At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 16th day of December, 2016.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

NADIAH HABABI,

Plaintiff,

-vs-

LUTHERAN MEDICAL CENTER, IVAN CORTES and THERESA DEWEIL,

Defendants.

Motion Sequence # 1
INDEX No. 501765/15

The following papers numbered 1 to 7 read on this motion	Papers Numbered
Notice of Motion, Affirmation, and Affidavits	1, 2, 4, 5
Answering Affidavit (Affirmation)	
Reply Affidavit (Affirmation)	
Memorandum of Law	3, 6, 7

Upon the foregoing papers, defendants Lutheran Medical Center ("LMC"), Ivan Cortes ("Mr. Cortes") and Therese Deweil ("Ms. Deweil"; collectively, "defendants") move for an order, pursuant to CPLR § 3212, granting defendants summary judgment and dismissing plaintiff Nadiah Hababi's ("plaintiff") verified complaint in its entirety and with prejudice.

BACKGROUND FACTS & PROCEDURAL HISTORY

Plaintiff was employed as a medical assistant at LMC's Lutheran Family Health Centers Park Ridge site from on or about September 23, 2013 to on or about September 22, 2014. She learned of the job opening through a woman who formerly held the position, Ms. Demes Kauther ("Ms. Kauther"). Both plaintiff and Ms. Kauther are Muslim women. As an employee of LMC, plaintiff's primary responsibilities were to assist patients with their medical appointments, to print patients' lab results and to provide Arabic-to-English translation, since many of LMC's patients and physicians spoke Arabic. While on the job plaintiff wore a headscarf (commonly known as a hijab) as an expression of her Hindu/Muslim beliefs. Ms. Kauther had previously worn a hijab on the job as well.

In accordance with the Health Insurance Portability & Accountability Act ("HIPAA"),

LMC maintained certain strict privacy and confidentiality policies which its employees were required to adhere to. One of these policies forbade employees from releasing or discussing confidential patient information except as required by law or in the performance of work-related functions. In this regard, LMC maintained a Compliance Program Manual which provided that disclosure of a patient's health information in violation of the law or LMC's rules would subject a staff member to immediate dismissal. During her orientation, plaintiff was provided with a copy of LMC's compliance manual as well as its personnel policies and procedures.

On or about August 2014, a non-party patient who resided in the same religious community as plaintiff complained to LMC's Site Director, Mr. Cortes, of suspicions that plaintiff had disclosed the patient's private health information to a neighbor of the patient. Upon investigation, it was discovered that plaintiff had accessed the patient's medical records without authorization on two occasions; November 11, 2013 at 1:38pm and March 25, 2014 at 8:28pm, respectively. According to LMC policy, medical assistants are only allowed to access a patient's files when they are involved in the care of that patient, which LMC asserts was not the case with plaintiff on either of the aforementioned occasions. The March 25th access, in particular, occurred more than three hours after plaintiff's shift had ended. Based upon these findings, LMC terminated plaintiff on September 22, 2014. Thereafter, on February 16, 2015, plaintiff commenced the instant action to recover compensatory damages for employment discrimination, on the basis of religious and national origin discrimination as well as unlawful retaliation, in violation of the New York State Human Rights Law as reflected in Executive Law § 296 ("NYSHRL"), and the New York City Human Rights Law as reflected in New York City Administrative Code § 8-107 ("NYCHRL").

DISCUSSION

1. Religious Discrimination

In order to establish a prima facie case of discrimination under the NYSHRL and/or the NYCHRL, the plaintiff must demonstrate: "(1) that he or she is a member of [a] class protected by the statute, (2) that he or she was actively or constructively discharged, (3) that he or she was qualified to hold the position from which he or she was terminated, and (4) that the discharge

occurred under circumstances giving rise to an inference of discrimination" (*Chiara v Town of New Castle*, 126 AD3d 111, 120 [2d Dept 2015]; *see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Moreover, "[t]o prevail on summary judgment, defendants 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" (*Forrest*, 3 NY3d at 305).

In her complaint, plaintiff alleges that throughout the course of her employment with LMC she was subjected to unlawful employment practices and repeated acts of discrimination and retaliation as a result of her national origin and religion (*see* Verified Complaint, ¶ 29). Among other things, plaintiff asserts that every time an incident involving the Islamic terror group "ISIS" occurred, her immediate supervisor, Ms. Deweil, would make comments such as, "you Muslims, look what you do to the Americans"; plaintiff further claims that Ms. Deweil would throw magazines depicting the atrocities allegedly committed by ISIS at her (Hababi Deposition, 48: 19-23; 49). Moreover, plaintiff alleges that both Ms. Deweil and Mr. Cortes made inappropriate comments about her hijab. Specifically, plaintiff states that on one occasion Ms. Deweil requested that plaintiff remove her hijab because it was "[a] very nice day" and "[plaintiff] ha[d] no right to have that scarf because [she was] living in the United States" (*id.* at 52: 15-20). With respect to Mr. Cortes, plaintiff claims that on approximately five to seven occasions he questioned why she wore the hijab, and made comments like "you are so beautiful, you should take it off. You are in the United States" (*id.* at 60: 19-22). Plaintiff further claims that a Jewish co-worker named Sophia did not like her, and would say things to her like "Arabs kill Jews" and "Muslim people kill each other for no reason" (*id.* at 59: 9-10; Mem. of Law in Opp, Hababi Aff, ¶ 18).

Based upon a review of the record submitted by the parties, the Court finds that defendants have established their initial prima facie entitlement to judgment as a matter of law on the cause of action for discrimination. The record demonstrates that defendants have a legitimate, nondiscriminatory basis for terminating plaintiff's employment (*see Tibbetts v*

Pelham Union Free School District, 143 AD3d 806, 896 [2d Dept 2016]). As noted earlier, plaintiff disclosed a patient's confidential health information, which, according to LMC's policies is a dischargeable offense. Moreover, defendant demonstrated that plaintiff was hired because of her Arabic-speaking abilities, and both plaintiff's predecessor and successor were also Muslim women who wore hijabs.

In opposition, the Court finds that plaintiff has failed to raise a triable issue of fact as to whether the circumstances leading to her termination give rise to an inference of discrimination (*see Forrest*, 3 NY3d at 305). Though she denies the unauthorized use allegations, this assertion is unavailing in the face of defendants' evidence that the subject patient's file was in fact accessed using plaintiff's log in information on the subject dates and times. Moreover, LMC submitted proof that its computers log off automatically after 30 minutes of inactivity and that each LMC employee had a unique user ID and password known only to them (*see* Cortes Aff, ¶ 11, Exhibits 17-20). Accordingly, the Court finds that plaintiff fails to raise a triable issue of fact in this regard, and grants that branch of defendants' motion for summary judgment dismissing plaintiff's claims of discrimination in employment on the basis of national origin and religion in violation of the NYSHRL and the NYCHRL.

2. Hostile Work Environment

In order to establish a claim of a hostile work environment in violation of Executive Law § 296 or Administrative Code § 8-107, a plaintiff must show that the workplace was "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*, 3 NY3d at 310; *La Marca-Pagano v Dr. Stephen Phillips, P.C.,* 129 AD3d 918, 919 [2d Dept. 2015]). Factors courts assess in making this determination include the "frequency and severity of the discrimination, whether the allegedly discriminatory actions were threatening or humiliating or a 'mere offensive utterance,' and whether the alleged actions 'unreasonably interfere with an employee's work'" (*La Marca-Pagano*, 129 AD3d at 919-20).

Here, the instances of discrimination that plaintiff alleges she was subjected to occurred throughout her one-year period of employment with LMC (*compare Forrest*, 3 NY3d at 310).

In her complaint, plaintiff alleges that she complained to Mr. Cortes about the alleged incidents on more than one occasion but neither Mr. Cortes nor LMC investigated the matter or took any remedial action (Hababi Complaint, ¶ 29: sub-paragraphs m, n, o & t). Although her complaint was verified by her attorney who lacks personal knowledge of the underlying facts *(see Beaton v Transit Facility Corp.*, 14 AD3d 637, 637 [2d Dept 2005]), the complaint was buttressed by her affidavit, submitted in opposition to the instant motion for summary judgment, in which plaintiff avers that she complained to Mr. Cortes "in late August 2014 / early September 2014 – just a few weeks prior to" her termination by LMC (Hababi Aff, ¶ 20). However, in his supporting affidavit, Mr. Cortes stated that he never made any comments to plaintiff about removing her hijab (*see* Cortes Aff, ¶ 26). Mr. Cortes further stated that plaintiff never complained to him, nor anyone else to his recollection, about any mistreatment she was subjected to at LMC (*see id.* ¶ 27). It should be noted that during her deposition, plaintiff stated that she did not tell anyone at LMC of the alleged discriminatory acts of Ms. Deweil or Mr. Cortes (*see* Hababi Deposition, 56: 3-6; 19-21; 61: 20-22). In any event, in light of the conflicting affidavits of the parties, the Court finds that a triable issue of fact exists as to whether plaintiff was subjected to a hostile work environment (*see generally Espinoza v Coca-Cola Bottling Co. of NY., Inc.*, 121 AD3d 640, 641 [2d Dept 2014]; *Mason v Dupont Direct Financial Holdings, Inc.*, 302 AD2d 260, 262 [1st Dept 2003]).

Accordingly, the Court denies that branch of the defendants' motion for summary judgment dismissing plaintiff's claims of a hostile work environment in violation of the NYSHRL and the NYCHRL.

3. Retaliation

To establish a prima facie case of retaliation under Executive Law § 296 or Administrative Code § 8-107, a plaintiff must show that: (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between

the protected activity and the adverse action (*see Johnson v North Shore Long Is. Jewish Health Sys., Inc.*, 137 AD3d 977, 979 [2d Dept 2016]).

In her complaint, plaintiff avers that because of her alleged complaints to Mr. Cortes, LMC began to retaliate against her (Hababi Complaint, ¶ 29: sub-paragraph p). Specifically, plaintiff alleges, inter alia, that following her complaints LMC increased her workload, often preventing her from taking her lunch breaks (*id.* at ¶ 29: sub-paragraphs q & r). According to plaintiff, LMC's ultimate decision to fire her was also in retaliation for her complaints (*see* Hababi Aff, ¶ 20 at ¶ 21). Based upon a review of the record submitted by the parties, the Court finds that defendants have sufficiently demonstrated as a matter of law that no triable issue of fact exists as to whether the adverse employment action plaintiff suffered was based on her violation of company policy rather than as an act of retaliation.

In opposition, the Court finds that plaintiff has failed to "submit sufficient evidence from which a jury could reasonably find a causal connection between any protected activity in which [s]he engaged and any adverse employment action, or to rebut the defendants' evidence that any adverse action taken against h[er] was justified by legitimate, nondiscriminatory reasons" (*Cotterell v State*, 129 AD3d 653, 655 [2d Dept 2015]). Although plaintiff asserts that she was fired just a few weeks after complaining to Mr. Cortes, the Court notes that she cannot "avoid summary judgment 'by merely pointing to the inference of causality resulting from the sequence in time of the events'" (*Forrest*, 3 NY3d at 313, quoting *Chojar v Levitt*, 773 F Supp 645, 655 [SDNY 1991]). As such, the Court grants that branch of defendants' motion for summary judgment dismissing plaintiff's claims of retaliation in violation of the NYSHRL and the NYCHRL.

4. Intentional Infliction of Emotional Distress

Based upon the factual allegations described herein, plaintiff, in her complaint, asserts that defendants engaged in extreme and outrageous conduct that caused her severe mental, emotional and psychological distress (*see* Hababi Complaint, ¶¶ 67-70). In order to bring a cause of action for intentional infliction of emotional distress, the plaintiff must be able to prove

that the alleged conduct was "so outrageous in character, and so extreme in degree, as to be beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Sarlo v Fairchild Sons, Inc.*, 256 AD2d 322, [2d Dept 1998]). Here, in light of defendants' failure to address the instant cause of action in its moving papers, the Court denies as moot that branch of defendants' motion for summary judgment dismissing the cause of action for intentional infliction of emotional distress.

CONCLUSION

Accordingly, defendants' motion for summary judgment dismissing the complaint herein is granted to the extent of dismissing: (1) plaintiff's claims of discrimination in employment on the basis of national origin and religion in violation of the NYSHRL and the NYCHRL; and (2) plaintiff's claims of retaliation in violation of the NYSHRL and the NYCHRL.

The foregoing constitutes the Decision and Order of the Court.

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ENTER,

HON. LARRY D. MARTIN
J.S.C.