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| <b>Trinidad v Mary Manning Walsh Nursing Home Co., Inc.</b>  |
| 2019 NY Slip Op 31706(U)   |
| June 13, 2019  |
| Supreme Court, New York County   |
| Docket Number: 155232/2015   |
| Judge: Nancy M. Bannon   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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MARILOU TRINIDAD,

Plaintiff,

INDEX NO.: 155232/2015

-against-

MARY MANNING WALSH NURSING HOME  
CO., INC., CONTINUING CARE COMMUNITY  
OF THE ROMAN CATHOLIC ARCHDIOCESE OF  
NEW YORK d/b/a ARCHCARE and ROMAN  
CATHOLIC ARCHDIOCESE OF NEW YORK,

DECISION and ORDER

MOTION SEQ. 003

Defendants.

-----X  
NANCY M. BANNON, J.:

This action arises out of plaintiff Marilou Trinidad's claims that she was subject to discrimination, retaliation and an alleged hostile work environment, based on her race and national origin, in violation of both the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL). Defendants Mary Manning Walsh Nursing Home, Co., Inc., (Mary Manning) and Continuing Care Community of the Roman Catholic Archdiocese of New York d/b/a/ ArchCare<sup>1</sup> (ArchCare) (collectively, defendants) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint. For the reasons set forth below, defendants' motion is granted and the complaint is dismissed.

**BACKGROUND AND FACTUAL ALLEGATIONS**

Prior to being terminated in July 2012, plaintiff had been employed by defendants since

<sup>1</sup> Defendants state that ArchCare is improperly sued as Continuing Care Community of the Roman Catholic Archdiocese of New York d/b/a ArchCare.

2008 as a Registered Nurse (RN) at Mary Manning. Mary Manning is one of the nursing homes owned and operated by ArchCare, and is located in New York, New York. Plaintiff is Asian, of Filipino descent, and alleges that she was discriminated against on the basis of race/national origin.<sup>2</sup> She states that, prior to the 2011 appointment of Akia Blandon (Blandon), an African-American, as the new director of nursing, she had never received any negative remarks about her work. However, after Blandon was appointed, “it became apparent that [Blandon] was intent in removing as many Filipino nurses [from Mary Manning] so she can replaced [sic] them with other non-Filipino nurses more particularly with African-American nurses.” Complaint, ¶ 16. Further, Blandon purportedly showed her “excitement” when Filipino nurses were suspended or terminated as a way to intimidate Filipino nurses. *Id.*, ¶ 18.

According to plaintiff, when non-Filipino nurses committed serious medical errors, such as overdosing different patients with percocet, ambien or valium, Blandon did not penalize them. However, Filipino nurses were suspended and terminated for far less serious misconduct. Marjorie Valdez (Valdez), the assistant director of nursing, is Filipino. However, Valdez allegedly stated to plaintiff that while “she may be Filipino by descent, she is ‘black at heart’ in the hope and expectation that she can win the favor of [Blandon] . . . .” *Id.*, ¶ 25.

Plaintiff believes that her termination was the result of Blandon’s strategy to terminate Filipino nurses in favor of hiring non-Filipino nurses. According to plaintiff, from the time Blandon “was appointed as Director for Nursing, there have been about twenty five (25) Filipino

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<sup>2</sup> Plaintiff’s complaint states that she is Filipino and that she was discriminated against on the basis of race. However, she testified that she is Asian, of Filipino descent, and that she was discriminated against on the basis of race/national origin. Moller aff, exhibit E, plaintiff’s tr at 366-367.

nurses already working at the Mary Manning Walsh Nursing Home facility but since then more than fifteen (15) Filipino nurses have been either terminated or forced to resign by Ms. Bandon and were subsequently replaced by about seventeen (17) non-Filipino nurses mostly African-American who were chosen or approved by Ms. Bandon.” *Id.*, ¶ 27.

As set forth in the complaint, the circumstances surrounding plaintiff’s termination are as follows: On April 18, 2012, plaintiff submitted a two-week vacation request from May 20 until June 2, 2012. This request was approved on April 26, 2012. Plaintiff wanted to fly to the Philippines to assist her minor daughter with processing immigration papers and obtaining a visa so that her daughter could travel to the United States.

On May 7, 2012, due to the “foreseeable delay in her daughter’s visa processing,” plaintiff submitted a request to extend her vacation as an unpaid leave from June 3, 2012 to June 16, 2012. *Id.*, ¶ 31. The request for unpaid leave of absence form, signed by plaintiff, states the following, in relevant part: “I understand that the applicable provisions of the Home’s Human Resources Policies will apply and that my employment is subject to termination if I willfully exceed the expiration date of this leave.” *Id.*, exhibit 4 at 1.

Plaintiff claims that Bandon did not promptly reply to her leave of absence request. Plaintiff allegedly attempted to contact Bandon several times regarding her leave application, however Bandon, “in continued display or harassment and hostility of Filipino nurses, either refused to speak to Plaintiff or made herself unavailable to Plaintiff.” Complaint, ¶ 34.

On May 31, 2012, plaintiff’s sister, who also works for defendants, advised plaintiff that her leave of absence request had been denied. The complaint states that Bandon’s purposeful conduct in the delay of processing her application was discriminatory. Plaintiff claims that

Bandon certainly knew plaintiff would be unable to return to work on June 3, 2012, after being notified only three days earlier that her leave request had been denied.

On June 7, 2012, plaintiff emailed Bandon a request to reconsider the denial of her extended leave request. She also informed Bandon that she would need to stay longer in the Philippines as she had an appointment with the US Embassy on June 13, 2012.

On June 25, 2012, plaintiff received an email from defendants' human resources department advising her to contact them by June 27, 2012. Plaintiff contacted human resources and stated that "it was unfair and unjustified that her leave extension application was denied by Ms. Bandon when leave applications are ordinarily processed within seven (7) days from submission, and that she submitted her leave applications timely but the denial was made only long [sic] after Plaintiff has [sic] already left for Manila; and no reasons were given for the denial whatsoever." *Id.*, ¶ 53.

Plaintiff advised human resources that it was taking longer than anticipated in the Philippines and that she would be returning to work on July 19, 2012. According to plaintiff, she was not informed that she would be penalized by her actions. On July 19, 2012, upon her return to work, Bandon "handed Plaintiff indefinite suspension pending disciplinary investigation." *Id.*, ¶57. Defendants advised plaintiff on July 23, 2012 that she had been terminated, retroactive to July 19, 2012, due to an "unauthorized leave of absence."

Plaintiff states that defendants did not conduct an investigation prior to dismissing her, nor did they allow her to be heard. She continues that defendants have granted Bandon "free hand in harassing, suspending and terminating the employment of Filipino nurses . . ." *Id.*, ¶ 64. Further, "[u]pon information and belief, several Filipino nurses have informed Dr. Griffo

(Griffo), then Medical Director at [Mary Manning] about the seeming discrimination and hostile treatment displayed by Ms. Bandon against many Filipino nurses at [Mary Manning].” *Id.*, ¶ 66. However, defendants have failed to investigate these concerns.

After plaintiff was terminated, she commenced this action, alleging ten causes of action.<sup>3</sup> In the first and second causes of action, plaintiff claims that, in violation of the NYSHRL and NYCHRL, defendants allowed or caused plaintiff to be subjected to discrimination and harassment based on her race and national origin. Among other things, plaintiff is seeking compensatory and punitive damages for the resulting loss of employment and mental anguish.

In the third and fourth causes of action, plaintiff alleges that she was retaliated against, in violation of the NYSHRL and NYCHRL, when she was terminated after complaining about discriminatory conduct. In addition, although Griffo advised defendants that the Filipino nurses felt discriminated against, defendants did not address the situation. “Instead, Plaintiff was allowed to be suspended unjustly and finally terminated from her employment.” *Id.*, ¶ 93.

Plaintiff’s fifth and sixth causes of action set forth that defendants failed to remedy the constant and continued harassment by Bandon, who has been suspending and terminating plaintiff and other Filipino nurses without providing them with an investigation or a chance to be heard. Plaintiff states that she was in constant fear of displeasing Bandon, as she knew that Bandon wanted to replace her with a non-Filipino nurse.

Plaintiff further testified that she was discriminated against and subject to a hostile work environment when defendants delayed in responding to her leave request, when she was the only

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<sup>3</sup> By stipulation signed on August 6, 2015, plaintiff withdrew causes of action seven through ten.

charge nurse assigned to her floor on May 18, 2012 and when she was assigned a “floating” nurse assignment, instead of an assignment on a regular floor.<sup>4</sup> *See tr* 274-276, 367-369.

Regarding defendants’ alleged delay in responding to her leave of absence request, plaintiff testified that she knew of “two black nurses [Dolly Leganuer (Leganuer) and Angela Campbell (Campbell)] that requested for leave of absence and [Blandon] gave her answer right away.”

Plaintiff’s *tr* at 276.

#### Defendants’ Motion

Defendants maintain that plaintiff was terminated because of her absence from work without authorization for more than 6 weeks, not due to her race/national origin. In support of defendants’ motion, Blandon submits an affidavit addressing plaintiff’s leave of absence request. Blandon states that Michelle Ortiz (Ortiz) is responsible for approving or denying requests for time off. According to Blandon, Ortiz informed her that plaintiff was requesting an additional two weeks off from June 3-16, 2012 so that plaintiff could assist her daughter. Ortiz told Blandon that “she had advised Plaintiff that she could not grant” this additional request.

Blandon herself then reviewed plaintiff’s leave request along with the staffing needs from June 3-16, 2012. “Based on staffing needs, and recognizing that Plaintiff had already been granted two weeks off for vacation, I determined that Plaintiff’s request to take an additional two weeks off immediately following her approved vacation could not be granted.” Blandon *aff*, ¶ 12. She states that she denied plaintiff’s request on May 25, 2012.

Blandon expected plaintiff to return to work on June 3, 2012. On June 7, 2012, plaintiff

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<sup>4</sup> Although these allegations were not in plaintiff’s complaint, defendants addressed them in their motion for summary judgment.

“confirmed” that she was aware that her request had been denied, but asked Bandon to reconsider her request. In the letter, plaintiff also advised Bandon that she would continue to be absent for several weeks after June 16, 2012. Bandon requested that plaintiff provide her with a flight itinerary. “I thought that if Plaintiff had booked a return flight to the United States for a date after June 2, 2012 (i.e. the last day of her approved vacation period), that would indicate an intent on Plaintiff’s part to be absent from work regardless of whether her request for an unpaid leave of absence had been approved or denied.” *Id.*, ¶ 17.

Plaintiff did not respond with her flight itinerary until July 6, 2012. “Although Plaintiff’s email indicated that her return flight on July 16, 2012 was the ‘earliest available inbound flight,’ I thought it was strange and very unlikely that there were no earlier flights from the Philippines to the New York metro area . . . .” *Id.*, ¶ 24.

In support of defendants’ motion, Peter Hill (Hill), the Corporate Director of Human Resources for ArchCare, also sets forth the circumstances surrounding plaintiff’s termination. Hill submits the employee code of conduct, which indicates that employees are prohibited from taking an unauthorized leave of absence and that this conduct may result in termination. Hill explains that, upon plaintiff’s return to work on July 19, 2012, he requested that an investigation take place regarding plaintiff’s absence. Plaintiff issued a written statement explaining why she needed to remain in the Philippines until July 16, 2012.<sup>5</sup> Valdez also wrote a statement memorializing the meeting she had with plaintiff upon her return. Hill then reviewed the documents in plaintiff’s personnel file, including plaintiff’s written statement. He and Bandon

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<sup>5</sup> In this letter, plaintiff states that she actually received the travel documents for her daughter on June 29, 2012 but that the earliest flight available was July 16, 2012. *See Hill aff*, exhibit E.

determined the following, in relevant part: On April 18, 2012, plaintiff submitted a request to take a two week vacation from May 20, 2012 to June 2, 2012. Ortiz approved this request. Plaintiff did not have any remaining vacation time after this two-week period.

On May 7, 2012 plaintiff requested to extend her vacation from June 3, 2012 until June 16, 2012. Also on May 7, 2012, plaintiff booked round trip tickets to the Philippines, leaving on May 20, 2012 and returning on June 15, 2012. At this time, plaintiff was expected to return to work on June 3, 2012 and had not yet requested permission for an extended leave, nor was she granted permission for one. Hill continued that, the return flight scheduled for June 15, 2012 was almost two weeks after the last day of plaintiff's approved vacation.

Plaintiff left for the Philippines on May 20, 2012 and did not return to the United States until July 16, 2012. She did not have permission to be absent for the six week period from June 3, 2012 through July 16, 2012. Hill states, "[e]ven if Plaintiff's request for an unpaid leave of absence had been granted, her request would have only covered the period from June 3-16, 2012 and would not have permitted Plaintiff to remain out of work through July 16, 2012." Hill aff, ¶ 15.

According to Hill, he concluded that plaintiff should be terminated due to her unauthorized leave of absence from June 3, 2012 through July 16, 2012. His decision was based on the results of the investigation and also the employee code of conduct, not based on plaintiff's race/national origin. Hill further notes that Bandon did not have the authority to terminate plaintiff.

Hill states that plaintiff's union, on her behalf, challenged her termination by filing a grievance with defendants. In accordance with the grievance procedures, defendants reviewed it

internally and denied it. According to Hill, although the union pursued the grievance to arbitration, plaintiff did not appear at the arbitration and the arbitration was dismissed.

According to defendants, Bandon's alleged delay in responding to plaintiff's extended leave request from June 3-June 16, 2012 does not establish pretext. In addition, even if Bandon had approved this extended leave, plaintiff remained in the Philippines for another month past her requested leave date.

According to defendants, plaintiff cannot establish an inference of discrimination by comparing herself to other non-Filipinos who were allegedly not penalized for making medication errors. To start, plaintiff's testimony regarding these incidents is hearsay. Plaintiff was not involved in these incidents, nor was she aware if Bandon had been notified. In any event, plaintiff is not similarly situated to these individuals, as some of them were not RNs, and, more importantly, her misconduct occurred under completely different circumstances. "Plaintiff . . . chose to be absent from work for six weeks and for purely personal reasons without any authorization." Defendants' memorandum of law at 13.

*Adverse Actions/Discrimination Claims that other employees were treated more favorably*

Hill rejects plaintiff's assertions regarding the termination of Filipino nurses in favor of African-American ones. He states, in relevant part:

"Not only was Marjorie Valdez, who is Asian/Filipino, hired as the Assistant Director of nursing for Mary Manning based on Ms. Bandon's recommendation, but very few Asian Filipino nurses were terminated while Ms. Bandon was Director of Nursing at Mary Manning. During the approximately three year period that Ms. Bandon was the Director of Nursing at Mary Manning (i.e., from October 10, 2011 until November 28, 2014), a total of seventy-four nursing staff members (including RNs, LPNs, and CNAs) were terminated but only seven of those individuals or 9% were Asian, while forty-three individuals or 58% were Black/African American. More specifically . . .

- (i) A total of twenty-four LPNS were terminated at Mary Manning but only two LPNs or 8% were Asian, while nineteen LPNs or 79% were Black/African

American.

- (ii) A total of ten RNs were terminated at Mary Manning but only four RNs or 40% were Asian (including Plaintiff), while three RNs or 30% were Black/African-American. . . .

“In fact, during Ms. Blandon’s tenure as Director of Nursing at Mary Manning, two nurses at Mary Manning were terminated for taking unauthorized leaves of absence – Plaintiff and another nurse named Lisamae Haynes. Ms. Haynes is Black/African-American.”

*Id.*, ¶¶ 27, 28.

Defendants claim that, both before and after Blandon was appointed, plaintiff was regularly assigned to the eighth floor but was given a floating assignment, based on staffing needs. Further, according to defendants, plaintiff only speculates that she was the only charge nurse assigned to her floor on May 18, 2012, as she did not know how many nurses were on each floor that day. In any event, Blandon, was not responsible for the staffing assignment.

Finally, defendants argue that plaintiff’s reliance on other nurses receiving quicker responses is misplaced and based on hearsay. They point to plaintiff’s testimony where she acknowledges that the leaves of absence for both Campbell and Leganuer were denied.

Defendants argue that plaintiff has not provided any support for her hostile work environment claims. Among other arguments, they note Blandon, the alleged harasser, never made offensive remarks about plaintiff’s race/national origin.

#### *Retaliation*

Defendants argue that plaintiff’s retaliation claims must fail as a matter of law because, among other arguments, plaintiff’s own testimony confirms that she did not engage in any protected activity. All employees, including plaintiff, received an employee handbook setting forth defendants’ written policies prohibiting discrimination, harassment and retaliation in the

workplace. The employee handbook also provided the procedure for reporting discrimination or harassment. Hill maintains that, during the course of plaintiff's employment, plaintiff never made any complaints either to him or to other employees, that she had been discriminated or retaliated against. Furthermore, plaintiff had no involvement in the complaints allegedly made to Griffo. Even if plaintiff had engaged in protected activity, there is no causal connection between any complaints and her termination.

#### Plaintiff's Opposition

Plaintiff reiterates the events leading up to her termination. Although she was initially promptly advised that she had been approved to take off from May 20 to June 2, 2012, she was not informed about her June 3-16, 2012 request until she was already in the Philippines. Plaintiff highlights that she made her second leave request on May 7, 2012 to Ortiz but that Bandon did not acknowledge the request until May 16, 2012. According to plaintiff, Ortiz informed plaintiff that she could not make the determination on the extension of leave, as it had to be made by Bandon. Plaintiff claims that she did not hear back with a definitive result until May 31, 2012. Plaintiff was unable to access a computer and seek reconsideration of this denial until June 7, 2012.

Although plaintiff's daughter's immigrant visa interview was scheduled for June 1, 2012, plaintiff was required to return for an additional interview on June 13, 2012. She states, "[w]ith my daughter about to [sic] 18 years old just a little over two months after her scheduled interview on 1 June 2012, I had to ensure that we would complete all the necessary paperwork . . . ." Plaintiff's aff, ¶ 16. After this second interview, plaintiff had to wait two to three weeks for her daughter's passport and travel documents to be finalized. Plaintiff received her daughter's

documents by July 6, 2012, however “the earliest possible flight that my child and I could fly together” was July 16, 2012. Ms. Baker, from Human Resources, “seemed to have fully understood my situation directly telling me ‘I Understand.’” *Id.*, ¶51. Plaintiff argues that Bandon and the staff “maliciously delayed the denial” of her request.” *Id.*, ¶ 61. She alleges that “[a]s per previous practice at Mary Manning, we were not denied any leave request for purposes of assisting family members. Also, such request was always timely processed.” *Id.*, ¶ 64.

Plaintiff claims that the adverse action of termination that was taken against her “was not commensurate to the misconduct alleged against me.” *Id.*, ¶ 68. Further, due to the “ill-motivated” cause of termination, plaintiff was denied unemployment insurance benefits.

In opposition to defendants’ motion, plaintiff argues that she was subject to an adverse action and a hostile work environment when she was “moved from having a regular assigned floor on the 8<sup>th</sup> floor to becoming a ‘floater’ being shuffled from floor to floor.” Plaintiff’s aff, ¶ 86. She continues that she suffered an adverse employment action when Bandon deliberately failed to notify her within a reasonable amount of time that her extended leave request had been denied. In her affidavit, for the first time, plaintiff raises the argument that she complained to Ms. Slattery, her nurse supervisor, about being a floater and noted the “different treatment of Filipino nurses by Ms. Bandon.” *Id.*, ¶ 88. However, nothing was done to address plaintiff’s concerns. Plaintiff alleges that she and other Filipino nurses were subsequently treated even worse by Bandon.

Plaintiff claims Bandon’s behavior led to the Filipino nurses having a fear of a misconduct record. She explains that Bandon would “write up” Filipino nurses for minor

matters and convert the matters into major misconduct. However, when non-Filipino nurses would make even grave errors, Bandon would not take any action against them. She states that “[i]t is known to other nurses” that African-American nurses were involved in various incidents jeopardizing patient’s safety but these nurses were not reprimanded. *Id.*, ¶ 63. In addition, plaintiff’s “colleagues,” who are willing to testify, know of events where non-Filipino nurses were “given a pass” by Bandon despite the severity of the incidents. *Id.*, ¶ 84. Other Filipino nurses who were forced to resign or were terminated by Bandon are also allegedly willing to testify.

## DISCUSSION

### I. Summary Judgment

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant’s burden is “heavy,” and “on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.” *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d

Dept 2010) (internal quotation marks and citation omitted).

## II. Discrimination Claims under the NYSHRL and NYCHRL

Pursuant to the NYSHRL and the NYCHRL, it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's race or national origin. *See* Executive Law § 296 (1) (a); Administrative Code of the City of NY (Administrative Code) § 8-107 (1) (a).

Under the NYSHRL, the court applies the burden shifting analysis developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), where the plaintiff has the initial burden to establish a prima facie case of discrimination. *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004). Plaintiff must set forth that “the plaintiff is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination.” *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009).

If the plaintiff is able to set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating that the plaintiff was discharged for a nondiscriminatory reason. *Id.* at 965. If the employer meets this burden, the plaintiff is still entitled to “prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination.” *Id.* (internal quotation marks and citation omitted).

The provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts. *Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 (1st Dept 2016). On a

motion for summary judgment dismissing a claim for discrimination under the NYCHRL, courts have reaffirmed the applicability of the burden-shifting analysis as developed in *McDonnell Douglas Corp. v Green*, in addition to the mixed-motive analysis. See *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 (1st Dept 2016) (internal quotation marks and citation omitted) (“A motion for summary judgment dismissing a City Human Rights Law claim can be granted only if the defendant demonstrates that it is entitled to summary judgment under both the *McDonnell Douglas* burden-shifting framework and the mixed-motive framework”).

Under the mixed-motive analysis, “the employer’s production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination.” *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 (1st Dept 2012) (internal quotation marks and citations omitted).

Here, plaintiff alleges that the adverse actions, in addition to her actual termination, occurred under circumstances giving rise to an inference of discriminatory termination as they exemplify the discriminatory treatment faced by plaintiff and other Filipino nurses. See e.g. *Mandell v County of Suffolk*, 316 F 3d 368, 379 (2d Cir 2003) (internal quotation marks and citation omitted) (“A showing of disparate treatment -- that is, a showing that the employer treated plaintiff less favorably than a similarly situated employee outside his protected group -- is a recognized method of raising an inference of discrimination for purposes of making out a *prima facie* case”); see also *Mazzeo v Mnuchin*, 751 Fed Appx 13, 14 (2d Cir 2018) (internal quotation marks and citation omitted) (“Discriminatory motivation may be inferred from, among other things, invidious comments about others in the employee’s protected group[,] or the more favorable treatment of employees not in the protected group”).

Accordingly, prior to addressing plaintiff's actual termination, the court will address the alleged adverse actions.

*Adverse Actions - Being Moved from Floor to Floor and Delay in Responding to Vacation Request*

To be considered materially adverse, a change in working conditions must be more disruptive than a "mere inconvenience or an alteration of job responsibilities." *Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 315 (1st Dept 2005) (internal quotation marks and citation omitted). According to plaintiff, after Blandon was hired, plaintiff's nursing assignment was changed from a regular floor nurse to a floating nurse and that this change was due to her race/national origin. Further, most of her Filipino colleagues were also forced to be floating nurses. Plaintiff also claims that, on one day, she was assigned as the only charge nurse on her floor.

Blandon states that, while plaintiff was generally assigned to one floor, plaintiff was periodically given a floating assignment, based on staffing needs. Defendants further maintain that there no was link between plaintiff's assignment on May 18, 2012 and her race/national origin and that she only speculates as to the number of nurses on the other floors on that date.

The court finds that, regardless of the conflicting testimony, neither requiring plaintiff to be the only charge nurse on one day, nor requiring her to move around the floors more than she would like, amounts to an adverse employment action. While it may be inconvenient for plaintiff, it does not "amount to a materially adverse change in the terms and conditions of [plaintiff's] employment." *Humphries v City Univ. of N.Y.*, 146 AD3d 427, 427 (1st Dept 2017).

Nevertheless, even if being moved from floor to floor could be considered an adverse action, plaintiff merely speculates that only Filipino nurses were moved around, or that she was given a certain nursing assignment, as a result of Blandon's discriminatory animus while African-American nurses were not. *See e.g. Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 (1st Dept 2013) (Plaintiff has failed to demonstrate how "discrimination was one of the motivating factors for the defendant's conduct").

Plaintiff believes that she suffered from an adverse action when Blandon declined to timely respond to plaintiff's request for an additional leave of absence. However, courts have found that "standing alone, even constant denials of [her] vacation would not rise to the level of an adverse employment action." *Mejia v Roosevelt Is. Med. Assoc.*, 95 AD3d 570, 572 (1st Dept 2012) (internal quotation marks and citation omitted).

Plaintiff also alleges that it was defendants' policy to grant leave requests for the purpose of assisting family members. However, plaintiff does not provide any support for this contention, nor is there any indication that defendants' leave policy was not applied uniformly to all employees. Plaintiff herself testified that two African-American nurses were also denied extended leave requests. *See e.g. Kosarin-Ritter v Mrs. John L. Strong, LLC*, 117 AD3d 603, 604 (1st Dept 2014) (In dismissing plaintiff's age discrimination claim, court held, among other things, plaintiff "submitted no evidence that the dress code with respect to hair style was not applied equally to all employees").

Moreover, while plaintiff alleges that these two nurses received a quick response to their leave requests, her testimony indicates that she does not have firsthand knowledge of this assertion. In actuality, plaintiff had already been terminated prior to Campbell making a request

for a leave of absence. *See* plaintiff's tr at 281-282.

### *Termination*

As Hill explained, plaintiff was terminated as a result of her own misconduct when she remained absent from work without authorization. In brief, based on the staffing needs, plaintiff's request for an additional two week leave of absence was denied. Even if it had been granted, plaintiff did not return to work for an additional month after this time. As noted above, defendants conducted an investigation and took several factors into consideration. For example, although plaintiff was asked to provide a flight itinerary on June 9, 2012, plaintiff did not respond with an itinerary until July 6, 2012. Defendants concluded that plaintiff should be terminated for taking an unauthorized leave of absence, in violation of company policy, as set forth in the employee code of conduct.

Plaintiff does not dispute that she did not receive permission to be out of work an additional six weeks after her last approved vacation day. Nor does she dispute that she had booked her return flight back for June 15, 2012 prior to requesting and receiving permission for an extended leave. It is also undisputed that plaintiff was aware that her request had been denied, yet she remained out of work for an additional month after the last date of her second requested leave of absence. The employee code of conduct and other company documents had instructed plaintiff that employees are prohibited from, and could possibly be terminated by, taking an unauthorized leave of absence.

In conclusion, while termination is an adverse action, even viewing the evidence in the light most favorable to plaintiff, plaintiff has not provided any evidence that she was terminated as a result of her race/national origin.

It is well settled that “[a] plaintiff relying on disparate treatment evidence must show she was similarly situated in all material respects to the individuals with whom she seeks to compare herself.” *Mandell v County of Suffolk*, 316 F3d at 379 (internal quotation marks and citation omitted). Here, plaintiff alleges that defendants discriminated against her on the basis of race/national origin when she was terminated for her conduct but that other non-Filipino nurses were not terminated when they committed “much more significant infractions,” such as medication errors. Plaintiff’s memo of law at 21. However, in addition to plaintiff’s speculation as to what transpired during those incidents, plaintiff has failed to establish that these nurses engaged in similar conduct. On the contrary, defendants have presented evidence that another African-American nurse was also penalized with termination for taking an unauthorized leave of absence. In addition, the decision to terminate plaintiff was made by Hill. Bandon did not have authority to terminate plaintiff. “The mere fact that [plaintiff] may disagree with [her] employer’s actions or think that [her] behavior was justified does not raise an inference of pretext.” *Melman v Montefiore Med. Ctr.*, 98 AD3d at 121 (internal quotation marks and citations omitted).

Plaintiff asserts, without any evidence, that 15 out of 25 Filipino nurses were terminated and replaced by 17 African-American nurses after Bandon was appointed. However, plaintiff has not presented any evidence of these statistics. “Vague references that plaintiff’s treatment was inferior to that afforded to unidentified comparators are insufficient to withstand a motion for summary judgment.” *Watson v Arts & Entertainment Television Network*, 2008 WL 793596, \*16, 2008 US Dist Lexis 24059, \*45 (SD NY, Mar. 26, 2008, No. 04-Civ-1932 [HBP]), *aff’d* 352 Fed Appx 475 (2d Cir 2009). On the other hand, Hill, who is the Corporate Director of Human

Resources, stated that, between 2011 and 2014, a total of 24 LPNs were terminated but only two or 8% were Asian, while nineteen or 79% were African-American.

Plaintiff further argues that Blandon was looking for a reason to terminate her and replace her with an African-American nurse. However, plaintiff has not provided anything more than self-serving allegations in support of her contentions. “[S]elf-serving testimony . . . is insufficient to defeat summary judgment.” *Deebs v ALSTOM Transp., Inc.*, 346 Fed Appx 654, 656 (2d Cir 2009) (internal quotation marks omitted).

Plaintiff is unable to establish a prima facie case of discrimination on the basis of race/national origin pursuant to the *McDonnell Douglas* framework. Even, assuming arguendo, that plaintiff was able to do so, defendants proffered a legitimate nondiscriminatory reason for plaintiff’s termination, which was based on policies and procedures related to an unauthorized leave of absence. In opposition, plaintiff fails to raise an issue of fact as to whether defendants’ reason for terminating her was pretextual. Plaintiff herself signed a form acknowledging that she may be subject to termination if she exceeds the expiration date of her leave.

Turning to the mixed-motive analysis, plaintiff has not produced any evidence that race/national origin discrimination played a motivating role in the adverse actions taken against her. “Stated otherwise, on this record, no triable issue exists as to whether the employer, in taking the challenged action, was motivated at least in part by [race/national origin] discrimination.” *Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 81 (1st Dept 2017) (internal quotation marks and citation omitted); *see also Matias v New York & Presbyt. Hosp.*, 137 AD3d 649, 650 (1st Dept 2016) (“The absence of any evidence [that defendants were motivated by] discriminatory animus is equally fatal to any claim of mixed motive [under the

NYCHRLJ”).

Plaintiff claims that various employees will be able to testify about discriminatory treatment they were subjected to or about the situations where non-Filipino nurses were not penalized for making severe treatment errors. However, at this time, defendants have met their burden on the motion for summary judgment. Plaintiff has not submitted affidavits or deposition testimony from these individuals and her reliance on hypothetical testimony or affidavits cannot raise a triable issue of fact. “In opposing the motion for summary judgment, the plaintiff should have laid bare *all* of [her] evidence and arguments.” *Popalardo v Marino*, 83 AD3d 1029, 1030 (2d Dept 2011) (internal quotation marks and citations omitted).

In conclusion, as set forth above, defendants are granted summary judgment dismissing plaintiff’s claims for discrimination in violation of the NYSHRL and NYCHRL.

#### IV. Retaliation Claims under the NYSHRL and NYCHRL

Under both the NYSHRL and the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Executive Law § 296 (7); Administrative Code § 8-107 (7). Under the broader interpretation of the NYCHRL, “[t]he retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity.” Administrative Code § 8-107 (7).

When analyzing claims for retaliation, courts apply the burden shifting test as set forth in *McDonnell Douglas Corp. v Green* (411 US at 802), which places the “initial burden” for establishing a prima facie case of retaliation on the plaintiff. For a plaintiff to successfully make out a prima facie claim of retaliation under the NYSHRL, she must demonstrate that: “(1) [she]

has engaged in a protected activity, (2) [her] employer was aware of such activity, (3) [she] suffered an adverse employment action based upon the activity, and (4) a causal connection exists between the protected activity and the adverse action.” *Harrington v City of New York*, 157 AD3d 582, 585 (1st Dept 2018). Under the NYCHRL, instead of demonstrating that she suffered from an adverse action, plaintiff need only “show only that the defendant took an action that disadvantaged [her].” *Id.* (internal quotation marks and citations omitted).

Protected activity under the NYCHRL refers to “opposing or complaining about unlawful discrimination.” *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dept 2010) (internal quotation marks and citations omitted); *see also Pezhman v City of New York*, 47 AD3d 493, 494 (1st Dept 2008) (“[C]omplaining of conduct other than unlawful discrimination is not a protected activity subject to a retaliation claim under the State and City Human Rights Laws”).

In the complaint, plaintiff’s retaliation claim consists of the allegation that other Filipino nurses complained to Griffo about the hostility felt by Filipino nurses since Bandon was hired, but that defendants failed to remedy the situation. Plaintiff testified that she did not complain to anyone during the course of her employment that she was subject to race/national origin discrimination. Furthermore, plaintiff herself did not speak to Griffo. Therefore, plaintiff cannot establish the first element in a prima facie case of retaliation under either the NYSHRL or the NYCHRL because she did not engage in protected activity. *Breitstein v Michael C. Fina, Co.*, 156 AD3d 536, 537 (1st Dept 2017) (“In support of his retaliation claim, plaintiff failed to demonstrate that he engaged in a protected activity”).

In response to defendants’ motion, plaintiff now claims that she complained to a supervisor that she and other Filipino nurses were being moved to floating positions. However,

nothing was done to address her concerns and Bandon treated her even worse. Plaintiff specifically testified that she did not tell any supervisor that she felt discriminated against. Accordingly, “[p]laintiff’s affidavit, which contradicted [her] deposition testimony, created only a feigned issue of fact, and [is] insufficient to defeat defendant’s motion.” *Mermelstein v East Winds Co.*, 136 AD3d 505, 505 (1st Dept 2016).

However, even assuming, arguendo, that plaintiff was opposing discriminatory practices, there is no indication that Bandon was aware of plaintiff’s complaints. Moreover, there is no causal connection between plaintiff’s complaint of being a floater nurse and Bandon’s subsequent denial of her extended leave request.

Accordingly, defendants are granted summary judgment dismissing the claims for retaliation under the NYSHRL and NYCHRL.

#### V. Hostile Work Environment Claims

##### *NYSHRL*

Under the NYSHRL, a hostile work environment exists where 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.” *La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918, 919 (2d Dept 2015) (internal quotation marks and citations omitted). Generally, isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment; in order to be actionable, the offensive conduct must be pervasive. *Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 51 (4<sup>th</sup> Dept 1996).

Plaintiff fails to provide any factual allegations to demonstrate that defendants subjected to her to an environment “permeated with discriminatory intimidation, ridicule, and insult” in violation of the NYSHRL. *La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d at 919 (internal quotation marks and citation omitted). “Indeed, the complaint contains no allegations of any comments or references to plaintiff’s [national origin] or race made by any employee of defendants.” *Whitfield-Ortiz v Department of Educ. of the City of N.Y.*, 116 AD3d 580, 581 (1st Dept 2014).

#### NYCHRL

Plaintiff alleges that she was subject to continued harassment by Bandon, who had been suspending and/or terminating Filipino employees without the benefit of an investigation or allowing them to be heard. The record, which includes plaintiff’s written statement to defendants and a report from Valdez memorializing her conversation with plaintiff about her extended absence, belies plaintiff’s allegations that no investigation took place or that she was unable to be heard. In addition, plaintiff’s union pursued a grievance on her behalf.

According to plaintiff, she constantly feared that Bandon would find a reason to terminate her so that she could replace her with another non-Filipino nurse. However, there was no indication beyond plaintiff’s personal belief that Bandon wanted to replace Filipino employees, like plaintiff, with non-Filipino employees. “[A] plaintiff’s feelings and perceptions of being discriminated against are not evidence of discrimination.” *Basso v Earthlink, Inc.*, 157 AD3d 428, 430 (1st Dept 2018) (internal quotation marks and citation omitted).

Plaintiff testified that she believed she was subject to a hostile work environment when she was floated from floor to floor, when she was the only nurse assigned to a floor on one day

and when she allegedly did not receive a timely response to her leave request. Her memorandum of law alleges that she was subject to a hostile work environment due to the “manner that the Director of Nursing of the Defendants ignored, delayed and denied Plaintiff’s request for extension of her leave of absence . . . .” Plaintiff’s memo of law at 29. While plaintiff may have been displeased with the way defendants handled these employment decisions, she has provided no evidence that they were motivated on account of plaintiff’s race and national origin. *See e.g. Witchard v Montefiore Med. Ctr.*, 103 AD3d 596, 596-597 (1st Dept 2013) (“Nor does plaintiff’s contention that she was transferred to an assignment, which she perceived to be less desirable, establish a claim of hostile work environment”).

Considering the totality of the circumstances, even in the light most favorable to plaintiff, plaintiff fails to raise a triable issue of fact that she was subject to a hostile work environment in violation of the NYSHRL.

#### *NYCHRL*

A hostile work environment exists in violation of the NYCHRL where an employee “has been treated less well than other employees because of her protected status.” *Chin v New York City Hous. Auth.*, 106 AD3d at 445. Under the NYCHRL, “the conduct’s severity and pervasiveness are relevant only to the issue of damages. To prevail on liability, the plaintiff need only show differential treatment -- that she is treated ‘less well’ -- because of a discriminatory intent.” *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 110 (2d Cir 2013) (internal citation omitted). To establish a hostile work environment claim under the NYCHRL, “the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated

less well than other employees because of her [protected status].” *Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 (1st Dept 2009). Despite the broader application of the NYCHRL, conduct that consists of “petty slights or trivial inconveniences . . . do[es] not suffice to support a hostile work environment claim.” *Buchwald v Silverman Shin & Byrne PLLC*, 149 AD3d 560, 560 (1st Dept 2017) (internal quotation marks and citation omitted).

The First Department has recently reiterated the necessity to evaluate certain types of hostile work environment claims under the differential treatment standard. It recognized that, under the NYCHRL, “differential treatment may be actionable even where the treatment does not result in an employee’s discharge. . . .” *Suri v Grey Global Group, Inc.*, 164 AD3d 108, 120 (1st Dept 2018).

As noted with plaintiff’s claims that she was subject to disparate treatment, plaintiff provides no evidence that employees outside of her protected class were given preferential treatment with respect to defendants’ policies, or that they were even similarly situated employees. Although plaintiff speculates that she was treated less well than other employees due to her race/national origin, even under the lesser burden of the NYCHRL, plaintiff is still required to prove that “the conduct is caused at least in part by discriminatory or retaliatory motives . . . .” *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d at 113.

In addition, plaintiff claims that, on one occasion, a nurse supervisor who is Filipino stated that she was “black at heart,” allegedly in the hopes of winning the favor of Blandon. However, this comment is “at most a stray remark that does not, without more, constitute evidence of discrimination.” *Basso v Earthlink, Inc.*, 157 AD3d at 430 (internal quotation marks and citation omitted).

Accordingly, as the allegations do not support a hostile work environment claim under either the NYSHRL or NYCHRL, defendants are granted summary judgment dismissing these causes of action.

### CONCLUSION

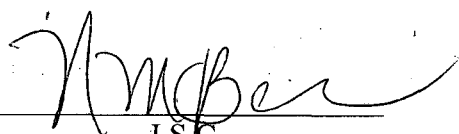
Accordingly, it is

ORDERED that defendants Mary Manning Walsh Nursing Home, Co., Inc. and Continuing Care Community of the Roman Catholic Archdiocese of New York d/b/a/ ArchCare's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to said defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: June 13, 2019

ENTER:

  
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J.S.C.

**HON. NANCY M. BANNON**