

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**
Justice

IAS PART 16

VALERIY KHALDAROV,

Plaintiff,

- against -

NEIGHBORHOOD HOUSING SERVICE OF NYC,

Defendant.

INDEX NO. 553/2004

MOTION
DATE March 2, 2004

MOTION
CAL.NO. 15

The following papers numbered 1 to 9 read on this motion by defendant to dismiss the plaintiff's complaint for failure to state a cause of action pursuant to CPLR §3211[a][7].

	<u>PAPERS NUMBERED</u>
Notice of Motion/Affid(s)-Exhibits-Memos of Law....	1 - 6
Memorandums in Opp.....	7 - 8
Replying Memo of Law.....	9

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

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true and liberally construed (Palazzolo v Herrick, Feinstein, LLP, 298 AD2d 372; Schulman v Chase Manhattan Bank, 268 AD2d 174). Moreover, although the court "may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (Well v Rambam, 300 AD2d 580), the papers submitted in opposition to the motion are insufficient since they are not in affidavit form. Accordingly, a determination of whether the complaint states any cause of action must be based solely on the four corners of the pleading.

The plaintiff's complaint contains thirteen paragraphs reciting his factual allegations. He asserts he was hired by Accounting Principals, a temporary agency, and sent to perform services for the defendant. It is at the defendant's place of business where the plaintiff claims he was the subject of certain derogatory statements made by Robert Gilmour, an employee of the defendant, and that at some point was told by Mr. Gilmour that "Accounting Principals is replacing you". The complaint

expressly pleads only one legal theory of recovery. In the fourteenth paragraph, the plaintiff asserts the "defendant breached his duty to properly supervise his [sic] employees' actions".

The plaintiff's complaint fails to state a cause of action for negligent supervision as there are no facts nor simply even an allegation that the defendant knew or should have known of Mr. Gilmour's propensity for the conduct the plaintiff alleges led to his injuries (See, Manno v Mione, 249 AD2d 372).

The plaintiff's assertion that he has a cause of action based upon a violation of the New York State Human Rights Law (See, Executive Law §296) is without merit. Although under the circumstances it is possible both Accounting Principals and the defendant could be considered the plaintiff's employers (See, DeWitt v Liberman, 48 F.Supp2d 280), the facts as alleged are insufficient to support hostile work environment or discriminatory discharge claims under the New York State Human Rights Law.

To state a claim based upon a hostile work environment, the plaintiff must allege his 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" (Harris v Forklift Sys., 510 US 17, 21 [internal quotation marks and citations omitted]). However, the "mere utterance of an. . . epithet which engenders offensive feelings in an employee" does not affect the conditions of employment to sufficiently significant degree to constitute a hostile work environment (Meritor Sav. Bank, FSB v Vinson, 477 US 57, 60). Here, the plaintiff has alleged nothing more than a handful of statements by Mr. Gilmour that he perceived as offensive. While the statements concerning religious background and ethnicity may have been ugly and crass, the facts in the complaint do not establish, for pleading purposes, that the plaintiff's workplace was permeated with discriminatory intimidation. Since the other comments concerning strip clubs, the plaintiff's living arrangements and lack of financial success were not alleged to be predicated on the plaintiff's sexual orientation, ethnic background or religious heritage they are not actionable (See, Raum v Laidlaw Ltd., 1999 US App LEXIS 8219).

"In order to state a prima facie case of discriminatory discharge, a plaintiff must allege that: (1) [he] is a member of a protected class; (2) [he] satisfactorily performed the duties of her position; (3) [he] was discharged; and (4) [his] discharge occurred under circumstances giving rise to an inference of discrimination" (Farrell v. Child Welfare Admin., 22 Fed. Appx. 65; see also, Vitale v Rosina Food Prods., 283 AD2d 141). In the present case, the plaintiff fails to establish in the complaint his sexual orientation, ethnic background or religious heritage. He also does not allege that he was discharged by the defendant, but rather asserts he was "replaced" by Accounting Principals. Moreover, the plaintiff does not expressly state his

replacement at the defendant's place of business and his termination from Accounting Principals was based upon his sexual orientation, ethnic background or religious heritage.

Accordingly, the defendant's motion to dismiss the plaintiff's complaint for failure to state a cause of action pursuant to CPLR §3211[a][7] is granted.

Dated: April 29, 2004

Peter J. Kelly, J.S.C.