

Gray v Quest Diagnostics, Inc.

2008 NY Slip Op 33567(U)

December 29, 2008

Supreme Court, Suffolk County

Docket Number: 07-6810

Judge: Joseph C. Pastorella

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12, 2005. it is claimed that the defendant began reviewing Medicare codes plaintiffs entered into the computer during April 2005. The plaintiffs assert that they did not receive training on how to properly enter Medicare codes into the computer and relied upon co-workers to obtain this information, and that the lack of training resulted in the defendant's issuance of poor performance evaluations to the plaintiffs. The plaintiffs claim that as a result of the false and pretextual evaluations, that they were terminated on May 25, 2005. They further claim that they were discriminated against for lawfully complaining about the defendant's discriminatory conduct, that they have been retaliated against by the defendant who terminated their employment on the basis of their lawful complaints of discrimination, causing them to suffer severe and lasting embarrassment, humiliation, and anguish as well as other incidental and consequential damages and expenses for which they seek equitable and injunctive damages.

The defendant seeks summary judgment dismissing the complaint on the basis that there is no merit to the causes of action asserted in the complaint alleging claims of race discrimination and retaliation and no triable issue of fact. In support of such application, the defendants have submitted copies of the summons and complaint; answer; attorney's affirmation; the affidavits of Marcelene Ray and the affidavits of Nancy Lynch and Joseph Marcano; copies of the transcripts of the examinations before trial of Christine Gray, Terri Minter, Steve Berman, and Nancy Lynch; employment application of Christine Gray with the job offer as phlebotomist and acceptance/benefit letter; employment application of Terri Minter with the job offer as phlebotomist and acceptance/benefit letter; copy of Compliance Training 2003/Employee Attendance and Certification Form for Christine Gray; copy of Compliance Training 2004/Employee Attendance and Certification Form for Christine Gray; Annual Certification of Christine Gray for 2004 and 2005; annual Certification Form for Terri Minter for 2003 and 2005; copy of Compliance Training 2004/Employee Attendance and Certification Form for Terri Minter; Annual Certification of Terri Minter for 2004; copy of policy manual; copy of Quest Diagnostics Overpayment Refund August 9, 2005 in the amount of \$30,976.66; and Memoranda of Law.

The plaintiffs oppose this motion with an attorney's "Declaration;" a copy of a Training Profile and Certification for Compliance Policies & Procedure for Christine Gary dated December 10, 2002 and for Terri Minter dated July 22, 2003; and copies of policy labeled QDI 249 and QDI 237.

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 issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014 [2nd Dept 1981]).

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Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

Human Rights Law (Executive Law §296(1)(a) states: “It shall be an unlawful discriminatory practice...[f]or an employer or licensing agency, because of the age, race, creed, color, national origin, sex, disability, genetic predisposition or carrier status, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or interms, conditions or privileges of employment.”

“A plaintiff alleging racial discrimination in employment has the initial burden to establish a prima facie case of discrimination. To meet that burden, a plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and, (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. The burden then shifts to the employer to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision. In order to nevertheless succeed on her claim, a plaintiff must prove that the legitimate reasons proffered by a defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason” (*Forrest v Jewish Guild for the Blind, et al.*, 3 NY3d 295, 786 NYS2d 382 [2004]; *Dinah v Salzman*, 2005 NY Misc Lexis 3591, 234 NYLJ 82 [Supreme Court of New York, Queens County 2005]). In order to assert a viable claim of retaliatory discharge pursuant to New York Executive Law §296(1)(e), an employee must demonstrate that there was a reasonable basis to believe that his or her employer engaged in an actionable discriminatory practice and that as a result of the employee’s opposition to that practice, the employer discharged the employee (*Dodd v Middletown Lodge (elks Club) No. 1097*, 264 AD2d 706 [2nd Dept 1999]; *Leavy v New York City Transit Authority et al*, 2006 NY Slip Op 50177U, 11 Misc3d 1052A [Supreme Court of New York, Kings County 2006]).

“To prevail on their summary judgment motion in a racial discrimination in employment case, defendants must demonstrate either a plaintiff’s failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual. In that event, summary judgment would constitute a highly useful device for expediting the just disposition of a legal dispute for all parties and conserving already overburdened judicial resources inasmuch as no valid purpose is served by submitting to a jury a cause of action that cannot survive as a matter of law (*Forrest v Jewish Guild for the Blind, et al.*, supra).

In the instant action, the plaintiffs, Gray and Minter, have failed to demonstrate that they were discharged from their employment with Quest Diagnostics under circumstances giving rise to an inference of discrimination. nor have they demonstrated retaliation. It is further determined that the defendant has offered legitimate, nondiscriminatory reasons for its’ challenged actions, and that the plaintiffs have failed to raise any material issue of fact as to whether the defendnats’ explanations were pretextual. Here, the submitted documentation satisfies the defendant’s burden on a summary judgment motion of establishing

its entitlement to dismissal of the complaint as it has established a legitimate and nondiscriminatory basis for discharging the plaintiffs which cannot serve as the basis for a claim of employment discrimination. The plaintiffs have not offered sufficient support to create a question of fact as to whether their terminations, or any alleged adverse treatment during their employment, occurred under circumstances giving rise to an inference of discrimination. The record does not support that the plaintiffs did not receive training sufficient for them to properly perform their duties and responsibilities. The admissible evidence and testimony, to the contrary, demonstrates that the plaintiffs were given the same training as other employees, and instead of the training being inadequate, that the plaintiffs by their own admissions intentionally engaged in activity involving improperly writing , entering and obtaining diagnostic codes on Medicare cases in violation of Quest company policy.

Steve Berman testified at his examination before trial¹ that he worked for Quest Diagnostics from August 6, 1985 through April 4, 2008 and left when his position was eliminated as a result of two business units being combined. Prior to leaving he was the compliance officer for the Syosset business unit. He has a bachelor of arts from NYU and two years of graduate work in anthropology. He stated he always conducted the new hire training, and there is a general sign in sheet as well as specific individual training sheets which both the plaintiffs signed and were certified. To be certified, he stated, means that he provided the trainee with the training. He was aware that Ms. Gray and Ms. Minter alleged that they did not receive the training and were terminated for discrimination. He stated there were three parts to the training: human resources, safety, and compliance, and that he did the compliance training before Minter and Gray's employment began. The training documents reveal that they attended the training sessions, read the policies involved, and answered the questions relating to those policies. They would have been provided the training materials the day before their training and would have come to the session with the questions answered which would have been reviewed first as part of the training session. He had no specific recollection of training Christine Gray or Terri Minter, but stated he has the documentation that they were in his classes.

He stated that every employee is also required to participate in an annual compliance retraining; the individual's supervisor trains for Medicare billing, but the plaintiffs would not have needed billing training as it would have been covered in their new hire training. He stated that he provided new hire training that would have involved some of the rules and regulations regarding Medicare, specifically one on diagnosis codes because Quest Diagnostics employees cannot provide diagnosis codes. The diagnostic codes must come from the physician or the physician's staff. His training records indicate that the plaintiffs would have read that policy. Mr. Berman testified he never had an employee sign an acknowledgment form if he did not train them on the policies or procedures they were signing indicating they received training on.

Mr. Berman testified that Ms. Gray and Ms. Minter were terminated from Quest based upon their own admissions that they supplied diagnosis codes without confirmation from the ordering physician on a lot of occasions. He testified that Ms. Minter told him she did it because it was more convenient for the patient. and that her supervisor did not train her on these billing codes. He stated Medicare had been

¹Pages 8, 17, 28,31,32,36,37,38 and pages 40 on, and signature page have not been provided.

billed prior to their knowing that the codes were incorrectly placed on the bills, so they advised Medicare that the codes were billed in error after Quest conducted an audit, and then refunded Medicare in the amount of approximately \$32,000.00. Mr. Berman stated that the law is clear that Quest employees cannot supply the codes, and whether the codes were correct was subjective because the plaintiffs had no reason to do so. He also testified it is not a matter of the code being correct or not correct, it is a matter that Quest employees are not permitted to supply the code.

Mr. Berman also testified that it was his decision to terminate Ms. Minter and Ms. Gray. He first conducted an interview with Marcy Ray from Human Resources and a member of their compliance corporate team. After Ms. Minter and Ms. Gray admitted they had supplied the diagnosis codes, they were suspended without pay. Thereafter, there was discussion as to whether there was any choice other than to terminate, they decided that since they both violated Quest policies and the Medicare law, that they had no alternative but to terminate. He stated that they never stated they never received training on Medicare billing, and that he even stated to them that he trained them not to do this, and that's when they told him. He had notes from his investigation interviews which set forth that on May 9, 2005 at 7:30 p.m. Nancy Lynch received a call from Kerry Ulrich, the lead phlebotomist at the Commack PSC, to discuss scheduling and to mention that employee Terri Minter was adding DX codes to scripts without calling for clarification. Kerry said she had already told Terri that this could not be done and that Terri was ignoring her instructions. She also advised that she observed Terri write a DX code on another script, Kerry told her that could not be done and scratched off what she had written in, and that instead, Terri had written in that instance that DX codes had been supplied by the physicians. Kerry also noted Terri's handwriting on a script and noticed that this was done on a Saturday morning when the physician was not reachable. Kerry also thought there was an altered DX code in Terri's handwriting.

Mr. Berman also testified that his note indicated that Kerry also noted that Christine Gray had a Medicare patient and asked Kerry to draw the patient; there were DX codes on script and Christine added another, and there was no DX code on script; Kerry saw the documentation that Christine had called the office, left a message telling the office that she had used the DX code, and if the office had a problem with that, to call her. She then called the patient and told the patient what she had done. Kerry told Christine that she was not signing the rec (requisition) and Christine said she would sign it.

Joseph Marcano has set forth in his affidavit that he has been employed by Quest Diagnostics Incorporated (Quest) for twenty one years, is currently Supervisor of Patient Services since August 2007 and prior to that held the position of Manager of Patient Services, and is familiar with both Christine Gray and Terri Minter. In his former position as Manager of Patient Services during the plaintiffs' entire employment, he oversaw the day to day operations of various Quest Diagnostics facilities located in Nassau County including 2171 Jericho Turnpike Suite 102, Commack where the plaintiffs worked. From about 2003 to present, Nancy Lynch, the plaintiffs' former supervisor, reported directly to him, and he in turn reported directly to Gary DeRisi, Director of Patient Services. In January 2005, he attended a staff meeting at the Commack PSC which was attended by the plaintiffs, Nancy Lynch, Marcy Ray, Quest Diagnostics' Human Resources Generalist, Ms. Ulrich, and phlebotomist Sara Dixon, Tara King (Tara Longo) and Esperanza Nunez and the plaintiffs. He states that during the meeting the entire staff, including the plaintiffs, raised concerns about the manner in which they were being supervised by Kerry Ulrich, the then Phlebotomy Group Lead for Commack, and the concerns centered around the way Ms.

Ulrich spoke to the staff, the way in which they were treated by the patients and how their treatment was addressed by Ms. Ulrich, and the lack of formal recognition by management. He states that at no time was he expressly advised or given any indication that their concerns were race-related or that the plaintiffs believed they were being subjected to race discrimination in any way. He and Ms. Lynch, he states, suggested that they service the patients' needs to the best of their ability and then afterwards escalate the patients' behavior to either him or Ms. Lynch so that it can be immediately addressed, which would include providing the identity of the patient and physician. It was agreed that any reprimands would be in private, either during the shift/after hours, depending on the seriousness of any infraction. He states that Ms. Lynch discussed the nomination process for several of Quest's recognition programs, including "Thanks to You" and Take a Bow." The meeting ended with there being a common goal of collaboration on the part of staff management going forward. At no time, before or after the January 2005 meeting did the plaintiffs complain to him that they had been subjected to race discrimination by Ms. Lynch or Ms. Ulrich, or anyone else in management. Neither he, nor Ms. Lynch nor Ms. Ulrich were involved in the compliance investigation that led to the decision to terminate the plaintiffs' employment or the termination decision, but instead, both the compliance investigation and the termination decision were conducted by Steve Berman, Quest's former unit Compliance Officer/NEOP Compliance Facilitator.

Marcelene Ray set forth in an affidavit dated October 20, 2008 that she is African/American and known among the employees at Quest as Marcy Ray. As part of her employment with Quest, she is generally responsible for maintaining and coordinating policies and programs covering various Human Resources-type areas, including employment, employee relations issues, wage and salary administration, placement and staff member services, and the Field Operations Department. She stated the plaintiffs were generally responsible for performing daily activities of the PSC/Mobile/In-office phlebotomy accurately and on time; performing with confidence both the forensic and clinical specimen collection and processing duties following established practices and procedures; maintaining required records and documentation; demonstrating organizational commitment, and promoting a positive image to patients, clients, employees, and the public in general. She states Quest requires new employees to complete a training program that is part of its New Employees Orientation Program (NEOP) within two weeks of their hire date, with the program focusing on the Integrity Commitment, Code of Business Ethics, key compliance policies, personal accountability and HIPPA. Materials provided are the Employee Handbook, Integrity Commitment, the Code of Business Ethics, and Your Compliance Policy Handbook. Employees are required to certify that they have attended the training and understand the standards they are expected to follow and the consequences to employees and to Quest that may result from any violation of the requirements. Jamie Dromerhauser, Specialist, Staffing/NEOP Facilitator and Steve Berman, Unit Compliance Officer' NEOP Compliance Facilitator conducted the training for the plaintiffs.

Marcelene Ray set forth in her affidavit dated November 4, 2008, that she is currently employed by Quest for six years as Human Resources Generalist and has been employed by Quest for eighteen years and is familiar with Christine Gray and Terri Minter. She states she had submitted a prior affidavit and that the plaintiffs claimed that she had no personal knowledge of many of the statements contained in it, but she sets forth that those statements were based on her personal knowledge as she was aware of the events based upon her current role with Quest and having personally reviewed the plaintiffs' personnel records or was a witness to the events as they unfolded. In her capacity as Human Resources Generalist, she personally assists in ensuring that new employees undergo NEOP as part of the new hire process and

additional training based upon their department and/or position. The forms associated with their training are part of their personnel files. She states that she has personal knowledge that Ms. Gray worked for Quest previously during which time she reported to Ms. Bucher and Mr. Tepedino, both of whom reported to Mr. Marcano and Mr. DeRisi before resigning from her employment, and that she was rehired again in 2004 reporting to Ms. Lynch until her termination on May 23, 2005, which was deemed effective May 25, 2005. She states that Ms. Minter was hired by Quest in 2004, reporting to Mr. Tepedino then to Ms. Lynch until her termination on May 23, 2005, deemed effective May 25, 2005. As of January 2005, the plaintiffs were working at the Commack OSC and they, along with Ms. Ulrich, reported directly to Ms. Lynch until their respective separations from Quest.

Ms. Ray states that the personnel records reflect that Ms. Gray attended the training program on December 9th and 10th in 2002, and the copy of the document for the training program was signed by Ms. Gray as confirmation, and that Ms. Minter attended the training program on July 21st and July 22nd of 2003, and the copy of the document for the training program was signed by Ms. Minter as confirmation. Ms. Ray states that in addition to this NEOP training, new employees are provided with and instructed to review "Your Compliance Policy Handbook" and answer questions for their functional area on a worksheet. They are also asked to complete a "Training Profile & Certification form for Compliance Policies & Procedures" which identifies the policies the employee has been trained on and requires upon completion of training the employee's signature acknowledging receipt of the training, which both Ms. Gray and Ms. Minter signed on December 10, 2002 and July 22, 2004 respectively.

Ms. Ray stated that Ms. Gray was initially hired on December 9, 2002 and voluntarily left her employment on August 29, 2003. She was then rehired on January 26, 2004, and Quest did not require her to repeat the NEOP or resign any of the documents that she had previously signed due to the short amount of time that transpired between her resignation and rehire. She states that during the time that the plaintiffs worked at the Commack PSC, they did not complain to her that they were being subjected to race discrimination by either Ms. Lynch or Ms. Ulrich or that they believed their race was a factor in connection with any decisions made by Ms. Lynch or Ms. Ulrich which affected the terms and conditions of their employment. Rather, the complaints or concerns from the plaintiffs were that there was a lack of recognition from management and Ms. Ulrich's leadership style, and consequently, a meeting was scheduled at the request of Ms. Gray and was held on January 24, 2005. Ms. Gray had been promoted to Phlebotomist II on or about May 24, 2004 and transferred to the Smithtown/Brookside Drive PSC., and thereafter to the Commack PSC. Ms. Ray states that Ms. Gray felt there was discourse amongst the staff at the Commack PSC. At no time did Ms. Gray indicate that the necessity for a meeting was due to either her or Ms. Minter being subjected to race discrimination or that race-related issues were a factor in making the request for the meeting. Additionally, on May 10, 2005, they did not complain of discriminatory behavior by their supervisors, Lynch or Ulrich.

Ms. Ray took notes at the meeting and set forth in her affidavit that during the meeting, Ms. Dixon raised the issue of patients being rude and disrespectful towards the staff and reported having been called several names by patients, including a "jiggaboo." Ms. Gray complained of being counseled regarding an error or deficiency in her performance in the presence of other staff members and a patient by Ms. Ulrich and suggested that such action take place at the end of the day in private. Moreover, the entire staff complained about being verbally abused by patients and gave examples of patients banging on windows,

smearing feces on the PSC doors and/or knocking on the door, and about the lack of formal recognition by management with respect to the Commack PSC as a whole as well as individual phlebotomist. Thereafter, it was agreed that the patients' needs would be serviced to the best of the employee's abilities, patients' behavior would be escalated to her or to Ms. Lynch so that it could be addressed immediately, and it was further agreed that any reprimands should be conducted in private either during the shift or after hours, depending upon the seriousness of any infraction. Ms. Lynch discussed the nomination process for several of Quest's recognition programs, including "Thanks to You" and "Take a Bow."

Ms. Ray also set forth that she is personally aware of the facts and circumstances surrounding the termination of Ms. Gray and Ms. Minter as she sat in on the meetings that were separately held with them by Mr. Berman on May 23, 2005, as part of his compliance investigation into their alleged improper usage of diagnosis code in the performance of their duties as reported by Ms. Ulrich. During that meeting, she states, Ms. Gray reported that when the diagnosis codes were not on the physician's script for the patient that she would retrieve the code from a diagnosis book and input it into the computer system, and during the meeting with Ms. Minter, Ms. Minter reported that when the diagnosis codes were not on the physician's script for the patient, she would write in the codes when she knew them and claimed she had never been instructed not to add codes. When Ms. Minter was asked if she knew of any other staff member that was supplying codes, she responded that it was just her and Ms. Gray. This information confirmed that they had been improperly using diagnosis codes in the performance of their duties, and Mr. Berman, in conjunction with Karen McKeown, the Quest Diagnostic's Manager for Compliance, made the decision to terminate the employment of both Ms. Gray and Ms. Minter. She adds that neither Ms. Lynch nor Ms. Ulrich were involved in or consulted in connection with the decision to terminate the plaintiffs' employments of which they were notified on May 23, 2005, effective May 25, 2005.

Nancy Lynch testified at her examination before trial that she is employed by Quest Diagnostics as a patient services supervisor and supervises a staff of seven satellite offices in Nassau and Suffolk County. She has worked for Quest for twenty years, starting as a courier, then a certified phlebotomist, a phlebotomy supervisor and a phlebotomy trainer. At the PSC's (Patient Service Centers) she supervised, she posted items on the bulletin boards at each location concerning matters that had to do with a patient being able to understand where their billing was coming from, if they needed to make a complaint, postings in regard to break times for the PSC's, minimum wage posters, compliance posters, Gold Standards posters, and safety posters. She stated that during her twenty years at Quest, she never observed discrimination in the workplace, no one ever complained to her about discrimination, she has never been part of a discrimination investigation, no one from management ever spoke to her concerning complaints of workplace discrimination, and she had never been provided with discrimination in the workplace training. She never heard of an employee being referred to as an "Oreo" and has never referred to an employee as an "Oreo".

When Ms. Minter and Ms. Gray were employed at Quest, Joe Marcano was the manager and all training was done by the supervisory and management staff and human resources. Minter and Gray were both hired as phlebotomists, and are required to receive annual compliance and safety training. She testified that the Diagnosis information is a code or a narrative that a doctor puts on a prescription to coincide with the laboratory testing ordered for the patient, and that the only training there is in diagnosis information is, one, you cannot receive diagnosis information from anyone except the physician or an

authorized person from his facility and there is a proper protocol to record that diagnosis information when it is received from a doctor's office in the nature of a diagram. She described the diagram as a box with four quadrants: in the boxes is placed the name of the person spoken to at the doctor's office, the person writing the information stating you were the person who made the phone call and spoke to the doctor's office, the diagnosis information or clarification of something on the prescription that needed to be clarified, and the date and time of the call.

Ms. Lynch testified that at the orientation, new employees are provided the 1-800CHEQ line number on a card and that the phone number is also posted in the break room on a compliance poster for information concerning human resources, environmental health and safety issues, so that employees can call anonymously if they have a problem or concerns about anything that is going on in the workplace. She testified that Kerry Ulrich was a lead phlebotomist employed at one of the service centers and did not recall receiving any complaints about Ms. Ulrich. She stated the employees are trained in regard to every single insurance that Quest Diagnostics takes, including Medicare, and are trained to enter all insurance information into the computer whether it is United Healthcare or Medicare. She witnessed Ms. Gray and Ms. Minter at work and counseled and disciplined Ms. Gray with a formal written warning about her customer service skills concerning complaints she received about Ms. Gray from patients and from the clients' office in regard to her behavior towards the patients while Ms. Gray was working in the Brookside Drive PSC in Smithtown. She did not recall counseling or disciplining Ms. Minter. She also testified that while Ms. Minter and Ms. Gray were at the Commack PSC they complained about their lead, Kerry Ulrich, being difficult, however, she did not remember the specifics and stated she never heard Ms. Ulrich make any racist comments. Because Ms. Gray had asked for a meeting to discuss the complaints, she did not inquire any further. At the meeting that followed, she was present with Human Resources represented by Marcy Ray, but she did not recall the discussions. She stated she never encouraged any patients to make complaints about Ms. Gray or Ms. Minter. She testified that Ms. Gray was on a disciplinary action because of her behavior with patients and clients at the Smithtown, Brookside office. She stated that the reason Ms. Gray and Ms. Minter were terminated from Quest was due to a complaint from Kerry Ulrich that they were adding diagnosis information (diagnosis codes) to physicians' prescriptions for Medicare patients. Ms. Lynch stated that their termination did not require her approval and she was not involved in the compliance investigations concerning the diagnosis information that was found.

At her examination before trial, Christine Gray testified that she is currently employed with Lab Corp. as a phlebotomist since July 2005. She had been a team lead in the Virginia Lab Corp., but when she transferred back to New York in July 2007 there was no team lead position open. When asked about her answer to Interrogatory question number 12 wherein she set forth that Nancy Lynch exhibited racist and discriminatory behavior whose impact was augmented by the position of authority she held over her and other African-American employees, and when asked for an example, she replied that twice a year they meet to share how the departments are going, and at the meetings they have awards for the PSC and Commack, and each of us got an award. When Kerry was out, Nancy Lynch praised Terri and her for doing a good job. And at this meeting, she only gave the awards to the Caucasian staff in Commack then came the next day stating she left Terri and her award at home. Ms Gray then said "We got it, but she didn't present it in front of everyone. She did it behind doors." She also testified that previously she had been recognized for her exemplary service at work. She also gave an example of discriminatory conduct by Ms. Lynch in speaking to her in that Ms. Lynch asked her if she wanted to go to Commack or stay at

Smithtown/Brookside, and she stated that she made a decision to go to Commack because “I already knew Smithtown is a racist PSC, the people around there...the residents, the doctor office that I worked for next door, because PSC was connected to the doctor’s building.” She did not recall if she ever complained of race discrimination while working at the site and stated, “I probably did, but I don’t recall exactly, you know, what dates.” While working at Smithtown, she stated she never complained to HR about any discrimination. She also testified that Ms. Lynch exhibited discriminatory behavior because, “Yeah, you know, how she talked to us. She talked to us differently. She talked to the Afro-Americans then she talked to her Caucasian.... You know, just advice-wise. More advising her Caucasians to try to move up in Quest. You know, being more of a demeanor to the African-American, yelling, asking why instead of trying to investigate.” When asked how frequently this occurred, she stated, “We don’t-from the issue from January to when I got terminated, yes, weekly. Maybe twice, three times that I’ll be on the phone calling the HR... It’s several times during the week because if we have issues with patients and stuff, we have to call the supervisor because the team lead didn’t know what to do.” Ms. Gray testified that Ms. Lynch came to the site from Syosset about once a week and if she didn’t come to the site, she would call on the phone. When asked what Ms. Lynch would say that would be racist and discriminatory, she replied, “I’m just trying to remember, you know, because I blocked a lot of stuff out... Right. You know, she’ll say she’s gonna check into it, but she never do. She usually speak to Kerry; she don’t speak to us. She ask for Kerry on the phone and never really acknowledged Terri or myself or Sara.” She then testified that Kerry was the team lead and would be the most senior person at the site. She also testified that once they went to Ms. Lynch and she didn’t respond to what they were saying to her so they had to go to HR.

Ms. Gray also testified that Kerry Ulrich exhibited racist and discriminatory behavior and when asked for an example, she replied, “Well, the word Oreo is two chocolate and white in the middle.” When asked if Kerry used the word Oreo to describe someone, she replied, “Yes, me and Terri in a situation” but never said it in the presence of her co-workers. She used it once in a while and she described Kerry as hostile, and they “didn’t pay attention to her” because they had “a patient environment,” “so the more I ignore her, the more she get crazy, throwing things, calling us you people, you know.” She also testified that Kerry gave the Caucasian people breaks, not acknowledging Terri or herself or Sara to go on breaks. She also testified that Kerry was exhibiting discriminatory behavior almost every day by saying in front of patients “What are you doing, that’s not how you do it.”

Ms. Gray testified that she was trained at the Bayshore PSC for entering codes or billing by Sue Manchester, the team lead there, and when she came to Quest in December 2002, she only had one day and maybe two hours of training, and she never did the training that everyone went through for that week because Jamie needed her at the Huntington PSC because they were very short staffed. She testified that she had been doing phlebotomy for fourteen years, so if she had any questions she just had to ask, and just signed. When asked what her understanding of what she was to do when a patient came in with a requisition that has a test on it but not a diagnosis code, she replied, “How it was taught. Like I said, we had an ICD book, which breaks down, for example, if a person has a comp, you know, what codes to put in for it. Sometimes the doctor would have, say, for example, fatigue, you could look in that ICD book I’m talking about, you could get the DX code....” She stated it was her understanding that she always needed to put a diagnosis code into the computer system when a patient came in for service, regardless of whether it was a Medicare patient or any other type of insurance. She testified that she was never told that the manner in which she was selecting codes was incorrect.

Ms. Gray stated that she, Terri Minter and Sara Dixon talked about complaining about the racist and discriminatory behavior and that they started complaining in January 2005, but not before that because it was only after Kerry came back from surgery "that's when hell broke loose." She did not recall Nancy or Kerry ever discriminating against her before January 2005 and that Kerry treated them the same after surgery as she did before surgery "like we're dirt underneath her shoe, put it like that." She felt it was race discrimination because she felt Kerry treated the Caucasians in "the better manner than she treat us." She stated she complained to Marcy, but never used the 1-800 number to complain directly or anonymously. She claimed that Nancy Lynch never did anything about her complaints but then stated that the Commack PSC management and human resources/staff meeting in January 2005, after the Kerry Ulrich behavior toward them, was scheduled after complaints to Nancy Lynch or Human Resources, and that they discussed discrimination, the workload and the constant breaks. She stated that at that meeting she was "pretty sure" she brought up the issue of race discrimination in the workplace by saying "the team lead treat us different," and thought she indicated how they were treated differently, but Kerry denied it and "blamed it on medications, whatever her issues were." She stated that there were no other meetings to address the concerns about their treatment.

Ms. Gray testified that one day they had an incident with a patient who had Medicaid, and that she looked in the book and got the diagnostic code for the patient, and she and Terri asked Kerry Ulrich to point out to them where in the SOP book it set forth that it was wrong for them to do that because they had been doing it. She stated she was told she wasn't supposed to be calling the doctor's office, which was closed as it was seven in the morning, so she called all day long to get the appropriate code to make sure the one she chose was appropriate for that doctor's office. When she couldn't get the doctor's office she got out the book, but Kerry Ulrich had an issue with putting the diagnostic code on the script (prescription slip). It was her understanding that she could write on the doctor's prescription. After a break during her testimony, she testified that she made a copy of the prescription and wrote the code on that because you're not allowed to write on the "doctor's script." She observed Terri Minter do the same thing, as well as Sue Manchester, Maggie, Maria, Laurie, and everybody she worked with, writing who you spoke to, what time you spoke to them, if the doctor's office was closed, and other comments such as problems, medical problems, maybe attitude, or difficult vena puncture.

Ms. Gray stated that after January 2005, she diagnosed herself with anxiety, nervousness and depression and stated she suffered decreased appetite and weight loss, and before then she was happy as a camper. In July 2005, she moved to Newport News, Virginia, as she had been traveling there for ten years and wanted to transfer there after she had accepted a position with Quest. She stated that Quest's human resources diagnostics management was working with its facility in Virginia to help her find a position, but that they were "playing with her transfer" because Nancy Lynch told her she never got her paper for transfer. Jamie in HR didn't receive it, and the lady in Newport News could never get in contact with Nancy, so she was never offered a position in Quest. She testified that this was a form of racism because she wanted something and they couldn't find her (Nancy). She further stated "It's the different way she treat the staff.... It was just how she talk to me." She later testified that the way the whole situation ended was that "I just didn't...I wasn't bothered with it, because I finally got the lady supervisor in Virginia and she was saying, you know, we get paid on an A scale and down in Virginia it was an E scale. So I said to her, can you break that down into money, you know, you talking about McDonald's or Wal-Mart? You know, and I just left it alone because she didn't really give me any figures, and I didn't really want to

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move somewhere and I would be making \$5 an hour.” She stated that she did not receive an offer to transfer to Virginia. Then around March 15, 2005, she decided again to transfer but thought she couldn’t because she was told by Nancy that she was on a final written warning. She thought she may have spoken to Marcy at HR. She did not pursue a transfer to Virginia after that.

Ms. Gray testified she started working with Quest in December 2002 after fourteen years with the New York Blood Center. She was hired at fourteen dollars an hour, worked Monday through Saturday with one day off a week-the day of her choosing. She testified that during her employment with Quest, she never made herself familiar with the policies and procedures of the compliance handbook as it pertained to phlebotomists, because, “like I said, I was thrown in the position, and I pick up quickly on what I learn. So I had no time to get into—you know, to read everything which I was supposed to. I was just thinking the team lead, supervisor, whatever they was teaching me was appropriately.” She did not read it at home because, she stated, she did not have time, and she did not read it during lunch as she takes herself from the company at lunch time and tries to regroup and come back. She did not realize, she stated, that when she signed the New Employee Compliance Training Acknowledgment that she was agreeing that she “exactly opened up the handbook, read everything.” She also stated that she signed the page that says, “I understand that I will complete the worksheet in your compliance approximately handbook and contact my manager or supervisor concerning information regarding addition training specifically related to my job function.” She testified that she signed the phlebotomist new hire document indicating she understood the phlebotomy service policy contained in the compliance handbook, but did not recall ever looking at the phlebotomy services policy.

Ms. Gray testified that she was not subjected to any race discrimination during the time she worked in Bayshore, that Frank Tepedino was her supervisor there, and she did not recall having received any corrective action from Mr. Tepedino during the time she worked in Bayshore, but when shown a document which she signed indicating that Mr. Tepedino gave her a verbal warning concerning the dates of sick days taken, she stated that did not consider this discrimination. She stated she had a good relationship with Mr. Tepedino and left Quest August 13, 2003 to pursue a daycare business and education in September, but may have told him it was to go back to school, but it didn’t work out. She then called Frank who told her there were no openings in Bayshore; she spoke to Maggie who told her what was open, and she came back and worked in Smithtown reporting to Maggie, received a promotion to phlebotomist II from Nancy and was transferred to Brooksite for several months where she reported to Nancy. During that time at Brooksite, May 24, 2004 to January 2005, Nancy presented some issues, but she stated she refused to sign the performance evaluation (involving issues with patients) because she did not agree with it and agreed to transfer instead. She felt that during the time she worked at the Brooksite PSC that she was being discriminated against by patients, but not by other employees. A performance improvement plan document was provided to the plaintiffs and other employees, and Ms. Gray indicated that she would like more computer skills in that sometimes they get requests for tests that they are not familiar with and have to call customer service and ask them for a test code, which is different from a diagnosis code. She discussed this with Nancy, who told the team lead, Kerry, but testified it never happened.

While working at the Brooksite Drive PSC on September 14, 2004, she received a final written warning for inappropriate behavior which she refused to sign. The incident involved a complaint from Dr. Belding’s office. She felt this complaint subjected her to race discrimination, but she did not remember

telling Nancy that she was being racist and did not include racism in her one page handwritten response to at least two complaints Nancy had made her aware of. She thought it was because she was rushing, but stated she did not know about the incidents complained of prior to this final written warning, but then testified that they did discuss it when the incident occurred and was made aware every time someone complained. She thought that each time she probably told Nancy that she thought that the incidents were racially motivated. She testified that she thought that her 2004 annual performance review constituted race discrimination, and that she told Nancy the same. However, when asked about her notation on that review and whether it contained any reference to her believing that she had been subject to race discrimination, she replied, "Well, because my evaluation rate was stemming from my Brookside Smithtown working by myself and the patients that I had incidents with, and then it rolled onto Kerry, the team lead." Then she stated that "I love working with the Commack PSC," but when questioned that her statement refers to the racial claims having to do with the Smithtown PSC, she responded, "It was both" but she did not write that "because at the time I was writing fast, and I probably forgot to put it in there. It's just a small little area that's in my mind would be a book." When questioned that she testified that her complaint was based on the fact that she was subjected to racist and discriminatory behavior while working at the Commack PSC, then why would you state in your rebuttal that you love working at Commack, she replied, "Because the racial people that I was having problems with have nothing to do with the other people I was working with." She further stated that she did not think it was "necessary in my particularly valuation. It was just from me personally...they already knew the racial problems in which I put in there. But I just wanted to put that we had no problems working with each other, it was just the issue with Nancy and Kerry. She also stated there was a name discrepancy (mislabeling), but she made complaints that they were short staffed and that she and Terri had to look over the "temp stuff" and make sure everything was bagged; they had to write on tubes, and had to do the front (desk) and draw, and that the name discrepancy occurred because they were short staffed.

Ms. Grey also testified that Kerry had personal problems with her husband and weight and talked about it at work, and that she thought this was a form of race discrimination and "was pretty sure" she told HR. She spoke to Marcy a lot who told her they would have meetings, but they never had any. She then testified that the discrimination started in January 2005 after Kerry Ulrich returned from her surgery, and that prior to that Kerry praised her and Terri regarding the good work they were doing, and that Nancy was praising them in Kerry's absence. On January 18, 2005 a patient came in with some sort of emergency before they were to leave to go home, and Nancy said they had to stay and they were not happy about it. She said Kerry was unhappy, threw the phone and smoked with her little Caucasian friends while she and Terri tried to take care of the issues in the PSC.

Ms. Gray testified that from January 2005 until she and Terri were terminated in May that she, Terri and Sara took their lunch breaks but were not told to take breaks, so they would take their own breaks and Ms. Gray would go out to her car, call HR or speak to Marcy. She began keeping personal notes about things that were happening at work. On January 25, 2005 her personal note states that there was a form of harassment because she was told to put everything the doctor wants regarding the Bernardini script, but she could not remember the incident or what was harassing about that incident. She indicated she had meetings on January 25, 2005, and February 17, 2005 in Hauppauge with Nancy Lynch but could not recall what the meetings were for and did not know if she went. She also testified that Kerry and Sara went at it more than herself and Kerry. In April 2005 she developed some medical problems and

was taking pain medication and asked everyone to watch her work because her medication was making her weary and she forgot to call for a state lead who got angry even though she told everyone to watch her work.

She testified that she was called to go to Syosset where she met with Steve Berman who advised her that she was being suspended because of the DX codes (ICD-9) and that she was not to be putting in the DX code (on the script) when there was none written on it. She stated that she said she didn't, but then that she only put it on the side of the copies. He told her that he and Nancy discovered the codes being written in when they were reviewing some of the files from Commack. She told him she did not remember him teaching the training class and that she never saw him before. She spoke to Terri afterwards, who had also been suspended and that they talked about a lawsuit for race discrimination because they did not believe they were fired due to the problem with the diagnostic code. She did not know whose decision it was to fire them. She stated that the workload was unevenly distributed and that the African-American employees, she, Terri and Sara, did the brunt of the work, everything from the front to the back, and that Espy and Joanne who were fairly new, did a lot of the vena punctures.

Terri Minter testified at her examination before trial that she worked with Christine Gray at Quest and that they were also friends other than at work and that they went to girls' night out with Esperanza (Espy) who was Spanish and Maggie who was black. She testified that Maggie was transferred to Smithtown and promoted to supervisor. She had been working for Dr. Klein since March 2003 as a medical assistant, but she stated he started getting outrageous and throwing temper tantrums so she left. Then she testified that she left because he was cutting hours due to financial problems. She stated she was hired by Quest in July 2003 after an interview with Jamie Dromerhauser and had a two day training in Syosset with a woman the first day and Steve Berman the second day, and then was to work Monday through Saturday with one day off during the week. She was to report to Ellen Butcher or Frank Trepedino. Thereafter, on or about August 10, 2003, she was supervised by Nancy Lynch in Commack, where she always worked. In Commack she worked with Christine Gray, Carrie, Esperanza, Tara who was white, Tim who was white, and sometimes Freddy who is black, Joanne who is white, and Ikbar who is Indian. They had four leads prior to Kerry Ulrich coming to supervise them as lead phlebotomist in about 2004.

Ms. Minter stated that on July 21, 2003, she signed the employment agreement; the NEOP document wherein she checked off everything they went over during orientation; the company policy but could not remember if it was reviewed; the EEO/harassment/disability policy, and information for employees or applicants with disabilities and an invitation to participate in an affirmative action program form; Quest Diagnostics' Integrity commitment and acknowledgment form, and actual policy signed July 22, 2003 with an acknowledgment that she would adhere to its' contents; Quest Diagnostics Incorporated Phlebotomist Service Acknowledgment with the Compliance Policy Handbook, but she stated they did not go over the whole thing, but she could not remember which things they did not go over; and acknowledgment of receipt of the employee handbook which she only sometimes glanced through and it was not reviewed during orientation. Ms. Minter testified that everyone who attended the training was required to sign an acknowledgment form. After her training with Mr. Berman she had questions about gifts, entertainment and promotional items, unannounced government inspections, and indigent patients, but never had any discussion with her supervisors concerning CPT coding. It was her understanding that

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when she signed the document on July 22, 2003 that she was agreeing to fully comply with Quest Diagnostics policies and procedures as contained in the document identified as Exhibit 14 and that her continued employment with Quest Diagnostics was conditioned upon her adherence to the policies and procedures contained in that document.

Ms. Minter testified that she was aware the Quest Diagnostics Employees' Handbook contained policies and procedures for reporting discrimination, but was not aware of the "check line." She was aware of the 800 number for reporting inappropriate conduct in the workplace if you did not want to come forward, and that the number could be obtained from Human Resources. It was her understanding that if she felt she was being subjected to discrimination in the workplace that she could call Human Resources or go to the immediate supervisor.

Her duties at the Commack PSC were drawing blood, doing urine COC, drug screen, answering the phones, putting patients' information in the systems, stocking the rooms, and ordering supplies. She testified that she was provided with on the job training for about a week by a co-worker, Sharon Washington, for her computer duties of entering patient information (name, address, date of birth, insurance, the doctor's name and tests ordered on the prescription) and was provided a user name and password unique to her that no one else could use.

Ms. Minter testified that the prescription would have the name of the test and the diagnosis code, but sometimes there was no diagnosis code. She stated that if she knew the code, she would put the code into the computer, and if she did not know the code that she would try to call the doctor to get the code. She also stated that each facility had a book with the different codes in it. The prescription for the test goes along with the requisition that is printed out by the computer. There were times, she stated, that when a prescription did not have a code on it, that she would write the diagnosis code on the prescription along with her name or the initials and the name of the person you called at the doctor's office, but could not remember if she wrote it on the prescription or on another document. She stated this is the procedure she was told to use; she could handwrite on the requisition, but not on the prescription as that is illegal as it is altering the prescription, as that was what she was told at her previous job at Local 115. She stated she never wrote on the prescription, and was never told by anyone at Quest that writing on the prescription was illegal. She stated that there were times, like on a Saturday, when patients would come in but the doctor's office was not open, that she would not contact the doctor's office but instead looked up the code in the script that was in the office and note it on the requisition form, but would not follow up with the doctor's office when the office was then open to confirm or verify that she was using the right code. Other times, if the code was missing on the script and she knew the code, she would not call the doctor's office even though it was open, unless it was for a Medicare patient. Ms. Minter testified that the computer would need a code for Medicare, but not for Blue Cross, United Healthcare, Oxford. She testified that none of her supervisors ever gave her any instruction with respect to how to input those codes into the Quest Diagnostics' system, and just trained her to do the computer and drug screen. She also stated she knew the codes from working for Local 115 as they used Quest lab at the time and had the same data base. She testified that if the script did not have a code and she did not know the code, she could look it up in the CPT but didn't use it often as she had the codes in her head from working Local 115.

Ms. Minter testified that she believed Marcy Ray, Joe Marcano, Joanne (a temp), Gary Derisi, and

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Sara Dixon all had knowledge concerning the information related to this litigation. She testified that Kerry Ulrich exhibited racist and discriminatory behavior because, "It was like, call her numerous times stating that patients came in, made racial remarks toward us. She would hear what the patient said. She would pull the patient to the side, tell the patient to call the 800 number and complain on the person. And I'm looking at her like why would you do that, and he cursed her out." As to Nancy, she replied, "Well, Nancy, when we told Nancy and told her what the situation was (with Kerry), she, like, blew it off." She said Nancy never called her any racist names, never made any comments towards her personally, but "it was the way if you would talk to her about situations, she would just, like, it was no big deal." She testified Nancy never brought up her race. There were no other reasons she felt Nancy Lynch discriminated against her.

Concerning Kerry Ulrich, Ms. Minter testified that Kerry exhibited racist and discriminatory behavior toward her and other African-American employees in that "Sara Dixon, her and Sara would get into it every day.... They would go tit for tat. If a patient says something about Sara, she was on the patient's side without hearing the whole side. A patient came in one day, cursed Sara and said F you, straight up. So Kerry, the patient walk out, Kerry pull the patient to the side, here's the 800 number, call and complain. So I asked her, why did you do that? Oh, you don't understand. Kerry, like no, Kerry you don't understand. He told the girl F you." She testified that she reported that specific incident which she thought occurred in 2005 to Nancy, Joe and Marcy. She testified that Kerry also exhibited racist and discriminatory behavior in that "Okay. Patient came to the front window, I'm sitting at the front desk, she come-she saw me. she did like this (indicating a sneer). I'm like, excuse me.... She's like I have this for my granddaughter. I said, okay, but I need a prescription and I need your granddaughter's name on it. So patient get very upset, so I did like this to Kerry. I said, listen, you hear this. So Kerry was like, okay, patient was verbally abusive. So patient said, what's your name. Kerry said, oh, her name is Terri. So I'm looking at her like okay. She told Kerry and say I'm calling higher up because she need to be retrained. I look at Kerry like you need to talk to her, this is getting out of hand. Kerry said nothing to the patient." She felt this had something to do with her race because, "Every day I'm sitting at the front desk. I have patients come in that are white and they come in and look at me and, like, and scared to touch me."

Ms. Minter also testified that Kerry was married and that she knew things weren't going right for her at home. One day Kerry said something to her and she said, "Okay, Kerry, calm down, I'll get to it. She got mad and threw the phone." She felt this was race related because the only time Kerry would throw stuff or slam doors was if she said something to Kerry that Kerry didn't like. She testified she called Nancy and said you need to come up here, this is getting outrageous again. She then testified that Kerry also did this to Christine and Sara but not with any white co-workers.

Ms. Minter testified that prior to January 2005 she was not subjected to racial discrimination by Ulrich and Lynch although she had worked with and for Kerry Ulrich in 2004. She stated it was in January 2005 when Kerry came back from surgery that all hell broke loose because she felt that she and Christine were doing a good job filling in for Kerry and that Kerry didn't like it that Nancy told her wonderful things about them and that perhaps Kerry wasn't Nancy Lynch's favorite anymore. It was in January 2005, she testified, that they complained verbally to Nancy Lynch numerous times about racist behavior exhibited by employees and about the workload, as well as to Marcy Ray, Joe and Buddy (McDonald). Thereafter they had meetings attended by Christine Gray, Terri Minter, Sara Dixon, Tara,

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Joanne and Espy, and possibly Tim, at which time they talked about race, the patients, the workplace, everything. After the meeting the racist remarks continued from the patients, and the racist situation with Kerry, that Kerry was always on her break and they were not taking breaks. She testified that she was overworked and drew approximately a hundred patients a day, but then testified that everyone in the office had to draw approximately a hundred patients a day.

Ms. Minter testified that Kerry Ulrich talked down to her when she would say, "What's are you doing and what's going on, what's this. And I'm looking at her, like you need to lower your voice and calm down, because I'm sitting at the front doing my job and she's on the side doing nothing." She felt her work was never good enough for Kerry and stated, "It's like, I'm at the front checking patients in, doing the computer, she's sitting there, supposed to be doing the computer, too, and I'm doing both at the same time, checking patients in and doing the computer." She felt Kerry was being critical because Kerry said, "How can you do both things and keep your mind on everything and this stuff is going around, so I just start tuning her out." She also testified that Kerry would tell Sara to do one thing and Sara would say, "I'm doing it this way because I was trained to do it that way, and she would just fly off the handle." Ms. Minter testified that Kerry interfered with her ability to do her job in a satisfactory manner because, "She would, like, how can you do all that at one time without making mistakes and everything. I couldn't do that. How could you be so super efficient and I can only do one thing at a time; and I was like, I don't know." She also testified that in January 2005 that Kerry did not provide for breaks for her and that she reported this to Nancy, Marcy and HR. She said Nancy brushed it off. She further testified that from January 2005 until May she did not take a lunch break, but would eat at the front while she was working, and that Christine and Sara did the same.

In June 2004 she started keeping notes because Kerry and Sara were going at each other every day. There was one incident recorded for June and the next was July 2004 as there had been no other incident, then no further note until January 2005 as things were back to normal. A meeting was held January 25, 2005 relating to an incident in January. She stated, it was "like we did everything wrong" while Kerry was out. She testified that she blew her stack and that Christine kept telling Kerry she would take care of it. At that meeting she said Kerry said it was unfair that they were saying it is a racial issue, but she said that patients come in every day looking at you and making comments and you say nothing. She testified that Nancy and Joe said it was Kerry's responsibility that when patients come in like that Kerry should call Syosset and let them know, but she never did. A note of March 19, 2005 indicates that Kerry is having problems with her husband. She testified that if there was no note there was no problem that day.

Ms. Minter testified that Kerry Ulrich had involvement in Nancy Lynch's evaluations of her performance since Kerry was lead phlebotomist and Nancy had to go to her, and that she got 3's and 4's so she stated she got good evaluations. She had received a final warning in 2004 as she stated they were short staffed and she mismatched tubes, but she did not consider this final warning to be a form of discrimination. She received a "Take a Bow" certificate one year also.

In May 2005 she had a meeting with Steve Berman, Marcy and Joe about the CPR code, but nothing was brought up about race or anything else. She testified that on or about May 12th 2005 that the defendants began reviewing Medicare codes which the plaintiffs entered into the computer during April 2005. She testified they wanted to know how she knew how to put the codes on and she explained that

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she did it before because she worked in a doctor's office. She later testified that she did not receive training from Quest on how to properly enter Medicare codes in the computer and that she relied upon her co-workers to obtain this information, and sometimes it would be Christine or herself. She testified that Christine showed her how to do it since she was there longer. She testified that Christine told her that if there was no diagnostic code on the prescription that she could either call the doctor's office or look in the book they had on the ledge, and if she got the code out of the book she had no obligation to call the doctor's office. That meeting ended with her being suspended. She then spoke to Christine Gray afterwards and learned she had been terminated. Ms. Minter testified that she had been wrongfully terminated because of her race and for complaining to Nancy and Kerry and not for anything she did regarding Medicare.

It is noted that QDI 253, Policy requires that all diagnosis information be obtained from the ordering physician or the physician's authorized staff and be properly documented. The reason is that "[s]ubmitting a claim containing a diagnosis information obtained from someone other than the ordering physician or the physician's authorized staff may be viewed by the government as a violation of the False Claims Act. The Background set forth was that "[t]hird party payers often decide whether they will pay for certain tests based on the diagnosis information provided. The ordering physician is in the best position to provide diagnosis information because only the physician knows the patient's history, symptoms and medical condition. Quest Diagnostics uses the diagnosis information obtained from the physician or the physician's authorized staff on claims sent to insurance companies to get paid for the testing performed." The Guidelines further set forth that "Diagnosis information **must** come from the physician or the physician's authorized staff.... Diagnosis information may be obtained from a physician's outside billing service as long as there is written documentation from the physician authorizing the billing service to provide such information.... Generally, diagnosis information must be submitted to the third party payer exactly as provided by the physician or the physician's authorized staff.... One exception occurs when a physician has not provided any diagnosis information **and** diagnosis information is required by the third party payer. In these instances: Employees should contact the physician or the physician's authorized staff to obtain the missing diagnosis information; or Employees may use V72.6 or other third party payer approved generic diagnosis code, so long as: The physician provided narrative diagnosis information that is either illegible or that cannot be translated to and ICD code in the ICD manual or provided an ICD code that is not in the ICD manual; the third party payer has indicated that V72.6, or other third party payer approved generic diagnosis code is acceptable as a default code; **and** this acceptance has been documented in writing to or from the third party payer."

Based upon the foregoing, it is determined that the defendant Quest has demonstrated prima facie entitlement to summary judgment and the plaintiffs have failed to raise a triable issue of fact to preclude summary judgment to show they were discriminated against in violation of New York State Human Rights Law (NYSHRL), as amended NY Exec. Law §296 et seq. or that their termination of employment was retaliatory

An adverse employment action requires a materially adverse change in the terms and conditions of employment. To be materially adverse, a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less

distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation (*Forrest v Jewish Guild for the Blind, et al.*, supra). Here the defendant has demonstrated that the plaintiffs were writing in diagnostic codes which had not been appropriately assigned by the physician's office or their staff. Such conduct was in violation of the policy of Quest as set forth in QDI 253. This translated into a refund to Empire Medicare Services in the amount of \$30,976.66 for compliance policy violation IR#05-083R.

Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including the frequency of the discriminatory conduct; the severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. The conduct must both have altered the conditions of a victim's employment by being subjectively perceived as abusive by a plaintiff and have created an objectively hostile or abusive environment, one that a reasonable person would find to be so (*Forrest v Jewish Guild for the Blind, et al.*, supra). The record supports that although the plaintiffs testified that incidents giving rise to this lawsuit occurred on a weekly or daily basis, they also testified that they made personal notes concerning incidents and there were only incidents noted relative to a January 2005 date and on March 19, 2005. The plaintiffs' testimony set forth that if there was no note then nothing happened.

Excessive work, denials of requests for leave with pay and a supervisor's general negative treatment of a plaintiff are not materially adverse changes in the terms, conditions or privileges of employment. Being yelled at, receiving unfair criticism, receiving unfavorable schedules or work assignments do not rise to the level of adverse employment actions.... Mere personality conflicts must not be mistaken for unlawful discrimination, lest the antidiscrimination laws become a general civility code. Even if a plaintiff's supervisor did harbor personal animosity against the plaintiff, Title VII provides relief only for racial discrimination, not fickleness. Personal animosity is not the equivalent of discrimination and is not proscribed by Title VII. A plaintiff cannot turn a personal feud into a discrimination case by accusation. It might be just as likely that a plaintiff was excluded because of her acknowledged personality conflict with a supervisor, but such behavior is not prohibited by antidiscrimination laws (*Forrest v Jewish Guild for the Blind, et al.*, supra). Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it interferes with an employee's work performance (*Harris v Forklift Sys., Inc.*, 510 US 17 [1993]). In the instant action, the plaintiffs did not document on their evaluations that they felt they were the subject of racial discrimination as they didn't think about it at the time or were rushed in signing their evaluations. They both testified that they did not feel they were subjected to discrimination based upon their race at any time prior to January 2005. Thereafter, they complained of being yelled at by their supervisor Ms. Ulrich or being corrected in front of others, the supervisor taking the patient's side, and their not receiving personal recognition. Although Ms. Minter and Ms. Gray stated they did not receive lunch and/or coffee breaks, they still admitted to taking their lunches and breaks on their own. Although Ms. Minter complained of being treated with an unfair work load and had to draw about 100 patients per day, she also testified her co-workers had to draw the same number as well. Neither plaintiff has demonstrated that they were subject to excessive work, in fact, testimony by Ms. Minter supports that all

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of her co-workers had to perform the same number of patient draws each day, as well as share other responsibilities at the desk based upon their years of experience and length of employment as related to the newer, less experienced and temporary employees. It has not been demonstrated that the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

The standards for recovery for racial discrimination in employment under the New York State Human Rights Law, N.Y. Executive Law §296, are the same as the federal standards under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §2000e et seq. Because both the Human Rights Law and Title VII address the same type of discrimination, afford victims similar forms of redress, are textually similar and ultimately employ the same standards of recovery, federal case law in this area also proves helpful (*Forrest v Jewish Guild for the Blind, et al.*, supra).

A plaintiff's claim that she has suffered disparate treatment in the workplace may be shown through proof either of discriminatory employment action or that she has been subjected to a hostile work environment. Even one racial epithet is inexcusable. Employers are both free and well advised to adopt zero tolerance policies in the workplace. A racially hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment (*Forrest v Jewish Guild for the Blind, et al.*, supra).... Even a merely offensive racial slur is reprehensible, but it is not actionable. A hostile work environment requires more than a few isolated incidents of racial enmity. Instead of sporadic racial slurs, there must be a steady barrage of opprobious racial comments. Mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment. No hostile work environment exists where a supervisor made, on occasion, racist remarks, including one directed at a plaintiff.... In New York, the use of racial slurs and insults by a supervisor without the knowledge and acquiescence of an employer does not constitute an unlawful discriminatory practice actionable under the State Human Rights Law. An employer cannot be held liable under state law for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it (*Forrest v Jewish Guild for the Blind, et al.*, supra).

Ms. Gray testified to being referred to as an "Oreo" by Kerry Ulrich, her supervisor on maybe one or more occasions, but not in front of other co-workers. Although reprehensible if stated, the plaintiffs have demonstrated what amounts to sporadic racial slurs and not a steady barrage of opprobious racial comments. Here, the epithets complained of did not pervade plaintiff's work environment, having allegedly occurred on one or more occasions (*Snell v Suffolk County*, 782 F2d 1094 [2nd Cir 1986]). Both plaintiffs have testified that they were not discriminated against by any of their co-workers, and testified to isolated events supported in a conclusory manner via their own testimony on several occasions that there were problems at work, and not necessarily race related. The dates of these occasions are set forth in their personal notes dated from January 2005 to March 2005. The plaintiffs have not demonstrated that Quest was in any manner encouraging, condoning or approving of discriminatory treatment against the plaintiffs and have not demonstrated that a hostile work environment was created by Quest based upon its' treatment of them. The plaintiffs' claim of discriminatory treatment at work is conclusory and speculative and unsupported by the record.

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Factual disputes are not enough with regard to summary judgment; they must relate to material issues. There mere fact that a plaintiff may disagree with her employer's action or think that her behavior was justified does not raise an inference of pretext. As a matter of law, an employee's disagreement with an employer's business decision is insufficient to prove discriminatory conduct.... A plaintiff cannot avoid summary judgment by merely pointing to the inference of causality resulting from the sequence in time of the events. As a matter of law, the mere fact that the incidents of which a plaintiff complains occurred after grievances were filed does not create an issue of fact as to causality (*Forrest v Jewish Guild for the Blind, et al.*, supra).

In the instant action, the plaintiffs complained that nothing was done in response to their complaints, however, they have testified, and the record further supports, that there were several meetings conducted with Human Resources and other Quest personnel in response to the complaints of the plaintiffs and other co-workers, mainly dealing with issues of being short staffed, discriminatory remarks from some plaintiffs, personality clashes with Kerry Ulrich, and the lack of recognition by their supervisors. The fact that the plaintiffs were terminated in May, 2005 after having made complaints does not create an issue of fact as to causality or retaliatory action on behalf of Quest. It has been established by Quest, and admitted to by the plaintiffs, that they did enter diagnostic codes without having obtained the proper authorization from the physician's office or the representative of the physician, and then failed to properly document the necessary information on the prescription for the tests ordered, in violation of the Quest policy as set forth above. The plaintiffs both signed receipt of "Quest Diagnostics Your Compliance Policy Handbook" entitled "Diagnosis Information" which sets forth in part "**Never** go into a patient's chart or a physician practice management system to obtain diagnosis information. **Never** use a diagnosis code from a prior date of service. **Never** assume, guess, or make up a diagnosis code based on the type of test that has been ordered." The defendant has therefore demonstrated a rational basis upon which to predicate the termination of the plaintiffs' employment with Quest. The plaintiffs have also admitted to having mislabeled patients' names on the incorrect specimen tubes as a basis for their being reprimanded on another occasion (*see, Leavy v New York City Transit Authority et al*, 2006 NY Slip op 50177U, 11 Misc 3d 1052A [Supreme Court of New York, Kings County 2006]). The plaintiffs have not submitted any affidavits with their opposition to the instant motion, and their respective deposition transcripts assert mere conclusions, speculation and unsupported allegations that they were discriminated against. The plaintiffs' assertions of discriminatory treatment based upon race and for retaliatory treatment are not supported by the record or any admissible evidence and are deemed insufficient to defeat the instant motion for summary judgment (*see, Castro v New York University et al*, 5 AD3d 135 [1st Dept 2004]).

Dated: December 29, 2008



HON. JOSEPH C. PASTORESSA

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