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United States District Court, S.D. New
 York.

Karen ABDEL-KHALEK, Plaintiff,

v.

ERNST & YOUNG LLP, Defendant.

No. 97 CIV. 4514 JGK.

April 7, 1999.

Linda J. Sammartano, Esq., Law Office of
 Linda J. Sammartano, Bruce E. Menken,
 Esq., Menken & Dean, New York, for the
 Plaintiffs.

James M. Beach, Esq., Proskauer Rose
 LLP, New York, for the Defendant.

AMENDED OPINION AND ORDER

KOELTL, District J.

*1 This case is brought by a former employee of Tenenbaum and Associates, Inc. ("TAI"), a company many of whose assets have been acquired by the defendant, Ernst & Young, LLP. The plaintiff contends that her employment was terminated by TAI and that she was not hired by Ernst & Young because she had a disabled daughter. She alleges violations of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA"), the New York State Human Rights Law, Executive Law § 290 et seq., the Administrative Code of the City of New York § 8-101 et seq., and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA").

The defendant has moved for summary judgment on all of the plaintiff's claims. For the reasons that follow, the defendant's motion for summary judgment is granted in part and denied in part.

I.

The standard for granting summary judgment is well established. Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Gallo v. Prudential Residential Servs. Ltd. Partnership*, 22 F.3d 1219, 1223 (2d Cir.1994). "The trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." *Id.* at 1224.

The moving party bears the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The substantive law governing the case will identify those facts which are material and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); see also *Gallo*, 22 F.3d at 1223.

If the moving party meets its burden, the burden shifts to the nonmoving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). With respect to the issues on which summary judgment is sought, if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper. See *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir.1994).

II.

*2 The facts underlying this case are undisputed except where specifically noted. The plaintiff was hired by TAI in or about February 1990 as a technical services representative in TAI's New York office. (Def.'s 56.1 Statement ¶ 3.) TAI was a company that provided real and business property tax consulting services to third parties. (Def.'s 56.1 Statement ¶ 1.) The plaintiff's duties at TAI included, among other things, preparing documents and forms to submit to the tax commission, maintaining the calendar of a TAI appraiser, tracking the status of appeals, and completing refund forms when an appeal was successful. (Def.'s 56.1 Statement ¶ 4; Pl.'s 56.1 Statement ¶ 1.)

On October 11, 1994, the plaintiff gave birth to her daughter approximately eight weeks early. (Def.'s 56.1 Statement ¶ 5; March 26, 1998 Dep. of Karen Abdel-Khalek at 15, (hereinafter "Abdel-Khalek Dep."), attached as Ex. B to Aff. of James M. Beach dated Oct. 14, 1998 (hereinafter "Beach Aff.")). As a result of her premature birth, the plaintiff's daughter had a number of health problems. She was on a respirator until approximately October 18, 1994, on oxygen until approximately

November 8, 1994, and fed by a feeding tube until approximately November 24, 1994. (Def.'s 56.1 Statement ¶ 6; Pl.'s 56.1 Statement ¶ 5.) On or about October 18, 1994, the plaintiff's daughter underwent an appendectomy and surgical volvulus repair because of a problem with her intestines. (Def.'s 56.1 Statement ¶ 7; Pl.'s 56.1 Statement ¶ 5.) The plaintiff's daughter also had a heart monitor until approximately July 1995 and had to be monitored for cystic fibrosis and other medical problems for more than one year. (Pl.'s 56.1 Statement ¶ 5.) By memo dated November 30, 1994, Brian Howes ("Howes"), TAI's Chief Operating Officer, granted the plaintiff an "exception to our policy on short term disability" because of the "medical circumstances" surrounding the "unexpected early delivery of her baby." (Pl.'s 56.1 Statement ¶ 9; Memo from Brian Howes to Mary Ann Corwin dated Nov. 30, 1994, attached as Ex. G to Aff. of Bruce E. Menken dated Oct. 28, 1998 (hereinafter "Menken Aff.")).

In the fall of 1994, Philip Tatarowicz ("Tatarowicz"), a partner at Ernst & Young and its national director of state and local tax policy and standards, learned that Seafield Capital Corporation ("Seafield"), TAI's majority shareholder, was seeking to sell its interest in TAI. (Def.'s 56.1 Statement ¶ 8; Pl.'s 56.1 Statement ¶ 11.) Tatarowicz thereafter met with Tony Jacobs ("Jacobs") and Tony Levinson ("Levinson"), two Seafield executives, a number of times to discuss whether Ernst & Young would purchase TAI's assets and hire all or some of TAI's employees. (Def.'s 56.1 Statement ¶¶ 9-10; Pl.'s 56.1 Statement ¶¶ 12-13.)

On December 21-22, 1994, Tatarowicz and James Maguire ("Maguire"), another Ernst

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& Young partner, met with Jacobs, Levinson, and Howes, so that Ernst & Young could conduct due diligence. (Def.'s 56.1 Statement ¶ 11; Pl.'s 56.1 Statement ¶ 14.) During that due diligence meeting, Howes provided Tatarowicz and Maguire with a summary of the roles played by each TAI employee. (Def.'s 56.1 Statement ¶ 11; Pl.'s 56.1 Statement ¶ 14.) Howes told Tatarowicz that the plaintiff was out on pregnancy leave. (Def.'s 56.1 Statement ¶ 12; Pl.'s 56.1 Statement ¶ 15.) The parties dispute whether he also told Tatarowicz that the plaintiff's daughter was experiencing serious health problems.

*3 In late December 1994 or early January 1995, the plaintiff requested an unpaid leave of absence from TAI. (Def.'s 56.1 Statement ¶ 15.) Howes granted the plaintiff's request with the express condition that if the plaintiff did not report back to work by April 1, 1995, she would be deemed to have abandoned her job. (Def.'s 56.1 Statement ¶ 15; Pl.'s 56.1 Statement ¶ 10; Memo from Brian Howes to Mary Ann Corwin dated Jan. 5, 1995, attached as Ex. F to Menken Aff.)

Ernst & Young ultimately agreed to interview even those employees at TAI that Ernst & Young did not intend to hire. (Def.'s 56.1 Statement ¶ 16.) Thus the plaintiff was interviewed by Victor Zammit, ("Zammit"), an Ernst & Young principal, on April 5, 1995. (Def.'s 56.1 Statement ¶ 18; Pl.'s 56.1 Statement ¶ 20.) The parties disagree about whether the plaintiff told Zammit during the interview that her daughter was suffering from any medical problems. (Def.'s 56.1 Statement ¶ 19; Pl.'s 56.1 Statement ¶ 22.) In any event, Zammit allegedly never discussed his interview of the plaintiff with Tatarowicz. (Def.'s 56.1 Statement ¶ 20; Pl.'s 56.1 Statement ¶ 21.)

Tatarowicz ultimately decided not to offer the plaintiff a job at Ernst & Young. (Def.'s 56.1 Statement ¶ 14; Pl.'s 56.1 Statement ¶ 19.)

On May 31, 1995, TAI entered into an asset purchase agreement with Ernst & Young and ceased transacting business. (Pl.'s 56.1 Statement ¶ 25; Asset Purchase Agreement dated May 31, 1995, attached as Ex. A to Beach Aff.) On June 21, 1995, TAI filed Articles of Dissolution by Voluntary Action with the Secretary of State in Missouri. (Pl.'s 56.1 Statement ¶ 27; Articles of Dissolution by Voluntary Action dated June 21, 1995, attached as Ex. B to Menken Aff.) The plaintiff's position at TAI was eliminated effective June 15, 1995. (Letter from Brian Howes to Karen Abdel-Khalek dated May 31, 1995, attached as Ex. J. to Menken Aff.)

III.

The defendant first moves for summary judgment on the plaintiff's claim that the defendant discriminated against her because of her association with a disabled person in violation of the ADA. The defendant argues that the plaintiff cannot demonstrate that anyone at Ernst & Young had notice of the plaintiff's daughter's disability before the decision was made not to hire her. The plaintiff responds that the plaintiff has made out a prima facie case of disability discrimination and that there is an issue of fact concerning if and when Tatarowicz and others at Ernst & Young knew about the plaintiff's daughter's disability.

The ADA provides that "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job

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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). The term “discriminate” includes “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.”42 U.S.C. § 12112(b)(4).

*4 Courts in this district have applied the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), a Title VII case, to cases brought for disability discrimination under the ADA. See, e.g., *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 52 (2d Cir.1998) (applying McDonnell Douglas analysis to ADA case); *Wallengren v. French*, 97 Civ. 0528, 1999 WL 65048, at *3 (S.D.N.Y. Feb. 11, 1999) (same). Both parties agree that the McDonnell Douglas analysis is also appropriate in this case, which presents the theory of “association discrimination,” or discrimination based on a person’s known association with another person who has a disability.

In a disability association discrimination case, the parties agree that the plaintiff bears the initial burden of establishing a prima facie case of association discrimination by demonstrating that:

- (1) the plaintiff was ‘qualified’ for the job at the time of the adverse employment action;
- (2) the plaintiff was subjected to adverse employment action;
- (3) the plaintiff was known by [her] employer at the time to have a relative or as-

sociate with a disability;

(4) the adverse employment occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer’s decision.

Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1085 (10th Cir.1997); see also *Hilburn v. Murata Elec. North Am., Inc.*, 17 F.Supp.2d 1377, 1383 (N.D.Ga.1998) (same); *Bates v. Powerlab, Inc.*, 97-CV-2551, 1998 WL 292370, at *4 (N.D.Tex. May 18, 1998) (same); *Barker v. International Paper Co.*, 993 F.Supp. 10, 14 (D.Me.1998) (same). After the plaintiff establishes a prima facie case of discrimination, “the burden of production then shifts to the defendant who must proffer a legitimate, non-discriminatory reason for its actions in order to rebut the presumption of unlawful discrimination.” *Greenway*, 143 F.3d at 52; *Den Hartog*, 129 F.3d at 1085. Once such a reason is proffered, “the McDonnell Douglas analysis is complete” and simply drops out of the picture. The ultimate burden of persuading the factfinder that the employer’s stated reason for the adverse employment action is pretextual remains with the plaintiff. See *Greenway*, 143 F.3d at 52; *Den Hartog*, 129 F.3d at 1085.

The defendant here contends that the plaintiff has not established a prima facie case of association discrimination. In particular, the defendant argues that the plaintiff cannot establish the third and fourth prongs of her prima facie case, namely that the plaintiff’s employer knew at the time of the adverse employment action that the plaintiff had a relative or associate with a disability, and that the adverse employment action occurred under circumstances raising a reasonable inference that

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the disability of the relative or associate was a determining factor in the employer's adverse employment decision.

*5 As to the third prong of the plaintiff's prima facie case, the defendant argues that the undisputed evidence indicates that no one at Ernst & Young knew at the time they decided not to hire the plaintiff that the plaintiff's daughter had medical problems. It is plain, however, that there is a disputed genuine issue of fact on this issue. Howes testified at his deposition that he knew that the plaintiff's daughter had medical problems around the time the baby was born in October 1994. (Sept. 2, 1998 Dep. of Brian Howes at 38, attached as Ex. D to Beach Aff. (hereinafter "Howes Dep.")). Further, the plaintiff has submitted evidence indicating that "it was general knowledge around the office that [the plaintiff] had given birth to a daughter with serious physical disabilities." (Oct. 27, 1998 Aff. of Ken Voss ¶ 6 (hereinafter "Voss Aff.")). Moreover, the plaintiff has submitted evidence indicating that Howes expressed concern in October 1994 about the cost of the plaintiff's baby to TAI's health insurance plan, and that Howes and other managers at TAI expressed the opinion in late 1994 and early 1995 that the plaintiff would not be able to do her job when she returned to work because she would be preoccupied with her daughter. (Aff. of Teresa Kidd dated Oct. 21, 1998 ¶ 3-6 (hereinafter "Kidd Aff."); Voss Aff. ¶ 7.) All of these events occurred before or at approximately the same time as Howes' meeting with Tatarowicz on December 21-22, 1994 at which Howes and Tatarowicz discussed the plaintiff and other employees at TAI.

As to whether Howes conveyed the information he knew about the plaintiff's daughter's medical problems to anyone at Ernst

& Young, Howes testified at his deposition that he only recalls telling Tatarowicz at the December 21-22, 1994 meetings that the plaintiff was out on pregnancy leave. (Howes Dep. at 106.) Tatarowicz similarly testified that he only recalls being told at the December 1994 meeting that the plaintiff was out on pregnancy leave. (Sept. 23, 1998 Dep. of Philip Tatarowicz at 64-68, attached as Ex. C to Beach Aff. (hereinafter "Tatarowicz Dep.")).

However, Tatarowicz's contemporaneous notes from the December 21-22 meeting indicate next to the plaintiff's name "Leave of Absence; Pregnancy Leave," not simply "pregnancy leave." (Tatarowicz Notes, attached as Ex. I to Menken Aff.) Further, neither Howes nor Tatarowicz testified that they did not discuss the plaintiff's daughter's medical problems at the December 21-22 meetings, only that they did not recall having such a conversation. In fact, Tatarowicz also testified that he has no independent recollection of the specifics of what Howes told him at the December 1994 meetings other than his contemporaneous notes. (Tatarowicz Dep. at 64-68.) Given the evidence that Howes expressed concern over the plaintiff's daughter's medical condition and its impact on TAI before he met with Tatarowicz in December 1994, and given the contemporaneous notes which reflect a discussion of a leave of absence and not simply a pregnancy leave, there is an issue of credibility concerning whether Howes mentioned the specifics of the plaintiff's pregnancy leave to Tatarowicz. Thus the motion for summary judgment based on this prong is denied. *Cf. Barker*, 993 F.Supp. at 14-15 (denying summary judgment because there was a credibility determination to be made with respect to the testimony of one of the defendant's employees to the effect that he

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was not aware of the plaintiff's wife's disability, but granting summary judgment on another ground).

*6 As to the fourth prong of the plaintiff's prima facie case, the defendant contends that the plaintiff has not put forward any evidence that could support a reasonable inference that the plaintiff was not hired under circumstances giving rise to a reasonable inference of discrimination. However, the plaintiff points to evidence indicating that although she was not hired by Ernst & Young after it took over TAI, the employee who had been hired to replace her during her leave of absence from TAI was hired by Ernst & Young. Moreover, there is evidence indicating that that replacement employee, Dineen Constantino, was hired by Ernst & Young to perform essentially the same functions that she had been performing at TAI. (Howes Dep. at 161-63; July 16, 1998 Dep. of Mary Ann Corwin at 48-50, attached as Ex. E to Beach Aff. (hereinafter "Corwin Dep.")). The plaintiff further points to evidence that Ernst & Young eventually hired a permanent employee, Joann Castro, to take over Constantino's job. (Corwin Dep. at 55-56.) Significantly, the plaintiff also points to evidence indicating that of the eight technical services representatives employed by TAI at the time that Ernst & Young took over TAI, six were immediately hired by Ernst & Young and a seventh was hired by Ernst & Young soon thereafter. (Corwin Dep. at 93-97.) The plaintiff was thus allegedly the only technical services representative not to secure employment at Ernst & Young. The defendant does not contest this evidence.

Drawing all reasonable inferences in favor of the plaintiff, the above evidence demonstrates issues of fact concerning whether

Ernst & Young decided not to hire the plaintiff under circumstances giving rise to a reasonable inference of discrimination. The evidence that the defendant decided not to hire the plaintiff although it eventually hired every other employee with the same job as the plaintiff, and that Howes indicated his belief that the plaintiff would not be able to perform her job because of her daughter's medical problems before he met with Tatarowicz, his future partner at Ernst & Young, is evidence from which a reasonable factfinder could draw the inference that the plaintiff was not hired by Ernst & Young because of her daughter's disability. Thus the motion for summary judgment on the plaintiff's ADA claim is denied.

The defendant expressly states in its initial moving papers that it is not moving for summary judgment based on the plaintiff's alleged inability to establish that the defendant's articulated reasons for not hiring the plaintiff were pretextual. However, in the defendant's reply papers, it contends that summary judgment is appropriate for precisely this reason. The defendant improperly raises this argument for the first time in its reply papers and thus it need not be considered by this Court. *See, e.g., Playboy Enterprises, Inc. v. Dumas*, 960 F.Supp. 710, 720 n. 7 (S.D.N.Y.1997) (stating that "[a]rguments made for the first time in a reply brief need not be considered by a court" and collecting cases), *aff'd*, 159 F.3d 1347 (2d Cir.1998). Even if the Court were to consider this argument, the evidence discussed above concerning the circumstances under which the plaintiff was not hired by the defendant are more than sufficient to demonstrate that there are genuine issues of material fact concerning whether the defendant's articulated reason for not hiring the plaintiff-essentially that

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the plaintiff's job was being eliminated and consolidated into other employees' jobs at Ernst & Young was a pretext. Thus this ground for summary judgment lacks merit and even if it had been properly raised it would not be a basis for granting summary judgment.

IV.

*7 The defendant argues next that it cannot be held liable for any alleged discrimination by TAI against the plaintiff because it is not a successor in liability to TAI. The plaintiff responds that there are at least questions of fact about whether Ernst & Young is a successor in liability to TAI and can be held liable for TAI's discriminatory acts.

Courts in other districts have analyzed successor liability in cases arising under the ADA in the same way in which they have analyzed successor liability in cases arising under Title VII. *See, e.g., Coleman v. Keebler Co.*, 997 F.Supp. 1094, 1099 n. 6 (N.D.Ind.1998) (noting that "[t]he powers and remedies of the ADA are the same as those available under Title VII," that successor liability has been approved under Title VII, and thus concluding that "the successor employer doctrine is applicable to ADA cases"); *McKee v. American Transfer and Storage*, 946 F.Supp. 485, 487-88 (N.D.Tex.1996) (noting that the ADA and Title VII have the same administrative procedures and remedies and thus finding that the factors to be considered in the context of Title VII successor liability also apply in the context of the ADA). This Court also finds it appropriate to use the same analysis of successor liability in this ADA case as would be used in a Title VII case. *Cf. Greenway*, 143 F.3d at 52-53 (approving the same burden shifting ana-

lysis in an ADA case as that used in Title VII cases).

To determine whether successor liability is appropriate, the Court should look to a variety of factors, including:

- 1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.

Fennell v. TLB Plastics Corp., 84 Civ. 8775, 1989 WL 88717, at *2 (S.D.N.Y. July 28, 1989) (quoting *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir.1974)); *see also Lobos v. Aeromexico*, 77 Civ.2007, 1978 WL 180, at *6 (S.D.N.Y. July 5, 1978).

Under these nine factors, there are plainly issues of fact about whether Ernst & Young can be held liable as a successor to TAI. First, there is an issue of fact about whether the defendant had notice of the plaintiff's charge of discrimination. The plaintiff argues that the defendant had notice of the charge because the plaintiff notified Howes between June 1 and June 15, 1995 that she believed that she was not being hired by Ernst & Young because of her daughter's medical condition. (Howes Dep. at 82-83.) Howes, who had been the Chief Operating Officer of TAI, was a partner at Ernst & Young at that time. (Howes Dep. at 123-24.) Drawing the inferences most

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favorable to the plaintiff, as is required on a motion for summary judgment, these facts indicate that there is at least an issue of fact about whether Ernst & Young had notice of the plaintiff's charge of discrimination. Cf. *Equal Employment Opportunity Comm'n v. MTC Gear Corp.*, 595 F.Supp. 712, 717 (N.D.Ill.1984) (finding, in a Title VII case, that an issue of material fact concerning the issue of successor liability existed where the president of the alleged successor corporation had also been the president of the predecessor corporation when the plaintiff's charges of discrimination were filed).

*8 As to the second factor, it is not apparent from the papers before the Court whether TAI or Seafield is available to provide relief to the plaintiff. The defendant argues that Seafield has received more than \$3.5 million under the terms of the asset purchase agreement and thus is available to provide relief. However, in support of that contention, the defendant only points to an exhibit that purports to be a Summary of Quarterly Statements with no attribution to any source. (Summary of Quarterly Statements, attached as Ex. I to Beach Aff.) Moreover, the plaintiff argues that even if Seafield continues to receive money under the asset purchase agreement, that does not by itself demonstrate that Seafield is able to provide relief to the plaintiff. The plaintiff also points to the fact that TAI stopped existing as of June 21, 1995 and thus may not be available to provide any relief to the plaintiff. Under these circumstances, there is an issue of fact about whether Ernst & Young's predecessor is available to provide relief to the plaintiff.

Finally, factors three through nine point to issues of fact concerning whether there has

been substantial continuity of business operations between TAI and Ernst & Young. The plaintiff points out that Ernst & Young hired 32 of TAI's 55 employees when it took over TAI. (Howes Dep. at 140-41.) Many of the employees continued to perform the same or similar functions at Ernst & Young's and continued to work at TAI's former offices for a period of months. (Howes Dep. at 175-76, 178; Corwin Dep. at 59-60, 69-70.) Further, Tatarowicz acknowledged at his deposition that after acquiring TAI, Ernst & Young's property tax group was a separate business unit, although he could not recall whether it had been a separate business unit before the acquisition of TAI. (Tatarowicz Dep. at 20-21.) Howes, who previously was Chief Operating Officer of TAI, now runs the property tax group at Ernst & Young. (Howes Dep. at 14; Tatarowicz Dep. at 128.) Under these circumstances, drawing all inferences in favor of the plaintiff, a reasonable fact finder could determine that Ernst & Young is a successor to TAI. Thus the defendant's motion for summary judgment on this issue is denied.^{FN1}

^{FN1.} The defendant in its reply papers argues for the first time that Ernst & Young is not liable for any of the plaintiff's claims against TAI because there is no merit to the plaintiff's ADA claims against TAI. The defendant argues in particular that the plaintiff's position at TAI was terminated at the same time as every other position at TAI and thus there is no evidence of discrimination. Again, the Court need not consider this argument because it is made for the first time in the defendant's reply papers. However, even if the Court were to consider it, the Court would deny the motion

for summary judgment on that basis. Given the circumstances discussed above that led to the end of the plaintiff's employment at TAI, the plaintiff has put forward a prima facie case of discrimination. It is true that the defendant has articulated a nondiscriminatory reason for terminating the plaintiff's employment at TAI—namely that TAI was taken over by Ernst & Young and that all positions at TAI were therefore eliminated. Further, the defendant points out that the plaintiff actually continued to work at TAI for two weeks after the transaction between TAI and Ernst & Young was completed. However, the plaintiff has pointed to evidence demonstrating questions of fact about TAI's reasons for terminating her employment. In addition, it is not clear from the papers before the Court whether the plaintiff can demonstrate at trial that her employment with TAI would have been extended had she not had a daughter with a disability. Thus even if the Court were to consider this argument improperly made for the first time in the defendant's reply papers, the defendant's motion for summary judgment on this ground would be denied.

V.

The defendant next moves for summary judgment on the plaintiff's second and third claims. The defendant argues first that the New York State Human Rights Law, Executive Law § 290 et seq. does not permit claims of disability association discrimination but instead only provides relief for individuals who are themselves disabled. The

plaintiff concedes that there are no cases holding that this statute provides relief to individuals who are not themselves disabled, but she argues that the legislative history of the statute permits the Court to imply a cause of action for disability association discrimination under this statute.

A court interpreting a statute should look first to the plain language of the statute. *See Greenery Rehabilitation Group v. Hammon*, 150 F.3d 226, 231 (2d Cir.1998) (“In interpreting a statute, we must first look to the language of the statute itself.”); *United States v. Kelly*, 147 F.3d 172, 175 (2d Cir.1998) (“The appropriate starting point for the interpretation of any statute is its language.”); *Encore College Bookstores, Inc. v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410, 417-18 (1995) (“Where, as here, the literal language of a statute is precise and unambiguous, that language is determinative.”). “[U]nless otherwise defined, individual statutory words are assumed to carry their ordinary, contemporary, common meaning.” *Greenery Rehabilitation Group*, 150 F.3d at 231 (citation omitted); *see also ILC Data Device Corp. v. County of Suffolk*, 182 A.D.2d 293, 298-99, 588 N.Y.S.2d 845, 848 (2d Dep't 1992) (“It is a basic principle of statutory interpretation that statutory language is generally to be construed in accordance with its plain and obvious sense, and the meaning attached to it should be neither strained nor artificial.”). Only if the statute is ambiguous should the court turn to other methods of statutory interpretation such as legislative history. *See Olga Coal Co. v. Connors*, 159 F.3d 62, 67 (2d Cir.1998) (“[W]here, as here, the meaning of a statutory provision is otherwise unambiguous, resort to legislative history is inappropriate.”); *Greenery Rehabilitation Group*, 150 F.3d at 231 (when language of a statute is ambiguous,

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the Court may then look to legislative history in order to interpret the statute).

*9 In this case, the plain language of the New York State Human Rights Law clearly indicates that it only prohibits discrimination against individuals who are themselves disabled. See, e.g., N.Y. Exec. Law § 296(1)(a) (McKinney 1998) (noting that “[i]t shall be unlawful discriminatory practice: (a) For an employer or licensing agency, because of the ... disability ... of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual”). The language of the statute is not ambiguous with respect to the issue of disability association discrimination. Rather, unlike the ADA, this statute says nothing about disability association discrimination and gives no indication that it was intended to provide a cause of action for disability association discrimination. While it is true that the New York State statute is generally interpreted consistently with its federal counterpart, this cannot be done in the face of plainly differing statutory language. See, e.g., *Reeves v. Johnson Controls World Servs.*, 140 F.3d 144, 155 (2d Cir.1998) (finding that “[r]egardless of the legislative history of the NYHRL ... indicating that the statutory definition of disability was intended to be coextensive with that of the federal disability statutes” the Court was bound by the New York Court of Appeals' construction of the NYHRL that relied on a literal reading of the statute and that resulted in a different definition of disability under the NYHRL than under the ADA). Unlike the ADA, the statute does not contain a definition of discrimination that explicitly encompasses disability association discrimination. Because the New York State Human Rights Law, Executive Law § 290 et seq. does not provide for a claim of disability

association discrimination, the defendant's motion for summary judgment dismissing this claim is granted.

As to the plaintiff's claim under the Administrative Code of the City of New York, however, there is a textual basis under the statute for a claim of disability association discrimination. The Administrative Code provides that “[i]t shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived ... disability ... of any person, to refuse to hire or employ or to bar or to discharge from employment such person” See N.Y.C. Admin. Code § 8-107(1)(a). The Administrative Code further provides that “[t]he provisions of this section set forth as unlawful discriminatory practices shall be construed to prohibit such discrimination against a person because of the actual or perceived ... disability ... of a person with whom such person has a known relationship or association.” N.Y.C. Admin. Code § 8-107(20). Under the plain language of this provision, there is a claim for disability association discrimination under the New York City Administrative Code.

The defendant contends that despite this provision, the plaintiff's claim must be dismissed for failure to comply with Administrative Code § 8-502(c). Section 8-502(c) provides that “[p]rior to commencing a civil action [alleging unlawful discriminatory practices] ... the plaintiff shall serve a copy of the complaint upon the city commission on human rights and the corporation counsel.” The defendant claims that the plaintiff's admitted failure to serve a copy of her amended complaint on those agencies requires that her claim under the New York City Administrative Code be dismissed.

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*10 However, the defendant forthrightly points out that the courts in this district, following the New York state courts, often have not viewed compliance with the requirements of § 8-502(c) as a condition precedent to suit. *See, e.g., Cully v. Milliman & Robertson, Inc.*, 20 F.Supp.2d 636, 644 (S.D.N.Y.1998) (finding that “[t]he clear weight of authority in New York courts is that the § 8-502(c) requirement of notice to the City is not a condition precedent to a valid suit”); *Westphal v. Catch Ball Products Corp.*, 953 F.Supp. 475, 481 (S.D.N.Y.1997); *McNulty v. New York City Dep’t of Finance*, 941 F.Supp. 452, 461 (S.D.N.Y.1996); *see also Bernstein v. 1995 Assocs.*, 217 A.D.2d 512, 515, 630 N.Y.S.2d 68, 72 (1st Dep’t 1995). This Court agrees with the reasoning of those courts that have so interpreted § 8-502(c). Moreover, there is no reason why the plaintiff cannot serve a copy of her amended complaint on the City’s Commission on Human Rights and the Corporation Counsel immediately in order to comply with § 8-502(c). Thus the defendant’s motion to dismiss the plaintiff’s disability association discrimination claim under the Administrative Code of the City of New York is denied.

VI.

Finally, the defendant moves for summary judgment on the plaintiff’s ERISA claim. The defendant argued initially that the plaintiff has no standing to assert a claim for any alleged interference with the plaintiff’s interest in Ernst & Young’s benefit plan because the plaintiff never had such an interest. The plaintiff responded that her ERISA claim only alleges unlawful interference with the plaintiff’s rights under TAI’s benefit plan, not under Ernst & Young’s plan. The defendant replied that

the plaintiff cannot demonstrate that TAI violated the plaintiff’s rights under its employee benefit plan and thus the claim against Ernst & Young, as the alleged successor to TAI, must be dismissed.

ERISA provides that it is “unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan” 29 U.S.C. § 1140. A “participant” is defined as “any employee or former employee of an employer ... who is or may become eligible to receive a benefit of any type from an employee benefit program” 29 U.S.C. § 1002(7). This provision prohibits employers from discharging employees to avoid paying medical benefits. *See, e.g., Bailey v. Policy Management Systems Corp.*, 814 F.Supp. 37, 39 (N.D.Ill.1992) (finding that allegation that the plaintiff was fired because she submitted approximately \$40,000 in claims to the employee health plan was sufficient to state a claim under 29 U.S.C. § 1140); *Posey v. Anheuser-Busch, Inc.*, Civ. A. No. 94-1470, Civ. A. 94-3079, 1995 WL 591327, at *5 (E.D.La.1995) (noting that evidence that defendant discharged the plaintiff with the specific intent to avoid paying future medical expenses would allow the plaintiff to prevail on a claim under 29 U.S.C. § 1140).

*11 In cases brought under 29 U.S.C. § 1140, courts have adopted the McDonnell Douglas burden shifting analysis discussed above. *See, e.g., Tavoloni v. Mount Sinai Medical Ctr.*, 26 F.Supp.2d 678, 680 (S.D.N.Y.1998) (“In evaluating motions for summary judgment on Section 510 [29 U.S.C. § 1140] claims, the Court applies the familiar McDonnell-Douglas burden

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shifting analysis.”); *Strohmeyer v. International Bhd. of Partners and Allied Trades*, 989 F.Supp. 455, 461 (W.D.N.Y.1997) (applying McDonnell Douglas analysis to claim brought under 29 U.S.C. § 1140), *aff'd*, 164 F.3d 619 (2d Cir.1998). To make out a prima facie case under § 1140, the plaintiff must demonstrate that she is a member of a protected group, was qualified for the benefit claimed, and was discharged in circumstances giving rise to an inference of discrimination. See *Tavoloni*, 26 F.Supp.2d at 680.

The plaintiff was clearly an employee protected under § 1140 and the defendant does not dispute that the plaintiff was eligible for medical benefits under TAI's employee benefit plan. Moreover, the plaintiff has raised genuine issues of material fact about whether she was fired from TAI under circumstances giving rise to an inference of discrimination. For example, she has submitted evidence indicating that Howes was aware of and concerned about how much money the plaintiff's daughter's medical problems would cost TAI. The defendant contends that all of TAI's employees were fired and lost their group benefits at the same time as the plaintiff because TAI was sold to Ernst & Young, and argues that therefore there can be no inference of discrimination. However, the plaintiff has pointed to evidence raising an inference of discrimination. If she can demonstrate at trial that she lost her benefits sooner than she would have otherwise because the defendant was trying to avoid paying medical benefits for the plaintiff's daughter, then she may prevail at trial. It is not possible to determine at this point whether the plaintiff may be able to prove such a claim and, if so, what the damages from such a claim would be. Thus the defendant's motion for summary judgment dismissing the

plaintiff's ERISA claim is denied.

Conclusion

For the reasons explained above, the defendant's motion for summary judgment dismissing the plaintiff's ADA claim is denied. The defendant's motion for summary judgment dismissing any claim of successor liability is denied. The defendant's motion for summary judgment dismissing the plaintiff's second cause of action under the New York State Human Rights Law is granted. The defendant's motion for summary judgment dismissing the plaintiff's third cause of action under the New York City Administrative Code is denied. The defendant's motion for summary judgment dismissing the plaintiff's ERISA claim is denied.

SO ORDERED.

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