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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CHERYL F. SMITH,

Plaintiff,

v.

FJM CORPORATION, d.b.a. REALTY
EXECUTIVES OF NEVADA

Defendant.

Case No. 2:07-CV-1417-KJD-GWF

ORDER

Currently before the Court is Defendant FJM Corporation's (hereinafter "Realty Executives") Motion for Summary Judgment (#21), filed July 29, 2008. Plaintiff filed a Response (#24) on September 2, 2008, to which Defendant filed a Reply (#26) on October 3, 2008.

I. Background

Plaintiff Cheryl Smith ("Smith") worked for Realty Executives as its Corporate Broker from March 2, 2002, until her termination on January 15, 2007. She was 53 years-old at the time she was hired. According to Realty Executives, Smith was fired because she violated the terms of her employment agreement by competing with the agents in her office by listing and selling properties. According to Defendant, Smith's employment agreement prohibited her from listing and selling properties during her employment as its Corporate Broker. Smith avers that her employment

1 agreement is ambiguous as to her right to list and sell properties, and claims that she was fired as a
2 result of age and gender discrimination. Specifically, Smith alleges that she was fired as part of
3 Defendant's plan to create a more youthful image at the brokerage.

4 Smith filed a Complaint in state court on October 4, 2007, alleging seven claims for relief for
5 (1) breach of contract; (2) failure to pay commissions; (3) penalties for failure to pay commissions
6 pursuant to NRS §§ 608.020 and 608.040; (4) declaratory judgment; (5) gender discrimination and
7 retaliation in violation of Title VII of the Civil Rights act of 1964 (Title VII); (6) age discrimination
8 and retaliation in violation of the Age Discrimination in Employment Act ("ADEA"), and; (7) a
9 claim for attorney's fees pursuant to Title VII and the ADEA.

10 Here, Defendant seeks that the Court grant summary judgment on its behalf under various
11 theories. Particularly, Defendant avers that Smith's claims are without merit, as Smith openly
12 breached the terms of her employment agreement, received all of the commissions to which she was
13 entitled, failed to exhaust her administrative remedies on her retaliation claims, can provide no
14 evidence of gender discrimination, and cannot establish a claim for age discrimination.

15 **II. Standard for Summary Judgment**

16 Summary judgment may be granted if the pleadings, depositions, answers to interrogatories,
17 and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any
18 material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ.
19 P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the
20 initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at
21 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a
22 genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
23 587 (1986); Fed. R. Civ. P. 56(e).

24 All justifiable inferences must be viewed in the light most favorable to the nonmoving party.
25 See Matsushita, 475 U.S. at 587. However, the non-moving party may not rest upon the mere
26 allegations or denials of his or her pleadings, but he or she must produce specific facts, by affidavit

1 or other evidentiary materials provided by Rule 56(e), showing there is a genuine issue for trial. See
2 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The court need only resolve factual
3 issues of controversy in favor of the non-moving party where the facts specifically averred by that
4 party contradict facts specifically averred by the movant. See Lujan v. Nat’l Wildlife Fed’n., 497
5 U.S. 871, 888 (1990); see also Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 345
6 (9th Cir. 1995) (stating that conclusory or speculative testimony is insufficient to raise a genuine
7 issue of fact to defeat summary judgment). “[U]ncorroborated and self-serving testimony,” without
8 more, will not create a “genuine issue” of material fact precluding summary judgment. Villiarimo v.
9 Aloha Island Air Inc., 281 F.3d 1054, 1061 (9th Cir. 2002).

10 Summary judgment shall be entered “against a party who fails to make a showing sufficient
11 to establish the existence of an element essential to that party’s case, and on which that party will
12 bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Summary judgment shall not be granted
13 if a reasonable jury could return a verdict for the nonmoving party. See Anderson, 477 U.S. at 248.

14 **III. Analysis**

15 **A. Breach of Contract**

16 Plaintiff’s first claim for relief alleges that Realty Executives breached the terms of her
17 employment contract by failing to give her ninety (90) days written notice of its intent to terminate
18 her employment. Defendant argues that Smith’s breach of contract claim fails because it was not
19 required to give notice under the circumstances of Plaintiff’s termination.

20 The employment agreement provides that ninety (90) days written notice is required to
21 terminate the contract. Additionally however, the contract also provides that, “[i]n the event of any
22 violation . . . of any of the terms of [the] agreement . . . [Realty Executives] may terminate
23 employment without notice . . .” (Def.’s Mot. for Summ. J. Ex. E p. 4.)

24 Realty Executives claims that it was not obligated to give Smith ninety (90) days notice of her
25 termination because she violated the employment agreement when she began listing and selling
26 properties. Specifically, Defendant argues that Smith violated Section Six of the employment

1 agreement, which required her to “devote all of her time, attention, knowledge, and skills solely to
2 the business and interest of Employer, and Employer shall be entitled to all of the benefits, profits, or
3 other issues arising from or incident to all work, services, and advice of Employee, . . .” (Id. at 3.)

4 Smith, in opposition, argues that Section Six of the employment agreement does not prohibit
5 her from listing and selling property, and is ambiguous at best. The Court agrees.

6 Summary judgment is appropriate for breach of contract claims only if the contract provision
7 or the contract in question is unambiguous. A contract or a provision of a contract is ambiguous if it
8 is reasonably susceptible to more than one interpretation. Castaneda v. Dura-Vent Corp., 648 F.2d
9 612, 619 (9th Cir.1981). “The question of the interpretation of a contract when the facts are not in
10 dispute is a question of law,” to be decided by the court. Shelton v. Shelton, 78 P.3d 507, 510 (D.
11 Nev. 2003). If however, the court finds that a contract’s terms “are reasonably susceptible to more
12 than one interpretation, extrinsic evidence is admissible to determine the parties’ true intent. Red
13 Rock Communications, Inc. v. American Telecasting, Inc., 2006 WL 254195 at *5 (D. Nev. 2006).
14 Determining the parties’ true intent or the circumstances that may elucidate ambiguous language may
15 require fact finding by the trier of fact. Id. More specifically, “when interpreting a contract, ‘a court
16 may consider surrounding circumstances, including negotiation, prior understandings, and
17 subsequent conduct[.]’” Id. (quoting Taylor v. State Farm Mut. Auto. Ins. Co., 854 P.2d 1134, 1139
18 (Ariz.1993)). If the court’s inquiry into the parties’ actual meaning of the contract does not resolve
19 the issue, the intent of the parties in light of the competing interpretations of an ambiguous contract
20 is a factual issue to be resolved by the jury. See Economy Forms Corp. v. Law Co., Inc., 593 F.Supp.
21 539 (D.C. Nev. 1984.); United States, Etc. v. Haas & Haynie Corp., 577 F.2d 568, 573 (9th Cir.
22 1978). Therefore, summary judgment is improper, where differing views of the parties’ intent raise a
23 genuine issue of fact. U.S. v. Sacramento Municipal Utility Dist., 652 F.2d 1341, 1344 (9th
24 Cir.1981).

25 Here, the Court finds the provisions of Plaintiff’s employment contract to be ambiguous.
26 Specifically, the Court finds that Section Six is reasonably susceptible to more than one

1 interpretation. An examination of the evidence does not resolve the ambiguity of the parties' intent
2 regarding whether or not the contract prohibited Plaintiff from listing and selling properties during
3 the course of her employment.

4 Accordingly, the Court finds that the interpretation of the parties' intent upon entering the
5 contract is a factual issue to be decided by a jury, thus barring summary judgment. Accordingly,
6 Defendant's Motion for Summary Judgment as to Plaintiff's breach of contract claim is denied.

7 **B. Failure to Pay Commissions and Penalties for Failure to Pay Commissions**

8 Plaintiff's second claim for relief alleges that Realty Executives failed to pay her
9 commissions she earned during the course of her employment. Specifically, Plaintiff argues that
10 Realty Executives owes her \$5,660 as a seller's agent, for a commission on a property located at
11 10765 Avenzo, in Las Vegas, that closed shortly after her termination. Defendant's Motion for
12 Summary Judgment relies upon its allegation that Plaintiff breached the employment contract,
13 averring that Realty Executives does not owe Plaintiff the commission under the contract, as the sale
14 was not closed until after the date of her termination.

15 Specifically, Section Eight(B) of the employment contract states that in the event of a
16 contractual violation, the employer "may terminate [Smith's] employment without notice, and with
17 compensation . . . only to the date of such termination." (Def.'s Mot. for Summ. J. Ex. E at 4.) Here,
18 Defendant argues it is not obligated to pay Smith the commission she seeks in her second cause of
19 action, because she violated the employment contract by listing and selling property during the
20 course of her employment, and because the sale for which she is seeking commission, closed after
21 her termination.

22 Specifically, the property upon which Plaintiff seeks commission payment, closed 18 days
23 after Plaintiff's termination. (See Def.'s Mot. for Summary Judg. Ex L at CS 21.) Plaintiff's second
24 cause of action therefore, hinges upon the determination of whether or not Plaintiff's behavior
25 violated the terms of her employment contract. If it is determined that Plaintiff's behavior violated
26 the terms of her employment contract, then Defendant most likely will not be found to have breached

1 the contract by failing to give Smith's ninety (90) days notice of termination. If however, it is
2 determined that Defendant's behavior was not a violation of the terms of Smith's employment
3 contract, then it is highly probable that Defendant will be found to have breached the employment
4 agreement by failing to give plaintiff ninety (90) days notice of her termination. Under these
5 circumstances, should it be determined that Defendant breached the employment agreement and
6 should have given Plaintiff ninety (90) days notice of termination, her termination date would have
7 fallen on or near April 15, 2007, which was after the date of closing for the 10765 Avenzo, Las
8 Vegas property for which she claims the closing transaction commission. Thus Plaintiff may
9 potentially have a right to her commission payment on the sale. (Id.)

10 Accordingly, the Court finds that resolution of Plaintiff's breach of contract claim bars
11 summary judgment on Plaintiff's second and third claims for relief.

12 **C. Declaratory Judgment**

13 Plaintiff admits that her fourth claim for relief, for declaratory Judgment, is moot and
14 requests that it be dismissed. Accordingly, the Court hereby dismisses Plaintiff's declaratory
15 judgment claim.

16 **D. Failure to Exhaust Administrative Remedies**

17 Plaintiff's fifth and sixth claims for relief, for gender and age discrimination, respectively,
18 allege retaliation under both Title VII and the ADEA. Here, Defendant seeks that the Court grant
19 summary judgment on Plaintiff's retaliation claims for failure to exhaust administrative remedies.
20 Specifically, Defendant alleges that Plaintiff failed to assert her retaliation claims in her Equal
21 Employment Opportunities ("EEOC") Charge, and that Plaintiff failed to assert allegations of
22 retaliation in her intake documents submitted to the EEOC. (Def.'s Mot. for Summ. J. at 16.)

23 Exhaustion of administrative remedies through the EEOC is an essential condition of the
24 Title VII and ADEA statutory schemes, and therefore is mandatory as a precondition to bringing such
25 claims in federal court. See Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F.2d
26 726, 729 (9th Cir. 1984); See also, Legnani v. Aitalia Linee Aeree Italiane, S.P.A., 274 F.3d 683,

1 686 (2d Cir. 2001). “Title VII places primary responsibility for disposing of employment
2 discrimination complaints with the EEOC in order to encourage informal conciliation of employment
3 discrimination claims and foster voluntary compliance with Title VII.” Id. at 729 (citing Ong v.
4 Cleland, 642 F.2d 316, 319 (9th Cir.1981). “[I]ncidents of discrimination not included in an EEOC
5 charge may not be considered by a federal court unless the new claims are ‘like or reasonably related
6 to the allegations contained in the EEOC charge.’” Sosa v. Hiraoka, 920 F.2d 1451, 1456 (9th Cir.
7 1990). Additionally, “in determining whether an allegation under Title VII is like or reasonably
8 related to allegations contained in a previous EEOC charge, the court inquires whether the original
9 EEOC investigation would have encompassed the additional charges.” Green v. Los Angeles County
10 Superintendent of Schools, 883 F.2d 1472 (9th Cir. 1989) (citing Kaplan v. International Alliance of
11 Theatrical and Stage Employees and Motion Picture Machine Operators, 525 F.2d 1354, 1359 n. 3
12 (9th Cir.1975). It is required therefore, that plaintiffs bringing claims under Title VII must exhaust
13 their administrative remedies before seeking judicial relief from discriminatory action. Brown v.
14 Puget Sound Elec. Apprenticeship & Training trust, 732 F.2d at 729.

15 In her Complaint before this Court, Plaintiff has asserted claims for retaliation under Title
16 VII, and the ADEA. In her EEOC Intake Questionnaire however, Smith only made claims for age
17 and gender discrimination, and failed to indicate or assert any allegation of retaliation. Likewise, in
18 her EEOC Charge of Discrimination, Plaintiff made claims for age and gender discrimination, but
19 failed to assert a claim for retaliation. (Def.’s Mot. for Summ. J. Ex. R.) On August, 12, 2007, after
20 conducting an investigation into Plaintiff’s allegations, the EEOC sent Smith a Dismissal and Notice
21 of Rights Letter advising Smith that her charge had been dismissed because the EEOC was unable to
22 conclude that discriminatory acts occurred. (Smith Depo. at 201:8 –202:1; Def.’s Mot. to Dismiss
23 Ex. S.) The letter advised Plaintiff that she could bring suit in either federal or state court on her
24 claims, if she desired, so long as she filed within ninety (90) days. Plaintiff timely filed her
25 Complaint in this Court on October 4, 2007.

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1 Though Plaintiff's EEOC Charge must be construed liberally, (see Sousa v. Hiraoka 920 F.2d
2 at 1456), the Court finds that Plaintiff's claims for retaliation cannot reasonably be expected to grow
3 out of her discrimination claims. This case is distinguishable from Sousa v. Hiraoka, where the
4 Ninth Circuit found that allegations not asserted in the petitioner's EEOC charge were sufficiently
5 related to the claims that had been asserted, because they were of the same nature and could be
6 "expected to grow out of the charge of discrimination." 920 F.2d 1451. Here however, Plaintiff
7 filed her Charge with the EEOC after her termination, and therefore her claim for retaliation cannot
8 be sufficiently related to her filing of a charge of discrimination. See Schiappa, Sr. v. Brookhaven
9 Science Associates, LLC, 403 F. Supp.2d 230, 235 (E.D.N.Y. 2005) (Plaintiff's retaliation claim
10 could not be "based upon or reasonably related to" his EEOC charge alleging discrimination because
11 the charge was filed after his termination, and "alleged retaliation must occur after the filing of the
12 charge").

13 Additionally, Plaintiff failed to respond to Defendant's Motion for Summary Judgment
14 seeking that her claims for retaliation under Title VII and the ADEA be dismissed for failure to
15 exhaust administrative remedies. According to Local Rule 7-2(d), the Court may consider failure to
16 file points and authorities in opposition as consent to the granting of the motion.

17 Accordingly, the Court finds that it cannot exercise jurisdiction over Plaintiff's claims for
18 retaliation because Plaintiff failed to bring such claims in her EEOC charge. Plaintiff has failed to
19 exhaust her administrative remedies in regard to her claims for retaliation under Title VII and the
20 ADEA. Additionally, by failing to respond to Defendant's Motion regarding retaliation, Plaintiff
21 concedes Defendant's argument.

22 **E. Gender Discrimination**

23 Plaintiff's fifth cause of action alleges gender discrimination under Title VII. Defendant
24 claims that Smith's gender discrimination claim fails for several reasons. Specifically, Defendant
25 avers that Plaintiff failed to bring her action for pay disparity within the 300 day time bar under 42
26 U.S.C. § 2000e-5(e)(1). Additionally, Defendant asserts that Smith cannot prove a *prima facie* case

1 for disparate treatment under Title VII, and even if she did prove a *prima facie* case, she cannot
2 demonstrate that Realty Executives' alleged nondiscriminatory reason for its actions is a pretext for
3 discrimination.

4 ***1. Pay Disparity***

5 Plaintiff alleges that Defendant discriminated against her based on gender by paying her less
6 than its Director of Executive Education, Tony Berti, between January 2005, and June 2005.
7 Specifically, Plaintiff's Complaint alleges that Realty Executives discriminated against her in
8 violation of Title VII and NRS 613.330 by paying Tony Berti a higher salary and higher transaction
9 fee, despite the fact that he had less experience than Smith, and did not have a broker's license.
10 Defendant avers that Plaintiff's claim regarding the pay disparity between herself and Tony Berti
11 fails because she did not bring the claim within 300 days of the alleged discriminatory conduct. The
12 Court agrees.

13 42 U.S.C. § 2000e-5(e)(1) requires a party to file an EEOC charge within 300 days of the
14 alleged unlawful employment practice. The 300 day time bar acts as a statute of limitations, thus a
15 claim not brought within the 300 day period cannot be sustained. See Zipes v. Trans World Airlines,
16 455 U.S. 385, 393–94 (1973). Here, Plaintiff alleges that beginning in January 2005, she was paid
17 substantially less than Mr. Berti. (See Complaint at ¶ 33.) The issue was resolved however, when
18 Plaintiff brought the disparity to Realty Executives owner Jeff Moore's attention. Mr. Moore
19 admitted surprise at the disparity, and subsequently increased Plaintiff's salary to a rate higher than
20 Tony Berti's. Plaintiff received the salary increase on July 1, 2005. Plaintiff's EEOC Charge was
21 filed in February, 2007—more than 300 days after the alleged discriminatory conduct.

22 Plaintiff concedes that her claim for pay disparity under Title VII is time barred, yet argues
23 that her claim remains viable under the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), and NRS
24 608.017. Specifically, Plaintiff avers that the applicable limitations period under the EPA is two
25 years. (Pl.'s Opposition at 23.)

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1 Upon examination of Plaintiff’s Complaint, the Court finds that Plaintiff has failed to bring a
2 claim under the EPA. Her attempt to raise a claim under the EPA by bringing it for the first time in
3 her Opposition to Plaintiff’s Motion for Summary Judgment fails. Plaintiff has conceded that her
4 Complaint fails to bring a claim under the EPA, but argues that because a violation of the EPA was
5 “mentioned in discovery”, it should be considered here. (Pl.’s Opp’n at 24.) Plaintiff cites
6 Menodiono v. Centinela Hosp. Med. Center, 521 F.3d 1097, 1102–03 (9th Cir, 2008), to argue that
7 federal courts follow the rules of notice pleading, and therefore, because a violation of the EPA was
8 “mentioned in discovery” it is sufficient to have put Defendant on notice that Plaintiff could bring a
9 claim under the EPA. The Court disagrees. Here, Plaintiff not only fails to direct the Court to the
10 discovery documents that allegedly put the Court and Defendant on notice of her EPA claim, but
11 Plaintiff has made no attempt to amend her pleadings so as to allege such a claim.

12 Accordingly, the Court finds Plaintiff’s EPA claim is improperly raised at this time and
13 therefore fails.

14 ***2. Disparate Treatment***

15 To state a *prima facie* case of disparate treatment under Title VII, plaintiff must show that (1)
16 she belongs to a protected class, (2) she was performing according to her employer’s legitimate
17 expectations, (3) she suffered an adverse employment action, and (4) similarly situated employees
18 outside of her protected class were treated more favorably. See Bergene v. Salt River Project Agr.
19 Imp. And Power Dist., 272 F.3d 1136, 1140 (9th Cir. 2001); see also McDonnell Douglas Corp. v.
20 Green, 411 U.S. 792, 802 (1973); Foss v. Thompson, 242 F.3d 1131, 1134 (9th Cir. 2001). Once
21 the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate
22 nondiscriminatory reasons for the allegedly discriminatory conduct. See Sischo-Nownejad v.
23 Merced Community College Dist., 934 F.2d 1104, 1109 (9th Cir. 1991) (superseded by statute on
24 other grounds as recognized in Dominguez-Curry v. Nevada Transp. Dept., 424 F.3d 1027 (9th
25 Cir.2005) (quoting Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir.1985)). The employer’s
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1 articulation of a facially nondiscriminatory reason shifts the burden back to the plaintiff to show that
2 the employer's reason was a pretext for discrimination. Id.

3 Defendant avers that Plaintiff has failed to establish that she was performing according to her
4 employer's legitimate expectations, because she violated her employment agreement by listing and
5 selling properties during the course of her employment. Additionally, Defendant avers that Plaintiff
6 has failed to establish the fourth element required to establish a *prima facie* case of disparate
7 treatment because she cannot prove that other similarly situated employees outside of her protected
8 class were treated more favorably.

9
10 ***a. Employer's Expectations***

11 Plaintiff's employment agreement states that Smith would "render such other and unrelated
12 service and duties as may be assigned [her]from time to time by Employer, and that she would
13 "perform all of the duties required of and from her pursuant to the express and implicit terms of this
14 agreement, to the reasonable satisfaction of Employer." (Def.'s Mot. for Summ. J. Ex. E.) Here, the
15 record is replete with evidence that Plaintiff was notified by Defendant that her actions of listing and
16 selling property were believed to be in violation of her employment agreement, yet Plaintiff
17 continued to list and sell property in spite of said admonitions, in direct opposition to her employer's
18 legitimate expectations.

19 Realty Executives learned that Plaintiff was listing and selling property in August 2006.
20 Specifically, Plaintiff informed Realty Executives owner Jeff Moore's executive assistant that if Mr.
21 Moore had a problem with her listing and selling activities, then they would need to have a
22 discussion regarding whether Plaintiff would remain in the position of Corporate Broker. (Smith
23 Depo. at 223:8-21.) Shortly thereafter, at a lunch meeting on September 1, 2006, Jeff Moore
24 notified Plaintiff that her activities violated her employment agreement, and that she could not
25 continue to list and sell while she maintained her position as Corporate Broker (See Smith Depo. at
26 68:22 to 69:9-21; 73:13-22; 78:11-17; Jeff Moore Depo. at 51:5-16.) Mr. Moore notified Plaintiff

1 that she needed to decide what she wanted to do because her Agreement prohibited her from listing
2 and selling. (Smith Depo. at 78:11–17.) According to Moore, Plaintiff told him that she would get
3 back to him with her decision. (Id.; Jeff Moore Depo. at 51:17–18.). According to Plaintiff, after her
4 lunch meeting with Mr. Moore on September 1, 2006, she wrote him a letter on September 29, 2006
5 which outlined her concerns that she was being forced out in order that Realty Executives might
6 project a more youthful image, and about her diminished capacity to earn commissions due to the
7 prohibition of her listing and selling activities. (Pl.’s Opp’n Ex. 10.) Smith argues that this letter
8 was not a refusal to stop listing and selling, but a means of “continu[ing] the dialogue” and
9 “reiterating her request that either she be allowed to continue listing and selling on an occasional
10 basis to supplement her income . . . or Mr. Moore tell her where her contract prohibited her from
11 engaging in this activity” (Pl.’s Opp’n at 9.) A reading of Plaintiff’s letter, demonstrates that Moore
12 clearly laid out Realty Executives position that she Smith “cease and desist” selling real estate, as it
13 was a violation of her employment agreement. (See Pl.’s Opp’n Ex. 10.)

14 Additionally, Moore has testified that the company’s policy of having a non-competing
15 broker was discussed virtually once a year in the company’s strategic planning meetings, during
16 management meetings, and during recruiting presentations throughout the term of Plaintiff’s
17 employment. (Jeff Moore Depo. At 71:3–15.) Specifically, Smith admits that she attended a
18 Strategic Planning Meeting on January 10, 2005, wherein Realty Executives’ policy of having a non-
19 competing Corporate Broker was discussed. (See Smith Depo. at 127:14 to 128:4; Fafie Moore
20 Depo. at 66:16–23; Def.’s Mot. for Summ. J. Ex. K.) However, in spite of Moore’s admonition,
21 Smith continued to list and sell property. (Smith Depo. at 138:19 to 139:1; 143:8–12, 145:1–4;
22 146:3–6.) The Court finds Plaintiff’s behavior precludes her from establishing a *prima facie* case of
23 disparate treatment, because it establishes that she was not performing her employment
24 responsibilities according to her employer’s legitimate expectations.

1 ***b. Similarly Situated Employees Treated More Favorably***

2 Defendant points out that the individual who held the broker position at Realty Executives
3 prior to Plaintiff was Gail McQuarry, a 67 year-old female at the time she resigned from
4 employment. (Jeff Moore Depo at 37:12–21, 38:–3–4, 110:3–11). Ms. McQuarry was allowed to
5 list and sell properties. Defendant claims however, that as the business grew, it implemented the
6 policy of having a non-competing Corporate Broker. (Moore Decl. at ¶ 3.) The individual who
7 replaced Plaintiff as the Corporate Broker upon her termination is Mr. Moore, a male who is two
8 years older than Plaintiff, and who is equally prohibited from listing and selling property.

9 Plaintiff alleges she has proven a *prima facie* case of gender discrimination because the
10 Corporate Broker who proceeded her was allowed to list and sell whereas she was not. Defendant
11 disclaims Plaintiff’s argument, because Mr. Moore, who took over Plaintiff’s position as Corporate
12 Broker, is also prohibited from listing and selling property. The Court disagrees, and finds that
13 Plaintiff has sufficiently pled a *prima facie* case of gender discrimination.¹

14 The Court finds however, that Defendant has sufficiently articulated a valid
15 nondiscriminatory reason for its policy that Plaintiff was not allowed to list or sell property, and for
16 Plaintiff’s ultimate termination. Specifically, Defendant claims that Plaintiff was prohibited from
17 listing and selling property during her employ as the Corporate Broker *inter alia*, to avoid
18 competition between the broker and the agents she oversaw.² Additionally, the evidence
19 demonstrates that Plaintiff was aware that Realty Executives management believed her conduct was
20

21 ¹The Court is not convinced that the prohibition placed upon Mr. Moore during his tenure as the Corporate
22 Broker sufficiently disproves Plaintiff’s claim that other similarly situated employees outside of her protected class were
23 treated more favorably, given that Moore is the owner of Realty Executives, was involved in Plaintiff’s termination, and
was aware of Plaintiff’s complaint of disparate treatment.

24 ²Defendant provides evidence to suggest that it maintains the policy prohibiting the Corporate Broker from
25 listing and selling property as one of its major recruiting tactics for new agents, and to strengthen the perception of its
26 agents that the Corporate Broker is working for them, and not competing against them. (See Jeff Moore Depo. at 23:2–8;
70:2–8.) Additionally, the Corporate Broker has access to a considerable amount of information related to a sale which
could be used to profit personally if the Broker was one of the agents involved in the transaction. (Smith Depo. at
214:9–11.)

1 in violation of her employment agreement. (See Smith Depo. at 68:22 to 69:9–21; 73:13–22;
2 78:11–17; Jeff Moore Depo. at 51:5–16.) According to Defendant, Plaintiff was ultimately
3 terminated because she refused to cease listing and selling property after being warned that it was a
4 violation of her employment contract to do so. (Def.’s Mot. for Summary Judgment Ex. Q.)

5 Having articulated a valid nondiscriminatory reason for its actions, the burden shifts back to
6 Plaintiff to demonstrate that Realty Executives’ reason was a pretext for discrimination. Here,
7 Plaintiff has failed to do so. Accordingly, Plaintiff’s claim for gender discrimination fails, and
8 Defendant’s Motion for Summary Judgment is granted as to Plaintiff’s fifth cause of action.

9 **F. Age Discrimination under the ADEA**

10 Plaintiff’s sixth cause of action alleges that Defendant discriminated against her because of
11 her age. Specifically, Plaintiff alleges that she was fired by Realty Executives in order that they
12 might present a more youthful image.

13
14 The substantive provisions of the ADEA are modeled on those of Title VII. Because of the
15 relationship between the ADEA and Title VII, the substantive standards burdens, and organizations
16 of proof developed under Title VII have been extended to federal claims of age-based discrimination.
17 See Palmer v. United States, 794 F.2d 534, 537 (9th Cir. 1986) (“The criteria applied to a Title VII
18 discrimination claim also apply to claims arising under the ADEA.”).

19 Therefore, to prove discriminatory treatment under the ADEA, the Plaintiff must present
20 evidence that gives rise to an inference of unlawful discrimination. See Tex. Dept. of Cmty. Affairs
21 v. Burdine, 450 U.S. 248, 253 (1981). “That is, the plaintiff’s age must have actually played a role in
22 the employer’s decision making process and had a determinative influence on the outcome.” Reeves
23 v. Sanderson Plumbing Prods., Inc., 530 U.S. 133,141 (2000). Plaintiff has the burden of proving
24 that the disparate treatment was the result of intentional discrimination based on her protected
25 characteristics. EEOC v. Flasher Co., Inc., 986 F.2d 1312, 1314 (10th Cir. 1992).

1 29 U.S.C. § 623(a) states in relevant part, “It shall be unlawful for an employer . . . to fail or
2 refuse to hire . . . or otherwise discriminate against any individual with respect to his compensation,
3 terms, conditions, or privileges of employment, because of such individual’s age. . . .” To establish a
4 *prima facie* case of an ADEA violation, Plaintiff must show that she (1) was a member of a protected
5 class [age 40–70]; (2) was performing her job in a satisfactory manner; (3) was rejected for
6 employment or otherwise subjected to an adverse employment action; and (4) was replaced by a
7 substantially younger employee with equal or inferior qualifications. See Wallis v. J.R. Simplot Co.,
8 26 F.3d 885, 891 (9th Cir. 1994). Defendant argues that Plaintiff has failed to establish the second
9 and fourth elements required to establish a *prima facie* case of age discrimination.

10 As in Title VII cases, once the plaintiff establishes a *prima facie* case, the burden shifts to the
11 defendant to articulate nondiscriminatory reasons for the allegedly discriminatory conduct. See
12 Sischo-Nownejad, 934 F.2d at 1109. The employer’s articulation of a facially nondiscriminatory
13 reason shifts the burden back to the plaintiff to show that the employer’s reason was a pretext for
14 discrimination. Id. The plaintiff may establish pretext “either directly by persuading the court that a
15 discriminatory reason more likely motivated the employer or indirectly by showing that the
16 employer’s proffered explanation is unworthy of credence.” Godwin v. Hunt Wesson, Inc., 150 F.3d
17 1217 (9th Cir 1998) (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)).

18 ***1. Satisfactory Job Performance***

19 Defendant argues that Plaintiff has failed to establish the second element required to establish
20 a *prima facie* case of age discrimination. Specifically, Defendant avers that Smith cannot show that
21 she was performing her job in a satisfactory manner because she violated the employment agreement
22 by listing and selling properties during the course of her employment, and further, that Plaintiff
23 continued to do so after being warned by Mr. Moore that Realty Executives management believed
24 her actions were contrary to her employment agreement.
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1 Here, the Court agrees that Plaintiff cannot establish that she was performing her job in a
2 satisfactory manner. Plaintiff spends the majority of her Opposition arguing that Mr. Moore made
3 discriminatory comments that are sufficient to demonstrate pretext. These arguments (whether
4 persuasive or not) however, cannot overcome the fact that Plaintiff acted against her employer's will
5 by continuing to list and sell property, even after she had been asked not to.

6 It is not disputed that Plaintiff was warned that she should not list and sell property while
7 employed as the Corporate Broker. Specifically, Plaintiff met with Mr. Moore on September 1,
8 2006, and has testified that at that meeting she was told that the Realty Executives management
9 believed her actions of listing and selling property while employed as the Corporate Broker violated
10 her employment agreement. (Smith Depo. at 68:22 to 69:8-15; 69:16-21; 73:13-22; Jeff Moore
11 Depo. at 51:5-16.) While Plaintiff argues that she was discriminated against by being the only
12 employee prohibited from listing and selling property, the Court finds that Defendant has proffered a
13 valid nondiscriminatory reason for prohibiting Plaintiff from listing and selling property.

14 Additionally, Plaintiff argues that Defendant's stated reason for her termination is suspect,
15 because Defendant waited four and one-half months after finding out that she was listing and selling
16 property before firing her. The Court is not persuaded by this argument, especially, because Plaintiff
17 continued to list and sell property during the four and one-half month period.

18 ***2. Replaced by Substantially Younger Employee***

19 Defendant further avers that Plaintiff cannot establish the fourth element of a *prima facie* case
20 of discrimination under the ADA because she cannot demonstrate that she was replaced by a
21 substantially younger employee with equal or inferior qualifications. Plaintiff alleges that upon her
22 termination, her position was filled by Tony Berti, a younger male, who had less experience and was
23 less qualified than Plaintiff. Defendant however, provides evidence that the individual who has
24 replaced Plaintiff as the Corporate Broker is not Tony Berti, but Mr. Moore, who is two years older
25 than Plaintiff. Additionally, prior to Mr. Moore taking over as Corporate Broker, Realty Executives
26 interviewed Bruce Allit and Steve Kitnick, both of whom are in their 60's and older than Plaintiff,

1 and have a great deal of experience and qualifications. The position was eventually offered to Mr.
2 Allit, but Allit declined the offer. (Jeff Moore Depo. At 15:17–21.) Subsequently, due to the
3 downturn of real estate market conditions, Realty Executives decided that Mr. Moore would continue
4 to handle the Corporate Broker duties. (Fafie Moore Depo. at 100:1–6.)

5 “An inference of discrimination can be established by showing the employer had a continuing
6 need for the employees’ skills and services in that their various duties were still being performed or
7 by showing that others not in their protected class were treated more favorably.” (See Pl.’s Opp. at
8 28 (citing Diaz v. Eagle Produce, Ltd., 521 F.3d 1201, 1208 (9th Cir. 2008)). Plaintiff alleges that an
9 inference of discrimination is established by the promotion of Mr. Berti to General Manager upon her
10 termination. Specifically, although Berti was not made the Corporate Broker, Plaintiff alleges he
11 “wholly assumed” her duties. Defendant, in opposition, provides evidence that rebuts Plaintiff’s
12 allegations that Mr. Berti, replaced her. (Pl.’s Opp’n at 13.)

13 Specifically, Berti cannot hold the position of Corporate Broker because he is not an officer
14 of the company, and does not hold a broker’s license. (Jeff Moore Depo. At 93:22–23.)
15 Additionally, Berti has testified that he did not take over Plaintiff’s responsibility for reviewing files,
16 and has only recently been receiving training to do so from Mr. Moore. Additionally, Berti has
17 testified that he was not given the responsibility of representing Realty Executives at hearings before
18 the Greater Las Vegas Association of Realtors (“GLVAR”).³ Defendant also provides testimony that
19 upon assuming the position of General Manager, Berti “began to share responsibility for answering
20 agents’ questions with at least five other individuals.” (Def.’s Reply at 17.)

21 The Court finds that Plaintiff has failed to demonstrate that she was replaced by a
22 substantially younger employee with equal or inferior qualifications, and therefore, for this reason
23 too, has failed to establish a *prima facie* case of discrimination under the ADEA. Accordingly,
24 Plaintiff’s Motion for Summary Judgment is granted as to Plaintiff’s sixth claim for relief.

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26 ³While Berti admits to having attended two hearings before the GLVAR, he claims he did so only to learn the
business in order to better perform his duties as General Manager.

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G. Attorney's Fees pursuant to Title VII and the ADEA.

Plaintiff's seventh claim for relief seeks attorney's fees pursuant to Title VII and the ADEA. Specifically, Plaintiff seeks attorney's fees pursuant to 42 U.S.C. § 2000e-5(k) that were incurred prosecuting her gender discrimination claim. Likewise, Plaintiff seeks attorney's fees pursuant to 29 U.S.C. § 626(b) for fees incurred prosecuting her age discrimination claim.

Here, the Court finds that Plaintiff has failed to establish a *prima facie* case for both her Title VII and ADEA claims. Therefore, as Summary Judgment for both claims has been granted, the Plaintiff's claim for attorney's fees under either both Title VII (or the EPA) and the ADEA is moot.

IV. Conclusion

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (#21) is **DENIED** as to Plaintiff's first, second, and third claims for relief.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (#21) is **GRANTED** as to Plaintiff's fourth, fifth, sixth, and seventh claims for relief.

DATED this 16th day of March 2009.



Kent J. Dawson
United States District Judge