| **Dessources v American Conference Inst.** |
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| 2015 NY Slip Op 31040(U) |
| May 20, 2015 |
| Supreme Court, Kings County |
| Docket Number: 017624/2013 |
| Judge: Wavny Toussaint |
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At a Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse at Civic Center, Brooklyn, New York on the 20th day of May, 2015

PRESENT:

HON. WAVNY TOUSSAINT,

Justice

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DIANA DESSOURCES,

Index No: 17624/2013

Plaintiff

-against-

**DECISION AND ORDER**

AMERICAN CONFERENCE INSTITUTE
KENNETH HORTON, individually, and,
JOHN DOES 1-10 (names presently unknown), and
ABC CORPS. 1-10 (names presently unknown),

Defendants.

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**The following papers numbered 1 to 2 read herein:**

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ and Affidavits (Affirmations) Annexed | 1-2 |
| Opposing Affidavits (Affirmations) | 3 |
| Reply Affidavit (Affirmations) | 4 |

This is an action for unlawful termination as a result of a disability association discrimination claim brought by plaintiff, Diana Dessources (hereinafter "plaintiff") against defendants, American Conference Institute (hereinafter "ACI") and Kenneth Horton, the Managing Director of ACI and

[*.2]

plaintiff's supervisor (hereinafter "Horton") alleging violations of the New York City Human Rights Law, which is codified at Administrative Code of City of NY § 8-107 *et seq.*("NYCHRL"). Defendants move pursuant to CPLR 3211 for dismissal of the action.

The complaint alleges that ACI, a producer of educational programs and seminars employed plaintiff as a producer of legal education conferences for approximately four and a half months from March 1, 2011 to August 1, 2011. During that period of time, plaintiff's mother was suffering from cancer. ACI granted plaintiff days off from work to visit and care for her mother, during times of intense suffering and need. Plaintiff never sought a formal leave of absence under the Federal Family and Medical Leave Act (FMLA) or otherwise. Allegedly, Horton, repeatedly questioned the plaintiff about her mother's condition and when discussing her absences his tone was unpleasant. Plaintiff further alleges Horton appeared "irritated," "displeased," "disapproving," and "clearly unhappy," during their conversations about her mother.

Despite the absences, plaintiff alleges her job performance was not affected, as she completed her work in a timely manner and communicated with ACI regularly. She further alleges that she produced greater conferences than ever before and was praised by ACI's Managing Director for her excellent work. After completing production of two of three assigned conferences, plaintiff began organizing the third conference, but was terminated with the given explanation of "poor performance." Plaintiff disputes the assessment of her performance and asserts it was pre-textual as she was unlawfully terminated because of her association with her disabled mother, who defendants knew was suffering from cancer during her period of employment.

On or about November 7, 2012, plaintiff filed an action against defendants alleging disability association discrimination under the NYCHRL and the American with Disabilities Act ("ADA") in

the United States District Court for the Southern District of New York. On May 14, 2013, that court dismissed plaintiff's ADA claim with prejudice, and the NYCHRL claim without prejudice. Plaintiff subsequently filed the instant complaint with this Court pursuant to CPLR 205(a). Defendants filed the instant pre-answer dismissal motion pursuant to CPLR § 3211(a)(7).

Defendants seek dismissal asserting the complaint does not allege that defendants took any action against plaintiff based on her mother's cancer. Moreover, defendants assert even if plaintiff believed she had a good reason to be absent from work, and otherwise performed well, she is not entitled to pursue this suit based on her allegations of unlawful termination based on disability association discrimination.

The Defendants' motion relies heavily on factual arguments, and the circumstances surrounding ACI's decision to terminate is a material fact at issue. Defendants claim the circumstances alleged fail to sufficiently prove that defendants discriminated against plaintiff's mother. Further, defendants note, plaintiffs relationship and responsibilities with respect to her mother's illness was not a determining factor in the decision to terminate her employment and therefore, the complaint fails to meet the liberal standards of the NYCHRL, and should be dismissed.

In reviewing a motion to dismiss for failure to state a claim under CPLR 3211(a)(7), the Court must accept the allegations of the complaint as true, give the plaintiff the benefit of every favorable inference and determine only whether the facts as alleged fit within a cognizable legal theory. (*See* *Polonetsky v. Better Homes Depot*, 97 NY2d 409 [2001]). The court's role is simply to determine whether the facts, as alleged, fit into any valid legal theory. (*Sokoloff v. Harriman Estates*, 96 NY2d 409 [2001]). This liberal standard simply inquires whether the plaintiff has a cause of action and not whether one was stated. (*Wiener v. Lazard Freres & Co.*, 241 AD2d 114 [1st Dep't

1998]). A motion to dismiss must be denied if from the four corners of the complaint, factual allegations demonstrate any cause of action cognizable at law. (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 [2002]).

The NYCHRL requires that an employer "make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job . . . provided that the disability is known or should have been known by the [employer]" ( § 8-107 [15] [a]). (*Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 885 [2013]). In addition, the NYCHRL provides employers an affirmative defense if the employee cannot, with reasonable accommodation, "satisfy the essential requisites of the job" (Administrative Code § 8-107 [15] [b]). ( *Phillips v. City of New York*, 66 AD3d 170, 183 [1st Dep't 2009]). Thus, the employer, not the employee, has the "pleading obligation" to prove that the employee "could not, with reasonable accommodation, satisfy the essential requisites of the job" (*Romanello supra citing Phillips*, 66 Ad3d at 183).

Administrative Code § 8-107(20) explicitly grants standing to sue those who have been discriminated against by virtue of their association with disabled individuals. ( *Bartman v. Shenker*, 5 Misc 3d 856 [2004). That section provides:

> "Relationship or association. The provisions of this section set forth as unlawful discriminatory practices shall be construed to prohibit such discrimination *against a person* because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation or alienage or citizenship status of a person with whom *such person* has a known relationship or association."

Here, the defendants argue that the plaintiff's claim does not present a reasonable inference of disability association discrimination, warranting dismissal. Defendants further argue that the allegations in the complaint do not establish that the plaintiff was fired because of disability

association discrimination. After review of the complaint the Court finds plaintiff has sufficiently plead a claim. The complaint sets forth allegations sufficient to put the defendants on "notice" of the disability association discrimination claim as the allegations clearly state plaintiff was terminated from her employment because of her association with her mother, who was physically disabled due to cancer. *(See* CPLR § 3013 requiring plaintiffs to give notice of occurrences intended to be proved). The complaint alleges a connection between plaintiff's absences from work due to her association with her disabled mother and ACI's decision to terminate her employment. In the complaint, plaintiff alleges that she believes she performed her job well and was praised for her work; that ACI associated the plaintiff with a disabled person; that ACI's management knew of such disabled person and repeatedly questioned the plaintiff about the disabled person's condition; and that the Plaintiff was fired shortly thereafter requesting additional time off as her mother's condition worsened. *See* Complaint at ¶¶ 13-53. The plaintiff satisfied her obligation in the complaint.

In response to a pre-answer motion to dismiss under CPLR 3211, a plaintiff is not required to supply evidentiary support for her claims. *(Salles v. Chase Manhattan Bank*, 300 AD2d 226 [1st Dept 2002]). In deciding a pre-answer motion, the court cannot consider the relative merits of a plaintiff's contentions against a defendant's conflicting assertions nor establish whether a plaintiff produced evidence to support his or her claim. (*See e.g. Residence on Madison Condominium v. W.T. Gallagher & Associates, Inc.*, 271 AD2d 209 [1st Dept 2000]; *Washington Avenue Assoc. v. Euclid Equipment*, 229 Ad2d 486 [2d Dept 1996]). Producing evidence to support a claim is the essential purpose of discovery. Thus, to grant dismissal at this time would be premature in light of the fact that there has been no exchange of discovery by the parties.( *See First & 91 LLC v. 1765 First Assoc. LLC*, [2009 NY Slip Op 50639] [Sup. Ct. NY, 2009]). The Court cannot ignore the plaintiff's

allegations and simply accept ACI's statement that plaintiff's termination was based solely on poor performance. More importantly, the plaintiff has sufficiently established a colorable association disability claim under NYCHRL and for pleading purposes has reasonably inferred she was terminated for her association with her terminally ill mother. Defendants motion to dismiss the claim under NYCHRL is at best premature since discovery is clearly required under the circumstances. (See CPLR 3211(d) ). ( *Rivera v. Lutheran Med. Ctr.*, 866 N.Y.S.2d 520, 523 [N.Y. Sup. Ct. 2008]).

Accordingly, the defendants' pre-answer, pre-discovery motion to dismiss the plaintiff's complaint is hereby denied. Defendants are to serve an answer within thirty (30) days of service of this order with notice of entry.

ENTER

Hon. Wavny Toussaint
J.S.C.

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