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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 113558/2007
CARALP, EDWIGE
VS.
CREDIT AGRICOLE CHEUVREUX
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 113558/07
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1, 2, 3, 4
Answering Affidavits — Exhibits	5
Replying Affidavits	6, 7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
JAN 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 26, 2009

MARTIN SHULMAN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 1

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EDWIGE CARALP,

Plaintiff,

Index No.: 113558/07

-against-

DECISION AND ORDER

CREDIT AGRICOLE CHEUVREUX NORTH AMERICA, INC., KHALED BEYDOUN, FRANCOIS SIMON, JEAN-CLAUDE BASTIEN, ANTHONY WEST, and IAN PEACOCK,

Defendants.

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SHULMAN, J.:

Defendants move for summary judgment, pursuant to CPLR 3212. Plaintiff is a former employee of corporate defendant Credit Agricole Cheuvreux North America, Inc. ("Cheuvreux"), a broker of European securities. Cheuvreux terminated plaintiff and she is now suing defendants for unlawful discrimination based on gender, pregnancy, disability and sexual harassment, pursuant to New York State Executive Law § 296, and the New York City Administrative Code § 8-107.

Defendant Khaled Beydoun ("Beydoun") is head of Cheuvreux' North American clients and was plaintiff's direct supervisor. Defendant Anthony West ("West") had been plaintiff's supervisor, but left Cheuvreux prior to the decision to terminate plaintiff. Defendant Ian Peacock is Cheuvreux' Chief Executive Officer, but was not involved in the decision to terminate plaintiff. Jean-Claude Bastien and Francois Simon, although named in the caption, were not served, and therefore are not parties to this action.

In March, 2006, plaintiff joined Cheuvreux as a French Specialist, at an annual salary of $150,000. Plaintiff's official title was Vice President-Sales. After joining

Cheuvreux, plaintiff received a copy of Cheuvreux' Employee Handbook, which detailed the company's "Equal Employment Opportunity/Sexual Harassment Policy and Complaint Procedure" and a "Short-Term Disability Policy" that included pregnancy leaves.

On May 15, 2006, Nicolas D'Halluin ("D'Halluin") accepted employment with Cheuvreux as a second French Specialist. D'Halluin had been plaintiff's direct supervisor at a former place of employment.

In June, 2006, plaintiff learned that she was pregnant, but did not inform anyone at Cheuvreux of that fact until July 19, 2006. By the time plaintiff notified Cheuvreux that she was pregnant, D'Halluin had already started working at Cheuvreux.

On November 24, 2006, plaintiff commenced her pregnancy leave and, during the period of her leave, plaintiff agrees that she received all of the benefits to which she was entitled, according to Cheuvreux' "Short-Term Disability Policy."

Starting in January, 2007, all salespersons at Cheuvreux began reporting directly to Beydoun. On February 19, 2007, plaintiff returned to work.

At a management review of 2006 production figures, it was determined that plaintiff's production was the lowest in the unit. Plaintiff's revenues for the six months she worked in 2006, prior to taking pregnancy leave, were $335,465. The next lowest producer had been working at Cheuvreux for only four and a half months in 2006, and had revenues of $654,641. D'Halluin's revenues for 2006, from his start date of July 3, 2006, were $1,722,301. The decision was made to eliminate the second French Specialist position held by plaintiff.

On March 5, 2007, Beydoun met with plaintiff and told her that her French Specialist position had been eliminated, but he would consider her for employment as a Pan-European salesperson, for which she had to submit a proposed business plan. Plaintiff submitted her proposed plan on March 8, 2007, but, allegedly, Beydoun found the plan insufficient, and plaintiff was terminated on March 12, 2007. Plaintiff received four months' severance pay and defendants assert that her former position was not replaced. D'Halluin remains the only French Specialist.

Plaintiff has alleged two incidents of sexual harassment. The first allegedly occurred in September, 2006, when Francois Simon pointed to plaintiff and another pregnant employee, said "you too," and then moved his hands in front of his stomach, indicating a round belly. The other employee states that the incident did not occur.

The second alleged incident of sexual harassment occurred at a company social outing during the summer of 2006, when Bastien, a Cheuvreux executive, pointed to plaintiff's open-toed shoes and said that he found her pedicure sexy, and that red-polished women's toes were his fantasy.

There is no indication as to whether plaintiff ever reported these incidents to the company, pursuant to the Employee Handbook's sexual harassment procedures. In support of her claims, plaintiff submits an affidavit from one of her attorneys who states that plaintiff was one of only three women in Cheuvreux' equity sales department, out of a total of 13 employees. After plaintiff's employment was terminated, the attorney alleges that Cheuvreux got rid of another woman, leaving only one female employee out of a total number of 14 employees. The attorney fails to identify the other female who was terminated.

Plaintiff has also submitted her own affidavit, in which she states that she was told by someone in human resources that Cheuvreux was not a place for a woman to work. She also disputes the allegation that her performance was poor, and also says that D'Halluin's performance was not as stellar as defendants aver.

In response, defendants submit affidavits from Cheuvreux' Chief Financial Officer, a woman, who states that Cheuvreux did not fire any other female employee, but Cheuvreux did terminate a male employee, hired after plaintiff, for poor performance. She further affirms that Cheuvreux currently employs 17 salespersons, 5 of whom are women.

Plaintiff asserts eight causes of action. The first three causes of action, alleging unlawful discrimination, retaliation and aiding and abetting unlawful discrimination, are based on New York State Executive Law § 296. The last five causes of action, alleging the same grounds as the first three, plus intimidation and employer acquiescence to unlawful discrimination, are based on New York City's Administrative Code § 8-107.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If

there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

The New York State Human Rights Law § 296 makes it "an unlawful discriminatory practice ... [f]or an employer ... because of the ... sex ... of any individual ... to discriminate against such individual in ... conditions ... of employment [internal quotation marks omitted]." *Espaillat v Breli Orignals, Inc.*, 227 AD2d 266, 268 (1st Dept 1996).

New York City Administrative Code § 8-107 (1) (a) makes it an unlawful discriminatory practice

> "For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status 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 *Forrest v Jewish Guild for the Blind*, 3 NY3d 295 (2004), the court said that:

> "[t]o prevail on their summary judgment motion, defendants must 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. In that event, summary judgment would constitute a highly useful device for expediting the just disposition of a legal dispute for all parties and conserving already overburdened judicial resources [internal quotation marks and citations omitted]."

Id. At 305.

"The standards for recovery under the New York State Human Rights Law (see Executive Law § 296) are the same as the federal standards under Title VII of the Civil Rights Act of 1964 [citations omitted]." *Id.* According to the court in *Sogg v American Airlines, Inc.*, 193 AD2d 153, 155 (1st Dept 1993), these standards

> "relating to burden and order of proof in employment discrimination cases brought under the Human Rights Law are the same as those established by the United States Supreme Court in *McDonnell Douglas Corp. v Green.* The three-step process laid out in [that case] requires that, first, the plaintiff establish a prima facie case of discrimination. If the plaintiff sustains this burden, the defendant must offer rebuttal evidence articulating a legitimate, independent, nondiscriminatory reason for its actions. Once defendant does so, in order to prevail plaintiff must prove, by a preponderance of the evidence, that the defendant's stated reasons are only a pretext for discrimination [internal citations omitted]."

Thus, for plaintiff to make out her prima facie case, she must establish that: 1) she is a member of a protected class; 2) she was qualified to hold the position in question; 3) she was terminated from employment; and 4) the discharge occurred under circumstances that give rise to an inference of unlawful discrimination. *Forrest v Jewish Guild for the Blind, supra* at 305.

In the instant matter, plaintiff satisfies the first three prongs without question. Plaintiff is female and was pregnant, and so is and was a member of a protected class. Defendants do not dispute that she was hired because she was qualified for the position, nor is it in issue that she was fired. Therefore, the only question remaining is whether her termination occurred under circumstances giving rise to an inference of unlawful discrimination.

Looking at all of the evidence in a light most favorable to plaintiff, it may be conceded that she has met this prong as well, but only with respect to her claim of unlawful discrimination based on gender, pregnancy and disability. Plaintiff has not met her initial burden with respect to her claim of sexual harassment.

There is no evidence that plaintiff complained to anyone at Cheuvreux of the alleged incidents of sexual harassment that she maintains created a hostile work environment. *See generally, Pace v Ogden Services Corp.*, 257 AD2d 101 (3d Dept 1999).

> "Hostile work environment sexual harassment exists when the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the terms or conditions of employment. Whether a workplace may be viewed as hostile or abusive can be determined only by considering the totality of the circumstances. [I]solated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment [internal quotation marks and citations omitted]."

Macksel v Riverhead Central School Dist., 2 AD3d 731, 731-732 (2d Dept 2003); *Thompson v Lamprecht Transport*, 39 AD3d 846 (2d Dept 2007). Since plaintiff has not provided evidence that the alleged harassment was pervasive, nor has she indicated that she made the managers at Cheuvreux aware of her concerns, the causes of action based on sexual harassment must be dismissed.

Nor has plaintiff met her initial burden with respect to her cause of action for retaliation. To establish a claim of retaliation, a plaintiff must establish: "(1) engagement in a protected activity; (2) the employer's awareness of participation in that activity; (3) an adverse employment action based on that activity; and (4) a causal

connection between the protected activity and the adverse action taken by the employer." *Hernandez v Bankers Trust Co.*, 5 AD3d 146, 148 (1st Dept 2004).

Plaintiff has provided no evidence of any of these requisite elements to sustain this cause of action. Summary judgment may be properly granted on a cause of action alleging retaliatory termination where there is no evidence that plaintiff ever complained to anyone at Cheuvreux, including the human resources department, of any alleged wrongful conduct. *Dunn v Astoria Fed. Sav. & Loan Ass'n*, 51 AD3d 474 (1st Dept 2008).

Therefore, the only claims for which plaintiff has arguably met her burden of establishing a prima facie entitlement are those for the unlawful discrimination claims, based on plaintiff's gender, pregnancy and disability. The burden now shifts to defendants to prove that plaintiff's termination was based on legitimate, nondiscriminatory reasons.

The evidence submitted with the motion indicates that plaintiff's job performance was well below that of all of the other salespersons in her unit. Although an inference may be drawn from statistical evidence, or the fact that the position was filled or held open for a person who is not in the same protected class as plaintiff (*Sogg v American Airlines, Inc.*, 191 AD2d at 156, *supra*), here, the alleged statistic was provided, on plaintiff's behalf, from her attorney, an individual without personal knowledge of the facts, and stated without any indication as to how his information was gathered. These unsubstantiated conclusions of plaintiff's attorney are insufficient to sustain plaintiff's

burden. *Batista v Santiago*, 25 AD3d 326 (1st Dept 2006). Additionally, there is no evidence that anyone was hired to replace plaintiff.

In her affidavit, plaintiff contradicts some of the statements made at her examination before trial. For example, in her affidavit, plaintiff says that she was aware of other pregnant women being fired by Cheuvreux, whereas in her deposition she stated that she did not know of any other pregnant women being fired. Furthermore, plaintiff gives no indication of the source of her knowledge. "[A] party's affidavit that contradicts [his or her] prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment." *Pippo v City of New York*, 43 AD3d 303, 304 (1st Dept 2007); *Burkoski v Structure Tone, Inc.*, 40 AD3d 378 (1st Dept 2007).

"Plaintiff has failed to demonstrate that her job performance was satisfactory, or that defendants' reasons for terminating her employment were pretextual." *Basillote v Holsa, Inc.*, 34 AD3d 347 (1st Dept 2006). Based on the foregoing, defendants' motion for summary judgment on plaintiff's causes of action for unlawful discrimination based on her gender, pregnancy and disability is granted. Lastly, plaintiff's cause of action for aiding and abetting unlawful discrimination cannot be maintained, because she has failed to prove discrimination, retaliation or sexual harassment. *Strauss v New York State Dep't of Educ.*, 26 AD3d 67 (3d Dept 2005).

For the foregoing reasons, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants 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.

This constitutes the decision and order of the court. Courtesy copies of this decision and order have been sent to counsel for the parties.

DATED: January 26, 2009

Martin Shulman, J.S.C.