

O'Connor v Bank of New York

2008 NY Slip Op 30614(U)

February 28, 2008

Supreme Court, New York County

Docket Number: 0103217/2006

Judge: Edward H. Lehner

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

DEFENDANT. EDWARD H. LEHNER

PART 19

Index Number : 103217/2006

O'CONNOR, DONNA

VS

BANK OF NEW YORK

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

MAR 05 2008

NEW YORK
CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

motion is decided in accordance

with accompanying memorandum decision

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

Dated: FEB 28 2008

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

department in 2004, and William Potter, the current Managing Director of the SDM department, who replaced Puck.

Plaintiff commenced her employment with BNY on August 3, 1998, as Vice President in the SDM department, reporting directly to Jeffrey Bartlein, the SDM Group Head at that time (Complaint, ¶¶ 2, 12; Pl Dep., at 72 [Aff. of David A. McManus, Exh 1]; Pl Aff., ¶ 1). Bieselin approved plaintiff's hire (Bieselin Aff., ¶ 3). Approximately six months later, Bartlein resigned from employment (Pl Dep., at 130; Bieselin Dep., at 105 [McManus Aff., Exh 2]). After considering other candidates, Bieselin selected plaintiff to replace Bartlein as SDM Group Head, effective January 1999 (Complaint, ¶ 13, Bieselin Dep., at 105-106; Pl Aff., ¶ 3; Pl Dep., at 130, 132-133, 338-339). Plaintiff's transition to Group Head was a functional promotion (Pl Dep., at 338-339).

BNY's SDM department has responsibility for maintaining securities reference and indicative data required by other departments of BNY (the internal customers of the SDM department) to provide securities processing and accounting services (Bieselin Dep, at 82; Bieselin Aff., ¶ 2). At all relevant times, Bieselin, as Manager Director, had managerial responsibilities to oversee the SDM department, in addition to other departments (Bieselin Dep., at 8; Bieselin Aff., ¶ 1). Bieselin asserts that, given its internal support function, it is critical for the SDM department to collaborate with its internal customers (Bieselin Aff., ¶ 2).

As SDM Group Head, plaintiff reported directly to Bieselin from January 1999 through January 2004 (Complaint, ¶ 14; Pl Dep., at 339). Between January 1999 and January 2006, Bieselin approved, and plaintiff received, substantial salary increases and bonuses (Complaint, ¶ 15; Pl Dep., at 339). Bieselin asserts that, during the period of time that plaintiff

reported directly to him, various SDM internal customers complained to him that plaintiff was not performing projects to their satisfaction, and was difficult to work with (Bieselin Aff., ¶ 6; Bieselin Dep., at 109-11). Plaintiff admits that Bieselin counseled her on multiple occasions, and instructed her to improve her demeanor and personal interactions (id.; Pl Dep., at 150-156; 159-161). Plaintiff also admits that she disregarded Bieselin's counseling, and never sought out any of the individuals who complained about her to address her performance deficiencies, or improve her working relationships (Pl Dep., at 161). Bieselin asserts that plaintiff's unsatisfactory performance and poor interactions with colleagues continued throughout her tenure with BNY (Bieselin Aff., ¶ 6; Bieselin Dep., at 109-111).

In August of 2003, plaintiff met with Bieselin, and informed him of her interest in becoming a Managing Director, after four years of running the day-to-day operations of the SDM department (Pl Aff., ¶ 4). In order for plaintiff to be promoted to Managing Director, Bieselin had to first nominate her for promotion (Bieselin Aff., ¶ 7). Plaintiff claims that, although she was not promoted to Managing Director, Bieselin: (1) promoted three of his male direct reports (William Puck, Steve Farlese and Tim Overzat) to Managing Director in 2002 and 2003; (2) promoted "a less qualified male colleague" (Dominic Crow) to Managing Director in 2006; and (3) hired Brendan Potter as Managing Director to oversee SDM in late 2005, effectively replacing plaintiff (Complaint, ¶¶ 16, 32, Pl. Dep., at 90-92, 118, 342). Plaintiff contends that she was the only female among Bieselin's direct reports who was not promoted to Managing Director (Complaint, ¶ 17). However, it is undisputed that Bieselin also nominated Marina Lewin, a woman, for promotion to Managing Director (Bieselin Dep., at 27; Bieselin Aff., ¶ 9; Pl., Dep., at 92-93; 120-124; see McManus Aff., Exh 15).

During a meeting in August 2003, Bieselin counseled plaintiff that, in order to be nominated for promotion to Managing Director, she had to gain visibility within BNY, in addition to demonstrating consistent overall good performance and leadership, and developing good relationships (Pl Dep., at 65-66; 71-73; Bieselin Dep., at 133-136; Bieselin Aff., ¶ 10). Plaintiff admits that Bieselin created opportunities for her to gain visibility within BNY by, for example: (1) introducing plaintiff to his own superiors; (2) scheduling meetings with the Executive Vice President to whom Bieselin reported, during which plaintiff made a presentation regarding the SDM department; and (3) regularly taking plaintiff with him to BNY's market data committee, of which he and one of BNY's Vice-Chairmen were members (Pl Dep., at 71-74; 147-148; see also Bieselin Dep., at 133-136; Bieselin Aff., ¶ 11).

Bieselin asserts that, by early 2004, he was devoting a substantial portion of his time to the acquisition of a company in connection with BNY's efforts to develop its hedge fund business (Bieselin Aff., ¶ 12; Bieselin Dep., at 108-109). As a result, he was unable to spend sufficient time overseeing and managing the operations of the SDM department (Bieselin Aff., ¶ 12; Bieselin Dep., at 108-109; Pl Dep., at 140). Thus, Bieselin asked Puck, then Managing Director of Investment Accounting Services, to oversee the SDM department, in addition to his other responsibilities (Bieselin Aff., ¶ 12; Bieselin Dep., at 108-109; Puck Aff., ¶ 1; Puck Dep., at 28, 32-33 [McManus Aff., Exh 3]; Pl Dep., at 140). Puck began overseeing the SDM department effective January 2004, reporting directly to Bieselin, and plaintiff began reporting directly to Puck (Bieselin Aff., ¶ 12; Bieselin Dep., at 108-109; Puck Dep., at 28, 32-33, 43; Puck Aff., ¶ 2; Pl Dep., at 140).

Although plaintiff alleges that she was "demoted" from her position as SDM

Group Head when Puck began overseeing the department (Complaint, ¶ 19; Pl Dep., at 142), plaintiff admits that her title and salary remained the same, and that she retained all SDM Group Head responsibilities between January 2004 and March 2005 (Pl Dep., at 145-146; 209-214; 225-226; 361; 363-364; 366-367; 420). Indeed, plaintiff concedes that the only thing that changed was that, instead of reporting directly to Biesel, a Managing Director, she was now reporting directly to Puck, also a Managing Director (Pl Dep., at 361). Plaintiff also admits that, to the extent this change in the SDM reporting structure resulted in her "demotion" because there was an additional reporting level, everyone else in the SDM department, including male employees, were also "demoted" (Pl Dep., at 217-220).

Plaintiff also claims that reporting directly to Puck hindered her opportunities for promotion to Managing Director (Complaint, ¶ 48; Pl Dep., at 170). However, plaintiff admits that she has no evidence that Puck was placed in that role to prevent her from being promoted to Managing Director (Pl Dep., at 170-173, 364), and that Biesel continued to provide opportunities to her to gain visibility within BNY (Pl Dep., at 225-226; see also Biesel Aff., ¶ 11).

Puck asserts that, by the fall of 2004, he observed deficiencies in plaintiff's performance and management of the SDM department, including poor organizational effectiveness that often resulted in deliverables not being accurately or timely completed which, in turn, led to the frustration of internal BNY customers who relied on SDM data (Puck Aff., ¶ 5; Puck Dep., at 62-63, 88-91, 112-124). Puck observed that plaintiff would react defensively when problems involving SDM were raised by internal customers (Puck Aff., ¶ 5; Puck Dep., at 120-125).

Puck further asserts that, by this time, he had also received several complaints about plaintiff's ineffectiveness as SDM Group Head from various SDM internal customers (Puck Aff., ¶ 6; Puck Dep., at 63-68, 88-91; see also Pl Dep., at 388, 390-391). Indeed, some of those internal customers asked Puck not to involve plaintiff in their specific projects, but instead involve her subordinates, because they viewed plaintiff as an impediment to the timely completion of tasks (id.). Plaintiff admits that Puck counseled her about these issues on multiple occasions during his tenure overseeing the SDM department (Pl Dep., at 256, 388, 390-91; see also Puck Aff., ¶ 6).

In November 2004, Puck prepared an informal evaluation (see McManus Aff., Exh 17) regarding his own assessment of plaintiff's performance under his management (Pl Dep., at 419; Puck Dep., at 143). In this evaluation, Puck provided plaintiff with both positive and negative comments regarding her performance. For example, Puck noted that plaintiff needed to improve her organizational effectiveness, including: (1) being "more proactive with respect to anticipating/identifying issues;" and (2) being "more objective with respect to analyzing problems especially when multiple areas are involved" (2004 Informal Evaluation, at 2). Although plaintiff did not agree with the negative comments, she admits that she did not view them as discriminatory (Pl Dep., at 261-63; 421-22).

Puck alleges that, despite being counseled that she needed to improve her organizational effectiveness, as well as her interpersonal skills and relationships with co-workers, plaintiff made no significant effort to do so, and her performance in those areas remained deficient (Puck Aff., ¶ 8).

For example, Puck alleges that, in January 2005, although he informed plaintiff

that the Managing Director of another sector of BNY had complained that certain reports based on information received from the SDM department were inaccurate, plaintiff did not contact the Managing Director in the time frame that Puck requested (Puck Aff., ¶ 9; Puck Dep., at 12-21). Moreover, during a meeting arranged by Puck with that Managing Director and others to discuss the issues, plaintiff refused to perform any analysis that was requested of her (Puck Aff., ¶ 9; Puck Dep., at 122-124). Puck alleges that, based on his observations, he concluded that plaintiff's organizational ineffectiveness and inability or unwillingness to interact effectively with co-workers was negatively impacting the overall performance of the SDM department (*id.*, ¶ 10).

Puck asserts that, in light of these deficiencies, he recommended to Bieselin that the SDM department be reorganized so that managerial responsibilities would be split between management of the day-to-day operations of the SDM department, and management of vendor relations and SDM projects (Puck Aff., ¶ 110; *see also* Bieselin Dep., at 87-88; Bieselin Aff., ¶ 15). Bieselin approved Puck's recommendation, and the SDM department was reorganized in March 2005, with plaintiff in charge only of projects and vendors, and no longer in charge of the entire department (Bieselin Dep., at 89; Bieselin Aff., ¶ 15; Puck Dep., at 85; Puck Aff., ¶ 11; McManus Aff., Exh 18 [organizational chart for SDM department]).

Plaintiff alleges that, as a result of this change, she now had to attend Puck's staff meetings, and operate as a peer to individuals she once managed (Complaint, ¶ 26; PI Aff., ¶ 8). In June 2005, plaintiff complained to Human Resources that she believed she was being subjected to sex discrimination, but no action was taken as a result of her complaint (*id.*, ¶¶ 27-28; PI Aff., ¶ 10).

Puck asserts that, following this reorganization, plaintiff's performance deficiencies persisted, and he continued receiving complaints that plaintiff was not viewed as a team player, or as someone who could effect change and results (Puck Aff., ¶ 12; Puck Dep., at 88-90). Thus, in a formal performance evaluation given to plaintiff in the fall of 2005 (see McManus Aff., Exh 19), Puck noted that plaintiff needed to improve her interpersonal skills with colleagues, be more proactive with respect to anticipating issues, objectively analyze problems, and work with others in a collaborative fashion to accomplish results (id; Puck Dep., at 90).

Bieselin alleges that, in late 2005, as part of his efforts to restructure the SDM department so as to create a more effective global operating team, he hired Potter as a Managing Director to oversee SDM, replacing Puck, who continued to have responsibility for other departments (Bieselin Aff., ¶ 17; Bieselin Dep., at 86-91, 148; see also Puck Dep., at 134-135; Pl Aff., ¶ 11). Once in that role, Potter evaluated the department's needs and structure, and concluded that he wanted the vendor management and project management teams within SDM to report directly to him and that, therefore, plaintiff, who was in charge of those groups, represented a layer of management that was not necessary (Potter Aff., ¶ 3; Bieselin Aff., ¶ 18; Bieselin Dep., at 122-123). Based on this assessment, Potter recommended that plaintiff's position be eliminated (Potter Aff., ¶ 3; Bieselin Aff., ¶ 18; Bieselin Dep., at 122-123). Bieselin approved Potter's recommendation and plaintiff's position was eliminated, effective February 2, 2006 (Bieselin Aff., ¶ 19; Bieselin Dep., at 122-124). On January 23, 2006, Bieselin terminated plaintiff (Complaint, ¶ 33; Pl Aff., ¶ 11).

DISCUSSION

A. Gender Discrimination Claims

In her first cause of action for gender discrimination, plaintiff claims that BNY denied her a promotion to Managing Director, diminished her responsibilities, and ultimately terminated her employment because she is a woman (Complaint, ¶¶ 36-41). Based on the undisputed record evidence, plaintiff cannot create an issue of fact with respect to any of her gender discrimination claims, and thus, summary judgment must be granted to BNY.

Where, as here, plaintiff has no direct evidence of discrimination, she must proceed under the three-step burden shifting analysis first articulated by the United States Supreme Court in McDonnell Douglas Corp. v Green (411 US 792 [1973]), and clarified in St. Mary's Honor Ctr. v Hicks (509 US 502 [1993]) and Reeves v Sanderson Plumbing Prods., Inc. (530 US 133 [2000]) (see e.g. Shah v Wilco Sys. Inc., 27 AD3d 169, 176 [1st Dept 2005], lv dismissed in part, denied in part 7 NY3d 859 [2006] ["in determining employment discrimination claims under the New York City Human Rights Law, federal standards are applied ... (under) the framework established in McDonnell Douglas"] [internal citations omitted]).

Under that analysis, a plaintiff must first establish a prima face case of discrimination (see id.). If the plaintiff is able to establish a prima facie case, the burden of production shifts to the defendant, who must proffer a legitimate, non-discriminatory reason for its actions (id.). Once the defendant articulates a neutral reason for its actions, any presumption of discrimination drops from the case, and it is plaintiff's burden to show by a preponderance of the evidence 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) discrimination was the real

reason (see Forrest v Jewish Guild for the Blind, 3 NY3d 295 [2004]; Farrugia v North Shore Univ. Hosp., 13 Misc 3d 740 [Sup Ct, NY County 2006]). To satisfy this burden, plaintiff must prove that her gender was a determinative factor in the adverse employment action about which she complains (see Stephenson v Hotel Empls. and Rest. Empls. Union Local 100 of AFL-CIO, 14 AD3d 325, 329 [1st Dept 2005], affd 6 NY3d 265 [2006] [holding that the issue in an action for employment discrimination “is not whether defendants acted with good cause, but whether their business decisions would not have been made but for a discriminatory motive”] [citation omitted]). Plaintiff cannot make this showing with respect to any of her gender discrimination claims, and they must be dismissed as a matter of law.

1. **Failure to Promote Claim**

Plaintiff's failure to promote claim must be dismissed because plaintiff cannot establish a prima facie case, and BNY had a legitimate non-discriminatory reason not to consider plaintiff for promotion to Managing Director – her performance – that plaintiff cannot establish is pretextual.

To establish a prima facie discriminatory failure to promote case, plaintiff must demonstrate that; (1) she is a member of a protected class; (2) she was qualified for the position at issue; (3) she was rejected for the position; and (4) the circumstances of the adverse employment decision give rise to an inference of discrimination (Subramanian v Prudential Sec., Inc., 2003 WL 23340865 [ED NY 2003]). Plaintiff cannot establish the second and fourth prongs of her prima facie case.

First, plaintiff cannot establish that she was qualified for promotion to Managing Director. The record conclusively establishes that plaintiff was failing to meet BNY's

performance expectations for her position as Vice President and, therefore, was not qualified to be considered for promotion to the next level. In fact, the record shows that plaintiff was performing her day-to-day responsibilities with difficulties, and exhibiting significant deficiencies. Both Bieselin and Puck received numerous complaints from several SDM internal customers regarding plaintiff's performance, and the fact that plaintiff was difficult to deal with and did not produce results (Bieselin Dep., at 109-111; Bieselin Aff., ¶ 6; Puck Dep., at 62-63, 88-91, 112-24; Puck Aff., ¶¶ 5-6, 8-12). Puck also observed that, instead of collaborating with others in a productive fashion to solve problems and accomplish results, plaintiff would react defensively when problems involving SDM were raised (Puck Dep., at 62-63, 88-91, 112-124; Puck Aff., ¶ 5; see 2004 Informal Evaluation and 2005 Formal Evaluation). Despite having been counseled on these issues multiple times by two different Managing Directors, plaintiff's performance in those areas continued to be deficient (Bieselin Dep., at 109-11; PI Dep., at 150-156, 159; McManus Aff., Exh 17, 19). Indeed, plaintiff admitted disregarding their counseling, and never sought out any of the individuals who complained about her to address her performance deficiencies (PI Dep., at 161, 390-91). Under these circumstances, plaintiff was clearly not qualified for advancement to the Management Director position. Therefore, she cannot establish a prima facie case with respect to her failure to promote claim (see e.g. Newsom-Lang v Warren Intl., Inc., 249 F Supp 2d 292 [SD NY], affd 80 Fed Appx 124 [2d Cir 2003] [dismissing failure to promote claim after concluding plaintiff was not qualified for the position at issue, and thus failed to establish a prima facie case]).

Although plaintiff asks the court to disregard Bieselin's and Puck's sworn testimony about the complaints each received from internal customers regarding plaintiff as

hearsay, the court rejects this argument. The record evidence demonstrates that Puck and Bieselin personally observed plaintiff's deficiencies (Puck Dep., at 63-68, 90, 114-119, 120-123; Bieselin Dep., at 21), and contemporaneously informed her of these complaints upon receiving them (Puck Dep., at 120, 140; Bieselin Dep., at 110-11, 136-138). Moreover, plaintiff admittedly failed to address these complaints (Pl Dep., at 161).

In her opposition to the motion, plaintiff claims that she was qualified for promotion to Managing Director based on her own personal assessment of her qualifications and performance. Specifically, plaintiff presents a one-sided view of her performance evaluations, which focuses solely on the positive feedback she received, and claims that such positive feedback supports her claim that she was unfairly denied promotion to Managing Director (Pl Opp., at 7-11). Plaintiff, however, ignores the negative criticism and admonitions to improve in certain areas set forth in those same written evaluations.

For instance, in plaintiff's Fall 2004 informal evaluation, Puck noted that plaintiff needed to focus on: (1) "[b]eing more proactive with respect to anticipating/identifying issues and developing plans to address especially given the responsibilities and associated risks within the Daily Operations Group of her department" and (2) "[b]eing more objective with respect to analyzing problems especially when multiple areas are involved" (2004 Informal Evaluation, at 2). Puck also noted that "as [plaintiff] is extremely supportive of her people and their actions, this is sometimes viewed as defensive behavior which precludes her from being viewed as an 'objective team player' and often results in an adversarial relationship" (*id.*).

Mr. Puck made similar comments in plaintiff's 2005 formal evaluation and, in addition, advised plaintiff that she needed to "improv[e] her interpersonal skills so that her

technical skills can be better appreciated by those with whom she is working which will then allow her to be viewed as a team player whom others will seek out” (2005 Formal Evaluation, at 2). He also counseled plaintiff to “address the negative perception some groups have of the Product/Project Group with [SDM]” under plaintiff’s supervision (*id.*). In addition, plaintiff’s 2005 performance evaluation explicitly notes that plaintiff did not meet requirements in the area of organizational effectiveness, including “us[ing] authority to gain results; interact[ing] well with coworkers; gain[ing] cooperation and action from others not under his/her direct control” (*id.* at 1).

Thus, contrary to plaintiff’s contentions, her own evaluations contain explicit criticism of various areas of her performance as Vice President, thus demonstrating that she was not in a position to even be considered for promotion to Managing Director. Significantly, plaintiff admitted that Puck’s criticism of her performance was not discriminatory (Pl Dep., at 263).

Indeed, although plaintiff may not agree with her supervisors’ perceptions of her performance, it is well settled that it is the decision-maker’s perception, not that of the plaintiff, which is relevant (see Matter of New York Tel. Co. v New York State Div. of Human Rights, 222 AD2d 234, 236 [1st Dept 1995] [the employee “may not substitute its judgment for that of the employer with regard to hiring and promotion”]). Thus, plaintiff’s differing personal opinion of her performance is insufficient to create an issue of fact (see Berner v Gay Men’s Health Crisis, 295 AD2d 119 [1st Dept 2002] [granting summary judgment for the employer after holding that plaintiff’s disagreement with employer’s perception of her performance was insufficient to raise an issue of fact as to whether defendant’s legitimate non-discriminatory

reason for its employment actions was pretextual]).

Plaintiff also claims that she was qualified for promotion to Managing Director based upon the affidavit of Gerard Bartlein, plaintiff's former supervisor, who attests that plaintiff "is, without question, qualified to be a managing director at (BNY)" (Bartlein Aff., ¶ 8). However, Bartlein supervised plaintiff for only a five-to six-month period, and has admittedly not worked at BNY or worked with plaintiff since 1998 – nearly nine years ago (*id.*, ¶¶ 2, 9). He does not have any personal knowledge regarding plaintiff's performance thereafter, and his affidavit is thus devoid of relevance or probative value (see e.g. Dickerson v Health Mgt. Corp. of Am., 21 AD3d 326 [1st Dept 2005] [granting summary judgment for the employer in a race discrimination case after holding that affidavits from former employees lacked probative value because they failed to assert facts from which personal knowledge regarding plaintiff's termination may be inferred]; Demonte v Chemical Bank, 1994 WL 364068 [SD NY 1994] [affidavit of plaintiff's former supervisor, stating that employer's criticisms of plaintiff's performance were unfounded, carried little weight where former supervisor had not worked with plaintiff during the time leading up to the alleged adverse employment actions]).

Apart from Bartlein's affidavit, plaintiff fails in her opposition to offer an affidavit, or point to the testimony, of any witness with relevant and personal knowledge supporting her performance claims. In contrast, Puck directly supervised plaintiff for almost two years, and Biesel supervised her throughout her entire tenure at BNY (Pl Dep., at 130; Puck Dep., at 42, 52-53, 85; Biesel Dep., at 8, 24, 103-104).

Plaintiff also fails to establish that she was not considered for promotion under circumstances giving rise to an inference of gender discrimination. In order to find an inference

of gender discrimination, plaintiff must show that the position was given to a man, that other women were denied promotions to Managing Director on the basis of their gender, that she was demeaned because she is a woman, or that the decision-maker bore discriminatory bias (Mittl v New York State Div. of Human Rights, 100 NY2d 326 [2003]; see e.g. Chauvancy v Dresdner Bank AG, 5 Misc 3d 1006 (A) [Sup Ct, NY County 2004]; Foster v Livingston-Wyo. ARC, 2004 WL 1884485 [WD NY 2004]). Plaintiff proffers no facts to make such a showing. Moreover, it is undisputed that Bieselin, the individual responsible for nominating plaintiff for promotion, nominated Marina Lewin, a woman, for promotion to Managing Director during the exact time period at issue here (Bieselin Dep., at 27; Bieselin Aff., ¶ 9; Pl Dep., at 64-65, 92-93, 120-24; see McManus Aff., Exh 15). This fact precludes any inference that Bieselin failed to nominate plaintiff for promotion to Managing Director because of her gender. Indeed, plaintiff admits in her deposition that she cannot reconcile the fact that Bieselin promoted Lewin to Managing Director with her claim that Bieselin did not promote her because she is a woman (Pl Dep., at 122-23).

Moreover, any inference of gender discrimination is further belied by the fact that the same actor – Bieselin – made all of the critical decisions regarding her employment at BNY – approving plaintiff’s hiring, providing her an early functional promotion to Group Head, approving salary increases and bonuses throughout her tenure at BNY, changing her job responsibilities, and ultimately deciding to terminate her (see e.g. Weit v Flaum, 1997 WL 1107704, * 4 [Sup Ct, NY County 1997], affd 258 AD2d 286 [1st Dept 1999] [granting summary judgment for the employer on plaintiff’s discrimination claims where plaintiff could not overcome the “presumption of lack of discrimination that arises when the ‘same actors’

responsible for promoting her allegedly discriminated against her on the basis of age and gender”]; see also Schnabel v Abramson, 232 F3d 83 [2d Cir 2000] [affirming summary judgment for the employer where the same manager hired and fired plaintiff, after recognizing that discriminatory motivation would be inconsistent with decision to hire]; Grady v Affiliated Cent. Inc., 130 F3d 553 [2d Cir 1997], cert denied 525 US 936 [1998] [same]; Pinkney v EMI Music Publ., 2006 WL 2456815 [SD NY 2006] [same]).

Likewise, here, it is illogical that Bieselin would have suddenly acted with gender-bias against plaintiff with respect to promotions, when no such animus was exhibited toward plaintiff throughout her career at BNY, particularly where he previously promoted her to Group Head, and approved her for discretionary raises and bonuses.

Although plaintiff claims that same actor defense does not apply here because Bartlein, not Bieselin, actually hired her, the evidence conclusively establishes that plaintiff could not have been hired without Bieselin’s approval (Bieselin Aff., ¶ 3; Pl Dep., at 223-24; see Campbell v Alliance Natl. Inc., 107 F Supp 2d 234 [SD NY 2000]) [the involvement of multiple decision makers does not preclude the application of the same actor inference]).

Plaintiff also contends that she can establish an inference that BNY engages in gender discrimination with respect to whom it promotes to Managing Director through the use of statistics. However, plaintiff’s reliance on the speculative and abstract affidavit of William J. Carrington, her “statistical expert,” is unavailing. In his affidavit, Carrington states that he compared distributions of men and women among Vice Presidents and Managing Directors at BNY, and found that men were more likely to be in the higher-ranking Managing Director position. However, in reaching that conclusion, Carrington relies solely on BNY’s internal and

bank-wide personnel directory for the period December 2005 and January 2006 (Pl Opp., at 3, 11-12). That directory reflects bank-wide information even though, as confirmed by plaintiff, she was employed in one department throughout her entire tenure with BNY, and her failure to promote claims are limited to the promotion decisions made by Biesel, who she conceded was the only decision maker responsible for nominating her to Managing Director (Pl Dep., at 64-69, 89-90, 121-22). Because Carrington's statistics admittedly pertain to individuals in all other areas of BNY, performing entirely different duties, and managed, evaluated and promoted by different Managing Directors, his affidavit is not probative of her claims (see Sundaram v Brookhaven Natl. Lab. Associated Univ., Inc., 1996 WL 563829, * 2 [ED NY 1996] [noting that "[w]here an employer has numerous divisions with different decisionmakers making employment decisions for each division ... statistical evidence would generally have meaning only if based on an examination of the employment decisions made by the decisionmakers who made the [challenged] decision"]).

Plaintiff and her expert also fail to address the fact that plaintiff admitted that she is not aware of any BNY policy or standard practice of discriminating against women, and that she does not have any knowledge regarding any other woman's attempts as to promotion (Pl Dep., at 5-11, 460 ["(t)his lawsuit is about myself. My experience at the Bank of New York"]).

Plaintiff also contends that she can establish an inference of gender discrimination because she was replaced by a man – Potter. Contrary to plaintiff's contentions, however, Potter did not replace plaintiff in her role as SDM Group Head. Rather, the record evidence reveals that Potter was hired as Managing Director to replace Puck, another Managing Director, as SDM Group Head – a position plaintiff admittedly did not occupy at the time Potter was hired

(Bieselin Dep., at 86-91; Bieselin Aff., ¶ 17; Puck Dep., at 134-135; Puck Aff., ¶ 13; Potter Aff., ¶ 2; Pl. Dep., at 366-367; see McManus Aff., Exhs 18, 20-21 [organizational charts for SDM department]). It is thus undisputed that plaintiff was no longer the SDM Group Head after the Spring 2005 SDM reorganization, that Potter did not replace her, and that her position was simply eliminated.

No inference of discrimination can arise from these facts and, accordingly, plaintiff's failure to promote claim must be dismissed.

Moreover, even assuming, *arguendo*, that plaintiff could establish a *prima facie* case, her failure to promote claim must still be dismissed because BNY had a legitimate, non-discriminatory reason for not considering her for promotion to Managing Director – her performance deficiencies as Vice President, as observed by and reported to Bieselin and Puck (see Newsom-Lang v Warren Intl., Inc., 249 F Supp 2d 292, *supra* [dismissing failure to promote claim after concluding that plaintiff was not qualified for the position at issue]; Leavy v New York City Transit Auth., 11 Misc 3d 1052 [A] [Sup Ct, Kings County 2006] [granting employer's motion to dismiss failure to promote claim where plaintiff was not qualified for position at issue]). As detailed above, BNY has presented evidence that plaintiff was not nominated for promotion to Managing Director because she was not meeting the performance expectations of her position as Vice President. Plaintiff presents no evidence to contradict these facts.

Furthermore, plaintiff fails to present any evidence that her deficient performance evaluations represented a pretext for her discrimination. Although plaintiff may have received some satisfactory performance ratings in her evaluations in some areas of her position as Vice

President, her evaluations also contained negative criticisms of other aspects of her performance, which she admitted were not discriminatory (Pl. Dep., at 263). In addition, plaintiff has offered no admissible evidence suggesting that Bieselin's conclusion that she was not qualified for promotion to Managing Director was pretextual and, hence, false (see e.g. Owens v Waldorf-Astoria Corp., 1997 WL 251556 [SD NY 1997] [granting summary judgment on failure to promote claims where, although plaintiff had received positive performance evaluations, plaintiff offered no evidence to contradict defendant's assertion that plaintiff was not the most qualified applicant]).

Plaintiff also fails to establish that the real reason that she was not promoted to Managing Director was her gender. Indeed, plaintiff admitted that she does not know whether her gender was a motivating factor in the decision not to promote her (Pl Dep., at 123-124 ["Q: You don't know one way or another whether or not gender was a motivating factor in Mr. Bieselin deciding not to promote you? A: I don't know that for sure"]). Further, as noted above, Bieselin: (1) promoted a woman to Managing Director within the relevant time period; (2) approved plaintiff's hire, functional promotion and salary increases and bonuses; and (3) provided her with opportunities to increase her visibility within BNY (Bieselin Dep., at 27, 105, 136; Bieselin Aff., ¶¶ 3, 9, 11; Pl Dep., at 71-74, 132, 147-149, 339).

Accordingly, plaintiff's failure to promote claim must be dismissed as a matter of law.

2. Reduction in Responsibilities Because of Her Gender

Plaintiff vaguely asserts that BNY diminished her responsibilities because she is a woman (Complaint, ¶¶ 39-41). To the extent plaintiff claims that BNY discriminated against her

by assigning her responsibilities only over vendors and special projects in connection with the SDM department reorganization in March 2005, her claim must be dismissed because the evidentiary record demonstrates that BNY had a legitimate, non-discriminatory reason for reorganizing the department. Specifically, plaintiff's organizational ineffectiveness and poor interpersonal skills and relationships with co-workers, which did not improve despite being counseled multiple times, were negatively impacting the overall performance of the SDM department (Bieselin Dep., at 109-111; Bieselin Aff., ¶¶ 6, 14; Puck Dep., at 63-68, 88-91; 112-124; Puck Aff., ¶¶ 4-5, 8-12; see also 2005 Formal Evaluation). Based on these deficiencies, Puck recommended, and Bieselin approved, a departmental reorganization whereby managerial responsibilities over SDM would be split between operations and vendors and projects, with plaintiff in charge of the latter (Bieselin Dep., at 87-89; Bieselin Aff., ¶ 15; Puck Dep., at 85; Puck Aff., ¶ 14).

Plaintiff does not submit any evidence suggesting that the SDM department reorganization occurred under circumstances giving rise to an inference of discrimination, or that her performance deficiencies were a pretext for discrimination, or that gender discrimination was the real reason her responsibilities were reduced. To the contrary, because Bieselin approved the SDM reorganization that resulted in the reduction of her responsibilities, the same actor presumption belies any inference of gender discrimination or pretext (see e.g. Weit v Flaum, 1997 WL 1107704, supra; Schnabel v Abramson, 232 F3d 83, supra).

Because plaintiff cannot establish that her responsibilities were reduced because of her gender, this claim must be dismissed.

3. Discriminatory Termination Claim

To establish a prima facie discriminatory termination case, plaintiff must demonstrate that she was terminated under circumstances which give rise to an inference of gender discrimination (Mittl v New York State Div. of Human Rights, 100 NY2d 326, *supra*; *see* Chauvancy v Dresdner Bank AG, 5 Misc 3d 1006 (A), *supra* [granting summary judgment for the employer dismissing plaintiff's gender discrimination case after holding that the circumstances of plaintiff's termination did not give rise to an inference of discrimination]). Here, the record reveals that no facts exist which could give rise to an inference of gender discrimination.

First, Potter was hired to replace Puck in his role overseeing SDM, not plaintiff (Bieselin Dep., at 148; Bieselin Aff., ¶ 17, Puck Aff., ¶ 2). Second, Potter, the individual who recommended eliminating plaintiff's position, is not one of the individuals who plaintiff claims discriminated against her (PI Dep., at 79). Indeed, Potter had only recently become employed by BNY at the time he recommended plaintiff's job elimination, and thus, had no involvement in any of the employment decisions concerning plaintiff until he commenced his employment with BNY (Puck Aff., ¶ 1).

Further, because Bieselin approved the elimination of plaintiff's position and her termination, the same actor inference belies any claim of discrimination (*see* Schnabel v Abramson, 232 F3d at 91 [“where the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire”] [citation omitted]; Strohmeyer v International Brotherhood of Painters & Allied Trades, 989 F Supp 455, 460 [WD NY 1997], *affd* 164 F3d 619 [2d Cir 1998] [granting summary judgment on the ground that “employers who knowingly

hire workers within a protected group seldom will be credible targets for charges of pretextual firing”] [citation omitted]).

Plaintiff’s assertion that she “can establish a discriminatory inference simply by showing more favorable treatment of employees not in the protected group” (Pl Opp., at 16) is baseless. The law is clear that plaintiff “may satisfy the fourth prong of the prima facie case ‘by showing that the employer subjected [her] to disparate treatment, that is, treated [her] less favorably than a similarly situated employee outside [her] protected group’” (DaCosta v North Shore Univ. Hosp. at Forest Hills, 16 Misc 3d 1118 [A], * 3 [Sup Ct, Queens County 2007] [citation omitted]; Duggan v Local 638, 419 F Supp 2d 484, 490 [SD NY 2005] [“To survive summary judgment, a plaintiff may raise an inference of discrimination by showing that his employer treated him less favorably than a similarly situated employee outside his protected group”] [citation and internal quotation marks omitted]). Here, however, plaintiff has failed to identify a single similarly situated male treated more favorably than she was – i.e, a male within her department who was performing work similar to that of other employees and who was not terminated. Accordingly, plaintiff cannot establish the requisite discriminatory inference (see id.; see also Matter of Washington County v New York State Div. of Human Rights, 7 AD3d 895, 896 [1st Dept 2004] [“No inference of discrimination arises, however, unless [plaintiff] is able to demonstrate that a similarly situated male employee benefitted from terms and conditions of employment that were denied to her”]).

Because plaintiff has presented no evidence giving rise to an inference of gender discrimination with respect to her termination, she cannot establish a prima facie case and, accordingly, her discriminatory discharge claim must be dismissed.

Plaintiff's discriminatory discharge claim should also be dismissed because BNY has proffered a legitimate, non-discriminatory reason for her termination, which plaintiff cannot establish to be a pretext for gender discrimination. Despite plaintiff's contentions, her position was in fact eliminated, and Potter did not replace her. As established by the unrefuted Potter affidavit, after he was hired to oversee the SDM department, he evaluated the department's need and structure, and concluded that he wanted the vendor management and project management teams within the SDM department to report directly to him. Plaintiff, who was in charge of those groups, represented a layer of management that was not necessary (Potter Aff., ¶ 3). Based on his assessment, he recommended that plaintiff's position be eliminated (*id.*). Thus, it is clear that BNY had a legitimate non-discriminatory reason for terminating plaintiff (see e.g. Berliner v Peerless Importers, Inc., 8 AD3d 157 [1st Dept 2004] [granting summary judgment on discrimination claim; employer's corporate reorganization is a legitimate business reason for plaintiff's termination that is not pretextual]; see also Matter of Maury v Frederick Goldman, Inc., 232 AD2d 215 [1st Dept 1996] [affirming administrative determination that plaintiff was not terminated on the basis of any protected category but because her position was eliminated]).

B. Retaliatory Discrimination

In her second cause of action, plaintiff claims that BNY "demoted" her by virtue of Puck joining the SDM department in January 2004 in retaliation for complaining to Bieselin in August 2003 that her male peers were being promoted to Managing Director while she was not, because she is a woman (Complaint, ¶ 47). However, the evidentiary record establishes that plaintiff was not demoted in January 2004. In any event, even if she were demoted, plaintiff's retaliation claim would still have to be dismissed because: (1) the factual basis for her retaliation

claim is false; and (2) the alleged "demotion" was justified by a legitimate, non-retaliatory reason, which plaintiff cannot establish was a pretext for retaliation.

In order to establish a prima facie case of retaliation, plaintiff must demonstrate that: (1) she engaged in a protected activity; (2) defendant was aware of the protected activity; (3) she was subjected to an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse decision (see Forrest v Jewish Guild for the Blind, 3 NY3d 295, supra). Plaintiff cannot establish any of the prongs of her prima facie case and thus, this claim must be dismissed as a matter of law.

First, plaintiff did not engage in any protected activity prior to January 2004. Although plaintiff alleges that, in 2003, she "complained to Bieselin about his failure to promote her along with her male colleagues" (Complaint, ¶ 18), plaintiff admits that this allegation, upon which her entire retaliation claim is premised, is false. In her deposition, plaintiff testified that, in her August 2003 meeting with Bieselin, she did not complain to Bieselin that males were promoted to Managing Director while she was not, or that she was being discriminated against on the basis of her gender, but merely questioned the fact that she was not promoted:

Q. Did you complain that [Mr. Bieselin] failed to promote you along with your male peers in this meeting?

A. I didn't. This was in retrospect that, you know, that's how I feel. I assumed that he would do the right thing at the time.

* * *

Q. In that meeting did you express to [Bieselin] that you believed it was discriminatory that you hadn't been promoted to managing director and other males had?

A. No, I assumed he would do the right thing.

* * *

Q. Did you state to [Bieselin] that you were complaining about his failure to promote you along with male colleagues? That's a yes or no question.

A. I doubt I would have said, you know, specifically named out.

Q. So you didn't, correct?

A. That's correct.

Pl Dep., at 162-168; see also Bieselin Aff., ¶ 10.

Thus, plaintiff admitted that her allegation in paragraph 18 of the complaint is false. Because plaintiff did not "protest or oppose statutorily prohibited discrimination" (Cruz v Coach Stores, Inc., 202 F3d 560, 566 [2d Cir 2000]), her discussion with Bieselin in August 2003 does not constitute protected activity (see Singh v Home Depot, Inc., 2003 WL 21909776, * 6 [ED NY 2003] [no protected activity where letter "did not protest unfair treatment suffered by Plaintiff ... based on anyone's 'race, color, religion, sex or national origin'"]; Banez v New York Foundling Hosp. 2001 WL 1035142 [SD NY 2001] [plaintiff did not engage in protected activity when she did not specifically mention discrimination in her complaint to employer]).

Plaintiff also fails to establish the third prong of her prima facie retaliation case, as the evidence is clear that plaintiff was not in fact demoted in January 2004. To the contrary, when Puck began overseeing the SDM department, plaintiff retained her same title and salary, as well as all of her SDM Group Head responsibilities until the March 2005 reorganization (Pl Dep., at 145-46, 209-14, 361, 363-64, 366-67, 420). Indeed, plaintiff admits that the only thing

that changed was that she began reporting directly to Puck instead of to Bieselin (Pl Dep., at 361).

Moreover, even assuming that plaintiff could establish a prima facie case of retaliation, it is clear that Puck joined the SDM department for a legitimate, non-retaliatory reason which plaintiff cannot establish is pretextual. The evidentiary record clearly establishes that Bieselin asked Puck to oversee the SDM department, in addition to his other responsibilities, because he was unable to closely oversee and manage the SDM operations himself (Bieselin Dep., at 108-109; Bieselin Aff., ¶ 12; Puck Dep, at 28, 32-33; Pl Dep, at 140). Plaintiff has presented no evidence to contradict these facts, or to demonstrate pretext.

In her opposition, plaintiff effectively abandons her claim that BNY “demoted” her by virtue of Puck joining the SDM department in January 2004 in retaliation for complaining to Bieselin in August 2003 that her male peers were being promoted to Managing Director. Instead, she improperly raises new retaliation theories for the first time.

By plaintiff’s own admission, both in the complaint and in her sworn deposition testimony, her retaliation claim is limited to her allegation that she was “demoted” when Puck began to oversee the SDM department in January 2004 (Complaint, ¶¶ 19, 47; Pl Dep., at 142). Despite these admissions, plaintiff now claims, in opposition to BNY’s summary judgment motion, that BNY also retaliated against her “once when she was told she would not be promoted in November 2004, again when her duties where reduced in March 2005 and finally, when she was terminated in January 2006” (Pl Opp., at 19). She also asserts that she was “passed over for a promotion when Mr. Potter became Managing Director” (*id.*, at 22).

Plaintiff's new retaliation theories, raised for the first time in her opposition to the instant motion, cannot be considered as a basis for defeating summary judgment, and must be disregarded (see e.g. Pinn v Baker's Variety, 32 AD3d 463 [2d Dept 2006] [new theory raised for first time in opposition to summary judgment motion should not be considered by the court]; Harrington v City of New York, 6 AD3d 662, 663 [2d Dept 2004] ["it was improper to assert a new theory of liability for the first time in opposition to the defendant's motion for summary judgment"]; Rochester v Blue Cross and Blue Shield, 2000 WL 1052064, * 6 [ED NY 2000] [refusing to consider allegations of discrimination not made in plaintiff's complaint or EEOC charge after noting that "it is inappropriate to raise new claims for the first time in submission in opposition to summary judgment"]).

Accordingly, BNY's motion for summary judgment dismissing plaintiff's retaliation claim is granted.

Finally, plaintiff argues that BNY's motion should be denied as premature pursuant to CPLR 3212 (f), because she has not had the opportunity to depose Debra Modra, a former BNY Vice President. Plaintiff contends that Modra is a key witness, because she worked in the same department as plaintiff, and also complained about sex discrimination. Plaintiff's argument is without merit. It is well settled that to deny a motion for summary judgment on the ground that "facts essential to justify opposition may exist, but cannot then be stated," there must be a likelihood of discovery leading to such evidence (Frierson v Concourse Plaza Assocs., 189 AD2d 609 [1st Dept 1993]). "Mere hope that somehow the plaintiffs will uncover evidence that will prove their case provides no basis for postponing a decision on a summary judgment

motion” (Fulton v Allstate Ins. Co., 14 AD3d 380, 381 [1st Dept 2006] [internal quotation marks and citations omitted] [reversing denial of summary judgment which implicitly granted cross motion to compel discovery pursuant to CPLR 3212 (f)]).

Here, it is clear that a deposition of Modra will not shed any light on the matters addressed in the motion papers. The fact that this court may have previously ordered the deposition to take place in discovery does not change this fact (see e.g. Kennerly v Campbell Chain Co., 133 AD2d 669 [2d Dept 1987] [rejecting plaintiff’s contention that summary judgment should have been denied until he had an opportunity to conduct court-ordered depositions]). As plaintiff conceded in her deposition, and as demonstrated in Modra’s affidavit, submitted in connection BNY’s reply, Modra does not possess any relevant personal knowledge regarding any of the employment decisions forming the basis of plaintiff’s discrimination and retaliation claims (see e.g. Altebrando v Gozdziwski, 13 Misc 3d 1241 [A] [Sup Ct, NY County 2006], affd ___ AD3d ___, 2008 WL 191807 [1st Dept 2008] [denying plaintiff’s cross motion for discovery pursuant to CPLR 3212 (f) where the discovery sought did not relate to the issues in the case]; see also Arendt v General Elec. Co., 270 AD2d 622 [3d Dept 2000] [denying plaintiff’s motion to compel defendant to produce its CEO for a deposition where plaintiffs failed to show that CEO possessed necessary and relevant information germane to plaintiffs’ lawsuit]).

Modra worked under plaintiff for approximately eight months in 2006 (Modra Aff., ¶¶ 3-4). For this brief period of time that Modra worked under plaintiff, she was plaintiff’s subordinate, and “did not participate in any employment decisions concerning” plaintiff (id., ¶ 5, Pl Dep., at 278-285). In fact, as plaintiff acknowledged, and Modra confirms, Modra did not

participate in any decisions concerning plaintiff's employment, and was not present at any meeting between plaintiff and Bieselin, Puck and/or Potter, regarding plaintiff's potential promotion to Managing Director, plaintiff's performance, plaintiff's compensation, or plaintiff's job responsibilities (Modra Aff., ¶¶ 5-6; Pl Dep., at 278-88, 328). Thus, Modra has no possible evidence relating to plaintiff's claims, and, therefore, plaintiff has failed to satisfy her burden under CPLR 3212 (f).

The fact that Modra internally complained about gender discrimination (Pl Opp., at 23) does not change this conclusion, as "an employee's comments about [her] own situation, and not that of the plaintiff, [have] no bearing on the issue of discrimination" (Malarkey v Texaco, Inc., 983 F2d 1204, 1211 [2d Cir 1993]; see also Martin v Citibank, N.A., 762 F2d 212, [2d Cir 1985] [statement of another employee about his experience regarding discrimination in the terms and conditions of his own employment cannot support a claim of unlawful employment discrimination]; Alleyne v Four Seasons Hotel – NY, 2001 WL 135770 [SD NY 2001], affd 25 Fed Appx 74 [2d Cir 2002] [alleged discriminatory acts against employees other than plaintiff were not probative of plaintiff's discrimination claim]). Since, as plaintiff stated in her deposition, "[t]his lawsuit is about myself" (Pl Dep., at 460), her request that BNY's summary judgment motion be denied under CPLR 3212 (f) so that she may depose Modra must be denied.

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 28, 2008

ENTER:



J.S.C.

FILED

MAR 05 2008

NEW YORK
COUNTY CLERK'S OFFICE