UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| TINAMARIE HARDEKOPF, | : | |
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| Plaintiff, | : | 02 Civ. 3251 (LAP) |
| | : | |
| -against- | : | MEMORANDUM AND ORDER |
| | : | |
| SID WAINER & SON, | : | |
| | : | |
| Defendant. | : | |
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LORETTA A. PRESKA, United States District Judge:

On April 29, 2002, Tinamarie Hardekopf ("Ms. Hardekopf" or "Plaintiff") filed a complaint ("Complaint" or "Compl.") against Sid Wainer & Son ("Sid Wainer" or "Defendant"), claiming that it discriminated against her in terminating her employment on the basis of her sex and pregnancy in or about January 2001, in violation of (1) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. ("Title VII");[1] (2) the New York State Human Rights Law, N.Y. Exec. Law §§ 296 et seq. ("NYSHRL"); and (3) the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107 et seq. ("NYCHRL"). Plaintiff also alleges a fourth claim for vacation pay under New York Labor Law § 191. Following the close of discovery, Defendant moved, by notice of motion dated

[1] Plaintiff consented by so-ordered stipulation entered September 9, 2002, to withdraw Plaintiff's Title VII claim of sex discrimination to the extent that it was based on the transfer of accounts serviced by Amy Bragga to Vincent Lombagno as alleged in paragraphs 22 through 24 in Plaintiff's Complaint. As part of this stipulation, Defendant withdrew its motion for an order pursuant to Fed. R. Civ. P. 12(b)(6) dismissing Plaintiff's claims of sex discrimination as time-barred.

October 13, 2003, for an order granting summary judgment pursuant to Fed. R. Civ. P. 56 and dismissing Plaintiff's Complaint. Defendant claims that Plaintiff has neither presented any evidence of discrimination nor rebutted Defendant's legitimate reasons for terminating Plaintiff. For the reasons stated below, the motion for summary judgment is granted, and the Complaint is dismissed in its entirety.

BACKGROUND

The facts pertinent to the instant motion are as follows and, except where noted, are undisputed.[2] Sid Wainer is a specialty foods business in New Bedford, Massachusetts, which sells produce and gourmet food products to the food industry in

[2] Despite being required to do so by Local Civil Rule 56.1(b) and being represented by counsel, Plaintiff failed to submit a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and any additional material facts as to which it is contended that there exists a genuine issue to be tried. Local Civil Rule 56.1(c) provides that "[e]ach numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party." Instead, Plaintiff's "Statement of Facts," (Pl's Br. at 1-3), is "based upon the deposition testimony of Plaintiff, Sid Wainer, Stuart Miller, Plaintiff's Complaint, and Plaintiff's Affidavit." (Id. at 1 n.1.) Nevertheless, insofar as Plaintiff's Statement of Facts refers directly to deposition testimony or Plaintiff's Affidavit, it shall be considered on this motion. Allegations in the Complaint are insufficient for purposes of this motion.

various states. (Def's 56.1 Statement[3] ¶ 1; Compl. ¶ 17.) Plaintiff, a female, was employed by Sid Wainer from January 10, 2000 through January 2, 2001 as a sale representative in New York. (Def's 56.1 Statement ¶ 2; Compl. ¶ 13.) Plaintiff was interviewed and hired for a sales/commission position by Henry Wainer, present of Sid Wainer, and Stuart Miller, a consultant to Sid Wainer. (Def's 56.1 Statement ¶ 3; Pl's Dep.[4] at 55, 58.) Plaintiff negotiated a guaranteed salary of $80,000, plus additional compensation if commissions on her sales exceeded that amount. (Def's 56.1 Statement ¶ 3; Pl's Dep. at 56-62.) Before Plaintiff was hired, Plaintiff understood that Sid Wainer had only one salesperson in New York, Amy Bragga, and that Plaintiff was hired because Sid Wainer was attempting to expand its New York sales territory. (Def's 56.1 Statement ¶ 4; Pl's Dep. at 65-66.) Prior to the commencement of Plaintiff's employment, Ms. Bragga was responsible for all of Sid Wainer's accounts in New York. (Def's 56.1 Statement ¶ 5; Compl. ¶ 18.) Plaintiff was given ten accounts that had previously been opened by Ms. Bragga. (Def's 56.1 Statement ¶ 5; Pl's Dep. at 67-68, 74; Def's 56.1 Statement, Ex. E (computer run of sales for accounts given by Ms.

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[3] Reference is to Defendant's Rule 56.1 Statement, dated October 10, 2003.

[4] Reference is to the Transcript of Plaintiff's Deposition, dated May 27, 2003, attached as Exhibit A to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, dated January 12, 2004 ("Pl's Br.").

Bragga to Plaintiff).) Plaintiff contends that these accounts were "ten of the less desirable accounts" because the accounts had either never ordered before or had ordered very little. (Pl's Dep. at 75.) However, Plaintiff concedes that she chose accounts based on her relationship with them and that nine of them were, in fact, desirable. (Def's 56.1 Statement ¶ 7; Pl's Dep. at 66-67, 87.) Plaintiff was given her choice of sales territory, i.e., the east side or the west side of Manhattan, and she selected the east side. (Def's 56.1 Statement ¶ 6; Pl's Dep. at 57, 72.) Ms. Bragga was still allowed to service the other accounts she had opened on the east side which had not been given to Plaintiff, and Plaintiff does not contend that these accounts should have been given to her at this time and did not expect any of Ms. Bragga accounts to have been given to her at all. (Def's 56.1 Statement ¶ 8; Pl's Dep. at 79, 83.) Plaintiff alleges that Ms. Bragga retained approximately one-hundred accounts she had been assigned and/or developed on both the east and west sides. (Pl's Dep. at 83.) Plaintiff was also told she could pursue accounts on the west side, provided that they were not already served by Ms. Bragga. (Def's 56.1 Statement ¶ 6; Pl's Dep. at 73-74.)

In February 2000, Ms. Bragga resigned from Sid Wainer. (Def's 56.1 Statement ¶ 9; Compl. ¶ 21.) In March 2000, on Plaintiff's recommendation, Sid Wainer hired Vincent Lombagno as

Ms. Bragga's replacement, and Mr. Lombagno was assigned Ms. Bragga's accounts. (Def's 56.1 Statement ¶ 9; Pl's Dep. at 110-11.) Plaintiff alleges that Mr. Lombagno had less experience in the food service industry than Plaintiff. (Pl's Dep. at 111.)

Plaintiff concedes that for the last six months of her employment with Sid Wainer, which lasted approximately one year, Messrs. Wainer and Miller criticized her sales performance. (Def's 56.1 Statement ¶ 10; Pl's Dep. at 145-152.) Plaintiff concedes that Mr. Wainer told her that her "numbers were not where he had expected them to be," her territory "was not performing as he had hoped," and she "[wasn't] working hard enough." (Def's 56.1 Statement ¶ 10; Pl's Dep. at 132, 140, 145.) Plaintiff also concedes she understood that Mr. Wainer expected her to "open new accounts and to sell more to existing accounts" to improve her sales. (Pl's Dep. at 137.) Plaintiff further concedes that on or around November 15, 2000, one month before she announced that she was pregnant, Mr. Miller came to New York to meet with her and told her "he wasn't satisfied with the growth on the east side," that he did not think Plaintiff was working "hard enough," that it appeared to him that Plaintiff had an "attitude problem," and that there was no reason why Plaintiff should not be succeeding. (Def's 56.1 Statement ¶ 11; Pl's Dep. at 146-49.) Mr. Wainer's and Mr. Miller's discussions with Plaintiff from June through November 15, 2000, regarding her

sales performance were documented by five memoranda in Plaintiff's personnel file:

> June 16, 2000: "I talked to [Plaintiff] yesterday about her sales volume. She has been with us for about 5 months and her volume is starting to flatten out. I told her that she has not been submitting call reports and it may represent that she is not working hard enough.
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> August 3, 2000: "I just spoke to [Plaintiff] about her sales. After a small spurt at the end of June, her sales have actually fallen. While she has submitted a Marketing Note saying that New York City goes away for the summer, our sales elsewhere in the region have continued to increase. I reiterated to her that we are not receiving her call reports and also that she is not requesting samples to show to prospective customers."
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> August 31, 2000: "I just called [Plaintiff] in New York to inform her that her sales last week were only $2,347.54. . . . I told [Plaintiff] that she clearly has not been working very hard throughout the summer, and that her sales have dropped dramatically during this time."
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> October 16, 2000: "Once again, I called [Plaintiff] in New York to talk about her performance. After my last talk, her sales increased for a couple of weeks, but have slipped right back down. . . . After 8 months, she should be selling 5 times what she sold last month."
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> November 16, 2000: Stuart Miller met with [Plaintiff] in New York City on November 14, 2000. At this time, Stuart told her that she was not succeeding, and doesn't seem to be working very hard. [Plaintiff] has not been submitting call reports or requesting samples, even though, she has been told to do so repeatedly. [Plaintiff] was told that she seems to have an attitude problem which is interfering with her succeeding. [Plaintiff] was told that Sid Wainer is succeeding elsewhere, and there is no reason that she should not be succeeding as well.

(Def's' Rule 56.1 Statement, Ex. F (Memoranda dated June 16, 2000, August 3, 2000, August 31, 2000, October 16, 2000 and November 16, 2000.) Plaintiff does not dispute her poor sales performance, (Pl's Dep. at 153), but instead claims (and asserts conversations with her superiors) that Sid Wainer's quality and prices caused the poor performance due to the types of accounts Plaintiff served. (Def's 56.1 Statement ¶ 13; Pl's Dep. at 134, 172 (plaintiff believes that she had a "higher clientele which was high profile and required better quality" than Sid Wainer provided); id. at 164 (plaintiff believes that Sid Wainer's prices did not "coincide with their quality"); id. at 172 (plaintiff believes Sid Wainer was not "used to supplying accounts" like Plaintiff's).)

For the period March to December 2000, Mr. Lombagno's total sales were $2,743,000 as compared to Plaintiff's total sales of $334,000. (Def's 56.1 Statement ¶ 14 & Ex. G (monthly sales comparison).) Discounting the Goldman Saks account (which comprised approximately $850,000 of his total sales) because Plaintiff claims that she should have been given "some part" of the account, Mr. Lombagno's sales still exceeded Plaintiff's sales by $1.5 million. (Def's 56.1 Statement ¶ 14 & Ex. H (computer run for Mr. Lombagno's sales from new accounts).) Plaintiff alleges (as she raised with her superiors) that it was unfair to compare her sales to Mr. Lombagno's because he had been

assigned all of Ms. Bragga's accounts, Mr. Lombagno's accounts were mostly corporate and restaurant associate accounts which do not cut back as significantly as the type of accounts Plaintiff served during the summer months, and Mr. Lombagno did not have to spend as much time on "damage control" due to poor product quality or delivery. (Pl's Dep. at 139, 149, 162.)

On December 15, 2000, Plaintiff informed Mr. Wainer and Mr. Miller at a sales meeting that she was pregnant. (Def's 56.1 Statement ¶ 15; Pl's Dep. at 174-75.) Plaintiff's sales in December 2000 ($27,000), were lower than her sales in November 2000 ($45,000). (Def's 56.1 Statement ¶ 17 & Ex. D (monthly sales report chart).)

Plaintiff concedes that her sales performance would have been an issue in her annual review tentatively scheduled for some date after January 4, 2001, and she intended to justify her poor performance by "tell[ing] them again about the problems" that she was having with her sales. (Def's 56.1 Statement ¶ 16; Pl's Dep. at 181-82.)

On or about December 29, 2000, Plaintiff received a call from Mr. Wainer's secretary, who notified Plaintiff that she was to attend a meeting with Mr. Miller. Plaintiff was terminated by Mr. Miller on January 2, 2001. (Pl's Dep. at 181.) Upon her termination, Plaintiff was paid $28,800, the balance due to her pursuant to her guaranteed salary. (Def's 56.1 Statement

¶ 19; Pl's Dep. at 184.) Plaintiff's commissions on her sales never exceeded her guaranteed salary. (Def's 56.1 Statement ¶ 19; Pl's Dep. at 62.) Plaintiff received a letter dated December 22, 2000, claiming her employment was terminated because of work performance deficiencies effective January 2, 2001. (Pl's Dep. at 184; Wainer Dep.[5] at 15.)

Plaintiff alleges that she was treated in a discriminatory manner when all of Ms. Bragga's accounts were assigned to Mr. Lombagno, (Pl's Dep. at 109-110, 153), when she was asked to assist Mr. Lombagno on a presentation to Goldman Sachs but wasn't given "some" of the new accounts generated from that presentation, despite them, and the original Goldman Sachs account, being on the east side, (Pl's Dep. at 112), and when she was terminated days after informing them at she was pregnant, (Pl's Dep. at 121).

Although Plaintiff alleges that she is owed one week of vacation pay based on Sid Wainer's employee manual, the manual explicitly states that vacation is not paid if an employee is terminated for cause. (Def's 56.1 Statement, Ex. D (Employee Handbook) at 11.)

[5] Reference is to the Transcript of Henry Wainer's Deposition, dated June 5, 2003, attached as Exhibit B to Pl's Br.)

I. Legal Standard

Under Rule 56, summary judgment shall be rendered if the pleadings, depositions, answers, interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. Proc. 56(c); Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986). An issue of fact is genuine when "a reasonable jury could return a verdict for the nonmoving party," and facts are material to the outcome of the litigation if application of the relevant substantive law requires their determination. Anderson, 477 U.S. at 248.

The moving party has the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

The substantive law determines the facts which are material to the outcome of a particular litigation. See Anderson, 477 U.S. at 250; Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1320 (2d Cir. 1975). In determining whether summary judgment is appropriate, a court must resolve all ambiguities, and draw all reasonable inferences against the moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio

Corp., 475 U.S. 574, 587-88 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

If the moving party meets its burden, the burden then shifts to the non-moving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e). The non-moving party must "do more than simply show there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Only when it is apparent, however, that no rational finder of fact "could find in favor of the non-moving party because the evidence to support its case is so slight" should summary judgment be granted. Gallo v. Prudential Residential Servs. Ltd. Partnership, 22 F.3d 1219, 1223 (2d Cir. 1994).

## II. Title VII

Title VII provides, in pertinent part:

> It shall be an unlawful employment practice for an employer --
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ...

42 U.S.C. § 2000e-2(a).[6]

[6] Federal standards that are applied to employment discrimination claims brought under Title VII also apply to claims brought under the NYSHRL and the NYCHRL. Weinstock v. Columbia University, 224 F.3d 33, 42 n.1 (2d Cir. 2000).

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court set forth a burden shifting framework under which Title VII cases are analyzed. Id. at 802-05. A claim of pregnancy discrimination is also subject to this analysis. See, e.g., Kerzer v. Kingly Manufacturing, 156 F.3d 396, 400-01 (2d Cir. 1998). As the Supreme Court declared in Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981), under the McDonnell Douglas framework the ultimate burden of persuasion "remains at all times with the plaintiff." Id. at 253. However, the allocation of burdens of production and order of presentation of proof shifts as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Burdine, 450 U.S. at 252-53 (quoting McDonnell Douglas, 411 U.S. at 802-04 (internal citations omitted)).

The initial burden of establishing a prima facie case of discrimination under Title VII is "de minimis." See Kerzer v. Kingly Mfg., 156 F.3d 396, 401 (2d Cir. 1998); see also Minus v. West, 99 Civ. 7229, 2003 U.S. Dist. LEXIS 9277, at *8 (E.D.N.Y. May 30, 2003). Once the plaintiff has established a prima facie

case, the burden shifts to the defendants to offer a non-discriminatory justification for their actions. As the Court of Appeals has noted, "[a]ny legitimate, non-discriminatory reason will rebut the presumption triggered by the prima facie case." Fisher v. Vassar Coll., 114 F.3d 1332, 1335-36 (2d Cir. 1997)(en banc), abrogated on other grounds, Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000); see also Bailey v. Colgate-Palmolive Co., 99 Civ. 3228, 2003 U.S. Dist. LEXIS 8175, at *43-44 (S.D.N.Y. May 14, 2003). At that point, the presumption of discrimination disappears, and plaintiff must prove "that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Roge v. NYP Holdings, Inc., 257 F.3d 164, 168 (2d Cir. 2001) (quoting Reeves, 530 U.S. at 143 (quoting Burdine, 450 U.S. at 253)). "To defeat summary judgment within the McDonnell Douglas framework, moreover, 'the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the "motivating" factors.'" Holtz v. Rockefeller & Co., 258 F.3d 62, 78-79 (2d Cir. 2001) (quoting Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 203 (2d Cir. 1995)).

## III. Analysis

### A. Plaintiff's Prima Facie Evidence

Plaintiff has the initial burden of establishing a prima facie case of unlawful discrimination by showing that: (1) she is a member of a protected class; (2) she performed her duties satisfactorily; (3) she suffered an adverse employment action; and (4) the action occurred under circumstances giving rise to an inference of discrimination. See McLee v. Chrysler Corp., 109 F.3d 130, 134 (2d Cir. 1997). The only dispute between the parties is whether the Plaintiff has established the second and fourth criteria.

Although Plaintiff does not dispute that her work performance was poor, the Court of Appeals has "long emphasized that the qualification prong must not be interpreted in such a way as to shift into the Plaintiff's prima facie case an obligation to anticipate and disprove the employer's proffer of a legitimate, non-discriminatory basis for its decision." Gregory v. Daly, 243 F.3d 687, 696 (2d Cir. 2001). Accordingly, Plaintiff "need only make the minimal showing that she possesses the basic skills necessary for performance of the job." Id. (internal quotation marks and citations omitted). While Defendant has put forth evidence of Plaintiff's poor work performance, it has not demonstrated that Plaintiff's performance was "so manifestly poor as to render her unqualified for

continued employment and thereby defeat her prima facie case." Id. at 697 n.7. Thus, Plaintiff satisfies the second prong of the standard.

As to the fourth criterion, the temporal proximity between Plaintiff's announcement of her pregnancy and her termination is such that an inference of discrimination on the basis of pregnancy is raised. See Pellegrino v. County of Orange, 313 F. Supp. 2d 303, 315 (S.D.N.Y. 2004) ("Evidence of temporal proximity between an employee's request for maternity leave and her termination is sufficient to establish an inference of discrimination.") (citing Flores v. Buy Buy Baby, Inc., 118 F. Supp. 2d 425, 431 (S.D.N.Y. 2000). Thus, Plaintiff has established a prima facie case of discrimination of the basis of pregnancy.

B. Nondiscriminatory Reason and Pretext

Sid Wainer has articulated a legitimate, nondiscriminatory reason for terminating Plaintiff, viz., Plaintiff's documented and conceded poor sales performance. "Consequently, any presumption in [P]laintiff's favor drops from sight, and she must adduce competent evidence sufficient to warrant a reasonable juror in finding that the purported grounds for discharge are pretextual and that the defendant was actually motivated, at least in part, by discrimination on account of pregnancy." Ahmad v. Ann Taylor, Inc., No. 99 Civ. 170, 1999 U.S

Dist. LEXIS 20581, at *9 (S.D.N.Y. Jan. 20, 2000). "A reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515 (1993) (emphasis in original).

Whatever disputes Plaintiff may raise regarding the reasons for her poor sales performance, she concedes that her performance was poor and, despite being warned about her performance continuously for approximately six months before she announced her pregnancy, her performance never improved. Plaintiff also does not dispute that she was told she was not succeeding one month prior to her pregnancy announcement. Even Plaintiff's purported reasons for her sales performance are nothing more than disagreement with Sid Wainer's business assessments--i.e., its quality and pricing, account assignment process, and expectations for the New York sales territory. See Danzer v. Norden Sys., Inc., 151 F.3d 50, 58 (2d Cir. 1998) ("Neither the Court, nor the jury, sits as a 'super-personnel department' to reexamine an entity's decisions on the usefulness to the enterprise of an at-will employee."); Dister v. Continental Group, Inc., 859 F. 2d 1108, 1116 (2d Cir. 1988) ("Evidence that an employer made a poor business judgment in discharging an employee generally is insufficient to establish a genuine issue of fact as to the credibility of the employer's

reasons."). Plaintiff even admits that, in her view, Mr. Wainer "just . . . didn't understand the business in New York as much as [she] thought he did." (Pl's Dep. at 140.) Moreover, Plaintiff concedes that another Sid Wainer salesperson went on three maternity leaves. (Pl's Dep. at 176-79.) See Visco v. Community Health Plan, 957 F. Supp. 381, 388-89 (N.D.N.Y. 1997) (plaintiff's "personal opinion that her firing was for reasons relating to her pregnancy" was "insufficient" in light of evidence that defendant accommodated pregnant women who took maternity leave).

Plaintiff argues, inexplicably, that "Plaintiff had no reason to believe she was not performing her duties satisfactorily" because "Plaintiff was never given any indication that she would be terminated," "Defendant never issued Plaintiff a final warning, or put her on a corrective action program." (Pl's Br. at 6.) However, what Plaintiff fails to recognize is that an employer is under no such duty to do so unless the it can be demonstrated that Plaintiff was treated differently in this respect from similarly situated employees. Furthermore, Plaintiff has not shown, or even alleged, that any other similarly situated employee performed poorly to a substantially similar degree but escaped termination. At best, Plaintiff suggests only that her supervisors, in their overall evaluation,

failed to take into account her alleged reasons for her admittedly poor performance.

Plaintiff also appears to argue that the "temporal proximity" between Plaintiff's termination and her pregnancy announcement satisfy her burden of demonstrating pretext. (See Pl's Br. at 9.) However, while Plaintiff is entitled to rely on the same evidence she used to support her prima facie case, see Kerzer, 156 F.3d at 401 (citing Gallo, 22 F.3d at 1225), it is well established that "temporal proximity itself is not sufficient to show pretext." Sasannejad v. Univ. of Rochester, 329 F. Supp. 2d 385 (S.D.N.Y. 2004) (citing Bombero v. Warner-Lambert Co., 142 F. Supp. 2d 196, 211 n.28 (D. Conn. 2000), aff'd, Fed. Appx. 38 (2d Cir. Apr. 16, 2001) ("Generally, temporal proximity, standing alone, is insufficient to carry plaintiff's burden at step three of the McDonnell Douglas analysis. Courts in this circuit have typically required some additional evidence.")). Not only has Plaintiff failed to demonstrate any additional evidence, Plaintiff has not begun to demonstrate that Defendant's proffered reason was false. See Kerzer, 156 F.3d at 401 ("An employer's reason for termination cannot be proved to be a pretext for discrimination 'unless it is shown both that the reason was false, and that discrimination was the real reason.") (quoting Hicks, 509 U.S. at 515). Sid Wainer's dissatisfaction with Plaintiff's performance--beginning

months before Plaintiff's announcement--is not only well documented, it is conceded by Plaintiff. No reasonable juror, therefore, could find that the purported reasons for termination were pretextual and that the Defendant was actually motivated, at least in part, by discrimination on the basis of pregnancy or sex. See, e.g., Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985) ("[Plaintiff] has provided no indication that any evidence exists that would permit the trier of fact to draw a reasonable inference of pretext. She has offered no evidence suggesting that the [employer's] treatment of her differed from that accorded other [similarly situated employees not in her protected class]; that the [employer] departed from its general policies in discharging her; or that [similarly situated employees not in her protected class] on probation who acted similarly were retained.").

Accordingly, Defendant's motion for summary judgment on this claim is granted. Additionally, because the same standards that are applied to employment discrimination claims brought under Title VII also apply to claims brought under the NYSHRL and the NYCHRL, Defendant's motion for summary judgment on these claims is granted as well.

C. Vacation Pay

Sid Wainer's Employee Manual ("Manual") states, in the section entitled "Vacations," that "earned vacation days . . .

are credited to the employee on the anniversary [of employment]." (Def's 56.1 Statement, Ex. I.) The Manual further states in that section that "[v]acation days accrued in the current year, but not yet credited until the anniversary, will not be paid to an employee who is terminating for any reason other than layoff retirement or permanent disability." (Id.) Plaintiff argues that the section of the Manual entitled "Separation" does not reference benefits and thus the Manual is "unclear." This argument misses the point and ignores the relevant, controlling section of the Manual on this topic. Under New York Labor Law § 198-c, vacation and vacation pay are "benefits" payable upon termination if such payment is the subject of an agreement between an employer and an employee. However, the agreement between the employer and the employee here is unequivocal that unless the employee termination is for "layoff retirement or permanent disability" no vacation pay will be owed. There is nothing "unclear" about the Manual in this respect. Accordingly, Defendant's motion for summary judgment on this claim is granted.

## CONCLUSION

For the above stated reasons, Defendant's motion for summary judgment (docket no. 15) is granted. The Clerk of the Court shall mark this action closed and all pending motions denied as moot.

SO ORDERED

September ___, 2004

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LORETTA A. PRESKA, U.S.D.J.