[* 1]

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

PRESENT: WALTER B. TOLUB Justice PART 15

HELEN BROOK,

Plaintiff,

- v -

OVERSEAS MEDIA,

Defendants.

INDEX NO. 107439 /2007

MOTION DATE 1/25/2008

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, this motion is decided in accordance with the accompanying memorandum decision.

This constitutes the decision and order of the court.

FILED
MAR 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/7/08

WALTER B. TOLUB, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

FILED
MAR 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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HELEN BROOK

Index No. 107439/07

Plaintiff,

Mtn Seq. 003

-against-

OVERSEAS MEDIA

Defendant.

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WALTER B. TOLUB, J.:

By this motion, defendant moves to dismiss plaintiff's complaint on the grounds that it (1) fails to state a cause of action; (2) is contradicted by documentary evidence; and (3) is barred for lack of subject matter jurisdiction.

Plaintiff began working for defendant, a Russian television network, as a non-paid writer in June of 2004. In January, 2005 defendant hired plaintiff as a writer, and soon promoted her to an editorial/producer position for the network. In November, 2005, plaintiff was promoted a second time, and asked to write and produce two of defendant's television shows.

Plaintiff claims that in the Spring of 2006, she was diagnosed with carpal tunnel syndrome (Complaint at ¶8). Plaintiff further claims that in May of 2006, she began treatment

for carpal tunnel syndrome and was "instructed to take short breaks and limit her typing" (id. at ¶9).

On May 30, 2006, plaintiff claims that she advised her boss, George Tsikhiseli that she needed to take short breaks and reduce her typing due to her condition. She presented this information to Mr. Tsikhiseli in a memorandum written on company letterhead, and through the presentation of a doctor's note. The memorandum, dated May 30, 2006, reads in entirety as follows:

> To: Gerogiy Tsikhiseli
> From: Helen Brook
> Date: May 30, 2006
> Re: Miscellaneous
>
> As per your request, please be advised that on May 30th, 2006, I worked in the office from 2:20 p.m. till 9:15 p.m. I arrived at 2:20 p.m. because of incidental sickness. The details thereof are confidential. Please note that on Tuesdays I finish work at 9:15 p.m. and on Wednesdays start at 10:00 a.m. - this is a broken shift.
>
> Furthermore as the result of this rigorous work schedule and continuous typing for many hours on a daily basis I have developed a condition in the wrist that needs treatment and **may require reasonable adjustments.** I would appreciate your cooperation in this matter.
>
> Should you have any questions concerning the above, I would be happy to address them.

(Notice of Motion, Exhibit B, emphasis added). The doctor's

note, written on a prescription form from Dr. Yuri Patin reads "Brook, H. Off duty, 06.07 - 07.14.06" (remainder illegible)(id. Exhibit C).

Plaintiff claims upon learning of her request for "reasonable adjustments", Mr. Tsikhiseli responded by telling her to "do her job or leave" (id. at ¶10), at which time plaintiff immediately filed a claim with the Workers' Compensation Board (id. ¶12).

Following the filing of the Workers' Compensation Board claim, plaintiff claims that Mr. Tsikhiseli began harassing and mistreating her at work. In August, 2006, plaintiff claims that Mr. Tsikhiseli told her that she was "free to go if she did not want to be loyal to Overseas Media" (Complaint ¶ 15). In September of 2006, the Workers' Compensation Board fined defendant for failing to provide necessary documents pertaining to plaintiff's pending Workers' Compensation case. Less than two months later, plaintiff was terminated from defendant's employ. The instant action, and subsequent motion practice, followed.

Discussion

As with any motion to dismiss, the only inquiry that is to be made by the court at this juncture is whether plaintiffs' facts, as alleged, "fit within any cognizable legal theory" upon which plaintiffs may succeed (Leon v. Martinez, 84 NY2d 83, 87-88 [1994]; Campaign For Fiscal Equity, Inc. v. State of New York, 86

NY2d 307, 318 [1995]. See generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial [James Publishing 2007] §36.01 *et seq.*).

Plaintiff's complaint is comprised of three causes of action. The first, alleges disability discrimination under the New York City Human Rights law. The second cause of action alleges retaliation under the New York City Human Rights Law, and the third and final cause of action, alleges discrimination and retaliation under Workers' Compensation Law § 120.[1]

As a preliminary matter, plaintiff's third cause of action for retaliatory discharge and discrimination predicated upon her Worker's Compensation claim is dismissed inasmuch as her sole remedy for such claims is to file a complaint with the Worker's Compensation Board (see, Rice v. University of Rochester Medical Center, 46 AD3d 1421 [4th Dept 2007]; Burlew v. American Mutual Insurance Co., 63 NY2d 412 [1984]). Whether or not dismissal of the balance of plaintiff's complaint is warranted turns on an evaluation of the claims under the New York City Human Rights Law (New York City Administrative Code §§ 8-102, 8-107 *et seq.*).

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[1] The court notes that although the causes of action contained within plaintiff's complaint allege only violations of the New York City Human Rights Law (NYCRR 8-101, 8-107 *et seq.*), plaintiff's complaint states that the action is "brought under the New York State Executive Law §§ 292, 296 et seq. ("the New York State Human Rights Law") and the Administrative Code of the City of New York §§ 8-101, 8-107 et seq. ("the New York City Human Rights Law")(see, Complaint).

Claims of disability discrimination under New York law require a plaintiff to preliminarily establish that they requested a reasonable accommodation from their employer, and the employer, refused to make the accommodation (see, Pimentel v. Citibank, NA, 29 AD3d 141 [1st Dept 2006]). The obligation of reasonable accommodation however, "is limited to the employer's knowledge of the disability that needs to be accommodated" (id. at 148). Here, contrary to plaintiff's claims, the memorandum and doctor's note plaintiff submitted to her employer does not adequately describe plaintiff's limitations and in what manner she could be accommodated, and do not request a reasonable accommodation. Also unclear to this court is which of plaintiff's job responsibilities were, and were not limited as a result of the claimed disability. Under these circumstances, defendant cannot be held responsible for failing to provide an accommodation (Pimentel, 29 Ad3d 148; see also Pembroke v. New York State Office of Court Administration, 306 AD2d 185 [1st Dept 2003]). As such, plaintiff's first cause of action must be, and is, dismissed.

What is left, is plaintiff's second cause of action for retaliation under the New York City Human Rights Law (NYCRR 8-101, 8-107 *et seq.*), and presumably, the New York State Human Rights Laws (New York State Executive Law §§ 292, 296 et seq.).

The provisions of both the New York State Human Rights Law

and the New York City Human Rights Law are similar in that they prohibit an employer from taking actions against an employee for activities such as: opposing practices forbidden under the respective statutes; filing a complaint, testifying or assisting in a proceeding under either statute; or commencing a civil action challenging the alleged unlawful discriminatory practice (see, New York Executive Law §297(1)(e)[2], 3(a) and (b)[3]; NYCRR §8-107(7)).[4]

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[2] "1.(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article" (McKinney's Executive Law § 296).

[3] "3. (a) It shall be an unlawful discriminatory practice for an employer, licensing agency, employment agency or labor organization to refuse to provide reasonable accommodations to the known disabilities of an employee, prospective employee or member in connection with a job or occupation sought or held or participation in a training program"

(b) Nothing contained in this subdivision shall be construed to require provision of accommodations which can be demonstrated to impose an undue hardship on the operation of an employer's, licensing agency's, employment agency's or labor organization's business, program or enterprise" (McKinney's Executive Law § 296).

[4] "7. Retaliation. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assisted the commission or the corporation counsel in an investigation commenced pursuant to this title, or (v) provided

To maintain a prima facie cause of action for retaliation under these laws, plaintiff bears the burden of demonstrating that (1)she was a participant in a protected activity; (2) her employer knew of the protected activity; (3) she suffered an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action (Torge v. New York Society for the Deaf, 270 AD2d 153 [1st Dept 2000]; see also Forrest v. Jewish Guild for the Blind, 3 NY3d 295 [2004]; Thide v. New York State Department of Transportation, 27 Ad3d 452 [2nd Dept 2006])).

Contrary to defendant's arguments, plaintiff appears to have a valid claim for retaliation under the Human Rights Law, notwithstanding the fact that a similar claim is being advanced by plaintiff under § 120 of the Workers' Compensation Law. As such, defendant's motion to dismiss plaintiff's second cause of action is denied. Accordingly, it is

ORDERED that defendant's motion to dismiss is granted solely as to the first and third causes of action; and it is further

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any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of this chapter. The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity (NYCRR §8-107(7)).

ORDERED that the balance of this action shall continue.

Counsel for the parties are directed to appear for a Preliminary Conference in IA Part 15, Room 335, 60 Centre Street, New York, New York on May 16, 2008 at 11:00 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: ٣/١٣/٠٨

HON. WALTER B. TOLUB, J.S.C.