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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 116643/2006

BARON, SUSAN

VS

NORTH FORK BANK

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 12/23/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

...is 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant North Fork Bank for summary judgment dismissing the complaint is denied; and it is further

ORDERED that plaintiff's request for a missing document charge is denied, at this juncture, without prejudice to renew at the time of trial; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED

FEB 18 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/17/09

J.S.C.

HON. CAROL EDMEAD

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 35

----------X

SUSAN BARON,

Plaintiff,

-against-

NORTH FORK BANK,

Defendant.

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Index No. 116643/06

Motion Sequence #004

MEMORANDUM DECISION

Plaintiff, Susan Baron ("plaintiff"), commenced this action against defendant North Fork Bank ("North Fork" or the "Bank"),[1] alleging claims of age discrimination and retaliation under New York State Human Rights Law §296 *et seq.* and the New York City Administrative Code §8-504(a), based on certain performance counseling memoranda she received and her termination following her complaint of age discrimination.

The Bank now moves for summary judgment dismissing the complaint.

Factual Background

According to plaintiff, in March 1994, plaintiff commenced employment with North Fork's corporate predecessor, Commercial Bank of New York, as a Business Development Officer and Assistant Vice-President. After Commercial Bank's merger with North Fork, plaintiff remained employed at North Fork's "Street branch." Subsequently, plaintiff was transferred to the private banking division. She was transferred again in December 2003, to North Fork's Street branch.

In August 2005, plaintiff came under the direct supervision of Margaret Coppola ("Coppola") and Nicole Rospond ("Rospond"). From the commencement of her career with North Fork's corporate predecessor until she came under the supervision of Coppola and Rospond, plaintiff received uniformly

[1] According to defendant, North Fork Bank is now Capital One, NA by reason of merger.

positive performance evaluations.

Following her transfer to the Bank's Street branch, on November 3, 2005, Coppola and Rospond advised plaintiff of deficiencies in her performance, which were detailed in a "counseling memorandum" (the "November 2005 Counseling Memorandum"). Plaintiff was also advised of the Bank's goals and performance expectations, and in turn, plaintiff was to provide ideas and recommendations (the "Action Plan") to her supervisors within two weeks. Plaintiff signed the November 2005 Counseling Memorandum.

According to the record, on November 28, 2005, the Bank issued plaintiff a follow-up memorandum detailing her job requirements and performance expectations (the "November 2005 Follow-Up Memorandum"). On January 5, 2006, a meeting was held between plaintiff and her supervisors. At that time plaintiff was reminded that she failed to provide the Action Plan.

On January 6, 2006, plaintiff responded to the Bank in writing, wherein she asserted her qualifications and impliedly denied the existence of any problems.

On January 17, 2006, plaintiff was provided another memorandum, advising of her failure to provide an Action Plan to improve performance (the "January 2006 Second Memorandum"). Plaintiff was given until January 27, 2006 to provide her Action Plan, in order to address the areas in the November 2005 Counseling Memorandum.

On January 26, 2006, the day before the Action Plan was due, plaintiff wrote to the Bank's human resources department complaining that ". . . I have become increasingly concerned that I may be the target of age discrimination" ("plaintiff's Complaint Letter").

Upon receipt of plaintiff's Complaint Letter, Linda Migliorisi, Vice President of Human Resource manager for the Bank contacted plaintiff to arrange for an interview to obtain the specifics, if any, of plaintiff's "concern" in furtherance of an investigation thereof (see February 2, 2006 letter references to

"recent conversations").

When plaintiff refused to be interviewed without the presence of her attorney, Linda Migliorisi advised plaintiff there was no right to counsel and that she had a duty to cooperate with the investigation by engaging in an interview, especially given the absence of any specifics. Linda Migliorisi responded to plaintiff in writing on February 2, 2006, advising plaintiff of the following:

> . . . Pursuant to the Bank's policy, I contacted you to arrange for an interview in furtherance of any investigation of this matter. You have an obligation to attend such an interview and cooperate. You have refused to attend such an interview in the absence of your counsel. Please be advised that the Bank is not required to and does not permit such a practice. Your refusal to cooperate with the investigation constitutes insubordination and precludes the Bank from conducting a full and fair investigation. Accordingly, unless and until you attend an interview regarding your complaint, the file will be closed with a notation that the Complainant refused to cooperate. The issue of your insubordination will be reviewed based upon your response to this letter.

In response, by letter dated February 6, 2006, plaintiff stated that the February 2, 2006 letter unfairly impugned her work performance, and that her request that her attorney be present at her interview was not unreasonable. Plaintiff stated that Linda Migliorisi's response raised a serious question as to whether her investigation was fair and impartial. Plaintiff asserted that she had been a diligent, productive and loyal employee, who had never acted in an insubordinate manner during her employment at the Bank, and that she carried out all of her duties for the past 10 years.

On March 17, 2006, Linda Migliorisi responded to plaintiff's letter, again advising plaintiff of her obligation to cooperate with the investigation. Plaintiff was advised of her continuing insubordination in refusing to provide an Action Plan. Plaintiff was given "a last opportunity" to provide the Action Plan by March 27, 2006. Plaintiff was also warned that her failure to produce the Action Plan or engage in any other insubordination, or failure to improve her performance, "will subject" her to "further disciplinary action, up to and including termination of employment."

On March 22, 2006 plaintiff received her annual performance review. The review reflected

generally unsatisfactory performance and deficiencies in organization/prioritization, time management and product knowledge.

On March 27, 2006, plaintiff finally provided an Action Plan. In the Action Plan plaintiff outlined organizational efforts she had undertaken and proposed an intense computer advancement program. She agreed to prioritize work, improve e-mail handling, and undergo additional training to utilize software.

Almost four months later, on July 12, 2006 plaintiff's employment was terminated by reason of inadequate performance. The termination memorandum detailed numerous performance deficiencies.

Plaintiff was fifty-eight years old at the time of her termination.

This action for age discrimination and discriminatory retaliation ensued.

Defendant's Motion

Based on the facts, the Bank was entirely justified in counseling plaintiff for her performance deficiencies and ultimately terminating her employment for performance issues. The Bank repeatedly cited specific performance deficiencies an afforded plaintiff numerous opportunities to improve. The Bank tried to involve plaintiff in the improvement process through a proactive Action Plan; however, plaintiff's response letter on January 6, 2006 failed to address any of the specific items in the Bank's November 2005 Counseling Memorandum or provide any ideas or recommendations for improvement as requested. Plaintiff refused to participate in the improvement process until faced with termination of employment.

The facts further reveal that plaintiff's "Complaint Letter" was nothing more than a ploy to prevent further disciplinary action. Plaintiff's "complaint" failed to set forth any details regarding plaintiff's "concern," and plaintiff entirely refused to cooperate with the investigation into her "allegations of discrimination." Complaints are investigated and resolved pursuant to the non-discrimination policy maintained and published as a part of the Bank's employee handbook. The initial part of any

investigation is the interview of the complainant; however, plaintiff refused to be interviewed in the absence of an attorney. Had the complaint been real, plaintiff surely would have cooperated and pursued it, consistent with the Bank's policies. This simple case of classic non-performance resulting in termination of employment should be dismissed, as there is no basis for the complaint.[2] Thus, based upon the facts as set forth above, no issues of fact exist and summary judgment dismissing the complaint is warranted.

Opposition

Summary judgment must be denied because the deposition testimony of the parties and the Bank's internal emails raise genuine issues of material fact as to whether plaintiff was fired because of her age and because she complained of age discrimination. The record contains substantial evidence that defendant's stated reason for firing plaintiff was a pretext for illegal discrimination and retaliation.

The direct evidence of the Bank's discriminatory intent includes a barrage of derogatory remarks directed at her by her managers, including being referred to as "too old," "an old bat," "smelling like an old person." Following her transfer to the Street branch, both Coppola and Rospond began directing derogatory comments to plaintiff concerning her age. Plaintiff testified:

> A. I was called old and told that my clothes smelled, my coat smelled. I made too much noise when I walked. I couldn't do-that I was old bat. I got cold like an old lady because I wore a fur coat. They commented you get cold like an old lady. . . .
>
> *****
>
> Q. When did she make each of the comments-
> A. I don't remember when.
> Q. -That you told me about.
> A. I don't remember when. They were made a lot. You know a lot.
>
> *****
>
> Q. How many of these comments were made?
> A. I don't how many. Quite a few, it was happening quite a lot.
> (Plaintiff EBT, pp. 20-24)

Such derogatory references to plaintiff's age constitute direct evidence of age discrimination and

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[2] The Court notes that defendant did not submit a memorandum of law in support of its motion.

raise genuine issues of material fact for trial.

Additional proof establishes that plaintiff's termination was illegal. The Bank managers contradicted each other as to who made the decision to fire plaintiff. Linda Migliorisi, Vice President of Human Resource manager for the Bank, testified that she did not participate in the termination decision but rather was only asked to review the decision after it was made by plaintiff's supervisors. However, plaintiff's direct supervisor, Coppola, testified that the directive to terminate plaintiff came from Linda Migliorisi. This classic instance of pointing of fingers at one another and attempt by plaintiff's managers to distant themselves from the illegal firing raise genuine issues of material fact concerning defendant's motivation for the firing. Also, the decision makers implausibly denied knowledge of plaintiff's internal age discrimination complaint while she was still employed, denials that are expressly contradicted by documentary proof. Coppola testified that she first learned that plaintiff made a discrimination complaint in "late 2007," from "Linda Migliorisi," after plaintiff left the employ of the Bank. However, Coppola conceded at her deposition that she received a letter written by plaintiff during plaintiff's employment, wherein plaintiff writes that she "is increasingly concerned that she may be the target of age discrimination." To maintain her credibility, Coppola testified that she did not understand plaintiff to be complaining of age discrimination. Coppola's testimony is also contradicted by the following email written by her in February 2006: " . . . Additionally, it may be seen by her as another example of (perceived discrimination)." Coppola's obviously perjurious testimony regarding a central issue in contention raises a genuine issue of material fact warranting a trial.

Further, the failure of plaintiff's managers to communicate with her regarding her age complaint or their "concerns" regarding her appearance belies their claim that the purpose of the counseling memoranda was to improve her performance rather than set her up for discharge. With respect to the counseling memoranda, plaintiff asserts that the November 2005 Counseling Memorandum, which was

never provided to her, was read aloud to her in a meeting attended by Coppola, Rospond, and James Buck who was, in turn, their supervisor. The meeting was intended to make plaintiff's work life more difficult, and ultimately set her up for termination. The November 2005 Follow-Up Memorandum was hostile and designed to create a paper trail, and was a further effort to pressure and degrade her. The January 17, 2006 Second Memorandum was false, misleading, and designed not to counsel but to create a paper trail. Numerous disparaging remarks were directed at plaintiff that implicitly referenced her age and were intended to humiliate her and make her workplace uncomfortable for her. Further, instead of investigating plaintiff's Complaint Letter, Linda Migliorisi, in an effort to conceal wrongdoing rather than explore the truth, never conducted an investigation into plaintiff s complaint. Instead, managers of the Bank threatened to discipline plaintiff for insisting on her attorney being present for a meeting about her age complaint, and exchanged emails regarding their concern over plaintiff's smelly overcoat:

> . . . But also consider the consequences of letting her coat remain unkempt . . .
> . . . Every coat she wears to office has the same odor emanating from it.

No one ever confronted plaintiff concerning any of these concerns or raised them during plaintiff's eleven years of employment. Indeed, the aforementioned internal email highlighted plaintiff's manager's awareness that their "concerns" potentially raised discrimination issues. An employer truly interested in having plaintiff succeed would at least speak to her regarding that type of employment concern. Although plaintiff requested a copy of the November 2005 Counseling Memorandum, the bank refused to provide her with such a copy. According to Coppola's deposition testimony, "Human Resources" instructed him not to provide plaintiff with a copy of the Counseling Memorandum, a document that purportedly was generated to give her guidance on how to improve. Further, the Bank chose not to speak with her regarding purported issues of her appearance and hygiene despite the fact that they were important enough to warrant back and forth communications between the managers. This is not

the conduct of an employer interested in promoting a long term tenure of employment for plaintiff at the Bank.

Further, the Bank's failure to provide notes that Linda Migliorisi conceded she created about certain aspects of plaintiff's workplace conduct entitles the plaintiff to a missing document instruction. Migliorisi testified that she prepared documentation "that would be needed for the content in a counseling memorandum" "to have something to refer back to." Plaintiff repeatedly demanded production of the notes. When the notes were not provided, plaintiff made a motion to compel their production. The court ordered that the "Notes referred to in the motion" be provided within two weeks of the date of this order. However, the notes were never produced, and plaintiff is now entitled to an adverse inference which by itself raises genuine issues of material fact for trial.

Strong public policy considerations dictate a broad application of the Human Rights Law's protections, which should be interpreted liberally to achieve their intended purpose. Thus, as genuine issues of material fact exist concerning whether plaintiff's termination was motivated because of her age and because she complained of age discrimination, summary judgment must be denied.

Reply

Plaintiff failed to demonstrate that factual issues exists as to (a) whether she was satisfactorily performing her job and (b) whether her termination occurred under circumstances giving rise to an inference of discrimination. Plaintiff also failed to demonstrate that a factual issue exists as her claim for retaliation.

As to the alleged derogatory comments, first, such "statements" were never the subject of any communication to human resources or plaintiff's department head. Second, at her deposition, plaintiff had no recollection of the date or time of any such statement, except that it occurred approximately one year prior to her termination of employment. She admittedly did nothing as a result. Third, even if true,

such an isolated incident made remotely from termination of employment does not as a matter of law support an age discrimination claim.

Plaintiff's assertion that all of the counseling memoranda were false lacks merit. At her deposition, plaintiff professed no recollection as to most of the incidents reflected in the memorandum. In light of the unequivocal statements by the Bank's officers as to plaintiff's non-performance, her failure to recollect does not raise a triable issue of fact.

Nor did the Bank act in bad faith by failing to provide plaintiff with a copy of the initial Counseling Memorandum. Plaintiff was concededly supplied with a memorandum detailing the needed areas of improvement and requesting her help in fashioning a plan for her improvement. The memorandum was concededly discussed with plaintiff and plaintiff signed it. The counseling memoranda are discussed and not disseminated per Bank policy. Plaintiff failed to cooperate in improving her own performance until faced with disciplinary action. As a result, no triable factual issue exists.

The Bank asserts that plaintiff's Complaint Letter was not a complaint as to age discrimination. Plaintiff's purported "complaint" consisted solely of a statement that she "may be the target of age discrimination." The only "incident" cited was a management instruction to prepare a competent and relevant response to a counseling memorandum which plaintiff signed - a requirement plainly unrelated to age.

Assuming, that the Complaint Letter is deemed to be a "complaint," it nevertheless should not be treated as such. It is undisputed that plaintiff failed to provide any specifics at any time prior to discovery in this action, and refused to meet with the Bank's human resources department in furtherance of an investigation. Plaintiff's reason for the refusal, *i.e.*, to attend with counsel, was not a valid reason for plaintiff's failure to cooperate in the investigation. Indeed, plaintiff concedes in her complaint in this

action that she had no right to insist on the presence of counsel. Such lack of cooperation was plainly insubordinate and properly resulted in closure of investigation. Because of plaintiff's failure to make a true complaint of age discrimination and cooperate with an investigation there is no triable issue of fact as to the making of a complaint.

Further, the Bank argues that it did not fail to investigate plaintiff's age discrimination "complaint." The Bank made several efforts to attempt to investigate. It was only plaintiff's intransigence that prevented such investigation. Had plaintiff revealed to human resources the details she now asserts, an investigation could have been had. Plaintiff's refusal to cooperate in the investigation warrants a strong adverse inference against her.

Further, no factual issue exists as to who made the termination decision. As shown in moving affidavits, the decision was that of a group in which several officers had input. And, regardless of who had the ultimate authority, the decision was taken and it rested on sound non-performance grounds, as detailed in the documentation. And, there is also no causal nexus between the arguable "complaint" and the adverse acts by the Bank, six months thereafter.

Nor does the Bank's alleged failure to counsel plaintiff as to her personal behavior raise an inference of age discrimination. The fact that the plaintiff exhibited poor personal hygiene and eating habits was determined to be irrelevant to her non-performance and, therefore, not raised. Assuming that plaintiff's hygiene and personal habits did influence the decision to terminate her employment, then such termination would plainly not be age related. Thus, no triable issue of fact is raised.

Finally, the alleged inconsistencies in Coppola's deposition do not create a triable issue of fact. Whether Coppola viewed the letter of January 26, 2006 as an actual complaint as to age discrimination is irrelevant. Second, Coppola clearly explained her view that the Complaint Letter was not necessarily a complaint. Coppola's subsequent e-mail of February 23, 2006 is not to the contrary, since it only

reflects her perception of plaintiff's views a full month later.

Accordingly, there is no triable issue of fact as to the vast majority of plaintiff s performance deficiencies warranting warning and termination of employment. Under these circumstances, summary judgment is warranted as a non-discriminatory reason for termination exists.

As to the discovery issue, plaintiff's counsel was advised that Migliorisi conducted a search for such notes and it appeared that such notes did not exist.

Analysis

Where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [NY Sup Ct 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). On a defendant's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the plaintiff (*Kesselman v Lever House Rest.*, 29 AD3d 302, 816 NYS2d 13 [1st Dept 2006] *citing Goldman v Metropolitan Life Ins. Co.*, 13 AD3d 289, 290, 788 NYS2d 25 [1st Dept 2004]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts

sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

The standards for recovery under New York State Human Rights Law ("NYSHRL") and New York City Human Rights Law ("NYCHRL") are in accord with Federal standards under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) (*Ferrante v Am. Lung Assn.*, 90 NY2d 623, 629, 665 NYS2d 25 [1977] *citing Matter of Laverack & Haines v New York State Div. of Human Rights*, 88 NY2d 734, 738, 650 NYS2d 76; *see also Hanna v New York Hotel Trades Council*, 18 Misc 3d 436, 851 NYS2d 818 [Sup Ct New York County 2007] [noting New York City Council policy that NYCHRL is to be liberally and independently construed with the aim of making it more protective than its federal (Title VII of the Civil Rights Act of 1964) or state (Executive L. § 290 *et seq.*) counterparts, and that such other human rights laws "should merely serve as a base for the NYCHRL, not its ceiling"; however, "as the NYCHRL and federal Title VII address the same type of discrimination, are textually similar, and employ the same standards of recovery, New York courts . . . continue to attempt[] to resolve federal, state, and city employment discrimination claims consistently with *McDonnell Douglas*

Corp."]). Thus, on a claim of discrimination, plaintiff has the initial burden to prove by a preponderance of the evidence a *prima facie* case of discrimination (*Ferrante v Am. Lung Assn., supra, citing Texas Dept. of Community Affairs v Burdine*, 450 US 248, 252-253, 101 SCt 1089, 1093-1094; *McDonnell Douglas Corp. v Green*, 411 US 792, 802, 93 SCt 1817, 1824 [1973]). To support a *prima facie* case of age discrimination under NYSHRL and NYCHRL, plaintiff must demonstrate that (1) she is a member of the class protected by the statute; (2) she was actively or constructively discharged; (3) she was qualified to hold the position from which she was terminated; and (4) the discharge occurred under circumstances giving rise to an inference of age discrimination (*see Ferrante v Am. Lung Assn., supra*; *Holtz v Rockefeller & Co.*, 258 F3d 62, 76-77 [2d Cir 2001]). "By making out this 'minimal' *prima facie* case, . . . the plaintiff 'creates a presumption that the employer unlawfully discriminated,' and thus places the burden of production on the employer to proffer a nondiscriminatory reason for its action" (*Holtz v Rockefeller & Co., supra* at 77). Therefore, once plaintiff makes her *prima facie* showing, the burden of going forward shifts to defendant to demonstrate a valid business reason for the adverse action (*see Ferrante v Am. Lung Assn., supra* at 629). If such a reason is shown, then plaintiff bears the burden of demonstrating that age discrimination was the real reason for the adverse action (*McDonnell Douglas Corp. v Green., supra*).

However, since the defendant Bank is the movant, and must conclusively demonstrate its entitlement to judgment as a matter of law, the Bank must show that plaintiff does not have a *prima facie* case, or, failing that, the Bank must offer a non-discriminatory reason for the alleged adverse action (*see Hanna v New York Hotel Trades Council*, 18 Misc 3d 436 *supra*). The burden would then shift back to plaintiff to defeat the motion for summary judgment by showing that there is a material issue of fact (i) as to whether the Bank's asserted reason for the alleged national origin discrimination is false or unworthy of belief, and (ii) that it is more likely than not that plaintiff's age was the real reason

for the discrimination (*see Hanna v New York Hotel Trades Council*, 18 Misc 3d 436, *supra*).

It is undisputed that plaintiff falls within a protected class and that she was terminated. At issue is whether she was qualified to hold the position from which she was terminated and that her discharge occurred under circumstances giving rise to an inference of age discrimination.

Defendant's submissions indicate that plaintiff was advised of her poor work performance, was given performance goals and expectations in November 2005, and was given two weeks to create an Action Plan to improve her performance. When plaintiff failed to provide her Action Plan, plaintiff was given a follow-up memorandum detailing the Bank's expectations and requirements of the plaintiff. When plaintiff still failed to provide her Action Plan, plaintiff's managers met with her in January 2006, urging that she provide her Action Plan; plaintiff was given until January 27, 2006 to provide her Action Plan. According to defendant's submissions, plaintiff's performance had not improved by this time. Yet, instead of submitting her Action Plan, plaintiff complained about being the "the target of age discrimination." Thereafter, plaintiff refused to be interviewed in the absence of an attorney, and the Bank warned that the investigation would be closed unless plaintiff cooperated. In March 2006, instead of closing the investigation, the Bank continued to pursue plaintiff's cooperation with the investigation, and gave plaintiff additional time to submit her Action Plan. Plaintiff's continued failure to submit her Action Plan to address the Bank's initial's performance concerns, and her refusal to cooperate with the initial stages of the Bank's investigation into the complaint of age discrimination, support the Bank's position that plaintiff was insubordinate and that plaintiff failed to meet the Bank's performance standards. Thus, by the time plaintiff received her performance review in March 2006, the Bank had sufficient basis to give plaintiff an unsatisfactory performance review. The record also indicates that there was sufficient support for the Bank's conclusion that plaintiff lacked time management skills, and was lacking in product knowledge and in her ability to prioritize assignments. The memoranda do not,

on their face, indicate any improper discriminatory intent, and provide a non-discriminatory reason for plaintiff's termination. Therefore, the Bank's submissions indicate that plaintiff was not qualified to hold the position from which she was terminated and that there was a non-discriminatory reason for plaintiff's discharge.

However, in opposition, plaintiff submitted sufficient evidence from which a jury may conclude that the Bank's treatment of plaintiff, from the time she came under the supervision of Coppola and Rospond, was improperly motivated by plaintiff's age.

The record must be examined as a whole in order to ascertain whether, in light of all the circumstances, the evidence supports a finding of such "intent" to discriminate (*Sogg v American Airlines, Inc.*, 193 AD2d 153, 603 NYS2d 21 [1st Dept 1993] *citing City of Schenectady v State Div. of Human Rights*, 37 NY2d 421, 427, 373 NYS2d 59 [1975]).

In *Miles v North General Hosp.* (998 F Supp 377 [SDNY 1998]), the court denied the branch of defendants' motion for summary judgment to dismiss plaintiff's age discrimination claim. Plaintiff's performance reviews for the years 1991-1994 demonstrated that plaintiff, a Nursing Care Coordinator, had performance issues concerning the timely submission of reports, although she otherwise had favorable write-ups. Yet, plaintiff's 1994 evaluation, the year she was fired, "was, for the most part, favorable." "From March 1994 until plaintiff was fired on December 16, 1994, she received approximately eight written warnings concerning late reports as well as problems on her floor with patient care, including one dated December 16, 1994-the day plaintiff was fired." Yet, the court noted: ". . . Because an employer's 'intent and state of mind are implicated' . . . 'direct, smoking gun, evidence of discrimination is rarely available' . . . Courts must be mindful that 'clever men may easily conceal their motivations. . . .'" (*Id.* at 384). The court held that although there was strong evidence that defendants did not discriminate on any basis, there was sufficient evidence from which a jury could

conclude that plaintiff's discharge was based at least in part on plaintiff's age. According to the court, the evidence included: discriminatory remarks made by plaintiff's supervisor, even though plaintiff did not remember exactly when they were made in 1991 and 1992, two years before she was fired; the affidavits of the three former employees attesting to the claim that older employees were being forced to resign or retire; plaintiff's supervisor's purported harsh treatment of plaintiff; plaintiff's manager's effort to pad plaintiff's file with negative references to her performance; and the severe decision to fire, rather than demote or discipline in some other less severe fashion, a 55-year old employee with 25 years of service who was receiving satisfactory or better ratings in most categories on her evaluations, "when other [Nursing Care Coordinators] who were also remiss in submitting reports on time were not fired." Since a jury could reasonably conclude that, more likely than not, plaintiff was dismissed at least in part because of her age, summary dismissal of plaintiff's age discrimination claim was denied.

Here, the record contains evidence that plaintiff's manager's made explicit, derogatory references to plaintiff's age. Plaintiff testified that Coppola and Rospond, who issued plaintiff the memoranda which ultimately gave rise to plaintiff's termination, repeatedly called her "too old," referred to her as an "old bat," and told plaintiff that she "got cold like an old lady." Such direct evidence of age discrimination raises a genuine issues of material fact for trial (*Levin v Analysis & Technology, Inc.*, 960 F 2d 314 [2d Cir 1992] [reversing grant of summary judgment on plaintiff's age discrimination claim, where plaintiff alleged that his supervisors made specific derogatory references to his age]; *see, Schreiber v Worldco, LLC*, 324 F Supp 2d 512 [DCNY 2004] [holding that verbal comments by plaintiff's manager's about plaintiff's age constituted evidence of age discrimination]).

That such derorgatory "statements" were never the subject of any communication to human resources or "plaintiff's department head" is inconsequential; according to plaintiff, the statements were repeatedly made by plaintiff's immediate supervisors, Rospond and Coppola, who in turn issued the

memoranda giving rise to plaintiff's termination; further, Linda Migliorisi testified that the decision to terminate the plaintiff was made by Respond and Coppola. Under such circumstances, it cannot be said that such comments constitute "an isolated incident made remotely from [plaintiff's] a termination" and insufficient to support an age discrimination claim, as defendant argues. Further, that plaintiff had no recollection of the date or time of any such statement, except that it occurred approximately one year prior to her termination of employment, is also inconsequential for purposes of this summary judgment motion (*see Miles v North General Hosp.*, 998 F Supp 377, *supra*).

It is undisputed that plaintiff worked at the Bank for more than 10 years, and that her performance evaluations indicate that she received uniformly positive performance evaluations for her entire career at the Bank. It is also undisputed that plaintiff enjoyed positive performance evaluations until Rospond and Coppola, who allegedly made the derogatory, age-related comments, became plaintiff's immediate supervisors.

Further, plaintiff set forth sufficient evidence from which a jury may conclude that the Bank's purported reason for her termination is unworthy of belief. Plaintiff points out that Linda Migliorisi of Human Resources testified that the decision to terminate plaintiff was made by plaintiff's supervisors and that she was only asked to review the determination. However, Coppola and Respond testified that Linda Migliorisi and the Human Resources made the determination to terminate the plaintiff.

As to her claim of retaliatory discrimination, plaintiff must show that (1) she was 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 activity, and (4) there is a causal connection between the protected activity and the adverse action (*Gallo v Alitalia-Linee Aeree Italiane-Societa per Azioni*, 585 F Supp 2d 520 [SDNY 2008]). "The causal connection needed for proof of a retaliation claim "'can be established indirectly by showing that the protected activity was closely followed in time by the adverse

action" (*Cifra v GE*, 252 F3d 205, 217 [2d Cir 2001] *quoting Reed v Lawrence & Co.*, 95 F3d 1170, 1178 [1996], *quoting Manoharan v Columbia Univ. Coll. of Physicians & Surgeons*, 842 F2d 590, 593 [1988]).

Although plaintiff's Complaint Letter did not provide specifics, plaintiff expressly stated that she believed she was the subject of age discrimination, and the Bank responded by beginning to undertake an investigation into her complaint. The Bank's claim that plaintiff's Letter Complaint was not a complaint of discrimination is belied by the actions it sought to undertake in response to the Complaint Letter. Therefore, it cannot be said that plaintiff did not engage in protected activity. Further, an issue of fact exists as to whether plaintiff's supervisor's were aware of plaintiff's Letter Complaint. At her deposition, Coppola conceded that she received a copy of plaintiff's Complaint Letter while plaintiff was still employed at the Bank. Although Coppola testified that she did not understand plaintiff to be complaining of age discrimination, Coppola drafted an email in February 2006, one month after receiving plaintiff's Complaint Letter, wherein she refers to "another example of (perceived) discrimination." Plaintiff was terminated subsequent to her filing of her Complaint Letter.

In light of the issues of fact as to whether plaintiff's termination was based in part on her age and/or her filing of the Letter Complaint, dismissal of plaintiff's retaliation claim is also unwarranted (*Dodson v CBS Broadcasting Inc.*, 2004 WL 1336231 [SDNY 2004] *citing Triola v Snow*, 305 F Supp 2d 264, 271 [EDNY 2004] [retaliation claim "contain[s] disputed issues of material fact, namely, whether [supervisor] King's actions were done in retaliation for Plaintiff's EEO complaints or because the Plaintiff was an unsatisfactory employee," including conflicting testimony between plaintiff's supervisors. "King alleges that he removed the Plaintiff . . . because [another supervisor] Weaver told him that the Plaintiff was 'not working out,' . . . Weaver, however, does not recall this conversation

and stated that the Plaintiff was doing a 'satisfactory job'"]; *Hernandez v Kellwood Co.*, 2003 WL 22309326 at 21 [SDNY 2003]["A material issue of fact does exist as to whether insubordination and poor performance on the part of Plaintiff were the real grounds for the firing or whether Plaintiff's discharge was actually retaliatory. Thus, the Court concludes that a rational jury could find that Defendants' stated rationale is a pretext for retaliation."]; *Spiegler v Israel Discount Bank*, 2003 WL 21488040 at 13 [SDNY 2003]["Because material issues of fact regarding the cause and timing of [plaintiff's supervisor's] decision to fire [plaintiff] remain," and because plaintiff has established a prima facie case of retaliation, plaintiff's "retaliation claims must be resolved at trial"]; *Shannon v Fireman's Fund Ins. Co.*, 156 F Supp2d 279, 291 [SDNY 2001]["Numerous courts have stated that 'a plaintiff may establish pretext and thereby successfully oppose summary judgment . . . by demonstrat[ing] weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, non-discriminatory reason for its action.' Although [defendant] argues that at most, the discrepancies in its explanations for [plaintiff's] termination create a weak issue of fact as to whether [defendant's] proffered reason for termination was untrue, this evidence may be used by the jury to infer pretext"]; *Shin v ITOCHU Int'l, Inc.*, 1998 WL 474198 at 5-6 [SDNY 1998][Based on evidence that "calls into question [defendant's] assertion of the timing of the termination decision . . . a reasonable juror could infer that [defendant's] explanation [for plaintiff's termination] is pretextual." Furthermore, plaintiff "had twice complained of 'discrimination' prior to the termination decision, and may have been viewed as a repeat 'complainer.' Plaintiff, therefore has satisfied her burden of demonstrating that the proffered reason for her termination was pretextual"]).

Further, contrary to the Bank's contentions, it cannot be said, as a matter of law that no causal nexus exists between the alleged comments made by plaintiff's immediate supervisors, Coppola and Rospond, and the treatment she received by these same supervisors, and her ultimate termination, based

in part on the actions undertaken by Coppola and Rospond.

As to plaintiff's request for an order directing a missing document instruction, the plaintiff is directed to move such relief before the trial judge. Although *Mantelli v New York City Health and Hospitals Corp.* (276 AD2d 373, 714 NYS2d 64 [1st Dept 2000]), to which plaintiff cites, held that a missing document charge was proper, since plaintiffs adduced evidence that the fetal monitoring strips at issue existed and had been in defendant's control, and defendant advanced no adequate explanation for their nonproduction, the underlying missing document charge was made at the time of trial by the "trial court" and here, the Bank indicates that a search for the notes generated by Linda Migliorisi produced no results. Therefore, plaintiff's request for a missing document charge is denied, at this juncture, without prejudice to renew at the time of trial.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant North Fork Bank for summary judgment dismissing the complaint is denied; and it is further

ORDERED that plaintiff's request for a missing document charge is denied, at this juncture, without prejudice to renew at the time of trial; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: February 17, 2009

Hon. Carol Robinson Edmead, J.S.C.