Hannigan v North Patchogue Fire Dept.
2017 NY Slip Op 31148(U)
May 26, 2017
Supreme Court, Suffolk County
Docket Number: 12-5864
Judge: Martha L. Luft
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[* 1]

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SHORT FORM ORDER

INDEX No. 12-5864
CAL. No. 15-01750OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 2-22-16
ADJ. DATE 5-9-17
Mot. Seq. # 003 - MG; CASEDISP

---X

THERESA A. HANNIGAN,

Plaintiff,

- against -

NORTH PATCHOGUE FIRE DEPARTMENT, DENNIS CURRY,

Defendants.

---X

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Upon the following papers numbered 1 to 46 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 23 - 43 ; Replying Affidavits and supporting papers 44 - 46 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the North Patchogue Fire Department and Dennis Curry for summary judgment in their favor dismissing the complaint is granted.

Plaintiff Theresa Hannigan commenced this action to recover damages allegedly based upon discrimination and retaliation by defendants. Plaintiff's complaint alleges violations of, among other things, the Civil Rights Act, the Americans with Disabilities Act, and New York State Human Rights Law. It also alleges claims for intentional infliction of emotional distress and prima facie tort. Plaintiff alleges that she was a member of the North Patchogue Fire Department as an EMT from 2002 through 2008, when she resigned due to injuries sustained in an unrelated motor vehicle accident which prevented her from performing her duties as an EMT. In 2010, plaintiff reapplied to the Department, and the essence of her claim is that the denial of her reinstatement was both discriminatory and retaliatory based upon her sexual orientation. Issue has been joined, discovery is complete and a note of issue has been filed.

Defendants now move for summary judgment in their favor dismissing the complaint. In support of the motion they submit, among other things, a copy of the pleadings; the deposition transcripts of plaintiff and Dennis Curry; various correspondence; affidavits of Roy Cavaco, Jr., George Walters, Adam Walters, Thomas Mosca, Kyle Logiudice, Jeff Engel, and John Drews; and plaintiff's medical records. In opposition, plaintiff submits her own affidavit; the deposition transcript of Dennis Curry; letters of Dr. Mark Gudesblatt, dated July 30, 2016, and Dr. Borimir Darakchiev, dated July 26, 2016; and various correspondence.

Plaintiff testified that she first joined the North Patchogue Fire Department in 2002 as a volunteer EMT. She was employed as a paid EMT with the Central Islip-Hauppauge Volunteer Ambulance Corps. Plaintiff testified she was married, divorced, is homosexual, and since 1998 she has been living with her partner. Plaintiff testified that in 2006 she sustained a spinal injury in a motor vehicle accident, underwent a laminectomy, and the injury prevented her from performing her duties as an EMT. In 2008, she resigned from the North Patchogue Fire Department.

Plaintiff further testified that in 2005 she was told by Jamie Cevone, a co-worker at the Central Islip-Hauppauge Volunteer Ambulance Corps, that Brad Tygar, a member of the North Patchogue Fire Department, stated that plaintiff was homosexual. Plaintiff testified that she was upset about the comment because she believed her homosexuality would bring shame to the fire department. Plaintiff testified that Bridget Volpi, a member of the North Patchogue Fire Department, expressed that she thought it was wrong for plaintiff not to bring her partner Patricia to an installation dinner. Plaintiff testified she was never told not to bring her partner to any function or to keep her sexual orientation secret. After 2005, plaintiff brought Patricia to firehouse functions and did so until her resignation from the North Patchogue Fire Department in 2008.

On October 17, 2005, plaintiff formally complained to Captain Dominick Thorn and Chief Volpe of the Fire Department about Mr. Tygar's comment. Upon investigation, Jamie Cevone was unwilling to give a statement. Plaintiff testified she made no other complaints to the officers of the North Patchogue Fire Department. In 2010, when plaintiff applied for reinstatement she did not provide the fire department with any documentation from her doctors that she was cleared to return to work. She testified that she believes her application was denied based upon her disability and her sexual orientation. She admits that the membership committee believed that she was unable to lift stretchers and perform the physical aspects of being an EMT. At the time of her interview she wore a leg brace, was being treated for an autoimmune condition, and since March 2011, is wheelchair bound. Plaintiff also admits she did not reapply for her paid

position with the Central Islip-Hauppauge Volunteer Ambulance Corps because of her age and inability to handle the physical aspect of the job.

Dennis Curry testified that he was Vice President of the North Patchogue Fire Department. He was present at plaintiff's membership interview, and prepared a denial letter. Curry testified he had a conversation with Kyle Logiudice, who told him he did not believe plaintiff was physically fit to perform the duties of an EMT due to her injuries from the car accident.

North Patchogue Fire Department Membership Committee members Roy Cavaco, Jr., Adam Walters, and Jeff Engel each aver that they were not aware that plaintiff was homosexual. Committee members George Walters, Thomas Mosca, and Kyle Logiudice aver that they were aware that plaintiff was homosexual.

North Patchogue Fire District Manager John Drews avers that the North Patchogue Fire Department does not have employees. He avers there are approximately 100 volunteers that do not receive pay for their services; rather volunteers do receive points based upon the number of runs they make throughout the year. If a volunteer accrues 50 points, they become eligible for the state volunteer retirement plan. He avers that plaintiff became a volunteer in 2004, and from 2004 to 2008 she was only eligible for pension credit in 2004 and 2005. He avers he was not aware plaintiff is a homosexual.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, *citing Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

Defendants have established their prima facie entitlement to summary judgment in their favor dismissing each of the causes of action in the complaint. Initially, as to all counts, defendant Curry maintains that he is entitled to qualified immunity as he took no part in the decision to deny plaintiff's reinstatement application, that he was not a member of the membership committee, and that the sole claim that plaintiff alleges against him is that he did not advise her why her application was denied. Government officials performing discretionary functions are entitled to qualified immunity, thereby shielding them from civil liability, as long as their actions did not violate the plaintiff's clearly established legal rights; it must be objectively reasonable for the defendants to have believed that their conduct as related to the plaintiff was lawful under the circumstances (*see Anderson v Creighton*, 483 US 635, 638–640, 107 SCt 3034 [1987]; *Demoret v Zegarelli*, 451 F3d 140, 148–149 [2d Cir 2006]; *Linen v County of Rensselaer*, 274 AD2d 911, 914, 711 NYS2d 236 [3d Dept 2000]). Here, Curry has established his prima facie entitlement to qualified immunity. In opposition, plaintiff has not addressed the issue and has, therefore, failed to raise a triable

issue of fact and waived the claim (*see Breirly v Deer Park Sch. District.*, 359 F Supp 2d 275, 300 [ED NY 2005]; *Taylor v City of N.Y.*, 269 F Supp 2d 68, 75 [ED NY 2003]).

Defendants contend that North Patchogue Fire Department is not a proper party to this action, as it is merely an administrative arm of the North Patchogue Fire District. The two are separate entities and the Fire Department lacks the capacity to be sued (*see Rose v County of Nassau*, 904 F Supp 2d 944 [ED NY]; *Bartnicki v Centereach Fire Department*, 22 AD2d 637, 635 NYS2d 696 [2d Dept 1995]). Nevertheless, the North Patchogue Fire District served an answer to the complaint stating the "North Patchogue Fire District s/h/a North Patchogue Fire Department," conceding it is the proper party in interest. The Court notes the supplemental summons with notice served on July 11, 2012 is a nullity, as it was served without leave of court (*see* CPLR 305 [c]).

As to plaintiff's first cause of action, defendants have established that federal law does not prohibit discrimination based upon sexual orientation (*Dawson v Bumble and Bumble*, 398 F 3d 211 [2d Cir 2005]; *but see Hively v Ivy Tech Community College of Indiana*, __ F3d __, 2017 WL 1230393 [7th Cir April 4, 2017]). "The law is well-settled in this circuit ... that .... Title VII does not prohibit harassment or discrimination because of sexual orientation" (*Simonton v Runyon*, 232 F.3d 33, 35 [2d Cir 2000]). "Thus, to the extent that she is alleging discrimination based upon her lesbianism, [the plaintiff] cannot satisfy the first element of a prima facie case under Title VII because the statute does not recognize homosexuals as a protected class" (*Dawson v Bumble and Bumble, supra*). Likewise, plaintiff's claim of retaliation under federal law is not viable, as plaintiff alleges one member of the fire department made a statement that plaintiff is homosexual. The statement is truthful and remote in time. Defendants have established that plaintiff was not engaged in a protected activity and that her "employer" did not take an adverse "employment" action against her (*Mormol v Costco*, 364 F. 3d 55 [2d Cir 2004]). In opposition, plaintiff fails to raise a triable issue of fact and does not address the federal statute, and therefore, does not oppose dismissal (*see Breirly v Deer Park Sch. District.*, 359 F Supp 2d 275, 300 [ED NY 2005]; *Taylor v City of N.Y.*, 269 F Supp 2d 68, 75 [ED NY 2003]).

Plaintiff's second cause of action alleges she was subject to disparate treatment based upon sexual orientation, retaliation, and disability in violation of state law. Executive Law § 296 prohibits discrimination by an employer.[1] It also prohibits the employer from retaliating against an employee for opposing any practices forbidden under the Human Rights Law. Section 297 (9) of the Human Rights Law states: "Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction ... unless such person has filed a complaint hereunder ... with any local commission on human rights." Here, plaintiff filed a complaint with the New York State Division of Human Rights (NYSDHR) and the matter was dismissed "on grounds of administrative convenience," permitting her a right to bring suit. "The standards for recovery under section 296 of the Executive Law are in accord with Federal Standards under Title VII of the Civil Rights Act of 1962 (42 USC 2000e *et seq.*)" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 629, 665 NYS2d 25 [1997]; *see also Matter of Aurecchione v New York State Div. of Human Rights*, 98 NY2d 21, 744 NYS2d 349 [2002]; *Matter of Argyle Realty Assoc. v New York State Div. of Human Rights*, 65 AD3d 273, 882 NYS2d 458 [2d Dept 2009]). On a claim of

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[1] Executive Law §§ 290 - 301 comprise Article 15 of the Executive Law, and is known as the Human Rights Law.

discrimination, a plaintiff has the initial burden of establishing a prima facie case of discrimination (*id.*). While this burden is "de minimus" (*Sogg v American Airlines,* 193 AD2d 153, 162, 603 NYS2d 21 [1st Dept 1993], *lv dismissed* 83 NY2d 846, 612 NYS2d 106, *lv denied* 83 NY2d 754, 612 NYS2d 109 [1994]), a plaintiff must present more than "conclusory allegations of discrimination" and provide "'concrete particulars' to substantiate the claim" (*Muszak v Sears, Roebuck & Co.*, 63 F Supp2d 292 [WD NY 1999], quoting *Meir v Dacron*, 759 F 2d 989 [2d Cir], *cert. denied* 474 US 829, 106 SCt 91 [1985]).

Executive Law § 296 (1) (a) states: "It shall be an unlawful discriminatory practice... for an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Specifically Executive Law § 296 (9) (a) provides:

> It shall be an unlawful discriminatory practice for any fire department or fire company therein, through any member or members thereof, officers, board of fire commissioners or other body or office having power of appointment of volunteer firefighters, directly or indirectly, by ritualistic practice, constitutional or by-law prescription, by tacit agreement among its members, or otherwise, to deny to any individual membership in any volunteer fire department or fire company therein, or to expel or discriminate against any volunteer member of a fire department or fire company therein, because of the race, creed, color, national origin, sexual orientation, military status, sex, marital status, or familial status, of such individual.

Defendants have established that no right of action exists against them for discrimination based upon Executive Law § 296 (9) as disability is not included in the categories protected by Executive Law § 296 (9) (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 786 NYS2d 382 [2004]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 665 NYS2d 25 [1997]; *Muriel v. Dominican Republic Educ. and Mentioning Project, Inc.*, 85 AD3d 1464, 926 NYS2d 198 [3d Dept 2011]; *Lambert v Macy's East, Inc.*, 84 AD3d 744, 922 NYS2d 210 [2d Dept 2011]). Moreover, a disability that prevents an employee from performing job requirements in reasonable manner is not protected disability within meaning of the Executive Law (*Matter of Regal Entertainment Group v New York State Div. of Human Rights,* 61 AD3d 1102, 875 NYS2d 647 [3d Dept 2009]) and defendants have shown, by plaintiff's own admission, that she was unable perform the essential functions of the job (*Gill v Maul*, 61 AD3d 1159, 876 NYS2d 751 [3d Dept 2009]). In addition, defendants have established that plaintiff was not treated differently from other members of the fire department in the terms, conditions or privileges of her "employment," nor otherwise raised an inference of discrimination (*see Ferrante v American Lung Assn., supra*; *Alvorada v Hotel Salisbury, Inc.*, 38 AD3d 398, 833 NYS2d 25 [1st Dept 2007]; *Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326, 800 NYS2d 391 [1st Dept 2005]; *Matter of Washington County v New York State Div. of Human Rights*, 7 AD3d 895, 776 NYS2d 650 [3d Dept 2004]).

Plaintiff's claim of discrimination based upon sexual orientation under state law is governed by the same standards as federal claims (*St. Juste v Metro Plus Health Plan*, 8 F Supp 3d 287 [ED NY 2014]). To

establish a prima facie case of discrimination based on disparate treatment, plaintiff must show that: (1)she belonged to a protected class; (2) she was qualified for the position she held; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent (*St. Juste, supra*). Here, plaintiff belongs to the protected class; however, defendants have established that she was not qualified for the position for which she reapplied. Plaintiff admits in her deposition testimony that she did not reapply as an EMT with the Central Islip-Hauppauge Volunteer Ambulance Corps in 2010 because of her age and her belief that she would not be able to handle the physical aspects of the job. Plaintiff also admits that after her motor vehicle accident she was totally disabled.

In opposition, plaintiff submits two letters, both of which are without evidentiary value. It is well settled that the opinion testimony of an expert must be based on facts in the record or personally known to the witness (*see Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 480 NYS2d 195 [1984] citing *Cassano v Hagstrom*, 5 NY2d 643, 646, 187 NYS2d 1 [1959]; *Shi Pei Fang v Heng Sang Realty Corp.*, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]; *Santoni v Bertelsmann Property, Inc.*, 21 AD3d 712, 800 NYS2d 676 [1st Dept 2005]). An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion (*see Shi Pei Fang v Heng Sang Realty Corp. supra)*. Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment *(see Zuckerman v City of New York supra*; *Leggis v Gearhart*, 294 AD2d 543, 743 NYS2d 135 [2d Dept 2002]; *Levitt v County of Suffolk*, 145 AD2d 414, 535 NYS2d 618 [2d Dept 1988]). The letter from Dr. Borimir Darachiev, dated July 26, 2016, is unsworn and is not in admissible form. The letter from Dr. Mark Gudesblatt, dated July 30, 2016, is affirmed under the penalty of perjury, and therefore, is admissible evidence. However, Dr. Gudesblatt fails to state the basis of his opinion made six years after 2010 and that opinion is speculative, unsubstantiated, and conclusory (*see Mestric v Martinez Cleaning Co.*, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]). Plaintiff has failed to raise a triable issue of fact that at the time of her reapplication she was had the ability to work. Defendants, through affidavits of Membership Committee members, have also demonstrated that no discriminatory intent existed, as three of the board members were not aware of plaintiff's sexual orientation. In opposition, plaintiff has failed to raise a triable issue of fact.

Plaintiff's third cause of action asserts a claim under the Americans with Disabilities Act of 1990 (42 USC § 12101 et. seq.) (hereinafter the ADA). To establish a prima facie case of disability discrimination under either the Executive Law or the ADA, a plaintiff must establish, inter alia, that he or she was otherwise qualified to perform the essential functions of the position, with or without a reasonable accommodation (*see* Executive Law § 292 [21]; *Heyman v Queens Village Comm. for Mental Health for Jam. Community Adolescent Program*, 198 F 3d 68, 72 [2d Cir 1999]; *Thide v New York State Dept. of Transp.*, 27 AD3d 452, 453, 811 NYS2d 418 [2d Dept 2006]). Here, defendants have established a prima facie entitlement of dismissal of disability discrimination because plaintiff admits she could not perform the essential functions of the position of EMT. Defendants also have established a prima facie entitlement of dismissal of the retaliation claim. To make a prima facie showing of retaliation, a plaintiff must show that (1) he or she has engaged in protected activity, (2) the employer was aware that he or she participated in such activity, (3) he or she suffered an adverse employment action based upon the activity, and (4) there is a causal connection between the protected activity and the adverse action (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313, 786 NYS2d 382 [1997]; *Thide v New York State Dept. of Transp., supra*; *Gordon v New York City Bd.*

of Educ., 232 F 3d 111, 116 [2d Cir 2000]). Here, defendants have demonstrated that they were not employers, as the position was voluntary. In opposition, plaintiff has failed to raise a triable issue of fact.

Plaintiff's fourth cause of action alleges a hostile work environment and retaliation. A hostile work environment exists "'[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' "(*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310, 786 NYS2d 382 [2004], quoting *Harris v Forklift Sys.*, 510 US 17, 21, 114 SCt 367 [1993]; *see Vitale v Rosina Food Prods.*, 283 AD2d 141, 143, 727 NYS2d 215 [4th Dept 2001]). To recover against an employer for the discriminatory acts of its employee, the plaintiff must demonstrate that the employer became a party to such conduct by encouraging, condoning, or approving it (*see Matter of State Div. of Human Rights [Greene] v St. Elizabeth's Hosp.*, 66 NY2d 684, 687, 496 NYS2d 411 [1985]; *Matter of Totem Taxi v New York State Human Rights Appeal Bd.*, 65 NY2d 300, 305, 491 NYS2d 293 [1985]), or otherwise failed to take immediate action on a complaint (*Priore v The New York Yankees*, 307 AD2d 67, 761 NYS2d 608 [1st Dept 2003]). Here, defendants have established only one complaint was made in 2005 about a statement allegedly made by Brad Tygar that plaintiff was homosexual. That statement does not rise to the level of discriminatory intimidation, ridicule, or insult. The Fire Department attempted to investigate the allegation but the witness refused to provide a statement, leaving only a hearsay allegation. Moreover, the claim of a hostile work environment is time barred. The statute of limitations is three years for a hostile work environment brought under 42 USC § 1983 and 300 days for a complaint filed with the NYSDHR or the Equal Employment Opportunity Commission (*Patterson v County of Oneida, N.Y.*, 375 F 3d 206 [2d Cir 2004]). As plaintiff alleges the conduct occurred in 2005 and her complaint with the NYSDHR was filed in 2011, the fourth cause of action is time barred.

Turning to the plaintiff's fifth cause of action, a claim for intentional infliction of emotional distress "predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 490 NYS2d 735 [1985]). Defendants have established that the conduct complained of does not rise to the level of atrocity or outrageousness necessary to sustain a claim of this nature (*see Howell v New York Post Co.*, 81 NY2d 115, 596 NYS2d 350 [1993]). Defendants have established that their conduct was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . . and [was] utterly intolerable in a civilized community" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 461 NYS2d 232 [1983], quoting Restatement [Second] of Torts § 46, Comment d; *see Marmelstein v Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 NY3d 15, 862 NYS2d 311 [2008]; *Baumann v Hanover Community Bank*, 100 AD3d 814, 957 NYS2d 111 [2d Dept 2012]). In opposition, plaintiff has failed to raise a triable issue of fact. Thus, summary judgment is granted as to the fifth cause of action for intentional infliction of emotional distress.

Plaintiff's final cause of action alleges prima facie tort. The elements of a cause of action for prima facie tort are the intentional infliction of harm, which results in special damages, without any excuse or justification, by an act or series of acts which would otherwise be lawful (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142–143, 490 NYS2d 735 [1985]). Here, defendants have established that their conduct was not solely motivated by malice or "disinterested malevolence" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333, 464 NYS2d 712 [1983]; *see also Curiano v Suozzi*, 63 NY2d 113, 117, 480

NYS2d 466 [1984]). The uncontroverted affidavits of the Membership Committee members establish that they were not motivated by malice toward plaintiff. Further, a critical element of the cause of action for prima facie tort is that the plaintiff suffered specific, measurable loss, causing special damages (*Freihofer v Hearst Corp., supra*, 65 NY2d, at 143, 490 NYS2d 735; *Curiano v Suozzi, supra*, 63 NY2d, at 117, 480 NYS2d 466; *ATI, Inc. v Ruder & Finn*, 42 NY2d 454, 458, 398 NYS2d 864 [1977]). In opposition, plaintiff has failed to raise a triable issue of fact and has not shown any special damages. Plaintiff's conclusory statement that the evidence supports her claims, without more, is insufficient to create a material issue of fact that precludes summary judgment. Accordingly, the motion by the defendants is granted and the complaint is dismissed.

Dated: 5/26/17

Martha L. Luft
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION