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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 105335/2011

SHERIDAN, ERIKA

VS.

FARLEY, THOMAS A.

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 10/27/11

HON. EILEEN A. RAKOWER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

ERIKA SHERIDAN,

Petitioner,

-against-

THOMAS A. FARLEY, Commissioner of the New York City Department of Health and Mental Hygiene, and the NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Respondents.

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Index No. 105335/11

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER:

Erika Sheridan ("Petitioner") brings this Article 78 proceeding challenging her termination from respondent New York City Department of Health and Mental Hygiene ("DOHMH"). Petitioner was a provisional appointee in the position of Associate Staff Analyst from June 15, 2009 until her termination on January 7, 2011. In this capacity, she was responsible for "analyzing medical software slated for doctors and nurses working within the NYC Jail Clinics" pursuant to a federally funded program known as the eClinicalWork Electronic Health Record ("eCW"). Specifically, Petitioner's job was to "ensur[e] the medication component functioned properly." Petitioner claims that in the course of her duties, she "uncovered several critical software flaws that resulted in inmate injury." Specifically, the program was flawed in that

- the software did not maintain an accurate history of prescribed medications, resulting in over or under-medication of inmates;
- critical information was missing from medication orders resulting in inaccurate data in the patient's chart;
- there were no safeguards to ensure that prescribed medication was processed through pharmacies, resulting in inmates being released without critical medication; and

- prescribed medication orders that were processed and given to patients were removed from the system leaving no record of the order resulting in inaccurate record keeping and accountability.

Petitioner states that she documented these problems and brought them to the attention of her supervisor, Executive Director Richard Stazesky, via e-mail. Petitioner claims that Stazesky verbally admonished her to stop documenting the problems with the program. Petitioner "flatly refused" to remain silent about the problems, and Stazesky continued to admonish her "for several months" until she was told on January 7, 2011 that her services were no longer required.

Petitioner alleges that she was wrongfully terminated by DOHMH in retaliation for her whistle-blowing concerning the potential dangers of the eCW system, in violation of Civil Service Law ("CSL") §75-b, and in violation of right to free speech under the First Amendment. Petitioner further claims that her termination was arbitrary and capricious. Petitioner provides a January 24, 2011 letter of recommendation written by Stazesky on Petitioner's behalf. Petitioner claims that the letter, which describes her as "the consummate professional," is evidence that her termination from DOHMH was in bad faith. Although no performance evaluations were completed during Petitioner's tenure, she states that at all times she performed her work in a satisfactory manner.

DOHMH provides a verified answer, a memorandum of law; and the affidavit of Richard Stazesky, Executive Director of the Bureau of Information Technology Initiatives at DOHMH. Stazesky states that pursuant to a Mayoral Initiative in 2006, the City embarked on a campaign to provide an electronic health record system to approximately 800 primary care providers who serve "the poorest and sickest New Yorkers." To that end, the City issued a Request for Proposal ("RFP") seeking a private vendor "to provide customization, development, implementation and on-going support of an electronic health record system for each of four diverse medical settings throughout the City," including DOHMH's Correctional Health Services, which includes approximately 225 medical providers.

Stazesky states that, at the end of the RFP process in late 2006, the City selected eCW as its vendor, and entered into a contract whereby eCW would provide electronic health record services in its jails. He further states that, contrary to Petitioner's claim that the project was federally funded, it was actually funded

by a New York City tax levy. According to Stazesky, "the contract called for three cycles of development to make eCW more user friendly to the unique jail environment."

Stazesky explains that eCW was originally developed for the typical out-patient environment, such as a doctor's office. Accordingly, eCW had to be modified in order to be applied to City jails, which house thousands of men and women at a time, and see about 100,000 admissions annually. DOHMH is currently "in the last development cycle," and "has been implemented in all active New York City Department of Correction facilities and will be implemented at new facilities as they open."

eCW was fully implemented in the Rose M. Singer Correctional Center on Riker's Island, the women's jail, in November 2008. Thereafter, Stazesky states that the project "stalled." He was asked to take over the project in April of 2009 and resume the development and implementation process in the male facilities. He hired Petitioner because he had worked with her previously and knew that, although "she could be rigid and defensive, and ... sometimes had difficulty working with others," "she was a diligent and focused worker." Stazesky asked Petitioner to provided assistance on the project as a Development Specialist, "with a specific focus on the medication module," which he explains is "the application that permits an end user to order and discontinue medication, print medication orders, view a patient's medication history, and view a patient's currently prescribed medications, etc." Her primary responsibilities "involved working with end users to identify new requirements for the eCW systems, working with end users and the software vendor to troubleshoot problems, working with the software vendor to develop the system's functional requirements and test new functionality prior to release, and working with fellow electronic health record team members to assist in the implementation activities." Stazesky states that, although Petitioner possessed the technical skills to perform her job, she showed difficulty working with her team members and acted unprofessionally toward the software vendor staff.

Stazesky states that Petitioner raised concerns she had with the "Current Medication" section after she noticed that some medications appeared to be missing from patients' charts, as well as some medication stop dates. Stazesky and Petitioner discussed these issues in a series of e-mails, which are annexed to DOHMH's answer. Stazesky states that while these issues were important, "they

were not severe enough to prevent us from proceeding ...." Stazesky notes that DOHMH

> "use[s] a second system in the jails, known as QuadraMed, to profile and dispense medications to the inmates, i.e. to process pharmacy orders. Medications are not dispensed from eCW; the medication component of eCW is used only for placing or changing a medication order. eCW does not check for medication conflicts or contraindications – that is all handled by the Quadramed system. So, while eCW displays the medications that have been ordered by a physician, Quadramed determines and displays the medication that is actually given to the patient.

This is reflected in a November 21, 2010 e-mail from Stazesky to Petitioner, wherein he states that "The bottom line is that since every med order has to be entered into the QuadraMed pharmacy system that system serves as the fail safe to ensure nothing is incorrectly ordered."

Stazesky states that Petitioner also raised with him the issue of "deleted" orders for medication, "wherein a medication previously prescribed to a patient could then be deleted from the system." Petitioner wanted this function to be removed from the program. However, Stazesky states that he disagreed with Petitioner on the grounds that "the medical professionals who prescribe medication may reasonably wish to delete an incorrectly prescribed medication from a patient's chart to avoid potentially dangerous confusion later." Nevertheless, the issue was raised with the vendor; however, Stazesky was informed that removal of the "delete" function "would require a major reworking of the system's architecture." Stazesky states that, "[a]s a workable solution, we trained our users not to use the delete function, but to use the 'discontinue' option instead."

In addition to voicing and discussing her concerns with Stazesky and DOHMH coworkers in e-mails, Stazesky states that he raised the issues identified by Petitioner at meetings with vendor staff and the DOHMH Deputy Commissioner.

Stazesky claims that Petitioner's inability to cooperate with others was the reason she was ultimately terminated. At meetings with vendor staff, Petitioner "was antagonistic and overly aggressive, and her interactions and communications with the software staff was often harsh and accusatory in nature." In addition, in her interactions with Stazesky and their team, Petitioner was "sarcastic, defensive and belligerent." Stazesky further states that Petitioner could not get along with her direct supervisor, Deputy Director Ulkar Qazen. According to Stazesky, Petitioner "did not treat Ms. Qazen appropriately, in that she was uncooperative and resistant to guidance and instruction – unacceptable behavior given that Ms. Qazen was responsible for giving Ms. Sheridan her assignments and reviewing her work with her."

Stazesky claims that, in December of 2010, Qazen told him that she was afraid of Petitioner because she had become aggressive and accusatory during a discussion. It was at this time that Stazesky determined that Petitioner should be terminated. He states that he approached Louise Cohen, Deputy Commissioner for Health Care Access and Improvement, and told her that Petitioner was damaging team morale and should be terminated. Pursuant to Cohen's direction, on December 17, 2010, he brought the matter to the attention of Human Resources. Both HR and Cohen agreed that Petitioner should be terminated. Further, on January 4, 2011 Qazen sent Stazesky an e-mail with the subject line "Erika blew up at me." In the e-mail, Qazen states that after sending Petitioner an e-mail, "she began to accuse me of several things. One of which was that I contradict everything she does and that I am breathing down her neck." Qazen continues, "[s]he began shouting .... I felt like she was going physically [sic] hurt herself or me. Please advise as to what I should do as I feel like it's a bit hostile here." (emphasis in original).

Stazesky denies ever instructing Petitioner to stop documenting issues with eCW. He states that he hired Petitioner for the very purpose of identifying issues with the program, and that he merely told her to "tone down the manner in which she chose to communicate." With respect to the issue of deletion of medications, Stazesky states that due deliberation was had on the issue, and "her singular focus on it was no longer productive."

Lastly, with respect to Petitioner's claim regarding the letter of recommendation, Stazesky states that he wrote the letter because he still believes

that Petitioñer is an effective employee, and thinks that she could be successful in a different work environment.

In reply, Petitioner submits an attorney's affirmation and an affidavit.

It is well settled that a provisional employee can be terminated at any time and for any reason or for no reason at all, in the absence of a showing by the employee that the termination was effected in bad faith, for a constitutionally impermissible purpose, or was otherwise contrary to law (*see Miggins v. City of New York*, 286 A.D.2d 258 [1st Dept. 2001]). "The burden of raising and proving ... 'bad faith' is on the employee and the mere assertion of 'bad faith' without the presentation of evidence demonstrating it does not satisfy the employee's burden" (*Witherspoon v. Horn*, 19 A.D.2d 250, 251 [1st Dept. 2005]).

CSL §75-b provides, in pertinent part:

> 2. (a) A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. "Improper governmental action" shall mean any action by a public employer or employee, or an agent of such employer or employee, which is undertaken in the performance of such agent's official duties, whether or not such action is within the scope of his employment, and which is in violation of any federal, state or local law, rule or regulation.
>
> (b) Prior to disclosing information pursuant to paragraph (a) of this subdivision, an employee shall have made a good faith effort to provide the appointing authority or his or her designee the information to be disclosed and shall provide the appointing authority or designee a

> reasonable time to take appropriate action unless there is imminent and serious danger to public health or safety. For the purposes of this subdivision, an employee who acts pursuant to this paragraph shall be deemed to have disclosed information to a governmental body under paragraph (a) of this subdivision.

As noted by the First Department in *Xu v. New York City Department of Health*, "[j]urisprudence has made clear that a notice of claim is required as a condition precedent" in whistle-blower cases brought under CSL §75-b (2010 NY Slip Op 6288, *6 [1st Dept. 2010]) (citing cases). "Thus, in order for petitioner to pursue her wrongful discharge claim, compliance with *General Municipal Law § 50-e* was required" (*id.*).

Here, Petitioner has failed to file a notice of claim. Nor does she seek permission to file a late notice of claim. Accordingly, her CSL §75-b claim must be dismissed (*see Donas v. City of New York*, 2009 NY Slip Op 3838 [1st Dept. 2009]).

Turning to Petitioner's First Amendment claim, "[i]t is well established that a governmental entity may not discharge or retaliate against an employee based upon that employee's exercise of the right of free speech" (*Rigle v. County of Onondaga*, 267 A.D.2d 1088, 1089 [4th Dept. 1999]). "To establish a First Amendment retaliation claim, a plaintiff must show: (1) his speech addressed a matter of public concern; (2) he suffered an adverse employment action; and (3) a causal connection between the speech and the adverse employment action" (*Otte v. Brusinski*, 2011 U.S. App. LEXIS18892, *2 [2d Cir. 2011]) (citation omitted). The U.S. Supreme Court has held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline" (*Garcetti v. Ceballos*, 547 U.S. 410, 421 [2006]).

Here, Petitioner's First Amendment claim fails because the speech which allegedly formed the basis for her termination was made pursuant to her official duties. Petitioner states in her own affidavit that

> As a Development Specialist for [DOHMH], I was responsible for analyzing medical software slated for

> doctors and nurses working within the NYC Jail Clinics .... I was specifically responsible for ensuring the medication component functioned properly.

Lastly, Petitioner fails to meet her burden of "demonstrat[ing], by competent proof, that a substantial issue of bad faith exists" which requires a hearing (*Tsao v. Kelly*, 28 A.D.3d 320, 321 [1st Dept. 2006]). Petitioner offers no more than her own subjective belief that she was terminated for pointing out flaws in the eCW software. This is insufficient to meet Petitioner's burden of proof (*see Thomas v. Abate*, 213 A.D.2d 251, 252 [1st Dept. 1995]). Moreover, DOHMH has shown a good faith basis for Petitioner's termination. As noted above, DOHMH provides evidence both in the Stazesky affidavit, and through e-mail communications annexed thereto, that Petitioner conflicted with her colleagues and her supervisor.

Wherefore, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: October 26, 2011

EILEEN A. RAKOWER, J.S.C.