State of Connecticut
Commission on Human Rights and Opportunities
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MEMORANDUM

To: All Counsel

From: Kimberly D. Morris, Secretary II, OPH

Re: CHRO ex rel. Stephanie Danner v. ATOS IT Solutions and Services Inc.
CHRO No. 1730314; Fed. No. 16a201700452

Date: February 22, 2019

Enclosed is the Presiding Human Rights Referee's Ruling and Order on Respondent's Motion for Summary Judgement.

cc.

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STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS

Commission on Human Rights and Opportunities, ex rel.
Stephanie Danner, Complainant — CHRO Case No. 1730314

v.

Atos IT Solutions and Services, Inc., Respondent — February 22, 2019

2-22-2019 4:38pm

Ruling and Order on Motion for Summary Judgment

Background

On December 5, 2016, the complainant, Stephanie Danner, of 33R Tunxis Street, Windsor, Connecticut (complainant), filed an affidavit of illegal discriminatory practice with the Commission on Human Rights and Opportunities (commission). The complaint alleges a cause of action against the respondent, Atos IT Solutions and Services, Inc., whose business address is 2500 Westchester Avenue Suite 300, Purchase, New York (respondent), for mental disability discrimination and failure to accommodate the complainant's mental disability in violation of General Statutes § 46a-60 (a) (1) (now General Statutes § 46a-60 (b) (1)) [1] and, by virtue of General Statutes § 46a-58 (a), the American with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq. (ADA). The complaint also alleges that the respondent retaliated against the complainant in violation of General Statutes § 46a-60 (a) (4) (now General Statutes § 46a-60 (b) (4)). [2]

On October 3, 2017, the case was sent directly to public hearing through the early legal intervention program, General Statutes § 46a-83 (f) (2). The commission deferred prosecution of the complaint to the complainant and complainant's attorney pursuant to General Statutes § 46a-84 (d). The respondent filed an answer to the complaint on November 7, 2017. On December 26, 2018, the respondent filed a motion for summary judgment along with a memorandum of law and documentary evidence, including two affidavits, in support of said motion. On January 3, 2019, the commission filed a response and memorandum objecting to the respondent's motion for summary judgment. On January 10, 2019, the respondent filed a reply to the commission's objection, including additional evidence in support of its motion for summary judgment. On January 23, 2019, the complainant filed an objection to the summary judgment motion, along with an attachment in support of the objection. On January 25, 2019, the

[1] Effective October 1, 2017, General Statutes § 46a-60 (a) (1) was re-codified as § 46a-60 (b)(1). Public Act 17-127, "An Act Concerning Discriminatory Practices Against Veterans, Leaves of Absence for national Guard Members, Application for Certain Medicaid Programs and Disclosure of Certain Records to Federal Military Law Enforcement," amended the statute to add "status as a veteran" as a new protected class. Since the substantive change does not affect the present case, in order to avoid confusion, the references herein will be to the citation in effect when the complaint was filed. *Angelsea Productions, Inc. v. Commission on Human Rights & Opportunities*, 236 Conn. 681, 683, n. 1 (1996).

[2] Effective October 1, 2017, General Statutes § 46a-60 (a) (4) was re-codified as § 46a-60 (b) (4). To avoid confusion, the references herein will be to the citation in effect when the complaint was filed. *Angelsea Productions, Inc. v. Commission on Human Rights & Opportunities*, supra.

respondent filed a reply to the complainant's objection. For the reasons set forth below, I hereby grant the respondent's motion for summary judgment.

Discussion

Authority of Human Rights Referee to Rule on a Motion for Summary Judgment

I first address the argument of the commission and complainant that the filing of a motion for summary judgment is not an allowable motion under the regulations governing this administrative adjudication. As recognized under previous rulings of this tribunal, the regulations confer on the presiding referee the full authority to control contested case proceedings, with the authority to rule upon "all motions and objections", including summary judgment motions. See Regs., Conn State Agencies, § 46a-54-83a (a); *Commission on Human Rights & Opportunities ex rel. Perreira v. Yale New Haven Hospital*, 2016 WL 9405663, CHRO No. 1433048 (September 7, 2016) (Ruling on summary judgment); *Commission on Human Rights & Opportunities ex rel. Stephenson v. Webster Bank*, 2013 WL 8374107, CHRO No. 1110235 (August 22, 2013) (Ruling on motion for summary judgment); *Commission on Human Rights & Opportunities ex rel. Barnes v. Goodman,* 2009 WL 1941468, CHRO No. 0710395 (June 5, 2009) (Ruling on motion for summary judgment); *Commission on Human Rights & Opportunities ex rel. Carretero v. Hartford Public Schools,*2005 WL 5746419 CHRO No. 0310481 (November 28, 2005) (Ruling on motion for summary judgment); *Commission on Human Rights & Opportunities ex rel. Blake v. Beverly Enterprises-Connecticut*, 1999 WL 34765982, CHRO No. 9530630 (July 8, 1999) (Rulings on motions for summary judgment/dismissal and directed verdict). The plain purport of these rulings is that dismissals, including on motions for summary judgment, are an available option to hearing officers on grounds other than those provided in § 46a-54-88a (d) of the Regulations of Connecticut State Agencies. [3] I therefore conclude that the tribunal has the authority to rule on the respondent's motion for summary judgment.

The Hearing of a Contested Case is De Novo

The complainant argues that the mere fact that her complaint has been transferred to the Office of Public Hearings (OPH) for public hearing as a contested case establishes the existence of a genuine issue of fact. In support, she attaches to her objection a copy of the record notice from the commission's principal attorney sending the case directly to public hearing through the early legal intervention process. The complainant's argument is unavailing. The law delineates the limits of a human rights referee's authority. Pursuant to General Statutes Section 46a-84, as well as the Hearing Conference Summary and Order filed December 7, 2017, the case before the tribunal is a de novo matter. *Commission on Human Rights & Opportunities, ex rel. Pallet v. Oral Care Dental Group II, LLC*, 2015 WL 2152657, *3, CHRO No. 1310478 (April 16, 2015); *Commission on Human Rights & Opportunities, ex rel. Taylor v. Salvation Army, ARC*, 2013 WL 1409348, *3, CHRO No. 1010252 (March 28, 2013). Contrary to the complainant's interpretation, the referee only has the limited information about the case that is alleged in the complaint sent to the Office of Public Hearing for a de novo contested case proceeding, in this case pursuant to the commission's early legal intervention process. The basis on which the commission's legal counsel would choose to send the

[3] Section 46a-54-88a (d) of the Regulations of Connecticut State Agencies specifically permits and sets forth the circumstances and standards pursuant to which a complaint, or a portion of a complaint, may be dismissed, namely, for failure to establish jurisdiction, failure to state a claim upon which relief can be granted, failure to appear at a lawfully noticed conference or hearing without good cause, or failure of a party to sustain his or her burden after presentation of the evidence.

case to this office directly for public hearing, or what may have motivated that decision, is not at issue in the case. When the commission refers a case to the OPH pursuant to the early legal intervention process, it sends only the affidavit of illegal discrimination and a copy of the letter from the commission's legal office to the parties that the case is being sent public hearing pursuant to its early legal intervention process. No other documents submitted during the investigation and conciliation process are sent to the OPH and are not a part of the OPH record. The hearing of a contested case as de novo is not optional. Any relevant and material evidence that the complainant desires this tribunal to consider must be introduced into the record in accordance with statutes, regulations, and orders that govern this contested case proceeding.

The Summary Judgment Motion

The bases for the respondent's summary judgment motion in a nutshell are that complainant cannot establish essential prima facie elements of her case because (1) there is no reasonable accommodation in the way of assistance or changes to the position or the workplace that the respondent could provide to enable the complainant to do her job, despite having a disability; and (2) the complainant's request to work from home on a permanent basis as a non-leave accommodation after she had exhausted her available leave under the Family and Medical Leave Act (FMLA) was not a request for a reasonable accommodation. According to the respondent, in its judgment the job cannot be performed remotely and the complainant's inability to work at the office placed an undue hardship on the respondent. The respondent argues in the alternative that the complainant cannot refute the respondent's legitimate, nondiscriminatory reason for terminating her employment, namely that layoffs had been occurring for an extended period, the complainant was spared initially from being laid off, and she was only terminated when she indicated that she could not be physically present to work at the office on a permanent basis.

The principles that govern the tribunal's review on a motion for summary judgment are well established.

> "Practice Book § 17–49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party.... The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law.... In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact ... but rather to determine whether any such issues exist.... The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.... Once the moving party has met its burden [of production] ... the opposing party must present evidence that demonstrates the existence of some disputed factual issue.... [I]t [is] incumbent [on] the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists.... The presence ... of an alleged adverse claim is not sufficient to defeat a motion for summary judgment...." (Brackets in original; citations omitted; internal quotation marks omitted.)

Episcopal Church v. Gauss, 302 Conn. 408, 421-22 (2011); see also, e.g., *Vollemans v. Wallingford*, 103 Conn. App. 188, 293 (2007); *Commission on Human Rights & Opportunities ex rel. Carretero v. Hartford Public Schools,*2005 WL 5746419, supra, *7.

I

Claims of Disability Discrimination and/or Failure to Reasonably Accommodate

Under the Connecticut Fair Employment Practices Act it is a discriminatory practice "(f)or an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's ... present or past history of mental disability...." General Statutes § 46a-60 (a) (1). Similarly, the ADA prohibits a "covered entity" from discriminating "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112 (a).

Although General Statutes § 46a-60 (a) (1) does not include the duty of reasonable accommodation that is expressly required under the American with Disabilities Act; 42 U.S.C. § 12112 (b) (5) (A); our Supreme Court has interpreted § 46a–60 (a) (1) "to require employers to make a reasonable accommodation for an employee's disability." *Curry v. Allan S. Goodman, Inc.,* 286 Conn. 390, 415 (2008). The *Curry* court held that " ... reasonable accommodation is a part of the employee's prima facie case that focuses on an individual employee's particular disability and the job requirements, i.e., that, despite their protected trait, they will be able to perform the essential functions of the job with some type of assistance; under this framework, if the employee makes such a showing, then the burden of production shifts to the employer to show that the accommodation would constitute an undue hardship."(Citation omitted). *Curry v. Allan S. Goodman, Inc.,* supra, 286 Conn. 410.

"Under the analysis of the disparate treatment theory of liability, there are two general methods to allocate the burdens of proof: (1) the mixed-motive *Price Waterhouse* model; *Price Waterhouse v. Hopkins,* 490 U.S. 228, 246, 109 S. Ct. 1775, 1788, 104 L.Ed.2d 268 (1989); and (2) the pretext *McDonnell Douglas–Burdine* model. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 252–56, 101 S.Ct. 1089, 1093–95, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed.2d 668 (1973)." *Levy v. Commission on Human Rights & Opportunities,* supra, 236 Conn. at 104-105. "In the disability context, a prima facie case for disparate treatment is established under the *McDonnell Douglas* framework if the plaintiff shows: (1) he suffers from a disability or handicap, as defined by the applicable statute; (2) he was nevertheless able to perform the essential functions of his job, either with or without reasonable accommodation; and that (3) the employer took an adverse employment action against him because of, in whole or in part, his protected disability. C.G.S.A. § 46a–60 (a) (1)." *Curry v. Allan S. Goodman, Inc.*, supra, 286 Conn. at 426.

A. Respondent Has Met Its Initial Burden of Showing Nonexistence of Material Facts

1) Prima Facie Case: The respondent argues that the complainant cannot present evidence supporting the second prima facie element of a claim for disability discrimination under our state antidiscrimination laws, including under General Statutes § 46a-58 (a) if liability under the ADA is found. The respondent first argues that the complainant cannot, as a matter of law, satisfy her burden of showing that she was able to perform the essential functions of her job, either with or without reasonable

accommodation, giving rise to a presumption of discrimination under the second prima facie prong of *McDonnell Douglas*. The respondent also contends that the medically indicated permanent work-from-home restriction requested upon exhaustion of the complainant's maximum FMLA leave, as extended (Onderick Affidavit ¶¶ 8-13), was not a reasonable accommodation request.

The respondent supports its summary judgment motion with supporting evidentiary materials negating the complainant's disability/reasonable accommodation claim for two reasons: (a) by complainant's own admission, she suffered permanent short-term memory impairment which adversely impacted the "problem-solving aspects of her position [which] required her to learn new things every day and to retain that knowledge" (Hamilton Affidavit ¶¶ 9, 11); and (b) she was unable to present herself to work at the respondent's Cheshire office for a period of indefinite duration with no assurances that she would be able return to work in the office anytime in the near future. For these reasons, the respondent asserts, the complainant was unable to perform the essential functions of her position as a service desk technician with or without a reasonable accommodation, and the request for an additional non-leave accommodation to work from home permanently was not a request for a reasonable accommodation. *Curry v. Allen S. Goodman, Inc.*, supra, 286 Conn. 409, 415-416; *Festa v. Board of Education of East Haven,* 145 Conn. App. 103, 113-114 (2014); *Langello v. West Haven Board of Education*, 142 Conn. App. 248, 259-260 (2012); *Commission on Human Rights & Opportunities ex rel. Secundo v. The Housing Authority of Hartford,* 2000 WL 35575649,*17.

Generally, essential functions must be fundamental to the position, and not merely marginal. See 29 C.F.R. § 1630.2 (n). [4] "In approaching this inquiry, '[a] court must give considerable deference to an employer's judgment regarding what functions are essential for service in a particular position.' " *Shannon v. New York City Transit Authority,* 332 F.3d 95, 100 (2d Cir. 2003). If the job function constitutes an essential function, the plaintiff carries the burden of showing "that, despite [the plaintiff's] protected trait, [the plaintiff] will be able to perform the essential functions of the job with [or without] some type of assistance." *Curry v. Allan S. Goodman, Inc., supra*, 286 Conn. at 409. Furthermore, an accommodation is

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[4] Title 29 of the Code of Federal Regulations, § 1630.2 (n), implementing equal employment provisions of the Americans with Disability Act, provides:

(n) Essential functions—

(1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

reasonable if "at least on the face of things, it is feasible for the employer to provide the accommodation." (Internal quotation marks omitted.) *Curry, supra,* at 419. Whether a job function constitutes an essential function of a particular job is a fact specific inquiry. See, *Curry*, supra, at 13, 18; *Kovachich v. State of Connecticut, Department of Mental Health and Addiction Services, supra, 2017 WL 5203275, *3, 5;* 29 C.F.R. § 1630.2 (n).

The respondent, in its motion and supporting exhibits, has made an affirmative evidentiary showing that there is not a factual dispute that the complainant's position as a service desk technician required her to be able to "learn new things daily and to maintain such knowledge in order to receive, analyze, and resolve client issues, and determine to escalate issues when necessary." (Hamilton Affidavit ¶ 9). By her own admission, the complainant's ability to perform her job duties was impaired as a result of her short-term memory loss due to the medications she was taking for bipolar disorder and anxiety. In particular, during one of her intermittent FMLA leaves, the complainant communicated to David Hamilton, her supervising manager, that because of her mental disabilities of bipolar disorder and anxiety she "didn't know what [the respondent] was going to do with her [as she] ha[d] nobody to manage and [she'd] do a shitty job if [she] did."(Hamilton Affidavit ¶ 11 and Exhibit 1 thereto; Onderick Affidavit, Exhibits 3 and 4 thereto). She further stated that, due to medications she was taking for the same, her "short term memory is really bad and its permanent." (Hamilton Affidavit ¶ 11 and Exhibit 1 thereto).

The respondent also has made an affirmative evidentiary showing that there is no factual dispute that the complainant's job duties required her to present to work at the respondent's Cheshire office and that the complainant's physical presence in the office at work is essential for the complainant to serve as a service desk technician, the job in question (Hamilton Affidavit ¶¶ 12 -19). The respondent attaches to its motion an evidentiary document from the complainant's psychiatrist, who indicated a permanent work-from-home restriction in revised paperwork submitted on October 9, 2016, in connection with the complainant's request for a post-leave accommodation to work permanently from her home (Onderick Affidavit ¶¶ 14, 15, and Exhibit 4 attached thereto).

I conclude that the motion for summary judgment having been made and supported by affidavits of Laurie Onderick, who is employed by the respondent as a Human Resources specialist for leave administration, and David Hamilton, who holds the position of Service Desk Manager for the respondent and was the complainant's manager throughout her employment, together with evidentiary exhibits attached to both affidavits, the respondent has met its burden of coming forward to show, initially, the absence of any genuine issue as to material facts both (a) that the complainant was unable to perform the essential functions of the position, with or without the requested accommodation, and also (b) that the requirement of an indefinite and open-ended work-from-home restriction was not a reasonable accommodation to which the complainant was entitled under the Connecticut Fair Employment Practices Act or the Americans with Disabilities Act, because of the substantial hardship to the respondent caused by the complainant's inability to present herself to the office to perform her work duties. Thus, to oppose summary judgment, the complainant must present evidence that demonstrates the existence of some disputed factual issue on these elements of the claim. *Ramirez v. Health Net of Northeast, Inc.*, 285 Conn. 1, 10-11 (2008).

2) Pretext: The respondent argues in the alternative that no genuine question of material fact exists as to whether the respondent's stated reason for terminating the complainant was a pretext for discharging her on the basis of her mental disability. In his affidavit, David Hamilton, the complainant's manager, states that for legitimate, nondiscriminatory business reasons, layoffs had been occurring for an extended period of time and the complainant was spared initially from being laid off (Hamilton Affidavit

¶¶ 7, 8). Hamilton also avers that as part of offshoring of service desk positions, including those who reported to complainant, the complainant's managerial position was eliminated in August 2016, and instead of terminating her then, the respondent reassigned complainant as a service desk technician tasked with providing computer support services to Cooper University Health Center ("Cooper Hospital") (Hamilton Affidavit ¶¶ 6, 7, 8). Laurie Onderick, the respondent's Human Resources specialist for leave administration, and Hamilton both affirm that the complainant was only terminated when she indicated she could not be physically present for work in the office on a permanent basis (Onderick Affidavit ¶ 15 and Exhibit 4 thereto; Hamilton Affidavit ¶¶ 16, 17).

The respondent, as the moving party, has made an initial showing through evidentiary facts outside the pleadings that it is entitled to summary judgment. As the opposing party, the complainant must come forward with countervailing evidentiary materials that demonstrate the existence of a genuine issue of disputed fact for determination at a public hearing as to whether the respondent's proffered reason was a pretext for discharging the complainant because of her disability.

B. Complainant Failed to Substantiate Her Claims by Presenting Evidence Disclosing the Existence of Genuine Issues of Material Fact

For purposes of summary judgment, the respondent, as the moving party, having met its initial burden of establishing the absence of any material dispute that (a) the complainant was unable to perform the essential functions of the position, with or without the requested accommodation; (b) the permanent work-from-home restriction was not a request for a reasonable accommodation; and (c) the respondent's articulated legitimate nondiscriminatory reason for the employment action was the true reason and not a pretext for discrimination, the nonmoving party must substantiate her claim by setting forth specific facts showing the existence is a genuine issue of material fact for determination at the public hearing.

When, as here, a motion for summary judgment is made and supported by admissible evidence via affidavits or other similar materials showing that there is an absence of evidence in support of the complainant's case, it is incumbent on the complainant to come forward with counter affidavits and concrete evidence to make a showing sufficient to establish the existence of a factual basis for the challenged elements on which the complainant will bear the burden of proof at the public hearing. *Ramirez v. Health Net of Northeast., Inc.*, supra, 285 Conn. 10-11; *Gianetti v. Health Net of Connecticut, Inc.*, 116 Conn. App., 459, 464-65 (2009); *Vollemans v. Wallingford*, supra, 103 Conn. App. at 193. A party may not simply rely on the mere allegations of her pleading or "on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Buell Industries, Inc. v. Greater New York Mutual Insurance Co.*, 259 Conn. 527, 558 (2002). If the nonmoving party has failed to make a sufficient evidentiary showing that there is a genuine issue of material fact on an essential element of her case on which she has the burden of proof, then summary judgment is appropriate. *Episcopal Church v. Gauss*, supra, 302 Conn. 421-22; *Buell Industries, Inc. v. Greater New York Mutual Insurance Co.*, supra, 259 Conn. at 550; *Gianetti v. Health Net of Connecticut, Inc.*, supra.

In their responses to the motion for summary judgment, the commission and the complainant failed to present any concrete evidence demonstrating the existence of a disputed issue of material fact as to whether the complainant was able to perform the essential functions of the position, with or without a reasonable accommodation, to wit that she was qualified for the job; whether the requested accommodation was a reasonable one and did not present an undue hardship on the respondent; or whether the articulated business reasons for the respondent's employment decisions were merely a pretext for discrimination.

In the present situation, where the complainant has completely failed to come forward with any evidentiary materials that would make a prima facie showing of essential elements of her claim, or that would otherwise enable the complainant to sustain her burden of proving by a preponderance of the evidence that the respondent terminated her employment for discriminatory reasons *because of* her protected disability, the tribunal is satisfied that there is no genuine issue as to any material fact with regard to the complainant's disability/failure to accommodate claims and the respondent is entitled to judgment as a matter of law on these issues.

II
Retaliation Claim

In her affidavit, the complainant alleges that the respondent retaliated against her, in violation of General Statutes § 46a-60 (a) (4), when it terminated her on October 17, 2016. General Statutes § 46a-60 (a) (4) provides in relevant part that it is a discriminatory practice under the Connecticut Fair Employment Practices Act for an employer to "discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84." Under the *McDonnell Douglas* pretext model, in order to establish a prima facie case of employment retaliation, an employee must show that (1) she was engaged in statutorily protected activity; (2) the employer was aware of the activity; (3) the employee suffered an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. *Darden v. Stratford,* 420 F. Supp.2d 36, 45-46 (D. Conn 2006); *Samakaab v. Department of Social Services*, 178 Conn. App. 52, 62 (2017); *Phadnis v. Great Expression Dental Centers of Connecticut, P.C.*, 170 Conn. App. 79, 94-95 (2017); *Marasco v. Connecticut Regional Vocational-Technical School System*, 153 Conn. App. 146, 163-64 (2014), cert. denied 316 Conn. 901; *Ayantola v. Board of Trustees of Technical Colleges,* 116 Conn. App. 531, 537-38 (2014). Once the complainant has established a prima facie case, the burden-shifting paradigm of *McDonnell Douglas* applies. If the complainant is able to establish a prima facie case, the burden of production shifts to the employer to provide a legitimate nondiscriminatory reason for the employment action. Once the employer does so, then the complainant must prove that the employer's proffered legitimate reasons were not the true reasons, but were a pretext for discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981); *Feliciano v. Autozone, Inc.* supra; *Jacobs v. General Electric Co.*, 275 Conn. 395, 401 (2005); *Board of Education of Norwalk v. Commission on Human Rights & Opportunities,* 266 Conn. 492, 510 (2003).

The basis for the complainant's retaliation claim is not apparent from a review of the complaint affidavit. The complainant does not indicate in the complaint what activity protected by § 46a-60 (a) (4) was undertaken or engaged in. In its motion for summary judgment, the respondent first argues that the complainant cannot rely on her requests for FMLA leave to support a claim for retaliation because, under the ADA, "a request for FMLA leave is not a request for a reasonable accommodation under the ADA." *Acker v. General Motors, L.L.C.,* 853 F.3d 784, 791 (5th Cir. 2017). The respondent points out that, in any case, all of complainant's requests for FMLA were granted, and even after her FMLA leave had been exhausted, she was provided an additional one-month leave as an accommodation (Respondent's motion for summary judgment, p. 14, footnote 49 and accompanying text) (Onderick Affidavit ¶¶ 8-12). Assuming arguendo that the complainant's request for a permanent work-from-home accommodation is the protected activity alleged, the respondent then contends that even if questions of fact exist as to the first three prima facie elements of the retaliation claim, the complainant cannot produce any evidence of a causal connection between any alleged protected activity and the adverse responsive action. In support

of its motion, the respondent points to the uncontroverted evidence that complainant was terminated not in response to any alleged protected activity, but because she conceded that she was unable to perform the essential duties of the job and because she was unable to present to work at the Cheshire office where the Cooper Hospital account was managed. [5]

Concerning the fourth prong of her prima facie case of retaliation, in order to carry her initial burden at trial, the complainant must show that there is a causal connection between her protected activities and the alleged adverse employment actions complained of, in this case the termination of her employment. The inquiry into whether causation has been established is inherently factual in nature. *Ayantola v. Board of Trustees of Technical Colleges,* supra, 116 Conn. App. 533-34. To carry her burden of demonstrating a causal connection between the protected activities and the adverse actions alleged, the complainant must establish that a retaliatory motive played a role in the adverse employment actions alleged. [6]

Neither the complainant nor the commission has countered the respondent's evidence by calling the tribunal's attention to other evidentiary items demonstrating that the complainant's participation in a statutorily protected activity was a motivating factor in her termination under the causal connection standard in *Darden* v. *Stratford*, 420 F. Supp.2d 36, 45 (D. Conn. 2006); *Phadnis v. Great Expression Dental Centers of Connecticut, P.C.*, supra, 179 Conn. App. 94-95; *Marasco v. Connecticut Regional Vocational-Technical School System*, supra, 153 Conn. App. 163-64; or that the respondent's proffered reasons for the complainant's termination were pretextual. In the absence of any responsive evidentiary facts or substantive evidence to make out the complainant's retaliation claim and rebut the respondent's affirmative showing, a public hearing would be useless and the respondent, as the moving party, is entitled to summary judgment as a matter of law.

Conclusion

In summary, having considered the respective claims of the parties, including the undisputed factual assertions in material presented by the respondent, such as affidavits and documentary exhibits, and viewing the complaint and the submitted evidentiary materials in the light most favorable to the complainant, the tribunal finds that the respondent has satisfied its burden of establishing that there is no genuine issue as to material facts upon which the outcome of the case depends with regard to claims that the respondent discriminated against the complainant based on her mental disability, failed to

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[5] See discussion earlier in this ruling at pp. 4-7, including references to evidentiary materials in support of the motion for summary judgment.

[6] In *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), the United States Supreme Court held, in a Title VII retaliation claim, that where an employee complains that she was retaliated against for filing a claim of discrimination, the employee has the burden of proving that the retaliation would not have occurred "but for" the employee's complaint. This is a higher burden of proof than the causal connection standard in *Darden* v. *Stratford*, 420 F. Supp.2d 36, 45 (D. Conn. 2006), where the employee is only required to prove that her participation in the statutorily protected activity was a motivating factor in the employer's decision. See also, e.g., *Phadnis v. Great Expression Dental Centers of Connecticut, P.C.*, supra, 179 Conn. App. 94-95; *Marasco v. Connecticut Regional Vocational-Technical School System*, supra, 153 Conn. App. 163-64; *Ayantola v. Board of Trustees of Technical Colleges, supra,* 116 Conn. App. 537-38. In light of several post-*Nassar* decisions by Connecticut courts declining to adopt the "but for" standard for retaliation claims in this state, and absent contrary direction from the Connecticut Supreme Court, the tribunal will continue to apply the "motivating factor" standard in employment retaliation claims under General Statutes §46a-60 (a) (4).

reasonably accommodate the same, or retaliated against her because she opposed discriminatory practices. The tribunal further finds that the complainant has not designated any factual basis, through counter affidavits or other evidentiary material from any source, to demonstrate the existence of genuine issues of fact in support of the challenged elements of complainant's disability discrimination and retaliation claims or to show that the articulated nondiscriminatory reasons for the respondent's employment action can be disputed.

For the reasons more fully set forth herein, and in accordance with the provisions of subdivision (4) of subsection (d) of § 46a-54-88a of the Regulations of Connecticut State Agencies, the respondent's motion for summary judgment is hereby granted on all claims, including discrimination on the basis of the complainant's mental disability, failure to make a reasonable accommodation for the complainant's disability, and retaliation.

It is so ordered this 22nd day of February 2019.

Elissa T. Wright
Presiding Human Rights Referee

cc.

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