

**Freese v Willa**

2010 NY Slip Op 31766(U)

July 8, 2010

Supreme Court, Suffolk County

Docket Number: 27304/2009

Judge: William B. Rebolini

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK**

**I.A.S. PART 7 - SUFFOLK COUNTY**

**PRESENT:**

**WILLIAM B. REBOLINI**  
Justice

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Gayle Freese,

Plaintiff,

-against-

Ronald Willa, Warren Wartell, Eunice Ro, Thomas Edwards, Peter M. Baigent, Joseph Antonelli, Kevin Kelly, Christine Oster, Local 1102 Retail Wholesale and Department Store Union United Food and Commercial Workers Union, Faculty-Student Association of the State University of New York at Stony Brook, Inc. Undergraduate Student Government,

Defendants.

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Index No.: 27304/2009

Motion Sequence No.: <sup>001</sup>003; MG

Motion Date: 1/12/10

Submitted: 5/12/10

Motion Sequence No.: <sup>002</sup>004; MG  
CDISPO

Motion Date: 1/12/10

Submitted: 5/12/10

Attorneys [See Rider Annexed]

Upon the following papers numbered 1 to 56 read upon these motions to dismiss for failure to state a cause of action: Notice of Motion and supporting papers, 1 - 4; 5 - 30; Answering Affidavits and supporting papers, 33 - 48; Replying Affidavits and supporting papers, 49 - 51; Other: Memorandum of Law , 31 - 32; 52 - 53; sur-reply 54-56.

The plaintiff was formerly employed by the defendant Faculty-Student Association of the State University of New York at Stony Brook, Inc. (FSA) as a bookkeeper working exclusively on the account serving the defendant Undergraduate Student Government (USG). On or about December 20, 2007, the plaintiff was informed that her work hours and those for another bookkeeper were to be cut from 40 hours a week to 32 hours a week effective January 7, 2008. Thereafter, the plaintiff began to complain about her reduced working hours to USG employees and students and allegedly exhibited a negative attitude towards FSA and her immediate supervisor, the defendant

Thomas Edwards (Edwards). Based on that behavior, Edwards held a meeting with the plaintiff on January 25, 2008, which was also attended by the defendant Christine Oster (Oster), the Human Resources Manager for FSA. At the meeting the plaintiff allegedly became belligerent and refused to accept attempts to counsel her regarding her attitude. In a letter to Oster dated January 27, 2008, the plaintiff admitted to touching Oster at the meeting in a manner that Oster found objectionable and she objected to being told not to speak with students and others about her complaints. The plaintiff also accused Edwards and the defendant Ronald Willa (Willa), the Controller at FSA, of misappropriating \$810.50 of USG money, accused Willa of making an inappropriate comment about a university student to Edwards and accused the defendant Eunice Ro (Ro), the Administrative Director of USG, of a one-time waste of USG funds and of polishing her nails on USG time.

On January 29, 2008, the plaintiff sent an e-mail to Edwards (among others) stating “I warned you not to mess with me. You need to think good and hard, as we share something that can take Ron and FSA down. If you don’t use it, I will.” The “Ron” referenced in the e-mail is Willa. In addition, the e-mail contained a postscript stating “And by the way, there are enough buses in the SAC loop to throw the rest of you under.” One of the addressees of this e-mail was Ro, an employee of USG, which is the client of FSA. On January 31, 2008, two employees of FSA, Oster and the defendant Warren Wartell, met with the plaintiff and three representatives of the plaintiff’s union, the former defendant Local 1102 Retail Wholesale and Department Store Union United Food and Commercial Workers Union (Local 1102) to discuss the accusations and statements made by the plaintiff in her letter and e-mail.<sup>1</sup> In a letter dated February 6, 2008, the attorney for USG notified FSA that he was advising his client to have no dealings with the plaintiff and insisted that the plaintiff be “separated from any and all matters pertaining to USG and the students.” After its investigation, FSA suspended the plaintiff for two weeks and, based on the letter from USG’s attorney, removed her from working on the USG account. In addition, FSA informed the plaintiff that there was no other position at FSA in which she could be placed and she was furloughed indefinitely with the promise that, should a position open up for which she was qualified, she would be offered the position.

On March 17, 2008, the plaintiff filed a complaint with the New York State Division of Human Rights (State DHR) alleging, *inter alia*, Willa’s sexual harassment of others. In addition, the plaintiff filed a grievance with Local 1102 in which she objected to her suspension, her removal from the USG account and her being furloughed from her position. The matter went to arbitration and a hearing was held on May 5, 2008. Thereafter, the plaintiff continued to disparage FSA, USG and their employees. On June 9, 2008, the plaintiff sent a letter to the defendant Peter M. Baigent (Baigent), Vice President for Student Affairs at Stony Brook University, which impugned the management and integrity of FSA and its client, USG, and explicitly stated that she was not loyal

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<sup>1</sup> This case was removed to the United States District Court, Eastern District of New York on August 20, 2009 and assigned to the Honorable Judge Leonard D. Wexler bearing Civil Action Number 09-CV-3610(LCW)(MLO). The plaintiff discontinued the action against Local 1102 with prejudice by a signed stipulation dated October 22, 2009. Said stipulation was “so ordered” by Judge Wexler October 27, 2009, and the case was remanded to this Court. As such, Local 1102 is no longer a party to this action.

to FSA. On June 18, 2008, the arbitrator's written decision upheld FSA's decision to suspend the plaintiff and its decision to remove her from the USG account, leaving her without a position at FSA. However, based on testimony regarding the promise made to the plaintiff about future job openings, the arbitrator also found that FSA was under a continued obligation to offer the plaintiff the first available position for which she was qualified. Thereafter, on July 16, 2008, the plaintiff sent a letter to the attorney for USG repeating her disparagement of FSA and USG. Based on the plaintiff's continued insubordination and disrespectful conduct, FSA discharged the plaintiff on August 15, 2008. By letter dated September 12, 2008, Local 1102 informed the plaintiff that it would not be filing an additional grievance regarding her discharge from employment. In the letter the union stated that "unfortunately, an arbitrator will uphold your discharge as a result of the following: (i) your previous two week suspension; (ii) your admitted lack of "loyalty" to the Employer; and (iii) your post-discharge confrontation with Edwards." On October 29, 2008, the State DHR issued a Determination and Order After Investigation dismissing the plaintiff's complaint against FSA and Willa.

The plaintiff then commenced this action by service of a summons and verified complaint which sets forth three substantive causes of action: the first cause of action asserts a claim for retaliation, the second cause of action alleges breach of contract and the third cause of action alleges wrongful termination. However, the second cause of action for breach of contract contains allegations against the former defendant Local 1102 only and is dismissed herein based on the plaintiff's discontinuance with prejudice as to that party.

The Court will first consider the motion made by the defendants Willa, Warren Wartell, Ro, Edwards, Joseph Antonelli, Kevin Kelly, Oster, FSA and USG (collectively, the defendants) because it raises issues which may determine the right of the plaintiff to bring this action against any or all of the parties. Initially, the defendants assert that the plaintiff's action must be dismissed because her retaliation claim is barred 1) pursuant to Executive Law § 297(9) which precludes a state court action after the filing of a complaint with the State DHR, 2) pursuant to 42 USC § 2000e-5 (e) & (f) due to her failure to commence an action within the 90 day period after the receipt of a "right to sue" letter from the United States Equal Employment Opportunity Commission (EEOC), and 3) pursuant to Labor Law §740 due to her failure to allege a "violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety." These issues will be addressed seriatim.

New York Executive Law § 296<sup>2</sup> prohibits discrimination by an employer and also prohibits the employer from retaliating against an employee for opposing any practices forbidden under the Human Rights Law. Section 297(9) of the Human Rights Law states: "Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction ... unless such person has filed a complaint hereunder ... with any local

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<sup>2</sup> Executive Law §§ 290 - 301 comprise Article 15 of the Executive Law, and is known as the Human Rights Law.

commission on human rights.” Once an employee files such a complaint, the courts are divested of jurisdiction and dismissal of a subsequent action is required (see, Emil v. Dewey, 49 NY2d 968 [1980]; Hirsch v. Morgan Stanley & Co., Inc., 239 AD2d 466 [2<sup>nd</sup> Dept., 1997]). It is of no importance that the plaintiff’s termination occurred after the filing of a complaint (see, Benjamin v. New York City Dept. Of Health, 57 AD3d 403 [1<sup>st</sup> Dept., 2008]; Spoon v. American Agriculturalist, Inc., 103 AD2d 929 [3<sup>rd</sup> Dept., 1984]). The State DHR investigated the plaintiff’s claims of retaliatory discipline and found them to be without merit stating “The investigation supports the workplace issues between Complainant and her employer led to Complainant’s termination.” The Court finds that the plaintiff’s cause of action for retaliation under this section of the law is barred.

In addition to the New York State Human Rights Law, the plaintiff has a potential claim for retaliation based on 42 USC §2000e-3(a) which prohibits retaliation by an employer against an employee who attempts to exercise his or her rights under the anti-discrimination provisions of Title VII. Prior to commencing a court action under Title VII, a plaintiff is required to file a complaint with the EEOC or with a state agency which then cross files it with the EEOC. After a decision is reached, if the EEOC chooses not to litigate the case on behalf of the complainant, it notifies the complainant that, pursuant to 42 USC §2000e - 5(f), he or she has a 90 day window in which to commence a court action “or your right to sue based on this charge will be lost.” It is undisputed that the EEOC mailed the requisite notice to the parties on February 10, 2009. This action was commenced on August 3, 2009, more than 90 days after receipt of said notice. The Court finds that the plaintiff’s cause of action for retaliation under federal law is barred.

Irrespective of the Court’s finding that the cause of action is barred under the New York Human Rights Law and federal statute, the plaintiff has failed to state a cause of action based thereon. “The standards for recovery under section 296 of the Executive Law are in accord with Federal Standards until Title VII of the Civil Rights Act of 1962 (42 USC § 2000e *et seq.*)” (Ferrante v. American Lung Assn., 90 NY2d 623 [1997]). On a claim of discrimination, plaintiff has the initial burden of establishing a *prima facie* case of discrimination (*id.*). While this burden is “de minimus” (Sogg v. American Airlines, 193 AD2d 153, *lv dismissed* 83 NY2d 846 [1994], *lv denied* 83 NY2d 754 [1994]), plaintiff must present more than “conclusory allegations of discrimination” and provide “‘concrete particulars’ to substantiate the claim” (Muszak v. Sears, Roebuck & Co., 63 FSupp2d 292 [WDNY 1999], quoting Meiri v. Dacon, 759 F2d 989 [2d Cir 1985], *cert. denied* 474 US 829 [1985]).

CPLR §3211(a)(7) provides that the Court must afford the pleading a liberal construction, accept all the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible inference and determine only whether the facts as alleged fit within any cognizable legal theory (see, Leon v. Martinez, 84 NY2d 83 [1994]; Hynes v. Griebel, 300 AD2d 628 [2<sup>nd</sup> Dept., 2002]; Glassman v. Zoref, 291 AD2d 430 [2<sup>nd</sup> Dept., 2002]). The criterion is whether the plaintiff has a cause of action, not whether he or she has stated one (see, Vorel v. NBA Properties, Inc., 285 AD2d 641 [2<sup>nd</sup> Dept., 2001]). “Moreover, a court may freely consider evidentiary material submitted on the motion to remedy any defects in the complaint” (*id.*). Here, the plaintiff has not alleged any facts supporting

a claim of discrimination and it has been found by the relevant state and federal agencies that her administrative complaint, based on allegations regarding purported inappropriate comments about others, must be dismissed.

The third potential basis for a claim of retaliation available to the plaintiff can be found in Labor Law §740, often referred to as New York's "whistleblower" statute. In order to state a claim under Labor Law §740, a plaintiff must allege an actual violation of a law, rule or regulation and that such violation presents a substantial and specific danger to the public health or safety (Labor Law §740[2]). A review of the complaint and the papers submitted in support and in opposition to these motions reveals that the plaintiff has not alleged any facts consistent with a claim under this section of the law.

Based upon the foregoing, the plaintiff's first cause of action based on alleged retaliation is dismissed.

The defendants further assert that the plaintiff's action must be dismissed because her wrongful termination claim (the third cause of action) is based on 1) an alleged breach of an agreement between FSA and USG for services; 2) an allegation that FSA failed to abide by the requirements of the USG Constitution when it terminated her employment; and 3) an allegation that FSA breached its collective bargaining agreement (CBA) with Local 1120 when it terminated her employment. These issues will likewise be addressed seriatim.

It is undisputed that the plaintiff was employed by FSA and that USG was and is FSA's client pursuant to a written agreement. The plaintiff alleges that "FSA's termination of Plaintiff was not properly conducted under the terms of Defendant USG's Agreement for Services with Defendant FSA." Plaintiff does not and cannot allege that she is a party to, or a third-party beneficiary of said agreement. It is well settled that a plaintiff cannot maintain a cause of action based on a breach of a contract against a party with whom it is not in privity (see, LaBarte v. Seneca Resources Corp., 285 AD2d 974 [4<sup>th</sup> Dept., 2001]; Outrigger Constr. Co. v. Bank of Leumi Trust Co. of N.Y., 240 AD2d 382 [2<sup>nd</sup> Dept., 1997]; Martirano Constr. Corp. v. Briar Contr. Corp., 104 AD2d 1028 [2<sup>nd</sup> Dept., 1984]). The Court finds that the allegations in the plaintiff's complaint regarding this issue fail to state a cause of action against the defendants (see, LaBarte v. Seneca Resources Corp., 285 AD2d 974 [4<sup>th</sup> Dept., 2001]).

It is likewise undisputed that the plaintiff is not a member of USG and that FSA is not governed by the USG Constitution. The plaintiff alleges that said constitution states that "any termination or other decisions regarding professional staff must be decided by a simple majority vote of filled seats of the Executive Council." Therefore, the plaintiff alleges that FSA could not discipline her or terminate her employment without a vote of the USG Executive Council. However, the complaint itself recognizes that USG has professional staff. A review of a copy of the constitution attached to the complaint makes it clear that the cited provision applies to the staff employed by USG, and that it is in no way applicable to employees of FSA. The Court finds that

the allegations in the plaintiff's complaint regarding this issue fail to state a cause of action against the defendants.

The third issue regarding the plaintiff's claim for wrongful termination involves her allegations that her termination violated the CBA between FSA and Local 1102. It is well settled that "when an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to the agreement may not sue the employer directly for breach of that agreement, but must proceed, through the union, in accordance with the contract" (Matter of Board of Educ., Commack Union Free School Dist. v. Ambach, 70 NY2d 501 [1987]; *see*, Wolfson v. Preventive Medicine Clinical Servs., 26 AD3d 751 [4<sup>th</sup> Dept., 2006]; Yoonessi v. State of New York, 289 AD2d 998 [4<sup>th</sup> Dept., 2001], *lv denied* 98 NY2d 609 [2002]). An exception arises where the employee alleges that the union breached its duty of fair representation, in which case the employee may litigate the contract dispute directly against the employer (*see*, Matter of Board of Educ., Commack Union Free School Dist. v. Ambach, 70 NY2d 501 [1987]; Yoonessi v. State of New York, 289 AD2d 998 [4<sup>th</sup> Dept., 2001]). However, the plaintiff's allegations regarding this cause of action do not allege that the union breached its duty of fair representation. In addition, and irrespective of the plaintiff's discontinuance against Local 1102, the complaint fails to state a cause of action as it does not allege that the union's decision to forego a grievance regarding her termination from employment was arbitrary, discriminatory or in bad faith (*see*, Melville v. Blanche Community Progress Day Care Ctr., Inc., 2009 NY Slip Op 3189U [Sup Ct, Queens County 2009]).

Accordingly, the plaintiff's third cause of action for wrongful termination is dismissed.

Baigent moves for dismissal of the complaint, insofar as asserted against him, pursuant to CPLR §3211(a)(7) on the grounds that there are no factual allegations made against him in the complaint bearing on the plaintiff's substantive causes of action. A review of the verified complaint and the papers submitted by the plaintiff in opposition to this motion reveals that Baigent is entitled to a dismissal of the complaint for many, if not all, of the reasons set forth above.

Based on the plaintiff's discontinuance with prejudice as to the second cause of action, the decision herein dismissing the first and third causes of action and the fact that the plaintiff's fourth cause of action for attorney's fees is dependent on her substantive causes of action, the motions to dismiss the complaint are granted.

Accordingly, it is

**ORDERED** that the motion (mot. seq. #003) by the defendant Peter M. Baigent for an order pursuant to CPLR §3211(a)(7) dismissing the complaint against him, and the motion (mot. seq. #004) by the remaining defendants pursuant to CPLR §3211 (a) (2), (5), (7) dismissing the complaint against them, are hereby consolidated for purposes of this determination; and it is further

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**ORDERED** that the motion by the defendant Peter M. Baigent for an order pursuant to CPLR §3211(a)(7) dismissing the complaint against him, is granted; and it is further

**ORDERED** that the motion by the defendants for an order pursuant to CPLR §3211 (a) (2), (5), (7) dismissing the complaint against them is granted .

Dated: July 8, 2010

  
HON. WILLIAM B. REBOLINI, J.S.C.

RIDER

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