SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46V**

Justice

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CYNTRA CUNLIFFE

Plaintiff,

- v -

CAROLINE SANDBERG,

Defendant.

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INDEX NO. 150610/2022

MOTION DATE 05/18/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ordered that defendant's motion to dismiss is determined as follows:

Plaintiff Cyntra Cunliffe worked as a non-live-in nanny for defendant Caroline Sandberg from February 18, 2015 to March 6, 2020. Plaintiff worked five days per week for 55 scheduled hours per week during that period. Plaintiff alleges that she was also required to work an average of three unscheduled hours each week.

Plaintiff alleges in her complaint that defendant "consistently mocked the color of Plaintiff's skin." As an example, she alleges that "in or around October 2018, while in Plaintiff's presence, Defendant told her older son that Plaintiff's face 'is the same color as [Defendant's] poop.'" Defendant then encouraged her older son to make the same comment on several occasions "by laughing and smiling when her son made those comments." Plaintiff further alleges that defendant frequently told her to "shut up"; told her that she "does not deserve anything and [Defendant] does not have to pay [Plaintiff]"; stole items out of Plaintiff's bag; falsely blamed

plaintiff for her son nearly drowning in the bathtub; replaced plaintiff with a "light-skinned" nanny; and falsely told potential employers that Plaintiff hit children.

On January 20, 2022, plaintiff commenced this action by filing a summons and complaint, asserting, inter alia, causes of action for failure to furnish accurate wage statements in violation of the New York Labor Law (NYLL) (Second Cause of Action) and for skin color discrimination in violation of the New York State Human Rights Law (NYSHRL) (Third Cause of Action). Defendant now moves to dismiss these causes of action. In support of its motion, defendant submits weekly wage statements for the entire duration of plaintiff's employment that list 40 regular hours and 15 overtime hours worked each week.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must accept all allegations in the complaint as true, draw all inferences in light most favorable to plaintiff, and determine only whether the facts fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). On a motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1), dismissal is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

As to plaintiff's Second Cause of Action, NYLL § 195(3) requires employers to "furnish each employee with a statement with every payment of wages" listing specific information, including dates of work and rates of pay. For employees not exempt from overtime compensation, this wage statement must include "the number of regular hours worked, and the number of overtime hours worked" (*id.*).

Defendant argues that it complied with the requirements of § 195(3) simply by furnishing the wage statements regardless of their accuracy. However, courts have interpreted § 195(3) as

requiring employers to furnish accurate wage statements that reflect the number of hours actually worked (*see Copper v Cavalry Staffing, LLC*, 132 F Supp 3d 460, 468 [EDNY 2015]; *Rojas v Splendor Landscape Designs Ltd.*, 268 F Supp 3d 405, 413 [EDNY 2017]). Accepting the facts alleged in the complaint as true, plaintiff alleges an average of three hours per week that are not accounted for on the wage statements. Plaintiff has thus stated a claim for a violation of NYLL § 195(3) for furnishing inaccurate wage statements. Moreover, defendant's reliance on *Gardner v D&D Elec. Const. Co. Inc.*, 2019 N.Y. Slip Op. 32389[U] [N.Y. Sup Ct, New York County 2019] is unavailing. In *Gardner*, the court granted the motion to dismiss where paystubs submitted by the defendant utterly refuted plaintiff's claim that the wage statements lacked statutorily required information. Here, even if the wage statements constitute documentary evidence, they cannot utterly refute plaintiff's allegation that she worked additional unscheduled hours that are not accounted for on the wage statements. Thus, this branch of defendant's motion is denied.

As to plaintiff's Third Cause of Action, it is unlawful discriminatory practice "for an employer . . . to subject any individual to harassment because of the individual's . . . color" (Executive Law § 296[1][h]). To plead an actionable cause of action for hostile work environment for claims filed on or after October 11, 2019, a plaintiff must allege she was subjected to "inferior terms, conditions or privileges of employment" because of membership in a protected category; plaintiff need not show that the conduct was severe or pervasive (*id.*; 2B NY PJI 9:5 at 952-953). Employment discrimination cases are "generally reviewed under notice pleading standards" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]).

Defendant argues that one stray remark — that Plaintiff's face "is the same color as [Defendant's] poop" — made in an over five-year employment relationship could not be said to create a hostile work environment. Plaintiff argues that to determine whether there is a hostile

work environment, this comment should be viewed in totality with defendant's encouragement of her son and the other allegations regarding defendant's conduct (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004]).

Under the NYSHRL's current standard, defendant's comment about the color of plaintiff's face and her encouragement of her son to make similar comments on several occasions are sufficient to state a claim for hostile work environment. Thus, at this early stage, plaintiff has sufficiently pled that she was subjected to "inferior terms, conditions or privileges of employment" because of her skin color.

Accordingly, it is hereby ORDERED that defendant Caroline Sandberg's motion to dismiss is denied in its entirety.

This constitutes the decision and order of this Court.

6/28/2022
DATE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE