Batilo v Mary Manning Walsh Nursing Home Co., Inc.
2018 NY Slip Op 32763(U)
October 26, 2018
Supreme Court, New York County
Docket Number: 152461/2015
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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NELDA BATILO,

Plaintiff,

- v -

MARY MANNING WALSH NURSING HOME CO., INC., CONTINUING CARE COMMUNITY OF THE ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK D/B/A ARCHCARE, and ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK,

Defendants.

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INDEX NO. 152461/2015

MOTION DATE 05/04/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

ORDER

Upon the foregoing documents, it is

ORDERED that defendants Mary Manning Walsh Nursing Home, Co., Inc. and Continuing Care Community of the Roman Catholic Archdiocese of New York d/b/a/ ArchCare's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to such defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DECISION

This action arises out of plaintiff Nelda M. Batilo's claim that

she was subjected to discrimination, retaliation and an alleged hostile work environment, based on her race and national origin, in violation of both the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL).

Defendants Mary Manning Walsh Nursing Home, Co., Inc., (Mary Manning) and Continuing Care Community of the Roman Catholic Archdiocese of New York d/b/a/ ArchCare[1] (ArchCare) (collectively, defendants) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint.[2]

Background and Factual Allegations

Prior to being terminated in March 2012, plaintiff had been employed since 1999 by defendants as a licensed practical nurse (LPN) at Mary Manning. Mary Manning is one of the nursing homes owned and operated by ArchCare, New York, New York.

Plaintiff is Asian, of Filipino descent, and alleges that she was discriminated against based upon her race/national origin.[3] She states that, prior to the 2011 appointment of Akia

[1] Defendants state that ArchCare is improperly sued as Continuing Care Community of the Roman Catholic Archdiocese of New York d/b/a ArchCare.
[2] The complaint has been dismissed as against defendant Roman Catholic Archdiocese of New York.
[3] Plaintiff testified that she is making a claim that she was discriminated against on the basis that she is Filipino

Blandon (Blandon), an African-American, as the new director of nursing, she had an "unblemished personnel record." However, after Blandon was appointed, Filipino nurses, including plaintiff, were treated with hostility, and were "written up and suspended for [sic] myriad of reasons often unfounded and without opportunity to be heard or any formal investigation."

Plaintiff states that she initially witnessed Blandon's prejudice in January 2012, when, according to plaintiff, Blandon wrongfully terminated Jae Hee Chung (Chung), a nurse of Korean descent, for failing to account for a Duragesic patch in her medication cart. Plaintiff claims that, although she advised Blandon and other nurses that Chung did not lose the medication patches, Blandon failed to investigate. Plaintiff asserts that, after this incident, Blandon retaliated against plaintiff by moving her from floor to floor, in contrast to her having been previously assigned to a specific floor for most of her shift. Plaintiff continues that, "on February 13, 2012, plaintiff put it to the attention of Ms. Blandon the unfairness that plaintiff was subjected to in her workplace when despite plaintiff being assigned to work for a particular floor during her shift, she is

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(national origin). However, her complaint maintains that she was racially discriminated against.

being pulled out and moved from one floor to another." She claims that African-American nurses "are not moved from one floor to another" as often as plaintiff is moved. According to plaintiff, Blandon did not investigate plaintiff's complaints. Instead, on March 7, 2012, Blandon allegedly retaliated against plaintiff by suspending her from work for five days, arising from an incident that occurred on February 12, 2012. According to plaintiff, she and another nurse "had an altercation." Plaintiff believes that Blandon did not investigate but suspended plaintiff due to "obvious bias and discriminatory conduct." Plaintiff states that she "feared" Blandon due to her power to "suspend Filipino nurses even without investigation and unwillingness to find the truth." Plaintiff alleges that when Ann Gail Jones (Jones), a nurse who is African-American, had a similar altercation, she was not punished at all. In plaintiff's statement to Blandon regarding the incident, plaintiff wrote that, when she saw another nurse on the third floor, she "told her that every time she shows up for work, scheduled and at times not scheduled, that I was the one to be bounced around and mess-up [sic] my schedule."

Plaintiff claims that Blandon's "harassment and hostility" continued until plaintiff was wrongfully terminated on March 27,

2012. Plaintiff explains that she was terminated for failing to attend to a resident in distress on the 13th floor. However, plaintiff argues that this complaint was "unfounded," as plaintiff was tending to another resident at the time. Plaintiff alleges that Blandon did not investigate and that plaintiff "was never given [sic] opportunity to see the complaint and present her story." Plaintiff contends that, although she was terminated for the incident, other non-Filipino nurses have not been terminated for "more serious offenses." For example, non-Filipino nurses have made medication errors such as giving a resident an overdose of Percocet or an overdose of valium, yet these nurses faced no penalties.

Plaintiff asserts that, prior to Blandon's appointment, there were approximately 25 Filipino nurses. However, about "fifteen of them have been terminated or were forced to resign by Ms. Blandon and were replaced by about seventeen African-American personnel by the end of 2013 or thereabout. After plaintiff was terminated, she commenced this action, alleging ten causes of action.[4] In the first and second causes of action, plaintiff claims that, in violation of the NYSHRL and NYCHRL,

[4] By stipulation signed on September 14, 2015, plaintiff withdrew causes of action seven through ten.

she was discriminated against and harassed, based on her race, when she was suspended and terminated without a formal investigation. According to plaintiff, Blandon did not punish other African-American nurses when they committed more serious offenses. In the third and fourth causes of action, plaintiff alleges that she was retaliated against, in violation of the NYSHRL and NYCHRL, when she reported the unfair termination of Chung. Plaintiff states that, in retaliation, she was moved from floor to floor, "to cover other floor(s) just to give medication to residents when there are adequate registered nurses covering the floor already". After plaintiff complained about this unfair practice, she was further retaliated against by being suspended based upon an altercation with another nurse and eventually terminated after a complaint about patient care.

Plaintiff's fifth and sixth causes of action set forth that plaintiff was subject to constant fear and harassment in the workplace for being Filipino. She states that Blandon "has shown her dislike for Filipino nurses by being [sic] writing up Filipino nurses for the flimsy charges while disregarding more serious offenses committed by non-Filipino nurses, more particularly, African-American nurses." However, according to plaintiff, defendants failed to remedy this situation.

With respect to hostile work environment, the complaint ¶ 82 sets forth, in pertinent part:

> "In order to stop Plaintiff and prevent discovery of truth [sic] behind the possible illegal termination of another employee by Ms. Blandon, and suppressed [sic] Plaintiff's complaint of the unfair practice by the supervisors employed by Defendants in moving Plaintiff from floor to floor during her shift, and the questionable procedure adopted by Defendants' supervisor in requiring Plaintiff to perform duties that is [sic] appropriate for a registered nurse, Defendants became hostile to Plaintiff by suspending Plaintiff without formal investigation which eventually led to her termination without the benefit of investigation on March 27, 2012."

Defendants' Motion

In defendants' motion for summary judgment, they maintain that plaintiff was terminated because of her conduct on March 12, 2012, not due to her race/national origin. In support of defendants' motion, Peter Hill (Hill), the Corporate Director of Human Resources for ArchCare, sets forth the circumstances surrounding plaintiff's termination, and explains that plaintiff already pursued a grievance through her union regarding the termination. This grievance was denied by an impartial arbitrator.

Hill states that, prior to 2012, plaintiff was disciplined several times while working for defendants. For example, plaintiff was disciplined in 2003 for failing to sign for a

controlled substance that she had given to a resident. He continues that, on February 12, 2012, plaintiff was disciplined for using inappropriate language with another nurse. In his affidavit, Hill confirms that defendants investigated the allegation and submits the statements taken from plaintiff, the other employee involved, other employees and an individual visiting a resident at the nursing home.

Following an investigation, the "allegations of inappropriate work conduct, unprofessional behavior and inappropriate use of language were founded." Plaintiff was suspended for five days. The disciplinary action notice that plaintiff received advised her that any further occurrence of this type of behavior might result in termination.

In his sworn statement, Hill further states that, on March 13, 2012, defendants received a complaint from the brother and friend of a resident regarding the failure to provide care to this resident on the overnight shift of March 12-13, 2012. Plaintiff had been the only nurse on duty assigned to provide care to the residents of the 13th floor, including the resident in question. Hill alleges that defendants investigated and found that plaintiff had initially not responded to this resident, who was in respiratory distress. Other information

had been obtained by the video surveillance system and from other nurses, which Hill provides in the record. On March 27, 2012, Hill informed plaintiff that her "employment at the Home has been terminated effective March 14, 2012 due to jeopardizing the safety and welfare of a resident, unacceptable work performance and unacceptable conduct."

Termination

Defendants maintain that they terminated plaintiff after they concluded that plaintiff engaged in misconduct by failing to respond to a patient in respiratory distress. Hill confirmed that he made the decision to terminate plaintiff, because of his good faith belief, based on an investigation indicating that plaintiff "was guilty of jeopardizing the safety and welfare of a Mary Manning resident, unacceptable performance and unacceptable conduct due to her neglect and failure to promptly provide care to the resident in respiratory distress during the overnight shift on March 12-13, 2012."

Plaintiff's union, on her behalf, challenged her termination through the appropriate grievance procedures. The union ultimately pursued the grievance to arbitration before Jeffrey Tener (Tener), an impartial arbitrator selected by the parties. After a hearing, Tener issued an Award and Opinion

(Award) denying the union's grievance and upholding plaintiff's discharge for just cause.

In his Award, Tener set forth the positions of the parties. He noted that both the union and plaintiff agreed that if "[plaintiff] did what she has been accused of doing, there was just cause for her termination." Tener explained that, "[a]s was typical, [plaintiff] was the only nurse assigned to floors 13 and 15 on that shift." The call bell log indicated that the resident rang her bell three times. The resident, who was on oxygen 24/7, was complaining that she could not breathe. Although there was a Certified Nurse's Aide (CNA) assigned to the floor, CNAs are not permitted to handle oxygen and must inform a nurse when oxygen is required.

Tener summarized that the dispute arises over whether the CNA on duty advised plaintiff that the resident needed oxygen and what plaintiff did in response. The CNA advised Tener that she told plaintiff two times that the resident needed oxygen, but plaintiff responded that she was busy. The resident then called 911. Only when the CNA informed plaintiff about the 911 call, did plaintiff respond to the resident. During the hearing, the union argued that the CNA was not credible. It

maintained that plaintiff did not neglect the resident and was only asked to help the resident after 911 was called.

Tener concluded that, "[b]ased on a careful review of the testimony and other evidence, I have determined that [plaintiff] did ignore several such requests [from a CNA that a resident could not breathe]." Tener found the CNA to be credible while ["plaintiff], on the other hand, was not credible. She was not responsive and tended to be evasive in her answers so that questions had to be asked several times before she could answer." Tener concluded with the following, in relevant part, "the Employer did meet its burden of proving that [plaintiff] jeopardized the safety and welfare of a resident, that her work performance was unacceptable and that her failure to respond truthfully to the allegations was unacceptable. There was just cause for her termination."

As a result, defendants argue that plaintiff cannot establish any causal connection between her race/ethnicity and her termination. In addition, as an impartial arbitrator also concluded that plaintiff was terminated for just cause, collateral estoppel should preclude plaintiff's discriminatory discharge claims.

Adverse Actions/Discrimination Claims that Other Employees were Treated More Favorably

Regarding the February 12, 2012 incident, defendants argue that no inference of discrimination can be inferred under these circumstances, as plaintiff was disciplined for engaging in unprofessional work behavior. According to defendants, any claims that other employees were not disciplined for engaging similar behavior is speculative. In addition, plaintiff's situation is not the same, as she yelled and cursed at a nurse in a resident area of the nursing home, and the altercation was witnessed by a visitor. On the other hand, plaintiff testified that she did not witness the other altercation, she was unaware if any profanity was used, and it occurred in an elevator, away from the residents. Plaintiff further testified that she does believe that her behavior warranted discipline, just not suspension.

Hill rejects plaintiff's assertions regarding the termination of Filipino nurses in favor of African-American ones. He states, in relevant part:

> "Plaintiff's allegations are not true . . . In fact, not only was Marjorie Valdez, who is Asian/Filipino, hired as the Assistant Director of nursing for Many Manning based on Ms. Blandon's recommendation, but very few Asian Filipino nurses were terminated while Ms. Blandon was Director of Nursing at Mary Manning. During the approximately three year period that Ms. Blandon was the Director of Nursing at Mary Manning (i.e., from October 10, 2011 until November

> 28, 2014), a total of twenty-four LPNs were terminated at Mary Manning but only two LPNs or 8% were Asian (including Plaintiff), while nineteen LPNs or 74% were Black/African American."

Hill states that he was unaware that plaintiff is Filipino at the time of plaintiff's suspension and termination. Further, Hill continues that he was unaware of any discrimination complaint made by plaintiff. With respect to the March 12, 2012 incident, defendants argue that plaintiff's claim that she was discriminated against because she was terminated or disciplined while other non-Filipino employees were not disciplined for more serious conduct, is unfounded. Defendants state that plaintiff is not similarly situated to a CNA or a nursing supervisor, the other two employees involved with the resident in distress.

Furthermore, regarding the alleged medication errors made by other employees, defendants note that plaintiff has no personal knowledge of these errors. Even if the medication errors were true, defendants allege that plaintiff is not similarly situated to the other individuals. While there was no evidence that the medication errors posed a life-threatening risk to a resident, plaintiff's failure to respond to a resident was life-threatening. In addition, plaintiff was specifically hired by defendants in 1999 as a "float" LPN, to assist the

floors as needed. As a result, plaintiff cannot state that she was discriminated against by being a float nurse.

Retaliation

Defendants maintain that plaintiff's retaliation claims must fail as a matter of law because plaintiff did not engage in any protected activity. Plaintiff did not complain to defendants that she was being discriminated against, nor did she state that Chung was allegedly wrongfully terminated based on her race. Even if plaintiff had engaged in protected activity, the suspension and termination were based on legitimate, non-retaliatory considerations.

Plaintiff's Opposition:

Plaintiff alleges the same facts for her discrimination, retaliation and hostile work environment claims. For example, in relevant part, plaintiff claims:

> "The complaint against me was merely a ruse to Defendants and Ms. Blandon the reason and opportunity to terminate my employment because of my race and national origin, being part and parcel [sic] general scheme to harass and retaliate against me because of my effort to present evidence clearing Ms. Chung, the Korean nurse whom the Defendants and Ms. Blandon previously suspended and terminated."

Plaintiff states that, after she spoke out about Chung, she was "regularly shuffled from floor to floor." She claims that other nurses, who were not Filipinos, were not moved and could

continue to work on the floor where they had been assigned. Plaintiff states that, although she did not complain to Blandon, she complained to other supervisors that the other non-Filipino nurses were not moved. However, according to plaintiff, she did not receive a response. She continues that, while she was suspended for five days on February 12, 2012, an African-American nurse who engaged in similar behavior was not punished. According to plaintiff, a five-day suspension is the maximum penalty one can receive, and defendants issued this penalty to her, despite no patients being harmed.

Subsequently, Blandon moved her from floor to floor, so that plaintiff would make mistakes and Blandon would have reason to terminate her. She alleges that these changes in her assignment "led to my altercation Lota Amar which became the pretext for my suspension by [Blandon]."

Plaintiff reiterates her version of what transpired on March 12, 2012, and states that other nurses were also at fault in the situation. She continues that the nurse supervisor and the CNA failed to do what they were supposed to do, yet she was the only one who was terminated. According to plaintiff, the CNA should have called the supervisor but failed to do so. In addition, according to another CNA, the nurse supervisor was already with the resident and should have assisted her but did

not do so. "However, as I was the only Filipino involved, all the blame was pinned on me and not even a single charge or complaint was leveled against the nurse supervisor and the CNA who did not lift a finger to assist the resident." Plaintiff again provides examples of other African-American nurses who made medication errors yet were not disciplined. Plaintiff does not address the merits of the arbitration award but argues that it does not preclude a discrimination claim.

Plaintiff argues that Blandon has always been prejudiced against plaintiff. She provides one example where Blandon, stated, on one occasion, that plaintiff came from the "ghetto." She explained that this fortifies the claim of hostility that she faced every day in the work force. In addition, plaintiff argues that she was subject to a hostile work environment, as moving from floor to floor was unbearable and difficult.

In opposition to defendants' motion, plaintiff attaches an undated complaint from "concern staff" to several administrators employed by defendants. In relevant part, the complaint states that the employees are "tired of the abuse and mistreatment" by Blandon and "some of her unprofessional Supervisors such as Ms. Renee Lopez (Lopez), Mr./Ms. Daryl Thomas, Ms. Lisa Ianouss and Ms. Ciarni." The complaint states that "[t]o our understanding, all of the older Supervisors are being mistreated." Among other

allegations, including that Lopez is unprofessional and uses "street language," the complaint states that Blandon "discriminates against Phillipinoes. Ms. Magry is just a cover up for her discriminatory action. Ms. Magry is like her trained pet [Blandon] Leads and she follows."

Plaintiff provides a response from defendants dated January 22, 2013 indicating that defendants reviewed the disciplinary actions taken against nurses and that a "close examination of the cases of the few Filipino employees who have been discharged shows that these terminations were based on serious work issues totally unrelated to national origin." The response further noted that the complaint is anonymous, but that any employees who express their concern should speak to Human Resources as any charges of discrimination will be thoroughly investigated. Plaintiff characterizes this response as the following: "instead of conducting an in-depth investigation, Defendants perfunctorily issued its decision that the Filipinos were removed for valid reasons without looking into the merit of each case".[5]

[5] Plaintiff states that this is the response to the anonymous complaint made by staff in the record. However, this is unclear, as the complaint is undated and anonymous.

In addition, plaintiff attaches an Equal Employment Opportunity Commission (EEOC) Intake Questionnaire, dated April 15, 2013, that was filled out by a Filipino nurse, previously employed by defendants.[6] Although plaintiff has not provided any affidavits, she states that, during trial, other employees will testify in support of plaintiff's allegations.

Plaintiff's testimony:

The court notes the following portions of plaintiff's testimony, in relevant part:

Plaintiff testified that she told several other nurses that Chung did not have the medication patch. She did not advise Blandon of this, nor did she mention Chung's race or national origin when she tried to exonerate Chung. Plaintiff testified that she had never stated to anyone that she believed accusations had been made against Chung because she was Asian.

Plaintiff testified that she did not complain to Blandon that she was being moved from floor to floor due to her race/national origin. She testified that she asked Ms. Slattery (Slattery), another supervisor, why the other nurses who are not Filipino do not have to move from floor to floor. Plaintiff

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[6] There is no indication as to what transpired with this EEOC questionnaire. Defendants objected to this document, alleging that, prior to this submission, they had never seen it.

testified that Slattery did not say anything further. She further testified that Blandon is the one to make the decision about moving nurses. Plaintiff believes that the suspension she received in February 2012 was in retaliation for complaining that she was moved, while the non-Filipino nurses were not moved.[7]

In support of her argument that she is entitled to progressive discipline, plaintiff cites to a "supervisor's guide to labor relations." However, this is dated June 2013, which is after plaintiff had been terminated, and states on the cover that it is a draft. The Employee Handbook provided in the record indicates that "Discipline may include any action(s), up to and including termination." There is no mandated progressive penalty. Further, Hill testified that, although defendants generally attempt to impose progressive discipline, there are situations "when there is a particular incident that warrants skipping steps of discipline . . . Sometimes things are so serious we need to go directly to termination of employment."

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[7] During oral argument, the court asked plaintiff to clarify the claim made for a hostile work environment. Plaintiff stated that, after she attempted to exonerate Chung from any wrong-doing, plaintiff was moved from floor to floor, which made it difficult for plaintiff to perform her job. The court noted that plaintiff is alleging that she suffered an adverse action, because she complained, which is a claim for retaliation.

Plaintiff further testified that she has no firsthand knowledge about any alleged medication errors, that she heard about them from other employees and that she does not know if Blandon or anyone at ArchCare knew about the errors.

Discussion

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." Dallas-Stephenson v Waisman, 39 AD3d 303, 306 (1st Dept 2007). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact." People v Grasso, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." *Id.* at 544. "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." Ruiz v Griffin, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

II. Discrimination Claims under the NYSHRL and NYCHRL

Pursuant to the NYSHRL and the NYCHRL, it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's race or national origin. See Executive Law § 296 (1) (a); Administrative Code of the City of NY (Administrative Code) § 8-107 (1) (a).

Under the NYSHRL, the court applies the burden shifting analysis developed in McDonnell Douglas Corp. v Green (411 US 792 [1973]), where the plaintiff has the initial burden to establish a prima facie case of discrimination. Forrest v Jewish Guild for the Blind, 3 NY3d 295, 305 (2004). Plaintiff must set forth that "the plaintiff is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." Baldwin v Cablevision Sys. Corp., 65 AD3d 961, 965 (1st Dept 2009).

If the plaintiff can set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating that the plaintiff was discharged for a nondiscriminatory reason. Id. at 965. If the

employer meets this burden, the plaintiff is still entitled to "prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination." Id. (internal quotation marks and citation omitted).

The provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts. Bennett v Time Warner Cable, Inc., 138 AD3d 598, 599 (1st Dept 2016). On a motion for summary judgment dismissing a claim for discrimination under the NYCHRL, courts have reaffirmed the applicability of the burden-shifting analysis as developed in McDonnell Douglas Corp. v Green, in addition to the mixed-motive analysis. See Hudson v Merrill Lynch Inc& Co., 138 AD3d 511, 514 (1st Dept 2016) (internal quotation marks and citation omitted) ("A motion for summary judgment dismissing a City Human Rights Law claim can be granted only if the defendant demonstrates that it is entitled to summary judgment under both the McDonnell Douglas burden-shifting framework and the mixed-motive framework").

Under the mixed-motive analysis, "the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination." Melman v Montefiore Med. Ctr., 98 AD3d 107,

127 (1st Dept 2012) (internal quotation marks and citations omitted).

Adverse Actions/Disparate Treatment

Plaintiff claims that she suffered from three adverse actions during her employment; being moved from floor to floor, suspension and termination. Plaintiff argues that she can establish that these adverse actions were taken under circumstances giving rise to an inference of discrimination by demonstrating that she was subject to disparate treatment. See e.g. Mandell v County of Suffolk, 316 F 3d 368, 379 (2d Cir 2003) (internal quotation marks and citation omitted) ("A showing of disparate treatment -- that is, a showing that the employer treated plaintiff less favorably than a similarly situated employee outside his protected group -- is a recognized method of raising an inference of discrimination for purposes of making out a *prima facie* case").

Moving from Floor to Floor

It is undisputed that plaintiff was hired as a floating nurse and not assigned to a specific floor. However, she claims that, due to her race/national origin, she was moved regularly from floor to floor, sometimes for mundane tasks. As set forth below, plaintiff fails to raise a triable issue of fact with respect to this claim under the NYSHRL and NYCHRL because

plaintiff cannot establish the third element of a discrimination claim; namely, that she was subject to an adverse employment action.[8]

An adverse employment action, in pertinent part, is as follows:

> "An adverse employment action requires a materially adverse change in the terms and conditions of employment. To be materially adverse a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. . . . A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation."

Messinger v Girl Scouts of U.S.A., 16 AD3d 314, 314-315 (1st Dept 2005) (internal quotation marks and citations omitted).

Under the NYCHRL, "differential treatment may be actionable even where the treatment does not result in an employee's discharge". Suri v Grey Global Group, Inc., ___AD3d___, 2018 NY Slip Op 05627, *17 (1st Dept 2018); see also Chin v New York City

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[8] Although plaintiff testified that she was not making a claim that she was a floater or went between floors due to her national origin/race, in her affidavit she alleges it was due to her race/national origin.

Hous. Auth., 106 AD3d 443, 444 (1st Dept 2013) (internal quotation marks and citations omitted) ("[N]one of this alleged conduct on defendant's part either constituted an adverse action, under the [NYSHRL], or disadvantaged plaintiff, under the [NYCHRL]").

Floating from floor to floor as needed, even for the task of giving medication, is not an adverse employment action, because it did not "amount to a materially adverse change in the terms and conditions of [plaintiff's] employment." Humphries v City Univ. of N.Y., 146 AD3d 427, 427 (1st Dept 2017); see also Silvis v City of New York, 95 AD3d 665, 665 (1st Dept 2012) (internal quotation marks and citation omitted) ("Plaintiff's transfer from the position of literacy coach to a classroom teacher was merely an alteration of her responsibilities, and not an adverse employment action. Apart from a change in her duties, plaintiff retained the terms and conditions of her employment, and her salary remained the same").

Furthermore, to be considered materially adverse, a change in working conditions must be more disruptive than a "mere inconvenience or an alteration of job responsibilities." Messinger v Girl Scouts of U.S.A., 16 AD3d at 315. Thus, requiring plaintiff to move around the floors more than she

would like, is simply an inconvenience, and does not amount to an adverse employment action.

Nevertheless, even if being moved from floor to floor could be considered an adverse action, plaintiff only speculate, and offers no evidence that she was moved around due to a discriminatory animus while African-American nurses were not. See e.g. Chin v New York City Hous. Auth., 106 AD3d at 445 (Plaintiff has failed to demonstrate how "discrimination was one of the motivating factors for the defendant's conduct").

Suspension

Plaintiff believes that her race/national origin was a motivating factor in her suspension. Plaintiff does not dispute the underlying altercation that led to this disciplinary action, nor does she dispute that her behavior warranted disciplinary action. However, she claims that she was subject to disparate treatment because other non-Filipino employees who got into similar verbal altercations were not punished.

Where, as here, the claim of disparate treatment is based on inconsistent disciplinary practices, a plaintiff is required "to show that similarly situated employees who went undisciplined engaged in comparable conduct." Watson v Arts & Entertainment Television Network, 2008 WL 793596, *16, 2008 US Dist Lexis 24059, *45 (SD NY, Mar. 26, 2008, No. 04-Civ-1932

[HBP]) (internal quotation marks and citations omitted), affd 352 Fed Appx 475 (2d Cir 2009). In the instant situation, plaintiff has failed to meet her burden of demonstrating that her comparators engaged in similar conduct. As noted in the record, plaintiff's altercation took place in front of the residents and a visitor wrote a complaint, while the incident with Jones occurred in an elevator. Further, plaintiff only speculates what transpired with Jones, as she was not present during that incident.

Termination

With respect to disparate treatment, plaintiff alleges that defendants discriminated against her because of her race/national origin because non-Filipino nurses were not terminated when they committed other, more serious offenses, such as errors giving medication. In one example, plaintiff states that a patient was overdosed with Percocet, but that the African-American nurses involved had no charges against them.

Here, plaintiff has failed to meet her burden of demonstrating that her comparators were similarly situated. To begin, plaintiff was found to have jeopardized the safety of a patient, and only speculates that her comparators engaged in similar conduct when they made medication errors. It is well settled that "[a] plaintiff relying on disparate treatment

evidence must show she was similarly situated in all material respects to the individuals with whom she seeks to compare herself." Mandell v County of Suffolk, 316 F3d at 379 (internal quotation marks and citation omitted).

In addition, plaintiff claims that two other employees involved in the incident that led to her termination were not disciplined, even though they engaged in misconduct. According to plaintiff, the CNA should have called other nurses if the patient was in respiratory distress. Plaintiff also speculates that the nurse supervisor should have assisted the resident.

"In order for employees to be similarly situated for the purposes of establishing a plaintiff's prima facie case, they must have been subject to the same standards governing performance evaluation and discipline and must have engaged in conduct similar to plaintiff's." Norville v Staten Island Univ. Hosp.,196 F Supp 3d 89, 96 (2d Cir 1999) (internal quotation marks and citation omitted). Here, plaintiff cannot meet her prima facie burden of establishing a prima facie case because she has not established that the other two employees, each with differing job titles from plaintiff's, were subject to the same discipline standards or engaged in the same conduct. For example, it is undisputed that a CNA is not permitted to handle oxygen.

Furthermore, Hill, the one who terminated plaintiff, testified that he was unaware she was Filipino at the time of termination. See e.g. Castillo v Montefiore Med. Ctr., 155 AD3d 426, 426 (1st Dept 2017) (Plaintiff failed to raise a triable issue of fact under the NYCHRL to support her claims of pregnancy-based discrimination when plaintiff stated that she did not inform the administrator of her pregnancy and the administrator testified that she did not have knowledge of plaintiff's pregnancy prior to her termination").

Plaintiff asserts, without any evidence, that 15 out of 25 Filipino nurses were terminated and replaced by 17 African-American nurses after Blandon was appointed. However, plaintiff has not presented any evidence of these statistics. "Vague references that plaintiff's treatment was inferior to that afforded to unidentified comparators are insufficient to withstand a motion for summary judgment." Watson v Arts & Entertainment Television Network, 2008 WL 793596 at *16, 2008 US Dist Lexis 24059 at *45. On the other hand, Hill, who is the Corporate Director of Human Resources, stated that, between 2011 and 2014, two Asian and 19 African-American LPNs were terminated.

Finally, plaintiff submits an anonymous complaint from employees and an EEOC questionnaire. Although plaintiff

speculates that defendants did not investigate these and other claims, the record indicates that defendants did respond and did address the employees' complaint. Plaintiff now asserts that she will have various employees testify on her behalf to confirm her allegations of disparate treatment. However, at this time, defendants have met their burden on the motion for summary judgment and plaintiff's reliance on hypothetical testimony cannot raise a triable issue of fact. Although discovery has already taken place and multiple people have been deposed, plaintiff has not submitted affidavits or deposition testimony from these individuals. "In opposing the motion for summary judgment, the plaintiff should have laid bare *all* of [her] evidence and arguments." Popalardo v Marino, 83 AD3d 1029, 1030 (2d Dept 2011) (internal quotation marks and citations omitted); see also Costello v Saidmehr, 236 AD2d 437, 438 (2d Dept 1997) (internal quotation marks and citation omitted) ("A shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment").[9]

[9] In any event, the court has reviewed the employees' complaint and the EEOC form in the record. Plaintiff still has not produced any evidence that she was either terminated, or treated differently from anyone else under the circumstances, due to her race/national origin.

Plaintiff is unable to meet her prima facie burden in the McDonnell Douglas framework. Even if plaintiff could meet her burden, as set forth below, she has failed to produce any evidence demonstrating that the decision to suspend or terminate her was pretextual. Regarding the suspension, defendants have provided a legitimate reason for suspending plaintiff for five days to rebut plaintiff's prima face case.

Plaintiff does not dispute that she was involved in an altercation at work or that she deserved some disciplinary action taken against her. Nevertheless, plaintiff alleges that defendants' choice to give her the maximum penalty after her verbal altercation, instead of a lesser penalty, demonstrates race/national origin-based discrimination.

Plaintiff's arguments are unsupported and are without merit. Defendants' handbook states that discipline may include any action, including termination. Plaintiff has failed to demonstrate how defendants deviated from the company policy in their disciplinary determination. The court will "not sit as a super-personnel department that reexamines an entity's business decisions." Baldwin v Cablevision Sys. Corp., 65 AD3d at 966 (internal quotation marks and citation omitted).

Furthermore, although plaintiff believes that she should have been given a lesser penalty, her disagreement with the

given disciplinary action does not raise an inference of pretext. It is well settled that, "a challenge . . . to the *correctness* of an employer's decision, does not, without more, give rise to the inference that the [adverse action] was due to [race/national origin] discrimination]." Melman v Montefiore Med. Ctr., 98 AD3d at 121 (internal quotation marks and citations omitted).

With respect to the termination, defendants investigated an incident and found that plaintiff should be terminated for compromising the health of a resident. Although plaintiff states that there was never any investigation, the record indicates that there were formal investigations into both plaintiff's suspension and her termination. Moreover, plaintiff's union represented her in an arbitration proceeding, and a neutral arbitrator found that plaintiff was not credible with her version of what transpired, and that defendants had just cause for termination.

Plaintiff now claims that she did not commit any misconduct in connection to the incident that lead to her termination. Nevertheless, given the arbitrator's detailed findings that plaintiff's work performance was unsatisfactory, plaintiff is collaterally estopped from re-litigating any factual issues with respect to her misconduct that resulted in termination. See

Advanced Aerofoil Tech. AG v Missionpoint Capital Partners LLC, 140 AD3d 663, 664 (1st Dept 2016) ("doctrine of collateral estoppel bars plaintiff from litigating two factual issues that were determined in a prior arbitration proceeding commenced by plaintiff").[10]

Accordingly, as evidence of "unsatisfactory work performance" is a nondiscriminatory motivation for defendants' actions, defendants have met their burden of providing a nondiscriminatory reason for both the suspension and termination. Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 46 (1st Dept 2011). In response, plaintiff fails to raise a triable issue of fact as to whether the reasons proffered by defendants were "merely a pretext for discrimination." Hudson v Merrill Lynch & Co., Inc., 138 AD3d at 514.

Turning to the mixed-motive analysis, plaintiff has not produced any evidence that race/national origin discrimination played a motivating role in the adverse actions taken against

[10] The court notes that the arbitration addressed plaintiff's grievance, pursued through her union, in accordance with the collective bargaining agreement. It did not address plaintiff's statutory discrimination claims. "Thus, the arbitrator's decision did not have preclusive effect on the plaintiff's separate action based on unlawful discrimination in employment." Caban v New York Methodist Hosp., 119 AD3d 717, 718 (2d Dept 2014).

her. See e.g. Matias v New York & Presbyt. Hosp., 137 AD3d 649, 650 (1st Dept 2016) ("The absence of any evidence [that defendants were motivated by] discriminatory animus is equally fatal to any claim of mixed motive [under the NYCHRL]").

Even under the more liberal standards of the NYCHRL, plaintiff fails to raise to triable issue of fact that she was treated less well than similarly situated employees outside of her protected class. As noted above, plaintiff provides no evidence that employees outside of her protected class were given preferential treatment with respect to defendants' disciplinary policies, or that they were even similarly situated employees. Further, defendants attest that, out of 24 nurses that were terminated between 2011 and 2014, two were Filipino and 19 were African-American. Moreover, a Filipino nurse was promoted at Blandon's recommendation. In response, plaintiff fails to raise an inference of race/national origin discrimination as she "has presented no statistical data or analysis" in support of her argument that defendants terminated more Filipino nurses on average during the period. *Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 78 (1st Dept 2017).

In summary, the specific instances of alleged disparate treatment referenced by plaintiff do not suggest discrimination

based on race or national origin. Accordingly, defendants are granted summary judgment with respect to plaintiff's discrimination claims in the complaint.

III. Retaliation Claims under the NYSHRL and NYCHRL

Plaintiff has made various intertwined discrimination and retaliation claims. The first retaliation claim appears to be plaintiff's belief that, after she advised defendants that Chung, an Asian nurse, should not have been terminated, defendants retaliated against plaintiff by moving her from floor to floor. According to plaintiff, moving her from floor to floor caused her to engage in an altercation with another nurse, for which she was suspended five days. Shortly after returning from suspension, defendants allegedly continued to retaliate against plaintiff by terminating her.

Plaintiff seems to alternately allege a related retaliation claim, namely: after she complained to numerous supervisors that she was being moved around while non-Filipino nurses were not, defendants retaliated against her by suspending her for five days when she had a verbal altercation with another nurse. According to plaintiff, the suspension was unfair because she should have been given a progressive disciplinary penalty, not

the maximum penalty, and her conduct did not pose a risk to patients.

Retaliation:

Under both the NYSHRL and the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Executive Law § 296 (7); Administrative Code § 8-107 (7). Under the broader interpretation of the NYCHRL, "[t]he retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7).

When analyzing claims for retaliation, courts apply the burden shifting test as set forth in McDonnell Douglas Corp. v Green (411 US at 802), which places the "initial burden" for establishing a prima facie case of retaliation on the plaintiff. For a plaintiff to successfully make out a prima facie claim of retaliation under the NYSHRL, she must demonstrate that: "(1) [she] has engaged in a protected activity, (2) [her] employer was aware of such activity, (3) [she] suffered an adverse employment action based upon the activity, and (4) a causal connection exists between the protected activity and the adverse

action." Harrington v City of New York, 157 AD3d 582, 585 (1st Dept 2018). Under the NYCHRL, instead of demonstrating that she suffered from an adverse action, plaintiff need only "show only that the defendant took an action that disadvantaged [her]." Id. (internal quotation marks and citations omitted).

"The term protected activity refers to action taken to protest or oppose statutorily prohibited discrimination." Sharpe v MCI Communications Servs., 684 F Supp 2d 394, 406 (SD NY 2010) (internal quotation marks and citations omitted); see also Brook v Overseas Media, Inc., 69 AD3d 444, 445 (1st Dept 2010) (internal citation omitted) (referring to protected activity under the NYCHRL as "'opposing or complaining about unlawful discrimination'").

Here, plaintiff cannot establish the first element in a prima facie case of retaliation under either the NYSHRL or the NYCHRL because she did not engage in protected activity. Plaintiff alleges that she was retaliated against after she advised several people about Chung's improper termination. However, plaintiff's complaints did not "constitute protected activity," as plaintiff never asserted to anyone that Chung was improperly terminated because of her race or national origin. Fruchtman v City of New York, 129 AD3d 500, 501 (1st Dept 2015);

see also Breitstein v Michael C. Fina, Co., 156 AD3d 536, 537 (1st Dept 2017) ("In support of his retaliation claim, plaintiff failed to demonstrate that he engaged in a protected activity").

Plaintiff subsequently states that, after she complained to three supervisors about being moved from floor to floor, she was retaliated against by being suspended after engaging in an altercation with another nurse. In her testimony, plaintiff clarified that she verbally complained to one supervisor specifically how other non-Filipino nurses were not being moved, but that the supervisor did not respond to her complaint. In her statement to Blandon regarding the altercation, plaintiff asked why she was being moved around, while the other nurse was not asked to move. Again, there is no indication that plaintiff engaged in protected activity. Int'l Healthcare Exch., Inc. v Global Healthcare Exch., LLC, 470 F Supp 2d 345, 357 (SD NY 2007), (internal quotation marks and citations omitted) ("ambiguous complaints that do not make the employer aware of alleged discriminatory misconduct do not constitute protected activity. The complaint must put the employer on notice that . . . discrimination is occurring").

However, even assuming, arguendo, that plaintiff was opposing discriminatory practices, there is no indication that

Blandon or Hill, the supervisors responsible for her suspension and termination, were aware of this activity. In any event, no causal connection exists between plaintiff's complaints and defendants' actions, and defendants have provided legitimate business reasons their actions.

Accordingly, defendants shall be granted summary judgment dismissing the claims for retaliation under the NYSHRL and NYCHRL.

IV. Hostile Work Environment Claims

NYSHRL

Under the NYSHRL, a hostile work environment is present when "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Forrest v Jewish Guild for the Blind, 3 NY3d at 310 (internal quotation marks and citation omitted).

"Whether a workplace may be viewed as hostile or abusive -- from both a reasonable person's standpoint as well as from the victim's subjective perspective -- can be determined only by considering the totality of the circumstances." Matter of Father Belle Community Ctr. v New York State Div. of Human

Rights, 221 AD2d 44, 51 (4th Dept 1996). These circumstances include "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Forrest v Jewish Guild for the Blind, 3 NY3d at 310-311 (internal quotation marks and citation omitted). Generally, isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment; to be actionable, the offensive conduct must be pervasive. Matter of Father Belle Community Ctr. v New York State Div. of Human Rights, 221 AD2d at 51.

In combination with her discrimination and retaliation claims, plaintiff alleges that she was subject to a hostile work environment when her floor assignments were changed, as this was stressful for her. She adds that, not only was this done in retaliation for the Chung incident, but that it altered the conditions of her employment. Regardless, plaintiff's allegations that she was regularly moved from floor to floor cannot support a hostile work environment claim. See Witchard v Montefiore Med. Ctr., 103 AD3d 596, 596-597 (1st Dept 2013) ("Nor does plaintiff's contention that she was transferred to an

assignment, which she perceived to be less desirable, establish a claim of hostile work environment").

In addition, plaintiff claims that, on one occasion, Blandon made an offensive remark to plaintiff. According to plaintiff, this exemplifies the hostility she faced in the workplace. While plaintiff may have been exposed to a "mere offensive utterance," a reasonable person cannot find that plaintiff was subject to a hostile work environment. Brennan v Metropolitan Opera Assn., 284 AD2d 66, 72 (1st Dept 2001). Considering the totality of the circumstances, even in the light most favorable to plaintiff, plaintiff fails to raise a triable issue of fact with respect to her NYSHRL hostile work environment claim.

NYCHRL

A hostile work environment exists where an employee "has been treated less well than other employees because of her protected status." Chin v New York City Hous. Auth., 106 AD3d 443, 445 (1st Dept 2013). "Under the NYCHRL, there are not separate standards for discrimination and harassment claims." Johnson v Strive E. Harlem Empl. Group, 990 F Supp2d 435, 445 (SD NY 2014) (internal quotation marks and citation omitted). To establish a hostile work-environment claim under the NYCHRL,

"the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her [protected status]." Williams v New York City Hous. Auth., 61 AD3d 62, 78 (1st Dept 2009). Despite the broader application of the NYCHRL, conduct that consists of "petty slights or trivial inconveniences . . . do[es] not suffice to support a hostile work environment claim." Buchwald v Silverman Shin & Byrne PLLC, 149 AD3d 560, 560 (1st Dept 2017) (citation omitted).

As noted with plaintiff's disparate treatment claim, even viewing the evidence in a light most favorable to plaintiff, plaintiff has not presented any evidence that race/national origin discrimination played any role in the actions taken against her. Although plaintiff speculates that she treated less well than other employees due to her race/national origin, even under the lesser burden of the NYCHRL, plaintiff "is required to do more than cite to [her] mistreatment and ask the court to conclude that it must have been related to [her protected status]." Campbell v Cellco Partnership, 860 F Supp 2d 284, 296 (internal quotation marks and citation omitted).

Plaintiff alleges that Blandon's one allegedly discriminatory remark raises a triable issue of fact with respect to discriminatory intent and hostile work environment. She claims that she "feared" Blandon due to her power to "suspend Filipino nurses even without investigation and unwillingness to find the truth." However, "a plaintiff's feelings and perceptions of being discriminated against are not evidence of discrimination." Basso v Earthlink, Inc., 157 AD3d 428, 430 (1st Dept 2018) (internal quotation marks and citation omitted). Furthermore, Blandon's comment is "at most a stray remark that does not, without more, constitute evidence of discrimination." Id. (internal quotation marks and citation omitted). Thus, defendants must be granted summary judgment with respect to plaintiff's hostile work environment claims under the NYSHRL and NYCHRL.

10/26/2018
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE