UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, -against- DAY & ZIMMERMANN, INC., Defendant.	**ORAL ARGUMENT REQUESTED** Case No. 3:15-cv-01416 (VAB)

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* SUPPORTING DAY & ZIMMERMANN NPS, INC.

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I. STATEMENT OF INTEREST

The National Association of Manufacturers ("NAM"), as *amicus curiae*, respectfully submits this brief in support of Defendant Day & Zimmermann NPS, Inc.'s ("DZNPS") motion for summary judgment. The issues in controversy in this litigation are of paramount importance to manufacturers and employers nationwide because they will affect the way employers communicate with employees during any investigation or litigation, and because the Equal Employment Opportunity Commission ("EEOC") seeks to improperly curtail an employer's First Amendment right to communicate freely with its employees. NAM submits this brief in response to the EEOC's unconstitutional interference with routine communications between DZNPS and its employees during the course of an EEOC investigation. The EEOC's causes of action in this case should be dismissed not only because they overreach as a matter of law, but also because they represent poor public policy for employers and employees in this country.

NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, provides the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. NAM is a powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The outcome of this case will significantly affect the rights of NAM members and other employers to communicate with their employees during litigation and investigations.

II. INTRODUCTION

In October 2012, Gregory Marsh filed a disability discrimination charge with the EEOC, alleging that DZNPS failed to reasonably accommodate his disability and terminated his employment. The EEOC seeks to prosecute claims of retaliation and interference against DZNPS under the Americans with Disabilities Act ("ADA") based on an informational letter (the "Letter") DZNPS sent to employees identified by the EEOC as potential witnesses in its investigation of Mr. Marsh's charge. The Letter, sent by counsel for DZNPS, provided the context of Mr. Marsh's charge, explained that the EEOC requested the employees' personal contact information, and provided the employees with a clear and accurate recitation of their rights in connection with the EEOC's investigation of Mr. Marsh's claim.

When read within the context of the EEOC's investigatory actions, the plain language of DZNPS's Letter does not support a claim for retaliation or interference because it communicates valuable information to employees for a legitimate purpose. Neither the language of the Letter, nor the circumstances surrounding its distribution, support the EEOC's conclusory allegations that it was retaliatory or interfered with Mr. Marsh's ADA rights. In pushing its overreaching agenda, the EEOC seeks to set precedent that would trample employers' First Amendment rights and chill employers' ability to communicate freely with their employees. The EEOC's claims in this case are not only contrary to the law—they represent extraordinarily poor public policy.

III. ARGUMENT

A. DZNPS's June 17, 2014 Letter Does Not Violate Section 503(a) Or (b) Of The Americans With Disabilities Act.

On June 17, 2014, DZNPS issued a Letter to 146 employees that the EEOC identified as potentially relevant witnesses to Mr. Marsh's disability discrimination investigation. The Letter was issued directly in response to the EEOC's demand for the employees' personal contact

information in connection with its investigation of Mr. Marsh's claims. The context and the language of the Letter demonstrate its clear purpose: (1) to provide the 146 employees with the basic context for the disclosure of their names and personal contact information to the EEOC, (2) to explain why the employees may be contacted by the EEOC, and (3) to apprise the employees of their rights in connection with the EEOC investigation. This type of employer-employee communication does not violate Sections 503(a) or 503(b) of the ADA.

1. The Letter Does Not Constitute An "Adverse Action" Within The Meaning of Section 503(a) As A Matter Of Law.

The EEOC asserts that the Letter issued by DZNPS had a materially adverse effect on Mr. Marsh because it publicized Mr. Marsh's disability discrimination charge, disclosed facts about medical restrictions placed on Mr. Marsh, and identified him as a member of his local union. This, the EEOC claims, sent a message to DZNPS employees that if they file a claim against DZNPS, the facts about their charge will be exposed to the members of their union, which the EEOC claims is an adverse action under Section 503(a) of the ADA. Plaintiff's Opposition to Motion to Dismiss, Dkt. #20, at 4-5. The EEOC is wrong.

The Letter was merely a measure taken by DZNPS and its counsel to efficiently and accurately inform the 146 employees identified by the EEOC that they would be contacted by the EEOC in connection with an investigation, to provide context to the investigation so that the employees understood what the EEOC would be questioning them about, and to apprise the employees of their rights in connection with the investigation. The Letter was not "publicized" and the EEOC does not point to additional facts indicative of retaliatory animus. As such, the Letter does not constitute an adverse action.

As noted in the briefs of the parties, the Supreme Court defined "materially adverse employment action" as action that "well might have dissuaded a reasonable worker from making

or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). The Supreme Court phrased the standard in general terms because the significance of an employer's act depends on the particular circumstances of the case. As the Court best articulated it: "Context matters." *Id.* at 69; *see also Ragusa v. Malverne Union Free Sch. Dist.*, 381 F. App'x 85, 90 (2d Cir. 2010). Context is particularly important in the scope of litigation, as "it will be the rare case in which conduct occurring within the scope of litigation constitutes retaliation prohibited" by the ADA. *Steffes v. Stepan Co.*, 144 F.3d 1070, 1075 (7th Cir. 1998). Indeed, "[r]easonable defensive measures do not violate the anti-retaliation provision of Title VII, even though such steps are adverse to the charging employee and result in differential treatment." *Richardson v. Comm'n on Human Rights & Opportunities*, 532 F.3d 114, 123 (2d Cir. 2008) (internal quotations omitted); *see also Rogers v. Makol*, Case No. 3:13-CV-946 (JAM), 2014 U.S. Dist. LEXIS 127650, 2014 WL 4494235, at *4 (D. Conn. Sept. 10, 2014).[1] "[I]t cannot be doubted that an employer may retain legal counsel to deal with discrimination claims and take other steps reasonably designed to prepare for and assist in the defense. *An employer has latitude in deciding how to handle and respond to discrimination claims, notwithstanding the fact that different strategies and approaches in different cases and classes of cases will result in differences in treatment.*" *United States v. N.Y.C. Transit Auth.*, 97 F.3d 672, 677 (2d Cir. 1996) (emphasis added).

Here, DZNPS retained counsel to assist in the defense of Mr. Marsh's discrimination claim. Upon the EEOC's request to provide the personal contact information of 146 employees, DZNPS and its counsel decided that a letter to its employees would be the best way to communicate that information to those employees. The Letter, sent only to those employees identified by the EEOC, explained the underlying facts of the EEOC investigation to provide

[1] Copies of electronically published cases are annexed hereto at Exhibit A.

context to the employees about the investigation and notified the employees about their rights in connection with the investigation. Under these circumstances, the Letter was the most efficient way to communicate with 146 employees who were going to be contacted by government investigators from the EEOC. Employers should be able to communicate with their employees during the course of an EEOC investigation, especially when those employees will be questioned by government investigators. The Letter and its contents was an appropriate defensive measure taken by DZNPS in connection with the investigation. *Richardson*, 532 F.3d 114, 123 (2d Cir. 2008); *United States v. N.Y.C. Transit Auth.*, 97 F.3d 672, 677 (2d Cir. 1996) (affirming employer policy to process discrimination claims through its own EEO office or Law Department because "employer's control over the handling of claims against it serves several essential purposes that have nothing to do with retaliation, malice, or discrimination"); *see also Rogers v. Makol*, Case No. 3:13-CV-946 (JAM), 2014 U.S. Dist. LEXIS 127650, 2014 WL 4494235, at *4 (D. Conn. Sept. 10, 2014) (employer's exercise of legal right to oppose former employee's employment benefits is permissible defensive measure); *Shih v. JPMorgan Chase Bank, N.A.*, No. 10 CV 9020 (JGK), 2013 U.S. Dist. LEXIS 32500, 2013 WL 842716 , at *5 (S.D.N.Y. March 7, 2013) (ruling that an internal human resources communication refuting plaintiff's discrimination claim amounted to permissible reasonable defensive measure).

The EEOC, however, relies on its conclusory allegation that the Letter was a disguise for a more sinister retaliatory intent on the part of DZNPS to dissuade workers from making a discrimination charge. The EEOC's focus on the underlying intent of the Letter (rather than a reasonable reading of it) is misplaced and the cases that the EEOC relies on for its flawed analysis are distinguishable. In *Mogenhan v. Napolitano*, 613 F.3d 1162 (D.C. Cir. 2010), the court found that the employer's behavior was retaliatory because the plaintiff's supervisor posted

a copy of the plaintiff's discrimination complaint on the government-wide intranet without any legal justification. The D.C. Circuit found that two of the plaintiff's factual assertions warranted trial. First, twenty days after the plaintiff sought EEO counseling regarding her disability discrimination complaint, the plaintiff's supervisor posted her EEO complaint on the United States Secret Service intranet where her fellow employees accessed it. *Id.* at 1166. Second, the D.C. Circuit found that one month after the supervisor published the plaintiff's complaint, the supervisor increased the plaintiff's workload significantly for the express purpose of keeping the plaintiff too busy to file discrimination complaints. *Id.* Here, DZNPS specifically distributed its Letter to the 146 employees identified by the EEOC. DZNPS did not "publicize" the Letter on the company intranet (or anywhere else) like the rogue supervisor did in the case of *Mogenhan v. Napolitano*. In fact, the only information regarding Mr. Marsh's charge available online is information published by the *EEOC*. Press Release, EEOC, EEOC Sues Day & Zimmermann NPS for Unlawful Retaliation over Discrimination Charge (Sept. 28, 2015) (available at: https://www1.eeoc.gov/eeoc/newsroom/release/9-28-15.cfm) ("EEOC Press Release").

In *Greengrass v. Int'l Monetary Sys. Ltd.*, 776 F.3d 481, 485 (7th Cir. 2015), another case the EEOC relies on, the Seventh Circuit's finding of an adverse employment action relied not merely upon the employer's disclosure of information about the plaintiff's EEOC charge, but more so on additional facts indicative of retaliatory animus. The plaintiff claimed that the primary results of an internet search of her name revealed links to the SEC filings at issue and that a recruiter informed her that she was unemployable due to the public availability of the SEC filings. To corroborate the recruiter's comment, the plaintiff alleged that she had trouble finding work. *Id.* Moreover, the court cited evidence of the employer's acts that potentially created an inference of retaliation, including inconsistency in the employer's approach to disclosure of

litigant names in SEC filings, potential "disdain" expressed by the employer's general counsel for the EEOC process, and the forwarding of the complainant's charge to her immediate supervisor with arguably disparaging commentary about the charge. *Id.* at 486-87. Other than DZNPS's Letter to its employees, the EEOC points to no additional facts indicative of retaliatory animus like the plaintiff did in *Greengrass v. Int'l Monetary Sys. Ltd.* The Letter itself does not suggest disdain for the EEOC investigation or for the charges brought by Mr. Marsh. The EEOC relies solely on its faulty interpretation of the Letter.

Additional cases relied upon by the EEOC have similar inapposite facts. In *Booth v. Pasco Cnty. Fla.*, 829 F. Supp. 2d 1180, 1192-93 (M.D. Fla. 2011), the court found that the plaintiff had alleged a sufficiently adverse effect because she had been involuntarily transferred to a less desirable work location with a significantly increased workload and because the union issued a memorandum in which it described the plaintiff's EEOC charge as frivolous and threatened to raise union dues to cover litigation costs. *Id.* In *Hopkins v. Bridgeport Bd. of Education*, 834 F. Supp. 2d 58, 66 (D. Conn. 2011), the Court held that the employer's refusal to provide employment references for complainant after the filing of a discrimination complaint was a sufficiently adverse effect. In *Ray v. Ropes & Gray LLP*, 961 F. Supp. 2d 344, 360 (D. Mass. 2013), the court found support for an adverse effect because the employer disseminated the EEOC's determination letter containing "derogatory" and "severely damaging information" about the plaintiff (such as allegations of criminal misconduct) to a press outlet which published the letter in full to the public. Here, DZNPS did none of the above. The Letter contained no disparaging language about the EEOC investigation, and it did not disclose confidential

information.[2] Further, the EEOC points to no additional actions taken by DZNPS that could reasonably be construed as retaliatory.

There is no evidence that Mr. Marsh was dissuaded by the Letter from pursuing his charge, and when examined in its full context, the Letter would not dissuade a reasonable employee from doing so either. *Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 572 (2d Cir. 2011) ("[W]hile the test is an objective one, it is relevant that [plaintiff] himself was not deterred from complaining" by the alleged retaliatory actions of defendant.) The Court must reject the EEOC's assertions that the Letter, without more, constitutes an adverse action because it would lead to oppressive results for employers. Following the EEOC's rationale, a litigation hold memorandum issued to potential witness employees which typically contains information similar to the contents of DZNPS's Letter would be deemed to have an adverse impact on the potential plaintiff. Similarly, an employer's disclosure of details of a discrimination charge to employee witnesses during the conduct of an internal investigation would amount to an adverse effect on the complainant under the EEOC's flawed reasoning. Clearly, the law does not support such a result.

[2] The disclosure of private or confidential information is allowed for an employer to effectively maintain a discrimination-free environment. The Second Circuit has noted that "it is hard to imagine how a company could keep a complaint confidential and also conduct a fair and thorough investigation." *Finnerty v. William H. Sadlier, Inc.*, 176 Fed. Appx. 158, 163 (2d Cir. 2006). Courts in other circuits have consistently found the disclosure of an employee's medical information not to be actionable when the employee voluntarily disclosed it in the course of filing a charge or complaint against the employer. *EEOC v. C.R. New England Inc.*, 644 F.3d 1028, 1047 (10th Cir. 2011); *Gilliard v. Ga. Dep't of Corr.*, 500 Fed. Appx. 860, 872 (11th Cir. 2012); *Ray v. Ropes & Gray LLP*, 961 F. Supp. 2d 344, 360 (D. Mass. 2013) ("Although an EEOC determination of a charge by a private sector employee is not a 'decision' of public record, there is nothing prohibiting either the charging party or the respondent from publicizing the determination."); *Steffes v. Stepan Co.*, 144 F.3d 1070, 1075 (7th Cir. 1998) (disclosure of plaintiff's lawsuit and medical condition to plaintiff's current employer was justified by a legitimate need associated with defense of the first litigation). Here, the Letter did not contain any medical diagnosis, medical records, or disclose any medical information obtained as a result of Mr. Marsh's employment with DZNPS. DZNPS merely parroted a brief summary of what Mr. Marsh himself disclosed publicly in his charge to provide its employees some context for the EEOC investigation.

2. The Letter Does Not Interfere With Any Rights Secured By The ADA In Violation Of Section 503(b) As A Matter Of Law.

The EEOC alleges that DZNPS's Letter interfered with Mr. Marsh's ADA rights because it sought to "shame" Mr. Marsh, discourage others from participating in the investigation or filing charges of their own, and could potentially interfere with Mr. Marsh's future job prospects. Plaintiff's Opposition to Motion to Dismiss, Dkt. #20, at 17. These allegations, however, are contradicted by the plain language and context of the Letter.

As this Court has noted, neither the Supreme Court nor the Second Circuit has established a test for analyzing an interference claim under the ADA. *EEOC v. Day & Zimmerman NPS, Inc.*, Case No. 15-CV-01416 (VAB), 2016 U.S. Dist. LEXIS 48800, 2016 WL 1449543, at *4 (D. Conn. Apr. 12, 2016). Courts in other circuits have interpreted 503(b) claims to require a variety of elements, including discriminatory animus, proof of plaintiff's exercise of ADA rights at the time the alleged interference took place, and a "distinct and palpable injury" resulting from the alleged interference. *See Youngblood v. Prudential Ins. Co.*, 706 F. Supp. 2d 831, 839-40 (M.D. Tenn. 2010) (following Ninth and Sixth Circuit law interpreting the Fair Housing Act which requires discriminatory animus in support of an interference claim); *Wray v. Nat'l R.R. Passenger Corp.*, 10 F. Supp. 2d 1036, 1040 (E.D. Wis. 1998) (requiring plaintiff to show that she was attempting to exercise ADA rights at time of interference); *Brown v. City of Tucson*, 336 F.3d 1181, 1193 (9th Cir. 2003) (requiring evidence of "distinct and palpable injury"). These cases mark a clear distinction between an interference claim and a retaliation claim under the ADA.[3]

[3] Following these cases, the EEOC must show that DZNPS acted with discriminatory animus in issuing its Letter, that Mr. Marsh was actually exercising rights under the ADA at the time the Letter issued, and that Mr. Marsh suffered some "palpable" injury as a result of the Letter. The record is clear that Plaintiff fails on all of these accounts. As discussed above, the Letter does not lend itself to a reasonable inference of discriminatory animus. Moreover, Mr. Marsh was no longer an employee of DZNPS at that time that the Letter issued and can point to no

In light of the lack of guidance from the Supreme Court and Second Circuit, this Court further observed that "interpretations of the NLRA can serve as a useful guide to interpreting similar language in the ADA, as both are part of a wider statutory scheme to protect employees in the workplace nationwide." *Day & Zimmerman NPS, Inc.*, Case No. 15-CV-01416 (VAB), 2016 WL 1449543, at *5 (internal quotations omitted); *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 570 (3d Cir. 2002).

The National Labor Relations Board ("NLRB") and courts interpreting the National Labor Relations Act ("NLRA") have established the clear right of employers to communicate with employees about pending investigations so long as those communications are accurate and do not on their face discourage employees from participating in the investigation. The NLRB case of *In re Baptist Medical Center/Health Midwest*, 338 NLRB 346 (2002) is instructive. *In re Baptist* examined an employer's memorandum to employees which contained information about employee rights and responsibilities if approached by government investigators. *Id.* at 346. At the time that the employer distributed this memorandum, the employer was subject to two pending actions before the NLRB. *Id.* The original memorandum informed employees of their right not to speak with justice department investigators and requested that employees contact the employer's legal representative in the event they received a request to meet with a government investigator. *Id.* at 346-47. In a subsequent memorandum, the employer clarified that employees were free to speak to NLRB investigators and need not notify the employer if contacted in connection with the NLRB matters. *Id.* at 347. In response to the original memorandum, the

right that he was exercising under the ADA at the time the Letter issued. Finally, the EEOC's allegations regarding injury are speculative, not palpable. Since these cases all come from outside the Second Circuit, we acknowledge that this Court is not necessarily bound by their authority, but they do provide persuasive authority that § 503(b) claims are distinct from § 503(a) claims in that § 503(b) is not as broad as the EEOC argues it is.

union filed an unfair labor practice charge with the NLRB alleging that the employer interfered with employee rights under the NLRA. *Id.*

In a reasoned decision, the NLRB found that the employer's memorandum did not interfere with employee rights to avail themselves of the protections of the NLRA. Specifically, the NLRB held that since the memorandum was clear that employees were free to speak with NLRB investigators without contacting management and would not face employment repercussions if they did so, it did not interfere with employee access to the NLRB investigative process. *Id.* at 347-48. Here, DZNPS's Letter unequivocally declared that employees were free to participate in the EEOC investigation and would face no negative consequences from participation. The language speaks for itself:

> It is your decision whether you wish to speak with the investigator and your decision will not have an adverse impact on your current or future employment with DZNPS. DZNPS is committed to providing equal employment opportunities to all employees and applicants for employment without regard to race, color, religion, sex, national origin, age, disability, sexual orientation or other status protected by applicable federal, state or local law. DZNPS also prohibits any form of retaliation against an employee, including those who chose to participate in the EEOC investigation.

Def.'s Mot. To Dismiss, Dkt. #13-1, Ex. A. One can hardly conceive of a more even-handed recitation of employee rights in regard to EEOC rules and investigations. Yet the EEOC unreasonably argues that this neutral expression of employee rights is demonstrative of interference by DZNPS. While it may be true that courts must be cognizant of employees' tendencies to discern the "intended implications" of an employer communication, it is also equally true that courts must not discredit the face value of an employer's statement to employees without any evidence of an unexpressed implication. *Compare NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (courts will weigh intended implications of employer

communications to employees), *with In re Baptist*, 338 NLRB at 348 (presumption that legitimate concerns addressed in employer memorandum will be taken at face value by reasonable employee); *see also NLRB v. J. W. Mortell Co.*, 440 F.2d 455, 457, 460-61 (7th Cir. 1971) (complainant failed to show actual interference with rights resulting from employer public notices disparaging union and advising employees that they need not meet with an NLRB representative). In an analogous context, courts have routinely held that an employee cannot advance an unreasonable interpretation of an employer handbook to support a position contrary to the language of the document. *DeMicco v. Home Depot USA*, Inc., 101 F. Supp. 2d 122, 125-26 (E.D.N.Y. 2000) ("A personal interpretation of a document that is clearly unreasonable in light of the document's plain language cannot be relied upon to create a commitment to continued employment."); *Wong v. Digitas, Inc.*, Case No. 3:13-CV-00731 (MPS), 2015 U.S. Dist. LEXIS 254, 2015 WL 59188, at *6 (D. Conn. Jan. 05, 2015) ("[U]nless there are contradictory terms, the Policy should be read to be consistent with the offer letters and the Handbook, and individual phrases should not be read out of context."); *Grunberg v. Quest Diagnostics, Inc.*, Case No. 3:05-CV-1201 (VLB), 2008 U.S. Dist. LEXIS 8205, 2008 WL 323940, at *10 (D. Conn. Feb. 5, 2008) ("A contractual promise cannot be created by plucking phrases out of context . . . . The mere fact that the plaintiff believed the guidelines to constitute a contract does not bind the defendant without some evidence that it intended to be bound to such a contract." (internal quotations omitted)).

The NLRA cases make clear that the EEOC must show some facts indicative of actual interference with Mr. Marsh's rights. The key distinction between DZNPS's letter and the cases relied upon by the EEOC is that the cases cited by the EEOC all involved employer actions "attaching negative consequences to the exercise of protected rights . . . ." *Bachelder v. Am. W.*

Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir. 2001). Here, the Letter expressly stated in no uncertain terms that employees had the right to participate in the investigation and would not suffer any negative employment consequences for exercising their rights. Moreover, the EEOC's own actions belie its argument that the purported chilling effect of the Letter was that it "publicized" Mr. Marsh's disability and EEOC charge. The EEOC itself publicized Mr. Marsh's charge and disability through press releases to the general public. *See* EEOC Press Release (available at: https://www1.eeoc.gov/eeoc/newsroom/release/9-28-15.cfm). The EEOC simply has not produced any evidence that the Letter actually interfered with Mr. Marsh's or any other employee's exercise of their ADA rights.

B. The EEOC's Position Overreaches And Impermissibly Interferes With Long-Recognized And Legally Protected Rights Of An Employer To Communicate With Its Employees.

1. It Is Well Settled That Employers Have A First Amendment Right To Communicate With Employees.

DZNPS's right to communicate with its employees about a government investigation is protected by the First Amendment to the United States Constitution. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); *see also Austen v. Catterton Partners V, LP*, 831 F. Supp. 2d 559, 565 (D. Conn. 2011) (recognizing the importance of employers communicating with putative class members/former employees). An employer is free to communicate its views to employees regarding a governmental investigation, as long as the communication does not contain a threat of reprisal or force, or a promise of benefit in exchange for employees foregoing cooperation with the government. *See Gissel Packing Co.*, 395 U.S. 575. Judicial restraints on an employer's right to communicate with its employees must be made with great caution and may only be justified by *a likelihood of serious abuses*. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104 (1981) (emphasis added). Restraints on communications must be made on a clear record and

specific findings of abuse; the mere possibility of abuse does not justify curtailing employer speech. *Id.* at 104. "Serious abuses" are communications which include false, misleading, or intimidating information designed to undermine cooperation in the litigation. *See Austen*, 831 F. Supp. 2d at 568. For example, "[l]etters to class members warning them that they might be liable for costs should they participate in the class action and urging them to disassociate themselves from the suit have also been held improper." *Hampton Hardware, Inc. v. Cotter & Co.*, 156 F.R.D. 630, 632 (N.D. Tex. 1994) (citing *Erhardt v. Prudential Group, Inc.*, 629 F.2d 843, 845 (2d Cir. 1980)).

In the context of communications with putative class action members, the Second Circuit has acknowledged the right of a defendant corporation to communicate its opinions of a case to putative plaintiffs. *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc.*, 455 F.2d 770, 775 (2d Cir. 1972); *see also Mendez v. Enecon Northeast Applied Polymer Sys., Inc.*, Case No. CV 14-6736 (ADS) (AKT), 2015 U.S. Dist. LEXIS 90794, at *4-6 (E.D.N.Y. July 13, 2015) (absent false or misleading content, parties are free to communicate with employees regarding class action). The Third Circuit recognized a similar First Amendment right in protecting an employer's right to question employees, even regarding union matters during an organizing effort, so long as the questioning is not coercive. *Graham Architectural Prod. Corp. v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983). These cases are relevant to EEOC investigations due to the quasi-judicial nature of EEOC investigations. *See Blake-McIntosh v. Cadbury Beverages, Inc.*, Case No. 3:96-CV-2554 (EBB), 1999 U.S. Dist. LEXIS 12801, 1999 WL 464529, *22 (D. Conn. June 15, 1999) ("The EEOC constitutes a quasi-judicial agency . . . .")

Here, DZNPS's communication to its employees falls squarely within its rights under the First Amendment. The Letter, issued for legitimate reasons within the context of a quasi-

judicial proceeding, was neutral in its recitation of the basic context of Mr. Marsh's charge, and it included an accurate and even-handed recitation of employee rights. The Letter expressly reassured the employees that they had a right to speak with EEOC investigators and would not suffer any negative consequences if they chose to do so. This neutral and fair manner of communicating with employees is particularly crucial for manufacturers, many of which have unionized workforces. The smooth functioning of manufacturing relies on open lines of communication and trust with employees, particularly in the context of government regulation. Manufacturers rely on their employees to help raise safety and other important concerns in collaboration with unions to maintain a safe and discrimination-free work environment, and it is probably not too far to state that the success of American manufacturing is dependent on bilateral trust and communication between manufacturers and employees and their representatives. The position the EEOC advocates for here is contrary to the interests of America's manufacturers and their employees, for the EEOC seeks to curtail open and balanced communication between manufacturers and employees—as evidenced by the EEOC's disparagement of the Letter, which both the DZNPS and the union approved before distribution. Based on the above-referenced cases, the EEOC cannot reasonably argue that the communication evidenced a likelihood of serious abuse by DZNPS because that communication did not contain a threat of reprisal or force, or a promise of benefit in exchange for employees foregoing cooperation with the government.

The EEOC, however, argues that "the letter's statement that employees could refuse to speak with the Commission, or could request the presence of Defendant's counsel at any meeting, left no mistake that DZNPS's preference was that employees decline to participate in EEOC's investigation entirely." Plaintiff's Memorandum of Law in Opposition to Motion to

Dismiss the Complaint, Dkt. #20, at 2-3. This is nothing more than a conclusory allegation in light of the full content and context of the Letter and is a gross exaggeration. In fact, the Letter never used the word "refuse" and merely stated the following:

> As part of the EEOC process, an investigator has been assigned to evaluate the merits of Mr. Marsh's allegations. It is our understanding that the investigator may contact you to inquire into your job responsibilities during the Fall 2012 outage. It is your decision whether you wish to speak with the investigator and your decision will not have an adverse impact on your current or future employment with DZNPS. DZNPS is committed to providing equal employment opportunities to all employees and applicants for employment without regard to race, color, religion, sex, national origin, age, disability, sexual orientation or other status protected by applicable federal, state or local law. DZNPS also prohibits any form of retaliation against an employee, including those who chose to participate in the EEOC investigation.

Def.'s Mot. To Dismiss, Ex. A. This language cannot reasonably be summarized as a communication issued for the purpose of discouraging participation in the EEOC investigatory process. To the contrary, it informed employees that they have unilateral decision-making authority as to how to respond to contact from the EEOC. The EEOC cannot disregard an employer's First Amendment rights simply by advancing a wholly conclusory theory that the Letter was issued to repress employee rights despite the Letter's indisputably accurate and neutral content. *See Austen*, 831 F. Supp. 2d at 565 (recognizing the importance of employers communicating with putative class members/former employees). Moreover, the EEOC asks the Court to read subjective speculative intent into one sentence in the Letter while ignoring the rest of the Letter and the context in which it was sent. This approach would violate the Supreme Court's admonition that "context matters" in the analysis of employer/employee communications. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 69.

The EEOC's rationale is also in conflict with the principles supporting an employer's qualified immunity, which immunizes employer communications from defamation claims similar

in nature to the claims advanced by the EEOC here. *Meloff v. N.Y. Life Ins. Co.*, 240 F.3d 138, 145 (2d Cir. 2001); *Olivieri v. McDonald's Corp.*, 678 F. Supp. 996, 1001-02 (E.D.N.Y. 1988) (applying qualified immunity to employer memorandum assessing qualifications of franchisor since the memorandum lacked malice and was not published beyond the circle of employees necessary to make the franchise determination); *Post v. Regan*, 677 F. Supp. 203, 207 (S.D.N.Y. 1988) ("[W]ords are to be viewed in context and given their ordinary and usual meaning . . . as they would be read and understood by the public to which they are addressed."); *Happy 40, Inc. v. Miller*, 63 Md. App. 24, 35 (Ct. Spec. App. 1985) ("[C]ourts have frequently found a complete lack of evidence of abuse of the qualified privilege accorded communications within the employer-employee relationship in cases involving comments made by an employer about its former employee . . . ."). Connecticut recognizes this privilege and rationale. *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 662 A.2d 89, 103 (Conn. 1995).

2. Courts Have Regularly Ruled That A Plaintiff Cannot Advance An Unreasonable Interpretation Of A Document Contrary To Its Plain Language.

The Court should not adopt the EEOC's unfounded and conclusory reading of DZNPS's Letter since the Letter's plain language speaks for itself and there is no evidence to support the EEOC's conclusory allegation of a discriminatory subtext. As noted above, courts will not accept a party's interpretation of a document that clearly contradicts the document's plain language absent some specific evidence undermining the plain language. *DeMicco*, 101 F. Supp. 2d at 125-26; *Post v. Regan*, 677 F. Supp. at 207 (words should be read in context and with ordinary meaning); *see also Thomas v. MasterCard Advisors, LLC*, 901 N.Y.S.2d 638, 639-40 (2010) (plain language of employee handbook may not be ignored); *Lobosco v. New York Tel. Co./NYNEX*, 96 N.Y.2d 312, 316–17 (2001) (declining to read an implied contract obligation

into an employee handbook where the plain language expressly declared that the handbook did not create contractual obligations).

The same basic legal tenet applies here. The Court should decline to read the EEOC's speculative and unfounded intent into the Letter in light of the clearly stated plain language of the Letter. The EEOC cannot pick and choose provisions of the Letter, ignoring those provision that are fatal to the false picture it wishes to paint. The simple point is that when read in full context, the Letter expresses that employees have total discretion as to the decision to participate in the EEOC investigation. It simply cannot be credibly argued that the Letter's plain language stands for the repression of employee rights when in fact it expresses the exact opposite sentiment. The EEOC's proffered reading is unreasonable and flies in the face of well-settled protections afforded to communications from an employer to its employees, including rights under the U.S. Constitution.

C. Adoption Of The Rule Espoused By The EEOC Is Bad Public Policy.

The EEOC asks this Court to ignore the plain language of DZNPS's Letter and to curtail an employer's First Amendment rights to communicate with its employees despite the far-reaching consequences that will flow from such an approach. This is a slippery slope that this Court should assess with caution. If the Court rules that a communication of this nature is impermissible, it will effectively empower government agencies to chill employers from communicating anything to employees about pending investigations, including the fact that employees may decide for themselves whether to participate, and may have counsel present for interviews if so desired. If an employer is not allowed to communicate with employees about their basic rights in a governmental investigation, the government will be left alone to police its own conduct in investigations. This raises the risk of government investigators overstating their

authority or misrepresenting facts in an effort to intimidate witnesses to force their participation in investigations. There can be no doubt that government lawyers would seize on such a ruling and attempt to expand its reach to other types of government investigations.

The EEOC pushes an approach that tramples on an employer's right to defend itself in government investigations and conduct its own internal investigations in response to discrimination charges. Under the EEOC's reasoning, an employer would not be allowed to communicate basic information about a charge to relevant employee witnesses during an internal investigation without incurring liability for retaliation. To be clear, this is a serious implication of the EEOC's rationale. The EEOC identified 146 employees that it deemed to be relevant witnesses to Mr. Marsh's charge of discrimination. Under the EEOC's rationale here, DZNPS's in-house counsel and/or human resources professionals would be barred from describing the factual allegations in Mr. Marsh's complaint to these 146 witnesses during an internal investigation of Mr. Marsh's complaint. The result of the EEOC's reasoning is that it would have a chilling effect on employers attempting to address discrimination allegations and would obstruct employers from assessing potential liability by severely curtailing an employer's First Amendment right to take reasonable steps in response to a discrimination claim. Manufacturers, as employers to 12 million employees nationwide, would be particularly disadvantaged because the effective management of a large industrial workforce often requires that the manufacturer be able to communicate by correspondence, or through union management, rather than individualized communication.

Moreover, if this Court were to adopt the EEOC's arguments in this case it would lead to the absurd result of prohibiting employers from issuing litigation holds describing the basic details of a discrimination charge to employee witnesses. Employers are required by law to issue

litigation holds which "inform its officers and employees of the actual or anticipated litigation, and identify for them the kinds of documents that are thought to be relevant to it." *Samsung Elecs. Co. v. Rambus, Inc.*, 439 F. Supp. 2d 524, 565 (E.D. Va. 2006), *vacated on other grounds*, 523 F.3d 1374 (Fed. Cir. 2008). "In circumstances where issuing a legal hold notice is appropriate, such a notice is most effective when the organization identifies the custodians and data stewards most likely to have relevant information, and when the notice . . . Communicates in a manner that assists persons in taking actions that are, in good faith, intended to be effective." The Sedona Conference, The Sedona Conference Commentary on Legal Holds: The Trigger & the Process, 11 SEDONA CONF. J. 265, 282-83 (2010), *available at* https://www.acc.com/chapters/ncr/upload/Materials-LegalHolds-Sedona.pdf. "The initial and subsequent hold notices and reminders should describe the matter at issue, provide specific examples of the types of information at issue, identify potential sources of information, and inform recipients of their legal obligations to preserve information, and include reference to the potential consequences to the individual and the organization of noncompliance." *Id.* at 283.

These guidelines are consistent with the unique nature of the employer/employee relationship, which allows employers to communicate truthful information to their employees. *N.Y.C. Transit Auth.*, 97 F.3d at 677 ("An employer has latitude in deciding how to handle and respond to discrimination claims, notwithstanding the fact that different strategies and approaches in different cases and classes of cases will result in differences in treatment."); *Steffes*, 144 F.3d at 1075 (conduct within the scope of litigation rarely constitutes retaliation). Here, the Letter contained information similar to what would be contained within a litigation hold addressing Mr. Marsh's threat of litigation. Specifically, litigation holds should describe the matter at issue, provide specific examples of the types of information at issue, identify

potential sources of information, and inform witnesses or custodians of their legal obligations. The EEOC takes the position that the information in the Letter is *per se* retaliatory. It therefore follows that the EEOC would charge that this same information in a litigation hold would also be *per se* retaliatory. This position conflicts with well settled law requiring employers to issue litigation holds and notify employees of their obligations to preserve evidence. *See Connor v. Office of the AG*, Case No. 14-CV-961 (LY), 2015 U.S. Dist. LEXIS 27174, at *12-15 (W.D. Tex. Mar. 5, 2015) (rejecting retaliation claim based on employer's litigation hold).

IV. CONCLUSION

Employer actions take on more or less significance depending on the context of the act. Here, weighing the full context surrounding DZNPS's Letter to its employees proves that DZNPS had legitimate concerns that necessitated a written communication to certain employees about the disclosure of their private contact information to the government and the likelihood of imminent contact by federal investigators. In the absence of evidence of bad faith behind such a communication, employers must be allowed to exercise their First Amendment right to communicate freely with their employees and take reasonable steps in response to charges of discrimination. DZNPS exercised this right in a fair and neutral manner, yet the EEOC is attempting to curtail these rights in an effort to police its own investigations. The Court should not allow this overreach by the EEOC as it conflicts with the law and good public policy.

For the foregoing reasons, NAM respectfully supports DZNPS's motion for summary judgment in this action.

Dated: October 28, 2016

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EXHIBIT A

JULIETTE BLAKE-McINTOSH, Plaintiff, v. CADBURY BEVERAGES, INC., a/k/a DR. PEPPER/CADBURY NORTH AMERICA, a/k/a DR. PEPPER/SEVEN UP COMPANY, GARY LYONS, HENRY UDOW, and JOHN P. SOI, Defendants.

3:96-CV-2554 (EBB)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

1999 U.S. Dist. LEXIS 12801

June 24, 1999, Decided
June 25, 1999, Filed

DISPOSITION: [*1] Cadbury's motion to dismiss or in alternative motion for partial summary judgment as to Count IV of plaintiff's First Amended Complaint [Doc. No. 52] granted in part and denied in part.

COUNSEL: For JULLIETTE BLAKE-MCINTOSH, plaintiff: Jeffrey R. Hellman, Zeisler & Zeisler, P.C., Bridgeport, CT.

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For CADBURY BEVERAGES, INC., defendant: Paul Monroe Heylman, Ira Michael Shepard, David E. Worthen, Linda G. Hill, Schmeltzer, Aptaker & Shepard, Washington, DC.

For GARY LYONS, HENRY UDOW, JOHN P. SOI, defendants: Hugh F. Keefe, Lynch, Traub, Keefe & Errante, New Haven, CT.

For GARY LYONS, HENRY UDOW, JOHN P. SOI, defendants: David J. Rowland, J. Stephen Poor, Seyfarth, Shaw, Fairweather & Geraldson, Chicago, Il USA.

JUDGES: ELLEN BREE BURNS, SENIOR JUDGE, UNITED STATES [*2] DISTRICT JUDGE.

OPINION BY: ELLEN BREE BURNS

OPINION

RULING ON MOTION FOR PARTIAL SUMMARY JUDGMENT

This ruling addresses defendant Cadbury Beverages, Inc.'s ("Cadbury") motion to dismiss or, in the alternative, motion for partial summary judgment pursuant to Federal Rules of Civil Procedure 12(b)(6) and 56, which seeks dismissal of Count IV of plaintiff Juliette Blake-McIntosh's First Amended Complaint. In January 1997, Blake-McIntosh sued Cadbury and three individual defendants for racial discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2 (1998) and for conspiring to discriminate against her in violation of 42 U.S.C. § 1981. The plaintiff also brought a pendent state common law claim for defamation per se, alleging that the defendants published statements defaming her

character and professional reputation and that she was forced to disclose such statements in the course of a job search. Cadbury seeks dismissal of this claim. [1] For the following reasons, Cadbury's motion to dismiss or, in the alternative, motion for partial summary judgment [Doc. No. 52] is [*3] granted in part and denied in part.

1 The individual defendants have not joined this motion, but rather separately moved for summary judgment on their own.

BACKGROUND

I. Parties

Blake-McIntosh, who is a black woman of Jamaican descent, graduated from law school in 1985. In April 1990, Cadbury hired her as an in-house attorney under the title of Assistant Division Counsel. (Def.'s Exs. 1, 3-4.) In May 1995, Blake-McIntosh informed Cadbury for the first time that the company had discriminated against her on the basis of race. Among other things, the plaintiff maintained that white male employees were given greater responsibilities and more favorable assignments than she while her workload actually increased, she was not promoted in the same manner as white employees, and she and other African-Americans were paid lower salaries than white counterparts. (First Am. Compl. P 17.)

The employment relationship between Cadbury and Blake-McIntosh began to deteriorate during the summer of 1995. [*4] The parties exchanged several contentious memoranda and at some point, the plaintiff accused the defendant of retaliating against her for complaining of discrimination. (Def.'s Exs. 10, 17.) In addition, some phone calls and meetings took place between the plaintiff and her supervisors, and the parties unsuccessfully engaged in severance negotiations. (Def.'s Exs. 10-11, 13, 15-17.) However, the problems continued. For the purposes of this motion, it suffices to note that Cadbury claims to have discovered and accused Blake-McIntosh of several types of wrongdoing, and the plaintiff denied these allegations as being a pretext for retaliation. (Def.'s Exs. 10, 13-18.) On September 8, 1995, Cadbury suspended the plaintiff with pay. (Pl.'s Ex. 19.)

II. Termination and Subsequent Events

Cadbury terminated Blake-McIntosh's employment on October 18, 1995. The parties present at the termination meeting were Blake-McIntosh, her attorney, and individual defendants John Soi, Senior Vice President of Human Resources, and Gary Lyons, Cadbury's General Counsel. At the meeting, Lyons told the plaintiff that she was fired for "engaging in a pattern of misrepresentation, insubordination [*5] and failure to perform legal duties." (Pl.'s Ex. 1 at 225-26.) Cadbury documented these reasons for termination in a writing dated October 18, 1995, which Lyons placed in the plaintiff's personnel file. (Pl.'s Ex. 2.)

Individual defendants Lyons and Soi testified in their depositions that they were unaware of any complaints of acts of legal malpractice levied against the plaintiff prior to her raising the issue of discrimination against the company. (Pl.'s Ex. 1 at 260; Ex. 9 at 23.) In addition, the plaintiff's 1994 performance evaluation gave her high rankings. (Pl.'s Ex. 17.) Finally, Lyons stated in his deposition that he did not speak to the plaintiff to obtain her side of the story during an investigation, which eventually concluded that she committed legal malpractice. (Pl.'s Ex. 1 at 168.)

In October 1995, Blake-McIntosh filed discrimination claims with the United States Equal Employment Opportunity Commission ("EEOC") and the Connecticut Commission on Human Rights and Opportunities ("CCHRO"). In response, Cadbury filed a Position Statement with the EEOC in its Boston office pursuant to 29 C.F.R. § 1601.15 (1997) and a Verified Answer with the CCHRO as required by Connecticut [*6] General Statutes §§ 46a-54, 46a-83 (1997). These filings included statements relating to the plaintiff's alleged wrongdoing as an employee. They also included allegations that the plaintiff violated the American Bar Association Rules of Professional Conduct and the applicable rules of the New York and Connecticut Bar Associations, committed legal malpractice, and neglected job responsibilities and work assignments. (Blake-McIntosh Aff. P 9; Pl.'s Ex. 3.) According to Cadbury, this and other evidence raised an "after-acquired evidence" affirmative defense to the plaintiff's employment discrimination claim. (Def.'s Mem. Supp. at 6.) The plaintiff later requested and received from the EEOC a copy of Cadbury's aforementioned filings. (Def.'s Exs. 18-19.)

On May 20, 1996, Blake-McIntosh also filed a wage claim with the Connecticut Department of Labor, contending that Cadbury wrongfully failed to pay her a

bonus in 1995. The Department of Labor investigated the claim and decided to bring suit on Blake-McIntosh's behalf to recover the unpaid bonus. (Pl.'s Ex. 5.) The agency referred the matter to the Connecticut Attorney General for prosecution of a civil claim. The Attorney General confirmed [*7] this by letter dated September 26, 1996 to defendant Lyons on behalf of Cadbury, threatening suit if Cadbury failed to make payment. (Id.) On October 16, 1996, the defendant wrote a letter to the Assistant Attorney General in charge of the case, which repeated that it fired Blake-McIntosh for cause based upon insubordination, misrepresentation, and breach of legal duties. (Pl.'s Ex. 6.) Shortly thereafter, the Commissioner of Labor through the Attorney General sued Cadbury under Connecticut General Statutes § 31-72.

III. Defamation Allegations

On January 17, 1997, Blake-McIntosh filed suit against Cadbury and the following three individual defendants, who worked for Cadbury at the time the events related to her termination occurred: Gary Lyons, Henry Udow, and John Soi. In her First Amended Complaint, the plaintiff alleges the following claims: (1) a "disparate treatment" violation of Title VII for discriminating in employment on the basis of race and national origin; (2) a violation of Title VII for retaliation against the plaintiff for raising discrimination concerns with her superiors; (3) a violation of 42 U.S.C. § 1981 for knowingly [*8] acting in concert to discriminate against the plaintiff; and (4) defamation per se in violation of Connecticut common law. (First Am. Compl. Counts I-IV.)

Blake-McIntosh alleges that the defendant's defamatory statements were published in several ways that caused injury to her character and reputation. First, she maintains that the defendant published libelous statements to the EEOC and the CCHRO. Second, the plaintiff contends that Cadbury circulated its EEOC Position Statement to the following high-level supervisory employees: (1) Todd Stitzer, the Chief Operating Officer; (2) John Soi, the head of human resources; (3) John Brock, the Chief Executive Officer; and (4) Mike Clark, the head of the worldwide legal department. (Pl.'s Ex. 7 P 12; Ex. 8 at 57-58, 137; Ex. 9 at 326-27.) Evidence also shows that Blake-McIntosh voluntarily told former co-workers in the legal department and other peers about Cadbury's statements in its EEOC and CCHRO filings. (Def.'s Statement of Facts P 21.) Third, Blake-McIntosh asserts that the defendant published defamatory statements to the Connecticut Attorney General while no judicial proceedings had been instituted. (Pl.'s Ex. 6; Blake-McIntosh [*9] Aff. PP 12-13, 16.) Finally, the plaintiff alleges that she was compelled to self-publish the defamatory reasons for her firing, as stated to her by Lyons and Soi at her termination meeting, to potential employers and job search consultants. (Blake-McIntosh Aff. PP 19-20, 23-25.) She maintains that Cadbury knew or should have known that she would be forced to self-publish these statements to others. (Pl.'s Exs. 11-14; Blake-McIntosh Aff. PP 21-22, 28.)

Cadbury has moved to dismiss Count IV of the First Amended Complaint, which alleges defamation per se, pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted or, in the alternative, for partial summary judgment under Rule 56.

STANDARD OF REVIEW

Where a party makes a motion to dismiss for failure to state a claim but the parties present matters outside the pleadings to the court, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Fed. R. Civ. P. 12(b). Each party has presented evidence outside of the pleadings and has filed a Local Rule 9(c) statement of facts not in dispute; thus, the defendant's motion will be construed as one seeking partial [*10] summary judgment.

Summary judgment should be granted if the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts are deemed material only when they might affect the outcome of the case under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Irrelevant or unnecessary factual disputes will not be considered. See Anderson, 477 U.S. at 248. Moreover, the mere existence of a scintilla of evidence in support of the nonmoving party's case or "metaphysical doubt as to the material facts" will not prohibit summary judgment. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). To present a "genuine" issue of material fact, there must be contradictory evidence "such that a

reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248. [*11]

Rule 56 mandates summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322; accord Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987). The moving party possesses the initial burden to show the absence of a genuine issue of material fact. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). Where the non-movant has the burden of proof at trial, the moving party may discharge its initial burden by merely pointing to the "absence of evidence to support the nonmoving party's" claims or defenses. Celotex, 477 U.S. at 325. Once the burden shifts, the nonmoving party holding the burden of proof at trial may not rest upon the mere allegations or denials of his pleadings, but rather must "designate specific facts showing there is a genuine issue for trial." Id. at 324; Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir 1995). If the evidence is [*12] "merely colorable" and "not significantly probative," the court may decide the legal issue and grant summary judgment. See Anderson, 477 U.S. at 249-50; First Nat'l Bank, 391 U.S. 253, 290, 88 S. Ct. 1575, 20 L. Ed. 2d 569. In sum, summary judgment is proper where no reasonable jury "could find by a preponderance of the evidence" for the nonmoving party. See Anderson, 477 U.S. at 248.

In deciding a summary judgment motion, the Court must view the record as a whole and in the light most favorable to the nonmoving party. See Matsushita Elec., 475 U.S. at 587; Adickes, 398 U.S. at 158-59. Either party may submit as evidence "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" to support or rebut a summary judgment motion. Fed. R. Civ. P. 56(e). Supporting and opposing affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. See id. Unsworn statements, letters addressed to litigants, and affidavits composed of hearsay and nonexpert opinion evidence do not satisfy Rule 56(e) and must be disregarded. See Adickes, 398 U.S. at 158 n.17; [*13] Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 968-69 (6th Cir. 1991). General averments or conclusory allegations of an affidavit do not create specific factual disputes. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888-89, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990). Nor may a party create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts earlier deposition testimony. See Reid v. Sears Roebuck & Co., 790 F.2d 453, 460 (6th Cir. 1986).

DISCUSSION

This ruling addresses four substantive issues central to Blake-McIntosh's defamation claim: (1) whether the defendant's statements to the EEOC and CCHRO are absolutely privileged; (2) whether the defendant's statements to the Connecticut Attorney General in connection with its prosecution of a wage claim by the Department of Labor are absolutely privileged; (3) whether the defendant's intracorporate communications to high-level supervisory employees are qualifiedly privileged, and if so, whether the plaintiff has presented sufficient evidence of malice in fact to overcome the privilege on a motion for summary [*14] judgment; and (4) whether the plaintiff may maintain an action for self-defamation.

I. Choice of Law

As an initial matter, Blake-McIntosh raises the question of whether Connecticut law or Massachusetts law governs the resolution of her defamation claim with respect to the EEOC filing. When deciding state-created claims based on diversity jurisdiction or supplemental jurisdiction, federal courts must apply state substantive law and federal procedural law. See 28 U.S.C. § 1652; Hanna v. Plumer, 380 U.S. 460, 465, 14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74-77, 82 L. Ed. 1188, 58 S. Ct. 817 (1938). In addition, federal courts must apply the horizontal choice of law rules of the forum state to determine which state's substantive law governs the claim at issue. See Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4, 46 L. Ed. 2d 3, 96 S. Ct. 167 (1975) (per curiam); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941); Mentor Ins. Co. (U.K.) v. Brannkasse, 996 F.2d 506, 513 (2d Cir. 1993). [*15] Because defamation constitutes a state tort claim over which the Court possesses supplemental jurisdiction pursuant to 28 U.S.C. § 1367, the Court must apply Connecticut's choice of law rules to determine which state's substantive law applies.

Connecticut courts largely have abandoned the doctrine of *lex loci delicti* in favor of the "significant

relationship test" advanced in the Restatement (Second) Conflicts of Law in determining choice of law issues in tort actions. See United Technologies Corp. v. American Home Assurance Co., 989 F. Supp. 128, 135 (D. Conn. 1997); O'Connor v. O'Connor, 201 Conn. 632, 638-53, 519 A.2d 13, 16-23 (1986). Under the significant relationship test, the applicable law is that of the state with "the most significant relationship to the occurrence and the parties under the principles stated in § 6." Restatement (Second) Conflicts of Law § 145. The contacts relevant to the significant relationship test are: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business [*16] of the parties; and (4) the place where the relationship, if any, between the parties is centered. See United Technologies, 989 F. Supp. at 136. The Court should consider these factors in conjunction with the policies outlined in section 6 of the Restatement, see id., and they should be evaluated according to their relative importance to the particular issue. See O'Connor, 201 Conn. at 652, 519 A.2d at 23 (quoting Restatement (Second) Conflict of Laws § 145).

Application of the significant relationship test to Blake-McIntosh's defamation claim yields the conclusion that Connecticut law governs its resolution. The plaintiff worked in Cadbury's Stamford, Connecticut office, thus, the relationship between the parties was centered in Connecticut. The plaintiff's domicile is in White Plains, New York and the complaint does not allege that Cadbury maintains any offices within Massachusetts. Hence, Connecticut should be considered the place of business of the parties. In addition, the place where the plaintiff's injury occurred favors the forum state because almost all of the allegedly defamatory conduct complained of took place in Connecticut. The [*17] plaintiff's only argument that Massachusetts law applies is that Cadbury filed its Position Statement with the EEOC's regional office in Boston, Massachusetts. According to the plaintiff's allegations, however, the defendant published the majority of the defamatory statements in Connecticut not Massachusetts. As a result, the Court will apply Connecticut's substantive law to Blake-McIntosh's defamation claim.

II. Defamation and Privileges

Defamation consists of the twin torts of libel and slander, and the gist of a defamation claim is the publication of written or oral statements which tend to injure a person's reputation or good name. See W. Page Keeton, Prosser & Keeton on the Law of Torts § 111 (5th ed. 1984). To maintain an action for defamation, "there must be an unprivileged publication of false and defamatory matter which is actionable per se or which results in special harm to another." Britton Mfg. Co. v. Connecticut Bank & Trust Co., 20 Conn. Supp. 113, 115, 125 A.2d 315, 316 (1956); see also Torosyan v. Boehringer Ingelheim Pharm., Inc., 234 Conn. 1, 27, 662 A.2d 89, 103 (1995); Kelley v. Bonney, 221 Conn. 549, 563, 606 A.2d 693, 701 (1992). [*18] Under Connecticut law, when a party is the victim of defamation per se, she is presumed to be injured and entitled to general damages without proof of actual damages. See Battista v. United Illuminating Co., 10 Conn. App. 486, 491-92, 523 A.2d 1356, 1359-60 (1987).

An absolute or qualified privilege constitutes an affirmative defense to a defamation claim, and the burden rests with the defendant to establish its existence. See Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 618, 116 A.2d 440, 446 (1955). An absolute privilege bars the recovery of damages for a defamatory statement, even if the defendant published it falsely or maliciously. See Kelley, 221 Conn. at 565, 606 A.2d at 702; Petyan v. Ellis, 200 Conn. 243, 246, 510 A.2d 1337, 1338 (1986). On the other hand, a qualified privilege may be abused, and thus lost, where the defendant makes the statement with malice in fact -- that is, with knowledge of its falsity or reckless disregard as to its truth. See Torosyan, 234 Conn. at 29, 662 A.2d at 103-04; Bleich v. Ortiz, 196 Conn. 498, 504, 493 A.2d 236, 238-40 (1985); [*19] Charles Parker, 142 Conn. at 615-16, 116 A.2d at 445-46. Either an absolute privilege or a qualified privilege may be lost by an unnecessary or unreasonable publication to one for whom the occasion is not privileged. See Kelley, 221 Conn. at 575, 606 A.2d at 707; Bleich, 196 Conn. at 501, 493 A.2d at 238. Whether a privilege is available for a particular communication is a question of law for the court, see Victoria v. O'Neill, 688 F. Supp. 84, 90 (D. Conn. 1988); Torosyan, 234 Conn. at 28, 662 A.2d at 103, but whether the privilege is nevertheless defeated through its abuse is a question of fact for the jury. See Bleich, 196 Conn. at 501, 493 A.2d at 239; Hassett v. Carroll, 85 Conn. 23, 36, 81 A. 1013, 1019 (1911).

A. Absolute Privilege: Judicial and Quasi-Judicial Proceedings

Connecticut follows the common law rule "that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy." Petyan, 200 Conn. at 245-46, 510 A.2d at 1338 [*20] (internal quotations omitted); see also Briscoe v. LaHue, 460 U.S. 325, 331-32, 75 L. Ed. 2d 96, 103 S. Ct. 1108 (1983). A judicial proceeding includes "any hearing before a tribunal which performs a judicial function, ex parte or otherwise, and whether the hearing is public or not." Petyan, 200 Conn. at 246, 510 A.2d at 1338. For example, an absolute privilege attaches to statements to the Internal Revenue Service, the grand jury, and the United States Attorney's Office when made in the course of judicial proceedings. See Abrahams v. Young & Rubicam Inc., 79 F.3d 234, 240 (2d Cir. 1996).

Absolute immunity also extends to defamatory statements made in "quasi-judicial" proceedings of "administrative officers, such as boards and commissions, so far as they have powers of discretion in applying the law to the facts which are regarded as judicial or 'quasi-judicial,' in character." Petyan, 200 Conn. at 246, 510 A.2d at 1338 (extending an absolute privilege to information supplied by an employer on the "fact-finding supplement form of the employment security division of the state labor department"); see also Kelley, 221 Conn. at 566-71, 606 A.2d at 702-05 [*21] (holding that an absolute privilege attaches to a decertification proceeding before the state board of education); Arigno v. Murzin, 1998 Conn. Super. LEXIS 691, No. CV 960474102S, 1998 WL 142467, at *2 (Conn. Super. Ct. Feb. 6, 1998) (ruling that state police investigation proceedings are quasi-judicial); Magnan v. Anaconda Indus., Inc., 37 Conn. Supp. 38, 44-46, 429 A.2d 492, 495-96 (1980) (applying an absolute privilege to information supplied on an "unemployment notice" as required by regulations). The following factors may assist in determining whether a proceeding is quasi-judicial in nature: whether the body has the power to: (1) exercise judgment and discretion; (2) hear and determine or ascertain facts and decide; (3) make binding orders and judgments; (4) affect the personal or property rights of private persons; (5) examine witnesses and hear the litigation of issues on a hearing; and (6) enforce decisions and impose penalties. In addition, courts may consider whether sound public policy supports granting the complete freedom of expression that absolute immunity provides. See Kelley, 221 Conn. at 567-68, 606 A.2d at 704.

1. Statements to EEOC and [*22] CCHRO

Connecticut law clearly accords an absolute privilege to Cadbury's statements to the EEOC in its Position Statement and to the CCHRO in its Verified Answer regarding its reasons for terminating the plaintiff. The EEOC constitutes a quasi-judicial agency with the authority to administer federal employment discrimination laws, investigate claims by aggrieved parties, and bring actions itself. See 42 U.S.C. § 2000e-5(b). A Title VII claim for racial discrimination may not be heard in federal court unless first filed with the EEOC. The CCHRO is a state agency vested with similar quasi-judicial powers within the state of Connecticut. See Conn. Gen. Stat. §§ 46a-51 to 46a-99. Both agencies possess discretion to decide facts and apply law, thereby acting in a quasi-judicial capacity. Cadbury filed statements with the EEOC and the CCHRO on forms provided by them at their behest, in order to defend against the plaintiff's claims. Public policy dictates that employers should be allowed to state candidly their reasons for terminating an employee so long as the statement bears a reasonable relationship to the purpose of an EEOC or CCHRO hearing. [*23] See Petyan, 200 Conn. at 250-51, 510 A.2d at 1341. Therefore, the defendant's statements to the EEOC and CCHRO are absolutely privileged and liability may not be premised upon them.

2. Statements to Attorney General's Office

Cadbury's statements to the Connecticut Attorney General is similarly privileged. See Field v. Kirton, 856 F. Supp. 88, 98 (D. Conn. 1994). Blake-McIntosh maintains that Cadbury's absolute privilege to publish statements to the EEOC does not extend to its letter to the Attorney General because no legal proceedings had commenced as of that time. However, this argument disregards the policy behind granting complete freedom of expression to litigants in these situations. By the time Cadbury sent the letter, the Department of Labor had concluded its investigation and referred the matter for prosecution to the Attorney General. The Attorney General then informed Cadbury that it was filing a wage claim on Blake-McIntosh's behalf. The filing of a suit was imminent, and Cadbury's responsive letter to the Attorney General merely presented its position in an attempt to resolve the matter. Thus, the defendant's letter properly may [*24] be characterized as a statement made in the course of a judicial or quasi-judicial proceeding.

Cf. Abrahams, 79 F.3d at 240 (stating that an absolute privilege attaches to statements made to the United States Attorney's Office); Arigno, 1998 WL 142467, at *2 (concluding that state police investigations are quasi-judicial in nature).

Sound public policy supports the Court's belief that the Connecticut Supreme Court would accord an absolute privilege to statements made to the Attorney General for purposes of resolving a civil claim where the matter already had been investigated and referred for prosecution by a state agency. See Kelley, 221 Conn. at 567-68, 606 A.2d at 704 (holding that courts may consider public policy in deciding whether to (grant an absolute privilege). If such communications do not receive absolute protection, the Attorney General's fact-finding function would become impaired because parties and witnesses might be discouraged from offering truthful information. Similarly, attorneys representing clients might be less willing to settle lawsuits out of court, for fear that communications could form the basis of a defamation [*25] claim. As a result, the Court holds that Cadbury's statements in the letter to the Attorney General are protected by an absolute privilege.

B. Qualified Privilege for Intracorporate Communications

Connecticut recognizes that the dissemination of a defamatory communication among employees of a corporation may satisfy the "publication" element of a prima facie case of defamation. See Abrahams, 79 F.3d at 240; Torosyan, 234 Conn. at 27-28, 662 A.2d at 103. The inclusion of a libelous statement in an employee's personnel file constitutes a publication. See Torosyan, 234 Conn. at 27-28, 662 A.2d at 103; Gaudio v. Griffin Health Servs., 1997 Conn. Super. LEXIS 1179, No. CV910035730S, 1997 WL 242873, at *3 (Conn. Super. Ct. May 2, 1997). However, "communications between managers regarding the review of an employee's job performance and the preparation of documents regarding an employee's termination are protected by a qualified privilege." Torosyan, 234 Conn. at 29, 662 A.2d at 103. The essential elements of a qualified privilege include good faith, an interest to be upheld or a duty to be performed, a statement limited in its [*26] scope to this purpose, a proper occasion, and publication in a proper manner to proper parties only. See Victoria, 688 F. Supp. at 91. Cadbury's circulation of the reasons for the plaintiff's termination to Todd Stitzer, John Soi, John Brock, and Mike Clark and satisfy these elements, and thus are entitled to a qualified privilege.

A qualified privilege may be defeated by a finding of actual malice. See Torosyan, 234 Conn. at 29-30, 662 A.2d at 103-04; Gaudio, 1997 WL 242873, at *3. If the defendant establishes a qualified privilege for the occasion, the court must presume that the communication was made in good faith and without malice, and the burden shifts to the plaintiff to rebut these presumptions. See Victoria, 688 F. Supp. at 91. "The state of mind exception . . . is appropriate only where solid circumstantial evidence exists to prove the plaintiff's case." Clements v. County of Nassau, 835 F.2d 1000, 1005 (2d Cir. 1987).

The Court concludes that the plaintiff has presented sufficient circumstantial evidence that the defendant published the statements among its managers with malice, at least [*27] to withstand a motion for summary judgment. Individual defendants Lyons and Soi testified in their depositions that they were unaware of any complaints of acts of legal malpractice levied against the plaintiff prior to her raising the issue of discrimination against the company. (Pl.'s Ex. 1 at 260; Ex. 9 at 23.) In addition, the plaintiff's 1994 performance evaluation gave her high rankings. (Pl.'s Ex. 17.) Finally, Lyons stated in his deposition that he did not speak to the plaintiff to obtain her side of the story in an investigation which eventually concluded that she committed malpractice. (Pl.'s Ex. 1 at 168.) At the summary judgment stage, the Court's role is not to weigh the evidence, but merely to determine whether a genuine issue of material fact exists for trial. See Anderson, 477 U.S. at 249. Because a jury could return a verdict in the plaintiff's favor on this issue, the Court denies summary judgment. At trial, the plaintiff may overcome Cadbury's qualified privilege to circulate defamatory statements among high-level managers by demonstrating the defendant published such statements with actual malice.

III. Self-Defamation

Blake-McIntosh asserts [*28] a claim for self-defamation, alleging that she was compelled to repeat false statements of the reasons for her termination to future potential employers and job search consultants. Neither the Connecticut Supreme Court nor the Appellate Court has decided whether a right of action for self-defamation exists. See Wilhelm v. Sunrise Northeast, 1996 Conn. Super. LEXIS 3316, No. CV950549041,

1996 WL 737473, at *1 (Conn. Super. Ct. Dec. 9, 1996); Anderson v. Gamma One, Inc., 1995 Conn. Super. LEXIS 3127, No. CV 95-0376916- S, 1995 WL 681659, at *2 (Conn. Super. Ct. Oct. 6, 1995). Ordinarily, no action for defamation will lie where the defendant makes the defamatory statements only to the plaintiff, and the plaintiff subsequently disseminates the statements to others. See Gamma One, 1995 WL 681659, at *2; Bremseth v. Hartford Hosp., 1995 Conn. Super. LEXIS 2048, No. CV93 0531168S, 1995 WL 424641, at *4 (Conn. Super. Ct. July 12, 1995). However, several trial courts recognize self-defamation claims as a narrow exception to this rule. See, e.g., Gamma One, 1995 WL 681659, at *2-3; Baptista v. Hexacomb Corp., 1994 Conn. Super. LEXIS 1632, No. CV93 0352137, 1994 WL 320273, at *1 (Conn. Super. Ct. June 17, 1994); [*29] Gaudio v. Griffin Health Servs., Corp., 1991 Conn. Super. LEXIS 3098, No. CV91 03 57 30S, 1991 WL 277308, at *3 (Conn. Super. Ct. Dec. 19, 1991). Where a state's highest court has not decided an issue, federal courts "must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." Commissioner of Internal Revenue v. Bosch, 387 U.S. 456, 465, 18 L. Ed. 2d 886, 87 S. Ct. 1776 (1967).

The Court concludes that Connecticut's highest court would follow the lead of the trial courts and allow a common law right of action for self-defamation. In order to establish a self-defamation claim, Blake-McIntosh must demonstrate that: (1) she was under a "strong compulsion" to republish defamatory statements to a nonprivileged party, see Gaudio, 1997 WL 242873, at *3; (2) Cadbury should have reasonably foreseen that she would be so compelled, see Gamma One, 1995 WL 681659, at *2-3; and (3) the statements were actually republished in connection with the application for other employment. See Bremseth, 1995 WL 424641, at *5. Whether these requirements are satisfied must be decided by the [*30] factfinder under the circumstances of each case.

There plainly exists a genuine issue of material fact regarding whether the plaintiff was under a strong compulsion to publish the statements and whether the defendant should have reasonably anticipated that such disclosures would be made. Cadbury's application form for employment asks candidates to state their reasons for leaving a prior job, (Pl.'s Exs. 11-12), and the plaintiff's outplacement counselors purportedly told her that she had to inform them and prospective employers of the facts concerning her termination. (Blake-McIntosh Aff. P 20.) The plaintiff also has come forward with evidence that the statements were actually republished by her to outplacement counselors, prospective employers and recruiters, and references for employment. (Id. PP 20, 23-25.) The specialized nature of legal employment also allows an inference that Cadbury could have reasonably foreseen that Blake-McIntosh would have been so compelled.

The defendant asserts that Blake-McIntosh's self-defamation claim attempts to make an "end-run" around the absolute privilege accorded to Cadbury's filings with the EEOC and the CCHRO. In Thompto v. Coborn's Inc., 871 F. Supp. 1097, 1128 (N.D. Iowa 1994), [*31] the court addressed this question and held that no self-defamation claim exists for the self-publication of privileged statements originally made to an administrative agency in a judicial or quasi-judicial setting, even if the plaintiff was under a strong compulsion to disclose it. That court reasoned as follows:

> To limit the qualified privilege only to communications made by defendants themselves, but to strip it away from communications self-published by the claimant, even if the claimant is under a strong compulsion to do so, would create an insupportable conundrum of holding defendants liable for statements qualified in one context but not in a context that has nothing to do with the defendants' conduct. Such a limit on the qualified privilege would make it nearly impossible for a defendant to make the legitimate business decision to terminate an employee for poor performance, properly document that decision for the purposes of a civil rights investigation, but still avoid tort liability for defamation because the discharged employee is or feels compelled to make some explanation of his or her termination to prospective employers.

Thompto, 871 F. Supp. at 1128. [*32] The Court agrees with the defendant that no self-defamation claim may be based on statements protected by an absolute privilege in one context, which are then repeated by the plaintiff in another.

The circumstances of this case are different from Thompto. Blake-McIntosh has presented evidence that Cadbury published defamatory statements to her at the time of her termination, before she had filed discrimination claims with the EEOC and the CCHRO. Defendant Lyons informed the plaintiff of the reasons for her termination at this meeting and later documented them in a letter to her personnel file. These statements were not protected by an absolute privilege, and thus may form the basis of a claim for self-defamation. Accordingly, the Court denies summary judgment with respect to the plaintiff's self-defamation claim.

CONCLUSION

For the previous reasons, Cadbury's motion to dismiss or, in the alternative, motion for partial summary judgment as to Count IV of the plaintiff's First Amended Complaint [Doc. No. 52] is granted in part and denied in part. The Court grants summary judgment on the plaintiff's defamation claim in so far as it is based on statements published [*33] by Cadbury to the EEOC, the CCHRO, and the Office of the Attorney General because they are absolutely privileged. The Court denies summary judgment on the plaintiff's defamation claim in so far as it is based on statements published by Cadbury to high level supervisory employees within the company, and also denies summary judgment regarding the plaintiff's claim for self-defamation.

SO ORDERED.

ELLEN BREE BURNS, SENIOR JUDGE

UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 24th day of June, 1999.

MADELEINE CONNOR VS. OFFICE OF THE ATTORNEY GENERAL OF TEXAS, KARIN McDOUGAL AND ALLAN COOK

NO. A-14-CV-961 LY

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

2015 U.S. Dist. LEXIS 27174

March 5, 2015, Decided
March 5, 2015, Filed

COUNSEL: [*1] Madeleine Connor, Plaintiff, Pro se, Austin, TX.

For Office of the Attorney General of Texas, Karin McDougal, Allan Cook, Defendants: Adam N. Bitter, LEAD ATTORNEY, Office of the Attorney General, Austin, TX; Jennifer Settle Jackson, LEAD ATTORNEY, Texas Attorney General, Austin, TX.

JUDGES: ANDREW W. AUSTIN, UNITED STATES MAGISTRATE JUDGE. HONORABLE LEE YEAKEL, UNITED STATES DISTRICT JUDGE.

OPINION BY: ANDREW W. AUSTIN

OPINION

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL

UNITED STATES DISTRICT JUDGE

Before the Court are Defendants' Motions to Dismiss Pursuant to Federal Rule 12(b)(6), filed in November 2014 (Dkt. Nos. 17 & 29); Plaintiff's Supplemental Response, filed on December 22, 2014 (Dkt. No. 34); and Defendants' Reply, filed on January 9, 2015 (Dkt. No. 37). The undersigned submits this Report and Recommendation to the United States District Court pursuant to 28 U.S.C. § 636(b) and Rule 1(h) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas.

I. GENERAL BACKGROUND

Plaintiff Madeline Connor ("Connor"), an attorney, has been employed in the General Litigation Division of the Office of the Attorney General of Texas ("OAG") since May 21, 2007. On October [*2] 23, 2014, Connor filed this lawsuit under the Equal Pay Act of 1963 ("EPA") alleging that the OAG violated the EPA by paying her unequal compensation as compared to her male co-workers, in violation of 29 U.S.C. § 206(d)(10) and § 215(a)(2). Connor also alleges that the OAG has retaliated against her for filing the instant lawsuit in violation of 29 U.S.C. § 215(a)(3). In her Third Amended Complaint,[1] Connor alleges a claim under 42 U.S.C. § 1983 against Karin McDougal and Allan Cook individually, alleging that they violated her First Amendment rights by issuing a litigation hold containing a speech ban.

1 Defendants ask the Court to strike the Third Amended Complaint because it was filed without leave of Court. The Court declines to do so, as it

would have granted Connor leave if she had sought it. The Court reminds Connor that in the future she must obtain leave of court to file any amended complaints.

II. STANDARD OF REVIEW

Rule 12(b)(6) allows for dismissal of an action "for failure to state a claim upon which relief can be granted." While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations in order to avoid dismissal, the plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A plaintiff's obligation "requires [*3] more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The Supreme Court has explained that a complaint must contain sufficient factual matter "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In evaluating a motion to dismiss, the Court must construe the complaint liberally and accept all of the plaintiff's factual allegations in the complaint as true. *See In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2009).

III. ANALYSIS

A. Wage Discrimination Claim under the EPA

The OAG argues that Connor cannot establish a prima facie case of wage discrimination under the EPA because she has failed to come forward with specific facts to support her claim and has only "alleged broad generalizations and conclusory allegations, which does not suffice." Motion to Dismiss at p. 19. The Court disagrees.

The EPA prohibits an employer from discriminating against its employees on the basis of sex by paying wages to employees of one sex "in such establishment at a rate less than the rate [*4] at which [the employer] pays wages to employees of the opposite sex" for equal work on jobs that require "equal skill, effort, and responsibility, and which are performed under similar working conditions...." 29 U.S.C. § 206(d)(1). To establish a prima facie case for wage discrimination under the EPA, a plaintiff must show that: "(1) her employer is subject to the Act; (2) she performed work in a position requiring equal skill, effort, and responsibility under similar working conditions; and (3) she was paid less than the employee of the opposite sex providing the basis of comparison." *Chance v. Rice Univ.*, 984 F.2d 151, 153 (5th Cir. 1993). Once a plaintiff has established a prima facie case, the burden shifts to the employer to "prove by a preponderance of the evidence that the wage differential is justified under one of the four affirmative defenses set forth in the Equal Pay Act: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any other factor than sex." *Siler--Khodr v. Univ. of Tex. Health Science Ctr. San Antonio*, 261 F.3d 542, 546 (5th Cir. 2001).

As noted above, the second element of a prima facie case of wage discrimination requires a plaintiff to show that "she performed work in a position requiring equal skill, effort, and responsibility under similar working [*5] conditions." *Chance*, 984 F.2d at 153. "To establish 'equal work,' the plaintiff need not prove that the duties performed are identical, but merely that the 'skill, effort and responsibility' required in the performance of the jobs is 'substantially equal.'" *Pearce v. Wichita County, City of Wichita Falls, Texas, Hospital Bd.*, 590 F.2d 128, 133 (5th Cir. 1979) (quoting *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238-39 (5th Cir. 1973)). Although a plaintiff need not identify a comparator with *identical* job responsibilities and title, "she must identify someone with circumstances 'nearly identical' to her own, such that the court can evaluate her claim of unfair treatment." *Weaver v. Basic Energy Services*, 578 F. App'x 449, 451 (5th Cir. 2014). In other words, "[t]he Act necessarily requires a plaintiff to compare her skill, effort, responsibility and salary with a person who is or was similarly situated." *Jones v. Flagship Int'l*, 793 F.2d 714, 723 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065, 107 S. Ct. 952, 93 L. Ed. 2d 1001 (1987). Whether two jobs "require equal skill, effort, and responsibility, and are performed under similar working conditions is a factual determination." *Fallon v. State of Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989). Because job duties vary so widely, the provisions of the Equal Pay Act must be applied on "a case-by-case basis." *E.E.O.C. v. Mercy Hosp. and Medical Center*, 709 F.2d 1195, 1197 (7th Cir. 1983).

In support of her wage discrimination claim, Connor alleges the following:

Plaintiff's pay is substantially lower than many of her male co-workers who work in the same civil litigation division of the OAG as Plaintiff, the General Litigation Division. Defendant OAG summarizes [*6] the skill, effort, and responsibilities of an attorney working in GLD as follows: "The General Litigation Division defends state agencies, elected and appointed state officials, and state employees in civil rights litigation including employment litigation. Such suits include whistleblower claims, tenure denials, claims of discrimination, student dismissals, and First and Fourteenth Amendment constitutional claims. The division represents clients in libel, slander and other tort actions. The division defends against challenges to the constitutionality of state statutes. The division handles state and federal suits through all litigation stages including the appellate process."

The work performed by Plaintiff requires equal or greater skill, effort, and responsibilities as her male co-workers in GLD. Plaintiff's male co-workers in GLD who are paid more yet perform under the same working conditions as Plaintiff include, or have included, the following: Tom Albright, Darren Gibson, Dan Perkins, Eric Vinson, Drew Harris, Marc Reitvelt, Esteban Soto, and Andrew Stephens.

Plaintiff's pay is substantially lower than at least one male attorney, Allan K. Cook, who works in another civil litigation division of the OAG, [*7] The Law Enforcement Defense Division (LED). Defendant OAG summarizes, in pertinent part, the skill, effort, and responsibilities of an attorney working in LED as follows: "The Law Enforcement Defense Division provides representation for all state law enforcement agencies, their officials and employees in against elected officials." Although assigned to another civil litigation division of the OAG, Defendant Cook told Plaintiff he performs the same kind of work that makes up most of Plaintiff's docket (employment discrimination cases).

Amended Complaint at 3-4.

These allegations are sufficient to state an EPA wage discrimination claim that is plausible on its face. *Ashcroft*, 556 U.S. at 678. Connor has alleged sufficient facts to show that her job duties were substantially similar to her male comparators and that those comparators were payed more for "substantially equal" jobs. *Pearce*, 590 F.2d at 133. That is all that is required to state a prima facie claim for relief for wage discrimination under the EPA at this stage of the proceedings. *Id.* Notably, the OAG does not argue that Connor's job is not substantially similar to those of her comparators, but rather simply argues that Connor has failed to allege sufficient facts to support [*8] her claim.

In support of its argument that Connor fails to allege sufficient facts to support her claim, the OAG relies heavily on the Second Circuit's decision in *EEOC v. Port Authority of New York and New Jersey*, 768 F.3d 247 (2nd Cir. 2014), in which the Second Circuit affirmed the Rule 12(b)(6) dismissal of a an EPA claim where the EEOC had failed to sufficiently allege that the female attorneys performed substantially equal work as the male attorneys. The *Port Authority* case can be easily distinguished from the instant lawsuit. Both the Fifth and Second Circuits require an EPA claim at the pleading stage of a case to "include sufficient factual matter, accepted as true to permit the reasonable inference that the relevant employee's job *content* was substantially equal." *Id.* at 256 (citing *Iqbal*, 556 U.S. at 678) (internal citations omitted). Applying this standard to the specific facts of its case, the Second Circuit found that the EEOC had failed to allege sufficient facts to show that male comparators's job duties were substantially equal to the plaintiffs' job duties. The Second Circuit emphasized that after a *three-year investigation* conducted with the Port Authority's cooperation, "the EEOC's complaint and incorporated interrogatory responses rely almost entirely on broad generalizations drawn [*9] from job titles and divisions, and supplemented only by the unsupported assertion that all Port Authority nonsupervisory attorneys had the same job, to support its 'substantially equal' work claim." *Id.* at 256. Unlike the EEOC in *Port Authority*,

Connor has not simply referred to job codes or job titles or alleged "an attorney is an attorney is an attorney," but rather has alleged specific facts regarding her job duties and the job duties of her male comparators and thus has alleged a prima facie claim of wage discrimination. In addition, unlike the plaintiff in *Port Authority*, Connor has not had three years in which to investigate her claim but rather is in the initial discovery phase of the case. Thus, the OAG's reliance on *Port Authority* for its precedential value in this case is misplaced.

B. Retaliation Claim under EPA

Like Title VII, the EPA, through the Fair Labor Standards Act ("FLSA"), prohibit employers from retaliating against employees who engage in protective activity under the Act. *Browning v. Southwest Research Inst*, 288 F. App'x 170, 178 (5th Cir. 2008), *cert. denied*, 555 U.S. 1170, 129 S. Ct. 1315, 173 L. Ed. 2d 585 (2009). To establish a prima face case of retaliation under the EPA, a plaintiff must show: (1) she participated in an activity protected by the Act; (2) her employer took an adverse employment [*10] action against her; and (3) a causal connection exists between the protected activity and the adverse employment action. *Thibodeaux-Woody v. Houston Comty. Coll.*, 593 Fed. Appx. 280, 2014 U.S. App. LEXIS 21664, 2014 WL 6064479, at * 4 (5th Cir. 2014) (citing *Banks v. E. Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir.), *cert. denied*, 540 U.S. 817, 124 S. Ct. 82, 157 L. Ed. 2d 34 (2003)). If the plaintiff makes this showing, the burden shifts to the employer to articulate a legitimate, nonretaliatory reason for the adverse employment action. *Id.*

Connor alleges that after she filed this lawsuit, the OAG retaliated against her by (1) issuing a libelous statement to the media which defamed her professional reputation, and (2) issuing a litigation hold that contained unconditional directives to Connor and potential witnesses not to talk about this lawsuit to anyone.[2] The OAG argues that Connor has failed to allege sufficient facts to show that the above-actions were adverse employment actions. The Court agrees.

> 2 Connor's Third Amended Complaint also alleged that the OAG retaliated against her by "assigning a lawsuit to her to defend before this Court in order to intimidate her and deter her from pursuing her right to redress her grievances against the OAG." Dkt. No. 25 at ¶ 21. Connor has subsequently withdrawn this claim. *See* Dkt. No. 34 at 8.

"The antiretaliation provision protects an individual not from all retaliation, but from [*11] retaliation that produces an injury or harm." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). For purposes of a retaliation claim, an adverse employment action is one that "a reasonable employee would have found . . . materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* (internal quotations and citations omitted). Whether an alleged action is retaliatory will "depend upon the particular circumstances. Context matters." *Id.* at 69. Normally, "petty slights, minor annoyances, and simple lack of good manners will not create such deterrence." *Id.* at 68.

As noted, Connor's Third Amended Complaint alleges that the adverse employment actions consisted of (1) a libelous statement to the media which defamed her professional reputation, and (2) a litigation hold that contained unconditional directives to Connor and potential witnesses not to talk about this lawsuit to anyone. With regard to the alleged libelous statement, Connor simply makes a conclusory statement that "Defendant OAG issued a libelous statement to the media defaming her professional reputation only one day after filing this lawsuit." Dkt. No. 25 at ¶ 21. Connor, however, fails to state [*12] what the libelous statement was, how it was false, and how the statement defamed her professional reputation. Without such facts, the Court cannot conclude that a reasonable employee would have found the action "materially adverse," *i.e*, that it would have dissuaded a reasonable worker from making a charge of discrimination. *Burlington*, 548 U.S. at 68. *See also, Griffin v. Potter*, 356 F.3d 824, 829-30 (7th Cir. 2004) (holding that supervisor's alleged hostility towards postal employee, which manifested in form of negative comments about employee, was not so severe or pervasive as to qualify as actionable adverse employment action); *Mylett v. City of Corpus Christi*, 97 F. App'x 473, 476 (5th Cir. 2004) (finding that alleged humiliation including countermanding plaintiff's orders in front of his subordinates and characterizing him as a liar were not adverse employment actions); *Stewart v. Evans*, 275 F.3d 1126, 1136, 348 U.S. App. D.C. 382 (D.C. Cir. 2002) (finding that publishing report that allegedly damaged plaintiff's reputation was not adverse employment action where plaintiff failed to show that it affected her job

performance ratings or the conditions of her employment).

Connor has also failed to show that the litigation hold constituted an adverse employment action. Connor's Third Amended Complaint alleges that "Defendant OAG also issued a litigation hold that contained unconditional directives to Plaintiffs [*13] and potential witnsess[es] not to talk about this lawsuit to anyone, which is prohibited by the First Amendment." Dkt. No. 25 at ¶ 21. The litigation hold letter states, in relevant part, the following:

> As a result of our agency's receipt of the following information, the OAG anticipates litigation against the agency and/or some of its employees. The notice relates to a Complaint filed against the Office of the Attorney General of Texas in the United States District Court, Western District of Texas. As indicated by Ms. Madeleine Connor:
>
> > "This is an action brought under the Equal Pay Act of 1963 (EPA) to correct unlawful employment practices of the basis of gender."
>
> Litigation has been initiated by Madeleine Connor. Therefore, pursuant to the Data Preservation for Pending or Potential Litigation Policy, a litigation hold has been issued regarding this matter. It is imperative that the OAG preserve all documents and electronic information that may be relevant to the employee or charges stated. This memorandum is being addressed to you because you have been identified as an individual who may have created, modified, or stored documents and electronic information that are related to the matter as referenced herein. [*14]
>
> You are directed not to discuss this document, or the matter referenced herein, without first contacting Allan Cook, AAG at (512) 475-1917 or Kim Coogan, AAG at (512) 475-2335. You are further directed not to discuss the litigation hold and the contents of this memorandum without first contacting the Litigation Hold Response Team (the "team") or its designated representatives. Please see the attached list of team members and representatives. The team and its representatives can assist you with your duties to comply with the terms of this memorandum. This direction is made to ensure that the rights and interests of all individuals involved, including the right to privacy, are safeguarded. It is also made to ensure that the work-product and attorney-client privileges are preserved.
>
> You are directed to retain, and not alter, any information that is relevant to the matter referenced in the document. You must undertake retention of any information, including any written as, well as electronic information, regardless of the OAU's retention policies or any other policies applicable to your division. You should also note that electronic information includes emails, voicemail messages, and all [*15] types of information that is commonly created, stored, and transferred by computer. This requirement also pertains to relevant electronic information that may be stored on your personal computing devices.
>
> This litigation hold is effective on the first day you obtained any knowledge of the hold and will continue in effect until you receive written notice from the team that the litigation hold has been released.

Exh. A to Plaintiff's Supplemental Response.

Connor acknowledges that after she complained about the "speech ban" in the litigation hold, the OAG "issued a different litigation hold without the constitutionally infirm language in it." Dkt. No. 25 at ¶17. Thus, the Court is a bit perplexed as to what exactly Connor is complaining about. Regardless, Connor has failed to show that the litigation hold was an adverse employment action. Once the OAG was notified of

Connor's lawsuit, the OAG was under a duty to preserve relevant evidence and thus issued a standard "litigation hold" letter. *See Ashton v. Knight Transp., Inc.*, 772 F. Supp.2d 772, 800 (N.D. Tex. 2011) ("A duty to preserve arises when a party knows or should know that certain evidence is relevant to pending or future litigation."); *Adorno v. Port Authority of New York and New Jersey*, 258 F.R.D. 217, 228 (S.D.N.Y. 2009) (noting that the defendant was under an obligation to "put in [*16] place a litigation hold" after plaintiff filed EEOC complaint); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."). Connor has failed to show how issuing a standard litigation hold letter would dissuade a reasonable worker from making a charge of discrimination. Accordingly, Connor has failed to make out a prima facie claim of retaliation under the EPA.

C. First Amendment Claim against the Individual Defendants

Connor has also asserted a First Amendment claim under 42 U.S.C. § 1983 against Karin McDougal ("McDougal"), an Assistant Attorney General in the General Counsel Division of the OAG, and Allan Cook ("Cook"), an Assistant Attorney General in the Law Enforcement Defense Division of the OAG. Connor alleges that McDougal and Cook issued a litigation hold containing "a speech ban unlimited in scope and time that affirmatively denies Plaintiff's First Amendment rights to speech, assembly, and to petition for redress of grievances." Plaintiff's Response at p. 9.[3] Defendants argue that Connor's First Amendment claim should be dismissed because McDougal and Cook are entitled to qualified immunity.

> 3 Connor clarifies [*17] in her Response that she is not asserting a First Amendment retaliation claim in this lawsuit. Thus, the Court need not address Defendants' arguments with regard to First Amendment retaliation. See Plaintiff's Supplemental Response at p. 8.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct. *Harlow*, 457 U.S. at 818. "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). Once the defense of qualified immunity has been raised, the burden shifts to the plaintiff to show that it does not apply. *Jones v. Lowndes County, Miss.*, 678 F.3d 344, 351 (5th Cir. 2012).

Connor has failed to allege sufficient facts to show [*18] a violation of her First Amendment rights. First, as discussed above, Connor concedes that after she complained about the "speech ban" in the litigation hold, the OAG issued a different litigation hold "without the constitutionally infirm language in it." Third Amended Complaint at ¶17. Connor fails to explain how such action violated her First Amendment rights. Moreover, even if the OAG had failed to remove the objectionable language from the litigation hold, Connor has failed to show that a reasonable official would have understood that issuing such a litigation hold would have violated Connor's First Amendment rights. In fact, Connor has failed to even respond to the Defendants' argument that they are entitled to qualified immunity, and has thus failed to sustain her burden to show that the doctrine of qualified immunity does not apply in this case. *See Jones*, 678 F.3d at 351. As a result, Connor's First Amendment claims against Defendants McDougal and Cook should be dismissed.

IV. RECOMMENDATION

Based upon the foregoing, the Court **RECOMMENDS** that Defendants' Motions to Dismiss Pursuant to Federal Rule 12(b)(6) (Dkt. Nos. 17 & 29) be **GRANTED IN PART AND DENIED IN PART**. The Court **RECOMMENDS** that the Motions to Dismiss Plaintiff's wage discrimination claim under the Equal Pay

[*19] Act be **DENIED**, and the Motions to Dismiss Plaintiff's retaliation claim under the Equal Pay Act be **GRANTED**. Lastly, the Court **RECOMMENDS** that the Motions to Dismiss Plaintiff's First Amendment claims against Karin McDougal and Allan Cook be **GRANTED** and Defendants Karin McDougal and Allan Cook be dismissed from this lawsuit.

V. WARNINGS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from *de novo* review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53, 106 S. Ct. 466, 472-74, 88 L. Ed. 2d 435 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

To the extent that a party has not been served by the Clerk with this Report & Recommendation [*20] electronically pursuant to the CM/ECF procedures of this District, the Clerk is directed to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested.

SIGNED this 5th day of March, 2015.

/s/ Andrew W. Austin

ANDREW W. AUSTIN

UNITED STATES MAGISTRATE JUDGE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. DAY & ZIMMERMAN NPS, INC., Defendant.

No. 15-cv-01416 (VAB)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2016 U.S. Dist. LEXIS 48800; 32 Am. Disabilities Cas. (BNA) 1316

April 12, 2016, Decided
April 12, 2016, Filed

COUNSEL: [*1] For Equal Employment Opportunity Comm, Plaintiff: Raechel Lee Adams, LEAD ATTORNEY, U.S. Equal Employment Opportunity Commission-NY, New York, NY; Robert David Rose, LEAD ATTORNEY, U.S. Equal Employment Opportunity Commission - FL, New York, NY; Sara Smolik, LEAD ATTORNEY, U.S. Equal Employment Opportunity Commission, Boston, MA.

For Day & Zimmermann NPS, Inc., Defendant: Kimberly Gost, William J. Simmons, LEAD ATTORNEYS, PRO HAC VICE, Littler Mendelson, P.C. - (Phil -PA), Philadelphia, PA; Stephen P. Rosenberg, Littler Mendelson, P.C.- NH, CT, New Haven, CT.

JUDGES: Victor A. Bolden, United States District Judge.

OPINION BY: Victor A. Bolden

OPINION

RULING ON MOTION TO DISMISS

Plaintiff, the Equal Employment Opportunity Commission ("EEOC"), brings this action against Defendant, Day & Zimmerman NPS, Inc. ("DZNPS"), alleging violations of the Americans with Disabilities Act ("ADA"). Defendant has moved to dismiss the Complaint [Doc. No. 1] under Federal Rule of Civil Procedure 12(b)(6).

For the reasons that follow, Defendant's Motion to Dismiss [Doc. No. 13] is DENIED. Plaintiff's claims of retaliation and interference under the ADA may proceed. This Ruling is without prejudice to Defendant raising the issues of the availability of damages and a jury trial [*2] for the claims again at a later time.

I. BACKGROUND

EEOC alleges that, since at least June 2014, DZNPS has engaged in unlawful employment practices with respect to a group of electricians hired to work at the Millstone Power Station in Waterford, Connecticut, in violation of Sections 503(a) and 503(b) of the ADA. Section 503(a) prohibits retaliation "against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]." 42 U.S.C. § 12203(a). Section 503(b) makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by [the ADA]." 42 U.S.C. § 12203(b).

Specifically, EEOC allegations focus on Gregory Marsh, one of DZNPS's electricians. DZNPS hired Mr. Marsh, a member of Local 35 of the International Brotherhood of Electrical Workers ("Local 35"), in September 2012 to work at the Millstone Power Station. In October 2012, Mr. Marsh filed a charge [*3] of discrimination with EEOC, alleging that DZNPS failed to accommodate his disability reasonably and unlawfully terminated his employment. In March 2014, EEOC sought information from DZNPS as part of its investigation of Mr. Marsh's charge, including the names and contact information of other electricians who had worked for DZNPS at the Millstone Power Station in the fall of 2012.

In June 2014, before providing the requested information to EEOC, DZNPS sent a letter (the "June 2014 Letter") to approximately 146 individuals, all of whom were members of Local 35 and all of whom had worked, or continued to work, for DZNPS. In the June 2014 Letter, DZNPS identified Mr. Marsh by name and indicated that he had filed a charge of discrimination on the basis of disability. The letter identified Mr. Marsh's union local, the medical restrictions on his ability to work, and the accommodation he had requested. It further informed the recipients of their right to refuse to speak to EEOC investigator and offered them the option to have DZNPS counsel present if they chose to speak to EEOC. EEOC alleges that this letter constitutes retaliation against Mr. Marsh for opposing conduct made unlawful by the [*4] ADA. EEOC further alleges that the letter interfered with Mr. Marsh and the approximately 146 recipients of the letter in their the exercise or enjoyment of rights protected by the ADA, including the right to communicate with EEOC, the right to participate in an EEOC investigation, and the right to file a charge of discrimination with EEOC.

On May 20, 2015, EEOC issued to DZNPS a Letter of Determination finding reasonable cause to believe that the ADA had been violated and inviting DZNPS to engage in informal methods of conciliation with EEOC to endeavor to eliminate the allegedly unlawful employment practices and provide appropriate relief. The parties, however, did not resolve the matter. As a result, EEOC filed the Complaint initiating this litigation on September 28, 2015.

II. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim under Rule 12(b)(6) is designed "merely to assess the legal feasibility of a complaint, not to assay the weight of evidence which might be offered in support thereof." *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003) (citations omitted). When deciding a Rule 12(b)(6) motion to dismiss, a court must accept the material facts alleged in the complaint as true, draw all reasonable inferences in favor of the plaintiff, [*5] and decide whether it is plausible that the plaintiff has a valid claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007).

A plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level," and assert a cause of action with enough heft to show entitlement to relief and "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 555, 570. A claim is facially plausible if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Although "detailed factual allegations" are not required, a complaint must offer more than "labels and conclusions," or "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Twombly*, 550 U.S. at 555, 557 (2007). Plausibility at the pleading stage is nonetheless distinct from probability, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the claims] is improbable, and . . . recovery is very remote and unlikely." *Id.* at 556 (internal quotation marks omitted).

III. DISCUSSION

Essentially, Defendant asks this Court to find that the June 2014 Letter provides insufficient evidence to create a genuine issue of [*6] material fact as to Plaintiff's ADA claims. However, "[t]he court's function on a Rule 12(b)(6) motion is not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). The Court concludes that, construing the Complaint in the light most favorable to Plaintiff, its allegations are sufficient to state a plausible claim for violation of Sections 503(a) and

503(b) of the ADA.

A. Retaliation Claim

Plaintiff alleges that Defendant unlawfully retaliated against Mr. Marsh for his filing a charge of discrimination with the EEOC. Section 503(a) of the ADA provides: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a).

"A prima facie case of retaliation under the ADA is made up of the following elements: (1) the employee was engaged in an activity protected by the ADA, (2) the employer was aware of that activity, (3) an employment action adverse to the plaintiff occurred, and (4) there existed a causal connection between the protected activity [*7] and the adverse employment action." *Muller v. Costello*, 187 F.3d 298, 311 (2d Cir. 1999). However, "a plaintiff is not required to plead a *prima facie* case . . . to defeat a motion to dismiss. Rather, because a temporary 'presumption' of discriminatory motivation is created under the first prong of the *McDonnell Douglas* analysis, a plaintiff need only give plausible support to a minimal inference of discriminatory motivation." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 84 (2d Cir. 2015).

To plead a retaliation claim sufficiently in an employment discrimination context, the Second Circuit has held that "the plaintiff must plausibly allege that: (1) defendants discriminated--or took an adverse employment action--against him, (2) 'because' he has opposed any unlawful employment practice." *Id.* at 90.

Defendant argues that the ADA retaliation claim should be dismissed on both prongs. First, Defendant argues that Plaintiff has not alleged that Defendant took any adverse employment action against Mr. Marsh. Second, Defendant argues that, even if Plaintiff plausibly alleged an adverse employment action, Plaintiff has not alleged facts showing that the action was caused by Mr. Marsh's protected activity. At this early stage of the case, Defendant's arguments fail. The Court cannot conclude as a matter of law that [*8] the June 2014 Letter does not constitute an adverse employment action and that it was not sent because of Mr. Marsh's discrimination charge.

To determine whether something "could be found to constitute an adverse employment action" for purposes of an ADA retaliation claim, "the key inquiry is whether the effect of defendants' decision was materially adverse." *Ragusa v. Malverne Union Free Sch. Dist.*, 381 F. App'x 85, 90 (2d Cir. 2010). "'[A]dverse actions' in the retaliation context are defined more broadly than in the discrimination context. For an allegedly retaliatory action to be materially adverse, the plaintiff must show that the action 'could well dissuade a reasonable worker from making or supporting a charge of discrimination.'" *Lewis v. Boehringer Ingelheim Pharms., Inc.*, 79 F. Supp. 3d 394, 413 (D. Conn. 2015) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)). Furthermore, "some actions may take on more or less significance depending on the context." *Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 568 (2d Cir. 2011).

Here, the parties agree that Defendant sent a letter to approximately 146 fellow members of Mr. Marsh's union, and that in the letter, Defendant identified Mr. Marsh by name as having filed a charge of disability discrimination, identified Mr. Marsh's union local, identified the medical restrictions placed on Mr. Marsh's ability to work, and identified the accommodation Mr. Marsh sought. Routinely, courts have held that, when an [*9] employer disseminates an employee's administrative charge of discrimination to the employee's colleagues, a reasonable factfinder could determine that such conduct constitutes an adverse employment action. *See, e.g., Mogenhan v. Napolitano*, 613 F.3d 1162, 1166, 392 U.S. App. D.C. 195 (D.C. Cir. 2010) (denying summary judgment on ADA retaliation claim because a jury could believe the posting of employee's discrimination complaint on employer's intranet could "chill a reasonable employee from further protected activity"); *Greengrass v. Int'l Monetary Sys. Ltd.*, 776 F.3d 481, 485 (7th Cir. 2015) (holding that listing plaintiff's name in publicly available SEC filings and referring to her discrimination complaint as "meritless" constituted materially adverse employment action because "an employee's decision to file an EEOC complaint might be negatively viewed by future employers"); *Booth v. Pasco Cnty., Fla.*, 829 F. Supp. 2d 1180, 1192, 1202 (M.D. Fla. 2011) (reasonable juror could conclude that, if employer approved and endorsed union communication identifying plaintiff by name, calling his EEOC charges "frivolous," and stated that union might have to raise additional dues in order to pay for lawsuit, the posting of the

communication would dissuade a reasonable worker from making a charge of discrimination because it is foreseeable that it "would provoke anger from union members" and result in "social ostracism and [*10] associated problems"); *Ray v. Ropes & Gray LLP*, 961 F. Supp. 2d 344, 359-60 (D. Mass. 2013), *aff'd*, 799 F.3d 99 (1st Cir. 2015) (providing EEOC determination letter with sensitive personal information to a website was adverse employment action because "threat of dissemination of derogatory private information, even if true, would likely deter any reasonable employee from pursuing a complaint against his employer").

Plaintiff also alleges that the June 2014 Letter was sent "because he filed a charge of discrimination." Compl. ¶ 17. "While a bald and uncorroborated allegation of retaliation might prove inadequate to withstand a motion to dismiss, it is sufficient to allege facts from which a retaliatory intent on the part of the defendants reasonably may be inferred." *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 195 (2d Cir. 1994) (denying motion to dismiss retaliation claim where "allegations provide a chronology of events from which an inference can be drawn that actions taken by [d]efendants were motivated by or substantially caused by" plaintiffs' protected activities).

Here, Plaintiff alleges that Defendant sent the letter three months after it had contacted Defendant to request names and contact information for other electricians who had worked for Defendant in the fall of 2012. Defendant counters that it sent the letter seventeen months after Mr. [*11] Marsh had filed his initial discrimination charge with the EEOC. However, the period between the initial administrative filing and the alleged adverse employment action "is not the only relevant timeframe." *Greengrass*, 776 F.3d at 486 (noting that employer "did not become aware of the EEOC's intention to seriously pursue [plaintiff's] claim until . . . the agency informed [the employer] it would be taking interviews," and "[t]hus, a reasonable jury could find that [employer] decided to retaliate against [employee] not when she filed her charge, but when [employer] saw that the EEOC was taking the charge seriously").

Courts have found a three-month gap to provide sufficient temporal proximity to satisfy the causation prong. *See, e.g., id.* (finding three months to be "suspicious timing"); *Hopkins v. Bridgeport Bd. of Educ.*, 834 F. Supp. 2d 58, 67 (D. Conn. 2011) ("three month period could allow for an inference of causation" in retaliation claim). "The Second Circuit and the Courts of this District have found a causal connection" where there were even longer gaps but it was plausible that there was no earlier opportunity to retaliate. *Blanco v. Brogan*, 620 F. Supp. 2d 546, 557 (S.D.N.Y. 2009) (collecting cases). Here, it is plausible that the first opportunity to retaliate against Mr. Marsh, whom they had already terminated, was when the EEOC provided [*12] a list of fellow union members to whom Defendant could disseminate the potentially damaging EEOC charge.

Accordingly, the Court cannot conclude as a matter of law that Defendant's disclosure of the details of Mr. Marsh's EEOC disability discrimination charge in the June 2014 Letter could not plausibly have been a retaliatory act in violation of Mr. Marsh's rights under the ADA.

B. Interference Claims

Section 503(b) of the ADA provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

42 U.S.C. § 12203(b). Neither the Supreme Court nor the Second Circuit has yet outlined a test for an interference claim under the ADA. As one court noted, "[c]ase law interpreting § 503(b) is sparse. The plain words of the statute, however, preclude a party from intimidating or coercing another party not to exercise his rights under the ADA, as well as barring interference against a person who has exercised his rights under the ADA." *Breimhorst v. Educ. Testing Serv.*, No. 99-cv-3387, 2000 U.S. Dist. LEXIS 23363, at *19, 2000 WL 34510621, at *7 (N.D. Cal. Mar. 27, 2000). [*13] The Second Circuit has, in at least one case, allowed an ADA interference claim to proceed, without analysis, in conjunction with an ADA retaliation claim that it found was sufficiently supported to survive a motion for summary judgment. *See Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 222-224 (2d Cir. 2001) (holding that both § 503(a) and § 503(b) claims survived summary judgment because

"plaintiff has come forward with sufficient evidence to establish a prima facie case of retaliation"). The Third Circuit has observed that Section 503(b) "arguably sweeps more broadly than" Section 503(a). *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 789 (3d Cir. 1998); *see also Brown v. City of Tucson*, 336 F.3d 1181, 1192 (9th Cir. 2003) ("[T]he ADA's interference provision . . . protects a broader class of persons against less clearly defined wrongs" than its anti-retaliation provision.)

Plaintiff asserts interference claims on behalf of Mr. Marsh and on behalf of the approximately 146 current and former employees of Defendant who received the June 2014 Letter. Plaintiff argues that the letter was intended to coerce, intimidate, threaten, or interfere with these individuals' in the exercise of their rights under the ADA to communicate with the EEOC concerning potential unlawful discrimination. Based on the plain language of the statute, such conduct is sufficient to state a plausible ADA interference claim.

While it is true that [*14] Plaintiff has not alleged any direct evidence of Defendant's intent behind the June 2014 Letter, the issue of an employer's intent is a question of fact that cannot be resolved on a motion to dismiss. *Cf. Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 134 (2d Cir. 2000) (summary judgment "ordinarily inappropriate" in employment discrimination cases because "intent and state of mind are in dispute" and "a trial court should exercise caution when granting summary judgment to an employer where . . . its intent is a genuine factual issue"). Moreover, as discussed above, the disclosure of sensitive personal information about an individual could well dissuade that individual from making or supporting a charge of discrimination under the ADA. Therefore, the Court reasonably could infer that the letter could have the effect of interfering with or intimidating Mr. Marsh and the letter's recipients with respect to communicating with the EEOC about potential disability discrimination by Defendant.

In addition, courts have noted that the ADA's anti-interference provision is similar to a provision in the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (the "NLRA"), and that "interpretations of the NLRA can serve as a useful guide to interpreting similar language in the ADA, as [*15] both are 'part of a wider statutory scheme to protect employees in the workplace nationwide.'" *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 570 (3d Cir. 2002) (quoting *McKennon v. Nashville Banner Pub'g Co.*, 513 U.S. 352, 357, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995)). In the context of the analogous NLRA provision, the Supreme Court observed that "the economic dependence of the employees on their employers" creates a "necessary tendency of the former . . . to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *N. L. R. B. v. Gissel Packing Co.*, 395 U.S. 575, 617-18, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969). As a result, the Court held that, in that case, it was reasonable to conclude "that the intended and understood import of [the employer's] message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities." *Id.* at 619. Having to address this matter simply on the allegations before it, this Court cannot conclude that the content of the June 2014 Letter does not support a similarly interfering import.

Defendant also argues that the interference claims should be dismissed because Plaintiff has not alleged that any of the letter's recipients were harmed by the letter, even if it had been intended to coerce, intimidate, threaten, or interfere with their exercise of rights under the ADA. [*16] However, looking again at the NLRA context, the Second Circuit explicitly has held that an employer's actions violate the NLRA's anti-interference provision "if, under all the existing circumstances, the conduct has a reasonable tendency to coerce or intimidate employees, regardless of whether they are actually coerced." *New York Univ. Med. Ctr. v. N.L.R.B.*, 156 F.3d 405, 410 (2d Cir. 1998). Applying such a standard to this case, this Court cannot find as a matter of law that the allegations in the Complaint do not render it plausible that the June 2014 Letter had "a reasonable tendency to coerce or intimidate" the individuals who received it.

Accordingly, the Court cannot dismiss Plaintiff's claims that Defendant's alleged actions violated Section 503(b) of the ADA.

C. Prayer for Relief

Defendant argues that Plaintiff's claims for damages and injunctive relief should be dismissed. Defendant argues that the ADA does not authorize compensatory or punitive damages for retaliation and interference claims. It further argues that the claims for injunctive relief should be dismissed because DZNPS has done nothing that requires corrective action on its part. At this stage of

the proceedings, the Court will not dismiss either of these requests for relief.

On the latter point, the Court's [*17] denial of Defendant's motion to dismiss the retaliation and interference claims is dispositive. The Court cannot conclude based purely on the allegations that no harm has occurred that requires the types of remediation requested by Plaintiff.

As for the issue of damages, it is an open question in this Circuit whether a plaintiff can seek compensatory or punitive damages for violations of Section 503 of the ADA. *See Infantolino v. Joint Indus. Bd. of Elec. Indus.*, 582 F. Supp. 2d 351, 362 (E.D.N.Y. 2008). While Section 503 contains no specific enforcement or remedial provision of its own, it states that "[t]he remedies and procedures available under" 42 U.S.C. §§ 12117, 12133, and 12188 "shall be available to aggrieved persons for violations" of the anti-retaliation and anti-interference provisions of the ADA. 42 U.S.C. § 12203(c). In the employment discrimination context, the relevant provision is 42 U.S.C. § 12117, "which in turn adopts the remedies set forth in Title VII, specifically 42 U.S.C. § 2000e-5 and 42 U.S.C. § 1981a(a)(2)." *Edwards v. Brookhaven Sci. Associates, LLC*, 390 F. Supp. 2d 225, 235 (E.D.N.Y. 2005) (citing 42 U.S.C. § 12117). This provision indicates that the remedies for violation of Section 503 "are coextensive with the remedies available in a private cause of action brought under Title VII." *Id.*

Section 1981a provides that in an action "against a respondent who engaged in unlawful intentional discrimination" under certain provisions of the ADA, "the complaining party may recover compensatory and punitive damages." [*18] 42 U.S.C. § 1981a(a)(2). While Section 503 is not one of the enumerated sections, 42 U.S.C. § 1981a(a)(1) provides that Title VII employment discrimination plaintiffs "may recover compensatory and punitive damages." Because 42 U.S.C. §§ 12203(c) and 12117 indicate that the remedies available to those seeking relief for violations of the anti-retaliation and anti-interference provisions of the ADA are the same as those available under Title VII, it follows that such claimants may recover compensatory and punitive damages. Following similar reasoning, some courts have found that Section 503 does authorize actions for damages. *See Edwards*, 390 F. Supp. 2d at 233-36; *Baker v. Windsor Republic Doors*, 635 F. Supp. 2d 765, 766-71 (W.D. Tenn. 2009), *aff'd*, 414 F. App'x 764 (6th Cir. 2011).

In the absence of binding Supreme Court or Second Circuit case law, this Court shall defer its final ruling on the issue of the availability of compensatory and punitive damages under Section 503 of the ADA. This issue has divided courts within this Circuit, *compare Edwards*, 390 F.Supp.2d at 233-36 (finding damages available) *with Infantolino*, 582 F. Supp. 2d at 362-63 (finding damages unavailable), and while the Second Circuit has affirmed at least one judgment awarding damages in an ADA retaliation case, it did so without analyzing the issue, *see Muller v. Costello*, 187 F.3d 298 (2d Cir.1999). With such uncertainty regarding how the Second Circuit would rule, the prudent approach is to allow the damages claims to proceed at this stage, without prejudice to raising the issue again, [*19] if and when a motion for summary judgment is filed or at some later time. *Cf. Cox v. Eichler*, 765 F. Supp. 601, 610-11 (N.D. Cal. 1990) (denying without prejudice motion to strike prayer for punitive damages where availability of such relief under ERISA was open question of law).

By taking this approach, the Court will not have unduly wasted the time and resources of the parties if the Second Circuit were to decide to allow such a claim, as such an occurrence would--in the event this Court had granted the motion to dismiss solely as to the requests for damages[1]--necessitate re-opening discovery on this issue. *Cf.* Wright & Miller, Fed. Prac. & Proc. § 1373 (3d ed.) (factors district court should consider in deferring determination of a motion to dismiss under Rule 12(i) include, *inter alia*, "avoid[ing] costly and protracted litigation," "expense and delay," "the difficulty or likelihood of arriving at a meaningful result of the question presented by the motion," and "the possibility that the issue to be decided on the hearing is so interwoven with the merits of the case . . . that a postponement until trial is desirable"). Because Plaintiff has stated plausible claims for ADA retaliation and interference, for now, the case will proceed regardless of whether damages are [*20] available as a remedy for the alleged violations. Therefore, Defendant is not prejudiced by the Court's decision not to rule on the matter definitively at this time.

1 The Court takes no position at this time on its ultimate resolution of this issue if it is presented again.

Accordingly, the Court denies Defendant's motion to

dismiss Plaintiff's claims for injunctive relief and denies, without prejudice to renewal, Defendant's motion to dismiss Plaintiff's claims for damages.

C. Jury Trial Demand

Defendant also seeks to strike Plaintiff's demand for a jury trial, arguing that Plaintiff is entitled only to equitable relief in this case. Because, as discussed *supra*, the Court has not ruled that compensatory and punitive damages are unavailable for Plaintiff's claims in this action, Defendant's argument fails at this time. Therefore, to the extent Defendant seeks to strike Plaintiff's jury demand, its Motion to Dismiss is denied without prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendant's Motion to Dismiss [Doc. No. 13]. Plaintiff's claims under Sections 503(a) and 503(b) of the ADA shall proceed. Defendant may again raise the issues of the availability of damages and a jury trial for [*21] the claims at a later time.

SO ORDERED at Bridgeport, Connecticut, this 12th day of April, 2016.

/s/ Victor A. Bolden

Victor A. Bolden

United States District Judge

MINODORA GRUNBERG, Plaintiff, v. QUEST DIAGNOSTICS, INC., Defendant.

CIVIL ACTION NO. 3:05-cv-1201 (VLB)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2008 U.S. Dist. LEXIS 8205; 13 Wage & Hour Cas. 2d (BNA) 1152

February 5, 2008, Decided
February 5, 2008, Filed

COUNSEL: [*1] For Minodora Grunberg, Plaintiff: Karen Anderson, LEAD ATTORNEY, Maya & Associates, Westport, CT.

For Quest Diagnostics, Inc, Defendant: Jennifer L. Schancupp, LEAD ATTORNEY, Kim C. Starr, LEAD ATTORNEY, Michael J. Soltis, LEAD ATTORNEY, Jackson Lewis LLP -- Stfd, CT, Stamford, CT.

JUDGES: Vanessa L. Bryant, United States District Judge.

OPINION BY: Vanessa L. Bryant

OPINION

MEMORANDUM OF DECISION AND ORDER GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [DOC. # 56]

The plaintiff, Minodora Grunberg, brings this case against the defendant, Quest Diagnostics, Inc. ("Quest"), her former employer, asserting claims for relief under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq., the Connecticut Fair Employment Practices Act ("CFEPA"), Conn. Gen. Stat. § 46a-60 et seq., and Connecticut common law. Currently pending before the court is Quest's motion for summary judgment. [Doc. # 56] For the reasons hereinafter set forth, the motion for summary judgment is GRANTED.

I. Standard

Summary judgment is appropriate only when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine [*2] issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The substantive law governing the case will identify those facts that are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" Bouboulis v. Transp. Workers Union of Am., 442 F.3d 55, 59 (2d Cir. 2006) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

The moving party bears the burden of showing that no genuine issues exist as to any material facts. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party meets its burden, "an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e). "If [*3] the party moving for summary judgment demonstrates the absence of any genuine issue as to all material facts, the nonmoving party must, to defeat summary judgment, come forward

with evidence that would be sufficient to support a jury verdict in its favor." Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp., 302 F.3d 83, 91 (2d Cir. 2002).

"The non-movant cannot escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts, or defeat the motion through mere speculation or conjecture." Western World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d Cir. 1990) (internal quotations and citations omitted). A party also may not rely on conclusory statements or unsupported allegations that the evidence in support of the motion for summary judgment is not credible. Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993).

The court "construe[s] the evidence in the light most favorable to the non-moving party and . . . draw[s] all reasonable inferences in its favor." Huminski v. Corsones, 396 F.3d 53, 69-70 (2d Cir. 2004). "[I]f there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party, [*4] summary judgment must be denied." Am. Home Assurance Co. v. Hapag Lloyd Container Linie, GmbH, 446 F.3d 313, 315 (2d Cir. 2006).

II. Facts

The following facts relevant to this motion are undisputed, unless noted otherwise. Grunberg worked for Quest from June 6, 2001 until March 15, 2004. Quest provides medical diagnostic testing services to the public through its patient service centers and laboratories.

On May 31, 2001, Grunberg applied to Quest for the position of Field Operations Supervisor ("FOS") for the New Haven, Connecticut metro area. Included in her application was an Employee Agreement, signed by Grunberg, that reads:

> 13. I understand and acknowledge that I may terminate my employment at any time and for any reason, with appropriate notice to the Company. I also understand that the Company may terminate my employment at any time and for any reason. Except for this Agreement, there are no other written or oral agreements relating to my employment. . .
>
> * * *
>
> 15. I understand this Agreement cannot be amended except if I and an Operations Commercial Leader who is a member of the Company's Focus Group sign a document which indicates our intent to modify this Agreement.

[Doc. # 56, [*5] Ex. C] Grunberg does not claim nor is there any evidence that the Employee Agreement was amended, affecting her claims.

On June 6, 2001, Grunberg accepted Quest's offer of employment as FOS by signing an offer letter that states "[b]y accepting this offer, you are agreeing . . . that the only binding contract between you and the company is the Employee Agreement contained in the Company's application." [Doc. # 56, Ex. D] On June 19, 2001, Grunberg signed an Acknowledgment of Receipt of Quest's Employee Handbook stating: "you understand that the handbook is only a summary and is not to be construed in any way as a binding agreement. . . . You understand that your employment is at-will and you have the right to terminate your employment at any time and the company has the same right." [Doc. # 56, Ex. E] Grunberg does not recall ever receiving a copy of the Employee Handbook, but does not dispute she signed the Acknowledgment of Receipt.

Although she has not produced any evidence, Grunberg has a vague recollection of the subsequent promulgation of company policies. She recalls occasionally receiving memoranda summarizing various company policies at meetings with management, but she could [*6] not recall which policies she received in memorandum format or the level of detail in those summaries.

As FOS, Grunberg was responsible for the operations of nine patient service centers and two laboratories located in the New Haven metro area. She reported directly to Dorothy Burts, Director of Operations for Quest. Grunberg's position required her to travel between the eleven offices under her direct supervision, and Quest's Connecticut headquarters in Wallingford, where Burt's worked.

Grunberg began reporting symptoms of depression to her physician in 2000, prior to her employment with Quest. Her symptoms persisted throughout her tenure of employment. Grunberg informed no one associated with Quest that she was diagnosed with, experienced

symptoms of or sought treatment for depression. She occasionally cried at work, and sometimes wore latex gloves while in patient service centers for fear of exposure to germs, a symptom of her diagnosis.

On January 10, 2003, Grunberg requested an internal transfer to fill the open position of Branch Supervisor for the Stamford, Connecticut, metro area. Burts denied the transfer request, citing deficient managerial skills and explaining Grunberg was [*7] having difficulty dealing with her inferiors in New Haven. At Grunberg's request, Burts and Grunberg met to discuss the denial of her transfer request, but Burts declined to provide the names of specific employees who had complained about Grunberg.

In the Spring of 2003, the New Haven metro area floater, an employee who's primary responsibility is to cover for other, absent employees, resigned. Quest declined to replace the floater because the loss of a significant account in the New Haven area altered its demands on employees and resources available. Quest internal procedures dictate that the FOS perform the duties of any unavailable employees. After the floater position was eliminated, Grunberg was forced to take on additional duties by filling in for absent employees previously replaced by the floater. Grunberg complained to Burts that her resources were strained in the absence of a floater. Burts decided not to reinstate the floater position.

On June 13, 2003, Grunberg again requested an internal transfer, this time into the open position of FOS for the Stratford, Connecticut, metro area. Burts again denied the request, restating the same reason for rejecting Grunberg's prior transfer [*8] request.

In August 2003, Grunberg met with Robert Moody, a senior officer in Quest's Human Resources Department, to discuss her relationship with Burts and the denial of her transfer requests. At the meeting, during which no formal action was taken by either Moody or Grunberg, Moody told Grunberg she appeared "very stressed." On September 23, 2003, Burts and Grunberg met again, this time at Burts's initiation, to discuss Grunberg's performance. During their conversation, Grunberg indicated that FOS for New Haven was not the right position for her. Burts informed Grunberg Quest would post her position as an opening and seek a replacement, but encouraged Grunberg to use the company's internal placement system to search for a new, more suitable position. Grunberg recalls Burts altering her position at the close of the meeting, saying Quest *may* post her position as an opening if Grunberg's performance did not improve. Burts also told Grunberg she appeared stressed.

On October 9, 2003, Burts formally requested approval from Quest to post FOS for New Haven as an opening and seek a replacement for Grunberg. On October 14, 2003, Burts's request was approved and the position was posted as an [*9] opening on Quest's internal website that day. On October 17, 2003, the position of FOS for New Haven was posted as an opening on Quest's publicly accessible website.

On October 17, 2003, Grunberg began missing work due to her medical condition. On October 21, 2003, Grunberg formally requested FMLA leave, retroactive to October 17, 2001. That same day, Quest confirmed via letter that Grunberg's FMLA request had been approved. The letter explained that Grunberg could use up to sixteen (16) weeks of FMLA leave, and noted "your FMLA leave could be certified through tentatively February 5, 2004." [Doc. # 56, Ex. N] Quest hired a new FOS for New Haven while Grunberg was on FMLA leave, on January 18, 2004.

In February 2004, Grunberg claims she left a voicemail message for Burts stating her desire to return to work on February 16, 2004. Burts does not recall receiving a message from Grunberg while she was on leave. She left a similar message for the Quest benefits specialist responsible for her file. On February 5, 2004, Quest sent a letter to Grunberg explaining that her FMLA leave had expired and she had lost her job restoration rights under the FMLA, but that Quest would continue providing [*10] her with health benefits and would be receptive to finding her an open position of employment within the company upon her return from medical leave. The Quest benefits specialist attached a post-it note to the letter stating "I had to mail this letter to you because your FMLA expires 2/5/04. However, as long as you return on 2/16/04, there's nothing you have to do." [Doc. # 66, Ex. M]

On February 16, 2004, Grunberg returned to work. She was informed by her replacement that she was no longer FOS for New Haven. Grunberg traveled to Quest headquarters in Wallingford and had a meeting with Burts and Moody that afternoon. Quest confirmed Grunberg's prior position had been filled and offered Grunberg a short term position within the company, at

their Stamford location, at the same salary and benefits level, until she could find a permanent position. Grunberg accepted the temporary position through March 17, 2004. On March 15, 2004, Grunberg resigned. On July 25, 2005, Grunberg filed a fourteen count complaint.

III. Discussion

The claims still pending [1] in this case are for: 1) a hostile work environment in violation of the ADA and CFEPA (counts 1 and 3); 2) retaliation in violation of the ADA [*11] and CFEPA (counts 2 and 4); 3) interference and retaliation in violation of the FMLA (counts 13 and 14); 4) negligent supervision (count 5); 5) intentional infliction of emotional distress (count 6); 6) negligent misrepresentation (count 10); 7) breach of contract (count 11); and 8) constructive discharge (count 12). [Doc. # 1] On July 27, 2007, Quest moved for summary judgment on all then-remaining counts. [Doc. # 56]

1 On March 27, 2007, the court (Droney, J) dismissed Grunberg's claim for negligent infliction of emotional distress (count 7). [Doc. # 39] In a footnote to her memorandum in opposition of this motion, Grunberg requested leave to withdraw her claims for coercion under CFEPA (count 8) and defamation (count 9) because she was unable to discern any factual predicate for those causes of action. While this is not the preferred method of withdrawing a claim, the court hereby grants the withdrawal of those claims.

A. ADA and CFEPA Hostile Work Environment [2]

2 Generally, Connecticut courts use ADA standards to analyze CFEPA disability claims. See Ann Howard's Apricots Rest. v. Comm'n on human Rights & Opportunities, 237 Conn. 209, 224-26, 676 A.2d 844 (1996). There are, however, some points [*12] of differential. See generally Beason v. United Tech. Corp., 337 F.3d 271 (2d Cir. 2003). As such, the court's considerations and findings on Grunberg's ADA hostile work environment and retaliation claims apply equally to her CFEPA hostile work environment and retaliation claims, unless specifically noted otherwise.

Grunberg alleges in her complaint that Quest's conduct towards her based on her disability created a hostile work environment in violation of the ADA's anti-discrimination provisions. Quest asserts in the current motion that Grunberg cannot allege any set of facts that show Quest discriminated against her because of her disability, as no one at Quest had any actual or constructive knowledge of her disability.

The ADA provides that no employer "shall discriminate against a qualified individual with a disability *because of* the disability of such individual." 42 U.S.C. § 12112(a) (emphasis added). The act defines disability as: "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 U.S.C. § 12102(2).

To prove liability for [*13] discrimination under the ADA's first definition of disability, an employer must have notice of the disability. See Rodal v. Anesthesia Group of Onondaga, 369 F.3d 113, 118 (2d Cir. 2004) (showing an employer had notice of employee's disability an element of a prima facie showing of ADA discrimination). Grunberg admits that she told no one at Quest of her symptoms or diagnosis of or treatment for depression, and has alleged no facts showing that anyone at Quest had actual knowledge of such symptoms, diagnosis or treatment. Her argument that her treating doctors knew of her symptoms has no relevance to a finding of whether Quest or any of its employees had notice of her disability. Further, Grunberg's argument that Moody and Burts's statements that she appeared "stressed" could constitute constructive knowledge of her disability is unpersuasive because 1) those comments were made after the conduct alleged to create a hostile work environment, namely the removal of the floater position and denial of her transfer requests, had already occurred, 2) the observations are not alleged to have concerned Grunberg's general appearance and performance but, instead, regarded only her demeanor during [*14] those specific meetings, and 3) a mere comment about stress is insufficient to prove notice of a disability that substantially limits a major life activity. See 42 U.S.C. § 12102(2)(A); see generally Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002) (ADA should "be interpreted strictly to create a demanding standard for qualifying as disabled"). [3] In this particular case, the comments were made during a meeting in which Grunberg's supervisors were giving her negative

feedback, a circumstance under which one would be expected to experience episodic as opposed to systematic stress.

> 3 The CFEPA has a broader definition of disability that does not require a showing that the employee's symptoms substantially limited a major life activity. See Conn. Gen. Stat. § 46a-51(15). This does not affect the court's reasoning for two reasons: 1) CFEPA still requires an employer to be on notice of the employee's disability for a discrimination claim, and 2) the facts proffered by Grunberg also do not meet the CFEPA standard for disability.. See Beason, 337 F.3d at 276-79.

Grunberg asserts a secondary argument that Quest regarded her as disabled, entitling her to ADA protection under 42 U.S.C. § 12102(2)(C). [*15] [4] She offers no evidentiary support for that proposition. Courts look to Equal Employment Opportunity Commission ("EEOC") regulations for guidance in interpreting the ADA. Ryan v. Grae & Rybicki, P.C., 135 F.3d 867, 870 (2d Cir. 1998). The EEOC regulations define "regarded as" to mean an individual who:

> 1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> 2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> 3) Has none of the impairments defined [by the regulations] but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(l).

> 4 The Second Circuit has held there is no "regarded as" disability discrimination under CFEPA. Beason, 337 F.3d at 279-81. The following discussion applies only to Grunberg's ADA hostile work environment claim.

None of these definitions can support Grunberg's claim. To fit any of the three definitions of "regarded as," Quest would have had to mistakenly believe that Grunberg had a disability as defined by the [*16] ADA. Sutton v. United Airlines, 527 U.S. 471, 489, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999). There is no credible evidence that any Quest employee believed, mistakenly or not, that Grunberg suffered from depression or any other impairment or disability that substantially effected her major life activities.

Grunberg has not factually shown that she was entitled to protection against discrimination under the ADA. She has not provided any evidence that Quest was on notice of her disability, or that any employee of Quest regarded her as having a disability. In fact, Quest has submitted uncontroverted evidence that none of its employees knew or believed Grunberg had a disability during the relevant time period. Accordingly, the motion for summary judgment as to Grunberg's hostile work environment claims under the ADA and CFEPA is GRANTED, as no reasonable jury could conclude Grunberg was discriminated against because of her depression. [5]

> 5 The court finds that even if Grunberg qualified for protection from discrimination under the ADA, she has not alleged facts sufficient for her hostile work environment claim to survive summary judgment. For a work environment to be so hostile as to become actionable, "the workplace [must [*17] be] permeated with discriminatory intimidation, ridicule, and insult that is sufficiently pervasive to alter the conditions of the victim's employment." Kassner v. 2nd Ave. Delicatessen, Inc., 496 F.3d 229, 240 (2d Cir. 2007) (internal quotations omitted). Grunberg has not provided the court with any set of facts that could lead a reasonable jury to conclude Quest created such an atmosphere in her workplace because of her disability. See Balonze v. Town Fair Tire Centers, Inc., 2005 U.S. Dist. LEXIS 5317 at *27-28 (D. Conn. Mar. 31, 2005).

C. ADA and CFEPA Retaliation

Grunberg also claims that Quest retaliated against her for opposing its conduct in violation of the ADA. Quest's motion for summary judgment argues that any objections Grunberg raised were not in opposition to any alleged discriminatory practices based on disability and thus not entitled to protection under the ADA.

ADA retaliation claims are analyzed pursuant to the same burden shifting framework used in Title VII cases. Weixel v. Bd. of Educ. of City of New York, 287 F.3d 138, 148 (2d Cir. 2002). The ADA provides that "[n]o person shall discriminate against any individual because such individual has opposed any act or [*18] practice made unlawful by this Act." 42 U.S.C. § 12203(a). "To establish a prima facie case of retaliation under the ADA, a plaintiff must establish that (1) the employee was engaged in an activity protected by the ADA, (2) the employer was aware of that activity, (3) an employment action adverse to the plaintiff occurred, and (4) there existed a causal connection between the protected activity and the adverse employment action." Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224, 234 (2d Cir. 2000).

Quest asserts that Grunberg has not set forth facts that can reasonably meet the first element of a prima facie ADA retaliation claim because any complaints lodged by Grunberg were not in opposition to any disability discrimination, and thus not considered an activity protected by the ADA.

Grunberg's ADA retaliation claim does not automatically fail simply because summary judgment was granted to Quest on her ADA discrimination claim. Treglia v. Town of Manlius, 313 F.3d 713, 719 (2d Cir. 2002) ("plaintiff may prevail on a claim for retaliation even when the underlying conduct complained of was not in fact unlawful"). "However, ambiguous complaints that do not make the employer aware of alleged [*19] discriminatory misconduct do not constitute protected activity." Int'l Healthcare Exch., Inc. v. Global Healthcare Exch., LLC, 470 F. Supp. 2d 345, 357 (S.D.N.Y. 2007); see also Ramos v. City of New York, 1997 U.S. Dist. LEXIS 10538 at *7 (S.D.N.Y. Jul. 22, 1997) ("While there are no magic words that must be used when complaining about a supervisor, in order to be protected activity the complainant must put the employer on notice that the complainant believes that discrimination is occurring"); Gibson v. Conn. Judicial Dep't Court Support Servs. Div., 2007 U.S. Dist. LEXIS 30950 at *27 (D. Conn. Apr. 25, 2007).

Grunberg offers no evidence in any pleadings, affidavits or exhibits on the record that any complaint she raised made or should have made Quest aware she believed that she was being discriminated against because of her disability. The only opposition she raised was at meetings with Burts and Moody regarding the denials of her transfer requests and elimination of the floater position. There are no issues of material fact that could lead a reasonable jury to conclude any of Grunberg's complaints constitute protected activity under the ADA. This is particularly true when, as discussed [*20] above, no Quest employees had any knowledge of her alleged disability. Accordingly, summary judgment is GRANTED as to Grunberg's ADA and CFEPA retaliation claims.

D. FMLA Interference and Retaliation

Grunberg alleges that Quest failed to return her to the same or an equivalent position following her FMLA leave in violation of that statute's interference provision. She further claims that Quest retaliated against her for exercising her FMLA rights. Quest asserts that it is factually undisputed that it made the decision to remove Grunberg from her position and post that position as an opening prior to Grunberg notifying anyone associated with the company that she intended to take FMLA leave. Therefore, her interference and retaliation claims must fail as a matter of law.

"A plaintiff may raise separate causes of action for interference with the exercise of FMLA rights and employer retaliation against employees who exercised their FMLA rights." Gauthier v. Yardney Tech. Prods., 2007 U.S. Dist. Lexis 67448 at *9 (D. Conn. Sept. 13, 2007) (citing Potenza v. City of New York, 365 F.3d 165, 167 (2d Cir. 2004)). The FMLA makes it "unlawful for any employer to interfere with, restrain, or deny [*21] the exercise of . . . any right" under the statute, 29 U.S.C. § 2615(a)(1), including the right "to be restored by the employer to the position of employment held by the employee *when leave commenced,*" or "an equivalent position." 29 U.S.C. § 2614(a)(1) (emphasis added). "In addition to the substantive guarantees contemplated by the Act, the FMLA also affords employees protection in the event they are discriminated against for exercising their rights under the Act." Gauthier, 2007 U.S. Dist. LEXIS 67448 at *10 (D. Conn. Sept. 13, 2007) (quoting King v. Preferred Tech. Group, 166 F.3d 887, 891 (7th Cir. 1999)). Employers who discriminate against an employee because he or she has exercised FMLA rights may be held liable under an FMLA retaliation claim.

Burts requested permission from her superiors to remove Grunberg as FOS and post Grunberg's position as an opening on October 9, 2003. That request was approved on October 14, 2003, and the opening was

posted on Quest's internal website that day. Grunberg has proffered no evidence to dispute these facts. Grunberg did not begin missing work due to her illness until October 17, 2003, and did not notify Quest that she intended to take FMLA [*22] leave until October 21, 2003.

Grunberg's FMLA interference claim fails as a matter of law because Quest made the decision to remove her as FOS and begin searching for a replacement before she notified anyone associated with the company that she intended to exercise her rights under the FMLA. See Kennebrew v. N.Y. City Hous. Auth., 2002 U.S. Dist. LEXIS 3038 at *76 (S.D.N.Y. Feb. 26, 2002) ("No FMLA violation occurs where an employer has already decided to terminate the employee before the employee requests FMLA leave"); Reinhart v. Mineral Techs., Inc., 2006 U.S. Dist. LEXIS 89279 at *40 (D. Pa. Nov. 27, 2006); Beno v. United Tel. Co. of Fla., 969 F. Supp. 723, 726 (M.D. Fla. 1997).

Grunberg also lost the right to be reinstated to the same or similar position under the FMLA following her leave because she had already been deemed unqualified as an FOS prior to her leave and the decision to relieve her from that position had already been made. See Clark v. New York State Elec. & Gas Corp., 67 F. Supp. 2d 63, 81 (N.D.N.Y. 1999).

Grunberg's only argument is that Quest posted the FOS job opening on its external website on October 17, 2003, the same day she began her absence from work. This [*23] fact is irrelevant to the court's determination as Quest had clearly already made its decision at that point. Burts had determined it was appropriate to remove Grunberg as FOS and begin searching for a replacement, and requested and received permission from the company to do so, all prior to Grunberg beginning her FMLA leave.

Grunberg's FMLA retaliation claim must fail for the same reason. Quest made the decision to remove Grunberg from her position prior to her exercise of FMLA rights. It could then not have retaliated against her for exercising her rights by determining she was unqualified for the same or a similar position. See Sista v. CDC Ixis North America, Inc., 445 F.3d 161, 176 (2d Cir. 2006) (employer intent to retaliate because of exercise of FMLA rights a material element of proof in FMLA retaliation claim).

In her complaint, Grunberg also alleges Quest's retaliation took the form of the facts alleged in her original claims for defamation and coercion under CFEPA. As mentioned above, Grunberg has abandoned those claims by failing to provide any factual support. Grunberg abandonment is also evinced by the fact that she does not rely on those allegations in her opposition to [*24] this motion. As such, the court finds she has abandoned the theory that the purported defamatory or coercive conduct can constitute an FMLA retaliation claim.

Quest's motion for summary judgment as to Grunberg's FMLA interference and retaliation claims is GRANTED. Quest made the decision to remove Grunberg as FOS before she elected to take FMLA leave; therefore, Quest had no obligation to restore her to the same or similar position as she did not hold that position when she elected to take FMLA leave. Quest could not have retaliated against Grunberg by removing her from that position for exercising FMLA rights because the decision to do so was contemplated and completed prior to her exercise of those rights.

E. Negligent and Intentional Tort Claims

Grunberg asserts claims for negligent supervision, intentional infliction of emotional distress and negligent misrepresentation. Quest argues that these claims are all preempted by the exclusivity provision of the Connecticut Workers' Compensation Act ("WCA"), Conn. Gen. Stat. § 31-275 et seq., and must fail as a matter of law. In the alternative, Quest asserts that Grunberg has failed to allege facts that could prove the elements of each individual [*25] tort claim.

The WCA is the exclusive remedy for personal injuries arising out of and in the course of employment. See Conn. Gen. Stat. § 31-284(a). The statute's definition of personal injury specifically excludes "mental or emotional impairment, unless such impairment arises from a physical injury or occupational disease." Conn. Gen. Stat. § 31-275(16)(B)(ii). Grunberg's claims allege only emotional injury; she does not allege any physical injury as defined by the WCA. Accordingly, Grunberg's common law claims are not preempted by the WCA.

1. Negligent Supervision and Negligent Misrepresentation

Grunberg is precluded from bringing claims for

negligent supervision and negligent misrepresentation even though those claims are not preempted by the WCA. The Connecticut Supreme Court has held that claims of negligence in the context of continuing employment that result in emotional distress are barred as a matter of law. See Perodeau v. City of Hartford, 259 Conn. 729, 758-63, 792 A.2d 752 (Conn. 2002). Courts in this district have routinely applied this principle to all claims of negligence occurring in the course of employment. See Antonopoulos v. Zitnay, 360 F. Supp. 2d 420, 431-32 (D. Conn. 2005); Rosario v. J.C. Penney, 463 F. Supp. 2d 229, 233 n. 9 (D. Conn. 2006); [*26] Dinice-Allen v. Yale-New Haven Hosp., 2008 U.S. Dist. LEXIS 1802 at *19 (D. Conn. Jan. 10, 2008); Pruitt v. Mailroom Tech., Inc., 2007 U.S. Dist. LEXIS 57808 at *21 (D. Conn. Aug. 9, 2007).

Grunberg's claims of negligent supervision and negligent misrepresentation are based only on facts arising in the context of continual employment. Her negligent supervision claim relies on the removal of the floater position and denial of her transfer requests, and fail as a matter of law. All of the acts complained of occurred while Grunberg was employed by Quest and before she elected to take leave. Her claim of negligent misrepresentation is also barred by Perodeau. [6] Quest made the decision to remove Grunberg from her position prior to her taking FMLA leave. The company continued to provide her with employee benefits, including the leave itself, through her return to work on February 16, 2003. Quest's February 5, 2003, letter explicitly stated that Grunberg should contact Quest if she wanted another position upon her return to work, and in fact provided her with such a position when she did return from leave. Thus, Grunberg and Quest were in a continued employment relationship when any alleged [*27] negligent misrepresentation was made. The rule of Perodeau should apply, and her claim must fail.

> 6 The court also finds that Grunberg has not alleged sufficient facts to support a negligent misrepresentation claim. "An action for negligent misrepresentation requires the plaintiffs in the present case to prove that [the defendant] made a misrepresentation of fact, that [the defendant] knew or should have known that it was false, that the plaintiff reasonably relied upon the misrepresentation, and that the plaintiff suffered pecuniary harm as a result thereof." Glazer v. Dress Barn, Inc., 274 Conn. 33, 73, 873 A.2d 929 (Conn. 2005). Grunberg has failed to persuade the court that a reasonable jury could find that the contents of the note sent along with the February 5, 2005, letter was factually false. The only evidence in support of this claim are the letter and the note. There is no inconsistency between the two documents. The letter offered Quest's assistance in finding Grunberg an alternate position should she return to work. The note invited Grunberg to return to work on February 16, 2003, despite the expiration of her FMLA leave. Upon her return, Quest in fact aided her in finding continued employment [*28] within the company.

The facts alleged by Grunberg in support of her negligent supervision and negligent misrepresentation claims fall squarely within the rule barring all claims of negligence against an employer arising in the context of continued employment. As a result, summary judgment must be GRANTED as to negligent supervision and negligent misrepresentation.

2. Intentional Infliction of Emotional Distress

Grunberg's claim for intentional infliction of emotional distress is not preempted by the WCA because she suffered no physical injury, nor is it barred by the rule articulated in Perodeau that applies only to torts of negligence.

In order for Grunberg to prevail on her claim for intentional infliction of emotional distress, she must show: "1) that the actor intended to inflict emotional distress; or that he knew or should have known that emotional distress was a likely result of his conduct; 2) that the conduct was extreme and outrageous; 3) that the defendant's conduct was the cause of the plaintiff's distress; and 4) that the emotional distress sustained by the plaintiff was severe. Petyan v. Ellis, 200 Conn. 243, 253, 510 A.2d 1337 (Conn. 1986). Whether Quest's conduct was extreme and outrageous [*29] is a question of law for the court. See Appleton v. Board of Educ., 254 Conn. 205, 210, 757 A.2d 1059 (Conn. 2000).

The extreme and outrageous requirement necessitates that conduct "exceeds all bounds usually tolerated by decent society . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly

intolerable in a civilized community." Id. at 210-11 (internal citations omitted).

Grunberg's allegations fall well short of this well established definition of extreme and outrageous conduct. At most, Grunberg was exposed to a series of everyday business decisions. The fact that she did not agree with her supervisors decisions does not create a cause of action for intentional infliction of emotional distress. This finding is further buttressed by Grunberg's own admissions that no one employed at Quest had any awareness of her treatment or diagnosis for depression.

As there are no issues of material fact that could lead a reasonable jury to find for Grunberg, summary judgment is GRANTED on her claim for intentional infliction of emotional distress.

F. Breach of Contract [*30] and Constructive Discharge

"As a general rule, contracts of permanent employment, or for an indefinite term, are terminable at will" in Connecticut. D'Ulisse-Cupo v. Board of Directors of Notre Dame High School, 202 Conn. 206, 212, 520 A.2d 217 (Conn. 1987). An exception to this general rule exists where a former employee can show a demonstrably improper reason for his or her dismissal in violation of some important public policy. Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 474-75, 427 A.2d 385 (Conn. 1980). Courts allow tort claims for wrongful discharge, including the tort of constructive discharge, to proceed only when the former employee is "*otherwise without a remedy* and that permitting the discharge to go unaddressed would leave a valuable social policy to go unvindicated." Burnham v. Karl & Gelb, P.C., 252 Conn. 153, 165, 745 A.2d 178 (Conn. 2000) (emphasis in original). The existence of a statutory scheme enacted to address the public policy articulated by a discharged employee preempts and precludes a tort claim for wrongful discharge in violation of that same public policy. Id. at 162-63.

Grunberg does not articulate a public policy violated by her alleged constructive discharge. The court can only assume [*31] that she would rely on the public policy of preventing disability discrimination in the workplace. As discussed above, this important public policy is adequately addressed by the presence of the ADA and CFEPA. Those statutes contain specific provisions creating causes of action for employees discriminated against because of their disability, or retaliated against for opposing such discrimination, and therefore preclude all tort claims for wrongful discharge in violation of the public policy against disability discrimination, including Grunberg's claim for constructive discharge. The preclusion of Grunberg's claim is irrespective of the success or failure of her ADA or CFEPA claims. Id. Summary judgment as to the constructive discharge claim is GRANTED.

Another exception to Connecticut's rule of at will employment is breach of a contract implied in fact. [7] "A contract implied in fact, like an express contract, depends on actual agreement." Reynolds v. Chrysler First Commer. Corp., 40 Conn. App. 725, 730, 673 A.2d 573 (Conn. App. Ct. 1996). For her breach of contract claim to survive, Grunberg must offer facts that would allow a reasonable jury to conclude Quest agreed through either its words, actions, [*32] or conduct, to enter into some form of contractual agreement under which Grunberg would not be terminated. Coelho v. Posi-Seal International, Inc., 208 Conn. 106, 112, 544 A.2d 170 (Conn. 1988).

> 7 Count 11 of the complaint is for breach of contract. In briefing the current motion, both parties advance legal arguments regarding breach of an implied contract. The court will consider these arguments regarding the existence of an implied contract, as on the face of the pleadings no express, written contract was breached.

Grunberg's claim rests on general statements made in Quest's employment documents outlining the existence of a progressive disciplinary policy. In certain circumstances, employer statements in personnel manuals can create implied contracts between an employer and its employees. See Gaudio v. Griffin Health Servs. Corp., 249 Conn. 523, 533, 733 A.2d 197 (Conn. 1999). "A contractual promise cannot be created by plucking phrases out of context; there must be a meeting of the minds between the parties. The mere fact that the plaintiff believed the guidelines to constitute a contract does not bind the defendant without some evidence that it intended to be bound to such a contract." Reynolds, 40 Conn. App. at 730 [*33] (internal citations omitted). Employers can protect themselves against claims that their employment documents create contracts implied in fact by inserting explicit disclaimers and explanatory text clearly stating the employer does not intend to contract. See Finley v.

Aetna Life & Casualty Co., 202 Conn. 190, 199 n. 5, 520 A.2d 208 (Conn. 1987) (overruled on other grounds by Curry v. Burns, 225 Conn. 782, 626 A.2d 719 (Conn. 1993)). These disclaimers could, of course, be rendered moot if an employee can show a contract was created through an employer's statements or actions beyond the employment documents themselves.

Quest points to specific disclaimers noting an intent not to create a contract through its employment documents or company policies included in its Employee Agreement, offer letter and Acknowledgment of Receipt of its Employee Handbook, all signed by Grunberg. Grunberg does not dispute these facts. She does not alert the court of any statements made to her by any Quest employee promising that the company would not terminate her unless it strictly followed a specific progressive disciplinary policy. In the absence of such facts, there is no evidence on the record that could lead a reasonable jury [*34] to conclude Quest intended to enter into a contract obligating it to employ a specific progressive disciplinary policy, nor that Quest and Grunberg had any meeting of the minds. Accordingly, summary judgment must be GRANTED on Grunberg's breach of contract claim.

IV. Conclusion

For the reasons stated above, the motion for summary judgment is GRANTED. Grunberg has failed to point to any issues of any material fact that could lead a reasonable jury to conclude she could prevail on any of her claims.

The clerk shall terminate this action.

IT IS SO ORDERED.

/s/

Vanessa L. Bryant

United States District Judge

Dated at Hartford, Connecticut: February 5, 2007.

MATTHEW MENDEZ, on behalf of himself and all others similarly situated, Plaintiff, -against - ENECON NORTHEAST APPLIED POLYMER SYSTEMS, INC., and ROBERT BARR and MICHAEL BARR, each in their individual and professional capacities, Defendants.

CV 14-6736 (ADS) (AKT)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2015 U.S. Dist. LEXIS 90794

July 13, 2015, Decided
July 13, 2015, Filed

COUNSEL: [*1] For Matthew Mendez, on behalf of himself and all others similarly situated, Plaintiff: Anthony Patrick Malecki, LEAD ATTORNEY, Law Offices of Borrelli & Associates, Great Neck, NY; Alexander T. Coleman, Borrelli & Associates PLLC, Great Neck, NY; Michael J. Borrelli, Borrelli & Associates, P.C., Great Neck, NY.

For Enecon Northeast Applied Polymer Systems, Inc., Robert Barr, Michael Barr, each individual and professional capacities, Defendants: Lee Evan Riger, LEAD ATTORNEY, Balfe & Holland, P.C., Melville, NY.

JUDGES: A. KATHLEEN TOMLINSON, United States Magistrate Judge.

OPINION BY: A. KATHLEEN TOMLINSON

OPINION

ORDER

A. KATHLEEN TOMLINSON, Magistrate Judge:

Presently before the Court in this putative collective action brought pursuant to the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") is the letter motion by Defendants Enecon Northeast Applied Polymer Systems, Inc. ("Enecon"), Robert Barr, and Michael Barr (collectively, "Defendants") seeking "remedial relief" with respect to a letter, dated June 10, 2015, which Plaintiff's counsel sent to potential collective action members ("the Letter"). DE 22. The Letter states as follows:

Dear Enecon Northeast Applied Polymer Systems, Inc. Employee:

> Our office [*2] represents Plaintiff Matthew Mendez in the above-referenced matter. Mr. Mendez is a former employee of Enecon Northeast Applied Polymer Systems, Inc. ("Enecon"). This employee has brought a lawsuit in federal court for Enecon's alleged violations of numerous provisions of the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"). This employee brought the lawsuit on behalf of both himself and other non-managerial employees working for Enecon. We are currently investigating

> this employee's claims by speaking with other Enecon employees to determine if they have any information that support[s] Mr. Mendez's claims. This is the reason why we would like to speak with you.
>
> Mr. Mendez alleges, among other things, that Enecon violated the minimum wage and overtime provisions of the FLSA and the NYLL due to Enecon's failure to compensate its employees for hours worked while traveling to and from each job site.
>
> If you have any information regarding any of the violations that Mr. Mendez alleges Enecon committed as mentioned in this letter, we would like to speak with you. You can feel free to give me a call at any time at (516) 248-5550 to discuss these issues further.
>
> Respectfully,
>
> Anthony [*3] P. Malecki
> *For the Firm*

DE 22-1.

Defendants argue that the Letter is improper because it (1) suggests the existence of a unified class, (2) suggests that Enecon's employees are obligated to speak with Plaintiff's counsel, and (3) misstates the law in order to induce potential collective action members to join Plaintiff's lawsuit. *See* DE 22 at 1-2. Accordingly, Defendants ask the Court to issue an order which (1) requires Plaintiff's counsel to send a court-approved remedial correspondence to all recipients of the Letter, or (2) permits Defendants' counsel to send curative correspondence to the recipients of the Letter. *See id.* at 1. Plaintiff opposes Defendants' motion, arguing, *inter alia*, that "while the Court has the authority to control communications to putative collective [action] members, there is nothing close to misleading or coercive in Plaintiff's letter warranting the Court's involvement." DE 23 at 2. For the reasons explained below, Defendants' motion is DENIED.

"Courts have the authority in both Rule 23 class actions and FLSA collective actions (29 U.S.C. § 216(b)) to enter appropriate orders governing the conduct of counsel and parties." *Brown v. Mustang Sally's Spirits & Grill, Inc.*, No. 12-CV-529S, 2012 U.S. Dist. LEXIS 144722, 2012 WL 4764585, at *2 (W.D.N.Y. Oct. 5, 2012) (citing, e.g., *Hoffmann--La Roche Inc. v. Sperling*, 493 U.S. 165, 170-71, 110 S. Ct. 482, 107 L. Ed. 2d 480, (1989); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-100, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981)). "This supervisory authority exists even [*4] before a class is certified." *Id.* (citing *In re Initial Public Offering Sec. Litig.*, 499 F.Supp.2d 415, 418 n. 13 (S.D.N.Y. 2007)). "The 'primary purpose in supervising communications is to ensure that potential members receive accurate and impartial information regarding the status, purposes and effects of the class action.'" *Id.* (quoting *Hinds County, Miss. v. Wachovia Bank N.A.*, 790 F. Supp. 2d 125, 134 (S.D.N.Y.2011) (internal alteration omitted).

As the Supreme Court recognized in *Gulf Oil*, "a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil*, 452 U.S. at 100. However, the Supreme Court made clear that judicial intervention "limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Id.* at 101-02; *accord Dziennik v. Sealift, Inc.*, No. 05-CV-4659, 2006 U.S. Dist. LEXIS 33011, 2006 WL 1455464, at *3 (E.D.N.Y. May 23, 2006). Such intervention "should result in a carefully drawn order that limits speech as little as possible consistent with the rights of the parties under the circumstances." *Gulf Oil*, 452 U.S. at 100. "As is implicit in the Supreme Court's reference to the 'conduct of counsel and parties,' an order may limit communications by plaintiffs, defendants, or both." *Zamboni v. Pepe W. 48th St. LLC*, No. 12 CIV. 3157, 2013 U.S. Dist. LEXIS 34201, 2013 WL 978935, at *2 (S.D.N.Y. Mar. 12, 2013) (quoting *Gulf Oil*, 452 U.S. at 100) (internal citation omitted). [*5]

Here, Defendants have failed to establish that the Letter sent by Plaintiff's counsel is misleading, improper, or otherwise warrants judicial intervention. "[P]laintiffs generally have a right to contact members of the putative class." *Dziennik*, 2006 U.S. Dist. LEXIS 33011, 2006 WL 1455464, at *3 (citing *Williams v. Chartwell Financial Servs., Ltd.*, 204 F.3d 748, 759 (7th Cir. 2000)). As one district court has stated, "[b]oth parties need to be able to communicate with putative class

members--if only to engage in discovery regarding issues relevant to class certification--from the earliest stages of class litigation. . . . District courts thus must not interfere with *any* party's ability to communicate freely with putative class members, unless there is a specific reason to believe that such interference is necessary." *Austen v. Catterton Partners*, 831 F. Supp. 2d 559, 567 (D. Conn. 2011) (emphasis in original); *accord Brown*, 2012 U.S. Dist. LEXIS 144722, 2012 WL 4764585, at *2. Here, the Letter sent by Plaintiff's counsel (1) informs Enecon employees about the existence of Plaintiff's lawsuit, (2) briefly describes the claims alleged, (3) states that Plaintiff's counsel is "currently investigating" Plaintiff's claims "by speaking with other Enecon employees to determine if they have any information that support[s Plaintiff's] claims," and (4) states that recipients may "feel free" to contact Plaintiff's counsel "[i]f [they] have any information regarding any of the violations [*6] that [Plaintiff] alleges Enecon committed as mentioned in this letter." DE 22-1. Defendants do not claim that any information in the Letter is patently false, only that the Letter is, in Defendants' view, "easily capable of being misconstrued." DE 22 at 3. The Court disagrees and finds nothing inherently intrusive or misleading about the communication by Plaintiff's counsel, which appears to be squarely aimed at obtaining information which may be relevant to Plaintiff's claims and discovery in this action. Accordingly, in light of the principles espoused in *Gulf Oil* and its progeny, the Court concludes that no judicial intervention is warranted with respect to the Letter.

The Court further notes that the American Bar Association has issued a formal opinion regarding a lawyer's ethical obligations when communicating with putative class members during the period between filing a class action lawsuit and class certification. *See* ABA Formal Op. 07-445 (2007). The opinion states, in part:

> Both plaintiffs' counsel and defense counsel have legitimate need to reach out to potential class members regarding the facts that are the subject of the potential class action, including information that may be relevant to whether [*7] or not a class should be certified. With respect to such contacts, Rule 4.3, which concerns lawyers dealing with unrepresented persons, does not limit factual inquiries but requires both sides to refrain from giving legal advice other than advice to engage counsel, if warranted. If, on the other hand, plaintiffs' counsel's goal is to seek to represent the putative class member directly as a named party to the action or otherwise, the provisions of Rule 7.3, which governs lawyers' direct contact with prospective clients, applies. . . . However, Rule 7.3's restrictions do not apply to contacting potential class members as witnesses, so long as those contacts are appropriate and comport with the Model Rules [of Professional Conduct].

Id. (footnote omitted). As Plaintiff points out, Magistrate Judge Lindsay recently denied a motion which concerned the same letter at issue in this case on the grounds that it did not violate ABA Formal Op. 07-445. *See Chowdury v. Peter Luger, Inc.*, No. 14-cv-5880, DE 30. Unlike the defendants in *Chowdury*, Defendants here do not argue that the Letter constitutes an improper solicitation of business or that Plaintiff's counsel committed an ethical violation. Accordingly, the Court will not undertake an [*8] analysis of whether the Letter complies with ABA Formal Op. 07-445 since the Court has already ruled that no judicial action is warranted pursuant to *Gulf Oil*. Finally, the Court notes that it is not preventing Defendants from communicating with prospective collective action members who are not already represented by an attorney, so long as that communication complies with the Rule of Professional Conduct.

For the foregoing reasons, Defendants' motion is DENIED.

SO ORDERED.

Dated: Central Islip, New York

July 13, 2015

/s/ A. Kathleen Tomlinson

A. KATHLEEN TOMLINSON

U.S. Magistrate Judge

WILLIAM ROGERS, Plaintiff, v. NAIF MAKOL and SKOOTER'S RESTAURANT II, INC., Defendants.

No. 3:13-cv-946 (JAM)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2014 U.S. Dist. LEXIS 127650

September 10, 2014, Decided
September 10, 2014, Filed

PRIOR HISTORY: Rogers v. Makol, 2014 U.S. Dist. LEXIS 65099 (D. Conn., May 12, 2014)

COUNSEL: [*1] William Rogers, Plaintiff, Pro se, East Longmeadow, MA.

For Naif Makof, Scooters Restaurant II, Inc., Defendants: Timothy F. Murphy, LEAD ATTORNEY, Skoler, Abbott & Presser, P.C., Springfield, MA.

JUDGES: Jeffrey Alker Meyer, United States District Judge.

OPINION BY: Jeffrey Alker Meyer

OPINION

RULING ON DEFENDANTS' MOTION TO DISMISS [Doc. #42]

Plaintiff William Rogers has sued his former employer Skooter's Restaurant II and its owner Naif Makol for allegedly discriminating and retaliating against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("ADA"). This Court previously granted defendants' motion to dismiss the complaint and allowed plaintiff to file an amended complaint "stating facts and dates sufficient to show that his complaint [was] not time-barred." Doc. #36 at 4. Plaintiff has filed an amended complaint, and I now consider and grant defendants' motion to dismiss the amended complaint.

Background

In July 2013, plaintiff filed a federal court complaint alleging that defendants had violated Title VII and the ADA by discriminating against him on the basis of his race, color, and disability. *See* Doc. #1. The complaint alleged that [*2] defendants failed to promote him and terminated his employment on September 24, 2011, and that on some unspecified date they conducted a criminal background check without his authorization or consent. *Id.* at 2-3.

Attached to the complaint was a letter dated February 20, 2013, addressed to the U.S. Equal Employment Opportunity Commission ("EEOC") and the Connecticut Commission on Human Rights and Opportunities ("CHRO"), claiming that defendants had discriminated against him "because of [his] race and learning disability." *Id.* at 7. The letter further described how plaintiff was demoted from assistant manager of the restaurant to short order cook, how he was subjected to an unauthorized criminal background check, how he was terminated after malfunctioning windshield wipers prevented him from reporting to work during a rainstorm on September 23, 2011, and how he was later retaliated

against when defendants "filed a charge of Willful Misconduct" with the Department of Labor and appealed his application for unemployment compensation. *Id.* at 7-8.

In October 2013, defendants moved to dismiss the complaint on statute-of-limitations grounds. Doc. #18. I granted the motion because plaintiff's filing of his discrimination [*3] charge with the EEOC and CHRO in February 2013 was not within the required 300 days from the date of his alleged termination in late September 2011. Doc. #36 at 2-3. Nevertheless, in view of plaintiff's suggestion that he somehow remained employed and "on call" after September 2011, I granted plaintiff leave to file an amended complaint that pled "with specificity a date of termination that is not time-barred." *Id.* at 3-4.

Plaintiff timely filed an amended complaint in June 2014, reiterating his claims of Title VII and ADA discrimination and retaliation and also claiming a violation of the Whistleblower Protection Enhancement Act of 2012. Doc. #41 at 1.[1] The amended complaint attached several documents relating to plaintiff's dealings with the CHRO and his unemployment benefits proceedings in 2012 and 2013.

> 1 Although plaintiff's complaint does not expressly allege retaliation, his letter to the CHRO of March 2013 that is attached to the complaint alleges that defendants retaliated against him in connection with their post-employment opposition to his receipt of unemployment benefits. Doc. #41 at 7.

Discussion

When deciding a motion to dismiss, a court must accept all well-pleaded allegations as true [*4] and draw all reasonable inferences in favor of the pleader. *Hishon v. King*, 467 US 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). Although detailed allegations are not required, the complaint must adduce sufficient facts to afford the defendants fair notice of the claims and the grounds upon which they are based, and to demonstrate a right to relief. *Bell Atl. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Conclusory allegations are not sufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Documents attached to a complaint may be considered alongside the complaint in evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Kalyanaram v. Am. Ass'n of Univ. Professors at N.Y. Inst. of Tech., Inc.*, 742 F.3d 42, 44 n. 1 (2d Cir. 2014) (citing *Yak v. Bank Brussels Lambert*, 252 F.3d 127, 130 (2d Cir. 2001)). Moreover, in reviewing a *pro se* complaint, a court must interpret the complaint's allegations liberally to "raise the strongest arguments [they] suggest[]." *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007). *See also Nielsen v. Rabin*, 746 F.3d 58, 63 (2d Cir. 2014); *Hogan v. Fischer*, 738 F.3d 509, 515 (2d Cir. 2013).

As explained in my prior ruling granting defendants' first motion to dismiss, in order to state a claim for Title VII and ADA violations, a plaintiff must timely file a charge of discrimination with the EEOC. *See* 42 U.S.C. § 2000e-5(e)(1) (Title VII time limit); 42 U.S.C. § 12117(a) (incorporating this Title VII provision into the ADA statutory scheme). In Connecticut, an employee must file the charge with the EEOC within 300 days of the "alleged unlawful [employment] practice," *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), "subject in rare cases to equitable [*5] doctrines such as tolling or estoppel." Doc. #36 at 3 (citing *Nat'l R.R. Passenger Corp.*, 536 U.S. at 113, and *Zerilli-Edelglass v. N.Y.C. Transit Auth.*, 333 F.3d 74, 80-81 (2d Cir. 2003)).

Plaintiff's amended complaint does not allege that he was fired on a date later than September 2011. Indeed, the amended complaint does not identify any date on which he was terminated. In one of the attachments to the amended complaint--plaintiff's letter of March 14, 2012, to the CHRO--plaintiff states that he was terminated on September 25, 2011. Doc. #41 at 9. Because plaintiff continues to allege that he was terminated no later than September 2011, neither his Title VII nor ADA complaint are timely absent evidence that he filed a charge with the CHRO and EEOC within 300 days, by no later than July 2012.

Plaintiff's alleges that he filed an intake questionnaire with the EEOC on December 10, 2012. Doc. #41 at 8; Doc. #46 at 8. But even if this intake questionnaire were sufficient to constitute a charge,[2] the date of this filing--December 10, 2012--was more than 400 days after his alleged termination in late September 2011, and therefore plaintiff's claims remain untimely.

> 2 Under some circumstances, an intake questionnaire may constitute a charge of

discrimination with the EEOC if it contains, as required by EEOC regulations, [*6] "an allegation and the name of the charged party," and can be "reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and employee." *Fed. Expr. Corp. v. Holowecki*, 552 U.S. 389, 402, 128 S. Ct. 1147, 170 L. Ed. 2d 10 (2008). Plaintiff's amended complaint has pled no facts to establish that these criteria are met in this case. Alongside his opposition to defendants' motion to dismiss, plaintiff attaches what appears to be the signature page of an EEOC intake questionnaire, which is signed December 10, 2012 and which includes a checked box indicating an intent to file a charge of discrimination. Doc. #46 at 8. That single page does not include an allegation or the name of a charged party. I make no finding as to whether the whole intake questionnaire, including the pages plaintiff did not provide the Court, would have been sufficient to constitute a charge of discrimination.

Plaintiff also relies on the letter that he sent to the CHRO, dated March 14, 2012 and bearing the subject "RE: Wrongful termination of employment/retaliation."[3] Doc. #41 at 9. Although plaintiff's letter fell within the 300-day period from the date of plaintiff's termination, the letter did not allege [*7] that he was terminated for any discriminatory reason. Rather, it stated only that plaintiff informed his employer that he was unable to work on September 23, 2011, due to hazardous weather, that he was subsequently omitted from the restaurant's work schedule, and that his numerous attempts to contact his employer went unanswered. Without alleging discrimination, plaintiff's letter asks the agency "to assist me with this wrongful termination of employment and hope[s] that there is short term solution [sic] for solving this problem." *Id.*

3 A complaint filed with a state fair employment practice agency such as the CHRO may be automatically dual-filed with the EEOC if the two agencies participate in a worksharing agreement that so authorizes. 42 U.S.C. § 2000e-8(b); 29 C.F.R. § 1601.13(c). The CHRO and the EEOC routinely participate in such agreements and have done so during the years immediately before and after plaintiff filed his earliest attached letter to the CHRO in Fiscal Year 2012. *Sawka v. ADP, Inc.*, 2014 U.S. Dist. LEXIS 107018, 2014 WL 3845238 at *1 and *4 n.2 (D. Conn. 2014) (allowing CHRO charges as an acceptable substitute to EEOC charges for timeliness purposes because of the worksharing agreement covering plaintiff's EEOC and CHRO complaint in May 2011); *Bagley v. Yale Univ.*, 2014 U.S. Dist. LEXIS 118662, 2014 WL 4230921 at *10-11 & n.6 (D. Conn. 2014) (describing the worksharing agreement [*8] and addendum for Fiscal Years 2013 and 2014, which provide for dual-filing of charges between the EEOC and the CHRO). Although there is no evidence on this matter in the record, I will assume for the purpose of this opinion that such agreement was in effect during Fiscal Year 2012.

At the bare minimum, a charge of discrimination with the EEOC must include "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of," 29 C.F.R. § 1601.12, and must be "reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and employee." *Fed. Expr. Corp. v. Holowecki*, 552 U.S. 389, 402, 128 S. Ct. 1147, 170 L. Ed. 2d 10 (2008). While "[d]ocuments filed by an employee with the EEOC should be construed, to the extent consistent with permissible rules of interpretation, to protect the employee's rights and statutory remedies," *id.* at 406, the primary purpose of an EEOC charge is "to alert the EEOC to the discrimination that a plaintiff claims he is suffering." *Mathirampuzha v. Potter*, 548 F.3d 70, 77 n.6 (2d Cir. 2008) (citation omitted).

To that end, the EEOC recommends that those wishing to file a charge send a letter to the EEOC that includes, *inter alia*, "[w]hy you believe you were discriminated against (for example, because [*9] of your race, color, religion sex . . . , national origin, age . . . , disability or genetic information)." U.S. EQUAL EMP'T OPP. COMM'N, HOW TO FILE A CHARGE OF EMPLOYMENT DISCRIMINATION, http://www.eeoc.gov/employees/howtofile. cfm (last visited Sept. 10, 2014). Plaintiff's letter, without alleging discrimination or any facts that would suggest discrimination as the reason for his termination, did not alert the EEOC to any discrimination that he suffered.

Even if the letter of March 2012 were sufficient to constitute a charge, the federal court claims now alleged by plaintiff are not reasonably related to the allegations in the letter. Claims not raised in an EEOC complaint may only be brought in federal court if "reasonably related" to the claim filed with the agency. *Mathirampuzha,* 548 F.3d at 76 (plaintiff's administrative charge of a single act of discrimination was not reasonably related to later court charge of retaliation and hostile work environment). "The central question is whether the complaint filed with the [EEOC] gave th[e] agency adequate notice to investigate discrimination on both bases." *Id.* at 77 (*quoting Williams v. N.Y.C. Hous. Auth.*, 458 F.3d 67, 70 (2d Cir. 2006) (*per curiam*)). But plaintiff's letter did not give the CHRO or EEOC adequate notice to investigate a claim of any type of discrimination at all, [*10] much less to investigate plaintiff's current claims of discrimination on the basis of both race and disability.

In an effort to show that his claim comes within the 300-day limit, plaintiff argues that defendants discriminated not only by terminating him, but also by protesting his claims to unemployment compensation in March 2012 and by appealing his award of unemployment compensation on several occasions in September and November 2012. Doc. #41 at 3-4. But defendants' opposition to and appeal of his unemployment benefits were not an adverse employment action within the scope of the anti-discrimination prohibitions of Title VII or the ADA, because they occurred after plaintiff's employment was terminated. Both Title VII and the ADA forbid discrimination or retaliation *during* the course of an employment relationship, *see* 42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 12112(a); the statutes are silent about actions taken *after* the employer-employee relationship is severed by termination. *See Memnon v. Clifford Chance US, LLP*, 667 F.Supp.2d 334, 341 (S.D.N.Y. 2009) ("[T]here has been no adverse employment action taken against [plaintiff] because all of the conduct that gives rise to her allegations against [defendant] occurred after she resigned pursuant to the Settlement Agreement.").

To the extent that the anti-retaliation [*11] provisions of Title VII or the ADA might extend to an employer's post-employment conduct, *see, e.g., Hopkins v. Bridgeport Bd. of Educ.*, 834 F.Supp.2d 58, 66-67 (D. Conn. 2011), plaintiff's complaint does not plausibly allege that the defendants' opposition to plaintiff's unemployment benefits was by reason of his filing a claim of discrimination. To the contrary, the first indication that plaintiff claimed that his termination was for a race- and disability-based discriminatory reason was his letter to the CHRO in February 2013, Doc. #41 at 6-7, which post-dates his unemployment benefit proceedings in 2012.

Moreover, a former employer is entitled to undertake reasonable defensive measures against an employee's charge of discrimination. *See Richardson v. Comm'n on Human Rights & Opportunities*, 532 F.3d 114, 123 (2d Cir. 2008) ("Reasonable defensive measures do not violate the anti-retaliation provision of Title VII, even though such steps are adverse to the charging employee and result in differential treatment.") (quoting *United States v. N.Y.C. Transit Auth.*, 97 F.3d 672, 677 (2d Cir. 1996)). Such measures may include exercising the legal right to oppose a former employee's unemployment benefits by arguing that he was terminated for cause. *See Whalley v. Reliance Grp. Holdings, Inc.*, 2001 U.S. Dist. LEXIS 427, 2001 WL 55726 at *12 (S.D.N.Y. 2001) ("Since Whalley initiated the unemployment benefits process, such opposition was Reliance's right as a former employer, not retaliatory in nature, and Whalley has not [*12] introduced evidence that the reasons articulated by Reliance for its employment action constituted improper discrimination under the ADA.").

In short, plaintiff's Title VII and ADA claims are plainly time-barred. His complaint does not plausibly allege that he filed a charge of discrimination with the EEOC or CHRO within 300 days of his termination. Nor does the complaint plausibly allege Title VII or ADA liability on the basis of defendants' opposition to plaintiffs post-employment claim for unemployment compensation.

Plaintiffs whistleblower claim fails as well. The Whistleblower Protection Act of 1989 ("WPA") protects federal employees against retaliation by their employers after reporting evidence of agency misconduct. 5 U.S.C. § 1201 *et seq.* Section 2 of the WPA describes its purpose as "to strengthen and improve protection for the rights of *Federal employees,* to prevent reprisals, and to help eliminate wrongdoing *within the Government.*" Pub. L. No. 101-12 § 2(b) (emphasis added). Plaintiff claims that defendants violated the Whistleblower Protection Enhancement Act of 2012 ("WPEA"), which strengthens the WPA's protections for federal whistleblowers. Pub. L. No. 112-199. The WPEA is clear: it pertains solely to

"[protection of certain disclosures of information by [*13] *Federal employees*." *Id.* at Title I (emphasis added). Plaintiff was not covered by these protections because he was not a federal employee; that is, his restaurant employer was a private company, not a part of the federal government. Moreover, he has alleged no facts suggesting that he was terminated for engaging in protected whistleblowing activity. Such activity would include disclosures of information that he reasonably believed to evidence a violation of a law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8). Plaintiff has made no mention of reporting alleged misconduct on the part of his employer prior to his allegedly wrongful termination. Because the amended complaint alleges neither that plaintiff was a federal employee nor that he engaged in any protected whistleblowing activity, plaintiffs claim under the Whistleblower Protection Enhancement Act of 2012 is denied.

Conclusion

Defendants' motion to dismiss the amended complaint [Doc. #42] is GRANTED. The amended complaint is dismissed pursuant to Fed. R. Civ. P. 12(b)(6) with prejudice for failure to state a claim upon which relief can be granted. [*14] The Clerk is directed to close this case.

It is so ordered.

Dated at Bridgeport this 10th day of September 2014.

/s/ Jeffrey Alker Meyer

United States District Judge

YUH-RONG F. SHIH, Plaintiff, - against - JPMORGAN CHASE BANK, N.A., Defendant.

10 Civ. 9020 (JGK)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2013 U.S. Dist. LEXIS 32500

March 7, 2013, Decided

SUBSEQUENT HISTORY: Motion denied by Shih v. JPMorgan Chase Bank, N.A., 2013 U.S. Dist. LEXIS 92080 (S.D.N.Y., June 28, 2013)

COUNSEL: [*1] Yuh-Rong F. Shih, Plaintiff, Pro se, Flushing, NY.

For JP Morgan Chase Bank, NA, Defendant: Stacey L. Blecher, LEAD ATTORNEY, J.P. Morgan Chase & Co., Legal Department, New York, NY.

JUDGES: John G. Koeltl, United States District Judge.

OPINION BY: John G. Koeltl

OPINION

MEMORANDUM OPINION AND ORDER

JOHN G. KOELTL, District Judge:

The plaintiff, Yuh-Rong F. Shih, brings this action against the defendant, JPMorgan Chase Bank, N.A. ("Chase"), her former employer. The plaintiff, proceeding pro se, alleges that Chase retaliated against her in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e et seq. (2006); the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq. (2006); Title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12111 et seq. (2006); the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law §§ 290 et seq. (McKinney 2010); and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code §§ 8-101 et seq. (2011). Chase now moves for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, seeking to dismiss all of the plaintiff's claims.

I.

The standard for granting summary judgment is well established. [*2] "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1223 (2d Cir. 1994). "[T]he trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." Gallo, 22 F.3d at 1224. The moving party bears the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. The substantive law governing the case will

identify those facts that are material and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

In [*3] determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)); see also Gallo, 22 F.3d at 1223. Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. See Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994). If the moving party meets its burden, the nonmoving party must produce evidence in the record and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible . . . ." Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993); see also Scotto v. Almenas, 143 F.3d 105, 114-15 (2d Cir. 1998) (collecting cases).

Where, as here, a pro se litigant is involved, although the same standards for dismissal apply, a court should give the pro se litigant special latitude in responding to a summary judgment motion. See McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) [*4] (courts "read the pleadings of a pro se plaintiff liberally and interpret them 'to raise the strongest arguments that they suggest'" (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994))). In particular, the pro se party must be given express notice of the consequences of failing to respond appropriately to a motion for summary judgment. Local Civil Rule 56.2; see also McPherson, 174 F.3d at 281; Vital v. Interfaith Med. Ctr., 168 F.3d 615, 620-21 (2d Cir. 1999). In this case, Chase complied with Local Civil Rule 56.2 by providing the required notice to the plaintiff. (See Def.'s R. 56.2 Notice.)

II.

The following facts are undisputed for the purposes of this motion, unless otherwise indicated.

Chase employed the plaintiff from January 1990 to August 2002. (Am. Compl. ¶¶ 3, 8.) At the time of the events in question, the plaintiff was a fifty-year-old Asian woman who suffered from carpel tunnel syndrome. (Am. Compl. ¶ 22.) In August 2001, the plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging discrimination and retaliation on the basis of age, national origin, and sex. (Am. Compl. ¶ 5.) The plaintiff alleges that Chase denied her claim for [*5] workers' compensation benefits in March 2002, although the Workers' Compensation Board ultimately approved her disability benefits and an insurance carrier reimbursed Chase for the full amount. (Am. Compl. ¶¶ 6-7.)

The plaintiff's employment was terminated on August 16, 2002. (Am. Compl. ¶ 8; Lieberman Aff. Ex. A.) On November 1, 2002, the plaintiff filed an amended charge with the EEOC to include disability discrimination and retaliation charges. (Am. Compl. ¶ 9.) The plaintiff then filed a lawsuit ("the 2002 Lawsuit") against Chase in or around November 2002. (Am. Compl. ¶ 12; Lieberman Aff. ¶ 4.) The 2002 Lawsuit asserted claims of discrimination and retaliation in violation of the same statutes under which the present lawsuit has been brought. (Am. Compl. ¶ 12; Lieberman Aff. ¶ 4.) The plaintiff alleges that she discovered in April 2003 that Chase had reduced her severance payment without notice. (Am. Compl. ¶ 14.)

In May 2005, the parties verbally agreed to settle the 2002 Lawsuit before trial. (Lieberman Aff. ¶ 6.) On or about September 7, 2005, in connection with the resolution of the 2002 Lawsuit, the plaintiff executed a Negotiated Settlement Agreement and General Release ("the [*6] 2005 Agreement/Release"). (Lieberman Aff. Ex. C ("Agreement/Release").) The plaintiff read the entire 2005 Agreement/Release and signed it freely, under the direction of her attorney. (Shih Dep. 13, 15, 26-27.) Pursuant to the 2005 Agreement/Release, Chase agreed to pay the plaintiff a total of $120,000 "in settlement of any and all claims [the plaintiff] asserted against [Chase] in this Action and may have as a result of her employment and/or the termination thereof." (Agreement/Release ¶ 1.) In consideration for the settlement payment, the plaintiff agreed to release Chase "from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, bonuses, controversies, agreements, promises, claims, charges, complaints and demands whatsoever . . . ." (Agreement/Release Ex. A at 1.) This general release covered claims arising under a

list of statutes, including all of the anti-discrimination statutes relevant to this case, and "any claim of retaliation under such laws . . . ." (Agreement/Release Ex. A at 1.)

The 2005 Agreement/Release also contained a provision ("the carve-out") which stated that the plaintiff did [*7] not waive any rights to or release Chase from "payments of any and all benefits and/or monies earned, accrued, vested or otherwise owing, if any, to [the plaintiff] under the terms of [Chase's] retirement, savings, deferred compensation and/or profit sharing plan(s)." (Agreement/Release ¶ 2(c).) At the time the plaintiff executed the 2005 Agreement/Release, she believed that Chase still owed her approximately $3480 in severance pay. (Shih Dep. 17-20, 61-63.)

On or about May 21, 2007, the plaintiff filed a malpractice lawsuit against Scott Mishkin ("the Mishkin Lawsuit"), the attorney who represented her in the 2002 Lawsuit. (Am. Compl. ¶¶ 18, 27; Lieberman Aff. ¶ 11.) The plaintiff contended that Mishkin, by advising her to sign the 2005 Agreement/Release, caused her to lose her right to collect the allegedly unpaid severance. (Shih Dep. 30-31.) Chase was not named as a party in the Mishkin Lawsuit, and no third-party claim was ever brought against Chase. (Lieberman Aff. ¶ 11.) Chase did provide a sworn affidavit to Mishkin's counsel dated July 10, 2007, indicating that Chase did not owe the plaintiff any additional severance and that Chase actually overpaid her by $580. (Lieberman [*8] Aff. Ex. E.)

On or about April 1, 2008, the plaintiff and Mishkin's counsel entered into a Stipulation of Settlement for the Mishkin Lawsuit (Lieberman Aff. Ex. F), but Chase was not a signatory to the Stipulation of Settlement and did not give Mishkin's counsel authority to sign on its behalf (Lieberman Aff. ¶ 17). On April 18, 2008, although not a party to the Mishkin Lawsuit, Chase offered to pay the plaintiff $4060.14 as part of the Mishkin settlement if the plaintiff executed a new release agreement. (Lieberman Aff. Ex. G.) Because the plaintiff failed to return a signed release agreement to Chase, Chase did not make any payment to her. (Lieberman Aff. ¶ 19.) On November 26, 2008, Chase renewed its settlement offer of $4060.14, conditioned upon the plaintiff's execution of a new release agreement. (Lieberman Aff. Ex. I.) Chase explained: "[We] cannot authorize a payment to you unless you execute a new Release Agreement, which we need so that we can be certain that there are no more outstanding claims." (Lieberman Aff. Ex. I.) The plaintiff never returned a signed release agreement to Chase. (Lieberman Aff. ¶ 22.)

On March 27, 2009, the plaintiff filed a charge against Chase with [*9] the EEOC, alleging retaliation on the basis of sex, national origin, age, and disability. (Am. Compl. ¶¶ 74, 98; Knepper Aff. Ex. A.) The plaintiff and Chase's EEOC Case Manager Kathryn Knepper attended an EEOC mediation session on July 17, 2009. (Knepper Aff. ¶ 4.) Knepper was authorized to renew Chase's settlement offer of $4060.14, again conditioned upon the plaintiff's execution of a new release agreement. (Knepper Aff. ¶ 3.) The plaintiff advised that she would not execute the proffered release agreement. (Knepper Aff. ¶ 5.) On September 8, 2010, the EEOC issued a Dismissal and Notice of Rights, by which the EEOC dismissed the plaintiff's charge for lack of substantiating information and gave the plaintiff notice of her right to sue. (Knepper Aff. Ex. B.)

On December 2, 2010, the plaintiff filed the present action against Chase, alleging that Chase retaliated against her in violation of Title VII, the ADEA, the ADA, the NYSHRL, and the NYCHRL. The plaintiff alleges that Chase took the following "adverse" actions against her: (1) "On or about April 15, 2003, Plaintiff's severance payment was reduced without notice"; (2) "In or around 2002, workers' compensation benefits were denied [*10] to Plaintiff"; (3) "On or about July 10, 2007, [Chase's Assistant General Counsel] asked [a Chase Human Resources employee] to issue a false affidavit in connection with the Mishkin Litigation and insisted that the information was correct"; (4) "On or about April 18, 2008, [Chase's Assistant General Counsel] denied that [Chase] ever offered the terms and conditions of settlement that Mishkin's counsel presented in Court in connection with the Mishkin Litigation"; (5) "On or about April 18, 2008, [Chase] refused to set aside the Agreement/Release that Plaintiff executed in September 2005"; (6) "On or about June 12, 2008, [Chase] refused to comply with the terms of the Stipulation of Settlement [from the Mishkin Lawsuit]"; (7) "In or around December 2008, [Chase] refused to investigate [the] conduct [of Chase's Assistant General Counsel]"; and (8) "On or about July 17, 2009, [Chase] did not send a representative to the EEOC mediation with authority." (Pl.'s R. 56.1 Stmt. ¶ 27.)

III.

Chase now moves for summary judgment on all of the plaintiff's claims. Chase first argues that the 2005 Agreement/Release bars the plaintiff's claims concerning Chase's allegedly retaliatory actions taken before [*11] September 2005. Chase further argues that the plaintiff's claims should be dismissed because the plaintiff has failed to set forth a prima facie case of retaliation, and even if she had, she has failed to present evidence showing that Chase's proffered non-retaliatory reasons for its actions were merely pretext for retaliation.

A.

As an initial matter, Chase argues that the plaintiff's claims concerning Chase's allegedly retaliatory actions taken before September 2005 should be dismissed because she broadly released any and all such claims by executing the 2005 Agreement/Release. These include her claims that Chase reduced her severance payment without notice in or about April 2003 and that Chase denied her workers' compensation benefits in or around 2002.

The parties dispute whether severance pay is covered by the carve-out that provides an exception to the general release. The plaintiff asserts that severance pay is covered by the carve-out, which provides an exception to the general release for "payments of any and all benefits and/or monies earned, accrued, vested or otherwise owing, if any, to [the plaintiff] under the terms of [Chase's] retirement, savings, deferred compensation [*12] and/or profit sharing plan(s)" (Agreement/Release ¶ 2(c)), and thus she has not waived her right to claim any unpaid severance. On the other hand, Chase contends that severance pay is not covered by the carve-out, and therefore this claim is barred by the 2005 Agreement/Release's broad language releasing Chase "from all actions, causes of action, suits, debts, dues, controversies, agreements, promises, claims, charges, complaints and demands whatsoever." (Agreement/Release Ex. A at 1.)

It is unnecessary to determine whether the 2005 Agreement/Release bars the plaintiff's claims concerning Chase's allegedly retaliatory actions taken before September 2005 because the claims fail as a matter of law in any event. For the reasons explained below, none of the plaintiff's retaliation claims--whether occurring before or after September 2005--can survive Chase's motion for summary judgment.

B.

Title VII, the ADEA, the ADA, the NYSHRL, and the NYCHRL contain anti-retaliation provisions that prohibit an employer from retaliating against an employee for opposing discriminatory conduct prohibited by the statutes. See 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); 42 U.S.C. § 12203(a); N.Y. Exec. Law § 296(e); [*13] N.Y.C. Admin. Code § 8-107(7). The Court will first address the retaliation claims under Title VII, the ADEA, the ADA, and the NYSHRL together, and will later address the retaliation claim under the NYCHRL separately.

1.

The anti-retaliation provisions in Title VII, the ADEA, the ADA, and the NYSHRL contain nearly identical language and are analyzed under the same framework. See Kessler v. Westchester Cnty. Dep't of Soc. Servs., 461 F.3d 199, 205 (2d Cir. 2006) (noting that "the same standards and burdens apply to claims under both [Title VII and the ADEA]"); Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155, 159 (2d Cir. 1999) (noting that "it is appropriate to apply the framework used in analyzing retaliation claims under Title VII in analyzing a claim of retaliation under the ADA"); Sutera v. Schering Corp., 73 F.3d 13, 16 n.2 (2d Cir. 1995) (noting that "[t]he same analysis [as used for Title VII and ADEA claims] applies to claims under the New York Human Rights Law"). Retaliation claims are analyzed under the burden-shifting framework established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See Gorzynski v. Jetblue Airways Corp., 596 F.3d 93, 110 (2d Cir. 2010).

Under [*14] the McDonnell Douglas framework, the plaintiff carries the initial burden of establishing a prima facie case of retaliation. See McDonnell Douglas, 411 U.S. at 802. "To establish a prima facie case of retaliation, [the plaintiff] must show that (1) she was engaged in protected activity; (2) [the defendant] was aware of that activity; (3) [the plaintiff] suffered a materially adverse action; and (4) there was a causal connection between the protected activity and that adverse action." Lore v. City of Syracuse, 670 F.3d 127, 157 (2d Cir. 2012) (citations omitted). If the plaintiff meets this initial burden, the defendant must point to evidence of a legitimate, non-retaliatory reason for the challenged action. See Cifra v. Gen. Elec. Co., 252 F.3d

205, 216 (2d Cir. 2001). If the defendant meets its burden, then "the plaintiff must point to evidence that would be sufficient to permit a rational factfinder to conclude that [the defendant's] explanation is merely a pretext for impermissible retaliation." Id. (citations omitted).

Here, the parties do not dispute that the plaintiff has satisfied the first two elements of a prima facie case of retaliation. Chase does not dispute that the plaintiff's [*15] filing of charges with the EEOC in 2001 and 2009, as well as her filing of the 2002 Lawsuit, constitute protected activity under the statutes, nor does it dispute that it was aware of that activity. However, Chase asserts that the plaintiff has not satisfied the third and fourth elements of a prima facie case of retaliation.

With respect to the third element, Chase argues that the plaintiff has not suffered a materially adverse action. According to Chase, to establish an adverse action a plaintiff must show that the challenged action "affected the terms, privileges, duration, or conditions of the plaintiff's employment." (Def.'s Mem. Supp. Mot. S.J. at 11 (quoting Cooper v. N.Y. State Dep't of Human Rights, 986 F. Supp. 825, 828 (S.D.N.Y. 1997)) (emphasis added).) Chase maintains that because the plaintiff was not an employee at the time of the challenged actions, none of the challenged actions constitute adverse actions affecting her employment.

However, as the United States Supreme Court has made clear, retaliation extends beyond strictly employment-related and workplace-related actions. See Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 67, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). Under Burlington Northern, a [*16] materially adverse action in the retaliation context is one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Id. at 68 (citation and internal quotation marks omitted). As the Supreme Court explained, both the language of Title VII's anti-retaliation provision and its protective purpose indicate that retaliation is not limited to discriminatory actions that affect the terms and conditions of employment. See id. at 62-64. Thus, any action by an employer that would dissuade a reasonable employee from opposing discriminatory conduct can support a claim of retaliation. See id. at 67-68; see also Kessler, 461 F.3d at 207. This may include actions taken outside the context of the plaintiff's employment. See, e.g., Marchiano v. Berlamino, No. 10 Civ. 7819, 2012 U.S. Dist. LEXIS 135109, 2012 WL 4215767, at *4-5 (S.D.N.Y. Sept. 20, 2012) (holding that an employer suing a former employee for contribution is a materially adverse action for the purposes of a retaliation claim).

Nevertheless, it is unnecessary to decide whether the plaintiff in this case has satisfied the third element of a prima facie case of retaliation, because Chase correctly argues that the plaintiff [*17] has not satisfied the fourth element: that there is a causal connection between the protected activity and any of the allegedly adverse actions. Taking each instance of protected activity and the subsequent actions in turn, there is no evidence that the plaintiff's involvement in protected activity caused Chase to take adverse actions against her.

After the plaintiff filed the 2001 charge with the EEOC, Chase allegedly denied her workers' compensation benefits in 2002. (Pl.'s R. 56.1 Stmt. ¶ 27.) However, the Workers' Compensation Board ultimately approved her disability benefits and an insurance carrier reimbursed Chase for the full amount. (Am. Compl. ¶ 7.) The plaintiff then alleges that, after she filed the 2002 Lawsuit, Chase took several adverse actions against her, spanning from April 2003 to December 2008. In or about April 2003, Chase allegedly reduced the plaintiff's severance payment without notice. (Pl.'s R. 56.1 Stmt. ¶ 27.) However, a Chase Human Resources employee later reviewed the plaintiff's employment records and in July 2007 issued a sworn affidavit indicating that Chase did not owe the plaintiff any additional severance and that Chase actually overpaid her by $580. [*18] (Lieberman Aff. Ex. E.) Nonetheless, the plaintiff alleges that this affidavit was false and that its issuance constituted an adverse action in itself. (Pl.'s R. 56.1 Stmt. ¶ 27.) In April 2008, Chase allegedly refused to set aside the 2005 Agreement/Release. (Pl.'s R. 56.1 Stmt. ¶ 27.) However, the plaintiff admits that she read the entire 2005 Agreement/Release and signed it freely, under the direction of her attorney. (Shih Dep. 13, 15, 26-27.) In April 2008 Chase allegedly denied making the settlement offer contained in the Stipulation of Settlement for the Mishkin Lawsuit, and in June 2008 Chase allegedly refused to comply with its terms. (Pl.'s R. 56.1 Stmt. ¶ 27.) However, Chase was not a signatory to the Stipulation of Settlement nor gave Mishkin's counsel authority to sign on its behalf (Lieberman Aff. ¶ 17), and on three different occasions Chase made a settlement offer of $4060.14 to the plaintiff that was always

conditioned on her execution of a new release agreement (Lieberman Aff. Ex. G, Ex. I; Knepper Aff. ¶ 3). The plaintiff further alleges that Chase's refusal to investigate the conduct of its Assistant General Counsel in or around December 2008 constituted another [*19] adverse action. (Pl.'s R. 56.1 Stmt. ¶ 27.) Then, after the plaintiff filed the 2009 charge with the EEOC, Chase allegedly failed to send a representative with authority to the EEOC mediation session. (Pl.'s R. 56.1 Stmt. ¶ 27.) However, Chase maintains that its representative at the EEOC mediation session was authorized to renew Chase's settlement offer of $4060.14, again conditioned upon the plaintiff's execution of a new release agreement. (Knepper Aff. ¶ 3.)

The plaintiff has failed to present any evidence demonstrating a causal connection between the protected activity and any of the allegedly adverse actions. The plaintiff has not offered any direct or circumstantial evidence indicating that Chase took the challenged actions as a result of her engagement in protected activity. With respect to the actions taken in March 2002 and April 2003, the plaintiff presents no evidence that her 2001 and 2002 filings prompted Chase to deny her workers' compensation benefits and reduce her severance payment. With respect to the actions taken in July 2007, April 2008, June 2008, and December 2008, the plaintiff alleges that these actions were also in retaliation for her 2001 and 2002 filings. [*20] Although these actions stem from a prolonged dispute over the same monetary issue from April 2003, they occurred at least five years after the plaintiff engaged in protected activity. This level of temporal proximity is insufficient to raise an inference of causation. See Del Pozo v. Bellevue Hosp. Ctr., No. 09 Civ. 4729, 2011 U.S. Dist. LEXIS 20986, 2011 WL 797464, at *7 & n.111 (S.D.N.Y. Mar. 3, 2011) (collecting cases and noting that "[c]ourts in this Circuit have held that periods of two months or more defeat an inference of causation" (internal quotation marks omitted)). In addition, the plaintiff's claim that Chase did not send a representative with authority to the EEOC mediation session in retaliation for her 2009 EEOC filing is clearly without merit. The evidence shows that Chase's representative was authorized to offer a conditional settlement arrangement that the plaintiff ultimately rejected. Because the plaintiff has failed to present evidence demonstrating a causal connection between the protected activity and any of the allegedly adverse actions, she has failed to set forth a prima facie case of retaliation.

Moreover, Chase has pointed to evidence of legitimate, non-retaliatory reasons for its actions [*21] that the plaintiff has not refuted. "An employer has latitude in deciding how to handle and respond to discrimination claims . . . . Reasonable defensive measures do not violate the anti-retaliation provision of Title VII, even though such steps are adverse to the charging employee . . . ." United States v. N.Y.C. Transit Auth., 97 F.3d 672, 677 (2d Cir. 1996). Here, Chase took most of the challenged actions in response to the plaintiff's incessant demands for the allegedly unpaid severance of $3480, and no rational jury could find that Chase has been unreasonable in its actions over the years. Chase had already paid the plaintiff $120,000 pursuant to the 2005 Agreement/Release, under which Chase believed it had settled all outstanding claims with the plaintiff. When the plaintiff sued Mishkin in 2007, Chase was not even a party to the suit but still offered as part of the Mishkin settlement a conditional sum of $4060.14--more than the $3480 the plaintiff had been pursuing in the first place. It was entirely reasonable for Chase to condition this settlement offer on the plaintiff's execution of a new release agreement, in the hopes of ensuring that she would not sue Chase once more. [*22] Despite Chase's repeated offers of this reasonable settlement arrangement, the plaintiff chose not to accept its terms.

In the end, the plaintiff has failed to set forth a prima facie case of retaliation, let alone show that Chase's proffered reasons for its actions were pretextual. The plaintiff has not presented any evidence indicating that Chase took the challenged actions for retaliatory reasons, and no rational jury could find that any of Chase's actions were taken in retaliation against the plaintiff for engaging in protected activity. Accordingly, the defendant's motion for summary judgment dismissing the plaintiff's claims under Title VII, the ADEA, the ADA, and the NYSHRL is **granted.**

2.

A claim under the NYCHRL "requires an independent analysis, as the New York statute, amended by the Local Civil Rights Restoration Act of 2005, was intended to provide a remedy reaching beyond those provided by the counterpart federal civil rights laws." Simmons v. Akin Gump Strauss Hauer & Feld, LLP, No. 11 Civ. 4480, 508 Fed. Appx. 10, 2013 U.S. App. LEXIS 1571, 2013 WL 261537, at *2 (2d Cir. Jan. 24, 2013)

(summary order), aff'g No. 10 Civ. 8990, 2011 U.S. Dist. LEXIS 115838, 2011 WL 4634155 (S.D.N.Y. Oct. 6, 2011). "[T]he retaliation inquiry under the [NYCHRL] is [*23] 'broader' than its federal counterpart." Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 723 (2d Cir. 2010) (citing Williams v. New York City Hous. Auth., 61 A.D.3d 62, 872 N.Y.S.2d 27, 34 (App. Div. 2009)). Under the NYCHRL, retaliation "in any manner" is prohibited, and the retaliation need not necessarily result in "an ultimate action with respect to employment" or in "a materially adverse change in the terms and conditions of employment." N.Y.C. Admin. Code § 8-107(7).

Even applying the NYCHRL standard, however, the plaintiff's retaliation claim under the NYCHRL suffers from the same defects as her retaliation claims under Title VII, the ADEA, the ADA, and the NYSHRL. Simply put, the plaintiff has failed to set forth a prima facie case of retaliation because she failed to present evidence demonstrating a causal connection between the protected activity and any of the allegedly adverse actions. Moreover, Chase has proffered legitimate, non-retaliatory reasons for its actions that the plaintiff has not refuted. No rational jury could find that Chase retaliated "in any manner" against the plaintiff. Therefore, the defendant's motion for summary judgment dismissing the plaintiff's claim [*24] under the NYCHRL is also **granted**.

CONCLUSION

The Court has considered all of the arguments of the parties. To the extent not specifically addressed above, the remaining arguments are either moot or without merit. For the foregoing reasons, the defendant's motion for summary judgment is **granted** with respect to all of the plaintiff's claims. The Clerk is directed to enter judgment dismissing this case. The Clerk is also directed to close this case and all pending motions.

SO ORDERED.

Dated: New York, New York

March 7, 2013

/s/ John G. Koeltl

United States District Judge

2015 WL 59188
United States District Court,
D. Connecticut.

Roger WONG, Plaintiff,
v.
DIGITAS, INC., Defendant.

No. 3:13–CV–00731 (MPS).
|
Signed Jan. 5, 2015.

Attorneys and Law Firms

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MEMORANDUM OF DECISION

MICHAEL P. SHEA, District Judge.

***1** Plaintiff Roger Wong ("Mr.Wong") filed an amended complaint (Amend.Compl.[Doc.# 30]) against his former employer, Defendant Digitas, Inc. ("Digitas"), for breach of contract (Count One) and breach of the implied covenant of good faith and fair dealing (Count Two) arising out of Digitas's February 2012 termination of his employment.[1] Pending before this Court is Digitas's motion for summary judgment [Doc. # 31]. Mr. Wong opposes the motion, arguing that there are genuine issues of material fact regarding whether Digitas was bound by contract to follow procedures in its Anti–Harassment Policy (the "Policy"), and whether it breached the Policy, and thus its contractual obligations, by failing to interview Mr. Wong before terminating his employment.

1 Mr. Wong filed his original complaint on May 8, 2013, in the Superior Court for the Judicial District of Stamford/Norwalk, alleging race and national origin discrimination in violation of the Connecticut Fair Employment Practices Act (Conn.Gen.Stat. §§ 46a–60(a)(1) and 46a–60(a)(5)) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e–2(a) and 1981), as well as a claim for breach of contract. Digitas removed the case to federal court on May 20, 2013. (Notice of Removal [Doc. # 1].) On May 5, 2014, Mr. Wong filed an amended complaint dropping his federal and state discrimination claims and adding a claim for breach of the covenant of good faith and fair dealing. (Amend.Compl.[Doc.# 30].) The Court retains jurisdiction under 28 U.S.C. § 1332 because of the diversity of the parties.

Because they are required by law, anti-discrimination and anti-harassment policies of the type Mr. Wong relies on generally do not create enforceable contracts. *See Byra–Grzegorczyk v. Bristol–Myers Squibb Co.*, 572 F.Supp.2d 233, 254 (D.Conn.2008); *Peralta v. Cendant Corp.*, 123 F.Supp.2d 65, 84 (D.Conn.2000). But even if the Court were to treat the Policy like an employment handbook or personnel manual that could form an enforceable contract, the Policy is consistent with Mr. Wong's offer letters from Digitas and the Digitas Employee Handbook (the "Handbook"), and does not alter the at-will relationship between the parties clearly set forth in those documents. Because Mr. Wong has failed to show the existence of a contract that altered his at-will employment relationship or required that Digitas interview him before terminating him, his breach of contract claim (Count One) fails as a matter of law. His claim for breach of the covenant of good faith and fair dealing (Count Two) also fails. To show that an employer breached the covenant of good faith and fair dealing with respect to an at-will employee, the employee must show that he was discharged in violation of an important public policy. But Mr. Wong does not even allege that his discharge violated any public policy. Therefore, the Court GRANTS Digitas's motion for summary judgment.

I. *BACKGROUND*

Digitas "is an advertising, marketing and brand strategy corporation, incorporated in Massachusetts" (Pl.'s Opp. Br. [Doc. # 34] at 6), with its principal place of business in Massachusetts. (Def.'s Response to Pl.'s Mot. to File Amend. Compl. [Doc. 28] at 3.) Mr. Wong,

a New York resident, began working for Digitas in December 2008 as a term employee without benefits. (Seltzer Aff. Ex. B [Doc. # 31–3] at 9.) In June 2009, Mr. Wong became an Associate Creative Director, which was a full-time position that included benefits. (Seltzer Aff. Ex. A [Doc. # 31–3] at 5–6.) Within a year, Mr. Wong was promoted to Vice President and Director, Creative. (Amend. Compl. [Doc. # 30] ¶ 9.) Mr. Wong reported to Jesse Vendley ("Mr.Vendley"), Senior Vice President, Creative. (Pl.'s L.R. 56(a)(2) Stmt. [Doc. # 34–2] ¶ 8.)

*2 In January 2012, Mr. Wong and a team of Digitas employees were on location in California working on a commercial shoot for Comcast, one of Digitas's clients. (Pl.'s L.R. 56(a)(2) Stmt. [Doc. # 34–2] ¶¶ 18–19.) On January 31, 2012, during the shoot, Mr. Wong and Heather Greaux ("Ms.Greaux"), Senior Motion Media Producer for Digitas, had a disagreement on the set and later exchanged text messages about their disagreement, and about whether Mr. Wong would drive Ms. Greaux to the set the next morning. That night, Mr. Wong sent a text message to Peter McCann ("Mr.McCann"), Executive Producer, Comcast Account, requesting that he not be required to work with Ms. Greaux in the future. (Pl.'s Opp. Br. Ex. F [Doc. # 34–5] at 135–38.) Also that night, Ms. Greaux sent an e-mail to her supervisors—Steve Torrisi ("Mr.Torrisi"), Senior Vice President, Global Head of Production, and Mr. McCann—complaining about Mr. Wong's behavior toward her on the set and during their exchange of text messages. (Pl.'s L.R. 56(a)(2) Stmt. [Doc. # 34–2] ¶ 25; Seltzer Aff. Ex. J [Doc. # 31–6] at 6–7.) In her e-mail, Ms. Greaux described Mr. Wong's "unprofessional" and "abusive" behavior (Seltzer Aff. Ex. J [Doc. # 31–6] at 6–7), lodged a formal complaint against Mr. Wong, and requested that she no longer be required to work with him. (Pl.'s L.R. 56(a)(2) Stmt. [Doc. # 34–2] ¶ 26.) Mr. Torrisi contacted Human Resources, which assigned Mark Murata ("Mr.Murata"), Senior Vice President, to investigate Ms. Greaux's complaint. (*Id.* ¶ 27.)

During Mr. Murata's investigation he examined e-mails and text messages and spoke to Ms. Greaux, Sarah Kearney (Associate Director, Marketing), Mr. McCann, Mr. Torrisi, Mr. Vendley, and Mr. Vendley's supervisor, Matt D'Ercole (Executive Vice President, Creative). (Pl.'s L.R. 56(a)(2) Stmt. [Doc. # 34–2] ¶ 29.) Mr. Murata did not interview Mr. Wong. (*Id.* ¶ 34.). Based on his investigation, Mr. Murata decided to terminate Mr. Wong's employment, and did so on February 10, 2012. (*Id.* ¶ 34.)

Additional undisputed facts are set forth below in the discussion of the parties' arguments.

II. *STANDARD*

Summary judgment is appropriate only when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The moving party bears the burden of demonstrating that no genuine issue exists as to any material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323–25 (1986). If the moving party carries its burden, "the opposing party must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." *Brown v. Eli Lilly & Co.,* 654 F.3d 347, 358 (2d Cir.2011). "A dispute regarding a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Williams v. Utica Coll. of Syracuse Univ.,* 453 F.3d 112, 116 (2d Cir.2006) (internal quotation marks and citation omitted).

III. *DISCUSSION*

A. Breach of Contract Claim (Count One)

*3 Mr. Wong argues that his employment was governed in part by Digitas's Anti–Harassment Policy (the "Policy"), which, he claims, modified the at-will relationship between him and Digitas and imposed a contractual obligation on Digitas "to investigate all harassment complaints and interview both the complainant and the accused involved in the alleged harassment." (Pl.'s Opp. Br. [Doc. # 34–1] at 10.) Mr. Wong contends that Digitas violated the Policy—and therefore breached its contract with him—by "relying solely on the complaining party," and not interviewing Mr. Wong before terminating him. (*Id.*)

"[A]ll employer-employee relationships not governed by express contracts involve some type of implied contract of employment. There cannot be any serious dispute that there is a bargain of some kind; otherwise, the employee would not be working." *Gaudio v. Griffin Health Servs. Corp.*, 249 Conn. 523, 532 (1999) (internal quotation marks and citations omitted). In Connecticut, it is the general rule that "contracts of permanent employment, or for an indefinite term, are terminable at will." *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 474 (1980). This general rule "can be modified by an agreement of the parties." *Schermerhorn v. Mobil Chem. Co.*, No. 3:99 CV 941(GLG), 2001 WL 50534, at *4 (D.Conn. Jan. 9, 2001).

To show that an employer and an employee agreed to modify an at-will employment relationship, "a plaintiff must prove that the employer had agreed, either by words or action or conduct, to undertake some form of actual contractual commitment" inconsistent with the at-will relationship. (*Id.*) Mr. Wong does not allege that Digitas made any verbal representations to him—at any time during his employment at Digitas—that would modify the at-will relationship or obligate Digitas to interview certain people before terminating him.

The Court thus examines the Policy as well as the other documents evidencing the relationship between Mr. Wong and Digitas to determine whether there is a genuine issue of material fact as to whether Mr. Wong's at-will employment was modified by the language of the Policy. [2]

2 Mr. Wong's related argument that Digitas followed the Policy with respect to another employee accused of harassment by interviewing him and giving him verbal warnings (Pl.'s Opp. Br. [Doc. # 34–1] at 25) is not sufficient to show a "meeting of the minds" between him and Digitas that it would follow the Policy with respect to him. *Cardona v. Aetna Life & Cas.*, No. 3:96CV1009 (GLG), 1998 WL 246634, at *6 (D.Conn. May 8, 1998). "[C]ontracts are not created by evidence of customs and usage." *Reynolds v. Chrysler First Commercial Corp.*, 40 Conn.App. 725, 732 (1996) (internal quotation marks and citations omitted). Mr. Wong fails to meet "his burden to establish that adherence to these policies and procedures was the result of a contractual commitment by the defendant." *Id.*

1. Offer Letters

Mr. Wong began working for Digitas in December 2008 as a term employee without benefits (Seltzer Aff. Ex. B [Doc. # 31–3] at 9.) Mr. Wong's December 19, 2008 offer letter stated that "joining Digitas is contingent upon filling out" certain forms, including the Policy. (Seltzer Aff. Ex. B [Doc. # 31–3] at 8.) Both Mr. Wong's December 19, 2008 offer letter for the "term employee" position, and his June 15, 2009 offer letter for Associate Creative Director, provided that his employment would be "at-will," that he "may be terminated by either" party "at any time and for any reason, without notice," and that "[n]othing in this offer letter shall be construed to guarantee [his] employment for a fixed or indefinite term." (Seltzer Aff. Ex. B [Doc. # 31–3] at 5–6, 8–9.) These offer letters were addressed to Mr. Wong and identified his salaries and supervisors. On each offer letter, Mr. Wong signed beneath a statement that read, "I have read and understand the foregoing offer of employment. In accepting this offer, I acknowledge that I will be an at-will employee of Digitas and that the foregoing terms of employment may be subject to change." (Seltzer Aff. Ex. B [Doc. # 31–3] at 6, 9.)

***4** Mr. Wong asked his supervisor, Mr. Vendley, if he "could get a letter that actually stipulated a contract" that was not at-will. But Mr. Vendley told Mr. Wong that only "senior partners" were able to get such contracts, and that Mr. Vendley had tried unsuccessfully to negotiate such a contract for himself. (Wong Tr. [Doc. # 31–4] at 80.). Mr. Wong also attempted to "get a contract [that] stipulated at least a year or two [of] guaranteed work" that was not at-will, but he was unable to do so. (*Id.* at 81.)

Mr. Wong accepted the offer for Associate Creative Director by signing the offer letter on June 15, 2009. (Pl.'s L.R. 56(a)(2) Stmt. [Doc. # 34–2] ¶ 4.) He "fully understood at the time he accepted Digitas'[s] offer of employment that his employment was at-will." (*Id.* ¶ 5.) Mr. Wong understood at-will

employment to mean that "at any point Digitas could terminate my employment, as well as I could terminate my employment at any time." (Wong Tr. [Doc. # 31–4] at 81.) Within a year, Mr. Wong was promoted to Vice President and Director, Creative. (Amend. Compl. [Doc. # 30] ¶ 9.) There is no evidence that Mr. Wong's at-will status changed when he was promoted.

Thus, definitive contract language in the offer letters repeatedly states that Mr. Wong's employment is at-will and terminable by any party, for any reason, at any time. It is also clear from Mr. Wong's deposition testimony and his attempts to negotiate a contract that guaranteed several years of work that he understood the relationship was at-will.

2. The Employee Handbook

Statements in an employee handbook or personnel manual, "under appropriate circumstances, may give rise to an express or implied contract between employer and employee." *Finley v. Aetna Life & Cas. Co.*, 202 Conn. 190, 198 (1987) *overruled in part on other grounds, Curry v. Burns*, 225 Conn. 782 (1993). "By eschewing language that could reasonably be construed as a basis for a contractual promise, or by including appropriate disclaimers of the intention to contract, employers can protect themselves against employee contract claims based on statements made in personnel manuals." *Id.* at 199 n. 5. However, "[e]ven when a handbook contains a disclaimer of contractual intent, contradictory statements by the employer can lead to liability." *Thompson v. Revonet, Inc.*, No. 3:05–CV–168 (RNC), 2005 WL 3132704, at *2 (D.Conn. Nov. 21, 2005). "[W]hether a personnel manual or employee handbook gives rise to an enforceable contract, interpreting all inferences in a light most favorable to the plaintiff, is a question of law for the Court." *Cardona v. Aetna Life & Cas.*, No. 3:96CV1009 (GLG), 1998 WL 246634, at *5 (D.Conn. May 8, 1998). It is only "[i]n the absence of definitive contract language" that "the determination of what the parties intended is generally treated as a question of fact to be decided by a jury." *Id.* at *2.

Digitas maintained an Employee Handbook (the "Handbook") for its U.S. employees. (Pl.'s L.R. 56(a)(2) Stmt. [Doc. # 34–2] ¶ 9.) The February 2012 version of the Handbook contains clear, express, and repeated disclaimers of any intention to create anything other than an at-will relationship. The introduction to the Handbook states:

> *5 The contents of this Handbook are guidelines only and supersede any prior handbook or policy. The company has the right, with or without notice, in an individual case or generally, to modify its interpretation of and/or change any of its guidelines, policies, practices, working conditions or benefits at any time. Many matters covered by this handbook are also described in separate official documents. These official documents always are controlling over any statement made in this handbook or by any supervisor or manager.

(Pl.'s L.R. 56(a)(2) Stmt. [Doc. # 34–2] ¶ 10; Seltzer Aff. Ex. F [Doc. # 31–5] at 14.) Under the heading, "Employment at Will," the introduction of the Handbook continues as follows on page four (on the second page of text in the Handbook):

> Your employment with us is "employment at will," and you and the Company are free to choose to end the work relationship at any time, with or without cause or notice. There is no "contract of employment" between the Company and any employee with the exception of some key executives, and nothing in this guide in any way expresses

> or implies such a contract. No one is authorized to provide any employee with an employment contract or special arrangement concerning terms or conditions of employment unless the contract or agreement is in writing and signed by the President of Digitas North America.

(Pl.'s L.R. 56(a)(2) Stmt. [Doc. # 34–2] ¶ 11; Seltzer Aff. Ex. F [Doc. # 31–5] at 15.) The heading "Employment at Will" is referenced in the table of contents on page two.

These statements—stating that the Handbook provides "guidelines only," and disclaiming Digitas's intention to form anything other than an at-will employment relationship—are consistent with, and reinforce, the statements in the offer letters. The statements are clear, unequivocal, and "sufficiently obvious as to be readily observable to any employee reviewing the manual." *Cardona,* 1998 WL 246634, at *5 (finding that no contract was created by an employee handbook even when the disclaimer was located on the second page and was not labeled as a "disclaimer").

Mr. Wong argues that Digitas "failed to demonstrate that its disclaimer is sufficiently clear, conspicuous, and explicit to constitute a valid disclaimer and warrant an entry of summary judgment." (Pl.'s Opp. Br. [Doc. # 34–1] at 17.) In support of his argument, Mr. Wong cites cases in which Connecticut courts have denied motions for summary judgment, even when the handbooks contained disclaimers. As Digitas points out, these cases are distinguishable. For example, Mr. Wong cites *Elliff v. St. Vincent's Med. Ctr.,* No. CV91 28 92 82 S, 1993 WL 526587, at *1 (Conn.Super.Ct. Dec. 7, 1993), where the "personnel manual ... contain[ed] a contractual disclaimer [that] [was] untitled, [was] not referenced in the manual's table of contents, [was] placed on the last page, and [was] in fine print." Similarly, in *Wasilewski v. Warner–Lambert Co.,* No. CV93 04 44 45, 1995 WL 373928, at *4 (Conn.Super. Ct. June 19, 1995), the "alleged disclaimer" was "on the last page of Warner–Lambert's employee handbook," was untitled, and lacked specificity. The courts denied summary judgment to the employers in both cases, finding that the disclaimers were insufficient. In contrast, the statements quoted above from the Handbook appear in regular sized font, on the second page of the Handbook's text (page four of the Handbook), under the heading "Employment at Will," which is referenced in the table of contents on page two of the Handbook. Thus, the language in the Handbook, together with the offer letters and Mr. Wong's deposition testimony, establishes that the parties did not intend alter the at-will employment relationship.

3. The Anti–Harassment Policy

***6** Mr. Wong alleges that the Anti–Harassment policy (the "Policy") modified the at-will relationship and imposed a contractual obligation on Digitas to interview Mr. Wong in any harassment investigation in which he was accused of harassment, and that Digitas breached that obligation by failing to interview him before terminating his employment. The following additional facts are pertinent to this argument. Mr. Wong first acknowledged that he received and read the Policy by signing it on December 19, 2008. (Seltzer Aff. Ex. H [Doc. # 31–6] at 2.) Mr. Wong also acknowledged that he received the Policy, along with several other Digitas policies, by signing an acknowledgement on August 15, 2010. (Seltzer Aff. Ex. I [Doc. # 31–6] at 4.)[3]

3 Because both parties refer to a version of the Policy dated September 14, 2006, the Court assumes that the Policy did not change between September 2006 and August 2010. (*See* Seltzer Aff. Ex. G [Doc. # 31–5] at 17–20.)

Mr. Wong relies on the following paragraph of the Policy, which appears under the heading "Harassment Investigations,"

> When we receive the complaint we will promptly investigate the allegation in a fair and expeditious manner. The investigation will be conducted in such a way as

> to maintain confidentiality to the extent practicable under the circumstances. We will conduct a private interview with the person filing the complaint, witnesses, and the person alleged to have committed harassment. When we have completed our investigation, we will, to the extent appropriate, inform the person filing the complaint and the person alleged to have committed the conduct of the results of that investigation.

(Seltzer Aff. Ex. G [Doc. # 31–5] at 18–19.) Because he was the "person alleged to have committed harassment," Mr. Wong argues that the Policy required Digitas to interview him before terminating him. Mr. Wong distinguishes between the mandatory language (e.g., "we will") and the discretionary language (e.g., "to the extent appropriate") in that portion of the Policy, and argues that by stating "we will," without qualification, Digitas committed itself to "conduct a private interview with ... the person alleged to have committed harassment." (Pl.'s Opp. Br. [Doc. # 34–1] at 14–15.) Mr. Wong also argues that this portion of the Policy was not sufficiently disclaimed. He contends that the Handbook's statement that "nothing in *this guide* in any way expresses or implies such a contract" (Seltzer Aff. Ex. F [Doc. # 31–5] at 14) (emphasis added) suggests that the Handbook disclaimer applies only to the Handbook and not to the Policy. (Pl.'s Opp. Br. [Doc. # 34–1] at 17–18.)[4]

4 The Court notes that this position contradicts Mr. Wong's deposition testimony, in which he asserted that the Policy was part of the Handbook. Mr. Wong testified that Mr. Murata "didn't follow Digitas *handbook* procedure" when Mr. Murata "decided to unilaterally terminate [Mr. Wong's] employment without interviewing [him] after a complaint was filed against [Mr. Wong], nor did he follow regular procedure ..." (Wong Tr. [Doc. # 31–3] at 27) (emphasis added). He testified that Mr. Murata "not only should have" interviewed him, "that was stated in the Digitas *handbook,* as [his] right." (Wong Tr. [Doc. # 34–5] at 62) (emphasis added). Mr. Wong stated that his breach of contract claim "refers to the Digitas *handbook,* specifically to its harassment policy. It's very clear in its language that when a harassment complaint is brought against an employee, a thorough investigation would be conducted ..." (Wong Tr. [Doc. # 31–3] at 69–70) (emphasis added). Finally, Mr. Wong was asked, if, in his breach of contract claim, he was referring to any contract "[o]ther than the harassment policy of the Digitas *handbook* " (emphasis added), and he responded in the negative. (*Id.* at 70.)

Even if the Handbook disclaimer does not apply to the Policy, that does not suggest that the Policy imposed a contractual obligation on Digitas. "A contractual promise cannot be created by plucking phrases out of context; there must be a meeting of the minds between the parties." *Christensen v. Bic Corp.,* 18 Conn.App. 451, 458 (1989). "[J]ust because a plaintiff believes certain provisions constitute a contract does not bind the defendant without evidence that the defendant actually intended to be bound by such a contract." *Foster v. Massachusetts Mut. Life Ins. Co.,* No. CIV. 3:02CV1433 (PCD), 2004 WL 950827, at *5 (D.Conn. Apr. 14, 2004).

***7** Read as a whole, the Policy does not contradict the offer letters or the Handbook disclaimers regarding an at-will employment relationship. A contract "should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 63 (1995). Thus, unless there are contradictory terms, the Policy should be read to be consistent with the offer letters and the Handbook, and individual phrases should not be read out of context.

Mr. Wong's argument omits critical language of the Policy. The portion of the Policy that precedes the description on investigations states that the Policy simply "sets forth [Digitas's] goals of promoting a workplace free of harassment," and "is not designed or intended to limit [Digitas's] authority to discipline or take remedial action for workplace

conduct which [it] deem[s] unacceptable, regardless of whether that conduct satisfies the definition of harassment." (Seltzer Aff. Ex. G. [Doc. # 31–5] at 17.) "Where it is determined that such inappropriate conduct has occurred, [Digitas] will act promptly to eliminate the conduct and impose such corrective action as is necessary, including disciplinary action where appropriate." (*Id.*)

This language makes clear that by adopting the Policy, Digitas did not "limit [its] authority" to deal with workplace harassment, and did not assume any contractual obligations to alleged harassers, including as to the manner in which it would carry out investigations. Read as a whole, there is nothing in the Policy suggesting an intent to modify Mr. Wong's at-will employment relationship.

Reinforcing this conclusion is the express linkage between Digitas's December 2008 offer letter to Mr. Wong and the Policy. The December 2008 offer letter, which described an at-will employment relationship in clear terms, stated that "joining Digitas is contingent upon filling out" certain forms, including the Policy. (Seltzer Aff. Ex. B [Doc. # 31–3] at 8.) The fact that the offer letter incorporated the Policy by reference strongly suggests that the parties did not intend that one would contradict the other.

As Digitas points out, the undisputed evidence in the record shows that it acted in accordance with its statement in the policy, "promptly to eliminate" Mr. Wong's conduct—which it deemed unacceptable—by terminating his employment, as it determined to be "necessary" and appropriate." (Def.'s Reply Br. [Doc. # 35] at 8.) Because the offer letters, the Handbook, and the Policy—when read together—do not suggest that Mr. Wong's employment at Digitas was anything but at-will, there is no genuine issue of material fact as to whether Digitas had a contractual obligation to interview Mr. Wong—or anyone else—before terminating him when he was accused of harassment.

Finally, unlike employee handbooks and personnel manuals, which may, under certain circumstances, create contracts between employers and employees, anti-harassment policies generally do not create contracts because they are required by law. State and federal laws require employers to create and disseminate anti-harassment policies and complaint procedures in order to defend themselves from vicarious liability by showing that they exercised "reasonable care to prevent and correct promptly any sexually harassing behavior." *Faragher v. City of Boca Raton,* 524 U.S. 775, 808 (1998). And in this case, there is evidence that Mr. Wong understood that the Policy was created to comply with the law rather than to embody a contractual commitment to employees accused of harassment. In 2008, he signed a note that was attached to the Policy that stated that "Massachusetts employers are required to establish and distribute a detailed and comprehensive sexual harassment policy, including a description of the process for filing complaints." (Seltzer Aff. Ex. H [Doc. # 31–6] at 2; M.G.L.A. 151B § 3A.[5]) Thus, the Policy "does not indicate that [Digitas] is undertaking any contractual obligations towards [Mr. Wong]; rather it obliges [Digitas] to comply with federal and state anti-discrimination laws, and to undertake an investigation upon receiving complaints of discrimination and/or harassment." *Byra–Grzegorczyk,* 572 F.Supp.2d at 254 (internal quotation marks and citations omitted). "As any promises in the policy are general statements of adherence to the anti-discrimination laws, standing alone they do not create a separate and independent contractual obligation." *Peralta,* 123 F.Supp. at 84.

5 Mass. Gen. Laws Ann. 151B § 3A(b) provides, in relevant part, that every employer shall:
> (1) adopt a policy against sexual harassment which shall include:
>
> (i) a statement that sexual harassment in the workplace is unlawful;
>
> (ii) a statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for cooperating in an investigation of a complaint for sexual harassment;
>
> (iii) a description and examples of sexual harassment;
>
> (iv) a statement of the range of consequences for employees who are found to have committed sexual harassment;

(v) a description of the process for filing internal complaints about sexual harassment and the work addresses and telephone numbers of the person or persons to whom complaints should be made; and

(vi) the identity of the appropriate state and federal employment discrimination enforcement agencies, and directions as to how to contact such agencies.

(2) provide annually to all employees an individual written copy of the employer's policy against sexual harassment; provided, however, that a new employee shall be provided such a copy at the time of his employment.

4. Plaintiff Fails to Defeat Summary Judgment Under Rule 56(d)

***8** Mr. Wong also argues that "it is unclear to Plaintiff whether another of Defendant's policies, referred to as the 'Janus Book' in the Handbook, imposes contractual liability upon either party." (Pl .'s Opp. Br. [Doc. # 34–1] at 15.) According to the Handbook, "[t]he Janus Book is a manual that provides the principles and standards of conduct and behavior for every employee," and was accessible from the Digitas Portal. (Selzer Aff. Ex. F [Doc. # 31–5] at 14.) "Among other important policies in the Janus Book are the Code of Conduct (1.02) and the Complaint Procedure for Accounting and Auditing Matters (1.05.02). The Code of Conduct defines the standard of behavior which all employees must observe." (*Id.*) Mr. Wong notes that he requested copies of all handbooks, agreements, and other policies from Digitas, but never received a copy of the Janus Book, "nor did Defendant provide Plaintiff with any documents of evidence of Plaintiff acknowledging in writing that Plaintiff received or agreed to any Janus Book terms and conditions." (Pl.'s Opp. Br. [Doc. # 34–1] at 18 n. 3.) Digitas did not respond to these claims, and did not mention the "Janus Book" in its papers.

Mr. Wong, however, did not file a motion to compel Digitas to provide a copy of the "Janus Book," or otherwise invoke this Court's procedures for resolving discovery disputes. *See* United States District Judge Michael P. Shea, *Instructions for Discovery Disputes,* http://ctd.uscou rts.gov/sites/default/files/forms/MPSDiscovery D#ispute Instructions#–for0#0website 99Revisedd#d4.10.14.pdf. Nor did Mr. Wong submit affidavits or declarations suggesting that the facts related to the Janus Book are essential to justify his opposition to summary judgment, as permitted by Fed.R.Civ.P. 56(d). Rule 56(d), formerly Rule 56(f), sets forth the process by which a party opposing summary judgment may oppose the motion by requesting further discovery. "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed.R.Civ.P. 56(d).[6] "[T]he failure to file an affidavit under Rule 56 [(d)] is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate." *Paddington Partners v. Bouchard,* 34 F.3d 1132, 1137 (2d Cir.1994). Mr. Wong did not file such an affidavit, and his mere reference to the need for additional discovery is insufficient to defeat summary judgment. Further, he does not even suggest the Janus Book would help his claims here. In fact, he acknowledges that he is not aware of any evidence that it would do so. (Pl.'s Opp. Br. [Doc. # 34–1] at 18 n. 3.) Therefore, the Court grants Digitas summary judgment on Count One.

6 The affidavit must include "(1) what facts are sought and how they are to be obtained; (2) how these facts are reasonably expected to raise a genuine issue of material fact; (3) what efforts the affiant has made to obtain them; and (4) why the affiant's efforts were unsuccessful." *Gualandi v. Adams,* 385 F.3d 236, 244 (2d Cir.2004).

B. Breach of Covenant of Good Faith and Fair Dealing (Count Two)

***9** "Every contract carries an implied covenant of good faith and fair dealing requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement." *Habetz v. Condon,* 224 Conn. 231, 238 (1992). However, an "at-will employee may successfully challenge his dismissal" as a

breach of the covenant of good faith and fair dealing only in "the situation where the reason for his discharge involves impropriety ... derived from some important violation of public policy." *Magnan v. Anaconda Indus., Inc.*, 193 Conn. 558, 572 (1984) (internal quotation marks and citations omitted). Since the Court has determined that Mr. Wong was an at-will employee, he must show that his termination violated an important public policy. Mr. Wong does not allege a single violation of public policy related to his termination. Therefore, the Court grants Digitas summary judgment on Count Two.

IV. *CONCLUSION*

For the foregoing reasons, the Court grants Defendant's motion for summary judgment [Doc. # 31] in its entirety and dismisses the complaint.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 59188, 2015 IER Cases 173,976

End of Document

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2016, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Barry J. Waters
Barry J. Waters