UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CANDICE LUE, Plaintiff, - against - JPMORGAN CHASE & CO., ALEX KHAVIN, FIDELIA SHILLINGFORD, JOHN VEGA, HELEN DUBOWY, PHILIPPE QUIX, THOMAS POZ, CHRIS LIASIS, MICHELLE SULLIVAN, and DOES 1 - 10, inclusive, Defendants.	:	No. 16 Civ. 03207 (AJN) (GWG)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

SEYFARTH SHAW LLP

Robert S. Whitman
rwhitman@seyfarth.com
Anshel Joel Kaplan
akaplan@seyfarth.com
620 Eighth Avenue
New York, New York 10018
Telephone: (212) 218-5500
Facsimile: (212) 218-5526

Attorneys for Defendants

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I. PRELIMINARY STATEMENT

Candice Lue ("Plaintiff") began her employment with Chase in August 2012 as a Drafting Analyst in its commodities division. After the sale of that business, Plaintiff transferred to the role of Reporting Analyst in the Counterparty Risk Group ("CRG") in November 2014.

Almost immediately after her arrival in CRG and throughout her tenure there, Plaintiff had numerous instances of rude and insubordinate behavior. She resisted and refused to perform certain assign tasks because she appeared to believe they were beneath her. Rather than address problems with her supervisors constructively, she turned away when they addressed her or spoke back in a confrontational manner. In repeated instances, after being advised that she was expected to perform a task, she responded that she was being treated "as if she was the help, as if this is 1910."

In July 2015, Plaintiff was placed on a performance improvement plan and informed that she was expected to perform all duties as assigned and to refrain from hostile and unprofessional comments. Instead of complying, Plaintiff became increasingly disrespectful and continued her refusal to perform her assigned tasks, despite repeated requests from both her supervisors. Because Plaintiff's unprofessionalism and insubordination failed to improve, Plaintiff received a Written Warning in September 2015. This, too, did not result in a change in Plaintiff's behavior, and after multiple additional incidents of insubordination, Plaintiff was terminated in January 2016.

In her 231-page amended complaint, Plaintiff asserts claims primarily for race discrimination and retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981 ("§ 1981"). The record demonstrates that there is no genuine dispute of material fact and that Plaintiff's claims cannot succeed as a matter of law.

As discussed in detail below, Plaintiff was properly assigned her various work duties and was rightly expected to perform them. While she claims that these assignments singled her out because she is Black, the tasks had in fact been assigned to and exclusively performed by Plaintiff's predecessor, a Caucasian, before Plaintiff's arrival in the group. Nor is there any factual support for Plaintiff's allegations that she was retaliated against because she had lodged complaints with Human Resources about her perceived unfair treatment. Chase responded promptly to Plaintiff's complaints and investigated them fairly and thoroughly, finding that no discrimination had occurred. Rather, as the record amply demonstrates, Plaintiff's performance warnings and eventual termination resulted not because she complained to HR, but because she persisted in her inexplicable and intractable refusal to perform the duties expected of her, and because she was extraordinarily harsh and insubordinate in her interactions with her supervisors.

It was this behavior, not the imagined presence of racial animus, that prompted Plaintiff's discipline and termination. Accordingly, the Court should dismiss Plaintiff's claims in their entirety with prejudice.

II. FACTS

Chase respectfully refers the Court to the accompanying Local Rule 56.1 Statement of Undisputed Facts ("56.1 Stmt.").

III. SUMMARY JUDGMENT STANDARD

A party is entitled to summary judgment if the pleadings, depositions, affidavits, and other discovery establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The party seeking summary judgment bears the initial responsibility of identifying the bases for its motion and those portions of the record that demonstrate the absence of a genuine factual issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant

satisfies this burden, the non-moving party must proffer admissible evidence demonstrating that a trial is required because disputed issues of material fact exist. *Liberty Lobby*, 477 U.S. at 249.

For Plaintiff to survive summary judgment, she "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Nor may Plaintiff rely on conclusions or speculation; she must present "concrete evidence from which a reasonable [fact-finder] could return a verdict in [her] favor." *Liberty Lobby,* 477 U.S. at 256; *see also W. World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990) (nonmoving party "cannot escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts, or defeat the motion through mere speculation or conjecture") (internal quotations and citations omitted). The Supreme Court has made clear that summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (citation omitted).

IV. SUMMARY JUDGMENT IS WARRANTED AS TO ALL CLAIMS

A. Claims Against the Individual Defendants Should be Dismissed

Title VII "does not impose liability on individuals." *Peguero-Miles v. City Univ. of N.Y.*, No. 13-CV-1636, 2015 WL 4092336, at *8 (S.D.N.Y. July 6, 2015) (Nathan, J.) (*citing Lore v. City of Syracuse*, 670 F.3d 127, 169 (2d Cir. 2010) (collecting cases)). As such, counts 1-6 and 8-10 of the Amended Complaint must be dismissed to the extent they assert Title VII claims against the Individual Defendants.

While individuals may be held liable under § 1981, "a plaintiff must demonstrate some affirmative link to *causally connect* the actor with the discriminatory action. . . . [P]ersonal liability under section 1981 must be predicated on the actor's *personal involvement*." *Patterson v.*

Cty. of Oneida, N.Y., 375 F.3d 206, 229 (2d Cir. 2004) (emphasis added). As demonstrated below, Plaintiff cannot point to a single admission, statement, or act that would even remotely suggest the Individual Defendants' actions were racially motivated; as such, there was no "discriminatory action" with which they were "personal[ly] involve[d]." Accordingly, the Individual Defendants must be dismissed from this action as to the § 1981 claims as well.

B. Claims Beyond the Statute of Limitations Should be Dismissed

In New York, a plaintiff seeking relief under Title VII must file a timely charge of discrimination with the EEOC within 300 days of the date of the allegedly discriminatory employment practice. *Butts v. City of N.Y. Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1401 (2d Cir. 1993). Plaintiff filed her EEOC charge on August 13, 2015. (Am. Compl. ¶ 53.) Thus, to the extent her Title VII claim is premised on events that occurred prior to October 17, 2014 (300 days before August 13, 2015), they are time-barred and must be dismissed.

Here, such events include those involving Defendant Chris Liasis, all of which occurred prior to October 17, 2014. (*See, e.g.*, Am. Compl. ¶¶ 150, 154, 197)

C. Claims Beyond the Scope of the EEOC Charge Should be Dismissed

"A district court only has jurisdiction to hear Title VII claims that either are included in an EEOC charge or are based on conduct subsequent to the EEOC charge which is 'reasonably related' to that alleged in the EEOC charge." *Butts*, 990 F.2d at 1401. Thus, Plaintiff's Title VII claims must be dismissed to the extent they are based on events outside the scope of her EEOC charge.

Here, Plaintiff's EEOC charge does not mention or even allude to any acts by Individual Defendants Sullivan or Liasis. (Am. Compl., Ex A.) As such, all Title VII claims in the Amended Complaint involving Sullivan and Liasis must be dismissed.

D. Plaintiff Cannot Establish Her Claims of Race Discrimination

1. Legal Framework

Plaintiff has asserted claims for race discrimination under Title VII and § 1981. (Am. Compl. ¶¶ 87-96.) Employment claims brought under both statutes are analyzed under the burden-shifting framework of *McDonell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See McGill v. Univ. of Rochester*, 600 F. App'x 789, 790 (2d Cir. 2015) (*McDonnell Douglas* analysis applies to employment discrimination claims under Title VII and § 1981).

Under that framework, Plaintiff must first establish a *prima facie* case, which requires admissible evidence that: (1) she is a member of a protected class; (2) she was qualified for the position she held; (3) she suffered an adverse employment action; and (4) the adverse action took place under circumstances giving rise to the inference of discrimination. *McGill*, 600 F. App'x at 790-91. If Plaintiff establishes a *prima facie* case, Chase must articulate a "legitimate, nondiscriminatory business reason" for its action. *Id.* Once Chase does so, "the presumption raised by the *prima facie* case is rebutted, and drops from the case," and Plaintiff must prove that the reason proffered by Chase for her termination is false and that the real reason for the action was discrimination based on her race. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993) (internal quotations and citations omitted). The ultimate burden of persuasion rests at all times with Plaintiff. *Id.* at 507.

Here, even assuming *arguendo* that Plaintiff can establish a *prima facie* case, the uncontroverted facts in the record show that Chase terminated her employment because of her unsatisfactory performance. Plaintiff has no evidence to create a triable issue that Chase's decision was a pretext for race discrimination.

2. Chase Terminated Plaintiff's Employment For Legitimate Reasons

Following a Performance Improvement Plan and a Written Warning, Plaintiff was terminated for unsatisfactory performance, continued failure to perform her assigned tasks, and her overall lack of professionalism, including using inappropriate and disrespectful tone in emails and verbal communication. (56.1 Stmt., ¶ 50.)

Inappropriate comments, insubordination, and disruptive behavior in the workplace are undeniably legitimate reasons for termination. *See, e.g., Nieves v. Angelo, Gordon & Co.*, 341 F. App'x. 676, 679 (2d Cir. 2009) (insubordination and failure to complete assigned tasks were legitimate reasons for termination); *Gill v. Mt. Sinai Hosp.*, 160 F. App'x. 43, 44 (2d Cir. 2005) (failure to complete job duties, inability to take directions, and confrontational and unprofessional behavior were legitimate business reasons for termination); *Beshty v. Gen. Motors*, 144 F. App'x. 196, 196 (2d Cir. 2005) (confrontational style furnished a legitimate business reason for termination).

The specific details of Plaintiff's performance shortcomings are discussed below.

a. Plaintiff's Behavioral and Attitude Problems

Plaintiff joined the CRG in November 2014. (56.1 Stmt., ¶ 7.) Shortly thereafter, Alex Khavin, head of the CRG and Plaintiff's second-level supervisor, assigned Plaintiff the responsibility to take minutes at the monthly CRG Governance Meetings and to collect and distribute documents for the team in advance of those meetings (those assignments are referred to collectively herein as the "Tasks"). (Khavin Dec., ¶ 20.) Plaintiff was unhappy with being assigned the Tasks and responded with instances of confrontational and unprofessional behavior:

- Following Khavin's assignment of the Tasks, Plaintiff met with Fidelia Shillingford, her direct manager, to complain that the Tasks were demeaning and that Khavin was treating Plaintiff "as if she was the help, as if this is 1910." (56.1 Stmt., ¶ 17.)

- Based on Shillingford's concern that Plaintiff might have difficulty juggling the Tasks along with her other responsibilities, all of which were still new to her, Shillingford and Khavin tried to accommodate her by agreeing to reinstall the rotation that was temporarily in place during the latter half of 2014. (Shillingford Dec., ¶ 16.) To that end, Shillingford e-mailed Dauber on February 4, 2015 asking for the names of two additional analysts who could assist with the responsibility of handling the Tasks. (56.1 Stmt., ¶ 20.) In reply to this e-mail—an e-mail which had been sent in an effort to accommodate her—Plaintiff brashly retorted, "Just to reiterate . . . I have never considered these tasks to be my responsibility [to begin with] as I had confirmed such in the interview and on the job." (*Id.*)

- At the April 2015 Governance Meeting, in an attempt to make the document collection and distribution more efficient for the CRG, Khavin asked everyone to e-mail in advance to Plaintiff all materials for the next Governance Meeting so that she could circulate the materials before the Governance Meeting began and thereby save an appreciable amount time. (56.1 Stmt., ¶ 21.) Plaintiff viewed this innocuous request as an effort to further demean her, so in response, she disrespectfully got up and walked out of the meeting. (*Id.*)

- On April 24, Plaintiff again complained to Shillingford that Khavin was demeaning her by assigning the Tasks to her, asking, "Am I the help? Is this 1910?" (56.1 Stmt., ¶ 23.)

- On May 26, Plaintiff brazenly sent a meeting invite to Shillingford to discuss Plaintiff's "lack of trust and confidence I have in your management."[1] (56.1 Stmt., ¶ 24.)

- On May 27, prior to that month's Governance meeting, a member of the group sent his materials directly to Plaintiff, per Khavin's April directive. Plaintiff then e-mailed the *entire CRG*: "In the interest of team spirit, can you please print, sort, organize and staple as well as send your own presentation materials to the team? I find it unfair and demeaning that the task of printing, sorting, organizing, stapling, sending out and lugging YOUR presentation materials to the meetings is placed on me." (56.1 Stmt., ¶ 25.)

- In an e-mail to Plaintiff on May 27, Khavin reiterated that the Tasks were her responsibility and once again suggested that Plaintiff ask the administrative assistant for help in completing the Tasks. (56.1 Stmt., ¶ 26.) In response to Khavin, Plaintiff said that the Tasks were demeaning and unfair, concluding for a third time, "Am I the help? Is this 1910?" (*Id.*)

- On July 22, in a meeting with Shillingford, Plaintiff accused Shillingford of "bullying her" when Shillingford asked her when she would be completed with one of the reports she was preparing. Notwithstanding the accusation, Shillingford again explained that the Reporting Analyst had responsibilities and deadlines, and as her manager, Shillingford was entitled to ask when she could expect the task to be complete. (56.1 Stmt., ¶ 32.)

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[1] Of course, the issue was not *that* she complained, but rather *how* she complained. Regardless, Chase responded promptly to Plaintiff's complaints and investigated them fairly and thoroughly. (56.1 Stmt., ¶¶ 28-33.)

b. Plaintiff's Performance Improvement Plan and Subsequent Written Warning

In light of these incidents, Plaintiff was placed on a performance improvement plan ("PIP") on July 30, 2015 and informed that she was expected to perform all projects and tasks assigned to her as well as to improve her communication style, the tone of which to date had been hostile and unprofessional. (56.1 Stmt., ¶ 34.)

Despite the PIP, Plaintiff's behavior did not improve. On August 3, only two business days after being placed on the PIP, Plaintiff lashed out in an e-mail to Shillingford (copying John Donnelly, Chase's global head of HR, and several others). She declared:

> Since I was raised in a household where TRUTH matters, I will not compromise my dignity to fully respond to or to sign off on the malicious and mendacious comments you have made about me and my work . . . . Having a manager who will fabricate things to make me seem incompetent . . . is a blight on any career success I could or would have had at JP Morgan. I consider you to be the enabler, the facilitator and the coordinator of the second class treatment from Alex Khavin that has been meted out to me . . . . It's amazing how bad managers can turn good employees into bad employees. (Shake my head).

(56.1 Stmt., ¶ 36.)

On August 25, 2015, Shillingford asked Plaintiff in an e-mail to remind all CRG members to save their materials in the shared folder on the Chase network to enable Plaintiff to print them in advance of the next Governance Meeting. (56.1 Stmt., ¶ 37.) Plaintiff did not respond. (*Id.*) The next day, Shillingford asked again, this time in person. (56.1 Stmt., ¶ 38.) Plaintiff looked at her blankly without responding. (*Id.*) When Shillingford told her this was unacceptable and reminded Plaintiff that refusing to perform her assigned duties was one of the areas for improvement on her PIP, Plaintiff responded, "I have no further comments" and walked away. (*Id.*) Plaintiff refused to print the materials for the August Governance Meeting, and another employee had to step in and do so. (56.1 Stmt., ¶ 39.)

On September 23, 2015, Shillingford asked Plaintiff to print and bring to the September Governance Meeting certain documents for which she and Shillingford were responsible, specifically the "Dashboard, Exposure [Report], and Canada SL Limits" materials. (56.1 Stmt. ¶ 40.) Plaintiff responded: "Please be advised that I will be sending out and printing *the Exposure Report*" (emphasis added), implying that she was refusing to send out and print the other two items. (*Id.*) Shillingford replied:

> You were brought in to assist with my roles and responsibilities. At the time of hire, specific functions were outline[d] but as with any other job, overtime, more will be assigned. It is rather disrespectful and insubordinate for you to refuse to perform a responsibility assigned by your immediate manager. This is one of my responsibilities which I am off boarding to you given my increasing workload and it's my expectation[] that you fully pick this responsibility [up] going forward.

(*Id.*) Plaintiff responded, "You can continue to be disingenuous and willful as much as you want to but this is stemming from the racial discrimination charge I raised with HR. As I said in our impromptu meeting earlier today, I have no further comments on this matter." (56.1 Stmt., ¶ 41.)[2]

As a result of Plaintiff's continued unacceptable behavior following the PIP, she received a Written Warning on September 24, 2015. The Warning informed Plaintiff that she was expected to "perform the job responsibilities for which she was hired; she is expected to print all materials for our monthly governance team meeting and provide copies for each team member." (56.1 Stmt., ¶ 42.) The Written Warning further provided, among other things, that "Plaintiff may receive additional corrective action and/or be terminated at any time during or after the written warning restrictions period if . . . performance continues to not meet expectations, there is no immediate and sustained improvement or if another performance issue arises." (*Id.*)

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[2] Plaintiff had complained to HR on May 29, 2015 regarding her treatment in CRG. (56.1 Stmt. ¶ 29.) Her claim of retaliation arising from that complaint is discussion in section IV.E, *infra*.

c. Plaintiff's Termination

Despite the PIP and Written Warning, Plaintiff's insubordination and disrespect continued. On September 25, 2015, the day after the Warning was issued, Plaintiff e-mailed Shillingford:

> As is evidenced in the attached 'Written Warning' dated 9/24/15 that you presented to me in a meeting yesterday, you continue to be the enabler, the facilitator, the coordinator and the enforcer of the second class treatment which originated from Alex Khavin and has been meted out to me. This is why, I have repeatedly asked HR to remove you as my manager to prevent you from carrying out these unlawful acts against me. However, it is including HR's failure to prevent these unlawful acts against me that has caused you to continue to harass me on a monthly basis since Alex Khavin and/or cohorts subtly made it solely your job to enforce the second class treatment against me whereby I am ordered to print, collate, staple and lug the presentation materials of each of the team members to the monthly meetings.

(56.1 Stmt., ¶ 43.)

In an e-mail exchange on October 14 and 15, 2015, Plaintiff reacted unprofessionally to constructive feedback from Shillingford. (56.1 Stmt., ¶ 44.) Shillingford reached out to HR, saying:

> These are the patronizing and accusatory emails that I receive from Candice on a frequent basis. The environment has become toxic and inoperable. Instead of directing my time and effort into my work; my efforts are channeled on internalizing how to approach Candice on a task and/or how to respond appropriately to these emails. In effect, my primary focus has shifted to managing my interactions and the work has become secondary. I cannot continue to be productive in this environment. Can we please have a conversation this afternoon; if your schedules permit?

(*Id.*)

On October 21, 2015, Shillingford sent an e-mail to Plaintiff reminding her to ensure that all of the group's materials are ready to go for that month's Governance Meeting. (56.1 Stmt., ¶ 45.) Plaintiff ignored this e-mail. (*Id.*) Then, instead of collecting all of the team members' documents to print and distribute, Plaintiff e-mailed only her personal documents to the group. (*Id.*) In response, Shillingford reminded Plaintiff that it was her responsibility to coordinate *all* of

the materials for the Governance Meeting, not just her own. (*Id.*) As before, another member of the group had to step in and complete this task instead of Plaintiff. (*Id.*)

Also on October 21, 2015, Shillingford reminded Plaintiff that she had transitioned one of her responsibilities to Plaintiff and that she was expected to present it at the Governance Meeting. (56.1 Stmt., ¶ 46.) Plaintiff disrespectfully and unprofessionally responded "that it takes very little intellect for anyone to see that the full trail of the email attachment you referenced gave no directive of the transitioning to me of PRESENTING the Dashboard . . . only ordering me to print same." (*Id.*)

In December 2015, the situation reached a boiling point. On December 1, Shillingford approached Plaintiff and explained that another analyst was going to be responsible for organizing the materials for the Governance Meeting, but that he would be working from home the next day, and asked Plaintiff to coordinate with this analyst to make sure the task was completed. (56.1 Stmt., ¶ 47.) In response, Plaintiff turned her head away from Shillingford and continued working on her computer. (*Id.*) Shillingford asked for a response, and Plaintiff replied, "I have no comments." (*Id.*)

Shillingford then sent Plaintiff a confirmatory e-mail, noting for the record that she had refused to coordinate with the other analyst to prepare the documents for the Governance Meeting. In response, Plaintiff stated:

> For the record, your PLOYS which are cover ups for the unlawful behavior being meted out to me will not stand. There is no 'other analyst' who is being ordered to have everyone in the department send their documents to them to print, collate, staple and lug to the monthly meetings. Your ploys ONLY consist of 'other analysts' asking team members to give their printed, collated and stapled documents to them for them to put the documents in order as per the agenda and take them into the meeting. Again, that's all your ploys consist of. Furthermore, please be advised that this racial discrimination against me has been escalated to the point where these ploy compromises will not be effective.

(56.1 Stmt., ¶ 48.)

Following this incident, as well as those from the preceding months, and in view of the fact that Plaintiff had been placed on a PIP and Written Warning, Shillingford decided that Plaintiff's employment should be terminated and worked with HR to draft a Recommendation for Termination ("RFT"). (56.1 Stmt., ¶¶ 49-50.) On January 6, 2016, the RFT was approved and Plaintiff was terminated. (56.1 Stmt., ¶ 51.)

3. Plaintiff Cannot Raise a Triable Issue of Pretext

In light of Chase's extensive and detailed articulation of legitimate reasons for Plaintiff's termination, Plaintiff must identify specific evidence in the record to create a triable issue that Chase's reasons were pretextual. She cannot do so.

As an initial matter, Plaintiff cannot identify any non-Black employee who engaged in the same or substantially similar behaviors as she and was not terminated. Her inability to do so precludes her, as a matter of law, from establishing that her own termination for such behaviors was racially motivated. *See Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000)(where claim of disparate treatment is based on inconsistent disciplinary practices, a plaintiff is required "to show that similarly situated employees who went undisciplined engaged in comparable conduct"); *Montana v. First Federal Savings and Loan Assoc. of Rochester*, 869 F.2d 100, 104 (2d Cir. 1989) (in employment discrimination case, "the primary focus is always on whether an employer treats an employee less favorably than other employees for an impermissible reason"); *Thomas v. S.E.A.L. Sec., Inc.*, No. 04 Civ. 10248 (JSR) (GWG), 2007 U.S. Dist. LEXIS 63841, at *44-45 (S.D.N.Y. Aug. 30, 2007) ("given the uncontroverted evidence that [Defendant] believed that [Plaintiff] had engaged in improper conduct, and the absence of any evidence that persons in [Plaintiff's] situation were not terminated, a reasonable jury could not use the evidence in the current record to find that the complaint to [Defendant regarding discrimination] 'was a substantial motivating factor' for his termination") (citations omitted); *Baptiste v. New York City Transit*

Auth., No. 02 Civ. 6377 (NRB), 2004 WL 626198, at *5 (S.D.N.Y. Mar. 29, 2004) ("lack of discrimination against other similarly situated employees is further evidence that prevents the creation of an inference of discrimination").

Despite the absence of any valid comparator, Plaintiff asserts a host of subjective, speculative contentions concerning events that she believes establish racial animus. None of her contentions have merit, and we address each of them in turn.

First, Plaintiff claims she was discriminated against on the basis of her race because she was assigned the Tasks, even though non-Black members of the CRG were never assigned the Tasks, exclusively or rotationally, during the two years before she joined the group. (Am. Compl. ¶¶ 4-8.) This is demonstrably false. Plaintiff's predecessor, Baruch Horowitz, a Caucasian, was exclusively responsible for the Tasks well before Plaintiff joined the CRG. (56.1 Stmt., ¶ 18.)[3]

Second, Plaintiff claims she was assigned the Tasks even though her job description did not mandate such responsibilities, and even if it did, none of the Credit Analysts were assigned the Tasks even though they had the same job description. (Am. Compl. ¶ 60.) This is false. Plaintiff's job description states "Specific responsibilities will include: . . . Contributing to team-wide efforts such as . . . *preparing management presentations*" (emphasis added). (56.1 Stmt., ¶ 16.) As HR determined, Plaintiff should have understood that "preparing management

[3] Plaintiff relies on a February 4, 2015 email from Dauber (Dauber Dec., Ex. A), to suggest that taking minutes had been rotational for the "two years" before Plaintiff joined the CRG and therefore was not exclusively assigned to her predecessor. (Am. Compl. ¶¶ 8, 172.) This is untrue. Dauber's email states in pertinent part, "Every analyst and/or associate on this team has been the minute taker of our Extended meetings at some time during the last 2 years." By "extended meetings," Dauber was referring not to the Governance Meetings, for which the practice was that Horowitz alone would take the minutes, but to other meetings, such as the Technology Initiatives Meeting and Investment Risk Process meetings, for which the task of taking minutes was in fact rotated among the CRG. (Dauber Dec. ¶¶ 3-4.) The only time the minute-taking for the Governance Meetings was rotational was during Horowitz's absence, first for a disability and then when he left Chase, from June 2014 until Plaintiff's arrival in November 2014. (56.1 Stmt., ¶ 18.)

presentations" encompassed the Tasks, adding that Plaintiff's perception of her responsibilities was "simply wrong." (56.1 Stmt., ¶ 33.)[4]

Third, Plaintiff claims that, unlike non-Black Analysts, she was required to ask for permission before working from home and that her requests to work from home to care for her sick mother were denied, requiring her to use vacation days. (Am. Compl. ¶ 60.) On the contrary, Plaintiff's predecessor, Horowitz, had to ask for and obtain permission before working from home. (Horowitz Dec., ¶ 7.) The same is true for the other analysts and associates in the CRG. (Shillingford Dec., ¶¶ 13-14.) Moreover, CRG policy provides that when an employee is away from the office to care for a sick relative, she must use sick, personal or vacation time; working from home is not a substitute for such forms of paid leave. (Shillingford Dec., Ex. C.) Thus, to the extent that Plaintiff's supervisors required her to use vacation days to care for her mother, they acted consistently with CRG policy in doing so and applied the policy equally to other employees.

Fourth, Shillingford, who is Black, made the decisions to hire and fire Plaintiff. (Shillingford Dec., ¶¶ 6, 35.) The fact that the same decision-maker made both decisions, and that she is the same race as Plaintiff, undermines any possible inference of discrimination. *See Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir. 1997) ("[W]hen the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute ... an

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[4] As for the Credit Analysts, they have different duties than Reporting Analysts and report to different supervisors, even though the official job descriptions are the same. (Shillingford Dec., ¶ 8.) Whereas Reporting Analysts prepare daily and monthly reports on counterparty transactions, and report to Shillingford, Credit Analysts perform analysis pertaining to counterparty transactions and report to Dauber. (*Id.*) Thus, there is no basis to draw an inference of discrimination from differences in their assigned tasks. *See Arty v. N.Y. City Health & Hosps. Corp.*, No. 09 CIV. 05982 AJN, 2013 WL 6246490, at *10 (S.D.N.Y. Dec. 3, 2013) (Nathan, J.) ("drawing an inference of discrimination from disparate treatment requires a 'showing that the more favorably treated employees were similarly situated to the plaintiff *in all material respects*'"), *amended on other grounds on reconsideration*, No. 09 CIV. 05982 (AJN), 2014 WL 11428192 (S.D.N.Y. Aug. 18, 2014) (emphasis added).

invidious motivation that would be inconsistent with the decision to hire."); *Connell v. Consolidated Edison Co. of N.Y.*, 109 F. Supp. 2d 202, 209 (S.D.N.Y. 2000) (inference against discriminatory intent when decision maker is in same protected class as plaintiff); *Drummond v. IPC Int'l, Inc.*, 400 F. Supp. 2d 521, 532 (E.D.N.Y. 2005) (noting "a well-recognized inference against discrimination exists where the person who participated in the allegedly adverse decision is also a member of the same protected class."). Further negating any possible racial animus is the fact that, despite Plaintiff's sustained disrespect and confrontational nature, Shillingford sympathetically requested of HR that Plaintiff's termination occur *after* the holiday season, not before or during. (Shillingford Dec., ¶ 35.)

Fifth, Plaintiff has no evidence—such as racist comments or other alleged discriminatory behavior—that anyone involved in evaluating her performance, investigating her complaints, or deciding on her performance warnings and termination harbored a discriminatory animus against her. While she speculates at length about motives and attaches inflammatory labels to certain statements, this is not enough to withstand summary judgment in the absence of evidence that would otherwise permit an inference of discrimination. *See Smalls v. Allstate Ins. Co.*, 396 F. Supp. 2d 364, 371-72 (S.D.N.Y. 2005) ("A plaintiff's speculations, generalities, and gut feelings, however genuine, when they are not supported by specific facts, do not allow for an inference of discrimination to be drawn.") (*quoting Little v. N.Y.*, 1998 WL 306545, at *6 (E.D.N.Y. June 8, 1998), *aff'd*, 173 F.3d 845 (2d Cir. 1999)); *McLean-Nur v. DOT*, No. 98 Civ. 819 (NRB), 2000 U.S. Dist. LEXIS 3495, at *21 (S.D.N.Y. Mar. 21, 2000) (granting summary judgment where plaintiff cited "no derogatory comments about his . . . race, [and] thus fail[ed] to produce the requisite evidence that [employer] was actually motivated by discriminatory intent"). Plaintiff may disagree, even emphatically, with the decisions made concerning her employment at Chase

and her eventual termination. But she has no grounds to challenge those decisions without specific evidence that they were made for discriminatory reasons. *See Scaria v. Rubin*, 117 F.3d 652, 654 (2d Cir. 1997) (per curiam) ("This Court does not sit as a super-personnel department that reexamines an entity's business decisions."); *O'Sullivan v. New York Times*, 37 F. Supp. 2d 307, 308–309 (S.D.N.Y. 1999) (district courts "do not have a 'roving commission to review business judgments'" and "'must refrain from intruding into an employer's policy apparatus or second-guessing a business's decision-making process'") (citations omitted).

4. Plaintiff Cannot Establish Her Other Claims of Discrimination

In addition to Plaintiff's conventional discrimination claims, she also asserts other causes of action for discrimination, though they are not denominated as such. Each of these lacks merit.

a. "Failure to Take Steps to Prevent Discrimination, Retaliation and Harassment"

In her Fifth Cause of Action, Plaintiff claims that Philippe Quix, a Managing Director (and Khavin's supervisor), Thomas Poz, an Executive Director in CRG, Helen DuBowy, an HR Business Partner, and John Vega, an Executive Director in Employee Relations, all failed to take steps to rectify the purported discrimination against her. (Am. Compl. ¶¶ 136-141.) In early 2015, Chase's HR department conducted an investigation into Plaintiff's complaints relating to her previous position (before she transferred to CRG); it conducted another, multi-week investigation later in 2015 into claims pertaining to her experiences after she joined CRG. (56.1 Stmt., ¶¶ 28-33.) Both investigations found her complaints to be unsubstantiated. (56.1 Stmt. 13, 33.) Therefore, despite Plaintiff's opinion to the contrary, Chase acted swiftly and thoroughly to investigate whether any discrimination had occurred. None was, so no corrective action was warranted.

b. "Intentional Infliction of Career Regression and Career Stagnation on the Basis of Race"

In her Sixth Cause of Action, Plaintiff claims that Michelle Sullivan, a Vice President, and Chris Liasis, an Executive Director, intentionally worked to "regress and stagnate" her career because she is Black. (Am. Compl. ¶¶ 142-67.) As argued in section IV.C *supra*, such a claim is barred as matter of law. But if even not barred, the claim has no merit. The claim boils down to three allegations: (i) Liasis was unimpressed with Plaintiff's suggestion to improve business as usual ("BAU") and stated as much in her performance review (Am. Compl. ¶¶ 152-56); (ii) Sullivan slighted Plaintiff by failing to recognize her work on a project (*id.* ¶ 157); and (iii) Liasis removed Plaintiff from the process of doing novations and relegated her to "counting pencils" (*id.* ¶¶ 158-59).[5]

Each of these actions and decisions reflects business judgments by Chase and its managers and may not be challenged in the absence of specific evidence of a discriminatory motivation. *See, e.g., Scaria*, 117 F.3d at 654 ("This Court does not sit as a super-personnel department that reexamines an entity's business decisions."). But Plaintiff's challenges are unavailing in any event. With respect to the first item, Liasis made the business decision to reject Plaintiff's suggestion because he believed it could cause delay and inefficiencies. (Liasis Dec., ¶ 6.) With respect to the second, Sullivan did in fact acknowledge Plaintiff's work on the project, but at the same time provided feedback that Plaintiff should have sought her input before circulating an email about it to the entire group. (Sullivan Dec., ¶ 3-7.) With respect to the third, Plaintiff was taken off novations because the department underwent a structural change whereby, in order to

[5] Plaintiff also alleges in this cause of action that (i) Khavin stagnated her career by "switching" her manager from Dauber to Shillingford so that Khavin could discriminate against her (an argument which is meritless and addressed in the next section) and (ii) Shillingford stagnated her career by "enforcing" Khavin's discriminatory assignment of the Tasks (an argument which was shown to be meritless in section IV.D, *supra*).

improve efficiency, certain individuals were assigned to handle financial commodities and others to handle physical commodities. Because novations were assigned to the financial commodities group, they were no longer part of Plaintiff's responsibilities. (Laisis Dec., ¶¶ 3-4.) Additionally, due to a second structural change, the two teams that were responsible for "drafting" and "client service" were merged. As a result of the merger, Plaintiff was required to engage in certain client service functions, which she believed were beneath her and relegated her to "counting pencils." (Laisis Dec., ¶¶ 9-11.)

c. "Unlawful Segregation on the Basis of Race" and "Unwillingness/Failure to Promote to a Managerial Position on the Basis of Race"

In her Eighth Cause of Action, Plaintiff claims that Khavin switched her manager from Dauber, who is Caucasian, to Shillingford, who is Black, so that Khavin could neutralize her own discriminatory behavior toward Plaintiff. (Am. Compl. ¶ 183.) Her Ninth Cause of Action is essentially the same, alleging that Khavin made Shillingford her manager because it was "Khavin's best bet to ensure that the unlawful disparate treatment she executes against Blacks was carried out as she knew that Shillingford would be willing to enforce her bigotry to gain her, Khavin's favor." (*Id.* ¶ 191.)

This is nonsense. Khavin made the decision that Shillingford would supervise whomever was hired for the Reporting Analyst role in order to give Shillingford managerial experience. (Khavin Dec., ¶ 5; Shillingford Dec., ¶ 4.) This occurred before Khavin knew who would be hired into the role and before she knew Plaintiff or her race. (Khavin Dec., ¶ 6.) Shillingford interviewed Plaintiff and expressly told her that that if she were hired, she would report to Shillingford. (Shillingford Dec., ¶ 5.) Plaintiff's offer letter confirms this. It states in part: "Your position at the time of transfer will be AM - Credit Reporting Risk Analyst, reporting to Fidelia Shillingford." (Shillingford Dec., Ex. A.)

E. Plaintiff Cannot Establish Her Claims of Retaliation

1. Legal Framework

Plaintiff has also asserted a claim for relief for retaliation under Title VII and § 1981. (Am. Compl. ¶¶ 97-111.) Retaliation claims brought under these statutes are both analyzed under the burden-shifting framework of *McDonell Douglas*. *See Littlejohn v. City of N.Y.*, 795 F.3d 297, 315 (2d Cir. 2015).

To establish a *prima facie* case of retaliation, a plaintiff must show (1) that she was engaged in protected activity by opposing an unlawful practice; (2) that the employer was aware of that activity; (3) that she suffered adverse employment action; and (4) that there was a causal connection between the protected activity and the adverse action." *Stevens v. N.Y.*, No. 09-CV-5237 CM, 2011 WL 3055370, at *9 (S.D.N.Y. July 20, 2011).

Here, even assuming *arguendo* that Plaintiff can establish a *prima facie* case, the record shows that Chase terminated her employment because of unsatisfactory performance. Thus, Plaintiff has the burden of identifying evidence creating an issue of fact that the real reason for this decision was retaliation. She cannot do so.

2. Plaintiff Cannot Raise a Triable Issue of Pretext

Plaintiff claims that "[f]or taking a stance against the unlawful act of racial discrimination through peaceful defiance and by filing a charge against JPMorgan Chase with the [EEOC] for the said unlawful act, I was severely punished by JPMorgan Chase and its managers" by being placed on a PIP, issued a Written Warning, and ultimately terminated. (Am. Compl. ¶ 98.) Plaintiff cannot point to a shred of evidence, direct or circumstantial, that suggests that these actions were retaliatory. Instead, Plaintiff spends the next *ten pages* of the Amended Complaint attempting to pick apart what she has deemed inaccuracies in the PIP and Written Warning. (*Id.* ¶¶ 98-109.)

First, Plaintiff no doubt disputes her supervisors' conclusion that her behavior was, in fact, insubordinate. This is not sufficient:

> An employee's own assessment of [her] work performance is insufficient to establish pretext. Consequently, the question is not whether the proffered reason should have justified [Plaintiff's] termination, but whether it *actually* motivated the decision. [Plaintiff] offered no evidence that [her] long history as a troublesome employee was not the reason [she] was fired. [She] cannot establish pretext by admitting the occurrence of what the employer perceived as transgressions and then asserting that the employer should not have held that perception, or should have excused the behavior.

Stevens, 2011 WL 3055370 at *7 (emphasis in original). Plaintiff must produce specific *facts*, not conclusory allegations, to rebut Chase's proffered evidence substantiating its non-retaliatory reasons for its actions. Her subjective belief that Chase had a retaliatory motive, no matter how firmly held or emphatically articulated, does not satisfy that obligation. *See Ennis v. Sonitrol Mgmt. Corp.*, 02-CV-9070 (TPG), 2006 U.S. Dist. LEXIS 2599, at *50 (S.D.N.Y. Jan. 24, 2006) (dismissing retaliation claim where there was "no evidence that the reasons defendants proffered for plaintiff's discharge are untrue or are merely pretext for a retaliatory motive"); *see also Liberty Lobby,* 477 U.S. at 256 (party opposing summary judgment must present "concrete evidence from which a reasonable [fact-finder] could return a verdict in [her] favor"); *W. World Ins. Co.*, 922 F.2d at 121 (nonmoving party "cannot escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts, or defeat the motion through mere speculation or conjecture") (internal quotations and citations omitted).

Second, Plaintiff appears to contend that because the PIP, Written Warning, and termination occurred after her complaints of discrimination and/or EEOC Charge, these actions were *ipso facto* retaliatory. Yet the law is clear that "temporal proximity in and of itself is usually 'insufficient to satisfy [a plaintiff's] burden to bring forward some evidence of pretext' in the retaliation context." *Alejandro v. N.Y. City Dep't of Educ.*, No. 15-CV-3346 (AJN), 2017 WL

1215756, at n.8 (S.D.N.Y. Mar. 31, 2017) (Nathan, J.) (quoting *El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d Cir. 2010)). All of the disciplinary actions that followed Plaintiff's complaints were consistent with those that preceded the complaints, and were the natural (and non-retaliatory) consequence of Plaintiff's failure to improve her behavior or meet her managers' legitimate expectations. *Spencer v. Perrier Grp. of Am.*, No. 95 CIV. 8404 (JSR), 1997 WL 282258, at *1 (S.D.N.Y. May 28, 1997) ("[T]he mere filing of such a complaint does not insulate an employee from subsequent discipline or discharge by his employer, nor create an automatic presumption that any subsequent employer action adverse to the employee is retaliatory in nature.").

F. Plaintiff Cannot Establish Her Claim of "Aiding and Abetting"

Plaintiff claims that Vega, DuBowy, and Poz "aided and abetted" violations of Title VII and § 1981 because they disagreed with her assessment that she was the victim of discrimination. (Am. Compl. ¶¶ 112-123.) As an initial matter, a claim of aiding and abetting is not viable as a matter of law under Title VII or § 1981. *See Smith v. Riccelli Brokerage Servs., LLC*, No. 09-CV-00230S, 2011 WL 2007209, at *5 (W.D.N.Y. May 23, 2011) ("it is clear that Title VII does not provide for aider and abettor liability"); *Long v. Marubeni Am. Corp.*, No. 05 CIV. 0639 (GEL), 2006 WL 547555, at *4 (S.D.N.Y. Mar. 6, 2006) (§ 1981 contains no language that provides for aider and abettor liability).

Even if such a claim could be brought, it would be without merit, as there can be no aiding and abetting a violation of Title VII or § 1981 without an underlying violation of those statutes. *See White v. Pacifica Found.*, 973 F. Supp. 2d 363, 377 (S.D.N.Y. 2013) ("accessory liability may only be found where a primary violation has been established").

G. Plaintiff's Claim of Harassment Should Be Dismissed

Plaintiff claims she was harassed based on her race by (i) Sullivan and (ii) Khavin and Shillingford. (Am. Compl. ¶¶ 125-33.) As demonstrated below, in neither case can Plaintiff make the requisite showing and this claim should be dismissed as well.

1. Legal Framework

To establish a hostile work environment claim, plaintiff must show:

> [1] that the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' and [2] that a specific basis exists for imputing the objectionable conduct to the employer. The plaintiff must show that the workplace was so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of her employment were thereby altered. This test has objective and subjective elements: the misconduct shown must be 'severe or pervasive enough to create an objectively hostile or abusive work environment,' and the victim must also subjectively perceive that environment to be abusive.

Alfano v. Costello, 294 F.3d 365, 373-74 (2d Cir. 2002) (internal citations omitted). In evaluating hostile work environment claims, courts must be mindful that "Title VII does not establish a general civility code for the American workplace.'" *Batista v. Waldorf Astoria*, No. 13 CIV. 3226 LGS, 2015 WL 4402590, at *7 (S.D.N.Y. July 20, 2015) (internal citations omitted). In order to be considered unlawful harassment, "incidents must be more than 'episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.' Isolated acts, unless very serious, do not meet the threshold of severity or pervasiveness." *Alfano*, 294 F.3d at 374.

2. Plaintiff Cannot Show a Triable Issue of Harassment

a. Sullivan

Plaintiff alleges that Sullivan harassed her because Sullivan "fought tooth and nail" to review Plaintiff's performance for 2014 even though Sullivan was no longer her manager at the time the review was done. (Am. Compl. ¶ 133). She is wrong. Sullivan did not "fight tooth and nail," or at all, to provide feedback on Plaintiff's 2014 performance. Rather, she questioned HR about whether, in light of Plaintiff's transfer to the CRG, it was still appropriate for Sullivan to

participate in Plaintiff's review. (Sullivan Dec., Ex. B.) HR responded that, pursuant to company practice, the primary feedback and rating should be provided by the manager under whose supervision Plaintiff had spent the majority of the year. (Sullivan Dec., ¶ 9.) That was Sullivan. Thus, despite Plaintiff's description of being "hunted and haunted" by Sullivan, who she claims was "bent on derailing, smearing, and destroying" Plaintiff's career (Am. Compl., ¶¶ 133), Chase policy provided that Sullivan, not Shillingford, would be Plaintiff's primary reviewer for 2014.

Even if Sullivan's 2014 review could somehow be considered harassment, it was a discrete event that falls well short of the "continuous and concerted" behavior necessary to establish a harassment claim. *See Magadia v. Napolitano*, No. 06 CIV. 14386(CM), 2009 WL 510739, at *17 (S.D.N.Y. Feb. 26, 2009) (hostile work environment claim must be based on "constant jokes and ridicule or physical intimidation" and not "discrete, adverse employment decisions concerning promotions, discipline, and appraisal, and about employer criticism").[6]

b. Khavin and Shillingford

Plaintiff alleges that Khavin and Shillingford harassed her "on a monthly basis whereby they . . . ordered me, as if I was the house slave, to do" the Tasks. (Am. Compl. ¶ 125.) As demonstrated above, the Tasks were part of Plaintiff's Reporting Analyst role. They were performed by Plaintiff's Caucasian predecessor before she arrived in CRG. (56.1 Stmt., ¶ 18.)

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[6] Indeed, courts have rejected harassment claims based on far more egregious conduct than the single performance review complained of here. *See, e.g., Wilson v. N.Y.P. Holdings, Inc.*, No. 05 CIV. 10355, 2009 WL 873206, at *28 (S.D.N.Y. Mar. 31, 2009) (references to black females as "whores," and "sluts," and comments that "training females is like training a dog" and that "women need to be horsewhipped," among other things, amounted to no more than "mere offensive utterance[s]"); *McCoy v. City of N.Y.*, 131 F. Supp. 2d 363 (E.D.N.Y. 2001) (display of noose and racially offensive advertisement, plus comments of "fucking nigger" coupled with obscene gestures, held insufficient to establish hostile environment claim); *Johnson v. IAC/Interactive Corp.*, 2 F. Supp. 3d 504, 515-17 (S.D.N.Y. 2014) (allegedly racist comments of "ghetto cut," a misidentification of an African American character, and explicit racial video content, do not rise to the level of hostile work environment under § 1981).

There is no basis whatsoever to contend that the assignment of these duties to Plaintiff was racially motivated.

H. Plaintiff Cannot Establish Her Claim of Intentional and/or Negligent Infliction of Mental, Physical and Emotional Distress

In her Seventh Cause of Action, Plaintiff claims that all Defendants intentionally and/or negligently caused her to suffer "severe mental stress, emotional anxiety, and physical pain." (Am. Compl. ¶ 169.) This is simply a statement of her alleged damages rather than a cause of action. But even if it could be construed as a discrete claim, it should be dismissed. If the claim is for the tort of intentional infliction of emotional distress, it should be dismissed because liability on this theory, "has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667, 681 (S.D.N.Y. 1995) (collecting cases and noting that courts have been "extremely reluctant" to find this is satisfied). And if the claim is for negligent infliction of emotional distress, it would be barred as a matter of law in light of workers' compensation preemption. *See Arroyo v. WestLB Admin., Inc.*, 54 F. Supp. 2d 224, 232 (S.D.N.Y. 1999), *aff'd*, 213 F.3d 625 (2d Cir. 2000).

I. Plaintiff Cannot Establish Her Claim of Defamation of Character

In her Tenth Cause of Action, Plaintiff claims that Liasis and Sullivan defamed her in violation of Title VII and § 1981 by depicting her in her 2013 and 2014 performance reviews as tardy, arrogant, and uncongenial. (Am. Compl. ¶ 125.) It is unclear whether Plaintiff intends to plead this as a defamation claim under state law, but if so, the claim is time-barred. In New York, "the statute of limitations for defamation actions is one year, and the cause of action accrues on the date of the alleged false statement." *Daniel v. Long Island Hous. P'ship, Inc.*, No. 08-CV-01455

JFB/WDW, 2009 WL 702209, at *10 (E.D.N.Y. Mar. 13, 2009). Here, both reviews occurred more than a year before Plaintiff commenced this action on April 29, 2016. And in any event, "[u]nder New York law, the evaluation of an employee's performance, even an unsatisfactory evaluation, is a matter of opinion that cannot be objectively categorized as true or false and cannot be actionable" in a claim for defamation. *Brattis v. Rainbow Advert. Holdings, L.L.C.*, No. 99 CIV. 10144 (NRB), 2000 WL 702921, at *4 (S.D.N.Y. May 31, 2000) (collecting cases).

If Plaintiff intends this claim as additional grounds for discrimination, it is beyond the scope of her EEOC charge, which as discussed in section IV.C, *supra*, did not even allude to Liasis and Sullivan, let alone address the events that form the basis of this claim.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant their Motion for Summary Judgment and dismiss Plaintiff's claims in their entirety with prejudice.

Dated: New York, New York
May 9, 2017

Respectfully submitted,

SEYFARTH SHAW LLP

By: /s/ Anshel Joel Kaplan

Robert S. Whitman
rwhitman@seyfarth.com
Anshel Joel Kaplan
akaplan@seyfarth.com
620 Eighth Avenue
New York, New York 10018
Telephone: (212) 218-5500
Facsimile: (212) 218-5526

Attorneys for Defendants