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

PRESENT: JANE S. SOLOMON Justice

PART 55

Index Number : 107086/2010

WANG, LUISA

vs.

VISITING NURSE SERVICE

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 9/19/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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**Cross-Motion:** ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum decision and Order.



Dated: 10/21/11

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

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LUISA WANG,

Plaintiff,

-against-

VISITING NURSE SERVICE OF NEW YORK, and VNS CHOICE,

Defendants.

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Index No. 107086/10

DECISION & ORDER



SOLOMON, J.:

Plaintiff Luisa Wang (Wang) sues defendants Visiting Nurse Service of New York and VNS CHOICE Community Care i/s/h/a VNS Choice, its subsidiary (together VNS) for discrimination and retaliatory discharge under New York Administrative Code § 8-107 and Executive Law § 296. VNS moves for summary judgment dismissing the complaint on the ground that there is no issue of fact that Wang was neither discriminated against, nor discharged. Wang cross moves for summary judgment in her favor.

Wang is a registered nurse. In 2008 she was hired by VNS and in 2009 she became a Nurse Consultant. Her duties included visiting a roster of patients at their homes at least once a month to oversee their needs and assess their living conditions. According to the complaint, Wang was diagnosed with lupus on September 4, 2009;[1] she also suffered swelling, spotting

[1] Subsequent testing revealed the September 4 diagnosis to be a false positive (Wang deposition and Diep deposition, attached to Keil Affidavit, Ex. 1, p. 182 and Ex. 10, p. 25-6).

and the formation of lesions on her hands when exposed to second hand smoke. At the time, she was assigned to two heavy smoking patients.

On February 22, 2010, Wang's rheumatologist, Dr. Jenny T. Diep (Diep) wrote on behalf of Wang, asking that she be accommodated "so that she does not receive any exposure to second hand smoke" (Diep Letter, attached to Keil Affirmation, Ex. 19). At her deposition, Diep testified that she wrote the letter based on Wang's representation that any exposure to cigarette smoke triggered her symptoms, although, notably, she had no evidence of the connection (Diep deposition, attached to Keil Affirmation, Ex. 10, p. 34). Diep stated that the intent of her letter was to convey the request that Wang's working environment be completely smoke free (*Id.*, p. 34-36).

With Diep's letter, Wang requested that VNS screen each of her patients to confirm that the patient's homes were "considered to be smoke free," and that any smoker patients be reassigned to other nurses. VNS determined that there was no way it could control a patient's home, could not guarantee that all patients' homes, lobbies, hallways in buildings, or building exteriors would be smoke free.[2] Moreover, it could not ensure that patients would properly report the conditions in their

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[2] Each of these areas are considered part of a Nurse Consultant's work environment (See, Job Description, attached to Keil Affirmation, Ex. 11).

apartments. Accordingly, it rejected Wang's proposed accommodation. She was placed on unpaid leave pending determination of a workable accommodation that would comply with Diep's letter and the requirements of Wang's work.

VNS offered Wang the option of continuing as a Nurse Consultant, wearing a face mask while tending to patients in smokey environments, which Wang rejected. VNS next offered to interview Wang for the positions of Clinical Evaluation Manager and Home Care Consultant. Both positions required the applicant to be a registered nurse, and had higher salaries than a Nurse Consultant. More importantly, the positions were based in hospitals where VNS could guarantee smoke free environs. On April 20, 2010, VNS offered Wang the Home Care Consultant position. One week later, Wang rejected the offer of employment; she felt that it was a demotion because it entailed less patient contact, and did not interest her. Wang also declined an interview for a Clinical Evaluation Manager position because she decided to return to school, and a full time job would conflict with her academic schedule. This action was brought in May 2010, while Wang was still technically a VNS employee. Then, in December 2010, Diep wrote that Wang could work as a Nurse Consultant in a home care environment with minimal exposure to cigarette smoke (Letter, attached to Keil Affidavit, Ex. 41). In April 2011, VNS offered a home care position to Wang (Keil

Affirmation, Ex. 45), which Wang rejected because, by then, she wanted to work part time (Id., Ex. 46). VNS opted to create a position to fit Wang's schedule, and wrote to her by letter dated May 12, 2011, stating that "[i]f you do not accept the offer by [May 27, 2011] . . . we will conclude that you have decided to resign from your employment with VNS CHOICE."(*Id.*, Ex. 47). VNS did not hear from Wang, and on June 6, 2011, served this motion to dismiss her claims for employment discrimination and retaliation.

A. Disability Discrimination

A claim for disability discrimination is properly brought under New York State Executive Law § 296, known as the New York State Human Rights Law (NYS HRL) and the Administrative Code of the City of New York § 8-107 (the NYC HRL). Under both statutes, an employee must show: (1) she was disabled within the meaning of the statutes; (2) she was qualified for the position; (3) she was discharged or suffered other adverse employment action; and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination (*see, Rainer N. Mittl, Ophthalmologist, P.C. v. New York State Division of Human Rights*, 100 NY2d 326, 330 [2003]). If established, the burden shifts to the employer to rebut the presumption with evidence that the action was taken for a legitimate,

nondiscriminatory reason (*Id.*). If the employer establishes a valid reason, the burden shifts back to the employee to raise an issue as to whether the reason was pretextual (*Id.*).

Amongst several other arguments, VNS argues that Wang was not discriminated against because VNS provided her numerous accommodations which would have allowed her to return to work, but she unreasonably rejected each one. Wang counters that VNS did not consider her initial proposed accommodation, which required VNS to confirm that each of her patient's homes were considered to be smoke free before Wang entered the home, and to reassign any smoker patients to other nurses. Wang argues that the failure to accept this proposed accommodation violates the "interactive process" requirement of both the NYS and NYC HRL.

1. The New York State Human Rights Law:

Under the NYS HRL, "[t]he first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested. The interactive process continues until, if possible, an accommodation reasonable to the employee and employer is reached" (*Phillips v City of New York*, 66 AD3d 170, 176-77 [1st Dept., 2009]). Wang misinterprets what the "interactive process" entails. It does not mean that VNS must accept her proposed accommodation, rather, it means that the employer and the

employee must make good faith efforts to reach a reasonable solution to accommodate the employee's disability.

VNS did so. Its rejection of Wang's proposed accommodation, after it considered it, does not violate this process. Moreover, even if Wang's proposal was reasonable, as a matter of law, "[t]he employer has the right to select which reasonable accommodation will be provided, so long as it is effective in meeting the need" (9 NYCRR 466.11[j][6]). VNS provided multiple reasonable accommodations that would have allowed Wang to continue to work for VNS as a registered nurse while simultaneously complying with its understanding that Wang not be exposed to any smoke. That Wang rejected them does not mean that VNS did not participate in the interactive process.

2. The New York City Human Rights Law:

Under the NYC HRL, the term "reasonable accommodation" means such accommodation that can be made that shall not cause undue hardship in the conduct of the employer's business (New York Administrative Code § 8-102(18). If an accommodation can be made, it must be made, unless it is unreasonable (i.e., if it causes undue hardship to the employer) (*Phillips v. City of New York*, 66 AD3d, at 182).

Here, according to Diep's letter, Wang's disability was triggered by contact with cigarette smoke. VNS determined that it could not make an accommodation that would allow Wang to

continue to work as a Nurse Consultant and also guarantee that Wang would not be exposed to any smoke in her working environment (Deposition of Lisa Howe-Perry, a regional clinical manager for VNS, attached to Keil Affirmation, Ex. 2, p. 55; deposition of Margarita Asiain, attached to Keil Affirmation, Ex. 7, p. 48-9). It persuasively explained that many patients are not sufficiently in control of their living spaces to guarantee the absence of any smoke; that some patients misrepresent their apartments' conditions; and that some patients lack the capacity to provide reliable answers to questions about smoking in their homes (Schwartz deposition; Martinez-Salazar Deposition; David Deposition; Courtenay Deposition; Viciedo Deposition; each attached to Keil Affirmation). Instead, it offered Wang a guaranteed smoke-free environment; a hospital nursing position.

Wang argues that she had never requested a guarantee that she would never be exposed to cigarette smoke, and VNS is purposely inflating the extent of Diep's first letter. However, Diep confirmed at her deposition that when she wrote "any exposure to second-hand smoke" she meant what she wrote literally (Diep deposition, attached to Keil Affirmation, Ex. 10, p. 34-36). In any event, VNS has established that Wang's first proposal for a strictly smoke free environment was impossible of implementation. The burden shifts to Wang to rebut this position. Wang has failed to do so. Moreover, when Wang provided

Diep's revised recommendation, VNS offered her the opportunity to return to her position, which Wang declined.

2. Retaliation

The only evidence of retaliation mentioned in the papers is a "sarcastic comment" made on March 8, 2010, by Angela Courtenay, VNS's manager of employee health services. The comment was "how could you live in New York and not be exposed to second hand smoke?" and "Did you take taxis everywhere?" On its face, these comments do not make out a retaliation claim.

To make a prima facie showing of retaliation, "plaintiff must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]).

In her opposition to this motion, Wang states that she was terminated from her employment with VNS because she sought a reasonable accommodation for her disability. However, when this action commenced, she was still on the VNS payroll, albeit on unpaid leave. Subsequently, her employment indeed was terminated by VNS, but that was when she refused to return to the position it offered her. The complaint is entirely devoid of an allegation that she was terminated in retaliation for any actions

she took, or that her placement on unpaid leave was constructive termination. There being no other articulated basis for retaliation, summary judgment should be granted dismissing the claim.

In light of the foregoing, it hereby is

ORDERED that the cross-motion of plaintiff Luisa Wang is denied, and it further is

ORDERED that the motion for summary judgment of defendants Visiting Nurse Service of New York and VNS CHOICE Community Care is granted, and the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly with costs and disbursements as taxed.



Dated: Oct 21, 2011

Enter:

J.S.C.