

**Hilsby v New York State Off. for People with Dev.  
Disabilities**

2019 NY Slip Op 33395(U)

November 15, 2019

Supreme Court, Suffolk County

Docket Number: 21211/2012

Judge: William B. Rebolini

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**COPY**

Short Form Order

**SUPREME COURT - STATE OF NEW YORK**

**I.A.S. PART 7 - SUFFOLK COUNTY**

**PRESENT:**

**WILLIAM B. REBOLINI**  
**Justice**

Denyse Hilsby,  
  
Plaintiff,

Motion Sequence No.: 002; MG; CD  
Motion Date: 8/30/18  
Submitted: 12/19/18

-against-

Index No.: 21211/2012

New York State Office for People  
with Developmental Disabilities, Victoria Schultz,  
Barry Ockner, Robert Lopez, Yolanda Sahagan,  
Deborah Sorg, Alfred Laul, Barbara Harris, and  
Shiny Sajan (sued in their individual and official  
capacity pursuant to New York Executive Law  
§290 et seq.),

Attorney for Plaintiff:  
Scott Michael Mishkin, P.C.  
1 Suffolk Square, Suite 240  
Islandia, NY 11749

Defendants.

Attorney for Defendant:  
Letitia James  
New York Attorney General  
300 Motor Parkway, Suite 230  
Hauppauge, NY 11788

Clerk of the Court

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

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

Plaintiff commenced this action seeking to recover damages for alleged violations of the New  
York State Human Rights Law, Executive Law § 296 ("HRL"). Plaintiff alleges that defendant New  
York State Office for People with Developmental Disabilities ("OPWDD") and current and former

*RW*

**Hilsby v. NYS Office for People w/Dev. Disabilities, et al.**

Index No.: 21211/2012

Page 2

employees, defendants Victoria Schultz, Barry Ockner, Robert Lopez, Yolanda Sahagun, Deborah Sorg, Alfred Laul, Barbara Harris and Shiny Sajan (hereinafter the “employee defendants” when referred to collectively), retaliated against her for opposing unlawful discrimination against two co-employees, and subjected her to a hostile work environment. Plaintiff also alleges that the employee defendants aided and abetted, and participated in the conduct giving rise to her retaliation claims. Plaintiff further alleges that the retaliation was initially in the form of intimidation, harassment, interrogations, threats of discipline, increased supervision and ultimately a reassignment. She avers that the retaliatory conduct created a hostile work environment.

Issue has been joined, discovery is completed, and a note of issue has been filed. Defendants now move for summary judgment dismissing the complaint, arguing, inter alia, that plaintiff has failed to state a prima facie case of retaliation and failed to demonstrate that a hostile work environment existed. It is also argued that the claims against the employee defendants for aiding and abetting must fail, as the claims against OPWDD for violation of the HRL cannot stand.

The deposition transcripts and the sworn statements submitted by the employee defendants in support of the motion, disclose that plaintiff was hired in 2005, as a part-time licensed nurse practitioner, and for most of her employment was assigned to the Employee Health office at the Long Island Developmental Disabilities Services Office (“LIDDSO”) located at 81 Mall Drive in Commack. Her primary responsibility was to conduct physical examinations of employees. However, in 2010, there was a statewide change in policy to centralize physical examinations of employees under the auspices of the Department of Civil Service’s Employee Health Services (“EHS”) rather than have local offices, like LIDDSO, perform the physicals. As a result, a significant portion of plaintiff’s responsibilities were being eliminated, prompting LIDDSO to discuss alternative employment options for her.

In 2011, meetings were held with plaintiff, Jerry Huber (not a party herein), who was the director of LIDDSO, and defendant Barry Ockner, a deputy director of the OPWDD. The purpose of the meetings was to explore whether plaintiff’s skill set as a nurse practitioner could be used at an Intermediate Care Facility (“ICF”) which was understaffed. At an ICF, plaintiff would be responsible for treating individuals with developmental disabilities. Although plaintiff expressed resistance to being reassigned to an ICF, the Employee Health office at LIDDSO did not have an Infection Control (“IC”) nurse, and plaintiff volunteered to take on some of those duties, which allowed LIDDSO to justify retaining plaintiff in her position. However, a decision was made by the director of nursing in Albany and by survey teams that LIDDSO needed a full-time IC nurse. The job was posted at a lower grade than that of a licensed nurse practitioner, as such skills were not required, and listed duties that encompassed the remaining functions of plaintiff’s position at the Employee Health office. Plaintiff did not apply for the position.

In February 2013, when an IC nurse was hired, plaintiff’s job at the Employee Health office was eliminated and she was reassigned, effective August 1, 2013, to the ICF in Centereach, which covers the eastern Suffolk County locations. The reassignment fulfilled OPWDD’s operational needs, as a nurse practitioner could perform many of the same functions as a physician, and there

Hilsby v. NYS Office for People w/Dev. Disabilities, et al.

Index No.: 21211/2012

Page 3

was no on-site physician or nurse practitioner employed to cover the area. In addition, Ockner asserts that an attempt was made to make the reassignment convenient for plaintiff. He states that plaintiff had previously requested and OPWDD granted approval allowing her to also work part-time at another State job in Stony Brook at the Long Island Veteran's Home. The ICF in Centereach, he states, is in close proximity to the Veteran's Home in Stony Brook.<sup>1</sup>

The HRL provides, in pertinent part, that “[i]t shall be an unlawful discriminatory practice...to retaliate...against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article” (Executive Law § 296 [7]; see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 327, 786 NYS2d 382 [2004]). In order to make a prima facie showing of unlawful retaliation, a “plaintiff must show that (1) she has engaged in a protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse employment action” (*Forrest v Jewish Guild for the Blind*, *supra* at 312-313; *Keceli v Yonkers Racing Corp.*, 155 AD3d 1014, 1016, 66 NYS3d 280 [2d Dept. 2017]; see *Ananiadis v Mediterranean Gyros Prods., Inc.*, 151 AD3d 915, 54 NYS3d 155 [2d Dept. 2017]; *La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918, 12 NYS3d 192 [2d Dept. 2015]). To prevail on a motion on a motion for summary judgment in a retaliation case, “a defendant must demonstrate that the plaintiff cannot make out a prima facie claim of retaliation or, having offered legitimate, non-retaliatory reasons for the challenged actions, that there exists no triable issue of fact as to whether the defendant’s explanations were pretextual” (*Keceli v Yonkers Racing Corp.*, *supra* at 1016; *Delrio v City of New York*, 91 AD3d 900, 901, 938 NYS2d 149 [2d Dept. 2012]; see *Forrest v Jewish Guild for the Blind*, *supra*; *La Marca-Pagano v Dr. Steven Phillips, P.C.*, *supra*).

Here, defendants do not dispute an awareness of plaintiff’s engagement in a protected activity and thus the first two elements of the cause of action are satisfied. Defendants argue plaintiff has failed to tender evidence sufficient to satisfy the adverse employment and causal nexus elements of a retaliation claim.

With respect to the adverse employment element of a claim for retaliation, a plaintiff need only show that the challenged action was “harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination” (*Hicks v Baines*, 593 F3d 159, 162 [2010], quoting *Burlington N. & Santa Fe Ry. Co. v White*, 548 US 53, 57, 126 S Ct 2405 [2006]; see *Keceli v Yonkers Racing Corp.*, *supra*). The causal connection element may be established either “indirectly by showing that the protected activity was followed closely by retaliatory treatment, or directly through evidence of retaliatory animus directed against a plaintiff by the defendant” (*Calhoun v County of Herkimer*, 114 AD3d 1304, 1307, 980 NYS2d 664 [4th Dept. 2014]; see *Gordon v New York City Bd. of Educ.*, 232 F3d 111, 117 [2d Cir. 2000], or based

---

<sup>1</sup>Plaintiff tendered her resignation from the position at the ICF effective April 23, 2014, and transferred her State service to the Long Island Veteran's Home in Stony Brook.

Hilsby v. NYS Office for People w/Dev. Disabilities, et al.

Index No.: 21211/2012

Page 4

upon a showing of disparate treatment of similarly situated employees (see *Dotson v J.C. Penney Co., Inc.*, 159 AD3d 1512, 73 NYS3d 703 [4th Dept.], *lv denied* 32 NY3d 902, 84 NYS3d 855 [2018]).

Here, OPWDD has established its entitlement to judgment as a matter of law dismissing the cause of action alleging retaliation based on the reassignment in 2013, by demonstrating that it had a legitimate, non-retaliatory reason for the reassignment which was unrelated to plaintiff's participation in a protected activity. OPWDD has provided sufficient evidence that the reassignment was based on operational needs, and not linked to a retaliatory motive, and plaintiff has failed to raise an issue of fact as to whether this proffered reason was merely a pretext for retaliation (see *Forrest v Jewish Guild for the Blind*, *supra*; *Johnson v North Shore Long Is. Jewish Health Sys., Inc.*, 137 AD3d 977, 27 NYS3d 598 [2d Dept. 2016]; *Brightman v Prison Health Service, Inc.*, 108 AD3d 739, 970 NYS2d 789 [2d Dept. 2013]; *Chin v New York City Hous. Auth.*, 106 AD3d 443, 965 NYS2d 42 [1st Dept. 2013]; see also *Mitchell v SUNY Upstate Med. Univ.*, 243 F Supp 3d 255 [N.D.N.Y. 2017]). Moreover, as the reassignment was a lateral transfer, "[a]part from a change in the nature of her duties, plaintiff 'retained the terms and conditions of her employment, and her salary remained the same'" (*Silvis v City of New York*, 95 AD3d 665, 665, 946 NYS2d 22 [1st Dept. 2012], *lv denied* 20 NY3d 861, 964 NYS2d 84 [2013], quoting *Matter of Block v Gatlin*, 84 AD3d 445, 445, 922 NYS2d 327 [1st Dept.], *lv denied* 17 NY3d 709, 930 NYS2d 553 [2011]; see *Mejia v Roosevelt Is. Med. Assocs.*, 95 AD3d 570, 944 NYS2d 521 [1st Dept. 2012], *lv denied* 20 NY3d 1045, 961 NYS2d 374 [2013]). Additionally, plaintiff's allegations of excessive scrutiny and threats of disciplinary action, without more, do not constitute adverse employment actions (see *Chin v New York City Hous. Auth.*, *supra*; *Mejia v Roosevelt Is. Med. Assocs.*, *supra*; see also *Tepperwien v Entergy Nuclear Operations*, 663 F3d 556, 568 [2d Cir. 2011]; *Mitchell v SUNY Upstate Med. Univ.*, *supra*; *Jaeger v North Babylon Union Free Sch. Dist.*, 191 F Supp 3d 215 [E.D.N.Y. 2016]; *Henry v NYC Health & Hosp. Corp.*, 18 F Supp 3d 396 [S.D.N.Y. 2014]).

Moreover, defendants established that the challenged actions were not causally connected to any protected activity engaged in by plaintiff. There is insufficient temporal proximity between plaintiff's protected activity in March 2010 and the supposedly adverse action, i.e., reassignment, taken by OPWDD in 2013 so as to create an inference of causation (see *Clark County Sch. Dist. v Breeden*, 532 US 268, 121 S Ct 1508 [2001]; *Massaro v Department of Educ. of City of New York*, 121 AD3d 569, 993 NYS2d 905 [1st Dept. 2014]; *Williams v City of New York*, 8 AD3d 238 [1st Dept. 2007] [18-month gap defeats claim of causal connection]). 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.*, *supra*; *Simeone v County of Suffolk*, 36 AD3d 890, 826 NYS2d 560 [2d Dept. 2007]).

As plaintiff has failed to present a cognizable legal basis to hold OPWDD or any other party liable for a violation of the HRL, the aiding-and-abetting claims against the employee 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]).

Hilsby v. NYS Office for People w/Dev. Disabilities, et al.

Index No.: 21211/2012

Page 5

Therefore, defendants are entitled to summary judgment dismissing plaintiff's retaliation cause of action.

Plaintiff's hostile work environment claim is also dismissed. "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.*, *supra* at 919, quoting *Harris v Forklift Systems, Inc.*, 510 US 17, 21, 114 S Ct 367 [1993]; see *Forrest v Jewish Guild for the Blind*, *supra*).

Here, plaintiff alleges that defendant Sahagun's and defendant Sajan's retaliatory animus in targeting her secretary, April Scafa, for reassignment to another division without first notifying plaintiff created a hostile work environment. Plaintiff also alleges that she was out ill for three weeks as a result of extreme anxiety and fear she experienced as a result of the retaliatory actions taken against her. She avers that a hostile work environment was created upon her return to work on February 29, 2012 when she was instructed to apply for medical leave. Plaintiff alleges her attempts to do so were futile, as her calls went unanswered and no one from Human Resources contacted her. It is alleged that "[t]his episode was put upon plaintiff merely to continue [sic] the retaliatory behavior towards plaintiff, thus creating a completely hostile work environment for her." While plaintiff may have found these incidents offensive, her interactions with defendants taken together did not create an environment so severe or pervasive as to permeate the workplace and alter the conditions of plaintiff's employment (see *Forrest v Jewish Guild for the Blind*, *supra*; *Johnson v North Shore Long Is. Jewish Health Sys., Inc.*, *supra*; *La Marca-Pagano v Dr. Steven Phillips, P.C.*, *supra*).

Any allegations or arguments by plaintiff not explicitly addressed herein have been reviewed and deemed to be without merit.

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

Dated:

11/15/2019



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

  X   FINAL DISPOSITION            NON-FINAL DISPOSITION