

By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Context

A. Motion To Strike

I address at the outset the Motion To Strike, which is premised on several asserted transgressions of the principle that “[w]hen an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed.” *Morales v. A. C. Orsleff’s EFTF*, No. 00-1707, slip op. at 7 (1st Cir. April 11, 2001) (citations and internal quotation marks omitted); *see also generally* Motion To Strike. I find that the following

identified portions of the Reidman affidavit do indeed offend this principle and I therefore strike them on that basis:

1. The entirety of paragraph 4, which states: “My ability to breathe was substantially limited by my asthma condition.” Affidavit of Plaintiff Judith Reidman (“Reidman Aff.”) (Docket No. 17) ¶ 4. Reidman was not asked at deposition whether her asthma condition “substantially limited” her ability to breathe; however, her statement in paragraph 4 embodies a legal conclusion that (as discussed later in this opinion) is at odds with the conclusion that I reach based on the facts to which Reidman testified at deposition, primarily that use of an inhaler brought her attacks under control within a period of time she described as “a maximum of 15 minutes, maybe.” Deposition of Judith M. Reidman (“Reidman Dep.”), attached as Exh. A to Defendant’s Statement of Undisputed Material Facts Submitted in Support of Its Motion for Summary Judgment (“Defendant’s SMF”) (Docket No. 8), at 212-13, 221-22.

2. That portion of paragraph 5 stating: “However, many times, the inhaler would not stop my coughing. In that situation, the coughing could continue for over ½ hour. I would have to go to the bathroom or outside to continue coughing until it subsided.” Reidman Aff. ¶ 5. This contradicts deposition testimony in which Reidman stated that the inhaler did bring her coughing under control, that her episodes lasted “a maximum of 15 minutes, maybe,” that “[t]he nature of the attacks” was, “I’d get coughing. I’d get wheezing, I’d have a hard time breathing and would have to use my inhaler,” and that after using her inhaler, “I would have to sit quietly 10 minutes maybe,” after which she could get back to work. Reidman Dep. at 212-13, 221-22.

3. The entirety of paragraph 6, which states: “Even when the inhaler helped to alleviate the severity of my coughing attacks, after the coughing reduced I would still have to carefully control my breathing for quite awhile to avoid a relapse of the coughing attack.” Reidman Aff. ¶ 6. By

insinuating that the inhaler did not always bring her attacks under control, this statement contradicts portions of Reidman's deposition testimony, referenced above, stating that it did. In addition, it conflicts with her deposition testimony that after using her inhaler she "would have to sit quietly 10 minutes maybe," after which she could return to work.

4. That portion of paragraph 12 stating: "Overall, the attacks varied in degree and severity, but generally I would be unable to breathe and would be gasping for air for at least 15 minutes. If my inhaler was ineffective (which it was on occasion), the attacks would last significantly longer." *Id.* ¶ 12. This contradicts portions of the deposition testimony, referenced above, indicating that her attacks would last "a maximum of 15 minutes, maybe," including about ten minutes' quiet time after using the inhaler to get the coughing under control.

I find that the following portions of the Reidman affidavit identified by JHA do not contradict earlier deposition testimony and hence decline to strike them:

1. The entirety of paragraph 9, which states: "During my entire time working with defendant, I experienced asthma related coughing attacks on a regular basis." *Id.* ¶ 9. Although Reidman initially testified that she had endured twenty or more asthma attacks – of unspecified severity – during the entirety of her employment with JHA, she clarified that she remembered "20 or so that were serious incidents" in which she might have had to use her inhaler. Reidman Dep. at 209, 217. This would not preclude the existence of a greater number of less serious attacks.

2. That portion of paragraph 12 stating: "During my employment with defendant, I had significantly more than 20 asthma attacks. I recall approximately 20 or so severe attacks." Reidman Aff. ¶ 12. This is not inconsistent with the deposition testimony referenced above.

3. That portion of paragraph 10 stating: "During the meeting I had with Mr. Brown about a week before I was terminated in which I informed him of the substance of my telephone call with my

physician, Mr. Brown told me that he was ‘tired of women being emotional’ in the workplace.” Reidman Aff. ¶ 10. This is not inconsistent with testimony cited by JHA, Motion To Strike at 5, in which Reidman omitted mention of this comment but was responding to the immediate question, “What did they [her physician’s office] tell you?” and to a proceeding broader question, “Wouldn’t you agree with me that – that there was a breakdown in your relationship with Mr. Brown as your supervisor?” rather than a question as to all that was said in the particular meeting described, *see* Reidman Dep. at 288-90.

B. Facts Cognizable on Summary Judgment

With the foregoing dispute resolved, the parties’ statements of material facts, credited to the extent either admitted (in some instances only expressly for purposes of summary judgment) or supported by record citations in accordance with Loc. R. 56, reveal the following relevant to this recommended decision:

Reidman was hired by JHA in July 1994 as a group compliance contract analyst. Defendant’s SMF ¶ 1; Plaintiff’s Opposition to Defendant’s Statement of Undisputed Material Facts, etc. (“Plaintiff’s Opposing SMF”) (Docket No. 15) ¶ 1; Defendant’s Response to Plaintiff’s Opposition to Defendant’s Statement of Undisputed Material Facts, etc. (“Defendant’s Reply SMF”) (Docket No. 23) ¶ 1. In May 1996 she received a revised job description from her supervisor, Fred Brown. *Id.* ¶ 6. Reidman understood all of her duties and responsibilities and worked under the same job description for the balance of her tenure at JHA. *Id.* ¶ 7.

Reidman concedes that during the course of her employment with JHA, management pointed out certain performance problems that she had. *Id.* ¶ 10. She also acknowledges that she was spoken to about performance problems at different points during her employment. *Id.* ¶ 11.¹ She concedes

¹ Brown’s general management approach was to have discussions or counseling sessions with all of the employees he supervised about
(*continued on next page*)

that on one occasion JHA informed her that it believed she was overpaid. *Id.* ¶ 12. She was aware that on at least one occasion Robert Taylor, the president of JHA, was dissatisfied with her level of performance and that there were other times that Brown was dissatisfied with her performance. *Id.* ¶ 13.²

Reidman received a performance evaluation in August 1996 that identified performance deficiencies on her part. *Id.* ¶ 14. Her performance-review document identified (i) need to improve choice of language; (ii) delegation of too much to Brown instead of analyzing what needs to be done and making recommendations; (iii) treaty wording not demonstrating the level of understanding Reidman should have; (iv) inadequate depth of analysis; (v) failure to take initiative; (vi) need for higher level thought and impact on results rather than task-oriented activity as assigned; (vii) need to take ownership and responsibility; and (viii) need to demonstrate serious, consistent improvement. *Id.* ¶ 15.

At the same time as Brown had performance problems with Reidman, he also had performance issues with another female employee and two male employees. *Id.* ¶ 16. Brown did not fire or put Reidman on probation at that time; instead he provided her with the opportunity to improve her performance. *Id.* ¶ 18.³

Reidman's next performance evaluation was in January 1997, at which time she believed that she was meeting performance expectations. *Id.* ¶ 19. After that time, she recalls one-on-one meetings

the ways in which they could improve their performance even if, on balance, they were performing very well. Plaintiff's Statement of Additional Undisputed Material Facts ("Plaintiff's Additional SMF") (Docket No. 14) ¶ 13; Defendant's Response to Plaintiff's Statement of Additional Undisputed Material Facts ("Defendant's Opposing SMF") (Docket No. 24) ¶ 13.

² Taylor became president of JHA in 1996. Rule 30(b)(6) Deposition of John Hewitt & Associates, Inc. by its designee, Robert G. Taylor, attached as Exh. J to Defendant's SMF, at 24.

³ Brown testified that he used probation as "a formal statement that you have a limited period of time during which performance must be returned to an acceptable level or you will be terminated." Plaintiff's Additional SMF ¶ 4; Defendant's Opposing SMF ¶ 4. He had used probation during his career in the past, although he did not recall ever having placed a JHA employee on probation. *Id.* ¶ 5.

with Brown, but is unable to recall their frequency except to concede that they may have occurred every two months or so during 1997. *Id.* ¶ 20.⁴

Brown felt that as of January 1997 Reidman was being grossly overpaid for her level of performance and contribution. *Id.* ¶ 21. Nonetheless, Brown approved Reidman's initial starting salary of \$45,000 and increased her salary from \$45,000 to \$46,800 in August 1995, from \$46,800 to \$47,800 in January 1997 and from \$47,800 to \$49,500 in January 1998. *Id.* He also approved payment to Reidman of a bonus in January 1997 (for calendar year 1996) and January 1998 (for calendar year 1997). *Id.*⁵ In July 1998, he agreed to continue payments of \$100 a month that he considered bonuses, although these payments were unrelated to performance and were intended to compensate Reidman for not having a dependent (her husband) on JHA's health insurance plan. Plaintiff's Additional SMF ¶ 27; Defendant's Opposing SMF ¶ 27.

Reidman is sure that she was evaluated by Brown in January 1998, although such an evaluation would not have been anything formal but rather something akin to a "fireside chat." Defendant's SMF ¶ 22; Plaintiff's Opposing SMF ¶ 22; Defendant's Reply SMF ¶ 22. She does not recall the content of the meeting. *Id.* ¶ 23. She concedes that the substance of a written January 1998 performance evaluation appears consistent with discussions she had with Brown in 1996 although not thereafter; however, she does not recall that Brown raised any performance problems with her in 1998 or that she ever received the January 1998 written performance evaluation from Brown. *Id.* ¶ 24. Brown recalls

⁴ Reidman protests JHA's characterization of these meetings as "counseling sessions." Plaintiff's Opposing SMF ¶ 20. In the underlying testimony, the meetings are referred to as "one-on-ones." Reidman Dep. at 109.

⁵ JHA states that Reidman was performing only to the minimal acceptable level that would allow her to receive her bonus in January 1998, and that Brown had some serious concerns as of the end of 1997. Plaintiff's Additional SMF ¶ 20; Defendant's Opposing SMF ¶ 20. In informing Reidman of her 1996 bonus, Taylor wrote her: "Thank you for your effort and contribution in 1996. Let's make 1997 better!" *Id.* ¶ 12. This was a form letter received by all employees. *Id.* In informing Reidman of her 1997 bonus, Taylor and Brown wrote her, "Thanks for your personal contribution to JHA's success in 1997. Our success is totally dependent upon the extra effort and contribution of each JHA employee towards achieving our goals. Thank you, again." *Id.* ¶ 18. This, too, was a form letter received by all employees. *Id.*

providing Reidman with an oral evaluation in January 1998 and expects that he would have given her a copy of a written evaluation at that time as well. *Id.* ¶ 25.

The evaluation indicated that, although Reidman was heading in the right direction, there were still many performance areas to be addressed, including: (i) more critical thought on wording for contracts; (ii) still asking Brown questions to which she should know the answer; (iii) need for more proactive initiative on current product issues and competitor intelligence; (iv) need to make effective use of various sources; (v) not having a functional ability to research using Westlaw and other issues; (vi) need for initiative and to correct an absence of work in claims risk-management support; (vii) need for more critical thinking; (viii) need for insight and proactive contributions; and (ix) need to take responsibility for contributions rather than just responding to assigned tasks. *Id.* ¶ 26. However, Brown testified that, “In the totality, I would say her ’97 performance was better than her 1996 performance.” *Id.* ¶ 25.

Brown intended that Reidman’s salary increase in January 1998 be “more significant than a token but to be very [sic] that this was in anticipation of continued improvement and significant improvement over her level of performance in the past.” *Id.* ¶ 27.⁶ Reidman acknowledges that Brown probably talked to her in 1998 about the way she should have been doing her job because that is the way he dealt with employees; however, she does not specifically recall the conversations. *Id.* ¶ 29. She did not view his concerns at that time as big issues. *Id.* ¶ 28. These sessions were tantamount to constructive criticism from a supervisor to an employee. *Id.* ¶ 30.

In Brown’s view, shortly after January 1998 Reidman’s performance began to decline. *Id.* ¶ 31. Reidman denies that this is so, noting that Brown counseled all employees he supervised, even if they were performing well overall, that she was not placed on probation, that she received a bonus

⁶ In January 1998 at least three other JHA employees received a smaller salary increase than Reidman. Plaintiff’s Additional SMF ¶ (continued on next page)

payment (for her 1997 performance) in March 1998, that, according to JHA's written bonus policy, an employee who "is not meeting performance expectations will not be eligible for payment" of company bonuses, and that in June 1998 she was asked to speak at a company-sponsored seminar that was publicized in JHA's August 1998 Disability Bulletin. *Id.* ¶ 31; *see also* Plaintiff's Additional SMF ¶¶ 6, 24; Defendant's Opposing SMF ¶¶ 6, 24.⁷

According to Brown, he met with Reidman in March 1998 concerning his very serious concerns over her performance, particularly her errors in contract language. Defendant's SMF ¶ 32; Plaintiff's Opposing SMF ¶ 32; Defendant's Reply SMF ¶ 32. Reidman admits that she met with Brown at that time but does not recall that any significant performance issues were raised in 1998. *Id.*⁸

Reidman was asked at deposition, "You do recall . . . in May of '98, the problems with your failure to provide information to Mr. Taylor in a timely manner concerning the presentation that he was scheduled to give?" *Id.* ¶ 33. She responded, "I recall what you are talking about, yes." *Id.* Brown had a performance counseling sessions with Reidman in May 1998 concerning her inability to deal effectively with Taylor. *Id.* ¶ 34. Reidman recalls Brown saying something to the effect that she needed to deal directly with Taylor, but does not recall when that was. *Id.* A handwritten note by Brown dated "Wednesday, May 27, 1998" describes events that, per his deposition testimony,

22; Defendant's Opposing SMF ¶ 22.

⁷ JHA states that annual bonuses were based on corporate, rather than individual, performance. Defendant's SMF ¶ 103; Plaintiff's Opposing SMF ¶ 103; Defendant's Reply SMF ¶ 103. Taylor testified that, although a supervisor could recommend that an employee not receive a bonus based on performance issues, he did not recall any employee ever not receiving a bonus for that reason, and the company policy was to pay the bonus if the employee was there and met time-eligibility requirements. Plaintiff's Additional SMF ¶¶ 6-7; Defendant's Opposing SMF ¶¶ 6-7.

⁸ Reidman further states that, although Brown invited her to raise questions or concerns on a particular project, he became upset when she asked questions. Plaintiff's Opposing SMF ¶ 32.

occurred on May 28 and May 29, 1998. Plaintiff's Additional SMF ¶ 25; Defendant's Opposing SMF ¶ 25.⁹

According to Brown, he again reviewed Reidman's performance deficiencies with her in July 1998. Defendant's SMF ¶ 38; Plaintiff's Opposing SMF ¶ 38; Defendant's Reply SMF ¶ 38. In his assessment, her performance had significantly deteriorated. *Id.* According to Brown, he was clear with Reidman about what he needed from her in terms of results and emphasized that she had not been delivering those results. *Id.* ¶ 39. However, he did not place her on probation or threaten to terminate her employment at JHA. *Id.* Reidman does not recall speaking to Brown concerning performance-related issues in July 1998. *Id.* ¶ 38.¹⁰

Brown testified at deposition that in July 1998 he made notes of his meeting with Reidman "regarding [his] frustration and concern with [her] performance relative to expectations and needs of the organization." Plaintiff's Additional SMF ¶ 28; Defendant's Opposing SMF ¶ 28. Handwritten text at the top of the page states in part, "regarding my frustration & concern re: Judith's performance relative to expectations/needs of org. – important needs – still no achieving level of necessary performance." Defendant's SMF ¶ 38; Plaintiff's Opposing SMF ¶ 38; Defendant's Reply SMF ¶ 38. On September 23, 1998 Brown provided Reidman with a copy of her personnel file. *Id.* A copy of a document was produced that was identical to the document in question except that it was not dated and did not contain the negative handwritten statements regarding Reidman at the top of the page. *Id.*¹¹ At his deposition, Brown indicated that he prepared the body of a document containing his notes of the

⁹ A further statement, that the handwritten notes dated March 27, 1998 were not created on March 27, 1998, is neither admitted nor supported by the materials cited. Plaintiff's Additional SMF ¶ 26; Defendant's Opposing SMF ¶ 26.

¹⁰ Reidman does not dispute that there may have been a meeting in July 1998; rather, she testified that she could not recall anything pertaining to it. Defendant's SMF ¶ 40; Plaintiff's Opposing SMF ¶ 40; Defendant's Reply SMF ¶ 40.

¹¹ Reidman states that the handwritten notations at the top of the page were "[t]he only comments that are negative to plaintiff on the face of" the document and that "[t]he remaining portion of the text is merely issues to be discussed." Plaintiff's Opposing SMF ¶ 38. This is not an entirely accurate characterization of the document, the body of which contains *inter alia* the following: "Identify/address weaknesses regarding current treaties that need to be updated/[word illegible]." See Exh. A to Affidavit of David A. Strock (Docket *(continued on next page)*)

meeting contemporaneously with the meeting. Plaintiff's Additional SMF ¶ 28; Defendant's Opposing SMF ¶ 28. He stated that he could not recall exactly when he put his summary comments on the top of the document to indicate what it contained, noting that he could have added them when he was compiling information for response to the Maine Human Rights Commission ("MHRC"). *Id.* He further stated that he did not hesitate to put comments on documents if it helped him to remember or highlight a point. *Id.* He remembered his conversation with Reidman in July 1998 independent of this document. *Id.*¹²

In August 1998 Brown's frustration with Reidman's performance had continued to grow. Defendant's SMF ¶ 41; Plaintiff's Opposing SMF ¶ 41; Defendant's Reply SMF ¶ 41. Reidman was not accomplishing her work or was performing inadequate work. *Id.* As a result, Brown e-mailed other employees concerning what Reidman was doing for them. *Id.* Brown testified that as of August 1998 Reidman's poor performance negatively affected the whole company and that his "frustration with her lack of performance was probably not too difficult to divide by the general employee population." Plaintiff's Additional SMF ¶ 86; Defendant's Opposing SMF ¶ 86. Tammy Desjardins, an employee who worked next to Reidman, testified that she was not aware that Reidman had any performance problems while employed at JHA. *Id.* ¶ 87.

No. 16).

¹² Several additional statements by Reidman are neither admitted nor supported by her citations to the underlying record material. Among these are: "Mr. Brown testified that his handwritten notes regarding the July 1998 meeting were made just before his meeting with plaintiff and additional remarks were added just before he put the document into plaintiff's personnel file." Plaintiff's Additional SMF ¶ 30. Brown did not testify that he put the document as annotated into the "personnel file"; rather, he testified: "There is some notation at the top which I added afterwards that I put in the file just to note what it was." Rule 30(b)(6) Deposition of John Hewitt & Associates, Inc., by its designee, Frederick R. Brown ("Brown Dep."), attached as Exh. E to Defendant's SMF, at 153. Reidman also states that "Mr. Brown altered his notes regarding the July 1998 meeting at least two months after the meeting to include negative comments regarding plaintiff's performance." Plaintiff's Additional SMF ¶ 31. The cited material indicates that Brown prepared the body of the document contemporaneously with the July 1998 meeting and that he did not recall exactly when he put the summary comments on the top, although it could have occurred when he was compiling information for the MHRC. Brown Dep. at 153, 156-58. In addition, JHA states that both the original of the document, without annotations, and Brown's copy, with annotations, were produced to Reidman in discovery. Defendant's Opposing SMF ¶ 30.

Brown testified at deposition that he decided during the first week in September 1998 to terminate Reidman's employment and discussed the decision with Taylor. Defendant's SMF ¶ 42; Plaintiff's Opposing SMF ¶ 42; Defendant's Reply SMF ¶ 42. Reidman contends, on the basis of the following evidence, that the decision was made no more than one week prior to her termination: (i) Brown admits that he took no action to effectuate termination (other than talking with Taylor) until one week before the termination (during which time he compiled documents, spoke with an attorney and drafted a termination letter); (ii) an e-mail shows that Brown did not address dental and medical benefit issues until the day of termination; (iii) a JHA organization chart dated September 14, 1998 continued to identify Reidman as director of contracts and compliance; (iv) there is no concrete, documentary evidence that the termination decision was made in early September; (v) Taylor first testified, "I mean when he [Mr. Brown] came in on the 23rd and said, we just can't go on, this is it, I said, fine," then later testified that he and Brown had spoken in early September about Reidman; (vi) although Taylor testified that the decision was to terminate Reidman at the end of the month, "which would be the end of the pay period," she was discharged on September 23, 1998 – neither the end of the month nor the end of the pay period (which ended on September 30, 1998); and (vii) Brown and Taylor both testified that no single, particular event precipitated the termination. *Id.*

On September 23, 1998 Brown met with Reidman to terminate her employment, providing her with a document titled "Strictly Confidential." *Id.* ¶ 43. Reidman was never placed on probation while at JHA. Plaintiff's Additional SMF ¶ 10; Defendant's Opposing SMF ¶ 10.

With respect to alleged age discrimination, Reidman points to the following examples of circumstantial evidence supporting her claim: (i) comments about her age made by a supervisor who was not involved in the termination process and comments by Taylor and Brown about age in general; (ii) the fact that at one time during her employment a younger individual was selected for an

underwriting position instead of her; (iii) that at the time of her termination she was the oldest female employee (although JHA at that time employed two older men); (iv) that after her discharge, a majority of her primary job functions were redistributed to other employees, including a thirty-year-old who was hired on March 1, 1999, a thirty-one-year-old who was hired on November 8, 1998 and an existing thirty-seven-year-old employee¹³; and (v) a week before her discharge Michael Leeper, another supervisor (not Reidman's supervisor), stated: "how old is she anyway," and "maybe the company should just offer her early retirement." Defendant's SMF ¶¶ 46, 55, 82; Plaintiff's Opposing SMF ¶¶ 46, 55, 82; Defendant's Reply SMF ¶¶ 46, 55, 82; Plaintiff's Additional SMF ¶¶ 80, 82; Defendant's Opposing SMF ¶¶ 80, 82.

Reidman recalls Taylor commenting on the occasion of her 55th birthday in June 1997, while having birthday cake, "we're not the oldest employee, right, Judy." Defendant's SMF ¶ 47; Plaintiff's Opposing SMF ¶ 47; Defendant's Reply SMF ¶ 47. She believes Brown responded to a question from a co-worker about his age on one of his birthdays by saying, "I'm not as old as you, right, Judy?" *Id.* ¶ 49. She believes this comment was made in 1997 but is not sure. *Id.* ¶ 50. When a co-worker left JHA in January 1996, Reidman commented that she liked the gift that was purchased for that employee. *Id.* ¶ 51. Reidman claims that Brown responded that if and when she retired, "they" would buy her two. *Id.*

With respect to the underwriting position, Reidman claims that when the position became available, she expressed an interest in it to Brown, and the position was given to a younger male employee, Darren Hotham. *Id.* ¶ 53.¹⁴ She concedes that she does not know Hotham's employment

¹³ Reidman's job functions also were assumed in part by an employee who was 61 years old at the time. Plaintiff's Additional SMF ¶ 82; Defendant's Opposing SMF ¶ 82.

¹⁴ Reidman elsewhere states that she applied for this position, Plaintiff's Additional SMF ¶ 84, but the record citation given indicates only that she expressed interest in it.

background. *Id.* ¶ 54. However, when JHA announced his selection, it stated that nobody else had expressed an interest in the position. *Id.*¹⁵

With respect to alleged sex discrimination, Reidman points to the following circumstantial evidence: (i) at the time of her termination, no females held management-level positions, (ii) members of management made statements that women were too emotional for the workplace and that a woman was employed as a token, (iii) different standards were applied to women and men with regard to discipline for the use of profanity, attendance at educational classes and invitations to lunch;¹⁶ (iv) Hotham, a male, was hired for the open underwriting position instead of Reidman; and (v) Taylor stated at deposition that “we brought on a lot of women,” as if it were some type of new policy for the company. *Id.* ¶ 56.

While Reidman was employed with the company, Jane Carson was a vice-president, Vickie Manning was promoted to a manager position although she left soon thereafter, and Reidman herself was the director of contract administration. *Id.* ¶ 57. Carson left two years before Reidman was terminated, and Manning left a week after receiving the promotion. *Id.* ¶¶ 57-58. Taylor defined a “management-level employee” as someone who is “managing a process or you are accountable for

¹⁵ An additional statement by JHA, “Mr. Hotham was selected for the position because he had temporarily performed the underwriting function during the absence of the prior employee in that job and because his claims experience provided relevant background experience for the underwriting position[.]” Defendant’s SMF ¶ 54, is neither admitted nor supported by the record citation given. Portions of Reidman’s response to this point also are neither admitted nor supported by the record citation given – that she “repeatedly asked to cover the position” at the time Hotham was temporarily performing in it and that “[h]er requests were rejected.” Plaintiff’s Opposing SMF ¶ 54.

¹⁶ With respect to ability to attend educational classes, Reidman concedes that she is unaware which female JHA employees attended such seminars. Defendant’s SMF ¶ 75; Plaintiff’s Opposing SMF ¶ 75; Defendant’s Reply SMF ¶ 75. Reidman states that she is entitled to a negative inference against this fact on the ground that she specifically requested sufficient documentation from JHA to establish its pattern of approving male employees’ attendance at educational classes, and JHA refused to produce those documents. *Id.* JHA points out that (and the case file bears out), that assuming there were such a discovery dispute, it was not brought to the attention of the court. *Id.* I therefore decline to draw the requested negative inference. *See also id.* ¶ 76.

delivering certain things. The buck stops with you.” *Id.* ¶ 58. He agreed that even the JHA receptionist was, under his definition, a management-level employee. *Id.*¹⁷

Reidman alleges that Brown commented about five or six times beginning in 1995 that women were too emotional in the workplace. *Id.* ¶ 59. Reidman recollected that Brown made two such comments in 1995 and a third in 1995 or 1996. *Id.* ¶¶ 62-63. Two of these comments were made in the context of a discussion among a group of employees, once in response to a comment by another employee, and one was made to Reidman when she was teary-eyed. *Id.* ¶¶ 60-62. According to Reidman, Brown also told her about a week prior to her termination, when she was teary-eyed after learning that she had a serious liver condition, that he was “tired of women being emotional in the workplace.” *Id.* ¶ 59; Plaintiff’s Additional SMF ¶ 85; Defendant’s Opposing SMF ¶ 85.

Reidman also testified that shortly after Carson left in February 1996, Reidman entered a conference room during a conversation among Taylor, Kinsley and Leeper and overheard Taylor saying that women were too emotional in the workplace anyway. Defendant’s SMF ¶¶ 64-65; Plaintiff’s Opposing SMF ¶¶ 64-65; Defendant’s Reply SMF ¶¶ 64-65. Reidman testified that the comment was prompted by Leeper saying something about Carson, whose job he had assumed. *Id.* ¶ 64. Reidman testified that, during the same conference, Taylor referred to Carson as a “token woman officer.” *Id.* ¶ 66.

Reidman further contends that Brown applied a different standard to members of each sex on permissible language in the workplace. *Id.* ¶ 67. About a week before Reidman’s termination, Brown called her into his office to speak with her about saying the word “shit” when at the same time outside his office another co-worker (Mr. Whitaker) was using profanity while in a conversation with another

¹⁷ Several additional statements by Reidman are neither admitted nor supported by any citation to the record. These include: “Simply because Ms. Manning had the title of ‘manager’ and plaintiff had the title of ‘Director,’ those titles did not indicate that either Ms. Manning or plaintiff were management-level employees,” Plaintiff’s Opposing SMF ¶ 57, and “the only female management-level (continued on next page)

individual. *Id.* ¶ 68. Brown did not stop Whitaker from using profanity. *Id.* When Reidman brought the issue up, Brown simply smiled and shrugged his shoulders. *Id.* Reidman concedes that she is unaware whether that co-worker ever was counseled on use of profanity and, if he were, she would agree that she did not experience differing treatment. *Id.* Brown counseled Whitaker from time to time in 1995, 1996 and 1997 on his use of profanity and spoke to another employee, Mr. Patterson, in 1997 about his use of profanity. *Id.* ¶ 69. Reidman alleges that two other male employees (Hotham and Kinsley) used profanity in the workplace. *Id.* ¶ 70. As with Whitaker, she does not know whether they were counseled but agrees that if they were, it would not be discrimination. *Id.*

Reidman also testified that Brown would immediately stop her in a roomful of people and reprimand her in front of her co-workers if he thought that she had used profanity. *Id.* ¶ 68. By contrast, if male employees such as Hotham were reprimanded, it was done privately. *Id.* Brown admits that JHA did not have a specific written policy on the use of profanity in the workplace and admits that some use of profanity in the workplace was acceptable. *Id.*

Reidman alleges that Taylor treated women differently by not inviting them out to lunch. *Id.* ¶ 73. Based on her observations, as a general matter, Taylor would not stop to “chitchat” with female employees as he would with male employees. *Id.* ¶ 74.

With respect to alleged disability discrimination, Reidman identifies the following circumstantial evidence in support of her claim: (i) she had asthma, which was allegedly exacerbated at times by odors in her seat location in the office, and although management changed her seat location it did not do so quickly enough, *id.* ¶ 78; (ii) that although Brown claims he never saw Reidman coughing uncontrollably or in any physical distress because of her asthma, Reidman and Desjardins testified that Brown had in fact seen her in that condition, Plaintiff’s Additional SMF ¶¶ 56-59,

employee (as that term is generally defined) during Plaintiff’s employment was Ms. Carson,” *id.* ¶ 58.

Defendant's Opposing SMF ¶¶ 56-59; (iii) that, following a phone call in which Reidman learned that bloodwork showed abnormal liver function tests, there was tension between Reidman and Leeper, and management stayed away from Reidman during her final week at JHA, *id.* ¶¶ 36, 79; (iv) that only during that final week did Brown take steps to effectuate Reidman's termination, *id.* ¶¶ 45-49; (v) that Leeper commented, after hearing about the telephone call, "that's a disability claim waiting to happen," *id.* ¶ 80; and (vi) when Brown finally agreed to move Reidman's desk location, he angrily informed her, "Just remember, we're accommodating you," *id.* ¶ 77.¹⁸

Reidman concedes that JHA knew about her asthma problem since 1994, although Brown and Taylor both deny knowing about her asthma condition. Defendant's SMF ¶ 85; Plaintiff's Opposing SMF ¶ 85; Defendant's Reply SMF ¶ 85. During her deposition Reidman testified that she had "20 or more" asthma attacks while working for JHA. *Id.* ¶ 91.¹⁹ She had significantly more than twenty such attacks during her employment with JHA. *Id.* Desjardins testified that the attacks would vary in severity but would occur up to three times a week. *Id.* The attacks would consist of coughing, wheezing and gasping for breath. *Id.* In response to these symptoms, Reidman would use an inhaler on an as-needed basis. *Id.* An asthma attack would last from two to five minutes before Reidman used an inhaler. *Id.* ¶ 93. After she used the inhaler, Reidman would sit quietly for approximately ten minutes. *Id.* As a result, the entire episode would last no more than fifteen minutes. *Id.*

Desjardins testified that Reidman's asthma attacks were much more severe than just a cough; "it sounds like a seal from her chest, like a barking noise." Plaintiff's Additional SMF ¶ 67; Defendant's Opposing SMF ¶ 67. According to Desjardins, during an attack Reidman would be

¹⁸ References to an alleged vision problem are omitted inasmuch as Reidman does not mention this condition in her opposition to summary judgment. See Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's SJ Opposition") (Docket No. 13) at 11-20.

¹⁹ JHA contends in its statement of material facts that Reidman testified that she had "approximately 20 asthma attacks"; Reidman denies this, stating that she testified that she recalled "having '20 or more' serious asthma attacks" while at JHA. Defendant's SMF ¶ (continued on next page)

unable to breathe and would move away from her desk so she could lean over to put her head between her knees, coughing toward the floor. *Id.* ¶ 68. Desjardins stated that when Reidman's coughing would not subside, Reidman would go to the restroom or outside to avoid disrupting her co-workers. *Id.* ¶ 69. During an asthma attack, Reidman was unable to breathe. *Id.* ¶ 70.

Reidman contends that the flatulence of a co-worker triggered asthma attacks. Defendant's SMF ¶ 94; Plaintiff's Opposing SMF ¶ 94; Defendant's Reply SMF ¶ 94. As a result, she asked to be moved away from that employee. *Id.* ¶ 95. After making this request to Brown on almost a daily basis, she was eventually moved to a new location in 1997. *Id.*

Reidman claims in addition that she was subject to discrimination on the basis of a perceived disability as a result of the phone call approximately one week prior to her termination (allegedly overheard by Brown and others, although Brown contends he did not hear its context) in which she was informed that a blood test had revealed an abnormal liver function. *Id.* ¶ 79.²⁰ During Reidman's final week she does not recall even talking to Brown, whose office was right next to her desk. Plaintiff's Additional SMF ¶ 81; Defendant's Opposing SMF ¶ 81. Brown admits that he may have spoken to Leeper just before Reidman was terminated on September 23, 1998. Defendant's SMF ¶ 79; Plaintiff's Opposing SMF ¶ 79; Defendant's Reply SMF ¶ 79.²¹

Reidman adduces the following additional evidence relevant to her claims of untruthfulness on the part of JHA employees:

91; Plaintiff's Opposing SMF ¶ 91; Defendant's Reply SMF ¶ 91. In the record material cited by both parties, Reidman testified that she had "twenty or more" attacks while working at JHA. Reidman Dep. at 209.

²⁰ Reidman ultimately learned that she would be fine. Defendant's SMF ¶ 80; Plaintiff's Opposing SMF ¶ 80; Defendant's Reply SMF ¶ 80.

²¹ A further statement by Reidman, that "Mr. Brown admits that he looked to Mr. Leeper, a member of upper management, for assistance in managing plaintiff and, therefore, he would be influenced by Mr. Leeper's information," Plaintiff's Additional SMF ¶ 89, is neither admitted nor supported by the record citations given.

1. Taylor claims he never informed Reidman that she was doing a good job. Plaintiff's Additional SMF ¶ 51; Defendant's Opposing SMF ¶ 51. However, from time to time he informed Reidman she had done a good job on a particular project. *Id.* ¶ 52.

2. Brown testified that he never had been counseled about his use of profanity in the workplace; however, Taylor testified that he personally had told Brown to tone down his language in the office. *Id.* ¶¶ 53-54.

3. Brown denies making any of the derogatory gender-biased comments that Reidman alleges he made. *Id.* ¶¶ 60-61.

4. Taylor testified that, "I did not personally instruct any employee of JHA to not help her. I was – there was – was not using my power as the president of a company in abusing and to command people not to help her." *Id.* ¶ 62. However, Taylor read Reidman's MHRC complaint to the entire company and commented as he read that he believed the charges were frivolous, unfounded and would be vigorously defended. *Id.* ¶ 63. In addition, Desjardins testified that Taylor called her and another employee into his office and told them that they were employed by the company and that they were to stay out of the dispute between the company and the plaintiff. *Id.* ¶ 64. He told them, "You work for this company and this is where you get your paycheck and job, you, know stay out of it." *Id.* According to Desjardins, JHA attorney Peter Kraft refused to release her final paycheck until she agreed not to talk about anyone who previously worked at JHA. *Id.* ¶ 65. To get her paycheck, she sent Kraft a letter agreeing not to "slander" any employee of JHA. *Id.* In the context of resolution of a post-employment dispute between Desjardins and JHA, Taylor and JHA specifically authorized Desjardins to discuss issues associated with Reidman's employment. *Id.* ¶¶ 64-65.

III. Analysis

Reidman's four-count complaint asserts violations of both federal anti-discrimination laws (Counts I, III and IV) and the Maine Human Rights Act ("MHRA") (Count II). First Amended Complaint and Demand for Jury ("Complaint") (Docket No. 2) ¶¶ 27-61. The parties agree that federal analysis is dispositive of Reidman's MHRA claims. Summary Judgment Motion at 5-6 n.2; Plaintiff's SJ Opposition at 2 n.1. Accordingly, I likewise treat Count II as subsumed in Reidman's federal claims. *See CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 888 F. Supp. 192, 203 (D. Me. 1995), *aff'd*, 97 F.3d 1504 (1st Cir. 1996).

A. Count I: Age Discrimination

Reidman alleges in Count I of her complaint that JHA impermissibly terminated her employment based upon her age (then 56) in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623 *et seq.* Complaint ¶¶ 27-34. JHA contends that Reidman fails to make out a *prima facie* case of age discrimination and, in any event, falls short of adducing sufficient evidence from which a trier of fact ultimately could conclude that she was the object of such discrimination. Summary Judgment Motion at 5-9. Reidman survives the *prima-facie* stage, but to no avail. No reasonable trier of fact could discern age discrimination in the portrait she ultimately paints.

"The ADEA makes it illegal for an employer 'to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.'" *Suarez v. Pueblo Int'l, Inc.*, 229 F.3d 49, 53 (1st Cir. 2000) (quoting 29 U.S.C. § 623(a)(1)). "Where, as here, an employee lacks direct evidence that the employer's actions were motivated by age animus, the *McDonnell Douglas* burden-shifting framework dictates the progression of proof." *Id.*

"The first step in this progression involves the employee's *prima facie* case." *Id.* "To climb this step, an employee suing under the ADEA for termination of employment must adduce evidence

which, if believed, suffices to prove four facts: (1) that he was at least forty years old when he and his employer parted company; (2) that his job performance met the employer's legitimate expectations; (3) that he lost his position through an adverse employment action attributable to the employer (typically, a firing); and (4) that the employer had a continuing need for the services that he had been rendering.” *Id.* JHA challenges Reidman's showing as to only one facet of this test: that her job performance met its legitimate expectations. Summary Judgment Motion at 6; Plaintiff's SJ Opposition at 20-21; Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment (Docket No. 22) at 7. Nonetheless, viewing the record in the light most favorable to Reidman, her job performance met JHA's legitimate expectations. She never was on probation and she received annual raises and bonuses. *See Mulero-Rodríguez v. Ponte, Inc.*, 98 F.3d 670, 673 (1st Cir. 1996) (for purposes of *prima facie* case, plaintiff's thirty-year tenure with defendant, with attendant promotions and pay raises, supported inference that employee's job performance was adequate to meet employer's needs, even when evidence did not extend all the way to time of discharge).

Once a plaintiff establishes a *prima facie* case, the *McDonnell Douglas* rubric shifts the burden to the defendant to “produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2106 (2000) (citation and internal quotation marks omitted). “This burden is one of production, not persuasion; it can involve no credibility assessment.” *Id.* (citation and internal quotation marks omitted). JHA meets its production burden, adducing evidence that Reidman was fired on the basis of an aggregation of longstanding, worsening performance problems.

At this stage, “the *McDonnell Douglas* framework – with its presumptions and burdens – disappear[s], and the sole remaining issue [is] discrimination *vel non*.” *Id.* (citations and internal quotation marks omitted). “Although intermediate evidentiary burdens shift back and forth under this

framework, [t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Id.* (citation and internal quotation marks omitted). In attempting to satisfy this burden, a plaintiff “must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” *Id.* (citations and internal quotation marks omitted). “[A] plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” *Id.* at 2109.

In attempting to prove “discrimination *vel non*,” Reidman relies heavily on this latter principle, arguing that she adduces sufficiently strong evidence of mendacity on the part of JHA to justify taking her case to a jury on that basis alone. Plaintiff’s SJ Opposition at 3 (“The evidence shows that defendant has tried to conceal its true motivation through altering documents, attempting to influence witnesses, dishonesty, and manufacturing a justification for plaintiff’s termination after the fact.”). However, her key allegations do not survive close scrutiny:

1. That Brown altered his handwritten documentation of an alleged July 1998 counseling session with Reidman, deliberately adding damning information to the top of the document some time after September 23, 1998, when Reidman obtained a copy of the document from her personnel file that contained no such additional notations. *Id.* at 4-6. JHA demonstrates that (i) Brown did add notations to the document, (ii) he does not remember when he did so, but it may have been in connection with Reidman’s MHRC proceedings, (iii) Brown had a practice of adding notations to documents to help him remember or label things, and (iv) both versions of the document were released to Reidman during discovery. These facts extinguish what otherwise would have been a colorable inference that

Brown deliberately falsified this document as a sort of coverup or after-the-fact reengineering of the truth of Reidman's termination.

2. That Brown authored a second suspicious document concerning a May 1998 incident in which Reidman allegedly failed to complete a work assignment for Taylor in a timely or adequate fashion. *Id.* at 6. Reidman points out that the document, which is dated May 27, 1998, discusses events that (per Brown's deposition testimony) actually happened on the two succeeding days, May 28th and May 29th. *Id.* However, given that Brown testified that he independently recalled the incident and that Reidman acknowledged at deposition that she as well remembered it, there can be little doubt that some such incident occurred. The date mismatch thus does not bear out an inference that no such event occurred, or even that the document was manufactured after-the-fact for the purpose of buttressing JHA's defense against Reidman's charges.

3. That, per the testimony of Desjardins, both Taylor and a JHA attorney attempted to silence Desjardins from testifying with respect to Reidman. *Id.* at 9-10. Whatever may initially have been said to Desjardins, who was engaged in her own post-termination dispute with JHA, the company demonstrates that it executed a settlement agreement with her that expressly allowed her to discuss Reidman. Thus, an ultimate inference of coverup is not sustainable.

Stripped of these critical assertions, Reidman's evidence of mendacity is reduced to an assortment of purported miscellaneous lies by Brown and Taylor, including Brown's denial that he had ever seen Reidman in physical distress from asthma in the face of contradictory testimony from Reidman and Desjardins; his denial that he knew that Reidman had received bad news from her physician a week before her termination in the face of contradictory testimony from Reidman and Desjardins; his denial that he had been counseled for use of profanity in the face of Taylor's testimony that he had personally spoken to Brown about use of profanity; and Taylor's denial that he had tried to

prevent any JHA employee from helping Reidman in the face of Desjardins' testimony that Taylor had read Reidman's complaint aloud to the entire company and told Desjardins and another employee to stay out of the dispute. *Id.* at 9-11. A reasonable fact-finder, crediting the testimony of Reidman and Desjardins over that of Brown and Taylor, could indeed draw the inference that as to these issues Brown and Taylor lied. However, these purported miscellaneous lies do not sketch such a compelling picture of calculated coverup as to permit a trier of fact – without more – to infer that the true reason for Reidman's discharge was impermissible animus of some kind.

The question remains whether, in any event, the evidence as a whole raises a material issue as to pretext – in other words, that JHA's asserted performance-based justification for Reidman's discharge was false. Reidman confronts a formidable obstacle in the form of JHA's extensive evidence that management did in fact regard her as suffering from various performance problems. Reidman acknowledges that some of these concerns were communicated to her, and the record (including the body of Brown's July 1998 handwritten notes) reveals contemporaneous documentation of others. Nonetheless, the evidence viewed in the light most favorable to Reidman raises a genuine (if relatively weak) question of pretext in view of Brown's and Taylor's asserted miscellaneous lies, Reidman's continuing receipt of annual raises and bonuses despite evidence that subpar employees were not entitled to receive bonuses, the fact that Reidman was never placed on probation, the fact neither Brown nor Taylor could identify a single event precipitating the termination, and the fact that Reidman did not recall having been counseled for any significant performance problems in 1998.

This leaves the final, critical piece of the puzzle: whether a reasonable fact-finder could find that the termination was in fact motivated, at least in part, by age-based animus. *See Domínguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 430-31 (1st Cir. 2000) (once plaintiff makes out *prima facie* case and defendant meets its burden of production, "the focus [at summary judgment] should be on the

ultimate issue: whether, viewing the aggregate package of proof offered by the plaintiff and taking all inferences in the plaintiff's favor, the plaintiff has raised a genuine issue of fact as to whether the termination of the plaintiff's employment was motivated by age discrimination.") (citations and internal quotation marks omitted). I conclude that a reasonable fact-finder could not make such a determination.

First, none of the purported lies directly concerns Reidman's age. Second, her circumstantial evidence consists of facts that, in their totality, are not sufficiently probative of age discrimination to permit a reasonable trier of fact to conclude that Reidman's termination was indeed motivated (even in part) by that particular impermissible criterion. Specifically, Reidman adduces evidence that:

1. On the occasion of her 55th birthday in June 1997 Taylor remarked, "We're not the oldest employee, right, Judy." Both the innocuous context of this comment and its temporal distance from Reidman's September 1998 termination distance it from the decisional process.²² See *Mulero-Rodríguez*, 98 F.3d at 676 (comment that plaintiff was "too old to handle" salespeople, made eight months before his discharge, standing alone, was "too remote in time to be linked with the decision to terminate" plaintiff).

2. Brown, possibly in 1997, responded to a question from a co-worker about his age on the occasion of his birthday by saying that he was not as old as Reidman. Again, the context and timing of this remark attenuate it from the decisional process.

²² JHA classifies these alleged comments as "stray remarks," Summary Judgment Motion at 7 – *i.e.*, "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself," which "normally are insufficient to prove [an] employer's discriminatory animus," *Shorette v. Rite Aid of Maine, Inc.*, 155 F.3d 8, 13 (1st Cir. 1998) (citation and internal quotation marks omitted). Technically, a "stray remark" is a comment that does not qualify as "direct evidence" of discriminatory animus, as opposed to indirect evidence adduced pursuant to the *McDonnell Douglas* burden-shifting paradigm. See, *e.g.*, *Shorette*, 155 F.3d at 13; *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 96 (1st Cir. 1996) ("[A]t a minimum, direct evidence does not include stray remarks in the workplace."). Here, Reidman proceeds on a *McDonnell Douglas* theory. See generally Plaintiff's SJ Opposition. Nonetheless, "stray remark" types of considerations are relevant in this context as well. See, *e.g.*, *Suttle Caribe*, 202 F.3d at 433 n.6 (noting that asserted "stray remarks," "with their varying levels of relevance, can properly be considered at the summary judgment stage under the *McDonnell Douglas-Burdine-Hicks* framework.").

3. When Reidman remarked to Brown in 1996 that she liked a retirement gift given to a co-worker, Brown responded that if and when Reidman retired, JHA would give her two such gifts. Again, the context and timing of this remark distance it from the decisional process.

4. Shortly before Reidman's termination Leeper asked Desjardins whether Reidman would consider taking "early retirement." Reidman argues that Leeper, a senior manager, influenced the decision to discharge her. Plaintiff's SJ Opposition at 22; *see also Mulero-Rodríguez*, 98 F.3d at 675 ("The biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case.") (citations and internal quotation marks omitted). However, the evidence cognizable on summary judgment merely shows that Brown informed Leeper on the day of Reidman's termination that she was about to be terminated. It is simply too great a stretch to infer from this that Leeper influenced the termination decision.

5. Reidman was not selected for an underwriting job at JHA, which was given to a younger male employee. Reidman does not establish that she applied for – as opposed to expressing interest in – this position. In any event, she does not establish that she was equally or more qualified for the position.

6. At the time of her termination, Reidman was the oldest female JHA employee. However, JHA at that time also employed two older men.

7. That after Reidman's discharge her job functions were distributed among several younger employees. However, certain functions also were distributed to one older employee.

Inasmuch as no reasonable finder of fact could conclude that, even if the reasons given by JHA for Reidman's discharge were pretextual, JHA was in fact motivated by her age, JHA is entitled to summary judgment as to Count I.

B. Count III: Disability Discrimination

Reidman alleges in Count III of her complaint that she was discharged in violation of the Americans with Disabilities Act (the “ADA”), 42 U.S.C. § 12101 *et seq.*, on the basis of (i) disability, (ii) a record of having had a disability, (iii) being regarded by JHA as having a disability, and (iv) in retaliation for requesting accommodation or for preparing to assert her rights pursuant to the ADA. Complaint ¶¶ 43-54. In her opposition to summary judgment Reidman makes no argument concerning retaliation, effectively waiving that point. *See* Plaintiff’s SJ Opposition at 11-20; *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990) (“It is settled beyond peradventure that issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed waived.”) (citation and internal quotation marks omitted).²³ JHA argues – and I agree – that Reidman fails to demonstrate as a matter of law that she had a disability, had a record of having had a disability or was perceived by JHA as disabled. Summary Judgment Motion at 13-19.

The ADA proscribes discrimination by a covered entity “against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a).

“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). In turn, EEOC regulations define “major life activities” as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working,” and “substantially limits” as “[u]nable to perform a major life activity that the average person in the general population can perform” or

²³ In addition, although the Complaint identifies a vision problem as one of Reidman’s disabilities, Complaint ¶ 45, she presses no argument on summary judgment concerning that condition, *see* Plaintiff’s SJ Opposition at 11-20, effectively conceding JHA’s entitlement to summary judgment as to that point.

“[s]ignificantly 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(i) & (j).

EEOC regulations also provide in relevant part:

(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(1) Is regarded as having such an impairment means:

(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 paragraphs (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

Id. § 1630.2.

Reidman asserts that her asthma constituted a “disability” and that she had a record of having asthma-related “disability” inasmuch as that condition substantially limited the major life activity of breathing. Plaintiff’s SJ Opposition at 11-15, 19-20. Viewing the facts in the light most favorable to Reidman, one could find that she had frequent asthma attacks at work, including approximately twenty severe attacks over the course of her tenure at JHA. She also had about ten asthma attacks outside the workplace during that entire time. Her testimony establishes that her asthma condition was not particularly debilitating outside of the workplace and that, at work, the condition was effectively controlled by use of an inhaler – *i.e.*, that after coughing for up to five minutes, using an inhaler and resting for about ten minutes, she was able to return to work. This does not constitute a substantial limitation on the major life activity of breathing. *See, e.g., Nugent v. Rogosin Inst.*, 105 F. Supp.2d

106, 114 (E.D.N.Y. 2000) (plaintiff who produced no evidence that asthma significantly limited her ability to breathe outside workplace or significantly hindered her daily activities could not reasonably be found to be substantially limited in her ability to breathe); *Tangires v. Johns Hopkins Hosp.*, 79 F. Supp.2d 587, 596 (D. Md.), *aff'd*, 230 F.3d 1354 (4th Cir. 2000) (inasmuch as plaintiff's asthma was correctable by medication, it did not substantially limit her in any major life activity). Accordingly, Reidman neither had a disability nor a record of disability based on her asthma.

Reidman next contends that, regardless whether she was actually disabled, she was fired on the basis of perceived disability – her asthma and a possibly serious liver condition about which she was informed a week prior to her termination. Plaintiff's SJ Opposition at 16-19. Reidman adduces no evidence that any JHA decisionmaker considered or treated her asthma as substantially limiting any major life activity. With respect to her liver condition, JHA emphasizes that both Taylor and Brown testified that the decision to discharge Reidman was made in early September (prior to the phone call in which Reidman learned of the potential condition). Summary Judgment Motion at 17. Reidman indirectly controverts this timing, producing evidence from which a reasonable trier of fact could conclude that the decision was not made until approximately a week prior to the event, including: (i) a lack of written documentation that the decision was made in early September, (ii) the fact that no concrete steps were taken to effectuate the termination until one week before it happened, (iii) that neither Brown nor Taylor could identify a discrete incident leading to the termination and (iv) Brown's and Taylor's credibility could be found questionable; in particular, Brown could be found to have lied concerning his knowledge of the liver condition.

Nonetheless, Reidman's remaining evidence boils down to the temporal proximity of the discharge, Leeper's comment that the condition was "a disability waiting to happen," tension between Reidman and members of management (Leeper, Brown) during the week prior to her discharge, and

Brown's and Taylor's alleged untruthfulness (including the purported lie regarding Brown's knowledge of the liver condition). None of this constitutes proof that JHA viewed the liver condition (the economics of which concerned Leeper) as a "disability" in the ADA sense – *i.e.*, that it viewed the condition as substantially limiting a major life activity. *See, e.g., South v. NMC Homecare, Inc.*, 943 F. Supp. 1336, 1341 (D. Kan. 1996) (evidence that, during month plaintiff was terminated, plaintiff told employer that his abdominal tumor may have reappeared, and employer feared necessary diagnostic tests might raise company's premiums, did not demonstrate that employer perceived the impairment as substantially limiting major life activities).

JHA accordingly is entitled to summary judgment as to Count III.

C. Count IV: Sex Discrimination

Reidman alleges in Count IV of her complaint that she was discharged from JHA on the basis of her gender in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.* Complaint ¶¶ 55-61. JHA contends that Reidman falls short of making out a *prima facie* case and, in any event, fails to adduce sufficient evidence of the ultimate fact of discrimination to warrant trial by jury. Summary Judgment Motion at 9-13. I disagree.

As in the context of Reidman's age-discrimination claim, (i) Reidman meets her burden at the first stage of making out a *prima facie* case,²⁴ (ii) JHA meets its burden at the second stage of producing evidence that the termination was based on legitimate, nondiscriminatory reasons, (iii) Reidman falls short of proving that JHA's asserted mendacity alone justifies a finding that it acted on the basis of impermissible motive, and (iv) Reidman nonetheless marshals adequate, if weak, evidence from which a finding of pretext could be made. Reidman nevertheless survives summary

²⁴ A *prima facie* case of gender discrimination is made out by proof that "(1) [a plaintiff] belonged to a protected class, (2) she performed her job satisfactorily, (3) her employer took an adverse employment decision against her, and (4) her employer continued to have her duties performed by a comparably qualified person." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, (continued on next page)

judgment on this claim for one key reason: Brown, indisputably the JHA manager who made the decision to end Reidman's employment, allegedly remarked that he was tired of women being emotional in the workplace suspiciously close in time to (within one week of) Reidman's termination.²⁵ Brown allegedly had made similar comments in 1995 and 1996, denies having made such comments (a coverup, per inferences that could be drawn in favor of Reidman) and had previously betrayed gender bias in his public rebuke of women (but not men) for use of profanity. That is enough to merit trial by jury on the issue whether gender bias played a role in Reidman's termination. *See Mulero-Rodríguez*, 98 F.3d at 675-76 (comment allegedly repeatedly made to plaintiff by employee in position to influence decisionmakers that plaintiff "was the only Puerto Rican running a Cuban company" sufficed on summary judgment to permit inference in plaintiff's favor that national-origin animus played role in plaintiff's termination).

For these reasons, JHA fails to demonstrate entitlement to summary judgment as to Count IV.

IV. Conclusion

For the foregoing reasons, I **GRANT** in part and **DENY** in part the Motion To Strike, as noted earlier, and recommend that the Summary Judgment Motion be **GRANTED** as to Counts I, III and that portion of Count II alleging age and disability discrimination, and **DENIED** as to Count IV and that portion of Count II alleging sex discrimination.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B)

54 (1st Cir. 2000).

²⁵ As mentioned in the context of Reidman's disability-discrimination claim, Reidman adduced evidence indirectly controverting JHA's testimony that the termination decision was made in early September.

207-773-4775

v.

JOHN HEWITT & ASSOCIATES, INC. WILLIAM C. KNOWLES

defendant

[COR]

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