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

PRESENT: IRA GAMMERMAN PART LA Part 27

Index Number : 100018/2004
PASATURO, FRANCINE
VS
HOME SEWING ASSOCIATION, INC.
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
SEP 14 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/7/06

IRA GAMMERMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 27

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FRANCINE PASATURO,

Plaintiff,

- against-

HOME SEWING ASSOCIATION, as successor to HOME SEWING ASSOCIATION, INC., AMERICAN SEWING & CRAFT ASSOCIATION, INC., THE AMERICAN HOME SEWING ASSOCIATION, INC., INTERNATIONAL SEWING MACHINE ASSOCIATION, and JOAN CARTER CAMPBELL,

Defendants.

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Index No. 100018-04

PC No. 19382

IRA GAMMERMAN, J.H.O.:

BACKGROUND

Plaintiff, Francine Pasaturo, brings this action against her former employer, defendant Home Sewing Association, Inc. ("HSA"), seeking damages for employment discrimination.

Plaintiff contends that both the elimination of her job while she was on medical leave for cancer treatment, and HSA's subsequent refusal to consider her for reinstatement, were violations of the anti-discrimination provisions of the New York State Human Rights Law (Executive Law § 290, et seq.) ("NY HRL"), and the New York City Human Rights Law (Administrative Code of the City of New York § 8-10, et seq.) ("NYC HRL").[1]

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[1]The New York Human Rights Law, Executive Law § 296 (1) (a) provides, in pertinent part:

> It shall be an unlawful discriminatory practice: (a) [f]or an employer . . . because of the . . . disability . . . of any individual to

Besides HSA, the caption includes various predecessor and related entities that, according to the complaint, shared office space and common management, and were in the business of putting on trade shows for their member organizations. In addition, the caption names HSA's former Executive Vice President, Joan Carter Campbell ("Campbell"), who made the decision to

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> refuse to hire or employ or to bar or to discharge from employment such individual.

The New York City Human Rights Law provides, in NYC Admin Code § 8-107(1)(a):

> 1. Employment. It shall be an unlawful discriminatory practice:
>
> (a) For 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 [emphasis added].
>
> ***
>
> 15. Applicability; persons with disabilities.
>
> (a) Requirement to make reasonable accommodation to the needs of persons with disabilities. Except as provided in paragraph (b), any person prohibited by the provisions of this section from discriminating on the basis of disability shall make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity.
>
> (b) Affirmative defense in disability cases. In any case where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question.

eliminate plaintiff's job, and who declined to consider her application to return for an available job opening. However, only HSA has been served.

Defendant moves for summary judgment. It contends that the action is time-barred. As to the merits, it asserts that plaintiff's cancer played no role in the decision to eliminate her job or in the decision not to consider her for reinstatement; that her job was eliminated as part of a downsizing program; that she cannot show damages because she subsequently obtained employment at a higher salary; and that, in any event, as a matter of law, plaintiff was not disabled. Plaintiff contends that the action is timely; that she was disabled within the meaning of the NY HRL and the NYC HRL; and that the reasons given by defendant for eliminating her job and refusing to consider her for reinstatement, are pretextual.

Defendant's motion is denied.

FACTS

It appears that plaintiff was hired in 1993. In addition to receptionist duties, she handled various clerical duties as well. The testimony of Elizabeth Barry, one of HSA's then managers, contained in defendant's own moving papers, describes plaintiff as a "very kind person" (BP 17). Barry's testimony also supports the conclusion that HSA's then Executive Vice President Len Ennis, found plaintiff to be a valuable member of his staff, and supported her against staff members who expressed views critical of her job performance (BP 17-18).

In August or September 1995, plaintiff informed HSA that she had been diagnosed with breast cancer. She underwent a mastectomy and returned to work on September 18, 1995. She

continued to work while undergoing chemotherapy and radiation treatment.[2] HSA was aware that she was undergoing this treatment.

Campbell was hired in November 1995, replacing Ennis as Executive Vice President. Campbell testified that she was hired with the understanding that she was to cut costs. She testified that she anticipated that this would include downsizing.

At the time Campbell was hired, plaintiff was undergoing chemotherapy and radiation treatment while working full-time. While there is testimony that the quality of plaintiff's job performance was not affected by her cancer treatment, there is also testimony from which a jury could conclude that plaintiff's job performance was adversely affected by the effects of this treatment while she was undergoing it. As described by plaintiff, this period of time was physically very difficult. Questioned by defense counsel about two notes in her personnel file complaining that she had forgotten to do certain things, she testified that she did not recall the incidents. She testified further:

> This was 11/28/95. Your other document was 11/30/95. That was when I was on chemo.
>
> I have had four treatments of chemo, extensive treatments of chemo. I was sick as a dog. Puking my guts out like you would not believe and weak like, I couldn't even move. There were days I couldn't get out of bed, but I forced myself to go to work because I needed this job. I needed to pay my rent and pay my bills.
>
> I am so hurt that this is what they did behind my back while I was on chemo and not, and didn't have the decency or respect for me to tell me what was going on.

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[2]Defendant's moving memo of law states, at 4, that plaintiff "had surgery, underwent chemotherapy, and returned to work." This chronology is not supported by any evidence in the motion papers. Plaintiff's testimony that she underwent chemotherapy after returning to her job at HSA following her surgery, is uncontradicted by any admissible evidence.

Yes, one of the side effects of chemo is forgetfulness.

So yes, maybe I did forget. I don't know (FP 47).

Subsequently, plaintiff requested permission to take unpaid medical leave until June 30, 1996, to be hospitalized for a bone marrow harvest in preparation for a stem cell transplant. Campbell approved her request in a letter dated January 31, 1996. Plaintiff testified that Campbell told her "not to worry about anything, that my position was secure and just to focus on getting well and that I would have a job when I get back" (FP 101).[3]

In that letter, Campbell advised plaintiff of the approval of her request for unpaid medical leave and stated that HSA

> cannot guarantee that any employee will return to his/her previous job, salary, or location. However, every effort will be made to place employees returning from leave in an available position suitable to their abilities and qualifications.[4]

Campbell testified that she wrote this letter because she "thought we needed to have the terms of our leave agreement in writing" (JC 42).

Plaintiff's last day of work was January 31, 1996, at which time she was placed on unpaid

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[3]Campbell denies making such a statement. She testified that she personally handed plaintiff the letter, but did not recall whether or not she had a conversation with plaintiff at that time (JC 42). For the purposes of this motion, plaintiff's testimony must be credited as true.

[4]Nothing in the motion papers indicates that the letter describes any preexisting HSA policy. In any event, the obligations imposed on an employer by statute to accommodate an employee's disability are not limited by the employer's stated "policy" concerning medical leave or otherwise, see Pimentel v Citibank, N.A., 29 AD3d 141 (1st Dept), lv denied 2006 NY LEXIS 2120 (2006) ("[t]he employer has the responsibility to investigate an employee's request for accommodation and determine its feasibility. An employer who fails to do so, and instead terminates the employee based on exhaustion of leave, has discriminated 'because of' disability within the meaning of the [law]'" [citing Parker v Columbia Pictures Industries, 204 F3d 326 (2d Cir 2000)]).

medical leave, which was scheduled to end June 30, 1996. During her unpaid medical leave she received disability benefits.

Plaintiff was discharged from the hospital on March 22, 1996. On an unspecified date thereafter, in March or April of 1996, plaintiff met with Campbell in her office and stated that she was ready to return to work as of May 1, considerably sooner than the June 30 scheduled end of the medical leave. Campbell testified that at that time, Campbell told plaintiff that "she needed to bring a physician's statement indicating that she was indeed released for full-time work."[5]

Instead of allowing plaintiff to resume working, in a letter dated April 26, 1996, Campbell wrote:

> This is to inform you that your position as Receptionist/Secretary with the American Home Sewing & Craft Association has been eliminated due to lack of work.
>
> Your actual last day of work with the association was January 31, 1996, at which time you were placed on an unpaid medical leave of absence, at your request. Your doctor has released you to return to work May 1, 1996, however, your job position at AHSCA no longer exists.
>
> I am sorry to have to inform you of this action, but as we have been utilizing more technology and streamlining our operations, we have found we need fewer staff to carry on the business of the association.
>
> Please feel free to use my name as a reference when you start to seek other employment.

Campbell testified that she decided to eliminate plaintiff's job while plaintiff was still out

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[5]Plaintiff testified that Campbell asked her to get letters from all her doctors certifying that she was released for full-time work. Plaintiff testified that she did so.

on medical leave. She testified that she did not recall when she made the determination to do so (JC 44), or whether it was at the beginning, middle, or end of plaintiff's leave (JC 45), but surmised that because of the "magnitude" of the decision to eliminate a staff position, it was probably toward the end of plaintiff's leave. She testified that she did not recall whether her decision to eliminate plaintiff's job was before or after the day that plaintiff came to defendant's office to advise that she was ready to return to work (JC 57-58), at which time Campbell told her to supply medical authorization. For the purposes of this motion, the issue must be resolved in plaintiff's favor. Defendant offers no explanation of why Campbell requested medical clearance if she had already decided to eliminate plaintiff's job. Campbell testified that the decision to eliminate plaintiff's job was solely her own.

As discussed more fully below, by letter dated July 3, 1996, plaintiff sought to be reinstated. Without considering whether there were jobs available suited to her qualifications, Campbell declined to consider her application.

NONDISCRIMINATORY REASONS

The naked assertion of a nondiscriminatory reason for its decisions to eliminate plaintiff's job and not consider her for subsequently available jobs, does not act as a talisman automatically entitling defendant to summary judgment. "[S]ometimes the validity of a company's legitimate reduction masks, in an individual case, a discriminatory animus," Gallo v Prudential Residential Services, Ltd. Partnership, 22 F3d 1219 (2d Cir 1994).

Defendant's contention that the asserted reasons for selecting plaintiff's job for elimination, and for refusing to consider her for reinstatement, were based on legitimate, nondiscriminatory reasons, rests entirely on Campbell's testimony as to her thought processes.

For several reasons, her testimony fails to meet defendant's burdens, including its burden to establish "the absence of a material issue of fact as to whether their explanations were pretextual," Forrest v Jewish Guild for the Blind, 3 NY3d 295 (2004). Each of these reasons independently mandates denial of the motion.

First, based solely on the evidence contained in defendant's moving papers, and on Campbell's testimony in particular, a jury could conclude that these decisions were discriminatory.

Second, because the key facts - Campbell's internal thinking processes - are solely within her knowledge, she being the person who acted on behalf of defendant, and because the issue turns on her credibility, summary judgment is inappropriate.

Third, the material contained in defendant's own moving papers contains inconsistencies based upon which a jury could discredit defendant's claim of nondiscriminatory motive.

DOWNSIZING

Campbell testified that from the beginning of Campbell's employment, she was seeking to cut costs and to determine who could be terminated to do so.[6] She testified that she terminated

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[6]Campbell testified that at the time she was hired, she was told that because of financial difficulties, the Search Committee wanted HSA downsized, and that the decision of whom to let go was left to Campbell (JC 29-30). She testified that the Search Committee did not tell her how much money she needed to save (JC 31).

The savings resulting from the elimination of plaintiff's job were relatively small. Campbell testified that HSA's budget was approximately $1.7 million when she started. Campbell received a bonus in 1996, the year she eliminated plaintiff's job, of approximately $17,100. She received an annual bonus of at least 18% of her base salary, which was $95,000 in 1996 and was $121,700 at the time she resigned (JC 54-56). It appears that plaintiff's salary in 1995 was $18,999.84. Plaintiff received a raise for 1996 to $19,570.00.

Campbell testified that only one employee, the mailroom clerk, who was the first

one employee, George, who was the mailroom clerk, prior to the time that plaintiff went on unpaid medical leave. Subsequently, some employees were terminated, and some new employees were hired. Ultimately, it appears that HSA divested itself of all employees.[7] Campbell left HSA in 2003.

Campbell testified tunequivocally (JC 40), that at the time that plaintiff's leave began, she had not targeted plaintiff as someone to be terminated, had not decided that plaintiff's position would be eliminated, and had not made any decisions about staffing.

Campbell testified that the sole reason for her decision to terminate plaintiff was:

> Most of the work of her position was being done by other people, and because, while she was on leave of absence, the office was functioning fine, no one was required to do overtime and no temporary work was needed, it became apparent that we could do without that position (JC 46).[8]

In response to a question as to what efforts were made to return plaintiff to her position when she sought to return to work, Campbell testified that "at the time she was ready to return to work I had no opening suitable to her abilities and qualifications." She testified that at the time

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employee terminated, was being paid less than plaintiff.

It appears that at the time that plaintiff sought to return to her job, only one or two other employees had been terminated: the mailroom clerk and, perhaps, another secretary who, as discussed more fully below, was fired not for lack of work, but for failing to keep up with her workload. It also appears that at least three new employees were hired after plaintiff's job was eliminated.

[7]It appears that eventually HSA's operations were fully outsourced to Foxfire Management, a Pennsylvania company run by Joyce Perhac, a former HSA employee.

[8]Defendant's moving memo of law states, at 4, "Ms. Campbell simply determined that HSA did not need a receptionist." Campbell's testimony does not include such a statement. In any event, plaintiff's duties were not limited to receptionist functions.

that she decided to eliminate plaintiff's job, she did not consider eliminating any other positions, but was observing everybody else.[9]

She affirmatively testified that plaintiff's job performance played no role in the decision to eliminate plaintiff's job (JC 52). Therefore, while defendant's memo of law is heavily focused on the quality of plaintiff's job performance, defendant cannot rely on any alleged defective job performance to justify its elimination of plaintiff's job. Indeed, to conclude that Campbell made that decision based, even in part, on any dissatisfaction with plaintiff's job performance, a jury would necessarily have to discredit Campbell's testimony as lacking in credibility. As discussed more fully below, such a conclusion would permit a jury to find that defendant's actions were discriminatory.

Thus, according to Campbell's testimony, she chose that particular time to eliminate plaintiff's job rather than eliminate plaintiff's job at some time in the future, and/or eliminate other jobs, because plaintiff was already out on medical leave and therefore her job responsibilities had been reassigned to other people. As discussed more fully below, this testimony, contained in defendant's moving papers, supports the conclusion that her decision to eliminate plaintiff's job at the time that she did, was discriminatory. Also, as discussed more fully below, evidence in defendant's own moving papers, including Campbell's own testimony, demonstrates that a co-worker, Susan, to whom many of plaintiff's duties had been assigned while plaintiff was on medical leave, failed to keep up with the resulting workload, and that the co-worker was fired for that reason. Therefore, a jury could conclude that the asserted ground

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[9]She inconsistently testified (JC 72) that she considered eliminating the position of an employee named Susan instead of that of plaintiff.

("no work available") for eliminating plaintiff's job was pretextual. Either of these findings would permit a jury to find for plaintiff on the issue of discrimination.

As can be seen from its plain text, Campbell's April 26, 1996 letter telling plaintiff that her job had been eliminated, did not tell her she was fired. Plaintiff's leave was scheduled to end June 30, 1996. On its plain face, Campbell's April 26, 1996 letter can be construed as meaning that at that point in time, there was no longer a job to which plaintiff could return prematurely from her leave, leaving open the possibility that, as promised in Campbell's January 31, 1996 letter, "every effort will be made to place employees returning from leave in an available position suitable to their abilities and qualifications." As noted, above, Campbell viewed that letter as memorializing a "leave agreement."

By letter dated July 3, 1996, three days after the end of her medical leave, plaintiff sought reinstatement. It appears that at that time, notwithstanding Campbell's letter stating that HSA needed fewer staff, HSA was actively seeking to hire an employee whose job would include functions previously handled by plaintiff and by Susan (who had been fired). Nevertheless, plaintiff's application was rejected without an interview. Asked whether, at the time, in July 1996, that plaintiff sought to be reinstated, there was a position for which plaintiff might have been qualified, Campbell testified, "I don't know because I didn't interview her" (JC 80).

A jury could conclude that failing to ascertain whether there was a position for which plaintiff might have been qualified was contrary to the agreement memorialized in Campbell's January 31, 1996 letter to make "every effort ... to place employees returning from leave in an available position suitable to their abilities and qualifications." A jury could therefore conclude that defendant did not comply with its own representation and stated policy. Such a finding

would support plaintiff's claim of discrimination, see Gallo v Prudential Residential Services, Ltd. Partnership, 22 F3d 1219, supra (where defendant contended that plaintiff had been discharged as part of a reduction in force, and where defendant had personnel policy to find positions for employees whose jobs had been eliminated, evidence that, inter alia, defendant refused to consider plaintiff for opening that would mostly entail work that plaintiff had previously performed, presented genuine issues of material fact as to pretextuality).[10]

After plaintiff filed suit, Campbell hired an employee whom she knew had breast cancer, who underwent breast cancer surgery while employed by HSA, and who continued working for HSA after the surgery. Contrary to defendant's contentions, this post-suit hiring does not establish that defendant's termination of plaintiff and/or its refusal to consider her for reinstatement, were unrelated to her cancer. It does, however, demonstrate that HSA's downsizing did not prevent it from hiring employees.

STATUTE OF LIMITATIONS

After pursuing the required administrative remedies, plaintiff brought suit in federal court, asserting claims under the Americans with Disabilities Act, 42 USC § 12101, and the Family and Medical Leave Act, 29 USC § 2601, et seq., together with state law claims. By order dated December 3, 2003, the federal court dismissed the federal claims, on the ground that HSA did not have enough employees to come within the scope of the federal statutes. The federal

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[10]In addition, as discussed more fully below, defendant's own moving papers contain evidence, including Campbell's own testimony, that Campbell's reasons for refusing to consider plaintiff's application for reinstatement were at least in part reasons that a jury could conclude related to problems with plaintiff's job performance attributable to the effects of her cancer treatment. That evidence supports plaintiff's claim that defendant's refusal to consider reinstating her was discriminatory.

court declined to exercise supplemental jurisdiction over plaintiff's state law claims.

The present action was commenced within the six months of that dismissal permitted by CPLR 205. Accordingly, contrary to defendant's contention, it is not untimely, both because a dismissal of a federal action for lack of subject matter jurisdiction is within the protection of CPLR 204, see e.g. Denehy v St. John's Queens Hosp., 114 AD2d 991 (2d Dept 1985), and because, in any event, the numerosity requirement does not go to subject matter jurisdiction, Arbaugh v Y & H Corp., ___ US ___, 126 SCt 1235 (2006).

SUBSEQUENT EMPLOYMENT/DAMAGES

The complaint alleges, at paragraph 34, that the damages sustained by plaintiff include mental anguish. There is evidence from which a jury could conclude that plaintiff, already experiencing the emotional impact of a cancer diagnosis and difficult therapy, experienced significant emotional damages and mental anguish as the result of defendant's actions, including depression resulting from loss of the ability to pay her basic living expenses.[11] Mental anguish is a compensable injury in disability discrimination cases, see e.g. Consolidated Edison Co. of New York, Inc. v New York State Div. of Human Rights on Complaint of Easton, 77 NY2d 411, reargument denied 78 NY2d 909 (1991); Beame v DeLeon, 209 AD2d 252 (1st Dept 1994), affd

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[11]Inter alia, plaintiff testified that as the result of defendant's actions, she suffered from depression, that she remained unemployed until June of 1996, and that her employment was initially in the form of temporary jobs. She testified:

> I was eight months behind in my rent. My brother was paying my medical. I couldn't find a job. They were going to evict me. They were going to shut off my phone, my Con Ed. I was lucky I had friends of mine and my family making my food because I couldn't afford to buy food (FP 114).

as mod on other grounds, 87 NY2d 289 (1995); New York City Transit Authority v State Div. of Human Rights, 78 NY2d 207 (1991); Weissman v Dawn Joy Fashions, Inc., 214 F3d 224 (2d Cir 2000).

Contrary to defendant's contention, the fact that plaintiff ultimately found employment at higher compensation does not somehow "cancel out" the damages she had already sustained.

MCDONNELL PRINCIPLES

In adjudicating disability cases under the NY HRL and NYC HRL, New York law generally follows the burden-shifting standards of McDonnell Douglas Corp. v Green, 411 US 792 (1973). As the Court of Appeals explained in Ferrante v American Lung Assn, 90 NY2d 623 (1997):

> The standards for recovery under section 296 of the Executive Law are in accord with Federal standards under title VII of the Civil Rights Act of 1964 (42 USC § 2000e et seq.). (see, e.g., Matter of Laverack & Haines v New York State Div. of Human Rights, 88 NY2d 734, 738; Matter of Miller Brewing Co. v State Div. of Human Rights, 66 NY2d 937, 938). On a claim of discrimination, plaintiff has the initial burden to prove by a preponderance of the evidence a prima facie case of discrimination (Texas Dept. of Community Affairs v Burdine, 450 US 248, 252-253; McDonnell Douglas Corp. v Green, 411 US 792, 802). To support a prima facie case of age discrimination under the Human Rights Law, plaintiff must demonstrate (1) that he is a member of the class protected by the statute; (2) that he was actively or constructively discharged; (3) that he was qualified to hold the position from which he was terminated; and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination (see, e.g., McDonnell Douglas Corp. v Green, 411 US, at 802; Woroski v Nashua Corp., 31 F3d 105, 108 [2d Cir]).
>
> The burden then shifts to the employer "to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision" (Matter of Miller Brewing Co. v State Div. of Human Rights, 66

NY2d, at 938; see also, Texas Dept. of Community Affairs v Burdine, 450 US, at 253; Matter of Laverack & Haines v New York State Div. of Human Rights, 88 NY2d, at 738).

If the trier of fact believes the plaintiff's evidence, and if the defendant is silent in the face of the presumption of discrimination, judgment must be entered for plaintiff because no issue of fact remains in the case (Texas Dept. of Community Affairs v Burdine, 450 US, at 254). However, if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff, then the presumption raised by the prima facie case is rebutted and " 'drops from the case' " (St. Mary's Honor Ctr. v Hicks, 509 US 502, 507 [citation omitted]).

Despite the absence of the presumption, plaintiff is still entitled to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination (see, e.g., McDonnell Douglas Corp. v Green, 411 US, at 805 [claimant "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a ... discriminatory decision"]). This may be accomplished when it is "shown both that the reason was false, and that discrimination was the real reason" (St. Mary's Honor Ctr. v Hicks, 509 US, at 515 [emphasis in original]).

"The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination" (St. Mary's Honor Ctr. v Hicks, 509 US, at 511 [emphasis in original]).

On the other hand, "[i]t is not enough ... to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination" (St. Mary's Honor Ctr. v Hicks, 509 US, at 519 [emphasis in original]) for plaintiff to prevail. Thus, even if the employer's reason is "unpersuasive, or even obviously contrived" (St. Mary's Honor Ctr. v Hicks, 509 US, at 524), plaintiff always has the ultimate burden of proof to show that intentional discrimination has occurred under a consideration of all the evidence.

Discriminatory intent need not be proved directly. As the Court of Appeals held in

Forrest, supra:

> A person alleging racial or other discrimination does not have to prove discrimination by direct evidence. It is sufficient if he or she proves the case by circumstantial evidence.

As noted above, one of the ways in which a jury may find for a plaintiff on the issue of discrimination is to infer discrimination upon finding that the employer's asserted nondiscriminatory reason is pretextual, Ferrante v. American Lung Assn, supra.[12]

SUMMARY JUDGMENT STANDARD

Care must be taken not to confuse the substantive burdens for such a discrimination claim, with the procedural burdens and standards under New York summary judgment practice.[13]

The burden on a movant is not lessened merely because the claim is one for

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[12]See also Listemann v Philips Components, 13 AD3d 494 (2d Dept 2004) ("A factfinder who concludes that the proffered reasons are pretextual is permitted to infer the ultimate fact of discrimination"); Morse v Wyoming County Community Hospital and Nursing Facility, 305 AD2d 1028 (4th Dept 2003) ("a discriminatory intent may be inferred from "the very fact that an employer offers a sham excuse for its action". Thus, contrary to the determination of the court, a plaintiff may defeat a properly supported motion for summary judgment in a discrimination case under the Executive Law by raising a triable issue of fact concerning either the falsity of the employer's explanation for the challenged action or the employer's discriminatory motive [emphasis in original; internal citations omitted]); Reeves v Sanderson Plumbing Products, 530 US 133 (2000); Chuang v Univ. of Cal. Davis, 225 F3d 1115 (9th Cir 2000) ("plaintiff can prove pretext in two ways: (1) indirectly, by showing that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer"); Branson v Ethan Allen, Inc., 2004 WL 2468610 (ED NY 2004).

[13]"To grant summary judgment is must clearly appear that no material and triable issue of fact is presented...This drastic remedy should not be granted where there is any doubt as to the existence of such issues...or where the issue is 'arguable' [emphasis added]," Sillman v Twentieth Century-Fox F. Corp., 3 NY2d 395 (1957); see also Jacqueline S. v City of New York, 81 NY2d 288 (1993) ("summary judgment should be denied if there is a doubt as to whether there is a material triable issue of fact [emphasis added]); cf. Gilbert, The Gondoliers ("Of that there is no manner of doubt, no probable, possible shadow of doubt, no possible doubt whatever.")

discrimination, see Ferrante v American Lung Assn, 90 NY2d 623, supra (denying defendant's summary judgment motion in discrimination case; observing that "defendant has confused plaintiff's ultimate burden with the showing needed to withstand a summary judgment motion"); see also Forrest v Jewish Guild for the Blind, 3 NY3d 295 (Smith, G.B., J., concurring) ("Two separate but related analyses are relevant on this appeal, the standard governing summary judgment and the standard governing the allegations of racial discrimination alleged by plaintiff.")

As the Court of Appeals held in Winegrad v New York University Medical Center, 64 NY2d 851 (1985), under New York practice,

> [a]s we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers [emphasis added; internal citations omitted].[14]

The moving defendant's burden on a motion for summary judgment in a case governed by the McDonnell principles was stated by the Court of Appeals in Forrest v Jewish Guild for the Blind, supra:

> [T]o prevail on their summary judgment motion, defendants must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were

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[14]In this regard, New York summary judgment practice differs from federal summary judgment practice, see Celotex Corp. v Catrett, 477 US 317 (1986) (in federal practice, as to issues on which the nonmovant has the burden of proof at trial, the movant need not support its motion with evidence.) Therefore, in applying federal precedent, a state court must take care to adhere to state rules regarding the burden on a summary judgment motion.

pretextual [emphasis added].[15]

Thus, merely offering evidence of a nondiscriminatory reason is not enough. To prevail on a motion for summary judgment, a movant must include, in its moving papers, admissible evidence sufficient to establish the absence of a triable issue of fact as to whether its explanation is pretextual. It is well established that if the moving papers fail to meet the movant's burden, the motion must be denied even if the opposing papers are inadequate, Winegrad v New York University Medical Center, supra.

INCONSISTENCIES

One established way for a plaintiff to meet her burden at trial to show pretext is the presence of inconsistencies in defendant's evidence.

Thus, in Reeves v Johnson Controls World Services, Inc., 140 F3d 144 (2d Cir 1998), plaintiff contended that he was fired because of his disability. Defendants contended that he was fired for dishonesty, to wit, lying about a certain incident. Reversing the lower court, the Second Circuit held that the inconsistencies

> at least create a triable issue as to the true motivation for plaintiff's dismissal. To the extent that these inconsistencies can only be

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[15]See also Hemingway v Pelham Country Club, 14 AD3d 536 (2d Dept 2005) ("To establish its entitlement to summary judgment in an age discrimination case, a defendant must demonstrate either the plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for its challenged actions, the absence of a material issue of fact as to whether the explanations proffered by the defendant were pretextual [emphasis added]").

In New York practice, a motion for summary judgment based on the alleged inability of the plaintiff to establish the elements of a prima facie case must be supported by admissible evidence, see e.g. Tibodeau v Abrahams, 260 AD2d 367 (2d Dept 1999); Purificati v Meyer & Diensenhouse, 243 AD2d 697 (2d Dept 1997).

resolved based upon credibility determinations, such questions of witness credibility are to be decided by the jury [emphasis added].[16]

Whether Office Was Functioning Adequately in Plaintiff's Absence

The premise that plaintiff's job was eliminated because "the office was functioning fine, no one was required to do overtime and no temporary work was needed, it became apparent that we could do without that position," is severely undercut by inconsistent evidence, contained in defendant's own moving papers, that 1) after plaintiff went on medical leave, much of her work was reassigned to another staff member, Susan; and 2) Susan was fired because she did not handle the workload.

Plaintiff testified, without contradiction, that Susan was working at HSA when plaintiff was hired. Campbell testified that Susan's duties were similar to plaintiff's.[17] Campbell testified

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[16]See also Rodriguez v General Motors Corp., 904 F2d 531 (9th Cir 1990) ("Gibbs is not merely denying the employer's reasons. He is pointing to specific divergencies between the three reasons. His case, of course, is not open and shut ... Gibbs should have the opportunity to test the credibility of the reasons before the jury").

[17]Plaintiff testified that both she and Susan functioned as assistant to the show director (FP 20). She testified that both she and Susan would put membership packets and information packets together for trade shows (FP 25). She testified that both she and Susan typed correspondence, and that with the possible exception of Pat Kobishyn, one of the managerial staff, of the staff typed their own correspondence (FP 27).

Campbell testified (JC 72) that Susan performed secretarial duties: answering the telephone, typing, and filing. She testified that Susan's duties were similar to plaintiffs.

Barry's testimony was somewhat different. She testified (EB 60) that Susan was Len Ennis' secretary. She testified that plaintiff was the receptionist, and that Susan was responsible for the bulk of correspondence and secretarial work; that both Susan and plaintiff prepared form letters; that preparing form letters was Susan's job but that plaintiff would assist if Susan was backlogged or if plaintiff had nothing else to do. She testified that plaintiff's primary job was to answer the telephone and to let people in at the door (EB 60-61).

(JC 72) that Susan was fired because, according to Campbell, she "wasn't a good employee," this being because, according to Campbell, "she did not do the work she was supposed to be doing," and because "Susan could not organize her work enough to do what she had on her plate." Barry, one of defendant's managers, likewise testified that Susan was fired for being unable "to keep up with the work."[18]

Even though defendant would presumably be in possession of such information, the date on which Susan was fired is not established by admissible evidence in the present motion papers.[19] Campbell's testimony, including her testimony that plaintiff's job was eliminated before

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[18]There is no evidence in the motion papers that Susan had any such problem prior to the time that plaintiff went on medical leave. To the contrary, Campbell, who began working at HSA in November 1995, testified that she realized that Susan was not a good employee in early 1996. Plaintiff's medical leave began February 1, 1996.

[19]The complaint alleges on information and belief, at ¶ 24, that Susan informed defendant in June 1996 that she wished to resign. The answer denies that allegation.

The complaint alleges, at ¶ 28, that Susan's employment terminated in our about the end of July 1996 or early August 1996; that on information and belief a replacement was hired two days before Susan's last day of employment; that on information and belief the replacement was terminated after approximately two weeks; and that another replacement was subsequently hired.

Defendant's answer, at ¶ 28, denies those allegations but admits that Susan's employment terminated on or about July 31, 1996 (no evidentiary support is provided to establish that date), and that the first replacement "was terminated after two weeks because she did not have the skills and abilities necessary to perform the duties of the Office Manager position."

Campbell testified (JC 62) that as of the April 26, 1996 letter advising plaintiff that her job had been eliminated, there was no receptionist and no secretary. That testimony supports the inference that Susan, who was a secretary, had already been fired prior to April 26, 1996. On this motion for summary judgment, that inference must be resolved in plaintiff's favor.

Campbell testified (JC 72) that Susan was fired while plaintiff was still on leave; see also (JC 76) (plaintiff still on leave when Susan was fired). She testified further (JC 80) that Susan's position "may have been open" in or around July 1996," before Evelyn, Susan's replacement, was hired.

Susan was terminated, permits the inference that at the time that plaintiff's job was eliminated, there was a need for someone to do both the work that Susan had been doing and the work that Susan was fired for not doing. This is further supported by the admission in defendant's answer, at paragraph 28, that "the first individual hired to replace [Susan], was terminated after two weeks because she did not have the skills and abilities necessary to perform the duties of the Office Manager position."

Resolving this issue in plaintiff's favor for the purposes of this motion, that fact would permit a jury to discredit both Campbell's testimony that she eliminated plaintiff's job because "while she was on leave of absence, the office was functioning fine, no one was required to do overtime and no temporary work was needed, it became apparent that we could do without that position," and the statement in her April 26, 1996 letter that plaintiff's job was eliminated for "lack of work." That in turn would permit a jury to find that the excuse given by defendant was pretextual, see Chuang v University of Cal. Davis Bd. of Trustees, 225 F3d 1115 (9th Cir 2000) ("plaintiff can prove pretext in two ways: [1] indirectly, by showing that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable, or [2] directly, by showing that unlawful discrimination more likely motivated the employer [emphasis added]").

MIXED MOTIVE

Even discounting the evidence, contained in defendant's own moving papers, that Campbell's "lack of work" excuse for refusing to allow plaintiff to return to work was pretextual, there is an additional reason to find that this decision was discriminatory. While a jury could well find, based on Campbell's testimony, that downsizing was a motivating factor in Campbell's

decision to eliminate plaintiff's job, it could also find, also based on that same testimony by Campbell, that Campbell's decision was discriminatory.

As the Court of Appeals held in Forrest, supra:

> appellant could prove her case even if there were mixed motives for her firing, that is a legitimate and an illegitimate reason.

In such a "mixed motives" case, the McDonnell principles are modified. The rules applicable to such a "mixed motive" case are referred to as the Price Waterhouse principles, referring to Price Waterhouse v Hopkins, 490 US 228 (1989). As the court held in Allen v Domus Development Corp., 273 AD2d 891 (4th Dept), rearg denied 715 NYS2d 206 (4th Dept 2000):

> In a "mixed-motives" case, unlike a "pretext" case, "the burden is on the plaintiff to show that an illegitimate factor ... played a motivating or substantial role in the defendant's employment decision ... If the plaintiff presents sufficient evidence to support an inference of impermissible discrimination, the burden then shifts to the employer to show that the employment decision would have been reached in the absence of that impermissible motive."[20]

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[20]See also Parker v Columbia Pictures Industries, 204 F3d 326 (2d Cir 2000) (plaintiff "must show only that disability played a motivating role in the decision"); Stratton v Department for the Aging for City of New York, 132 F3d 869 (2d Cir 1997) (plaintiff may establish a "mixed-motive" case by "convinc[ing] the trier of fact that an impermissible criterion in fact entered into the employment decision" [internal citations omitted]. Danzer v Norden Systems, Inc., 151 F3d 50 (2d Cir 1998) (employee may meet burden of proving that adverse employment decision was motivated at least in part by impermissible reason by using mixed-motives analysis or by proving pretext under three-step analysis of McDonnell); Luciano v Olsten Corp., 110 F3d 210 (2d Cir 1997); LaFond v General Physics Services Corp., 50 F3d 165 (2d Cir 1995); Tyler v Bethlehem Steel Corp., 958 F2d 1176 (2d Cir), cert denied 506 US 826 (1992) (discussing differences between "pretext" cases that apply McDonnell Douglas, and "mixed-motive" or "direct evidence" cases that apply Price Waterhouse; plaintiff may establish a "mixed-motive" case by "convinc[ing] the trier of fact that an impermissible criterion in fact entered into the employment decision.")

THE DECISION-MAKING PROCESS

As Judge Haight held in Berk v Bates Advertising USA, Inc., 1997 WL 749386 (SD NY 1997) ("Berk I"), where plaintiff asserted discrimination based on breast cancer, and where "[a]t least eighteen other Bates employees were discharged around the time that plaintiff was terminated":

> with regard to plaintiff's ultimate termination, even if financial pressures were involved, if discrimination placed plaintiff in a more tenuous employment position than others, her claim may proceed [emphasis added].[21]

Cf. DiMascio v General Elec. Co., 27 AD3d 854 (3d Dept 2006) (defendant met burden to show nondiscriminatory reduction in workforce as reason for determination; "defendant showed that the methods it used to select employees for termination were nondiscriminatory.")

Thus, if the decision to eliminate plaintiff's job at that time was influenced by improper factors, there is ground for imposing liability.

Accordingly, even were a jury to conclude that, had plaintiff been allowed to return to her original job, or been reinstated, her employment would have been terminated within a relatively

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[21]See also Eshelman v Agere Systems, Inc., 397 F Supp 2d 557 (ED Pa 2005). In that disability discrimination case, as here, defendant claimed that plaintiff, a cancer patient, was terminated as part of a reduction in force. Upholding a jury verdict in plaintiff's favor, the court stated:

> a business downturn decimated Agere, eventually resulting in the layoff of 18,000 employees worldwide and the closure of its manufacturing operation in Reading, Pennsylvania, where Eshelman had worked. As part of a company-wide reduction in force (Force Management Program or "FMP"), Eshelman was selected for lay-off effective December 30, 2001. Agere's handling of this process was the primary focus at trial.

short period of time because of genuine downsizing, such a finding would not require a judgment in defendant's favor. It would relate merely to the extent of damages. Even if plaintiff would have ultimately been terminated as defendant continued to downsize, she can prevail on the merits if her cancer played a role in the decision to eliminate her job on (or before) April 26, 1996 rather than at a later date.

CAMPBELL'S OWN TESTIMONY DEMONSTRATES THAT PLAINTIFF'S ILLNESS PLAYED A MAJOR ROLE IN THE DECISION NOT TO ALLOW HER TO RETURN TO HER JOB

Campbell testified that when she decided to eliminate plaintiff's job, plaintiff's job was the only job that she considered eliminating (JC 46). Taking Campbell's testimony as true, the reason that Campbell chose to eliminate plaintiff's job at that time, is that, because of her cancer, plaintiff was temporarily absent on medical leave, and her job functions had therefore been assigned to other staff members. That is, instead of placing plaintiff on an equal footing with other employees in deciding whose job to eliminate, Campbell selected plaintiff's job because she was on medical leave for cancer treatment.

Thus, while some jobs were going to be eliminated, because a jury could find that "discrimination placed plaintiff in a more tenuous employment position than others, her claim may proceed," Berk I, 1997 WL 749386, supra.[22]

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[22]See also Konipol v Restaurant Associates, 2002 WL 31618825 (SD NY 2002) ("Since [plaintiff] claims that her absence was caused by her disabling cancer-related fatigue and since RA ended her employment because of that extended absence, Konipol has also adequately demonstrated that she was terminated because of her disability [emphasis added]"); Morris v City of New York, 153 F Supp 2d 494 (SD NY 2001) (jury could find defendant's asserted reason for nonpromotion pretextual where recommendation not to promote officer included overt references to officer's sick record, and employer knew officer's absent days were related to his disability); Greene v State of New York., 1998 WL 264838 (SD NY 1998) ("Plaintiff's final evaluation remarks that Plaintiff 'used an excessive amount of sick time during this period due to illness' ...

Therefore, in order to prevail on this motion for summary judgment, defendant must satisfy not only its burden, as defined in Forrest, for claims to which the McDonnell rules are applicable, but also its Price Waterhouse burden. To meet the latter, defendant was required to supply admissible evidence in its moving papers to demonstrate the lack of a triable issue of fact whether, if plaintiff had not been out on medical leave, the same adverse decisions would have been made regarding her employment, at the same times that they were made. It is not enough to show that her job would eventually have been eliminated.

The motion papers contain no evidence whatsoever to support such a finding.

REASONABLE ACCOMMODATION - UNPAID MEDICAL LEAVE

Campbell's testimony supports plaintiff's claims under the NYC HRL for an additional reason. Based on Campbell's testimony, a jury could conclude that defendant did not fulfill its obligation under the NYC HRL[23] to provide plaintiff with reasonable accommodation.

Depending on the circumstances, temporary medical leave can be a "reasonable accommodation," see, e.g., Garcia-Ayala v Lederle Parenterals, Inc., 212 F3d 638 (1st Cir 2000) ("This court and others have held that a medical leave of absence -- Garcia's proposed accommodation -- is a reasonable accommodation under the Act in some circumstances"

Defendants' overt reference to illness as a basis for termination, coupled with a showing that her supervisors knew it was closely related to Plaintiff's disability, could certainly provide a basis for an inference of discrimination").

[23]The current version of the New York State HRL likewise contains a "reasonable accommodation" requirement. However, that requirement was added by L.1997, c. 269, § 1, and thus was not part of the NY HRL at the time plaintiff's claims accrued. Therefore, defendant owed no duty under the NY HRL to accommodate plaintiff's disability, see Kwarren v American Airlines, 303 AD2d 722 (2d Dept 2003).

[collecting cases]). The court there held:

> An absent employee obviously cannot himself or herself perform; still, the employer may in some instances, such as here, be able to get temporary help or find some other alternative that will enable it to proceed satisfactorily with its business uninterrupted while a disabled employee is recovering. In situations like that, retaining the ailing employee's slot while granting unsalaried leave may be a reasonable accommodation required by the ADA [emphasis added].

Cf. Berk I, supra, (Haight, J.) ("Bates insists that the decision to remove plaintiff from the TWA account was made before she returned to work. However, if proven, this might present a failure to accommodate plaintiff's temporary absence from work due to surgery").

Campbell testified that during plaintiff's absence, "[m]ost of the work of her position was being done by other people," and that "the office was functioning fine, no one was required to do overtime and no temporary work was needed." Therefore, a jury could conclude that the medical leave that plaintiff requested, and which defendant granted, imposed no unreasonable hardship on defendant. Taking this as true for the purposes of this motion,[24] the medical leave was therefore a reasonable accommodation,[25] which defendant was required to provide under the NYC HRL.

According to Campbell's testimony, Campbell chose to eliminate plaintiff's job at that

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[24]As discussed more fully above, there is evidence that this was not the case: Campbell testified that another employee, Susan, who had been assigned much of plaintiff's work when plaintiff was on leave, was fired by Campbell for not keeping up with the workload. However, on this summary judgment motion, all issues must be resolved in favor of plaintiff as the non-moving party.

[25]Cf. Berk I, 1997 WL 749386, supra ("A jury could reasonably find that Bates had made a reasonable accommodation for plaintiff by allowing her to miss work for a limited time, and that she remained qualified for her position under the ADA").

time, rather than another job, precisely because plaintiff's job functions had been taken over by others - because she was on the very medical leave that functioned as a "reasonable accommodation." This supports plaintiff's claim of discrimination. Eliminating an employee's job because she is on medical leave is not a "reasonable accommodation."

REASONABLE ACCOMMODATION - REARRANGING JOB DUTIES

As Judge Haight held in Berk I, 1997 WL 749386, supra:

> Reasonable accommodation under the ADA includes "job restructuring, [or] part-time or modified work schedules." [citing 42 USC § 12111 (9) (B)].

The testimony contained in defendant's own moving papers demonstrates that reallocation of job functions formed a routine element of Campbell's management approach, even to the extent of having senior management personnel answer phones (JC 77) and enter data.[26]

However, Campbell's own testimony supports the conclusion that she did not consider reallocating job responsibilities so as to reincorporate plaintiff back into the office when she was ready to return to work - even though, as discussed more fully above, one of the people to whom plaintiff's work had been reallocated was fired for not keeping up with the workload. She testified that she considered eliminating Susan's position instead of plaintiff's. Asked why she decided to eliminate plaintiff's position instead of Susan's, she said that she could not answer that

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[26]For example, Campbell testified (JC 76) that after firing Susan, an employee who performed duties similar to plaintiff's, she modified the position by taking some of the functions that had been allocated to Kobishyn, one of defendant's managers, and adding them to Susan's position. She testified that she hired Evelyn in August of 1996 for that revamped job. Barry testified (EB 79) that after Kobishyn was terminated, "a lot of the responsibilities were realigned." Barry also testified that after plaintiff went on leave, Susan "assumed some of the responsibilities, and then when Joan Campbell came in, everything was realigned. I got new responsibilities and different responsibilities ... all of the responsibilities were all moved around" (EB 79).

question as thus phrased, because she changed Susan's job by reallocating job duties.

Thus, a jury could conclude that defendant breached its obligation under the NYC HRL to provide a reasonable accommodation to plaintiff by failing to include her in the reallocation of job duties that was already part of its ongoing practice and policy.

REINSTATEMENT TO DIFFERENT POSITION

Campbell testified that she terminated three other people in "early 1996": the mail room clerk, George; Susan; and Joan (one of the managers). The only remaining employees from the original seven would appear to be Campbell, Kobishyn, Barry, and Joyce Perhac, all senior managers, leaving no support staff.

Campbell testified that Susan's position might have been open at the time that plaintiff sent the July 3, 1996 letter. Campbell testified (JC 76) that after firing Susan, she modified the position by adding some of Kobishyn's accounting and membership functions to the position. However, she testified that she could not remember when she thus "restructured" Susan's position (JC 80). Resolving that issue in plaintiff's favor for purposes of this motion, when plaintiff sought reinstatement in July 1996, there was a job open (Susan's) that had not been filled, that consisted of secretarial duties of the type that plaintiff had been performing, and that had not yet been "restructured." Even as restructured, the job included answering the telephone, and sending out membership materials, functions that plaintiff had performed. A new employee, Evelyn, was hired in August 1996 for this restructured position, but was terminated two weeks later because "she did not have the skills and abilities necessary to perform the duties" of the restructured position, answer paragraph 28. Thus, there were at least two actual job openings for which plaintiff could have been considered: the opening for which Evelyn was hired, and the opening

created by Evelyn's termination.

ADDITIONAL INCONSISTENCIES

There are additional inconsistencies in defendant's evidence that would permit a jury to discredit its "lack of work" defense as pretextual, because they are inconsistent with the defense and/or because they undermine Campbell's credibility.

Medical Letter

As noted above, Campbell testified that she told plaintiff "she needed to bring a physician's statement indicating that she was indeed released for full-time work." Defendant offers no explanation of why Campbell requested medical clearance if she had already decided to eliminate plaintiff's job.

Outsourcing and Technology

As noted above, in her letter, Campbell stated:

> as we have been utilizing more technology and streamlining our operations, we have found we need fewer staff to carry on the business of the association.

However, Campbell testified that the reference to "utilizing more technology" referred merely to the fact that all staff had been provided with personal computers and were doing their own data entry and correspondence. She testified that this was ongoing prior to the time that plaintiff went on medical leave (JC 63), which suggests that no change had occurred in this regard that would have affected the work that plaintiff had been doing. This, in turn, however, appears inconsistent with testimony contained in defendant's own moving papers, that while plaintiff was on medical leave, Campbell found that there was data that plaintiff failed to enter.

While Campbell testified that some of HSA's functions were outsourced, she testified that

as of the date that she fired plaintiff, the outsourcing had not yet occurred. A jury could conclude that, since there was work that was later outsourced, but which had not been outsourced at the time plaintiff sought to return to work, the statement that there was no work for plaintiff to do when she sought to return was untrue.

Decision of Whose Job to Eliminate

As noted above, Campbell testified that plaintiff's job was the only one she considered eliminating when she decided to eliminate plaintiff's job (JC 46). However, she also testified that she considered eliminating Susan's job instead of plaintiff's (JC 72).

Alleged Nonreliance by Campbell on Information Known to Her at the Time She Eliminated Plaintiff's Job

As noted above, Campbell testified that job performance played no role in her decision to eliminate plaintiff's job. However, as discussed more fully below, Campbell testified that she declined to consider plaintiff's July 3, 1996 letter seeking reinstatement because of concerns about plaintiff's job performance. The information on which those concerns were based was acquired by Campbell prior to Campbell's April 26, 1996 letter telling plaintiff that her job had been eliminated.

Therefore, in order to credit Campbell's testimony, a jury would have to reconcile in defendant's favor the following:

a. when Campbell told plaintiff in April that her job had been eliminated, Campbell had all of the negative input from the managers, from the personnel file, and from her own discoveries;

b. that negative input led Campbell to decline even to consider plaintiff for reinstatement in July at a time when a job opening was available;

c. that very same negative input played no role whatsoever in Campbell's decision, just a few months earlier, to eliminate plaintiff's job.

This underscores the importance of the established rule that summary judgment should not be granted where the key factual determination turns on the credibility of the moving party. Whether Campbell's testimony is credible must be determined by a jury.

In view of the foregoing, I conclude that defendant has failed to meet its burden, both under the McDonnell principles and the Price Waterhouse ("mixed motive") principles, to demonstrate the lack of a triable issue of fact as to discrimination.

WAS PLAINTIFF "DISABLED"

Since defendant has failed to meet these burdens, the motion must be denied unless, as a matter of law, plaintiff is not "disabled" under the NY HRL and/or NYC HRL. Defendants contend that, as a matter of law, cancer is not a disability under either statute.

New York Executive Law § 292 (21) defines "disability" as follows:

> (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrated by medically accepted clinical or laboratory diagnostic techniques or
>
> (b) a record of such an impairment or
>
> (c) a condition regarded by others as such an impairment
>
> provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations,[27] do not prevent the

[27]As noted above, the phrase "upon the provision of reasonable accommodations," was added by L.1997, c. 269, § 1, and was therefore not part of the statute at the time plaintiff's claims accrued.

> complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held [subsections separated for emphasis.]

Thus, on its plain face (and omitting the "reasonable accommodation" provision), under the NY HRL a plaintiff has a "disability" if she meets any one of several tests:

Under the first, a disability is a physical, mental or medical "impairment" resulting from anatomical, physiological, genetic or neurological conditions and which a) "prevents the exercise of a normal bodily function," and b) does not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

Under the second, a disability is a physical, mental or medical "impairment" resulting from anatomical, physiological, genetic or neurological conditions, which impairment a) is "demonstrable by medically accepted clinical or laboratory diagnostic techniques," even if it does not affect any bodily function; and b) does not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

Under the third, a disability is a record of either the first or second type of impairment.

Under the fourth, a disability is a condition regarded by others as an impairment of either the first or second type.

Thus, to come within the scope of the statutes, plaintiff need not establish that she had a qualifying "impairment" at the time she was told her job was eliminated, and/or at the time she sought to be reinstated. She is within the protection of the statutes if she can establish that the

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However, the NYC HRL, quoted above, did contain such a provision at the time in question. Therefore, to the extent, if any, that plaintiff's claims might be deemed to depend on an obligation to reasonably accommodate her disability, she could maintain her claims under the NYC HRL but not the NY HRL.

elimination of her job resulted from the fact that she had a record of a qualifying impairment, or, even if she had no record, if she was falsely regarded by her employer as having either a qualifying impairment or a record of a qualifying impairment.[28]

New York City Administrative Code, section 8-102 (16) defines "disability" somewhat more broadly than does the NY HRL:

> (a) The term disability means any physical, medical, mental or psychological impairment, or a history or record of such impairment. (b) The term 'physical, medical, mental, or psychological impairment' means: (1) an impairment of any system of the body; including but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system [emphasis added].

Thus, on its plain face, the NYC HRL differs from the NY HRL in that the NYC HRL does not require that the impairment affect any "normal body function" or that the impairment be "demonstrable by medically accepted clinical or laboratory diagnostic techniques."

In construing the NYC HRL, consideration must be given to The Local Civil Rights Restoration Act of 2005, Local Law 85/2005, which provides as follows:

> Section 1. The purpose of this local law, which shall be known as the "Local Civil Rights Restoration Act of 2005," is to clarify the scope of New York City's Human Rights Law. It is the sense of the Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law. In particular, through passage of this local law, the Council seeks to underscore that the provisions of New York City's Human Rights Law are to be construed

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[28] "The statutory language is sufficiently broad, and the legislative history sufficiently supportive of an interpretation, that nondisabled individuals like plaintiff whom an employer wrongfully perceives as impaired, come within its reach," Ashker v International Business Machines Corp., 168 AD2d 724 (3d Dept 1990).

> independently from similar or identical provisions of New York state or federal statutes. Interpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise [emphasis added].

In sharp contrast to the NY HRL and the NYC HRL, the federal ADA expressly includes a "major life activity" element in defining "disability," as follows:

> (2) Disability
>
> The term "disability" means, with respect to an individual--
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 USC § 12102 (2) [emphasis added].

The "major life activity" does not have to be one related to the activities of the job or that creates a need for the employer's "reasonable accommodation," see e.g. Keller v Board of Educ. of City of Albuquerque, N.M., 182 F Supp 2d 1148 (DNM 2001) (where tamoxifen [a form of chemotherapy for breast cancer patients] caused plaintiff to experience a dried vaginal lining, resulting in substantial impairment of sexual intercourse, a major life activity, plaintiff was "disabled" within the meaning of the ADA); Berk v Bates Advertising USA, Inc., 25 F Supp 2d 265 (SD NY 1998) (Haight, J.) ("Berk II") (denying defendant's motion for summary judgment, holding that breast cancer was a disability within ADA because it "substantially limited" former employee's major life activity of reproduction within meaning of the ADA's definition of

disability).

The NY HRL and the NYC HRL's definitions of "disability" are broader than the federal ADA's definition because, inter alia,

a. the NY HRL and NYC HRL contain no "major life activity" requirement in the statutory definition;

b. the NY HRL and NYC HRL's definition is not limited to "physical" and "mental" impairments: and

c. under the plain facial text of the NY HRL, an impairment that does not affect any "bodily function" qualifies as a disability as long as it is demonstrated "by medically accepted clinical or laboratory diagnostic techniques."

Applying the statutory language, the New York Court of Appeals has repeatedly held that, so long as the "impairment" is "demonstrated by medically accepted clinical or laboratory diagnostic techniques," the NY HRL does not require that any "normal life function" be affected by the impairment. As noted above, the NYC HRL's definition of "disability" is even broader. Accordingly, the federal courts have repeatedly held that the "major life activity" requirement, which is statutorily part of the federal ADA's definition of "disability," plays no role in the NY HRL or NYC HRL.

This key aspect of the NY HRL definition was the focus of the Court of Appeals' decision in State Div. of Human Rights v Xerox Corp., 65 NY2d 213 (1985), where, as described by the court:

> McDermott testified that Dr. Wright informed her that the job offer was withdrawn because she had the "disease" of "active gross obesity." She testified that she had always been overweight, but that it had not prevented her from performing any task or function.

> It had not interfered with her ability to raise five children under 10 years of age after her husband died. Neither did it prevent her from working outside of the home at jobs similar to the one originally offered by Xerox. In fact, she stated her weight had not inhibited her in any way, except in carrying bundles for long distances.
>
> ***
>
> Xerox urges that it did not deny complainant employment because of a present impairment but because of a statistical likelihood that her obese condition would produce impairments in the future. It urges that persons with such conditions are not disabled within the meaning of the statute and can be refused employment because of the adverse impact their employment may have on disability and life insurance programs..

The Court of Appeals squarely held that plaintiff had a "disability" within the meaning of the NY HRL. Distinguishing the NY HRL from statutes that, like the federal ADA, have a statutory definition that includes a "major life activity" element, the court held:

> The only question then is whether the complainant suffered an impairment within the meaning of the statute. Although the Commissioner found that she did, the company urges that the determination is not supported by substantial evidence because there is no evidence that her condition presently places any restrictions on her physical or mental abilities. It urges that the Commissioner misinterpreted the statute in holding that her condition of obesity itself constitutes an impairment. These arguments might have some force under typical disability or handicap statutes narrowly defining the terms in the ordinary sense to include only physical or mental conditions which limit the ability to perform certain activities (see, e.g., 29 U.S.C. S 706[6] [now 7], defining a "handicapped individual" as a person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities"). However in New York, the term "disability" is more broadly defined. The statute provides that disabilities are not limited to physical or mental impairments, but may also include "medical" impairments. In addition, to qualify as a disability, the condition may manifest itself in one of two ways: (1) by preventing the exercise of a normal bodily function or (2) by being "demonstrable by medically accepted clinical or laboratory diagnostic techniques" (Executive

Law § 292[20] [now 21]) [emphasis added].

The court stated further:

> Fairly read, the statute covers a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future. Disabilities, particularly those resulting from disease, often develop gradually and, under the statutory definition, an employer cannot deny employment simply because the condition has been detected before it has actually begun to produce deleterious effects. Thus, the Commissioner could find that the complainant's obese condition itself, which was clinically diagnosed and found to render her medically unsuitable by the respondent's own physician, constituted an impairment and therefore a disability within the contemplation of the statute [emphasis added].

In Matter of State Div. of Human Rights on Complaint of Granelle, 70 NY2d 100 (1987), the Court of Appeals, reversing the Appellate Division, upheld the Commisioner's finding in favor of a job applicant who was rejected based on asymptomatic spondylolisthesis. As stated by the court:

> Here, there is no dispute[29] that Granelle suffers from a disability as that term is defined under the Human Rights Law (see, Executive Law § 292 [21]; State Div. of Human Rights [McDermott] v Xerox Corp., 65 NY2d 213, 219). He may not be subjected to discriminatory action based upon his disability, unless that disability renders him incapable of performing in a reasonable manner the activities involved in the job or occupation sought.

Subsequently, in Delta Air Lines v New York State Div. of Human Rights, 91 NY2d 65 (1997), also involving claims of discrimination based on weight, the Court of Appeals distinguished Xerox on the following grounds:

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[29]Since the issue was not disputed, it cannot be said that the Court of Appeals held that plaintiff was disabled within the meaning of the NY HRL. However, that the court made this observation without questioning it, is a strong indication of its views.

> Appellants did not proffer evidence or make a record establishing that they are medically incapable of meeting Delta's weight requirements due to some cognizable medical condition. That was crucial in Xerox and is utterly absent here. We are satisfied that weight, in and of itself, does not constitute a disability for discrimination qualification purposes and the discrimination claims in that respect are, therefore, correctly unsustainable [emphasis added].

In Reeves v Johnson Controls World Svcs., 140 F3d 144, supra, the Second Circuit confirmed that under both Xerox and Delta, the NY HRL does not require a "major life activity" showing. The court held:

> Plaintiff maintains that his mental impairment constitutes a disability for purposes of the [NY HRL], whether or not it satisfies the ADA's definition of disability. He contends that the NYHRL defines disability more broadly than does the ADA, and that unlike the federal statute, the state statute does not require him to identify a major life activity that is substantially limited by his impairment. The clear and controlling authority of the New York Court of Appeals' decision in State Division of Human Rights v. Xerox Corp., 491 N.Y.S.2d 106 (1985), compels us to agree [emphasis added].

The Second Circuit held in Reeves that under the controlling precedent of the New York Court of Appeals:

> an individual can be disabled under the [NY HRL] if his or her impairment is demonstrable by medically accepted techniques; it is not required that the impairment substantially limit that individual's normal activities ... we are bound by the construction of the statute propounded by the state's highest court [internal citation omitted].[30]

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[30]See also Burton v Metropolitan Transp. Authority, 244 F Supp 2d 252 (SD NY 2003) (definition of disability is broader under NY HRL than federal definition under federal ADA; individual can be disabled under New York law if his or her impairment is demonstrable by medically accepted techniques; no requirement that the impairment substantially limit that individual's normal activities); Epstein v Kalvin-Miller Intern., Inc., 100 F Supp 2d 222 (SD NY 2000) ("Because the Court now holds that plaintiff fails to state a claim under the stricter requirements of the ADA, it must consider anew whether plaintiff states a prima facie case under

Discussing Delta, the Second Circuit explained:

> In [Delta][31] the New York Court of Appeals reaffirmed its construction of the NYHRL in Xerox. In [Delta], the complainant flight attendants argued that they were disabled because they were "overweight," as determined by the employer's weight standards. The court held that the complainants were not disabled for purposes of the NYHRL, as construed in Xerox, because they "did not proffer evidence or make a record establishing that they are medically incapable of meeting [the airline's] weight requirements due to some cognizable medical condition. That was crucial in Xerox and is utterly absent here."

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the NYHRL ... the Court finds that plaintiff is clearly disabled within the meaning of the NYHRL"); Sacay v Research Foundation of City University of New York, 44 F Supp 2d 496 (ED NY 1999) ("the range of impairments that may potentially qualify as a disability is broader under the NYSHRL ... In contrast to the ADA, an individual need not show a substantial limitation of her normal activities to prove a disability under the NYSHRL, but instead need only establish that her impairment is "demonstrable by medically accepted techniques *** The New York City Administrative Code defines "disability" in even broader terms than the NYSHRL and the ADA, for it states that it can be a "physical, medical, mental, psychological, impairment, or a history or record of such impairment"); Johns-Davila v City of New York, 2000 WL 1725418 (SD NY 2000) ("While disability discrimination under the ADA and NYSHRL is analyzed similarly, disability is defined more broadly under NYSHRL [collecting cases]); Vaughnes v United Parcel Serv., Inc., 2000 WL 1145400 (SD NY 2000) ("Although the New York Human Rights Law generally tracks the ADA ... the New York statute adopts a broader definition of disability"); Hazeldine v Beverage Media, 954 F Supp 697 (SD NY 1997) ("an individual can be disabled under the [New York] Executive Law if his impairment is demonstrable by medically accepted techniques; it is not required that the impairment substantially limit that individual's normal activities"); Scott v Flaghouse, Inc., 159 F3d 1348 (2d Cir 1998) (citing Reeves and reversing the lower court's dismissal, on "major life activity" grounds, of NY HRL claim).

[31]The Second Circuit cited the case as Alesci v New York State Div.of Human Rights, 91 NY2d 65 (1997). The Court of Appeals' decision appearing at 91 NY2d 65 adjudicates two appeals, one brought by the employer (Delta), and one brought by the complainants. The lead complainant was Alesci. The caption of the Court of Appeals' decision includes the caption of both cases.

SIROTA

Notwithstanding this seemingly overwhelming authority, in 2001 the Appellate Division, First Department, took a diametrically opposite view of the role of "major life activity" in claims under the NY HRL and NYC HRL. In Sirota v New York City Bd. of Educ., 283 AD2d 369 (1st Dept 2001), the First Department held:

> As the motion court held,[32] plaintiff's cancer and attendant

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[32]A review of the motion court's decision in Sirota, reported at NYLJ Jan 23, 2001 p 26 c 5 (Supreme Court, NY County 2001) demonstrates that, contrary to the First Department's reference to the motion court's grounds for dismissing the claims, the motion court relied on "major life activity" only for its dismissal of the federal ADA claim. The motion court dismissed the NY HRL and NYC HRL claims on grounds unrelated to "major life activity" ("Because plaintiff's job duties required regular attendance at work, no reasonable accommodation existed which would have enabled her to perform the essential functions of her job. Finally, plaintiff cannot demonstrate that she suffered an adverse employment action. Accordingly, plaintiff's claim under the New York State Human Rights Law and the New York City Human Rights Law (1st and 2nd causes of action) fail to state a cause of action and are hereby dismissed"). The employer/respondent's brief on appeal describing the lower court's decision, noted that the lower court had dismissed the federal ADA claims on, inter alia, "major life activity" grounds (at 18-19) and describes the lower court's dismissal of the NY HRL and NYC HRL claims as based on grounds other than "major life activity" (at 20).

As described by the motion court's decision, the disability discrimination claims were based on an alleged failure to provide reasonable accommodation. Addressing the "reasonable accommodation" issue in connection with the federal ADA claims, the motion court held:

> in Spring, 1995, after plaintiff was again found healthy and able to perform her job without restrictions both by plaintiff's own physician and the Board's Medical Bureau, plaintiff requested a reduced and less stressful schedule as an accommodation for her claimed disability. Principal Ferrandino requested that plaintiff provide medical documentation to support her request for an accommodation; it is undisputed that plaintiff failed to provide medical documentation. In July, 1995, the Board of Education Medical Bureau again examined plaintiff and for the third time found her fit. The Medical Bureau also requested that plaintiff provide medical documentation to support her request for an accommodation because of a medical condition. Plaintiff again

> surgeries do not constitute a disability within the meaning of the discrimination statutes (42 USC § 12112; Executive Law § 292[26]; Administrative Code of City of N.Y. § 8-107 [15]), since they did not substantially limit her in a major life activity, as evidenced by her own physician's letters affirming her ability to work on a regular, full-time basis (see, Reeves v. Johnson Controls World Servs., 140 F.3d 144, 150-152 [2d Cir.]).[33] Moreover,

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> failed to provide the Bureau with any medical documentation. Plaintiff's failure to provide medical documentation to support her request for an accommodation precludes her claim that she was unlawfully denied an accommodation.

The motion court held further:

> the substance of plaintiff's allegations of disability discrimination is that defendants did not change the terms and conditions of her employment, thereby causing stress, anxiety, embarrassment and inconvenience. Plaintiff does not complain that her class size was not reduced, but, rather, that it was not reduced sufficiently to conform to her subjective desires. When the law requires an accommodation, it requires an objectively reasonable one. An employer is not required to give an employee whatever accommodation she subjectively demands. As a matter of law, the evidence does not support plaintiff's claim under ADA.

[33]As discussed above, in Reeves the Second Circuit held that "major life activity," while a required element under the federal ADA, is not a required element under the NY HRL and NYC HRL. Reeves has been repeatedly cited for this very point.

Curiously, the First Department's homogenization of the three statutory definitions is the mirror image of the charge given by the trial court in Weissman v Dawn Joy Fashions, Inc., supra, 214 F3d 224. As described by the Second Circuit:

> At the outset, we need not address whether a heart attack constitutes a "disability" under the ADA. Although Dawn Joy argues on appeal that Weissman's impairment was not a disability under the ADA and that Weissman was not "regarded as" disabled under the ADA, the District Court charged the jury-- without objection--using the definition of "disability" under the NYHRL and the Administrative Code. The District Court correctly

> assuming plaintiff does have a disability, her chronic absenteeism, tardiness and unsatisfactory performance evaluations establish that she was unable to perform the essential functions of her job as a special education teacher, and thus was not otherwise qualified therefor as required by the discrimination statutes[34] (see, McLee v. Chrysler Corp., 109 F.3d 130, 135 [2d Cir.]), and that defendants did not retaliate against her for requesting accommodation on account of her cancer. Moreover, assuming plaintiff is otherwise qualified for the job, her complaints that defendants refused to accommodate her requests for a schedule modification or transfer and continued to give her negative evaluations do not show an adverse employment action as required by the discrimination statutes, but only a permissible refusal to change the terms and conditions of her employment [emphasis added].

Thus, Sirota squarely holds that both the NY HRL and the NYC HRL require a showing

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> concluded that because the term "disability" is " 'more broadly defined' " under the NYHRL and the Administrative Code than it is under the ADA, and Weissman pleaded violations of all three statutes, he only needed to satisfy the broader standard under the State and City statutes in order to prevail in this case. See Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 155 (2d Cir.1998) (quoting State Div. of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 218-19, 491 N.Y.S.2d 106, 109, 480 N.E.2d 695 (1985)); see also Hazeldine v. Beverage Media, Ltd., 954 FSupp. 697, 706 (S.D.N.Y.1997) (noting that both the NYHRL's and the Administrative Code's definitions of "disability" are broader than the ADA's definition). For this reason, we consider whether the evidence was sufficient to support the conclusion that Weissman was disabled under the NYHRL and the Administrative Code.

[34]This was essentially the ground on which the motion court had dismissed the NY HRL and NYC HRL claims. Because of time bar issues, the only federal claims litigable on the merits were those that accrued once plaintiff was medically capable of working on a regular, full-time basis ("As a result, all claims of disability discrimination prior to August 23, 1994 are time-barred; specifically, all claims occurring in Fall 1992, Spring 1993 and Fall 1993 must be dismissed. Thus, the only claims of disability discrimination under the ADA and related retaliation that are properly before this Court are plaintiff's allegations arising after August 23, 1994; these claims allegedly begin in Spring 1995 when plaintiff returned to work, and are set forth in plaintiff's EEOC charge, i.e., plaintiff received an unsatisfactory classroom observation and evaluation").

that the plaintiff's impairment substantially limits a major life activity.[35]

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[35]Defendant's moving papers do not address the "record of impairment" and "perception" branches of plaintiffs' claims. In its Rule 3212(b) statement, and in its reply papers, perhaps in an attempt to remedy this fatal omission, it attempts to construe Sirota as holding that as a matter of law, cancer cannot be a "disability." This meritless argument is based on quoting language from the decision out of context. Defendant omits from its quotation the following underscored language:

> plaintiff's cancer and attendant surgeries do not constitute a disability within the meaning of the discrimination statutes ... since they did not substantially limit her in a major life activity, as evidenced by her own physician's letters affirming her ability to work on a regular, full-time basis.

While Sirota holds that in order to be "disabled" within the scope of all three of the statutes, a person's impairment must substantially limit a "major life activity," it does not hold that no cancer patient can be "disabled." It merely holds that the fact that a person has cancer does not render her disabled per se; she must also meet the "major life activity" test.

It is well established that under the statutes, whether a person is "disabled" is a fact-sensitive issue that must be determined on a case-by-case basis, see e.g. Toyota Motor Mfg., Kentucky, Inc. v Williams, 534 US 184 (2002) ("Congress intended the existence of a disability to be determined in such a case-by-case manner"); Bragdon v Abbott, 524 US 624 (1998) (declining to consider whether HIV infection is a per se disability under the ADA); School Bd. v Arline, 480 US 273 (1987) (individualized attention to disability claims is "essential"). Nothing in Sirota suggests the contrary.

Indeed, in Sirota, the employer/respondent itself stated, in its brief on appeal at 31, "[t]he determination of the issue of whether cancer constitutes a disability under the ADA may also vary from case to case with the post-treatment condition of the plaintiff" (at 31).

As Judge Haight explained in Berk I, supra:

> The legislative history of the ADA makes clear that cancer patients were intended to receive protection under the statute. For example, an early report on the bill lists cancer among the list of conditions constituting an "impairment." H.R.Rep. 101-485(II), 101st Cong., 2d Sess., at 51 (1990). Persons with a history of cancer are listed among [f]requently occurring examples" of persons with a "record" of impairment. Id. at 52- 53. The report explained that testimony heard by Congress "indicated there still exists widespread irrational prejudice against persons with cancer." Id. at 75. Likewise, EEOC

I am unable to discern any line of reasoning that would justify what appears to be a radical departure by the First Department in Sirota from prior Court of Appeals precedent. However, as a lower court within the jurisdiction of the Appellate Division, First Department, I am duty-bound to follow the First Department's holding. The proper and orderly administration of justice demands that lower courts defer to the authority of appellate courts. As I held in

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> Regulations implementing the ADA state that the provision regarding a "record" of impairment serves, for example, to protect "former cancer patients from discrimination based on their prior medical history." 29 C.F.R. Pt. 1630, App. § 1630.2(k).
>
> It is clear that cancer patients were contemplated in the drafting of the ADA. It is also clear that cancer constitutes an "impairment" under the ADA. However, under the statute, an impairment is only a "disability" if it substantially limits a major life activity [emphasi added].

Cases in which cancer patients have been permitted to assert claims under the federal ADA include Eshelman v Agere Systems, Inc., supra (upholding jury verdict for plaintiff); Konipol, supra (denying defendant's motion for summary judgment); Keller, supra (denying defendants' motion for summary judgment); Berk I, supra (denying defendant's motion for summary judgment).

Cases in which plaintiffs have been allowed to pursue disability discrimination claims under the NY HRL based on cancer include, e.g., Zarycki v Mount Sinai, 2005 WL 2977568 (SD NY 2005) (permitting amendment of complaint to allege violation of NY HRL based on breast cancer); Bendel v Westchester County Health Care Corp., 112 F Supp 2d 324 (SD NY 2000) (denying motion to dismiss NY HRL claim based age and disability [breast cancer]).

Indeed, while I do not reach the issue, since cancer is "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions" that is "demonstrated by medically accepted clinical or laboratory diagnostic techniques," it would appear that under the Court of Appeals' holdings, including Xerox, cancer is, for purposes of the NY HRL, ipso facto a disability, subject only to the requirement that, subject to any applicable reasonable accommodation requirement, it "not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held," an issue that is itself fact-sensitive. A similar result would appear compelled by the text of the NYC HRL.

Cohoes Realty Associates v Lexington Ins. Co., Index No. 502594/96 (Sup Ct, NY County, May 18, 2000), mod on other grounds 292 AD2d 51 (1st Dept 2002):

> it is axiomatic that a trial court is obligated to defer to the rulings of the Appellate Division, and I conclude that any relief for plaintiffs must come at the Appellate level.[36]

Neither the parties' briefing nor my own research have supplied any Court of Appeals or First Department decision issued subsequent to Sirota that would justify my viewing Sirota as having been judicially overruled.[37]

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[36]See also Sullivan v Sullivan, 73 NYS2d 547 (Sup Ct, Kings County 1947) (Special Term has duty to follow the law of the department as enunciated by the Appellate Division, even though the Special Term is of the opinion that the Court of Appeals has held otherwise); but see Angelo v City of New York, 183 Misc 391 (City Ct, Kings County 1944) (trial court has duty, regardless of its own opinion, to follow the law as enunciated by the Court of Appeals and not the law as subsequently thereto enunciated by the Appellate Division); cf. Berk II, supra (Haight, J.) ("Whether or not I agree with the Second Circuit's reading of [School Bd. of Nassau County, Fla. v Arline, 480 US 273, reh denied 481 US 1024 (1987)] is quite beside the point").

[37]Two post-Sirota First Department decisions appear to apply the pre-Sirota definition of "disability" in that they adjudicate NY HRL disability claims without discussing whether the plaintiff met a "major life activity" test. In Pimentel v Citibank, N.A., supra, 29 AD2d 141 (1st Dept 2006), plaintiff suffered from anxiety and depression. The First Department stated:

> The term "disability" is defined as "physical, medical or mental impairments that 'do not prevent the complainant from performing in a reasonable manner the activities involved in the job.' " Pembroke v New York State Office of Court Admin., 306 AD2d 185 (1st Dept.2003), citing Executive Law, § 292 former [21],

The court made no mention of any "major life activity" requirement. However, the court stated further that "[t]he issue of whether the plaintiff suffered a disability as defined by the New York statutes is not in contention." Therefore, I do not view Pimental as overruling Sirota.

See also Gallegos v Elite Model Management Corp., 28 AD3d 50 (1st Dept 2005) (plaintiff with asthma; no discussion of "major life activity"; compare Muller v Costello, 187 F3d 298 (2d Cir 1999) (plaintiff not disabled under federal ADA because asthma did not substantially limit "major life activity").

At least one post-Sirota Appellate Division decision outside the First Department appears, at least impliedly, to continue to construe the NY HRL as not requiring a "major life activity" showing, see Picciano v Nassau County Civil Service Commission, 290 AD2d 164 (2d Dept 2001) (color blindness; leave to serve late notice of claim affirmed; no discussion of "major life activity" requirement); cf. Pageau v Tolbert, 304 AD2d 1067 (3d Dept 2003) (plaintiff could not lift arm above chest level; "all parties agree that petitioner has a disability and was denied the position based on that disability").

Sirota has been cited in but two officially reported cases. In Haviland v Yonkers Public Schools, 21 AD3d 527 (2d Dept 2005), the Second Department cited Sirota in discussing the defendant's contention that plaintiff's employment as a probationary teacher was terminated based upon, inter alia, her excessive absenteeism, which prevented her from performing her duties as an elementary school teacher in a reasonable manner. "Major life activity" is not addressed in the decision. In Belnord Realty Associates, L.P. v Joseph, 10 Misc 3d 43 (App T 1st Dept 2005), a housing discrimination case, the court held that because the plaintiff's hip displasia and related conditions, which caused pain and difficulty in walking, did not substantially limit a "major life activity," she was not disabled within the meaning of the rent control succession provisions. However, unlike the NY HRL, that statute expressly includes a "major life activity" test in defining "disability":

> (iii) a disabled person is defined as a person who has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which substantially limit one or more of such person's major life activities [emphasis added].

9 NYCRR 2204.6[d][3][iii].

In addition to Sirota, defendant relies on DaPonte v Manfredi Motors, Inc., 335 F Supp 2d 352 (ED NY 2004), affd 157 Fed Appx 328 (2d Cir 2005). The issues before the Second Circuit did not include the adjudication of the NY HRL and NYC HRL claims. The district court dismissed the ADA claim on "major life activity" grounds, and dismissed the NY HRL and NYC HRL claims, as follows:

> Because Plaintiffs have failed to show that A. DaPonte was disabled for ADA purposes, they have failed to make out a prima facie case of disability discrimination under the ADA. "The legal standards for discrimination claims under the ADA and under New York state and city law are essentially the same, except to the

> extent that the New York statutes support a broader definition of 'disability,' a distinction not relevant here." Woolley v. Broadview Networks, Inc., No. 01 CV 2526, 2003 WL 554754, at *8 (S.D.N.Y. Feb.26, 2003) (citing Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 147 (2d Cir.1998)). Accordingly, this Court's discussion of Plaintiffs' ADA claims also applies to their state and city claims. Defendants' motion for summary judgment is thus granted as to the ADA, NYSHRL, and NYCHRL claims.

In Woolley, the court had held:

> To satisfy that burden [under the ADA], the plaintiff must show that (1) he is disabled; (2) that he is "otherwise qualified to perform [his] job"; and (3) that he was "discharged because of" his disability. Id. Woolley clearly cannot meet the third element, and it is thus unnecessary for the Court to address the first two [emphasis added].

Thus, the court in Woolley did not adjudicate the issue whether plaintiff was disabled under the ADA. As to the NY HRL and NYC HRL, the Wooley court held:

> The legal standards for discrimination claims under the ADA and under New York state and city law are essentially the same, except to the extent that the New York statutes support a broader definition of "disability," Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 147 (2d Cir.1998), a distinction not relevant here. Accordingly, the above discussion of the federal ADA claims applies to the state and city claims as well.

Thus, the decision in Woolley does not support the premise, for which it (along with Reeves) was incorrectly cited by the district court in DuPonte, that if a plaintiff is not disabled under the ADA she is ipso facto not disabled under the NY HRL and NYC HRL. Other federal courts citing Woolley continue to apply the principle that a person can be disabled under the NY HRL and/or NYC HRL even though not disabled under the ADA, see e.g. Lovely H. v Eggleston, 235 FRD 248 (SD NY 2006); Vinson v New York City Dept. of Corrections, 2006 WL 140553 (ED NY 2006); Greenberg v New York City Transit Authority, 336 F Supp 2d 225 (ED NY 2004);; Picinich v United Parcel Service, 321 F Supp 2d 485 (ND NY 2004) ("The NYHRL definition of disability is broader than that of the ADA because it does not require identification of a major life activity that is substantially limited by an individual's impairment"); Romain v Ferrara Brothers Building Materials Corp., 2004 WL 1179352 (ED NY 2004) ("It is well-established that the NYSHRL and NYCHRL define disability more broadly than does the ADA: unlike the federal statute, they do not require Romain to identify a major life activity that

Accordingly, any error in the Sirota holding must be addressed at the appellate level. Unless the present motion can be denied on grounds that are fully consistent with the First Department's holding in Sirota, the motion must be granted.

I conclude that Sirota, in which the plaintiff's cancer and surgery were held not to render her "disabled" within the "major life activity" test that the First Department viewed as applicable to the NY HRL and NYC HRL, is distinguishable from the present case for three independent reasons.

First, as to plaintiff's claims under the NYC HRL, Sirota was decided prior to the enactment of Local Civil Rights Restoration Act of 2005, Local Law 85/2005, quoted above.

Second, as to both plaintiff's NY HRL and NYC HRL claims, the present case is distinguishable on its facts because defendant has failed to meet its burden as movant to show the lack of a triable issue of fact as to whether plaintiff's impairment substantially limited her in a "major life activity" during the time she was on chemotherapy and radiation, to wit, working, thinking and remembering.

Third, plaintiff's claims are based not merely on the first branch (present disability) of the statutory definition. They are based as well on the second (record of impairment) and third (employer's perception) branches.

NYC LOCAL LAW 85/2005

In Sirota, the court construed NYC HRL as containing the same "major life activity" requirement as does the federal ADA. Pursuant to Local Law 85/2005, as quoted above,

> the provisions of New York City's Human Rights Law are to be

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is substantially limited by his impairment").

> construed independently from similar or identical provisions of New York state or federal statutes. Interpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.

Sirota was decided in 2001. This 2005 statute legislatively amends NYC HRL so as to legislatively overrule cases such as Sirota that set the federal requirements as a "ceiling above which the local law cannot rise." It is therefore no longer permissible to construe the NYC HRL as including a "major life activity" requirement.[38]

SIROTA DISTINGUISHABLE ON ITS FACTS

A key distinguishing factor between the present case and Sirota is that the plaintiff in Sirota underwent only surgery, not chemotherapy and radiation. The use of a particular therapy other than surgery for cancer can result in a substantial limitation of a "major life activity" so as to satisfy the "disability" standard of the ADA.[39]

In particular, courts have held that the effects of chemotherapy and/or radiation can render a person "disabled" within the "major life activity" standard of the federal ADA. See e.g. Eshelman v Agere Systems, Inc., supra (ED Pa 2005) (upholding jury verdict in favor of cancer

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[38]Defendant cannot complain that the enactment of the Local Law deprives it of protections it had when plaintiff's claims accrued. At that time, the First Department had not yet issued Sirota, and Xerox was controlling authority. Under Xerox, which was decided in 1985, New York law did not impose a "major life activity" requirement on claims under either the NY HRL or the NYC HRL.

[39]See e.g. Keller v Board of Educ. of City of Albuquerque, N.M., 182 F Supp 2d 1148, supra (where tamoxifen caused plaintiff to experience a dried vaginal lining, resulting in substantial impairment of sexual intercourse, a major life activity, plaintiff was "disabled" within the meaning of the ADA).

patient; holding that issue whether employer regarded employee as limited in major life activity of working because of her chemotherapy, causing memory problems, was for jury)[40]; Konipol v Restaurant Associates, 2002 WL 31618825 (SD NY 2002), supra (genuine issue of material fact existed as to whether employee, with reasonable accommodation of temporary leave because of breast cancer treatment-related fatigue, could perform the essential functions of her employment, precluding summary judgment on employee's ADA and NY HRL wrongful termination claim against former employer)[41]; cf. Hale v Provident Life and Accident Ins. Co., 2003 WL 1510463 (Cal App 2003) ("The term 'chemo-brain' was coined to refer to memory and thinking deficits experienced by persons who had undergone chemotherapy").

MEMORY PROBLEMS

As discussed more fully below, defendant's own moving papers contain evidence that defendant viewed plaintiff as having memory and thinking problems that affected her ability to

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[40]As described by the court in Eshelman,

> The record includes a letter from Eshelman's family physician Beverly J. Niehls, M.D., in support of her claim that she suffered a cognitive dysfunction resulting from her chemotherapy treatment referred to as "chemo brain." Although this correspondence does not contain an actual diagnosis that Eshelman suffers from this condition, Dr. Niehls explained that this condition "can include deficiencies in verbal memory and psychomotor functioning," and that Eshelman had "mentioned that she struggled with short term memory loss."

[41]In that case, the court stated "[e]xcept to the extent that the NYHRL supports a broader definition of 'disability,' Reeves v. Johnson Controls World Servs., Inc., supra, 140 F3d 144, 147 (2d Cir 1998) -- an issue not material here -- the legal standards for discrimination claims under the ADA and under New York state and city law are essentially the same."

work effectively during the time that she was working while undergoing chemotherapy and radiation. Since defendant has failed to meet its burden to show the lack of a triable issue of fact as to whether those problems were the result of plaintiff's cancer therapy, it has failed to meet its burden on this motion to show that plaintiff was not disabled within the "major life activity" standard imposed by Sirota.

As the Court of Appeals held in McEniry v Landi, 84 NY2d 554 (1994), under the NY HRL

> [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.

See also Pimental v Citibank, N.A., supra, (1st Dept 2006) ("In order to state a prima facie case of employment discrimination due to a disability under both New York's Executive Law and the City's Administrative Code, the plaintiff must demonstrate that he or she suffered from a disability and that the disability caused the behavior for which he or she was terminated.")

Federal case law is in accord, see e.g. Sedor v Frank, 42 F3d 741 (2d Cir 1994) ("[t]he causal relationship between disability and decision need not be direct, in that causation may be established if the disability caused conduct that, in turn, motivated the employer to discharge the employee"); Morris v City of New York, 153 F Supp 2d 494, supra; Greene v New York, supra, 1998 WL 264838.

In Eshelman v Agere Systems, Inc., 397 F Supp 2d 557, supra, the court upheld a jury verdict in favor of plaintiff, whose chemotherapy for breast cancer had resulted in memory problems. The court observed that plaintiff's

> memory problems resulted in her permanent layoff from all Agere jobs. Agere viewed her memory problems, which had resurfaced

> in the context of driving limitations, as a factor disqualifying her from its new restructured and relocated workforce. Agere's perception of Eshelman's memory problems proved fatal to her career. Eshelman's memory impairment was one of three factors that effectively precluded her from every job remaining under Agre's restructured operation outside of Reading.

Even if plaintiff's job performance during the time she was undergoing chemotherapy and radiation was substandard, the inquiry is whether she was capable of performing her duties in a reasonable manner at the time she sought to return to work, see McEniry v Landi, supra ("The legislative purpose of preventing discrimination against employees with disabilities is best served by pinpointing the time of actual termination as the relevant time for assessing the employee's ability to perform.")

Thus, if a jury were to conclude 1) that Campbell's decisions were based on plaintiff's poor job performance while plaintiff was undergoing chemotherapy and radiation; 2) that the poor job performance was, at least in part, the result of that therapy; and 3) that at the time she sought to return to work/be reinstated, she was capable of performing work in a reasonable manner, it could conclude that the decisions were based on plaintiff's record of a disability and/or on defendant's perception that plaintiff had memory or attention deficits.

PLAINTIFF'S JOB PERFORMANCE

Even according to the testimony of defendant's witnesses, HSA's Executive Vice President, Len Ennis, was very satisfied with her assistance and "protected her."

Campbell began working for HSA in November 1996. At that time, besides Campbell, there were three managerial staff members: Pat Kobishyn, Joan Katz, and Beth Mauro Barry. In addition, there were three support staff: plaintiff, Susan, and George (JC 16). Campbell had approximately two months, in a seven-person office, to personally observe plaintiff's job

performance.[42] During this period of time, plaintiff was undergoing chemotherapy and radiation treatment.

Campbell testified that she never really formed an opinion whether plaintiff was a good worker because "she had so little time to observe her." However, she testified that she viewed plaintiff's work as "adequate," and "good," if "a little sloppy." She testified that papers on plaintiff's desk did not seem to be in order. She testified that she had no personal experience with plaintiff's taking inaccurate phone messages. Nor did she personally observe any inaccurate data entry by plaintiff (JC 26-27). She testified that the primary problem that she observed with plaintiff's job performance, was that plaintiff

> was very talkative, spent a lot of time in conversation and not at her desk working. I just had a general feeling that the work performance wasn't diligent.

Asked whom plaintiff was talking to, Campbell responded "Lots of times it was me." She testified that she, Campbell, could have terminated the conversation had she wished to do so (JC 24).

Indeed, while, as discussed more fully below, she was told by other staff members (who were themselves ultimately terminated) about problems with plaintiff's job performance, she testified that these complaints were not consistent with what she personally observed prior to the time that plaintiff took medical leave.

While Campbell testified that she observed conflict between Kobishyn, who was the office manager, and George, the mailroom clerk who was terminated (JC 44), she testified that

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[42]Campbell testified that during one week of that time she herself was out sick, and that plaintiff was out sick part of this time as well.

she observed no conflicts between plaintiff and any other HSA staff.[43]

As noted above. Campbell testified that at the time that plaintiff took unpaid medical leave, Campbell had not targeted plaintiff's job to be eliminated, or plaintiff as someone to be terminated.

CAMPBELL'S RELIANCE ON PLAINTIFF'S ALLEGEDLY INADEQUATE JOB PERFORMANCE

Campbell testified that after being hired, she reviewed the employees' personnel files, including plaintiff's, including notes in plaintiff's file critical of her job performance (JC 81-82).[44] Some of the notes refer to discussions as to whether plaintiff should be terminated. She testified further:

> I had two very capable senior managers [referring to Kobishyn and Barry] who had told me that they had problems with her work performance in the past, that, in fact, she had been spoken to about that, that, in fact, it had not -- they had not seen improvement, and the fact that there were notes in the file that substantiated that, lent it some credibility to their statements.

Specifically, she testified that she was told that there were problems with plaintiff taking accurate phone messages and problems with accurate data entry. However, as noted above, she testified that she had no personal experience with plaintiff's taking inaccurate phone messages or entering data inaccurately, and that the notes were inconsistent with her personal observations

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[43]However, Barry testified that plaintiff and Kobishyn did not have a good relationship (EB 54).

[44]The notes are not before the court on this motion, and, moreover, there is nothing in defendant's motion papers authenticating them as admissible business records. Accordingly, defendant, which must support its motion by admissible evidence, may not rely on the notes, or on verbal descriptions of their contents, in violation of best evidence and hearsay rules.

during the two months' overlap (JC 83). Campbell testified that the allegedly inaccurate data entry had occurred before Campbell was hired (JC 26-27).[45]

Campbell testified that these were the "only thing [sic] two things I can recall." However, Campbell testified that by the time plaintiff sought to return to work, "we were doing all of our own data entry," (JC 62-63)[46] and the phones were being answered by everyone (JC 77). Therefore, these two supposed deficiencies were in matters which would no longer have been a significant part of plaintiff's job.

As reflected in plaintiff's testimony, quoted above, at least some of these notes, on which Campbell admittedly relied, were based on incidents of forgetfulness that, if they occurred, occurred while plaintiff was undergoing chemotherapy and radiation, and which, a jury could find, resulted from that therapy.[47]

Campbell testified that her decision not to consider reinstating plaintiff, even though a job opening was available, was in part the result of these negative comments:

> There were a number of reasons. First was because of the reports of my senior managers and the notes in her file about her bad performance.[48]

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[45]Campbell did not identify any specific examples of inaccurate data entry.

[46]This referred to data concerning the individuals who attended the trade show (JC 88). However, Campbell testified that from the time, in November, that Campbell's employment began, HSA staff all entered their own data (JC 62-63). Plaintiff testified without contradiction that she, plaintiff, did not attend trade shows (FP 21).

[47]"This was 11/28/95. Your other document was 11/30/95. That was when I was on chemo ... Yes, one of the side effects of chemo is forgetfulness. So yes, maybe I did forget. I don't know."

[48]It appears from the transcript that among these notes are one referring to unidentified spelling and grammatical errors (FP 32). Ironically, it appears from the transcript that at least

Campbell testified that she received these reports and reviewed those notes before plaintiff went on medical leave (JC 81-82).

While Campbell testified that while she and plaintiff worked together she was generally satisfied with plaintiff's job performance, she testified that she changed her view after plaintiff went on medical leave. She testified (JC 79):

> while she was on her leave of absence, I had occasion to go into her desk to get something, and I found work that had not been done, checks that had been remained uncashed for six months.[49] She didn't do that. Data entry that had not been done. And that was in spite of the fact that I had been assured when she want on her leave that her work was caught up. So to me that just lent credence to the fact that - sloppy work.

She testified that a) the negative comments by the managerial staff and b) the uncashed checks and unentered data, were the sole reasons for her decision not to consider plaintiff for reinstatement (JC 79). Indeed, as noted above, the impression she got from the notes and adverse comments was not consistent with what she personally observed in the two months that she and plaintiff worked at HSA at the same time.[50]

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two of the notes, evidently written personally by managerial staff, contain spelling errors (FP 44, 50).

[49]However, she testified inconsistently that the checks were found by Kobishyn (JC 86), who was the person who would have done the initial recording of the checks (JC 86). Campbell testified that plaintiff's desk drawers were not kept locked (JC 83). She admitted that she had no way of knowing whether the checks were put in plaintiff's drawer by someone other than plaintiff (JC 87). Absent any showing that Campbell has personal knowledge of where the checks were found by Kobishyn, her testimony is inadmissible hearsay, on which defendant may not rely in support of its motion.

[50]See Berk I, 1997 WL 749386, supra (Haight, J.):

> There is a question of fact as to whether his impression of her work

At least some of the adverse notes were about memory lapses that occurred while plaintiff was undergoing chemotherapy and radiation. Therefore, a jury could find that the decision to not consider plaintiff for reinstatement, was based at least in part on inadequacies in her job performance that occurred while she was undergoing chemotherapy and radiation. Thus, a jury could conclude that "the disability caused the behavior," McEniry, supra. Indeed, one of defendant's own witnesses, Barry, one of defendant's managers, testified that she knows some people with cancer "get sick, nauseous .. I guess people would feel fatigued." This lends support to plaintiff's contention that defendant perceived her as being disabled.

There is varying testimony as to whether plaintiff was ever informed of any dissatisfaction with her job performance. There is no evidence that any of these notes were shown to plaintiff contemporaneously. Asked whether there was a policy or practice to give an employee whose work was criticized an opportunity to respond, Campbell testified that at the time "the policies were vague and inconsistent" (JC 97). It appears that before deciding not to consider plaintiff's July 3, 1996 application for reinstatement, Campbell gave plaintiff no opportunity to respond to the negative material in the notes, or to Campbell's own personal negative observations, thereby depriving plaintiff of the opportunity to explain, inter alia, the effect of chemotherapy on her memory. For purposes of this motion, I must accept plaintiff's testimony as true, and assume that plaintiff was not informed of the notes, and that she was not told about the managers' dissatisfaction with her job performance.

Campbell's testimony as to her reasons for not considering plaintiff's July 3, 1996 application for reinstatement would permit a jury to conclude that Campbell made her decisions

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was a result of her absence, and thus due to her disability.

based on the belief that the thinking and memory defects that were reported to her and/or that she personally discovered (which, as discussed above, could be found to be the result of plaintiff's cancer therapy), were still, and would continue to be present.

Accordingly, a jury could conclude that defendant's refusal to consider plaintiff's July 3, 1996 application for reinstatement was based, at least in part, on her disability.

SOLE KNOWLEDGE

"Proof of an employer's subjective perception, of course, is rarely proved by direct evidence," Eshelman, supra (upholding jury verdict of discrimination in favor of cancer patient plaintiff). Accordingly, even under the federal summary judgment principles, the Second Circuit has cautioned that "in an employment discrimination case when, as here, the employer's intent is at issue, the trial court must be especially cautious about granting summary judgment," Kerzer v Kingly Manufacturing, 156 F3d 396 (2d Cir 1998); see also Gallo, supra ("[b]ecause writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination"); Hiller v Runyon, 95 F Supp 2d 1016 (SD Iowa 2000) ("[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant. This is because defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it [internal citation omitted]").

Under well-established appellate precedent, a motion for summary judgment may not be granted where it is based on "evidence" that consists of averments of a defendant with sole

knowledge of the facts. As the Appellate Division held in Koen v Carl Co., 70 AD2d 695 (3d Dept 1979):

> Credibility of persons having exclusive knowledge of facts should not be determined by affidavits submitted on summary judgment motions, but rather at trial by the trier of facts. Where, as here, the allegations [of the defendant] ... relate to matters solely within [the defendant's] knowledge, plaintiff's inability to refute by evidentiary proof those allegations should not be held against plaintiff on the determination of motion.[51]

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[51] See also Tenkate v Moore, 274 AD2d 934 (3d Dept 2000) ("summary judgment is inappropriate where, as here, the facts governing the resolution of material issues are within the exclusive knowledge of the moving parties"); Fisher v Kavoussi, 90 AD2d 597 (3d Dept 1982) (affirming denial of summary judgment where "[t]he relationship between defendants, including communications between them as to the floor condition and the appointment for the inspection, presented a matter exclusively within their own knowledge"); Santorio v Diaz, 86 AD2d 926 (3d Dept 1982) ("Summary judgment is unavailable when, as here, the salient facts underlying the motion are solely within the knowledge of the moving party. Instead, the movant's version should be subjected to cross-examination at trial [internal citations omitted]"); Wood v Picon, 57 AD2d 863 (2d Dept 1977) (reversing lower court; denying summary judgment where plaintiff was sole witness to accident).

In Wood, the court held:

> Plaintiff is the sole surviving eyewitness to the accident. With all due respect to his presumed honesty, he could have said anything at the EBT that he chose to say. It is important to note that an EBT is, as its name suggests, an examination before trial (CPLR 3113), and not a cross-examination (see Dolan, Examination Before Trial and Other Disclosure Devices (rev. ed.), § 45).
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> Special Term had before it only the cold record. The Justice presiding did not see the plaintiff, who to him was merely a voice offstage. Unlike a trial in open court, where the testimony of a witness can be more properly evaluated, the court had only a transcript with which to weigh the testimony of the plaintiff, who has the sole and exclusive knowledge of the facts of the accident.

While Campbell was not served in this action, her role as the person who made the decisions on behalf of defendant renders the principle applicable to her knowledge to the same extent as if she had been served.

Here, defendant's motion for the "drastic remedy" of summary judgment rests on the credibility of Campbell's testimony as to her own thought processes. This factor alone mandates dismissal of the motion.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied.

Dated: 9/7/06

IRA GAMMERMAN, J.H.O.

Defendant attempts to rely on testimony other than that of Campbell to establish the lack of discriminatory motive. In its moving memo of law, at 7, defendant, citing to page 40 of Barry's deposition, asserts that Barry, a former HSA staff member, testified that "what I know for sure was that she wasn't fired because she had cancer." While this mischaracterizes Barry's testimony at p 40, she testified at p 19 that plaintiff was not terminated because she had cancer.

However, as stated on that same page 7 of defendant's memo of law, Campbell testified "that she alone made that decision and that no one else was involved in it." Defendant offers no evidence to support the premise that Barry is competent to testify to the inner workings of Campbell's thought processes.

The reliability of Barry's testimony is seriously undercut by its inconsistencies with other testimony. For example, she testified (EB 79) that she had no recollection of plaintiff working in the office while Campbell was working in the office, while Campbell's own testimony is to the contrary. In addition, she testified that after George, the mailroom clerk, was laid off, his duties were taken over by Evelyn, and that while some mailing was outsourced, Evelyn did the day-to-day correspondence. However, Campbell's testimony was that George was terminated before plaintiff went on medical leave, and that Evelyn was not hired until August of 1996.