Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **SALVATORE MODICA** IAS PART 37
Justice

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NISSRINE KALAFATOGLU,

Plaintiff(s),

-against-

BEAUTY 35 INC., ROBERT KIM and SAMUS ZEN LIU,

Defendant(s).

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Index No.: 711763/15

Motion Date: April 4, 2016

Cal. No.: 62

Mot. Seq. No.: 1

The following papers were read on this motion by Defendants for an Order, pursuant to CPLR 3211(a)(7), dismissing the Complaint, or alternatively, pursuant to CPLR 3024(b), striking allegations in the Complaint.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits (Defts).....	EF 5,7-9
Memorandum of Law in Support (Defts).....	EF 6
Answering Affidavits-Exhibits (Pltf).....	EF 11, 13-15
Memorandum of Law in Opposition (Pltf).....	EF 12
Memorandum of Law in Reply (Defts).....	EF 16

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Plaintiff commenced this action seeking damages for injuries she allegedly sustained as a result of being sexually harassed, discriminated and retaliated against by her former employer on the basis of gender, sex, and national origin. In her Verified Complaint, Plaintiff asserts claims for, *inter alia*, discrimination on the basis of gender, sex, and/or national original, retaliation by her employer for the reporting by the plaintiff of sexual harassment in the workplace. Finally, the plaintiff asserts a claim of intentional infliction of emotional distress. Here, the facts reveal that Plaintiff worked at a beauty supply store called BEAUTY 35, INC., as a cashier and subsequently, a sales person. Defendants ROBERT KIM and SAMUS ZEN LIU ("KIM and "LIU") were employed at BEAUTY 35, INC. as store managers.

In her complaint, Plaintiff alleges that, in her employment, she was subordinate to both Defendants KIM and LIU and that said Defendants had the right to alter Plaintiff's terms of employment including her work hours, her pay, and her position. Plaintiff is a female, of Algerian national descent; she speaks Arabic and French. Defendant LIU is a male, of Chinese-American national origin. Plaintiff claims that Defendant LIU reprimanded her for speaking Arabic while exempting other employees in the store who spoke Hindi, Chinese, Spanish, Korean, and any non-Arabic language. She claims that she was treated less favorably than other employees. At times, Plaintiff alleged that Defendant LIU threatened BEAUTY 35, employees, apparently with termination, if they spoke Arabic in the workplace. Plaintiff alleged that Defendants created a hostile work environment during her employment.

Unable to tolerate the discrimination and sexual harassment, Plaintiff allegedly reported her concerns to the assistant manager at the store. Plaintiff claimed that she advised Defendant LIU that his inappropriate behavior made her uncomfortable. Plaintiff claimed that as a result of the hostile work environment created by the defendants, it caused her to cry and vomit; it also caused her severe bleeding (prenatal bleeding due to stress), which required emergency medical attention to prevent a miscarriage or harm to the fetus.

A. CPLR 3211(a)(7)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against defendant for failure to state a cause of action is decided as follows: "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference." *Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608 (2nd Dept. 1999)(internal citations omitted); *Leon v. Martinez*, 84 NY2d 83 (1994). Applying this standard, a Court must then determine whether the facts alleged fit within any cognizable legal theory *1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc.*, 260 AD2d 770 (3rd Dept. 1999). The Court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion *See, Stukuls v. State of New York*, 42 NY2d 272 (1977); *Jacobs v. Macy's East, Inc., supra.* In addition, the Court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. *See Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633 (1976). Such a motion will fail if, from its four corners, factual

allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits *Given v. County of Suffolk*, 187 AD2d 560 (2nd Dept. 1992). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. *See, Rovello v. Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint." *Jericho Group, Ltd. v. Midtown Development, L.P.*, 32 AD3d 294 (1st Dept. 2006)(internal citations omitted).

Plaintiff alleges in her Verified Complaint, the following causes of action:

1) Discrimination on the basis of sex, gender, and/or national origin under New York State law and New York City Administrative Code;

2) Retaliation under New York State law and New York City Administrative Code;

3) Intentional infliction of emotional distress;

4) Assault and battery;

5) False imprisonment

Discrimination on Basis of Sex, Gender, and/or National Origin

Pursuant to New York State Human Rights Laws (Executive Law § 296[1][a]) and New York City Human Rights Laws (§ 8-107 *et seq.* of the Administrative Code of the City of New York), it is unlawful for an employer to discriminate in its employment practices against any person on the basis of sex or gender. Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000 *et seq.*) (Title VII) also prohibits discrimination on the basis of sex or gender. Since the standards of proof are the same to prove a claim of discrimination under New York's Executive Law and Title VII, courts apply the same analysis to both types of claims. *See Kremer v. Chemical Constr. Corp.*, 456 US 461 (1982); *Lucas v. South Nassau Comm. Hosp.*, 54 F Supp.2d 141 (1998); *Constantine v. Kay*, 792 NYS2d 308 (N.Y. Sup., Kings Cty. 2004).

Sexual discrimination which establishes a hostile work

environment constitutes a violation of Title VII and Executive Law § 296. *See San Juan v. Leach*, 278 A.D.2d 299 [2000]; *Lamar v. Nynex Serv. Co.*, 891 F. Supp. 184 (1995). A complaint claiming hostile work environment sexual harassment must allege conduct severe or pervasive enough to create a work environment that a reasonable person would find hostile or abusive; it must allege that the victim subjectively perceived the environment to be hostile; and it must either indicate that a single incident was extraordinarily severe, or that a series of incidents were effectively continuous and concerted to have altered the conditions of the working environment *See* McKinney's Executive Law § 296; *San Juan v. Leach, supra; Samide v Roman Catholic Diocese of Brooklyn*, 194 Misc. 2d 561 [2003]. Constructive discharge occurs when an employer makes working conditions "so intolerable that [a plaintiff is] forced into an involuntary resignation." *Clark v. State*, 186 Misc. 2d 896, 898 (2001), *quoting Pena v. Brattleboro Retreat*, 702 F.2d 322, 325 [2d Cir. 1983]; *see Stetson v. NYNEX Serv. Co.*, 995 F2d 355 [1993]).

Moreover, the alleged harassment can be imputed to the corporate employer and can result in imposition of direct liability based upon the conduct of a supervisor, officer or director of the corporation. *See Vitale v. Rosina Food Prods., Inc.*, 283 AD2d 141 [4th Dept. 2001]; *San Juan v Leach, supra; Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44 (4th Dept. 1996); *Herlihy v. Metropolitan Museum of Art*, 214 AD2d 250 (1st Dept. 1995]; *Kersul v. Skulls Angels, Inc.*, 130 Misc2d 345 (N.Y. Sup. Ct., Queens Cty., Special Term 1985). Furthermore, a co-employee may be individually subject to liability under § 296(6) of the Executive Law if he or she has an ownership interest in the corporate employer, has the authority to do more than simply carry out personnel decisions made by others, or if he or she directly participated in the unlawful conduct, regardless of his or her status in the corporation *See Patrowich v. Chemical Bank*, 63 NY2d 541 (1984); *Murphy v. ERA United Realty*, 251 AD2d 469 (2nd Dept. 1998); *Steadmen v. Sinclair*, 223 AD2d 392 [1st Dept. 1996); *Curran v. All Waste Sys.*, 213 F.3d 625 [2d Cir. 2000]; *Bass v. World Wrestling Federation Entertainment, Inc.*, 129 F. Supp.2d 491 (2001).

This Court finds that the Complaint states a cause of action for discrimination on the basis of sex, gender, and/or national origin under the Human Rights Laws via ¶'s 37-51.

Retaliation Under New York State Law and New York City Administrative Code

Plaintiff's cause of action for retaliation must be dismissed. To sustain a cause of action for retaliation, Plaintiff must allege that she participated in a protected activity known to Defendants, an adverse employment action was taken against her, and that she alleged that a causal connection between the adverse action and the protected activity. *See Forrest v. Jewish Guild For The Blind, supra; Romney v. New York City Transit Auth.*, 8 AD3d 254 (2nd Dept. 2004). Plaintiff failed to make allegations that she participated in a protected activity, such as filing a complaint with the New York State Commission on Human Rights or with the Equal Employment Opportunity Commission. *See e.g., Romney v. New York City Transit Auth., supra; Constantine v Kay, supra.* Therefore, the complaint fails to state a cause of action for retaliation.

Intentional Infliction of Emotional Distress

Regarding the tort of intentional infliction of emotion distress, the Court of Appeals of New York in *Howell v. New York Post Co.*, held:

> "The tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and the injury; and (iv) severe emotional distress...[T]he 'requirements of the rule are rigorous, and difficult to satisfy. Indeed, of the intentional infliction of emotional distress claims considered by [the Court of Appeals of New York], every one has failed because the alleged conduct was not sufficiently outrageous.'" [internal citations omitted].

Howell v. New York Post Co., 81 NY2d 115 (1993), held:

The Court finds that Plaintiff have stated a cause of action for intentional infliction of emotional distress via ¶'s 35, 53.

Assault and Battery

To establish a cause of action for assault, it must be alleged that there was physical conduct that places the [plaintiff] in imminent apprehension of harmful contact. *See Fugazy v. Corbetta*, 34 AD3d 728 (2nd Dept. 2006]. To recover damages for battery, Plaintiff must allege bodily contact, made with intent, which is offensive in nature. *See id.*

This Court finds that Plaintiff stated causes of action for assault and battery via ¶'s 35, 47-48 whereby Plaintiff alleged that Defendant LIU would continually and inappropriately touch said Plaintiff.

False Imprisonment

"To establish a cause of action for false imprisonment the plaintiff must show that: (1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged. Restatement, 2d, Torts, § 35; *but see*, Prosser, Torts [4th ed], § 11, which rejects the requirement that the plaintiff must be conscious of the confinement)" *Broughton v. State of New York*, 37 NY2d 451 (1975).

This Court finds that the Complaint states a cause of action for false imprisonment via ¶'s 34-35, 46-53.

B. CPLR 3024(b)

That branch of the motion which is for an order pursuant to CPLR 3024(b) striking allegations in the complaint is hereby denied as academic.

Pursuant to CPLR 3211(f), Defendants' time to serve a pleading responsive to the complaint is extended until ten (10) days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated: January 18, 2017

Salvatore J. Modica