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SHORT FORM ORDER

COPY

INDEX No. 10-35644

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 7-2-12 (#003 & #005)
MOTION DATE 7-23-12 (#006)
ADJ. DATE 8-8-12
Mot. Seq. # 003 - MD
005 - MG; CASEDISP
006 - MD

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LORIANNE LA MARCA-PAGANO,

Plaintiff,

- against -

DR. STEVEN PHILLIPS, P.C.,

Defendant.

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WEINSTEIN, KAPLAN & COHEN, P.C.
Attorney for Plaintiff
1325 Franklin Avenue, Suite 210
Garden City, New York 11530

ZABELL & ASSOCIATES, P.C.
Attorney for Defendant
1 Corporate Drive, Suite 103
Bohemia, New York 11716

Upon the following papers numbered 1 to 103 read on these motions to compel and for summary judgment; Notice of Motion/ Order to Show Cause (003)and supporting papers 1 - 10; Notice of Cross Motion (005) and supporting papers 11 - 57; Answering Affidavits and supporting papers 58 - 77; Replying Affidavits and supporting papers 78 - 87; Notice of Motion/Order to Show Cause (006) and supporting papers 88 - 97; Answering Affidavits and supporting papers 98 - 103; Replying Affidavits and supporting papers __; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (003) by plaintiff for an order compelling defendant to comply with discovery demands and appear for a further deposition, and the motion (006) by plaintiff for an order compelling the compliance with a subpoena by a non-party, are consolidated for the purposes of this determination and are decided together with the cross motion (005) by defendant for an order dismissing the complaint; and it is further

ORDERED that the motion (005) by defendant for an order granting summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motions (003, 006) by plaintiff for orders compelling discovery and compliance with a subpoena are denied as moot, the complaint having been dismissed.

Plaintiff instituted the within action to recover damages she allegedly sustained as a result of sexual discrimination by defendant in violation of New York State Human Rights Law ("NYSHRL") and retaliation by defendant which resulted in the termination of her employment. Defendant, Dr. Stephen Phillips, P.C., is a domestic corporation which hired plaintiff as a receptionist on April 6, 2010. Plaintiff's job responsibilities included answering the telephone, booking patient appointments, checking patients in and out, and processing insurance claims. She was hired to work part time, and full time during a period that another employee would be taking maternity leave. Plaintiff alleges that she was subjected to a hostile work environment, based upon her gender, which was permeated with unlawful sexual innuendo and comments.

Plaintiff asserts that after complaining directly to Dr. Phillips about her allegations of sexual harassment, no corrective action was taken. Rather, plaintiff maintains that defendant began to engage in a campaign of illegal retaliation. She claims that her attorneys faxed a letter to defendant on September 14, 2010 outlining her claims but that she was discharged on September 15, 2010 in retaliation. Thereafter, she commenced the within action.

Although her complaint states that "Dr. Phillips made repeated comments about his wife's breasts, regularly referring to them as "chicken cutlets", she admitted during her examination before trial that she heard Dr. Phillips say to the office manager that his wife's breasts looked like chicken cutlets on one occasion and that she did nothing after hearing this statement, that she did not tell her supervisor or discuss her feelings about this with Dr. Phillips. Plaintiff alleges in her complaint that Dr. Phillips "made regular comments" and "comments" about female patients he found to be physically attractive or whom he believed had undergone breast augmentation surgery, about their short skirts, and that he made suggestive jokes and innuendos, and that in response thereto she complained directly to him. However, during her deposition, plaintiff admitted that he did not make these comments about her and that she heard him speak about breast augmentation and comment upon the length of a patient's skirt only one time, and that noone who was employed by Dr. Phillips made sexual innuendos about or to her.

Plaintiff maintains that in or about July 2010 she "overheard" a conversation which was "derogatory about a woman" and that she told Dr. Phillips about it and in response he said, "I'm sorry...[t]hat's sexual harassment, it wouldn't be tolerated". (She allegedly heard her co-worker identify a woman in a picture as her ex-boyfriend's "pussy for hire" to another dentist in the practice.) Additionally, plaintiff contends that she spoke to Dr. Phillips about "his friends being inappropriate." She maintained that she told him that "somebody had made a phone call" to her and that she hung up after the person propositioned her. Plaintiff claims that Dr. Phillips "engaged in a sexually charged e-mail exchange with one of his friends discussing the possibility of [her] engaging in a sexual encounter with [the friend]" (she admitted during her examination before trial that none of the three e-mails to which she referred were either addressed to or from her and that she opened Dr. Phillips e-mail because she "didn't recognize who it came from and [she] didn't know it was something that had to do with [her]"), that he regularly made sexually suggestive jokes and innuendo at her expense, and that he referred to her breasts as being "saucy". Despite these claims, plaintiff admitted during her pre-trial deposition that the only time she spoke to Dr. Phillips about any comments or improper conversations in the office was after the July 2010 conversation she overheard. Finally, in describing the incident wherein Dr. Phillips referred to her breasts as "saucy", plaintiff stated that she opened her shirt "a little

bit" to show him a necklace and he said "oh, saucy", thus she did not know if he was referring to her necklace and assumed it was about her breasts.

Plaintiff now moves for an order compelling defendant to provide full and complete responses to her discovery demands pursuant to CPLR 3124, to appear for a further deposition at defendant's expense, and for costs of the motion. Defendant opposes plaintiff's motion and cross moves for an order dismissing plaintiff's complaint pursuant to CPLR 3211 (a) (7) or granting summary judgment dismissing the complaint, and for an order sanctioning plaintiff's attorney. Additionally, plaintiff moves for an order compelling non-party John McConnell's compliance with a subpoena *ad testificandum* and for penalties and sanctions pursuant to CPLR 2308 (a).

In opposition to the plaintiff's motions and in support of its cross motion, defendant submits affidavits from Stephen Phillips, D.D.S. ("Dr. Phillips", the principal of defendant), Andrea Grabowski (defendant's office manager), Peter Barkoff ("Dr. Barkoff", a dentist at defendant's practice), Nicole Bergami (a dental assistant/receptionist at defendant's practice), Terry Reddy and Kathleen Matykiewicz (dental hygienists at defendant's practice), and John McDonnell (a patient and friend of Dr. Phillips).

Dr. Phillips avers that plaintiff's resume, one source used in the initial hiring of plaintiff, was replete with untruths. He indicates that plaintiff used the name "Lorianne Pagano" rather than her "proper" name, Lorianne LaMarca-Pagano, as part of a "calculated effort to defraud [defendant] into hiring her" since her then current employer, Gregory LaMarca, Esq. was her ex-husband and then current boyfriend. On her resume she reported working for one employer for nine years but testified that she was actually employed there for less than four years. Similarly, her resume indicates that plaintiff worked at an endodontic office for approximately ten years, yet her deposition testimony revealed that she was fired by the office after working there for approximately one year. In her employment application, plaintiff claimed that she attended North Shore High School from "79 to 83" and earned a degree, when in fact, as she stated during her examination before trial, she dropped out of high school after her second year and eventually earned a G.E.D.

During her employment by defendant, Dr. Phillips states that plaintiff was disrespectful and insubordinate to Dr. Barkoff, including referring to him by his first name, and that Dr. Barkoff had suggested that Dr. Phillips fire her. Dr. Phillips argues that plaintiff took excessive cigarette and bathroom breaks, that she would frequently "clock in early" then sit in her car smoking cigarettes and drinking coffee, that she was rude and inappropriate with patients and other office visitors, that she was observed flirting with patients, that she brought inappropriate photos of herself to work and left them at the front desk for anyone to observe, that she showed pictures of herself in "sexy poses" to Dr. Phillips and the office staff, that she was frequently reprimanded for being dressed inappropriately and told to wear a labcoat over her clothing, that she called in sick as a result of a hangover, and that she "snooped" through personal e-mails of Dr. Phillips and through the company payroll ledger. He claims that because of the aforementioned transgressions and because plaintiff did not show up for work at all on September 14, 2010 after having been told on September 13, 2010 to come in at 1 p.m. on the 14th, she was fired on September 15, 2010 .

Andrea Grabowski asserts that she was plaintiff's supervisor and that during plaintiff's employment period plaintiff "never, ever" complained to her about any inappropriate behavior or offensive remarks in the workplace. Ms. Grabowksi corroborated each of Dr. Phillips complaints relative to plaintiff's behavior and stated that plaintiff "frequently, almost daily, came into the office wearing extremely tight and low-cut clothing which exposed her cleavage." Ms. Grabowski stated that when Dr. Phillips related to her that he wished to fire plaintiff in July 2010 for "snooping through his emails and ... going through his checkbook", that she requested that he "hang tight" for a few weeks until she got back from maternity leave and settled in to work again. Ms. Grabowski claimed that plaintiff left work early on September 7, 2010 despite having been told that she could not leave early. Finally, Ms. Grabowski avers that she never heard Dr. Phillips speak about his wife's breasts, and more specifically, that he never referred to his wife's breasts as "chicken cutlets" in her presence.

Dr. Barkoff alleges in his affidavit that he never once heard plaintiff complain or imply that anyone said or did anything that was offensive or inappropriate at the office. However, he stated that many of the things that plaintiff did were offensive and inappropriate, including her improper attire and frequent cigarette breaks. Dr. Barkoff complained that plaintiff "immediately and repeatedly" called him by his first name rather than by his title of "Dr. Barkoff," which led him to issue a stern warning to her claiming that she was insubordinate. Nicole Bergami, Terry Reddy, and Kathleen Matykiewicz each bolster the statements of Dr. Phillips, in that none ever heard Dr. Phillips refer to his wife's breasts as "chicken cutlets" or received complaints about this from plaintiff. Each of them indicated that plaintiff's behavior at work was inappropriate.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see,* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

It is clear that a cause of action for sexual harassment based upon a hostile work environment exists in New York under Executive Law § 296 (1) where the discriminatory conduct is so pervasive that the workplace is permeated with discriminatory insult, ridicule, and intimidation so as to alter the terms or conditions of the victim's employment (***Eastport Assoc., Inc. v NYS Div. of Human Rights***, 71 AD3d 890, 897 NYS2d 177 [2d Dept 2010]; ***Ortega v Bisogno & Meyerson***, 2 AD3d 607, 769 NYS2d 279 [2d Dept 2003]). Isolated remarks and offensive conduct are insufficient as a basis for a sexual harassment claim based upon a hostile work environment where they are not so severe or pervasive as to

permeate the workplace and alter the conditions of the victim's employment (***Thompson v Lamprecht Transport***, 39 AD3d 846, 834 NYS2d 312 [2d Dept 2007]).

In making a determination to dismiss pursuant to CPLR 3211 (a) (7) the court must assume to be true the facts plead, give every favorable inference to the allegations, and determine only whether the alleged facts fit any cognizable legal theory (***Dickinson v Igoni***, 76 AD3d 943, 908 NYS2d 85 [2d Dept 2010]). The Court denies the portion of defendant's motion to dismiss pursuant to CPLR 3211 (a) (7), it having determined that plaintiff has adequately plead her causes of action for discrimination based on sexual harassment in violation of NYSHRL and for retaliation within the four corners of the complaint. However, based upon the evidence submitted, it is clear that summary judgment should be granted to defendant and the complaint should be dismissed because plaintiff cannot show that the conduct of which she complains is so pervasive that the workplace was permeated with discriminatory insult, ridicule, and intimidation as to alter the terms or conditions of her employment. It is evident that the remarks and conduct of which she complains, even if true, were isolated incidents and that the most egregious conduct complained about was that of a third-party and was discovered by plaintiff in an improper manner, *i.e.* reading her employer's private e-mail. Similarly, that fact that she rarely complained to Dr. Phillips and that when she allegedly did do so, he agreed with her and stated that the conduct complained of constituted sexual harassment which would not be tolerated, belies the conclusion that the workplace was permeated by this improper and offensive conduct. Accordingly, the portion of the complaint which seeks damages for sexual harassment in violation of NYSHRL is dismissed.

To establish a claim for unlawful retaliation, a plaintiff must demonstrate that (1) she was engaged in a protected activity; (2) her employer was aware that she participated in that 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, 768 NYS2d 382 [2004]; ***Murphy v Kirkland***, 88 AD3d 795, 930 MYS2d 285 [2d Dept 2011]; ***Beharry v Guzman***, 33 AD3d 742, 743, 823 NYS2d 195 [2d Dept 2006]; ***Pace v Ogden Servs. Corp.***, 257 AD2d 101, 104, 692 NYS2d 220 [3d Dept 1999]). Retaliation in violation of Executive Law §296(7) will not be found where there is ample proof of a legitimate, independent, and nondiscriminatory reason for the employer's action, such as poor job performance (*see*, ***Johnson v NYU Hosps. Ctr.***, 39 AD3d 817, 835 NYS2d 340 [2d Dept 2007], *lv denied* 9 NY2d 805, 842 NYS2d 781 [2007]; ***Thide v Mew York State Dept. of Transp.***, 27 AD3d 452, 811 NYS2d 418 [2d Dept 2007]; ***Joslyn v Santaella***, 112 AD2d 305, 491 NYS2d 751 [2d Dept 1985]). Thus, a defendant employer accused of unlawful retaliation satisfies its burden on a motion for summary judgment with evidence showing that the plaintiff is unable to establish all of the four elements of a retaliation claim or that the plaintiff's employment was terminated for a legitimate and nondiscriminatory reason (*see*, ***Forrest v Jewish Guild for the Blind***, *supra*; ***Johnson v NYU Hosps. Ctr.***, *supra*; ***Thide v New York State Dept. of Transp.***, *supra*). Further, a prima facie case of retaliation for a sexual harassment complaint requires evidence of a subjective retaliatory motive for the termination (*see*, ***Matter of Pace Univ. v New York City Commn. on Human Rights***, 85 NY2d 125, 623 NYS2d 765 [1995]; ***Martinez v Triangle Maintenance Corp.***, 293 AD2d 721, 741 NYS2d 427 [2d Dept 2002]; ***Matter of Town of Lumberland v New York State Div. of Human Rights***, 229 AD2d 631, 644 NYS2d 864 [3d Dept 1996]).

Based upon the adduced evidence, defendant has demonstrated prima facie that there was no causal connection between plaintiff's claim of sexual harassment and her termination (*see,* ***Beharry v Guzman***, *supra*; ***Baliva v State Farm Mut. Auto. Ins. Co.***, 286 AD2d 953, 730 NYS2d 655 [4th Dept 2001]; ***Matter of Ramos v Coombe***, 237 AD2d 713, 654 NYS2d 454 [2d Dept 1997], *lv denied* 89 NY2d 981, 656 NYS2d 739 [1997]). The evidence produced establishes that plaintiff was terminated after she left work early without permission on September 7, 2010, failed to report to work as required on September 14, 2010, and after a "history" of inappropriate work place behavior.

In opposition, plaintiff failed to raise a triable issue of fact that she was unlawfully retaliated against because of her sexual harassment complaint. Although plaintiff was terminated shortly after filing her complaint, the elapsed time between her filing and her dismissal does not, by itself, serve to support an inference of retaliation or serve to avoid the consequences of dismissal (*see,* ***Forrest v Jewish Guild for the Blind***, *supra*; ***Pace v Ogden Servs. Corp.***, *supra*; *see also,* ***Chojar v Levitt***, 773 F. Supp. 645 [1991]). No other actions by defendant were offered by plaintiff as evidence of retaliation. Furthermore, plaintiff's assertions regarding the reasons for the immediacy of her termination are conclusory and unsubstantiated and, therefore, fail to satisfy her burden of showing that the reasons put forth by defendant for her discharge were merely pretextual and not the result of a legitimate business decision (*see,* ***Singh v State of N.Y. Off. of Real Prop. Servs.***, 40 AD3d 1354, 837 NYS2d 378 [2d Dept 2007]; ***Williams v City of New York***, 38 AD3d 238, 831 NYS2d 156 [1st Dept 2007]; ***Beharry v Guzman***, *supra*; ***Pace v Ogden Servs. Corp.***, *supra*). Accordingly, the retaliation portion of plaintiff's complaint is dismissed and defendant's motion for summary judgment dismissing the complaint is granted. Based on the foregoing, plaintiff's motions to compel discovery and compliance with a subpoena are denied as moot.

Dated: 16 Jan. 2013

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION