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United States District Court,
N.D. California.

Carol GOSHO and Sarah Lewis, Plaintiffs,
v.
U.S. BANCORP PIPER JAFFRAY, INC., Defendant.

No. C–00–1611PJH. | Oct. 1, 2002.

Attorneys and Law Firms

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Opinion

ORDER RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON CAROL GOSHO'S CLAIMS

PHYLLIS J. HAMILTON, J.

***1** The motion of defendant U.S. Bancorp Piper Jaffray, Inc., for summary judgment on the claims of plaintiff Carol Gosho came on for a hearing on July 31, 2002, before this court, the Honorable Phyllis J. Hamilton presiding. Plaintiffs appeared by their counsel Paul Mollica and Jamie Franklin and defendant appeared by its counsel Nancy Pritikin, Allan King, and Michelle Barrett. Having read the parties' papers and carefully considered the arguments of counsel and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motion for the following reasons.

BACKGROUND

Plaintiff Carol Gosho ("Gosho") was employed as a broker by defendant U.S. Bancorp Piper Jaffray, Inc. ("Piper") from January, 1996, until November 2, 2000, when she voluntarily left the firm. Gosho alleges that during her tenure at Piper, she was intentionally discriminated against on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–5, et seq. ("Title VII"); the California Fair Employment and Housing Act, Cal. Gov't Code § 12900, et seq. ("FEHA"); and Article I, Section 8 of the California Constitution.[1] Piper now seeks summary judgment on all claims.

DISCUSSION

A. Legal Standard

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 323. Once the moving party meets its initial burden, the non-moving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

Summary judgment is ordinarily not appropriate in an employment discrimination case on "any grounds relating to the merits because the crux of a Title VII dispute is the elusive factual question of intentional discrimination." *Warren v. City of Carlsbad,* 58 F.3d 439, 443 (9th Cir.1995), *cert. denied,* 516 U.S. 1171, 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996). " 'The requisite degree of proof necessary to establish a prima facie case ... on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence." ' *Aragon v. Republic Silver State Disposal, Inc.,* 292 F.3d 654, 659 (9th Cir.2002) (quoting *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 889 (9th Cir.1994)); *see also Chuang v. Univ. of Cal. Davis,* 225 F.3d 1115, 1124 (9th Cir.2000) (The plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment.).

***2** Courts have recognized that in discrimination cases, an employer's true motivations are particularly difficult to ascertain, thereby making such factual determinations generally unsuitable for disposition at the summary judgment stage. *See U.S. Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983) (acknowledging that discrimination cases present difficult issues for the trier of fact, as "there will seldom be 'eyewitness' testimony as to the employer's mental processes"); *Lowe v. City of Monrovia.* 775 F.2d 998, 1009 (9th Cir.1985), *amended,* 784 F.2d 1407 (9th Cir.1986) (stating that very little additional evidence is required to raise a genuine issue of fact regarding motive, and concluding that summary judgment is ordinarily inappropriate once a prima facie case has been established).

B. Defendant's Motion for Summary Judgment

1. Title VII and FEHA claims

In support of her claim of intentional discrimination, Gosho asserts that she received inadequate administrative support, resulting in an inability to conduct and grow her business; that she did not receive referrals or accounts from departing brokers, a key tool for building business at Piper; that her efforts to switch from a commission-based business to fee-based services were hampered by Piper; that she was thwarted in her attempts to use financial planning and marketing materials prepared by Emerald Publications ("Emerald"); that she was routinely denied access to meetings and training seminars; that she was improperly disciplined and compelled, under threat of forcible removal from the building, to move her office to a less desirable location; that because of lack of assistance from Piper's compliance department, she was unable to use the designation "Certified Financial Planner" for a period of several months; and that because of Piper's computer problems, her license was suspended for one day.

Piper seeks summary judgment on the Title VII and FEHA claims, arguing that Gosho fails to establish a prima facie case of sex discrimination, and also arguing that Gosho's claims are time-barred. To survive summary judgment on an intentional discrimination claim, a plaintiff must first establish a prima facie case that "gives rise to an inference of unlawful discrimination." *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). In order to establish a prima facie case of discrimination under either Title VII or the FEHA, the plaintiff must show that she belongs to a protected class; she was qualified for the position she held; she was subject to an adverse employment action; and similarly situated individuals outside the protected class were treated more favorably. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Godwin v. Hunt Wesson Inc.,* 150 F.3d 1217, 1220 (9th Cir.1998).

Once the plaintiff has established a prima facie case, the burden then shifts to the defendant to show, through the introduction of admissible evidence, that its employment decisions were made for legitimate non-discriminatory reasons. *Burdine,* 450 U.S. at 255; *McDonnell Douglas,* 411 U.S. at 802. If the defendant establishes a non-discriminatory reason, the burden shifts back to the plaintiff to show that the proffered reason is pretextual. *Burdine,* 450 U.S. at 253; *Brooks v. City of San Mateo,* 229 F.3d 917, 928 (9th Cir.2000). Pretext can be shown by direct evidence that demonstrates that discrimination is the more likely motivation for the adverse employment action, or by indirect evidence that shows the employer's explanation is not credible. *Chuang,* 225 F.3d at 1127.

***3** The parties in the present case do not dispute that Gosho was a member of a protected class and that she was qualified for her position. Piper argues, however, that Gosho provides no evidence that she suffered an adverse employment action, or that similarly-situated male employees were treated more favorably. The court finds that Gosho falls to establish a prima facie case of disparate treatment because she provides no evidence of an employment action which can be considered "adverse," and which also occurred within the statutory limitations period.[2]

The Ninth Circuit "h[as] yet to articulate a rule defining the contours of an adverse employment action" under Title VII. *Ray*

v. Henderson, 217 F.3d 1234, 1240 (9th Cir.2000). Unlike other circuits, which consider an employment action "adverse" if it materially affects the terms and conditions of employment, the Ninth Circuit construes "adverse employment action" broadly, finding that "a wide array of disadvantageous changes in the workplace constitute adverse employment actions." *Id.* The court has noted, for example, that transfers of job duties, undeserved performance ratings, and dissemination of unfavorable job references may under certain circumstances constitute adverse employment actions. *Id.* at 1241–43. Similarly, an employee who is denied secretarial support and excluded from meetings and seminars that would have made her eligible for salary increases may be found to have suffered from adverse employment actions. *Id.* at 1241. FEHA, as interpreted by California courts, employs a narrower definition. Under this more restrictive approach, an adverse employment action must be "both detrimental and substantial" and must "result in a material change in the terms of employment." *Thomas v. Dep't of Corrections,* 77 Cal.App.4th 507, 510, 91 Cal.Rptr.2d 770 (2000).

Gosho argues that she has established a prima facie case of disparate treatment based on six categories of adverse employment actions. The court finds that none of the actions Gosho complains about resulted in a "material change in the terms of employment," the FEHA standard explained above. The only question, then, is whether these actions qualify under the Ninth Circuit's broad definition of "adverse employment action."

a. administrative support

Gosho argues that Piper hampered her career development by providing her with insufficient administrative support. She claims that during the time she was employed at Piper, she had at least ten separate sales assistants, many of whom were unable to adequately perform their jobs. The court finds that Gosho's claim that she received subpar assistance is not the same as a claim that she was denied assistance. *See Ray,* 217 F.3d at 1241. While it is clear that Gosho was frustrated with the quality of assistance she received, she points to no evidence that she was ever denied an assistant, or that she received lower-quality or less competent assistants than other Piper Jaffray brokers; she even admits that she was able to recruit and train assistants on her own.

b. distribution of departing brokers' accounts

***4** Gosho asserts that she received less than her share of transferred accounts from departing brokers. Based on statistical evidence set forth in the Declaration of Paul Neergaard, Gosho claims that in 1998 and most of 1999, she received no transferred accounts, and that for the remaining time that she worked at Piper she received far fewer accounts, on average, than male brokers.[3] Under either federal or California law, such a restricted flow of accounts, if proven, would certainly cause a material and disadvantageous change sufficient for a prima facie showing.

Nevertheless, the statistics in the Neergaard Declaration are not sufficient to establish Gosho's prima facie case. In the Ninth Circuit, while "statistics have a place in disparate treatment cases, their utility depends on all of the surrounding facts and circumstances." *Aragon,* 292 F.3d at 663. To have value, statistics must show a "stark pattern of discrimination unexplainable on grounds other than [gender]." *Id.* (citations omitted). Relying on a declaration from Douglas Heske, Gosho's supervisor, Piper argues that accounts were distributed on the basis of production and business expertise, and that Gosho's production levels were below average.[4] If Gosho's statistical evidence established that male brokers at her production level, or with her level of experience, received more accounts than she die, she might be able to make the requisite showing. Absent such a showing, the statistics in the Neergaard Declaration (which does not reveal any information about who did receive transferred accounts) do not show a stark pattern of discrimination as required by *Aragon* and are of dubious value. *Id.*

Moreover, Gosho's complaints about the assignment of accounts is time-barred. Her statistics indicate that she received account referrals in 1999 and 2000, and she herself testified in her deposition that she felt she was fairly treated by Kris Sorenson, who replaced Heske as branch manager during the period December 1998 to December 1999, and that she had no problems with Heske, after he resumed his position as branch manager in December 1999.

c. fee-based services

Gosho complains that Piper did not support fee-based services, and in fact hampered her efforts to provide such services. Yet she offers no evidence to support this claim. Moreover, the failure to support fee-based services cannot be considered an adverse employment action; there is no evidence that the change in Piper's policy in 1999—to allow brokers to charge an hourly fee—impacted Gosho's ability to perform her job as a broker, and no evidence that any broker charged a fee for

services prior to the change in policy.

d. the Emerald materials

Gosho contends that her career "stagnated" while she waited for Piper to approve the Emerald marketing materials for her use. She asserts that she made it clear before she started working at Piper that she wanted to use the Emerald materials as her primary marketing tools, and that it took a year and a half for Piper to clear the Emerald materials for her use, during which time she could not conduct seminars that would result in new clients. She also contends that a male broker received full support from Piper when he sought approval of special materials.

***5** The parties dispute whether, while Gosho was waiting for approval of the Emerald materials, she could have used Piper's materials in order to perform her responsibilities as a broker and continue to earn a living from managing existing accounts as well as developing new business. Heske states in his declaration that Piper provides materials similar to the Emerald materials, and that therefore Gosho did not suffer an adverse employment action. Gosho testified in her deposition that she never discovered comparable marketing tools, and stated in her declaration that the Piper marketing materials were not adequate for her purposes and were not similar to the Emerald materials.

Even if it is true that Piper provided no alternative to or substitute for the Emerald materials, a bureaucratic delay in approving marketing materials is not the kind of disadvantageous change to the workplace envisioned by the Ninth Circuit. *Ray,* 217 F.3d at 1241. Although Gosho claims that she lost substantial income and opportunities due to the delay, she offers no evidence supporting this claim. As Gosho was apparently the only broker (of approximately 1000) at Piper Jaffray to use these materials, they cannot be said to have been essential to her job performance as a broker. Moreover, Piper's delay in approving the materials cannot support Gosho's claim of disparate treatment, as it occurred in 1996 and 1997.

e. access to meetings and training seminars

Although Gosho alleges in her complaint that she was not permitted to attend meetings, seminars, and training sessions, she provides no evidence to support this claim.

f. improper discipline

Gosho claims that she was improperly disciplined in July 1997, possibly in connection with a complaint made by her sales associate, who had allegedly told Gosho's supervisor, branch manager Heske, that Gosho had been verbally abusive, and who had requested a new assignment. Gosho claims that Heske, demanded that Gosho move to a windowless office on the first floor, and that when Gosho protested, Heske compelled her to switch offices with a broker on the 22nd floor, allegedly a less desirable location. The demand to switch offices was allegedly accompanied by a threat that Gosho would be forcibly removed from the building by security guards if she did not comply.

This event cannot provide a basis for Gosho's claim of disparate treatment because it occurred in 1997. Nor can the event be construed as an adverse employment action for purposes of establishing a prima facie case of disparate treatment. As noted above, Gosho must point to evidence that shows some change in her employment situation, whether material under FEHA or just broadly disadvantageous in the Ninth Circuit. For example, in a Ninth Circuit Title VII case involving the forced relocation of a professor's research laboratory, the plaintiff was able to demonstrate the significant damage the relocation did to his research. *Chuang,* 225 F.3d at 1122. Gosho provides no such evidence.

***6** Nor does she show that the forced relocation had the kind of detrimental material change required under FEHA. Gosho claims that her removal to the 22nd floor had a direct bearing on her productivity for a variety of reasons, including client perception and access to resources and support. However, the evidence supporting this claim is made up of generalized and unsupported opinion by her experts Drs. Janice Fanning and William Bielby—*e.g.,* "[c]lients' perceptions of the quality of a broker are likely to be influenced by the broker's office space"—and does not relate specifically to her productivity after she switched offices. While Gosho may have been inconvenienced by having to switch offices, she did not suffer an adverse employment action.

g. the suspension of Gosho's license

Gosho alleges that Piper caused her to lose her Financial Planner License on two occasions—once for a period of several months, and once for one day. She offers no evidence as to either Piper's involvement in the suspension or the subsequent impact on her ability to work.

2. Gosho's Constitutional Cause of Action

A claim of employment discrimination may be brought under Article I, Section 8 of the California Constitution only where "a plaintiff has been denied entrance into a profession or particular employment or terminated from the same." *Strother v. Southern Calif. Permanente Medical Group,* 79 F.3d 859, 871 (9th Cir.1996); *Lappin v. Laidlaw Transit Inc.,* 179 F.Supp.2d 1111, 1127 (N.D.Ca.2001). Summary judgment must be granted on this claim because Gosho was neither denied a position nor terminated from her position.

CONCLUSION

In failing to provide evidence sufficient to support a triable issue with regard to whether Piper perpetrated any adverse employment action within the statutory period, Gosho does not meet her burden of establishing a prima facie case of intentional sex discrimination. Accordingly, Piper's motion for summary judgment must be GRANTED. This order fully adjudicates the motion listed at Nos. 256 and 285 and portions of the motions listed at Nos. 306 and 315 on the clerk's docket for this case.[5]

IT IS SO ORDERED.

Footnotes

[1] Gosho does not oppose the motion with regard to the claims of constructive discharge and retaliation, and has apparently withdrawn the harassment claim.

[2] To obtain relief for a violation of either Title VII or FEHA, the complainant must first file an administrative charge with the Equal Opportunity Employment Counsel of the California Department of Fair Employment and Housing within a specified time from the date on which the alleged unlawful practice occurred. 42 U.S.C. § 2000e–5(e)(1) (limitations period under Title VII is 300 days prior to date of filing of administrative charge); Cal. Gov't Code § 12960 (limitations period under FEHA is one year prior to date of filing of administrative charge). Gosho filed her claim on January 31, 2000. Thus, even under FEHA's slightly more generous standard, she can seek relief only for events dating back to January 31, 1999.

In its recent decision of *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), the Supreme Court ruled that under Title VII, " "[e]ach discriminatory act starts a new clock for filing charges alleging that act.... Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice," " and a plaintiff "can only file a charge to cover discrete acts that 'occurred' within the appropriate time period." *Id.* at 2072–73. In other words, a plaintiff may not recover based on discrete acts that occurred prior to the limitations cut-off on a "continuing violations" theory.

[3] The statistical evidence appears In the Neergaard Declaration. Piper moves to strike the Neergard Declaration and all Gosho's statistical evidence. The court finds that the Neergaard Declaration is admissable to the extent that it provides a summary of the number of accounts Gosho received. It is not admissible, however, for the purpose of establishing a gender imbalance in the assignment of accounts.

[4] Gosho moves to strike this portion of the Heske Declaration as hearsay. Since the Neergaard statistics do not establish a gender imbalance, as Gosho claims, and since the Heske evidence only serves to counter the Neergaard statistics, the court does not consider plaintiffs' objections.

[5] To the extent that the court does not address specific evidentiary objections made by Piper Jaffray or by plaintiffs, either the objections are overruled or the evidence is not relevant to the issues raised in the underlying motion or motions.