SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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TONICA EMMANUEL,

Plaintiff,
-against-

CUSHMAN & WAKEFIELD, INC., NANCY LARA, *Individually*, and CHARLENE COGER, *Individually*,

Defendants.
----------X

Index No.: 159316/15

DECISION AND ORDER

MOT. SEQ. 001

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for discrimination in employment on the basis of sex and disability in violation of the New York City Human Rights Law (Administrative Code of City of N.Y. § 8-101, et seq; hereinafter NYCHRL), the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is granted.

II. BACKGROUND

1. Facts and The Parties' Allegations

The plaintiff, Tonica Emmanuel, was formerly employed by the defendant Cushman & Wakefield, Inc. (C&W), as a receptionist for Scholastic, Inc. (Scholastic), in an office building owned by C&W. She asserts that the defendant Nancy Lara, her supervisor at C&W, wrongfully terminated her employment at the urging of a co-worker, the defendant Charlene Coger, because she was pregnant and rendered partially disabled by her pregnancy. The plaintiff thus alleges

that all of the defendants are liable to her under various provisions of the NYCHRL prohibiting discrimination on the basis of sex and disability, and further alleges that the defendants retaliated against her and created a hostile work environment based on these impermissible factors. Specifically, she asserts that Coger had, on three occasions during 2011, either asked questions or made comments about her pregnancy, including whether she intended to keep the child in light of prior terminations of pregnancy. The plaintiff also asserts that Lara asked during her 2009 employment interview whether she anticipated having children in light of potential scheduling difficulties such an employee might have during certain times of the day. The plaintiff also asserts that Coger, who evinced an animus against pregnant co-workers, convinced other coworkers to monitor her arrival times, compelled them to require the plaintiff to swipe her ID card upon arriving and leaving the office, and convinced Lara to impose discipline upon her and ultimately terminate her employment because of her pregnancy. She also asserts causes of action under the NYCHRL to recover for aiding and abetting proscribed discrimination, and for C&W's vicarious liability for the discriminatory acts of its employees.

The defendants answer the complaint, denying all allegations of wrongdoing, and assert, as an affirmative defense, that the action is barred by collateral estoppel by virtue of the dismissal of a prior federal action involving the same parties and factual allegations.

The defendants submit the pleadings, an attorneys' affirmation, the deposition transcripts of the parties in the federal action, affidavits from the defendants Lara and Coger in the federal action, C&W's written Equal Employment and Anti-Harassment Policy, disciplinary notices issued to the plaintiff in 2011 and 2012, and the message posted on the plaintiff's Facebook web page in January 2012 complaining, among other things, about discrimination on the basis of pregnancy. They also submit the complaint in the federal court action, the March 12, 2012,

letter terminating the plaintiff's employment, and the opinion and order in the federal court action. The plaintiff relies on an attorney's affirmation and the same documentation and transcripts.

It is undisputed that the plaintiff informed the defendants of her pregnancy in October 2011, and that she was pregnant at the time that her employment was terminated. The defendants allege that the plaintiff's employment was terminated in March 2012 because, after two prior warnings advising her of misconduct, and an in-person disciplinary conference, she took a nap on a couch in the main reception area of Scholastic's offices while on her break during business hours. The defendants thus assert that the plaintiff's employment was terminated because of her inability to exercise care and responsibility in seeing to the business needs of Scholastic, which was C&W's client.

The first warning was issued by Lara to the plaintiff on July 13, 2011, and thus prior to the October 2011 notification of the plaintiff's pregnancy. It informed the plaintiff that she had violated C&W's "Guidelines for Business Conduct" by moving Scholastic's trademarked Clifford the Big Red Dog mascot from its permanent location without permission in order to photograph herself with it. The second warning, issued on January 19, 2012, informed the plaintiff that C&W "received a report of an insulting nature that you posted on a social networking site during work hours (January, 9th, at 2:33 p.m.)." In that second notice, Lara informed the plaintiff that "C&W Policy, and [Scholastic's] Policy prohibit participation in social networking during business hours, unless there is a specific definable business function associated with such participation." The plaintiff had posted to her Facebook page that "[t]he day my pregnancy was announced ppl at my job started to try and make my life a living hell. They don't realize it's a mission impossible. Thanks Jesus." The posting also complained that

"[o]ld bitter ppl with no education, no kids, no man, no lives, no future are a joke!!" and that "[w]hen ppl at work try to make your job harder than it needs to be, just countdown till your blessed to no longer be there. 142 days left."

In the letter of termination, dated March 12, 2012, Lara referred to a verbal warning discussion she had with the plaintiff on January 19, 2012, and that "[i]mmediate improvement in your conduct was expected." Lara asserted therein that,

> "[o]n Thursday, March 8, 2012, it was reported to me that you were observed sleeping in the reception area. While you admitted that you were sleeping on the couch, you stated that you were on your break. This is the main reception area for Scholastic employees and visitors and sleeping is neither professional nor permissible whether you are on your break or not."

Lara concluded that, accordingly, the plaintiff "continue[d] to demonstrate a lack of responsibility" in the area of providing "care and responsibility to the clients [sic] needs during business hours." Lara stated that, inasmuch as "the plaintiff's conduct has not improved," the plaintiff's employment was terminated effective immediately. In her affidavit, Lara asserts that "[i]n March 2012, a Scholastic Employee, Eileen Baiera, complained to me that [plaintiff] had fallen asleep, during work hours, in the main reception area of the Education department. I confronted [plaintiff] with the allegation and [plaintiff] admitted that she had fallen asleep. Cushman & Wakefield terminated her employment as a result." At her deposition, Lara explained that, had the plaintiff taken a nap during her break at a location that wasn't visible to persons entering Scholastic's offices, her employment would not have been terminated.

Lara's testimony also described an incident in which Scholastic provided the plaintiff with a ticket to an important corporate event, even though the plaintiff was C&W's employee, and that the plaintiff failed to attend or provide an explanation for her absence to Baeira or Scholastic board member Marjorie Mayer, who had provided her with the ticket. Lara

characterized this conduct as a "huge" slight, although the plaintiff was not disciplined for it. She also characterized the plaintiff's behavior as being "at war" with others in the reception area and Scholastic's education department. Lara asserted that Baiera had called her on several occasions to complain that the plaintiff was not being helpful to visitors to Scholastic's offices, and not engaging with or accommodating visitors in a manner befitting a receptionist, including wearing headphones while at the reception desk and having an excessive number of personal conversations in the reception area while visitors were coming and going.

The plaintiff averred at her deposition that she had been diagnosed with gestational diabetes and high blood pressure and that, in October 2011, after she advised the defendants that she was pregnant, she was subject to discrimination and retaliation because of her pregnancy and disabilities, which included greater scrutiny of her arrival and departure times, and the requirement that she swipe her ID card upon arriving and leaving the office. The plaintiff claims that she was treated differently than her non-pregnant or non-disabled co-workers by being harassed and reprimanded, and that Lara and Coger also participated in this activity.

According to Lara, Coger was employed by C&W, and was one of the telephone operators working on the Scholastic account. As explained by Lara, Coger, who reported to Lara, assumed "some responsibility for the oversight of the receptionists and other operators on the Scholastic account," but "did not have the authority to hire, fire, adjust grievances, or discipline employees," and "had no role in the decision to hire, fire, or discipline [plaintiff]."

In their motion the defendants argue that this action is barred by the doctrine of collateral estoppel, inasmuch as the United States District Court for the Southern District of New York dismissed a prior action (the federal action) that the plaintiff had commenced against the defendants under bothTitle VII of the Civil Rights Act of 1964 (42 USC § 2000e, et seq.;

hereinafter Title VII) and the NYCHRL that was premised on the same allegations she makes here. See Emmanuel v Cushman & Wakefield, Inc., 2015 WL 5036970, 2015 US Dist LEXIS 113280 (SD NY, Aug. 26, 2015, No. 1:13-CV-2894 [GHW]). The defendants contend that, to the extent that any claims under the broader NYCHRL are not barred by collateral estoppel because they were not actually litigated on the merits in the federal action, or because there are more lenient standards for analyzing those claims than under Title VII, they have nonetheless established their prima facie entitlement to judgment as a matter of law dismissing them, and that the plaintiff has not raised a triable issue of fact in opposition to that showing.

The plaintiff disputes that her NYCHRL claims are barred by collateral estoppel, and argues that her submissions are sufficient to raise a triable issue of fact as to the defendants' liability for violating the NYCHRL.

2. The Federal Action

In April 2013, the plaintiff initiated an action in the United States District Court for the Southern District of New York (the District Court) against the defendants, alleging federal and NYCHRL claims of gender and disability-based discrimination, hostile work environment, and retaliation. The complaint in the federal action is virtually identical to the one in the instant action, except that it sets forth causes of action alleging violations of Title VII, as amended by the Pregnancy Discrimination Act of 1978 (PDA), as well as the Americans with Disabilities Act (42 USC §12101, et seq.; hereinafter the ADA). The defendants moved for summary judgment dismissing the complaint in the federal action. On August 26, 2015, the District Court granted the motion to the extent of dismissing all of the federal claims with prejudice, but it declined to exercise supplemental jurisdiction over the plaintiff's NYCHRL claims, and dismissed them without prejudice. The District Court noted that, inasmuch as the plaintiff failed to oppose the

defendants' arguments with respect to any disability discrimination claim under the ADA and any hostile work environment claim under Title VII, these claims were dismissed as abandoned. The District Court awarded summary judgment to the defendants dismissing the remaining claims alleging discrimination and retaliation due to the lack of evidence that the plaintiff was terminated as a result of her pregnancy or for engaging in protected activity.

In its decision and order, the District Court, which considered the same documents, affidavits, and deposition transcripts presented here, provided a detailed background of the federal action and the parties' contentions. The District Court concluded that "the evidence suggesting that Coger was biased against pregnant employees does not indicate that [plaintiff's] pregnancy was a motivating factor in Lara's decision to terminate her employment." Emmanuel v Cushman & Wakefield, Inc., supra, 2015 WL 5036970, *5, 2015 US Dist LEXIS 113280, *16-17. In addition, the District Court reasoned that, even if Coger were biased and did tell Lara that plaintiff was sleeping on the couch, as alleged by the plaintiff, an employer could be "held liable under such a 'cat's paw' theory of discrimination only if the decision maker 'relies on facts provided by the biased supervisor' in deciding to take an adverse employment action." Id. at *7, *21. (internal quotation marks and citations omitted). Here, the plaintiff conceded that she told Lara that she had been sleeping. Accordingly, the District Court concluded that Lara did not have to rely on any information from an allegedly biased employee in terminating the plaintiff's employment, and "any biased conduct on the part of Coger should not be deemed a proximate cause of Lara's termination decision." Id. at *7, *23. The District Court further held that, even if the plaintiff could establish that her termination occurred under circumstances giving rise to an inference of pregnancy discrimination, the defendants "articulated a legitimate, nondiscriminatory reason for its decision to terminate her employment— falling asleep on a

couch in the reception area during business hours— and [plaintiff] cannot establish that this stated reason was a pretext for discrimination." Id. at *5, *17.

In the federal action, the plaintiff also alleged that the reasons given by Lara for the termination of her employment were a pretext for discrimination because similarly situated coworkers outside of the protected class were not terminated when they engaged in the same conduct. However, the District Court found "deficiencies" with this allegation, reasoning that "Coger's purported failure to discipline Sierra and Williams for sleeping in the reception area is not probative of pretext because, as noted, it is undisputed that Coger was not involved in the decision to terminate [plaintiff's] employment." Id. at *6, *19. Lara asserted at her deposition that, prior to the incident involving the plaintiff, she had never received a complaint about an employee sleeping on the job from Coger or any other person. The District Court concluded that Coger's alleged preferential treatment of nonpregnant employees, did not "impeach" Lara's assertion that the plaintiff was terminated for sleeping while at work. "[Plaintiff] thus cannot demonstrate that Lara's (and by extension, Cushman's) stated reason for her termination was a pretext for pregnancy discrimination." Id. at *6, *20. In addition, the District Court concluded that plaintiff failed to establish that these other co-workers were not pregnant, or otherwise outside of any protected class to which she belonged.

The federal court decision further noted that the plaintiff suggested "in passing" that, in analyzing her claims, the District Court should have applied the mixed-motive analysis as "articulated in Price Waterhouse v Hopkins, 490 US 228 (1989)." Id. at *3 n 6, *10 n 6. Since the District Court concluded that there was no direct evidence of discrimination, it rejected the plaintiff's suggestion, and analyzed her claims under the McDonnell Douglas burden-shifting framework. See McDonnell Douglas Corp. v Green, 411 US 792 (1973). Nonetheless, the

District Court added that, "[a]pplying a mixed-motive analysis, however, would not change the outcome in this case, since the two frameworks at issue 'merely represent different methods of conceptualizing the same inquiry (whether an illegal discriminatory reason played a motivating role in an adverse employment action).'" Id. (citation omitted).

In analyzing the plaintiff's retaliation claims, the District Court assumed, for the sake of argument, that the plaintiff would be able to establish a prima facie case of retaliation when she complained on Facebook about pregnancy discrimination, and was terminated from employment two months later. However, the District Court agreed with the defendants that they articulated a legitimate non-retaliatory reason for the termination of the plaintiff's employment, and that she did not submit facts sufficient to show that the explanation for her termination was pretextual. The District Court noted that, in light of its dismissal of the retaliation claims on that ground, it was not required to resolve whether the plaintiff's posting was itself a protected activity, and whether such protection was wrongfully infringed upon by C&W's policy prohibiting the posting a social network sites during business hours . The District Court nonetheless held that the plaintiff "has not presented any competent evidence of specific instances in which similarly situated co-workers outside of her protected class were not disciplined for posting on Facebook during business hours." Id. at *9, *28. Moreover, it ruled that, "even if the Court were to overlook this deficiency, the evidence does not permit a finding that Cushman's stated reason for issuing a written warning to [plaintiff]—that she violated an employer policy by posting on a social networking site during business hours—was a pretext for retaliation." Id. The District Court referred to Lara's affidavit, in which she asserted that, after getting approval from C&W's human resources department, she issued a warning to plaintiff with respect to the post on Facebook, as Lara had concluded that the post was "gear[ed] towards the specific employee who

had reported the post, and because of the time that [the post] occurred, which was during business hours." Id. (internal quotation marks omitted).

III. DISCUSSION

1. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." Dallas-Stephenson v Waisman, 39 AD3d 303, 306 (1st Dept. 2007). Upon the proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact." People v Grasso, 50 AD3d 535, 545 (1st Dept. 2008) (internal quotation marks and citation omitted). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." Id. at 544. "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." Ruiz v Griffin, 71 AD3d 1112, 1115 (2nd Dept. 2010) (internal quotation marks and citation omitted).

2. Collateral Estoppel

The defendants correctly contend that collateral estoppel bars the relitigation of the plaintiff's NYCHRL causes of action alleging pregnancy discrimination, hostile work environment, and retaliation under both the McDonnell Douglas burden-shifting framework and the Price Waterhouse mixed-motive framework. "Collateral estoppel is a doctrine based on general notions of fairness involving a practical inquiry into the realities of the litigation; it

should never be rigidly or mechanically applied." Matter of Halyalkar v Board of Regents of State of N.Y., 72 NY2d 261, 268-269 (1988) (citations omitted). Even when a federal court declines to exercise jurisdiction over state-law claims, those state-law claims can be barred by collateral estoppel when the federal court addresses issues that are identical to those raised in the state-law claims. See Sanders v Grenadier Realty, Inc., 102 AD3d 460 (1st Dept. 2013). The doctrine of collateral estoppel applies where "[f]irst, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue . . . had a full and fair opportunity to contest the prior determination." Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP, 116 AD3d 134, 138 (1st Dept. 2014) (internal quotation marks and citation omitted). "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue." Matter of Press, 30 AD3d 154, 156 (1st Dept. 2006) (internal quotation marks and citation omitted).

3. NYCHRL - Pregnancy Discrimination

Pursuant to the NYCHRL, it is an unlawful discriminatory practice for an employer to refuse to hire, employ, fire, or discriminate against an individual in the terms, conditions, or privileges of employment because of the individual's gender. Administrative Code of City of N.Y. (Ad. Code) § 8-107 (1) (a). Although pregnancy is not explicitly listed in the statute, "pregnancy discrimination is a form of gender discrimination under the NYCHRL." Chauca v Abraham, 841 F3d 86, 90 n 2 (2nd Cir. 2016). The provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts. See Bennett v Time Warner Cable, Inc., 138 AD3d 598 (1st Dept. 2016). Analysis of claims under the NYCHRL is to be independent, and the court must evaluate discrimination claims with regard for the NYCHRL's

"uniquely broad and remedial purposes." Williams v New York City Hous. Auth., 61 AD3d 62, 66 (1st Dept. 2009) (internal quotation marks and citation omitted);

Under the NYCHRL, "[a] motion for summary judgment dismissing a City Human Rights Law claim can be granted only if the defendant demonstrates that it is entitled to summary judgment under both the McDonnell Douglas burden-shifting framework and the mixed-motive framework." Hudson v Merrill Lynch & Co., Inc., 138 AD3d 511, 514 (1st Dept. 2016). In connection with the burden-shifting analysis, the plaintiff must set forth that he or she "is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." Baldwin v Cablevision Sys. Corp., 65 AD3d 961, 965 (1st Dept. 2009). 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 nondiscriminatory reasons for its employment actions. See id.. If the employer meets this burden, the plaintiff must "prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination." Id. (internal quotation marks and citation omitted). Under the mixed-motive analysis, "the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination." Melman v Montefiore Med. Ctr., 98 AD3d 107, 127 (1st Dept. 2012) (internal quotation marks and citations omitted).

Here, the defendants have met their burden demonstrating that the doctrine of collateral estoppel bars the plaintiff from relitigating the identical issues that have already been decided in the federal action. See Hudson v Merrill Lynch & Co., Inc., supra. The plaintiff has not shown

that she was deprived of a full and fair opportunity to litigate those issues. See Grika v McGraw, 161 AD3d 450 (1st Dept. 2018). In considering the plaintiff's allegations that she was subject to discrimination, the District Court, applying the McDonnell Douglas burden-shifting framework, found that plaintiff failed to establish that her termination occurred under circumstances giving rise to an inference of discrimination. It held that Lara made the decision to terminate the plaintiff's employment, that she terminated said employment for a valid reason, and that the plaintiff failed to raise a triable issue of fact as to whether her pregnancy was a motivating factor in this decision.

The plaintiff alleges that she has submitted new facts that were not raised in the federal action to support the theory that Coger influenced Lara's decision to terminate her employment. However, the parties' submissions reflect that the District Court addressed this contention, even citing, in its decision, the same section of Lara's deposition that plaintiff cites to now. The District Court also considered, and rejected, this "cat's paw" theory of discrimination, in which a decision-maker can be held liable for an adverse action if she relied on facts provided by a biased supervisor. Consequently, this court's consideration of the issue of whether Coger's purported bias against pregnant employees was a proximate cause of Lara's determination to terminate plaintiff is barred by the doctrine of collateral estoppel, because the plaintiff failed to point to "any evidence on the relevant issue that the court in the previous litigation overlooked." Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP, supra, at 140-141.

The court rejects the plaintiff's further contention that a factual dispute remains as to whether she was treated less well than her non-pregnant coworkers, and whether this discriminatory animus played a role in the termination of her employment. The District Court specifically considered, and rejected, both the allegation that similarly situated non-pregnant

coworkers were not terminated for sleeping on the couch and the allegation that similarly situated non-pregnant co-workers were not disciplined for posting on Facebook during business hours. Since there was no evidence of comparators to the plaintiff being treated differently, collateral estoppel precludes these claims. See Hudson v Merrill Lynch & Co., Inc., supra.

Nor is there merit to the plaintiff's contention that she raised a triable issue of fact as to whether there is an inference of discrimination under the mixed-motive analysis, as described in Price Waterhouse v Hopkins (490 US 228 [1989]), that was not resolved in the prior federal action. The District Court concluded that, were it to apply this analysis, the outcome would be the same. Even if the District Court did not directly rule on the applicability of the mixed motive analysis, the dispositive issue relevant to the instant claim—whether or not discriminatory animus played a role in adverse actions taken against plaintiff—has already been resolved by that court. In both the District Court action, as here, the plaintiff failed to raise a triable issue of fact as to whether the termination of her employment was motivated, even in part, by discrimination. "The absence of any evidence" that defendants were motivated by "discriminatory animus is equally fatal to any claim of mixed motive" under the NYCHRL. Matias v New York & Presbyt. Hosp., 137 AD3d 649, 650 (1st Dept. 2016).

4. NYCHRL Hostile Work Environment

A hostile work environment exists where an employee "has been treated less well than other employees because of her protected status." Chin v New York City Hous. Auth., 106 AD3d 443, 445 (1st Dept. 2013). "Under the NYCHRL, there are not separate standards for discrimination and harassment claims." Johnson v Strive E. Harlem Empl. Group, 990 F Supp 2d 435, 445 (SD NY 2014) (internal quotation marks and citation omitted). To establish a hostile work environment claim under the NYCHRL, "the primary issue for a trier of fact in

harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender." Williams v New York City Hous. Auth., 61 AD3d 62, 78 (1st Dept 2009). As with the claims of pregnancy discrimination, collateral estoppel precludes the plaintiff from arguing that she was treated less well than other employees as a result of her pregnancy with respect to the termination of her employment and the written warning she received in connection with her Facebook post.

The court rejects the plaintiff's contention that she raised a triable issue of fact as to whether she was treated less well than other employees because her attendance was monitored and she was required to swipe her identification card upon arriving at and leaving the office. The plaintiff's deposition testimony reflects that at least one non-pregnant receptionist was required to swipe her identification card. Her remaining claims that she was treated less well due to her gender are conclusory and cannot defeat summary judgment. Even under the NYCHRL, "not every plaintiff asserting a discrimination claim will be entitled to reach a jury." Melman v Montefiore Med. Ctr., supra, at 131. Nor does the plaintiff raise a triable issue of fact with respect to discriminatory intent and hostile work environment with her allegations that Coger made a total of three comments regarding the plaintiff's pregnancy, or Lara's 2009 inquiry if she had children. Despite the broader application of the NYCHRL, conduct that consists of "petty slights or trivial inconveniences . . . do[es] not suffice to support a hostile work environment claim." Buchwald v Silverman Shin & Byrne PLLC, 149 AD3d 560, 560 (1st Dept. 2017) (citation omitted). Contrary to the plaintiff's contentions, "a plaintiff's feelings and perceptions of being discriminated against are not evidence of discrimination." Basso v Earthlink, Inc., 157 AD3d 428, 430 (1st Dept. 2018) (internal quotation marks and citation

omitted). The challenged comments are "at most [stray remarks] that [do] not, without more, constitute evidence of discrimination." Id. (internal quotation marks and citation omitted).

5. NYCHRL Retaliation

Under the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Ad. Code § 8-107 (7). For a plaintiff to establish a claim for retaliation under the NYCHRL, he or she must demonstrate that: "(1) [he or she] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [him or her]; and (3) a causal connection exists between the protected activity and the adverse action." Fletcher v Dakota, Inc., 99 AD3d 43, 51-52 (1st Dept. 2012).

The District Court already addressed the issue of whether or not the close temporal relationship between the plaintiff's post to her Facebook web site and the termination of the plaintiff's employment can establish causation. It explicitly noted that a finding of causation would be unfounded, since the plaintiff cannot establish that the explanation for the termination of her employment was pretextual. Even if the written warning that the plaintiff received in January 2012 could be construed as an adverse action, the plaintiff cannot establish pretext. It is undisputed that the plaintiff and the other receptionists had been warned not to use social media while at the reception desk. It is also undisputed that Lara had disciplined the plaintiff not for the content of her post, but because she had violated an employer policy by posting to social media during business hours. The plaintiff was unable to present evidence of specific instances where employees outside of her protected class were not disciplined. Since the plaintiff was given a full and fair opportunity to litigate this issue, collateral estoppel precludes any remaining claims of retaliation.

6. NYCHRL Disability Discrimination

Pursuant to the NYCHRL, it is an unlawful discriminatory practice for an employer to refuse to hire, employ, fire, or discriminate against an individual in the terms, conditions, or privileges of employment because of the individual's disability. Ad. Code § 8-107 (1) (a). Disability is defined as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." Ad. 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). On a motion for summary judgment seeking to dismiss a claim for disability discrimination under the NYCHRL, as with other NYCHRL discrimination claims, an analysis must be done under both the McDonnell Douglas burden-shifting and the Price Waterhouse mixed-motive framework.

Lara asserts in her deposition that the plaintiff did not inform her or any other person with the authority to terminate the plaintiff's employment that the plaintiff suffered from high blood pressure or gestational diabetes. In opposition to that showing, plaintiff fails to raise a triable issue of fact to support her claim of disability-based discrimination. The plaintiff points to her testimony that, in the winter prior to her termination, she advised Coger that she was suffering from diabetes and hypertension. However, the plaintiff does not provide more than conclusory allegations that Lara or any other defendants were aware of her alleged disabilities. As result, she cannot establish any history of disability. See Matter of Flores v Doherty, 71 AD3d 405 (1st Dept. 2010); see also Castillo v Montefiore Med. Ctr., 155 AD3d 426 (1st Dept. 2017). The plaintiff merely speculates that Lara and C&W knew of her alleged disabilities. However, it is well established that "[c]onclusory allegations of discrimination are insufficient to

defeat a motion for summary judgment." Dickerson v Health Mgmt. Corp. of Am., 21 AD3d 326, 329 (1st Dept. 2005).

Even if the plaintiff could establish that she suffered from a disability, she has not raised a triable issue of fact that defendants discriminated against her by terminating her for these disabilities. Rather, the defendants established valid business reasons for the termination of the plaintiff's employment, and the "[p]laintiff has failed to show that the reason proffered by defendants is merely a pretext for discrimination against her." Castillo v Montefiore Med. Ctr., supra, at 427.

7. Additional Claims

The plaintiff also seeks to recover for alleged violations of Ad. Code §§ 8-107 (6) and (13). Ad. Code § 8-107 (6) provides that an individual employee may be held liable for aiding and abetting discriminatory conduct. Ad. Code § 8-107 (13) provides that an employer is liable for the discriminatory conduct of its employees. Since the defendants established their entitlement to the dismissal of the underlying discrimination and retaliation claims, they have also demonstrated, prima facie, that the plaintiff's causes of action against Coger for aiding and abetting the allegedly discriminatory conduct must fail as a matter of law. See Abe v Cohen, 115 AD3d 491 (1st Dept 2014). In any event, Lara and C&W cannot be held liable for aiding and abetting their own alleged discriminatory acts. See Hardwick v Auriemma, 116 AD3d 465, (1st Dept 2014). Similarly, as the defendants have shown that there is no actionable conduct at issue, they have demonstrated, prima facie, that there can be no employer liability under Ad. Code § 8-107 (13). Since the plaintiff does not address these issues in her opposition papers, she has failed to raise a triable issue of fact, and summary judgment must be awarded to the defendants dismissing these causes of action.

IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of the defendants Cushman & Wakefield, Inc., Nancy Lara, and Charlene Coger for summary judgment dismissing the complaint is granted, and the complaint is dismissed; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 27, 2018

ENTER:

J.S.C.

HON. NANCY M. BANNON