

Apiado v North Shore Univ. Hosp. (At Syosset)

2008 NY Slip Op 30987(U)

April 1, 2008

Supreme Court, Nassau County

Docket Number: 5505-04/

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X **PART 11**

PILAR LOPEZ APIADO,

INDEX NO. 5505/04

X X X

Plaintiff,

-against-

MOTION DATE: 1/29/08

SEQUENCE NO. 008, 009

**NORTH SHORE UNIVERSITY HOSPITAL
(AT SYOSSET),**

Defendant.

-----X

Notice of Motion, Affs. & Exs.....	1
Notice of Cross-Motion, Affs. & Exs.....	2
2-Affirmations in Opposition & Exs.....	3-4
2-Reply Affirmations & Exs.....	5-6
Plaintiff's Memorandum of Law.....	7
Defendant's Memoranda of Law.....	8-11

Upon the foregoing papers, it is ordered that the motion by defendant for an order granting summary judgment is granted.

Plaintiff's cross-motion for an order invoking the Court's inherent power to reconsider a decision dated March 28, 2007 is denied. The branch of the cross-motion seeking to dismiss the affirmative defenses is granted.

In this action plaintiff seeks damages for age, race and disability discrimination in her discharge from duties at defendant's Clinical & Anatomical Lab as of October 9, 2000.

Plaintiff worked as a laboratory technician in the employer hospital's blood bank. She was discharged from this position after mistakenly dispensing a unit of blood from the general blood bank supply for transfusion into a post-operative patient who had previously deposited a unit of her own blood to be used by her as needed. The remaining claims are for wrongful termination and pain and suffering pursuant to Title 2, Section 1311 of the U.S. Code, Title VII of Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, Rehabilitation Act of 1973, Title I of Americans with Disabilities Act of 1990 and the New York State Executive Law (Human Rights Law) by reason of the defendant's violations of the statutory proscriptions against discrimination on the basis of age and disability.

Plaintiff filed a complaint with the New York State Labor Commission which resulted in a decision disqualifying her from receiving unemployment benefits because her employment was terminated due to misconduct. This decision was appealed within the New York State Department of Labor and that decision dated October 22, 2001 was the subject of an CPLR Article 78 proceeding in the Appellate Division, Third Department. The Appellate Division on April 3, 2003 found plaintiff's claims "to be unavailing".

Plaintiff also on February 6, 2001 filed a Complaint under Title VII of the Civil Rights Act for Americans with Disabilities Act with the New York State Division of Human Rights charging defendant with ". . . an unlawful discriminatory practice relating to Employment because of Age, Disability and Race/Color in violation of the Human Rights Law of the State of New York. After investigation, and following review of related information and evidence with named parties, the Division of Human Rights has determined that, insofar as respondent North Shore University

Hospital at Syosset is concerned, there was no probable cause that said North Shore has engaged in or is engaging in the unlawful discriminatory practice complained of."

That Complaint was dismissed with a finding that:

"The record supports that complainant's probationary status and evaluations were in accordance with the collective bargaining agreement. As such, there is no indication that age, disability and/or race/color were factors in either the evaluations or her status as probationary. . . .

"Although the complainant alleges she was the only one disciplined for failing to make quality control entries . . . the record indicates that these duties were assigned to the complainant. Based on the record, all employees were rotated. As such, there is no indication of disparate treatment. The complainant has offered no information to indicate that race/color was a factor in the selection of a trainer. . . .

"The investigation did not reveal evidence to support the complainant's allegations that she was denied equal terms, conditions and privileges of employment and terminated due to her age, disability and/or race/color. The respondent articulated business reasons for its decisions concerning the complainant's employment that were not shown to be pretextual."

The United States Equal Employment Opportunities Commission (EEOC) adopted the findings of the State Division of Human Rights by decision dated June 21, 2004.

Consistent with state and federal law, plaintiff timely filed this case under federal law pursuant to Title 2, Section 1311 of the U.S. Code, Title VII of Civil

Rights Act of 1964, Age Discrimination in Employment Act of 1967, Rehabilitation Act of 1973, Title I of Americans with Disabilities Act of 1990 and the New York State Executive Law (Human Rights Law) by reason of the defendant's violations of the statutory proscriptions against discrimination on the basis of age and disability.

In support of this application, defendant demonstrates with documentation that after a pattern of poor performance, disciplinary warnings and a serious error in blood delivery, plaintiff's employment was terminated.

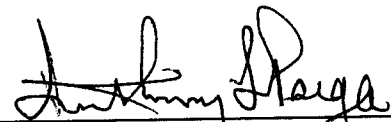
The proponent of a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 (1980)).

Plaintiff has not met her burden of demonstrating any questions of fact that would preclude summary disposition. Plaintiff maintains that she was fired following a "course of discriminatory conduct and harassment because of her age, sex and race". Specifically, plaintiff states that "I am a 63 year old woman of Filipino descent and was fired by the defendant on October 9, 2000, after 15 years of service in its laboratory." Plaintiff's conclusory and unsubstantiated allegations that her termination was attributable to age, sex and racial discrimination were insufficient to sustain her burden of proof. There has been no demonstration of any genuine factual issue as to the unconstitutionality or arbitrariness or that the determination was "merely pretextual" (*Broome v. Keener*, 236 AD2d 498 (2nd Dept., 1997)).

Plaintiff has not set forth any issues of fact with respect to her being a member of a protected class or that she was qualified to hold the laboratory employee position or that her "termination occurred under circumstances giving rise to an inference" of discrimination (*Ferrante v. American Lung Assoc.*, 90 NY2d 623 (1997)).

The Court has carefully considered plaintiff's sworn testimony, statements by her family and her interpretation of the events at her workplace. However, plaintiff's credibility is not dispositive in the absence of a *prima facie* showing that her termination was not the result of a documented pattern of incidents but rather pretextual (*Stephenson v. Hotel Union*, 6 NY3d 265 (2006)).

Dated: April 1, 2008.



Anthony L. Parga, J.S.C.

ENTERED

APR 03 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**