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United States District Court,
S.D. New York.

Renee MIHALIK, Plaintiff,
v.
CREDIT AGRICOLE CHEUVREUX NORTH AMERICA, INC., Defendant.

No. 09 Civ. 1251(DAB).
|
July 29, 2011.

MEMORANDUM AND ORDER

DEBORAH A. BATTS, District Judge.

***1** Plaintiff Renee Mihalik ("Mihalik") brings this diversity action against her former employer, Defendant Credit Agricole Cheuvreux North America, Inc. ("Cheuvreux" or the "Company"), for gender discrimination and retaliation pursuant to the New York City Human Rights Law ("NYCHRL"). Plaintiff alleges that Cheuvreux maintained a hostile work environment, altered the terms of her employment after she rejected her supervisor's sexual advances, and retaliated against her for protesting the way she was treated. Defendant now moves to strike Plaintiff's Rule 56.1 Counter-statement and Affidavit and also moves for summary judgment on each of Plaintiff's claims. For the following reasons, Defendant's Motion to Strike is DENIED, and its Motion for Summary Judgment is GRANTED on all counts.

I. BACKGROUND

Except where noted, the following facts are undisputed. Cheuvreaux is a Delaware corporation engaged in the business of securities brokerage, research and execution. (Def.'s 56.1 Stmt. ¶ 1.) In June 2007, Mihalik, a citizen of New Jersey, interviewed for a position as a salesperson at Cheuvreux's Alternative Execution Services ("AES") desk in New York.[1] (*Id.* ¶¶ 4–5.) The responsibilities of the position involved recruiting institutional clients for Cheuvreux and selling the firm's trade-execution services to them. (*Id.*)

At the time of Mihalik's interview, Cheuvreux had approximately 45 employees in its New York office, including 5 employees at its AES desk. (*Id.* ¶ 8.) The Company did not have strong name recognition in the United States, and according to Mihalik, Cheuvreux's Chief Executive Officer told her that the Company's efforts in the U.S. market were in their infancy. (Pl.'s 56.1 Stmt. ¶ 127; Affidavit of Renee Mihalik ("Mihalik Aff.") ¶ 9.) During her interview, Mihalik stated that she had senior contacts at major potential clients, including Galleon, Legg Mason, BlackRock and LibertyView, and was prepared to use those contacts if she came to work for the Company. (Def.'s 56.1 Stmt. ¶ 6.) However, the Company understood that Mihalik was "coming from a standing start", since her contacts would not move to Cheuvreux immediately and it would take time to build a revenue-generating base of customers. (Pl.'s 56.1 Stmt. ¶ 18.) Cheuvreux ultimately hired Mihalik as Vice President of AES, with an annual salary of $190,000.00 and a potential bonus of $175,000.00, and she began work on July 9, 2007. (Def.'s 56.1 Stmt. ¶ 7.)

A. Mihalik's Performance at Cheuvreux

Mihalik recruited a number of new accounts for the AES desk during her tenure at Cheuvreux, including Galleon, Legg Mason, BlackRock and LibertyView. (Pl.'s 56.1 Stmt. ¶ 18.) However, while Mihalik's new accounts were all considered clients formally, only LibertyView conducted any actual business through the desk. Moreover, even LibertyView conducted little activity with the desk, generating only $22,700.00 in commissions during Mihalik's nine-month tenure with the Company. (Def.'s 56.1 Reply Stmt. ¶ 18(2); 131.) Mihalik's commissions compared unfavorably against those of the two other salespersons on the AES desk, who had worked with Cheuvreux-related clients for several years, and brought in monthly commissions ranging from $96,811.00 to $438,498.00 throughout the period of Mihalik's employment. (*See* AES Sales Report, Attached

as Ex. B to Declaration of Melissa Franzen in Supp. of Def.'s Mot. Summ. J.). On February 26, 2008, Mihalik emailed to a colleague that she had "so many things awaiting either contract or something else, but no trading as of yet ... p-me off too ... makes me look like am slacking but am certainly not ... BRUTAL clients/prospects." (See Email of Renee Mihalik, Attached as Ex. 78 to Declaration of Barbara M. Roth in Supp. of Def.'s Mot. Summ. J. ("Roth Decl.").) (Elipses and emphasis in original.)

***2** During her tenure at the Company, Mihalik did not follow up on several sales leads in a timely fashion. On July 30, 2007, Ian Peacock, Cheuvreux's Chief Executive Officer and head of its AES desk, referred sales leads for three potential clients to Mihalik and another salesperson, Dominic Romano. (Def.'s 56.1 Reply Stmt. ¶ 16; Pl.'s 56.1 Stmt. ¶ 16). After Peacock requested a status update on these leads nine days later, Mihalik emailed Romano, asking "Do you know anything about these accounts Ian keeps asking us about?" (Def.'s 56.1 Stmt. ¶ 24; Pl.'s 56.1 Stmt. ¶ 24.) Romano replied that he had been working on two of the leads, and Mihalik took the third lead at that point. (*Id.*) On October 17, 2007, Peacock forwarded Mihalik a sales lead from Patrick Egan of TradingScreen. Nearly one-and-a-half months later, on November 29, Mihalik emailed Egan about the lead, asking "How are you?!?!?! I havent spoken to you in so long! ... Do you remember what this is all about?" (Email of Renee Mihalik, Attached as Ex. 29 to Roth Decl.) Mihalik claims she had spoken to Egan about the potential lead prior to her November 29 email, but does not cite any evidence to support this assertion. (Pl.'s 56.1 Stmt. ¶ 64.) Finally, a week after Mihalik returned from a European business trip, on January 30, 2008, Peacock emailed Mihalik stating that a Cheuvreux colleague in Europe was "upset that you didn't get back to [a potential client] when you promised." (Def.'s 56.1 Stmt. ¶ 103.) Mihalik then contacted the European colleague, apologized and explained that she had not spoken to the potential client yet because her luggage (which contained her notes and business cards) had been misplaced by her airline during her journey back to New York. (*Id.* ¶ 104.)

B. Evidence Relating to Sexual Harassment

Mihalik presents numerous allegations of sexually-related conduct at Cheuvreux, but the Company disputes virtually all of the allegations. Mihalik testified that Peacock showed her pornographic images "once or twice a month." (Def.'s 56.1 Stmt. ¶ 140; Deposition Transcript of Renee Mihalik ("Mihalik Tr.") 111, 126.) Some of the incidents began when Peacock spontaneously laughed at his computer, and when Mihalik inquired about the object of his laughter, Peacock would show her pornographic images on the computer. (Def.'s 56.1 Stmt. ¶ 141, Mihalik Tr. 110–11.) Cheuvreux disputes this allegation implicitly, acknowledging only that Peacock forwarded one pornographic email to male salespersons at Cheuvreux on August 10, 2007. (Def.'s 56.1 Reply Stmt. ¶ 138.)

Mihalik also alleges that Peacock asked her intrusive personal questions and made unwelcome comments about her appearance from July through December 2007. Specifically, when Mihalik started work in July 2007, she alleges that Peacock asked whether she was married, if she was dating, how old she was, and if she was a "cougar."[2] (*Id.* ¶ 79.) Mihalik asserts that Peacock commented on her appearance and dress frequently during this period, telling her she looked "very sexy" once a week, remarking "You should dress like that every day. You might get more clients in turn," and making comments about "how a shirt accentuated [her] cleavage." (*Id.;* Mihalik Tr. 133, 149, 159.) Peacock also told Mihalik that he liked her red shoes, and implicitly suggested that the color of the shoes indicated she was promiscuous. (Def.'s 56.1 Stmt. ¶ 79; Mihalik Aff. ¶ 27.) Finally, Mihalik alleges that Peacock asked her if she enjoyed a particular sexual position and propositioned her twice in December 2007, inviting her to stay overnight with him at the "Cheuvreux flat". (*Id.* ¶¶ 75; 79 .)

***3** It is undisputed that Mihalik complained about Peacock to Chief Compliance Officer David Zack on four occasions starting in December 2007. (Pl's 56.1 Stmt. ¶ 81.) At first, she only complained about Peacock's difficult management style and "demeaning" criticism of her performance. (Mihalik Tr. 178–90.). But Mihalik asserts that she subsequently complained to Zack about Peacock's critiques of her appearance and his comments about her private life.[3] (Mihalik Tr. 178.) There is no evidence that Mihalik made any complaints to Zack about Peacock's use of pornography and his December 2007 propositions.

C. Mihalik's Termination

On March 20, 2008, Peacock emailed Mihalik an assignment to cold-call potential clients:

> I am out next week and I want to focus on stirring up new business and to identify a client list of U.S. brokers.... I want you to concentrate o[n] U.S. clients

> trading U.S. markets and prospect, call and make *actual contact* to 20 [potential clients] per day. That's 20 quality conversations (not attempts or voicemails) x 7 days until I'm back on [April 2] and hopefully that will stir up a few prospects. This is a firm objective I'm sure you can achieve with focus and determination."

(Email of Ian Peacock, Attached as Ex. V to Affidavit of Matthew T. Schatz Opp. Def.'s Mot. Summ. J. ("Schatz Aff.")) (emphasis in original). Peacock also told Mihalik to maintain a list of contacts and the outcome of each cold-call so that the two of them could review the results. (*Id.*) Mihalik did not follow Peacock's instruction, and spoke with only 17 potential clients during the 7–day period instead of 140. (Def.'s 56.1 Stmt. ¶ 126.)

Around this time, Mihalik showed Zack a draft email she was preparing to send to Peacock, stating:

> I just want to make sure that you realize that the confrontations we have on the desk in front of all my colleagues are very unprofessional and behavior unbefitting a manager .... I will be happy to provide you with all the clients I am currently working on signing and the progress I am making with each. To constantly belittle me by saying I am not working or trying, or by saying that I should not think this is "a free ride" isn't appropriate or professional aside from the fact that it is an inaccurate statement.

(Draft Email of Renee Mihalik dated April 2, 2008, Attached as Ex. 164 to Roth Decl.) Zack counseled Mihalik against sending this email, and Mihalik ultimately decided not to send it.

On April 9, 2008, Mihalik was scheduled to present her business plan to the AES team at a monthly meeting, but she improvised a presentation that was not "cogent", and several members of the team noted her lack of preparedness and complained to Peacock. (Def .'s 56.1 Stmt. ¶ 130.) On April 10, 2008, Peacock met with Mihalik, confronted her about her failure to complete his cold-call assignment, and terminated her.[4]

II. DISCUSSION

Before turning to Cheuvreux's Motion for Summary Judgment, it is necessary to address the Company's Motion to Strike, which challenges portions of Mihalik's Affidavit and her 56.1 Counter–Statement submitted in opposition to the Company's Motion for Summary Judgment.

A. Motion to Strike

***4** Local Rule 56.1(a) provides that a party moving for summary judgment must file a "short and concise statement ... of the material facts as to which the moving party contends there is no genuine issue to be tried." The purpose of the Rule 56.1 Statement is to "streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties." *Holtz v. Rockefeller & Co.,* 258 F.3d 62, 74 (2d Cir.2001). A party opposing summary judgment must then submit a counter-statement of material facts responding to each assertion that the moving party made. *See* Local Rule 56.1(b). While a "district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules", all assertions in a moving party's statement and an opposing party's counter-statement must be supported by admissible evidence. *See* Local Rule 56.1(d); *Holtz v. Rockefeller & Co., Inc.,* 258 F.3d 62, 74 (2d Cir.2001). Where the record does not support the assertions made in a statement or counter-statement, those assertions should be disregarded and the record reviewed independently. *Id.*

With respect to affidavits offered on summary judgment, Rule 56(e) of the Federal Rules of Civil Procedure provides that the affidavits "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed.R.Civ.P. 56(e). Accordingly, "[a] court may ... strike portions of an affidavit that are not based upon the affiant's personal knowledge, contain inadmissible hearsay or make generalized and conclusory statements." *Hollander v. American Cyanamid Co.,* 172 F.3d 192, 198 (2d Cir.1999). However, nothing in the Federal Rules or the Local Rules requires a court to engage in the time-consuming, cumbersome process of formally striking such evidence. *See Sauerhaft v. Board of Educ. of the Hastings–on–Hudson Union Free Sch. Dist.,* 05 Civ. 09087(PGG), 2009 WL 1576467 at *7–8 (S.D.N.Y. June 2, 2009). Instead, a court may "simply disregard the allegations that are not properly supported." *Id.*

Cheuvreux has moved to strike certain portions of Mihalik's Affidavit and Rule 56.1 Counter–Statement. Cheuvreux offers various reasons for its motion, including that the referenced statements lack support in the record, are based on inadmissible hearsay, contain legal argument, and contain conclusory assertions. Cheuvreux

also argues that several portions of Mihalik's Affidavit contradict her previous deposition testimony and are not based on personal knowledge.

Although many of Mihalik's assertions in her Counter–Statement and Affidavit are improper, the Court declines to engage in the time-consuming task of formally striking each statement at issue. Instead, following the practice of several other courts in the district, this Court will disregard any statements that lack support or are otherwise inadmissible. Thus where Mihalik has denied or objected to a fact asserted by Cheuvreux, the Court will deem that fact disputed only where Mihalik has provided admissible evidence to support its objection. To the extent that Mihalik's 56.1 Statement or Affidavit uses conclusory or argumentative language, the Court will not make the suggested inferences simply because Plaintiff has suggested them. Such measures will protect Defendant's concerns adequately, and accordingly, the Court DENIES Cheuvreux's Motion to Strike.

B. Legal Standards

1. Summary Judgment

***5** A district court should grant summary judgment when there is "no genuine issue as to any material fact," and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see also Hermes Int'l v. Lederer de Paris Fifth Ave., Inc.,* 219 F.3d 104, 107 (2d Cir.2000). A party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion," and of drawing the court's attention to the materials "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once the moving party has made this showing, the non-movant "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986).

Genuine issues of material fact cannot be created by mere conclusory allegations. *Heublein v. United States,* 996 F.2d 1455, 1461 (2d Cir.1993). While a court must always "resolv[e] ambiguities and draw [ ] reasonable inferences against the moving party," the non-movant may not rely upon "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment" and "there must be more than a 'scintilla of evidence' in the non-movant's favor." *Id.; Knight v. U.S. Fire Ins. Co.,* 804 F.2d 9, 11–12 (2d Cir.1986).

The Second Circuit has advised district courts to be "particularly cautious about granting summary judgment to an employer in a discrimination case when the employer's intent is in question." *Schwapp v. Town of Avon,* 118 F.3d 106, 110 (2d Cir.1997). Since direct evidence of an employer's discriminatory intent will "rarely be found, 'affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.' " *Id.* (citations omitted). Nevertheless "the salutary purposes of summary judgment-avoiding protracted, expensive and harassing trials-apply no less to discrimination cases than to ... other areas of litigation", and summary judgment is still the time for plaintiffs to "put up or shut up" by pointing to specific evidence supporting their position. *Weinstock v. Columbia Univ.,* 224 F.3d 33, 41 (2d Cir.2000).

2. New York City Human Rights Law

Under the NYCHRL, an employer is prohibited from discriminating or retaliating against its employees. *See* N.Y. City Admin. Code §§ 8–107 et seq. Although the standard for NYCHRL discrimination claims was traditionally identical to the standard for federal discrimination claims, recent amendments to the NYCHRL require courts to construe the statute more generally in order to accomplish its "uniquely broad and remedial purposes." *Williams v. New York City Hous. Auth.,* 61 A.D.3d 62, 74–75 (1st Dep't 2009). In short, "the text and legislative history [of the Amendment] represent a desire that the City HRL 'meld the broadest vision of social justice with the strongest law enforcement deterrent.' " *Id.* at 68 (citing Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law,* 33 Fordham Urb. L.J. 255, 262 (2008)). *See also Spiegel v. Schulmann,* 604 F.3d 72, 83 (2d Cir.2010). Thus while federal discrimination caselaw is still applicable to NYCHRL claims, it should be considered as a "floor below which the City's Human Rights Laws cannot fall, rather than a ceiling above which the local law cannot rise." 61 A.D.3d at 66–67. *See also Woodard v. TWC Media Solutions, Inc.,* 09 Civ. 3000(BSJ)(AJP), 2011 WL 70386 at *9 (S.D.N.Y. January 4, 2011) (holding that prima facie case for sexual harassment under NYCHRL may be established based on conduct "less egregious" than that required to support a Title VII claim).

***6** Discrimination claims based on sexual harassment are

typically evaluated under *quid pro quo* or hostile work environment frameworks. *See Le Prevost v. New York State,* 2009 WL 856999 (S .D.N.Y.2009) (citing *Karibian v. Columbia Univ.,* 14 F.3d 773, 777 (2d Cir.1994)). *Williams* held that courts should not restrict NYCHRL claim analysis to the traditional analytical frameworks for sexual harassment, and that courts should examine broadly whether "different terms, conditions and privileges of employment [were imposed] based, inter alia, on gender." 61 A.D.3d at 75. However, in the absence of any guidance on an alternate framework for applying the NYCHRL, the Court will begin with the traditional *quid pro quo* and hostile work environment analyses, and then incorporate the special considerations articulated by *Williams. See Diagne v. New York Life Ins. Co.,* 09 Civ. 5157(GBD)(GWG), 2010 WL 5625829, at *16–17 (S.D.N.Y. Dec. 8, 2010) (holding that NYCHRL claims should be reviewed under Title VII analytical framework); *Winston v. Verizon Services Corp.,* 633 F.Supp.2d 42, 48 (S.D.N.Y.2009) (noting lack of clarity about contours for the application of the NYCHRL post-*Williams* and applying Title VII framework).

C. Quid Pro Quo Harassment

To establish a prima facie claim for *quid pro quo* sexual harassment, plaintiffs must present evidence that they were subject to unwelcome sexual conduct, and that their reaction to the conduct affected the compensation, terms, conditions or privileges of their employment. *Fitzgerald v. Henderson,* 251 F.3d 345, 356 (2d Cir.2001) (quoting *Karibian v. Columbia University,* 14 F.3d 773, 777 (2d Cir.), *cert. denied,* 512 U.S. 1213 (1994)). In short, a plaintiff must establish that a "tangible job benefit or privilege [was] conditioned on an employee's submission to sexual blackmail and that adverse consequences follow[ed] from the employee's refusal ." *Carrero v. New York City Hous. Auth.,* 890 F.2d 569, 579 (2d Cir.1989).

A plaintiff can demonstrate a causal connection between sexual advances and subsequent adverse employment actions with evidence that a supervisor explicitly threatened or warned the plaintiff that failure to accede to sexual conduct would result in adverse action. *Messer v. Fahnestock & Co. Inc.,* 03 Civ. 4989(ENV)(JMA), 2008 WL 4934608 at *15 (E.D.N.Y. Nov. 18, 2008). *See also Hamilton v. Bally of Switzerland,* 03 Civ. 5685(GEL), 2005 WL 1162450 (S.D.N.Y. May 17, 2005) (rejecting *quid pro quo* claim brought under Title VII where alleged harasser did not threaten adverse employment action if plaintiff failed to succumb to advances); *Hwang v. DQ Marketing and Public Relations Group,* No. 102524/08, 2009 WL 3696604 (Sup.Ct.N.Y.Co. Sept. 30, 2009) (same, for claim brought under NYCHRL post-*Williams*). Alternatively, a plaintiff can establish causality by demonstrating that an adverse employment action followed closely in time after rejection of a supervisor's sexual advances. *Messer,* 2008 WL 4934608 at *15 (collecting cases finding causal connection where adverse action occurred two months or less after incident and rejecting link for period greater than three months).

***7** If a plaintiff establishes a prima facie case of harassment, the burden then shifts to the defendant, who must proffer some legitimate nondiscriminatory reason for the adverse action at issue. *Spiegel,* 604 F.3d at 80. "If the defendant proffers such a reason, the presumption of discrimination ... drops out of the analysis, and the defendant will be entitled to summary judgment ... unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination." *Id.* The plaintiff may do this by demonstrating that the legitimate reason offered by the defendant is actually a pretext for discrimination. *Id.*

Here, Mihalik fails to establish a prima facie case for *quid pro quo* harassment because she presents no evidence of any linkage between her rejection of Peacock's alleged sexual advances in December 2007 and her termination in April 2008. Mihalik has neither alleged nor testified that Peacock's advances were accompanied by suggestions that continued employment depended on submitting to those advances. Moreover, while there is no bright line time limitation for establishing causality, the passage of over three months between the advances at issue and Mihalik's termination is significant, and undermines Plaintiff's suggestion that these two events were linked.

Mihalik argues that she suffered more immediate employment consequences after she rejected Peacock's advances. Specifically, Mihalik argues that Peacock added menial tasks to her job responsibilities, criticized her performance publicly, and excluded her from meetings after she rejected his advances. However, Mihalik's only support for her contention that she was tasked with menial jobs is Peacock's March 20, 2008 cold-calling assignment, and she conceded in her testimony that this assignment was not menial. (*See* Mihalik Tr. 219–20.) Peacock's criticisms of Mihalik's performance also do not constitute tangible job detriments. *See Mormol v. Costco Wholesale Corp.,* 364 F.3d 54, 59 (2d Cir.2004) ("A tangible employment action ... 'constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.' ")

(*citing* *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 753 (1998); *Bonnano v. Verizon New York,* 06 Civ. 6671(DAB), 2011 WL 832855 at *7 (S.D.N.Y. March 4, 2011) (acknowledging "special considerations" of NYCHRL and *Williams,* but granting summary judgment where defendant's actions did not affect plaintiff's pay, job status or title).

Finally, Mihalik only cites evidence of one specific meeting from which she was excluded, and does not provide any timeframe to link this alleged exclusion to her rejection of Peacock's advances. As a result, even under the liberal standards of *Williams,* Mihalik has failed to present evidence that she suffered a tangible job detriment sufficient to establish a *quid pro quo* claim.

***8** Even if Plaintiff could establish a prima facie case, Cheuvreux has proffered a legitimate, nondiscriminatory reason for Mihalik's termination, supported by ample evidence and unrefuted apart from conclusory allegations. As described above, Mihalik failed to follow up on several sales leads, failed to follow a direct instruction to complete a cold-calling assignment, and maintained a poor sales record throughout her tenure at the Company. Mihalik's poor sales record is especially significant, and reinforced by her own email of February 26, 2008, in which she states that she "has no trading as of yet", that she had "BRUTAL clients/prospects", and that she was worried about how this would be perceived by the Company.

Mihalik argues that Cheuvreux's stated reasons for terminating her are pretextual. Specifically, she challenges the significance of her sales record, arguing that her performance should have been evaluated based on the new clients she signed to Cheuvreux, even if those client did not generate immediate revenue for the Company. She states that "monthly revenue is not a proper indicator of performance" because it took time for clients to begin using Cheuvreux's AES services and generating commissions after they signed up with the Company. (Pl.'s 56.1 Stmt. ¶ 18.) As support, Mihalik cites her own affirmation and testimony from Zack, who testified that it could "possibly" take up to ten months before a client started trading after they had signed with the Company. (Mihalik Aff. ¶¶ 67–69; Deposition Transcript of David Zack 38). However, Zack's testimony is far too attenuated to support Mihalik's assertion.

More importantly, Mihalik has not introduced any evidence to support her contention that commission revenue was an improper indicator of performance. In contrast, Defendant has produced evidence that salespersons were credited for clients only when those clients actually traded through the Company and generated commissions for the Company. (Def.'s 56.1 Reply Stmt. ¶ 18.) Thus while Mihalik may disagree with the method by which performance was measured, she has failed to counter the Company's demonstration that sales commissions were, in fact, a key measure of performance. *See Hamilton,* 2005 WL 1162450 at *10–11 (declining to "second-guess" the business judgment of employer in Title VII case where employee was terminated for poor sales record, even though she had received positive customer feedback and supervised some of her company's top performers). Accordingly, the Court finds no basis to conclude that the Company's proffered non-discriminatory reasons for terminating Mihalik's employment were false.

Mihalik's sales job was doubtlessly difficult, given that Cheuvreux had little name recognition in the U.S. market and that she could not draw on an existing client list, as established AES salespersons at the Company could. However, Mihalik has introduced insufficient evidence to explain why the Company's explanation for her termination was pretextual, and the Court is left only with Mihalik's unsupported assertions about performance measurement. These assertions can be characterized as a "scintilla of evidence", and are insufficient to present a disputed issue of fact. *See also Weinstock,* 224 F.3d at 42 ("A plaintiff must "produce not simply 'some' evidence, but 'sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the [defendant] were false, and that more likely than not [discrimination] was the real reason for the [employment action].' "). As a result, Plaintiff has not presented sufficient evidence of gender discrimination under a *quid pro quo* theory to survive summary judgment.

D. Hostile Work Environment

***9** To establish a prima facie claim for sexual harassment under a hostile work environment theory, a plaintiff must proffer evidence from which a reasonable trier of fact could conclude that the defendant's workplace was "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of [the plaintiff's] employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993) (citations omitted). Determining "whether sexual harassment alters the conditions of employment 'is not, and by its nature cannot be, a mathematically precise test [and] can be determined only by looking at all the circumstances.' " *Id.,* 510 U.S. at 23. However, a plaintiff must persuade the factfinder

that "the work environment both objectively was, and subjectively was perceived by the plaintiff to be, sufficiently hostile to alter the conditions of employment for the worse." *Schiano v. Quality Payroll Svs., Inc.,* 445 F.3d 597, 604–05 (2d Cir.2006).

In *Williams,* the First Department considered the recent amendments expanding the NYCHRL's scope, and held that the inquiry for sexual harassment claims under the NYCHRL should "focus on unequal treatment based on gender" and prevent "too much unwanted gender-based conduct to continue befouling the workplace." *Id.* at 79. Accordingly, the court held that plaintiffs were no longer required to establish "severe and pervasive" conduct to establish liability under the NYCHRL and that summary judgment should generally be denied in "borderline" cases. 61 A.D.3d at 75, 80. Nevertheless, the court noted that the NYCHRL was not a "general civility code" and that "petty slights and trivial inconveniences" were still non-actionable under the law. *Id.* at 78–80. As a result, district courts applying the NYCHRL in hostile work environment cases have granted summary judgment for defendants when "the incidents alleged amount[ed] to only sporadic insensitive comments." *Fullwood v. Assoc. for the Help of Retarded Children, Inc.,* 08 Civ. 6739(DAB), 2010 WL 3910429, at *9 (S.D.N.Y. Sept. 28, 2010) (granting summary judgment for defendants where plaintiff alleged that defendant made offensive racial comments on four separate occasions over a two-year period). *See also Diagne v. New York Life Ins. Co.,* 2010 WL 5625829, at *16–17 (S.D.N.Y. Dec. 8, 2010) (granting summary judgment for defendant where plaintiff alleged that defendant made racial slurs "[s]ometimes" because the evidence was "of such a minimal character and supported by such inconclusive and vague evidence that a reasonable jury would have to conclude that it represents, at best, 'petty slights or trivial inconveniences.' "); *Wilson v. N.Y.P. Holdings, Inc.,* 05 Civ. 10355(LTS), 2009 WL 873206 (S.D.N.Y. Mar. 31, 2009) (granting summary judgment on hostile work environment claim where plaintiffs' supervisors commented over a number of years that "training females [was] like training dogs" and that "women need to be horsewhipped", and referred to female celebrities as "whores" and "sluts").

***10** Here, Mihalik's gender discrimination claim revolves around her testimony that Peacock showed her pornographic images, made objectifying comments, and initiated sexual overtures. For the reasons discussed below, this testimony does not present evidence of a hostile work environment sufficient to withstand Defendant's Motion for Summary Judgment.

First, Mihalik testified that Peacock showed her pornography once or twice a month from July through December 2007. However, Mihalik concedes that she asked to view the images in question on at least one occasion, and presents no details about the circumstances of the other occasions. Based on this limited showing, the pornographic displays are properly categorized as "trivial inconveniences" that are non-actionable under *Williams.* Mihalik relies on *Patane v.. Clark,* 508 F.3d 106, 114 (2d Cir.2007), for the proposition that the presence of pornography in the workplace supports a hostile work environment claim, but the plaintiff in *Patane* was required to handle pornographic videotapes for her supervisor regularly and discovered that her supervisor was viewing pornographic websites on the plaintiff's own computer, and is therefore distinguishable.

Mihalik also testified that Peacock commented repeatedly on her appearance in an objectifying and demeaning manner and propositioned her twice in December 2007. Specifically, Mihalik testified that Peacock commented she looked "very sexy" once a week and made other sporadic comments from July through December 2007, including one remark suggesting that Mihalik was promiscuous and one question about whether she enjoyed a particular sexual position. These comments are certainly boorish and offensive, but are not so grave or objectionable that they would have altered the conditions of Mihalik's employment. Additionally, the alleged sexual advances involved two isolated instances of propositioning in December 2007, and Plaintiff does not contend that any further comments or intrusive behavior took place during the four months afterwards.

Therefore, considering the totality of circumstances and bearing in mind the *Williams* court's admonition that the NYCHRL is not a "general civility code", the Court finds that Peacock's alleged conduct, while demeaning and inappropriate, did not create a hostile work environment actionable under the NYCHRL. Since Plaintiff has failed to present sufficient evidence to support a hostile work environment or any other type of gender discrimination, Defendant's Motion for Summary Judgment on Plaintiff's gender discrimination claim is GRANTED.

E. Retaliation Claim

To establish a prima facie claim for retaliation under the NYCHRL, a plaintiff must adduce sufficient evidence to permit a trier of fact to find that: (1) the plaintiff engaged in a protected activity; (2) the employer knew of this activity; (3) the employer took adverse action against the

plaintiff; and (4) a causal connection existed between the protected activity and the adverse action. *Woodard,* 2011 WL 70386 at *9. Under the NYCHRL, protected activities include "oppos[ing] any practice forbidden under this chapter ..." and retaliation is prohibited "in any manner." N.Y.C. Admin. Code § 8–107(7). Thus "[t]he retaliation ... need not result in an ultimate action with respect to employment ... or in a materially adverse change in the terms and conditions of employment." *Id. See also Williams,* 61 A.D.3d at 69–72. Once the plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to establish a legitimate, non-discriminatory reason for the alleged retaliation. *Woodard,* 2011 WL 70386 at *9. If the employer meets its burden, then the burden shifts back to the plaintiff to show that the proffered legitimate reason is a pretext. *Id.*

***11** Here, Mihalik argues that she engaged in three instances of protected activity and was terminated as a result. First, Mihalik argues that she brought Peacock's alleged harassment to Zack's attention. However, Plaintiff has presented no evidence establishing a link between her conversations with Zack and her termination by Peacock, and Defendant has presented undisputed evidence that Zack did not repeat Mihalik's complaints to Peacock. (Def.'s 56.1 Stmt. ¶ 81.) Accordingly, there is no evidence of any causality between the complaints at issue and the termination. Plaintiff also argues vaguely that she complained directly to Peacock, but does not cite any evidence in the record to support her assertion.

Mihalik argues alternatively that her rejection of Peacock's sexual advances constituted a protected activity. However, even assuming that the rejections did constitute a protected activity, the time lag between the alleged sexual advances and Plaintiff's termination undermines any inference of causality. Moreover, as discussed above, Defendant has offered legitimate, non-discriminatory reasons for Plaintiff's termination, and Plaintiff has failed to show that these reasons are pretextual.

Therefore, Plaintiff has failed to present sufficient evidence to support her retaliation claim, and Defendant's Motion for Summary Judgment on the claim is GRANTED.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is GRANTED on all counts. The Clerk of Court is directed to CLOSE the docket in this case.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 3586060

Footnotes

1 The AES division (or "desk") offers clients a non-traditional method of conducting equity trading, including algorithmic, program or direct market access trading. (Def.'s 56.1 Stmt. ¶ 4.)

2 Neither party has provided a useful definition for the term "cougar", but it can be understood as "a middle-aged woman seeking a romantic relationship with a younger man." *See* Merriam Webster's Online Dictionary, at http://www.merriam-webster.com/dictionary/cougar (last visited July 27, 2011).

3 Defendant argues that Mihalik never introduced testimony to support this assertion. However Mihalik's testimony concerning her complaints to Zack is evident in the transcript. (*See* Mihalik Tr. 178.) Regardless, for reasons discussed below, any disputes about this issue of fact are immaterial.

4 Specific details of this meeting are disputed. Cheuvreux states that Mihalik initially lied about completing the cold-call assignment, and only admitted that she hadn't completed it when confronted with a telephone log of her calls. (Def.'s 56.1 Stmt. ¶ 132.) According to Cheuvreux, Mihalik then told Peacock "What are you going to do about it?" and Peacock discharged her.

(*Id.*) According to Mihalik, she did not lie about completing the cold-call assignment. (Pl.'s 56.1 Stmt. ¶ 132.) Instead, Peacock immediately confronted her with the telephone call log and "began yelling at her saying 'You didn't even come close to what I told you to do' and 'This is fucking unacceptable.' " (*Id.*) Peacock then told her "This is not working out." and Mihalik replied "What's not working out. Me and you or me at the company?" (*Id.*) According to Mihalik, Peacock then started to get very aggravated and said "This isn't working out. I am letting you go. I'm getting rid of you." (*Id.*) For purposes of the decision, disputes about details of this meeting are not relevant.

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