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

PRESENT: HON. MARTIN SHULMAN PART 1
Justice

Mary Jennings Mahon

INDEX NO. 116958/07 ~~116960/07~~

MOTION DATE

- v -

MOTION SEQ. NO. 002

Metropolitan Transportation Authority, et al.

MOTION CAL. NO.

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

	PAPERS NUMBERED
Amended Notice of Motion — Affidavits — Exhibits A-H; Statement of Material Facts	1, 2
Answering Affs.-Exhibits A-E; Response to Statement of Material Facts	3, 4, 5
Reply Aff. -Exhibits A-D; Reply to Response to Statement of Material Facts	6, 7
Supplemental Affs. in Support-Exhibits	8, 9
Answering Aff. of Plaintiff - Exhibits A-F	10
Supplemental Reply Aff. In Support - Exhibits 1-2	11
Answering Aff. of Plaintiff - Exhibits A-H	12
Further Reply Aff. In Support	13

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
SEP 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: SEP 21 2009

Martin Shulman, J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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MARY JENNINGS MAHON,

Plaintiff,

Index No.: 116958/07

-against-

DECISION & ORDER

THE METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAILROAD COMPANY, ELLIOT J. SANDER, MYRNA I. RAMON, and MARGARET CONNOR,

Defendants.

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Martin Shulman, J.S.C.:

BACKGROUND

Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety. According to the complaint, plaintiff Mary Jennings Mahon is an attorney who was employed by the defendant Metropolitan Transportation Authority ("MTA"). Plaintiff was first hired, on February 1, 1996, as First Deputy General Counsel, and, in 1999, was promoted to Deputy Executive Director, General Counsel and Secretary of MTA. On January 22, 2003, plaintiff accepted an offer to become Vice President, General Counsel and Secretary of defendant The Long Island Railroad Company ("LIRR"), an MTA subsidiary, a position that she retained until February 9, 2007. Plaintiff remained on the MTA payroll until March 7, 2007, using up her accumulated leave for the period after February 9, 2007.

On January 24, 2007, plaintiff was informed that she was being terminated from LIRR, effective February 9, 2007, and was being replaced by a former MTA counsel, a woman approximately 20 years younger than plaintiff. Allegedly, no reason was

provided for this action. Thereafter, plaintiff instituted the present lawsuit, alleging seven causes of action: (1) breach of MTA's and LIRR's employment manuals, and Executive Order No. 2, mandating that government employees not be treated differently based on their political affiliations; (2) breach of contract in not providing plaintiff with a severance package; (3) age discrimination, pursuant to N.Y.S. Executive Law §296; (4) age discrimination, pursuant to the N.Y.C. Admin. Code § 8-107(i); (5) sex discrimination, pursuant to N.Y.S. Executive Law §276; (6) sex discrimination, pursuant to N.Y.C. Admin. Code § 8-104-1 [*sic*]; and (7) failure to provide plaintiff with a lifetime pass to the transportation system of her choice.

Plaintiff was originally hired on an at-will basis by MTA ("Employment Letter"), and plaintiff admits in her Response to Defendants' Statement of Material Facts that she was an employee at-will at the MTA. Further, in her EBT, plaintiff agrees that she had no contract, written or oral, with either MTA or LIRR (EBT, at 52-61, 121). Plaintiff said:

> I didn't have a contract for a specific term. I had a contract of employment that I—if my performance was what was a [*sic*] expected and high performance, if I otherwise did my job very well, if there was no reduction in force in play, that I could expect to be continued in employment and treated in a manner that was not disparate with respect to my race and my age.

Id. at 184.[1]

Plaintiff disputes that she was ever hired by LIRR after she had been asked to leave MTA against her will. *Id.* at 93-97. Plaintiff asserts that she continued to be an

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[1] Although plaintiff mentions race in her EBT, she has not alleged a claim of racial discrimination in the instant action.

MTA employee who was reassigned to LIRR, an MTA subsidiary, and was kept on the MTA payroll, continuing to accrue New York state pension benefits. *Id.* at 184. When plaintiff joined LIRR, she was replaced by a woman 16 years younger than plaintiff, which plaintiff testified constituted neither an improper nor an unlawful act on the part of MTA, and that such action did not constitute age discrimination. *Id.* at 202.

In her complaint, plaintiff attaches a copy of an evaluation of her employment performance from 2005, which indicated that her work was "outstanding," but neither side has included any other performance reviews for plaintiff. In defendant Elliot G. Sander's ("Sander") affidavit, Sander, MTA's CEO, states that plaintiff was replaced in 2007 because she was not a strong performer and, at the time he decided to terminate her employment, he was unaware of plaintiff's age.

Plaintiff argues that, according to her understanding, male employees who left the MTA at approximately the same time that plaintiff was terminated received outplacement services and severance packages, which were denied to plaintiff. However, plaintiff has provided no evidence to substantiate these claims, and several MTA executives deny the claims. Furthermore, in her EBT, plaintiff states that severance was never discussed with her, and that she was never promised a severance package upon her eventual termination, but that she generally relied on her understanding of what MTA's severance procedures were (EBT, at 267-269).

In her affidavit, defendant Margaret M. Connor ("Connor"), MTA Director of Human Resources, avers that none of the persons plaintiff mentioned received a severance package, except for Thomas Kelly, who had a contract with MTA that

specified such severance. Additionally, Connor states that on or about January 1, 2007, prior to plaintiff's termination, the new MTA administration decided that severance would not be paid to involuntarily terminated executives unless they had a written contract specifying a severance package. This assertion is also confirmed by Atilal Lee, MTA Assistant Director of Employee Benefits, who states that no one who left MTA in or after 2007 was treated better than plaintiff.

Connor also avers that plaintiff was not employed by MTA once she started working for the LIRR, but that MTA acted as LIRR's payroll agent. Additionally, Connor says that no terminated MTA employees are entitled to a lifetime transportation pass, which is confirmed by the MTA Operating Procedures attached to the Connor affidavit (Ex. E-3).

Madelyn Olia ("Olia"), LIRR Executive Director of Human Resources, states in her affidavit that plaintiff is only entitled to LIRR benefits, that such benefits do not include a Metro-North pass, which is the pass plaintiff is seeking, and that no one terminated from LIRR has received a severance package since Olia started working for LIRR in 2004.

Defendant Myrna I. Ramon, MTA Chief of Staff, states in her affidavit that the only persons who received severance packages were employees who had contracts with MTA that required such compensation.

Plaintiff also contends that she was terminated just three weeks after there was a change in administration, which she concludes was politically based, plaintiff being a Republican. However, plaintiff has offered no evidentiary substantiation for this

assertion. Further, the history of the employment changes at MTA and LIRR do not necessarily support plaintiff's conclusions.

In 2002, Katherine Lapp became MTA Executive Director, and she removed plaintiff from her position as MTA General Counsel to bring in a new General Counsel of her choosing, Catherine A. Rinaldi ("Rinaldi"). Similarly, on January 1, 2007, Sander was named MTA Executive Director, and he hired a new General Counsel, replacing plaintiff with Rinaldi.

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).

Defendants' motion for summary judgment dismissing the complaint is granted. Although plaintiff asserts a cause of action for breach of contract, it is undisputed that plaintiff was an employee at-will, both with MTA and LIRR.[2]

[2] Although the parties have argued as to whether plaintiff was employed by MTA or LIRR, the court's discussion indicates that the result would be the same regardless of

> New York law is clear that absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired. Thus, either the employer or the employee generally may terminate the at-will employment for any reason, or for no reason [internal quotation marks and citations omitted].

Smalley v Dreyfus Corp., 10 NY3d 55, 58 (2008); *Barcellos v Robbins,* 50 AD3d 934 (2d Dept 2008); *DeSimone v Supertek, Inc.*, 308 AD2d 501 (2d Dept 2003).

Plaintiff has argued that she was denied severance pay, contrary to MTA's and LIRR's regular practice.

> To prevail on a breach of contract claim in the absence of a written agreement, plaintiff must produce evidence in admissible form demonstrating that defendant ... had a regular practice of making severance payments to terminated employees, and that she relied on such practice in continuing her employment.

Bailey v New York Westchester Square Med. Ctr., 38 AD3d 119, 125 (1st Dept 2007).

Plaintiff has failed to produce any evidence that she relied on MTA's and LIRR's alleged severance procedures to her detriment. The "absence of actual proof of reliance of a regular practice of severance payments constitutes sufficient grounds of the dismissal for a claim for severance pay." *Hirschfeld v Institutional Investor, Inc.*, 260 AD2d 171, 172 (1st Dept 1999); *Jellinick v Joseph J. Naples & Assocs., Inc.*, 296 AD2d 75 (4th Dept 2002). In addition, none of the persons terminated at the same time as plaintiff received severance pay, except for one employee who was guaranteed such payment pursuant to a written contract. *Bailey v New York Westchester Square Med. Ctr.*, 38 AD3d 119, *supra*.

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which entity employed plaintiff.

However, even if there was such a practice in place when plaintiff was initially hired, "when parties have an employment contract terminable at will, the contract can be modified and different compensation rates fixed without approval of the other party since the dissatisfied party has a right to leave his employment." *General Elec. Technical Servs. Co. Inc. v Clinton,* 173 AD2d 86, 88 (3d Dept 1991). Therefore, even if a severance policy such as plaintiff claims did exist, without any evidence of her relying on that policy, the evidence that the new MTA General Counsel decided, prior to plaintiff's termination, not to grant any severance compensation to employees terminated against their wills, would vitiate plaintiff's ability to maintain this claim.

The court also finds unavailing plaintiff's argument that she relied on defendants' employee manuals to establish the terms of her contract with MTA and LIRR.

> No details have been provided to show such reliance. Plaintiff has not stated that she was induced to leave her prior position, that she turned down another job offer because of the manual, or because of what she believed [defendants]' termination procedures to be. Her conclusory statements as to reliance cannot defeat a motion for summary judgment.

Patrowich v Chemical Bank, 98 AD2d 318, 323 (1st Dept), *aff'd* 63 N.Y.2d 541 (1984).

Plaintiff, as an at-will employee, could only prevail in this action if she could demonstrate that her termination was brought about in violation of a statutory or constitutional prohibition, such as the alleged age and sex discrimination appearing in the complaint.

> On a claim of discrimination, plaintiff has the initial burden to prove by a preponderance of the evidence a prima facie case of discrimination. To support a prima facie case of age discrimination under the Human Rights Law, plaintiff must demonstrate (1) that [s]he is a member of the class protected by the statute; (2) that [s]he was actively or constructively discharged; (3) that [s]he was qualified to hold the position from which [s]he was terminated; and (4) that the discharge occurred under

> circumstances giving rise to an inference of age discrimination [citations omitted].

Ferrante v American Lung Ass'n, 90 NY2d 623, 629 (1997). The standards for maintaining an unlawful discrimination suit are the same under N.Y.S. Executive Law ¶296 and the N.Y.C. Admin. Code. *See Rios v Metropolitan Transp. Auth.,* 6 Misc.3d 1006(A), 800 N.Y.S.2d 355 (Sup Ct, Richmond County 2004).

Plaintiff has failed to meet her burden. The circumstances surrounding plaintiff's termination are identical to the circumstances surrounding her appointment to LIRR. A new General Counsel wanted to staff MTA with persons of her own selection, and replaced plaintiff with a woman 16 years her junior. When plaintiff was appointed to LIRR, the woman who had the position plaintiff assumed was terminated. In her EBT, plaintiff affirmatively states that this action was neither unlawful nor indicative of age discrimination. Plaintiff has only provided speculative and conclusory statements to support her allegations of age discrimination, and such statements are insufficient to defeat defendants' summary judgment motion (*Johnson v Lord & Taylor,* 25 AD3d 435 [1st Dept 2006]), and are insufficient to meet her burden of persuasion. *Stephenson v Hotel Employees & Rest. Employees Union Local 100 of AFL-CIO,* 6 NY3d 265 (2006).

Plaintiff has also failed to provide any evidence that she was treated differently from the male employees who were terminated at approximately the same time. All of the evidence provided to the court indicates that none of the male employees received severance packages, plaintiff's main allegation of disparate treatment.

> 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, non-

> discriminatory reasons for the challenged action – the absence of a material issue of fact as to whether its explanations were pretextual [internal quotation marks and citations omitted].

Bailey v New York Westchester Square Med. Ctr., 38 AD3d at 123.

Defendants have asserted that plaintiff was discharged because she was not a strong performer, and because the new General Counsel wanted to place a person of his own choosing in plaintiff's position. "[A] discharged employee must do more than challenge the employer's decision as contrary to sound business or economic policy, since such an argument does not give rise to the inference that the employee's discharge was due to [sex] discrimination [internal quotation marks and citation omitted]." *Alvarado v Hotel Salisbury, Inc.*, 38 AD3d 398 (1st Dept 2007).

Although plaintiff argues that she was an excellent employee, she only provides an evaluation of her performance made two years prior to her termination to support her claim. Plaintiff's "self-serving and conclusory statements in opposition are insufficient to defeat [defendants'] motion for summary judgment." *Bouras v Corsell*, 301 AD2d 426 (1st Dept 2003).

As to her cause of action based on a violation of Executive Order No. 2, plaintiff has failed to provide any evidence in admissible form that would indicate that she was terminated because of her political affiliation. The past employment practices of MTA General Counsels indicate that, when a new General Counsel is appointed, he or she would replace other executive positions with persons of his or her own choosing. When plaintiff was transferred to LIRR, and replaced by a woman 16 years her junior, plaintiff stated that such action was within the prerogative of the General Counsel, and that

such employment shifting did not constitute an unlawful act. Additionally, there is no evidence that plaintiff's political affiliation played any role in her termination.

Lastly, plaintiff's claim that she was improperly denied a lifetime transportation pass of her selection is refuted by the written operation policies of both MTA and LIRR, which do not provide such a benefit to employees who are involuntarily terminated, such as plaintiff.

Plaintiff's argument that further discovery is needed so that she may depose the other terminated employees to discover whether they did, in fact, not receive severance compensation is unavailing to withstand the granting of defendants' motion. Plaintiff "should not be allowed to use pre-trial discovery as a fishing expedition when [she] cannot set forth a reliable factual basis for [her] suspicions." *Orix Credit Alliance, Inc. v R.E. Hable Co.*, 256 AD2d 114, 115 (1st Dept 1998).

Based on the foregoing, 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 this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

Dated: New York, New York
September 21, 2009

HON. MARTIN SHULMAN, J.S.C.