

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12  
Justice

- - - - - x

IRENE PORTER,

Plaintiff,

Index No.: 22259/2001

- against -

Motion Date: 3/29/06

SANDRA LLOYD, CASSANDRA WASHINGTON,  
NEW YORK HOSPITAL MEDICAL CENTER OF  
QUEENS.

Motion No. 25

Defendants.

- - - - - x

The following papers numbered 1 to 13 on this motion:

	<u>Papers Numbered</u>
Defendants' Notice of Motion-Affirmation- Affidavit(s)-Service-Exhibit(s) & Memorandum of Law	1-5
Plaintiff's Affirmation in Opposition- Affidavit(s)-Exhibit(s)	6-9
Defendants' Reply Affirmation-Exhibit(s) and Reply Memorandum	10-13

By notice of motion, defendants seek an order of this Court, pursuant to CPLR §3212, granting them summary judgment and dismissing the complaint.

Plaintiff files an affidavit in opposition and defendants reply.

In the underlying cause of action, plaintiff, pro se, alleges various claims as follows:

(a) that defendants, as her employers, breached a duty of care to her, resulting in her illness and temporary hospitalization in May of 1999;

(b) that defendants breached a contractual duty to her by failing to recognize her symptoms of physical distress, causing plaintiff to be hospitalized in May of 1999;

(c) that defendants wrongfully terminated plaintiff for no justifiable reason;

(d) that defendants deprived plaintiff of her right to union representation;

(e) that defendants violated plaintiff's right to privacy by firing her for no justifiable reason;

(f) that defendants slandered her, by the doctor announcing in the doctor's waiting room where she was sent for the drug testing, "Oh, she's here for drug testing."

and finally,

(g) that defendants deprived her of overtime compensation to which she was entitled.

Plaintiff, Irene Porter, was terminated from her employment with New York Hospital Medical Center of Queens (NYHQ) on March 7, 2000, after consenting to and testing positive for marijuana. Ms. Porter, a Home Care Coordinator/Community Health Nurse (HCC/CHN) began her employment with NYHQ in August of 1996, as a per visit nurse who was called to work by the agency on an as needed basis. For a period of time in 1997, Ms. Porter, transferred to another title where she worked as a coordinator only. In May of 1999, Ms. Porter accepted a position as an HCC/CHN, which was to begin effective June 1, 1999. In accepting that position, Ms. Porter became a staff member subject to the rules, regulations and provisions of the Collective Bargaining Agreement (CBA), between 1199 (Service Employee International Union) and the City of New York, and was therefore placed on a six month probationary period.

At that time, defendant, Cassandra Washington, was the Agency Director of Patient Care Services, and defendant, Sandra Lloyd, was plaintiff's immediate supervisor.

On May 26, 1999, however, Ms. Porter became ill, was briefly hospitalized and did not return to work until July 25, 1999. Two days after returning, she requested a second leave of absence, which was granted and she remained out of work for five and a half (5 ½) months.

She returned to work January 12, 2000. Ms. Porter eventually filed a claim for disability and Worker's Compensation benefits for her medical leaves of absence between May 27, 1999 to January 11, 2000, for which Ms. Porter received the sum of \$9,720.00. The Worker's Compensation Board concluded that Ms. Porter's diagnosis of hypertension was work-related stress.

In February of 2000, NYHQ Human Resources Department, received a letter from Ms. Porter's brother expressing concern regarding her mental health, behavior and alleged alcohol and substance abuse (defendants' Exh. G).

As an employee of NYHQ, Ms. Porter signed an undated consent form to be tested for substance abuse (attached as Exh. I). Ms. Porter also signed a Substance Abuse Policy Statement when hired, on July 3, 1996 (defendants' Exh. H). On March 1, 2000, NYHQ received the results of the test sample taken from Ms. Porter on February 29, 2000, which indicated a positive presence of marijuana (defendants' Exh. K).

Article VII of the CBA to which Ms. Porter was subject as a result of being hired as a full time HCC/CHN, provides in pertinent part:

"1. Newly hired employees shall be considered probationary for a period of six (6) months from the date of employment, excluding time lost for sickness and other leaves of absence (emphasis added).

5. During or at the end of the probationary period the Hospital may discharge any such employee at will and such discharge shall not be subject to the grievance and arbitration provisions of this agreement." (Defendants Exh. C, (CBA), p. 12, Art. VII, Probationary Employees).

Because of the leaves of absence and other time taken by Ms. Porter from the time of her hire as an HCC/CHN until the time when she voluntarily agreed to drug testing, Ms. Porter remained on probationary status. Accordingly, defendants contend that Ms. Porter's discharge was subject to the "discharge at will" provision noted above, as well as the Substance Abuse Policy Statement, which she acknowledged receiving on July 3, 1996, and which holds, in part, that "evidence of impairment may lead to termination" (defendants Exh. H).

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of

law, tendering sufficient evidence to eliminate any material issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form" (Santanastasio v. Doe, 301 AD2d 511 [2<sup>nd</sup> Dep't. 2003]).

In plaintiff's first cause of action, she essentially makes a claim of negligence on defendants' part, alleging that her supervisors caused her illness and hospitalization by failing to recognize her work related stress. "It is well settled that the exclusivity remedy provisions of the Worker's Compensation Law preclude common law negligence claims" (citation omitted) (Martinez v. Canteen Vending Services, 18 AD3d 274 [1<sup>st</sup> Dep't. 2005]; Monteiro v. State, 27 AD3d 1133 [4<sup>th</sup> Dep't. 2006]).

Plaintiff provides no evidence to dispute the claim that she was an "at-will" employee. Consequently, on the second cause of action, there was no "contract" between the parties imposing any duty on defendants of a specific or implied nature (Horn v. New York Times, 100 NY2d 85, 89 [2003]).

Plaintiff's third cause of action for "wrongful termination" also fails where, as here, there is no statutory or contractual restriction on the employer's right to discharge an at will employee (Leibowitz v. Bank Lenmi Trust Co. of New York, 152 AD2d 169, 173 [2<sup>nd</sup> Dep't. 1989]). "Absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at-will terminable at any time by either party." *Id.*, at 173.

Plaintiff's fourth cause of action asserts essentially that NYHQ deprived her of her right to union representation when she sought to grieve the poor performance evaluation she received from Sandra Lloyd in July of 1999. Once again, as noted previously, Ms. Porter was an at-will probationary employee, who was not eligible to avail herself of the arbitration or grievance procedures if discharged by the employer. Moreover, as noted by defendants, performance evaluations were not covered by the CBA.

With respect to plaintiff's fifth cause of action, the law in New York does not recognize a common law right to privacy (Freihofer v. Hearst Corp., 65 NY2d 135, 140 [1985]).

Plaintiff was tested for drug use, on consent, with positive results for marijuana and discharged from employment within one week thereafter. As noted above, the basis of plaintiff's sixth cause of action is the statement purportedly made by the doctor in the waiting room, "Oh, she's here for drug testing."

"[I]t is fundamental that truth is an absolute unqualified defense to a civil defamation action" Guccione v. Hustler Magazine Inc., 800 F2d 298, 301 [2<sup>nd</sup> Cir. 1986]; Treppel v. Biovail Corp., 2004 WO 23397589, SDNY 2004). In her deposition testimony, plaintiff admitted that she was at that office for drug testing.

Finally, plaintiff's claim that she was deprived of overtime compensation, is not supported by the record. As defendants point out, the CBA agreement which applied to plaintiff as a probationary employee, allowed the employee to receive overtime compensation when the employee sought prior authorization for such work, which plaintiff admits never having obtained. Moreover, her claim for such compensation, when made, was time barred (§301 Labor Management Relations Act).

Accordingly, upon all of the foregoing, it is hereby

ORDERED, that defendants' motion for summary judgment is granted and the complaint is dismissed, and, it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: Jamaica, New York  
June 13, 2006

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**JOSEPH P. DORSA**  
**J.S.C.**