UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRICILLA SARAF,

Plaintiff,

- against -

WEST PUBLISHING CORPORATION d/b/a THOMSON REUTERS,

Defendant.

16-CV-1425 (VSB)

OPINION & ORDER

Appearances:

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VERNON S. BRODERICK, United States District Judge:

Plaintiff Pricilla Saraf brings this action against Defendant West Publishing Corporation ("West") alleging claims for: (1) discrimination and harassment on the basis of her gender and/or pregnancy in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), the New York State Human Rights Law ("NYSHRL"), and the New York City Human Rights Law ("NYCHRL"); (2) interference and retaliation in violation of the Family Medical Leave Act ("FMLA"); and (3) failure to pay commission in violation of § 191 of the New York Labor Law

("NYLL"). Before me is West's motion for summary judgment seeking dismissal of all of Plaintiff's claims. Plaintiff fails to present sufficient evidence indicating that the non-discriminatory justifications proffered by Defendant for the termination of her employment are false. However, Plaintiff does present sufficient evidence to create a genuine issue of fact as to whether discriminatory animus was a motivating factor in Defendant's decision to terminate her employment. Accordingly, Defendant's motion is GRANTED IN PART and DENIED IN PART.

I. Background

The specific facts relevant to Defendant's motion for summary judgment are discussed in the applicable sections below. In this section, I provide certain general background facts to provide context for the disputes discussed in this Opinion & Order.

Plaintiff was a Business Development Associate ("BDE")—also known as a Sales Executive ("SE")—in the Thomson Reuters Expert Witness Services ("TREWS") business at West. (*See* Def.'s Reply 56.1 ¶¶ 1, 263.)[1] The SEs on the TREWS sales team were generally responsible for, among other things, the placement and/or referral of experts to law firms for purposes of litigation. (*Id.* ¶¶ 15–21.) When a law firm retains an expert placed and/or referred by TREWS, the client signs a contract with West confirming the business arrangement and TREWS receives a percentage of the fee for every hour the expert performs services. (*Id.* ¶ 19.)

The SEs on the TREWS sales team were each responsible for their own geographical region. (*Id.* ¶ 10.) Karen Hurley was responsible for the Mid-Atlantic region. (*Id.* ¶ 92.) Plaintiff was hired in April 2014 as the SE for the Northeast region. (*Id.* ¶ 36.) Robert Genthner

[1] "Def.'s Reply 56.1" refers to Defendant's Reply 56.1 Undisputed Statement of Material Facts, filed on April 4, 2018. (Doc. 114.) I refer to this document because it consolidates Defendant's 56.1 Statement, (Doc. 92), Plaintiff's 56.1 Counterstatement, (Doc. 105), and Defendant's reply to Plaintiff's counterstatement, (Doc. 114).

was her direct supervisor. (*Id.* ¶ 14.) Genthner reported to Robert Alston, (*id.*), who reported to Tommy Williams, the individual who had overall responsibility over TREWS, (*id.* ¶ 68).

During the summer of 2015, Josh Becker, CFO of West, recommended that TREWS be reviewed for "optimization/compensation consistency." (*Id.* ¶ 69.) Williams, who was among the West Publishing employees who received an email from Becker that mentioned reviewing TREWS for optimization/compensation consistency, understood this to mean "increasing inside sales [Account Managers] roles and reducing the number of field (SE) employees." (*Id.*) Around that time, TREWS became a "red flag" concern for senior leadership due to significant revenue shortfalls. (*Id.* ¶ 70.)

Senior leadership within West, including Alston and Williams, met at a "TREWS Summit" in Minnesota on September 15, 2015 to discuss TREWS revenue and other challenges facing the business. (*Id.* ¶ 75.) As an outgrowth of the TREWS Summit, Alston was tasked with developing a reorganized structure for the TREWS sales team. (*Id.* ¶ 80.) After several discussions, Genthner recommended that the TREWS sales team be reorganized to consolidate the Northeast and Mid-Atlantic regions. (*Id.* ¶¶ 91–92.)

On October 19, 2018, Plaintiff disclosed to Genthner that she was pregnant. (*Id.* ¶ 130.) Later that same day, Genthner informed Alston of Plaintiff's pregnancy. (*Id.* ¶ 131.) Alston informed Colleen Doherty, Director of Human Resources, of Plaintiff's pregnancy on October 19 or 20, 2018. (*Id.* ¶¶ 6, 135.) Alston and Genthner testified that they had already decided to terminate Plaintiff's employment as part of an overall reduction-in-force by the time she informed Genthner of her pregnancy, (*id.* ¶ 133), a fact that Plaintiff strongly disputes. Doherty performed an assessment of the choice to terminate Plaintiff's employment rather than Hurley's employment and concurred with the decision. (*Id.* ¶ 150.) Plaintiff was notified that her position

was being eliminated on November 4, 2015. (*Id.* ¶ 152.)

II. Procedural History

Plaintiff commenced this action on February 24, 2016. (Doc. 1.) On April 25, 2016, Plaintiff filed an amended complaint. (Doc. 16.) Defendant filed a partial motion to dismiss Plaintiff's FMLA claims on May 20, 2016. (Doc. 21.) After the parties submitted briefing, I denied the motion on November 16, 2016. (Doc. 40.) Defendant submitted an answer on December 9, 2016. (Doc. 46.)

On January 19, 2018, after the completion of discovery, Defendant filed a motion for summary judgment as to all of Plaintiff's claims, (Doc. 88), along with affidavits with exhibits, (Docs. 89–91), a Rule 56.1 Statement, (Doc. 92), and a memorandum of law in support, (Doc. 93). On March 6, 2016, Plaintiff filed her opposition, (Doc. 106), declaration in opposition with exhibits, (Doc. 104), and Rule 56.1 Counter-Statement, (Doc. 105). Defendant filed its reply on April 4, 2018, (Doc. 112), along with a reply affidavit with exhibits, (Doc. 113), and a reply Rule 56.1 Statement, (Doc. 114).

III. Legal Standard

Summary judgment is appropriate when "the parties' submissions show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Fay v. Oxford Health Plan*, 287 F.3d 96, 103 (2d Cir. 2002); *see also* Fed. R. Civ. P. 56(a). "[T]he dispute about a material fact is 'genuine[]' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law," and "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Id.*

On a motion for summary judgment, the moving party bears the initial burden of establishing that no genuine factual dispute exists, and, if satisfied, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial," *id.* at 256, and to present such evidence that would allow a jury to find in his favor, *see Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000).

To defeat a summary judgment motion, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials . . . ." Fed. R. Civ. P. 56(c)(1). In the event that "a party fails . . . to properly address another party's assertion of fact as required by Rule 56(c), the court may," among other things, "consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." Fed. R. Civ. P. 56(e)(2), (3).

Finally, in considering a summary judgment motion, the Court must "view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor, and may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party." *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir. 1995) (internal citations and quotation marks omitted); *see also Matsushita*, 475 U.S. at 587. "[I]f there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party," summary judgment must be denied. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d

Cir. 2002).

However, courts must exercise "an extra measure of caution" in determining whether to grant summary judgment in employment discrimination cases "because direct evidence of discriminatory intent is rare and such intent often must be inferred from circumstantial evidence . . . ." *Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 603 (2d Cir. 2006) (internal quotation marks omitted). Nevertheless, "a plaintiff must provide more than conclusory allegations to resist a motion for summary judgment." *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008). The ultimate inquiry is "whether the evidence can reasonably support a verdict in plaintiff's favor." *James v. N.Y. Racing Ass'n*, 233 F.3d 149, 157 (2d Cir. 2000).

IV. Discussion

A. *Discrimination Claims*

1. Applicable Law

a. Title VII and NYSHRL

Under Title VII, it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Congress amended Title VII by passing the Pregnancy Discrimination Act, based on the determination that "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." *DeMarco v. CooperVision, Inc.*, 369 F. App'x 254, 255 (2d Cir. 2010) (summary order) (quoting *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983). The NYSHRL similarly regards discrimination on the basis of pregnancy as discrimination on the basis of sex. *See Shimanova v. TheraCare of N.Y., Inc.*, 15 Civ. 6250 (LGS), 2017 WL 980342, at *4 (S.D.N.Y. Mar. 10, 2017).

Title VII and NYSHRL discrimination claims on the basis of sex are analyzed under the three-step burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Walsh v. N.Y.C. Hous. Auth.*, 828 F.3d 70, 74–75 (2d Cir. 2016) (analyzing gender discrimination claims brought pursuant to Title VII and the NYSHRL under *McDonnell Douglas*). First, the employee bears the burden of setting forth a prima facie case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802. To set forth a prima facie case of discrimination, a plaintiff must show (1) she belongs to a protected class; (2) she was qualified for the position at issue; (3) she suffered an adverse employment action; and (4) the action occurred under circumstances giving rise to an inference of discrimination. *See id*. The fourth prong may also be established by showing that the terminated plaintiff's "position remained open and was ultimately filled by a non-pregnant employee." *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 64 (2d Cir. 1995). The Second Circuit has emphasized that the "burden of establishing a *prima facie* case is *de minimis*." *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467 (2d Cir. 2001) (collecting cases).

If a plaintiff successfully presents a prima facie case of discrimination, the burden shifts to the defendant to proffer legitimate, non-discriminatory reasons for the adverse employment action. *See id.* at 466, 468–69. The defendant's burden at this stage is also "light." *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 52 (2d Cir. 1998). This burden "is one of production, not persuasion; it 'can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993)). In other words, as long as the "explanation provided . . . [is] legally sufficient to justify a judgment for the defendant" and the defendant "clearly set[s] forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection," the presumption raised by the

prima facie case is rebutted. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981).

Lastly, the burden shifts back to the plaintiff to demonstrate that the proffered reason is a pretext for discrimination. *See Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000), *cert. denied*, 540 U.S. 811 (2003). To defeat summary judgment, "the plaintiff must produce not simply some evidence, but sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the defendant were false, and that more likely than not discrimination was the real reason for the employment action." *Id.* (internal quotation marks omitted). "To get to the jury, it is not enough to disbelieve the employer; the factfinder must also believe the plaintiff's explanation of intentional discrimination." *Id.* (internal quotation marks omitted). "Though the plaintiff's ultimate burden may be carried by the presentation of additional evidence showing that 'the employer's proffered explanation is unworthy of credence,' it may often be carried by reliance on the evidence comprising the prima facie case, without more." *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995) (quoting *Burdine*, 450 U.S. at 256). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253.

b. NYCHRL

Claims under the NYCHRL are to be construed "separately and independently from federal and state discrimination claims." *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2015). The New York City Council amended the NYCHRL "to require that its provisions be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws . . . have been so construed." *Id.* (internal quotation marks omitted). Claims under

the NYCHRL "must be reviewed . . . more liberally than their federal and state counterparts." *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009) (internal quotation marks omitted).

"To establish a *prima facie* case of discrimination under the NYCHRL, a plaintiff must show 'that her employer treated her less well than other similarly situated employees, at least in part for discriminatory reasons.'" *Kops v. PPM Am., Inc.*, No. 15 Civ. 1584 (GBD), 2016 WL 7188793, at *5 (S.D.N.Y. Dec. 5, 2016) (quoting *E.E.O.C. v. Bloomberg L.P.*, 967 F. Supp. 2d 816, 836 (S.D.N.Y. 2013)). An employer may present a legitimate, non-discriminatory reason for its actions, but it is entitled to summary judgment "only if the record established as a matter of law that discrimination played *no* role in its actions." *Id.* (quoting *Bloomberg L.P.*, 967 F. Supp. 2d at 836). A court must evaluate "the totality of the circumstances . . . because 'the overall context in which the challenged conduct occurs cannot be ignored.'" *Mihalik*, 715 F.3d, at 113 (quoting *Hernandez v. Kaisman*, 957 N.Y.S.2d 53, 59 (1st Dep't 2012)).

2. Application

a. Title VII and NYSHRL

Defendant contends that it is entitled to summary judgment because Plaintiff fails to establish her prima facie case, and even if she did, she is unable to show that Defendant's proffered non-discriminatory basis for terminating Plaintiff is a pretext.

i. Prima Facie Case

Defendant does not address—and therefore concedes for purposes of this motion, *see AT&T Corp. v. Syniverse Techs., Inc.*, No. 12 Civ. 1812(NRB), 2014 WL 4412392, at *7 (S.D.N.Y. Sept. 8, 2014)—the first three prongs of the prima facie standard. Instead, Defendant argues that Plaintiff is unable to establish the fourth prong—that the action occurred under

circumstances giving rise to an inference of discrimination—because (1) the decision to terminate Plaintiff's employment was made before Genthner, Alston, Williams, or Doherty learned of Plaintiff's pregnancy, and (2) even if the decision were made after learning of her pregnancy, Plaintiff fails to set forth evidence giving rise to an inference of discrimination. (Def.'s Mem. 7–23.)[2]

First, Defendant contends that the deposition testimony of Genthner, Alston, Williams, and Doherty, along with three email communications among Genthner, Alston, and Williams, confirm that the decision to terminate Plaintiff's employment was made prior to October 19, 2015—the date Plaintiff first disclosed that she was pregnant. (*Id.* at 16–19.) As an initial matter, the testimony cited by Defendant regarding purported verbal conversations among Genthner, Alston, Williams, and Doherty about terminating Plaintiff's employment does not support the conclusion that a final decision was made before October 19. During his deposition, Williams did not specifically recall a phone call where Alston or Genthner informed him of a decision to terminate Plaintiff's employment. (Williams Dep. 293:25-294:8.)[3] Doherty could not recall when the recommendation to terminate Plaintiff was made, (Doherty Dep. 53:21-54:10),[4] but estimated that it was in the approximate time frame of late September or early October 2015, (*id.* at 57:6-12). However, she did not remember the conversation and did not memorialize it. (*Id.* at 52:14-17.) The only testimony supporting the conclusion that the

[2] "Def.'s Mem." refers to Defendant's Memorandum of Law in Support of Its Motion for Summary Judgment, filed January 19, 2018. (Doc. 93.)

[3] "Williams Dep." refers to the deposition of Tommy Williams, dated March 24, 2017, excerpts of which are attached as Exhibit 2 to the Boyarsky Affidavit ("Boyarsky Aff."), and Exhibit 5 to the Rahman Declaration ("Rahman Decl.").

[4] "Doherty Dep." refers to the deposition of Colleen Doherty, dated March 6, 2017, excerpts of which are attached as Exhibit 5 to the Boyarsky Affidavit, and Exhibit 3 to the Rahman Declaration.

decision to terminate Plaintiff's employment occurred prior to October 19 were the verbal conversations between Genthner, (Genthner Dep. 292:22-293:25),[5] and Alston, (Alston Dep. 130:14-131:4).[6] Genthner recommended to Alston that Plaintiff's employment be terminated, and Alston agreed and informed Williams of the recommendation, (Alston Dep. 117:15-22, 119:16-24, 130:14-132:11; Genthner Dep. 292:22-293:17); however, neither Genthner or Alston testified that the decision was finalized before October 19. In addition, Genthner testified that he did not believe a final decision on his proposal had been made when he sent an email to Plaintiff on October 20 to "recap" a one-on-one meeting he had with her. (Genthner Dep. 326:18-327:23.) Therefore, the testimony cited by Defendant does not support a factual finding, for purposes of summary judgment, that the final decision was made and verbally communicated before October 19.

Even if the testimony of Genthner and Alston could be read as support for a factual finding that the final decision was made prior to October 19, the three emails cited by Defendant create a genuine issue of material fact with regard to this issue that a jury must decide. The October 16 emails—which are substantively identical—discuss three "proposals" for how the sales territories can be reorganized in the order that Genthner and Alston would "recommend" them. (Boyarksy Aff. Exs. 26–28.) Genthner's October 16 email to Alston states that they should "discuss further next week" and that he could provide "any additional data/models" necessary to make a decision. (*Id.* Ex. 26.) Genthner testified during his deposition that he understood that his October 16 email was not "an accepted proposal." (Genthner Dep. 295:19-

[5] "Genthner Dep." refers to the deposition of Robert Genthner, dated March 15, 2017, excerpts of which are attached as Exhibit 4 to the Boyarsky Affidavit, and Exhibit 4 to the Rahman Declaration.

[6] "Alston Dep." refers to the deposition of Robert Alston, dated February 28, 2017, excerpts of which are attached as Exhibit 3 to the Boyarsky Affidavit, and Exhibit 2 to the Rahman Declaration.

296:5.) The October 18 email, while speaking in more final terms, also discusses "2016 TREWS org recommendations" and notes "proposed reductions" in yellow highlighting in one of the attachments to the email. (Boyarsky Aff. Ex. 28.) A reasonable jury could interpret these emails as proposals and not final decisions, thus creating a genuine issue of fact as to when the ultimate decision to terminate Plaintiff's employment occurred.[7]

More importantly, none of the emails state that it was Plaintiff's employment that was to be terminated. Plaintiff's name is not referenced in any of the emails. (*Id.* Exs. 26–28.) Although Defendant urges me to draw the inference that the October 16 emails' reference to the "varied performance in the SE that would likely be positioned in [the] new 'Atlantic' region" refers to Hurley and not Plaintiff, (Def.'s Mem. 18–19), that inference is not the only inference that can be drawn from the emails, and the emails create a factual issue for a jury to decide.[8] Similarly, Defendant contends that the October 18 email's reference to the "reduction of the Northeast SE position" clearly refers to the termination of Plaintiff's employment, (*id.*), but a juror could reasonably interpret that statement to refer to the elimination of the Northeast region as a result of its consolidation with the mid-Atlantic region rather than a reference to the termination of Plaintiff's employment. The fact that Alston testified that he was referring to Plaintiff, (Alston Dep. 352:2-15), does not conclusively establish the meaning of the email, particularly considering that the "proposed reductions" in the attachment highlighted in yellow did not include Plaintiff, (*see* Boyarsky Aff. Ex. 28). Taken together, the testimony and emails

[7] In addition, Doherty testified that she must complete her own analysis and assessment before any final decisions with respect to reductions in force are made, and that she had the authority to recommend the termination of the employment of another employee after performing her assessment. (Def.'s Counter 56.1 ¶¶ 335–36.)

[8] Alston and Genthner testified during their depositions that they would also describe Plaintiff's performance as "varied." (Alston Dep. 335:18-21; Genthner Dep. 298:5-18.) In addition, Williams testified that he did not understand that sentence to refer to any particular person. (Williams Dep. 280:14-282:25.) In other words, it is not clear from this record who Genthner and Alston were referencing.

do not conclusively establish that the decision to terminate Plaintiff was made prior to October 19, and thus, summary judgment is not warranted on that basis.

Second, Defendant argues that Plaintiff fails to meet the fourth prong of the prima facie standard because the evidence is insufficient to establish an inference of discrimination. However, courts have held that a plaintiff may fulfill the fourth prong by demonstrating that after her employment was terminated, her responsibilities were assumed by a non-pregnant employee. *See, e.g.*, *Kia Song Tang v. Glocap Search LLC*, No. 14-CV-1108 (JMF), 2015 WL 1344788, at *4 (S.D.N.Y. Mar. 24, 2015) ("[A]lthough [defendant] did not hire anyone to replace [p]laintiff, there is no dispute that [p]laintiff's responsibilities were assumed by [other employees], neither of whom was pregnant at the time. That alone is sufficient."); *see also Quaratino*, 71 F.3d at 65 (holding that demonstrating that position remained open and was ultimately filled by a non-pregnant employee is sufficient to meet the fourth prong of the prima facie standard). It is undisputed that Hurley was not pregnant when she assumed Plaintiff's responsibilities after Plaintiff's employment was terminated. This is sufficient to meet Plaintiff's "de minimis" burden of making out a prima facie case. *See Kia Song Tang*, 2015 WL 1344788, at *3–4. In addition, the temporal proximity between Plaintiff's explicit disclosure of her pregnancy on October 19 and the finalization of the termination of her employment approximately one week later, (Def.'s Reply 56.1 ¶¶ 353–54, 356), "is adequate to raise an inference of discrimination," *Flores v. Buy Buy Baby, Inc.*, 118 F. Supp. 2d 425, 431 (S.D.N.Y. 2000) (holding that period of approximately one month between disclosure of pregnancy and termination was enough to raise inference of discrimination). A reasonable jury may therefore conclude that Plaintiff has established a prima facie case of discrimination.

ii. Non-Discriminatory Justification

The next question is whether Defendant has set forth a legitimate, non-discriminatory justification for its actions. Plaintiff does not appear to contest whether Defendant has done so. (*See* Pl.'s Opp. 24.)[9] In any event, multiple courts have found that a reduction-in-force effort—as established by the record here, (Def.'s Reply 56.1 ¶ 151)—is a valid, non-discriminatory reason to terminate an individual's employment. *See Sgarlata v. Viacom, Inc.*, No. 02 Civ. 7234(RCC), 2005 WL 659198, at *7 (S.D.N.Y. Mar. 22, 2005) (collecting cases). Moreover, Defendant contends that Hurley was chosen over Plaintiff because Hurley excelled in certain performance areas, including: (1) revenue performance, (2) tenure at West, (3) generating "strategic" cases, and (4) engaging potential clients. (Def.'s Mem. 16–18.) Defendant therefore successfully rebuts Plaintiff's prima facie case.

iii. Pretext

The burden thus shifts back to Plaintiff to demonstrate that Defendant's proffered reasons are a pretext for discrimination. Plaintiff argues that there is a genuine issue of fact concerning the truth of each of Defendant's proffered reasons for choosing Hurley over Plaintiff for the new consolidated SE position, (Pl.'s Opp. 25–31), and that discriminatory animus can be inferred from the facts in the record. I first address whether a reasonable juror could conclude that each of Defendant's proffered reasons was false. I will then address whether a reasonable juror could infer discriminatory animus.

With respect to revenue performance, Plaintiff does not dispute that Hurley's revenue generation was better than her revenue generation during the relevant time period. (Pl.'s Opp.

[9] "Pl.'s Opp." refers to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, filed on March 6, 2018. (Doc. 106.)

26.) Rather, Plaintiff contends that Defendant's assertion that revenue generation was the "most important" criteria in determining whether to select Hurley or Plaintiff is false. (*Id.*) However, Plaintiff fails to identify sufficient evidence to create a genuine issue of fact concerning revenue generation. There is substantial undisputed evidence in the record that revenue was an important criterion in judging SE performance. For example, at least as of July 31, 2015, monthly revenue comprised 60% of Plaintiff's variable incentive compensation for each quarter, compared to 20% for quarterly contracts signed and 20% for quarterly new client contracts signed. (*See* Boyarsky Aff. Ex. 19; *see also id.* Ex. 12.) Nothing in the record suggests that Plaintiff's incentive compensation for 2015 was weighted differently or was based on any other factors. In addition, on multiple occasions between July and October 2015, Genthner contacted Plaintiff to discuss her revenue underperformance. (*See* Def.'s Reply 56.1 ¶ 57.) For example, on August 7, 2015, Genthner emailed Plaintiff about her "tough quarter," specifically referring to her low numbers in incentive compensation. (*Id.*) On August 18, 2015, Genthner sent Plaintiff's sales team a monthly revenue report for July,[10] indicating that the team had failed to meet its revenue goals and encouraging them to focus on generating revenue. (Boyarsky Aff. Ex. 13.) The same day, Genthner, personally emailed Plaintiff to discuss "how to reverse the trending" in revenue for her region. (*Id.*) Notes of Genthner's one-on-one meetings with Plaintiff in August and September 2015 also indicate that he discussed with Plaintiff the revenue underperformance in her region and the need for more focused activity to improve revenue. (*Id.* Ex. 16.) Moreover, the first goal listed on Plaintiff's 2014 year-end performance review was achieving her region's revenue target.[11] (Rahman Decl. Ex. 33.)

[10] Genthner regularly circulated monthly revenue reports to the Sales Team. (Def.'s Reply 56.1 ¶ 45.)

[11] Plaintiff cites to Genthner's testimony that he did not always address each of the items in his notes with employees during one-on-one meetings. (Pl.'s Opp. 26 n.32.) However, this testimony is insufficient to create an

Indeed, the main reason for the TREWS reorganization was the group's underperformance with regard to revenue. (Boyarsky Aff. Exs. 21, 22.) After the TREWS Summit discussing possible solutions to the obstacles facing TREWS, Genthner assembled proposals for the reorganization of the team to increase or maximize its revenue generation. (*See id.* Ex. 26.) In his October 16 email to Alston, he repeatedly noted the expected impact each of his proposals would have on revenue. (*Id.*) As noted above, Alston sent a substantially identical email to Williams the same day. (*Id.* Ex. 27.) Taking all of this evidence into account, it is not surprising that Genthner and Alston would consider revenue generation to be the most important factor in selecting an SE to be responsible for the newly created region.

Plaintiff's attempt to create a genuine dispute of fact as to whether revenue generation was the most important factor in terminating Plaintiff's employment relies on several arguments. Plaintiff points out that there are no contemporaneous documents laying out the rationale for terminating Plaintiff's employment. However, "a lack of documentary evidence, standing alone, neither renders facts genuinely disputed nor establishes pretext." *Simmons v. City of N.Y.*, 16-CV-1589 (VEC), 2017 WL 6397745, at *13 (S.D.N.Y. Dec. 13, 2017), *appeal dismissed* (Feb. 23, 2018). She also notes that the SE job description does not list revenue generation as one of the position's five "Accountabilities." (Pl.'s Opp. 26; *see also*, Rahman Aff. Ex. 28.) This argument is unpersuasive because the job description states that "growing revenue in the region" is an objective that the SE will be expected to achieve, (Rahman Aff. Ex. 28), and revenue

issue of fact since (1) revenue underperformance was a repeated topic in the notes, (*see* Boyarsky Aff. Ex. 16), (2) Genthner raised revenue underperformance with Plaintiff in emails, (*id.* Ex. 13), (3) revenue was consistently declining during the months prior to the termination of Plaintiff's employment, (*see* Rahman Decl. Exs. 21, 22), (4) achieving revenue targets was a goal listed on Plaintiff's 2014 year-end performance review, (*id.* Ex. 33), and (5) Plaintiff does not deny that Genthner raised revenue issues during the one-on-one sessions, but rather contends that there is no evidence to corroborate that he did and that she does not remember whether or not he did, (Def.'s Reply 56.1 ¶¶ 113, 115, 118). The failure to remember whether something did or did not happen is insufficient to create an issue of fact. *See Kennedy v. City of N.Y.*, 570 F. App'x 83, 84–85 (2d. Cir. 2014) (summary order).

generation was clearly something for which Plaintiff was held accountable, based on the evidence discussed above. Plaintiff also argues that performance warnings issued to Hurley and another SE for low activity numbers, despite them outperforming revenue expectations, indicate that revenue was not the most important factor. But the fact that SEs were accountable for metrics other than revenue does not mean that revenue was not the most important factor in judging performance, particularly given the fact that the reason high activity is important is because it leads to revenue generation in the long term. Plaintiff's contention that revenue was unimportant given Hurley's lower 2014 performance rating than Plaintiff's, despite Hurley having higher revenue attainment, similarly ignores that revenue being the most important factor does not mean that other factors were not important or do not weigh into an employee's overall performance.[12] Plaintiff's argument that the "BDE of the Month" award was not based on revenue metrics is unpersuasive for the same reason.

Plaintiff also argues that using revenue as the most important metric in judging Plaintiff's performance was inappropriate because of the undisputed nine to twenty-four month lag between revenue-generating activity and revenue actualization. (Pl.'s Opp. 27.) While it is true that Plaintiff had only been in her position for eighteen months when she was terminated, Plaintiff has presented no evidence suggesting that the Northeast region's revenue in the months preceding Plaintiff's termination was not attributable to Plaintiff's performance. Nor has she identified evidence that after the termination of her employment such revenue was realized. As discussed above, West clearly considered revenue generation to be connected to SE performance, since SE incentive compensation was based largely on revenue and Genthner discussed attaining

[12] I note that there was only a 5% difference between Hurley's and Plaintiff's revenue attainment. (Def.'s Reply 56.1 ¶ 257.)

regional revenue goals with the SEs on a regular basis. Even if it were ill-advised from a business perspective for Defendant to use revenue as a metric to assess Plaintiff's performance, it was not "so lacking in merit as to call into question its genuineness." *Dister v. Cont'l Grp., Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988) ("[I]t is not the function of a fact-finder to second-guess business decisions or to question a corporation's means to achieve a legitimate goal.").

With respect to tenure, Plaintiff does not dispute that Hurley had a longer tenure at West than Plaintiff. Rather, Plaintiff argues that because the new "Atlantic" territory contained the entire Northeast region and only a portion of the Mid-Atlantic region, Defendant's proffered reason that Hurley had more time to build relationships with clients in her region due to her tenure was a pretext for discrimination. (Pl.'s Opp. 28.) However, Plaintiff presents no evidence to suggest that relationships with clients in one region could not yield business in other regions. Plaintiff also presents no evidence to suggest that client relationships in the Northeast region should have been weighted more heavily than client relationships in the portions of the Mid-Atlantic region that became part of the new Atlantic region. Finally, Plaintiff ignores that Genthner also testified that Hurley's longer tenure was important to him because it reflected that she had more experience and that she reacted positively to coaching, whereas there was reason to believe that coaching did not cause a change in results for Plaintiff. (Genthner Dep. 239:15-241:15.) I therefore do not find that tenure was so "implausible, inconsistent, incoherent [or] contradictory" a factor, such that there is an issue of fact as to its genuineness. *See Kautz v. Met-Pro Corp.*, 412 F.3d 463, 470 (3d Cir. 2005).

With respect to focus on "Strategic" practice areas, Plaintiff raises several arguments for why evaluation based on that criteria was a pretext for discrimination. Plaintiff first argues that the evidence shows pretext because Alston did not identify the specific Strategic practice areas

when he requested Genthner to send case types to Doherty. (Pl.'s Opp. 28.) However, that fact does not call into question the substantial evidence that the Strategic practice areas were a specific focus for SEs. (*See* Pl.'s Dep. 49:3-50:16; Genthner Dep. 143:4-15, 176:12-177:12; Alston Dep. 159:9-20; Boyarsky Aff. Exs. 14, 15, 16, 19, 30; Rahman Decl. Exs. 22, 47.)[13] Plaintiff does not deny that the term Strategic practice areas was a term used at West. The fact that those areas may not have been described in a consistent or coherent fashion does not mean they were not a focus. Plaintiff also argues that because Plaintiff had a higher number of Strategic searches than Hurley between September 21, 2015 and October 28, 2015, (Rahman Decl. Ex. 47), Defendant's reliance on Strategic search activity is a pretext. However, Plaintiff's reliance on an arbitrary time period to measure performance—one that includes at least one week after the termination decision was made—does not call into question the genuineness of Defendant's proffered reason, particularly taking into account Hurley's documented stronger performance in this area during other time periods. (Boyarsky Supp. Aff. Ex. J.)[14] The only evidence Plaintiff cites that could arguably create a genuine issue of fact on this issue is a Q2 Sales Team evaluation that assigns Plaintiff a score of 8 and Hurley a score of 6 in the area of "Prospecting," which is defined as "[s]trategic lead generation." (Def.'s Reply 56.1 ¶ 282; Rahman Decl. Ex. 33.) However, given the slight difference in scores and the fact that the evaluation reflected performance during a narrow time period preceding the termination of Plaintiff's employment by several months, I find that it is not sufficient to create a genuine issue of material fact as to the genuineness of Defendant's proffered reason. *See Taylor v. Polygram*

[13] "Pl's Dep." refers to the deposition of Pricilla Saraf, dated February 9, 2017, excerpts of which are attached as Exhibit 1 to the Boyarsky Affidavit, and as a part of Exhibit 1 to the Rahman Declaration. I note that Plaintiff was also deposed on February 16, 2017, and experts of the deposition are attached as Exhibit 2 to the Boyarsky Affidavit, and as a part of Exhibit 1 to the Rahman Declaration.

[14] "Boyarsky Supp. Aff." refers to the Supplemental Affidavit of Mitchell Boyarsky in Further Support of Defendant's Motion for Summary Judgment, filed April 4, 2018. (Doc. 113.)

Records, No. 94 CIV. 7689(CSH), 1999 WL 124456, at *14 (S.D.N.Y. Mar. 8, 1999) ("The fact that [plaintiff] may have received prior positive evaluations cannot in itself demonstrate that her later negative evaluations, and the concomitant proffered explanation, are unworthy of credence.").

Plaintiff also argues that Defendant's assertion that Hurley excelled compared to Plaintiff with respect to "client engagement" is pretextual. (Pl.'s Opp. 29–30.) Plaintiff points to evidence that (1) Genthner and/or Alston recommended that Hurley contact Plaintiff in the summer of 2015 to seek advice about how to better connect with decision-makers at law firms, (Saraf Decl. ¶ 11)[15]; (2) Plaintiff consistently received praise regarding her client engagement skills and was asked to give presentations about her techniques, (Def.'s Reply 56.1 ¶¶ 192–94, 197–207); (3) Plaintiff's 2014 year-end performance review noted that she "illustrated a strong ability to build immediate rapport with clients, (Rahman Decl. Ex. 33), while Hurley's noted that she needed to "evolv[e] her conversations with clients" and "better establish additional deeper-level relationships that can lead to more TREWS opportunities across her region," (*id.* Ex. 57); and (4) Hurley's June 2015 performance warning criticized her search activity and noted the "importance of developing new relationships with key litigators," (*id.* Ex. 62).

As an initial matter, Plaintiff's statement in her declaration recalling a statement by Hurley concerning a statement by Genthner and/or Alston is clearly hearsay and would be inadmissible at trial for its truth. I therefore do not consider it on this motion. Similarly, the statements of praise recounted by Plaintiff by out-of-court witnesses who were not any of the decision-makers relevant to this action constitute hearsay and are not considered for their truth.

[15] "Saraf Decl." refers to the Declaration of Pricilla Saraf, dated March 5, 2018, which is attached as Exhibit 7 to the Rahman Declaration.

To the extent a decision-maker such as Genthner, Alston, or Williams praised Plaintiff for reasons other than those used to make the decision to choose Hurley over Plaintiff, those facts are immaterial to the question of pretext. Their praise of Plaintiff's client-engagement skills, however, are relevant to the pretext question to the extent it shows that Plaintiff presented better client-engagement skills than Hurley. Nevertheless, Plaintiff admitted that Genthner may have also praised other SEs for making connections with clients. (Pl.'s Dep. 246:1-7.) Moreover, while it is undisputed that Hurley received criticism at the end of 2014 and a warning in June 2015, in part due to her struggles developing relationships with clients, her performance improved thereafter, including during the period leading up to the decision to consolidate the regions. (Genthner Dep. 211:15-212:4.) Therefore, I find that Plaintiff has failed to set forth sufficient evidence for a reasonable jury to conclude that client engagement was not actually a reason for Plaintiff's termination.

Finally, Plaintiff contends that Defendant's selection of Hurley over her due to their relative call activity is pretextual. (Pl.'s Opp. 30–31.) Plaintiff cherry picks activity numbers to highlight that Plaintiff outpaced Hurley during certain periods prior to the termination decision. However, during the period of June 22 through October 19, 2015, Hurley had higher numbers than Plaintiff in first-attempt phone calls, second-attempt phone calls, prospecting emails, LinkedIn emails, and networking events. (Rahman Decl. Ex. 43.) This demonstrates that even though Plaintiff scored higher in the "Activity" category on her June 2015 performance evaluation, (*id.* Ex. 26), Hurley improved her performance relative to Plaintiff in the months leading up to the regional consolidation. Moreover, the fact that Genthner and Alston planned to hire for "inside" sales employees to make cold calls does not diminish the value of the activity metric in evaluating SEs.

Therefore, I find that Plaintiff has failed to set forth sufficient evidence for a reasonable jury to conclude that Defendant's proffered legitimate, non-discriminatory reasons for choosing Hurley over Plaintiff were false. However, even if Plaintiff could show that Defendant's reasons were false, she would still have to show that discrimination was the real reason for the adverse employment action. *See Weinstock*, 224 F.3d at 42 ("To get to the jury, it is not enough to disbelieve the employer; the factfinder must also believe the plaintiff's explanation of intentional discrimination." (internal quotation marks omitted)). She has failed to do so.

Plaintiff argues that discrimination was the real reason for her termination based upon: (1) Genthner's reaction to her disclosure of her pregnancy; (2) the October 20, 2015 email from Genthner creating a "paper trail" to document unfounded deficiencies in Plaintiff's performance; (3) the "sham" assessment conducted by Doherty; (4) Doherty's failure to notify Plaintiff of her FMLA options and rights; (5) other complaints regarding gender discrimination against Williams and Alston; and (6) purported inconsistencies in the testimony of the decision-makers in this action. I address each in turn.

First, Plaintiff relies wholly on speculation in arguing that Genthner's reaction to Plaintiff's pregnancy disclosure reveals discriminatory intent. According to Plaintiff, Genthner was leaning towards terminating Hurley's employment, but Plaintiff's pregnancy caused him to change his mind, as evidenced by the "inopportune time" of Plaintiff's pregnancy leave and Genthner's questions regarding her plans and potential coverage. (Pl.'s Opp. 19–20, 21.) The only evidence Plaintiff cites for the notion that Genthner was leaning towards terminating Hurley's employment rather than Plaintiff's employment prior to learning about Plaintiff's pregnancy is that Genthner did not mention Hurley as a person who could cover Plaintiff's region, the proposed restructuring plan called for the redistribution of Hurley's region between

neighboring regions but left Plaintiff's region intact, and Hurley was afraid she would be fired in October 2015. (*Id.* at 21.) The fact that Genthner did not mention Hurley as a potential coverage option does not indicate anything about which way he was leaning in choosing between Plaintiff and Hurley. Similarly, the redistribution of Hurley's region is not probative of which way Genthner was leaning, particularly since the redistribution plan did not change after Genthner chose Hurley. Finally, Hurley's subjective fears regarding her job security say nothing about Genthner's state of mind. None of the evidence cited by Plaintiff, therefore, raises an inference that Genthner was going to choose Plaintiff over Hurley before her pregnancy disclosure. Nor did Genthner's questions to Plaintiff after learning of her pregnancy evince an "obvious preoccupation and concern with[] the business ramifications of [Plaintiff's] pregnancy." (*Id.*) According to Plaintiff, Genthner asked her about her due date, whether she would be taking maternity leave, and offered coverage options for her region. (Pl.'s Dep. 101:18-102:21.) Reading the evidence in the light most favorable to the Plaintiff, Genthner's comments did not suggest discriminatory animus against Plaintiff due to her pregnancy.

Second, Plaintiff contends that Genthner's October 20 "recap" email was meant to create a "paper trail" to justify her termination. (Pl.'s Opp. 20, 31–32.) Genthner's email purports to recount discussions from his "last two 1:1 calls" with Plaintiff. (Rahman Decl. Ex. 54.) He states that they had discussed the need to improve Plaintiff's search tally, notes that Plaintiff's region was significantly behind in its searches, and encourages Plaintiff to focus her efforts on improving her search tally. (*Id.*) While the parties dispute whether Genthner had ever sent such a "recap" email to Plaintiff before, (Pl.'s Dep. 103:23-104:7; Genthner Dep. 325:2-326:17), and whether Genthner had actually raised the issues stated in his email during the October 19

meeting,[16] (Def.'s Reply 56.1 ¶ 360), there is no dispute that Genthner had sent SEs follow-up feedback emails before, (*see, e.g.*, Rahman Ex. 59), and had raised the same criticisms with Plaintiff on prior occasions, (*see* Boyarsky Supp. Aff. Ex. G). Moreover, neither party addresses the possibility that the issues had been raised during a one-on-one call prior to the October 19 call, a possibility indicated by Genthner's reference to the "last two 1:1 calls." (Rahman Decl. Ex. 54.) In addition, Plaintiff presents no evidence to rebut Genthner's testimony that he sent the email because a final decision on his proposal to select Hurley had not been made, and he wanted to continue to coach Plaintiff as part of the team if she ultimately stayed or help her improve her performance to find another role within West if her employment was ultimately terminated.[17] (Genthner Dep. 326:18-327:23.) However, given that the parties dispute whether Genthner had ever sent such a "recap" email to Plaintiff, and whether Genthner actually raised the criticism at issue during the one-on-one meeting, I find that there is a "weak issue of fact," *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 148 (2000), as to whether the October 20 email was meant to create a paper trail to mask discriminatory animus.

Third, Plaintiff argues that Doherty engaged in a "sham" process effectively to rubber stamp the decision made by Genthner, Alston, and Williams. (Pl.'s Opp. 22–23.) Plaintiff takes issue with the fact that Doherty consulted with Alston to understand which metrics were important in assessing SE performance. (*See* Doherty Dep. 65:8-66:21.) As an initial matter, Alston—as the Director of TREWS—was in a position to know the metrics used to assess SE performance. Further, Plaintiff argues that Doherty lacked experience in assessing SE

[16] I note that when asked earlier in her deposition whether Genthner told her during the October 19 one-on-one call that she needed to do ten "sourced by" searches monthly, Plaintiff did not remember one way or another. (Pl.'s Dep. 102:22-103:4.)

[17] Plaintiff's contention that the October 20 email did not contain any "coaching" is belied by the text of the email.

performance, (Pl.'s Opp. 14); therefore, it made sense for Doherty to turn to Alston to understand the metrics that were important in evaluating SE performance. While Plaintiff argues that this compromised Doherty's independence, she offers no evidence to suggest that Alston harbored discriminatory animus or improperly influenced Doherty's conclusions as to which factors to consider.[18]

Plaintiff also takes issue with the criteria Doherty used to conduct her assessment and the relative weights she assigned them. (Pl.'s Opp. 14–15, 22–23.) Doherty considered the following five criteria (and relative weights): (1) 2015 revenue performance through September 2015 (40%); (2) contracts signed (20%); (3) average searches (20%); (4) 2014 performance evaluation (10%); and (5) tenure (as a tie breaker).[19] (Boyarsky Aff. Ex. 32.) Plaintiff argues that Doherty placed too much weight on revenue and not enough weight on average searches. (Pl.'s Opp. 14–15.) Plaintiff correctly notes that Doherty appears to have assigned a 10% weight to the average search criteria rather than the listed 20%. (*See* Boyarsky Aff. Ex. 32.) However, even if Doherty had doubled the weight assigned to the average search criteria to 20%, Hurley would have still outperformed Plaintiff on the overall evaluation.[20] (*See id.*) Moreover, for the reasons described above, the weight assigned to revenue generation was not unreasonable, given the emphasis that the business placed on that metric. Plaintiff fails to provide evidence to support the conclusion that the criteria applied by Doherty were entirely unreasonable or without foundation.

[18] In fact, Plaintiff criticizes Doherty's evaluation for not taking into account two of the four criteria Alston provided her. (Pl.'s Opp. 14.)

[19] Plaintiff correctly notes that Hurley was assigned an inexplicably higher score than Plaintiff in the tenure category, but that fact is immaterial because tenure was only to be used as a tie-breaker, and there was no tie between Plaintiff and Hurley. (*See* Boyarsky Aff. Ex. 32.)

[20] Notably, Hurley would have scored higher even if the weight assigned to the average search criteria were tripled (30%) or quadrupled to equal the weight assigned to revenue (40%). (*See* Boyarsky Aff. Ex. 32.)

Fourth, Plaintiff contends that Doherty's four-day delay in responding to Plaintiff's email asking who her Human Resources representative was, after Doherty had already learned Plaintiff was pregnant, evidences discriminatory animus. The FMLA requires an employer to notify an employee of his or her eligibility to take FMLA leave within five business days of learning that the employee may require FMLA leave. *See* 29 C.F.R. § 825.300(b)(1). Plaintiff cites to no authority suggesting that delay in responding to an email about FMLA leave may constitute a violation of Title VII, let alone delay in responding to an email inquiring about the identity of a Human Resources representative. The delay is not a sufficient basis to infer animus.

Fifth, Plaintiff points to accusations of sex discrimination by two other West employees against Williams, Genthner, and Doherty as support for an inference of discrimination here. (Pl.'s Opp. 15–16, 24.) As an initial matter, the evidence cited by Plaintiff, which includes emails and other out-of-court statements by third parties, (Def.'s Reply 56.1 ¶¶ 372–86), is almost certainly hearsay and thus inadmissible for the truth of the statements. Regardless, the accusations of discrimination bear little similarity to the accusations here; none of them involve pregnancy discrimination or the FMLA. As such, without more, they are insufficient to establish an inference of discriminatory animus against Plaintiff.

Finally, Plaintiff argues that purported inconsistencies and contradictions in the decision-makers' testimony supports a finding of discriminatory animus. (Pl.'s Opp. 31–32.) Plaintiff contends that the testimony conflicts as follows: (1) Doherty testified that Genthner and Alston both told her between late September and early October that they had decided to terminate Plaintiff's employment, but Genthner testified he did not tell anyone but Alston until he learned of Plaintiff's pregnancy; (2) Doherty testified that Genthner and Alston were confident Plaintiff would score lowest on Doherty's assessment in late September or early October, but Genthner

testified that he made a "holistic assessment," not one based on a scorecard; and (3) Doherty did not receive performance metrics from Alston until October 21. (*Id.*)

First, Doherty's testimony does not state that both Genthner and Alston informed her that Plaintiff's employment was likely to be terminated. (*See* Doherty Dep. 159:10-161:8.) During her deposition, Doherty was asked questions about a conversation she had with Alston during which he informed her of Plaintiff's pregnancy. (*Id.* at 158:16-159:8.) She was then asked about when she learned about the possibility that Plaintiff's employment would be terminated, and she stated that "we had had conversations in late September, early October where she was the person identified." (*Id.* at 159:10-17.) Given the immediately preceding line of questioning regarding her conversation with Alston, the "we" to whom she refers is most plausibly her and Alston. She then stated that "[w]e had talked about her region, and Rob Alston and Rob Genthner had talked about her, because, again, . . . as the managers closest . . . to the performance of their team, they . . . believed she would be the one who had the lowest performance once we did the assessment." (*Id.* at 159:18-160:1.) The reasonable reading of this testimony is that Alston informed her in late September or early October that Plaintiff was likely to be terminated, and that Alston and Genthner had conversations about Plaintiff likely being the lowest performer on the future assessment, and that is not inconsistent with Genthner's testimony that Alston was the only person he told prior to October 19 about his proposal to terminate Plaintiff's employment.

Second, the testimony is not inconsistent as to the timing of when Doherty learned of the possibility Plaintiff's employment would be terminated. When asked when Genthner first proposed retaining Hurley over Plaintiff, Alston testified that "it was leading into [the] second week of October where I receive more correspondence from [Genthner] confirming, where he already been discussing, I think, his preference [to retain Hurley over Plaintiff]." (Alston Dep.

128:3-14.) That testimony is not inconsistent with Doherty's estimate that Alston first identified Plaintiff in "late September, early October." (Doherty Dep. 159:10-17.)

Third, Doherty's testimony that Alston and Genthner believed Plaintiff would be the lowest performer on the Human Resources assessment is not inconsistent with Genthner's testimony that he did not perform an assessment based on any "scorecard" or with the fact that Doherty did not receive the data for her assessment until October 21. Rather, it reflects that Alston and Genthner, based on the data they had reviewed, anticipated that Hurley would perform better on a future Human Resources assessment than Plaintiff. The fact that Doherty had not yet assembled the criteria for her assessment does not contradict a belief held by Alston and Genthner as to how they expected Plaintiff to perform on a future assessment. They both knew Plaintiff's work and Hurley's work and had reviewed data related to their work, so they were in a position to have an understanding of who might be the lowest performer.

Because I find that Plaintiff has failed to set forth sufficient evidence for a reasonable jury to conclude that Defendant's proffered, non-discriminatory justifications for choosing Hurley over Plaintiff were false, or that discrimination was more likely than not the real reason for Defendant's actions, Defendant is entitled to summary judgment on Plaintiff's Title VII and NYSHRL claims.

b. NYCHRL

However, Defendant is not entitled to summary judgment on Plaintiff's NYCHRL discrimination claim. As mentioned above, claims under the NYCHRL are to be construed "separately and independently from federal and state discrimination claims." *Mihalik*, 715 F.3d at 113. Claims under the NYCHRL "must be reviewed . . . more liberally than their federal and state counterparts." *Loeffler*, 582 F.3d at 278 (internal quotation marks omitted).

As discussed above, Plaintiff has established a prima facie case of discrimination, and Defendant has offered legitimate, non-discriminatory reasons for its actions. However, under the NYCHRL, an employer can offer legitimate, non-discriminatory reasons, but it is entitled to summary judgment "only if the record established as a matter of law that discrimination played *no* role in its actions." *Kops*, 2016 WL 7188793, at *5 (quoting *Bloomberg L.P.*, 967 F. Supp. 2d at 836). Based on the totality of the circumstances—including that Plaintiff's responsibilities were assumed by a non-pregnant employee, the short time period between Plaintiff's disclosure of her pregnancy and the termination of her employment, and Genthner's October 20 email "recap" all of which could signal discriminatory animus—the record does not establish, "as a matter of law that discrimination played no role" in Defendant's actions. *Id.* (emphasis omitted). Therefore, Defendant is not entitled to summary judgment on Plaintiff's NYCHRL claim.

B. *FMLA Retaliation Claim*

1. Applicable Law

A plaintiff may make out a claim for retaliation under the FMLA where an employer discriminates against her for exercising her right to take FMLA leave. *See Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 174–77 (2d Cir. 2006). At the summary judgment stage, retaliation claims under the FMLA are analyzed under the burden-shifting framework laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Sista*, 445 F.3d at 174–77. Accordingly, a plaintiff must first establish a prima facie case by showing that "1) [s]he exercised rights protected under the FMLA; 2) [s]he was qualified for [the] position; 3) [s]he suffered an adverse employment action; and 4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent." *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 429 (2d Cir. 2016) (internal quotation marks omitted).

If the plaintiff establishes a prima facie case, the defendant must provide a legitimate, non-discriminatory reason for its actions. *Id.* If the defendant succeeds, then the plaintiff must show that the defendant's explanation is a pretext for discrimination. *See id.* However, a plaintiff need not show that the exercise of her FMLA rights was the "but-for" cause of the employer's adverse employment action; rather, a plaintiff may overcome summary judgment by showing that her request for FMLA leave was at least one "motivating factor" in the employer's decision. *Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 166 (2d Cir. 2017); *see also Di Giovanna v. Beth Israel Med. Ctr.*, 651 F. Supp. 2d 193, 205 (S.D.N.Y. 2009) ("To defeat summary judgment, [plaintiff] need not show that defendants' proffered reason was false or played no role in the decision to terminate him, but only that it was not the only reason, and that his filing for FMLA leave was at least one motivating factor.") The burden of persuasion remains at all times with the plaintiff. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

2. Application

Defendant argues that it is entitled to summary judgment because Plaintiff fails to establish the first and fourth prongs of the prima facie standard, and because Plaintiff cannot rebut the legitimate reasons for terminating Plaintiff. (Def.'s Mem. 33–35.)

First, Defendant argues that Plaintiff failed to exercise her rights under the FMLA because she did not provide notice of her intent to take leave. (*Id.* at 29–33.) As discussed above, Plaintiff testified that when she revealed her pregnancy to Genthner, they discussed her due date, whether she would be taking maternity leave, and he offered coverage options for her region. (Pl.'s Dep. 101:18-102:21; *see also* Genthner Dep. 304:7-21.) During Plaintiff's conversation with Genthner, after learning Plaintiff was pregnant, Genthner told her that he

covered for Cherisse Lake, a former TREWS teammate, while she was on maternity leave. (Genthner Dep. 302:13-20.) Plaintiff testified, and Defendant disputes, (Def.'s Reply 56.1 ¶ 306), that she informed Genthner that she planned to take maternity leave, but did not provide an exact estimate of how long because she did not know the company's policy,[21] (Pl.'s Dep. 213:13-214:1). Based on this evidence, I find a reasonable jury could conclude that Plaintiff provided adequate notice of her intent to take FMLA leave. *See* 29 C.F.R. § 825.302(c) ("An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. Depending on the situation, such information may include . . . that the employee is pregnant.").

Defendant next argues that Plaintiff fails to meet the fourth prong of the prima facie standard because she cannot establish an inference of retaliatory intent. However, the temporal proximity between Plaintiff's request for FMLA leave on October 19 and the termination of her employment several days later is sufficient to establish an inference of retaliatory intent. *See Donnelly v. Greenburgh Cent. Sch. Dist. No. 7*, 691 F.3d 134, 152 (2d Cir. 2012) (holding that ten-day period between exercise of FMLA rights and retaliatory conduct was sufficient to establish an inference of retaliatory intent). Plaintiff therefore presents sufficient evidence for a reasonable jury to find that she has established her prima facie case.

As discussed above, Defendant offers several legitimate, non-discriminatory reasons for terminating Plaintiff's employment, and Plaintiff fails to demonstrate that those reasons are false. However, for the same reason that Plaintiff's NYCHRL claim survives, her FMLA retaliation

[21] Defendant asks that I disregard this testimony because Plaintiff purportedly raised the fact that she informed Genthner that she intended to take maternity leave for the first time during her deposition. (Def.'s Mem. 30.) However, I do not find that Plaintiff's testimony is inconsistent with her representations in her pleadings and other filings, and any credibility determinations must be made by the jury. Therefore, I will consider her testimony in resolving Defendant's summary judgment motion.

survives. Plaintiff need not demonstrate that Defendant's reasons were false to avoid summary judgment; rather, Plaintiff need only present enough evidence for a reasonable jury to conclude that discrimination was a "motivating factor" in Defendant's decision. *Woods*, 864 F.3d at 166; *Di Giovanna*, 651 F. Supp. 2d at 205. Here, I find that Plaintiff has presented sufficient evidence for a jury to conclude that discrimination may have been a motivating factor, among others, for Defendant terminating Plaintiff's employment. Summary judgment on Plaintiff's FMLA retaliation claim is thus denied.

C. *FMLA Interference Claim*

1. Applicable Law

To establish a claim for interference under the FMLA, a plaintiff must establish: "1) that she is an eligible employee under the FMLA; 2) that the defendant is an employer as defined by the FMLA; 3) that she was entitled to take leave under the FMLA; 4) that she gave notice to the defendant of her intention to take leave; and 5) that she was denied benefits to which she was entitled under the FMLA." *Graziadio*, 817 F.3d at 424. A plaintiff must only establish that an "employer in some manner impeded the employee's exercise of his or her rights protected" by the FMLA. *Di Giovanna*, 651 F. Supp. 2d at 199 (internal quotation marks omitted).

2. Application

Defendant contends that Plaintiff fails to establish that she provided adequate notice of her intention to take FMLA leave and that she was denied benefits to which she was entitled under the FMLA. For the same reasons stated above, Plaintiff has presented enough evidence for a jury to conclude that she provided adequate notice of her intention to take FMLA leave. Similarly, because a reasonable jury may conclude that Plaintiff's leave request was a motivating factor in her termination, a reasonable jury could also conclude that she was denied benefits to

which she was entitled under the FMLA. For these reasons, Plaintiff's interference claim survives summary judgment.

D. *New York Labor Law Claims*

Defendant also seeks summary judgment with respect to Plaintiff's claim pursuant to § 191 of the NYLL for failure to pay commissions due to her from 2015. (Def.'s Mem. 35.) Defendant contends that it sent Plaintiff a check for her earned commissions in February 2016, (*see* Boyarsky Aff. Ex. 44), but Plaintiff returned it because she was unsure of what it was. Plaintiff acknowledges that she received and returned the check, but contends that Defendant has provided insufficient evidence to establish that the check was payment for her 2015 fourth quarter commissions. Defendant fails to provide any evidence—other than the check—that the check represented Plaintiff's earned commissions. Because it is not possible to determine, based on the face of the check, what it is a payment for, (*see id.*), Defendant is not entitled to summary judgment on Plaintiff's § 191 claim.

V. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment is GRANTED IN PART and DENIED IN PART. Specifically, Defendant's motion for summary judgment is granted with respect to Plaintiff's Title VII and NYSHRL discrimination claims and denied with respect to Plaintiff's NYCHRL discrimination, FMLA retaliation, FMLA interference and NYLL claims.

Trial will begin on July 8, 2019. No later than February 7, 2019, the parties shall submit a joint pretrial order in accordance with Rule 6(A) of my Individual Rules & Practices in Civil Cases. On the same date, but in a separate document, the parties shall propose a schedule for pretrial submissions pursuant to Rule 6(B) of my Individual Rules & Practices in Civil Cases.

The Clerk of Court is respectfully directed to terminate the open motion at Document 88.

SO ORDERED.

Dated: December 20, 2018
New York, New York

Vernon S. Broderick
United States District Judge