IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

TERESA SMITH-BARRETT,

Plaintiff,

vs. 05-CV-6354

JOHN E. POTTER, Postmaster General
of the United States Postal Service,

Defendant.

REPLY MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT

Terrance P. Flynn, United States Attorney for the Western District of New York, Christopher V. Taffe, Assistant U.S. Attorney, of counsel, hereby offers this Reply Memorandum in support of the defendant's motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure.

POINT ONE

No *Prima Facie* Showing On Racial Claim

The plaintiff has failed to present to this Court admissible evidence establishing her prima facie showing. At this juncture, the plaintiff must identify admissible evidence that supports her

Title VII race, gender and retaliation claims.[1]

> Rule 56(e) provides that affidavits in support of and against summary judgment "shall set forth such facts as would be admissible in evidence." Fed.R.Civ.P. 56(e) (emphasis added); see also Community of Roquefort v. William Faehndrich, Inc., 303 F.2d 494, 498 (2d Cir.1962) ("Since the object [of summary judgment] is to discover whether one side has no real support for its version of the facts, the Rule specifically states that affidavits shall 'set forth such facts as would be admissible in evidence.' ") (citation omitted). Therefore, only admissible evidence need be considered by the trial court in ruling on a motion for summary judgment. Baskin v. Wyatt Co., 125 F. 3d 55, 66 (2d Cir. 1997).[2]

Rule 56.1(d) of the Local Rules of Civil Procedure for the United States District Court for the Western District of New York states that "[e]ach statement of material fact by a movant or opponent must be followed by citation to evidence which would be admissible, as required by Federal Rule of Civil Procedure 56(e)."

Conclusory statements and non-specific challenges to a witness's credibility are inadequate to successfully oppose a motion for summary judgment. Opals on Ice Lingerie v. Body Lines,

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[1] The state Human Rights Law claim has been withdrawn.

[2] The plaintiff erroneously asserts that for a Rule 56 motion, a court is to accept as true all factual allegations in the complaint. This rule, of course, applies to Rule 12(b)(6) motions and not Rule 56 motions. *Compare* Chille v. United Airlines, 192 F.Supp.2d 27, 30 (W.D.N.Y. 2001) *with* Venti v. EDS, 236 F.Supp.2d 264, 269 (W.D.N.Y. 2002).

320 F.3d 362, 370 n. 3 (2d Cir. 2003). “An ‘opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions.’" Opals on Ice Lingerie, supra. "Summary judgment.... is a valuable tool for piercing conclusory allegations and disposing of unsupportable claims prior to trial." Applegate v. Top Associates, Inc., 425 F.2d 92, 96 (2d Cir. 1970).[3]

In her response, the plaintiff fails to submit admissible evidence addressing: 1) her status as a member of a protected class; 2) her qualifications for the positions at issue; 3) that she suffered an adverse employment action; and 4) any inference of discrimination.” Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000).

First, the plaintiff offers no admissible evidence that she is a member of a Native American tribe. The only evidence before the Court is the statement from the Ponsford Native American Tribe stating that she is not a member of a tribe. She fails to address the inconsistencies in the records of the USPS, outlined

[3] The plaintiff argues that summary judgment is not appropriate in employment discrimination cases. This Court has already addressed such an incorrect assertion and has recognized that the principles underlying the summary judgment procedure apply equally to such cases. Venti, 236 F.Supp.2d at 270.

in the government's opening Memorandum at pages 9-10, in which there are conflicting statements suggesting that the claim of Native American membership is a recent phenomenon. *Compare* **Exhibit P** *with* **Exhibits Q, R.**

The plaintiff nonetheless seeks to rely on her marginal lineage. On this issue, the Supreme Court has stated as follows:

> The Court of Appeals was thus quite right in holding that § 1981, "at a minimum," reaches discrimination against an individual "because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens."

Ladd v. Boeing Co., 463 F.Supp.2d 516, 525 (E.D.Penn. 2006) quoting St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987).

The difficulty posed by the plaintiff's situation is that the evidence before this Court conclusively establishes that the plaintiff is not a member of an American Indian tribe. In our opening brief, we state that

> "[h]eritage alone does not satisfy her burden to establish a membership in an American Indian tribe and being a descendent is a far cry from qualifying as a member of a protected class. A contrary conclusion would mean that all persons having ancestors who were American Indians, regardless of attenuation, would be entitled to membership in a protected class."

Although there does not appear to be any case law directly on point addressing protected status that rests in large part

upon identifiable membership such as the American Indian, a plaintiff must do more than show "some" lineage to some protected class *where membership is identifiable*.[4]

Second, the plaintiff makes no effort to submit admissible evidence that her American Indian status was known by any member of the management staff at the time she applied for the various positions. All the plaintiff states is that "I have made my Native American heritage known to my supervision." *Affidavit of Theresa Smith Barrett*, dated October 15, 2007, paragraph 13. The plaintiff fails to state when and how she made this fact known to her supervision, to whom she made it known and other details to give that claim some credibility. In responding to a summary judgment motion, the non-moving party "may not rely on mere conclusory allegations or unsubstantiated speculation, but instead must offer some hard evidence that its version of the events is not wholly fanciful." D'Amico v. City of New York, 132 F.3d 145, 149 (2d Cir. 1998). The plaintiff has failed to provide any evidence other than her unsubstantiated claim that her supervisors were made aware of her racial background.

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[4] Unlike individuals of ethnic or racial lineage (Polish, Italian, Irish, female, African-American, etc.) whose membership is not necessarily a recorded fact, membership in an American Indian tribe is recorded and can be certified by the tribe itself. See **Exhibit U**.

Moreover, this statement is contrary to her deposition testimony in which she admits never telling either Deborah Essler or Lou Speciale that she was a Native American. See *Deposition of Theresa Smith-Barrett*, dated April 10, 2007, pp. 108-119. **(Exhibit B)**.

Third, the plaintiff failed to address in her response that she suffered a 'materially adverse change' in the terms and conditions of employment. Demoret v. Zegarelli, 451 F.3d 140, 151 (2d Cir. 2006). As to each issue not related to the failure to promote,[5] the plaintiff has failed to establish that she was subjected to *adverse actions* which is a requirement of a *prima facie* showing. Thus, each of these claims should be dismissed. See Brown v. Paulson, 2007 WL 1512781 (2d Cir. 2007)(summary order)(citing cases).

Finally, as for the remaining issues involving claim of failure to promote, the plaintiff has failed to show that "the circumstances of the adverse employment decision give rise to an inference of discrimination." Howley v. Town of Stratford, 217 F.3d 141, 150 (2d Cir. 2000). See also Maqsood v. Bell Security, Inc., 2007 WL 2886735 (2d Cir. 2007)(summary order)(plaintiff

[5] EEO #1, Issues 3, 8, 9 and EEO #2, Issues 2,3,5,6,7,8,9,10.

must show that "the purported adverse employment action occurred under circumstances giving rise to an inference of discrimination."). Respecting the gender claims, there is no such inference because the ADO is a woman for all but one claim and two of the positions at issue were filled by women. The race based claims fail because the plaintiff's proof that her supervisors "knew" she was an American Indian is wholly lacking. Thus, the plaintiff failed to meet her burden with respect to the fourth element of a *prima facie* showing. Id.

POINT TWO

The plaintiff has failed to present to this Court admissible evidence which creates a dispute that the actions of either Essler or Speciale were motivated by discriminatory intent. The burden has shifted to the plaintiff to prove, by a preponderance of the evidence, that the reasons articulated by management were not the true reasons, but merely pretexts for discrimination. Burdine, supra, at 257. The plaintiff retains "the ultimate burden of persuasion, and must adduce enough evidence of discrimination so that a rational fact finder can conclude that the adverse job action was more probably than not caused by discrimination." Back v. Hastings On Hudson Union Free School Dist., 365 F.3d 107, 123 (2d Cir. 2004). "It is not enough . .

. to *dis*-believe the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination." Hicks, supra, at 519 (emphasis in original).

Here, the plaintiff fails to allege *any* facts to prove (much less suggest) pretext. Without such evidence at a trial, the plaintiff would fail to convince a jury that the proffered reasons for the several decisions at issue were merely pretextual. Therefore, this case should proceed further.

CONCLUSION

For the reasons stated herein, the complaint in its entirely as against the defendants must be dismissed.

Dated: Rochester, New York, October 29, 2007

Respectfully submitted,

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