

Falu v Seward & Kissel LLP

2010 NY Slip Op 30528(U)

March 9, 2010

Supreme Court, New York County

Docket Number: 114437/08

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

DECENT.

PART 17

Index Number : 114437/2008

FALU, MELANIE

VS.

SEWARD & KISSEL LLP

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

Justice

INDEX NO.

114437-08

MOTION DATE

MOTION SEQ. NO.

#001

MOTION CAL. NO.

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 per

affidavit

FILED

MAR 15 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated:

3/9/10

EMILY JANE GOODMAN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
MELANIE FALU,

Plaintiff,

-against-

Index No. 114437/08

SEWARD & KISSEL LLP,

Defendant.

-----X
EMILY JANE GOODMAN, J.S.C.:

In this employment discrimination action, plaintiff Melanie Falu alleges that her former employer, defendant Seward & Kissel LLP (S&K), a law firm, “subjected her to discrimination based on gender, race, national origin, and sexual orientation” in violation of the New York State Human Rights Law (Executive Law § 296) (State HRL), New York City Human Rights Law (Administrative Code of City of N.Y. [Administrative Code] § 8-107) (City HRL), and 42 USC § 1981. Plaintiff also claims that S&K subsequently terminated her after she complained about hiring discrimination. S&K moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint, or alternatively, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND

On April 9, 2001, plaintiff was hired as a Training and Applications Support Manager with S&K. According to plaintiff, her job duties included giving software training courses and providing software applications support. Plaintiff alleges that she was involved in hiring administrative support staff.

Plaintiff alleges that, throughout her employment with S&K, she “witnessed and

experienced many occasions of stereotyping and discrimination on the basis of race, national origin, gender, and sexual orientation” (Complaint, ¶ 25). As a result of these experiences, plaintiff came to believe that S&K discriminated in hiring employees. For instance, on April 30, 2003, plaintiff sent an e-mail to Casey McKenzie, the firm’s Secretarial Manager, discussing a potential new hire. In her e-mail, plaintiff expressed interest in the candidate, Ravonda Mallory, mentioned her high score on the hiring exam, and stated that she was a “real nice person, smart, articulate, and obviously [had] law firm experience” (*id.*, ¶ 28). McKenzie responded to plaintiff’s e-mail by stating, “Am I gonna win another medal from the NAACP?” (*id.*, ¶ 29). Plaintiff understood that McKenzie was considering (unfavorably) the use of race as a factor in hiring. Plaintiff felt extremely uncomfortable with the sarcastic and mocking tone in McKenzie’s e-mail. Additionally, McKenzie allegedly told plaintiff that the firm’s partners had a preference for hiring certain types of secretaries. McKenzie told plaintiff that white females were the most desirable, while male, gay, or black secretaries were less desirable. According to plaintiff, McKenzie informed her that some of the partners disliked having male, gay, or black secretaries. McKenzie left the firm in 2005.

According to plaintiff, after McKenzie’s departure, she continued to receive countless inquiries about job applicants’ race, gender, and sexual orientation. Plaintiff alleges that the firm’s new Secretarial Manager, Iris Diaz, distorted equal employment opportunities of job applicants by giving preferential treatment to Hispanic females, such as herself. On or about May 17, 2006, plaintiff discovered that a newly-hired secretary, Yajihira Fequiere, had cheated on her employment test, with the assistance of another secretary at the firm, Vialda Molano. Plaintiff alleges that Molano gave Fequiere a Microsoft Word document of the word processing

test used for hiring candidates, and that Fequiere was subsequently offered a position at the firm. It appeared that no disciplinary actions were taken against Fequiere or Molano in any way. Plaintiff believed that the reasons for the special treatment were the secretaries' race and national origin, and plaintiff alleges that she told Diaz that she was very uncomfortable with this preferential treatment based on race and ethnicity. In response, Diaz allegedly told plaintiff that no one else would know about the cheating incident.

Disturbed by Diaz's response, plaintiff allegedly told her supervisor, Robert Dvorkin, that she did not feel comfortable participating in the firm's discriminatory hiring practices. During this conversation, Dvorkin allegedly apologized to plaintiff, but did nothing about her complaint.

On May 30, 2006, plaintiff was asked to participate in applicant testing. Plaintiff claims that she informed Dvorkin that she did not wish to be involved in the applicant hiring process, due to the discriminatory and unethical nature of the firm's hiring practices. Later that day, plaintiff was called into a meeting with Dvorkin and M. William Munno, a partner at the firm. Plaintiff was told that the firm intended to terminate her, and that she should start looking for another job. The reasons for her termination were that she had sneaked out of the office early, and had accessed and printed confidential documents. Plaintiff believed that there must have been some misunderstanding and told Munno and Dvorkin that she had authorization to access documents as a manager and member of the Information Systems Department. According to plaintiff, any restricted documents were secured in such a way that unauthorized individuals could not gain access to them, even by accident. Plaintiff admits that she did leave the office early on certain occasions, but always made up the lost time by coming in earlier or staying later.

- Her supervisor had explained this understanding in an explanatory comment in plaintiff's 2006

performance appraisal. In addition, plaintiff claims she told Munno and Dvorkin that she believed that the reason for her termination was her refusal to participate in discriminatory hiring practices.

Plaintiff alleges that she later learned that Fcquiere, the newly-hired secretary, was terminated on the same day that she received her notice of termination. She claims that she also found out that Molano, the secretary who had leaked the exam, was merely reprimanded. Plaintiff claims that other employees who were accused of similar conduct were not immediately terminated. Plaintiff's last day at the firm was on June 28, 2006.

On May 30, 2007, plaintiff filed a charge of unlawful discrimination and retaliation with the New York State Division of Human Rights (NYSDHR). After investigating her complaint, NYSDHR made a probable cause determination that plaintiff had been subjected to discrimination (*id.*, ¶ 15, Exh. A). Plaintiff subsequently requested administrative dismissal of the charge. On June 16, 2008, NYSDHR annulled plaintiff's election of administrative remedy (*id.*, ¶ 17, Exh. B).

The complaint alleges six causes of action: (1) discrimination pursuant to the State HRL (Executive Law § 290, *et seq.*); (2) discrimination pursuant to the City HRL (Administrative Code § 8-101, *et seq.*); (3) discrimination pursuant to the Civil Rights Act of 1866, as amended, 42 USC § 1981, *et seq.*; (4) retaliation pursuant to the State HRL; (5) retaliation pursuant to the City HRL; and (6) retaliation pursuant to section 1981.

DISCUSSION

A. S&K's Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as

alleged in the complaint as true, accord [plaintiff] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, “bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss” (*JFK Holding Co., LLC v City of New York*, 68 AD3d 477 [1st Dept 2009], quoting *O’Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154 [1st Dept 1993]). Where extrinsic evidence is submitted in connection with the motion, the appropriate standard of review “is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 402 [1st Dept 2007] [internal quotation marks and citation omitted]). In the context of a motion to dismiss, employment discrimination cases are generally reviewed under notice pleading standards (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009], citing *Swierkiewicz v Sorema N.A.*, 534 US 506, 514-515 [2002]).

Dismissal of a complaint pursuant to CPLR 3211 (a) (1) is proper where the documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law” (*Leon*, 84 NY2d at 88).

1. Discrimination Claims

S&K contends that plaintiff fails to allege any facts to support that she was discriminated against on the basis of her gender, race, national origin, or sexual orientation. The court agrees.

Absent direct evidence of discrimination, claims of discrimination pursuant to the State HRL, City HRL, and section 1981 are reviewed under the *McDonnell Douglas* burden-shifting

framework established in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) (see *McGrath v Toys "R" Us, Inc.*, 3 NY3d 421, 429 [2004] ["we have held that federal burden-shifting standards apply to claims brought under the state and local Human Rights Laws"]; *Martin v Citibank, N.A.*, 762 F2d 212, 216-217 [2d Cir 1985] [applying *McDonnell Douglas* to section 1981 claims]).

A plaintiff alleging discrimination¹ has the initial burden of establishing a prima facie case of discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). To establish a prima facie case of discrimination under the State and City HRLs, the plaintiff must establish that: (1) she is a member of a protected class; (2) she is qualified for the position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination (see *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]; *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 122-123 [1st Dept 2007]). Once the plaintiff proves a prima facie case, the burden shifts to the employer to articulate some "legitimate, nondiscriminatory reason" for the adverse employment action taken (*Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270 [2006] [internal quotation marks and citation omitted]). If the defendant produces such evidence, the plaintiff must then show that the proffered reason was merely a pretext for

¹The State HRL and City HRL provide, in pertinent part, that it is an unlawful discriminatory practice for an employer, because of an individual's race, national origin, sex, and sexual orientation, "to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment" (Executive Law § 296 [1] [a]; Administrative Code § 8-107 [1] [a]).

Section 1981, entitled "Equal rights under the law," provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens" (42 USC § 1981 [a]).

discrimination (*Ferrante*, 90 NY2d at 629-630).

“A plaintiff states a viable cause of action under Section 1981 . . . only by alleging a deprivation of his rights on account of his race, ancestry, or ethnic characteristics” (*Zemsky v City of New York*, 821 F2d 148, 150 [2d Cir], *cert denied* 484 US 965 [1987]). In order to establish a claim based on section 1981, the plaintiff must show that: (1) the defendant discriminated against him or her on the basis of race; (2) the discrimination was intentional; and (3) the discrimination was a “substantial” or “motivating factor” for the defendant’s actions (*Tolbert v Queens College*, 242 F3d 58, 69 [2d Cir 2001]; *see also Feacher v Intercontinental Hotels Group*, 563 F Supp 2d 389, 401 [ND NY 2008]).

Here, plaintiff’s discrimination claims are based solely on the allegation that she was subjected to “unfair discriminatory practices based on gender, race, national origin and sexual orientation” (Complaint, ¶¶ 89, 99, 109).² However, plaintiff has failed to provide factual allegations to support this conclusion. Rather, plaintiff is alleging discrimination against *other employees*. In opposition to the motion, plaintiff argues that “she not only observed, but was specifically told, that her supervisors made hiring decisions based upon a candidate’s race, gender, and sexual orientation,” and that S&K “treated employees differently in consideration of such characteristics through the cheating incident” (Plaintiff’s Mem. of Law in Opp., at 11). The complaint fails to allege that plaintiff suffered an adverse employment action as a result of these hiring decisions. Nor was plaintiff one of the secretaries involved in the cheating incident. Indeed, there are no facts from which the court can infer that plaintiff was terminated, or

²Plaintiff only identified herself as a member of a “racial minority” in the complaint (Complaint, ¶¶ 9, 87, 92, 97, 102, 107, 112). However, plaintiff does not identify her race, national origin, or sexual orientation.

subjected to any other adverse action, based upon her gender, race, national origin, or sexual orientation.³ Accordingly, plaintiff's discrimination claims are dismissed (*see Goldin v Engineers Country Club*, 54 AD3d 658, 659 [2d Dept 2008], *lv dismissed in part, denied in part* 13 NY3d 763 [2009] [conclusory allegations of discrimination on the basis of sex were insufficient to state a cause of action under State HRL.]; *DuBois v Brookdale Univ. Hosp. & Med. Ctr.*, 29 AD3d 731, 732 [2d Dept 2006] [employee's conclusory allegations that her employer discriminated against her on the basis of her Trinidadian descent failed to state a cause of action under § 1981 and the State HRL]; *Vanscoy v Namic USA Corp.*, 234 AD2d 680, 682 [3d Dept 1996] [plaintiff's allegations of age and sex discrimination were correctly dismissed as wholly unsupported and conclusory]).

2. Retaliation Claims

S&K contends that plaintiff's retaliation claims should be dismissed, since plaintiff has failed to allege that she engaged in a protected activity. S&K further argues that the complaint fails to allege that there was a causal connection between the protected activity and plaintiff's termination. It also argues that its contemporaneous business records directly contradict plaintiff's allegations of retaliation.

Retaliation claims brought pursuant to the State HRL, City HRL, and section 1981 are also analyzed pursuant to the *McDonnell Douglas* burden-shifting framework (*see CBOCS West, Inc. v Humphries*, – US –, 128 S Ct 1951, 1960-1961 [2008] [section 1981]; *see Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 967 [1st Dept 2009], *lv denied* 2010 NY Slip Op 63000

³Plaintiff does not plead, and does not argue in opposition, that she was subjected to a hostile work environment.

[2010] [State and City HRLs]). To establish a prima facie case of retaliation,⁴ the plaintiff must show that: (1) she engaged in a protected activity (i.e., opposed or complained about discriminatory practices); (2) the employer was aware of the plaintiff's participation in the protected activity; (3) there was an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse action (*Forrest*, 3 NY3d at 312-313; *Albunio v City of New York*, 67 AD3d 407, 413 [1st Dept 2009]). Causation can be established indirectly by showing that the protected activity was closely followed by the adverse action (*Cifra v General Elec. Co.*, 252 F3d 205, 217 [2d Cir 2001]). Once a prima facie case is established, the burden shifts to the employer to produce "evidence of a legitimate, nonretaliatory reason for the challenged employment decision" (*id.* at 216). If the defendant meets this burden of production, the burden shifts back to the employee, who must demonstrate that the employer's reason was a pretext for retaliation (*Pace v Ogden Servs. Corp.*, 257 AD2d 101, 105 [3d Dept 1999]).

In the present case, it cannot be said that plaintiff does not have a viable cause of action for retaliation. The complaint alleges that plaintiff complained to Diaz and Dvorkin about the firm's discriminatory hiring practices after she discovered that a secretary had cheated on her

⁴The court notes that there are differences between the anti-retaliation provisions of the State HRL and City HRL. The State HRL provides that it is an unlawful discriminatory practice for an employer "to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article" (Executive Law § 296 [1] [e]). By contrast, the City HRL provides that it is unlawful for an employer to retaliate against an employee "*in any manner* against any person because such person has . . . opposed any practice forbidden under this chapter" (Administrative Code § 8-107 [7] [emphasis supplied]). At a minimum, "the retaliatory or discriminatory act or acts complained of *must be reasonably likely to deter a person from engaging in protected activity*;" (*id.* [emphasis supplied]).

employment test on May 17, 2006, and again on May 30, 2006, the same day that she received her notice of termination (Complaint, ¶¶ 43, 54, 59, 63). Plaintiff alleges that she was fired within two weeks of these complaints (*id.*, ¶ 67).⁵ Although the court has considered S&K's affidavits submitted in connection with the motion, the court cannot conclude that the essential facts, as pleaded by plaintiff, have been negated beyond substantial question (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] ["(w)hen evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate"]). Diaz does not deny that plaintiff complained to her about discrimination. Rather, she only states that, on May 18, 2006, plaintiff informed her that Fequiere had cheated on her word processing test with Molano's help (Diaz Aff., ¶ 17). While Dvorkin states that plaintiff never complained that McKenzie was preferring white females, or otherwise discriminating in hiring secretarial candidates, he does not address plaintiff's allegation that she complained to him after the cheating incident or on May 30, 2006 (Dvorkin Aff., ¶ 22). In addition, a period of two weeks between plaintiff's complaints and termination can give rise to an inference of causation (*see Feingold v State of New York*, 366 F3d 138, 156-157 [2d Cir 2004] [causation satisfied by period of two weeks between plaintiff's complaint and termination]; *Reed v A.W. Lawrence & Co., Inc.*, 95 F3d 1170, 1178 [2d Cir 1996] [plaintiff established fourth element of retaliation claim where her discharge occurred 12 days after her

⁵Although S&K has not raised the issue, the court notes that the complaint is verified only by counsel. However, for the reasons discussed on page 12 *infra*, the evidence before this court is sufficient to state a *prima facie* case of retaliation.

complaint]).

Moreover, to the extent that S&K's motion is made pursuant to CPLR 3211 (a) (1), the court concludes that the documentary evidence, by itself, fails to resolve all issues of fact as a matter of law (Siegel, NY Prac § 259 [4th ed]).

B. S&K's Motion for Summary Judgment

It is well settled that “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 demonstrate the absence of any material issues of fact” (*Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once a prima facie showing has been made, the burden shifts to the motion's opponent to “present evidentiary 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]). “The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues of fact exist, not to determine the merits of any such issues” (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, *rearg denied* 3 NY2d 941 [1957]).

As to this branch of S&K's motion, plaintiff contends that summary judgment is premature because discovery has not yet been conducted in this case. Plaintiff argues that she needs discovery relating to disciplinary actions taken against other employees accused of similar misconduct. She also seeks depositions of Diaz and Dvorkin, who deny that plaintiff complained about discrimination to them. However, plaintiff only offers an attorney's affidavit in opposition

to S&K's motion, and the complaint is not verified by plaintiff. "An attorney's affidavit is of no probative value on a summary judgment motion *unless* accompanied by documentary evidence which constitutes admissible proof" (*Adam v Cutner & Rathkopf*, 238 AD2d 234, 239 [1st Dept 1997]). In response, S&K contends that plaintiff has not submitted any evidence to substantiate that a genuine material issue of fact exists that would preclude summary judgment.

As previously noted, to establish a prima facie case of retaliation, the plaintiff must demonstrate that: (1) she engaged in a protected activity; (2) the employer was aware of the plaintiff's participation in the protected activity; (3) there was an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse action (*Forrest*, 3 NY3d at 312-313). Once a prima facie case is established, the burden shifts to the employer to produce "evidence of a legitimate, nonretaliatory reason for the challenged employment decision" (*Cifra*, 252 F3d at 216). If the defendant meets this burden of production, the burden shifts back to the employee to demonstrate that the employer's proffered reason was a pretext for retaliation (*Pace*, 257 AD2d at 105).

The court admonishes plaintiff's counsel for its unexplained and troubling failure to submit either a complaint verified by plaintiff or an affidavit; however, plaintiff has submitted a complaint in connection with the NYSDHR investigation which she verified (and the agency made a probable cause finding), based on substantially similar allegations made here. The complaint in the agency proceeding includes plaintiff's allegation that she informed her director on at least two occasions (one being May 30, 2006) that she did not want to participate in the applicant hiring process due to the discriminatory nature of the S&K's practices, and that she was informed in a meeting with her director and the managing partner on May 30, 2006 that she

should start looking for a new job. Accordingly, plaintiff has made a prima facie case of retaliation, the court turns to S&K's reasons for plaintiff's termination.

S&K contends that it had two legitimate, nonretaliatory reasons for terminating plaintiff: (1) she accessed restricted, confidential disciplinary documents regarding the firm's staff; and (2) sneaked out of the office early. To support these contentions, S&K submits an affidavit from Dvorkin, who states that he made the decision to terminate plaintiff after he learned that she left the office early, and had accessed and printed restricted current secretarial salary information (Dvorkin Aff., ¶ 4). Dvorkin avers that Linda O'Mara, S&K's Director of Administration, told him that plaintiff was "sneaking" out of the office with the assistance of an associate, Isaac Yedid (*id.*, ¶ 8). Dvorkin subsequently confronted Yedid, who admitted that he had helped plaintiff "sneak" out of the office early by meeting her downstairs with her coat (*id.*). When Dvorkin met with plaintiff on May 30, 2006, plaintiff admitted that she had left early and had bypassed the 23rd floor receptionist (*id.*, ¶ 16). She tried to justify her conduct by saying that, as a single mother, she had to leave early (*id.*). Plaintiff had no answer for why she accessed and printed confidential salary information (*id.*, ¶ 17). S&K also points to an affidavit from Diaz, in which she states that, in mid-May 2006, she discovered that plaintiff had reviewed her restricted, confidential documents (Diaz Aff., ¶¶ 4-5). According to Diaz, the document history (metadata) indicated that, on March 29, 2006, plaintiff accessed 31 such documents, including documents relating to staff salaries and disciplinary actions (*id.*, ¶ 6, Exhs. 1-31). Plaintiff also accessed one document on March 1, 2006 (*id.*, Exh. 32). Additionally, on April 11, 2006, plaintiff accessed and printed annual salary data and adjustments for the entire non-legal staff (*id.*, ¶ 7, Exh. 33). Plaintiff also accessed six other documents relating to salary and personnel statistics (*id.*, ¶ 8,

Exhs. 34-39). S&K has sufficiently articulated legitimate, nonretaliatory reasons for terminating plaintiff (see *Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326, 328 [1st Dept 2005] [“(d)efendant’s evidence regarding plaintiff’s absenteeism and tardiness was sufficient to establish a legitimate, nondiscriminatory explanation for his termination”]; *Moree v Frank H. Reis, Inc.*, 2001 WL 736810, *6, 2001 US Dist LEXIS 8860, *18 [SD NY 2001] [violation of company’s confidentiality policy was legitimate, nondiscriminatory reason for demotion]).

Because S&K has met its burden of setting forth a legitimate, nonretaliatory reason for plaintiff’s termination, the burden shifts back to plaintiff to show an issue of fact as to pretext.

To demonstrate pretext, the plaintiff must show “*both* that the [employer’s stated] reason was false, *and* that [retaliation] was the real reason” (*St. Mary’s Honor Ctr. v Hicks*, 509 US 502, 515 [1993] [emphasis in original]). At this stage, in order to defeat summary judgment, the plaintiff must present sufficient evidence to suggest that the employer was motivated in whole or in part by discrimination or retaliation (see *Grady v Affiliated Cent., Inc.*, 130 F3d 553, 560 [2d Cir 1997], *cert denied* 525 US 936 [1998]; *Ferrante*, 230 AD2d at 685 [to defeat summary judgment, a plaintiff may point to evidence establishing a reasonable inference that the employer’s reason is unworthy of credence]). “The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination [or retaliation]” (*Reeves v Sanderson Plumbing Prods., Inc.*, 530 US 133, 147 [2000] [internal quotation marks and citation omitted]).

Plaintiff relies on the temporal proximity between her protected activities and her termination. Temporal proximity can give rise to an inference of retaliation (*Roberts v Philip*

Morris Mgt. Corp., 288 AD2d 166 [1st Dept 2001]; *Quinn v Green Tree Credit Corp.*, 159 F3d 759, 770 [2d Cir 1998] [holding that a strong temporal connection between the plaintiff's complaint and other circumstantial evidence is sufficient to raise an issue with respect to pretext]). However, it cannot be the only evidence to defeat summary judgment (*Galimore v City Univ. of New York Bronx Community College*, 641 F Supp 2d 269, 289 [SD NY 2009] [timing of events alone cannot defeat summary judgment in the face of defendant's proffered legitimate reason]). Plaintiff also relies on the fact that courts are hesitant to dismiss employment discrimination complaints prior to discovery where the evidence needed to prevail on such a complaint, is in the hands of the opposing party.

Pursuant to CPLR 3212 (f), “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just” (emphasis supplied). The party seeking disclosure must put forth an evidentiary basis to suggest that discovery might lead to relevant evidence, or show that the facts are exclusively within the knowledge of the other side (*Auerbach v Bennett*, 47 NY2d 619, 636 [1979]; *Hariri v Amper*, 51 AD3d 146, 152 [1st Dept 2008]; *Global Mins. & Metal Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]; *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]). The “mere hope” that discovery will uncover the existence of a material issue of fact is insufficient to deny the motion (*Maysek & Moran v Warburg & Co.*, 284 AD2d 203, 204 [1st Dept 2001]).

Here, discovery is necessary to ascertain S&K's reason for the termination (i.e., was plaintiff terminated because of retaliation or because she improperly accessed confidential

information and snuck out of the office, or was she terminated for both reasons). Although S&K's stated reasons are legitimate and convincing reasons to terminate any employee, summary judgment must be denied as the necessary discovery is exclusively within the knowledge of S&K. However, the motion for summary judgment may be renewed after discovery is complete.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 001) of defendant Seward & Kissel LLP to dismiss the complaint, or alternatively, for summary judgment dismissing the complaint is granted except as to the retaliation causes of action; and it is further

ORDERED that parties appear for a discovery conference on April 22, 2010 at 10AM; and it is further

ORDERED that S&K may renew its motion for summary judgment to dismiss the remaining retaliation claims after completion of discovery.

This Constitutes the Decision and Order of the Court.

Dated: March 9, 2010

ENTER:

FILED

MAR 15 2010

NEW YORK
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J.S.C.
EMILY JANE GOODMAN