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| Updyke v Long Island Dev. Disabilities Servs. Off. |
| 2019 NY Slip Op 30560(U) |
| March 5, 2019 |
| Supreme Court, Suffolk County |
| Docket Number: 27337/2012 |
| Judge: William B. Rebolini |
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Desiree Updyke, as Administer and Personal
Representative of the Estate of Kathy Stewart,

Plaintiff,

- against -

Long Island Developmental Disabilities Services
Office, Victoria Schultz, Carmen Maldonado,
Deborah Sorg, and William Esposito (pursuant
to New York Executive Law §290 et seq.)

Defendants.

Motion Sequence No.: 001; MG; CD

Motion Date: 5/16/18

Submitted: 8/15/18

Index No.: 27337/2012

Attorney for Plaintiff:

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Attorney for Defendants:

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Clerk of the Court

Upon the following papers numbered 1 to 12 read on this motion for summary judgment: Notice of Motion and supporting papers, 1 - 4 and Memorandum of Law, 5 - 6; Answering Affidavits and supporting papers, 7 - 9 and Memorandum of Law, 10; Replying Memorandum of Law, 11 - 12; it is,

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

Plaintiff, Desiree Updyke, as administrator and personal representative of the estate of Kathy Stewart ("Stewart"), commenced this action seeking damages for alleged violations of the New York State Human Rights Law, Executive Law § 296 ("HRL"). Plaintiff alleges that defendant Long Island Developmental Disability Services Office ("LIDDSO") and its employees, defendants Victoria

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Schultz, Carmen Maldonado, Deborah Sorg and William Esposito (hereinafter the "Defendants" when referred to collectively), discriminated against Stewart based on a perceived disability of substance abuse, failed to provide her a reasonable accommodation for the perceived disability or for her actual disability, a broken wrist, and retaliated against her when she made a complaint of discriminatory treatment. In addition, plaintiff alleges that Victoria Schultz ("Schultz"), Carmen Maldonado ("Maldonado"), Deborah Sorg ("Sorg") and William Esposito ("Esposito") participated in, and aided and abetted, the complained of discriminatory and retaliatory treatment.

Discovery has been completed and the note of issue filed. Defendants now move for summary judgment dismissing the complaint, arguing, inter alia, that Stewart was disciplined for legitimate non-discriminatory reasons relating to deficiencies in her work performance and misconduct. Defendants argue that the failure-to-accommodate claims should be dismissed as without merit and the retaliation claims dismissed as there is no evidence of a causal connection between Stewart's complaints of discrimination/retaliation and the discipline imposed. They also argue that the claims against the individual defendants for aiding and abetting must fail, as the claims against LIDDSO for violation of the HRL cannot stand. The following has been ascertained from the excerpts of the deposition transcripts and the sworn statements by defendants in support of the motion.

Plaintiff had worked for New York State for approximately thirty years as a registered nurse when, on November 27, 2003, she began working for the New York State Office for People With Development Disabilities ("OPWDD") at LIDDSO, in the civil service title "Nurse II." Stewart worked in different capacities as a Nurse II until February 2008, when she was assigned to the 81 Mall Drive Program, a day treatment program for individuals with developmental disabilities. Stewart became the Program Nurse, and her duties included, among other things, transcribing physician orders, administering medications and treatments to the individuals in the program and documenting same, as well as storing and accounting for controlled and non-controlled substances. Schultz, a Nurse Administrator II and Acting Director of Nursing at OPWDD's LIDDSO, was the head of the nursing department and indirectly supervised Stewart. Maldonado, a Nurse Administrator I, was Stewart's immediate supervisor for clinical issues. Sorg was the Labor Relations Director at LIDDSO, and her responsibilities included conducting interrogations and interviews, supervising investigators and reviewing investigation reports. Esposito is a LIDDSO investigator.

In October 2008, LIDDSO was notified that on September 30, 2008, Stewart was arrested and charged with driving while under the influence of drugs or alcohol and drugs. LIDDSO received additional notification that Stewart's license was revoked on October 14, 2008 for refusing to submit to a chemical test. Stewart was convicted of driving while impaired on June 3, 2009.

On November 5, 2008, Stewart was issued a notice of discipline for ten unscheduled absences that occurred between January 31, 2008 and October 1, 2008. The proposed penalty was a \$500 fine, but according to Sorg's affidavit, Stewart received a letter of reprimand which does not result in any monetary loss.

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Thereafter, Stewart broke her wrist, and from August 3, 2009 until September 27, 2009 was out of work on sick leave with full pay. She had surgery on October 16, 2009 for a perforated gastric ulcer, extending her sick leave until October 28, 2009 at half-pay. Stewart requested and was approved for modified duty and returned to work on October 29, 2009. However, by November 17, 2009, she was out again on sick leave with full pay until December 7, 2009, and then at half-pay from December 8, 2009 until January 13, 2010. During this time, Stewart again made a request for modified duty, but the request was denied as a few days after a doctor cleared her for light duty, another doctor wrote a new note indicating that she was totally disabled. Stewart returned to work on January 14, 2010, as a note provided by her doctor indicated she was able to perform her duties at full capacity. Stewart then had two unscheduled absences, calling in sick on February 16 and 17, 2010. Although Schultz asserts in her affidavit that shortly after August 2009, Stewart began exhibiting drug-seeking behavior by admitting that she was going to different doctors in an effort to obtain new prescriptions,¹ it was not until the unscheduled absences in February 2010 that major infractions in her work performance were revealed.

As a result of calling in sick, other nurses on the staff had to cover for Stewart and administer medications in accordance with physician orders. These orders, which provide the directives for the type of medication, dosage, time, frequency and how it is to be administered, are typically received by the Program Nurse on or before the first of each month, and filed in the appropriate binder. The orders had not been filed and upon entering the medication room to find them, the covering nurse, Kathy Wilson, found the room in disarray. Schultz and Maldonado were contacted and each conducted an inspection. Although there is some inconsistency as to the state of the room, according to the contentions made in support of the motion, the inspections revealed that the prescription orders had not been filed in the appropriate binders or in the medication administration records ("MARs"), that Stewart had not initialed the MARs as required upon administering medication/treatment to an individual, and that the MARs were completely blank up until that day in mid-February. The inspection also revealed a deficiency in the count of several controlled drug medications, improperly secured personal health information in violation of HIPAA, and unfiled documents which could have led to a negative impact on the continued certification of the day treatment program and receipt of government funding. It was concluded by Schultz, as a nursing administrator and patient advocate, that Stewart posed a danger to those in her charge and should no longer be allowed to practice as a registered nurse. Stewart was placed on administrative leave and thereafter suspended for misconduct.

Upon locating the physician orders in the treatment room on February 16, Wilson discovered that Stewart had improperly administered a controlled substance to an individual at the wrong time which could have led to a serious adverse event for that individual. Wilson filed a "Reportable Incident" report which triggered LIDDSO's obligation under OPWDD regulations to initiate an

¹Schultz asserts that Stewart was encouraged to use the Employee Assistance Program and to seek other alternatives to pain management.

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immediate investigation. According to Sorg, evidence she and Esposito unveiled during their investigation demonstrated that Stewart was grossly negligent and mismanaged the medication regimen for 22 individuals with developmental disabilities in the day treatment program, and substantiated allegations contained in the Reportable Incident report and written statements received from Schultz, Maldonado and other co-workers. An Investigative Report was prepared and forwarded to Employee Relations in Albany, the office that prepares the notices of discipline and decides the proposed penalty based upon the employee's employment and disciplinary history and the seriousness of the misconduct. The Employee Relations office issued a notice of discipline to Stewart dated December 9, 2010, wherein 45 charges of misconduct were detailed and her termination recommended. Termination, however, was never implemented as Stewart exercised her right under the collective bargaining agreement to appeal the notice of discipline.

During the investigation, other purported misconduct occurred. On April 8, 2010, Stewart was allegedly insubordinate when she failed to comply with Sorg's directive to relinquish possession of Schultz's February 28 letter. Sorg explained that the draft had been inadvertently printed on the wrong printer, picked up by a staff member and given to Stewart. Sorg directed Stewart to return the draft as it was not final and not intended to be distributed to anyone outside of the investigatory process.

On April 14, 2010, while being questioned by Sorg as part of the investigation, Stewart purportedly refused to answer inquiries pertaining to her September 30, 2008 DWI arrest. Stewart claimed she did not want to jeopardize her court case. According to Sorg, Stewart had signed a "use immunity" form which provides that statements made under the threat of insubordination cannot be used against an employee in a criminal prosecution. Stewart was issued a notice of discipline dated April 26, 2010 for these incidents, with a proposed penalty of termination. In response, Stewart filed a grievance challenging the notice of discipline, and when the grievance was not resolved, the matter was submitted to arbitration. Following a hearing, the arbitrator found Stewart guilty of the two charges of insubordination and imposed a penalty of suspension without pay for one year. On May 4, 2010, Stewart served LIDDSO a notice of intention to file a claim with the EEOC for discrimination and retaliation in her employment.

Another notice of discipline dated April 11, 2011 was issued based on Stewart's misconduct of driving with a suspended driver's license as a result of the September 2008 DWI arrest while performing her duties from December 2008 through June 2009. This misconduct was revealed when LIDDSO's investigators discovered that Stewart had filed for and received mileage reimbursements for work-related travel. Again, the Employee Relations office recommended a proposed penalty of termination, and again Stewart exercised her right under the collective bargaining agreement to appeal.

Defendants maintain that although Stewart was on suspension as a result of the aforementioned incidents of misconduct, she was still an employee of LIDDSO, awaiting a date to proceed to arbitration. Prior to receiving a date, LIDDSO was notified that Stewart committed suicide on June 20, 2011.

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To state a prima facie case of employment discrimination due to a disability under Executive Law § 296, a plaintiff must show that he or she suffers from a disability, and that the disability engendered the behavior for which he or she was discriminated against in the terms, conditions, or privileges of his or her employment (*Matter of McEniry v Landi*, 84 NY2d 554, 620 NYS2d 328 [1994]; *Kulaya v Dunbar Armored, Inc.*, 110 AD3d 772, 972 NYS2d 659 [2d Dept 2013]; *Thide v New York State Dept. of Transp.*, 27 AD3d 452, 811 NYS2d 418 [2d Dept 2006]). If the plaintiff succeeds in establishing a prima facie case, the burden of proof shifts to the employer to demonstrate that the disability prevented the employee from performing the duties of the job in a reasonable manner or that the employer's action was motivated by legitimate nondiscriminatory reasons (*Matter of McEniry v Landi, supra*; *Kulaya v Dunbar Armored, Inc., supra*; *Thide v New York State Dept. of Transp., supra*). If the employer establishes that it had valid nondiscriminatory reasons for its action, the burden shifts back to the plaintiff to raise a triable issue of fact as to whether the stated reasons were pretextual (*Kulaya v Dunbar Armored, Inc., supra*; *Thide v New York State Dept. of Transp., supra*).

Here, LIDDSO established its prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging employment discrimination on the ground of disability by showing that it had a legitimate, nondiscriminatory reasons for the change in the conditions of Stewart's employment which were unrelated to her alleged disability or perceived disability, a reason that plaintiff has not shown is pretextual (*see Kulaya v Dunbar Armored, Inc., supra*; *Thide v New York State Dept. of Transp., supra*). Defendants have provided sufficient evidence that Stewart was terminated not because of a disability but rather for incorrectly dispensing a controlled substance and other medications to several participants in the day treatment program, and for not performing essential functions of the position of a Program Nurse (*see Halvatzis v Jamaica Hosp. Med. Ctr.*, 163 AD3d 532, 81 NYS3d 107 [2d Dept 2018]; *McCarthy v St. Francis Hosp.*, 41 AD3d 794, 840 NYS2d 800 [2d Dept 2007]). In opposition, plaintiff has failed to raise an triable issue of fact. Plaintiff failed to set forth in the complaint or in her opposition papers factual allegations sufficient to show that, upon the provision of reasonable accommodations, Stewart could perform the essential functions of her job (*see Staskowski v Nassau Community Coll.*, 53 AD3d 611, 862 NYS2d 544 [2d Dept 2008]). Indeed, plaintiff alleges that Stewart herself complained the work was overwhelming. As plaintiff has failed to present a cognizable legal basis to hold LIDDSO or any other party liable for a violation of the HRL, the aiding-and-abetting claims against its employees, the individual defendants, cannot stand (*see Medical Express Ambulance Corp. v Kirkland*, 79 AD3d 887, 913 NYS2d 296 [2d Dept 2010]; *Trovato v Air Express Intl.*, 238 AD2d 333, 655 NYS2d 656 [2d Dept 1997]).

Plaintiff also failed to make a prima facie showing of retaliation. To make a prima facie showing of retaliation, a plaintiff must show (1) participation in a protective activity known to defendant; (2) an adverse employment action; and (3) a causal connection between the protected activity and the adverse employment action (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 327, 786 NYS2d 382 [2004]; *see Simeone v County of Suffolk*, 36 AD3d 890, 828 NYS2d 560 [2d Dept 2007]; *Thide v New York State Dept. of Transp., supra*). An employee engages in a protected activity by complaining about unlawful discrimination (*Forrest v Jewish Guild for the Blind, supra*;

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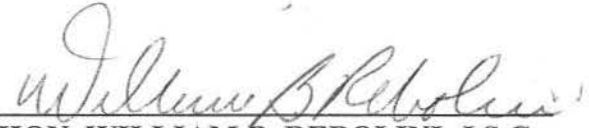
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Brunache v MV Transp., Inc., 151 AD3d 1011, 59 NYS3d 37 [2d Dept 2017]). Here, defendants established that the challenged actions were not causally connected to any protected activity engaged in by Stewart. In opposition, plaintiff failed to submit sufficient evidence from which a causal connection could be found between any protected activity in which Stewart engaged and any adverse employment action (see *Keceli v Yonkers Racing Corp.*, 155 AD3d 1014, 66 NYS3d 280 [2d Dept 2017]; *Simeone v County of Suffolk, supra*). The court has considered plaintiff's remaining contentions and finds them to be without merit.

Accordingly, the defendants' motion for summary judgment is granted and the complaint is dismissed.

Dated: March 5, 2019


HON. WILLIAM B. REBOLINI, J.S.C.

 X FINAL DISPOSITION _____ NON-FINAL DISPOSITION