Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

ERICA DIGGS,

Plaintiff,

-against-

OSCAR DE LA RENTA, LLC, and JBCSTYLE NYC, LLC, and CINDY CHEECK, an Individual and ANGIE SANTOS, an Individual,

Defendants.

Index Number 16175/2012

Motion Date November 30, 2012

Motion Seq. No. 1

The following papers numbered 1 to 10 read on this motion by defendants Oscar de la Renta (ODLR), LLC, Cindy Cheek (Cheek), Nora Elezay (Elezay),[1] and Angie Santos (Santos) to dismiss plaintiff Erica Diggs' complaint pursuant to CPLR 3211(a)(7) and cross motion by plaintiff for sanctions.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-3
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Upon the foregoing papers it is ordered that this motion and cross motion are determined as follows:

Plaintiff, an African-American female, commenced this action asserting causes of action based on racial discrimination, retaliation, and hostile work environment under the New York State Human Rights Law, Executive Law § 290 *et seq.* (NYSHRL) and New York City Human Rights Law, Administrative Code of City of NY § 8-101 *et seq.* (NYCHRL), as well as a claim for intentional infliction of emotional distress. Plaintiff was a temporary employee placed at

[1] Elezay is alternately referred to as Nora Elezaj.

ODLR by JBCStyleNY (JBC), a temporary staffing agency, which began on April 16, 2012 and ended on April 25, 2012.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be 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 Wander v St. John's Univ.*, 99 AD3d 891, 893 [2012]; *Kamen v Berkeley Coop. Towers Section II Corp.*, 98 AD3d 1086, 1086 [2012]).

In examining whether plaintiff's complaint sufficiently alleges a hostile work environment under the NYSHRL, the court looks to whether "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Schenkman v New York Coll. of Health Professionals*, 29 AD3d 671, 673 [2006] [internal quotation marks and citation omitted]; *see also Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004]; Executive Law § 296[1][a]). In her complaint, plaintiff alleges that during the period from April 17 through 19, defendant Elezay, an ODLR employee, "routinely" directed the epithet "n-----" towards employees of color in the presence of plaintiff and other employees and supervisors. Plaintiff also alleges that ODLR employee Ramon Cabral "consistently" referred to Elezay as "white girl" and ODLR distribution center manager Santos "frequently" referred to Asian employees as "Wong Tong."

Affording plaintiff the benefit of every possible favorable inference (*see Goldfarb v Schwartz*, 26 AD3d 462, 463 [2006]), these allegations are sufficient to support plaintiff's claims of a hostile work environment under the NYSHRL (*see Mitchell v TAM Equities, Inc.*, 27 AD3d 703, 705-706 [2006]; *San Juan v Leach*, 278 AD2d 299, 300 [2000]). Similarly, plaintiff's hostile work environment claim also survives dismissal under the more liberal standard of the NYCHRL (*see Albunio v City of New York*, 16 NY3d 472, 477 [2011]; *Nelson v HSBC Bank USA*, 87 AD3d 995, 999-1000 [2011]), inasmuch as a determination that such comments were "petty slights and trivial inconveniences" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 79-80 [2009] cannot be reached at this juncture. The court further notes that the affidavit submitted in defendants' opposition papers merely sets forth a different, disputed version of the facts and is insufficient to defeat plaintiff's claims (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]; *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; *Datena v JP Morgan Chase Bank*, 73 AD3d 683 [2010]).

Although defendants' motion challenges plaintiff's retaliatory discharge and intentional infliction of emotional distress claims only in conclusory, sweeping terms, the court nevertheless proceeds to address the sufficiency of these claims.

To state a cause of action for retaliation under the NYSHRL, the complaint must allege that (1) plaintiff engaged in a protected activity; (2) defendants were aware of such activity; (3) plaintiff was subject to an adverse action; and (4) there was a causal connection between the protected activity and the adverse action (*see Forrest*, 3 NY3d 295, at 312-313; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 [2012]). Under the NYCHRL, however, the employee need not have "suffer[ed] a materially adverse action as a result of retaliation" (*Schanfield v Sojitz Corp. of Am.*, 663 F Supp 2d 305, 343 [2009]), and need only show that the employer retaliated in any manner (*see id.*) or took an employment action that disadvantaged him or her (*Fletcher*, 99 AD3d at 51-52).

Plaintiff alleges in the complaint that she had engaged in the protected activity of complaining about racially derogatory comments in the workplace, that both JBC and ODLR were alerted of her complaint against such conduct, and that she was subsequently terminated and not offered a permanent position or called back for further employment after she expressed an interest in doing so and despite defendants' statements that she may being considered for permanent employment and/or might be asked to return to work at ODLR. Furthermore, the court finds that plaintiff's allegations, including the fact that she was terminated within a short time frame after her complaint, are sufficient to support a causal connection between the protected activity and the adverse action suffered (*see Mitchell*, 27 AD3d at 706; *Artis v Random House, Inc.*, 34 Misc 3d 858, 865-867 [2011]; *see also DuBois v Brookdale Univ. Hosp.*, 6 Misc 3d 1023[A], *11-12 [2004], *affd* 29 AD3d 731 [2006] [discussing temporal relationship between employer's knowledge of protected activity and adverse employment action as proof of retaliatory animus]). Thus, plaintiff's retaliation claims under both NYSHRL and NYCHRL also survive dismissal (*see Mitchell*, 27 AD3d at 706; *San Juan*, 278 AD2d at 300; *Cirillo v Muss Dev. Co.*, 278 AD2d 353, 355 [2000]).

The court notes that plaintiff inartfully lumps all discrimination-related causes of action under two claims labeled under the NYSHRL and NYCHRL. Insofar as plaintiff's complaint appears to assert a cause of action for racial discrimination, such claim also survives dismissal. To set forth a claim for racial discrimination, plaintiff must allege that: (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she suffered adverse employment action; and (4) adverse action

occurred under circumstances giving rise to an inference of discrimination (*see Forrest*, 3 NY2d at 306; *Brathwaite v Frankel*, 98 AD3d 444, 445 [2012]).

Plaintiff alleges that she is a member of a protected class on the basis of her race; that she was qualified to hold her position, as she was being considered for permanent employment; and that she may have suffered an adverse employment action due to being terminated from her temporary position, not being offered a permanent position, and not being called back for further employment. As discussed in relation to her retaliation claims, plaintiff also demonstrates that an inference of discrimination may be drawn from the facts alleged.

With respect to plaintiff's cause of action for intentional infliction of emotional distress, the court finds that the complaint's allegations, when taken as a whole, do not rise to the extreme or outrageous level necessary to sustain such a claim (*see Kamen v Berkeley Co-op. Towers Section II Corp.*, 98 AD3d 1086, 1087 [2012]; *Seal v Marks*, 232 AD2d 626, 627 [1996]).

Finally, the court finds that the imposition of sanctions is not warranted, as defendants' conduct of moving to dismiss falls within the bounds of an adversarial proceeding and does not rise to the level of frivolousness (see 22 NYCRR § 130-1.1[c]; *Lazich v Vittoria & Parker*, 189 AD2d 753, 754 [1993]).

Accordingly, defendants' motion to dismiss is granted only to the extent of dismissing the intentional infliction of emotional distress claim, but is denied in all other respects. Plaintiff's cross motion for sanctions is denied.

Dated: April 16, 2013
D#48

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J.S.C.