SHELLEY HNOT, et al., Plaintiffs, v. WILLIS GROUP HOLDINGS LTD., WILLIS NORTH AMERICA INC., et al., Defendants.

01 Civ. 6558 (GEL)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

April 5, 2005, Decided
April 8, 2005, Filed

DISPOSITION: [*1] Defendants' motion for summary judgment granted with respect to plaintiff's constructive discharge claim, and with respect to any pay disparity claims accruing prior to September 11, 1998. Defendants' motion for summary judgment denied with respect to plaintiff's pay disparity claims arising after that date.

COUNSEL: Linda P. Nussbaum, Joseph M. Sellers, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., New York, New York; Martin R. Lee, Lawrence J. Profeta, Warshaw Burstein Cohen Schlesinger & Kuh, LLP, New York, New York, for plaintiffs.

Bettina B. Plevan, Myron D. Rumeld, Proskauer Rose, LLP, New York, New York, for defendants.

JUDGES: GERARD E. LYNCH, United States District Judge.

OPINION BY: GERARD E. LYNCH

OPINION

OPINION AND ORDER

GERARD E. LYNCH, District Judge:

Plaintiff Heidi Scheller brings this employment discrimination action against her former employer Willis Group Holdings, and its affiliated entities (collectively, "Willis"). Plaintiff alleges that she was underpaid and constructively discharged due to her sex, in violation of Title VII of the 1964 Civil Rights Act, *42 U.S.C. 2000e-2 et seq.* ("Title VII"). [1] In an Opinion and Order dated March 18, 2005, this [*2] Court granted a motion by Scheller and Shelley Hnot for class certification. *Hnot v. Willis Group Holdings Ltd., 228 F.R.D. 476, 2005 U.S. Dist. LEXIS 4416, 01 Civ. 6558 (GEL), 2005 WL 659475 (S.D.N.Y. March 21, 2005)*. Defendants now move for summary judgment against plaintiff Scheller's individual claims on the grounds that they are time-barred, and that plaintiff cannot establish a prima facie case or demonstrate that defendants' alleged non-discriminatory reasons for their actions were pretextual. For the reasons below, defendants' motion will be granted in part and denied in part. [2]

1 Plaintiff's complaint also asserts a claim of retaliation in her complaint. (See 2d Am. Compl. P58.) However, her brief in opposition to defendants' summary judgment motion fails to respond to defendants' persuasive argument that plaintiff is unsuccessful in establishing a prima facie case of retaliation. (See D. Mem. 16-20.) Thus, plaintiff has abandoned the claim.
2 A similar motion regarding plaintiff Shelley Hnot's claims is discussed in a companion opinion.

[*3] **BACKGROUND**

Heidi Scheller was hired by Willis, an insurance brokerage company, in August 1993 as an Account Executive with the officer title of Vice President, to work in the Boston, Massachusetts office. (Scheller Dep. 7, 26; Brown Aff. Ex. D.) When she joined Willis, Scheller brought with her a lucrative account, Thermo Electron Corporation ("Thermo"), and three other clients. (Scheller Aff. P16-22.) In early 1994, Scheller was appointed the "international resource" for Willis in Massachusetts, to advise colleagues and clients about overseas insurance issues. (Scheller Dep. 138-140.) She was promoted to Senior Vice President in 1997. (Brown Aff. Ex. F.) Scheller reported to Jay Sarrey and the Chief Executive Officer ("CEO") of Massachusetts, David Jollin. [3] (Scheller Dep. 20, 33.)

3 Willis's organizational structure and corporate titles are described in some detail in the Court's class certification opinion. *Hnot, 2005 U.S. Dist. LEXIS 4416, 2005 WL 659475, at *2-5*.

During Scheller's employment, she received [*4] a base salary, which increased each year (except 1997 when there was a salary freeze). (Profeta Aff. Ex. 13.) Scheller's salary was lower than the base salaries of a number of male producers/account executives. Scheller was also eligible to receive incentive compensation. (Sarrey Aff. P36.) In 1996 and 1997, she had an Incentive Bonus Plan where she was paid ten percent of any new business she garnered, plus ten percent of any

net annual increase in renewal business. (Scheller Aff. P94, Ex. 25, 26.) Each employee had his or her own individualized incentive plan. Defendants allege that Scheller's total compensation was one of the highest in the office. [4] (D. Reply 15.)

4 Defendants provide a chart of total compensation of producers/account executives. However, a number of individuals alleged by plaintiff to be similarly situated (*e.g.,* Stephen Grant, Rick Ives. William McNamara, and Jack Tarbell) are not included.

Willis's contact at Thermo, Richard Somerville, closely monitored how Willis handled the account, [*5] and he was a demanding client. (Scheller Aff. P36; Jollin Dep. 254.) During the first few years at Willis, Thermo generated large revenues for Willis under Scheller's management. (Scheller Aff. P35.) Defendants claim that Somerville eventually began expressing dissatisfaction with the account's management, and with Scheller's negative attitude. (Sarrey Aff. P16-17, 23, Ex. A.) Scheller avers, however, that in 1997, she began experiencing difficulties with the Willis Thermo team, including threats of staff departures. (Scheller Aff. P38.) She contends that it was only after Somerville learned that a critical employee on the team might be transferred to other duties in January 1998 that he requested that Sarrey oversee the Thermo account. (Id. at P49.) Willis then reorganized staffing of the Thermo team, and Sarrey assumed overall responsibility for the account. (Scheller Dep. 186-87.)

At the end of August 1998, Scheller was on bereavement leave. When she returned on September 3, 1998, Jollin informed her that she would have to take a paid 30-day leave of absence. (Scheller Aff. P65.) Defendants allege that after the reorganization of the Thermo team, Scheller refused to accept [*6] Sarrey's authority over the Thermo account and was disruptive and insubordinate, and that the leave was intended to give her time to adjust and reconcile herself to the new management structure. (Sarrey Aff. P29, Ex. A.) Scheller's leave was later extended to 90 days. (Scheller Dep. 226-27.) In a letter from her then attorney dated November 30, 1998, Scheller resigned, effective December 2, 1998. (Sarrey Aff. Ex. C.)

DISCUSSION

I. Summary Judgment Standard

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show 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." *Fed. R. Civ. P. 56(c)*. A "genuine issue of material fact" exists if the evidence is such that a reasonable jury could find in favor of the non-moving party. *Holtz v. Rockefeller & Co., 258 F.3d 62, 69 (2d Cir. 2001)*. In deciding a summary judgment motion, the court must "resolve all ambiguities and draw all reasonable inferences in the light most favorable to the party opposing [*7] the motion." *Cifarelli v. Vill. Of Babylon, 93 F.3d 47, 51 (2d Cir. 1996)*.

The nonmoving party, however, may not rely on "conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998)*. The non-moving party must make a "showing sufficient to establish the existence of [every] 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, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*.

II. Statute of Limitations

Title VII claims must be filed with the EEOC within 300 days of the alleged discriminatory act. *42 U.S.C. § 2000e-5(e)(1)*. [5] Under Title VII, each discrete act of discrimination "constitutes a separate actionable 'unlawful employment practice.'" *AMTRAK v. Morgan, 536 U.S. 101, 114, 153 L. Ed. 2d 106, 122 S. Ct. 2061 (2002)*. A plaintiff can "only file a charge to cover discrete acts that 'occurred' within the appropriate time period." Id. Recovery is precluded for acts outside the time period, even if related acts occurred within the statutory time period. *Patterson v. County of Oneida, 375 F.3d 206, 220 (2d Cir. 2004)*. [*8]

5 Massachusetts provides an identical statute of limitations for employment discrimination claims. Claims must be filed with the Massachusetts Commission Against Discrimination within 300 days of the alleged discriminatory act. *Mass Gen. Laws ch. 151B, § 5*; *Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against Discrimination, 441 Mass. 632, 808 N.E.2d 257, 265 n. 11 (Mass. 2004)*.

Scheller's constructive discharge claim is unquestionably timely. The "date that [an employee's constructive discharge] claim accrue[s] [is] the date when she gave definite notice of her intention to [leave]." *Flaherty v. Metromail Corp., 235 F.3d 133, 138 (2d Cir. 2000)*. Scheller resigned by letter dated November 30, 1998. (Sarrey Aff. Ex. C.) Since that date is within 300 days of August 26, 1999, when plaintiff filed her EEOC charge, plaintiff's constructive discharge claim is timely.

Scheller asserts that the statute of limitations for her disparate compensation claims is governed by [*9] the "continuing violation" doctrine. "If a plaintiff has experienced a continuous practice and policy of

discrimination, . . . the commencement of the statute of limitations period may be delayed until the last discriminatory act." *Washington v. County of Rockland, 373 F.3d 310, 317 (2d Cir. 2004)*, quoting *Fitzgerald v. Henderson, 251 F.3d 345, 359 (2d Cir. 2001)*. A continuing violation is conduct that is "composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *Morgan, 536 U.S. at 103*.

Disparate pay claims, however, do not constitute a continuing violation. In a different context, the Supreme Court has reasoned that "each week's paycheck that delivers less to a [disadvantaged class member] than to a similarly situated [favored class member] is a wrong actionable under Title VII, regardless of the fact that [the] pattern was begun prior to the effective date" of the statute. *Bazemore v. Friday, 478 U.S. 385, 395-96, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986)*. The Second Circuit has applied this reasoning to hold that pay disparity claims under the *Equal Pay Act* involve discrete claims for each pay [*10] period, and not a continuing violation reading back before the limitations period. See *Pollis v. The New Sch. For Soc. Research, 132 F.3d 115, 119 (2d Cir. 1997)* ("A cause of action based on receipt of a paycheck prior to the limitations period is untimely and recovery for pay differentials prior to the limitations period is barred irrespective of subsequent, similar timely violations.").

Most courts in this district have found that the reasoning in Pollis applies to Title VII claims. *See, e.g., Hernandez v. Kellwood Co., 2003 U.S. Dist. LEXIS 17862, No. 99 Civ. 10015 (KNF), 2003 WL 22309326, at *14-15 (S.D.N.Y. Oct. 8, 2003*) ("It is clear from Morgan and the relevant Second Circuit case law that . . . pay disparities . . . are to be considered discrete acts and, therefore, cannot be lumped together to form a 'continuing violation.'"); *Quarless v. Bronx-Lebanon Hosp. Ctr., 228 F. Supp. 2d 377, 383 n.2 (S.D.N.Y. 2002)* (holding that in light of Morgan, Pollis applies to Title VII claims); *Gross v. Nat'l Broad. Co., Inc., 232 F. Supp. 2d 58, 68 (S.D.N.Y. 2002)* (noting that Morgan is in accord with Pollis). Therefore, Scheller's [*11] pay disparity claims are subject to Title VII's statute of limitations, and Scheller may sue only as to pay periods that are within the limitations period.

Plaintiff argues that the applicable filing date for statute of limitations purposes should be July 8, 1999, when defendants received notice of plaintiff's intention to file a charge with the EEOC, rather than August 26, 1999, the actual date her charge was filed. (P. Mem. 27 n.14; Profeta Aff. Ex. 36.) Defendants requested that she postpone her filing after an effort to resolve the matter, and in good faith, plaintiff only filed her charge after these negotiations broke down. (Profeta Aff. Ex. 37, 38; P. Mem. 28 n.14.) Plaintiff requests that the court apply equitable tolling principles to calculate the statute of limitations period with reference to July 8, 1999.

The filing requirement under *42 U.S.C. § 2000e-5(e)(1)* is not a jurisdictional prerequisite, but is subject to waiver and tolling when equity so requires. *Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398, 71 L. Ed. 2d 234, 102 S. Ct. 1127 (1982)*; *Zerilli-Edelglass v. N.Y. City Transit Auth., 333 F.3d 74, 80 (2d Cir. 2003)*. When determining [*12] whether equitable tolling is applicable, a district court must consider whether the person seeking application of the equitable tolling doctrine (1) has acted with reasonable diligence during the time period she seeks to have tolled, and (2) has proved that the circumstances are so extraordinary that the doctrine should apply. *Zerilli-Edelglass, 333 F. 3d at 80-81*. Here, plaintiff has acted with reasonable diligence. Additionally, "where the defendant assures the plaintiff that he intends to settle, and the plaintiff in reasonable reliance on that assurance, delays bringing his suit until after the limitations period has run, the defendant may be estopped to rely on the limitations defense." *Robinson v. Pan American World Airways, Inc., 645 F. Supp. 70, 73 (S.D.N.Y. 1986)*. Therefore, it is appropriate to deem Scheller's EEOC charge filed as of July 8, 1999. Although Scheller was on a paid leave of absence starting in early September 1998 (Scheller Dep. 215-19), her employment did not terminate until December 2, 1998, when she submitted her resignation. Accordingly, Scheller's pay claims between September 11, 1998 (300 days before July 8, 1999) and [*13] December 2, 1998 are thus timely.

Defendants' motion for summary judgment is therefore granted with respect to any pay disparity claims prior to September 11, 1998, and denied for all claims properly within the statute of limitations.

III. Gender Discrimination Claims

A. Legal Standard

In Title VII discrimination cases, the courts have established a complex burden-shifting framework based on *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)* to determine whether a plaintiff's claim survives summary judgment. A plaintiff has the initial burden of demonstrating that she (1) belonged to a protected class, (2) was qualified for the position, (3) suffered an adverse employment action, and (4) the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent. *Terry v. Ashcroft, 336 F.3d 128, 137-38 (2d Cir. 2003)*.

The burden of establishing a prima facie case is not onerous, and is frequently described as minimal. *Scaria*

v. Rubin, 117 F.3d 652, 654 (2d Cir. 1997). See e.g., *St. Mary's Honor Ctr. v Hicks, 509 U.S. 502, 506, 125 L. Ed. 2d 407, 113 S. Ct. 2742*. No evidence of discrimination is [*14] needed, and showing a preference for a person not in the protected class is enough to raise an inference of discrimination. *James v. N.Y. Racing Ass'n, 233 F.3d 149, 153-54 (2d Cir. 2000)*.

Once plaintiff establishes a prima facie case, the burden then shifts to the employer, who must articulate a legitimate, non-discriminatory reason for its adverse employment action. *McDonnell, 411 U.S. at 802*; *James, 233 F.3d at 154*. That burden "requires the defendant to produce admissible evidence showing 'reasons for its actions which, *if believed by the trier of fact,* would support a finding that unlawful discrimination was not the cause of the employment action.'" *Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 263 (S.D.N.Y. 2002)*, quoting *St. Mary's Honor Ctr., 509 U.S. at 507 (1993)* (emphasis in original). If the employer fails to present such a reason, plaintiff prevails.

The plaintiff is then required to show that the proffered reason is a pretext for discrimination. *McDonnell, 411 U.S. at 804*. When the employer has proffered an explanation and the plaintiff has attempted to refute [*15] it, the Court must "examine the entire record to determine whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.'" *Schnabel v. Abramson, 232 F.3d 83, 88 (2d Cir. 2000)*, quoting *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000)*.

B. Constructive Discharge

To establish a claim of constructive discharge, a plaintiff must show that an employer "deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." *Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983)*. A court must dismiss unless the evidence is sufficient for a rational trier of fact to infer that the "working conditions . . . were 'so difficult or unpleasant that a reasonable person in the [plaintiff's] shoes would have felt compelled to resign.'" *Stetson v. NYNEX Serv. Co., 995 F.2d 355, 361 (2d Cir. 1993)*, quoting *Pena, 702 F.2d at 325*.

Plaintiff alleges that defendants engaged in a deliberate course of conduct that made her employment intolerable. [*16] (P. Mem. 6.) She contends that Willis's interference with staffing of the Thermo account undermined her authority, and upset Somerville so that he was induced to demand involvement by someone who had greater control and authority. (Scheller Aff. P44-47.) According to Scheller, her supervisor, Sarrey, usurped her role on the account (P. Mem. 12), and Scheller was subsequently demoted during restructuring (P. Mem. 12; Scheller Aff. Ex. 15), left with only a small part of her prior workload. (Scheller Aff. Ex. 14; Sarrey Dep. PP60-61.) On September 2, 1998, Sarrey stated that there were sufficient grounds for plaintiff's termination (Scheller Aff. Ex. 11), and he informed Scheller the next day that she would have to take a 30-day leave. (Scheller Aff. P65).

Defendants assert that no reasonable jury could find that Scheller's working conditions were so intolerable as to amount to constructive discharge. Disappointment or a mere reduction or change in job responsibility do not constitute constructive discharge. *Cooper v. Wyeth Ayerst Lederle, 106 F. Supp. 2d 479, 497 (S.D.N.Y. 2000)*; *Grant v. Morgan Guar. Trust Co. of N.Y., 638 F. Supp. 1528, 1539 (S.D.N.Y. 1986)*. [*17] However, a court must examine the whole record because a combination of factors could constitute constructive discharge, even if each taken alone would not. *Halbrook v. Reichhold Chems., Inc., 735 F. Supp. 121, 127 (S.D.N.Y. 1990)*. For example, in *Kirsch v. Fleet St., Ltd., 148 F.3d 149 (2d Cir. 1998)*, the court found sufficient evidence of constructive discharge where plaintiff's largest account was transferred to a younger individual, and the supervisor admitted that the company was trying to force plaintiff out. *Id. at 161*. On the other hand, in *Neale v. Dillon, 534 F. Supp. 1381 (E.D.N.Y. 1982)*, the court found that an employer's transfer of plaintiff from a supervisory to non-supervisory position, even when she had no office after she returned from maternity leave, did not constitute constructive discharge. *Id. at 1390*.

Here, defendants assert that neither plaintiff's rank nor pay was reduced. (D. Mem. 3.) However, plaintiff points out that a reduced role on the Thermo account would affect her book of business, and thus her bonus compensation. [6] (P. Mem. 13; Scheller Aff. P72.) Moreover, after [*18] the restructuring, there was considerable tension between plaintiff and her supervisor. Plaintiff and defendants dispute who is to blame. Defendants accuse plaintiff of insubordination which undermined their efforts to meet Somerville's demands on the Thermo account. (Sarrey Aff. PP26-30.) Plaintiff, on the other hand, blames Willis for Somerville's initial dissatisfaction, and claims that Sarrey actively worked to oust her from any involvement with Thermo. [7] (Scheller Aff. PP59-60.) A reasonable factfinder could believe defendants' version, but they need not. Drawing reasonable inferences in favor of plaintiff, a jury could find that Scheller was forced out through defendants' actions.

6 Defendants deny that Sarrey received any production credit for the Thermo account, or any increase in his bonus. (Sarrey Reply Decl. P3.)

7 As far as the briefs reveal, neither party chose to depose Somerville. Since Somerville is presumably available to both sides, the jury can draw an inference either way as to who would benefit by his testimony. Plaintiff incorrectly argues that statements in Sarrey's affidavit attributed to Somerville are hearsay. (P. Mem. 30.) Somerville's statements are non-hearsay, admissible not for the truth of the matter asserted (*i.e.,* whether his complaints about plaintiff were accurate), but for their effect on the state of mind of Sarrey, the listener. See *United States v. Puzzo, 928 F.2d 1356, 1365 (2d Cir. 1991)* (finding that testimony offered for its effect on the listener was admissible). The mere fact that Somerville was complaining about plaintiff, even if inaccurately, would give Sarrey a reason to demote her.

[*19] Nevertheless, plaintiff's constructive discharge claim is unsuccessful. A plaintiff must present evidence that her alleged constructive discharge "occurred in circumstances giving rise to an inference of discrimination." *Bennett v. Watson Wyatt & Co., 136 F. Supp. 2d 236, 252 (S.D.N.Y. 2001)*. Even if it were found that Sarrey undermined Scheller and took over the Thermo account for himself, there is no evidence that this maneuvering was due to Scheller's gender, and the circumstances give rise to a strong inference of a self-interested financial motivation. Based on Scheller's own evidence, Sarrey had a financial incentive to take over the Thermo account.

An examination of the record reveals two facts for which a jury arguably could draw inferences of gender discrimination. First, in a deposition of Willis's Massachusetts CEO, Jollin, indicates that the only two executives who were advised to take leaves were both women, Scheller and Carol Ottaviani. (Jollin Dep. 264-67.) However, plaintiff does not dispute Jollin's testimony that Ottaviani later returned to Willis and retained her same accounts. (Id.) Second, plaintiff's allegations that she lacked institutional [*20] support are similar to plaintiff Hnot's claims and could reflect a broader discriminatory practice. But while such evidence may be relevant to Scheller's compensation claims, it is insufficient to establish that Sarrey's alleged usurpation of the Thermo account was based on Scheller's sex rather than on Sarrey's self-interest or Somerville's discontent with Scheller.

Even if a plaintiff was treated unfairly, such treatment does not constitute a cause of action under Title VII, unless the unfair treatment was based on discriminatory animus. There is no evidence here that Scheller's demotion had to do with gender. Therefore, defendants' motion for summary judgment on Scheller's constructive discharge claims is granted.

C. Pay Disparities

Plaintiff has established a prima facie case of discrimination in compensation. She is a female, and thus a member of a protected class under Title VII, and was qualified for her position. Defendants argue that Scheller was one of the most highly compensated individuals in the Boston office. (See D. Reply 15.) However, plaintiff received a lower base salary than many of her male colleagues. (See Profeta Aff. Ex. 14.) In addition, Scheller's [*21] bonus plan in 1996 and 1997 awarded her 10% of the new business she produced, but other male colleagues were awarded 15-30% on new business. (P. Mem. 23; Scheller Aff. Ex. 28, 29.) While each bonus plan varied according to each individual, and defendants plausibly argue that Scheller's bonus was primarily tied to servicing the Thermo account rather than to generating new business, a jury would not be required to accept defendants' analysis.

Defendants allege that plaintiff compares herself to others who are not similarly situated. (D. Mem. 21.) Plaintiff identified six individuals she thought were comparable to her during her deposition (Scheller Dep. 70-78), and then later identified several other men as comparators. (P. Mem. 18-19.) Individuals that plaintiff compares herself to must be similarly situated in "all material aspects," such as holding the same position and reporting to the same supervisor. *Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000)*; *Shumway v. United Parcel Serv., 118 F.3d 60, 64 (2d Cir. 1997)*. Scheller points out that most of the individuals she points to (*e.g.,* Doyle, Grant, Ives, and Probolus) were categorized [*22] in defendants' discovery materials as producers, producer/account executives, and account executives, as was she. (Profeta Aff. Ex. 22.) An organizational chart presented by plaintiff demonstrates that several of the comparators also had Sarrey as a supervisor. (See Profeta Aff. Ex. 21.) In addition, even if Scheller is compared with all the individuals discussed by both plaintiff and defendants, her base salary was lower than almost all. (Profeta Aff. Ex. 14.) Whether employees are similarly situated is ultimately a question of fact for the jury, *Graham, 230 F.3d at 39*, and plaintiff satisfies the "all material aspects" test for the purposes of a prima facie case. Accordingly, Scheller has provided sufficient evidence to meet the minimal requirements of a prima facie case.

Defendants offer non-discriminatory reasons for the higher salaries of certain individuals. For example, defendants explain that Jack Tarbell had twenty years of experience in the insurance industry prior to his Willis employment (Sarrey Aff. P50), John Probolus had more production-oriented responsibilities (id. at PP53-54), Stephen Grant was an expert in construction surety,

[*23] a specialized skill (Sarrey Reply Decl. at P7), and James Doyle had a longer tenure at Willis. (Id. at P9.) Even assuming that defendants adequately meet their burden of setting forth non-discriminatory reasons for the pay disparities, Scheller presents sufficient evidence to permit a reasonable jury to find these reasons pretextual.

Scheller's evidence creates genuine issues of material fact regarding the adequacy of defendants' alleged rationale. Plaintiff presents plausible evidence that absent discrimination, she should have been paid at least as well as her male peers. Defendants' witnesses, Sarrey and Jollin, described job performance, revenue, amount of business handled, skill set, professional development, marketplace, and peer salaries in the Boston area as important factors in salary compensation. (Sarrey Dep. 100, 102, 139; Jollin Dep. 96.) Employing these criteria, plaintiff presents substantial evidence that she was equally or more qualified than her peers. For example, Scheller's "book of business" was among the highest in the Boston office. (P. Mem. 20-21; Scheller Aff. Ex. 18-19.) She had solid performance appraisals (Scheller Aff. Ex. 6-8), and was recognized [*24] by the head of International Practice for Willis as the most experienced broker in the Boston office capable of servicing and producing international business. (Scheller Aff. Ex. 3 at 2.) In 1995, she was named to Willis's Exceptional Producers' Council. (Scheller Aff. Ex. 2.) Defendants argue that compensation differences, and bonus plans in particular, were "individually negotiated arrangements." (Def. Mem. 8.) However, the very lack of any attempt at internal equity could be seen by a jury as supporting a finding of pretext.

Plaintiff's statistical evidence lends further support to an inference of discrimination. The statistics tend to show that women in general were paid much less than comparable men. Plaintiff's expert, Dr. Mark Killingsworth, analyzed officers and employees who hold functional titles equivalent to officers. Controlling for the exact position held, employing company, years of service, education, and other factors, Dr. Killingsworth found statistically significant differences between men and women both in base salary and in total compensation. (Webber Aff. Ex. 107; Webber Aff. Ex. 108 at tbls. A, B.) The parties' respective arguments about the probative force [*25] of Dr. Killingsworth's evidence are discussed in the class certification opinion, and need not be further detailed here. See *Hnot, 205 U.S. Dist. LEXIS 4416, 2005 WL 659475, at *2-6*. Suffice it to say that the arguments go to the weight of the testimony and are for a jury to resolve.

Plaintiff also provides anecdotal evidence sustaining an inference of discriminatory intent. Scheller alleges that her efforts to manage and grow her account were often unsupported and undermined. (Scheller Aff. PP100-06.) For example, she claims she was denied adequate support staff, unlike male producer/account executives. (Id. at P104.) In addition, Scheller alleges that when she asked to be considered for a management role in the office, her requests were not taken seriously, while such requests from similarly-situated men were. (Id. at P109.) While she acknowledges that she was appointed to an advisory committee, plaintiff contends that this was solely a sounding board without decision-making authority. (Id.) Defendants contest these allegations, but if believed by a jury, could contribute to a finding of discriminatory intent. For these reasons, plaintiff's compensation claims survive summary [*26] judgment.

CONCLUSION

Defendants' motion for summary judgment is granted with respect to plaintiff's constructive discharge claim, and with respect to any pay disparity claims accruing prior to September 11, 1998. Defendants' motion for summary judgment is denied with respect to plaintiff's pay disparity claims arising after that date.

SO ORDERED:

Dated: New York, New York

April 5, 2005

GERARD E. LYNCH

United States District Judge