SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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SARA HUNTER HUDSON, JULIA KUO and CATHERINE WHARTON,

Plaintiffs,

Index No. 156706/13

-against-

DECISION/ORDER

MERRILL LYNCH & CO., INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INC. and BANK OF AMERICA CORP.,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmations in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs Sara Hunter Hudson, Julia Kuo and Catherine Wharton commenced the instant action against defendants Merrill Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith Inc. and Bank of America Corp. (hereinafter collectively referred to as "Merrill Lynch" or "defendants") alleging employment discrimination based on their gender in violation of the New York City Human Rights Law ("NYCHRL"). Defendants now move for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint. For the reasons set forth below, defendants' motion is granted.

The relevant facts are as follows. In late 2008 and early 2009, plaintiffs were all enrolled in one of two Financial Advisor ("FA") trainee programs at Merrill Lynch's Fifth Avenue branch in

Manhattan. The "Paths of Achievement" ("POA") program covered all FA trainees enrolled before February 1, 2008, including Ms. Wharton. The "Practice Management Development" ("PMD") program covered all FA trainees enrolled after February 1, 2008, including Ms. Hudson and Ms. Kuo. The PMD program was divided into three stages. The initial stage was the Trainee Stage during which FA trainees underwent initial testing and received relevant licenses if they did not already hold them. At the end of the Trainee Stage, the FA trainees received a "production number" which permitted them to begin bringing in business and triggered the start of Stage I of the program. During Stage I, which lasted three months, the FA trainees underwent further training while undertaking to find and serve wealth management clients. Stage II, during which trainees continued to find and serve wealth management clients, lasted thirty six months. During Stages I and II, the FA trainees' performance was measured against performance "hurdles" or "targets" which varied depending on the salary range assigned to the trainee when he or she was hired. The three primary hurdles were production credits ("PCs"), defined as the revenue generated by the products clients purchased; "new annuitized assets," defined as the sum of assets generating a recurring stream of revenue; and the number of new client relationships formed with households having a net worth above $250,000. The FA trainees were tracked monthly and reviewed on a quarterly basis with each trainee receiving a grade of "Met Requirements" or "Does Not Meet." During Stage I and the first twelve months of Stage II of the PMD program, the FA trainees were salaried; thereafter, they were transitioned to a reduced salary but were eligible for incentive compensation and performance-based bonuses.

The POA program, in which Ms. Wharton was enrolled, consisted of two stages. The initial stage was the POA Trainee Stage, which was equivalent to the PMD Trainee Stage. The final stage

was the POA FA stage which lasted up to twenty four months and ended as soon as the trainee met his or her performance requirements. The POA trainees were salaried until they graduated from the program and then were compensated solely by commission rather than the mix of salary and incentive compensation given to PMD trainees. The POA trainees' performance was measured by (1) the better of cumulative production credits or annuitized assets less liabilities; (2) total assets less liabilities; and (3) wealth management points for completion of training courses and evaluations.

Plaintiffs all had experience in business prior to joining Merrill Lynch's FA trainee program. Ms. Wharton, who joined the POA program in October 2006, had been, *inter alia*, a business analyst at Deloitte Consulting before joining the FA trainee program. She received her production number in May 2007 and had been scheduled to graduate from the POA program in May 2009. Ms. Kuo spent more than a decade as a business analyst at financial firms including UBS and Merrill Lynch. In November 2006, she joined an FA trainee program at UBS and in March 2008, she moved to Merrill Lynch's FA trainee program. In July 2008, she entered Stage II of the PMD program. Ms. Hudson worked in the financial services industry since the 1980s, holding positions at Chemical Bank and Manufacturers Hanover Trust. Between 1994 and 2003, she was a vice president at Bank of New York where her role included generating investment management business for the bank. Ms. Hudson had been enrolled in the FA trainee program at Morgan Stanley before choosing to enroll in the PMD program at Merrill Lynch in July 2008. In November 2008, she entered Stage II of the program.

As part of the PMD trainee program, full-fledged FAs could volunteer to serve as mentors to FA trainees. Sales managers were responsible for determining who might be a good fit for each FA

trainee and they allegedly attempted to assign a mentor as soon as practicable. Plaintiffs allege that male employees were assigned mentors more quickly than female trainees. However, defendants allege that pairing trainees and mentors through the program was voluntary and a mentor was not always immediately available. It is undisputed that Ms. Wharton worked with mentor Todd Sears from the time she joined Merrill Lynch until February 2007 when Mr. Sears assumed another position at the company. In April 2007, Peter Wiener became her new mentor and allegedly split accounts with her. Ms. Hudson has alleged that she had to find her own mentor as one was never assigned to her. After meeting with several FAs, Ms. Kuo picked Vince Ambroselli as her mentor because he was an international FA. Ms. Kuo alleges that Hector Ramos, a fellow FA trainee, received a mentor before she did, but admits that Mr. Ramos was hired before she was.

FAs at Merrill Lynch were also able to enter into written teaming arrangements with other FAs or FA trainees through which they would pool accounts and share PCs based on an agreed split percentage. Plaintiffs allege that such behavior was promoted for the male FA trainees and not the female trainees. However, defendants allege that unless a trainee was recruited to Merrill Lynch with a team or served on an existing team in an administrative capacity prior to enrolling in the training program, trainees were usually not on teams because they typically did not have their own books of business. Further, defendants allege that management did not force FAs or FA trainees onto teams but that FAs and FA trainees typically approached management about their mutual desire to team. Ms. Wharton teamed with senior FA, Everett Weinberger. Ms. Hudson alleges that she did not know how teams were formed and that she assumed management assigned people to teams but that she never asked to be placed on one. In December 2008, Ms. Hudson began the process of forming a team with FA Pamela Stern but the process was delayed because they both took vacations

during that time. Ms. Kuo testified that she never requested to team or pool accounts with an FA nor was she denied the opportunity to do so. She also split accounts with Mr. Ambroselli and another FA.

In the fall of 2006, Joe Mattia, then-Director/Branch Manager, and a few senior female FAs, formed a group called the Fifth Avenue Women's Network (the "Women's Network"), which sponsored several annual events for female FAs and FA trainees. In May 2008, the Women's Network invited female FAs and trainees to hear author Nina DiSesa, a businesswoman, discuss her book, "Seducing the Boys Club," which was about gender in the workplace. Plaintiffs allege that Mr. Mattia requested that all female FAs read the book and attend the talk with the author and that they understood they were required to attend. Ms. Kuo and Ms. Wharton attended the talk at which the author allegedly encouraged women to stroke men's egos with flattery and manipulation in order to succeed in a male-dominated environment and they allege that they considered the message of the book to be highly offensive. However, defendants allege that no FAs or FA trainees complained to Mr. Mattia or Human Resources that the book or the presentation were offensive.

Plaintiffs allege other gender-bias conduct during their time at Merrill Lynch as follows: Ms. Kuo alleges that Mr. Mattia neglected to introduce her as a new hire at a weekly training meeting but that Mr. Mattia introduced a male FA trainee who was hired at the same time and that only after a colleague brought the mistake to his attention did Mr. Mattia finally introduce her. Further, Ms. Hudson alleges that Joel Meshel, a Sales Manager, refused to help her with a business opportunity involving a New York company which had close ties to the South Korean government that could have brought in a lot of money for Merrill Lynch. Specifically, Ms. Hudson alleges that Mr. Meshel spoke dismissively about the opportunity and advised her to "stick to [her] knitting." Ms. Hudson

alleges that she considered the remark to be sexist but she testified that she took the remark to mean that she should stick to bringing in business from people she knew. Defendants allege that based on Mr. Meshel's thirty years of experience in the financial services industry, Mr. Meshel advised against the opportunity because it was unlikely Merrill Lynch would undertake that type of business. Ms. Hudson also testified that an employee at Merrill Lynch told her that Mr. Meshel was the worst person to whom she could have taken the opportunity, that Mr. Meshel was generally unhelpful and ruthless to all trainees and that she was unaware of Mr. Meshel helping any FA, male or female, with business.

The third and fourth quarters of 2008 saw a severe economic downturn in the American economy generally and in the financial sector in particular. In September 2008, Merrill Lynch was acquired by Bank of America Corporation. On January 15, 2009, Linda Houston replaced Mr. Mattia as the Director of the Fifth Avenue branch. The next day, Merrill Lynch's senior management notified the branch offices that headcount needed to be reduced and that there would be an imminent reduction in force ("RIF") in the FA trainee program which would result in the termination of fourteen FA trainees out of a total of twenty eight FA trainees at the Fifth Avenue branch. Defendants allege that Mr. Meshel worked with Anna Roccanova, the Fifth Avenue branch's Business Manager, to assemble a preliminary proposed layoff list for the office.

As part of the RIF process, Merrill Lynch management provided the Fifth Avenue branch with an initial "presumptive" layoff list. The list was made up of nine FA trainees who had failed to meet certain benchmarks and was generated by a computer at Merrill Lynch's corporate management which sorted the FA trainees solely by their success or failure in meeting their performance targets at least 50% of the time. The list contained seven men and two women,

including Ms. Wharton, who was included on the list based on the computer's identification of her as a Stage II FA trainee who had failed to achieve her hurdles in ten of her twelve months in production, which placed her well below the 50% threshold. Defendants allege that shortly thereafter, they realized that two of the male FA trainees were included on the list erroneously as one no longer worked at the Fifth Avenue branch and the other had already effectively separated from Merrill Lynch and a formal separation agreement was in the process of being negotiated. Out of the remaining seven FA trainees included in the list, three male FA trainees were subsequently removed after Ms. Roccanova and Mr. Meshel sought input from Traci Kamil, Regional HR Director, and Sabina McCarthy, Regional Marketing Director. Specifically, defendants allege that one of the male FA trainees, "JBC", was removed from the list based on documented medical concerns over his fragile emotional state as he had been on and off medical leave and was in contact with Merrill Lynch's Employee Assistance Program ("EAP"), which was designed to help employees in need. Defendants further allege that EAP was concerned that JBC was suicidal and advised Ms. Kamil that he should not be terminated at that time. Thus, JBC was removed from the list based on EAP's recommendation and he later resigned in early 2009. Another male FA trainee removed from the list, Shahe Galstian, had been hired pursuant to an agreement with a female senior FA, Taylor Hanex, for whom Mr. Galstian had previously worked when accepted into the training program. Ms. Hanex had entered into an agreement with Merrill Lynch which required her, *inter alia*, to "guarantee Shahe's PMD goals and hurdles are met each and every month for nine months" until July 2009. Defendants allege that the agreement meant that Ms. Hanex's own credits would be transferred whenever Mr. Galstian's fell short to make up any shortfall for him. As a result, the numbers based on which the list was generated did not accurately reflect Mr. Galstian's numbers,

once they were adjusted upward pursuant to his agreement with Ms. Hanex. In July 2009, after the agreement expired, Mr. Galstian was terminated for poor performance. The third male FA trainee removed from the list, Josh Young, had signed and closed a multi-million dollar deal that was slated to hit Merrill Lynch's books shortly after the RIF list was generated, but which was not reflected in Merrill Lynch's records at the time the computer generated the list. Defendants allege that management was alerted that once the transaction "hit the books," Mr. Young would have met and exceeded his performance goals and that the deal had not yet "hit the books" only because it was subject to a mandatory waiting period for 401(k) accounts. Defendants allege that on this basis, Mr. Young was removed from the list. Thus, Ms. Wharton, a second female FA trainee and two other male FA trainees were the only ones that remained on the list for termination.

Once the first list was finalized, the Fifth Avenue branch was obligated, pursuant to the RIF, to terminate an additional nine FA trainees. It was at this time that Mr. Meshel and Ms. Roccanova finalized the second list of nine FA trainees for termination. Mr. Meshel and Ms. Roccanova sought to fill the requisite remaining layoff slots by turning to Stage II of the PMD program, which included Ms. Kuo and Ms. Hudson. Defendants allege that management looked at the remaining individuals in groups based on their "length of service" in the program. Five Stage II FA trainees - Ms. Kuo and four male FA trainees - appeared in the group of those with six performance months or more. Of these individuals, defendants allege that Ms. Kuo's performance was weakest. Specifically, three of the male FA trainees had met their hurdles 100% of their Stage II months, the other male FA trainee met his hurdles 83% of his Stage II months but Ms. Kuo had met her hurdles in only 50% of her Stage II months. Defendants allege that as a result, management considered Ms. Kuo a clear choice from that group to be terminated.

Defendants allege that management next reviewed the performances of those FA trainees with one to three performance months, which included two male FA trainees and two female FA trainees, including Ms. Hudson. According to defendants, Ms. Hudson stood out from this group because she had essentially failed to generate any production or accumulate any annuitized assets. It is undisputed that in January 2009, Ms. Hudson had fewer than four PCs and no annuitized assets while the other three FA trainees in the group, including another female, had many more PCs and annuitized assets. Defendants further allege that they had no reason to believe that Ms. Hudson could overcome her significant performance deficit or that she would succeed long-term in the training program. As a result, management decided that Ms. Hudson seemed like an appropriate addition to the second list for termination.

After identifying the poorest-performing Stage II FA trainees, management still had to select seven more FA trainees for termination at which point they tried to determine which Stage I trainees would be most likely to succeed. Management allegedly relied on such evidence as whether the Stage I trainees had been recruited from Morgan Stanley along with their books of business and whether they had longstanding client relationships due to working with FAs. Ultimately, management selected six of the nine Stage I FA trainees for termination. Finally, management reviewed pre-production FA trainees, those who were still in the Trainee Stage of the programs, to decide who could be eliminated with the least disruption to the organization and selected one of the three people on this list for termination, thus reaching the required fourteen FA trainees. At the end of the process, Mr. Meshel and Ms. Roccanova presented the termination recommendations to Ms. Houston, the Director/Branch Manager, for discussion and approval. Ms. Houston, in turn, submitted the final list to corporate management, and it was approved.

The events underlying this matter were the subject of prior litigation in federal court. In 2013, the District Court of the Southern District of New York granted defendants' motion for summary judgment as to the Civil Rights Law Title VII and New York State Human Rights Law claims and declined jurisdiction over the NYCHRL claims. Plaintiffs then filed a new complaint in this court on July 23, 2013 alleging one cause of action for employment discrimination pursuant to the NYCHRL.

On a motion for summary judgment to dismiss a complaint alleging employment discrimination in violation of the NYCHRL, the court is required to conduct a specific burden shifting analysis. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 (2004). This standard requires plaintiff to first demonstrate (1) membership in a protected class; (2) qualification for the employment; (3) an adverse employment action; and (4) circumstances that give rise to an inference of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If the plaintiff establishes her prima facie case using this analysis, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged action. *See id.* at 802-04. Once the defendant satisfies its burden, it becomes the plaintiff's burden to show that defendant's stated reason was merely a pretext for discrimination. *See id.* Specifically,

> [W]here a defendant on a summary judgment motion has produced evidence that justifies its adverse action against the plaintiff on nondiscriminatory grounds, the plaintiff may not stand silent. The plaintiff must either counter the defendant's evidence by producing pretext evidence...or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination.

Bennett v. Health Mgt. Sys., Inc., 92 A.D.3d 29, 35-36, 37 (1st Dept 2011). The public policy underlying the broad reach of the NYCHRL "demands that the court's treatment of such claims

maximize the ability to ferret out such discrimination, not create room for discriminators to avoid having to answer for their actions before a jury of their peers...." *Bennett v. Health Mgt. Sys., Inc.*, 92 A.D.3d 29, 43 (1st Dept 2011).

In the instant action, defendants' motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint, which alleges one cause of action for employment discrimination on the basis of gender in violation of the NYCHRL, is granted. As an initial matter, plaintiffs have met their initial burden of establishing a prima facie case of discrimination. They have demonstrated membership in a protected class, specifically that they are women, and they have demonstrated qualification for their employment as FA trainees. Further, they have shown an adverse employment action taken against them in that they were all terminated from Merrill Lynch in January 2009. Finally, they have alleged circumstances that give rise to an inference of gender discrimination. Such allegations include, *inter alia*, the following: Ms. Wharton alleges that she was treated differently than male FA trainees included on the presumptive layoff list who were not terminated. Ms. Hudson and Ms. Kuo, while not initially selected for termination by the computer that generated the presumptive layoff list, were selected during the second step of Merrill Lynch's RIF, the selection for termination of Stage II FA trainees who had weak performance records relative to their peers in the same "length of service" groups. Plaintiffs allege that such process involved at least two subjective, discretionary decisions including the decision to focus on Stage II FA trainees as potential candidates for termination as opposed to Stage I FA trainees, which shows gender discrimination. Additionally, plaintiffs allege that the decision to terminate Ms. Hudson and Ms. Kuo as opposed to certain male FA trainees within the group of Stage II FA trainees with the same length of service as these plaintiffs leads to an inference of discrimination. Plaintiffs have also

alleged a numerical disparity that characterized the January 2009 RIF as a whole in which the statistical impact of the RIF can be viewed as falling more heavily on women relative to their numbers in the trainee programs.

Pursuant to the *McDonnel Douglas* analysis, the burden now shifts to defendants to articulate a legitimate, non-discriminatory reason for plaintiffs' termination. In response, defendants have put forth evidence that plaintiffs were terminated for the nondiscriminatory reason of poor performance during a time when defendants were attempting to cut costs through an RIF. It is well-settled that an employer's decision to cut costs through an RIF constitutes a legitimate, non-discriminatory reason for an employee's termination. *See Matter of Laverack & Haines v. New York State Div. of Human Rights*, 88 N.Y.2d 734 (1996)("[t]he downsizing of a company's employment rolls, due to business failings and economic setbacks, constitutes a sustainable rebuttal and explanation for the decision to terminate a particular employee....") Additionally, an employer can legitimately select employees for termination based on their performance. *See Bendeck v. N.Y.U. Hosps. Ctr.*, 77 A.D.3d 552 (1st Dept 2010)(granting summary judgment in favor of employer which "provided substantial and significant reasons to terminate plaintiff's employment...includ[ing] poor work performance"); *see also Bennett*, 92 A.D.3d at 29 (affirming summary judgment where employer put forth credible evidence of nondiscriminatory motivations, including plaintiff's unsatisfactory work performance). Specifically, defendants assert that plaintiffs were terminated after Merrill Lynch employed an objective, performance-based methodology in executing the RIF. As an initial matter, defendants have put forth evidence that Ms. Wharton was terminated based on her inclusion in the presumptive layoff list because she had failed, more than 50% of the time, to meet her performance hurdles. Defendants have put forth evidence that Ms.

Hudson had by far the weakest performance data within the Stage II group of FA trainees with the same length of service as she had. As of January 2009, Ms. Hudson had only 3.7 PCs and zero annuitized assets. In sharp contrast, the other three Stage II FA trainees with whom she was compared had many more PCs and they had annuitized assets of $132,492.30, $244,300.57 and $276,501.19. Finally, defendants have provided evidence that Ms. Kuo had the weakest performance record in her "length of service" group of FA trainees having met her performance hurdles only 50% of her months in Stage II.

As defendants have demonstrated nondiscriminatory reasons for terminating plaintiffs, the burden shifts back to plaintiffs to show that defendants' reasons are merely a pretext for discrimination. The First Department has held that

> In determining whether the reason for an adverse action was pretextual, 'it is not for the Court to decide whether the [] complaints [about plaintiffs]...were truthful or fair, as long as they were made in good faith.' 'The mere fact that [plaintiff] may disagree with [the] employer's actions or think that [plaintiff's] behavior was justified does not raise an inference of pretext.'

Melman v. Montefiore Medical Center, 98 A.D.3d 107, 120-21 (1st Dept 2012). As an initial matter, plaintiffs have failed to meet their burden of establishing that the reasons provided by defendants for plaintiffs' termination are merely pretext for discrimination. As an initial matter, plaintiffs' reliance on certain termination statistics fails to show evidence of pretext. While statistics are relevant to support a discrimination claim, it is well-settled that statistical analysis is rarely "sufficient to defeat summary judgment. Although a generalized statistical analysis of selections in an RIF can provide circumstantial evidence of an inference of discrimination in support of a prima facie case, as a matter of law, it is not sufficient to establish that the Defendant's legitimate business rationale for eliminating Plaintiff's position is false, or that her...gender was the real reason for her termination."

Zito v. Fried, Frank, Harris, Shriver & Jacobson, 869 F.Supp. 2d 378, 395-96 (S.D.N.Y. 2012). It is undisputed that Merrill Lynch's January 2009 RIF resulted in the termination of seven out of the eight female FA trainees at the Fifth Avenue branch, which plaintiffs assert is compelling evidence that gender discrimination played a role in the terminations. However, the raw statistics presented here fall short of permitting an inference of gender discrimination sufficient to show pretext. As an initial matter, only twenty eight employees were under consideration for the RIF as FA trainees and only fourteen were eventually terminated. Such a small sample size counsels against heavily weighting statistical evidence. *See Orisek v. Am. Inst. of Aeronautics*, 938 F.Supp 185, 192 (S.D.N.Y. 1996)("[f]or statistical evidence to be probative, the sample must be large enough to permit an inference that...gender...was a determinative factor in the employer's decision.") Additionally, the numbers may be viewed as non-indicative of discrimination even though seven out of eight female trainees were terminated as half of those terminated as a result of the RIF were male FA trainees. Although plaintiffs assert that there were fewer female FA trainees to begin with, given the small sample size, such statistic reveals little. Contrary to plaintiffs' assertions, the raw statistics provide evidence that they were terminated based on poor performance. It is undisputed that a computer, and not a Merrill Lynch employee, targeted Ms. Wharton and other underperforming trainees for termination and that the computer did so based on statistical performance metrics. Further, it is undisputed that both Ms. Hudson and Ms. Kuo trailed their peers by both PCs and annuitized assets and that their performance metrics were far below those of any FA trainee who ultimately survived the RIF.

Additionally, plaintiffs' reliance on defendants' removal of certain male FA trainees from the presumptive layoff list as evidence of pretext is misplaced. It is undisputed that Merrill Lynch

removed three male FA trainees from the presumptive layoff list. However, Merrill Lynch has provided evidence that each of these male FA trainees was removed based on individualized explanations and extenuating circumstances. These circumstances included grave medical concerns; that one male FA trainee was the beneficiary of a "sponsorship" with an FA; and that another male FA trainee had signed significant business slated to transfer to Merrill Lynch the month after the RIF. Plaintiffs' assertion that defendants' treatment of the male FA trainee who had signed significant business slated to transfer to Merrill Lynch the month after the RIF differed from the treatment they received on the basis of gender is evidence of pretext is without merit. Plaintiffs have not pointed to any business that plaintiffs had signed or closed at the time of the RIF that was not considered. Indeed, they testified that as of their termination date, they had not signed or closed business that had been posted with Merrill Lynch but merely that they had business prospects in the "pipeline." The fact that Merrill Lynch did not consider that plaintiffs' business generation could improve in 2009 due to any future business prospects they might have is also unavailing as evidence of pretext as Merrill Lynch's decision to consider only signed and closed business in deciding whether to terminate its trainees was a permissible business judgment. *See Martin v. MTA Bridges & Tunnels*, 610 F.Supp. 2d 238, 251 (S.D.N.Y. 2009)("[t]he Court does not sit as a super-personnel department that reexamines an entity's business decisions.") Indeed, "[t]he reasons tendered [by the employer] need not be well-advised, but merely truthful." *Dister v. Cont'l Grp., Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988). Ms. Kuo's assertion in opposition to defendants' motion that she in fact *had* signed and closed business within Merrill Lynch that was not taken into account by the RIF decision-makers based on an inaccurate record of her performance data is also unavailing. Ms. Kuo testified at her deposition that she had "no reason to dispute" the accuracy of her rating at Merrill

Lynch and when she was asked directly whether at the time of the RIF she had any business that was signed but had not yet posted at Merrill Lynch, she replied that she did not. Therefore, she cannot now attempt to create an issue of fact by providing an affidavit denying the testimony she gave in her deposition without any other evidence. *See Palazzo v. Corio*, 232 F.3d 38 (2d Cir. 2000)("[i]n opposing summary judgment, a party who has testified to a given fact in his deposition cannot create a triable issue merely by submitting his affidavit denying the fact.") Further, any inaccuracy in Ms. Kuo's performance rating at Merrill Lynch does not evince pretext as she has not presented any evidence that Mr. Meshel or Ms. Roccanova knew that the data reflected in the reports for Ms. Kuo was inaccurate. Indeed, Mr. Meshel testified that he "made the decision based on the information that I had on my screen, which is that Ms. Kuo, clearly, in terms of the peers that I had compared her to, was the weakest performer." Thus, at most, a jury could infer that perhaps Merrill Lynch inaccurately assessed Ms. Kuo, based on incomplete data, when considering her for termination but not that she was the victim of gender discrimination.

Additionally, plaintiffs' reliance on defendants' alleged contradiction of the directive from management when they considered Stage II FA trainees for termination prior to considering less experienced Stage I FA trainees as evidence of pretext is unavailing. While the wisdom of adopting such a system is debatable, plaintiffs have provided no evidence that the termination of Stage II FA trainees prior to Stage I FA trainees was discriminatory as they have presented no statements to the effect that Merrill Lynch's motive for choosing the sequence it did had anything to do with gender. Indeed, Mr. Meshel testified that he considered the remaining individuals in Stage II before the more junior trainees "because those are the people that [he]...had the most information on in terms of objective performance data."

Finally, plaintiffs' reliance on the alleged existence of a gender-biased culture at Merrill Lynch as evidence of pretext is unavailing. Plaintiffs point to a handful of incidents or practices at Merrill Lynch that they assert evidence gender bias on the part of senior managers, which, they argue, affected the termination decisions made by Mr. Meshel and Ms. Roccanova or hindered the ability of women to succeed at Merrill Lynch. It is well-settled that any evidence of corporate culture from statements made by or conduct of management is generally found to have probative value toward establishing a *prima facie* case yet such evidence is insufficient to prove that the employer's performance-based explanations for termination were pretextual. *See Slattery v. Swiss Reinsurance America Corporation*, 248 F.3d 87 (2d Cir. 2001). As an initial matter, plaintiffs' assertion that their alleged required participation in the event surrounding the book "Seducing the Boys Club" is evidence of pretext is without merit. The event was hosted by Mr. Mattia, who had been fired from Merrill Lynch by January 2009 and had no involvement in plaintiffs' termination. Thus, while the "Seducing the Boys Club" event may be validly assailed as inappropriate by plaintiffs, such event does not call into question the gender-neutral decision to terminate plaintiffs. Additionally, plaintiffs' assertion that certain FAs failed to assist them in bringing in business and in providing plaintiffs with teaming and mentoring opportunities at the Fifth Avenue Branch as evidence of pretext is misplaced. To support such allegations, Ms. Hudson relies on a single incident involving an investment opportunity presented to her in December 2008 involving a New York-based company with ties to the South Korean government, of which Mr. Meshel was allegedly dismissive and condescending in his response to her and later told Ms. Hudson to "stick to [her] knitting." However, such conduct and the statement made by Mr. Meshel is insufficient to prove pretext. Ms. Hudson testified that she believed Mr. Meshel's "knitting" comment to relate to the

type of work "I should be doing" but she did not testify that she believed that comment to be sexist but only "not appropriate." Further, regardless of how Ms. Hudson perceived such comment, this court finds that a finder of fact would not understand such comment to reflect gender-bias based on the circumstances. As the District Court found, Mr. Meshel's statement to "'stick to one's knitting' is a familiar cliche connoting that a person should stay within his area of knowledge or expertise." *Vuona, et. al. v. Merrill Lynch & Co., In., et. al.*, No. 10-C6529 (S.D.N.Y. 2013). Additionally, Mr. Meshel's conduct in dismissing Ms. Hudson's potential business opportunity is not indicative of gender-bias as such conduct is consistent with Ms. Hudson's testimony that Mr. Meshel was a generally unhelpful colleague as opposed to a sexist one and that he failed to help any FA trainees, male or female. Further, Ms. Wharton has failed to point to any evidence that suggests any failure to help her bring in business was based on her gender or that management, as opposed to individual FAs or FA trainees, actively formed teams. Finally, Ms. Kuo's allegations of incidents of gender-bias such as the fact that Mr. Mattia failed to introduce her at a series of weekly meetings but instead introduced Mr. Ramos, a male FA trainee, and that she was assigned a mentor later than male colleagues is insufficient as evidence of pretext. As an initial matter, Mr. Mattia played no role in the RIF and was fired from Merrill Lynch before any plaintiffs were terminated. Thus, any gender bias he may have had is irrelevant. Further, there is no evidence that Ms. Kuo was denied teaming and mentoring opportunities on the basis of her gender as she merely points to the fact that Mr. Ramos was assigned a mentor before she was. However, she also testified that Mr. Ramos had been hired before she was and thus, such conduct is unavailing as evidence of pretext.

Accordingly, defendants' motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint is granted. The complaint is hereby dismissed in its entirety.

This constitutes the decision and order of the court.

Dated: 4/22/14

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.