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

PRESENT: HON JOAN A. MADDEN Justice

PART 11

Index Number : 118343/2003

YANAI, SANDRA

VS

COLUMBIA UNIVERSITY

Sequence Number : 001

DISC

INDEX NO. _____

MOTION DATE 12/22/06

MOTION SEQ. NO. 00

MOTION CAL. NO. _____

The following papers, numbered ... _____ this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order.

FILED

JUL 17 2006

NEW YORK COUNTY CLERK'S OFFICE

Dated: July 11, 2006

_____ 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: PART 11

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SANDRA YANAI,

Plaintiff,

-against-

COLUMBIA UNIVERSITY,

Defendant.

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INDEX NO. 118343/03

JOAN A. MADDEN, J.:

In this action for damages based on claims of employment discrimination, defendant Columbia University (Columbia) moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint in its entirety. Plaintiff opposes the motion. As discussed below, the motion is granted in part and denied in part.

BACKGROUND

The following facts are not disputed. Plaintiff was employed by defendant Columbia from approximately February 1984 to July 2003, as an administrative officer in the Health Sciences Division (Division), now known as the Columbia University Medical Center. For the last 16 of those years, plaintiff served as an Administrative Coordinator in the Obstetrics and Gynecology Department (Department), with her duties consisting of processing personnel matters, including physician appointments, and administrative personnel actions concerning hiring and salary.

In 1995, plaintiff was diagnosed with giant cell tumor, a form of bone cancer. Taking a paid medical leave of absence for approximately three months, plaintiff underwent surgery and

radiation treatment. In 1999, plaintiff was diagnosed with a reoccurrence of giant cell tumor. Commencing at the end of June 1999, she took a leave of absence with full salary for six months, followed by long term disability leave with 2/3 of her salary. During that time, plaintiff underwent a second surgery, which shortened her left leg and requires her to use a crutch in order to walk. After a course of rehabilitation, plaintiff returned to work in May 2000. She required, and still requires, ongoing medical monitoring and physical therapy. The medical examinations, including bone and body scans, kept her from work for approximately one or two days each quarter, for one year, and thereafter one or two days every six months. On the days she had physical therapy, she did not take a lunch hour and left work one hour early.

On June 30, 2003, the Department administrator, Lisa David, met with plaintiff and notified her that she was being laid off, as her position was being eliminated, effective immediately. David handed plaintiff a letter "confirmin[ing] that as a result of a reorganization within the department, it will be necessary to terminate your employment on a layoff basis as of July 7, 2003." The letter explained that plaintiff would be paid through that date and for accrued unused vacation time, and would receive "a layoff allowance equal to 6 months of salary, representing one month for each year of completed service equal to 6 months of salary." The following day, David circulated a memorandum to all physicians and staff in the Department, advising that plaintiff's position had been eliminated and that she would be leaving the Department, "as part a continued restructuring of administrative functions in the Department, and in an effort to manage our overhead costs." At that time, plaintiff was 49 years old.

In or about October 2003, plaintiff commenced the instant action, asserting five causes of action. The First and Second causes of action allege disability discrimination and retaliation in

violation of the New York State and New York City human rights laws, the Third and Fourth causes of action allege age discrimination in violation of New York State and New York City human rights laws; and the Fifth cause of action alleges breach of contract. Defendant is now moving for summary judgment dismissing the complaint in its entirety. In response, plaintiff has withdrawn the portion of the First and Second causes of action alleging wrongful termination based on disability, as well as the Fifth cause of action for breach of contract.

DISCUSSION

Plaintiff's complaint, as limited by her withdrawal of the claims as noted above, alleges employment discrimination on the basis of disability by virtue of a hostile work environment and salary inequities, wrongful termination on the basis of age, and retaliation, all in violation of New York State and New York City Human Rights laws, respectively Executive Law §290, et seq and New York City Administrative Code §8-101 et seq.

New York State Human Rights Law, Executive Law §296 (1)(a), makes it unlawful for an employer "because of the age . . . [or] disability . . . of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Similarly, New York City Human Rights Law, NYC Admin Code § 8-107(1)(a), makes it unlawful "[flor an employer or an employee or agent thereof, because of the actual or perceived age . . . [or] disability. . . of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment."

In determining employment discrimination claims, New York courts apply the same standards as federal courts. See Forrest v. Jewish Guild for the Blind, 3 NY3d 295, 305 (2004);

Aurecchione v. New York State Division of Human Rights, 98 NY2d 21, 25-26 (2002); Walsh v. Covenant House, 244 AD2d 214, 215 (1st Dept 1997). However, in 2005, the New York City Council enacted the Local Civil Rights Restoration Act of 2005 ("LCRRA"), which is intended

> to clarify the scope of New York City's Human Rights Laws. It is the sense of the Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law. In particular, through the passage of this local law, the Council seeks to underscore that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes. Interpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.

Local Law No. 85 of 2005, section 1; see also Jordan v. Bates Advertising Holdings, Inc., 11 Misc3d 764, 2006 WL 316812 (Sup Ct, NY Co 2006). To carry out that purpose, the "Construction" section of the law was amended to provide that "[t]he provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed." NYC Admin Code §8-130 (as amended by Local Law No. 85 of 2005, §7).[1]

Defendant argues that the LCRRA is inapplicable to the instant action, as it did not take effect until October 3, 2005, when it was enacted. However, to the extent the above-quoted provisions are intended to "clarify" the legislative intent and construction of the City's Human

[1]Prior to the 2005 amendment, section 8-130 provided that "[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."

Rights Law as originally enacted in 1991, they do not create new rights, but are consistent with the meaning and enforcement of pre-existing rights, and as such, are entitled to retroactive application. See Statutes §54; Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 NY2d 443 (1965), cert denied by Estwing Manufacturing Co. v. Singer, 382 US 905 (1965).

Thus, as the legislature always intended that the City law be construed liberally and independently beyond state and federal interpretations, this Court will be mindful of that purpose in considering whether defendant is entitled to summary judgment dismissing plaintiff's several claims as asserted under both New York City and New York State human rights laws.

EMPLOYMENT DISCRIMINATION

A plaintiff alleging discrimination in employment under New York State and New York City Human Rights Laws bears the initial burden of establishing a prima facie case by showing that she is a member of a protected class, she was qualified for the position, she suffered an adverse employment action, and that such adverse action occurred under circumstances giving rise to an inference of discrimination. See Forrest v. Jewish Guild for the Blind, supra at 305; Ferrante v. American Lung Ass'n, 90 NY2d 623, 629 (1997); Messinger v. Girl Scouts of the USA,16 AD3d 314 (1st Dept 2005). To prevail on a motion for summary judgment, the defendant employer has the burden to "demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual." Forrest v. Jewish Guild for the Blind, supra at 305; accord Messinger v. Girl Scouts of the USA, supra at 314. Although the question whether discrimination occurred ordinarily raises issues of fact, summary judgment is a "highly useful device" in discrimination cases when defendant demonstrates the absence of a prima facie case, and plaintiff is unable to raise an issue of fact.

Forrest v. Jewish Guild for the Blind, supra at 305-306.

At the outset, Court notes that the first two elements necessary to establish a prima facie case of employment discrimination, i.e. that plaintiff is a member of a protected class and was qualified for the position she held, are not disputed. With respect to the third element, it is not disputed that plaintiff was subject to adverse employment actions when she was laid off from her position and when she was denied certain salary increases. As will be seen below, the Court will analyze those elements that are in dispute and the arguments raised by defendant in seeking summary judgment, in the context of each specific discrimination claim asserted by plaintiff.

HOSTILE WORK ENVIRONMENT

Discrimination by virtue of a hostile work environment is created when "the work place is permeated with discrimination, intimidation, ridicule, and insult that is sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment." Id at 310 (quoting Harris v. Forklift Systems, Inc., 510 US 17, 21 [1993]). To establish a prima facie case of a hostile work environment, plaintiff must show that: 1) she is a member of a protected class; 2) she was subjected to unwelcome conduct or speech that was based on her membership in that class; 3) the conduct or speech was sufficiently severe or pervasive to create a hostile work environment; and 4) defendant is liable for such conduct or speech. See id at 310-313; Scott v. Memorial Sloan-Kettering Cancer Center, 190 FSupp2d 590, 598-599 (SDNY 2002).

As indicated above, it is undisputed that as a disabled person, plaintiff is a member of a class protected by New York State and New York City human rights laws. For purposes of the instant motion, defendant concedes that plaintiff was subjected to unwelcome conduct and speech based on her disability, and does not dispute plaintiff's testimony as to the incidents of

harassment. The only issue raised by defendant is whether such incidents, as alleged by plaintiff, were sufficiently severe or pervasive to have created a hostile work environment.[2]

"Proving the existence of a hostile work environment involves showing both 'objective and subjective elements: the misconduct shown must be severe or pervasive enough to create an objectively hostile or abusive work environment, and the victim must also subjectively perceive that environment to be abusive.'" Feingold v. State of New York, 366 F3d 138, 150 (2nd Cir 2004)(quoting Alfano v. Costello, 294 F3d 365, 374 [2nd Cir 2002] and Harris v. Forklift Systems, Inc., supra at 21); accord Forrest v. Jewish Guild for the Blind, supra at 311. The factors considered include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with [the] employee's work performance." Feingold v. State of New York, supra at 150 (quoting Harris v. Forklift Systems, Inc., supra at 23); accord Forrest v. Jewish Guild for the Blind, supra at 310-311. Although a "mild, isolated incident does not make a work environment hostile, the test is whether 'the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment *altered for the worse*.'" Feingold v. State of New York, supra at 150 (quoting Terry v. Ashcroft, 336 F3d 128, 148 [2nd Cir 2003]). The plaintiff's work environment need not be "unendurable or intolerable," as the "fact that the law requires harassment to be severe or pervasive before it can be actionable does not mean that employers are free from liability in all but the most egregious cases." Id (citations omitted).

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[2]Since defendant's motion papers make no mention of the fourth element as to defendant 's liability for the abusive conduct or speech, the Court will assume that defendant concedes this element as well, for the purposes of determining the instant motion.

Applying this standard, the Court concludes that plaintiff has made a sufficient prima facie showing that she suffered from a hostile work environment predicated on her disability. At her deposition, plaintiff testified that when she returned to work in May 2000, after being diagnosed with cancer and undergoing surgery which left her disabled and required her to use a crutch to walk, physicians and other employees in the office laughed and made jokes about the way she walked, which embarrassed her and made her "feel like a freak."

Specifically, plaintiff testified that she was repeatedly subjected to the follows remarks and conduct: one physician and other employees in the Department called her a "gimp" and a "gimparina"; one employee told her to "fly out of the office on your broom," referring to plaintiff's crutch; another employee remarked about her leaving early for physical therapy; one physician pushed his shoulders to the side and imitated the way she walked; her direct supervisor "micro-managed" her files, her lunch hour and her appointments for physical therapy and follow-up care treatment, and complained about the length of time she need to go to and return from the bathroom; her direct supervisor also required her to work on files stored in a purportedly defective bottom drawer of a file cabinet, which plaintiff alleges even able-bodied employees had difficulty opening; and when the Associate Vice President for Human Resources Galene Kessin saw plaintiff carrying a large calendar, she laughed and remarked that, now, plaintiff would have sufficient space to note all her medical appointments.

Plaintiff also testified that her direct supervisor in the Department, and Kessin responded to her repeated requests for an "equity" raise by telling her that she felt "entitled" to such a raise because of her disability, and by asking whether the disability payments she received while on medical leave, were not "pay enough." Another employee frequently accused her of thinking she "deserved things because you can't walk."

Plaintiff further testified that as a result of the stress and poor body image caused by the ridicule to which she was subjected at work, she consulted a therapist in the summer of 2003, and in May 2004, she was still suffering from panic attacks and anxiety, and had difficulty sleeping. Although plaintiff testified that she was able to perform her job, despite the harassing and humiliating conduct and comments directed at her, she explained that she was able to do so "because I try my best to separate out the torment from . . . get[ting] my work done for the doctors and everyone else."

Taking the totality of the circumstances described above and based on defendant's concession for the purpose of the instant motion in accepting plaintiff's testimony as credible, plaintiff has offered sufficient proof to permit a fact finder to conclude that she experienced pervasive discriminatory intimidation, ridicule and insult predicated on her disability. As to the subjective element, an employee who needs to "separate out the torment" suffered at her workplace, in order to continue performing her job, clearly experiences her work environment as abusive. As to the objective element, this Court concludes that although mindful that the law banning discrimination does not proscribe rudeness or prescribe a general code of civility, Faragher v. City of Boca Raton, 524 US 775, 787-788 (1998), from the evidence presented, an inference can be drawn that a reasonable employee in plaintiff's position would have perceived the conditions of her employment as altered for the worse. Under the circumstances of this case, this Court is not prepared to rule, as a matter of law, that a reasonable person in plaintiff's position would not have experienced as abusive the many references to her disability, which were allegedly made primarily by her superiors and by physicians, in multiple contexts and often in a ridiculing and humiliating manner. See e.g. Hendler v Intelecom USA, Inc., 963 FSupp 200

(EDNY 1997)(plaintiff with asthma who alleged that exposure to secondhand cigarette smoke caused breathing difficulties, raised issue of fact as to whether co-workers' comments about his inability to tolerate cigarette smoke, which defendant characterized as a "few sporadic jokes," created a hostile work environment); Zveiter v Brazilian National Superintendency of Merchant Marine, 833 F Supp 1089 (SDNY 1993)(fact finder could reasonably find that the abuse to which plaintiff was subjected constituted a hostile work environment based on sexual harassment, where plaintiff alleged a relatively few incidents of employees touching her, leering at her, and making sundry comments, jokes and suggestions). Defendant, therefore, is not entitled to summary judgment dismissing plaintiff's hostile work environment claim.

DISCRIMINATORY SALARY

Plaintiff alleges disability discrimination based on salary disparities, asserting two separate grounds: first, defendant's denial of an annual cost of living increase in July 2000, and second, defendant's denial of what has been referred to as an "equity raise."

A prima facie case of discrimination based on disparate pay, requires plaintiff to show that she is a member of a protected class and that she was paid less than similarly situated nonmembers of the class. See Shah v. Wilco Systems, Inc, 27 AD3d 169, 176 (1st Dept 2005). Defendant may rebut plaintiff's showing by demonstrating a non-discriminatory reason for the employment action, at which point the burden shifts back to plaintiff to show that the reason given is a pretext for discrimination. Id at 176-177.

Plaintiff alleges that she was the only continuing administrative employee in the Department who was denied a 3% cost of living increase in July 2000, which was shortly after she returned from the second medical leave of absence in May 2000. Defendant does not dispute plaintiff's allegation, but argues that it is entitled to summary judgment since it can

establish a non-discriminatory reason for its action.[3] Defendant cites to the deposition testimony of Galene Kessin, Associate Vice President for Human Resources, regarding the University's policy of not providing salary increases to individuals on leave. Specifically, Kessin testified that "if an individual is on leave and the information has been recorded in the personnel information system, that person's name is going to have an XXX next to it to indicate that the person is on leave and a salary increase cannot be processed." When asked if the policy precludes an increase not only while an employee is on leave, but also for some period of time after she has returned from an extended leave, Kessin answered, "[t]he policy does not preclude an increase after a person returns from leave."

By itself, Kessin's testimony is insufficient to demonstrate a non-discriminatory reason, as it is directly contradicted by undisputed facts in the record. Despite Kessin's testimony that when an employee on leave returns to work, she is entitled to an increase, the record shows that plaintiff had returned to work in May 2000, and had been working for at least one month or more, when she was denied the annual cost of living increase that went into effect in July 2000. Although plaintiff testified that the salary rosters for the July increases are often generated in late April or early May, it is not disputed that plaintiff was back at work in May; plaintiff also testified that such raises are across-the-board to all employees in a uniform

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[3]The Court will not consider the statute of limitations issue raised in defendant's original motion papers. In its accompanying memorandum of law, defendant argues that any claim premised on the July 2000 cost of living increase, is barred by the three-year statute of limitations. In her opposition papers, plaintiff concedes that any claims for damages for discriminatory differences in salary, which accrued prior to the October 21, 2000 commencement of this action, are time-barred. Plaintiff asserts, however, that the pay differential from that date forward is actionable. Defendant's reply papers do not mention the statute of limitations issue, and address only the non-discriminatory reason for denying the cost of living increase. Thus, it appears that defendant is no longer pursuing a statute of limitations defense.

percentage amount. Furthermore, while Kessin testified that increases are not given to employees on leave, the uncontroverted record shows that plaintiff received a 3% cost of living increase in July 1999 while she was out on medical leave.

Significantly, defendant submits no competent evidence explaining why the Department deviated from Columbia's purported policy, i.e. why the 2000 increase was not processed for plaintiff even though she was back at work, and why she was given an increase in 1999 even though she was still on medical leave. Moreover, defendant has not produced any documentary proof to support Kessin's testimony regarding Columbia's policy, so at best it appears to be unwritten. Additionally, when the chairman of the Department, Dr. Lobo, was asked whether the Department had such a policy, he simply answered that "[t]here was no policy as far as I know."

Under these circumstances, defendant has failed to make a sufficient showing that the Department's denial of the 3% cost of living increase in July 2000 was based on a nondiscriminatory policy, rather than on the fact that plaintiff was disabled and had been on medical and disability leave. Defendant, therefore, is not entitled to summary judgment as to those portions of the First and Second Causes of Action relating to the denial of the July 2000 cost of living increase.

Next, the Court will consider the second ground for plaintiff's discriminatory salary claim, which is based defendant's denial of an "equity raise" to the midpoint in the pay scale for her grade, which plaintiff alleges she was entitled to in order to make her salary comparable with others in the Department.[4] Defendant contends that this claim must fail, as plaintiff cannot show

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[4]Plaintiff characterizes this raise as an "equity raise." At her deposition, Galene Kessin, Associate Vice President for Human Resources, explained that an "equity raise is an increase that is sometimes given when we have discovered that someone is not being paid comparably to people doing similar work who have similar background and experience."

that she was treated differently and paid less than other similarly situated employees. The Court agrees.

It is well settled law that an employee claiming that she was discriminated against in the payment of wages, including an equity raise, must establish that she was paid less than similarly situated employees, who are not members of her protected class. See Kent v. Papert Cos., Inc., 309 AD2d 234, 241-242 (1st Dept 2003). "The individuals being compared must be similarly situated in all material respects. 'While their circumstances do not have to be identical, there should be a reasonably close resemblance of facts and circumstances. What is key is that they be similar in significant respects.'" Shah v.Wilco Systems, Inc., supra (quoting Lloyd v.Bear Stearns & Co., Inc., 2004 WL 2848536 [SDNY 2004])(citations omitted); accord McPherson v. NYP Holdings, Inc., 2005 WL 2129172 (EDNY 2005); DeJesus v. Starr Technical Risks Agency, Inc. 2004 WL 2181403 (SDNY 2004); Quarless v. Bronx-Lebanon Hospital Center, 228 FSupp2d 377(SDNY 2002), aff'd 75 Fed.Appx 846 (2nd Cir 2003).

Here, plaintiff bases her discriminatory salary claim on the assertions that other employees in the Department were brought to the midpoint in their salary grade, were hired at higher grade levels or at higher salaries, or received raises and bonuses. Plaintiff, however, fails to submit any competent proof to support these conclusory assertions, and more importantly fails to allege or submit competent proof comparing herself to specific individual employees in the Department or any other department or division of Columbia University who were situated in "all material respects," such as holding the same or a comparable position, or reporting to the same or a comparable supervisor. See Hnot v. Willis Group Holdings Ltd, 2005 WL 831664 (SDNY 2005). While plaintiff points to no specific proof in the record, reviewing plaintiff's submissions

it appears that she may be relying on portions of her deposition testimony. At her deposition, plaintiff was questioned about a handwritten chart she created by compiling information about employees in the Department.[5] Testifying that the chart pertained to the issue of "salary equity" in the Department, plaintiff explained that the chart listed the names of employees in the Department, their job titles, grade levels, hire dates, education and salaries, including any salary actions such as raises. Significantly, plaintiff has not submitted this chart with her opposition papers, nor has she submitted any other documentary or competent proof to support her conclusory assertions and demonstrate which employees had comparable roles and responsibilities and, as such, were similarly situated.[6]

Also at her deposition, plaintiff was explicitly questioned about which employees performed comparable work in the Department, and responded that she was the only human resources employee in the Department, but she had "friends in other departments who were in HR making more than I made." She was then asked to identify specific individuals, and testified that "a friend who subsequently left, Georgina Enriquez . . . was making in the 70's and was in the surgery department," and a woman, Lorraine Smith, "who does a comparable job . . . in the department of neurology was paid higher as well." Despite plaintiff's identification of

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[5]As part of her job responsibilities, plaintiff had access to all personnel information for the employees in the Department, and complied the chart based upon that information.

[6]In some instances, an expert affidavit is submitted to analyze salary and employee information listed on a chart. See e.g. Weit v. Flaum, 258 AD2d 286 (1st Dept 1999)(plaintiff's chart purporting to show salary discrepancies between male and female employees, did not indicate whether employees were similarly situated, and unsupported by any expert testimony, chart failed to support inference of discriminatory motive).

Enriquez and Smith, she submits no affidavit nor points to any document or other competent proof that would provide a factual basis to support her bare and conclusory testimony that these employees performed comparable work.

Absent a sufficient evidentiary basis for concluding that plaintiff was paid less than similarly situated non-disabled employees, plaintiff has failed to make a prima facie case of disparate pay discrimination based upon defendant's denial of an equity raise. See Shah v. Wilco Systems, Inc., supra; Lloyd v. Bear Stearns & Co., supra. Defendant, therefore, is entitled to summary judgment dismissing the portions of the First and Second causes of action relating to such claim.

AGE DISCRIMINATION

To establish a prima case of age discrimination in the termination of employment, plaintiff must show through direct, statistical or circumstantial evidence that: 1) she is within the protected age group; 2) she was qualified for the position; 3) she was discharged; and 4) the discharge occurred under circumstances giving rise to an inference of age discrimination. See Ferrante v. American Lung Association, supra at 629; Cronin v. Aetna Life Insurance Co., 46 F3d 196 (2nd Cir 1995). This initial burden is frequently described as a "low threshold" or "*de minimus*." See DiMascio v. General Electric Co., 27 AD2d 854 (3rd Dept 2006); Wiesen v. New York University, 304 AD2d 459, 460 (1st Dept 2003); Exxon Shipping Co. v. New York State Division of Human Rights, 303 AD2d 241 (1st Dept 2003); Scaria v. Rubin, 117 F3d 652, 654 (2nd Cir 1997); Hnot v. Willis Group Holdings Ltd, supra. "No evidence of discrimination is needed, and showing a preference for a person not in the protected class is enough to raise an inference of discrimination." Id.

Once plaintiff establishes a prima facie case, the burden shifts to defendant to rebut the presumption of discrimination by producing admissible evidence establishing a legitimate, independent and nondiscriminatory reason for the termination. Ferrante v. American Lung Association, supra at 629. The burden then shifts back to plaintiff to prove that the legitimate reason proffered by defendant was merely a pretext for discrimination. Id at 629-630.

The Court of Appeals has identified two ways for a defendant to prevail on a motion for summary judgment in an age discrimination case. Either defendant demonstrates a failure on plaintiff's part in establishing every element of a prima facie case, or once defendant proffers a legitimate non-discriminatory reason for plaintiff's termination, defendant demonstrates the absence of a material issue of fact as to whether its reason is pretextual. Forrest v. Jewish Guild for the Blind, supra at 305-306; Hemingway v. Pelham Country Club, 14 AD3d 536 (2nd Dept 2005). Appellate case law emphasizes, however, that trial courts should be particularly cautious in deciding whether to award summary judgment to the defendant in an age discrimination case, since the employer's intent is often at issue and careful scrutiny may reveal circumstantial evidence supporting an inference of discrimination. See Belfi v. Prendergast, 191 F3d 129 (2nd Cir 1999); Chertkova v. Connecticut General Life Insurance Co, 92 F3d 81, 87 (2nd Cir 1996); Gallo v. Prudential Residentail Services, LP, 22 F3d 1219,1224 (2nd Cir 1994); Rosen v. Thornburgh, 928 F2d 528, 533 (2nd Cir 1991).

In seeking summary judgment, defendant submits arguments predicated on both grounds. Defendant concedes that plaintiff can make out the first three elements of a prima facie case, i.e.1) that she was in a protected age group, 2) that she was qualified for the position, and 3) that she was discharged. However, defendant contends that she cannot present any evidence of the fourth element, that is that she was discharged under circumstances giving rise to an inference of age

discrimination. Defendant also asserts that it had a legitimate business purpose for terminating plaintiff's employment.

Contrary to defendant's contention, the Court finds that plaintiff has sufficiently satisfied the "initial low threshold" of a prima facie case by showing that her discharge occurred under circumstances giving rise to an inference of age discrimination, as plaintiff was replaced by someone substantially younger, Todd Hoisington, who was 37 years old, or 12 years younger than plaintiff at the time she was discharged. See O'Connor v. Consolidated Coin Caterers Corp., 517 US 308, 313 (1996); Stephenson v. Hotel Employess & Restaurant Employees Union Local 100 of the AFL-CIO, 6 NY3d 265 (2006); Rogue v. NYP Holdings, Inc., 257 F3d 164 (2nd Cir 2001); Montana v. First Federal Savings & Loan Ass'n, 869 F2d 100, 105 (2nd Cir 1989). At her deposition, Lisa David, the Department Administrator who made the decision to terminate plaintiff's employment, testified that when plaintiff "left, her job responsibilities were assigned to Todd Hoisington" who was responsible for plaintiff's "entire job."[7]

Additional evidence of discrimination can be inferred from defendant's departure from its stated personnel policy in not placing plaintiff in its "layoff pool." For plaintiff to carry her burden of producing sufficient circumstantial evidence giving rise to an inference of discrimination, it is enough that she present evidence showing that defendant departed from its usual employment practices and procedures in dealing with her. See Norville v. Staten Island University Hospital, 196 F3d 89, 97 (2nd Cir 1999); see also Stern v. Trustees of Columbia University, 131 F3d 305, 313 (2nd Cir 1997).

Plaintiff testified at her deposition that the day after she was notified of the lay off, she

[7]David also testified that Hoisington "used" an existing clerical employee, Martha Julia, "as his support." Julia, however, was less than a year younger than plaintiff.

returned to Columbia and met with Hope Reynolds, a human resources administrator, and told Reynolds that she "wanted to be in the layoff pool" and "wanted another job immediately." Plaintiff testified that she knew the layoff pool was part of Columbia's personnel manual, and had seen "formal layoff paperwork."[8] According to plaintiff, Reynolds responded by reassuring her not to "worry about it, just start applying for jobs, send me e-mail or send Galene [Kessin] e-mail with the requisition number of the job you want to apply for." Kessin was also questioned about Columbia's personnel manual and the layoff pool, and testified that she exchanged e-mails with plaintiff and told plaintiff that she should e-mail her resume, search the website daily for open positions and notify her or Reynolds if she saw a job that interested her. While this testimony and the record before the Court [9] suggest that Kessin and Reynolds may have provided some job search assistance to plaintiff on a informal basis, defendant submits no deposition testimony, affidavit or document indicating that it actually followed the procedures in its personnel manual and formally placed plaintiff in the layoff pool. Thus, on the record presented, the Court must conclude that defendant departed from its stated personnel policy by not including plaintiff in its layoff pool.

Based upon the foregoing and in view of the *de minimus* nature of plaintiff's burden at this

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[8]Defendant's Personnel Policy Manual includes a section entitled "Recall Rights/Layoff Pool," which provides that an employee who is laid off "will be included in the layoff pool on their date of termination" and "can remain in the layoff pool for up to twelve (12) months from the last day worked or for a period of time equal to the length of employment, which ever is less." The Manual states that upon notice of layoff, the employee "must complete a transfer application for employment and file it with the Employment section of the Personnel Office" and that "[e]mployees in the layoff pool must be available for interview and referrals . . . [and] must accept any offer at the same or higher salary grade or they will be removed from the layoff pool and lose their recall rights."

[9]It must be noted that both defendant and plaintiff submit only excerpts of the transcripts of the various depositions.

stage, Wiesen v. New York University, supra at 460, the Court finds that she has sufficiently sustained her initial burden of establishing a prima facie case of age discrimination.

The burden now shifts to defendant to demonstrate a legitimate non-discriminatory reason for plaintiff's termination. Defendant submits sufficient evidence to establish that the elimination of plaintiff's position was part of a restructuring of the Department intended to improve efficiency and undertaken in response to financial pressures, which constitutes a legitimate and nondiscriminatory reason for an employment decision. See Laverack & Haines, Inc. v. New York State Division of Human Rights, 88 NY2d 734, 739 (1996); Mete v. New York State Office of Mental Retardation & Developmental Disabilities, 21 AD3d 288 (1st Dept 2005); Green v. Citibank, NA, 299 AD2d 182 (1st Dept 2002); DiMascio v. General Electric Co., supra. Lisa David, the Department administrator who made the decision to terminate plaintiff's employment, testified that she was responsible for reducing the Department's substantial operating deficit, while at the same time improving the level of services provided to patients and physicians. David explained that she decided that plaintiff's position should be eliminated because "the job as it was structured had a lot of inefficiencies and duplication of effort with the managed care credentialing processing. We had two of our groups approaching physicians to collect the same information. So it was duplicative, therefore inefficient. And in addition to that, as a second reason, it was not providing a good service to the physicians." Significantly, plaintiff concedes that when she was laid off, the Department was restructuring its administration to reduce its deficit and to improve management.[10] Thus, based on defendant's proof as to the Department's restructuring, it has

[10]In his Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, plaintiff's counsel states that "[t]here is no dispute that when she [Yanai] was let go the department was restructuring its administration as part of an effort to improve its management and reduce the deficit. But the fact that Columbia was engaged in restructuring is

satisfied its burden to show a legitimate non-discriminatory reason for plaintiff's termination.

Clearly however, "even during a legitimate reorganization or workforce reduction, an employer may not dismiss employees for unlawful discriminatory reasons." Maresco v. Evans Chemetics, 964 F2d 106, 111 (2nd Cir 1992)(quoting Hagelthorn v. Kennecott Corp., 710 F2d 76, 81 [2nd Cir 1983]). So to withstand defendant's summary judgment motion, plaintiff has the burden to raise a material issue of fact as to whether the legitimate reason offered by defendant was a pretext for discrimination. See Ferrante v. American Lung Association, supra at 629-630. The Court of Appeals has clarified the showing needed to satisfy this burden by emphasizing at the outset that "[g]enerally, a plaintiff is not required to *prove* [her] claim to defeat summary judgment." Id at 630. Rather, "'to defeat a properly supported motion for summary judgment in an a age discrimination case, plaintiff must show that there is a material issue of fact as to whether (1) the employer's asserted reason for the challenged action is false or unworthy of belief, *and* (2) more likely than not the employee's age was the real reason.'" Id (quoting Criley v. Delta Air Lines, Inc., 119 F3d 102 [2nd Cir 1997])

When viewed in the light most favorable to her, as is appropriate in the context of defendant's motion for summary judgment, Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Management, L.P., 7 NY3d 96 (2006), plaintiff's evidence is sufficient to defeat summary judgment. First, that age discrimination was a motivating factor in the layoff of plaintiff, notwithstanding the restructuring, can be inferred from the undisputed fact that the restructuring of the Department affected a disproportionate number of older employees, as 100% of the terminated employees were over age 40 and no younger employees were terminated in the restructuring.

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not conclusive on the issue of whether terminating Yanai's employment was discriminatory."

Based upon defendant's employment records, plaintiff has shown that during the period of the restructuring, a total of five administrative employees were laid off, including plaintiff, and that ages of those five employees ranged from 43 to 55, with an average age of 49. See Maresco v. Evans Chemetics, 964 F2d 106 (holding that defendant's discharge of two of the three older accounting employees, and none of the 20 younger accounting employees, resulted in a disproportionate termination of employees in the protected class, which was sufficient to raise an issue as to whether defendant's stated economic reason was pretextual); Epstein v. Kemper Insurance Co., 210 FSupp2d 308, 317 (SDNY 2002)(finding a question of fact as to pretext based, *inter alia*, on a comparison of the number of staff attorneys over the age of 40 prior to and after the hiring a new managing attorney, where the comparison showed that prior to the new managing attorney's hire, seven of ten staff employees were over 40, that during her tenure, six of the seven attorneys over 40 suffered adverse employment action and currently only one staff attorney was over 40).[11]

Moreover, "the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom'" can also be considered in determining whether defendant's explanation is pretextual. See Reeves v. Sanderson Plumbing Products, Inc., 530 US 133, 143 (2000)(quoting Texas Department of Community Affairs v. Burdine, 450 US 248 [1981]). As determined above in connection with plaintiff's prima facie case, plaintiff's job duties were reassigned to an employee

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[11]In Maresco, the court noted that there was a disproportionate termination of employees in the protected class and in Epstein, the court compared the number of older attorneys prior to and during the new manager's tenure. Here, plaintiff relies on the undisputed fact that of the five administrative employees laid off during the asserted restructuring all were older employees with an average age of 49. Under these circumstances, where only older employees were laid off, a specific numerical comparison regarding older and younger employees in relation to those employees laid off , when considered with the other evidence of age discrimination, is not necessary to raise a triable issue of fact.

younger than plaintiff by 12 years, and defendant departed from its personnel policy by failing to place plaintiff in the layoff pool. The parties' employment relationship was governed by a written Personnel Policy Manual in effect at the time of plaintiff's layoff. As previously discussed, the manual provides for a "layoff pool" which is the formal procedure by which laid off employees are notified of and considered for open positions. Of particular significance is the section of the manual entitled "Separations," which defines a layoff as "a termination initiated by the University because of discontinuance of a position, a lack of work or a lack of funds" and explicitly states that in the case of a layoff "[e]fforts will be made to relocate the employee to a job of equivalent salary-grade level prior to the layoff." Notwithstanding these provisions in the personnel manual, defendant failed to place plaintiff in the layoff pool, and made no effort to relocate her prior to the lay off, as defendant gave plaintiff no advance notice of the termination. Further, plaintiff's undisputed deposition testimony shows that after she was laid off, defendant did not offer her any other position even though she applied for 38 or 40 jobs.

These circumstances -- the age of the terminated employees, the age of plaintiff's replacement and defendant's departure from its personnel policies[12] -- when viewed together are sufficient to create a genuine factual issue as to whether during the restructuring, age was a

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[12] Plaintiff also contends that the pretextual nature of defendant's stated reason for terminating plaintiff's employment, that it was due to restructuring based on operating deficits, can be inferred from the fact that during the restructuring and layoffs, the Department continued to hire and promote administrative staff, and from fiscal year 2003 to fiscal year 2004, the Department's budget for administrative staff increased by $434,762. Although defendant admits that its budget increased, it argues that the Department's revenues increased by nearly nine million dollars, $8,829,422 to be exact. The defendant also points to the fact that as a percentage of revenue, the Department's administrative staff expenditures actually decreased from 6.86% in fiscal year 2003, to 6.41% in fiscal year 2004. As plaintiff fails to challenge these figures or their significance, it cannot be inferred from the record, and specifically from the increase in the budget for the salaries of administrative staff, that defendant's reasons for the layoffs were pretextual.

motivating factor in defendant's decision to terminate plaintiff's employment. As noted above, even during a legitimate reorganization, an employer may not dismiss an employee for an unlawful discriminatory reason, such as the employee's age. See Maresco v. Evans Chemetics, 964 F2d 106. A trier of fact could find that while there was a restructuring, that defendant's explanation as to its decision to terminate plaintiff's employment is "unworthy of credence," that is pretextual. Furthermore, "[p]roof that the defendant's explanation is unworthy of credence is . . . [a] form of circumstantial evidence that is probative of intentional discrimination. . . . [O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." Reeves v. Sanderson Plumbing Products, Inc., supra at 147. "'[D]iscrimination is rarely so obvious or its practices so overt that recognition of it is instant and conclusive, it being accomplished by devious and subtle means.'" Ferrante v. American Lung Ass'n, supra at 631 (quoting 300 Gramatan Avenue Assocs v. State Division of Human Rights, 45 NY2d 176, 183 [1978].

Defendant, therefore, is not entitled to judgment as a matter of law dismissing plaintiff's age discrimination claims as pleaded in the Third and Fourth causes of action.

RETALIATION

"Under both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices." Forrest v Jewish Guild for the Blind, supra at 396. To establish unlawful retaliation, plaintiff must show that: 1) she engaged in protected activity; 2) her employer was aware that she participated in such activity; 3) she suffered an adverse employment action based upon her protected activity; and 4) the existence of a causal connection between the protected activity and the adverse employment action. Id.

In moving for summary judgment dismissing plaintiff's retaliation claim, defendant contends that plaintiff cannot establish the first and third elements listed above. Defendant argues that plaintiff's deposition testimony fails to identify any protected activity for which she was allegedly retaliated against, and any adverse action she suffered as a result of her protected activity. The Court does not agree.

A claim of retaliation can be based upon retaliatory conduct occurring against a former employee. See Landwehr v. Grey Advertising, Inc., 211 AD2d 583 (1st Dept 1995); Gonzalez v. City of New York, 354 FSupp2d 327 (SDNY 2005); Beckett v. Prudential Insurance Co., 893 FSupp 234 (SDNY 1995). In Landwehr v. Grey Advertising, Inc., supra, the First Department found that a former employee could maintain a claim concerning his employer's retaliatory conduct in response to his retention of counsel, where the employee was laid off due to a reduction in workforce, and the evidence indicated that he may have been qualified for other positions in the company. See also Gonzalez v. City of New York, supra (former employee permitted to maintain retaliation claim, where employer's refusal to provide a recommendation was based in part on employee's filing a lawsuit for employment discrimination); Beckett v. Prudential Insurance Co., supra (former employee permitted to maintain claim for post-employment retaliation against employer who gave negative job references to prospective employer, in direct retaliation for employee's complaints of sexual harassment).

The facts of the instant case are nearly identical to those in Landwehr v. Grey Advertising, Inc., supra. Here, defendant maintains that plaintiff was laid off due to a restructuring of the Department, and the record contains sufficient evidentiary proof to indicate that plaintiff may have been qualified for other positions at Columbia. Specifically, at her deposition, plaintiff testified that from the time she was laid off until the date she found her

present job, she applied for 38 or 40 jobs at Columbia, and had four interviews but no offers. She further testified that she believed that she had been "blacklisted because I retained an attorney," and that "[t]here was a lot of verbiage going around" about her hiring an attorney. She explained that she had two interviews for a position in the neurology department, and later heard from "a former colleague" that the administrative manager of that department was "going around saying that I had a lawyer" and that she was "suing Columbia." Plaintiff also testified that there were positions for which she was qualified, and defendant's human resources administrator, Galene Kessin conceded that plaintiff was qualified for at least two positions.

On the authority of Landwehr v. Grey, plaintiff's deposition testimony is sufficient to show that she engaged in a protected activity by hiring an attorney after she was laid off, and that she suffered an adverse action as result of such activity when defendant retaliated against her by not hiring her for another position. Thus, as plaintiff can make out a prima facie case of retaliation, defendant is not entitled to summary judgment dismissing such claim, which is pleaded as part of the First and Second causes of action.[13]

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted only to the extent of severing and dismissing those portions of the First and Second Causes of Action for salary discrimination based upon the equity raise, and in all other respects the motion is denied; and it is further

ORDERED that plaintiff having withdrawn the portions of the First and Second Causes

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[13]In deciding defendant's motion for summary judgment, the Court wishes to make clear that no determination is made as to the confidential documents belonging to defendant, which are in plaintiff's possession.

of Action for wrongful termination based on disability, and the Fifth Cause of Action for breach of contract, such causes of action are severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on July 27, 2006 at 2:30 p.m. in Part 11, Room 351, 60 Centre Street.

DATED: July 11, 2006

ENTER:

J.S.C.