SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **SHIRLEY WERNER KORNREICH** J.S.C. PART 34

Index Number : 121601/2002
LOFTMAN, PATRICIA O.
vs
COLUMBIA UNIVERSITY
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 6/29/06
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
AUG 02 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/26/06

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

PATRICIA O. LOFTMAN,

Plaintiff,

Index No.: 121601/02

- against -

DECISION and ORDER

COLUMBIA UNIVERSITY,

Defendant.

----------X

KORNREICH, SHIRLEY WERNER, J.:

Plaintiff brought this action pursuant to New York City Human Rights Law, Administrative Code §8-101 *et seq.* and New York State Human Rights Law, Executive Law §209 *et seq.*, alleging racial discrimination by defendant, her employer. Defendant now moves for summary judgment. Plaintiff opposes the motion.

Background

Plaintiff avers that she is a Certified Nurse-Midwife and has worked at defendant's Department of Obstetrics and Gynecology (the "Department") since April 19, 1982. From 1984 to June 30, 1999, she served as Director of Midwifery Services. That position was eliminated in 1999, at which point plaintiff continued as a Staff Midwife. Dr. Stephen Matseoane ("Dr. Matseoane"), the Director of the Department, alleges that he eliminated plaintiff's position as part of a reorganization of the department. Dr. Matseoane and Ellen Giesow ("Giesow"), Associate Dean for Administration for the Columbia University Affiliation at Harlem Hospital Center, both aver that plaintiff did not suffer any decreased pay as a result of her position being eliminated. Further, plaintiff acknowledges that the only difference between her Director of Midwifery position and a Staff Midwife position was that, as Director, she had to devote roughly 25 percent of her time to administrative tasks.

Giesow avers that defendant provides administrative services and medical, nursing, and ancillary staff to the Columbia University Affiliation (the "Affiliation") pursuant to an Affiliation Agreement with the New York City Health and Hospitals Corporation ("NYCHHC"). Under the Affiliation Agreement, NYCHHC provides a maximum payment to defendant each year to cover non-physician compensation. NYCHHC does not compensate defendant for any intervening salary increases that are not required by a collective bargaining agreement. As a result, the Affiliation's Physician Assistants ("PAs") secured a collective bargaining representative in December 2004. The collective bargaining agreement only covered PAs, not Midwives. Due to increasingly stringent budgets imposed by NYCHHC, defendant froze the salaries of non-union staff at the Affiliation in 1994. This freeze covered the Midwives in the Department.

Plaintiff alleges that she was subjected to discriminatory practices by Dr. Barbara Lanzara ("Dr. Lanzara"), the Associate Director of the Department. Plaintiff avers that Dr. Lanzara "had a very clear preference for working with Caucasian mid-levels" (the term "mid-levels" encompasses Midwives and Physician Assistants). Plaintiff further alleges that Dr. Lanzara rearranged mid-level schedule assignments so as to schedule all African-American care providers together on Wednesdays and all Caucasian care providers together on Thursdays. Dr. Lanzara testified in her EBT that this arrangement was the result of scheduling preferences and conveniences, not racial preferences. Additionally, Plaintiff claims that defendant gave undue preferential treatment to Caucasian mid-levels by accommodating their requests for schedule changes so that they could pursue educational opportunities. However, plaintiff also admits in her EBT that none of the African-American midwives had been denied a schedule change when

requesting for educational reasons because "no one asked for schedule changing for educational reasons."

Plaintiff also avers that she was subjected to disparate pay because of racial discrimination. She alleges that between 1999 and 2001, the Department hired three Caucasian mid-level employees, Janet Taylor, Janet Marshall, and Holly Weiner, at higher salaries than that received by plaintiff, although all three were less experienced. Plaintiff additionally claims that Shannon Holloway, a Caucasian PA with the Department, was promoted to Chief Physician Assistant with a pay increase despite being less qualified than the other PAs, all of whom were African-American. Plaintiff further avers that this disparity was the result of Dr. Lanzara's racial preferences, which ultimately influenced the hiring decisions made by Dr. Matseoane despite Dr. Lanzara's lack of direct participation in the salary negotiation process.

Defendant responds that the salaries for the new employees were driven not by racial animus, but by personnel demands, employment negotiations, differing qualifications, and the fact that the new employees were not subject to the salary freeze. Also, defendant claims that Holly Weiner's greater salary was the result of a new job description that required her to work night and weekend shifts. On October 31, 2000, plaintiff filed a complaint against defendant with the New York City Commission on Human Rights ("NYCCHR") alleging that she received disparate pay because of her race. She further filed two amended complaints, one on January 31, 2001 and another on February 12, 2002. On July 30, 2002, the NYCCHR dismissed the complaints on the basis of administrative convenience so that plaintiff could pursue this action.

Plaintiff additionally alleges that defendant retaliated against her because she filed a complaint. First, plaintiff alleges that Dr. Matseoane re-instated the Director of Midwifery position in 2001, appointing another midwife in the Department to the post while plaintiff was

out on vacation. In support of this allegation, plaintiff submits a copy of the minutes from the departmental staff meeting at which the position was supposedly announced. The minutes indicate that Ms. Allen-John, one of the midwives, was appointed "Head of Midwifery Service." Plaintiff alleges that the appointee, though a skilled midwife, was less qualified than plaintiff because she lacked administrative experience. She further claims that defendant "went to great lengths" to avoid appointing plaintiff to the position when defendant's original appointee declined the post. Dr. Matseoane, in both his affidavit and his EBT, denies that he ever re-instated the position. He testifies that in order to re-instate the position, he would have been required to seek permission from the Affiliation. Dr. Matseoane also denies ever referring to Ms. Allen-John as the "Head Midwife." He claims he only intended to have her act as an informal liaison between the midwives and the department's administration.

Plaintiff also claims that defendant retaliated against her by falsely accusing her of low productivity and refusing to see a patient. Plaintiff testifies that in December 2001, she received a memo indicating that her October 2001 productivity level had been low. However, plaintiff alleges that this memo inaccurately deflated her productivity and failed to account for the type of work she was doing. She also claims that the productivity level indicated in the memo still met a previously set productivity standard for mid-levels. Plaintiff further avers that in March 2002, she received a disciplinary notice accusing her of refusing to treat a patient. Plaintiff testifies that in actuality, she had simply informed the physician involved that treating the patient was outside the scope of her duties since the patient was deemed high-risk. Dr. Masteoane, who issued the disciplinary notice, avers in his affidavit that he issued the notice because plaintiff was insubordinate in refusing to reveal the reason she deemed the patient high-risk to the attending

physician. He also alleges that plaintiff told the attending physician that her reasons would be revealed when she "wrote up" the physician.

Lastly, plaintiff alleges retaliation in the form of disparate application of the Department's vacation request policy. Since 1982, the Department granted vacation requests on a first come, first served basis. According to Dr. Lanzara, who scheduled vacation requests, plaintiff always submitted her requests several months in advance and usually secured her desired vacation times. This caused some discord amongst the other providers, many of whom were not able to set their vacation plans early and thus never received their requested leave because they always filed requests after plaintiff had filed hers. Dr. Lanzara avers that in November 2001, plaintiff submitted a request for vacation during Christmas of 2002. Dr. Lanzara further alleges that she returned the request to plaintiff, explaining that November 2001 was simply too far in advance to request vacation for December 2002. Further, Dr. Matseoane circulated a memorandum in December 2001 establishing that the Department would no longer accept Christmas vacation requests before July 1 of the same year. Plaintiff alleges that, notwithstanding the new policy, Dr. Lanzara granted vacation time for Christmas 2002 on a request submitted before July 1, 2002 by another of the Department's employees. However, Dr. Lanzara denies this allegation. Further, Dr. Lanzara avers that, despite the policy change, plaintiff received her requested Christmas leave each year.

Conclusions of Law

In order to prevail on a motion for summary judgment, the moving party must establish a prima facie showing that he or she is entitled to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once such a showing is made, the non-moving party has the burden of providing admissible evidentiary proof establishing the

existence of a material factual issue requiring a trial. *Id.*, at 560. The evidence submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the non-moving party. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept. 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 N.Y.2d at 562.

A plaintiff alleging racial employment discrimination on a disparate pay theory under the New York State[1] and New York City Human Rights Laws[2] has the initial burden to establish a prima facie case by demonstrating (1) that she is a member of a protected class; (2) that she was paid less than similarly situated non-members of that protected class; and (3) evidence of discriminatory animus. *Shah v. Wilco Systems, Inc.*, 27 A.D.3d 169, 176 (1st Dept. 2005). The burden then shifts to the employer, who must demonstrate, through admissible evidence, "legitimate, independent, and nondiscriminatory reasons" for the employment decisions. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 390 (2004). In order to prevail once such a showing is made, the plaintiff must demonstrate that the stated reasons were false and that the real reason was discrimination. *Id.*, at 391.

Here, the parties do not contest that plaintiff is African-American, a protected class. Further, plaintiff has demonstrated that she was paid a lower salary than a number of Caucasian mid-level providers hired by defendant. In addition, plaintiff has offered evidence, in the form of resumes and testimony by the plaintiff, that these individuals are similarly situated in relation to her. Since defendant has also submitted EBT testimony suggesting that these individuals are

[1] New York has adopted the burden-shifting analysis from *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1997), in analyzing cases under the New York State Human Rights Law, which has the same standards for recovery as Title VII of the Civil Rights Act of 1964.

[2] New York City recently amended its Human Rights Law, rejecting the previous practice of interpreting the NYCHRL as a mirror image of state and federal anti-discrimination practices. As the NYCHRL espouses a broader and more liberal standard for discrimination claims than the NYHRL, the court needs not determine the specifics of analysis under the NYCHRL on this motion, as the plaintiff's case survives summary judgment even under the more restrictive standards of the NYHRL.

not similarly situated, triable issues of fact exist, warranting a trial as to the second element of the disparate pay claim.

Additionally, plaintiff has raised factual issues regarding possible discriminatory animus motivating the disparate salaries. Although only Dr. Matseoane has the authority to make final salary determinations, plaintiff has produced evidence suggesting that Dr. Lanzara's suggestions and preferences carry substantial weight with Dr. Matseoane, as indicated by Dr. Matseoane's EBT testimony that he considered Dr. Lanzara's recommendations during the hiring process after the Director of Midwifery position was eliminated. Further, plaintiff has provided evidence from which a fact-finder could reasonably conclude that Dr. Lanzara preferred Caucasian mid-level providers over African-American providers, particularly when she scheduled all African-American providers to work Wednesdays and all Caucasian providers (including herself) to work Thursdays. In situations where the ostensible decision-maker (here, Dr. Matseoane) is influenced by an additional party, bias on the part of the additional party may sometimes be imputed to the decision-making party. *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001) (age-related comments made by supervisor with no decision-making authority could still be evidence of discriminatory animus); *Weber v. Parfums Givenchy, Inc.*, 49 F. Supp. 2d 343, 361 (S.D.N.Y. 1999) (discriminatory statements made by individual with "substantial input in the decision-making process" could lead to inference of discriminatory animus). Here, a reasonable finder of fact could conclude from the evidence that Dr. Lanzara had a bias toward Caucasians and that this bias, through her influence with Dr. Masteoane, found expression in the disparate salary paid to plaintiff.

Furthermore, plaintiff has demonstrated the necessity of a trial in regard to defendant's proffered non-discriminatory rationale for the disparate salaries. Plaintiff's evidence indicates

that, despite the freeze on mid-level salaries, defendant did have some discretion to increase salaries by upgrading sufficiently qualified employees to a higher job title or by offering employees additional responsibilities. Such was the case with Shannon Holloway, a Caucasian physician assistant who was upgraded to Senior PA and received a pay raise of $6000. Although the PAs unionized in 2004, resulting in their no longer being subject to the salary freeze, Holloway's job title upgrade occurred prior to the unionization, when she was still subject to the salary freeze. One could reasonably conclude from this evidence that defendant retained the ability to increase the salaries of its mid-level providers despite the salary freeze, and that defendant's claim that it was unable to increase salaries was merely a pretext to cover up the previously discussed racial bias.

To recover on a retaliation claim, plaintiff must show: (1) participation in a protected activity known to defendant; (2) an action materially adverse to a reasonable employee[3]; and (3) a causal connection between the protected activity and the adverse action. *Forrest*, 3 N.Y.3d at 327; *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. _____, 126 S.Ct. 2405, 2409 (2006). A materially adverse action means that "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker form making or supporting a charge of discrimination." *Burlington Northern*, 126 S.Ct. at 2409. Causation can be proven "(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or ... (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant." *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000).

[3] The New York Court of Appeals in *Forrest* required an adverse employment action, but in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. _____ (2006), the U.S. Supreme Court held that the anti-retaliation provision of Title VII (which has language identical to the NYHRL) only requires a materially adverse action. Although the NYCHRL rejects any materiality requirement in retaliation cases, this does not affect the court's opinion as other issues are dispositive.

Here, it is undisputed that plaintiff's filing of complaints with the New York City Commission on Human Rights (NYCCHR) is a protected activity, and the evidence clearly shows that Dr. Matseoane was aware of the complaints.

Defendant is not entitled to summary judgment on plaintiff's second cause of action. Plaintiff has shown causation indirectly, as the alleged failure to promote her occurred in proximity to her initial complaint to the NYCCHR on October 31, 2000. The alleged promotion of Stacy Allen-John to the Directory of Midwifery position took place on January 3, 2001, approximately two months after plaintiff's initial complaint and several weeks prior to her first amended complaint. Additionally, courts have recognized that retaliatory failure to promote may not always follow in close proximity to the protected activity because the "opportunities for retaliation do not necessarily immediately present themselves" in such instances. *Mandell v. County of Suffolk*, 316 F.3d 368, 384 (2d Cir. 2003). A trier of fact could reasonably infer from this record that defendant's decision to promote someone other than plaintiff was motivated by retaliatory animus.

The evidence available also raises an issue of fact regarding whether defendant's failure to promote plaintiff to the allegedly reinstated Director position constitutes a materially adverse action, within the meaning established by *Burlington Northern*. A trier of fact could rationally conclude that the threat of such a failure to promote would dissuade a reasonable worker from filing a discrimination claim. As defendant offers no non-retaliatory justification for the failure to promote plaintiff, summary judgment is inappropriate as to this cause of action.

However, defendant is entitled to summary judgment on plaintiff's third cause of action, as plaintiff has failed to establish an issue of fact regarding the causal connection between her filing a complaint and the adverse actions constituting that cause of action. In an effort to

directly demonstrate causation, plaintiff relies solely on Dr. Matseoane's testimony that, despite not having been accused individually of discriminating against plaintiff, he was "very outraged" and felt deeply hurt because the accusation implicated him, as head of the Department. Defendant correctly points out that this alone is insufficient to demonstrate causation, especially as any reasonable person accused of racial discrimination would understandably be outraged and hurt, regardless of any intent to retaliate. Furthermore, one cannot reasonably infer, from outrage alone, that Dr. Matseoane would violate the law by retaliating against plaintiff, especially given his testimony that he did not express his outrage to anybody and that he believed the situation was "between the university and, perhaps, the legal people."

Plaintiff also has not raised any issues of indirect proof of retaliatory animus on her third cause of action, since none of the alleged retaliatory acts in that cause of action occurred in close proximity to any of her complaints to the NYCCHR. *See Ponticelli v. Zurich American Ins. Group*, 16 F. Supp. 2d 414, 436 (S.D.N.Y. 1998) (two-and-a-half month separation "hardly the close proximity of time" contemplated for establishing causal connection). The memorandum in which plaintiff was allegedly accused of low productivity came in December 2001, long after plaintiff filed her first amended complaint on January 31, 2001 and before she filed her second amended complaint on February 12, 2002. Although plaintiff received a disciplinary memorandum in March 2002 regarding her refusal to see a patient, the record indicates that the issue was not motivated by plaintiff's February 12 filing, for Dr. Matseoane had received correspondence on the matter from the attending physician on February 10, 2002. Lastly, the Department's change in vacation policy and any alleged inequitable application of the policy took place in November 2001, over nine months after plaintiff filed her first amended complaint and several months prior to her second amended complaint, preventing any reasonable inference

of causation. Since no issue of fact exists as to retaliatory animus in any of these instances, summary judgment is appropriate in regard to the third cause of action and the court need not decide whether the alleged incidents constitute materially adverse actions. Accordingly, it is

ORDERED that the motion is granted to the extent of granting partial summary judgment to defendant COLUMBIA UNIVERSITY as to the third cause of action only, and that cause of action is dismissed; it is further

ORDERED that defendant's motion for summary judgment is denied as to the first and second causes of action, and those causes of action are severed and shall continue; and it is further

ORDERED that the parties are to appear before the Court for trial, at 9:30 a.m. on Monday, August 7, 2006 at 111 Centre Street, Room 1227, New York, N.Y.

The foregoing constitutes the decision and order of the Court.

ENTER:

J.S.C.

Date: July 26, 2006

FILED
AUG 02 2006
COUNTY CLERK'S OFFICE
NEW YORK