

Hamburg v New York Univ. Sch. of Medicine

2016 NY Slip Op 31095(U)

June 16, 2016

Supreme Court, New York County

Docket Number: 153572/2012

Judge: Eileen A. Rakower

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

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CAROLE HAMBURG, MD,

Plaintiff,

Index

No. 153572/2012

- against -

**DECISION
and ORDER**

NEW YORK UNIVERSITY SCHOOL OF MEDICINE,
and NEW YORK UNIVERSITY LANGONE
MEDICAL CENTER,

Defendants.

Mot Seq. 1

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HON. EILEEN A. RAKOWER

Plaintiff, Carole Hamburg, MD (“Plaintiff” or “Dr. Hamburg”), was employed by NYU’s School of Medicine as an Assistant Professor (Clinical) in the Department of Radiology from September 17, 2002, until December 31, 2011. In December 2011, when Plaintiff was 60, Plaintiff’s employment contract was not renewed. Plaintiff brings this action asserting causes of action for age discrimination in violation of the New York City Human Rights Law, codified at N.Y.C. Admin. Code 8-101, et seq. (“the NYCHRL”), and breach of contract. Plaintiff claims she was terminated in 2011 because of her age, and Defendants failed to provide sufficient notice of her non-renewal in accordance with the terms of NYU’s faculty handbook.

Plaintiff commenced this action on June 11, 2012, by summons and complaint. Defendants interposed an Answer on September 5, 2012. Plaintiff was deposed on June 13, 2014 and June 20, 2014. Dr. Michael Recht (“Dr. Recht”), the Chairman of the Department of Radiology at the NYU’s School of Medicine, was deposed on June 20, 2014. Plaintiff served a note of issue, dated October 29, 2014.

Defendants move for an Order, pursuant to CPLR § 3212, granting summary judgment in their favor and against Plaintiff and dismissing Plaintiff’s Complaint. Defendants submit the attorney affirmation of Sarah B. Evans; the Complaint; the Answer; transcripts of Plaintiff’s depositions; transcript of Dr. Michael Recht’s

deposition; note of issue; The New York City Health and Hospitals Corporation and New York University School of Medicine Affiliation Agreement for the services at Bellevue Hospital Center and Gouverneur Healthcare Services (Fiscal Years 2009-2011); June 19, 2002 letter to Plaintiff appointing Plaintiff as Assistant Professor (Clinical) in the Department of Radiology of NYU School of Medicine; October 14, 2011 letter to Plaintiff from Dr. Recht advising Plaintiff that her contract was not being renewed effective December 31, 2011; Revision to the Policies and Procedures for Appointment, Promotion and Tenure at NYU School of Medicine effective April 1, 2002; August 20, 2004 letter to Plaintiff; September 28, 2005 letter to Plaintiff; September 7, 2006 letter to Plaintiff; August 21, 2008 letter to Plaintiff; September 1, 2008 letter to Plaintiff; April 6, 2009 letter to Plaintiff; July 13, 2009 letter to Plaintiff; April 9, 2010 letter to Plaintiff; December 22, 2010 letter to Plaintiff; January 18, 2011 letter to Plaintiff; April 18, 2011 letter to Plaintiff; Faculty Handbook of NYU, published 2008 (“NYU’s Faculty Handbook”); and the affidavit of Dr. Recht.

Plaintiff opposes. Plaintiff submits an affidavit of Dr. Hamburg; printout of Dr. Ellen B. Wetter’s page on NYU’s School of Medicine’s website; printout of Dr. Jahanguir Yaghoobian’s page on NYU’s School of Medicine’s website; printout of Dr. Robin Albert’s page on NYU’s School of Medicine’s website; June 19, 2002 letter to Plaintiff offering Plaintiff employment as a member of NYU Radiology Associates; June 19, 2002 letter to Plaintiff appointing Plaintiff as Assistant Professor (Clinical) in the Department of Radiology of NYU School of Medicine; January 18, 2011 letter to Plaintiff confirming Plaintiff’s status as a member of the faculty of NYU’s School of Medicine for the academic year 2010-2011 as Assistant Professor (Clinical); NYU’s Faculty Handbook; October 14, 2011 letter to Plaintiff; April 18, 2011 letter to Plaintiff; December 22, 2010 letter to Plaintiff; April 9, 2010 letter to Plaintiff; December 15, 2009 letter to Plaintiff; July 13, 2009 letter to Plaintiff; April 6, 2009 letter to Plaintiff; January 8, 2009 letter to Plaintiff; December 8, 2008 letter to Plaintiff; July 18, 2011 letter to Plaintiff; Evaluation of Plaintiff for evaluation period from April 2011 to October 2011; transcript of Dr. Recht’s deposition; a chart of “Faculty who left the Radiology Department from December 31, 2010 until the present”; June 1, 2011 e-mail from NYU School of Medicine; Tisch Center Flyer; and Gouverneur Roster as of July 30, 2014.

Oral argument was heard on Defendants’ motion for summary judgment. The minutes of the oral argument were provided to the Court thereafter.

The undisputed facts are as follows: Hamburg was born in 1950. Hamburg was employed by NYU's School of Medicine as an Assistant Professor (Clinical) in the Department of Radiology from September 17, 2002, until December 31, 2011.

By letter dated June 1, 2002, Dr. Robert Grossman, the then-Chairman of the Department of Radiology at NYU's School of Medicine, offered Plaintiff a full-time non-tenured position as an Assistant Professor (Clinical) in the Department of Radiology, effective September 17, 2002. On July 2, 2002, Plaintiff accepted the appointment and agreed to the terms of the June 1, 2002 letter. Plaintiff signed a Faculty Group Practice Employment Agreement, which contained additional terms of Plaintiff's appointment as an Assistant Professor (Clinical) in the Department of Radiology and as medical staff of the hospital as an attending physician.

Beginning in June 2002 through her last day of employment, Plaintiff was assigned to and worked in the general radiology department at NYU's School of Medicine. Plaintiff worked two days per week from September 2002, until September 2008, at which time Plaintiff's schedule increased to three days per week.

By letter dated August 20, 2004, Plaintiff was reappointed to the Medical Staff of Gouverneur Hospital Services as an Attending Physician for the period of September 16, 2004, through September 15, 2006. By letter dated September 7, 2006, Plaintiff was reappointed to the Medical Staff of Bellevue Hospital as an Assistant Attending Physician in Radiology for the period of September 1, 2006 through August 31, 2008. By letter dated August 21, 2008, Plaintiff was reappointed to the Medical Staff of Gouverneur Healthcare Services as an Assistant Attending Physician in Radiology for the period of September 14, 2008 through September 13, 2010. By letter dated September 1, 2008, Plaintiff was reappointed to the Medical Staff of Bellevue Hospital as an Assistant Attending Physician in Radiology for the period of September 1, 2008 through August 31, 2010.

In November 2008, Dr. Recht was appointed the Chairman of the Department of Radiology at NYU's School of Medicine. At that time of Dr. Recht's appointment, Plaintiff was working as a radiologist in the Department of Radiology within the general radiology section and was stationed at Gouverneur Hospital.

By letters dated April 6, 2009, July 13, 2009, and April 9, 2010, Dr. Recht notified Plaintiff that she would be receiving a bonus or additional compensation. Each of these letters informed Plaintiff of an additional bonus or compensation distinct from and additional to the ones identified in previous letters.

By letter dated December 22, 2010, Dr. Recht wrote to Plaintiff:

I want to thank you for all your hard work on behalf of our department during this past year! This letter will describe your compensation for the next calendar year, January – December 2011. I am pleased to tell you that despite the significant cuts in reimbursements for imaging this year we have been able to maintain current salary levels across the department.

Dr. Recht notified Plaintiff that her compensation would be based on a “Base Salary” in the amount of \$185,400 to “be paid on a monthly basis” and a “Variable (Bonus) Compensation” “dependent in part on the overall financial success of the department.” Dr. Recht wrote, “We anticipate that these will occur three times during the year, the first of which will be paid on February 1, 2011, the second on May 1, 2011 and the third on August 1, 2011.” Dr. Recht further wrote, “You are receiving a bonus of \$19,800 in your February paycheck.”

By letter dated January 18, 2011, Plaintiff’s status as an Assistant Professor (Clinical) in Radiology at NYU’s School of Medicine for the academic year 2010 - 2011 was confirmed. By letter dated April 18, 2011, Dr. Recht informed Plaintiff that she would be receiving a bonus or additional compensation.

On May 3, 2011, Plaintiff met with Dr. Recht. Dr. Recht advised Plaintiff that her employment with NYU’s School of Medicine would conclude on December 31, 2011.

By letter dated October 4, 2011, Dr. Recht advised Plaintiff that “[a]s discussed in our meeting of May 3, 2011 due to operational changes in the Department of Radiology, [Plaintiff’s] contract is not being renewed effective December 31, 2011.” Plaintiff was 61 years old at the time that she was terminated from the Department of Radiology at NYU’s School of Medicine.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d

255 [1970]). See *Soho Ctr. For Arts & Educ. v. Church of St. Anthony of Padua*, 146 A.D. 2d 407, 411 [1st Dep’t 1989] (citations omitted) (“A party appearing in opposition to a motion for summary judgment must lay bare his proof and present evidentiary facts sufficient to raise a genuine triable issue of fact . . . Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose [to oppose summary judgment], as is reliance upon surmise, conjecture or speculation.”). “[A] self-serving affidavit offered to contradict deposition testimony does not raise a bona fide question of fact and will be disregarded.” (*Lupinsky v. Windham Construction Corp.*, 293 A.D.2d 317, 318 [1st Dep’t 2002]).

Plaintiff’s Age Discrimination Claim under NYCHRL

Plaintiff claims that her employment contract with the Department of Radiology at NYU Langone Medical Center was not renewed, effective December 31, 2011, because of her age.

The NYCHRL makes it unlawful for an employer “because of the actual or perceived age . . . of any person to discriminate against such person in compensation or in terms, conditions or privileges of employment.” (Administrative Code § 8–107[1][a]). The NYCHRL, as amended by the Local Civil Rights Restoration Act of 2005 (the “Restoration Act”), requires claims brought under the City HRL to “be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws . . . have been so construed.” Interpretations of state or federal laws “may be used as aids in interpretation only to the extent that the counterpart provisions are viewed ‘as a floor below which the City’s Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.’” (*Bennett v. Time Warner Cable, Inc.*, 2014 WL 6682634 [N.Y.Sup. Nov. 25, 2014], at *3).

A claim of discrimination brought under the City HRL must, “on a motion for summary judgment, be analyzed both under the *McDonnell Douglas* framework and the somewhat different ‘mixed-motive’ framework recognized in certain federal cases.” (*Melman v. Montefiore Medical Center*, 98 A.D. 3d 107, 113 [1st Dep’t 2012]) (emphasis added).

A plaintiff alleging employment discrimination in violation of the NYCHRL, “has the initial burden to establish a prima facie case of discrimination.” (*Melman*, 98 A.D. 3d at 113, citing *Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 305 [2004]). To meet this burden, the plaintiff must show that (1) he or she is a member of a protected class; (2) he or she was qualified to hold the position; (3) he or she

was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. (*Melman*, 98 A.D.3d at 113). “[M]eeting the minimal requirements of a prima facie case ... does not equate to creating a triable issue of fact in the face of admissible evidence that the . . . [defendant] had legitimate, nondiscriminatory reasons for the challenged decisions.” (*Id.* at 128).

If the plaintiff satisfies his or her prima facie burden of establishing a prima facie case of discrimination, the burden then shifts to the defendant “to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support” the challenged decision. (*Forrest*, 3 N.Y. 3d at 304). “[I]f the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff, then the presumption raised by the prima facie case is rebutted and drops from the case.” (*Ferrante*, 90 N.Y.2d at 629 [citations omitted]). “[T]he defendants’ burden in this regard is one of production, and not proof.” (*Mancuso v. Douglas Elliman LLC*, 808 F. Supp. 2d 606, 620 [S.D.N.Y. 2011]).

Where the defendant rebuts the presumption of discrimination, then “[i]n order to nevertheless succeed on [his] claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason.” (*Forrest*, 3 N.Y. 3d at 304). “In determining whether the reason for an adverse action was pretextual, ‘[i]t is not for the Court to determine whether the complaints against plaintiff were truthful or fair, so long as they were made in good faith.’” (*Melman*, 98 A.D.3d at 121 citing *Saenger v. Montefiore Med. Ctr.*, 706 F. Supp. 2d 494, 508 [S.D.N.Y. 2010]).

“A person alleging racial or other discrimination does not have to prove discrimination by direct evidence. It is sufficient if he or she proves the case by circumstantial evidence.” (*Forrest*, 3 N.Y.3d at 326). “Additional evidence of discrimination can be inferred from [a] defendant’s departure from its stated ... policy” when taking the challenged adverse action. (*See generally Yanai v. Columbia University*, 2006 WL 6849491 [N.Y. Sup. 2006]).

In order to make out a discrimination claim based on disparate treatment, a plaintiff must first set forth a prima facie case of discrimination, i.e., that he is a member of a protected class and that he was treated differently than similarly situated non-members of the class. (*Shah v. Wilco Sys., Inc.*, 27 A.D. 3d 169, 176 [1st Dep’t

2005]). “The individuals being compared must be similarly situated in all material respects.” (*Shah*, 27 A.D.3d at 177).

A plaintiff’s “[c]onclusory allegations of discrimination are insufficient to defeat summary judgment.” (*Dickerson v. Health Mgmt. Corp. of Am.*, 21 A.D.3d 326, 329 [1st Dep’t 2005]). “Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment.” (*Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 452 [2d Cir. 1999], *as amended on denial of reh’g* [Dec. 22, 1999]).

Here, Defendants do not dispute that that Plaintiff has established the first three elements of a prima facie case of age discrimination. Defendants do not dispute that Dr. Hamburg, by virtue of her age, is a member of a class protected by the statute; that Dr. Hamburg was qualified for her positions with Defendants; and Dr. Hamburg was subjected to an adverse employment action by being terminated.

However, Defendants argue that Dr. Hamburg fails to establish that her termination occurred under circumstances giving rise to an inference of discrimination, the fourth element necessary to establish a prima facie case of age discrimination.

An inference of discrimination “may be drawn from direct evidence, from statistical evidence, or merely from the fact that the position was filled or held open for a person not in the same protected class.” (*Sogg v. American Airlines, Inc.*, 193 A.D. 2d 153, 156 [1st Dept 1993]). In an age discrimination claim, an inference of discrimination may be supported by “direct or statistical evidence that would logically support an inference of discrimination.” (*Bailey v New York Westchester Sq. Med. Ctr.*, 38 A.D. 3d 119, 123 [1st Dept 2007]). In the absence of direct or statistical evidence, a plaintiff must “show her position was subsequently filled by a younger person or held open for a younger person.” (*Bailey*, 38 A.D. 3d at 123). See *Melman*, 98 A.D. 3d at 114-115

Here, Plaintiff argues that Defendants assigned her job functions to a radiologist who was in “her late 30’s, early 40’s” and Defendants terminated other members of the general radiology section of the Radiology Department in 2011, all of whom were older than Plaintiff. Plaintiff claims that these events give rise to an inference of discrimination.

At her deposition, Plaintiff testified, “[T]here was really no reason for me to be terminated, and the people that were terminated in addition to me were all of a similar age and the person that sat at my desk after I left was in her late 30’s, early

40's." See Plaintiff's deposition transcript at 218:2-14. Concerning the individual who took over Plaintiff's responsibilities after she was terminated, Dr. Hamburg states in her affidavit:

Defendants replaced me with a woman Dr. Recht described in 2014 as being "in her 40's." I worked only three days per week, and my replacement worked four days per week at Gouverneur. Defendants never even offered me the opportunity to work additional days per week. My replacement was specialized in musculoskeletal radiology, having served a fellowship in that discipline. However, because Gouverneur was not primarily an orthopedic hospital, the cases were primarily in general diagnostic radiology. Moreover, while I participated in reading x-rays, as well as ultrasounds and bone density modalities, my replacement did not initially do so. In any event, I had more extensive training in musculoskeletal radiology than any fellowship could provide, having worked for several years at the Hospital for Joint Disease and in Defendants' musculoskeletal section.

Concerning the other older members of the general radiology section who were also terminated, Dr. Hamburg states in her affidavit:

I was not the only older member of General Radiology who was terminated by Defendants in 2011. Defendants also terminated a 68-year-old M.D./Ph.D., an 80-year-old M.D., an 81-year-old M.D., and an 86-year-old M.D. See list provided by Defendants entitled "Faculty who left the Radiology Department from December 31, 2010 until the present," attached as Exhibit 11.

In response, Defendants claim that Plaintiff has failed to provide evidence to support an inference of discrimination. Defendants claim that Plaintiff admits that Dr. Recht never made any comments to her that she considered to be discriminatory with respect to age and that no one had ever told her that Dr. Recht made any such comments. Defendants claim that while Plaintiff states that the contracts of several other older employees were also not renewed (Dr. Tobin, Dr. Bergeron, and Dr. Becker), Plaintiff does not show "any relevant comparator, an otherwise similarly-situated employee outside plaintiff's protected class - namely, younger - whose contract was similarly not renewed." Defendants further argue that age-related animus cannot be inferred because Dr. Frank Luongo, who was in his late 30s or early 40s, was the first employee of the general radiology department whose contract was not renewed, and because Dr. Wetter, Dr. Yahoobian, and Dr. Albert, individuals who are approximately the same age as plaintiff and worked within her

section, were absorbed into other sections of the department because they were well suited for those areas and Plaintiff was not.

In response to Defendants' arguments, Plaintiff argues that Defendants fail to show that Dr. Luongo's contract was "one of the General Radiology nonrenewals, rather than someone who was either terminated for other reasons or departed voluntarily." Plaintiff contends that Dr. Luongo was terminated for disciplinary reasons. Plaintiff states, "Although Dr. Recht disputed this [the fact that Dr. Luongo was terminated], he did not explain why Dr. Luongo departed, and characterized his departure at various times as having been a "dismissal," see Ex. 10 at 59:8, and as having been 'his decision not to renew his contract' Ex. 10 at 59:24-25."

In response to Defendants' claim that Dr. Hamburg was not suited for reassignment in the Radiology Department as part of their effort to increase research, Plaintiff argues Dr. Recht was responsible for directing her duties and her research, and Defendants should not be able to use as a basis for her termination Dr. Recht's own failure to have her perform research or to even advise her of the consequences of not performing research.

Assuming, as the Court does for these purposes, that Plaintiff has satisfied her prima facie burden of establishing a prima facie case of employment discrimination under the *McDonnell Douglas* framework, the burden then shifts to Defendants "to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support" their nonrenewal and termination of Dr. Hamburg's employment with NYU School of Medicine. (*Forrest*, 3 N.Y. 3d at 304).

Here, Defendants submit deposition testimony of Dr. Recht, the Chairman of the Department of Radiology at the NYU School of Medicine. Dr. Recht testified that he made the final decision concerning the non-renewal and termination of Plaintiff's employment with NYU's School of Medicine.

On May 3, 2011 Dr. Recht met with Plaintiff and advised Plaintiff that her employment with NYU's School of Medicine would conclude on December 31, 2011. By letter dated October 14, 2011, Dr. Recht wrote, "As discussed in our meeting of May 3, 2011 due to operational changes in the Department of Radiology, your contract is not being renewed effective December 31, 2011."

Dr. Recht testified that "relatively early in [his] tenure as chair of radiology" and no later than the end of 2009, Dr. Recht met with a "leadership team" regarding

the direction of the Radiology Department at the NYU School of Medicine, and to discuss how to improve the department. Dr. Recht testified, “[O]ur leadership team had several discussions about where we felt the department needed to be so that we would be the best academic radiology department we could be.” In those meetings, “the topic of research, how much research needed to be done in the department, was brought up ..., who was doing research and how we were going to create more research within the department.” 37:22-40:12. Dr. Recht testified that another topic discussed at those meetings was “[w]hether we believed that section of general radiology was something that we believed that an academic department should have or not have.” 40:20-25. Dr. Recht testified, “The decision was made that over time and when appropriate, we were going to eliminate the section of general radiology.” 41:2-6.

When asked about what would happen to “the radiologists that were part of that section,” which included Dr. Hamburg, Dr. Recht testified, “Some of those radiologists had their contracts not renewed.” The renewals were issued “at various times” in order “to make sure that we were able to absorb the work that was being done by the general section, by the sub-specialized sections in the department well enough to know that by doing that, we weren’t going to interfere with the workings of the department or patient care.” 41:12-42:6. Dr. Recht testified that, while he had “discussions with [his] leadership team” where they “discussed the direction of the department,” the “final decision” was his. 51:3-51:20.

Dr. Recht testified that at the time these discussions concerning non-renewals were taking place, the members of the general radiology department were Frank Luongo, Dr. Kittroedete, Thomas Bergeron, Elliot Berenbaum, Robin Wetter, Michael Tobin, Dr. Yaghoobian, Mel Becker and Dr. Hamburg. Dr. Recht testified, to the best of his recollection, that the first person within that group who was told that their position would not be renewed was Frank Luongo, who was in his “late 30’s, early 40s.” Dr. Kittroedete, who Dr. Recht “guessed” was in “his 60’s or 70’s,” was the next member of the department, followed by Dr. Tobin, who Dr. Recht “assumed ... was in [his] late 60’s, mid to late 60’s,” Dr. Hamburg, Dr. Becker, who was in his 80’s, and Dr. Bergeron, who was “in his late 60’s or 70’s.” (42:7-47:19). Dr. Yaghoobian, Dr. Albert, and Dr. Wetter were absorbed into other sections. See 47:20-25 (“Dr. Albert went to the section of chest radiology. Dr. Wetter and 24 Dr. Yaghoobian were absorbed into the section of abdominal radiology.”). Dr. Recht testified, “Based on my discussions with the section heads, we felt that the people who we absorbed into those sections were more appropriate to do those functions.” (48:13-16). Dr. Recht further testified that there is no general radiology section now. (49:18-19).

At his deposition, Dr. Recht was shown a copy of a December 22, 2010 letter that he had written to Dr. Hamburg in which he referenced significant cuts. Dr. Recht was asked, "Is it correct to say those cuts played no role in your decision not to renew Dr. Hamburg?" Dr. Recht answered, "That is incorrect." When asked "[w]hat aspect of them [the financial cuts] impacted [his] decision," Dr. Recht answered:

Because revenue to the department was being decreased for every exam that we did, we needed to be very careful to make sure that we had the right organization and people in our department to allow us to achieve our mission, which was to be the best academic radiology department anywhere, one of the best. I'd like to say the best, but it's certainly one of the best academic radiology departments. Because we didn't have unlimited revenue, and in fact, our revenue for the exams that we were doing was shrinking, we needed to make very tough decisions to make sure we were set up correctly to thrive, survive and thrive, in the future of the radiology.

(64:11-65:9).

Here, Defendants have satisfied their burden of producing evidence of legitimate, independent, and nondiscriminatory reasons for Plaintiff's 2011 termination. Through the testimony of Dr. Recht, Defendants show the overall reductions of the needs of the general radiology department and the phasing out of the general radiology department. The overall plan was to absorb a number of radiologists from that department into subspecialties in order to accommodate the work that they had but that not all of the radiologists in the general radiology department were renewed. Dr. Hamburg, a radiologist in the general radiology department, was one of those radiologists whose position was non-renewed as a result of the changes.

Here, where Defendants have rebutted the presumption of discrimination, under the *McDonnell Douglas* framework, the burden shifts to Plaintiff to produce sufficient proof in admissible form to support a rational finding that the legitimate, nondiscriminatory reasons proffered by Defendants were false and that more likely than not discrimination was the real reason for Defendants' non-renewal of Dr. Hamburg's position at NYU. (*Forrest*, 3 N.Y. 3d at 304).

Where the defendant rebuts the presumption of discrimination, then "[i]n order to nevertheless succeed on [his] claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for

discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason.” (*Forrest*, 3 N.Y. 3d at 304). “In determining whether the reason for an adverse action was pretextual, ‘[i]t is not for the Court to determine whether the complaints against plaintiff were truthful or fair, so long as they were made in good faith.’” (*Melman*, 98 A.D.3d at 121 citing *Saenger v. Montefiore Med. Ctr.*, 706 F. Supp. 2d 494, 508 [S.D.N.Y 2010]).

“The mere fact that [plaintiff] may disagree with [his] employer's actions or think that [his] behavior was justified does not raise an inference of pretext. A challenge . . . to the *correctness* of an employer's decision does not, without more, give rise to the inference that the [adverse action] was due to age discrimination.” (*Melman*, 98 AD3d at 121)(citations omitted). As further stated in *Melman*, “the court in an employment discrimination case should not sit as a super-personnel department that reexamines an entity’s business decisions” (*Id.*) (citations omitted).

In Plaintiff’s affidavit submitted in opposition to Defendants’ motion, Plaintiff claims, “The circumstances of my termination show that the stated reasons for my termination, i.e. that the Radiology Department was placing a greater emphasis on research and that it had to maintain revenue, were pretextual.”

Plaintiff testified that when she met with Dr. Recht on May 3, 2011, Dr. Recht “told [her] that my contract would not be renewed” and “that there were operational changes” (185:18-23; 187:16-18). When asked whether she recalled “Dr. Recht saying anything else about the reasons why he had decided not to renew [her] contract,” Plaintiff testified, “He said that that they wanted to focus on more research and that researchers were very expensive.” (187:19-24). Plaintiff testified that she did not come to learn of any additional reasons why Dr. Recht did not renew her contract (188:4-10). Plaintiff testified that Dr. Recht never made any comments or statements that she considered to be discriminatory or biased with respect to age and no one ever told her that they heard Dr. Recht make any comments of statements. (247:4-247:21).

Plaintiff claims that her termination was not motivated by a shift toward an emphasis on research because Dr. Recht “never directed [her] to perform research, either in individual meetings, emails, or letters, or at any other time” or “even suggested that [she] do research.” Plaintiff claims had Dr. Recht suggested that she perform research, she “would have enthusiastically participated in research.”

Plaintiff further claims that her termination was not motivated by a shift to research because “only two Ph.D.s joined the Radiology Department in the wake of my termination, compared to a number of M.D.s.”; “one of the other members of General Radiology who was terminated was an M.D./Ph.D., and he was never offered the opportunity to do more research”; “[a]s of July 30, 2014, the radiology roster at Gouverneur, where I had worked ... listed no Ph.Ds;” and June 1, 2011 announcement of the new outpatient imaging group that was joining the Radiology Department “listed the nine members of the group, all of whom were M.D.s, and none of whom was a Ph.D.” Plaintiff further states, “As for the members of General Radiology who were absorbed into other sections of the Radiology Department, none had any current research at the time I was terminated.”

Plaintiff claims that her termination was not motivated by an attempt to increase revenues. Plaintiff claims that despite the cuts that had been referenced in Dr. Recht’s December 22, 2010 letter to her, “the letter expressed the expectation that bonuses which were ‘dependent in part on the overall financial success of the department,’ would be paid three times in 2011.” Plaintiff states that she received bonuses of \$19,800 on February 1, 2011, \$7,500 on May 1, 2011, and \$10,000 on August 1, 2011. Plaintiff claims, “Thus, whatever revenue problems the Radiology Department may have been having did not affect salaries or prevent the payment of bonuses even after I was informed of my termination.” Plaintiff further argues, that based upon Dr. Recht’s own statement, the work that Plaintiff had performed “was not discontinued, but was instead done elsewhere in the Radiology Department.”

Plaintiff’s deposition testimony and her affidavit is insufficient to raise a genuine issue of fact that Defendants’ proffered reasons for not renewing her contract were pretextual. Although Plaintiff’s deposition testimony and affidavit indicate that Plaintiff believes that her age played a role in her termination, Plaintiff’s statements in this regard are devoid of any specifics and replete with conclusions. Plaintiff fails to provide any proof in admissible form to substantiate her belief that his age played a role in her termination. Plaintiff’s subjective, unsubstantiated belief that her age played a role in Defendants’ decision to terminate her is insufficient to establish pretext. (*Bickerstaff*, 196 F.3d at 452 [“Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment.”])

First, Plaintiff fails to demonstrate that the decision not to renew her contract because of a focus and shift to research was pretextual. Plaintiff contends that her termination was not motivated by a shift to research because Dr. Recht did not raise the issue of research with Plaintiff prior to the May 3, 2011 meeting when she was terminated; however, such a fact even if true does not prove that the stated reason for the termination was false (that Defendants were phasing out the general radiology department which had performed no research) and that discrimination was the real reason for Plaintiff's termination. To the extent that Plaintiff claims that Defendants' hiring decisions "in the wake of [her] termination" demonstrate that Defendants are not focused on research as they claim, Plaintiff lacks personal knowledge, does not provide any evidence to substantiate her claims concerning the research being conducted at the Radiology Department of NYU School of Medicine since her termination, and her claims even if true do not belie Defendants' claim. Even if a physician does not have a PHD, that does not mean that he or she may not be performing research. Plaintiff's claim that Defendants are not focusing on research based on her cursory glance of the credentials of the current staff is "mere speculation, insufficient to defeat summary judgment." (*Leandry v. City of New York*, 127 A.D.3d 520 [1st Dep't 2015]).

As for Plaintiff's contention that none of "the members of General Radiology who were absorbed into other sections of the Radiology Department . . . had any current research at the time [she] was terminated," such an allegation is similarly unsubstantiated. Plaintiff's belief that she was as qualified as those other members of the general radiology department who were absorbed are "subjective conclusions without evidence that would 'reasonably support[] a finding of prohibited discrimination.'" (*Bringley v. Donahoe*, 499 Fed. Appx. 116, 119 [2d Cir. 2012][quoting *James v. N.Y. Racing Ass'n*, 233 F.3d 149, 154 [2d Cir. 2000]).

Second, Plaintiff fails to demonstrate that the decision not to renew her contract because of financial reasons was pretextual. In her affidavit, Plaintiff contends that Defendants' contentions that financial reasons – namely, cuts in reimbursement – factored into their decision to terminate her contract is pretextual because she was given the same bonus installment in 2011 as the previous year despite the cuts in reimbursement. Defendants claim, "Plaintiff appears to presume that cuts in reimbursement required corresponding cuts in the salaries and bonuses paid to General Radiology employees . . . [However,] It was perfectly reasonable for defendants to maintain the same bonus level for plaintiff while she remained

employed at NYU, while at the same time implementing broader, long-term organizational changes in response to revenue reductions.” Plaintiff also challenges Defendants’ justification because defendants “continued to have radiologists perform the work she had been doing.” Defendants argue, “Once again, plaintiff is impermissibly second-guessing the propriety of defendants’ business judgment. In any event, downsizings and restructurings by their very nature often involve the absorption of a discharged employee’s job functions by remaining employees.” “The mere fact that [plaintiff] may disagree with [his] employer’s actions ... does not raise an inference of pretext.” (*Melman*, 98 AD3d at 121)(citations omitted). “A challenge . . . to the *correctness* of an employer’s decision does not, without more, give rise to the inference that the [adverse action] was due to age discrimination.” (*Id.* at 121)(citations omitted). Here, Plaintiff’s belief that cuts in reimbursement should have been reflected in corresponding cuts is speculative, conclusory, and unsupported. It is not inconsistent for Defendants, or any employer, to maintain the same salary or bonus level for a plaintiff or any other employee while they remained employed while at the same time planning to implement long term organizational changes to address the reduction of revenues and ensure the financial viability of their business.

Lastly, the Court notes that Plaintiff points to a portion of Dr. Recht’s testimony as evidence that Defendants’ stated financial reasons for Plaintiff’s termination were a pretext for discrimination. Dr. Recht testified, “[S]ince we were eliminating the general radiology section, *we weren’t able to use that revenue* to hire people in the appropriate subspecialty sections that would allow us to increase both sub--actually (sic) our subspecialization as well as our research output.” (emphasis added). (page 113, lines 10-18). Plaintiff argues that based on this portion of his testimony, “Dr. Recht admitted that the elimination of General Radiology actually reduced revenue.” Dr. Recht, in opposition to Plaintiff’s affidavit, submits an affidavit in which he corrects this portion of his testimony. Dr. Recht states, “The deposition transcript is not correct.” He states, “What I said at my deposition ... was ‘since we were eliminating the general radiology section, *we were* able to use that revenue to hire people in the appropriate subspecialty sections that would allow us to increase both our sub -- actually our subspecialization as well as our research output.” (emphasis added). Dr. Recht states, “My statement as transcribed suggests that eliminating the general radiology section prevented the Radiology Department from using the cost savings to hire individuals in subspecialty sections and conduct more research, which does not make sense.” Dr. Recht further states, “I did not

initially catch this transcription error when I reviewed the deposition transcript.” Here, Dr. Recht’s correction of the portion of this testimony is consistent with his other deposition testimony. This one portion of his deposition, which Dr. Recht corrects, is insufficient to create an issue of fact to defeat summary judgment given the entire record.

Accordingly, applying the *McDonnell Douglas* framework, Plaintiff has failed to raise a genuine issue of fact concerning either the falsity of Defendants’ proffered reason for her termination or that discrimination was more likely the real reason for the termination. Plaintiff does not produce evidence to establish that Defendants’ proffered reasons for her nonrenewal were false, or demonstrate that age discrimination was more likely the reason for her nonrenewal.

Mixed Motive Analysis

A claim of discrimination brought under the City HRL must, “on a motion for summary judgment, be analyzed both under the *McDonnell Douglas* framework and the somewhat different ‘mixed-motive’ framework recognized in certain federal cases.” (*Melman*, 98 A.D. 3d at 113).

Under the mixed motive analysis, a plaintiff only has to raise an issue as to whether the Defendant’s adverse action was “motivated at least in part . . . by discrimination” or “more likely than not based in whole or in part on discrimination.” (*Melman*, 98 A.D.3d at 113 [internal citations omitted]). A plaintiff need not prove the reasons proffered by the defendant for the adverse action were false or pretextual. (*Id.*).

Thus, under the City HRL, once a defendant “on a summary judgment motion has produced evidence that justifies its adverse action against the plaintiff on nondiscriminatory grounds, the plaintiff “must either counter the defendant’s evidence by producing pretext evidence (or otherwise), or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination.” (*Id.*). A plaintiff “may present evidence of pretext and independent evidence of the existence of an improper discriminatory motive,” or “leave unchallenged one or more of the defendant’s proffered reasons for its actions and . . . show that discrimination was just one of the motivations for the conduct.” (*Bennett*, 92 A.D.3d at 38-39). “[E]vidence of an unlawful motive in the mixed motive context need not be direct, but can be circumstantial--as with proof of any other fact.” (*Id.*). “[M]eeting the minimal requirements of a prima facie case

[under the mixed motive analysis] ... does not equate to creating a triable issue of fact in the face of admissible evidence that the employer had legitimate, nondiscriminatory reasons for the challenged decisions.” (*Melman*, 98 A.D. 3d at 128).

Even under the City HRL’s liberal mandate, “not every plaintiff asserting a discrimination claim will be entitled to reach a jury.” (*Melman*, 98 A.D.3d at 131 [affirming summary judgment in favor of Defendant and dismissal of Plaintiff’s age discrimination and retaliation claims under the City HRL]).

As discussed above, even assuming that Plaintiff meets the prima facie burden under the *McDonnell Douglas* framework, Plaintiff fails to provide evidence in admissible form to demonstrate that Defendants’ proffered legitimate reasons for terminating her position was mere pretext.

Turning to the mixed-motive analysis, Plaintiff argues that Defendants’ admission that Defendants reassigned functions that had been performed by Dr. Hamburg to a radiologist who Dr. Recht estimated was “in her 40’s” creates a genuine material issue of fact that should not be resolved on a motion for summary judgment. Plaintiff relies on *Yanai v. Columbia Univ.*, 2006 WL 6849491, *27-28 [Sup Ct, NY County 2006].

In *Yanai*, the plaintiff, Sandra Yanai (“Yanai”), had been employed by Columbia University from February 1984 to July 2003 as an administrative officer in the Health Sciences Division. Yanai was notified on June 30, 2003, that her position “was being eliminated as a result of a reorganization with the department.” At the time, Yanai was 49 years old. Yanai commenced an action, alleging, *inter alia*, age discrimination under New York State and New York City human rights law. In analyzing Yanai’s age discrimination claims, the court held that she had satisfied the “‘initial low threshold’ of a prima facie case by showing that her discharge occurred under circumstances giving rise to an inference of age discrimination as plaintiff was replaced by someone substantially younger ...”, and “[a]dditional evidence of discrimination can be inferred from defendant’s departure from its stated policy in not placing plaintiff in its ‘layoff’ pool.” The Court found that Defendant, in turn, submitted “sufficient evidence to establish that the elimination of plaintiff’s position was part of a restructuring of the Department intended to improve efficiency and undertaken in response to financial pressures, which constitutes a legitimate and nondiscriminatory reason for an employment decision.” The Court found that Plaintiff, in turn, had provided sufficient evidence to defeat Defendant’s summary judgment. The Court held, “First, that age

discrimination was a motivating factor in the layoff the plaintiff, notwithstanding restructuring, can be inferred from the undisputed fact that the restructuring of the Department affected a disproportionate number of older employees, as 100% of the terminated employees were over age 40 and no younger employees were terminated in the restructuring.” The Court further held, “These circumstances - the age of the terminated employees, the age of plaintiff’s replacement and defendant’s departure from its personnel policies - when viewed together are sufficient to create a genuine factual issue as to whether during the restructuring, age was a motivating factor in defendant’s decision to terminate plaintiff’s employment.” (*Id.*).

Here, in contrast to the underlying facts at issue in *Yanai*, the record shows that three other doctors in the General Radiology Department who were approximately the same age as Plaintiff were retained, Plaintiff provides no evidence of a similar departure in Defendants’ policy in the nonrenewal of her position, or any other evidence to substantiate that age played any role in Defendants’ decision to terminate her employment.

Accordingly, Defendants demonstrate that no jury could find Defendants liable under either the *McDonnell Douglas* test, “or as one of a number of mixed motives, by direct or circumstantial evidence,” as also required under the City HRL. (*Bennett*, 92 A.D.3d at 41). Defendants are therefore entitled to summary judgment and a dismissal of Plaintiff’s age discrimination claim under the NYCHRL.

Plaintiffs’ Breach of Contract Claim

By letter dated June 19, 2002, entitled “Faculty Group Employment Agreement,” (“Employment Agreement”), Dr. Hamburg was offered “employment by NYU Radiology Associates, the Faculty Practice Plan for the Department of Radiology, subject to the terms and conditions of the New York University School of Medicine Faculty Practice Plan, February 2002, a copy of which is annexed hereto and made a part hereof.” The Employment Agreement states, “Upon signature of you, the Dean of the School and the Department Chair, this letter shall constitute our Faculty Practice Plan Participation/Employment Agreement with you, as defined in the Faculty Practice Plan.” Paragraph 1 of the Employment Agreement provides:

We are proposing an appointment as Assistant Professor (Clinical), in the Department of Radiology. Your faculty appointment, non-tenure eligible, is subject to the approval of the School of Medicine Appointments and

Promotions Committee and the Board of Trustees of New York University. You will be an employee of the New York University School of Medicine in your teaching and clinical service capacities.

Paragraph 16 of Employment Agreement states:

This agreement shall be for an initial one year period and is renewable upon agreement of both parties, at a salary to be determined by School guidelines for participants in faculty practice plans, and based upon performance and clinical productivity. The Academic Appointment *is terminable in accordance with provisions stated in the NYU Faculty Handbook and School policies*. The Hospital Appointment is terminable in accordance with the Bylaws and Rules of The Hospital. This agreement shall terminate automatically and simultaneously upon termination of expiration of the Academic Appointment. (emphasis added).

The Table of Contents of the Handbook lists the following sections: Introduction; The University; The Faculty; The Students; and Selected University Policies. The sections are then broken down into further sections. Relevant here is the Faculty section of the Handbook. The Table of Contents reads:

ACADEMIC FREEDOM AND TENURE 21

Title I: Statement in Regard to Academic Freedom and Tenure 21

Title II: Appointment and Notification of Appointment 29

Title III: Rules Regulating Proceedings to Terminate for Cause the Service of a Tenured Member of the Teaching Staff, Pursuant to Title I Section VI, of the Statement in Regard to Academic Freedom and Tenure 32

Title IV: General Disciplinary Regulations Applicable to Both Tenured and Non-Tenured Faculty Members 38

OTHER FACULTY POLICIES 41

Faculty Membership and Meetings 41

Faculty Titles 42

Responsibilities of the Faculty Member 46

Compensation 50

Sabbatical Leave 51

Leave of Absence (paid and unpaid) 52

Faculty Grievance Procedures 56

Page Retirement 59
University Benefits 59
Legal Matters 60

Title II is entitled "Appointment and Notification of Appointment." Section X of Title II is entitled "General Appointment Procedures Affecting the Full-time Tenure-Earning Ranks." Section XI is entitled "Notification of Non-Tenured Faculty Members." Section XI provides:

1. [Notification; prospects] During his or her probationary period, each full-time assistant professor, associate professor, and professor shall be notified annually by the departmental head or chairperson, or by the dean in schools without departmental organization, of his or her prospect of being recommended by the department on the evidence then available for an appointment resulting in tenure. Where it is unlikely that tenure will be achieved, such notification shall be in writing.
2. [Notification; no reappointment] Notice of intention not to reappoint a full-time assistant professor, associate professor, or professor shall be sent to the individual affected according to the following schedule:
 - a) Not later than March 1 of the first year of academic service, if the appointment is to be terminated on August 31.
 - b) Not later than December 15 of the second year of academic service, if the appointment is to be terminated on August 31.
 - c) In all other cases, not later than August 31, if the appointment is to be terminated on the following August 31, or not later than one year before the termination of the appointment.

However, a faculty member whose period of appointment is due to terminate on a date other than August 31, after receipt of the notice required by this paragraph 2, shall have the right, upon written notification to his or her dean at least 120 days prior to the termination date of the period of appointment, to an extension of his or her appointment until the following August 31. That right shall be

communicated to the faculty member in the notice required by this paragraph 2. Under no circumstances shall such extension of appointment, however described, be considered to create any right to further appointment nor shall it, or any other faculty appointment, carry with it a right of continuous or permanent tenure in the absence of written notice awarding such tenure after the carrying out of the procedures described above in Section X.

Plaintiff contends that pursuant to Title II, Section XI(2) of the Faculty Handbook, Defendants were required to notify Dr. Hamburg of its intention not to reappoint her “no later than August 31, if the appointment is to be terminated on the following August 31, or not later than one year before the termination of the appointment.” Plaintiff claims that Defendants breached this provision of the Handbook because Dr. Recht informed Dr. Hamburg on May 3, 2011 that her last day of employment with Defendants would be December 31, 2011, less than one year before the termination of her appointment. Plaintiff also contends that under Section XI(2), she had the right to an extension of her appointment until August 31, 2012, and Defendants never communicated that right to her and her employment terminated eight months earlier, on December 31, 2011.

Defendants argue that notification of Section XI of the Faculty Handbook applies only to tenure-track and tenured faculty, which Plaintiff was not. Defendants contend that when Section XI(2) is read together with Section XI(1), “it is clear that Section XI(2) sets forth the notice provisions only for those tenure-track faculty members who do not receive a tenured appointment.” Defendants argue that since Plaintiff was not on tenure track or tenured, the notice provisions set forth in this section do not apply to her. Defendants further argue that University Bylaw 73, rather than Section XI(2), is “the applicable portion of the Faculty Handbook.” Bylaw 73 provides that “Appointment to a non-tenure position shall be for a definite period of time, not exceeding one academic year unless otherwise specified, and shall automatically terminate at the close of that period unless there is an official notice of renewal.”¹

¹. Bylaw 73, which is entitled “Non-Tenure Positions [Bylaw 73] provides, in relevant part:

- a) Instruction or research service shall be without tenure implications of any kind, regardless of rank or title, if rendered in a part-time capacity, or in a

Plaintiff contends that Bylaw 73 did not apply to an Assistant Professor (Clinical), such as Dr. Hamburg, because such position was a full-time service appointment and even if it did apply, the notice provisions set forth in Section XI(2) could still be enforced.

“The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage.” (*Flomenbaum v. New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dep’t 2009]). “It is axiomatic that a contract is to be interpreted so as to give

temporary position, or in a program having a subsidy of limited duration. Appointment to a non-tenure position shall be for a definite period of time, not exceeding one academic year unless otherwise specified, and shall automatically terminate at the close of that period unless there is an official notice of renewal. Non-tenure position include the following:

- instructor;
- research professor ...
- adjunct professor, adjunct associate professor, adjunct assistant professor;
- clinical professor, clinical associate professor, clinical assistant professor;
- visiting professor . . .

Any position designated by a title not specified in this chapter shall be a non-tenure position unless the Board of Trustees determines otherwise.

b) In the Tisch School of the Arts

c) A full-time instructor is usually appointed for one year only, but if not promoted at the expiration of three years as an instructor shall be ineligible for further full-time appointment in the University. Full-time service in the rank of Instructor may not be counted towards the attainment of tenure by instructors who are promoted to the rank of Associate Professor or Professor Library.

effect to the intention of the parties as expressed in the unequivocal language employed.” (*Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d 351, 355 [N.Y. 1978]). “The best evidence of what parties to a written agreement intend is what they say in their writing.” (*Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 [N.Y. 2002])[quoting *Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 [N.Y. 1992]]. “Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms.” (*Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 (N.Y. 2007)). “Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.” (*Greenfield*, 98 N.Y.2d at 569). The Court should “construe the agreements so as to give full meaning and effect to the material provisions” and “[a] reading of the contract should not render any portion meaningless.” (*Beal*, 8 N.Y.3d at 324) (citations omitted).

Here, Plaintiff’s June 19, 2002 Employment Agreement offers Plaintiff the position of Assistant Professor (Clinical) in the Department of Radiology. It states, “Your faculty appointment, non-tenure eligible, is subject to the approval of the School of Medicine Appointments and Promotions Committee and the Board of Trustees of New York University.” It further provides that Plaintiff’s employment is “subject to the New York University School of Medicine Faculty Practice Plan, February 2002” and that her “Academic Appointment [was] terminable in accordance with the provisions stated in the NYU Faculty Handbook and School policies.” The Handbook provides at Title II, § XI(2) that “[n]otice of intention not to reappoint a full-time assistant professor . . . shall be sent . . . not later than August 31, if the appointment is to be terminated on the following August 31, or not later than one year before the termination of the appointment.” While Defendants argue that this provision applies only to tenure-track and tenured faculty, and does not apply to non-tenure track faculty such as Dr. Hamburg, the provisions of the Handbook do not make such a clear distinction. Defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law on the breach of contract claim.

Wherefore, it is hereby

ORDERED that Defendants' motion for summary judgment with respect to the first cause of action (intentional violation of the NYCHRL) is granted, and the first cause of action is dismissed; and it is further

ORDERED that Defendants' motion for summary judgment with respect to the second cause of action (breach of contract) is denied and shall proceed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JUNE 16, 2016

JUN 16 2016



EILEEN A. RAKOWER, J.S.C.