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

PRESENT: EDWARD H. LEHNER PART 19

Justice

Index Number : 101014/2009

**MORALES, MELODY**

VS.

**HAWAIIAN TROPIC ZONE**

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 101014-09

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 ... | |
| 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 accompanying memorandum decision

FILED
SEP 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: SEP 22 2009

J.S.C.

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

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MELODY MORALES,

Plaintiff,

Index No.
101014/09

- against -

HT REST NYC, LLC,

Defendant.

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EDWARD H. LEHNER, J.;

Before the court is a motion to dismiss the amended complaint against HT Rest NYC, LLC (the "Restaurant") pursuant to CPLR 3211(a) 7. The amended complaint is dismissed on consent against the originally named defendants and the clerk is directed to enter judgment accordingly without costs, severing the action as against Restaurant.[1]

Plaintiff asserts that she applied for a position as a waitress at the Restaurant but was not hired and was allegedly told that the reason she was rejected was because: "You have a Latin accent," "You don't speak White," and "You are Ghetto" (amended complaint ¶ 46). However, there is no claim by defendant that plaintiff could not perform the duties of a waitress (tr. p. 12). Plaintiff, who states that her "nation of origin is Puerto Rico" (amended complaint ¶ 49), alleges that she was

[1] At oral argument it was stipulated that the action was discontinued against all of the originally named defendants and would continue only against HT Rest NYC, LLC (tr. pp.5-6).

"treated ... differently because of her national origin and race" (Id., ¶ 52), and maintains that she has therefore adequately alleged employment discrimination.

Defendant asserts: that it operates a restaurant in the Times Square area with a Hawaiian motif in which all the waitresses "are clad in bikinis while they serve (the customers)" (tr., p. 8); that 40% of its employees are Hispanic (Id., p. 29); that plaintiff "speaks in an improper ... erotic ... unacceptable way" (Id., p. 13); that "speech (is) presentation (and) not a protected class" (Id. p. 27); and that its refusal to hire her based upon her speech does not amount to discrimination (Id., p. 29).

Plaintiff's amended complaint has eight causes of action: i) discrimination because of race and national origin under New York State Executive Law § 296 ("State Human Rights Law"); ii) retaliation and discrimination under the State Human Rights Law because plaintiff has opposed practices forbidden by such law; iii) aiding and abetting under the State Human Rights Law; iv) discrimination under New York City Administrative Code § 8-107 ("City Human Rights Law"); v) retaliation for opposing discrimination under the City Human Rights Law; vi) aiding and abetting under the City Human Rights Law; vii) coercing, threatening or intimidating under the City Human Rights Law and viii) employer's responsibility for its employee's discrimination under the City Human Rights Law.

"The standards for recovery under section 296 of the Executive Law are in

accord with Federal Standards under title VII of the Civil Rights Act of 1964" [Ferrante v. American Lung Association, 90 NY2d 623 (1997)]. Similarly, "in determining employment discrimination claims under the New York City Human Rights Law, federal standards are applied" [Shah v. Wilco Systems, Inc., 27 AD3d 169, 176 (1st Dept. 2005)].

"[A] complaint in an employment discrimination lawsuit ... need not include ... specific facts establishing a prima facie case of discrimination .... When a ... court reviews the sufficiency of a complaint (on a motion to dismiss based upon the pleadings), its task is necessarily a limited one. The issue is not whether the plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims" [Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 508, 511 (2002)]. Similarly, "(o)n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. (The court must) accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" [Leon v. Martinez, 84 NY2d 83, 87-88 (1994)].

In McDonnell Douglas Corporation v. Green, 411 U.S. 797, 802 (1973), the court ruled that to establish a prima facie case of discrimination a plaintiff must show "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications,

he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." The Supreme Court later explained "the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment (is): First, the plaintiff has the burden of proving by the preponderance of evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, non-discriminatory reason for the employer's rejection.' Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons proffered by the defendant were not its true reasons, but were a pretext for discrimination" [Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981)]. However, "(t)he prima facie case under McDonnell Douglas ... is an evidentiary standard, not a pleading requirement ... (and) the requirements for establishing a prima facie case under McDonnell Douglas (do not) apply to the pleading standards that the plaintiffs must satisfy in order to survive a motion to dismiss" [Swiekiewicz v. Sorema, N.A., supra at pp. 510-511].

While "a justified concern over language skills and problems arising out of transliteration ... (is) not evidence of discrimination" [De La Cruz v. New York City Human Resources Administration Department of Social Services, 82 F. 3d 16, 23 (2nd

Cir. 1996)], it has been held that "a prima facie case of ... discrimination ... (can be) established by ... (wrongful conduct against) a Black woman with a pronounced West Indian accent" [Fugardi v. Angus, 216 AD2d 85 (1st Dept. 1995)]. "(C)omments about a person's accent may be probative of discriminatory intent" [Thelusma v. New York City Board of Education, 2006 WL 2620396 at p. 3 (E.D.N.Y.)]. While the Sixth Circuit has held that discrimination based upon the manner of speaking can be national origin discrimination, [Berke v. Ohio Department of Public Welfare, 628 F2d 980 (1980)], that Circuit has ruled that "[u]nlawful discrimination does not occur ... when a plaintiff's accent affects his ability to perform the job effectively" [Ang v. Proctor and Gamble Company, 932 F. 2d 540, 549 (1991)]. In Fragante v. City and County of Honolulu, 888 F2d 591 (9th Cir. 1989), the court stated:

> An adverse employment decision may be predicated upon an individual's accent when – but only when – it interferes materially with job performance. There is nothing improper about an employer making an *honest* assessment of the oral communications skills of a candidate for a job when such skills are reasonably related to job performance. (emphasis in original)

See also, Simpson v. Enlarged City School District of Newburgh, 2005 WL 264 7947 (S.D.N.Y.) ("case law recommends close scrutiny of dismissals based on accent or diction to screen bonafide personnel decisions from merely pretextual firings of non-Americans or non-whites"); Mejia v. New York Sheraton, 459 F. Supp. 375 (S.D.N.Y. 1978) (plaintiff's "language difficulty and her level of performance in its

totality during her training period did not qualify her for the job she sought and defendant was privileged to so decide as to the plaintiff in good faith" [emphasis added]); Meng v. Ipanema Shoe Corporation, 73 F. Supp. 2d 392 (S.D.N.Y. 1999).

Since refusing to employ plaintiff as a waitress because of a Latin accent can be discrimination based upon race or national origin, plaintiff has sufficiently alleged that the Restaurant discriminated against her. Defendant's contention that it had an honest and good faith basis for not employing plaintiff based on the nature of its business and the manner in which she speaks (not her accent) is a factual issue and not one to be resolved on this motion directed to her pleading.

While plaintiff has, among the eight causes of action alleged, set forth questionable claims for aiding and abetting improper discriminatory acts and for improper retaliation, the Restaurant has not challenged such claims in its papers herein.

In view of the foregoing, defendant's motion is denied. This decision constitutes the order of the court.

Dated: September 22, 2009



J.S.C.