Matter of Allman v New York State Dept. of Correctional Servs.
2011 NY Slip Op 32369(U)
August 11, 2011
Sup Ct, NY County
Docket Number: 103176/2010
Judge: Louis B. York
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SCANNED ON 8/16/2011

[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. PART 2

Index Number : 103176/2010

ALLMAN, CRYSTAL

vs

NYS DEPT. CORRECTIONAL

Sequence Number : 001

DISM ACTION/ INCONVENIENT FORUM

INDEX NO. ________

MOTION DATE ________

MOTION SEQ. NO. ________

MOTION CAL. NO. ________

The following papers, numbered 1 to ______ were read on this motion to/for ________

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED

AUG 16 2011

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion /

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 8/16/11

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF
NEW YORK
COUNTY OF NEW YORK
---------------------------------------X

In the Matter of the Application of
CRYSTAL ALLMAN,

Plaintiff,
– against –

Index No. 103176/2010

NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, RUDOLPH JEFFREY,
and JOSEPH WILLIAMS,

Defendants.
---------------------------------------X

FILED
AUG 16 2011
NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.:

BACKGROUND

As defendants have moved to dismiss under CPLR 3211, the Court accepts plaintiff's recitation of the facts as true. See Weisen v. New York University, 304 A.D.2d 459, 460, 758 N.Y.S.2d 51, 52 (1st Dept. 2003). Below is an account of the facts as alleged in plaintiff's complaint, as supplemented by the papers currently before the Court.

Plaintiff Crystal Allman worked as a correctional counselor at the Lincoln Correctional Facility ("Lincoln") of the New York State Department of Correctional Services ("DOCS") from approximately September 28, 1995 until January 26, 2009. Defendants Rudolph Jeffrey and Joseph Williams, the deputy superintendent and superintendent at Lincoln, respectively, were plaintiff's supervisors at that time. Plaintiff, a correctional counselor, was a liaison with Lincoln inmates who were in the Work Release Program. Among other things, she verified their work information as part of her job. In November 2007, she reported alleged violations of the Work Release Program's policies and

procedures to Jeffrey and Williams. In particular, she told them that at least three DOCS employees were allowing inmates to submit fraudulent time cards and receive payments for hours they had not worked. In response to plaintiff's report, staff and inmates allegedly began calling her a whistleblower and a snitch. Plaintiff also informed her supervisors that she would report the alleged violations to the State Inspector General, who investigates internal DOCS complaints. Days after she spoke with her supervisors, Defendant Jeffrey wrote plaintiff up for an incident in which she allegedly slammed a door. The Inspector General ultimately ruled that plaintiff's claim about the violations lacked merit.

In addition, the complaint describes plaintiff's alleged disability and defendants' alleged failures to accommodate her. Plaintiff claims DOCS required her to type her written synopses of her reviews of the guidance unit standards.[1] Allegedly as a result of the typing, plaintiff developed right shoulder pain and hand numbness. Around March 10, 2008 plaintiff received a diagnosis of carpal tunnel syndrome. Her doctor gave her permission to work with limited duty and with no repetitive use of either hand. Around April 7, 2008, plaintiff provided documentation of her diagnosis to defendants and requested special equipment that would accommodate her carpal tunnel. Defendant instead informed plaintiff the documentation was incomplete and asked her to resubmit it with additional materials. After plaintiff did so, around April 17, defendant Williams placed plaintiff on medical leave. Plaintiff asserts she was forced to leave because of her disability. Upon William's advice, plaintiff submitted a sick leave pay request, which was approved around

[1] Keyboard specialists normally typed the summaries but because of staff shortages plaintiff did the typing herself. Plaintiff alleges that DOCS violated its employment policy by assigning her this duty.

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May 2008.

Plaintiff returned to work at Lincoln around July 27, 2008, but her condition worsened. On August 22, 2008, plaintiff requested further medical leave. The same day, Lincoln denied the request by letter. The letter indicated her request was submitted late and did not include a diagnosis. Plaintiff was absent from work at Lincoln from August 22, 2008, to October 1, 2008, during which time Lincoln placed her on leave without pay. When plaintiff returned to work, she filed a successful grievance requesting retroactive half-pay sick leave for the period she missed.

During the relevant period, plaintiff also worked as a registered nurse at Bronx-Lebanon Hospital Center ("Bronx-Lebanon"). DOCS required employees to get approval for second jobs. Prior to working at Bronx-Lebanon, plaintiff had sought and received approval for a previous position. She alleges that she did not seek approval for her job at Bronx-Lebanon because she was unaware that DOCS, having approved her once, required her to get approval for the new job. Around October 15, 2008, defendant Williams asked plaintiff if she still worked at her original second job or worked elsewhere. Plaintiff told him about her job at Bronx-Lebanon, where she worked Saturday and Sunday, bimonthly, from 8:00 pm to 8:30 am each of the two days. Defendant Williams then emailed Investigator Cho of the Inspector General's Office, requesting that the office investigate whether plaintiff had worked without permission during her absences.

Shortly after defendant Williams' and Investigator Cho's correspondence regarding plaintiff's secondary employment, plaintiff attended an employee in-service program where she encountered a former male co-worker. Two years earlier, the co-worker had sent

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plaintiff pictures of himself exposed. When she saw him at the program, plaintiff became upset and left the meeting. She then asked her supervisor for permission to be excused from the program for personal reasons. The supervisor ordered her to detail the incident in writing. Her supervisors informed her that they would forward her written statement to the Office of Diversity Management for investigation. Plaintiff claims that when she called the Office around January 14, 2009, the Office had not received her complaint.

On January 21, 2009, inspector Cho questioned plaintiff about her carpal tunnel syndrome and her job at Bronx-Lebanon. On January 26, 2009, after the investigation, plaintiff received a Notice of Discipline ("NOD") pursuant to the Disciplinary Procedure, Article 33 of the Agreement between the State of New York and the Public Employees Federation. The NOD recommended dismissal from service and loss of any accrued annual leave. The NOD concluded that: 1) on two occasions, plaintiff was absent from duty without authorization; 2) from April to October 2008, plaintiff submitted false documents in support of her absences; 3) plaintiff wrongfully obtained sick leave benefits totaling $16,787.20; 4) plaintiff engaged in outside employment at Bronx-Lebanon without the requisite approval; 5) plaintiff's secondary employment exceeded the maximum twenty weekly hours; and 6) plaintiff made false and misleading statements to Investigator Cho during his investigation.

Pursuant to a collective bargaining agreement between DOCS and The Public Employees Federation, the parties arbitrated plaintiff's job-related grievances, including her allegedly retaliatory termination. Plaintiff, represented by her union, and DOCS presented evidence at a hearing before Richard Graba of the American Arbitration Association. On

May 18, 2010, Arbitrator Graba issued a decision in which he recommended plaintiff's termination and loss of leave accrual. Mr. Graba determined that: 1) DOCS had probable cause to suspend plaintiff without pay on January 22, 2009; 2) plaintiff engaged in outside employment at Bronx-Lebanon without authorization; 3) plaintiff falsely reported her employment dates; 4) plaintiff exceeded the permitted twenty hours of work; and 5) DOCS served plaintiff the NOD for just cause. Mr. Graba also found in favor of plaintiff on several issues, including that she was not absent from duty without authorization, that she did not submit false documents to support her absences, and that she was entitled to sick leave benefits.

On March 10, 2010, prior to the arbitrator's decision and after she received a Right to Sue letter from the Equal Employment Opportunity Commission, plaintiff commenced this action, asserting claims under 42 U.S.C. §§ 2000e et seq. ("Title VII"); Title I and Title II of the Americans with Disabilities Act ("ADA"); 42 U.S.C. § 1983; The New York State Human Rights Law, N.Y. Executive Law §§ 290 et seq. ("State Human Rights Law"); New York State Executive Law § 55; and The New York City Human Rights Law, Administrative Code Title 8 ("City Human Rights Law"). In particular, plaintiff's first cause of action asserts that DOCS violated Title I and II of the ADA, the State Human Rights Law, and the City Human Rights Law; her second cause of action states that DOCS retaliated against her for reporting sexual harassment; the third cause of action, against the individual defendants, alleges that they participated in the discrimination; and the fourth cause of action rests on an alleged violation of plaintiff's First Amendment right to speak on matters of public concern.

Now, defendants move to dismiss on the grounds that 1) jurisdictional issues bar plaintiff's City Human Rights Law causes of action; 2) the portion of plaintiff's first cause of action that is based on the ADA is barred as a matter of law; 3) plaintiff fails to state a First Amendment retaliation cause of action; 4) plaintiff fails to state a cause of action for a hostile work environment under the State Human Rights Law; and 5) plaintiff's State Human Rights Law and Title VII claims fail based on documentary evidence. Plaintiff opposes the motion and cross-moves to amend her complaint to add a fifth cause of action, asserting a First Amendment retaliation claim for her whistleblower activities. She concedes that her City Human Rights Law causes of action must be dismissed for lack of jurisdiction and contends that she did not bring a claim for hostile work environment.[2] On the other hand, she claims that she has viable causes of action under the ADA, the First Amendment, the State Human Rights Law and the Whistleblower Act. As plaintiff withdraws her New York City Human Rights Law causes of action and states there is no hostile work environment claim, only the second, third and fifth of defendants' arguments are relevant. For the reasons below, the Court partially grants and partially denies defendants' motion and denies plaintiff's cross-motion.

DISCUSSION

Initially the Court notes that the parties' arguments muddle some of the issues. For example, in their papers defendants blur the line between summary judgment and motion

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[2] Defendants' confusion on this point is understandable, however, as the first cause of action expressly states that plaintiff was subjected to a hostile working environment. Complt at ¶ 69.

to dismiss standards. In addition, in her papers plaintiff continues to argue the issue of hostile work environment although she repeatedly clarifies that she has not asserted this claim; and, rather than specify which act or acts of defendants support which of her causes of action, she often blurs the line and refers to all the acts as generally supporting all the claims. The Court has done its best to overcome these issues in the following discussion.

Plaintiff's Cross-Motion to Amend the Complaint

In her cross-motion, plaintiff seeks to add a fifth cause of action, which alleges that defendants retaliated against her for reporting corruption and fraud within DOCS to the State Inspector General. According to plaintiff, defendants' conduct violated Executive Law § 55(1), which requires State officers and employees to report fraudulent or corrupt conduct. Thus, she asserts what courts often describe as a First Amendment retaliation claim.

Under CPLR § 3025,,

> "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

The court need not limit its consideration to the causes of action as alleged by the plaintiff in her complaint; it must only determine "whether the facts as stated fit within any cognizable legal theory." Zito v. County of Suffolk, 81 A.D.3d 722, 724, 916 N.Y.S.2d 611, 613 (2nd Dept. 2011). A court may consider any papers and exhibits which the plaintiff has annexed to the complaint, along with documentary evidence or facts of which it can take

judicial notice. Dubois v. Brookdale University Hosp., Index No. 60264/04, 2004 WL 3196952, at *4 (Sup. Ct. Kings County Dec. 4, 2004)(Dubois I), aff'd, 29 A.D.3d 731, 815 N.Y.S.2d 239 (2nd Dept. 2006). This includes disciplinary notices and arbitration awards that a party may append to a motion. Id. Despite the liberality of courts in allowing the amendment of pleadings, there is a restriction. To avoid a waste of judicial and party resources, courts habitually deny the motion to amend if "the proposed amendment is palpably insufficient or patently devoid of merit." MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d 499, 499-500, 901 N.Y.S.2d 522, 522 (1st Dept. 2010).

The basis of plaintiff's proposed cause of action is her contention that defendants retaliated against her for reporting corruption within the DOCS. According to the amended complaint defendants retaliated against plaintiff because she reported the problems with the time cards. In particular, they allegedly reprimanded her for slamming a door – an incident that she alleges never happened; forced her to take unpaid medical leave; and brought her up on the disciplinary charges that eventually led to her termination. Plaintiff bases her claim on Executive Law § 55, which requires State employees to report any information relating to "corruption, fraud, criminal activity, conflicts of interest, or abuse by another Department employee or state officer relating to his or her office or employment . . . ." N.Y. Executive Law § 55(1) (2006).

Defendants point to the arbitrator's ruling, which they provide, in support of their opposition to the cross-motion as well as in support of their motion to dismiss. As noted, the arbitrator found that there was a valid and nondiscriminatory basis for plaintiff's

termination. Plaintiff correctly argues that this ruling does not necessarily lead to denial of her cross-motion or dismissal of this litigation, as a negative decision by an arbitrator regarding the employee's misconduct does not preclude a discrimination lawsuit by the employee. See Chiara v. Town of Newcastle, 61 A.D.3d 915, 916, 878 N.Y.S.2d 755, 757 (2nd Dept.), lv dismissed, 13 N.Y.3d 887, 893 N.Y.S.2d 832 (2009). If there is no bias claim relating to the arbitrator's decision, this "attenuate[s] a plaintiff's proof of the requisite causal link." Collins v. New York City Transit Authority, 305 F.3d 113, 119 (2d Cir.2002). However, though this may create problems when plaintiff attempts to prove her case, it merely creates factual issues for consideration in a summary judgment motion or at trial.

Ultimately, the Court denies the cross motion, however, as plaintiff has not stated persuasively that any retaliatory actions occurred due to her whistleblower activities. Plaintiff argues that the close temporal proximity between her report concerning the time cards and her disciplinary warning for the door slamming incident supports her proposed cause of action. However temporal proximity, on which plaintiff relies, is insufficient to satisfy the pleading requirement in this context. See Sayed v. Hilton Hotels Corp., 627 F.3d 931, 933 (2nd Cir. 2010). Retaliation claims "are routinely dismissed when as few as three months elapse between the protected EEO activity and the alleged act of retaliation." Nicastro v. Runyon 60 F. Supp. 2d 181, 185 (S.D.N.Y.,1999) (in context of summary judgment motion); see Ponticelli v. Zurich American Ins. Group, 16 F.Supp.2d 414, 435 (S.D.N.Y.1998)(same); Hargett v. New York City Transit Auth., 640 F. Supp. 2d 450, 481 (S.D.N.Y. 2009)(same). Here, (1) the more significant acts – e.g., plaintiff's NOD, with its recommendation of termination, on January 26, 2009 – occurred over a year after the

protected activity in November 2007, (2) the determination to place plaintiff on leave without pay rather than sick leave occurred nine months later, and (3) only the writeup for slamming the door occurred within days of the protected activity. Using this timeline, the events are not "temporally proximate enough to satisfy the causality element of plaintiff's retaliation claim." Baldwin v. Cablevision Systems Corp., 65 A.D.3d 961, 967, 888 N.Y.S.2d 1, 6 (1st Dept. 2009). As plaintiff alleges no facts other than temporal proximity in her complaint or in this motion to support her allegations, therefore, plaintiff has not pleaded a valid cause of action.

In addition, for this argument to prevail, the act in question must be an adverse employment action, significant enough to deter the future exercise by employees of their First Amendment rights. See Zelnik v. Fashion Inst. of Tech., 464 F.3d 217, 225 (2d Cir. 2006). Though, as plaintiff notes, the reprimand went into her record, it did not result in any loss of income, demotion, or significant and immediate harm. Thus, it did not comprise the kind of adverse action which would dissuade a reasonable worker from reporting the alleged misconduct. See Copantitla v. Fiskardo Estatorio, Inc., – F. Supp. 3d –, – (S.D.N.Y. 2011)(avail at 2011 WL 2127808, at *39)(allegations that plaintiff received unfavorable work schedules and less desirable assignments and was repeatedly sent home from work were insufficient as a matter of law to constitute an adverse action). The decision to place plaintiff on medical leave without pay the second time she went on leave was not adverse as the determination was reversed and she received retroactive sick leave pay for the period in question. See Dubois v. Brookdale Univ. Hosp. and Medical Center, 29 A.D.3d 731, 732, 815 N.Y.S.2d 239, 240 (2nd Dept. 2006)(Dubois II).

Motion to Dismiss

Defendants ~~also~~ move to dismiss the complaint under CPLR § 3211. For this purpose, the Court must accept the allegations in the complaint as true. See Simkin v. Blank, 80 A.D.3d 401, 403, 915 N.Y.S.2d 47, 50 (1st Dept. 2011). Where, as here, movant has submitted the disciplinary records and arbitrator's award, this Court may properly consider all of this annexed material. If this evidence flatly contradicts the complaint's allegations, the Court must grant defendants' motion to dismiss. Dubois I, 2004 WL 3196952, at *4. The standard, again, is high; the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Trade Source, Inc. v. Westchester Wood Works, Inc., 290 A.D.2d 437, 438, 736 N.Y.S.2d 605, 605 (2nd Dept. 2002).

First Cause of Action

Plaintiff's first cause of action arises under Title I and Title II the ADA, which prohibits state employers from discriminating against qualified individuals with disabilities because of the disabilities "in regard to . . . terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (2009). Defendants incorrectly state that the Eleventh Amendment bars lawsuits for damages brought by state employees against a State in response to the State's alleged failure to comply with Title I of the ADA. Instead, the Eleventh Amendment bars monetary suits. See Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001). People with disabilities have recourse against discrimination under Title I of the ADA, which prescribes the standards applicable to the states. See id. at 374

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n.9. Although only the United States may enforce those standards in actions for money damages, plaintiff correctly argues that private individuals may enforce them in the context of actions for injunctive relief. Id.

Here, plaintiff states that her claim under Title I seeks an injunction directing her reinstatement. This is permissible under the ADA. Moreover, plaintiff has raised at least one triable issue of fact under the provision: there is a question as to whether defendants' initial failure to accommodate her disability, which in turn forced her to take sick leave with half pay, was discriminatory within the meaning of the statute. See Parker v. Columbia Pictures Ind., 204 F.3d 326, 332 (2nd Cir. 2000). Therefore, the Court denies the defendants' motion to the extent that it seeks dismissal of that part of plaintiff's first cause of action which she asserts under Title I of the ADA.

Defendants move to dismiss plaintiff's Title II claim, also part of the first cause of action, on the ground that Title I rather than Title II is the proper vehicle a discrimination claim. Title II, defendants note, mandates equal access to government services and programs and does not mention employment. The Supreme Court expressly left the question of whether Title II applies to employment claims unanswered in Board of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 360 n.2 (2001) and the Second Circuit also has left the issue unresolved. Moreover, contrary to plaintiff's contention, there is no clear consensus in the district courts of New York. See Scherman v. New York State Banking Dept., No. 09 Civ 2476 (DAB)(AGP), 2010 WL 997378, at * 7 (S.D.N.Y. 2010)(listing New York district court decisions which reach differing conclusions).

It is not for this Court to decide what essentially is an issue of federal law. However, it must determine whether plaintiff can assert a Title II cause of action in this lawsuit. Relying on statutory interpretation, dicta in Tennessee v. Lane, 541 U.S. 509, 515 (2004), and the reasoning in various court decisions, the Scherman Court persuasively argues that plaintiffs cannot bring employment related claims under Title II of the ADA. Scherman, 2010 WL 997378, at *6-10. Accordingly, this Court concludes, based on Scherman and the dicta in Lane to which Scherman refers, that plaintiff's first cause of action should be dismissed to the extent that plaintiff seeks redress under Title II. As the Court dismisses the cause of action, it need not determine whether plaintiff has sufficiently alleged animus.

Second Cause of Action

Defendants also seek to dismiss plaintiff's second cause of action, which plaintiff bases on Title VII and on the State Human Rights Law.[3] Title VII makes it unlawful for employers to retaliate against employees who oppose unlawful employment practices or in any way make a charge or participate in an investigation related to the alleged unlawful practices. 42 U.S.C. §§ 2000e et seq. To state a prima facie claim for retaliation, plaintiff must show that: (1) she was engaged in an activity protected under Title VII; (2) defendants knew of her participation in the activity; (3) an adverse employment action occurred; and (4) a causal connection existed between the activity and the adverse employment action. Wenping Tu v. Loan Pricing Corp., Index 108938/2005, 2008 WL 4367589, at *11 (Sup.

[3] Plaintiff's cause of action also references the City Human Rights Law. However, as stated, she has withdrawn this portion of her first, second and third causes of action.

Ct. N.Y. Co. 2008). A causal connection may be established indirectly, by showing, for example, temporal proximity between the protected activity and the discriminatory treatment; or directly, by showing retaliatory animus which defendants directed against plaintiff. Id., 2008 WL 4367589, at *11.[4] The same pleading requirement exists for claims under the State Human Rights Law. See Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004); see also Graves v. Finch Gruyn & Co., Inc., 457 F.3d 181, 184 n.3 (2nd Cir. 2006)(noting that the standards are the same for both claims).

Plaintiff contends that DOCS discriminated against her when they did not forward her sexual harassment complaint to the Office of Diversity Management. For the purposes of Title VII, the question is whether the plaintiff had a good faith, reasonable belief that her complaint concerned a violation of the anti-discrimination laws and whether this complaint resulted in a retaliatory action by defendants. See Sumner v. United States Postal Service, 899 F.2d 203, 209 (2d Cir. 1990). Although plaintiff's supervisors informed her that they would forward the harassment complaint to the Office of Diversity Management for investigation, when plaintiff called the office a few months later, she discovered that they had not done so. It appears that this is the basis of her claim.

Plaintiff has set forth a prima facie case as to the first two prongs of the cause of action. That is, she engaged in protected activity when she reported the harassment and defendants were aware of the report as they'd requested it. However, it appears that all

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[4] Plaintiff also discusses whether the actions created a hostile work environment. However, as she has expressly stated there is no claim for hostile work environment here, the Court does not address her arguments.

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of the alleged retaliations to which plaintiff refers in her brief in connection with this motion – that is, defendants' refusal to accommodate her disability, which required her to take leave; and defendants' decision to unjustly discipline her for slamming the door – occurred before she filed the sexual harassment complaint. As a matter of law, it would not be reasonable for plaintiff to conclude that these prior actions occurred in retaliation for a charge she had not yet filed. Moreover, plaintiff does not explain how the failure to forward the charge – which, according to the complaint, defendants had compelled her to file – was in any way retaliatory. The inconsistency in the pleadings and failure to allege facts which would show a causal connection warrant dismissal.

Third Cause of Action

The third cause of action asserts discrimination in violation of the State Human Rights Law and Title VII. It appears the argument here is that the decision to suspend plaintiff without pay constituted discrimination "in the compensation, terms, conditions, and privileges of her employment . . . ." Complt ¶ 68. However, for the same reasons stated above, see supra at p.10 (citing Dubois II, 29 A.D.3d at 732, 815 N.Y.S.2d at 240, this argument fails.

Fourth Cause of Action

In her fourth cause of action plaintiff alleges that defendants retaliated against her for exercising her right to free speech. To support an allegation of retaliation for exercising First Amendment rights, a plaintiff must demonstrate two factors. First, the speech must be "on a matter of public concern, as determined by the content, form, and context of a

given statement, as revealed by the whole record," Berry v. Perales, 195 A.D.2d 926, 928, 600 N.Y.S.2d 838, 840 (3d Dept. 1993). Second, although a public employee's right to speak on matters of public concern cannot be constrained by the employer, he or she must accept certain limitations on this freedom in order to facilitate government policies and so as not to impair the performance of government functions. Weintraub v. Bd. of Educ. of City Sch. Dist. of City of New York, 593 F.3d 196, 200-01 (2nd Cir. 2010). Therefore, when a public employee's speech is within the scope of his or her official duties, the speech is not considered to be on a matter of public concern and is not protected by the First Amendment. Id. Finally on this point, whether a statement is made within the course of one's official duties is one of law rather than fact. Connick v. Meyers, 461 U.S. 138, 148 n.7 (1983).

Applying these guidelines to the case at hand, therefore, the Court must determine whether plaintiff made the complaint in her official capacity. See Adams v. New York State Educ. Dep't, 752 F. Supp. 2d 420, 462 (S.D.N.Y. 2010). Here, plaintiff states that her duty was to report to the Inspector General and not to her supervisors and that this takes her conduct out of the purview of her duty as an employee and makes the speech a matter of public concern. She relies on Executive Law § 55 (1), which requires State employees to report fraudulent or corrupt conduct to the Inspector General, as support.

Defendants challenge plaintiff's characterization of her duties, stating that she also was required to notify her supervisors of any possible corruption. They annex a copy of the New York State DOCS Directive No. 2260, which provides that Departmental employees are responsible for notifying their supervisors when they know of or suspect that the State

assets have been lost or stolen. They also annex Directive No. 4401, which requires staff members to report corrupt or unethical behavior that could damage the facility, the Guidance and Counseling Unit, the well-being of a client or staff, or the counseling process. Based on the employee directives which defendants have provided, plaintiff had a duty to report the alleged corruption to her supervisors. Therefore, the speech is not protected.

Even if there had been no formal written requirement, speech can be part of an employee's official duties if it is part of her or his concerns, even if there is no written requirement. See Anemone v. Metropolitan Transp. Auth., 629 F.3d 97, 116 (2nd Cir. 2011). Here, ensuring that there was no abuse of the work release program was "part and parcel" of plaintiff's job. See id. As a result, her speech was made in the course of her employment. Therefore the Court dismisses the fourth cause of action for this reason as well.

Individual Defendants

Defendants also move to dismiss the claims to the extent that they are asserted against Williams and Jeffrey. Individual employers, including supervisors, are not liable under the ADA or Title VII. Garibaldi v. Anixter, 407 F. Supp. 2d 449, 450 (W.D.N.Y. 2006)(noting that this principle is "well-settled in the Second Circuit"). Plaintiff argues that defendant Williams should be personally liable because he ordered plaintiff to leave the facility when she requested the accommodation for her disability. However, as individual liability will not lie under the ADA or Title VII, this argument is of no avail. Her supervisors can be held liable under the State Human Rights Law if they encouraged, condoned or

approved the discrimination. See Clayton v. Best Buy Co. Inc., 48 A.D.3d 277, 277, 851 N.Y.S.2d 485, 486 (1st Dept. 2008)(under State Human Rights Law). Plaintiff asserts that through discovery she may learn that defendant Williams directed defendant Jeffrey to write up plaintiff for the door slamming incident. However, this is mere speculation and plaintiff does not provide any basis for her theory. Moreover, as already stated, the writeup is insufficient to constitute an adverse act. Compare to Brightman v. Prison Health Serv., Inc., 62 A.D.3d 472, 472, 878 N.Y.S.2d 357, 358 (1st Dept. 2009)(claim that individuals increased plaintiff's workload, refusal to allow her overtime, failed to pay her overtime when she worked extra hours, and transferred her directly to section where alleged harasser worked stated claim for individual liability). Finally, she has not addressed motion as it applies to Jeffrey, and therefore appears to concede that the action should be granted as to him.

Accordingly, it is

ORDERED that the prong of the first cause of action that rests on Title II, and the second, third and fourth causes of action are severed and dismissed; and it is further

ORDERED that the prong of the first cause of action that rests on the City Human Rights Law is withdrawn; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED, that plaintiff's cross-motion to amend the complaint is denied.

FILED

AUG 16 2011

NEW YORK COUNTY CLERK'S OFFICE

ENTER:

Dated: 8/11/11

LOUIS B. YORK, J.S.C.

LOUIS B. YORK J.S.C.