feel that anything about your work environment was intolerable?
>
> A. It wasn't intolerable.

(LeBlanc Tr. 290:6–21).

Even viewing all facts, most of which stem from Plaintiff's own testimony, in the light most favorable to Plaintiff, there is no evidence indicating that Plaintiff suffered a hostile work environment. Instead, Plaintiff seemed to enjoy his employment with Defendant and get along well with his fellow employees and supervisors. (LeBlanc Tr. 49:25–51:23). For these reasons, Defendant's motion for summary judgment as to Plaintiff's claim for hostile work environment under the NYCHRL is granted.

## CONCLUSION

***22** For the foregoing reasons, Defendant's motion for summary judgment is DENIED with respect to Plaintiff's failure to accommodate claim, and GRANTED with respect to all other claims. The Clerk of Court is directed to terminate Docket Entry 42.

The parties shall appear for a pretrial conference on May 2, 2014, at 2:00 p.m.

SO ORDERED.

### All Citations

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United States District Court, S.D. New York.

Sherry SCALERCIO-ISENBERG, Plaintiff,
v.
MORGAN STANLEY SERVICES GROUP INC., et al., Defendants.

19-CV-6034 (JPO)
|
Signed 12/19/2019

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OPINION AND ORDER

J. PAUL OETKEN, District Judge:

***1** Plaintiff Sherry Scalercio-Isenberg brings this action *pro se* against Defendants Morgan Stanley Services Group Inc., Matthew Dziedzic, James P. Gorman, Jeff Brodsky, and Kerrie R. Heslin (collectively, "Morgan Stanley"), pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621–634, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112 *et seq.*, the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.*, and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-101 *et seq.* (*See* Dkt. No. 5-2 ("Compl.").) Plaintiff alleges that Morgan Stanley discriminated against her on the basis of age, gender, and disability when it failed to hire her. (*Id.*) She further alleges that Defendants retaliated against her when she complained of the discrimination. (*Id.*) Defendants removed the case from New York Supreme Court, New York County, on June 27, 2019. (Dkt. No. 1.) Defendants now move to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Dkt. No. 8.) For the reasons that follow, the motion to dismiss is granted.

**I. Background**

Plaintiff Sherry Scalercio-Isenberg is a 53-year-old woman. (Compl. at 4.) She was previously Managing Director, Head of Americas at Lombard Risk Management. (Compl. at 4, 7.) In that role, she managed a team of fourteen, and reported directly to the London-based CEO. (Compl. at 4.) In 2012 or 2013, Scalercio-Isenberg resigned from Lombard Risk Management due to her need for an emergency surgery. (*Id.*) The surgery left her with a physical disability on her left side, which is visible when she walks. (*Id.*)

Scalercio-Isenberg asserts in her complaint that she applied to Defendant Morgan Stanley over 25 times in approximately six months. (Compl. at 5.)[1] Scalercio-Isenberg alleges that the online application portal "requires the [c]andidate to answer many [p]re-screening questions which directly relate to a [c]andidate['s] [g]ender, [d]isability and [a]ge." (Compl. at 5–6.) However, the online portal only collects data on a volunteer basis regarding a candidate's gender and ethnicity. (Dkt. No. 10-2 at 6.)[2] No data is collected via the online portal regarding a candidate's disability or age. (*See* Dkt. No. 10-2.) In any event, Scalercio-Isenberg never received an interview.

1 Morgan Stanley disputes this fact, asserting that she submitted 24 applications between September 2016 and May 2018. (Dkt. No. 9 at 2 n.3.)

2 The candidate portal was "incorporated by reference" in the complaint (*see* Compl. at 5–6), and thus can be properly considered when considering Morgan Stanley's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007).

Scalercio-Isenberg subsequently contacted Defendant Matthew Dziedzic, who she alleges "oversees and controls the [r]ecruiting and hiring process for [r]isk management positions" in the New York Office. (Compl. at 7.) In a phone conversation, Dziedzic raised concerns about Scalercio-Isenberg's resume format. (*Id.*) A contact of Scalercio-Isenberg whom she describes as "a highly regarded expert in the [r]ecruiting [s]ervices business," allegedly told her that Dziedzic was attempting to " 'weed' [her] out," and that it was "a common practice used by [r]ecruiters to hide Title VII [d]iscrimination." (Compl. at 7–8.) In response, Scalercio-Isenberg decided to "find a way around the potential

  

discrimination she suspected was occurring," and reached out to Victoria Heimann, a recruiter in Morgan Stanley's Philadelphia office. (Compl. at 8, 15.) Heimann provided her with guidance regarding how to improve her resume. (*Id.*)

***2** On May 3, 2018, Scalercio-Isenberg again applied to Morgan Stanley, this time for Executive Director, Liquidity Planning and Coverage Strategy. (Compl. 8–9.) On May 6, 2018, when she checked her application status, she was "shocked" to learn that she was no longer being considered for the position. (Compl. at 9.) The next day, she sent an email to Dziedzic, requesting feedback on her application. (*Id.*) In her email, she expressed her surprise and asserted that she was "highly qualified in every area of [l]iquidity risk [management,] i.e., [t]reasury, cash management, [c]ollateral [management] and all reg[ulatory] compliance." (Compl. at 10.) When he did not respond, she alleges that she sent Dziedzic five follow-up emails from May 8, 2018, to May 26, 2018. (Compl. 10–11.) In the interim, on May 17, 2018, Scalercio-Isenberg had a phone call with Alison Guerzon, who worked with Recruiting, to "review [Scalercio-Isenberg's] background and experience." (Compl. at 11.) As part of that conversation, Guerzon "inquired about a break in employment," and Scalercio-Isenberg "explained the break was due to [her] surgery and provided details." (*Id.*) Guerzon expressed "interest and empathy," and provided information about a helpful program for which Scalercio-Isenberg would qualify. (*Id.*)

In her May 22, 2018 email to Dziedzic, she asserted that "[t]his [wa]s clearly NOT a beneficial time to discriminate against a Female Wallstreet [sic] professional," and that she would not tolerate gender discrimination. (Dkt. No. 10-9 at 2.)[3] In her May 26, 2018 email to Dziedzic, she complained of his "unethical business practices," because he had remained "silent and unresponsive." (Dkt. No. 10-10 at 3.)[4] She further threatened to "move forward with next steps and, at a minimum, email the timeline of events and copies of the emails ... sent ... to [Defendant] James Gorman [President and CEO of Morgan Stanley]." (*Id.*) In further correspondence, she asked how it was "ethically possible" for her to be rejected only three days after applying and demanded a "logical response and explanation." (Compl. at 12.) She informed him that she had "worked in Wall Street a long time [sic]" and that she was "very business savvy and kn[e]w bullshit when [she saw] it." (Compl. at 12, 18.)

3 This email was "incorporated by reference" in the complaint (*see* Compl. at 11), and thus can be properly considered when considering Morgan Stanley's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* *Roth*, 489 F.3d at 509.

4 This email was also "incorporated by reference" in the complaint (*see* Compl. at 11), and thus can be properly considered when considering Morgan Stanley's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* *Roth*, 489 F.3d 499 at 509.

On June 3, 2018, Scalercio-Isenberg emailed Defendant James Gorman, President and CEO of Morgan Stanley. (Compl. at 12.) In the email, she expressed concern about Dziedzic and the "unethical business practice" in the New York office. (*Id.*) She stated that a friend of hers who "knows [and] worked with [Dziedzic] previously ... validated [her] concerns after [she] explained [her] interactions with [Dziedzic]." (*Id.*) She went on to describe herself as "a very smart, dynamic Wallstreet [sic] woman" who "keep[s] [her]self in good shape" and is "very presentable no matter what kind of meeting or board presentation." (Dkt. No. 10-12 at 3.)[5] She explained that she was the Managing Director, Head of Americas at Lombard Risk Management, and provided insight into her working experience in the 1990s:

> In the late 90's, as a Sr. Treasury-Finance Analyst, reporting into the Treasurer/CFO's office[, w]e were in a liquidity crisis! I worked through all the numbers late one night when PNW (Pinnacle West Capital corp./APS [sic] was contemplating Chapter11 [sic] bankruptcy. I was only 28 years old, I had no idea what was happening in the Board room [sic]. The CFO came down and told me what I needed to prepare, asap! I built spreadsheets for hours at late night [sic] figuring our Liquidity position out for 2 weeks! No software program to run the calcs! Our Holding Company managed Liquidity for 4 other entities. [Many Bank Accounts,

> several Broker Dealer relationships for Liquidity funding or Investment for excess Cash reserves.: [sic]

***3** (*Id.*) Scalercio-Isenberg also attached "a timeline of events and a screenshot [of the job position]." (Compl. at 12; *see* Dkt. No. 10-12 at 6.)

5 This email was also "incorporated by reference" in the complaint (*see* Compl. at 12), and thus the full text can be properly considered when considering Morgan Stanley's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* *Roth*, 489 F.3d 499 at 509.

On June 7, 2018, Morgan Stanley began what Scalercio-Isenberg refers to as "formal [r]etaliation efforts" against her by sending her a cease and desist letter. (Compl. at 13.) The letter from Defendant Kerrie Heslin, outside counsel for Morgan Stanley, asserts that Scalercio-Isenberg engaged in "repeated abusive, disparaging and disruptive behavior toward Morgan Stanley's employees, including ... unsolicited emails making false and disparaging remarks about Matthew Dziedzic." (Compl. at 14.) It affirms that all Morgan Stanley hiring decisions "are based on legitimate, business reasons," and that based on Scalercio-Isenberg's "abusive and unprofessional conduct, [she is] not eligible to be considered for any positions at Morgan Stanley. (Compl. at 13.) Heslin wrote that Scalercio-Isenberg "must immediately cease and desist from ... further abusive, disruptive and unwanted contact toward Morgan Stanley's employees, including but not limited to any unsolicited contact via email, telephone, text message or social media." (Compl. at 14.) Scalercio-Isenberg, for her part, asserts that her "communications were professional, pleasant and cordial."[6] (Compl. at 16.)

6 While Morgan Stanley details a number of "harassing email[ ]" communications sent to Defendants after Scalercio-Isenberg's receipt of the cease and desist letter (*see* Dkt. No. 9 at 8–10), the Court cannot consider them in the context of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). None of these emails are "attached to the complaint or incorporated in it by reference," nor are they documents "upon which the complaint solely relies" and are "integral to the complaint." *Roth*, 489 F.3d at 509 (alterations omitted). The emails do not qualify as documents that Scalercio-Isenberg "had knowledge and relied on in bringing suit," *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993), because "[a] plaintiff's reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). Accordingly, these communications are "excluded" from consideration. Fed. R. Civ. P. 12(d).

## II. Legal Standard

A district court properly dismisses an action under Rule 12(b)(1) if the court "lacks the statutory or constitutional power to adjudicate it." *Garcia v. Lasalle Bank NA.*, No. 16 Civ. 3485, 2017 WL 253070, at *3 (S.D.N.Y. Jan. 19, 2017) (quoting *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.A.R.L.*, 790 F.3d 411, 417 (2d Cir. 2015)). "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005). In considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a court must accept as true all the material factual allegations contained in the complaint, but a court is "not to draw inferences from the complaint favorable to plaintiffs." *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004). Additionally, a court "may refer to evidence outside the pleadings." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

***4** Dismissal under Rule 12(b)(6) is proper when a complaint lacks "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A document filed *pro se*," like the complaint here, "is to be liberally construed and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Boykin v. KeyCorp*, 521 F.3d 202, 214 (2d Cir. 2008) (Sotomayor, J.) (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)). Nonetheless, even a *pro se* complaint must contain

"factual allegations sufficient to raise a right to relief above the speculative level," including "an allegation regarding [each] element necessary to obtain relief." *Blanc v. Capital One Bank*, 2015 WL 3919409, at *2 (internal quotation marks omitted). When considering a motion to dismiss under Rule 12(b)(6), the Court may consider facts alleged in the complaint as well as any documents attached to it as an exhibit or incorporated in it by reference. *See* *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (per curiam). Additionally, when a plaintiff fails to attach or incorporate by reference any document "upon which it solely relies and which is integral to the complaint, the court may nevertheless take the document into consideration in deciding the defendant's motion to dismiss." (*Id.* (internal quotation marks and citation omitted))

**III. Discussion**

Defendants move to dismiss Plaintiff's NYSHRL and NYCHRL claims pursuant to Federal Rule of Civil Procedure 12(b)(1). Defendants further move to dismiss Plaintiff's Title VII, ADEA, ADA, NYSHRL, and NYCHRL claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

**A. Territorial Scope of NYSHRL and NYCHRL**

Morgan Stanley argues that Scalercio-Isenberg's NYSHRL and NYCHRL claims must be dismissed pursuant to Rule 12(b)(1) because she cannot plead facts alleging any impact in New York State or New York City. (*See* Dkt. No. 9 at 12–15.)

Scalercio-Isenberg is a resident of New Jersey, not New York. (*See* Compl. at 27.) Under the NYSHRL and NYCHRL, "nonresidents of the city and state must plead and prove that the alleged discriminatory conduct had an impact within those respective boundaries." *Hoffman v. Parade Publ'ns*, 15 N.Y.3d 285, 289 (2010). Critically, "it is the site of impact, not the place of origination, that determines where discriminatory acts occur." *Int'l Healthcare Exch., Inc. v. Global Healthcare Exch., LLC*, 470 F. Supp. 2d 345, 362 (S.D.N.Y. 2007). Scalercio-Isenberg alleges, in sum and substance, that she was discriminated against when she was not hired by the New York office of Morgan Stanley, and that Morgan Stanley retaliated against her when she complained. (*See* Compl.)

However, even "[w]here the discriminatory conduct occurs outside the geographical bounds of New York City, courts have found that the impact requirement is satisfied if the plaintiff alleges that the conduct has affected the terms and conditions of plaintiff's employment within the city." *Anderson v. HotelsAB, LLC*, No. 15 Civ. 712, 2015 WL 5008771, at *2 (S.D.N.Y. Aug. 24, 2015). Courts in this district have accordingly found that when non-resident plaintiffs allege that that they were not hired for a job in New York City on a discriminatory basis, the impact requirement for both the NYSHRL and NYCHRL is met. *See* *Chau v. Donovan*, 357 F. Supp. 3d 276, 283–84 (S.D.N.Y. 2019); *Anderson*, 2015 WL 5008771, at *3–4. Therefore, Scalercio-Isenberg's NYSHRL and NYCHRL claims cannot be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

**B. Age and Gender Discrimination Claims**

Scalercio-Isenberg alleges that Morgan Stanley's decision not to hire her was impermissibly based, in part, on her age and gender. (*See* Compl. at 4.) Discrimination claims under Title VII, the ADEA, and the NYSHRL are evaluated under the *McDonnell Douglas* burden-shifting framework. *See* *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Dimps v. Taconic Corr. Facility*, No. 17 Civ. 8806, 2019 WL 1299844, at *7 (S.D.N.Y. Mar. 20, 2019) ("The pleading standards for employment discrimination claims raised under NYSHRL mirror the pleading requirements under Title VII ... and ADEA.") First, the plaintiff must establish a *prima facie* case of discrimination based on the protected characteristic. The burden then shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. Finally, the burden shifts back to the plaintiff to demonstrate the employer's reason for the adverse employment action was merely a pretext for discrimination. *See* *Dimps*, 2019 WL 1299844, at *4 (citing *McDonnall Douglas*, 411 U.S. at 802, 804).

***5** Here, Scalercio-Isenberg has failed to make out a *prima facie* case that she suffered age or gender discrimination when Morgan Stanley declined to hire her. To establish a *prima facie* claim of gender or age discrimination for failure to hire, a plaintiff must demonstrate: (1) she is a member of a protected class, (2) she was qualified for the job for which she applied, (3) she was denied the job; and (4) the denial occurred under circumstances that give rise to an inference of invidious discrimination. *Vivenzio v. City of Syracuse*, 611 F.3d 98, 106 (2d Cir. 2010). Further, to prevail on a claim of

age discrimination, the plaintiff must demonstrate that her age was the "but for" cause of the adverse employment action. *See* *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009).

Here, Scalercio-Isenberg does not demonstrate that Morgan Stanley's failure to hire her occurred under circumstances that give rise to an inference of gender discrimination. Scalercio-Isenberg has alleged no facts that suggest that Morgan Stanley's decision not to hire her was based on her gender. The fact that she showed that she was "very interested" in employment with Morgan Stanley when she submitted approximately 25 job applications (*see* Compl. at 7), does not entitle her to a job interview. Further, the speed with which her latest application was rejected (*see* Compl. at 8–9) does not suggest anything other than perhaps a familiarity with her application after a litany of job applications. Even the fact that she may have volunteered that she was a woman on her application (*see* Dkt. No. 10-2 at 6) does not move the needle in her favor. Scalercio-Isenberg is missing the connective tissue that links her protected status to the alleged failure to hire. She offers no allegations, save for her own speculation and that of other uninvolved persons, that Morgan Stanley used that information in its hiring decisions — much less that it was a *motivating factor* in their decision making. Accordingly, Scalercio-Isenberg fails to make out even a *prima facie* case for gender discrimination under Title VII or the NYSHRL.

Scalercio-Isenberg further cannot demonstrate that she was not hired on account of age discrimination. She does not allege any facts that suggest that Morgan Stanley even knew of her age when the decision not to hire her was made. Contrary to the allegations in her complaint, the online application portal does not collect information about a candidate's age. (*See* Dkt. No. 10-2.) Scalercio-Isenberg alleges that while assisting her with "streamlining" her resume, Heimann told her: "Sherry, at our [a]ge, we've done a lot, we have a lot of experience ... but you don't want to intimidate the [h]iring manager." (Compl. at 8.) Even if this statement were to be construed as Heimann expressing an opinion that the hiring manager was "intimidated" by Scalercio-Isenberg's age, this comment alone is insufficient to demonstrate that age discrimination was the "but for" cause of Morgan Stanley's failure to hire her. Accordingly, Scalercio-Isenberg also fails to make out a *prima facie* case for age discrimination under the ADEA or the NYSHRL.

**C. Disability Discrimination Claims**

Scalercio-Isenberg also claims that she failed to be hired at Morgan Stanley, in part, on the impermissible basis of her disability. (*See* Compl. at 4.) Disability discrimination claims are similarly handled under the *McDonnell Douglas* framework. *See* *Dimps*, 2019 WL 1299844, at *7. To establish a *prima facie* claim of disability discrimination under the ADA, a plaintiff must demonstrate that (1) the employer is subject to the ADA; (2) the plaintiff is disabled within the meaning of the ADA or perceived to be so by her employer; (3) she was otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; (4) she suffered an adverse employment action; and (5) the adverse action was imposed because of her disability. *Davis v. N.Y.C. Dep't of Educ.*, 804 F.3d 231, 235 (2d Cir. 2015) (per curiam). The "same elements" must be proved to establish an NYSHRL disability claim. *Kinneary v. City of N.Y.*, 601 F.3d 151, 158 (2d Cir. 2010).

***6** Here, Scalercio-Isenberg has alleged no facts to suggest that Morgan Stanley knew of her disability when they made the decision not to hire her. Contrary to the allegations in her complaint, the online application portal does not collect information about a candidate's disability. (*See* Dkt. No. 10-2.) Additionally, while Scalercio-Isenberg alleges that she mentioned her disability to Guerzon in their May 17, 2018, conversation (*see* Compl. at 11), Morgan Stanley had made the decision not to hire her by May 6, 2018 (*see* Compl. at 9). Although Scalercio-Isenberg alleges that her disability is "visible when she walks" (Compl. at 4), she does not allege that any of the defendants ever saw her walk and was thus alerted to her disability. Accordingly, Scalercio-Isenberg fails to make a *prima facie* case of disability discrimination under the ADA or the NYSHRL.

**D. NYCHRL Discrimination Claims**

The NYCHRL has a different pleading standard than pleading standards applied to claims under Title VII, ADEA, the ADA, and the NYSHRL. To prove a claim for discrimination under the NYCHRL, a plaintiff must demonstrate by a preponderance of the evidence that she was "treated less well at least in part *because of* a protected trait." *Bell v. McRoberts Protective Agency*, No. 15 Civ. 0963, 2016 WL 1688786, at *4 (S.D.N.Y. Apr. 25, 2016) (internal quotation marks omitted) (quoting *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 110 (2d Cir. 2013)). As noted above, Scalercio-Isenberg has not pleaded any facts that permit an inference that she was treated less well than other applicants

to Morgan Stanley, including other unsuccessful Morgan Stanley applicants. While Scalercio-Isenberg has asserted that the situation "has smelled bad from the beginning" (Compl. at 12), she must raise "factual allegations sufficient to raise a right to relief above the speculative level." *Blanc*, 2015 WL 3919409, at *2 (citation omitted). Accordingly, her NYCHRL claims must fail.

**E. Retaliation Claims**

"The standards for evaluating ... retaliation claims are identical under Title VII and the NYSHRL." *Kelly v. Howard I. Shapiro & Assocs. Consulting Eng'rs, P.C.*, 716 F.3d 10, 14 (2d Cir. 2013) (per curiam) (citation omitted). To establish a *prima facie* case of retaliation, a plaintiff must demonstrate (1) she engaged in protected activity; (2) the employer was aware of that activity; (3) the employee suffered a materially adverse action; (4) there was a causal connection between the protected activity and that adverse action. *Id.*

It is not clear that Scalercio-Isenberg's allegations establish that she was engaged in protected activity. A plaintiff is "required to have had a good faith, reasonable belief that [s]he was opposing an employment practice made unlawful by Title VII." *McMenemy v. City of Rochester*, 241 F.3d 279, 285 (2d Cir. 2001). "The reasonableness of the plaintiff's belief is to be assessed in light of the totality of the circumstances." *Galderi-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998). "The objective reasonableness of a complaint is to be evaluated from the perspective of a reasonable similarly situated person." *Kelly*, 716 F.3d at 17. Here, Scalercio-Isenberg's alleged subjective belief that she was being discriminated against on the basis of her gender, age, or disability cannot plausibly be viewed as a reasonable belief under the circumstances alleged in the complaint. Scalercio-Isenberg never alleged that anyone commented negatively on any protected characteristic nor has she alleged a single fact that would suggest that Morgan Stanley's decision not to hire her was made on any discriminatory basis. Because she has not alleged enough facts to suggest that she was engaged in protected activity, her retaliation claims under both Title VII and the NYSHRL must fail.

***7** To prevail on a retaliation claim under the NYCHRL, a plaintiff must show (1) that she took an action opposing her employer's discrimination, and (2) that, as a result, the employer engaged in conduct that was reasonably likely to deter a person from engaging in such action. *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 816, 838 (S.D.N.Y. 2013) (quoting *Mihalik*, 715 F.3d at 112). "A defendant is not liable if the plaintiff fails to prove the conduct is caused at least in part by discriminatory or retaliatory motives." *Mihalik*, 715 F.3d at 113 (citing *Williams v. N.Y.C. Hous. Auth.*, 872 N.Y.S.2d 27, 39–40 & n.27 (N.Y. App. Div. 1st Dep't 2009)). As discussed above, Scalercio-Isenberg has failed to allege facts suggesting that any discrimination took place. Further, under the circumstances, it cannot plausibly be inferred that Morgan Stanley's cease and desist letter was motivated even in part by "discriminatory or retaliatory motives." Defendant Heslin explicitly stated that the letter was intended to stop Scalercio-Isenberg's "repeated abusive, disparaging and disruptive behavior toward Morgan Stanley's employees, including ... unsolicited emails making false and disparaging remarks about Matthew Dziedzic." (Compl. at 14.) Indeed, Scalercio-Isenberg herself alleges that that she sent a litany of emails to various Morgan Stanley employees — including emails to Defendant Gorman, Morgan Stanley's CEO. (Compl. at 9–12.) The letter further affirms that all Morgan Stanley hiring decisions "are based on legitimate, business reasons," and that based on Scalercio-Isenberg's "abusive and unprofessional conduct, [she is] not eligible to be considered for any positions at Morgan Stanley." (Compl. at 13.) Given that Scalercio-Isenberg has not alleged any facts plausibly giving rise to an inference that discrimination took place, it follows that she has not alleged any facts that might demonstrate that Defendant Heslin's letter was based even in part by "discriminatory or retaliatory motives." Accordingly, Scalercio-Isenberg's NYCHRL retaliation claim must fail.

**F. Individual Liability**

Scalercio-Isenberg also brings suit against several individual defendants: James Gorman, President and CEO; Jeff Brodsky, Chief Human Resources Officer; Matthew Dziedzic, Head of North America Experienced Recruiting; and Kerrie Heslin, outside legal counsel for Morgan Stanley. As a matter of law, none of the individual defendants can be held liable under Title VII, the ADA, or the ADEA. *See* *Mandell v. Cty. of Suffolk*, 316 F.3d 368, 377 (2d Cir. 2003) (holding that there is no individual liability under Title VII); *Costabile v. N.Y. Dist. Council of Carpenters*, No. 17 Civ. 8488, 2018 WL 4300527, at *4 (S.D.N.Y. Sept. 10, 2018) (citing *Spiegel v. Schulmann*, 604 F.3d 72, 79 (2d Cir. 2010)) (finding that there is no individual liability under the ADA); *Wray v.*

  

*Edward Blank Assocs., Inc.*, 924 F. Supp. 498, 503 (S.D.N.Y. 1996) (holding that there is no individual liability under ADEA). And Defendant Heslin cannot be held individually liable under the NYSHRL because such liability is "limited to individuals with ownership interest or supervisors, who themselves, have the authority to hire and fire employees." *Malena v. Victoria's Secret Direct, LLC*, 886 F. Supp. 2d 349, 365–66 (S.D.N.Y. 2012) (citation omitted). As outside counsel for Morgan Stanley, she does not meet this standard.

Under the NYSHRL and the NYCHRL, individual liability requires "[a]ctual participation in conduct giving rise to a discrimination claim." *Villar v. City of N.Y.*, 135 F. Supp. 3d 105, 143 (S.D.N.Y. 2015). Here, as discussed in Sections III.B–III.E above, Scalercio-Isenberg has not alleged any facts that suggest that there *was* any conduct giving rise to a discrimination claim. Accordingly, it follows that there is no individual liability for any of the defendants under the state or city law.

**G. Leave to Amend**

The Second Circuit has held that "[d]istrict courts should generally not dismiss a *pro se* complaint without granting the plaintiff leave to amend.... However, leave to amend is not necessary when it would be futile." *Ashmore v. Prus*, 510 F. App'x 47, 49 (2d Cir. 2013) (summary order) (citing *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000)). "[T]he court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Cuoco*, 222 F.3d at 112 (quoting *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 795 (2d Cir. 1999) (per curiam)). Accordingly, because of the "special solicitude" with which *pro se* complaints must be read, *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011) (citation omitted), this Court will afford Scalercio-Isenberg an opportunity to amend her complaint and cure the deficiencies noted above.

**IV. Conclusion**

For the foregoing reasons, Defendants' motion to dismiss is GRANTED. Plaintiff is granted leave to file an amended complaint provided that she does so on or before January 21, 2020. If no amended complaint is filed on or before January 21, 2020, this action will be dismissed with prejudice.

***8** The Clerk of Court is directed to close the motion at Docket Number 8.

SO ORDERED.

**All Citations**

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United States District Court, S.D. New York.

Kathryn SHIBER, Plaintiff,
v.
CENTERVIEW PARTNERS LLC, Defendant.

21 Civ. 3649 (ER)
|
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**OPINION AND ORDER**

Edgardo Ramos, D.J.:

***1** Kathryn Shiber brings this action against Centerview Partners LLC, asserting violations of the Americans with Disabilities Act ("ADA"), the New York City Human Rights Law ("NYCHRL"), the New York State Human Rights Law ("NYSHRL"), and the New Jersey Law Against Discrimination ("NJLAD"). Doc. 23 ("Second Amended Complaint" or "SAC"). Before the Court is Centerview's motion to dismiss Shiber's claims under the NYSHRL and the NYCHRL pursuant to 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. For the reasons set forth below, Centerview's motion is GRANTED.

## I. BACKGROUND

In September 2019, Centerview—an investment bank and advisory firm with offices in New York City—offered Shiber, a New Jersey resident, a position in its three-year analyst program. Doc. 23 ¶¶ 3, 5, 9. Shiber started at Centerview on July 6, 2020, after completing several weeks of training and exams. *Id.* ¶¶ 7, 12. Because of the Covid-19 pandemic, Shiber worked remotely from her home in New Jersey from the outset of her employment. *Id.* ¶ 16. Shiber alleges that when Centerview partner Richard Case emailed the incoming analyst class ahead of their start date, he noted that while it made sense for the analysts to start remotely, he would continue to provide updates as Centerview got "closer to ... office re-openings." *Id.* ¶¶ 14, 15. At the time, Shiber understood her remote work to be temporary and expected to work in person from Centerview's New York City offices once those offices reopened. *Id.* at 16. Shiber alleges that although she was working from her home in New Jersey, Centerview deducted New York State taxes from her paycheck. *Id.* ¶¶ 17, 18.

Shiber alleges that soon after she began working, it became clear to her that Centerview expected its employees at times to work 24 hours a day or across several days. *Id.* ¶ 21. But Shiber alleges she has been diagnosed with Unspecified Anxiety Disorder and Unspecified Mood Disorder and that, because of these and to avoid exacerbating her symptoms, she requires consistent sleep. *Id.* ¶ 26.

Shiber explains that in the week of August 24, 2020, she worked from 8:00 a.m. to 1:00 a.m. for two or three days in a row and only logged off from her computer because she believed her tasks for the day were complete. *Id.* ¶ 22. On one of those days, Shiber alleges she was reprimanded via email for logging off at 1:00 a.m. and was told she should have asked the associate and second-year analyst on the project before logging off. *Id.* ¶ 23. According to Shiber, that week, she reached out to Cheryl Robinson, of Centerview's Human Resources Department, and requested to speak with her about how she could manage work-life balance. *Id.* ¶¶ 18, 28.

Shiber spoke with Robinson later that day, informing her that she had a disability and that, as a result, she required eight to nine hours of sleep each night. *Id.* ¶ 29. Shiber alleges Robinson told her she was not required to disclose the specifics of her disability and that she would "see what [she] could do." *Id.* ¶ 30.

***2** According to Shiber, Robinson called her later that day and suggested she put up "guard rails." *Id.* ¶ 31. In other words, at a certain time each night, Shiber would log off from her work computer and would not be expected to perform any work tasks. *Id.* Robinson explained that Shiber's colleagues would be made aware of this accommodation and that, with the accommodation, she would be able to sleep eight hours each night. *Id.* ¶ 32. In response, Shiber told Robinson she was concerned about her team learning that she required an accommodation and did not want her need for an

  

accommodation to impact her opportunities at Centerview. *Id.* ¶ 33. Shiber alleges Robinson told her she would speak with Centerview senior partner Tony Kim, who Robinson assured her would be a "good resource for this type of thing." *Id.* ¶ 34.

Shiber alleges she had a call with Robinson and Kim shortly thereafter and that, on the call, she reiterated that she did not want her need for an accommodation to impact her career. *Id.* ¶ 35. In response, Kim told her he understood and that he would simply tell her co-workers that she would be unavailable at certain hours of the night, noting there are a number of reasons why someone might not be available at those hours. *Id.* ¶ 36. Shiber agreed to the "guard rails" proposal, having been comforted by Kim's and Robinson's assurances. *Id.* ¶ 37. The following week, Robinson told Shiber that Kim had told the team Shiber had a "hard stop" each night between midnight and 9:00 a.m. *Id.* at 38. Shiber notes she did not request those times. *Id.*

Shiber alleges she continued to perform her tasks and worked each day from 9:00 a.m. to midnight. *Id.* ¶ 41. Shiber alleges the only negative feedback she thereafter received related to PowerPoint formatting issues and was not overly critical. *Id.* ¶ 42.

On September 15, 2020, Shiber received a video call invitation from Centerview's Chief Operating Officer Jeanne Vicari; at the time, Shiber assumed Vicari scheduled the call to check in on Shiber's accommodation. *Id.* ¶¶ 44, 45. Instead, Shiber was terminated on the call. *Id.* ¶ 46. Shiber alleges that Vicari and Robinson, who was also on the call, made clear she was being terminated because of her disability, telling her that she could not perform the "essential functions" of her job with her accommodation in place, that she had made a mistake in accepting the job, and that she should have known that the position would require many 120-hour weeks and that, in light of her disability, she would be unable to do the job. *Id.* ¶¶ 47–50.

Shiber was shocked and humiliated, but wanted to salvage her position: she alleges she explained to Vicari and Robinson that she was able to work—and had worked—105 hours a week with her accommodation in place and was willing to work 120 hours a week in order to keep her job. *Id.* ¶ 52. Still, Vicari and Robinson made clear her termination was final and not negotiable. *Id.* ¶ 54. Though Centerview gave Shiber a termination letter, the letter did not provide any explanation for her termination. *Id.* ¶ 56.

In the two-and-a-half months Shiber worked for Centerview, she never stepped foot inside Centerview's New York City office and instead worked exclusively from her home in New Jersey. Doc. 26 at 1.

On April 23, 2021, Shiber brought this action against Centerview, asserting claims only under the NYCHRL. *See* Doc. 1. Centerview moved to dismiss the complaint on July 9, 2021. *See* Doc. 16. Shiber amended her complaint on July 23, 2021, adding claims under the NYSHRL and the NJLAD. *See* Doc. 18 ("First Amended Complaint" or "FAC"). Shiber again amended her complaint on August 23, 2021, this time adding claims under the ADA. *See* Doc. 23. Centerview now moves for partial dismissal of the SAC, arguing that this Court lacks subject matter jurisdiction over Shiber's NYSHRL and NYCHRL claims. *See* Doc. 24.

## II. LEGAL STANDARD

***3** Federal Rule of Civil Procedure 12(b)(1) requires that an action be dismissed for lack of subject matter jurisdiction when the district court lacks the statutory or constitutional power to adjudicate the case. Fed. R. Civ. P. 12(b)(1). The party asserting subject matter jurisdiction carries the burden of establishing, by a preponderance of the evidence, that jurisdiction exists. *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (citing *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). "On a Rule 12(b)(1) motion challenging the district court's subject matter jurisdiction, the court may resolve the disputed jurisdictional fact issues by referring to evidence outside of the pleadings[.]" *Zappia Middle East Constr. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000). When evaluating a motion to dismiss for lack of subject matter jurisdiction, the court accepts all material factual allegations in the complaint as true but does not draw inferences from the complaint favorable to the plaintiff. *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir 2004).

## III. DISCUSSION

### a. NYCHRL and NYSHRL Claims

The NYCHRL covers only those who inhabit or are persons within New York City, including those who work in the city.

*Hoffman v. Parade Publ'ns*, 933 N.E.2d 744, 746–47 (N.Y. 2010). In other words, the NYCHRL does not necessarily restrict non-residents from stating a claim, but rather expands protections to non-residents who work in New York City. *Id.* To state a claim under the NYCHRL, a non-resident plaintiff—like Shiber—must allege that the discriminatory conduct had an impact in New York City. *Id.*

The purpose of the impact requirement is to make the NYCHRL "simple for courts to apply and litigants to follow, lead[ing] to predictable results," and not necessarily to engage in a fact intensive analysis of all the plaintiff's ties to New York City. *Fried v. LVI Servs., Inc.*, 500 F. App'x 39, 42 (2d Cir. 2012) (quoting *Hoffman*, 933 N.E.2d at 747). Courts look to where the impact occurs, not the place of its origination, to determine the location of the discriminatory acts, and the impact needs to be felt by the plaintiff in New York City. *See Vangas v. Montefiore Med. Ctr.*, 823 F.3d 174, 183 (2d Cir. 2016); *Amaya v. Ballyshear LLC*, 340 F. Supp. 3d 215, 221 (E.D.N.Y. 2018) (quoting *Int'l Healthcare Sch. v. Global Healthcare Exch., LLC*, 470 F. Supp. 3d 345, 362 (S.D.N.Y. 2007)).

Courts have repeatedly held that a non-resident plaintiff's occasional meetings in or travel to the city are tangential and do not satisfy the impact requirement. *See Hoffman*, 933 N.E.2d at 748 (dismissing non-resident plaintiff's NYCHRL claims where plaintiff attended quarterly meetings in the city and where the decision to terminate him was made in the city); *see also Fried*, 500 F. App'x at 42.

The Second Circuit has also rejected arguments that impact can be established by interactions with people in New York while the plaintiff is elsewhere, as "the impact of the employment action must be felt *by the plaintiff* in [the city]." *Vangas*, 823 F.3d at 182–83. "To hold otherwise, such that the NYCHRL would cover employees who work at call centers outside the city and whose only contacts with [the city] are phone conversations with persons in the city, would broaden the statute impermissibly beyond those 'who work in the city.' " *Id.*

The impact requirement—as applied under the NYCHRL—also applies under the NYSHRL, as the intent of that statute is to protect those who live or work within New York State. *See E.E.O.C. v. Bloomberg L.P.*, 967 F. Supp. 2d 816, 865 (S.D.N.Y. 2013); *see also Hoffman*, 933 N.E.2d at 747. To state a claim under the NYSHRL, a non-resident plaintiff must allege that she felt an impact in New York State. *Hoffman*, 933 N.E.2d at 747.

***4** Because Shiber at all relevant times worked from her home in New Jersey and because she cannot demonstrate an impact in New York City or New York State, her NYCHRL and NYSHRL claims must be dismissed.

Shiber argues she meets the impact requirement because she expected that at some point she *would* work in New York City. Doc. 28 at 6–7. Shiber explains she was hired to work in New York City and, had she not been fired, she eventually would have been required to work there, once the offices reopened and Centerview employees no longer had to work remotely. *Id.* Here, Shiber analogizes to two failure-to-hire cases, *Anderson v. HotelsAB, LLC* and *Chau v. Donovan*, and argues that she, like the plaintiffs in those cases, was deprived of the opportunity to work in New York. But, as Centerview points out, *Anderson* and *Chau* are inapposite.

In both cases, the plaintiffs asserted discriminatory failure-to-hire claims, alleging they felt an impact in New York when they were denied employment—on discriminatory grounds—in New York. *See Anderson v. HotelsAB, LLC*, 2015 WL 5008771, at *3, 10–11 (S.D.N.Y. Aug. 24, 2015) ("Plaintiff's Complaint sufficiently alleges that Defendants' conduct had an impact with respect to her prospective employment responsibilities in New York City" because "Plaintiff [ ] alleged that she would have worked in New York for a period of seven months and that the requirements of the controller position would have required her to do so each year"); *see also Chau v. Donovan*, 357 F. Supp. 3d 276, 283 (S.D.N.Y. 2019) ("Although Chau never worked in New York City for Granger or Donovan, the job for which she alleges she was not hired in violation of the NYCHRL and NYSHRL would have offered her employment within New York City.").

But, here, Shiber has not alleged—and cannot allege—a discriminatory failure-to-hire claim. Instead, Shiber alleges that, had she not been fired, she at some point might have been able to work in New York City. This is not enough. As another court in this district made plain, pleading impact in New York City by "unspecified future career prospects would ... represent a[n] ... impermissible broadening of the scope of [the NYCHRL and NYSHRL]." *Kraiem v. JonesTrading Inst. Servs. LLC.*, 492 F. Supp. 3d 184, 199 (S.D.N.Y. 2020). In

other words, if "impact can be shown by a mere hope to work in New York down the line, the flood gates would be open." *Id.* Here, Shiber points to no facts showing—with any specificity—that she one day would have been able to work in Centerview's New York City offices or that she relied on some promise of eventual in-person work. Shiber's allegations that Centerview had plans to re-open its offices—at some point—are insufficient to prove that she would have been required to work in person and, in any event, do not show that Shiber suffered an impact in New York City or New York State.

Shiber also analogizes to *Wexelberg v. Project Brokers*. In that case, the court denied a motion to dismiss for lack of subject matter jurisdiction where a plaintiff's employers directed him to work from his home in New Jersey but "consistently treated him as an employee in their New York office[.]" As Shiber points out, the *Wexelberg* court noted that while the plaintiff was not "physically located in the New York office, he was working remotely from his home *for* the New York office[.]" *Wexelberg v. Project Brokers LLC*, No. 13 Civ. 7904 (LAK) (MHD), 2014 WL 2624761, at *4 (S.D.N.Y. Apr. 28, 2014) (emphasis added).

***5** But Shiber ignores the fact that the plaintiff in *Wexelberg* worked at the New York City office for six of the eleven weeks during which he was employed by defendants and only worked from home—at defendants' direction—for the balance of that period. *Id.* at *4. Because he was working remotely when he was terminated, the *Wexelberg* court classified his circumstances as "falling in a grey area" for purposes of the impact requirement. *Id.* at *10. In other words, even though the plaintiff was fired while he was working from home—not in the New York office—the court nonetheless found he was covered by the NYCHRL and the NYSHRL as he initially worked at defendants' New York office and, indeed, worked from there for the majority of his employment. *Id.* at *10–11. Shiber, on the other hand, worked remotely for the entirety of her employment. The circumstances of her employment do not fall within the "grey area" described in *Wexelberg*. [1]

[1] Shiber also cites to *Wexelberg* to support her argument that she was treated as a New York employee because Centerview withheld New York State taxes from her pay. Doc. 28 at 11. In *Wexelberg*, the court noted that the defendants withheld a portion of plaintiff's pay to account for New York State income taxes and that this fact is one of a "set of circumstances lend[ing] itself to several plausible arguments for statutory coverage." 2014 WL 2624761 at *11. But, as stated above, the *Wexelberg* court made clear that the most significant circumstance—for purposes of meeting the impact requirement—was the plaintiff's in-person work in the New York office for the majority of his employment. *Id.* Shiber does not point to any law—and the Court knows of none—showing that payment of New York State taxes *alone*—while not living and working in New York—does not overcome a failure to otherwise meet the impact requirement. Indeed, the Appellate Department, First Department specifically addressed this issue when it dismissed a non-resident plaintiff's NYSHRL and NYCHRL claims where her only argument that she met the impact requirement was that she filed New York State income taxes. *See Benham v. eCommission Solutions, LLC*, 989 N.Y.S.2d 20 (N.Y. App. Div. 2014).

Last, Shiber urges the Court to consider the impact of the Covid-19 pandemic and, specifically, the fact that "remote work arrangements ... have upended the traditional work-from-the-office assumption upon which *Hoffman* was based." Doc. 28 at 12. But Shiber does not point to any law showing that the NYCHRL or NYSHRL requirements have changed in light of the pandemic. As Centerview points out, at no point during the pandemic did the New York City Council or the New York State Legislature amend the human rights laws to render the impact requirement inapplicable or to make an exception for out-of-state plaintiffs working remotely because of the pandemic.

In *Pakniat v. Moor*, the Appellate Division, First Department considered the NYCHRL and NYSHRL impact requirement in light of Covid-19. *See Pakniat v. Moor*, 145 N.Y.S.3d 30, 31 (N.Y. App. Div. 2021). Pakniat, a Montreal resident, sued her employer under the NYSHRL and the NYCHRL for sexual harassment and retaliation. *Id.* at 30–31. The Supreme Court, New York County dismissed Pakniat's claims for lack of subject matter jurisdiction, noting Pakniat lived and worked in Montreal for the entirety of her employment, and rejecting Pakniat's arguments that she met the impact requirement because the alleged discriminatory acts—including the decision to terminate her employment—occurred in New York. *Id.* The Supreme Court also

rejected Pakniat's contention that the *Hoffman* standard should no longer apply, given the increase in remote working arrangements during the Covid-19 pandemic. *Id.* at 31.

In affirming the dismissal, the Appellate Division explained that while the Covid-19 pandemic "has only expanded the diaspora of remote workers, many of them laboring in other states for New York firms," the "clear directive of *Hoffman* bars this Court from expanding the jurisdictional breadth of either statute to encompass behavior such as that alleged in the complaint." *Id.* at 31. Shiber attempts to distinguish herself from the plaintiff in *Pakniat*, noting she was hired to work in New York City for a New York City employer. But, as discussed, that Shiber worked for a New York company is not enough to allow her to come within the protections of the New York human rights laws.

***6** In any event, the court in *Pakniat* made clear that, even in light of the Covid-19 pandemic, a plaintiff asserting claims under the NYCHRL and NYSHRL "must still satisfy the jurisdictional requirement that the impact of the discrimination was felt in New York City and State," and the fact that an allegedly unlawful decision terminating a plaintiff's employment occurred in New York is insufficient to plead impact in New York. *Id.* at 30–31. That is no less true here.

Shiber argues that allowing Centerview to "evade responsibility for its actions under New York law" is counter to the statutes' aim of deterring discrimination by New York employers. Doc. 28 at 13. But Shiber does not offer a workable alternative to the impact requirement for remote employees, and her suggestion that an employee's expectation of future work in New York might allow that employee to gain the protection of New York's human rights laws is, as Centerview makes clear, untenable.

An expectations-based test would be "impractical [and] would lead to inconsistent and arbitrary results." *Hoffman*, 933 N.E.2d at 747. And, "the permutations of such a rule are endless." *Id*. It also would extend the protections of the human rights laws far beyond those the laws are meant to protect. In other words, such an expansion would flout the clear purposes of the *Hoffman* impact requirement: that it be "simple for courts to apply and litigants to follow, lead[ ] to predictable results, and confine[ ] the protections of the [statutes] to those who are meant to be protected—those who work in the city[.]" *Id.*

**b. Request for Discovery**

At the close of her argument, Shiber asks that the Court allow for jurisdictional discovery to "delve into additional facts, including (a) whether or not other similarly situated Analysts have actually returned to working out of Centerview's offices and when that occurred, (b) internal communications at Centerview as to the expectation that Shiber would work in their New York City offices and (c) other indicia that Shiber was considered a New York employee by Centerview." Doc. 28 at 14. But, a plaintiff is not entitled to jurisdictional discovery if it cannot show that the requested discovery is "likely to produce the facts needed to withstand a Rule 12(b)(1) motion." *Molchatsky v. United States*, 778 F. Supp. 2d 431, 438 (S.D.N.Y. 2011) (internal citations and quotation marks omitted), *aff'd*, 713 F.3d 159 (2d Cir. 2013).

Here, it is beside the point whether Centerview currently requires its employees to work in person, whether Shiber one day might have worked out of Centerview's New York office, or whether Centerview considered Shiber to be a New York employee. The fact remains that she did not live or work in New York at the time she was fired and she cannot point to any impact she felt in New York as a result of that firing. In other words, Shiber cannot overcome the reality that she fails the impact test. As such, Shiber's request for jurisdictional discovery is denied.

## IV. CONCLUSION

For the reasons set forth above, Centerview's motion to dismiss Shiber's NYSHRL and NYCHRL claims is GRANTED. The parties are directed to appear for a status conference on May 13, 2022 at 11:00 AM. The parties are instructed to call (877) 411 9748 and enter access code 3029857# when prompted.

The Clerk of Court is respectfully directed to terminate the motion, Doc. 24.

It is SO ORDERED.

**All Citations**

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| STATE OF NEW YORK ) | | **AFFIDAVIT OF SERVICE** |
| ) | ss.: | **BY OVERNIGHT FEDERAL** |
| COUNTY OF NEW YORK ) | | **EXPRESS NEXT DAY AIR** |

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

**On June 8, 2023**

deponent served the within: **Brief for Defendant-Respondent**

**upon:**

Niall MacGiollabhui Esq.
Law Office of Niall MacGiollabhui
171 Madison Avenue, Suite 305
New York, NY 10016
(646) 850-7516

the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

**Sworn to before me on June 8, 2023**

Mariana Braylovskiy

*MARIANA BRAYLOVSKIY*
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

T. Heath

**Job# 320344**