SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

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KAREN EHMANN,

Plaintiff,

-against-

GOOD SAMARITAN HOSPITAL MEDICAL CENTER,

Defendant.

----------x

TRIAL TERM PART: 45

INDEX NO.:019216/05

MOTION DATE:5-31-10
SUBMIT DATE:8-18-10
SEQ. NUMBER - 001

The following papers have been read on this motion:

Notice of Motion, dated 5-7-10.....1
Memorandum of Law in Support, dated 5-7-10.....2
Affidavit in Opposition, dated 7-14-10.....3
Memorandum of Law in Opposition, dated 7-14-10.....4
Reply Affidavit, dated 8-16-10..... 5
Reply Memorandum of Law, dated 8-17-10.....6

This motion by defendant Good Samaritan Hospital Medical Center pursuant to CPLR 3212 for summary judgment is granted and the complaint is dismissed in its entirety.

This action is premised upon plaintiff Karen Ehmann's allegations that her former employer, the defendant, Good Samaritan Hospital Medical Center ("Hospital"), discriminated against her and created a hostile work environment because of her age. She also claims both intentional and negligent infliction of emotional distress.

Plaintiff commenced employment with the Hospital on September 8, 2003 as a part time Registered Dietician working four days a week. She held this position until her

resignation from the Hospital effective June 3, 2005. During her employment with the Hospital, Ehmann's supervisors were Sandra Cruz-Jute ("Jute"), a Nutrition and Food Service Manager, and Susan Propper ("Propper"), the Director of the Nutrition and Food Service Department. Both Jute and Proper interviewed Ehmann for her position at the Hospital. Although plaintiff did not have any experience in the nutrition field prior to her employment at the Hospital, Jute and Propper recommended that she be hired for the position. Ultimately, Ehmann was offered the Registered Dietician position. Ehmann was 54 years old when she was hired.

As a Registered Dietician, plaintiff's responsibilities included assessing patients' nutritional needs, completing patient care plans, and educating patients on their nutritional needs and dietary guidelines. Upon commencement of employment, Ehmann was placed on a six month probationary period. At the end of her probationary period, on March 8, 2004, she received a Performance Appraisal, indicating that she had successfully completed probation. In her Performance Appraisal, Jute specifically noted that "[Ehmann] continues to improve her nutrition assessments from when she first started till now. With time, quantity, and experience/knowledge, [Plaintiff] will be able to master documentation."

Thereafter, in June 2004, Ehmann received her first annual Performance Appraisal wherein she was rated as satisfactory overall. Her Performance Appraisal indicated that although she was adequately progressing as a new dietician, she still needed to improve in certain areas, such as the completion of reassessments. In this appraisal, Jute wrote that "[Ehmann's] first experience as a Dietician is steadily leading to a high standard. Practice and experience will make [her] an excellent clinician. She is very positive and outgoing and

likes to do public speaking. Performs re-assessments consistently."

Plaintiff states in her affidavit that in June 2004, "right after [her] June annual appraisal, defendant hired Keith Aubel, who had been a Diet Technician, as a Registered Dietician" Ehmann Aff., ¶ 27. Ehmann states that Aubel started working three days a week and at the time of his hire, he was 24 years of age. She alleges that the Hospital "wanted to engineer it so that [Aubel] would become a five day a week Registered Dietician, which he eventually did" but that "[f]or him to do so, he would have to first jump over [her]" *Id.* Plaintiff alleges that the Hospital gave Aubel preferential treatment, at her expense, because of her age.

Despite Ehmann's initial progress as a new dietician, on November 1, 2004, Jute and Propper issued a Verbal Counseling Notice which led to a meeting with Ehmann. She was counseled about her job performance. Jute and Propper discussed with Ehmann the different areas in which corrective action was needed, including checking patient files on a daily basis and ensuring that the dietary needs of the patients were not based upon a subjective evaluation. Ehmann claims that when she asked Jute and Propper to support their allegations of her work related deficiencies, she was not provided any proof and was even prevented from defending herself. Ehmann claims she was "dumbfounded" as to why or how defendant could claim that certain matters required "Corrective Action Immediately" when she had never been told of any problems with her performance, and in fact, all previous appraisals had indicated that her performance was satisfactory. As a result, Ehmann prepared a written response disputing the performance deficiencies which had been identified.

Ehmann then requested a meeting with Human Resources to discuss her

dissatisfaction with the Verbal Counseling Notice. Danielle Robbins, the Director of Human Resources for the Hospital, spoke with Ehmann on November 2, 2004 and then again on November 22, 2004 to further discuss her concerns. Robbins also spoke with Propper whereupon Propper explained to Robbins the basis for the Verbal Counseling Notice and identified examples of plaintiff's poor job performance. Ultimately, Robbins determined that the discipline issued to Ehmann was warranted due to ongoing performance deficiencies and that there was no basis to believe that the plaintiff was being treated unfairly by either Jute or Propper. Plaintiff submits that the Verbal Counseling Notice was one of the adverse employment actions that she received.

In December 2004, Jute completed another review of plaintiff's Nutritional Assessment Forms to determine whether plaintiff's documentation had improved after the counseling and instruction that was provided to her. Apparently Jute requested that Ehmann herself choose which charts she would have liked her to review. Jute then reviewed the charts provided to her by the plaintiff and again made notations on these charts. Jute provided those comments to the plaintiff so that she could review and improve upon the errors that she had made on these charts. As a result of her review, Jute determined that plaintiff's documentation had not improved. Plaintiff claims that it was in December 2004 that Jute removed her from the Geriatric Committee, a forum in which the needs of geriatric patients are discussed.

On May 11, 2005, plaintiff received a Written Warning for her continued performance deficiencies. This Written Warning indicated several areas in which plaintiff's performance of her job responsibilities was deficient. Specifically, it noted that the plaintiff failed to timely: 1) complete patient documentation on her assigned units; 2) follow up appointments

with patients; 3) complete all necessary paperwork associated with her position including the input of information on Hospital Care Plans for patients. The Written Warning also advised the plaintiff that her competency skills were below average. Plaintiff again contacted Human Resources to dispute the basis for the Written Warning. She complained that she had not been provided with any evidence of her performance deficiencies and that she was being unfairly criticized. On May 19, 2005, Ehmann met with Lori Spina, the Hospital's Vice President of Human Resources, regarding her disagreement with the performance deficiencies noted in the Written Warning. On May 24, 2005, Spina contacted Ehmann and advised her that she would discuss her concerns with Jute and Propper. Spina also recommended to the plaintiff that she sit down and discuss her concerns with Propper and Jute.

On May 24, 2005, Spina met with Propper and Jute regarding plaintiff's assertion that the criticism of her job performance was without basis. Propper and Jute, in turn, provided Spina with documentation of plaintiff's poor work performance and further advised Spina that plaintiff was resistant to instruction and refused to listen to the advice and suggestions offered by Jute and Propper. Spina ultimately determined that there were significant deficiencies in plaintiff's performance of her job responsibilities. Accordingly, the Written Warning was found not only to be appropriate but necessary as well.

On May 25, 2005, plaintiff approached Charles Bove, the Vice President of Administration, to discuss her concerns about the Written Warning she had received. She also advised Bove of her experience at the Hospital from July 2004 through May 2005. Bove told her that he would meet with her supervisors to review the issues that she had brought to

his attention. On May 26, 2005, Bove met with Propper to obtain information about plaintiff's job performance and the basis for her complaints. Bove also discussed the complaint with Spina who advised him that the disciplinary action plaintiff received was appropriate in light of plaintiff's continued poor work performance.

Subsequently, on or about May 31, 2005, plaintiff sought to have a meeting with Richard Murphy, the Hospital's Chief Executive Officer. She states that she was unsuccessful, despite several efforts to make an appointment with him. Spina then contacted plaintiff and scheduled a meeting for May 31. 2005 to discuss the findings of her investigation. Pursuant to Spina's earlier recommendation, Spina requested that Jute, Propper and Bove attend the meeting so that all outstanding issues could be resolved and the parties could move forward. However, because of a mis-communication, plaintiff was not aware that Jute and Propper would be attending this meeting. When plaintiff arrived at the meeting and observed that Jute and Proper were also in attendance, plaintiff refused to meet with Spina.

On June 3, 2005, plaintiff submitted a letter of resignation to the Hospital. Plaintiff's letter indicated that she felt that she was being forced to resign. She noted that the "conditions have become so hostile, unsafe and intolerable." She also noted that she resigned in part because plaintiff wanted to care for her ailing mother.

On June 17, 2005, plaintiff filed a Charge of Retaliation against the defendant Hospital with the Equal Employment Opportunity Commission ("EEOC"). Notably, the Charge of Retaliation did not allege that plaintiff had been discriminated against on the basis

of her age, nor did it allege that she had been retaliated against because of any complaint of age discrimination. On June 22, 2005, the EEOC dismissed plaintiff's charge and issued her a "right to sue" letter. The EEOC's cover letter to the plaintiff advised her that the Commission was dismissing her Charge because she had neither invoked an EEO statute nor the protected act that she had engaged in which allegedly caused the Hospital to retaliate against the Plaintiff. The EEOC advised the plaintiff that "if [she was] retaliated against, it was not illegal under [the EEOC's] statutes."

On December 2, 2005, plaintiff commenced this action, pursuant to Article 15 of the New York State Executive Law §§296 and 297. Plaintiff's complaint contains four causes of action, the first two alleging age discrimination in violation of the New York State Human Rights Law, Executive Law §296; and the last two alleging intentional and negligent infliction of emotional distress, respectively. Specifically, in her first cause of action, plaintiff alleges that the defendant and its agents, through their actions, created a hostile work environment against her because of her age. She claims that the hostile work environment to which she was subjected became so intolerable that she was forced to resign. Plaintiff claims that her resignation, as such, constituted a constructive discharge. In her second cause of action, Ehmann claims that the defendant, through its agents, engaged in unlawful employment practices because of her age and that this also was a violation of the Executive Law. Her third and fourth causes of action sound in intentional infliction of emotional distress and negligence, respectively.

The standards for establishing unlawful employment discrimination under Executive

Law § 296(1), also known as the Human Rights Law, are the same as those governing Title VII cases under the Federal Civil Rights Act of 1964 (*Rainer N. Mittl, Ophthamologist, P.C. v. New York State Div. of Human Rights*, 100 NY2d 326, 330 [2003]). Executive Law § 296(1) provides:

> "It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, 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 in terms, conditions, or privileges of employment."

A plaintiff alleging age discrimination in employment has the initial burden to establish a prima facie case of discrimination. To meet this burden, 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. *Ferrante v. American Lung Assn.*, 90 NY2d 623, 629 (1997). 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" *Id.* If this showing is made by the employer, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason. *Id.*

Thus, to prevail on its summary judgment motion, the defendant must demonstrate

either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for its challenged actions, the absence of a material issue of fact as to whether its explanations were pretextual. In that event, summary judgment constitutes "a highly useful device for expediting the just disposition of a legal dispute for all parties and conserving already overburdened judicial resources." *Matter of Suffolk County Dept. of Social Servs. v. James M.*, 83 NY2d 178, 182 (1994).

The primary focus in an employment discrimination claim is whether the employer has treated the employee less favorably than others for an impermissible reason *Kump v. Xyvision, Inc.*, 733 F. Supp. 554 (EDNY 1990). This can be established in four ways: by demonstrating facial discrimination, disparate treatment, disparate impact or, in appropriate cases, harassment. Retaliation for filing a discrimination claim is also prohibited. Human Rights Law, §296[1][e].

By plaintiff's own allegations, this case is not one of facial discrimination; that is, the plaintiff does not challenge a practice or policy which is facially discriminatory. *New York State Div. Of Human Rights v. New York-Pennsylvania Professional Baseball League*, 36 AD2d 364 (4th Dept. 1971), *affd* 29 NY2d 921 (1972). It is also clear, despite plaintiff's pleaded allegations, that her claims are not predicated upon any facially neutral employment policy which nevertheless adversely affects her as a member of protected class; this case is not one of disparate impact, in which the adverse affect of neutral policy cannot be justified as a business necessity. *See, Raytheon Co. v. Hernandez*, 540 US 44 (2003). There simply is no allegation by the plaintiff that the defendant Hospital had any "policy," much less a

discriminatory policy, which affected members of a protected group of which she was a part. Therefore, this theory cannot be utilized.

Turning to the harassment charge, there are two types of unlawful harassment: (1) *quid pro quo* claims involving a demand for sexual favors in exchange for an employment benefit, and (2) hostile work environment claims. *Meritor Sv. Bank, FSB v. Vinson*, 477 US 57 (1986). It is plain from the facts and the arguments advanced by the parties in this case, that to the extent plaintiff possesses any meritorious harassment claim, it is predicated upon a hostile work environment claim, rather than a *quid pro quo* claim. However, even reading the record generously in plaintiff's favor, as it must on a motion for summary judgment (*see, e.g., Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept. 2003]), no such claim exists in this case.

A hostile work environment may be found upon proof that 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*, 3 NY3d 295 (2004); *Kaptan v Danchig*, 19 AD3d 456 (2nd Dept. 2005). Discrimination claims based on harassment have been recognized in cases involving discrimination on the basis of race (*Firefighters Institute for Racial Equality v. St. Louis*, 549 F2d 506 [8th Cir. 1977]), religion (*Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 NY2d 72 [1980]), sex (*Meritor Savings Bank, FSB v. Vinson*, supra; *Thoreson v. Penthouse Int'l, Ltd.*, 80 NY2d 490 [1992]), sexual orientation (*State Division of Human Rights v. Dom's Wholesale and Retail Center, Inc.*, 18 AD3d 335

[1st Dept. 2005]), or disability, even including the mistaken belief that plaintiff suffers from a disability (*Scardace v. Mid Island Hospital, Inc.*, 21 AD3d 363 [2nd Dept. 2005]). Harassment claims involving discrimination based on age are ordinarily not recognized under the law. Nevertheless, for the sake of a thorough analysis of plaintiff's claim, this Court herewith examines plaintiff's hostile work environment (harassment) claim.

The test for a hostile environment has both objective and subjective elements: a hostile environment is one that would reasonably be perceived and is perceived as hostile or abusive. *Forrest v. Jewish Guild for the Blind*, *supra*; *San Juan v. Leach*, 278 AD2d 299 (2nd Dept. 2000). The factors to be considered include the frequency and severity of the conduct, whether the conduct was threatening or humiliating as opposed to being merely offensive, and whether it unreasonably interfered with the plaintiff's work performance. *Forrest v. Jewish Guild for the Blind*, *supra*. Although generally isolated remarks or occasional episodes do not suffice (*Id.*; *Thompson v. Lamprecht Transport*, 39 AD3d 846 [2nd Dept. 2007); *Kaptan v Danchig*, *supra*), if the alleged conduct is extraordinarily severe, a single incident may create a hostile environment. *San Juan v. Leach*, *supra*.

In this case, the defendant has demonstrated, and the plaintiff has plainly failed to rebut, that there was no hostile work environment based upon her age. Ehmann contends that her work was unfairly criticized and that she was subject to disciplinary actions that others were not subjected to. Assuming the truth of her allegations and even affording her the benefit of every favorable inference (*Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]; *Haymon v. Pettit*, 9 NY3d 324 [2007]), this

treatment was not demonstrably part of an overall hostile environment based upon her age. She fails to provide any admissible evidence, or even allegations, that she was subjected to any insult or disparaging comment based on her age.

Notably, even at her sworn deposition, she was unable to provide any evidence of any derogatory comments about her age. In fact, no where in her pleadings or supporting proof does the plaintiff claim that her work was unfairly criticized because of her age. Accordingly, this Court finds that plaintiff's claim that the defendant hospital harassed her by creating a hostile work environment is without merit and must be dismissed.

Relatedly, plaintiff's constructively discharge should also be dismissed. A claim for constructive discharge caused by a hostile work environment is actionable under the Human Rights Law. *Mitchell v. TAM Equities, Inc.*, 27 AD3d 703 [2nd Dept. 2006]; *Kaptan v. Danchig*, *supra*. Again, however, in order to establish a claim of constructive discharge based on a hostile environment created by a supervisor, the plaintiff must establish that the abusive working environment became so intolerable that plaintiff's resignation qualified as a fitting response, *i.e.*, that a reasonable person would have felt compelled to resign. *Thompson v. Lamprecht Transport*, *supra*. As there is no evidence of an abusive and intolerable working environment, her claim for constructive discharge cannot be maintained.

Finally, the Court finds that the defendant has presented proof that the disciplinary actions taken against the plaintiff were based on job performance, and that her age was not a factor. Accordingly, it has shown that there was no disparate treatment based on age. Disparate treatment claims are based upon an employer's less favorable treatment of the

employee due to the employee's membership in a protected group. Thus, a disparate-treatment claim comprises two elements: an employment practice, and discriminatory intent. *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160 (2nd Cir. 2001). In general, there are three ways of establishing unlawful disparate treatment: (1) direct evidence; (2) circumstantial evidence; or (3) by establishing a "mixed motive."

In this case, the plaintiff does not present any direct evidence of a discriminatory policy or discriminatory intent on the part of the Hospital, or direct evidence that the reasons given to her for the discipline were pretextual and that the actual motive for the adverse employment action was her age. Plaintiff appears to be relying upon circumstantial evidence and "mixed motive" of the defendant. In that regard, a *prima facie* case of discrimination may be established by showing that: (1) the claimant was a member of a protected class; (2) the claimant was denied an employment opportunity or treated adversely; (3) the claimant was qualified for the position in question; and (4) the discharge occurred under circumstances giving rise to an inference of age discrimination. *Stephenson v. Hotel Employees and Restaurant Employees Union Local 100 of the AFL-CIO*, 6 NY3d 265 (2006). Defendant has shown, *prima facie,* that the motive for any adverse employment action was poor job performance, and not age discrimination. In response, the plaintiff has presented no evidence that the reasons given by the defendant were pretexual, and that the actual motive was her age.

It is worthy of note that Jute and Propper were the individuals who made the decision to hire the plaintiff, and were also the same individuals who issued her disciplinary warnings.

This creates a strong inference that discrimination was not a determining factor for the adverse action taken by the employer. *Dickerson v. Health Mgt. Corp. Of Am.*, 21 AD3d 326, 329 (1st Dept. 2005). Ehmann's claim that the very same individuals who hired her for the Registered Dietician position are the ones who took action against her based on her age is simply illogical. *See, Carlton v. Mystic Transp., Inc.*, 202 F. 3d 129, 137 (2nd Cir. 2000).

Further, pursuant to recent United States Supreme Court authority, demonstrating a "mixed motive"on the part of the employer cannot be utilized in a claim made under ADEA. *Gross v. FBL Financial Services, Inc.*, _ US _, 129 S. Ct. 2343 (2009). That is, a plaintiff cannot make out a case under the statute by demonstrating that age was "a motivating factor" in any adverse employment action, but rather must show that it was the actual reason for such adverse action. Therefore, a plaintiff must demonstrate that her age was the "but for" cause of the adverse employment action and not merely a contributing factor. *Id.*

As age discrimination claims brought under the New York State Human Rights Law are analyzed in the same manner as claims brought under the ADEA (*Brennan v. Metropolitan Opera Ass'n Inc.*, 192 F.3d 310, 316-17 [2nd Cir. 1999]), plaintiff herein also has the burden of demonstrating that discrimination was the "but for" factor in any adverse employment decision. That is, the plaintiff must show that a protected characteristic – her age – was the determining factor and that, but for the employer's discriminatory motive, the adverse employment action would not have taken place. *Gross v. FBL Financial Services, Inc., supra; see also Anderson v Young & Rubicam,* 68 AD3d 430 (1st Dept. 2009). In this case, defendant has demonstrated that no action was taken against Ehmann because of her

age, and that consequently she has no claim under the ADEA or Human Rights Law. In response, plaintiff presents no evidence demonstrating that the discipline of which she complains was solely the result of discrimination based upon her age.

Relatedly, in response to the defendant's showings plaintiff also has failed to demonstrate that she was constructively discharged because of age. "[C]onstructive discharge occurs when [an] employer, rather than acting directly, deliberately makes an employee's working conditions so intolerabale, that the employee is forced into an involuntary resignation." *Morris v. Schroder Capital Mgmt., Intl.*, 7 NY3d 616, 622 (2006). "A constructive discharge cannot be proven merely by evidence that an employee disagreed with the employer's criticisms of the quality of his work, or did not receive a raise, or preferred not to continue working for that employer." *Spence v. Maryland Casualty Co.*, 995 F.2d 1147, 1156 (2nd Cir. 1993).

The undisputed facts, together with her sworn deposition testimony herein, confirm that plaintiff resigned from her employment with the Hospital due to her belief that her work performance was being unfairly criticized . *See e.g.,* Ehmann Tr., pp. 457-460. In light of her failure to provide any evidence of severe or pervasive harassment that would cause a reasonable individual to feel compelled to resign, her claim for a constructive discharge as an element of her *prima facie* claim (under either a disparate impact theory or a harassment/hostile environment claim) fails as a matter of law.

In sum, Ehmann has failed to demonstrate that she resigned under circumstances that give rise to an inference of age discrimination. The evidence in this case illustrates that

plaintiff's age was not a factor in any employment decision, much less that her age was the "but for" cause of any action. *Brennan v. Metropolitan Opera Ass'n Inc.*, *supra*.

Aside from the demonstrable absence of age-based discrimination, there is a further reason why the these claims are without merit. While is it is clear that Ehmann disagreed with the substance of her discipline, her belief is insufficient to demonstrate that she was subjected to any adverse employment action, which also is needed to establish a *prima facie* case of age discrimination. An adverse employment action requires a materially adverse change in the terms and conditions of the employment. *Forrest v. Jewish Guild for the Blind*, *supra* at 306.

In *Forrest,* the Court of Appeals explained that a "materially adverse" change must be "more disruptive than a mere inconvenience or an alteration of job responsibilities," and may include such changes as 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." *Id.* "[B]eing yelled at, receiving unfair criticism, receiving unfavorable schedules or work assignments, do not rise to the level of adverse employment actions." *Id.* at 307; *Messinger v. Girl Scouts of the U.S.A.*, 16 AD3d 314, 315 (1st Dept. 2005).

Here, plaintiff was not suspended, did not receive a decrease in her pay, and was permitted, in spite of the employer's evaluation of her performance deficiencies, to continue in her employment. Thus, the Court finds that the discipline imposed upon her does not rise to the level of an adverse employment action. Further, and as noted above, the plaintiff is

required to show that age was the determining factor and that, "but for" the employer's discriminatory motive, the adverse employment action – assuming there had been one – would not have taken place. No issue of fact is raised by showing, as the plaintiff attempts to do here, that the employer's decision was arbitrary or unsupported by her job performance. The plaintiff must also show that such action was motivated by Ehmann's age. *Ioele v. Alden Press, Inc.*, 145 AD2d 29 (1st Dept. 1989). That has not been accomplished.

To the extent that the plaintiff argues that the constructive discharge leading to her resignation constituted an adverse employment action, it is unavailing. As noted above, mere written and verbal warnings are not adverse employment actions, and no hostile work environment has been demonstrated. Her resignation from her employment, if a result of negative communications from her employer, therefore cannot constitute a constructive discharge. Accordingly, the Court finds she was not subjected to any adverse employment actions during her employment.

In view of the foregoing, this Court finds that in response to the defendant's proof the plaintiff has failed to shift the burden back to the defendant to articulate a legitimate nondiscriminatory reason for the its business decisions. *Ferrante v. Am. Lung. Assoc.*, *supra* at 629; *Energy Expo, Inc. v. New York State Div. of Human Rights*, 112 AD2d 302 (2nd Dept. 1985). The plaintiff's first two causes of action predicated upon a claim for age based discrimination are therefore dismissed in their entirety.

Plaintiff's third and fourth causes of action sound in intentional and negligent infliction of emotional distress, respectively.

The Court of Appeals has stated that "[t]he tort [of Intentional Infliction of Emotional Distress ("IIED")] has four elements: (I) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Howell v. New York Post Co*, 81 NY2d 115 (1993). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Murphy v. American Home Products Corp.*, 58 NY2d 293, 303 (1983). In general, mere allegations of discrimination are insufficient to establish IIED. *Williams v. Port Auth.*, 880 F. Supp. 980 (EDNY 1995).

Plaintiff's allegations clearly fall far short of meeting this stringent standard. Based upon a plain and simple reading of the papers submitted, this Court finds that there is no evidence of any inappropriate conduct during plaintiff's employment with the Hospital, much less outrageous conduct required to sustain a claim for IIED. A garden-variety employment discrimination claim does not set forth a claim for IIED. *Hargett v. MTA*, 552 F.Supp.2d 393, 401 (SDNY 2008); *Herlihy v. Metro. Museum of Art*, 214 AD2d 250, 262-63 (1st Dept. 1995). As such, plaintiff's third cause of action for IIED is dismissed.

Plaintiff's fourth cause of action for Negligent Infliction of Emotional Distress ("NIED") is also dismissed. Not only is such a claim barred by the New York State Workers' Compensation Law §11 (*Duran v. Jamaica Hosp.*, 216 F. Supp. 2d 63 [EDNY 2002]), but even if her claim was not barred by the Workers' Compensation Law, a claim for NIED

arises only in unique circumstances, such as when a defendant owes a special duty to the plaintiff, or where there is proof of a traumatic event that cause the plaintiff to fear for her own safety. *Cucchi v. New York City Off-Track Betting Corp.*, 818 F. Supp. 647, 656 (SDNY 1993); *Tartaro v. Allstate Indem. Co.*, 56 AD3d 758, 759 (2nd Dept. 2008). Not even the termination of employment gives rise to a claim for NIED, as an employer owes the same duties to all employees. *Cucchi v. New York City Off-Track Betting Corp., supra.* Moreover, at no time during her employment was plaintiff's physical safety endangered. *See, Hart v. Child's Nursing Home Co., Inc.*, 298 AD2d 721, 723 (3rd Dept. 2002).

Under these circumstances, plaintiff's fourth cause of action is also dismissed.

Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint is granted in its entirety.

This shall constitute the Decision and Order of this Court.

DATED: September 17, 2010

ENTER

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Acting Supreme Court Justice

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