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

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

LEIGH SHORT,

Plaintiff,

- v -

DEUTSCHE BANK SECURITIES, INC.,

Defendant.

Index No.: 105678/05

Motion Date: 11/06/08

Motion Seq. No.: 005

Motion Cal. No.: _____

The following papers, numbered 1 to 11 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2, 3, 4, 5
Answering Affidavits - Exhibits	6, 7, 8, 9, 10
Replying Affidavits - Exhibits	11

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

The defendant Deutsche Bank Securities, Inc. ("Deutsche") pursuant to CPLR 3212 seeks summary judgment dismissing the plaintiff Leigh Short's ("Short") complaint that alleges employment discrimination based on gender. Short opposes Deutsche's motion.

Short, an Australian citizen, began working as an equities research salesperson on Deutsche's Asian and Australian Research Sales Desk in New York City in April 2001. Her primary duties were to establish relationships with institutional investors, to

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

provide them with research produced by defendant's research analysts, and to advise on and recommend the purchase and sale of securities. Deutsche's salespersons generated revenue when investors acted on the research by trading securities and paying commissions through Deutsche's trading desks. During the relevant period, Deutsche had an Australian sales desk and an Asian sales desk (collectively referred to as the "Australasian" sales desk), that sold research and gave advice relating to East Asia and Australia to U.S.-based customers.

In 2001, Deutsche bank upgraded its Australian and Asian research sales desks. As part of this upgrade, Deutsche hired Short from Merrill Lynch, where she had worked for approximately twelve years, almost exclusively selling Australian research. Her offer letter from Deutsche describes her position as "Director, Australian Sales." Short's compensation package was a base salary of $150,000 and a guaranteed bonus for 2001 of $425,000. For all years after 2001, the amount of her bonus, if any, would be entirely discretionary. Deutsche also agreed to pay Short a $49,800 annual housing allowance for two years under its Globally Mobile Employee Program.

Raymond Kim ("Kim") was selected to head the Australasian sales desk in the United States and became Short's direct supervisor two months after Short was hired. Short also reported, with respect to the Australian product, to Susan

Delmenico, head of Australian research sales in the U.S. and to the head of Australian equities, initially Robin Yandel, and later Steve Vrcelj, both of whom were located in Australia.

A little more than two and one half years later, Short submitted to Deutsche's Human Resources on February 17, 2004, an 100 page document alleging that Kim, who had managed her throughout that period, had discriminated against her and nearly every other female who reported to him at Deutsche. On April 16, 2004, Human Resources determined that "Our findings lead us to the conclusion that there is no support for a gender discrimination claim."

After her resignation on May 5, 2004, plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission in August 2004. Two years later, the EEOC determined that "there is a reasonable cause to believe that Respondent [Deutsche Bank] discriminated against Charging Party [Leigh Short] and a class of similarly situated females in its Asia and Australian Sales desks, in violation of Title VII."

As her first cause of action, Short asserts that Deutsche violated the New York City Human Rights Law (Administrative Code § 8-102[5]). Her second cause of action contends that Deutsche breached its responsibilities under the New York State Human Rights Law (Executive Law § 292). The third and last cause of action complains that Deutsche denied her rights as set forth in

the New York State Equal Pay Law (Labor Law § 194, or "New York EPA").

More specifically, Short alleges in her complaint that Kim discriminated against her and nearly every other females who reported to him, and that Deutsche knew about and allowed such discrimination. The acts of discrimination include paying Short and other women less money than their male counterparts; re-assigning higher-revenue generating accounts covered by women, including Short, to males; favoring males in the day-to-day operation and management of the desk; allowing men and not women to violate Deutsche's travel and entertainment ("t&e") policies; making unfounded allegations that Short violated the t&e policy and was subordinate; creating a intolerable working conditions by, among other things, fostering a culture of misogyny on the desk by harassing and threatening females and insisting that women act in a subservient manner to him; and ultimately forcing Short to leave Deutsche, as he had with other females who reported to him. As for Short's third cause of action pursuant to New York EPA, the complaint alleges that Deutsche paid her less "incentive compensation for her 2003 performance than less successful male employees".

New York EPA is one of twelve sections of Article 6 of the Labor Law, the "Payment of Wages" Act (Labor Law §190, et seq). In order to state a claim under New York EPA, a plaintiff must

show that she was "paid a *wage* at a rate less than the rate at which an employee of the opposite sex in the same establishment is paid for equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions (emphasis added)."

In Truelove v Northeast Capital & Advisory, Inc., 95 NY2d 220, 222 (2000), the Court of Appeals, in affirming the dismissal of plaintiff's claim for the balance of quarterly bonus installments under Labor Law § 193 ("Deductions from wages"), determined that Truelove's claim did not meet the statutory definition of wages set forth in Labor Law § 190.

Labor Law § 190 states that "[a]s used in this article: (1) wages mean the earnings of an employee for labor or services rendered". In Truelove, the Court of Appeals stated that "Courts have construed this statutory definition as excluding certain forms of 'incentive compensation' that are more in the nature of a profit-sharing arrangement and are both contingent and dependent, at least in part, on the financial success of the business enterprise". The Court held that factors, including that "...the declaration of the bonus pool was solely dependent upon his employer's overall financial success...[and that] plaintiff's share in the bonus pool was entirely discretionary and subject to the non-reviewable determination of his employer... "take plaintiff's bonus payments out of the statutory

definition of wages" under Article 6 of the Labor Law. *Id*, at 224.

The Appellate Division, First Department, relying on Truelove, has dismissed claims for bonuses under Labor Law §§ 191 ("Frequency of payments") and 193 ("Deductions from wages"). See Guiry v Goldman, Sachs & Co., 31 AD3d 70 (1st Dept 2006) and Hunter v Deutsche Bank AG, 56 AD3d 274 (1st Dept 2008).

Citing Truelove, Deutsche argues that the $368,800 bonus (that amount over and above Short's base salary of $150,000) that she received for 2003 does not constitute wages protected by the New York EPA.

Short does not dispute Deutsche's assertion that the incentive compensation was discretionary, and in fact, appends to her responsive papers a copy of Deutsche's Manual that states, in pertinent part, that "incentive compensation is discretionary and designed to reward employees for their individual performance, the performance of their division, and the overall financial success of Duetsche Bank." Instead, Short argues that "no case in the state of New York has ever limited the scope of state Equal Pay Act in this manner", meaning that no court has extended the application of Truelove to claims pursuant to Labor Law § 194. Plaintiff urges this court to limit Truelove and, by implication, its progeny Guiry and Hunter to Labor Law §§ 191 and 193 claims.

Statutes § 97 provides that "A statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent." Plaintiff provides no argument or basis for carving out New York EPA claims from the narrow definition of wages set forth in Labor Law §190(1). Doing so would be in complete derogation of the fundamental rule of statutory construction and interpretation stated in Statutes § 97. Therefore, as interpreted by the Court of Appeals in Truelove, Labor Law §190(1) does not cover the bonus that Short challenges in her third cause of action, which fails to establish a cognizable claim under the New York EPA.

Apparently in order to rescue her New York EPA claim, Short argues for the first time in opposition to Deutsche's motion, that gender was the basis for fixing the base salaries of the salespersons and that Deutsche paid her a lower base salary than it paid her male counterparts.

Putting aside the procedural prohibition against plaintiff's untimely claim [Abalola v Flower Hosp., 44 AD3d 522 (1st Dept 2008)], this court finds that Deutsche has established prima facie evidence that Deutsche paid equal wages to members of the opposite sex with respect to equal work on jobs requiring equal skill, effort and responsibility. Both sides agree that females and males on the Australasian sales "performed substantially similar work". As argued by defendant, Short testified under

oath that in 2001 she requested a base salary of $150,000 (and a guaranteed bonus of $425,000 for that year) and that Deutsche paid her that exact salary and bonus. She raises no issue of fact with respect to Deutsche's evidence that the base salaries paid to all the salespersons were derived after negotiations at the time of hire, and took into consideration the salary received prior to employment. The record establishes that the highest paid salespersons, including a female, received a higher base salary because their compensation at their prior employment was well in excess of what Short was earning when she left Merrill Lynch, and that Short's total compensation for 2001, including her housing allowance was nearly $625,000, more than twice the amount she received in compensation from Merrill Lynch in 2000.

The record before the court also shows that at the end of 2003, Short and the other salespeople on the Australasian sales desk who had a $150,000 base salary, two males and three females, received an "across the board" increase , i.e. all salespeople with a base salary of $150,000, including Short, received a salary increase to $165,000 effective January 1, 2004. In fact the only salesperson who did not receive a raise in his base salary of $150,000 was salesperson Cooper, who is a male. Short's assertion that in 2003 Deutsche paid all three women a base salary of $150,000 and the male directors an "average base salary in the amount of $160,000" has no basis in the record

before the court. Therefore, defendant has established its right to summary judgment dismissing Short's claim with respect to any base salary claim under the New York EPA.

Short's claims of disparate treatment in employment, including bonus awards, are cognizable under the New York State and New York City Human Rights Law. Such claims must be considered under the standards for recovery under those laws.

> The standards for recovery under section 296 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 (42 USC § 2000e et seq; see Rainer N. Mittl, Opthalmologist, P.C. v New York State Division of Human Rights, 100 NY2d 326, ... [2003]). Thus, "[b]ecause both the Human Rights Law and Title VII address the same type of discrimination, afford victims similar forms fo redress, are textually similar and ultimately employ the same standards of recover, federal case law in this area also proves helpful to the resolution of this appeal".

Forrest v Jewish Guild for the Blind, 3 NY3d 295, 391 (2004).

On a claim of employment discrimination under the federal and state laws, a plaintiff has the initial burden of showing, prima facie, that "(1) she is a member of a protected class; (2) she was qualified to hold the position, (3) she was terminated from employment or suffered other adverse employment action, and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination". Bailey v New York Westchester Square Medical Center, 38 AD3d 199, 122 (1st Dept 2007). "This initial burden has been referred to as 'de minimus'". Schwaller v Squire Sanders & Demsey, 249 AD2d 195 (1st Dept 1998).

> To prevail on a motion for summary judgment, an employer 'must demonstrate either the employee's failure to establish every element of intentional discrimination, or- having offered legitimate, nondiscriminatory reasons for the challenged action- the absence of a material issue of fact as to whether the explanations were pretextual' (citations omitted).

Bailey, supra, 123.

Moving for summary judgment, Deutsche has no dispute that Short meets the first two elements of her claim. However, Deutsche contends that Short has failed to meet her initial burden that she was either terminated or suffered other adverse employment action.

With respect to that element, Short contends that Deutsche constructively fired or terminated her as a result of a hostile work environment created by her supervisor Raymond Kim. She contends that the abusive work environment created by Kim became so intolerable that her resignation constituted a fitting response, that is a reasonable person would have felt compelled to resign.

The United States Supreme Court has stated:

> A hostile-environment constructive discharge claim entails something more: A plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign. *** '[U]nless conditions are beyond "ordinary" discrimination, a complaining employee is expected to remain on the job while seeking redress'.

Pennsylvania State Police v Suders, 542 U.S. 129, 147 (2004).

The Supreme Court held that "A constructive discharge involves both an employee's decision to leave and precipitating conduct" (id, at 148).

"A ... constructive discharge occurs... when an employer 'deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation' (citations omitted)". Fisher v KPMG Peat Marwick, 195 AD2d 222, 225 (1st Dept 1994). Lopez v S.B. Thomas, Inc., 831 F2d 1184, 1188 (2d Cir. 1987) characterized the inquiry as one of fact, stating that "[t]o find that an employee's resignation amounted to a constructive discharge, the trier of fact must be satisfied that the... working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." See also Thompson v Lamprecht Transport, 39 AD3d 846, 848 (2d Dept 2007).

On this motion, the court must afford Short, the non moving party, all favorable inferences. Holcomb v Iona College, 521 F3d 130, 137 (2d Cir. 2008). As with the other elements of an employment discrimination claim, plaintiff's initial burden of showing a constructive discharge is minimal. St. Mary's Honor Center v Hicks, 509 US 502, 506 (1993).

Stetson v NYNEX Service Company, 995 F2d 355 (2d Cir. 1993), where the Second Circuit affirmed the trial court's grant of defendant's motion for summary judgment dismissing a

"constructive discharge" claim, is instructive. In finding that the plaintiff in Stetson failed to meet his initial minimal burden, the court contrasted Stetson's claims with the assertions of the plaintiff in Lopez v S. B.Thomas, Inc., 831 F2d 1184 (2d Cir 1987), whose allegations, the Court held, made out such a claim.

In reversing the grant of summary judgment dismissing the claim of Lopez, an employee of Puerto Rican descent, for constructive discharge, the Second Circuit observed that

> According to Lopez, his supervisor had criticized his performance in ethnically degrading, lewd, and obscene terms. When Lopez complained to the defendant's vice president, the vice president suggested that Lopez resign. In addition, a few months later, the supervisor placed Lopez on 90 days' probation and told him that at the end of that period his employment would be terminated regardless of his performance. Ten days later, Lopez resigned. We ruled that these facts, if proven, would suffice to permit a reasonable fact finder to find that Lopez had been constructively discharged.

Stetson, at 360.

In distinguishing Lopez from the claims in Stetson, the Second Circuit cited prior precedent that established that constructive discharge generally cannot be established simply through evidence that an employee was dissatisfied with the nature of his assignments, or that he felt that the quality of his work has been unfairly criticized, or because working conditions were difficult or unpleasant.

The federal appeals court determined that

> though Stetson was dissatisfied with his assignments, with the criticisms of his work and with his compensation, the record falls far short of reflecting working conditions so difficult or unpleasant as to permit an inference that a reasonable person in Stetson's position would believe he was forced to resign.

See *Id.*

This court finds that Short likewise has failed to meet even her minimal burden of raising an inference that at the time of her resignation on May 4, 2004, the working conditions at the Australasian desk had escalated beyond the alleged "ordinary" discrimination that she contends she experienced on the Australasian sales desk ever since Kim's arrival. Collectively her allegations are very similar to those that the Second Circuit found to be insufficient in Stetson. Her allegations fail to show a "ratcheting " up of the discrimination to the "breaking point" for a reasonable person in her situation. See Petrosina v Bell Atlantic, 385 F3d 210, 230 (2d Cir. 2004).

New York courts have described the standard as the development of intolerable, not just difficult or unpleasant, work conditions after otherwise discriminatory circumstances, or as additional discriminatory actions that constitute a career-ending move. Best v Peninsula New York Hotel, 309 AD2d 524 (1st Dept. 2003).

In her e-mail message of resignation of May 5, 2004, Short wrote

> "Since November 2003, Ray Kim has continually attacked my professional character; negatively impacted my career

> path; and substantially reduced my remuneration. With such a hostile working environment, I went to HR and asked them to conduct an enquiry into his actions. Despite the findings of the investigation and promises of change, Ray Kim is still in his position. I am left with no option but to resign and seek legal counsel."

Absent from the record is even minimal support for Short's statement that she was "left with no option but to resign" because of anything done by either Deutsche or Kim.

First, this court concurs with Deutsche that its failure to demote Kim, standing alone, provides no evidence of a precipitating event. Since Kim was Short's supervisor throughout her employment, his continued status does not constitute the "ratcheting up" of discrimination required for an inference of constructive discharge.

Second, Short's complaint of a "substantial reduction in her remuneration" falls short as an intolerable work condition that forced her resignation. In fact, the record shows that her base salary increased as of January 1, 2004, from $150,000 to $165,000. The $368,800 bonus that Short received for 2003, which represented an 11% reduction from the prior year, starkly contrasts with the facts in Kirsch v Fleet Street, Ltd, 148 F3d 149 (2d Cir 1998), where the salesman's salary was cut more than 50%, his largest account reassigned, and where his manager made clear statements of his desire to hire younger employees. Instead, the irrefutable record shows that in 2003 Short received

the third highest bonus on the desk, behind two men, both of whom received $533,800, and a female, who received $418,800. Her bonus was higher than that awarded to six other salespeople reporting to Kim on the Australasian sales desk, five of whom were men.

Deutsche's argument that Short would have no way of knowing at the time of her resignation that her 2003 incentive compensation was behind that of two male salespersons, each of whom received $533,800, is persuasive that such circumstance was not a precipitating event. Also militating completely against Short's allegations that the reduction in bonus was "the last straw" is the fact that at all times, Short made known that if Kim had been demoted she would have returned to work.

Unlike the allegations in Lopez or Kirsch, Short makes no claim that Kim ever made any discriminatory comments to her. In further marked contrast to the coercive actions of the employers in those cases, Deutsche made repeated efforts to entice Short to remain in her position. Such actions included granting Short three months paid medical leave during its investigation of her complaint, and then, even after it concluded that Short had no basis for a gender discrimination claim, proposing that she return to the Australian sales desk, reporting directly to the new head of the Australian sales desk, Eric Roles, instead of Kim. Short's rejection of the offer as long as the position

required that she report even indirectly to Kim is further evidence of an autonomous decision on her part and of the absence of any circumstances that in any way resemble those alleged to have forced the plaintiffs' resignations in Lopez and Kirsch.

Her non-negotiable condition as to Kim's demotion also militates against her claim that change in duties, and shifting of her responsibilities from the Asian to the Australian equities forced her resignation. As in Stetson, her disaffection with her assignments coupled with allegedly unfair criticisms of her work and receipt of a reduced bonus is not evidence of intolerable conditions from which "'quitting was the only way [a reasonable person] could extricate herself'(citation omitted)." Petrosino v Bell Atlantic, 385 F3d 210, 231 (2d Cir. 2004).

That Short's decision was volitional and premeditated, is further evidenced by intentions she expressed to resign and leave the United States, well before she ever complained of gender discrimination. Such intentions were voiced seven months before the hostile work environment that she alleged in her resignation message. Nearly one year before her resignation, Short, on April 2, 2003, sent her sister-in-law in Australia an e-mail that indicated her plans to leave the Deutsche in 2004. "Do you want to be associated with my 2004 and on adventure...I've come up with the outline of a plan and I'm very excited. The logo is ..."MDR" in big letters." Subsequent e-mails from Short explain

that "MDR" stands for "My Dreams Realized," a plan to travel extensively and become a champion bridge player.

The arrangements for personal trips in the United States and Europe that she booked just two days after she filed her complaint and applied and was granted paid medical leave show the unfolding of the plans outlined in the e-mail that she sent to her sister-in-law the year before. There is further evidence that nothing Deutsche or Kim did compelled Short to leave, but that her resignation decision was entirely voluntary and a realization of her plan. During the early part of her unpaid medical leave, she notified the apartment management of her request to vacate her apartment effective March 26, 2004 (two months before the expiration of the lease term). Also, at no time during her unpaid medical leave, did Short submit to Deutsche any of the paperwork necessary for renewal of her work visa, which was due to expire at around the same time as her apartment lease. Her inaction with respect to her visa is particularly telling given that Kim had authorized its renewal for 2004 on December 15, 2003, during the very period when Short alleges that Kim was forcing her out.

Assuming arguendo that plaintiff has established prima facie that she suffered adverse employment actions in the form of the reduction of her bonus and reassignment of responsibilities in 2003, she has not met the minimal burden as to the final element

of her prima facie case, i.e. that such actions occurred under circumstances giving rise to an inference of discrimination.[1]

In the absence of direct evidence of discrimination, which Short lacks in this case, courts in New York utilize the order and allocation of proof regime enunciated in McDonnell Douglas Corp. v Green, 411 U.S. 792 (1973), and its progeny to evaluate claims under the New York State and New York City Human Rights Laws ("the McDonnell-Douglas test"). Under the McDonnell-Douglas test, once a plaintiff has established her prima facie case, the burden shifts to the defendant to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent and non-discriminatory reasons to support its employment decision. After the defendant has done so the burden shifts back to the plaintiff to prove the defendant's proffered reason was really a pretext for discrimination. Forest, 3 NY3d at 316-317.

To defeat a properly supported motion for summary judgment in an employment discrimination case, plaintiff must show that there is a material issue of fact as to whether the employer's asserted reason for the challenged action is false or unworthy of belief and more likely than not the employee's gender was the real reason. However, it remains the movant's burden to

[1]Short's allegations that in 2003 Kim lowered her performance ratings in three of four categories from "Exceeds expectations" to "Fully meets expectations", standing alone, do not constitute an adverse employment action.

establish entitlement to summary judgment as a matter of law. To prevail in this case, defendant must demonstrate, as a matter of law, that any adverse employment actions were based upon non discriminatory reasons. Ferrante v American Lung Association, 90 NY2d 623 (1997).

Short offers not one scintilla of evidence that would support an inference of discrimination with respect to her bonus award and work assignments in 2003.

The records show that the top three bonuses went to women in 2001, with Short receiving the highest award; in 2002, women received the first, second and fourth highest bonus, with Short again, the recipient of the highest bonus; and in 2003, the second and third highest bonuses, went to women, Short in third place.

Notwithstanding that it defies logic and common sense that in 2003 Kim would suddenly reduce Short's bonus and change her assignments because she is a woman, having given her excellent performance reviews in 2001 and 2002, extended her housing allowance when she was no longer entitled to it, and awarded her the highest bonus on the desk in 2002, the court assumes arguendo that Short has met her minimal burden to show Kim did so.

Defendant's nondiscriminatory reasons for the reduction in Short's bonus are that the bonuses of each and every salesperson, regardless of gender, declined when their guarantee expired.

Supporting this history is the fact that several males on the sales desk also received lower bonuses in 2003, the year after their guarantee, including three males who suffered even greater declines in their bonuses than Short and another women on the desk. As to Short's allegation that one male employee was overpaid a bonus in 2003, Deutsche's non-discriminatory reason is that while the revenue generated by the accounts of that employee increased significantly, the revenues generated in Short's accounts decreased during that same period. Short fails to proffer any evidence that contradicts Deutsche's non-discriminatory reasons or that supports her contention that gender was the real reason for the disparate treatment in the 2003 bonus awards.

Short fails to raise an inference that the reshuffling of account management was an adverse employment action, since there is no dispute that such reassignments were not demotions; nor did they lead to a significant diminution of material responsibilities. Nor does she offer any evidence that tends to show that Kim's request that Short devote a larger percentage of her time to the Australian market, which was consistent with her job title, constitutes an adverse employment action.

Short cites Zimmerman v Associates First Capital Corporation, 251 F3d 376 (2d Cir. 2001) to support her contention that Kim's reshuffling of account manager assignments occurred

under circumstances giving rise to an inference of discrimination. In Zimmerman, the court held that the mere fact that an employee was replaced by someone outside the protected class will suffice for the required inference of discrimination. However, Zimmerman is completely distinguishable on its facts from the action at bar since plaintiff in that case was terminated. In Zimmerman, two months after the arrival of a new supervisor, that supervisor fired plaintiff Zimmerman, who held the position of Assistant Vice President, and replaced her with a male.

In any event, analogizing the reassignment of Short's accounts to Zimmerman's being replace by a male, there is no evidence of gender animus here, as Short's Asia accounts were not assigned to a male salesperson. The evidence is that Kim reassigned management of the Asian product only on two of Short's accounts, and that he did not assign the Asian portions of the two accounts with whom Short had strong relationships. Further, one of the two Asian product accounts that Kim reassigned was to a female salesperson.

Even assuming that the re assignments arose in circumstances that raise an discriminatory inference, Short offers no evidence that tends to rebut Deutsche's evidence of non-discriminatory reasons for re-organization of the Australasian sales desk.

Among those reasons were that Kim reshuffled account manager accounts on a regular basis when the existing account manager had failed to improve Deutsche's revenues or broker rankings in that account; that Deutsche decided to devote more attention to its Australian business, where it was losing market share; that one of the two Australian salespersons left the desk, leaving it understaffed and in need of Short to fill the vacancy, as Short had a demonstrated record working the Australian market.

Even applying the remedial provisions of the City Human Rights Law, as amended by the Restoration Act, as liberally construed in (Williams v New York City Housing Authority, 2009 Slip Op 00440 [1st Dept 2009]), Short's opposition papers, improperly raising issues as to hostile work environment for the first time, do not raise any inference that she and/or other female salespersons suffered differential treatment, i.e. gender based discrimination, on the Australasian sales desk.

In terms of her allegations of an atmosphere of misogyny on the desk, the record is replete with evidence that both male and female salespersons were unhappy with Kim's management style. Nor are Short's allegations that Kim accused her of violating firm travel and entertainment policy by scheduling personal travel to the West Coast in November 2003 and accusing her of insubordination in an e-mail in December 2003 sufficient to establish gender animus as a matter of law.

Short's complaints that Kim entertained Deutsche client's at "strip clubs" during business travel in violation of the firm's policy are likewise insufficient. She admits that Kim never discussed this activity with her, and that her beliefs were solely based on rumors. It is significant that Short never mentioned the strip club issue in her internal complaint or to Deutsche's investigators, raising it for the first time in her EEOC Charge of Discrimination. Indeed, the evidence shows that when Deutsche learned of Kim's patronizing of strip clubs, Kim was terminated, which took place around the time that Short filed her complaint with the EEOC. There is no evidence in the record that Deutsche knew of Kim's activity, let alone condoned, acquiesced in, or approved any alleged discriminatory behavior, so liability for harassment may not be imputed to Deutsche. Forrest, 3 NY3d at 311.

Short has not established prima facie her "pattern and practice" claims since she has not identified any widespread policy of practice of discrimination against women at Deutsche. Citing no statistics, even Short's anecdotal contention that Kim "fired" all the women on the desk except Yu is belied by the record. In fact, the evidence is that Kim "fired" only three employees, two of whom were men, and that he promoted *no* men, but did appoint two women as deputy heads of the desk. Moreover,

Short does not disagree that Kim offered to promote her to replace another woman who headed the Australian desk.

In any event, as to the pattern and practice claims, this court opines that Short lacks standing, as a former Deutsche employee, to seek relief on behalf of others in her class that would have res judicata effect on an entire class of similarly situated Deutsche employees who are neither parties to nor represented herein.

Based on the foregoing, the court shall grant defendant's motion for summary judgment.

Accordingly, it is

ORDERED that the motion is GRANTED; and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint.

This is the decision and order of the court.

Dated: June 17, 2009

ENTER:

J.S.C.