

-----X
MONIQUE ROMAIN,

Index No. 302633/2007

Petitioner,

- against -

DECISION AND ORDER

BRONX LEBANON HOSPITAL CENTER and
NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents
-----X

LUCY BILLINGS, J.S.C.:

Petitioner challenges respondent New York State Division of Human Rights' decision upholding respondent Bronx Lebanon Hospital Center's termination of her employment and finding the termination lawful and non-discriminatory on the basis of her race or disability. She asks the court to vacate and reverse that decision and find that the hospital's termination of her employment was unlawfully discriminatory on the basis of her disability. C.P.L.R. §§ 7803(2) and (3), 7806; N.Y. Exec. Law § 296(1)(a) and (e) and (7).

Respondent Bronx Lebanon Hospital Center moves to dismiss the proceeding. C.P.L.R. §§ 406, 409(b), 3211(a)(7), 7804(d) and (f). After oral argument and repeated but unsuccessful attempts to settle the proceeding, the court denies the petition and grants respondent hospital's motion to dismiss the proceeding for the reasons explained below.

RECEIVED

MAR 25 2009

I. UNDISPUTED MATERIAL FACTS

Petitioner was employed by Bronx Lebanon Hospital Center as a Laboratory Technologist for over 36 years. In late August 2006 she received a memorandum dated August 24, 2006, from James Dunne, Administrator of the hospital's Departments of Pathology and Respiratory Therapy, addressed to all Clinical Laboratory Technologists, Technicians, Cytotechnologists, and Supervisors regarding a new New York law, N.Y. Educ. Law § 8605(1), requiring their licensure effective September 1, 2006. The memorandum further notified petitioner that: "Anyone failing to file an application with the SED [State Department of Education, the licensing agency] . . . by 9/30/06 will be placed off work, without pay, until you provide proof of compliance" Petition, Ex. K.

As petitioner intended to retire in December 2006, she informed her Lab Supervisor Lehksam Beharry that she did not intend to apply for the license. Dunne also was aware that petitioner did not intend to apply for the license. Of the hospital's 63 employees required to be licensed under the new law, N.Y. Educ. Law § 8605(1), she was the only employee who failed to apply for the license.

At the end of September 2006 petitioner took leave due to pain, tingling, numbness, and weakness in her left shoulder and arm, which disabled her from working. She claimed the more demanding duties that Dunne continually assigned to her and not to other personnel in her department caused her disabling

condition. On October 13, 2006, her Lab Supervisor Beharry authorized petitioner's receipt of disability benefits. While on leave, petitioner received a memorandum dated October 20, 2006, from James Dunne that:

Effective 10/1/06, you were no longer eligible to work as a Lab Technologist, and were subsequently placed off-duty without pay.

To date, you have not provided the necessary documentation to prove compliance with the NYS licensure law. Therefore, you do not meet the necessary licensure requirement for employment as a Lab Technologist, and are hereby terminated from your position at Bronx-Lebanon Hospital Center effective immediately.

Petition, Ex. H.

Petitioner intended to return to work at the end of November 2006, to work for approximately two weeks, and to use two weeks of accrued vacation time. Due to her termination, she did not receive wages or vacation benefits for this period.

II. PETITIONER'S CLAIM OF DISCRIMINATION

Although SED notified petitioner that she could not practice as a laboratory technologist without a license, Petition, Ex. N, her employer never notified her that she would be terminated, as opposed to suspended without pay, from her employment due to her failure to obtain a license, until she was in fact terminated. This distinction, however, is of no consequence. First, as petitioner readily admitted to her supervisors that she never intended to obtain the license, an indefinite suspension without pay would not have provided her an opportunity to regain her position. Second, she claims her termination was unlawful not because she received no advance written notice, but because the

termination was based on her disability.

To establish discrimination based on disability or petitioner's status on leave due to her disability, petitioner must show she was qualified to hold the position from which she was terminated. Pimentel v. Citibank, N.A., 29 A.D.3d 141, 145 (1st Dep't 2006); Staskowski v. Nassau Community Coll., 53 A.D.3d 611 (2d Dep't 2008); McCarthy v. St. Francis Hosp., 41 A.D.3d 794 (2d Dep't 2007); McKenzie v. Meridian Capital Group, LLC, 35 A.D.3d 676, 677 (2d Dep't 2006). See Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 305 (2004); Dickerson v. Health Mgt. Corp. of Am., 21 A.D.3d 326, 328 (1st Dep't 2005); Mete v. New York State Off. of Mental Retardation & Dev. Disabilities, 21 A.D.3d 288, 290 (1st Dep't 2005); Kent v. Papert Cos., 309 A.D.2d 234, 242 (1st Dep't 2003). While petitioner's job performance may have been exemplary for over 36 years, and petitioner may have satisfied all the requirements of education, skill, and experience for her position, as of October 1, 2006, Education Law §§ 8602 and 8605(1) prohibited her from performing any of a laboratory technologist's functions until she, at minimum, applied for a license from SED. Petition, Exs. H, K, and N. Once she filed the application, she would have received a temporary work permit from SED while her application was processed. Id., Exs. K and N. Although correspondence she received from SED indicates she may have been eligible to submit an application until September 1, 2007, she would have been engaging in unauthorized practice if she continued to practice as

a laboratory technologist in the meantime. Id., Ex. N. See N.Y. Educ. Law § 8602.

Thus, even though petitioner may have been permitted under the Education Law to wait to apply for her license until her leave concluded, her admission that did not intend ever to apply for the license establishes her lack of legal authorization to perform a laboratory technologist's functions after September 30, 2006. Petition ¶¶ 36, 59-60, and 63. See Pimentel v. Citibank, N.A., 29 A.D.3d at 146; Staskowski v. Nassau Community Coll., 53 A.D.3d 611; McKenzie v. Meridian Capital Group, LLC, 35 A.D.3d at 677. Without that authorization she lacked the qualifications for her position as a Laboratory Technologist and was unable to perform her job. Kent v. Papert Cos., 309 A.D.2d at 242-43, 247; Pantaleone v. Jackson, 204 A.D.2d 458, 459 (2d Dep't 1994).

This lack of authorization, qualifications, and hence ability to perform the job of Laboratory Technologist was precisely the reason the hospital provided for petitioner's termination. This reason, on its face, is neither discriminatory, nor in retaliation for complaining about being assigned duties that caused her disabling condition. It is unrelated to her physical disability, her status on leave due to her disability, Mete v. New York State Off. of Mental Retardation & Dev. Disabilities, 21 A.D.3d at 293; Kent v. Papert Cos., 309 A.D.2d at 244-45; Brennan v. Metropolitan Opera Assn., 284 A.D.2d 66, 71 (1st Dep't 2001); Town of Lumberland v. New York State Div. of Human Rights, 229 A.D.2d 631, 635 (2d Dep't 1996), or any

complaints about disabling duties. Forrest v. Jewish Guild for the Blind, 3 N.Y.3d at 313; Williams v. City of New York, 38 A.D.3d 238 (1st Dep't 2007).

Petitioner failed to show, moreover, that the position from which she was terminated was filled by a person who also was not licensed or even by a person who was not physically disabled, see Brennan v. Metropolitan Opera Assn., 284 A.D.2d at 70; Sogg v. American Airline, 193 A.D.2d 153, 156, 158 (1st Dep't 1993); Town of Lumberland v. New York State Div. of Human Rights, 229 A.D.2d at 635-36, or present statistical evidence regarding the hospital's broader practice of not retaining disabled employees. Kent v. Papert Cos., 309 A.D.2d at 244, 247; Brennan v. Metropolitan Opera Assn., 284 A.D.2d at 72; Caballero v. First Albany Corp., 237 A.D.2d 800, 802 (3d Dep't 1997). See Mete v. New York State Off. of Mental Retardation & Dev. Disabilities, 21 A.D.3d at 292-93; Sogg v. American Airline, 193 A.D.2d at 156; Ioelle v. Alden Press, 145 A.D.2d 29, 35 (1st Dep't 1989). Nor did she present evidence of comments by hospital personnel involved in terminating her that reflect bias or a stereotype regarding disabled persons or persons on leave due to disability or any other evidence of circumstances creating an inference of discrimination based on her disability or status on leave, Pimentel v. Citibank, N.A., 29 A.D.3d at 145; Staskowski v. Nassau Community Coll., 53 A.D.3d 611; McCarthy v. St. Francis Hosp., 41 A.D.3d 794; McKenzie v. Meridian Capital Group, LLC, 35 A.D.3d at 677, or of retaliation for complaints related to her

disability. Forrest v. Jewish Guild for the Blind, 3 N.Y.3d at 313; Williams v. City of New York, 38 A.D.3d 238. See Forrest v. Jewish Guild for the Blind, 3 N.Y.3d at 308; Mete v. New York State Off. of Mental Retardation & Dev. Disabilities, 21 A.D.3d at 290, 292; Brennan v. Metropolitan Opera Assn., 284 A.D.2d at 69.

In fact, petitioner never articulates a basis for her claim that her termination was premised on her disability, other than that she was the only employee terminated for failing to apply for a license, and she was disabled. Forrest v. Jewish Guild for the Blind, 3 N.Y.3d at 308. Yet she was also the only employee who failed to apply for a required license. The totality of her burden, moreover, is not simply to show she was disabled and was terminated. To the contrary, it is to show that, but for her disability, she would not have been terminated. Pimentel v. Citibank, N.A., 29 A.D.3d at 145; Staskowski v. Nassau Community Coll., 53 A.D.3d 611; McCarthy v. St. Francis Hosp., 41 A.D.3d 794; McKenzie v. Meridian Capital Group, LLC, 35 A.D.3d at 677. See Loele v. Alden Press, 145 A.D.2d at 34-36.

Nor did petitioner present any other evidence that the hospital's stated reason for her termination was false and a pretext for the hospital's true reason: her disability, her status on leave due to disability, Shine v. Roosevelt Hosp., 26 A.D.3d 204 (1st Dep't 2006); McCarthy v. St. Francis Hosp., 41 A.D.3d 794, or retaliation for complaints about disabling duties. Forrest v. Jewish Guild for the Blind, 3 N.Y.3d at 313; Williams

v. City of New York, 38 A.D.3d 238. See Forrest v. Jewish Guild for the Blind, 3 N.Y.3d at 308; Dickerson v. Health Mgt. Corp. of Am., 21 A.D.3d at 328; Mete v. New York State Off. of Mental Retardation & Dev. Disabilities, 21 A.D.3d at 293, 296; Kent v. Papert Cos., 309 A.D.2d at 245. Even if petitioner has shown that the hospital's reasons for terminating her are unsupported by the evidence or its decision was unwise or motivated by ill will, such circumstances do not necessarily show that discrimination due to disability was the motivation. Ioele v. Alden Press, 145 A.D.2d at 36, 39. Petitioner must show more than the absence of "good cause" for her termination. Id. at 36. Again, she must show that the hospital would not have terminated her but for its discriminatory motive.

III. CONCLUSION

Respondent Division of Human Rights' decision upholding respondent Bronx Lebanon Hospital Center's termination of petitioner's employment and finding the termination lawful, non-discriminatory, and non-retaliatory is consistent with New York law, N.Y. Exec. Law § 296(1)(a) and (e) and (7), because the petition admits petitioner was unqualified for the position from which she was terminated after September 30, 2006. Moreover, the hospital provided this lack of qualification as a legitimate, non-discriminatory, and non-retaliatory reason for petitioner's termination, which petitioner failed to show was a pretext for a discriminatory or retaliatory reason.

In sum, the hospital has demonstrated both petitioner's

failure to establish the elements of her discrimination or retaliation claims and the absence of a factual issue whether the hospital's explanation for her termination was pretextual.

Forrest v. Jewish Guild for the Blind, 3 N.Y.3d at 305, 313; Dickerson v. Health Mgt. Corp. of Am., 21 A.D.3d at 328; Metz v. New York State Off. of Mental Retardation & Dev. Disabilities, 21 A.D.3d at 290, 293, 296. Therefore the court denies the declaratory and injunctive relief sought by the petition and grants Bronx Lebanon Hospital Center's motion to dismiss this proceeding. C.P.L.R. §§ 7803(2) and (3), 7806. This decision constitutes the court's order and judgment on the petition. C.P.L.R. §§ 409(b), 7806.

DATED: February 27, 2009



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.