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

PRESENT: HON. PAUL WOOTEN **PART** 7
Justice

JULIE CHERNOV,
Plaintiff,

INDEX NO. 151682/13

-against-

MOTION SEQ. NO. 002

SECURITIES TRAINING CORP.,

Defendant.

The following papers were read on this motion by defendant for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ **Yes** ■ **No**

This action arises out of Julie Chernov's (plaintiff) claims that her employer, defendant Securities Training Corp. (STC), discriminated against her based on her disability, by terminating her, in violation of the New York City Human Rights Law (NYCHRL). Before the Court is a motion by STC, pursuant to CPLR 3212, for summary judgment dismissing the complaint.[1]

BACKGROUND

Plaintiff's Complaint:

Prior to being terminated in November 2012, plaintiff had been employed with STC since 1989. STC "provides test preparation and training services to members of the financial services industry to assist industry members in meeting a variety of regulatory registration requirements"

[1] In her reply, plaintiff does not make a cross motion, but presents an informal request that the court grant summary judgment on the issue of plaintiff's disability. The Court will not address plaintiff's motion as it was not brought pursuant to a formal motion and STC was only notified on reply.

(Complaint, ¶ 4). In 1995, plaintiff was promoted to the first vice president/director of information technology position. Plaintiff's office was located in lower Manhattan.

On October 25, 2012, as a result of Hurricane Sandy, STC's normal operations were significantly impacted. All of the computer systems under plaintiff's supervision had crashed. STC moved its computer equipment to another location so that it could resume its operations. STC's office in lower manhattan was "rendered uninhabitable for a period of at least several weeks" (*id.*, ¶ 17). Plaintiff did not visit the STC office after the storm. Plaintiff claims that she, like many other STC employees, "worked remotely from home to help minimize the Company's Sandy-related business interruption" (*id.*, ¶ 18).

Plaintiff's elderly mother, a resident of Long Beach, NY, had been displaced as a result of the storm. Plaintiff then "sought two or three days off using accrued vacation time" (*id.*, ¶ 25). David Snyder (Snyder), plaintiff's supervisor, granted this request. Although she had taken the days off, plaintiff still worked remotely on STC matters.

Plaintiff claims that, due to the "myriad professional and personal demands she was juggling in the aftermath of Hurricane Sandy, [plaintiff] began to experience acute anxiety" (*id.*, ¶ 28). The complaint sets forth that this acute anxiety was actually an exacerbation of a pre-existing diagnosed anxiety disorder which plaintiff had successfully managed for many years.

On November 18, 2012, plaintiff called Lucy Wagoner (Wagoner), STC's human resources director, and allegedly advised Wagoner that "she was suffering from an acute state of anxiety" (*id.*, ¶ 30). Plaintiff also called Snyder and purportedly told him that she was "suffering from acute anxiety" and that she may need "intermittent time off to manage this condition" (*id.*, ¶ 33). Evidently plaintiff also requested FMLA leave during this conversation, but was advised that FMLA leave would not be appropriate.

Plaintiff claims this was the first time she disclosed her "disabling medical condition" to STC (*id.*, ¶ 35). After this disclosure, STC's "attitude towards [plaintiff] changed dramatically"

(*id.*, ¶ 34). Snyder relayed to plaintiff that "business concerns were pre-eminent and that [plaintiff] should not expect to receive any further accommodations from STC . . . ." (*id.*, ¶ 41). The complaint provides that, immediately after plaintiff's disclosure, STC allegedly took steps to dissuade her from taking leave.

On November 19, 2012, plaintiff received an email from Snyder directing her to attend a meeting at STC's temporary office location. On November 20, 2012, plaintiff attended the meeting, where she again advised Wagoner and Snyder that she was experiencing "anxiety" and that she would require occasional time off (*id.*, ¶ 39). However, "[i]n sharp contrast to the Company's prior willingness to make appropriate accommodations for [plaintiff], Snyder steadfastly refused to commit to granting [plaintiff] any future leave." (*id.*, ¶ 30). Plaintiff claims that, after her conversation with Snyder and Wagoner she still worked on "various STC projects at home during her pre-approved vacation on the days before and after Thanksgiving" (*id.*, ¶ 44).

On November 28, 2012, plaintiff received a generic termination letter from Paul Weisman (Weisman), STC's CEO, informing her that she had been terminated from STC and, among other things, that she can expect to receive a letter explaining her benefits status and that she should return any STC property.

Plaintiff's complaint contains one cause of action, in which she alleges that STC discriminated against her on account of her perceived or actual disability in violation of the NYCHRL. She alleges that she "consistently" received positive evaluations of her work performance and was never the subject of employee discipline. In addition, even during the aftermath of Hurricane Sandy, she continued to meet the needs of the company. Plaintiff believes that she was terminated as a result of STC's concern that her actual or perceived disability would impair her ability to perform competently as an employee. She further claims that STC terminated her due to its unwillingness to make reasonable accommodations for her

actual or perceived disability.

STC's Position:

STC argues that plaintiff cannot establish a prima facie case of disability discrimination as there was no record that plaintiff had a disability or that STC perceived her to be disabled or engaged in unlawful discrimination. In actuality, according to STC, plaintiff was terminated due to plaintiff's "failure to perform her job as Director of IT in the critical post-Sandy recovery period, and based on her documented history of poor performance . . . ." (Brady affirmation, ¶ 40).

In support of its contentions, STC provides other email communications between plaintiff and STC, not mentioned in the complaint. To start, plaintiff acknowledges that she did not visit STC after Hurricane Sandy or help with relocating the computer systems. All of the computer systems under plaintiff's supervision had crashed. On November 4, 2012, plaintiff emailed Snyder and Weisman and gave them an update on the status of her mother's house and belongings. She then states,

> "I know how hard my team and DBS and everyone at STC has been working to keep the company going. I also know that I haven't been able to be part of that process. I am grateful for the time and space given to me to focus on helping my family. I look forward to seeing everyone in person . . ." (STC's exhibit M).

After speaking with Wagoner on November 18, 2012, on November 19, 2012, Wagoner emailed plaintiff and advised her that plaintiff had five vacation days remaining, three sick days and no personal leave. Wagoner memorialized the conversation with plaintiff that she understood plaintiff wanted to take additional time off, "however you should speak with [Snyder] because STC is currently not approving any additional vacation requests from NY employees given the current post-Sandy situation. An email will be going out shortly to NY employees informing them . . . ." (STC's exhibit N).

Plaintiff emailed Wagoner and stated "[a]t this point I'm only looking for this Wednesday

and Friday, which I had already put in for and had approved" (*id).*

The entire NY-based STC office received the email from Weisman later that night on November 19, 2012, where he advised them of the temporary policies regarding vacation leave and other items. He concluded by stating, "[w]e will revisit the personnel issues again on December 31, 2012 if we have not returned to 17 Battery Place. Thanks again for your understanding and cooperation during these extreme conditions" (STC's exhibit Q).

On November 19, 2012, Snyder requested that he, plaintiff and Wagoner meet at STC's temporary offices located in lower Manhattan to clarify plaintiff's requests in light of her telephone calls to them and her email responses.

Also on November 19, 2012, plaintiff emailed Colin Ryan (Ryan), who is the manager of STC's technology vendor. She emailed Ryan to advise him that she would be "taking some time off from STC. I'm finding it too difficult to deal with my mom's situation in Long Beach and her health issues and deal with STC at the same time" (STC's exhibit O).

On the evening of November 20, 2012, plaintiff emailed Snyder and said that she is "sorry if my situation is causing you additional stress. I care very much about my STC family and I'm very committed to helping the company get through this difficult time" (STC's exhibit P).

Wagoner's notes from the conversations held with plaintiff on November 18, 2012 and November 2012 summarized plaintiff's claims that she was under a lot of stress due to the loss of her mother's home. As a result, plaintiff would not be available to work five days a week, as she may have to be in Long Beach to meet contractors and would not be able to work those days. The days that she was at her own home though, she would be able to work remotely. "Julie began to say that she was under a lot of stress dealing with the loss of her mother's house and dealing with STC. She said she could not handle it right now. She also said that due to the loss of her mother's house her mother's condition is getting worse" (Plaintiff's exhibit 26 at 1).

On November 26, 2012, plaintiff replied yes to the holiday party invite scheduled for December 13, 2012. In addition, STC had issues with plaintiff over the year and her evaluations were not overwhelmingly positive. In plaintiff's 2006 evaluation, Weisman noted plaintiff's attendance needed improvement. In plaintiff's performance review dated April 27, 2011, both the categories of productivity and attitude needed improvement.

Testimony of Weisman:

Weisman, who is the current CEO of STC, has been working there since 1979. During his testimony, Weisman confirmed that plaintiff was an at-will employee. Weisman testified that, over time, he was dissatisfied with plaintiff's performance. For example, in 2007, plaintiff's presentation did not work at an important meeting. Weisman said he was surprised and embarrassed that the presentation did not work. In another instance, Weisman found that plaintiff had "doctored" an email, deleting a couple of sentences. This email was sent to Snyder, from plaintiff, in which plaintiff was seeking a raise for one of her consultants, who also happened to be plaintiff's personal friend.

The days plaintiff was unavailable after Hurricane Sandy also impacted Weisman's decision to terminate plaintiff. Weisman stated that, contrary to plaintiff's claims as to her communications with STC after Hurricane Sandy, there was a period of time where plaintiff was not in communication with STC. Weisman evidently realized after receiving plaintiff's November 4, 2012 email that, since Hurricane Sandy, plaintiff had been "out of the loop" and not engaged in the post-Sandy recovery (STC's exhibit C, Weisman tr at 254). He testified that, as he was attempting to get the company back together, he began to realize that he was not relying on plaintiff (*id.* at 255). Weisman stated that a number of employees were dealing with the issue of losing a home, and Weisman testified that he did not think plaintiff "was the right person to take us out of this whole storm and get us into the space and get the phones and computers set up and move us forward" (*id.* at 329-330).

When questioned about a warning versus an outright termination, Weisman testified that it "wasn't a performance warning type of thing" (*id.* at 344). In this situation, an employee advised him that she could not work when STC needed her to work, and that she would work on her own schedule. Weisman stated that the company just could not work that way.

According to Weisman, Snyder did not offer an opinion as to whether plaintiff should be terminated, but told Weisman that the department "could move forward" if plaintiff was let go. Wagoner did not participate in the decision to terminate plaintiff. Neither Wagoner nor Snyder mentioned any FMLA request or anxiety disorder. Weisman testified that, although it was not an easy decision to terminate plaintiff, he is "running the company and I had to do what was best for the future of our business" (*id.* at 310). He stated the following, in pertinent part:

> "It was a cumulative thing, as I've outlined in the number of questions you've asked me. When I did hear that [plaintiff] expressed the fact that she needed to be present to rebuild a house down in Long Beach, she did not know what her schedule would be, she would let us know on a particular day whether it's Long Beach day or STC day, once I heard that, you know, I was disappointed" (*id.* at 313).

Testimony of Wagoner:

Wagoner testified that employees who are seeking FMLA, leave, or accommodations for a disability would speak to her about it. STC has provided FMLA and also other leave for disabled employees. Wagoner stated that plaintiff called on November 18, 2012 to tell Wagoner that her mother had just lost her home and that her mother was getting sick over the situation. Wagoner continued that plaintiff asked about taking time off to be with her mom because her mom was sick, and Wagoner advised plaintiff that she can apply for FMLA if her mother has a serious health condition. Plaintiff then asked Wagoner how many vacation days she had left. Wagoner testified that plaintiff never mentioned any personal health condition or that she herself suffered from anxiety disorder. Wagoner advised plaintiff to call Snyder, who was plaintiff's supervisor, about getting permission to use vacation days.

On November 19, 2012, Wagoner spoke to Snyder and Weisman about plaintiff's request to use vacation days to spend time with her mother and also to be home for the contractors. There was no discussion of plaintiff's alleged anxiety. Wagoner continued that when they had the meeting with plaintiff, plaintiff "wasn't saying that she was gonna take vacation days, she was telling us she wasn't coming in certain days. She was telling us what days she was coming to the office and what days she wasn't" (STC's exhibit F, Wagoner tr at 105). Wagoner continued, "I didn't hear her say anything about her own health issues in our conversation"[2] (*id.* at 117).

Testimony of Snyder:

Snyder testified that plaintiff's performance as the director of technology post Hurricane Sandy was "pathetic" due to her lack of responsiveness (STC's exhibit D, Snyder tr at 159). He testified that plaintiff was difficult to reach and nonresponsive for a three-week period of time after October 25, 2012.[3]

Plaintiff's Reply:

Plaintiff claims there is undisputed evidence that she has been suffering from anxiety disorder for many years. When she recognized a "spike" in her symptoms, she communicated this to STC and requested an intermittent leave. Plaintiff was improperly terminated a week later as a result of disclosing this disability. Plaintiff believes that any "passing references" to her performance issues do not belie her claim that she is entitled to the protections under the NYCHRL.

Plaintiff provides receipts from therapist visits, in support of her contention that she had

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[2] Counsel for plaintiff maintains that Wagoner misstated this during her deposition, as her notes taken after conversations with plaintiff note plaintiff's "stress" dealing with work and her mother's house.

[3] There are additional transcripts in the record of an STC and nonparty witness, however a summary of their testimony is not needed at this time.

been successfully managing a long-diagnosed anxiety disorder through therapy. Plaintiff provides a receipt from a social worker's office indicating that plaintiff had therapy sessions with this social worker in 2008, 2010 and 2012. The most recent receipt for 2012 showed that plaintiff had seen the therapist twice in that year. However, after Hurricane Sandy, plaintiff did not see any providers, allegedly due to the providers' inability to schedule appointments. Plaintiff provides after-the-fact notes from providers who saw plaintiff after she had been terminated, for instance on April 6, 2013, allegedly confirming that plaintiff had been suffering from anxiety in November 2012.

In response to Wagoner's notes, counsel writes, "[a]lthough Wagoner's post-hoc notes do not fully and accurately reflect the phone call and meeting, Wagoner explicitly states . . . [plaintiff] raised concerns about her mental state, stated she was suffering from extreme stress, and sought leave for that reason" (Levy affirmation, ¶ 62).

Plaintiff's Testimony:

Plaintiff testified that she had previously taken two medical leaves for surgery from STC, and returned to work without issue. She said she was aware of the procedures to request leave. Plaintiff recalls telling Snyder that her mother's house was destroyed after the storm. She did not have any discussions regarding any of her own anxiety until November 18, 2012. Plaintiff testified that she called Snyder and told him "I was experiencing extreme anxiety and overwhelming feelings of stress and anxiety. That I hadn't been sleeping. I've been having stomach problems. That I was not – I was having a very, very difficult time" (STC's exhibit B, plaintiff tr at 148). She continued that she did not have a definite amount of time that she was seeking to take off, she just knew that she "needed to continue helping my family on Long Island and I needed to take care of myself and try to address my heightened state of anxiety" (*id.* at 149). Plaintiff testified that she never asked for FMLA leave in writing from anyone at STC or asked for medical leave.

When plaintiff attended the meeting on November 20, 2012, she stated the following, in pertinent part:

> "I reiterated my feelings of stress and anxiety. I spoke about the very bad situation on Long Island with my family and my mother. I spoke about and asked for some time off, a day here and there . . . I don't recall that I said anything other than that. I spoke about what was going on with my mother and the situation in her house in Long Beach. I don't recall speaking about anything other than that" (*id.* at 157).

Snyder evidently told plaintiff that they had a company to run. Plaintiff believed that someone had directed Snyder to say this to plaintiff as it was "robotic" and he did not say anything else. She claimed, after this conversation, she felt her job was in jeopardy due to the fact that she related her stress and anxiety and that she needed to take a day off here and there.

DISCUSSION

I. Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Svc. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006], quoting *Winegrad*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden

shifts to the nonmoving party to produce evidentiary proof of inadmissible form of sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980], *DeRosa v City of NY*, 30 AD3d 323, 325 [1st Dept 2006].

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY 2d 223, 231 [1978], *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

II. NYCHRL

Pursuant to the NYCHRL, as stated in Administrative Code § 8-107(1)(a), it is an unlawful discriminatory practice for an employer to: refuse to hire or employ, fire, or discriminate against an individual in the terms, conditions or privileges of employment because of the individual's disability. Under the NYCHRL, disability is broadly defined as "any physical, medical, mental or psychological impairment, or a history or record of such impairment" (Administrative Code § 8-102[16][a]).

To establish a case of disability discrimination under the NYCHRL, the plaintiff "must demonstrate that he or she suffered from a disability and that the disability caused the behavior for which he or she was terminated" (*Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 [1st Dept 2006]). Under the NYCHRL, the court applies the burden shifting analysis developed in (*McDonnell Douglas Corp. v Green,* 411 US 792 [1973]), where the plaintiff has the initial

burden to establish a prima facie case of discrimination (*Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 305 [2004]). This analysis requires plaintiff to set forth that he is a member of a protected class, was qualified for the position, was actively or constructively discharged, and that the discharge occurred under circumstances giving rise to an inference of discrimination (*Ferrante*, 90 NY2d at 629).

If the plaintiff is able to set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating that the plaintiff was discharged for a nondiscriminatory reason (*id).* If the employer meets this burden, the plaintiff "is still entitled to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination" (*id.* at 629-630).

In addition, when analyzing cases brought under NYCHRL, the Appellate Division, First Department, has reaffirmed the applicability of the burden shifting analysis, in addition to the mixed-motive analysis (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012] ["an action brought under the NYCHRL must, on a motion for summary judgment, be analyzed both under the *McDonnell Douglas* framework and the somewhat different 'mixed-motive' framework recognized in certain federal cases"]).

At this stage, plaintiff must show that there is an issue of material fact as to whether the employer's stated reasons are false and pretextual (*Melman*, 98 AD3d at 114), or "unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor," for the employer's action (*id.* at 127; *see also Carryl v MacKay Shields, LLC* , 93 AD3d 589, 590 [1st Dept 2012]). Where the plaintiff "responds with some evidence that at least one of the reasons proffered by defendant is false . . . such evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45 [1st Dept 2011]).

Applying these principles to the case at hand, STC is entitled to summary judgment. Plaintiff's cause of action is one for discrimination based on alleged disabilities. However, plaintiff cannot demonstrate a prima face case of disability discrimination. Even if plaintiff's expected rise in stress due to life stressors could be construed in any way as a disability, she cannot prove that STC perceived or knew that she had an alleged disability. Plaintiff testified that no one knew or perceived her to have an impairing mental illness prior to her phone conversations with Snyder and Wagoner on November 18, 2012. Plaintiff's emails make no mention of any diagnosed and disabling medical condition, they just reiterate plaintiff's need to take time off from her job to deal with her mother's housing and her mother's health situation. Plaintiff does not even claim that she would not be able to work remotely as a result of her situation, just that her mother's issues prevented plaintiff from going into the office. As plaintiff suggests, she still worked remotely, even on the vacation days she was pre-approved for. In fact, plaintiff responded to STC on November 26, 2012 that she would be able to attend the holiday party in December 2012.

Plaintiff evidently is aware of the process by which to seek approved medical leave, as STC had granted her two leaves in the past when she had surgery. She does not provide any documentation to STC about her alleged disability nor does she make an application for FMLA or leave based on such.

As a result, even under the broadest of terms, plaintiff cannot establish that STC was made aware of any history of disability (*see e.g. Matter of Flores v Doherty*, 71 AD3d 405, 406 [1st Dept 2010] [no evidence that employer knew of employee's disability prior to termination]; *see also Canales-Jacobs v New York State Office of Ct. Admin.*, 640 F Supp 2d 482, 500 [SD NY 2009] ["the employer here did not have notice of plaintiff's condition, so there could be no causal connection between her psychiatric condition and the decision to bring her up on

charges leading to her termination"]; *Woolley v Broadview Networks*, 2003 WL 554754, *8, 2003 US Dist LEXIS 2716, *24 [SD NY Feb 26 2003 No. 01 Civ. 2526 (GEL)] [Under the Americans with Disabilities Act, New York State and New York City Human Rights Laws, "[t]o establish the causation element of his prima facie case, a plaintiff must introduce evidence sufficient to permit a factfinder to conclude that she was fired solely because of her disabilities. At the very least, the employer must have knowledge of the disability" [internal quotation marks and citations omitted]).

Counsel claims that plaintiff raised concerns about her mental state. "A shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment" (*Costello v Saidmehr*, 236 AD2d 437, 437 [2d Dept 1997] [internal quotation marks and citation omitted]). Even under the NYCHRL, "not every plaintiff asserting a discrimination claim will be entitled to reach a jury" (*Melman v Montefiore Med. Ctr.*, 98 AD3d at 131). Although it is stressful to deal with family and other life issues, the stress of everyday life cannot be extrapolated by STC to be considered a disabling impairment.[4]

In a way to rebut summary judgment, plaintiff provides receipts from a few therapist appointments that she had throughout the years in an attempt to show that she suffered from a mental impairment. She also provides a statement from a provider who she saw after she was terminated, who acknowledged plaintiff's anxiety. Nonetheless, plaintiff did not see a healthcare provider after Hurricane Sandy nor did she receive any medical treatment as a result of the alleged stress. Her self-diagnosed "heightened" anxiety and stress cannot be configured

[4] Plaintiff further contends that she was dissuaded from asking for leave. The record indicates that, as a result of the necessary and emergency recovery operations at STC, all NY based employees were told that STC would not be granting any additional requests for vacation time. Vacation time, not medical or other leave, was addressed in this letter.

to be a medical diagnosis given to STC.[5]

Even if plaintiff could establish that she suffered from a disability, she has not raised a triable issue of fact that STC showed pretext or discriminatory animus in its decision to terminate her. Although she received the termination letter after her conversations with Snyder and Wagoner, the timing of plaintiff's termination does not raise an issue of fact. Plaintiff's inadequate performance is well-documented.

Weisman, who was not made aware of any alleged mental impairment, testified that the decision to terminate had been building up for the few weeks before, when he realized that plaintiff was not the right person to take STC out of the storm by moving the computers into the space, getting set up and moving forward. Plaintiff, as director, was responsible for getting the temporary space for the computers set up, yet she was not present.

Weisman testified that many of his employees had to deal with the impact of Hurricane Sandy and that he was dissatisfied with plaintiff's absence and her inadequate response. Plaintiff admitted that she was absent from STC after October 25, 2012, focusing on her own family problems. She emailed Snyder and Weisman on November 4, 2012, acknowledging how hard her team has been working and how she knows she has not been a part of that process. She did not mention her own alleged anxiety problems. None of plaintiff's allegations can establish that her termination was motivated, even in part, by discrimination (*see e.g. Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 494 [1st Dept 2014] ["Even under the mixed-motive analysis applicable to City Human Rights Law claims, plaintiff's claim fails, because there is no evidence from which a reasonable factfinder could infer that [protected status] played any role in defendant's decision to terminate him"]).

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[5] As STC notes, plaintiff herself wrote an email where she used the word stress and states she was sorry if she caused Snyder any additional stress.

In addition, Weisman testified to other instances where he questioned plaintiff's professionalism and capabilities. And, plaintiff's performance evaluations further document issues with plaintiff's performance. The court in an employment discrimination case "should not sit as a super-personnel department that reexamines an entity's business decisions" (*Melman v Montefiore Med. Ctr.*, 98 AD3d at 121 [internal quotation marks and citation omitted]).

Plaintiff's Termination Letter:

Plaintiff further claims that it was unreasonable that she was terminated by a generic termination letter as she never received negative feedback after Hurricane Sandy and that she was not provided with any explanation in the letter. Plaintiff is an at-will employee, meaning that STC or plaintiff could terminate her employment at any time, for any reason or no reason, with or without cause or notice. Moreover, plaintiff fails to demonstrate how STC's decision, at the time, to terminate her, was pretextual (*see e.g. Melman,* 98 AD3d at 121 ["A challenge . . . to the *correctness* of an employer's decision does not, without more, give rise to the inference that the adverse action was due to [disability] discrimination"] [internal quotation marks and citations omitted]).

Reasonable Accommodation:

Plaintiff's complaint is grounded in discrimination based on a perceived or actual disability. Nonetheless, she avers that STC did not provide her with a reasonable accommodation in her informal request for intermittent leave. Regardless, as mentioned, STC was not aware of plaintiff's alleged impairment. A duty to provide an accommodation to a disabled employee "cannot arise if the employer is unaware of the disability" (*Nande v JP Morgan Chase & Co.*, 17 Misc 3d 1103[A], 2007 NY Slip Op 51819[U], *11 [Sup Ct, NY County 2007], *affd* 57 AD3d 318 [1st Dept 2008]). Accordingly, this claim fails.

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant Securities Training Corp., for summary judgment dismissing the complaint herein is granted, and the complaint is dismissed in its entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

ORDERED that defendant Securities Training Corp. is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and upon the Clerk of the court who is directed to enter judgment accordingly.

Dated: 8/31/15

PAUL WOOTEN ***J.S.C.***

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**