

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SANDRA A. CAPEK,

Plaintiff,

- against -

BANK OF NEW YORK MELLON, N.A.,

Defendant.

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Case No. 15CV4155-LTS-AJP

AMENDED COMPLAINT

PLAINTIFF DEMANDS A
TRIAL BY JURY

Plaintiff Sandra A. Capek ("Capek" or "plaintiff"), by her attorneys, Vladeck, Waldman, Elias & Engelhard, P.C., complains of defendant Bank of New York Mellon, N.A. ("BNY Mellon" or "defendant"), as follows:

NATURE OF CLAIMS

1. Plaintiff brings this action to remedy discrimination on the basis of race and religion and retaliation for her opposition to unlawful practices in violation of Section 1981 of the Civil Rights Act of 1866, 42 U.S. C. § 1981 ("Section 1981"); the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq. (the "Executive Law"); and the Administrative Code of the City of New York § 8-107 et seq. (the "City Law").

2. Capek has more than 25 years of investment experience in the financial services industry. Prior to her role as Senior Wealth Director for BNY Mellon Wealth Management in the New York region, Capek was a Senior Financial Advisor for Mellon Advisor Services at Dreyfus Service Corporation. She was a member of the President's Council, and was responsible for successfully overseeing more than one billion dollars in client assets for some of

the firm's wealthiest clients. Despite her decades of indisputable success, Capek has been subjected to unlawful discrimination and retaliation by defendant.

3. In the mistaken belief that Capek is Jewish, she was required by her managers to cultivate clients in Jewish communities. When Capek asked for clarification, she was told to take the lead and partner with a Jewish Portfolio Manager who was newly assigned to her office. She was told by her manager to hold seminars in Temples in order to get new business. Capek expressed concern about this instruction, and told her manager that targeting particular religious or ethnic groups in this way was not appropriate. After her legitimate complaints of discrimination, her long distinguished career took a downward spiral. She was singled out for unnecessary criticism, including inaccurate and biased reviews; given unrealistic goals; given a lower marketing budget than similarly-situated peers; and denied qualified prospect leads. In addition, she was subjected to intimidation tactics, including repeated threats to her job and an extended performance warning, humiliated in front of colleagues, and treated with disdain. The continuous retaliation, designed to force her to quit, took a toll on her business and on her health.

JURISDICTION AND VENUE

4. Jurisdiction of this Court is proper under 28 U.S.C. §§ 1331. This Court has supplemental jurisdiction over plaintiff's Executive Law and City Law claims pursuant to 28 U.S.C. § 1367 because these claims closely relate to her Section 1981 claims and arise from a common nucleus of operative facts such that they form part of the same case or controversy.

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), because defendant's headquarters are in this district and thus defendant resides in the Southern District of New York.

6. Pursuant to § 8-502(c) of the City Law, prior to filing this Amended Complaint, plaintiff served a copy of the Amended Complaint on the City of New York Commission on Human Rights and the Corporation Counsel of the City of New York. Plaintiff has complied fully with all administrative prerequisites to bringing this action.

PARTIES

7. Defendant BNY Mellon is a global financial services corporation organized under the laws of Delaware and headquartered in New York. Defendant is an employer within the meaning of the Executive Law and the City Law. Capek was hired by Dreyfus Services Corporation ("Dreyfus") in 1989. In 1994 Mellon Financial Corporation ("Mellon") acquired Dreyfus. As of July 1, 2007, the Bank of New York Company, Inc. and Mellon merged with and into defendant's present entity, the Bank of New York Mellon, N.A.

8. Defendant is an employer within the meaning of the Executive Law, and the City Law.

9. Capek has been employed by defendant and its predecessor entities, Dreyfus and Mellon, for more than 25 years. Capek worked in defendant's Garden City and Manhattan locations.

FACTUAL ALLEGATIONS

Background

10. Capek received a Masters in Business Administration in 2002 and has had an extremely successful career, until, that is, she objected to defendant's practice of profiling ethnic groups. While at Dreyfus, which merged into defendant in 2007, plaintiff was often ranked as the "#1" asset and revenue producer, and consistently among the top 5% of producers. Capek also won numerous awards for her work. Through her more than 25-year career, Capek

reported to more than 15 managers, all of whom reviewed her highly -- until she complained of discrimination.

11. Defendant often described its mission as "delivering excellence," and ensuring that clients' experiences were favorable. The message to employees was clear that the focus was to be on relationships as a whole and not on any one factor.

12. Throughout the years her responsibilities increased, as did her titles. Capek started in the Service division, but within a year was selected to join the Sales group where she won an award in her first year. She was promoted to the Business Advisors Group in 1991, and then selected for the High Net Worth Personal Advisor Group in 1994. She was made a Senior Vice President of investments, and managed the largest book of high net worth clients at the firm. In 2000, Capek was voted by the Board of Directors to be appointed to the coveted title of Senior Vice President of Investments.

13. Capek has received numerous Awards and Honorable Mentions, including Big Brothers Big Sisters of Long Island 2012 Honoree and "Woman of the Year"; *Worth Magazine's* "Names You Can Trust, The Top 250 Financial Advisors in America," 2002; *Worth Magazine's* "Best Advisors, Best Advice, Get Rich with the Top 250 financial Advisors," 2001.

14. In 2006 Capek was recruited to join the Mellon Private Asset Management Group, now BNY Mellon Wealth Management (the "Wealth Management Group"), as a Senior Director. In just her second year in the Wealth Management Group, Capek received an award and was given an "Outstanding" rating on her annual review. In the nine years that Capek was in the Wealth Management Group, she brought in approximately \$400 million dollars in assets. Since Capek joined the firm, she successfully brought in over \$1 billion dollars in assets. As a result of her efforts, defendant makes millions of dollars a year in revenue.

Plaintiff's Complaints of Discriminatory Assignments

15. In early 2013, Capek's then-manager, James Fagan ("Fagan"), repeatedly stated that he wanted Capek to work with a Jewish portfolio manager for certain geographic areas with large Jewish communities. In addition, it became clear that defendant often chose men over women for certain clients, believing that those clients would prefer to deal with men.

16. For example, in one instance, Fagan insisted that a Jewish Portfolio Manager be selected to work with Capek on a potential client because Fagan perceived the potential client as being Jewish because he had a Jewish last name.

17. Upon information and belief, in another instance, defendant gave a non-Jewish lead to one of Capek's non-Jewish colleagues, rather than to Capek, whom defendant believed to be Jewish. As a result, Capek lost significant incentive pay in 2013.

18. In or about March or April of 2013, Capek complained to Fagan about what she perceived to be unlawful assignments. In particular, Capek told Fagan that she was uncomfortable with that type of profiling.

19. By August 2013, when Capek persisted, Fagan did not deny Capek's complaint of discriminatory profiling. Nor did Fagan suggest that his decision to assign certain people to certain accounts or markets was based on any factors other than being Jewish or male. In fact, he justified his conduct by stating that he makes decisions based on what he believes will be "a good fit" for the client. Fagan further justified his unlawful assignments by stating that there are "cultural sensitivities in the buying environment." When Fagan eventually realized that Capek was not Jewish, he responded, "All this time I thought you were Jewish."

20. When Capek told Fagan she thought the assignments should not be made based on gender or religion (or other stereotypes), as it would also disadvantage the non-Jewish Portfolio Managers in her office, Fagan repeatedly stated that he would raise it with his, and

Capek's boss, Katia Friend ("Friend"), as well as the Regional Manager, Doris Meister ("Meister"), both of whom were stationed in defendant's Manhattan offices. Meister recruited Fagan from AllianceBernstein, where they both had worked. Meister and Fagan repeatedly discussed the goal of developing the "Bernstein" clients, and focusing on the Jewish communities in the North Shore of Long Island.

21. At one point in August 2013, Fagan became dismissive of Capek and told her that he "did not have time" to listen to her. Capek decided to call the Ethics Helpline. Capek explained that new prospect leads were being assigned based on religion. Capek also explained that she had been discriminated against by being assigned only leads from prospective Jewish clients because her manager believed she was Jewish. When asked, she gave her name but requested that it not be forwarded to the participants about whom she complained.

Retaliation

22. Prior to her complaints, Capek's performance reviews were uniformly positive. Many managers noted her successes at "team building," her "impressive knowledge base" and described her as a "professional ambassador of the firm." She was called one of the "best and brightest minds at BNY Mellon." Capek's positive reviews had resulted in her various promotions, increased responsibilities and compensation.

23. Soon after her complaints, however, for the first time in her stellar career, she was given an inaccurate, mediocre review. Remarkably, despite Capek's complaints, her review stated that it was a priority that she partner with a particular portfolio manager, who happened to be Jewish. Indeed, according to the defendant, such a partnership would be a "gamechanger" for Capek.

24. Before complaining, Capek was told to pursue an outside partnership by Fagan and Friend. She worked on it for months, and it required approval by upper management.

Although the partnership was to be presented to the Head of the Wealth Management Group, in November 2013, it was suddenly rejected by Friend and other managers, including Meister, with no credible explanation. The partnership opportunity would have resulted in greater marketing opportunities for Capek and, ultimately, greater compensation.

25. In December 2013, Capek received a performance review from Friend, who had just become Capek's direct supervisor because Fagan had recently resigned. Friend, who had been Capek's direct boss for only six weeks, gave Capek a negative performance review that was not based on fact, and which included negative, gratuitous comments, and was in clear retaliation for her complaints. Indeed, except for a brief introductory meeting in January 2013, Friend had never met individually with Capek or seen her perform in any way. Capek, whose career until then was filled with accolades, was, for the first time, criticized for artificial failings and given an unwarranted warning. These actions were in retaliation for her complaints and had a negative effect on her working environment.

26. Capek recognized the retaliation, but followed the unreasonable mandates given to her and even exceeded them, despite having her marketing budget reduced and made lower than her similarly situated colleagues. Nevertheless, in further retaliation, Friend extended the warning and stiffened the criteria. Capek followed protocol and complained to Employee Relations that she was being retaliated against. Although she requested confidentiality, that request was not honored, which only escalated the retaliation.

27. In March 2014, Capek was assigned to make a presentation at defendant's headquarters with her teammates to the Senior Management team, including Meister and Friend, and other colleagues, of her largest client, who owns a successful world-wide Holiday products business. This was part of a "client review" process. Right before Capek was to speak, members of the management team made derogatory remarks about this \$200 million dollar client and

successful business owner, commenting negatively on his appearance, calling him a "Hippie" "who took so many drugs" he now has "ADD." This not only unfairly diminished Capek's presentation, it showed a lack of respect on the part of the management team to one of the firm's wealthiest individual clients. In so doing, the management team showed its disdain for yet another Jewish investor and for Capek.

28. After the meeting, Meister said she would discuss this client with other groups which trade this client's assets. In light of the recent trading issues at defendant, Capek had become concerned about how this client was being treated throughout the organization where he had been a large client for over 20 years. If other groups within defendant shared the view the Wealth Management Senior Management team did, the client was potentially treated in an unfair manner. Given the retaliatory reaction to her prior legitimate complaints, Capek was concerned about further retaliation against her -- and her client -- if she again made a further formal complaint. Capek was put in an intolerable position by senior management.

29. In December 2014, even with the constant attacks on her by Friend, supported by Meister, Capek had a successful production year. She hit 9 of 11 goals and brought in \$48 million dollars and over \$450,000 in Gross New Business Revenue - the highest of any Wealth Director in her office. Nevertheless, Friend told Capek that she would be placed on an extended performance warning. When Capek asked Friend for written documentation justifying the threats and actions against her, Friend refused to provide her with any documentation, and the retaliation continued. Despite repeated requests for the documentation supporting Friend's erroneous assessments, which is normally given as a matter of course, it has never been provided.

30. During 2014, Capek received from colleagues, clients and other managers numerous congratulatory or complimentary communications for her work. She also received a certificate for her 25th anniversary with defendant, along with a watch and a day off.

31. In late January 2015, plaintiff, through counsel, informed defendant's counsel of plaintiff's retention of counsel in connection with her claims, and expressed concern about the effect of the retaliation on plaintiff's health. The retaliation continued to the point of requiring plaintiff to take a medical leave of absence.

FIRST CAUSE OF ACTION

Race Discrimination Under Section 1981

32. Plaintiff repeats and realleges paragraphs 1 to 31 of this Complaint as if fully set forth herein.

33. By the acts and practices described above, including making job assignments based on race, defendant discriminated against plaintiff in the terms and conditions of her employment in violation of Section 1981.

34. Defendant knew that its actions constituted unlawful discrimination and/or acted with malice or reckless disregard for plaintiff's statutorily protected rights.

35. As a result of defendant's discriminatory acts, plaintiff has suffered and will continue to suffer economic damage, irreparable injury, emotional distress, reputational injury and other compensable damages.

SECOND CAUSE OF ACTION

Religious Discrimination Under the Executive Law

36. Plaintiff repeats and realleges paragraphs 1 through 35 of this Complaint as if fully set forth herein.

37. By the acts and practices described above, defendant has discriminated against plaintiff in the terms and conditions of employment on the basis of her religion, in violation of the Executive Law.

38. As a result of defendant's discriminatory acts, plaintiff has suffered and will continue to suffer irreparable injury, emotional distress, reputational injury and other compensable damages.

THIRD CAUSE OF ACTION

Religious Discrimination Under the City Law

39. Plaintiff repeats and realleges paragraphs 1 through 38 of this Complaint as if fully set forth herein.

40. By the acts and practices described above, defendant has discriminated against plaintiff in the terms and conditions of employment on the basis of her religion, in violation of the City Law.

41. As a result of defendant's discriminatory acts, plaintiff has suffered and will continue to suffer irreparable injury, emotional distress, reputational injury and other compensable damages.

FOURTH CAUSE OF ACTION

Section 1981: Retaliation

42. Plaintiff repeats and realleges paragraphs 1 to 41 of this Complaint as if fully set forth herein.

43. By the acts and practices described above, defendant has retaliated against plaintiff in the terms, conditions and privileges of her employment for her opposition to unlawful practices in violation of Section 1981.

44. Defendant acted with malice and/or reckless indifference to plaintiff's statutorily protected rights.

45. As a result of defendant's retaliatory acts, plaintiff has suffered and will continue to suffer irreparable injury, emotional distress, reputational injury and other compensable damages.

FIFTH CAUSE OF ACTION

Retaliation Under the Executive Law

46. Plaintiff repeats and realleges paragraphs 1 through 45 of this Complaint as if fully set forth herein.

47. By the acts and practices described above, defendant has discriminated against plaintiff for her opposition to unlawful employment practices in violation of the Executive Law.

48. As a result of defendant's retaliatory acts, plaintiff has suffered and will continue to suffer irreparable injury, emotional distress, reputational injury and other compensable damages.

SIXTH CAUSE OF ACTION

Retaliation Under the City Law

49. Plaintiff repeats and realleges paragraphs 1 through 48 of this Complaint as if fully set forth herein.

50. By the acts and practices described above, defendant has discriminated against plaintiff for her opposition to unlawful employment practices in violation of the City Law.

51. As a result of defendant's retaliatory acts, plaintiff has suffered and will continue to suffer irreparable injury, emotional distress, reputational injury and other compensable damages.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that the Court:

a. declare the acts and practices complained of herein to be violations of Section 1981, the Executive Law and the City Law.

b. enjoin and permanently restrain these violations of Section 1981, the Executive Law and the City Law;

c. direct defendant to take such affirmative steps as are necessary to ensure that the effects of these unlawful practices are eliminated and do not continue to affect plaintiff's employment opportunities;

d. award plaintiff damages to make her whole for all earnings she would have received but for defendant's discriminatory treatment, including, but not limited to, wages, commissions, bonuses, pension and retirement, health care coverage and other lost benefits including future lost wages and benefits;

e. award plaintiff compensatory damages for mental anguish, emotional distress, humiliation, and damage to reputation;

f. direct defendant to pay an additional amount as punitive damages for its willful and/or reckless disregard of plaintiff's statutory rights;

g. award plaintiff damages to compensate for any adverse tax consequences;

h. award pre-judgment interest;

i. award plaintiff attorneys' fees, costs and disbursements;

j. award plaintiff such additional relief as the Court may deem just and proper.

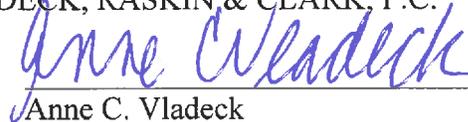
DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, plaintiff demands a trial by jury in this action.

Dated: New York, New York
August 4, 2015

VLADECK, RASKIN, & CLARK, P.C.

By:



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