UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ALLISON, MICHELLE	:	CIVIL ACTION NO. 3:06 cv 01826 (SRU)
Plaintiff	:	
VS.	:	
	:	
HEALTH CARE RELIANCE, LLC and and DANA, ERIC	:	
Defendants	:	NOVEMBER 1, 2007

DEFENDANTS' L.R. 7(d) BRIEF IN REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

NOW COMES defendants, Health Care Reliance, LLC, and Eric Dana and pursuant to Local Rule 7(d), hereby replies to plaintiff's opposition to *Motion for Summary Judgment.*[1]

1. There Are Still No Genuine Issues Of Fact If Plaintiff's Failure to Promote/Demotion Claim Is Analyzed Under The Non-Modified McDonnell Douglas Standard.

Movant analyzes the plaintiff's first two counts under the McDonnell Douglas standard as modified for failure to promote cases[2] brought under Title VII (Defendant's Memorandum in Support of Summary Judgment at pages 8, 14-15)

[1] Plaintiff makes numerous statements contrary to law and the evidence presented; not all of which can be addressed within the ten pages allotted by the Local Rules. Defendant is prepared to discuss to cite all such inaccuracies at argument

[2] Specifically modified is the prima facie case to be established by the plaintiff. Namely she must demonstrate "'(1) she is a member of a protected class; (2) she 'applied and was qualified for a job for which the employer was seeking applicants'; (3) she was rejected for the position; and (4) the position remained open and the employer continued to seek applicants having the plaintiff's qualifications.' " Petrosino v. Bell Atlantic, 385 F.3d 210, 226 (2d Cir. 2004), *quoting* Brown v. Coach Stores, Inc., 163 F.3d 706, 709 (2d Cir. 1998)

Plaintiff, in her Memorandum in Opposition, argues that because her "cause of action [is] grounded in having been promoted and subsequently demoted", therefore the ". . .appropriate analysis of this case [is] under the burden shifting approach outlined in Jackson v Health Resources of Rockville Inc., 357 F.Supp.2d [507 (D.Conn. 2005)]." (Plaintiff's Memorandum in Opposition at page 8). As the Petrosino and Brown cases (fn 1, supra) each, indeed, employ the burden shifting approach from McDonnell Douglas, as utilized in Jackson, it is presumed the plaintiff intends that the prima facie case modification for failure to promote cases should not be employed. Defendant does not agree. However, even if analyzed under the non-modified McDonnell Douglas burden shifting framework there would still be no genuine issue of material fact. Under the non-modified burden-shifting framework, Plaintiff must first establish a prima facie case of discrimination by showing: 1) membership in a protected class; 2) qualification for the position; 3) an adverse employment action; and 4) the existence of circumstances giving rise to an inference of discrimination based on race and/or color. Reeves v. Sanderson Plumbing Products. Inc., 530 U.S. 133, 142 (2000); Fisher v. Vassar College 114 F.3d 1332, 1335 (2d Cir. 1997), cert. denied. 522 U.S. 1075 (1998); McLee v. Chrysler Corp., 109 F.3d 130, 134 (2d Cir. 1997). Secondly, if the plaintiff meets this burden then the defendant has the burden of producing evidence of a legitimate nondiscriminatory business reason for its decision. St Mary's Honor Center v Hicks 509 U.S. 502, 506-507 (1993). Once defendant proffers such a reason, the presumption of discrimination "simply drops out of the picture," and the plaintiff must then show that the defendants' proffered reason is a pretext for the discrimination. St Mary's Honor Center v Hicks 509 U.S. at 511, 515 (1993). As the Hicks Court indicated, "a reason cannot be proved to be

a 'pretext for discrimination' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason. St Mary's Honor Center v Hicks 509 U.S. at 516 (1993) (emphasis in original).

There is evidence that Plaintiff could not establish a prima facie case because she was not qualified for the position[3]. While plaintiff was experienced in the MDS aspect of the Director of Nursing Services position, "other than [MDS] area, she would need training across the board" (Deposition of Eric Dana at page 39, (Exhibit B to Motion For Summary Judgment)). There were numerous confirmations of this opinion including (1) the plaintiff's own admission that she "was not really ready for the position at that time" (Allison Deposition at page 93, (Exhibit A to Motion for Summary Judgment)); (2) Gail Lagan's opinion to Dana that Allison did not have the requisite experience for the position (Dana Deposition at page 141, (Exhibit B to Motion For Summary Judgment); Lagana Deposition at page 41-42, (Exhibit D to Motion For Summary Judgment)); (3) Gail Lagana expressed concern regarding plaintiff's interpersonal skills (Dana Deposition at page 141, (Exhibit B to Motion For Summary Judgment)); (4) Dana's discussions with at least ten employees at Ellis Manor who worked with plaintiff and expressed, for one reason or another, that she was not qualified for the DNS position (Dana Deposition at pages 141-147, (Exhibit B to Motion For Summary Judgment)).

[3] It should also be noted that while plaintiff had been returned to the position of Assistant Director of Nurses, she retained her salary increase from when made the Acting Director of Nurses (Dana Deposition at page 137 (Exhibit B to Motion for Summary Judgment)), thus creating doubt as to whether she had even suffered an adverse employment decision.

Assuming, *arguendo*, the plaintiff is able to establish a prima facie case, defendant has produced evidence of a legitimate nondiscriminatory business reason for its decision. Namely, that plaintiff "was not an appropriate candidate for the Director of Nursing position" (Dana Deposition at page 147, (Exhibit B to Motion For Summary Judgment)) and that a more qualified candidate was found ("Ms Johnson came along, who clearly, unequivically, has more experience and more skills and was known to the facility. . ." (Dana Deposition at pages 147, (Exhibit B to Motion For Summary Judgment))). Plaintiff cannot show that these reasons were false[4], and that discrimination was the real reason[5].

2. There Is No Evidence of Pretext in Defendants' Nondiscriminatory Business Reasons for Terminating Plaintiff's Employment

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[4] In addition to plaintiff's admission that she "was not really ready for the position at that time" (Allison Deposition at page 93, (Exhibit A to Motion for Summary Judgment)), she also stated that she told Eric Dana, the day after such admission, that she wanted to give the job "a chance" (Allison Deposition at page 93, (Exhibit A to Motion for Summary Judgment) rather than changing her mind about her fitness to be the Director of Nursing Services. Furthermore, it is undisputed that Elizabeth Johnson possessed experience as a Director of Nursing Services (Allison Deposition at pages 110-111 (Exhibit A to Motion For Summary Judgment); Resume of Elizabeth Johnson, Exhibit O to Motion For Summary Judgment) and that the plaintiff did not (Exhibit P to Motion For Summary Judgment))

[5] When asked why she believed Johnson was unfairly promoted instead of her, plaintiff stated, in unresponsive fashion, "because [Dana] promoted me to the position of director of nurses and then he took the job away and gave it to Elizabeth Johnson and she is a white woman" (Allison Deposition at page 109, (Exhibit A to Motion for Summary Judgment) As briefed in defendant Memorandum in Support of Motion for Summary Judgment (at pages 23-24) the plaintiff's subjective belief of discrimination is not evidence and does not create a triable issue of fact as to discriminatory motive. Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985)

Plaintiff suggests that defendant's reasons stated for plaintiff's termination are pretext and characterizes the defendants' decision to end plaintiff's employment as "based upon her job searching activities with department heads, and for the negative affect [sic] on Ellis Manor" (plaintiff's Memorandum at page 12). This is accurate but incomplete as the "job search activities" included informing co-employees that she had accepted another position and was waiting to receive a holiday bonus from the defendants before tendering resignation.[6] Plaintiff suggests that a reasonable jury "could find that the defendants had no policy regarding job searches in the workplace and that the employer allowed this type of activity to occur on its property" (plaintiff's Memorandum at page 13). In stating such, plaintiff evades a geniune reason she was terminated, that Dana was apprised she had communicated to co-employees her offer of another position and her intentions to remain with the defendants until her holiday bonus was awarded. Plaintiff also states that a reasonable jury could find that:

> the defendant was planning to stay at Ellis Manor beyond the date of the bonus, and that the defendants were aware plaintiff was planning to continue her employment with Ellis Manor, and that the defendants knew of the possibility that the "bonus" part of what they heard was untrue, and did not care about acsertaining the truth
>
> (Plaintiff's Memorandum at page 14).

[6] While plaintiff denies that she told anyone she would accept the position from Maple View Manor or that she was waiting for a holiday bonus before tendering her resignation (Allison Deposition at page 128-129). she cannot dispute what was communicated to Dana by Carolee Collins and Janet Jerome -- that Allison had informed co-employees she had accepted the new position and was remaining until the bonuses were distributed (Dana Deposition at pages 116-117 Exhibit B to Motion for Summary Judgment; Affidavit of Collins attached as Exhibit R to Motion for Summary Judgment; Affidavit of Jerome attached as Exhibit Q to Motion for Summary Judgment).

Assuming, arguendo, there was evidence that both Collins and Jerome were mistaken, which there isn't, Eric Dana's reliance on their word, along with that of Gail Lagana's confirmation (Lagana Deposition at pages 9-10, Exhibit D to Motion For Summary Judgment,; Dana Deposition at pages 109-110, attached as Exhibit B), was reasonable. Furthermore, if Dana's investigation was to be deemed unreasonable, it could not establish a question of fact. Meiri v. Dacon, 759 F.2d 989, 995 (2d Cir. 1985) ("Evidence that an employer made a poor business judgment generally is insufficient to establish a question of fact as to the credibility of the employer's reasons."); Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1223 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981) ("[t]he question before the court is not whether the company's methods were sound, or whether its dismissal of [the plaintiff] was an error of business judgment. . .The question is whether he was discriminated against. . ."

Defendants
By their attorneys

By: _____

Mark Shipman (ct 04323)
C. Scott Schwefel (ct 19324)
Shipman, Sosensky, Randich & Marks, LLC
135 South Road
Farmington, CT 06032
Tel: (860) 606-1700
Fax: (860) 606-1770
E-mail: mark@shipso.com
E-mail: scott@shipso.com

CERTIFICATION OF SERVICE

This is to certify that on November 1, 2007 the foregoing was filed electronically and a copy was served, via first class mail, upon:

Mark S. Loman, Esq.
116 Cottage Grove Road
Suite 101
Bloomfield, CT 06002

C. Scott Schwefel