At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 24th day of January, 2019.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

PAMELA WILSON
Plaintiff,
- against -

LONG ISLAND COLLEGE HOSPITAL, STAFFCO OF BROOKLYN, LLC AND SUNY DOWNSTATE MEDICAL CENTER
Defendants.

Index No.: 504099/2014

Motion Seq. # 7 & 8

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	PAPERS NUMBERED
StaffCo's Notice of Motion, Affidavits, Affirmation and Exhibits	1
StaffCo's Memorandum of Law in Support of Summary Judgment	2
SUNY Downstate Medical Center's Notice of Motion, Affidavits, Affirmation and Exhibits	3
SUNY Downstate Medical Center's Memorandum of Law in Support of Summary Judgment	4
Plaintiff's Memorandum of Law in Opposition to Summary Judgement	5
StaffCo's Reply Memorandum is Support of Summary Judgment	6
SUNY Downstate Medical Center's Reply Memorandum in Support of Summary Judgment	7

Upon the foregoing papers Defendant, StaffCo of Brooklyn, LLC ("StaffCo"), moves this Court for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the First Amended Complaint with prejudice and granting StaffCo such other and further relief as this Court deems just and proper. SUNY Downstate Medical Center ("SUNY") moves this Court for an Order pursuant to CPLR § 3212 granting summary judgment, dismissing the Complaint in its entirety and for such other relief this Court deems proper, together with costs, disbursements and such other relief as this Court deems just, proper and equitable.

Background

Pamela Wilson ("Plaintiff") is a black female who was born in Guyana in 1952. Plaintiff was hired by Long Island College Hospital ("LICH") in or about 1998 and worked there until August 17, 2012. In 1998, LICH was owned and operated by Continuum Health Partners. Between about September 2003 and August 17, 2012 Plaintiff held the position of Department of Cardiology Fellowship Coordinator.

In or about December 2006, Plaintiff complained to her direct supervisor, Linda Tafone, that a white male was hired to a similar position as she held, but because of a "manager" designation, was paid more than Plaintiff. In or about June 13, 2007, Plaintiff filed a charge with the EEOC alleging discrimination on the basis of gender, race and/or national origin and retaliation. In or about September 2007 Plaintiff filed a supplemental charge with the EEOC naming Tafone as Respondent. LICH eventually implemented a salary increase for Plaintiff and Plaintiff did not further pursue her charge with the EEOC.

In or about July 2011, SUNY took over the operation of LICH and entered into a contract with StaffCo, a professional employer organization ("PEO"), to employ the non-physician staff. Thereafter, Plaintiff was offered and accepted employment with StaffCo at the LICH facility. Defendants contend that throughout SUNY's acquisition of the LICH facility, the facility was facing financial hardship. Ultimately the LICH facility was closed.

StaffCo commenced a reduction of force in the LICH facility and began layoffs. Plaintiff received notice in July 2012 that she would be laid off on August 17, 2012. Dr. Balendu Vasavada, a physician at LICH, informed Plaintiff that another position, Residency Coordinator, would be open to LICH employees effected by the layoffs. In or around August 2012, Plaintiff applied for

the Residency Coordinator position and interviewed with Tafone on or about August 19, 2012. Plaintiff was not hired as Residency Coordinator. Dianna Torres, a Latina 18 years younger than Plaintiff, was hired in Plaintiff's stead.[1] In this action, Plaintiff alleges Defendants discriminated against her in 1) her selection for termination in the reduction of force, and 2) Defendants' decision to hire Torres over Plaintiff as Residency Coordinator on the basis of age, race, color, and national origin and in retaliation for her 2007 EEOC charge.

Claims Related to Failure to Hire Plaintiff

As indicated above, Plaintiff claims that LICH, StaffCo and SUNY ("Defendants") discriminated against her in their refusal to hire her as Residency Coordinator, in violation of the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL"). Under those statutes, claims are analyzed under the standard for employment discrimination claims brought under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA), under the ***McDonnell Douglas*** standard.[2] Under the ***McDonnell Douglas*** standard, to support a prima facie case of employment discrimination, the plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she suffered adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. ***See McDonnell Douglas Corp. v Green Supra*** and ***Forrest v Jewish Guild for the Blind, 3 NY 3d 295, 305 (2004).*** Moreover, "[w]hen a decision to hire... one person rather than another is reasonably attributable to an

[1] Notably, Torres also identifies as black. Plaintiff contends that Torres has lighter skin than Plaintiff.
[2] ***See McDonnell Douglas Corp. v Green, 411 U.S. 792 (1973).***

honest even though partially subjective evaluation of their qualifications, no inference of discrimination can be drawn." ***Lieberman v Gant, 630 F.2d 60, 67 (2d Cir. 1980).***

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. ***CPLR 3212[b]***; ***Gilbert Frank Corp.v Federal Ins. Co., 70 NY2d 966, 967 (1988)***; ***Zuckerman v City of New York, 49 NY2d 557, 562 (1980).*** On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. ***Spinelli v Procassini, 258 AD2d 577 (2nd Dept. 1999)***; ***Tassone v Johannemann, 232 AD2d 627, 628 (2nd Dept. 1996)***; ***Weiss v Garfield, 21 AD2d 156, 158 (3rd Dept. 1964)***. In the instant case, Plaintiff is clearly a member a protected class. She plainly suffered an adverse employment action when her employer refused to hire her for the Residency Coordinator position. Plaintiff was likely qualified to hold the position of Residency Coordinator, as evidenced by the fact that she was interviewed for the position. However, Plaintiff failed to establish the adverse employment action gave rise to an inference of unlawful discrimination. Defendants were able to articulate a legitimate, non-retaliatory reason for hiring Torres instead of Plaintiff. Specifically, the Residency Coordinator position required overseeing some 81 residents, and in a previous job Torres had done similar work. Defendants are permitted to make that determination without being second-guessed by this Court. ***See Dorecely v Wyandanch Union Free School Dist., 665 F.Supp.2d 178 (E.D.N.Y. 2009).*** It follows that Plaintiff failed to meet the burden necessary to establish discriminatory hiring. Therefore, summary judgment is granted dismissing the claim of discriminatory hiring.

Claims Related to Reduction of Force and Layoffs

a. New York City Human Rights Law Claims Against SUNY

Plaintiff alleges SUNY discriminated and retaliated against her in violation of the NYCHRL. It is well established that the City of New York lacks the power to waive the State of New York's sovereign immunity by passing an anti-discrimination statute applicable to instrumentalities of the state. ***Jattan v Queens College of City University of New York, 64 AD 3d 540, 542 (2d Dept. 2009).*** SUNY is an instrumentality of the State of New York, Plaintiff failed to oppose SUNY's contention that the NYCHRL claims are barred by sovereign immunity. Moreover, Plaintiff failed to address the sovereign immunity defense in her lengthy Memorandum of Law in Opposition to Summary Judgment. Therefore, summary judgment is granted dismissing the fourth, fifth and sixth causes of actions of the complaint brought against SUNY under the NYCHRL are dismissed.

b. Claims of Race, Color and National Origin Discrimination

Plaintiff contends that Defendants discriminated against her because of her race, color and/or national origin, in laying her off during the reduction of force. Under the ***McDonnell Douglas*** standard, the burden is on the plaintiff to establish unlawful discrimination. ***St. Mary's Honor Center v Hicks, 509 US 502, 506 (1993).*** In the instant case, Plaintiff failed to make any showing whatsoever that the circumstances surrounding her lay-off give rise to an inference of race, color and/or national origin discrimination. Plaintiff was laid off when her employer was facing financial hardship, Plaintiff failed to show that her race, color and/or national origin in any way contributed to her lay-off. Accordingly, summary judgment is granted dismissing the second and fourth causes of action of the complaint regarding race, color and/or national origin discrimination, in violation of the NYSHRL and NYCHRL.

c. Claims of Retaliation

Plaintiff argues that Defendants retaliated against her because she had previously complained of unlawful discrimination in violation of the NYSHRL and NYCHRL. As stated above, in or about December 2006 Plaintiff complained about gender, race and/or national origin discrimination and in 2007 she filed charges with the EEOC. Plaintiff was laid off in 2012. To make out a prima facie showing of retaliation, Plaintiff must demonstrate: (1) participation in a protected activity known to defendant; (2) an adverse employment action; and (3) a causal connection between the protected activity and the adverse employment action. ***Forrest Supra at 327.*** In arguing retaliation, Plaintiff maintains that the Defendants engaged in a "steady drumbeat" of retaliatory conduct dating back to when Plaintiff filed the EEOC charges. ***See Duplan v City of New York, 888 F3d 612 (2d Cir. 2018).*** However, Plaintiff fails to show any connection between Plaintiff's layoff and her 2006/2007 complaint, much less a continuous and "steady drumbeat" of retaliatory behavior over a five-year period. Additionally, Defendants present a non-pretextual reason for laying off Plaintiff in that LICH was experiencing severe financial hardship and Plaintiff was not the only employee laid off at that time. Accordingly, summary judgment is granted dismissing the third and sixth causes of action alleging retaliation.

d. SUNY's Defense that StaffCo was the Sole Employer

SUNY claims that StaffCo was a registered professional employer organization (PEO), which SUNY contracted to employ the non-physician staff of the LICH facility. Furthermore, SUNY maintains that Staffco was Plaintiff's only employer and Plaintiff was never employed by SUNY. Plaintiff counters that StaffCo and SUNY were joint employers and SUNY can, therefore, be liable for discrimination that occurred at the LICH facility. It is well settled that the term "employer" is

construed broadly under the NYSHRL and NYCHRL such that a direct employer/employee relationship is not required. ***Gryga v. Ganzman, 991 F. Supp. 105, 108 (E.D.N.Y. 1998).*** In ***McDougal v State University of New York Downstate Medical Center, Long Island College Hosp., 2013 WL 1437616, at 4 (E.D.N.Y. 2013)***, a case involving the facility in question in the present case, the Eastern District court refused to find that StaffCo was the only employer for the purpose of Title VII, NYSHRL and NYCHRL. Significantly, in the PEO agreement, "StaffCo expressly agrees to *co-employ* the StaffCo Employees with SUNY" (PEO Page 2, emphasis added). At the very least, whether SUNY was Plaintiff's employer for the purpose of the statutes in question is an issue of fact that cannot be determined at this stage of the litigation. Accordingly, the branch SUNY's motion for summary judgment alleging SUNY was not Plaintiff's employer is denied.

e. Claims of Age Discrimination

Plaintiff claims that she was discriminated against because of her age when Defendants laid Plaintiff off during the reduction of force. Age discrimination is analyzed under the ***McDonnell Douglas*** standard. ***See Abdu-Brisson Supra at 466.*** In the instant case, Plaintiff was over 40-years old and, therefore, a member of a protected class. Moreover, Plaintiff has made a prima facie showing that she was qualified to hold the Department of Cardiology Fellowship Coordinator position and suffered an adverse employment action when she was laid off. Furthermore, in the light most positive to Plaintiff, her layoff may give rise to an inference of discrimination. Specifically, Plaintiff points to the fact that employees over age 40 in Plaintiff's designation (Management Coordinator) were significantly more likely to be laid off than

employees under the age of 40.[3] Defendants contend that while the majority of laid-off employees in Plaintiff's designation were over 40-years-old, the layoffs actually increased the average age of the hospital-wide workforce. Whether or not age discrimination did occur for members of Plaintiff's job classification is a question of fact that cannot be determined at this stage of the litigation. Accordingly, the motion for summary judgment on the first and fourth causes of action alleging age discrimination is denied. It Is HEREBY:

ORDERED that StaffCo's motion is granted dismissing that the second, third, fifth and sixth causes of action of the complaint against StaffCo, and it is further

ORDERED that StaffCo's motion is denied as to the first and fourth causes of action, and it is further

ORDERED that SUNY's motion is granted dismissing that the second, third, fourth, fifth and sixth causes of action of the complaint against SUNY, and it is further

ORDERED that SUNY's motion is denied as to the first cause of action.

This is the Decision and Order of the Court.

ENTER

LOREN BAILY-SCHIFFMAN
JSC

HON. LOREN BAILY-SCHIFFMAN

[3] Of the 41 management coordinators employed before the reduction of force, 16 were terminated. Of the 16 terminated, 13 were over the age of 40 and only 3 were under the age of 40.