

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 7

X INDEX NO. 16357/01
ANNE MARIE CHARLES

BY: SCHULMAN, J.

- against -

DATED: November 17, 2004

HIGHLAND CARE CENTER, INC.

X

_____ In this action to recover damages for discrimination in the workplace, defendant Highland Care Center Inc., seeks an order granting summary judgment dismissing the complaint.

Plaintiff Anne Marie Charles, an African-American, was born in 1939 and came to the United States from Haiti. In 1975 she was hired by Highland Care Center, Inc. (Highland) as a certified nursing assistant (CNA). Highland operates a nursing home and health care facility in Jamaica, New York. In September 1998 Ms. Charles took a leave of absence from Highland and attended classes so that she could obtain license as a licensed practical nurse (LPN). Ms. Charles returned to work at Highland as a CNA in November 1999, and in April 2000 she took and passed the LPN certification examination and received her license. Highland thereafter offered her a position as a LPN, which she accepted.

On the evening of January 22, 2001, a comatose patient identified here as "Doe" was admitted to Highland, at which time

the patient was examined by a physician's assistant and a Highland physician prescribed certain medications to be administered to the patient. Highland's standard procedures required that the physician's prescriptions be faxed to an off-site pharmacy who would then deliver the ordered medication to Highland in separate blister packs designated for each patient. Upon receipt, the individual blister pack would be brought to the appropriate floor and placed in that floor's medication cart. Highland's business records establish that the prescriptions for Doe were faxed to the pharmacy.

LPN's at Highland are assigned discrete nursing duties. An LPN assigned to serve as the Medication Nurse on any given day is responsible for administering prescribed medication to each patient on her assigned floor and addressing any issues related to this function. A LPN assigned to serve as a Charge Nurse occupies the nursing station on her assigned floor and directs the activities of the CNAs, processes paperwork and engages in other general nursing duties. The Medication Nurse's duties include visiting each patient's room with a medication cart at certain pre-designated times. The cart contains a "Medex" sheet for each patient stating the type and dosage of medication to be administered to the particular patient and the time of day the medication is to be administered.

On January 23, 2001, the morning after Doe was admitted, Ms. Charles worked the 8:00 A.M. to 4:00 P.M. shift, and was assigned to serve as the Medication Nurse on Doe's floor. The physician's order, as reflected on the Medex sheet directed that the drugs Prednisone, KCL, HCTZ, Lovenox and Synthroid were to be administered to Doe at 10:00 A.M. that morning. Ms. Charles updated Doe's Medex sheet and discovered that his medication was missing from the medication cart. Ms. Charles testified at her deposition that she advised Leon Metillus, the Charge Nurse, that these medications were missing from the chart. Mr. Metillus is a LPN and is also Haitian. After completing her 10:00 A.M. rounds, Ms. Charles testified that she telephoned the pharmacy and was told that the medications had not been delivered, and that the pharmacy would do its best to deliver the medications. At the end of her shift at 4:00 P.M., Ms. Charles she advised Marie Damour, the Charge Nurse who was coming on duty, that Doe's medication had not been received from the pharmacy. Ms. Damour, is also Haitian, and was serving as both the Charge Nurse and Medication Nurse during the night shift. At no time between her discovery that Doe's medication was missing and the end of her shift, did Charles inform her nursing supervisor, or a physician, or anyone else that could provide responsive medical care, that a comatose patient under her care as Medication Nurse had not received his prescribed

medication.

Doe's medication was not received during Damour's shift and she failed to ascertain whether Charles had informed her nursing supervisor or other superiors that Doe's medication was unavailable. Edith Santiago, who is Filapino, was the Medication Nurse on the 8:00 A.M. to 4:00 P.M. shift on January 24, 2001. By the time Santiago went on duty, Doe's medications had not been delivered and she was thus unable to administer the medications to the patient. Ms. Santiago also failed to confirm with her supervisors whether this situation had been reported to them by one of the Medication Nurses on a previous shift. That afternoon the physician's assistant Eva Schneider learned that Doe had not received the prescribed medications and she immediately informed senior management and advised that the failure to administer Doe's medication could have caused adrenal insufficiency and had the potential to be life threatening. Doe's medications were obtained and administered to him on January 24, 2001.

Highland's management immediately investigated the events surrounding the failure to obtain and administer the medications to Doe. Highland determined that Ms. Charles, Ms. Damour and Ms. Santiago were all participants in the chain events that resulted in the failure to administer medications to Doe. Ms. Charles did not work on January 24, 2001. On January 25, 2001

she reported to work and was interviewed, in the presence of her union delegate, by Vishnu Ramdass, Highland's nursing care coordinator and a registered nurse. Padma Lewis-Marks, Highland's assistant administrator, and William Scales, Highland's associate director of nurses, were also present at this meeting. Ms. Charles testified that Mr. Ramdass told her that she was terminated because she failed to give Doe his medications at 10:00 A.M. and failed to make any attempt to call the pharmacy, and that she informed him that she had telephoned the pharmacy and that she also told the Charge Nurse, Mr. Metillus that the medications were missing from her cart. Ms. Charles testified that Mr. Ramdass and Ms. Lewis-Marks both told her that she was the Medication Nurse, that she was responsible for the medications and was supposed to call the pharmacy, and that she was supposed to notify her supervisor. Ms. Charles testified that she had notified the Charge Nurse who was responsible for obtaining anything from the outside. Ms. Charles also questioned the duties the Charge Nurse, arguing that she had 40 patients to give medication to and other duties, while the Charge Nurse was only sitting and doing paperwork and making phone calls. Highland determined that Ms. Charles bore the brunt of the responsibility as she was the Medication Nurse, and had allowed an entire day to pass without alerting her supervisor or a physician that a comatose patient in her care had not received any

medication prescribed to him that day, and failed to document this event. Ms. Charles was terminated on January 25, 2001, and Ms. Damour and Ms. Santiago were each given written warnings and suspended for three days. Mr. Metillus, when questioned by Mr. Ramdass, initially stated that Ms. Charles never advised him that Doe's medication had not been delivered. Several days later, after Ms. Charles was terminated, Mr. Metillus submitted a written statement in which stated that the nurse (Ms. Charles) had advised him that she did not have the medication for the patient, that he told her to call the pharmacy and fax the medication orders and to notify a supervisor and that the nurse did not get back to him on this matter. Mr. Metillus' statement was not notarized.

Ms. Charles alleges in her complaint that she was terminated from her employment due to her age and national origin. Plaintiff also alleges a claim for damages based upon the negligent training, hiring and supervision of its employees which resulted in the alleged discriminatory conduct.

Defendant Highland now seeks an order granting summary judgment dismissing the complaint in its entirety. Defendant asserts that plaintiff cannot establish a cause of action for discrimination in employment and that she was terminated due to her unsatisfactory job performance. Defendant also asserts that plaintiff's negligent hiring claim is barred by the provisions of

the Workers' Compensation Law. In support of its motion defendant has submitted the deposition transcripts, or portions thereof, of the following current or former Highland employees: Vishnu Ramdass, William Scales, Chaim Kaminetzky and Padma Lewis-Marks. Defendant has also submitted affidavits from employees Dr. Mark Gombert and Barbara Gerchick, and copies of business records pertaining to the LPN's shifts and assignments, the medications prescribed for Doe, incident reports and disciplinary reports.

Plaintiff, in opposition, asserts that Ms. Gerchick's affidavit is not admissible as she was not employed by Highland at the time of plaintiff's termination and that Dr. Gombert's affidavit is not admissible as he was never identified as either a fact or expert witness. Plaintiff also asserts that the deposition transcripts of Ramdass, Scales, Kaminetsky and Lewis-Marks which was submitted by the defendant is inadmissible as the deponents failed to execute the transcripts. Plaintiff, however, has submitted the full transcripts of these deponents' testimony in opposition to the motion for summary judgment.

Plaintiff, in opposition asserts that triable issues of fact exist as to her discrimination claim. In support of her claim of discrimination based on age, plaintiff states that at the time of her termination she was 61 years old and was perhaps the oldest LPN employed by Highland. Plaintiff asserts that the Charge Nurses,

Damour and Santiago, were then aged 47 and 49, that these Charge Nurses were also aware of the fact that the medications had not been delivered, that they had failed to properly annotate the fact that Doe's medicines were not present in their 24 Hour Reports and had also failed to so inform their supervisors of the problem, but they were not terminated or disciplined. Plaintiff claims that Mr. Mellitus at first lied to his supervisors and that he was not disciplined at all. Plaintiff claims that Mr. Ramdass made improper comments referring to Ms. Charles' age, based on the fact that after working for Highland for 25 years as a CNA, she went to school to become an LPN, and that Ms. Miller, an evening shift nurse referred to her as an "old nurse's assistant". It is further asserted that three weeks after Ms. Charles was terminated, Highland hired an 18 year old LPN, and that all of the LPN's hired thereafter were significantly younger than Ms. Charles. In support of her claim of discrimination based upon national origin, plaintiff stated that Ms. Padma Lewis-Marks fired the Director of Nurses, who is Haitian, and further stated that Highland "kept firing Haitian nurses all the time." Plaintiff's counsel also asserts that Chaim Kaminetzky, the owner of Highland, testified at his deposition that he made fun of the union organizer's language and that the organizer is Haitian.

At the outset, the court finds that the deposition

transcripts relied upon by the defendant are admissible. Each deponent was an employee at Highland at the time of their respective deposition, the deposition transcripts are certified by a court reporter and were submitted by plaintiff's counsel to the witness for review and execution. Contrary to plaintiff's assertion, the failure of the deponents to execute the transcript does not bar the use of the transcript by the defendant. (See CPLR 3116[a].) The court further finds that the affidavits of Ms. Gerchick and Dr. Gombert are admissible. Dr. Gombert is an employee of Highland and his affidavit is offered to attest to the nature of the medications that were prescribed to Doe, but were not administered during Ms. Charles' shift. Plaintiff has not established that she served any discovery demands which required that Dr. Gombert be listed as a witness, and his affidavit is only offered as a fact witness as regards the properties of the prescribed medications. The court rejects plaintiff's claim that the failure to disclose the identity of Dr. Gombert is prejudicial. Plaintiff and her counsel at all times were aware of the specific medications and could have, if desired, consulted with a physician or pharmacist of her own choosing or sought the deposition of a Highland physician. As regards Ms. Gerchick, she was not hired as the Director of Nursing until after the plaintiff filed her note of issue on January 20, 2004. Highland, thus, could not have

previously identified this individual as a witness. Inasmuch as Scales, Ramdass and Lewis-Marks all left their employment with Highland after their depositions and prior to the service of the instant motion, Highland is not precluded from submitting an affidavit by its current Director of Nursing. It is noted that Ms. Gerchick, in her affidavit, sets forth the duties assigned to nurses at Highland, which is consistent with the deposition testimony of the now former employees, and also identifies certain business records which were previously provided to plaintiff's counsel.

Turning now to Ms. Charles' claim, it is well settled that a plaintiff alleging racial or age discrimination in employment has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination (see Forrest v Jewish Guild for the Blind, ___ NY2d ___, 2004 N.Y. LEXIS 3489 [2004]; Ferrante v Am. Lung Assn., 90 NY2d 623, 629 [1997]). The burden then shifts to the employer "to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence,

legitimate, independent, and nondiscriminatory reasons to support its employment decision" (id. [citations omitted]). In order to nevertheless succeed on her claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason (see id. at 629-630).

The standards for recovery under the New York State Human Rights Law (see Executive Law § 296[1]) are the same as the federal standards under title VII of the Civil Rights Act of 1964 (42 USC § 2000 et seq.) (see Mittl v New York State Div. of Human Rights, 100 NY2d 326, 330, [2003]). Thus, "because both the Human Rights Law and title VII address the same type of discrimination, afford victims similar forms of redress, are textually similar and ultimately employ the same standards of recovery, federal case law in this area also proves helpful to the resolution of this appeal" (Matter of Aurecchione v New York State Div. of Human Rights, 98 NY2d 21, 26, [2002]; see also Forrest v Jewish Guild for the Blind, supra).

To prevail on their summary judgment motion, defendant must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions,

the absence of a material issue of fact as to whether their explanations were pretextual. The first two elements necessary to establish a claim of discrimination are not in dispute. Plaintiff is an African-American woman from Haiti, and was qualified to work at Highland as a LPN and to be assigned to the position of Medication Nurse. At the time she was terminated from her employment plaintiff was 61 years old.

Here, the defendant has demonstrated the absence of a prima facie case of discrimination under Executive Law § 296 and that it had a facially valid, independent, and nondiscriminatory reason to discharge the plaintiff (King v Brooklyn Sports Club, 305 AD2d 465 [2003]; Oross v Good Samaritan Hosp., 300 AD2d 457 [2002]; Jordan v American Intl. Group, 283 AD2d 611 [2001]). Plaintiff has not meet her burden of raising a question of fact with respect to whether the claimed reason for her termination was, in reality, merely a pretext for illegal discrimination. The court finds that plaintiff has produced nothing beyond bare, unsubstantiated assertions of animus toward her because of her national origin and age. Plaintiff testified that no one at Highland directly or indirectly made any remarks to her regarding her national origin. Plaintiff's claim that Highland was "always firing Haitians" is not supported by the evidence and the fact that the Director of Nursing was terminated does not establish a bias

against Haitians. Furthermore, the court has examined Mr. Kaminetzky's testimony and finds that plaintiff's counsel's characterization of his testimony is inaccurate. Although counsel seeks to portray Mr. Kaminetzky as a man who made fun of the Haitian language, and by implication was biased, Mr. Kaminetzky in fact testified that he and a Haitian union organizer engaged in good natured ribbing, and that he thought the organizer was a "very nice guy." Mr. Kaminetzky testified, in substance, that Ms. Charles made a serious error in judgment, and that when confronted by management, she was belligerent and failed to take responsibility for her actions.

As regards plaintiff claim of discrimination based on her age, the two isolated comments allegedly made by Ms. Miller, an evening nurse supervisor, and Mr. Ramdass, a day nurse supervisor, are insufficient to establish a discriminatory animus on the part of Highland. Ms. Miller allegedly stated to plaintiff that she was "an old nurse's assistant" and this comment was reported by plaintiff to the Director of Nursing. This comment is ambiguous and may have referred to the fact that plaintiff had worked at the facility as a nurse's assistant for 25 years prior to her obtaining her license as an LPN. Mr. Ramdass' alleged comment only reveals a lack of understanding on his part as to why Ms. Charles wanted to go to school to obtain her LPN license. As regards the ages of the

LPNs at Highland, the evidence presented establishes that there was at least one other LPN on staff who was 62 years old, and the other LPNs were aged 24, 25, 27, 30, 39 and two were aged 50 at the time plaintiff was terminated in 2001. The fact that Highland hired an 18 year old LPN several weeks after plaintiff was terminated is insufficient, in itself, to establish a claim of discrimination based upon age. The court finds that no evidence has been presented that raises a triable issue of fact regarding discrimination in employment on the basis of age.

Contrary to plaintiff's assertions, there is ample evidence that plaintiff was discharged, not because of unlawful discrimination, but because of her unsatisfactory job performance. It is undisputed that plaintiff, a Medication Nurse, was aware of the fact that medication for Doe, a comatose patient under her care, had not been delivered to Highland and therefore could not be administered at any time during her 8 hour shift. Doe was unable to communicate and therefore was entirely dependent upon the staff of Highland to provide adequate and proper medical care. The failure to administer the prescribed medications in a timely fashion could have had endangered his health and welfare. Although plaintiff asserts that she made a telephone call to the offsite pharmacy, she only reported the problem to the Charge Nurse, who was also a LPN and did not report the problem to her supervisors or

a physician. When confronted by her supervisors, plaintiff sought to blame the Charge Nurse, rather than recognize her errors in judgment and accept responsibility for her own acts or omissions. Both Ms. Damour and Ms. Santiago, the Medication Nurses who came on duty after plaintiff's shift received written warnings and were suspended for three days.

Plaintiff's present assertion that there is no evidence that Doe's prescriptions were faxed to the pharmacy prior to the beginning of her shift and that Ms. Damour was responsible for this error, does not raise any triable issues of fact as regards her discrimination claim. At the time plaintiff came on duty she was responsible for the administration of medications to Doe, she knew that the medications were not in her cart, learned that they had not been delivered to the facility and failed, throughout her 8 hour shift, to inform her supervisors of the problem. Based upon the facts presented, Highland could chose to deem Ms. Charles the prime offender in this chain of events, and could chose to terminate her. However, there is no evidence the decision to terminate her was motivated by a racial or age bias. Ms. Damour and Mr. Mellitus are also Haitian, and disciplinary actions were taken against Ms. Damour and Ms. Santiago. Mr. Mellitus was not responsible for the administration of medications and was not plaintiff's supervisor, and there was not subject to any

disciplinary actions. The court finds that under the circumstances presented here, plaintiff has not raised any triable issues of fact and Highland established a non-discriminatory reason for plaintiff's termination (see Pramdip v Building Service 32B-J Health Fund, 308 AD2d 523 [2003]; Scott v Citicorp Servs., 91 NY2d 823, 825[1993]; King v Brooklyn Sports Club, supra; Jordan v American Intl. Group, supra; cf. Mittl v New York State Div. of Human Rights, supra; Ferrante v American Lung Assn., supra at 631). Therefore, defendant's motion for summary judgment dismissing plaintiff's first cause of action for employment discrimination complaint is granted.

Plaintiff's second cause of action for negligent hiring, training and retention of its employees is dismissed. An employee may not sue his or her employer for injuries caused by negligent supervision (see Rosario v Copacabana Night Club, 1998 WL 273110, 1998 US Dist LEXIS 7840 [1998]; Ross v Mitsui Fudosan, 2 F Supp 2d 522, 532; Silberstein v Advance Mag. Publs., 988 F Supp 391; Nagle v Franzese, 1991 WL 4736, 1991 US Dist LEXIS 519 [1991]), negligent hiring (see Rosario v Copacabana Night Club, supra; Chrzanowski v Lichtman, 884 F Supp 751; Nagle v Franzese, supra) or negligent retention of its employees (see generally Wolfe v Sibley, Lindsay & Curr Co., 36 NY2d 505 [1975]; Maas v Cornell Univ., 253 AD2d 1, 3-4 [1999]; Walker v Weight Watchers

International, 961 F Supp 32, 35 [1997]; Brown v Bronx Cross County Medical Group, 834 F Supp 105, 109 [1993]; O'Brien v King World Productions, Inc., 669 F Supp 639, 641 [1987]).

In view of the foregoing, defendant's motion for summary judgment dismissing the complaint in its entirety is granted.

Settle order.

J.S.C.