

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LISA JACOBS,

Plaintiff,

-vs-

00CV-1015C(SC)

SUNY AT BUFFALO SCHOOL OF MEDICINE,
ROSWELL PARK CANCER INSTITUTE,

Defendants.

The above-referenced case was referred to Magistrate Hugh B. Scott pursuant to Title 28 U.S.C. § 636(b)(1)(B). On March 28, 2007, Magistrate Judge Scott filed a Report and Recommendation recommending that the defendants' motion for summary judgment be granted and the complaint dismissed.

Plaintiff requested an extension of time in which to file objections to the Report and Recommendation. In an order of April 20, 2007, Magistrate Judge Scott directed plaintiff to file objections by May 26, 2007. No objections have been filed.

The court has carefully reviewed the Report and Recommendation, the record in this case, and the pleadings and materials submitted by the parties, and no objections having been timely filed, it is hereby

ORDERED, that pursuant to 28 U.S.C. § 636(b)(1), and for the reasons set forth in Magistrate Judge Scott's Report and Recommendation, the motion of the defendants for summary judgment is granted, and the case is dismissed.

So ordered.

____ \s\ John T. Curtin____
JOHN T. CURTIN
United States District Judge

Dated: 6/4, 2007
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Lisa Jacobs,

Plaintiff,

vs

Hon. Hugh B. Scott

**Report
&
Recommendation**

State University of New York
at Buffalo School of Medicine, et al.,

00CV1015C

Defendants

Before the Court is the defendants' motion for summary judgment (Docket No. 108).

Background

The plaintiff, Lisa Jacobs ("Jacobs"), was appointed a clinical assistant professor of the State University of New York at Buffalo School of Medicine ("University of Buffalo") starting November 1, 1997. She was assigned to work at Roswell Park Cancer Institute ("Roswell"), as a medical resident in the Radiation Oncology Department.¹ She claims that while she was assigned

¹ A consortium exists among the University of Buffalo and various area hospitals with respect to residency programs. It appears that the funds to pay Jacobs' residency salary were actually part of the Veterans' Administration Hospital budget. (Docket No. 115, Exhibit E, page 133). However, inasmuch as Jacobs was assigned to a position at Roswell, the Court refers to

there she was supervised by Dr. Kyu Shin, Program Director; Dr. Zachery Grossman, Acting Chair of the Department of Radiation Medicine; Dr. Jeff Lee, Acting Clinical Director of Radiation Medicine; Dr. Gary Proulx, Supervising Attending Physician; Dr. Francis Hahn, Supervising Attending Physician; Dr. James Orner, Supervising Attending Physician; Dr. Cynthia Ikner, Chief Resident; and Dr. Nicholas Petrelli, Chair of the Department of Surgery. (Complaint at ¶14). On January 21, 1998, Jacobs was notified that her participation in the Radiation Oncology Department was “no longer possible” and that her appointment was terminated as of January 30, 1998. (Complaint at ¶ 15).

The plaintiff asserts that from the beginning of her assignment at Roswell, Dr. Lee refused to provide business cards to her although they were provided to male residents who requested them; Dr. Lee permitted male residents to work at Millard Fillmore Outpost, but would not allow Jacobs or other female residents to do so; Dr. Lee permitted male residents to borrow slides for presentations, but did not allow her to do so; Dr. Lee did not allow Jacobs to participate in a study in which he allowed male residents to participate; Dr. Lee refused to permit Jacobs to take a radiation safety course provided to male residents; Dr. Lee did not permit Jacobs to take vacations and holidays which were permitted to male residents; Dr. Lee permitted male residents to complete evaluations of attending physicians, but did not allow Jacobs to do so; Dr. Orner and Dr. Lee required Jacobs and other female residents to perform tasks that were the responsibility of nursing staff but did not require male residents to do so; Dr. Lee required Jacobs to bring a male escort whenever she went to dinner with married male doctors; Dr. Orner hung up on Jacobs although he never hung up on male residents, and, finally, Jacobs alleges that the librarian

Jacobs’ residency experience in Buffalo as taking place at “Roswell.”

at Buffalo General Hospital treated her in a disrespectful and malicious fashion but treated male residents respectfully. (Complaint at ¶ 16 a-k). Jacobs also claims that she was treated to a hostile work environment based on the following alleged events: Dr. Shin commented on Jacobs physical appearance and asked her if she had a boyfriend, and if she wanted to get pregnant; Dr. Orner and Dr. Proulx “man-handled” Jacobs against her will and in ways she found offensive; Dr. Lee made offensive jokes on sexual topics in Jacobs presence; Dr. Proulx asked Jacobs offensive personal questions about her sex life; Dr. Petrelli ordered Jacobs to sit near him during grand rounds and placed his hand uncomfortably close to her buttocks; a radiation technician named “Larry” propositioned her sexually and made offensive personal comments about her appearance at the departmental holiday party. (Complaint at ¶ 17 a-f). Jacobs asserts hostile environment, disparate treatment and retaliation claims under 42 U.S.C. §2000 e (“Title VII”) and New York State Human Rights Law § 296.

Jacobs’ path through medical school and residency has not been particularly smooth. She graduated from Bowdoin College in 1989 and entered Boston University School of Medicine in 1989. Jacobs was dismissed from that school in 1991 with the recommendation that she undergo appropriate counseling with the possibility that she could return. In 1992, she was allowed to return to Boston University, but in March of 1993 Jacobs was again dismissed by the University “due to failure to attain and demonstrate competence in professional and interpersonal skills at a level expected of a third-year medical student.”² (Docket No. 114, Exhibit H at page 9). The

² The March 30, 1993 dismissal letter from Dr. Linda Dugas of the Boston University School of Medicine cited “inappropriate behaviors” characterized by “excessive expectations” and “disruptive” behavior as the reason for Jacobs’ initial dismissal in 1991. (Docket No. 114, Exhibit H at page 1). Jacobs was readmitted into the program in 1992 conditioned upon various criteria. However, by the Spring of 1993, it was determined upon re-evaluation that Jacobs’

plaintiff then began medical studies at the University of Liege, in Belgium, receiving a medical degree from that school in 1996. (Docket No. 114, Exhibit D, page 25). Jacobs began an internship in medicine at the University of Rochester in July of 1996, but was suspended³ from that program after only two months.⁴ (Docket No. 114, Exhibit D, page 21, 40-42). At the time she was suspended and relieved of clinical responsibilities, Jacobs was advised to undergo a mental health assessment and counseling. (Docket No. 114, Exhibit D, page 54). The plaintiff contends that she received counseling, but that it was not acceptable to the University of Rochester. (Docket No. 114, Exhibit D, page 55).

“most recent rotation at Emerson Hospital again highlights multiple incidents of inappropriate behavior which have been disruptive to individuals, health care teams and your fellow students. Although [Jacobs had] supplied the Committee with much documentation to support many positive interactions, it is the Committee’s conclusion that [Jacobs is] not able to maintain the consistent level of interpersonal behavior that is critical to performing effectively in a physician’s office, or as a member of a health care team in a hospital or clinic.” (Docket No. 133, Exhibit H at page 9).

³ At her deposition, Jacobs testified that she “resigned” from the position at the University of Rochester because she “was required to go in early to work” due to “an insecure resident;” that she was expected to “do my vacation time in Rochester” with the understanding that she could be called into work if another resident was sick; and that she was not given time off for doctors or dentists visits. (Docket No. 114, Exhibit D, page 41-42). Jacobs eventually acknowledged that she had been suspended and relieved of clinical responsibility prior to her “resignation.” (Docket No. 114, Exhibit D, page 43, 46).

⁴ According to a complaint lodged against Jacobs during her short stay at the University of Rochester, Jacobs walked into a male patient’s room, and while the patient was using the urinal, removed his hand from the urinal, placed a paper clip in his hand to administer a test (the patient was asked to identify the object placed in his hand). (Docket No. 114, Exhibit D, page 51). Jacobs disputes this description of events. Jacobs contends that she knocked on the door before she entered the room; that the patient’s wife was holding both the urinal and the patient’s penis; that she placed the paper clip in the patient’s hand, but he was unable to identify the object; and that she spent a great deal of time supporting and comforting the patient’s wife (who was upset that her husband could not identify the paperclip). (Docket No. 114, Exhibit D, pages 51-52).

Subsequently, in October of 1996, Jacobs entered a post-graduate training program in anaesthesiology at the Albany Medical Center (“AMC”). Jacobs acknowledges that she did not tell officials at AMC that her privileges at the University of Rochester had been suspended. (Docket No. 114, Exhibit D, page 71).⁵ Although she was at AMC less than one year, during that time multiple complaints were lodged against Jacobs. One patient complained that Jacobs inappropriately advised the patient’s boyfriend that the patient was HIV positive. Another patient complained about Jacobs’ manner and that she failed to provide them with adequate information. In a separate incident, a patient complained that Jacobs performed a rectal exam and then examined the patient’s mouth without changing latex gloves. Finally, several nurses lodged various separate complaints regarding their interactions with Jacobs and her alleged failure to comply with hospital rules. (Docket No. 114, Exhibit D, pages 72-77). The training program Jacobs entered at AMC was supposed to be a four year program. Jacobs denies that AMC was contemplating action to terminate her from the program, but acknowledges that she hired an attorney to negotiate the “situation.” (Docket No. 114, Exhibit D, pages 81-84). Like Boston University and the University of Rochester, AMC asked Jacobs to undergo a psychiatric evaluation. (Docket No. 114, Exhibit D, page 83). Jacobs agreed to be released by AMC, and

⁵ In January of 2003, charges against Jacobs were filed with the New York State Department of Health State Board for Professional Medical Conduct. Among the charges, it was claimed that Jacobs’ application to the University of Rochester listed her attendance at the University of Liege from September 1989 to June 1996, when in fact, she did not start at the University of Liege until 1993. She failed to advise the University of Rochester that she was dismissed from the University of Boston Medical School. She made similar and other misstatements on applications to AMC, Strong Memorial Hospital, and St. Vincent’s Medical Center. After a hearing, Jacobs was found guilty by the Committee for the State Board of Professional Medical Conduct of filing false information on hospital applications and Jacobs was stricken from the roster of licensees kept by the New York State Board of Regents. (Docket No. 115, Exhibit F, at pages 15-17).

was allowed to finish a rotation at the Veteran's Hospital. She asserts that she was not required to enroll in a program under the auspices of the New York State Department of Health that monitors physicians with mental health problems. (Docket No. 114, Exhibit D at pages 83-85).

Jacobs briefly worked at St. Vincent's Hospital, in Worcester, Massachusetts in 1997. The plaintiff claims that she could not stay at St. Vincent's because she did not have a "limited license in hand" which is required of medical residents in Massachusetts. Jacobs acknowledges that she applied for a license in conjunction with St. Vincent's but that the application was withdrawn by the hospital. According to Jacobs, St. Vincent's withdrew the application for the following reasons: because Jacobs may have had to enroll in the Massachusetts Medical Society's program that monitors physician's with mental health problems; because Boston University "bad-mouthed" her to St. Vincent's; and because her Worcester employer was under the impression that she had made misrepresentations to the Massachusetts Board of Medicine. (Docket No. 114, Exhibit D, pages 104-106).

In September of 1997, Jacobs became aware of an opening for a second-year resident in the radiation oncology department at Roswell. She responded to the notice and received a call from Dr. Shin, who was the program director. He invited Jacobs for an interview. According to Jacobs, after she arrived at her hotel on October 5, 1997, Dr. Shin unexpectedly appeared in the hotel lobby and called her room.⁶ She joined him in the lobby and they went to the hotel's restaurant where Dr. Shin interviewed her for the position. (Docket No. 114, Exhibit D, page 127). During the interview, Dr. Shin asked Jacobs what her weakness was. Jacobs responded:

⁶ It is undisputed that, unknown to Jacobs, on October 1, 1997 Dr. Shin had been dismissed from his position at Roswell, although he still held a title at the University of Buffalo. (Docket No. at Exhibit G at ¶25).

When he asked me what my weakness was, I volunteered to him that I felt a weakness was that other people may perceive me to be an attractive woman and I have had difficulties because of it. I explained I won a prize in the Miss America Pageant, and that because of my looks, nurses, I felt, oftentimes gave me a hard time. An then, I went into, I think, a conversation where basically an attending at Albany Medical Center had complained to me about how the best and the brightest female interns are the most picked on at Albany Medical Center. And how he was amazed with the new crop of interns they had coming in – they had done advanced cardiac life saving and basically, he had lunch with the nurses who were teaching and running the class afterwards. And the nurses were critical of the female physician who was, in the opinion of the male attending physician, the best looking and the brightest female of the group. And he could not get over how the female nurses talked about how they were going to go after her and give her a hard time. So I explained that I felt my weakness as a physician was that some other people perceive me to be attractive, and thereby, I had problems because of it.

(Docket No. 114, Exhibit D, pages 121-122). Jacobs was asked if Dr. Shin responded to her statement. She testified as follows:

Yes. I felt that after [her statement that her weakness was that she was perceived to be attractive] his tone became flirtatious. I was basically explaining to him that I felt a possible weakness was having arguments with nurses and he became very flirtation after he heard I won a prize in the Miss America Pageant.

(Docket No. 114, Exhibit D, page 122).⁷ Jacobs asserts that Dr. Shin asked whether she had a boyfriend, whether or not she was interested in getting pregnant and what her religion was. He also allegedly advised her that she was pretty enough to be a stewardess. (Docket No. 114, Exhibit D, page 126). Jacobs admits that she did not advise Dr. Shin that she had been referred

⁷ Upon further questioning, according to Jacobs, she won the “Almond medical scholarship” in a pageant in Massachusetts that Jacobs described as “part of the Miss America Pageantry system,” but a “lower pageant than the actual Miss America Pageant.” (Docket No. 114, Exhibit D, page 123).

for psychiatric counseling in connection with her work at the University of Rochester or AMC. (Docket No. 114, Exhibit D, page 129-130). Her interview with Dr. Shin in the hotel restaurant lasted approximately 45 minutes. (Docket No. 114, Exhibit D, page 132). It should be noted that this was Jacobs' *only* face to face meeting with Dr. Shin. (Docket No. 114, Exhibit D, page 149, 153). Jacobs does not claim that Dr. Shin made any sexual advances toward her.

According to Jacobs, the following day she went to Roswell where she was interviewed by Dr. Orner. (Docket No. 114, Exhibit D, page 133-134). She then returned to her home to Boston, Massachusetts. (Docket No. 114, Exhibit D, page 134). Jacobs states that after an initial employment offer was extended to her, she received a telephone call from Dr. Shin who advised her that the residency program was "in such a state that they could not accept a resident into it now and he withdrew the offer of employment." (Docket No. 114, Exhibit D, pages 135-136). Jacobs testified that another physician, Dr. Jerome Yates was involved in the decision process; that Dr. Yates wanted her to come to Buffalo, that he had more authority than Dr. Shin; and that he reaffirmed the offer for her to come to Buffalo. (Docket No. 114, Exhibit D, page 136).⁸ After these communications Jacobs accepted the position at Roswell.

Jacobs started at Roswell on November 1, 1997.⁹ According to the defendants, by the

⁸ Jacobs testified that Dr. Orner later advised her that Dr. Shin had contacted AMC and had obtained a reference advising that Jacobs "argues with nurses." Jacobs opined that Dr. Shin was no longer interested in her when he found out that she argues with nurses. Jacobs stated that Dr. Orner "had explained that anybody who has half a brain argues with nurses. [Dr.] Yates felt I was great. And I ended up coming to Buffalo." (Docket No. 114, Exhibit D, page 136).

⁹ After she started at Roswell, Jacobs asserts that Dr. Orner advised her that he did not like Dr. Shin, that the hospital had been in the process of terminating Dr. Shin. At that point, Jacobs informed Dr. Orner that she "felt sexually harassed" by Dr. Shin because he asked if she had a boyfriend or was interested in getting pregnant, and commented that she was so pretty she could be a stewardess during her interview. (Docket No. 114, Exhibit D, page 138). Jacobs

following month there were numerous concerns about plaintiff's performance.¹⁰ As was the case when Jacobs was at the University of Rochester, the plaintiff demonstrated considerable concern over scheduling and taking time off work. Although she had been at Roswell for less than two months, Jacobs announced an intention to take several days off surrounding December 25, 1997. By memo dated December 15, 1997, Dr. Lee advised Jacobs that residents could not take time off from work without using vacation days. Dr. Lee noted that he had previously addressed this issue in a memo dated November 25, 1997. (Docket No. 114, Exhibit C, page 153).¹¹ On December 18, 1997, Dr. Lee determined it necessary to issue the following memo to remind Jacobs of her

claims that Dr. Orner arranged for Jacobs to tell her story to Lucille Binkowski, Jim Donathen (Rowell's attorney) and Dr. Lee. (Docket No. 114, Exhibit D, page 139). Jacobs testified that Dr. Lee also advised her that Dr. Shin was threatening to sue the hospital and that Dr. Shin had named Jacobs in the lawsuit. (Docket No. 114, Exhibit D, page 140). In any event, Jacobs testified that Dr. Yates and Dr. Zachary Grossman wanted her to be a sexual harassment witness against Dr. Shin. (Docket No. 114, Exhibit D, page 141). The defendants deny any such action was taken. (Dr. Grossman, Docket No. 110, ¶ 11; Dr. Orner, Docket No. 111, ¶ 6; Dr. Yates, Docket No. 121, ¶ 7).

¹⁰ At the outset, there were questions relating to whether Jacobs was properly credentialed for the position. According to a memo from Lucy Binkowski to Cheryl Kishbaugh, Roswell administrators, Binkowski asked Jacobs whether she was credentialed. According to Binkowski, Jacobs responded: "The VA [Veteran's Administration Hospital] told me that the previous candidate was not selected as he was an illegal alien, however, he trained at Johns Hopkins. Why does UB [State University of New York at Buffalo] have to go to such an extent to check credentials. They should accept what we give them and be done with it." (Docket No. 114, Exhibit C, page 166). Subsequently, the record reflects that AMC notified Roswell that Jacobs was not privileged in any procedures while at AMC. (Docket No. 114, Exhibit C, pages 133, 176).

¹¹ It appears that the residency program in which Jacobs was participating was federally funded. Jacobs responded to Dr. Lee's memo by drafting dated December 22, 1997, addressed "TO WHOM IT MAY CONCERN;" in which she announced that she had checked with the personnel department who advised that Jacobs was a federal employee. Therefore, she stated: "I am not accountable to Roswell Park Cancer Institute for time off." (Docket No. 114, Exhibit C, page 138).

responsibilities at Roswell:

1) When the attending to whom you are assigned to work is not in the clinic, it is your responsibility to assist the other attendings in the clinic. This may involve seeing new patients, follow ups, or patients under treatment. It may also involve assisting with simulations. You may not spend time in other clinics when your assigned Radiation Medicine attending is away. This includes when they are at Millard Fillmore, doing research or on vacation. It is only by spending time in the clinic that your clinical judgement as a radiation oncologist can be developed.

2) You may not perform research with an attending outside of Radiation Medicine without my approval or the program director's approval.

(Docket No. 114, Exhibit C, page 140).

The record also reflects that as part of the residency program, Jacobs was to attend a lecture on December 22, 1997. (Docket No. 114, Exhibit C, page 144). On that date, Dr. Cindy Ikner notified Dr. Lee that Jacobs did not attend the lecture. (Docket No. 114, Exhibit C, page 139). On December 23, 1997, Dr. Orner wrote to Dr. Lee expressing his concerns:

To begin with, I observed that many of her interactions have been bizarre and inappropriate with clinicians, staff, and patients. Her discussions of intimate personal life details with near strangers is somewhat disturbing and her interactions with staff is [sic] poor.

She appears to be preoccupied with personal and social events which seem to always take precedent over clinical and educational responsibilities. She is extremely lax about her schedule and despite her apparent interest in initial social patient interactions, she seems to show very little interest in simulations, patient planning details, or following patient progress or follow-up. She shows very little initiative and appears to be preoccupied with her own defined schedule as opposed to that of the clinic or physician she is working with.

She has shown a disrespect for authority and a disturbing

condescension to those she feels are beneath her within the hospital. It often appears that she does what she feels like doing, whether it be personal or academic and not what she is told to do. She shows a very poor ability to take any personal constructive criticism and becomes combatant with those trying to help her. Obviously, this is an obstacle to potential teaching and training.”

(Docket No. 114, Exhibit C, page136).

On that same date, there was a meeting attended by Dr. Lee, Dr. Jacobs, Dr. Grossman, and Jack LaShomb, at which they discussed plaintiff’s “need to improve her performance as a resident”. (Docket No. 114, Exhibit A, page 15). According to Dr. Lee, the meeting was held because “[t]here had been previous inappropriate behavior and inadequate attendance and performance in the clinic by Dr. Jacobs.” (Docket No. 114, Exhibit A page 16).

Three days later, on December 30, 1997, a patient, a 72-year old women suffering from cancer, lodged a complaint against Jacobs based upon comments made by Jacobs during an examination. The patient, and her daughter, complained that Jacobs suggested that at age 72, it was “her time” to die. The complaint quotes Jacobs’ as having said: “Let’s face it, you are 72, if cancer did not get you, it would be your time to check out anyway.” (Docket No. 114, Exhibit C, page 86-87, 127). The comment upset the family who had been attempting to have the patient keep a positive spirit. (Docket No. 114, Exhibit C, page 127). The hospital’s patient advocate forwarded the complaint to the department. By memo dated January 8, 1998, Dr. Grossman, acting chair of the Division of Radiation Medicine, stated that he believed that plaintiff should be dismissed, but that he lacked the official capacity to dismiss her. He notified Jacobs that she was “permitted to interact with patients in the presence of an attending only, from here on, unless otherwise notified, while you are at Roswell Park or the Roswell Park Outpost at Millard

Fillmore Suburban.” (Docket No. 114, Exhibit C, page 114).

On December 31, 1997, Dr. Orner sent a letter to Dr. Lee, the acting clinical director, regarding Dr. Jacob’s rotation with him, which ended that day. Dr. Orner stated:

Despite her presence in the Department she made no effort to see any of my patients with me or spend anytime within the clinic. Today I saw all my patients under treatment as well as an educationally interesting consult and a recently radiated head and neck followup. Despite the fact that only several of these were listed on the computer scheduling system including a followup who did not show, she made no attempt to see the patients or to contact myself or Ann Luterek to find out what was happening in our clinic today. As I told you in previous notes, this is not the first time this situation has occurred.

(Docket No. 114, Exhibit C, page 132).

Dr. Gary M. Proulx, another attending physician at Roswell, wrote to Dr. Lee on January 3, 1998, “to inform [him] of several incidents of inappropriate behavior over the last two months by our resident, Lisa Jacobs, that I have witnessed or have been informed by others that I feel you should be aware.” (Docket No. 114, Exhibit C, page 121). Dr. Proulx noted that on one occasion Jacobs had accused him of threatening her¹², and on another she proposed following him into the bathroom to continue a discussion.¹³ He was also told by another resident, Cindy Ikner, M.D.,

¹² According to Dr. Proulx, Jacobs had asked him for helpful hints on “what things were important in eventually finding a good job after residency.” He stated that he advised her “that passing the boards was obviously very important but that as in any job having good recommendations was also equally as important.” She allegedly replied that she thought his comments were threatening to her. Dr. Proulx states that he told her that I was only answering her question and that he had given this advice to all of the other residents. Dr. Proulx stated that Jacobs apologized and stated that she does not take criticism very well. (Docket No. 114, Exhibit C, page 121).

¹³ Dr. Proulx determined it was necessary to advise Dr. Lee of an incident, following a simulation, wherein Jacobs allegedly followed him into the hall to ask a question as I left to go to

that plaintiff had said that Dr. Proulx “appears to be a friendly type of person who puts his hands on shoulders when talking to people, but did not state that I have attempted to touch her sexually.” (Docket No. 114, Exhibit C, page 121). Dr. Proulx denied touching Jacobs in any fashion. (Docket No. 114, Exhibit C, page 121). He concluded his letter stating:

I am very concerned about Lisa’s mental state not only for the few incidents I have mentioned, but also for the many other instances that I have witnessed her behavior as being strange in conferences for example and several other occasions when she has been openly critical of almost everybody in the department. I feel she is unstable mentally and a potential danger to providing proper patient care and this is why I now feel compelled to document this.

(Docket No. 114, Exhibit C, page 121).

A January 7, 1998, Dr. Lee asked Lucille Binkowski, the program administrator, to send a memo to Dr. Shin summarizing his concerns about Jacobs:

1. Insubordinate and does not follow directions.
2. Inappropriate comments to staff, nurses and doctors.
3. Creating rumors and dissension among staff.
4. Faculty physicians are refusing to work with her and are grading her with poor performance.
5. Patient complaint, which is currently under investigation by Marjorie Lynette, Roswell Patient Advocacy RN.

(Docket No. 114, Exhibit C, page 109).

On January 16, 1998, Dr. Lee wrote to Dr. Grossman explaining that, on that date, there had been a procedure for the removal of a radiation implant from a patient under the care of Dr. Jacobs and an attending physician identified as Dr. Hahn. Jacobs did not show up for the

the bathroom. Dr. Proulx stated that, apparently upon arriving at the bathroom door, he advised Jacobs that he would be “out in a minute to finish the talk.” Jacobs allegedly responded “we could continue it in there (meaning the bathroom) if you want.” To which Dr. Proulx maintains he replied: “absolutely not.” (Docket No. 114, Exhibit C, page 121).

procedure. Although a resident in the Radiation Medicine department, it appears that Jacobs did not want to be around radioactive materials. Dr. Lee stated that Jacobs informed him that Dr. Hahn had advised her that “she did not have to be around radioactive materials. Dr. Lee reported that Jacobs “unfamiliarity with this radiation medicine in-patient is inexcusable” and that “[h]er absence at the time of removal of the implant could have seriously jeopardized the welfare of this patient.” (Docket No. 114, Exhibit C, page 95). Dr. Lee added that:

[t]his is not the first incident where Dr. Jacobs has not followed her responsibility for patient care. I am seriously concerned about her motivation and ability to continue as a radiation medicine resident. Actions have already been taken to prevent Dr. Jacobs from seeing patients without an attending physician present. This incident shows that Dr. Jacobs is irresponsible with regards to important patient care issues, and that despite previous discussions and guidance, she represents a serious liability to the Division of Radiation Medicine and Roswell Park Cancer Institute.

(Docket No. 114, Exhibit C, page 95).

By memorandum dated January 21, 1998, Dr. Yates advised the plaintiff that:

After multiple attempts by members of the staff of the Radiation Oncology Department to encourage you to develop your skills, it is the consensus of the leadership in that department, that your progress has been insufficient to warrant your attention as a resident. Your continued training at this hospital is no longer possible.

(Docket No. 114, Exhibit C, page 93). The memorandum also advised plaintiff of her right to pursue a grievance challenging the determination.¹⁴ The following day, Dr. Shin sent a clarifying

¹⁴ Plaintiff pursued a grievance. Pursuant to the grievance procedures of the Consortium (Docket No. 114, Exhibit C, pages 97-104). Jacob argued that she was dismissed in retaliation for her having resisted and complained about alleged sexual harassment. On April 28, 1998, the grievance committee issued its report:

memo to Jacobs notifying her that her dismissal was not limited to Roswell Park, but that she was “no longer being retained at any of the hospitals within the Graduate Medical Education Consortium of the State University of New York at Buffalo.” (Docket No. 114, Exhibit C, page 92).

Prior to her separation from Roswell, Jacobs applied to the Radiation of Oncology program at the University of Wisconsin at Madison.¹⁵ Subsequent to her termination in Buffalo, Jacobs began as a resident in Wisconsin on or about July 1, 1998. (Docket No. 115, Exhibit E, page 64-65). Jacobs was subsequently terminated from the University of Wisconsin. She asserts that her termination was “because I complained.” (Docket No. 115, Exhibit E, page 66).

The Committee felt Dr. Jacobs’ intelligence is not the issue, but rather, her professional attitudes and behavior. Dr. Jacobs stated she felt her termination was due to sexual harassment but she never filed a formal complaint, despite (according to her file) recommendations to do so from both Dr. Ikner and Ms. Cheryl Kishbaugh. Dr. Jacobs presented no witnesses, affidavits, or other documentation to substantiate her allegations of sexual harassment and discrimination. Therefore, the Committee felt it had no material bearing on her termination.

Despite her short tenure with the radiation oncology program, there were specific evaluations on file, and the action of requiring her to see patients only with attendings present provided her with remedial feedback on her interpersonal skills and professional behavior. It was the opinion of the Committee that the Department of Radiation Oncology and its witness[es], along with the documentation supplied to all, provided sufficient evidence of Dr. Jacobs’ continued inability to interact appropriately with patients and others. As a result, the Committee supported the decision to terminate Dr. Lisa Jacobs from the radiation oncology residency program.

(Docket No. 114, Exhibit B, page 46).

¹⁵ Jacobs testified that she had also applied for a position at Louisville University. She stated that she was offered a position, she accepted the position, but the offer was rescinded by Louisville University due to her termination from Roswell. (Docket No. 115, Exhibit E, page 66).

However, Jacobs acknowledged that the University had cited performance issues¹⁶ as the basis of her termination. (Docket No. 115, Exhibit E, page 68). The plaintiff filed an employment discrimination law suit against the University of Wisconsin based upon that termination.¹⁷

¹⁶ In upholding the grant of summary judgment, the Seventh Circuit described the record as including evidence of Jacobs job performance at the University of Wisconsin:

Jacobs soon experienced problems with her job performance. Jacobs's first evaluation, completed by Mehta on August 20, cited Jacobs for a lack of basic medical knowledge, inability to interpret MRI images, and poor communication and organizational skills. In follow-up evaluations on September 8 and 30, Mehta noted that despite small improvements in some areas, Jacobs' overall performance remained unsatisfactory. In light of these problems, Mehta had Jacobs meet with the director of the residency program, Dr. Paul Harari. At a September 17 meeting, Jacobs acknowledged that she was having difficulty keeping up with her patient load, but blamed her problems on other staff members. After the meeting, Harari solicited input from other doctors on Jacobs's performance. One doctor responded that Jacobs's history-taking skills were "severely lacking" and that "her performance is at or below the level of a 3 year medical student." A second doctor informed Harari that Jacobs asked "odd" and "argumentative" questions at conferences and that other residents had raised concerns about Jacobs's

Jacobs v. University of Wisconsin Hospital & Clinics Authority, 12 Fed.Appx. 386, 388 (7th Cir. 2001).

¹⁷ Jacobs' claims in that case mirror those in the present action:

Jacobs alleges that throughout her residency she was subjected to harassment and discrimination on the basis of her gender and race. According to Jacobs, Harari caressed her and inappropriately touched her arm, shoulders, and back during her interview and on four separate occasions during her residency. Jacobs also contends that Mehta made derogatory references to women by calling them "scatterbrained," "uneducated," or "incompetent," and told Jacobs that she was "not worth the effort of paging." Jacobs alleges that a radiologist on a few occasions told her that he wanted to "take a look" at her and then would stare at her breasts and buttocks. Jacobs also perceived harassment in sexual jokes that a female receptionist in the department e-mailed her and a physician's comment that Jacobs was his "guinea pig." Finally, Jacobs alleges generally that female residents were subjected to similar harassment and received less pay and vacations than male residents. Jacobs claims (without documentary support) that she complained about this harassment to Harari and Mehta but her complaints led

Summary judgment dismissing the complaint was granted in that case.¹⁸

Subsequently, Jacobs has worked for short periods at various other hospitals. After a two months at Jamaica Hospital in Jamaica, New York, Jacobs was suspended from practice there due to the determination by the New York State Department of Health Office of Professional Medical Conduct that Jacobs had submitted falsified information in various employment applications. (Docket No. 115, Exhibit E, page 34-35). She started, but was not allowed to complete, a masters degree program in public health at Columbia University. Jacobs contends that she was not allowed to complete the program because she took too long of a leave of absence. (Docket No. 115, exhibit E, page 42-44). Jacobs also testified that more recently she

nowhere; in fact she claims that Mehta told her at their August 20 meeting that he would not tolerate complaints about harassment and that he would “kill” her if she pursued her complaints. The first complaint of discrimination in the record is an October 15 letter to the UWHCA's House Staff Committee for Medical Staff and the human resources office.

Jacobs v. University of Wisconsin Hospital & Clinics Authority, 12 Fed.Appx. 386, 388-389 (7th Cir. 2001).

¹⁸ The Court granted summary judgment based upon the fact that Jacobs could not establish even a triable issue of fact as to whether she was meeting performance standards for her position at the University of Wisconsin. The Court also cited to the fact that Jacobs had submitted false information in her application for employment in that case. In addition to the misrepresentations regarding her history at the University of Boston, and other residency programs, the Court noted that Jacobs had misled the University of Wisconsin as to her reasons for leaving her residency at Roswell:

On October 15 Harari learned that Jacobs had been terminated for “unacceptable performance” from her previous residency at the Roswell Cancer Institute in Buffalo, New York. But in her transmittal letter, filed after she knew she was to be fired from Roswell, Jacobs stated that she was looking to leave Roswell because the program was of poor quality.

Jacobs v. University of Wisconsin Hospital & Clinics Authority, 12 Fed.Appx. 386, 388 (7th Cir. 2001).

was offered a position at St. Elizabeth's Hospital (location not provided), but declined that opportunity to work at an unnamed hospital in West Virginia. (Docket No. 115, Exhibit E, pages 58-59). Jacobs acknowledges that she was terminated by the hospital in West Virginia position after a few months. (Docket No. 115, Exhibit E, pages 59-60).¹⁹

Discussion

Standard of Review

Summary judgment is appropriate where there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law. See Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 188 (2d Cir. 1992) citing Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991). To prevail on its summary judgment motion, the moving party must show that "there is no genuine issue as to any material fact" and that it "is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard, we "resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment." Cifra v. General Electric Co., 252 F.3d 205, 216 (2d Cir.2001).

In discrimination cases, the inquiry into whether the plaintiff's sex or race caused the conduct at issue often requires an assessment of individuals' motivations and state of mind, matters that call for a "sparing" use of the summary judgment device because of juries' special advantages over judges in this area. Distasio v. Perkin Elmer Corp., 157 F.3d 55, 61 (2d Cir.1998); accord Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir.1998) (noting juries' possession of the "current real-life experience required in interpreting subtle sexual dynamics of

¹⁹ The reason for this termination is not in the record before the Court.

the workplace based on nuances, subtle perceptions, and implicit communications").

Nonetheless, an employment discrimination plaintiff faced with a properly supported summary judgment motion must "do more than simply show that there is some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). See Distasio, 157 F.3d at 61. She must come forth with evidence sufficient to allow a reasonable jury to find in her favor. See McCarthy v. New York City Technical College, 202 F.3d 161, 167 (2d Cir.2000). In this regard, the non-moving party must, "demonstrate to the court the existence of a genuine issue of material fact." Lendino v. Trans Union Credit Information, Co., 970 F.2d 1110, 1112 (2d Cir. 1992), citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A fact is material:

when its resolution would "affect the outcome of the suit under the governing law" and a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party."

General Electric Company v. New York State Department of Labor, 936 F.2d 1448, 1452 (2d Cir. 1991), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Even where facts are disputed, in order to defeat summary judgment, the nonmoving party must offer enough evidence to enable a reasonable jury to return a verdict in its favor. See Anderson, 477 U.S. at 248; Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir.1998). Thus the "non-moving party may not rely on conclusory allegations or unsubstantiated speculation." Byrnie v. Town of Cromwell, Bd. of Educ. 243 F.3d 93, 101 (2d Cir. 2001). "The non-moving party must come forward with enough evidence to support a jury verdict ... and the ... motion will not be defeated merely ... on the basis of conjecture or surmise." Trans Sport, supra, 964 F.2d at 188. Summary judgment is appropriate "[w]here the record taken as a whole could not lead a rational

trier of fact to find for the non-moving party." Nippon Fire & Marine Ins. Co., Ltd. v. Skyway Freight Systems, Inc., 235 F.3d 53 (2nd Cir. 2000) quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Title VII Shifting Burdens

Under the burden-shifting analysis outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a plaintiff first must establish a *prima facie* case of discrimination based on gender. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas, 411 U.S. at 802. To establish a *prima facie* case of gender discrimination, the plaintiff must satisfy the following four elements: (1) that plaintiff falls within the protected group, (2) that plaintiff was qualified for the position and performed the job duties satisfactorily, (3) that plaintiff was subject to an adverse employment decision and (4) that the adverse employment decision was made under circumstances giving rise to an inference of unlawful discrimination. McDonnell Douglas, 411 U.S. at 802 ; Fisher, 114 F.3d at 1335.

If the plaintiff establishes a *prima facie* case of gender discrimination, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the challenged employer action. McDonnell Douglas, 411 U.S. at 802. If the defendant proffers such a reason, the presumption of discrimination created by the *prima facie* case drops out of the analysis, and the defendant "will be entitled to summary judgment ... unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination." James v. N.Y. Racing Ass'n, 233 F.3d 149, 154 (2d Cir.2000) citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519-524 (1993); see also McDonnell Douglas, 411 U.S. at 804; Fisher v. Vassar College, 114 F.3d 1332,

1336 (2d Cir.1997) (en banc), *cert. denied*, 522 U.S. 1075 (1997). The plaintiff "must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43 (2000).

Title VII and Human Rights Law Claims²⁰

Jacobs has failed to meet her burden to establish a *prima facie* case of either hostile work environment or disparate treatment at Roswell. The Court notes that the plaintiff has submitted no evidence, other than her unsubstantiated allegations, to support her claims of sexual harassment²¹ or disparate treatment²² in this case. More importantly, the defendants have

²⁰ The complaint in this case also asserts claims under the New York State Human Rights Law (New York Executive Law § 296) ("NYSHRL"). Claims under the NYSHRL receive the same analysis as claims under Title VII and ADEA. Fisher v. Vassar College, 114 F.3d 1332, 1335 (2d Cir.1997) (in banc); Lightfoot v. Union Carbide Corp., 110 F.3d 898, 913 (2d Cir.1997); Raskin v. Wyatt Co., 125 F.3d 55, 60 (2d. Cir. 1997).

²¹ The plaintiff points to the alleged comments by Dr. Shin during his initial interview in October of 1997. It appears that Dr. Shin's alleged comment to the effect that the plaintiff was pretty enough to be a stewardess came after the plaintiff initiated discussion of her "attractiveness" being a professional weakness. Further, Jacobs admits that she only met Dr. Shin on this one occasion. Although Jacobs alleged "repeated" fondling and man-handling by Dr. Orner, Jacobs identified only two occasions: one when Dr. Orner was alleged to slapped her on the back (which Jacobs' acknowledges was an attempt to say that she had done a great job at a conference (Docket No. 115, Exhibit E, page 154); and another instance when he put his arm around her back (Docket No. 115, Exhibit E, pages 153). She asserts that on one occasion Dr. Proulx also put his arm around her and pulled her close to him so that her breast came into contact with his body. (Docket No. 115, Exhibit E, page 160). She does not allege that either Dr. Orner or Dr. Proulx made explicit sexual advances toward her. Jacobs also points to various alleged comments from Dr. Shin, Dr. Orner and Dr. Proulx regarding whether she had a boyfriend; whether she wanted to have children; asking her to read a private card from a boyfriend aloud; whether she got "hot and heavy" with her boyfriend; how there was a need for a male birth control pill because they were all sexually active. (Docket No. 115, Exhibit E, pages

demonstrated the existence of a legitimate, non-discriminatory basis for Jacobs' termination – her unsatisfactory performance of her duties as a resident at Roswell. The plaintiff has failed to rebut this basis for her termination or to raise a question of fact as to whether the proffered legitimate, nondiscriminatory basis was a pretext for some discriminatory animus. Indeed, in response to the instant motion, the plaintiff does not address any of the specific factual allegations (i.e. the complaints lodged by patients; her failure to attend mandated lectures, her failure to participate in a scheduled medical procedure; her difficulty in communicating with the other doctors, nurses

156-167). The defendants deny that these incidents occurred. Even if it were assumed that these incidents did occur, the Court notes that several may be sexually neutral. Moreover, considering the severity, quality and quantity of the alleged events, the Court cannot conclude that they are so pervasive as to constitute a hostile work environment. Thus, even if the plaintiff were able to establish a *prima facie* case, which she cannot, summary judgment would still be appropriate. Kotcher v. Rosa and Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir.1992) ("The incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief."); Carrero v. New York City Housing Auth., 890 F.2d 569, 577 (2d Cir.1989) ("The incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.").

²² The plaintiff's complaint asserts that she was denied business cards, was not allowed to borrow slides, and was not allowed vacation days – each of which were allegedly afforded to male residents. The plaintiff has submitted no evidence to support these contentions. Indeed, documents in the record reflect that the policy relating to taking vacation days was gender neutral. (Docket No. 114, Exhibit C, page 153-155). Moreover, the plaintiff acknowledges that there were only three residents in the program while she was there, two female (including herself), and one male (Dr. Bruin²³). At her deposition, Jacobs testified that her allegations to the effect that male residents were allowed to have business cards, or to borrow slides was based upon comments to her by Dr. Ikner. Jacobs admitted that she had no first hand knowledge that this was, in fact, the case. (Docket No. 115, Exhibit E, pages 128-129). Jacobs also points to the fact that she was not "allowed" to work at Millard Fillmore Hospital or participate in a study in which Dr. Bruin was involved. It is undisputed that Dr. Bruin was a third year resident when Jacobs started at Roswell. The plaintiff was not aware of how long Dr. Bruin had been a resident at Roswell before he was asked to participate in the study. (Docket No. 115, Exhibit E, pages 130-131). The plaintiff has failed to demonstrate that a material question of fact exists as to whether her assignment at Roswell (and not Millard Fillmore) or the fact that she was not asked to participate in the study during the three months that she was at Roswell had anything to do with her gender.

and staff at Roswell) which the defendants articulate as the basis for her termination. The plaintiff's conclusory allegations are not sufficient to preclude summary judgment as to the Title VII and §296 claims asserted in this case. The motion for summary judgment with respect to these claims should be granted.

Retaliation Claims

To establish a prima facie case for retaliation, a plaintiff must show that (1) the employee was engaged in protected activity; (2) the employer was aware of that activity; (3) the employee suffered an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. Manoharan v. Columbia Univ. College of Physicians & Surgeons, 842 F.2d 590, 593 (2d Cir.1988); Reed v. A.W. Lawrence & Co., Inc., 95 F.3d 1170 (2nd Cir. 1996). The allocation of burdens of proof in retaliation cases follows the same general rules enunciated by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973) and its progeny discussed above.

The plaintiff did express complaints regarding statements made by Dr. Shin to her at the initial interview. Subsequent to her complaints, Jacobs admits that she was told to give her account of the interview to members of the Roswell administration, and to the hospital's labor attorney (who she alleges that she met with). It is undisputed that Dr. Shin had already been terminated by Roswell at that time. As noted above, Jacobs only had one face to face meeting with Dr. Shin, at her initial interview in which he allegedly told her that she was pretty enough to be a stewardess, and inquired as to whether she had a boyfriend and intended to have children. Dr. Shin did invite Jacobs, along with the two other residents, to a lunch on one occasion. Jacobs

asserts that Dr. Lee advised her not to go to the lunch “to make it look like Kyu Shin was sexually harassing me.” (Docket No. 114, Exhibit D, page 143). Such a statement would suggest that Roswell was, in fact, encouraging her to bring a sexual harassment claims against Dr. Shin. Indeed, Jacobs’ claims that Roswell took no steps to investigate her allegations of the comments allegedly made by Dr. Shin is contradicted by own deposition testimony. (Docket No. 114, Exhibit D, pages 138-140). In any event, Jacobs has failed to articulate any basis from which it could be concluded that there is any causal connection between her termination and her complaints regarding Dr. Shin’s comments to her. The plaintiff’s retaliation claims should also be dismissed.

Conclusion

It is recommended that the defendants’ motion for summary judgment be granted and the complaint in this matter be dismissed in its entirety.

Pursuant to 28 USC §636(b)(1), it is hereby ordered that this Report & Recommendation be filed with the Clerk of the Court and that the Clerk shall send a copy of the Report & Recommendation to all parties.

ANY OBJECTIONS to this Report & Recommendation must be filed with the Clerk of this Court within ten(10) days after receipt of a copy of this Report & Recommendation in accordance with 28 U.S.C. §636(b)(1), Rules 6(a), 6(e) and 72(b) of the Federal Rules of Civil Procedure, as well as WDNY Local Rule 72(a)(3).

FAILURE TO FILE OBJECTIONS TO THIS REPORT & RECOMMENDATION

WITHIN THE SPECIFIED TIME, OR TO REQUEST AN EXTENSION OF TIME TO FILE OBJECTIONS, WAIVES THE RIGHT TO APPEAL ANY SUBSEQUENT ORDER BY THE DISTRICT COURT ADOPTING THE RECOMMENDATIONS CONTAINED HEREIN. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed2d 435 (1985); F.D.I.C. v. Hillcrest Associates, 66 F.3d 566 (2d. Cir. 1995); Wesolak v. Canadair Ltd., 838 F.2d 55 (2d Cir. 1988); see also 28 U.S.C. §636(b)(1), Rules 6(a), 6(e) and 72(b) of the Federal Rules of Civil Procedure, and WDNY Local Rule 72(a)(3).

Please also note that the District Court, on *de novo* review, will ordinarily refuse to consider arguments, case law and/or evidentiary material which could have been, but was not, presented to the Magistrate Judge in the first instance. See Patterson-Leitch Co. Inc. v. Massachusetts Municipal Wholesale Electric Co., 840 F.2d 985 (1st Cir. 1988).

Finally, the parties are reminded that, pursuant to WDNY Local Rule 72.3(a)(3), “written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority.” **Failure to comply with the provisions of Rule 72.3(a)(3) may result in the District Court’s refusal to consider the objection.**

So Ordered.

/s/ Hugh B. Scott

United States Magistrate Judge
Western District of New York

Buffalo, New York
March 27, 2007