[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK J.S.C. PART 39
Justice

Index Number : 601631/2004
SCHLISSERMAN, NEIL T.
vs.
PA CONSULTING GROUP
SEQUENCE NUMBER : 012
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
DEC 20 2013
NEW YORK COUNTY CLERK'S OFFICE

RECEIVED
DEC 20 2013

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/18/13

BARBARA R. KAPNICK, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 39

----------x

NEIL T. SCHLISSERMAN, RHEA A. COOK, and MICHAEL A. PEREIRA,

Plaintiffs,

- against -

PA CONSULTING GROUP INC. and PA HOLDINGS LIMITED,

Defendants,

----------x

DECISION/ORDER
Index No. 601631/04
Motion Seq. No. 012

BARBARA R. KAPNICK, J.:

In this action, plaintiff Rhea A. Cook ("Cook") has sued her former employer, defendant PA Consulting Group Inc. ("PA"), to recover damages for alleged defamation and employment discrimination based on sex and national origin.[1] PA now moves for summary judgment dismissing the Second Amended Complaint in its entirety, with prejudice.

Background

The following facts are taken, except where otherwise noted, from defendant's Statement of Material Facts, which plaintiff has not disputed.

---

[1] It is undisputed that by prior orders of the Court, plaintiffs' causes of action for wrongful discharge, breach of contract, tortious interference, declaratory judgment, misrepresentation and shareholder oppression, were dismissed, as were all the claims of plaintiff Michael Pereira. Neil Schlisserman subsequently discontinued his remaining claims, and the action as against defendant PA Holdings Limited was also discontinued. Plaintiff Rhea Cook's causes of action for defamation and employment discrimination against PA Consulting Group Inc. are, therefore, the only remaining claims.

Defendant PA Consulting Group, Inc. ("PA"), a U.S. subsidiary of U.K.-based PA Holdings Limited ("PA Holdings"), is a management consulting firm, specializing in technology for businesses, and is chiefly involved in "implementation consulting," that is, helping clients "do whatever they need to be doing" (as opposed to "strategy consulting," or, giving advice). (Moynihan Dep. 42:13-43:20, Oct. 17, 2008; Wigton Dep. 19:13-22, Dec. 15, 2009.) PA employs consultant scientists, and occasionally invests in ideas developed by the consultants. (Moynihan Dep. 44:25-46:18.) Cook was employed by PA as U.S. Marketing Manager from November 1999 until her termination on September 18, 2003, and worked primarily in PA's Princeton, New Jersey and New York City offices. (Cook Dep. 48:12-15, 52:9-20, Feb. 15, 2007; Second Am. Compl. ¶ 11.) Plaintiff's direct supervisor was Dr. Adam Adams, PA's Global Head of Marketing, who also hired plaintiff. (Cook Dep. 55:15-56:8, Feb. 15, 2007.) Plaintiff received regular salary increases and bonuses throughout her employment with PA, and performed her work satisfactorily.

At the time that plaintiff was hired, she received certain documents (Lalik Aff. Ex. 36), including PA's Service Manual, which contained PA's equal opportunity and sexual harassment policies. (Lalik Aff. Ex. 37.) During her employment with PA, plaintiff also

received copies of PA's Employee Handbook, which included PA's nondiscrimination policy, and the Code of Conduct which contained a "Conflicts of interest" section, which provided that "PA employees should avoid all situations that might give rise to a conflict with the interests of PA or its clients, whether actual or perceived," and directed that "[a]ll outside interests must be disclosed to PA." PA would then decide whether the outside interest "is compatible with PA's best interests, and whether it will be allowed". (Lalik Aff. Ex. 21, ¶10.)

In or around March 2002, plaintiff began working with Neil Schlisserman ("Schlisserman"), a managing consultant in PA's Government and Public Services practice, and Michael Pereira ("Pereira"), a principal consultant in PA's Product and Process Engineering ("P&PE") practice, and other PA employees who were working with Princeton's Plasma Physics Research Laboratory to explore a new sterilization process, referred to as "cold ion deposition sterilization," or "plasma sterilization." Schlisserman and Pereira asked plaintiff to meet with them to discuss the possibilities for practical uses of the plasma sterilization technology and to consider presenting the technology to PA as an investment opportunity. Plaintiff became involved to assist in marketing. (Cook Dep. 85:13-86:6, Sept. 23, 2008.)

She discussed the plasma sterilization project with John Buckley ("Buckley"), PA's head of technology, and, at her request, he visited the Princeton lab to review the technology. (Cook Dep. 90:7-92:3, Sept. 23, 2008.) At some later time, Dr. Alec MacAndrew ("MacAndrew"), a high-ranking PA executive and the global P&PE practice leader, also visited the Princeton lab. (Cook Dep. 92:17-93:9, Sept. 23, 2008.) According to plaintiff, Buckley was enthusiastic about the project and thought that it warranted further investigation to "assess the soundness" of the opportunity to commercialize the plasma sterilization technology. (Cook Dep. 93:13-94:17, Sept. 23, 2008.)

In early August 2002, Schlisserman sent an e-mail to Buckley and MacAndrew, and copied plaintiff, Pereira and Gregg Karlberg ("Karlberg"), Schlisserman's immediate supervisor, to provide an update on the plasma sterilization project, noting that it was not as far along as he had hoped, and asking whether they wanted to continue supporting the project or would prefer that he, Pereira and plaintiff seek outside funding to move the project forward. (Lalik Aff. Ex. 28.) By e-mail dated November 8, 2002, MacAndrew responded that "unless PPPL can demonstrate basic feasability . . . I'm not interested in investing anything with them." (*Id.*) Schlisserman forwarded MacAndrew's e-mail to Dan Walsh ("Walsh"), Pereira's supervisor and U.S. practice leader for

[* 6]

the P&PE practice, and noted that PA apparently is passing on the plasma sterilization project. (*Id.*) Walsh responded that he thought "that is a good read." (*Id.*) After learning that PA was not interested in investing in the plasma sterilization project, Schlisserman, Pereira, and plaintiff (collectively, "the three"), with the knowledge of Karlberg (Karlberg Aff. ¶ 4), continued their efforts, on their own time, to seek investment capital for the development of the plasma sterilization technology. (Schlisserman Dep. 122:2-15, Feb. 13, 2007.) In late 2002, the three discussed forming an entity to pursue funding for the development of the plasma sterilization project, and, in January 2003, they established PlaZtec Inc. L.L.C. (*See* Lalik Aff. Exs. 62, 63.) A PlaZtec website was created, and a post office box, telephone number, and bank account were opened for the company. The three also drafted a business plan and purchased a computer. Through the spring of 2003, they continued to make efforts to solicit interest and investments in the sterilization technology.

On May 29, 2003, MacAndrew received the following e-mail from an anonymous sender (the "anonymous email"):

> From: pa_uk_consultant 2 [mailto:pa_wc_consultant@hotmail.com]
> Sent: 28 May 2003 23:26
> To: Alec MacAndrew
> Subject: our USA plasma sterilisation project
>
> I wish to know why the ion plasma sterilisation project out of Princeton

> University in the USA that you had us briefly study and PA had considered funding - - and if my recollection serves we had the exclusive right to pursue for some period of time under a written agreement with that institution - - is reliably and widely rumoured to have been developed surreptitiously in the USA offices by Mssrs. [sic] M. Pereira, N. Schlisserman and apparently several other colleagues, possibly including a partner. Apparently they have in fact formed an entity, built a web page (www.plaztec.com), solicited funds, and commenced operations even whilst being in PA's employ. Did we not, on intake, have each of them execute our standard non-compete instruments &c. How is it that we have paid them to take this opportunity away from us?

(Lalik Aff. Ex. 30.)

MacAndrew forwarded the e-mail to Walsh (*see* Lalik Aff. Ex 72), who in turn forwarded it to Schlisserman and Pereira, asking them for "an explanation . . . that satisfies me that there is not an explicit conflict of interest and a potential violation of the code of conduct." *Id.* Schlisserman responded to Walsh, copying MacAndrew, Karlberg and plaintiff, denying any allegations of wrongdoing and explaining what he, Pereira and plaintiff had done with respect to forming PlaZtec and pursuing funding for the plasma sterilization project. *Id.*

Plaintiff then sent an e-mail to Schlisserman, Walsh, Pereira, MacAndrew and Karlberg, asserting that nothing "sinister or unethical" had occurred, and stating that she was available to

speak to Walsh in the Princeton office the next day. (*See* Lalik Aff. Ex. 74.) When she spoke to Walsh, she told him that the sender of the e-mail was "taking some information that was similar but not at all accurate, and framing Mr. Pereira and Mr. Schlisserman. . . . and - - ultimately me . . . ." (Cook Dep. 158:20-25, 160:21-161:9, Sept. 23, 2008.) According to plaintiff, even though she was not identified in the anonymous e-mail, she "stepped up" to clarify the activities around the plasma sterilization project, and explained that "if something untoward has been happening, why would [she] stand up" and identify herself. (Cook Dep. 162:8-163:5, Sept. 23, 2008.) Plaintiff testified that the only people she knew who received the anonymous e-mail were MacAndrew, Walsh, Pereira, Schlisserman, and maybe Karlberg, and she herself may have sent it to Julie Davern, in PA's human resources department. (Cook Dep. 146:8-148:8, Sept. 23. 2008.) MacAndrew also may have sent the e-mail to Annette Wigton ("Wigton"), PA's U.S. head of human resources, who sent it to a member of her staff when PA was preparing for plaintiff's unemployment hearing. MacAndrew also forwarded it to PA's IT department to attempt to identify the sender.

MacAndrew took charge of an investigation of the anonymous e-mail and its allegations, after conferring with Adams and Andrew Hooke ("Hooke"), a PA partner in charge of Schlisserman's practice,

and Wigton was brought in to help with the investigation. At MacAndrew's request, the three prepared a package of information responding to the allegations of the anonymous e-mail. (Lalik Aff. Ex. 81; *see also* Lalik Aff. Exs. 77, 78, 79, 82.)

By letter dated July 18, 2003, MacAndrew and Hooke wrote to Schlisserman, informing him that the investigation into the allegations of the anonymous e-mail was concluded, and that they found that the "key assertions" made in the e-mail - - "that PA ever had an exclusive right to the technology, that you developed the technology surreptiously, that you commenced operations and that PA was paying you to take an opportunity away from PA" - - were unfounded. (Lalik Aff. Ex. 84.) The letter goes on, however, to note that "you should have realized that this activity . . . might have caused, or be perceived to be, an ethical or business conflict and . . . you should have . . . sought agreement to proceed in writing." (*Id.*) Finally, the letter states that "we cannot agree to any further involvement on your part in the Plasma Sterilization Project, therefore we would like you to confirm, in writing to us, that you have ceased all activity in connection with this project and dissolved the company." (*Id.*) A letter with the identical statements, dated July 23, 2003, was sent to plaintiff from MacAndrew and Adams. (Lalik Aff. Ex. 134.) In an e-mail dated August 5, 2003, Schlisserman advised MacAndrew and Wigton

that the three had not yet had an opportunity to discuss the letters they received, and they would get back to him "pertaining to next steps." (Lalik Aff. Ex. 85.)

On September 11, 2003, MacAndrew sent an e-mail to the three, and copied it to Adams, Hooke and Wigton, advising the three that, having not heard from them in almost seven weeks, he was insisting that each of them advise him and their line managers within one week that they had ceased all activity in the plasma sterilization project and dissolved PlaZtec. (MacAndrew Dep. 147:9-148:8, Feb. 2, 2010; *see also* Lalik Aff. Ex. 86.) At the time this e-mail was distributed, plaintiff was out on medical leave, having had to undergo an emergency appendectomy; she testified that she began checking her e-mails from home on Sunday, September 14, and probably would have received MacAndrew's e-mail around that date. (Cook Dep. 202:7-204:3, Sept. 23, 2008.) She began working again, from home, on September 15. (Cook Dep. 21:12-22:23, Nov. 18, 2009.)

On September 18, 2003, Schlisserman sent a lengthy response to MacAndrew on behalf of the three, detailing several issues that they wanted addressed before they "take any conclusive steps regarding PlaZtec." (Lalik Aff. Ex. 87.) In particular, the three were not satisfied with PA's efforts to identify and take action

against the sender of the anonymous e-mail, with PA's conclusion that the three should have realized that their activities might have caused or been perceived as an ethical or business conflict, and with the suggestion that they did not in fact have approval to pursue outside funding for the plasma sterilization project. (*Id.*) Schlisserman testified that they did not dissolve PlazTec, as MacAndrew requested, because they had not received any communication about the identity of the sender of the anonymous e-mail. (Schlisserman Dep. 64:2-65:17, Sept. 18, 2008.) None of the witnesses deposed, including MacAndrew, plaintiff, Schlisserman, Pereira or others who were aware of the e-mail, knew who the sender was, and the identity of the author/sender of the anonymous e-mail was never determined.

MacAndrew did not respond to the issues raised by Schlisserman's September 18 e-mail, and, instead, the three were notified that their employment was terminated, effective September 18, 2003. (Lalik Aff. Ex. 138.) On September 19, 2003, the day after plaintiff's employment was terminated, a staff meeting was held at the Princeton office. Plaintiff claims that she was told about the meeting by an administrative assistant and that employees at the meeting were told that she had been fired for cause and for stealing intellectual property, (Cook Dep. 43:3-23, 46:4-19, Nov. 18, 2009), but she could not remember who said that to her, and did

not know what actually was said at the meeting. (*Id.* at 46:20-48:22.) Several employees who were at the meeting were deposed by plaintiff, including Walsh, head of the Princeton office. He testified that he told staff at the meeting that the three were terminated because PA had determined that they had an outside conflict of interest, and they chose not to end their outside activities. (Walsh Dep. 135:23-136:14, Oct. 1, 2008.) PA partner Edward Cunningham testified that the meeting was called because other employees were wondering what happened, and staff were told that the three were asked to leave because of a conflict of interest. (Cunningham Dep. 26:10-27:24, Oct. 17, 2008.) PA partner Philip Sweetman testified that Walsh addressed the staff and told them that the three were asked to discontinue their involvement in outside work, and they chose not to and were terminated as a result. (Sweetman Dep. 32:5-18, Feb 3, 2010.) Stephen Kerr testified that Walsh announced that the three had left the company, but did not provide details. (Kerr Dep. 83:8-21, Oct. 27, 2008.)

Plaintiff brought this action in May 2004. After the completion of pre-trial discovery, and earlier motion practice, defendant now moves for summary judgment dismissing the remaining claims.

Discussion

It is well settled that to prevail on a motion for summary judgment, the moving party must, by submitting evidentiary proof in admissible form, establish the cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980); *see also Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such showing has been made, the burden shifts to the opposing party who must show, also by producing evidentiary proof in admissible form, that genuine material issues of fact exist which require a trial of the action. *See Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman*, 49 NY2d at 562.

While the evidence must be viewed in a light most favorable to the non-moving party, *Branham v. Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 (2007)), "the opposing party must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist." *Kornfeld v. NRX Tech.*, 93 AD2d 772, 773 (1st Dep't 1983), *aff'd*, 62 NY2d 686 (1984). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact. *Zuckerman*, 49 NY2d at 562. Further, as defendant correctly notes, "'[f]acts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted.'" *Madeline D'Anthony*

Enters., Inc. v. Sokolowsky, 101 AD3d 606, 609 (1st Dep't 2012) (quoting *Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544 (1975)).

Defamation

Defamation, whether in the form of libel or slander, generally is defined as the making of a false statement which "tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him [or her] in the minds of a substantial number of the community." *Golub v. Enquirer/Star Group*, 89 NY2d 1074, 1076 (1997) (internal quotation marks and citation omitted); *see also Geraci v. Probst*, 15 NY3d 336, 344 (2010); *Foster v. Churchill*, 87 NY2d 744, 751 (1996); *Rinaldi v. Holt, Rinehart & Winston*, 42 NY2d 369, 379 (1977). "The elements are a false statement, published without privilege or authorization to a third party, . . . and it must either cause special harm or constitute defamation per se." *Dillon v. City of New York*, 261 AD2d 34, 38 (1st Dep't 1999); *see also O'Neill v. New York Univ.*, 97 AD3d 199, 212 (1st Dep't 2012); *Salvatore v. Kumar*, 45 AD3d 560, 563 (2d Dep't 2007), *lv den* 10 NY3d 855 (2008). Defamation per se, limited to certain categories of statements considered "so noxious" that damages are presumed and need not be proven, *see Yonaty v. Mincolla*, 97 AD3d 141, 143-44 (3d Dep't 2012), *lv den* 20 NY2d 855 (2013) includes statements "that tend to injure another in his or her trade, business or profession." *Liberman v. Gelstein*, 80 NY2d

429, 435 (1992); *see also Geraci*, 15 NY3d at 344; *Herlihy v. Metropolitan Museum of Art*, 214 AD2d 250, 261 (1st Dep't 1995).

"'As a threshold, and constitutional, matter, a plaintiff alleging defamation must demonstrate the allegedly defamatory statement was "of and concerning" him or her.'" *Prince v. Fox Tel. Stas., Inc.*, 33 Misc 3d 1225(A) *14-15 (Sup Ct, NY Co. 2011), *aff'd in part and mod in part* 93 AD3d 614 (1st Dep't 2012) (quoting *Diaz v. NBC Universal, Inc.*, 337 Fed Appx 94, 96 (2d Cir 2009)); *see also Julian v. American Bus. Consultants*, 2 NY2d 1, 17 (1956).

> Where the person defamed is not named in a defamatory publication, it is necessary, if it is to be held actionable as to him, that the language used be such that persons reading it will, in the light of the surrounding circumstances, be able to understand that it refers to the person complaining.

Giaimo v. Literary Guild, 79 AD2d 917, 917 (1st Dep't 1981) (citation omitted); *see also Smith v. Catsimatidis*, 95 AD3d 737, 737 (1st Dep't 2012), *lv den* 20 NY3d 852 (2012); *DeBlasio v. North Shore Univ. Hosp.*, 213 AD2d 584, 584 (2d Dept 1995). "[A] plaintiff's claim is insufficient if the allegedly defamatory statement referenced the plaintiff solely as a member of a group, unless the plaintiff can show that the circumstances of the

publication reasonably give rise to the conclusion that there is a particular reference to the plaintiff." *Diaz*, 337 Fed Appx at 96.

Further, "[t]ruth is an absolute defense to a cause of action based on defamation[,]" *Silverman v. Clark*, 35 AD3d 1, 12 (1st Dept 2006); *see also Dillon*, 261 AD2d at 39, and "[s]ubstantial truth is all that is necessary to defeat a charge of libel." *Fairley v. Peekskill Star Corp.*, 83 AD2d 294, 297 (2d Dept 1981); *see also Shulman v. Hunderfund*, 12 NY3d 143, 150 (2009). "Generally, only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue." *Thomas H. v. Paul B.*, 18 NY3d 580, 584 (2012); *see also Brian v. Richardson*, 87 NY2d 46, 51 (1995); *Sandals Resorts Intl. Ltd. v. Google, Inc.*, 86 AD3d 32, 38 (1st Dept 2011). "An expression of pure opinion is not actionable . . . no matter how vituperative or unreasonable it may be . . . [when it] is accompanied by a recitation of the facts upon which it is based . . . [or] does not imply that it is based upon undisclosed facts." *Steinhilber v. Alphonse*, 68 NY2d 283, 289 (1986). A statement of opinion may be actionable, however, when it "implies a basis in facts which are not disclosed to the reader or listener." *Gross v. New York Times Co.*, 82 NY2d 146, 153 (1993); *see also Steinhilber*, 68 NY2d at 290; *Rinaldi*, 42 NY2d at 380-381. Such a "mixed opinion" is actionable not because it conveys a false opinion but because it implies that "the speaker [or writer] knows

certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking [or writing]." *Steinhilber*, 68 NY2d at 290; *see also Gross*, 82 NY2d at 153-154.

"Whether a particular statement constitutes an opinion or an objective fact is a question of law[,]" *Mann v. Abel*, 10 NY3d 271, 276 (2008), and depends largely on "the over-all context in which the assertions were made and . . . 'whether the reasonable reader [or listener] would have believed that the challenged statements were conveying facts about the . . . plaintiff.'" *Brian*, 87 NY2d at 51 (quoting *Immuno AG v. Moor-Jankowski*, 77 NY2d 235, 254 [1991], *cert den* 500 US 954 [1991]); *see also Millus v. Newsday*, 89 NY2d 840, 842 (1996); *Sandals Resort Intl. Ltd.*, 86 AD3d at 41-42. The Court should consider "the content of the communication as a whole, as well as its tone and apparent purpose[,]" *Brian*, 87 NY2d at 51, and factor in "the identity, role and reputation of the author." *Id.* at 52.

Even if a statement is defamatory, it also may be protected by an absolute or qualified privilege. *See Rosenberg v. MetLife, Inc.*, 8 NY3d 359, 365 (2007); *Liberman*, 80 NY2d at 437; *Toker v. Pollak*, 44 NY2d 211, 218 (1978). "The absolute privilege generally is reserved for communications made by individuals participating in

a public function, such as executive, legislative, judicial or quasi-judicial proceedings." *Rosenberg*, 8 NY3d at 365; *see also 600 W. 115th St. Corp. v. Von Gutfeld*, 80 NY2d 130, 135-36 (1992); *Park Knoll Assocs. v. Schmidt*, 59 NY2d 205, 209 (1983). "[S]tatements made during the course of a judicial or quasi-judicial proceeding are clearly protected by an absolute privilege 'as long as such statements are material and pertinent to the questions involved.'" *Rosenberg*, 8 NY3d at 365; *see Sexter & Warmflash, P.C. v. Margrabe*, 38 AD3d 163, 170-71 (1st Dept 2007).

A qualified, or conditional, privilege extends to a communication made by one person to another upon a subject in which both have an interest, or with respect to which both have a duty. *See Foster v. Churchill*, 87 NY2d 744, 751 (1996); *Liberman*, 80 NY2d at 437; *Shapiro v. Health Ins. Plan*, 7 NY2d 56, 60 (1959). Once defendants demonstrate that this "common interest" privilege applies, the privilege can be overcome only if a plaintiff establishes that defendants' statements were made with malice, that is, with spite or ill will or a knowing or reckless disregard for the statements' truth or falsity. *See Liberman*, 80 NY2d at 437-438; *Rosenberg*, 8 NY3d at 365; *Park Knoll Assocs.*, 59 NY2d at 211; *Stillman v Ford*, 22 NY2d 48, 53 (1968).

Statements made "about an employee in an employment context" may be protected by a qualified privilege. *Dillon*, 261 AD2d at 40; *see also Loughry v. Lincoln First Bank*, 67 NY2d 369, 376 (1986). The common interest privilege has been applied, for example, to statements communicated to a limited number of employees "who had a legitimate interest in knowing that a serious sanction had been imposed for the violation of a workplace rule[,]" *Bisso v. De Freest*, 251 AD2d 953 (3d Dep't 1998), and to statements made to staff members explaining the termination of another staff member, "in order to dispel rumors and to resolve morale problems" resulting from the unexplained termination. *Han v. State of New York*, 186 AD2d 536, 537 (2d Dept 1992); *see also, e.g., Bulow v. Women in Need, Inc.*, 89 AD3d 525, 526 (1st Dep't 2011) (remarks by plaintiff's supervisor to co-workers that plaintiff engaged in inappropriate sexual behavior); *Priovolos v. St. Barnabas Hosp.*, 1 AD3d 126, 127 (1st Dep't 2003) (statements about plaintiff's performance made in termination memo); *Present v. Avon Prods.*, 253 AD2d 183, 187 (1st Dep't 1999), *lv dism* 93 NY2d 1032 (1999) (statements by employees to management about another employee's alleged falsification of records); *Hollander v. Cayton*, 145 AD2d 605, 606 (2d Dep't 1988) (statements that physician was unethical and had mismanaged cases made at regular hospital staff meeting); *Gordon v. Allstate Ins. Co.*, 71 AD2d 850 (2d Dep't 1979) (statement

at meeting of plaintiff's fellow insurance agents that he was fired for 'kiting').

Here, plaintiff's defamation claim is based on the "publication, republication and distribution" of the anonymous e-mail, which did not mention plaintiff; comments about plaintiff's departure made by PA management at an employee meeting after she was terminated; and statements regarding her dismissal made by PA employees during plaintiff's unemployment hearings.

Plaintiff does not dispute the fact that the anonymous e-mail did not mention her name. In fact, at her deposition, plaintiff unequivocally testified that she was not alleging that the e-mail defamed her. (Cook Dep. 142:9-12, Sept. 23, 2008.) To the extent that plaintiff now claims, in her affidavit in opposition to defendant's motion, that she was confused during the deposition by counsel's line of questioning, and was precluded by defendant's counsel from explaining what she meant (Cook Aff. ¶ 10 n. 3), evidence does not support that claim. Nor does plaintiff now disavow her deposition testimony, except to assert that defendant "over-simplifies the issue." (*Id.*) In any event, plaintiff's burden of proving that the statements are "of and concerning" her "is not a light one[,]" *Chicherchia v. Cleary*, 207 AD2d 855, 855 (2d Dep't 1994) (internal quotation marks and citation omitted),

and it remains undisputed that the anonymous e-mail "itself fails to reveal any connection between any of the alleged defamatory matter and the plaintiff." *Julian*, 2 NY2d at 17; *see also Afftrex, Ltd. v. General Elec. Co.*, 161 AD2d 855, 856 (3d Dept 1990) (allegedly defamatory statement about a company's former principal was not "of and concerning" company because it did not "reflect directly" on company). Although "[t]he reference to the party alleging defamation may be indirect and may be shown by extrinsic facts . . . where extrinsic facts are relied upon to prove such reference the party alleging defamation must show that it is reasonable to conclude that the publication refers to him or her and the extrinsic facts . . . were known to those who read or heard the publication." *Chicherchia*, 207 AD2d at 856; *see also Gristede's Foods, Inc. v. Poospatuck (Unkechauge) Nation*, 2009 WL 4547792, *13 (EDNY 2009).

Plaintiff fails to show that readers of the anonymous e-mail, which refers generally to "several other colleagues, possibly including a partner," would be able to discern from the facts referred to in the e-mail that any defamatory statements were "of and concerning" plaintiff. *See Salvatore*, 45 AD3d at 563; *see also Springer v. Viking Press*, 60 NY2d 916, 917 (1983). To the contrary, by her own testimony, plaintiff stepped forward to identify herself as part of the group that was involved in the

plasma project, only after the anonymous e-mail was received by MacAndrew and forwarded to others. The response to the allegations prepared for MacAndrew by Schlisserman, Pereira, and plaintiff also shows that plaintiff did not consider that the alleged defamatory words, i.e., "reliably and widely rumoured to have been developed surreptiously," were directed at her, as the response addresses that allegation only with respect to Schlisserman and Pereira. (*See* Lalik Aff. Ex. 81 at § 2.2.)

The "republication and dissemination" of the e-mail within PA also was limited to a few employees who had a common interest in the subject of the e-mail, and was, therefore, protected by a qualified privilege. In her opposition, plaintiff does not dispute this, or otherwise even address the privilege issue. She also offers no evidence, and does not argue, that the republication was motivated by malice.

In view of the above findings, the Court need not reach the issue of whether the anonymous e-mail was protected opinion or was substantially true. Nonetheless, the Court notes that, by its terms, the e-mail was an inquiry based on rumors and speculation arising out of facts that were essentially true (formation of an entity, creation of a website, solicitation of funds), and does not imply that it was based upon undisclosed facts, and thus leads to

the "conclusion that the e-mail must be treated as an expression of the writer's views and opinions, which he is asking the reader to consider." *Sandals Resorts Intl. Ltd.*, 86 AD3d at 43; *see also Steinhilber*, 68 NY2d at 289. Further, as to any suggestion in the e-mail there might be a violation of PA's Code of Conduct, or that an opportunity had been "stolen" from PA, "a reasonable reader would understand the statements . . . as mere *allegations* to be investigated rather than as *facts*." *Brian*, 87 NY2d at 53 (emphasis in original). Similarly, the republication of the anonymous e-mail to PA employees was done "not necessarily to convince the reader of plaintiff's [misconduct] but rather to demonstrate the need for an investigation that would establish the truth or falsity of the charges." *Id.* at 54. "The tone of the e-mail, as well, indicates that the writer is expressing his or her personal views, in that it reflects a degree of anger and resentment" about what the writer thinks might be going on. *Sandals Resorts Intl. Ltd.*, 86 AD3d at 43.

Turning to plaintiff's claim that she was defamed by comments made at an employee meeting following her termination, her testimony about what was said was based on hearsay, and she acknowledged that she did not know what actually was said (Cook Dep. 43:6-23, 45:22-48:22, Nov. 18, 2009); testimony from witnesses who attended the meeting indicates nothing defamatory was said. In

any event, remarks made about her termination at a meeting of employees were protected by a common interest privilege, and, again, plaintiff presents no evidence to show that the remarks were made with malice.

In addition, the republication of the anonymous e-mail, and any allegedly defamatory statements made about plaintiff's dismissal during her unemployment hearing were covered by an absolute privilege, and are not actionable. "[A]ny submission made in conjunction with a determination of unemployment benefits is . . . protected by an absolute privilege." *LaPorte v. Greenwich House*, 2010 WL 1779342, *7 (SDNY 2010); *see also Burnett v. Trinity Inst. Homer Perkins Ctr., Inc.*, 2011 WL 281023, *5 (NDNY 2011); *Allan & Allan Arts v. Rosenblum*, 201 AD2d 136, 140 (2d Dept 1994); *Noble v Creative Tech. Servs.*, 126 AD2d 611, 613 (2d Dep't 1987).

Employment Discrimination

Plaintiff asserts two causes of action for employment discrimination, based on sex and national origin, and for retaliation, under the New York State Human Rights Law ("NYSHRL"), codified as Executive Law § 296 *et seq.* and the New York City Human Rights Law ("NYCHRL"), codified as Administrative Code of the City of New York (the "Administrative Code") § 8-107 *et seq.* Plaintiff claims that male, British employees were given preferential

treatment, and that a similarly situated British, male employee would not have been fired like she was. (*See* Cook Dep. 172:6-173:3, Feb. 15, 2007.) Plaintiff also alleges that PA retaliated against her for complaining about a sexually explicit comment made by a British PA executive.

Under the NYSHRL and the NYCHRL, it is unlawful for an employer to fire or refuse to hire or employ, or otherwise discriminate in the terms, conditions and privileges of employment, because of, as relevant here, an individual's sex or national origin. Executive Law § 296 (1) (a); Administrative Code § 8-107 (1) (a). It is also unlawful under the statutes for an employer to retaliate against an employee who has opposed or complained about discrimination prohibited by the statute. Executive Law § 296 (7); Administrative Code § 8-107 (7).

To establish a prima facie case of employment discrimination:

> [a] plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination.

Forrest v. Jewish Guild for the Blind, 3 NY3d 295, 305 (2004) (citing *Ferrante v. American Lung Assn.*, 90 NY2d 623, 629 (1997));

see also Stephenson v. Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO, 6 NY3d 265, 270 n.2 (2006); *Baldwin v. Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dep't 2009), *lv den* 14 NY3d 701 (2010).

To establish a claim of unlawful retaliation, a plaintiff must show that she participated in a protected activity known to defendants, an adverse employment action was taken against her, and a causal connection existed between the adverse action and the protected activity. *See Forrest*, 3 NY3d at 312-13; *Hernandez v. Bankers Trust Co.*, 5 AD3d 146, 148 (1st Dep't 2004); *Romney v. New York City Tr. Auth.*, 8 AD3d 254, 254 (2d Dep't 2004). "Protected activity" refers to action taken to oppose or complain about unlawful discrimination. *See Forrest*, 3 NY3d at 313; *Brook v. Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dep't 2010).

Employment discrimination claims brought under the NYSHRL generally are analyzed pursuant to the burden-shifting framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 US 792 (1973) for cases brought pursuant to Title VII of the Civil Rights Act of 1964. *See Stephenson*, 6 NY3d at 270; *Forrest*, 3 NY3d at 305 n.3; *Ferrante*, 90 NY2d at 629. Under *McDonnell Douglas*, the plaintiff has the initial burden of establishing a prima facie case of employment discrimination. 411

US at 802; *see also Stephenson*, 6 NY3d at 270; *Ferrante*, 90 NY2d at 629; *Melman v. Montefiore Med. Ctr.*, 98 AD3d 107, 113-14 (1st Dep't 2012); *Cuccia v. Martinez & Ritorto, P.C.*, 61 AD3d 609, 610 (1st Dep't 2009), *lv den* 13 NY3d 708 (2009); *Bailey v. New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 122-23 (1st Dep't 2007). Plaintiff's burden at this stage has been described as "de minimus" or "minimal." *See St. Mary's Honor Ctr. v. Hicks*, 509 US 502, 506 (1993); *Melman*, 98 AD3d at 115; *Wiesen v. New York Univ.*, 304 AD2d 459, 460 (1st Dep't 2003); *see also DeNigris v. New York City Health & Hosp. Corp.*, 861 F Supp 2d 185, 194 (SDNY 2012).

Once the plaintiff has established a prima facie case, the burden shifts to the employer to rebut the presumption of discrimination by demonstrating that there was a legitimate and nondiscriminatory reason for its employment decision. If that showing is made, the burden shifts back to the plaintiff to prove that the employer's reason was a pretext for discrimination. *See Texas Dept. of Community Affairs v. Burdine*, 450 US 248, 253 (1981); *Ferrante*, 90 NY2d at 629-30; *Melman*, 98 AD3d at 114.

Both the NYSHRL and the NYCHRL require that their provisions be "construed liberally" to accomplish the remedial purposes of prohibiting discrimination. Executive Law § 300; Administrative Code § 8-130; *see Matter of Binghamton GHS Employees Fed. Credit*

Union v. State Div. of Human Rights, 77 NY2d 12, 18 (1990); *Williams v. New York City Hous. Auth.*, 61 AD3d 62, 65 (1st Dep't 2009), *lv den* 13 NY3d 702 (2009). The NYCHRL further requires "an independent liberal construction analysis . . . targeted to understanding and fulfilling . . . the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart State or federal civil rights law." *Williams*, 61 AD3d at 66; *see* Administrative Code § 8-130; *Albunio v. City of New York*, 16 NY3d 472, 477-78 (2011); *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 (1st Dep't 2011), *lv den* 18 NY3d 811 (2012); *Nelson v. HSBC Bank USA*, 87 AD3d 995, 996-997 (2d Dep't 2011).

While recognizing the mandate to independently analyze claims brought under the NYCHRL, courts have continued to apply the same analytical standards as are applied to claims brought under federal and state law, including the *McDonnell Douglas* burden-shifting framework. *See Gordon v. Kadet*, 95 AD3d 606, 606-607 (1st Dep't 2012); *Carryl v. MacKay Shields, LLC*, 93 AD3d 589, 589-90 (1st Dep't 2012); *Melman*, 98 AD3d at 113-14; *Phillips v. City of New York*, 66 AD3d 170, 196-97 (1st Dep't 2009); *Benson v. Otis Elev. Co.*, 2012 WL 4044619, *6 (SDNY 2012); *Cuttler v. Fried, Frank, Harris, Shriver and Jacobson, LLP*, 2012 WL 1003511, *8 n.5 (SDNY 2012).

Recently, in *Bennett*, the First Department considered "whether, and to what extent" the *McDonnell Douglas* framework should continue to be applied to claims brought under the NYCHRL. 92 AD3d at 34. While upholding the *McDonnell Douglas* standard as basically sound, the Court questioned whether it made "sense to examine at the summary judgment stage whether an initial prima facie case has been made out." *Bennett*, 92 AD3d at 39. Recognizing that the *McDonnell Douglas* framework was never intended to be rigid or mechanistic, but, rather, is an orderly way to evaluate evidence, *id.* at 36 n.5, the Court instructed that when a defendant has offered evidence of a nondiscriminatory basis for its actions, "a court should ordinarily avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out" in the first place. *Id.* at 45; *see Furfero v. St. John's Univ.*, 94 AD3d 695, 697 (2d Dept 2012). Instead, the court should "proceed directly to looking at the evidence as a whole" to determine if it raises triable issues of fact as to whether defendant's non-discriminatory reason for its actions was a pretext for unlawful discrimination. *Bennett*, 92 AD3d at 45.

Courts also urge caution in granting summary judgment in employment discrimination cases, because direct evidence of an employer's discriminatory intent is rarely available. *See*

Ferrante, 90 NY2d at 631; *Bennett*, 92 AD3d at 43-44. Nonetheless, summary judgment remains available in discrimination cases, *see Ferrante*, 90 NY2d at 631; *Sibilla v. Follett Corp.*, 2012 WL 1077655, *5 (EDNY 2012), and is appropriate when "the evidence of discriminatory intent is so slight that no rational jury could find in plaintiff's favor." *Spencer v. Int'l Shoppes, Inc.*, 2010 WL 1270173, *5 (EDNY 2010) (internal quotation marks and citation omitted); *see also Melman*, 98 AD3d at 127-128; *Carryl*, 93 AD3d at 590; *Bennett*, 92 AD3d at 46.

In the instant case, plaintiff's causes of action for employment discrimination and retaliation are based on allegations that she was compelled to watch a film featuring PA's founder "extolling the leadership role played by British and 'Good Christian' men (Compl. ¶ 49); "[u]pon information and belief, none of the British or ostensibly 'Good Christian' men" working in PA's New York City office during the time that plaintiff worked there were fired, but other women, non-Christian, non-British employees were (*id.* ¶ 51); British executives in PA's U.S. office used "pejorative and expletive words that were personally offensive to female employees" (*id.* ¶ 53); she was subjected to "sexually explicit and demeaning" verbal and written statements by male partners and management (*id.* ¶ 52), including an e-mail sent by a British PA executive, in July 2003 (*id.* ¶¶ 55-57); and after she

complained about the executive's e-mail, PA improperly revealed her identity, she "encountered derision and undue suspicion from other PA employees" (*id.*, ¶¶ 59-61), and PA retaliated against her (*id.* ¶¶ 62-63).

In support of the above allegations, plaintiff testified at her deposition about several specific instances of alleged discrimination. Plaintiff described a remark made by a male speaker at a meeting in late 2000 attended by PA partners, which referred to another man as "a C word"; she also testified, however, that no one at the meeting, which included about 20 men and 3 women, had any response to the remark. (Cook Dep. 176:3-179:4, Feb. 15, 2007.) About a month later, as she testified, plaintiff used the "f" word during a meeting with a consultant and a PA head of marketing, and was immediately reprimanded. (*Id.* at 180:9-182:2.) This, according to plaintiff, was disparate treatment because a "man was allowed to say . . . one of the most obscene words in the English language" and she was criticized for "a less egregious act." (*Id.* at 182:6-18.)

One other specific comment described by plaintiff was in an e-mail sent in July 2003 by PA partner Gary Miles ("Miles"), who, responding to a conference organizer's request that PA pay a fee to speak at a conference, stated that "we don't pay to speak," and

compared the request for money to charging Cameron Diaz for the pleasure of having sex with her. (Compl. ¶¶ 55-56; Lalik Aff. Ex. 151.) Plaintiff reported the incident to Wigton, the head of human resources, and the same day, Jonathan Moynihan, PA's Executive Chairman (Moynihan Dep. 24:7-8, Oct. 17, 2008), wrote to Miles that remarks like the one referring to sex with Cameron Diaz must stop. (Lalik Aff. Ex. 153.) Miles subsequently resigned, after being informed that disciplinary action would be taken against him. (Lalik Aff. Ex. 158.) Plaintiff then complained again to Wigton that she had heard that Miles had stated that he knew she had complained about him, and she was upset that her identity had been revealed. (Lalik Aff. Exs. 156, 157.) Her concerns were addressed by Wigton and Moynihan. (Lalik Aff. Exs. 156, 157, 158.) At her deposition, plaintiff testified that she did not know whether someone at PA told Miles that she had complained. (Cook Dep. 113:6-9, Nov. 18, 2009.)

Plaintiff provided another example of alleged sex discrimination, which occurred sometime before May 2001, when a British manager changed an evaluation plaintiff had given to a woman employee under her direct supervision. After plaintiff gave the employee a score of "3," the British manager changed the score to "2," based on negative comments about the employee from someone who had little experience working with the employee. (Cook Dep.

[* 33]

185:25-188:17, Feb. 15, 2007.) Plaintiff protested the change, and the review eventually was changed back to a score of "3." (*Id.* at 195:18-24.) Plaintiff claims that this was discrimination because there was no reason "to discount her detailed and emphatic review" of the employee. (*Id.* at 191:9-20.) Around this same time, plaintiff complained to Wigton that PA had a "misogynistic culture," and that she was being ignored by the British office. (*Id.* at 196:3-8, 202:2-203:5.) Plaintiff could not recall anything specific she might have said to Wigton (*id.* at 203:19-204:18), and she did not claim, at that time, that she was being discriminated against based on sex. (*Id.* at 197:11-14.) She testified, however, that during a round of lay-offs after September 11, 2001, she "took issue" when a woman employee was laid off, instead of a less talented "white foreign man" in the Boston office, whose nationality was unknown to plaintiff. (*Id.* at 204:25-206:3.) As plaintiff recalled, she might have told "a graphics guy in Washington" that she thought the decision to retain the male employee was based on sex, but did not say anything to anyone in human resources. (*Id.* at 207:23-210:4.)

As to the film featuring PA's founder, which plaintiff viewed prior to and during a senior management meeting held in or around November 2000, about a year after she started working at PA (*id.* at 229:3-25), plaintiff testified that she felt the film was

[* 34]

"inappropriate," and objected to using it at the management meeting because it was "so white and so British" and would offend women and minorities because "[t]he overtones are restrictive and exclusive." (*Id.* at 230:24-231:13, 236:22-237:19.) At her deposition, plaintiff acknowledged that "Good Christian men" was not a direct quote from the film, but, rather, represented her impression that there was "some reference to Christianity that I didn't think was appropriate." (*Id.* at 232:16-234:20, 239:4-240:25.) She also testified that after seeing a photograph taken at a senior management meeting in the fall of 2000, she mentioned to Wigton that it showed an "outrageously greater proportion" of men than women in the senior ranks. (*Id.* at 212:7-13.) By her own testimony, plaintiff had no evidence other than the above to support her sex discrimination claim. (*Id.* at 212:14-24.)

With respect to her claim that she was discriminated against because she is American, and not British, plaintiff chiefly relies on evidence that David Ganesh, a British partner, was sent back to the U.K. office after allegedly harassing women in the Boston office, and argues that he was given preferential treatment because he was not immediately fired for misconduct, but, instead, was given an opportunity to return to the U.K. office and resign. (*Id.* at 213:24-214:18, 220:2-223:24.) Plaintiff also contends that, in early 2002, when PA laid off some employees, individuals from the

U.K. were brought over "to do what clearly American hires could have done." (*Id.* at 224:4-13.)

Even assuming, without deciding, that plaintiff's evidence could meet the minimal requirements for a prima facie case of discrimination, defendant submits admissible, largely undisputed evidence, including deposition transcripts, affidavits, and documents, that PA terminated plaintiff's employment after she, and Schlisserman and Pereira, did not comply with PA's instructions to stop all work on the plasma sterilization project and dissolve PlaZtec. The evidence of plaintiff's refusal to comply with PA's request is sufficient to demonstrate a legitimate, nondiscriminatory reason for plaintiff's termination. *See Clark v. Morelli Ratner PC*, 73 AD3d 591, 591 (1st Dep't 2010); *Baur v. Rosenberg, Minc, Falkoff & Wolff*, 2008 WL 5110976, *4 (SDNY 2008).

Thus, proceeding to consider all the evidence as a whole, and further viewing all the evidence in a light most favorable to plaintiff, plaintiff fails to show that material genuine issues of fact exist as to whether defendant's stated reason was pretextual. *See Bendeck v. NYU Hosps. Ctr.*, 77 AD3d 552, 554 (1st Dep't 2010) (unsupported assertions insufficient to show pretext). At her deposition, plaintiff acknowledged that MacAndrew directed her to stop her work on the plasma sterilization project and that she did

not. (Cook Dep. 243:23-244:19, Feb. 15, 2007; Cook Dep. 19:21-20:7, Nov. 18, 2009.) Schlisserman also testified that the three did not dissolve their company, despite MacAndrew' request, because they wanted the anonymous author of the e-mail to be identified first. (Schlisserman Dep. 64:2-65:17, Sept. 18, 2008; Lalik Aff. Ex. 87.) Evidence also shows that plaintiff repeatedly stated to other people, including former colleagues, that she was fired because she (and two other colleagues) "pushed back on a request that [PA] made regarding the independent company that we've been trying to fund over the last several weeks." (Lalik Aff. Ex. 140; Cook Dep. 65:3-10, Nov. 18, 2009; *see also* Lalik Aff. Ex. 139.)

Plaintiff's disagreement with defendant's conclusion that her work on the plasma sterilization project did or could create the appearance of a conflict of interest and must stop, does not show that defendant's proffered reason was pretextual. *See Melman*, 98 AD3d at 121. "'[A] challenge . . . to the *correctness* of an employer's decision does not, without more, give rise to the inference that the [adverse action] was due to . . . discrimination.'" *Id.* (quoting *Kelderhouse v. St. Cabrini Home*, 259 AD2d 938, 939 (3d Dept 1999) (emphasis in original); *see also Forrest*, 3 NY3d at 308 (holding that the mere assertion that stated reason was false is not enough to raise issue of pretext).

Plaintiff also "does not raise a jury issue merely by showing that the employer's decision was arbitrary or unsupported by the facts." *Ioele v. Alden Press,* 145 AD2d 29, 36 (1st Dep't 1989). Nor can plaintiff demonstrate pretext based on her conclusory assertion that she would not have been dismissed if she were a man (Cook Dep. 244:20-245:25, Feb. 15, 2007), especially when two male colleagues were fired at the same time for the same reason, or based on her unsupported belief that it was "easier" for PA to fire her because she was American. (*Id.* 245:16-21) Under the circumstances, even if defendant's decision to terminate plaintiff while she was still at home following surgery, could be considered harsh, the court's "function is not to substitute [its] business judgment for that of the employer." *Citibank v. New York State Div. of Human Rights,* 227 AD2d 322, 325 (1st Dept 1996), *lv den* 88 NY2d 815 (1996); *see also Melman,* 98 AD3d at 121; *Baldwin,* 65 AD3d at 966.

Plaintiff also offers insufficient evidence to show that PA engaged in a pattern and practice of discrimination against women and non-British employees in the terms and conditions of employment. Plaintiff does not allege that she, individually, was discriminated against in terms of salary or bonuses or promotions, and evidence shows, as she asserts, that she received regular increases and bonuses and generally good evaluations. Plaintiff claims, however, that PA fired women, and American and minority

employees, "with regularity and impunity," and gave preferential treatment to, and rarely terminated, British or Anglo-Saxon male employees. (Cook Aff. ¶¶ 19-20.) By her own admission, however, this was an "assumption," and not something she "could say for sure." (Cook Dep. 257:5-258:4, Feb. 15, 2007.)

In support of her claim of disparate treatment, plaintiff also submits an affidavit of Nancy Wolman, who worked as PA's Human Resources Manager for the Boston and Princeton offices, from around 1992 to 2000. (Spanos Aff. Ex. E.) Wolman attests that she "witnessed an insidious policy of disparate treatment of individuals at PA," including, "[i]n certain cases," giving preferential treatment to British men. (*Id.* ¶ 5.) The only example she provides of such disparate treatment, however, involves the treatment of David Ganesh. As this Court has previously found, Ganesh was not a similarly situated employee and thus his situation is not relevant. (Decision/Order on mot. seq. no. 011, dated October 28, 2011.)

To the extent that plaintiff contends that a discriminatory environment was created by British executives' "marked propensity for using derogatory language particularly offensive to female employees," this claim is based on evidence of only one incident, involving Gary Miles' comment related to paying for sex, a remark

that plaintiff testified was not "personally" offensive to her (Cook Dep. 96:15-21, Nov. 18, 2009), and is insufficient to establish a hostile environment, under either the NYSHRL or the NYCHRL. Similarly, her assertions that her job was made more difficult by an influx of British employees, and that she felt there was a "misogynist culture" at PA, fail to raise triable issues of fact as to whether PA discriminated against her based on sex or national origin.

Plaintiff's retaliation claim also fails because she has not rebutted PA's legitimate, nondiscriminatory reasons for her termination. *See Williams,* 38 AD3d at 238; *Pace v. Ogden Servs. Corp.*, 257 AD2d 101, 105 (3d Dep't 1999). Plaintiff does not, in any event, clearly allege in her Complaint, or otherwise identify, what retaliatory actions occurred, other than asserting that her identity was improperly revealed, after she complained about Miles' e-mail, which made her subject to "derision and undue suspicion from other PA employees." (Compl. ¶¶ 60-63.) Notably, at her deposition, plaintiff acknowledged that she did not know "one way or the other" whether the issue with Miles played any role in the decision to terminate her employment. (Cook Dep. 114:23-115:3, Nov. 18, 2009.)

Accordingly, for all the reasons stated above, it is hereby ORDERED that defendant's motion for summary judgment is granted and the Complaint is dismissed, without costs or disbursements; and it is further ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: December 18, 2013

FILED

DEC 20 2013

NEW YORK
COUNTY CLERK'S OFFICE

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.