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SHORT FORM ORDER

INDEX No. 03-6905
CAL. No. 09-00559-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 4-9-10
ADJ. DATE 4-14-10
Mot. Seq. # 004 - MG; CASEDISP

ANNA REYES,	:	FRANK & ASSOCIATES, P.C.
	:	Attorney for Plaintiff
Plaintiff,	:	500 Bi-County Boulevard., Suite 112N
	:	Farmingdale, New York 11735
- against -	:	
	:	MILMAN LABUDA LAW GROUP PLLC
DCH MANAGEMENT, INC.,	:	Attorneys for Defendant
	:	3000 Marcus Avenue, Suite 3W3
Defendant.	:	Lake Success, New York 11042

Upon the following papers numbered 1 to 37 read on this motion to reargue ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 (Including a Memorandum of Law); Notice ofCross Motion and supporting papers __ ; Answering Affidavits and supporting papers 10 - 27 ; Replying Affidavits and supporting papers 28 - 37 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant DCH Management is granted.

Defendant DCH Management ("DCH") moves for summary judgment dismissing a complaint by plaintiff Anna Reyes ("plaintiff") and provides a prior order of this court dated February 19, 2010, copies of the pleadings, various correspondence, various pretrial deposition transcripts and a memorandum of law. Plaintiff opposes and provides an affidavit, excerpts from various deposition transcripts, various correspondence and memoranda, and a memorandum of law. DCH has replied and provided a reply memorandum of law. By order of this court dated February 19, 2010, a motion by DCH was dismissed without prejudice for failure to submit a copy of the pleadings with leave to renew for the same relief within 30 days of the entry of the date of the order upon proper papers. This motion timely ensued.

By her complaint, plaintiff alleges that she was hired by DCH in 1985 and that, in 1998, she filed the first of three discrimination charges with the Equal Employment Opportunity Commission regarding racial discrimination. Plaintiff alleges that another DCH employee, Vijay Singal ("Singal"), regularly made anti-Hispanic comments in her presence. Those comments, it is alleged, included referring to plaintiff as a "spic." Plaintiff worked as an office cleaner and contends that during her tenure with DCH performed her work in a satisfactory manner. She also contends that persons

working for DCH's clients gave her permission to drink bottled water and coffee from the kitchen of one of the offices she was charged with cleaning. She alleges that on September 27, 2001 she brought her son to work with her, that she and her son ate dinner in that kitchen, and that the next day she was suspended for doing so. Plaintiff further alleges that despite advising Singal that she had obtained permission to eat in the kitchen, she was advised that she was suspended from her position pending an investigation of the matter. She contends that her suspension was unlawful inasmuch as it was based upon her national origin and race and was in retaliation for previous complaints by her concerning unlawful harassment by Singal. Plaintiff was terminated on October 4, 2001.

By its motion DCH contends that the basis of plaintiff's termination was poor work performance. It argues that it has supplied a lengthy chronicle of plaintiff's work history with requisite documentation to support its contention that the termination was not race based and notes that the majority of its cleaning staff is, contrary to plaintiff's assertions, Hispanic. DCH contends that plaintiff's assertions have no basis in fact and are premised entirely on unsubstantiated speculation.

DCH notes that plaintiff was hired in 1984 and that she was assigned to clean office suites at 362 Fifth Avenue, New York, New York and, occasionally, 358 Fifth Avenue. Upon completion of a three month probationary period, according to DCH, plaintiff began working a full-time shift of Monday through Friday from 5:00 PM to 12:00 AM. She also became a member of the Service Employees Union Local 32BJ (the "union"), which represents building service workers. According to DCH, its building services staff consisted of a number of individuals of Hispanic origin. Among those noted to be of Hispanic origin by DCH was a door man at the 362 Fifth Avenue office, a night porter, a handyman and another doorman. All but one, according to DCH, remained in its employ during plaintiff's tenure with the company. According to DCH, plaintiff's duties included cleaning and emptying ashtrays, emptying waste baskets, dusting, wiping glass surfaces, sweeping and vacuuming carpeted areas. According to DCH, plaintiff was the subject of numerous complaints during the course of her employment, and those complaints, cumulatively, were the basis of her termination.

According to DCH, the first documented complaint regarding plaintiff's job performance occurred on October 7, 1988. It was advised by the manager of one of its tenants, Silver Knit, at 362 Fifth Avenue, that the staff of the company found the kitchen area to be dirty, that the rugs were not vacuumed, that the reception areas were not swept or mopped, and that the ash trays were not emptied. A second notice was sent to DCH by the same manager on December 16, 1988 complaining about plaintiff's work. On December 15, 1988, a DCH supervisor wrote to plaintiff advising that certain items were missing from an office refrigerator and that no one other than plaintiff had access to the floor after close of business. On the following day, the supervisor reported to plaintiff that she had received a complaint from a tenant at 362 Fifth Avenue that its offices were not being properly cleaned and plaintiff was warned, in writing, that if improvement in her work was not observed, plaintiff would be subject to disciplinary action. That same day, a second complaint regarding plaintiff's work was received from the office manager of another tenant, who also indicated that she wished to file a formal complaint. On December 19, 1988, a representative of another tenant filed a complaint regarding plaintiff's work and further noted that one of its employees had been the subject of plaintiff's vitriol. Ultimately, based on these incidents, DCH suspended plaintiff for one week. The determination was

sent, in writing, to plaintiff and she was further advised that any future reports of poor job performance would be cause for immediate dismissal. Plaintiff's job performance thereafter improved. In 1993, however, DCH received a complaint from one of its tenants that a refrigerator was missing from its showroom. Ultimately, despite her denial, upon an investigation, plaintiff was suspended for one week. She received notification of the suspension in writing and was also reminded of her earlier transgressions, including alleged poor job performance and theft. Plaintiff was also advised that any further complaints regarding theft or poor job performance would warrant immediate dismissal. In June 1993, another tenant complained about plaintiff's job performance and, on August 9, 1993, plaintiff received a strongly worded warning letter. Plaintiff was observed by DCH's general manager, Henri Tchen ("Tchen"), to be performing her job functions inadequately and advised her that her performance was very poor and warned that if it did not improve significantly, she would be fired.

On August 23, 1993, plaintiff filed a "Charge of Discrimination" with the Equal Employment Opportunity Commission ("EEOC") claiming that she had been suspended, harassed and treated differently by Tchen based upon, alternatively, her sex or national origin. Ultimately Tchen left the company and plaintiff withdrew the charge. In 1994, Singal replaced Tchen as plaintiff's supervisor. On October 19, 1994, Singal received a complaint from a tenant that its office had not been properly cleaned. Plaintiff was responsible for cleaning that office. It was alleged that the office was not cleaned during the weekend and that the office smelled of garbage which had not been removed. Upon inquiry, plaintiff advised that she was unable to enter the office suite because she could not open the door. However, upon investigation, it was determined that the office lock had not been changed and it was noted that plaintiff had been cleaning the office for the preceding nine years. Plaintiff was advised by memorandum that it was necessary to maintain good relationships with tenants. On November 10, 1995, DCH received another complaint from a different tenant regarding plaintiff's job performance. On November 13, 1995, the manager of 362 Fifth Avenue sent a memorandum to DCH's management about a number of allegations concerning plaintiff including missing merchandise and indicating that he had received an anonymous phone call indicating that plaintiff was stealing goods from the building. Plaintiff and her union representative were notified of those complaints, in writing, and advised that she was now given her final warning that unless her job performance improved she would be terminated. Plaintiff thereafter filed a grievance with her union asking that the warning letter be removed from her personnel file. The union was unable to have the letter removed. On November 30, 1995, plaintiff again filed a claim with the EEOC alleging retaliation for her 1993 claim and because she is Hispanic. On August 1, 1996, plaintiff was again warned about poor job performance based upon an alleged failure to take extra care, as requested, in cleaning an office suite. She was warned by her supervisor in writing that her performance had not improved and that further disciplinary action would be taken if she failed to improve. On August 7, 1996, plaintiff filed a complaint with her union regarding the warning letter. Ultimately the matter was not taken to arbitration and the letter remained in plaintiff's personnel file. On February 12, 1998, the doorman working at the building where plaintiff was assigned wrote to DCH's manager that plaintiff had not been working for the previous two and one-half weeks. On April 3, 2000, Singal received a complaint from DCH's corporate offices. Specifically it was alleged that plaintiff was failing to adequately clean the offices and, on April 6, 2000, plaintiff was provided with a memorandum specifying the deficiencies in her job performance. Thereafter, Singal issued plaintiff a warning letter. On that day DCH received another,

unrelated complaint regarding plaintiff's job performance. Among the concerns raised in the letter was plaintiff's failure to turn the lights off in the tenant's suite or lock the door. Another complaint was lodged by another tenant on April 12, 2000, and DCH was asked to immediately provide a new cleaning team. Plaintiff was thereafter reassigned. Again, on April 12, another tenant stated that its offices had not been dusted and that the cleaning was generally inadequate. Plaintiff was then issued a warning letter on April 13 by Singal which stated that it was to be the final notice and that if her performance did not improve further disciplinary action would be taken. On May 9, 2000, DCH was advised that plaintiff had filed a complaint with her union regarding the April 13 letter. On October 4, 2000, Singal issued a "final warning" to plaintiff after receiving another poor job performance report. Thereafter, plaintiff was given an opportunity to improve her job performance. On April 4, 2001, plaintiff was cited for failure to vacuum two floors of the building which were assigned to her and, on July 6, 2001, another complaint was lodged by a tenant concerning plaintiff's job performance. On September 19, 2001, DCH received a complaint from a tenant regarding allegations of theft in their offices which plaintiff was assigned to clean. The letter included specific observations of plaintiff on the evening of September 13 entering the office suite wearing street clothes and thereafter removing a water bottle from the refrigerator and preparing coffee. It was noted that some time earlier plaintiff had been observed hosting a birthday party in its offices and permitting a young boy to have pizza in the conference room. It was also noted that the remains of a cake purchased for an employee's birthday had been left in the refrigerator but was missing the following day. The tenant requested that the thefts be stopped immediately and advised that DCH would be held responsible for the matter. DCH learned, on September 28, 2001, that plaintiff had again been observed with other individuals eating in the conference room. Upon investigation, it was determined that on the occasions described by the tenant, plaintiff had been working in its office suites. Other employees were also interviewed and confirmed plaintiff's culpability as to the alleged misconduct. A meeting was then held on DCH's conference room to determine appropriate disciplinary action. Plaintiff was in attendance. Thereafter she was suspended by letter dated September 28, 2001. Upon investigation, plaintiff was terminated on October 4, 2001 by letter. Thereafter plaintiff filed a grievance with the union challenging the termination and requesting reinstatement to her job without loss of pay. According to DCH, an arbitration was scheduled, however, prior to its commencement a settlement was reached regarding the matter.

By her opposition, plaintiff addresses the various contentions by DCH seriatim. First she contends that she responded to the charge that she stole a refrigerator in 1993 with an offer to submit to a lie detector test. Plaintiff notes that she filed a complaint charging discrimination with the EEOC on August 23, 1993. She also notes that on November 15, 1995 a disciplinary notice was placed in her personnel file based upon an anonymous complaint "which was never investigated by Defendant." Plaintiff notes that she filed a complaint with the union on November 20, 1995 and a charge of discrimination with the EEOC on November 30, 1995. She contends that she was subjected to "a series of unending disciplinary warnings" by Singal and that she responded to those warnings with two complaints lodged with the union on August 7, 1996 and May 9, 2000. Plaintiff notes that allegations contained in letters from tenants to DCH dated September 19, 2001 and September 28, 2001 resulted in a letter placed in her personnel file memorializing a meeting she had with members of the DCH management staff. She notes that she was given a letter dated September 28, 2001 informing her of a

suspension pending an investigation. Plaintiff also notes that she was informed of her termination from employment by letter dated October 4, 2001. She contends that DCH management involved in the investigation failed to inquire of the tenants employees as to whether she was the proper subject of the complaints. Plaintiff denies having been interviewed by Singal. She also denies making any statements during the September 28, 2001 meeting which could be construed as an admission. Plaintiff contends that her ultimate dismissal on October 4, 2001 was based on an improper investigation.

Plaintiff contends that it is undisputed that she is a member of a protected class. She also contends that she was qualified for her position having worked for DCH from 1984 until her dismissal on October 4, 2001. Plaintiff claims she worked for DCH for ten years before Singal began to "supervise her and subject her to continuous harassment, including suspension." Plaintiff also claims that it is undisputed that she was terminated from her position. She further contends that DCH conducted an improper and incomplete investigation of the complaints regarding her performance. She alleges that she was the only Hispanic member of the cleaning staff and that she was supervised by non-Hispanic employees. Her termination, upon an allegedly improper investigation, plaintiff argues, gives rise to an inference of discrimination.

Plaintiff also contends that the reason proffered by DCH for her termination is pretextual. As noted, plaintiff contends that the investigation of the September 2001 complaint was incomplete. Plaintiff alleges that her non-Hispanic employers, including Singal, Ting Chung Ghaw ("Ghaw") and Albert Babb, frequently referred to her as a "spic."

By its reply, DCH notes as a threshold matter, that it employs numerous individuals of Hispanic background both in its building services staff including plaintiff's shop steward, and other departments. It contends that plaintiff's assertion is further belied by the fact that she was employed by DCH for more than seventeen years. It also challenges plaintiff's assertion that its investigations into the numerous complaints against her were cursory. It points to her own deposition testimony during which she acknowledged the areas she was responsible for maintaining and that she received numerous contemporaneous warnings about the complaints lodged against her by tenants. DCH also points to the somewhat inexplicable and belated assertion by plaintiff that Ghaw referred to plaintiff as a "spic" despite her failure to make that accusation during her deposition testimony. DCH notes that plaintiff does not challenge its assertion that retaliation claims must be dismissed. Specifically, it is noted that the EEOC charges were filed in 1993 and 1995 respectively, yet plaintiff was not dismissed until October 2001. In essence, DCH argues that there was no temporal connection between the two events.

To establish entitlement to summary judgment in a case alleging discrimination, a defendant "must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of material issue of fact as to whether their explanations were pretextual (*see* ***Forrest v Jewish Guild for the Blind***, 3 NY3d 295, 305 [2004]). Here, DCH has established, prima facie, that it terminated plaintiff's employment for legitimate, nondiscriminatory reasons by providing extensive documentation as to the numerous instances in which plaintiff failed to do the work she was assigned over the course of many years. The complaints lodged against plaintiff came from a number of

sources. She was given repeated opportunities to improve her job performance. DCH has also established that it employed many other Hispanic individuals. It has also shown that plaintiff did not work in the same place or at the same time as those alleged to have referred to her in a derogatory manner. In response, plaintiff failed to raise a triable issue of fact as to whether DCH's reasons were pretextual (*see* ***Ferrante v American Lung Assn.***, 90 NY2d 623 [1997]).

Plaintiff has also failed to establish an issue of fact as to her retaliation claims. The requisites to make a showing of a prima facie case of retaliation are similar to those for making such used in discrimination cases. To establish retaliation, a plaintiff has the initial burden of showing: (i) participation in a protected activity; (ii) that the defendant knew of the protected activity; (iii) adverse employment action; and (iv) a causal connection between the protected activity and the adverse employment action (***Dooner v Keefe, Bruyette & Woods***, 157 F Supp 2d 265, 284 [SD NY 2001]). Plaintiff's opposition is silent as to DCH's fully documented assertion that its decision to terminate her was not a retaliatory measure. In any event, the abundant record supports DCH's position that there is no nexus between the EEOC charges and plaintiff's termination. The motion by DCH, therefore, is granted.

Dated: 15 July 2010

J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION