SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM
Justice

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MARY MURPHY,

Plaintiff,

- v -

WOLFORD AMERICA, INC. and MICHELLE CATUCCI,

Defendants.

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INDEX NO. 162914/2015

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 65, 66, 67, 69, 71, 72 were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is granted.

This action arises out of plaintiff Mary Murphy's claims that her employer, defendant Wolford America, Inc. (Wolford), as well as defendant Michelle Catucci (Catucci), discriminated against her by wrongfully terminating her as a result of her age, in violation of the New York City Human Rights Law (NYCHRL). Defendants collectively move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was hired by Wolford in 2008, when she was 50 years old. Wolford "produces tights and stockings for women and men, underwear for women, women's clothing . . . ." Aff of

Nancy Lima (Lima), Wolford's Director of Human Resources, Defendants' exhibit E, ¶ 4. Wolford's products are manufactured in Europe under the name Wolford AG, which is headquartered in Austria. Wolford distributes these products in the United States in many retail locations. Wolford's corporate office is in New York, New York.

Plaintiff was hired as a controller in Wolford's corporate office, and reported to nonparty Wilson Lee (Lee), the finance director. Plaintiff's job responsibilities included "assisting [Lee] in managing the financial and operational activities within Wolford, completing monthly closings, addressing cash flow issues, administering and managing record-keeping employee benefits and the 401(k) plan." *Id.*, ¶ 10.

In November 2011, Catucci was hired as Wolford's president. While Catucci worked for Wolford, it operated between 27-32 retail locations. Plaintiff alleges that, during a meeting held in February 2012, Catucci "stated her desire to make Wolford a 'younger company.'" Complaint, ¶ 7. Catucci also purportedly stated that Wolford "required younger employees to attract younger clientele." *Id.*, ¶ 8.

In January 2013, plaintiff was terminated at the age of 55. Although she was advised that her termination was due to performance deficiencies, plaintiff claims that the reasons provided were pretextual. Plaintiff alleges that, prior to the time Catucci was hired, she had always received positive reviews.

After plaintiff was terminated, she commenced the captioned action alleging wrongful discharge based on age discrimination in violation of the NYCHRL. Plaintiff claimed that, at the time of her termination, she was the oldest employee at Wolford's corporate office and that she was replaced by a younger employee. According to plaintiff, after Catucci was hired, the retail stores only hired employees under the age of 40 and the corporate office hired "numerous"

employees under the age of 40. *Id.*, ¶ 10. In addition, plaintiff claimed that other employees have made similar allegations of age discrimination.

Defendants now move for summary judgment, alleging that age was not a factor in plaintiff's termination, but rather that plaintiff was fired for exercising poor professional judgment and violating company policies. Plaintiff opposes the motion.

Disclosure of Confidential Information

Plaintiff's job duties included handling confidential information such as salary information, disability-related issues and hiring/firing. Defendants allege that, on November 6, 2012, plaintiff engaged in conduct that violated the non-disclosure and confidentiality provisions of Wolford's Employee Handbook. The Employee Handbook indicates, among other things, that employees should not disclose pricing and salary information. According to defendants, plaintiff disclosed the salary of Sonia Kim (Kim) to Cheryl Terrio (Terrio), who was the east regional retail director, and was one of Kim's peers. Catucci testified that Terrio told her that plaintiff "referenced [the] salary of Sonia Kim." Defendants' exhibit D, Catucci tr at 41. Defendants issued a warning to plaintiff. The record of the warning given to plaintiff reflects, in relevant part, that, "[a]s Controller, [plaintiff] has the responsibility to always keep salary information confidential and it should only be shared privately to an employee's supervisor and higher and not to discuss or reference an employee's salary in any information conversation." Defendants' exhibit L at 1.

Christina Lewandowski (Lewandowski), former training and employee relations manager and director for Wolford, stated that, when she spoke to plaintiff about the incident:

> "[Plaintiff] initially acknowledged that she did, in fact, inform [Terrio] that [prospective hire Kara] Harding's projected salary was almost as much as Ms. Kim earned at Wolford. At that time, [plaintiff] rationalized her disclosure of this information by informing me that Ms. Kim reported to [Terrio], and thus the disclosure of such information was not inappropriate."

Defendants' exhibit W, Lewandowski aff, ¶ 4.

Lewandowski continued that, in actuality, Kim and Terrio were "peers within Wolford." *Id.* In addition, after discussing the incident with Catucci, it was Lewandowski's "understanding that [Catucci] felt this was a severe lapse in judgment and confidence that she expected a person performing the position of Wolford's Controller to exhibit." *Id.*, ¶ 6.

Plaintiff testified that she was not speaking to Terrio when she discussed Kim's salary, but that she was on the phone with human resources in Austria and Terrio came up behind plaintiff, "listening to my conversation." Defendants' exhibit C, plaintiff's tr at 227. Plaintiff believed that Terrio misrepresented that she had the actual conversation with plaintiff because Catucci "was doing everything she could to terminate" her and Catucci had Terrio "checking" on plaintiff. *Id.* at 228.

Sandra Binder (Binder) is a Wolford AG human resources employee based in Austria. Binder emailed Lewandowski and Catucci regarding scheduling a teleconference to address plaintiff's job description and also regarding the November 6, 2012 incident. The email stated the following, in relevant part:

> "I leave it up to you whether you would like to lead the conversation. As I mentioned already I just want to make very clear that changes which are going to be implemented (e.g. not taking care of complaints from Sales Consultants any longer) will be communicated and executed straight away. Nevertheless things which she has been 'allowed' to do for a long time and [plaintiff] has never been told to stop doing that need a warning system before any consequences in terms of contract termination will take place.

> "I completely agree with [Catucci] that she does have a trustworthy position and therefore needs to be trusted for 100% and it is absolutely inacceptable to communicate/discuss any sensitive information with anyone except the people it should be discussed with. Breeches [sic] like this can and will lead to termination, especially as we did hand out a written warning with regards to that already."

Defendants' exhibit I at 1-2.

Defendants claim that plaintiff further violated company policies and used poor judgment when she sent an email to Paul Rubin (Rubin), her former boyfriend, and to other Wolford employees, discussing confidential issues about her employment. The email discussed the November 6, 2012 incident, indicating, in pertinent part: "As per a conversation [Lewandowski] and [Catucci] on Monday Nov 12, 2012 – they had informed me I was being written up . . . . The conversation with Cheryl was regarding Kara Harding and if the employee request form had been completed and forwarded to Sandra (Binder)." Defendant's exhibit N at 1. Plaintiff also wrote in that email that this was a "conversation I had with Sandra on Nov 6th regarding a few issues – was later told conversation had been overheard." *Id.*

Plaintiff testified that she had only emailed Rubin and others when Catucci "tried to write up a report on me before I was going on vacation." *Id.* at 218. Plaintiff also explained that, in that letter, she was conveying to everyone that she had been overheard due to lack of office space. "I'm in an open area. She came in, her desk was just behind me." *Id.* at 225. Plaintiff stated that she was "getting told by [Lee] that [Catucci] was going to do everything and anything that she could to terminate me. . . . I'm getting accused and blamed for everything - - I wasn't doing anything that wasn't right." *Id.* at 223.

In addition, defendants allege that plaintiff's conduct violated provisions in the Employee Handbook when she shared confidential information about Catucci' s clothing allowance with

Rubin. Plaintiff testified that Rubin is a CPA and that she only asked him questions regarding the calculations of Catucci's annual clothing allowance.

401k Incident

On December 17, 2012, plaintiff received a check with the after-tax proceeds of her 401k account. The reason for the payout was listed as a "termination benefit." On January 3, 2013, Plaintiff called Lee seeking assistance after she was unable to put her company contribution into the 401k. Lee spoke to the financial company and determined that plaintiff could not complete the company contribution because she was marked as terminated. Lee emailed Thomas Melzer, Wolford AG's CFO, the following, in relevant part:

> "[Plaintiff] terminated herself on the 401(k) retirement plan to withdraw all the contributions she made, which is illegal. As Controller and an associate plan administrator, she should be aware that this is not allowed by law and by our plan document and if she was not sure, she should have asked me. Now, there could be disciplinary action against her."

Defendants' exhibit Q at 1.

According to Catucci, Lee advised her about the irregularity in plaintiff's 401k account. Catucci stated that, based on the circumstances, she, Lee and other individuals based in Austria made the decision to terminate plaintiff. Catucci testified that she felt plaintiff used poor judgment in the situation. She further testified that it "created a prejudicial situation because not every employee was offered the opportunity to [empty their 401k]." Catucci tr at 84. "Based on her role as an administrator of the 401k," plaintiff was the only employee who would be able to voluntarily withdraw her 401k. *Id.* at 91. Specifically, Catucci testified that "[t]here were several conversations over this period and my concern was that because of advice I was getting from

counsel about the situation that given [plaintiff's] particular role and responsibility in the company, that this was very harmful." *Id.* at 88.

Plaintiff maintained that she withdrew the money from her 401k to help pay her daughter's college expenses. She testified that she was worried that Catucci was going to fire her and "was trying to opt out of the 401, put the money away. And then if she fired me, I wouldn't care." Defendants' exhibit C, plaintiff's tr at 239. Plaintiff believed that Catucci "would have tried to hold up the paperwork" to prevent plaintiff from withdrawing her 401k funds after she left Wolford. Plaintiff claims that she did not try to use the 401k illegally and that Catucci was using it as an excuse to terminate plaintiff based on her age. Plaintiff explained that she was not trying to end her employment but that she was "trying to opt out and end a 401(k)." *Id.* at 254-255. She wanted to close out the 401k, "[w]hich, by law, I was over 50, I could do it without being penalized." *Id.* at 255. She stated that the money was going to go back into her account and that she had already requested the forms to do so.

While at Wolford, plaintiff had previously taken out two loans from her 401k and she executed loan agreements for both. However, in the instant situation, plaintiff testified, "it was opting out. Not a loan." *Id.* at 248. Plaintiff believed that her actions were appropriate and could be classified as a "hardship withdrawal." *Id.* at 261. Plaintiff understood that Lee, Catucci and someone in Austria were involved in the decision to terminate her. "[Lee], like I said. He was helping [Catucci], because he's spineless. Anything [Catucci] told him to do is what he did." *Id.* at 245.

Plaintiff's Additional Relevant Testimony:

Plaintiff maintained that, prior to Catucci's arrival, she had received positive reviews. She testified that Catucci did not have a good relationship with the other finance employees "[b]ecause as far [Catucci] was concerned, she had no knowledge of the financials, and it wasn't her forte. She just wanted to get new people in." *Id.* at 127-128. At the first meeting held after Catucci's arrival at Wolford, Catucci introduced herself and discussed the following, in relevant part: "Making a change for the company to make it a younger company. She wanted them to go after younger clientele. She was telling us how she's going to revamp the whole office, the organization, as far as in New York." *Id.* at 133. Plaintiff testified that she remembered Catucci "mentioning her desire to broaden Wolford's clientele to reach more groups of people, such as people who were younger," but that Catucci did not state that she no longer wanted older people to be customers. Plaintiff summarized:

> "Basically, that she wanted to become a younger company. She wanted to get, um, a lot more younger salespeople in, because a number of them had been with the company since the company first opened and they were older. You had - - I believe there was one or two in their 70s. So basically, she wanted to turn it around. She wanted all young kids in there as sales associates."

Id. at 134-135.

After the meeting, plaintiff felt that Catucci wanted to "run the company the way she wanted and not by the rules. She didn't want anybody that really had knowledge of anything, if she could bring somebody else in to train them the way she wanted them trained." *Id.* at 141-142. Plaintiff believed that Catucci wanted to learn what she could from the financial group, such as plaintiff, and then "get rid of us." *Id.* at 135. Plaintiff claims that it was "turning out to be age discrimination . . . . I discussed it with [Lee] when we found out that Jill Tonnesan was getting

terminated." *Id.* at 136. Nonetheless, plaintiff testified that no one made any disparaging comments to plaintiff about her age.

According to plaintiff, Catucci gave her a list of five employees whom she sought to terminate, and they were all over 40, namely, Yaneira Marin (Marin), Nydia Rocha (Rocha), Laura Venticinque (Venticinque), Diana Sweetland (Sweetland) and Ron Wing (Wing). *Id.* at 139.

Defendants state that Marin was terminated for performance reasons. Venticinque went out on a medical leave and did not return to Wolford. Wing resigned voluntarily in 2016 at the age of 54. Defendants note that Wing is only five years younger than plaintiff and older than Catucci. Wing remained at Wolford after Catucci left. Sweetland and Rocha are still employed by defendants. According to defendants, while plaintiff mentions many employees in her testimony, there is no admissible evidence provided regarding plaintiff's age discrimination claim. Catucci testified that Tonnesan was based in Kansas City and her employment was terminated by "mutual agreement." Catucci tr at 31. Catucci was aware that Tonnesan filed a complaint with the EEOC alleging that she was discriminated against based on age. Catucci testified that Tonnesen was not terminated. "Nor was she going to be terminated. She filed a lawsuit and EEOC complaint while she had a job", stated Catucci. *Id.* at 34.

Plaintiff claimed that she spoke to Lee, her direct supervisor, and advised him that she was being discriminated against based on age. She maintained that Lee "was spineless. He would not open up his mouth. He wouldn't stand up to her." Plaintiff's tr at 150. Plaintiff testified that Catucci would hire friends of friends and that it was "discrimination. Because all she's doing is for her own well-being, you know. Oh here, I owe you a favor. You did this for me, now get your kid in here." *Id.* at 162. She did not remember whether she told the corporate offices in Austria but claims that she said she was being "targeted" by Catucci. *Id.* at 149. Plaintiff testified that,

while she was employed at Wolford, several employees, including Rocha, conveyed to her that they felt as though they were being discriminated against on the basis of age.

Plaintiff testified that, although she worked holidays and weekends, Catucci refused to grant her "comp" days. However, Catucci granted requests made by other employees for comp days. Plaintiff testified that Catucci "just decided she would give comp days to whoever she felt like giving it to." *Id.* at 233. Plaintiff testified that younger employees, like "Kimberly," were granted comp days. She also conceded, however, that Catucci denied comp days to other employees younger than plaintiff. Catucci allegedly favored certain employees who were "her hires." Plaintiff testified that "[d]oing the comp days has nothing to with that - - about my age." *Id.* at 235. She explained that it was just a way for Catucci to "get [her] out." *Id.* at 236.

The Instant Motion

Defendants allege that plaintiff cannot set forth a prima facie age discrimination claim since she has not produced any direct or circumstantial evidence that they terminated her based, in whole or in part, on her age. Defendants claim that the purported comments Catucci made during the February 2012 meeting are "stray remarks," and cannot support an inference of age discrimination. Initially, Catucci testified that she did not recall stating that she desired to make Wolford a "younger company." Catucci further testified that she did not state that "Wolford required younger employees in order to attract younger clientele." Catucci tr at 102-103.

Defendants allege that there is no connection between these comments and plaintiff's termination, which was 11 months later. In addition, defendants note that Catucci referred to broadening Wolford's client base and did not suggest that Wolford should stop trying to sell to

older clients. Furthermore, the comments allegedly referred to hiring younger salespeople, not internal corporate employees such as plaintiff.

With respect to plaintiff's allegation that she was the oldest employee in Wolford's corporate office, defendants argue that this is unsupported and, in addition, is inadequate to establish an inference of discrimination. In comparison, plaintiff's first replacement was Michael Cook (Cook), 40 years old at the time he was hired. After Cook resigned approximately nine months later, defendants hired Mercedes Montesdeoca (Montesdeoca), 46 years old at the time she was hired. Montesdeoca is still employed by Wolford. Aff of Lima, ¶ 11. Defendants further state that both Lee and Catucci were 42 and 45 respectively, when they decided to terminate plaintiff. In addition, plaintiff was hired by Lee when she was 50, further weakening her claim of age discrimination.

Lee was terminated for performance reasons in 2014. Catucci testified that, in 2015, it was "mutual[ly]" agreed that she would leave Wolford and she signed a confidentiality agreement regarding her departure. Catucci tr at 20. Catucci was 48 at the time of her termination. Defendants listed eight employees who were involuntarily terminated from the corporate office between 2011 and 2015. Including plaintiff, Catucci, and Lee, the employees were 26, 30, 36, 40, 44, 48 and 55 years old at the time they were terminated.

In addition, defendants submit the affidavit of Rocha, one of the employees referred to by plaintiff in support of her age discrimination claim. However, Rocha contradicted plaintiff's testimony stating, in relevant part, that "I have never felt as though I have been discriminated against or harassed due to my age, or any other protected basis, throughout my employment with Wolford, including, but not limited to, while Ms. Catucci served as Wolford's President." Defendants' exhibit U, Rocha aff, ¶ 4.

Regarding the November 2012 warning, defendants maintain that plaintiff received this for disclosing confidential information to another employee. Although plaintiff now disputes that she spoke to Terrio, the record provided, including plaintiff's own email, establishes that she did. Moreover, even if plaintiff disagrees with the warning she received, her disagreement is not a basis to support an age discrimination claim. Similarly, even if they were mistaken, defendants' belief that plaintiff intended to use her 401k in an illegal manner arose in good faith and plaintiff has not proffered any evidence to suggest that their actions in investigating and terminating her based on irregularities in that account were the result of plaintiff's age.

In further support of their motion, defendants point to Catucci's affidavit. Catucci indicated that she spent the first two months of her employment "learning about Wolford's business and internal operations." Defendants' exhibit G, Catucci aff, ¶ 11. She then identified "loose controls" within the Finance Department, such as no written policy existing for "employee' use of 'comp days.'" *Id.*, ¶ 12. After this time period, Catucci "decided to correct the deficiencies [she] identified, particularly because [she] attributed some of them to Wolford's then financial performance (which I sought to improve)." *Id.*, ¶ 13. Specifically. Catucci "determined that the Finance Department required more stringent oversight, a decision that affected both Wilson Lee, Wolford's then-Finance Director, and Plaintiff." *Id.* Catucci provides several examples of "changes which subjected Mr. Lee to more stringent oversight," including, among other things, "[r]equiring that invoices be approved by the supervisor or store manager who ordered the service before checks would be signed . . . ." *Id.* Defendants further maintain that, although plaintiff alleges that Catucci unjustly scrutinized her performance, Catucci's new directives affected all employees in the finance department, regardless of their age.

Defendants allege that, even if plaintiff is able to support a prima facie age discrimination claim, they have met their burden of demonstrating legitimate nondiscriminatory reasons for plaintiff's termination. As noted, defendants maintain that they terminated plaintiff's employment due to the documented lapses in professional judgment and that these constitute legitimate, nondiscriminatory reasons for termination. Plaintiff breached Wolford's policies by both disclosing Kim's salary, for which she received a warning, and emailing her former boyfriend.

Shortly thereafter, plaintiff was ultimately fired as a result of again displaying poor judgment in connection with the discretionary access to the 401k account. Lee was alerted to the issue when plaintiff stated that she was having problems entering an employer contribution into her own account. Defendants note that, if plaintiff's true intent was to opt out of her 401k account, she would not have been attempting to make an employer contribution into the account.

Defendants further argue that Catucci is also entitled to summary judgment dismissing the complaint. According to defendants, plaintiff has not set forth any basis to hold Catucci individually liable for age discrimination. In addition, since Wolford did not discriminate against plaintiff on the basis of age, Catucci could not have aided or abetted such conduct.

Plaintiff's Opposition

In opposition, plaintiff maintains that, contrary to defendants' contentions, she is able to establish a prima facie case by demonstrating an inference of age discrimination leading to her termination. According to plaintiff, the circumstances leading up to her termination suggest that it was based on her age. As noted above, plaintiff argues that Catucci, as the new president of Wolford, announced her desire for Wolford to become a "younger" company at the February 2012

meeting. Less than a year later, plaintiff, who was purportedly the oldest corporate employee at the time, was terminated.

Plaintiff believes that Catucci's primary motivation in firing plaintiff was to hire younger employees. In addition, plaintiff claims that another employee filed and settled a lawsuit against Wolford alleging age discrimination. According to plaintiff, while defendants have stated that plaintiff's replacements and "decision makers were within the age range protected by federal law," these "protected age ranges" are irrelevant to the standards under the NYCHRL. Similarly, although defendants argue that Catucci's statements at the February 2012 meeting could be construed as stray remarks, this standard is inapplicable under the NYCHRL. Even if it were applicable, plaintiff asserts that the remarks were not merely stray, since they demonstrated that Catucci's decision-making was tied to her desire to make Wolford a younger company.

Furthermore, although plaintiff concedes that defendants have raised nondiscriminatory reasons for her termination, she claims that an issue of fact remains as to whether these reasons were pretextual. For instance, plaintiff believes that defendants' version of the November 6, 2012 incident was misleading and incomplete. According to plaintiff, she was speaking to Binder over the phone when Terrio overheard Kim's salary. She claims that this version of events can be gleaned from her November 12, 2012 email as well as her testimony. She also points to Lee's email "Now, there could be disciplinary action taken against her," as an indication that defendants were looking for an opportunity to terminate plaintiff.

Plaintiff also notes that she was a dedicated worker and had no disciplinary action taken against her prior to Catucci's arrival. She further asserts that the ultimate reason provided for plaintiff's termination was not as serious as defendants made it out to be, but was merely a pretext for effecting her termination so that Wolford could be a "younger" company. She also argues that,

although defendants insist that plaintiff's improper classification on her 401k was illegal, Wolford was not exposed to any legal consequences.

LEGAL CONCLUSIONS

Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

Age Discrimination in Violation of the NYCHRL

Pursuant to the NYCHRL, it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to fire or discriminate against an individual in the terms, conditions or

privileges of employment, because of the individual's actual or perceived age. *See* Administrative Code of the City of NY (Administrative Code) § 8-107 (1) (a).

The provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts. *Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 (1st Dept 2016). On a motion for summary judgment dismissing a claim for discrimination under the NYCHRL, courts have reaffirmed the applicability of the burden-shifting analysis as developed in *McDonnell Douglas Corp. v Green*, in addition to the mixed-motive analysis. *See Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 (1st Dept 2016) (internal quotation marks and citation omitted) ("A motion for summary judgment dismissing a City Human Rights Law claim can be granted only if the defendant demonstrates that it is entitled to summary judgment under both the *McDonnell Douglas* burden-shifting framework and the mixed-motive framework").

In the burden-shifting analysis, the plaintiff must set forth that he or she "is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009). With respect to age discrimination, if plaintiff "does not produce direct or statistical evidence that would logically support an inference of discrimination, she must show her position was subsequently filled by a younger person or held open for a younger person." *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 123 (1st Dept 2007); *see also Ashker v International Business Machs. Corp.*, 168 AD2d 724, 725 (3d Dept 1990) ("Also, when age discrimination is charged, the complaint must also allege that someone younger replaced the terminated employee, or include direct evidence of discriminatory intent or statistical evidence of discriminatory conduct").

If the plaintiff is able to set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating nondiscriminatory reasons for its employment actions. *Baldwin v Cablevision Sys. Corp.*, 65 AD3d at 965. If the employer meets this burden, the plaintiff must "prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination." *Id.* (internal quotation marks and citation omitted).

Under the mixed-motive analysis, "the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination." *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 (1st Dept 2012) (internal quotation marks and citations omitted).

Here, plaintiff alleges that she has established that the termination occurred under circumstances giving rise to an inference of age discrimination based on Catucci's comments at the February 2012 meeting, because plaintiff was the oldest employee in the corporate office at the time she was terminated, and because other employees have made allegations of age discrimination. Plaintiff also alleges that there was a pattern of age discrimination since Wolford has hired numerous employees under the age of 40 in both the corporate office and the retail locations since Catucci's arrival. According to the complaint, plaintiff was replaced by a younger employee. Plaintiff also testified that Catucci advised plaintiff that she Catucci wished to terminate 5 employees who were all over 40.

Given plaintiff's "de minimis burden," to establish her prima facie case, the court "assume[s] that these circumstances surrounding the challenged adverse actions giv[e] rise to an inference of discrimination." *Melman v Montefiore Med. Ctr.*, 98 AD3d at 114-115 (internal quotation marks and citations omitted).

Nonetheless, as set forth below, defendants have met their burden of providing a legitimate business reason for plaintiff's termination, which was based on exercising poor professional judgment and breaching company policies. In response, plaintiff fails to raise a triable issue of fact as to whether the reasons proffered by defendants were "merely a pretext for discrimination." *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d at 514. Plaintiff has only provided "[c]onclusory allegations of discrimination [which] are insufficient to defeat a motion for summary judgment." *Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326, 329 (1st Dept 2005).

Defendants have alleged that plaintiff was terminated for abusing her professional discretion in connection with her 401k plan. They contend that plaintiff attempted to withdraw money from her 401k so that she could access the funds without having to go through the loan agreement process.

Plaintiff does not dispute that she improperly classified herself as being terminated, but argues that it was a mistake and that defendants blew the situation out of proportion and used it as a pretext to terminate her. However, plaintiff has failed to demonstrate how defendants' decision to terminate her was pretextual. Although plaintiff claims that this decision was wrong, there is no evidence that defendants did not believe plaintiff exercised poor judgment or breached company policy. Moreover, the decision to terminate plaintiff was made not only by Catucci, but by Lee and others in Austria. "The mere fact that [plaintiff] may disagree with [her] employer's actions or think that [her] behavior was justified does not raise an inference of pretext." *Melman v Montefiore Med. Ctr.*, 98 AD3d at 121 (internal quotation marks and citations omitted).

Defendants further argue that plaintiff exercised poor professional judgment in other situations, including the November 6, 2012 incident in which she informed Terrio about Kim's salary. Plaintiff explains that she was overheard and that her version of the events is documented

in an email to Rubin and others. However, the record indicates that several human resources employees memorialized the incident in the same manner, with plaintiff directly advising Terrio of Kim's salary. In addition, there is no record that plaintiff disputed the written warning she received after the incident. Thus, there is no indication that defendants were mistaken in believing that the incident occurred in the manner reported.

In addition, the Employee Handbook advised plaintiff not to disclose salary information. Plaintiff has failed to demonstrate how defendants deviated from the company policy in their written warning. It is well settled that the court will "not sit as a super-personnel department that reexamines an entity's business decisions." *Baldwin v Cablevision Sys. Corp.*, 65 AD3d at 966 (internal quotation marks and citation omitted).

Further, plaintiff argues that, examining Lee's email, one could extrapolate that defendants were looking for a reason to terminate her. However, plaintiff has not provided anything more than self-serving allegations in support of her contentions. "[S]elf-serving testimony . . . is insufficient to defeat summary judgment." *Deebs v ALSTOM Transp., Inc.*, 346 Fed Appx 654, 656 (2d Cir 2009) (internal quotation marks omitted).

Plaintiff believes that she was doing a good job, and that she was given warnings and eventually fired as a result of her age. However, even viewing the evidence in the light most favorable to plaintiff, plaintiff has not provided any evidence that she was terminated as a result of her age. *See e.g. Fruchtman v City of New York*, 129 AD3d 500, 501 (1st Dept 2015) ("While termination is indisputably an adverse action, plaintiff's conclusory claim that her termination was motivated by a[n age]-related bias is insufficient to establish discrimination"); *see also Brierly v Deer Park Union Free Sch. Dist.*, 359 F Supp 2d 275, 296 (ED NY 2005) (internal quotation marks

and citation omitted) ("An employee's opinion about his own qualifications does not suffice to give rise to an issue of fact about whether he was discriminated against . . .").

Plaintiff has made several allegations regarding defendants' pattern of age discrimination but does not provide any support for them in opposition to their motion. For example, plaintiff alleges that defendants were attempting to terminate the older employees and only hire younger employees. In the complaint, plaintiff claims that, since Catucci's arrival, defendants have hired numerous employees under the age of 40. Defendants respond that plaintiff's initial replacement was 40 years old and, after he left, his replacement was 46 years old. In addition, between the years 2011 and 2015, employees of all age ranges were terminated. Including plaintiff, the ages of the terminated employees were 26, 30, 36, 40, 44, 48 and 55.[1] In opposition, plaintiff "has presented no statistical data or analysis" in support of her argument that defendants "declined to [hire] older [employees] at a higher rate than younger [employees] during the relevant period." *Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 78 (1st Dept 2017).

Additionally, although plaintiff testified that Catucci advised plaintiff that she wished to terminate 5 employees who were all over 40, at least 3 of these employees remained at the company after Catucci was terminated. Plaintiff further testified that various employees told her that they thought defendants were discriminating against them based on age. However, one of the employees mentioned submitted an affidavit specifically denying plaintiff's testimony. In addition, the alleged age discrimination claim and settlement reached with another employee is insufficient to raise a triable issue of fact. There is no information about this employee's complaint

[1] Plaintiff argues that defendants' "protected age ranges" are irrelevant to the standards under the NYCHRL. Nonetheless, she asserts that defendants have hired numerous employees under the age of 40. In any event, the NYCHRL does set forth a specific age range as a protected class and employers may be held liable for discriminating against people on the basis of their actual or perceived age, not just against people 40 years and older.

or her situation to infer a pattern of age discrimination. *See e.g. Melman v Montefiore Med. Ctr.*, 98 AD3d at 124 ("Aside from his failure to flesh out the facts underlying the departures of the other older departmental chairmen, plaintiff has not offered any statistical data or analysis that could support a finding of a pattern of age discrimination"); *see also Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 517 (1st Dept 2016) (internal quotation marks and citation omitted) ("reliance on statistics as evidence of pretext or bias is unavailing, because the sample sizes are too small to support an inference of discrimination").

Although plaintiff alleges that Catucci gave her a hard time when trying to take "comp days," she also conceded that this was not attributable to her age and that Catucci's policies affected all employees. *See e.g. Kosarin-Ritter v Mrs. John L. Strong, LLC,* 117 AD3d 603, 604 (1st Dept 2014) (In dismissing plaintiff's age discrimination claim court held, among other things, plaintiff "submitted no evidence that the dress code with respect to hair style was not applied equally to all employees").

Although plaintiff alleges that younger employees were treated more favorably, plaintiff testified that Catucci wanted to run the company a certain way and that she preferred to hire people whom she already knew, regardless of their age. Contrary to plaintiff's contention, to establish age discrimination plaintiff must demonstrate that there was discriminatory animus based on age. *See e.g. Whitfield-Ortiz v Department of Educ. of the City of N.Y.*, 116 AD3d 580, 581 (1st Dept 2014) (Plaintiff's NYCHRL claim fails because it does not "contain any factual allegations demonstrating that similarly situated individuals who did not share plaintiff's protected [age] characteristics were treated more favorably than plaintiff").

Plaintiff testified that various employees would be able to testify regarding plaintiff's age discrimination claims. She also asserted that it can be inferred from Lee's email that defendants

were unjustly looking for the first opportunity to terminate her. However, defendants have met their burden on the motion for summary judgment. Plaintiff has not submitted affidavits or deposition testimony from these individuals, and her reliance on hypothetical testimony or affidavits cannot raise a triable issue of fact. "In opposing the motion for summary judgment, the plaintiff should have laid bare *all* of [her] evidence and arguments." *Popalardo v Marino,* 83 AD3d 1029, 1030 (2d Dept 2011) (internal quotation marks and citations omitted).

Stray Remarks

As noted above, plaintiff alleges that, when Catucci started working for Wolford, she announced her plans to make Wolford a younger company. Catucci allegedly wanted to reach younger clientele and hire younger sales associates in the retail locations. "Verbal comments can serve as evidence of discriminatory motivation when a plaintiff shows a nexus between the discriminatory remarks and the employment action at issue." *Chiara v Town of New Castle*, 126 AD3d 111, 124 (2d Dept 2015). However, the verbal comments here do not comprise evidence, because Catucci purportedly made the remarks eleven months prior to plaintiff's termination.

In any event, notwithstanding the timing, even if Catucci "made inappropriate [age]-based comments, under the circumstances, they constitute at most stray remarks which, even if made by a decision maker, do not, without more, constitute evidence of discrimination." *Hudson*, 138 AD3d at 517 (internal quotation marks and citations omitted).[2] Plaintiff testified that Catucci

[2] Contrary to plaintiff's contention, courts have held that the stray remarks doctrine is applicable under the NYCHRL. *See e.g. Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 494 (1st Dept 2014) (internal quotation marks and citation omitted) ("We decline to hold, as urged by plaintiff and amici, that the stray remarks doctrine may not be relied on in determining claims brought pursuant to the City Human Rights Law, even as we recognize the law's uniquely broad and remedial purposes").

sought to broaden Wolford's clientele. Catucci did not state that she no longer sought to retain the older clientele. Neitther Catucci nor any other employee made any disparaging comments to plaintiff about her age. Furthermore, plaintiff believed that Catucci wanted to hire younger employees for the retail locations. There was no indication, beyond plaintiff's personal belief, that Catucci wanted to replace the corporate employees, like plaintiff, with younger employees. "[A] plaintiff's feelings and perceptions of being discriminated against are not evidence of discrimination." *Basso v Earthlink, Inc.*, 157 AD3d 428, 430 (1st Dept 2018) (internal quotation marks and citation omitted).

Turning to the mixed-motive analysis, none of plaintiff's allegations can establish that her termination was motivated, even in part, by discrimination. *See e.g. Matias v New York & Presbyt. Hosp.*, 137 AD3d 649, 650 (1st Dept 2016) ("The absence of any evidence [that defendants were motivated by] discriminatory animus is equally fatal to any claim of mixed motive [under the NYCHRL]"). Similarly, although plaintiff claims to have been the oldest employee in the corporate office at the time of her termination, there is no basis to conclude that her age was a factor in her termination or that younger employees were treated more favorably. Even under the lesser burden of the NYCHRL, plaintiff "is required to do more than cite to [her] mistreatment and ask the court to conclude that it must have been related to [her age]." *Campbell v Cellco Partnership*, 860 F Supp 2d 284, 296 (internal quotation marks and citation omitted).

Claims Against Catucci

Plaintiff claims damages against Wolford and Catucci, former president of Wolford. Plaintiff does not indicate on what basis she seeks to hold Catucci liable for NYCHRL violations. Under the NYCHRL, pursuant to Administrative Code § 8-107 (1) (a), individual employees may be held liable when they "act with or on behalf of the employer in hiring, firing, paying, or in

administering the 'terms, conditions or privileges of employment.'" *Priore v New York Yankees*, 307 AD2d 67, 74 (1st Dept 2003). Administrative Code § 8-107 (6) provides that an individual employee may be held liable for aiding and abetting discriminatory conduct under the NYCHRL.

Since Catucci did not commit any actionable conduct, she cannot be found individually liable. Additionally, since the discrimination claim against Wolford has been dismissed, a claim against Catucci as an aider and abettor of Wolford's allegedly discriminatory conduct fails as a matter of law. *See e.g. Abe v Cohen*, 115 AD3d 491, 492 (1st Dept 2014) ("[Defendant] cannot be held liable for aiding and abetting an act which itself is not actionable").

In conclusion, even viewing the evidence in a light most favorable to plaintiff, plaintiff fails to demonstrate that age discrimination was a motivating factor in her termination. Given the foregoing analysis, defendants are entitled to summary judgment dismissing the complaint, since they have "established that there is no evidentiary route that could allow a jury to believe that discrimination played a role in the [termination of plaintiff's employment]." *Kosarin-Ritter*, 117 AD3d at 604 (1st Dept 2014) (internal quotation marks and citation omitted).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants Wolford America, Inc. and Michelle Catucci for summary judgment dismissing the complaint is granted, and the complaint is dismissed with costs and disbursements to said defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that, within 20 days after this order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this order, with notice of entry, on counsel for plaintiff, as well as on the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

1/30/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE