SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 5

LASHEAN PALMER

INDEX NO. 650639/13

MOT. DATE

- v -

MOT. SEQ. NO. 001

NEW YORK CITY DEPARTMENT OF HEALTH AND HYGIENE

The following papers, numbered 1 to 4 were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	No(s). 1
Notice of Cross-Motion/Answering Affidavits — Exhibits	No(s). 2, 3
Replying Affidavits	No(s). 4

In this action, plaintiff seeks to recover for defendant's alleged violation of the New York City Human Rights Law based upon discrimination based upon plaintiff's disability of fibroids. Defendant New York City Department of Health and Mental Hygiene ("DHMH") moves for summary judgment dismissing the complaint. Plaintiff opposes the motion. This motion has been timely brought[1], therefore summary judgment relief is available. For the reasons that follow, the motion is granted.

Facts

The relevant facts are largely undisputed. Plaintiff began working at DHMH as a probationary employee in a civil service position in or about May 2012. Plaintiff was hired as Caseworker but was given the title of Health Service Manager due to her qualifications and was assigned to work at the Rose M. Singer facility on Riker's Island in the Discharge Planning Program. Plaintiff was responsible for supervising the daily operation of the facility. During this period, plaintiff suffered from endometriosis and/or fibroids[2]. Plaintiff explained at her deposition that this condition caused excessive vaginal bleeding irrespective of plaintiff's menstrual cycle. On or about June 12, 2012, plaintiff began bleeding through her clothing. Plaintiff testified that this bleeding was exacerbated by a cortisone injection she had received due to pain resulting from a car accident she had been involved with in February 2012. Plaintiff reported to her supervisor, Wendy Cornell, and was told to seek medical treatment. Plaintiff was ultimately admit-

Dated: January 5, 2016

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

1 The parties agreed to adjourn the submission of the motion for thirty days via stipulation which was presented to the court to be so-ordered. However, since a justice was not assigned to this action, the stipulation was not timely so-ordered. In any event, since the parties have otherwise demonstrated good cause for the delay in submitting this motion, the motion is properly considered *supra*.

2 At her deposition, plaintiff testified that she during the relevant time period she suffered from endometriosis but in her affidavit she states that she had fibroids. The difference between these two conditions is not explained. In any event, this discrepancy, if resolved, would not lead to a different result.

ted to Montefiore Hospital where she spent several days and, *inter alia*, received a blood transfusion. Plaintiff returned to work on June 18, 2012.

On the same day that she returned to work, plaintiff had a meeting with Michael Ash and Patricia Brown, two of her supervisors. Plaintiff's account of this meeting differs significantly from Mr. Ash and Ms. Browns' version. Plaintiff testified at her deposition that at this meeting, Ms. Brown informed plaintiff that she had the same condition and that based upon her experience, the only way to treat this condition was a hysterectomy. Ms. Brown purportedly went on to say that this treatment would cause plaintiff to miss a significant amount of time from work. Plaintiff testified at her deposition that Ms. Brown "did ask what was I going to do to address the issue and at that time I was uncertain." In her affidavit, plaintiff states that Ms. Brown informed her that she did not think plaintiff's employment at DHMH would work out because of her medical condition. Meanwhile, Mr. Ash denies that there was any discussion at this meeting about plaintiff's medical condition. Ms. Brown, however, admits that there was discussion about plaintiff's condition but she denied talking about plaintiff's treatment options or telling plaintiff that her employment would not work out at DHMH because of her medical condition.

Ms. Brown and Mr. Ash testified that the purpose of the meeting was to discuss concerns about plaintiff's job performance, specifically her failure to grasp information and learn her position. Ms. Brown and Mr. Ash also discussed their concern that plaintiff's time and attendance were a contributing factor to plaintiff's performance issues. Plaintiff admits that Mr. Ash did talk about her work and "that he didn't think that [plaintiff] w[as] picking up on certain things." According to plaintiff, those "certain things" included "[t]urnover time in reference to an inmate entering the facility, how long a period of time you're engaging the clients, what the roles and the different services that should be provided to the clients in a timely manner and respect to time 48 hours, 72 hours and thus far."

There is no dispute that plaintiff was never given a written warning in connection with her job performance. Plaintiff continued to work at DHMH thereafter. Plaintiff states the following in her affidavit.

> On or about August 14, 2012, [plaintiff] had major dental work performed. [She] requested and was approved for a two day medical leave of absence. [Plaintiff] returned to work on or about August 16, 2012.
>
> In or about early September 2012, [Plaintiff] became ill on [her] way to work that day because [she] was sick. [Plaintiff] sought medical attention and, unfortunately, was not immediately cleared to return to work by [her] doctor. Plaintiff contacted Ms. Brown by e-mail on September 11, 2012 and asked her where to send the medical documentation of [her] condition. In that e-mail, [plaintiff] also asked if the agency needed any specific documentation filled out by [her] treating physician. [Plaintiff] was told by Ms. Brown to contact Human Resources, which [she] did. Plaintiff never returned to work.

Defendant has provided copies of plaintiff's timesheets. Defendant has also provided a copy of an email dated November 5, 2012 sent by Lourdes Hernandez, defendant's Executive Director, HR, Payroll/Timekeeping and Labor Relations to Michael Aragon, defendant's Senior Director, Labor Relations, wherein she states:

> Re: LaShean Daniels-Palmer, HSM I (provisional title) (caseworker – underlying title)
>
> Ms. Palmer was hired as HSM I while attending a caseworker pool. At the time, the program had a HSM vacancy and after interviewing her they realized she was

overqualified for caseworker but met all the qualifications and preferred skills for HSM-I with discharge planning on Rikers Island. Since she was appointed 5/21/12 there has been an attendance issue as you may see below.

Week ending	6/2/12	3 hrs WPA
	6/16/12	28 hrs SL/LWOP
	7/11/12	7 hrs LWOP
	7/25/12	2 hrs ALV
	8/14-15/12	14 hrs ALV
	9/4 – present	request for medical leave was submitted (see attached).

Per Pat Brown the program has not been able to properly train her due to her absenteeism. Please note that Ms. Daniels-Palmer is still serving probation on her underlying civil service title of Caseworker.

On or about November 7, 2012, plaintiff received a letter from Mr. Aragon that she had been terminated from employment with DHMH. The letter states in pertinent part: "Dear Ms. Palmer: Please be advised, that effective today, close of business, your services as a Health Services Manager as well as your underlying title of Caseworker, are no longer required."

Plaintiff brought this action seeking redress for her termination which she believes was prompted by her fibroid condition. Specifically, plaintiff seeks reinstatement to her position with defendant, for back pay and benefits from the date of her termination, for compensatory damages and punitive damages. Plaintiff explains that since her discharge, she "ha[s] suffered from severe anxiety and emotional distress."

Arguments

Defendant argues that plaintiff cannot demonstrate a triable issue of fact regarding her claims of discrimination because defendant had a legitimate business reason for terminating plaintiff: absenteeism. Defendant further maintains that plaintiff cannot demonstrate the proffered reason for her termination is pretextual. Finally, defendant argues that punitive damages are not available against a municipality.

In turn, plaintiff contends that she was terminated because her supervisor, Ms. Brown, believed that plaintiff's medical condition would cause plaintiff to miss substantial time from work. Plaintiff points to the June 18, 2012 meeting and maintains that her account of what transpired in that meeting is sufficient to raise a triable issue of fact. She further maintains that she had no basis to believe defendant was dissatisfied with plaintiff's work performance.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue *(Rotuba*

Extruders v. Ceppos, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

A prima facie case of discrimination requires a showing by plaintiff that: [1] she is a member of a protected class; [2] she was qualified to hold the position; [3] she was terminated from employment or suffered another adverse employment action; and [4] the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Only if these elements are satisfied will there be a rebuttable presumption of discrimination which the employer can then rebut by proving a legitimate, independent, non-discriminatory reason for the adverse employment action (*id.* citing *Ferrante v. American Lung Association*, 90 NY2d 623 [1997]; see also *McDonnell Douglas Corp. v. Green*, 411 US 792 [1973]). If the employer is successful, the burden then shifts back to plaintiff who has to prove that the reason being offered is a pretext, and therefore false.

Here, assuming *arguendo* that plaintiff has demonstrated a *prima facie* case of discrimination, defendant has established a legitimate business reason for her termination. Plaintiff's time sheets show that she took numerous days off during the approximate six months that she worked for defendant. Plaintiff's supervisors complained that she was not "grasping the material" and that her job performance was suffering due to the numerous days she missed work. Therefore, defendant has rebutted plaintiff's claims by establishing that it properly terminated plaintiff, a probationary civil employee, based on her absenteeism.

In turn, plaintiff has failed to raise a triable issue of fact as to whether the proffered reason was pretextual. Indeed, the two month time period that plaintiff did not report to work before she was ultimately terminated was not even due to her fibroids and/or endometriosis. While plaintiff states that she had and/or submitted medical documentation to support her two month leave due to back pain, she has not provided such documentation to the court. Even if she had, plaintiff is wholly unable to show that her termination was not due to her absenteeism, but rather, because of disability discrimination based upon fibroids and/or endometriosis. Even crediting plaintiff's claim that Ms. Brown said to her at the June 18, 2012 meeting that she would miss a significant amount of work if she had a hysterectomy, there is no dispute that plaintiff never had a hysterectomy. Otherwise, plaintiff's claims are insufficient to raise a triable issue of fact because a reasonable fact-finder could not conclude on this record that plaintiff's termination was the result of disability discrimination.

Accordingly, it is hereby **ORDERED** that defendant's motion for summary judgment is granted in its entirety and it is further **ORDERED** that this case is dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: January 5, 2015
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.