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DUPLICATE ORIGINAL

SHORT FORM ORDER

INDEX No. 22021/2011 ~~11-10357~~
CAL. No. 13-01427MV

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 1-8-14
ADJ. DATE 6-10-14
Mot. Seq. # 002 - MG; CASEDISP

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DIANA AZZOPARDI,

Plaintiff,

- against -

BABYLON UNION FREE SCHOOL DISTRICT AND ERIC FRIEDMAN,

Defendant.

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Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 17 - 18; Replying Affidavits and supporting papers ___; Other memoranda of law 16, 19 - 20; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants Babylon Union Free School District and Eric Friedman for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint is granted.

This is an action with a single cause of action for "wrongful discharge from employment" which includes an allegation that "[t]he termination of the employment of the Plaintiff was rendered in respect to a reckless disregard for due propriety, and by reason of the position enjoyed by the Plaintiff in the community in which she resides, and the declarations made relative to her failure to appropriately perform, the Plaintiff was defamed."

The plaintiff was formerly employed by the defendant Babylon Union Free School District (the District) as a "part-time aide/monitor" (aide) at its Babylon Memorial Grade School (the School). At all relevant times, the defendant Eric Friedman (Friedman) was the Principal at the School. It is undisputed that the plaintiff was appointed as an aide effective September 1, 2002, that re-appointments were made annually, and that such appointments were governed by a collective bargaining agreement between the District and the Non-Instructional Aide and Monitor Association (NIAMA). It is also undisputed that

the plaintiff was, at all times, an at-will employee of the District. On January 26, 2011, the plaintiff was called into Friedman's office regarding a complaint by a parent that she had allegedly made an inappropriate comment to the woman's son about the son's behavior. On January 31, 2011 the plaintiff attended a meeting held by the Superintendent of the District (the Superintendent) regarding the allegation. By letter dated February 1, 2011, the Superintendent informed the plaintiff that she was recommending that the plaintiff be terminated from her employment effective February 8, 2011. By letter dated February 11, 2011, the Superintendent informed the plaintiff that the Board of Education had approved the termination of her employment.

The plaintiff commenced this action by filing a summons and complaint with the Clerk of the Court on July 26, 2011, and issue was joined by the defendants on or about September 20, 2011. The defendants now move for summary judgment dismissing the complaint on the grounds that the plaintiff does not have a cause of action for employment discrimination or defamation, that there was no violation of the plaintiff's due process rights as she had no right to representation, and that the complaint must be dismissed as the plaintiff failed to file a notice of claim prior to commencing this action. It is undisputed that the plaintiff was required to file a notice of claim regarding her claims pursuant to Education Law § 3813, and that she failed to do so. Accordingly, summary judgment in favor of the District is warranted on this basis alone (***Matter of Brown v Schuyler-Chemung-Tioga Bd. of Coop. Educ. Servs.***, 5 AD3d 939, 775 NYS2d 191 [3d Dept 2004]; ***Matter Perlin v South Orangetown Cent. School Dist.***, 216 AD2d 397, 628 NYS2d 348 [2d Dept 1995]). In any event, the defendants have established their entitlement to summary judgment dismissing all of the plaintiff's causes of action.

In support of their motion, the defendants submit, among other things, the pleadings, the depositions of the plaintiff and Friedman, the NIAMA collective bargaining agreement with District (CBA), and correspondence between the parties. Initially, the Court notes that the deposition transcripts submitted are certified but unsigned, and that the defendants have failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). However, said transcripts may be considered herein as they have been adopted by the party deponent (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Ashif v Won Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008], and/or the parties have not raised any challenges to their accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]).

At her deposition, the plaintiff testified that she had signed the bottom of the letters re-appointing her to the position of aide for the years 2003/2004 to 2006/2007, and that she did not recall if she received letters for the remaining years before her termination. She indicated that her understanding of the term "at-will" employee is that "I can be discharged whenever ..." She stated that each year aides received a packet of information which included rules and regulations including the statement that it is an aide's job "to support and show acceptable behavior by using words of encouragement, praise and using discussions about choice, rather than negativity or sarcasm," when issues arise with students. The plaintiff further testified that in January 2011 she was called into Friedman's office, that Friedman said to her that a parent had complained that she had told a fourth grade student that the student's mother "has to take medication because of you," and that she told Friedman that she would never say such a thing. She stated that she had engaged in a "bantering conversation" with the student, and that she did

not "recall exactly what I said, but I know it was in - - like levity, you now, a teasing thing ..." She indicated that she attended a meeting with the Superintendent and other administrators on January 31, 2011, that she had asked if she could postpone the meeting because she "wanted to have representation," and that she was told that she could not do so as the CBA did not afford her the right to representation. Nonetheless, the meeting was delayed until the NIAMA representative could attend. The plaintiff further testified that the Superintendent asked her questions, that she told the Superintendent that she remembered having a conversation with the student, but that she did not remember what she said, and that she denied making the specific statement attributed to her. She indicated that she was told that the group would conduct an investigation, and that "they would let me know by letter." She acknowledged that she received a letter dated February 11, 2011 terminating her employment effective February 8, 2011, and that she was paid through February 7, 2011. She also stated that Friedman told the aides at the School that she would no longer be working there before she was actually terminated. The plaintiff further testified that Friedman and the aide staff had a common interest in knowing the change in her employment status, that she has no basis for the allegation that Friedman recommended her termination from employment, that she does not allege that Friedman spoke with anyone outside the school district about her termination, and that no one has ever told her that her reputation in the community has been affected. She stated that she was not permitted to have representation at the Superintendent's meeting, that she was not able to speak with the student or his parents regarding the allegations against her, and that she did not "get to tell my side to Mr. Friedman." She indicated that the sole basis for her claim that she was denied due process is that she should have had representation and the opportunity to do those things because "[i]t's the right thing to do." The plaintiff further testified that she did not file a notice of claim regarding her termination from employment, and that Friedman never gave her a negative evaluation. She acknowledged that an evaluation dated June 23, 2008, signed by her and Friedman indicates that "we have talked to you about your need to be visible, attentive and respectful of students and fellow colleagues." However, she indicated that she did not remember that conversation, and that she would not have written a response in the section provided "[p]robably because I wanted to stay in the position." She also acknowledged that, if she had made the comment attributed to her, it would have been inappropriate.

At his deposition, Friedman testified that he was retired from his position as the principal at the School, that he served in that position from 1991 or 1992 to July 2011, and that he believes that he hired the plaintiff as an aide. He stated that he recalls evaluations of the plaintiff that referenced her attendance, her talking on her cell phone at inappropriate times, and comments and relations with students, staff and parents. He indicated that, when this incident came to light, he followed up by speaking to the plaintiff, that he relayed to her the information provided to him, and that the plaintiff "admitted to having said what she said. She said that she said it in a joking fashion." Friedman further testified that he told the plaintiff that the statement was "distinctly inappropriate," and that he was going to report the incident to the Superintendent. He stated that he did report the incident orally and in writing to the Superintendent, that he does not discharge or suspend employees, and that the Superintendent recommends to the Board of Education whether an employee should be terminated. He indicated that he did not attend the Superintendent's meeting where the plaintiff was questioned about the incident, and that he would have announced to the aide staff that the plaintiff was no longer serving as an aide after it was determined by others that she was terminated from her employment.

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 Hospital***, 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 trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v 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]).

An employee who does not work under an agreement for a definite term of employment, is an at-will employee who may be discharged at any time with or without cause (*see* ***Lobosco v New York Tel. Co.***, 96 NY2d 312, 727 NYS2d 383 [2001]; ***Sabetay v Sterling Drug***, 69 NY2d 329, 514 NYS2d 209 [1987]; ***Negron v JP Morgan Chase***, 14 AD3d 673, 789 NYS2d 257 [2d Dept 2005]). New York does not recognize a cause of action for the tort of abusive or wrongful discharge of an at-will employee (*see* ***Lobosco v New York Tel. Co.***, *supra;* ***Murphy v American Home Prods. Corp.***, 58 NY2d 293, 461 NYS2d 232 [1983]; ***Daub v Future Tech Enter., Inc.***, 65 AD3d 1004, 885 NYS2d 115 [2d Dept 2009]) ***McGimpsey v Folchetti & Assoc***., 19 AD3d 658, 798 NYS2d 498 [2d Dept 2005]; ***Negron v JP Morgan Chase***, *supra*). In addition, there is no implied obligation of good faith and fair dealing in an employment at-will relationship (*see* ***Ingle v Glamore Motor Sales***, 73 NY2d 183, 538 NYS2d 771 [1989]; ***Matter of DePetris v Union Settlement Assn.,*** 86 NY2d 406, 633 NYS2d 274 [1995]; ***Murphy v American Home Products***, *supra*; ***Robertazzi v Cunningham***, 294 AD2d 418, 742 NYS2d 115 [2d Dept 2002]). Therefore, the defendants have made a prima facie showing of their entitlement to summary judgment herein (*see* ***McGimpsey v J. Robert Folchetti & Assoc***., *supra*).

To the extent that the complaint can be read to set forth causes of action for illegal discrimination, defamation and violations of the plaintiff's due process rights, the defendants also have established their prima facie entitlement to summary judgment herein. 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. 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."

"The standards for recovery under section 296 of the Executive Law are in accord with Federal Standards until 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]). On a claim of discrimination, plaintiff has the initial burden of establishing a prima facie case of discrimination (*id.*). While this

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

burden is "de minimus" (***Sogg v American Airlines***, 193 AD2d 153, 162, 603 NYS2d 21, 27 [1st Dept], 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 [WDNY 1999], quoting ***Meiri v Dacon***, 759 F2d 989 [2d Cir 1985], *cert. denied* 474 US 829, 106 SCt 91 [1985]). Here, the defendant's have established that the plaintiff has failed to allege, or to testify regarding, any facts indicating that she is a member of a "protected class," or that there was any concrete particulars indicating any prohibited behavior on the part of the defendants.

In order to establish a prima facie cause of action for defamation, it is necessary to prove that the defendant made "a false statement, published without privilege or authorization to a third-party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (***Dillon v City of New York***, 261 AD2d 34, 38, 704 NYS2d 1, 5 [1st Dept 1999]; *see also* ***Frechtman v Gutterman***, 115 AD3d 102, 979 NYS2d 58 [1st Dept 2014]; ***Epifani v Johnson***, 65 AD3d 224, 882 NYS2d 234 [2d Dept 2009]). Put more simply, the plaintiff must prove (1) a defamatory statement of fact; (2) regarding the plaintiff; (3) that the statement was published or broadcast to a third party by the defendant; and (4) that the statement caused the plaintiff to suffer damages (***San Sung Korean Methodist Church of N.Y. v Professional USA Constr. Corp.***, 4 Misc3d 1006[A], 791 NYS2d 873 [Sup Ct, Queens County 2004]). In addition, CPLR 3016 (a) requires that the particular words complained of be set forth in a complaint alleging defamation (***Epifani v Johnson***, *supra*). Judicial interpretation of this section requires that the defamatory words be set forth *in haec verba* (verbatim) (***Glazier v Harris***, 99 AD3d 403, 952 NYS2d 112 [1st Dept 2012]; ***Wadsworth v Beaudet***, 267 AD2d 727, 701 NYS2d 145 [3d Dept 1999]; ***Conley v Gravitt***, 133 AD2d 966, 520 NYS2d 672 [3d Dept 1987]). Here, the plaintiff has failed to set forth the allegedly defamatory statements of the defendants or to allege or testify that she suffered any damages as a result of any statement by the defendants.

In addition, the plaintiff's testimony establishes that Friedman's informing the school aides that the plaintiff "would no longer be working" at the School was protected by a qualified privilege. A qualified privilege arises when a person makes a good faith, bona fide communication upon a subject in which he or she has an interest, or a legal, moral or societal interest to speak, and the communication is made to a person with a corresponding interest. The underlying rationale of this common interest privilege is that so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded (***Grier v Johnson***, 295 AD2d 888, 686 NYS2d 535 [3d Dept 1999]). This common interest includes statements to fellow employees on a subject concerning the employer (***Curren v Carbonic Sys., Inc.***, 58 AD3d 1104, 872 NYS2d 240 [3d Dept 2009]). However, the privilege will be lost where the statement was not made for its stated purpose or if it was made with malice, that is to say with ill will, spite, or culpable recklessness (***Lieberman v Gelstein***, 80 NY2d 429, 590 NYS2d 857 [1992]; ***Frechtman v Gutterman***, *supra*; ***Diorio v Ossining Union Free School Dist.***, 96 AD3d 710, 946 NYS2d 195 [2d Dept 2012]). After a finding that the defendant has sustained its burden of demonstrating that the statements were protected by a qualified privilege, the burden then shifts to the plaintiff to demonstrate that the defendant spoke with malice either under the common-law or constitutional standard (*see* ***Demas v Levitsky,*** 98 NY2d 728, 738 NYS2d 402 [2002]). Here, the plaintiff does not allege, nor does she testify to, any facts bearing on the malice of the defendants.

Lastly, it is undisputed that the subject CBA does not alter the status of the plaintiff as an at-will employee or provide a process for challenging the District's actions in terminating her employment which would lead to a claim that the District violated her due process rights. Generally, "when an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to the agreement may not sue the employer directly for breach of that agreement, but must proceed, through the union, in accordance with the contract (***Matter of Board of Educ., Commack Union Free School Dist. v Ambach***, 70 NY2d 501, 522 NYS2d 831 [1987]; ***Michael F. Wolfson, M.D., M.P.H. v Preventitive Medicine Clinical Servs.***, 26 AD3d 751, 809 NYS2d 322 [4th Dept 2006]). However, the plaintiff's allegations regarding this potential cause of action do not allege that the defendants breached an duty under the CBA, or that NIAMA failed to act on her behalf.

More importantly, the plaintiff has not pled, nor has she testified regarding, any statutory or contractual right requiring the defendants to engage in a formal process to terminate her employment as an at-will employee (***Lobosco v New York Tel. Co.***, *supra*; ***Sabetay v Sterling Drug***, *supra*; ***Negron v JP Morgan Chase***, *supra*; *see generally* ***Meyers v City of New York***, 208 AD2d 258, 622 NYS2d 529 [2d Dept 1995]; ***Matter of Carter v Murphy***, 80 AD2d 960, 437 NYS2d 344 [3d Dept 1981]).

Having established their entitlement to summary judgment dismissing the complaint, it is incumbent upon the plaintiff to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition to the defendants' motion, the plaintiff submits an affirmation by her attorney who has no personal knowledge of the facts herein, which is insufficient on a motion for summary judgment (***Sanbria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]; ***9394, LLC v Farris***, 10 AD3d 708, 782 NYS2d 281 [2d Dept 2004]; ***Deronde Prods., Inc. v. Steve Gen. Contr., Inc.***, 302 AD2d 989, 755 NYS2d 152 [4th Dept 2003]). In any event, the plaintiff fails to raise an issue of fact regarding her cause of action for wrongful discharge or any of the potential causes of action that arguably could be "read into" her complaint. Accordingly, the defendants motion for summary judgment is granted.

Dated: July 24, 2014

W. Gerard Asher
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION