UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

x

KALIOPE KASIOTAKIS,

Plaintiff,

-against-

No. 14 Civ. 462 (CM)

MACY'S RETAIL HOLDINGS, INC.,
d/b/a/ MACY'S

Defendants.

x

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT

McMahon, J.:

In June 1998, Kaliope Kasiotakis ("Kasiotakis") began working at Macy's as a Beauty Advisor at its Herald Square store in New York City. In 2002, Kasiotakis resigned for personal reasons, but returned six months later, in 2003, to work as a Beauty Advisor in the same store. Amended Comp. ¶ 10. She was eventually promoted to Operations Manager for Estee Lauder, where she worked until her termination in 2013. Def's 56.1 Stmt. ¶ 2. Kasiotakis' duties included, *inter alia*, maintaining the stock and cleanliness of the Estee Lauder counter, managing inventory, and making testers; she did not sell product. Pltf.'s Reply to 56.1 Stmt. ¶ 3.

Plaintiff was fired from her job after being accused of violating store policy against providing other store employees with promotional items, and for failing to cooperate with an investigation into her conduct. She insists that she was fired because she was the only employee of Greek-American background in her area, but offers not a scintilla of evidence to indicate that anything other than her giving a Lancome promotional item to another Estee Lauder sales associate -- which indisputably happened – either occasioned her termination or factored into the

decision to fire her. Her effort to construct a "for want of a nail, the kingdom was lost" argument, in order to link a stray remark by a fellow employee to a decision that in no way involved the person who made the remark fails as a matter of fact and law. And her insistence that Macy's misinterpreted the incident that occasioned her downfall may or may not be true, but that is of no moment, since she offers no evidence that any mistake was a pretext for discrimination of any sort.

The motion for summary judgment is granted and the complaint dismissed.

Statement of Facts

The following facts, viewed most favorably to the non-moving party (Plaintiff), are undisputed unless otherwise noted.

As recited above, Plaintiff worked at Macy's Herald Square from 1998 until 2002, and again from 2003 until 2013. There is no indication in the evidence that she was a problem employee.

An individual named Yelitza Jimenez ("Jimenez") became the Training Manager for Estee Lauder, the cosmetic brand for which Plaintiff was an Operations Manager, sometime in the fall of 2011. Def's 56.1 Stmt. ¶ 4; Ganz Cert. Exhibit A 162:16-24. Kasiotakis was employed directly by Macy's, and reported in-house to both Jimenez (also employed directly by Macy's) and Brandy Cusimano ("Cusimano"), the Macy's Department Manager for Fragrances and Cosmetics, as well as executives of Estee Lauder (which is not a division of Macy's, but an independent company). *Id.* at 32:21-24; 43:11-14.

Comments About Plaintiff's Ethnicity After Jimenez Arrives .

Kasiotakis alleges that Jimenez did not like her because Plaintiff is Greek. Her evidence for this assertion is the following:

1. A co-worker, Elena Rechkina ("Rechkina"), told Kasiotakis that yet another co-worker (whose name no one knows) told Rechkina that Jimenez told her that Jimenez "has a list of who she wants to get [...] rid of." Kasiotakis is "on that list." *Id.* at 116:11-23. Kasiotakis also says that Rechkina told her that the same un-named co-worker told Rechkina that Jimenez calls Kasiotakis "Griega," which is the Spanish word for "Greek." *Id.* at 118:21-119:3. In addition to the fact that this is inadmissible triple hearsay (Jimenez told an unnamed person, who in turn told Rechkina, who in turn told Plaintiff), Rechkina could not tell Kasiotakis why Jimenez would have included her on such a list, and Plaintiff did not know who else was on the list, or whether they were Greek or not Greek. *Id.* at 116:12-117:6.

2. Another co-worker, Jessica, told her that Jimenez doesn't like "other races" and had heard her once talk in a derogatory manner about Chinese (but not Greek) people. *Id.* at 124:5-14.

3. In November 2012, Kasiotakis claims that Mary Guzman ("Guzman"), yet another beauty advisor, told Kasiotakis that Guzman overheard Jimenez speaking in Spanish with Melissa Fassett ("Fassett"), Macy's Lancôme Business Manager. Guzman allegedly told Plaintiff that Jimenez said, "I want to get that Greek." Def.'s 56.1 Stmt. ¶ 23; Mirer Cert. Exhibit 1, 101:20-102:22; 104:19-25; 105:16-20. In addition to the fact that this, too, is multiple hearsay (double rather than triple), Fassett, who was deposed, testified that she does not speak or understand Spanish, and that she has never heard Jimenez speak Spanish. Ganz Cert. Exhibit C, 15:2-9; 17:12-18:6. Fassett also testified that she has never had a conversation with Jimenez

about Kasiotakis, in any language, *Id.* at 19:10-15, and Jimenez also claims that the alleged conversation never took place. Ganz Cert. Exhibit B, 94:8-18. Guzman did not testify, so the hearsay problem remains.

4. When Kasiotakis met Albania Gonzalez ("Gonzalez"), Head of Macy's Human Resources for Cosmetics & Fragrance, in 2012, Gonzalez appeared to have heard of her; she said, "Oh, this is Kaliope" in a disdainful tone of voice, one that suggested that Gonzalez was "kind of like looking down on me." Mirer Cert. Exhibit 1, 61:10-13. *Id.* at 64:12-18.

Significantly, Kasiotakis herself never heard Jimenez, or anyone else, make a negative comment about her ethnicity. Def.'s 56.1 Stmt. ¶ 24. Kasiotakis also testified that Gonzalez never said or did anything to make Kasiotakis think that she (Gonzalez) had a problem with people of Greek ethnicity. Def.'s 56.1 Stmt. ¶ 28.

Jimenez Takes Plaintiff to Cusimano's Office For Counseling

On occasion, Jimenez would bring an associate into Cusimano's office to discuss a behavior she had observed that she believed needed to be corrected. Pltf.'s Reply to 56.1 Stmt. ¶ 6. Jimenez stated that the purpose of these meetings was not disciplinary. Def.'s 56.1 Stmt. ¶ 6.

Kasiotakis recalled three such meetings over the summer of 2012. *Id.* at ¶ 7.

On the first occasion, Jimenez brought Kasiotakis to Cusimano's office to discuss excess stock/boxes at the Estee Lauder counter. *Id.* at ¶ 8. Kasiotakis recalls explaining to Cusimano that there were a large number of boxes on the counter because she had stocked the counter before the stock floor closed for the evening. Cusimano, apparently finding nothing wrong with this, gave Plaintiff a "high five" and told her that she was "doing a great job." *Id.* There is no written record of this visit.

Two to three weeks later, Jimenez again raised with Cusimano her concern about too many product boxes "laying around," this time at the Estee Lauder counter area on the third floor. Jimenez believed that this posed a hazard. *Id.* at ¶ 9. Kasiotakis agrees that Cusimano and Jimenez have, as employees with supervisory roles, the right to address any concerns with an employee's actions or how the department looks. *Id.* at ¶ 11. Nonetheless, she responded to the news that she needed to report to Cusimano's office again by saying, "We're doing this again? It looks like you guys are gonna, you know, interrogate – interrogate me and make me feel like I'm not doing my job and I should bring a union rep then. Here you're bringing me here again for stock to be put away on the third floor." Pltf.'s Reply to 56.1 Stmt. ¶ 9. Kasiotakis offered Cusimano an explanation for the presence of the boxes; new inventory had just arrived, which she had not yet gotten around to putting away. According to Plaintiff, Cusimano and Jimenez responded, "Oh, okay, everything is clear." Def.'s 56.1 Stmt. ¶ 10. Again, there was no written record of this visit.

Approximately one week later, Jimenez brought Kasiotakis to Cusimano's office a third time, this time to address a report from an Estee Lauder counter manager who claimed to have seen Kasiotakis give two bags containing "gift with purchase (GWP)" (bags with product or product samples that are given as bonuses or rewards to customers who spend some target amount of money on Estee Lauder products) to a known diverter (i.e., someone who purchases products in large quantities in order to sell them elsewhere)[1]. *Id.* at ¶¶ 13, 14. Macy's has a policy that governs distribution of GWP, which is discussed in greater detail below; unauthorized distribution of gift can result in discipline and/or termination. *Id.* at ¶ 29, ¶ 33.

[1] Def.'s 56.1 Stmt. ¶ 14.

Kasiotakis acknowledged that if indeed she had given GWP merchandise to a diverter, this would have constituted a violation of Macy's policy, which could have resulted in her termination. *Id.* at ¶ 15. However, Kasiotakis explained to Cusimano and Jimenez that the bags in question were not GWP, but rather products that had been "pre-sold" to the customer, who later picked them up upon presentation of a valid receipt. Pltf.'s Reply to 56.1 Stmt. ¶ 13. Kasiotakis noted that her job required her to hand over product upon the presentation of such a pre-paid receipt, and indicated that she had no idea that the customer was known to be a diverter; only later was she shown information suggesting this. *Id.*; Miren Cert. Exhibit 1, 156:25-157:3. Def.'s 56.1 Stmt. ¶ 15.

By Kasiotakis's own admission, there was nothing inappropriate in Cusimano's and Jimenez's questioning her about what had happened. *Id.* at ¶16. Furthermore, no formal disciplinary action was taken against her. *Id.* at ¶ 18. However, Jimenez documented the incident on a Macy's "Record of Contact/Disciplinary Action" form. Mirer Cert. Exhibit 6. These forms are used to record associate-manager contact or "coaching," and are a "memorialization that a conversation took place." Mirer Cert. Exhibit 4, 53:20 - 54:13. They do not constitute discipline. *Id.*

Nonetheless, these encounters felt hostile to Kasiotakis; she characterizes the occasions on which she was brought to Cusimano's office as evidence that Jimenez did not like her. Mirer Cert. Exhibit 1, 71:9-13; 73:6-18. She felt that she was being called into the office simply for doing her job, and pointed out that she had never been brought to Cusimano's office until Jimenez began working at the Estee Lauder counter. *Id.* at 161:21-24.

Jimenez placed two other notes of "employee contacts" in Plaintiff's file, neither of which involved a visit to Cusimano's office. *See* Mirer Cert. Ex. 6. The second documents an

instance on June 23, 2012 when Jimenez questioned Kasiotakis about the source of free products that she was making available to her team. *Id.* Kasiotakis stated that she obtained the products from the Estee Lauder representative; Jimenez noted that she [Jimenez] had received a stock delivery of the product in question earlier in the week. *Id.* (Macy's policy stipulates that *gratis* products must come from a company representative rather than store inventory. Ganz Cert. Exhibit E, 69.)

On August 28, 2012 Jimenez placed a third note in Kasiotakis's file documenting her observation that Kasiotakis had "damaged out" a product and placed it in an area where the walked-in incentive products were kept. *Id.* According to Jimenez's note, another employee, Yosaira Hernandez ("Hernandez"), gave the damaged product out to known diverters. *Id.*

Jimenez, as will be seen, played no role in Plaintiff's termination; she did not even know that it was taking place.

Macy's Gift with Purchase ("GWP") Policy

Macy's GWP Policy, which is found in its 2007 Employee Handbook, provides that "At no time is gift merchandise given to any customer or associate without satisfying the minimum required purchase……These items cannot be given to any associate, customer or associate representative without proper purchase." Ganz Cert. Ex. E, 69; Def.'s 56.1 Stmt. ¶ 29. Additionally, gift merchandise can only be given on purchases from the line supplying gift with purchase or purchase with purchase; which means, for example, that Estee Lauder GWP cannot be given to a customer who purchases Lancôme or L'Oréal or MAC products at Macy's. Def. Rule 56.1 Stmt. ¶ 29.

Kasiotakis understood that Macy's GWP policy required the customer to make a qualifying purchase from the requisite vendor. Ganz Cert. Exhibit A, 19:11-15; 169:22-170:20;

498:9-13. She also was aware that gifts involved in GWP promotions could not be given to customers before the date of the particular promotion for which those gifts were authorized. Def.'s 56.1 Stmt. ¶ 31. Kasiotakis further understood that a customer could only get a gift from a particular vendor when that customer made an eligible purchase of *that vendor's product*. *Id.* at ¶ 32. Finally, she understood that if an employee gave a GWP to an associate or a customer who had not made the qualifying purchase, it was a violation of policy, which could result in termination. *Id.* at ¶ 33.

There is evidence in the record that the policy was not always followed. Lina Parisi ("Parisi"), another beauty advisor for Estee Lauder, stated in her deposition that it was common practice of giving away gifts or samples to loyal customers, even without a purchase and sometimes before the date of a particular promotion. Pltf.'s Response to 56.1 Stmt. ¶ 33. Be that as it may, both Mark Jimenez (Macy's Loss Prevention Manager) and Rose Ashmore (Director of Labor Relations) testified that many Macy's employees have been terminated for failing to comply with the Gift With Purchase policy. Ganz Cert. Exhibit B, 20:6-13; 20:20-21:5; Exhibit L, 49:14-50:6. That evidence is uncontradicted.

The January 27, 2013 Incident

The incident that led to Kasiotakis's termination occurred on the afternoon of Sunday, January 27, 2013.

Kasiotakis testified that she went to the stock area on the tenth floor to get samples (small packaged amounts of product) so the sales associates could build their sales. Mirer Cert. Exhibit 1, 199:10-18. On her way back to the main cosmetics floor (which is the ground floor on the Broadway side of the Herald Square store), she saw 3 Lancôme cosmetics bags and 2 Lancôme samples on the floor by the elevators. *Id.* at 198:24-199:24. She placed the Lancôme items on top

of the Estee Lauder samples that she was transporting in a Macy's clear security bag. *Id.* at 199:20-200:2. She stopped at the third floor Estee Lauder counter to store some of the items she was carrying before bringing the rest to the main counter. *Id.* at 202:13-203:6.

At the third-floor Estee Lauder counter, Kasiotakis saw a co-worker, Parisi. Although they worked for Estee Lauder, she knew that Parisi liked Lancôme products, so she called her over saying, "Hey, this is the upcoming gift," *Id.* at 204:4-9. Parisi took the bag from Kasiotakis, examined it, and then walked back to the counter to help a customer. She placed the Lancôme bag by the register, where she also kept empty Estee Lauder bags. *Id.* at 205:12-16.

At this time, Fassett, the Lancôme business manager, was coming down the escalator. She saw Kasiotakis hand the bag to Parisi. Ganz Cert. Exhibit C, 64:16-65:2. Fassett approached Kasiotakis and asked her why she had Lancôme bags and samples in her possession. *Id.* at 66:25-67:5. All this is undisputed.

From this point, stories diverge. According to Plaintiff, she told Fassett that she found the Lancôme merchandise on the tenth floor by the elevators, and returned the remaining samples that she had found. *Id.* at 205:18-206:8. Fassett says that Kasiotakis told her that a stock associate had given the Lancôme items to her, but that Kasiotakis had refused to identify the stock associate by name. Ganz Cert. Exhibit C, 89:20-90:2.

Fassett also testified that she saw Parisi give the bag to a customer who purchased an Estee Lauder product, as an incentive for opening a Macy's credit card account. *Id.* at 65:4-6; 86:12-17. But Kasiotakis saw no such thing; she testified that all she saw was Parisi placing the Lancôme bag next to the register. Mirer Cert. Exhibit 1, 207:21-208:9. Other evidence suggests that Fassett's recollection is wrong: A contemporaneous surveillance video shows Parisi placing the bag next to the register, but does not show Parisi handing it to a customer. Mirer Cert.,

Exhibit 9. A register tape also shows Parisi processing a return at that time; Macy's has no record of Parisi's opening a new credit card account for a customer until later that afternoon. Mirer Cert., Exhibit 10.

However, whether Fassett saw it or not, it is undisputed that Parisi gave the Lancôme bag to a customer who was opening a new credit card account; the customer had admired the bag Ganz Cert. Exhibit A, 297:5-14; Exhibit F, 11:14-12:6. It is also undisputed that no one ever asked Parisi to return the Lancôme bag. Fassett testified that she did not ask Parisi to return the bag because Parisi had already given it to a customer. Pltf. Resp. to 56.1 Stmt. ¶ 40. Kasiotakis simply never asked Parisi to return the Lancôme bag to her or even ask Parisi what happened to the bag that Kasiotakis had given her. Ganz Cert. Exhibit F, 80:12-18; 81:5-17.

Fassett testified that she immediately returned to the Lancôme counter and called security to report the violation of store policy. MF 79:7-19. In addition to calling security, Fassett also emailed Carol Whitman ("Whitman"), store manager of the Herald Square Macy's, an account of what she says that she observed. Ganz Cert. Exhibit C, 84:17-19; 96:2-10; 97:9-11; Exhibit G.

Again, Fassett's version of events was contradicted, this time by Macy's Loss Prevention Manager Mark Jimenez, who recalls that the security person reported taking Fassett's call in the evening, while the incident took place in the afternoon. Def. 56.1 Stmt. ¶ 69.

Fassett also states that she spoke to her stock associates and explained that under no circumstances were they to give Lancôme products to another brand. MF 90:9-14; 91:6-14; 92:14-93; Ganz Cert., Exhibit G.

Despite the inconsistencies between Fassett's version of events and the recollections of others, at least the following facts are undisputed: Plaintiff somehow obtained Lancôme samples and cosmetics bags and brought them to the Estee Lauder counter; she gave the Lancôme

products to Parisi, who liked Lancôme products; Parisi left the bag where it was visible to customers; and Parisi eventually gave a Lancôme bag to an Estee Lauder customer who had admired it. That there were violations of Macy's GWP Policy by both Plaintiff (who gave the products to Parisi) and Parisi is, therefore, undisputed as well.

Plaintiff is Suspended From Her Job

The next day, Fassett went to Gonzalez's office and relayed her version of the events of the previous day. Def.'s 56.1 Stmt. ¶ 46. Later in the day, Loss Prevention Manager Mark Jimenez came to Gonzalez's office and discussed what had happened. *Id.* Mark Jimenez and Gonzalez viewed the security video, which confirmed that Kasiotakis had handed the Lancôme bag to Parisi. *Id.* at ¶ 48. Plaintiff argues that Gonzalez could not have watched the video because it does not confirm Fassett's account of events; Gonzalez testified that she saw Parisi hand the bag to the customer in the video, whereas the video does not actually show this. Pltf.'s Resp. to 56.1 Stmt. ¶ 50. The point is immaterial to the outcome of the motion.

Gonzalez then spoke to Ashmore, Director of Labor Relations, who told Gonzalez to schedule a meeting with Kasiotakis. Ganz Cert. Exhibit D, 60:5-7; Certification of Rose Ashmore in Support of the Defendant's Motion for Summary Judgment ("Ashmore Cert."), ¶¶ 3,4.

Later that afternoon, Mark Jimenez asked Kasiotakis to accompany him and another Loss Prevention officer to Gonzalez's office. Def.'s 56.1 Stmt. ¶ 50. While in the office, Gonzalez told Kasiotakis that it had come to her attention that Kasiotakis had Lancôme bags and samples in her possession; she asked Kasiotakis who gave them to her. *Id.* at 51. Kasiotakis does not deny that she said, "I don't know what you are talking about," but claims this is simply because no one had "given" her the bags; she had found them. Pltf.'s Reply to 56.1 Stmt. ¶ 51; Mirer Cert.

Exhibit 1, 187:10-18. Kasiotakis knew that if she gave untruthful responses in a Loss Prevention investigation she could be terminated. *Id.* at ¶ 53.

According to Kasiotakis, she complained that she was being interrogated without a union representative's being present, she was not asked any further questions of. Mirer Cert. Exhibit 1, 188:3-18. Gonzalez testified that she asked Plaintiff several other questions (as to all of which Plaintiff denied knowing anything), and also testified that Plaintiff never asked for a union representative to be present. Ganz Cert. Exhibit D, 63:3-14; 64:9-11.

Kasiotakis testified that the meeting then ended immediately in her suspension. *Id.* at 188:7-14. Gonzalez agreed that she suspended Kasiotakis at the conclusion of the meeting, asked for her telephone number, and told her there would be further investigation. Def.'s 56.1 Stmt. ¶ 52.

Kasiotakis Goes to Her Union Representative

After her suspension, Kasiotakis met in person with Felix Ocasio ("Ocasio"), the recorder for Local 1-S Union (the "Union") that represents Macy's employees in Herald Square. *Id.* at ¶ 54. Ocasio helps process grievances for those employees. *Id.* At his deposition Ocasio testified that the Union tells its members not to sign anything from security, and not to reveal anything or volunteer any information if they are being interrogated. Mirer Cert. Exhibit 16, 75:25-76:5; 76:6-8; 78:11-14.

Kasiotakis told him that she had been suspended. *Id.* She also told Ocasio that a manager had asked her why she was in possession of Lancôme bags and samples that did not belong to her, and that the manager had asked her where she got these items. *Id.* at ¶ 55. Kasiotakis told Ocasio that she told the manager that she (Kasiotakis) did not know what the manager was

talking about. *Id.* at ¶56. She claims that she told Ocasio the remainder of her side of the story. Pltf.'s Resp. to 56.1 Stmt. ¶ 56.

Ocasio recalls the conversation very differently; he testified that Kasiotakis denied that she ever had Lancôme bags. Ganz Cert. Exhibit L, 27:16-22.

Ocasio also testified that there was never any mention of Kasiotakis's Greek heritage, or any reference to alleged discrimination by Jimenez, Fassett or Gonzalez, in his conversation with Plaintiff. *Id.* at 40:4-44:13.

Kasiotakis is Fired

On January 29, 2013, Parisi called Kasiotakis to tell her that she, too, had been suspended. Def.'s 56.1 Stmt. ¶ 61. During that call, Parisi told Kasiotakis what Parisi had said to Macy's security: Kasiotakis had shown her a Lancôme bag, and she (Parisi) had given that bag to a customer who had opened an instant credit account and who had asked for the bag. *Id.* According to Kasiotakis, Parisi said that she was uncomfortable signing a statement that called the cosmetics bag a "Gift;" she had described it as an "empty bag." Pltf.'s Resp. to 56.1 Stmt. ¶ 61.

Mark Jimenez investigated the incident. He spoke with Fassett, stock personnel, Kasiotakis, and Parisi. Def.'s Rule 56.1 Stmt. ¶ 62. He also viewed the videotape, checked register tape on the day in question, and inspected the Lancôme bags that Kasiotakis had returned to Fassett. *Id.* Kasiotakis contends that Mark Jimenez could not have spoken to any Lancôme stock personnel because there were no stock personnel present that day, Pl Resp. to 56.1 Stmt. ¶ 62, but her supposition about what Mark Jimenez did, or to whom he spoke, is just that – conjecture – and not evidence.

Gonzalez shared Kasiotakis's employment file (which contained the notes from Ms. Jimenez) with Rose Ashmore, Director of Labor Relations, and showed her the video. Def.'s 56.1 Stmt. ¶ 63. After reviewing all the evidence, Ashmore made the decision to fire Plaintiff for failing to cooperate in the company's investigation and for violating the GWP policy. Def.'s 56.1 Stmt. ¶ 64; Ashmore Cert. ¶ 8. Ashmore, testified that nothing else, including specifically YelitzaJimenez's notes in Plaintiff's file, played any part in her decision to end Kasiotakis's employment. Supp. Cert. of Rose Ashmore, ¶ 3.

On February 14, 2013, Gonzalez met with Kasiotakis and advised her that her employment was being terminated for two reasons: she had violated the company's Gift With Purchase Policy and then failed to cooperate with the investigation. Def.'s 56.1 Stmt. ¶ 65.

PROCEDURAL HISTORY

Kasiotakis filed her complaint with the EEOC and received permission to sue on October 22, 2013. She brought timely suit on January 17, 2014 against Macy's alleging violation of the NYS Human Rights Law, N.Y. Exec. Law § 290 *et seq*. After mediation failed and after obtaining counsel, Kasiotakis filed an amended complaint on July 18, 2014 further alleging national origin discrimination in violation of 42 U.S.C. § 1981, 42 U.S.C. § 2000e *et seq.*, New York Exec. § 290 *et seq.*, and New York Administrative Code §§ 8-101 *et seq.*

Macy's filed a motion for summary judgment on April 27, 2015. Docket 14-CV-462, # 51. It subsequently moved to strike the affidavits of two witnesses, Emma Sulistiyo and Jaron Newton, which were included with Plaintiff's opposition papers. Seven weeks after discovery ended on March 6, 2015, Kasiotakis emailed and identified these two additional witnesses. Prior to the discovery cutoff, Kasiotakis failed to amend her interrogatory answer to identify these

individuals as persons with relevant knowledge. Kasiotakis provided Macy's with their affidavits as part of her opposition to Macy's motion for summary judgment.

Federal Rule of Civil Procedure 37(c)(1) provides that a party's failure to identify a witness as required by Rule 26(a) means that party may not use that witness to supply evidence on a motion unless the failure was "substantially justified." Although Plaintiff has not provided evidence of "substantial justification," the testimony of these two witnesses is completely immaterial to the outcome of the motion. Therefore, the motion to strike their testimony is denied.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party moving for summary judgment is initially responsible for demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Then the onus shifts to the party resisting summary judgment to present evidence sufficient to satisfy every element of the claim. The non-moving party is required to "go beyond the pleadings" and "designate specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quotation marks omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). But in assessing the record to determine whether there is a genuine issue to be tried as to any material fact, the court is required to resolve any ambiguities and draw all permissible inferences in favor of the party against whom summary judgment is sought. *Id.* at 255.

"[The Second Circuit has] repeatedly expressed the need for caution about granting summary judgment to an employer in a discrimination case where . . . the merits turn on a dispute as to the employer's intent." *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008)

(citing *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997); *see also Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994); *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985)). Where an employer has acted with discriminatory intent, direct evidence of that intent will only rarely be available, so that "affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Gallo*, 22 F.3d at 1224.

Even in the discrimination context, however, a plaintiff must provide more than conclusory allegations to resist a motion for summary judgment. *See Meiri*, 759 F.2d at 998. "Summary judgment remains available for the dismissal of claims in cases lacking genuine issues of material fact." *McLee v. Chrysler Corp.*, 109 F.3d 130, 135 (2d Cir. 1997).

II. The *McDonnell Douglass* Burden-Shifting Framework

Discrimination claims brought under both 42 U.S.C. 1981 and Title VII are analyzed under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). "Although intermediate evidentiary burdens shift back and forth under this framework, [t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000) (internal quotations removed). Indeed, the question for the court is whether the plaintiff's evidence, taken as a whole, establishes a substantial likelihood that the employer intentionally discriminated against the plaintiff. *Id.* at 143.

On a motion for summary judgment, if the defendant produces evidence – even *de minimus* evidence – that its adverse actions toward plaintiff occurred for some legitimate, nondiscriminatory reason, the "*McDonnell Douglas* framework – with its presumptions and

burdens – disappear[s] and the sole remaining issue [is] discrimination *vel non*." *Reeves*, 530 U.S. at 143 (internal citations and quotation marks removed). In order to survive summary judgment, the plaintiff "must then come forward with evidence that the defendant's proffered, non-discriminatory reason is a mere pretext for actual discrimination." *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000). If the evidence is "insufficient to permit a reasonable trier of fact to find that [ ] discrimination was the reason for" the relevant adverse action, summary judgment is appropriate. *James v. N.Y. Racing Ass'n*, 233 F.3d 149, 156-57 (2d Cir. 2000).

A. Plaintiff's Prima Facie Case

"To state a prima facie case of discriminatory discharge under Title VII and 42 U.S.C. 1891, a plaintiff must allege that: (1) [s]he falls within a protected group; (2) [s]he held a position for which [s]he was qualified; (3) [s]he was discharged; and (4) the discharge occurred under circumstances giving rise to an inference of discrimination." *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 229 (2d Cir. 2014) (internal quotations omitted). Macy's concedes that Plaintiff can establish prongs one through three. By virtue of her being Greek, Plaintiff is a member of a protected class. In addition, she had basic eligibility for the position she held and she was discharged. However, Macy's argues that Plaintiff cannot establish circumstances of her discharge that give rise to an inference of discrimination.

The fourth element is a flexible one that can be satisfied differently in differing factual scenarios. *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 91 (2d Cir. 1996). This element could be satisfied by a showing that plaintiff's position remained open after she was discharged or that she was replaced by someone outside her protected class. *Trashis v. Riese Org.*, 211 F.3d 30, 36 (2d Cir. 2000), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). A plaintiff may also establish an inference of discrimination by

demonstrating that he was treated differently from other similarly-situated individuals. *Abdu-Brisson v. Delta Air Lines*, 239 F.3d 456, 468 (2d Cir. 2000). In this scenario, the Second Circuit requires a showing that the more favorably treated employees were "similarly situated" to the plaintiff in "all material respects." *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997). Lastly, the Plaintiff may proffer evidence of "actions or remarks made by decisionmakers that could be viewed as reflecting a discriminatory animus." *Chertkova*, 92 F.3d at 91 (citation omitted).

Kasiotakis has produced no evidence regarding who, if anyone, replaced her in her position. She argues that Macy's is in the best position to conclusively establish the current state of her position, but it is Kasiotakis's burden to offer evidence in support of all elements of her prima facie case, and she has not done so. *See Brown v. Northrop Grumman Corp.*, No. 12-CV-1488, 2014 WL 4175795 at *8 (E.D.N.Y. Aug. 19, 2014) (plaintiff failed to provide competent evidence that employer replaced her with male worker); *Olle v. Columbia Univ.*, 332 F.Supp.2d 599, 616 (S.D.N.Y. 2004) (no *prima facie* case made out where plaintiff could not substantiate she was replaced by male employee), *reconsid. denied*, 2004 WL 2580684 (S.D.N.Y. Nov. 15, 2004), *aff'd*, 136 F. App'x 383 (2d Cir. 2005).

Kasiotakis does point to a fact that, in her view, shows that she was treated less favorably than a "similarly situated" employee, Josaira Hernandez. Kasiotakis contrasts the "employee contact" that was placed in her file for damaging out product, with the verbal counseling given to Hernandez, who had taken the product and given it to a diverter. *See* Pl. Resp. 56.1 Stmt. ¶ 19. However, Plaintiff does not in any way establish that Hernandez was "similarly situated" to her in "all material respects." Shumway, 118 F.3d at 64. Nor does she establish that counseling is less punitive than an "employee contact," In fact, all the competent evidence establishes that

counseling is more punitive than "employee contact" – indeed, that "employee contact" is not punitive at all!

Kasiotakis's "strongest inference" of discrimination is premised on alleged statements made by Jimenez that she wanted to "Get that Greek." Macy's argues that these statements are inadmissible hearsay, or in any case stray remarks not uttered by someone involved in the decision making process.

Simply in order to get to the third stage of the *McDonnell Douglas* analysis I will ignore the fact that her testimony qualifies as triple hearsay and would never be admitted at trial. I turn to Macy's argument that this statement, if made, is no more than a "stray remark" made by a non-decisionmaker. Macy's is correct.

To determine whether a remark evidences an intent to discriminate, courts in the Second Circuit analyze four factors: (1) who made the remark, *i.e.*, a decisionmaker, a supervisor, or a low-level coworker; (2) when the remark was made in relation to the employment decision at issue; (3) the content of the remark, *i.e.*, whether a reasonable juror could view the remark as discriminatory; and (4) the context in which the remark was make, *i.e.*, whether it was related to the decisionaking process. *St. Louis v. New York City Health & Hosp. Corp.*, 682 F.Supp.2d 216, 230 (E.D.N.Y. 2010) (citation omitted); *Seltzer v. Dresdner Kleinword Wasserstein, Inc.*, 356 F.Supp.2d 288, 295 (S.D.N.Y. 2005).

Applying this analysis here, the remark qualifies as stray. It was made by Jimenez, who indisputably had nothing to do with the decision to fire Plaintiff. Remarks made by employees who are not decision makers are insufficient to establish an inference that an adverse employment action was motivated by discriminatory animus. *See Dixon v. International Fed'n of Accountants*, 416 Fed.Appx. 107, 110 (2d Cir. 2011); *Cai v. Wyeth Pharms., Inc.*, No. 09 Civ.

5333, 2012 WL 933668, at *7 (S.D.N.Y. Mar. 19, 2012); *Gorley v. Metro-North Commuter R.R.*, No. 99 Civ. 3240, 2000 WL 1876909, at *18 (S.D.N.Y. Dec. 22, 2000).

Moving on to the second factor, the remark was purportedly uttered months before the incident that led to Kasiotakis's discharge. "Stray remarks by non-decision-makers or by decision-makers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of the decision." *See Campbell v. Alliance Nat'l Inc.*, 107 F.Supp.2d 234, 247 (S.D.N.Y 2000) (citation and internal quotation marks omitted).

Finally, the comment had no relation to the decision making process; there is absolutely no evidence that Jimenez had any involvement in the investigation into the incident that led to Plaintiff's termination. *See Hawana v. City of N.Y.*, 230 F.Supp.2d 518, 527 (S.D.N.Y. 2002); *Chuan-Guo Xiao v. Continuum Health Partners, Inc.*, No. 01 CIV. 8556(HB), 2002 WL 1586954, at *5 (S.D.N.Y. July 17, 2002).

Plaintiff apparently realizes that Yelitza Jiminez's remark alone is insufficient, even at the prima facie case stage, to establish circumstances giving rise to an inference of discriminatory intent on the part of the people who actually made the decision to fire her. She tries to tie the remark to the incident that led to her termination by invoking the "cat's paw" theory announced by the Supreme Court in *Staub v. Proctor Hosp.*, 131 S.Ct. 1186 (2011). The effort fails.

In *Staub*, the Supreme Court considered "the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision." *Id.* at 1189. In a "cat's paw" case, a plaintiff typically seeks to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision. The Supreme

Court held that an employer may be liable for a supervisor's act that is (1) motivated by animus; (2) intended to cause an adverse employment action; and (3) a proximate cause of the ultimate employment action. *Id.* at 1194.

Plaintiff sees Yelitza Jimenez as the supervisor with the discriminatory animus in this case. According to her theory, Jimenez – the person who placed the employee "contact" memos in her file -- made the "Get that Greek" statement to her friend and fellow supervisor, Fassett. By hearing the remark without protest, Fassett allegedly became cloaked with Jimenez's anti-Greek animus and acted in furtherance of it when she made the made false statements in the investigation that led to Kasiotakis's discharge.

There are several obvious problems with this Rube Goldberg argument.

First, under a cat's paw theory, the supervisor in Jimenez's position must have *intended* for the adverse action to result, and Plaintiff has produced no evidence that Jimenez intended to cause her to be fired.

Second, Plaintiff would have us believe that Fassett's "lack of protest" in response to the remark meant that Fassett "accepted the animus and acted in service of such when she took action against Kasiotakis . . ." Pl. Br. at 3, 14-15. Of course, here the problem with Plaintiff's triple hearsay becomes even more apparent; Plaintiff never heard whatever Jininez may have said, let alone saw Fassett's reaction to it (assuming any such statement was ever made). So there is literally no admissible evidence to undergird her assertion that Fassett did not react negatively to whatever Jimenez may have said. However, Plaintiff's argument suffers from a logical fallacy as well: were this court to accept her premise, then anyone within earshot of a person who utters a discriminatory remark who does not protest could be assumed to harbor discriminatory attitudes – which may not be true at all.

Third, under a "cat's paw" theory, an employee may be liable when a final decision maker "relies *entirely* on an improperly motivated recommendation from a subordinate….. because the subordinate, although not formally delegated the power to make decisions, acts as the [defendant's] agent." *Nagle v. Marron*, 663 F.3d 100, 117 (2d Cir. 2011) (emphasis added); *see also Kregler v. City of New York*, 987 F.Supp.2d 357, 365 (S.D.N.Y. 2013) ("In a cat's paw scenario, a non-decision maker with a discriminatory motive dupes an innocent decision maker into taking action against the plaintiff.") (citation and internal quotation marks omitted). Here, there is not the slightest bit of evidence that Yelitza Jimenez "duped" Fassett into reporting Plaintiff to Ashmore and Gonzalez, let alone that she "duped" Ashmore into making the decision to terminate. Jimenez was not involved in the incident that led to Kasiotakis's termination. As far as this court is aware, she was not apprised of what happened on January 27, 2013 until this lawsuit commenced. No evidence in the record suggests that Fassett spoke to Yelitza Himinez between the time she observed the incident at the cosmetics counter and the time she reported ot to Gonzalez. There is also no evidence that Jiminez was aware that Kasiotakis was under investigation. Although Kasiotakis points to the fact that Jimenez had previously "papered" her file by calling her into Cusimano's office on three occasions, both Macy's policy and Ashmore's unrefuted testimony confirm that these records of employee contact were not a form of discipline and did not weigh into the decision to terminate Kasiotakis's employment.

In short, "cat's paw" should be limited to its facts – an employee's hostile supervisor goes to an unwary decision maker and persuades the decision maker to take action against the employee for a reason that turns out to be false – because the real reason is the hostile supervisor's animus. No such facts are present here.

Thus, Macy's is entitled to summary judgment dismissing the complaint because Plaintiff has failed even to make out a prima facie case of discrimination.

B. Macy's Must Articulate a Legitimate, Non-Discriminatory Reason for Discharging Plaintiff

Assuming arguendo that Plaintiff had made out a prima facie case (she has not) Macy's easily satisfies its burden in the second step of the *McDonnell Douglas* framework: it has proffered a legitimate, nondiscriminatory reason why it terminated Kasiotakis's employment. She violated the company's GWP policy by giving Lancôme GWP to an Estee Lauder sales associate, was less than truthful about the incident, and failed to cooperate in a company investigation. *See* Def.'s Rule 56.1 Statement, ¶ 64. The Second Circuit has recognized that both violating company policy and failing to cooperate in a company investigation are legitimate, non-discriminatory reasons for discharging an employee. *See Shumway*, 118 F.3d at 65 (violation of company policy); *Brown v. The Pension Boards*, 488 F.Supp.2d 395, 406 (S.D.N.Y. 2007) ("Certainly, an employer is entitled to discharge an employee who fails to follow company rules.") (internal quotation marks omitted); *Lattimore v. Initial Sec., Inc.*, No. 03 Civ. 7579, 2005 WL 1870812 (S.D.N.Y. Aug. 3, 2005) ("refusing to cooperate with an internal investigation constitute[s] legitimate grounds for discharge.").

C. Plaintiff Must Prove Pretext

Were we to reach the third McDonnell-Douglas stage, it is clear that Plaintiff has failed to establish pretext.

A plaintiff confronted with the articulation of a legitimate, non-discriminatory reason for her termination can establish pretext by showing that the defendant's proffered reasons "were not the only reasons and that the prohibited factor was at least one of the motivating factors." *Holcomb*, 521 F.3d at 138. In opposing summary judgment, "the plaintiff must establish a

genuine issue of material fact either through direct, statistical or circumstantial evidence as to whether the employer's reason for discharging her is false and as to whether it is more likely that a discriminatory reason motivated the employer to make the adverse employment decision." *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 401 (2d Cir. 1998) (citation omitted). As the Supreme Court has held, "A reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason is false, *and that discrimination was the real reason.*" *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)(emphasis added). Put otherwise, employers are allowed to make decisions on any basis – even an erroneous one – as long as they are not discriminating against the Plaintiff.

Kasiotakis relies upon the following facts in her establishment of pretext: (1) accounts by Loss Prevention Manager Mark Jimenez and Human Resources Manager Gonzalez that were contradicted by surveillance video; (2) the absence of investigative notes in the file and the absence of an investigation into the register tape; (3) the fact that Fassett did not alert the investigators that there were not additional GWP's missing; (4) the brevity of Kasiotakis's interview with Human Resources; and (5) Fassett's sending Mark Jimenez and Gonzalez her account of what happened after Kasiotakis was suspended. Pl. Br. at 18-19.

None of these things establishes that Plaintiff was fired because she is of Greek ancestry. At most, they suggest that Macy's may have gotten some of the facts wrong (although that does not in the end exonerate her). For example, the video does appear to contradict certain aspects of Fassett's account as given to Mark Jimenez and Gonzalez. However, the video clearly shows Kasiotakis handing the Lancôme cosmetics bag to Parisi. Whether Parisi immediately handed the bag to a customer (as maintained by Fassett) or gave it away later in the day is immaterial;

Kasiotakis violated Macy's GWP policy simply by giving the GWP to another sales associate or a customer who had not made the eligible purchase.

It is also uncontested that Kasiotakis told Cusimano that "she did not know what [Cusimano] was talking about" when asked about the incident. Kasiotakis did not cooperate with the investigation. That alone justified her dismissal, and there can be no question of pretext, since Plaintiff did not cooperate with the investigation.

Finally, there is not a scintilla of evidence in the record tending to show, or even suggest, that Plaintiff's Greek ancestry had anything to do with the decision to end her employment. Plaintiff may disagree with Macy's actions, or think that the penalty was too harsh, but it is not the role of the court to determine "whether the defendant's decision to fire plaintiff was correct, but whether it was discriminatory." *DeFina v. Meenan Oil Co.*, 924 F.Supp.2d 423, 435 (E.D.N.Y. 2013); *see also Fleming v. MaxMara USA, Inc.*, 371 Fed.Appx. 115, 118 (2d Cir. 2010); *Dister v. Cont'l Group, Inc.*, 859 F.2d 1108 (2d Cir. 1998).

III. Plaintiff's Alternative Mixed-Motive Theory

A plaintiff may also proceed under a mixed motive analysis under *Price Waterhouse* to establish a violation of Title VII and 42 U.S.C. 1981. Unlike the *McDonnell-Douglass* framework, which requires the Plaintiff to bear the burden of persuasion throughout the proceedings, the *Price Waterhouse* mixed motive theory requires a plaintiff to show evidence that an illegitimate factor had a "motivating" or "substantial" role in the employment decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989). The defendant employer then may set out its affirmative defense that "it would have made the same decision even if it had not allowed [the impermissible factor] to play a role." *Id.* at 244-45.

The plaintiff's burden in a mixed motive case is "heavier than the *de minimus* showing required to establish a prima facie *McDonnell Douglas* case." *Raskin v. Wyatt Co.*, 125 F.3d 55, 60 (2d Cir. 1997). The *Raskin* Court further explained:

> The types of indirect evidence that suffice in a pretext case to make out a prima facie case . . . do not 'suffice, even if credited, to warrant' a *Price Waterhouse* burden shift. Evidence potentially warranting a *Price Waterhouse* shift includes, *inter alia*, policy documents and evidence of statements or actions by decisionmakers 'that may be viewed as *directly reflecting* the alleged discriminatory attitude.' In short, to warrant a mixed-motive burden shift, the plaintiff must be able to produce a 'smoking gun' or at least a 'thick cloud of smoke' to support his allegations of discriminatory treatment. *Id.* at 60-61 [(emphasis in original) (citations omitted)].

For the reasons set forth above, Plaintiff has not even made out a prima facie case, so she obviously has not satisfied the higher evidentiary standard for establishing mixed motive. Her "cat's paw" theory does not constitute a "smoking gun," or even a "thick cloud of smoke."

IV. Plaintiff's New York State and City Law Discrimination Claims are Dismissed

"Since claims under the NYSHRL are analyzed identically to claims under . . . Title VII, the outcome of an employment discrimination claim made pursuant to the NYSHRL is the same as it is under . . . Title VII." *Smith v. Xerox Corp.*, 196 F.3d 358, 363 n.1 (2d Cir. 1999), *overruled on other grounds by Meachem v. Knolls Atomic Power Lab.*, 461 F.3d 134,140-41 (2d Cir. 2006).

And while there are aspects of the New York City Human Rights Law that are more favorable to a Plaintiff than federal and state law, those portions of the law (which address the standards for hostile work environment) are not implicated here. Where, as here, Plaintiff has no evidence tending to show that she was fired because of her ethnicity, her claims under City law is no more viable than her federal and state claims. *See Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) (New York Human Rights Law and New York City Human Rights Law claims subject to same analysis as Title VII employment discrimination claim); *Melie v.*

EVCI/TCI College Admin., 374 Fed.Appx. 150, 154 (2d Cir. 2010) (plaintiff's failure to present genuine issue of fact regarding pretext doomed both federal and NCYHRL claim); *Vinokur v. Sovereign Bank*, 701 F.Supp.2d 276, 291-92 (S.D.N.Y. 2010) (granting summary judgment on NYSHRL and NYCHRL discrimination claims because the plaintiff failed to show pretext).

CONCLUSION

For the foregoing reasons, Macy's motion for summary judgment is GRANTED, and the case is dismissed. The Clerk of the Court is directed to remove the motions as Docket No. 51 and 70 from the Court's list of pending motions, to enter judgment for Defendant Macy's, and to close the file.

Dated: October 15, 2015

U.S.D.J.

BY ECF TO ALL COUNSEL