SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 17

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KATHLEEN KORNICHUK,

Plaintiff,

- against -

DECISION AND ORDER

Index No: 22970/10

Motion Sequence No: 001
Original Return Date: 04-19-11

TRANSPORT WORKERS UNION LOCAL 252, TRANSPORT WORKERS UNION OF AMERICA, ALF-CIO, INTERNATIONAL TRANSPORT WORKERS UNION and PATRICIA BOWDEN,

Defendants.

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P R E S E N T :
HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 5 were submitted on this Notice of Motion on May 19, 2011:

	Papers numbered
Notice of Motion and Affirmation in Support	1-2
Memorandum of Law in Support	3
Affirmation in Opposition	4
Reply Affirmation	5

This motion by the defendants Transport Workers Union, Local 252 ("Local 252") and Patricia Bowden ("Bowden") for an order pursuant to CPLR 3211(a)(1), (5) and (7) granting them judgment dismissing the complaint against them is decided as follows:

The plaintiff in this action is a former employee of the Transport Workers Union, Local 252. She was an at-will employee and was not a member of Local 252. Her employment was terminated on December 16, 2009 by the defendant Bowden, the President of Local 252. In this action

commenced by the filing of a Summons with Notice on December 15, 2010, the plaintiff seeks to recover: (1) for retaliation in alleged violation of Workers' Compensation Law §120, which protects workers' compensation claims, and Labor Law §740, which protects whistleblowers; (2) negligent supervision; and (3) intentional tort.

The defendants Local 252 and its President, defendant Bowden, seek dismissal of the complaint on collateral estoppel grounds and pursuant to CPLR 3211(a)(7) . The facts pertinent to the determination of this motion are as follows:

The plaintiff filed a claim for unemployment benefits and Local 252 challenged that award. A hearing was held before the Unemployment Insurance Appeals Board on July 1, 2010 at which all parties were represented by counsel.

At the hearing, the plaintiff testified that she was injured on the job on October 21, 2009; that on the advice of her doctor, she sought to file a workers' compensation claim in November 2009; that her hours were cut on or about December 8th or 9th because of her workers' compensation claim; and that she contacted the defendant International Transport Workers Union ("International Union") to complain about those events on December 15, 2009.

The plaintiff testified that the next day when she arrived at the office, Mary Flaiban immediately asked her about the status of a scanning job, which the plaintiff reminded her they had agreed did not need to be done until the Christmas break. The plaintiff testified that Flaiban was nasty and yelling and so she asked her why she was harassing her, whereupon Flaiban announced to Bowden that the plaintiff had arrived at work. The plaintiff testified that Bowden then screamed from her office for her to come to see her. The plaintiff testified that when she entered Bowden's office, Bowden, Samuels and Flaiban were all present. She testified that Bowden asked her why she

had called the International Union and Bowden told her she had no rights because she was not in the union and that she was "nobody" there. The plaintiff testified that she told Bowden that she had called the International Union because she had been told that she was going part time. She admitted, however, that Bowden had told her that she was going part time because she wanted two part time workers, not because of her workers' compensation claim. She testified that Bowden told her not to contact the International Union again, that she would be fired if she did, and that her part-time status was to take effect immediately because she had contacted the International Union. Plaintiff testified that she was ultimately terminated by Bowden that day on account of her workers' compensation claim and her complaint to the International Union. She denied ever being asked to leave Bowden's office that day and to come back on Monday or raising her voice that day.

Local 252's employees (President Bowden, Mary Flaiban and Local 252's Vice President Juanita Samuels), however, disagreed with the plaintiff's version of events. Bowden testified that the plaintiff had a history of work problems. More specifically, her attitude when answering the phone was problematic; her breaks were overly frequent and extended; whether she put in a full day's work was questioned; and she was uncooperative in scheduling time off leaving the office short-handed. Bowden testified that it was these things that led her to cut the plaintiff's hours. The plaintiff was told approximately a week before she was fired that her hours were being reduced in February.

Bowden, Flaiban and Samuels testified that on December 16th, Flaiban asked the plaintiff if she had completed an assignment, to which the plaintiff protested – screaming and accusing Flaiban of harassing her. They testified that Bowden then asked the plaintiff to come to her office and that once in Bowden's office, the plaintiff refused to sit down and continued to scream, accusing

Bowden, Flaiban and Samuels of being a clique. They testified that she repeatedly asked why Bowden was picking on her and whether this was because of her workers' compensation claim and she was told that it was not. They testified that the plaintiff was told to stop screaming several times and that when she persisted in screaming, she was asked several times to go home for the day. They testified that the plaintiff persisted in yelling and alleging that the meeting was the result of her workers' compensation claim and/or her contact with the International Union. They testified that although Bowden told her it was not and that she couldn't understand why she had called the International Union because it could not help her, she continued to scream and asked "am I fired?" They testified that the plaintiff refused to leave and instead stated that "they would finish this now;" that she "had it;" and, that she couldn't take it anymore. Defendant Bowden ultimately answered plaintiff in the affirmative, i.e., that she was in fact fired.

In his decision captioned "Issues: loss of employment through misconduct. Employer's objection to claimant's entitlements," the Administrative Law Judge credited Local 252's employees' testimony and rejected the plaintiff's. The Administrative Law Judge accordingly found that the plaintiff's hours were reduced due to her job performance and that she was discharged because she continued to yell and argue with the Local 252's president defendant Bowden on December 16th, not because of her workers' compensation claim or her contact with the International Office. The Administrative Law Judge accordingly found that because she was terminated due to job misconduct, she was not qualified to receive unemployment benefits.

"Under the doctrine of collateral estoppel, a party is precluded from 'relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same.'"

Vitello v Amboy Bus Co., 83 AD3d 932 (2nd Dept 2011), quoting Ryan v New York Tel. Co., 62 NY2d 494, 500 (1984). "Two elements must be established: (1) that 'the identical issue was necessarily decided in the prior action and is decisive in the present action'; and (2) that the precluded party 'must have had a full and fair opportunity to contest the prior determination.'" Vitello v Amboy Bus Co., supra, quoting D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 (1990). "Collateral estoppel is applicable to quasi-judicial determination of administrative agencies, including the [Workers' Compensation Board]." Vitelo v Amboy Bus Co., supra, quoting Ryan v New York Tel. Co., supra, at p. 499; O'Gorman v Journal News Westchester, 2 AD3d 815, 816 (2nd Dept 2003); Rigopolous v American Museum of Natural History, 297 AD2d 728, 729 (2nd Dept 2002). Even where "there are variations in the facts alleged, or different relief sought, the separately stated causes of action may nevertheless be grounded on the same gravamen of wrong upon which the action is brought." Smith v Russell Sage College, 54 NY2d 185, 193 (1981); see also, Staatsburg Water Co. v Staatsburg Fire District, 72 NY2d 147 (1988). Collateral estoppel applies when "the finding for which preclusive effect [is] sought was a necessary step in fixing the legal rights of a party to the proceeding." Staatsburg Water Co. v Staatsburg Fire District, supra, at p. 155.

The plaintiff's claims are barred by the doctrine of collateral estoppel. While the ultimate issue determined at the Administrative Hearing was the plaintiff's entitlement to unemployment benefits, the determining factor was clearly the reason for her termination; to wit: was it her job misconduct or her workers' compensation claim coupled with her complaint to the International Transport Workers Union? The Administrative Law Judge found that the plaintiff's on-the-job misconduct caused her termination. That finding was both "material" and "necessarily decided" in

the administrative proceeding and is "decisive" here. The plaintiff's claims advanced here for violations of the Workers' Compensation Law and the Labor Law, negligent supervision and intentional tort seek to recover for her termination. Given the Administrative Law Judge's finding, those claims fail.

In any event, the plaintiff's retaliation claim which is premised upon her filing a workers' compensation claim and contacting the International Union when her hours were cut fails under CPLR 3211(a)(7). The plaintiff's claim pursuant to Workers' Compensation § 120 which bars discrimination by an employer for filing or attempting to file a compensation claim, falls exclusively within the Workers' Compensation Board's jurisdiction. Workers' Compensation Law § 120; Burlew v American Mut. Ins. Co., 63 NY2d 412, 416 (1984). Furthermore, a plaintiff can recover under Workers' Compensation Law § 120 only if "no other valid reason is shown to exist" for the employer's challenged action. A valid reason for the plaintiff's termination was found by the Administrative Law Judge after a hearing at which the plaintiff fully participated.

The plaintiff's claim pursuant to Labor Law § 740 fails because Labor Law § 740 protects an employee against "retaliatory personnel action" when the employee discloses or threatens to disclose a violation of law, rule or regulation and the violation presents a substantial and specific danger to public health and safety. Remba v Federation Employment and Guidance Service, 76 NY2d 801(1990); see also, Lebowitz v Bank Leumi Trust Co., 152 AD2d 169 (2nd Dept 1989); Green v Saratoga A.R.C., 233 AD2d 821 (3rd Dept 1996); Granser v Box Tree South, Ltd., 164 Misc 2d 191 (Supreme Court New York County 1994). An employee's belief that a violation occurred is insufficient. Nadkarni v North-Shore Long Island Jewish Health System, 21 AD3d 354 (2nd Dept 2008); Hughes v Gibson Courier Services Corp., 218 AD2d 684 (2nd Dept 1995). The plaintiff has

not alleged that she disclosed or threatened to disclose a violation of law, rule or regulation which presents a substantial and specific danger to public health and safety. She only alleges that she was fired for filing a workers' compensation claim and for complaining to the International Union about the cut in her hours.

Plaintiff's present reliance on 42 USC § 2003e-3(a) is misplaced as she has not advanced a Title VII claim.

The plaintiff's claim for negligent supervision and intentional tort also fail under CPLR 3211(a)(7). By imposing a whistleblower/retaliation claim, the plaintiff has waived all other claims. Labor Law 740 (7); Feinman v Morgan Stanley Dean Witter, 193 Misc 2d 496 (Supreme Court New York County 2002). Moreover, the plaintiff has not alleged that Local 252 or any of the defendant unions know or should have known of Bowden's propensity for conduct that caused her injury, which is a required element of a claim sounding in negligent supervision. Carnegie v J.P. Phillip, Inc., 28 AD3d 599 (2nd Dept 2006). Finally, Bowden cannot be held liable for negligently supervising herself and New York does not recognize a cause of action based on prima facie tort for wrongful discharge of an at-will employee. Dailey v Tofel, Berelson, Saxl & Partners, P.C., 273 AD2d 341 (2nd Dept 2000), citing Schrieber v St. John's University, 195 AD2d 544 (2nd Dept 1993), affd as mod., 84 NY2d 120 (1994).

Accordingly, after due deliberation, it is

ORDERED, that the motion by the defendants Transport Workers Union Local 252 and Patricia Bowden for an Order dismissing the complaint against these defendants is **granted** and the action is dismissed against these defendants.

Settle judgment.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
October 10, 2011

ENTER:

JOEL K. ASARCH, J.S.C.

Copies mailed to:

Mayer, Ross & Hagan, P.C.
Attorneys for Plaintiff

Colleran, O"Hara & Mills, LLP.
Attorneys for Defendants Local 252 and Bowden

Cohen, Weiss and Simon, LLP
Attorneys for Defendant Transport Workers Union