COPY

Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

----------X

JODI ALBERT,

Plaintiff,

-against-

NASSAU COUNTY OFFICE OF COURT ADMINISTRATION, AND KATHRYN HOPKINS, BILL HARKINS, DONA PRATESI AND PAUL LAMANNA (sued in their individual capacities pursuant to New York Executive Law §290 et seq.),

Defendants.

----------X

INDEX NO.: 07703/15
MOTION DATE: 10/19/17
MOTION SEQ. NO.: 001 MG; CASE DISP

PLAINTIFF'S ATTORNEY:
Scott Michael Mishkin, P.C.
One Suffolk Square, Suite 240
Islandia, New York 11749

DEFENDANTS' ATTORNEY:
Hon. Barbara Underwood
Acting Attorney General of the
State of New York
300 Motor Parkway, Suite 230
Hauppauge, New York 11788

Upon the following papers numbered 1 to 39 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 18 - 36 ; Replying Affidavits and supporting papers ___; Other memorandum of law 17, 37, 38 - 39 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 001) of defendants for an order pursuant to CPLR R. 3212 granting defendants summary judgment dismissing the complaint is granted.

Plaintiff was formerly employed as a senior court clerk ("SCC") by defendant Nassau County Office of Court Administration, which oversees the administration of the New York State Unified Court System ("UCS"). It is undisputed that plaintiff was hired by UCS in 2003, that she was appointed to the position of SCC in 2007, and that a candidate for such civil service position must meet certain minimum qualifications and be able to perform the duties set forth in the "title standards" developed by UCS.

In 2010, plaintiff interviewed for an assignment to the Nassau County Supreme Court with the court's chief clerk, defendant Kathryn Hopkins ("Hopkins"), and its deputy chief clerk, defendant Bill Harkins ("Harkins"), and she informed them at that time that she had diabetes, Type 1. Plaintiff was assigned to the Nassau County Supreme Court, Matrimonial Part, and served in the courtroom as a "part clerk" for Justice Maron from October 2010 to March 2011, and as the part clerk for Justice Janowitz from March 2011 to February 2012. She claims to have enjoyed courtroom work very much. During both periods as a part clerk, defendant Dona Pratesi

("Pratesi") was plaintiff's immediate supervisor, and nonparty Richard Seibt ("Seibt") supervised Pratesi and the entire Matrimonial Part.

It is further undisputed that, due to her diabetes, one of plaintiff's toes had to be amputated in February 2012, that plaintiff delivered a note to Seibt from her podiatrist dated March 13, 2012 stating that the plaintiff "is healing, however to avoid future wounds it would be beneficial for her to remain limited weight bearing"; and that she was out on paid and unpaid leave of various types from February 10, 2012 to July 9, 2012. Upon her return to work, plaintiff was assigned to an office position in the judgment office of the Matrimonial Part, where Seibt became her immediate supervisor, and plaintiff worked in courtrooms on an "as needed" basis. Plaintiff submitted a second note to Seibt from her podiatrist dated May 1, 2013, stating that it would be beneficial if plaintiff remained in a "limited weight bearing position." In June 2013, Hopkins assigned plaintiff to the Foreclosure Part in the main building of the Nassau County Supreme Court, and Harkins became her immediate supervisor. The staff in the Foreclosure Part, including the SCCs, sat behind a long counter while serving the public and the plaintiff was provided with a stool to sit upon. The plaintiff often chose not to sit on her stool during her work in the Foreclosure Part.

It is further undisputed that plaintiff sent Hopkins an email during the time that she was assigned to the Foreclosure Part thanking Hopkins for making accommodations for her, and that she was transferred back to the judgment office in the Matrimonial Part in August 2013, where Seibt was her immediate and overall supervisor once again. In September 2013, plaintiff was assigned to the intake office in the Matrimonial Part, where Pratesi became her immediate supervisor and plaintiff was assigned as a part clerk approximately two times a month. In January 2014, there was a reduction in the number of SCCs working in the Matrimonial Part and plaintiff was reassigned to the judgment office where she served as a part clerk approximately four times a month.

Plaintiff's feet became very bad at the end of the summer of 2014, and she delivered an undated note to Seibt from her podiatrist in the fall of 2014 which stated that the plaintiff should remain in a "strict limited or non weight bearing position at work." In letters dated December 15, 2014, plaintiff notified Hopkins, Harkins, Pratesi, and the district executive, defendant Paul Lamanna ("Lamanna") that she believed that she was being discriminated and retaliated against due to her disability. On December 16, 2104, Lamanna held a meeting with plaintiff, her union representative, and Hopkins to discuss plaintiff's situation. On December 18, 2014, plaintiff served defendants with notices of claim alleging that she had made a formal complaint on October 10, 2014, and that they had failed to honor her treating physician's reasonable accommodation requests.

It is further undisputed that Lamanna held an additional meeting regarding plaintiff's situation on January 5, 2015, that plaintiff submitted a list of accommodation requests at that

time, and that certain accommodations were discussed. On January 7, 2015, Lamanna forwarded to plaintiff's union representative the suggestion that plaintiff could be transferred to the main building of the Supreme Court, which was subsequently rejected by plaintiff. On January 15, 2015, Lamanna presented an alternative plan to plaintiff which included, among other things, the continued review of plaintiff's leave requests, that her work location would be wheelchair accessible, and that, if her assignment to a courtroom was necessary, she would only be assigned to the courtroom of the supervising judge, Justice Zimmerman, who would be made aware of her needs and who would facilitate accommodating those needs. Between January 15, 2015 and her last day at work on May 21, 2015, plaintiff was assigned to Justice Zimmerman's courtroom two times. Plaintiff retired from UCS on July 16, 2015 and is receiving disability retirement benefits.

Plaintiff commenced this action by the filing of a summons with notice on May 1, 2015, and she served, as of right, an amended complaint dated May 29, 2015. In her complaint, plaintiff alleges that defendants "could have accommodated Plaintiff's disability by assigning her to an office position ... to work solely in the office" after receiving the May 1, 2013 note from plaintiff's podiatrist, and that defendants discriminated against her and retaliated against her based on her disability in violation of the New York State Executive Law §296. Plaintiff seeks actual, compensatory and emotional damages for defendants' alleged violations of said law.

New York Executive Law §296[1] prohibits discrimination by an employer, and also prohibits the employer from retaliating against an employee for opposing any practices forbidden under the Human Rights Law. Section 297(9) of the Human Rights Law states: "Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction ... unless such person has filed a complaint hereunder ... with any local commission on human rights." There is no indication that plaintiff filed a complaint with the local human rights commission. "The standards for recovery under section 296 of the Executive Law are in accord with Federal Standards under Title VII of the Civil Rights Act of 1962 (42 USC 2000e *et seq.*)" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 629, 665 NYS2d 25 [1997]; *see also Matter of Aurecchione v New York State Div. of Human Rights*, 98 NY2d 21, 744 NYS2d 349 [2002]; *Matter of Argyle Realty Assoc. v New York State Div. of Human Rights*, 65 AD3d 273, 882 NYS2d 458 [2d Dept 2009]). On a claim of discrimination, plaintiff has the initial burden of establishing a *prima facie* case of discrimination (*id.*). While this burden is "*de minimis*" (*Sogg v American Airlines,* 193 AD2d 153, 162, 603 NYS2d 21 [1st Dept 1993], *lv dismissed* 83 NY2d 846, 612 NYS2d 106 [1994], *lv denied* 83 NY2d 754, 612 NYS2d 109 [1994]), plaintiff must present more than "conclusory allegations of discrimination" and provide 'concrete particulars' to substantiate the claim" (*Muszak v Sears, Roebuck & Co.*, 63 F Supp 2d 292 [WD NY 1999], quoting *Meiri v Dacon*, 759 F2d 989 [2d Cir1985], *cert. denied* 474 US 829, 106 SCt 91 [1985]).

---

[1] Executive Law §§290-301 comprise Article 15 of the Executive Law, which is known as the Human Rights Law.

Defendants now move for summary judgment dismissing the complaint on the grounds that, among other things, plaintiff's request for an exclusive office position was not reasonable, that the medical documentation submitted by plaintiff did not support that request, and that UCS offered her alternative reasonable accommodations for her disability. Defendants also assert that plaintiff's retaliation claim should be dismissed as she was not engaged in "protected activity," and that any claim against the individual defendants for aiding and abetting should be dismissed.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion who must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; *Rebecchi v Whitmore*, *supra*).

At her deposition, plaintiff testified that she had given her podiatrist the title standards for the SCC position prior to his writing the subject notes to UCS, that when she gave Seibt the March 13, 2012 note she told him that she could not be on her feet, but did not request to work solely in an office, and that she did not recall when she first made that request. She stated that, when she returned to work in the judgment office after the amputation of her toe, she was assigned to work in a courtroom "not too much of the time" or approximately one time per month; that she was assigned to work in a courtroom approximately two times per month while she was working in the Foreclosure Part; and that she remained in the judgment office under Seibt's supervision until her retirement from UCS. She indicated that, when she worked in the intake office or the judgment office, she was not completely sedentary, but she would be on her feet much less than in a courtroom, and that, when she worked in the Foreclosure Part, she had a hard time remaining seated on the stool provided because she was a "good worker" and she could not "let everybody around me go to pieces." The plaintiff further testified that she did not remember when she first told Seibt or Pratesi that she needed to work solely in an office but "assumed" that her podiatrist notes "were speaking for themselves," that she first told Harkins, her supervisor in the Foreclosure Part, that she needed to work solely in an office when she was transferred there, and that she first told Lamanna of her needs in her first meeting with him on December 16, 2014. She indicated that Lamanna "brought up" the idea of her using a wheelchair

at work in their second meeting on January 5, 2015, that she never asked for the use of a wheelchair, and that she believes that her use of a wheelchair would have been a "reasonable accommodation" for her disability. She stated that, at the January 5, 2015 meeting, she presented a list of requested accommodations she had prepared, that Lamanna maintained that her podiatrist notes were unclear and requested that she obtain another note on her next visit to her doctor at that meeting, and that Lamanna expressed that he was going to assign her only to Justice Zimmerman's part whenever her presence in a courtroom was needed by moving Justice Zimmerman's clerk to the part that needed coverage.

Plaintiff further testified that, in a conversation with Justice Zimmerman when she was first assigned there, the Justice told her to "sit down and everyone would help her as much as possible," that she was assigned to Justice Zimmerman's part a total of two times after the January 15, 2015 meeting, and that she had a good experience the first time that she was assigned to said part. She stated that she was next assigned to Justice Zimmerman's courtroom on May 21, 2015, that all of the judge's staff was out for the day, and that she was not able to remain seated during work. She indicated that her feet "went from bad to worse" that day, that she went out on leave which was approved by Lamanna, and that was the last day that she worked in the UCS before retiring. The plaintiff further testified that, after being out on leave for a portion of the weeks ending April 10, 2015 and April 17, 2015, she had submitted notes from her podiatrist allowing her to return to work "in a non weight bearing position at this time," and that on both occasions Pratesi had assigned her to a courtroom on the Monday she returned to work. She stated that she was aware that there was a statewide restriction on hiring as of January 2014, that she knew the Nassau County Supreme Court was experiencing a "shortage of clerks ... [but] that's not my problem ... I have a disability to worry about," and that no one in the UCS ever said anything derogatory about her disability to her. She indicated that she did not know why she believed, as alleged in her complaint, that she was being discriminated against as of October 10, 2014, and that her podiatrist notes were notice that she should work solely in an office even though none state that she should not work in a courtroom setting.

Plaintiff maintains that she was retaliated against for submitting her podiatrist's notes, when she was assigned to the Foreclosure Part, when she was denied an opportunity to work according to an alternate work schedule which would allow her to attend doctor appointments without using her accrued leave, when she was assigned to a courtroom on the aforesaid Mondays in April 2015, and when Seibt gave her a poor work performance evaluation in May 2015. She acknowledges that an alternate work schedule would not have addressed her need for a more sedentary position at work. She also maintains that all of the allegations against the individual defendants involve their alleged failure to act upon the podiatrist notes submitted on her behalf, and that Pratesi created a hostile work environment by telling the office staff that Seibt might be transferred from the Matrimonial Part because of the plaintiff's lawsuit "not because of my disability ... [but] because she feels like she's being wrongfully accused."

Pratesi testified that she is employed as a principal court clerk in the Matrimonial Part, that her duties include supervision of the intake and judgment offices and the SCCs that work in the six courtrooms of the part, and that Seibt is her supervisor. She stated that the Matrimonial Part was staffed by one associate court clerk ("ACC") and seven SCCs in 2014, that the higher pay grade ACC performed highly technical work in the back offices and helped supervise office staff, and that there were only one or two SCCs available to work one of the six courtrooms if a part clerk was absent. She indicated that the decision to assign a SCC to cover a courtroom was generally made by Seibt, or sometimes by Hopkins, that she never saw the plaintiff's doctor's notes, and that, at some point, she and Seibt discussed that plaintiff would be the last choice to cover a courtroom where she could ask the court officer "to do the running for her." Pratesi further testified that Hopkins had originally announced that SCCs were not eligible to work an alternate work schedule due to the need for coverage in the courtrooms, and that it was her understanding that plaintiff was transferred to the Foreclosure Part because it was a back office position where the court could better accommodate her. She indicated that, with the exception of one SCC who was asked by the justice to whom she was assigned to delay her retirement for a short period of time, only some lower pay grade employees received permission to work an alternate work schedule.

At his deposition, Lamanna testified that he has been employed as the executive director for the Tenth Judicial District, Nassau County since 2007, that he is responsible for, among other things, overseeing the day to day operations of the courts on behalf of the administrative judge and acting as the local head of human resources, and that his role in determining the reasonableness of an accommodation request only arises if there is a complaint by an employee. He stated that he believes that he first met plaintiff in the Foreclosure Part when Hopkins introduced him as a courtesy, that he called a meeting for the next day when he was notified that plaintiff had made a discrimination complaint on December 15, 2014, and that he reviewed plaintiff's podiatrist's notes and leave requests prior to that meeting. He indicated that, in their first meeting on December 16, 2014, plaintiff requested that she not be assigned to courtroom work, that he observed that her podiatrist's notes did not address the idea that she could not work in a courtroom setting, and that he advised her that her request was not reasonable in light of the operational demands on the court, because such work was a fundamental part of her job title even if infrequent, and due to the reduced staffing levels in the court.

Lamanna further testified that plaintiff was not satisfied with the refusal to direct a "no courtroom assignment," that he did not know of an SCC that could not be assigned to a courtroom if needed, and that the work in a courtroom is done at a desk, with a chair, and the plaintiff would not have to get to her feet if she did not want to do so, as she could be assisted by court staff. He stated that, after his second meeting with the plaintiff on January 5, 2015, he forwarded an offer to plaintiff via her union representative suggesting a transfer to the court information center (CIC) in the main building of the Supreme Court because, although she would not be guaranteed that she could avoid courtroom work, the likelihood was "significantly

diminished" as there are 26 open parts and "a lot more clerical operations to draw from" in assigning coverage of those courtrooms. He indicated that, while waiting for plaintiff's response to the offer, he met with the administrative judge, Thomas Adams, Justice Zimmerman, and Hopkins to update them and to formulate a "plan B," because Seibt had informed him that plaintiff was planning to reject the offer and pursue litigation and a disability retirement. Lamanna further testified that he was informed of plaintiff's rejection of the transfer to CIC on January 13, 2015, that he set up a third meeting on January 15, 2015 to convey, among other things, the plan to assign her only to Justice Zimmerman's courtroom and to grant her associated proposed accommodations. He stated that he never received the April 2015 notes which he believes were submitted in connection with plaintiff's absences as "work return notes" as opposed to her requests for accommodation, that he believes that UCS could accommodate plaintiff's needs whether or not she worked in an office or a courtroom, and that he believes the Matrimonial Part and at least one courtroom was wheelchair accessible. He indicated that Seibt was responsible for assigning SCCs to ensure coverage of the Matrimonial Part courtrooms, that Pratesi only executed Seibt's instructions, and that he was not permitted to amend the title standards which were established by the OCA.

In an affidavit submitted in support of the defendants' motion, Lamanna swears that the time detail report for plaintiff maintained by the UCS reveals, among other things, that plaintiff took 407 days of paid and unpaid leave while assigned to the Matrimonial Part, and that the one SCC named by the plaintiff as not being assigned to a courtroom was not performing SCC duties while president of the local union from 2012 to 2014, and after a later leave without pay, and was not assigned courtroom work due to her short term, temporary request upon her return to her position, which was not a guarantee for the future. He states that he did not consider plaintiff's request to completely and permanently avoid courtroom work reasonable because the medical documentation did not indicate that an office position was required to accommodate plaintiff's needs, because courtroom duties are an essential function of the SCC position, and because the court system was facing "unprecedented operational and fiscal challenges" including reduced staffing and an increased workload. He indicates that lower grade staff are not authorized to be assigned as part clerks, that the pool of eligible staff is limited to SCCs and higher pay grades, and that flexibility is needed to prioritize courtroom staffing demands to ensure the court's public service obligations. Lamanna further swears that, in his view, the accommodations afforded to the plaintiff were reasonable and adequate to meet her medical needs.

In her affidavit, Hopkins swears that she has been employed as the chief clerk of the Supreme Court, Nassau County since 2002, that her duties include managing all aspects of the civil operations of the Supreme Court, including the Matrimonial Part, and that plaintiff was assigned to the Matrimonial Part from November 25, 2010 to the end of her employment with UCS, except for her work in the Foreclosure Part from June 10, 2013 to August 22, 2013. She states that it was her decision to transfer plaintiff to the Foreclosure Part based on the plaintiff's May 1, 2013 podiatrist note, that the work was more sedentary, and that plaintiff could sit on a

stool and be given assistance in the retrieval, copying and delivery of files. Hopkins indicates that she provided such assistance to the plaintiff on the occasions that she served in the Foreclosure Part. Hopkins further swears that, prior to the court system's initiation of a retirement incentive in 2010 and its program of layoffs in 2011, there were more SCCs than judges in the courts, enabling SCCs to assist in the back offices, and that, with those changes and the further attrition in staffing due to retirements or otherwise, it has become more difficult to "redeploy" staff to cover working courtrooms. She indicates that staff with a higher pay grade than SCCs can be used in a courtroom but are needed to assist judges with legal documentation and many other tasks, and that no SCC has ever been guaranteed that they can avoid courtroom work, as it would shift the staffing to a smaller pool of candidates.

In his affidavit, nonparty Seibt swears that he has been employed by UCS as a court clerk specialist since 1996, that his responsibilities include supervising the day to day operations of the Matrimonial Part, and that, except for the summer that plaintiff was assigned to the Foreclosure Part, he has been her supervisor. He states that plaintiff was a part clerk when she first was assigned to the Matrimonial Part, but that changed when she returned in July 2012 from an extended medical leave and, at her request, she was assigned to the judgment office under his direct supervision. He indicates that, until plaintiff notified the defendants that she felt she was being discriminated against on December 15, 2014, Pratesi assigned SCCs to courtrooms after discussing staffing issues with him and that he considered plaintiff a "fill in ... assigned ... only if it would best effectuate operational needs," and only after checking on options and after careful deliberation.

Seibt further swears that he considers working in a courtroom to be a fundamental function of a SCC based on the title standards and the work performed, that he does not assign higher grade ACCs to courtrooms because they are needed to review and process judgments and court orders, and that to do otherwise would increase the backlog of court cases. He indicates that he participated in the January 2015 meetings with plaintiff and believes that her assignment to the CIC in the main building would have been a good option for plaintiff, and that he and plaintiff met with Justice Zimmerman shortly after the January 15, 2015 meeting to discuss how plaintiff would be accommodated if and when assigned to that courtroom, including having the secretary pull court files, have the court officer transport files, and leaving the door separating the courtroom from the anteroom to chambers open so plaintiff could roll into the anteroom on her wheeled desk chair, without having to stand. Seibt further swears that the job performance evaluation he completed for the period April 1, 2014 to March 31, 2015 was his uninfluenced assessment of the plaintiff's ability to meet deadlines and maintain her productivity because of her numerous absences and leaves, that he does not consider the evaluation to be negative, but factual, and that he determined that the plaintiff's overall rating was "meets job requirements."

A review of the time detail reports for plaintiff reveals that they are consistent with the testimony of the parties as summarized above. The podiatrist's note dated March 13, 2012

indicates that "it would be beneficial for [the plaintiff] to remain limited weight bearing" and the note dated May 1, 2013 indicates that "it would be beneficial for [the plaintiff] to remain in a limited weight bearing position." The undated podiatrist's note, presumably issued on or about October 10, 2014, states "[i]t is imperative that [the plaintiff] remains in a strict limited or non weight bearing position at work." Two identical podiatrist notes dated December 15, 2105 state that "A more sedentary position was again stressed to accommodate for her disabilities, and allow [the plaintiff] to remain more nonweightbearing [sic] during the day." The podiatrist notes dated April 10, 2015 and April 17, 2015 both contain the heading "work return note," and state that the plaintiff "is able to return to work [in] a non weight bearing position at this time."

The title standards for senior court clerk provide in pertinent part that SCCs "serve as part clerks swearing witnesses, polling jurors ... keeping court minutes ... [and] are responsible for the supervision of uniformed court personnel ... [SCCs] also work in court offices where they supervise ... other court personnel engaged in processing prisoner correspondence, reviewing calendaring decisions ...." The request for reasonable accommodations dated January 5, 2015, and submitted by the plaintiff at the meeting of the same date, does not include a request to be excused from courtroom work due to her diabetes, but includes, among other things, requests to take breaks and a place to treat her condition, as well as "permission to use a chair or stool."

Human Rights Law (Executive Law) §296 (1) (a) states: "It shall be an unlawful discriminatory practice...[f]or an employer or licensing agency, because of an individual's ... disability ... to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." "To state a *prima facie* case of employment discrimination due to a disability under Executive Law §296, a plaintiff must show that he or she suffers from a disability and that the disability engendered the behavior for which he or she was discriminated against in the terms, conditions, or privileges of his or her employment" (*Kulaya v Dunbar Armored, Inc.*, 110 AD3d 772, 972 NYS2d 659, 660 [2d Dept 2013]; *see Timashpolsky v State Univ. of N.Y. Health Science Ctr. at Brooklyn*, 306 AD2d 271, 761 NYS2d 94 [2d Dept 2003], *lv. denied* 1 NY3d 507, 776 NYS2d 223 [2004]). Here, it is undisputed that the plaintiff suffers a disability as defined by the statute.

To establish a *prima facie* case for failure to accommodate a disability, plaintiff must show that he or she suffered from a disability, that he or she could perform the essential functions of her position with or without reasonable accommodation, and that his or her employer refused to make such accommodations (*see* Executive Law §292 [21]; *Simeone v County of Suffolk,* 36 AD3d 310, 760 NYS2d 534 [2d Dept 2006]; *Pimental v Citibank, N.A.*, 29 AD3d 141, 811 NYS2d 381 [1st Dept 2006]). It is well settled that an employer is not required to eliminate any of the essential functions of a job in order to accommodate an individual with a disability (*see Pabon v New York City Tr. Auth.*, 703 F Supp 2d 188, 196 [ED NY 2010]; *Gilbert v Frank*, 949 F2d 637, 642 [2d Cir 1991]). Thus, "[a] reasonable accommodation can never involve the

elimination of an essential function of a job" (*McMillan v City of New York*, 711 F3d 120, 127 [2d Cir 2013] quoting *Shannon v New York City Tr. Auth.*, 332 F3d 95, 100 [2d Cir 2003]). In addition, a reasonable accommodation "does not impose an 'undue hardship' on the employer's business" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 834, 988 NYS2d 86 [2014]).

The podiatrist's notes prior to April 2015 did not indicate that the plaintiff should be assigned to a fully non-weight bearing position at work, or that she should not be assigned to work in a courtroom under any circumstances. In addition, the testimony reveals that the office positions assigned to the plaintiff, and requested as a permanent assignment, are themselves not non-weight bearing positions. Moreover, it is undisputed that the plaintiff was accommodated by the granting of paid and unpaid leave from February 2012 to December 15, 2014, the date of her complaint of discrimination. It is well settled that temporary leaves of absence can be considered reasonable accommodations in addressing an employee's disability (*Micari v Transportation World Airlines, Inc.*, 43 F Supp 2d 275 [ED NY 1999]; *Miloscia v B.R. Guest Holdings LLC*, 33 Misc 3d 466, 928 NYS2d 905 [Sup Ct, Ct, New York County 2011], *affd in part & mod in part* 94 AD3d 563, 942 NYS2d 484 [1st Dept 2012]). In addition, where a plaintiff is granted disability leave to address his or her health issues and fails to establish that the accommodation was unreasonable, a disability claim is properly dismissed (*see Esposito v Altria Group, Inc.*, 67 AD3d 499, 888 NYS2d 47 [1st Dept 2009]).

To prevail on a summary judgment motion with respect to a disability discrimination claim, an employer must show that it engaged in a good faith interactive process that assessed the needs of the disabled individual and the reasonableness of the accommodation requested (Executive Law §290 [3]; *Jacobsen v. New York City Health & Hosps. Corp.*, *supra*; *Graham v New York State Off. of Mental Health*, 154 AD3d 1214, 64 NYS3d 334 [3d Dept 2017]). Plaintiff's testimony indicates that her medical condition worsened in the late summer of 2014, and that defendants met with her a number of times after the receipt of her complaint in December 2014. Thus, defendants have established that they undertook a good-faith interactive process to assess plaintiff's needs and the reasonableness of her accommodation requests, and continued the process until, if possible, an accommodation reasonable to both UCS and plaintiff could be reached (*see Phillips v City of New York*, 66 AD3d 170, 884 NYS2d 369 [1st Dept 2009]).

Here, the record does not reveal that plaintiff objected to any of the accommodations offered in the interactive process undertaken by defendants. Instead, plaintiff has taken the position that the only accommodation that she considers reasonable is a guarantee that she will not be assigned courtroom work. However, plaintiff acknowledges that the ability to use a wheelchair in performing her job functions, including assignment to a courtroom, would have been a reasonable accommodation. Generally, an "employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some

reasonable accommodation" (*Gile v United Airlines, Inc.*, 95 F 3d 492, 499 [7th Cir 1996]; *see also Fink v New York City Dept. of Personnel*, 855 F Supp 68 [SD NY 1994]). On this basis alone, defendants have established their *prima facie* entitlement to summary judgment dismissing plaintiff's claim for failure to accommodate.

Nonetheless, defendants have also *prima facie* established that courtroom work is an essential function of the SCC position. The title standards, as well as the testimony, establish that the SCC position is distinguished from lower pay grade positions by the fact that SCCs are assigned to courtrooms, as well as the training and "typical duties" which are required of them to satisfy the requirements of the position (*see Jones v Saint Joseph's Coll.*, 46 AD3d 467, 847 NYS2d 584 [1st Dept 2007]; *Simeone v County of Suffolk, supra*). In addition, defendants have *prima facie* established that the limited number of higher pay grade clerks in the Matrimonial Part are tasked with additional responsibilities which require their presence in back offices which support the functioning of the court system. Thus, accommodating plaintiff's request to be permanently excused from courtroom work would impose an undue hardship on UCS. Accordingly, defendants have established their *prima facie* entitlement to summary judgment dismissing plaintiff's claim for failure to accommodate.

The court now turns to plaintiff's claim that she was assigned to courtroom work in retaliation for her submission of the podiatrist's notes and her complaint of discrimination. In order to establish a *prima facie* case for retaliation, a plaintiff must show that he or she was engaged in a protected activity, that his or her employer was aware of that activity, and that there was a causal connection between the protected activity and the adverse employment action (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 786 NYS2d 382 [2004]; *Bennett v Health Mgt. Sys. Inc.*, 92 AD3d 29, 936 NYS2d 112 [1st Dept 2011]). Under Executive Law §296, "protected activity" refers to any action taken to protest or oppose discrimination prohibited by the statute (*see Johnson v North Shore Long Is. Jewish Health Sys., Inc.*, 137 AD3d 977, 27 NYS3d 598 [2d Dept 2016]; *Clarson v City of Long Beach*, 132 AD3d 799, 18 NYS3d 397 [2d Dept 2015]). The podiatrist's notes do not complain of any discriminatory action by defendants. Each is addressed to plaintiff, and each was used by her solely to request some sort of accommodation for her disability.

Thus, defendants have established their *prima facie* entitlement to summary judgment on plaintiff's claim that she was assigned to courtroom work in retaliation for submitting said notes. The testimony reveals that plaintiff did not file a complaint with defendants regarding their alleged failure to accommodate her disability prior to December 15, 2014. Absent a complaint prior to that time, the plaintiff cannot establish that she was engaged in a protected activity, and that there was a causal connection between her assignment to courtroom work and any activity on her part (*see Borawski v Abulafia*, 140 AD3d 817, 33 NYS3d 412 [2d Dept 2016]: *see also Forrest v Jewish Guild for the Blind, supra*). After her complaint of December 15, 2014, the

evidence reveals that defendants determined through an interactive process that plaintiff's request to be permanently excused from courtroom work was unreasonable, and made an effort to reasonably accommodate her disability.

Retaliation in violation of Executive Law §296(7) will not be found where there is ample proof of a legitimate, independent, and nondiscriminatory reason for the employer's action (*see Johnson v NYU Hosps. Ctr.*, 39 AD3d 817, 835 NYS2d 340, *lv denied* 9 NY2d 805, 842 NYS2d 781 [2d Dept 2007]; *Thide v New York State Dept. of Transp.*, 27 AD3d 452, 811 NYS2d 418 [2d Dept 2007]). Defendants have *prima facie* established that they had legitimate, independent, and nondiscriminatory reasons for not giving plaintiff a guarantee that she would never be assigned to a courtroom, and that her assignment to courtrooms after her complaint in December 2014 until her final day of active employment, including in April 2015, was extremely limited and in conformance with the accommodations initiated by defendants.

Similarly, defendants have *prima facie* established that they had legitimate, independent and nondiscriminatory reasons for assigning plaintiff to the Foreclosure Part, and denying her request for an alternate work schedule. In addition, the plaintiff's testimony establishes that her request for an alternate work schedule was not related to her disability but was for her personal convenience. Finally, defendants' submissions *prima facie* established that the allegedly negative work performance evaluation completed by Seibt in 2105 was based on legitimate grounds and was not retaliatory in nature (*see Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 970 NYS2d 789 [2d Dept 2013]; *Michno v New York Hosp. Med. Ctr. of Queens*, 71 AD3d 746, 899 NYS2d 248 [2d Dept 2010]).

A defendant employer accused of unlawful retaliation satisfies its burden on a motion for summary judgment with evidence showing that the plaintiff is unable to establish all of the four elements of a retaliation claim or that the plaintiff's employment was terminated for a legitimate and nondiscriminatory reason (*see Forrest v Jewish Guild for the Blind*, *supra*; *Johnson v NYU Hosps. Ctr.*, *supra*; *Thide v New York State Dept. of Transp.*, *supra*). Further, a *prima facie* case of retaliation requires evidence of a subjective retaliatory motive for the adverse employment action (*see Matter of Pace Univ. v New York City Commn. on Human Rights*, 85 NY2d 125, 623 NYS2d 765 [1995]; *Martinez v Triangle Maintenance Corp.*, 293 AD2d 721, 741 NYS2d 427 [2d Dept 2002]). Defendants' submissions *prima facie* establish that they did not have subjective retaliatory motives in undertaking any action relative to plaintiff, and that plaintiff did not suffer a materially adverse change in her job (*see Forrest v Jewish Guild for the Blind*, *supra*). Accordingly, the defendants have established their *prima facie* entitlement to summary judgment dismissing plaintiff's claim for retaliation.

Despite the absence of a claim for hostile work environment in her complaint, plaintiff testified that Pratesi created such a situation when she announced that Seibt might be transferred out of the Matrimonial Part because of the instant lawsuit. A hostile work environment exists

"'[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'"(*Forrest v Jewish Guild for the Blind*, 3 NY3d at 310, 786 NYS2d at 394, quoting *Harris v Forklift Sys.*, 510 US 17, 21, 114 S Ct 367, 126 LEd2d 295 [1993]; *see Beharry v Guzman*, 33 AD3d 742, 823 NYS2d 195 [2d Dept 2006]). To recover against an employer for the discriminatory acts of its employee, the plaintiff must demonstrate that the employer became a party to such conduct by encouraging, condoning, or approving it (*see Matter of State Div. of Human Rights [Greene] v St. Elizabeth's Hosp.*, 66 NY2d 684, 687, 496 NYS2d 411 [1985]; *Matter of Totem Taxi v New York State Human Rights Appeal Bd.*, 65 NY2d 300, 491 NYS2d 293 [1985]), or otherwise failed to take immediate action on a complaint (*Priore v The New York Yankees*, 307 AD2d 67, 761 NYS2d 608 [1st Dept 2003]).

Here, defendants' submissions establish that Lamanna removed Pratesi from any supervision of plaintiff and from any involvement in reviewing plaintiff's accommodation requests immediately after plaintiff complained about Pratesi's statements. In addition, plaintiff testified that she has no proof that Pratesi made any statements different from those set forth above, and her testimony does not indicate that she was the subject of any abusive behavior. Accordingly, defendants have established their *prima facie* entitlement to summary judgment dismissing plaintiff's claim for hostile work environment.

The court now turns to plaintiff's final claim that the individual defendants can be held liable herein based upon their "authority to hire, fire or discipline employees at OCA" or for aiding and abetting violations of the Executive Law. It is well settled that the Executive Law provides for direct individual liability if the defendant has an ownership interest in the employer or has the authority to hire and fire employees (*Gorman v Covidien, LLC*, 146 F Supp 3d 509 [SD NY 2015]; *E.E.O.C. v Suffolk Laundry Servs., Inc.*, 48 F Supp 3d 497, 523 [ED NY 2014]). For the reasons set forth above, the individual defendants, whether or not they had the authority to hire or fire, have established their *prima facie* entitlement to summary judgment dismissing all of the plaintiff's claims. In addition, a defendant cannot be held liable for aiding and abetting an act which itself is not actionable (*see Graham v New York State Off. of Mental Health*, 154 AD3d 1214, 64 NYS3d 334 [3d Dept 2017]; *Kelly G. v Board of Educ. of City of Yonkers*, 99 AD3d 756, 952 NYS2d 229 [2d Dept 2012]). Accordingly, defendants have established their *prima facie* entitlement to summary judgment dismissing the complaint in its entirety.

As defendants have established their entitlement to summary judgment dismissing the complaint, it is incumbent upon plaintiff to produce evidence in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, *supra*; *Rebecchi v Whitmore*, *supra*; *O'Neill v Town of Fishkill*, *supra*). In opposition to defendants' motion, plaintiff submits, among other things, her affidavit, excerpts of her deposition testimony and that of Lamanna and Pratesi, and the affidavits of three co-workers who were employed at the Nassau County Supreme Court. In her affidavit, plaintiff swears that, after her toe was amputated in February 2012, she was

given a doctor's note to "go back to work in a non-weight bearing capacity," and that, from that time to the end of her career, she was "forced to decide between my health and my job." She states that, while she was working in the Foreclosure Part, another UCS employee visited to decide if she wanted to be assigned there and told her that it was "too hectic and did not want that position." She indicates that she sent the June 2013 email thanking Hopkins for the accommodations afforded her because she feared retaliation, that she was assigned to courtroom work on November 11, 2014 and May 21, 2015 despite the fact that other SCCs were available for that assignment, and that the job performance evaluation completed by Seibt after this lawsuit was commenced is the only bad review she had while employed by UCS.

The selected excerpts of the deposition testimony of plaintiff, Lamanna and Hopkins do not add anything to the determination of this motion. In her affidavit, Marion Holfelder swears that she has been employed as a court officer in the Matrimonial Part for nine years, and that "some time" in April 2015 she was assigned to a courtroom when Pratesi came into the part and complained about plaintiff to the clerk, and that Pratesi stated that she would assign plaintiff wherever she wanted. She further swears that she was assigned to Justice Zimmerman's courtroom on May 21, 2015, that the normal part clerk was reassigned to another part after lunch, and that plaintiff replaced that clerk and "was left with the remaining work for the day without either a law clerk or a secretary."

In his affidavit, Robert M. Hennessey swears that he has been employed as a court officer in the Matrimonial Part, that he has heard Pratesi say "on more than one occasion in sum and substance 'who does [the plaintiff] think she is? I'll [assign] that bitch where ever I want. I don't care what's wrong with her.'"

In his affidavit, William Imandt ("Imandt") swears that he has been employed by the UCS since 1983, that he currently holds the title of SCC, that he was a union delegate from 1988 to June 2014, and that he has served as the union president from June 2014 to the execution of his affidavit on September 18, 2017. He states that "I believe, in late 2012, early 2013, [plaintiff] came to me asking for help with a possible assignment that would be less taxing on her physically," that "I was aware of numerous SCCs that were assigned to various desk jobs in the Matrimonial Center," and that, in that time frame, he had requested that Hopkins, Harkins and Lamanna accommodate the plaintiff's disability by assigning her to a office desk job in the Matrimonial Part or the Supreme Court. He indicates that he was aware of five to seven SCCs working in a position where they were primarily seated "for most if not almost the entire day." Imandt further swears that the plaintiff told him in June 2013 that she did not want to be transferred to the Foreclosure Part because she thought it would be harder on her, that after she was transferred he made several calls on her behalf asking for a reassignment, and that "I was told that it was management's purview to assign personnel." He states that he attended the December 16, 2014 meeting, that Lamanna explained that workforce reductions required more staff flexibility, and that despite his indicating that he was aware that several SCCs were either

never, or "hardly ever," sent to a courtroom, "[t]here was still no explanation why" the plaintiff was not being accommodated. He indicates that Lamanna would not agree that the plaintiff would be the last one considered for assignment to a courtroom.

Once a defendant rebuts the presumption of discrimination with a legitimate reason for the subject decision, the plaintiff must then show by a preponderance of the evidence that the defendant's reasons were merely a pretext for discrimination (*see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270, 811 NYS2d 633 [2006]). A "nonmoving party 'must offer some hard evidence showing that its version of the events is not wholly fanciful'" (*Jeffreys v City of New York*, 426 F3d 549, 554 [2d Cir 2005] quoting *D'Amico v City of New York*, 132 F3d 145, 149 [2d Cir 1998]). The burden of proof on the ultimate issue of discrimination always remains with the plaintiff (*see Stephenson v Hotel Employees and Rest. Union, supra*).

Here, plaintiff's testimony reveals that the terms and conditions of her employment were not adversely affected, that the privileges of her employment remained the same, and that she was not discharged from her employment. In addition, plaintiff does not allege facts which indicate that she received disparate treatment from that of her fellow employees in the terms, conditions or privileges of her employment, or otherwise raise an inference of discrimination (*see Ferrante v American Lung Assn., supra*; *Alvarado v Hotel Salisbury, Inc.*, 38 AD3d 398, 833 NYS2d 25 [1st Dept 2007]; *Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326, 800 NYS2d 391 [1st Dept 2005]). Moreover, plaintiff has failed to raise an issue of fact regarding the reasonableness of defendants' accommodations during her employment, and the unreasonable nature of her proposed accommodation (*see Pembroke v New York State Off. of Ct. Admin.*, 306 AD2d 185, 761 NYS2d 214 [1st Dept 2003]).

The affidavits submitted by plaintiff contain numerous instances of hearsay, fail to address the critical time periods discussed above, or fail to establish whether the statements therein are made with personal knowledge or are mere conclusions drawn without hard evidence of the facts. It is well settled that, while hearsay may be used to oppose a summary judgment motion, such evidence is insufficient to warrant denial of summary judgment where it is the only evidence submitted in opposition (*Mallen v Farmingdale Lanes, LLC*, 89 AD3d 996, 933 NYS2d 338 [2d Dept 2011]; *Stock v Otis El. Co.*, 52 AD3d 816, 861 NYS2d 722 [2d Dept 2008]). Here, plaintiff has failed to raise an issue of fact requiring a trial of this action. Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: July 12, 2018

HON. PAUL J. BAISLEY, JR.
J.S.C.