UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MICHELLE WARD	:	
v.	:	CIV. NO. 3:03CV1326 (WWE)
UNITED STATES SURGICAL DIVISION OF TYCO HEALTHCARE GROUP, LP	:	

RECOMMENDED RULING ON MOTION FOR SUMMARY JUDGMENT

Michelle Ward brings this action against her employer, United States Surgical Corporation, Division of Tyco Healthcare Group, L.P. ("USS"), arising out of a company-wide restructuring in 2001. Plaintiff alleges that USS discriminated against her on the basis of her disability in retaliation for her complaints of discrimination. Plaintiff contends that defendant violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq.; the Americans with Disabilities Act ("ADA") of 1990, 42 U.S.C. §§12111, et seq.; and Conn. Gen. Stat. §46a-60(a)(1), the Connecticut Fair Employment Practices Act "CFEPA".[1]

Pending is defendant's Motion for Summary Judgment **[Doc. #23]**. For the reasons that follow, summary judgment is **GRANTED** on all counts.

[1]Plaintiff acknowledges that "the evidence in this case supports a claim of employment discrimination on the basis of disability or perceived disability, rather then sex and accordingly withdr[ew] her sex discrimination claims." [Doc. #27 at 1].

STANDARD OF LAW

Summary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. See D'Amico v. City of New York, 132 F.3d 145, 149 (2d Cir. 1998); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, (1986). The non-moving party may not rely on conclusory allegations or unsubstantiated speculation. See D'Amico, 132 F.3d at 149. Instead, the non-moving party must produce specific, particularized facts indicating that a genuine factual issue exists. See Wright v. Coughlin, 132 F.3d 133, 137 (2d Cir. 1998). To defeat summary judgment, "there must be evidence on which the jury could reasonably find for the [non-movant]." Anderson, 477 U.S. at 252. If the evidence produced by the non-moving party is merely colorable or is not significantly probative, summary judgment may be granted. See id. at 249-50.

Pursuant to D. Conn. L. Civ. R. 56(a)(3),

> Each statement of material fact in a Local Rule 56(a)1 Statement by a movant or by an opponent in a Local Rule 56(a)2 Statement, and each denial in an opponent's Local Rule 56(a)2 Statement, must be followed by a specific citation to (1) the affidavit of a witness competent to testify as to the facts at trial and/or (2) evidence that would be admissible at trial. The affidavits, deposition testimony, responses to discovery requests, or other documents containing such evidence shall be filed and served with the Local Rule 56(a)1 and 2 Statements in conformity with Fed. R. Civ. P. 56(e). Counsel and pro se parties are hereby notified that failure to provide specific

> citations to evidence in the record as required by this Local Rule may result in sanctions, including, when the movant fails to comply, an order denying the motion for summary judgment, and, when the opponent fails to comply, an order granting the motion.

When a motion for summary judgment is supported by documentary evidence and sworn affidavits, the nonmoving party must present "significant probative evidence to create a genuine issue of material fact." Soto v. Meachum, Civ. No. B-90-270 (WWE), 1991 WL 218481, at *6 (D. Conn. Aug. 28, 1991). A party may not rely "on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987).

A party may not create a genuine issue of material fact by presenting contradictory or unsupported statements. See Securities & Exchange Comm'n v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir. 1978). Nor may he rest on the "mere allegations or denials" contained in his pleadings. Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995). See also Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993) (holding that party may not rely on conclusory statements or an argument that the affidavits in support of the motion for summary judgment are not credible). A self-serving affidavit which reiterates the conclusory allegations of the complaint in affidavit form is insufficient to preclude summary judgment. See Lujan v. National Wildlife Fed'n, 497 U.S. 871,

888 (1990). "The nonmovant, plaintiff, must do more than present evidence that is merely colorable, conclusory, or speculative and must present concrete evidence from which a reasonable juror could return a verdict in her favor." Page v. Connecticut Department of Public Safety, 185 F. Supp. 2d 149, 152 (D. Conn. 2002) (citations and internal quotation marks omitted).

FACTS

Based on defendants' Local 56(a)(1) Statement and exhibits[2] [doc. #24] and plaintiff's Local 56(a)2 Statement and exhibits[3] [doc. #28], the following facts are undisputed.

1. Plaintiff Michelle Ward, is a citizen of the United States and resides in West Haven, Connecticut. Def. 56(a)(1) and

[2]Defendant's Exhibit A is a copy of Michelle Ward's 1999 Employee Performance Appraisal, prepared by her supervisor, James Andreoli. Exhibit B is a copy of Michelle Ward's 2000 Employee Performance Management Document, prepared by her supervisor, James Andreoli and signed by her first level manager Tony Lopes; her second level manager, Dave Baker; and the Human Resources Manager. Exhibit C is a copy of an ad for openings in Warehouse/Traffic Operations for Distribution Coordinators. Exhibit D is a copy of a note dated May 28, 2001, from Dr. Joanne Foodim. Exhibit E is a copy of a letter to Michelle Ward, dated December 19, 2001 from Gina Alfveby, Manager of Employee Benefits for Tyco/United States Surgical. Exhibit F is a copy of a note dated September 17, 2001, from Dr. Joanne Foodim, and Exhibit G is a copy of a note dated December 17, 2001, from Dr. Joanne Foodim. Defendant also submitted the declarations of James Andreoli [doc. #23-3] and Lorrie Kiley [doc. #23-2] and selected pages from Michelle Ward's deposition transcript [doc. #23-4] in support of summary judgment.

[3]Plaintiff's Exhibit A is a copy of her affidavit, dated November 13, 2001. Exhibit B is a copy of her Revised Responses to Defendant's First Set of Interrogatories, and Exhibit C is selected pages from her deposition transcript, dated November 12, 2004.

Pl. 56(a)(2) Local Stat. at ¶1.

2. USS does business in the State of Connecticut. Id. at ¶2.

3. USS has a place of business located at 195 McDermott Road, North Haven, Connecticut. Id. at ¶3.

4. USS hired Ward in or about 1985 and continues to employ her. Id. at ¶4.

5. Ward was hired as a Warehouse Person. Id. at ¶5.

6. Ward was originally assigned to packing duties, which she performed for several years. Id. at ¶6.

7. Ward does not have a college degree, nor has she earned any certifications from post-high school technical or educational institutions. Id. at ¶7.

8. While working as a packer, Ward would "sometimes be called upon to do backup" for the woman handling the warehouse's print office duties. [Doc. #24 at ¶8; Doc. #23-4 at 32:8-10 and 32-33].

9. When that woman left USS, she was replaced by another woman, Sheila Kane. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶9.

10. According to Ward, when Ms. Kane left her warehouse position, Ward and another woman, Carolyn Randsley, expressed an interest in taking over the warehouse print office duties. Id. at ¶14.

11. Ward alleges that she complained to USS management that she should be assigned the print office duties over Ms. Randsley. Id. at ¶15.

12. On or about 1990, Ward was assigned duties in the warehouse print office. Id. at ¶17.

13. Ward worked in the warehouse print office for eleven years. Id. at ¶29.

14. During that time, while her daily duties may have changed, Ward remained a Warehouse Person. Id. at ¶19.

15. While shw was working as a Warehouse Person, as both a packer and in the warehouse print office, Dave Baker was the warehouse manager. Id. at ¶20.

16. According to Ward, Baker had a temper and often shouted at warehouse employees. Id. at ¶21.

17. Ward could not see Baker's treatment of employees working in the warehouse from the print office. Id. at ¶22.

18. There was a level of supervisors between Ward and Baker. [Doc. #24 at ¶23].

19. The same supervisors who oversaw the warehouse also oversaw the warehouse print office. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶24.

20. One supervisor, James Andreoli, supervised Ward for several years. Andreoli prepared Ward's performance evaluations in 1999 and 2000. Id. at ¶25.

21. Ward had little discretion with respect to her print office tasks; her duties were essentially clerical and repetitive. Andreoli Decl. ¶6.

22. While Ward was working in the warehouse print office, USS's customer service department prepared the material orders and

sent them to the warehouse print office printer. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶27.

23. The customer service department was located in a different building. Id. at ¶28.

24. Ward did not create the material orders. Id. at ¶29.

25. Ward released the Customer Service Department's material orders from the print office printer's queue, waited for them to print, and took the printed orders off the printer. Id. at ¶30.

26. Ward took the printed material orders to slots outside the warehouse print office door, where others in the warehouse would retrieve them and fill the orders. Id. at ¶31.

27. Ward did the same thing with respect to material orders for international shipments. Id. at ¶32.

28. Ward did the same thing with respect to work orders for Valley Lab, a USS-affiliated company. Id. at ¶33.

29. If the weight of a particular material order exceeded 150 pounds when filled, Ward would type a bill of lading and attach it to the material order before placing the order in the slot outside the warehouse print office door. Id. at ¶34.

30. If a work order required special labeling - such as indicating the presence of hazardous materials - Ward would type up the label and attach it to the material order before placing the order in the slot outside the warehouse print office door. Id. at ¶35.

31. When there was an emergency order, the Customer Service Department would create and send the order to the warehouse print office printer. Id. at ¶36.

32. The Customer Service Department would then call the warehouse print office on the telephone to alert the warehouse that an emergency order had been sent. Id. at ¶37.

33. Ward often fielded these calls and notified the warehouse supervisors. Id. at ¶38.

34. USS had an answering service to answer most of the telephone calls to the warehouse print office. Id. at ¶39.

35. Sometimes Ward received telephone calls in the warehouse print office advising her that certain product lots needed to be returned to USS's main building. Ward would verbally communicate that information to the person responsible for quarantining product lots. Id. at ¶40.

36. Telephone calls for warehouse supervisors came in to the warehouse print office. Ward would sometimes take these calls and pass the messages along to the supervisors. Id. at ¶41.

37. The Traffic Department made arrangements with outside trucking companies. Id. at ¶42.

38. Ward called the trucking companies to confirm times of arrival and to advise them to which area of the warehouse the trucks should go. Id. at ¶43.

39. Otherwise, Ward testified to no other responsibilities

relative to deliveries and pick-up. Ward Tr. ¶¶64-66.

40. A report printed in the warehouse print office each morning contained information about the previous day's material order shipments. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶45.

41. Ward wrote the figures from these daily reports onto a pre-existing spreadsheet and faxed the spreadsheet to the company president. Id. at ¶46.

42. Ward did not analyze these numbers. She testified that she "had a basic spreadsheet made out and [she] just filled in the dollars." [Ward Tr. at 65].

43. Ward maintained, distributed and, if necessary, ordered office and certain warehouse supplies, such as notebooks, magic markers, safety razors, pens and paper. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶48.

44. After Tyco Healthcare merged with U.S. Surgical, Steve Brown became the head of the warehouse and Dave Baker's supervisor. Id. at ¶49.

45. While James Andreoli was already one of Ward's supervisors, Ward claims Baker assigned Andreoli to work out of the warehouse print office in 2001. Id. at ¶50.

46. Ward believes Baker assigned James Andreoli to work out of the warehouse print office to impress Brown. Id. at ¶51.

47. In or about 2001, USS implemented a company-wide restructuring that affected many employees and many positions. Id. at ¶52.

48. In some cases, old positions were eliminated and the duties formerly handled by those positions were reassigned to new and existing positions. Id. at ¶53.

49. In April 2001, Ward saw a classified advertisement posted by USS for Distribution Coordinator positions. Id. at ¶54.

50. The advertisement for Distribution Coordinator stated,

> We currently have 1st and 2nd shift positions in which you'll work with Customer Logistics and other distribution centers, invoice customer orders on a daily basis, file, trace and expedite customer shipments, and enter data for productivity reports. To qualify, you must have a Bachelor's degree or the equivalent work experience, proficiency in MS Word and Excel, and knowledge of inventory control practices. You must also have the ability to analyze numbers, and sound written/verbal communications skills.

[Def. Ex. C].

51. Candidates for the Distribution Coordinator position needed a minimum of four years of college or the equivalent in related experience. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶56.

52. In addition to four years of college or equivalent experience, ideal candidates needed experience developing and implementing multi-departmental service and delivery logistics.[4] Def. 56(a)(1) Stat. ¶57.

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[4]Plaintiff disputes this statement, stating that "[t]he job description does not state." She cites to Exhibit B ¶12, which is her response to defendant's first set of interrogatories, which is not the job description. Interrogatory 12 asks, "Describe the basis for your contention in Paragraph 18 of your Complaint that the 'new position' your supervisor encouraged you to apply for was the position you already held. Your response should include, but not be limited to, a comparison of the duties

53. The bulk of the Distribution Coordinators' work would be developing production matrices, charts and graphs, and developing and maintaining more significant inter-departmental coordination and oversight.[5] Id. at ¶58.

54. Since USS had never had such a system, prior experience in this area was critical.[6] Id. at ¶59.

55. USS envisioned the Distribution Coordinator position as a springboard into higher level management and was seeking candidates with demonstrated ability to do so.[7] Id. at ¶60.

56. While the Distribution Coordinators' responsibilities might include some of the clerical duties previously done by Ward, this was a small percentage of their responsibilities.[8] Id. at ¶61.

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and qualifications of your existing position and those of this 'new position.' [Pl. Ex. C, Interr. 12]. There is no "comparison" of the two positions provided in the interrogatory answer. Defendants cite to the affidavit of Lorrie Kiley, the then USS Employee Specialist in 2001, when the position for Distribution Coordinator was posted, to support its contention that this material fact is not in dispute. Kiley was "involved in recruiting to fill . . . the Distribution Coordinator position." [Kiley Decl. ¶10].

[5]See n 4.

[6]See n 4.

[7]See n 4.

[8]Plaintiff disputes this statement and cites to her transcript, plaintiff's exhibit C, at pages 123-24. Plaintiff did not append page 123 to exhibit C. Page 124, which is appended, does not address the percentage of duties performed by Ward that were later incorporated into the Distribution Coordinator's position. Defendant appended Ward's transcript page 123; however, page 123 does not support plaintiff's factual contention.

57. When Ward inquired about the position, Lorrie Kiley, a representative from the Human Resources department, advised Ward she was not qualified because she lacked the requisite education and experience. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶62.

58. Kiley also advised Ward that the Distribution Coordinators would be spending a significant amount of time on the warehouse floor.[9] Def. 56(a)(1) Stat. ¶63.

59. Ward advised Kiley she could not work on the warehouse floor because she could not wear steel-toed shoes.[10] Id. at ¶64.

60. Safety regulations required everyone working on the warehouse floor to wear steel-toed shoes. Ward contends she could not wear them because they hurt her feet. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶65.

61. Ward did not mention any lifting restrictions during the

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[9]Plaintiff disputes this statement. She cites to plaintiff's exhibit B ¶13, which is her response to defendant's first set of interrogatories. Interrogatory 13 asks, "Identify to whom you spoke and the substance of the discussion on May 29, 2001, and any time before or after that date, regarding the alleged elimination of your entire office job and your return to the warehouse for 80% of your time. Please include specific details as to what you said and what was said to you during this conversation." Pl. Ex. B, Interr. 13. There is no reference in plaintiff's answer to a conversation with Ms. Kiley and the time to be spent on the warehouse floor.

[10]Plaintiff disputes this statement. She cites to plaintiff's exhibit B ¶13, which is her response to defendant's first set of interrogatories. There is no reference in plaintiff's answer to a conversation in which plaintiff advised Kiley that she could not work on the warehouse floor because she could not wear steel-toed shoes.

call with Kiley.[11] Def. 56(a)(1) Stat. ¶66.

62. At that time, Kiley was not aware Ward had any lifting restrictions.[12] Id. at ¶67.

63. In addition to creating the Distribution Coordinator position, Brown implemented new procedures in the warehouse print office, including having all material orders printed up at one time (i.e. first thing in the morning), rather than at 15 to 30 minute intervals throughout the day. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶68.

64. This meant the only material orders that came in during the remainder of the day were emergency orders, which Ward or someone else would handle. Id. at 69.

65. USS believed this change meant it no longer needed a Warehouse Person in the print office full-time.[13] Def. 56(a)(1) Stat. ¶70.

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[11]Plaintiff disputes this statement. She cites to plaintiff's exhibit B ¶14, which is her response to defendant's first set of interrogatories. There is no reference in plaintiff's answer to interrogatory 14 to a telephone conversation with Kiley regarding lifting restrictions.

[12]Plaintiff disputes this statement. She cites to plaintiff's exhibit A ¶14, which is her affidavit dated November 13, 2001, submitted with her CHRO complaint. Paragraph 14 states, "On May 28, 2001, my physician, Joanne Foodim, M.D., informed my employer in writing that I suffer from anemia related to my cancer treatment and that as a result I should not be required to work in a position requiring manual work and that, specifically, I should not be lifting over 5 to 10 pounds regularly." Pl. Ex. A ¶14.

[13]Plaintiff disputes this statement and cites to her transcript at page 87. She testified, "Dave said - Jim told me that Dave said they no longer needed somebody full time in the print office." Def. Ex. A at 87. Plaintiff offered no contradictory testimony on this point.

66. Ward was advised that, because this change in the printing procedures so increased the office's efficiency, she was no longer needed in the warehouse print office for a full day. Id. at ¶71. Plaintiff agreed that this statement was made, but claimed that the statement was false. Pl. 56(a)(2) Stat. ¶ 70.

67. Ward testified that Baker changed her position to impress Steve Brown.[14] Def. 56(a)(1) Local Stat. at ¶73.

68. Ward's pay and benefits were not affected.[15] Id. at ¶74.

69. On May 22, 2004, USS advised Ward her time in the print office would be cut to four hours per day and she would be assigned other duties in the warehouse to fill her work day. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶¶ 72,75.

70. On May 24, 2001, Ward contacted the Tyco Employee Concern Line because Baker had reprimanded her for not completing a certain task quickly enough and Ward was concerned she might be fired.[16] Def. 56(a)(1) Local Stat. at ¶78.

71. On May 24, 2001, plaintiff filed a harassment complaint with the defendant. Compl. ¶17.

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[14]Plaintiff disputes this statement, citing to her transcript at page 78. She testified, "So that was like [Baker] was trying to impress Steve Brown on doing everything, even making changes with me, you know." Def. Ex. A at 78. She offers no contradictory testimony.

[15]Plaintiff disputes this statement, citing to her transcript at page 98. However, she testified that there was no difference in her pay, benefits, hours or shift. Def. Ex. A at 98. She offers no contradictory testimony.

[16]Plaintiff agrees "that she made the contact and that this was one of the reasons." Pl. 56(a)(2) Stat. ¶78 (emphasis added).

72. Ward contends that she told the Concern Line Operator that Baker was retaliating against her for complaining in or about 1990 about Baker giving his friends preferential treatment for office positions. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶81.

73. The notes of the concern line operator states that Ward believed that Mr. Baker as retaliating against her because of the incident on May 10, 2001. "Ms. Ward stated on May 10, 2001, [that] Mr. Baker told her that he wanted the work, referring to the printing of documents, to come out faster." The notes indicate that Ward said Baker was "yelling at her during this incident, and he was three feet away from her." There is no reference to a 1990 retaliation claim in the notes. [Def. Ex. to 9/15/05 Let.].

74. On May 29, 2001, Ward advised USS she was not physically capable of performing certain manual tasks in the warehouse. Id. at ¶83.

75. Ward produced a doctor's note, dated May 28, 2001, stating that Ward was weak as a result of anemia and "should not be employed in a position that requires manual work. Specifically, she should not be lifting [more than] 5-10 lbs. regularly." Id. at ¶84.

76. When there was not enough work to sustain Ward's full time hours, USS gave her as many hours of work as possible and recommended she apply for part-time short-term disability benefits to cover time without work. Id. at ¶86.

77. Plaintiff testified that she did not apply for short-term disability because she could still perform the functions of her job with the exception of the lifting restriction set forth by her doctor. Pl. 56(a)(2) Local Stat. at ¶87.

78. USS found full-time work for Ward in the Bio Lab that she could do with her restrictions. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶88.

79. Defendant informed Ward that the Bio Lab work was not a permanent assignment and Ward was advised that the work there would eventually run out. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶89.

80. Ward provided USS with a doctor's note, dated September 17, 2001, that stated Ward was able to work "with restrictions." Dr. Joanne Foodim remarked "she should continue sedentary, not manual, work until reevaluated in 3 weeks." Def. Ex. F.

81. Ward worked in the Bio Lab until November 2001. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶91.

82. USS told Ward that there was no work for her that fit her physical restrictions. Id. at ¶92.

83. Ward testified that she applied for a job in the Bio Lab that required that she act as a go-between with a company in Puerto Rico. She stated that "they wanted somebody in Spanish to - you know, so they can translate back and forth, that spoke both languages." Ward does not speak Spanish. She was not offered the job. Id. at ¶93.

84. Ward did not file for short-term or long-term disability.

Id. at ¶94; Ward Tr. at 163.

85. At her deposition, Ward was asked, "Is it your opinion that if you couldn't perform any jobs that actually were needed to be done, that the company should have kept you on doing nothing? Ward replied, "Yes." Ward Tr. at 142.

86. On December 19, 2001, Gina Alfveby, Manager of Employee Benefits at USS, sent a letter to Ward stating the following.

> In your recent conversation with Melissa Slater-Ayala concerning your employment situation you noted the case of another individual who was given a "light-duty" position in USS manufacturing. At the time that you were placed into a light-duty position, manufacturing options were not considered due to the fact that your physician's note dated May 28, 2001 indicated "that you not be employed in a position that requires manual work." This restriction was also reiterated in a subsequent note dated September 17, 2001.
>
> However, if you and your physician now feel that a position in manufacturing would not go against these restrictions, please contact me immediately to discuss this option for your return to work.
>
> The company would also like to reiterate that you are not currently receiving any short-term disability benefits because you have not contacted Prudential (the short-term disability administrator) to make arrangements to collect these benefits. The company is concerned that you are not receiving the benefits that you are entitled to, and I again urge you to contact Prudential so you can begin receiving them.
>
> Should you wish to discuss the option of a light-duty position in manufacturing, of if you have any other questions, please contact me at your earliest convenience . . . .

Def. Ex. E.

87. Ward provided USS with a note from Dr. Foodim, dated December 27, 2001 stating, "Michelle Ward is under my care. She states that she gets weak and faint with manual work. Therefore, I recommend that if possible her work position be sedentary." Def. Ex. G.

88. In February 2002, USS offered Ward a position in the manufacturing department. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶98.

89. Ward accepted the position and returned to work in March 2002. Id. at ¶99.

90. Ward received the same pay, benefits, and full-time hours she received in the warehouse. Id. at ¶100.

91. Shortly after beginning work in the manufacturing department, USS moved Ward to Quality Control as a Quality Control Technician. Id. at ¶101.

92. Ward continues to work in Quality Control, where she is the highest paid QC Tech. Id. at ¶102.

DISCUSSION

USS now moves for summary judgment, pursuant to Fed. R. Civ. P. 56, seeking dismissal of Ward's complaint in its entirety. Specifically, defendant argues that summary judgment is appropriate because (1) Ward has not demonstrated she was disabled or was perceived as being disabled; (2) Ward cannot show she was qualified for the Distribution Coordinator position; (3)

Ward cannot show she was denied the position because of her disability; and (4) Ward cannot show USS changed her warehouse duties because of a disability. [Doc. #23-1 at 25].

1. ADA or CFEPA Claims

Title I of the ADA provides that no covered entity, including private employers, shall discriminate against a qualified individual with a disability because of the disability of such individual. See Heyman v. Queens Vill. Comm. for Mental Health for Jamaica Cmty. Adolescent Program, Inc., 198 F.3d 68 (2d Cir. 1999). "A plaintiff alleging employment discrimination under the ADA bears the initial burden of establishing a prima facie case." Ryan v. Grae & Rybicki, 135 F.3d 867, 869 (2d Cir. 1998). To establish a prima facie case of disability discrimination, a plaintiff must prove by a preponderance of the evidence that: (1) her employer is subject to the ADA or CFEPA; (2) she was disabled; (3) she was otherwise qualified to perform the essential functions of her job; and (4) she suffered an adverse employment action because of her disability. See Heyman, 198 F. 3d at 72. The parties in this case do not dispute that the defendant is subject to the ADA or CFEPA. However, USS argues that Ward is not "an individual with a disability" under the ADA.[17]

[17] Discriminatory claims brought under the CFEPA are construed similarly to that of ADA claims, with the Connecticut courts reviewing federal precedent concerning employment

a. Disability

Under the ADA, "disability" is defined as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. §12102(2). Defendant argues that plaintiff cannot meet the threshold burden of proving she was disabled. First, defendant points out that plaintiff testified that she was not disabled and that her doctor did not consider her disabled. See Ward Tr. 139, 149. Plaintiff does not dispute this assertion. Rather, she argues that she was a cancer patient and that this fact was known to defendant. [Doc. #27 at 5]. Ward further argues, that the "heavy-lifting restriction was one consequence of her cancer and that fact also was known to the defendant."

> discrimination for guidance in enforcing the CFEPA. Levy v. CHRO, 236 Conn. 96, 103, 671 A.2d 349 (1996). With respect to disability discrimination claims under CFEPA, however, the CFEPA has a far broader definition of "disabled" than the ADA. See Beason v. United Technologies Corp., 337 F.3d 271, 277 (2d Cir. 2003). The statutory definition of a physically disabled person, for purposes of the CFEPA, is: "any individual who has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device." Conn. Gen. Stat. § 46a-51(15).

Worster v. Carlson Wagon Lit Travel, Inc., 353 F. Supp. 2d 257, 267 (D. Conn. 2005). Here, plaintiff did not offer an alternative argument on "disability" under the CFEPA.

Id. Plaintiff contends that "[t]he evidence in this case . . . viewed in the light most favorable to [her], would permit a jury to find both that she actually was disabled within the meaning of the law and that the defendant so regarded her." [Doc. #27 at 8 (emphasis added)].

Defendant argues that a lifting restriction of five to ten pounds and/or a cancer diagnosis is not a per se disability as a matter of law and argues that there is no evidence in the record demonstrating that plaintiff had "a physical or mental impairment that substantially limits one or more of the major life activities . . . ." 42 U.S.C. §12102(2).

The record contains three doctor's notes that were provided to USS addressing plaintiff's medical condition. The first, dated May 28, 2001, states that Ward is seeking medical care for anemia and is weak. The note contained the doctor's recommendation that Ward not perform manual work that required her to regularly lift more than five to ten pounds. Def. Ex. D. The second, dated September 17, 2001, states that Ward should "continue sedentary, not manual work." Def. Ex. F. The third note dated December 27, 2001, states, "[Ward] states she gets weak and faint with manual work. Therefore, I recommend that if possible her work position be sedentary." Def. Ex. G. This is the only medical evidence that plaintiff submitted to her employer. Ward identified no other physical restrictions beyond the lifting limit and sedentary, non-manual work preference

indicated in these notes.[18] [Compl. ¶19].

As to plaintiff's cancer diagnosis, plaintiff provided no medical evidence that she was diagnosed with cancer by any competent medical professional or that she was receiving treatment for cancer in May 2001 or at any other time. The record contains an allegation at paragraph 12 of the Complaint that states "[i]n approximately 1994, the plaintiff was diagnosed with cancer. This fact was known to the defendant." [Compl. at ¶12]. As stated infra at note 18, plaintiff alleges that her anemia in May 2001 was due to cancer treatment. However, this allegation is not supported by any evidence in the record.[19] See infra note 18. In opposition to summary judgment, plaintiff has

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[18]Although, the Complaint at paragraph 19 contains an allegation stating that,

> On May 28, 2001, the plaintiff's physician, Joanne Foodim, M.D., informed the defendant in writing that the plaintiff suffered from anemia related to her cancer treatment and that as a result the plaintiff should not be required to work in a position requiring manual work and that, specifically, the plaintiff should not be lifting over 5 to 10 pounds regularly . . .

the note does not state that the anemia was related to plaintiff's cancer treatment. Compare Def. Ex. D with Compl. at ¶19.

[19]The Court notes that Ward also stated in her November 2001 affidavit submitted to the CHRO that "seven (7) years ago, I was diagnosed with cancer. This fact was known to my employer." Pl Ex. A at ¶ 7. She further stated that on May 28, 2001, my physician Joanne Foodim, M.D. informed my employer in writing that I suffer from anemia related to my cancer treatment and that as a result I should not be required to work in a position requiring manual work and that, specifically, I should not be lifting over 5 to 10 pounds regularly." Pl. Ex. A at ¶ 14.

offered no treatment records from Dr. Foodim, or further medical evidence, to support her allegations that the anemia or lifting limitations were related to her cancer treatment.

Major Life Activity

Under the ADA, "major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. §1630.2(i). As the Supreme Court noted in Bragdon v. Abbott, 524 U.S. 624, 638 (1998) this list is illustrative, and not exhaustive. Under certain circumstances, "major life activity" may include heavy lifting. See Colwell v. Suffolk City Police Dept., 158 F.3d 635, 643 (2d Cir. 1998) (assuming without deciding, that the police officer's back condition affected his ability to stand, sit, lift objects, work and sleep, were major life activities.); Ryan v. Grae & Rybicki, 135 F.3d 867, 870 (2d Cir. 1998) (identifying other "major life activities," including, but not limited to, "sitting, standing, lifting, or reaching." (quoting U.S. Equal Employment Opportunity Commission, Americans with Disabilities Act Handbook I-27 (1992)). Defendant does not dispute that lifting may be considered a "major life activity." Rather, defendant argues that neither the cancer nor the lifting restrictions was "substantially limiting."

Substantial Limitation

The next step in the Court's analysis is to determine

whether the plaintiff's impairment "substantially limits" the life activities that are properly deemed manor. "This inquiry is individualized and fact-specific." Colwell, 158 F.3d at 643 (multiple citations omitted).

The ADA defines the term "substantially limits" to mean:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. §1630.2(j)(1). The regulations further counsel that

> [t]he following factors be considered in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. §1630(j)(2).

"[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent and long-term." Toyota Motor Mfg. Ky. Inc v. Williams, 534 U.S. 184, 122 S. Ct. 681, 691 (2002). "It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the

ADA requires those 'claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial.'" Id. at 691-92 (quoting Albertson's Inc. v. Kirkingburg, 527 U.S. 555, 567 (1999)).

Here, no evidence of a medical diagnosis was submitted. The only evidence submitted to support this claim are the three notes from Dr. Foodim, which do not support a finding of a disability. There is no medical evidence in the record that plaintiff was diagnosed with cancer or was undergoing treatment for that condition. The ADA requires individuals with lifting restrictions and/or cancer, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation, in terms of their own experience, is substantial. See Albertson's Inc., 527 U.S. at 567. On this record, plaintiff has not shown that her impairment substantially limited one or more major life activity. 42 U.S.C. §12102(2). Accordingly, the Court finds that summary judgment should enter on this claim under the ADA and the CFEPA.

b. Regarded as Having Such an Impairment

Ward argues that even if her impairment does not substantially limit a major life activity, she is, nonetheless, disabled because USS regarded her as having an impairment that

substantially limited her ability to work.[20] "[W]hether an individual is regarded as having a disability turns on the employer's perception of the employee' and is therefore a question of intent, not whether the employee has a disability." Colwell, 158 F.3d at 646 (internal quotation marks and citation omitted). "It is not enough, however, that the employer regarded that individual as somehow disabled; rather, the plaintiff must show that the employer regarded the individual as disabled within the meaning of the ADA." Id. (emphasis added) (citing Francis, 129 F.3d at 285-86).

"Substantially limited" in the ability to work means that plaintiff is: [21]

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[20]The ADA defines "regarded as having such an impairment" as follows:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
> (3) Has none of the impairments defined in paragraph (h)(1)or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. §1630.2(l)(1)-(3). While the CFEPA definition of disability is broader than that of the ADA, CFEPA provides no cause of action for perceived physical disability. See Beason v. United Technologies Corp., 337 F.3d 271, 279-82 (2d Cir. 2003).

[21]

> When the major life activity under consideration is that of working, the statutory phrase "substantially limits" requires, at a minimum, that plaintiffs

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

> allege they are unable to work in a broad class of jobs. Reflecting this requirement, the EEOC uses a specialized definition of the term "substantially limits" when referring to the major life activity of working:
>
> "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." §1630.2(j)(3)(i).
>
> The EEOC further identifies several factors that courts should consider when determining whether an individual is substantially limited in the major life activity of working, including the geographical area to which the individual has reasonable access, and "the number and types of jobs utilizing similar training, knowledge, skills or abilities, within the geographical area, from which the individual is also disqualified." §§1630.2(j)(3)(ii)(A), (B). To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Sutton v. United Airlines, Inc., 527 U.S. 471, 491-92.

29 C.F.R. §1630.2(j)(3)(I). "An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." Pikoris v. Mount Sinai Medical Center, No. 96 CIV. 1403 (JFK), 2000 WL 702987, *12, (S.D.N.Y. May 30, 2000) (quoting Ryan, 135 F.3d at 872); see Lacoparra v. Pergament Home Centers, Inc., 982 F. Supp. 213, 229 (S.D.N.Y. 1997)("That an employer deems an employee incapable of performing a particular job is insufficient; the employer must perceive the employee as generally unable to work.")). Although USS believed that plaintiff was not qualified for the Distribution Coordinator position, defendant offered plaintiff positions in the Bio Lab and manufacturing and contacted plaintiff to ascertain her ability to work. [Def. Ex. E, Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. At ¶98]. Indeed, she continues to work at USS in Quality Control.

This Court is persuaded, drawing all inferences in plaintiff's favor, that a reasonable trier of fact could not conclude by a preponderance of the evidence that USS regarded Ward as suffering from a physical impairment that significantly restricted her ability to perform the major life activity of work.

With regard to plaintiff's lifting restriction, viewing the evidence in a light most favorable to Ward, the defendant could have perceived that Ward's anemia left her unable to lift more

than five to 10 pounds.[22] [Def. Ex. D]. As set forth above, "this does not amount to a perception of [her] as substantially limited in the major life activities of lifting or carrying." Beason, 213 F. Supp. 2d at 111. Nor, does this amount to a perception that Ward is substantially limited in the major life activity of working as defined by the ADA. Plaintiff has not presented any evidence that USS perceived Ward's lifting restriction to substantially limit her ability to perform a "the number and types [23]of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area [to which she has reasonable access]." 29 C.F.R. §§1630.2(j)(3)(ii)(A), (B); Sutton, 527 U.S. at 492. Specifically, plaintiff has not shown that USS regarded her as generally unable to work because of her lifting restriction. The record demonstrates that plaintiff

[22]To the extent that Ward argues that she was "regarded as" disabled because she allegedly had cancer in 1994, she has proffered no evidence that any of the decision makers in this case knew or were aware she had cancer. Silvera v. Orange County School Board, 244 F.3d 1253, 1262 (11th Cir.) ("discrimination is about actual knowledge and real intent, not constructive knowledge and assumed intent."), cert. denied, 534 U.S. 976 (2001); Woodman v. WWOR-TV, Inc., 293 F. Supp. 2d 381, 387 (S.D.N.Y. 2003) (granting summary judgment on age claim where plaintiff failed to show that decision makers knew her age); Prebilich-Holland v. Gaylord Entertainment Co., 297 F.3d 438, 444 (6th Cir. 2002) (granting summary judgment on pregnancy discrimination claim where plaintiff failed to show decision maker knew about pregnancy, even though co-workers knew). Moreover, Ward provided no evidence that the cancer diagnosis in 1994 was related to the lifting restriction imposed by her doctor in 2001.

[23]Plaintiff testified that the purpose of the May 2001 doctor's note was to excuse her from doing warehouse work after her hours in the print office were reduced to four (4) hours a day, due to the restructuring in the print office. Ward Tr. 105-108, 115.

continued to work for USS even after she provided a doctor's note regarding her lifting limitations. See Pikoris, 2000WL702987, *12-13 (holding that the defendant-employer did not perceive the plaintiff, a resident anesthesiologist, as disabled because it offered her alternative employment within the hospital after it terminated her residency.). Ward continued to work in the print office after she submitted the May 28, 2001 doctor's note[24], and then was employed to file in the Bio Lab through November 2001. [Ward Tr. 136]. In December 2001, she was offered a position in manufacturing, where she began working in March 2002.[25] Indeed,

[24]Plaintiff testified that after defendant cut her hours in the print office they offered her a position "on the floor" and she told them "I can't do that work anymore. I can't do heavy lifting anymore." [Ward Tr. at 93]. Plaintiff also contends that she was unable to wear required steel-toed shoes on the warehouse floor, although, no medical evidence was submitted to support her contention.

[25]The record contains a letter dated December 19, 2001 from Gina Alfveby, Manager Employee Benefits, to plaintiff that states:

> In your recent conversation with Melissa Slater-Ayala concerning your employment situation you noted the case of another individual who was given a "light-duty" position in USS manufacturing. At the time that you were placed in a light duty position, manufacturing options were not considered due to the fact that your physician's note dated May 28, 2001 indicated "that you not be employed in a position that requires manual work." This restriction also reiterated in a subsequent note dated September 17, 2001.
>
> However, if you and your physician now feel that a position in manufacturing would not go against these restrictions, please contact me immediately to discuss this option for your return to work.

plaintiff is still employed at USS.

An employer's accommodation of an employee's lifting restrictions does not mean that the employer perceived the plaintiff as substantially limited in the major life activity of working as defined by the ADA. Beason, 213 F. Supp. 2d at 112-113 (accommodation of lifting restriction of twenty-five pounds in positions with a physical demand rating of "3" is not broad enough to "substantially limit" the major life activity of working); Colwell, 158 F.3d at 646 ("An employer that accedes to minor and potentially debatable accommodations (a sensible way to avoid litigation, liability, and confrontation), does not thereby stipulate to the employee's record of a chronic and endless disability."). "Thus, in order to prove that [defendant] perceived her as substantially limited in her ability to work, [plaintiff] bore the burden of presenting evidence that [defendant] perceived her to be incapable of working in a broad range of jobs suitable for a person of her age, experience, and training because of her disability." Ryan, 135 F.3d at 872; Colwell, 158 F.3d at 647; Beason, 213 F. Supp. 2d at 115.[26] Ward

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Def. Ex. E. Plaintiff provided defendant with a third doctor's note dated December 27, 2001. [Def. Ex. G]. In February 2002, USS offered Ward a position in the manufacturing department. Def. 56(a)(1) and Pl. 56(a)(2) Local Stat. at ¶98. Ward accepted the position and returned to work in March 2002. Id. at ¶99.

[26]In Beason the Court found that,

> While [plaintiff's] evidence may suggest a perception that he is unable to perform work that involves heavy lifting, much moving around, or the use of heavy or vibrating machinery, he has not presented sufficient

failed to present such evidence. The fact that plaintiff was perceived to have a lifting restriction is not enough. Id. The Court finds that Ward presented no evidence to create a genuine issue of material fact that, because of her disability USS perceived her to be incapable of working in a broad range of jobs suitable for a person of her age, experience, and training.

Plaintiff also argues that, "defendant acknowledged that it regarded the plaintiff as disabled when it recommended that she apply for disability insurance benefits." [Doc. #27 at 6]. Plaintiff offers no legal support for this proposition and several courts considering this argument have rejected it. See Summers v. Middletown & Reutlinger, P.S.C., 214 F. Supp. 2d 751, 756 (W.D. Ky. 2002) (defendant's placement of plaintiff on short

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> evidence that he was regarded as unable to perform technical or mechanical work that may have been within his abilities or qualifications, but that did not require a high physical demand. Beason's evidence parallels that presented by one of the plaintiffs in Colwell, where the Second Circuit found the plaintiff's evidence of an inability to lift objects of more than twenty pounds, stand or walk for more than half an hour to an hour, and a need to get up and change position disqualifies him from only a narrow range of jobs (those involving physical confrontation) and thus his impairment is not a substantially limiting one." Colwell, 158 F.3d at 644 (internal quotation marks omitted); see also Zarzycki v. United Technologies Corp., 30 F. Supp. 2d 283, 293-95 (D. Conn. 1998).
>
> Moreover, Beason has presented no evidence of the specific job market in the geographic area to which he had reasonable access by which a reasonable juror could conclude that he was perceived as substantially limited in his ability to perform a broad range or class of jobs.

213 F. Supp. 2d 114-115.

term disability "does not establish [that defendant] regarded plaintiff as disabled."); See also Keith v. Ashland, Inc., 2000 WL 178389, *3, 205 F.3d F.3d 1340 (6th Cir. 2000); Crandall v. Paralyzed Veterans of America, 146 F.3d 894, 898 (D.C. Cir. 1998) (holding that an offer of paid medical leave does not establish that the employer regarded the employee as disabled); Cody v. CIGNA Healthcare, 139 F.3d 595, 599 (8th Cir. 1998) (holding that inducing an employee to take medical leave or to submit to a psychological evaluation before returning to work does not establish that an employer knew the employee was disabled); Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 883 (6th Cir.1996) (similar). Summers, 214 F. Supp. 2d at 756 (efforts to accommodate plaintiff by offering an alternative position "does not necessarily mean defendant regarded her as having a substantially limiting disability."). The fact that USS continued to offer plaintiff other positions in the company, such as the Bio Lab, manufacturing, and quality control, is evidence that they did not perceive her as being substantially limited in her ability to work. The evidence supports the proposition that USS knew that Ward had lifting restrictions but expected that she would return to work when she received medical clearance. See Def. Ex. E.

Ward has therefore failed to demonstrate that she "was regarded as" being disabled within the meaning of the ADA. Accordingly, defendant's motion for summary judgment is granted on this claim.

2. Retaliation Claim

Title VII also provides that it is unlawful for an employer to discriminate against an employee "because he has opposed any practice . . ., or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter." 42 U.S.C. §2000e-3(a). To state a prima facie case of retaliation, plaintiff must demonstrate that: (1) she engaged in protected activity; (2) defendant was aware of her participation in the protected activity; (3) defendant took an adverse employment action against her; and (4) a causal connection existed between the protected activity and the adverse employment action. Cruz v. Coach Stores, Inc., 202 F.3d 560, 566 (2d Cir. 2000). "Retaliation claims are analyzed in the same manner under the CFEPA." Worster, 353 F. Supp. at 270 (citing Brittell v. Dep't of Correction, 247 Conn. 148, 163-64 (1998) (state anti-discrimination statute is coextensive with the federal statute)).

Here, a reasonable jury could find that plaintiff engaged in a protected activity on May 24 and June 4, 2001.[27] There is no dispute that USS was aware of plaintiff's complaints to the Employee Concern Line on May 24 and to Human Resources on June 4.

[27]As stated, plaintiff has not shown that she made a discrimination complaint on May 24, 2001. The Employee Concern Line operator's notes indicate that "Ms. Ward stated on May 10, 2001, [that] Mr. Baker told her that he wanted the work, referring to the printing of documents, to come out faster." The notes indicate that Ward said Baker was "yelling at her during this incident, and he was three feet away from her." There is no reference to a 1990 retaliation claim in the notes. [Def. Ex. to 9/15/05 Let.].

Defendant vigorously argues that plaintiff suffered no adverse employment action as her pay and benefits were unaffected and her reassignment to the warehouse was due to restructuring of the print office. USS argues that the reduction in hours "resulted from the pre-complaint decision to reduce the number of hours in the print shop, and Ward's own alleged inability to lift, which limited her ability to do other work in the warehouse." [Doc. #42 at 10]. This Court assumes, without deciding, that an adverse employment action occurred, and concurs with Judge Goetell's reasoning in Hill v. Pinkerton Security & Investigation Serv. Inc., 977 F. Supp 148, 158 (D. Conn. 1997). "While we have difficulty in finding that plaintiff's lateral reassignment, without a change in pay or benefits, was an adverse employment action, we recognize that there have been cases, albeit arguably distinguishable, that have found a reassignment to meet the requirement of an adverse employment action." Id.

Defendant argues that plaintiff cannot meet the burden of proving the fourth element of her prima facie case of retaliation. The Court agrees. "The causal connection needed for proof of a retaliation claim can be established indirectly by showing that the protected activity was closely followed in time by the adverse action." Cifra v. General Electric Co., 252 F.3d 205, 216 (2d Cir. 2001) (citations and quotation marks omitted). Defendant argues that, "[u]nlawful retaliation requires, as a matter of both law and logic, plaintiff to prove that the adverse job action occurred after the protected activity." [Doc. #42 at

7-8 (emphasis added)]. Plaintiff fails to address the required temporal association between the filing of her discrimination complaint and her reassignment. Rather, Ward argues generally that, "[t]he causal connection needed for proof of a retaliation claim can be established indirectly by showing that the protected activity was closely followed in time by the adverse action." [Doc. #42 at 9 (citing Cifra, 252 F.3d at 216)].

The record establishes that Ward's complaints occurred after USS' decision to restructure the print shop, after the Distribution Coordinator position was created, and after plaintiff's hours were reduced and reassigned. USS underwent a company-wide restructuring in early 2001. [Def. 56(a)(1) and Pl 56(b)(2) Local Stat. at ¶52]. In some cases, old positions were eliminated and the duties formerly handled by those positions were reassigned to new and existing positions. [Kiley Decl. at ¶ 6; Andreoli Decl. at ¶ 11]. In addition, Steve Brown, who was head of the warehouse in 2001, implemented new technologies and processes that eliminated many of the clerical functions previously assigned to Ward in the warehouse print office. [Andreoli Decl. at ¶ 12]. Jim Andreoli, Ward's supervisor, "advised Ward that the restructuring and the implementation of the new technologies and processes meant her hours in the print office were going to be reduced, but [he] assured her she would get additional work elsewhere and it would not affect her pay or benefits." Id. at ¶15. Andreoli stated that he "was not aware until after [he] discussed these changes with Ward that she had

any physical restriction." Id. at ¶16. In April 2001, Ward saw a classified advertisement posted by USS for Distribution Coordinator positions.[28] [Def. 56(a)(1) and Pl 56(b)(2) Local Stat. at ¶54]. Laurie Kiley, a representative from the Human Resources Department, informed Ward that she was not qualified for the position of Distribution Coordinator. [Ward. Tr. 123; Def. 56(a)(1) and Pl. 56(b)(2) Local Stat. at ¶62]. Kiley states that Ward "did not mention any lifting restrictions, nor was [Kiley] aware of any such restrictions at the time." [Kiley Decl. ¶23]. On May 22, 2001, plaintiff's supervisor advised her that Ward's hours in the warehouse print office would be cut to four hours per day and she would be assigned other work in the company to fill the remainder of her work day. [Def. 56(a)(1) and Pl. 56(b)(2) Local Stat. at ¶¶ 72, 75]. Ward was offered four hours' work in the warehouse. [Ward Tr. at 98]. Ward's pay and benefits were not affected. [Def. 56(a)(1) Local Stat. at ¶73; Ward Tr. at 98]. On May 24, 2001, Ward contacted the Tyco Employee Concern Line to report that Dave Baker had reprimanded her for not completing a certain task quickly enough and Ward was concerned

[28]Ward testified that she saw the posting after she returned from her vacation in April 2001. [Ward Tr. 83-84]. Ward also avers that her vacation was in May 2001 and that the Distribution Coordinator job was posted during her vacation and she learned of the position on May 25, 2001. [Pl. Ex. A at ¶13; Ex. B at C; Compl. at ¶18]. However, on May 22, 2001, it is undisputed that Ward's hours in the print office were cut to four hours a day and she was informed that she would be reassigned to warehouse duties during the remainder of the day. This discrepancy in dates is not relevant to this determination, as the reduction in hours clearly occurred before Ward engaged in protected activity on May 24, 2001, when she contacted USS's Employee Concern Line. [Pl. Ex. A ¶ 13; Pl. Ex. B at 11].

she might be fired. [Def. 56(a)(1) Local Stat. at ¶78]. There is no evidence that Ward complained on the basis of a disability. On May 29, 2001, Ward advised USS she was not physically able to perform certain manual tasks in the warehouse. [Def. 56(a)(1) and Pl 56(b)(2) Local Stat. at ¶ 74]. Ward produced a doctor's note dated May 28, 2001, stating that she was weak as a result of anemia and "should not be employed in a position that requires manual work. Specifically, she should not be lifting [more than] 5-10 lbs. regularly." Id. at ¶84. Ward testified that this was the first doctor's note provided to Human Resources. [Ward Tr. at 106]. Ward stated that she requested the note from her doctor because USS "didn't believe that I couldn't do the physical job they wanted me to do." [Ward Tr. at 105]. She stated that the purpose of the note was to excuse her from working in the warehouse. [Ward Tr. at 108]. On June 4, Ward filed a complaint with USS contending she was being discriminated against on the basis of her disability. [Ward Tr. at 117-18; Pl. Ex. A].

Plaintiff has not shown that her hours were reduced in retaliation for engaging in protected activity on May 24, when she made a complaint to the company's Employee Concern Line. Moreover, plaintiff offered no evidence to show when she was told by Lori Kiley that she was not qualified for the position of Distribution Coordinator. Defendant states that plaintiff was denied the position in April 2001. [Doc. #42 at 8]. The record establishes that the first time Ward complained to the Employee Concern Line was on May 24, 2001-after her work hours were cut in

the print office on May 22. See Bryant v. Begin Manage Program, 281 F. Supp.2d 561, 573 (E.D.N.Y. 2003) (finding plaintiff failed to present a prima facie case of retaliation where plaintiff admitted that her complaint of alleged discrimination was made after her employer's decision to terminate her employment); Hill v. Pinkerton Security & Investigation Serv. Inc., 977 F. Supp 148, 158-59 (D. Conn. 1997) (The only adverse action complained of was taken after plaintiff's complaint was filed.); Washington v. Garrett, 10 F. 3d 1421, 1435 (9th Cir. 1994) ("the record shows that Washington's first informal EEO complaint was filed in April, but the RIF was underway by early February. The timing of the two events negates an inference of retaliation, and summary judgment was proper.").

Ward has failed to establish that she was retaliated against for her protected activity. The evidence in the record stands unrebutted that the decisions to reorganize the print office, to reduce Ward's hours in the print office and to reassign plaintiff were made as a result of the restructuring of the company prior to plaintiff's engaging in any protected activity. Summary judgment is therefore granted on the retaliation claim under both the ADA and the CFEPA.

CONCLUSION

Accordingly, defendant's Motion for Summary Judgment **[Doc. #23]** is **GRANTED** on all counts.

Any objections to this recommended ruling must be filed with the Clerk of the Court within ten (10) days of the receipt of this order. Failure to object within ten (10) days may preclude appellate review. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a) and 6(e) of the Federal Rules of Civil Procedure; Rule 2 of the Local Rules for United States Magistrates; Small v. Secretary of H.H.S., 892 F.2d 15 (2d Cir. 1989)(per curiam); F.D.I.C. v. Hillcrest Assoc., 66 F.3d 566, 569 (2d Cir. 1995).

Dated at Bridgeport, this 16th day of September 2005.

_____/s/_____
HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE