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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEOFFREY D.S. WRIGHT PART 62
Justice

INDEX NO. 113339/07

Barbara K. Nixon-Tinkelman

Plaintiff/Petitioner(s)

MOTION DATE_____

- v -

New York City Department of Health and Mental Hygiene

MOTION SEQ. NO. 002

Defendant/Respondent(s)

The following papers, numbered 1 to 4 were read on this motion/petition for Summary Judgment.

	Papers Numbered
Notice of Motion/Petition Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4
Other (Cross-motion) & Exhibits Annexed	

Cross-Motion: Yes X No

This motion for summary judgment is granted as per the annexed decision

GEOFFREY D. WRIGHT
A.J.S.C.

Dated: June 27, 2011 J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTRY OF NEW YORK: Part 62

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BARBARA K. NIXON-TINKELMAN

Plaintiffs,

-against-

NEW YORK CITY OF HEALTH AND MENTAL HYGIENE

Defendants.

----------X

Index # 113339/07
Motion Cal. #
Motion Seq. #
DECISION/ORDER
Present:
Hon. Geoffrey Wright
Judge, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion for Summary Judgment

PAPERS	NUMBERED
Notice of Motion, Affidavit & Exhibits Annexed----------	1
Order to Show Cause, Affidavit & Exhibits----------	
Answering Affidavit & Exhibits Annexed----------	2,3
Replying Affidavits & Exhibits Annexed----------	4
Other (Cross-motion) & Exhibits Annexed----------	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:
Plaintiff Barbara K. Nixon-Tinkelman commenced the instant action against defendant New York City Department of Health and Mental Hygiene asserting (DHMH) claims of discrimination on the basis of disability and retaliation. Defendant now moves for summary judgment.

From 1990 until August 21, 2006 plaintiff worked for defendant as Regional Director in Oral Health Programs (OHP) in the Division of Health Care Access and Improvement (HCAI). Since 1994, defendant has been designated as a Civil Service 55A, physically disabled person. On August 23, 2006, after returning from medical leave, plaintiff was placed on loan to the Bureau of Transitional Health Care (THCC). In 2007, she was formally transferred to THCC.

In a motion for summary judgment in a discrimination case, the plaintiff bears the initial burden of establishing a prima facie case. *Bendeck v. NYU Hospitals Center*, 77 A.D.3d 552, 909 N.Y.S.2d 439, 2010 N.Y. Slip Op. 07585. The plaintiff must demonstrate that "the plaintiff is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. *Baldwin v Cablevision Systems Corp.* 65 A.D.3d 961, 888 N.Y.S.2d 1, 107 Fair Empl.Prac.Cas. (BNA) 1059, 2009 N.Y. Slip Op. 06718 citing *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 687 N.E.2d 1308, 665

N.Y.S.2d 25, 78 Fair Empl.Prac.Cas. (BNA) 1539, 1997 N.Y. Slip Op. 08773.

Plaintiff satisfies the first requirement by showing that she is classified a Civil Service 55A, physically disabled person. By participating in this program, it is clear that plaintiff suffers from a disability as defined by Executive Law § 292 (21). Plaintiff is member of a class protected by Executive Law § 296 (b) and Administrative Code § 8-107.

After returning from medical leave, plaintiff was placed on loan to a different bureau within DHMH. Plaintiff claims that her assignments were beneath a worker with her education and experience. Though plaintiff's title and pay was not altered by the transfer, a transfer from a position of responsibility to one with menial tasks can be considered adverse employment action. *Mejia v. Roosevelt Island Medical Associates*, Slip Copy, 31 Misc.3d 1206(A), 2011 WL 1260111 (Table) (N.Y.Sup.), 2011 N.Y. Slip Op. 50506(U). Before the transfer, plaintiff's duties were managerial and supervisory, whereas after, her duties were secretarial. This constitutes an adverse employment action.

However, even after accepting the transfer to be a functional demotion, plaintiff still fails to make a prima facie showing of discrimination because there is no proffered evidence indicating that the adverse action occurred under circumstances giving rise to an inference of discrimination. On the contrary, defendant provides a letter from the plaintiff indicating that she had concerns about returning to her previous office. The mere fact that plaintiff is a member of a protected class and that something bad happened to her does not indicate causation and is insufficient to rise inference of discrimination. *Mejia v. Roosevelt Island Medical Associates* citing *Ochei v. All Care/ Onward Healthcare*, Slip Copy, 2009 WL 890061 (S.D.N.Y.).

Plaintiff also contends that defendant failed to provide her with reasonable accommodations as required by Executive Law § 296 (3-a). A plaintiff making such a claim bears the initial burden of making a prima facie case. *Hispanic Aids Forum v. Estate of Bruno*, 16 Misc.3d 960, 839 N.Y.S.2d 691, 2007 N.Y. Slip Op. 27284. To make a prima facie showing for reasonable accommodation, the plaintiff must demonstrate that the plaintiff proposed and was refused an objectively reasonable accommodation. *Pembroke v. New York State Office of Court Admin. v.* 306 A.D.2d 185, 761 N.Y.S.2d 214, 2003 N.Y. Slip Op. 15493.

Plaintiff contends that she requires a telephone modified for the hearing impaired. The only time plaintiff was without such a device was from January 2007 to February 2008. Plaintiff does not provide any evidence that she requested this accommodation prior to the initiation of the instant complaint which occurred in October 2007. Though plaintiff's request was ultimately granted, an unexplained delay in providing a reasonable accommodation may still be considered to be a violation of Executive Law § 296. *2132-38 Wallace Ave. Corp. v. Gibson*, 60 A.D.3d 575, 876 N.Y.S.2d 33, 2009 N.Y. Slip Op. 02304.

However, plaintiff fails to make a prima facie showing that her requested accommodation was a reasonable accommodation pursuant to Executive Law § 292 (21-e) which defines reasonable accommodation as "actions taken which permit an employee, prospective employee or member with a disability to perform in a reasonable manner the activities involved in the job or

occupation sought or held." There is no evidence indicating that operating telephones was a part of her job at that time. The plaintiff even admits in her deposition that communicating with people by telephone was not one of her job duties at that time.

Plaintiff claims that she was denied a reasonable accommodation in the form of a transfer to an office closer to her home in Queens. A transfer may be considered to be a reasonable accommodation, but the burden is on the plaintiff to demonstrate that a "vacant funded position exists and that plaintiff was qualified to fill that position." *Pimentel v. Citibank, N.A.*, 29 A.D.3d 141, 811 N.Y.S.2d 381, 2006 N.Y. Slip Op. 01911 citing *Jackan v. New York State Dept. of Labor*, 205 F.3d 562, 10 A.D. Cases 497, 17 NDLR P 104.

Plaintiff identifies a number of places, including her own home, that she could have been transferred to. However, none of the proposed locations were THCC offices. Such a transfer would require plaintiff to work without direct supervision and without office resources. Plaintiff provides the deposition of her direct supervisor to show that plaintiff may be able to work without day-to-day supervision. Even if the court were to accept this claim, plaintiff provides no evidence indicating that she can perform her job without the resources of the office and without regular contact with other employees. Without such evidence, plaintiff does not raise a triable issue of fact as to whether she was improperly denied a workspace in non-THCC offices. *Krist v. OppenheimerFunds, Inc.*, 18 Misc.3d 1111(A), 856 N.Y.S.2d 498 (Table), 2007 WL 4624023 (N.Y.Sup.), 2007 N.Y. Slip Op. 52494(U).

Plaintiff claims that she was physically unable to continue to commute to her office in Manhattan because it required her to use public transportation. She wanted to have position outside of Manhattan because she could then drive. Plaintiff also wanted to work closer her home in Queens. Defendant identified Rikers Island and Queensboro Correctional Facility as two locations in Queens that would be appropriate for plaintiff to transfer to. Plaintiff failed to request to be transferred to either location after they were made known to her. In her affidavit in support of the instant motion, plaintiff claims that neither facility was appropriate because she would have been denied access to immediate medical care. This is not substantiated by any evidence.

Defendants identified two locations plaintiff could transfer to that were reasonable accommodations. This satisfies the employer's burden of engaging in a good faith interactive process to find a reasonable accommodation. *Phillips v. City of New York*, 66 A.D.3d 170, 884 N.Y.S.2d 369, 22 A.D. Cases 621, 2009 N.Y. Slip Op. 05990.

Plaintiff also claims she was retaliated against because she requested accommodation. Such a claim demands that the plaintiff bear the initial burden of making a prima facie showing that "(1) she engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered adverse employment action based on her activity, and (4) there is a causal connection between the protected activity and the adverse action." *Bendeck v. NYU Hospitals Center*, 77 A.D.3d 552, 909 N.Y.S.2d 439, 2010 N.Y. Slip Op. 07585 citing *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 819 N.E.2d 998, 786 N.Y.S.2d 382, 2004 N.Y. Slip Op. 07620.

Plaintiff's claims of adverse employment action in regards to retaliation are the same as those claimed in regard to discrimination and they fail on the same merits. There is no evidence of the adverse employments actions being anything other than legitimate management decisions.

Finally, plaintiff claims to have been subjected to a sexually and disability hostile work environment. "To establish a claim of a hostile work environment, plaintiff must show that the work environment was permeated with discriminatory intimidations, ridicule and insult which was so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment" *Lore v. New York Racing Ass'n. Inc.,* 12 Misc.3d 1159(A), 819 N.Y.S.2d 210 (Table), 2006 WL 1408419 (N.Y.Sup.), 2006 N.Y. Slip Op. 50968(U) The only evidence plaintiff provides is deposition claiming that a single employee called defendant "trailer trash" and expressed her penchant for stabbing people. Though these statements are certainly hostile, they are not sexually or disability charged and isolated incidents do not constitute a hostile work environment. *National Medical Health Card Systems, Inc. v. Fallarino*, 21 Misc.3d 304, 863 N.Y.S.2d 556, 2008 N.Y. Slip Op. 28310.

Defendant's motion for summary judgment is granted.

This constitutes the decision and order of the Court.

GEOFFREY D. WRIGHT
AJSC

July 27, 2011