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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MICHAEL D. STALLMAN PART 7

Index Number : 118625/2006

PEZHMAN, ANNA

VS

ANN TAYLOR RETAIL INC.

Sequence Number : 002

PARTIAL SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 5/18/07

MOTION SEQ. NO.

MOTION CAL. NO. 104

The following papers, numbered 1 to 7 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-5
Replying Affidavits	6-7

Cross-Motion: X Yes ☐ No

Upon the foregoing papers, it is ordered that this motion **"Is determined in accordance with the annexed memorandum decision and order."**

FILED

Copies to both sides JUL 23 2007

The parties are directed to appear for a Preliminary Conference on Thursday, August 16, 2007 at 9:30AM in Room 949 (IAS Part 7) 111 Centre Street. COUNTY CLERK'S OFFICE NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/16/07

J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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ANNA PEZHMAN,

Plaintiff,

-against-

ANN TAYLOR RETAIL, INC. and BETH OGER,

Defendants.

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Index No. 118625/06

Decision and Order

MICHAEL D. STALLMAN, J.:

The following motions are consolidated for disposition here: (1) plaintiff Anna Pezhman's (Pezhman) motion for leave to amend her first amended complaint (complaint) to add a cause of action for negligent misrepresentation, and to add parties as defendants (mot. seq. no. 003); and (2) plaintiff's motion for partial summary judgment on her new claim for negligent misrepresentation and Pezhman's claim under section 191 of the Labor Law (mot. seq. no. 002). Defendants Ann Taylor Retail, Inc. and Beth Oger cross-move for partial summary judgment dismissing those two causes of action.

BACKGROUND

Pezhman, appearing pro se, was employed as a part-time sales associate at Ann Taylor, a woman's apparel store, at the corporate defendant's Madison Avenue shop. During the term of Pezhman's employment, Ann Taylor paid its sales associates a wage, while allowing them to earn bonuses under a written "ATS Sales Associate Incentive Plan." (Plan) Under the Plan, a sales associate who achieves sales of $400 or more per hour per month (SPH), as assessed at the end of each fiscal month, earns a bonus equal to 2% of his or her net sales for that month. Under the Plan, SPH is calculated by "dividing an associate's net sales by the number of payroll hours worked during

the fiscal month." Logan Aff., Ex. A. The Plan claims to be designed to "encourage associates to delight their clients and drive profit for the company while rewarding high performing sales associates for proven financial results." *Id.*

Ann Taylor employs a "Performance Improvement Measurement System" (PIMS) to keep track of a sales associate's progress towards receipt of the incentive bonus. Statistical ranking reports are available under PIMS. The results are posted on a bulletin board daily, and at the end of each month.

The Plan contains a disclaimer, which reads:

> Sales Audit and Human Resources use audited Net Sales and Payroll Hours data when determining SPH incentive eligibility. SPH numbers appearing in PIMS can, at times, appear inflated throughout the month. This is due to incorrect clockings that do not get adjusted on the same day they occur. It is the responsibility of associates to ensure that they have properly clocked in and out for every shift worked, or to immediately communicate to a manager any adjustments that need to be made.

Pezhman claims that her monthly report for December 31, 2005 indicated that she had sold $48,670 worth of merchandise, with an SPH of $416, which would entitle her to receive a bonus. However, when she received her paycheck about two weeks later, her paycheck had no bonus. Similarly, in February, the monthly summary posted on the bulletin board indicated that Pezhman had sold $40,022, with an SPH of $401. Again, however, her paycheck failed to show a bonus.

On each occasion, Pezhman complained to Judy Logan, Store Manager for Talent at Ann Taylor's Madison Avenue shop. Pezhman was told that, on both occasions, she had relied on an SPH number which was erroneous, in that she had actually worked more hours, as reflected in her paycheck, causing her SPH to fall below $400, negating her right to a bonus.

Plaintiff claims that she made "employment decisions" based on the validity of the numbers posted weekly on the board (Pezhman Affirm. of Law in Support of Amendment, ¶ 10), in that she

both agreed to work extra hours on occasion to help, for example, with the clean-up of the store after hours, and also that she "established a selling pace" based on the posted SPH (Pezhman Affirm. in Support of Memo of Motion to Amend, ¶ 8), and that she would not have worked extra productive, while less lucrative hours, had she known that the SPH was incorrect. She claims that she "established a selling pace in equilibrium with most of her co-workers in view of the accuracy of the statistical ranking," and that, had she known that the numbers were "deceptively inflated," she would have either have "implemented a more aggressive selling pace to compensate for the inflation" or, if she had known that "the incentive was unattainable," she would have "instituted a less stressful SPH." *Id.*

Pezhman claims that, shortly after she made a formal complaint to the Labor Department regarding her unpaid bonuses, she was transferred to a less lucrative floor, where she would be unable to keep up her selling pace. She complains that, sometime thereafter, she was terminated, allegedly in retaliation for her complaints to the Labor Department.

Pezhman commenced this action, alleging, among other things, violation of the New York Human Rights Law and the Administrative Code of the City of New York, because her supervisors allegedly refused to address Pezhman's complaints that she was subject to a hostile work environment, consisting of fellow workers allegedly making derogatory comments about people of Middle Eastern and South Asian ancestry[1], and by allegedly calling Pezhman "crazy" and "sick in the head." *See e.g.* Complaint, ¶ 28. Pezhman also brings a claim under Labor Law § 191, for Ann Taylor's alleged failure to pay her wages.

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[1] Pezhman claims to be of Iranian ancestry.

In the present motions, Pezhman seeks to add a cause of action for negligent misrepresentation, claiming that Ann Taylor was negligent in failing to verify the accuracy of the SPHs, upon which Pezhman would justifiably rely. Pezhman also seeks leave to add several co-workers and supervisory personnel to the action.

In the event that Pezhman is permitted to amend her complaint, she also seeks partial summary judgment on the negligent misrepresentation claim, as well as seeking partial summary judgment on her present Labor Law § 191 claim. Ann Taylor, in the event that amendment is granted, requests partial summary judgment dismissing the potential cause of action for negligent misrepresentation, as well as on Pezhman's Labor Law § 191 claim. No other causes of action in the complaint, or proposed second amended complaint (amended complaint), are implicated in the present motions.

DISCUSSION

A. Amendment

"It is settled that leave to amend a pleading shall be freely given (CPLR 3025 [b]) in the absence of prejudice or surprise, although this Court has consistently held that in order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated." *Thompson v Cooper*, 24 AD3d 203, 205 (1st Dept 2005); *see also Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363 (1st Dept 2007); *see also Verizon New York, Inc. v Consolidated Edison, Inc.*, 38 AD3d 391 (1st Dept 2007). Therefore, the court must first determine whether there is any merit to Pezhman's proposed cause of action for negligent misrepresentation. There is not.

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct

information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 (2007); *see also Parrott v Coopers & Lybrand, L.L.P.*, 95 NY2d 479 (2000).

Pezhman maintains that a special relationship between herself and Ann Taylor came into being as a result of the creation of the PIMS report "since the purpose of the bonus plan was to induce plaintiff to sell at an aggressive pace with the expectation that she would receive a monetary reward ... ." Pezhman Affirm. in Further Support of Motion for Partial Summary Judgment, ¶ 8. In other words, Pezhman maintains that a special relationship approaching privity was created by Ann Taylor when it generated the weekly reports specifically to encourage associates to reach a bonus-level selling pace.

The facts as alleged do not reflect a special relationship; they describe an employee-employer relationship which New York law does not consider the sort of relationship required for a negligent misrepresentation claim. *See Rivas v Amerimed USA, Inc.*, 34 AD3d 250 (1st Dept 2006)(employee-employer relationship alone does not create privity). Pezhman's reliance on *Ossining Union Free School District v Anderson LaRocca Anderson* (73 NY2d 417 [1989]) to establish privity is not valid. In *Ossining*, the Court found that a special relationship approaching privity existed between an engineering firm which created a report concerning the structural soundness of a building, which was inaccurate, but upon which the building's owner had relied, to its detriment. The Court held that a relationship approaching privity had resulted from the fact that the engineering firm was aware that the report would be transmitted to the owner, "with the objective thereby of shaping [the] plaintiff's conduct," thus creating a "duty of diligence." *Id.* at 426.

In the present case, Pezhman claims that Ann Taylor created the SPH reports with the knowledge that sales associates would rely on them in pacing their work so as to meet the bonus requirements. However, the Plan makes clear that the purpose of the Plan was to cause the sales associates to "delight their clients and drive profit for the company while rewarding high performing sales associates for proven financial results." Logan Aff., Ex. A. That is, the Plan's purpose was to maximize Ann Taylor's profits, and enhance sales associates' earnings, not to allow sales associates to tailor their work habits to meet incentive requirements, without regard to Ann Taylor's profits. Ann Taylor never meant to reward sales associates for working just enough to obtain a bonus. No special relationship approaching privity was created by the generation of the monthly reports. Therefore, Pezhman's proposed cause of action for negligent misrepresentation fails to allege a major and necessary element of the cause of action.[2]

Pezhman has also failed to show justifiable reliance. The Plan specifically stated that the SPH numbers appearing in PIMS could be incorrectly inflated, due to clocking errors. Whether or not Pezhman's weekly SPH numbers were inflated due to clocking errors or not[3], she was forewarned that the monthly reports might be incorrect, and was not justified in relying on them to determine what selling pace she would assume. In sum, Pezhman has not established her right to amend to add a claim for negligent misrepresentation. Consequently, Ann Taylor's motion for partial summary judgment dismissing this cause of action is denied as moot.

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[2] Plaintiff's reliance on *164 Mulberry Street Corp. v Columbia University* (4 AD3d 49 [1st Dept 2004]), carries no weight. The facts there do not coincide with the allegations here in any way.

[3] Pezhman claims they were not due to clocking errors.

of Trustees of Colgate Rochester Divinity School/Bexley Hall/Crozier Theol. Seminary, 254 AD2d 709 (4th Dept 1998) (complaint alleging discrimination did not meeting pleading requirements of CPLR 3013 because the allegations did not identify the defendant with particularity). There are legal arguments to be made concerning the addition into Pezhman's action of new defendants, especially as to their inclusion in the causes of action for discrimination, which must be addressed before this Court can determine if the amendment has merit. Ann Taylor should be permitted to respond to any arguments Pezhman might raise in defense of her proposed amendment. Therefore, Pezhman's motion to add party defendants is denied at this time, with leave to renew upon proper papers. The Court does not reach the issue of whether the proposed amendment lacks merit.[5]

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact.'" *Kesselman v Lever House Restaurant*, 29 AD3d 302, 303 (1st Dept 2006), quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to raise a triable issue of fact. *Kesselman,* at 303-304. The evidence on a motion for summary judgment should be liberally construed in favor of the non-movant. *Id.* The court's role on a summary judgment motion "is solely to determine if any triable issues exist, not to determine the merits of any such issues." *Sheehan v Gong*, 2 AD3d 166 (1st Dept 2003).

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[5] Because leave is denied, Pezhman has the opportunity to clarify the allegations of the proposed pro-se amended complaint before resubmitting her motion, by specifying whether proposed causes of action apply to some or all of the defendants, for example, "First Cause of Action against defendants X and Y only." This avoids confusion over whether a cause of action is against an individual mentioned in the allegations following the heading of that cause of action, or whether the complaint is merely providing background allegations, which occurs often in pro-se pleadings.

Pezhman cannot pursue her Labor Law claim for a second reason. While Pezhman maintains only that she relied on the correctness of the weekly postings, assuming that they were correct, she never claims to have kept track of her hours herself. As a result, there is no way to actually determine what hours Pezhman worked on a weekly basis, or whether or not the weekly reports were correct (or that the monthly postings were incorrect). Consequently, there is no basis upon which to prove that Pezhman was unfairly denied wages under the statute, or what those wages were. Pezhman's real complaint is that the discrepancies in the weekly and monthly postings created an unfair situation, which is not situation Labor Law § 191 was meant to ameliorate.

As a result of the foregoing, it is

ORDERED that plaintiff Anna Pezhman's motion to amend her first amended complaint is denied, with leave to renew that part of her proposed amended complaint which seeks to add party defendants; and it is further

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that the part of defendants' cross motion for partial summary judgment dismissing the cause of action under Labor Law § 191 is granted, and this cause of action is dismissed; and it is further

ORDERED that the part of defendants' cross motion for partial summary judgment dismissing the cause of action for negligent misrepresentation is denied as moot.

Dated: July 16, 2007
New York, New York

ENTER:

J.S.C.

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performance resulted in enhanced earnings for Ann Taylor, her bonus was based on Ann Taylor's performance. *See also Guiry v Goldman, Sachs & Co.*, 31 AD3d 70 (1st Dept 2006).