Pustilnik v Battery Park City Auth.
2021 NY Slip Op 31133(U)
April 8, 2021
Supreme Court, New York County
Docket Number: 150138/2020
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 150138/2020

ALIX PUSTILNIK,

MOTION SEQ. NO. 001

Plaintiff,

- v -

BATTERY PARK CITY AUTHORITY and B.J. JONES,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17

were read on this motion to DISMISS.

Giskan Solotaroff & Anderson LLP., New York, NY (Jason Solotaroff and Amy E. Robinson of counsel), for plaintiff.
Schoeman Updike Kaufman & Gerber LLP, New York, NY (Beth L. Kaufman and Jeremy Miguel Weintraub of counsel), for defendants.

Gerald Lebovits, J.:

This is an employment-discrimination action brought under the New York City Human Rights Law (NYCHRL). Plaintiff, Alix Pustilnik, was formerly general counsel for defendant Battery Park City Authority. She alleges that the Authority and its president, defendant B.J. Jones, terminated her from her position as general counsel due in part to her age, disabilities, and caretaking responsibilities for her elderly parents. Defendants now move under CPLR 3211 to dismiss Pustilnik's complaint. The motion is denied.

BACKGROUND

According to the allegations of the complaint, Pustilnik is an experienced attorney, with a range of both public- and private-sector legal experience. She began serving as general counsel to the Battery Park City Authority in May 2014, when she was 46. (*See* NYSCEF No. 1 at ¶ 2.)

In September 2017, the Authority's president stepped down and was succeeded by defendant Jones in October 2017. Jones was then 46. Pustilnik alleges that since becoming president, Jones has hired or promoted to senior staff positions six individuals ranging in age from 31 to 44—and that Jones did not promote individuals who were older than he was to senior staff positions. She also alleges that Jones was aware of the ages of senior Authority staff, including herself, through birthday parties and other office interactions.

Pustilnik's father suffered a serious fall in late 2017, suffering injuries that exacerbated his chronic heart condition and which led to his death several weeks later. Over that period, Pustilnik accompanied her father to medical appointments and remained with him during hospital stays. As a result, she was out of the office periodically. She alleges, though, that she worked remotely during her absences from the office.

After Pustilnik's father died, she took two weeks away from the office to attend to her 87-year-old mother, who was also ill at the time. Pustilnik alleges that she was required to assist her mother with making doctor's appointments, maintaining her apartment, and other task. These obligations regularly occupied her time until her termination as general counsel. The complaint alleges that senior Battery Park City Authority officials, including Jones, were aware of Pustilnik's caretaking responsibilities because she spoke extensively about those obligations.

Pustilnik's complaint also describes her own medical issues. Since the late 1990s, Pustilnik has suffered from severe depression. In 2015, she was diagnosed with arthritis, which forced her to miss work periodically. She alleges that the Authority was aware of her arthritis because she used a standing desk to avoid the pain sitting for extended periods caused her and was frequently required to stretch or sometimes lie down in the office or during meetings. Pustilnik also alleges that she specifically told Jones that the arthritis caused her pain and discomfort while at work. Moreover, before her termination, Pustilnik sent emails stating that she would be out of the office for doctor's appointments related to her arthritis.

According to the complaint, the loss of Pustilnik's father aggravated her depression and arthritis, in ways visible to Authority staff members. She alleges, for example, that after witnessing Pustilnik visibly upset over her father during a staff meeting, several of her co-workers asked her whether she was all right or needed help. Pustilnik alleges that she also informed Jones and another senior Authority official that in the wake of her father's death, she was experiencing emotional difficulties that were causing her, among other things, to lose sleep.

She further alleges that in February 2018, Jones and the Authority's then-chairman, informed her that she was being terminated as the Authority's general counsel. She alleges that they affirmatively told her that her performance did not contribute to her dismissal, but instead that she was being fired because the Authority's legal department was downsizing and she was its highest-paid staff member. Pustilnik alleges that her replacement as the Authority's general counsel was then in her mid-40s.

Pustilnik brought an action in the U.S. District Court for the Southern District of New York against the Authority and Jones, challenging her termination under the federal Age Discrimination in Employment Act and the Americans With Disabilities Act. The district court granted defendants' motion to dismiss for failure to state a claim. (*See Pustilnik v Battery Park City Auth.*, *Pustilnik v Battery Park City Auth.*, 2019 WL 6498711, at *3 [SD NY Dec. 3, 2019] [Abrams, J.].)

Pustilnik then sued in this court to challenge her termination under the New York City Human Rights Law, relying on very similar allegations to those she raised in the federal action.

Pustilnik contends that her termination was motivated in part by discrimination on the basis of age, disability, and caretaker status. She seeks reinstatement and related injunctive relief, backpay, damages, and attorney fees. Defendants now move to dismiss under CPLR 3211.

DISCUSSION

I. Defendants' Argument that This Court Lacks Subject-Matter Jurisdiction to Hear NYCHRL Claims Against the Battery Park City Authority and Its Employees

Defendants argue first that the action should be dismissed for lack of subject-matter jurisdiction under CPLR 3211 (a) (2). Defendants argue that the Battery Park City Authority, as a public-benefit corporation, is an instrumentality of New York State. Therefore, they contend, sovereign immunity bars Pustilnik's NYCHRL claims against the Authority (and against Jones in his role as an Authority executive). (*See* NYSCEF No. 10 at 7-8; NYSCEF No. 17 at 2-5.)

This court's research has not uncovered any prior New York precedent on whether the Battery Park City Authority should be considered a State instrumentality for purposes of claims under the NYCHRL. Considering this question as a matter of first impression, this court concludes that the Authority is *not* a State instrumentality in this particular statutory context.

A. Whether a Particularized Inquiry is Required to Determine the Authority's Status for Jurisdictional Purposes

As an initial matter, the mere fact that the Battery Park City Authority is a public-benefit corporation does not alone render it a State instrumentality, as defendants contend. (*See e.g. John Grace & Co. v State Univ. Constr. Fund*, 44 NY2d 84, 88 [1978] [explaining that "public benefit corporations . . . created by the State for the general purpose of performing functions essentially governmental in nature, are not identical to the State or any of its agencies, but rather enjoy, for some purposes, an existence separate and apart from the State, its agencies and political subdivisions"].)

There also is no merit to defendants' contention that the Battery Park City Authority, in particular, is *necessarily* a State instrumentality for purposes of the claims brought against it in this action. The Authority relies on the Court of Appeals' decision in *Matter of World Trade Center Lower Manhattan Disaster Site Litigation* (30 NY3d 377 [2017]).[1] But the holding of *Matter of World Trade Center* runs directly counter to the Authority's position here. In that case, the Court carefully distinguished between two types of legal issues: (i) those involving a public-benefit corporation's "*outward-facing* relations with private parties," in which the question is "whether a statute or common-law rule defining the State's rights or responsibilities vis-à-vis private parties [can] be extended to a public benefit corporation"; and (ii) those involving "a

[1] The various state and federal decisions issued in the *Matter of World Trade Center* litigation are the only authority of which this court is aware that have considered in *any* context whether the Battery Park City Authority is a State instrumentality.

public benefit corporation's *inward-facing* relations with other state bodies." (*Id.* 389-390 [emphases in original].)

The issue in *Matter of World Trade Center* was an inward-facing question under this typology—*i.e.*, whether the Battery Park City Authority, as a public-benefit corporation, had the legal capacity to challenge the constitutionality of a state statute. And the Court of Appeals held that in *that* context, public-benefit corporations should be treated categorically as State instrumentalities. (*See id.* at 393.) The issue in the current action, by contrast, is an *outward*-facing question: whether a statute prohibiting certain kinds of discriminatory conduct by governmental bodies toward private parties like Pustilnik can properly be extended to a public-benefit corporation like the Authority. For purposes of that inquiry, the Authority is not necessarily a State body. Instead, "a particularized inquiry into the nature of the instrumentality and the statute claimed to be applicable to it is required" to make a determination one way or the other.[2] (*Id.* at 389, quoting *John Grace & Co.*, 44 NY2d at 88.)

B. Whether the Authority is a State Body for NYCHRL Purposes under a Particularized Inquiry

To conduct the necessary "particularized inquiry," a court should consider whether a public-benefit corporation should be regarded as a State body for purposes of a given statute in light of the objectives of the statute at issue, the statute's normal operation, and the public policy goals that the corporation was created to achieve. (*See John Grace & Co.*, 44 NY2d at 88-89; *accord Matter of Levy v City Commn. on Human Rights*, 85 NY2d 740, 744 [1995]; *Collins v Manhattan & Bronx Surface Tr. Operating Auth.*, 62 NY2d 361, 366-370 [1984].)

Here, this inquiry indicates that the Battery Park City Authority should not be regarded as a State body for purposes of NYCHRL claims against it (or against its employees).

The NYCHRL is intended to provide "uniquely broad and remedial" protections for "the civil rights of all persons" within the statute's geographic scope; and it is to be "construed liberally" to fulfill this purpose. (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009] [internal quotation marks omitted].) Treating the Battery Park City Authority as a State body—thereby affording it blanket immunity from NYCHRL claims—would undermine this core statutory objective.

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[2] Plaintiff emphasizes that the Battery Park City Authority previously argued in the *Matter of World Trade Center* litigation that courts should apply a "particularized inquiry" to the Authority to determine whether it is a State instrumentality. (*See* NYSCEF No. 12 at 7.) But the Authority lost that argument in *Matter of World Trade Center*; it therefore is not judicially estopped from taking the opposite position now. (*See Becerril v. City of NY Dept. of Health & Mental Hygiene*, 110 AD3d 517, 519 [1st Dept 2013] [explaining that judicial estoppel precludes a party from taking a given legal position only where the party took a contrary position in a prior proceeding *and* thereby secured a ruling in its favor].) Nor does this court's rejection of the Authority's argument in this case rest on any perceived inconsistency between the Authority's arguments in the two actions.

Additionally, this undesirable result is not required by a countervailing interest in protecting and furthering the Battery Park City Authority's status and functioning as a public authority. True, public authorities, as a general matter, "are created to accomplish a specific purpose or mission and are endowed with the freedom and flexibility necessary to achieve that mission." (*Matter of Levy*, 85 NY2d at 745.) The Court of Appeals has thus held on several occasions that public-benefit corporations should not necessarily be subject to operational restrictions and requirements that bind the State and its agencies, such as public-contracting and civil-service provisions. (*See e.g. John Grace & Co.*, 44 NY2d at 89 [letting and payment of public contracts]; *Collins*, 62 NY2d at 369-372 [civil-service requirements]; *Matter of Plumbing, Heating, Piping & A.C. Contrs. Assn. v New York State Thruway Auth.*, 5 NY2d 420, 422-424 [1959] [contract-bidding procedures].) But the NYCHRL is a generally applicable statute, governing private and public employers alike. Applying its antidiscrimination provisions to the Authority thus would not impose obligations properly reserved only for State agencies and instrumentalities.

The Battery Park City Authority's particular purpose as a public-benefit corporation does not entail treating it as a State body for purposes of the NYCHRL, either. The Authority was created in the late 1960s to facilitate the development of the then-blighted area along the Hudson River piers near Battery Park (and, in so doing, to increase the supply of affordable housing in New York City). (*See* Public Authorities Law § 1971 [describing the need for and objectives of the Authority].) The Authority does not attempt to identify any reason it cannot achieve these goals, continue to develop and maintain Battery Park City as it now exists, and also maintain "[c]ompliance with the NYCHRL anti-discrimination provisions." (*Center for Independence of the Disabled v Transp. Auth.*, 184 AD3d 197, 207-208 [1st Dept 2020].) Indeed, even if the Authority *were* a State body, it would still be subject to antidiscrimination damages actions brought against it in Supreme Court under the *State* Human Rights Law. (*See Koerner v State*, 62 NY2d 442, 448-449 [1984] [holding that in enacting the NYSHRL, the Legislature waived not only the State's sovereign immunity from suit, but also the requirement that damages claims against the State be brought in the Court of Claims].)

Moreover, as Pustilnik argues (*see* NYSCEF No. 12 at 8), the Court of Appeals and Appellate Division have repeatedly held that *other* public authorities in New York City, such as the MTA and NYCTA, are properly subject to the NYCHRL. (*See Matter of Levy*, 85 NY2d at 744-745 [NYCTA]; *Center for Independence of Disabled*, 184 AD3d at 206-208 & n 4 [1st Dept 2020] [MTA]; *Terranova v. New York City Transit Auth.*, 49 AD3d 10, 15-16 [2d Dept 2007] [NYCTA]; *see also Matos v Triborough Bridge & Tunnel Auth.*, 2008 WL 858995, at *10-*11 [ED NY Mar. 31, 2008] [TBTA].[3])

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[3] At oral argument on this motion, counsel for plaintiff drew this court's attention to a recent decision of the U.S. District Court for the Southern District of New York (Koeltl, J.), holding that the MTA and the Manhattan and Bronx Surface Transit Operating Authority are not State instrumentalities for purposes of overtime-pay requirements imposed by the Civil Service Law and its implementing regulations. (*See Romero v Metropolitan Transit Auth.*, 444 F Supp 3d 583, 588-590 [SD NY 2020].) This court concludes, though, that the analysis involved in assessing the MTA and MABSTOA's status for purposes of the Civil Service Law differs materially from that required to evaluate the Battery Park City Authority's status for purposes of the NYCHRL.

The Battery Park City Authority does not provide any basis to conclude it would make sense to treat the Authority differently in this context from other public-benefit corporations in New York City. At most, the Authority argues that the holdings of those decisions are inapposite because they construed Public Authorities Law § 1266 (8), which undisputedly does not apply here. (*See* NYSCEF No. 17 at 3-4.) The relevance of those decisions, though, does not depend on straightforwardly translating their analysis of § 1266 (8) to the current context. Rather, it is that there are no distinctive statutory or policy considerations that merit treating the Authority differently from other public-benefit corporations for purposes of whether the Authority should be subject to NYCHRL claims.

This court concludes, therefore, that the Battery Park City Authority is not a State body for purposes of NYCHRL claims against it (or against its executives for their official acts). The branch of defendants' motion seeking dismissal under CPLR 3211 (a) (2) is denied.

II. Defendant's Argument that Collateral Estoppel Bars Pustilnik's Age-Discrimination and Disability-Discrimination Claims under the NYCHRL

Defendants next argue that Pustilnik's age-discrimination and disability-discrimination claims are barred by collateral estoppel, and therefore subject to dismissal under CPLR 3211 (a) (5), because a federal court previously dismissed her related claims under the ADEA and ADA. (*See Pustilnik* 2019 WL 6498711, at *3.) This court does not agree that collateral estoppel bars Pustilnik's claims.

Collateral estoppel, or issue preclusion, applies only if (i) "the issue in the second action is identical to an issue which was raised, necessarily decided, and material in the first action," and (ii) "the plaintiff had a full and fair opportunity to litigate the issue in the earlier action." (*Parker v Blauvelt Volunteer Fire Co*., 93 NY2d 343, 349 [1999].) Here, Pustilnik's NYCHRL claims for age and disability discrimination do not present an identical issue to her ADEA and ADA claims in the federal action, because the two sets of claims are subject to different pleading requirements.

To state a cause of action under the ADEA or the ADA in a termination case, a plaintiff must plausibly allege that her age or disability was a *but-for* cause of the challenged termination: *i.e.*, that but for age or disability, the plaintiff would still be employed. (*See Green v Town of East Haven*, 952 F.3d 394, 403 [2d Cir 2020] [ADEA]; *Natofsky v City of New York*, 921 F.3d 337, 347-350 [2d Cir 2019] [ADA].) Under the NYCHRL, on the other hand, a plaintiff asserting age or disability discrimination need satisfy only the less-demanding requirement that her age or disability was a motivating factor in the termination decision—a part of the employer's decision-making process, rather than alone a but-for cause of the employer's decision to fire the plaintiff. (*See Watson v Emblem Health Servs.*, 158 AD3d 179, 182-183 [1st Dept 2018]; *Melman v Montefiore Med. Ctr.*, 92 AD3d 107, 127 [1st Dept 2012].) Because making out a claim under the ADEA and ADA requires a different, more-demanding showing than making out a claim

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The district court's decision in *Romero* thus sheds little light one way or the other on the State-instrumentality questions presented by the current motion.

under the NYCHRL, motions to dismiss these two categories of claims do not present identical issues for estoppel purposes.

Defendants contend, though, that the shortcomings of Pustilnik's complaint perceived by the federal district court remain in her current NYCHRL complaint, which is based on essentially the same factual allegations. (*See* NYSCEF No. 10 at 11-13.) Therefore, defendants contend, the district court's holding—namely, that Pustilnik failed to allege plausibly that her termination occurred under circumstances giving rise to an inference of discrimination—estops her from stating a cause of action here. This court disagrees.

It is undisputed that the NYCHRL's pleading standards are materially looser than the trans-substantive plausibility standard of the Federal Rules of Civil Procedure—or, for that matter, the CPLR's notice-pleading standard for claims under the NYSHRL. (*See Williams v New York City Hous. Auth.*, 61 AD3d 62, 65-69 [1st Dept 2009]; *Vig v N.Y. Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009].) As a result, allegations that would be insufficient to state a federal claim might well be enough to state a cause of action under the NYCHRL. This difference defeats defendants' estoppel argument.

Defendants are correct that in some circumstances, unfavorable rulings rendered by a federal court may still have collateral estoppel effect in a later action brought under the NYCHRL, notwithstanding this difference in pleading standards. (*See* NYSCEF No. 17 at 6-7.) But this limited principle does not avail defendants here.

The First Department has been careful to emphasize in this context that estoppel will apply only where the federal court was deciding "strictly factual question[s] not involving application of law to facts or the expression of an ultimate legal conclusion," because these factual determinations do "not implicate any of the several ways" in which analysis of NYCHRL claims is "not identical to their federal and state counterparts." (*Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP*, 116 AD3d 134, 140 [1st Dept 2014]; *accord Hudson v Merrill Lynch & Co.*, 138 AD3d 511, 515-517 [1st Dept 2016].[4]) Here, on the other hand, the question for the federal district court was whether the allegations of Pustilnik's complaint could be read to raise a sufficient inference of discriminatory intent to state a cause of action. The district court held that Pustilnik's allegations did not plausibly raise the necessary inference of discrimination. (*See Pustilnik*, 2019 WL 6598711, at *4-*8.) That holding does not resolve a strictly factual question. Rather, it is grounded in the threshold set by federal law for when plaintiffs' allegations should entitle them to proceed past the pleading stage and obtain discovery from defendants. The CPLR and the NYCHRL, on the other hand, set a different, lower threshold. As a result, the federal court's dismissal of Pustilnik's age-discrimination and disability-discrimination claims brought under federal law does not estop Pustilnik from relying on the same allegations to assert discrimination claims under the NYCHRL.

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[4] The First Department's decision in *Sanders v Grenadier Realty, Inc.* (102 AD3d 460 [1st Dept 2013]), on which defendants rely (*see* NYSCEF No. 10 at 9-10), preceded the Court's elucidation in *Simmons-Grant* and *Hudson* of how federal rulings on federal claims relate for estoppel purposes to later NYCHRL claims.

III. Defendants' Challenge to the Sufficiency of Pustilnik's Discrimination Allegations

That Pustilnik is not *precluded* from asserting age- and disability-discrimination claims under the NYCHRL does not itself mean that her claims state a cause of action. Defendants argue that they do not—and therefore that this court should dismiss those claims under CPLR 3211 (a) (7).

In considering a CPLR 3211 (a) (7) motion to dismiss, this court must afford the complaint a liberal construction, accept all facts as alleged in the pleading to be true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within a cognizable legal theory. (*Chanko v Am. Broadcasting Cos.*, 27 NY3d 46, 52 [2016].)

A discrimination claim under the NYCHRL has four elements: that (1) plaintiff is a member of a protected class; (2) plaintiff was qualified for the position; (3) plaintiff suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. (*Askin v. Dep't of Educ. of City of New York*, 110 AD3d 621, 622 [1st Dept 2013].) A plaintiff "need not plead [specific facts establishing] a prima facie case of discrimination but only needs to give 'fair notice' of the nature of the claim and its grounds." (*Vig*, 67 AD3d at 145.)

This court concludes that Pustilnik has stated causes of action for each of the three alleged grounds of discrimination that she has identified (age, disability, and caretaker status). The branch of defendants' motion seeking dismissal of the complaint under CPLR 3211 (a) (7) is denied as well.

A. Pustilnik's Age-Discrimination Claim

To support her age-discrimination claim, Pustilnik has alleged that she is over 50 and that defendant Jones (who is under 50) knew her age; that Jones repeatedly hired individuals to the Battery Park City Authority's senior staff who were in their 30s and 40s; that notwithstanding her satisfactory performance, defendants terminated Pustilnik's employment on non-performance grounds that were suspicious and seemingly pretextual; and that Pustilnik was replaced by an attorney who is several years younger than Pustilnik (and whom Jones knew to be younger).[5] This court concludes that these allegations are sufficient to state a cause of action under the

[5] Pustilnik's allegations are thus more extensive than in *Askin v Department of Educ. of the City of N.Y.* (110 AD3d 621 [1st Dept 2013]) and *Massaro v Department of Educ. of the City of N.Y.* (121 AD3d 569, 570 [1st Dept 2014]), cited by defendants. In *Askin*, the plaintiff had alleged *only* her age and adverse treatment by her superiors in the Education Department. (*See Askin*, 110 AD3d at 622.) In *Massaro*, the plaintiff's allegation that she was treated less well than "younger teachers" was conclusory; and the plaintiff had not provided any information at all about the age difference between the plaintiff and the "younger teachers" to support an inference of discriminatory motivation. (*See* 2013 NY Slip Op 31011[U], at *4 [Sup Ct, NY County May 7, 2013], *aff'd* 121 AD3d 569.)

relaxed pleading standards governing NYCHRL claims. (*See Matter of McIntosh v Dept. of Educ. of the City of N.Y.*, 115 AD3d 464 [1st Dept 2014] [reversing dismissal of NYCHRL age- and race-discrimination claims].)

Defendants emphasize that "[a]bsent from the Complaint are allegations of comments or criticisms about Plaintiff's age, of any discussion of Plaintiff's age in connection with her firing, or of any invidious comments about older individuals." (NYSCEF No. 10 at 15.) It is true that Pustilnik has not made these sorts of allegations. And this court does not disagree that the age-discrimination allegations that Pustilnik *has* made are somewhat thin. At the same time, though, the complaint fairly puts defendants on notice of the nature of Pustilnik's age-discrimination claim and the grounds she has for believing that defendants terminated her employment in part for discriminatory reasons. At the current stage of this action, that is sufficient.

Defendants also offer various arguments seeking to rebut, or at least undercut, the inferences of discrimination that Pustilnik identifies from the allegations of her complaint. But at the pleading stage, this court is obliged to construe the complaint in the light most favorable to the nonmoving party, drawing inferences *for* her, not against her.[6] Defendants' evidence-specific challenges to the allegations of Pustilnik's complaint are certainly fair argument at summary judgment; but they do not warrant dismissal at the pleading stage.

B. Pustilnik's Disability-Discrimination Claim

With respect to Pustilnik's disability-discrimination claims, Pustilnik has alleged the nature of her disability (severe arthritis and also depression); described in detail how these conditions were exacerbated by the stress and emotional upheaval of her father's final illness and death and her mother's increased need for care; alleged that her supervisors were aware not only of her disability but of its deterioration; and alleged that she was fired within a matter of months of her conditions first worsening due to her father's illness. That is sufficient to state an NYCHRL disability-discrimination cause of action.

Defendants contend that Pustilnik has not alleged any facts that would directly connect her disability and her termination (such as, for example, comments from Pustilnik's supervisors or co-workers questioning her job performance or commitment during her father's illness or thereafter). Here, too, defendants are correct about the absence of such allegations. And this court regards the question whether Pustilnik's complaint states a disability-discrimination cause

[6] Relatedly, defendants ask this court, in effect, to take judicial notice of information contained on the Battery Park City Authority's official website, which (defendants contend) indicates that defendant Jones hired or retained several members of his senior staff who were Pustilnik's age or older. (*See* NYSCEF No. 10 at 19-20; NYSCEF No. 17 at 14 & n 5.) But the information to which defendants refer is not the sort of straightforward factual information of which this court could properly take judicial notice on a CPLR 3211 (a) (7) motion. Rather, understanding this information's relevance and import to the present motion would entail learning more details about the circumstances under which these individuals were hired or retained by defendants. Those details are not available merely from looking at the Authority's website. Nor did defendants attempt to provide them in the form of affidavits from persons with knowledge.

of action as close. The First Department has made clear, though, that in appropriate cases, temporal proximity alone can raise a sufficient inference of discrimination to satisfy the plaintiff's pleading burden. (*See Brown v City of N.Y.*, 188 AD3d 518, 519 [1st Dept 2020] [CPLR 3211 motion to dismiss]; *see also Parris v New York City Dept. of Educ.*, 111 AD3d 528, 529 [1st Dept 2013] [CPLR article 78 petition].)

Defendants argue that the necessary temporal proximity is absent because Pustilnik's disability—and defendant's awareness of that disability—was longstanding. But the allegations of the complaint detail how Pustilnik's disability materially worsened in the months prior to her termination, as a result of her father's illness and death and the associated support and care Pustilnik needed to provide to her mother during that period. It is this *aggravation* of Pustilnik's disability that she identifies as contributing to her termination, not the underlying condition in isolation.

Defendants also contend that Pustilnik has still not shown the necessary temporal proximity between the aggravation of her condition and her firing. This court disagrees. An approximately three-month gap existed between Pustilnik's father's death in November 2017 and her termination in February 2018. On its own, this three-month gap might be borderline, given the First Department's holding in *Parris* that a five-month gap was too long to show the necessary temporal proximity. (*See* 111 AD3d at 529.) But the complaint also expressly alleges that Pustilnik needed to take time off from her job after her father's death; and that after her return to work, Pustilnik told defendant Jones and other Authority staff about emotional difficulties that she was continuing to experience due to her father's death. (*See* NYSCEF No. 1 at ¶ 24.) Under these circumstances, this court concludes that Pustilnik has alleged sufficient temporal proximity to raise an inference of discrimination—at least at the pleading stage.

C. Pustilnik's Caregiver-Discrimination Claim

Pustilnik also has asserted an NYCHRL claim for discrimination on the basis of her status as a caregiver to her parents. In particular, Pustilnik alleges that during her father's final illness, she needed "to accompany her father to medical appointments and to be in the hospital with him to ensure he received proper care." (NYSCEF No. 1 at ¶ 20.) And she alleges that after her father's death, she had "ongoing caretaker responsibilities for her 87-year-old mother," which entailed frequent visits or telephone calls to her mother "to help her with daily life activities such as making doctor appointments, maintaining her apartment, and making necessary telephone calls." (*Id.*) These responsibilities are alleged to have continued until Pustilnik's termination. (*See id.*)

The NYCHRL bars employment discrimination on account of an individual's "caregiver status." (NY City Admin. Code § 8-107 [1] [a].) The statute defines "caregiver" as "a person who provides direct and ongoing care for a minor child or a care recipient." (*Id.* § 8-102.) The definition of "care recipient" includes "a person with a disability" who is a "covered relative," such as a parent, who "relies on the caregiver for medical care or to meet the needs of daily living." (*Id.*) The statute does not, however, define what it means for a care recipient to "rel[y] on the caregiver for medical care" or the scope of "needs of daily living." Nor are these terms specifically discussed or explained in the statute's legislative history.

This court also is not aware of appellate precedent construing these terms. In fact, the *sole* on-point precedent that this court's research has located is a decision of Supreme Court, Queens County, in *Palmer v Cook* (65 Misc 3d 374, 388-389 [Aug. 5, 2019] [Buggs, J.]). In *Palmer*, the court held that the plaintiff stated an NYCHRL claim for caregiver discrimination by alleging that she suffered adverse employment action motivated by her request for "four (4) hours off on eight (8) consecutive Fridays to take [her husband] to his chemotherapy sessions." (65 Misc 3d at 389.) This decision, though, interpreted only the "medical care" prong of the definition of "care recipient"; it did not have occasion also to consider the "needs of daily living" prong of that definition.

1. Pustilnik's Allegations that She Acted as a Caregiver for Her Father

In contending that she acted as a caregiver for her father, Pustilnik has not alleged that she directly provided her father with medicine or other forms of physical care. Nor (as in *Palmer*) does Pustilnik's complaint allege that she provided transportation or comparable logistical support that her father needed to access medical care provided by others. On the other hand, Pustilnik *has* alleged that she accompanied her father to medical appointments and was with him in the hospital "to ensure he received proper care." (NYSCEF No. 1 at ¶ 20.) Construing these allegations in the light most favorable to Pustilnik, she has alleged in essence that she was acting as his patient advocate with treating providers to ensure that the treatment he received fully addressed his medical needs—a common role for adults helping elderly parents or relatives who need medical care. This court concludes that by alleging that she was taking steps necessary to ensure that her father could receive proper medical care, Pustilnik has established for pleading purposes that she was acting as a caregiver for her father within the meaning of the NYCHRL.

This court is not persuaded by defendants' argument that a plaintiff must herself directly provide medical care (for example by administering pills and injections to another person, or by managing another person's catheter or feeding tube) to qualify as a caregiver. (*See* NYSCEF No. 17 at 17.) The statute could easily have said as much; but it did not. And defendants' proffered interpretation would exclude large swathes of medically related caretaking responsibilities—as in the example from *Palmer* in which a sick spouse (or child or parent) depends on the NYCHRL plaintiff to transport him for needed medical treatment. This narrow reading of "caregiver status" (or its subsidiary definitions) cannot be reconciled with the NYCHRL's undisputedly broad and remedial purpose.

Additionally, as with her disability-discrimination claim, Pustilnik has sufficiently alleged a causal relationship between her taking time off from work to provide care to her father while he was dying and her subsequent termination, given the close temporal proximity between the two. The court again finds this question to be close. But given the comparatively relaxed pleading standards governing NYCHRL claims, Pustilnik's caregiver-discrimination allegations relating to her father state a cause of action, if only just.

2. Pustilnik's Allegations that She Acted as a Caregiver for Her Mother

Pustilnik's claim that she also acted as a caregiver for her mother after her father's death rests on the "needs of daily living" aspect of providing care, not the "medical care" aspect. In assessing the sufficiency of the complaint, this court must first consider how to construe "needs of daily living": *i.e.*, whether it encompasses all typical "daily life activities," as Pustilnik contends (*see* NYSCEF No. 12 at 19-20), or whether it should be read more narrowly.

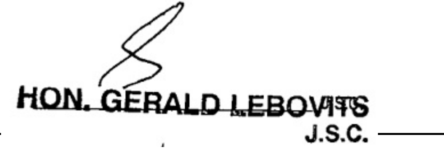
This court concludes that a (somewhat) narrower reading of "needs of daily living" is correct. This statutory term is similar in phraseology to "activities of daily living"—a commonly used concept in contexts where an individual (or set of individuals) is responsible for providing care to another. (*See e.g.* Mental Hygiene Law [MHL] § 81.20 [7] [describing the duties of a guardian for the personal needs of an incapacitated person]; *Coleman v Daines*, 79 AD3d 554, 555 [1st Dept 2010], *aff'd* 19 NY3d 1087 [2012] [discussing a Medicaid application for in-home personal care services].) Thus, "needs of daily living" for purposes of the NYCHRL do not encompass all typical "daily life activities" as Pustilnik would have it, but instead an individual's core needs, such as "mobility, eating, toileting, dressing, grooming, housekeeping, cooking, shopping, money management, banking, driving or using public transportation." (MHL § 81.03 [h] [defining "activities of daily living"].)

The allegations of Pustilnik's complaint relating to the assistance she provided her mother are somewhat vague and conclusory: she states only that she frequently called or visited her mother to help with activities "such as making doctor appointments, maintaining her apartment and making necessary telephone calls." (NYSCEF No. 1 at ¶ 20.) This court agrees with defendants that the general statement that Pustilnik helped her mother "maintain[] her apartment" and "mak[e] necessary telephone calls" is not sufficient to state a caregiver-status cause of action under the NYCHRL.

This court reaches a different conclusion, though, with respect to Pustilnik's allegation that she helped her mother schedule appointments regarding her mother's ongoing physical and psychological conditions (which are detailed in the complaint). Receiving treatment to preserve or restore one's physical and mental health can be a core aspect of daily life, on a par with the other "activities of daily living" described above. Thus, even if an individual's need for assistance with making doctor's appointments or the like does not itself rise to the level of relying on another for medical care, it qualifies at the very least as a "need[] of daily life" for purposes of the NYCHRL. And Pustilnik's allegation that her "caretaking responsibilities were well-known to BPCA senior officials," and that Pustilnik frequently provided such assistance to her mother until her termination, suffices to make out—at least for pleading purposes—a caregiver-discrimination cause of action.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendants' motion to dismiss the complaint under CPLR 3211 is denied.



HON. GERALD LEBOVITS
J.S.C.

4/8/2021
DATE

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART		[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
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