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

PRESENT: HON. JUDITH J. GISCHE Justice

PART 10

Index Number : 150169/2008

QUINONES, CARMEN

VS

EIHAB HUMAN SERVICES INC

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____

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, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION:

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

Dated: May 22, 2009

HON. JUDITH J. GISCHE J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Carmen Quinones,

Plaintiff (s),

-against-

Eihab Human Services, Inc., Fatma Aboud, Maria Cioffi-Krause and Khalida "Doe,"

Defendant (s).

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DECISION/ ORDER
Index No.: 150169-08
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs n/m (§3211) w/TNH affirm, exhs	1
Pltf x/m (§3215) w/CLB affirm, CQ affid, exhs	2
Defs reply w/TNH affirm, exhs	3
Pltf supp affirm w/CLB affirm	4
Transcript 3/19/09	5

Upon the foregoing papers, the decision and order of the court is as follows:

This is an employment discrimination action by plaintiff brought under the New York State and City Human Rights Laws (Exec Law §§ 290, 296.16 and Admin Code §§ 8-101, 8-102 and 8-107.1, respectively) (hereinafter "human rights laws")[1]. Eihab Human Services, Inc. ("Eihab") is plaintiff's former employer and the individually named

[1]The New York State Human Rights Law, the Civil Rights Act of 1964 and the New York City Human Rights Laws, are textually the same (with some exceptions not germane to this motion). Thus, for all intents and purposes, cases construing Title VII can be relied upon by the court in construing the local statutes relied upon by the plaintiff. Furthermore, reference to the "human rights laws" in this decision means both the state and local claims she has asserted.

defendants were other employees employed by Eihab at the time of plaintiff's termination from employment.

The court has before it a motion by Eihab and the individually named defendants for the dismissal of the complaint for failure to state a cause of action (CPLR § 3211 [a] [7]). The plaintiff has cross moved for entry of a default judgment against the individually named defendants because they did not appear in this action nor answer the complaint. Plaintiff withdrew her cross motion in her supplemental affirmation (and at oral argument), but still opposes the defendants' motion to dismiss.

Although issue has been joined as to Eihab, it has not moved for summary judgment, but (like the individually named defendants) seeks dismissal of the complaint on the basis that it is legally insufficient.

In determining whether a complaint is sufficient so as to withstand a motion to dismiss pursuant to CPLR § 3211 (a) (7) "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st Dep't 1997).

The following facts and legal arguments are considered by the court:

Facts and Legal Arguments

Eihab is a not-for-profit agency that provides services to developmentally challenged New Yorkers. The agency is regulated by the Office of Mental Retardation

and Developmental Disabilities ("OMRDD"). Thus, under 14 NYCRR §§ 633.2 and 633.22, OMRDD has set forth certain rules and regulations for the protection of individual receiving services at facilities it operates or certifies.

Plaintiff was hired by Eihab in June 2006. She later assumed the position of Eihab's Medical Services Coordinator.

On September 19, 2007, plaintiff was arrested with her son at the home of a friend. Plaintiff was charged with criminal possession and intent to sell controlled substances.

The next day, on September 20th, OMRDD notified Eihab of plaintiff's arrest. This was pursuant to a criminal background check obtained by OMRDD from the Division of Criminal Justice Services (*see* 14 NYCRR § 633 [k] [2]).

Plaintiff was terminated from employment on September 24, 2007. The letter sent by Eihab notifying plaintiff of her dismissal confirms that she was terminated because of her arrest and the charges brought against her. In November 2007, following her termination, plaintiff applied for unemployment benefits. Eihab opposed the claim on the basis that plaintiff was terminated "for cause." The criminal charges were later dropped against plaintiff on December 6, 2007. Following a testimonial hearing at the Department of Labor before an administrative law judge on January 2, 2008, the employer's objection to plaintiff's claim for benefits was overruled, and plaintiff was found eligible to receive unemployment.

Plaintiff has asserted seven (7) causes of action against the defendants. All are supported by the foregoing (and some other) facts. The claims are as follows: employment discrimination (1st and 4th COA), aiding and abetting (against the

individually named defendants) (2nd and 5th COA), respondeat superior, based upon negligent acts of the individually named defendants (3rd COA), negligent infliction of emotional distress (6th COA) and intentional infliction of emotional distress (7th COA).

Plaintiff contends that Eihab's termination of her was an adverse employment action that violated the state and city and human rights law. She contends that she was wrongly accused of a crime and ultimately exonerated of all charges. According to plaintiff, Eihab should not have fired her and its decision to do so before the facts were sorted out was a discriminatory act. She contends Eihab could have, should have, but chose not to, let her keep her job until the accusations against her were resolved.

Plaintiff contends that Eihab's actions, including its objecting to her application for unemployment benefits, were emotionally damaging, embarrassing, and has ruined her reputation. She contends she was humiliated when a fellow co-worker called to see why she was no longer working for Eihab. Plaintiff contends Eihab could easily have let her get unemployment benefits, rather than making her fight it at a hearing. She contends Eihab even pressed its objection all the way through a hearing. Plaintiff claims she has had problems finding employment because she does not have a good reference from Eihab. According to plaintiff, this whole experience has been stressful and taken a financial toll on her as well.

In relevant part, Executive Law § 296.16 prohibits adverse employment actions in the following situation:

> "16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of

> application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720. 35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law . . ."

Section 8-107 (11) of the New York City Administrative Code provides, in relevant part, as follows:

> "11. Arrest record. It shall be an unlawful discriminatory practice, unless specifically required or permitted by any other law, for any person to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the person involved, any arrest or criminal accusation of such person not then pending against that person which was followed by a termination of that criminal action or proceeding in favor of such person, as defined in subdivison two of section 160.50 of the criminal procedure law, in connection with the licensing, employment or providing of credit to such person . . ."

CPL § 160.50 (1) provides that upon termination of a criminal action or proceeding in favor of the accused and the records and files of that criminal action or proceeding "shall be sealed and not made available to any person or public or private agency." CPL § 160.50 (1) (c). This is to "ensure that the protections provided be consistent with the presumption of innocence, which simply means that no individual should suffer adverse consequences merely on the basis of an accusation, unless the charges were ultimately sustained in a court of law." People v Patterson, 78 NY2d 711, 716 (1991) (*quoting* the Governor's Approval Mem, 1976 McKinney's Session Laws of

NY, at 2451).

Defendants argue that plaintiff has failed to state a cause of action for employment discrimination and she was discharged for cause. Defendants claim that when she was terminated, she had been charged with a crime (a felony and a misdemeanor) and the charges were still pending against her. The charges were not resolved in her favor, as that term is defined under CPL 160.50, until months later. Defendants contend that the specific reference to CPL § 160.50 in the body of the human rights law is significant. It makes it clear that an employer cannot discriminate against someone (prospective employee, current employee) who has been cleared of a crime. However, the human rights law does not erode an employer's right to decide whether an employee should be fired, provided there is no discriminatory motive for the firing.

Defendants also argue that not only was plaintiff fired for cause, the rules of the OMRDD require them to conduct a "safety assessment" once an agency certified by OMRDD is notified that an employee has been arrested. 14 NYCRR 633.22 [k][2][i]. Defendants state that they evaluated the circumstances and decided it would be best to terminate plaintiff because she had access to medications at Eihab and the charges were drug related.

Defendants argue that the claims against the individual defendants must be dismissed because without an underlying cause of action, they did not "aid or abet" any discriminatory acts against plaintiff. While acknowledging they opposed plaintiff's application for unemployment benefits, they argue that this was because she was fired for cause, and even if she can prove her facts, this and other conduct does not rise to

the level of emotional distress.

Discussion

A properly pled cause of action for employment discrimination must be supported by facts tending to show that the plaintiff was discharged or suffered other adverse employment action under circumstances giving rise to an inference of discrimination. Forrest v. Jewish Guild for the Blind, 3 NY3d 295 (2004); Ferrante v. American Lung Association, 90 NY2d 623 (1997).

Plaintiff was an at-will employee. An at-will employee may be terminated without cause or with cause, provided the termination is not for a discriminatory reason. Murphy v. American Home Products Corp., 58 N.Y.2d 293 (1983).

Plaintiff has not asserted a wrongful termination claim. Rather, her claim is that she was terminated by Eihab for discriminatory reasons. Plaintiff's facts, however, do not support that cause of action. Under the human rights laws, it is unlawful for an employer to act adversely upon a person's employment with respect to any arrest or criminal accusation that is "not then pending" followed by the termination of that criminal action in the person's favor. Plaintiff's facts satisfy neither condition.

On the day she was fired, there were pending, unresolved, criminal charges against the plaintiff. Those charges were not resolved in her favor (as CPL 160.50 provides) until several months later. Giles v. Lockport Savings Bank, 142 A.D.2d 943 (4th Dept 1988). Thus, when plaintiff was fired she was ostensibly fired "for cause."

Though plaintiff claims her arrest was a tragic mistake and she was innocent of all the charges, even if this is true, the employer's decision to terminate her on September 24, 2007 is not a discriminatory act. On that day, she had charges against

her. Though later dismissed, this does not affect the employer's prior decision to fire the plaintiff. The cases plaintiff relies upon all involve situations where someone applies for employment or to be rehired after criminal action has been resolved in their favor, but the employer (or prospective employer) does not want to rehire the person because they were at one time accused of and/or charged with a crime. Plaintiff does not allege she reapplied for employment after the charges were dropped, but Eihab refused to hire her because of the previous arrest or criminal charges. *compare* Salinger v. U.S. Air, 560 F Supp 202, 203 (1983). Thus, defendants' motion, for the dismissal of plaintiff's 1st and 4th causes of action must be, and hereby is, granted. The claims of employment discrimination under the New York State and New York City Human Rights Laws are hereby dismissed.

Although plaintiff seeks damages for the negligent and/or intentional infliction of emotional distress, those claims must be dismissed as well. The elements of an intentional infliction of emotional distress cause of action are: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal conduct between the conduct and the injury; and (iv) severe emotional distress. Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993). A negligent infliction of emotional distress cause of action is generally premised upon the breach of a duty owed directly to the plaintiff which either unreasonably endangers a plaintiff's physical safety or causes the plaintiff to fear for his or her own safety. Daluise v. Sottile, 40 A.D.3d 801 (2nd Dept 2007).

The events plaintiff describes, even when viewed cumulatively and assuming she can prove them at trial, do not amount to conduct even close to approaching the

"threshold of outrageousness needed to support a cause of action for intentional infliction of emotional distress." Graupner v. Roth, 293 A.D.2d 408, 410 (1st Dep't 2002). Nor do her facts support a claim for negligent infliction of emotional distress. None of the acts she complains of are unreasonable and they do not involve any threat to physical safety; those acts include, for example, telling other employees that they should apply for the job plaintiff was fired from and opposing her application for unemployment benefits. Defendants' motion for the dismissal of the 6th and 7th causes of action is granted.

Plaintiff contends that the defendants aided and/or abetted the discriminatory acts of their employer, or they engaged in discriminatory acts during the course of their employment for which the employer is vicariously liable.

As a general rule, a plaintiff must first establish a primary (i.e the employer's) violation of the human rights laws before claims that other employees in a supervisory capacity aided or abetted the employer's discriminatory acts. *see,* Dewitt v. Lieberman, 48 F.Supp.2d 280, 294 (S.D.N.Y.1999); *see also,* Greene v. St. Elizabeth's Hospital, 66 N.Y.2d 684 (N.Y.1985). Plaintiff has failed to state a cause of action for discrimination against the employer. Therefore, the accessorial claims against the employees must be, and hereby are, dismissed as well.

The respondeat superior/ vicarious liability claim also fails because there are no facts to support it. Where an employee is acting within the scope of his or her employment, the employer is liable for any damages caused by the employee's negligence under a theory of *respondeat superior.* Therefore, if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the

hiring or retention or the adequacy of the training. Karoon v. New York City Transit Authority, 241 A.D.2d 323 (1st dept 1997). Plaintiff only states that the individuals fired her and that this was a negligent act. Even affording her pleading the broadest construction, she has not alleged any facts supporting a negligence claim against any of the individuals. Therefore, she has no respondeat superior claim against the employer based upon vicarious liability.

Having dismissed each one of plaintiff's claims, the defendants' motion for the dismissal of the entire complaint is hereby granted. The Clerk shall enter judgment in favor of the defendants against the plaintiff dismissing the complaint.

Conclusion

Defendants' motion to dismiss the complaint is hereby granted and it is dismissed. The clerk shall enter judgment in favor of defendants against the plaintiff.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 22, 2009

So Ordered:

Hon. Judith J. Gische, J.S.C.