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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MARGARET KIERNAN,

Plaintiff,

-against-

NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM AT PLAINVIEW HOSPITAL,

Defendant.

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 19402/08
Motion Seq. No.: 01

DECISION AND ORDER

Papers Read on this Motion:

Defendant's Notice of Motion	01
Defendant's Affidavit of William Raccioppi	xx
Plaintiff's Memorandum of Law	xx
Defendant's Memorandum of Law	xx
Defendant's Reply Memorandum	xx

Defendant North Shore-Long Island Jewish Health System at Plainview Hospital ["North Shore"] moves for an order pursuant to CPLR §3212 dismissing the plaintiff's complaint. The plaintiff opposes the motion.

In May of 2006, the plaintiff Margaret Kiernan was terminated as a CT scan technologist at the defendant North Shore after allegedly: (1) conducting, and then deleting from a CT scan console, a partial CT scan procedure performed on the wrong, body part – the brain instead of the kidneys – and; (2) then failing to inform her supervisors of the error, as required by hospital operating procedures (Raccioppi Dep., 39-40; 45-46; Raccioppi Aff., ¶¶ 5-7 [Exhs., "A", "B"]; Kiernan Dep., 140-141; 150-151).

The disciplinary materials generated in connection with the subject incident – which refer to the "substantial" volume of prior disciplinary incidents involving the plaintiff – further note that the plaintiff's initials were found on the deleted scan and that by virtue of her conduct, the plaintiff had "demonstrated noncompliance with department protocols resulting in an unnecessary study of [and

radiation exposure to] the patient's brain * * *" (Raccioppi Aff., Exhs., "A"-"C").

Although the plaintiff denied deleting the scan image and claims that a male co-employee misleadingly told her that the patient was a "head" [brain] scan (Kiernan Aff., ¶¶ 5-6, 33, 35), she admitted telling supervisors at the time that "[i]t was my fault * * * I don't know why I didn't check the [patient's] orders" (Kiernan Dep., 140-141; 150-152; Kiernan Aff., ¶ 6 Raccioppi Aff., Exh., "A").

Thereafter, in October of 2008, the plaintiff commenced the within action alleging, *inter alia*, that she was subjected to a hostile work environment and age/gender discrimination within the meaning of Executive Law §§ 290, *et., seq*. (Gegwich Aff., Exh., "A").

The defendant North Shore has answered, denied the material allegations of the complaint and interposed various affirmative defenses (Gegwich Aff., Exh., "B"). Discovery has been conducted and North Shore now moves for summary judgment dismissing the complaint.

A plaintiff alleging discrimination in employment has the initial burden of establishing a *prima facie* case of discrimination (*Lambert v Macy's E., Inc*., 84 AD3d 744, [Dept 2011] *see, Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]). Specifically, a plaintiff must carry the "initial burden of showing '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'" (*Suriel v Dominican Republic Educ. & Mentoring Project, Inc*., 85 AD3d 1464 [3d Dept 2011], *quoting from, Forrest v Jewish Guild for the supra, Lambert v Macy's E., Inc*., *supra*).

The burden then shifts to the employer or employers " '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' " (*Ferrante v American Lung Assn*., *supra,* 90 NY2d at 629, *quoting from, Matter of Miller Brewing Co. v State of Div. of Human Rights*, 66 NY2d 937, 938 [1985]; *Suriel v Dominican Republic Educ. & Mentoring Project, Inc*., *supra*; *Lambert v Macy's E., Inc*., *supra*).

Further, to establish entitlement to summary judgment in a gender discrimination case, 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 a material issue of fact as to whether their explanations were pretextual" (*Forrest v Jewish Guild for the Blind, supra,* 3 NY3d 295, 305; *Ferrante v American Lung Assn., supra,* 90 NY2d 623, 631; *Sayegh v Fiore*, 88 AD3d 981 [2d Dept 2011]; *Considine v Southampton Hosp.*, 83 AD3d 883 [2d Dept 2011]; *Lichtman v Martin's News Shops Management, Inc.*, 81 AD3d 696 [2d Dept 2011]; *Dombrowski v Metropolitan Property and Cas. Ins. Co.*, 77 AD3d 608) [2d Dept 2010].

With these principles in mind, and upon the evidentiary record presented, North Shore has demonstrated its *prima facie* entitlement to judgment as a matter of law (*Considine v Southampton Hosp., supra*, 83 AD3d 883; *Lichtman v Martin's News Shops Management, Inc.*, 81 AD3d 696, [2d Dept 2011], *Apiado v North Shore University Hosp. (At Syosset), supra*, 66 AD3d 929). More particularly, North Shore has adduced evidence establishing that it terminated the plaintiff for a legitimate, nondiscriminatory purpose, *i.e.*, because she, *inter alia*, improperly performed a partial CT head scan instead of the prescribed, renal scan without first reviewing the patient slip or chart, and then – as she herself admitted – failed to report the incident to her supervisors, as required by hospital rules and regulations (Kiernan Dep., 140-141; Gegwich Aff., Exh. "KK").

The Court notes that the record supports North Shore's assertions that the plaintiff had been disciplined on several other occasions prior to the 2006, with respect to, among other things, the performance of CT scans, including a 2002 incident in which the plaintiff was expressly warned that "you have had many occurrences in the past where you have been spoken to" and further that, "[a]ny future occurrence" involving an improperly performed CT scan "will result in your immediate termination * * *" (Gegwich Aff., Exh.,"R")(*cf., Lichtman v Martin's News Shops Management, Inc., supra,* 81 AD3d 696, 697).

In opposition to North Shore's motion, the plaintiff failed to raise a triable issue of fact with respect to whether the defendant's explanation for her termination was false, unworthy of belief, or was a pretext for the alleged discrimination (*Considine v Southampton Hosp., supra*, 83 AD3d at 884; *Lichtman v Martin's News Shops Management, Inc., supra*, 81 AD3d 696, 697; *Lerner v Astoria Federal Sav. and Loan Ass'n*, 73 AD3d 1134, 1135 [2d Dept 2010]).

The plaintiff's claims, *inter alia*, that she did not report the subject CT incident because the supervisor had "given * * * [her] a hard time" in the past and/or that another technician was actually to blame because he led her to believe a head scan was prescribed (Kiernan Dep., 139-142; 150; 211-212;

Kiernan Aff., ¶¶ 6-7), do not support the assertion that rationale underlying North Shore's termination – conducted in part by two female administrators (*Walder v White Plains Bd. of Educ.*, 738 F.Supp.2d 483, 501 [S.D.N.Y. 2010]) – was false, pretextual or otherwise improper (*Michno v New York Hosp. Med. Ctr. of Queens*, 71 AD3d 746, [2d Dept 2010])(Pemberton Aff., ¶¶ 5-6). The record further indicates that the plaintiff's position was later filled by a female technician (Kiernan Dep., 169, 190; Raccioppi Dep., 65). The plaintiff's contention that male employees were not disciplined and/or treated in the same, allegedly negative way she was, lacks substantiation in the record and fails to generate a triable issue of fact with respect to her claims of gender discrimination, retaliatory conduct and/or age discrimination (*Lambert v Macy's East, Inc., supra,* 84 AD3d 744, 746). Nor is "[p]retext * * * established by evidence of prior favorable performance evaluations" (*Matter of Suleman v State of N.Y. Dept. of Taxation & Fin.*, 27 AD3d 1040, 1042 [3d Dept 2006]; *Schwaller v Squire Sanders & Dempsey*, 249 AD2d 195, 197 [1st Dept 1998]).

Lastly, North Shore has also established its entitlement to judgment as a matter of law dismissing the plaintiff's claims of hostile work environment by "proffering sufficient evidence that the allegedly offensive conduct was not sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an objectively hostile or abusive work environment" (*Sayegh v. Fiore, supra,* 88 AD3d 981 [2d Dept 2011]; *Grovesteen v New York State Public Employees Federation, AFL-CIO,* 83 AD3d 1332, 1334 [3d Dept 2011]; *Thompson v Lamprecht Transp.*, 39 AD3d 846, 847-848 [2d Dept 2007]). The Court notes that the record supports the defendant's assertions that North Shore employees did not subject the plaintiff to abusive, age or gender-based comments or animus in the work place (*Thompson v Lamprecht Transp., supra*)(*see*, Kiernan Dep., 211-214; 219-221; 229-231).

The Court has considered the plaintiff's remaining contentions and concludes that they are insufficient to defeat North Shore's motion for summary judgment.

Accordingly, it is,

ORDERED that the motion pursuant to CPLR §3212 by the defendant North Shore-Long Island Jewish Health System at Plainview Hospital, for an order dismissing the plaintiff's complaint is ***granted***.

This constitutes the Decision and Order of the Court.

DATED: November 28, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
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