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SHORT FORM ORDER

COPY

INDEX No. 09-50089
CAL No. 13-01403OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 12-23-13
ADJ. DATE 4-4-14
Mot. Seq. # 001- MG; CASEDISP

JOANNA CORNS,

Plaintiff,

- against -

GOOD SAMARITAN HOSPITAL MEDICAL CENTER, KATHLEEN LEPORE, PRISCILLE ALLERS, PATRICIA KURZ, CHARLES BOVE and PATRICIA HOGA,

Defendants.

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Upon the following papers numbered 1 to 13 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 9 - 11 ; Replying Affidavits and supporting papers ___; Other Memos of Law in Support and in Reply 7 - 8, 12 - 13 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted.

Plaintiff was employed by defendant Good Samaritan Hospital Medical Center (the "Hospital") as a Nursing Assistant from May 31, 2005 through May 3, 2006 and from August 6, 2007 through May 13, 2009. During the first term of employment, plaintiff requested and was granted a medical leave of absence from July 7, 2005 through December 5, 2005 for non-work related injuries sustained as a result of a dog bite. On January 15, 2006, plaintiff requested and was granted a second leave of absence to provide medical care for her husband, and remained on leave until May 3, 2006. On May 1, 2006, plaintiff was notified by the Hospital that an extension of the leave of absence would not be granted due to staffing needs, and her employment was terminated. However, plaintiff was advised to re-apply for employment when she was able to return to work. Plaintiff did so, and was re-hired by the Hospital on August 6, 2007 as a Nursing Assistant. Within a short time of recommencing her employment with the Hospital, plaintiff exhibited difficulty performing her job functions. Plaintiff was repeatedly counseled for her poor job performance and misconduct and despite being given several opportunities, she did not improve. She was suspended for three days in December 2008 and eventually terminated on May 13, 2009.

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Plaintiff commenced this action seeking damages for the Hospital's decision to terminate her employment as of May 2009. In her complaint plaintiff alleges causes of action for tortious hostile work environment, negligence, intentional and negligent infliction of emotional distress, prima facie tort, libel and slander, breach of contract, tortious interference with a contract, and for constitutional violations. The defendants now move for summary judgment dismissing the complaint, arguing that plaintiff's at-will employment was terminated due to her unsatisfactory job performance and violations of the Hospital's general rules of conduct.

At the time plaintiff's job performance began to allegedly deteriorate, her direct supervisor was defendant Patricia Allers, Nurse Manager, who reported to defendant Patricia Kurz, Director of Medical Surgical Nursing, and defendant Patricia Hogan, Chief Nursing Officer Senior Vice President of Nursing. Defendant Charles Bove was the Executive Vice President and Chief Administrative Officer who heard plaintiff's level three grievance hearing and advised her by letter dated September 14, 2009 that her grievance had been denied. In the complaint, it is alleged that Kathleen LePore, a Registered Nurse ("RN") at the Hospital, was plaintiff's supervisor. However, in response to questions during her examination before trial ("EBT"), plaintiff admitted that LePore was not her supervisor or in her chain of command at the Hospital, but a relative with whom she had an ongoing dispute.

In support of the motion defendants have submitted, *inter alia*, the affidavit of Allers and the affidavit of Lori Spina ("Spina"), who during the relevant times herein, was employed by the Hospital as Vice President of Human Resources and was responsible for overseeing all aspects of employee relations, including grievance hearings and investigations into allegations of improper termination brought by employees. Spina asserts that when plaintiff was first hired in 2005, she completed an application which informed her that if hired, she agreed to abide by the rules and regulations set forth in the Hospital's employee handbook, and that her employment would be on an "at will basis so that either party may terminate the employment relationship at any time." Upon being hired both times, plaintiff attended orientation where she received a copy of the Hospital's General Rules of Conduct and the Hospital's Employee Handbook.

Spina and Allers both assert that plaintiff's duties as a Nursing Assistant included assisting RNs in caring for patients which consisted of, but was not limited to assisting with patient admissions; performing direct patient care with attention to personal hygiene, safety, comfort and skin care; preparing patients for meals; assisting with feeding patients and distributing other nourishments as directed; assisting with transporting patients to other departments and at discharge; communicating appropriate information to RNs regarding patient conditions and needs; and assisting RNs in preparing patients for examinations and treatment. Spina and Allers set forth several instances wherein plaintiff failed to comport herself in an appropriate manner and was counseled about her job performance:

> • An incident on April 6, 2008 when plaintiff made a statement to a Hospital physician in front of a patient that when she starts her shift in the morning, her patients are always dirty. The incident was documented in writing on a Disciplinary Action Notice form signed by the plaintiff.

• A complaint to the Hospital from a patient's daughter that on June 18, 2008 the plaintiff discussed confidential medical issues in front of the patient, and complained to fellow employees that the patient had not been well-cared for prior to admission. A meeting was held with plaintiff wherein she was counseled and advised to refrain from having conversations regarding employees, hospital or personal business, patient care or any medical or confidential information in patient areas. The meeting was memorialized in writing by Allers with a "Memo to file."

• A complaint received from a patient on June 24, 2008 that plaintiff told the patient she would have to wait to have her soiled bed changed until after plaintiff returned from a lunch break. A meeting was held wherein plaintiff was counseled regarding her unprofessional and irresponsible behavior and advised to satisfy patient's needs before taking a break. This meeting was also memorialized in writing by Allers with a "Memo to file."

• An RN, Melissa Hurley, reported on August 27, 2008 that although plaintiff was assigned to assist and serve a patient lunch, the patient's lunch tray was never opened and the patient was not fed. The incident was documented with a "Note to file" submitted by Assistant Nurse Manager ("ANM") Katherine Papaa. Plaintiff was counseled on September 5, 2008 regarding her unsatisfactory work performance, her inability to complete tasks assigned to her, and her poor communication skills. Allers memorialized this meeting with a "Memo to file."

• On November 30, 2008, ANM Lynn Gailbraith ("Gailbraith") and RN Alica Protiva ("Protiva") reported that the plaintiff was assigned by RN G. Deprano to change a patient, but an hour later, the patient had not been changed. When plaintiff was asked about the assignment, she became agitated and in front of patients, loudly complained about her workload and left the room. The incident was memorialized in writing with a statement from Deprano.

• On December 8, 2008, a patient's daughter complained to the Hospital that her mother had soiled herself and requested plaintiff's assistance. Plaintiff refused to assist the patient and yelled at her for asking for assistance. The patient remained in her soiled clothes until the shift changed. The patient and her daughter requested that plaintiff not be assigned to care for her. Plaintiff was issued a written warning and suspended from work for three days. She was counseled that if she failed to improve upon her performance, further disciplinary action would be considered, including terminating her employment. A Disciplinary Action Notice was completed and signed by the plaintiff with a description: "Uncooperative, antagonistic attitude regarding work assignment and patient. Interference with the rights of the patient. Substandard work performance."

• On April 30, 2009, Gailbraith and Protiva reported that during a patient's discharge, plaintiff stated to the Hospital's transportation service, in front of the patient and the patient's son, that the patient should not be transported in a wheelchair because the patient had a lumpy butt. Gailbraith and Protiva counseled plaintiff regarding her negative comments and a memo was sent to Allers memorializing the incident and counseling session.

• On May 12, 2009 a Unit Clerk was looking for a patient's sweater and when she asked plaintiff about it, plaintiff, in the presence of patients, used vulgar language to describe how the patient had soiled the sweater up to the neck and it could not be cleaned. The patient who had witnessed the incident made a complaint. Plaintiff admitted to using inappropriate language, and after being counseled, was sent home for the remainder of the day. The Unit Clerk provided a written statement of the incident.

After the last incident, Allers met with Kurz to discuss plaintiff's numerous counseling sessions regarding her inappropriate and unprofessional conduct in the workplace. The decision was made to terminate plaintiff due to her history. On May 13, 2009, plaintiff was verbally informed by Kurz that her employment with the Hospital had been terminated, and with a follow-up letter dated May 18, 2009, Spina confirmed plaintiff's termination. Plaintiff thereafter filed a grievance and during the meeting regarding her grievance, acknowledged that she engaged in the conduct which led to her termination. Plaintiff did not present any additional facts in support of her grievance for the Hospital to consider. By letter dated June 20, 2009, Spina advised plaintiff that her grievance request for reinstatement was denied. Plaintiff was informed of the right to take her termination to the third step in the grievance process. The level three grievance hearing was held on August 5, 2009 with Bove, Hogan and Kurz in attendance. By letter dated September 14, 2009, Bove informed plaintiff that after reviewing the documentation and speaking to employees assigned to the same unit as plaintiff, he concluded that plaintiff's termination of employment was justified.

At her EBT on October 26, 2012, plaintiff testified that the basis of her claim against the Hospital was that she was fired, and she did not understand why she had been fired. As to the individual defendants, plaintiff could not articulate the basis for the allegations against them, other than a purported family disagreement between herself and defendant Lapore who is her deceased husband's relative and an employee at the Hospital. According to plaintiff, Lapore and the other individual defendants are friends, and Lapore, out of vengeance based on the family disagreement, convinced them to terminate her employment at the Hospital.

Based on the above, defendants have made out a prima facie case entitling them to summary judgment dismissing the complaint. It is well settled that an employer may not be held liable for the purportedly wrongful discharge of an at-will employee (*see* ***Sullivan v Harnisch***, 19 NY3d 259, 946 NYS2d 540 [2012]; ***Matter of De Petris v Union Settlement Assn.***, 86 NY2d 406, 633 NYS2d 274 [1995]; ***Ingle v Glamore Motor Sales***, 73 NY2d 183, 538 NYS2d 771 [1989]), and that such an employee may not circumvent this rule by using other causes of action to substitute for such a claim (*see* ***Murphy v American Home Prods. Corp.***, 58 NY2d 293, 461 NYS2d 232 [1983]; ***La Duke v Lyons***, 250 AD2d 969, 673 NYS2d

240 [3d Dept 1998]). Thus, the act of terminating an at-will employment relationship may not form the basis for a cause of action of intentional or negligent infliction of emotional distress or prima facie tort in circumvention of the at-will employment rule (***Minovici v Belkin BV***, 109 AD3d 520, 971 NYS2d 103 [2d Dept 2013]; ***Fama v American Intl. Group***, 306 AD2d 310, 760 NYS2d 534 [2d Dept 2003]; ***Tramontozzi v St. Francis College***, 232 AD2d 629, 649 NYS2d 43 [2d Dept 1996]).

In opposition, plaintiff has failed to raise a triable issue of fact. Indeed, plaintiff has failed to establish that the plaintiff's conduct was "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be so atrocious, and utterly intolerable in a civilized community" (***Fischer v Maloney***, 43 NY2d 553, 567, 402 NYS2d 991 [1978]) as required to make out an IIED and a NIED claim (***Tartaro v Allstate Indem. Co.***, 56 AD3d 758, 868 NYS2d 281 [2d Dept 2008]), or that such conduct by the plaintiff was without excuse or justification as required for a prima facie tort claim (*see* ***Burns Jackson Miller Summit & Spitzer v Lindner***, 59 NY2d 314, 464 NYS2d 712 [1983]). Therefore, the defendants are entitled to summary judgment dismissing the third, fourth and fifth causes of action for intentional infliction of emotional distress, prima facie tort and negligent infliction of emotional distress.

For the same reason the allegations in the second cause of action for negligence in the hiring, training, supervision, management and control of the individually-named defendants resulted in plaintiff's being terminated, must be summarily dismissed (*see* ***Hassan v Marriott Corp.***, 243 AD2d 406, 663 NYS2d 558 [1st Dept 1997]). To the extent the complaint contains allegations that the individually-named defendants conspired to terminate plaintiff's employment, such conspiracy claims are not actionable since New York does not recognize a common-law tort theory of liability based upon wrongful discharge of an at-will employee (***Monsanto v Electric Data Sys. Corp.***, 141 AD2d 514, 529 NYS2d 512 [2d Dept 1988]). Thus, insofar as the complaint alleges such a conspiracy claim, it is also summarily dismissed.

In the sixth cause of action for libel and slander, plaintiff alleges the defendants made false written and oral statements which were published causing plaintiff to sustain damage to her reputation, pecuinary loss and emotional distress. A defamation cause of action does not lie based on the allegations in the plaintiff's papers and her EBT testimony. Upon questioning during her EBT, plaintiff admitted that her conduct caused her to be terminated. Additionally, the unfavorable assessment of her work performance in the aforementioned memos to file, statements and disciplinary notices, "amounted to a nonactionable expression of opinion" (***Ott v Automatic Connector, Inc.***, 193 AD2d 657, 658, 58 NYS2d 10 [2d Dept 1993]; ***Goldberg v Coldwell Banker, Inc.*** 159 AD2d 684, 553 NYS2d 432 [2d Dept 1990]). Moreover, "no cause of action for defamation exists for the discharge of an at-will employee...[as] an employer has the right, without judicial interference, to assess an employee's performance on the job" [internal citations omitted] (***Miller v Richman***, 184 AD2d 191, 193, 592 NYS2d 201 [4th Dept 1992]; *see* ***Ott v Automatic Connector, Inc.***, *supra* at 658).

The defendants also demonstrated their prima facie entitlement to summary judgment dismissing the seventh cause of action for breach of contract and the eighth cause of action for tortuous inference with contract. It is clear that based on the application for employment and the Hospital's employee handbook, that plaintiff was an at-will employee and that there was no agreement establishing a fixed duration for her employment or an express written policy limiting the Hospital's right to discharge her for any reason or no

reason (***Murphy v American Home Prods. Corp.***, *supra*; ***Ingle v. Glamore Motor Sales, Inc.***, 73 NY2d 183, 538 NYS2d 771 [1989]; ***McGimpsey v J. Robert Folchetti & Associates, LLC***, 19 AD3d 658, 798 NYS2d 498 [2d Dept 2005]). Indeed, the employee handbook explicitly disclaims any contractual relationship (***see Lobosco v New York Tel. Co.***, 96 NY2d 312, 727 NYS2d 383 [2001]). Furthermore, given that the individual defendants were in charge of plaintiff's duties, and they were charged with deciding or recommending her termination, they were acting in the scope of their employment. As such, neither the employer nor its employees could be liable for tortious interference with plaintiff's employment contract (***Presler v Domestic & Foreign Missionary Socy. of Protestant Episcopal Church in the U.S.A.***, 113 AD3d 409, 980 NYS2d 2 [1st Dept 2014]; ***Marino v Vunk***, 39 AD3d 339, 835 NYS2d 47 [1st Dept 2007]).

The ninth cause of action alleging constitutional violations must also be dismissed. The complaint is devoid of any facts to suggest that plaintiff was deprived of any constitutionally protected rights or privileges under state or federal law. Plaintiff's conclusory averments fail to identify a protected interest under 42 USC § 1983. Furthermore, plaintiff has not demonstrated that the Hospital maintained an official policy or custom which subjected plaintiff to denial of a constitutional right. The basis of plaintiff's constitutional violations is the Hospital's custom and practice of not conducting grievances or following grievance procedures in accordance with the employee handbook, which it is alleged deprived plaintiff of her liberty interests. Assuming for arguments sake, that such a liberty interest exists, plaintiff testified and clearly was afforded the opportunity to grieve her termination in accordance with the procedures set forth in the employee handbook. Therefore, the ninth cause of action is without merit and is summarily dismissed.

Plaintiff alleges the creation, or at least toleration, of a hostile work environment in the form of harassment and retaliation (first cause of action). "In order to establish a hostile work environment, plaintiffs must establish that the conduct complained of was severe or pervasive" (***Harris v Forklift Sys.***, 510 U.S. 17, 21, 114 S. Ct [1993]). Moreover, to be actionable, "the offensive conduct must be pervasive" (***Father Belle Community Ctr. v New York State Div. of Human Rights***, 221 AD2d 44, 51, 642 NYS2d 739 [4th Dept 1996]). The only basis asserted by plaintiff to support this cause of action is her belief that she was unfairly scrutinized and subjected to disciplinary action by her supervisors and counseled in front of patients and other employees. Such assertions are insufficient to support this cause of action (*see* ***Gaffney v City of N.Y.***, 101 AD3d 410, 955 NYS2d 318 [1st Dept 2012], *lv denied* 21 NY3d 858, 970 NYS2d 748 [2013]). To the extent plaintiff alleges that she was retaliated against, plaintiff's claim cannot be sustained as she has failed to set forth facts to establish that she was engaged in a protected activity (*see* ***Forrest v Jewish Guild for the Blind***, 3 NY3d 295, 786 NYS2d 382 [2004]). Thus, plaintiff has failed to demonstrate that she was subjected to a hostile work environment. Therefore, this cause of action must also be summarily dismissed.

Accordingly, as plaintiff has failed to raise an issue of fact to overcome the defendants' prima facie showing of entitlement to summary judgment, the motion is granted and the complaint is dismissed.

Dated: 12-8-14

Hon. Denise F. Molia
A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION