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SCANNED ON 7/14/2008

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

PRESENT: Hon. Doris Ling-Cohan Justice

PART 36

Index Number : 112884/2007
BENDECK, PATRICIA
VS.
NYU HOSPITALS CENTER
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 112884-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion to dismiss is decided in accordance with the attached memorandum decision.

FILED
JUL 14 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/11/08

HON. DORIS LING-COHAN
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

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PATRICIA BENDECK,
Plaintiff,

Index No.: 112884/07

Motion Seq. No.: 001

-against-

NYU HOSPITALS CENTER (also known as NYU MEDICAL CENTER) and ANNETTE JOHNSON,

Defendants.

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LING-COHAN, J.:

This action is brought by Patricia Bendeck, to recover damages as a result of her termination of employment with NYU Hospitals Center (NYUHC). Plaintiff contends that she was induced by NYUHC through benefits and promises, to accept a position as an executive assistant, and that following her complaints of sexual harassment by a co-worker, she was subsequently terminated. Plaintiff alleges causes of action for retaliation under New York City and New York's States' Human Rights Laws, breach of contract, promissory estoppel, and tortious interference with contract.

Defendants NYUHC and Annette Johnson (Johnson), move pursuant to CPLR 3211 (a) (7), dismissing the complaint, or in the alternative, pursuant to CPLR 3212, granting summary judgment.[1] Defendants argue that plaintiff's retaliation claims should be dismissed because plaintiff failed to plead that she engaged in a protected activity. Defendants also contend that plaintiff's cause of action for breach of contract and promissory estoppel must be dismissed, because she was an employee at-will and could not rely on continued employment. Movants further argue that the cause of action for intentional interference with her employment agreement

[1] Although defendants contend that this is a motion to dismiss pursuant to CPLR 3211 (a) (7) (failure to state a cause of action) they submit documentary evidence which they rely on and make arguments pursuant to CPLR 3211 (a) (1).

should be dismissed on the ground that an agent of an employer, such as Johnson, cannot interfere with a co-employee's contract.

FACTUAL ALLEGATIONS

In September of 2006, NYUHC offered a position to plaintiff to serve as an executive assistant for Johnson. Plaintiff was offered an annual salary and benefits, including tuition assistance at New York University (NYU), for herself as well as for her children. Plaintiff alleges that NYUHC promised her that, after her first six months of employment as a probationary employee, plaintiff's employment would be secure and could not be terminated except for cause. She maintains that this policy as well as a policy prohibiting retaliation against an employee for reporting a violation of NYUHC's ethical code, were contained in NYUHC's staff handbook (the handbook), a copy of which she was provided.

Plaintiff accepted the position with NYUHC and began her employment on September 25, 2006. During the initial period of her employment, plaintiff met Madeline Rios (Rios) who was also employed by NYUHC and worked in the same office. It is alleged that shortly after plainiff met Rios, Rios began to engage in a pattern of sexual harassment towards plaintiff. Several times each week until December 1, 2006, Rios allegedly made physical contact with plaintiff, including, but not limited, to grabbing her arm in order to get her attention. Plaintiff alleges that the grabbing of her arm caused her to experience physical and emotional discomfort. During the week of November 20, 2006, Rios allegedly slapped plaintiff on her buttocks and on November 30, 2006, Rios grabbed plaintiff's wrist and squeezed it hard, also causing plaintiff discomfort. On December 1, 2006, plaintiff communicated with Rios by e-mail in which she complained of Rios's behavior and explained that she thought that the behavior was unacceptable and disrespectful.

Plaintiff alleges that, following December 1, 2006, Rios engaged in "intimidating behavior" on a daily basis including staring at plaintiff, making faces at plaintiff, and blocking plaintiff's path in the hallway, and that such misconduct continued throughout her employment with NYUHC (Complaint, ¶ 23). Following plaintiff's communications with Rios on December 1, 2006, Rios allegedly informed NYUHC's Human Resources Department that plaintiff had falsely accused Rios of sexual harassment.

On December 22, 2006, Johnson informed plaintiff that Johnson knew of plaintiff's complaint against Rios and allegedly accused plaintiff of "'building a sexual harassment case'" against NYUHC and "insulted Rios by making such allegations." (Complaint, ¶ 25). Johnson also allegedly stated that as a result of plaintiff's complaint she wanted to terminate plaintiff's employment, demanded that plaintiff quit her job, and stated that she would give plaintiff time to find another job. Plaintiff maintains that she told Johnson that Rios had committed such misconduct and that she would not quit her employment because her complaint against Rios was valid.

Plaintiff continued to work for NYUHC and Johnson until March 26, 2007, at which time she was informed by Johnson that she was being terminated. She alleges that Johnson again accused her of building a sexual harassment case, and stated to plaintiff that she had given her enough time to find another job.

Plaintiff filed this lawsuit on September 24, 2007. She alleges causes of action for retaliatory termination under section 296 of New York State's Executive Law and section 8-107 of New York City's Administrative Code, breach of an employment contract, promissory estoppel, and tortious interference with contract.

DISCUSSION

In the first cause of action, plaintiff alleges that NYUHC's termination of her employment was a direct and proximate result of the complaint made against Rios and that her termination violates section 296 of New York State's Executive Law. Besides losing substantial income and benefits, plaintiff allegedly "suffered the indignity of discrimination, the invasion of rights to be free from discrimination, and great humiliation and embarrassment which has manifested itself in emotional stress." (Complaint, ¶ 36). In the second cause of action, plaintiff alleges that NYUHC's termination also constitutes a retaliatory discharge under section 8-107 of New York City's Administrative Code.

Both the Executive Law of New York State as well as the Administrative Code of the City of New York prohibit employers from retaliation against an employee because the employee has opposed any forbidden practices, or because the employee filed a complaint, testified, or assisted in any proceeding regarding any forbidden practices. *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 (2004). The Court of Appeals has explained that:

> [u]nder both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices (see Executive Law § 296 [7]; Administrative Code of City of NY § 8-107 [7]). In order to make out the claim, plaintiff must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action.

Id; see also Bailey v New York Westchester Square Med. Centre, 38 AD3d 119, 122-23 (1st Dept 2007).

Here, plaintiff contends that she was engaged in a protected activity as she was opposing and complaining about unlawful behavior, specifically Rios's conduct, and contends that she was terminated solely because of her complaints to Rios and Johnson. "While such protected activity sometimes consists of filing a lawsuit or formal complaint with an agency, it

may also take the form of less formal protests, such as making complaints to management, writing critical letters to customers, or expressing support of co-workers who have filed charges." *Del Castillo v Pathmark Stores*, Inc., 941 F Supp 437, 438 (SD NY 1996) (citations omitted).[2]

Here, plaintiff complained of Rios' misconduct to Rios directly by e-mail, had a discussion with Johnson about her concerns, and maintains that NYU's Human Resources Department was also aware of plaintiff's allegations as Rios informed that department that plaintiff was falsely accusing her of sexual harassment. Johnson allegedly accused plaintiff of building a sexual harassment case against NYUHC, and stated that she wanted to terminate plaintiff's employment and demanded that she quit. In response, plaintiff alleges she told Johnson that she would not quit her job because her complaint against Rios was valid.

NYUHC and Johnson do not present reasons to explain plaintiff's termination or include testimony from NYUHC or Johnson explaining what lead to the decision. Although defendants contend that plaintiff fails to properly plead that Rios engaged in same-sex harassment, "a claim for retaliatory conduct does not necessarily fail by reason of a subsequent finding that the underlying discrimination complaint, upon which the claim of retaliation is premised, is without merit." *Modiano v Elliman*, 262 AD2d 223, 223 (1st Dept 1999). Therefore, defendants' argument that plaintiff's retaliation claim should be dismissed because she failed to plead the essential elements of a same-sex harassment claim, is without merit.

There clearly remains a question of fact as to why plaintiff was terminated and whether it was in retaliation for plaintiff's complaints concerning Rios's behavior. As such a dispute of fact exists, defendants' motion to dismiss the first and second causes of action must be denied.

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[2] New York State courts generally apply the federal standards in evaluating employment discrimination claims under the Human Rights Law. *See Aurecchione v New York State Div. of Human Rights*, 98 NY2d 21, 26 (2002).

The third cause of action is for breach of contract. Plaintiff alleges that pursuant to the handbook, after her first six months of employment as a probationary employee, plaintiff's job was secure and plaintiff's employment could not be terminated except *for cause*. She maintains that the handbook further dictates that she would not be subject to retaliation for reporting a violation of NYUHC's ethical code, and that NYUHC's termination of her employment constitutes a breach of the employment agreement.

Defendants contend that plaintiff's breach of contract claim must be dismissed, because plaintiff was an at-will employee and, therefore, cannot constitute a breach of contract claim; that the anti-retaliation provisions of the handbook cannot support a breach of contract claim; that the handbook contains no provision requiring NYUHC to have cause to discharge plaintiff; and that the Court of Appeals has consistently refused to recognize a public policy exception to the doctrine of at-will employment.

Plaintiff relies on the Court of Appeals decision in *Weiner v McGraw-Hill, Inc.* (57 NY2d 458 [1982]), arguing that her status as an at-will employee is a rebuttable presumption and that the trier of fact will have to consider the course of conduct of the parties as well as the totality of the circumstances in order to determine whether a presumption of at-will employment is overcome. However, in *Sabetay v Sterling Drug, Inc.* (69 NY2d 329, 334-335 [1987]), the Court of Appeals noted the limited holding of *Weiner*. "[B]ecause of the explicit and difficult pleading burden, post-*Weiner* plaintiffs alleging wrongful discharge have not fared well." *Id.*

The effect of employment handbooks was examined more recently in *Lobosco v New York Tel. Co./NYNEX* (96 NY2d 312 [2001]). There, the Court of Appeals held that "[r]outinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employment agreements . . . [i]t would subject employers who have developed written

policies to liability for breach of employment contracts upon the mere allegation of reliance on a particular provision. Clearly that cannot be, especially in light of conspicuous disclaiming language." *Id.* at 317.

Relying on *Lobosco*, the Second Circuit Court of Appeals in *Baron v Port Auth. of New York and New Jersey* (271 F3d 81, 88 [2d Cir 2001]), held that "where a sufficiently unambiguous disclaimer, conspicuously placed in the employee handbook such that the employee reasonably could be expected to read it is at issue, the totality of the circumstances inquiry is unnecessary; the implied contract claim may be dismissed as a matter of law."

Here, plaintiff was aware that she was an employee at-will by both her applicant questionnaire and the handbook. The applicant questionnaire which she signed clearly states: "I understand that my employment is not governed by any written or oral contract and is considered an 'at will' arrangement. This means that I am free, as is NYU Medical Center, to terminate the employment relationship at any time as long as there is no violation of applicable policy, federal, state or local law." (McEvoy Affirm., ex. A).

Furthermore, plaintiff's at-will employment status was also discussed in the handbook which states "[t]he information is intended to serve as an overview only and is not a contract of any kind. Neither this handbook nor any other document confers any contractual right, either expressed or implied to remain employed by the Hospitals Center or the school." (*Id.*, ex. C, at 4).

Thus, since the handbook did not confer any contractual rights on plaintiff and the applicant questionnaire specifically states that plaintiff's employment was at-will and not governed by any written or oral contracts, plaintiff's cause of action for breach of contract must be dismissed.

The fourth cause of action is for promissory estoppel. In order to state a cause of action for promissory estoppel, plaintiff must allege that she reasonably relied to her detriment on a clear and unambiguous promise. *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003); *citing Rogers v Town of Islip,* 230 AD2d 727 (2d Dept 1996). Plaintiff alleges that NYUHC made promises to her regarding her compensation, benefits, tuition assistance, job security, and freedom from retaliation and that NYUHC knew or should have known that plaintiff would reasonably rely upon such promises. Defendants contend that plaintiff cannot state a cause of action for promissory estoppel, because she was an at-will employee and because her alleged reliance on policy statements and promises of salary and benefits are insufficient as a matter of law.

The First Department has held that it is unreasonable for an at-will employee to rely on an employer's alleged promise that it is committed to continued employment of the employee because the latter's employment can be terminated at any time. *Skillgames, LLC v Brody,* 1 AD3d at 250-251; *see also Berger v Roosevelt Inv. Group Inc.*, 28 AD3d 345, 346 (1st Dept 2006) (holding that plaintiff could not reasonably rely on any alleged misrepresentation of defendant with respect to the length of his employment, since plaintiff was an at-will employee). Here, since plaintiff was an at-will employee, and her reliance on policy statements and promises of salary and benefits are insufficient as the employment could be terminated at any time; thus, plaintiff's cause of action for promissory estoppel must be dismissed.

In the fifth cause of action, plaintiff claims that Johnson intentionally, willfully, and maliciously interfered with an employment agreement between herself and NYUHC. Plaintiff contends that due to Johnson's interference with the employment agreement, her employment was terminated and that she lost and will continue to lose substantial income, and

benefits including wages, social security, tuition assistance at NYU and healthcare.

"In a contract interference case . . . the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages." *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 (2007). According to section 766 of the Restatement of Torts, one "who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract."

The First Department has discussed claims for tortious interference of at-will agreements in *Thawley v Turtell* (289 AD2d 169 [1st Dept 2001]). There, the court held that "[w]here . . . the parties are all employees of the same company, the case law is clear that at-will agreements are classified as only prospective contractual relations and therefore cannot support a claim for tortious interference with existing contracts." *Id.* at 169-170 (citations omitted).

Furthermore, the First Department has held that an at-will employee can be freely terminated at any time for any reason, and that "[p]laintiff cannot be allowed to evade the employment-at-will rule by recasting her cause of action in the garb of tortious interference with her employment. Moreover, where . . . the individual defendants are co-employees of plaintiff, in order for a claim of tortious interference with an employment relationship to lie, it must be alleged that defendant co-employees acted outside the scope of their authority." *Marino v Vunk*, 39 AD3d 339, 340 (1st Dept 2007) (citations omitted).

Here, plaintiff's conclusory allegations that the defendants acted with malice in deciding to end her employment, are insufficient, to demonstrate that Johnson's conduct was outside the

scope of their employment. *Id.* at 340-341. Therefore, plaintiff's cause of action for tortious interference must be dismissed.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that the defendants NYU Hospitals Center and Annette Johnson's motion to dismiss is denied as to the first and second causes of action and is granted as to the third, fourth, and fifth causes of action; and it is further

ORDERED that the defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants with notice of entry.

Dated: July 11, 2008

Hon. Doris Ling-Cohan, J.S.C

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