UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DEBORAH FAYSON, 00-CV-0860E(Sr)

Plaintiff,

-vs- MEMORANDUM

KALEIDA HEALTH, INCORPORATED and DAVID CROSTON, Director of Clinical Engineering of Kalieda Health, Individually, and ORDER[1]

Defendants.

Fayson, an African American female, commenced this action October 4, 2000 alleging, *inter alia*, violations of (a) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. ("Title VII"), (b) the Civil Rights Act of 1991, 42 U.S.C. §1981a, (c) the Equal Pay Act of 1963, 29 U.S.C. §206 *et seq.* and 28 U.S.C. §1343(4) (the "EPA"), (d) the New York State Human Rights Law, N.Y. Exec. Law §290 *et seq*. ("HRL") and (e) New York's Labor Law §194 ("Section 194") in that she had suffered discrimination because of her gender

---

[1]This decision may be cited in whole or in any part.

and her race. She filed an Amended Complaint December 5, 2001 adding retaliation claims. On June 17, 2002 she moved for preliminary injunctive relief pursuant to the Fair Labor Standards Act, 29 U.S.C. §§215(a)(3), 216(b) and 217. Specifically, she seeks, *inter alia*, an award of back-pay and a promotion to Physiological Equipment Specialist. Defendants cross-moved July 12, 2002 to strike two letters written by Kaleida's Senior Employee Relations Specialist Vicky Loretto, on the grounds that such are inadmissible as offers of settlement. On July 22, 2002 defendants moved for summary judgment of dismissal. For the reasons stated herein, defendant's motion for summary judgment will be granted and plaintiff's motion for preliminary injunctive relief and defendant's motion to exclude evidence will be denied as moot.

Fayson is a Senior Biomedical Equipment Technician ("Sr. BMET") employed by Kaleida. Previously, Fayson was employed in a similar capacity by Millard Fillmore Hospital ("MFH") — before MFH merged with Buffalo General Hospital ("BGH") and Children's Hospital of Buffalo ("CHOB") into Kaleida in 1998. Defendant Croston is the director of Clinical Engineering for

Kaleida and, as such, he is above Fayson on Kaleida's organizational chart — although he is not her direct supervisor.

MFH's pre-merger structure included the positions of Biomedical Equipment Repair Person ("BMER") and Biomedical Equipment Technician ("BMET"), the occupants of both of which tested and maintained medical equipment. BMET's were superior to BMER's. BMET's were further divided into six sub-levels according to skill — *i.e.,* BMET 0 through BMET 5, the latter being the highest of the sub-levels. Consequently, the higher-level BMET's were paid more than were lower-level BMET's. Immediately prior to the merger, Fayson was a BMET 1 at MFH.[2]

Croston had been the Director of Clinical Engineering at BGH and he retained that position at Kaleida. Kaleida's Clinical Engineering Department is part of its Information Systems and Technology Department ("IST"). Croston does not have final decision making authority with respect to employment

[2]*See* Fayson Dep., at 33:2-3, 94:9-16. Plaintiff's counsel repeatedly and erroneously contends that Fayson had been a BMET 3 since 1997 — even though Fayson expressly states in her deposition that she was a BMET 1 in the spring of 1999 when the merger took place.

decisions such as pay raises or promotions, although he does make recommendations with respect to such. The vice-president of IST had the authority for making employment decisions within IST.

Inasmuch as MFH, BGH and CHOB each had had its own classifications for Biomed employees,[3] Kaleida had to integrate its Biomed positions post-merger. Croston was responsible for this task. Although MFH, BGH and CHOB used their pre-merger classifications and pay-scales for some period of time after the merger, the Biomed positions were ultimately changed to BMET, Sr. BMET and various specialist positions. Croston suggested a new classification scheme whereby employees received new positions based on their previous positions. Accordingly, BMET A's (BGH) and BMET 2's through BMET 5's (MFH) would be offered a position as either a Sr. BMET or as a specialist; BMET B's and C's (BGH) and BMER's and BMET 0's and 1's (MFH) would be offered BMET positions. The vice-president of IST accepted

[3]For example, BGH's BMET position was further classified as either A, B, or C — with BMET A as the most skilled and thus compensated more than lower-level BMETs.

Croston's suggested structure. Kaleida established pay ranges based on skills and job performance for each of the renamed positions.

Following Kaleida's restructuring, Fayson — formerly a BMET 1 at MFH — was offered a BMET position with an increased rate of pay of $17.95 per hour. All other BMET positions offered to white males were for the same rate of pay. Fayson refused the BMET position and requested a promotion to Sr. BMET. Fayson was promoted to an entry level Sr. BMET position at a rate of pay of $19.49 per hour ($38,000 per year), which was 8.6% higher than the increased salary that she was offered with the restructured BMET position in May 1999.[4] Others — *i.e.,* white male Sr. BMET's — were paid $43,000 per year, although each of these Sr. BMET's had held higher positions than Fayson in their respective pre-merger hospitals.[5]

---

[4]Subsequently, Fayson has received three promotions, bringing her rate of pay to $20.69 per hour.

[5]Fayson contends that two letters written by Loretto constitute an admission that Kaleida paid Fayson less than "other equally situated employees." Pl.'s Aff. in Opp. to Defs.' Cross Mot., at ¶4. The undersigned assumes *arguendo* that the Loretto letters are admissible for purposes of this summary judgment motion, but does not address defendants' motion to exclude, which is mooted by this Memorandum and Order. The Loretto letters referenced

(continued...)

In May 1999 Fayson bid on a position as a Physiological Therapy Equipment Specialist. She and several white male applicants were rejected, but the position was filled by a further applicant — a white male named Jeff Ward — in September 1999.

Fayson was offered a promotion as a Physiological Equipment Specialist in January 2001 ("January 2001 Promotion Offer") that would have increased her pay to $23.08 per hour ($45,000 per year) — which would have represented a 16.1% increase in her pay.[6] Fayson, however, refused the promotion.[7] Fayson's salary increase under the January 2001 Offer, however, would have been staggered, ostensibly in accordance with a Kaleida policy that required such where an employee's raise is more than 10-12% of their existing salary. Several

---

[5](...continued)
a discrepancy based on experience and educational requirements — but not work duties. Accordingly, Kaleida's purported admission fails to establish an EPA violation for the same reasons that Fayson's EPA claims fail as discussed below. Indeed, the Loretto letters appear to simply acknowledge Fayson's wage disparity without addressing the reasons for such.

[6]Fayson was offered the position over three white males who bid for the position. Croston Aff., at ¶58.

[7]Scott Schultz, a white male, was simultaneously offered the same position at a salary of $45,000.

white males have had their salaries staggered following a promotion under this policy.[8] In each case — including Fayson's —, the second increment of the increase was conditioned upon a "better than satisfactory" evaluation. Notably, Fayson's January 2001 Promotion Offer was not contingent upon her dropping her lawsuit.

Rule 56(c) of the Federal Rules of Civil Procedure ("FRCvP") states that summary judgment may be granted only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In other words, after discovery and upon a motion, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is

---

[8]Both Brian Bialecki and Michael Schuler had their salary increases staggered for six months — as opposed to the three-month staggering to which Fayson would have been subjected. *See* Croston Aff., at ¶61. Moreover, both Bialecki and Schuler were also subjected to the "better than satisfactory" requirement in order to receive the second installment of their salary increases. *See ibid*.

thus appropriate where there is "no *genuine* issue of *material* fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).[9]

With respect to the first prong of *Anderson*, a genuine issue of material fact exists if the evidence in the record "is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, at 248.[10] Stated another way, there is "no genuine issue as to any material fact" where there is a "complete failure of proof concerning an essential element of the nonmoving party's case." *Celotex*, at 323. Under the second prong of *Anderson*, the disputed fact must be material, which is to say that it "might affect the outcome of the suit under the governing law ***." *Anderson*, at 248.

---

[9]Of course, the moving party bears the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Goenaga* v. *March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995) (citing *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). If the moving party makes such a showing, the non-moving party must then come forward with evidence of specific facts sufficient to support a jury verdict in order to survive the summary judgment motion. *Ibid.*; FRCvP 56(e).

[10]*See also Anderson*, at 252 ("The mere existence of a scintilla of evidence in support of the [movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [movant].")

Furthermore, "[i]n assessing the record to determine whether there is a genuine issue as to any material fact, the district court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought." *St. Pierre* v. *Dyer*, 208 F.3d 394, 404 (2d Cir. 2000) (citing *Anderson*, at 255).[11] Nonetheless, mere conclusions, conjecture, unsubstantiated allegations or surmise on the part of the non-moving party are insufficient to defeat a well-grounded motion for summary judgment. *Goenaga*, at 18.[12] Indeed, in order to survive a motion for summary judgment, plaintiffs in discrimination cases must offer more than "purely conclusory allegations of discrimination, absent any concrete particulars ***." *Meiri* v. *Dacon*, 759 F.2d 989, 998 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985). Summary judgment is nonetheless appropriate in discrimination cases. *Holtz* v. *Rockefeller*, 258 F.3d 62, 69 (2d Cir. 2001).

---

[11]In employment discrimination cases, district courts must be "especially chary in handing out summary judgment *** because in such cases the employer's intent is ordinarily at issue." *Chertkova* v. *Conn. Gen. Life Ins. Co.*, 92 F.3d 81, 87 (2d Cir. 1996).

[12]*See* footnote 9.

Inasmuch as plaintiff conceded at oral argument and in her brief that she can state no claim with respect to the following claims: 42 U.S.C. §1983, negligence and intentional infliction of emotional distress, such will be dismissed with prejudice.

Turning to the merits of defendants' motion with respect to Fayson's claims concerning her January 2001 Promotion Offer, such will not be dismissed on administrative exhaustion grounds. Although Fayson did not exhaust her administrative remedies by either amending the charge that she filed with the Equal Employment Opportunity Commission ("EEOC") on March 16, 2000 or by filing a new EEOC charge, such claim may be "reasonably related" to Fayson's filed EEOC charge. *See Holtz*, at 82-85. Inasmuch as defendants fail to address whether Fayson's claims with respect to her January 2001 Promotion Offer are reasonably related to the claims made in her EEOC charge, defendants fail to demonstrate that they are entitled to judgment as a matter of law on this ground.

Fayson's Title VII claims are barred as untimely to the extent that they relate to conduct that occurred before May 22, 1999 — *i.e.,* more than 300 days before she filed her EEOC charge on March 16, 2000. *See* 42 U.S.C. §2000e5(e)(1); *Van Zant* v. *KLM Royal Dutch Airlines*, 80 F.3d 708, 712 (2d Cir. 1996). Fayson's assertion that defendants' alleged discrimination amounts to a "continuing violation" is unavailing. *See Gross* v. *Nat'l Broadcasting Co.*, No. 00 Civ. 5776(SAS), 2002 WL 1482621, at *7 (S.D.N.Y. July 10, 2002) ("The holding in [*Nat'l R.R. Passenger Corp.* v. *Morgan*, __ U.S. __, 122 S. Ct. 2061, 2072 (2002)], is in accord with Second Circuit law which states that alleged *failures to compensate adequately*, transfers, job assignments and *promotions* cannot form the basis for a continuing violation claim.") (emphasis added); *cf. Pollis* v. *New Sch. for Soc. Research*, 132 F.3d 115, 118-119 (2d Cir. 1997) (holding that the "continuing violation" doctrine was inapplicable to an Equal Pay Act claim because such involves "a series of discrete, individual wrongs rather than a single and indivisible course of wrongful action").

Fayson's EPA claims are barred as untimely to the extent that they relate to conduct that occurred before March 16, 1998 — *i.e.,* two years before Fayson filed her EEOC charge. *See* 29 U.S.C. §255(a); *Pollis*, at 118-119. Inasmuch as Fayson does not allege that the pay discrimination was willful, the EPA's two-year statute of limitation is applicable. *See* 29 U.S.C. §255(a); Pl.'s Mem. Of Law., at its fourteenth page[13] (conceding the applicability of a "Two Year EPA Time Limit"). To the extent that Fayson claims that the statute of limitations was tolled under the "continuing violations" doctrine, such argument is unavailing for the reasons discussed above. *Pollis*, at 118-119.

Fayson's HRL claims are barred as untimely to the extent that they relate to conduct that occurred before October 4, 1997 — *i.e.,* three years before Fayson filed suit in this action. N.Y. C.P.L.R. §214(2); *Quinn* v. *Green Tree Credit Corp.*, 159 F.3d 759, 765 (2d Cir. 1998). To the extent that Fayson claims that the statute of limitations was tolled under the "continuing violations" doctrine, such argument is unavailing for the reasons discussed above. *Cf. Pollis*,

[13]Fayson's Memorandum of Law is unpaginated.

at 118-119; *Coffey* v. *Cushman & Wakefield, Inc.*, No. 01 Civ. 9447 JGK, 2002 WL 1610913, at *3-4 (S.D.N.Y. July 22, 2002) (noting that New York state courts interpret the HRL so that it is consistent with analogous federal statutes).

Fayson's Title VII claims against defendant Croston will be dismissed inasmuch as Title VII does not provide for individual liability on the part of an employer's agent such as Croston. *Wrighten* v. *Glowski*, 232 F.3d 119, 119 (2d Cir. 2000) (citing *Tomka* v. *Seiler Corp.*, 66 F.3d 1295, 1317 (2d Cir. 1995)). In any event, such claim may also be dismissed because Fayson failed to name Croston in her EEOC charge — despite the fact that his role as Director of Clinical Engineering was known or knowable at such time. *See Poulsen* v. *City of North Tonawanda, N.Y.*, 811 F. Supp. 884, 892-893 (W.D.N.Y. 1993).

Although the Second Circuit Court of Appeals has not addressed whether the EPA provides for individual liability, at least one district court in this Circuit has held that it does. In *Bonner* v. *Guccione*, No. 94 Civ. 7735, 1997 WL 362311, at *13 (S.D.N.Y. July 1, 1997), the court followed the holdings of

several other Circuits' Courts of Appeals in holding that the EPA permits individual liability. In determining whether individual liability under the EPA exists in a given case,

> "courts examine the economic realities of the workplace, including whether the individual has operational control of the defendant corporation, an ownership interest, controls significant functions of the business or determines salaries and makes hiring decisions." *Ibid.*

Unlike the individual defendant in *Bonner*, Croston has neither operational control of nor an ownership interest in Kaleida. This Court must ascertain whether Croston "controls significant functions of the business or determines salaries and makes hiring decisions." *Ibid.* Croston contends that he only makes *recommendations* with respect to raises and promotions and that he has no final decision-making authority with respect to such. Defs.' LRCvP 56 Statement of Undisputed Material Facts ("Defs.' LRCvP 56 Statement"), at ¶3; Croston Aff., at ¶¶5, 23. In attempting to demonstrate a genuine issue of material fact, Fayson's Objections to Defs.' LRCvP 56 Statement merely states:

> "Plaintiff objects to this statement for the following reasons. Personal liability under the Human Rights Law may be established if a defendant 'actually participates in the conduct giving rise to a discrimination claim.' *Tomka* v. *Seiler*, [66 F.3d 1295, 1317 (2d Cir. 1995)]."

This bland legal assertion, however, does nothing to create a genuine issue of material fact as to whether Croston "controls significant functions of the business or determines salaries and makes hiring decisions."[14] Accordingly, Fayson's EPA claim against Croston will be dismissed. *See Patrowich* v. *Chem. Bank*, 63 N.Y.2d 541, 542 (1984). Moreover, inasmuch as Fayson has failed to direct this Court's attention to any evidence that creates a genuine issue of material fact as to whether Croston had the authority to do more than carry out personnel decisions, Fayson's claims against Croston alleging violations of the HRL and Section 194 of New York's Labor Law will also be dismissed. *See Ibid.* Turning to Fayson's remaining Title VII claims, Title VII states that "[i]t shall be an unlawful employment practice for an employer *** to discriminate

[14]Indeed, the language from *Tomka* quoted by Fayson is only applicable to aider and abettor claims under HRL 296(6), which is not alleged in the Amended Complaint.

against any individual with respect to [her] 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)(1). Title VII claims are reviewed under the framework promulgated by *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and its progeny.

> "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." *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 252-253 (1981).[15]

Indeed, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the

---

[15]Internal citations and punctuation omitted. *See also St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 508 n.3 (1993) (discussing the burden-shifting analysis established in *McDonnell Douglas* and construed in *Burdine*).

plaintiff." *Id.* at 253. Nonetheless, the plaintiff's burden to show a prima facie case of racial discrimination at the summary judgment stage is *de minimis*. *Howley* v. *Town of Stratford*, 217 F.3d 141, 150 (2d Cir. 2000) (citing *Chambers* v. *TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994)).

Fayson predicates her Title VII claim on essentially three allegations. First, she alleges that she was paid less than white male Sr. BMET's when she was promoted to Sr. BMET in May 1999.[16] Second, she alleges that she was denied a promotion to the position of Physiological Therapy Equipment Specialist ("PTES") in May 1999. Third, she alleges that the January 2001 Promotion Offer was discriminatory inasmuch as it would have staggered her pay increase and made the second installment contingent upon her receiving a "better than satisfactory" evaluation. She, however, fails to raise a genuine issue of material fact with respect to any of these issues.

---

[16]Defendants do not suggest that Fayson's restructured BMET position or her promotion to Sr. BMET occurred before May 22, 1999. Accordingly, this Court will treat such Title VII claim as timely to the extent that such allegedly discriminatory paychecks were issued on or after May 22, 1999. *See Pollis*, at 118-119.

First, Fayson alleges that Kaleida paid her less than other Sr. BMET's. Claims of unequal pay actionable under Title VII are generally analyzed under the same standards as the EPA. *See Belfi* v. *Prendergast*, 191 F.3d 129, 139 (2d Cir. 1999). Consequently, in order to establish a *prima facie* case of discriminatory pay under Title VII, Fayson must demonstrate that "(1) she was a member of a protected class, (2) she was qualified for the job in question, (3) she was paid less than men for the same work, and (4) the employer's adverse employment decision occurred under circumstances that raise an inference of discrimination." *Ibid.* Unlike the EPA, Title VII requires "evidence of discriminatory animus." *Ibid.* Fayson's allegation that Kaleida harbored discriminatory intent against her (or African Americans or females generally), however, is undermined by the fact that Kaleida gave her multiple promotions and raises during the relevant time frame.[17] *Cf. Grady* v. *Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir. 1997), *cert. denied*, 525 U.S. 936 (1998).

[17]For example, the January 2001 promotion offer represented more than a 16% percent pay increase. Such severely undercuts Fayson's allegations of discriminatory intent.

Assuming without deciding that Fayson has stated a prima facie case of racial discrimination,[18] Kaleida has articulated a legitimate, nondiscriminatory reason for Fayson's wage disparity — to wit, that Fayson was not so similarly qualified that she should receive the same compensation as employees with more experience and/or skills — *i.e.,* employees who held higher positions under the pre-merger structure. Inasmuch as defendants have satisfied their burden of production, "'the *McDonnell Douglas* framework *** disappear[s] and the sole remaining issue *** [is] discrimination *vel non*.'" *Holtz*, at 77 (quoting *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-143 (2000)). The presumption of discrimination has disappeared and Fayson must show that race and/or sex at least partly motivated the wage disparity. *Holtz*, at 78-79 (citing *Cronin* v. *Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2dCir. 1995)).

Although Fayson did earn less than other Sr. BMET's — white males —, she fails to provide any evidence that this wage disparity was motivated by racial

[18]For the reasons discussed below, it is not clear that Fayson can show that, after her rejection, Kaleida continued to seek applicants from persons with her level of qualifications or that Kaleida's continued applicant search constituted circumstances that give rise to an inference of unlawful discrimination.

or sex discrimination as opposed to legitimate business reasons such as compensating employees according to their ability.[19] *See Tomka*, at 1312-1313; *Gumbs* v. *Hall*, 51 F. Supp. 2d 275, 280 (W.D.N.Y. 1999).

In *Belfi*, the plaintiff alleged that (1) men were paid more than was she and (2) the plaintiff presented some evidence of the defendant's inconsistent and pretextual explanation for the wage disparity. *Belfi*, at 139-140. Nonetheless, the Second Circuit Court of Appeals affirmed summary judgment for the defendant because such allegations were insufficient where defendant's explanation did not constitute proof of racial or sex discrimination. *Ibid.* Fayson presents even less evidence than that which was found insufficient in *Belfi* where she merely contends that she was paid less than white males, without any

---

[19]Indeed, when Fayson was offered the position of BMET in May 1999, she was to be paid the same amount as seven other BMET's — white males. The only BMET who earned more than Fayson was Rosemary Jackson — an African American female who had been employed by MFH since 1957. Only after Fayson had requested and received a promotion to Sr. BMET did she receive a salary that was lower than other Sr. BMET's. This, standing alone, does not give rise to any discriminatory inference because Fayson was promoted to an *entry level* Sr. BMET position. Fayson appears to contend that Kaleida cannot differentiate between Sr. BMET's of varying skill levels — *i.e.,* employees that are *not* similarly situated — for purposes of compensation. Kaleida may. *See* 29 U.S.C. §206(d)(1); *Aldrich* v. *Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526-27 (2d Cir. 1992).

evidence of racial or sex discrimination. The wage disparity, standing alone, however, is insufficient to survive Kaleida's motion for summary judgment. *See Tomka*, at 1312-1313 (holding that the fact that three male account managers were paid more than plaintiff — a female account manager — is insufficient to survive a motion for summary judgment); *Montana* v. *First Fed. Savings & Loan Assoc. of Rochester*, 869 F.2d 100, 106-107 (2d Cir. 1989) (affirming grant of summary judgment because female manager claiming sex discrimination failed to raise an inference of discrimination where she alleged nothing more than the fact that six male managers were not terminated when their positions were eliminated, whereas plaintiff was terminated); *Gumbs*, at 280 (granting summary judgment against black female plaintiff who opposed defendants' motion by relying "on little more than the evidence that she has presented to establish her prima facie case: that she is a black female, and that [her superior], a white male, chose another white male for the Vice President position. That is not enough, however, absent evidence suggestive of race or sex discrimination."). Moreover, Fayson's self-comparison with other workers does not raise a genuine issue of

material fact. *See Holt* v. *KMI-Continental, Inc.*, 95 F.3d 123, 130 (2d Cir. 1996), *cert. denied*, 520 U.S. 1228 (1997).[20] Accordingly, Fayson's Title VII claim for unequal pay will be dismissed because she fails to create a genuine issue of material fact that she was discriminated against on the basis of race or sex.

Second, Fayson claims that Kaleida discriminated against her by selecting a white male for the position of PTES over her in 1999. In May 1999 Fayson and several other applicants — white males — bid on the PTES position, but were rejected because Kaleida deemed them all unqualified. Croston Aff., at ¶52. Several months later Jeff Ward applied for and was awarded the position.

In order to establish a *prima facie* case of racial discrimination for failure to promote, plaintiff must show that she (1) is a member of a racial minority, (2) applied for and was qualified for the promotion sought, (3) that she was rejected despite her qualifications, and (4) that, after her rejection, the position remained

[20]*See also Gumbs*, at 282 ("Whether plaintiff considers herself to have been the better candidate — indeed, even whether she *was* the better candidate — is not the issue. What matters is why the employer did what it did, not whether it was wise to do so. Title VII prohibits discrimination, not poor judgment.").

open and the employer continued to seek applicants from persons of plaintiff's qualifications. *McDonnell Douglas*, at 802; *Cruz* v. *Coach Stores, Inc.*, 202 F.3d 560, 565 (2d Cir. 2000).[21]

Fayson concedes that Ward is as equally qualified as she for the PTES position. *See* Fayson Dep., at 87-88, 138. The Second Circuit Court of Appeals has held that, "[w]hen a plaintiff seeks to prevent summary judgment on the strength of a discrepancy in qualifications ignored by an employer *** the plaintiff's credentials would have to be so superior to the credentials of the person selected for the job that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff ***." *Byrnie* v. *Town of Cromwell*, 243 F.3d 93, 103 (2d Cir. 2001) (citation omitted). Accordingly, inasmuch as Fayson concedes that Ward is equally qualified, her claim fails as a matter of law. Moreover, even if Fayson considered herself more qualified than Ward, such self comparison is insufficient to create a genuine

[21]*See also Burdine*, at 253 ("The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.").

issue of material fact. *Gumbs*, at 280. Employers are not required to make wise employment decisions; they are merely prohibited from making discriminatory ones. *Buompane* v. *Citibank*, No. 00 Civ. 7998(DLC), 2002 WL 603036, at *14 (S.D.N.Y. Apr. 18, 2002). More importantly, Fayson offers no evidence of discrimination other than the fact that Ward is a white male which, standing alone, is insufficient. *See Tomka*, at 1312-1313; *Montana*, at 106-107; *Gumbs*, at 280. Accordingly, Fayson fails to establish a *prima facie* case of racial discrimination for failure to promote and her Title VII claim on this ground will be dismissed.

Third, Fayson claims that the January 2001 promotion offer was discriminatory because her 16.1% salary increase was staggered. Fayson alleges that Scott Schultz, a white male offered the same position on the same day, was not subjected to a staggered salary increase.[22] Fayson and Schultz, however,

---

[22]Fayson's brief suggests that she is asserting a disparate impact claim. Nonetheless, Fayson appears to actually allege disparate treatment. *See Harris* v. *Am. Protective Servs.*, 1 F. Supp. 2d 191, 196 (W.D.N.Y. 1998) (setting forth *prima facie* case for disparate treatment claim under Title VII). In any event, even if Fayson alleges a claim of disparate impact, such would fail because both plaintiff and white males were impacted by Kaleida's (continued...)

were not similarly situated because Schultz was not receiving a raise of more than 10-12%. Croston Aff., at ¶¶58-60. Moreover, Kaleida's policy of staggering certain salary increases was applied to several white male employees who received salary increases of more than 10-12%. *Id.* at ¶61; Defs.' Mot. For S. J., at Exhibit N. The fact that Fayson's January 2001 Promotion Offer included a staggered salary increase does not create an inference of discrimination — and Fayson thus fails to establish a prima facie case of discrimination under Title VII with respect to the January 2001 Promotion Offer.[23] *See Montana*, at 106-107 (affirming summary judgment where both

---

[22](...continued)
policy of staggering — and Fayson does not allege that females and/or African Americans were disproportionately affected by such policy. *See Brown* v. *Coach Stores, Inc.*, 163 F.3d 706, 712 (2d Cir. 1998) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-432 (1971) for the proposition that "[t]o establish a prima facie case of disparate impact, a plaintiff must show that a facially neutral employment policy or practice has a significant disparate impact.").

[23]Fayson rejected the January 2001 Promotion Offer. Inasmuch as the staggering requirement was not discriminatory, Fayson's rejection of such promotion was ill-advised. In any event, Fayson's rejection of the promotion and salary increase would constitute a failure to mitigate damages because Fayson could have accepted the salary increase while still maintaining her suit for the balance of what she claims to have been shorted by the allegedly discriminatory salary staggering. Indeed, an appropriate old adage suggests that one in the hand is better than two in the bush.

male and female employees were subjected to restructuring related terminations and reassignment). Accordingly, Fayson's remaining Title VII and HRL[24] claims will be dismissed because Fayson presents no evidence upon which a reasonable trier of fact could conclude that race or sex was a motivating factor in any of the alleged adverse employment actions. *See Schnabel* v. *Abramson*, 232 F.3d 83, 87, 90-91 (2d Cir. 2000).

Fayson's Title VII claim alleging harassment under a hostile environment theory will be dismissed because it is undisputed that Kaleida had a policy against sexual harassment, but plaintiff failed to report the alleged sexual harassment. Accordingly, Kaleida has an affirmative defense against any such claims. *See* Fayson Dep., at 37, 122-124; Defs.' Mot. for Sum. J., at Ex. O; *Burlington Indus.* v. *Ellerth*, 524 U.S. 742, 765 (1998); *Faragher* v. *Boca Raton*, 524 U.S. 775, 807-808 (1998).

---

[24]Inasmuch as claims under Title VII and the HRL are governed by the same standard (with notable exceptions not relevant here), Fayson's claims will be addressed in tandem. *Ferrante* v. *Am. Lung Ass'n*, 90 N.Y.2d 623, 629 (1997); *Quinn*, at 765.

Additionally, Fayson asserts retaliation claims that essentially complain of three allegedly adverse employment actions. *See Mitravich* v. *Occidental Chem. Corp.*, N0. 97-CV-0885E, 2001 WL 118578, at *6 (W.D.N.Y. Jan. 8, 2001) (discussing the elements for a *prima facie* case of retaliation). First, Fayson contends that the January 2001 Promotion Offer contained a staggered salary increase in retaliation for Fayson having asserted discrimination claims against Kaleida. For the reasons discussed above — namely that the staggered salary increase was not unlawfully discriminatory —, Fayson's thereupon-predicated retaliation claims also fail. Second, Fayson contends that Kaleida retaliated against her by forcing her to use sub-standard equipment and office space. This retaliation claim fails as a matter of law because being subjected to less-than desirable equipment and office space is not an adverse employment action. *See Galabya* v. *New York City Bd. Of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000). More importantly, Fayson has voluntarily opted not to take advantage of newer equipment and office space to which she alleges that she has been denied access. *See* Fayson Dep., at 107-109. Third, Fayson contends that she has been

transferred to MFH, where she contends there is less room for training and career advancement. Such, however, is not actionable retaliation to the extent that Kaleida frequently transfers its Biomed personnel between locations as needed. *See* Croston Aff., at ¶67. More importantly, Fayson was stationed post-merger at Kaleida's various facilities, including MFH, *before* she asserted discrimination claims against Kaleida. *See* Fayson Dep., at 112-113. This completely undermines her contention that such transfers were retaliatory. *Slattery* v. *Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir.), *cert. denied*, __ U.S. __, 122 S.Ct. 348 (2001). Accordingly, Fayson's retaliation claims will be dismissed.

Fayson's remaining EPA and Section 194 claims will now be addressed.[25] An employer violates the EPA where it pays an employee

> "at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex *** for equal work on jobs the performance of which requires equal skill, effort, and responsibility,

[25]Inasmuch as the "allegations necessary to plead a claim under §194 are identical to those under the Equal Pay Act," this Court considers Fayson's claims in tandem. *Gibson* v. *Jacob K. Javits Convention Ctr. Of N.Y.*, No. 95 Civ. 9728(LAP), 1998 WL 132796, at *2 (S.D.N.Y. Mar. 23, 1998).

> and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; (iv) a differential based on any other factor other than sex *** ." 29 U.S.C. §206(d)(1).

Accordingly, to establish a *prima facie* case under the EPA, Fayson must show that (1) Kaleida pays different wages to employees of the opposite sex, (2) the employees perform equal work on jobs requiring equal skill, effort and responsibility and (3) the jobs are performed under similar working conditions. *Belfi*, at 135. Unlike Title VII, the EPA does not require discriminatory animus. *Id.* at 136. Once a *prima facie* case is established, the burden of persuasion shifts to the defendant to show that the wage disparity is justified by one of the above-enumerated four affirmative defenses provided for by the EPA. If a defendant meets its burden of persuasion,[26] the plaintiff "may counter the employer's affirmative defense by producing evidence that the reasons the defendant seeks to advance are actually a pretext for sex discrimination." *Ibid.*

[26]Notably, the burden that shifts to the defendant after the plaintiff has made a prima facie showing is one of persuasion rather than production, which is the burden that shifts under the *McDonnell Douglas* burden shifting analysis performed in discrimination suits involving, *inter alia*, Title VII.

As applied here, Fayson fails to establish a *prima facie* case under the EPA where she fails to show that she, as a Sr. BMET, performed equal work on jobs requiring equal skill, effort and responsibility as other Sr. BMET's. *See* Am. Compl., at ¶¶11, 14, 38-40; Fayson Aff., at ¶¶ 52-67. Indeed, the mere fact that her title — Sr. BMET — is the same title held by other employees against whom she compares herself does not establish that Fayson performed equal work on jobs requiring equal skill, effort, and responsibility for purposes of the EPA because job content — rather than job title — is determinative. *See Tomka*, at 1310 ("the standard under the Equal Pay Act is job content and not job title or description"); *Sobol* v. *Kidder, Peabody & Co.*, 49 F. Supp. 2d 208, 219 (S.D.N.Y. 1999) (discussing plaintiff's EPA claim and stating that "[m]erely because their jobs carried the same title does not mean that they required the same skill"). Although Fayson "need not demonstrate that her job is identical to a higher paid position," she must nonetheless "show that the two positions are 'substantially equal' in skill, effort, and responsibility." *Lavin-McEleney* v. *Marist College*, 239 F.3d 476, 480 (2d Cir. 2001) (citing *Tomka*); *see also Lambert* v.

Genesee Hosp., 10 F.3d 46, 56 (2d Cir. 1993) (discussing the "substantially equal" standard), *cert. denied*, 511 U.S. 1052 (1994).

Fayson compares herself to the following eleven Sr. BMET's: Victor Golovin, Brian Wakefield, Craig Langhans, John Perusich, George Millitello, Steve Rukavino, Robert Kawalerski, Mark Wyek, Jeff Ward, Scott Schultz, and Kenneth Cerra (collectively "Comparators"). *See* Fayson Aff., at ¶¶52-67. Fayson contends that each of the Comparators earned $5,000 more than she did when she was appointed Sr. BMET for equal work on jobs requiring equal skill, effort, and responsibility. *Ibid*. Fayson, however, focuses exclusively on the Comparators' qualifications — as opposed to their work duties. Consequently, Fayson fails to show that, relative to the Comparators, she performed *equal work* on jobs requiring equal skill, effort, and responsibility under similar working conditions. *See Tomka*, at 1310 (affirming summary judgment where plaintiff "set forth no specific facts to indicate that she performed substantially equal work

to either of the two named district managers");[27] *Bliss* v. *Rochester City Sch. Dist.*, 196 F. Supp. 2d 314, 341 (W.D.N.Y. 2002) (granting defendants' motion for summary judgment and dismissing a school teacher's EPA claim because she failed to make a *prima facie* case in that she failed to present admissible evidence showing, *inter alia*, "how any male performed equal work on a job requiring equal skill, effort and responsibility, or how their jobs were performed under similar working conditions"); *Cavuoto* v. *Oxford Health Plans, Inc.*, No. 399CV00446, 2001 WL 789316, at *6 (D. Conn. June 13, 2001) ("The burden is on the Plaintiff to prove that her position is substantially equal to the other comparators. [Plaintiff] faces a high standard of proof and, as it is

---

[27]*Tomka* denied summary judgment with respect to several other employees because the employer did not "allege that their job duties differed" — which is distinguishable here where Kaleida contends that the Sr. BMET's paid more than Fayson possessed higher skills and had more complex duties. *See Tomka,* at 1310-1311. Although the determination whether two positions involved equal work is usually a question for the trier of fact, *id.* at 1312, there is no question of fact here because Fayson has set forth no facts creating a genuine issue of material fact as to whether she performs equal work relative to the Comparators. *See Gerbush* v. *Hunt Real Estate Corp.*, 79 F. Supp. 2d 260, 262-263 (W.D.N.Y. 1999) (granting defendant's motion for summary judgment dismissing EPA claim because plaintiff failed to show that she performed "equal work" as other managers), *aff'd*, 234 F.3d 1261 (Table), No. 00-7274, 2000 WL 1689764, at *1 (2d Cir. Nov. 9, 2000).

her burden to prove her *prima facie* case, she may not argue an 'inference of equal work merely from the defendant's failure to prove otherwise.'") (citations omitted); *Mitravitch*, at *4 (granting defendant's motion for summary judgment dismissing EPA claim where there was no evidence in the record satisfying the "equal work" requirement); *Victory* v. *Hewlett-Packard Co.*, 34 F. Supp. 2d 809, 825 (E.D.N.Y. 1999) (granting defendant's motion for summary judgment because plaintiff's "proof fails to satisfy the rigorous standards of an EPA claim" where plaintiff failed to provide evidence of "similarly experienced male colleagues performing like work"). Moreover, to the extent that Fayson is asserting EPA claims with respect to any other position, such claims are similarly infirm. Accordingly, Fayson's remaining EPA claims will be dismissed.

Accordingly, it is hereby ***ORDERED*** that defendants' motion for summary judgment is granted, that plaintiff's motion for a preliminary injunction is denied as moot, that defendant's motion to exclude evidence is denied as moot, and that the Clerk of this Court shall close this action.

DATED: Buffalo, N.Y.

September 18, 2002

JOHN T. ELFVIN
S.U.S.D.J.