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

PRESENT: WALTER B. TOLUB Justice

PART 15

Mercier, N

INDEX NO. 113349/06

MOTION DATE

- v -

MOTION SEQ. NO. 001

Cooperative Centrale

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
OCT 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/21/09

WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YCRK: IAS PART 15

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NANCY MCIVER

Plaintiff,

Index No.113349/06
Mtn. Seq.001

-against-

COOPERATIVE CENTRALE RAIFFEISEN BOERENLEENBANK B.A., RABOBANK NEDERLAND, DOE CORPORATIONS 1-5, and TERRANCE MCKAY, Individually,

Defendants.

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WALTER B. TOLUB, J.:

This is Defendants' motion for partial summary judgment pursuant to CPLR §3212. Defendants seek to dismiss Plaintiff's causes of action for age and gender discrimination and her cause of action against Mr. McKay for aiding and abetting the claimed discriminatory conduct.

Facts

As stated in Plaintiff's Complaint, in 1991 Plaintiff was hired by Rabobank as a Vice President and Team Leader in its Credit Department. In 1993, Plaintiff was approached by Hans den Baas and was offered the opportunity to transfer to a new department within Rabobank, the Corporate Finance Group (CFG). Plaintiff accepted the position in CFG and began working under Mr. den Baas.

Plaintiff claims that during the first six years of her twelve year employment with CFG, she was an integral part of the group and contributed to Rabobank's success, development and

profits.

In the late 1990's, Ms. Dagmar Venus, a woman in her twenties, was hired for a junior position in CFG. Plaintiff claims that Ms. Venus and Mr. den Baas began a relationship. Plaintiff claims that the relationship affected Mr. den Baas because he wanted a more youthful image. With that, Plaintiff claims that Mr. den Baas' conduct and attitude began to change.

Plaintiff claims that Mr. den Baas began excluding her from senior-level dinners, client dinners and meetings. Plaintiff claims that another employee of similar age within CFG who complained of age discrimination was terminated and that his duties and responsibilities were assumed by several younger people who were brought to CFG by Mr. den Baas. Plaintiff also claims that Mr. den Baas was only adding men to the CFG Department.

Plaintiff claims that Mr. den Baas and Rabobank engaged in a consistent and unlawful pattern of age discrimination and subjected Plaintiff to standards and conduct which it did not subject younger males in Plaintiff's position to. Specifically Plaintiff claims that *inter alia*, her bonus was reduced at a time when younger male employees were given increasingly larger bonuses, Mr. den Baas' "contempt" for people of age came out at dinners or when questioned about certain CFG practices, Mr. den Baas took steps to limit the transactions he assigned to

Plaintiff, and Plaintiff's accounts were given to younger male employees.

In May, 2004, Plaintiff complained about Mr. den Baas to Wendy Bellus, the head of Rabobank's Human Resources Department. Plaintiff contends that nothing was done to stop and prevent the continuation of age and gender discrimination.

In June, 2005, Mr. den Baas resigned from Rabobank. Plaintiff claims that discrimination continued in CFG even after his departure because younger male colleagues had adopted Mr. den Baas' views and conduct.

Following Mr. den Baas' departure, Rabobank hired Thomas McKay as the new head of CFG. Mr. McKay was 10 years younger than the Plaintiff.

Plaintiff met with Mr. McKay on more than one occasion to complain of discriminatory treatment towards her by Mr. den Baas. Plaintiff claims that no significant action was taken by Mr. McKay to remedy the discrimination at her work environment.

Plaintiff then hired counsel to assist in addressing her discrimination claims. On October 16, 2005, roughly a month after seeking to address her discrimination claims, and four months after Mr. McKay was hired, Plaintiff received emails from Mr. McKay implying that there were problems with some of Plaintiff's transactions. Plaintiff was fired four days later from her position on October 20, 2005. Plaintiff claims that the

emails sent to her days before her termination were a pretext for being fired in retaliation for her discrimination complaints. Plaintiff claims that Rabobank then hired a younger male to fill her position.

Plaintiff commenced this action on September 28, 2006. Plaintiff Complaint asserts; (1)that Rabobank violated the New York City Human Rights Law (NYCHRL)8 §8-107(1)(a) [age discrimination]; (2) that Rabobank violated NYCHRL8 §8-107(1)(a) [gender discrimination]; (3) that Rabobank violated NYCHRL 8 §8-107(7) [retaliation]; and (4)that Mr. McKay aided and abetted discrimination and retaliation in violation of NYCHRL 8 §8-107(6).

By this motion, Defendants seek partial summary judgment arguing; (1)that the discrimination claims should be dismissed as a matter of law for Plaintiffs failure to proffer any evidence that discrimination played a role in any adverse actions taken by Defendants; (2) Plaintiff's claims for front and back pay should be dismissed because of her failure to make efforts to find a new job following her termination; and (3) Any claim of discrimination that occurred prior to September 18, 2003 is barred by the three year statute of limitations.

Discussion

As with any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective

motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]. A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:180).

On defendant's motion for summary judgment, defendant may demonstrate the lack of several prima facie elements of plaintiff's case, however, to prevail, defendant only needs to demonstrate the absence of a single element (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:182). Once defendant presents evidence showing the absence of facts necessary to establish a prima facie case, the burden shifts to the plaintiff (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing] §37:190).

At the outset, the Court notes that any claim prior to September 18, 2003 is barred by the statute of limitations.

In order to establish a prima facie case of age or gender

discrimination, Plaintiff must demonstrate that she was a member of the class protected by the statute, was actively or constructively discharged, was qualified to hold the position from which she was terminated, and that the discharge occurred under circumstances which give rise to an inferece of age or gender discrimination (Ferrante v. American Lung Assn, 90 NY2d 623 [1997]). Once an employee has established a prima facie case of discrimination under Human Rights Law, the burden shifts to the employer to rebut the presumption of discrimination by clearly setting forth a legitimate, independent and nondiscriminatory reason to support its employment decision (Id.).

Here, Plaintiff has met her initial burden of demonstrating that she was a member of a protected class as an older female, that she was terminated from her position which she was qualified to hold, and that, under all of the circumstances in Plaintiff's Complaint, that the discharge occurred under circumstances which give rise to an inference of age discrimination.

Defendants argue that Plaintiff was given a large bonus that in some years was less than other employees because she did not perform as well as they did. Additionally, Defendants argue that Plaintiff was terminated for her poor performance, a legitimate non-discriminatory reason.

Plaintiff argues that the stated reasons and the emails sent

to her by Mr. McKay were merely pretexts for her termination.

Material issues of fact exist as to whether Rabobank's asserted reason for Plaintiff's termination is genuine or merely a pretext. It is not for the court to assess credibility on a motion for summary judgment (Id.).

Plaintiff did have a duty to mitigate her damages by seeking substitute employment similar to that from which she was terminated. In determining whether a plaintiff has met the duty to mitigate a court must look at whether a reasonable degree of diligence was used in the search for comparable employment (Reilly v. Cisneros, 835 F.Supp. 96 [WDNY 1993]). Meeting that burden requires more than demonstrating merely that the Plaintiff could have taken additional steps to find employment. Defendant must show that the course of conduct Plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment (id.).

Here, Plaintiff claims that she actively sought work and applied to over 60 jobs. Defendants dispute Plaintiff's contention arguing that she did not apply for a job for eight months after her termination and that she only applied for three positions. Again, these are issues of fact to be determined by a jury. As such, defendants motion to dismiss is denied.

Defendants remaining arguments have been considered and this Court finds them unavailing.

Accordingly, it is

ORDERED that Defendants motion to dismiss is denied except as noted for claims arising prior to September 18, 2003.

Counsel for the parties are directed to appear for mediation as scheduled on November 5, 2009

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/2/09

HON. WALTER B. TOLUB, J.S.C.