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SHORT FORM ORDER

INDEX No. 13-31586
CAL. No. 16-00653OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 8-2-16
ADJ. DATE 9-27-16
Mot. Seq. # 004 - MG; CASEDISP

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JANET L. D'AGOSTINO,

Plaintiff,

- against -

MMC EAST LLC d/b/a PORSCHE OF HUNTINGTON, FRANK CAPUTO & BRIAN MILLER,

Defendants.

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Upon the following papers numbered 1 to 34 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 22 - 30 ; Replying Affidavits and supporting papers 31 - 32 ; Other memoranda of law 20 - 21, 22, 33 - 34 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

The plaintiff was formerly employed by the defendant MMC East LLC, d/b/a Porsche of Huntington (MMC), as a receptionist at its automobile dealership. It is undisputed that the defendant Frank Caputo (Caputo) is the sales manager at the dealership, and that the defendant Brian Miller (Miller) is the owner of MMC (collectively, the defendants). It is further undisputed that the plaintiff began her employment with MMC in March 2011, when Miller purchased the dealership, that the plaintiff suffers from asthma, and that she received unpaid leave from her position when the renovations and painting of the dealership caused her to suffer adverse health issues. On or about July 25, 2013, Caputo terminated the plaintiff's employment with MMC.

In her complaint, the plaintiff sets forth four causes of action. In the first and second causes of action, the plaintiff respectively alleges that the defendants discriminated against her on the basis of her actual disability and her perceived disability in violation of the New York State Human Rights Law (HRL). The third cause of action alleges that the defendants violated Human Rights Law § 296 in refusing to provide a reasonable accommodation as to her known or perceived disability. The fourth cause of action alleges that the defendants retaliated against her in violation of the HRL based on her complaints that she was denied a reasonable accommodation for her disability.

New York Executive Law § 296 [1] prohibits discrimination by an employer, and also prohibits the employer from retaliating against an employee for opposing any practices forbidden under the Human Rights Law. Section 297 (9) of the Human Rights Law states: "Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction ... unless such person has filed a complaint hereunder ... with any local commission on human rights." There is no indication that the plaintiff filed a complaint with the local human rights commission. "The standards for recovery under section 296 of the Executive Law are in accord with Federal Standards under Title VII of the Civil Rights Act of 1962 (42 USC 2000e *et seq.*)" (***Ferrante v American Lung Assn.***, 90 NY2d 623, 629, 665 NYS2d 25 [1997]; *see also* ***Matter of Aurecchione v New York State Div. of Human Rights***, 98 NY2d 21, 744 NYS2d 349 [2002]; ***Matter of Argyle Realty Assoc. v New York State Div. of Human Rights***, 65 AD3d 273, 882 NYS2d 458 [2d Dept 2009]). On a claim of discrimination, plaintiff has the initial burden of establishing a prima facie case of discrimination (*id.*). While this burden is "de minimus" (***Sogg v American Airlines,*** 193 AD2d 153, 162, 603 NYS2d 21 [1st Dept 1993], *lv dismissed* 83 NY2d 846, 612 NYS2d 106 [1994], *lv denied* 83 NY2d 754, 612 NYS2d 109 [1994]), plaintiff must present more than "conclusory allegations of discrimination" and provide 'concrete particulars' to substantiate the claim" (***Muszak v Sears, Roebuck & Co.***, 63 FSupp2d 292 [WD NY 1999], quoting ***Meiri v Dacon***, 759 F2d 989 [2d Cir 1985], *cert. denied* 474 US 829, 106 SCt 91 [1985]).

The defendants now move for summary judgment dismissing the complaint on the grounds, among other things, that the plaintiff cannot establish a prima facie case of discrimination herein, that the plaintiff was terminated from her employment for legitimate, nondiscriminatory reasons, and that the plaintiff cannot establish that she was terminated based upon unlawful retaliation. In support of their motion, the defendants submit, among other things, the pleadings, the affidavits of two of its employees, excerpts from the transcripts of the deposition testimony of the parties, and documents regarding the plaintiff's employment history.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***,

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

172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*).

At her deposition, the plaintiff testified that she was employed as a receptionist by MMC beginning in March 2011, that her duties included dealing with clients, meeting and greeting customers when they arrived at the dealership, and answering the telephones, and that she would be the first person a customer would see when they enter the showroom at the dealership. She stated that she first learned that the defendants were painting the dealership when she arrived at work on September 19, 2012, that she had previously told Caputo that she had asthma and requested that MMC use Benjamin Moore odorless paint, and that Caputo had told her that said paint was "too expensive." She indicated that, after she got to work that day, she had a bad reaction to the paint fumes, that the service manager, Shaun Tjepkema (Tjepkema), told her that Caputo's office had been painted, and that she called Caputo to let him know of her issue. The plaintiff further testified that Caputo permitted her to leave work that day, that she told the defendants that she would provide them with notes from her doctor regarding her need for leave from work due the painting of the dealership, and that she was permitted to take leave from September 19, 2012 until November 30, 2012 to resolve her medical condition. She stated that it was her understanding that the defendants were extending her leave of absence for as long as needed, and that she felt better during the first week of November 2012 but was told that the painting was still ongoing. She indicated that she returned to work on November 30, 2012, that she was not terminated at that time, and that she was not treated differently than any other MMC employee because no one else had a disability.

The plaintiff further testified that she was out of work a lot in April and May 2013 due to her mother's health issues, that she was out in June 2013 when her mother passed away, and that Tjepkema and another employee told her that the defendants decided to paint again while she was away in June 2013. She stated that she agreed with the idea that the defendants should paint while she was away from work, that she returned to work after July 4, 2013, and that she did not have any health issues regarding the painting of the dealership after she returned to work in November 2012 or July 2013. She indicated that the doctor notes provided to the defendants in 2012 indicated that she could not return to work until the painting was done and the odor from the paint was gone, and that the notes did not require or mention the use of odorless paint by the defendants. The plaintiff further testified that it is her signature on an employee warning report dated July 11, 2012, wherein she was disciplined for tardiness and failure to wear proper business attire, that she objected to the discipline in a separate paper which she does not have in her possession, and that the accusations were false or explainable. She indicated that the defendants did everything that she wanted until July 2013, when she was terminated from her employment, that she did not know if Miller had anything to do with her being fired, and that Miller had nothing to do with the refusal to use odorless paint at the dealership. She stated that she did not have any facts to support her belief that she was terminated due to her asthma, that no one at work referred to her condition in a disparaging manner, and that she never filed any complaints with anyone regarding the

defendants failure to use odorless paint or to give her advance notice as to when the dealership would be painted.

Caputo testified that he has been employed by MMC as the sales manager since March 2011, that the plaintiff first complained about the painting of the dealership when she had a reaction to the paint in 2012, and that she told him that she could not work while the painting was being done. He stated that he was the one who decided to terminate the plaintiff's employment with the input of Tjepkema.

In his affidavit in support of the motion, Caputo swears that the plaintiff's duties included greeting customers, being at work at 8:30 a.m., and maintaining the "ups rotation," which required her to know the attendance and availability of MMC's sales consultants. He states that he spoke with the plaintiff several times about her repeated tardiness and inappropriate dress, and that he drafted the employee warning report dated July 11, 2012 which indicated that she might be dismissed from employment if she did not improve in those areas. He indicates that the plaintiff took leave from September 17, 2012 to November 30, 2012 due to her reaction to the first painting of the dealership, that she returned to work, and that she took a second leave of absence from June 24, 2013 to July 5, 2013, when a second round of painting was done at the dealership. Caputo further swears that he learned on July 2, 2013 that the dealership received a mystery shopping report which indicated that MMC's receptionist had ignored the mystery shopper, that such a negative report can result in the denial of financial incentives by MMC's franchisor, and that Tjepkema determined that the plaintiff was the receptionist on duty on the date of the mystery shopper's visit to the dealership. He states that he presented a second employee warning report to the plaintiff on July 16, 2013 regarding her failure to greet the mystery shopper, that the plaintiff refused to sign the report so he wrote that she had refused on the line provided for her signature. He asserts that he called the dealership on July 25, 2013 to speak with a certain sales consultant, that the plaintiff answered the telephone and did not know if said person was available or even in the building, and that he wrote up another employee warning report based on the incident and terminated the plaintiff's employment that date.

In his affidavit in support of the motion, Tjepkema swears that he has been employed as the service manager at the dealership since March 2011, that he received an electronic version of the mystery shopper report on or about July 2, 2013, and that it is not unusual for such a report to be sent to the dealership "several months after the mystery shop took place." He states that the mystery shopper is hired by Porsche Cars North America to review MMC's operations, and that the report indicates that "[a] few people ignored me, including the employee at the reception desk who I had to walk right by when I was looking for service." He indicates that he determined that the plaintiff was on duty on the day of the mystery shop, that he drafted an employee warning report dated July 11, 2013, that he attached a copy of the mystery shopping report, the subject repair order, and the plaintiff's "time punch data" for February 18, 2013 to the report, and that he gave the employee warning report to Caputo for presentation to the plaintiff.

A review of the employee warning reports dated July 11, 2012, July 11, 2013 and July 25, 2013, the plaintiff's work attendance records, the notes from the plaintiff's doctor, and the documents regarding the mystery shopping report reveals that they are consistent with the testimony of the parties as summarized above.

Human Rights Law (Executive Law) 296 (1) (a) states: "It shall be an unlawful discriminatory practice...[f]or an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." "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" (***Kulaya v Dunbar Armored, Inc.***, 110 AD3d 772, 972 NYS2d 659, 660 [2d Dept 2013]; *see* ***Timashpolsky v State Univ. of N.Y. Health Science Ctr. at Brooklyn***, 306 AD2d 271, 761 NYS2d 94 [2d Dept 2003], *lv. denied* 1 NY3d 507, 776 NYS2d 223 [2004]).

Here, the defendants have established their prima facie entitlement to summary judgment dismissing the plaintiff's first and second causes of action for discrimination based on her disability or perceived disability. The plaintiff acknowledges that she did not receive disparate treatment from that of her fellow employees in the terms, conditions or privileges of her employment, and that she does not have any facts to support her belief that she was terminated based upon her disability. In addition, her testimony does not otherwise raise an inference of discrimination (*see* ***Ferrante v American Lung Assn.***, *supra*; ***Alvarado v Hotel Salisbury, Inc.***, 38 AD3d 398, 833 NYS2d 25 [1st Dept 2007]; ***Dickerson v Health Mgt. Corp. of Am.***, 21 AD3d 326, 800 NYS2d 391 [1st Dept 2005]).

As to plaintiff's third cause of action alleging a failure to accommodate, to establish a prima facie case for failure to accommodate a plaintiff must show that he or she suffered from a disability, that he or she could perform the essential functions of her position with reasonable accommodation, and that his or her employer refused to make such accommodations (*see* ***Pimental v Citibank, N.A.***, 29 AD3d 141, 811 NYS2d 381 [1st Dept 2006]; ***Pembroke v New York State Office of Court Admin.***, 306 AD2d 185, 761 NYS2d 214 [1st Dept 2003]). It is well settled that temporary leaves of absence can be considered reasonable accommodations in addressing an employee's disability (***Micari v Transportation World Airlines, Inc.***, 43 F Supp 2d 275 [ED NY 1999]; ***Miloscia v B.R. Guest Holdings LLC***, 33 Misc 3d 466, 928 NYS2d 905 [Sup Ct, New York County 2011], *affd in part & mod in part* 94 AD3d 563, 942 NYS2d 484 [1st Dept 2012]). In addition, where a plaintiff is granted disability leave to address their health issues and fails to establish that the accommodation was unreasonable, a disability claim is properly dismissed (*see* ***Esposito v Altria Group, Inc.***, 67 AD3d 499, 888 NYS2d 47 [1st Dept 2009]).

Here, the defendants have established their prima facie entitlement to summary judgment dismissing the plaintiff's third cause of action for failure to accommodate her disability. It is undisputed that the defendants granted the plaintiff leave on those occasions when it was renovating and painting the dealership, and that the defendants did so in accordance with the instructions contained in the doctor's notes provided to them by the plaintiff. The plaintiff acknowledges that she was never denied leave, and that the defendants were extending her leave of absence for as long as needed under the circumstances. In addition, the plaintiff's testimony establishes that she returned to work after each leave of absence without any health issues, or any change in the terms of her employment until the date she was terminated.

The Court now turns to the plaintiff's fourth and final cause of action alleging that she was terminated from her employment in retaliation for her complaints that she was denied a reasonable accommodation herein. In order to establish a prima facie case for retaliation, a plaintiff must show that he or she was engaged in a protected activity, that his or her employer was aware of that activity, and that there was a causal connection between the protected activity and the adverse employment action (*see* ***Forrest v Jewish Guild for the Blind***, 3 NY3d 295, 786 NYS2d 382 [2004]; ***Bennett v Health Mgt. Sys. Inc.***, 92 AD3d 29, 936 NYS2d 112 [1st Dept 2011]). Under Executive Law § 296, "protected activity" refers to any action taken to protest or oppose discrimination prohibited by the statute (*see* ***Johnson v North Shore Long Is. Jewish Health Sys., Inc.***, 137 AD3d 977, 27 NYS3d 598 [2d Dept 2016]; ***Clarson v City of Long Beach***, 132 AD3d 799, 18 NYS3d 397 [2d Dept 2015]).

Here, the defendants have established their prima facie entitlement to summary judgment on the plaintiff's cause of action for retaliation. The plaintiff acknowledges that she never filed any complaints with the defendants regarding their alleged failure to use odorless paint or to give her advance notice as to when the dealership would be painted. Absent a complaint to the defendants, the plaintiff cannot establish that she was engaged in a protected activity, and that there was a causal connection between her termination from employment and any activity on her part (*see* ***Borawski v Abulafia***, 140 AD3d 817, 33 NYS3d 412 [2d Dept 2016]: *see also* ***Forrest v Jewish Guild for the Blind***, *supra*; ***Clarson v City of Long Beach***, *supra*).

In opposition to the defendants' motion, the plaintiff submits, among other things, excerpts from her deposition and that of Tjepkema, excerpts from the deposition of a co-worker, the employee warning reports for July 11, 2013 and July 25, 2013, and the mystery shopper's report. In the additional deposition testimony of the plaintiff, she stated that she originally requested that Miller use odorless paint in March 2011, and that she was unfairly disciplined for tardiness because the time clock at the work was faulty, and for the failure to wear proper attire because it was not true. She indicated that, when she first met with Caputo regarding the poor mystery shopping report, he told her the mystery shop was in April 2013, then corrected himself to say it was on February 18, 2013. She further testified that, on July 25, 2013 when Caputo called looking for a sales representative, she searched and could not determine whether the person was present at the dealership, that Caputo was "mean" to her when she got back on the telephone, and that she was upset with him because she was trying to do him a favor.

The additional excerpts of Tjepkema's deposition testimony do not add anything to the determination of this motion. At her deposition, Heidi Weinstein testified that she reports to Caputo, that her duties as receptionist include answering phones and directing customers to the proper salesperson, and that she is not responsible for knowing where salespeople are at all times. She stated that the dress code at the dealership is to look professional, and that she was present when the plaintiff was told numerous times that her attire was inappropriate.

Here, the plaintiff has failed to raise an issue of fact requiring a trial of this action. In the memorandum of law submitted in opposition to the defendants' motion, the plaintiff contends, among other things, that her termination occurred "under highly suspicious circumstances," that the defendants failed to accommodate her known disability reasonably, and that she has established a prima facie claim for retaliation. However, the plaintiff does not dispute that she was disciplined prior to the events

leading to her claim of discrimination, or the defendants' direct evidence that her failure to greet the mystery shopper was a significant factor in a negative report to the dealership. The plaintiff has failed to submit any evidence that her termination was not based upon legitimate non-discriminatory reasons and was instead all pretext (*see* ***Ganthier v North Shore-Long Is. Jewish Health Sys., Inc.***, 345 F Supp 2d 271 [ED NY 2004]; ***Forrest v Jewish Guild for the Blind***, *supra*).

In addition, the plaintiff has failed to raise an issue of fact regarding the reasonableness of the defendants' accommodations during her employment. The plaintiff contends that the defendants failed to provide her with an accommodation because they failed to enter into a good faith "interactive process" to determine the accommodation to be afforded to her. Under the specific circumstances herein, the plaintiff's contention is without merit (*see* ***Kaufman v Columbia Mem. Hosp.***, 2014 WL 2776662 [ND NY 2014][circumstances surrounding failure to hold a dialogue must give rise to an inference of discrimination]). Moreover, the plaintiff has failed to raise an issue of fact regarding her claim for retaliation.

Finally, the plaintiff has failed to address the arguments proffered by the defendants in their motion that the first and second causes of action must be dismissed as to Miller, as the plaintiff has not asserted any facts in her submission or any allegations in her complaint that Miller aided and abetted any discriminatory conduct. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see* ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; ***Welden v Rivera***, 301 AD2d 934, 754 NYS2d 698 (3d Dept 2003]; ***Hajderlli v Wiljohn 59 LLC***, 24 Misc3d 1242A, 2009 NY Slip 911 operator 51849U [Sup Ct, Bronx County 2009]).

In any event, Caputo and Miller cannot be held liable for aiding and abetting MMC's alleged discriminatory actions where no violation of the Human Rights Law has been established (***Abe v Cohen***, 115 AD3d 491, 981 NYS2d 692 [1st Dept 2014]; ***Strauss v New York State Dept. of Educ.***, 26 AD3d 67, 805 NYS2d 704 [3d Dept 2005]). Accordingly, the defendants motion for summary judgment is granted in its entirety.

Dated: April 27, 2017

W. Gerard Asher
J.S.C.
HON. W. GERARD ASHER

X FINAL DISPOSITION ___ NON-FINAL DISPOSITION