2002 WL 34209804
Only the Westlaw citation is currently available.
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United States District Court,
N.D. California.

Carol GOSHO and Sarah Lewis, Plaintiffs,
v.
U.S. BANCORP PIPER JAFFRAY, INC., Defendant.

No. 00–1611 PJH. | Oct. 1, 2002.

Attorneys and Law Firms

Michelle R. Barrett, Nancy E. Pritikin, Littler Mendelson, San Francisco, CA, for Defendant.

Opinion

ORDER RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON SARAH LEWIS' CLAIMS

PHYLLIS J. HAMILTON, J.

***1** The motion of defendant U.S. Bancorp Piper Jaffray, Inc., for summary judgment on the claims of plaintiff Sarah Lewis came on for a hearing on July 31, 2002, before this court, the Honorable Phyllis J. Hamilton presiding. Plaintiffs appeared by their counsel Paul Mollica and Jamie Franklin and defendant appeared by its counsel Nancy Pritikin, Allan King, and Michelle Barrett. Having read the parties' papers and carefully considered the arguments of counsel and the relevant legal authority, and good cause appearing, the court hereby DENIES the motion for the following reasons.

BACKGROUND

Plaintiff Sarah Lewis ("Lewis") was hired in January 1998 by defendant U.S. Bancorp Piper Jaffray ("Piper") as a broker in Institutional Fixed Income Sales. From January to April 1998, she worked in Piper's Portland, Oregon branch office. She then moved to the Newport Beach, California office, where she worked until March, 2000, when she was terminated. The events about which she complains all occurred after she moved to the Newport Beach office.

Lewis alleges causes of action for sex discrimination and harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–5, et seq. ("Title VII") and the California Fair Employment and Housing Act, Cal. Gov't Code § 12900, et seq. ("FEHA"); retaliatory discharge in violation of Title VII and FEHA; sex discrimination in violation of Article I, § 8 of the California Constitution; and defamation. Piper now seeks summary judgment on the Title VII and FEHA claims, and on the defamation claim.[1]

DISCUSSION

A. Legal Standard

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Material facts are those that may affect the outcome of the case. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 323. Once the moving party meets its initial burden, the non-moving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

Summary judgment is ordinarily not appropriate in an employment discrimination case on "any grounds relating to the merits because the crux of a Title VII dispute is the elusive factual question of intentional discrimination." *Warren v. City of Carlsbad,* 58 F.3d 439, 443 (9th Cir.1995); *cert. denied,* 516 U.S. 1171, 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996). " 'The requisite degree of proof necessary to establish a prima facie case ... on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence." ' *Aragon v. Republic Silver State Disposal, Inc.,* 292 F.3d 654, 659 (9th Cir.2002) (quoting *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 889 (9th Cir.1994)); *see also Chuang v. Univ. of Cal. Davis,* 225 F.3d 1115, 1124 (9th Cir.2000) (plaintiff in employment discrimination action need produce very little evidence in order to overcome employer's motion for summary judgment).

***2** Courts have recognized that in discrimination cases, an employer's true motivations are particularly difficult to ascertain, thereby making such factual determinations generally unsuitable for disposition at the summary judgment stage. *See U.S. Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983) (acknowledging that discrimination cases present difficult issues for the trier of fact, as "there will seldom be 'eyewitness' testimony as to the employer's mental processes"); *Lowe v. City of Monrovia.* 775 F.2d 998, 1009 (9th Cir.1985), *amended,* 784 F.2d 1407 (9th Cir.1986) (stating that very little additional evidence is required to raise a genuine issue of fact regarding motive, and concluding that summary judgment is ordinarily inappropriate once a prima facie case has been established).

B. Defendant's Motion for Summary Judgment

1. Title VII and FEHA discrimination claims

In support of her allegation of intentional discrimination, Lewis asserts that unlike male brokers at Piper, she received insufficient assistance with career development from her supervisors, Joe Tessmer and Carol Kemnitz, and received inadequate leads and referrals, essential to her income level and career advancement. Lewis further alleges that when her sales assistant left the firm in April, 1999, Piper failed to provide a replacement for six months, and that during that period her career suffered because she was required to perform those tasks ordinarily delegated to the assistant. She also claims that in October, 1999, her account with Clark County, Nevada, one of her largest, was taken from her and given to a less experienced male broker.

Piper seeks summary judgment, arguing that Lewis fails to establish a prima facie case of sex discrimination. To survive summary judgment on an intentional discrimination claim, a plaintiff must first establish a prima facie case that "gives rise to an inference of unlawful discrimination." *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). In order to establish a prima facie case of discrimination under either Title VII or FEHA, the plaintiff must show that she belongs to a protected class; that she was qualified for the position she held; that she was subjected to an adverse employment action; and that similarly situated individuals outside the protected class were treated more favorably. *McDonnell Douglas Corp. v. Green,* 11 U.S. 792, 802 (1973); *Godwin v. Hunt Wesson Inc.,* 150 F.3d 1217, 1220 (9th Cir.1998).

Once the plaintiff has established a prima facie case, the burden then shifts to the defendant to show, through the introduction of admissible evidence, that its employment decisions were made for legitimate non-discriminatory reasons. *Burdine,* 450 U.S. at 255; *McDonnell Douglas,* 411 U.S. at 802. If the defendant establishes a non-discriminatory reason, the burden shifts back to the plaintiff to show that the proffered reason is pretextual. *Burdine,* 450 U.S. at 253; *Brooks v. City of San Mateo,* 229 F.3d 917, 928 (9th Cir.2000). Pretext can be shown by direct evidence that demonstrates that discrimination is the more likely motivation for the adverse employment action, or by indirect evidence that shows the employer's explanation is not credible. *Chuang,* 225 F.3d at 1127.

***3** The parties do not contest that Lewis, a woman, belongs to a protected class. They disagree about whether Lewis can meet the remaining elements of the prima facie case. With regard to the second element, Piper argues that Lewis was not qualified for her job, claiming that because she was fired for violating company policies, she was, by definition, not qualified. *See Godwin,* 150 F.3d at 1220 (to establish that she is qualified for a position, a plaintiff must show that her work performance met the employer's legitimate job expectations).

This argument is not valid, as it relies on the events that allegedly led to Lewis' dismissal in 2000 to show that she was not qualified at the time of the discriminatory actions, which Lewis claims occurred in 1998–1999. Moreover, Lewis points to evidence showing that her production doubled in her first year at Piper and she was praised by her then supervisor; her FY–1998 Individual Accountability Plan summarizes Lewis' work as "commendable;" and there was no criticism of her performance in Lewis' files prior to her termination. This evidence is sufficient to meet the showing required for this element of the prima facie case.

Next, Piper argues that Lewis has not established that she suffered an adverse employment action. Lewis claims that failing to provide her with a sales assistant, reassigning one of her largest accounts, failing to assign accounts to her, and otherwise depriving her of career development, each individually, as well as cumulatively, were adverse employment actions. Piper responds that Lewis cannot prove this element of her prima facie case because the events she complains about, even if true, are not cognizable adverse employment actions.

The Ninth Circuit "h[as] yet to articulate a rule defining the contours of an adverse employment action." *Ray v. Henderson,* 217 F.3d 1234, 1240 (9th Cir.2000). Unlike other circuits, which consider an employment action "adverse" if it materially affects the terms and conditions of employment, the Ninth Circuit construes the term broadly, finding that "a wide array of disadvantageous changes in the workplace constitute adverse employment actions." *Id.* The court has noted, for example, that transfers of job duties, undeserved performance ratings, and dissemination of unfavorable job references may constitute adverse employment actions. *Id.* at 1241–43. Similarly, an employee who is denied secretarial support and excluded from meetings and seminars that would have made her eligible for salary increases may be found to have suffered from adverse employment actions. *Id.* at 1241. Under this standard, at least some of the behavior about which Lewis complains arguably meets the definition of an adverse employment action.

The parties dispute whether Lewis was denied a sales associate and if she was, what impact that had on her earnings. Citing the deposition testimony of Joe Tessmer, Piper claims that despite the fact that Lewis' low productivity did not justify a full-time sales assistant, her request for an assistant was nonetheless approved. Lewis, on the other hand, asserts that she asked repeatedly for an assistant but was never given authority to hire anyone and was instead told to file her own papers. Lewis has provided evidence that presents a disputed issue of fact with regard to whether she was denied administrative assistance.[2]

***4** The parties also dispute the financial effect of the transfer of the Clark County, Nevada, account ("the Clark account"). Piper contends, based on the testimony of Carol Kemnitz, that it continued to pay Lewis commissions on the account after the transfer and that she actually made more than she would have if the Clark account had remained hers. Lewis challenges the use of the evidence showing she was better off after the transfer, arguing that it is inadmissible hearsay. Nevertheless, even if Piper could show, with admissible evidence, that Lewis did not suffer financially from the transfer of the Clark account, such a reassignment arguably qualifies as an adverse employment action under *Ray'* s broad definition.

The evidence with regard to the assignment of accounts is inconclusive. Lewis testified in her deposition that she had "no way of knowing" whether any accounts that should have been assigned to her were not. With regard to the claim that she was denied career development, Lewis points to evidence that suggests that coaching by supervisors is crucial to career growth at Piper, and claims that Piper never worked with her to improve her performance. Piper asserts that it attempted to assist Lewis with building her business but that, like all institutional salespersons, Lewis was ultimately responsible for generating her own business. The court finds that this claim is too vague to qualify as an adverse employment action, even under the Ninth Circuit's broad standard. Moreover, Lewis provides no evidence of any specific effect, material or otherwise, that was caused by this alleged failure to assign accounts to her or help her improve her performance.

Lewis' FEHA claim must be analyzed under California law which has a narrower definition of "adverse employment action." Under FEHA, an adverse employment action must be "both detrimental and substantial" and must "result in a material change in the terms of employment." *Thomas v. Dep't of Corrections,* 77 Cal.App.4th 507, 510, 91 Cal.Rptr.2d 770 (2000). Under this standard, Lewis cannot meet the third element of the prima facie case with regard to the alleged denial of sales assistants and career development and support because she does not provide evidence that these acts resulted in a material change in the terms and conditions of her employment. Depending on whether or not the loss of the Clark account resulted in a financial loss to Lewis, a fact which is in dispute, the reassignment of the Clark account may have had sufficient material effect to be considered adverse under FEHA.

Finally, the court must consider whether Lewis has provided evidence showing that similarly-situated male brokers were treated more favorably than she was. Lewis claims that the fact that the Clark account was taken from her and given to a man

shows that Piper treated men preferentially. Relying on testimony from Joe Tessmer, Piper claims that undisputed evidence shows that Piper has reassigned other accounts from male brokers to female brokers. Piper's argument is not persuasive. Even accepting Piper's evidence of generally equal treatment in other situations, the court finds that it does not necessarily follow that the specific reassignment of the Clark account from Lewis to a man does not satisfy the prima facie requirement.

***5** Lewis also claims that Piper's alleged refusal to assign her a sales assistant shows the more favorable treatment of men. Lewis presents evidence that the only two men who lacked sales assistants over the relevant period went only a week before obtaining replacements, while Lewis had to wait five months. She also claims that the evidence shows that two men in solo offices, like hers, had sales assistants. In response, relying on testimony from Carol Kemnitz, Piper claims that at least one other male broker who operated his own office did so without a sales assistant. Piper also claims that after Lewis' assistant resigned, Piper approved Lewis' request for temporary support. The court finds that the facts surrounding these claims are in dispute, and that a triable issue therefore exists with regard to this element of the prima facie case.

Lewis also points to four similarly situated men who received counseling from Tessmer or Kemnitz between 1999 and 2000. Piper counters that as to three of the men, one was fired for failing to improve his production, one left before the deadline for improving his production, and the third did improve his production after receiving the counseling. Piper is silent as to the fourth man, however, and the undisputed evidence as to the third is that he received counseling and then improved his performance, thus supporting Lewis' claim.

b. defendant's articulation of a nondiscriminatory reason

Lewis having met her burden of establishing a prima facie case, the burden shifts to Piper to show nondiscriminatory reasons for its actions. Based on testimony from Joe Tessmer and Carol Kemnitz, Piper contends that the Clark account was transferred to a broker with a preexisting relationship with Clark County, with a stronger portfolio, and a higher production level than Lewis. Based on this evidence, Piper has established a legitimate, nondiscriminatory reason for the transfer of the Clark account. Piper has not provided a nondiscriminatory reason for the remaining adverse actions, asserting only that it did give Lewis counseling and did not deny Lewis a sales assistant.

c. pretext

The plaintiff who has established a prima facie case need produce very little evidence of discriminatory motive to raise a genuine issue of fact as to pretext. *Warren,* 58 F.3d at 443. Any indication of discriminatory motive may raise a question that can be resolved only by a factfinder. *Id.* A plaintiff may establish pretext in two ways, either by direct evidence of discrimination, or by substantial circumstantial evidence that the employer's proffered reasons were not reliable. *Godwin,* 150 F.3d at 1219. Lewis takes the latter route, arguing that the circumstantial evidence supporting a conclusion of pretext is substantial. Her burden should be evaluated in light of the difficulty of ascertaining an employer's true motivations. *Aikens,* 460 U.S. at 716; *Lowe,* 775 F.2d at 1009.

Lewis makes three arguments in support of her claim that Piper's articulated reasons for its actions are pretextual. First, she contends that her experts provide statistical evidence of disparity in compensation between male and female brokers, and argues that this evidence should be viewed against the backdrop of Piper's general policies towards women, reflected in the Sepler Report and in other expert testimony obtained during discovery. For the reasons stated in the Order re Renewed Motion for and Order Certifying a Plaintiff Class and in the Order re Motions to Strike Expert Opinion Testimony, filed herewith, the court does not consider the Sepler Report or the Bielby Report (to the extent that it purports to comment on or expand upon the findings in the Sepler Report) as evidence for purposes of the present motion.

***6** Statistical evidence regarding an employer's policy and practices may be relevant in a disparate treatment case. *Aragon,* 292 F.3d at 662–64. To show disparate treatment based solely on statistics, Lewis would have to show a "stark pattern of discrimination, unexplainable on grounds other than [gender]." *Id.* at 663 (citations omitted). However, where, as here, the statistics are not sufficient to establish a prima facie case, the evidence may be helpful in showing that an employer's articulated reason for a challenged employment decision was pretextual. *Diaz v. Am. Tel. & Tel.,* 752 F.2d 1356, 1363 (9th Cir.1985).[3]

Lewis claims, based on the statistical evidence and the reports of her expert Janice Madden, Ph.D., that broker ranks at Piper are substantially more male dominated than in the securities field as a whole, and that women brokers received significantly lower annual compensation than comparable men. Lewis argues that this statistical evidence supports her claim that Piper's

articulated reasons for the adverse employment actions were pretextual. Piper claims that not only is the statistical evidence inadmissable as hearsay, but that it is too broad in nature and is not connected to Lewis' individual claims.

In the September 13, 2001, order denying plaintiffs' motion for class certification, the court found that Dr. Madden's analysis of the statistical evidence was not helpful in establishing commonality—*i.e.,* the existence of a national discriminatory policy at Piper with regard to female brokers—because plaintiffs failed to establish any causal connection between plaintiffs' compensation and the actions by the individual branch managers. Similarly, for purposes of the present motion, those same statistics are insufficient to show a "stark pattern unexplainable on grounds other than [gender]" because plaintiff has not connected the statistics relating to differentials in compensation to Lewis' specific allegations of disparate treatment. The court finds, however, that the statistics and the Madden Report may provide some support, when considered with other evidence, for Lewis' claim that Piper's articulated reasons for the asserted "adverse employment actions" are pretextual.

Second, Lewis argues that Tessmer has admitted that his decision to reassign the Clark account was subjective. Subjective practices are "particularly susceptible to discriminatory abuse and should be closely scruitinized." *Warren,* 58 F.3d at 443. The subjective nature of an employer's decision can provide circumstantial evidence of pretext. *Bergene v. Salt River Project Agr. Imp. and Power Dist. .,* 272 F.3d 1136, 1142 (9th Cir.2001). Piper claims that the subjective nature of Tessmer's decision is irrelevant absent additional evidence of pretext, also relying on *Bergene. See id.* (only "against a background of other evidence of pretext" was the subjective nature of the allegedly adverse action relevant).

***7** Piper is correct that *Bergene* does not support the premise that a subjective decision alone is enough to show pretext. It is also true that under *Godwin,* circumstantial evidence of pretext must be specific and substantial in order to survive summary judgment. *Godwin,* 150 F.3d at 1222. Nevertheless, combined with the statistical evidence showing a disparity between the earnings of male brokers and female brokers, this evidence—while certainly insufficient to establish a prima facie case—can be used to establish at least a disputed issue with regard to whether Piper's articulated reasons are pretextual.

Third, Lewis argues that pretext can be shown because all of Piper's evidence to the contrary comes in the form of statements, depositions and declarations prepared after this litigation commenced, without any contemporaneous evidence. This argument is without merit. Such *post hoc* testimony is disqualifying only if it conflicted with earlier, contemporaneous documentation. *See Godwin,* 150 F.3d at 1222 ("Simply because an explanation comes after the beginning of litigation does not make it inherently incredible") (citation omitted).

Lewis' showing of pretext is meager compared to the showing made by plaintiffs in recent Ninth Circuit cases. In *Godwin,* for example, the circumstantial evidence showing pretext consisted of direct conflicts between the employer's proffered reasons and a contemporaneous memo prepared at the time of the adverse employment action. *Godwin,* 150 F.3d at 1222. In *Chuang,* a case involving a particularly egregious example of discrimination, pretext was shown by direct contradictions between depositions and the proffered non-discriminatory reason. *Chuang,* 225 F.3d at 1127–28. Nevertheless, in view of the difficulty of divining Piper's true motivations, the court finds that Lewis has established an inference of pretext sufficient to withstand summary judgment. *See Miller v. Fairchild Indus., Inc.,* 797 F.2d 727, 732 (9th Cir.1986) (employer's true motivations are particularly difficult to ascertain, and if pretext presents elusive factual question, summary judgment is inappropriate).

2. Title VII and FEHA retaliation claims

Lewis alleges that on March 31, 2000 she was terminated in retaliation for having filed a claim for sex discrimination with the EEOC on November 17, 1999. Piper claims there was no retaliatory motive and that three specific transgressions led up to Lewis' firing. First, on February 17, 2000, Lewis allegedly faxed an inappropriate document, addressed to another Piper salesperson, to the office of a client where she knew the salesperson was attending a meeting. Second, in early March, 2000, Lewis supposedly disparaged Piper to a client during the question-and-answer session of a national sales meeting. Third, also in March 2000, Lewis allegely faxed confidential compensation information regarding certain male employees to at least two female employees, as well as to her lawyer.

***8** Under both Title VII and FEHA, it is unlawful to retaliate against an employee because she has taken action to enforce rights protected under Title VII. 42 U.S.C. 20002–3(a); Cal. Gov.Code § 12940(h). The order of proof for Title VII suits outlined in *McDonnell Douglas* also governs actions for retaliatory discharge under section 704(a). *Miller,* 797 F.2d at 730.[4] To establish a prima facie case of discriminatory retaliation, a plaintiff must show that she engaged in an activity protected under Title VII; that her employer subjected her to an adverse employment action; and that there was a causal link between the protected activity and the employer's action. *Id.* at 731. If the plaintiff satisfies the requirements for a prima facie case,

the burden of production shifts to the employer to present legitimate reasons for the adverse employment action. *Brooks,* 229 F.3d at 928. If the employer carries this burden, the plaintiff must demonstrate a genuine issue of material fact as to whether the reason advanced by the employer was a pretext. *Id.*

In the present case, it is clear that Lewis engaged in a protected activity by filing charges with the EEOC. Nor is there a dispute over the fact that her termination a little over four months later represented an adverse employment action.[5] The parties disagree, however, as to whether any triable facts exist with regard to the element of causation. Piper argues that the amount of time between the protected activity and the adverse employment action does not support an inference of retaliation, citing authority from outside the Ninth Circuit. In the Ninth Circuit, as in at least five other circuits "[c]ausation sufficient to establish a prima facie case of unlawful retaliation may be inferred from the proximity in time between the protected action and the allegedly retaliatory discharge." *Miller,* 797 F.2d at 731; *see also Yartzoff v. Thomas,* 809 F.2d 1371, 1375 (9th Cir.1987). The court finds that Lewis' firing, four months after Piper learned that she had filed with the EEOC, is close enough in proximity to establish the required causation. Lewis has therefore established a prima facie case of retaliation under Title VII.

Piper has also arguably succeeded in showing that it had nondiscriminatory reasons for firing Lewis. The Indiscreet fax, the disparaging remarks at the sales conference, and the leaked compensation information may not be overwhelming reasons for firing someone—common sense dictates careful examination of such an explanation—but they are legally sufficient according to the *Burdine* / *McDonnell Douglas* burden-shifting analysis. In order to withstand summary judgment, therefor, Lewis must offer evidence showing a factual dispute with regard to pretext.

Indirect, circumstantial evidence of pretext must be substantial. *Godwin,* 150 F.3d at 1219. Lewis argues that sufficient circumstantial evidence exists to cast doubt on Piper's explanation for her firing and point to retaliation as the more likely reason. For example, Lewis contends that although Piper claims she was terminated in part because she used a client's fax machine to send a document to a colleague and asked "improper" questions during an internal sales meeting, Piper did not have any pre-existing policies regarding either of these types of actions. Moreover, Lewis argues, while Piper did have a policy regarding the disclosure of confidential information, the evidence shows that when Kemnitz leaked confidential information, she was not even reprimanded.[6] Lewis also claims that the Sepler Report shows that Piper engaged in a pattern of retaliation. She also claims that she was cleared of misconduct in a state unemployment proceeding, with regard to the very events that Piper claims formed the basis for her termination.[7]

***9** As with the claim of intentional discrimination, resolution of Lewis' claim of retaliatory firing turns on the issue of pretext. The court finds that Lewis has presented sufficient evidence to withstand summary judgment on this claim.

3. Defamation claim

After terminating Lewis, Piper filled out a form U–5 (Uniform Termination Notice for Securities Industry Registration) as required by National Association of Securities Dealers by-laws, stating that Lewis had been fired because she had failed to follow company policies and procedures. Lewis alleges that this statement was false and defamatory because the real reason for her firing was the retaliatory motive. Piper argues that this claim should be dismissed because the reason stated on the U–5 for Lewis' termination was true, and truth is a complete defense to libel; and because the U–5 is a privileged document.

The issue of the truth of the statements on the U–5 is inextricably linked with the retaliation claim. If Lewis was terminated in retaliation for filing the charge of discrimination with the EEOC, it follows that the statements on the U–5 must be untrue. Similarly, resolution of the question of privilege turns on the factual dispute as to the truthfulness of the proffered reasons for firing Lewis. With regard to the privilege argument, the consensus among courts that have examined this issue is that a U–5 should enjoy only a qualified privilege. *See, e.g., Dawson v. New York Life Ins. Co.,* 135 F.3d 1158, 1162–64 (7th Cir.1998) (gathering circuit case law and finding consensus that the U–5 enjoys a qualified privilege). A qualified privilege is revoked by proof of malice or by a showing of reckless disregard as to the truth of the statements. *Glenn K. Jackson Inc. v. Roe,* 273 F.3d 1192, 1202 (9th Cir.2001). If the statements on the U–5 are untrue, Lewis could arguably show the malice required to revoke whatever privilege the U–5 might enjoy. Because the issue of the truthfulness of the statements in the U–5 is in dispute, Lewis' defamation claim cannot be decided on summary judgment.

CONCLUSION

In accordance with the foregoing, the court hereby DENIES defendant's motion for summary judgment on the Title VII and FEHA discrimination claims and on the defamation claim. The sexual harassment claim and the claim brought under Article I, § 8 of the California Constitution are DISMISSED. This order fully adjudicates the motion listed at No. 261 and a portion of the motions listed at Nos. 285 and 302 on the clerk's docket for this case.[8]

IT IS SO ORDERED.

Footnotes

1 Piper's motion for summary judgment is silent as to Lewis' claim under the California Constitution. A claim may be brought under Article I, § 8 of the California Constitution only where an employer has refused to hire a plaintiff, or has terminated a plaintiff from employment, on the basis of sex, race, creed, color, or national or ethnic origin. Cal. Const. art. I, § 8; *Strother v. Southern Calif. Permanente Medical Group,* 79 F.3d 859, 871 (9th Cir.1996). Lewis appears to have abandoned the constitutional claim, as she argues discriminatory treatment based on gender while she was employed by Piper, and retaliatory discharge based on her filing a charge of discrimination with the EEOC, but does not argue that she was discharged because of her gender.

2 To the extent that the September 13, 2001, order denying plaintiffs' motion for class certification indicates that there is no dispute regarding whether Lewis had the authority to hire sales assistants, that portion of the order is stricken.

3 As the court noted in *Aragon,* however, " 'statistical evidence in a disparate treatment case, in and of itself, rarely suffices to rebut an employer's legitimate, nondiscriminatory rationale for its decision to dismiss an individual employee. This is because a company's overall employment statistics will, at least in many cases, have little direct bearing on the specific intentions of the employer when dismissing a particular individual." ' *Id.* at 663 n. 6 (quoting *LeBlanc v. Great Am. Ins. Co.,* 6 F.3d 836, 848–49 (1st Cir.1993), *cert. denied,* 511 U.S. 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994)).

4 Because of the similarities between the FEHA and Title VII, California courts routinely look to federal decisions in deciding cases under the FEHA, *see, e.g., Univ. of So. Calif. v. Superior Court,* 222 Cal.App.3d 1028, 1035, 272 Cal.Rptr. 264 (1990), except where differences exist between the two statutory schemes, as in the definition of "adverse employment action," discussed above.

5 Lewis argues that the transfer of the Clark account also constitutes a retaliatory employment action. However, according to Lewis' complaint the Clark transfer happened in October of 1999, before she told Piper that she had filed with the EEOC.

6 Piper argues that Kemnitz revealed only production numbers, while Lewis distributed compensation figures. Nevertheless, even if this distinction between compensation and production figures is an important one, the lack of any action against Kemnitz, even a reprimand, supports Lewis' claim of pretext.

7 The parties battle over the admissibility of evidence relating to the unemployment proceedings. Because the court finds that Lewis has provided sufficient evidence to establish the existence of a triable issue with regard to pretext, the court need not consider the admissibility of this evidence.

8 To the extent that the court does not address specific evidentiary objections made by Piper Jaffray or by plaintiffs, either the objections are overruled or the evidence is not relevant to the issues raised in the underlying motion or motions.