*To Be Argued By Michael H. Sussman*

# 20-2233

## UNITED STATES COURT OF APPEALS
## FOR THE SECOND CIRCUIT

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COLETTE D. RAGIN,

*Plaintiff-Appellant,*

v.

RIVERBAY CORPORATION,

*Defendant-Appellee.*

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**On Appeal from an Order and Judgment of the United States District Court for the Southern District of New York**

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## APPELLANT'S BRIEF-IN-CHIEF AND SPECIAL APPENDIX

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## PRELIMINARY STATEMENT

Appellant, a disabled female, was terminated on pretextual grounds, and a reasonably charged jury could so conclude. The district court arrogated the fact-finding function and drew disputed and arguable conclusions which rested on denying the "admissibility" of appellant's version of events. The decision below should be reversed and vacated, and the matter tried to a jury

## QUESTION PRESENTED

Whether the district court erred in granting appellee's motion for summary judgment and resolving disputed issues of material fact, including the decision-maker's intent?

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

As appellant's claims arise under federal anti-discrimination law, the district court below had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. On July 13, 2020, appellant timely filed her Notice of Appeal from the district court's final judgment entered on June 24, 2020 and, accordingly, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE CASE

Appellant, Colette Ragin, a disabled female, filed this discrimination case on May 23, 2017. JA-2, 13-19. On June 20, 2017, appellee Riverbay Corporation answered. JA-4, 20-31. After unsuccessful mediation and discovery, appellee filed

a motion for summary judgment on July 19, 2019. JA-32-33. Appellant opposed the motion, relying upon deposition testimony, exhibits and her own Affidavit. By order and opinion dated June 22, 2020, the district court granted appellee's motion, SA-1-26, and the clerk entered judgment for defendants, JA-714. On July 13, 2020, appellant timely noticed her appeal to this Honorable Court. JA-713. She now perfects that appeal.

## STATEMENT OF FACTS

Coop City contains over 15,000 owner-occupied units. JA-517-18. In 2015, appellee settled for $6,200,000 a wage and hour case brought on behalf of improperly classified exempt employees. JA-636-37. No one was disciplined for the misclassifications which led to this settlement. Id., JA-589, ll. 6-10. Indeed, Michael Munns, who served as internal counsel for appellee during the prior twenty-two years, claimed to have no knowledge of who was responsible for the misclassifications which caused this settlement. JA-560-61.

Starting in early 2015, Michael Mauro, Esq. led a study of appellee's compliance with federal and state wage laws. JA-336. Mauro's task was to provide guidance so Riverbay could comply with state and federal wage laws. JA-338. To do this, he needed to assess what duties classified employees were performing and whether those could be fairly classified as supervisory. Id.

Mauro typically sought information about Riverbay through appellant, its Director of Human Resources. JA-337. No one at Riverbay asked appellant to assist Mauro with his study. JA-422, ll. 12-14.

Appellant and her assistant, Kraigh Thomas, accompanied Mauro to meetings he held with Riverbay Department heads and employees to verify whether they were relating to Mauro an accurate depiction of job duties and responsibilities. JA-422-23. Appellant prepared a spreadsheet showing who worked in each department and their salaries. JA-424. The spreadsheet did not list whether the employee was or was not exempt, and appellant did not maintain that information. JA-424-25.

After he completed his analysis, Mauro held a meeting and presented his recommendations to General Manager Noel Ellison, Michael Munns, Kenneth Duchnowski, appellant and Peter Merola. JA-562-63, 341, 346. Appellant was not at this meeting. JA-637 ¶ 3.

After completing his analysis, Mauro interacted with Ken Ducknowski, who headed Riverbay's payroll function. JA-334, 340. Mauro and Duchnowski discussed how people were to be paid. JA-340. In completing his study, Mauro never learned who had been responsible for deciding how to classify employees for wage purposes before commencement of his review. JA-337.

Munns, appellee's inside counsel, could not recall the General Manager ever stating that Mauro's recommendations were to be implemented. Indeed, after Mauro

made his initial recommendations, there was substantial disputation concerning them among senior managers. JA-637 ¶ 4.

On June 9, 2015, Mauro wrote to Ragin and Thomas, "Here are my findings on the most recent round of interviews," and then recommended that seven individuals be deemed exempt employees, not entitled to overtime pay. JA-357. Appellant did nothing with information on exempt status which Mauro sent to her. JA-426. She explained that the June 9, 2015 email from Mauro to her mentioning seven employees "was an FYI . . . the whole thing was mismanaged. There was no responsibility matrix" JA-427, and "any emails that he sent me pertaining to reclassifications was like an FYI email," JA-428. Ragin further explained that "it was a totally disorganized project . . . there was no work-flow process. There was no project manager. Things were going helter skelter, completely disorganized, and the information that he gave me, there was nothing for me to do with it . . . ." Id.

Mauro had no knowledge of any role Ragin had in communicating the information in his June 9, 2014 memorandum to anyone else. JA-343, ll. 8-15. Appellant was entirely "out of the loop" with regard to monies to be paid Riverbay employees based on their classifications or any changes thereto. JA-438. Appellant was not responsible for preparing or certifying appellee's payroll. JA-637 ¶ 5.

Appellant's lack of responsibility for conveying Mauro's recommendations to others was corroborated. The appellee's Director of Finance, Peter Merola, received

a list of people who were to receive back pay from Jeff Buss, Esq., an attorney associated with Mauro's law firm. JA-483-84. Munns confirmed that Mauro prepared and provided directly to payroll a list of persons who were to receive back pay. JA-583.

Appellant was never directed to inform Payroll of the employment status of employees, that is whether they were exempt or non-exempt, and did not play that role in May-June 2015 with regard to any employees. JA-638 ¶ 6. Appellant understood that Mauro had direct communications with Payroll for this purpose. Id. She was never directed to transmit the information contained in the June 9, 2017 email from Mauro to anyone and neither she nor Thomas did so. Id. And Interim General Manager Noel Ellison had no idea whether Mauro sent this same email to anyone else at the company. JA-535.

On June 25, 2015, based upon the information she has since reviewed, individuals who had been classified as exempt improperly were to be given checks to compensate them for wages owed. JA-638 ¶ 7. Ragin played no role in determining who would be paid and what sums anyone would be paid and was not aware this was occurring. Id.

On June 24, 2015, Kraigh Thomas wrote Mauro and shared with him a memo which, he claimed, Ragin intended to provide hourly employees the following day, "This check represents a one-time disbursement of additional compensation." JA-

359. Thomas asked for additional information for this memorandum to hourly employees. Id. In fact, Ragin was not involved in composing or sending these letters and knew nothing about that process. JA-431.

At his deposition, Mauro claimed not to know why employees were being paid this one-time disbursement on June 25, 2015. JA-349, l.11 - JA-350, l.10. The checks being paid were to compensate improperly classified exempt employees who had worked overtime during the last six years without compensation. JA-470. Merola calculated the sums to be paid each person. JA-490. Merola provided his calculations to Duchnowski in payroll. Id. He could not recall circulating the list with the employees and the sum they would be paid to appellant. JA-491. He claims that six individuals listed on the June 9, 2015 email from Mauro should not have been paid for overtime, though they were on an initial list of about seventy five employees who did deserve payment, meaning that they were actually functioning in non-exempt positions and were supposed to have been paid overtime. JA-594-95. On June 25, 2015, Merola advised that newly classified non-exempt employees would be paid on that basis commencing June 29, 2015. JA-362.

On June 30, 2015, Ragin wrote two department heads and advised that two of the seven employees mentioned in Mauro's June 9 email, Ismael Bermudez, and Louis Loscalzo, were re-classified as non-exempt employees. JA-364. This email was sent to several persons including Michael Mauro, Esq., who, three weeks earlier,

had sent appellant an email indicating that these two employees were to be classified as exempt. JA-357. Mauro did not send any email to Ragin correcting this error. JA-638-39 ¶ 8.

On the same day, June 30, Ragin sent another email to department heads indicating that Ricardo Jakai, another employee who Mauro had recommended be classified as exempt, had been re-classified as non-exempt. JA-367. She copied this email to several persons including Michael Mauro, Esq., who, three weeks earlier, had recommended that Jakai be classified as exempt. JA-357. Mauro did not send any email to Ragin suggesting her email was in error. JA-638-39 ¶ 8.

On the same day, June 30, 2015, Ragin sent another email to department heads indicating that Raymond Cooper, Luis Lopez, and Wilmer Rodriguez had all been re-classified to non-exempt status. JA-370-71. She copied this email to several individuals including Michael Mauro, Esq., who, three weeks earlier, had recommended that these three employees be classified as exempt. JA-357. Again, Mauro did not send any email to Ragin suggesting her email was in error. JA-638-39 ¶ 8.

On the same day, June 30, 2015, Ragin sent a fourth email to department heads indicating that Filomena Velasquez had been re-classified to non-exempt status. JA-373. Again, she copied several people, including Michael Mauro, Esq., who, three

weeks earlier, had recommended that this employee be classified as exempt. JA-357. Mauro did not send any email to Ragin questioning her advice. JA-638-39, para. 8.

On August 2, 2015, Riverbay attorney Michael Munns wrote Mauro, "Mike, I don't yet know why but the six names you sent to Colette and Kraigh on June 9, 2015 did not result in those employees not being reclassified and receiving back pay checks on June 25, 2015 . . . Any advice on getting this $96,483 back?" JA-357.

On August 3, 2015, Munns wrote Ellison that Mauro believed these individuals were, and still are, exempt, "do not deserve the funds paid them and must pay it back." JA-356. In the same email, Munns advised Ellison, "They [sic] may be a two month window here so we need to be timely." Id.

On August 4, Riverbay's Director of Finance, Merola, suggested to Mauro that the six employees be switched to a salaried pay and no longer be paid "punch to punch." JA-363. The same day, Mauro explained that he had re-evaluated these six employees and "that they are properly considered exempt." Id.

Based on Mauro's advice, received by him on August 4, 2015, Merola wrote, "In accordance with Mike Mauro's below email, effective immediately the following employees are classified as EXEMPT..." Id. He asked Ragin to "please notify these employees and their supervisors" and asked Ducknowski to stop paying them punch to punch and the pay based on annual salary. Id.

In this context, Munns called appellant into his office and told her there was a mistake with the disbursement of money for certain employees. JA-429. He told appellant that the company was going to try to recoup the overpayment and she indicated she was not responsible for that. Id.

Appellant felt discomfort meeting with the employees allegedly improperly paid due to her lack of involvement in the process of determining how to pay such employees. Id. Accordingly, on August 6, 2015, Ragin requested from "legal" a "script" she could use in explaining to employees their re-classification. She further inquired of Merola, Munns, Ellison and Mauro whether "the memo Mike Munns prepares for employees to sign suffices for subject of repayment?" JA-362. Appellant did speak with each of the affected employees in the presence of Michael Munns. JA-430. Munns reported the content of these meetings to General Manager Ellison. JA-564-67.

In meeting with Ellison on this subject, Munns did not criticize appellant. JA-566. Ellison raised no issue with appellant during Munns' briefings. Id. Munns never determined that Ragin had erred in any manner with regard to the persons mentioned in Mauro's June 9 email, and he never heard anyone claim that Ragin was at fault for the payments made to these six individuals. JA-563.

After these events in early August 2015, through late that month, appellant continued performing her tasks, coordinating the ongoing review of employee

classifications caused by challenges raised to proposed classifications by various department heads. JA-387-409. To this end, on August 24, 2015, she wrote to department heads soliciting any further objections to the re-classifications Munns had proposed. Id. After receiving advice from department heads concerning the actual job duties and responsibilities of employees on August 24-25, 2015, Ragin passed this information to Munns and Mauro for their review and action.JA-433. Discussions as to how to classify employees continued within Riverbay management in late August 2015. JA-639 ¶ 9.

Though she never received any directive to transmit the contents of the June 9 email from Mauro to anyone, the termination letter appellee provided claims that appellant was terminated based upon her "failure to follow the written directives from outside counsel [Mauro] regarding the reclassification of six Riverbay employees..." JA-502.

Munns first saw the letter before the termination meeting. JA-568-69. Scott Trivella, Esq., appellee's outside labor counsel, emailed it to him. JA-570-71. Munns was unaware of any investigation Trivella did into the improper payments to classified employees. JA-575-76. Trivella never spoke with Ragin about this entire matter. JA-639 ¶ 10.

Merola attended the meeting at which Ellison terminated appellant. JA-564. Though he too had served as interim co-manager of Coop City, Merola did not know

whether Ellison had the authority, absent Coop Board approval, to terminate appellant. JA-591-92. Merola denied that he urged that course of action. JA-465, ll. 15-18. Indeed, as of the day before her termination, Merola claimed not to know this action was imminent. JA-472.

On the other hand, Ellison claims that Merola gave him input supporting appellant's termination. JA-536 ("He [Merola] agreed with termination."). Ellison claims he received this input from Merola a couple of weeks before he terminated appellant. Id. Munns also claimed that Merola supported appellant's termination before it occurred. JA-585-86.

Likewise, Ellison also claimed that Munns agreed with the decision in advance. JA-537. But Munns denied this, claiming that he did not recommend appellant's termination and was not asked for his views on the subject. JA-585, 587-88. And Merola does not recall Ellison providing any reason for appellant's termination at this meeting. JA-468.

The termination letter which Ellison signed claims that appellant failed to follow a directive from Mauro. JA-537, 502. When asked whether this directive was in the June 9 email, Ellison, the person who terminated appellant, responded, "I hadn't seen it so I wouldn't know." JA-537-38. Munns and Merola agreed that Mauro's June 9, 2015 email contained no direction to appellant. JA-498-99, 572.

Until August 27, 2015, the date she was terminated, appellant did not know she was being held accountable for the alleged overpayments to employees. JA-432. Before that date, no one had spoken with her in any way about the entire matter. Id. Ellison never spoke with her about her alleged failure to convey information in the June 9, 2015 email to Payroll. And Merola could recall no discussion with appellant between August 3 and 24 concerning what had occurred with the six individuals mentioned in the June 9 email from Mauro. JA-474.

Kraigh Thomas, who also received Mauro's June 9 email, was not disciplined or terminated for failing to act upon that document. JA-574, 486-87.

The payroll department cut the allegedly undeserved checks. JA-573. And Payroll is not part of HR or under Ragin's supervision. Id. The Department Head for Payroll, Ken Duchnowski, was not terminated in August 2015. Id.

Appellee made meager efforts to recoup the funds allegedly overpaid to the six employees. JA-488-89 (Merola, as appellee's Director of Finance unaware of any recoupment efforts or results thereof). Munns and Ellison developed no strategy with regard to how to recoup the funds. JA-563.

On August 17, 2015, Mauro advised Munns and Ragin how to recoup the overtime payments incorrectly made to exempt employees. JA-504. But, at his deposition, Mauro testified that he knew of no efforts to collect alleged over-payments made to the six employees. JA-353. Ellison did not know how much

money appellee recouped. JA-535. No one ever reported to him the sum recouped and he did not ask anyone. Id. Ellison does not know how many of the six improperly paid people returned the monies they were paid. JA-539. Munns did not know how many of the improperly paid employees paid appellee back the monies they received. JA-590. He never made any inquiry concerning how much of the money was returned, id., and though serving as in-house counsel, made no effort to recoup the funds. JA-591. Indeed, Munns was unaware of any effort appellee made to recoup the funds. JA-591-93. The Coop City annual budget is $200,000,000-$300,000,000. JA-535.

Peter Merola was Director of Finance for Riverbay between 1998 and November 2014 when he was asked to be interim co-general manager with Noel Ellison. JA-456, 459. Merola served in the latter position until April 7, 2015 after which Ellison served as sole interim general manager. JA-456, 461. Since 1998, Ken Duchnowski has been in charge of appellee's payroll. JA-456. Merola claimed that he played no role in determining employees' classification [exempt or non-exempt] before the Mauro study. JA-457. He could not recall any conversations with Ragin before February 4, 2015 regarding her role in the Mauro study.

Though he claims to have played no role in establishing classifications, Merola stepped down as interim general manager because the Coop City Board of Directors refused to provide him indemnification for actions relating to the lawsuit

which challenged appellee's wage and hour policies. JA-462-63. That lawsuit was settled in 2015. JA-463.

In 2015, Ragin reported to Noel Ellison. JA-459. After terminating appellant, Ellison met with Merola and Munns and they put Kraigh Thomas in charge of HR on an interim basis. JA-468-69, 591, ll. 17-21. At that time, Merola knew that Thomas had received the June 9, 2015 email from Mauro regarding the six exempt employees. JA-474. Merola could not recall anyone speaking with Thomas concerning what had occurred with regard to that email and why its content was not disseminated by him or appellant. JA-474-76.

Munns did not converse with Thomas about any efforts to recoup the funds allegedly improperly paid to appellee's employees. JA-592. At the time Thomas was made interim department head of HR, a female employee had fifteen years' experience in that department and Thomas about a year. JA-639, para. 11. After one year and two months, Thomas was replaced by a non-disabled female who sought no reasonable accommodation. JA-555.

When Ragin was terminated, Merola knew she received accommodations for her disability from the employer. JA-458.

Coop City paid a settlement of $6,000,000 in the Ramirez case which claimed that the company violated federal and state wage laws by misclassifying exempt and non-exempt workers. JA-477-78, 496-97. After Mauro produced his initial

classification report on March 31, 2015, Merola began challenging his findings and demanding changes to employee classifications. JA-479-80.

Ellison claimed he became Interim General Manager around July 2015. JA-516. In this position, he had hiring and firing authority. JA-520. Ellison claimed to have no knowledge as to how the Coop City Board of Directors came to settle the Ramirez wage and hour case for six million dollars. He "wasn't involved . . . . I heard stories, but I didn't have any intimate knowledge of it." JA-521. Ellison denied the case settled while he was Interim General Manager. JA-522, ll. 5-7. According to Ellison, the Mauro study was "probably" part of the implementation of the Ramirez settlement. JA-523.

Ellison claimed that Mauro was reporting to Ragin "most of the time." JA-525. Ragin denied that Mauro reported to her. JA-640 ¶ 13. Ellison claims that he stopped dealing with Mauro in August 2015 because he disagreed with how Mauro was classifying certain people. JA-526. Ellison also claims he communicated this disagreement to Ragin and probably to Mauro himself. JA-526-27.

Ellison did not like Mauro's methodology, specifically his interviewing and relying on department heads' representations concerning their staffs' duties and responsibilities. JA-527 ("I told him that I thought the findings and the interviews . . . were flawed and compromised."). Ellison also claimed that he told Mauro that Ragin was exerting too great an influence over his thinking and that department

heads, not Ragin, knew what their subordinates did. JA-528-29. Mauro gave Ellison a list of people who should be given overtime [non-exempt employees]. JA-530. Ellison did not view the list as particularly accurate and conveyed that to Mauro. JA-531. According to Ellison, Mauro did not tell him that he would review those classifications challenged by department heads. JA-532.

Ellison never spoke with Thomas about the June 9, 2015 email from Mauro to him and appellant. JA-533. Thomas never explained to Ellison why he did not share that email with him. Id. Nor did Ellison ever speak with Ragin about the June 9 email or why she did not disseminate it. JA-542. Ellison also did not ask Munns or Merola to speak with appellant about the June 9 email and how she handled it and why. Id.

Ellison told Cleve Taylor that he fired Ragin because she failed to follow-up on information from Mauro and it cost the corporation $90,000. JA-534. Appellant denies that Ellison communicated this dissatisfaction to her but notes that Ellison and Merola sought to override classification decisions Mauro made and that Mauro's recommendations were never deemed final. JA-640 ¶ 14. In fact, months earlier, Ellison claims that the failure to disseminate the June 9 email was *not* the only reason he terminated Ragin. Indeed, he decided that he could not trust Ragin's judgment because, he claimed, after she complained that an the Board secretary or liaison was asking her staff whether they were happy working for her, "she broke into prayer

and prayed that the first born of each of these people who were enemies would be taken by God and at that point I told Peter, this is a little bit too crazy for my liking. We need to move on this." JA-543-44. Ragin denies that any such incident ever occurred. JA-640 ¶ 15.

Though he had nothing to do with granting it, Ellison denied knowing that appellant was disabled but knew she was receiving an accommodation. JA-547-48. Ellison was aware that Ragin was concerned that he was calling executive meetings on the day, Wednesday, when she was not working as a reasonable accommodation. JA-549-50. When appellant complained about this, Ellison told her that her presence was not required or necessary at these meetings. JA-550.

Munns has worked as inside counsel to Coop City for 22 years. JA-597. He knew of no director other than appellant who appellee terminated. Id.

Scott Trivella, the outside counsel who wrote appellant's termination letter, was the same person who handled the reasonable accommodation requests made by Ragin. JA-598, 641 ¶ 16.

Male employees who contravened agency policy with substantial consequences were not disciplined, let alone terminated. JA-641 ¶ 17. In the summer of 2015, Donovan Plumber, Riverbay's Director of Buildings & Grounds, allowed in untrained seasonal employee to operate a lawn mower. Id. This violated agency policy. Id. The young worker severed three fingers as he operated the lawn mower.

Id., JA-540-41. No discipline was imposed upon Plumber, a male. JA-541 ¶ 17. Munns knew of no discipline for Plumber. JA-584-85.

Another non-disabled male manager, Anthony Rasuelo, appellee's Director of Construction, failed to ensure timely completion of critical repairs required by the company's loan with Wells Fargo and was never disciplined. JA-641 ¶ 17. Ragin attended Board meetings at which Board President Cleve Taylor stated that Rasuelo was negligent and had failed to timely complete critical repairs. JA-448. Merola denied any knowledge of issues with the work Rasuelo was required to supervise. JA-481. While recognizing that Rasuelo was responsible for implementing critical repair items required by its Wells Fargo loan, when confronted with appellant's claim that this male manager failed to perform, Munns claims not to know what occurred. JA-578-79. Munns did no review of Rasuelo's conduct. JA-580.

Another non-disabled male director, Edgar Perez, Director of Restoration, authorized payment to a vendor, Atlas, despite the company's failure to do a major painting job. JA-640-41. Another male director, Mark Gordon, ran the Extermination Department at Coop City. After investigation, Ragin concluded that he cursed at an employee, threw objects at an employee, and violated rules and laws governing the disposal of animals found at Coop City. JA-551-54. Merola confirmed there were issues with Gordon but had no idea who investigated them and did not know any details or whether he was disciplined in any manner. JA-481-82.

While appellant recommended Mr. Gordon's termination after concluding her investigation, Ellison did not heed this recommendation. Munns knew that Ragin had investigated Gordon and knew of the HR investigation and its results, but had no knowledge of what had occurred. JA-580-82. Munns knew of no discipline taken against Mr. Gordon. JA-582, ll. 10-12.

## DECISION BELOW

The district court held that appellant made out a *prima facie* case of employment discrimination but that no reasonable jury could conclude that appellee's asserted reason for terminating her was pretextual. More specifically, Judge Roman concluded that appellant was deeply involved in the reclassification review process and bore responsibility to transmit Mauro's June 9, 2015 email to payroll and to insure that it classified employees in a manner consistent with it.

The district court found non-comparable appellant's male and non-disabled comparators, concluding that none served in her unique role. His Honor also found irrelevant the company's replacement of her by her assistant who received the same June 9, 2015 memo as she had and took no action based upon it. The district court also found rather immaterial the appellee's lackluster pursuit of the $96,000 it claimed appellant cost it or the company's failure to even determine, let alone discipline, those responsible for employee misclassifications which caused it to pay more than $6,000,000 to settle a recent wage-hour case.

## SUMMARY OF ARGUMENT

The district court's opinion epitomizes the kind of fact finding that deprives litigants of their day in court. In each and every material regard, the decision draws factual conclusions on issues that a jury must be permitted to resolve. Specifically, a reasonable jury could determine that:

(1) appellant had no responsibility to do anything with the informational email she received on June 9, 2015 from Mauro;

(2) Mauro communicated directly with payroll in these regards;

(3) Mauro's recommendations were not always followed in any event and that Ragin had no reason to believe that those contained in his June 9 email had any more certain status in setting company policy;

(4) no one involved in the process, including Mauro, Munns or Merola, blamed Ragin for the mix-up in paying employees, let alone recommended her termination;

(5) Ellison, the decision-maker, falsely claimed that one or more of these men supported appellant's termination; and

(6) Ellison did not even know about the June 9, 2015 email when he terminated appellant and that Ellison claims that he terminated appellant for other reasons, including a fabricated account of a prior unrelated incident.

While Appellee insists that Ellison acted in a non-discriminatory manner, strong evidence of pretext, as here, defeats a motion for summary judgment and courts have been repeatedly directed to disregard any explanation provided by a Appellee which a jury need not credit. Critically, the court should review the record as a whole and, in doing so, "must disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 151 (2000).

Here, the evidence presented would allow a jury to infer that the stated reason for Appellant's termination is fabricated and that protected class membership motivated such adverse action. Direct evidence is not required to sustain Appellant's case, and her replacement by persons outside the protected class is sufficient, when combined with strong pretext evidence, to defeat such a motion and to sustain a verdict. In addition, the Appellee has terminated no other directors to Munns' memory in twenty-two years and failed even to discipline male directors who engaged in behavior which seriously contravened its policies. Finally, the absence of any effort to assess blame for the losses from wage and hour violations which far, far exceed this one makes non-credible Appellee's explanation of the Appellant's termination.

Rather than allow a jury to weigh the evidence on each of these material and disputed issues, the district court resolved them, inappropriately concluding that

appellant's deposition and consistent Affidavit in opposition to the grant of summary judgment did not count as admissible evidence

## STANDARD OF REVIEW

This court engages in *de novo* review of grants of summary judgment, drawing all factual inferences in favor of the non-moving party. See Paneccasio v. Unisource Worldwide, Inc., 532 F.3d 101, 107 (2d Cir. 2008).

A motion for summary judgment must be granted if the pleadings, discovery materials before the court, and any affidavits show there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Conversely, where a plaintiff comes forward with specific facts showing that there are genuine disputed issues of material facts, summary judgment should be denied. See Shannon v. N.Y.C. Transit Auth., 332 F.3d 95, 99 (2d Cir. 2003).

A fact is material when its determination "might affect the outcome of the suit under the governing laws . . . . Factual disputes that are irrelevant or unnecessary" are immaterial and do not preclude summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Royal Crown Day Care LLC v. Dep't. of Health & Mental Hygiene, 746 F.3d 538, 544 (2d Cir. 2014). A dispute regarding a material fact is genuine if there is sufficient evidence upon which a reasonable jury could

return a verdict for the non-moving party. See McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007).

On a motion for summary judgment, the district court does not resolve disputed issues of fact but assesses whether there are such issues to be tried. See Brod v. Omya, Inc., 6532 F.3d 156, 164 (2d Cir. 2011). The moving party hears the burden of demonstrating the absence of any dispute about any material factual issue. Am. Intl Grp. Inc. v. London Am. Int'l Corp., 664 F.2d 348, 351 (2d Cir. 1981). If it fails, summary judgment cannot be granted because a district court "is not to resolve disputes issues of fact but to assess whether there are any factual issues to be tried." Wilson v. Nw. Mut. Ins. Co., 625 F.3d 54, 60 (2d Cir. 2010).

In resolving motions for summary judgment, this Court settles all ambiguities and draws all permissible inferences for the non-moving party. See Patterson v. County of Oneida, 375 F.3d 206, 219 (2004). If the record contains any evidence from which a reasonable inference can be drawn in support of the opposing party on the issue on which summary judgment is being sought, that relief is improper. See Secs. Ins. Co. of Hartford v. Old Dominion Freight Line Inc., 391 F.3d 77, 83 (2d Cir. 2004).

Gender and disability claims brought under Title VII and the ADA are assessed under the familiar burden-shifting framework set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Jones v.

Yonkers Public Schools, 326 F.Supp.2d 536, 542 (S.D.N.Y. 2004). Under this rubric, the Appellant must first establish a *prima facie* case of discrimination by showing that (1) he is a member of a protected class; (2) qualified for the position; (3) suffered an adverse employment action and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination. See Holcomb v. Iona Coll., 521 F.3d at 130, 138 (2d Cir. 2008). This is a *de minimis* burden. See Id.

A *prima facie* case creates a presumption of discrimination which an appellee may rebut by asserting a legitimate, non-discriminatory reason. See McDonnell Douglas, 411 U.S. at 802. If the appellee meets its burden of production, appellant may still prevail by demonstrating that appellee's asserted reason is merely a pretext for unlawful discrimination and that defendant was actually motivated by discriminatory animus. Id. at 803-04. And, while an appellant may establish pretext by showing that the appellee's asserted reason was false and that the real reason was the appellant's protected-class status, see Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000), he is not required to disprove appellee's proffered reason. See Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 81 (2d Cir. 2001). Rather, to establish a violation of Title VII, that is, gender discrimination, an appellant need only establish that the impermissible consideration was a motivating factor in the appellee's adverse employment decision. See Id. To establish her ADA based

disability claim, appellant must meet the more rigorous "but for" standard this court adopted in Natofsky v. City of New York, 2019 U.S. App. LEXIS 11310, at *18-26 (2d Cir. 2019).

## ARGUMENT

### Point I

**Appellant made out a *prima facie* case of discrimination.**

Appellant is a member of two protected classes [female and disabled], was qualified to and did perform her job duties, was subject to adverse action [termination] and was replaced by a non-disabled male who held her position and carried out her duties for fourteen months. The same male was the recipient of the same email which allegedly caused Appellant's termination and was subjected to no discipline. And the record shows that, at the time, he was as deeply involved in implementing Mauro's recommendations as Appellant. Based on these facts, Appellant made out a *prima facie* case of discrimination, and the district court agreed.

## Point II

**Appellant raised sufficient questions of fact rebutting appellee's stated reason for termination, thus raising a jury issue as to whether appellee violated Title VII and the ADA.**

Appellee asserts that it terminated appellant because she failed to follow a directive from Mauro costing the company $96,000. The district court correctly determined that appellee had adduced a potentially neutral non-discriminatory reason for appellee's termination. But it incorrectly concluded that appellant failed to proffer sufficient evidence to raise a question of fact as to whether appellee's stated reason was pretextual.

"After the defendant has articulated . . . nondiscriminatory reasons, the plaintiff has an opportunity to show that the reason was merely a pretext for discrimination. Pretext may be demonstrated either by the presentation of additional evidence showing that 'the employer's proffered explanation is unworthy of credence . . . or by reliance on the evidence comprising the *prima facie* case, without more." Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 38 (2d Cir. 1994) (quotations & citations omitted). Moreover,

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon

> such rejection, [n]o additional proof of discrimination is required.

Id. (quotations & citations omitted).

Here, whether appellee's explanation, rather than discrimination, motivated the adverse action is subject to substantial doubt, raising a jury question as to pretext. Heyman v. Queens Vill. Comm. for Mental Health for Jamaica Cmty. Adolescent Program, Inc., 198 F.3d 68, 72 (2d Cr. 1999). Indeed, a reasonable jury could conclude here that appellee's asserted non-discriminatory is pretextual based by reaching the following conclusions, which are amply supported by the record.

First, Appellant never received any directive from Mauro. Second, she was never advised to circulate any email like that she received from Mauro to anyone else and reasonably understood that he was directly communicating with legal, payroll and the General Manager. Third, Ellison admits that, before terminating appellant, he never saw the "directive" which she allegedly failed to heed. Fourth, the two people Ellison claims supported his decision, Merola and Munns, denied that they did support the decision or that Ellison even asked for their opinions.

Fifth, at his deposition, Ellison defended appellant's termination by reference to a prior incident, which he claims caused him to lose faith in her judgment and caused him to want to be rid of her. But Ellison's version of this incident is disputed; it never happened, according to appellant. Sixth, appellee replaced appellant with

her assistant, who also received and did not follow the Mauro "directive," to the extent any such directive exists [and it does not].

Seventh, contrary to appellee's claim, its leading executives made very limited effort to recoup the $96,000 it claims to have lost as a result of Ragin's failure to follow Mauro's directive, and a reasonable jury could question whether the appellee cared at all about this matter, as opposed simply to using it as a pretextual basis for terminating appellant.

Finally, within the same year as appellant was fired for allegedly causing this loss, appellee never even investigated who was to blame for a $6,200,000 settlement it was forced to pay because of a series of wage and hour screw-ups. Again, a reasonable jury could wonder how a company could terminate appellant and not take any action even to determine who was to blame for the implementation of policies and practices causing a loss 62 times greater.

Despite each of these bases for rejecting appellee's allegedly neutral explanation for its adverse employment action, the district court concluded that no reasonable jury could reject appellee's allegedly neutral reason for terminating appellant or determine that this reason was false, masking invidious discrimination. But, this violates the most basic summary judgment principles repeatedly endorsed by the Supreme Court of the United States – a jury need not accept a defendant's contested rationale for an adverse action, and a district court necessarily makes

prohibited credibility findings and arrogates the jury's role when it so concludes. While this Court has certainly affirmed grants of summary judgment where an appellant could not raise genuine issues of material fact with regard to such an allegedly neutral, non-discriminatory reason, it has also vacated such grants where the non-moving party has contested the adduced reasons, leaving the determination to a petit jury. This is such an instance.

The record would easily allow a jury to reject appellee's explanation for appellant's termination: it could conclude that Mauro had direct communications with the separate Payroll Department and gave it recommendations on how to classify and pay employees. It could determine that Ragin was not in the middle of that relationship and did not understand that to be her role. It could conclude that Ragin further understood that Mauro's email was not to be treated as decisive or conclusive and did not commit Riverbay to any specific course of action which she was to facilitate, as the district court concluded she failed to do.

Indeed, from March 2015 forward, it could find that Mauro had made recommendations which managers, starting from General Manager Ellison, disputed, and that, until he and other higher level managers endorsed Mauro's proposals, they did not reflect operational directives.

A reasonable jury could also conclude that Riverbay had recently lost more than $6 million dollars due to misclassifications of its workforce and that it failed

even to investigate who was to blame for this and took no disciplinary action against anyone for it. Those potentially responsible included several non-disabled men, including the appellee's in-house attorney and its payroll director. These non-disabled men were, like appellant, directors, not subordinates, and are similarly situated and reasonable comparators. Cf. Mikinberg v. Bemis Co., 555 Fed. App'x. 34, 36 (2d Cir. 2014) (summary order) (rejecting disparate treatment claim where two co-workers to whom plaintiff compared himself were subordinates).

A reasonable jury also could conclude that, in this instance, those involved, including Merola, Munns and Mauro, did not blame Ragin or recommend disciplinary action against her and that Ellison, who fired her, lied when he claimed that Merola and Munns had recommended or supported her termination. A reasonable jury could also conclude that Ellison adduced other reasons for terminating Appellant, including a concocted incident with another co-worker, Cf. Mikinberg, supra, at 36 (noting that decision-maker did not give inconsistent explanations for appellant's termination), that he had never even seen the June 9 email from Mauro when he terminated appellant, that he had never discussed the incident with her and that he invoked this as a justification for her termination to shield his hostility toward her, which had been otherwise manifest when he disregarded her accommodation and scheduled important meetings on the day she

was off from work and expected her to stay at work well in excess of the hours provided by another accommodation.

A reasonable jury could also conclude that, after learning of the loss of $96,000, Riverbay did not aggressively seek repayment of those funds from the workers allegedly over-paid, making suspect its claim that any over-payment even occurred. A jury could determine that those who would be directly involved in seeking to recoup such funds knew little to nothing of any effort to do so, casting further doubt on the feigned concern expressed over this loss.

Finally, a reasonable jury could conclude that numerous non-disabled male directors had committed acts of negligence or worse and had maintained their positions with little, if any, adverse consequence, further causing doubt as to the consistency of the appellee's treatment of appellant.

The district court granted summary judgment by resolving each of these disputed, fact-laden issues in favor of appellee. In doing so, it resolved numerous issues of material fact, depriving appellant of her right to a jury trial. This is simply not permitted.

> On a motion for summary judgment, a court "cannot try issues of fact; it can only determine whether there are issues to be tried." Donahue v. Windsor Locks, 43 F.3d 37, Board of Fire Commissioners, 834 F.2d at 58 (internal quotes omitted); see also Gallo v. Prudential Residential Services Limited Partnership, 22 F.3d 1219, 1224 (2d Cir. 1994). If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source

> from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper. See, e.g., Brady v. Town of Colchester, 863 F.2d 205, 211 (2d Cir.1988)."

Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 36-37 (2d Cir. 1994).

We next highlight some of that impermissible fact-finding, assigning error to the material factual conclusions the district court should not have entered.

First, in its formulation of the facts, the district court ignored appellant's version of events: it apparently did so because it viewed her version as "unsupported by an admissible evidence." SA-5, n. 3. Of course, a plaintiff can raise issues on a Rule 56 motion by relying upon her own deposition testimony or an Affidavit which takes issue with movant's version of events. See Gallo v. Prudential Residential Servs. Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994) ("Affidavits and depositions must be carefully scrutinized for circumstantial proof which, if belied, would show discrimination."); Chambers v. TRM Copy Centers, Corp., 43 F.3d 29 (2d Cir. 1994) ("The inferences to be drawn from the underlying facts revealed in materials such as affidavits, exhibits, interrogatory answers, and depositions must be viewed in the light most favorable to the party opposing the motion. See, e.g., United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curium); Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 465(2d Cir. 1989).

And, where, as here, the non-movant does introduce sworn testimony disputing central allegedly undisputed facts movant relies upon in seeking summary

judgment, the adjudicating district court must reject any conclusion which a reasonable jury would not be required to draw from the evidence. Reeves, supra.

More specifically, here appellant explained that she had never been assigned the role of "go-between" by Mauro and Duchnowski, Munns, Merola or Ellison. Indeed, she was not present at critical meetings where these men discussed how to classify employees. She affirmed further that Munns communicated his recommendations directly to these men and that she was never tasked with communicating his proposals to any of them. JA-637-38.

If believed, this testimony raises a disputed issue of material fact as to what, if anything, Ragin should have done with the June 9 email Mauro sent to her and Thomas. Ragin has affirmed that she understood that Mauro was to make his recommendations to Ellison, who never provided any response [to her knowledge] to Mauro's June 9 recommendations. JA-638 ¶ 6. Having received no affirmation that Riverbay accepted these recommendations, Ragin was under no obligation to implement them and instead reasonably treated the six employees as they had always been classified.

The district court notes that Ragin acknowledged "she took no action in responses to Mauro's recommended re-categorization of several Riverbay employees," SA-13, but never deals with her explanation for *why* she took no action. On the other hand, a reasonable jury could accept that appellant was not required to

do anything with the information Mauro supplied in that she reasonably understood that Mauro was communicating with Ellison, Merola, Munns and Duchnowki and that they would provide marching orders to Payroll. Again, if it believed Ragin, a reasonable jury could question why Thomas did nothing with the same email and whether his inaction corroborates Ragin's testimony that her office was not a liaison between Mauro and others at Riverbay.

But the district court resolved this issue, claiming that appellee had established that Ragin engaged in conduct worthy of termination when she failed to pass the information in the June 9 email to others and issued memoranda later in June which contravened its content. SA-14. This was improper because, based upon the admissible evidence in the record, a reasonable jury could categorically reject these conclusions and accept Ragin's version of her responsibilities.

Second, the district court found that Ragin "allowed memos in her name to be distributed which contained back-pay checks for the six employees Mauro had told her were properly classified as exempt and therefore not entitled to back pay." Likewise, the district court concluded that "a basic awareness of the email's contents would have alerted [appellant] to the mistakes in the check memoranda and her subsequent internal emails to Riverbay department heads." SA-14. Again, these conclusions reflect rampant and impermissible fact-finding.

Appellant sent four emails on June 30, 2015 internalizing the longstanding classifications of the six employees and copied Mauro with each. Before doing do, Ragin received no direction from her superior, namely Ellison, that he had accepted Mauro's proposed reclassifications of the six employees at issue. A reasonable juror could accept appellant's contention that, absent such approval, Mauro's recommendations were *not to be implemented.* And, in late June, when Ragin copied Mauro with her four emails reflecting classifications contrary to those suggested by his June 9 recommendation, he never responded and advised Ragin that she was contravening accepted re-classifications. Quite the contrary – he did not respond at all. JA-638 ¶ 8.

Again, in this light, a reasonable jury could reach conclusions polar to the district court's, concluding that Ragin had done nothing wrong by failing to implement non-binding recommendations by an outside consultant, whose prior proposals had been rejected by Ellison and other directors. JA-638 ¶ 8.

The district court's decision also assumes, as against appellant's evidence, that [a] Mauro was a Riverbay decision-maker and [b] his recommendations as conveyed in an email to Ragin and Thomas were final and to be implemented. But the record provides no support for either prong of this proposition. Mauro was not a final decision-maker and his recommendations did not control or dictate Riverbay's classification decisions. Indeed, the district court's own recounting

recognizes that the directors had taken issue with, and failed to accept, Mauro's prior recommendations. SA-4.

Nor is there any evidence that Mauro communicated binding proposals to Ragin who then was tasked with conveying these to payroll and insuring their implementation. To the contrary, she attested to a different pathway for decisions – from Mauro to Ellison, Merola and Munns and then to payroll, run outside of her department by Duchnowski. JA-637-38.

Third, the district court accepted appellee's claims that, because Mauro told Munns that he had conveyed his recommendations regarding six employees to Ragin in early June, this imposed some responsibility upon appellant to transmit this information to others. But Ragin disputed this and explained that this was not her role, either assigned or accepted. That others may have presented a different understanding of Ragin's role is not dispositive [as the district court suggests at SA-14]; it merely demonstrates that there are two sides to this story, requiring resolution by a fact-finder.

In short, the fulcrum of the district court's decision granting summary judgment represents faulty fact-finding, which a reasonable jury could reject. The notion that plaintiff was somehow involved in the "reclassification project" and that this means she erred in failing to transmit Mauro's recommendations to payroll is a *non sequitur* which this Court should reject on *de novo* review. That appellant

attended meetings and provided Mauro information does not mean that her account of the actual decision-making process with respect to re-classifications is false, implausible or could not be credited by a factfinder. Cf. SA-15. Instead, the district court's rather shocking rejection of her description of her argument as based on "semantics and technicalities" is a poor disguise for prohibited and blatant fact-finding.

The district court's analysis of pretext fares no better. Appellant submitted below that the defendant's testimony concerning her termination was substantially and fundamentally false, masking discriminatory intent.

First, contrary to his deposition testimony, a reasonable jury could conclude that, Ellison terminated appellant without any such recommendation from Munns or Merola and that neither supported her termination. And, second, contrary to appellee's assertions below, Ellison claimed that he terminated plaintiff because she showed poor judgment in an exchange with one of his other subordinates, an incident appellant denies ever occurred. JA-640 ¶ 15.

The district court brushed aside these issues, first finding that "whether Ellison actually sought Merola or Munns' approval does not cast doubt on Ellison's status basis for that decision." SA-16. This is a highly dubious conclusion. First, no one argued that Ellison sought his subordinate's "approval" for his action. Second, the issue is whether Ellison can be believed or not. Relevant to that issue is whether

he received recommendations from subordinates who worked closely with Ragin and supported, as he claimed, his decision to terminate her. A reasonable jury could reason that a decision-maker who supports his decision to terminate by invoking the recommendations of subordinates, who in fact made no such suggestions, is not credible. The same jury could more easily disregard that decision-maker's testimony as to why he claims to have acted to begin with. This is precisely such a situation and the district court cannot blithely decide to attach no weight to the contradictions between Ellison's account of the process leading up to the adverse action and that testified to be Merola and Munns.

Likewise, the district court's treatment of Ellison's invocation of an entirely different basis for terminating plaintiff than that argued by Riverbay is astonishing and disregards settled law in this Circuit. See Chambers, supra, at 40-41. Simply stated, when a defendant invokes shifting explanations for an adverse action, this may be a telltale sign of discrimination. That principle does not depend, as the district court here claimed, on whether each reason might independently be adjudged as neutral or non-discriminatory. The issue is whether a decision-maker knows what s/he is talking about or is simply making reasons up, a conclusion more easily reached through the invocation of such shifting explanations.

Apart from showing that [a] Ellison lied when he claimed that subordinates recommended that he terminated plaintiff and [b] invoked different explanations in

justifying that action, appellant also demonstrated other significant grounds for concluding that appellee's claim that it terminated her because it lost the company $96,000 is pretextual, unworthy of belief and masks invidious discrimination.

First, appellant showed below that the company made meager, if any, efforts to recoup the allegedly overpaid funds. In response, the district court concluded that the parties do not dispute "the actual steps that were taken to recoup the funds." This is inaccurate – appellant contends that, other than directing her and Munns to meet with the six employees, appellee took no known steps to re-coup the funds, reflecting its relative indifference to their return and re-enforcing the pretextual nature of its reliance on this business loss in justifying appellant's termination.

The district court points to no other action Riverbay took to recoup the funds, citing only that it "solicited and received guidance from Mauro on the proper method to recoup the money." Of course, this is not evidence of any action by Riverbay to recoup the funds and the record is bereft of any and rather indicates that the company took no action. Indeed, at his deposition, Mauro testified that he knew of no efforts to collect alleged over-payments made to the six employees. Ellison did not know how much money appellee recouped. No one ever reported to Ellison the sum recouped and he did not ask anyone. Ellison does not know how many of the six improperly paid people returned the monies they were paid. Munns did not how many of the improperly paid employees paid appellee back the monies they received.

Munns never made any inquiry concerning how much of the money was returned, and through in-house counsel, made no effort to recoup the funds. Indeed, he was unaware of any effort appellee made to recoup the funds.

Taken together, this testimony could lead a reasonable jury to conclude that the issue was of no great moment to appellee and was simply used as a vehicle to terminate plaintiff.

Appellant further claims that, in 2014-15, Riverbay lost $6.2 million when it was required to settle a wage and hour case. It disciplined no one for this. Indeed, the record shows that senior managers conducted no investigation as to how this occurred and who bore responsibility. Appellant submits that a reasonable jury, apprised of these events, could easily conclude that Ellison, who was then co-General Manager, acted inconsistently when he terminated appellant for a much smaller loss and did nothing to ascribe blame to those responsible for the much more radical loss.

The district court concluded that "Plaintiff's suggestion that the failure to investigate and discipline whoever was responsible for the misclassification of the employees who brought the lawsuit indicates that Riverbay was unconcerned about the sum does not necessarily follow" and that showing that the company was unconcerned about the huge loss but fired her for a loss 62 times less "would not

create a basis for a finding that her termination was pretext for discrimination." SA-19.

The district court's reasoning is weak and misinterprets the critical issues: a reasonable jury could well conclude [if not "necessarily"] that a company engages in discrimination when it terminates a disabled woman for losing $96,000 due to her facilitation of payments to misclassified workers and does nothing to the able white males responsible for losing the company far more money. And, that same jury could deem defendant's failure to explain its disparate treatment of these two events as evidence of discrimination.

Finally, the district court's treatment of other comparator evidence suffers from the same analytic deficiencies: the district court acknowledges that disparate treatment may be used to establish pretext. See Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000). It also acknowledges that, in defining proper comparators, a court is to identify persons subject to the same performance evaluation and discipline standards. See Ruiz v. County of Rockland, 609 F.3d 486. 493-94 (2d Cir. 2010). Finally, the district court draws a reasonable inference that all Riverbay directors are judged by the same performance standards. However, the district court then holds that no reasonable juror could view the absence of any discipline against as evidence of pretext and unlawful discrimination because

appellant failed to specify the sum of money lost to Riverbay by dint of their misconduct.

This conclusion is baseless: as director of HR, Ragin had and presented information concerning four male employees who engaged in serious misconduct with *no adverse consequence*: one allowed an untrained employee to operate a machine, violating company policy. This resulted in the young man's severing three fingers. A second able male failed to ensure timely completion of critical facility repairs required by the company's loan with Wells Fargo imperiling the loan. A third authorized payment to a vendor who failed to perform a major painting job and a fourth cursed and threw objects at an employee and violated rules regarding the proper disposal of dead animals. Though Ragin recommended his termination, Ellison failed to act. JA-641-42.

In short, appellee never contested the evidence of disparate treatment, failing to show that the company investigated or took any action to discipline those responsible for the loss of $6.2 million or against those able, male managers responsible for other major violations Ragin cited

## CONCLUSION

Appellant introduced admissible evidence, which demonstrated that the sole reason Riverbay relies upon as a neutral non-discriminatory reason for her termination was false. A reasonable juror could so conclude and reason that appellee

disparately treated plaintiff, a disabled woman, when compared with how it treated able males who violated company policies with very serious effects. Accordingly, the district court's grant of summary judgment is due to be reversed and vacated and the case remanded for a plenary trial before a petit jury.

Dated: Goshen, New York
October 23, 2020

Respectfully submitted,

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## CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,656 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in Time New Roman 14-point type for text and footnotes.

Dated: Goshen, New York
October 23, 2020

MICHAEL H. SUSSMAN

# SPECIAL APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COLETTE D. RAGIN,

Plaintiff,

-against-

RIVERBAY CORPORATION,

Defendant.

No. 17-cv-3832 (NSR)

OPINION & ORDER

NELSON S. ROMÁN, United States District Judge:

Plaintiff Colette D. Ragin brings this action against her former employer, Defendant Riverbay Corporation ("Riverbay"), alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq., the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the New York State Human Rights Law ("NYSHRL"), New York Executive Law § 290, *et seq.* (ECF No. 1.) Plaintiff alleges that Defendant unlawfully terminated her on the basis of her gender and disability.[1]

Presently before the Court is Defendant's motion for summary judgment dismissing the Complaint in its entirety pursuant to Federal Rule of Civil Procedure 56. (ECF No. 30.) For the reasons that follow, Defendant's motion is GRANTED, and the case is dismissed.

**BACKGROUND**

The following facts are derived from the parties' respective Local Rule 56.1 statements and a review of the record, and are uncontested except where otherwise indicated.

Riverbay, commonly known as "Coop City," is a residential cooperative located in the

[1] Plaintiff alleges other instances of discrimination in the Complaint, including with respect to prior requests for reasonable accommodations and a purported demotion. However, Plaintiff is clear that her claims are premised only on her termination in 2015. (*See* Compl. (ECF No.1) ¶¶ 69–72.)

Bronx, New York. (Def.'s Local Rule 56.1 Statement ("Def. 56.1") (ECF No. 32) ¶ 1; Pl.'s Response to Def. 56.1 ("Pl. 56.1 Resp.") (ECF No. 38) ¶ 1.) In September 2008, Riverbay hired Plaintiff as its Director of Human Resources. (Def. 56.1 ¶ 2; Pl. 56.1 Resp. ¶ 2.) At the time of Plaintiff's hire, Marion Scott Real Estate, Inc. ("MSRE") served as managing agent for Riverbay. (Def. 56.1 ¶ 3; Pl. 56.1 Resp. ¶ 3.) From the time of her hire through November 2014, Plaintiff reported to a female assistant general manager named Gail Badger, who was an MSRE employee. (Def. 56.1 ¶ 4; Pl. 56.1 Resp. ¶ 4.) In 2009, Plaintiff asked Badger if Plaintiff could be allowed a flexible, four-day workweek as an accommodation to help her manage complications from multiple sclerosis. (Def. 56.1 ¶ 5; Pl. 56.1 Resp. ¶ 5.) While Riverbay, through Badger and MSRE, initially refused, Plaintiff was ultimately granted this accommodation after her counsel "threaten[ed] [Riverbay] with legal action." (Def. 56.1 ¶ 6; Pl. 56.1 Resp. ¶ 6.) In 2012, Plaintiff requested the additional accommodation of being allowed to arrive at work at 10:30 a.m. rather than 9:30 a.m. (Def. 56.1 ¶ 7; Pl. 56.1 Resp. ¶ 7.) MSRE granted Plaintiff's request. (Def. 56.1 ¶ 8; Pl. 56.1 Resp. ¶ 8.) Each of these accommodations continued for the duration of Plaintiff's employment. (Def. 56.1 ¶ 9; Pl. 56.1 Resp. ¶ 9.)

In August 2012, MSRE principal Herb Freeman, with MSRE employees Vernon Cooper and Badger, decided to merge the Riverbay positions of Director of Human Resources and Director of Risk Management. (Def. 56.1 ¶ 10; Pl. 56.1 Resp. ¶ 10.) The newly merged position was assigned to Ron Caesar, Riverbay's then-Director of Risk Management, and Plaintiff was reassigned to the position of Director of Organizational Development and Training. (Def. 56.1 ¶¶ 11–12; Pl. 56.1 Resp. ¶¶ 11–12.) The reassignment did not affect Plaintiff's salary. (Def.

56.1 ¶ 13.)[2]

On November 4, 2012, Plaintiff filed a Charge with the U.S. Equal Employment Opportunity Commission ("EEOC") naming Riverbay as Respondent, although her allegations were against Freedman, Cooper, and Badger of MSRE. (Def. 56.1 ¶ 14; Pl. 56.1 Resp. ¶ 14.) In her Charge, Plaintiff complained that she was being subject to a litany of adverse employment actions by MSRE on the basis of her gender and disability in violation of Title VII and the ADA. (Def. 56.1 ¶ 15; Pl. 56.1 Resp. ¶ 15.) On June 26, 2014, the EEOC issued a Dismissal and Notice of Rights informing Plaintiff that she had 90 days to file a lawsuit based on the violations alleged in her Charge. (Def. 56.1 ¶¶ 16–17; Pl. 56.1 Resp. ¶¶ 16–17.) Plaintiff did not do so. (Def. 56.1 ¶ 18; Pl. 56.1 Resp. ¶ 18.) Plaintiff has testified that MSRE's Freedman, Cooper, and Badger were the cause of the difficulties she encountered during her employment with Riverbay during the period when MSRE served as managing agent. (Def. 56.1 ¶ 25; Pl. 56.1 Resp. ¶ 25.)

In June 2014, Riverbay elected a new Board of Directors and appointed Cleve Taylor as new Board President. (Def. 56.1 ¶ 19; Pl. 56.1 Resp. ¶ 19.) In August 2014, Plaintiff was reassigned to the position of Director of Human Resources with a $31,000 salary increase. (Def. 56.1 ¶¶ 20–21; Pl. 56.1 Resp. ¶¶ 20–21.) Plaintiff believes that MSRE reassigned her and increased her salary at President Taylor's urging. (Def. 56.1 ¶ 22; Pl. 56.1 Resp. ¶ 22.) In addition, at President Taylor's request, Riverbay appointed Plaintiff, along with two other Riverbay Directors, Noel Ellison and Peter Merola, as "Knowledge Assistants" tasked with tracking MSRE and learning as much as possible about MSRE's operations. (Def. 56.1 ¶ 23; Pl. 56.1 Resp. ¶ 23.) In November 2014, at President Taylor's urging, Riverbay's Board of

[2] Plaintiff insists that the reassignment affected her status because she was "isolated in a newly created position with nebulous job functions." (Pl. 56.1 Resp. ¶¶ 12–13; Affidavit of Collette D. Ragin ("Ragin Aff.") (ECF No. 39) ¶ 20.) However, there is no dispute that Plaintiff's salary and title level remained the same.

Directors voted to expel MSRE as managing agent and appoint Ellison and Merola as interim co-general managers of Riverbay. (Def. 56.1 ¶ 27; Pl. 56.1 Resp. ¶ 27.) At that point, Ellison became Plaintiff's direct supervisor. (Def. 56.1 ¶ 28; Pl. 56.1 Resp. ¶ 28.)

In December 2014, Riverbay retained Michael Mauro, Esq., from the law firm Smith, Buss, & Jacobs LLP, to serve as outside counsel for the purpose of conducting an audit of certain employee positions that Riverbay had been treating as exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL"). (Def. 56.1 ¶ 29; Pl. 56.1 Resp. ¶ 29.) The audit was commenced after Riverbay was sued in a class-action wage and hour lawsuit brought by current and former Riverbay employees seeking damages for, *inter alia*, unpaid overtime. (Def. 56.1 ¶ 30; Pl. 56.1 Counter-Statement ("Pl. 56.1") (ECF No. 38) ¶ 2.) Plaintiff assisted Mauro during the audit process. (Def. 56.1 ¶ 31; Pl. 56.1 Resp. ¶ 31.) Specifically, she (1) prepared a spreadsheet containing information regarding all Riverbay employees treated as exempt, (2) scheduled and participated in Mauro's interviews of Riverbay's various department heads so that he could obtain information about the exempt positions in each department, and (3) provided Mauro with follow-up and clarifying information regarding the various positions that he was examining. (Def. 56.1 ¶ 32; Pl. 56.1 Resp. ¶ 31.)

In May 2015, Mauro presented an initial assessment of the positions at issue and recommended that Riverbay reclassify certain positions as "non-exempt" and pay back-pay estimated to be owed to the misclassified workers over the previous six years. (Def. 56.1 ¶ 34; Pl. 56.1 Resp. ¶ 34.) After being questioned by Riverbay's directors and leadership, Mauro agreed to reevaluate a number of the employees he had initially recommended to be reclassified as nonexempt. (Def. 56.1 ¶ 35; Pl. 56.1 Resp. ¶ 35.)

On June 9, 2015, Mauro sent an email (the "June 9th email") to Plaintiff and her

assistant, Kreigh Thomas, in which he advised them that he was changing his recommendation for six employees who he now felt were properly classified as exempt. (Def. 56.1 ¶ 36; Pl. 56.1 Resp. ¶ 36.) Plaintiff never acted on this email and did not pass the email along to anyone else to act on. (Def. 56.1 ¶ 37; Pl. 56.1 Resp. ¶ 37; Pl. 56.1 ¶ 21.) On June 25, 2015, Plaintiff allowed memos in her name to be distributed which contained back-pay checks for the six employees Mauro had told her were properly classified as exempt and therefore not entitled to back-pay.[3] (Def. 56.1 ¶ 38.) The improperly issued checks totaled $96,483. (Def. 56.1 ¶ 39; Pl. 56.1 Resp. ¶ 39.) Subsequently, on June 30, 2015, Plaintiff sent out emails to all of Riverbay's Department heads notifying them of which of their employees were being reclassified as non-exempt and instructing them on certain protocol for how to treat these newly non-exempt employees. (Def. 56.1 ¶ 40; Pl. 56.1 Resp. ¶ 40.) The emails identified all six of the employees in Mauro's email as non-exempt. (Def. 56.1 ¶ 41; Pl. 56.1 Resp. ¶ 41.)

In late July 2015, some directors began inquiring as to why certain employees who they believed were properly classified as exempt were still being classified as non-exempt. (Def. 56.1 ¶ 42; Pl. 56.1 Resp. ¶ 42.) Riverbay's in-house counsel, Michael Munns, followed up with Mauro. Mauro told him that he had informed Plaintiff in early June that six of the employees in question were properly classified as exempt. (Def. 56.1 ¶ 43; Pl. 56.1 Resp. ¶ 43.) Mauro forwarded the June 9th email to Munns. (Def. 56.1 ¶ 44; Pl. 56.1 Resp. ¶ 44.) Realizing that it had paid nearly $100,000 out erroneously, Riverbay made efforts to recoup the funds. (Def. 56.1 ¶ 45.)[4] Over the next few weeks, Plaintiff and Munns met with all six of the misclassified

[3] Plaintiff denies, without citing to any admissible evidence, that she "helped draft the memo." (Pl. 56.1 Resp. ¶ 38.)

[4] The parties dispute the quality of the attempts made to recoup the funds. Specifically, Plaintiff characterizes Riverbay's efforts as "meager," emphasizing the fact that other Riverbay directors including Merola did not know any details about them. (Pl. 56.1 ¶¶ 106–16.) However, the parties do not dispute the actual steps that were taken to recoup the funds, or that Riverbay was only partially successful in doing so.

employees, explained the error, and asked them to repay the money they had been erroneously paid. (Def. 56.1 ¶ 46; Pl. 56.1 Resp. ¶ 46.) A number of employees refused to comply with Plaintiff's request. (*Id.*)

On August 27, 2015, Ellison notified Plaintiff that her employment was being terminated as a result of her failure to follow written directives from Mauro regarding the classification of six Riverbay employees, which resulted in those employees being issued back-pay checks in the aggregate amount of $96,483. (Affirmation of Joseph A. Saccomano, Jr. ("Saccomano Aff.") (ECF No. 33) Ex. 11 ("Termination Letter").) It was Ellison who made the decision to terminate Plaintiff. (Def. 56.1 ¶ 48; Pl. 56.1 Resp. ¶ 48.) Ellison appointed Plaintiff's assistant, Kreigh Thomas, to fill Plaintiff's role on an unofficial basis while Ellison searched for Plaintiff's replacement. (Def. 56.1 ¶ 51; Pl. 56.1 Resp. ¶ 51.) Thomas is male and non-disabled. Although Thomas had also received the June 9th email, Ellison testified that he did not fault Thomas because Plaintiff was Thomas' boss and was tasked with leading the Human Resources Department's role in the reclassification project, so it was Plaintiff's responsibility to make sure Mauro's advice was acted upon. (Def. 56.1 ¶ 50; Pl. 56.1 Resp. ¶ 50.) Ultimately, Ellison replaced Plaintiff with Inelle Cooper, a non-disabled woman, as Director of Human Resources. (Def. 56.1 ¶ 53; Pl. 56.1 Resp. ¶ 53.)

Plaintiff subsequently filed a Charge with the EEOC alleging sex and disability discrimination against Riverbay arising from her termination. (Compl. (ECF No. 1) Ex. A.) On or about February 27, 2017, the EEOC issued a Notice of Right to Sue to Plaintiff. (*Id.* Ex. B.) This action ensued.

## LEGAL STANDARD

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *accord Benn v. Kissane*, 510 F. App'x 34, 36 (2d Cir. 2013).

A court should grant summary judgment when a party who bears the burden of proof at trial "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). " In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323 (internal quotation marks omitted).

In deciding a motion for summary judgment, the Court must "construe[] the evidence in the light most favorable to the non-moving party and draw[ ] all reasonable inferences in its favor." *Fincher v. Depository Tr. & Clearing Corp.*, 604 F.3d 712, 720 (2d Cir. 2010) (internal quotation marks omitted). However, the nonmoving party "may not rely on conclusory allegations or unsubstantiated speculation." *FDIC v. Great Am. Ins. Co.*, 607 F.3d 288, 292 (2d Cir. 2010) (internal citation and quotation marks omitted). Further, "[s]tatements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment." *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 452 (2d Cir. 1999); *see Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir.2008) ("Even in the discrimination context ... a plaintiff must provide more than conclusory allegations to resist a motion for summary judgment.").

## DISCUSSION

Riverbay states that it is entitled to summary judgment dismissing Plaintiff's sex discrimination claims under Title VII and the NYSHRL, as well as Plaintiff's disability discrimination claims under the ADA and the NYSHRL. For the following reasons, the Court agrees.

### I. Title VII Sex Discrimination Claim

Title VII provides that an employer cannot discriminate against "any individual" based on that individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). To establish a *prima facie* case of discrimination under Title VII, a plaintiff must prove that (1) she is a member of a protected class; (2) she is qualified for the position held; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Stratton v. Department for the Aging for City of New York*, 132 F.3d 869, 878 (2d Cir. 1997) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). To establish an inference of discrimination, a plaintiff must prove that an adverse employment action was taken against her "because of discriminatory animus on the part of [her] employer." *See Belfi v. Prendergast*, 191 F.3d 129, 139 (2d Cir. 1999). For Title VII discrimination claims based on disparate treatment, a plaintiff must also show that "she was similarly situated in all material respects to the individuals with whom she seeks to compare herself." *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000) ("When considering whether a plaintiff has raised an inference of discrimination by showing that she was subjected to disparate treatment, we have said that the plaintiff must show she was 'similarly situated in all material respects 'to the individuals with whom she seeks to compare herself.")

On a motion for summary judgment in a case wherein a plaintiff asserts that the

employer's decision was a pretext for discrimination, the plaintiff's discrimination claim is subject to the *McDonnell Douglas* burden-shifting standard. *Ya-Chen Chen v. City Univ. of New York*, 805 F.3d 59, 70 (2d Cir. 2015). Under this framework, a plaintiff bears the initial burden of demonstrating her *prima facie* case. *Cortes v. MTA New York Transit*, 802 F.3d 226, 231 (2d Cir. 2015). " The burden of proof that must be met to permit an employment-discrimination plaintiff to survive a summary judgment motion at the *prima facie* stage is *de minim[i]s.*" *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) (internal quotation marks omitted). Once a plaintiff demonstrates a *prima facie* case, a "presumption arises that the employer unlawfully discriminated." *Roge v. NYP Holdings, Inc.*, 257 F.3d 164, 168 (2d Cir. 2001). The burden then "shifts to the employer to give a legitimate, non-discriminatory reason for its actions." *McDonnell Douglas Corp.*, 411 U.S. at 802. If the employer articulates a non-discriminatory reason for its actions, the presumption of discrimination is rebutted and it "simply drops out of the picture." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510–11 (1993).

The "final and ultimate burden" then returns to the plaintiff to demonstrate that "defendant's reason is in fact pretext for unlawful discrimination." *See Cortes*, 802 F.3d at 231. The plaintiff must "produce not simply some evidence, but sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the defendant were false, and that more likely than not the discrimination was the real reason for the employment action." *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000) (internal quotation marks omitted) (citation omitted). Alternatively, a plaintiff may meet its final burden by relying on direct or indirect evidence demonstrating that'" an impermissible reason was a 'motivating factor, 'without proving that the employer's proffered explanation' played no role in its conduct."

*Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 81 (2d Cir. 2001) (quoting *Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 120 (2d Cir.1997)). "In short, the question becomes whether the evidence, taken as a whole, supports a sufficient rational inference of discrimination." *Weinstock*, 224 F.3d at 42.

Riverbay does not dispute that Plaintiff, a woman, is a member of a protected class under Title VII and was qualified for her position. Nor does Riverbay contest that Plaintiff suffered an adverse employment action when she was terminated on August 27, 2015. However, Riverbay contends that Plaintiff has not presented evidence sufficient to satisfy the fourth prong of her *prima facie* sex discrimination claim. Further, Riverbay states that even if Plaintiff has proven her *prima facie* case, Riverbay has supplied a legitimate, non-discriminatory reason for her termination, and Plaintiff has not demonstrated that the proposed reason is pretext for discrimination. Accordingly, this Court considers whether a genuine issue of material fact exists with respect to whether the circumstances surrounding Plaintiff's termination give rise to an inference of discrimination, and whether the parties have met their respective burdens at the second and third stage of the *McDonnell Douglas* analysis.

**a. Inference of Discrimination**

In her memorandum in opposition to Riverbay's motion, Plaintiff supports her *prima facie* sex discrimination claim with a single fact: she was terminated for her failure to act on an email and subsequently replaced by her male assistant, who had received the same email and also failed to act on it. (Pl.'s Mem. in Opp. to Def.'s Mot. to Dismiss ("Pl. Opp.") (ECF No. 37) at 7.) Each of these employment decisions was made by Ellison, an interim co-general manager of Riverbay. (Saccomano Aff. Ex. 5 ("Ellison Dep.") at 51, 92–94; Termination Letter; Affirmation of Michael Sussman ("Sussman Aff.") (ECF No. 38) Ex. 11 ("Merola Dep.") at 46.)

Admittedly, Plaintiff's assistant was not formally given Plaintiff's title; Ellison hired a permanent replacement, who was a woman, fourteen months later. (*Id.* at 92–96; Sussman Aff. Ex. 16 ("Munns Dep.") at 173.)

It is well-settled that "the mere fact that a plaintiff was replaced by someone outside the protected class will suffice for the required inference of discrimination at the *prima facie* stage of the Title VII analysis." *Zimmermann v. Assocs. First Capital Corp.*, 251 F.3d 376, 381 (2d Cir. 2001); *see Benedith v. Malverne Union Free Sch. Dist.*, 38 F. Supp. 3d 286, 318 (E.D.N.Y. 2014); *Dabney v. Christmas Tree Shops*, 958 F. Supp. 2d 439, 451 (S.D.N.Y. 2013); *Thomas v. iStar Fin., Inc.*, 438 F. Supp. 2d 348, 359 (S.D.N.Y. 2006). This comports with the general rule in this Circuit that discrimination can be inferred from evidence that the decision-maker showed a "preference for a person not of the protected class." *James v. New York Racing Ass'n*, 233 F.3d 149, 154 (2d Cir. 2000).

Riverbay attempts to distinguish the facts of this case by emphasizing that Plaintiff was eventually replaced by a woman and down-playing the role of Plaintiff's assistant in carrying out Plaintiff's former duties. Riverbay opines that Kreigh Thomas "did not replace Plaintiff" because he did not have an "interim" title and "was not a candidate to be the Director of Human Resources." (Def.'s Mem. in Further Support of Mot. to Dismiss ("Def. Reply") (ECF No. 34) at 5.) Instead, Thomas "fill[ed] the role of liaison between the Human Resources Department and Mr. Ellison" while Ellison searched for Plaintiff's successor. (*Id.*; Ellison Dep. at 92.)

For purposes of Plaintiff's limited burden on this motion, this distinction is of little importance. Thomas covered the responsibilities of Plaintiff's position in some capacity for over a year before the position was formally offered to a woman. (*See* Munns Dep. at 173 (agreeing the Thomas was "acting director" for the period until Cooper was hired).) In fact, Ellison

testified that Thomas was chosen precisely because of his familiarity with Plaintiff's work. (Ellison Dep. at 94.) Thus, Plaintiff has demonstrated that she was constructively replaced, albeit temporarily, by a man.

The fact that Plaintiff's position was permanently filled by a woman approximately one year after her termination does mitigate the strength of any inference of discrimination that might be drawn from the fact that Plaintiff was temporarily replaced by a man. Nonetheless, for purposes of this motion, Plaintiff has met her *de minimis* burden of establishing an inference of discrimination in the circumstances surrounding her discharge. *See Francis v. Elmsford Sch. Dist.*, 263 F. App'x 175, 177 (2d Cir. 2008) (plaintiff's temporary replacement by a younger employee supported an inference of discrimination on the basis of age); *Morris v. Charter One Bank, F.S.B.*, 275 F. Supp. 2d 249, 256 (N.D.N.Y. 2003) (same).

**b. Legitimate, Non-Discriminatory Reason for Termination**

Once the plaintiff has presented a prima facie case of discrimination, the defendant has the burden of producing "reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." *Chambers*, 43 F.3d at 38 (emphasis in original). " The employer need not *persuade* the court that it was motivated by the reason it provides; rather, it must simply articulate an explanation that, if true, would connote lawful behavior." *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 52 (2d Cir. 1998) (emphasis in original).

Riverbay has met its burden. Specifically, Riverbay asserts that Plaintiff was terminated for failing to act on Mauro's June 9th email and thereby facilitating the erroneous payment of almost $100,000 to Riverbay employees properly classified as exempt. (*See* Termination Letter.)

The burden therefore shifts back to Plaintiff to offer evidence that Riverbay's proffered reason was merely a pretext for unlawful discrimination.

**c. Pretext**

Plaintiff does not dispute that she received the June 9th email and took no action in response to Mauro's recommended re-categorization of several Riverbay employees. (*See* Ragin Aff. ¶ 6; Saccomano Aff. Ex. 3 ("Ragin Dep.") at 139–42.) Nor does Plaintiff deny that check memoranda dated June 25, 2015, providing back-pay to all of those employees were distributed in her name shortly thereafter. (*See* Sussman Aff. Ex. 3 (email from Thomas to Mauro, copying Plaintiff, including memo template in Plaintiff's name); Ragin Dep. at 145 (blaming Thomas for preparing and sending out the memoranda and insisting Plaintiff "didn't know anything about it").) Plaintiff also concedes that she sent a series of internal emails to Riverbay Department heads telling them that those employees should be classified as non-exempt going forward. (Ragin Aff. ¶ 8; Saccomano Aff. Ex. 12.) Since she is unable to directly challenge the truth of the events preceding her discharge, Plaintiff raises a series of arguments seeking to disclaim responsibility for those events, minimize the consequences of her omissions, and insinuate that she was treated more harshly than her male colleagues for allegedly comparable behavior. The Court considers each of these arguments in turn.

First, Plaintiff claims that the reason for her discharge was fabricated because she was never expressly directed to do anything with the information provided in the June 9th email, either by Mauro or anyone else at Riverbay. (Pl.'s Opp. at 7.) Rather, Plaintiff testified that the email, along with all other emails Mauro might have sent her during the reclassification project, "was an FYI." (Ragin Dep. at 141–42.) She further stated that she "probably opened the email and closed it back up" because she was "juggling 50 million balls" at the time. (*Id.*)

While the June 9th email does not give detailed instructions to Plaintiff on how precisely she should proceed, it is disingenuous to dismiss it as an "FYI" email. The June 9th email, which was addressed only to Plaintiff and her assistant, contained Mauro's "findings on the most recent round of interviews" with Riverbay personnel. (Sussman Aff. Ex. 2.) Plaintiff was present at Mauro's interviews, understood at the time that Mauro's project was a "reclassification of employees to determine if they were properly classified exempt versus non-exempt" and had exchanged information with Mauro to further the project on numerous prior occasions. (*See* Ragin Dep. at 136–39, 142; Sussman Aff. Ex. 2 (June 9th email telling Plaintiff that Mauro needed to discuss an employee's status with her).) Even if Plaintiff did view the June 9th email as purely informational, and not requiring immediate action on her part, a basic awareness of the email's contents would have alerted her to the mistakes in the check memoranda and her subsequent internal emails to Riverbay Department heads.

Rather than concede any of the foregoing, Plaintiff attempts to distance herself from the entire reclassification project, suggesting that because of her lack of involvement she had no reason to believe the information in the June 9th email meant anything important. Plaintiff states that no one at Riverbay directed her to assist Mauro and that the audit was "totally a disorganized project," "going helter skelter, completely disorganized" and with no procedure for funneling information to the appropriate people. (Ragin Dep. at 136, 140; *see* Ragin Aff. ¶¶ 3, 21.) Plaintiff's characterization of the level of her involvement in the reclassification project is in contrast to Mauro's representation of her as his "point of contact and kind of a conduit of information" at Riverbay, and Ellison's testimony that Mauro reported to Plaintiff "most of the time." (Sussman Aff. Ex. 1 ("Mauro Dep.") at 18; Ellison Dep. at 23.)

However, Plaintiff's minimization of her role does not create an issue of fact because it

remains undisputed that she did, in fact, assist in the reclassification project. Plaintiff attended employee interviews with Mauro and corresponded with him to provide information relevant to the reclassification of employees. (*See* Ragin Dep. at 136–39, 142; Pl. 56.1 Resp. ¶ 31; Pl. 56.1 ¶ 8 (admitting that when Mauro sought information from Riverbay, he typically did so through Plaintiff).) Plaintiff cannot paint herself as an unsophisticated or out-of-the-loop observer to the project when she was plainly familiar with Mauro's work and facilitated the exchange of information between Riverbay and Mauro by, *inter alia*, providing him with employee spreadsheets and clarifying information about employees after their interviews. (*Id.*) In short, Plaintiff's reliance on semantics and technicalities would not sway a reasonable juror, who would rightly understand the importance of the contents of the June 9th email and assume Plaintiff, an experienced professional and the Director of Human Resources, did too.

Furthermore, even if reasonable minds might disagree as to whether termination was the proper punishment for Plaintiff's failure to, at the very least, follow up on the June 9th email before allowing check memoranda to be distributed in her name, there is no basis for finding that such failure was mere pretext for sex discrimination. "It is not a court's role to second-guess an employer's personnel decisions, even if foolish, so long as they are non-discriminatory." *Greene v. Brentwood Union Free Sch. Dist.*, 966 F. Supp. 2d 131, 156 (E.D.N.Y. 2013), *aff'd*, 576 F. App'x 39 (2d Cir. 2014).

Plaintiff next suggests that several facts revealed by Ellison at his deposition indicate that he fabricated his reason for terminating her. Specifically, Plaintiff points out that Ellison (1) testified he did not see the June 9th email prior to terminating Plaintiff, (2) claimed Merola and Munns supported his decision, even though they testified that no one sought their opinions, and (3) referenced a prior incident as first prompting him to consider Plaintiff's termination. (Pl.'s

Opp. at 7–8.) As to the first, it is irrelevant that Ellison did not physically see the June 9th email. Ellison testified that he was aware of the email's existence because in-house counsel, who had seen the email, told him about it. (Ellison Dep. at 52–53.) He also knew at the time of Plaintiff's termination that Plaintiff's failure to act on the email had cost Riverbay financial loss. (*Id.* at 54.) His decision to terminate Plaintiff based on the foregoing is memorialized in his written notice of termination. (*See* Termination Letter.) Moreover, there is no dispute that the June 9th email does in fact exist, and that Plaintiff failed to act on it, in accordance with the language of Ellison's written notice.

It is similarly unimportant that Merola and Munns did not recall agreeing with Ellison's decision to terminate Plaintiff beforehand. Ellison has stated, even if he recalls soliciting input from others, that the decision was his. (Ellison Dep. at 51.) An issue of fact as to whether Ellison actually sought Merola and Munns' approval does not cast doubt on Ellison's stated basis for that decision.

The third issue raised by Plaintiff relates to an incident several months before Plaintiff's termination wherein Ellison stated he heard Plaintiff pray to God to kill the children of some of her colleagues, whom she called her "enemies." (Sussman Aff. Ex. 15 ("Ellison Dep.") at 60–61.) As a result of this incident, Ellison thought Plaintiff had "reached a point [where] [he] couldn't trust her judgment." (*Id.*) Plaintiff does not merely suggest that the proffered reason for her termination was pretext for this incident. Indeed, doing so would not help Plaintiff because the incident would itself provide a legitimate, non-discriminatory reason for firing her. Rather, Plaintiff states that both the June 9th email and this incident, which she maintains was fabricated, (Ragin Aff. ¶ 15), were pretext for discrimination. (Pl. Opp. at 8.) This strikes the Court as a rather transparent attempt to substitute for the uncontested facts surrounding the June 9th email

an incident that Plaintiff can deny ever happened, without any further explanation. Ultimately, Plaintiff's self-serving argument does nothing to aid Plaintiff in meeting her burden of providing evidence sufficient to support a rational finding that she was actually terminated because of her sex.

Next, Plaintiff attempts to shift blame for her omissions and nonfeasance in several alternative directions. First, Plaintiff suggests that her assistant should bear responsibility for the improper payment of Riverbay funds. Plaintiff avers that Thomas was the person who actually prepared the check memoranda in her name, that Thomas was also a recipient of the June 9th email, and that Thomas was "as involved, if not more involved" than she was in "dealing with Mauro's recommendations." (Ragin Aff. ¶¶ 7, 11; Ragin Dep. at 145; Sussman Aff. Ex. 2.) At the same time, Plaintiff readily acknowledges that Thomas was her assistant and a junior member of the Human Resources Department, of which she was head. (Ragin Aff. ¶¶ 7, 11.) Ellison explained that he did not fault Thomas for any nonfeasance precisely because of his subordinate relationship to Plaintiff. (*See* Ellison Dep. at 37–38 (noting that Thomas would have assumed his boss would raise any issue arising from the June 9th email because that is how the Human Resources Department was run at the time).) Next, Plaintiff points at Mauro for failing to correct the emails she circulated on June 30, 2015, which misclassified the individuals named in the June 9th email as non-exempt. (Ragin Aff. ¶ 8.) Finally, Plaintiff casts blame in the direction of other Riverbay Department heads. For example, Plaintiff insinuates that the head of the Payroll Department was responsible for any overpayment made because they were tasked with actually issuing the checks that were provided to the misclassified employees. (*See* Pl. 56.1 ¶¶ 15–16, 26; Ragin Dep. at 142–43 (insisting that Plaintiff "was not involved with money at all" and "didn't even have knowledge that the money was dispersed").)

As to Thomas, any reasonable juror understands that leadership positions are typically accompanied by greater levels of responsibility, not only for an employee's own work, but also for that of her subordinates. Even if Thomas were blameworthy in some regard, it remains undisputed that Plaintiff received the same June 9th email, failed to act on it, and then permitted the circulation of check memoranda in her own name that ignored the information provided in the June 9th email. It was Plaintiff and not Thomas who then sent a series of internal emails misclassifying the Riverbay employees listed in the June 9th email as non-exempt. Thomas' involvement does not relieve Plaintiff of her responsibility for the foregoing. Similarly, while Mauro may have been in a position to correct some of Plaintiff's oversights, Plaintiff remains responsible for her own undisputed role in committing those oversights in the first place.[5]

Plaintiff's arguments with regard to the culpability of other Riverbay Directors are no more persuasive. As discussed above, it is clear that Plaintiff was substantially involved in assisting with the reclassification project. Moreover, only Plaintiff and her assistant received the June 9th email. Based on the record before the Court, Plaintiff was the only senior Riverbay employee who had the information to prevent the overpayments but failed to acknowledge it or pass it along to other senior management staff in any manner. That Riverbay elected to terminate Plaintiff rather than other employees whose actions were facilitated by her nonfeasance does not provide a sound basis for finding that the reason for Plaintiff's termination was pretext for discrimination.

Plaintiff next attacks Riverbay's proffered reason for her discharge by attempting to minimize the impact of her conduct. Plaintiff makes much of the fact that Riverbay settled the class action that prompted the reclassification project for $6,200,000, but never investigated its

[5] To the extent Plaintiff also seeks to set out a disparate treatment argument in relation to Thomas and Mauro, the Court addresses such argument *infra* at 22.

personnel to determine who was to blame for the mis-classifications that caused the class action in the first place. (Ragin Aff. ¶ 2; Munns Dep. at 138.) Plaintiff also states that Riverbay's "leading executives made no effort to recoup the $96,000 it claims to have lost as a result of [P]laintiff's failure to follow Mauro's directive." (Pl. Opp. at 8.) Essentially, Plaintiff hopes that by trivializing the sum lost as a consequence of her omissions, she can convince a reasonable jury to "question whether the [D]efendant cared at all about this matter." (*Id.*)

Plaintiff's own testimony undercuts half of her argument. She has admitted that following the disbursement of the $96,000, she was asked to approach the misclassified employees and ask them to pay the money back. (Ragin Dep. at 143–45.) At these meetings, Plaintiff was accompanied by Munns, who subsequently briefed Ellison on what had transpired. (*Id.*; Munns Dep. at 42–45, 47.) It is further undisputed that Riverbay solicited and received guidance from Mauro on the proper method to recoup the money. (Sussman Aff. Exs. 2, 13.) These facts plainly bely Plaintiff's assertion that "no effort" was made to recover what was lost.

As to Riverbay's $6,200,000 settlement, Plaintiff's suggestion that the failure to investigate and discipline whomever was responsible for the misclassification of the employees who brought the lawsuit indicates that Riverbay was unconcerned about the sum does not necessarily follow. Moreover, even if Plaintiff were to succeed in persuading a jury that $96,000 was not a large sum for Riverbay, that would not create a basis for a finding that her termination was pretext for discrimination. Although "discharging [P]laintiff on the basis of so trivial a sum may seem somewhat rigid," Title VII does not "impose liability for being overly rigid or even harsh." *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 483 (S.D.N.Y. 1998).

Finally, Plaintiff attempts to demonstrate pretext by arguing that other Riverbay employees who were members of a non-protected class were not subject to termination for

violating Riverbay policies. Plaintiff identifies the following instances involving four male employees, at least three of whom were Directors, and three of whom were non-disabled, in support of her assertion:

- In the summer of 2015, Donovan Plumber, Riverbay's Director of Buildings and Grounds, allowed an untrained seasonal employee to operate a lawnmower in contravention of agency policy. The employee severed three fingers while operating the lawnmower. (Ragin Aff. ¶ 17.)
- At an unspecified time, Anthony Rasuelo, Director of Construction, failed to ensure timely completion of critical repairs, imperiling a loan Riverbay had from Wells Fargo. (*Id.*)
- At an unspecified time, Edgar Perez, Director of Restoration, authorized payment to a vendor despite the vendor's failure to complete a painting job. (*Id.*)
- At an unspecified time, Mark Gordon, who "ran the Extermination Department" at Riverbay, allegedly threw objects at an employee and violated rules and laws governing the disposal of animals. Plaintiff recommended Gordon's termination but Ellison took no action against him. (*Id.*)

In her memorandum in opposition to Riverbay's motion, Plaintiff did not invoke these examples of allegedly disparate treatment as a means of establishing her *prima facie* case of discrimination. However, disparate treatment may also be used to demonstrate pretext. *See Graham*, 230 F.3d at 43; *Dowrich v. Aramark Healthcare Support Servs., Inc.*, No. 03 Civ. 2392, 2007 WL 2572122, at *8 (E.D.N.Y. Sept. 4, 2007). The question here is whether a reasonable juror could find on these facts that there was disparate treatment in Riverbay's disciplining of Plaintiff when compared to similarly situated employees. *See Graham*, 230 F.3d at 43.

The facts required to demonstrate similarity in "all material respects" vary from case to case. The relevant inquiry generally addresses whether the plaintiff and the putative comparator were "subject to the same performance evaluation and discipline standards" and "engaged in comparable conduct." *Ruiz v. Cty. of Rockland*, 609 F.3d 486, 493–94 (2d Cir. 2010) (quoting *Graham*, 230 F.3d at 40). A plaintiff need not show that she and the putative comparator are identical, but rather that there is a "reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases." *Id.* at 494 (quoting *Graham*, 230 F.3d at 40).

The evidence produced by Plaintiff does not meet this standard. As a preliminary matter, Plaintiff does not identify in any detail the disciplinary standards she and her colleagues were subjected to. Even assuming that four of the five comparators were held to the same standards as her, because all were Directors at Riverbay, their conduct varies greatly from Plaintiff's alleged conduct. Plaintiff failed to act on an email and ultimately cost Riverbay $96,483. The putative male comparators engaged in a variety of misconduct, some but not all of which likely cost Riverbay money. Nowhere in the record is it revealed whether or how much Riverbay lost as a consequence of the comparators' actions. On these facts, no reasonable juror could find that Plaintiff was similarly situated to the proposed comparators.

Likewise, to the extent Plaintiff's factual assertions with regard to Thomas' and Mauro's culpability for Riverbay's overpayments can also be construed as disparate treatment arguments, neither of them is similarly situated with Plaintiff. As discussed herein, Thomas was Plaintiff's assistant, and Mauro was outside counsel. Neither of them would have been properly held to the same standards as Plaintiff, a Director of Riverbay.

In sum, Plaintiff fails to produce sufficient evidence to support a rational finding that the legitimate, non-discriminatory reason proffered by Riverbay for her termination was false, and

that more likely than not sex discrimination was the real reason for her termination. Nor does Plaintiff show that impermissible sex discrimination was a motivating factor in her termination. For those reasons, Riverbay is entitled to summary judgment in its favor on Plaintiff's Title VII claim.

**II. ADA Claim**

The ADA provides that "[n]o covered entity shall discriminate 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).

To establish a *prima facie* case of disability discrimination under the ADA, a plaintiff must demonstrate by a preponderance of the evidence that (1) his or her employer is subject to the ADA; (2) he or she was disabled within the meaning of the ADA; (3) he or she was otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation; and (4) he or she suffered an adverse employment action because of the disability. *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 169 (2d Cir. 2006) (quoting *Giordano v. City of New York*, 274 F.3d 740, 747 (2d Cir. 2001)).

Plaintiff's ADA claim is subject to the same *McDonell Douglas* burden-shifting framework as her Title VII claim. *Wagner v. Cty. of Nassau*, No. 11 Civ. 1613, 2014 WL 3489747, at *4 (E.D.N.Y. July 11, 2014). As noted in the Title VII discussion above, under this framework, a plaintiff must establish a *prima facie* case of disability discrimination, after which the burden shifts to the employer to offer, through the introduction of admissible evidence, a legitimate non-discriminatory reason for the adverse employment action. *Sista*, 445 F.3d at 169. Assuming the employer is able to provide such a reason, "the burden shifts back to the plaintiff to

demonstrate by competent evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Dorgan v. Suffolk Cty. Cmty. Coll.*, No. 12 Civ. 0330, 2014 WL 3858395, at *6 (E.D.N.Y. Aug. 4, 2014) (citing *Patterson v. Cnty. of Oneida, N. Y.*, 375 F.3d 206, 221 (2d Cir. 2004)). Unlike Title VII plaintiffs, ADA plaintiffs are required to demonstrate that the defendant's stated reason was false and that "but-for" the plaintiff's membership in the protected class, her employment would not have been terminated. *Natofsky v. City of New York*, 921 F.3d 337, 348 (2d Cir. 2019). Put differently, discrimination cannot merely be a motivating factor in an ADA plaintiff's termination; it must be the but-for cause.

The facts presented by Plaintiff in support of her ADA claim are nearly identical to those offered in support of her Title VII claim. The parties' respective arguments in favor of and against summary judgment on the ADA claim likewise mirror their Title VII arguments. Accordingly, most of the Court's Title VII analysis is applicable here, and the Court will not repeat its rationale in detail except where a previously unaddressed fact or argument may be relevant.

Riverbay does not dispute that Plaintiff has adequately demonstrated that she is disabled within the meaning of the ADA, that she was qualified to perform her job with the reasonable accommodations she had been granted, and that she suffered an adverse employment action. Moreover, the record establishes that Plaintiff was replaced by a non-disabled individual. This would remain true even had the Court not rejected Riverbay's argument that Thomas did not replace Plaintiff, as there is no evidence that Plaintiff's permanent replacement was disabled. Thus, Plaintiff produces evidence that could give rise to an inference of discrimination. She

meets her limited burden of establishing a *prima facie* case of disability discrimination under the ADA.

In response, Riverbay provides a legitimate, non-discriminatory reason for Plaintiff's termination, shifting the burden to Plaintiff to show that the stated reason was false, and that her disability was the but-for cause of her termination. To the extent Plaintiff raises the same arguments as she did in support of her Title VII claim, the Court rejects those arguments for the reasons already discussed. The only noteworthy addition to those arguments is Plaintiff's reference to her difficulties in obtaining reasonable accommodations for her disability earlier in her employment with Riverbay. (*See* Ragin Aff. ¶ 19.) Plaintiff admits that these difficulties arose in 2009 in connection with MSRE employees who no longer manage Riverbay. (*See* Ragin Dep. at 71–87.) There is no basis for attributing any of the alleged biases of these former employees to Ellison, the manager who actually made the decision to terminate Plaintiff. Moreover, after obtaining a reasonable accommodation in 2009, Plaintiff was granted a second accommodation in 2012, had her salary increased in 2014, and expressed satisfaction with a 2012 change in Riverbay leadership. (*See id.* at 106–08, 122–23, 123–25, 216–18.) In view of these facts, Plaintiff's assertion that she had to threaten legal action to obtain a reasonable accommodation six years prior to her termination does not constitute competent evidence that the proffered basis for her termination was false. Nor could a rational juror find that Plaintiff's disability constituted a real reason for her termination, let alone its but-for cause.

Since Plaintiff fails to produce any evidence sufficient to demonstrate that Riverbay's stated reason for discharging her was false or that disability discrimination was the reason for her termination, Riverbay is entitled to summary judgment in its favor on Plaintiff's ADA claim.

**III. NYSHRL Claims**

Before the Court assesses the viability of Plaintiff's state-law claims, it must first determine whether to exercise supplemental jurisdiction over those claims, given that it has dismissed all of Plaintiff's federal claims. The Court finds that the exercise of supplemental jurisdiction over Plaintiff's state claims is warranted given that the federal and state claims arise under an identical set of facts and the values of judicial economy, convenience, fairness, and comity weigh in favor of jurisdiction. *See* 28 U.S.C. § 1367(a); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988); *see also Langella v. Mahopac Central Sch. Dist.*, No. 18 Civ. 10023, 2020 WL 2836760, at *14 (S.D.N.Y. May 31, 2020) (because standards for deciding federal discrimination claims including ADA claims were identical to NYSHRL standards, "deciding the NYSHRL claims would not require an investment of additional judicial resources, and there would be no comity issues triggered"); *Henry v. NYC Health & Hosp. Corp.*, 18 F. Supp. 3d 396, 413 (S.D.N.Y. 2014) (same). The Court thus turns to the merits of Plaintiff's state law claims.

The Second Circuit has held that "claims brought under New York State's Human Rights Law are analytically identical to claims brought under Title VII." *Torres v. Pisano*, 116 F.3d 625, 629 n.1 (2d Cir. 1997); *see Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 107 n.10 (2d Cir. 2011); *Salomon v. Our Lady of Victory Hosp.*, 514 F3d 217, 226 n.9 (2d Cir. 2008). Moreover, "the scope of the disability discrimination provisions of [the NYSHRL] are similar to those of the [ADA]," *Camarillo v. Carrols Corp.*, 518 F.3d 153, 158 (2d Cir. 2008) (quotation marks omitted), and "the legal standards for discrimination claims under the ADA and the NYSHRL are essentially the same," *Murtha v. N.Y.S. Gaming Commission*, No. 17 Civ.

10040, 2019 WL 4450687, at *16 (S.D.N.Y. Sept. 17, 2019).[6] As a result, the Court's analysis regarding Plaintiff's federal claims applies with equal force to his NYSHRL claims. Because Plaintiff's Title VII and ADA claims were deficient, dismissal of Plaintiff's NYSHRL claims against the Riverbay is plainly warranted.

**CONCLUSION**

For the foregoing reasons, Defendant's motion for summary judgment is GRANTED in its entirety. The Clerk of the Court is respectfully directed to enter judgment in Defendant's favor, terminate the motion at ECF No. 30, and close the case.

Dated: June 22, 2020
White Plains, New York

SO ORDERED:

NELSON S. ROMÁN
United States District Judge

[6] However, the NYSHRL has been interpreted to endorse a broader definition of "disability" than the ADA. *See Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113, 117 n.1 (2d Cir. 2004). Since no party challenges that Plaintiff has adequately pleaded a disability under either the ADA or the NYSHRL, this distinction is not material to the Court's discussion.